08/20/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS
NATURAL RESOURCES DEFENSE COUNCIL AND
SIERRA CLUB'S PETITION FOR DIRECTED CERTIFICATION

I. INTRODUCTION

Following the filing on July 26, 1982 of "Applicants' Motion to Enforce the Hearing Schedule" and on July 27, 1982 of Intervenors' "Motion to Reschedule Hearings," the Licensing Board issued on August 5, 1982 an "Order Following Conference With Parties" (hereinafter Order). That Order provided that 10 C.F.R. § 2.761a did not prevent proceeding to hearing on certain issues prior to the issuance of the Supplement to the Clinch River Breeder Final Environmental Statement (CRBR FES) in final form. Order at 4. Specifically, the Order provided that all parties would proceed on non-environmental site suitability issues, for which a final Site Suitability Report (SSR) had issued in June 1982, in hearings to be conducted beginning the week of August 23, 1982. Id. All environmental issues would await the issuance of the final Supplement to the CRBR FES before hearings would commence on those issues. Id. at 5. No decision on the issues for which evidence is to be taken will be issued until the conclusion of the environmental hearings. Tr. at 737. On

August 9, 1982 the Natural Resources Defense Council, Inc. and the Sierra Club (hereinafter Intervenors or NRDC) filed "Natural Resources Defense Council, Inc. and The Sierra Club Petition For Directed Certification" (hereinafter Petition) which requested the certification of two questions. Those questions are:

1. the proper interpretations of Commission regulations; namely 10 C.F.R. § 2.761a and d § 51.52(a); and

2. the questions of the legal "finality" of a substantially supplemented environmental impact statement pending issuance of the supplement in "final" form.

Petition at 2.

Intervenors argued that 10 C.F.R.§ 2.761a forbids the holding of any LWA hearings prior to the issuance of the "final" Supplement to the CRBR FES and that Section 51.52(a) did not apply to this proceeding. They also argued that the Licensing Board erred in ruling that the 1977 CRBR FES constituted a "final" FES. For the reasons detailed below, the Staff opposes the Intervenors' Petition in its entirety and urges the Appeal Board to refuse certification of the Intervenors' questions.

II. DISCUSSION

A. Standards for Directed Certification

The standards for directed certification to the Appeal Board are well established in Commission practice. In order to have the Appeal Board grant a request for directed certification the party requesting certification must show that the ruling for which certification is requested either 1) threatens the party adversely affected by it with

immediate and serious irreparable harm which, as a practical matter, could not be alleviated by later appeal, or 2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana, Inc. (Marble Hill Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Intervenors have failed to meet either of these standards with respect to the Licensing Board Order of August 5, 1982.

As to the first standard of irreparable harm, Intervenors have failed to make any convincing showing of harm to their interests by the Licensing Board's ruling that evidence on site suitability issues be presented at this juncture in the hearing process. It must be emphasized that this is not a situation where the Licensing Board's decision on site suitability is going to be made in a vacuum. The Licensing Board has made it quite clear that it recognizes that there may be an overlap between some site suitability and environmental portions of the contentions. Tr. at 820. The Licensing Board also made it clear that, providing that the party makes a minimum showing of some rational connection to environmental concerns, the Board would allow testimony in the environmental portion of the hearings which covers contentions also discussed at the site suitability portion of the hearings. Tr. at 822. Significantly, the Licensing Board also pointed out that no decision on site suitability, FES adequacy, or the issuance of an LWA would be forthcoming until all of the environmental hearings are complete. Tr. at 737. Thus, with respect to the question of presenting evidence on some site suitability questions at this time and the environmental issues after the FES is final, the Licensing Board's August 5, 1981 Order does not present NRDC with the

prospect of irreparable harm. Intervenors themselves admit that the Board's rulings which deferred all environmental issues helps alleviate possible harm to them. Petition at 16.

The failure to present any irreparable harm is even more obvious with respect to the second question for certification, which addresses whether the 1977 FES can be considered a "final" environmental statement. Since the Licensing Board has deferred all environmental issues until the present Supplement to the 1977 FES is also made final, this question is essentially mooted as to any effect on NRDC. Certainly, Intervenors have not explained how the Licensing Board's statement, which was only dicta in the August 5, 1982 Order (Order at 4), results in any irreparable harm to them.

