UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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)

TENNESSEE VALLEY AUTHORITY'S BRIEF RESPECTING THE COMMISSION'S REVIEW OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARD DECISION

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Knoxville, Tennessee
May 6, 1982

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INTRODUCTION

The full Commission of the Nuclear Regulatory Commission (NRC) has granted the petitions of the Tennessee Valley Authority (TVA) and the NRC staff to review the Appeal Board's decision, In re Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-664, 15 NRC ____ (slip op. Jan. 6, 1982). The Commission accepted review of two significant policy and procedural questions:

> 1. Whether the Appeal Board correctly determined that a ruling on the petitions for intervention in this proceeding must await the filing by the NRC staff of its environmental assessment and the opportunity for petitioners and TVA to comment on the assessment.
>
> 2. Whether the Appeal Board was justified in reinstating contention nine, despite petitioners' failure to address its dismissal by the Licensing Board in its brief to the Appeal Board [Commission order (April 16, 1982) at 2].

The Commission, pending review, stayed the effectiveness of the Appeal Board decision which vacated the Licensing Board order dismissing the petitions to intervene (see In re Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), LBP-81-40, 14 NRC 828 (1981)).[1]

In accordance with the Commission's request for written briefs on the two limited issues, this brief does not specifically address the other errors in the Appeal Board decision or additional matters relevant to the petitions to intervene raised below. However, TVA does not waive those issues.[2]

PROCEDURAL HISTORY

TVA, a corporate agency and instrumentality of the United States established under the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended, 16 U.S.C. §§ 831-831dd (1976; Supp. IV, 1980), owns and operates the three-unit Browns Ferry Nuclear Plant located in Limestone County, Alabama. Each unit is licensed for a thermal power level of 3,293 megawatts. Commercial operation of Units 1, 2, and 3 began

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1 NRC counsel has informed us that, because in the NRC staff's view the Commission's order was unclear, the staff will not take any action on TVA's application or amendment to its operating license (which if granted would permit use of the now completed storage facilities) until the Commission completes review. In addition, the Licensing Board by order dated April 19, 1982 has delayed any further action in the proceeding pending a decision by the Commission. These actions put TVA in the worst possible position regarding further delay in this matter. Until the Commission acts, neither the staff nor the Licensing Board will take any further action on the requested license amendment.

2 For the convenience of the Commission, TVA has attached (Appendix A) a copy of its November 23, 1981 brief to the Appeal Board that addresses some of these subsidiary matters.

on August 1, 1974, March 1, 1975, and March 1, 1977, respectively. Operation of Browns Ferry Nuclear Plant results in planned generation of low-level radioactive wastes (LLRW). This waste consists of ion exchange and condensate demineralizer resins and miscellaneous trash such as polyethylene boots, rubber shoe covers, plastic hose, gloves, pine crates, scrap iron, mops, and brooms.

TVA must store or dispose of this waste in order to continue to operate the plant. Although a small amount of onsite storage capacity is available at the plant, TVA presently ships most of its LLRW to the licensed disposal facility at Barnwell, South Carolina. Because space is limited at Barnwell, the facility operator restricts the volume of wastes it will accept from the various utilities and others shipping to Barnwell. The disposal space allocated to TVA is gradually decreasing, thus forcing TVA, like all others who ship to Barnwell, to seek alternative arrangements for managing its LLRW.

The TVA Board of Directors has authorized the TVA staff to study and develop methods to manage LLRW, including onsite storage and volume reduction. As part of this evaluation, TVA prepared environmental assessments (EAs) in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1976; Supp. III, 1979) (NEPA), that addressed both life-of-plant storage and volume reduction at three plants, including Browns Ferry. Those EAs concluded that insignificant environmental consequences would result from storage and volume reduction. Under TVA's NEPA procedures (45 Fed. Reg. 54,511 (1980)), an EA merely evaluates the environmental consequences prior to any decisionmaking and does not commit TVA to a particular action.

On July 31, 1980 TVA submitted an application for life-of-plant storage of LLRW at Browns Ferry. On November 17, 1980 TVA modified the request to ask for approval to store LLRW for up to five years. As permitted under NRC regulations, TVA has constructed several concrete modules for this purpose and they stand ready for use today. These facilities assure that plant operations can continue whether or not offsite disposal space temporarily is limited. TVA would use them whether or not it later chooses to utilize volume reduction technology.[3]

In response to the notice of an opportunity for hearing dated December 11, 1980 (45 Fed. Reg. 81,697), a number of persons filed identical petitions to intervene. These petitioners, through two additional filings by counsel (one postdating the April 10, 1981 prehearing conference) proferred nine "contentions," eight of which sought solely to question TVA's purported future plans for volume reduction and long-term (life-of-plant) storage of LLRW. TVA and the NRC staff opposed intervention because none of the nine proposed contentions sought to contest a relevant issue of fact with the required specificity of 10 C.F.R. § 2.714 (1981).[4] In addition, TVA argued

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3 In the meantime, the TVA Board authorized the staff to begin preliminary design and investigative work that may eventually lead to procurement and installation of a volume reduction and solidification system at Browns Ferry as well as at two other plants. Although TVA may at some future time seek NRC approval to operate a volume reduction and solidification system at Browns Ferry, only the five-year proposal is before the NRC and subject to the notice in this proceeding (In re Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980)).

4 For a somewhat more detailed history, see TVA's appeal brief at 1-3.

that petitioners, each of whom lived at least 30 miles from the site, lacked standing to intervene.[5]

The Licensing Board's October 2, 1981 prehearing conference memorandum and order held that the petitioners had stated no contention which satisfied the requirements of 10 C.F.R. § 2.714. For that reason it dismissed the petitions and rejected the requests for hearing. Specifically, the Board held that petitioners did not seriously question TVA's five-year storage proposal (LBP-81-40, supra, 14 NRC at 831). It found that petitioners focused on what appeared to them to be TVA's longer term LLRW management plans (id.). The Licensing Board ruled that TVA's five-year proposal had immediate, independent utility (id. at 832). The Licensing Board then applied Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), in light of those two uncontested findings and held the NRC's consideration of TVA's five-year storage request did not improperly segment an LLRW management plan (LBP-81-40, supra, 14 NRC at 833). Consequently, it decided that all petitioners' contentions, which were based on a theory of improper segmentation, must fail as outside the scope of the proceeding (id.).

The Licensing Board also investigated the adequacy of each contention and found that, aside from the failure of petitioners to

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5 As pointed out at page 7 of TVA's appeal brief and argued at pages 10-13 therein, no legal presumption should attach to an operating license amendment of the limited nature here involved automatically conferring standing on these petitioners, each of whom lives at least 30 miles from the plant (see also In re Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), NRC Docket No. 30-6931, memorandum and order at 9-13 (March 31, 1982) (Appendix B)). The Licensing Board and the Appeal Board declined to rule on the question of standing.

raise relevant matters, many contentions were too vague to give adequate notice of what petitioners proposed to litigate or raised matters outside NRC's jurisdiction. The Licensing Board said contention 9 was the only one which addressed the application for five-year storage (id. at 836). It held that the contention was impermissibly vague and raised matters beyond NRC's jurisdiction (id. at 837).

Petitioners appealed. On January 6, 1982 the Appeal Board in ALAB-664 issued an unprecedented decision that vacated and remanded LBP-81-40 for reconsideration of the adequacy of petitioners' contentions (and provides petitioners with yet another opportunity to file adequate contentions) once the NRC staff has completed its full licensing evaluation. TVA and the NRC subsequently petitioned for review. The petitioners did not respond. The Commission's April 16 order accepts review on two issues as set out above.

THE APPEAL BOARD DECISION

The Appeal Board decided that the record below was insufficient to support the Licensing Board's finding that five-year storage had independent utility (ALAB-664, slip op. at 8-9).[6] The Appeal Board did agree with the Licensing Board (and this point was not disputed by petitioners before the Licensing Board or on brief to the Appeal Board)

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6 Relying on Minnesota v. NRC, supra, and In re Duke Power Co. (Amendment to Materials License SNM-1773), ALAB-651, 14 NRC 307 (1981), the Appeal Board correctly determined (slip op. at 18-19) (see TVA's appeal brief at 20-24) that under appropriate circumstances NRC could segregate and separately license an activity which was a part of a larger plan if that activity had independent utility. There is no disagreement with this proposition.

that "five year storage . . . offer[ed] a necessary, short term solution to TVA's storage problem" (id. at 12). Equally important, the Appeal Board held that because volume reduction would require additional NRC approval "[a]s a matter of procedure, therefore, the petitioners will have a subsequent opportunity to present their concerns . . ." (id.). However, even though petitioners did not raise the matter on brief and never contested it before the Licensing Board, the Appeal Board questioned whether approval of five-year storage would "as a practical matter . . . unduly circumscribe the Commission's decisional alternatives when subsequent applications are submitted" (id.).

Consequently, it vacated the Licensing Board order, reinstated the petitions, and remanded the matter to the Licensing Board for further consideration.

> Before the Board makes that decision, however, it must await the submission of the staff's environmental assessment and invite TVA to comment on what options it might later pursue in light of its decision to proceed only with the five year storage plan at this time. The Board must also permit the petitioners to recast their contentions to plead with specificity (i) the respects in which they believe that approval of the five year plan would inevitably lead to operation of the waste reduction and solidification facility, and (ii) why the environmental effects of incineration cannot be adequately considered if and when TVA seeks approval of that aspect of its overall plan. The Licensing Board can then decide whether these revised contentions satisfy the requirements for intervention set out in 10 CFR 2.714.[13/]

13/ Original Contentions 1-5 [sic], along with contentions prompted by the staff's environmental assessment, will be considered under the general intervention standards. The Licensing Board may, if it wishes, consider Contentions 6-9 under the standards governing nontimely requests [ALAB-664, slip op. at 21].

The Appeal Board reinstated every contention (numbers 5, 6, 7, 8, and 9 subject to timeliness), even though petitioners failed to brief the reasons for the Licensing Board's dismissal of contention 9 and did not address at all contentions 2, 6, 7, and 8.

As Appeal Board Chairman Eilperin's lucid dissent pointed out, petitioners have abandoned any interest they might have had in the five-year storage proposal (ALAB-664, slip op. at 35-36).[7] He agreed with his colleagues that the Licensing Board correctly determined that TVA needed the facility and that petitioners' procedural rights would not be prejudiced by approval of the five-year storage request (ALAB-664, slip op. at 24). He disagreed that petitioners might be practically precluded from raising volume reduction issues later and argued that petitioners had not alleged any possible practical prejudice (id.). Chairman Eilperin rightly discerned that the majority had confused the obligations of the NRC staff to review the entire amendment with obligations of the petitioners to plead specifically what limited matters interested them at the outset (see ALAB-664, slip op. at 27-29). He concluded by pointing out that the Appeal Board's decision really rested on grounds not briefed (or contested) by petitioners. The proper course consistent with past practice would be to treat the matter as having been waived (ALAB-664, slip op. at 36-37).

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7 Petitioners reaffirmed that they "don't really have a problem with the addition of the storage facilities" (tr. at 117) at the April 1, 1982 prehearing conference (Appendix C, tr. at 117-18).

SUMMARY OF POSITION

The Appeal Board authorizes a radical departure from the Commission's longstanding rules of practice and injects new significant delay into the licensing process. Parties and contentions must be delineated at the outset of a proceeding, not after the NRC staff has completed its review. This is done in order to focus issues. It reflects a balance of fairness among all parties. This helps the Licensing Board reach a sound decision in an expeditious manner on specific factual disputes.

The Commission long ago stated that where intervenors did not properly raise issues NRC adjudicative boards are under no general mandate to do so sua sponte where no important issue is involved (see In re Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 9 (1974)). Yet the Appeal Board majority in ignoring that and later directives acted incorrectly. It raised an issue not in dispute and not briefed in order to vacate a well-reasoned, sound Licensing Board order. The Appeal Board's action disregards NRC procedure (10 C.F.R. § 2.714) for initial pleading of relevant factual issues with specificity. It directly contravenes recently expressed Commission policy (In re Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54, 457 (1981)) for balanced, efficient adjudication where real and relevant factual issues are raised.

It is TVA's position that the Appeal Board as a matter of law and policy improperly vacated the Licensing Board order and adopted a

procedure, dependent on the NRC staff's environmental evaluation, contrary to NRC rules of practice. The Appeal Board's reinstatement of contention 9 is but a specific example of the larger problem. Petitioners did not address the Licensing Board's grounds for rejection and by doing so TVA asserts they waived any right to appeal. Accordingly, the Commission should reverse the Appeal Board's decision and affirm the Licensing Board's order dismissing the petitions.

This case illustrates what happens when NRC's procedural rules, practices, and policies are loosely followed or simply ignored. One and one-half years after submitting a minor license amendment request, the effects of which no petitioner now questions, the most preliminary decision on whether or not a hearing will be held and what issues will be addressed still has not been made.

ARGUMENT

I

The Appeal Board Has Raised A Spurious Issue.

A. Licensing of TVA's five-year storage proposal is not improper segmentation.

Petitioners claim in their appeal brief and through their contentions that TVA has a long-term plan for Browns Ferry that includes volume reduction and therefore NRC may not lawfully segment its review. Their legal conclusions are wrong.

The NRC may license an activity with independent utility regardless of future plans. In Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), the court let stand an Appeal Board's denial of an intervenor's attempt to delay spent fuel storage capacity expansion (analogous to what petitioners would have done here). The intervenor's position was based on the fact that the utility eventually would have to obtain an additional license amendment for long-term storage.

> [Intervenor] contends that NRC violated NEPA by improperly "segmenting" its consideration of the environmental impact of expansion of onsite storage capacity at Prairie Island. The theory is that because the present expansion of the spent fuel pool will accommodate the spent fuel assemblies produced at Prairie Island only until 1982, a request for further expansion is inevitable. Citing Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), Minnesota argues that the NRC was required to take into account the environmental impact of this "unavoidable consequence" of the current expansion.
>
> We find this argument without substance. Minnesota has not pointed to any consequence of future expansion that could not be adequately considered at the time of any requests for further expansion. . . . The Staff specifically found that the licensing action here would not foreclose alternatives available with respect to other licensing actions designed to ameliorate a possible shortage of spent fuel capacity (noting that "taking this action would not necessarily commit the NRC to repeat this action or a related action") and that addressing the environmental impact associated with the proposed licensing action would not overlook any cumulative environmental impacts [Minnesota v. NRC, supra, at 416 n.5 (emphasis added)].

As the Licensing Board found, petitioners do not contest the independent utility of five-year storage (LBP-81-40, supra, at 832). "Petitioners do not question this proposition. Nor does it appear

likely that granting this authority would in any way prejudice NRC action on future TVA applications dealing with LLRW management" (id.; emphasis added). They have alleged no consequence from long-term storage or a volume reduction solidification system that cannot be adequately evaluated at the time, if ever, that TVA should make a licensing request for those items. Because petitioners had the burden to point out the consequences that could not be considered at a later time, the independent need for and utility of TVA's five-year storage proposal allows this action to proceed regardless of volume reduction (see In re Duke Power Co. (Amendment to Materials License SNM-1773), ALAB-651, 14 NRC 307 (1981) (Oconee-McGuire)).

> In the instance of a segmented non-federal plan, NEPA does not impose an inflexible requirement that the entire plan receive an environmental assessment at the time that the first segment is put before a governmental agency for licensing action. Rather, it is settled that the agency may confine its scrutiny to the portion of the plan for which approval is sought so long as (1) that portion has independent utility; and (2) as a result, the approval does not foreclose the agency from later withholding approval of subsequent portions of the overall plan. See e.g., Atlanta Coalition v. Atlanta Regional Commission, 599 F.2d 1333 (5th Cir. 1979); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976); Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976); Trout Unlimited v. Morton, 509 F2d 1276 (9th Cir. 197[illegible]; Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973). As summarized by the Eighth Circuit in Froehlke, 534 F.2d at 1297:
>
> > The courts have been presented with the issue of "segmentation" of impact statements in various contexts and we do not propose to attempt the impossible, namely, the enunciation of a general rule that will cover all cases. The crucial dependence is upon the facts before the court in the particular case sub

> judice. Where it is found that the project before the court is an essentially independent one, an EIS for that project alone has been found sufficient compliance with the act. In such case there is no irretrievable commitment of resources beyond what is actually expended in an individual project [14 NRC at 313].

The Appeal Board correctly held that Oconee-McGuire does not require the Licensing Board to delve into TVA's planning process because of TVA's federal status. "If the petitioners wish to challenge TVA's compliance with its separate environmental responsibilities, they must do so in another forum" (ALAB-664, slip op. at 19). This is the law of the case, since petitioners did not challenge this legal conclusion by filing a response to TVA's and NRC's petitions to review. Also, petitioners essentially have conceded (their appeal brief at 5) that under Oconee-McGuire the first segment of an overall management plan for wastes can be considered independently by the NRC. At this point, then, no cognizable dispute exists because petitioners have not contested the independent utility of five-year LLRW storage, and their assertions in the petitions about segmentation are legally wrong.

