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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-259, 50-260 50-296
TENNESSEE VALLEY AUTHORITY	)	
(Browns Ferry Nuclear Plant, Unit Nos. 1, 2 and 3)	)	(License amendment to permit onsite storage of low-level radioactive waste)

PETITIONERS' BRIEF IN OPPOSITION TO THE TENNESSEE VALLEY AUTHORITY AND NUCLEAR REGULATORY COMMISSION STAFF PETITIONS FOR REVIEW

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May 10, 1982

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On July 3, 1980, the Tennessee Valley Authority submitted a request for an amendment to its operating licenses at the Browns Ferry Nuclear Plant. The original application requested permission to store low level radioactive waste generated at the Browns Ferry Nuclear Plant on the Plant site for the life of the Plant. In November of 1980, the Tennessee Valley Authority amended its request to store low level radioactive waste upon the Plant site from life of Plant to a period of five (5) years. In response to the NRC's notice of consideration of amendments to facility operating licenses, five (5) timely petitions were filed by nineteen (19) individuals, David R. Curott, et al. All the petitions were identical. Petitioners initially filed four contentions and later added five additional contentions. The subject matter of all nine contentions centered around an allegation that the Tennessee Valley Authority had a long range plan for low level radioactive waste management which involved the installation of a

volume reduction and solidification system, including at some point, the installation of an incineration system. The Tennessee Valley Authority denied the existence of such a plan.

On October 2, 1981, the Atomic Safety and Licensing Board issued a pre-hearing conference memorandum and order ruling on petitions to intervene and requests for a hearing. That Order denied the Petitioners the right to intervene in the proceedings relating to the licensing amendments. The Petitioners sought review of the Licensing Board's memorandum and order by the Atomic Safety and Licensing Appeal Board. The Appeal Board, in an order dated January 6, 1982, by a split decision, reinstated the petition and required the Licensing Board to wait until after the Staff's environmental assessment had been issued and the applicant and the Petitioners had an opportunity to respond to the environmental assessment, and then, after that, would have allowed the Petitioners additional time in which to recast their contentions in light of the environmental assessment before the Licensing Board could rule on the petitions and contentions. Both TVA and the Staff filed petitions for review of this order by the Commission; but your Petitioners, being willing to accept the common sense compromise of the Appeal Board and not wishing to delay the proceedings any further, chose to accept the decision of the Appeal Board and not seek Commission review.

On April 1, 1982, the parties all met in Huntsville, Alabama, and set a schedule for further proceedings in this matter pursuant to the Appeal Board's remand. That schedule called for a resolution of all the issues within a reasonable amount of time.

On April 16, 1982, the Commission granted a limited review of the Appeal Board's decision on two issues; first, 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; and second, 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.

THE APPEAL BOARD DEFERRED RULING ON THE PETITION TO INTERVENE BECAUSE THE RECORD WAS NOT SUFFICIENT TO SUPPORT ANY OTHER ACTION

The Petition to Intervene charged unlawful segmentation of the review of the Tennessee Valley Authority's Low Level Rad-Waste (LLRW) Plan for the Browns Ferry Nuclear Plant because an analysis of TVA's records showed that TVA planned to follow the five-year storage proposal with an application to allow the TVA to build an incinerator to burn the waste stored in the storage modules. The Petition further alleged that the incineration process was an integral part of the TVA plan for handling this Low Level Rad-Waste. It must be pointed out that the original application requested long term storage but a later amendment reduced the license request to five (5) years and entirely ignored any discussion of what must follow after the five-year period expired. The Appeal Board agreed with Petitioners and at page 12 of the Slip Opinion of ALAB 664 stated:

> "To begin with, TVA's evidentiary presentation to date reflects a totally integrated plan which

> includes incineration. TVA originally submitted a request in which temporary storage, long term storage, and waste reduction and solidification were part of the same proposal. Although, as a matter of regulatory tactics, TVA has now limited its immediate application to the five year temporary storage plan, it has not, as far as we can tell, backed away from its long term objectives."

