3/28/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPORATION TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant)	Docket No. 50-537 ASLBP Docket No. 75-291-12

APPLICANTS' ANSWER OPPOSING
INTERVENORS' APPLICATION FOR STAY
OF THE EFFECTIVENESS OF THE
ASLB PARTIAL INITIAL DECISION

Pursuant to 10 C.F.R. § 2.788(d), the United States Department of Energy and Project Management Corporation, for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby file this Answer Opposing Intervenors' Application for Stay of the Effectiveness of the ASLB Partial Initial Decision in the above-captioned proceedings. In urging the Appeal Board to stay the effectiveness of the decision of the Licensing Board recommending the issuance of a Limited Work Authorization (LWA), Intervenors have misstated the applicable legal standards, mischaracterized the ASLB decision, and ignored the fact that their arguments for a stay have, in large measure,

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already been rejected by both the Commission itself[1/] and the United States Court of Appeals for the District of Columbia Circuit.[2/] For these reasons, Intervenors' Application for Stay should be denied.

I. INTERVENORS HAVE MISSTATED THE APPLICABLE LEGAL STANDARDS FOR A STAY

While Intervenors accept the traditional four factor test stated in 10 C.F.R. § 2.788(e),[3/] in apparent anticipation of the fact that they will incur no irreparable injury if a stay is denied, they urge extension of that test to include the notion that even a "possible" irreparable injury has been held to suffice if there is a strong probability of success on the merits.[4/] In light of the extraordinary nature of the relief sought, Intervenors cannot seek refuge in less stringent standards not embodied in NRC's regulations or case law. Rather, they must meet a heavy burden under each of the four factors. They cannot rely on conclusory allegations, and they must demonstrate with

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1/ See United States Department of Energy (Clinch River Reactor Plant), CLI-82-23, ____ NRC __, August 17, 1982; [hereinafter, "Section 50.12 Decision"].

2/ Natural Resources Defense Council v. Nuclear Regulatory Commission, No. 82-1962 (D.C. Cir., October 6, 1982).

3/ Application of the Natural Resources Defense Council, Inc. and the Sierra Club for Stay of the Effectiveness of the ASLB Partial Initial Decision (Limited Work Authorization) of February 28, 1983, dated March 18, 1983 [hereinafter "Intervenors' Application"] at 3.

4/ Intervenors' Application at 3-4.

particularity their entitlement to a stay. Fire Protection For Operating Nuclear Power Plants (10 C.F.R. § 50.48), CLI-81-1, 13 NRC 778, 789 (1981).[5/]

II. INTERVENORS HAVE FAILED TO ESTABLISH A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

Intervenors argue that: a) the Board improperly found that the site was a suitable one from the standpoint of radiological health and safety; and b) the Board's decision on all contested environmental issues was in error. As to each argument, Intervenors have failed to show any likelihood of success on the merits.

A. Site Suitability

In regard to site suitability matters, the Board's decision addressed three issues:[6/]

5/ Likewise, Intervenors cannot shore-up the weaknesses in their position by resort to the notion that since the Clinch River Breeder Reactor Plant (CRBRP) is a first-of-a-kind plant, that somehow grant of a stay pending full Commission review on the merits is "plainly warranted." Intervenors' Application at 3. Upon consideration of factors which are mirror images of those governing grant or denial of a stay, the Commission was unpersuaded by Intervenors' argument that the first-of-a-kind nature of CRBRP would preclude the grant to conduct site preparation activities under 10 C.F.R. § 50.12 Section 50.12 Decision at 7.

6/ United States Department of Energy (Clinch River Breeder Reactor Plant), LBP 50-537 CP, ____ NRC ____, Partial Initial Decision (Limited Work Authorization), February 28, 1983, [hereinafter, "PID"] at 18.

(a) Whether core disruptive accidents (CDA's) should be considered as design basis accidents (DBA's) for the purposes of site suitability analysis;

(b) Whether the designated site suitability source term results in radiological consequences that envelop the spectrum of DBA's; and

(c) Whether the proposed containment design will reduce offsite doses to levels within the dose guideline values recommended for site suitability analysis.

