September 10, 1973

David G. Powell, Esq.
Tennessee Valley Authority
New Sprankle Building
Knoxville, Tennessee 37902

In the Matter of Tennessee Valley Authority
(Bellefonte Nuclear Plant, Units 1 and 2)
Docket Nos 50-438 and 50-439

Dear Dave:

Attached are an original and two copies of the affidavit you will need for the motion on September 17.

Also attached is a copy of ALAB-130 which explains why I don't intend to answer all the individual contentions now.

Very truly yours,

William D. Paton
Counsel for AEC Regulatory Staff

Enclosures:
As Stated.

cc w/enclosures:
William E. Garner, Esquire

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UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY Plaintiff v. THREE TRACTS OF LAND CONTAINING A TOTAL OF 1,174 ACRES, MORE OR LESS, IN JACKSON COUNTY, ALABAMA MARY TEXAS HURT GARNER, ET AL. Defendents	NO. CA 72-462

AFFIDAVIT

On June 19, 1973, the Tennessee Valley Authority (hereinafter TVA) filed with the U.S. Atomic Energy Commission (hereinafter AEC) an application for construction permits for two pressurized water nuclear reactors proposed to be located at the Bellefonte site in Jackson County, Alabama.

With respect to said application, certain obligations are imposed on AEC by the Atomic Energy Act of 1954, Title 10 of the Code of Federal Regulations and the National Environmental Policy Act of 1969 (hereinafter NEPA). In order to meet those obligations, access to the property is needed by AEC staff members and consultants from Argonne National Laboratory, U.S. Geological Survey, and the U.S. Army Corps of Engineers.

Access will be needed for a variety of purposes, among which are: observation of surface features, observation of the location and results of drilling activities and rock formations, comparisons of water levels to the land, consideration of locations of water intake and discharge structures with respect to the local ecology, consideration of the location of the meteorological measurements facility and the surrounding terrain, seismic and other exploratory work (including without limitation groundwater investigations, soil analysis, and installation of air quality monitoring instruments), and surveys and other activities connected with consideration of the health, safety, and environmental impacts of the proposed use of the site for an electric generating plant utilizing nuclear reactors.

Donald K. Davis
Licensing Project Manager
Bellefonte Nuclear Plant
U.S. Atomic Energy Commission

Gerald L. Dittman
Environmental Project Manager
Bellefonte Nuclear Plant
U.S. Atomic Energy Commission

Subscribed and sworn to before me
by Donald K. Davis and Gerald L. Dittman
this 7th day of September, 1973.

NOTARY PUBLIC
My Comm. Expires 7/1/74

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Michael C. Farrar, Member
Dr. Lawrence R. Quarles, Member

In the Matter of

MISSISSIPPI POWER AND LIGHT COMPANY

(Grand Gulf Nuclear Station,
Units 1 and 2)

Docket Nos. 50-416
50-417

Mr. Troy B. Conner, Jr., Washington, D. C., for the applicant, Mississippi Power and Light Company.

Mr. Joseph F. Scinto, for the AEC Regulatory Staff.

DECISION

(ALAB-130)

We have before us the appeal of the applicant, Mississippi Power and Light Company, from a portion of the prehearing conference order entered by the Licensing Board on May 15, 1973 in this construction permit proceeding involving the Grand Gulf Nuclear Station, Units 1 and 2. In that order, the Licensing Board granted the petition for leave to intervene of Raymond J. McGrath "insofar as [it] relates to the individual interests" of Mr. McGrath.[1] In doing so, it determined that "the petitioner has identified his interest and the manner in which it will be affected with sufficient particularity to sustain his basic right to intervene." Further, while excluding a substantial number of the contentions advanced in the petition to intervene, and reserving judgment on several others pending the receipt of further particularization, the Board expressly determined that two contentions would be admitted "as issue[s] in controversy".

Our review convinces us that the Licensing Board was justified in granting the petition to intervene. Accordingly, we affirm.

