UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF

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

DOCKET NOS. 50-416
50-417

(GRAND GULF NUCLEAR STATION, UNITS 1 & 2)

PETITIONER'S BRIEF IN SUPPORT OF ITS PETITION TO PARTICIPATE IN FACILITY OPERATING LICENSING PROCEEDINGS

OPENING STATEMENT

In July, 1982, the State of Louisiana (hereinafter "Louisiana" or "Petitioner") filed a "Petition to Participate as an Interested State in Facility Operating License Proceeding and to Reopen Such Proceeding to Precipitate Commission Rulings Consistant With Recent Court of Appeals Decision and to Request the Nuclear Regulatory Commission to Cease Issuing Licensing Consistant With the Court of Appeals Decision (sic)" in the above captioned proceeding,[1] seeking to intervene

[1]The petition was received by the Docketing and Service Branch, Office of the Secretary, Nuclear Regulatory Commission, on July 26, 1982.

in the operating license phase of these proceedings in order to assure that the issue of the economic impact of long term radioactive waste disposal is properly considered with reference to the Grand Gulf Nuclear Station, Units 1 & 2. Louisiana bases its requests on the April 27, 1982 decision in NRDC v. NRC (Ct. of App. for the D.C. Cir.) No. 47-1586 (1982) which held that the Table S-3 Rule is invalid because it fails to allow for proper consideration of the uncertainties concerning the long-term isolation of high-level and transuranic wastes, and because it fails to allow for proper consideration of the health, socioeconomic and cumulative effects of fuel-cycle activities.[2] Thus, "...in the absence of a valid generic [Table S-3] Rule, the environmental impact of fuel-cycle activities must be considered in individual licensing proceedings."[3]

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[2]The Table S-3 Rule, "Table of Uranium Fuel Cycle Environmental Data," instructs all licensing boards, when analyzing the environmental impact of a particular plant, to conclusively assume that such wastes will emit no radiological affluents into the environment after final burial.

[3]NRDC v. NRC, (Ct. of App., D. C. Cir.) (April 27, 1982), slip opinion at p. 17.

Louisiana is mindful of the fact that the Nuclear Regulatory Commission has appealed the Court of Appeals decision in NRDC v. NRC to the Supreme Court, and that the Order by the Court of Appeals staying the mandate will continue to be in effect until final disposition of the matter by the Supreme Court. However, Louisiana respectfully suggests that in the interest of judicial economy, common sense dictates that all further proceedings in the instant matter cease until the issue is resolved by the Supreme Court. As the Court of Appeals points out, "[a]lthough the original and interim [Table S-3] Rules have been superceded by the final Rule, their validity is still at issue. Individual licenses that were granted under those Rules have been challenged in separate actions, many of which are being held in abeyance pending the resolution of the broader issues presented in this case."[4]

Louisiana is also mindful of the fact, as pointed out by both the Applicant and the NRC Staff in their briefs, that its petition is untimely. Petitioner respectfully points out to the Licensing Board that it acted with all due speed upon learning of the NRDC v. NRC decision, and studying the opinion with regard to its effect on the instant proceedings and petitioners decision to seek intervention therein.

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[4] Id., footnote 7, slip opinion at p. 5.

Prior to the decision, Louisiana was bound to assume, as was the NRC, that the Table S-3 Rule was valid and that, with respect to the environmental effects of thefuel-cycle, "no further discussion of such environmental effects shall be required."[5]

Louisiana has no wish to unreasonable delay the instant proceeding. However, considering the language of the Court of Appeals in NRDC v. NRC, and the potentially far-reaching impact of the Court's holding, abeyance of the instant proceeding would appear to be in the best interest of all parties. To continue now, in the face of a court challenge to the permit and license proceeding for not having considered "the uncertainties concerning the long term isolation of high-level and transuranic wastes and ...the health, socioeconomic and cumulative effects of fuel-cycle activities"[6] runs the risk of wasting time and money now, and the likelihood of an even greater delay in litigating the issue.

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[5] Id., slip opinion at p. 17, citing 39 Fed. Reg. 14188 (1974) at 14191.

