NUCLEAR REGULATORY COMMISSION

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COMMISSION MEETING

In the Matter of:

DISCUSSION OF DOE PETITION ON

CLINCH RIVER BREEDER REACTOR

DATE: December 9, 1981 PAGES: 1 thru 22

AT: Washington, D. C.

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NUCLEAR REGULATORY COMMISSION

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DISCUSSION OF DOE PETITION ON CLINCH RIVER BREEDER REACTOR

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Nuclear Regulatory Commission
Room 1130
1717 H Street, N.W.
Washington, D.C.

Wednesday, December 9, 1981

The Commission met, pursuant to notice, at 3:15 p.m., NUNZIO PALLADINO, Chairman, presiding.

PRESENT:

NUNZIO PALLADINO, Chairman
VICTOR GILINSKY, Commissioner
PETER BRADFORD, Commissioner
JOHN AHEARNE, Commissioner
THOMAS ROBERTS, Commissioner

ALSO PRESENT:

LEONARD BICKWIT
SAMUEL CHILK
WILLIAM J. DIRCKS
HAROLD DENTON
GUY CUNNINGHAM
PAUL CHECK
FORREST REMICK
DENNIS RATHBUN
MARTIN MALSCH

# DISCLAIMER

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P R O C E E D I N G S

CHAIRMAN PALLADINO: The meeting will please come to order.

With this meeting, we continue on the subject of the Clinch River Breeder Reactor. The matter we will discuss now is the procedure for handling the DOE Petition for an exemption under 10 CFR 50.12 of the Commission's Rules.

In particular, we must consider who is the appropriate body within NRC to make the exemption decision, the Commission, the staff or an adjudicatory board.

We will not make that decision today but we will review the considerations involved.

I should add the Commission has scheduled a meeting for December 11th to give the parties an opportunity to discuss or give their views on the procedures for handling the DOE exemption request.

Since scheduling that meeting, we have had a request from one of the parties to defer that meeting until after December 15th. I would suggest to the Commission that we honor that request. We do have an opportunity for scheduling the meeting on December 16th and we have reserved time for 10:00 a.m. on the 16th.

I think it might be appropriate for the Commission at this time to address whether or not it would be willing to defer the meeting until that time so we can give appropriate



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notice to the parties involved.

Would you agree to meeting on the 16th rather than the 11th?

(Chorus of ayes.)

CHAIRMAN PALLADINO: We will schedule the meeting at which the parties will make their presentations.

COMMISSIONER BRADFORD: Were you going to come back to that subject or did you intend to talk about the format, what we expect them to address?

CHAIRMAN PALLADINO: I understand there have been requests from some of the parties. I gather we are giving all the parties an opportunity to make any comments as they see fit with regard to the procedures they think we ought to follow.

I would propose to look at our schedule a little more closely and after we hear the parties, we schedule another meeting at which we would make our decision.

COMMISSIONER AHEARNE: Are we asking these people to come in and address the merits of the petition or how should the Commission address the merits of the petition?

CHAIRMAN PALLADINO: This would be on the procedures and not the merits. Later there will be an opportunity for comments on the merits.

MR. BICKWIT: In our communications to the parties, we have specifically asked them not to address the merits.

COMMISSIONER GILINSKY: Are we just talking about whether the Commission takes it up or the Board takes it up?

COMMISSIONER BRADFORD: We have moved the meeting from the 11th to the 16th and then we figure out what to do with it.

CHAIRMAN PALLADINO: We had that meeting scheduled for the 11th so the parties could make such comments on the procedures to be used for handling the DOE exemption request. We just noted we had a request to defer it until after December 15th and I suggested we honor that. We just voted we honor it by rescheduling that meeting at 10:00 a.m. on December 16th.

That is as far as we have gotten. I did indicate we would not make a decision today. We do want to give the parties an opportunity to comment on the procedures. We would not make a decision on the procedures today. We want to wait for the parties to make their comments.

Subsequently after the December 16th meeting we would have a meeting at which time we would make that decision.

