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BEFORE THE  
UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEALS BOARD

In the Matter of

WISCONSIN-ELECTRIC POWER COMPANY )  
WISCONSIN-MICHIGAN POWER COMPANY ) Docket No. 50-247  
(Point Beach Nuclear Plant, Unit 2) )

INTERVENORS' MEMORANDUM  
IN SUPPORT OF STAFF'S  
PETITION FOR RECONSIDERATION

Intervenors support the Staff's Petition for Reconsideration and make the following additional points:

In its decision the Appeal Board emphasizes that there will possibly be a substantial delay in determining whether to issue a full-term license to Point Beach #2 if the fuel densification issue is resolved prior to that determination. (ALAB-90, pp. 9-12) The relevance of this delay to the stay order is apparently based on the Appeals Board's belief that there was a need for the electric power from Point Beach #2. (ALAB-90, p. 11) <sup>1/</sup> However, there is no basis in law for a

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<sup>1/</sup> If the need for power were a proper issue then the Board would at least have had to have an evidentiary hearing to determine whether the need existed. Counsel for Intervenors presented substantial contentions that no such need existed. (Appeal Board Transcript (January 3, 1973) at pp. 37-42.)

licensing board reviewing an issue of radiological safety to be concerned with power needs or the delay which will ensue from the full exploration of a relevant safety issue. The power need question and the effect of necessary delay are exclusively raised in the context of the environmental review and are outside the scope of the Commission's radiological safety review. See New Hampshire v. Atomic Energy Commission, 406 F 2d 170 (CA 1st, 1969) and <sup>2/</sup> National Environmental Policy Act, Section 101.

The Appeal Board advised the parties to the proceeding that evidence, including affidavits and exhibits, would not be received and then, in contravention of its own order, treated statements by Counsel and extra-record documents as evidence to support its decision. (ALAB-90, fn. 4)

Obviously, the standard established by footnote 4 goes far

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<sup>2/</sup> The Appeal Board reasoning that necessary delay and power needs are relevant factors in deciding whether to license a plant create, in effect, a plant by plant cost-benefit analysis on radiological safety matters. This position has been properly rejected by the Staff and should be rejected by the Appeal Board. See Answer attached to Staff's letter dated October 21, 1971, In the Matter of Consolidated Edison (Indian Point #2) Docket No. 50-247.

beyond what is acceptable under the Administrative Procedure Act or the Atomic Energy Act. <sup>3/</sup>

Finally, the Staff concedes that it has not completed its review of the fuel densification problem for Point Beach #1 or #2 (Tr. 15-16) and that it does not want any hearing on interim operation. (Staff Petition for Reconsideration, p. 8.) Removing, as we should, the element of delay and power need from consideration, we are left with the unassailable fact that at the present time there is no record sufficient to warrant issuance of a license to Point Beach #2 to operate at any level above 20%. The late discovery of the fuel densification problem means that resolution of that issue will delay the licensing decision on Point Beach #2 and other reactors. That is no basis for preventing a full and fair hearing on the issue prior to any licensing decision, including the right to full discovery and pre-trial preparation. There is no lawful basis for haste and there is every reason, both legal and technical, to see that this issue is resolved properly.

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3/ For an excellent discussion of the Commission's obligation to provide a right to an adjudicatory hearing see S. Rep. No. 92-787, 92nd Cong., 2nd Sess., particularly the Separate Views of Senator Baker.

Respectfully submitted,

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Counsel for Intervenor

Of Counsel (for purposes of this Memorandum only)

*Anthony Z. Roisman*  
Anthony Z. Roisman

Dated: January 15, 1973

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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of

WISCONSIN-ELECTRIC POWER COMPANY )  
WISCONSIN-MICHIGAN POWER COMPANY )  
(Point Beach Nuclear Plant, )  
Unit No. 2) )

Docket No. 50-301

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Intervenor's  
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was mailed, postage prepaid this 15th day of January, 1973 to  
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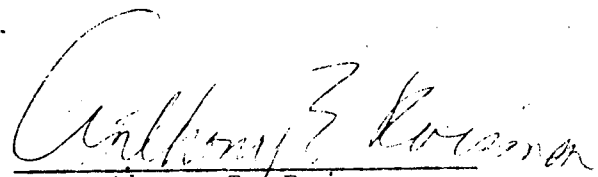
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