B. The Appeal Board erred in suggesting that TVA's long-term plans were material to this proceeding.

The Appeal Board has misconstrued the applicable standards for judging independent utility under NEPA. It erroneously determined that in order to find that the five-year storage proposal has independent utility the Licensing Board must find no "sufficient nexus" between

five-year storage and other planning options (ALAB-664, slip op. at 9). The nexus between present onsite storage and future LLRW management planning is entirely immaterial in any determination of independent utility (see Kleppe v. Sierra Club, 427 U.S. 390 (1976)). The proper test is to see if storage is needed and if now proceeding with storage will foreclose consideration of alternatives in the future (In re Duke Power Co. (Amendment to Materials License SNM-1773), ALAB-651, 14 NRC 307, 313 (1981) (Oconee-McGuire); Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)). The need is not contested (ALAB-664, slip op. at 11-12). Thus, the only remaining question is whether five year storage forecloses the future full consideration of alternatives.[8]

The Appeal Board without explanation of its reasoning concluded that storing LLRW onsite for an interim period could foreclose future alternatives (ALAB-664, slip op. at 15). Such reasoning fails to take into account that TVA's operating licenses now authorize the plant to generate LLRW incident to plant operations and to store that material onsite prior to shipment offsite. The requested amendment would do no more than change the present location of onsite storage from small temporary locations to larger facilities specifically designed to store LLRW and thereby increase the amount of material that could be kept. If long-term storage or volume reduction should

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8 The fact that TVA has already taken the risk to build several storage modules without seeking approval for volume reduction or longer term storage shows that TVA believes they are needed now, irrespective of any possible future alternatives.

eventually be proposed as a component of TVA's operations, the NRC staff must and still can fully evaluate those options at the time TVA requests a license amendment. No one contests that fact (ALAB-664, slip op. at 25).

Volume reduction is a spurious issue in this proceeding. It is by no means an inevitable result of five-year storage. Accordingly, even if the Appeal Board majority were correct, which it is not, in assuming that TVA has already decided upon some comprehensive low-level waste program for Browns Ferry,[9] since the five-year storage proposal clearly has independent utility, the existence of a long-term TVA plan for Browns Ferry is as immaterial to this proceeding as it was in Oconee-McGuire. The Appeal Board's statements to the contrary are plainly wrong.

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9 The Appeal Board's statement that TVA originally submitted a request for volume reduction (ALAB-664, slip op. at 12) and that TVA plans to use volume reduction (id. at 4) is wrong. TVA's environmental document was an assessment for NEPA purposes. It does not reflect a past decision but is rather to be used in making a decision. The Appeal Board also erred in saying that NEPA mandates that the environmentally preferable option be implemented (ALAB-664, slip op. at 17). There is no such substantive legal requirement (see Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)).

II

The Appeal Board Incorrectly Vacated the Licensing Board Order and Imposed Procedures Inconsistent with NRC Rules and Policy.

A. The Appeal Board decision contravenes longstanding rules and policies requiring specific pleadings at the outset of a proceeding.

NRC procedural regulations clearly require at least one timely, specific, relevant, factual contention to be pleaded before intervention is sanctioned (and in the case of an operating license amendment before a hearing will be held) (10 C.F.R. § 2.714 (1981)).[10] As established above, however, petitioners have not properly identified any cognizable issue in this proceeding. The Appeal Board in permitting the petitioners to try again turns the pleading process upside down, wholly neglecting the basic policy considerations which impose upon prospective intervenors the obligation of identifying specific factual issues at the outset of a proceeding.

The NRC pleading rules balance the rights of potential intervenors with those of the applicant, NRC staff, and Licensing Board to know at the outset of a proceeding with clarity and precision what arguments are being advanced. In its first order explaining the purpose of the expanded rules of practice in 1971, the Commission stated that in accepting petitions to intervene

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10 The need for specific, relevant, factually based contentions, especially when a hearing would not otherwise be held, is argued in TVA's appeal brief at 14-19. TVA also sets forth at pages 24-35 in detail why each contention fails to comply with 10 C.F.R. § 2.714.

> [a] cardinal prehearing objective . . . will be to establish, on as timely a basis as possible, a clear and particularized identification of those matters related to the issues in this proceeding which are in controversy. As a first step in this prehearing process, we expect the Board to obtain from petitioners a detailed specification of the matters which they seek to have considered in the ensuing hearing [In re Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), 4 AEC 635, 636 (1971) (emphasis added)].

Accord, In re Boston Edison Co. (Pilgrim Nuclear Power Station), 4 AEC 666, 667-68 (1971).

> In the Commission's view, the course outlined above is central to the proper focus and orderly conduct of the prehearing process, including the scope of appropriate discovery, and of the later hearing itself [id. at 668].

This is especially important when a hearing will not otherwise be held except on receipt of an adequate petition to intervene (see In re Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 AEC 689, 690 (1971); accord, In re Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 358 (1972), aff'd sub nom. Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974)).

> [Petitioner] does not challenge the guidance given to this Licensing Board in the hearing notices or the Licensing Board's compliance with that guidance. Instead, [petitioner] asserts that the Licensing Board must conduct what amounts to a de novo review of all matters (i.e., radiological safety as well as environmental) relating to the issuance of the operating license, whether or not in controversy. As we have previously held with respect to radiological safety matters, a proceeding of this type is not intended to encompass a de novo review but is "intended to resolve specific problems with respect to the plant in question." Absent a petition for intervention raising such problems, no public hearing need be held [5 AEC at 358; footnote omitted].

Traditionally, based on the information contained in the applicant's submittal, would-be intervenors have been required and have been able to frame at least one adequate factual contention at the outset of a proceeding. While it is true that additional issues may be identified or prior issues refined upon discovery or with the issuance of the NRC staff's review documents, this does not change the obligation of potential intervenors to frame issues at the outset of a proceeding (In re Wisconsin Elec. Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974)).

The argument that petitioners' obligation to be specific at the outset of a proceeding is somehow unfair has already been resolved by the Appeal Board, Commission, and courts.

> Section 2.714(a) reflects the administrative conclusion that the effectuation of the purposes of the Atomic Energy Act requires that the request for a hearing (in the form of a petition for intervention) include an identification of the contentions which the petitioner seeks to have litigated in the matter. To our mind, there is nothing unreasonable about this conclusion. It certainly would not further--but indeed would impede--the orderly carrying out of the adjudicatory process to accord an individual the status of a party to a proceeding in the absence of any indication that he seeks to raise concrete issues which are appropriate for adjudication in the proceeding. This is particularly so on the operating license level where, by virtue of Section 189a. of the Act itself, there is no mandatory hearing requirement; i.e., the license may be issued without a hearing in the absence of a proper request therefor. It is difficult for us to perceive any rational basis for triggering the hearing mechanism without regard to whether there are, in fact, any questions which even possibly might warrant resolution in an adjudicatory proceeding. Cf. Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 594-595 (D.C. Cir. 1971).

> We are unimpressed with petitioners' suggestion (Br. pp. 2-3) that it is not possible for them to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures. In the first place, we can take official notice of the fact that, without prior resort to discovery, BPI has filed contentions in several past cases. More fundamentally, the suggestion ignores the fact that there is abundant information respecting the particular facility available to the public at the time of the publication of the notice of hearing or of an opportunity for hearing--including at least the applicant's detailed safety analysis and environmental reports [In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92 (1973) (footnotes omitted), aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd sub nom., BPI v. Atomic Energy Comm'n, 502 F.2d 424 (D.C. Cir. 1974); accord, Koshkonong, supra].

The procedures that delineate under what circumstances a hearing is provided are left to the discretion of the agencies to which Congress has confided responsibility for substantive judgment (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978)). The obligation to show that there are material factual issues (as opposed to legal issues) in dispute before a hearing is held is one the Supreme Court has upheld on a number of occasions (see, e.g., Costle v. Pacific Legal Foundation, 445 U.S. 198, 214 (1980); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 621 (1973); FPC v. Texaco, 377 U.S. 33, 39 (1964)).

> We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open [United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956)].

The pleading obligation of petitioners has two purposes. The first is to focus the proceeding on issues of fact in dispute.

> The Commission's regulations . . . prescribe that [petitioners] must be specific as to the focus of the desired hearing. In this manner the Commission narrows those within the larger class to those entitled to participate as intervenors, and thus to assist the Commission in the resolution of the issues to be decided. In doing so we do not think the agency transgresses its legislative charter [BPI, supra, at 429].

The second, as the Appeal Board has described, is one of fairness.

> The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being asked . . . . So is the Board below. It should not be necessary to speculate about what a pleading is supposed to mean [In re Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975); emphasis added].

The Commissioners have noted a similar policy consideration.

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations [Statement of Policy, supra, 13 NRC at 454].

As Chairman Eilperin correctly points out (ALAB-664, slip op. at 30), the majority's cryptic statement that the right to intervene may turn on the staff's conclusions is no more than a bootstrap

argument.[11] It makes no attempt to address the basic policy underpinnings of section 2.714. The Appeal Board in allowing petitioners to wait until NRC has completed its evaluation, some one and one-half years after the proceeding began, violated the cardinal rule on which NRC's system of practice is based.

B. The Appeal Board has confused the obligations of the NRC staff with those of the petitioners.

The Appeal Board draws support for turning the pleading process upside down through confusing what the NRC staff must do to approve the license amendment with petitioners' obligation to properly plead an issue. Petitioners' obligation--that of identifying contested issues--is different from that of the NRC staff, which must review all relevant issues. In confusing these two fundamental roles the Appeal Board errs.

The obligations of the petitioners to plead specific, factual, relevant contentions under section 2.714 and the Board's duty to resolve them are independent of the NRC staff's duty to review the license amendment request and are based on different considerations (see Union of Concerned Scientists, supra, 499 F.2d at 1077-78). The NRC staff

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11 In effect, the Appeal Board is also permitting the petitioners to ignore the clear requirements of timely pleading prior to the first prehearing conference without petitioners having justified their delay in doing so. The Appeal Board cannot direct a Licensing Board to accept late-filed recast contentions without requiring petitioners to address the five factors of 10 C.F.R. § 2.714(a)(1) (In re Nuclear Fuel Servs., Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 616 n.6 (1977)).

(and ACRS) are responsible for compiling the record on all relevant issues. The Board resolves only contested issues. A Licensing Board is not under an obligation to review all matters de novo. Congress did not intend for further hearings to be held absent a bona fide intervention (id.).

Petitioners must show why a hearing is "worthwhile." They do "'not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists'" (In re Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC ____ (Feb. 11, 1982) (reported in CCH Nuc. Reg. Rep. ¶ 30,660 at 30,181, 30,195 n.29) (a broad allegation that an EIS is needed would not be sufficient under section 2.714)). They have the burden to explain how the consequences of future actions at Browns Ferry cannot be adequately considered at a later time (Minnesota v. NRC, 602 F.2d 412, 416 n.5; see also Vermont Yankee, supra, at 553-54).

The petitioners have failed to specify why an EIS is needed for NRC's licensing action relying solely on generalized legal conclusions. Spent fuel capacity expansion, a seemingly more compelling situation, has been permitted without an EIS in every case reaching final decision (see In re Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981); In re Commonwealth Edison Co. (Quad Cities Station, Units 1 and 2), order (Oct. 27, 1981)). It appears incongruous for TVA's request to expand LLRW storage to be subject to the preparation of an EIS when its spent fuel capacity expansion request was granted at Browns Ferry as well as numerous other plants without one. Thus the

Appeal Board should have required the petitioners to comply strictly with the provisions of 10 C.F.R. § 2.714. Having failed to allege specifically why an EIS is needed, their contentions were invalid. There is no indication from the Appeal Board how it considered petitioners so unusually handicapped that the simple requirements for timely pleading could be ignored.

The Appeal Board presumes that petitioners must have additional documentation by the NRC staff and TVA in order to be able to tell whether an interest will in fact be affected and to frame contested issues. Apart from being contrary to fundamental Commission practice and policy regarding the burden imposed on petitioners under section 2.714, this position makes no practical sense (Union of Concerned Scientists, supra, at 1077). It automatically injects several years into the hearing process, because no prehearing procedures can commence until the issues are delineated. Petitioners' role is not to independently evaluate the record. Nor by broad assertions can petitioners impose that duty on the Licensing Board (id.). That is the job of the NRC staff. Petitioners must raise and must plead specific issues of factual dispute at the outset of a proceeding. The Appeal Board decision simply confuses the fundamental distinction among roles.

C. The Appeal Board in remanding the proceeding raises an issue not sought to be litigated by the petitioners.

The Appeal Board reversed the Licensing Board and remanded the proceeding to resolve an issue not raised below nor briefed by the

petitioners (ALAB-664, slip op. at 12). Aside from being contrary to NRC policy, this directly violates NRC procedural rules.

NRC procedure prohibits a Licensing or Appeal Board from raising any issue sua sponte, except under very limited circumstances. The Appeal Board may look only at "serious" issues not raised by the parties below (see 10 C.F.R. § 2.760a (1981)). That authority must be exercised with care. The Boards have an obligation to make an affirmative finding of the need to address the issues the Licensing and Appeal Boards raise on their own (In re Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC ____ (Dec. 29, 1981) (reported in CCH Nuc. Reg. Rep. ¶ 30,656 at 30,159). To pose a question merely meeting the requirements of section 2.714 will not satisfy this obligation (id.). No serious issue falling within the ambit of section 2.760a is raised here, nor has the Appeal Board identified one.

The Commission has specifically warned against broad ranging inquiries in the past.

> The Licensing Board has mistakenly assumed that it is under a mandate from the Appeal Board to explore and resolve specific issues in operating licensing proceedings which have not been raised by the parties. We affirm the Appeal Board's finding that none of its decisions require such an undertaking.
>
> To have a Licensing Board engage in an idle exercise examining issues just for the sake of examination--when the parties have not raised such matters, and the Board is satisfied that there is nothing to inquire about--would serve no useful purpose [Indian Point, supra, 8 AEC at 8].

Again, as the court in Union of Concerned Scientists, supra, at 1077, points out, to have the Licensing Board independently evaluate uncontested issues would inappropriately intrude on the NRC staff's function, would be contrary to congressional intent, and would be impractical.

The issue which the petitioners must address on remand (ALAB-664, slip op. at 21) is one they have never sought to litigate. Petitioners have not raised the issue of need, nor alleged that the grant of a five-year storage license would practically foreclose alternatives, thereby forcing the NRC to approve a future volume reduction request.[12] They have not challenged the Licensing Board's findings on those matters. Consequently, the Appeal Board erred in questioning matters supported by Licensing Board findings but not challenged below, and the Licensing Board order must be affirmed.

III

The Appeal Board Improperly Reinstated Contention 9.

As Chairman Eilperin correctly notes in his dissenting opinion (ALAB-664, slip op. at 34-36), the Appeal Board reinstated contention 9

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12 Moreover, it is clear that prior practice precludes petitioners from taking up this issue, a matter never raised below, on appeal.

"Intervenors also have never advanced any particular challenge to the calculations used to demonstrate the ability of the plant to withstand a design basis crash. They thus never raised the issue below, and accordingly have no right to raise it here. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 351-52 (March 17, 1978)" (In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 n.36 (1978)).

(subject to a challenge on timeliness) even though petitioners' appeal brief did not adequately address that item. The Appeal Board's action clearly conflicts with prior law which treats as waived unbriefed or inadequately briefed matters on appeal.

Proposed contention 9 reads in pertinent part:

> The environmental impacts of TVA's proposal for five year LLRW storage . . . are not adequately discussed . . . because there is a failure to consider the costs of decommissioning of the storage modules or other long term disposition of the LLRW at the conclusion of the five year storage [petitioners' amended contentions, contention 9].

The Licensing and Appeal Boards agreed that to the extent this contention challenged TVA's environmental assessment it could not be considered. The Licensing Board further found the contention too vague to be admitted (slip op. at 17) because it did not indicate what five-year storage costs were challenged and why the costs should be considered. Petitioners simply had furnished no factual orientation from which it could be determined how they would have the Licensing Board evaluate decommissioning costs.

In their appeal brief petitioners in passing mentioned contention 9 in relation to impacts from volume reduction, but failed to brief the adequacy of the contention with respect to five-year storage. The Appeal Board reinstated contention 9, saying that costs both economic and environmental could be considered with respect to five-year storage (ALAB-664, slip op. at 19-20).[13] The Appeal Board also suggested

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13 All three members indicated that the ultimate disposal of LLRW could be considered. Where such wastes will go and how much disposal will cost are, however, irrelevant in this proceeding. Contention 9

without support that the costs of storage might preclude certain options at the end of five years (id. at 16-17). Petitioners' proposed contention, in contrast, lacks specificity in that regard.

The resurrection of contention 9, as Chairman Eilperin states, flows also from the Appeal Board majority's basic confusion regarding the obligations of the NRC staff and of intervenors (id. at 35-36). The staff must consider all relevant costs, but the petitioners must specifically indicate what aspect they contest. Moreover, as he points out, prior practice dictates that an unbriefed matter be treated as waived (id. at 36).

