UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et. al.	)	Docket No. 50-460 OL
	)	
(WPPSS Nuclear Plant No. 1)	)	

COALITION FOR SAFE POWER
FIVE FACTOR TEST ON INTERVENTION - FEB. 11, 1983

Pursuant to the Atomic Safety and Licensing Board Order of January 26, 1983 (TR at 122) Petitioner Coalition for Safe Power hereby submits its position on the five factor test which may be required to establish standing in the above proceeding. Petitioner first shows that, in fact, the five factor test is unnecessary because reliance is not placed on the "Caldwell affidavit" (dated October 11, 1982 and filed as an attachment to "Coalition for Safe Power Amendment to Request for Hearing and Petition for Leave to Intervene" dated November 2, 1982) and that the Caldwell affidavit cured the potential defect in the original petition in a timely fashion, according to Commission regulations, and thus is not subject to the rules governing late filings.

First, Petitioner refers the Board to its "Position on Protective Order" dated February 7, 1983. Generally therein Petitioner asserts that the original petition with its affidavit from the Director of the Coalition for Safe Power (which sought only to establish that members of the Coalition did reside within the geographical zone of interest) was sufficient. As is outlined in the Position, the Coalition is an organization dedicated soley to working against nuclear power and thus no affidavits from members (who are presumed to have implicitly authorized the filing of the petition by the fact of their membership) are required. Furthermore, examination of the record in Washington Public Power Supply

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System Plants Nos. 1 and 2 (Docket Nos. 50-460 CPA and 50-397 CPA), under the jurisdication of this very Board, establishes the fact that the organization has members who reside near the facility and did before the filing of the original petition.

Secondly, Petitioner submits that this case, for the reasons outlined above, it not the same as Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330 (1979) and furthermore, that the licensing board in WNP-2 erred in its finding on the intent of 10 CFR 2.714(a)(3). While the requirements of 10 CFR 2.714 must ultimately be met, 2.714(a)(3) provides than amendments may be made to the original petition. This section does not restrict the types of amendments which are permitted. Petitioner fails to understand why the Staff and the Applicant in the instant case and WNP-2, and the Board in WNP-2, believe that 2.714(a)(3) refers only to the submittal of contentions in the form of a supplement. WNP-2 at 334. If its intent were so restricted it would be redundant (to 10 CFR 2.714(b)) to the point of being meaningless.

Defects in pleadings and procedure are generally permitted to be cured. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2) ALAB-146, 6 NRC 631 (1973). In the present case, the NRC Staff perceived the defect in the original petition as curable stating:

> Under 10 CFR 2.714(a)(3), a petition for leave to intervene may be amended, without prior approval of the presiding officer, at any time up to fifteen days prior to a special prehearing conference held pursuant to 10 CFR 2.751a....Since Section 2.714(a)(3) does not limit the reasons for the amendment, and assuming the defect is curable, Petitioner could amend its petition to include a member affidavit which would satisfy the standing requirement. See e.g. Enrico Fermi, LBP-79-1, 9 NRC 73, 77 (1979). The NRC Staff does not object to the present petition on the grounds that Petitioner lacks standing, provided it amends its petition to include the requisite affidavit from at least

> one member who lives within the geographical proximity of the plant, who has an interest that will be affected by operation of the facility and who authorizes Petitioner to represent his or her interests.

NRC Staff Response to Coalition for Safe Power Request for Hearing and Petition for Leave to Intervene, dated Spetember 30, 1982. It should be noted that this is contrary to the position taken by the Staff in WNP-2 that both 2.714(a)(3) and 2.714(b) were restricted to the filing of contentions. The Board originally impaneled in this proceeding issued a Memorandum and Order on October 13, 1982 stating:

> The Coalition states that at least one member residing within a fifty-mile radius has in fact authorized the filing of the petition and request for hearing. Petition at 2nd page. Therefore, whether or not the Coalition wishes to cure the deficiency in its petition by the affidavit of one or more of its members, or by other means, may turn out to be a minor point and we make no ruling of recommendation. However, we caution the petitioner that the Board and prospective parties must have enough information filed in this proceeding to establish that the Coalition is expressly authorized to represent the interests of at least one member who has standing to intervene or that the Coalition is entitled to the presumption of implicit authorization to represent such a member as set out in Allens Creek, supra, at 396. IN either case the name and address of at least one member with standing to intervene must be supplied.

