

1/9/84

BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR SAFETY AND LICENSING BOARD

DOCKETED
USNRC

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

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Docket No. 50-537CP

APPLICANTS' ANSWER TO NRDC'S REPLY
PURSUANT TO THE BOARD'S DECEMBER 28, 1983 ORDER

The United States Department of Energy and Project Management Corporation (hereinafter "Applicants") hereby file their Answer to NRDC's Reply Pursuant to the Board's December 28, 1983 Order. In support of their Answer, the Applicants state the following:

1. Applicants' Notification Concerning Project Termination, dated December 27, 1983 indicates that the project has been terminated. It will not, therefore, be built. On NRDC's own Motion, the Appeal Board has terminated the LWA appeal, and the LWA decision has been vacated. United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 17 NRC__, Slip Op., December 15, 1983. Therefore, a CP cannot be issued, and CRBRP cannot meet all of its programmatic objectives. Both of the contentions raised in NRDC's Motion to Intervene are, therefore, moot and its Motion to Intervene should be denied as moot.

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2. NRDC's Reply presents four basic arguments seeking to forestall issuance of a Construction Permit (CP) Partial Initial Decision (PID) by the Licensing Board:

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- a. Given the Appeal Board's termination of the LWA appeal, issuance of a CP PID by the Licensing Board would unfairly improve Applicants' position, and irreparably harm NRDC.
- b. The position taken by Applicants and Staff before the Appeal Board is inconsistent with their position here.
- c. The circumstances here are not appropriate for issuance of a CP PID, and issuance of a CP PID would be useless as precedent.
- d. Issuance of a CP PID would adversely affect NRDC's interests.

3. Improvement of Applicants' Position and Harm to NRDC - NRDC argues that a Partial Initial Decision resolving the issues before the Board in the CP proceedings would improve Applicants' position, and irreparably harm NRDC. NRDC's position is without merit for the following reasons:

- a. NRDC's withdrawal and dismissal from CP proceedings, coupled with their failure to file Proposed Findings pursuant to the Board's August 11, 1983, Order, resulted in an irretrievable waiver and forfeiture of any rights or interest which NRDC might have had in the resolution of the issues before the Board in the CP proceedings.
- b. NRDC speculates that if they had pursued their LWA appeal to conclusion, they would have been

successful, and a CP PID would be precluded. They ignore the fact that they sought and were granted termination of the LWA appeal, and that accordingly, the LWA decision was dismissed on grounds of mootness. A dismissal on ground of mootness carries no implication of success or failure on the merits of the LWA decision. It is neutral and it simply preserves the rights of all the parties as to the LWA issues. Contrary to NRDC's assertion (see Reply at 4), the LWA appeal dismissal is neither favorable nor unfavorable to Applicants. United States v. Munsingwear, 340 U.S. 36 (1950).

- c. It does not follow that dismissal of the LWA decision can have any effect on whether the Board should issue the pending CP PID. The alleged "improvement" in Applicants' position, if it exists at all, would occur if the Board resolved in Applicants' favor those issues before the Board in the CP hearings. In that regard, the Applicants are merely seeking a resolution of the issues in which they have invested substantial resources and energy, and if that is an improvement, it will not carry with it the authority or means to construct the CRBRP. In marked contrast, NRDC's asser-

tion that they will be irreparably harmed is simply fatuous. Incredibly, they argue that issuance of a CP PID would be useless as precedent (Reply at 6-7), while at the same time they assert that it would be harmful to them. They elected to forfeit all rights in the issues before the Board in the CP proceedings. They elected to terminate the LWA appeal. They sought for years to stop construction of the CRBRP, and they have now received complete relief. NRDC, however, has no cognizable right to forestall the Board's resolution of very issues that they have long since abandoned.

4. Inconsistent Positions. NRDC asserts that Applicants' advancement of compelling circumstances for issuance of a PID is somehow inconsistent with its having made no such claim with respect to the LWA appeal before the Appeal Board. As NRDC would have it, Applicants "cannot pick and choose what licensing decisions should be on the books". Reply at 5-6. While Applicants registered no opposition to NRDC's Motion to terminate the LWA appeal, that in no way precludes Applicants from seeking a Board resolution of the CP issues in which so much of the Applicants', Staff's and the Board's time and resources were invested.^{1/}

^{1/} NRDC has forgotten that it moved to terminate the LWA appeal, and that the Appeal Board granted that unopposed motion. Applicants did not pick or choose. They merely registered no opposition to NRDC's choice. It hardly seems productive of

(continued)

5. The Circumstances for Issuance of a CP PID - NRDC argues that the CP PID should not be issued because, in their view, breeder license applications are not contemplated in the foreseeable future. Moreover, NRDC argues that such a PID would be essentially useless as precedent. Reply at 6-7. In making this argument, NRDC at least concedes that there is no prohibition on issuance of the PID, and that issuance of the PID is a matter for the Board's discretion. Three points warrant emphasis here. First, the efforts invested by the Board, Applicants, and Staff in development of the record were substantial, and in light of their withdrawal and dismissal, NRDC's were not. Second, NRDC's withdrawal, and their own assertion that a PID would be useless as precedent, conclusively demonstrates that issuance of a PID would be entirely harmless to NRDC. Third, while CRBRP has been terminated, the LMFBR base program has not, and the guidance embodied in the PID will be of considerable value in providing program direction. The public interests inherent in that program have been previously recognized by the Commission itself as compelling circumstances, and they are equally compelling here. See United States Department of Energy (Clinch River Breeder Reactor Plant), 16 NRC 412, 429-433 (1982).

