UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S REPLY TO THE
BRIEF OF INTERVENORS IN RESPONSE TO
THE COMMISSION'S ORDER OF DECEMBER 10, 1982

The Department of Energy and Project Management Corporation on behalf of themselves and the Tennessee Valley Authority (Applicants), herewith file their Reply to the Brief of Intervenors.

## Introduction

Intervenors' various arguments regarding the Section 50.12 authorization granted by the Commission are nothing more than a reformulation of their previous arguments already presented to and rejected by the Commission at the time it issued its Order on August 17, 1982. As in the past, Intervenors argue that the Congressional mandate is "evaporating"; that earlier start of site work will provide no informational



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benefits;[1] and that the Project will not benefit from the early start of site preparation activities. Although Intervenors contend that these arguments are based primarily on "facts which have arisen since August 1982," even a cursory examination of these facts demonstrates that they fail to support Intervenors' position.

Finally, Intervenors criticize both Applicants and the Commission for failing to understand, as Intervenors apparently believe they do, the appropriate standard to be applied in Section 50.12 proceedings. Intervenors assert, for example, that Applicants are "persistently and deliberately seek[ing] to confuse the concepts of 'extraordinary circumstances' and exigent circumstances." [2] As to the Commission, Intervenors charge that the Commission "ignores the distinction between the nature of the relief and the nature of the circumstances justifying relief." [3] Intervenors' arguments notwithstanding, the Commission's decision of August 17, 1982 was fully in accord

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1/ Interestingly, Intervenors finally concede that advancing site work will result in the early transfer of information from the CRBRP to other projects within the LMFBR Program. Intervenors now assert, however, based on nothing in the record, that early transfer of information will not be beneficial.

2/ Intervenors' Brief at 3.

3/ Intervenors' Brief at 6.

with its past precedent. The record in this proceeding fully supports that decision and it should be reaffirmed. 4/

## I. The Commission Applied The Appropriate Standard In Granting Applicants' Section 50.12 Request

Intervenors would have the Commission believe that past Commission precedent conclusively establishes that only "exigent circumstances" as defined by Intervenors warrant Section 50.12 relief. 5/ Although Applicants submit that the circumstances here are indeed exigent, Applicants also submit that Commission precedent establishes a number of factors which must be taken into account in applying Section 50.12.

From the time it first promulgated Section 50.12, the Commission has stated that Section 50.12 relief would be granted in order to prevent "undue hardship." Fed. Reg. 5746 (March 21, 1972); 39 Fed. Reg. 14506 (April 24, 1974). Moreover, in promulgating Section 50.12, the Commission noted that such relief was particularly appropriate "where plants are in an advanced stage of development, but where no site preparation work has yet been started. . . ." 37 Fed. Reg. 5746. In one of the first cases decided by the Commission

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4/ Because Intervenors continue to assert the absence of record evidence regarding the Commission's Section 50.12 decision, Applicants have attached hereto a copy of the Brief of Applicants filed December 15, 1982 with appropriate citations to the record.

5/ Intervenors agree that Section 50.12 requests should be granted sparingly, yet claim that the unique characteristics of CRBRP are irrelevant. See Intervenors Brief at 4, n. 3 and 8. Clearly these characteristics ensure that the Commission decision will not be precedent setting and entirely consistent with the Commission's sparing use of Section 50.12. Applicants agree with Intervenors that CRBRP should be treated as a commercial reactor. This includes, of course, the right to request relief under Section 50.12.

under Section 50.12, the Commission stated that exemptions under Section 50.12 "are granted sparingly and only in extraordinary circumstances." Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3, CLI-73-25, 6 AEC 619, 622 N. 3 (1973). 6/

Intervenors do not seriously dispute the fact that the Commission, in applying the broad standard of undue hardship or extraordinary circumstances, has identified a number of decisional factors to be taken into account in Section 50.12 proceedings including:

1. Whether the environmental review was at an advanced stage;

2. Whether the delay was caused by events outside the control of the Applicant;

3. Whether the grant of the request would avoid delay;

4. Whether the Project was in an advanced stage of development; and

5. Whether grant of the request would result in substantial cost savings to the public.

Two additional factors were added in the Commission decision in WPPSS: First, the presence of exigent circumstances, and second, the likelihood of timely relief from the Licensing Board.

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6/ Intervenors criticize Applicants on the ground that, according to Intervenors, Applicants "rely almost exclusively on the Commission's decision in Carolina Power and Light Company (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-74-22, 7 AEC 939 (1974)." While Intervenors assertion is plainly incorrect, it is curious that Intervenors themselves rely exclusively on one Commission decision - Washington Public Power Supply System (WPPS Nuclear Project Nos. 3 & 5), CLI-77-11, 5 NRC 719 (1977). See Intervenors Brief at 5-7.

Contrary to the approach taken by Intervenors, Applicants suggest that all relevant Commission precedent should be taken into account and read in harmony. That precedent clearly demonstrates that the Commission has not rigidly adhered to a fixed formula in considering Section 50.12 requests, but has, in light of the equitable nature of Section 50.12, looked at the totality of circumstances surrounding the request. More to the point, the Commission has held that the public interest is the touchstone for Section 50.12 relief. As the Commission noted in Shearon Harris (and in this case), Section 50.12 relief is available in "compelling circumstances to serve the public interest."

In this case, the Commission's decision authorizing site preparation was fully in accord with its past interpretations of Section 50.12. In issuing that decision, the Commission took into account all the relevant factors including the need for immediate relief,[7/] and concluded that the public interest favored granting the request.

## II. Absent Relief Under Section 50.12, The Project Would Have Suffered Unnecessary And Harmful Delays

As Applicants noted in their initial brief to the Commission, there is no serious dispute that the Section

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7/ The "exigent circumstances" standard was implicitly considered in all Section 50.12 requests. Virtually without exception, every Section 50.12 request has been made in order to avoid undue hardships resulting from delay in commencing site preparation activities. Intervenors, disputing the Commission's findings under the public interest factor, similarly recognize that the need to avoid undue hardship due to delay meets the "exigency" standard.

