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

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

APPLICANTS' ANSWER TO INTERVENORS' APPEALS

Pursuant to the Atomic Safety and Licensing Appeal Board's (Appeal Board) February 7, 1984 Order, 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 to the Appeals filed by the Natural Resources Defense Council, (NRDC) and the Sierra Club (Intervenors) in the above-captioned docket. 1/

In what follows Applicants' Answer will address: 1) the relevant procedural history; 2) the denial of NRDC's Motion to Intervene; 3) the Notice of Conference with Parties; and 4) the effect of the pendency of NRDC's LWA appeal on the Licensing Board's authority last June to dismiss NRDC entirely as a party to this proceeding.

1/ On February 6, 1984, NRDC filed a Notice of Appeal and a Brief in support thereof from the Licensing Board's January 20, 1984 Order Regarding NRDC Motion to Intervene, and on the same date, NRDC and the Sierra Club filed a Notice of Appeal and a Brief in support thereof from the Licensing Board's January 20, 1984 Notice of Conference with Parties.

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On that basis, the Applicants' will show that the Licensing Board's actions should be affirmed, and that the subject appeals should be dismissed.

I. THE RELEVANT PROCEDURAL HISTORY

The relevant history of Intervenors' participation in the Clinch River Breeder Reactor Plant (CRBRP) Construction Permit proceedings is set forth in detail in the Licensing Board's February 28, 1983 Partial Initial Decision (limited work authorization [hereinafter "PID"], 17 NRC 158, at 161-168, and in the Licensing Board's January 20, 1984 Memorandum of Findings (construction permit phase) [hereinafter "Memorandum of Findings"], LBP-84-4, Slip Op. (January 20, 1984), at 13-16. This history is commended to the Appeal Board's attention and will not be repeated here.

Of particular importance here are the following indisputable facts: 1) During the LWA hearings, Intervenors never advanced any contentions which related to the environmental impacts of site preparation activities. 2/ See PID, 17 NRC at 164, 167; 2) Intervenors did not appeal from the Board's June 29, 1983 ruling which dismissed them in entirety from the Construction Permit proceedings; and 3) Intervenors failed to file Proposed Findings of Fact

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2/ Before the Commission in the Section 50.12 proceedings NRDC did not present any serious substantive information concerning or contesting the Staff's and Applicant's evaluation of the environmental impacts of site preparation activities or the redressability of those activities. Indeed, the Commission's decision shows that NRDC raised only legal or policy arguments in this regard, and no substantive disputes existed. United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 422-428. In the LWA hearings, all issues as to the impacts of site preparation and construction activities were decided by the Board as uncontested matters, and NRDC took no appeal from those findings. PID, 17 NRC 158, at 247-250.

in connection with the Construction Permit hearings pursuant to the Board's August 11, 1983 Order, [3/] and thus forfeited and waived any rights or interest they might have had in the resolution of the issues before the Board in those hearings. 10 C.F.R. §2.754 a) and b); Florida Power & Light Co. (Saint Lucie, Unit 2), ALAB 280, 2 NRC 3, at 4 n.2 (1975).

II. THE DENIAL OF NRDC'S MOTION TO INTERVENE

NRDC's Brief in Support of Appeal, dated February 6, 1984 stated that ". . . the only reason given by the Licensing Board for denying NRDC's motion to intervene is that it would 'not be conducive to orderly practice', since '(p)arties cannot be permitted to float in and out of proceedings at will.'" Natural Resources Defense Council, Inc. Brief in Support of Appeal at 5. NRDC then proceeds to discuss three cases cited by the Licensing Board in connection with the aforementioned "only reason", and to infer that "[t]hese cases cannot be read to prohibit a former intervenor from raising entirely new contentions based on extraordinary circumstances which arose after the intervenor was originally dismissed" Id. at 6. From this, NRDC concludes that the Board "has erred in completely failing to address the question whether NRDC's Motion meets the 10 C.F.R. §2.714 late filing criteria" Id. at 7.

NRDC's analysis of the Board's reasoning is simply incorrect. The need for orderly practice was not the only, and in fact, not even the controlling reason for denial of NRDC's Motion. The propositions stated by NRDC's two proferred contentions were expressly conceded by Applicants, and the Board expressly found

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3/ The Order was served upon all parties and potential parties at the Board's direction (TR 8662-4).

that these propositions were moot. Order Regarding NRDC Motion to Intervene, January 20, 1984 [hereinafter "Board Order"] at 4-5. On this basis the Board concluded that no valid purpose would be served by the admission of an intervenor or by the litigation of moot contentions in an admittedly moot proceeding. Id. at 5. Unless one admissable contention is stated, the Motion to Intervene could not be granted. Philadelphia Co. (Peach Bottom Atomic Power Station, Units 2 and 3, ALAB-216, 8 AEC 13 (1974). For that reason the Board correctly held that "there is no need to go into the late filing criteria set forth in 10 C.F.R. §2.714(a) [4/] on some "even if" basis, because "'the undisputed facts establish that the apparently significant . . . issue does not exist, has been resolved, or for some other reason will have no effect on the outcome of, the licensing proceeding'". Board Order at 5-6.

