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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

Administrative Judges

Stephen F. Eilperin, Chairman
Gary J. Edles
Howard A. Wilber

In the Matter of	)	
	)	
MISSISSIPPI POWER & LIGHT COMPANY, et al.	)	Docket Nos. 50-416 50-417
	)	
(Grand Gulf Nuclear Station, Units 1 and 2)	)	

APPLICANT'S BRIEF IN OPPOSITION TO APPEAL OF ORDER DENYING STATE OF LOUISIANA'S PETITION FOR INTERVENTION

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November 19, 1982

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Preliminary Statement

This is an appeal from a Memorandum and Order, dated October 20, 1982, of the Atomic Safety and Licensing Board (hereinafter "Licensing Board") denying the State of Louisiana's petition for intervention in the captioned proceedings, filed on July 26, 1982. 1/ The State of Louisiana (hereinafter "petitioner") had sought to intervene in these uncontested proceedings in order to raise issues related to environmental impacts associated with the permanent disposal of high-level radioactive waste. Some of those issues pertained to health and other impacts of the

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1/ Memorandum and Order Denying State of Louisiana's Petition for Intervention (hereinafter "Memorandum and Order") (October 20, 1982).

projected releases set forth in Table S-3 of 10 C.F.R. Part 51. 2/

Applicants Mississippi Power & Light Company, Middle South Energy, Inc. and South Mississippi Electric Power Association (hereinafter "Applicants") opposed the petition on the grounds that petitioner had failed to satisfy the requirements for late intervention under 10 C.F.R. §2.714(a)(1) and that the Licensing Board lacked jurisdiction to entertain the petition as to Grand Gulf Nuclear Station, Unit 1, which had been issued a low-power license by the Director, Nuclear Reactor Regulation, prior to the filing of the petition. The Staff also opposed the petition as unjustifiably late.

In denying the petition, the Licensing Board rejected Applicants' jurisdictional argument, but agreed with the Applicants and Staff that petitioner had failed to establish good cause for its lateness, had offered no showing of an ability to make a substantial contribution to the record, and had sought to expand the issues and thereby delay the proceeding. In balancing all of the relevant factors, the Licensing Board held that petitioner's late intervention had not been justified. On November 4, 1982, petitioner

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2/ As discussed below, the invalidation of the Table S-3 rule by the United States Court of Appeals for the District of Columbia in Natural Resources Defense Council, Inc. v. NRC, 685 F.2d 459 (D.C. Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3261, 3289 (October 5 and 12, 1982), was essentially petitioner's basis for seeking late intervention.

appealed the Memorandum and Order denying its petition for intervention.

As discussed below, the Licensing Board was well within its discretion in determining that petitioner had failed to satisfy the requirements for late intervention under the Commission's rules. First, its request to litigate waste disposal issues almost four years after the opportunity for seeking intervention had passed is entirely unwarranted. Second, other than a rather vague ipse dixit that it could do so, petitioner has failed to demonstrate the availability of any expertise it could bring to bear on the issue of waste disposal and thereby assist in the development of a sound record. Finally, the fact that petitioner "seeks to commence a licensing proceeding rather than join one already in progress" [3/] indisputably establishes that granting the petition would broaden the issues and delay the proceedings. Because the Licensing Board did not abuse its discretion in balancing the relevant factors for late intervention, [4/] its order should be affirmed. Alternatively, the decision below should be affirmed as to Unit 1 for want of jurisdiction.

An interim development subsequent to the Licensing Board's decision confirms its correctness. In a Statement

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3/ Memorandum and Order at 13.

4/ Appellate review of a licensing board's application of these factors is governed by the "abuse of discretion" standard. South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 885 (1981).

of Policy issued on October 29, 1982, the Nuclear Regulatory Commission (hereinafter "Commission" or "NRC") provided guidance to its Staff and boards on the continued use of Table S-3 in NRC proceedings. 5/ The Commission stated that it does not intend to initiate show cause proceedings with regard to licenses or permits already issued in reliance upon Table S-3, 6/ and further directed its Licensing and Appeal Boards "to proceed in continued reliance on the Final S-3 rule until further order from the Commission," subject to the outcome of judicial proceedings. 7/ Accordingly, the judicial invalidation of Table S-3, which is the primary basis for petitioner's proposed intervention, 8/ does not have any presently operative effect in NRC proceedings and would not justify litigation of any of the issues pleaded in the petition.

Statement of Facts

The matter on appeal originates from a notice regarding these proceedings published in the Federal Register on July

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5/ Statement of Policy on "Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts," 47 Fed. Reg. 50591 (November 8, 1982) (hereinafter "Statement of Policy").

6/ 47 Fed. Reg. at 50593.

7/ Id.

8/ Petition to Participate as an Interested State in Facility Operating License Proceedings and to Reopen Such Proceedings to Precipitate Commission Rulings Consistent With Recent Court of Appeals Decision and to Request the Nuclear Regulatory Commission to Cease Issuing Licenses Consistent With the Court of Appeals Decision (hereinafter "petition") at 3-5.