[6] Id., slip opinion at p. 11-12.

ARGUMENT

I. Meeting the Burden of Non-timely Filing of a Petition to Intervene Under 10 CFR 2.714(a)(1).

The NRC Staff has conceded that the State of Louisiana likely possesses the requisite interest to intervene as a party,[7] as required by 10 CFR 2.714(a)(2) but opposes the petition as untimely, as does the Applicant. As pointed out by both the Applicant and the NRC Staff, non-timely petitions will not be granted absent a determination based upon a balancing of the following factors set out in 10 CFR 2.714(a)(1):

> (1) Good cause, if any, for failure to file on time.
>
> (2) The availability of other means whereby the petitioner's interest will be protected.
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> (3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (4) The extent to which the petitioner's interest will be represented by existing parties.
>
> (5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

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[7] "NRC Staff Opposition to Untimely Petition to intervene of State", p. 2, footnote 2.

It is worth digressing briefly to point out that the original statement of the factors required to be met to carry the burden of untimely filing under section 2.714(a)(1) was worded slightly different than the existing rule. As it original appeared, section 2.714(a)(1) read in pertinent part

> "Non-timely filings will not be entertained absent a determination... that the petitioner has made a substantial showing of good cause for failure to file on time, and with particular reference to the following factors:
>
> (1) The availability of other means whereby petitioner's interest will be protected.
>
> (2) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (3) The extent to which petitioner's interest will be represented by existing parties.
>
> (4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

In a Nuclear Regulatory Commission decision reversing an Appeal Board decision denying an untimely petition where no good cause was shown, and adopting an interpretation of 10 CFR 2.714(a) contrary to that reached by a majority of the Appeals Board, the Commision pointed out that the quoted language from Section 2.714(a) "Is not a model of clarity." The Commision goes on to say:

"Focusing on the policies underlying the rule, however, and semantics aside, we do not construe Section 2.714(a) as automatically barring inquiry into the purposes which may be served, or hindered, by accepting an untimely petition where, as here, the petitioner has not shown good cause for his tardiness. Rather, the purpose of Section 2.714(a) is to establish appropriate tests for disposition of untimely petitions in which the reasons for the tardiness as well as the four listed factors should be considered, thus giving the Licensing Boards broad discretion in the circumstances of individual cases."[8]

The Rule was subsequently amended to its present form. Commenting on the new rule the Commission stated:

"The Commission believes that Section 2.14 should be amended in the interest of clarifying the requirements in regard to . . . late filings of petitions . . . . Section 2.714 is amended to outline clearly the factors which need to be considered and balanced before the presiding officer passes upon the admissibility of late filings. In essence, the amendment codifies the Commision's decision In the Matter of Nuclear Fuel Services, Inc., and New York State Atomic and Space Development Authority (1 NRC 273), which makes clear that the reason for the untimely filing is one factor to be balanced along with the others in determining whether a late filing will be admitted."[9]

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[8] Nuclear Fuel Services, Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

[9] 43 Fed. Reg. 17798 (Apr. 26, 1978) at 17799.

The Commission's decision in West Valley continues to be the leading case on the issue of untimely petitions to intervene. It is noteworthy that in the West Valley case, the Commission, as did the Appeal Board and the Licensing Board, found that the petitioner, Erie County, had no good excuse for their failure to file on time, but nevertheless allowed the interventions, finding at least 3 of the 4 factors in the original Section 2.714 weighed in the County's favor. Thus, it appears on the basis of West Valley that a petitioner with no good excuse may still be permitted to intervene, based on a balancing of the remaining factors. The Commission in West Valley further stated, on p. 275, that "the burden of justifying intervention on the basis of the other factors in the rule in considerably greater where the latecomer has no good excuse." The correllary to this rule is that a petitioner with a good excuse has a considerably lesser burden with respect to the remaining factors. Indeed, one Licensing Board, when considering an untimely petition of an individual, "found that [petitioner] has a marginably good excuse for the late filing. Therefore, we assign a

substantial but not great burden to [petitioner] in evaluating his petition on the basis of the four other factors of Section 2.714(a)."[10] Similarly, a different Licensing Board stated that:

