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LAW OFFICES

CONNER & KNOTTS

1747 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

TROY B. CONNER, JR.
JOSEPH B. KNOTTS, JR.
J. MICHAEL McGARRY, III
NICHOLAS S. REYNOLDS
MARK J. WETTERHAHN

September 20, 1976

(202) 833-3500
CABLE ADDRESS: ATOMLAW

Mr. Benard C. Rusche
Director, Office of Nuclear
Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of Public Service Electric & Gas Company
(Salem Nuclear Generating Station, Units 1 and 2)
Docket Nos. 50-272 and 50-311

Dear Mr. Rusche:

In response to your letter of September 8, 1976, enclosed is the "Applicant's Memorandum on the Request of the Environmental Coalition on Nuclear Power to Suspend the Operating License for Unit 1 and the Construction Permit for Unit 2 of the Salem Nuclear Generating Station." For the reasons stated therein, no show cause proceeding is justified pursuant to 10 CFR 2.206 for the Salem Nuclear Generating Station.

Sincerely,

Mark J. Wetterhahn
Counsel for Public Service
Electric & Gas Company et al.

MJW/mwm

cc: Richard Fryling, Jr., Esq.
Michael E. Riddle, Esq.
Dr. Chauncey Kepford
Mr. Chase R. Stephens

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APPLICANT'S MEMORANDUM ON THE REQUEST OF THE ENVIRONMENTAL COALITION ON NUCLEAR POWER TO SUSPEND THE OPERATING LICENSE FOR UNIT 1 AND THE CONSTRUCTION PERMIT FOR UNIT 2 OF THE SALEM NUCLEAR GENERATING STATION

On August 26, 1976, the Office of the Secretary of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") received a document styled "Petition for Intervention" ("Petition") in the captioned proceeding from the Environmental Coalition on Nuclear Power ("Coalition").[1/] The Coalition, as basis for its request cited "the Atomic Energy Act of 1954, as amended, Part 2.714 of Title 10 of the Code of Federal Regulations, and decisions 73-1776, 73-1867, 74-1385 and 74-1586 of the United States Court of Appeals for the District of Columbia.[2/] By letter dated September 8, 1976, the Director of the Office of Nuclear Reactor Regulation ("Director") informed the Applicant that "[a]lthough the petition is for intervention, we are treating the complaint as a request for Order to show cause for suspension of the Unit No. 2 Construction Permit No. CPPR-53 and the Unit No. 1 License No.

1/ Neither the Applicant, Public Service Electric and Gas Company ("Applicant" or "Company") acting for itself and on behalf of Philadelphia Electric Company, Delmarva Power and Light Company, and Atlantic City Electric Company, nor its counsel in Washington, D.C. were served by the Coalition. With only a few exceptions, this petition is identical in substance to at least six other petitions, all captioned "Petition for Intervention", involving facilities in the mid-Atlantic region.

2/ Petition at p. 1. The decisions referred to are Natural Resources Defense Council, et al. v. NRC, Nos. 74-1385, 74-1586; and Aeschliman, et al. v. NRC, Nos. 73-1776 and 73-1867 (D.C. Cir., July 21, 1976) (hereinafter referred to as NRDC and Aeschliman, respectively).

DPR-70 issued to the Public Service Electric & Gas Company for the Salem Nuclear Generating Station." This pleading contains the Applicant's comments on the Coalition filing, as construed by the Director of the Office of Nuclear Reactor Regulation, i.e., as a request for an order for the suspension of the construction permit and operating license. We will rely on this interpretation by a responsible spokesman for the NRC; however, should any arm of the Commission indicate an intention to treat this Coalition filing as a "petition for intervention" and a request for a hearing involving the Salem Nuclear Generating Station, Applicant will expect the further opportunity to respond in that forum.[3/]

At the outset, Applicant wishes to note an anomalous situation regarding the Director of Nuclear Reactor Regulation's consideration of the suspension of the operating license for Unit 1. In its General Statement of Policy,[4/] the Commission recites that "two nuclear power plants are at the stage where an operating license might otherwise have been issued imminently." The NRC further stated that:

3/ The Commission's Memorandum and Order of September 14, 1976 in the Vermont Yankee and Midland proceedings (Docket Nos. 50-271, and 50-329, 330, respectively) gives at least tactic approval to such procedure, Slip Opinion at p. 6. See also Duquesne Light Company (Beaver Valley Power Station, Unit 1) Order of the Appeal Board dated September 14, 1976.

4/ Environmental Effects of the Uranium Fuel Cycle, Docket No. RM-50-3, General Statement of Policy, 41 Fed. Reg. 34707 (August 16, 1976).

> "There are obvious costs incurred when plants stand idle. Since existing concepts for reprocessing and waste technology do not vary significantly with the design of nuclear power generating facilities, it is extremely unlikely that the revised environmental survey will result in any modification of these facilities. Only the possibility of discontinuing their construction or use is likely to be at issue." 5/

As a result of this finding, the NRC issued an operating license to Salem Unit 1 authorizing fuel loading and low-power testing. 6/ Inasmuch as the Commission has made a positive determination that an operating license should be issued, presumably, after itself weighing the factors in the General Statement of Policy, the Coalition would seemingly have to make even a more substantial showing before the Director before he would consider having such Commission-issued license suspended. In any event, inasmuch as the Coalition has not addressed the equitable factors contained in the General Statement of Policy, the Director should dismiss such request outright.

