Applicant 2/23/83

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

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

APPLICANT'S RESPONSE IN OPPOSITION TO
"COALITION FOR SAFE POWER FIVE FACTOR TEST
ON INTERVENTION - FEBRUARY 11, 1983"

I. INTRODUCTION

During the Special Prehearing Conference held on January 26 and 27, 1983 in the captioned proceeding, the Board permitted the Coalition for Safe Power ("petitioner") to submit a statement addressing whether it satisfied the five factor test governing late intervention, as set forth at 10 C.F.R. §2.714(a)(1).[1] The petitioner filed that statement on February 11, 1983.

The Washington Public Power Supply System ("Applicant") hereby responds to that statement. For the reasons set forth below, Applicant submits that petitioner has failed to satisfy the five factor test governing late intervention and, assuming that the petition is to be

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1 Washington Public Power Supply System Nuclear Projects Nos. 1 & 2, Docket Nos. 50-397-CPA, 50-460-CPA, and 50-460-OL, Transcript of January 26 - 27, 1983 Prehearing Conference ("Tr.") at 123.

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treated as late-filed, that petitioner should not be admitted as a party to this proceeding. Accordingly, Applicant urges the Board to reject petitioner's request for a hearing and petition to intervene and to terminate these proceedings.

II. ARGUMENT

A. Application of 10 C.F.R. §2.714(a)(1) Is Required Under the NRC Rules of Practice.

Rather than simply addressing the five factor balancing test set forth in Section 2.714(a)(1) as requested by the Board, petitioner first advances the specious argument that such test is not even applicable. Petitioner apparently believes that it filed a timely request for a hearing and petition to intervene for the reasons set forth in its February 7, 1983 "Position On Protective Order" ("protective order position"). It also asserts that Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 430 (1979) ("WNP-2"), is distinguishable from the instant proceeding and that in any event it is incorrect. Applicant will respond to each of these arguments before turning to the five factor balancing test.

1. Timeliness of Petition to Intervene and Request for Hearing. The record in this proceeding belies the assertion by petitioner that its petition to intervene and request for a hearing is timely. Petitioner initially submitted a pleading attached to which was the affidavit

of its director reciting that certain of its members living within a fifty mile radius of WNP-1 authorized petitioner to request intervention and a hearing on their behalf.[2] The Board held correctly that the petition was defective because it failed to disclose the name and address of at least one member with an interest in the proceeding. The Board did, however, permit petitioner to submit an amended petition and noted that petitioner could, in lieu of submitting a specific representational authorization of a member with personal standing, show that such authorization could be presumed from membership in petitioner.[3] Rather than following the instructions of the Board, petitioner submitted an amended petition with which it provided the affidavit of an entirely new member who joined petitioner and authorized it to represent his interests in this proceeding after the September 15, 1982 deadline by which petitions to intervene and requests for a hearing were to be filed with NRC.[4] When questioned during the Special Prehearing Conference why it adopted this course, petitioner for the first time conjured up

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2 September 10, 1982, "Request for Hearing and Petition for Leave to Intervene" ("petition").

3 Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ASLBP No. 82-479-06-OL, (slip op., October 13, 1982) at 4-5.

4 November 2, 1982, "Coalition for Safe Power Amendment to Request for Hearing and Petition for Leave to Intervene" ("amended petition"). See Tr. at 90-91.

potential harassment as the explanation for its failure to disclose the names and addresses of its members referred to in its original petition.[5] Most recently, either during or after the Special Prehearing Conference, petitioner apparently decided to change its position yet again and argue for the first time that its standing to participate is based not on the express authorization of a member to represent his interests in this proceeding, but on the implied authorization of its members living in the area of WNP-1. The purported basis for this most recent flip-flop is petitioner's assertion that it "is an organization dedicated solely to working against nuclear power"[6] and based on this new theory, argued that no affidavits from its members are required.[7]

Notwithstanding petitioner's shotgun array of arguments regarding the basis of its standing to intervene in this proceeding, a number of basic conclusions are manifest. First, petitioner simply cannot rely on the affidavit of its director to establish standing in this proceeding unless affidavits from its members setting forth their interest in this proceeding and authorizing petitioner to represent those interest are submitted on

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5 Tr. at 90-91.

