RAS 3932

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Tennessee Valley Authority	)	Docket No. 50-390-LA
	)	
(Watts Bar Nuclear Plant, Unit 1)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER TO REQUEST FOR A HEARING AND PETITION TO INTERVENE OF WE THE PEOPLE INC., TENNESSEE

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.714(c), Tennessee Valley Authority ("TVA"), applicant in the above-captioned matter, hereby files its answer to the request for hearing and petition for leave to intervene ("Petition") filed on January 17, 2002, by We The People, Inc. Tennessee (hereinafter "Petitioner" or "We The People"). The Petition responds to the Notice of Opportunity for a Hearing published by the Nuclear Regulatory Commission ("NRC" or "Commission") in the *Federal Register* on December 17, 2001, concerning TVA's proposed amendment to its operating license for the Watts Bar Nuclear Plant, Unit 1 ("WBN").[1] As discussed below, Petitioner has not satisfied the Commission's requirements for standing to intervene with respect to this matter. Therefore, under 10 C.F.R. § 2.714, the Petition must be denied.

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[1] *See* "Tennessee Valley Authority; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing," 66 Fed. Reg. 65,005 (Dec. 17, 2001).

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II. BACKGROUND

A. The Approval at Issue

The license amendment request ("LAR") at issue, first submitted to the NRC on August 20, 2001, concerns proposed changes to Technical Specifications that would allow incore irradiation services for the United States Department of Energy ("DOE").[2] These changes would allow TVA to insert tritium-producing burnable absorber rods ("TPBARs") into the WBN reactor core to support DOE in maintaining its tritium inventory for national defense purposes.[3] In the LAR, TVA proposes to insert up to approximately 2,300 TPBARs in the WBN reactor core. The TPBARs neither contain fissile material nor replace normal reactor fuel, and because the TPBARs will not adversely affect reactor neutronic or thermal-hydraulic performance, their presence in the core would not have a significant effect upon the probability or consequences of previously analyzed accidents, including fuel handling accidents.

The LAR contains a no significant hazards consideration determination ("NSHD"),[4] in which TVA concludes, *inter alia*, that the LAR:

- does not involve a significant increase in the probability or consequences of an accident previously evaluated;
- does not create the possibility of a new or different kind of accident from any accident previously evaluated; and

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2 *See* "Watts Bar Nuclear Plant (WBN) - Unit 1 - Revision of Boron Concentration Limits and Reactor Core Limitations for Tritium Production Cores (TPCs) - Technical Specification (TS) Change No. TVA-WBN-TS-00-015" (Aug. 20, 2001).

3 The TPBARs absorb neutrons and are similar to (and would replace) normal burnable neutron absorber rods that serve to shape neutron flux in the core. They will be installed in fuel assemblies where burnable absorber rods are normally placed in selected fuel assemblies. 66 Fed. Reg. at 65,005-06.

4 The NRC made its own proposed determination that the amendment request involves no significant hazards considerations, pursuant to 10 C.F.R. § 50.92. 66 Fed. Reg. at 65,006.

- does not involve a significant reduction in a margin of safety.

LAR, at E1-20 - 32. Importantly, other than the insertion and removal of the TPBARs, the LAR would not result in any significant change to plant operations. With regard to the potential for radiological consequences associated with the LAR, the NSHD concludes that, "[t]he impacts of TPBARs on the radiological consequences for all evaluated events are very small, and they remain within 10 CFR 100 regulatory limits. The additional offsite doses due to tritium are small with respect to LOCA source terms and are well within regulatory limits." *Id.* at E1-24.

Under the interagency agreement between DOE and TVA with respect to the irradiation services to be provided, TVA's responsibilities are limited to irradiation of the TPBARs during reactor operation, consolidating the TPBARs into containers and shipping casks provided by DOE, and loading the casks on DOE-furnished transport for removal by DOE.[5] The Technical Specification changes at issue in the LARs do not involve the transport and subsequent storage, processing, and use of the TPBARs by DOE.

B. NRC Standing Requirements

It is fundamental that any entity requesting a hearing or seeking to intervene in a Commission proceeding must demonstrate that it has standing to do so. The Commission's regulations in 10 C.F.R. § 2.714(a)(2) provide that a petition to intervene, among other things, "shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors set forth in

5 Interagency Agreement No. DE-AI02-00DP00315 between the United States Department of Energy and the Tennessee Valley Authority for Irradiation Services (Jan. 1, 2000).

[§ 2.714(d)(1)]." Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene, the Atomic Safety and Licensing Board ("Licensing Board") is to consider:

> (i) The nature of the petitioner's right to be made a party to the proceeding.
>
> (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
>
> (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2).