For the purposes of the Application for Stay, Intervenors apparently do not take issue with the Board's decision as to the latter two issues,[7/] but instead urge that there is a substantial likelihood of error in the Board's consideration of the first issue--whether CDA's should be considered as DBA's for the purposes of site suitability analysis at the LWA-1 stage.

Intervenors have premised their argument on a clear misconstruction of the applicable NRC regulatory standards. Throughout the proceedings, Intervenors have asserted that site suitability findings must be finally and conclusively established at the LWA-1 stage of the proceeding based upon a completed, detailed design review. Thus, in their application for a stay, Intervenors claim that the "CDA/DBA issue is decisive" and must "be resolved before any decision is made to expend millions of additional dollars to prepare the site for construction." Intervenors' Application at 7. The real thrust of Intervenors'

7/ See PID at 21-22.

argument stands out in bold relief in their Proposed Findings of Fact submitted to the Board:[8/]

> Staff cannot logically reach a final determination as to whether CDAs or other accidents should be within the design basis envelope until it has completed a detailed CRBR safety review.

Contrary to Intervenors' arguments, a final and conclusive decision on the "CDA/DBA issue" is not required at the LWA-1 stage. Section 50.10(e)(2) of the Commission's regulations establishes the following standard to govern the Licensing Board's site suitability findings at the LWA-1 stage:

> based upon the available information and review to date, there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety. ... [9/]

Under this regulation, the Board's site suitability findings:

1. do not require a complete safety review, but can be "based on the available information and review to date."[10/]

2. do not require definitive evidence, but only a showing of "reasonable assurance that the proposed site is a suitable location."[11/]

8/ Intervenors, Natural Resources Defense Council, Inc. and The Sierra Club, Proposed Findings of Fact For The Limited Work Authorization (LWA-1) Proceedings, January 24, 1981 at 19.

9/ 10 C.F.R. § 50.10(e)(2).

10/ 10 C.F.R. § 50.10(e)(2)(iii).

11/ Id.

3. do not presuppose a completed, detailed design, but merely a "reactor of the general size and type proposed."[12/]

At the time it promulgated 10 C.F.R. § 50.10 the Commission specifically stated that the conclusions reached in an LWA proceeding could, under appropriate circumstances, be revisited during the Construction Permit or even Operating License stage.

> The rules adopted herein would not preclude the presiding officer from reopening the NEPA and limited safety hearing after grant of authorization under § 50.10(e) to consider new information upon motion by an interested party or on its own initiative. 13/

Moreover, the Commission noted that "any grant of authorization to conduct on-site activities could not serve to prejudice the outcome of the radiological safety review itself."[14/]

12/ Id. Compare 10 C.F.R § 50.35(a) discussed below.

13/ 39 Fed. Reg. 14506, 14507 (April 24, 1074). (Emphasis added).

14/ The regulation mirrors this view. 10 C.F.R. § 50.10(e)(4) provides that" [a]ny activities undertaken pursuant to an authorization granted under this paragraph shall be entirely at the risk of the applicant and, except as to matters determined under paragraphs (e)(2) and (e)(3)(ii), the grant of the authorization shall have no bearing on the issuance of a construction permit with respect to the requirements of the Act, and rules and regulations, or orders promulgated thereto." Similarly in Gulf States Utilities Company (River Bend Station, Units 1 & 2) LBP-75-50, 2 NRC 419, 461 (1975) the Board discussed the scope of review in the following terms:

> It is not required that the Board make findings at present as to whether the specific design of the River Bend Station

(Continued)

The Board's decision concerning the CDA/DBA issue fully complied with 10 C.F.R. § 50.10. Upon consideration of the design features incorporated in CRBRP to prevent progressions of an accident to the point of core damage or a CDA,[15/] the Board determined that these features can inhibit CDA initiation, that these features lend credibility to the proposition that CDA's need not be included within the envelope of DBA's, and that such component designs and functional characteristics can prevent DBA's from progressing to CDA's within the technological state-of-the-art. PID at 19-20. The Board specifically rejected all of Intervenors' evidence to the contrary as either inapposite, unnecessary to a decision, or adequately addressed in the record. PID at 20; 71-74. On this basis, the Board found and concluded that there were no threshold matters which would preclude designing and constructing a reactor of the size and type proposed so as to exclude CDA's from the spectrum of DBA's. PID at 19-22.

