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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Marshall E. Miller, Chairman
Gustave A. Linenberger, Jr.
Dr. Cadet H. Hand, Jr.

In the Matter of)
)
)

UNITED STATES DEPARTMENT OF ENERGY)
PROJECT MANAGEMENT CORPORATION)
TENNESSEE VALLEY AUTHORITY)

(Clinch River Breeder Reactor Plant))
)
)

Docket No. 50-537

INTERVENORS' ANSWER TO NRC STAFF'S MOTION FOR SUMMARY
DISPOSITION OF INTERVENORS' CONTENTIONS

On September 30, 1982, Intervenors Natural Resources Defense Council, Inc. (NRDC) and the Sierra Club received "NRC Staff Motion for Summary Disposition of Intervenors' Contentions." The Staff's Motion seeks summary dismissal of Intervenors' Contentions 6 and 7(a)(1) pursuant to 10 CFR §2.749. Intervenors hereby answer the Staff's Motion for Summary Disposition pursuant to 10 CFR §2.749(a)(1) and (b). The Motion should be granted as to Contentions 6(a) and 6(b)(2), and denied as to Contentions 6 (general); 6(b)(1), (3) and (4); and 7(a)(1), as the Staff has

failed to meet its burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law. This answer is supported by the attached statement of "Material Facts As To Which There Are Genuine Issues To Be Heard" and "Affidavit of Thomas B. Cochran."

SUMMARY

According to the Commission's regulations, the Staff's summary disposition motion cannot be granted unless the Licensing Board finds that:

the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 CFR §2.749(d). As is true for the analogous Rule 56 of the Federal Rules of Civil Procedure, the burden of showing the absence of a genuine issue as to any material fact is upon the party seeking summary disposition, and the record will be viewed in the light most favorable to the party opposing the motion. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970), Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). In addition, the Commission's general rule is that "the applicant or proponent of an order has the burden of proof." 10 CFR §2.732.

As shown below, the Staff has not met its burden of showing that there is no genuine issue as to any material fact concerning Contentions 6 (general); 6(b)(1), (3) and (4); and 7(a)(1). As for Contention 6(a), the Staff is correct that it is mooted by new analyses which appear in the draft FES Supplement for CRBR. Consequently, Intervenors do not oppose Staff's Motion with regard to Contention 6(a), assuming Staff's assertions concerning the final FES Supplement are correct. Additionally, Intervenors believe that Contention 6(b)(2) is also mooted by new information in the DESS regarding the impact of transportation of plutonium required for the CRBR. Consequently, Intervenors do not oppose Staff's Motion with regard to Contention 6(b)(2).

The Staff has failed to meet its burden as to Contentions 6 (general) and 6(b)(1), (3) and (4), because it has failed to even acknowledge that Contention 6 is based on both the CRBR-specificity of the fuel-cycle environmental analyses and the adequacy of those analyses.^{1/} The new analyses which appear in

^{1/} Applicants, in sharp contrast to the Staff, have noted that Contention 6 goes to both the specificity and the adequacy of the fuel cycle analyses. Applicants' Answer in Support of NRC Staff Motion for Summary Disposition of Intervenors' Contentions, October 12, 1982, at 3. Applicants argue incorrectly that there is no genuine issue as to the adequacy of the analyses because "Intervenors have presented nothing beyond sweeping, unsubstantiated allegations..." Id. In the first place, Intervenors have in fact submitted extensive comments on the inadequacies of the fuel cycle analyses in the draft FES Supplement, some of which are noted below, responded to interrogatories and conducted substantial discovery. In the second place, neither Applicants nor Staff have ever objected to the admission or form of this contention, but rather stipulated (cont. next page)

the draft FES Supplement and ER amendments appear to dispense with the issue of the CRBR-specificity of the fuel cycle environmental analyses, but they do not dispense with the adequacy of those analyses, as questioned by the third sentence of Contention 6(b) and numbered paragraphs (1), (3) and (4) which follow it. Thus, the Staff has not met its burden as to Contention 6(b) and is not entitled to summary disposition. "No defense to an insufficient showing is required." Perry, supra, 6 NRC at 754, quoting 6 J. Moore, Federal Practice ¶ 56.22[2], pp. 2824-25 (2d Ed. 1966). Examples of still-disputed material facts regarding Contention 6 are detailed below.