In determining whether a petitioner has established the requisite interest, the Commission traditionally has applied contemporaneous judicial concepts of standing. *See, e.g., Gulf States Utils. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). The Commission has further determined that to satisfy the standing requirements of 10 C.F.R. § 2.714, a petitioner must demonstrate that:

> 1. it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute;
>
> 2. the injury can fairly be traced to the challenged action; and
>
> 3. the injury is likely to be redressed by a favorable decision.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1),

CLI-93-21, 38 NRC 87, 92 (1993); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In particular, with respect to the alleged "injury-in-fact," the Commission has held that it is incumbent upon the petitioner to allege some "plausible chain of causation" from the licensing action at issue to the alleged injury that would or could be redressed in the proceeding. *Zion*, CLI-99-4, 49 NRC at 192 (1999). Such injury may be actual or threatened. *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995). The injury, however, must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (citations omitted). Additionally, the claimed injury suffered by a petitioner must fall within the "zone of interests" sought to be protected by the Atomic Energy Act ("AEA") or the National Environmental Policy Act. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, __ NRC __ (slip op. at 7, Jan. 24, 2002); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985).

Thus, a petitioner must have a "real stake" in the outcome of the proceeding to establish an injury-in-fact for standing. While this stake need not be a "substantial" one, it must be "actual," "direct," or "genuine." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979). A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the petitioner must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982) (*citing Allied-Gen. Nuclear Serv.* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976)); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 743

(1982). Herein, Petitioner has failed to demonstrate any more than an academic interest and, therefore, has failed to show standing. The Petition should be dismissed.

III. DISCUSSION

A. Petitioner Has Not Established Standing to Intervene

The Petition does not demonstrate that the petitioner organization has standing. As recited in *Private Fuel Storage*, there are two routes by which an organization can attempt to demonstrate standing in an NRC hearing. First, it can assert injury to organizational interests and demonstrate that these interests are protected by the Atomic Energy Act. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Second, an organization can base standing on the interests of individuals that it represents. To derive representational standing from an individual, an organization must identify at least one member (by name and address) and provide some "concrete indication" that the member has authorized the organization to represent him or her in the proceeding. In addition, the petition must demonstrate the standing of that individual assessed against the standards recited above. *See, e.g., Vermont Yankee Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987).

Here, Petitioner asserts standing based on the representational interests of one identified member, Ms. Ann Harris, Director of We The People, rather than on the organizational interests of We The People itself. As discussed below, however, Petitioner has failed to demonstrate representational standing in this matter.

1. Petitioner Is Not Entitled to Standing Based on Ms. Harris' Geographic Proximity

Ms. Harris' purported interest in this proceeding is based on her geographic proximity to WBN. She is a property owner at Ten Mile, Tennessee and resides in Rockwood,

Tennessee. Petition at 1. Both locations are within 20 miles of WBN. In the circumstances of this proceeding, however, mere geographic proximity is insufficient to confer standing on Ms. Harris, and thus does not establish representational standing for the Petitioner.

Where the proposed action involves the obvious potential for offsite consequences, the NRC has recognized a "proximity presumption" under which a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity. However, that presumption does not apply in a license amendment case like the present one. As the Commission stated in *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989):

> It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. *See, e.g., Virginia Electric Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 AEC 222, 226 (1974). *Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific "injury in fact" which will result from the action taken....*

Id. at 329, 330 (emphasis added).

Applying this standard to this proceeding, We The People has not demonstrated any means by which the proposed amendment could lead to offsite consequences injurious to Ms. Harris or her property. To the contrary, the NSHD and LAR, as discussed above, make it clear that the proposed license amendment does not involve any obvious potential for offsite consequences. The TPBARs neither contain fissile material nor replace normal reactor fuel.

They will not adversely affect fuel handling procedures, reactor operations, or reactor neutronic or thermal-hydraulic performance. The presence of TPBARs in the core would have no significant effect upon the probability of previously analyzed accidents, including fuel handling accidents.

Furthermore, issuance of the LAR would not result in any significant change to the offsite radiological consequences associated with WBN design basis accidents. The NSHD concludes that, "[t]he impacts of TPBARs on the radiological consequences for all evaluated events are very small, and they remain within 10 CFR 100 regulatory limits. The additional offsite doses due to tritium are small with respect to LOCA source terms and are well within regulatory limits." *Id.* at E1-29. Given the absence of a clear potential for offsite consequences, Ms. Harris' proximity to WBN — alone — is insufficient to confer standing upon We The People in this proceeding.

