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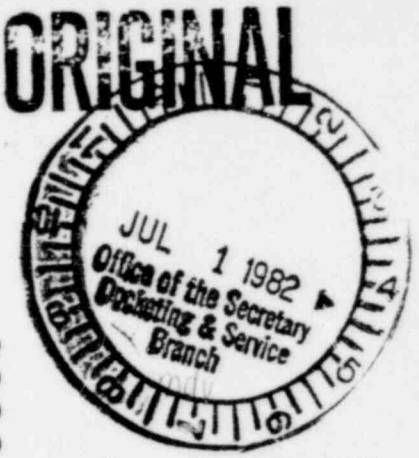

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANTS' RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB PETITION TO THE COMMISSIONERS TO EXERCISE THEIR INHERENT SUPERVISORY AUTHORITY TO DELINEATE THE SCOPE OF THE LIMITED WORK AUTHORIZATION PROCEEDING FOR THE CLINCH RIVER BREEDER REACTOR

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Energy

DATED: July 1, 1982

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SCOPE OF THE LIMITED WORK AUTHORIZATION PROCEEDING FOR
THE CLINCH RIVER BREEDER REACTOR

The United States Department of Energy and Project Management Corporation, acting for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby respond to National Resources Defense Council, Inc.'s Petition to the Commission dated June 11, 1982.

INTRODUCTION

Intervenors' Petition to the Commission is an improper attempt to obtain interlocutory review of an evidentiary ruling by the Licensing Board in this proceeding. Intervenors have failed to set forth any legally sufficient grounds for seeking such review. The issues presented do not involve matters of major policy or law, and review at

this time will create rather than avoid delay in the proceedings. This is simply a classic case of a complex evidentiary ruling which, by reason of its familiarity with the record and expertise, the Licensing Board is uniquely equipped to decide.

In their lengthy discourse, Intervenors merely argue the merits of why a Limited Work Authorization should not issue for CRBRP. Intervenors, in effect, request the Commission to decide, without benefit of any record established at an evidentiary hearing, that because of the Board's evidentiary rulings, the evidence which will be presented at the LWA hearing will not permit the Board to make the requisite site suitability and environmental findings necessary for the issuance of an LWA. Implicit in Intervenors' request is the conclusion that the Board will disregard the burden of proof established by the LWA regulations and improperly issue an LWA.[1/] Not surprisingly, Intervenors fail to explain how, prior to an evidentiary hearing, they are able to discern the evidence which Applicants will introduce. Nor do Intervenors explain

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1/ That the Board will improperly issue an LWA is a logical implication of Intervenors' argument. Because Intervenors oppose the issuance of an LWA, if Applicants' evidence were insufficient to support appropriate LWA findings and the Board denied Applicants' request, Intervenors' Petition would be meaningless.

how they are able to conclude that the Board will improperly issue an LWA.[2/]

Intervenors' attempt to obtain interlocutory review is particularly inappropriate in this instance because of the advanced stage of this proceeding. At the present time, the discovery period is closed, the Staff has issued the Site Suitability Report (SSR) and the update to the Final Environmental Statement (FES) is expected to issue in the very near future. All of the major milestones of the Licensing Board's schedule have been met and hearings on Applicants' request for an LWA are scheduled to commence on August 24, 1982. Although the Board made its evidentiary rulings on April 20, 1982 and issued its Order on April 22, 1982, Intervenors-inexplicably and in violation of applicable Commission regulations-have delayed seeking review of the Board ruling and Order for over six weeks. Review at this juncture will only serve to delay the proceedings and impede the Board's authority to regulate their course. For

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2/ It is ironic that Intervenors are complaining about the scope of the LWA issues in light of Intervenors' conclusion that, because of the scope, Applicants will be unable to introduce evidence sufficient to permit the Board to make the necessary site suitability and environmental findings. It is, after all, Intervenors who oppose the issuance of an LWA. Unlike Intervenors, Applicants believe that the Licensing Board will fulfill its responsibility and act in accordance with the requirements of law.

this reason alone, Intervenors' Petition should be summarily dismissed.

In short, in seeking interlocutory review, Intervenors have not only failed to state any legally sufficient grounds, but more importantly are asking the Commission to prejudge both the merits of the evidence which will be presented at the hearing, and the Board's future findings of fact and conclusions of law regarding that evidence. Applicants submit that the factually complex issues raised by Intervenors Petition can and should be reviewed by the Commission only after the conclusion of the evidentiary hearing on Applicants' request for a Limited Work Authorization, and the issuance of the Licensing Board's Partial Initial Decision.

BACKGROUND

On April 5-6, 1982, the Licensing Board convened a prehearing meeting of counsel in order to rule on Intervenors' contentions as well as various pending motions. During the course of that meeting, the Board, recognizing that the scope of Intervenors' Construction Permit contentions went beyond the more limited scope of issues which must be considered at an LWA hearing, requested the parties to state their position as to which issues encompassed by Intervenors' contentions should be considered at the LWA hearings and which should be deferred until the Construction

Permit or even the Operating License stage of the hearing process.

Although the parties and the Board were in agreement as to the deferral of a number of issues, because of the factual complexity of Intervenors' Contentions 1-3, the Board scheduled a meeting for April 20, 1982 for the sole purpose of deciding which issues encompassed within Intervenors Contentions 1-3 were appropriate for consideration at the LWA stage. The Board requested the parties to provide written statements of their positions and to bring any experts necessary to a full discussion of these contentions.

Subsequently on April 15, 1982, Applicants submitted a detailed statement of their position regarding Contentions 1-3.[3/] The NRC Staff submitted a statement which was in substantial agreement with the Applicants' position. In their Statement, Applicants pointed out that for an LWA proceeding, it is not necessary to conduct a full scale, in-depth review of all elements of the plant design. Such a review is proper for the Construction Permit proceeding. At

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3/ Inasmuch as Intervenors have quoted from and attached to their petition only selected portions of Applicants' Statement of Position, a copy of Applicants Statement of Position is attached to this Response as Appendix A. That Statement sets forth in detail Applicants position with regard to the scope of review at the LWA stage, and in the interest of accuracy, Applicants commend its entire contents to the Commission's attention.

the LWA proceeding, the applicable standard contemplates a finding of reasonable assurance, based on available information, that the proposed site is a suitable location for "a reactor of the general size and type proposed." As for the requisite environmental findings, the scope of review is limited to the probable impacts of the proposed action, including the environmental impacts of accidents. The limited nature of the LWA findings necessarily imposes limitations on the scope of analyses, systems, structures and components which must be considered, and the level of detail which must attend that consideration.

On April 20, 1982, Intervenors submitted their statement of position regarding the scope of the LWA proceedings. As in their Petition to the Commission, Intervenors argued that the Board must conduct a detailed review of the CRBRP plant design -- in effect conduct a construction permit proceeding -- in order to issue an LWA.[4/]

4/ Intervenors had previously contended that an LWA could not issue to CRBRP because it is a "first-of-a-kind reactor." This contention was grounded on the notion that all elements of the design must be known and reviewed before any decision can be made. Intervenors' contention was dismissed by the Board and Intervenors did not seek review of that ruling. In arguing that the Board must conduct a CP type proceeding in order to issue an LWA, Intervenors in effect are again raising the previously dismissed contention that an LWA cannot issue to CRBRP.

