UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of		
ARIZONA PUBLIC SERVICE COMPANY, et al.	)	Docket Nos. STN 50-529 STN 50-530
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	

JOINT APPLICANTS' ANSWER TO WEST VALLEY'S MOTION SEEKING STAY OF DECISION

In a somewhat confusing but nonetheless blatant attempt to bypass the Commission's procedural requirements, Intervenor West Valley Agricultural Protection Council, Inc. ("West Valley") has requested this Appeal Board (1) to declare the Final Environmental Statement ("FES") prepared by the NRC Staff ("Staff") inadequate and invalid and (2) to stay any hearing in this proceeding until (a) the Licensing Board refers its July 11, 1983, Memorandum and Order to the Appeal Board and (b) the Staff prepares a supplement to the FES. West Valley's Motion Seeking Stay of Decision Permitting Hearing to Proceed with Inadequate EIS ("Motion") at 3; Memorandum in Support of Motion ("Memorandum") at 11. Without waiting for the Licensing Board to render a decision on its request for referral, West Valley attempts in its Motion to place directly before the Appeal Board the very question

decided below concerning adequacy of the FES. The Appeal Board has no jurisdiction to pass on this question unless and until it either accepts a referral of the ruling below or grants a motion for directed certification of the question. This Appeal Board is well aware that the Licensing Board has made so such referral, and that no motion for directed certification has been filed.

FACTUAL BACKGROUND

Hearings on Joint Applicants'[1/] application for operating licenses for the Palo Verde Nuclear Generating Station ("PVNGS") were concluded in June, 1982, at which time the record was closed. On October 14, 1982, West Valley filed a Petition to Intervene seeking, among other matters, the reopening of the record in the Palo Verde proceeding to consider various contentions set forth in the Petition to Intervene and related to the effects of salt deposition on the productivity of lands owned by West Valley members. By Memorandum and Order dated December 30, 1982, the Licensing Board granted the Petition to Intervene and reopened the record for Units 2 and 3. The Unit 1 record remained closed. The Licensing Board admitted one of West Valley's contentions, which alleged that salt deposition

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1/ The Joint Applicants in this operating license proceeding are Arizona Public Service Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, El Paso Electric Company, Public Service Company of New Mexico and Southern California Public Power Authority.

from PVNGS will reduce the productivity of agricultural lands owned by West Valley members

Subsequently, on February 2, 1983, West Valley filed a motion requesting, among other matters, that the Licensing Board formally rule that the environmental statements prepared by the Staff at both the construction permit stage and operating license stage are inadequate and fail to comply with the National Environmental Policy Act ("NEPA"), and that hearings in this proceeding be continued pending completion by the Staff of a supplement to the FES. By Memorandum and Order dated July 11, 1983, the Licensing Board denied West Valley's request. It found that "at this time, there is no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect." Memorandum and Order at 6. The Licensing Board added that under the requirements of NEPA as well as the Commission's own regulations, even if new information becomes available after issuance of an FES, a supplemental statement need not necessarily be prepared and circulated. Id. at 3-4, 7.

Not content with the Licensing Board's decision, West Valley now seeks to involve this Appeal Board in the matters considered below. For the reasons set forth herein, each of West Valley's requests should be denied.

I. WEST VALLEY'S REQUEST THAT THE APPEAL BOARD RULE THAT THE FES IS INADEQUATE SHOULD BE DENIED AS AN IMPERMISSIBLE INTERLOCUTORY APPEAL

As previously noted, the Licensing Board ruled in its July 11 Memorandum and Order that there is no basis in the record for determining that the FES is inadequate. West Valley has appealed this ruling to the Appeal Board by asking it to rule that the FES is inadequate. Memorandum at 11. The basic and fundamental problem with West Valley's request is that the question decided by the Board below is not one which West Valley may place before this Appeal Board as a matter of right. "[A] licensing board's action is final for appellate purposes where it either disposes of at least a major segment of a case or terminates a party's right to participate; rulings which do neither are interlocutory." Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); see Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 894-95 (1982). The ruling which West Valley has appealed in this case did neither; it's appeal is thus interlocutory.