6 "Coalition for Safe Power Five Factor Test On Intervention - Feb. 11, 1983" ("position on five factor test") at 1; Tr. at 38.

7 Id. at 3-4.

the record.[8] Because such affidavits have yet to be produced, it is impossible for the Board to verify for itself, by independent inquiry, the truthfulness of the petition to intervene.[9]

Second, to the extent petitioner relies upon Larry Caldwell to establish its standing, petitioner must satisfy the five factor test governing late-filed petitions

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8 The legal basis for this position is set forth in Applicant's November 17, 1982 Amended Answer in Opposition to Amended Request for Hearing and Petition for Leave to Intervene ("Amended Answer") at 3-16. The cases are legion.

9 WPPSS Nuclear Project No. 1, supra, slip op. at 4. Petitioner asserts that examination of the record in connection with the construction permit extension proceedings in WNP-1 and WNP-2 "establishes the fact that the organization has members who reside near the facility and did before the filing of the original petition." Position on five factor test at 1-2. This argument does not pass muster. First of all, the Board has already admonished that information directed to its attention "must be part of record of this proceeding or known to be readily available to the Board and the parties." WPPSS Nuclear Project No. 1, supra, slip op. at 5. If petitioner would like the Board to rely on its pleadings in other proceedings, then those pleadings should be placed on the record. That was not done here. Second, petitioner's assertion, if anything, demonstrates the weakness of its position. Petitioner conceded during the Special Prehearing Conference that the one member it identified in those other proceedings who lived within a fifty mile radius of WNP-1 (M. Terry Dana) specifically would not support petitioner's efforts to intervene in this proceeding on his behalf and in fact refused to sign any papers in connection with this proceeding (Tr. at 44). Therefore, it has not been established that petitioner has members who reside within a fifty mile radius of WNP-1 and who support its request to intervene in this proceeding.

to intervene and requests for hearing.[10] Petitioner's representational standing to participate in this proceeding exists by virtue of and is no greater than Mr. Caldwell's standing to participate.[11] Therefore, if Mr. Caldwell was untimely (which petitioner concedes),[12] petitioner was also untimely.[13]

Third, petitioner may not now assert that its standing is based upon the presumption that its members implicitly authorized petitioner to represent their interests. Petitioner had the opportunity to raise this argument when it filed its amended petition and it apparently chose not to do so.[14] Now, after the Special Prehearing Conference, it would be manifestly unfair and highly inappropriate for the Board to allow petitioner, as it exhausts each argument, to again totally reformulate

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10 Applicant's Amended Answer at 9-12 sets forth the legal basis for this position.

11 Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976) (where organizations failed to allege injury to themselves, they could establish standing only if individuals whose interest they were representing could have established standing). Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390 (1979) (representational standing of organization "wholly derivative in character").

12 Position on five factor test at 7.

13 See the text accompanying notes 22-24, infra.

14 See petitioner's amended petition to intervene.

its theory (however inaccurate) that its members living within the area surrounding WNP-1 implicitly authorized petitioner to represent their interests.[15]

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15 While petitioner may not be represented by counsel, by its own admission it is hardly inexperienced in NRC proceedings. Petition at ¶¶ 3 and 9. Given the admonition of the Board to prospective parties "that either their pleadings meet the standard of care required in a court of law, or they may suffer any appropriate adverse result flowing from inaccurate pleadings," (WPPSS Nuclear Project No. 1, supra, slip op. at 3), it would be patently unfair for the Board to permit petitioner to reformulate again its standing arguments at this late date and to thereby essentially amend its petition for a second time. Moreover, since such amendment would not have been filed 15 days prior to the Special Prehearing Conference, the amendment would be untimely (10 C.F.R. §2.714(b)) and as a result the five factor test set forth in Section 2.714(a) would have to be satisfied.