On April 20, 1982, the Board convened a meeting which lasted approximately seven hours and permitted all parties to present their respective positions. After hearing the arguments of all parties, the Board ruled, in accordance with applicable NRC regulations, that the detailed design review sought by Intervenors would be conducted at the Construction Permit stage of the licensing proceeding, and that the review at the LWA stage would be limited to that required by 10 C.F.R. § 50.10(e). On April 22, 1982, the Board issued its Order deferring certain of Intervenor's contentions until the CP stage and limiting the scope of certain other contentions in accordance with NRC regulations. On June 11, 1982, six weeks later, Intervenors' filed their Petition.

RESPONSE

I. INTERVENORS' PETITION FOR REVIEW OF AN INTERLOCUTORY EVIDENTIARY RULING IS WHOLLY IMPROPER

The Nuclear Regulatory Commission has a long standing policy, reflected in its regulations, against interlocutory review of Licensing Board orders and rulings. 10 C.F.R. § 2.730(f), for example, provides "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." The basis for this rule is the avoidance of "piecemeal litigation." and the delays which

inevitably result therefrom.[5/] As the Appeal Board stated in Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-209, 1 NRC 411, 413 (1975):

> It has long been determined, all things considered, that proceedings can be conducted most efficiently if the right to obtain appellate review of interlocutory orders is deferred to an appeal at the end of the case. The Commission's Rules of Practice so provide and we must follow them.

Similarly in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975) the Appeal Board stated:

> The general policy of the Commission does not favor the singling out of an issue for appellate examination during the continued pendency of the trial proceeding in which that issue came to the fore.

Although the Commission may consider interlocutory matters, it has chosen to do so "most sparingly" [6/] and

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5/ See Catlen v. United States, 324 U.S. 229, 233 (1945):

> The foundation of this policy is not in merely technical conceptions of finality. It is one against piecemeal litigation. The case is not to be sent up in fragments. ... Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

6/ Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978).

only in "exceptional circumstances."[7] Because of the extraordinary nature of interlocutory review, a party seeking such review has a particularly heavy burden to surmount. Interlocutory review is appropriate only

> where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which as a practical matter, could not be alleviated by later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Company of Indiana, Inc. (Marble Head Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).[8]

7/ Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977).

8/ In their Petition, Intervenors state that "numerous decisions have established that interlocutory review would be undertaken" citing Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-405, 5 NRC 1190, 1192 (1977) and Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980). Intervenors fail to point out that in both cases the Appeal Board refused to entertain interlocutory review. In fact, the only case cited by Intervenors in which interlocutory review was undertaken by the Commission is United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-18, 4 NRC 67 (1976). In that decision, the Commission conducted a sua sponte review of a Board ruling because of "important issues of law and policy", i.e., the relationship of the NRC with EDRA, an issue which the Commission believed might "recur in future licensing of ERDA facilities." Id. at 76. In contrast, the issue raised by Intervenors' Petition deals with technical issues, rather than law and policy, and would have no impact on the relation-

Continued

As will be demonstrated, neither circumstance is present in this case. Any imagined error in the Board Order can be raised on appeal of the Board's final order as well as at subsequent stages of this proceeding before the Board. Further, the Board Order, which strictly adheres to NRC's regulations and case law, can hardly be considered a ruling which "affects the structure of the proceeding in a pervasive or unusual manner." Indeed, only if the Board had ruled in the manner suggested by Intervenors could it so affect the structure of this proceeding.

II. ANY ALLEGED ERROR IN THE BOARD'S RULING CAN BE RAISED ON APPEAL

Although Intervenors complain in various sections of their Petition that they will somehow be foreclosed from raising certain issues at later stages of this proceeding, in discussing the standard for interlocutory review, Intervenors only claim that the Board's ruling will affect the structure of the LWA proceeding in a "pervasive manner."

In any event, Intervenors will be provided ample opportunity to challenge the Board's Order on appeal.

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ship between two federal agencies. Furthermore, in its 1976 decision, the Commission noted tht the decision of the Licensing Board itself threatened substantial delay for the proceeding, delay which could not be recaptured by later correction of error. "Id. In the present situation, however, as Intervenors must concede, Commission intervention would result in delaying, rather than expediting, the course of the proceedings.

Pursuant to the NRC regulations and case law, a party to an initial licensing proceeding, may appeal the initial decision of the Licensing Board, including an initial partial decision, and take exception to the Board's findings of fact and conclusions of law. 10 C.F.R. § 2.762(a). In addition, a party may raise both errors of fact and law on appeal. Id. Thus, NRDC is free to appeal the Licensing Board's ruling regarding the scope of contentions 1, 2, and 3 should the Board ultimately recommend the issuance of an LWA-1. Moreover, the Appeal Board has the authority to exercise sua sponte review in order to insure that environmental and safety issues are fully and properly addressed. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-509, 8 NRC 679 (1978). Thus, any error which might be committed by the Board affecting the environmental or safety findings may be subject to review even if not raised by any party.

It should also be emphasized (as discussed in detail infra), that the LWA proceeding is merely the first step in the CRBRP licensing process. To the extent that any new information or changed circumstances arise during subsequent proceedings, the Board is free to review that

information or changed circumstances in light of its previous LWA findings.

In summary, Intervenors will have ample opportunity to obtain review of the Board's evidentiary rulings regarding Contentions 1, 2 and 3. NRDC must, however, be required to await the issuance of a partial initial decision before raising these issues before the Commission.

III. THE BOARD'S RULING DOES NOT AFFECT THE BASIC STRUCTURE OF THE PROCEEDING IN A PERVASIVE OR UNUSUAL MANNER

Although conceding that the Board's evidentiary rulings "might be correct" for light water reactors,[9/] Intervenors nonetheless request the Commission to undertake the extraordinary procedure of interlocutory review of the Licensing Board's evidentiary ruling on two grounds. First, the result of the Licensing Board ruling "will be a severely constricted record that will not permit the Board rationally to make the LWA findings required by law."[10/] Secondly, "the basic structure of the proceeding will also be pervasively affected in that Intervenors will be prevented from making our affirmative case on NEPA and site suitability issues."[11/]

9/ Intervenors Petition at 55.

10/ Id. at 54.

11/ Id. at 54.

It is ironic that Intervenors, who oppose the issuance of an LWA on the ground that the procedure should not be available for "first-of-a-kind reactors", request review on the ground that the Board will not be able to make rational site suitability and environmental findings. If Intervenors are correct, the Board will refuse to recommend the issuance of an LWA. Moreover, should the Board erroneously recommend an LWA, the Appeal Board, and if necessary, the Commission can review and reverse that recommendation. Obviously, the Commission should not prejudge the Licensing Board's actions prior to the creation of a record in this proceeding.

Intervenors' second ground is even more perplexing than the first. Intervenors claim, without explanation, that because of the Board ruling they will be unable to make their affirmative case.[12/] As a preliminary matter, it

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12/ Intervenors continually complain that they are hampered in their preparation because they will be unable to obtain discovery on the details of a probabilistic risk analysis of accident probabilities. Yet, at a deposition of Dr. Thomas Cochran, Intervenors' primary witness on Contentions 1-3, Dr. Cochran stated that such an analysis could not be relied upon to exclude HCDAs from the envelope of design basis accidents. (Tr. of Cochran deposition at 176-177 (June 22, 1982)). Thus, Intervenors apparently would like to engage in discovery concerning an analysis upon which Applicants will not rely at the LWA hearing and which Intervenors believe cannot be relied upon. Applicants can hardly conceive of a more inappropriate area of discovery.

should be noted the Intervenors have engaged in discovery of unprecedented scope. To date, Intervenors have submitted and received responses to 19 sets of Interrogatories directed to Applicants, 25 sets of Interrogatories directed to the NRC Staff, 10 sets of Admissions directed to Applicants and 10 sets of Admissions directed to the NRC Staff. Intervenors have also deposed more than fifteen persons, and have had production of more than one hundred thousand pages of documents. Under these circumstances, it is difficult to understand the basis for Intervenors' argument that the Board's ruling will prevent Intervenors from preparing their affirmative case.