With regard to Contention 7(a)(1), which questions whether CRBR can meet its programmatic objectives in a timely fashion, the Staff asserts that the "timing objective" has been changed from a date certain for CRBR operation to "as expeditiously as possible", and that no alternative to CRBR can achieve the objectives more expeditiously than the present CRBR proposal. The Staff has once again failed to meet its burden of showing the absence of a genuine issue as to any material fact, because Intervenorors contend there could very well be alternatives to the

its admissibility in both 1976 and 1982. Special Prehearing Conference Memorandum and Order, April 6, 1976, at 436; NRC Staff Response to Intervenorors' Revised Statement of Contentions and Proposed Areas of Discovery, March 19, 1982, at 18; Applicants' Response to NRDC's Revised Statement of Contentions and Bases, March 19, 1982, at 4. In the third place, Applicants' statement attempts to improperly shift the burden of demonstrating the existence of material issues in the first instance to Intervenorors.

CRBR as now planned which would meet the programmatic objectives more expeditiously than the CRBR as now planned. Examples of potentially more expeditious alternatives, involving the choice of steam generators or alternative sites for the CRBR, are detailed below. Thus, viewing the facts in the light most favorable to Intervenors, as the Staff concedes is required in summary disposition decisions, Motion at 2, the Board cannot find that there is remaining no genuine issue of material fact as to Contention 7(a)(1).

DISCUSSION

Contention 6(b)

Contention 6(b) questions both the existence and the adequacy of ER and FES analyses of the environmental impact of the CRBR fuel cycle. The Staff's suggested material facts A.3-A.14 go only to the existence of CRBR-specific fuel cycle analyses, not to their adequacy. Consequently, while there remain no genuine issues of material fact insofar as the existence of these analyses is concerned,^{2/} the adequacy of those analyses remains very much an issue requiring litigation in this proceeding.

Contention 6 begins: "The ER and FES do not include an adequate analysis of the environmental impact of the fuel cycle

^{2/} Subpart (a) and the first and second sentences of subpart (b) may properly be considered moot for this reason.

associated with the CRBR for the following reasons[.]"The third sentence in part 6(b) reads:

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;

* * *

(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.

(Emphasis added). That Contention 6 has been understood to question the adequacy of the fuel cycle environmental analyses is reflected in the Licensing Board's Order admitting that contention:

Contention 9, which alleges that the SER (sic) and FES do not include an adequate analysis of the environmental impact of the fuel cycle associated with the CRBR, was admitted. It was renumbered Admitted Contention 6 (Tr. 210).

April 14, 1982 Order Following Conference with Parties, at 5 (emphasis added).

When the Board questioned the alternative pleading structure of Contention 6(b) at the April 5, 1982 Conference with Parties (Tr. 205-09), counsel for Intervenors explained the meaning of the wording:

[W]hat we are talking about is a series of impacts, some of which are discussed in the ER and the FES but discussed inadequately, and some of which are not discussed at all. And we have tried in responding to the interrogatories^{3/} to clarify to the maximum extent possible precisely where we feel these deficiencies in analysis are, and they are deficiencies in analysis. Either there is no discussion in these environmental documents or the discussion that is found in those documents is inadequate.

(Tr. 207, Mr. Greenberg). The Board noted explicitly that Contention 6(b) was being interpreted to plead in the alternative (as to both the existence of analyses and as to their adequacy) (Tr. 209), and both Applicants (Tr. 209) and Staff (Tr. 210) declined the Board's virtual invitation to object. The Board admitted Contention 6 on that understanding without modification. (Tr. 210).

