ADJUDICATORY ISSUE

(NEGATIVE CONSENT)

October 25, 1983 SECY-83-437

COMMISSION LEVEL
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For: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-742 (IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY, ET AL.)

Facility: Palo Verde Nuclear Generating Station, Units 2 and 3

Petition for Review: None.

Review Time Expires: November 8, 1983.

Purpose: To inform the Commission of an interlocutory Appeal Board decision and to recommend that

Discussion: In ALAB-742 the Appeal Board denied a motion for directed certification of an interlocutory order of the Licensing Board. The challenged order had denied intervencr West Valley Agricultural Protection Council's motions (1) to declare the NRC environmental impact statements (EIS) inadequate in the area of salt deposition effects from operation of Palo Verde

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Units 2 and 3,[1] and (2) to stay the hearing pending the supplementation of the statements.

The Appeal Board denied the motion for directed certification because it did not meet the standards for interlocutory review. The Appeal Board emphasized that interlocutory appellate review under 10 C.F.R. 2.718(i) is discretionary, disfavored, and undertaken only in the most compelling circumstances.[2] The Appeal Board in ruling on West Valley's motions used the criteria set forth in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (Marble Hill). The Marble Hill criteria only permits review of rulings of the Licensing Board which "(1) threaten the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by

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[1]The Palo Verde operating license proceeding is closed on Unit 1. The Licensing Board reopened the evidentiary record on Units 2 and 3 to consider the asserted adverse impact of salt deposition on nearby agricultural lands from operation of the Palo Verde facility.

[2]10 C.F.R. § 2.730(f) precludes interlocutory appeals as a matter of right (except for intervention petitions under 10 C.F.R. 2.714a). To obtain interlocutory review, therefore, a party must request referral under section 2.730(f) or directed certification under 10 C.F.R. 2.718(i). Acceptance of review under either section is discretionary.

a later appeal or (2) affect the basic structure of the proceeding in a pervasive or unusual manner."

The Appeal Board held that the Licensing Board's ruling did not meet either standard. First, the Appeal Board noted that the inquiry into whether the EISs were adequate was essentially a factual inquiry best left for appellate review of an initial decision. Similarly, the Appeal Board found that whether any inadequacy could be cured in a hearing would best be addressed after the proceeding below was completed. Finally, the Appeal Board found that the basic structure of the proceedings would be fundamentally unaltered irrespective of whether a supplemental EIS were done.

OGC believes that

EIS

We therefore recommend that

James A. Fitzgerald
Assistant General Counsel

Attachment:
ALAB-742

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Tuesday, November 8, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '83 SEP 19 A11:31

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Reginald L. Gotchy
Howard A. Wilber

September 19, 1983
(ALAB-742)

SERVED SEP 19 1983

In the Matter of	)	
ARIZONA PUBLIC SERVICE COMPANY, ET AL.	)	Docket Nos. STN 50-529 STN 50-530
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	

Kenneth Berlin, Washington, D.C., for the intervenor, West Valley Agricultural Protection Council, Inc.

Arthur C. Gehr, Warren E. Platt, Charles A. Bischoff and Vaughn A. Crawford, Phoenix, Arizona, for the applicants, Arizona Public Service Company, et al.

Lee Scott Dewey for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

This operating license proceeding remains before the Licensing Board by reason of its grant of the late petition for leave to intervene of the West Valley Agricultural Protection Council, Inc. (West Valley). On the strength of that grant, the Board reopened the evidentiary record for the purpose of considering the environmental issue raised by West Valley; -- viz., the asserted adverse impact that the salt deposition associated with the operation of the Palo

Verde facility will have upon the productivity of nearby agricultural lands owned by West Valley members.[1]

On February 2, 1983, West Valley filed a motion below seeking, inter alia, (1) a declaration that the NRC staff's environmental impact statements for the Palo Verde facility did not address adequately the matter of salt deposition effects; and (2) a deferral of any hearings on those effects pending staff preparation of an adequate environmental analysis.[2] In a supplemental motion filed on May 6, West Valley renewed its assertions and prayer for relief.

In a July 11, 1983 memorandum and order, the Licensing Board denied both motions. It ruled that (1) "at this early stage of consideration of the salt deposition issue," it lacked the authority to direct the staff to prepare a new or supplemental environmental statement; (2) "as the record now stands, it has not been established that material

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[1] See LBP-82-117B, 16 NRC 2024 (1982). For reasons stated in that opinion, the Board confined the record reopening to Units 2 and 3 of the Palo Verde facility.

