UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 50-259 OLA
TENNESSEE VALLEY AUTHORITY	)	50-260 OLA
	)	50-296 OLA
(Browns Ferry Nuclear Plant,	)	(Low-Level Radioactive
Units 1, 2, and 3)	)	Waste Storage Facility)

TENNESSEE VALLEY AUTHORITY'S BRIEF ON PETITIONERS' STANDING TO INTERVENE

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Knoxville, Tennessee
April 13, 1982

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The Atomic Safety and Licensing Board has asked the parties and petitioners to brief the issue of petitioners' standing to intervene in this proceeding. In TVA's view petitioners may not intervene because the petitions do not meet the tests established for standing in section 188 of the Atomic Energy Act, 42 U.S.C. § 2239 (1976), or section 2.714 of the Commission's Rules of Practice (10 C.F.R. § 2.714 (1981)).

Under the Rules of Practice, in order to establish standing the petitioners must show (1) the nature of the petitioners' right under the Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the petitioners' property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioners' interest (10 C.F.R. § 2.714(d) (1981)). The petitions here fail to demonstrate sufficient interest to justify intervention.

Petitioners allege that they have an interest in the proceeding based generally on their status (1) as residents and property owners in close geographical proximity to the plant (about 30-35 miles);[1] (2) as customers for power from several municipal or cooperative electrical systems, each of which purchases and obtains its electricity from TVA; (3) as users of water and air "which may be affected by the proceeding"; and (4) as consumers of foodstuffs, both animal and vegetable, that might be "grown and raised in close proximity to the Browns Ferry Nuclear Plant" (In re Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-81-40, 14 NRC 828 (1981)). Petitioners generally assert that the granting of license amendments may increase health and safety risks to them and their descendants.

These general allegations of interest do not meet the standing test. The concept of standing, an injury in fact arguably within the zone of interest sought to be protected by the Atomic Energy Act (and the National Environmental Policy Act), is well known and need not be discussed in detail (see In re Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976); In re Public Serv. Co. (Marble Hill Nuclear Generating

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1 At the April 10, 1981 prehearing conference, their attorney stated that at times some of the petitioners have visited areas nearer the plant (tr. at 38-39) (i.e., a park 15 miles away, the town of Athens about 10 miles from the plant, and the Redstone Arsenal some 20 miles upstream of the plant). These nonspecific statements add nothing to petitioners' bases for standing.

Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980)).[2] Each petitioner's bare allegation of "proximity" to the site is insufficient in this instance for standing.[3]

As discussed below, this operating license amendment no longer presents a case of first impression with respect to applying the proximity test for standing to a relatively minor activity such as storage of LLRW. The appeal board has held that nearness to a nuclear plant site raises a rebuttable presumption that an interest will be affected (In re Virginia Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979); In re Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979)). The application of that presumption to the issue of standing until recently, however, has been litigated only in the context of the proposed construction and operation of a nuclear power plant or spent fuel storage capacity expansions. Those activities involve the potential, albeit extremely unlikely, accidental release of millions of curies and resulting harm extending

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2 Finding standing is not simply an empty exercise as it is important in determining what contentions are valid. There must be a logical nexus between contentions and the interest affected on which standing is based (see Warth v. Seldin, 422 U.S. 490, 505 (1975); Flast v. Cohen, 392 U.S. 83, 103 (1968); In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975)).

3 The economic concern of a ratepayer that petitioners allege is not a legally sufficient interest (Pebble Springs, supra, 4 NRC at 613-14; In re Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); In re Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239 (1980)). They have asserted no additional bases for standing other than proximity for questioning impacts to air, water, and agricultural products.

out many miles from a plant. Here, TVA is proposing to store up to five years' production of trash and resins having a maximum level of radioactivity several orders of magnitude less than that contained in the reactor cores or spent fuel pools. A significant effect from releases from an LLRW storage facility (accidental or otherwise) cannot be technically assumed to occur out to the same distance as that which would result from an incident involving the plant itself. A licensing board should not legally presume an effect to petitioners' interest absent specific allegations detailing how those effects could result in this instance. For that reason, petitioners should not be permitted simply to rely on geographic proximity of 30 miles to satisfy the standing requirements.

In a proceeding involving a cobalt-60 storage facility in Bethesda, Maryland, a licensing board recently addressed this precise issue and found no standing for an organization whose members lived from 0.3 to 4.6 miles from the site in question (In re Armed Forces Radiobiology Research Inst. (Cobalt-60 Storage Facility), NRC Docket No. 30-6931 (March 31, 1982) (memorandum and order) (copy attached)).

