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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of Docket Nos. 50-416/417 OL
MISSISSIPPI POWER AND LIGHT ASLBP No. 82-476-04-OL
COMPANY, et al.

(Grand Gulf Nuclear Station,
Units 1 and 2) November 4, 1982

APPEAL OF ORDER DENYING LOUISIANA'S
PETITION FOR INTERVENTION

SUMMARY

On July 26, 1982, the Attorney General of Louisiana, William J. Guste, Jr., filed a "Petition to Participate as an Interested State in Facility Operating License Proceedings, etc."

The purpose of Louisiana's Petition for Intervention is to assure that "adequate consideration will...be given...to its views in regard to:

1. Long term radioactive waste disposal, including high-level radioactive wastes wherever they are finally stored;

2. The fact that the NRC has yet to determine what method is to be used to dispose of high-level transuranic wastes;

3. The need for an environmental impact statement on the Grand Gulf Nuclear Power Station assessing the environmental impact of these high-level wastes after they are disposed and there is no basis to assume that these wastes will have no environmental effect after burial if they are in fact buried;

4. The need to consider the health, socio-economic, and cumulative effects of the projected releases.

5. The need to consider these issues on a case by case basis because there is currently no valid generic rule on point."¹

In its Petition, the State of Louisiana "requests the Nuclear Regulatory Commission...to refrain from granting any operating license to the Grand Gulf Nuclear Power Station until the issues raised herein are resolved."²

Louisiana bases its requests on the April 27, 1982 decision in NRDC v. NRC, ___ F.2d ___ (D.C. Cir. April 27, 1982) which held that the Table S-3 Rule is invalid because it fails to allow for proper consideration of the uncertainties concerning the long-term isolation of high-level and transuranic wastes, and because it fails to allow

¹Petition, pp. 2-3.

²Id., p. 3.

for proper consideration of the health, socioeconomic and cumulative effects of fuel-cycle activities.

On October 20, 1982, the Atomic Safety and Licensing Board denied Louisiana's Petition for Intervention; this denial was received by Petitioner on October 25, 1982. Louisiana herein respectfully appeals the denial of its Petition for Intervention.

ARGUMENT

Louisiana is mindful of the fact that the Nuclear Regulatory Commission has appealed the Court of Appeals decision in NRDC v. NRC to the Supreme Court, and that the Order by the Court of Appeals staying the mandate will continue to be in effect until final disposition of the matter by the Supreme Court. However, Louisiana respectfully suggests that in the interest of judicial economy, common sense dictates that all further proceedings in the instant matter cease until the issue is resolved by the Supreme Court. As the Court of Appeals points out, "[a]lthough the original and interim [Table S-3] Rules have been suspended by the final Rule, their validity is still at issue. Individual licenses that were granted under those Rules have been challenged in separate actions, many of which are being held in abeyance pending the resolution of the broader issues presented in this case."³

³NRDC v. NRC, ___ F.2d ___ (D.C. Cir. April 27, 1982), opinion at p. 5.

Louisiana is also mindful of the fact, as pointed out by both the Applicant and the NRC Staff in their briefs in opposition to Louisiana's Petition for Intervention, that its Petition is untimely. Petitioner respectfully points out to the Appeal Board that it acted with all due speed upon learning of the NRDC v. NRC decision, and studying the opinion with regard to its effect on the instant proceedings and petitioners decision to seek intervention therein.

Louisiana has no wish to unreasonable delay the instant proceeding. However, considering the language of the Court of Appeals in NRDC v. NRC, and the potentially far-reaching impact of the Court's holding, abeyance of the instant proceeding would appear to be in the best interest of all parties.

I. Meeting the Burden of Non-timely Filing of a Petition to Intervene Under 10 CFR 2.714(a)(1).

Non-timely petitions will not be granted absent a determination based upon a balancing of the following factors set out in 10 CFR 2.714(a)(1):

- (1) Good cause, if any, for failure to file on time.
- (2) The availability of other means whereby the petitioner's interest will be protected.

