UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD



Administrative Judges:

Stephen F. Eilperin, Chairman
Gary J. Edles
Howard A. Wilber



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| In the Matter of | ) | |
| MISSISSIPPI POWER & LIGHT COMPANY, ET AL. | ) | Docket Nos. 50-416 50-417 |
| (Grand Gulf Nuclear Station, Units 1 and 2) | ) | |

William J. Guste, Jr., and Ian Douglas Lindsey, Baton Rouge, Louisiana, for the petitioner, the State of Louisiana.

Troy B. Conner, Jr., Mark J. Wetterhahn, and Robert M. Rader, Washington, D.C., for the applicants, Mississippi Power & Light Company, et al.

Richard J. Rawson for the Nuclear Regulatory Commission staff.

DECISION

December 8, 1982

(ALAB-704)

This is an appeal by the State of Louisiana from a Licensing Board decision that denied the State's late-filed petition to intervene in the otherwise uncontested Grand Gulf operating license proceeding because it failed to meet

the criteria of 10 CFR § 2.714(a). [1] See LBP-82-92, 16 NRC __ (Oct. 20, 1982). The State filed its petition on July 21, 1982 following issuance of a low power operating license for Grand Gulf, Unit 1. [2] The State of Louisiana



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1/ In resolving the question whether a late-filed intervention petition should be granted, 10 CFR § 2.714(a) mandates that five factors be balanced:

(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.

2/ The Director of Nuclear Reactor Regulation issued this license on June 16, 1982. Applicants argue that the issuance of that license divested the Licensing Board of jurisdiction to consider the State's petition. However, 10 CFR § 2.717(a) provides that the Board's jurisdiction continues until "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." We agree with the Licensing Board that, until the Commission exercises its authority to license full power operation, the adjudicatory boards have jurisdiction to resolve all issues before them. LBP-82-92, supra, 16 NRC at __ (slip opinion at 5-8).

seeks to raise issues regarding the environmental impact of the nuclear fuel cycle. According to the State, a recent court of appeals decision ruled that those issues had been wrongly excluded from individual Nuclear Regulatory Commission licensing proceedings. See Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (Nov. 29, 1982) (No. 82-545, 1982 Term) (S-3 decision). That recent court decision, we are told, provides good cause for late intervention.

As we detail below, most of the issues the State seeks to raise were in fact litigable when this operating license proceeding was first noticed for hearing more than four years ago. As to these matters, the State plainly has not prevailed under the Commission's late-filed intervention criteria. With regard to the one subject that the State could not have raised earlier (because it was covered by a generic rule) -- the amount of effluents released annually by fuel cycle activities supporting a typical light water nuclear reactor -- a recent Commission policy statement instructs its adjudicatory boards to treat ongoing licensing proceedings as if the rule that set out those values were still in effect. Statement of Policy, "Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts," 47 Fed. Reg. 50591 (Nov. 8, 1982) (S-3 policy statement). Consequently,

we affirm the Licensing Board's rejection of the State's intervention petition (with one modification required by the S-3 policy statement) for failure to meet Commission late-filing requirements, and on the basis of the Commission's recent policy statement.

I.

In order to understand our disposition of the State's appeal, some background on the reason for, and history of, the Commission's consideration of the environmental impact of the nuclear fuel cycle is required. We draw, in part, upon the Commission's Statement of Consideration in promulgating the final S-3 rule: 3/

> The National Environmental Policy Act of 1969 (NEPA) [42 U.S.C. § 4321] requires that the Commission look closely at the environmental impact of a proposed nuclear power reactor before it may license the construction or operation of the facility . . . .The environmental impact of operating a nuclear power reactor is not limited to effects specific to the plant itself, such as site alterations due to plant construction or the release of reactor effluents. The environment will also be affected by the fuel cycle activities necessary to support plant operation. Since operation of a nuclear plant involves a commitment to prepare fuel and dispose of spent fuel and waste, the environmental impacts considered in the NEPA analysis for a power reactor should include contributions from uranium fuel cycle activities.

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3/ The S-3 rule is codified at 10 CFR §§ 51.20(e) and 51.23(c). It was denominated the S-3 rule because the values specified in the rule are set out in a table labeled S-3.

44 Fed. Reg. 45362, 45363 (Aug. 2, 1979) (footnote omitted). Because the fuel for a particular reactor cannot be identified at the start of the fuel cycle and traced through the various steps to final disposal, the fuel cycle impacts for a particular reactor must be estimated hypothetically. Moreover, given the wide-ranging inquiry necessary to evaluate the impacts, it is preferable to attempt this assessment generically rather than through individual licensing proceedings. Ibid.