> Not every risk with which the Commission is substantially concerned is perforce, one which must be deemed to create standing in some member of the public. It is necessary to determine whether or not petitioners have alleged a potential injury which is particularized to the individual petitioner and not one which is "shared in substantially equal measure by all of a large class of citizens" Edlow International Company supra

> [3 NRC] at 576 citing Warth v. Seldin 422 US 490, 499 (1975). See also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station Unit 1) ALAB 535, 9 NRC 377, 390 (1979).
>
> We believe that petitioners have failed to make such a particularized contention [Cobalt-60, supra, slip op. at 9-10].

The licensing board went on to note that petitioners had not alleged a nexus between potential releases and injury.

> Unlike the proximity nexus of nuclear reactor proceedings where accidental fission product release from the reactor may occur such cannot here occur because of the wholly dissimilar nature of a cobalt facility [id., slip op. at 11].

The licensing board found particularly important that, even postulating a total removal of shielding from the cobalt-60 sources by accident, the level of radiation at three to five miles would be essentially at background (id.).

The same defect exists in the petitions in this proceeding. There is no indication how normal operations or accidents would materially increase any petitioner's exposure above background. To show standing, petitioners must specifically allege the mechanism of release and how they could be injured by releases from the storage facility. There is nothing in the petitions or in the transcript which indicates with the required specificity how a health or property injury to even one of the petitioners could occur from 5-year storage, long-term storage, or volume reduction.

A petitioner must "allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he

can imagine circumstances in which he could be affected . . ." (United States v. SCRAP, 412 U.S. 669, 688-89 (1973) (emphasis added)). Nonspecific allegations that water, air, and foodstuffs could be contaminated are not enough. This very point was addressed in North Anna:

> It is not enough simply to call out neighboring waters, air, and agricultural products and to allege that these elements of the environment might or will be adversely affected to some undefined extent and in some undetermined manner by the expansion of the [waste storage, in that case spent fuel] capacity. How the expansion of the spent fuel pool capacity might or will bring about environmental contamination, and the extent of such contamination, deserve to be described with particularity. General allegations of cause and effect relationships without meaningful supporting allegations of specific facts establishing a reasonable nexus between cause on the one hand and effect on the other are insufficient to support a petition for leave to intervene under the Commission's regulation [In re Virginia Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-79-9, 9 NRC 361, 363-64 (1979); emphasis in the original].

The Appeal Board has also stated that to establish standing, petitioners must provide an allegation which explicitly identifies the nature of the invasion of the personal interest which might flow from the proposed licensing action (Allens Creek, supra, 9 NRC at 393). Thus, the petitioners have a clear obligation to allege in a timely manner a mechanism by which air, water, and agricultural contamination could occur and how it could reasonably be expected to affect them.

The failure of petitioners to allege facts which would meet the test for standing is dispositive of their petitions. Without standing, their petitions must be dismissed.

Respectfully submitted,

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April 13, 1982

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Louis J. Carter, Chairman
Ernest H. Hill
Dr. David R. Schink

In the Matter of:	Docket No.: 30-6931
ARMED FORCES RADIOBIOLOGY RESEARCH INSTITUTE	March 31, 1982
(Cobalt-60 Storage Facility)	

MEMORANDUM AND ORDER

(RESOLVING ISSUES RAISED BY PETITION FOR LEAVE TO INTERVENE)

On July 28, 1981, the Director of Nuclear Material Safety and Safeguards granted the application of the Armed Forces Radiobiology Research Institute (AFRRI), filed August 28, 1980, for renewal of its By-Products Material License No. 19-08330-03 under 10 CFR Part 30. The license (amendment 14), as renewed, allows for the storage of Cobalt-60 in the AFRRI facility on the grounds of the National Naval Medical Center in Bethesda, Maryland, until July 31, 1986.

On August 31, 1981, the Citizens for Nuclear Reactor Safety, Inc. (CNRS) filed a Petition for Leave to Intervene requesting a

ANO not designated

hearing on this licensing action. CNRS is an intervenor in the ongoing proceeding for the renewal of the operating license for the TRIGA reactor located at the AFRRI facility in Bethesda. See Docket 50-170 OL. Just prior thereto, on August 7, 1981, CNRS' counsel wrote to the Commission's Secretary, requesting that the Commission grant a hearing on the materials license application and to consolidate it with the operating license proceeding. The Board considers that letter as having merged into the Petition for Leave to Intervene.