Applicant submits that this test has not been satisfied. As to the first factor, clearly there is no good cause for allowing petitioner to reformulate its petition at this late date. The Board in its October 13 Memorandum and Order advised petitioner of the various means by which it could cure the defects in its petition (WPPSS Nuclear Project No. 1, supra, slip op. at 4-5). Petitioner chose not to follow these instructions. As to factors two and four, viz., the availability of other means and other parties to protect petitioner's interest, neither weigh in favor of permitting further amendment. The NRC Staff is charged with the task of assuring that all regulatory requirements are satisfied and that WNP-1 is constructed and operated safely. If petitioner has specific concerns, it can bring them to the attention of the Staff either informally or formally through 10 C.F.R. §2.206. As for the third factor, there is little basis for concluding that this petitioner can assist in the development of a sound record. Petitioner has not indicated on the record with any degree of specificity that it has in fact retained any qualified experts or that it could assist in any other manner in developing the record. Lastly, it is clear that petitioner would "broaden the issues" and "delay the proceeding". In fact, no hearing will be held in

(footnote continued)

More importantly, on the merits, petitioner has not established standing based on the implicit authorization of its members to represent their interests in this proceeding. While Allens Creek, supra, held that in certain cases express authorization to represent a member's interest may be presumed by virtue of membership in the organization, it also recognized the obligation of a petitioner for intervention to disclose the name and address of such member:

> Absent disclosure of the name and address of one such member, it is not possible to verify the assertion that such members exist. In a footnote in their brief, the amici curiae endeavor to brush this consideration aside by noting that the veracity of the Guild's allegation that it has nearby members that has never been challenged and, were it to be, the Board below could require a Guild officer to submit an affidavit attesting to the truthfulness of the allegation. What this line of reasoning ignores is that both the Board and the other parties were entitled to be provided with sufficient information to enable them to determine for themselves, by independent inquiry if thought warranted, whether a basis existed for a formal challenge to the truthfulness of the assertions in the Guild's petition. Beyond that, **we are unprepared to accept amici's implicit thesis that standing may be established by means of an affidavit which makes conclusionary assertions not susceptible of verification by either other litigants**

(footnote continued from previous page)
connection with the WNP-1 operating license application if the petition is denied. In short, all five factors weigh against allowing petitioner to amend its petition for a second time.

> **or the adjudicatory tribunal.** We know of no authority for such a novel and unattractive proposition, which to us runs counter to fundamental concepts of procedural due process.[16]

It is, therefore, not surprising that in cases where organizations have rested their standing on the presumed authorization of members, the names and addresses of those members have been disclosed.[17]

In short, based on the record in this proceeding, the only basis set forth upon which petitioner's standing could conceivably rest is the Caldwell affidavit. However, it is now evident that Mr. Caldwell did not become a member of this organization until well after the September 15, 1982 deadline by which petitions to intervene and requests for hearing were to be filed. Nor did Mr. Caldwell seek pro se intervention prior to that deadline.

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16 Allens Creek, supra, ALAB-535, 9 NRC at 393 (**emphasis added**).

17 For example, in Consolidated Edison Company of New York (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715, 735 (1982), the Licensing Board ruled that the Union of Concerned Scientists was not required to produce an affidavit from one of its members authorizing that organization to intervene on their behalf. However, UCS did provide the names and addresses of its members (or sponsors) to the Board, thereby allowing the Board to verify on its own the fact that such members had an interest in the proceeding.

Therefore, petitioner's request to intervene should -- indeed must -- be treated as untimely and the five factor test applied.[18]

2. Applicability and Correctness of WPPSS Nuclear Project No. 2. Petitioner's efforts to distinguish WNP-2, supra, reflect its unwillingness to recognize that nothing on the record shows that petitioner had representational standing as of the September 15, 1982 filing deadline. Applicant relies upon WNP-2, supra, only for the proposition that when an organization seeks to establish representational standing by invoking the interest of a member, and that member joined the organization after the date by which petitions to intervene and requests for a hearing were to be filed, the organization must meet the five factor test of Section 2.714(a) governing untimely intervention petitions. This is precisely what the Licensing Board in WNP-2 held when confronted with a petitioner which (as is the case here) attempted to use a member acquired after the deadline for filing intervention petitions to establish standing. Therefore, because

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18 Cf. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239 (1980) (Because newly acquired standing is not itself grounds for granting a late-filed intervention petition, five factor balancing test should be applied when ruling on such petition).

petitioner may rely only on the Caldwell affidavit to establish its standing, this case is virtually identical factually to WNP-2.