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13 (cont.) raises the issue of the costs of ultimate waste disposal in the context of an operating license amendment. LLRW is generated at the plant, the operation of which is not at issue in this proceeding. There are certain costs associated with this waste which must be incurred in its ultimate disposal whether or not TVA stores LLRW before disposal. In short, petitioners have tried to raise the issue of operating costs and that cannot be litigated here.

"In this connection, it should be noted that the Prairie Island units were licensed for operation on the basis that they would generate radioactive wastes in a certain amount over the full term of their licenses. The amendment in question does not alter the situation; i.e., the proposed increase in the storage capacity of the spent fuel pool would not occasion the generation of more wastes than had been previously projected" (In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46-47 n.4 (1978), aff'd in pertinent part and remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)). Accord, In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979) (spent fuel pool capacity expansion); In re Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981); In re Public Serv. Elec. & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981). Moreover, petitioners may not litigate matters related to the ultimate disposal of wastes in any event (see, e.g., In re Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291 (1979) (the issue of offsite transportation of wastes is outside the scope of an operating license proceeding as is the ultimate disposition of these wastes).

TVA agrees that the petitioners had an obligation to state a specific factual contention under 10 C.F.R. § 2.714 regarding the costs of decommissioning. The Licensing Board was correct in dismissing the contention on that ground. Regardless of the merits, however, of the Licensing Board's action, petitioners did not adequately address the contention in their brief. Therefore, the contention should remain stricken.[14]

Chairman Eilperin cites In re Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 370 (1978) (both petitioners' counsel here were intervenors' counsel there), as support for dismissing number 9 (ALAB-664, slip op. at 36-37 n.10). Of similar effect are In re Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973); In re Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-409, 5 NRC 1391, 1397 (1977), and ALAB-367, 5 NRC 92, 104 n.59 (1977); In re Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 744 (1977). It is not enough simply to mention the contention. An argument which does not contain sufficient breadth is tantamount to an abandonment (In re Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975); In re Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 805 (1979)).

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14 Similarly, any appeal respecting contentions 2, 4, 6, 7, and 8 was also waived.

By neglecting to address their brief to the Licensing Board's grounds for dismissing the contention, petitioners have waived any right to challenge the Licensing Board's disposition of it. Consequently, the Appeal Board erred in reinstating contention 9 and others not adequately briefed.

CONCLUSION

The Licensing Board was fully justified in dismissing the petitions to intervene and denying the requests for a hearing. These petitioners, despite repeated opportunities, have failed to provide a sufficient basis for intervention in a timely manner. Implicit in the Commission's Statement of Policy on Conduct of Licensing Proceedings is the need for prospective intervenors to comply with NRC procedural regulations, or else all attempts to ensure a balanced and efficient hearing process will fail. The Commission and courts have recognized that the NRC rules of practice are not some byzantine system of regulations imposed simply for the sake of complexity, but rather are designed to obtain a focused resolution of factual issues. Given their inadequacy, denial of these petitions would be consistent with long-established NRC policy. Finally, rejecting these petitions, as the Appeal Board and

Licensing Board recognize, will not preclude any person from intervening in a later proceeding that might consider TVA proposals for LLRW if that person can demonstrate an interest which would be affected.

For the foregoing reasons, the Licensing Board's order dismissing the petitions should be affirmed and the Appeal Board's decision reversed.

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Knoxville, Tennessee
May 6, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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 IN OPPOSITION TO PETITIONERS' APPEAL OF THE LICENSING BOARD'S PREHEARING CONFERENCE MEMORANDUM AND ORDER RULING ON PETITIONS TO INTERVENE AND REQUESTS FOR HEARING

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APPENDIX A

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PROCEDURAL HISTORY

This proceeding involves the Tennessee Valley Authority's (TVA) application to amend the Browns Ferry Nuclear Plant operating license for the sole purpose of obtaining permission to store onsite for up to five years low-level radioactive waste (LLRW) generated in the course of normal plant operation. In acknowledgement of the notice of an opportunity for hearing dated December 11, 1980 (45 Fed. Reg. 81,697), a number of persons filed identical petitions for leave to intervene. In its response filed January 27, 1981, TVA took the position that the petitions should be denied because none demonstrated a sufficient injury to any cognizable interest to justify intervention as of right or in the discretion of the Nuclear Regulatory Commission

(Commission or NRC). The NRC staff concluded in its January 28 initial reply that the petitioners had satisfied the interest requirement of 10 C.F.R. § 2.714 (1981).

Subsequent to the Atomic Safety and Licensing Board's (Licensing Board or Board) order setting a prehearing conference, all petitioners through a single document amended the petitions and stated four issues which they sought to litigate. On April 3 TVA filed a response to the amended petitions opposing them because of a failure to raise valid contentions. The NRC staff's April 7 position was that three of the four contentions should not be admitted and that the remaining (contention 1) raised only a legal issue that the Board could resolve without a hearing.

At the April 10 prehearing conference, petitioners, through counsel, asked that the Board delay issuing any order concerning the adequacy of the petitions until such time as they filed an additional amendment (tr. at 82). The Board allowed petitioners 15 days to do this, and specifically noted that in so doing the Board had not waived the requirement for submitting a justification for late filing (tr. at 91).

On April 27 petitioners filed an amendment adding five contentions but failed to address why the Board should accept the late-filed issues. TVA, in its response of May 8, requested that the Board reject these additional matters because they did not comply with 10 C.F.R. § 2.714 and because they were late filed. The NRC staff on May 15 opposed the additional issues as untimely. Without

leave from the Board the petitioners on May 27 filed another untimely memorandum attempting to justify their late-filed contentions. The NRC staff subsequently submitted a June 4 reply on the merits of the new topics, finding them inadmissible and finding contention 1 no longer relevant.

On October 2 the Board, as reconstituted (46 Fed. Reg. 46,032 (1981)), issued a prehearing conference memorandum and order denying the petitions to intervene and requests for hearing (In re Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, and 3), LBP-81-____, ____ NRC ____ (slip op. Oct. 2, 1981)). Petitioners Noel M. Beck, et al.,[1] have filed a notice of appeal.

ISSUES PRESENTED ON APPEAL

1. Have the petitioners, each of whom lives 30 miles or more from the site of the proposed LLRW storage facility, adequately alleged facts to demonstrate standing to intervene in this proceeding?

2. Did the Licensing Board err in finding that the petitioners had failed to raise even one adequate contention, dismissing the petitions, and denying the requests for a hearing?

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1 David R. Curott, Uvonna J. Curott, Nancy Muse, Hollis Fenn, Richard L. Freeman, Noel M. Beck, and Robert W. Beck of Florence, Alabama; Alice N. Colcock, Betty L. Martin, and John R. Martin of Sheffield, Alabama; and Thomas W. Paul, Richard W. Jobe, Marjorie L. Hall, Gregory R. Brough, Michael D. Pierson, David Ely, Debbie Havas, Rebecca Hudgins, and Tom Thornton of Huntsville, Alabama.

STATEMENT

TVA[2] owns and operates the three-unit Browns Ferry Nuclear Plant located in Limestone County, Alabama. Each unit is licensed for a thermal power level of 3,293 megawatts. Commercial operation of Units 1, 2, and 3 began on August 1, 1974, March 1, 1975, and March 1, 1977, respectively. Operation of Browns Ferry Nuclear Plant results in planned generation of LLRW. This waste consists of ion exchange and condensate demineralizer resins and miscellaneous trash such as polyethylene boots, rubber shoe covers, plastic hose, gloves, pine crates, scrap iron, mops, and brooms.

TVA must store or dispose of this waste in order to continue to operate the plant. Although a small amount of onsite storage capacity is available at the plant, TVA presently ships most of its LLRW to the licensed LLRW disposal facility at Barnwell, South Carolina. Because space is limited at Barnwell, the facility operator restricts the volume of wastes it will accept from the various utilities and others shipping to Barnwell. The disposal space allocated to TVA for its LLRW is gradually decreasing, thus forcing TVA, like all others who ship to Barnwell, to seek alternative arrangements for managing its LLRW.

The TVA Board of Directors has authorized the TVA staff to study and develop methods to manage LLRW, including onsite storage

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2 TVA is a corporate agency and instrumentality of the United States established under the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended, 16 U.S.C. §§ 831-831dd (1976; Supp. III, 1979).

and volume reduction. As part of this evaluation, TVA prepared environmental assessments (EAs) in accordance with NEPA[3] that addressed both life-of-plant storage and volume reduction at three plants, including Browns Ferry. Those assessments concluded that insignificant environmental consequences would result from storage and volume reduction. Under TVA's NEPA procedures (45 Fed. Reg. 54,511 (1980)), an EA merely evaluates the environmental consequences prior to any decisionmaking and does not commit TVA to a particular action.

On July 31, 1980 TVA submitted an application for life-of-plant storage of LLRW at Browns Ferry. On November 17 TVA modified the request to ask for approval to store LLRW for up to five years. As permitted under NRC regulations, TVA has constructed several concrete modules for this purpose and they stand ready for use today. In the meantime, the TVA Board has authorized the staff to begin preliminary design and investigative work that may eventually lead to procurement and installation of a volume reduction and solidification system (VRSS) at Browns Ferry as well as two other plants. It is only the five-year proposal that is before the NRC and subject to the notice in this proceeding.

The Licensing Board's October 2, 1981 memorandum and order held that the petitioners had stated no contention which satisfied the requirements of 10 C.F.R. § 2.714 and for that reason dismissed

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3 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1976).

the petitions and rejected the requests for hearing.[4] Specifically, the Board held that petitioners did not seriously question TVA's five-year storage proposal (slip op. at 6). It found that the petitioners focused on what appeared to them to be TVA's longer term LLRW management plans (id.). The Board ruled that TVA's five-year proposal had immediate, independent utility and that this issue was not in question (slip op. at 7). It also held that granting the five-year request would not prejudice future NRC action on later LLRW activities if proposed by TVA (slip op. at 7-8). The Board then applied Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), in light of those two uncontested findings and held that NRC's consideration of TVA's five-year storage request did not improperly segment an LLRW management plan (slip op. at 10). Consequently, it decided that all petitioners' contentions, which were based on a theory of improper segmentation, must fail as outside the scope of the proceeding (id.).

The Board also investigated the adequacy of each contention. Aside from the clear failure of the petitioners to raise relevant matters, many contentions were found to be too vague to give adequate notice of what petitioners proposed to litigate or were judged to raise matters outside NRC's jurisdiction. The Board said contention 9 was the only one which addressed the application for five-year storage (slip op. at 16). It held that the contention was impermissibly vague and raised matters beyond NRC's jurisdiction (slip op. at 17).

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4 The Board declined to rule on the question of standing. Although it found TVA's position opposing standing "interesting," the Board found it unnecessary to address (slip op. at 5).

SUMMARY OF POSITION

TVA fully supports the well-reasoned Licensing Board decision. The Board correctly held that an inquiry into TVA's LLRW management planning was improper. Its determinations that the storage facility would have independent utility and that NRC review of five-year storage at this time would not preclude effective NRC evaluation of later LLRW proposals are beyond reproach. Petitioners did not contest those issues below and have not discussed them in their brief to the Appeal Board. Given these circumstances, petitioners may not raise matters concerning long-term storage or a VRSS in this proceeding as they have tried to do in eight of their contentions. Moreover, even if NRC could properly inquire into these matters in the context of the licensing proceeding, none of the contentions meets the conditions of 10 C.F.R. § 2.714 (clarity, precision, and specificity). Thus, the Appeal Board should affirm the Licensing Board's order.

Additionally, the Appeal Board can affirm the dismissal of the petitions on the basis of a lack of standing. The petitions to intervene clearly fail to meet the tests established for standing under section 188 of the Atomic Energy Act and 10 C.F.R. § 2.714. The petitions lack any specific factual allegations to indicate how the license amendments would affect petitioners' interests. There should be no legal presumption that an amendment to the operating license of the limited nature here involved automatically confers standing on all persons within 50 miles of the plant.

Petitioners' appeal brief does not address the standing issue It merely divines three reasons to support intervention, none of which is persuasive.

First, petitioners argue that because TVA is a federal agency, it must be treated more stringently than a private applicant. In In re Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 532 (1978), however, the Appeal Board considered that issue and its decision there serves as clear precedent for the NRC to treat TVA as any other private applicant.

Second, petitioners argue that somewhere they have raised at least one "litigable contention." Their brief, however, fails to illuminate that one specific, relevant factual issue. The Licensing Board clearly recognized that, apart from the question of scope of the hearing, many of the contentions were also defective for lack of specificity (see also tr. at 76). Even if TVA had some overall plan, which it does not, this does not, as petitioners assert, automatically mean NEPA is "unsatisfied" (brief at 7). Petitioners must allege how volume reduction and long-term storage constitute major federal actions. Moreover, they cannot simply rest on an ultimate legal conclusion that TVA's planning requires NRC to do an EIS. They must indicate with precision and clarity in what way their interests would be affected and what specific aspects of a VRSS and long-term storage they seek to contest.

Third, regarding TVA's planning for long-term storage or a VRSS, petitioners contend that the Licensing Board "erred by accrediting the bald allegations or assurances of counsel" (brief at 10).

The representations of TVA counsel that petitioners find offensive solely provided background information to the Board. It obviously could not glean information solely from the record on most of the issues raised by petitioners, since the matters far exceeded the scope of TVA's application. More importantly, however, this background information was not essential to the ultimate decision the Board made. Regardless of whether TVA has some waste management plan that may involve long-term (life-of-plant) storage or volume reduction of low-level wastes, five-year storage has independent utility and petitioners have not attempted to contest that fact (slip op. at 7) or to address that issue in their brief. Moreover, even if the topics of long-term storage and volume reduction were relevant, petitioners have provided nothing specific to show how their interests might be affected by such activities (see tr. at 76). Based on these two factors, the petitioners' arguments regarding the need for a more thorough NEPA analysis can be dismissed (In re Duke Power Co. (Amendment to Materials License SNM-1773), ALAB-651, ___ NRC ___, Nuc. Reg. Rep. (CCH) ¶ 30,613 (1981)).

Because of the failure to state adequate, legally cognizable contentions and because petitioners lack standing in this proceeding, the Appeal Board should affirm the Licensing Board's decision to dismiss the petitions.

ARGUMENT

I

Petitioners Have No Standing To Intervene.

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). The Rules of Practice require that 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)). The petitions here fail to demonstrate sufficient interest in the proceeding 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, (slip op. at 2)); (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."[5] Petitioners generally assert that

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5 At the prehearing conference their attorney stated that at times some of the petitioners visited areas nearer the plant (tr. at 38-39)

the granting of license amendments may increase health and safety risks to them and their descendants.

The petitioners' 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 NEPA), 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. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980). Each petitioner's bare allegation of "proximity" to the site is insufficient in this instance for standing.[6]

This operating license amendment 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, in other cases, 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 &

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5 (cont.) (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.

6 The economic concern of a ratepayer that petitioners allege is not a legally sufficient interest (Pebble Springs, supra, 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.

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, however, has been litigated only in the context of the proposed construction and operation of a nuclear 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 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 occurrence involving the plant itself. A licensing board should not legally presume an effect to petitioners' interest absent specific allegations detailing how those effects could occur 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.

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 five-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. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973)). 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 in some undetermined manner by the expansion of the [waste storage, in that case spent fuel] capacity. How the expansion of the spent fuel 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 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 had 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 and this appeal. Without standing, their petitions must be dismissed.

II

Petitioners Have Failed To Set Forth Even One Adequate Contention.

A. General considerations

Petitioners are not concerned about TVA's five-year storage proposal (slip op. at 6). As stated by the Licensing Board, the crux of petitioners' case is that NRC should review TVA's plans for long-term storage and a VRSS. This, as the Board found, is insufficient in light of 10 C.F.R. § 2.714 to support intervention. The Board expressly held that these contentions addressed matters outside the scope of the proceeding and that many in any event were impermissibly vague. TVA agrees.

(1) Specificity Is Required.

A number of appeal board and licensing board decisions have discussed the principles which should be applied in determining the adequacy of a contention. While a determination about the sufficiency of a contention must always be made on a case-by-case basis, the foremost guiding factor is that

> [t]he applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being asked . . . . So is the Board below. It should not be necessary to speculate about what a pleading is supposed to mean [In re Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975); emphasis added].

Merely contending that a proposal does not comply with the law or Commission regulations is insufficient (id.; accord, In re Allied-Gen. Nuclear Servs. (Barnwell Fuel Receiving & Storage Station), LBP-76-24, 3 NRC 725, 728-29 (1976) (The Board should reject a contention that only alleges that the environmental statement is inadequate and fails to detail the defects)).

None of the contentions is clear or precise. Even if petitioners are correct in asserting that NRC must consider long-term storage or VRSS operation, the contentions fail to indicate clearly and precisely how their interests would be affected and what aspects of VRSS operation or long-term storage they contest.

(2) Contentions Must Raise Contested Factual Issues.

