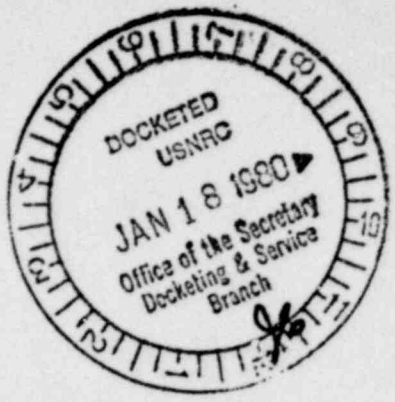

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Herbert Grossman, Chairman
Oscar H. Paris, Member
Frederick J. Shon, Member

SERVED JAN 18 1980

In the Matter of	)	
	)	Docket No. 50-155
CONSUMERS POWER COMPANY	)	
	)	(Spent Fuel Pool Expansion)
(Big Rock Point Nuclear Plant)	)	

ORDER FOLLOWING SPECIAL PREHEARING CONFERENCE

On December 5, 1979, a special prehearing conference was held, beginning at 9:30 a.m. at the Holiday Inn, U.S. 131 South, Petoskey, Michigan, pursuant to 10 C.F.R. § 2.751a, in this proceeding involving a proposed spent fuel pool expansion. A notice of this conference had been sent to all participants on October 11, 1979, which set the conference for November 14, 1979. The Order was published on October 18, 1979 at 44 Fed. Reg. 6179-6180. Subsequently, by Order of the Board dated November 5, 1979, the special prehearing conference was rescheduled to December 5, 1979 at the request of the parties. That Order was published on November 9, 1979 at 44 Fed. Reg. 65226.

As stated in those Orders, and as set forth in 10 C.F.R. § 2.751a, the purpose of the conference was to consider all intervention petitions, discuss specific issues to be considered at the evidentiary hearing, and establish a schedule for further

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action in the proceeding. The Orders also indicated that an opportunity would be afforded to members of the public who are not parties to the proceeding to make oral limited appearance statements. All non-parties who requested were permitted to make limited appearance statements. The Board heard twelve statements during the morning session and ten during the evening session that was convened solely for the purpose of hearing limited appearance statements.

On July 23, 1979, the N.R.C. had published a Notice of the Proposed Issuance of the Amendment to the Operating License in the Federal Register (44 Fed. Reg. 43126) providing that any person whose interest might be affected by the proceeding might file a request for a hearing in the form of a petition for leave to intervene pursuant to 10 C.F.R. § 2.714 by August 22, 1979. By that date petitions to intervene had been received from 24 residents of communities surrounding the facility (joint petitioners), John A. Leithauser on his own behalf and as attorney for Northwest Coalition, and John O'Neill, II. By Memorandum and Order dated September 25, 1979, the Board discussed deficiencies in certain of the petitions; provisionally granted the petitions to intervene of the 24 joint petitioners and John O'Neill, II; directed that Mr. Leithauser amend his petition no later than 15 days prior to the special prehearing conference in order to cure deficiencies in

his petition; directed the petitioners, licensee and staff to consult with each other prior to the prehearing conference to arrive at some agreement with regard to deficiencies in the petitions and to frame contentions; and directed each petitioner to file a supplement to the petition no later than 15 days prior to the prehearing conference which would include a list of specific contentions.

The Intervention Petitions

Pursuant to the Order, the licensee's attorneys and staff attorneys met with an attorney representing some of the 24 joint petitioners and with John O'Neill, II, acting pro se. Apparently, by the time of the conference, only 3 or 4 of the original 24 signers of the joint petition, Christa- Maria, Joanne Biers, Jim Mills and possibly Barbara Goodwin, remained in this proceeding and chose to be represented by the firm of Sheldon, Harmon and Weiss. (see Tr. 9, 58-59.) The others are involved only to the extent of offering limited appearance statements. The remaining 3 or 4 joint petitioners will continue to be designated as "Christa-Maria", the first of the joint petitioners to retain legal representation and in whose name the pleadings were filed.

Christa-Maria and John O'Neill submitted contentions within the time prescribed by the Board's Order and 10 C.F.R. § 2.714(b). As a result of their consultations, the N.R.C. staff,

[redacted]

Christa-Maria and the licensee entered into a stipulation dated November 26, 1979, in which Christa-Maria restated Contentions 2 and 3, which the staff and licensee agreed met the procedural requirements for admission in proceeding. Contention 4 was withdrawn by Christa-Maria under an agreeement by the staff and licensee not to object on the grounds of untimeliness to the refiling of a contention based upon matters raised in that withdrawn contention before the close of the time for discovery. The stipulation withdrew Contentions 5 and 6, concerning the storage of spent fuel after the expiration of the operating license, subject to their reassertion if the Commission's generic rulemaking proceeding (44 Fed. Reg. 61372) determines, prior to the conclusion of this proceeding, that on-site storage of spent fuel will be necessary after the expiration of the operating license. Christa-Maria also restated Contentions 1, 7, 8, and 9, the admissibility of which were contested by the staff and licensee. The Board admitted the stipulation. (Tr. 70.)