Section 2.206 requires that any persons making a request to institute a proceeding pursuant to 2.202 to modify, suspend or revoke a license "shall specify the action requested and set forth the facts that constitute the basis for the request

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5/ Id. at 34708.

6/ See NRC Press Release 76-189 (August 13, 1976) and the General Statement of Policy at p. 34708.

[emphasis supplied]." In its Indian Point decision,[7] in reviewing the denial by the Director of Regulation of a request for a show cause proceeding, the Commission held that "parties must be prevented from using 10 CFR 2.206 procedures as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented."[8] In addition, the Commission held that a show cause order would have been required only if substantial health and safety issues[9] had been raised. It further stated that a mere dispute over factual issues would not suffice.[10]

Section 2.206 imposes serious prosecutorial responsibilities upon the staff affecting authority already granted to licensees by the Commission. Section 2.206 was adopted by the Commission to provide a formal mechanism for members of the public, who might otherwise have no standing to

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7/ Consolidated Edison Company of New York, Inc. (Indian Point Units 1, 2 and 3) CLI-75-8, NRCI-75/8, 173, 177 (August 4, 1975).

8/ Id. at 176.

9/ In this case, the Coalition would presumably have to show a significant environmental issue which had immediate impact on the public. In the closely analogous case of a request for a stay pendente lite, the NRC has required a showing of a threat to health and safety or to the environment. Southern California Edison (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB-212, 7 AEC 986, 997 (1974).

10/ Indian Point, supra, note 2 at p. 176.

participate in a formal hearing, to bring matters to the Commission's attention for investigation.[11/]

The requirement for careful evaluation of the facts recognized by the Commission stems primarily from the fact that none of the legal safeguards to the hearing process, such as affidavits and a showing of standing and interest, are required. The Commission has stated that merely because a request for initiation of a show cause proceeding has been filed, such fact is not dispositive of whether a hearing should be held:

> "It should be emphasized that the mere filing of a request for enforcement action or license modification under §2.206 does not itself automatically initiate any proceeding. Only in instances where the Commission staff authorized to act upon §2.206 requests decides, after careful evaluation of the facts, to proceed upon a request, is a notice of violation or an order to show cause issued pursuant to other rules in Subpart B of Part 2 (10 CFR 2.201, 2.202) which provide procedural safeguards and remedies adequate to protect the interests of licensees." 12/

11/ See "Notice of Denial of Petition for Rule Making" dated January 19, 1976 in Docket No. PRM-2-2 which stated:

> "10 CFR 2.206 was promulated . . . to provide a simple procedure for a person to request enforcement action or license modification based on facts brought to the Commission's attention . . . ."

12/ Id.

Great care must be exercised in the first instance to assure that irresponsible, frivilous, and unsupported charges are not made the subject of a hearing. Moreover, the Staff must be able to sustain its position at any hearing by qualified evidence.[13/] We believe the Staff in the past has recognized the seriousness of its responsibilities, and following precedents such as Indian Point Unit 3,[14/] should deny the Coalition's request.

As discussed below, the Coalition is attempting to raise matters which should have previously been raised or matters which should be considered in a forum other than a show cause hearing. The Coalition seems to take the unsupported position that the D.C. Circuit's two opinions and the limited remands that resulted give it "an open season" on any and all matters that have occurred to it, and, while the matters it wishes to raise are considered, construction and operation of the Station should be automatically halted. There is absolutely no basis for this position.

13/ 10 CFR 2.202(a)(1)

14/ Consolidated Edison Company (Indian Point No. 3) Memorandum and Order of the Commission dated June 14, 1972, 4 AEC 942, 943 (1972).

Petitioner has failed to make any showing of entitlement to the institution of a show cause hearing. The Coalition has not raised a single substantial issue which warrants consideration of suspension of the Salem construction permit or operating license.

In that the Coalition has not set forth the facts that constitute the basis for its request, nor related its request in any way to the specific facts concerning the construction and operation of the Salem Station, the Director of Nuclear Reactor Regulation should reject the request and so advise the Coalition. Ordinarily such action would dispose of the matter. However, in Union Electric Company (Callaway Plant, Units 1 and 2) ALAB-346, NRCI-76/9, ___ (September 9, 1976), an Appeal Board ruled that the applicant in that proceeding had the burden of proof on a motion to suspend construction permits. Applicant submits that for the reasons hereinafter discussed, the Appeal Board's interpretation is incorrect and has no applicability to a situation, as here, where an outside party is requesting the institution of §2.202 proceedings. Nevertheless, as the Director might feel himself bound by that Appeal Board holding, Applicant will address the equitable factors identified by the Commission in its General Statement of Policy. It is readily apparent that the equities are all on the side of permitting continued construction and operation.

On October 20, 1972, the Commission published in the Federal Register a notice entitled "Consideration of Issuance of Facility Operating Licenses and Opportunity for Hearing" for the Salem Station (37 Fed. Reg. 22637). The Coalition did not request a hearing at that time. Another organization requested and was made a party to the proceeding, but was later dismissed and the proceeding dismissed. At least one of the members of the Coalition listed in the petition was a member of that group.