Petitioners seek to raise an identical legal issue in each of contentions 1 through 8, but without alleging the evidence of any specific, underlying, and disputed factual issue. This they cannot do. Their contentions must raise specific, contested factual issues.

Where a matter presented is strictly a legal issue, the contention will be denied (In re Armed Forces Radiobiology Research Inst. (TRIGA-Type Research Reactor), special prehearing conference memorandum and order (slip op. Aug. 31, 1981, at 11). Similarly, a licensing board in the San Onofre proceeding in an unpublished order held that it would not allow a contention which does not raise a specific factual issue (In re Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), memorandum and order

(slip op. Jan. 27, 1978, at 4); accord, In re Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811, 813 (1978) (operating license amendment), aff'd, ALAB-484, 7 NRC 984 (1978); In re Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-81-14, 13 NRC 677, 691 (1981) (on appeal)). In Beaver Valley, supra, the Licensing Board held that the NRC's conclusion that an action would not violate NEPA (if no EIS were prepared), standing alone was not an issue which could be litigated and "[t]he Board rejected this as a contention because it appeared that it was not a factual contention . . ." (7 NRC at 813; see also In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744 (1978), aff'd, ALAB-524, 9 NRC 65 (1979); In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92, aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974)).

Strict application of NRC's requirement for specific factual contentions is especially important in a case such as the present where, absent intervention, a hearing would not otherwise be held (In re Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7 (1974)).

> In [this] proceeding, unlike a construction permit proceeding, a hearing is not mandatory and, if held, is restricted to those matters which have been put into controversy by the parties and are determined by the Licensing Board to be issues in the proceeding. . . . There is, accordingly, especially strong reason in [this] proceeding why, before granting an intervention petition and thus triggering a hearing, a licensing

> board should take utmost care to satisfy itself fully that there is at least one contention advanced in the petition which, on its face, raises an issue clearly open to adjudication in the proceeding [In re Gulf States Utils. Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 n.10 (1974)].

Contentions 1 through 8 attempt only to raise general legal issues. Although, as discussed below, the petitioners' position with respect to each of them is incorrect, they should be rejected as inadequate on this ground alone. Even regarding the volume reduction and long-term storage activities they attempt to litigate, petitioners would have to allege with clarity and precision what specific factual aspect of these activities they wish to contest.

(3) The Notice Limits the Scope of the Proceeding.

Contentions 1 through 8 inappropriately seek to expand this proceeding beyond the scope of the notice. The only matter before the Commission is TVA's application for five-year LLRW storage. Petitioners would have other matters reviewed, such as permanent storage and volume reduction. Commission adjudicatory tribunals are precluded[7] from entertaining issues which do not come within the reach of matters placed before them for decision (In re Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978); In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 70 n.9 (1979)).

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7 Except where the Board sua sponte reviews serious safety issues pursuant to 10 C.F.R. § 2.760a (1981).

The scope of the Board's inquiry in this proceeding is limited to that set out in the notice (In re Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); accord, In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 (1979); In re Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980)).

(4) This Proceeding Does Not Involve a De Novo Review of All Possibly Relevant Matters.

Contentions 1 through 8, if accepted, would turn this narrow operating license amendment into a de novo hearing on all of TVA's LLRW planning. While this is clearly petitioners' goal, it is just as clearly impermissible. In a proceeding for an amendment to an operating license, as in a proceeding for an operating license, the hearing may not encompass a de novo review of the entire subject matter of the license application or all possibly relevant matters.

NRC regulations limit the proceeding to specific contentions (see In re Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 AEC 689, 690 (1971); accord, In re Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 358 (1972), aff'd sub nom. Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974)).

> [Petitioner] does not challenge the guidance given to this Licensing Board in the hearing notices or the Licensing Board's compliance with that guidance. Instead, [petitioner] asserts

> that the Licensing Board must conduct what amounts to a de novo review of all matters (i.e., radiological safety as well as environmental) relating to the issuance of the operating license, whether or not in controversy. As we have previously held with respect to radiological safety matters, a proceeding of this type is not intended to encompass a de novo review but is "intended to resolve specific problems with respect to the plant in question." Absent a petition for intervention raising such problems, no public hearing need be held [5 AEC at 358; footnote omitted].

The purpose of contentions in the hearing process is to narrow the focus of the proceeding. Accordingly, a licensing board must admit only adequately stated contentions. The Board is under no general mandate to explore and resolve any potentially relevant matter if it has not been properly raised by the intervening parties (In re Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 9 (1974); accord, In re Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811, 814 (1978) (operating license amendment), aff'd, ALAB-484, 7 NRC 984 (1978)).

Petitioners are under an obligation to detail with precision and clarity what they seek to litigate. This they have not done, even assuming their topics are relevant. Consequently, because the Board could find no contentions which complied with the Commission rules of procedure, under the terms of the notice, it correctly denied the petitions for leave to intervene and entered an appropriate order rejecting the requests for a hearing (In re Pacific Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175 (1977)).

Neither the Licensing Board nor the Appeal Board is under an obligation to inquire further (Indian Point, CLI-74-28, supra; Union of Concerned Scientists, supra).

(5) No EIS Is Needed for TVA's Five-Year Storage Proposal Because of Its Potential Long-term Planning Options.

Even if the petitioners were correct, which they are not, in assuming that TVA has already decided upon some comprehensive low-level waste program for Browns Ferry, the five-year storage facility can be licensed without preparation of an EIS addressing long-term storage or a VRSS.[8] Petitioners in their first eight contentions focus on the abstract legal issue of "segmentation" and the question of whether an EIS must be prepared on all possible management options for Browns Ferry LLRW. However, the issue of segmentation with respect to spent fuel has already been decided, a decision which, a fortiori, applies with equal force here. In Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), the court let stand an Appeal Board's denial of an intervenor's attempt to delay spent fuel storage capacity expansion (analogous to what petitioners would have done here). The intervenor's

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8 Spent fuel capacity expansion, a seemingly more compelling situation, has been permitted without an EIS in every case reaching final decision (see In re Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981); In re Commonwealth Edison Co. (Quad Cities Station, Units 1 and 2), order (Oct. 27, 1981)). It would be incongruous for TVA's request to expand LLRW storage to be subject to the preparation of an EIS when its spent fuel capacity expansion request was granted at Browns Ferry as well as numerous other plants without one.

position was based on the fact that the utility eventually would have to obtain an additional license amendment for long-term storage.

> [Intervenor] contends that NRC violated NEPA by improperly "segmenting" its consideration of the environmental impact of expansion of onsite storage capacity at Prairie Island. The theory is that because the present expansion of the spent fuel pool will accommodate the spent fuel assemblies produced at Prairie Island only until 1982, a request for further expansion is inevitable. Citing Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), Minnesota argues that the NRC was required to take into account the environmental impact of this "unavoidable consequence" of the current expansion.
>
> We find this argument without substance. Minnesota has not pointed to any consequence of future expansion that could not be adequately considered at the time of any requests for further expansion. . . . The Staff specifically found that the licensing action here would not foreclose alternatives available with respect to other licensing actions designed to ameliorate a possible shortage of spent fuel capacity (noting that "taking this action would not necessarily commit the NRC to repeat this action or a related action") and that addressing the environmental impact associated with the proposed licensing action would not overlook any cumulative environmental impacts [Minnesota v. NRC, supra, at 416 n.5].

As the Licensing Board found, petitioners do not contest the independent utility of five-year storage (slip op. at 7). They have alleged no consequence from long-term storage or a VRSS that cannot be adequately considered at the time, if ever, that TVA should make a licensing request including those matters. Thus, the independent need for and utility[9] of TVA's proposal allows this action to

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9 From a logical standpoint five-year storage is essentially an insurance policy which allows continued plant operations while regionally acceptable disposal plans are developed. If long-term

proceed without preparation of an EIS by NRC (see In re Duke Power Co. (Amendment to Materials License SNM-1773), ALAB-651, ___ NRC ____, Nuc. Reg. Rep. (CCH) ¶ 30,613 (1981)).

Duke Power does not, as petitioners suggest, require the Board to delve into TVA's planning process, as long as the independent utility of the five-year storage proposal is not disputed (and it is not) and the NRC staff is not foreclosed from evaluating relevant aspects of long-term planning when they arise in future license amendments (id. at 29,933). In essence, petitioners have conceded (brief at 5) that the first segment of an overall management plan for wastes can be considered independently by the NRC under the proper circumstances. They assert, however, that this is not true where an applicant is a federal agency, relying solely on dicta in Duke Power that said a NEPA analysis of a full plan would have to be made if a

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9 (cont.) storage or volume reduction is eventually deemed a desirable component of some future plan, the NRC staff must and still can evaluate those options at the time TVA requests a license amendment. No one contests that fact. The design of the storage modules is such that they can be built as needed and storage can be halted at any time as circumstances warrant (tr. at 49-50). This fact is also apparent from the licensing documents and is not contested.

The LLRW storage modules which TVA proposes to use have independent utility, and TVA would build them regardless of whether the wastes would stay onsite or would be transferred to a disposal facility prior to the expiration of the requested five-year authorization. They ensure that plant operations can continue while ultimate disposal options are developed. TVA may decide to stop using these facilities during or at the end of the five-year period. On the other hand, TVA may request longer term storage. Regardless of what TVA may in the future propose, the NRC staff can consider any environmental consequences of longer use at the time proposed, and proceeding with onsite storage for up to five years forecloses no future alteration. Similarly, evaluation of VRSS effects can adequately occur in the context of any future license amendment application.

federal agency was responsible for that planning. They are wrong for two reasons.

First, as Kleppe v. Sierra Club, 427 U.S. 390 (1976), and Minnesota v. NRC, supra, indicate, a NEPA review of an individual federal project distinct from an overall program is permissible if the proposal has independent utility and the unavoidable consequences flowing from it are analyzed. Again, petitioners have not contested the Licensing Board's conclusions in this regard (slip op. at 7). Second, if petitioners' argument were correct, TVA would be treated more stringently by NRC than a private applicant. The Appeal Board has already decided contrary to petitioners' position in Phipps Bend. It held that NRC's NEPA responsibilities were the same irrespective of TVA's position as a federal agency and what independent NEPA obligations TVA might have. Thus, under Phipps Bend, neither TVA's nor NRC's NEPA obligations are diminished or increased because the other federal agency is involved. Here NRC need review only TVA's five-year storage proposal and the unavoidable consequences that flow from it. To have it look beyond the proposal into TVA's planning (without showing that these plans are unavoidable or that TVA is asking them to be licensed) is not required.[10] As the Commission has

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10 The line of cases which discusses federal involvement in private actions is relevant here (see, e.g., Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979); Bradley v. United States Dep't of Housing & Urban Dev., 658 F.2d 290, 293 (5th Cir. 1981)). There must be "control over or responsibility" for a plan in order to make it a federal action requiring a NEPA evaluation by NRC. This does not change because TVA is a regulated federal agency. NRC will have a demonstrable "Federal 'responsibility' for the action" only when and if a licensing proposal comes before it (NAACP v. Medical Center, Inc., 584 F.2d 619, 634

said in Seabrook, NRC's NEPA analysis of a licensing activity is more limited than it would be if the activity were NRC's own project (In re Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 541-42 (1977), aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). It must focus on the applicant's proposal and the environmental issues which could be affected by the license conditions, not "on some broader but ill-defined concept extrapolated from that proposal" (id. at 542).

Consequently, petitioners have raised nothing in contentions 1 through 8 which the NRC need now review and which would support intervention.

B. No contention complies with the requirements of 10 C.F.R. § 2.714 (1981).

The Commission through section 2.714 requires that contentions be specific, precise, and clear and raise factual issues within the scope of the proceeding. Petitioners have not met these simple preconditions.

The original four contentions can be summarized as follows:

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10 (cont.) (3d Cir. 1978)). NRC's approval of five-year storage does not "enable" TVA to store for a longer period or operate a VRSS, and therefore does not require NRC to do a NEPA evaluation on those items (id. at 632; accord, Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272 (8th Cir.), cert. denied, 449 U.S. 836 (1980)). TVA, the only federal agency having responsibility for the planning at this time, has done a NEPA evaluation of it. Indeed, even if it were TVA's responsibility to do an EIS on its long-term planning, that issue cannot be litigated here (see pp. 29-30 infra).

1. Petitioners allege TVA has undertaken a major program at Browns Ferry, including life-of-plant storage and volume reduction by incineration. NRC review and approval of only a five-year storage proposal at this point would be an incremental review impermissible under NEPA.

2. Again assuming the program for life-of-plant storage and volume reduction, TVA has not submitted sufficient information to NRC to allow NRC to conduct an environmental review of the full program.

3. NRC would violate NEPA if it licensed life-of-plant storage and volume reduction at Browns Ferry without first preparing an EIS.

4. This contention is the same as number 2 except the alleged insufficient information involves health and safety rather than environmental matters.

Obviously, if petitioners' assumption that TVA in this application is proposing and NRC is reviewing life-of-plant storage and volume reduction is incorrect, which it is, these four contentions are fundamentally flawed. The Licensing Board correctly rejected them.

This deficiency carries through to petitioners' final amendment to their contentions. Contentions 5 and 6 merely restate and expand original contentions 1 and 3 and again incorrectly assume that life-of-plant storage and a VRSS are part of this proceeding. Contention 7 makes a strictly legal argument analogous to contention 3

that cannot be admitted as a contention. Contention 8 merely contains additional handwaving aimed at convincing the Licensing Board that TVA is actually proceeding on some broad program that NRC must evaluate in this proceeding. It does not contain a single recognizable factual issue but instead simply argues that TVA is trying to avoid scrutiny of its actual plan. Contention 9, the only item which even relates to TVA's proposed license amendment, must fail if for no other reason than because it is impermissibly vague. Thus, all the contentions were correctly rejected.

(1) Contentions 1, 2, and 3 Are Inadequate.

Contention 1 states that the Board should deny the application for an amendment because it violates NEPA. Contention 2 alleges that TVA has supplied insufficient information on which the Commission can base its environmental assessment of the proposal. Contention 3 states that an environmental impact statement is necessary prior to implementation of TVA's "long term" plans. Petitioners also request that the NRC suspend consideration of TVA's amendment pending an application for permanent storage and volume reduction.

Contentions 1, 2, and 3 raise matters which may not be litigated in this proceeding. First, statements to the effect that TVA's application violates NEPA or forms an inadequate basis on which to make environmental judgments raise legal, not factual, arguments. They contest no facts but rather involve only the ultimate conclusions of law that the Commission must make. The Licensing Board could have rejected those allegations solely on that basis (see, e.g., In re

Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811, 813 (NRC's conclusion that an action will not violate NEPA standing alone may not be litigated); see also In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744 (1978), aff'd, ALAB-524, 9 NRC 65 (1979)).

Even if petitioners' allegations were construed as an attempt to contest factual issues, they are too generalized and are set forth without any supporting bases. Thus, they must be rejected (see, e.g., In re Allied-Gen. Nuclear Servs. (Barnwell Fuel Receiving & Storage Facility), LBP-76-24, 3 NRC 725, 728-29 (1976) (failure to detail how the environmental statement is defective is appropriate grounds for rejecting a contention)). Petitioners' brief does not adequately address specificity regarding contentions 1 and 3 (brief at 7) and ignores contention 2 altogether.

Second, to the extent contentions 1, 2, and 3 raise any issue about TVA's long-term storage options for LLRW or a VRSS, these matters, as discussed above, are not properly the subject of this proceeding. The Board agreed (slip op. at 10-12). Approval of five-year storage does not enable TVA to store for a longer period or operate a VRSS. As appropriate, issues associated with those matters may be raised in a separate proceeding. Not until then will NRC have some control or responsibility over those measures. Simply put, volume reduction and long-term disposal are not "unavoidable consequences" from licensing five-year storage (In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978), aff'd in part and remanded on other grounds sub nom.

the notice,[11] are clearly irrelevant. If contention 5 attempts to raise any factual issue at all, as petitioners contend (brief at 7-8), it must fail because it lacks requisite specificity. Thus, the Licensing Board correctly rejected these two contentions on the same basis that it dismissed contention 1 (slip op. at 13-14).

In addition, contention 5 is irrelevant to any issue properly before the NRC in that it would have the Commission review a potential TVA administrative decision, not an NRC proposed action. The Licensing Board agreed (slip op. at 13-14). TVA's evaluation of environmental impacts pursuant to NEPA and the resulting decisions of the TVA Board of Directors are independent from any NRC decisions, and may not be litigated in NRC proceedings (cf. In re Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533 (1978)). The Commission does not review and approve the environmental decisions of other federal agencies (see In re United States Energy Research & Dev. Admin. (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); In re Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977)). Under the provisions of the Administrative Procedure Act, TVA's compliance with NEPA can only be challenged in a United States district court. It is beyond the authority of and totally inappropriate for an NRC licensing board to entertain a collateral attack on the validity of the EA

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11 In determining whether to entertain an issue, the Board must respect the terms of the notice (In re Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980)).

prepared by TVA (In re Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 85 (1979); cf. In re Public Serv. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179 (1978) (NRC has no authority to decide a matter resting in the jurisdiction of state regulatory agencies); accord, In re Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372 (1978)).

