

09/29/82

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 MOTION FOR SUMMARY  
DISPOSITION OF INTERVENORS' CONTENTIONS

The NRC Staff hereby moves for summary disposition of Natural Resources Defense Council, Inc., and Sierra Club's ("Intervenors") Contentions 6 and 7a(1), pursuant to 10 C.F.R. § 2.749. The Staff submits that the attached Staff affidavits and supporting documents demonstrate that there are no factual issues requiring adjudication and that dismissal of the Intervenors' Contentions is warranted as a matter of law. A discussion of the operative legal principles underlying summary disposition follows.

SUMMARY DISPOSITION PROCEDURES

The Commission's regulations provide that summary disposition of a matter at issue can be obtained on the pleadings if the moving papers demonstrate that there is no genuine issue of material fact and that the movant is entitled to a favorable decision as a matter of law. 10 C.F.R. § 2.749(d).

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The summary disposition procedures set forth in 10 C.F.R. § 2.749 are analogous to the summary judgment procedures contained in Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). The use of summary disposition has been encouraged by the Commission and the Appeal Board to eliminate litigation over contentions for which an intervenor has failed to establish the existence of a genuine issue. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241 (1973) aff'd sub nom BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-51 (1980). Although the burden of showing the absence of any genuine issue of fact is upon the moving party, and the record will be viewed in the light most favorable to the party opposing the motion,<sup>1/</sup> "a party opposing the motion...must set forth specific facts showing that there is a genuine issue of fact." 10 C.F.R. § 2.749(b); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). "Mere allegations or denials" will not suffice. Id. Perry, supra, n. 2, 6 NRC at 754; Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975). Any statement of material fact(s) required by 10 C.F.R. § 2.749(a) which is uncontroverted is deemed to be admitted. 10 C.F.R. § 2.749(a); Pacific Gas and Electric Co. (Stanislaus

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<sup>1/</sup> Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

Nuclear Project, Unit No. 1), LBP-77-45, 6 NRC 159, 163 (1977). The Staff notes the Joint Intervenors to date have only made mere allegations, having failed during discovery to identify any witnesses they will present on the admitted contentions. Joint Intervenors Response to NRC Interrogatories, March 16, 1982.

Finally, to draw on federal practice, the Supreme Court has pointed out that Rule 56 of the Federal Rules of Civil Procedure does not permit plaintiffs to get to a jury on the basis of the allegations in the complaints coupled with the hope that something can be developed at trial in the way of evidence to support the allegations. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 389-90 (1968). Similarly, a plaintiff may not defeat a motion for summary judgment on the hope that on cross-examination the defendants will contradict their respective affidavits. To permit trial on such a basis would nullify the salutary purpose of Rule 56 which permits the elimination of unnecessary and costly litigation where no genuine issues exist. See, Orvis v. Brickman, 95 F. Supp. 605, 607 (1951), aff'd, 196 F.2d 762 (D.C. Cir. 1952), cited approvingly in River Bend supra, 1 NRC at 248.

In light of these principles, and for the reasons set forth below, the Staff urges the Board to grant summary disposition Intervenors' Contentions 6 and 7a(1). If the Board is unable to grant summary disposition of these contentions in their entirety, summary disposition

should be granted on any portions of such contentions as to which there is no genuine issue of material fact.<sup>2/</sup>

#### Discussion

##### A. Contention 6(a) and (b)

As evidenced by the statement of material facts and affidavits attached to this pleading, the Staff has revised its 1977 FES evaluation of the Clinch River Breeder Reactor (CRBR) fuel cycle to be specific to the CRBR fuel cycle. Contention 6(a) and (b) argues that the fuel cycle analysis in the 1977 FES is inadequate because that analysis was not for the specific CRBR. (See Material Fact A1). The Staff will now include a CRBR-specific analysis of the fuel cycle in its FES Supplement. Furthermore, Applicants have included a CRBR-specific analysis of the fuel cycle in the ER. (See Material Facts A3-14). Thus, since the underlying premise for Contention 6(a) and (b) has been removed, there is no material issue of fact remaining and the holding of an evidentiary hearing is unnecessary to resolve Contentions 6(a) and (b).

##### B. Contention 7(a)(1)

Contention 7(a)(1) questions whether CRBR has been demonstrated to be able to achieve its programmatic objectives. The timing objective in

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<sup>2/</sup> Section 2.749(a) authorizes a "decision by the presiding officer in that party's [movant's] favor as to all or any part of the matters involved in the proceeding." See Public Services Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), LBP-77-46, 7 NRC 167 (1977); Toledo Edison Company (Davis-Besse Nuclear Power Station), LBP-73-30, 6 AEC 691, 699 (1973).