In order to determine whether, in fact, unlawful segmentation has occurred, the Appeal Board stated that the independent utility test as enunciated in the Duke Power Company case (Amendment to Materials License SMM-1733--Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station (ALAB-651, 14 NRC_____(1981), must be used to determine whether, in fact, the request is "genuinely segregable", (ALAB 664, slip opinion, p.11). In looking at the record the Appeal Board concluded that it simply did not have enough informat before it to make that decision. Throughout the opinion there are references to the inadequacy of the record. On page 11 of the slip opinion, the Board stated: "We cannot determine on the present record whether the temporary five year storage plan has independent unility." And again on page 12 of the slip opinion, "We must also be satisfied, however, that as a practical matter grant of the license amendments covering the five year period will not unduly circumscribe the Commission's decisional alternatives when subsequent applications are submitted. WE CANNOT MAKE THAT DETERMINATION ON THE BASIS OF CURRENT INFORMATION." (Emphasis Added) In fact, as the Appeal Board noted, it has been the applicant's position, "There are no alternatives to its program combining long term storage with incineration." (Slip opinion at p.

All this was in contrast to the Licensing Board who had erroneously treated the case as if it were already in an evidentiary phase and concluded that the five year storage plan had "immediate utility", (LBP-81-40, 1981, slip opinion at p. 7) and that granting the amendment would not prejudice NRC consideration of TVA's future LLRW management techniques, Ibid at 7, 8. The Licensing Board held that the contentions based upon improper segmentation of the LLRW management plan under NEPA must fail, Ibid at 10. In their Petitions for Review, TVA and the Staff both misapply the independent utility and show a misunderstanding of the distinction between pleadings and proof in testing the sufficiency of contentions. Here the pleadings and the proof have a different test. The test which should have been applied is that the intervening petition and contentions need show only sufficient allegations when looked at in the light most favorable to the Petitioners. The Board must wait until the evidentiary stages before it is allowed to weigh the evidence.

The principle behind the regulations is to favor public participation in the licensing process. A prospective intervenor is given the benefit of the license or amendment application, the environmental assessment and, under freedom of information, virtually the complete records of a public agency except confidential or classified data. Here the intervenors raised the issues which may require information beyond what TVA has furnished in support of its limited five year license amendment application.

Neither the Appeal Board nor the intervenors had all of the information that was available and hence the common sense approach of the Appeal Board to defer a decision until the staff environmental assessment has been completed and reviewed.

THE INDEPENDENT UTILITY TEST

A good statement of the Independent Utility Test can be found in Amendment to Materials License SNM 1773 (ALAB 65, 1981, Nuclear Regulation Reports, p. 29,930, 29,933); "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." It is clear from the case law that the question of independent utility is highly dependent upon the facts of the individual case. See Sierra Club v. Froehlke 534 F.2d, 1289, 1297 (8th Cir., 1976). In similar language both the staff and the TVA petitions for review assert that the petitions to intervene should be denied in part because the intervenors "did not dispute" (Staff Petition for Review at 7) and "did not contest" (TVA Petition for Review at p. 4) that the five year storage facility would have independent utility. Thus far the intervenors have said very little about the independent utility test because they relied on the decision of the Appeal Board in the Duke Power Case, supra, making a distinction between private power companies and federal agencies to require environmental analyses of all segments of a federal agency's plan. The Appeal Board at least implies

rejection of this theory in its decision below. See ALAB 664, slip opinion at 9-11. Administrative Judge Eilperin rejects it in his dissent. Ibid at 26. Assuming this doctrine is equally applicable to TVA as to private power companies, examine the fact that the five year storage facility alleviates the present shortage of available disposal facilities temporarily and only postpones the inevitable application for VRS. It distorts the policy of the independent utility test to say that TVA's five year storage plan has "independent utility" for purposes of avoiding the unlawful segmentation rule as delineated in Froehlke and other cases. A stretch of highway may have independent utility even if a proposed extension of it is not built because it serves a given area even if it never is extended. But a five-year storage plan for redioactive waste cannot be separated from what lies beyond those five years. Five year storage has no independent utility if some later disposition is not available. Petitioners alleged that TVA recognized this and planned and announced volume reduction and solidification as the next phase. The intervenors should be given the right to try to prove that this is what TVA plans. What intervenors object to is not that the waste now being produced will be stored temporarily in the five-year modules, but that it will be stored there without consideration now of phase 2 (the years six through the time when radioactive hazards no longer exist. The independent utility test must be applied in this context.

