

8/10/82

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

MISSISSIPPI POWER AND LIGHT COMPANY,  
MIDDLE SOUTH ENERGY, INC.  
AND  
SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

(Grand Gulf Nuclear Station,  
Units 1 and 2)

Docket Nos. 50-416  
50-417

NRC STAFF OPPOSITION TO UNTIMELY PETITION  
TO INTERVENE OF STATE OF LOUISIANA

I. INTRODUCTION

On June 16, 1982, the U.S. Nuclear Regulatory Commission issued a low power operating license to Mississippi Power and Light Company, Middle South Energy, Inc., and South Mississippi Electric Power Association for the Grand Gulf Nuclear Station, Unit 1. The matter of full power authorization is pending before the Commission pursuant to the Commission's "Statement of Policy on Issuance of Uncontested Fuel Loading and Low Power Testing Operating Licenses" (46 Fed. Reg. 47906, September 30, 1981) wherein the Commission retains to itself the decision on issuance of a full power operating license in uncontested cases.

Prior public notice of the proposed action and of opportunity for hearing in this matter was published in the Federal Register on July 28, 1978 (43 Fed. Reg. 32903-904). The Notice provided an opportunity for any person whose interest might be affected by the proceeding to file a petition for leave to intervene no later than August 28, 1978 pursuant to 10 CFR § 2.714. The Notice further provided that nontimely petitions for leave to intervene

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would not be granted in the absence of a substantial showing of good cause for the late filing, encompassing the factors set forth in 10 CFR § 2.714(a). No person filed a timely petition to intervene.

On July 21, 1982, almost four years after the filing date established in the Notice and after the issuance of the operating license referred to above, the State of Louisiana filed a "Petition to Participate as an Interested State . . .".<sup>1/</sup> A Notice establishing this Atomic Safety and Licensing Board to rule on petitions for leave to intervene was issued on August 3, 1982.

The Staff opposes this extremely late petition on the grounds that no good cause for the late filing has been demonstrated and no adequate showing on the balance of the pertinent factors in 10 CFR § 2.714(a)(1) has been made.<sup>2/</sup>

## II. DISCUSSION

### A. Admission of the State of Louisiana as an Intervenor

A late intervention petitioner must address the five specified factors in 10 CFR § 2.714(a)(1), and "affirmatively demonstrate that

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<sup>1/</sup> While the title of the petition requests participation as an interested state, the first paragraph of the petition requests leave to participate pursuant to 10 CFR § 2.714(a)(1), the Commission's rule for intervention. Louisiana's petition is treated herein as a petition for intervention, since there is no adjudicatory proceeding ongoing in which Louisiana could participate as an interested state.

<sup>2/</sup> Under 10 CFR § 2.714(a)(2), a petitioner must also set forth with particularity the petitioner's interest in the proceeding and how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene. The State of Louisiana has stated in its petition that Louisiana and its citizens are in proximity to Grand Gulf Nuclear Power Station and have health, safety and environmental interests, among others, which may be affected. The Staff concedes that the State of Louisiana likely possesses the requisite interest to intervene as a party. Nevertheless, for the reasons discussed herein, the Staff opposes Louisiana's petition as untimely.

on balance, they favor his tardy admission into the proceeding." Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980); Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Section 2.714(a)(1) provides that nontimely filings will not be entertained absent a determination that the petition should be granted based upon a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The State of Louisiana addresses none of these late-filing factors. The petition merely asserts that standing exists, makes a vague statement of the aspects<sup>3/</sup> of the subject matter as to which petitioner wishes to intervene, and offers as a basis certain assertions about the holding of the United States Court of Appeals for the District of Columbia Circuit in the April 27, 1982 decision in Natural Resources Defense Council v. United States Nuclear Regulatory Commission, (Civil Action No. 74-1586) ("NRDC"). In that case, the Court of Appeals overturned the Commission's fuel cycle rules which establish a set of values, denominated Table S-3,<sup>4/</sup> to be used in determining the environmental

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<sup>3/</sup> Louisiana asserts as part of its statement of aspects its belief that "without intervention adequate consideration will not be given to its views in regard to [five general aspects of disposal of high level waste]." However, no indication is given what "its views" are with respect to these matters.