Petitioner's efforts to discredit the logic of WNP-2 also are of no avail. First, the Licensing Board there did not hold that Section 2.714(a)(3) permits "only . . . the submittal of contentions in the form of a supplement," as petitioner claims.[19] Rather it held as follows:

> We interpret §2.714(a)(3) to permit amending a petition relative to interest as limited to those individuals who made a timely filing and are merely particularizing how their interest may be affected. We do not believe it is an open invitation for an organization whose membership is far removed from the facility and who claimed to have membership in the vicinity of the site to later try to recruit individuals in the vicinity as members and gain a retroactive recognition of interest.[20]

Moreover, while defects in pleadings may be cured, the amended petition filed by petitioner here did not cure the original petition. On the basis of the record now before the Board, petitioner has not established a basis for concluding that as of September 15, 1982, it had standing to participate in this proceeding. Petitioner could have amended its pleading and particularized the basis already on the record by which it claimed to

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19 Position on five factor test at 2.

20 WNP-2, supra, LBP-79-7, 9 NRC at 336.

establish standing as of that date, for example, by providing an affidavit from c the names and addresses of those members upon whose interest petitioner's standing was purportedly based.[21] However, petitioner chose not to do so and instead propounded an entirely new basis to justify its admission to these proceedings - the Caldwell affidavit. When viewed in this light, it is evident that the Caldwell affidavit does not "cure" the initial petition filed last September. Rather, it suggests that as of the filing date, petitioner had failed to identify any member willing to authorize petitioner either explicitly (by affidavit) or presumptively (by virtue of membership alone) to represent his interests in this proceeding. Thus, petitioner is attempting to do far more than cure a defect in its pleading and establish a more particularized statement of the basis for standing already referenced on the record. Rather, it is providing an entirely new basis upon which standing purportedly could be granted.

Second, petitioner suggests that WNP-2, supra, is incorrect because regardless of when an individual joins an organization, that organization would be authorized to represent his interests. It further asserts that because "membership in an organization is a fluid thing," it is impossible for an organization to be granted standing

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21 See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973).

"illegitimately".[22] Petitioner's assertion overlooks the basic premise of standing, viz., an organization, no matter how uniquely qualified, does not have standing to participate in an NRC licensing proceeding unless it first identifies a member whose interest is affected by the proceeding and such individual is a member of the organization by the deadline for filing petitions to intervene.[23] When taken to its logical conclusion, the difficulty with ignoring this basic premise is clear - any organization could intervene in any licensing proceeding if it promised to identify, sometime before the end of the proceeding, a member whose interest would be affected by the proceeding.[24] In short, petitioner's argument seeks to reverse

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22 Position on five factor test at 3-4.

23 Allens Creek, supra, ALAB-535, 9 NRC at 390-91; WNP-2, supra, LBP-79-7, 9 NRC at 336.

24 When adopting "contemporaneous judicial concepts of standing" as the benchmark against which the admission of an individual or organization to a licensing proceeding is to be measured, the Commission stated that "[o]ur administrative practice benefits from the concrete adverseness brought to a proceeding by a party who may suffer injury in fact by Commission licensing action . . . ." Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976) (emphasis added). It is well-established that such "concrete adverseness" in the federal courts must exist at the time the judicial process is invoked. Warth v. Seldin, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action'. . . .") (citations omitted) (emphasis added). Similarly, "concrete adverseness" must exist in licensing proceedings

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well-established concepts of standing by suggesting that a licensing board is free to hold a hearing on an operating license application without first requiring a showing of standing.

Third, petitioner challenges WNP-2, supra, because its finding "that individuals, such as members of petitioning organizations, should read the Federal Register notices . . . is absurd."[25] Again, petitioner fails to accurately state the holding of the decision In fact, the Licensing Board there held that one member of an organization petitioning to intervene in that proceeding who was a lawyer should have been aware of the Federal Register notice. The Board also held that another member of the petitioning organization who was not a lawyer should have seen local press releases announcing the opportunity for interested persons to petition to intervene and request a hearing.[26] It is difficult to understand what is "absurd" about this proposition.

In addition to mischaracterizing WNP-2 on this point, petitioner's claim is erroneous as a matter of law. The Federal Register Act provides that "[a] notice of hearing or of opportunity to be heard, required or authorized to

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at the time an individual or organization seeks to become a participant in those proceedings.