Thus, the Coalition filed its Amendment with the Caldwell affidavit attached. This was not an effort to establish "retroactive interest" as in WNP-2 but merely to cure a defect in the original pleading.

Applicant and Staff have raised the concept of "bootstrapping" -- the illegitimate granting of standing. Petitioner asserts that such "bootstrapping" is not possible. Regardless of when Mr. Caldwell, or any other new member of the Coalition, were to join the organization they would be represented by the organization. Membership in an organization is a fluid thing. Those who are members before the filing of a given petition may not be around during the possibly years of hearings following. Those who become members after the petition is filed are

reprented by the organization to the same degree as those who had previously been associated. The latter members are not illegitimately represented by the organization ("bootstrapped") given that the organization, such as the Coalition, represents them by the mere fact of their membership. An organization such as the Coalition is constantly in the process of soliciting members for the purpose of fundraising, education and general support.

As stated above, the holding in WNP-2, supra supported by both Staff and Applicant, was that 10 CFR 2.714(a)(3) and 2.714(b) were limited to the filing of contentions. WNP-2 at 334. We disagree. Furthermore, the Board's finding that individuals, such as members of petitioning organizations, should read the Federal Register notices regularly is patently absurd. WNP-2 also erred in applying the first factor of the five factor test, "good cause", to the member and the remaining factors to the petitioning organization. However, WNP-2, despite its ultimate ruling, does support Petitioner in this case. First, it held that at the time of filing of the original petition, an organization must have a member with the requisite personal interest. Petitioners, through the device of the Director's affidavit, have shown this to be the case. Secondly, the Board stated:

> The Board concludes that while the "interest" requirement may be "particularized" for timely petitioners it cannot be cured by an organization who aquires a new member considerably after the fact who has not established good cause for the out-of-time filing.

IN the instant case, Mr. Caldwell joined the COalition some two or three weeks after the petition was filed, and signed an affidavit to that respect some four weeks after the fact.

WNP-2, supra was not appealed. The Appeals Board, however, affirmed a licensing board decision in a similar case where intervention was allowed. Houston Lighting and Power Co. (South Texas Project, Units

1 and 2) ALAB-509, 9 NRC 644 (1979). In that case the applicant recited the "teachings" of WNP-2. The Appeals Board ruled against the applicant (while not challenging the legal theory of WNP-2) stating:

> 3. As we mentioned, CCANP's initial petition was timely filed. Applicants nevertheless contend that its intervention should have been denied as unjustifiably late. Their arguement rests on a technical point of law.
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> ...
>
> But if CCANP was "late", it was only in a legalistic sense;
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> ...
>
> The South Texas facility is not on the verge of completion; no suggestion is put forward that the conduct of a public hearing would delay licensing the plant for operation (assuming this if found to be warranted).
>
> ...
>
> An overwhelming showing on the "four factors" was not required to support a onclusion that CCANP should be permitted to intervene in these circumstances....We arrive at this result in full awareness that -- unlike an application for a construction permit - no hearings on an operating license application is required in the absence of a bona fide intervenor....But we stress again that CCANP's standing is firmly grounded. The interests of those it represents "may be affected by the proceeding" within the meaning of Section 189a of the Atomic Energy Act, which enjoins the Commission to "admit any such person as a party to [the] proceeding." It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on their technicalities.

All of these conclusions are direclty applicable to PEtitioner.

Additionally, the dormant nature of both the construction of the plant and the licensing proceeding casts doubt on the Applicant's objections to the timeliness of the petition. In a similar case (where a utility had voluntarily halted all activities in connection with its application for a construction permit) the Appeal Board stated:

> What we do find suprising, however, it that, having elected (albeit doubtless for good and sufficient business reasons) to have the Greenwood proceeding placed in limbo for years, the applicant is heard to complain at all of the CEE's belated arrival on the scene. Be that as it may, the proceeding still being at an incipient state by reason of the applicant's own choice, we are hesitant to take CEE's lateness as enough cause to bar its participation.

