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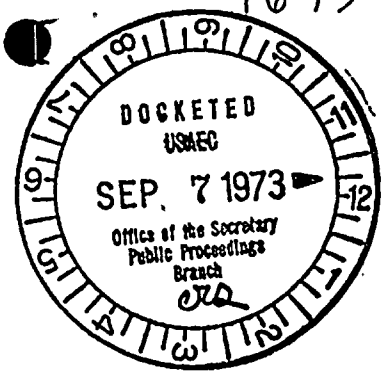

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-259
	)	50-260
(Browns Ferry Nuclear Plant Units 1, 2, and 3)	)	50-296

MEMORANDUM AND ORDER
(September 6, 1973)

Tennessee Valley Authority, the applicant, has moved pursuant to 10 CFR 2.749 for an order granting summary disposition on the pleadings and record, denying the relief sought by the intervenor Frank L. Parker, and authorizing the Director of Regulation to continue the construction permits for Browns Ferry Nuclear Plant, Units 2 and 3, and to issue an operating license for Unit 1. The motion is made on the grounds that there is no genuine issue as to any material fact and the applicant is entitled to a decision in its favor as a matter of law.

We have concluded that the motion for summary disposition should be denied, and that an environmental hearing should be held to effectuate the purposes of the

National Environmental Policy Act of 1969 and the Commission's regulations implementing it, to cover environmental considerations including those raised by Parker and the resolution of any previously unresolved nuclear safety issues having specific environmental implications.

The three reactors are located at the applicant's site in Limestone County, Alabama, adjacent to Wheeler Reservoir. An initial decision of an atomic safety and licensing board issued on May 9, 1967 in Docket Nos. 50-259 and 50-260 authorized the Director of Regulation to issue provisional construction permits for Units 1 and 2. The construction permits were issued on May 10, 1967. An initial decision by a separate board in Docket No. 50-296, issued on July 30, 1968, authorized the issuance of a provisional construction permit for Unit No. 3. That permit was issued on July 31, 1968.

The Commission issued on September 15, 1972, a notice of the opportunity for a hearing pursuant to 10 CFR Part 50, Appendix D, Section C. That notice recited that Tennessee Valley Authority, as an agency of the Federal government, and as "lead agency" under the

guidelines of the Council on Environmental Quality, had already prepared a draft and final environmental statement for the facilities, and that TVA's final environmental statement incorporated comments by the Commission on the draft. It also recited that Units 2 and 3 are subject to the provisions of 10 CFR Part 50, Appendix D, Section C.2, which provides for notice of opportunity for filing petitions for leave to intervene and requests for a hearing on environmental considerations relating to the continuation, modification, termination, or conditioning of the construction permits; and that Unit 1 is subject to the provisions of Section C.3. The notice provided for an opportunity for a hearing with respect to whether, considering the environmental matters covered by Appendix D, the construction permits for Units 2 and 3 should be continued, modified, terminated, or appropriately conditioned to protect environmental values, and with respect to the issuance of operating licenses for all three units.

Section C of Appendix D provides procedures for the environmental review of construction permits which were

issued before January 1, 1970, the effective date of the National Environmental Policy Act of 1969 (P.L. 91-190). Within Section C, two categories are established. Under paragraph 2, the opportunity for an environmental hearing is afforded. Paragraph 3, which establishes a similar procedure, and requires that the effects of operation as well as construction be considered as well as the environmental terms of an operating license, applies when it is likely that construction will be completed by the time when, or soon after, the staff completes its environmental review. Thus Unit 1 is subject to paragraph 3, and Units 2 and 3 are subject to paragraph 2.

The State of Alabama filed a petition for leave to intervene. That petition was granted by a memorandum and order of the Commission dated January 22, 1973. Having reached an understanding with the applicant as to water quality, the State's principal concern, the State withdrew its intervention. It was later permitted by an order of this board dated March 26, 1973 to participate in the proceeding under the special privisions of 10 CFR 2.715(c).