50.12 relief was and is necessary to prevent further delays in this Project. Indeed, events subsequent to the Commission decision have demonstrated that the Section 50.12 relief will avoid a delay of at least nine months in the completion of the Project. See Applicants' Brief at 9-11.

Intervenors do not dispute that the period of delay avoided by the Commission's decision is approximately nine months.[8/] Instead, Intervenors have devised a novel method of calculating the period of delay. According to Intervenors:

> the delays which the parties have been arguing over from the beginning in this matter, consistent with the WPPSS standard, have related to the issuance of the Licensing Board's decision, not the actual start-up of site preparation activities. 9/

Unfortunately, this statement which reflects Intervenors method of calculating delays, defies all logic, erroneously characterizes Applicants' position and is in conflict with the standard in WPSS.

Applicants thought it a matter of simply common sense that the period of delay in commencing site preparation ends on the date when such site preparation may commence pursuant to an LWA-1 decision by the Board -- not merely at the time the Board issues a decision. Thus, in light of the immediate

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8/ Intervenors in their Brief calculate the period of delay as six to eight months. Intervenors Brief at 23.

9/ Intervenors' Brief at 21-22.

effectiveness rules of 10 C.F.R. §2.764, Applicants may not commence site preparation activities for as much as eighty days after issuance of an LWA-1 decision by the Board. Thus, assuming a Board decision within three weeks of the end of briefing, an LWA-1 decision is not likely to be effective until mid- to late-May 1983 -- or some nine months after the start of site preparation activities in September 1982, and some five months from the Commission decision on January 6, 1983.

In addition, the Commission decision in WPPSS does not focus on the mere issuance of a decision by the Licensing Board as urged by Intervenors. Rather, in WPPSS, the Commission stated that Section 50.12 would be available where timely relief from the Board was unlikely. In this case, as Applicants have demonstrated, relief from the Board is highly unlikely -- even under the most ambitious of schedules -- until May, 1983. 10/

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10/ Intervenors argue that the Commission in reviewing its decision of August 17, 1982, should reconsider its decision "in light of evolving facts." Citing Davis, Administrative Law Text, Section 18.09 at 370-71 (3d ed. 1972). Although under certain circumstances it might be appropriate to consider changed factual circumstances, absolutely nothing has occurred since the Commission's August 17, 1982 decision which in any way effects the period of delay estimated by Applicants at 9-12 months. To the contrary, subsequent events have substantiated the accuracy of that estimate. In any event, Intervenors do not seriously argue that the period of delay should be considered as of the present time. Rather, Intervenors argue, as noted above, that the period of delay should stop at the time the Board issues its decision. Intervenors also concede that if their calculational method is not adopted, the period of delay is 6-8 months. See Intervenors Brief at 23.

## III. National Policy Continues To Support Expeditious Completion of CRBRP

Relying on recent Congressional action funding CRBRP for fiscal year 1983, Intervenors suggest that the Congressional policy for expeditious project completion is "evaporating." (Intervenors' Brief at 9 and 24). In particular, Intervenors contend that because the Conference Committee prohibited construction of permanent facilities and major purchases of equipment during the current fiscal year, and required the Department of Energy to consider alternative cost sharing arrangements with the private sector, it would be "inappropriate" to accelerate the CRBRP.

As a preliminary matter, it should be noted that Intervenors relegate to a footnote the statement in the Conference Report that "[o]ngoing activities related to the NRC licensing process should be continued." Applicants submit that this statement demonstrates the Congressional concern that the NRC review and licensing process continue without delay -- this includes, of course, the Section 50.12 authorization already granted by the Commission. As to the limitation on construction and purchase of equipment, as the Applicants' Site Preparation Activities Report shows, Applicants did not intend to engage in any permanent construction during the fiscal year. See SPAR Section 1. Nor did the Project intend to place any major equipment orders during the 1983 fiscal year. Rather, the funds requested and appropriated by Congress were intended in large measure to continue site preparation activities already commenced.

Contrary to Intervenors' assertions, Applicants submit that the recent Congressional action does not demonstrate a change in national policy. Nothing that has occurred in the recent Congressional appropriations process undercuts the intent of Congress as expressed in the Omnibus Budget Reconciliation Act of 1981, that CRBRP must be constructed as expeditiously as possible. Moreover, Intervenors fail to address the continuing support by the Executive Branch and the Department of Energy for the expeditious completion of CRBRP. In short, there is a continuing national policy in favor of expeditious completion of CRBRP.

## IV. Absent Section 50.12 Relief, The Project Would Have Suffered Undue Hardship

Intervenors vague and speculative arguments aside, the fact remains that absent Commission authorization to begin site preparation activities, the Project would have suffered undue hardship. First, a delay of this Project would result in an additional cost increase of $28,000,000 per year on a present worth basis -- a fact which is no longer in dispute.[11/] Second, at the point in time when Applicants requested authorization to commence site preparation, the Project had lost the ability to work around delays in the licensing process. Design work was virtually complete, major equipment orders of $500 million had been placed, and construction planning for site preparation was complete. Thus, in order to make any progress towards Project completion, it was (and remains) essential to begin site preparation. Ignoring these facts, Intervenors argue that the Project could somehow work around the delay, apparently on the basis that either site preparation was not on the critical path or some type of acceleration could take place at a later point in time.

As to the former argument, the advanced stage of design and planning noted above plainly discloses that the

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11/ In contrast to Intervenors, Applicants do in fact believe that the public interest is best served by avoiding additional costs of this magnitude. See Intervenors Brief at 11, n. 6.

