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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

James A. Laurenson, Chairman
Mr. Glenn O. Bright
Dr. Jerry Harbour

OFFICE OF SECRETARY
OF ENERGY & SERVICE

SERVED OCT 20 1982

In the Matter of)	Docket Nos. 50-416/417 OL
)	
MISSISSIPPI POWER AND LIGHT)	ASLBP No. 82-476-04-OL
COMPANY, <u>et al.</u>)	
)	
(Grand Gulf Nuclear Station,)	
Units 1 and 2))	October 20, 1982

MEMORANDUM AND ORDER DENYING
STATE OF LOUISIANA'S PETITION FOR INTERVENTION

I. SUMMARY

In a previously uncontested operating license matter, the Licensing Board holds that it has jurisdiction to rule on the late-filed petition to intervene of the State of Louisiana even though the Office of Nuclear Reactor Regulation already issued a low power operating license. However, the Licensing Board denies the petition to intervene. In evaluating the factors enumerated in 10 CFR § 2.714(a) for late-filed petitions, the Board finds that Louisiana failed to establish good cause for its late-filing, offered no showing of its ability to make a

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substantial contribution to the record, and sought to expand the issues and delay the proceeding. These factors were found to outweigh the factors that no other means were available to protect Louisiana's interests and that no other party would represent that interest. The fact that the District of Columbia Circuit Court of Appeals stayed its mandate in NRDC v. NRC, ___ F.2d ___ (D.C. Cir. April 27, 1982), coupled with NRC's petition for certiorari to the U. S. Supreme Court means that Table S-3 is still in force at this time. Thus, pursuant to 10 CFR § 2.758, the Board is unable to consider challenges to Table S-3 in this proceeding. The Commission has retained to itself the decision whether to grant full power operating licenses. The petition is denied and the proceeding is dismissed.

II. PROCEDURAL HISTORY

On September 4, 1974, the Atomic Energy Commission issued construction permits for Grand Gulf 1 and 2. On July 28, 1978, the Nuclear Regulatory Commission published a notice in the Federal Register regarding "receipt of application for operating licenses for Grand Gulf 1 and 2 and opportunity for hearing." 43 Fed. Reg. 32903 (July 28, 1978). No petition for leave to intervene or request for hearing was received within the 30 day period provided in the notice. Hence, no licensing board was convened and no hearing on the operating licenses was held. Construction of Grand Gulf 1 was completed on June 16, 1982 and a low power operating license was issued to Applicant by the Office

of Nuclear Reactor Regulation on that date for Grand Gulf 1. Construction of Grand Gulf 2 was halted on December 31, 1979 with approximately 22% of construction completed. Although some construction has resumed, the completion of construction of Grand Gulf 2 is not scheduled at this time.

On July 26, 1982, the Attorney General of Louisiana, William J. Guste, Jr., filed a "Petition to Participate as an Interested State in Facility Operating License Proceedings, etc." Curiously, the body of the Attorney General's Petition indicates that Louisiana seeks party status as an intervenor pursuant to 10 CFR § 2.714(a)(1) rather than participation as an interested state pursuant to 10 CFR § 2.715(c). The Petition does not set forth a specific proposed contention but mentions a need to consider the environmental impact of fuel cycle activities pursuant to the decision concerning Table S-3 in NRDC v. NRC, ___ F.2d ___ (D.C. Cir. April 27, 1982). The Petition does not specify either Grand Gulf 1 or Grand Gulf 2 as the object of the Attorney General's concern. In light of the suspended construction status of Grand Gulf 2, we shall assume that the Attorney General's Petition relates to Grand Gulf 1. In addition to the foregoing problems concerning the Petition, it also fails to contain any information concerning the following: (1) good cause for failure to file on time; (2) the extent to which Louisiana's participation may be expected to assist in developing a sound record; and (3) whether Louisiana's participation will delay the proceeding.