Even if there was a potential for offsite injury, We The People has not effectively asserted such an injury in its Petition. It has not shown any "plausible chain of causation" from the proposed amendment to offsite radiological injury. Consequently, because the Petitioner cannot and has not make such a showing, its standing cannot be based on the proximity of Ms. Harris' residence and property to WBN.

In particular, Ms. Harris' purported injuries are as follows:

- her "health, life, and properties" will be jeopardized if tritium is produced at WBN given the "increased likelihood of an accident due to the production of weapons grade tritium at WBN";
- said "increased likelihood of an accident" "would irrevocably change the value of [her] property at the Ten Mile location and also would make [her] residence at Rockwood uninhabitable since both are downwind" from WBN;

- the production of tritium at WBN provides "too many opportunities for terrorists [sic] attacks and further jeopardizes [her] life and those in the surrounding communities;" and

- the "environmental damage in the case of an accident due to the manufacturing of tritium would destroy an already damaged ecosystem forbidding any use of the water in the Tennessee River."

Petition at 1.[6] As a matter of law, these broad assertions, without more, do not demonstrate injury-in-fact. *See International Uranium (USA) Corp.*, CLI-98-6, 47 NRC 116, 117 (1998) (a petitioner must show an injury that is "distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical"), *citing Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83 (1998); *Warth v. Seldin*, 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

Ms. Harris' alleged interests are nothing more than abstract conjecture and speculation. Aside from the sweeping and unsupported claim that her "life" and "health" will be "jeopardized," Ms. Harris has not even suggested with any particularity how these purported injuries would occur *as a result of issuance of the proposed license amendment. Puget Sound*, 3 NRC at 422, and 15 NRC at 743. Nor has Ms. Harris shown how her purported injuries could plausibly be caused by activities associated with the LAR — that is, by those activities actually changed by the proposed amendment.

In total, Ms. Harris' alleged interests constitute nothing more than hypothesis, fear, and conjecture, and do not demonstrate a plausible injury-in-fact fairly traceable to the LAR. Many of her stated concerns are nothing more than "generalized grievance(s)," shared

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[6] In this regard, Ms. Harris claims her "health" could not withstand an accident, as some undefined "breathing problems" recently have begun to plague her for unstated or unknown reasons. Petition at 1. In addition to undefined "environmental damage" to a purportedly "already damaged ecosystem," Ms. Harris makes the broad claim that the "accident" she fears will "forbid[] any use of the water in the Tennessee River." *Id.*

substantially in equal measure by all or a large class of citizens and do not result in a distinct and palpable harm sufficient to support standing (*i.e.*, purported environmental damage, opportunities for terrorist attacks, and loss of water use from the Tennessee River). *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-81-25, 18 NRC 327, 333 (1983), *citing Transnuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977).[7] Therefore, Petitioner has not demonstrated how she would be personally harmed by the proposed amendment and standing cannot be found on any of these alleged bases.

2. Asserted Economic Interests Exceed the Zone of Interests in This Proceeding

Petitioner's assertions of economic injury (*i.e.*, to property value) do not fall within the zone of interests arguably protected by the governing statute, the AEA.

> The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. The appropriate party to raise safety objections about a specific licensing action is the party who, because of the licensing, may face some radiological harm (or the party who seeks the license). As such, it has long been our practice as an agency to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm.

International Uranium (USA) Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998). *See also Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). We The People thus cannot base its representational standing on Ms. Harris' assertions of diminished property value without showing radiological harm. Petition at 1. This Petitioner has not done.

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[7] With respect to her fear of terrorism, Ms. Harris herself acknowledges that it "jeopardizes" not only her life but also "those in the surrounding communities." Petition at 1.

3. Petitioner's Alleged Injuries Due to Hypothetical Terrorist Attacks Are Not Likely to be Redressed In This Proceeding

Petitioner asserts that the production of tritium at WBN "increases the likelihood of an accident" and provides "too many opportunities for terrorists [sic] attacks and further jeopardizes [her] life and those in the surrounding communities," (Petition at 1). Petitioner thereby seeks to challenge the conclusion in the proposed finding, under 10 C.F.R. § 50.92(c)(2), that the amendment will not create the possibility of a new or different kind of accident. To the extent the Petitioner is seeking a hearing challenging this conclusion, however, she is raising a matter that cannot be addressed in this forum. *See* 10 C.F.R. § 50.58(b)(6).