The Commission turned to that task in 1974. The S-3 rule it promulgated quantified the natural resources used and effluents released annually by fuel cycle activities supporting a typical nuclear power plant. The rule stated that in individual licensing proceedings the environmental impact from a proposed reactor should be as set out in Table S-3, and that "[n]o further discussion of such environmental effects shall be required." 39 Fed. Reg. 14188, 14191 (Apr. 22, 1974).

While the S-3 rule underwent judicial challenge 4/ it

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4/ The U.S. Court of Appeals for the District of Columbia Circuit invalidated a portion of the original rule because of perceived inadequacies in the rulemaking procedures. It, in turn, was reversed by the Supreme Court. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 547 F.2d 633 (D.C. Cir. 1976), rev'd sub nom. Vermont Yankeee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548-49 (1978).

also underwent a series of revisions. In March 1977, after extensive further analysis, the NRC promulgated a new ("interim") S-3 rule that differed only slightly from the original rule. 42 Fed. Reg. 13803, 13806-07 (Mar. 14, 1977). A year later the interim rule was amended to provide specifically and unambiguously that the health effects attributable to the impacts specified in S-3 were not covered by the rule and could be litigated in individual licensing proceedings. 43 Fed. Reg. 15613, 15616-17 (Apr. 14, 1978). After still further rulemaking proceedings, a final S-3 rule -- again, differing little from its earlier versions -- was issued. The final rule, together with the original and interim rules were all challenged in court, and it is the resulting decision upon which the State of Louisiana relies to establish good cause for its late filing. See p. 3, supra. 5/

Beyond its assertion of good cause for late filing, the State claimed that (1) its participation is necessary to assure that adequate consideration is given to the environmental impact of fuel cycle activities, (2) there is no basis to assume that high-level radioactive wastes will

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5/ The 30-day notice of opportunity for interested persons to file petitions for leave to intervene was published on July 28, 1978. 43 Fed. Reg. 32903. Thus the State's July 21, 1982 intervention petition was filed almost four years out of time.

have no environmental effect after burial (if in fact they are buried), and (3) there is a need to consider on a case-by-case basis the health, socioeconomic and cumulative effects of the projected releases from high-level wastes. Petition to Intervene (July 21, 1982) at 3-5. The NRC staff and applicants opposed the State's petition pointing to, among other things, its extreme lateness and the asserted absence of good cause for the late filing. The Licensing Board generally agreed with the position taken by the staff and applicants, and denied the State's petition. LBP-82-92, supra, 16 NRC at __, __ (slip opinion at 10-14, 17). This appeal followed.

II.

In its recent S-3 decision the District of Columbia Circuit ruled that all three S-3 rules -- original, interim, and final -- we invalid "due to their failure to allow for proper consideration of the uncertainties that underlie the assumption that solidified high-level and transuranic wastes will not affect the environment once they are sealed in a permanent repository." 685 F.2d at 494. The court also ruled that the original and interim rules had wrongly excluded consideration of the health, socioeconomic and cumulative effects of the releases projected in Table S-3. Id. at 486-90. These latter deficiencies, however, were cured according to the court by the Commission's amendment of the interim rule in April 1978, which allowed health,

socioeconomic and cumulative effect issues to be considered by individual licensing boards. Id. at 487-88, 490.

As is plain from the District of Columbia Circuit's S-3 decision, the State of Louisiana was at no time during the course of this operating license proceeding precluded from questioning the health, socioeconomic and cumulative environmental impacts of projected releases from high-level nuclear wastes. At least since April 1978, when the Commission amended its S-3 interim rule -- almost four months before petitions for intervention were due in this proceeding -- these subjects were ripe for litigation in individual licensing proceedings. 6/ Only the numerical quantification of the projected releases was generically fixed, and hence not litigable in individual licensing proceedings. Thus, as to health, socioeconomic and cumulative impacts the State cannot rely upon the court's recent decision as good cause for its late filing.

That being so, the State has an exceedingly heavy burden to justify an intervention petition on those latter

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6/ The Commission has taken the position that these subjects were never precluded from litigation in individual licensing proceedings, and that throughout, the S-3 rule only precluded case-by-case litigation of the numerical quantification of projected releases. See S-3 decision, supra, 685 F.2d at 488. This dispute between the court and the Commission is irrelevant for our purposes because the amendment to the interim rule antedated this operating license proceeding.

issues filed four years out-of-time and after license issuance. It must make a "compelling showing" on the other four factors governing late intervention. 7/ South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982). And a licensing board's evaluation of those factors will not be disturbed by us unless the board has abused its discretion. Id. at 885.

