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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPORATION TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant)	Docket No. 50-537

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
APPLICANTS' MOTION FOR A PROTECTIVE ORDER

Pursuant to the Board's Prehearing Conference Order, and the procedural rules set forth in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150 (1981), the Department of Energy and Project Management Corporation, acting for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby submit their Memorandum of Points and Authorities in Support of Motion for A Protective Order.

BACKGROUND

On February 9-10, 1982, a prehearing conference was held at Oak Ridge, Tennessee in order to establish a schedule for this proceeding. As part of the Order issued following the conference, the Licensing Board, in recognition of the large amount of discovery which has already been

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conducted, limited further discovery in this proceeding to two rounds, with the second round limited to follow-up matters.

On March 18, 1982, Intervenors submitted their first round of discovery to Applicants:[1/] (1) Intervenors' Sixteenth Set of Interrogatories; (2) Intervenors' Ninth Request for Admissions; and (3) Intervenors' Fifth Request for the Production of Documents.[2/] Included within the Sixteenth Set of Interrogatories were five interrogatories, each with multiple subparts, addressed to Contention 5 (safeguards).[3/] Applicants on March 29, 1982 filed a Motion for A Protective Order in regard to certain of those interrogatories and are engaged in preparing responses to the remainder.

On March 26, 1982, before receiving responses to that first round of discovery, Intervenors filed their second round of discovery, which included a Seventeenth Set

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1/ Virtually identical requests were served on the NRC Staff.

2/ Applicants are presently engaged in the process of updating their answers to the massive discovery requests previously filed by Intervenors.

3/ Intervenors' Sixteenth Set of Interrogatories to Applicants at 5-8.

of Interrogatories and Request to Produce to the Applicants. That set consisted of 19 interrogatories, most with multiple subparts, all again related to Contention 5.

NRDC had previously filed discovery requests with both Applicants and Staff concerning Contention 5 on a number of occasions[4/] and had received a large amount of information regarding safeguards.[5/] At the time these proceedings were suspended in 1977, Intervenors had indicated to the Board in a Statement in Advance of Special Meeting of Counsel for Parties filed on March 16, 1977, that discovery had been completed on Contention 5.[6/] Over the past four years, Intervenors have thus had sufficient time to focus their need for any additional information and submit a request, in one round as provided in the Board Order, for that information.

4/ Intervenors' First Set of Interrogatories to Applicants (11/17/75); Intervenors' Sixth Set of Interrogatories to NRC Staff (2/9/76); Intervenor's Eight Set to Staff (5/7/76); Intervenors' Eighth Set to Applicants (5/7/76); Intervenors' Twelfth Set to Staff (6/14/76); Intervenors' Tenth Set to Applicants (8/13/76); Intervenors' Fourteenth Set to Staff (8/27/76); Intervenors' Twelfth Set to Applicants (12/18/76).

5/ Staff Responses of 4/15/76, 7/15/76, 11/15/76 and 12/6/76 and Applicants' Responses of 12/9/75, 6/11/76, 9/7/76 and 1/6/77.

6/ Intervenors identified Contentions 2, 3, 4, 8, and 10 as the contentions requiring further discovery.

ARGUMENT

I. Intervenors' Entire Seventeenth Set of Interrogatories Violates the Board's Prehearing Conference Order of February 11, 1982

Following the prehearing conference held on February 9-10, 1982, this Licensing Board established a schedule for this proceeding. As part of that Order the Board directed that:

> Discovery will be limited to two rounds. The parties shall attempt to obtain all relevant information in the first round and the second round will be limited to follow-up matters. The rules concerning discovery set forth in the Comanche Peak case, 14 NRC 150 at 154-57, are incorporated herein by reference.

Prehearing Conference Order at 1-2.

In establishing this reasonable limitation on discovery, the Board was implementing Commission policy to "expedite that [the hearing] process by using appropriate management methods." Comanche Peak, 14 NRC at 154. As Chairman Miller stated at the Prehearing Conference, "you [NRDC] and all parties have had massive discovery." Transcript at 1061. Later, in addressing the issue of additional discovery, the Chairman stated that the Board takes "a very dim view of any 2100 or 2400 or 1400 requests for discovery ... we want this discovery focused" in order to protect the parties from "unnecessary burdensome work." Id. at 1121.