More importantly, any perceived difficulties which Intervenors may have in preparing their case is due solely to their insistence that the Board, at the LWA proceeding, must conduct a detailed review of all elements of the design of CRBR. Not surprisingly, Intervenors fail to cite any relevant authority for the proposition that a detailed review of all elements of the CRBR design is mandated by the LWA regulations. In fact, as Intervenors are well aware, the LWA regulations specifically preclude the type of review upon which Intervenors insist.

A. The Board Ruling On the Scope of the LWA Proceeding Was Correct

Intervenors' complaint with the Board ruling is not that the Board has somehow misread or misapplied the LWA regulations.[13/] Indeed, Intervenors fail to cite any relevant authority which in any way casts doubt upon the Board ruling. Rather, Intervenors apparently contend that regardless of the clear language of the LWA regulations, and the clear holdings of various Appeal Boards, the Board must engage in a far reaching and detailed review of the design of CRBRP. In effect, Intervenors would have the Board conduct a Construction Permit proceeding, and at the conclusion of that proceeding, as a lesser included finding, issue an LWA.

Before discussing the Board ruling, it is important to understand what the Board did not decide. Throughout their Petition, Intervenors continually mischaracterize the Board ruling and Order and state that the only evidence permitted by the Board is of a "hypothetical reactor" meeting "hypothetical design criteria". Contrary to Intervenors' statement, the Board did not so limit the review of CRBRP at the LWA proceeding. In particular, as its primary limitation on the Contentions 1-3, the Board held that

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13/ Intervenors concede as noted earlier that the Board's ruling "might be correct" for light water reactors. Intervenors' Petition at 55.

discovery at the LWA stage is limited to the following areas of concern:

1. The major classes of accidents initiators potentially leading to HCDAs;

2. The relevant criteria to be imposed for CRBRP;

3. The state of technology as it relates to applicable design characteristics or criteria; and

4. The general characteristics of the CRBRP design (e.g., redundant, diverse shutdown systems).

Board Order at 2-3.

As demonstrated in the Board Order quoted above (No. 4) and the recently issued Site Suitability Report, the pertinent design characteristics specifically proposed for CRBRP will be subject to review at the LWA hearing -- not the design of a hypothetical reactor. For example, pertinent elements of the CRBRP containment design, shutdown systems, decay heat removal systems, fuel failure detection systems, and systems for assuring primary system integrity will be considered at the LWA stage to the extent that those systems relate to findings of site suitability. Because of the limited nature of the activities permitted pursuant to an LWA and because those activities are taken at the Applicants' risk, it is simply not necessary to conduct a detailed review of all elements of the design of those systems. Such a review can await the Construction Permit

proceeding. As provided in the NRC regulations, the Board need only have reasonable assurance that the specific systems of the CRBRP can be designed to meet the site suitability requirements contained in NRC regulations[14/] and that the probable environmental impacts from construction and operation of such a reactor are properly analyzed.[15/]

Similarly, CRBRP design criteria are not hypothetical. The Board's ruling contemplates that the review will include consideration of pertinent design criteria. The PSAR contains the detailed design criteria for the CRBRP as does the NRC Staff's recently issued SSR.[16/] While these criteria are not final, they can hardly be characterized as hypothetical. Moreover, there is nothing to indicate that these criteria will change or that if a change is necessary, such changes cannot be accommodated at later stages of this proceeding.

Thus, the Board clearly did not rule that it would only consider a hypothetical raactor and hypothetical design criteria. Rather, the Board simply ruled that the detailed

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14/ 10 CFR § 50.10e (1982).

15/ Natural Resources Defense Council Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

16/ Site Suitability Report (Clinch River Breeder Reactor Plant), NUREG-0786 (June, 1982) (Appendix A).

design review sought by Intervenors must await the Construction Permit proceeding. As the Board stated in its Order:

> A full-scale inquiry into the specific design of the CRBR is inappropriate at the LWA-1 stage. 10 C.F.R. 50.10(e) establishes that an LWA-1 may be issued only after the Board has conducted a full NEPA review and has determined that 'based upon the available information and review to date, there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations.' 17/

Broadly stated, Intervenors complain of the Board rulings in two respects: (1) "The Licensing Board's interpretation of the scope of required LWA findings does not permit reasoned site suitability findings," and (2) "The Licensing Board's severe limitation of the scope of the LWA proceedings for CRBRP violates NEPA." Based on these two

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17/ United States Department of Energy (Clinch River Breeder Reactor Plant), Docket No. 50-537 at 3 (April 22, 1982). The Board's ruling in this case is amply supported by NRC case law. In Gulf States Utilities Company (River Breed Station Units 1 & 2) LBP-75-50, 2 NRC 419, 461 (1975) the Board discussed the scope of review for an LWA in the following terms.

> It is not required that the Board make findings at present as to whether the specific design of the River Breed Station conforms to the radiological health and safety requirements of 10 C.F.R. 50, the regulations with which Appendix I is associated. Whether or not the specific design can be expected to meet Appendix I requirements will be the subject of further hearings.

complaints, Intervenors apparently contend that the structure of the LWA proceeding will be pervasively affected and accordingly, interlocutory review is appropriate. As will be demonstrated, both complaints are entirely meritless.

1. Site Suitability

Intervenors' concern regarding site suitability is premised entirely on its misconception of the extent to which site suitability findings are final. Repeatedly throughout its argument, Intervenors state that the "issue of site suitability is essentially closed" after the LWA hearing. Indeed, Intervenors go so far as to suggest the following:

> If the Board finds that the site is suitable, that finding is not preliminary; it is a final decision. All contentions as to site suitability will presumably be resolved. We cannot imagine that the Board would permit reauthorization of site suitability contentions at the CP stage. 18/

Thus, based on their belief that all site suitability issues are final at the conclusion of the LWA proceeding, Intervenors contend that they should be permitted to engage in a full scale inquiry into the specific CRBRP design.

Intervenors' argument regarding finality is somewhat curious in light of counsel for Intervenors' statement

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18/ Intervenors' Petition at 50.

at the hearing before the Licensing Board regarding this very issue:

> ... I don't doubt that this Board will be able to raise any safety issue that it believes is important at any stage. That is a requirement of the Atomic Energy Act, and the Commission and Appeal Board have made it clear time and time again the Board members are not to close their eyes to new information.
>
> So I am not implying that when you make this LWA - when you make these LWA findings that that closes the record totally on your responsibilities or on the parties responsibilities from that point on. (Tr. at 510)

Thus, while advising the Licensing Board that its site suitability findings were not final, Intervenors now provide the Commission precisely the opposite advice.

Regardless of the patently inconsistent positions which Intervenors have taken on this issue, the NRC regulations and case law clearly establish that site suitability findings may be reopened at any stage of the proceeding for good cause. At the time the Commission promulgated its LWA regulation, the Commission specifically stated that the conclusions reached after an LWA proceeding could, under appropriate circumstances, be revisited during the Construction Permit[19/] or even Operating License stage.

