5/17/82

Before the
UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

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

MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB, IN OPPOSITION TO APPLICANTS' REQUEST FOR RECONSIDERATION

Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club (the "Intervenors"), submit this memorandum in opposition to the request, filed May 14, 1982, by the Department of Energy and its co-applicants, Project Management Corporation and the Tennessee Valley Authority (the "Applicants"), for reconsideration of the Commission's decision under 10 CFR §50.12 not to permit site preparation activities (Order, CLI-82-4, March 16, 1982). As set forth below, Intervenors believe that such a request is untimely

D503
S0/1

and without basis. [1]

From the outset, it has been Intervenors' position that Applicants' Section 50.12 request is part and parcel of the Clinch River Breeder Reactor licensing and must be treated as an adjudicatory matter. [2] The Commission's decision of March 16, 1982, was, in our view, a final and appealable order which fixed the rights of the parties. In such circumstances, we believe Applicants' request is untimely and cannot be properly considered by the Commission.

The Commission's regulations provide that a party may file requests for reconsideration only "within ten (10)

---

[1] Intervenors also object to the Commission's scheduling a meeting on the matter for Monday, May 17, one working day after filing. Under the Commission's Rules of Practice, 10 CFR §2.771(b), a party is given ten days to respond to requests for reconsideration. Even apart from this Rule, however, elementary fairness would seem to require that the Commission afford Intervenors, who have participated fully at every stage of the Section 50.12 proceeding, some reasonable time to respond.

[2] Given the hearing requirements of Section 189 of the Atomic Energy Act, the broad meaning ascribed to the term "license" by the Administrative Procedure Act, 5 U.S.C. §551(8) (including any agency "form of permission"), and the D.C. Court of Appeals decision in Sholly v. United States Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir.), suggestion for rehearing en banc denied, 651 F.2d 792 (D.C. Cir. 1980), cert. granted, 451 U.S. 1016 (1981) (requiring a hearing before any significant change in facility operation is authorized), we think no other conclusion is legally supportable.

days after the date of the decision." 10 CFR §2.771(a). The purpose of this rule is to give some finality to the Commission's rulings and not allow them to be relitigated at any time at the whim of a party. 3/ We do not believe that Applicants here can be permitted simply to wait until they feel the time is opportune to seek reconsideration. The Commission's rule, by its terms, precludes the filing of requests for reconsideration after the 10 day period elapses; it must be applied in this case. 4/

In any event, it seems apparent that Applicants' request is precisely the kind of broad-gauged effort to reli-

---

3/ The rule restricting a party's right to relitigate is also, we suggest, quite different from any rules relating to the Commission's ability to reconsider decisions on its own motion. In one case, the Commission is burdened; in the other it unburdens itself.

4/ The Commission's Rules of Practice, of course, are regulations which are binding on the Commission. E.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); United States v. Nixon, 418 U.S. 683 (1974); Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959), cert. denied, 376 U.S. 915 (1964); United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969). But even if it is argued that 10 CFR §2.771 might not be directly applicable, based upon the contention that the Section 50.12 proceeding is a "quasi" or "informal" adjudication to which Subpart G may not apply, the policy discussed above of establishing finality plainly warrants the Commission denying this request as untimely.

tigate decided matters which the rule is intended to avoid. The request presents no new information -- indeed does not indicate that there is any new information to be presented -- and is stated in the most conclusory terms. More importantly, on its face, it provides no justification for reconsideration.

Applicants seem basically to be seeking to rectify the failures of their previous presentation. They want the opportunity now to present "additional public interest factors, including the informational, programmatic, international, non-proliferation and national energy policy benefits associated with the grant of the request." But they had every opportunity to present these matters to the Commission in the extensive proceedings between December, 1981, and March, 1982. In fact, there can be little question that

these matters were before the Commission. [5/] If Applicants did not make a presentation on a particular point (or, as seems more likely, did not say what, in hindsight, they now might like to have said), their failure to do so is surely no grounds for reconsideration. Indeed, should the Commission allow reconsideration on such grounds, there would never be an end to litigation.