Project could not progress absent authorization to begin site preparation activities. As to the latter point, precisely this argument was made before the Commission on July 23, 1982. As Mr. Edgar, counsel for Applicants noted during oral presentations before the Commission on July 29, 1982, it is simply not physically possible to somehow combine site preparation work with the later scheduled safety related work in order to shorten the schedule.[12/]

Finally, Intervenors' makeweight arguments regarding the loss of technical personnel must, once again, be rejected. The experience of the Project over the four year hiatus (1977-1981) clearly demonstrates the very real and pressing difficulties experienced by this (and any major) project in maintaining a qualified and experienced technical cadre during periods of delay. See SPAR at 7.4.

## V. The Department of Energy's LMFBR Program Would Have Suffered Undue Hardship Absent Commission Authorization

Despite the record evidence to the contrary, Intervenors continue to assert that delaying CRBRP will have no effect on the LMFBR Program. In fact, the uncontradicted evidence in this proceeding shows that CRBRP is the critical path project within the LMFBR Program. The timely transfer of information from CRBRP to other elements of the LMFBR Program, including

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12/ See Hearing Transcript of Oral Presentations at 212 (July 29, 1982).

the Large Developmental Plant (LDP), [13] is vital to the successful completion of the LMFBR Program.

Intervenors concede, as they must, that "earlier completion of the CRBR may result in earlier transfer of information." Intervenors' Brief at 15. Intervenors contend, however, that because there may be some slippage in programs such as the LDP, delay of CRBRP will not have any effect on the LMFBR Program.[14] Precisely this contention was addressed at the oral presentation before the Commission on July 29, 1982 by Thomas Dillon of the Department of Energy.

> The rest of the program, almost every element of it, the fuel cycle program and the base program, is far, far advanced from where we are in this important aspect of the program. Our weakest link in the breeder program is where we are in plant projects. Our most crucial need is the Clinch River, and by accelerating the Clinch River project, we will strengthen the overall program.
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> ... the converse is not true ....[15]

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13/ Intervenors are simply wrong in stating that the LDP is not funded. The Department of Energy plans to spend $15,000,000 in fiscal year 1983 on the LDP project. The funds for the LDP were included in the LMFBR Program appropriation.

14/ Hearing Transcript of Oral Presentations at 57-58. (July 29, 1982). Other witnesses testified to this point as well. See Hearing Transcript at 97-99, 100-101.

15/ Although conceding that the Commission's decision will promote the early transfer of information to the LMFBR Program, Intervenors apparently believe that the information can be transferred at any time -- even at the end of the 30-year demonstration program. See Intervenors Brief at 15-16. This argument wholly ignores the fact that the LMFBR Program is a phased program -- while the CRBRP is being constructed and operated, other phases of the program, which will draw upon CRBRP, are at various stages of development and require technical input from CRBRP. The Commission clearly recognized this in its decision of August 17, 1982. CLI-82-23 at 27.

As Mr. Dillon pointed out, CRBRP is a critical element at this time in the overall DOE LMFBR Program. At the same time, delays in other projects which are awaiting technical information from CRBRP are in part brought about by the fact that CRBRP is not in a position to provide technical information necessary to advance these projects.[16/]

In addition to their misunderstanding regarding the timing of CRBRP vis-a-vis the LMFBR Program, Intervenors also erroneously criticize Applicants for failing to demonstrate the need for early transfer of information from CRBRP. In fact, Applicants provided the Commission detailed information regarding the necessity for early transfer of information. In the SPAR as well as in the later submission to the Commission on August 2, 1982, Applicants identified a large number of areas in which timely technical information from CRBRP was crucial to the various projects within the LMFBR Program. In the submission of August 2, 1982, for example, Applicants pointed out to the Commission that:

> The acceleration of the construction experience from CRBRP will allow for factoring that experience directly into the conceptual and preliminary design effort for LDP. Given that significant design progress is always made in the first year of a project's preliminary design, a delay in transfer of CRBRP experience to LDP by 9-12 months represents a very significant loss in potential benefits. For example, on the current CRBRP construction schedule, assuming 50.12 approval, the installation of leak tight cell liners and pouring of concrete for these cells will occur

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16/ In a number of instances, Intervenors question the present need for CRBRP. See for example Intervenors' Brief at 16, n. 9. The question of the need for CRBRP is, of course, a matter outside the scope of these proceedings. See U. S. Energy Research and Development Administration (Clinch River Breeder Reactor Plant) CLI-76-13, 3NRC 67 (1976).

> from mid 1983 thru 1984. Confirmation of this construction technique is anticipated, but any problems encountered will be lessons learned for LDP at a stage in the LDP design which will allow for conceptual design changes to be made without major cost impact .... On the other hand, if the Commission does not grant the 50.12 request, more of the CRBRP experience will be out of phase with the LDP, increasing the cost and difficulty of incorporating this experience into the LDP deisgn, and reducing the ability to maximize the beneficial use of this information.

Applicants' Submission at 13-14 (August 2, 1982).

Intervenors are simply in error in asserting that no evidence was introduced regarding the importance of the early transfer of information to the LMFBR Program. In fact, the record fully supports the Commission's decision that the avoidance of delay in CRBRP and the early transfer of information would be of great benefit to the LMFBR Program.

## VI. International Considerations Support the Commission's Decision

Intervenors add nothing to their previously rejected arguments regarding the promotion of international matters through the grant of Section 40.12 relief. The uncontradicted evidence, and the considered judgment of the Department of Energy and the Department of State, is to the effect that various international negotiations for cooperative agreements

as well as an effective non-proliferation policy are and continue to be promoted by grant of the Section 50.12 relief.[17/]

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17/ See Hearing Transcript of Oral Presentations at 9-10, 32-33; SPAR 7-4 and 7-8. Intervenors do quote from a recent four page article in Science magazine for the proposition that certain European countries are cutting back to some unknown extent in their nuclear programs. The accuracy of the status of foreign programs as reported in this article is doubtful. Precisely what inference is to be drawn from this article is unclear. It is, in any case, unrelated to the technological position of the United States vis-a-vis other countries with substantial breeder programs. With regard to international policy matters, the conclusions of the article are inconsistent with ongoing negotiations with other LMFBR developing nations.