Significantly, NRDC has not argued that its two contentions present litigable issues. It is simply beyond dispute that those contentions are moot. Given that undisputed fact, the Board properly denied the Motion to Intervene, and its Order should be affirmed.

III. THE NOTICE OF CONFERENCE WITH PARTIES

Having failed to gain readmission to the CRBRP Construction Permit proceedings directly, Intervenors have elected a novel device for attempting to gain readmission indirectly. Applicants'

4/ Even if it had been necessary to reach those criteria, the same result would obtain. See Applicants' Response to Motion of Natural Resources Defense Council, Inc. to Intervene, dated December 5, 1983, at 4-6. Even if discretionary intervention were considered, it is difficult to conceive of how NRDC could have an interest to protect or a contribution to make concerning redress or amelioration of the impacts of site preparation activities, when it never saw fit to raise substantive issues related to the subjects in these proceedings or in the Commission's Section 50.12 proceeding. See footnote 2 and accompanying text at 3, supra.

research located no cases in which an appeal was taken, successfully or not, from a Notice of Hearing, Notice of Prehearing Conference or like Notices. This is not surprising because such Notices in general and the instant Notification in particular do not, by themselves, affect the rights of any person. Rather, the instant Notification is merely the necessary result of three separate orders: 1) the Board's June 29, 1983 Order dismissing Intervenors from the proceedings; 2) the Appeal Board's Order dismissing Intervenors' LWA appeal and vacating the LWA decision; and 3) the Board's January 20 Order denying NRDC's Motion to Intervene.

As to the first order, despite its objections at the time, Intervenors were dismissed from the proceedings in entirety on June 29, 1983. Intervenors, however, have never appealed. Having failed to take a timely appeal, they have irretrievably lost their argument as to the propriety of the Board's June 29, 1983 ruling. 5/ The propriety of that ruling is not now properly before the Appeal Board.

As to the second order, before the Appeal Board Intervenors argued that the LWA appeal was moot, and on that basis this Appeal Board dismissed the Appeal and vacated the underlying LWA decision. ALAB-755 at 3 (December 15, 1983). That decision became final agency action on January 24, 1984. See, Memorandum

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5/ Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 159-160 (1980). Although the time limitations with regard to appeals are not jurisdictional, as a matter of general policy, they have been strictly enforced. Id. at 160. The untimeliness here is the direct product of Intervenors' lack of diligence, and Intervenors have advanced no "extraordinary and unanticipated circumstances" which would warrant a departure from the Appeal Board's general policy. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, at 165 n.3 (1982).

of Secretary of the Commission, Docket No. 50-537, January 25, 1984. To the extent that Intervenors had any contingent rights in the CRBRP Licensing Board proceedings by virtue of their LWA Appeal, all such rights were extinguished as of December 15, 1983. As acknowledged in its Brief in Support of Appeal relating to denial of its Motion to Intervene, Intervenors could then only claim the status of a "former party". See NRDC Brief in Support of Appeal, dated February 6, 1984 at 6. The fact that NRDC considered it necessary to file its November 23, 1983 Motion to Intervene, standing alone, is compelling evidence of NRDC's status as a former party.

As to the third and final order, it has been shown in Section II above that Intervenors' attempt to gain readmission to the proceedings through the November 23 Motion to Intervene was properly denied by the Licensing Board.

As a consequence of their own actions and the three orders mentioned above, Intervenors became and remain today "former parties". Consequently, the Notification did not itself affect Intervenors' right to participate in the Conference of the parties. If Intervenors have a grievance, it is with the three orders which gave them former party status, [6/] and as to each of these orders,

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6/ The Brief of NRDC and Sierra Club, in reliance upon 10 C.F.R. §2.714a, argues that there is an immediate right of appeal from this Notification since it wholly denied them the right to participate in the LWA Conference Brief of Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club in Support of Appeal, dated February 6, 1984 [hereinafter "NRDC/Sierra Brief"] at 2. 10 C.F.R. §2.714a, however, applies only to orders denying petitions for leave to intervene which are wholly denied, and in that case, an immediate appeal is allowed only on "the question whether the petition and/or hearing request should have been granted in whole or in part". 10 C.F.R. §2.714a (a) and (b). The Notification did not deny intervention, nor is the appeal of the Notification addressed to the question of whether the denial was proper.