> The Board below was therefore plainly correct in refusing to hear witnesses or allow discovery for the purposes of reviewing REA's decision to guarantee a construction loan for Wabash Valley [for a portion of its 17-percent interest in facility]. The matter was not an issue open for consideration by a board conducting a construction permit proceeding under the Atomic Energy Act. If relief is warranted from the REA's decision to guarantee the loan in question, it must be sought elsewhere [In re Public Serv. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 267-68 (1978)].

Similarly, petitioners inappropriately attempt by contention 6 to question the substance of TVA's NEPA analysis. Also, contention 6 lacks requisite precision and clarity. The contention appears to be no more than a restatement of contention 1, and contention 1 raises no litigable matter. The Licensing Board correctly rejected contention 6 on this basis (slip op. at 14). Petitioners' brief did not discuss the adequacy of this contention.

Contention 6 contains additional defects. In particular, contention 6(a) appears to challenge release levels set in NRC regulations designed to protect health and safety by alleging VRSS releases will cause cancer. This is an impermissible contention under the provisions of 10 C.F.R. § 2.758 (1981) (see, e.g., In re Commonwealth

Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980); In re Potomac Elec. Power Co. (Douglass Point Nuclear Generating Station, Units 1 and 2), ALAB- AEC 79, 88-89 (1974)). Similarly, contention 6(e) must be rejected. It does not disclose in the first instance how the value as a precedent, if any, of a Browns Ferry decision would affect whether the Browns Ferry proposal is or is not a major federal action. To the extent 6(e) suggests that the NRC will not follow its regulations in licensing other facilities at other plants based on a Browns Ferry "precedent," the contention is both inappropriate and irrelevent. Contention 6(g) is also irrelevant in that it does not disclose how construction scheduling could affect whether a proposal is a major federal action. Contentions 6(b), 6(c), 6(d), and 6(f), even if construed as an attempt to raise factual matters, are so wholly unspecific that they fail to comply with section 2.714.

(4) Contention 7 Is Inadequate.

Contention 7 alleges that NRC should process TVA's application under 10 C.F.R. pt. 30 rather than part 50. That is a purely legal issue. It contests no facts nor gives a basis for the legal assertion. Even if the contention contained a legitimate factual issue, it would still be unacceptable. It essentially restates contention 3, although based on an inconsistent legal theory, because it seeks to have an EIS prepared. Like contention 3, it should be rejected as irrelevant and nonspecific. The Board agreed with TVA's

position by dismissing this contention on the same basis as contention 1 (slip op. at 15). Petitioners' brief ignores this contention.

(5) Contention 8 Fails To Conform to Section 2.714.

Contention 8 is an odd mixture of many prior contentions and suffers from the same problems. To the degree this contention would require the Board to evaluate an irrelevant matter, long-term storage, it simply restates contention 1. The Board properly rejected it on this basis (slip op. at 16). Petitioners' brief does not address the adequacy of this contention.

Contention 8(b), like contention 7, presents a noncognizable legal issue concerning licensing under part 30.

Parts 8(a) and 8(c) seek to have this proceeding terminated or at a minimum delayed until TVA reevaluates its EA. Assuming arguendo that TVA is reevaluating the Browns Ferry EA, which it is not, petitioners cannot litigate TVA's determinations with respect to its NEPA obligations here.

Contention 8(a) also argues that TVA should not be permitted under any circumstance to apply for a license amendment. This amounts to a petition for an injunction against that which Commission regulations otherwise permit. Such relief is impermissible (In re Rochester Gas & Elec. Corp. (Sterling Power Project Nuclear Unit No. 1), ALAB-507, 8 NRC 551 (1978)).

(6) Contention 9 Is Inadequate.

Contention 9, like others in the proposed amendments, draws into question the adequacy of TVA's analyses in its EA. NRC's, not TVA's, evaluations of environmental impacts are relevant in this proceeding. TVA's EA for Browns Ferry is an internal TVA document, not a required NRC licensing document. The adequacy of the EA is not reviewable here. The Licensing Board agreed with TVA and properly rejected the contention to the extent contention 9 raised irrelevant matters (slip op. at 17).

Moreover, this contention cannot be maintained because of its lack of clarity and precision. The Licensing Board concurred (slip op. at 17). Petitioners' brief does not discuss this aspect of contention 9. In a recent decision, a licensing board considered the following contention:

> The Applicants have not adequately figured the costs and impacts of storage or disposal of spent fuel and other radioactive wastes, for the term of the operating licenses, in the cost/benefit analysis [In re Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Operating License Proceeding), slip. op. April 16, 1981, at 7].

The licensing board found:

> This contention is too vague to be admissible. It fails to meet the specificity and bases requirement of 10 C.F.R. § 2.714. Principally, it is not clear what issue the Intervenor is asking the Board to accept for litigation. Moreover, it is not clear what "impacts" are referred to [id.].

Similarly, contention 9 is vague. It is unclear what costs are referred to and what their effect on an NRC staff evaluation would

be. Petitioners simply furnish no factual orientation from which it can be determined how they would have the Licensing Board evaluate decommissioning costs in its decisionmaking.

Contention 9 also raises the issue of the costs of ultimate waste disposal in the context of an operating license amendment. LLRW is generated at the plant, the operation of which is not at issue in this proceeding. There are certain costs associated with this waste which must be incurred in its ultimate disposal whether or not TVA stores LLRW before disposal. In short, petitioners have tried to raise the issue of operating costs and that cannot be litigated here.

> In this connection, it should be noted that the Prairie Island units were licensed for operation on the basis that they would generate radioactive wastes in a certain amount over the full term of their licenses. The amendment in question does not alter the situation; i.e., the proposed increase in the storage capacity of the spent fuel pool would not occasion the generation of more wastes than had been previously projected [In re Northern States Power Co. (Prairie Island Nuclear Generating Plants, Unit 1 and 2), ALAB-455, 7 NRC 41, 46-47 n.4 (1978), aff'd in pertinent part and remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)].

Accord, In re Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979) (spent fuel pool capacity expansion); In re Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981); In re Public Serv. Elec. & Gas Co. (Salem Nuclear Generating Station), ALAB-650, 14 NRC 43, Nuc. Reg. Rep. (CCH) ¶ 30,608 (1981). Moreover, petitioners may not raise matters related to the ultimate disposal of wastes in any event (see, e.g., In re Pennsylvania Power

& Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291 (1979) (the issue of offsite transportation of wastes is outside the scope of an operating license proceeding as is the ultimate disposition of these wastes).

CONCLUSION

Petitioners have not adequately alleged facts to demonstrate standing to intervene and on that basis the petitions can be rejected. Moreover, the Licensing Board correctly ruled that the petitioners had failed to raise even one adequate contention. The Board was fully justified in dismissing the petitions and denying the requests for a hearing.

Neither the Licensing nor the Appeal Board has an obligation to allow intervention when, given repeated opportunity, these petitioners have failed to provide a sufficient basis for intervention in a timely manner. The Commission has formulated a statement of policy directing licensing boards to expedite licensing proceedings (Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981)). Implicit in this statement is the need to comply with NRC's procedural regulations. Explicit in this policy is the requirement only to have hearings on issues of material fact (id. at 457). Given their inadequacy, denial of these petitions would be consistent with that policy. Finally, denial of the petitions to intervene will not preclude any person from intervening in any later

proceeding that might consider long-term storage or volume reduction if that person can demonstrate an interest which would be affected.

For the foregoing reasons TVA respectf lly requests that the Licensing Board's order dismissing the petitions be affirmed.

Respectfully submitted,

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Knoxville, Tennessee
November 23, 1981

A P P E N D I X

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.	)	Docket Nos. 50-361 OL 50-362 OL
	)	
(San Onofre Nuclear Generating Station, Units 2 and 3)	)	

MEMORANDUM AND ORDER

This Memorandum and Order pertains to the contentions of Intervenors Friends of the Earth, Mr. and Mrs. August Carstens, Mr. and Mrs. Lloyd von Haden, Mr. Donald May, and Mrs. Donis Davey (FOE, et al.), and Intervenor Groups United Against Radiation Danger (GUARD). It also deals with the question of consolidation of certain parties and a discovery time table.

CONTENTIONS OF FOE, ET AL.

By our Memorandum and Order of October 26, 1977, the Licensing Board Established to Rule on Petitions for Intervention (hereinafter referred to "Petition Board") found that FOE, et al., had a requisite interest in the environmental and health and safety aspects of the San Onofre facility. The Petition Board also held that of FOE, et al.'s eleven contentions, at least Contention 4 was set forth with sufficient particularity and basis so as to comply with 10 CFR § 2.714. Intervention was allowed.

Subsequent to that Order this Licensing Board* was established and held a prehearing conference on December 6, 1977, to hear arguments on contentions not previously accepted. We consider first FOE, et al.'s and then GUARD's contentions seriatim.

FOE, ET AL., CONTENTION 1

> "1) The seismic design basis for SONGS 2 & 3 is inadequate to protect the public health and safety and does not comply with 10 CFR, Part 100, Appendix A, in that the earthquake which could cause the maximum vibratory ground motion has not been assigned as the safe shutdown earthquake."

Intervenor FOE, et al., argued that recent earthquakes and new discoveries of a new fault made by the California Energy Resources Conservation and Development Commission indicate that a review of the seismic design basis for SONGS 2 & 3 is in order.

Applicants, Southern California Edison Company and San Diego Gas and Electric Company (Applicants) stated they would prefer the contention to read more narrowly and offered their own version of an acceptable contention.

Staff found FOE, et al.'s contention suitable for discovery purposes but suggested that it should be simplified and clarified at the close of discovery (Tr. 546-47).

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* The Licensing Board is comprised of the same members that served on the Petition Board.

The Board finds Intervenor FOE, et al.'s contention suitable for discovery purposes. After discovery the Board will consider parties' suggestion to limit the scope of this contention.

In light of new evidence concerning dewatering and cavities discovered as a result of dewatering, Intervenor FOE, et al., Staff, and Applicants agreed that a contention in this regard should be adopted and presented the following stipulated contention (Tr. 552) which is also agreeable to the Board.

1a: "Whether the cavities caused by the Applicants' temporary dewatering of SONGS 2 & 3 site will have an unacceptable adverse effect on the capability of structures and equipment of the SONGS 2 & 3 to withstand the design basis seismic events."

FOE, ET AL., CONTENTION 2

FOE, et al.'s Contention 2 has been withdrawn (Tr. 570).

FOE, ET AL., CONTENTION 3

3. "10 CFR 51.21 and 51.52(b) and NEPA require that the Applicants shall submit an Applicants' Environmental Report - Operating License stage and that such report contain the latest results of the ongoing marine study required under the coastal commission permit. Joint intervenors are entitled to review both the AER-OLS and the Marine study at the operating license stage and may take a position and offer evidence concerning them."

This contention does not raise any factual issue and for this reason is disallowed. FOE, et al., asserts that it only wants to preserve its right to challenge the adequacy of the Staff's FES should it fail to consider the California's Marine Review Committee Report (MRC) (Tr. 601). The Staff is required to consider all available information that is relevant and significant in preparing its Environmental Statement. Failure to do so would appear to be a reasonable basis for challenge when the Statement is issued.

FOE, ET AL., CONTENTION 4

> 4. "The Applicants have not complied with 10 CFR Part 50, Appendix E regarding emergency plans since because of the jurisdictional diversity of the several state and local agencies involved and their inadequate fundings and staffing, appropriate and coordinated emergency plans cannot be developed. An operating license should not be granted for SONGS 2 & 3 because the various emergency response plans are so complex, overlapping, and difficult to implement that in the event of a nuclear accident the safety of persons in the surrounding areas will be imperiled."

The Board in its October 26, 1977, Order found that this contention was stated with sufficient particularity and basis to meet the requirements of 10 CFR § 2.714 and allowed intervention on this basis.

At the prehearing conference FOE, et al., offered a different wording of this contention. Applicants and the Staff countered with separate versions of their own.

The Board is of the opinion that the contention as stated in FOE, et al.'s petition is acceptable for discovery purposes. Parties will have an opportunity to ask for a refinement of this contention after discovery is completed.

FOE, ET AL., CONTENTION 5

FOE, et al.'s Contention 5 is withdrawn (Tr. 644-65).

FOE, ET AL., CONTENTION 6

6. "Joint intervenors contend that the public health and safety, and the spirit and intent of 10 CFR, Part 50, Appendix C (1.B) require, as matter of law, that the applicant, prior to the issuance of an operating license, set aside adequate funds to cover the costs of permanent shutdown and maintenance of the facility in a safe condition at the termination of operations; the applicant has not done so, and intervenors contend that an operating license should not be granted absent such an undertaking."

At the prehearing conference FOE, et al., proposed a new wording of this contention:

> "Applicant has not shown that it possesses or has reasonable assurances of obtaining the funds to pay the estimated cost of operating the plant for the period of the license plus the estimated cost of permanently shutting down the facility and maintaining it in a safe condition."

FOE, et al., contends that

> "the only thing that would satisfy (regulations) at the minimum would be in the form of an escrow account to assure that the money will be there at the end of the useful life of the plant so that either the state or the government or future ratepayers don't have to pay for it."

Section 50.33(f) deals with the financial qualifications of an applicant. It provides in pertinent part:

> "If the application is for an operating license, such information shall show that the applicant possesses the funds necessary to cover estimated operating costs or that the applicant has reasonable assurance of obtaining the necessary funds, or a combination of the two."

The Regulation is amplified by Appendix C to 10 CFR Part 50 which sets forth guidance on the financial data required of license applicants. Appendix C reads in pertinent part:

> ". . . it will ordinarily be sufficient to show at the time of the filing of the application, availability of resources sufficient to cover estimated operating costs for each of the first five years of operation plus the estimated costs of permanent shutdown and maintenance of the facility in safe condition. It is also expected that, in most cases, the applicant's annual financial statements contained in its published annual reports will enable the Commission to evaluate the applicant's financial capability to satisfy this requirement."

The Regulations do not require, as FOE, et al., asserts, the setting aside of funds for the ultimate decommissioning of the facility prior to the issuance of an operating license. Since there is no such requirement, FOE, et al., has failed to establish the basis for its contention that Applicants should be required to "set aside" decommissioning and maintenance funds. There is nothing unique about the San Onofre Nuclear Generating Station, Units 2 and 3 or of the Applicants, San Diego Gas and Electric Company and Southern California Edison Company which suggests that any different consideration should be given them than to other utilities. It is not uncommon for utilities to construct more than one unit at the same site and it is not at all unusual for there to be more than one Applicant.

The question of the escrowing of funds at the time of licensing for the decommissioning is the subject of a rule-making proceeding presently before the Commission. FOE, et al., has the option of participating in that proceeding. Contention 6 is disallowed.

FOE, ET AL., CONTENTION 7

FOE, et al.'s Contention 7 is withdrawn (Tr. 658).

FOE, ET AL., CONTENTION 8

> 8. "An operating license should not be granted for SONGS 2 & 3 because the National Environmental Policy Act, requires, as a matter of law, consideration at the construction permit stage of energy conservation as an alternative to nuclear power and such requirements have not yet been complied with."

FOE, et al., relies on Aeschliman v. U.S. NRC, 547 F2d 622, (1976), as interpreting Sections 102(c)(116) and 102(d) of NEPA to require as a matter of law, the consideration by NRC and the Applicants of energy conservation as an alternative to the proposed nuclear facility. That is not the holding of Aeschliman. Aeschliman merely addressed the propriety of a test that was imposed by the Commission in

a proceeding for a construction permit requiring a threshhold showing by an intervenor before the issue could be brought up as an issue in controversy. It merely removed the threshhold test criterion previously established by the Commission.

Need for power and alternatives to the nuclear facilities were extensively considered at the construction permit stage. Cf. Southern California Edison Company, et al., (San Onofre Units 2 & 3), LBP-73-36, RAI 73-10, pages 958-59, 964-67 (1973). Furthermore, the projected generating capacity of San Onofre 2 & 3 has been included in all power forecasts for Applicants' service area since the construction permit was issued more than four years ago. We take notice of the fact that the California Energy Commission has found need for at least one additional generating station (Sun Desert) for the area served by at least one of the utilities involved in this proceeding since the NRC's approval of the construction permit for San Onofre Units 2 & 3.

FOE, et al., has not stated any basis for consideration of conservation as an alternative to San Onofre, Units 2 & 3 in the operating license proceeding. FOE, et al.'s Contention 8 is disallowed.

FOE, ET AL., CONTENTION 9

9. "In light of accelerating costs of uranium, the decreased availability of domestic uranium and the lack of any guarantee that SONGS 2 & 3 will have a fuel supply, the cost-benefit analysis previously adopted for SONGS 2 & 3 is shown to be clearly erroneous and a proper cost-benefit analysis would now show that the costs outweigh the benefits and that the operation of SONGS 2 & 3 will not be in the best interest of the public and will not be in conformance with NEPA."