25 Position on five factor test at 4.

26 WNP-2, supra, LBP-79-7, 9 NRC at 337.

be given by an Act of Congress . . . shall be deemed to have been given to all persons residing within the States of the Union . . . when the notice is published in the Federal Register . . . ."[27] If petitioner believes that such provision is "absurd," it should direct its concern to Congress and not to this Board. The caselaw at NRC is fully in accord with that statutory provision.[28] Thus, petitioner's attempt to discredit WNP-2 on this basis should be rejected.

Lastly, petitioner argues that WNP-2, supra, "erred in applying the first factor of the five factor test, 'good cause', to the member and the remaining factors to the petitioning organization."[29] In fact, good reason exists for the Licensing Board's action there. As indicated above, representational standing is derivative in nature: if a member lacks standing to intervene in a proceeding, an organization also lacks standing to represent his interests in such proceeding.[30] A fortiorari, if an organization seeks to participate in an NRC proceeding, the questions are not simply whether it filed a timely intervention petition and, if not, whether it established

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27 44 U.S.C. §1508.

28 E.g., Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 634 (1975).

29 Position on five factor test at 4 and 6-7.

30 See note 11, supra, and accompanying text.

good cause for its failure to do so. Rather, the questions encompass whether the member whose interest is being invoked also acted in a timely manner to authorize the petitioning organization to represent his interests, assuming he had no desire to do so himself. If that member did not establish good cause for his failure to act in a timely manner, then he would not have standing to become a party to the proceeding; nor, therefore, would the organization seeking to invoke his rights to establish representational standing. At bottom, petitioner has failed to provide any reason for this Board not to apply the five factor balancing test applicable to untimely intervention petitions. Nor has any valid reason been given to question the correctness of WNP-2. Petitioner's arguments therefore should be rejected.

B. The Five Factor Balancing Test Indicates that Petitioner Should Not Be Admitted to this Proceeding.

1. Good Cause. The first element of the five factor balancing test is whether petitioner has shown "[g]ood cause, if any, for failure to file on time."[31] Importantly, "where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other

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31 10 C.F.R. §2.714(a)(1)(i).

factors must be particularly strong."[32] Neither Mr. Caldwell or petitioner have demonstrated such good cause.

Mr. Caldwell. Petitioner asserts first that because Mr. Caldwell is not petitioning for leave to intervene in this case, "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."[33] However, as discussed earlier, "ignorance of the publication of the Federal Register notice does not constitute good cause for this belated request [to intervene]."[34] Moreover, as is customary in operating license application proceedings, NRC published a "Notice of Opportunity for Public Participation in Proposed NRC Licensing Action for Washington Public Power Supply System Nuclear

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32 Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977); see also, Puget Sound Power & Light Company, et al. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979) (citing Perkins Nuclear Station, Units 1, 2 and 3, supra, ALAB-431); and Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 201 (1982) (good cause for the filing delay is most important in considering whether to grant a late intervention petition.)

33 Position on five factor test at 6.

34 Consolidated Edison Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982). See also, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (publication in Federal Register gives legal notice to all citizens); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 647 (1975) (same).

Project No. 1" in the Seattle Times, the Tri-Cities Herald (in Richland, where Mr. Caldwell lives) and the Yakima Herald Republic. Petitioner has provided no explanation of why Mr. Caldwell did not see any of these advertisements or why that explanation consticutes good cause.

Petitioner also claims that it was impossible for Mr. Caldwell to have known that it intended to request to intervene in the proceeding, and that this excuses Mr. Caldwell from acting in a timely manner to protect his rights.[35] Such assertion has no bearing on whether Mr. Caldwell demonstrated good cause under Section 2.714(a)(1)(i). Regardless of whether Mr. Caldwell wanted to intervene on a pro se basis or through petitioner, it is his interest which is at stake in this proceeding and which in some manner had to be brought to the attention of the Board in a timely manner. Petitioner is not vested with any special authority to represent what it perceives to be the public interest. Rather, it may represent only the interests of its members as it finds them, if it finds them. Therefore, the relationship between Mr. Caldwell and petitioner is irrelevant to the question of Mr. Caldwell's good cause.