The Commission's memorandum and order of January 22, 1973 also considered a petition for intervention which had been filed by Frank L. Parker. Parker's petition recited that he is a resident of Davidson County, Tennessee, and a consumer of power produced by TVA. He alleged that TVA had acted contrary to the National Environmental Policy Act of 1969, Section 102(2)(C), and the guidelines of the Council on Environmental Quality by failing to consider the benefit-cost ratio of the construction of cooling towers which are now under construction at the Browns Ferry site, and that his own independent benefit-cost analysis had determined that ratio to be 0.4. He alleged:

> "As petitioner, my interest lies in the financial feasibility and impact on the environment which the construction would have. As a member of the consuming public of TVA power, I represent my interest and the interests of consuming public similarly situated which oppose the increase of rates which would result from the Browns Ferry water cooling tower construction. The effect of entering an order denying my petition to intervene will effectively deny the hearing committee the evidence which shows the disregard of the benefit cost ratio of the construction. An order approving the operating license of the Browns Ferry Project Units 1, 2, and 3 causing an increase in consumer power rates will detrimently affect myself and all consumers similarly situated." (Emphasis supplied)

The Commission's memorandum and order, by which we are of course bound, viewed Parker's petition as

> "... raising the single issue of whether, considering a proper cost-benefit analysis, the plant's construction permits should be modified to preclude cooling towers."

In granting Parker's petition, the Commission observed:

> "The claim implicit in the Parker petition--that a proper cost-benefit analysis would demonstrate that any environmental gains attributable to cooling towers are outweighed by additional costs to applicant's customers--is a proper subject for Commission consideration pursuant to our NEPA obligations. Accordingly, an Atomic Safety and Licensing Board shall be convened to preside at a hearing." (Emphasis supplied.)

The Parker application for intervention was thus explicitly based on economic as well as environmental considerations: the prospective economic detriment to users of TVA's electricity through the ultimate inclusion in its rate base of the cost of the cooling towers, and consideration of that economic effect in the cost-benefit analysis. Evaluation of this argument under Section 102(2)(C) of the National Environmental Policy Act and the

Commission's regulations (10 CFR 50, Appendix D) requires balancing the advantages and costs of the project as a whole in order to determine what action may be appropriate. That action could conceivably include the imposition of limitations on power levels, for certain periods of time, and thus might dispense with the need for cooling towers as Parker suggests. Parker has also asserted specific environmental considerations, such as the generation of fog and possible interference with navigation on Wheeler Reservoir.

The basic procedures for this agency's environmental review are prescribed by Appendix D, paragraph A of 10 CFR Part 50. Those procedures require that an applicant submit an "applicant's environmental report" discussing environmental considerations, including alternatives to the proposed action and a cost-benefit analysis, as well as the status of compliance with environmental quality standards. The Director of Regulation is required to

> "... analyze the report and prepare a draft detailed statement of environmental considerations,"

(Par.A.6), to transmit the draft statement to appropriate Federal, State and local officials for comment, to publish in the Federal Register notice of its availability (Par.A.7), and to prepare a final detailed environmental statement

including a final cost-benefit analysis and consideration of available alternatives,

> "... as well as the environmental, economic, technical, and other benefits of the facility."
>
> * * *
>
> "On the basis of the foregoing evaluation and analysis, the detailed statement will include a conclusion by the Director of Regulation or his designee as to whether, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, the action called for is issuance or denial of the proposed permit or license or its appropriate conditioning to protect environmental values." (Par. A.8)

Paragraph A.10 requires that, in a proceeding in which a hearing is held, the regulatory staff will offer its detailed environmental statement in evidence.

Finally, paragraph A.11 prescribes the responsibility of an atomic safety and licensing board:

> "In a proceeding for the issuance of a construction permit for a production or utilization facility described in paragraph 1, the atomic safety and licensing board will (a) determine whether the requirements of Section 102(2)(C) and (D) of the National Environmental Policy Act and this appendix have been complied with in the proceeding, (b) independently consider the final balance among conflicting environmental factors in the

> record of the proceeding for the permit with a view to determining the appropriate action to be taken, and (c) determine, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, whether the permit should be issued, denied, or appropriately conditioned to protect environmental values.
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> "In a contested proceeding for the issuance of a construction permit for such a facility, the Atomic Safety and Licensing Board will also (d) decide any matters in controversy among the parties and (e) determine whether, in accordance with this appendix, the construction permit should be issued as proposed. In an uncontested proceeding for the issuance of a construction permit for such a facility, the Atomic Safety and Licensing Board will also determine whether the NEPA review conducted by the Commission's regulatory staff has been adequate."