> "A satisfactory explanation for failure to file on time does not automatically warrant the acceptance of a late file intervention petition. We must also consider the four factors specified under 10 CFR Section 2.714(a).... But where the lateness has been satisfactorily explained, a much smaller demonstration of these factors if necessary."[11]

In the instant case, Louisiana respectfully suggests, as shown above, that it has a good excuse for its late petition, namely the April 27, 1982 decision in NRDC v. NRC, and that it acted with all due speed with respect to that decision, and thus a "not great" or "much smaller" showing on the remaining four factors is necessary.

It is also quite evident from a reading of the decisions that the "balancing" required by section 2.714(a) has been interpreted to mean "balance" in the sense of a scale - putting the "pros" on one side and the "cons" on the

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[10] South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-78-6, 7 NRC 209, 212 (1978).

[11] Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant) LBP-78-24, 8 NRC 78, 83 (1978).

other. It has not been interpreted to mean that a positive finding must occur on all factors in order to find in favor of an untimely petitioner.

For example, in the previously cited Summer case, supra, where the Licensing Board found the late petitioner had a "marginally good excuse," the Board granted the petition, finding that of the remaining factors, two factors weighed in petitioner's favor, one factor weighed against him, and one was neutral. Similarly, in the previously cited Kewaunee case, supra, the Licensing Board states its findings on page 84 that:

> "In summary, the petitioners have made a strong showing of good cause for the late filing, and we have found that two of the four factors weigh in their favor and two have no significant weight. We conclude that [petitioners] have satisfactorily passed the test for untimely petitions set forth in section 2.714(a)."

It is also noteworthy, and relevant to the instant case, that a petitioner's status as a governmental entity may be taken into account, and that such status weighs in favor of the petitioner, as shown by several Appeal Board decisions. In one of the Marble Hill decisions, the Appeal Board states that:

> "[T]he decisions interpreting Section 2.714(a) as we read them allow the governmental nature of the petitioner to be taken into account in considering [t]he extent to which [the petitioners']

interest will be represented by existing parties' (the 'third factor'). It was one of the basic tenets of the dissent from the Appeal Board's majority decision in West Valley that a local government' might well view the demands of the public interest in a markedly different light than... private intervenors,' and that accordingly, because it is governments, not private parties, who are charged with the responsibility of identifying and protecting the public interest, a private party-even though it may be advancing contentions identical to those proposed by the petitioning government-could not be said to represent adequately the petitioning government's interest. In reversing the majority's decision in that case the Commission indicated agreement with this analysis, stating in its own West Valley decision that (1 NRC at 275):

> We share the view of the dissenting member of the Appeal Board that the private intervenors herein advancing contentions substantially identical to those of the County may not effectively represent the County's presumably broader interest." (footnotes omitted)[12]

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[12] Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20, 24 (1976).

Similarly, the Appeal Board in Jamesport denied an untimely petition of a private party, distinguishing a private party's right from the broader right of a governmental entity, again citing West Valley:

> "The West Valley petition was that of a County, seeking to advance its asserted (clearly cognizable) interest in the protection of the health and safety of the citizens of the County. To have excluded it from the proceeding would have the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act." (footnote omitted)[13]

Thus, not only does Louisiana have a justifiably good cause for its untimely petition, but its nature as a governmental entity, charged with the responsibility to protect the health and safety of its citizens, must weigh in favor of granting Petitioner's request for intervention.

II. The "Five Factors" of 10 CFR 2.714(a).

As previously indicated, Section 2.714 requires that untimely petitions will be weighed with reference to the 5 factors contained therein. Each factor was addressed separately by both the Applicant and the NRC Staff, and

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[13] Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 646 (1975).

will be likewise discussed separately below.