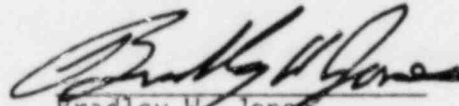
the LMFBR programmatic impact statement for the CRBR has been modified since 1977 and the timing objective for CRBR is now to have the plant built and operating as expeditiously as possible. (See Material Facts B2-4). The Commission has stated that the timing objective for CRBR contained in the LMFBR programmatic impact statement is to be taken as a given. CLI-76-13, 4 NRC 67, 92 (1976). The present timing objective differs from the general timing objective in the original LMFBR programmatic statement, where LMFBR development was to be ready for development of commercial size reactors in the 1990's. (Material Fact B.2). Since the timing objective of CRBR is now given as completing the project as expeditiously as possible, and since no alternative to the CRBR which could be completed more expeditiously has been proposed, no basis for Intervenor's Contention 7(a)(1) remains to be litigated. Thus, based on the statements of material facts, affidavits and attachments to this pleading, there is remaining no material issue of fact concerning Contention 7(a)(1) and the holding of an evidentiary hearing is unnecessary to resolve Contention 7(a)(1). The Staff, therefore, moves for summary disposition in the Staff's favor on Intervenor's Contention 7(a)(1).

#### Conclusion

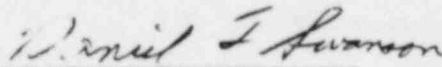
For the reasons set forth above, the Staff urges the Board to grant the Staff's Motion for summary disposition of NRDC, et al's, Contentions

6 and 7(a)(1) pursuant to 10 CFR § 2.749(d) and to dismiss these contentions from the CRBR licensing proceeding.

Respectfully submitted,



Bradley W. Jones  
Counsel for NRC Staff



Daniel T. Swanson  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 29th day of September, 1982.

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NUCLEAR REGULATORY COMMISSION

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UNITED STATES DEPARTMENT OF ENERGY  
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TENNESSEE VALLEY AUTHORITY

(Clinch River Breeder Reactor Plant)

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MATERIAL FACTS AS TO WHICH THERE IS  
NO GENUINE ISSUE TO BE HEARD

A. Contention 6(a) and (b)

1. Contention 6(a) and (b) states:

6. The ER and FES do not include an adequate analysis of the environmental impact of the fuel cycle associated with the CRBR for the following reasons:

- a) The ER and FES estimate the environmental impacts of the fuel cycle based upon a scale-down of analyses presented in the LMFBR Program Environmental Statement and Supplement for a model LMFBR Program Statement and Supplement are based upon a series of faulty assumptions.
- b) The impacts of the actual fuel cycle associated with CRBR will differ from the model LMFBR and fuel cycle and analyzed in the LMFBR Program Environmental Statement and Supplement. The analysis of fuel cycle

impacts must be done for the particular circumstances applicable to the CRBR. The analyses of fuel cycle impacts in the ER and FES are inadequate since:

- (1) The impact of reprocessing of spent fuel and plutonium separation required for the CRBR is not included or is inadequately assessed;
- (2) The impact of transportation of plutonium required for the CRBR is not included, or is inadequately assessed;
- (3) The impact of disposal of wastes from the CRBR spent fuel is not included, or is inadequately assessed;
- (4) The impact of an act of sabotage, terrorism or theft directed against the plutonium in the CRBR fuel cycle, including the plant, is not included or is inadequately assessed, nor is the impact of various measures intended to be used to prevent sabotage, theft or diversion.

2. The 1977 FES did not include an analysis of the CRBR-specific fuel cycle. (1977 FES, Sections 5.7.2.7, 11.11, and Appendix D).
3. The draft FES Supplement contains a CRBR-specific fuel cycle analysis. (draft FES Supplement, Section 5.7.2.7 and Appendix D).
4. Although specifics of the analysis of the fuel cycle in the draft FES Supplement could conceivably change for the final FES



Supplement, a CRBR-specific fuel cycle analysis will appear in the final FES Supplement. (Affidavit of Lowenberg at para. 4)

5. The draft FES Supplement analyzes the environmental impact of the reprocessing of spent fuel for CRBR. (Draft FES Supplement, Section 5.7.2.7 and Appendix D).