COMMISSIONER AHEARNE: By the parties, these are the parties to the original proceeding?

MR. BICKWIT: That is correct.

COMMISSIONER AHEARNE: I gather because it was a suspended proceeding rather than a new proceeding, those are the parties involved? Therefore, there are no new parties



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that can come in, is that correct?

MR. BICKWIT: It is conceivable that a new party could come into the proceeding. The selection of these particular people was made on the basis of the fact they are parties in the current proceeding.

COMMISSIONER AHEARNE: That would be Tennessee, Oakridge, DOE and the NRC staff?

MR. BICKWIT: The intervenor contingent. There are aspects of the applicant contingent other than DOE. It is DOE, Project Management and TVA.

CHAIRMAN PALLADINO: I would like to turn the meeting over to Dr. Remick, Director of OPE, to review the DOE Petition and outline the action options open to the Commission on that Petition.

MR. REMICK: Thank you, Mr. Chairman. I have with me, Dennis Rathbun from the Office of Policy Evaluation.

I thought it would be helpful to talk a little bit about what is normally required in a construction permit and an LWA-1 exemption to set the stage. You should have a handout outlining this.

A construction permit is normally required before there is the commencement of construction. This requires the issuance of a final environmental statement by the staff, a safety evaluation report by the staff, ACRS advice or a letter and a hearing in which the hearing Board must make favorable

NEPA and full health and safety findings.

If those are all met, a construction permit can be issued.

COMMISSIONER GILINSKY: This includes land clearing and so on?

MR. REMICK: The commencement of construction does include -- 50.10(c) indicates you must have a CP before commencement of construction which includes site preparation.

Normally you require those things before doing it. However, 50.10 also permits the Director of NRR to issue a Limited Work Authorization-1 to permit site preparation activities.

COMMISSIONER GILINSKY: What is the date of LWA-1?

MR. REMICK: 1974.

CHAIRMAN PALLADINO: What do you mean what is the date?

COMMISSIONER GILINSKY: When it became a rule.

MR. REMICK: Prior to that time basically utilities could undertake site preparation activities on their own. With NEPA and so forth, it was not permitted unless they had an LWA-1.

COMMISSIONER GILINSKY: Prior to NEPA.

MR. REMICK: Yes.

MR. BICKWIT: With an exemption from 50.10, they were able to undertake that kind of construction with that kind

of exemption.

MR. REMICK: Before NEPA, they could undertake certain site preparation activities without exemption?

MR. BICKWIT: No, they would need an exemption.

MR. MALSCH: They could do clearing and stuff.

MR. CUNNINGHAM: Prior to NEPA, the rule defined commencement of construction differently and allowed certain site preparation activities. It was post-NEPA that 50.10 --

MR. BICKWIT: 50.12 had a narrower application because there was a narrower need for it.

MR. REMICK: A LWA-1 requires the FES from the staff but instead of a full safety evaluation report --

COMMISSIONER BRADFORD: Excuse me, Forrest. What was the application of 50.12? If I understood correctly, it was not basic site preparation because that was not defined as being commencement of construction. Was it some sort of activity after you cleared the site?

MR. BICKWIT: Yes, going all the way up to safety related construction of a preliminary sort. 50.12 was used to allow construction itself, up to grade.

COMMISSIONER BRADFORD: Site preparation would have already taken place?

MR. BICKWIT: Yes.

COMMISSIONER GILINSKY: What year did 50.12 become a regulation?

MR. MALSCH: The exemption provision? The basic provision to grant exemptions when authorized by law and not endangering life or property has always been in Part 50.

After NEPA was enacted and the prohibition of activities on site prior to a CP was broadened, at the same time additional criteria were added to beef up the exemption granting process to include environmental factors. That was in 1971-1972. Much later on came the LWA regulation in 1974.

The way it works is before NEPA you could clear and excavate and construct non-nuclear forces to the facility without either a construction permit or an exemption. Exemptions were granted prior to NEPA to allow actual construction of some safety related items such as pouring foundation below grade.