A. Factor 1 - "Good Cause"

Citing West Valley, Applicant states "that late petitions may not be admitted without a strong showing of good cause."[14] In fact, the correct holding of West Valley is exactly the opposite, as discussed earlier; late petitions may still be admitted without any showing of good cause and, indeed, the Commission found that petitioner, Erie County, had no good cause in that case. In granting Erie County's petition, the Commision merely stated that "The burden of justifying intervention on the basis of the other factors in the rule is considerably greater where the latecomer has no good excuse."[15]

Both the Applicant and the Staff cite the Duke Power (Perkins) case in support of their argument on factor 1, relying on the statement that "[w]here no good excuse is tendered for the tardiness of the petition, a petitioner's demonstration on the other factors must be particularly strong."[16]

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[14] Applicant's brief at p. 8.

[15] West Valley, supra, 1 NCR at 275.

[16] NRC Staff brief at p. 4.

The case is inapplicable for two reasons: First, Louisiana has a good excuse, as previously stated. Second, the case is easily distinguishable from the instant proceeding. In Duke, the Petitioner was a private party raising a relatively narrow issue (withdrawal of make-up water) which concerned him personally as a riparian landowner. It is hardly similar to the instant case where the petitioner, a State, raises the much broader issue of the economic impact of the disposal of high-level radioactive wastes as it affects the citizens of this State.

The previous paragraph notwithstanding, the Duke case is analogous in one important respect. There, in an effort to show good cause, petitioner cites a federal Court of Appeals decision in support of his petition, as did petitioner herein. In that case, the petitioner waited nine (9) months after the rendition of the decision, and the Appeal Board found that "the reason was not a lack of an early awareness".[17] The case is thus further inapplicable to the instant proceeding inasmuch as Louisiana has, in this case, acted quickly upon learning of the NRDC decision, as was previously explained above.

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[17] Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462(1977).

Further asserting Louisiana's alleged failure to show "good cause," applicant and staff attacked Louisiana's reliance on the NRDC case and the issues raised by the Table S-3 Rule. The applicant states that "aspects of ultimate waste disposal other than those relating to Table S-3 which petitioner wishes to litigate, e.g., the methodology of waste burial, have likewise been within the public domain for years and years."[18] That may be so. However, applicant fails to point out, as has been previously stated, that "no further discussions of such environmental effects [of the fuel cycle] shall be required" beyond those set forth in Table S-3. Similarily, the NRC Staff "does not believe the existence of the fuel cycle rule constitutes good cause for Louisiana's standing silent in failing to express its concerns until the NRDC decision."[19] As previously stated, the rule does constitute good cause. In Louisiana, and presumably elsewhere, a law or regulation is presumed to be constitutional, analogous to the broader "presumption of innocence," unless shown to be otherwise. Louisiana thus presumed that the Table S-3 Rule was valid, until the Court of Appeals held otherwise.

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[18]Applicant's brief at p. 10.

[19]NRC Staff brief at p. 5.

B. Factor 2 - Availability of Other Means

Applicant basically makes two points here: the availability of the NRC Staff to protect petitioner's interest, and the opportunity for the petitioner to participate in rulemaking.

As to the applicant's statement that "The NRC staff with adequately protect petitioner's interest,"[20] Louisiana dismisses this argument completely with the comment that if this were carried to its logical conclusion, there would be no necessity or purpose in having any parties at all beyond the Applicant and the NRC Staff.

Applicant's second argument, the opportunity to participate in rulemaking, is likewise without merit. Applicant makes the statement that "the ultimate disposition of reactor waste is a generic issue to be determined by the Commission by rulemaking and is therefore not a matter for consideration by individual licensing boards."[21] This is the very heart of the NRDC decision, and was the precise reason that the rule was challenged.

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[20]Applicant's brief, p. 12.

[21]Applicant's brief, p. 14.

Indeed, as the National Resources Defense Council argued, and as the Court of Appeals held, the Nuclear Regulatory Commission may not treat reactor waste generically, and such an issue is a matter for consideration by individual Licensing Boards.