28, 1978 by the Commission entitled "Receipt of Application for Facility Operating Licenses; Availability of Applicants' Environmental Report; Consideration of Issuance of Facility Operating Licenses and Opportunity for Hearing." 9/ No petition for leave to intervene or request for hearing was received by the NRC within the 30-day period prescribed by the notice.

Accordingly, the application for operating licenses for the Grand Gulf Nuclear Station, Units 1 and 2, was unopposed. The license authorizing operation of Unit 1 at 5 percent of full power was issued by the Director, Nuclear Reactor Regulation, on June 16, 1982. 10/

On July 21, 1982, petitioner, represented by its Attorney General, filed a petition seeking late intervention and requesting a hearing in these proceedings. 11/ The caption of the petition was somewhat ambiguous as to whether the State of Louisiana was seeking to participate as an

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9/ 43 Fed. Reg. 32903 (July 28, 1978).

10/ See "Mississippi Power & Light Co., Middle South Energy, Inc., South Mississippi Electric Power Association, and Grand Gulf Nuclear Station, Unit No. 1: Issuance of Facility Operating License." 47 Fed. Reg. 26953 (June 22, 1982). The matter of full power authorization is pending before the Commission pursuant to its "Statement of Policy on Issuance of Uncontested Fuel Loading and Low Power Testing Operating Licenses," 46 Fed. Reg. 47906 (September 30, 1981).

11/ The petition was not served upon Applicants by petitioner. The service list appended to the petition was applicable to the Waterford proceeding. Applicant's counsel obtained a copy of the petition when served by the Docketing and Service Section of the Office of the Secretary.

interested State pursuant to 10 C.F.R. §2.715(c) or seeking full-party status as an intervenor under 10 C.F.R. §2.714. The text of the petition, however, as the Licensing Board found, is clear that the State of Louisiana sought status as a Section 2.714 petitioner. 12/ As noted, petitioner sought to litigate environmental impacts associated with the permanent disposal of reactor spent fuel. Petitioner requested the NRC to withhold any operating license for the Grand Gulf Nuclear Station until resolution of five issues related to permanent waste disposal. Inter alia, petitioner asserted that the April 27, 1982 decision of the United States Court of Appeals for the District of Columbia in invalidating the NRC's Table S-3 rule in Natural Resources Defense Council, Inc. v. NRC, 685 F.2d 459 (D.C. Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3261, 3289 (October 5 and 12, 1982), constituted a basis for a late intervention. However, the petition did not address the various factors required for discussion under 10 C.F.R. §2.714(a)(1)(i)-(v) for late intervention.

On August 3, 1982 the Licensing Board below was established to rule on the petition and to preside over any resultant proceeding. On August 10 and 19, 1982, respectively, the Staff and Applicants filed responses stating their opposition to the petition on the grounds

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12/ See petition at 1; Memorandum and Order at 3.

noted above. [13] The Licensing Board subsequently ordered petitioner to respond to the arguments of the Applicants and Staff, [14] which petitioner filed after an extension of time on October 11, 1982. [15]

The Licensing Board issued a Memorandum and Order on October 20, 1982, finding that petitioner had failed to satisfy three of the criteria for late intervention, including the requirement for "good cause." The Licensing Board ruled that, even considering petitioner's status as a governmental entity, the balancing of relevant factors weighed against permitting petitioner "to wait until a low power operating license is issued in an uncontested matter and then appear, without any showing of good cause for its failure to act on time, and delay the issuance of a full power license while an adjudicatory proceeding is fabricated." [16] Petitioner filed its appeal on November 4, 1982. [17]

13/ As stated previously, Applicants' answer was delayed due to the fact that it had not been served directly by petitioner.

14/ Order to Petitioner to Respond to Arguments of Staff and Applicant (August 31, 1982).

15/ Petitioner's Brief in Support of Its Petition to Participate in Facility Operating License Proceedings.

16/ Memorandum and Order at 14.

17/ Appeal of Order Denying Louisiana's Petition for Intervention (hereinafter "Petitioner's Brief"). See 10 C.F.R. §2.714a.

Argument

I. Petitioner Has Failed to Satisfy the Requirements for Late Intervention

A. Petitioner's Status as a Governmental Entity Does Not Add Any Weight to its Petition

Preliminarily, Applicants note their concurrence with the conclusion by the Licensing Board below that the State of Louisiana has sought intervention as a party pursuant to 10 C.F.R. §2.714(a) rather than participation as an interested State pursuant to 10 C.F.R. §2.715(c). 18/ Nonetheless, for the reasons discussed below, the Licensing Board erred in giving weight to petitioner's status as a governmental entity in balancing the relevant factors. 19/

It is clear that petitioner could not be granted any substantive relief under 10 C.F.R. §2.715(c) inasmuch as "a request under this section does not itself trigger a hearing." Northern States Power Company (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980) (views of Chairman Ahearne and Commissioner Hendrie). It logically follows that petitioner's entitlement to any substantive relief as an intervenor may not be predicated upon its governmental character. This is borne out by the decision in Boston Edison Company (Pilgrim Nuclear Power Station),

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18/ Memorandum and Order at 9. Petitioner does not challenge this interpretation of its petition on appeal and, in fact, addresses the balancing test under 10 C.F.R. §2.714(a)(1) for late intervention.