Thus our responsibility in this contested proceeding is (a) to determine whether NEPA and Appendix B have been complied with as to all three units; (b) independently to consider the final balance among conflicting environmental factors, including those raised by Parker, with a view to determining the appropriate action as to each of the three units; (c) to determine, after weighing all benefits against environmental costs, whether the construction permits for Units 2 and 3 and the operating licenses for all three units should, as appropriate, be issued, denied or conditioned; and (d) to decide any matters in controversy among the applicant, Parker and the staff.

On June 30, 1971, the staff of the Commission entered into a so-called "lead agency agreement," reflected in a letter of that date addressed by the then Director of Regulation to the Manager of Power of the Tennessee Valley Authority. The letter confirmed an understanding concerning the procedures to be followed by the AEC and TVA in implementing the requirements of the National Environmental Policy Act with respect to these and certain other applications for licenses for nuclear power reactors.[1/] It provided that TVA would be the "lead agency" and would prepare and circulate for comment the draft environmental statement required by the guidelines of the Council on Environmental Quality, transmitting it to CEQ and the appropriate agencies for comment, including the AEC. The letter continued:

> "... We will undertake to prepare appropriate comments on that statement which are within the scope of the AEC jurisdication by law or special expertise with respect to any environmental impact involved ....

1/ The letter simply purported to "confirm our understanding." The record before us does not indicate that there was any written agreement or memorandum of understanding signed by both agencies in accordance with the usual practice.

On February 10, 1972 the AEC Director of the Division of Radiological and Environmental Protection wrote a letter to the Director of Environmental Research and Development of TVA making it evident that the AEC's review of the draft environmental statement had been "concentrated" on its radiological aspects:

> "With respect to the preparation of the final detailed environmental statement by TVA, we would expect to provide informal advice with respect to those portions of the statement which are of particular concern to the AEC.
>
> "We are also in agreement that the final detailed environmental statement prepared by TVA will satisfy the AEC requirements specified in Appendix D to 10 CFR Part 50 for an environmental report and that TVA should provide us with 150 copies of that statement in accordance with Appendix D."

The import of this agreement is that participation by the AEC in the preparation of the final environmental statement by TVA would be limited to concerns of radiological safety and their environmental consequences.

On August 28, 1972 the AEC Deputy Director for Reactor Projects addressed a letter to the TVA Director of Environmental Research and Development reporting that the AEC regulatory staff had received the proposed final environmental statement prepared by TVA for the three Browns Ferry reactors, and had reviewed it,

> "... to determine whehter its contents meet the guidelines set by the AEC for the preparation of its environmental statements and thus adequately deals with the subject matter in light of experience gained in our preparation of other statements for other facilities. As a result of this review, it is our conclusion that the statement is adequate to support the proposed licensing actions."

It would thus appear that the extent of review by the AEC staff was limited to ascertaining whether TVA's preparation of the final environmental statement, a document which in the case of other applicants would have been prepared by the AEC staff, adequately deals with the subject matter.

It is clear that the interagency agreement of June 30, 1971 could not relieve the AEC staff of the statutory duties imposed upon it by the National Environmental Policy Act, as interpreted in the Calvert Cliffs' case.[2/] It is not at all clear that the letter reports that the AEC staff had in fact completed its process of interdisciplinary study, cost-benefit analysis, and weighing of alternatives prescribed by the National Environmental Policy Act and by

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2/ Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

Appendix D of Part 50. The record so far does not clearly disclose in factual terms the actions of the AEC staff as regards the TVA environmental statement as a whole.

TVA's "final environmental statement" departs very substantially from the usual form filed by applicants in reactor licensing proceedings. It consists of three separate volumes, two of which are labelled drafts, with Volume 1 being chronologically the last, and with multitudinous cross-references which obstruct rather than aiding the understanding. The absence of the AEC staff's draft environmental statement and final environmental statement, which under the procedures prescribed by Appendix D, Paragraph A would serve as a key to understanding an applicant's environmental report, has compounded our difficulties.

