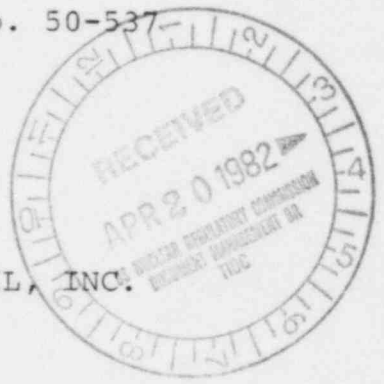
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	



RESPONSE OF NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB TO STAFF MOTION FOR A PROTECTIVE ORDER RELATIVE TO DISCOVERY

By motion dated April 16, 1982, the Staff objects generally to the "Natural Resources Defense Council, Inc., and the Sierra Club Twenty-fourth Set of Interrogatories and Request to Produce to the Staff." The Staff asks the Board to limit NRDC to 100 interrogatories, and claims that the same limit should apply as a matter of equity to all parties, including the Staff, (Staff Motion at 4). Remarkably, the "NRC Staff First Round of Discovery to NRDC, et. al.", dated April 15, 1982, contains well over 100 interrogatories to us. In fact, Counsel has counted approximately 250 separate questions in the 44 pages of interrogatories from the Staff to NRDC, not including the six "boilerplate" questions, preceeding the interrogatories and the six subparts of each request for admission. We can only conclude that the Staff never counted the number of questions it posed to NRDC.

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The Staff nowhere clearly states the grounds for its general objection. We assume that it is asserting that the NRDC interrogatories are unduly burdensome and oppressive. The Staff states without supporting affidavits or statements from cognizant technical Staff:

> If the Staff is required to answer these interrogatories, they will not be able to prepare the answers by the April 30, 1982, deadline set by the Board. The Staff estimates that preparation of responses will take 3 to 4 weeks of concentrated effort, resulting in a corresponding delay in the schedule for completion of the remaining Staff milestone documents. This is not even the end of new interrogatories, but only the end of the first round. A similar second round would result in a similar delay.

Id. at 3.

The Staff's objection does not approach meeting the burden that an objecting party must meet in resisting discovery. Moreover, the Staff unreasonably refused to accept an offer by NRDC which would have reduced the total number of questions by nearly one-half. The Staff seeks to arbitrarily limit the ability of NRDC to make legitimate discovery on the grounds that answering the questions will delay the hearing--holding the ultimate sword over the Board's head--without ever having read the questions propounded by NRDC.

Staff "Negotiations" Were Pro Forma

On Wednesday, April 15, 1982, NRDC served the interrogatories in question on the NRC Staff. This was pursuant to an agreement responding to a specific request by the

Staff that we send all "first-round" discovery at one time on the last possible day. NRDC had offered to submit its interrogatories as they were written, to enable the Staff to begin its work at once. The Staff objected to this. Staff Counsel specifically stated to NRDC Counsel that the Staff could, would and wished to answer all "first-round" discovery between April 15-30.

Staff Counsel, Mr. Swanson, telephoned NRDC Counsel Barbara Finamore on Friday, April 16. He voiced a general objection to the length of the interrogatories. When Ms. Finamore sought repeatedly from Mr. Swanson some specification as to which interrogatories were allegedly burdensome or which he would propose to strike, Staff Counsel finally admitted that he had not read the interrogatories and therefore could not answer the question. It is obvious that the Staff proceeded to file its motion after the most cursory examination of NRDC's discovery request.

Nonetheless, on Monday, April 19, NRDC Counsel offered to defer until after the issuance of the FES supplement responses on subparts (c)-(g) of questions 1-43 on pages 59-67, a total of 445 questions (as the staff counts questions) seeking information on the extent to which the Staff has considered the documents specifically identified therein, all of which were issued since the suspension of the CRBR proceeding. This would approximately halve the total number

of questions, and make the "burden" to the Staff very similar to the burden on NRDC. The Staff refused.

The Objecting Party Has a Substantial Burden Which the Staff Has Not Met

NRC historically follows the Federal Court decisions on interpretation of the rules of discovery. Allied-General Nuclear Services et. al. (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). There are, of course, numerous NRC decisions to the effect that the discovery rules are to be broadly and liberally construed. Eg. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, NRC1-75/6 579, 582:

> In general, it has been long recognized that discovery in litigation, as well as in agency adjudication, is intended to insure that the parties to the proceeding will have access to all relevant, unprivileged information prior to the hearing, and that the primary objectives of the discovery process include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Likewise, it has been uniformly recognized that the discovery rules are to be accorded a broad and liberal treatment so that parties may obtain the fullest possible knowledge of the issues and facts before trial, and that the inquiries are limited only by the requirement that they be reasonably relevant to a sensible investigation.
>
> However, the authorities have also held that, as a rule of necessity, there must be limitations on the concept of relevancy so as "...to keep the inquiry from going to absurd and oppressive bounds."

