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 No. STN 50-529 STN 50-530
	)	
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	
	)	

JOINT APPLICANTS' ANSWER TO WEST VALLEY'S MOTION SEEKING DIRECTED CERTIFICATION

On August 12, 1983, the Appeal Board for this proceeding issued an order denying a motion by Intervenor West Valley Agricultural Protection Council, Inc. ("West Valley") for a stay of the Licensing Board's July 11, 1983, memorandum and order. The Appeal Board noted that West Valley's motion for a stay was premature inasmuch as the Licensing Board's interlocutory order was not appealable as a matter of right and was not before the Appeal Board as a matter of discretion.

By order dated August 17, 1983, the Licensing Board denied West Valley's request that the July 11 order be referred to the Appeal Board. The Licensing Board's action has prompted West Valley to file a "Motion Seeking Directed Certification of Interlocutory Appeal" ("Motion") dated August 27, 1983. In its Motion West Valley requests the

Appeal Board to direct the Licensing Board to certify the July 11 order for appellate review.[1/]

The factual background associated with West Valley's Motion and participation in this proceeding is set forth in "Joint Applicants' Answer to West Valley's Motion Seeking Stay of Decision," dated August 8, 1983 ("Joint Applicants' Answer").[2/] What bears repeating from that statement is that 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

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1/ Attached to West Valley's Motion is a brief, supporting memorandum and a copy of West Valley's original memorandum of law submitted in support of its motion seeking a stay ("Memorandum in Support of Stay"). West Valley indicates that the Memorandum in Support of Stay is being submitted in support of its Motion for Directed Certification. Memorandum in Support of Motion, at 1. However, the factors governing a request for a stay, see 10 CFR §2.788(e), are not the same as the factors governing a request for directed certification, see page 4 infra. It is also noted that there is nothing in its Motion which suggests that West Valley is renewing at this time its earlier request for a stay of these proceedings. Accordingly, Joint Applicants urge that the Memorandum in Support of Stay be disregarded. However, in the event the Appeal Board is inclined to consider the resubmission of such Memorandum to be a renewal by West Valley of its earlier request for a stay, Joint Applicants would request the Appeal Board to consider "Joint Applicants' Answer to West Valley's Motion Seeking Stay of Decision," dated August 8, 1983, which is incorporated herein by this reference, in opposition to the issuance of a stay.

2/ 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.

the Staff at both the construction permit stage and the 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 Final Environmental Statement ("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.

West Valley's motion for directed certification is based on 10 CFR §2.718(i). A request for a Section 2.718(i) certification seeks the exercise by the Appeal Board of a discretionary power. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975). Such discretionary review is granted only in exceptional and extraordinary circumstances. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977); Public Service Company of New Hampshire, 1 NRC at 483. Furthermore, "[t]here is even

greater cause to be chary about reaching down for an issue at [an interlocutory] stage where, as here, the Licensing Board has affirmatively declined upon request to refer that issue." Public Service Company of New Hampshire, 1 NRC at 483. In light of these basic principles, it is no surprise that discretionary review is rarely undertaken.

> Our decisions establish that discretionary interlocutory review will be granted only sparingly, and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980) (emphasis added, footnotes omitted). This standard has been cited frequently by the Appeal Board. See Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Tested by the above-quoted standard, West Valley's Motion falls substantially short.

1. Harm to West Valley.

West Valley makes no serious claim that it will suffer immediate and serious irreparable injury which could

not be remedied by a later appeal. It simply asserts that failure to grant its Motion would cause irreparable injury on the presumption that it "will insure that the NRC Staff [will] not perform an impartial full analysis of potential harm caused by PVNGS." Motion at 3. The major shortcoming in this argument is that West Valley has completely failed to address why the alleged harm could not be remedied by a later appeal. West Valley's omission no doubt is due to the fact that the alleged harm could easily be remedied by appellate review.