In a contemporaneously issued decision, the Licensing Board resolved in the applicants' favor all issues previously raised by another intervenor. Accordingly, the Board authorized the issuance of an operating license for Unit 1 alone. LBP-82-117A, 16 NRC 1964 (1982). We affirmed that decision in ALAB-713, 17 NRC___ (February 15, 1983).

[2] Although West Valley also sought a postponement of discovery, it was later agreed by all parties that discovery should commence immediately. Tr. 2891.

information [bearing upon that issue] is lacking in the previously prepared environmental statement or that such a lack would cause a need for preparation and circulation of a supplemental environmental statement"; and (3) "even if there should be new information, a supplemental statement need not necessarily be prepared and circulated." On the last point, the Board noted that it is settled that a licensing board decision based upon the evidentiary record adduced in the proceeding may itself serve as a modification of the staff's Final Environmental Statement.[3]

On July 22, 1983, West Valley filed a motion with us for a stay of the July 11 order. In an unpublished order entered on August 12, we denied the motion as premature, without prejudice to its renewal should either (1) the Licensing Board refer the July 11 order to us under 10 CFR 2.730(f); or (2) West Valley petition for directed certification of the order under 2.718(i).[4]

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[3] LBP-83-36, 18 NRC ___, ___ - ___ (slip opinion at 3-8).

[4] In a footnote to our order, we took pains to note that:

> We need not and do not now decide, of course, whether any of the rulings contained in the July 11 order are fit subjects for interlocutory appellate review on referral or directed certification. That question will be confronted only if the Licensing Board chooses to refer the order or, absent such referral, West Valley seeks directed certification.

On August 17, 1983, the Licensing Board declined to refer its July 11 order. Thereafter, on August 27, West Valley moved for directed certification and thereby resurrected its request for stay relief. The motion is opposed by both the applicants and the staff. For the reasons that follow, we conclude that it lacks merit and, consequently, must be denied. The necessary consequence is that there is no warrant for the issuance of a stay.

1. This is the seventh motion for directed certification to come before us in recent months. In denying each of the previous six,[5] we found it necessary to reemphasize anew what we endeavored to stress in a long line of opinions stretching back to the first opinion on the standards for directed certification issued more than eight

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[5] Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC ___ (June 20, 1983); id., ALAB-734, 18 NRC ___ (July 19, 1983); id., ALAB-737, 18 NRC ___ (August 26, 1983) (two motions); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC ___ (July 27, 1983); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC ___ (September 15, 1983). The four Seabrook motions were filed by one or another of the intervenors in that proceeding; the Byron motion by the staff; and the North Anna motion by the applicant.

We have not included in the tabulation two recent attempts to take impermissible appeals from interlocutory orders. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC ___ (August 24, 1983), and September 13, 1983 Memorandum and Order (unpublished).

years ago: namely, that interlocutory appellate review of licensing board orders is disfavored[6] and will be undertaken as a discretionary matter only in the most compelling circumstances.[7] More specifically, in the exercise of our directed certification authority conferred by 10 CFR 2.718(i), we will step into a proceeding still pending below only upon a clear and convincing showing that the licensing board ruling under attack either

> (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner.[8]

With a single exception, the recently rejected directed certification motions invoked either exclusively or principally the second of the Marble Hill criteria. Judging from the content of the papers filed with us, in most instances the movants seemingly were under the impression that any licensing board order that has some discernible bearing upon the future course of a proceeding perforce

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[6] 10 CFR 2.730(f) explicitly prohibits interlocutory appeals other than those permitted by 10 CFR 2.714a governing appellate review of orders granting or denying intervention petitions.

[7] Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975).

[8] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

affects its "basic structure . . . in a pervasive or unusual manner." Such an expansive reading of the criterion is manifestly far wide of the mark. Indeed, were it on target, there would be virtually nothing left of the general proscription against interlocutory appeals.