On August 3, 1982, this Board was established to rule on the Petition and to preside over the proceeding in the event that a hearing is ordered. On August 10, 1982, the NRC Staff filed its opposition to the Petition. Staff contends that a balancing of the factors enumerated in 10 CFR § 2.714(a)(1) concerning nontimely intervention weighs heavily against accepting the Petition and that it should be denied. On August 19, 1982, Applicant filed its Answer to the Petition. Applicant asserts the following: (1) the Board lacks jurisdiction to consider the Petition or grant any relief; and (2) even if the Board has jurisdiction, the Petition is untimely and should be denied.

On August 31, 1982, the Board ordered the State of Louisiana to respond to the arguments of NRC Staff and Applicant. Louisiana's Brief in Support of its Petition makes it clear that the State is seeking intervention and party status. The Brief asserts that "all further proceedings in the instant matter [should] cease until the issue [of the validity of Table S-3] is resolved by the Supreme Court." Louisiana Brief at 3. Louisiana contends that the Licensing Board has jurisdiction to rule on the petition for leave to intervene. Turning to the criteria in 10 CFR § 2.714(a), the State argues as follows: (1) it has good cause to justify its untimely petition; (2) it has the means to obtain expertise to assist in developing a sound record; (3) the NRC Staff concedes that the State has no other available means or parties to protect or represent its interests; and (4) the factor of delay is inapplicable when the granting of a petition results in the ordering of a hearing.

III. JURISDICTION OF BOARD

This Board was established on August 3, 1982, by B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel. Nevertheless, applicant asserts that "the Licensing Board lacks jurisdiction to consider the Petition or grant any relief with respect to Grand Gulf, Unit 1." Thus, before we may consider the merits of the Petition or the opposition to it, we must resolve the issue of the Board's jurisdiction to decide this matter.

In essence, Applicant asserts 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." Applicant's Answer at p. 4. Applicant relies on an introductory paragraph in a Commission decision in an antitrust matter where construction permits were discussed as follows:

"An initial decision favorable to the applicants was issued in late 1975 (LBP-75-71, 2 NRC 894), construction permits were duly issued, and the Atomic Safety and Licensing Appeal Board affirmed the initial decision in early 1976. ALAB-306, 3 NRC 14. The Commission chose not to review the Appeal Board's decision, and judicial review was not sought within the prescribed time. At that point, the construction permit proceeding, including its antitrust review aspect, had come to an end." Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1305 (1977).

Applicant then argues: "Therefore, the filing of a late petition for intervention after the issuance of an operating license in an uncontested case, as petitioner acknowledges, constitutes a request to reopen the proceeding." Applicant's Answer at 5. This is a non sequitur. The Commission, in Houston Lighting and Power Company, supra, stated that the Licensing Board decided a construction permit proceeding in favor of applicants, the Appeal Board affirmed, the Commission chose not to review the Appeal Board's decision, and judicial review was not sought. Thus, the Commission concluded that the construction permit proceeding had come to an end. In the instant case, Applicant argues that the filing of a late petition for intervention after the issuance of a low power operating license by the Office of Nuclear Reactor Regulation in an uncontested case "constitutes a request to reopen the proceeding." There are several important differences, to wit:

(1) In the instant case the Commission has not yet had an opportunity to review the decision to grant a low power operating license and to make its own decision concerning the issuance of a full power operating license;

(2) The issuance of a low power operating license by the Office of Nuclear Reactor Regulation is not tantamount to a Commission determination not to review an Appeal Board decision; and

(3) Notwithstanding the title of Louisiana's Petition, there is no closed proceeding to reopen.

This appears to be a case of first impression. We have been unable to find any prior decision dealing with attempts to intervene in an uncontested operating license proceeding after the issuance of a low power license. However, on the issue of this Board's jurisdiction, we believe that the Commission's regulations make it clear that this Board has jurisdiction until the Commission acts on the full power operating license. 10 CFR § 2.717(a) provides in pertinent part as follows:

"Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences....A proceeding is deemed to commence when a notice of hearing or a notice of proposed action pursuant to § 2.105 is issued....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...whichever is earliest."

