UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

7/9/76

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-259
	)	50-260
(Browns Ferry Nuclear Plant, Units 1 and 2)	)	

LICENSEE'S MOTION TO FILE A REPLY TO THE STAFF'S JULY 6 RESPONSE

Licensee moves that it be permitted to file a response to the NRC Staff's Response to Licensee's Motion for An Order Authorizing Control Rod Drive System and Full Core Shutdown Margin Tests dated July 6, 1976, on the grounds that the Staff has

(1) Misapplied the Board's May 21, 1976, Order;

(2) Misinterpreted 10 C.F.R. §§ 50.57, 2.730(c) and 2.749 (1976); and

(3) Misconstrued TVA's position.

Argument in support of this motion is combined with the response in the enclosed brief.

Respectfully submitted,

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July 9, 1976

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LICENSEE'S BRIEF COMBINING ARGUMENT IN SUPPORT OF A MOTION TO RESPOND TO THE STAFF'S JULY 6 PLEADING AND LICENSEE'S RESPONSE

STATEMENT

Licensee Tennessee Valley Authority ("TVA") filed on June 21, 1976, a motion for an order authorizing control rod drive system and full core shutdown margin tests, accompanied by a brief in support of the motion and an affidavit. On July 6, 1976, the Regulatory Staff ("Staff") filed a Response to TVA's motion.

In its Response, the Staff states that the Board's order of May 21, 1976, determined that before the Board can authorize any activity requested by TVA but opposed by the Intervenor, the Board must determine if the Intervenor's contentions are relevant to the activity. If the Board

so finds, then the Staff argues that the Board must make the findings required by 10 C.F.R. § 50.57(a) (1976) and issue an initial decision. The Staff also argues that there is insufficient information before the Board to determine the effect of granting the motion on Intervenor's rights or to support summary disposition on the issues encompassed by section 50.57(a) with respect to the tests requested in TVA's motion.

The Board should promptly grant TVA's motion, for the Staff has misapplied the Board's May 21 Order, misinterpreted 10 C.F.R. §§ 50.57, 2.730(c), and 2.749 (1976), and misconstrued TVA's position.

ARGUMENT

I

The Staff Has Misapplied the Board's May 21 Order.

The Staff makes the following statement in its July 6 Response:

> This Board, in its order of May 21, 1976, determined that before it authorizes any activity which is requested by the Licensee but opposed by the Intervenor, the Board must determine if the Intervenor's contentions are relevant to the requested activity. If so found, the Board, pursuant to 10 CFR § 50.57(c), must make findings in the form of an initial decision on each matter specified in § 50.57(a) which is in controversy with respect to the amendment for which the hearing was requested. . . . In the instant case, the Intervenor has not yet objected. If he does, then this

Board must follow the procedures it found to be applicable in its order of May 21, 1976 [at 1-2].[1]

Thus it is the Staff's position that where the Intervenor opposes the motion the Board must then proceed under section 50.57, determine the relevance of the Intervenor's contentions, and make the section 50.57(a) findings required.

It is clear that the Intervenor has not opposed TVA's motion, and in fact filed no response at all. The Board's May 21 Order is by its terms applicable where the Intervenor opposes a motion to operate. Incredibly, the Staff opposes the motion based on the hypothetical that should the Intervenor at some time in the future oppose the motion, then the procedures in the May 21 Order would apply. The Staff then concludes that since those procedures would apply if the Intervenor should oppose the motion, they must also apply when the Intervenor does not oppose the motion. We find this passing strange.

II

The Staff Has Misinterpreted 10 C.F.R. §§ 50.57(c), 2.730(c), and 2.749 (1976).

Section 50.57(c) of the Rules of Practice provides, in regard to a motion such as the one filed by TVA, that:

> Prior to taking any action on such a motion which any party opposes, the presiding officer shall

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1 Emphasis added herein unless otherwise noted.

> make findings on the matters in controversy specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. . . . If no party opposes the motion, the presiding officer will issue an order pursuant to § 2.730(e) of this chapter, authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation.

It is unquestioned that the Intervenor has not opposed TVA's motion. The Staff has opposed the motion on the assumption that if the Intervenor should oppose the motion, the Board must make the section 50.57(a) findings.