More importantly, and in obvious recognition of Section 50.10(e)(4), the Board specifically held that the issue would be

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conforms to the radiological health and safety requirements of 10 C.F.R. 50. ...

15/ These features, which the Board found to be based upon proven technology, include two fast acting shutdown (scram) systems, a shutdown heat removal system (SHRS) with four independent heat removal paths, measures to prevent double-ended primary system pipe rupture, and methods to maintain the balance between heat generation and heat removal in individual fuel assemblies. PID at 19; at 66-72.

reviewed and decided after completion of the NRC Staff's detailed safety review at the Construction Permit proceedings. PID at 22. Thus, the Board's decision is entirely consistent with the applicable regulation, 10 C.F.R. § 50.10(e)(2). Moreover, it does not prejudice Intervenors. On the contrary, it affords them another opportunity to present evidence on the appropriate design basis accident for CRBRP. The Board's decision was clearly correct.

B. Environmental Findings

In alleging error in the Board's manifold findings on environmental issues, Intervenors merely list a number of environmental issues considered by the Board and assert, without argument, discussion, or citation to the record, that the Board's decision was, in some unarticulated way, inadequate. Applicants are at a loss to even guess at what Intervenors arguments on the merits might be in the future. In that case, Intervenors have not made any, much less the required strong showing of likelihood of success on the merits.[16/]

16/ See 10 C.F.R. § 2.788(e). Significantly, Intervenors rely upon Natural Resources Defense Council v. Nuclear Regulatory Commission 685 F.2d 459 (D.C. Cir. 1982) in support of these assertions. Of course, the mandate of that case has been stayed, certiorari has been granted, and the Commission has rejected the very holding of that case upon which Intervenors now rely. 47 Fed. Reg. 50591 (November 8, 1982).

III. THE REMAINING FACTORS

As to each of the remaining three factors -- irreparable injury, harm to other parties, and public interest -- Intervenors have failed to make any plausible showing.

Intervenors argue that, absent grant of a stay, they will be irreparably injured because of 1) direct injury to the environment, and 2) injury to their NEPA rights. Of course, the Commission has found that the environmental effects of site preparation activities would not be significant, and in any event, they are not irreparable since they are redressable with relatively modest cost and means. Section 50.12 Decision at 18-21. As to their NEPA rights, Intervenors argue that site preparation activities would create additional project momentum, foreclose alternatives under NEPA, and thus constitute irreparable injury. The Commission has found that site preparation activities, and the commitment of resources therefor, will not foreclose any alternatives, including project abandonment. Section 50.12 Decision at 21-22.

Regarding harm to other parties, Intervenors argue that a delay of one month or so, when contrasted with the irreparable harm to them, weighs in favor of a stay. Since they have shown no irreparable injury, there is nothing to weigh in Intervenors' favor. Further, unneccessary delay to the project, however, would have substantial adverse impacts upon the project, DOE's

programmatic interests, established national policy, and the public interest. Section 50.12 Decision at 23-30.

In regard to the public interest, Intervenors argue that the need for a "complete environmental review" will outweigh the cost of any delay. The simple facts are: 1) the environmental review for CRBRP is complete; 2) Intervenors have already had their opportunity for hearing; and 3) they have lost on each and every one of their contentions. There is no case law which holds -- as Intervenors now argue -- that there is a public interest (under NEPA or otherwise) in granting the extraordinary remedy of a stay pending review to a party who cannot make any showing of entitlement.

IV. CONCLUSION

Intervenors have failed to sustain their burden of demonstrating that the extraordinary relief of a stay is warranted, and their Application for a Stay should be denied.

Respectfully submitted,

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Dated: March 28, 1983

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NUCLEAR REGULATORY COMMISSION

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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

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