Since the notice of July 28, 1978, is within the scope of 10 CFR § 2.105, the Board's jurisdiction can be established as of that date. In any event, it is clear that, at the latest, this Board acquired jurisdiction upon its establishment on August 3, 1982. More importantly, it is clear from § 2.717 that the Board's jurisdiction does not terminate until the time the Commission issues a final decision or the time expires for Commission certification of the record. Thus, the fact that the Office of Nuclear Reactor Regulation issued a low power operating license cannot be equated with a final decision rendered by the Commission. The Commission published a statement of policy in the

Federal Register announcing that it had decided to "retain to the Commission itself the decision of whether or not an applicant will be granted authority for commercial operation, i.e., full power operation...." 46 Fed. Reg. 47906 (September 24, 1981). Until the Commission exercises its authority to license full power operation, this Board has jurisdiction to resolve all issues before it. Applicant's objection and challenge to the Board's jurisdiction is denied.

IV. NONTIMELY FILING OF PETITION

The Commission's regulations at 10 CFR § 2.714(a)(1) provide that nontimely filings of petitions to participate as a party will not be entertained absent a determination that the petition should be granted based upon a balancing of the following factors:

- (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.
- (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.

A. Participation As A Party

The State of Louisiana's Petition is ambiguous. It is captioned, "Petition To Participate As An Interested State..." However, in the body of the Petition, Louisiana asks for leave to participate pursuant to 10 CFR § 2.714(a)(1). If Louisiana wished to participate as an interested state, it would have relied on 10 CFR § 2.715(c). The State of Louisiana is no stranger to NRC proceedings. In 1977, Louisiana appealed a licensing board decision concerning a construction permit for River Bend Station. In that matter, the Appeal Board discussed the differences between participation as an interested state pursuant to § 2.715(c) and participation as a party pursuant to § 2.714(a). Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796-8 (1977). Moreover, the fact that Louisiana's Petition here raises specific issues concerning high-level radioactive waste disposal, confirms its other statements in its Petition and Brief regarding intervention as a party rather than participation as an interested state. Upon a consideration of all of the above factors, the Board concludes that Louisiana seeks admission as a party pursuant to § 2.714(a) rather than as an interested state pursuant to § 2.715(c). The State of Louisiana's Petition will be evaluated accordingly.

B. Evaluation and Analysis of Section 2.714(a) Factors

As noted by Applicant and NRC Staff, the Petition of the State of Louisiana does not mention or address any of the five factors listed in 10 CFR § 2.714(a)(1). However, these matters are addressed in Louisiana's Brief. We will proceed with our analysis of each factor and the balancing of all factors.

1. Good cause for failure to file on time.

The State of Louisiana's Petition deals with aspects of disposal and possible release of high-level transuranic radioactive waste and relies upon the decision of the District of Columbia Circuit Court of Appeals in NRDC v. NRC, ___ F.2d ___ (D.C. Cir. April 27, 1982). The State argues that these issues could not have been raised prior to the April 27, 1982 date of that decision and that Louisiana acted promptly thereafter in filing the Petition on July 26, 1982.

Unfortunately for Louisiana, issues surrounding the uranium fuel cycle have been raised in NRC proceedings long before the decision of the Circuit Court of Appeals in NRDC v. NRC, supra. In fact, the State of Louisiana was a party to the River Bend construction permit proceeding, Gulf States Utilities Company (River Bend Stations, Units 1 and 2), ALAB-444, 6 NRC 760, 794 (1977), where the Appeal Board discussed the fact that Table S-3 concerning the environmental effects associated with the uranium fuel cycle had been previously invalidated by the District of Columbia Circuit Court of Appeals in the first NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev. sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Thus, the controversy surrounding Table S-3 and the environmental effects of the uranium fuel cycle have been well known, especially to the State of Louisiana from its direct participation in the River Bend construction permit

proceeding, for a long time. Hence, the April 27, 1982 decision of the District of Columbia Circuit Court of Appeals in NRDC v. NRC, supra, does not contain "new information" and is insufficient to establish good cause for an untimely petition to intervene. ALAB-444 (River Bend) establishes Louisiana's knowledge of the existence of a controversy concerning Table S-3. Thereafter, Louisiana waited for five years and until after the issuance of a low power operating license in Grand Gulf before filing its Petition. There is nothing in the record before us from which it can be established or inferred that there is good cause for this untimely filing.