At the first prehearing conference on February 28, 1973, this board raised the question of the extent of the obligation of the staff to evaluate the environmental consequences of the project independently, notwithstanding the lead agency agreement, under the mandate of Section 102(2)(C) of the National Environmental Policy Act as interpreted by the Calvert Cliffs' case. Staff counsel

candidly responded that the AEC's staff review of radiological matters was the kind of review it would have made if it had itself prepared the environmental statement; but that the lead agency agreement was considered as completely relieving the AEC staff of making an independent study and analysis of other environmental considerations. He expressed the staff position that the only responsibility of the staff was to satisfy itself that the lead agency had covered the ground which the staff would have covered, although he also agreed that the AEC staff had the duty to make an independent balance of environmental considerations. At the same time he put forward the staff view that this board has the same broad responsibility as it would have in any other case to weigh environmental considerations.3/

Under Section 11s. of the Atomic Energy Act of 1954, 42 USC 2014(s), the term "person," to whom the statute and the Commission's regulations apply, means any individual or other entity, public or private, including any "government agency other than the Commission." Part 50 of the regulations, governing the licensing of utilization

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3/ Tr. 122-127.

facilities, includes the same definition. 10 CFR 50.2(1). Under both, the term "government agency" includes a corporation, such as TVA, which is owned by and is an instrumentality of the United States.[4/] The only distinction in either statute or regulation is a footnote to 10 CFR 50, Appendix D, saying:

> "Where the 'applicant' as used in this appendix, is a Federal agency, different arrangements for implementing the National Environmental Policy Act may be made, pursuant to the guidelines established by the Council on Environmental Quality."

None of the participants in the proceeding has cited this footnote, which appears to be the only provision in the regulations specifically concerned with such a case as the present one. The board has examined the guidelines of the Council on Environmental Quality,[5/] which do not address a proceeding in which one government agency as an entrepreneur is an applicant before another agency exercising a regulation function. The guidelines, read as a whole,

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4/ Atomic Energy Act of 1954, Sec. 11(1), 10 CFR 50.2(j).
5/ 36 F.R. 7724, April 23, 1971.

appear to concern themselves exclusively with joint ventures by two or more government agencies, developing the "lead agency" concept to fit the case where one agency has the principal responsibility for a joint effort and the others cooperate with and assist it.

The obligations of a regulatory agency under the National Environmental Policy Act, as interpreted in the Calvert Cliffs' case, do not appear to be affected by the identity of an applicant as a government agency. Indeed, the considerations to be taken into account by a regulatory agency may differ from those taken into account by an entrepreneurial agency, and the relative weights accorded to them may differ. The AEC, in its balancing of the cost and benefits of a project or weighing of alternatives as directed by NEPA, might conclude either that a project should not go forward as intended by an applicant or that limiting conditions should be imposed which would be regarded by an applicant as unnecessary restraints. The possibility of this lack of identity of views as between government agencies exercising functions of these different kinds is persuasive that, in view of the absence of a specific alternative procedure prescribed by the footnote

to Appendix D, the lead agency agreement between TVA and the AEC should not be interpreted as dispensing with full NEPA evaluation by the AEC staff in such a case, and indeed could not do so under the Calvert Cliffs' case. It would perhaps be consistent with the purposes of NEPA and with the guidelines of the Council on Environmental Quality to permit the applicant government agency to conduct such tests and investigations, as well as correspondence with other agencies, as might otherwise be performed by the AEC staff; but Section 102 of NEPA requires that the environmental consequences of proposed actions be considered "to the fullest extent possible", and at every distinctive and comprehensive stage of the proceeding.[6/] The interagency agreement of June 30, 1971 did not relieve the AEC staff of the statutory duties imposed upon it by the National Environmental Policy Act, as interpreted in the Calvert Cliffs' case.

The regulatory staff has expressed the view that this licensing board's obligations to conduct a full environmental evaluation under the National Environmental Policy Act are

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6/ Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1112-1119 (D.C. Cir. 1971).

unaffected by the lead agency agreement. We have concluded that the objectives of the Act require that we have the assistance of the regulatory staff in that evaluation process, and that an evidentiary hearing should be held to effectuate the purposes of that statute by providing explicitly an account of the staff's activities in evaluation of TVA's environmental statement and assisting the board in its own environmental evaluation. In the Greene County case the Second Circuit held:[7/]

> "... We conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement ...." (Emphasis in original).

The AEC staff has filed, attached to its response to the applicant's motion for summary disposition, an affidavit of Dicker dated June 14, 1973. Dicker is chief of an environmental projects branch in the AEC

7/ Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 422 (C.A. 2d 1972).