I

Before proceeding to the merits, we must correct the applicant's misapprehension respecting the meaning and effect of Section 2.714a of the Rules of Practice, 10 CFR 2.714a, which permits an appeal to us from a licensing board ruling on a petition to intervene. The applicant construes Section 2.714a to mean that where, as here, a licensing board grants an intervention petition but reserves decision on some of the contentions contained therein pending further particularization by the petitioner, the taking of an appeal may be deferred until the particularization has been received and the licensing board has ruled on those remaining contentions. This interpretation is plainly at odds with our recent decisions in *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, RAI-73-3 188 (March 29,

[1] While the petition to intervene was cast in terms of a class action, the Licensing Board ruled (1) that class actions are not permitted under the Commission's Rules of Practice; and (2) that, in any event, "petitioner has not shown that his claims and interests are typical of the class involved and that his representation will adequately protect the interests of the class". *Cf.* Rule 23 of Federal Rules of Civil Procedure. That ruling has not been challenged by the petitioner and, therefore, need not be considered by us.

1973); *Duquesne Light Co., et al.* (Beaver Valley Power Station, Unit No. 1), ALAB-109, RAI-73-4 243 (April 2, 1973); and *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, RAI-73-5 371 (May 25, 1973).

1. As those decisions squarely hold, two questions must be considered by a licensing board in determining whether to grant an intervention petition: (1) has the petitioner "demonstrate[d] the existence of a personal interest which may be affected by the proposed reactor"; and (2) does the petition "present *at least one* contention which complies with the applicable requirements". *Waterford, supra,* at p. 372 (emphasis supplied). If the licensing board is satisfied that both of those questions require an affirmative answer, it need go no further in deciding whether to allow intervention. Specifically,

> a board need not pass upon all contentions to resolve the question of whether intervention will be permitted, for it is sufficient for intervention purposes that one contention has been validly presented. The questions as to whether other contentions shall be allowed, and whether, ultimately, any contentions previously allowed can be disposed of by summary procedures, can be dealt with through further proceedings, and need not be considered in ruling upon intervention.

Ibid.[2]

Thus, in the present case, the Licensing Board fully discharged its function of deciding whether the petition for intervention should be granted when it concluded (1) that petitioner had established the requisite personal interest; and (2) that at least one of its contentions fulfilled the requirements of Section 2.714 and, therefore, should be allowed as an "issue in controversy". Having reached those conclusions, the Licensing Board properly acted on the petition without abiding the event of future rulings on other contentions which the Board believed to require further elaboration.

It follows that the appellate review provisions of Section 2.714a came into play immediately upon the issuance of the May 15 prehearing conference order. For that order represented the final determination of the Licensing Board on the question as to whether petitioner McGrath should be permitted to intervene; a determination which will not be affected by such disposition as may eventually be made by the Board with respect to the contentions as to which, for the time being, it has reserved judgment. Thus, the applicant was well advised to "protect its interest" by noting its appeal from the May 15 order, rather than awaiting (as it thought it had a right to do) further action by the Licensing Board.

2. It also follows that there is no reason for us to adopt, in the exercise of our discretion, the applicant's alternative suggestion that we withhold decision on the appeal until the Licensing Board acts on the remaining contentions. Just as the scope of that Board's inquiry on the issue of the grant or denial of an intervention petition was narrowly circumscribed, so too our role on a Section 2.714a appeal is a limited one. Under our prior decisions, what we are called upon now to decide is simply whether the Licensing Board correctly concluded that petitioner had established the requisite interest and that at least one of the contentions stated in the petition satisfies the requirements of the intervention rule. If we find such to be the case, we need not go on to examine any other contentions, or the disposition made of them by the Licensing Board, at this interlocutory stage of the proceeding.[3]

Before commencing an evidentiary hearing, a licensing board must, of course, pass upon the sufficiency of *every* contention contained in an intervention petition which has been previously granted. And, as stressed in *Beaver Valley 1, supra,* RAI-73-4 at p. 245, the board is to exclude from consideration at that

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[2] In an operating license proceeding such as *Prairie Island* and *Beaver Valley 1, supra,* the question of whether the intervention petition should be granted is often considered by a licensing board especially established for that purpose and, if the petition is granted, a discrete licensing board is then established to conduct all further aspects of the proceeding. See *Beaver Valley 1,* RAI-73-4 at p. 245. In a construction permit proceeding, such as *Waterford* and the present case, a single licensing board performs all of these tasks. For the purposes of the discussion herein, the distinction is of no moment.

