August 30, 1982 SECY-82-360

ADJUDICATORY ISSUE
(Information)

For: The Commission

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-688 (IN THE MATTER OF DEPARTMENT OF ENERGY, ET AL.)

Facility: Clinch River Breeder Reactor

Petitions for Review: None 1/ 50-537

Purpose: To inform the Commission of an Appeal Board decision [redacted] which, in the General Counsel's opinion, [redacted]

1/ The rules of practice prohibit petitions for review of Appeal Board decisions on requests for directed certification. 10 CFR 2.730(f) and 2.786(b)(9).

2/ [redacted]

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Information in this record was deleted in accordance with the Freedom of Information Act, exemptions 5
FOIA- 92-436

5/27

Discussion:

In ALAB-688, the Appeal Board denied intervenors' 3/ petition for directed certification of the Licensing Board's procedural order of August 5, 1982, finding that the ordered schedule for evidentiary hearings in the Limited Work Authorization (LWA-1) proceeding for this facility did not threaten petitioners with irreparable harm or affect the basic structure of the proceeding in a pervasive or unusual manner. For the reasons stated below, we believe that

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Intervenors sought directed certification on two aspects of the Licensing Board's order of August 5: (1) the initiation of evidentiary hearings prior to the NRC staff's publication of a final supplement to the project's 1977 Final Environmental Statement (FES); and (2) bifurcation of the hearing schedule to first consider contentions related to radiological site-suitability and then to consider contentions related to the NRC's compliance with the National Environmental Policy Act (NEPA) once the NRC staff has issued the final supplement to the FES. Intervenors contended that the

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3/ The intervenors are the Natural Resources Defense Council, Inc. and the Sierra Club.

Licensing Board erred in initiating the hearing before completion of the FES supplement. In their view, 10 CFR 2.761a makes the staff's issuance of an FES a condition precedent to the initiation of a hearing. Since the staff has circulated a draft supplement for public comment, intervenors contended that the 1977 FES was rendered non-final for the purposes of 10 CFR 2.761 and, thus, the Licensing Board should have waited to start the hearing until the final supplement was issued.

Applicants and staff contended that 10 CFR 2.761a established only a deadline for initiating a hearing after the staff's issuance of an FES but did not establish a bar to initiating hearings earlier. Applicants and staff also noted that under 10 CFR 51.21(a), once the staff has issued a draft environmental statement all parties may present testimony on all issues except that the staff may not testify on environmental issues until the FES is issued.

The Licensing Board rejected intervenors' contention that hearings could not be initiated prior to the staff's issuance of an FES. The Appeal Board did not explicitly rule on the correctness of this decision. Instead, the Appeal Board sidestepped the issue by finding that the stringent standards for directed certification had not been met because the Licensing Board's order

affects only the timing of the admission of evidence. 4/ Moreover, the Appeal Board noted that the current lack of applications for construction permits implied that resolution of this issue was not necessary for the immediate future management of the licensing process.

In our opinion,

Under these circumstances, we believe that

4/ Apparently, the Appeal Board would have directed certification only if the petitioners had been deprived of their right to procedural due process or the effects of the Licensing Board's decision could not have been remedied on appeal. Slip op. 5-6.

Recommendation:

EX. 5

Sheldon L. Trubatch
Acting Assistant General Counsel

Attachment:
ALAB-688

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Stephen F. Eilperin, Chairman
Dr. W. Reed Johnson
Gary J. Edles

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

Ms. Ellyn R. Weiss, Ms. Barbara A. Finamore, Mr. Dean Tousley and Mr. S. Jacob Scherr, Washington, D.C., for intervenors Natural Resources Defense Council, Inc., and the Sierra Club.

Messrs. George L. Edgar and William D. Luck, Washington, D.C., for applicants Project Management Corporation, United States Department of Energy, and Tennessee Valley Authority.

Mr. Bradley W. Jones for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

August 25, 1982

(ALAB-688)

The Natural Resources Defense Council, Inc. (NRDC), and the Sierra Club petition for directed certification of an August 5, 1982 unpublished order of the Licensing Board. See 10 CFR 2.718(i), 2.785(b)(1); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC

478, 482-83 (1975). That order sets forth the scope and schedule for evidentiary hearings in the Limited Work Authorization proceeding (LWA-1) for the Clinch River Breeder Reactor Project (CRBRP). [1/] In particular and insofar as pertinent here, the Licensing Board's order adhered to an earlier scheduling order that called for evidentiary hearings to begin August 23, 1982 on contentions related to radiological site suitability. Contentions involving the National Environmental Policy Act (NEPA), 42 U.S.C 4321 et seq., and the supplement to the Final Environmental Statement (FES) are to await issuance of the FES supplement and are to be the subject of a second phase