19/ In arguing that a detailed design review should be undertaken at the LWA stage, Intervenors rely upon the Commission's recent Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). Continued

> The rules adopted herein would not preclude the presiding officer from reopening the NEPA and limited safety hearing after grant of authorization under § 50.10(e) to consider new information upon motion by an interested party or on its own initiative. 20/

Moreover, the Commission noted that "any grant of authorization to conduct on-site activities could not serve to prejudice the outcome of the radiological safety review itself." 21/

The Commission regulations mirror this view. 10 C.F.R. § 50.10(e)(4) provides:

> Any activities undertaken pursuant to an authorization granted under this paragraph shall be entirely at the risk of the applicant and, except as to matters determined under paragraphs (e)(2) and (e)(3)(ii), the grant of the authorization shall have no bearing on the issuance of a construction permit with respect to the requirements of the Act, and rules and regulations, or orders promulgated thereto.

In summary, the entire basis for Intervenors' argument regarding site suitability is premised on a faulty

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Far from supporting Intervenors, the Statement of Policy clearly states that the detailed design review sought by Intervenors should be undertaken at the Construction Permit proceeding not at the LWA proceeding.

20/ 39 Fed. Reg. 14506, 14507 (April 24, 1974).

21/ Id. at 14507. It should be noted that Dr. Cochran has testified that, in his opinion, it is not necessary to engage in a detailed design review in order to establish the suitability of a site. (Tr. of Cochran deposition at 182-183).

assumption -- that all site suitability findings are final at the conclusion of the LWA proceeding. To the extent that the detailed review conducted at the CP or OL proceeding indicates to Intervenors that the LWA site suitability findings require modification, that issue can be raised before the Board.[22/]

2. Environmental Findings

Intervenors' various arguments that the Board ruling somehow violates NEPA highlights and reaffirms the necessity for the Commission policy against interlocutory review of evidentiary rulings. The Licensing Board in this proceeding has stated, in accordance with NRC regulations and case law, that it intends to conduct a "full NEPA review" during the LWA hearing phase. The Board recognized, however, as required by the LWA regulations, that:

> the finality of this review must of necessity await the completion of the CP evidentiary hearing where full design details and supportive analyses of the facility will be critiqued.

22/ To the extent that Intervenors are suggesting that, on the merits, the Board cannot make the required site suitability findings, that issue is clearly premature and must await the outcome of the LWA proceeding itself. Obviously, the Commission cannot prejudge the merits of this case absent a factual record.

Intervenors do not seriously argue[23/] that the Board's formulation of the legal principle regarding NEPA is incorrect. Rather, at the hearing, as well as in their Petition to the Commission, Intervenors have argued the merits of their case using the following logic:

> 1. The NRC Staff and Applicants have concluded that CDAs can be excluded from the envelope of DBAs;
>
> 2. Intervenors have concluded that CDAs should be included in the envelope of DBAs;

23/ Intervenors make the somewhat disingenuous statement that the distinction between "full" and "final" NEPA review is "nowhere suggested in pertinent regulations or cases and clearly contravenes the Commission's explanation of the LWA rule ... and the clear language of the rule itself." In fact, the Commission's explanation of the LWA rule and the rule itself clearly provide that the NEPA findings are not final and can be reopened. See 39 Fed. Reg. 14506, 14507 (April 24, 1974). Moreover, at the hearing, counsel for Intervenors specifically agreed that a full rather than final NEPA review was required:

> JUDGE MILLER: You make them full rather than final, don't you?
>
> MS. WEISS: That's right. (Tr. at 514)
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> * * *
>
> JUDGE MILLER: In that event, a full review then would be sufficient from your point of view.
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> MS. WEISS: Absolutely, absolutely. (Tr. at 515)

> 3. If the Staff and Applicants are wrong about the probability of CDAs, it is most likely that the postulated source term does not bound all credible accidents; 24/
>
> 4. If the source term is wrong, the risk analyses and the Summary of Radiological Consequences of Postulated Accidents in in Table 7.2 of the FES for CRBR are wrong so NEPA and 10 C.F.R. §§ 50.10(e) (2)(i) and 50.52(b) and (c) are not satisfied; and finally, 25/
>
> 5. If Applicants' and Staff's assumptions with regard to the probability of a CDA are incorrect, it is most likely that required design changes in CRBR would change the cost/benefit analysis. 26/

Based on this "logic", Intervenors conclude that there should be no limitations on the scope of Contentions 1-3 because the speculative sequence of events listed above might occur.

Plainly, the Commission cannot engage in the kind of absurd speculation suggested by Intervenors. In order for the Commission to accept Intervenors' argument, the Commission would have to (1) accept at face value and without any factual record, all of the factual premises implicit in Intervenors' argument (i.e., that a CDA should be a DBA); (2) assume that despite these factual premises the Board

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24/ Intervenors Petition at 30.

25/ Id. at 30.

26/ Id.

recommended the issuance of an LWA and (3) assume that the Board decision would be incorrect and in violation of NEPA.

Given the factual complexity of the issues, and the facts that no hearing has been held, no evidence has been introduced, no environmental findings have been made and no decision has been issued, it is virtually impossible to understand how any action taken by the Board to date violates NEPA.

The logical extension of Intervenors argument underscores its absurdity. If a "full NEPA" review cannot tolerate possible future changes in circumstances as Intervenors suggest, then the NRC's longstanding two-step licensing process is invalid. If all decisions must be definitive and final -- not subject to change -- then neither CRBRP nor any other reactor can be granted a CP much less an LWA. Indeed, NRC would be required to conduct an OL proceeding which would subsume both the CP and LWA stages.

The Board has clearly stated that it will conduct a full NEPA review. The Board's ruling regarding Contentions 1-3 does not in any way lessen or eliminate the Board's responsibility to make full environmental findings. In the context of Contentions 1-3, the Board must find (1) that there is reasonable assurance that the plant can be designed to conform to NRC standards; (2) that "if the plant is so designed, the radiological impact will be of

small weight in the environmental balance," and (3) "it is unlikely that any costs incurred in modifying the plant to meet [the standards] would be so large as to seriously disturb the cost/benefit or plant vs. alternatives balances reached in the environmental hearings." Gulf States Utilities Company (River Bend Station Units 1 & 2), LBP-75-50, 2 NRC 619, 663 (1975).

If the evidence adduced at the hearing is insufficient to permit the Board to make these findings, an LWA either will not be issued or the Board decision will be reversed on appeal. If, on the other hand, the Board finds, and the Commission agrees that the environmental record permits the issuance of an LWA, Intervenors can hardly complain. In either case, nothing is gained by attempting to prejudge the ultimate outcome of the LWA proceeding.

IV. INTERVENORS' PETITION VIOLATES THE COMMISSION'S RULES AND PROCEDURES

The Commission, recognizing "the public interest in the timely and orderly conduct of [its] proceedings," 27/ has established well defined procedures for review of interlocutory matters. The Intervenors have chosen to ignore those procedures, giving as their reason that compliance

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27/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

would have "no utility" and be "wasteful of time."[28/] In particular, Intervenors have failed to adhere to the required time periods for seeking an interlocutory review, failed to submit objections to the Licensing Board, and failed to seek review in the first instance from the Appeal Board. Accordingly, for the reasons which follow, Intervenors' Petition should be summarily dismissed.