Inasmuch as the Coalition's Petition contains no stated basis to support the request for the institution of a show cause proceeding,[15/] it is extremely difficult to respond to unarticulated charges. Nevertheless, herein, Applicant has examined the "contentions" of the Coalition to see if they support the issuance of an order to show cause.

The Coalition's contentions can be generally divided into two categories: (1) Those which seemingly bear some outward appearance of a connection to the NRDC and Aeschliman

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15/ Inasmuch as the Coalition is charged with knowledge of the General Statement of Policy and is experienced in NRC proceedings, Applicant submits that no opportunity for further submittals from the Coalition should be given.

decisions; and (2) the remaining contentions bearing no relationship to either case which could have been raised as contested issues at an operating license stage hearing. As discussed hereinafter, neither category can possibly give the requisite support for the institution of a show cause hearing.

The Court of Appeals' decision concerning energy conservation in Aeschliman cannot support the institution of a show cause proceeding. In Aeschliman, the Court held the Commission incorrectly failed to consider the alternative of energy conservation and the "threshold test" required of the intervenors in that case was arbitrary and capricious. The Court held that it was only necessary for an intervenor to bring "sufficient attention to [an] issue to stimulate the Commission's consideration of it." 16/ The Court continued:

> "Thereafter it was incumbent on the Commission to undertake its own preliminary investigation of a proffered alternative sufficient to reach a rational judgment whether it is worthy of detailed consideration in the EIS. Moreover, the Commission must explain the basis for each conclusion that further consideration of a suggested alternative is unwarranted." 17/

16/ Slip opinion at p. 13.

17/ Id.

Licensees submit that the Midland and Salem cases may readily be distinguished on the facts. The Midland case resulted from Court review of a construction permit proceeding. During such proceeding, the Commission reviews the environmental impact of the proposed facility prior to commencement of construction and while a spectrum of alternatives could be reasonably implemented.[18/] On the other hand, Salem Unit 1 has been granted an operating license and is presently undergoing startup testing; if such testing is not stopped, commercial operation is planned for late 1976. At that time Salem will be producing electricity for the customers of the four owner-utilities. Unit 2 has been under construction for 10 years and is well along toward completion. It is therefore submitted that there is really no viable alternative regarding conservation of energy that could be explored by the Commission under the "rule of reason" test set down by the Court in NRDC v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972) and cited by the Court in Aeschliman.[19/] In Aeschliman, the Court opined that an agency "may deal with circumstances 'as they exist and are likely to exist'" citing Carolina Environmental Study Group v. U.S., 510 F.2d 796, 801 (D.C. Cir. 1975).[20/]

18/ Any site preparation work prior to the issuance of a construction permit is at the applicant's risk and is not weighed in a cost-benefit analysis, 10 CFR 50.10.

19/ Slip opinion at p. 12.

20/ Id.

issue at the construction permit stage. Here the Coalition has, with regard to Salem, chosen to remain silent until now.

There are other distinctions between the cases. The intervenor in the Aeschliman case submitted comments on a draft environmental statement, which in the Court's eyes raised a colorable alternative not presently considered by the Commission and brought sufficient attention to the issue to the Commission's consideration. Here the Coalition submitted no such comments on the draft statement, nor took any other early action reasonably calculated to bring the question of energy conservation before the Commission when it still existed as a viable alternative.[22/] Even granting that, for the sake of argument, the question of energy conservation had to be considered here, the Coalition has given no factual basis for the necessity of shutdown while the Commission was examining the matter. The Aeschliman case cannot support the institution of show cause proceedings for the Salem Station.

The NRDC case was vacated and remanded to the Commission for further rulemaking action concerning a portion of its rule related to consideration of the environmental impact of the fuel cycle. The Court in NRDC held that the rule adopted by the former AEC in 1974 to codify the environmental effects of the uranium fuel cycle for individual light-water nuclear power reactors, 10 CFR 51.20(e) (summarized in Table S-3) was inadequately supported insofar as it treated the

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22/ Applicant does not concede that even if the matter were considered, there would be any change to the conclusion that the power from the Salem Generating Station was necessary.

reprocessing of spent fuel and of radioactive wastes. The Court found no defect in any other portion of the rule, specifically finding that, aside from reprocessing and waste storage, "the Environmental Survey did an adequate, even admirable job, of describing the processes involved." NRDC (Slip opinion at p. 24). As discussed, infra, the Coalition's "contentions" which bear any relation to fuel reprocessing or waste disposal only deal with the economic costs associated with each, as opposed to their environmental impact. Such dollar costs were never part of Table S-3 and thus the proper time for the Coalition to have raised them would have been at an operating license hearing. The Coalition has given no reason why this matter could not have been raised at that time.

Insofar as the Coalition alludes to matters concerning fuel reprocessing and waste disposal, it has not specifically related those matters to the Salem Station nor to any reasons why the construction and operation of the units need be suspended. The Commission has directed that the remanded questions should be considered in a reconvened generic rulemaking proceeding.[23/] There is no showing that the

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23/ The Commission has stated in its General Statement of Policy that it intends to reopen the rulemaking proceeding on the Environmental Effects of the Uranium Fuel Cycle, Docket No. RM-50-3 for the limited purposes of:

1. Supplementing the record on the reprocessing and waste management issues; and

2. Determining whether or not on the basis of the supplemental record, Table S-3 of 10 CFR 51.20(d) should be amended and, if so, in what respect.