- (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (4) The extent to which the petitioner's interest will be represented by existing parties.
- (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Commission's decision in West Valley⁴ continues to be the leading case on the issue of untimely petitions to intervene. In that proceeding, the Commission found that the petitioner, Erie County, had no good excuse for their failure to file on time, but nevertheless allowed the interventions, finding at least 3 of the remaining 4 factors in Section 2.714 weighed in the County's favor. The Commission in West Valley further stated, on p. 275, that "the burden of justifying intervention on the basis of the other factors in the rule is considerably greater where the latecomer has no good excuse." The corollary to this rule is that a petitioner with a good excuse has a considerably lesser burden with respect to the remaining factors. Indeed, one Licensing Board, when considering an untimely petition of an individual, "found that [petitioner] has a marginably good

⁴Nuclear Fuel Services, Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

the other. It has not been interpreted to mean that a positive finding must occur on all factors in order to find in favor of an untimely petitioner.

It is also noteworthy, and relevant to the instant case, that a petitioner's status as a governmental entity may be taken into account, and that such status weighs in favor of the petitioner, as shown by several Appeal Board decisions. In one such decision, the Appeal Board in Jamesport denied an untimely petition of a private party, distinguishing a private party's right from the broader right of a governmental entity, again citing West Valley:

"The West Valley petition was that of a County, seeking to advance its asserted (clearly cognizable) interest in the protection of the health and safety of the citizens of the County. To have excluded it from the proceeding would have the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act." (footnote omitted)⁷

Thus, not only does Louisiana have a justifiably good cause for its untimely petition, its nature as a governmental entity, charged with the responsibility to protect the health and safety of its citizens, must weigh

⁷Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 646 (1975).

in favor of granting Petitioner's request for intervention.

II. The "Five Factors" of 10 CFR 2.714(a)

A. Factor 1 - "Good Cause"

In its "Memorandum and Order Denying ...Louisiana's Petition for Intervention" the Licensing Board states that "[t]here is nothing in the record before us from which it can be established or inferred that there is good cause for this untimely filing."⁸ Speaking specifically of Louisiana's reliance upon the NRDC v. NRC case, the Licensing Board states in relevant part:

The State of Louisiana's Petition...relies upon the decision of the...Court of Appeals in NRDC v. NRC.... The State argues that these issues could not have been raised prior to the April 27, 1982 date of that decision and that Louisiana acted promptly thereafter in filing the Petition on July 26, 1982.

Unfortunately for Louisiana, issues surrounding the uranium fuel cycle have been raised in NRC proceedings long before the decision.... In fact, the State of Louisiana was a party to the River Bend construction permit proceeding, Gulf States Utilities Company (River Bend Stations, Units 1 and 2), ALAB-444, 6 NRC 760, 794 (1977), where the Appeal Board discussed the fact that Table S-3 concerning the environmental effects associated with the uranium fuel cycle had been previously invalidated by

⁸"Memorandum and Order Denying State of Louisiana's Petition for Intervention", p. 11.

the District of Columbia Circuit Court of Appeals in the first NRDC [case].... Thus, the controversy surrounding Table S-3 and the environmental effects of the uranium fuel cycle have been well known, especially to the State of Louisiana from its direct participation in the River Bend construction permit proceeding, for a long time. Hence, the April 27, 1982 decision...in NRDC v. NRC does not contain "new information" and is insufficient to establish good cause for an untimely petition to intervene. ALAB-444 (River Bend) establishes Louisiana's knowledge of the existence of a controversy concerning Table S-3. Thereafter, Louisiana waited for five years and until after the issuance of a low power operating license in Grand Gulf before filing its Petition.⁹

Louisiana is not so naive as to assert that Table S-3 and the environmental effects of the uranium fuel cycle have not been well known to the State of Louisiana. Indeed, they are well known, and the table and the effects of the fuel cycle are not "new information". However, the NRDC v. NRC case, invalidating the rule and allowing consideration of the environmental effects of the fuel cycle in individual licensing proceedings is new information - and highly relevant information at that. Indeed, Louisiana's attempt to assure that the environmental effect of the uranium fuel cycle is considered in the instant case is the very heart of the

⁹Id., pp. 10-11.

NRDC v. NRC case itself. It has been the consistent position of the Nuclear Regulatory Commission to disallow any attempt to raise the environmental impact of nuclear wastes as a relevant consideration in operating license proceedings, and it was such a denial in the Vermont Yankee proceeding that resulted in a court challenge to the denial and the consequent April 27, 1982 decision of Judge Bazelon invalidating the rule. Prior to the decision, Louisiana was bound to assume, as was the NRC, that the Table S-3 Rule was valid and that, with respect to the environmental effects of the fuel cycle, "no further discussion of such environmental effects shall be required."¹⁰

Therefore, even though Louisiana does have, and has had, knowledge of the environmental effects of the fuel cycle, the existence of the Table S-3 Rule prevented "[any] further discussion of such...effects." Louisiana respectfully suggests that the NRDC v. NRC opinion invalidating the rule is "new information" inasmuch as it would now allow consideration of the environmental effects of the uranium fuel cycle in the Grand Gulf operating license proceeding.