<sup>4/</sup> 10 CFR § 51.20(e) (1981).

impact of the uranium fuel cycle for individual nuclear power reactors under licensing consideration. The Court held, inter alia, that Table S-3 failed "to allow for proper consideration of uncertainties concerning the long-term isolation of high-level and transuranic wastes."<sup>5/</sup>

The Commission has emphasized that licensing boards are expected to demand compliance with the specificity and lateness requirements of 10 CFR § 2.714. Pacific Gas and Electric Company (Diablo Canyon Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). Despite its extreme lateness, Louisiana's petition contains no mention whatsoever of the five factors of Section 2.714, much less any demonstration that a balancing of those factors supports admission of the State as a party to a newly-initiated proceeding. In the Staff's view, consideration of these five factors weighs heavily against acceptance of the present petition.

Good Cause

The first factor in 10 CFR § 2.714(a)(1) is whether there is good cause for the filing delay. This is a prominent consideration in the decision whether to grant a late intervention petition. Where no good excuse is tendered for the tardiness of a petition, a petitioner's demonstration on the other factors must be particularly strong. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977).

The April 27, 1982 decision in NRDC is the sole reason that can be inferred from Louisiana's petition for its late-filed petition.

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<sup>5/</sup> NRDC, supra, slip op. at 11. On June 11, 1982, the Department of Justice and the Commission filed a petition for rehearing and reconsideration en banc of the NRDC decision.

However, it is unclear exactly what connection Louisiana believes may exist between that decision and the untimely attempt to raise its unspecified views on long term waste disposal associated with operation of Grand Gulf. In its petition, Louisiana sets forth five "specific aspects" of the subject matter of the proceeding as to which intervention is sought, but offers no reason as to why "its views" on these matters could not have been raised some four years ago when notice of the proceeding was published. For example, it appears possible that "its views" on "the need to consider the health, socioeconomic and cumulative effects of projected releases" (the fourth general aspect listed in the petition) may well have been litigable despite the S-3 rules. See "Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts From Spent Fuel Reprocessing and Radioactive Waste Management" (44 Fed. Reg. 45362, August 12, 1979).

Not only does Louisiana fail to address or even to suggest any reason for its failure to assert "its views" at the time of the Notice in this matter in 1978, the State also fails to address its delay in filing the present petition (which relies on NRDC) until nearly three months had passed after issuance of that decision and until after the low power license for Grand Gulf had already been issued.

The Staff does not believe the existence of the fuel cycle rule constitutes good cause for Louisiana's standing silent and failing to express its concerns until the NRDC decision. Staff submits that petitioner's failure to timely raise its concerns -- or at least to offer an explanation as to why it believes it could not have expressed them prior to NRDC -- operates as a bar to late intervention under 10 CFR § 2.714.

In sum, Louisiana has not made any showing of good cause for its delay of four years since the publication of the Notice in this matter and its delay of three more months since the issuance of NRDC before the filing of its exceedingly late petition.<sup>6/</sup>

Notwithstanding the insubstantiality of the reason implied for Louisiana's extended period of inaction, Louisiana's showing on the other four factors enumerated in 10 CFR § 2.714(a) must also be examined to determine whether they are so compelling as to permit intervention at this late date. As petitioner has not even attempted such a showing -- much less "affirmatively demonstrate[d]" that the factors favor its admission (Section 2.714(a)(1)) -- the petition must be denied.

Availability of Other Means and Other Parties

The second factor to be considered under § 2.714(a) is whether other means are available to protect petitioner's interest. Petitioner has failed to make any affirmative demonstration as to this factor. However, while the State may be able to express its views adequately by petitioning for and participating in NRC rulemaking, there may be no means other

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<sup>6/</sup> Petitioner makes no claim that it was not aware of the Grand Gulf proposal when it was noticed in the Federal Register in 1978. Even if it were to make such a claim, however, failure to read the Federal Register does not justify the nontimely filing of an intervention petition. New England Power and Light Company (NEP, Units 1 and 2), LBP-78-18, 7 NRC 932, 933-34 (1978); see Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7 (1980). Moreover, the State of Louisiana has been actively involved for some time in the emergency planning necessary in connection with the operation of the Grand Gulf facility and, thus, would have been well aware of the proposal to issue an operating license for the Grand Gulf facility.

than participation in a proceeding on the Grand Gulf licensing which would afford the same degree of protection for the State's interests with respect to the Grand Gulf facility. Similarly, as to the fourth factor -- the extent to which petitioner's interest will be represented by existing parties -- because there are no other parties in this uncontested proceeding, there is no one who might directly represent the interest of the State. However, the Appeal Board has observed that the availability of other means whereby the petitioner can protect its interest and the extent to which other parties will represent that interest are properly accorded relatively less weight than the other three factors in Section 2.714(a).