The Intervenors Seventeenth Set of Interrogatories violates both the letter and the spirit of the Board's Prehearing Conference Order. By their own admission, Intervenors had completed discovery on Contention 5 by March 1977 and Contention 5 has remained unaltered except for "mechanical corrections only."[7/] Yet, without even waiting for Applicants to update their responses to the previous four sets of Interrogatories addressing Contention 5, Intervenors have submitted two new rounds of discovery relating to that Contention. This contravenes of the Board's admonitions to minimize discovery and to keep it focused in order to expedite the hearing process and to protect the parties from unnecessary, burdensome work. Furthermore, the Order limits discovery to two rounds, with the second round only for follow-up matters. Yet, Intervenors' second round, the Seventeenth Set of Interrogatories, was submitted before Applicants even had a chance to answer the first round, the Sixteenth Set. Certainly, the second round cannot be considered a follow-up when the Intervenors have not even seen the responses to the first round of questions.

Applicants submit that Intervenors' Seventeenth Set of Interrogatories to Applicants in its entirety is in violation of the Board's Prehearing Order of February 11,

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7/ Intervenors' Revised Statement of Contentions, March 5, 1982, at 29.

1982. Intervenors have either failed to understand the Board's Prehearing Conference Order or have chosen to ignore it. In any event, the result of Intervenors' piecemeal approach to discovery is exactly the situation which the Board meant to avoid when it issued its Order -- i.e., massive, and unfocused discovery which will bog down the proceeding and place an unnecessary burden on the Applicants and Staff.[8/]

II. NRDC's Seventeenth Set of Interrogatories and Request for Production Far Exceeds the Scope of Contention 5.[9/]

A. Contention 5 Is Specifically Limited to the Cost of Safeguards for Purposes of the NEPA Cost Benefit Analysis.

In their latest discovery requests, Intervenors have sought information in virtually every instance directed solely at the adequacy of safeguards at all facilities which might be a source of fuel for the Clinch River Breeder Reactor.[10/] Not only does this discovery expand the scope of this proceeding beyond any reasonable bounds, but more

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8/ As indicated in Applicants' Motion, Applicants have discussed their objectives with Counsel for Intervenors.

9/ In this Section of Applicants' Memorandum of Points and Authorities, Applicants will address the general legal principles applicable to discovery on Contention 5.

10/ Because this objection applies to each of Intervenors' requests which are objectionable, applicants have not repeated this objection in discussing the individual requests.

importantly, it is in direct contravention of this Board's Order of April 6, 1976 admitting Contention 5.

At the time they originally proposed Contention 5, Intervenors apparently understood that the adequacy of safeguards at facilities within the CRBRP fuel cycle was not an appropriate issue in this proceeding. In response to Applicants' objection to Contention 5, Intervenors specifically stated that the scope of the contention was limited to the costs of safeguards for purposes of the NEPA cost benfit analysis. In responding to Applicants' objection to Contention 5, NRDC stated that the "potential cost [of safeguards] must be quantified in the construction permit impact statement".[11/] In response to this statement, the NRC Staff agreed that the Contention, as limited to the cost of safeguards, was admissable.[12/]

In admitting this Contention, the Board expressly limited its scope in the manner suggested by Intervenors and the Staff. In its Order, the Board stated:

> We hold that an evaluation of the potential cost of safeguarding the CRBR, fuel cycle facilities and transportation supports should be included in the NEPA

11/ See Natural Resources Defense Council, Sierra Club and East Tennessee Energy Group's Response to Applicant's [sic] Amended Answer to Petition to Intervene.

12/ NRC Staff Response to Applicants' Amended Answer to NRDC Petition to Intervene and NRC Staff Response to Applicants' Amended Answer.

