UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF 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"

Bradley W. Jones
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July 12, 1982

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I. INTRODUCTION

On June 11, 1982 the Natural Resources Defense Council, Inc. and Sierra Club (Intervenors) filed the above-styled request with the Commission. That pleading (hereinafter referred to as Certification Petition) argues that the Commission should direct certification to it of the question of whether limitations put on the litigation of contentions in the LWA hearing contained in the Licensing Board's April 22, 1982 Order were incorrect. For the reasons discussed below, the Staff believes that the Licensing Board's rulings were correct and certification should be denied.

II. BACKGROUND

On October 11, 1974, the Project Management Corporation (PMC) and the Tennessee Valley Authority (TVA), hereinafter referred to as Applicants, submitted to the Atomic Energy Commission (AEC) an application for a

construction permit and a Limited Work Authorization (LWA-1)[1/] under Section 104(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq. Extensive discovery and prehearing activities took place after filing of the application until April 25, 1977 when the Licensing Board suspended the proceeding at the request of Applicants. On January 18, 1982 the Licensing Board, at the request of Applicants, and without objection, lifted the suspension and resumed consideration of the application including the request for an LWA-1.

On April 5 and 6, 1982, the Licensing Board heard arguments on the Revised Statement of Contentions and Bases which had been filed by the Intervenors on March 5, 1982. The Licensing Board ruled on the revised contentions in its April 14, 1982 Order, admitting certain contentions. No objections were filed to this Order and the Certification Petition is not directed toward the April 14 Order. Arguments were heard on April 20, 1982 as to which issues within the first three admitted contentions should be deferred for purposes of discovery and litigation until after the LWA-1 evidentiary hearing and Partial Initial Decision. Intervenors argue that all of the issues within its first three contentions substantially address adequacy of the proposed CRBR design and, therefore, should be litigated at the LWA-1 hearing. Certification Petition. On the other hand, Applicants argue that they could demonstrate, in the LWA-1 phase of licensing, the feasibility of designing the CRBR so that hypothetical core disruptive accidents (HCDAs) can be sufficiently limited in their

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1/ Under agency practice the site preparation activities under 10 C.F.R. § 50.10(e)(1) and (2) have been designated as LWA-1 activities and installation of structural foundations, etc. under Section 50.10(e)(3) have been designated LWA-2 activities.

probability of occurrence as to exclude them from the design basis and, based upon this premise, Applicants contend it is not appropriate to deal with all issues embraced by the first three contentions in the LWA-1 phase. Applicants assert that their presentation in connection with their LWA-1 request would be limited to a showing based on a reactor of the general size and type proposed, in light of certain factors:

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; and

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

Tr. 489-91 (April 20, 1982 Prehearing Conference).

In its April 22, 1982 Order the Licensing Board ruled that certain issues could be litigated at the LWA-1 stage subject to being limited as proposed by Applicants.[2/] The Board deferred other portions of admitted contentions to the CP stage.[3/] The Licensing Board gave as the basis for the above limitations the position that "inquiry at the LWA stage is

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2/ Contentions 1(a) and 2(a)-2(h) which question whether CDA has been properly excluded from design basis accidents; and Contentions 3(b)-3(d) which question whether accidents other than design basis accidents have been sufficiently considered could be litigated at the LWA stage subject to being limited as specified by the Licensing Board.

3/ Contention 1(b), which dealt with the specifics of the Applicants' design was deferred until the CP stage since the Applicants had indicated they would not rely on the design specifics in meeting their burden in the LWA hearing. Order at 5. Contention 3(a), which broadly questions the need for and adequacy of a probabilistic risk assessment comparable to the Rasmussen Report, was similarly deferred to the CP hearing based on Applicants' representation that they would not rely on any analyses comparable to the Rasmussen study in support of their application for an LWA-1. April 22, 1982 Order at 2-6.

limited to consideration of whether it is feasible to design CRBR 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." April 22, 1982 Order at 2.