It is thus clear that TVA's motion is unopposed. In these circumstances, the presiding officer has no discretion in deciding the matter, for section 50.57(c) states that the presiding officer will issue the requested order. The Staff has unquestionably misinterpreted section 50.57(c) by attempting to require the Board to make findings that are only required where a motion is opposed.

The Staff also misinterprets 10 C.F.R. § 2.730(c) (1976). That section provides that within five days after service of a written motion a party may file an answer in support of or in opposition to the motion. Counting the time as prescribed by 10 C.F.R. § 2.710 (1976), a response by the Intervenor had to be filed by July 1, 1976. A review of the record demonstrates that the Intervenor filed no response. Yet the Staff has responded to the motion based on the assumption that "[i]f he does" oppose the motion, then the procedures in the May 21

Order would apply--so they should apply now. The Staff ignores that the Intervenor's time for filing a response has long since expired. Basing a response on what the Intervenor might hypothetically do in the future is not useful in deciding this motion.

The Staff's interpretation of 10 C.F.R. § 2.749 (1976) is likewise wrong. The Staff stated that it also reviewed TVA's motion and supporting documents "for adequate substance" under section 2.749, and concluded that the documents "do not now provide the Board with a sufficient factual basis upon which the Board may make the findings necessary under § 50.57(a)" (Response at 5). It is clear from section 2.749 that on a motion for summary disposition, a party opposing the motion

> . . . may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered [10 C.F.R. § 2.749(b) (1976)].

The Intervenor has filed no answer, so as to him the Board should grant the decision sought. The Staff's response contains no affidavits, points to no genuine issue of material fact, and merely expresses counsel's conjectures. Thus if TVA's motion were treated substantively as one for summary disposition in regard to the requested tests, the Staff's answer is wholly inadequate under section 2.749 and dictates that the motion be granted.

It is manifestly appropriate to issue the requested order. Fuel loading on unit 2 was completed on July 4, and the requested tests could have started on that day. Yet the unit is sitting idle. For every day that these tests are delayed, operation is delayed and the consumers of TVA power must pay a severe economic penalty. The inexplicable negativism of the Staff should not be permitted to impose such penalties.

III

The Staff Has Misconstrued TVA's Position.

The Staff's Response, on pages 3-5, goes to great length to describe all of the things which TVA purportedly did not consider. For example, the Staff states that:

> The affidavit gives no indication of whether or not any repaired system can malfunction in such a way as to adversely affect safety in connection with the conduct of the tests covered by the motion [Response, at 3-4].

Mr. Calhoun's affidavit analyses the worst accident that can happen, i.e., all operational control rods in the fully withdrawn position, and demonstrates that the reactors would remain within the technical specification shutdown margins.

The Staff faults TVA for not listing all the equipment on unit 2 that was not damaged by the fire and cites as an example source range monitoring instrumentation. It would be a useless exercise to list all

of the equipment which was not fire-affected. Mr. Calhoun's affidavit states clearly that fire-affected equipment is not involved in the tests on unit 2. There has been no reason put forth to doubt Mr. Calhoun's competence to make the affidavit, or to question the content of any matters stated therein. These matters are in any event not relevant to Intervenor's contentions since the Intervenor has not opposed the motion.

Based on the foregoing, it is clear that TVA's motion is unopposed and that under section 50.57(c) the Board is required to grant the requested motion. Even if the motion had been opposed by the Intervenor, there is sufficient information in the documents accompanying the motion to determine that the Intervenor's contentions are not relevant to the requested activity and that Intervenor's interests or rights could not be affected under the worst accident conditions.

The Board should grant TVA's motion to reply to the Staff's July 6 Response and TVA's June 21, 1976, motion to conduct control rod drive system and full shutdown margin tests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the original and 20 conformed copies of the following documents on the Nuclear Regulatory Commission by depositing them in the United States mail, postage prepaid and addressed to Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section:

Licensee's Motion To File A Reply To The Staff's July 6 Response

Licensee's Brief Combining Argument In Support Of A Motion To Respond To The Staff's July 6 Pleading and Licensee's Response

and that I have served a copy of each of the above documents upon the persons listed below by depositing them in the United States mail, postage prepaid and addressed:

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This 9th day of July, 1976.

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