19/ Memorandum and Order at 14.

CLI-82-16, 16 NRC ___ (July 30, 1982), where the Commission denied a request for a hearing by the Commonwealth of Massachusetts, implicitly finding that the NRC rules for late intervention are not to be applied more liberally with respect to a State than any other potential intervenor. Certainly, nothing in this decision gives credence to the hypothesis that governmental petitioners are to be treated any differently.

A recent Licensing Board decision has likewise required governmental entities seeking full party status to comply fully with 10 C.F.R. §2.714(a). See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982); Cf. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-35, 14 NRC 682, 688 (1981) (noting distinction between Section 2.714 parties and Section 2.715(c) participants. 20/

Even so, the Licensing Board below properly found that petitioner, which did not even initially address the five factors for late intervention under 10 C.F.R. §2.714(a)(1)

20/ Petitioner's reliance upon the separate opinion of Mr. Rosenthal in Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975), is without merit. In that case, Mr. Rosenthal commented upon the implications of having "excluded [petitioner] from the proceeding" in the West Valley case. Id. at 646. Here, by contrast, there is no existing "proceeding" from which petitioner has been "excluded." Rather, petitioner seeks to initiate a proceeding. Only bootstrap logic would lead to the conclusion that petitioner has been excluded from a proceeding which has not been convened.

(i)-(v), 21/ had not satisfied the Commission's requirements for late intervention.

B. The Licensing Board Did Not Abuse Its Discretion in Finding That The Balancing of Factors for Late Intervention Does Not Weigh in Favor of Granting the Petition

It is well established that compliance with the requirements for late intervention is mandatory. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). While no single factor is conclusive, some of the factors to be considered in determining the appropriateness of late intervention are entitled to greater weight than others. South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). Petitioner has failed to satisfy any of the requirements for late intervention, in particular, those which are entitled to greatest consideration.

1. No "good cause" has been shown for petitioner's almost four years' lateness. As it did below, petitioner stakes it claim of "good cause" for lateness upon the decision in Natural Resources Defense Council, Inc. v. NRC, supra, decided on April 27, 1982. Petitioner asserts, in an entirely conclusionary fashion, "that it acted with all due

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21/ As noted above, the Licensing Board afforded petitioner an opportunity to respond to the arguments of the Applicants and NRC Staff in opposing intervention. Following an extension of time, petitioner filed its brief addressing the various factors for late intervention on October 11, 1982. See note 14/, supra.

speed upon learning of the NRDC v. NRC decision, and studying the opinion with regard to its effect on the instant proceedings and petitioners [sic] decision to seek intervention therein." 22/ As both the Court of Appeals in the Table S-3 case and the Licensing Board below recognized, issues pertaining to the uranium fuel cycle have been raised in NRC proceedings for several years. The same issues have been litigated in the courts during roughly the same period of time. 23/ As the Licensing Board noted, petitioner was in fact a party to one such proceeding in which the Appeal Board discussed the invalidation of a prior version of Table S-3 by the United States Court of Appeals for the District of Columbia in Natural Resources Defense Council, Inc. v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev. sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). 24/ Accordingly, the Licensing Board correctly determined that petitioner was well aware of the ongoing controversy concerning the validity of Table S-3 such that the decision by the Court of Appeals on April 27, 1982 did not constitute "new information" establishing good cause for lateness.

On appeal, petitioner apparently seeks to distinguish between the underlying facts upon which it would litigate

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22/ Petitioner's Brief at 4.

23/ 685 F.2d at 463 n.7.

24/ See Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 794 (1977).

its proposed contentions as to environmental effects of the uranium fuel cycle, which it concedes "are well known," 25/ and the legal effect of the court's action in invalidating Table S-3. Petitioner takes the position that, prior to that decision, it was bound to assume that the Table S-3 rule was valid and that further discussion of environmental effects associated with the uranium fuel cycle would not be permitted. Petitioner's argument is without merit for several reasons.

First, the Table S-3 decision did not provide any "new information" in the sense relevant to establishing good cause for late intervention in an NRC proceeding. Petitioner may have believed that the Table S-3 decision gave it better legal arguments or a greater incentive to litigate Table S-3 issues, but the decision certainly did not provide petitioner with any "new information" relating to the environmental issues it now wishes to litigate.