(Footnote continued on next page)

Coalition's "contentions" have any specific applicability to the Salem Station nor provide any basis whatsoever for a show cause proceeding in this docket. The reconvened rulemaking will undoubtedly result in generic resolution of the reprocessing and waste disposal issues as indicated by the General Policy Statement and, to avoid duplicative, ad hoc reconsideration of the issues resolved therein, the prescription of the scope of further consideration, if any, in individual licensing proceedings. Applicant, therefore submits that the matters relating to spent fuel reprocessing and waste disposal matters that the Coalition seeks to raise in the guise of a show cause hearing, if not otherwise deficient, are misdirected. There is a real possibility that any attempt to proceed now will be soon mooted because either the interim rule will satisfy the Petitioner or foreclose or severely limit its ability to show a need for further consideration of the fuel cycle matter with regard to the Salem construction permit or operating license. In any event, there has been no showing that the fuel cycle matters alluded to in the Petition support the institution of show cause proceedings for this specific facility.

23/ (Footnote continued)

In addition, the General Statement of Policy contemplates an interim rulemaking proceeding which could result in a rule which is an adequate substitute for Table S-3 pending issuance of the final rule. The Commission states that the interim rulemaking would be accomplished through notice and comment procedures only.

For the other matters raised in the Petition, the Coalition has not attempted a showing of substantial good cause as to why it waited until now to raise these matters.[24/] More importantly, the Coalition has made no showing whatsoever, even if the Commission were to give further consideration to these matters, as to why a halt to construction and operation is required, pendente lite. The situation here is analogous to the situation existing after the Calvert Cliffs' decision[25/] was rendered. Following that case, an opportunity was given to request suspension of certain construction permits and operating licenses pending completion of further environmental review by the Commission. Such request had to set forth the factual basis for the request with specific reference to criteria similar to those in the General Policy Statement.[26/] In response to such opportunity, a request was made in the Indian Point Unit 3 docket for such a hearing. As here, such request was devoid of factual basis. In denying that request, the Commission stated:

24/ Even if viewed as a motion to reopen the proceeding, the Coalition has not met its burden of showing that its "newly discovered evidence" would cause a different result to be reached had it been considered (Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1) ALAB-227, 8 AEC 416, 418 (1974)).

25/ Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

26/ See 10 CFR Part 50, Appendix D, §E.4.

"The request is opposed by the applicant and the regulatory staff on the ground that the petition fails to meet the requirements established by 10 CFR Part 50, Appendix D, Section E.4 and the notice, for such a request. It is their position that, as required, the request fails to set forth with reasonable specificity matters which warrant a determination other than that made by the Director of Regulation and the factual basis for the request.

We agree that the petition fails to meet our pleading requirements and that it should be denied. In addition to the extreme generality of its allegations, the petition is devoid of any factual basis for the request. The purpose of the pleading requirements is to provide the Commission with information on which to make an informed judgment as to whether a hearing is warranted. A hearing imposes serious economic and manpower burdens upon all concerned. It is essential, therefore, that a request for hearing be drawn with some particularity. In the present circumstances, giving due recognition to the fact that petitioner appears without counsel, we conclude that the instant request does not warrant a hearing. In our view, a hearing request submitted by one in petitioner's circumstances [without counsel but having previously participated in AEC proceedings] should reflect at least some degree of compliance with applicable requirements. The present request falls far short of that standard, and it is denied. [footnotes omitted]

It is so ORDERED." 27/

27/ Note 14, supra.

Similarly, the Director should deny the Coalition's request for a show cause hearing for want of factual basis.

Specific Contentions

We turn now to consideration of the specific contentions. In Paragraph 2, the Coalition argues that "the cost/benefit analysis of the Applicant and the Commission is faulty because the recipients of the 'costs' and 'benefits' have not been properly identified." The Coalition gives absolutely no reason why it chose to wait 3-1/2 years since the issuance of the final environmental statement in this proceeding prior to again raising its "contention". The Coalition has made no showing of substantial good cause in its Petition for its lateness. The Coalition never commented on the draft environmental statement which preceded the FES and which was circulated for public comment. This "contention" is patently insubstantial and misconstrues what NEPA seeks to quantify, i.e., NEPA requires a federal agency to quantify to the extent possible, environmental rather than economic costs.

In Paragraph 3, Petitioner contends that "the stated costs of nuclear power by the Applicant assume catastrophic accident-free operation of nuclear power plants." Without explanation, the Coalition contends that "such an assumption is at odds with the revised conclusions of 'The Reactor Safety

Study,' WASH-1400 . . ." and the 1975 amendments to the Price-Anderson Act. The Coalition's "bottom line" is that the "[c]ost benefit analysis of nuclear power plants should include the costs of accidents." Initially, Commission precedent precludes consideration of the Price-Anderson legislation in individual adjudicatory proceedings (Florida Power & Light Company (Turkey Point Units 3 and 4) "Memorandum and Order", 4 AEC 787, 788 (1972)).

