

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION  
HAROLD R. DENTON, DIRECTOR

In the Matter of

WISCONSIN ELECTRIC POWER COMPANY  
(Point Beach Nuclear Power Plant,  
Unit 1)

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Docket No. 50-266  
(10 CFR 2.206)

DIRECTOR'S DECISION UNDER 10 CFR 2.206

By petition dated November 14, 1979, Wisconsin's Environmental Decade, Inc. (Decade), requested that the Commission enter an order to prohibit the reopening of Wisconsin Electric Power Company's Point Beach Nuclear Power Plant, Unit 1, at the end of the plant's refueling cycle. As the bases of its request, Decade contends essentially that

- (1) Resumed operation of the plant would violate certain limiting conditions for operation and would threaten public health and safety;
- (2) The NRC Staff's proposed bases (NUREG-0523) for continued operation of nuclear power plants experiencing significant steam generator tube degradation are inadequate to protect public health and safety; and
- (3) The Commission's existing regulations, technical specifications, and technical guidance are also inadequate to protect public health and safety.

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Specifically, Decade requests that the Commission prevent resumed operation of the Point Beach plant and commence an investigation and hearing on the safety implications of tube degradation at Point Beach.

On November 20, 1979, the Commission formally referred Decade's petition to the Staff for treatment pursuant to 10 CFR 2.206. Representatives of Decade, the

NRC Staff, Wisconsin Electric and Westinghouse Electric Corporation met that same day to discuss matters concerning degradation of steam generator tubes at Point Beach. Decade supplemented its November 24th petition with an additional petition dated November 26, 1979, which essentially reiterated the issues and arguments it raised earlier. The licensee submitted on November 27, 1979, a response to Decade's November 14th petition.<sup>\*/</sup> On November 28, 1979, the Union of Concerned Scientists submitted a statement in support of Decade's petition.

Pursuant to the Commission's request in its referral of Decade's petition to the Staff, the Staff briefed the Commission on November 28, 1979, on the Staff's proposed disposition of Decade's petition. At that meeting, the Staff explained its intention to impose certain new conditions on operation of the Point Beach plant to which the licensee had agreed and to deny the Decade's petition. The Commission provided Decade and the licensee an opportunity to express their views at the Commission meeting.

The Staff has issued the attached Order that permits resumption of operation of the Point Beach facility under certain conditions to which the licensee has agreed. In the Safety Evaluation Report accompanying the Order, the Staff analyzes the technical issues involved in the degradation of steam generator tubes at Point Beach and provides a basis for imposing the new conditions on operation of the Point Beach facility. In reaching its decision to impose these conditions on operation of Point Beach, the Staff has considered the technical arguments raised by Decade to support suspension of

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<sup>\*/</sup> At the Commission meeting, Kathleer Falk, General Counsel to Decade, implied that the licensee's response was an "unauthorized statement" to the Commission in that Decade had not been served with the statement prior to the Commission's meeting. Although 10 CFR 2.206 does not contemplate a formal pleading process, submission by licensees of statements in reply to section 2.206 petitions is certainly permissible in view of the fact that the Commission and the Staff may rely on various relevant sources of information in determining appropriate disposition of a petition under 10 CFR 2.206. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432-33 (1978). Moreover, as there is no "proceeding" as defined in Section 189a. of the Atomic Energy Act of 1954, as amended (discussed in text infra), there is no adjudication to which the Commission's ex parte rules apply. Thus, there is no merit to Decade's suggestion that the licensee's statement was "unauthorized."

operation. The Staff's response to these arguments is contained in the Safety Evaluation Report. Because the Staff believes that safe operation of the facility can be maintained with implementation of the newly imposed conditions, the Decade's petition is denied.<sup>\*\*/</sup> To the extend that safety concerns at the Point Beach facility have been identified, such concerns have been dealt with in the attached Order and Safety Evaluation Report.<sup>\*\*/</sup>

Decade urges the Commission to commence an adjudicatory hearing for the purposes of investigating the safety problems associated with tube degradation at Point Beach. In its consideration of the matters raised in Decade's petition, the Staff is not required to institute a proceeding to either investigate allegations of safety concern or determine what actions should be taken in response to safety issues raised in a 10 CFR 2.206 petition. As the D.C. Circuit Court of Appeals has stated,

"Generally speaking, the law gives agencies wide discretion to determine the means of administration of pertinent regulatory standards, the techniques of interpretation, application, filling in of details, and enforcement. The agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the

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<sup>\*\*/</sup> Decade also contends that operation with 10% plugged tubes is a violation of a limiting condition. The limiting conditions of this license do not address percentage of plugged tubes. In any event, under the Order issued this date, operation is permitted with up to 18% plugged tubes.

<sup>\*\*\*/</sup> As the Court indicated in Porter County Chapter of the Izaak Walton League vs. NRC, No. 78-1556, Slip Op. at 10 (D.C. Cir., Sept. 11, 1979):

The Commission has interpreted § 2.206 to require issuance of a show cause order when "substantial health or safety issues" have been raised. Consolidated Edison Co., 2 N.R.C. 173, 176 (1975).

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statute to warrant full proceedings. The appropriate agency official has substantial discretion to decline to initiate proceedings based on this review, at least where, as here, he gives reasons for denying or deferring a hearing. The NRC procedure [under 10 CFR 2.206] here accords with these precepts." Porter County Chapter of the Izaak Walton League v. NRC, No. 78-1556, Slip Op. at 11 (D.C. Cir., Sept. 11, 1979) (footnote omitted).

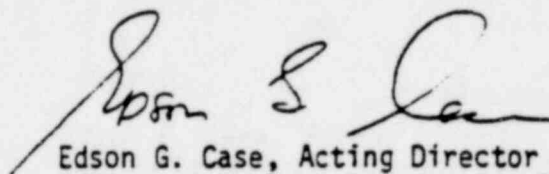
Moreover, it is clear that Decade has no right to a hearing on its 10 CFR 2.206 petition. Illinois v. NRC, 591 F.2d 12, 13-14 (7th Cir. 1979). In the first instance, consideration of a petition under 10 CFR 2.206 is not in itself a proceeding under section 189a. of the Atomic Energy Act of 1954, as amended, for which a hearing may be required; i.e., consideration of the petition is not a proceeding "for the granting, suspending, revoking, or amending of any license . . . ." Section 189a, 42 U.S.C. 2239(a). Furthermore, section 189a. requires the NRC to hold hearings only after a proceeding has begun. As there was no proceeding in this instance and as the Atomic Energy Act contains no provision for a hearing when no proceeding has been initiated under 189a., Decade is clearly not entitled to a hearing on its 10 CFR 2.206 petition. Illinois v. NRC, supra, 591 F.2d at 14.

A copy of this decision will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555 and in the Local Public Document Room at the library of the University of Wisconsin, Stevens Point, Stevens Point, Wisconsin 54481. Additionally, a copy of this decision will be filed with the Secretary for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations.

As provided in 10 CFR 2.206(c) of the Commission's regulations, this decision will constitute the final action of the Commission 20 days after the

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date of issuance, unless the Commission on its own motion institutes the review of this decision within that time.

A handwritten signature in black ink, appearing to read "Edson G. Case". The signature is fluid and cursive, with a large initial "E" and "C".

Edson G. Case, Acting Director  
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland  
this 30th day of November, 1979.

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November 30, 1979

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