Second, certain aspects of the issues petitioner seeks to litigate, e.g., health, socioeconomic and cumulative

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25/ Petitioner's Brief at 9. In a variety of decisions, it has been held that the recent discovery of information long available to a petitioner in other sources does not constitute "new information." See generally Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466-CP, "Memorandum and Order" (January 12, 1982) (slip op. at 3), aff'd, ALAB-671 (March 31, 1982); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL and 50-441-OL, "Memorandum and Order" (March 3, 1982) (slip op. at 3).

impacts of projected radioactive releases, could have in fact been litigated within the bounds of the Table S-3 rule.[26/] Only the level of emissions stated in the rule could not be litigated. Thus, Applicants do not agree, and the NRC remains of the view, set forth in its petition seeking certiorari, that the prior versions of Table S-3 precluded litigation of environmental impacts associated with projected radioactive releases as opposed to the quantum of those radioactive releases. As the NRC has argued on appeal, thereby stating the position of the Commission, "there is a difference between the amounts of effluents caused by reactor construction and operation, and the tangible consequences that those effluents have on human health, economy, society, and so on." [27/]

Petitioner has pointed to no NRC proceeding in which evidence concerning health, socioeconomic or cumulative

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26/ See "Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management," 44 Fed. Reg. 45362, 45371 (August 2, 1979).

27/ Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Filed by the Solicitor General on Behalf of the United States Nuclear Regulatory Commission and the United States of America at 19 (September 1982). The Appeal Board may take official notice of this document.

In its recent Statement of Policy, the Commission likewise reiterated: "No such preclusion [of consideration of health effects attributable to radioactive releases set out in Table S-3] appeared explicitly in the rules, and the Commission had maintained before the [Court of Appeals] that no preclusion had been implicitly intended or ever actually implied." 47 Fed. Reg. at 50592.

effects of environmental impacts listed in Table S-3 was excluded. On the contrary, the Staff has previously introduced evidence of public health consequences. 28/ Moreover, such health effects were specifically discussed in the Final Environmental Statement (hereinafter "FES") in this proceeding, which was published in September 1981. 29/ Accordingly, petitioner has failed to show that it could not have previously litigated environmental effects of the uranium fuel cycle for the Grand Gulf Nuclear Station, Units 1 and 2, at the time an opportunity to intervene was given. 30/

Third, petitioner's position does no more than state the operative circumstances in all NRC licensing proceedings. Ordinarily, a party may not challenge any of the Commission's regulations in a licensing proceeding. 31/

28/ See Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 187 (1978).

29/ Final Environmental Statement related to the Operation of Grand Gulf Nuclear Station, Units 1 and 2 (September 1981) at Appendix C, Impact of the Uranium Fuel Cycle.

30/ The Table S-3 decision is altogether irrelevant to petitioner's lateness in seeking to litigate other matters. Aspects of ultimate waste disposal other than those relating to Table S-3, such as the methodology of waste burial, have been open to public discussion for a number of years. The invalidation of Table S-3 by the Court of Appeals is simply immaterial to these other concerns which petitioner seeks to litigate.

31/ 10 C.F.R. §2.758. See generally Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-456, 7 NRC 63, 67 n.3 (1978); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974).

However, if a petitioner believes that the Commission's rules bar litigation of an issue, it has an obligation to pursue the issue promptly by seeking a request for a waiver pursuant to 10 C.F.R. §2.758(b) or a judicial challenge to the rule so as not to delay the ultimate outcome of the proceeding. Licensing proceedings would be seriously disrupted if any potential petitioner, having unilaterally decided that the Commission's rules preclude litigation of its claims, decided to stand on the sidelines until another party raised the issue before the NRC or the courts. For the same reason that "a petitioner cannot sit back and observe the proceeding, and then intervene upon deciding that its interest[s] are not being adequately protected by existing parties," 32/ a potential petitioner is obliged to exhaust all avenues of relief at the outset rather than wait until almost four years later when it believes that the judicial climate is more favorable to its views.

Finally, to the extent that petition claims the precedental value of Table S-3 decision is "new information" justifying intervention at this late stage, its claim is self-defeating. On September 1, 1982, the Court of Appeals granted motions for a stay of the mandate filed by the NRC and the utilities and directed the Clerk not to issue the

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32/ South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395, "Partial Order Following Prehearing Conference" (April 30, 1981) (slip op. at 4).

mandate for a period of 30 days. The filing of petitions for certiorari with the Supreme Court within that period, under Rule 41(b) of the Federal Rules of Appellate Procedure, effectively stays the decision until final action by the Supreme Court on the petitions for certiorari. In its recent Statement of Policy regarding the impact of the Table S-3 decision on NRC proceedings, the Commission noted that it previously advised the Court of Appeals that "it would proceed in reliance on the rule should the court grant its request to stay the mandate." 33/ As noted, the Commission therefore directed "its Licensing and Appeal Boards to proceed in continued reliance on the Final S-3 rule until further order from the Commission," subject to final outcome of the pending appeal. 34/ Thus, the precedental effect of Table S-3 decision cannot, in and of itself, be a basis for admitting a late petitioner.