Moreover, the Coalition's contention is founded upon an erroneous premise. Accidents were considered in the cost/benefit analysis contained in the FES for this facility. As a matter of law, Carolina Environmental Study Group v. NRC, 510 F.2d 796 (D.C. Circ. 1975), which found the NRC treatment of accidents in the context of environmental review not to be inadequate, is dispositive of this contention.[28/] The Coalition does not attempt to make a showing that the accidents considered in the FES were in any way improper or that other accidents should have been considered.

28/ With regard to accidents more severe than considered, i.e., Class 9 accidents, the Court found:

(Footnote continued on next page)

28/ (Footnote continued)

> "Because each statement on the environmental impact of a proposed action involves educated predictions rather than certainties, it is entirely proper, and necessary, to consider the probabilities as well as the consequences of certain occurrences in ascertaining their environmental impact. There is a point at which the probability of an occurrence may be so low as to render it almost totally unworthy of consideration. Neither we, nor the A.E.C. on this record, would treat lightly the horrible consequences of a Class 9 accident. Recognition of the minimal probability of such an event is not equatable with non-recognition of its consequences. We find nothing in the instant record which would indicate that the A.E.C. findings regarding Class 9 accidents are clearly erroneous or that the A.E.C.'s compliance with NEPA Section 102(2)(c)(i) in this case was inadequate." (Id.)

See also Citizens for Safe Power, Inc. v. NRC, F.2d 626, 633 (1975) wherein the Court of Appeals for the District of Columbia Circuit found that "[a]bsolute or perfect assurances are not required by [the Atomic Energy Commission] and merely present technology nor public policy admit of such a standard. It was for the Commission to arrive at a rational, practical and principled conclusion upon the basis of reasonably available evidence.

In Paragraph 4, the Coalition alleges that the U.S. supply of uranium is deficient to fuel all reactors and that the NRC has not properly taken into account the costs associated with the uranium. Petitioner contends that "the availability of fuel and energy and environmental costs of its extraction are an integral part of the nuclear fuel cycle and therefore must be included in a full and proper cost/benefit analysis of this reactor." The Court's remand in the NRDC decision was limited to further NRC consideration of waste reprocessing and disposal only. The Court found no error in the Commission's consideration of other aspects of the fuel cycle.[29/] Therefore, the scope of the Court's remand cannot support such a contention. The monetary cost aspects of nuclear fuel were never part of RM-50-3 and therefore were not part of those matters excluded from consideration in individual cases. No reason is given why this "contention" could not have been raised at the operating license stage.[30/]

In Paragraph 5, the Coalition merely repeats its argument regarding promotional rate structure and energy conservation. While the NRC can, in general, explore the impact of rate structures and disclose the results of such

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29/ See p.13, supra.

30/ Other boards have previously considered this issue. Gulf States Utilities Company (River Bend Station) ALAB-317, NRCI-76/3 (March 4, 1976).

studies in an FES, the state public utility commission, not the NRC, has authority over the rate structure of the utility. Here again it is worthy of noting that NRC has no economic regulatory jurisdiction.[30a/] As previously discussed, the matter is moot.

Contentions 6 and 7 contain merely further rhetoric concerning the costs of the nuclear fuel cycle. To the extent they purport to deal with the economic aspects of the fuel cycle, rather than the environmental costs, they are relevant only to a cost comparison with alternate means for fulfilling the need for power. These contentions give no factual basis for the Coalition's request to institute a show cause proceeding.

Contention 7 may be interpreted as raising questions concerning the use of plutonium at the Salem Station. The present construction permit and operating license carry no authority to use plutonium, which would be a matter of separate licensing approval. To the extent this contention seeks to question the credit given for plutonium in the cost of the plant (if any) it is only related to consideration of alternate means of generating electricity and should have been raised at the construction permit hearing. To the

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30a/ The NRC has no economic regulatory jurisdiction over rates. See the Atomic Energy Act of 1954, as amended, 42 USC §2018.

extent the Coalition is seeking a forum to espouse its views concerning plutonium, such matter is before the Commission in the context of a rulemaking proceeding, RM-50-5, Generic Environmental Statement on Mixed Oxide Fuel "GESMO").[31/]

The Coalition's Request for Financial Assistance Should Not Be Granted

The Coalition requests financial assistance from the Commission, which has previously refused similar requests by the Coalition in the Peach Bottom and Three Mile Island proceedings. On appeal of that denial in Peach Bottom, the Court of Appeals for the D.C. Circuit in York Committee for a Safe Environment refused to consider such assistance during the pendency of a rulemaking proceeding which the Commission has instituted regarding the entire matter of financial assistance.[32/] Since that rulemaking proceeding is still pending, the Commission cannot consider the

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31/ Dr. Kepford, the Coalition's authorized representative in this matter, is on the service list of the GESMO proceeding as representative of, inter alia, the Coalition.

32/ In York Committee for a Safe Environment v. NRC, 527 F.2d 812, 816 at n. 12 (D.C. Cir. 1975), the Court stated:

(Footnote continued on next page)

Coalition's request.[33] Moreover, such question is not before the Director of Nuclear Reactor Regulation as part of his consideration of the request to institute a show cause proceeding.