By order dated October 8, 1981, the Commission directed the Chairman of the Atomic Safety and Licensing Board Panel (ASLBP) to designate a board to review the CNRS' Intervention Petition, to determine whether the hearing requirements of section 189(a) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), and 10 CFR § 2.714 of the Commission's regulations have been met and, if so, to conduct an appropriate licensing proceeding under Parts 2 and 30 of the Commission's rules. Pursuant to this order, this Board was established by an Order of the Chairman and Chief Administrative Judge of the ASLBP dated October 13, 1981, to rule on the aforementioned Intervention Petition.

Pursuant to said Order, this Board was directed to determine

(1) whether the hearing requirements of section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), and 10 CFR § 2.714 of the Commission's regulations have been met;

(2) whether the petition must be denied because the instant proceeding terminated when the license was renewed on July 28, 1981; and

(3) whether the staff had timely notice of the petitioner's interest in obtaining a hearing in this case.

Section 189(a), supra provides in pertinent part, that:

> In any proceeding under this Act, for the granting, suspending, revoking or amending of any license...the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding...

Pursuant to 10 CFR § 30.34, each license issued under Part 30 of the Commission's is made subject to the provisions of the Act, as well as to all valid rules, regulations and orders of the Commission.

In Licensee's view, the first three words of section 189(a), "In any proceeding", are crucial to the determination of whether petitioner may intervene, as of right, Licensee contending that the issuance of its license renewal terminated these proceedings, thus terminating any rights of CNRS to intervene under that section. Under that interpretation, the CNRS petition can, according to Licensee, only be considered as a request to institute a proceeding during the term of a license, under the standards set out in sections 186, "Revocation," and 187, "Modification of License," of the Act, § 42 U.S.C. §§ 2236 and 2237, respectively, and 10 CFR §§ 2.206 and 30.61. Licensee contends CNRS has not met the requirements of either of these

sections and is therefore not entitled to a hearing. We agree that the requirements of sections 186 and 187 have not been met.[1/]

CNRS does not address the question of the timeliness of its attempt to intervene, either in its August 29, 1981 petition, or in its August 7, 1981 letter to Commission's Secretary. Counsel for CNRS stated in that letter, that she had discussed the pendency of Licensee's Cobalt-60 storage license renewal in a telephone conversation with one John Hickey of the NRC's Materials Licensing Branch on February 4, 1981, and had been told at that time that Mr. Hickey had not yet assigned the review of that license to anyone. Mr. Hickey is alleged to have stated his intention to delay making any decision on the Cobalt-60 storage renewal until the completion of the AFRRI reactor licensing proceedings, since some of the issues being litigated there also relate to the Cobalt storage license. These allegations concerning Mr. Hickey's representations are not denied by Staff nor does Staff argue that the petition is untimely.

Petitioner's counsel also stated in her August 7, 1981 letter that she had learned, only the day before, that the NRC "plans to

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1/ In general, Section 186 involves revocation for material false statements or facts or conditions that would warrant refusal of the original application, or failure to construct or operate in accord with the terms of the permit or license. Section 187 permits amendment, revision or a modification of the act or rules and regulations issued in accordance with the terms of the act.

take first action on the application to renew License No. 19-08330-03 before the reactor proceedings were completed," and noted that "since notice of proposed actions on materials license application is not published in the Federal Register, counsel cannot determine when and what the final decisions will be."

Licensee responds by urging that this Board consider the letter as an admission by CNRS that it had actual notice of the proceedings on the renewal of AFRRI's by-products material license not later than February 4, 1981, and argues that no hearing should be granted where a would-be intervenor had actual notice of the proceeding prior to the determination. This rule is proposed to apply even if the failure to publish notices of proposed actions in the Federal Register might otherwise be considered a denial of procedural due process.

This Board is unaware of any NRC decision which has defined the time frame within which petitions to intervene in domestic materials license proceedings must be filed. Nor is this Board aware of any precedent which has squarely addressed the issue of whether the Commission's failure to provide notice of pending domestic materials licensing aplications in the Federal Register

would constitute a violation of procedural due process, such as to suggest that the untimeliness of an intervention petition in such proceedings ought to be excused.[2/]

The Commission's general rule as to timeliness of an intervention petition is set forth in 10 CFR § 2.714 (a)(1), which provides, in pertinent part,

> that [t]he petition and/or request [for leave to intervene] shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer of the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102 (d)(3) (relating to hearings on antitrust matters).[3/]

On the basis of the foregoing language, staff argues that this rule does not govern the timeliness of an intervention petition in an action such as this, where the license was issued by the Director of Nuclear Material Safety and Safeguards. See Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear Material) CLI-76-61, 3 NRC 563, 579 (1976).