Petitioner. In support of its claim of good cause, petitioner describes what appears to have been a desperate and difficult effort to solicit anyone living

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35 position on five factor test at 6-7.

within the vicinity of WNP-1 as a new member, in hopes that the individual would be willing to execute an affidavit authorizing petitioner to represent his interests in this proceeding. Petitioner concedes that its quest was made necessary when it "failed to gain an affidavit or permission for release of [sic] name and address of a member prior to the filing of the original petition. . . ."[36]

Manifestly, this "difficulty" does not provide good cause for petitioner's failure to demonstrate standing as of September 15, 1982. Operating license proceedings are not simply an opportunity for antinuclear groups, without interest and located far from a given facility, to argue their own value preferences when the residents themselves (whose interests <u>are</u> affected by such facility) do not believe that a hearing on the facility is needed. Indeed, a fundamental policy reflected in the standing doctrine is that organizations (or individuals) claiming a special expertise in or concern with an issue are not free to rove the country-side in search of adjudicatory fora in which to assert their views:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depravations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there

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[36] Position on five factor test at 7.

> would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
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> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.[37]

In short, petitioner's inability to establish representational standing on a timely basis resulting from its dearth of members whose interests may be affected by this proceeding, and who are willing to come forward publicly to identify those interests, does not demonstrate good cause for failure to file a timely intervention proceeding.

Conclusion. Neither Mr. Caldwell nor petitioner has established good cause for petitioner's failure to file a timely intervention petition. This factor, therefore, weighs heavily against intervention in this proceeding.

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[37] Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972) (footnotes omitted).

2. Other Means to Protect Interests. Petitioner asserts that no other means are available to protect its interests because "commenting on the SER and the DEIS or entering a limited appearance are insufficient" and because the NRC Staff does not adequately represent its interests.[38] These conclusory assertions, without more particularization and substantiation, do not provide any basis upon which to conclude that this factor weighs in favor of petitioner. If petitioner claims there is a significant impediment to protecting its interests through informal consultation with the Staff, formal petitions to the NRC pursuant to 10 C.F.R. §2.206, or comments pursuant to 10 C.F.R. §51.25, it has failed to disclose them on the record. Because the burden was on petitioner to do so,[39] this failure is fatal to its argument.

Conclusion. Petitioner has failed to demonstrate that there are no other means by which its interest will be protected. This factor, therefore, weighs against late admission to the proceeding.

3. Contribution to the Record. Petitioner suggests first that the Board need not consider this factor because "it contemplate[s] intervention into an ongoing

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38 Position on five factor test at 7-8.

39 Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980) (late petitioner must address each of five factors and affirmatively demonstrate that on balance they favor tardy intervention).

proceeding."[40] As support for this proposition, it relies upon Florida Power and Light (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-220, 6 NRC 8, 23 (1977). However, such decision was made within the context of an antitrust proceeding. In a number of NRC proceedings involving health and safety questions, Boards have regularly considered this factor.[41]

Application of this factor weighs against late intervention. Notwithstanding its participation in other proceedings, petitioner's activities in this proceeding hardly suggest that it will contribute significantly to the record. A general assertion that it is "working with other intervenors" to identify "expert" witnesses in such areas as radiation, health-physics, engineering and nuclear safety[42] suggests only that petitioner may be in contact with other antinuclear groups. It does not indicate in any way how petitioner will contribute meaningfully to the technical evaluations surrounding issuance of the WNP-1 operating license.

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40 Position on five factor test at 8.

41 See Indian Point Station, supra, LBP-82-1, 15 NRC at 41; South Carolina Electric & Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212 (1978); Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 193-94, 211-12 (1979).

42 Position on five factor test at 8.

Conclusion. Because there is no adequate showing that petitioner will contribute significantly to the record in this proceeding, factor three weighs against intervention.

4. Representation by Other Parties. The holding of the Licensing Board in Indian Point, supra, is instructive in evaluating this factor:

> The third of the remaining four factors, the extent to which Petitioners' interest will be represented by existing parties, weighs in Petitioners' favor only to the extent that, if Petitioners' request is denied, there will be no proceeding and hence no parties. However, as the staff points out, it has a duty to see to it that the public interest in the enforcement of the Atomic Energy Act's requirements is met. In the circumstance of an unjustifiably late request which does not indicate what benefits to the public will result from its allowance, we believe it appropriate to assume that the Petitioners' interest will be adequately represented by the Staff. Consequently we do not weigh this factor in Petitioners' favor.[43]

Petitioner has provided no basis for concluding that the Staff will not assure the Atomic Energy Act is fully satisfied.