## Conclusion

Whether labeled as extraordinary or exigent, the circumstances surrounding the CRBRP clearly warranted relief under Section 50.12. By permitting the Project to begin site preparation activities, the Commission avoided a further delay of at least nine months and the consequent detrimental impacts of such a delay on the Project and the LMFBR Program. In addition, the Section 50.12 authorization was fully in accord with established national policy and promoted a number of important international policy issues. In sum, the Commission's decision was fully warranted under the circumstances and should be reaffirmed.

Respectfully submitted,

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for Project Management
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December 28, 1982

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

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| In the Matter of | ) | |
| UNITED STATES DEPARTMENT OF ENERGY | ) | |
| PROJECT MANAGEMENT CORPORATION | ) | Docket No. 50-537 |
| TENNESSEE VALLEY AUTHORITY | ) | (Section 50.12 Request) |
| (Clinch River Breeder Reactor Plant) | ) | |

BRIEF OF APPLICANTS
IN RESPONSE TO
COMMISSION ORDER OF
DECEMBER 10, 1982

The Department of Energy and Project Management Corporation, on behalf of themselves and the Tennessee Valley Authority, (Applicants) herewith file their Brief in Response to the Commission's Order of December 10, 1982.

## INTRODUCTION

On December 7, 1982, the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding to the Commission to identify "the exigent circumstances that warranted such extraordinary relief." Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, No. 82-1962, Slip op. at 4 (December 7, 1982).

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The Commission decision of August 17, 1982, (CLI-82-23) fully and carefully delineated the exigent or extraordinary circumstances warranting relief under Section 50.12. As in its past considerations of Section 50.12 requests, 1 the Commission addressed the extraordinary circumstances criterion under the four factors of 10 C.F.R. subsection 50.12(b). In particular, the Commission addressed the exigent or extraordinary circumstances criterion under the public interest factor. As the Commission stated in its decision:

> To determine whether the public interest warrants the initiation of site preparation activities under an exemption from 10 C.F.R. 50.10, the Commission considers the factors in 10 C.F.R. 50.12(b). Past Commission practice also suggests that exemptions of this sort are granted sparingly and only in extraordinary circumstances. E.g., Washington Public Power Supply System (WPPSS Nuclear Power Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977). The public interest criterion is therefore a stringent one. For the reasons discussed below, the Commission finds that the public interest favors an exemption in this extraordinary case.

CLI-82-23 at 17.
The Commission decision properly concluded that the public interest factors present in this case demonstrated extraordinary or exigent circumstances. Applicants submit that such a finding

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1 See for example, Carolina Power & Light Co. (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 and 4) CLI-74-22, 7 AEC 939 (1974) where the Commission noted that Section 50.12 relief is available in cases of "compelling circumstances to serve the public interest." Id. at 940.

was fully in accord with past Commission precedent. Accordingly, for the reasons set forth in this Brief, Applicants respectfully request that the Commission reaffirm its previous decision of August 17, 1982.[2]

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2 In reconsidering its previous decision, Applicants believe that the Commission should review its previous decision based on the factual circumstances existing as of August 17, 1982. Applicants submit, however, that even if considered as of the present date, a finding of extraordinary or exigent circumstances is fully warranted.

## I. THE SECTION 50.12 PROCEDURES ARE APPROPRIATELY INVOKED WHERE COMPELLING OR EXTRAORDINARY CIRCUMSTANCES ARE PRESENT

In promulgating Section 50.12, the Commission recognized its obligation to insure that its regulatory requirements do not cause undue hardship.[3]

Indeed, Section 50.12 reflects a conscious Commission policy decision to preserve its discretion to authorize site preparation in exceptional cases involving undue hardship. As the Commission noted at the time it promulgated Section 50.12(b), 10 C.F.R. subsection 50.12(b),

> ... the Commission realizes that in individual cases, particularly those instances where plants are in an advanced stage of development, but where no site preparation work has yet been started, undue hardship may be incurred. In those situations, relief may be sought by requesting a specific exemption under Sec. 50.12. Although it is expected that specific exemptions will be used only sparingly for this purpose, appropriate relief may be granted in particular cases where the facts so warrant and a favorable determination can be

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3 It is inherent in an administrative agency's authority and function to apply its regulations so as to avoid undue hardship. In National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943), the Supreme Court held that an administrative agency has an obligation to ensure that the purpose of the regulations is served by their application in a particular case:

> [t]he Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

See also WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)

> made with respect to the specified environmental considerations listed in the new Sec. 50.12(b).

37 Fed. Reg. 5746 (March 21, 1972 . In addition, at the time of the promulgation of 50.10(e), the Commission reiterated its position that relief under 50.12 would be available "in cases of undue hardship." 39 Fed. Reg. 14506, 14507 (April 24, 1974).

In its consideration of specific Section 50.12 requests, the Commission has similarly recognized the need, in appropriate cases, for relief under Section 50.12. In Carolina Power & Light Company (Shearon-Harris Nuclear Power Plant, Units 1, 2, 3 and 4) CLI-74-22, 7 AEC 939 (1974), the Commission, although noting that authorization to commence site preparation work "is the exception rather than the general rule," also recognized that

> It is manifestly in the public interest to have such an exception or exemption. See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972); Permian Basin Area Rate Cases, 390 U.S. 747, 784-87 (1968); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). This is true especially where, as here, benefits to the public will result from the site preparation work....

Id. at 944.