Further, in a recent Licensing Board decision in a case where this precise issue - that of the existence of rulemaking as "other means" available - was raised, the Board stated: While we agree that these provisions [to initiate and participate in rulemaking] are available to Petitioners, we do not think they are as efficacious as a prior hearing. Therefore we weigh this factor slightly in Petitioners' favor."[22]

Finally, the Staff itself concedes that "there may be no means other 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."[23] Such concessions are apparently persuasive, for in the Summer case, supra, the Licensing Board stated: "We need not dwell upon this point because the staff itself concedes that the...factor is weighed in Petitioner's favor...."[24]

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[22]Consolidated Edision Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 41(1982).

[23]NRC Staff brief, pp. 6-7.

[24]Summer, supra , 7 NRC at, 213.

(Staff's assertion that this factor, as well as factor 4, are "accorded relatively less weight than the other three" will be addressed in the discussion on factor 4).

C. Factor 3 - Development of a Sound Record

Applicant states on page 15 of its brief that "[T]here is no evidence that petitioner's representatives are by training, education or experience technically qualified and competent to assist the Licensing Board in addressing environmental issues related to the disposal of high-level wastes." Suffice it to say that the State of Louisiana has, or has the means to get, all the expertise necessary to fully address the issue in point.

Applicant also quotes from two opinions in support of its position on this factor. Neither case is appropriate.

The first case, Pebble Springs,[25] is inapplicable in that it deals neither with the broad issue of untimely intervention, nor with the narrower issue of the ability to develop the record. Rather, the case is an opinion on a certified question to the Commission on the issue of intervention as a matter of discretion where there is no intervention as a matter of right.

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[25] Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

Neither is Applicant's second case, Allens Creek[26] on point. In that case, an Appeal Board decision affirmed the Licensing Board's denial of an untimely petition for leave to intervene. The Appeal Board found that factor 3 weighed against the Petitioner, a "law-abiding teacher," who made the bare assertion that "I am expert at expressing myself on paper and orally."[27] It hardly seems appropriate to use the example of the resources available to a "law-abiding teacher" compared to the resources available to the State of Louisiana with reference to the ability to develop a sound record.

The Staff devotes only one paragraph to factor 3, citing the Zimmer case.[28] In that case, although finding this factor weighed against the petitioners, the Licensing Board found the weight to be "not strongly" against admission[29] and granted the untimely petition to intervene.

D. Factor 4 - Representation by Existing Parties

Here again, the Staff concedes that "because there are no other parties in this uncontested proceeding, there is no one who might directly represent the interest

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[26]Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239 (1980).

[27]Id., 11 NRC at 241.

[28]Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980).

[29]Id., 11 NRC at 576.

of the State."[30] Again, such concessions are presuasive, as previously pointed out from the statement in the Summer proceeding on this same exact factor, that "[W]e need not dwell upon this point because the Staff itself concedes that the...factor is weighted in Petitioner's favor...."[31]

The Staff has relied on a later opinion in the Summer proceeding for the proposition that factors 2 and 4 are "accorded relatively less weight than the other three." But the "less weight" language is confined to the narrow circumstances of that case, in which the Appeal Board also found 1) inexcusable lateness, 2) a material expansion, and 3) a marginal showing on petitioners ability to make a truly significant, substantive contribution. Petitioner respectfully suggests that none of these factors are applicable in the instant case.

The Applicant makes the same two points here that it did in its argument on factor 2, namely 1) the presence of the NRC Staff, and 2) the rulemaking power of the Commission. Neither argument is persuasive, as explained above in the discussion of factor 2. Also, recall that the Indian Point case, quoted in support of its argument here on factor 4, was the same opinion which held that rulemaking is "not...as efficacious as a prior hearing."

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[30] Staff brief, p.7.

[31] Summer, supra, 7 NRC at 213.

One final point needs to made with reference to factor 4. Two Licensing Boards, in opinions already cited, have indicated that this factor may be inapplicable to the circumstances of the instant case. The opinion in the Summer proceeding supra, states that:

> "It is not clear to the Board that this factor is applicable in a situation where, as here, no hearing whatever would be held were it not for the Petitioner's request."[32]

And again, in the Indian Point proceeding, supra, the Board states that this factor "weighs in Petitioners' favor...to the extent that, if Petitioners' request is denied, there will be no proceeding and hence no parties.[33]

E. Factor 5 - Broading of the Issues and Delay

Finally, Section 2.714(a)(v) requires the Licensing Board to balance "the extent to which the petitioner's participation will broaden the issue or delay the proceedings."