It is clear that Contention 6 is not limited to the question of whether CRBR-specific analyses exist. Consequently, the Staff's statements that the analyses have been added in the Draft FES Supplement (proposed material facts A.3, A.5, A.7, A.9, and A.11) and in Applicants' Environmental Report (proposed material fact A.14) and that such analyses will be included in the Final FES Supplement (proposed material facts A.4, A.6, A.8, A.10, A.12, and A.13) do not dispose of all genuine issues of material fact encompassed by Contention 6.

^{3/} The referenced interrogatory answers also indicate clearly that NRDC was concerned about the adequacy of analyses as well as their basis -- derived from the programmatic LMFBR data vs. CRBR-specific. See Answers and Objections of Intervenors to NRC Staff's Fifth Set of Interrogatories, March 29, 1982, at 20.

The Staff does not even address the question of the adequacy of their newly-added CRBR fuel cycle analyses in their statement of material facts.^{4/} In contrast, Intervenors do assert that the analyses in the draft FES Supplement are inadequate. (See Intervenors' Material Facts As to Which There Are Genuine Issues To Be Heard A.1-A.12 at pp. 1-5, infra; Affidavit of Thomas B. Cochran, at paragraphs 5-15, infra.) The above discussion clearly indicates material facts as to which there are genuine issues to be heard. Thus, the Staff is not entitled to summary disposition as to Contentions 6 (general), and 6(b)(1), (3), and (4). If the Staff is granted summary disposition as to these Contentions, Intervenors will seek to add late-filed contentions going to these issues based on the new information in the FES Supplement.

Contention 7(a)(1)

As a threshold matter, Applicants and Staff cannot pretend, by changing the timing "objective" from a date certain to an indeterminate "as expeditiously as possible," to escape entirely the issue of the timeliness of CRBR in meeting its objectives.^{5/} In 1976, the Commission explicitly accepted as a

^{4/} Indeed, for purposes of summary disposition, Staff cannot make any factual or legal claims as to the adequacy of these analyses as long as they are in draft form only.

^{5/} In fact, "as expeditiously as possible" is not the most concrete "timing objective" which is now in place for the CRBR. (cont. next page)

relevant issue in this proceeding whether the Clinch River facility as proposed is likely to meet the LMFBR program informational objectives which the ERDA review process determined should be met by a demonstration reactor, within the desired time frame. United States Energy Research and Development Administration, et al. (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 78 (1976) (emphasis added). Now Applicants and Staff seek to make impossible any determination as to the timeliness of CRBR in meeting its objectives by asserting that the timing "objective" has been changed from 1983 to "as expeditiously as possible."^{6/} This attempt to eliminate the issue by making the objective essentially meaningless cannot succeed.

As Intervenors illustrate below with examples concerning steam generators or alternative sites, it is not an established fact that there could be no alternative approach to a demonstration LMFBR plant which would result in more timely or expeditious achievement of the demonstration plant's programmatic

The draft FES Supplement for CRBR indicates, at pages iii and 8-4, that operation of CRBR is now scheduled to begin early in 1990. The May 1982 Programmatic LMFBR EIS indicates at page 41 that beginning construction in 1982 or early 1983 will allow completion of CRBR around 1990.

^{6/} Indeed, the Staff now asserts - contrary to the 1976 Commission decision, supra - that timeliness in meeting its objectives need not be shown for CRBR to obtain a construction permit or LWA. (October 13, 1982 Deposition of Paul Leech, at 58). The Staff has conducted no review of the timeliness issue, and apparently does not intend to conduct such review. (Id. at 7-8).

informational goals. That is to say, there remain genuine issues of material fact as to the prudence of the present approach to particular design features and sites as they affect timely achievement of the informational objectives. Imprudent approaches, such as choosing to install untested steam generators, or choosing an unsuitable site, infra, could very well result in less expeditious achievement of the objectives than more prudent approaches.