In light of the Commission's practice of granting relief under Section 50.12 "sparingly," the Commission has allowed such relief only in "extraordinary circumstances."[4] In Shearon-Harris, supra, the Commission enunciated the standard in the following terms:

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4 Washington Public Power Supply System (WPSSS Nuclear Project Nos. 3 and 5) CLI-77-11, 5 NRC 719 (1977).

> such work would be allowed -- by grant of an exemption only in the most compelling circumstances to serve the public interest; and even then such authorizations would be granted sparingly.

Shearon-Harris, supra at 940.

The Commission's case law on Section 50.12 provides a more explicit set of definitions for the sort of extraordinary or compelling circumstances which are sufficient for the grant of relief. In Shearon-Harris, for example, the Commission listed a number of circumstances which lead the Commission to conclude that granting the request was "particularly appropriate."

> In the circumstances of this case, it was particularly appropriate to authorize Carolina Power to perform such work. As explained above, even though the staff has issued a final environmental statement recommending the grant of construction permits for the Shearon-Harris reactor, the original licensing schedule had been substantially delayed because of design revisions which Carolina Power had to make to satisfy new requirements of the EPA. Moreover, a draft environmental statement based on these revisions (recommending a grant of construction permits) had been issued. And shortly after approval of the site preparation work, a final environmental statement of the revised plant was issued also recommending granting of the permits. In essence, this agency's environmental consideration of the proposed reactor was far from incomplete at the time the site preparation was authorized.

Shearon-Harris, supra, at 945.

In addition, it was found that permitting site preparation work would accelerate plant construction by six months and result in substantial cost savings to the public. Thus, in Shearon-Harris, the Commission identified the following factors as important to finding of extraordinary or compelling circumstances:

1. The environmental review was at an advanced stage.

2. The delay was caused by events outside the control of the applicant.[5]

3. Granting the request would accelerate project completion by six months, and

4. Granting the request would result in substantial cost savings to the public.

In Washington Public Power Supply, supra, the Commission noted an additional factor to be taken into account in a Section 50.12 proceeding. After finding that the Applicant had already been granted much of the relief it sought from the Licensing Board, the Commission stated that relief under 50.12 should be granted

> only in the presence of exigent circumstances, such as emergency situations in which time is of the essence and relief from a Licensing Board is impossible or highly unlikely.[6]

Id. at 723.

Finally, as the rulemaking history of Section 50.12 makes clear, authorization to commence site preparation is appropriate where the particular plant is "in an advanced stage of development, but where no site preparation work has yet been started...." 37 Fed. Reg. 5746 (March 21, 1972).

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5 In Gulf States Utilities Company (River Bend Station Units 1 and 2) CLI 76-16, 4 NRC 449 (1976), the Commission again noted that the delay was caused by events outside the applicants' control -- in that case the decision in NRDC v. NRC, Nos. 74-1385 and 74-1586 (July 21, 1976).

6 This factor was implicitly considered in Shearon-Harris in the finding that a delay was inevitable due to a revision of the final environmental statement and that grant of the request would accelerate construction by six months.

As shown in the Commission's decision of August 17, 1982, the factors considered important by the Commission are present in this case and a finding of extraordinary circumstances is clearly warranted. Because the Commission's decision was fully in accord with its past precedent regarding Section 50.12, the Commission should reaffirm that decision.

## II. IN VIEW OF THE EXTRAORDINARY AND COMPELLING CIRCUMSTANCES OF THIS REQUEST, THE COMMISSION SHOULD REAFFIRM ITS DECISION OF AUGUST 16, 1982

This request, as the Commission clearly found in its August 17, 1982 decision, is extraordinary in a number of important respects. As an initial matter, it should be emphasized that the net result of the Commission's decision is to advance the completion date of this Project by 9-12 months. / (Hearing Transcript at 73 (7/29/82).) At the time Applicants filed their request, Applicants estimated (and Intervenors did not seriously dispute) that grant of this request would save 6-12 months. / (Appl. Memorandum at 32 (7/1/82).) Subsequent events have amply demonstrated the accuracy of that estimate. At the present time, and under an ambitious, albeit exhausting hearing schedule, the Licensing Board in the underlying licensing proceedings will be in a position to issue an initial decision on LWA-1 issues by mid-to-late February 1983, at the earliest.[7] Moreover, in light of the Commission's regulations regarding immediate effectiveness review of initial decisions by Licensing Boards, authorization to proceed pursuant to an LWA-1 will not be

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7 Proposed findings are due January 24, 1983. Applicants have ten days to reply. Thus, the Board must issue a decision within 11 to 24 days of completion of briefing.

forthcoming until at least three months after the date of the Board decision.[8] Thus, the net effect of the Commission's decision has been to accelerate the completion of this vital project by approximately 9-12 months.[9]

While the schedular saving is significant in and of itself, its real importance lies in the beneficial consequences both to the Project and to DOE's LMFBR Program which will flow from the avoidance of further delay. As was thoroughly discussed in the Commission's decision of August 17, 1982, grant of this request was "particularly appropriate" and clearly warranted for at least five reasons. First, in light of the Project's unique nature, the grant of relief in this case is not precedent-setting and is entirely consistent with the Commission's sparing use of its Section 50.12 authority. Second, there are important national policies in favor of expeditious project completion which were clearly and properly advanced by the Commission's decision. Third, the Project is in an advanced stage of development and relief was necessary to avoid undue hardship. Fourth, grant of the request ensured the timely transfer of

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8 10 C.F.R. Subsection 2.764.

9 The Commission should review its August decision based on the facts before it as of that time. Even when viewed as of this date, however, a substantial time savings will result by permitting Applicants to proceed with site preparation activities. As shown above, an initial decision by the Board in February 1983 will not be effective under Commission regulations for approximately 3 months. Thus, as of this date, allowing Applicants to continue site preparation will advance the project completion by at least five months.

information from the CRBRP to other elements of the Department of Energy's LMFBR Program. Fifth, grant of the request will have a substantial positive impact on DOE'S international efforts.