At the prehearing conference FOE, et al., reworded its contention to read:

> "The Applicants' projection of fuel costs over the life of the plants does not adequately account for escalation of uranium prices and therefore the cost-benefit analysis is in error." Tr. 658.

Staff supports the rephrased contention; Applicants opposed vigorously the original contention and stand on their original argument in spite of intervenors' new offer. The Board believes that the contention is adequate for discovery purposes, and therefore Contention 9 as rephrased (Tr. 658) is allowed.

FOE, ET AL., CONTENTION 10

10. "As a matter of law, the National Environmental Policy Act of 1969 requires that radioactive waste management, a matter not fully considered prior to issuance of the construction permit, be considered prior to issuance of an operating license for SONGS 2 & 3."

FOE, et al., contends that because San Onofre Units 2 and 3 are nuclear reactors that will generate nuclear waste materials, waste management procedures must be analyzed in detail before an operating license can be granted. FOE, et al., cites Natural Resources Defense Council v. NRC 547 F.2d (D.C. Cir., 1976) as the basis for its position.

Waste management is covered by 10 CFR § 51.20(c) as set forth in Table S-3. In NRDC v. NRC the court examined the requirements imposed by NEPA to consider environmental impacts associated with the uranium fuel cycle and reviewed the Commission's rulemaking proceeding which had developed a generic analysis of those impacts. With respect to the Commission's rulemaking the court approved the overall approach and methodology of the fuel cycle rule and found that, regarding most phases of the fuel cycle, the underlying Environmental

Survey of the Nuclear Fuel Cycle (November 1972) represented an adequate job of describing the impacts involved. The court, however, found that the rule was inadequately supported by the record insofar as it treated the impacts from reprocessing of spent fuel and the impacts from radioactive waste management.

The Commission, in response to the court's action, issued a General Statement of Policy, 41 Federal Register 34707, and announced an intent to reopen the rulemaking proceeding on the environmental effects of the fuel cycle to supplement the existing record on waste management and reprocessing impacts. The Commission indicated an intent to handle the question of the environmental impacts of waste management and reprocessing generically rather than in individual licensing proceedings. On March 14, 1977, the Commission published its effective interim rule governing the treatment of waste management and reprocessing, 42 Federal Register 13803. The interim rule is to be effective pending determination of a final rule to result from the rulemaking proceeding.

The appropriate forum to raise questions regarding generic matters of waste management procedures is in the Commission's rulemaking. FOE, et al.'s proposed Contention 10

is not a legitimate contention for consideration during the operating license proceeding. It is disallowed.

FOE, ET AL., CONTENTION 11

FOE, et al.'s Contention 11 is withdrawn (Tr. 664).

GUARD'S CONTENTIONS

The Petition Board considered and granted the intervention of the Groups United Against Radiation Danger (GUARD) in its Memorandum and Order of October 26, 1977. GUARD's addenda to its original petition was dated August 17, 1977, and set forth seven proposed contentions. Staff was of the view that collectively the seven contentions (each of which essentially addressed the same matter, evacuation planning) could be reduced to two contentions. The Petition Board agreed with Staff and accepted the two condensed contentions suggested by Staff. They are:

1. "The applicants have not complied with 10 CFR Part 50, Appendix E regarding emergency plans since, because of inadequate funding and staffing of the several state and local agencies involved, appropriate and coordinated emergency plans cannot be developed.

2. "As a consequence of increases in freeway use in recent years and the influx of transient and resident individuals into the exclusion area and low population zone, there is no longer assurance that effective arrangements can be made to control traffic or that there is a reasonable probability protective measures could be taken on behalf of individuals in these areas including, if necessary, evacuation, particularly considering the unique geographic constraints in these areas; thus, applicants do not comply with 10 CFR § 100.3(a) or (b)."

At the prehearing conference GUARD offered a rewording of its evacuation contention listing some eleven different aspects. Of these eleven items, some are mere statements which raise no issue of fact; some are contentions without any supporting basis; some are contentions which challenge the Commission's Regulations; some, especially #11 are issues that were taken into account at the construction permit stage going directly to site suitability, population center, growth, and distribution of population. To the extent issues have been covered, they are res judicata, especially to this intervenor who participated as a party at the construction permit stage.

The Board is of the opinion that of the eleven items raised de novo at the prehearing conference the ones that are admissible are already embodied in the two contentions

previously found acceptable by the Board in its Order of October 26, 1977. The Board will permit discovery on these two contentions, subject to further refinement at the close of discovery.

In addition, Intervenor GUARD is entitled to conduct discovery on the issue of cavities which occurred as a result of dewatering. That contention is listed above as FOE, et al.'s Contention 1a.

GUARD also seeks intervention on FOE's Contention 2 which deals with the Price-Anderson Act. GUARD was of the opinion that it could take part in cross-examination on that issue, but now that FOE, et al., has withdrawn that contention, GUARD seeks to adopt it as its own. Putting aside the question of timeliness we consider the contention on its merits.

The argument is that the decision in Carolina Environmental Study Group v. United States Atomic Energy Commission, 431 F. Supp. 203 (W.D.N.C. 1977) declaring a portion of the Price-Anderson Act to be unconstitutional is grounds for staying the issuance of the San Onofre Units 2 and 3 operating license until a final judicial interpretation is obtained and any necessary legislative action is completed.

However, the Carolina Environmental Study Group v. AEC does not provide either a factual or legal basis for an issue in this proceeding. The case is not binding in this jurisdiction, and it has no impact whatsoever on the existing Price-Anderson Act statutory scheme. No injunctive relief was sought in that case and none was given. As recited by the Court (at page 226), a single federal district court judge is without the power to enjoin the operation of an Act of Congress. The court did not intend to impede the operation of the statutory scheme pending Supreme Court adjudication. The case is on direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252. Pending a judicial determination that actually impacts on the operation of the Price-Anderson Act the NRC licensing procedures remain unaffected, and should not be modified for purposes of this proceeding.

There is no basis for an issue in this proceeding as a result of the Carolina Environmental Study Group v. United States Atomic Energy Commission decision.

CONSOLIDATION

RE: GUARD

At the prehearing conference Applicants suggested that because GUARD has interests in this proceeding similar to FOE, et al., GUARD should be consolidated with FOE, et al. The Board feels that the better procedure is to allow GUARD to have discovery in its own right on the issues it raised and which were accepted by the Board. The Board will further consider the question of consolidation of intervenors at a subsequent prehearing conference.

RE: CITIES OF ANAHEIM AND RIVERSIDE

By its Memorandum and Order of October 26, 1977, the Petition Board consolidated the Cities of Anaheim and Riverside (Cities) with the Applicants because the interest of the Cities is essentially the same as the Applicants'. This similarity is based on the Cities' prospective co-ownership of the facilities as a result of its formal notice of intent to accept the Applicants' offer pursuant to the terms and conditions of a settlement agreement.

At the prehearing conference Applicants objected to the consolidation of the Cities. It appears that formal consummation of the agreement has not yet materialized (Tr. 531).

At the prehearing conference counsel for the Cities represented that only the question of investment tax credit remains; the agreements themselves have been negotiated and will likely be executed early in 1978 (Tr. 532). The investment tax credit matter involves a ruling by the U.S. Internal Revenue Service (IRS) which is expected by mid-1978 at latest (Tr. 533).

The thrust of Applicants' position appears to be that 10 CFR § 2.715a provides for consolidation of parties only and, since the Petition Board dismissed the Cities' petition for leave to intervene in its Order of October 26, 1977, they are not parties, hence, they cannot be consolidated.* The Applicants do suggest that at such time as the Cities become parties, they may be consolidated. The Applicants concede that when the Cities are formally co-owners, they would become parties and would be consolidated with Applicants (Tr. 575).

In light of the cloud which has been placed on the co-ownership question and the uncertainty of its resolution the Licensing Board is of the opinion that it should stay the

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* This, in our view, is a distorted interpretation of the Petition Board's Order. Its dismissal of the Cities' petition was predicated on the consolidation of the parties.

ruling consolidating the Cities with the Applicants until such time as the Applicants and/or Cities advise the Board of the outcome of the tax credit question and final resolution of the pending settlement agreement. In the meanwhile, the Cities may participate in discovery.

DISCOVERY

We have been advised that the Final Environmental Statement and the Safety Evaluation Report will not be available until mid-1978. It appears that there is more than adequate time for discovery. Discovery may begin on the accepted contentions and will continue until further notice of the Board. Each party shall submit a report to the Board on or before June 30, 1978, setting forth the status of its discovery and its proposed schedule for completing discovery.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

John M. Frysiak

John M. Frysiak, Chairman

Dated at Bethesda, Maryland
This 27th day of January 1978.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges

Robert M. Lazo, Esq., Chairman
Richard F. Cole, Ph.D
A. Dixon Callihan, Ph.D

In the Matter of ARIZONA PUBLIC SERVICE COMPANY, Et Al. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3 Operating License Proceeding)	Docket Nos. STN 50-528-OL STN 50-529-OL STN 50-530-OL April 16, 1981

MEMORANDUM AND ORDER

1. BACKGROUND

On July 25, 1980, the U.S. Nuclear Regulatory Commission (the Commission) published in the Federal Register a notice of receipt of an application for facility operating licenses for Palo Verde Nuclear Generating Stations Units 1, 2 and 3 and notice of opportunity for hearing (45 Fed. Reg. 49732).[1/] Such licenses would authorize 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 Arizona Electric Power Cooperative, Inc., (Joint Applicants) to possess, use and operate Palo Verde Nuclear Generating Station, Units 1, 2 and 3, three pressurized power nuclear reactors (the facilities) located on the Joint Applicants' site in Maricopa County, Arizona, approximately 36 miles west of the City of Phoenix.

1/ The July 25, 1980, notice is a clarification of an earlier notice published in the Federal Register (45 Fed. Reg. 46941-43) on July 11, 1980

The notice of opportunity for hearing provided that any person whose interest may be affected by this proceeding may file a petition for leave to intervene in accordance with the Commission's Rules of Practice (10 CFR 2.714). In response to this notice, on August 11, 1980, Patricia Lee Hourihan submitted a timely petition for leave to intervene and a request for hearing in the above-identified matter for herself as well as on behalf of two other persons, Kevin Dahl and Christopher Shuey. On November 21, 1980, Ms. Hourihan filed a Supplement to Petition for Leave to Intervene and Contentions (Supplement) setting forth 28 contentions.

On December 2, 1980, a prehearing conference was held before this Atomic Safety and Licensing Board (Board) to consider the petition for leave to intervene and to permit identification of the issues in this proceeding. At the prehearing conference, the Board orally granted the petition for leave to intervene as to Ms. Hourihan, thereby making her a full party to this proceeding.[2/] (Ms. Hourihan hereinafter will be referred to as "Intervenor.")

At the aforementioned prehearing conference the parties--Intervenor, Joint Applicants, and the NRC Staff--indicated that they would confer in an effort to arrive at a stipulation regarding the language of Intervenor's remaining contentions.[3/] Such a stipulation was executed and filed with the Board on December 12, 1980.

With regard to the Intervenor's contentions not withdrawn in the prehearing conference, the stipulation indicates that the Intervenor further withdrew Contentions Nos. 3, 9, 10, 15, 16, 20, 21 and 22 from Intervenor's November 21, 1980

2/ Tr. 16.

3/ Tr. 30. During the course of the discussion of Intervenor's contentions at the prehearing conference, Intervenor withdrew Contentions Nos. 19, 24, 25 and 27 (Tr. 30, 32).

Supplement and formed from the remaining contentions a group of reworded contentions which all the parties agreed were valid contentions (Appendix A to the Stipulation) and a group of reworded contentions that the parties were not able to agree were valid contentions (Appendix B).

Joint Applicants and the NRC Staff have each filed written responses to the disputed contentions. In the view of the Staff, only Contention 6B of the contentions set forth in Appendix B to the Stipulation should be accepted as a valid contention in this proceeding. Joint Applicants oppose each of the disputed contentions. By Order dated January 6, 1981, the Board afforded the Intervenor the opportunity until January 20, 1981, to respond in writing to any contention which has been objected to by Joint Applicants or the Staff. No response by Intervenor has been received.

II. CONTENTIONS

Upon consideration of the filings by the Petitioner and the other parties, this Board concludes that a hearing is warranted and that it should confirm its earlier oral ruling that Ms. Hourihan should be admitted as a party to the proceeding. Her petition provides sufficient assertion of her interest and she has submitted admissible contentions which identify specific aspects of the subject matter of the proceeding as to which she wishes to intervene. Accordingly, the Board will grant the petition for leave to intervene filed by Ms. Hourihan. Neither Mr. Dahl nor Mr. Shuey have requested party status, thus Ms. Hourihan will be the sole intervenor in this proceeding.[4/]

4/ Tr. 12

Further, the Board has concluded that it should approve the December 12, 1980 "Stipulation of Parties Regarding Contentions and Discovery." By so doing the Board accepts as issues in controversy in this proceeding three safety contentions (Contentions Nos. 1, 7 and 8) and one environmental contention (Contention No. 5).

Appendix B to the Stipulation sets forth three safety contentions (Contententions Nos. 6B, 17 and 23A) and five environmental contentions (Contentions Nos. 6A, 14, 18, 23B and 28) that the parties were not able to agree were admissible contentions. We will address each of these in turn.

CONTENTION NO. 6A

> The Applicants have not analyzed the financial consequences of an Anticipated Transient Without Scram (ATWS) event which can result in a Class 9 accident. [By this contention, Intervenor is not limiting the area of the contention to only ATWS events that could lead to Class 9 accidents.]

The Intervenor in this contention raised the issue that the potential dollar costs resulting from the consequences of an ATWS event (including an ATWS event that could lead to a Class 9 accident) have not been considered by the Joint Applicants.

The Commission recently issued an interim policy statement entitled "Nuclear Power Plant Accident Consideration Under the National Environmental Policy Act of 1969" (45 Fed. Reg. 40101, June 13, 1980), which revised Commission policy on the consideration of environmental impacts arising from

more severe very low probability accidents (Class 9 accidents) that are physically impossible.[5/] The interim policy statement provides:

> It is the Commission's position that its Environmental Impact Statement shall include considerations of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.

However, this interim policy statement applies to the Staff only and not to the Joint Applicants. Only applicants who file their environmental reports after July 1, 1980, are required to address such Class 9 risks. (45 Fed. Reg. 40103). The Applicant's environmental report was submitted on December 5, 1979.

Even if the contention were reworded to assert that the Staff had failed to take into account the costs of the referenced ATWS events it still must fail, at least for now. The contention is premature and in addition fails to meet the specificity requirements of 10 C.F.R. §2.714. Accordingly, it cannot be admitted.

CONTENTION NO. 6B

> The Applicants have not incorporated measures designed to mitigate a postulated ATWS event.

The Appeal Board has made it clear that "unresolved" issues such as ATWS cannot be disregarded in individual licensing proceedings because they have generic applicability. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2) ALAB-491, 8 NRC 245, 248 (1978) The Appeal Board added: "There must be some explanation why construction or operation can proceed even though an overall solution has not been found." (Id.)

5/ This policy will be applied to the Staff's environmental assessment of Palo Verde Nuclear Generating Station since it is an ongoing review. See Fed. Reg. 40101, at 40103.

In Northern States Power Company, (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, slip op. at 19 (September 3, 1980) the Appeal Board stated that the Licensing Board must look at the record and assure itself that "the generic safety issues have been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify operation.

Thus the basic matter set out in the contention must be dealt with in this proceeding. The issue to be dealt with under this contention would be (a) have the Joint Applicants incorporated measures to deal with ATWS events in their Palo Verde facility, and if not (b) does this pose a safety question that would foreclose issuing an operating license for the facility.6/

For the above reasons the Board finds this contention to be admissible.

CONTENTION NO. 14

> The Applicants have failed to show the effects of cumulative radiation on the Primary System of the PVNGS and the likelihood that these effects will not shorten the life-span of the plant.

This contention is not admissible for the reason that it fails to meet the bases and specificity requirements of 10 C.F.R. §2.714. The Intervenor states no basis for the contention. Furthermore, it is not clear from the contention what "effects" are of concern to the Intervenor and how these effects will lead to a shortening of the life of the Palo Verde Nuclear Station so as to be of concern in this licensing proceeding.

6/ Should the Commission resolve the ATWS issue or other generic questions by rule or regulation, such action would be binding on this Board and prevent litigation of this matter. See 10 C.F.R. §2.758.

CONTENTION NO. 17

> The Applicants have failed to adequately consider the report on "Spent Fuel Heat Up Following the Loss of Water During Storage" prepared by the Sandia Laboratories for the NRC in September of 1978 (SAND 77-1371).

This contention is unacceptable for the reason the Intervenor has failed to provide a basis with reasonable specificity as required by 10 C.F.R. §2.714. There is no showing how the cited report relates to the Palo Verde Station or why such report should be considered by the Joint Applicants.