6. Although specifics of the analysis of the reprocessing of spent fuel in the draft FES Supplement could conceivably change for the final FES Supplement, a CRBR specific analysis of the reprocessing of spent fuel will be included in the final FES Supplement.

(Affidavit of Lowenberg at paras. 4, 5)

7. The draft FES Supplement analyzes the impact of transportation of plutonium required for the CRBR. (Draft FES Supplement, Section 5.7.2.6 and Appendix D, Sections D.2.3 and D.2.4.5)

8. Although the specifics of the analysis of the impacts of transportation of plutonium could conceivably change for the final FES Supplement, a CRBR specific analysis of the impacts of transportation of plutonium will be included in the Final FES Supplement

(Affidavit of Lowenberg at paras. 4, 5)

9. The draft FES Supplement analyzes the environmental impact of the disposal of wastes from CRBR spent fuel. (Draft FES Supplement, Section 5.7.2.7 and Appendix D)

10. Although the specifics of the analysis of the disposal of wastes from CRBR spent fuel could conceivably change for the final FES Supplement, a CRBR-specific analysis of the disposal of wastes from CRBR spent fuel will be included in the final FES Supplement.

(Affidavit of Lowenberg at paras. 4, 5).

11. The impacts of sabotage, terrorism or theft against plutonium in the CRBR fuel cycle, including the impacts of measures to prevent sabotage, terrorism or theft, is included in the Draft FES Supplement. (Affidavit of Lowenberg at para. 5; Draft FES Supplement, Section 7.3 and Appendix E).

12. Although the analysis of the impacts of sabotage, terrorism or theft against plutonium in the CRBR fuel cycle, including the impacts of measures to prevent sabotage, terrorism or theft, could conceivably change for the final FES Supplement, a CRBR specific analysis of the impacts of sabotage, terrorism or theft against plutonium in the CRBR fuel cycle, including the impacts of measures to prevent sabotage, terrorism, or theft, will be included in the final FES Supplement. (Affidavit of Lowenberg at para. 5)

13. Differences between the model LMFBR and its associated fuel cycle and the CRBR and its associated fuel cycle will be accounted for in the final FES Supplement by conducting fuel cycle environmental analyses for the CRBR specific fuel cycle. (Affidavit of Lowenberg at para. 6)

14. The Applicants' Environmental Report also contains an analysis of the fuel cycle which is specific to CRBR. (Affidavit of Lowenberg at para. 7)

15. Based on the material facts set forth in A1-14 above and the supporting affidavit of Mr. Lowenberg attached to this Motion, the Staff contends there is no material issue of fact remaining and the holding of an evidentiary hearing is unnecessary to resolve contentions 6(a) and (b).

B. Contention 7(a)

1. Contention 7(a)(1) states:

7. Neither Applicants or Staff have adequately analyzed the alternatives to the CRBR for the following reasons:

a) Neither Applicants nor Staff have adequately demonstrated that the CRBR as now planned will achieve the objectives established for it in the LMFBR Program Impact Statement and Supplement.

(1) It has not been established how the CRBR will achieve the objectives there listed in a timely fashion.

2. Originally, WASH-1535 provided the general timing objective of having LMFBR development ready for commercial size reactors by the 1990's (WASH-1535, Volume I, Section 1.1.4.3.)

3. ERDA-1535, which incorporated WASH-1535 by reference, also provides that the reference plan for CRBR called for the plant to reach criticality by 1983. (ERDA-1535, Volume I, p. I.6)

4. The latest Supplement to the LMFBR programmatic Final Environmental Impact Statement provides that CRBR's timing objective is that the CRBR be completed "as expeditiously as possible." (May 1982 DOE Supplement to ERDA-1535, p. 43)

5. The 1977 FES for CRBR provided for operation of CRBR beginning in 1983, with commercialization of breeder operation beginning in 1986. (NUREG-0139, p. 8-8)

6. The proposed FES Supplement of July 1982 notes that the ERDA Programmatic Statement, as amended, provides for completion of CRBR as expeditiously as possible. (Draft Supplement to NUREG-0139, p. 8-4)

7. At this time no alternative demonstration breeder reactor proposal could be developed which would meet the programmatic objectives of the LMFBR demonstration plant in a more timely fashion ("as expeditiously as possible") than the CRBR plant. (Affidavit 8 Leech, para. 6)

8. Based on the material facts set forth in B1-7 above and the supporting affidavit and documentation attached to this Motion, the Staff contends there is no material issue of fact remaining and that the holding of an evidentiary hearing is unnecessary to resolve contention 7(a)(1).