A. In Light of the Project's Unique Characteristics, the Grant of Relief Was Entirely Consistent With The Commission's Sparing Use of its Section 50.12 Authority

In addition to the extraordinary circumstances attending this Project (which are discussed in detail below), the Project has certain unique characteristics which offer additional assurance against precedent-setting action. The plant will be licensed as a research and development reactor. Its primary mission is development of information, and not production of power. It is a key step in the development of the LMFBR, and thus must be constructed in a timely and expeditious manner to support the Nation's preparedness for longer-term nuclear power needs. Moreover, it will be owned by the United States Government, managed by DOE, located on government-owned land, and operated by another federal agency (the Tennessee Valley Authority) under contract to DOE. It is relatively small (375 MWe), compared to modern commercial reactors (1200 MWe)./ These unique Project characteristics, coupled with the exceptional circumstances discussed below, demonstrate that the Commission's authorization to begin site preparation will not be precedent-setting, but entirely consistent with the Commission's long-standing policy of granting such requests sparingly and only in exceptional circumstances.

Appl. Memorandum at 22 (7/1/82)

B. The Commission's Grant of the Request Advances Established National Policies

In submitting their request pursuant to Section 50.12, Applicants requested the Commission to give consideration to the established national policy in favor of expeditious project completion. /The Congress, the President and the Department of Energy have all determined that the CRBRP must be completed as soon as possible. Clearly these expressions of national policy constitute extraordinary and exigent circumstances which the Commission can and should take into account. /

Applicant's Memorandum at 29. (7/1/82)

CLI-82-23 at 23-26.

The intent of Congress, as reflected in the Omnibus Budget Reconciliation Act of 1981, can be summarized as follows:

a. The plant must be constructed in a timely and expeditious manner; construction must be undertaken as expeditiously as possible; the cooperation of all agencies is required;

b. Unrecoverable delays resulting from the 1977 decision to stop the project must be minimized; construction must be undertaken with as little delay as discretion will allow; and

c. The CRBRP is a key step in the development of the Liquid Metal Fast Breeder Reactor (LMFBR).[10]

The President's October 8, 1981, policy statement reflects a similar policy on the part of the Executive:

> I am directing that government agencies proceed with the demonstration of breeder reactor technology, including completion of the Clinch River Breeder Reactor. This is essential to ensure our preparedness for longer-term nuclear power needs.

17 Weekly Compilation of Presidential Documents, 1101-02 (1981).

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10 See H. R. Rep. No. 97-208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. H5817-18 (1981); 127 Cong. Rec. 58958 (1981)

The Department of Energy has implemented Congressional and Presidential policy and its own statutory responsibility for energy research and development, by determining that CRBRP should be completed as expeditiously as possible. The program called for in the Environmental Impact Statement for the Liquid Metal Fast Breeder Reactor Program (Supplement to ERDA-1535, DOE/EIS-0085-FS, May 1982) is construction of CRBRP as soon as possible.[11] In granting relief under Section 50.12, the Commission appropriately took this national policy into account. In its decision, the Commission, after reviewing the relevant legislative history, found:

> that the legislative history of the Omnibus Budget Reconciliation Act of 1981 clearly indicates a national policy that all federal agencies should exercise their discretion to enable CRBRP to be completed in a "timely and expeditious manner" so as to recoup some of the time lost since 1977. While this congressional intent may not rise to the level of a mandate that compels grant of the exemption, the Commission believes it is one important factor to consider that argues strongly in favor of the exemption.

CLI 82-23 at 26.

C. The Project Is In An Advanced Stage of Development and Relief was Necessary to Avoid Undue Hardship

As the Commission noted at the time it promulgated Section 50.12, the advanced stage of development of the Project is an important factor in considering the grant of relief under Section 50.12.[12] In addition, as the Commission noted in

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11 47 Fed. Reg. 33771 (Aug. 4, 1982)

12 37 Fed. Reg. 5746 (March 21, 1972).

Shearon-Harris, the advanced stage of the environmental review is similarly an important factor in assessing whether extraordinary circumstances are present. In this case, both the project and the environmental review of the Project are in an advanced stage of development. Further delay, therefore, would have resulted in undue hardship to the Project. / CLI-82-23 at 26.

In February of 1977, the NRC Staff completed its review of the radiological suitability of the Clinch River site, and issued a Site Suitability Report ("SSR") which concluded that the site was suitable for a reactor of the general size and type described in the application. See 10 C.F.R. subsection 50.10(e)(ii). In March of 1977, the NRC Staff completed its environmental review of CRBRP and issued its CRBRP Final Environmental Statement ("FES"), NUREG-1039. See 10 C.F.R. subsection 50.10(e)(i). The FES concluded that the action called for under NEPA was construction of the CRBRP.

On March 28, 1977, the Board issued an Order which set June 14, 1977 as the date of commencement of LWA hearings in Oak Ridge, Tennessee. The hearings were scheduled to continue until completion. On that basis, the Applicants anticipated that an LWA decision would be rendered in the fall of 1977, and that site preparation would then commence. On April 20, 1977, however, President Carter announced the previous Administration's decision to cancel the Project. Thereafter, the NRC licensing proceedings were suspended at ERDA's request and the NRC Staff suspended its review of the application.

In the ensuing four-year period, design, research and

development ("R&D"), and procurement activities for the CRBRP continued, while licensing activities and any possibility of commencing site preparation were precluded. By September 30, 1981, design and R&D were 90 percent complete, and more than $500 million of hardware had been placed on order. / The Project had advanced to the point that further progress toward completion could not be gained without commencement of site preparation. Indeed, the commencement of site preparation for Clinch River had become a critical path element of DOE's entire LMFBR Program.[13]

Applicants' Memorandum at 19 (7/1/82).