Moreover, the conjecture about terrorist attacks does not in any way demonstrate how that scenario is a new or different kind of accident *created by the proposed amendment.* Likewise, the Petitioner does not show how either the probability or consequences of such an event are increased by the proposed amendment. Nor does Petitioner identify any relief that could be given in this proceeding to mitigate the potential injury. This particular assertion constitutes, at best, a challenge to the design basis security threat ("DBT") for the WBN facility. Such a challenge is impermissible in an individual licensing proceeding, such as this, as it takes issue not with the proposed license amendments, but rather with the substantive content of Commission regulations — specifically 10 C.F.R. § 50.13 and 10 C.F.R. Part 73.[8] Such issues

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[8] The design basis security threat to reactors is addressed in 10 C.F.R. § 73.1(a)(1). Commission regulation 10 C.F.R. § 50.13 also explicitly provides that NRC reactor licensees are not required to provide for design features or other measures to protect against the effects of attacks and destructive acts, including sabotage, by an enemy of the United States (including, but not limited to, foreign governments), at least to the extent those threats exceed the DBT. The NRC and Federal decisions have consistently held that the responsibility for defense against such acts of war lies with the United States government. *See Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783-84 (D.C. Cir. 1968) (in licensing commercial reactors, the NRC is not required to consider issues related to — or require a showing of effective protection against — the possibilities of attack or sabotage by foreign enemies); *Carolina Power & Light Co.* (Shearon Harris

are not properly raised here. *See* 10 C.F.R. § 2.758(a); *Florida Power and Light Co.* (Turkey Point, Units 3 and 4), LBP-01-6, 53 NRC 138, 151 (2001); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 2), ALAB-456, 7 NRC 63, 65 (1978).[9] The Commission has rejected security claims in the past, noting that a petitioner would have to demonstrate that the activity in question risked a result "inimical to the common defense and security" that "would arise as a *direct* result" of the license amendments in question (emphasis in original). *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 163-66 (1995) (*citing United States Dep't of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 (1982), *rev'd and remanded per curiam on other grounds sub nom. Natural Resources Def. Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982). Thus, because Petitioner's asserted injuries caused by terrorists cannot be redressed by a favorable decision in this proceeding, they provide no basis for standing.

Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982) (Licensing Board declined to admit a proposed contention addressing an external attack by terrorists commandeering a very large airplane). Petitioner's conjecture that the WBN will become a targets for terrorists is insufficient to overcome the regulatory application of 10 C.F.R. § 50.13.

9 Petitioner's security-related concerns also involve generic issues currently under Commission review. The Commission's ongoing generic review of security concerns is the appropriate vehicle for considering Petitioner's security-related concerns. Well-established Commission precedent holds that proposed contentions concerning generic issues that are (or about to become) the subject of rulemaking by the NRC should not be adjudicated in individual licensing proceedings. *See, e.g., Oconee,* CLI-99-11, 49 NRC at 345; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998); *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993).

B. Petitioner Has Failed to Identify an Aspect Within the Scope of the Proceeding

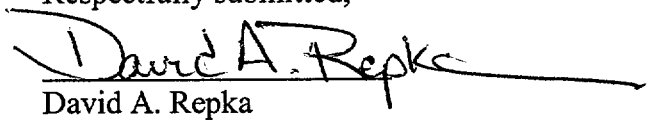
10 C.F.R. § 2.714(a)(2) also requires a petitioner to identify the "specific aspect or aspects of the subject matter of the proceeding" as to which it wishes to intervene. The purpose of this requirement is not to judge the admissibility of the issues, but to determine whether the petitioner specifies "proper aspects" for the proceeding. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978). The requirement is satisfied by identifying "general potential effects of the licensing action or areas of concern" within the scope of the proceeding. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 89 (1990).

The Petition is devoid of any information regarding the aspects of the LARs on which We The People wishes to intervene. As the Commission has held, "[t]he burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner." *Commonwealth Edison*, CLI-99-4, 49 NRC at 194. Thus, neither the Licensing Board, TVA, nor the NRC Staff is required to look to Petitioner's assertions to try to divine an aspect not advanced by Petitioner itself. *Id.*

IV. CONCLUSION

For reasons set forth above, Petitioner's request for a hearing and intervenor status does not satisfy the requirements of 10 C.F.R. § 2.714. Accordingly, the Petition should be denied.

Respectfully submitted,



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Dated in Washington, D.C.
this 29th day of January 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "TENNESSEE VALLEY AUTHORITY'S ANSWER TO REQUEST FOR A HEARING AND PETITION TO INTERVENE OF WE THE PEOPLE, INC., TENNESSEE" in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 29th day of January 2002. Additional e-mail service has been made this same day as shown below.

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