A. Intervenors' Petition is Untimely

In discussing the time periods prescribed by its regulations the Commission has stated:

> the Commission's adjudicatory system requires a certain discipline to keep it operating efficiently. It assumes that parties will assert their own interests in a timely fashion with adequate support, and that they will live with the costs of their decisions.

Consolidated Edison Company of New York (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 NRC 13, 15 (1977). Intervenors now ask the Commission to ignore its own procedures, and allow Intervenors to raise issues before the Commission one and a half months after the matters should have been presented to the Licensing Board.

The Order objected to by the Intervenors was issued on April 22, 1982. Yet, the Intervenors failed to respond or seek any relief from that Order until June 11,

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28/ Intervenors' Petition at 57 and 60.

1982. Intervenors seek to excuse their delay because (1) of "significant new information" which they have become aware of since the order was issued, (2) "there is only now a full complement of Commissioners", and (3) "there would have been no utility in filing objections with the Board as provided in § 2.752(c)".[29/]

Interlocutory review may be appropriate where, in addition to establishing a strong legal basis, the petitioner also demonstrates that early review will avoid delay. See United States Energy Research and Development Agency, supra. Here, Intervenors, by their failure to seek review in a timely fashion have created the conditions for delay. If review is granted, the inevitable result will be delay in the commencement of hearings, development of a record and meaningful review.

Moreover, none of Intervenors' rationalizations justify allowing the Intervenors to circumvent Commission regulations. Intervenors allude to "significant new information", of which they became aware for the first time after April 22, but provide no specifics. Certainly, the selected quotations from Intervenors' May 6, 1982 Deposition of the NRC Staff and from the March 30-31 and May 5, 1982 ACRS

29/ Intervenors' Petition at 55-56. In the later event, Intervenors have five days following an order under 10 CFR § 2.752 in which to file objections and seek review.

Meetings demonstrate no new information of such significance that Intervenors were compelled only after six weeks delay to pursue extraordinary measures of relief.

Intervenors in their petition, continue to rely upon precisely the same arguments which failed before the Licensing Board. They have presented no significant new information. As the Appeal Board observed in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976):

> After a decision has been rendered, a dissatisfied litigant who seeks to persuade us -- or any tribunal for that matter -- to reopen a record and reconsider "because some new circumstance has arisen, some new trend has been observed or some new fact discovered," has a difficult burden to bear.

Intervenors not only have not borne that burden, they have not even attempted to shoulder it.

Intervenors' other rationales for ignoring Commission procedures -- that the matters raised are such that only a five-member Commission can appropriately consider them and that there would have been "no utility" in following Commission procedures -- are presumptuous as well as unjustifiable. Certainly, parties to Commission proceedings do not have the luxury of deciding when the Commission

is properly configured or what procedures are worthy of being followed.[30/]

V. NO WAIVER OF THE LWA REGULATIONS IS JUSTIFIED

Intervenors alternatively suggest that the Commission consider their Petition as a request for a waiver pursuant to 10 C.F.R. § 2.758. In requesting a waiver, Intervenors make the novel argument that they are not seeking a waiver of 10 C.F.R. 50.10(e), but are seeking to waive the Board's interpretation of that regulation. The net effect of this argument is, of course, that any interlocutory ruling made by a Licensing Board, although not subject to direct review by the Commission may nonetheless be "waived" by the Commission. If this argument is accepted, interlocutory review would thus become the norm rather than the

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30/ Intervenors improperly moved the Commission to take interlocutory action. The petition rather should have been addressed to the Appeal Board. The Commission has delegated its interlocutory review authority to the Atomic Safety and Licensing Appeal Board, 10 C.F.R. § 2.785, with the Commission reserving the right to review the Appeal Board decision on certification from the Appeal Board, or in cases of "exceptional legal or policy importance", 10 C.F.R. § 2.786(a) to review the decision on its own motion. As the Commission stated in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), Docket Nos. 50-443, 50-444, unpublished Memorandum and Order dated March 23, 198 , "[t]he Rules of Practice specifically preclude the appeal of interlocutory decisions to the Commission or any other request for Commission review of such a decision." (Emphasis added). See, also, Consumer Power Co. (Midland Plant, Units 1 and 2), CLI-77-12, 5 NRC 725, 726 (1977).

exception. Although Applicants believe that this nonsensical argument should be dismissed out of hand, Applicants nonetheless will address the merits of the request.

A. Intervenors Failed to Follow the Procedures Mandated by 10 C.F.R. § 2.758

In requesting that the Commission also consider their petition to be a request for waiver of a Commission rule as provided for by 10 C.F.R. § 2.758, Intervenors failed to follow any of the procedures called for by that regulation. 10 C.F.R. § 2.758(a) states that "any rule or regulation of the Commission ... shall not be subject to attack by way of discovery, proof, argument, or other means in a adjudicatory proceeding involving initial licensing" except as provided in § 2.758(b), (c) and (d). Section 2.758(b) requires that a waiver petition shall be accompanied by an affidavit setting forth with particularity the special circumstances requiring waiver of Commission rules. No affidavit accompanies the Intervenors' petition. The petition and affidavit are to be submitted to the presiding officer. 10 C.F.R. § 2.758(c). Intervenors have not done so.

Moreover, the regulations provide that the presiding officer shall decide, based on the petition, affidavit and any responses, if the petitioning party has made a prima

facie showing that application of the rule in question "would not serve the purposes for which the rule or regulation was adopted" and should be waived. Id. Only if such a showing has been made will the presiding officer certify the matter directly to the Commission. Section 2.758(d). Obviously, since Intervenors have failed to submit any petition or affidavit to the Licensing Board, the determinations necessary for waiving a Commission regulation cannot be made.

Intervenors justify ignoring the clear requirements for requesting a waiver of Commission requlations by declaring that following such requirements "would clearly be futile and wasteful of time."[31/] Applicants submit that Intervenors cannot be allowed to pick and choose the Commission regulations they will follow or ignore. Those regulations and the procedures they mandate must be applied in an even handed manner in order to ensure the orderly and fair administration of NRC proceedings.

B. The LWA Rules are Fully Applicable to This Proceeding

In requesting a "waiver" of the LWA rules, Intervenors are in effect challenging the applicability of the LWA procedures to CRBR. In asserting such a challenge,

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31/ Intervenors Petition at 60.

Intervenors neglect to inform the Commission that the Licensing Board has recently dismissed its contention raising precisely this issue. On April 14, 1982, the Licensing Board, issued an Order dismissing Intervenors' former Contention 1 which asserted that as a matter of law the LWA procedure is inapplicable to first-of-a kind reactors such as the CRBR. In its Order, the Board stated that:

> The Board believes that as a matter of law, the LWA procedures do apply to the CRBR proceeding. Further, the denial of this contention as a pleading will not prejudice Intervenors because the applicability of LWA regulations can be challenged by proposed conclusions of law after a factual record has been developed at the evidentiary hearing. The contention as framed presents an ultimate legal question for the Board following the taking of evidence, rather than a factual issue or pleading. (Tr. 98). 32/

In now requesting that the Commission waive § 50.10(e), (or the Board's interpretation of 50.10(e)) Intervenors are attempting to circumvent the Board ruling and obtain interlocutory review of that ruling. For the reasons stated earlier, such review is patently inappropriate. As the

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32/ United States Department of Energy (Clinch River Breeder Reactor Plant), Docket No. 50-537 (April 14, 1982) (Order following Conference with Parties at 8.