2. The NRC Staff will adequately protect petitioner's interests. The Appeal Board has itself recognized that the NRC Staff has an independent, statutory responsibility to take all measures necessary to protect the public health and safety. Thus, the Appeal Board stated in denying late intervention in the Summer proceeding:

> As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is

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33/ 47 Fed. Reg. at 50593.

34/ Id.

> the staff's duty to ensure the existence of an adequate basis for each of the requisite Section 50.57 determinations.37/

The Staff has, of course, equivalent obligations with regard to environmental matters under 10 C.F.R. Part 51. Whether viewed from the perspective of ongoing litigation of Table S-3 matters or high-level waste disposal in general, the issues raised by petitioner are truly generic in nature and will require a uniform policy to be formulated and implemented with regard to all nuclear facilities, including the Grand Gulf Nuclear Station. Petitioner has failed to demonstrate why the Staff's actions in carrying out the Commission's policies with respect to all licensed reactors would not provide petitioner with an adequate assurance of the public health and safety commensurate with the degree of assurance achieved for other facilities. Petitioner has also not shown that its participation in ongoing rulemaking would not effectively protect its interests.

The Commission's recent Statement of Policy offers further guidance in emphasizing the generic nature of waste disposal issues. The Commission noted the pendency of the "waste confidence" proceeding, now in its final stages, 36/ in which the Commission is determining whether reasonable

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35/ Summer, ALAB-642, supra, 13 NRC at 896 (footnote omitted).

36/ See "Storage and Disposal of Nuclear Waste," 44 Fed. Reg. 61372 (October 25, 1979).

confidence exists that safe waste disposal will be available when needed. 37/ As for the Table S-3 rule, the Commission determined that "[t]o move further toward case-by-case litigation would reintroduce the significant burdens the rule was intended to relieve," 38/ and, as noted, directed Licensing and Appeal Boards to proceed in continued reliance on the S-3 rule.

Inasmuch as the Commission has taken no action with regard to the licenses of other plants whose environmental analyses were performed on the basis of Table S-3, no such action is justified with regard to the Grand Gulf Nuclear Station. Certainly, petitioner has not pointed out any aspects of waste disposal unique to the Grand Gulf Nuclear Station. Consistent with the previous determinations by the Commission's boards that the ultimate disposition of reactor waste is a generic issue to be determined by Commission rulemaking, 39/ the Appeal Board should determine that any

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37/ 47 Fed. Reg. at 50592. The Commission further noted that the United States Court of Appeals for the District of Columbia has ruled that NRC licensing need not be suspended pending the outcome of the waste confidence proceeding. See Potomac Alliance v. NRC, No. 80-1862 (D.C. Cir., July 20, 1982).

38/ 47 Fed. Reg. at 50592.

39/ See generally Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 OL and 50-353 OL, "Special Prehearing Conference Order" (June 1, 1982) (slip op. at 47-49); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338 SP and 50-339 SP,

(Footnote 39/ continued on next page)

remedy appropriate to the generic issues raised by petitioner can and will be effectuated by the Commission and its Staff on the basis of a uniformly applied policy. The implementation of such policy will adequately protect petitioner's interests.

Nonetheless, based upon the fact that "even the NRC Staff does not contend that its role would afford the same degree of protection for Louisiana as would party status as an intervenor," 40/ the Licensing Board held that this factor, although given less weight than the other factors, tilted in favor of petitioner. It is submitted that the Licensing Board misconstrued this particular requirement for late intervention. Obviously, none other than the petitioner, at least from its perspective, could ever represent its interests as well as it can. Whether equivalent representation or protection of those interests would be afforded by other parties is not, however, the pertinent question. The rule merely requires the Licensing Board to consider the "availability of other means whereby

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39/ (Continued)

"Order Denying Intervenors' Motion to Amend Petition to Intervene" (August 17, 1979); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466 CP, "Order" (March 10, 1980) (slip op. at 38). See also Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41 (1978), remanded, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

40/ Memorandum and Order at 12 (emphasis added).

the petitioner's interest will be protected." 41/ Whether or not such "other means" are available in any meaningful sense naturally depends upon the circumstances of each case.

In this instance, the generic nature of the issues, given the breadth of the rulemaking record and the scope of the Table S-3 litigation, necessitates the conclusion that the Staff will afford petitioner and others similarly situated an adequate measure of protection. Further, petitioner has failed to demonstrate that its participation in ongoing generic proceedings is not another available means to protect its interests.

3. Petitioner has failed to demonstrate an ability to assist the Licensing Board in developing a sound record. The Licensing Board below agreed with the Applicants and Staff that Louisiana "has not attempted to demonstrate any special expertise it possesses concerning the issues raised in the Petition." 42/ The record is wholly devoid of any evidence that petitioner or any potential representatives are by training, education or experience technically qualified and competent to assist the Licensing Board in developing a record on environmental issues related to the disposal of high-level waste.