COMMISSIONER BRADFORD: It was essentially the equivalent of the LWA-2?

MR. MALSCH: Essentially the equivalent in terms of scope of work. After NEPA was enacted, the prohibition of what you could do on site without receiving a construction permit was broadened so as to include site clearing and excavation.

At the same time they added into the exemption process some environmental criteria. The process or practice of granting exemptions has continued.

COMMISSIONER GILINSKY: When were those added?

MR. MALSCH: 1971-1972.



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MR. CUNNINGHAM: March of 1972.

MR. MALSCH: The practice of granting exemptions, the broadened prohibition continued but now instead of looking at the 50.12 about endangering life or property, it now includes consideration and balancing of some environmental factors.

That practice of granting exemptions had continued up until 1974 when the LWA was put in place.

COMMISSIONER GILINSKY: I read that 50.12 was only used in the Davis-Besse case, that must be since some date.

MR. MALSCH: It has not been used often.

COMMISSIONER GILINSKY: Is it since the LWA rules went into effect or since March of 1972?

MR. MALSCH: It was originally changed between 1972 and 1974. It was recently used.

MR. BICKWIT: Since 1974, it has been used twice, the River Bend proceeding and the WPPSS proceeding. It was granted in one case and denied in the other case.

COMMISSIONER BRADFORD: I think there are a number of inconsistent allegations about that provision, how often it has been used, some which obviously are wrong. We will have to learn that as we go along. Len's description is at least the third I have come across. I assume he is right.

COMMISSIONER AHEARNE: At some point I would hope we get the correct description.

MR. BICKWIT: There is a reference in Congressman

1 Udall's letter, to my knowledge, the Commission has not granted
2 an exemption under 10 CFR 50.12 in a contested proceeding since
3 the adoption of LWA regulations, in April of 1974. The thrust
4 of that is right.
5 The only time you have had the granting of an exemption
6 has been in the River Bend proceeding. That was a contested
7 proceeding but the exemption itself was not contested.
8 The thrust of what he is saying is right.
9 COMMISSIONER AHEARNE: At some point will we be able
10 to get a piece of paper which says these exemptions were granted
11 and a date, what case and what they were?
12 MR. BICKWIT: Sure.
13 COMMISSIONER GILINSKY: There must be a computer that
14 can do that.
15 MR. BICKWIT: We have done it internally.
16 CHAIRMAN PALLADINO: I think that would be very helpful.
17 MR. REMICK: To issue a LWA-1 requires the issuance
18 of the FES. Instead of a full safety evaluation report, a
19 site suitability report covering the basis -ologies. It also
20 requires a hearing with favorable NEPA findings and the Board
21 must also make site suitability findings.
22 COMMISSIONER AHEARNE: This is a hearing focused
23 specifically on the LWA?
24 MR. REMICK: Yes.
25 COMMISSIONER AHEARNE: Would it be a CP hearing

underway and it breaks off?

MR. REMICK: It can be a CP hearing underway segmented to look at LWA, the site suitability reports up to a certain point. If the Board makes the NEPA findings and site suitability findings then the Director of NRR can issue such an LWA-1.

The Director of NRR can issue a Limited Work Authorization-2 for foundation work of safety structures. This requires the FES, the site suitability report, the hearing, the Board must make favorable NEPA findings, site suitability findings and also that there are no unresolved safety issues related to those safety structures.

This is why Harold was talking about for an LWA-2, they have to do more complete safety evaluations to determine if there are unresolved safety issues related to the proposed activities.

COMMISSIONER AHEARNE: Did NRC issue any LWA-2's?

MR. MALSCH: I think it was routine.

MR. REMICK: In addition, the Commission may grant an exemption permitting the conduct of activities that are prohibited by 50.10 prior to the issuance of a construction permit. That exemption can be granted upon considering and balancing the following factors, four factors. These are abstracted and are not as completely written in 50.12.