The Staff nowhere claims that these questions are not relevant. Indeed, the majority of them are directed toward asscertaining exactly what technical matters the Staff

has reviewed and what it will rely upon in the LWA-1 proceeding. It simply totals the number of questions and characterizes that number as "unreasonable."

The party objecting to discovery has the burden of proving that hardship or injustice would be caused if the party were required to respond, Stonybrook Tenant Association, Inc., v. Alpert, 29 F.R.D. 161 (D.C. Conn. 1961). Objections must be specific; the claim that discovery is unduly burdensome must be supported by affidavits or evidence revealing the nature and extent of the burden. Wirtz v. Capitol Air Service, Inc., 42 F.R.D. 641 (D.C. Kan. 1967); Martin v. Easton Publishing Co., 85 F.R.D. 312 (D.C. Pa. 1980); Roesburg v. Johns-Manville Corporation, 85 F.R.D. 292 (D.C. Pa. 1980). If interrogatories seek relevant information, the fact that they involve work, research or expense is not sufficient to render them objectionable. Luey v. Sterling Drug, Inc., 240 F. Supp. 632 (D.C. Mich. 1965). The guide is not the number of interrogatories, but whether the demands are unusually burdensome in relation to the scope of the case itself. Stonybrook Tenants Association, supra. Considering the scope of this proceeding, its five-year hiatus and its-first-of-a-kind nature, a party resisting discovery should be required to make a very strong showing.

Here, the Staff has made no attempt whatever to identify which interrogatories are allegedly burdensome. Its motion should be denied outright for its failure to

meet the basic requirement of specificity. Staff merely states, as quoted above, that its responses will take 3-4 weeks to complete. The schedule contemplates two weeks and the Staff particularly requested that all of its first-round discovery be compressed into that two-week period. Now it claims that it needs an additional 1-2 weeks. If so, the Staff's obvious remedy is to seek a one or two week extension, not to attempt to strike NRDC's relevant, lawful interrogatories. The Staff itself created this situation by affirmatively asking NRDC to wait until April 15, to file all of its first-round discovery.

The Staff asserts that an extra 1-2 weeks to respond to NRDC's discovery will result in a corresponding delay in the schedule for completing Staff milestone documents, yet gives no reason why this should necessarily be so. Even assuming that Staff priorities cannot be adjusted to allow issuance of the supplements on the current schedule, the simple answer is: so be it. A one to two week "delay" in issuing the FES and SSR Supplements is hardly significant given the 5-year suspension of these proceedings.

The Staff must bear the burden, as must all parties, of appearing as a litigant in this case. It has a Staff of 25 persons devoted full-time to this proceeding, as well as approximately $2 million in outside contractor assistance. Transcript of Public Meeting, Discussion of Clinch River Breeder Reactor, February 12, 1982, at 75.(copy attached)

This is substantially more than an order of magnitude greater than the resources available to NRDC and should surely be sufficient for the Staff to meet its responsibilities. It should be noted that on April 15, the Staff propounded 44 pages of interrogatories of NRDC and the Applicant propounded an additional 11 pages. Thus, the burden is roughly comparable on NRDC.

The Staff has chosen to use its manpower and resources now on issues which the Staff itself claims are outside the scope of the LWA-1 proceeding. For example, a memorandum is attached announcing a meeting on April 21, 1982, to discuss the Clinch River Breeder Probabilistic Risk Assessment. The Staff's highest priority at this time should be to prepare for the LWA1 hearing. It is not unreasonable to require it to assign to this task the necessary number of persons from the 25 available inside NRC or its many contractors.