On January 18, 1982, the Licensing Board resumed the adjudicatory proceedings which had been suspended nearly five years earlier. In response, the NRC Staff began once again its radiological and environmental review of the Project.

On June 11, 1982, the NRC Staff issued its update to the 1977 radiological Site Suitability Report for CRBRP and again concluded that the Clinch River site was suitable for a reactor of the general size and type described in the application from the standpoint of radiological health and safety (NUREG-0786).

On July 19, 1982, the NRC Staff completed its documentation updating the 1977 FES for CRBRP. The NRC Staff determined that the document should be issued as a draft supplement and recirculated for comment. See 47 Fed. Reg. 33028 (July 30, 1982). This Supplement to the 1977 CRBRP FES noted that, although new information was included, the conclusions of the 1977 CRBRP FES had not changed. The Supplement concluded, as

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13 NRC Hearing Transcript, July 29, 1982 at 57.

did the 1977 CRBRP FES, that "the action called for is the issuance of a construction permit for the plant subject to certain limitations for the protection of the environment." As to site preparation activities, the Supplement reaffirmed the conclusion in the 1977 CRBRP FES that the environmental effects of site preparation would not be significant. Commission Order CLI-82-23 at 18-20.

As these facts demonstrate, at the time the Commission issued its order on August 17, 1982, the Project had advanced to the point that further progress toward completion was impossible unless site preparation activities were commenced. Moreover, the decision to recirculate the Supplement to the FES precluded the possibility of any timely relief by the Licensing Board.[14]

Because of the advanced stage of development, the Project lost its ability to work around delays in the licensing process. Absent Commission authorization, the Project would have been forced to mark time while awaiting an LWA decision by the Licensing Board and subsequent review by the Appeal Board and Commission. The net effect would have been to force the Project

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14 The Board had originally scheduled hearings on all LWA-1 issues for August 23, 1982. Up to the time of the Staff's decision to issue the update as a Supplement and recirculate it for comment, all milestones in the prehearing schedule had been completed. Once the staff determined that recirculation was necessary, the FES Supplement could not be issued in final form until November 1, 1982. As a result of the recirculation decision, the Board bifurcated the hearings, setting a site suitability phase for August 23-27, and an environmental stage for the weeks of November 17 and December 13. As a result, the Applicants' estimate of a 6-12 month savings associated with grant of Section 50.12 relief was modified to 9-12 months.

to maintain its design and construction team throughout the period of delay without any appreciable benefit to the Project, thus precluding the most productive use of Project funding, and inevitably increasing cost. / Applicants estimated and the Commission found that the grant of the Section 50.12 request would save or avoid $28,000,000 per year on a present worth basis.

Applicants' Memorandum at 20 (7/1/82).

In addition, the further delay of this Project threatened the technical resources of the Project. / As noted in the Site Preparation Activities Report (as well as the Commission decision):

Applicants' Supp. Resp. at 11-12 (8/2/82).

> Another serious concern would be the continued loss of the cadre of technical experts as they transfer to other areas in which they could hope to see more tangible progress during their technical careers. In fact, over the last five years, a substantial number of qualified personnel have left the CRBRP Project. Extensive efforts were undertaken during the last year to restore the necessary talent for effective project completion. However, retaining this nucleus of qualified personnel will be difficult without tangible progress on the Project.

SPAR at 7-4; Commission Memorandum and Order at 27-28.

Based on these facts, Applicants submit that the grant of relief was fully justified and clearly in accord with past Commission precedent. In particular, the facts of this case closely parallel those in Shearon-Harris which the Commission found compelling. As in Shearon-Harris, the environmental review process is at an advanced stage. As of 1977, the Final Environmental Statement was completed and concluded that the action called for is construction of CRBRP./ Due to circumstances

NUREG-0139 at iii.

and events beyond Applicants' control, including the four-year suspension of licensing and more recently the decision to recirculate a draft supplement to the FES, any possbiility of timely relief from the Licensing Board was effectively eliminated.15 Like the circumstances in Shearon-Harris compelling circumstances were present. The grant of relief would avoid an additional delay of 6-12 months and the undue hardship of increased costs to the Project and the Nation's taxpayers.

The consequences of further delay in this case, however, extend beyond the substantial immediate effects on the Project and the taxpayer. Unlike a commercial reactor, where the impacts of delay extend only to the project itself, additional delays in this Project will extend further to affect adversely the Nation's preparedness for longer-term nuclear power needs and vital international policies and programs./ CLI-82-23 at 26-28; Applicants' Memo at 20-21 (7/1/82).

D. Absent Immediate Relief From the Commission, the DOE LMFBR Program Would Have Suffered Undue Hardship

The primary role of the CRBRP is to provide technical information on a timely basis to LMFBR Program. The information to be obtained from design, construction, and operation of CRBRP is crucial to the timely and effective development of the major

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15 Given the extensive environmental reviews and the decision to recirculate, the circumstances of this case are plainly different than those in WPPSS, supra. There, the decision by the Board had already afforded the applicants much relief and the decision by the Board on an LWA-1 was "not too far off." In contrast, here, the likely delay as of the time of the Commission decision amounted to at least 10 months - the earliest period of time in which Board decision recommending an LWA-1 could become effective.

elements of the LMFBR Program including the Base Research and Development Program, the Large Development Plant and the LMFBR Fuel Cycle Program. /At the time of the Commission decision, due to past delays, the CRBRP was out of optimum synchronization with the overall LMFBR Program and had become the critical path element within the overall LMFBR Program. Any further delay of the CRBRP Project would have delayed the informational benefits to the LMFBR Program that would flow from CRBRP, adversely affected the coordination of the entire LMFBR Program /and, as noted earlier, eroded the talented cadre of technical personnel which has been assembled to carry out the Projects./

Appl's. Memo. at 21; Applicants' Supp. Response at 5-14; (8/2/82) SPAR at 7-5-7-10

Applicants' Memo. at 19-20 (7/1/82)

App. Supp. Response at 5-14(8/2/82); SPAR at 7-5 to 7-10.