Board noted in its Order, "the applicability of LWA regulations can be challenged by proposed conclusions of law after a factual record has been developed. ... "

Aside from the improper nature of the request, Intervenors have failed to meet the heavy burden imposed on parties attempting to waive agency regulations. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). ("An applicant for waiver faces a high hurdle even at the starting gate.") In order to meet that burden, Intervenors must establish that the application of the LWA rule "would not serve the purposes for which the rule or regulation was adopted." Intervenors attempt to meet this burden merely by bootstraping their previous arguments regarding NEPA and site suitability findings into an argument that the LWA rule "as interpreted" will not serve its intended purpose. For the reasons stated in the previous sections of this Response, this argument should be rejected.

CONCLUSION

Intervenors Petition does not raise any important issues of law or policy requiring immediate intervention by the Commission. Rather, the issue raised here is a highly technical and complex evidentiary matter which can be

resolved only after completion of hearings and the development of a factual record. For their part, Intervenors have wholly failed to meet the requisite standard for interlocutory review, and their Petition should be denied.

Respectfully submitted,

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APPENDIX A

DUPLICATE ORIGINAL

4/15/82

'82 [illegible] P4:32

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANTS' STATEMENT OF POSITION
IN REGARD TO
NRDC CONTENTIONS 1, 2, AND 3

Pursuant to the Board's instructions at the Prehearing Meeting of Counsel on April 6, 1982[1/] the United States Department of Energy and Project Management Corporation, acting for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby file their Statement of Position in regard to NRDC Contentions 1, 2, and 3.

The Board directed the parties to present their specific positions on which subparts or issues within NRDC Contentions 1, 2, and 3 should be deferred until after the

1/ Tr. 464-65; 467.

OWA hearing.[2/] This, in turn, must rest upon a determination as to what issues within Contentions 1, 2, and 3 are legally and factually necessary for an LWA decision.

In what follows, the Applicants will address: (1) the legal principles and framework which define the issues encompassed within an LWA decision, and (2) their specific positions as to each element of NRDC Contentions 1, 2, and 3.[3/]

I. THE LEGAL FRAMEWORK

For purposes of analysis, the legal framework for these proceedings can be divided into three stages: (1) the limited work authorization (LWA), (2) the Construction Permit (CP), and (3) the Operating License (OL). The following discussion identifies the specific factual and legal elements necessary for a decision at each stage, and the pertinent distinctions between those necessary elements at each successive stage. This, in turn, will establish the legal foundation for the Applicants' position as to each part of Contentions 1, 2, and 3.

For an LWA decision, the Board must make the following findings:

2/ Tr. 434; 464-65; 467.

3/ As a point of reference for the analysis, the Applicants have considered the approach recommended by the NRC Staff (Tr. 442-43), and after review, are in essential agreement with the Staff.

1. Environmental findings - all of the findings required by 10 C.F.R. § 51.52(b) pursuant to the National Environmental Policy Act (NEPA); 4/

2. Site Suitability findings - " ... that, based upon the available information and review to date, there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations under the Act and rules and regulations promulgated by the Commission pursuant thereto." 5/

As to the environmental findings, the NRC's Final Environmental Statement and the Board's decision must include consideration of the "probable impact of the proposed action on the environment." 6/ In NRC practice, the assessment of impacts has traditionally included the probable impacts associated with postulated accidents. 7/ The CRBRP FES included detailed consideration of the probable

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4/ 10 C.F.R. § 50.10(e)(2)(i).

5/ 10 C.F.R. § 50.10(e)(2) (ii).

6/ See 10 C.F.R. § 51.20(a); § 51.23(a); § 51.26(a); § 51.52 (c)(1)-(c)(3).

7/ See Final Environmental Statement related to Construction and Operation of Clinch River Breeder Reactor Plant, February 1977, Docket No. 50-537 (NUREG-0139) [hereinafter, "CRBRP FES"], Chapter 7 at 7-1 - 7-11; see also, 36 Fed. Reg. 22851 (December 1, 1971); 39 Fed. Reg. 26279 (July 18, 1974).

impacts associated with postulated accidents, including accidents beyond the design basis -- so called Hypothetical Core Disruptive Accidents ("HCDAs"). There are, however, specific limitations on the scope of this analysis and review.

First, the scope of review is limited by a rule of reason.[8/] The probable impacts must be considered; not those which are remote, hypothetical, and speculative.

Second, and as a corollary to the first limitation, the probable impacts should be quantified where possible. Where precise quantification is not possible, it is appropriate to use analyses which provide reasonable estimates of impacts.[9/]

Third, in assessing the impacts of accidents one should employ methods of analysis and assumptions which are as realistic as the state of knowledge will permit.[10/] In

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8/ Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) cited with approval in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978); Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 481 F.2d 1079, 1092 (D.C. Cir. 1973).

9/ 10 C.F.R. § 51.20(b).

10/ See 36 Fed. Reg. 22852 (December 1, 1971); Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291, 1297 (D.C. Cir. 1975); SIPI, supra, 481 F.2d at 1093; Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-78-34, 8 NRC 470, 480 (1978).

contrast, the conservative methods of analysis employed in the NRC safety evaluation process are not appropriate in the environmental context.[11/]

As to the site suitability finding, it must be emphasized that this finding is not a definitive, plant - specific or design - specific finding which requires a complete safety review for support. Rather, the following principles apply:

1. the finding does not require a complete safety review, but can be "based on the available information and review to date."[12/]

2. the finding does not require definitive evidence, but only a showing of "reasonable assurance that the proposed site is a suitable location."[13/]

3. the finding does not presuppose a completed, detailed design, but merely a "reactor of the general size and type proposed."[14/]

11/ Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 343 (1974), remanded on other grounds, CLI-74-23, 7 AEC 947; Gulf States Utilities (River Bend Station, Units 1 & 2), LBP-75-50, 2 NRC 419, 447-48 (1975); Perkins, supra, 8 NRC at 480.

12/ 10 C.F.R. § 50.10(e)(2)(iii).

13/ Id.

14/ Id. Compare 10 C.F.R. § 50.35(a) discussed below.

As to both the environmental and site suitability findings, the LWA decision is neither irrevokable nor with prejudice to the succeeding safety review at the Construction Permit stage. In this regard, the applicable NRC regulation states:

> (4) Any activities undertaken pursuant to an authorization granted under this paragraph shall be entirely at the risk of the applicant and, except as to matters determined under paragraphs (e)(2) and (e)(3)(ii), the grant of the authorization shall have no bearing on the issuance of a construction permit with respect to the requirements of the Act, and rules, regulations, or orders promulgated pursuant thereto. 15/

Thus, the applicable legal principles contemplate that should the subsequent safety review bring about a need for modifications in the facility or previous findings, the Applicant bears the risk. This reinforces the notion that information necessary for environmental and site suitability (LWA) findings can and should be substantially more limited than those for the CP, and that LWA findings can rest upon threshold considerations of design feasibility. 16/

15/ 10 C.F.R. § 50.10(e)(4).

16/ Similarly, the NEPA cost-benefit balance at the LWA stage can be structured to accommodate the potential for change resulting from the subsequent CP safety review by including information to show that: (1) the effects of accidents are not significant in relation to those associated with normal operation and anticipated operational occurrences, and/or (2) post-LWA design or procedural modifications are practicable and would not

Continued

Not only is the LWA decision limited in scope, but even the subsequent CP review is subject to substantial limitations. 42 U.S.C. § 2235 [§ 185 of the AEA] provides:

> All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit.
>
> * * *
>
> Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a 'license'.