Applicant quotes from the Licensing Board opinion in the Indian Point proceeding:

> "Absent some showing that a public benefit will accrue from their participation, it must be assumed that starting a proceeding at this late date will have the effect of, at a minimum, inconveniencing the applicant and

[32] Summer, supra, 7 NRC at 213.

[33] Indian Point, supra, 15 NRC at 41.

> diverting Commission resources from other tasks." (emphasis added)[34]

Here, the test set forth by the Board in weighing this factor is whether there is some showing that a public benefit will accrue. The State of Louisiana respectfully suggests that a public benefit will accrue from an inquiry into the environmental impact of the storage and disposal of high-level nuclear wastes generated by the Grand Gulf facility.

It is noteworthy that in the Summer proceeding, supra, the Licensing Board felt that this factor might be inapplicable in a case such as the instant one where, if there is no intervention, there is no hearing at all. The Board stated:

> "Nor is it clear to the Board that factor number [5] is applicable in a situation where the granting of the petition is the ordering of the hearing. If the petition is not granted there will be no issues to broaden nor a proceeding to delay."[35]

The Board then went on to find that, if this factor was applicable, it is nevertheless neutral, weighing neither in favor of nor against the Petitioner, and granted the petition.

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[34] Indian Point, supra, 15 NRC at 41.

[35] Summer, supra, 7 NRC at 213.

Finally, petitioner notes that both the Applicant and the Staff cite and discuss the opinion of Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 762 (1982) (See Staff brief at p. 8 and Applicant's brief at p. 17) to support the proposition that "the later the petition, the greater the liklihood that petitioner's request to participate will result in delay." The Fermi opinion cited does not deal with the issue of untimely petitions. Apparently, the Applicant and Staff meant to cite the case of Detroit Edison Company (Greenwood Energy Center, Units 2 and 3) ALAB-476, 7 NRC 759 (1978) which appears in the reporter immediately following the Fermi opinion and which does address the issue of untimely petitions to intervene. In spite of the language cited, however, the case does not support the Staff's position inasmuch as the language on which they relied was dictum, as the Appeal Board found that there was in fact no delay. It is also significiant that despite a finding of "inexcusable lateness" in that case, the Appeal Board nevertheless granted the untimely petition to intervene.

II. Other Matters

A. Jurisdiction of the Licensing Board

Applicant suggests in his brief that the

Licensing Board lacks jurisdiction to consider Louisiana's petititon to intervene, claiming that "when the Director, Nuclear Reactor Regulation, issued an operating license on June 16, 1982, the proceeding with regard to Unit 1 was at an end and the Licensing Board no longer possessed jurisdiction to entertain a petition for intervention or a request for any relief."[36] In support of his position, Applicant quotes from two opinions, one Commission opinion (South Texas)[37] and one Appeal Board opinion (Marble Hill).[38]

Neither case is on point inasmuch as they both deal with unrelated matters and/or final decisions of the NRC, and no such final decision exists in the instant proceeding.

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[36]"Applicant's Answer to State of Louisiana's Petition to Participate . . . ." p.4

[37]Houston Lighting and Power Company (South Texas Project Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977).

[38]Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979).