> cost benefit analysis, and hence the contention is admitted. 13/

In disregard of the Board's Order, Intervenors are attempting to raise issues through discovery concerning the adequacy of safeguards at the CRBR, all DOE and DOD facilities and at NRC licensed facilities. That NRDC is attempting to raise issues outside the limited scope of Contention 5 is made abundantly clear in NRDC's responses to the NRC Staff's Fifth Set of Interrogatories to NRDC. In response to Interrogatory 1, NRDC concludes with the following statement:

> Intervenors' position is that there must be enough information available to the public with respect to possible threat levels so that the public may be able to make an independent judgment as to the adequacy of safeguards. 14/

Intervenors' discovery is, of course, limited to the scope of their admitted contentions. Discovery under Contention 5 is, therefore, expressly limited to the cost, not the adequacy of safeguards. As will be discussed, to

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13/ Project Management Corporation, (Clinch River Breeder Plant), LBP7614, 3 NRC 430, 434-35 (1976).

14/ The information which must be made "available to the public" is carefully circumscribed by the Commission's recent rule regarding the Protection of Unclassified Safeguards Information. 46 Fed. Reg. 51718 (October 22, 1981). Moreover, much of the information requested by Intervenors is unnecessary for a Construction Permit. Both of these matters are more fully discussed later in this Memorandum.

the extent that Intervenors have a generic concern with the adequacy of safeguards, the appropriate forum for voicing those concerns is clearly not this proceeding, but rather a rulemaking proceeding or the LMFBR Program Environmental Statement.

B. Intervenors' Discovery Requests Raise Programmatic, Generic Issues Outside the Scope of a Licensing Proceeding.

In its discovery under Contention 5, Intervenors have requested information which has no relevance to an individual licensing proceeding, but rather concerns broad programmatic or generic safeguard issues outside the scope of this proceeding.

In Interrogatories 5, 6, 9, 10, 12-16, Intervenors request Applicants' assessment of various reports or testimony which address safeguards generally and which have no relevance to current Commission requirements. For example, in Interrogatory 9, Intervenors refer to a 1980 GAO report regarding safeguards and ask Applicants to state what "steps DOE has taken to follow the recommendation in the GAO report. ... " Whether DOE has or has not taken any steps to follow the GAO recommendation has no bearing or relevance to the CRBR. Applicants are required to meet the applicable Commission regulations concerning safeguards and security plans, and discovery directed toward adequacy of safeguards

must be related to adherence to those regulatory safeguards. The various reports, and testimony, including the GAO report, do not establish, nor are they relevant to, the requirements against which the CRBR safeguards will be judged.[15/]

In addition, in Interrogatories 2-4, and 7 Intervenors seek information regarding possible safeguards incidents at other nuclear facilities either in the United States or abroad. In Interrogatory 7, for example, Intervenors request information regarding the possible theft of nuclear material at two facilities in the 1960's and 1970's. Intervenors apparently would have this Board consider virtually any speculative or possible incident at any nuclear facility occurring at any time without regard to CRBR or current regulatory standards. As noted above, these standards are the appropriate guide for evaluating safeguards at CRBR and it is those standards which Applicants must meet.

Finally, in Interrogatories 5, 6, 9, 10, 13, 14, and 15, Intervenors' requests are addressed not only to CRBR, but to all nuclear facilities, domestic or foreign potentially within the CRBR fuel cycle. Obviously, such

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15/ See for example, Natural Resources Defense Council, Inc. and The Sierra Club Seventeenth Set of Interrogatories and Request to Produce to the Applicants, Nos. 5, 6, 9, 10, 13, 14, and 15.

requests go far beyond the bounds of this licensing proceeding and raise industry-wide generic issues.

In essence, Intervenors are attempting to use this proceeding as a forum for considering safeguards on an industry-wide or programmatic basis in direct contravention of the Commission's Order of August 27, 1976. In that Order, the Commission reviewed Intervenors' Contention 11 which provided:

> 11. ... The Applicants and Staff's analysis are inadequate with respect to:
>
> * * *
>
> (d) The environmental and safety risks associated with widespread use of LMFBR's including:
>
> (1) The risks of sabotage, terrorism and theft directed against plutonium or sabotage directed against LMFBR's and related fuel cycle facilities at any point in the LMFBR fuel cycle.