Furthermore, 10 CFR § 2.700, which describes the scope of "Subpart 6 - Rules of General Applicability" of the Commission's

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[2/] Because of their frequency, low individual impact, and the historical absence of controversy regarding them, materials licenses have not been noticed in the Federal Register, see Edlow International Company CLI-76-6, 3 NRC 563 at 579 nor does such appear to be required under 10 CFR Part 2.

[3/] The subsection also sets forth factors which may be balanced in determining whether a nontimely filing should be entertained. This rule, however, has been interpreted by the Commission to "assume that procedures for convening a hearing have already been commenced."

regulations (of which § 2.714 is a part) states only that the provisions of this subpart are to govern [certain] procedures in adjudications, via those initiated by the issuance of an order to show cause, pursuant to 10 CFR § 2.202; an order directing a hearing relating to the imposition of civil penalties, pursuant to 10 CFR § 2.205 (e); a notice of hearing, pursuant to 10 CFR § 2.104; a notice of proposed action, pursuant to 10 CFR § 2.105 or a notice of hearing on antitrust matters, pursuant to 10 CFR § 2.102(d)(3). By its very terms, then, 10 CFR § 2.700 does not contemplate that the provisions of § 2.714 relating to the timeliness of intervention petitions should apply to materials licenses issued pursuant to § 10 CFR § 2.103[4/] and Part 30, unless the Commission orders that a hearing be held pursuant to 10 CFR § 2.104, having found that such a hearing would be in the public interest, or unless the Commission, pursuant to 10 CFR § 2.105 (a)(4), "determines that an opportunity for a public hearing should be afforded."

Simply stated, it is the board's opinion that the issuance of the license renewal is not a "proceeding" under the act and that

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[4/] Section 2.103 which prescribes the action to be taken on applications for by-product material license simply provides that the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards may issue a license if it found that the application complies with the requirements of the Act and the regulations. The right to a hearing under this section is limited to an applicant who has been notified of a denial of the application.

under § 189(a) it need not hold a hearing before the license is renewed. See People of the State of Illinois v. NRC 591 F.2d 12, (1979) holding that the Atomic Energy Act gave Illinois no right to a hearing by the Commission of a "Request to Institute a Proceeding and Motion to Modify, Suspend or Revoke Special Nuclear Material License" where no formal proceeding had begun, for granting, suspending or revoking the license.[5/]

We think, however, that this case differs from the Illinois case since a fair interpretation of the facts indicates that staff indicated to petitioner that this material license would be consolidated with the ongoing proceeding making the operating license. In Illinois the opposite occurred, there complying with 10 CFR § 2.206 (b) and Section 555 (e) of the APA, the Director of Nuclear Material Safety and Safeguards advised the State of Illinois that no proceeding would be instituted.

We hold also that the issue of timeliness is not determinative even though the Petition for Leave to Intervene was filed after the issuance of the license because justice and fair play require consideration of the petition. The representation of staff to intervenor's counsel has not been denied. The action of

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5/ While Sholly v. NRC US App. D.C. 651 F.2d 780, 11/19/80 cert. granted 5/26/81, would appear to hold that a request for a hearing is sufficient under section 189(a) we believe that ruling applies only with regard to significant changes in the operation of a nuclear facility and not to material licensing.

staff, we hold, is an estoppel that may be asserted--even against the government. We think petitioners relied to their detriment on staff's representations. To hold otherwise would violate our notions of "elementary fairness" Moser v. United States 341 U.S. 41 at 47, 71 S.Ct 553, 95 L. Ed 729 (1951); USA v. Lazy FC Ranch 481 F.2d 985 (1973). See also Wisconsin Public Service Corporation, Kewaunee Nuclear Power Plant, LBP 78-24, 8 NRC (1978) where our brethren held that confusing and misleading letters from the staff to a prospective pro se petitioner for intervention and the failure of the staff to respond in a timely fashion to certain communications from such a petitioner, constituted a strong showing of good cause for an untimely petition.

Thus, under the compelling circumstances[6/] of this case we believe petitioner should have opportunity to be heard if petitioner has the requisite standing.

