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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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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

APPLICANTS' RESPONSE TO
MOTION OF NATURAL RESOURCES
DEFENSE COUNCIL, INC.
TO INTERVENE

The United States Department of Energy and Project Management Corporation hereby file their Response to Motion of Natural Resources Defense Council, Inc. to Intervene, dated November 23, 1983 [hereinafter "Intervenors' Motion"]. In support of this response, the Applicants state the following:

1. The Applicants concede that Congress has not appropriated funds for project continuance and that there is no reasonable likelihood that such funding will be appropriated.
2. The Applicants concede that the project participants have taken steps to reach agreement to terminate the project, but

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state that the agreement to terminate the project (Attachment C to Intervenor's Motion) has not been executed by all participants. That will not occur until the Tennessee Valley Authority (TVA) Board of Directors meets and approves TVA's execution of the agreement. This is expected to occur within the next few weeks, and the Applicants will so notify the Licensing Board.

3. The Applicants concede that the project cannot now satisfy the Commission's regulations governing issuance of a Construction Permit (CP) and that it is not now reasonably likely that the project will satisfy all of its programmatic objectives. In light of this, Applicants do not intend to seek issuance of a CP by the Commission.

4. Intervenor's Motion is in reality a de novo Petition for Leave to Intervene. Aside from the fact that it is formally insufficient,^{1/} it should be denied since: a) Intervenor's interest in the outcome is moot; b) the issues which the petition seeks to place in controversy are moot; and c) the petition fails to meet the criteria applicable to untimely petitions. In addition, the Applicants believe that the circumstances here are sufficiently compelling that the Board should issue a Partial Initial Decision, subject to the conditions set forth in paragraph 8 below.

^{1/} For example, there is no showing that any of NRDC's members now live within the prescribed distance from CRBRP, and there is no subscribed oath or affirmation for the contentions.

5. Intervenors Interest -

Intervenors state that they would be adversely affected by the Board's decision to issue a CP since if that were done, the Applicants might not perform site redress, and they would be irreparably harmed. Intervenors' Motion at 3-4. Intervenors cannot be adversely affected for the following reasons:

- a. The grant of a CP neither adds to nor subtracts from the Applicants' existing authority to conduct site preparation activities or their obligations regarding redress. The grant of a CP can have no effect on the interest stated by Intervenors.
- b. The Applicants will develop an appropriate plan for redress, and will seek review and approval of the NRC Staff. The Board should not presume that the Applicants will fail to fulfill their obligations, or the Staff will fail to fulfill its responsibilities.
- c. The Applicants do not intend to seek a CP, nor under present circumstances is there any basis under NRC's regulations for the Director of Nuclear Reactor Regulation to issue a CP.
- d. The Licensing Board's February 28, 1983 Partial Initial Decision authorized issuance of an LWA for the conduct of site preparation activities. Intervenors' parallel Motion to the Appeal Board argues that the LWA issues

are moot, and on those grounds, moved to terminate that proceeding. Applicants have conceded the point that the issues are moot, and Applicants have not objected to an order vacating the LWA decision. If the Appeal Board vacates the LWA decision, a CP cannot issue, and Intervenor's stated interests cannot be adversely affected by any action of the Licensing Board in the CP proceeding.

- e. Intervenor withdrew and were dismissed from the CP proceedings, and failed to file Proposed Findings of Fact pursuant to the Board's August 11, 1983 Order, thus waiving any and all rights they might have had in the CP proceeding.

6. Intervenor's Contentions -

Contention 1 seeks to establish that the project cannot satisfy NRC criteria for grant of a CP, while contention 2 seeks to establish that the project cannot meet all of its programmatic objectives. Since Applicants concede both propositions, both are moot and the contentions could not place in issue matters giving rise to a justiciable controversy. Moreover, if the Appeal Board vacates the LWA decision, a CP cannot be issued, and there is likewise no need for the Board to reach either of NRDC's moot contentions.

7. The Late Filing Criteria -

Intervenor has failed to sustain their burden as to each of the applicable factors, for the following reasons:

a. Good cause - Intervenor's allege that they could not have filed their two new contentions in a timely fashion because Congress' actions did not occur until recently. Intervenor's contentions merely take issue with the ultimate conclusion in these proceedings. Intervenor's would have this Board believe that they could not reasonably have advanced these contentions in a timely fashion. Congress' action was not a surprise to Intervenor's. Intervenor's participated actively in opposing the project before the Congress and have done so since its inception. It is simply incredible that Intervenor's could not have formulated these two new contentions through the exercise of reasonable diligence.