[3] A conclusion that none of the contentions either accepted or rejected by the Licensing Board was adequate would require us to vacate the grant of the intervention petition. In such circumstances, the Board would be obliged to act anew on the petition after it had received the requested particularization on the remaining contentions. Unless it found at least one of those contentions to be sufficient, the petition would have to be denied.

That the appropriate disposition of the petition might therefore conceivably turn out to hinge upon determinations as yet unmade by the Licensing Board does not suggest to us, however, that we should refrain from deciding now whether, looking to the determinations which that Board *has* already made, it can be said that the petition was correctly granted. To the contrary, we have previously pointed out that intervention questions should be resolved by us as expeditiously as possible. *Iowa Electric Light and Power Co., et al.* (Duane Arnold Energy Center), ALAB-108, RAI-73-3 195 (March 29, 1973). Accordingly, if we are able to conclude at this point that the result below was right, we should do so.

hearing any co[illegible]tion which does not present a genuine issue [illegible]opriate for resolution in the proceeding. Stated otherwise, the hearing is not to embrace a contention which either (1) as presented, fails to satisfy the requirements of Section 2.714; or (2) can be summarily rejected on the merits under the provisions of Section 2.749 of the Rules of Practice.[4]

But absent a referral by the Board under 10 CFR 2.730(f), our review of its rulings on such matters does not take place until the issuance of the initial decision.[5] Through the vehicle of exceptions to that decision, the parties will be free to challenge any determination made by the Board with respect to a particular contention—so long as that determination had some bearing upon the conclusions expressed, or the result reached, in the decision. Accordingly, if a licensing board rules that a particular contention in a granted intervention petition either does not meet the requirements of Section 2.714 or is amenable to summary rejection on its merits under Section 2.749, the intervenor can challenge that ruling in seeking review of the initial decision. By the same token, an applicant which deems itself aggrieved by licensing board action on a particular contention can, if the result may have been affected thereby, make that action the subject of an exception to the initial decision.[6]

In sum, the situation comes down to this. The Licensing Board has completed its task of determining whether the petition for intervention should be granted. While it has allowed intervention, it is still in the process of examining some of the intervenor's contentions for the purpose of deciding which of them should be admitted as "issues in controversy" and which should not. For our part, we have before us under Section 2.714a only the question as to whether the petition should have been denied outright for want of either the establishment of an adequate personal interest (*i.e.*, standing) or the assertion of at least one acceptable contention.[7]

We now turn to that question.

II

1. The Grand Gulf facility is to be located at a site on the east bank of the Mississippi River in Claiborne County, Mississippi, near Port Gibson. It appears from the draft environmental statement (p. 2-7) that the area in close proximity to the reactor contains some public recreational facilities and is also used for hunting and fishing. Mr. McGrath resides and is employed in Jackson, Mississippi, located approximately 50 miles from the facility site. The Licensing Board based its finding as to his standing not on that fact, but rather on the assertion that Mr. McGrath and his family "use the area in the immediate vicinity of the site for recreation and other purposes".

We think that this assertion might have been advanced with greater particularity in the petition. And while it was elaborated upon during the course of the prehearing conference on April 18, 1973 (Tr. 32-33), the additional information was supplied by counsel rather than by Mr. McGrath—a practice of which we disapprove. *Cf. Prairie Island, supra,* RAI-73-3 at pp. 190-191; *Waterford, supra,* RAI-73-5, fn. 6 at p. 372. Nevertheless, particularly since the assertion does not seem to have been seriously questioned,[8] we cannot regard as irrational the Licensing Board's conclusion that Mr. McGrath had sufficiently identified an interest which might be affected by the reactor. Consequently, we do not disturb that conclusion. *Prairie Island, supra,* RAI-73-3 at p. 193; *Beaver Valley 1, supra,* RAI-73-4 at p. 244.

2. Petitioner's contention 16(14) is to the effect that "the alternatives of conserving electricity or utilizing other methods of producing energy have not been adequately considered". At the prehearing

[4] All contentions, including the one or more on which the licensing board predicates its grant of the intervention petition, are subject to the summary disposition procedures outlined in Section 2.749. The fact that a contention may be adequate for the purposes of Section 2.714 does not mean that it necessarily gives rise to a "genuine issue [which must] be heard", within the meaning of Section 2.749. See *Beaver Valley 1, supra,* RAI-73-4 at pp. 244-245.