In rejecting Contention 11 in its entirety, the Commission specifically noted that the broad issues raised by that

Contention were more appropriately considered in connection with the LMFBR programmatic EIS.[16/]

Intervenors' current discovery requests concern matters even broader than the adequacy of safeguards for the LMFBR program. In its recent discovery requests, Intervenors now attempt to raise the issue of the adequacy of safeguards as an independent matter without considering either Commission regulatory standards or their application to CRBR or even the LMFBR program. Intervenors, in effect, would convert this licensing proceeding into a rulemaking proceeding in order to assess the adequacy of safeguards standards presently in effect at all nuclear facilities.[17/]

16/ As Applicants noted in their earlier Motion for A Protective Order, NRDC submitted comments to the Draft Supplement to the LMFBR Program EIS, regarding safeguards. At the time they submitted their comments, NRDC presumably understood that the adequacy of safeguards at all fuel cycle facilities was a programmatic issue.

17/ In all the interrogatories noted above, Intervenors are at least implicitly challenging NRC regulations. Moreover, in at least two instances, Intervenors appear to be directly challenging NRC regulations. In Interrogatory 8, for example, Intervenors request the "calculated uncertainty in measuring small amounts of plutonium in fuel assembly and bulk handling plants." Although the interrogatory is somewhat ambiguous, Applicants can only conclude that Intervenors believe that the present NRC standards for accounting for nuclear materials are inadequate. By ignoring NRC regulatory requirements or seeking discovery on matters which go beyond those requirements, NRDC is challenging existing Commission regulations without making the showing required by 10 C.F.R. § 2.758. Such challenges to Commission regulations have been routinely rejected

Continued

Prior to the suspension of this proceeding in 1977, Intervenors attempted to raise similar issues before the Board. In Contention 12, Intervenors, apparently recognizing the generic nature of safeguards issues, requested a stay of the CRBR proceeding pending a full resolution of the safeguards issue. In rejecting the broad scope of this Contention, the Board noted that the matter of safeguards raised "generic industry-wide issues". The Board concluded that:

> To stay construction of the CRB Reactor until after resolution of these two matters, already generic to existing plants ... appears to the Board to be unjustified. 8/

As in its previous Contention 12, Intervenors, through the discovery process, are again asking the Board to consider industry-wide safeguards issues. Intervenors' various requests raising such issues should be rejected.

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by the Licensing Boards. See, Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3) LBP-75-22 1 NRC 451 (1975); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) LBP-77-50, 6 NRC 261 (1977).

18/ Project Management Corp., supra at 442.

C. Intervenors' Discovery Requests Raise Issues Which Are Outside the Board's Jurisdiction. 19/

As in its previous discovery requests of March 18, 1982, Intervenors are requesting discovery regarding the adequacy of safeguards not only at the CRBR but also at all facilities potentially within the CRBR fuel cycle including facilities in foreign countries. See Interrogatories 5, 6, 9, 10, 13, 14, 15, 17-18. As Applicants noted in their March 29, 1982 Motion for a Protective Order, such an inquiry goes beyond the jurisdiction of the Board. As to any facilities which might have been licensed by the Nuclear Regulatory Commission, the adequacy of safeguards has already been determined by the Commission. In attempting to raise the issue of adequacy through the discovery process, the Intervenors are collaterally attacking final orders of the Commission and, in effect, are requesting the Board to review the Commission's decisions regarding safeguards at those facilities. On the other hand, to the extent that Intervenors are challenging or questioning safeguards at nuclear facilities which are not subject to NRC licensing,

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19/ Applicants argument regarding the Boards' jurisdiction applies to every Intervenor discovery request which seeks information or raises the issue of safeguards at all potential facilities within the CRBRP fuel cycle. See Interrogatories 1, 5-6, 10, 11, 13, 14, 16.

including foreign facilities, Intervenors are requesting the Board to expand the NRC jurisdiction beyond its statutory bounds.[20/]

20/ Section 202 of the Energy Reorganization Act of 1974 expanded the jurisdiction of the NRC under the Atomic Energy Act to include inter alia Demonstration Liquid Metal Fast Breeder Reactors, future demonstration reactors and certain waste storage facilities. Section 202, however, continued the limitations on NRC jurisdiction contained in Section 11(s) and 110 of the Atomic Energy Act without further exception. Section 110 expressly exempts from NRC licensing all of the DOE fuel cycle facilities to which NRDC is directing its inquiry.