Thus, petitioner has wholly failed to "show significant ability to contribute on substantial issues of law or fact

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41/ 10 C.F.R. §2.714(a)(1)(ii) (emphasis added).

42/ Memorandum and Order at 12.

which will not otherwise be properly raised or presented."[43/] Any expertise which petitioner or its representatives might have to offer in this area would, in any event, be much more profitably invested in the Commission's ongoing waste confidence proceeding. The record which petitioner might wish to create on waste disposal issues in a proceeding instituted for the Grand Gulf Nuclear Station could not possibly prove more comprehensive or authoritative than the record of the rulemaking now in progress or any rulemaking subsequently initiated as a result of the Table S-3 litigation.

On appeal, petitioner's position on this factor is only a statement that it has contacted a representative of the Union of Concerned Scientists and therefore believes that it will be able to "express its views" on matters it wishes to litigate. [44/] Aside from the fact that this statement goes beyond the record and may not be considered, [45/] a

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43/ Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976). See also Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422-23 (1977); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976).

44/ Petitioner's Brief at 11.

45/ It is a "settled principle that the decisions and orders of a trial-level tribunal are to be judged on appeal in the light of the record on which that tribunal acted." Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), Docket No. 50-376, ALAB "Memorandum and Order" (June 11, 1981) (slip op. at 2-3).

petitioner who has "offered nothing beyond his bare assertion which might lead [the Licensing Board] to believe that he would be able to make a significant contribution to the development of an evidentiary record" has not satisfied this requirement. 46/ The Licensing Board correctly found petitioner's assertion that it could obtain the necessary expertise to be "vague and insufficient." 47/

4. Petitioner's interests will be adequately protected by the existing parties. As the Licensing Board below noted, there are no "existing parties" at the present time because this is an uncontested proceeding. If the fourth factor is deemed applicable, however, it must be weighed against petitioner's late intervention for the reasons previously discussed above with respect to the second factor. In the completion of its environmental review for the Grand Gulf Nuclear Station, the NRC Staff will fully protect the interests of petitioner. The Staff will implement, pursuant to the directives of the Commission in rulemaking, all measures applicable to environmental impacts attributable to high-level waste disposal.

In the Indian Point proceeding, where a late petitioner sought intervention in a proceeding which would not have otherwise had a hearing, the Licensing Board held that the

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46/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 244 (1980).

47/ Memorandum and Order at 12.

Staff's independent obligations weighed against intervention, noting:

> [The staff] 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. 48/

In the Summer proceeding, the Licensing Board stated that "in a generic consideration covered by regulation or rulemaking," the obligation of the NRC Staff to protect the public health and safety, whether a hearing is held or not, would weigh against permitting late intervention. 49/

5. Permitting late intervention will necessarily broaden the issues and possibly delay the proceeding by requiring a hearing which would not otherwise occur. No

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48/ Consolidated Edison Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 41 (1982).

49/ South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 213 (1978). Even though the Licensing Board erred in weighing this factor in favor of petitioner, it correctly gave it less weight than the other relevant factors.

Contrary to the argument made by petitioner at page 12 of its brief, there is no indication in Summer, ALAB-642, supra, that the Appeal Board intended the second and fourth factors to be given less weight only where the other factors also tipped against late intervention. Such an approach would obviously be meaningless. In any event, the Licensing Board did in fact find that the other three factors weighed against permitting late intervention.

other petitioner has sought intervention in this proceeding. Petitioner does not dispute the ironclad conclusions of the Licensing Board that "(1) the petition is almost four years late; (2) Louisiana seeks to commence a licensing proceeding rather than join one already in progress; and (3) a low-power operating license has already been issued to Applicant." 50/ Under such circumstances, delay is inevitable if intervention is permitted. 51/

It is clear from the relief sought in the petition that petitioner seeks to delay the licensing for the Grand Gulf Nuclear Station to the extent the Licensing Board has jurisdiction to do so. 52/ The evident purpose of the petition is to tie up licensing for the Grand Gulf Nuclear Station in additional hearings whose outcome would necessarily depend upon the resolution of generic issues in rulemaking and in litigation before the courts. Although the Commission undoubtedly will make every effort to expedite a final resolution of these matters and has issued a Statement of Policy against delay as a result of the Table S-3 decision, the date when generic proceedings and litigation are completed remains uncertain.

50/ Memorandum and Order at 13.

51/ See Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 762 (1978).

52/ The Licensing Board noted that it "is without jurisdiction to grant or to 'refrain from granting any operating license to the Grand Gulf Nuclear Power Station . . . .'" Memorandum and Order at 16.