Those include whether the proposed activities will

1 give rise to significant adverse environmental impacts; whether
2 adverse impacts can be redressed; whether alternatives will
3 be foreclosed and the effect of delay on public interest.
4 Those are the four factors under 50.12.
5 As Harold indicated, the status of these various
6 requirements, the application was docketed in April of 1975
7 and the co-applicants are the Department of Energy, Tennessee
8 Valley Authority, and Project Management Corporation, which
9 is a corporation representing a large number of utilities.
10 Adjudicatory proceeding was initiated in June of 1975.
11 The parties to the best of my knowledge at that time were DOE,
12 TVA and PMC, the National Resources Defense Council, State
13 of Tennessee, Roane County and the City of Oak Ridge.
14 As Harold indicated, the FES was issued in early 1977;
15 the site suitability report in March of 1977. The proceeding
16 was to start in June of 1977 but suspended in April of that
17 year.
18 CHAIRMAN PALLADINO: Do you ask the parties to confirm
19 that they are still parties? Do you just assume they are still
20 parties?
21 MR. BICKWIT: You assume they are still parties unless
22 they withdraw.
23 COMMISSIONER AHEARNE: Roane County did withdraw?
24 MR. BICKWIT: Yes.
25 MR. REMICK: The Commission received an exemption

request on 30 November, the contents of that exemption request were a cover letter from Secretary Edwards summarizing the specific request. This was backed up by a site preparation activities report, so called SPAR. In that, it addresses the four factors under 50.12. It updates what are the proposed site preparation activities under the exemption request and it revises the proposed environmental or alleged environmental impact on these proposed site preparation activities.

A separate document came in which is a legal memorandum which is in support of the request and covers various legal aspects associated with the four factors, et cetera.

In that request, basically it requests prompt consideration by the Commission itself, requesting the Commission to consider the exemption. It asks for conduct of site clearing, grubbing, sometimes referred to as grading, although I think there is a difference between the two; excavation and construction of temporary support and service facilities and then some permanent services like a permanent road and so forth, with the request they be able to begin the site preparation activities in March, 1982.

Basically, in effect the request is an exemption from the hearing requirements for an LWA-1, specified in 50.10, in other words, they ask for permission to do the site preparation activities which would normally be approved under the LWA-1 and since the FES and site suitability report exist, basically



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what they are asking for is not require the findings of the Board, that they address the four factors under 50.12.

As we see the options for the Commission, primarily the question boils down to who is to prepare the initial decision on the DOE exemption request.

We see that could be done by the Commission itself and their subsets under that. You could do it with OPE/OGC assistance. According to the general counsel, since there are no ex parte bars here, you could do it with staff assistance, a combination of staff and OPE/OGC or you might wish to give it to a licensing board to make a record and perhaps certify that record to the Commission.

My understanding is apparently the manual, the NRC Manual, delegates the responsibility for exemption to the Director of NRR, so they could ask the Director of NRR to handle the exemption request.

The Commission could still retain review.

CHAIRMAN PALLADINO: It delegates?

MR. BICKWIT: It delegates it but all delegations are subject to the inherent authority of the Commission to take it back at any point.

COMMISSIONER AHEARNE: You are saying right at the moment Harold could go out and sign it?

MR. BICKWIT: Yes.

MR. DENTON: I have no such plans!



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(Laughter.)

MR. REMICK: The Commission could refer it to a licensing board to handle.

We indicate there are a number of issues. We think policy is inherent in the exemption request. DOE stresses both Congress' and the President's policies in favor of expediting the completion of CRBR.

You have received letters dated yesterday from Congressman Udall as well as from Congressmen Dingell and Ottinger who are opposed to the DOE request for expedited handling of the request.

There are timing considerations which DOE stresses the expeditious project completion and they would like to begin in March of 1982.

There is a question of the impact of the changes. They outline the changes and indicate those changes result in insignificant impact on the environment. These are questions I think should addressed on the merits.

The steps that we see that the Commission would need to take are decide who they wish to make the initial decision. You have already covered the NRDC letters of the 7th and 8th and you have made a decision on that.