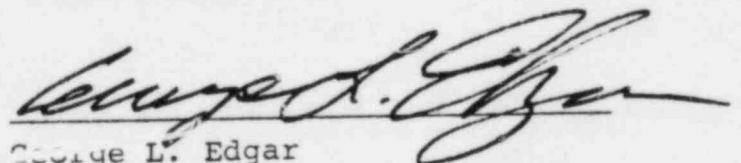
6. NRDC's Interests - NRDC persists in its argument that issuance of a PID will harm its interests. Although their assertion that the PID would be useless as precedent cannot be

this Board's time to delve into what NRDC believes that the Applicants should or should not have done before the Appeal Board. What was done is done, and the matter is now concluded by the Appeal Board.

squared with their claims of harm, judging from the shrill tone of NRDC's Reply, it is doubtless true that NRDC does not want a CP PID which resolves the issues before the Board in Applicants' favor. But the controlling question here is whether there is an interest which NRDC has a legal right to protect. The simple answer is no. NRDC forfeited all rights in regard to the CP issues before the Board when it withdrew and was dismissed, and when it failed to file Proposed Findings in disregard of the Board's August 11, 1983 Order. The Board's dismissal of NRDC did not include a ruling as to its legal effect. The Board allowed it to have whatever legal effect it might have. Transcript June 29, 1983 at 7732-33. Unfortunately, for NRDC, the effect it has here is terminal. NRDC has no cognizable interest in the PID, and its Motion to Intervene must be denied.

Accordingly, for the reasons stated above and in Applicants' December 5, 1983 Response to Motion of Natural Resources Defense Council, Inc. to Intervene, NRDC's Motion to Intervene should be denied, and the Board should proceed to issue the CP PID.

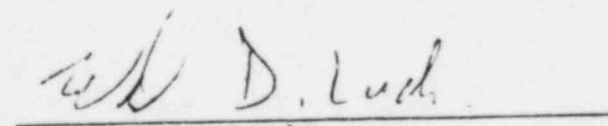
Respectfully submitted,



George L. Edgar
Attorney for Project Management
Corporation

Of Counsel:

Newman & Holtzinger, P.C.
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 862-8400



William D. Luck
Attorney for United States De-
partment of Energy

Dated: January 9, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PROJECT MANAGEMENT CORPORATION) Docket No. 50-537CP
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TENNESSEE VALLEY AUTHORITY)
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(Clinch River Breeder Reactor Plant))
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CERTIFICATE OF SERVICE

Service has been effected on this date by first class mail
to the following:

Marshall E. Miller, Esquire
Chairman
Atomic Safety and Licensing Board
Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814 (2 copies by hand)

Dr. Cadet H. Hand, Jr.
Director
Bodega Marine Laboratory
University of California
West Side Road
Bodega Bay, California 94923

Mr. Gustave A. Linenberger
Atomic Safety and Licensing Board
Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814 (by hand)

Mr. Gary J. Edles
Chairman
Atomic Safety and Licensing Appeal Board
Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814

Mr. Howard A. Wilber
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814

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

*Docket & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 (original and 3 copies
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Stuart Treby, Esquire
Sherwin E. Turk, Esquire
Elaine I. Chan, Esquire
Geary S. Mizuno, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Road
Bethesda, Maryland 20814 (2 copies by hand)

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State of Tennessee
Office of the Attorney General
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Tennessee Valley Authority
Office of the General Counsel
400 West Summit Hill Drive
Knoxville, Tennessee 37902 (2 copies)

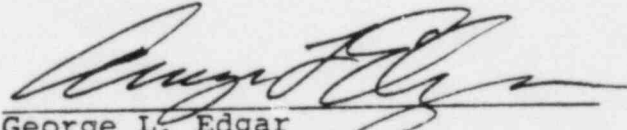
Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

William R. Lantrip, Esquire
Attorney for the City of Oak Ridge
Post Office Box 1
Oak Ridge, Tennessee 37830

Leon Silverstrom, Esquire
William D. Luck, Esquire
U.S. Department of Energy
1000 Independence Avenue, S.W.
Room 6B-256
Washington, D.C. 20585 (2 copies by hand)

Commissioner John L. Parish
Tennessee Department of Economic
and Community Development
Andrew Jackson Building
Suite 1007
Nashville, Tennessee 37219

Barbara A. Finamore, Esquire
S. Jacob Scherr, Esquire
Natural Resources Defense Council, Inc.
1725 Eye Street, N.W., Suite 600
Washington, D.C. 20006


George L. Edgar
Attorney for Project Management
Corporation

Newman & Holtzinger
1025 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
Telephone: (202) 862-8459

Dated: January 9, 1984

* / Denotes service by hand at 1717 "H" Street, N.W.
Washington, D.C.