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1/ A limited work authorization allows preliminary construction work to be undertaken at the applicants' risk, pending completion of later hearings covering radiological health and safety issues. See 10 CFR 50.10(e)(1); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 778 (1979). Before an LWA-1 can be granted, the staff must have issued the final environmental impact statement relating to the construction of the facility. Moreover, the Licensing Board must have made all the environmental findings required for issuance of a construction permit and "determined that . . . 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." 10 CFR 50.10(e)(2). The Commission has granted applicants a partial exemption from the requirements of 10 CFR 50.10, allowing them to initiate certain site preparation activities. CLI-82-23, 16 NRC __ (August 17, 1982).
(FOOTNOTE CONTINUED ON NEXT PAGE)

of hearings. Under the Board's order no party will be prohibited from putting forth evidence with respect to the FES at the time of the second phase hearings because of its failure to produce the evidence at the first phase. The Board did, however, reject petitioners' position that no hearings whatsoever could begin until completion of the FES supplement. Order of August 5, 1982, at 4-6.

NRDC and the Sierra Club have asked that we take up two questions at this time -- first, whether (as they urge) 10 CFR 2.761a precludes any evidentiary hearings on a limited work authorization request prior to issuance of the FES supplement, and second, whether the draft supplement now being circulated for public comment renders the 1977 FES

1/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) The CRBRP proceeding began with an application filed with this Commission in 1975. The NRC staff issued its FES in February, 1977. The proceeding was suspended in 1977 in accordance with President Carter's decision not to pursue the project. It was revived by President Reagan's October 1981 change in policy. At the Department of Energy's request, the NRC resumed licensing proceedings in February 1982. A draft supplemental FES was issued in July 1982 and is now being circulated for public comment. See generally NUREG-0139 (Supp. No. 1), "Draft Supplement to Final Environmental Statement Related to Construction and operation of Clinch River Breeder Reactor Plant" (July 1982) at xxii, 1-1.

non-final for purposes of that regulation. 2/

The request for directed certification is opposed by the NRC staff and the applicants. They argue that the standards for directed certification have not been met and that 10 CFR 2.761a is only an outer limit on when hearings should begin, not a bar to beginning hearings earlier. Staff and applicants contend that, with the exception of staff testimony on environmental issues, 10 CFR 51.52(a) 3/ permits all parties to present testimony on all issues prior

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2/ 10 CFR 2.761a provides in pertinent part:

> [T]he 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. . . .

3/ 10 CFR 51.52(a) provides:

> 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.

to issuance of a final environmental impact statement. 4/

We have often commented on the stringent standard a request for directed certification must meet:

> Our decisions establish that discretionary interlocutory review will be granted only sparingly, and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980) (footnotes omitted). We have been particularly reluctant to step in where the question for which certification has been sought involves the scheduling of hearings or the timing and admissibility of evidence. The reason for this is apparent:

> During the course of a lengthy and involved . . . proceeding, a licensing board almost inevitably will be called upon to make numerous determinations respecting what evidence is permissible and in what procedural framework it may be adduced. Were we to allow ourselves to be cast in the role of a day-to-day monitor of those determinations, we would have little time for anything else. Although the applicants urge that there are exceptional circumstances present here which warrant interlocutory involvement on our part, we do not perceive them. The most that can be said is that, if on review of the eventual

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4/ NRC Staff's Response to Petition for Directed Certification (August 20, 1982); Applicants' Response to Petition for Directed Certification (August 19, 1982).

> initial decision we should conclude that the Board below was wrong, a new hearing might have to be ordered. But it is also possible that the ultimate result will moot the questions which the applicants would have us resolve immediately.
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> In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 CFR 2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the federal judicial system, that judgment can scarcely be deemed irrational.

Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99-100 (1976). 5/

5/ See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978):

> [W]e enter the scheduling thicket cautiously. We are inclined to do so only to entertain a claim that a board abused its discretion by setting a hearing schedule that deprives a party of its right to procedural due process [footnote omitted].

See generally Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981).

It is not enough to warrant our review at this stage that the questions posed by NRDC and the Sierra Club involve the interpretation of NRC regulations or a generalized issue arising under the National Environmental Policy Act. Especially in light of the paucity of construction permit applications neither issue can be considered a recurring one of great importance to the proper functioning of the licensing process. All that hinges upon their answer is the timing of the admission of evidence. Compare Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC __, __ (August 19, 1982) (slip opinion at 6-7). We are unpersuaded that our disinclination to review those questions at this time threatens the petitioners with irreparable harm or affects the basic structure of the proceeding in a pervasive or unusual manner.

The petition for directed certification is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board