If the Commission should decide it wishes to make the initial decision, I think it should decide which roles it wishes its various staffs to play in that.

If the Commission decides that either the Commission or the staff is to make the initial decision, it should consider whether it wishes to request comments on the DOE exemption request and what comments it wishes to receive.

There is one other matter that the EDO has asked me to address and that is there probably should be an acknowledgement letter that the exemption request has been received and whether the Commission wishes anything specifically in that acknowledgement letter.

CHAIRMAN PALLADINO: I would propose we acknowledge it without comment. We are not in a position to make a comment, pro, con or even a neutral one.

COMMISSIONER AHEARNE: I gather this is no surprise to any department.

MR. REMICK: I assume not.

MR. DIRCKS: You might want to lay out the schedule.

COMMISSIONER AHEARNE: At the moment I gather the only thing we can say is we have scheduled a meeting on December 16th.

CHAIRMAN PALLADINO: Then we want to discuss a possible subsequent meeting.

COMMISSIONER GILINSKY: It is getting prompt consideration.

CHAIRMAN PALLADINO: Yes, we could say we are giving it prompt consideration.

MR. REMICK: Mr. Chairman, that covers our presentation.

CHAIRMAN PALLADINO: I guess we are open for questions on the subject.

COMMISSIONER AHEARNE: I gather as far as what decisions, we will have to wait until after the December 16th meeting.

COMMISSIONER BRADFORD: Unless we want to decide now.

CHAIRMAN PALLADINO: I think we indicated earlier we would wait until the parties had a chance to make their comments on the procedures. The procedures could have quite an impact on the direction of the decision.

COMMISSIONER GILINSKY: Can we express a view? I think the Commission ought to deal with this. That is my view!

MR. REMICK: What subset?

COMMISSIONER GILINSKY: The Commission should be able to take it up and decide the question of the exemption.

CHAIRMAN PALLADINO: What staff work if any would you want to see developed, and the staff work may be done by OPE, OGC and other staff.

COMMISSIONER AHEARNE: I would opt for 1(a)(C), combined staff and OPE/OGC, assuming Len's view about no ex parte problem being present. I agree with Vic. I do not think there is anyone other than the Commission who ought to decide this issue. It is going to end up fundamentally being a major policy question. That is what our role is supposed to be.



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MR. BICKWIT: You are going to detail staff to OGC and OPE?

COMMISSIONER GILINSKY: I would be inclined to rely on the staff reports to the Commission directly. It is obviously going to be things we are going to ask for help on, information from others and from Bill.

COMMISSIONER AHEARNE: Has this provision been used before?

MR. BICKWIT: 50.12? Yes. Shearon Harris and River Bend were examples.

COMMISSIONER AHEARNE: The paper you will be providing will outline that?

MR. BICKWIT: Yes.

COMMISSIONER GILINSKY: We certainly would want to have a chronology on the use.

MR. BICKWIT: 50.12 has not been used frequently. We have four examples in the research we have done, two of which resulted in the granting and two in the denial of the exemptions.

CHAIRMAN PALLADINO: What sort of things did those exemptions cover? Similar types of activities?

MR. BICKWIT: Yes, in some cases and in some, more minor.

CHAIRMAN PALLADINO: I do not think we want to focus on a decision. If people want to express their views, there

is nothing I can do to stop those expressions.

No matter which way we go, I presume we will want to send whatever order is developed out for comments.

MR. BICKWIT: I would think there is a possible legal barrier to not asking for comments. There is a suggestion in case law that due process requires some comment.

COMMISSIONER BRADFORD: Not asking for comment on the procedure or the substance?

MR. BICKWIT: On the substance.

COMMISSIONER BRADFORD: If in fact there is a strong Commission preference for 1(a)(c), and I must say I am inclined that way myself, I am not sure what the point is of asking the parties to comment on the 16th and advise us on the various procedural options.

CHAIRMAN PALLADINO: They asked, or NRDC asked for the privilege of commenting on it.

COMMISSIONER GILINSKY: Maybe we should hear from them on the merits.