Directorate of Licensing. His affidavit reports that he "reviewed" the TVA draft environmental statement and assigned responsibility for consideration of radiological impact and related subjects to members of the AEC staff, and that he then reviewed their contributions and prepared the AEC comments on TVA's draft statement. As to the final environmental statement, his affidavit says:

> "With respect to the Final Environmental Statement for the Browns Ferry project, I performed a function similar to that which I now perform when I review the work of one of the project managers under my supervision. I did not attempt to duplicate the detailed evaluation already performed by TVA. I did, however, review the final statement carefully and satisfied myself that sufficient credible factual material had been presented, and that the factual material supported the conclusions reached by TVA.
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> "I have also independently weighed the environmental, economic, technical and other benefits discussed in the Browns Ferry Final Environmental Statement, against environmental costs therein discussed; considered available alternatives; and reached the conclusion, as announced by the AEC regulatory staff in the Federal Register on March 9, 1973 (38 F.R. 6423), that, with respect to environmental matters, and the construction permits issued for Browns Ferry Units 2 and 3 should be continued and an operating license should be issued for Unit 1."

It is not at all clear that the meaning of these paragraphs is that the AEC staff did in fact conduct the independent interdisciplinary study and evaluation across the board of the environmental consequences of this project required by NEPA, either on the basis of the draft environmental statement or the final environmental statement. In the first case, it confined its evaluation to radiological impact and related subjects; in the second, Dicker apparently "reviewed" the work of the TVA staff as if it had been performed by the AEC staff. The record does not show when Dicker conducted his review, what was the factual basis of his review, or to what extent AEC experts skilled in the appropriate respective disciplines participated in it. So far as the record now shows, the "environmental statement" prepared by TVA apparently served a dual purpose: that of the environmental report normally prepared by an applicant, and that of the environmental statement normally prepared by the AEC staff. TVA, as the "lead agency", has apparently served in substance in a dual role, both as entrepreneur and as regulatory evaluator. This board has the obligation to satisfy itself that the AEC staff has complied with the

mandate of NEPA as interpreted in the Calvert Cliffs' and Greene County cases.[8] Under the regulation which mentions the case of an applicant which is a Federal agency,[9] it may be allowable that the AEC staff accept as truthful the factual results of field investigations and correspondence conducted by the applicant agency, without duplicating that work. But we conclude that NEPA requires on the part of the regulatory agency in such a case, as in others, at least the independent study of that information by a team of qualified members of the various professions whose expertise is required for the arm's length analysis required by the terms of NEPA.

TVA has asserted that, under its lead agency agreement with the AEC, an atomic safety and licensing board has approved an environmental statement prepared by TVA for the Watts Bar Nuclear Plant and the manner in which the environmental review was conducted, and that the Appeal

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8/ Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972); see Matter of Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station) (ALAB-79).

9/ 10 CFR 50, App. D, n. 1.

Board has affirmed that decision.[10] But we do not find in that case an obvious parallel to the present one. In the Watts Bar case, which was an uncontested construction permit proceeding, there was an evidentiary hearing. An AEC staff witness testified that the TVA environmental statement had been discussed among members of the AEC staff, which had considered the alternatives to the cooling towers as designed. He testified that the AEC staff had concluded that the applicant had made the correct choice with a natural draft cooling tower; and that it had reviewed TVA's judgments as expressed in the environmental statement, and had independently evaluated them.[11] The initial decision of the licensing board referred to the staff's review of the alternatives considered by the applicant and its conclusions that there were no identifiably feasible alternatives other than those treated by the applicant and that, of those alternatives analyzed,

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10/ See Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant Units 1 and 2), Docket Nos. 50-390 and 50-391, initial decision, December 19, 1972, and ALAB-97, January 25, 1973.