III. Intervenors' Interrogatories Raise Issues Which Need Not Be Considered In an LWA or Even A Construction Permit Proceeding. 21/

In seeking site specific safeguards information, 22/ Intervenors must satisfy not only the general relevancy standard applicable to all discovery requests, but also the separate and stricter standard of "necessity" set forth in 10 C.F.R. § 2.744(e) and 10 C.F.R. §§ 73.2 and 73.21. This standard of necessity is a result of Congress' passage of Section 147 of the Atomic Energy Act in which Congress mandated that safeguards information be withheld from public disclosure. In response to the Congressional directive, the NRC issued detailed regulations and strictly limited the instances in which such information could properly be disclosed. Section 2.744 permits disclosure of safeguards information only where "disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding". Similarly, Section 73.21 limits access

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21/ The objection stated herein applies to all Intervenors Safeguards discovery and will not be upeated in discussing each individual interrogatory.

22/ At the Construction Permit stage of this proceeding, it might be appropriate to consider the adequacy of safeguards at the CRBRP site on a very preliminary basis. As will be discussed, the adequacy of safeguards at CRBRP is an issue to be considered during the Operating License proceeding. Adequacy of safeguards at facilities in the fuel cycle is beyond the scope of this proceeding and would not even be considered in connection with an Operating License proceeding.

only to a person with an established need to know and "to whom disclosure is ordered pursuant to § 2.744(e) of this Chapter". 10 C.F.R. § 73.21(c)(vi).[23/]

Intervenors cannot in an LWA proceeding meet the threshold test of necessity. The information sought is simply not necessary for an LWA decision. Moreover, it is not necessary for a Construction Permit decision, but should be left for the Operating License proceeding. An applicant for a construction permit must submit certain technical information identified in 10 C.F.R. § 50.34(a). These regulations do not require safeguards information. Rather, 10 C.F.R. §§ 50.34(c) and (d) provide that such detailed information, in the form of a physical security plan and a safeguards contingency plan must be submitted only when an application is made for an operating license.

Various Licensing Boards decisions also demonstrate that detailed security and safeguards information need not be presented during a CP proceeding. For instance, the Licensing Board in Long Island Lighting Company, New

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23/ In addition to meeting the strict standard of "necessary" or "need to know", Intervenors must also agree to and abide by the terms of a protective order similar in scope to that issued in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI 80-24, 11 NRC 775 (1980). See 46 Fed. Reg. 51720 (October 22, 1981). Counsel for Intervenors, Mr. Greenberg, has indicated to Counsel for PMC his willingness to enter into such an agreement.

York State Electric and Gas Corporation (Jamesport Nuclear Power Station, Units 1 and 2), LBP-78-17, 7 NRC 826 (1978) was confronted with a contention that the Applicant's preliminary safeguards plans were incomplete. The Board found that:

> Contention IV.1 is without merit and, at best, is premature. We are unaware of any applicable regulation, and none has been cited by the parties, that requires an Applicant for a construction permit to submit at that stage preliminary security plans which would consider and/or specify the exact measures to be taken for safeguarding against radioactive releases resulting from criminal acts and sabotage at the plant.

Id. at 866. Similarly, in Power Authority of the State of New York (Greene County Nuclear Power Plant, LBP-79-8, 9 NRC 339 (1979) the Board in a CP proceeding summarily disposed of a contention which alleged that the Applicant's security plan was inadequate. One of the bases for the Board's decision was that a "preliminary discussion of the facility pertaining to protection of vital equipment is all that is required at this [i.e., CP] stage." Id. at 341.

In its discovery requests, Intervenors have sought detailed information regarding all facets of the adequacy of safeguards. Inasmuch as this information is not relevant or necessary in a Construction Permit proceeding, a fortiori, it is not relevant during an LWA proceeding. Accordingly, based on NRC regulations and case law, virtually all of

Intervenors' detailed interrogatories under Contention 5 are clearly premature and exceed the scope of this proceeding.

IV ~~D~~. Intervenors Requests for Comparisons Are Improper

In Interrogatories 3, 4, 7, 17, and 18, Intervenors in effect ask Applicants to draw comparisons between CRBR and other nuclear facilities either domestic or foreign. In Interrogatories 3, 4, and 7, Intervenors request information regarding possible safeguards problems which may have arisen at other nuclear facilities. The obvious, indeed the only possible purpose for these requests is to compare the safeguards plans or equipment at those facilities with that proposed for CRBR. Similarly, in Interrogatories 17 and 18, Intervenors request information regarding the safeguards and physical security regimes at foreign breeders. Again, the only possible purpose for these requests is to compare CRBR and foreign breeders.