In view of the Board's provisional granting of the petition for intervention in its Memorandum and Order of September 25, 1979, subject to the acceptance of an admissible contention, the Board's approval of the stipulation admitting Contentions 2 and 3, and the Board's admission of certain of the contested contentions (discussed below), the Christa-Maria intervention is granted.

[redacted]

John O'Neill's intervention was not opposed by the staff, was agreed to in the licensee's response to his petition only if his participation were consolidated with the other intervenors, and was provisionally accepted by the Board in its September 25, 1979 Order, subject to his clarifying at the time of the conference his connection with a geographic zone of interest. The Board indicated that it would rule on consolidating his petition after hearing arguments at the conference. At the conference (Tr. 68-69), Mr. O'Neill satisfied the parties and the Board of his standing to intervene. In view of our acceptance of his standing and of the admission of certain of his contentions (discussed below) we grant Mr. O'Neill's intervention. Furthermore, because the Board is persuaded that Mr. O'Neill has valuable contributions to make to this proceeding in his own right, we do not order him consolidated with the Christa-Maria intervention. In the future, if Mr. O'Neill desires to be consolidated with Christa-Maria for purposes of discovery and/or the evidentiary hearing, we will entertain a motion by him to that end.

As discussed in the Board's September 25, 1979 Order, Mr. Leithaiser's petition on behalf of himself and the Northwest Coalition was deficient in failing to disclose an interest that would be affected by any specific aspect of the proceeding, and on behalf of the Northwest Coalition was also deficient for a number

of other reasons. Mr. Leithauser was given until no later than 15 days prior to the special prehearing conference to cure the deficiencies and to file his contentions. Until the prehearing conference, no further word was heard from him. Moreover, at the conference (Tr. 59-68) it was disclosed that Mr. Leithauser had failed to comply with the Board's Order requiring him to consult with the staff and licensee with regard to his standing and contentions, and did not yet have his contentions in legible form. Mr. Leithauser indicated that he had failed to present his contentions in timely fashion because he had moved his office and home in the past two months, had taxed his financial resources in beginning this proceeding which had resulted in his phone's being disconnected and had not even had time to read the mail emanating from the proceeding. (Tr. 65.) Mr. Leithauser agreed with the Board's suggestion (Tr. 62) that it might be more advantageous for him to consolidate with Christa-Maria but submitted that his financial condition did not allow him to retain counsel. Mr. Leithauser was excluded from the proceeding (Tr. 66) and informed that he could request to be admitted in the future as a matter of the Board's discretion but would have to comply with the requirements of the regulations, including showing good cause for the late filing of an acceptable petition and acceptable contentions and for his non-compliance with the prior order of the Board requiring him to justify his standing.

Subsequent to the conclusion of the special prehearing conference, Mr. Leithauser submitted a "Belated Motion for Leave to File Pleading Out of Time", a letter addressed to the N.R.C. Commissioners regarding his status to intervene, and his contentions. His motion gave as reasons for accepting the late filings, his inability to meet the prehearing conference schedules because of his heavy personal schedules occasioned by his moving his home and offices which entailed numerous mechanical tasks and being in the employ of others; his assertion that motions filed out of time are not prohibited by the N.R.C. regulations; his complete lack of acquaintance with N.R.C. rules, regulations and practices; the fact that his filings would not interfere with the completion of the SER and EIA; his anticipation of having no difficulty in meeting the discovery schedule approved by the Board at the conference (see schedule, infra); his raising of issues as yet unspoken to; and his assertion that the grant of the motion would not prejudice any party to the proceeding.

Mr. Leithauser's letter regarding his standing to intervene indicated that he maintains a personal residence within 30 miles of the facility, which would justify his individual standing to intervene. However, his standing to intervene on behalf of the organization he refers to as the "Northwest Coalition", a claimed coalition of two or three primary organizations, is less supportable.

In these organizations, only one other individual, Ronald Beyer, is named, and Mr. Leithauser relies solely upon his own residence, his own authorization to represent the coalition, and his own representations as to the interests of these organizations in this proceeding, to support the coalition's intervention.