In addition, as Contention 7(a)(2) clarifies, the timeliness issue goes also to the question of whether the specific design of the demonstration plant is sufficiently similar to a practical commercial size LMFBR that building and operating the proposed demonstration plant (CRBR) will demonstrate anything relevant with respect to an economic, reliable and licensable LMFBR. As an example, if the next stage of LMFBR commercialization (i.e., the LDP) calls for a pool-type reactor rather than a loop-type reactor as at CRBR, then CRBR will demonstrate little or nothing relevant to pool reactors, and the informational objectives regarding likely future LMFBRs will not be timely served by the CRBR. (October 13, 1982 Deposition of John Long, at 17-19). That is, while changing to a pool-type reactor for the demonstration plant would obviously delay the construction of that plant, it would still achieve the desired informational objectives more expeditiously than CRBR if future LMFBRs will in fact be pool reactors. This issue has not been addressed in

either the ER as amended or the FES as provisionally supplemented.

The above are clearly material facts as to which there are genuine issues to be heard. Thus, the Staff is not entitled to summary disposition as to Contention 7(a)(1).

NRDC'S ANSWERS TO STAFF'S PROPOSED MATERIAL FACTS

A. Contentions 6(a) and (b)

1. Intervenors deny Staff's proposed material fact A.1.

Contentions 6(a) and (b) actually state:

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 and fuel cycle. The analyses of the environmental impacts of the model LMFBR and fuel cycle in the 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 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.

NRDC admits that its Contentions 6(a) and (b) state as above.

2. Intervenors admit Staff's proposed material fact A.2.

3. Intervenors admit Staff's proposed material fact A.3.

Intervenors admit that the draft FES Supplement contains a CRBR-specific fuel cycle analysis, but deny that the analysis is adequate. (Cochran Affidavit at ¶¶ 4-15).

4. Intervenors can neither admit nor deny Staff's proposed material fact A.4.

5. Intervenors deny Staff's proposed material fact A.5. The draft FES Supplement projects what DOE expects would be the environmental impact of reprocessing CRBR fuel at a hypothetical Developmental Reprocessing Plant, and blandly predicts that the impacts of possible alternative means of reprocessing such as a private facility or modification of facilities at Hanford or

Savannah River would be enveloped by the impacts estimated for DRP. As the facilities which might be used to reprocess CRBR fuel are utterly indeterminate, it cannot be said that the draft FES Supplement "analyzes" the environmental impact of the reprocessing of spent fuel for CRBR. (Cochran Affidavit at ¶¶ 8-9).

6. Intervenors can neither admit nor deny Staff's proposed material fact A.6.

7. Intervenors admit Staff's proposed material fact A.7.

8. Intervenors can neither admit nor deny Staff's proposed material fact A.8.

9. Intervenors admit Staff's proposed material fact A.9. Intervenors admit that the draft FES Supplement "analyzes" the environmental impact of the disposal of wastes from CRBR spent fuel to some extent, but Intervenors deny that the analysis is adequate. (Cochran Affidavit at ¶¶ 11-12).

10. Intervenors can neither admit nor deny Staff's proposed material fact A.10.

11. Intervenors admit Staff's proposed material fact A.11. Intervenors admit that some discussion 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, "is included" in the draft FES Supplement, but Intervenors deny that those impacts are adequately assessed. (Cochran Affidavit at ¶ 14).

12. Intervenors can neither admit nor deny Staff's proposed material fact A.12.

13. Intervenors can neither admit nor deny Staff's proposed material fact A.13.^{7/}

14. Intervenors admit Staff's proposed material fact A.14. Intervenors admit that the Applicants' Environmental Report now contains an "analysis" of the CRBR fuel cycle, but Intervenors deny that the analysis therein is adequate. (Cochran Affidavit at ¶¶ 4-15).