11/ Tr. 220-225.

none was superior to those actually selected. The licensing board also relied on the staff's independent analysis of the section covering benefit-cost weighing and balancing, and its arrival at essentially the same conclusions as had the applicant.[12/] The Appeal Board's affirmance, following review on its own motion, did not address itself to these issues.[13/]

The Commission's regulation governing summary disposition (10 CFR 2.749) embodies the well known concept of summary judgment. Under that concept a motion is granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine material issue remains for trial; and any doubt as to the existence of such an issue is resolved against the movant. Washington v. Cameron, 411 F.2d 705, 709, 710 (C.A.D.C. 1969); Jackson Tool and Dye, Inc. v. Smith, 339 F.2d 88 (C.A. 5th 1964). Moreover, the affirmative duties imposed upon this agency by NEPA, as interpreted in the Calvert Cliffs and Greene County cases, require diligence in carrying out the

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12/ Initial decision, par. 50.
13/ ALAB-97, January 26, 1973.

purposes of that statute beyond those imposed in private litigation. It is in any case the affirmative duty of an administrative agency to obtain all relevant information in the protection of the public interest, whether or not the parties have offered it,[14/] and the Commission's memorandum and order of January 22, 1973 have laid that duty upon us.

TVA and Parker have entered into an "agreed statement of facts and issues," on which TVA rests its claim that there are no material facts in issue because Parker and TVA agree that the environmental benefits of the cooling towers are outweighed by their economic costs. It is on the basis of this "agreed statement" that TVA largely rests its motion for summary disposition. The "agreed statement" is divided into two parts; one of "facts" and one of issues. The regulatory staff of the Commission has neither joined in that statement nor presented a separate statement, explaining that it wishes to reserve its position pending this board's determination of TVA's

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14/ Matter of National Bureau of Standards, 2 A.E.C. 323 (1963); Landis, The Administrative Process (1938), 39-39; see 2 Davis, Administrative Law Treatise, Secs. 15.05, 15.06.

motion for summary disposition.[15/] Indeed, the staff has declined to express any view as to the propriety or correctness of the issues to which TVA and Parker have stipulated.[16/] The agreement as to "facts" amounts in part to a stipulation of fact but in part only to a stipulation that witnesses, if called, would testify in certain ways. Both Parker and TVA reserve the right to offer as evidence contrary conclusions and opinions of qualified witnesses. The parties do not waive any objection to the introduction in evidence of certain documents on the grounds of relevancy and materiality. They also stipulate that the applicable thermal water quality standards with which the applicant must comply, pursuant to sections 303(a)(1) and 313 of the Federal Pollution Control Act Amendments of 1972 (FWPCA) (P. L. No. 92-500), provide that the maximum temperature rise above natural temperatures shall not exceed $5^{\circ}F$, nor shall the maximum water temperature exceed $86^{\circ}F$; that operation of Browns Ferry Units 1, 2, and 3 at full load year round would not meet the $5^{\circ}F$ rise and

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15/ Tr. 211-216; see Tr. 137-139.
16/ Tr. 212.

86°F maximum for a number of days similar to that described in Table 2.6-3 of the final environmental statement; that in order for the plant to operate with either 1, 2, or 3 units on a year round full power basis, some form of closed-cycle offstream cooling will be required to comply with currently applicable thermal water quality standards; that naturally occurring stream temperatures in Wheeler Reservoir will from time to time equal or exceed 86°F; and that, considering environmental impact, engineering feasibility, economic costs, time to completion and other factors concerning alternative heat dissipation methods, mechanical draft wet cooling towers provide the best method of complying with currently applicable thermal standards. They stipulate that design of the cooling towers and major site preparation began in June 1972; that the contract for the cooling towers was entered into in October 1972 for $8,510,000; that, in addition, approximately $5,300,000 had been expended as of January 1, 1973; and that the cost of diffusers already installed is $4,900,000.

The parties stipulate that the relief sought by Parker is an order which would:

(a) Delay construction of the cooling towers until certain provisions of the FWPCA are carried out (§306(b)(1)(B)), and until issuance of a report on water quality criteria replacing the report of the National Technical Advisory Committee on Water Quality Criteria (April 1, 1968) on which the current standards are based;

(b) Delay construction of cooling towers until TVA avails itself of remedies assertedly available to it under FWPCA in §§302, 306, and 316; and

(c) Obligate AEC to seek a ruling that §101 of NEPA and §306(b)(1)(B) of FWPCA, considered together, take precedence over §313 of FWPCA; if §101 of NEPA and §306(b)(1)(B) of FWPCA do hold such precedence, then obligate the AEC to attempt to obtain from EPA or the State of Alabama or both a change in water quality standards so that cooling towers would not be required.