Be that as it may, we need not decide whether the coalition has standing to intervene and be represented by Mr. Leithauser. Because the coalition's stated interest in the proceeding (Leithauser letter, dated December 12, 1979) is that its members reside near the facility, as does Mr. Leithauser, and because a single set of contentions was submitted on his own and the organization's behalf, Mr. Leithauser's representation of the organization would add nothing to his personal intervention. Furthermore, notwithstanding a resolution of the issue of standing favorable to Mr. Leithauser, the Board exercises its discretion, on balancing the five factors set forth in 10 C.F.R. § 2.714(a)(1), to not permit Mr. Leithauser's intervention either on behalf of himself or the coalition. Moreover, the Board notes that none of his contentions appear admissible so as to afford a basis for the intervention, with the possible exception of Contention Xd, which suggests a determination of the need for power, a matter on which the Board has requested further briefing (see discussion of O'Neill Contention VIII, infra). Even if that contention were admissible, it was previously raised by intervenor

O'Neill and should not afford the sole basis for the separate intervention of Mr. Leithauser.

As good cause for his late filings, petitioner relies upon his personal and financial predicament which required his heavy work schedule. While this situation might constitute good cause for requesting interim relief and perhaps excuse some tardiness in his individual filings, it does not constitute good cause for his failure to read his mail (Tr. 65) and, on behalf of the Northwest Coalition, his failure to delegate his obligations in this proceeding to some other member. Consequently, although we do find that some good cause exists for his failing, on his own behalf, to meet the time limits imposed by the Board's September 25, 1979 Order and 10 C.F.R. § 2.714, that good cause is somewhat counterbalanced by his inexcusable failure to communicate with the Board or parties (as directed in the Board's September 25, 1979 Order) during the two-and-a-half month period between the issuance of the Order and the prehearing conference. With regard to the late filings of the Northwest Coalition, we determine that no good cause exists for a coalition of organizations to have permitted the personal predicament of one member of its constituent organizations to result in a total disregard of the Board's Order and N.R.C. regulations.

In reviewing petitioner's contentions to determine whether other means are available to protect his (and the Northwest Coalition's) interests, the Board finds that, not only are other means available, but that only means other than this proceeding are appropriate for protecting petitioner from the perceived harm. Contentions I, II and Xa concern the long-term storage of spent fuel that is an issue before the Commission in its proposed rulemaking [44 Fed. Reg. 61372 (Oct. 25, 1979)] and cannot be considered in this proceeding. Contentions III, IV, V, VI and VII contain allegations and past instances of administrative, technical, and financial insufficiencies on the part of the licensee that are unrelated to the proposed fuel pool expansion and should properly be the subject of a show cause proceeding initiated under 10 C.F.R §§2.202 and 2.206 rather than this license amendment proceeding. Similarly, Contention VIII alleges a safety hazard due to a design deficiency in the reactor which should also be the subject of a show cause proceeding, rather than a contention in this spent fuel pool expansion proceeding. Contention IX relates to the licensee's emergency plan, which is covered by Appendix E to 10 C.F.R. Part 50, and is the subject of the Commission's proposed rulemaking, the advance notice of which was published at 44 Fed. Reg. 41483 (July 17, 1979). The Commission's rulemaking proceeding would be the proper forum to question the adequacy of the emergency planning requirements. Contention XI is not a contention by itself; it merely

incorporates all of the other contentions by reference and cannot be considered in any forum. Only Contention X relating to the need for power might afford the basis for an admissible contention (see the Board's discussion of O'Neill's Contention VIII and its request for further briefing on that contention, infra). Consequently, Mr. Leithauser's intervention is not only unnecessary to protect his and the Coalition's interests as expressed in his contentions, but, on the whole, improper. If the Board determines that the issue of the need for power can be heard, Mr. O'Neill's handling of that issue should obviate the need to permit Mr. Leithauser's intervention for that sole issue.

Nor can the Board find that petitioner's participation could reasonably be expected to assist in the development of a sound record in this proceeding, in light of what we perceive to be a lack of relevance in his contentions and there being no indication that he possesses any special expertise that might otherwise assist us. With regard to direct participation, Mr. Leithauser could hope, at best, to assist in the Commission's rulemaking ceedings on waste storage and emergency planning or in show cause proceedings relating to the alleged lack of the licensee's competence or safety hazards in the reactor design. Any assistance that Mr. Leithauser could render to the development of a sound record in this proceeding could best be offered through his assistance to

the admitted intervenors (which Mr. Leithauser came close to admitting, Tr. 62) and by limited appearance statements to the Board.