BASIC FAIRNESS REQUIRES THAT THE PETITIONERS BE ALLOWED TO RECAST THEIR CONTENTIONS AFTER RECEIVING THE STAFF'S ENVIRONMENTAL ASSESSMENT

The need for filing the Staff's environmental assessment prior to recasting of the Petitioners' contention was brought about in part by the Appeal Board's feeling that there was a need to compensate Petitioners for bad faith by the Tennessee Valley Authority in withholding thousands of pages of documents from them until the very eve of the pre-hearing conference. The majority devoted over half a page to the problem (ALAB 664, slip opinion at p. 20), and the minority view is contained in a lengthy footnote on page 32. A further example of this same attitude on the part of the Tennessee Valley Authority can be shown when TVA submitted an updated amendment to their July 31, 1980, application. No copies were served upon the Petitioners even though the Petitioners had been active participants for at least nine months previous to the submittal. In fact, the Licensing Baord and the intervenors were only served on March 29, 1982, when NRC Staff Counsel noticed the omission (see letter dated 3/29/82, from Richard J. Rawson, Counsel for the NRC Staff, attached as Exhibit "A"), which notes that the amendment was filed on November 3, 1981. To paraphrase Commissioner Gilinsky, the Board fashioned a common sense remedy to overcome the unfairness shown to the Petitioners by the Applicant.

THE BRIEFING OF CONTENTION NINE

The second item directed for briefing by the Commission was "whether the Appeal Board was justified in reinstating contention nine, despite petitioners' failure to address its dismissal by th

Licensing Board in its brief to the Appeal Board". Contention nine was dismissed by the Licensing Board basically because they said the matters complained of within the contention were outside of the Licensing Board's jurisdiction. The Petitioners specifically addressed the issue at page 8 of their brief by discussing contention four, five and nine as a group. The Petitioners specifically briefed contention nine and never intended to abandon contention nine. The Petitioners did address the dismissal by the Licensing Board in its brief to the Appeal Board.

THE OBLIGATIONS OF INTERVENORS

The Commissioners Ahearne and Roberts requested that all parties address the question of the obligations of prospective intervenors. The role of intervenors was clearly established in the case of Mississippi Power and Light (Grand Gulf Nuclear Station) ALAB 130, 6 AEC 423 (1973). The Petitioner must demonstrate the existence of a personal interest which may be affected by the proposed action and must present at least one contention which complies with the applicable rules and regulations. The opinion makes it clear that it is not the function of a licensing board to reach the merits of any contention in determining whether to grant the Petitioners intervenor status. Rather, it is sufficient if a contention is particularized to the extent that the applicant and the staff "will know at least generally what they will have to defend against or oppose". See Philadelphia Electric Company (Peachbottom Atomic Power Station, Units 2 and 3) ALAB 216, 8 AEC 13, 20 (1974), cited with approval in Houston Lighting and Power

Company, (Allen's Creek Nuclear Station) ALAB 590, 11 NRC 542 (1980).

It is the applicant who has the burden of proof to establish that he has met all of the conditions for a license. While intervenors may present reasons why a given application might not be worthy, the presence of an intervenor does not change the applicant's burden. The burden starts with the applicant and never shifts. In the case at bar, the Petitioners have alleged that the Tennessee Valley Authority has a totally integrated plan which includes incineration. The TVA has denied the existence of such a plan but as pointed out by the Appeal Board majority in their opinion at page 12, the evidentiary presentation to date reflects exactly what the Petitioners have contended. The present status of the case is that the record is inadequate to show that in fact this application has independent utility. Petitioners believe that the Appeal Board's Order that further proceedings await the completion by the staff of the environmental assessment is an aid to the applicant to help shore up an inadequate record. The Appeal Board then felt the obligation to compensate the Petitioners to make up for the supplemental proof being brought in to aid the applicant's case; hence, it devised the common sense remedy of allowing Petitioners to recast their contentions after the applicant has had the benefit of the additional information placed into the record.

CONCLUSION

For the reasons stated above, the Petitioners believe that the common sense compromise solution of the Appeal Board was

reasonable in light of the sorry state of the record at the time it reached the Appeal Board and that it should be reinstated in short order so that the time and energies of the parties that were utilized to develop the briefing schedules and hearing schedules in the Licensing Board hearing of April 1, 1982, is not wasted. Petitioners believe that enough time has been spent on delays and are willing to help in all ways to get the hearing process moving again.

Respectfully submitted,

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May 10, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Nuclear Regulatory Commission

In the Matter of	)	Docket Nos. 50-259 OLA
	)	50-260 OLA
	)	50-296 OLA
TENNESSEE VALLEY AUTHORITY	)	(Low Level Radioactive
	)	Waste Storage Facility)
(Browns Ferry Nuclear Plant, Units 1, 2 and 3)	)	

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:

> Petitioners' Brief in Opposition to the Tennessee Valley Authority and Nuclear Regulatory Commission Staff Petitions for Review

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 10th day of May, 1982.

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