CONTENTION NO. 18

> The Applicants have not adequately figured the costs and impacts of storage or disposal of spent fuel and other radioactive wastes, for the term of the operating licenses, in the cost/benefit analysis.

This contention is too vague to be admissible. It fails to meet the specificity and bases requirement of 10 C.F.R. § 2.714. Principally, it is not clear what issue the Intervenor is asking the Board to accept for litigation. Moreover, it is not clear what "impacts" are referred to.

CONTENTION NO. 23A

> The Applicants have not adequately considered the effects of on-site sabotage.

The Board recognizes the difficulty that an intervenor has with regard to asserting a contention on the security plan for a nuclear reactor with sufficient basis and specificity to satisfy the requirements of 10 C.F.R. §2.714, since the security plan is not available to the intervenor. The Board, however, does not believe that the basis cited by the Intervenor in

the support of this contention, the general availability of the Barrier Penetration Handbook, is sufficient in spite of this difficulty. The basis cited for such a contention should be site specific, i.e., stating specific reasons why a security plan may not be adequate for this particular station. The mere availability of a Handbook giving the times certain types of physical barriers can resist penetration, does not show that the security at the plant is insufficient. Further, the nexus between this book dealing with barrier penetration, i.e., an attack on a plant from outside and, on-site sabotage is not apparent. The contention is not admissible.

CONTENTION NO. 23B

> The Applicants have not adequately considered the economic cost effects of off-site sabotage.

This contention is unacceptable for the reason that it fails to satisfy the "basis" and "specificity" requirements of 10 C.F.R. §2.714. The simple assertion that the transmission line routes are public and that transmission line towers can be toppled easily does not support the contention. The Intervenor has failed to indicate any reason why she believes that such sabotage will occur at the Palo Verde Station or that it can have any substantial effect on the economic viability of the facility. The statements in the Intervenor's "Explanation" are, in essence, nothing more than speculation.

CONTENTION NO. 28

> The cost of PVNGS outweighs the cost of alternative sources of energy. The Applicants have not sufficiently met the requirements of 10 C.F.R. 51.21. The Applicants have failed to show the alternative available to meet Arizona's energy needs.

This contention lacks the basis and specificity required by 10 C.F.R. §2.714. It is nothing more than a collection of bare assertions that the costs of PVNGS outweigh the costs of alternatives, that Joint Applicants have not met the requirements of 10 C.F.R. §51.21, and that Joint Applicants have failed to discuss the available alternatives to PGNS. There is no basis stated to support any of these assertions. The construction permit Final Environmental Impact Statement did consider various alternatives and their costs relative to PVNGS (FES, September 1975, Chapter 9) and the Licensing Board evaluated that discussion (LBP-76-21, 3 NRC 662, 690-693, (1976)). Furthermore, the Intervenor has not indicated how the Joint Applicants have failed to meet 10 C.F.R. §50.21. In sum, the Intervenor has totally failed to show how the consideration of alternatives to PVNGS has been deficient. Accordingly, the contention lacks the required basis and specificity and is not admissible in this proceeding.

III. ORDER

For all the foregoing reasons and based upon a consideration of the entire record in this matter it is this 16th day of April, 1981

ORDERED

1. The Petition For Leave To Intervene in this proceeding by Patricia Lee Hourihan is granted;
2. The Stipulation of Parties Regarding Contentions and Discovery, dated December 12, 1980, is approved;
3. Intervenor's Contentions Nos. 1, 5, 6D, 7 and 8 are admitted as issues in controversey in this proceeding; and

4. Intervenor's Contentions Nos. 6A, 14, 17, 18, 23A, 23B and 28 are rejected.

A notice of hearing implementing this decision is appended to this Memorandum and Order as Attachment A.

Judge Richard F. Cole and Judge A. Dixon Callihan, Members of the Board, join in this Memorandum and Order.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Robert M. Lazo

Robert M. Lazo
Administrative Judge

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Louis J. Carter, Chairman
Mr. Ernest E. Hill
Dr. David R. Schink

In the Matter of:

ARMED FORCES RADIOBIOLOGY
RESEARCH INSTITUTE

(TRIGA-Type Research Reactor)

Docket No. 50-170

(Renewal of Facility
License No. R-84)

August 31, 1981

SPECIAL PREHEARING CONFERENCE
MEMORANDUM AND ORDER
(Allowing Interventions and Ruling on Contentions)

On April 15, 1981, this Board ordered that a Special Prehearing Conference be held for the purpose of considering contentions which were still in dispute.1/

The conference was held on Friday, May 1, 1981, at the NRC Hearing Room in Bethesda, Maryland, and was attended by members of the public and all parties were present with their attorneys and some of their experts.

As hereinafter set forth we allow the intervention of Citizens for Nuclear Reactor Safety, Inc., and rule on their contentions.

1/ Public Notice was given on April 22, 1981, 46 Fed. Reg. 22998.

I. Allowance of Intervention of CNRS

On December 10, 1980, the Citizens for Nuclear Reactor Safety, Inc. (CNRS) on its own behalf and on behalf of its members petitioned for leave to intervere in this matter. The petition stated that petitioner is a non-stock Maryland corporation whose members are residents of Montgomery County, Maryland, where the reactor, operated by the Armed Forces Radiobiology Research Institute (AFRRI), is situated. The petition alleged that three members of CNRS live within two thirds of a mile of the reactor and that two of the three are parents of a new born infant.

On December 24, 1980, the Defense Nuclear Agency, which operates the Licensee, filed an opposition to the petition for leave to intervene of CNRS averring that the petitioner had failed to establish standing, that the contentions and the petition were outside the scope of the renewal action under consideration, and that the contentions were contrary to the manifest weight of the documented evidence of record on file with the NRC.

The first of the oppositions relates to the fact that none of the members of CNRS - who it was averred lived within two thirds of a mile of the reactor - were identified. The balance of the petition consists primarily of responses to the allegations which aver the contrary and, in fact, constitute arguments on the merits. These points are enumerated in the margin. 2/

2/ The Defense Nuclear Agency opposition filed December 24, 1980, averred inter alia, (1) that the AFRRI Emergency Plan addressed all credible accidents; (2) that emergency response capabilities at AFRRI and the surrounding community meet all NRC regulatory requirements; (3) that routine discharges of radioactive effluents meet all NRC requirements; (4) that radioactive air borne effluents emitted by AFRRI meet NRC regulatory requirements; (5) that water, soil and vegetation monitoring is adequate; (6) that AFRRI has demonstrated that operation of the TRIGA reactor will fully comply with the requirements of safety and law; (7) that the AFRRI site does not constitute a significant hazard to public health and safety; (8) that the aging of the AFRRI TRIGA reactor does not impact upon safety; (9) that AFRRI security plans meet or exceed all NRC requirements;

On December 24, 1980, the Staff filed its response to the petition for leave to intervene alleging that the Petitioner had failed to demonstrate that it possesses standing in its own right and failed to identify at least one member with standing.

On January 16, 1981, Petitioner filed an Amendment to its Petition For Leave To Intervene to establish the identity and interest of several of its members and its authority to represent these individuals. Affidavits from Bruce Moyer, Rebecca Moyer, Bevin Grylack, Irving Stillman, Bernard Phillips, Delores Helman, Elizabeth Entwisle, and Edith Villastrigo were appended to the Amendment. These persons state they live from 0.3 to 4.6 miles from the site of the reactor.

On January 26, 1981, Staff filed its response and noted that the Petitioner's amendment addressed the defects advanced in Staff's original response and that by identifying certain members by name and establishing that their residences are in proximity to the reactor and authorizing CNRS to represent them in this proceeding, these affidavits were, in Staff's view sufficient. Staff stated also that counsel for Licensee authorized Staff to advise the Board that the Licensee concurs in the Staff's conclusion and did not intend to submit a separate response to the amendment. None has been filed.

We find that the Petitioner has cured the defects in its petition concerning the interest and standing requirements and in accordance with the provisions of 10 C.F.R. § 2.714 Petitioner's intervention is allowed.

Footnote 2 (continued)

(10) that management and internal organization at AFRRI are competent to operate the facility within applicable safety limits; and (11) environmental impact appraisal data submitted by AFRRI adequately address environmental impacts.

II. Approval of Stipulation of March 31, 1981

A number of meetings were held between the parties at which attempts were made to stipulate admissible contentions. Following these on March 27, 1981, the Staff, Petitioner, and Licensee met, and as a result were able to stipulate as to the admissibility of six of Petitioner's proposed contentions. Agreement was not reached on seven additional contentions. Both sets of contentions were filed with the Board in a stipulation signed by the Parties and the Petitioner on March 31, 1981.

That stipulation is approved. 3/

III. The Unstipulated Contentions - Consideration and Rulings

Contention 1. Accidents I 1) alleges that in the event of a rapid loss of coolant while the reactor is in the pulse mode, there could be a sudden temperature elevation sufficient to cause multiple cladding failure or fission product releases in excess of the limits provided in 10 C.F.R. Part 20.

Staff argues that the reactor cannot be pulsed unless it is critical and it cannot be critical without the water moderator. Thus Staff's position is that there is no basis for a contention which is stated as a physical impossibility. Staff further argues that it would be duplicative of contention 2. Staff asserts that loss of coolant accidents are covered by the stipulated contention.

Licensee also urges the Board to consider this contention as posing a physical impossibility, thus they are at a loss as to know what to defend against.

3/ The stipulated contentions are stated in full in Appendix "A". The unstipulated contentions are stated in full in Appendix "B".

Intervenors, on the other hand, allege that they have evidence to support their position, and made an offer of proof to the effect that, inasmuch as a loss of water coolant is a "finite" process, there are competing reactions between thermalization of the fast neutrons occurring in the water and also the heating up of the fuel element moderator and cladding. They further propose to demonstrate that the rates at which these occur will intersect at such a point that a power excursion is possible to produce the kinds of effects about which they are concerned. In other words, what was postulated is not that there is a total absence of water but that the rates at which they occur is critical in permitting a power excursion of the type about which they are concerned.

Clearly the Board is met with a conflict. Doubts, differing opinions and controversy have been and will continue to test men and women in science. Intervenor will be given the opportunity to prove that which Staff and Licensee consider to be an impossibility. 4/

This contention is accepted and is renumbered Contention 1. Appendix I.B. 5/

Contention 1. Accidents I 2) alleges that the Hazard Safety Report (HSR) erroneously concludes that radiation doses would result only from submersion exposure to noble gases released, but Petitioner contends that "individuals" would receive additional exposure due to what is termed

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4/ Even the eminent British physicist Baron Ernest Rutherford is believed to have said this: "The energy produced by the breaking down of the atom is a very poor kind of thing. Anyone who expects a source of power from the transformation of these atoms is talking moonshine", September 11, 1933.

5/ Stipulated Contention 1. Accident I is renumbered Contention 1. Accidents 1.A.

"internal emissions".

Counsel for Petitioner on April 14, 1981, filed a Petition for Waiver of Commission regulations alleging that the facts of this case present "special circumstances" within the meaning of 10 C.F.R. Section 1.758 such that the application of the concentration and dose limits set forth at 10 C.F.R. Part 20 and Appendices B and C would not serve the purpose for which these limits were adopted, i.e., would not adequately protect the public health and safety.

The affidavit attached to the Petition was executed by Petitioner's counsel and in summary avers: (1) that the AFRRI facility is in close proximity to two hospitals whose patients and staff are exposed, on a daily continuous long term basis to emissions and effluents from the facility; (2) that the facility is in close proximity to many residential dwellings and several schools, including elementary schools, and that elementary school students are particularly vulnerable to the radiological hazards of the AFRRI emissions and effluents; and (3) that the facility is in close proximity to many businesses and that because it is situated in the midst of a densely populated urban/residential area the population dose that results from routine emissions and effluents is significantly higher than would be the case if the facility were more remotely sited.

Petitioner's point appears to be that there are both more people, and people who are more susceptible to health hazards from radiation in the middle of Bethesda, Maryland, than contemplated by the regulations and that this demography, including close proximity to hospitals and elementary

schools, presents a "special circumstance" so as to permit an attack on the validity of the Commission's regulations under 10 C.F.R. Section 2.758.

Intervenor admitted at the Special Prehearing Conference that "the affidavit is inartfully phrased . . ." Tr. 25. It further appeared that the Petitioner is, essentially, trying to present the issue of whether sick people would be more susceptible to what it terms "internal emissions" or inhalation as opposed to submersion. Petitioner asserts it has several reports and studies done by reputable scientists to support that proposition and is prepared to submit them at hearing.

Petitioner further asserts that there is a regulatory void in that Part 20 concerns itself only with submersion doses. Petitioner does not ask that the Commission waive application of Part 20. It merely wishes the Commission to consider that in the absence of any standards applicable to research reactors the Board must consider the specific facts of this case due to the proximity of sick people and young people, specifically those of elementary and pre-school age. Tr. 28.

This Board reserves decision on this contention pending receipt from the Petitioner within fifteen (15) days of the service of this Order of a more specific affidavit concerning whether "special circumstances exist to permit this Board to entertain Petitioner's attack on the validity of the Commission's regulations". 10 C.F.R. Section 2.758.

If on the basis of the Petition, the revised affidavit, and any response thereto, we determine that a prima facie showing has been made, we shall, before ruling on the merits, certify directly to the Commission

for determination, the matter of whether the application of Part 20 and Appendix should be "waived or an exception made" 10 C.F.R. Section 2.758. [6/]

Contention 2. Accidents II 1) concerning the N-16 diffuser system has been withdrawn by Petitioner.

Contention 2. Accidents II 2)a) concerns the effect of a power excursion accident with reduction in the thermalizing effect of hydrogen with a resulting explosive zirconium steam reaction. Both of the said accidents it is alleged would result in a multiple cladding failure.

Staff opposes the admission of this contention, as stated, averring it lacks an adequate basis and raises an issue which is neither concrete nor litigable. Staff's position with regard to the zirconium interaction is that the zirconium hydride (which is the fuel with uranium) is stable and simply does not have any explosive reaction with either steam or air. Staff argues that the responses supplied by the Petitioner do not support the Petition. Staff further argues that the explosive reaction contention should not be allowed as it is merely a multiple cladding failure accident produced by either a power excursion or loss of coolant, and thus identical to stipulated Contention 2. Accidents II-4).

Petitioner insists that the concern is the explosive zirconium reactions based on the work of Dr. Earl A. Gulbransen, [7/] Petitioner had

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6/ This is renumbered Contention 1. Accidents I-B-2.

7/ Research Professor, Department of Metallurgical and Materials Engineering at the University of Pittsburg, Pennsylvania.

provided Staff with copies of letters from Dr. Gulbransen addressing this question. Staff argues that neither letter addressed a TRIGA reactor nor uranium-zirconium hydride, but referred to the tin zirconium alloy, zircaloy, which is used as fuel cladding in commercial power reactors but not in the TRIGA reactor. There is no scientific basis for an alleged event that cannot happen, Staff asserts, basing this belief on the research and tests of which it has knowledge and the fact that uranium zirconium hydride is extremely stable and a non-reactive substance.

It is the opinion of the Board that the matters to which reference has been made clearly show a factual disagreement which is best resolved at hearing unless disposed of prior thereto. This contention is allowed.

Contention 2. Accidents II 2)b) alleges a loss of coolant accident with the same reaction as in the prior contention and is allowed.

Contention 3. Testing Facility. Petitioner contends that the AFRRI facility is a testing facility within the meaning of Sections 31.a(3) and 104(c) of the Atomic Energy Act of 1954, as amended and Sections 50.21(c) and 50.2(r) of 10 C.F.R. Part 50. This contention is rejected on the clear wording of the regulations. Petitioner states the issue to be:

> "Whether the determining mode of operation for the AFRRI reactor is, or should be, its steady state mode or its pulsing mode. If it is the latter, the AFRRI power level exceeds 10 MWT and the reactor falls within the definition of a testing reactor."

Petitioner cites in support of its position the case of Trustees of Columbia University (Docket No. 50-208, ALAB-3, May 26, 1970, 4 AEC 349).

Petitioner has misread the decision of the Appeal Board which, in our view, clearly holds that the thermal power is to be determined by operation in the steady-state mode, rather than the pulsed mode.