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In fact, at this extremely late stage in the licensing process, it is "most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention" to one who fails to make an affirmative showing on the other three factors. Id.

#### Development of Sound Record

The third factor, the extent to which petitioner can assist in developing a sound record, also weighs against permitting late intervention. The State has not indicated any special expertise it possesses which would aid in the development of a sound record, See Cincinnati Gas & Electric Co., et al. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980), nor has it indicated that it would do anything more than express its views. Petitioner has failed in its burden of affirmatively demonstrating that this factor weighs in favor of permitting intervention.

Delay and Broadening of Issues

Finally, factor five, the extent to which petitioner's participation will broaden the issues or delay the proceeding, weighs almost conclusively against the grant of late intervention here. The later the petition, the greater the likelihood that petitioner's request to participate will result in delay. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 762 (1982). Where, as here, the petition is several years late, seeks to begin rather than join an adjudicatory proceeding, and comes after issuance of a low power license, petitioner should be required to meet a very heavy burden. It is simply indisputable that participation by the State of Louisiana at this late stage will both broaden the issues and delay the issuance of a full-power license for Grand Gulf. In Summer, ALAB-642, supra, the Appeal Board denied a petition for late intervention filed once the hearing date had been set, noting that "[petitioner's] participation in the proceeding could no longer be sanctioned without destructive damage to both the rights of the other parties and the integrity of the adjudicatory process itself." 13 NRC at 885. Similar considerations apply here, where a low power license has already been issued, to an even greater extent than in Summer.

In sum, there is no showing of good cause for the delay, there is no showing that Louisiana could contribute to the development of a sound record, and intervention at this late date would clearly broaden the issues and delay the proceeding without excuse. While there are not clearly any other fora or parties which might afford protection to the State's interests, these factors are accorded relatively less

weight than the others. On balance, it is clear that the factors to be considered under 10 CFR § 2.714 weigh heavily against granting the intervention petition of the State of Louisiana.<sup>7/</sup>

B. The State of Louisiana's Other Requests for Relief

Louisiana also requests in its Petition (1) that an operating license not be issued to Applicant until the matters raised in the Petition are resolved, and (2) that the Commission cease issuing operating licenses -- presumably for all nuclear power plant applicants -- until some time in the future. The Staff opposes both of these requests for the following reasons.

As to the issuance of the Grand Gulf operating license, the Staff notes again that the low power license has already been issued. As to any request that the full power license not issue, Louisiana has not yet been admitted as a party and lacks standing to request any action on the part of the Licensing Board other than its own admission into a proceeding.

As to any actions which may be taken by the Commission on the cessation of licensing generally, it is clear that Louisiana's request

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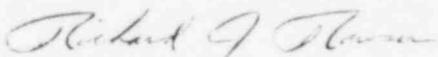
<sup>7/</sup> It should also be pointed out that Louisiana has not included any contentions with its exceedingly late-filed petition. This Licensing Board should take "utmost care to satisfy itself fully" that at least one contention raising an issue clearly open to adjudication is alleged before permitting the hearing process to be triggered. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 at n. 10 (1974), quoted in Cincinnati Gas & Electric Co., et al. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). As a general rule, a petitioner seeking intervention after the normal time for submission of contentions should include contentions in its petition. See Cincinnati Gas & Electric Co. et al. (William H. Zimmer Nuclear Power Station), LBP-80-14, 11 NRC 570, 571 n.1 (1980).

must be denied. Not only is the request directed to facilities other than the one which is the subject of this proceeding (and therefore beyond the jurisdiction of this Board), but it also seeks relief which can only be afforded by the Commission, such as pursuant to a petition for rulemaking under 10 CFR § 2.802. Further, the Staff understands that a Commission policy statement on Table S-3 and NRDC is under preparation. For these reasons, Louisiana's request for generic action by the Board must be rejected.

IV. CONCLUSION

As demonstrated above, consideration of the factors governing nontimely intervention weighs heavily against acceptance of the present petition and, accordingly, it should be denied. Louisiana's other requests for relief should also be denied.

Respectfully submitted,

  
for Mary E. Wagner  
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Richard J. Rawson  
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Dated at Bethesda, Maryland  
this 10th day of August, 1982





