

DOCKET NUMBER  
PROD. & UTIL. FAC. 50-237

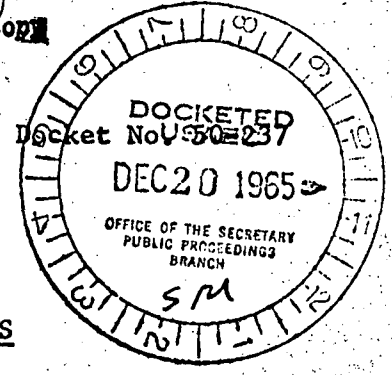
UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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In the Matter of  
COMMONWEALTH EDISON COMPANY  
Dresden Unit No. 2

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW SUBMITTED BY AEC REGULATORY STAFF  
IN THE FORM OF A PROPOSED INITIAL DECISION

This proceeding involves the application of Commonwealth Edison Company (Commonwealth) dated April 15, 1965, and amendments thereto dated May 17, July 9, August 17, August 19, September 16, October 4, and October 21, 1965, for a construction permit for a boiling water reactor designed to operate at 2255 megawatts (thermal) to be located at the Dresden Nuclear Power Station, Grundy County, Illinois. The facility will be constructed for Commonwealth by the General Electric Company. The application contains a description of the site and the proposed facility, the financial qualifications of the applicant, and the technical qualifications of the applicant, including those of its principal contractor, to design and construct the facility.

The application has been reviewed by the regulatory staff of the Atomic Energy Commission which concluded that the facility can be constructed and operated at the proposed site without endangering the health and safety of the public. The application was also reviewed by the

Advisory Committee on Reactor Safeguards which concluded that the proposed reactor can be built and operated at the proposed site without undue risk to the health and safety of the public.

In accordance with the requirements of the Atomic Energy Act of 1954, as amended, a hearing was held before the undersigned Atomic Safety and Licensing Board on December 7 - 8 , 1965, in Morris, Illinois, to consider whether the provisional construction permit should be issued. No persons sought to intervene in the proceeding.

The application and the proceeding thereon comply with the requirements of the Act and the Commission's regulations. There are no unresolved safety questions pertinent to the issuance of a provisional construction permit. There are no controverted matters of fact or law between the parties to the proceeding.

The Board has given careful consideration to all of the documentary and oral evidence produced by the parties and to the report of the Advisory Committee on Reactor Safeguards in this proceeding. The provisional construction permit sought should be issued because:

1. In accordance with the provisions of 10 CFR § 50.35(a)

- (1) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components on which further technical information is required;

- (2) The omitted technical information will be supplied;
  - (3) The applicant has proposed, and there will be conducted, a research and development program reasonably designed to resolve the safety questions with respect to those features or components which require research and development; and
  - (4) On the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility and (ii) taking into consideration the site criteria contained in Part 100, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;
2. The applicant is technically qualified to design and construct the proposed facility;
  3. The applicant is financially qualified to design and construct the proposed facility;
  4. The issuance of a permit for the construction of the facility will not be inimical to the common defense and security or to the health and safety of the public.

Pursuant to the Act and the Commission's regulations, IT IS ORDERED THAT, subject to review by the Commission upon its own motion or upon

petition for review in accordance with the "Rules of Practice," 10 CFR 2, Commonwealth is authorized to construct the facility in accordance with the application and with the evidence and representations entered in the record at the hearing; and the Director of the Division of Reactor Licensing is directed to issue a provisional construction permit pursuant to § 104(b) of the Act substantially in the form of Attachment A hereto.

IT IS FURTHER ORDERED THAT, in accordance with § 2.764, this Initial Decision shall become effective on (ten days after issuance) and, in the absence of any further order from the Commission, shall constitute the final decision of the Commission on (forty-five days after issuance), subject to the filing of a petition for review and to any order by the Commission upon such petition or upon its own motion.

ATOMIC SAFETY AND LICENSING BOARD

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Eugene Greuling

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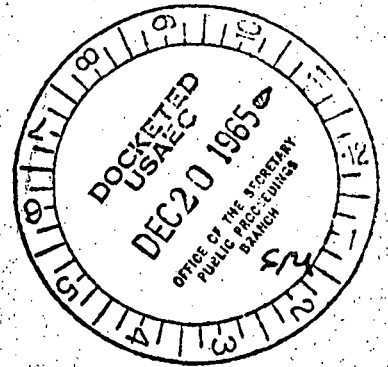
Hugh Paxton

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J. D. Bond, Chairman

Dated at Germantown, Maryland  
this      day of December, 1965.