As Applicants have noted, the adequacy of the CRBR safeguards will be judged against NRC regulatory requirements and discovery must be directed towards Applicants' satisfaction of those requirements. Whether safeguards problems have occurred at other plants is irrelevant to this question. Similarly, the safeguards regimes at foreign

facilities,[24/] operating under different standards than those prescribed by NRC can have no relevance to the "safeguards regime" at CRBR.

In Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446 (March 23, 1982), the Board issued a Protective Order and ordered that the NRC Staff need not respond to interrogatories which sought "to elicit a Staff comparison of 'similarities' between the 'problems' at Comanche Peak and another nuclear facility. ..." In issuing its Order, the Board stated that "such comparisons are not proper or necessary to a decision in this proceeding." Likewise here, the comparisons which Intervenors hope to make "are not proper or necessary to a decision in this proceeding."

24/ See Interrogatories 17 and 18.

CONCLUSION

For the foregoing reasons, as well as those contained in Applicants' Motion for a Protective Order, Applicants respectfully request that their motion be granted.

Respectfully submitted,

George L. Edgar
Attorney for Project
Management Corporation

for Warren E. Bergholz
Attorney for the
Department of Energy

DATED: April 2, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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PROJECT MANAGEMENT CORPORATION	)	Docket No. 50-537
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CERTIFICATE OF SERVICE

Service has been effected on this date by personal delivery or first-class mail to the following:

***Marshall E. Miller, Esquire
Chairman
Atomic Safety & Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20545

Dr. Cadet H. Hand, Jr.
Director
Bodega Marine Laboratory
University of California
P. O. Box 247
Bodega Bay, California 94923

***Mr. Gustave A. Linenberger
Atomic Safety & Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20545

*Daniel Swanson, Esquire
*Stuart Treby, Esquire
Office of Executive Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C 20545 (2 copies)

*Atomic Safety & Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20545

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U. S. Nuclear Regulatory Commission
Washington, D. C. 20545

*Docketing & Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20545 (3 copies)

William M. Leech, Jr., Attorney General
William B. Hubbard, Chief
Deputy Attorney General
Lee Breckenridge, Assistant
Attorney General
State of Tennessee
Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Oak Ridge Public Library
Civic Center
Oak Ridge, Tennessee 37820

Herbert S. Sanger, Jr., Esquire
Lewis E. Wallace, Esquire
W. Walter LaRoche, Esquire
James F. Burger, Esquire
Edward J. Vigluicci, Esquire
Office of the General Counsel
Tennessee Valley Authority
400 Commerce Avenue
Knoxville, Tennessee 37902 (2 copies)

**Dr. Thomas Cochran
Barbara A. Finamore, Esquire
Natural Resources Defense Council
1725 Eye Street, N. W., Suite 600
Washington, D. C. 20006 (2 copies)

Mr. Joe H. Walker
401 Roane Street
Harriman, Tennessee 37748

Ellyn R. Weiss
Harmon & Weiss
1725 Eye Street, N. W., Suite 506
Washington, D. C. 20006

Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

William E. Lantrip, Esq.
Attorney for the City of Oak Ridge
Municipal Building
P. O. Box 1
Oak Ridge, Tennessee 37830

Leon Silverstrom, Esq.
Warren E. Bergholz, Jr., Esq.
U. S. Department of Energy
1000 Independence Ave., S. W.
Room 6-B-256, Forrestal Building
Washington, D. C. 20585 (2 copies)

**Eldon V. C. Greenberg
Tuttle & Taylor
1901 L Street, N. W., Suite 805
Washington, D. C. 20036

Commissioner James Cotham
Tennessee Department of Economic
and Community Development
Andrew Jackson Building, Suite 1007
Nashville, Tennessee 37219

George L. Edgar
Attorney for
Project Management Corporation

DATED: April 2, 1982

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*/ Denotes hand delivery to 1717 "H" Street, N.W., Washington, D. C.

**/ Denotes hand delivery to indicated address.

***/ Denotes hand delivery to 4350 East-West Highway, Bethesda, Md.