Intervenors did not file objections to, or seek reconsideration by the Licensing Board of its April 22 Order nor did they seek certification from the Licensing Board for Appeal Board or Commission review of the April 22 Order. Intervenors now, however, seek to have the Commission direct the Licensing Board to certify to the Commission the ruling in the Licensing Board's April 22, 1982 Order to exclude explicit design consideration of HCDAs at the LWA-1 stage. Certification Petition at 6. Interlocutory review is sought under 10 C.F.R. §2.718(i) and the Commission's inherent supervisory authority over the conduct of NRC adjudications. Certification Petition at 53-54

The Certification Petition should be denied.

III. DISCUSSION

Intervenors' request is for interlocutory review by the Commission. Interlocutory review of a licensing board ruling through directed certification is discretionary and infrequently granted.[4/] A party seeking directed certification of an interlocutory issue must demonstrate that the Board's action "either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by later appeal or (b) affects the basic structure

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4/ See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plants, Units 1 and 2), ALAB-675, 15 NRC ____ Slip op. at 9 (May 17, 1982).

of the proceeding in a pervasive or unusual manner." Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693,694 (1979). Moreover, in order to justify Commission review of an interlocutory matter where relief has not first been requested from the Appeal Board, Intervenors must demonstrate extraordinary circumstances justifying such exceptional Commission action. Pennsylvannia Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980).

Intervenors claim that the Board's rulings on the scope of the LWA-1 proceeding will result in a "severely constricted record" that will not enable the Board to make proper LWA-1 findings in a rational manner. Certification Petition at 54. They assert that the basic structure of the proceeding will be pervasively affected in that Intervenors will be prevented from making their affirmative case on NEPA and site suitability issues. Id. Intervenors argue that the instant question presents the Commission with the significant issue of law or policy as to whether the same findings required for issuance of an LWA-1 for a light water reactor are appropriate for a "first-of-kind" project such as the CRBR.[5/] Certification Petition at 55.

A. Intervenors Have Failed to Demonstrate that Interlocutory Review Should Be Granted.

Intervenors have failed to meet the standard for granting interlocutory review because they have failed to demonstrate they are threatened with serious and immediate harm which cannot be remedied on appeal.

5/ Id., citing Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-558, 11 NRC 533, 536 (1980); See South Carolina Electric Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 15 NRC ___, Slip op. at 17 (December 14, 1981).

Although Intervenors repeatedly assert that the Board's ruling seriously impacts Intervenors' ability to argue their case, they offer no concrete showing of the asserted harm.

First, this is not a situation where Intervenors will not have an opportunity to argue as to whether the specific design at the CRBR is adequate. Intervenors' contentions as to adequacy are already admitted and can be litigated fully at the CP stage. Intervenors have failed to present any basis for concluding they are irreparably harmed by having to litigate certain issues at the CP stage rather than at the LWA-1 stage.

Second, Intervenors have not been denied the opportunity to litigate those aspects of their contentions which are relevant to matters that the Applicants, the party with the burden of proof, put in issue in Applicants' attempt to satisfy the standards applicable to an LWA-1. As to Intervenors' argument that the Board's ruling would leave it with inadequate information to challenge Applicants' case, the Staff believes there is a substantial body of technical information available concerning the LMFBR, in general, and CRBR, in particular.[6/] This includes documented consideration of alternative LMFBR design characteristics,[7/] LMFBR siting factors[8/], and the possible impacts associated with postulated accidents (including HCDAs) beyond the design basis.[9/] There has

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6/ See, e.g., LMFBR FES (December 1975) CRBR FES (February 1977) updated CRBR Site Suitability Report (June 1982).

7/ LMFBR FES § 4.2.5

8/ Id. § 4.2.2

9/ LMFBR FES, § 4.2.7.8; CRBR FES, Chapter 7.

also been an extraordinary amount of discovery. In addition, a complete update of the FES for the CRBR will be issued prior to the commencement of the LWA-1 hearing. Despite the impression one might get from Intervenors' Petition, the FES which has been prepared for Clinch River, and which is being updated, is not for some nebulous theoretical reactor. The analysis in the FES is for the general design features of the specific Clinch River plant. While Intervenors would have it proved that the design is adequate to meet all design criteria at the LWA state, the level of certainty they desire would frustrate the ability to ever issue an LWA prior to completion of the safety review. Such a result is inconsistent with the purpose of 10 C.F.R. § 50.10(e) to allow restricted site prepration activities. The available information provides a substantial factual basis upon which the adequacy of Applicants' case in support of its LWA-1 request can be assessed and challenged.