The Staff claims that our access to its "milestone documents" can substitute for discovery. (Staff Motion at 3). Our questions relate to the NRDC Contentions which are not co-extensive with the scope of the so-called milestone documents. Indeed, we are asking questions which are extremely unlikely to be addressed in those documents (see e.g. questions 9-18 on human error, questions 9-18 on the extent to which PSAR sections and other documents submitted by Applicant were or will be

considered at each licensing stage, questions 19-25 seeking identification of specific issues related to NRDC Contentions which Staff believes must be resolved for an LWA. and how those issues outside the LWA scope will be considered for the construction permit. A perusal of the interrogatories as a whole will confirm that the milestone documents cannot be expected to contain this information). Moreover, the purpose of discovery is not so narrow as the Staff suggests. One of the purposes of discovery is to obtain information for use on cross-examination and for the impeachment of witnesses. U.S. v. I.B.M., 66 F.R.D. 215 (D.C. N.Y. 1974) All relevant information related to the claim or defense of any party is discoverable. Thus, the question cited at note 2 of the Staff motion is relevant to establishing the qualifications of the various Staff members who make decisions on the CRBR review, who answer NRDC discovery and who testify. In addition, Counsel is aware that such records are routinely kept and can be produced without occasioning significant burden.

Finally, the Staff agreed to the protocol for discovery described at pages 11-13 of "Order Following Conference with Parties," April 14, 1982. It never asked to limit interrogatories to 100, nor did it so limit its own interrogatories. NRDC expended substantial effort in writing a focussed and comprehensive set of interrogatories. The Staff should not now be heard to ask for a general limitation which

it could have raised at the time it entered into the discovery agreement. Staff should be permitted to raise only specific objections to specific interrogatories and to support its objections in a manner that permits an informed ruling. Th s it manifestly has not done.

For the above-stated reasons, the "Staff Motion for a Protective Order Relative to Discovery" should be denied.

Respectfully submitted,

Ellyn R. Weiss
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Counsel for NRDC

DATED: April 20, 1982

NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

In the Matter of: PUBLIC MEETING

DISCUSSION OF CLINCH RIVER BREEDER REACTOR

DATE: February 12, 1982 PAGES: 1 - 81

AT: Washington, D. C.

ALDERSON REPORTING

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DISCUSSION OF CLINCH RIVER BREEDER REACTOR

PUBLIC MEETING

Nuclear Regulatory Commission
Room 1130
1717 H Street, N. W.
Washington, D. C.

Friday, February 12, 1982

The Commission convened, pursuant to notice, at 2:35 p.m.

BEFORE:

NUNZIO PALLADINO, Chairman of the Commission
VICTOR GILINSKY, Commissioner
PETER BRADFORD, Commissioner
JOHN AHEARNE, Commissioner
THOMAS ROBERTS, Commissioner

STAFF MAKING PRESENTATIONS AT THE MEETING:

S. CHILK
L. BICKWIT
M. MALSCH
F. REMICK
D. RATHBUN
G. CUNNINGHAM
P. LEECH
S. FELD
P. CHECK
S. TROBATCH
S. TREBY

effort that would be required for any one year during that period?

MR. CHECK: I believe, if I recall the projections correctly, that this 25 was the maximum.

COMMISSIONER BRADFORD: So you really are already at pretty close to the maximum.

COMMISSIONER GILINSKY: You have got 25 people employed now full time, or I mean the equivalent of 25 people employed?

MR. CHECK: Yes, give or take a bit. As I say, we are coming up.

COMMISSIONER BRADFORD: Is that also true for the contractual level of effort? Do you have a fair amount of review going on outside of NRC?

MR. CHECK: Oh, yes, we have.

COMMISSIONER BRADFORD: Is that also at about its peak annual level now?

MR. CHECK: The current projections show that the fiscal '82 is the peak year, yes.

COMMISSIONER BRADFORD: How much is involved?

MR. CHECK: It is around $2 million. It is a bit under. We had talked in terms of two and a half and we haven't spent that much.

COMMISSIONER ROBERTS: In the same vein, forget the timeliness, but is there a difference between

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 13, 1982

Docket No.: 50-537

MEMORANDUM FOR. Paul S. Check, Director, CRBR Program Office,
Office of Nuclear Reactor Regulation

FROM: Richard M. Stark, Project Manager, CRBR Program Office,
Office of Nuclear Reactor Regulation

SUBJECT: CLINCH RIVER BREEDER PROBABILISTIC RISK ASSESSMENT MEETING

DATE & LOCATION: April 21, 1982, Air Rights Building, Room 5033
Bethesda, Md. at 10:00 a.m.

PURPOSE: Discussion of Probabilistic Risk Assessment for CRBR

PARTICIPANTS: Department of Energy

J. Longenecker, D. Goeser, et. al.

NRC

B. Morris, C. Thomas, R. Stark, et. al.

Richard M. Stark

Richard M. Stark, Project Manager
CRBR Program Office
Office of Nuclear Reactor Regulation

cc: Service List

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ANO not designated