In Houston Lighting & Power Company, supra, the Appeal Board considered an intervenor's motion seeking directed certification of a licensing board intelocutory ruling. The ruling rejected the intervenor's position that a supplement to the final environmental statement for the Allens Creek facility was required. In denying the intervenor's motion, the Appeal Board found the intervenor's allegation of irreparable harm to be without merit. It stated in part:

> [I]t has not been satisfactorily explained why appellate scrutiny of the ruling cannot abide the event of the initial decision and (if dissatisfied with the result reached in that decision) TexPIRG's appeal from it. To be sure, if the ruling were found erroneous on such an appeal, the consequence might well be a vacation of the initial decision and a remand to the Board below. But the same possibility exists with respect to all interlocutory determinations made by licensing boards on matters

> which have a potential bearing upon the outcome of the proceeding. If, standing alone, that consideration were enough to justify interlocutory review, it would perforce follow that virtually every significant licensing board ruling during the course of a proceeding would be a fit candidate for immediate appellate examination. It is scarcely necessary to expound at any length upon why a drastic alteration of existing practice to accommodate that thesis would be intolerable--as well as in derogation of the Commission's explicit policy disfavoring interlocutory review. 10 CFR 2.730(f).

13 NRC at 310-11 (footnote omitted).

The Licensing Board here made a similar observation in its August 17 order:

> There will be no irreparable harm to West Valley if certification is not allowed. The only apparent detriment to it would be that it may have to participate in an early hearing which may be mooted by later events. This factor does not demonstrate any detriment and does not show any "irreparable" injury.

Order at 3 (citations omitted).[3/]

3/ In its Memorandum in Support of Stay, West Valley argued 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 NEPA. Memorandum in Support of Stay at 9. As stated in Joint Applicants' Answer, even if it is assumed 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 USC §4332. In this case the agency is the Nuclear Regulatory Commission, not the NRC 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 NEPA's requirements. See 10 CFR §51.52(b)(3).

2. Effect on Structure of the Proceeding.

In addressing the second factor articulated in Public Service Electric and Gas Company, supra, West Valley argues that proceeding with a hearing where there is an inadequate environmental statement would affect the basic structure of the proceeding. Memorandum in Support of Motion at 2. The argument is without merit. The Licensing Board has twice stated that "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." Order at 3 (August 17, 1983); Memorandum and Order at 6 (July 11, 1983). The Licensing Board has further ruled that whether West Valley's claims that significant information is lacking from the record have any merit must await the outcome of the hearing. Memorandum and Order at 7-8 (July 11, 1983).

West Valley's assertion that the Licensing Board's order granting West Valley's petition to intervene found the FES inadequate is a mischaracterization of what the Licensing Board stated. The Licensing Board simply noted, in considering whether West Valley could be expected to assist in developing a sound record, that there was a paucity of information on the consequences of salt drift to West Valley lands and that the testimony of West Valley's experts may make a valuable contribution to the record. Memorandum and Order at 9 (December 30, 1982). The Licensing Board ex-

pressly added, however, that it "need not decide the merits of that testimony in order to admit [West Valley] as a party." Id. Later in that same order, the Licensing Board, in considering whether to reopen the record, reiterated that the record on salt deposition is sparse. Id. at 13. It went on to conclude that this presented "adequate cause to reopen the record to consider [West Valley's] contentions." Id. This discussion makes clear that the Licensing Board did not decide the merits of West Valley's contentions respecting the adequacy of the FES, and thus did not find that the FES is inadequate. Rather, the Licensing Board decided to hold a hearing to make such determination.

If the hearing discloses that there are defects in the FES, evidence may be received at that time to cure such defects pursuant to the Commission's regulations. See 10 CFR §51.52(b)(3). The Licensing Board itself can require further development of the record at the hearing if it is not satisfied with the adequacy of the FES. See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526 (1977), quoting Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 335 (1973). Thus, proceeding with a hearing as the Licensing Board has decided to do will be consistent with the procedure specified by the Commission's regulations. It is hard to conceive of how the Licensing Board's action affects the structure of the proceeding in a

pervasive or unusual manner when that action is a decision to proceed in the very manner contemplated by the Commission.

As is the case here, in Houston Lighting & Power Company, supra, the intervenor filed a motion for directed certification of a licensing board ruling rejecting the intervenor's position that a supplement to the environmental statement was required. With regard to the effect of the licensing board's ruling on the proceeding, the Appeal Board simply stated: "No serious claim has been, or could be, made that the ruling in question has 'affected the basic structure of the proceeding in a pervasive or unusual manner'." 13 NRC at 311 n.1 (emphasis added). That observation has equal application here.

Based on the foregoing, West Valley's Motion for Directed Certification should be denied.

RESPECTFULLY SUBMITTED this 12th day of September, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Applicants' Answer to West Valley's Motion Seeking Directed Certification" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 12th day of September, 1983.

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