Interlocutory appeals are not favored in Commission proceedings. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981). In fact, the Commission's Rules of Practice prohibit appeals of interlocutory licensing board rulings such as the one involved here. 10 CFR §2.730(f). Procedurally, there are three

methods by which the Licensing Board's ruling may conceivably be placed before the Appeal Board. First, the Licensing Board may be requested to refer its ruling to the Appeal Board pursuant to 10 CFR §2.730(f). Second, the Licensing Board may be requested to certify the question of FES adequacy to the Appeal Board pursuant to 10 CFR §2.718(i). Finally, the Appeal Board may be requested to direct the Licensing Board to certify the question considered by the Licensing Board pursuant to 10 CFR §§2.718(i), 2.785(b)(1).

Strict standards govern the grant of motions for referral or certification. See Consumers Power Company, supra, 13 NRC at 99. There is no need in this response to analyze those standards. It suffices to say that the Licensing Board's ruling regarding FES adequacy is not properly before this Appeal Board inasmuch as the Appeal Board has not yet received any motion for directed certification from West Valley, much less granted any such motion. Furthermore, the Licensing Board has not yet referred the ruling to the Appeal Board or certified the question. To be sure, West Valley has, in a five-sentence letter to the Licensing Board, requested the Licensing Board to refer its ruling to the Appeal Board and to certify its ruling for appeal. An appropriate response to such request will be filed with the Licensing Board by Joint Applicants. In any event, however, unless and until the question concerning FES adequacy which West Valley has attempted to inject before

this Appeal Board has been properly placed there, the Appeal Board is without jurisdiction to consider the matter.[2/] Accordingly, West Valley's request that the Appeal Board rule that the FES is inadequate should be summarily dismissed.

II. THE COMMISSION'S RULES DO NOT AUTHORIZE THE FILING OF AN APPLICATION FOR STAY PENDING THE POSSIBILITY THAT AN APPEAL MAY BE TAKEN

In addition to requesting the Appeal Board to declare the FES inadequate, West Valley also seeks a stay in the proceedings pending a decision on its request to the Licensing Board to refer its ruling and the preparation of a supplement to the FES. Consistent with its pattern of avoiding the Commission's procedural requirements, West Valley seeks a stay notwithstanding the fact that a motion for a stay is not authorized under the present circumstances. That is, Section 2.788 of the Commission's Rules, pursuant to which an application for a stay is to be filed, states: "Within ten (10) days after service of a decision or action, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on an appeal or

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2/ Even assuming that the Licensing Board decides to refer its ruling, the Appeal Board is empowered to decline the acceptance of the referral. Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982).

petition for review." West Valley, of course, is not seeking a stay pending a decision on an appeal or petition for review because West Valley can make no such filing as a matter of right. The facts are that West Valley is seeking a stay pending a decision on its request that an interlocutory appeal be authorized. Memorandum at 11. Section 2.788 simply does not authorize a party to file, or a Commission tribunal to grant, an application for a stay of further proceedings pending the possibility of an appeal. This distinction is significant, for if a party were permitted to file an application for a stay pending the possibility of an appeal, the time and resources of the Commission's tribunals and other parties would be tied up in a horrendous number of debates and arguments on strictly interlocutory matters, all at the expense of an efficient and effective administrative process. West Valley's Motion is, at best, premature. For this reason alone, the Motion should be denied.

III. THE FACTORS TO BE CONSIDERED IN RULING ON AN APPLICATION FOR A STAY WEIGH AGAINST WEST VALLEY

Joint Applicants consider the Commission's regulations to be clear enough in proscribing West Valley's Motion in the present circumstances. However, should the Appeal Board consider West Valley's Motion on the merits, Joint Applicants oppose the Motion for the reason that the factors set forth in Section 2.788(e) governing applications for a stay weigh against West Valley. These factors are

(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) whether the party will be irreparably injured unless a stay is granted;

(3) whether the granting of a stay would harm other parties; and

(4) where the public interest lies.

1. Probability of Success on the Merits.

The question to be addressed by the first factor is whether West Valley is likely to prevail on the merits of its claim that the FES is inadequate and that a supplement to the FES should be prepared. In its discussion of this factor, West Valley totally mischaracterizes the Licensing Board's Memorandum and Order permitting West Valley to intervene. Specifically, West Valley asserts that the Licensing Board "found the EIS inadequate," Motion at 2, and that the Board's ruling on the Petition to Intervene "established the inadequacy of the EIS," Memorandum at 8. The facts are that in its Memorandum and Order of December 30, 1982, the Licensing Board noted that the salt deposition issue is a significant and serious one and that the record on salt deposition is sparse. Memorandum and Order at 13. However, these statements simply do not constitute a finding that the FES is inadequate. The Board had also identified several portions of the PVNGS record where the issue of the effects of salt deposition was addressed, including the FES - Construction Permit Stage, the Licensing Board's Ini-

tial Decision at the constructon permit stage, and the FES - Operating License Stage. See Memorandum and Order at 4-7.