Moreover, to permit such potential for delay by this extremely untimely petition to intervene would run squarely contrary to the Commission's policy on the conduct of licensing proceedings. The Commission has expressly instructed licensing boards to take strong measures to avoid any delay caused by intervenors. 53/

As the Licensing Board stated in the Indian Point proceeding in ruling upon whether petitioners' intervention would broaden the issues or delay the proceeding:

> 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. 54/

On appeal, petitioner has cited a portion of a Licensing Board decision in Summer which questions the applicability of the fifth factor to a previously uncontested proceeding. 55/ Although the Licensing Board in Summer found this factor on balance to be neutral, the circumstances here are different inasmuch as a low-power operating license has already been issued to Applicants for

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53/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

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

55/ Summer, LBP-78-6, supra, 7 NRC at 213.

Grand Gulf, Unit 1. Moreover, practical experience compelled the conclusion that initiation of a proceeding that would otherwise not occur carries a far greater potential for delay than merely adding a single late intervenor or contention to a host of others already in the proceeding. 56/

II. The Licensing Board Lacked Jurisdiction to Consider the Petition or Grant Any Relief With Respect to the Grand Gulf Nuclear Station, Unit 1

Although the Licensing Board below correctly determined that the petition did not satisfy the Commission's requirements for late intervention, it erred in determining that it had jurisdiction insofar as the petition pertains to Grand Gulf Nuclear Station, Unit 1. 57/

It is hornbook law that, while the Commission itself may exercise plenary authority over all regulatory matters

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56/ Petitioner's discussion of a news article relating to commercial operation of Unit 1 at page 13 of its brief is beyond the record and, in any event, wholly irrelevant to the matter of delay in the issuing of a full-power license for Unit 1. Applicants anticipate that a full-power license will be issued early next year. This license is, of course, necessary to the conduct of the rigorous power ascension program, which is to be completed prior to commercial operation of the unit.

57/ It is well settled that on appeal a party may urge affirmance on grounds rejected by the Licensing Board below. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978).

within the NRC's jurisdiction, 58/ licensing boards may perform only delegated functions within the jurisdiction granted them by the Commission, as delineated in the notice of hearing in a given proceeding. 59/ In the instant case, the notice four years ago affording potential intervenors an opportunity to seek a hearing in the Grand Gulf proceeding stated that the Commission "will consider the issuance of facility operating licenses" to Applicants upon the completion of necessary reviews and the making of a finding by the Commission that the application for the facility licenses complies with the requirements of the Atomic Energy Act of 1954, as amended, and the Commission's regulations.60/ As indicated by a review of the low-power license issued by the Director, Nuclear Reactor Regulation, on June 16, 1982, each of these conditions precedent were met in the issuance of the license, thereby terminating

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58/ See, e.g., Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 n.1 (1981); Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

59/ See e.g., Shearon Harris CLI-80-12, supra, 11 NRC at 517; Florida Power & Light Company (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1122 n.12 (1981); Commonwealth Edison Company (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

60/ "Mississippi Power & Light Co. and Middle South Energy, Inc. (Grand Gulf Nuclear Station, Units 1 & 2)," 43 Fed. Reg. 32903 (July 28, 1978).

further opportunity for a hearing under the terms of the 1978 notice. In other words, once the Director issued the license, the opportunity to request a hearing under the terms of the notice no longer existed.

The fact that the Commission has reserved to itself the decision as to whether an applicant will be granted authority for a full-power license in an uncontested case[61/] does not change the basic fact that an operating license for Unit 1 has issued. The Licensing Board improperly equated its own jurisdiction derived from the notice of opportunity for hearing issued in 1978 with the Commission's more recent reservation of authority on licensing full power operation of nuclear reactors.

Thus, although the Licensing Board below stated that its jurisdiction existed pursuant to 10 C.F.R. §2.105, it ignored the clear distinction in that section between unopposed proposed actions, which may be acted upon favorably by the Director, Nuclear Reactor Regulation, and proposed actions for which a hearing is requested. Accordingly, 10 C.F.R. §2.105(a) provides that the Commission must publish in the Federal Register a notice of proposed action with respect to an application for a license for a facility. Subsection (d) provides that the notice of proposed action must offer an opportunity for any person

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61/ "Statement of Policy on Issuance of Uncontested Fuel Loading and Low Power Testing Operating Licenses," 46 Fed. Reg. 47906 (September 30, 1981).

whose interest may be affected by the proceeding to file a petition for leave to intervene. The dispositive subsections (e)(1) and (2) then provide:

> (1) If no request for a hearing or petition for leave to intervene is filed within the time prescribed in the notice, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, may take the proposed action, inform the appropriate State and local officials, and publish in the Federal Register a notice of issuance of the license or other action.
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> (2) If a request for a hearing or a petition for leave to intervene is filed within the time prescribed in the notice, the presiding officer who shall be an Atomic Safety and Licensing Board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the presiding officer will issue a notice of hearing or an appropriate order. The presiding officer designated to rule on a request or petition concerning the antitrust aspects of an application may be either an Administrative Law Judge or an Atomic Safety and Licensing Board.

