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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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In the Matter of)
)
UNITED STATES DEPARTMENT OF ENERGY)
)
PROJECT MANAGEMENT CORPORATION)
)
TENNESSEE VALLEY AUTHORITY)
)
(Clinch River Breeder Reactor Plant))
)

Docket No. 50-537

APPLICANTS' RESPONSE TO
INTERVENORS' NOTICE OF INTENT TO
INTRODUCE NATIONAL SECURITY INFORMATION

The United States Department of Energy and Project Management Corporation, for themselves and on behalf of the Tennessee Valley Authority (the Applicants), herewith respond to Intervenor's Notice of Intent to Introduce National Security Information, dated November 5, 1982. For the reasons which follow, Applicants respectfully request that the Board exercise its discretion and exclude the portions of Intervenor's testimony containing classified information

INTRODUCTION

Less than two weeks before the commencement of hearings and four days after testimony was to be filed, on November 5, 1982, Intervenor notified the Board that they intended to introduce national security information at the hearings in Oak Ridge, Tennessee, commencing on November 16, 1982. In

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particular, Intervenors stated in their notice that the information "relates to Intervenors' showing that diversion of plutonium from the CRBR and its supporting fuel cycle is possible under certain scenarios which Applicants and Staff do not adequately take into account."

Because Applicants believe the information is not admissible, on November 11, 1982 counsel for PMC contacted Mr. Greenberg, counsel for Intervenors, to confer in an attempt to arrive at a resolution of the matter of classified information. After discussion, the parties remained in disagreement concerning the legal implications of the Intervenors' safeguards testimony in Answer 9: Applicants believe it to constitute an attack on the Commission regulations, while Intervenors do not. Consequently, it does not seem possible for the parties to arrive at a resolution concerning Answer 9 without resort to the Board.

As will be shown, Intervenors have failed to make any showing of the relevance, materiality or competency of the classified information as required by 10 C.F.R. §§ 2.908 and 2.911. Aside from the utter lack of relevance, materiality or competency of this information, Intervenors also fail to establish that exclusion of the information would be prejudicial to their interest or to the public interest. (See 10 C.F.R. § 2.911(b)).

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ARGUMENT

I. THE NATIONAL SECURITY INFORMATION IS
NOT RELEVANT OR MATERIAL TO ANY ISSUE
IN THIS PROCEEDING

Section 2.908 of the Commission's regulations requires Intervenorors to make a showing in their notice of intent of the "relevance and materiality of the information to the issues in the proceeding." 10 C.F.R. § 2.908(a)(4). Similarly, 10 C.F.R. § 2.911 provides in pertinent part:

A presiding officer shall not receive any Restricted Data or other National Security Information in evidence unless:

(a) The relevance and materiality of the Restricted Data or other National Security Information to the issues in the proceeding, and its competence are clearly established. ...

(Emphasis added).

In this case, Intervenorors have not, and cannot, establish that the classified information contained in their safeguards testimony is either relevant or material. ^{1/} Rather, as demonstrated by Dr. Cochran's testimony and explained below, Intervenorors are attempting, as they have repeatedly throughout this proceeding, to challenge the Commission's safeguards

^{1/} Relevancy is the tendency of the evidence to prove a material fact. Materiality is defined by McCormick in the following terms:

If the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial.

regulations. Such a challenge is outside the scope of issues in this proceeding and hence is immaterial. Moreover, because the issue itself is immaterial, any evidence regarding that issue is clearly irrelevant.

In answer to Question 9 in Intervenor's prepared safeguards testimony, Dr. Cochran provided the following response:

A. 9 Diversion of plutonium from the CRBR and/or its supporting fuel cycle facilities is certainly possible, in the sense of it not being possible. At least three scenarios can be hypothesized:

(1) The Staff considers a conspiracy between [CLASSIFIED] insiders to constitute a credible threat for diversion. [CLASSIFIED REFERENCE]. Applicants have admitted that two people acting in collusion might be able to divert plutonium from a CRBR bulk handling facility. See Deposition of Edward Penico, et al., June 16, 1982 at 15 (Witness Katz) (hereinafter cites as "DOE Dep."). Further, the Staff is forced to admit that more than [CLASSIFIED] insiders could constitute a credible threat. [CLASSIFIED REFERENCE]. And other experts agree that conspiracies of more than two persons can't be ruled out. See paragraph 2, below referring to collusion between insiders and outsiders.

In proffering this classified information on insider threats, Intervenor's in their notice of intent make the conclusory claim that the information "is necessary to demonstrate the extent to which Applicants and Staff fail adequately to analyze safeguards risks and consequences." In making this assertion, Intervenor's neglect to point out that Commission regulations specify the insider design basis threat for diversion

as a single insider. 10 C.F.R. § 73.1(a)(2). Thus, the Commission has conclusively determined in its regulation that the only credible insider threat is one individual. Testimony like that offered by Intervenorors regarding what the Staff or Applicant believe might be possible, "in the sense of not being impossible" is not material to any issue in this proceeding and is wholly irrelevant. In submitting this information under the guise of NEPA, Intervenorors are attempting to challenge the Commission's regulations.