With respect to the second standard for certification, NRDC has also failed to present a convincing argument to justify the Appeal Board taking the extraordinary remedy of granting certification. The Board's decision to take evidence relating to the final SSR and to defer hearing evidence on the environmental questions covered in the draft Supplement to the 1977 Clinch River FES does not affect this hearing in a "pervasive" or "unusual" manner. The Board's action is, in effect, nothing more than a ruling as to the order of presentation of issues in this proceeding; the very type of ruling which the Appeal Board has indicated it is reluctant to review through interlocutory certification requests. Pacific Gas and Electric Co. (Diablo Canyon Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Power Authority of the State of New York (Green County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977). The only part of the hearing affected by the Board's ruling is the point in time at which evidence on

certain issues will be presented. Intervenors have not presented anything that would indicate this will pervasively affect either the hearing itself or the result of the hearing. They have failed to demonstrate any way in which the preparation of their case will be pervasively affected by the format established by the Licensing Board. Thus, Intervenors have failed to meet the second standard for the granting of a request for certification to the Appeal Board.

The Appeal Board has repeatedly emphasized, and recently reaffirmed, that directed certification is an extraordinary remedy which will be exercised most sparingly. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, __ NRC __ (August 19, 1982). Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plan, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). Intervenors have failed to make a showing that they meet either of the standards for granting a request for directed certification which were set out in Marble Hill. Thus, they have failed to justify the Appeal Board's injecting itself into questions of evidentiary presentation on which the Licensing Board has already considered arguments and issued a ruling disposing of the issue.

B. Whether the Hearing May Begin Prior to Finalization of the FES Supplement

As discussed above, Intervenors are not entitled to certification of the Licensing Board's August 5, 1982 Order to the Appeal Board. Even if

certification were granted, Intervenors have failed to show error in the Licensing Board's Order.

The Licensing Board's Order only requires that site suitability issues be litigated in the first portion of this hearing. Order at 4. Thus, the question is whether the Board may require the parties to begin the presentation of evidence after the issuance of a draft supplement to an FES, but prior to the finalization of that supplement.

10 C.F.R. § 51.52(a) specifically states:

> (a) In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's Staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public. Any other Party to the proceeding may present its case on NEPA matters as well as on radiological health and safety matters prior to the end of the fifteen (15) day period.

In plain language this provision provides that parties other then the Staff may proceed to present evidence on issues related to both NEPA and radiological health and safety prior to the issuance of an FES. Intervenors' argument as to a possible inconsistency in the above provision (Petition at 12) is irrelevant to the present situation since all parties received the FES and Draft FES Supplement in June, more then 15 days prior to the commencement of the first phase of the LWA hearings. Beyond the fact that the provisions of Section 51.52(a) specifically provide that all parties except the Staff may proceed on all issues, the limitation on the Staff, by its terms, only applies to matters covered in "this part"; that is, the Staff is only limited in its presentation of environmental issues which are covered in Part 51. The site suitability

issues which the Licensing Board has ordered be addressed in the first phase of the hearing are not addressed in Part 51 and the Staff is not, therefore, prohibited by Section 51.52(a) from presenting its evidence on site suitability issues.

10 C.F.R. § 2.761a does not indicate that hearings as proposed by the Licensing Board are inappropriate. The pertinent section of 10 C.F.R. § 2.761a states:

> ... the presiding officer shall, unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by § 50.10(e)(2)(ii) and Part 51 of this chapter as soon as practicable after issuance by the Staff of its final environmental impact statement but no later than thirty (30) days after issuance of such statement . . .