> Indeed, it would be patently inequitable to do so unless it were clearly to appear that the three other factors weighed heavily in favor of rejecting the petition.

The Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3) ALAB-476, 7 NRC 759 (1978). Regarding the claim that the petitioners participation would broaden the issues and delay the hearings the Appeals Board in Greenwood said:

> Inasmuch as there appears to be no present certainty respecting when the Greenwood hearings will commence, it scarcly can be seriously claimed that the lateness of the CEE petition might itself be a source of delay.

GOOD CAUSE

The Board directed Petitioner to discuss "good cause for Mr. Caldwell not petitioning to intervene in this proceeding prior to the three weeks after the time limit." Tr at 120. As discussed above, Petitioner believes the apparent holding of WNP-2 that the first factor (good cause) of the five factor test should be applied to a member of a petitioning organization, where this member is necessary to confer standing upon the organization, is incorrect. The logical extension of this is to apply the remaining four factors of the test to the member, as if that member were petitioning pro se. Clearly such an extension would result in a finding bearing no resemblance to the circumstances created by the late entrance of an organization which, for example, generally has greater resources to expend on a proceeding of this nature. Mr. Caldwell is not petitioning for leave to intervene in this case. He is merely one member of the Coalition on whom standing relies. Mr. Caldwell's desire to be represented by the Coalition indicates no desire on his part to intervene pro se and thus he should not have been expected to keep a watch on the Federal Register in the long period of time during which Applicant could have filed its application. Mr. Caldwell, under WNP-2, apparently

should have solicited the Coalition for representation, yet would have had to have known that a proceeding was in progress and that Petitioner intended to file, before the actual date of filing. This would have been well beyond the ability of Mr. Caldwell who was unaware of the Coalition's intent until shortly after the filing occured.

If, on the other hand, the Board wishes to examine the Coalition's reasons for non-timely filing of the Caldwell affidavit (a point Petitioner does not conceed) the reasons are as follows. Petitioner failed to gain an affidavit or permission for release of name and address of a member prior to the filing of the original petition because it was not aware of the reluctance of its existing members until shortly beforehand. Mr. Caldwell's affidavit was signed shortly thereafter as a product of the ongoing process of membership solicitation which occurs as a regular part of the Coalition's work. The Coalition had good cause for not having previously had Mr. Caldwell as a member because of the difficulty of locating people in the Hanford area with anti-nuclear sentiments and with a desire to have their names publically associated with such views.

FIRST FACTOR

The availability of other means for Petitioner to protect its interests is non-existent. There is no state regulation at the operating license stage. The Operating License is the last available forum before the NRC prior to plant operation. Commenting on the SER and the DEIS or entering a limited appearance are insufficient to protect the significant specified interests that have been identified. Furthermore, the Appeal Board has held that participational rights including the entitlement to present evidence and conduct cross examination are not served by the limited appearance statement. Duke Power Co. (Amendment to Materials License SNM-1773) ALAB-528, 9 NRC 146 (1979). The

NRC Staff does not adequately represent the interests asserted by the Coalition as evidenced by the nature of many of the contentions submitted in its Supplement.

SECOND FACTOR

The Appeals Board in Florida Power and Light (St. Lucie Nuclear Power Plant, Unit No. 2) ALAB-420, 6 NRC 8, 23 (1977) upheld a Licensing Board decision that this factor, the extent to which petitioner's participation would assist in developing the record, was not applicable in a case such as the present, because it appears to contemplated intervention into an ongoing proceeding.