2. Availability of other means

The second factor to be considered pursuant to § 2.714(a) is whether other means are available to protect Louisiana's interests. Applicant contends that the NRC Staff will adequately protect the State's interests. However, the NRC Staff concedes that except for the possibility of participating in an NRC rulemaking proceeding, "there may be no means other than participation in a proceeding on the Grand Gulf licensing which would afford the same degree of protection...." NRC Staff Opposition To Untimely Petition To Intervene at 6-7. However, the Staff contends that under the circumstances of the instant matter, this factor should be given little weight.

Last year, the Appeal Board reversed a Licensing Board's grant of a untimely intervention petition in South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981). In that case, the Appeal Board found that although there were

no other available means to protect the late intervenor's interests, that factor and the factor of the extent to which other parties would protect that interest were entitled to less weight than the other three factors enumerated in § 2.714(a). Id. at 895. While it is true, as Applicant asserts, that the NRC Staff has a duty to make the requisite findings pursuant to § 50.57 including, inter alia, the fact that the issuance of the license will not be inimical to the health and safety of the public, we find that this obligation does not constitute other means to protect the interests asserted by Louisiana. Indeed, even the NRC Staff does not contend that its role would afford the same degree of protection for Louisiana as would party status as an intervenor. Nevertheless, in accord with ALAB-642 (Summer), we conclude that this factor, although resolved in favor of Louisiana, is entitled to less weight than other factors enumerated in § 2.714(a).

3. Development of a sound record.

Applicant and NRC Staff correctly note that Louisiana has not attempted to demonstrate any special expertise it possesses concerning the issues raised in the Petition. Indeed, Louisiana has not indicated that it would do anything other than express its views on these subjects. Its assertion that it "has, or has the means to get, all the expertise necessary to fully address the issue in point," Brief in Support of Petition at 18, is vague and insufficient. Without belaboring the point further, we find that Louisiana failed to establish that its intervention in this proceeding could be expected to assist in developing a sound record.

4. Representation of interest by existing parties.

Since there is no contested proceeding at the present time, there are no "existing parties" who might adequately represent Louisiana's interest. The remaining arguments and law concerning evaluation of this factor are essentially identical to those set forth under "Availability of other means", supra. The result here is the same: this factor, although resolved in favor of Louisiana, is entitled to less weight than other factors enumerated in § 2.714(a).

5. Delay and broadening of issues.

The general principle concerning delay was stated by the Appeal Board as follows: "Manifestly, the later the petition, the greater the potential that the petitioner's participation will drag out the proceeding." Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 762 (1978). That principle is particularly pertinent to the instant case because of the following: (1) the petition is almost four years late; (2) Louisiana seeks to commence a licensing proceeding rather than join one already in progress; and (3) a low power operating license has already been issued to Applicant. Under these circumstances, it cannot be disputed that Louisiana's participation, at this late date, will broaden the issues and delay the proceeding. Therefore, we find that this factor must be resolved against Louisiana.