Conclusion. This factor weighs against intervention.

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[43] Indian Point, supra, LBP-82-1, 15 NRC at 41.

5. Delay of Proceeding. The last factor to be considered is the extent to which late intervention will broaden the issues or delay the proceeding. Again petitioner asserts that the Board need not consider this factor.[44] However, other Boards faced with untimely intervention petitions which, if denied, would have obviated public hearings, have generally considered this factor.[45]

Clearly the admission of petitioner will delay the proceeding. As the Board in Indian Point, supra, stated:

> The last of the remaining factors, whether Petitioners' participation would broaden the issues or delay the proceeding, weighs against Petitioners. Clearly their participation will do both. Absent some showing that a public benefit will accrue from their participation, it must be assumed that starting a proceeding at this late date will have the effects of, at a minimum, inconveniencing the Applicant and diverting Commission resources from other tasks. Thus this factor weighs against Petitioners.[46]

In this case as well, the admission of petitioner will require the Applicant and Staff to divert resources away from other tasks.

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44 Position on five factor test at 9.

45 Indian Point Station, supra, LBP-82-1, 15 NRC at 41; Turkey Point Nuclear Generating Station, supra, LBP-79-21, 10 NRC at 195; Virgil C. Summer Nuclear Station, supra, LBP-78-6, 7 NRC at 213-14.

46 Indian Point, supra, LBP-82-1, 15 NRC at 41.

Petitioner cites a number of decisions for the proposition that this factor weighs in its favor. A close examination of those decisions suggests the contrary. First, although challenging the validity of WNP-2, supra, petitioner relies on the statement in that case that an organization required to demonstrate an interest in a proceeding may not do so by acquiring a new member "considerably after the fact who has not established good cause."[47] It apparently argues that the affidavit of Mr. Caldwell, signed about four weeks after the September 15, 1982 deadline was not filed "considerably after the fact" and that, consequently, intervention is appropriate here. Applicant submits that the word "nontimely" as used in Section 2.714(a)(1) means just what it says and that the Board in WNP-2, was not drawing any bright line as to what period of time is "considerably after the fact." Missing a filing deadline by two weeks has been held to be non-timely.[48] Given petitioner's failure to make a successful showing on this score, the delay occasioned by its failure to file a valid and timely intervention petition is clearly inexcusable.

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47 WNP-2, supra, LBP-79-7, 9 NRC at 335.

48 Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-624, 12 NRC 680, 682 (1980) (addressing untimeliness of contention and denying intervention proceeding).

Second, in both Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)[49] and Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3),[50] cited by petitioner, the respective applicants had acted or failed to act to prevent resolution of the intervention issue in a timely manner. In South Texas, applicants waited for more than six months before raising the issue of after-acquired members. Even then, however, the record did not in fact disclose the existence of an after-acquired member upon which representational standing was purportedly based.[51] In the instant case, in contrast, Applicant contested from the outset petitioner's standing based on a concededly after-acquired member disclosed on the record.

In Greenwood, the applicant had advised the Licensing Board that it lacked adequate technical personnel to respond to the intervention petition and in fact elected to have the proceeding placed in limbo.[52] Here, in sharp contrast, the Applicant is pursuing the licensing proceeding expeditiously. Accordingly, these decisions do not provide the support for petitioner that it suggests.

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49 ALAB-549, 9 NRC 644 (1979).

50 ALAB-476, 7 NRC 759 (1978).

51 South Texas, supra, ALAB-549, 9 NRC at 649.

52 Greenwood, supra, ALAB-476, 7 NRC 759, 762-63.

Conclusion. Because petitioner's admission will broaden and delay the proceeding, factor five weighs against intervention.

III. CONCLUSION

In light of the foregoing, Applicant urges the Board to conclude that, in balancing of the five factors set forth in Section 2.714(a)(1), petitioner's untimely petition should be denied and this proceeding terminated.

Respectfully submitted,

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February 23, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Response In Opposition to 'Coalition for Safe Power Five Factor Test On Intervention - February 11, 1983'", in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 23rd day of February, 1983:

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