b. Other Means Available to Protect
Petitioners' Interest -

For the reasons stated in paragraphs 5 and 6, Intervenor's have no cognizable interests to protect. Intervenor's chose to drop out of the CP decision and sought relief before Congress. Now that they have that relief, there is simply no reason to allow them back for another bite of a moot apple. In addition, Intervenor's attempt to bootstrap their readmission as parties on the grounds that the Licensing Board has primary authority "to order appropriate site restoration, and to order the NRC Staff to oversee site

restoration efforts". The CP decision will neither add to nor subtract from the authority to conduct site preparation under the LWA decision and the Commission's Section 50.12 decision, or the Applicants' obligations in regard to redress. Thus, the question of redress does not give rise to an interest which Intervenor could protect in these proceedings. In addition, the Applicants intend to develop an appropriate plan for site redress, and to obtain review and approval of the Staff. The Applicants have no objection to the Board's formalizing that obligation in an Order, and thus Intervenor's stated interest will be fully protected even if their Motion is denied.

c. Development of a Sound Record -

Since there are no issues in dispute, there is no need for a record.

d. Representation of NRDC's Interests -

Intervenor has no cognizable interests which need representation. A CP is not sought by Applicants, nor is there any basis for issuance of a CP.

e. Delay and Broadening the Proceedings -

Intervenor's contentions are not and cannot be in controversy. Allowing Intervenor to litigate moot issues would, by definition, delay and broaden the proceedings.

8. While for the reasons stated above, Intervenor's Motion should be denied, Applicants believe that the following compelling circumstances exist for the Board to issue its Partial Initial Decision, subject to the condition stated in subparagraph e. below.

- a. The parties and the Board have expended substantial effort and resources in development of the CP record.
- b. The technical issues to be addressed by the Partial Initial Decision are fundamental to LMFBR design, and the long-term future of advanced reactor development. The Board's resolution of the issues will provide formal documentation and a reference point for direction of longer-term efforts on advanced reactor development. This will serve as future guidance for the NRC licensing process, and advance the compelling public interest considerations which have been embodied in the CRBRP application.^{2/} See United States Department of Energy (Clinch River Breeder Reactor

^{2/} See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) ALAB 455, 7 NRC 41, 54 (1978); Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), A LAB-467, 7 NRC 459, 465 (1978).

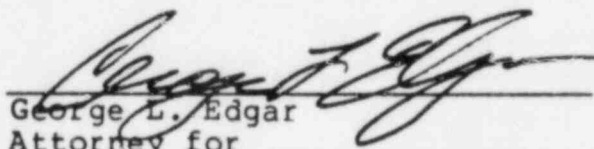
Plant), 16 NRC 412, 429-433 (1982)^{3/} [Hereinafter "Section 50.12 decision"]

- c. The additional resources necessary for issuance of a decision, while substantial, are not large in regard to the investment of resources already incurred by the Board and parties.
- d. Intervenorors have no cognizable interest whatever in how the Board will resolve the issues in the Partial Initial Decision. Intervenorors withdrew and were dismissed from the proceedings, and by failing to file Proposed Findings pursuant to the Board's August 11, 1983 Order, they have waived all rights and interest in those issues.
- e. The Applicants will not seek a CP, and will accept a condition that nothing in the Partial Initial Decision shall authorize the Director of Nuclear Reactor Regulation to issue that permit. Upon issuance of the Decision, the Applicants will move to, or the Board may sua sponte dismiss the Application on grounds of mootness, subject to the condition that an appropriate redress plan will be reviewed and approved by the NRC Staff.

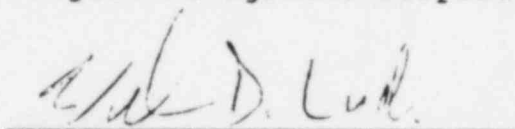
^{3/} Among the public interest considerations which would still be advanced by issuance of the PID are those involving information flow to the LMFBR base program and to a future cooperative project agreement. Section 50.12 Decision, 16 NRC at 431-432.

Accordingly, for the reasons stated above, Intervenor's Motion should be denied, the Board should issue an Order incorporating the foregoing terms and conditions, and the Board should proceed to issue the CP Partial Initial Decision.

Respectfully submitted,


George L. Edgar
Attorney for
Project Management Corporation

DATED: December 5, 1983


William D. Luck
Attorney for United States
Department of Energy

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
UNITED STATES DEPARTMENT OF ENERGY)
PROJECT MANAGEMENT CORPORATION)
TENNESSEE VALLEY AUTHORITY)
(Clinch River Breeder Reactor Plant))

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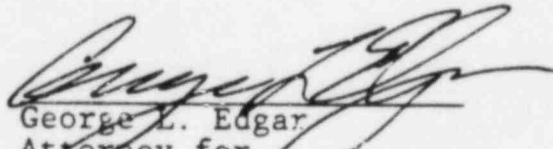
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