Section 2.761a could be interpreted in either of two ways. First, as Intervenors argue, it might be interpreted as being a prohibition on conducting a proceeding prior to the issuance of the FES. Second, however, it might be interpreted as providing a deadline by which hearings must be initiated. Intervenors argue that the Staff agreed with their interpretation when the Staff stated in its July 30, 1982 Response to Intervenors' motion to reschedule hearings that, ". . . once you have an FES you must begin a hearing as soon as practicable but not later than 30 days after the issuance of the FES." Petition at 8. Intervenors in their present filing underscore the wrong words in the above statement in making their argument. The word which is important in understanding the correct interpretation of both the regulation and the Staffs statement is "must". Both the regulation and the Staff's prior statement emphasize that Section 2.761a gives latest date by which the hearing must be commenced, but say nothing as to whether the hearing may begin sooner.

The question of which of the above interpretations of 10 C.F.R. § 2.761a is correct is not difficult to resolve. It is an elemental principle of statutory interpretation that statutes should be interpreted so as to not be repugnant to each other. Montgomery Charter Service, Inc. v. Washington Metropolitan Area Transit Commission, 325 F.2d 230 (C.A.D.C., 1963); Spencer County v. United States Environmental Protection Agency, 600 F.2d 844 (C.A.D.C., 1979). Under Intervenors' interpretation of 10 C.F.R. § 2.761a, that section and § 51.52(a) would be inconsistent with each other. While Section 51.52(a) clearly contemplates hearings and evidentiary presentations prior to the environmental statement being final, Intervenors' interpretation of 10 C.F.R. § 2.761a is that it would prohibit exactly what Section 51.52(a) allows. On the other hand, the Staff's interpretation avoids this inconsistency. Under the Staff's interpretation, Section 51.52(a) provides the requirements as to the earliest point in time at which the presiding officer can require presentation of evidence on environmental issues, while 10 C.F.R. § 2.761a presents a time limit as to when the presiding officer must commence the taking of evidence. Thus, the Staff's interpretation does not lead to inconsistent regulations as does the Intervenors' interpretation.

Intervenors state that, if the Commission had intended 10 C.F.R. § 2.761a to be only a deadline for the commencement of hearings it could have stated simply that the LWA hearing was to commence no later than 30 days after issuance of the FES. Petition at 6. In fact, the Commission said exactly that. In the Statement of Considerations accompanying the issuance of 10 C.F.R. § 2.761a the Commission stated:

> ... In response to several comments, the amendments adopted provide that separate hearings and decisions on issues covered by Appendix D of Part 50 of the Commission's regulations and site suitability need not be held and issued if the parties agree otherwise or the rights of any party would be prejudiced thereby. Also, unless the parties agree otherwise or the rights of any party would be prejudiced, any separate hearing on issues covered by Appendix D of Part 50 and site suitability must be commenced no later than 30 days after issuance by the regulatory staff of its final environmental impact statement. (emphasis added)

Thus, in the very language which the Intervenors admit would make the Commission's intentions clear, the Commission described 10 C.F.R. § 2.761a in terms of a deadline rather then a limitation.

Additionally, the policy underlying the issuance of 10 C.F.R. § 2.761a is more fully supported by the Staff's interpretation then by the Intervenors' interpretation. As the Intervenors state in their present Petition; "Intervenors do not quarrel with the argument that an underlying policy of the rule is the reduce the time required for hearings." Petition at 9. Proceeding to take evidence on issues for which the final Staff document (the SSR) has been issued serves this purpose and the Staff's interpretation of 10 C.F.R. § 2.761a is consistent with allowing more timely hearings.

Intervenors argue that section 51.52(a) was only meant to apply to some hypothetical hearing on the draft environmental statement and not to hearings on the final environmental statement. Petition at 12. Section 51.52(a) on its face dispells any interpretation that the hearings referred to in section 51.52(a) are only on draft environmental statements. 10 C.F.R. § 51.52(a) provides that the Staff will not present its position on environmental matters until the environmental impact statement is final. Thus, the hearing which Section 51.52(a) addresses

must concern itself with the final enviromental statement. In addition, Section 51.52(a) begins with the statement "[i]n any proceeding in which a draft environmental statement is prepared pursuant to [Part 51] . . .". This introduction to the rule clearly results in the Clinch River proceeding being within the purview of the requirements which follow the above language. Clinch River is a proceeding where a draft enviromental statement has been prepared pursuant to Part 51.