The Department of Energy's experience with the Fast Flux Test Reactor amply demonstrates the importance of the timely transfer of information between related project. As a result of the information obtained from the FFTF, improvements in the CRBRP design were made in a number of areas, including containment, reactor vessel access, all construction, maintenance and clamp, and hatch design./

Applicants' Supp. Response at 4-5 (8/2/82).

As with FFTF, the informational benefits to be derived from the CRBRP are particularily needed for the the Large Developmental Plant (LDP). Because the design of CRBRP is virtually complete, however, the CRBRP must move into construction and operation as soon as possible in order that as the LDP is being designed, the lessons of CRBRP construction can be factored into the LDP design effort on a timely basis./

Appl's. Supp. Resp. at 12-14(8/2/82); SPAR at 7-8 to 7-9.

In its decision of August 17, 1982, the Commission specifically addressed the need for the early transfer of

information from CRBRP.

> The Commission finds that if the ultimate decision is to proceed with CRBR, then delay now would adversely affect the public interest by foreclosing the opportunity to transfer early information from CRBR to the rest of the LMFBR Program. While it is not feasible to quantify, or otherwise precisely identify the specific adverse effects of delay, or to identify in advance just which items of information provided by CRBR will be of early value to the base R&D program or to the LDP, it is clear from the experience with the FFTF that the sooner CRBR is begun, the more likely that it will provide useful information at an early enough time to be integrated into the overall LMFBR Program.

CLI 82-23 at 27.

The effect of further delay on the DOE LMFBR Program is an extraordinary or exigent circumstance which demanded relief pursuant to Section 50.12.

E. Immediate Relief Was Necessary To Promote International Interests

Timely development of the CRBRP and continuation of the LMFBR Program also advance a number of vitally important and interrelated international policy considerations. These include reestablishment of the United States' influence and leadership in the international nuclear field as a technological leader, as a reliable venture partner, and as a leader in establishing effective measures toward a credible nonproliferation policy.

Other major industrial nations have now surpassed the United States in terms of demonstrating LMFBR technology at intermediate and near-commercial sizes. For example, France, the United Kingdom, and the Soviet Union have surpassed the United States in intermediate-scale plant experience, the Japanese and

Germans are both constructing CRBRP-size developmental plants, and the French plan to bring their first large-scale plant on line in 1983. SPAR at 7-10. Since several nations will have operating commercial or near-commercial size breeders by the mid-1990's, any delay of CRBRP places the United States' commitment and technology further behind the rest of the world./ SPAR at 7-10. Hearing Transcript at 46.

Delay of the CRBRP also lessens the ability of the United States to enter into ventures with foreign countries in the development of nuclear technology. As Deputy Secretary of Energy W. Kenneth Davis said in answer to a question at the Section 50.12 hearing before the NRC, there have been negotiations with the British, Japanese, and French with the aim of being full partners in follow-on development work. In this regard, he stated that an important element in concluding negotiations is some indication of this country's ability to move ahead promptly in LMFBR development. Transcript of Oral Presentations before the Nuclear Regulatory Commission (July 29, 1982), at 32-33 (hereinafter Hearing Transcript). Also see SPAR 7-4 and 7-8.

Just as delay in CRBRP diminishes the ability of United States industry to compete effectively in world nuclear markets over the long term, it also diminishes the ability of the United States to influence the development and control of nuclear energy in a positive and peaceful manner./ SPAR at 7-10: Hearing Transcript at 46.

At the hearing, Deputy Secretary Davis read into the record a July 29, 1982 letter to him from Under Secretary of State Richard T. Kennedy that stated that the United States must

actively develop breeder technology domestically if it is to participate effectively in international cooperative efforts for developing and controlling such technology. Hearing Transcript at 9-10. Tangible progress on CRBRP at this "critical phase" (Hearing Transcript at 32) in the international safeguards arena is required to provide the United States with the needed technological basis to continue its influence over LMFBR matters, not the least consequential of which is the worldwide nonproliferation aspect of LMFBR applications.

In a July 16, 1981 Statement, President Reagan expressed his view on the importance of supporting effective international measures to reduce the threat of proliferation to help achieve a credible nonproliferation policy. He also made it clear in that Statement that the United States must reestablish its credibility in developing international nuclear policy and safeguards, as well as its credibility as a supplier of nuclear equipment, technology and fuels.

In its decision of August 17, 1982, the Commission recognized the extraordinary international implications of continued delay of the CRBRP and concluded that "the public interest will likely be adversely affected by the loss of these benefits through further delay of the CRBRP Program." Commission Memorandum and Order at 28.

## CONCLUSION

For the reasons set forth above, Applicants submit that

there are extraordinary or exigent circumstances attending this request. These circumstances clearly warranted the Commission's exercise of its 50.12 authority. Accordingly, Applicants respectfully request that the Commission reaffirm its previous decision.

Respectfully submitted,

Frank R. Petersen
for George L. Edgar
Attorney for Project
Management Corporation

Leon S. Silverstrom
Attorney for the Department
of Energy

December 15, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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| In the Matter of | ) | |
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| UNITED STATES DEPARTMENT OF ENERGY | ) | |
| | ) | |
| PROJECT MANAGEMENT CORPORATION | ) | Docket No. 50-537 |
| | ) | (Section 50.12 Request) |
| TENNESSEE VALLEY AUTHORITY | ) | |
| | ) | |
| (Clinch River Breeder Reactor Plant) | ) | |
| | ) | |

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