This stipulation, with its limitations, escape clauses and reservations, and without the participation of the regulatory staff, constitutes an inadequate basis for summary disposition of the intervention of Parker. It is not adequate for the determination of the material facts, and does not constitute a foundation on which this board may make an order comparable in its effect to an initial decision under the Administrative Procedure Act.[17/]

We agree with the applicant that it is not within the authority of this agency and of this board to delay adjudication indefinitely until certain extrinsic events occur, including possible application by TVA to other government agencies for relief;[18/] and we agree that it

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17/ On January 4, 1972 the Environmental Protection Agency informed TVA that review of TVA's draft environmental statement and supplement for the Browns Ferry plant revealed deficiencies which made it impossible to verify all the conclusions reached, particularly with regard to the release of waste heat to Wheeler Reservoir in view of the then design of the waste heat removal system using underwater diffusers. See TVA Environmental Statement, Vol. 1, p. 3.1-1. EPA requested the opportunity to evaluate plans for alternative or auxiliary systems, but it does not appear on the present record whether it has done so or what the results have been.

18/ See Administrative Procedure Act, Sec. 6(a), 5 U.S.C. 555(b).

is beyond the authority of this board to require TVA to seek such relief or to obligate this regulatory agency to attempt to obtain from other agencies relief which might benefit the applicant or the intervenor Parker and others. But since the Commission has granted intervention on the basis of the issue raised by Parker, that issue is properly before this board. Within the limits of our licensing authority as adjudicatory body, we are under the obligation to ascertain whether any relief should be granted to Parker and what form that relief should take, whether by the imposition of limiting conditions or otherwise.19/

We have carefully studied the interim policy statement published by the Commission on the implementation of Section 511 of the FWPCA Amendments of 1972 (38 F.R. 2679, January 29, 1973). We do not find in it support for the applicant's view that, in the face of the Alabama water quality requirements, this agency and this board have no adjudicatory function to perform because the applicant's

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19/ It appears that TVA has proceeded with the construction of these cooling towers without an amendment of the construction permits granting it authority to do so. See Tr. 104-105.

proposed cooling towers are required, as it asserts, to meet those requirements. Whether they are required for that purpose or whether that end might be achieved in whole or in part by some limitation on operating levels is a question of fact; and consideration of the choice of means to meet those requirements is not an attack upon them.

TVA has also argued that the Commission's order of January 22, 1973 is invalid, mooted, and superseded as inconsistent with the memorandum of understanding between the EPA and the AEC in regard to the implementation of Section 511 of the FWPCA Amendments of 1972 and the interim policy statement published with that memorandum of understanding.[20/] We find nothing of substance in the contention that the Commission's order is invalid, even if we were free to reach such a decision. Nor is there any substance to the argument that, as a matter of the Commission's intention, the memorandum of understanding and the policy

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20/ 38 F.R. 2713, 2679, January 29, 1973.

statement superseded the Commission's order, since they were contemporaneous with it.21/

On July 27, 1973 Parker filed a brief document which asserts that he is in favor of summary disposition, and is even more in favor of insuring that the plant goes on line as soon as possible in the national interest,

> "... while the legal questions that we have raised here are sorted out."

Parker's position on the motion for summary disposition is that summary disposition should be granted---in his favor. But at least in the absence of action by Parker stipulating to withdraw his intervention, this board is under the obligation to perform the duties imposed on it by NEPA and the Commission's regulations. They are duties to the public as well as to an individual intervenor.

21/ The interim policy statement is dated January 12, 1973, ten days before the Commission's order. The memorandum of understanding was signed for the Commission on January 15, 1973, for the Environmental Protection Agency on January 19, 1973, and for the Council on Environmental Quality on January 22, 1973, the date of the Commission's order.

It is therefore ORDERED:

1. The applicant's motion for summary disposition on the pleadings and record, and for an order denying the relief sought by the intervenor Frank L. Parker, is denied;

2. The parties, including the regulatory staff, shall promptly confer as to the subject matter identified in paragraphs 2 to 8 inclusive of the notice and order for prehearing conference dated February 8, 1973, and shall promptly communicate with the atomic safety and licensing board concerning preparation for the hearing.

THE ATOMIC SAFETY AND LICENSING BOARD

Clark Goodman

Dr. Clark Goodman, Member

Frederick P. Cowan

Dr. Frederick P. Cowan, Member

Sidney G. Kingsley

Sidney G. Kingsley, Chairman

Dated this 6th day of September, 1973

at Washington, D. C.