In the related operating license proceeding (Docket 50-170), the petitioner was granted the right to intervene where members were identified who lived 0.3 to 4.6 miles from the site of the reactor. An organiation such as CNRS can establish standing through its members. Here, protection of the members is within the "zone of interests" and staff does not dispute this concern for the protection of the health and safety of its members. Not

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6/ See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 US 519, at 543, 98 S Ct. 1197, at 1211, 55 L Ed 2d 4601 (1978).

every risk with which the Commission is substantially concerned is perforce, one which must be deemed to create standing in some member of the public. It is necessary to determine whether or not petitioners have alleged a potential injury which is particularized to the individual petitioner and not one which is "shared in substantially equal measure by all of a large class of citizens" Edlow International Company supra at 576 citing Warth v. Seldin 422 US 490, 499 (1975). See also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station Unit 1) ALAB 535, 9 NRC 377, 390 (1979).

We believe that petitioners have failed to make such particularized contention.

A general description of the nature of cobalt storage may assist in understanding why this is so.

Unlike reactors, which generate fission products and have the potential for airborne and waterborne effluent releases, cobalt-60 in a facility, such as this, serves only as a source of gamma radiation. We can conceive of no pathway by which either airborne or waterborne contaminants could be released to adversely affect members of the public.

The cobalt-60 source is maintained within water and concrete shielded structures to protect the workers in the facility. If the shielding were to in some way be lost, the intensity of the gamma radiation is reduced very rapidly by distance. At a distance of 300 meters the dose rate would be reduced to a very

low safe level (10-100 mr/hr). At 600 meters (0.4 miles) it would be reduced to the level allowed for a worker in a restricted area (2.5 mr/hr 10 CFR 20). At 2000 meters (1.25 miles) it would be reduced to the level allowed for a person in an unrestricted area (0.25 mr/hr 10 CFR 20) and at 3 to 5 miles it would be reduced to approximately background level.

Thus there is no mechanism by which the AFRRI Cobalt-60 facility could possibly cause gamma radiation exposure to members of the public residing at distances of 3 to 5 miles.

The petitioner alleges as an injury only proximity of the cobalt facility to its members. Unlike the proximity nexus of nuclear reactor proceedings where accidental fission product release from the reactor may occur such cannot here occur because of the wholly dissimilar nature of a cobalt facility. Reactors may generate fission products and do have the potential for airborne and waterborne efflulent releases while the cobalt in this facility does not produce that effect since it is used only as a gamma irradiator. In summary, this is staff's position and we agree.

Petitioner argument that there is a hazard of low level gamma radiation which will emanate from the storage facility is not supported by the physical facts of the nature of the facility.

The further allegation of interest relating to the issues of emergency planning building access and security are not sufficiently particularized. To assume, arguendo, that

petitioner is correct, any order which may be entered in the licensing proceeding will affect the cobalt facility located within the same building.

In conclusion, we determine the answers to the issues raised by the Commission in its October 13, 1981 order as follows:

(1)(a) The requirements of section 189(a) of the Atomic Energy Act 42 USC 82239(a) have not been met since the renewal of a by-products material license is not a "proceeding".

(1)(b) The requirements of 10 CFR § 2.714 have not been met because the petitioners has failed to make at least one particularized contention alleging a potential injury which is not shared in substantially equal measure by a large class of citizens.

(2) The petition if otherwise sufficient for reasons of standing would not be denied on the grounds that the instant proceeding terminated because (a) the license renewal is not a proceeding and (b) even if considered a terminated proceeding there were sufficient grounds based on reasons of elementary fairness or estoppel to permit a hearing.

(3) The staff, in the board's view, had timely notice of the petitioner's interest in obtaining a hearing in this case, but for petitioner's lack of standing this was of no significant consequence in this case.

Therefore, it is this 31st day of March 1982

ORDERED

That the petition for a hearing is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Louis J. Carter, Chairman
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 50-259 OLA
TENNESSEE VALLEY AUTHORITY	)	50-260 OLA
	)	50-296 OLA
(Browns Ferry Nuclear Plant, Units 1, 2, and 3)	)	(Low-Level Radioactive Waste Storage Facility)

CERTIFICATE OF SERVICE

I hereby certify that I have served the original and two conformed copies of the following document on the Nuclear Regulatory Commission by depositing them in the United States mail, postage prepaid and addressed to Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Section:

Tennessee Valley Authority's Brief on
Petitioners' Standing To Intervene

and that I have served a copy of the above document upon the persons listed below by depositing them in the United States mail, postage prepaid and addressed:

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