The Burden of Proof

As previously discussed, the Coalition has given absolutely no basis or justification for the institution of the show cause proceeding. It does not attempt to justify its request in terms of the factors established by the Commission in its General Statement of Policy as considerations to be addressed in any request for a show cause order seeking the suspension or modification of a license on fuel cycle grounds. Nothing

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32/ (Footnote continued)

> "Finally, petitioners challenge the Commission's rejection of their request for financial and technical assistance. The Commission's response to that challenge is that it is currently reconsidering the question of financial assistance - including the question of retroactive assistance - and that '[p]etitioners' request for financial assistance is therefore still not foreclosed.' Brief for respondents at 35. We therefore do not reach petitioners' contention that they are entitled to assistance from the Commission because of their participation in the proceedings reviewed here, nor do we express any views regarding financial assistance during the remand proceedings."

33/ See 40 Fed. Reg. 37056 (August 25, 1975).

is presented to overturn the Commission's announced policy of resolving fuel cycle questions generically.

While the Applicant submits that the Appeal Board's interpretation in Callaway 34/ is incorrect for the reasons stated below, nevertheless, inasmuch as the Director presumably would feel himself bound by the Appeal Board holding, Applicant will address the equitable factors identified by the Commission in its General Statement of Policy. Inasmuch as the Coalition has not addressed these factors as they relate specifically to the Salem Station nor given any specific reason why a halt to construction and operation is necessary, the Applicant will have fulfilled its burden even if only one scintilla of evidence supports its showing that the equitable factors mandate continued construction and operation of the units. Here it is clear that the equities are overwhelmingly on the side of the Applicant. Attached hereto is the Affidavit of Robert Mittl, General Manager-Projects for Public Service Electric & Gas Company, which addresses certain of the equitable factors identifed by the Commission. Such affidavit is incorporated herein by reference.

34/ P. 7, supra.

In our view, the Appeal Board in Callaway misinterpreted Davis-Besse, the only case it cites for its proposition that an applicant bears the burden of proof.[35/] In that case, a Court of Appeals' decision found error in the Commission's decision which supported the issuance of construction permits. The Commission ordered a de novo hearing and decision from a licensing board and held that in that proceeding the burden of proof "shall be upon the licensees." As we interpret that decision, it did not hold that where a request for suspension of construction permits or operating licenses is made by an individual or group, the burden of proof is initially with the applicant.[36/] The holding seems clearly contrary to 10 CFR §2.732 which places the burden on the proponent of an order.

As we interpret ALAB-346, apparently the proponent of suspension need not satisfy any otherwise pertinent regulation of the Commission as to the form and substance of the motion or give any justification for its request, including the specific requirement of 10 CFR §2.206 to set forth the facts that constitute the basis for the request.

35/ Toledo Edison Company (Davis-Besse Nuclear Power Station), 4 AEC 801 (1972).

36/ Contrast this with 10 CFR Part 50, Appendix D, §E.3 which required certain applicants, after the Calvert Cliffs' decision, to demonstrate why construction or operation should not be suspended.

In our view, the interpretation expressed by the Appeal Board in Callaway is in violation of the Administrative Procedure Act, 5 U.S.C. §§556 and 558, as well as the Commission's Rules of Practice in requiring an applicant to present evidence to sustain a burden of proof against charges which have not even been articulated. The petitioner has at least the burden of going foward. We would note that a request for reconsideration of ALAB-346 has been filed.

This question has been faced squarely by the Commission in other proceedings, most recently in ALAB-315.[37/] An Appeal Board held that:

> "We agree that a show cause respondent is entitled to know what it is charged with and to be presented with the evidence against it before it is called upon to respond with evidence in its own behalf. The parties are mistaken in their belief that our ruling on burden of proof requires a different result. To the contrary, the reference in ALAB-283 to our Maine Yankee decision (see NRCI-75/7 at 17) was intended to indicate that the rule on burden of proof in a show cause proceeding operated just as it does in construction permit proceedings. On the page of that decision to which we made express reference, we said (6 AEC at 1018):

37/ Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-315, NRCI-76/2, 101 (February 27, 1976). See also Indian Point Unit 3, p. 6, supra, a Commission decision which also postdated Davis-Besse and which required a showing by one requesting institution of show cause proceedings.

> while the applicant has the ultimate burden of proof on the question of whether the permit or license should be issued, a party which contends that, for a specific reason, the permit or license should be denied has the burden of going forward with evidence to buttress that contention. Once it has introduced sufficient evidence to establish a prima facie case, the applicant must assume the burden of proof on the contention.
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> Stated another way, the term 'burden of proof' applies not to the initial burden of going forward with evidence but to the ultimate burden of persuasion. And Maine Yankee certainly lends support to the argument that a party in a show cause proceeding who seeks the suspension or modification of a construction permit has the obligation to make out a prima facie case for doing so based on competent evidence." [emphasis supplied] 38/

It is significant that ALAB-315 was decided well after the Davis-Besse case, which was the only authority relied upon by the Appeal Board in Callaway. In addition, Section 9(b) of the Administrative Procedure Act 39/ specifies that except in special instances, none of which are present, no withdrawal, suspension, revocation or annulment of a license

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38/ Id. at 110.