The Supreme Court has directly addressed the scope of and limitations upon CP findings in Power Reactor Development Corp. v. International Union of Electrical Workers (PRDC), 367 U.S. 396 (1961). In PRDC the court considered the question of whether the Commission's safety finding at the CP stage, i.e., " ... information sufficient

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significantly effect the cost/benefit balance. See CRBRP FES, Chapter 7.

to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public," must be "backed up with as much conviction as to the safety of the final design of the specific reactor in operation as the second, final finding [i.e., for issuance of an operating license] must be." PRDC, 367 U.S. at 807. The Court concluded:

> We think the great weight of the argument supports the position taken by PRDC and by the Commission, that Reg. 50.35 permits the Commission to defer a definitive safety finding until operation is actually licensed. The words of the regulation themselves certainly lean strongly in that direction. The first finding is to be made, by definition, on the basis of incomplete information, and concerns only the "general type" of reactor proposed. The second finding is phrased unequivocally in terms of "reasonable assurance," while the first speaks more tentatively of "information sufficient to provide reasonable assurance." The Commission, furthermore, had good reason to make this distinction. For nuclear reactors are fast-developing and fast-changing. What is up to date now may not, probably will not, be as acceptable tomorrow. Problems which seem insuperable now may be solved tomorrow perhaps in the very process of construction itself.

Id.

The principles enunciated in PRDC, supra, remain valid today. The applicable NRC regulations define the scope of the CP review as follows:

> Sec. 50.35. Issuance of construction permits.
>
> (a) When an applicant has not supplied initially all of the technical information required to complete the application and support the issuance of a construction permit which approves all proposed design features, the Commission may issue a construction permit if the Commission finds that (1) the applicant has described the proposed design of the facility, including, but not limited to, the principle architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public; (2) such further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration, will be supplied in the final safety analysis report; (3) safety features of components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components; and that (4) on the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and (ii) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility

> can be constructed and operated at the proposed location without undue risk to the health and safety of the public. 17/

Thus, it is readily apparent that even the ultimate CP findings do not contemplate a final resolution of all safety issues. Rather, it is sufficient to find that certain issues can be left for later consideration, that research and development programs are reasonably designed to achieve timely resolution of those issues, and on this basis, there is reasonable assurance that, taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public. 18/

In view of the foregoing, the legal principles which should govern the litigation of Contentions 1, 2, at 3 and the LWA stage can be summarized as follows:

> 1. The analyses of the environmental impacts of postulated accidents should (a) consider the most probable impacts, (b) utilize analyses which provide reasonable estimates of impacts, and (c) employ methods of analyses and assumptions which are as realistic as the state of knowledge will permit.

17/ 10 C.F.R. § 50.35(a).

18/ In contrast to 10 C.F.R. § 50.10(e)(2), the CP finding under 10 C.F.R. § 50.35(a) contemplates a more specific analysis of the facility, rather than findings concerning a reactor of the general size and type proposed.

2. The analysis of site suitability should be based on (a) the available information and review to date, (b) a standard of reasonable assurance, and (c) a reactor of the general size and type proposed.

3. The applicant proceeds at his own risk upon grant of an LWA, or even a CP.

4. The review of safety issues should be undertaken at the CP stage, and even then, unresolved issues can await timely resolution at the OL stage.

5. LWA findings should be predicated upon feasibility of design measures, while detailed review of specific design measures are appropriate for the subsequent CP or OL stages.

II. SPECIFIC POSITIONS IN REGARD TO NRDC CONTENTIONS 1, 2, AND 3

Given the foregoing principles, the Applicants' positions as to the appropriate stage for litigation of each element of Contentions 1, 2, and 3 are as follows:

A. General Position

The Applicants base their positions concerning which parts of Contentions 1, 2, and 3 should be litigated at the LWA stage upon the following central logic: 1. Site suitability - Site suitability findings require: (a) postulation of a radiological source term for site suitability analysis which is appropriate for a reactor of the general size and type proposed (350 MWe LMFBR), (b) assumption of the expected containment leakage rate, and (c) specification of meterological conditions appropriate to the site, in

order to determine that the proposed reactor would conform with the guideline values of 10 C.F.R. § 100.11.[19/] In the context of Contentions 1, 2, and 3, these findings should be based upon the following elements:

> 1) The postulated source term should envelope the consequences associated with accidents considered credible (i.e., design bases accidents). 20/
>
> 2) Hypothetical Core Disruptive Accidents (HCDAs) can be made sufficiently improbable that they need not be considered within the spectrum of design bases accidents.
>
> 3) There is reasonable assurance, based on the available information and review to date, that the site suitability source term postulated by the NRC Staff envelopes design basis accidents for a reactor of the general size and type proposed.
>
> 4) There is reasonable assurance that the containment can be designed such that, given the source term and meteorological conditions appropriate to the site, the proposed facility would conform to the guideline values of 10 C.F.R. § 100.11.

2. Environmental - Environmental findings require that the probable environmental impacts associated with accidents be reasonably estimated using realistic methods of analyses and assumptions.

19/ See 10 C.F.R. § 100.11; 10 C.F.R. § 50.10(e)(2).

20/ See 10 C.F.R. § 100.11, Note 1.

B. Specific Positions

Contention 1a):

1. The envelope of DBAs should include the CDA.

a) Neither Applicants nor Staff have demonstrated through reliable data that the probability of anticipated transients without scram or other CDA initiators is sufficiently low to enable CDAs to be excluded from the envelope of DBAs.

While Contention 1a) broadly questions whether or not HCDAs should be included in the envelope of design basis accidents, the scope of the contention must be limited for the purposes of an LWA decision. It is only necessary for that decision to determine whether there is reasonable assurance that initiators of HCDAs can be made sufficiently improbable that HCDAs are excluded from the envelope of design basis accidents. Specifically, the inquiry should be confined to consideration of whether it is feasible to design CRBRP to make HCDAs sufficiently improbable that they can be excluded from the envelope of design basis accidents for a reactor of the general size and type proposed, in light of the following:

1. The major classes of accident initiators potentially leading to HCDAs.

2. The relevant criteria to be imposed for the CRBRP.

3. The state of technology as it relates to applicable design characteristics or criteria.

4. The general characteristics of the CRBRP design (e.g., redundant, diverse shutdown systems).

Conversely, the scope of inquiry would not include examination of whether the detailed design will meet the criteria imposed. That is properly deferred to the CP or OL stage.

Contention 1b):

1. b) Neither Applicants nor Staff have established that Applicants' "reliability program" even if implemented is capable of eliminating CDAs as DBAs.

(1) The methodology described in the PSAR places reliance upon fault tree and event tree analysis. Applicants have not established that it is possible to obtain sufficient failure mode data pertinent to CRBR systems to validly employ these techniques in predicting the probability of CDAs.

(2) Applicants' projected data base to be used in the reliability program is inadequate. Applicants have not established that the projected data base encompasses all credible failure modes and human elements.

(3) Even if all of the data described in Applicants' projected data base is obtained, Applicants have not established that CDAs have a sufficiently low probability that they may be excluded from the CRBR design bases.

(4) Applicants have not established that the test program used for their reliability program will be completed prior to Applicants'

projected data for completion of construction of the CRBR.