Finally, the Commisison's regulations lend further support to the Licensing Board's determination that site suitability issues can be considered wihout necessitating a concurrent consideration of environmental issues. The Commission's regulations provide at 10 C.F.R. § 2.101(a-1) that an applicant for a construction permit may request an early site review and hearings to determine issues of site suitability. In the Statement of Considerations for that section the Commission states: ". . . finally, the effective rule provides that only one review of site suitability issues could be conducted prior to the full NEPA construction permit review." [emphasis added] (42 Fed. Reg. 22882, April 22, 1976). Clearly, the Comission was indicating in making the above statement that site suitability issues could be litigated separately from NEPA issues. The Licensing Board in Clinch River has not gone even as far as ordering that site suitability be completely separated from environmental issues, but has only ruled that the non-environmental portions of the hearing take place first and the environmental portions later, with both portions being completed prior to any LWA decision.

In sum, the Licensing Board's interpretation of the applicable regulations was correct and Intervenors have presented nothing to show that the Licensing Board was in error in setting the issues for consideration at the first session of hearings.

C. Whether the 1977 FES Constitutes a Final Environmental Statement.

Intervenors also request that the Appeal Board accept certification of the question of whether the 1977 FES constitutes the final environmental statement for this proceeding. An examination of the discussion above reveals that the resolution of the first question for certification does not depend on a resolution of this second question. In its Order the Licensing Board stated that it agreed with the Staff's analysis of 10 C.F.R. § 2.761a (which would make the finality of the FES irrelevent to the resolution of the first question for which Intervenors request certification). Order at 4. Also, the Board's statement as to the finality of the 1977 CRBR FES was preceeded by the statement: "... even if there be any requirement to await commencement of the hearings until after the issuance of the a FES . . ." Order at 4. This statement makes it clear that the Licensing Board did not believe that a "final" FES was necessary to begin hearings, but was only hypothesizing on what would happen if such a requirement did exist.

Additionally, the Board's Order deferred all environmental issues until after the Supplement to the FES is finalized, thus assuring that, whatever definition of a "final" environmental statement is accepted, the final environmental statement will be issued prior to any party being required to address those issues. In view of this situation, it would

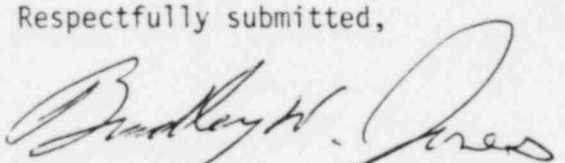
appear that the question of finality is moot or, at best, constitutes a request for the Appeal Board to render an advisory opinion.

For the above reasons the Staff urges the Appeal Board to deny the request for certification of Intervenors' second question concerning the finality of the environmental statement for the Clinch River Breeder Reactor.

III. CONCLUSION

Intervenors have not established, with respect to their questions for certification, either that Intervenors will be irreparably harmed by the Licensing Board's August 5, 1982 Order or that the Order affects this proceeding in a pervasive or unusual manner. Further, an examination of the arguments presented by Intervenors reveals that the Licensing Board's interpretation of 10 C.F.R. § 2.761a and 10 C.F.R. § 51.52 was correct and consistent with stated Commission policy. Finally, the questions of the finality of the 1977 Clinch River Breeder Reactor FES is raised only in dicta in the Licensing Board's Order, and is not appropriate for judicial review through directed certification. For the above reasons the Staff urges the Appeal Board to deny the Intervenors' Petition for Certification in its entirety.

Respectfully submitted,



Bradley W. Jones
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Dated at Bethesda, Maryland
this 20th day of August, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby ceritfy that copies of "NRC STAFF'S RESPONSE TO INTERVENORS NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB'S PETITION FOR DIRECTED CERTIFICATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by two asterisks, hand delivery, this 20th day of August, 1982:

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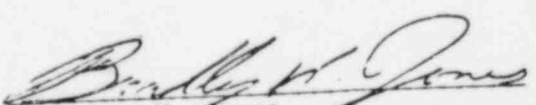

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