39/ 5 U.S.C. §558(c).

shall be lawful unless, prior to the institution of agency proceedings therefor the licensee shall be notified in writing and had been afforded opportunity to achieve compliance with all lawful requirements.[40/]

Finally, it is significant to note that ALAB-315 specifically requires that a prima facie case for suspension or modification must be "based on competent evidence." In this instance, taken in the light most favorable to the Coalition, its statements are mere conclusions without any evidentiary support. ALAB-315 involved the requested suspension of construction permits. A fortiori, inasmuch as an operating license has been granted for Unit 1, even the rationale of ALAB-315 does not support the burden of proof upon the Applicant.

Moreover, nothing in the Commission's General Policy Statement imposed such a burden on the holders of licenses. At most, under the Midland decision (which we consider erroneous on other points), an applicant has no burden of proof until and unless the show cause order is issued.

40/ In this case it would also be an anomaly if the Commission would issue a show cause order to the licensees to correct deficiencies in the Commission's NEPA review, (i.e., the Final Environmental Statement).

The Equitable Factors

The first factor to be considered is whether it is likely that significant adverse impact will occur until a new interim fuel cycle is in place.[41/] Total environmental impact of plant construction is small. See the Final Environmental Impact Statement in this proceeding, dated April 1973 (FES), pp. 4-1 to 4-4. All clearing and grading for all major structures for both units has been completed. The greatest environmental impacts associated with construction, i.e., clearing of the land and excavation, have already been incurred. Any halt to construction at this time would not change this situation and would merely prolong the time until the construction was completed and the site redressed (Affidavit at pp. 1-2).

Unit 2 has completed fuel loading with testing now in progress. The Final Environmental Impact Statement states that no significant environmental impacts are anticipated from normal operational releases (from both units) within 50 miles of the plant (FES at p. ii) over their lifetime. Here the only possible impact is from one unit over a short period of time. In addition, no significant quantities of radioactive wastes will be generated during the next few months. (Affidavit at p. 2)

41/ The Commission has stated that such interim rule might be promulgated in December, 1976. 41 Fed. Reg. 34708. Therefore, the period of interest is only 3-1/2 months.

With regard to the second factor, whether reasonable alternatives will be foreclosed by continued construction or operation, the Commission has already made the finding that "[s]ince existing concepts for reprocessing and waste technology do not vary significantly with the design of nuclear power generating facilities, it is extremely unlikely that the [Commission's] revised environmental survey will result in any modification of these facilities. Only the possibility of discontinuing their . . . use is likely to be at issue."[42/] This finding is dispositive of this second consideration.

The third factor to be considered is the effect of delay, i.e., an immediate and complete halt to construction or operation. A halt to construction on Unit 2 now would increase the ultimate cost of the facility due to cost escalation and the necessity of compressing the construction schedule to attempt to compensate for time lost. If shutdown of construction were required for a period of two weeks to three months, there would be a 2-for-1 schedule slippage plus an additional two weeks loss. If the shutdown were over three months, there would be a 1-for-1 schedule slippage plus an additional three months loss. Initial costs to shut down the site construction would total approximately $250,000 per week. Serious economic and social effects would occur. Approximately 1450 construction workers with a payroll of $920,000 per week are presently

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42/ 41 Fed. Reg. 34708

employed at the site. If Unit 1 were required to shut down, commercial operation scheduled for December 1976 would be delayed on at least a day-for-day basis. Each day of full power operation will result in a $430,000 saving to the customers of the licensees. Replacement energy necessitated thereby would have to be supplied by less economic fossil fired units (Affidavit at p. 2).

The next factor to be considered is the possibility that the cost/benefit balance will be tilted through increased investment. A total of $900 million has already been invested in the project (Affidavit at p. 2). A total of 30 million dollars, less than 4% of the total thus far will be spent on Unit 2 during the remainder of 1976. As to Unit 1, inasmuch as operation is commencing, the capital investment is substantially complete. In any event, the Court in Aeschliman held that any reanalysis of costs and benefits must not include such costs as costs of abandonment. Aeschliman, Slip Op. p. 21, n. 20. Thus, if it becomes necessary to consider the alternative of the project under Aeschliman, the cost/benefit balance will be independent of percent plant completion. Accordingly, the ultimate outcome of the NEPA cost/benefit will not be prejudiced by continued expenditures now, no matter what their rate or duration.

The next factor, "general public concerns" all point to permitting continued construction and operation of the Salem

Station. The Station will be utilized to provide nuclear baseload capacity for the Applicant's service territory. Generation not supplied by the plant will have to be provided by other available but less economic alternatives, which include facilities utilizing valuable and versatile fossil fuels. The sooner the Salem generating capacity becomes available, the sooner these resources can be conserved. Operation of the Station can result in significant cost savings to the Applicant's customers. Each day of full power operation will result in a $430,000 savings to the customers of the licensees (Affidavit at pp. 2-3). If the "general public" is composed of ratepayers, it will of course, eventually bear the economic costs of delay. Finally, the possible immediate effect on the large number of construction jobs at the site should the NRC order discontinuance of the work is evident.

The sixth factor, the need for the project has already been discussed. The economic cost of delay is real and substantial.