Subpart 1 b) broadly questions Applicants' design, their reliability program, its methods, and its data base as bases for excluding HCDA's from the design basis. For the reasons stated in regard to 1 a) above, this subpart involves matters of detailed design review and safety evaluation which are appropriately considered at to the CP or even OL stages. In addition, the reliability program is a confirmatory R & D Program, examination of which is appropriately considered at to the CP or OL stages.

Contention 2a) - c):

> 2. The analyses of CDAs and their consequences by Applicants and Staff are inadequate for purposes of licensing the CRBR, performing the NEPA cost/benefit analysis, or demonstrating that the radiological source term for CRBRP would result in potential hazards not exceeded by those from any accident considered credible, as required by 10 C.F.R. § 100.11(a), fn. 1.
>
> a) The radiological source term analysis used in CRBRP site suitability should be derived through a mechanistic analysis. Neither Applicants nor Staff have based the radiological source term on such an analysis.
>
> b) The radiological source term analysis should be based on the assumption that CDAs (failure to scram with substantial core disruption) are credible accidents within the DBA envelope, should place an upper bound on the explosure potential of a CDA, and

should then derive a conservative estimate of the fission product release from such an accident. Neither Applicants nor Staff have performed such an analysis.

c) The radiological source term analysis has not adequately considered either the release of fission products and core materials, e.g. halogens, iodine and plutonium, or the environmental conditions in the reactor containment building created by the release of substantial quantities of sodium. Neither Applicants nor Staff have established the maximum credible sodium release following a CDA or included the environmental conditions caused by such a sodium release following a CDA or included the environmental conditions caused by such a sodium release as part of the radiological source term pathway analysis.

Subparts 2a) through 2c) broadly question the validity of the NRC Staff's postulated radiological source term for site suitability analysis. The basic premise of the subpart is that the source term should envelope HCDAs and be derived from a mechanistic analyses which includes HCDAs. As discussed above in connection with their central logic and Contention 1a), Applicants will present their case to show that HCDAs can be excluded from the design basis envelope on the basis of design feasibility. On that basis, if the NRC Staff's postulated source term enveloped design basis accidents, then Contentions 2a), b), and c) would be resolved for the purposes of the LWA. The inquiry would

then be confined to consideration of whether the NRC Staff's source term is likely to envelope the design basis accident envelope, as defined under 1a), for a reactor of the general size and type proposed. In regard to subparts 2a) - . ` and HCDA/source term issues, the scope of discovery and litigation for an LWA decision should follow the scope set forth in regard to Contention 1a).

Contention 2d):

> d) Neither Applicants nor Staff have demonstrated that the design of the containment is adequate to reduce calculated offsite doses to an acceptable level.

This contention broadly questions the adequacy of the containment design. As noted previously, the proper scope of inquiry at the LWA stage encompasses feasibility of design, and not the detailed design review. Thus, for LWA purposes, the contention must be limited to consideration of the feasibility of designing the containment to meet the expected leakage rate assumed for purposes of site suitability analyses under 10 C.F.R. § 100.11. The inquiry must not extend to consider further elements of the containment design, since that is properly considered at the CP or OL stage.

Contention 2e):

> e) As set forth in Contention 8d), neither Applicants nor Staff have adequately calculated the guideline

values for radiation doses from postulated CRBRP releases.

NRDC has represented that this contention duplicates Contention 11d) (old 8d)). Contention 11d) should be litigated at the LWA stage as admitted.

Contention 2f) - h):

> f) Applicants have not established that the computer models (including computer codes) referenced in Applicants' CDA safety analysis reports, including the PSAR, and referenced in the Staff CDA safety analyses are valid. The models and computer codes used in the PSAR and the Staff safety analyses of CDAs and their consequences have not been adequately documented, verified or validated by comparison with applicable experimental data. Applicants' and Staff's safety analyses do not establish that the models accurately represent the physical phenomena and principles which control the response of CRBR to CDAs.
>
> g) Neither Applicants nor Staff have established that the input data and assumptions for the computer models and codes are adequately documented or verified.
>
> h) Since neither Applicants nor Staff have established that the models, computer codes, input data and assumptions are adequately documented, verified and validated, they have also been unable to establish the energetics of a CDA and thus have also not established the adequacy of the containment of the source term for post accident radiological analysis.

These subparts broadly question the computer models, input data, and assumptions used for analyses of

HCDAs for purposes of the Safety Analysis Report and radiological analyses. Matters addressed in the Preliminary Safety Analysis Report (PSAR) are clearly related to the CP.[21/] Thus, the major portion of the subject matter of the subpart is clearly appropriate for the CP stage and/or OL, and not for the LWA stage. As discussed above, it is only necessary for purposes of an LWA decision to consider whether the probable environmental impacts of postulated accidents are reasonably estimated using realistic methods and assumptions. This inquiry need not extend to consider the HCDA analysis codes in detail.

Contention 3a):

> 3. Neither Applicants nor Staff have given sufficient attention to CRBR accidents other than the DBAs for the following reasons:
>
> > a) Neither Applicants nor Staff have done an adequate, comprehensive analysis comparable to the Reactor Safety Study ("Rasmussen Report") that could identify other CRBR accident possibilities of greater frequency or consequence than the accident scenarios analyzed by Applicants and Staff.

This contention broadly questions the need for and adequacy of a probabilistic risk assessment for CRBRP. As discussed in 1a) above, it is sufficient for LWA purposes to address the matter of exclusion of HCDAs from the design

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21/ 10 C.F.R. § 50.34 - 50.35.

basis on the threshold level of feasibility. In contrast, the subject matter in this subpart involves studies which are confirmatory in nature, and detailed design considerations. Both are appropriately considered after the LWA.

> b) Neither Applicants' nor Staff's analyses of potential accident initiators, sequences, and events are sufficiently comprehensive to assure that analysis of the DBAs will envelop the entire spectrum of credible accident initiators, sequences and events.

This issue is appropriate for the LWA, subject to the limitations set forth in 1a) above.

Contention 3c):

> c) Accidents associated with core meltthrough following loss of core geometry and sodium-concrete interactions have not been adequately analyzed.

This issue is appropriate for the LWA, subject to the limitations set forth under subparts 2f), g), and h) above.

Contention 3d):

> d) Neither Applicants nor Staff have adequately identified and analyzed the ways in which human error can initiate, exacerbate, or interfere with the mitigation of CRBR accidents.

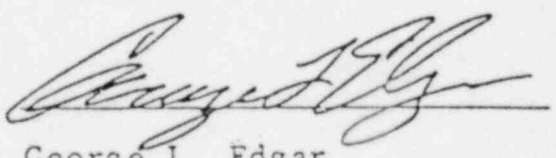
This issue should be considered at the CP, or even the OL stage.

CONCLUSION

The NRC review process, as noted above, encompasses three successive and increasingly more detailed levels of review. In recognition of the limited activity permitted under an LWA, as well as the fact that such activities are undertaken at the Applicants' risk, the Commission regulations regarding the issuance of an LWA require only: 1) a reasonable and realistic review of environmental impacts, and 2) a finding, based on information sufficient to provide reasonable assurance, that the site is suitable from the standpoint of radiological health and safety issues. More detailed findings should be deferred to the CP stage and even then unresolved safety issues can await timely resolution at the OL stage.

Accordingly, Applicants respectfully request that consideration of Contentions 1, 2 and 3 be limited in the manner set forth in II above for purposes of an LWA decision.

Respectfully submitted,



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DATED: April 15, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPORATION TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant)	Docket No. 50-537 (Section 50.12 Request)

CERTIFICATE OF SERVICE

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