C. The Balancing Test

Before turning to the balancing test, we note that we have also considered Louisiana's status as a governmental entity. We agree with the State that "such status weighs in favor of the petitioner." Brief in Support of Petition at 10. However, based upon our analysis and evaluation of the five factors enumerated in §2.714(a), we find that Louisiana (1) is inexcusably late; (2) offers no showing of its ability to make a substantial contribution to the record; and (3) seeks to expand the issues and delay the proceeding. Against those factors, we must balance the unavailability of other means to protect Louisiana's interests and the fact that there is no other party herein to represent that interest. As we have noted above, the latter two elements are entitled to less weight than the other three. Moreover, even the consideration of Louisiana's status as a governmental entity is insufficient to overcome and outweigh the other three factors resolved against the State. We also find that it would be unfair and unjust to permit Louisiana to wait until a low power operating license is issued in an uncontested matter and then appear, without any showing of good cause for its failure to act on time, and delay the issuance of a full power license while an adjudicatory proceeding is fabricated. For the foregoing reasons, pursuant to § 2.714(a), we deny Louisiana's Petition.

V. LOUISIANA'S REQUEST FOR RELIEF

Louisiana's Petition requests "the Nuclear Regulatory Commission and the Atomic Licensing Board (sic) to refrain from granting any

operating license to the Grand Gulf Nuclear Power Station until the issues herein are resolved." The petition cites the D. C. Circuit Court of Appeals decision in NRDC v. NRC, ___ F.2d ___ (D.C. Cir. 1982) and goes on to say that "Judge Bazelon states that in the absence of a valid generic rule, the environmental impact of fuel-cycle activities must be considered in individual proceedings."

Louisiana is correct in its statement that the D. C. Circuit Court of Appeals invalidated the Commission's Table S-3 concerning the uranium fuel cycle for licensing nuclear reactors. The Court held, "we conclude that the Table S-3 Rules are invalid because they fail to allow for proper consideration of uncertainties concerning the long-term isolation of high-level and transuranic wastes." Id. Slip Op. at 11. However, on September 1, 1982, that Court granted motions for stay of mandate and directed the Clerk not to issue the mandate for a period of 30 days. On September 27, 1982, the NRC filed a petition for certiorari in the U. S. Supreme Court in this matter. Rule 41(b) of the Rules of Appellate Procedure provides in pertinent part:

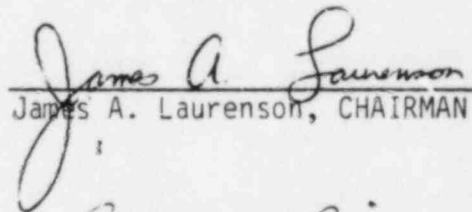
"A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court."

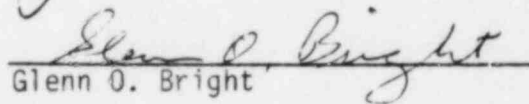
As relevant to the instant case, the order enforcing the decision of the D. C. Circuit Court of Appeals in NRDC v. NRC, supra, has been stayed and, hence, Table S-3 is still in force at this time. Thus, there is no present need to consider the environmental impact of fuel cycle activities in individual cases such as Grand Gulf. Indeed, in adjudicatory proceedings, licensing boards may not consider contentions that NRC Rules or Regulations are invalid. 10 CFR § 2.758.

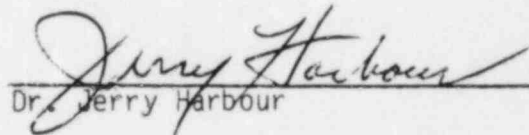
As we note in Procedural History, supra, the Office of Nuclear Reactor Regulation issued the low power operating license for Grand Gulf 1 on June 16, 1982. Louisiana is mistaken in its assertion that it was "the decision of the Licensing Board to grant an operational license for 5% power..." Brief in Support of Petition at 27. Finally, the Commission has retained to itself the decision of whether or not an applicant in an uncontested case will be granted authority for full power operation. 46 Fed. Reg. 47906 (September 30, 1981). Thus, this Licensing Board is without jurisdiction to grant or to "refrain from granting any operating license to the Grand Gulf Nuclear Power Station...."

ORDER

WHEREFORE, IT IS ORDERED this 20th day of October, 1982, that the Petition of the State of Louisiana, filed on July 26, 1982, is DENIED and this proceeding is DISMISSED.


James A. Laurenson, CHAIRMAN


Glenn O. Bright


Dr. Jerry Harbour