The seventh factor is "the extent of the NEPA violation." Among the authorities cited by the Commission for including this factor was Greene County Planning Board v. FPC, 455 F.2d 412 (2nd Cir.), cert. denied, 409 U.S. 849 (1972). In that case, the court denied a request for the halt of construction of a power line after a violation had been found noting that:

> "Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA . . . there is no indication . . . of obstinate refusal to comply with NEPA." 455 F.2d at 425.

Clearly there has been no obstinate refusal to comply with NEPA here. To the contrary, the licensees relied upon standards promulgated by the Government after formal rule-making.

More importantly, the decision in NRDC v. NRC can be read as finding no violation of NEPA at all. The result of the case was premised upon a perceived violation, not of NEPA, but of the Administrative Procedure Act. In his concurring opinion Judge Tamm states:

> "I further agree with the conclusion of the majority that it is impossible to determine from the record before us whether the Commission has fulfilled its statutory obligation under NEPA . . . ." (Slip Opinion, Tamm J. at 1-2.)

Also noteworthy is the fact that the majority did not dispute the conclusions of the Commission as to the relative insignificance of the environmental effects of fuel reprocessing and waste disposal (Slip Opinion, at 34) and seemed to acknowledge the correctness of Judge Tamm's prediction that any subsequent proceedings will result in essentially the same conclusions (Slip Opinion at 41 and n. 60).

The final factor involves timeliness of objections. It is not clear what the Commission had in mind on this item in its General Statement of Policy. It would appear that the Coalition is premature in its action since the Commission has already stated it will have a further pronouncement upon the question of the necessity of show cause proceedings following receipt of the survey requested from the Staff on or about September 30. On the other hand, the Coalition apparently seeks to relitigate matters which it could have previously raised. Certainly a request to suspend construction or operation based upon such matters which could have been previously litigated is untimely.

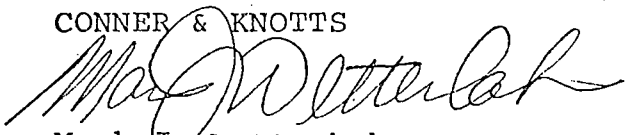
All equitable factors favor the continued construction and operation of the Salem Nuclear Generating Station.

Conclusion

For the reasons stated, the request to institute a show cause proceeding to suspend construction and operation of the Salem Nuclear Generating Station should be denied.

Respectfully submitted,

CONNER & KNOTTS



Mark J. Wetterhahn
Counsel for the Applicants

September 20, 1976

AFFIDAVIT OF ROBERT L. MITTL
GENERAL MANAGER, PROJECTS
PUBLIC SERVICE ELECTRIC AND GAS COMPANY

STATE OF NEW JERSEY)
: SS.
COUNTY OF ESSEX)

ROBERT L. MITTL, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am General Manager - Projects of Public Service Electric and Gas Company. In that position I am familiar with the construction and operation of the Salem Nuclear Generating Station and with the proceedings before the Nuclear Regulatory Commission.

2. Construction permits for the licensees' Salem Nuclear Generating Station were issued on September 25, 1968. Actual field work began in January 1968 under the NRC's then existing exemption regulation. An operating license for Unit 1 was granted on August 13, 1976. Fuel loading has been completed, with testing now in progress. Initial criticality is expected to be reached in early October. Clearing and grading for all structures associated with Unit 2 has been completed. To date, construction of Unit 2 is approximately 56% complete. The greatest environmental impacts associated with construction, i.e., clearing of the land and excavation, have already been incurred. Any halt to construction of Unit 2 at this time would not change this situation and would merely prolong the time until the

construction was completed and the site redressed. To date, approximately $900 million has been invested in the Salem Project, with $30 million to be spent on construction of Unit 2 during the remainder of 1976.

3. A halt of construction now on Unit 2 would increase the ultimate cost of the facility due to cost escalation and the necessity of compressing the construction schedule to attempt to compensate for time lost. If shutdown of construction were required for a period of two weeks to three months, there would be 2-for-1 schedule slippage plus an additional two-week loss. If the shutdown were over three months, there would be a 1-for-1 schedule slippage plus an additional three-month loss. Initial costs to shut down the site construction would total approximately $250,000 per week. Approximately 1450 construction workers with a payroll of $920,000 per week are presently employed at the site. If Unit 1 were required to shut down, commercial operation, scheduled for December 1976, would be delayed on at least a day-for-day basis. Each day of full power operation will result in a $430,000 savings to the customers of the licensees. Replacement energy necessitated thereby would have to be supplied by less economic fossil-fueled units. Operation during the next few months will not generate any significant quantities of high-level radioactive waste.

4. Based upon the foregoing facts, it is my conclusion that continued construction of Unit 2 and operation of Unit 1 of the Salem Nuclear Generating Station will not result in significant adverse impact prior to such time as a new fuel cycle rule can be promulgated and that reasonable alternatives in the areas of waste disposal or reprocessing will not be foreclosed.

However, a halt in construction and/or operation could have significant adverse impact upon the ability to provide economical power to the licensees' customers.

Robert L. Mittl

ROBERT L. MITTL

Sworn and subscribed to)
before me this 17th day)
of September, 1976.)

Veronica L. Adams

VERONICA L. ADAMS
A Notary Public of New Jersey
My Commission Expires Oct. 23, 1977