More particularly, that decision explains the issue fully when it says:

> As previously stated, the Columbia reactor would be authorized to operate steady-state power levels no greater than 250 kilowatts thermal. The question then became whether, in terms of the potential for releases of radioactivity, operation in the pulsing mode with maximum pulse peaks of up to 250,000 kilowatts involves hazards considerations essentially equivalent to or greater than those associated with steady-state operation at 10 megawatts thermal, which level is the criterion specified in Section 50.2(r)(1).
>
> The record here is clear that, when the subject reactor is pulsed, the power rises to the maximum pulse height and then drops after a fraction of a second. The pulse is limited in height and duration by an inherent prompt negative temperature coefficient of reactivity. In this TRIGA reactor the cycle for pulsing can, at a maximum, occur only once every 6 minutes. Even with the maximum pulse height reached for the fraction of a second during each pulse, the reactor, during the pulsing cycles, would be operating at an average power level considerably less than its authorized steady-state power level. Therefore, even if the reactor were to be pulsed as often as possible, the total energy generated would be substantially less than if the reactor had been operated continuously at its steady-state full power limit of 250 kilowatts thermal; and the resultant fission product inventory would be correspondingly lower. Viewing this in the context of our earlier statements as to the intended reach of Section 50.2(r), we think it manifest that the determining mode of operation for purposes of Section 50.2(r)(1) is the steady-state mode, which mode would produce the greater fission product inventory. The steady-state full power limit for the subject facility is, of course, far below the 10 megawatt thermal level specified in Section 50.2 (r)(1).
>
> Accordingly, our response to the Board's first question is that the Applicant's reactor is not a "testing facility" as defined in Section 50.2(r). We note, in this connection,

> the Staff's statement in the comments submitted to us that the Commission has licensed approximately 20 similar facilities over the past dozen years as research reactors, even though those reactors could pulse to power levels far in excess of 10 megawatts thermal; and that no TRIGA facility has been licensed as a "testing facility".

Clearly the matter presented is a legal issue. Licensee urges that since the Board is required to follow the decisions of the Atomic Safety and Licensing Appeal Board the testing facility contention does not warrant further consideration. See Consumers Power Company (Palisades Plant), Docket No. 50-255, ALAB 014, September 25, 1970, 4 AEC 418 at 423. The Board for the reasons stated holds that the contention is denied.

Contention 4. Siting. Petitioner contends that the reactor is a "testing reactor" and therefore Part 100 requirements apply as to which reasonable assurance cannot be given that Applicant's Emergency Plan is adequate.

This contention is rejected inasmuch as we have determined that this is not a "testing reactor". See our ruling on Contention 3 above. Given that determination, further consideration of this contention would be tantamount to a challenge to existing regulations which is proscribed in 10 C.F.R. Section 2.758(a).

Contention 5. Routine Emissions I. Petitioner here avers that actual and probable violations have taken place which demonstrate that applicant will not maintain operations so as to comply with Part 20 requirements.

Petitioner alleges (1) that from 1962 to 1979 releases resulted in whole body doses in excess of EPA's limit of 25 MREM; (2) that contaminated solid wastes were incinerated; (3) that released data indicates a high

probability that doses to the public were in excess of 0.5 REM and thus violated the principle that emissions from Applicant's operation be kept as low as is reasonably achievable (the ALARA principle); [8/](4) that the 1971 Environmental Report indicates rates as high as 1-5 mRad/hr. where 50 to 60 percent of the area within one mile is residential; and that it is highly probable that the dose limit was exceeded thus violating the ALARA principle.

Parts (1) and (2) are not necessary to consider as part of the wording of a contention. They are in the nature of supporting bases and as such may possibly be used as part of the evidentiary presentation, subject, of course, to all applicable rules of evidence.

Parts (3) and (4) are allowed. NEPA mandates our study of the environmental consequences "to the fullest extent possible" 42 USC 4332. It is an essential element of our decision-making process.

Though the data referred to by Intervenor may be somewhat stale, a factual basis has, none the less, been stated, which this Board finds sufficient for admissibility, although greater particularization would be helpful. The contention is marginally admissible. The Board expects these issues to be more fully explored and elucidated prior to hearing leaving open the possibility of better specification prior to the next pre-hearing conference.

8/ Since 1975 the Commission has substituted "as low as is reasonably achievable" (ALARA) for "as low as practicable" (ALAP). See In the Rulemaking C-1-75-8, 1 NRC 277, 278 (1975).

Contention 6. Routine Emissions II alleges that "special circumstances" within the meaning of 10 C.F.R. Section 2.758 warrant the Board's consideration of whether the off-site air and waterborne release limits set forth at 10 C.F.R. Part 20, and Appendices B and C thereto, are adequate to protect the public health and safety of the population in the vicinity of the AFRRI reactor.

Intervenor submitted an affidavit as part of its Petition for Waiver, but as we stated above in our consideration of Consideration 1. Accidents I-2), we reserve decision pending receipt of a more specific affidavit with regard to "special circumstances" which are alleged to exist.

Contention 7. Security contains a recitation of five categories of past violations and avers that neither the physical security plan nor the history of security violations demonstrate that the controlled areas can be protected from sabotage or diversion of special nuclear material according to the standards set forth at 10 C.F.R. Part 73.

It is the Board's opinion that the security contention should be allowed; however, it is limited to Building #42, which houses the reactor, and not the entire National Naval Medical Center on whose grounds the AFRRI site is located. 9/

Intervenor's difficulty in being more specific is obvious. Significant specification is not possible prior to access to confidential security information. In the Board's opinion, Licensee has sufficient basis to be on notice as to what must be defended. Discovery, limited as above,

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9/ The building is described in the AFRRI Reactor Facility Safety Analysis Report, May 1981.

will permit early re-examination of the security issues.

IV. Subject to the determinations set forth above, the following schedule shall be followed by all parties:

(a) thirty (30) days after the date this order issues the first set of interrogatories shall be filed;

(b) thirty (30) days thereafter, the answers to the first set of interrogatories shall be filed;

(c) twenty (20) days thereafter, the second set of interrogatories shall be filed;

(d) twenty (20) days thereafter, the answers to the second set of interrogatories shall be filed; and

(e) not later than forty-five (45) days thereafter, all Motions for Summary Disposition shall be filed.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Louis J. Carter, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 31st day of August 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James L. Kelley, Chairman
Dr. Peter A. Morris
Dr. Richard F. Foster

In the Matter of COMMONWEALTH EDISON COMPANY (Quad Cities Station, Units 1 and 2)	Docket Nos. 50-254-OLA 50-265-OLA (Spent Fuel Pool Modification) October 27, 1981

ORDER
(Reflecting Actions Taken at Prehearing Conference)

A special prehearing conference pursuant to 10 CFR 2.751a was held at the Rock Island County Office Building in Rock Island, Illinois, on October 14, 1981. Representatives of the Applicant, the NRC Staff, and each of the organizations petitioning to intervene in this proceeding were present and participated. This Order reflects the major matters discussed and actions taken at the Conference.

Admission of Petitioning Organizations as Parties. Timely petitions to intervene were filed by Citizens for Safe Energy ("CSE") and Quad-City Alliance for Safe Energy and Survival ("QASES"). Subsequent discussions among the petitioners, the Applicant and the NRC Staff resolved some initial questions from the Applicant about standing, and a list of agreed-upon contentions was developed. Our independent application of the standing-plus-one-valid-contention test satisfies us that

the petitions for intervention of these two organizations should be granted. CSE and OASES are admitted as parties. We will refer to them collectively as "the Intervenors."

A third organization, Older Americans for Elderly Rights ("OAER"), also petitioned for leave to intervene. However, the areas of interest indicated in their petition were too vague to qualify as contentions. Although reminded in our notice of the prehearing conference of their right to file further contentions, they chose not to do so. They were represented at the prehearing conference by Mr. Jack Smith, their Director, who indicated that OAER was no longer interested in participating as a party in this case. Tr. 14. The Chairman informed Mr. Smith that, under the circumstances, he could choose to withdraw the OAER petition, or the Board would deny it. Mr. Smith indicated his preference for a Board denial. Tr. 16. The OAER petition is denied.

Admitted Contentions. The parties have stipulated that a list of nine contentions -- set forth in Appendix A to their joint "Stipulation of Issue and Contentions" of October 2, 1981 -- "should be admitted for consideration as matters in controversy." Our independent review of these proposed contentions leads us to agree that these contentions should be admitted. Their admission is, of course, without prejudice to the possibility that one or more of them may later prove to be fit candidates for summary disposition under 10 CFR 2.749.

Disputed Contentions. The Intervenors propose three additional contentions which the Applicant and the Staff oppose. Each contention and our ruling on its admissibility are set forth below.

Contention 2: The Licensees have not considered in sufficient detail the possible alternatives to the proposed expansion of spent fuel storage capacity. Specifically, Licensees have not considered preferable alternatives for managing the spent fuel during the remainder of the operating license for the Quad Cities Nuclear Station, namely, the possibilities of:

a. shutting down the Quad Cities Nuclear Station once the racks presently installed in spent fuel pools are full, or

b. reducing electrical output from the Quad Cities Nuclear Station in conjunction with either energy conservation and pricing alternatives which would reduce demand or increasing the use of underutilized fossil fuel plants to meet current demand.

Ruling. This Board is not responsible for considering broad energy alternatives in the abstract. Our job is to apply the Commission's rules and federal statutes applicable to the comparatively narrow proposition before us -- whether the Applicant should be allowed to expand the capacity of the spent fuel pool at the Quad Cities facility.

In that context, any responsibility of ours to explore the alternatives outlined in this contention must flow from the National Environmental Policy Act ("NEPA") and implementing Commission regulations (10 CFR Part 51) which do require consideration of reasonably available alternatives through the vehicle of an environmental impact statement.[1/] However, that requirement is only triggered where the action proposed will constitute a "major Commission action significantly affecting the quality of the human environment." 10 CFR 51.5(a)(11).

1/ The Atomic Energy Act contains no comparable "consideration of alternatives" requirement.

In a number of recent cases, intervenors have argued that proposed expansions of particular spent fuel pools would have a "significant effect" on the environment, thus requiring an environmental impact statement. See, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station), ALAB-650 (1981); Consumers Power Co. (Big Rock Point), ALAB-636 (1981); Portland General Electric Co. (Trojan Nuclear Plant), 9 NRC 263 (1979); Northern States Power Co. (Prairie Island Nuclear Generation Plant), 7 NRC 41 (1978).[2/] In none of these cases was the requisite effect on the environment shown to exist. Nevertheless, the Appeal Board made it clear in Big Rock Point that, unless and until some generic determination can be made, these determinations must be made on a case-by-case basis. ALAB-636, slip op., p. 36, note 35.

In the present case, however, we do not have an explicit allegation of significant impact on the environment, let alone a substantial record showing of impact. In addition, we do not yet have the Staff's environmental analysis; Staff counsel stated that an environmental impact appraisal (EIA) will be prepared, but it apparently will not be available for some months. Tr. 29. In these circumstances, Big Rock Point provides explicit direction that the Board should:

> await the preparation of the staff's environmental analysis ... It is unwise, if not improper, to decide without the record supported provided by the staff's environmental review, whether a given action significantly affects the environment. Id., pp. 35-36.

2/ We ask the Staff to make copies of these decisions available to the Intervenors.

Accordingly, we are deferring our ruling on proposed Contention 2 until after the Staff's EIA is available. At that time, if the Intervenors wish to pursue this contention (or perhaps a contention revised in light of the EIA), we will hear further argument and issue any necessary rulings.

> Contention 7: The Licensees should be required to submit cost evaluations for handling, transportation and storage of the additional fuel which will be stored in the proposed racks for the remainder of the operating licenses for the Quad Cities Nuclear Station.

Ruling. This contention is disallowed. The financial qualifications of an applicant for a reactor construction permit are subject to scrutiny. See 10 CFR Part 50, Appendix C. However, no comparable requirement applies to an applicant for an amendment of the kind sought here. Consumers Power Co. (Big Rock Point Nuclear Plant) 11 NRC 117, 127 (1980).

This contention might possibly be viewed as something other than a "financial qualifications" contention. Thus, the costs of the proposed modifications might become relevant if we eventually become involved in a comparison of alternatives. However, as explained above, that would only happen upon a determination of significant environmental impact. Should such a determination be made following receipt of the Staff's EIA, contentions based upon it should be drafted on the basis of the record at that juncture.

At the prehearing conference, the Intervenors sought to link this contention with "substantial hidden subsidies to the nuclear power industry" and with the availability of other storage techniques, such as a new storage pool, dry caisson storage, or air-cooled storage racks.

Tr. 35-38. In the first place, the contention as drafted would have to be stretched considerably to reach these topics. Even assuming that could be done, some health or safety relationship between these topics and the proposed modification would have to be established.

We fail to see how this could be done with respect to the "hidden subsidies" question. The costs and policy soundness of such things as the Price-Anderson Act, decommissioning, and federal energy research programs are for the Congress, the Commission and State public utility commissions, not this Licensing Board.

As to the other proposed forms of storage, their availability could become relevant in this case should it appear that the Applicant's reracking proposal is not acceptably safe. But if the requisite safety showing is made, an applicant is free to choose among acceptable alternative approaches.

> Contention 12: The proposed racks, as well as the Quad Cities Nuclear Station, are not adequately designed to withstand earthquakes because the Safe Shutdown Earthquake (SSE) and the Operating Basis Earthquake (OBE) which were estabished for the Quad Cities Nuclear Station are no longer appropriate in light of new information about possible earthquakes in the Quad Cities Area. Some earthquake scientists at the St. Louis University and the Midwest Research Institute feel that the Mississippi Valley is ripe for a major earthquake.

Ruling. This contention is disallowed. The NRC rule governing contentions, 10 CFR 2.714(b), requires that a petition include "... the bases for each contention set forth with reasonable specificity." "Bases" does not mean evidentiary proof, which is produced at the hearing. But it does contemplate a clear articulation of the theory of the contention, sufficient that the Applicant can make an intellegent response.

Earthquakes do not occur just anywhere; they occur only on active faults. It would probably be sufficient, for example, if a contention stated that the previously established safe shutdown earthquake for Quad Cities was inadequate because new information would show that an earthquake of greater magnitude was now expected on a particular fault. Or a somewhat more general formulation might suffice. But this contention merely refers, without any specificity, to "new information about possible earthquakes in the Quad Cities Area." That is not sufficiently specific.

Discovery. The various discovery techniques (see 10 CFR 2.740) are now available to the parties. Discovery shall be limited at this time, as the rule provides, to those contentions that have been admitted by the Board -- i.e., the Appendix A contentions of the joint stipulation. The Board encourages the parties to engage in informal discovery, to show some restraint in the number of interrogatories, to forego hypertechnical objections to discovery, and to attempt to negotiate and resolve differences before bringing them to the Board.

Further Actions. It is not now possible to schedule any future actions. The Applicant has not completed its application and until that is done the Staff cannot complete its safety evaluation and EIA. When those documents are complete and served on the parties, it will be time to consider dates for closing discovery and beginning a hearing. In the mean time, should any party believe that some action by the Board is

necessary, they are, of course, free to file an appropriate motion. The device of a telephone conference is also available.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Peter A. Morris
ADMINISTRATIVE JUDGE

Richard F. Foster
ADMINISTRATIVE JUDGE

James L. Kelley, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 27th day of October, 1981

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

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

APPENDIX B

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 no 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

in the first category those on the improper segmentation, 1, 2, 5, 8 and 9. I put in the VRS category, 3, 4, and 6, and I wasn't quite sure where to put 7. That is the one I think that had to do with Part 30 and I think it might well go into the second category VRS.

MR. PYLE: Let me say that I got on to this particular case after the contentions were drafted.

JUDGE FRYE: Uh-huh.

MR. PYLE: And even with the attorney who drafted them will admit that they were less than artful, the drafting, that they were done in a hurry.

We probably will do a major re-editing and recasting of the contentions if the Board permits that in order to submit three or four or five good solubles as opposed to nine that are not quite on point.

As we admitted in our brief to the appeals court, we are basically having one complaint and we recognize that as well as everybody else and will probably want to take the opportunity to revise those.

JUDGE FRYE: Your basic one complaint being that you are concerned about incineration.

MR. PYLE: Involving production, reduction the incineration system.

JUDGE FRYE: Yes.

MR. PYLE: My folks don't really have a problem with the addition of the storage facilities. It is just what we see

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coming on the horizon.

JUDGE FRYE: Right. That was the way I read it too. That I guess brings up the next point since we basically then got two categories of contentions, those that are directed toward segmentation and those that are directed toward volume reduction and in particular, incineration.

It would seem to me, and this gets back to the schedule to a certain extent, that it is most unlikely that you will not be able to state a good contention on the segmentation issue. Does the staff and TVA agree with that?

MR. LAROCHE: Would you repeat that?

JUDGE FRYE: It is most unlikely that they will not state a good contention on the segmentation issue.

MR. RAWSON: I would be happy to speak to that first, Mr. Chairman, I think that the staff would agree that given the guidance of the Appeal Board has given to Petitioners in its decision, it is unlikely that the Petitioners will be unable to frame the contention which would meet the admissibility requirements of the 10 CFR 2.1714. That is not meant to reflect anything on the merits.

JUDGE FRYE: Surely, I am not talking about the merits at all at this point. I mean after all they have a basis it seems to us to be perfectly good and tnat is the TVA's environmental assessment and so that really reduces it to an argument over where it is specific enough. Would you agree, Mr. LaRoche?

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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 six conformed copies (four copies for the Commissioners) 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 Respecting the Commission's Review of the Atomic Safety and Licensing Appeal Board Decision

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

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This 6th day of May, 1982.

W. Walter LaRoche
Attorney for Applicant
Tennessee Valley Authority

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*Appendix A of the brief was not sent to these persons because they previously received a copy of it.