Joint Applicants, as part of their answer to the West Valley Petition to Intervene, included a 52-page volume of quotations from several PVNGS licensing documents, including the FES-CP and FES-OL, relating to the salt deposition issue. The subjects covered in such quotations included (1) the concentration of dissolved solids in the PVNGS condenser cooling water, (2) the characteristics of the condenser cooling water drift from the cooling towers, (3) the dispersion and deposition of the salt drift, and (4) the environmental effects of such salt deposition. These four subject matters follow closely the questions which the parties to this proceeding have stipulated to as constituting the salt deposition issue in this case. Joint Applicants also noted in that volume that the material presented did not consitute all of the discussion of those particular subjects in the various documents. Nonetheless, the quantity of the material provided in that volume illustrates that the salt deposition issue was not one which went unaddressed. In fact, the quoted excerpts illustrate that these matters did receive substantial attention.[3/] The foregoing

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3/ In addition to matters already contained in the PVNGS record, and as the Licensing Board and the other parties to this proceeding are well aware, Joint Applicants have undertaken additional experimental work with the Office of Arid Lands Studies at the University of Arizona to compile further information on the effects of foliar deposition of salt drift. The results of those studies will be made part of the record in the reopened proceeding.

clearly supports the Licensing Board's conclusion in its July 11 Memorandum and Order that there is at this time no basis in the record for determining that the FES is inadequate. Memorandum and Order at 6. The only suggestion that there may be deficiencies in the FES lies in the allegations of West Valley. Whether their claims that significant information is lacking from the record have any merit must await the outcome of the hearing to be held on the issues.

Even assuming that there are some defects in the FES, that does not automatically establish the need for a supplement to the FES. See State of California v. Watt, 683 F.2d 1253, 1267-68 (9th Cir. 1982). In fact, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980), the very case cited by West Valley in support of its argument that a supplement is required, supports the Licensing Board's decision to proceed with a hearing. In that case the Task Force challenged the adequacy of an environmental statement prepared by the Army Corps of Engineers ("Corps") in connection with the construction of the Warm Springs Dam. The facts showed that new information concerning seismic safety became available to the Corps after the completion of the environmental statement. The Task Force alleged that this information required the preparation of a supplement. The court noted that the Corps' decision prior to trial not to take another look at the issue of seismic safety in light of the new information did not comply with NEPA. The court

further noted, however, that the deficiency had been cured by additional studies conducted by the Corps after the trial had commenced. Facts concerning the studies had been submitted to the Court of Appeals in an affidavit filed by the Corps. These studies, the court added, supported the Corps' decision that the new information did not require the preparation of a supplement. Id. at 1025-26. Based on the additional studies, a supplement was neither required nor prepared.

As discussed by both Joint Applicants in their response to West Valley's motion of February 2, 1983, and the Licensing Board in its Memorandum and Order, the Commission's licensing tribunals have also had frequent occasion to address supplementation of a final environmental statement in instances where there are inadequacies or where changes are required. The Commission has adopted the procedure that defects in an environmental statement can be cured by the receipt of additional evidence subsequent to issuance of the environmental statement. See Ecology Action v. United States Atomic Energy Commission, 492 F.2d 998, 1000-02 (2nd Cir. 1974); Florida Power & Light Company (Turkey Point Nuclear Generating Station, Units Nos. 3 & 4), ALAB-660, 14 NRC 987, 1013-14 (1981); Philadelphia Electric Company (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 194-97 (1975). The Commission's regulations explicitly provide that a licensing board decision based on the eviden-

tiary record before it shall be deemed to modify the environmental statement:

> In . . . a proceeding [in which a hearing is held for the issuance of a permit, license or order], an initial decision of the presiding officer may include findings and conclusions which affirm or modify the content of a final environmental impact statement prepared by the staff. To the extent that findings and conclusions different from those in the final environmental statement prepared by the staff are reached, the statement will be deemed modified to that extent and the initial decision will be distributed as provided in §51.26(c). If the Commission or the Atomic Safety and Licensing Appeal Board in a final decision reaches conclusions different from the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed. 10 CFR §51.52 (b)(3).