[5] Section 2.730(f) precludes the taking of an interlocutory appeal from a licensing board ruling.

[6] The same privilege is enjoyed by the regulatory staff.

[7] It was on the basis of the foregoing considerations that, on May 30, 1973, we entered an order which, *inter alia,* denied the applicant's motion to defer action on its appeal.

[8] On this score, the applicant contends simply (Br. p. 7) that petitioner was not sufficiently specific respecting the "precise locations and duration" of his recreational activities in the area of the plant. We do not agree. It was stated that petitioner and his family use the Grand Gulf Park (which is contiguous to the facility site) and that he boats on the Mississippi River "[r]ight by" the site "[n]ot on a weekly basis, but every several months". (Tr. 32-33). That was enough specificity to undergird petitioner's claim of standing.

conference, petitioner's counsel stated that the basis for that contention was that the amounts expended by the applicant on advertising greatly exceeded (by a factor of 11) that devoted to research and development, and that he intended "to introduce evidence that there are geothermal sources in the Middle South Utilities' System area that could be utilized" (Tr. 66-67). We agree with the Licensing Board that, given this particularization, the contention is adequate,[9]

Applicant points (Br. pp. 11-12) to the fact that its environmental report represents (at p. 8.2-2) that there are "no known potential geothermal sites in the MSU service area" and that a like representation is to be found in the staff's draft environmental statement (at p. 9-14). The regulatory staff, which supports applicant's position that contention 16(14) should have been disallowed, makes a somewhat similar point in its brief (pp. 4-5): that petitioner has neither buttressed its allegation that there are geothermal sources in the area nor indicated that the alleged sources would or could provide a feasible alternative to the Grand Gulf facility. But, at the risk of undue repetition, we stress again that, in passing upon the question as to whether an intervention petition should be granted, it is not the function of a licensing board to reach the merits of any contention contained therein. Moreover, Section 2.714 does not require the petition to detail the evidence which will be offered in support of each contention. It is enough that, as here, the basis for the contention respecting the inadequacy of the consideration of alternatives to the construction of this plant is identified with reasonable specificity.

Needless to say, it will be open to both the applicant and the regulatory staff to move, pursuant to Section 2.749, for summary disposition of contention 16(14) on the ground that "there is no genuine issue to be heard" respecting the availability of adequate geothermal sources in the relevant area. In responding to such a motion, should one be filed, Mr. McGrath will be obliged to furnish the Licensing Board with a statement of the material facts which he considers to establish the evidence of a genuine issue respecting such availability. Section 2.749(b) is most specific in this regard:

> When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered.

The existence of this summary disposition procedure—which was adopted at the same time as the contentions provision of the present Section 2.714—is a further indication of the error in the view of the applicant and the regulatory staff that an intervenor must provide the evidentiary foundation for its contention (*i.e.*, demonstrate that it has merit) before it is admitted into the proceeding.[10]

3. Applicant also complains of the fact that the Licensing Board has given Mr. McGrath a further opportunity to particularize the contentions as to which the Board reserved judgment in the May 15 order. In view of the limited scope of our review on a Section 2.714a appeal, this question is not properly before us. In any event, a licensing board of necessity must be accorded very broad latitude in matters of this kind and it does not here appear that it abused its discretion.

III

For the foregoing reasons, we hold (1) that applicant's appeal is not premature, and (2) that the granting of Mr. McGrath's petition for leave to intervene was correct. Accordingly, the portion of the May 15, 1973 prehearing conference order under appeal is *affirmed.*

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

Margaret E. DuFlo
Secretary to the Appeal Board

Dated: June 19, 1973

[9] Consequently, it is not necessary for us to decide whether the Licensing Board was also correct in its conclusion that contention 16(18) fulfilled the requirements of Section 2.714.

[10] The Licensing Board may deem it appropriate to afford the parties the opportunity for discovery prior to acting upon a motion for summary disposition. *Cf.* Section 2.749(d).