Third, Intervenors provide no explanation as to why any harm to them cannot be adequately remedied on appeal. The grant of an LWA-1 is subject to appeal. Intervenors' presentation fails to provide a basis for departing from normal procedure where questions as to the actual conduct of a proceeding by a licensing board, including questions such as are involved here which deal with the scope of evidentiary presentations, are not subject to interlocutory appeal, but must await the normal agency appellate process. Moreover, even if the Licensing Board were to grant an LWA-1 on the basis of evidence which Intervenors believe is inadequate to satisfy NEPA, Intervenors have made no showing why the Commission's appellate review process, and the procedural protections it affords, would be inadequate to rectify any serious error.

In addition to their failure to demonstrate serious irreparable harm, Intervenors have not established that an interlocutory review is warranted under the cited standard because they have failed to show that the Licensing Board's ruling affects the basic structure of this CRBR construction permit proceeding in either a "pervasive" or "unusual" manner. On the contrary, the ruling preserves the purpose of an LWA-1 by which limited preconstruction activities can be conducted at an applicant's risk before completion of the radiological safety review which must precede the grant of a construction permit.[10/] There is nothing unusual about a phased consideration of substantive licensing requirements.[11/] It is not the Board's decision which is "unusual" in the present context, but the departure from the LWA-1 rule urged by Intervenors.

The grant of an LWA-1 does not guarantee eventual receipt of a construction permit. The risk that preconstruction work authorized under an LWA-1 may prove unnecessary should a construction permit be denied is borne by the Applicant. 10 C.F.R. § 50.10(e)(4); 39 Fed. Reg. 14506 (April 24, 1974). Moreover, the LWA hearing may be reopened on NEPA or site suitability grounds to consider new information, if necessary, on appropriate motion. Id.

In sum, the Licensing Board's Order does not deny Intervernors the opportunity to fully litigate their contentions in the CP proceeding nor to litigate in the LWA-1 proceeding those aspects of their contentions which relate to the standards for an LWA-1. Nor have they alleged any

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10/ See, Statement of Consideration, 39 Fed. Reg. 14506 (April 24, 1974).

11/ Cf. Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18 (1980) (early site review).

other harm which cannot be cured by the Commission's appellate process. Thus, they have not met the standards for interlocutory review. Additionally, Intervenors have not demonstrated any extaordinary circumstances justifying the Commission's accepting this interlocutory review where relief has not first been sought from the Appeal Board.

Rather than focusing on the requirements for granting interlocutory review, Intervenors' petition focuses on the argument that, under NEPA, the Licensing Board in the Clinch River Proceeding must conduct a safety review of the Clinch River Breeder Reactor in order to satisfactorily complete the environmental review. They make the same basic argument with respect to the site suitability determination required by 10 C.F.R. § 50.10(e)(2). An examination of the LWA rule and NEPA, as they apply to Clinch River, does not support Intervenors' assertions.

B. Neither the Commission's LWA Regulations nor NEPA Require a Safety Review of CRBR at This Time

In order for the Licensing Board to authorize issuance of an LWA-1 the Board must:

1) make the required NEPA findings[12/] and

2) determine that based upon the available information and review to date, there is reasonable assurance that the site is suitable for the facility of the size and type proposed.

12/ 10 C.F.R. § 50.10(e)(2) requires the Board to make all the findings required by 10 C.F.R. § 51.52(b) and (c). 10 C.F.R. § 51.52(b) and (c) requires the presiding officer to make findings as to: (1) matters in controversy between the parties, (2) whether the requirements of section 102(2) (A), (C) and (E) of NEPA and 10 C.F.R. Part 51 have been met, (3) the final balance between conflicting factors in the record, (4) the ultimate cost/benefit balance, (5) whether in accordance with Part 51, the construction permit should be issued and, (6) in an uncontested proceeding, whether the Staff's NEPA review is adequate.