Three courts of appeal have approved of this rule. New England Coalition v. United States Nuclear Regulatory Commission, 582 F.2d 87, 93-94 (1st Cir. 1978); Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291, 1294 & n.5 (D.C. Cir. 1975); Ecology Action v. United States Atomic Energy Commission, supra.

Under the Commission's own regulations, and Court decisions approving of the rule, West Valley's allegation that a stay is necessary to protect the integrity of the NEPA process is totally without merit. The salt deposition issue has been addressed in various licensing documents, it will be further addressed at the hearing to be held in this

reopened proceeding, and, pursuant to the Commission's rules, to the extent that a decision different from the conclusions in the FES is reached, that decision would be deemed to modify the FES and would be circulated in a manner similar to the FES. West Valley's argument that under this rule, one would never have to prepare an environmental statement if a hearing were to follow is so much waste ink. The Commission's rules require the preparation and circulation of environmental statements in compliance with NEPA. Both draft and final environmental statements were prepared for PVNGS at both the construction permit and operating license stages. The Commission's rule in Section 51.52(b)(3) simply provides an approved mechanism whereby defects in environmental statements may be cured.

2. Irreparable Injury.

West Valley has failed to show that it will be irreparably injured if its motion is denied. Its argument is that unless an adequate analysis is prepared by the NRC Staff, the salt deposition issue will never be adequately addressed in the manner contemplated by statute. Memorandum at 9. Its argument is faulty for two reasons. First, it rests on the premise that the existing FES is inadequate. As previously discussed herein, the Licensing Board has denied West Valley's motion for a declaration that the FES is inadequate.

Second, even assuming that the present FES is ultimately determined to contain deficiencies, West Valley will

not suffer irreparable injury. NEPA requires Federal agencies to include a detailed environmental statement with a proposal for major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. §4332. In this case the agency is the Nuclear Regulatory Commission, not the Staff. The Commission's regulations providing for the curing of defects by the receipt of additional evidence at the hearing provides an approved means of complying with statutory requirements.

3. Injury to Other Parties.

West Valley appears to concede in its argument respecting the third factor that at least Unit 2 may be delayed if hearings are stayed pending completion by the Staff of a supplement to the FES. Its argument seems to be that this delay is the fault of Joint Applicants and the Staff because these parties failed to prepare a supplement to the FES after having been given notice by West Valley that, in West Valley's opinion, the FES is inadequate. West Valley concludes that Joint Applicants and the Staff are thus in no position to complain.

The argument is ludicrous. West Valley is the only party to this proceeding who considers the FES inadequate. West Valley's opinion is hardly a sound basis on which to embark on preparation of some type of supplement to the FES. It is, however, reasonable for Joint Applicants and the Staff to assume that if there are defects in the FES, such can be cured in the manner contemplated by the

Commission's regulations. Joint Applicants are of course entitled to know at the earliest practicable time whether Units 2 and 3 will be licensed to operate. If a decision in their favor results, Joint Applicants will indeed have been injured if there has been an unjustifiable delay in reaching that decision and an associated delay in the operation of Units 2 and 3.

4. The Public Interest.

There is no need to dwell on the public interest in having an early decision on the licensing of Units 2 and 3. If the Units are environmentally sound, the facility should be approved promptly. If, on the other hand, the hearing shows that salt deposition from PVNGS will reduce the productivity of agricultural lands, the public interest will be served if this fact is known sooner rather than later. This is so because, in that event, there will be a need to initiate appropriate corrective action.

CONCLUSION

In sum, it would be inappropriate under the Commission's rules for the Appeal Board to consider at this stage either the Licensing Board's ruling on the adequacy of the FES or West Valley's request that the proceedings be stayed pending a decision on its request for referral of the Licensing Board's ruling and the preparation of a supplement to the FES. In the event this Appeal Board does consider the stay request, the foregoing analysis demonstrates that

none of the factors governing a decision on stay requests weigh in favor of West Valley. For all of the foregoing reasons, West Valley's Motion should be denied.

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DATE: August 8, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Applicants' Answer to West Valley's Motion Seeking Stay of Decision Permitting Hearing to Proceed" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 8th day of August, 1983.

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