Although not noted in their notice of intent, Intervenorors' reasons for including this classified information in their safeguards testimony is made abundantly clear in Dr. Cochran's testimony in response to Question 13. Dr. Cochran, recognizing that the Commission does not consider more than one insider a credible threat, takes direct issue with the Commission's regulation:

A. 13 In assessing the probability of an act of theft or sabotage, I do take into account current Commission regulations. It is my judgment that in certain respects, the regulations may be inadequate. For example, with respect to acts of sabotage, under 10 C.F.R. § 73.1(a)(1) the possibility of an internal conspiracy of more than one insider is not included. [Citation omitted]. As for the design basis threat for acts of theft under 10 C.F.R. § 73.1(a)(2), the definition excludes collusion of more than one insider.

Thus, as Dr. Cochran's testimony demonstrates, Intervenorors intend to introduce the safeguards testimony in an effort to challenge the Commission's considered judgment that the credible insider design basis threat is one individual.

Such a challenge is clearly improper and Dr. Cochran's testimony containing National Security Information should not be introduced.

II. THE TESTIMONY CONTAINING NATIONAL SECURITY INFORMATION IS NOT COMPETENT

Commission regulations provide that National Security Information may be admitted in evidence only if its competence is "clearly established." 10 C.F.R. § 2.911(a). In this case, the information submitted by Intervenors, even if somehow relevant and material, is so remote, and speculative that it is "not fit for the purpose for which it is offered." United States v. DeLucia, 256 F.2d 487, 491 (7th Cir.) cert. denied, 358 U.S. 836 (1958). See also Derr v. Safeway Stores, Inc., 404 F.2d 634 (8th Cir. 1968).

The testimony offered by Intervenors, which includes National Security Information, is of so little probative value as to be incompetent. In response to Question 9, Dr. Cochran's testimony addresses hypothetical "scenarios" which he describes as "certainly possible, in the sense of not being impossible." Applicants assume by this definition of "certainly possible" that the most Intervenors can claim regarding the reliability of this testimony is that it does not violate any physical laws. ^{2/} Intervenors apparently believe that they may

^{2/} The speculative nature of this testimony is further demonstrated by Dr. Cochran's consideration of insider threats using classified information. Using equivocal phrases such as "could" and "might", Dr. Cochran in effect requests the Board to overturn a Commission regulation.

introduce any testimony regardless of its attenuated and speculative nature so long as the testimony does not violate physical laws. Applicants can scarcely conceive of a more vague and patently unmanageable standard for the admissibility of evidence.

In any event, Section 2.911 of the Commission's regulations provides that the competency of the National Security Information must be clearly established. Intervenors' conclusory assertions that its hypothetical scenarios are possible because they are not impossible hardly meets this high standard.

III. EXCLUSION OF THE NATIONAL SECURITY
INFORMATION WILL NOT PREJUDICE
THE INTERESTS OF ANY PARTY OR
THE PUBLIC INTEREST

In addition to finding that the National Security Information is relevant, material and competent, the Board must also find that:

(b) The exclusion of the Restricted Data or other National Security Information would prejudice the interests of a party or the public interest.

Such a finding cannot be made under the circumstances present in this case.

Safeguards are at issue in this proceeding only for the purposes of the "NEPA cost/benefit analysis." Board Order of April 14, 1982. Under NEPA, this Board is only required to consider the reasonably foreseeable impacts of the proposed action. State of Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978). Thus, Intervenors' interest, as well as the public interest, can only be prejudiced if the Board excludes evidence

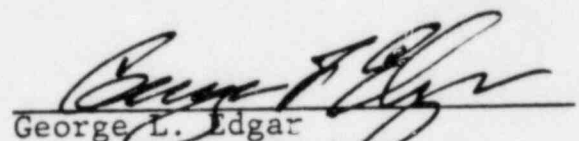
within the scope of the proceeding and relating to the reasonably foreseeable safeguards impacts.

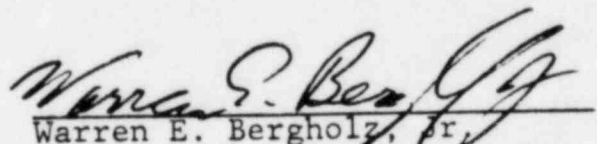
As demonstrated earlier, the proposed National Security Information is outside the scope of this proceeding and has no bearing on the reasonably foreseeable safeguards impacts. The information is speculative in the extreme. Indeed, even Intervenorors recognize this by claiming only that the hypothetical scenarios are not "impossible". Neither Intervenorors' interest nor the public interest weighs in favor of the introduction of such evidence, and neither can be prejudiced in any way by its exclusion.

CONCLUSION

For the reasons stated above, Applicants respectfully request that the Board exclude the National Security Information referred to in Intervenorors' Notice of Intent.

Respectfully submitted,


George L. Edgar
Attorney for Project
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Warren E. Bergholz, Jr.
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Department of Energy

DATED: November 12, 1982

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NUCLEAR REGULATORY COMMISSION

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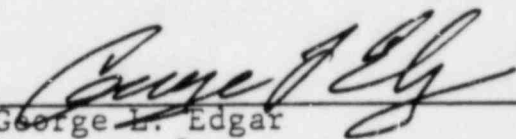
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