Intervenors are entitled to no relief. Accordingly, the appeal must be dismissed.

IV. THE EFFECT OF THE PENDENCY OF INTERVENORS' LWA APPEAL ON THE LICENSING BOARD'S AUTHORITY LAST JUNE TO DISMISS INTERVENORS ENTIRELY AS A PARTY TO THIS PROCEEDING.

The Appeal Board's February 7, 1984 Order, at 1-2, stated that the "Parties should address the effect of the pendency of NRDC's LWA appeal on the Licensing Board's authority last June to dismiss NRDC entirely as a party to this proceeding".

The Licensing Board's dismissal of Intervenors from the proceedings was based upon the dismissal of all of Intervenors' contentions (TR 7330). Intervenors do not now and have never asserted that there were contentions remaining for litigation before the Board at that time. Moreover, Intervenors then represented that they were ". . . not seeking to file findings of fact on our written statement or on any matters raised at the July Construction Permit hearing or to appeal" (TR 7317). In spite of their expressed desire to remain as parties, Intervenors did not appeal the Board's July 29, 1983 ruling dismissing them, 7/ nor did they file proposed findings of fact in connection with the Construction Permit hearing issues pursuant to the Licensing Board's August 11, 1983 Order. By these two inactions, Intervenors lost all rights they may have had to seek review of their dismissal, and all rights and interest in the remaining course of the CRBRP proceedings.

7/ NRDC argues that the Board's ruling was "not with prejudice" NRDC Brief at 7. In fact, the Board explicitly declined to issue a speculative ruling as to the effect of dismissal, but would only consider the effect of future decisions as they were made. TR 7332-3.

As of September, 1983, if Intervenors had any remaining right or interest in the Licensing Board proceedings, it was contingent on the pendency of their LWA appeal, and only then if they obtained a remand for further proceedings before the Board. The Board no longer had jurisdiction over the matters considered in the LWA decision. 8/ At the same time, the Board clearly had the authority to dismiss Intervenors, based upon their admitted lack of litigable contentions. Whatever remaining rights Intervenors may have had at the time were matters not before the Board, but within the exclusive province of the Appeal Board.

One continuing Intervenor inaction and one subsequent Intervenor action extinguished their contingent rights in the proceedings. Their continuing inaction in failing to appeal the dismissal has extinguished their opportunity for review of the dismissal. The dismissal ruling is not properly before the Appeal Board at this time. Their action in seeking and obtaining an Order from the Appeal Board dismissing the LWA appeal and vacating the LWA decision eliminated any and all potential opportunity for further participation before the Board in the event that the Appeal Board remanded. Thus, as of December 15, 1983, Intervenors had no rights remaining in the CRBRP proceedings before the Board.

In granting Intervenor's Motion to dismiss the LWA appeal and to vacate the LWA decision, the Appeal Board did not reach the question of revocation of the LWA decision. Instead, the Appeal Board merely noted the fact that the Licensing Board had jurisdic-

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8/ The Board's June 29 ruling obviously could not affect the Appeal Board's jurisdiction, and indeed, the Board explicitly declined to speculate concerning the legal effect of the ruling in light of future Appeal Board or Licensing Board decisions (TR 7333).

tion over the Construction Permit application and the authority to determine if any conditions to ameliorate the environmental impact of site preparation activities are needed. ALAB-755 at 3-4. This did not and could not, however, create or recognize new rights in favor of Intervenors. It simply left Intervenors' rights to participate before the Board as they then existed, and in fact, all of those rights had been extinguished.

On the whole, Intervenors' actions in regard to the CRBRP proceedings are fraught with inconsistency. They participated in the LWA proceedings, but never raised contentions concerning the environmental impacts of site preparation activities. They withdrew from the Construction Permit hearings, and did not appeal. They sought and obtained complete relief in regard to the LWA appeal. It was dismissed and the LWA decision was vacated, thus fully protecting any future rights as to the merits of that appeal. They were properly denied readmission to the Construction Permit proceedings because their only new contentions were moot. Now they have come full circle, and are belatedly seeking to gain readmission and participate on matters relating to conditions for ameliorating the environmental impacts of site preparation activities - matters in which they did not participate even when they were a party to the LWA hearings.

Intervenors must be held responsible for their own actions and inactions. There is simply no valid basis for their readmission to the proceedings. The loss of Intervenors' rights to participate before the Licensing Board is the direct result of their own actions and inactions, and each step along the way was consciously considered by Intervenors. The CRBRP project has

been terminated and it is time for these protracted proceedings to reach an orderly conclusion. The Appeal Board should affirm the Licensing Board and dismiss the appeals.

Respectfully submitted,

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William D. Luck
Attorney for United States Department of Energy

Dated: February 21, 1984

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