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UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of )  
COMMONWEALTH EDISON COMPANY )  
(Dresden Nuclear Power Station )  
Unit No. 2) )

Docket No. 50-237

MEMORANDUM OF THE REGULATORY STAFF IN

SUPPORT OF ITS PROPOSED FORM OF INITIAL DECISION

December 17, 1965

### Statement of the Case

At the hearing in the captioned proceeding, the regulatory staff submitted a proposed shortened form of initial decision for the Atomic Safety and Licensing Board's consideration.<sup>1/</sup> The proposed form of decision, intended for use only in uncontested cases, would identify the parties and the decisional record, recite that the statutory procedural requirements have been met, recite that the review by the regulatory staff and by the Advisory Committee on Reactor Safeguards (ACRS) have been made, specify that there are no unresolved safety questions or disagreements between the parties pertinent to the issuance of a provisional construction permit, specify the absence of intervention, recite that the Board has considered the entire record and set forth the ultimate regulatory and statutory findings and an appropriate order.

The staff is submitting herewith its "Proposed Findings of Fact and Conclusions of Law in the Form of a Proposed Initial Decision," which differs from the specimen produced at the hearing only in that the dates of the hearing have been inserted and in the notation that Dr. Eugene Greuling replaced Dr. Albert Kirschbaum as a member of the Board.

The applicant stated at the hearing that it would submit some additional findings. It agreed, however, that in the event the Board did not

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<sup>1/</sup> That document and the proposed form of provisional construction permit attached thereto were marked as Procedural Exhibits Nos. 1 and 1A.

consider such additional findings essential to its decision, the applicant waived rulings by the Board in accordance with § 8(b) of the Administrative Procedure Act (APA) on its proposals. This waiver was accepted by the Board. (Tr. 389)

#### Legal Discussion

The staff's position is that the proposed initial decision submitted by the staff in this proceeding, as described at page one above, fully meets the requirements of the Atomic Energy Act of 1954, as amended, and the APA. The Atomic Energy Act and Part 50 of the Commission's regulations require certain findings to be made before a provisional construction permit may be issued. These findings were reflected in the issues set out in the notice of hearing in this matter. Findings on these issues are specifically set out in the proposed initial decision submitted by the staff. Further, the procedural requirements of the Atomic Energy Act, such as the requirement for ACRS review and a mandatory hearing with a 30 day notice, have all been met.

Section 181 of the Atomic Energy Act makes applicable the provisions of the APA to all licensing hearings. The section of the APA pertinent to the scope of an initial decision is § 8(b) which provides as follows:

"8(b) Submittals and Decisions.--Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of

subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record, and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Emphasis supplied.)

Accordingly, the question presented is, in simplest terms, whether the proposed form of initial decision contains "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

There is a lack of direct precedent on this question which is understandable since "uncontested administrative proceedings" seldom reach the courts.<sup>2/</sup>

A review of the authorities relating to the purpose of findings in decisions under § 8(b) of the APA discloses, however, that the reasons generally advanced are (1) the Government should not operate in secret,

<sup>2/</sup> A recent discussion of the scope of the APA requirements in contested cases is set forth in "Administrative Findings Under Section 8(b)", 51 Virginia L. Rev. 459 (1965). See generally Administrative Law, Second Series, Pike and Fischer, Vol. 2, § 8b.13.



(2) the acts of the sovereign should be done in the open subject to comment and criticism, (3) losing parties especially have a right to know as fully as possible the grounds upon which their case was decided, and (4) the parties need to know the basis of the decision if they are to prepare intelligently for agency review of a decision of a subordinate officer, for reconsideration by the agency of its own decision, or for judicial review.

Another reason for requiring findings is to make clear the basis of the decision for use as a precedent in subsequent cases.<sup>3/</sup> Thus, the reasons for findings relate primarily to the articulation of the tribunal's basis for the resolution of contested matters and to the protection of the rights of participants. None of the reasons stated above are transgressed by the staff's proposed decision in the instant case. The applicant was present and agreed to the proposed procedural course of action and, indeed, has affirmatively waived its rights to rulings on proposed findings.

With respect to the form and content of decisions under § 8(b) of the APA, the legislative history provides some helpful guidance:

"The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.

<sup>3/</sup> 51 Virginia L. Rev. 459, 462. See also Davis, "Administrative Findings, Reasons, and Stare Decisis," 38 Calif. L. Rev. 218, 223-228 (1950).

"Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa."<sup>4/</sup>

The relevant issues in this proceeding are those specified by the Commission in the notice of hearing. The findings and conclusions on these issues are set forth in the proposed decision. The basis for the findings and conclusions on these issues is adequately set forth in the decision. Specifically, the proposed decision provides references to the application, to the favorable review by the staff and the ACRS, to the public hearing which was conducted, and to the facts that there are no unresolved safety questions pertinent to the issuance of a provisional construction permit, that there are no controverted matters of fact or law between the parties and finally, that the Board has given careful consideration to all of the evidence.

To the extent that any reservations the Board may have concerning use of the shortened form of initial decision may be predicated on considerations of possible prejudice to the applicant, it will be recalled that the applicant (see page 4 above) specifically waived any rulings by the Board on any additional findings it might file and that the Board approved the waiver. The legislative history of the APA as interpreted by the limited relevant case law supports the view that its

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<sup>4/</sup> Sen. Rep. pp. 24-25, H.R. Rep. p. 39 (Sen. Doc. pp. 210-211, 273).

procedural safeguards may be waived by the parties. H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., 233, 218 (1946). See also U.S. Bio-Genics Corp. v. Christenberry, 173 F. Supp. 645 (S.D.N.Y. 1959), aff'd, 278 F. 2d 561 (2d Cir. 1960), and Democratic Printing Co. v. F.C.C. 202 F. 2d 298 (D.C. Cir. 1952) which, though involving other sections of the APA, nevertheless would support the view that when all parties agree and none suffer prejudice, the requirements of the APA concerning findings may be waived.

At the hearing the staff noted that its proposed form of initial decision might be questioned by some in view of the language used in the Commission's statement of consideration which accompanied the amendments to the regulations authorizing the use of licensing boards noted above.<sup>5/</sup>

This statement of consideration recites in pertinent part that:

"Boards will be expected in their opinions to discuss the principal safety matters involved in issuance of the proposed construction permit or license with emphasis on those advances in reactor technology which might be of significance from a safety standpoint. In this sense, the Board's opinion should be prepared with the objective of familiarizing the Commission with the reasons for the Board's conclusions."

Under the circumstances of this particular case, which involves a type of facility reviewed by the Commission in two other recent proceedings, we do not believe that there are any unique advances in reactor technology of significance from a safety standpoint which need to be discussed in

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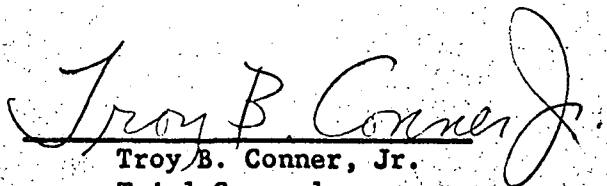
<sup>5/</sup> 27 F.R. 12184, December 8, 1962

The Board's decision. While the proposed facility involves some features which will require "research and development" work, none appear to present unique developmental problems. Accordingly, we do not consider that there are any special features of this facility which require explanation.

Conclusion

The staff does not suggest that the Board should not make such further comments as it may wish to include in its decision in this case. Our purpose in providing the proposed form of decision was to assist the Board in expediting its review by furnishing a document which the staff believes satisfies all pertinent legal requirements and is otherwise appropriate.

Respectfully submitted,

  
Troy B. Conner, Jr.  
Trial Counsel

Of Counsel:

Howard K. Shapar  
Assistant General Counsel  
Licensing and Regulation

Dated at Bethesda, Maryland

this 17th day of December, 1965.

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ATOMIC ENERGY COMMISSION

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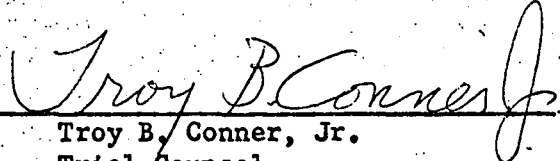
Docket No. 50-237

STAFF'S REPLY TO APPLICANT'S MOTION  
FOR EXPEDITED EFFECTIVENESS OF INITIAL DECISION

On December 13, 1965, the applicant filed a "Motion for Expedited Effectiveness of the Initial Decision" pursuant to § 2.764(a) of the Commission's "Rules of Practice," 10 CFR 2.

Good cause having been shown by the applicant, the staff consents to the granting of this request.

Respectfully submitted,

  
Troy B. Conner, Jr.  
Trial Counsel

Dated at Bethesda, Maryland  
this 17<sup>th</sup> day of December, 1965.