In Public Service Company of Oklahoma (Black Fox Station, Unit 1 and 2), ALAB-573, 10 NRC 775 (1979), the Appeal Board addressed the scope of the NEPA review required under the LWA rule. The Appeal Board, citing NRDC v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972), stated that while Section 102 of NEPA, which must be satisfied under the LWA provisions, required that agencies explore the environmental ramifications of their proposed actions to the fullest extent possible, that direction was subject to a rule of reason. The Appeal Board also stated that the rule of reason applied not only to the consideration of alternatives to the proposed action, but applied generally to the entire NEPA evaluation. Id. at 779. In Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-367, 5 NRC 92, 102 (1977), the Appeal Board indicated that it is appropriate, in an environmental review for analyzing alternatives to the proposed action, environmental effects is to examine the feasibility of the proposed action and alternatives to the action.

In its April 22 Order in this proceeding, the Licensing Board ruled that feasibility of eliminating HCDAs is an appropriate area of concern in the LWA proceeding. Nonetheless, the Licensing Board clearly recognized and went on to specifically point out that ultimately, in order to make the required NEPA findings, they must have sufficient information to conclude that the cost/benefit analysis reasonably addresses the environmental effects of CRBR. April 22, 1982 Order at 2-3. The Intervenors do not appear to disagree as to the use of the above standard, rather, the focus of their position on both the NEPA and site suitability determinations seems to be on the factual determination as to what information is necessary to make those determinations. Certification Petition at 3-5.

Intervenors' argument fails to recognize that the burden is on the Applicants to demonstrate that the design assumptions which form the basis for their evaluations of environmental effects, and which are relied upon by the Staff in the FES, are reasonable assumptions. That is, they have the burden to show that it is reasonable for the environmental analysis to assume that the probability of a HCDA can be reduced to a level where it need not be considered a design basis accident. Applicants have stated that they do not intend to rely on CRBR's specific design characteristics to demonstrate the reasonableness of the assumptions made. Rather, they intend only to discuss the CRBR design in general, while establishing design criteria for the plant and demonstrating that the state of technology will allow a meeting of that criteria. Applicants April 15, 1982 Statement of Position at 13-14. Applicants apparently believe that on the basis of a discussion concerning the general design criteria, and the state of technological capability to meet such criteria, that an adequate demonstration can be made concerning the probability of HCDAs to satisfy NEPA needs, without the need for specific design details. The fact that the burden is on Applicants to make the showing of reasonableness in the environmental analysis cannot be understated. If the state of technology is so sparse as Intervenors claim, then it would follow that Applicants will have difficulty meeting their burden. If, after the evidence is presented, Applicants have not demonstrated that the environmental review reasonably assesses environmental impacts by using general information about the

state of technology, then the Board must deny the LWA request. If Applicant makes the required showings the LWA-1 would be authorized by the Licensing Board. In either event, the Licensing Board's ruling as to the scope of the LWA-1 hearing does not change the finding which the Licensing Board must make as to whether the environmental effects of CRBR have reasonably been assessed.

The principal flaw in Intervenors' argument is that the very determination which must be made by the Licensing Board in determining the adequacy of the environmental review is whether the Applicants have presented adequate information for the Licensing Board to conclude that the information and assumptions in the FES are reasonable and provide a reasonable basis for concluding that the FES adequately assesses the environmental effects of CRBR. Intervenors, by their overly restricted view of the NEPA process,[13/] would require the Licensing Board to rule, before receiving evidence, on the ultimate question of whether Applicants can present sufficient evidence to show they have reasonably

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13/ Intervenors argue that because this is to be the final NEPA review the Licensing Board must resolve design issues whose resolution might conceivably change the environmental effects. Certification Petition at 23-25. In spite of Intervenors' argument to the contrary, the fact that the safety review could reveal an inadequacy in the design, which might change the environmental effects of the project, does not justify delaying completion of the NEPA process until safety review issues are resolved. The Commission pointed out in the Statement of Consideration accompanying the LWA rule that "[t]he rules adopted herein would not preclude the presiding officer from reopening the NEPA... hearing after a grant of authorization under § 50.10 (e) to consider new information... 39 Fed. Reg. 14506 (April 24, 1974). The Licensing Board noted the possibility that resolution of design issues could result in significant information justifying a reopening of the NEPA review. April 22, 1982 Order at 4, Tr. 509-516 (April 20, 1982 Prehearing Conference).

addressed the environmental effects of CRBR. Having lost this argument before the Licensing Board,[14/] they now seek to have the Commission, also in the absence of an evidentiary record, so rule. Intervenors have presented no basis for concluding the resolution of this issue is appropriate now, rather than when the Licensing Board has a full evidentiary record on which to base its conclusions as to the appropriateness of applying the LWA rule to the CRBR.