15. Intervenors deny Staff's proposed material fact A.15. As explained above, Staff's proposed material facts A.1-A.14 establish only that the ER and FES now include some "analysis" of the various environmental impacts of the CRBR fuel cycle. They do not establish--indeed, they do not even purport to establish--that those analyses are adequate. Intervenors contend that those analyses are not adequate (Cochran Affidavit at ¶¶ 4-15) as they appear in the draft FES Supplement. Thus, there clearly remain genuine issues of material fact with respect to those analyses in their present, draft form. Obviously, the adequacy of those analyses in the final FES Supplement remains entirely a matter of speculation. It would clearly be inappropriate to grant summary

^{7/} It is noteworthy that the Staff does not allege that the draft FES Supplement "accounts for" the differences between the model LMFBR and its associated fuel cycle and the CRBR and its associated fuel cycle. Indeed, the draft FES Supplement does not do so.

disposition as to the adequacy of those final analyses before they even exist.

B. Contention 7(a)

1. Intervenors admit Staff's proposed material fact B.1 if it is corrected so that the third word in Contention 7(a)(1) is "nor" instead of "or."
2. Intervenors admit Staff's proposed material fact B.2.
3. Intervenors admit Staff's proposed material fact B.3.
4. Intervenors admit Staff's proposed material fact B.4.
5. Intervenors admit Staff's proposed material fact B.5.
6. Intervenors admit Staff's proposed material fact B.6.
7. Intervenors deny Staff's proposed material fact B.7. In fact, there are "substantially better" alternatives to meet the objectives in a timely fashion than the CRBR as now planned. Contrary to the assertions of Staff and Applicants, it is not incontrovertible that "no alternative...proposal could be developed which would meet the programmatic objectives of the LMFBR demonstration plant in a more timely fashion...than the CRBR plant."

As an example, the GAO has expressed serious concern about Applicants' decision to install untested steam generators in CRBR. Cochran Affidavit at ¶ 17. If these untested steam generators do prove to be inadequate after they are installed, there can be little question that achievement of the

informational objectives of CRBR will either be delayed for a very substantial period--probably years - or will never be achieved at all. The Staff has admitted in deposition that this result is possible. Cochran Affidavit at ¶¶ 18-20. An alternative to the present proposal which might very well result in more timely achievement of CRBR's objectives would be to fully test the proposed steam generators before installing them in the CRBR plant.

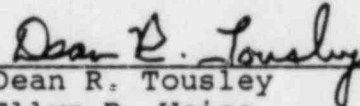
Another relevant example concerns the choice of a site for the demonstration LMFBR plant. The choice of a site which is more appropriate than the CRBR site for the demonstration plant would achieve the programmatic objectives more expeditiously than CRBR if the Licensing Board found the CRBR site unsuitable. The Staff has also admitted this possibility in deposition. (Cochran Affidavit at ¶¶ 21-22).

These are material facts as to which there remain genuine issues to be heard in the evidentiary hearing.

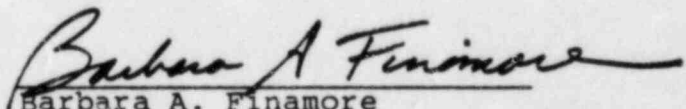
8. Intervenors deny Staff's proposed material fact B.8. Staff's proposed material facts B.2 - B.6 arguably establish that the "timing objective" for operation of CRBR has been changed from about 1983 to "as expeditiously as possible." Other facts indicate the present objective is to achieve CRBR operation about 1990. These facts do not establish that no alternative proposal could meet the programmatic objectives of the LMFBR demonstration plant in a more timely fashion than the CRBR plant as now

planned. As illustrated in B.7, supra, alternative approaches to particular plant features or sites might very well result in more timely achievement of the programmatic objectives than the approach presently being pursued for CRBR. Therefore, there remain genuine issues of material fact to be heard as to whether the CRBR as now planned will achieve its objectives in a timely fashion, and summary disposition as to the issue is inappropriate.

Respectfully submitted,



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