The first case cited by Applicant, the South Texas opinion, deals with the narrow issue of whether to reopen a closed construction permit hearing in order to obtain an antitrust hearing under Section 105 of the Atomic Energy Act. Not only is this case not on point, inasmuch as the instant case does not result from a request to consider the narrow unrelated antitrust issue decided there, it is further inapplicable because of the finality of the hearings in that case. A careful reading of the portion of the opinion which Applicant quotes shows that this was a final, unreviewable Commission decision. In reviewing the circumstances of the case in which a untimely antitrust petition had been routinely referred to the Licensing Board, the Commission stated that "the construction permit proceeding had formally come to an end with the expiration of time to seek judicial review, and . . .the licensingboards lacked delegated authority to reopen such proceedings."[39] Similarly, the opinion of the Appeal Board in Marble Hill is not on point inasmuch as it, too, involves a final Commission decision, as a careful reading

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[39]South Texas, supra, 5 NRC at p. 1307.

of the quoted portion of the decision cited by the Applicant will show. There, 6 months had elapsed since the Appeal Board's final decision and, since the Commission elected not to review this decision under the authority of 10 CFR 2.786(a), as they had the right to do, it thereafter became the Commission's final action.

Jurisdiction of the Licensing Board is set out in 10 CFR 2.717(a) which provides in pertinent part that:

> "[T]he jurisdiction of the presiding officer designated to conduct the hearing over the proceeding . . . commences when the proceeding commences.
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> * * *
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> The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, which ever is earliest."

Notwithstanding the language in the quoted section 2.17(a), the power of the Commission to render a final decision has been delegated to the Atomic Safety and Licensing Appeal Board, which "will also exercise the

authority and perform the functions which would otherwise have been exercised and performed by the Commission under . . . 2.717(a). . . ."[40] Even after the decision of the Atomic Safety and Licensing Appeal Board, such decision does not represent the final action of the entire Commission until after the expiration of time limits set forth in 10 CFR 2.786(a) and (b)(1), whichever is applicable.

In the instant case, there has been not the slightest suggestion that the decision of the Licensing Board to grant an operational license for 5% power represents the final, unreviewable action of the entire Commission. Thus, inasmuch as none of the prerequisites for the termination of Licensing Board jurisdiction set forth in 2.717(a) have occurred, the Licensing Board in the instant case still retains the jurisdiction to entertain Louisiana's petition to intervene.

B. Supplement to Applicant's Answer

Applicant cites the July 30, 1980 opinion of the Commission in the Boston Edison Company (Pilgrin Nuclear Power Station) proceeding for the proposition "that the NRC Rules regarding entitlement to a hearing are not to be applied more liberally with respect to the State than any

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[40] 10 CFR 2.785(b)(1).

other potential intervenor."[41] Petitioner respectfully disagrees that this statement is "implicit in [the Commission's] holding, as it claims.

Applicant also cites the July 12, 1982 "Memorandum and Order" of the Licensing Board in the Cleveland Electric Illumininating Company (Perry Power Plant, Unit 1 & 2) proceeding, suggesting, based on the quoted language, that "the waste disposal contentions . . . challenging Table S-3 may not be considered . . . but rather are appropriate for generic consideration in rulemaking. . . ."[42] The opinion is not a blanket denial, nor does it state, as applicant suggests, that the proper forum for such a contention is generic rulemaking. Indeed, as the quoted language suggests (". . . the Court of Appeals decision does not as yet provide a ground for resubmission of this contention (emphasis added)"), Judge Bloch hints that he would let the contention be resubmitted at the appropriate time.

Conclusion

Louisiana has shown that it has good cause to justify its untimely petition. When good cause is shown, a "much smaller" showing on the remaining 4 factors is

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[41] "Supplement to Applicants Answer to State of Louisiana's Petition to Participate," at p. 2

[42] Id. at p. 3

necessary. Of the remaining 4 factors, the NRC staff has conceded that factors 2 and 4 favor the petitioner. It is also probable that where, as here, the granting of a petition results in the ordering of a hearing, factor 5 may not apply. In addition, Louisiana feels it has, or has the means to obtain, expertise to assist in developing a sound record. Louisiana feels it has clearly met the balancing test required by 10 CFR 2.714(a), and that the Licensing Board has the jurisdiction to entertain its petition for leave to intervene.

Respectfully submitted,

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50-417

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Brief in Support of Its Petition to Participate in Facility Operating Licensing Proceedings Opening Statement, dated October 11, 1982 in the above-captioned proceedings, has been served on the following by deposit in the United States Mail, first class, this 11th day of October, 1982.

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ATTENTION: DOCKETING AND
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