In short, the parties to our licensing proceedings might well exercise in the future a greater measure of circumspection insofar as requests for interlocutory appellate review are concerned. Understandably, parties and their counsel are displeased whenever a licensing board enters an interlocutory order that appears to affect their interests adversely and, in their judgment, is plainly wrong to boot. And, no doubt, such an order will be found especially frustrating if its consequence is, for example, the litigation of issues that counsel believes should not be tried, the summary dismissal of issues that counsel is convinced are entitled to evidentiary consideration, or the infelicitous scheduling of the hearing on an issue. But, to repeat what we have said on so many prior occasions, in the overwhelming majority of instances the party simply must await the licensing board's initial decision before bringing its complaint to us (assuming that the grievance has not been mooted by intervening developments). The failure to accept this fact of adjudicatory life -- judicial as well as administrative -- has the unfortunate effect of diverting attention from the progress of the licensing board

proceedings where it belongs. Beyond that, insubstantial directed certification requests bring about a waste of our time,[9] as well as the profligate expenditure of the time and resources of the parties themselves.[10]

2. The directed certification motion at hand need not detain us long. In fact, it would be difficult to find a more apt illustration of a baseless request for our intercession in a proceeding still in an active status below.

In order to provide West Valley with the relief it seeks of us, we first would have to embark upon our own

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[9] On that score, we perhaps have gone to undue lengths in explaining in several recent published opinions the reasons for our rejection of a particular directed certification petition. From this point forward, we will be more inclined to reject such petitions summarily if their lack of merit appears manifest.

[10] In offering the foregoing observations, we have not overlooked the Commission's direction in its 1981 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456, to the effect that:

> If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission.

We discussed that direction in North Anna, ALAB-741, fn. 5 supra. As there concluded, the Commission did not intend to bring about a marked relaxation of the Marble Hill standard. Rather, the direction comes into play only with respect to questions of broad and immediate significance as to which a licensing board determines that prompt appellate determination on an interlocutory basis is necessary.

examination of the environmental impact statements currently on file to determine whether, contrary to the Licensing Board's express conclusion in the July 11 order, it is now apparent that to date the staff has not adequately addressed the salt deposition matter.[11] Assuredly, such an essentially factual inquiry is not fit grist for the interlocutory review mill; rather, that is precisely the kind of issue appropriately left for appellate scrutiny on a later appeal from the initial decision.

Moreover, were we to accept the invitation to look at the staff's salt deposition analysis and to agree with West Valley's appraisal of its sufficiency, there would remain the question whether the Board was right in its belief that any deficiencies might be cured by the evidence adduced at

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[11] Given that express conclusion, we do not understand West Valley's insistence that, in the December 30, 1982 memorandum and order granting its petition to intervene (LBP-82-117B, supra), the Licensing Board determined that the salt deposition matter had not been adequately addressed in either the construction permit or operating license Final Environmental Statements for Palo Verde. Directed Certification Motion (August 27, 1983) at 1. In any event, our own examination of LBP-82-117B has disclosed no such determination. This is scarcely surprising. Before the Licensing Board at that time was simply West Valley's late intervention petition and request that the record be reopened to take evidence on salt deposition effects. In acting affirmatively on the request, the Board was not called upon to make a substantive determination respecting the adequacy of the staff's environmental impact statements. All that it was required to decide, and did decide, was that there was "adequate cause to reopen the record to consider [West Valley's] contentions." 16 NRC at 2032.

the hearing and the initial decision based on that evidence. That question, as well, is one that both can and should await the final disposition of the proceeding below.

These considerations to one side, there is a total lack of foundation to West Valley's claim that the Licensing Board's order affects the "basic structure" of the proceeding. Memorandum in Support of Directed Certification Motion (August 27, 1983) at 2. The order plainly has no such effect -- pervasive or otherwise. Irrespective of whether the staff were to file a supplemental environmental impact statement prior to the hearing or, instead, the hearing should now go forward on the present staff analysis (with an opportunity given to the parties to supplement or to contradict it), "the shape of the ongoing adjudication" will remain fundamentally unaltered. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).[12]

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[12] There is no greater substance to West Valley's claim that the July 11 order threatens it with irreparable injury because the order "insure[s] that the NRC staff [will] not perform an impartial full analysis of potential [environmental] harm caused by" the Palo Verde facility. Directed Certification Motion at 3. For one thing, that line of argument assumes that the staff has not already performed such an analysis. As already noted, exploration of such questions is not appropriate on interlocutory appellate review. Secondly, and more fundamentally, West Valley will have ample opportunity to raise the matter of the adequacy of the staff's environmental analysis on an

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(Footnote Continued)

The motion for directed certification and the ancillary stay application are denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)
appeal from the Licensing Board's initial decision (should it be dissatisfied with that decision). See, e.g., Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981) (denying a motion for directed certification of a Licensing Board order that similarly rejected a request that the staff be required to prepare a supplemental environmental impact statement).