The juxtaposition of these subsections makes it crystal clear that a hearing may not be requested once the Director has issued a license. In other instances, both the Commission and the Appeal Board have likewise made it clear that issuance of the facility's license terminates the jurisdiction created by the notice of hearing. 62/

62/ See Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303,

(Footnote 62/ continued on next page)

The Licensing Board below noted that it was unable to find any prior decision dealing with an attempt to intervene in an uncontested operating license proceeding after the issuance of a low-power license by the Director. However, by addressing the issue in terms of the Board's jurisdiction in a contested case, it inadvertently created unnecessary confusion. In stating that "it is clear from §2.717 that the Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of the record," 63/ the Licensing Board truly begged the question of whether it had

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62/ (Continued)

1305 (1977); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979). The Appeal Board made the same finding of a lack of jurisdiction to reopen the record in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978). See also Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), Docket Nos. 50-400, 50-401, 50-402 and 50-403, "Memorandum and Order Denying Intervention Petition" (January 11, 1979) (slip op. at 1-2).

The Licensing Board's statement that it "acquired jurisdiction upon its establishment on August 3, 1982" (Memorandum and Order at 7) is clearly in error. The mere establishment of a licensing board to rule upon a request does not embellish the board with jurisdiction it otherwise did not possess. A licensing board, like any other judicial or administrative tribunal, possesses the inherent right and duty to determine in the first instance the bounds of its own jurisdiction. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980).

63/ Memorandum and Order at 7.

ever acquired jurisdiction with regard to Grand Gulf, Unit 1 at the outset.

Thus, while it is true that a licensing board's jurisdiction in a contested case does not cease until expiration of the period for review or upon rendering of a final decision by the Commission, the licensing board never acquires jurisdiction unless it is timely invoked. As the Licensing Board below conceded, there is no precedent holding that such jurisdiction exists after the Director has issued a license. It is simply beside the point that the Commission in recent years has reserved to itself, for reasons wholly unrelated to jurisdictional boundaries, the final decision to authorize full-power operation.

III. The Commission's Statement of Policy Bars Litigation of Petitioner's Claims

As discussed above, 64/ the Commission issued a Statement of Policy on October 29, 1982 providing the Staff and boards with further guidance regarding the treatment of uranium fuel cycle environmental impacts in ongoing licensing proceedings and with respect to licenses already issued, pending final action by the Supreme Court in the Table S-3 appeal. On the basis of the Commission's directive, the Licensing Board below could not, as discussed below, proceed to litigate the issues designated by petitioner.

64/ See pages 3-4, supra.

In stating the background of the situation which led to its policy, the Commission noted that it previously "determined sometime ago that a generic rule would be the most effective means for considering [uranium fuel cycle] such impacts in individual reactor licensing proceedings."65/ The Commission stated that the Table S-3 rule was intended to serve this function. The Commission further noted that it is "now entering the final stages of the so-called 'waste confidence' proceeding, a proceeding designed to reassess whether there is reasonable assurance that safe waste disposal will be available when needed." 66/

After determining that power reactor licensing may continue, notwithstanding the invalidation of Table S-3 by the Court of Appeals, the Commission noted that, given potential delay and drain on Staff resources which may be substantial, ongoing contested licensing cases should not be permitted to "evolve into replays of the S-3 rulemaking."67/ The Commission stated that such duplicative efforts "would not only delay licensing of qualified facilities, but would also substantially disrupt the Commission's regulatory program, including its program to develop safety standards for high-level waste disposal facilities." 68/

65/ 47 Fed. Reg. at 50591.

66/ Id. at 50592.

67/ Id.

68/ Id.

Accordingly, the Commission determined, as noted, that Licensing and Appeal Boards are "to proceed in continued reliance on the Final S-3 rule until further order from the Commission," subject to final disposition by the Supreme Court. 69/ In closed cases, the Commission indicated that it does not intend to initiate show cause proceedings with regard to licenses or permits issued in reliance upon the Table S-3 rule. Thus, petitioner could not, in any event, litigate the issues it has proffered.

Conclusion

For the reasons discussed above, petitioner has failed to satisfy the Commission's requirements for late intervention into this proceeding. The Licensing Board below correctly denied the petition in its entirety on this basis. Alternatively, the decision below denying the petition as to Grand Gulf Nuclear Station, Unit 1 should be affirmed for want of jurisdiction.

Respectfully submitted,

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November 19, 1982

69/ Id. at 50593.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
MISSISSIPPI POWER & LIGHT COMPANY, et al.	)	Docket Nos. 50-416 50-417
	)	
(Grand Gulf Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Brief in Opposition to Appeal of Order Denying State of Louisiana's Petition for Intervention," dated November 19, 1982 in the captioned proceeding have been served upon the following by deposit in the United States mail this 19th day of November, 1982:

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