If, however, this Board desires to rule on this factor, it should judge in favor of Petitioner's ability to participate in a manner which would develop a sound record. The Coalition has previously participated in several proceedings: presenting witnesses in the Trojan Spent Fuel Pool License Amendment proceeding and conducting extensive cross examination in the Trojan Control Building License Amendment which led to additional technical specifications to be imposed by the NRC Staff. The Coalition has, at present, a former WPPSS Quality Assurance worker who has agreed to participate in this proceeding. The Coalition is also in the process of working with other intervenors in the Skagit/Hanford Nuclear Project Construction Permit to identify other expert witnesses in the areas of radiation, health physics, geology, seismology, hydrology, engineering and nuclear safety. Additionally, the Coalition's contentions show a level of technical support which indicates future participation would aid in the development of a sound record.

THIRD FACTOR

The Appeals Board upheld a licensing board decision that this factor, the ability of other parties to represent petitioner's interests, was not applicable in a case such as the present, because it appears to

contemplate intervention into an ongoing proceeding. St. Lucie, supra at 23. The Coalition's interest cannot be represented by any other parties with the exception of the Staff, because there are no other parties. As stated above, the NRC Staff position is not considered to meet Petitioner's interests. Furthermorie, participation rights are not served by the ability to present a limited appearance statement. See McGuire Amendment to Materials License SNM-1773, supra at 150.

FOURTH FACTOR

The Appeal Board affirmed a licensing board determination that if there would be no proceeding without the participation of the petitioner, as in the instant case, that the first element of the fourth factor, the degree to which tardiness of the petition would delay the proceedings, is moot. St. Lucie, supra at 23. HOwever, should the Board wish to examine this factor it must include only the delay which can be attributed to the tardiness of the petition, in this instance the signing of the Caldwell affidavit, a matter of a few weeks. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2) ALAB-292, NRC 631, refering to Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, NRCI-75/4R 273 (1975) at 276. The later the petition the greater the potential delay. Greenwood, supra at 762. When tardiness is not in the extreme and the conduct of full hearings will not delay the licensing of the plant for operation this factor may not weight against the petitioner. See McGuire, supra at 150. See also South Texas, supra at 640.

The facility at bar is sixty percent completed and construction has been halted from two to five years. Completion of onstruction is not anticipated for many years. The NRC Staff is proceeding on a "manpower available" basis in its review. Four weeks delay by Petitioner is but a proverbial drop in the bucket in comparision to the delays

caused by Applicant and Staff. The petition, if considered late, has still been submitted well in advance of the final determination which will be made in this proceeding. Greenwood, supra at 763,4 supoports the notion that an applicant who has voluntarily halted all activities in connnection with its application has little to stand on in complaining about the lateness of a petition.

For the foregoing reasons, while it is unnecessary for Petitioner to meet the five-factor test, if in fact a judgement is based on these factors, it should find in favor of Petitioner.

Respectfully submitted,

Dated this day, the eleventh of February, 1983.

Nina Bell
Coalition for Safe Power

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "COALITION FOR SAFE POWER FIVE FACTOR TEST ON INTERVENTION - FEB. 11, 1983" in the above-captioned proceeding have been served on the following by deposit in the U.S. Mail, first class, postage prepaid, on this 11th day of February, 1983:

Herbert GRossman, Chairman
ASLB
USNRC
Washington, D.C. 20555

Glen O. Bright
Administrative Judge
ASLB
USNRC
Washington, d.c. 20555

Dr. Jerry Harbour
Administrative Judge
ASLB
USNRC
Washington, D.C. 20555

Docketing and Service Section
USNRC
Washington, D.C. 20555

Gerald C. Sorensen
Manager, Licensing Program
WPPSS
300 George Washington Way
Richland, Wa, 99352

*Nicholas S. Reynolds
Debevoise & Lieberman
1200 Seventeenth St. N.W.
Suite 700
Washington, D.C. 20036

ASLAB Panel
USNRC
Washington, D.C. 20555

State of Washington
Energy Facility Site Evaluation
Council
Mail Stop PY-11
Olympia, Wa, 98504

*Mitzi Young
Counsel for NRC Staff
Office of Executive Legal
Director
USNRC
Washington D.C. 20555

Nina Bell
Intervenor for CFSP