In sum, for the reasons set forth above, Intervenors respectfully submit that the Commission should summarily deny Applicants' request for reconsideration.

[5/] For example, "programmatic" benefits were discussed in the SPAR (at 7-1) and in Applicants' oral statements. See Transcript of February 16 Hearing at 82 (statement of Mr. Davis). They were also considered by the Commissioners. See Transcript of March 1 Meeting at 29 (Commissioner Palladino); Transcript of March 5 Meeting at 10 (Commissioner Roberts). "Informational" benefits were likewise mentioned in written presentations, see SPAR 7-1, 7-2, and oral statements, see Transcript of February 16 Hearing at 74 (statement of Mr. Edgar), and they, too, were considered by the Commission. See, e.g., Transcript of March 1 Meeting at 18, 25-26, 28, 40, 44 (statements of Commissioners Palladino, Gilinsky and Bradford, respectively). "National energy policy" was stressed from the very beginning by Applicants, see Secretary Edwards' letter of November 30, 1981 at 1, 3, 4, and emphasized at oral hearing. See Transcript of February 16 Hearing at 6; 87; 108 (statements of Messrs. Edgar, Davis and Kearney, respectively). The simple fact is that the Commission, in reaching its decision of March 16, did not ignore public interest factors other than cost. See Transcript of March 1 Meeting at 10, 12, 16 (statements of Commissioners Ahearne, Palladino and Bradford, respectively.)

Respectfully submitted,

Eldon V. C. Greenberg
TUTTLE & TAYLOR
1901 L Street, N.W.
Washington, D.C. 20036
(202) 861-0666

Barbara A. Finamore (By EVG)
Barbara A. Finamore
S. Jacob Scherr
Natural Resources Defense
Council, Inc.
1725 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-8210

Attorneys for Intervenors
Natural Resources Defense
Council, Inc., and the
Sierra Club

Dated: Washington, D.C.
May 17, 1982

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB, IN OPPOSITION TO APPLICANTS' REQUEST FOR RECONSIDERATION was delivered by hand this 17th day of May, 1982 to:

The Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable James K. Asselstine
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable Victor Gilinsky
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable John F. Ahearne
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable Thomas F. Roberts
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel Swanson, Esquire
Stuart Treby, Esquire
Bradley W. Jones, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Maryland National Bank Building
7735 Old Georgetown Road
Bethesda, Maryland 20814

R. Tenney Johnson, Esquire
Leon Silverstrom, Esquire
Warran E. Bergoholz, Jr., Esquire
Michael D. Oldak, Esquire
L. Dow Davis, Esquire
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

George L. Edgar, Esquire
Irvin N. Shapell, Esquire
Thomas A. Schmutz, Esquire
Gregg A. Day, Esquire
Frank K. Peterson, Esquire
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(3 copies)

Leonard Bickwit, Esquire
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20545

And by mail, postage prepaid, to the following:

Marshall E. Miller, Esquire
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
4350 East West Highway
Bethesda, Maryland 20814

Mr. Gustave A. Linenberger
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
4350 East West Highway
Bethesda, Maryland 20814

Dr. Cadet H. Hand, Jr.
Director
Bodega Marine Laboratory
University of California
P.O. Box 247
Bodega Bay, California 94923

Atomic Safety & Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Herbert S. Sanger, Jr., Esquire
Lewis E. Wallace, Esquire
James F. Burger, Esquire
W. Walker LaRoche, Esquire
Edward J. Vigluicci
Office of the General Counsel
Tennessee Valley Authority
400 Commerce Avenue
Knoxville, Tennessee 37902

William B. Hubbard, Esquire
Assistant Attorney General
State of Tennessee
Office of the Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

William E. Lantrip, Esquire
City Attorney
Municipal Building
P.O. Box 1
Oak Ridge, Tennessee 37830

Oak Ridge Public Library
Civic Center
Oak Ridge, Tennessee 37820

Mr. Joe H. Walker
401 Roane Street
Harriman, Tennessee 37748

Commissioner James Cotham
Tennessee Department of Economic
and Community Development
Andrew Jackson Building, Suite 1007
Nashville, Tennessee 32219

Eldon V. C. Greenberg