Here, the Licensing Board's denial of the State's intervention petition was well within its discretion. Extended discussion on our part is not warranted. In addition to the importance of the "good cause" factor and the absence of such a showing here, we have previously pointed to the importance of the third and fifth factors specified in 10 CFR § 2.714(a) -- the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, broaden the issues or delay the proceeding. As to developing a sound record, suffice it to say that we agree with the Licensing Board that the State failed to demonstrate that it has special expertise on the general subjects it seeks to raise. See LBP-82-92, supra, 16 NRC at ___ (slip opinion at 12). When

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7/ See n.1, supra.

a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. See generally Summer, supra, 13 NRC at 894; Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978). Vague assertions regarding petitioner's ability or resources, as we have here, are insufficient.

So too, it is manifest to us that the grant of an intervention petition at this very late hour, after the Director of Nuclear Reactor Regulation has issued a low power operating license in an uncontested proceeding, will perforce broaden the now non-existent adjudicatory issues and delay conclusion of the proceeding. The remaining factors of adequacy of existing representation and availability of other means to protect petitioner's interest, while weighing in the State's favor, are in this circumstance of decidedly "lesser weight than the other factors." Summer, supra, 13 NRC at 895.

With regard to the one subject the State was precluded from litigating by virtue of the S-3 rule -- the numerical quantification of effluent releases and its embodiment of the judgment that high level radioactive waste will be disposed of safely -- the policy statement recently issued by the Commission with regard to the District of Columbia Circuit's S-3 decision (see p. 3, supra) controls our

course. 8/ The policy statement addresses the question whether the subject matter of the S-3 rule should now be the subject of litigation in individual licensing proceedings, as the State asks be done here. The answer the Commission

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8/ Among other things the Commission explained that the court's decision (47 Fed. Reg. at 50592 (footnote omitted))

> does not call into question the Commission's awareness of waste disposal uncertainties or the adequacy of the evidence regarding uncertainties in the record on which the Commission relied. The state of the Final rulemaking record does not suggest that supplementary studies of uncertainties are likely to produce evidence that would change licensing decisions. The Commission continues to address the uncertainty over whether and when a permanent repository, or equivalent system of disposal, will be developed. The Commission has stated that it would not license plants without reasonable confidence that safe waste disposal will be available when needed, and has found that it has such reasonable confidence. 42 Fed. Reg. 34391 (July 5, 1977), NRDC v. NRC, 581 F.2d 166 (2d Cir. 1978). The Commission is now entering the final stages of the so-called "waste confidence" proceeding, a proceeding designed to reassess whether there is reasonable assurance that safe waste disposal will be available when needed. 44 Fed. Reg. 61372 (1979). The Court of Appeals has made clear that licensing need not be suspended pending the outcome of this reassessment. See Potomac Alliance v. NRC, [682 F.2d 1030 (D.C. Cir. 1982)]. In view of these considerations and the high cost of delaying the issuance of licenses for qualified facilities, the Commission concludes that power reactor licensing may continue. Should the "waste confidence" proceeding arrive at an outcome inconsistent with this policy judgment, the Commission will immediately inform the Congress and will reassess the positions taken in this policy statement.

has given is plainly in the negative (47 Fed. Reg. at 50592 (footnote omitted)):

> To move further toward case-by-case litigation would reintroduce the significant burdens the rule was intended to relieve. Use of the S-3 rule has served the important purpose of providing the underlying basis for consideration of fuel cycle impacts, and the Commission believes that an attempt to proceed without the rule would probably prove unworkable. In principle, and quite possibly in practice, contested licensing cases could rapidly evolve into replays of the S-3 rulemaking. The resulting delay and drain on staff resources would be substantial, and would not only delay licensing of qualified facilities, but would also substantially disrupt the Commission's regulatory program, including its program to develop safety standards for high-level waste disposal facilities.

That guidance of the Commission leaves no room for doubt that the question of safe waste disposal as reflected in the S-3 table of effluent releases is not a matter for case-by-case litigation in individual reactor licensing proceedings at this time. 9/ Indeed, the boards are explicitly directed to "proceed in continued reliance on the Final S-3 rule". 47 Fed. Reg. 50593. In short, the policy statement calls upon us to act as if the District of Columbia Circuit's decision, which is now under review by

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9/ A Commission policy statement is, of course, binding on its adjudicatory boards. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979).

the Supreme Court, is currently of no operative effect. 10/

The statement, however, directs the Commission's adjudicatory boards to condition their decisions and license authorizations on the final outcome of the judicial proceedings. Ibid. Accordingly, we so condition our decision, and the license authorization, in this case. The Licensing Board's October 20, 1982 decision denying the State of Louisiana's intervention petition is affirmed, subject to the final outcome of the judicial proceedings now before the Supreme Court in Nuclear Regulatory Commission v. Natural Resources Defense Council, Inc. (No. 82-545, 1982 Term), supra.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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10/ The District of Columbia Circuit has, in fact, stayed its mandate. See 47 Fed. Reg. at 50591.