MR. BICKWIT: With respect to the procedures, they may have some arguments that have not been presented to you or which you have not considered.

CHAIRMAN PALLADINO: No matter how we want to proceed on who does it, we should have some sort of order and some comment on the procedure. I would expect after the procedure is settled, there should be some comment period for the



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1 parties to provide input on the merits. I presume that would
2 come after we make the decision as to who will do it.
3 Would those be written comments on the merits or oral?
4 MR. BICKWIT: They could be either. You would have
5 legal problems if you do not have one or the other.
6 CHAIRMAN PALLADINO: I was trying to do with this
7 project what we had done for the earlier project. I had written
8 we would hear the parties on the procedures then the Commission
9 would make a decision on the procedure then prepare an order
10 for comment, then receive comments, then I guess we would have
11 to analyze thos comments and then request comments and they
12 could be oral if it is necessary to expedite by the parties
13 and everything has been heard, the Commission decides
14 whatever the decision is, whether or not the exemption would
15 be granted.
16 I would propose perhaps we might try to write up
17 something like this so we can have it before us. Right now
18 it is just scribblings on a piece of paper.
19 COMMISSIONER AHEARNE: And suggested time periods?
20 CHAIRMAN PALLADINO: The time periods would depend
21 on the decision on the procedures. You would get one timetable
22 if the Commission is to make the decision and a different
23 timetable if the Board is to make the decision.
24 COMMISSIONER BRADFORD: I think we should be able
25 to make the decision on the procedures pretty quickly after

the 16th.

CHAIRMAN PALLADINO: If the Commission is that prepared, it may be on the 16th we hear the parties and if the Commission is prepared after hearing the parties to proceed in one direction or another, we could do it on the 16th. Would there be any problem with that?

MR. BICKWIT: Certainly not.

CHAIRMAN PALLADINO: I would suggest we schedule it that way, schedule a possible decision on the 16th.

COMMISSIONER GILINSKY: If we have questions on the merits, who do we address them to? Suppose I want to ask about the petition, what sort of mechanism do we have?

MR. BICKWIT: What I understand the Commission is going to do on the 16th or thereafter is decide how to confront the merits.

COMMISSIONER BRADFORD: There are no ex parte barriers between now and then?

MR. BICKWIT: I believe there are none.

COMMISSIONER GILINSKY: I was interested in knowing how DOE came up with the numbers on the amount to be saved if there were an exemption.

MR. BICKWIT: The only exception I would make to the statement that there are no ex parte bars is if you had an issue that is contested in the suspended proceeding and you want to hear from a party other than the staff, there is a

possibility of an ex parte bar. If you are determined to get answers on the merits before you decide how to address the merits, it can be done with that caveat.

CHAIRMAN PALLADINO: Thinking ahead, will we need staff certification on any of the aspects of the four points? Does the staff have to concur?

MR. BICKWIT: If you choose an option with the Commission making the final decision, then the Commission makes the decision. The staff could dissent from it.

CHAIRMAN PALLADINO: Could it also ask for the staff's opinion on these four points?

MR. BICKWIT: I would assume that was contemplated. If you went out to the parties, you would not ignore the staff as a party.

CHAIRMAN PALLADINO: When we send out for comments, we could ask the staff to respond?

MR. BICKWIT: Yes.

CHAIRMAN PALLADINO: I guess we could specifically ask any group to respond?

MR. BICKWIT: That is my view.

CHAIRMAN PALLADINO: Any other comments?

(No response.)

CHAIRMAN PALLADINO: Thank you. We are adjourned.

(Whereupon, the meeting was adjourned at 3:55 p.m.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

COMMISSION MEETING

in the matter of: DISCUSSION OF DOE PETITION ON CLINCH RIVER BREEDER REACTOR

Date of Proceeding: December 9, 1981

Docket Number:

Place of Proceeding: Washington, D. C.

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Marilyn M. Nations

Official Reporter (Typed)

Marilyn M. Nations

Official Reporter (Signature)