C. Timeliness

Although the regulations do not provide any time limit in which to file or respond to a petition for certification, the Intervenors' request is, in effect, an appeal from the Licensing Board's April 22, 1982 Pre-Hearing Conference Order. Intervenors admit that they did not comply with the provisions governing objections to prehearing conference orders contained in 10 C.F.R. § 2.752(c). Certification Petition at 56. That rule provides time limits for filing objections to prehearing conference orders and provides that in ruling on objections

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14/ In this connection, it should also be noted that the Licensing Board specifically rejected one of Intervenors' contentions which sought to litigate whether the LWA rule should apply to a first of a kind reactor. In rejecting that contention the Licensing Board stated that ". . . [T]he denial of this contention as a pleading does 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 record. The contention as framed presents an ultimate legal question for the Board following the taking of evidence, rather than a factual issue or pleading." April 14, 1982 Order at 3; see also Tr. 98 (April 5-6, 1982 prehearing conference). Intervenors' argument as to the need to address the specific CRBR information at this time is nothing more than a restatement of their challenge to the regulations.

to a prehearing conference order the Board may review the order in consideration of the objection and certify matters raised therein pursuant to 10 C.F.R. § 2.718(i). Successful objections from Intervenors' standpoint could have obviated any necessity for immediate appellate review[15/] and, at a minimum, permitted the Licensing Board the benefit of Intervenors' extensive arguments.

Intervenors argue that objections would have been futile, that this failing should be overlooked in light of additional relevant information assertedly acquired by them since the Board's Order, and that the Commission has subsequently achieved its full complement of Commissioners. Certification Petition at 56-57. Intervenors also stress the importance of present Commission consideration of the scope of an LWA in the CRBR context. Id. at 57. As discussed below, these reasons are unavailing to justify Intervenors' failure to first interpose objections to the subject order or otherwise seek interlocutory review on a timely basis.

Intervenors litigative position in the certification petition on the scope of an LWA-1 in this CRBR proceeding is the same as that advanced during the April 20, 1982 prehearing conference which gave rise to the Board's April 22 Order. Despite the subsequent acquisition of information which Intervenors contend reinforce that position, if they felt aggrieved by the decision, they should and could have taken the necessary steps to rectify the situation on a timely basis.

15/ Cf. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 728-29 (1975).

Further, it is scarcely a valid excuse for deferring a timely request for interlocutory review that the Commission had only four members at the time. That situation had existed for some time during which Commission adjudicatory and non-adjudicatory functions were carried out on an uninterrupted basis. This situation has occurred on past occasions. A party cannot unilaterally assign a time period within which appellate relief is sought without destroying the orderliness of the administrative process. The Certification Petition should not be permitted to circumvent the time limits prescribed for more appropriate procedural remedies, by attempting to invoke the extraordinary remedy of directed Commission interlocutory review.

IV. CONCLUSION

In sum, Intervenors have not demonstrated that the Commission should accept Intervenors interlocutory appeal because Intervenors have not shown they will suffer immediate and serious irreparable harm from the Licensing Board's ruling. Intervenors will not suffer irreparable harm because 1) they may fully litigate the issues contained in their contentions, which have been deferred, at the CP stage of the proceeding, 2) Intervenors are not restricted in arguing whether the evidence presented by Applicant at the LWA-1 stage meets the requirements of 10 C.F.R. § 50.10(e), and 3) there is no basis for concluding that, if any errors exist in the Licensing Board's rulings, those errors cannot be adequately remedied through formal appellate procedures.

Further, the basis advanced by Intervenors to justify interlocutory review calls for the Commission to prematurely resolve the factual

question of whether Applicants have met their burden to show that the environmental analysis reasonably assesses the environmental effects of CRBR, prior to the Applicants presenting their case on that questions.

For the above reasons the Staff believes the Intervenors Certification Petition, which requests an interlocutory review of the Licensing Board's April 22, 1982 Prehearing Conference Order, should be denied.

Respectfully submitted,

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of July, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF 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" 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, this 12th day of July, 1982:

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