¹⁰NRDC v. NRC, ___ F.2d. ___ (D.C. Cir. April 27, 1982), slip opinion at p. 17, citing 39 Fed. Reg. 14188 (1974) at 14191.

B. Factor 2 - "Availability of Other Means"

The Licensing Board found, and the NRC staff conceded, that this factor should be resolved in favor of the State of Louisiana. The Licensing Board's finding that this factor, as well as factor 4, "is entitled to less weight than the other factors enumerated in Section 2.714(a)" will be discussed below, in Section "D".

C. Factor 3 - "Development of a Sound Record"

The Licensing Board found that "Louisiana has not indicated that it would do anything other than express its views on these subjects. Its assertion that it has, or has the means to get, all the expertise necessary to fully address the issue in point, Brief in Support of Petition at 18, is vague and insufficient." Petitioner has contacted a representative of the Union of Concerned Scientists and feel certain that it will be able to obtain all the expertise necessary to "express its views" from this or other similiar organizations.

D. Factor 4 - "Representation by Existing Parties"

Here, as with Factor 2, the Licensing Board found that "this factor, although resolved in favor of Louisiana, is entitled to less weight than the other factors....,"

citing South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981). But the "less weight" language is confined to the narrow circumstances of that case, in which the Appeal Board also found 1) inexcusable lateness, 2) a material expansion, and 3) a marginal showing on petitioners ability to make a truly significant, substantive contribution. Petitioner respectfully suggests that none of these factors are applicable in the instant case, inasmuch as its lateness is excusable (as has been explained above), it does not seek to materially expand the proceeding, and fully expects to make a significant, substantive contribution.

Further, in an earlier opinion in the same proceeding, the Licensing Board stated with reference to this factor: "It is not clear to the Board that this factor is applicable in a situation where, as here, no hearing whatever would be held were it not for the Petitioner's request."¹¹

E. Factor 5 - "Broadening of the Issues or Delay"

Petitioner feels that this factor, in addition to

¹¹South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213 (1978).

Factor 4, is inapplicable in a case such as the instant one, where, if there is no intervention, there is no hearing at all. In the same Summer proceeding quoted above in the previous section, the Licensing Board stated:

"Nor is it clear to the Board that factor number [5] is applicable in a situation where the granting of the petition is the ordering of the hearing. If the petition is not granted there will be no issues to broaden nor a proceeding to delay.¹²

In the alternative, however, should the Appeal Board find that this factor is applicable, Louisiana has just this day been made aware of an Associated Press story carried in the November 4, 1982 State-Times of Baton Rouge that "a delay in the nuclear fuel loading process [at the Grand Gulf 1 nuclear power plant] will push back the plant's scheduled February start-up of commercial operations by seven months." Louisiana respectfully suggests, therefore, in light of this new information, that it would not delay the proceeding, and that consequently a favorable finding on this factor must be made.

CONCLUSION

Louisiana has shown that it has good cause to justify its untimely petition. When good cause is shown, a

¹²Summer, supra, 7 NRC at 213.

"much smaller" showing on the remaining 4 factors is necessary. Of the remaining 4 factors, the Licensing Board has ruled in favor of petitioner on factors 2 and 4. It is also probable that where, as here, the granting of a petition results in the ordering of a hearing, Factor 4 and 5 may not apply. Futher, because Grand Gulf 1 will push back its scheduled February start-up by seven (7) months, petitioner will not delay the proceeding. In addition, Louisiana feels it has, or has the means to obtain, expertise to assist in developing a sound record. Louisiana feels it has clearly met the balancing test required by 10 CFR 2.714(a).

WHEREFORE petitioner prays that the Order of the Licensing Board, that the Petition of the State of Louisiana be denied, be reversed and that petitioner be allowed to intervene, in accordance with its original Petition.

Respectfully submitted,

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November 4, 1982

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Appeal of Order Denying Louisiana's Petition for Intervention, dated November 4, 1982 in the above-captioned proceedings, has been served on the following by deposit in the United States Mail, first class, this 4th day of November, 1982.

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