Furthermore, notwithstanding the apparent failure of his contentions to raise an admissible issue (with a possible exception of the need-for-power issue raised by O'Neill's Contention VIII), all of the broad areas of concern expressed in Mr. Leithauser's contentions have been raised in the admitted and non-admitted contentions of the other intervrnors: Leithauser's Contention I, II and Xa, relating to long-term waste storage, were covered by Christa-Maria Contentions 1, 5 and 6 and O'Neill's Contention I; Leithauser's Contentions III, IV, V, VI and VII, relating to alleged past mismanagement and incompetence, were covered by O'Neill's Contention VII; Leithauser's Contention VIII, relating to a loss-of-water accident, was covered in O'Neill's Contention IIE; Leithauser's Contention IX, relating to emergency plans, was covered by Christa-Maria's Contention 9; Leithauser's Contention X, relating to "grandfather" exemptions, plant safety, and need for power, was covered by O'Neill's Contentions VI, VII and VIII.

Finally, in view of the current deficiencies in his contentions, failing to exclude Mr. Leithauser at this juncture would result in delaying the proceeding because further efforts would

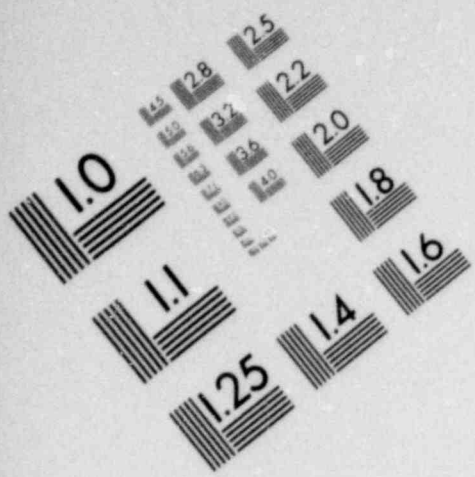
have to be made to attempt to fashion admissible issues from his inadmissible contentions. However, as demonstrated above, any admissible issues that might be fashioned at a prospective future conference would probably not broaden the issues, but would duplicate issues already raised by the other intervenors who have covered the general topics raised in Mr. Leithauser's unacceptable contentions.

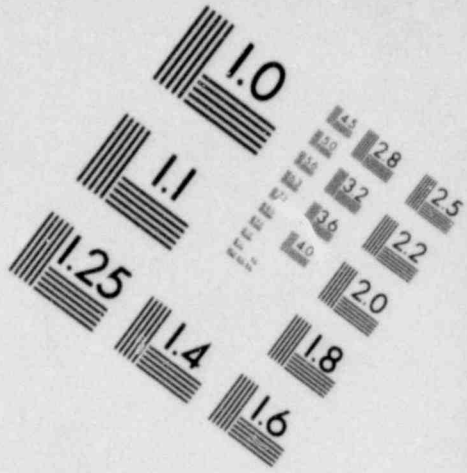
In summary, while some good cause exists for Mr. Leithauser's having failed to file in timely fashion (and he would not be broadening the issues but merely duplicating them), the other factors that must be considered in determining whether to exercise the Board's discretion to admit him, weigh heavily against him. In addition, while not taken into account in balancing the 5 factors listed in 10 C.F.R. § 2.714(a)(1), Mr. Leithauser's demonstrated inability to focus his attention on this proceeding and his lack of financial resources make it unlikely that he could make a positive contribution to the proceeding -- they suggest even further delay in the future. Consequently, Mr. Leithauser's petition for leave to intervene is denied. As provided by 10 C.F.R. § 2.714a, Mr. Leithauser may appeal this ruling to the Atomic Safety and Licensing Appeal Board within 10 days of service of this Order.

We note the October 1, 1979, Memorandum of the Appeal Board in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. ___, suggesting

that the Licensing Board allow argument on contentions before disallowing them. Here, however, unlike Allens Creek, we have not reviewed Mr. Leithauser's contentions to determine, on the basis of full argument, whether each of the issues raised is admissible. We have considered his contentions as a whole only to determine the threshold question of whether, in light of the nature of what he has presented to the Board, his intervention should be granted as a matter of the Board's discretion. Considering that the subject matter raised in his contentions has adequately been covered in the contentions presented by the admitted intervenors, which were argued at length at the prehearing conference, and that evaluating the factors listed in 10 C.F.R. § 2.714(a)(1) by viewing his contentions as a whole weighs heavily against permitting his intervention, we see no need to further delay this proceeding to schedule a second prehearing conference to argue Mr. Leithauser's late-filed contentions. In fact, Mr. Leithauser's lack of opportunity to fully defend his contentions was occasioned, not only by his failure to meet the prescribed deadline for submission of his contentions of 15 days prior to the conference, but by his not having those contentions at the conference itself where they could have been discussed. (Tr. 61-62)

We now turn to a discussion of the specific contentions raised by the admitted intervenors.





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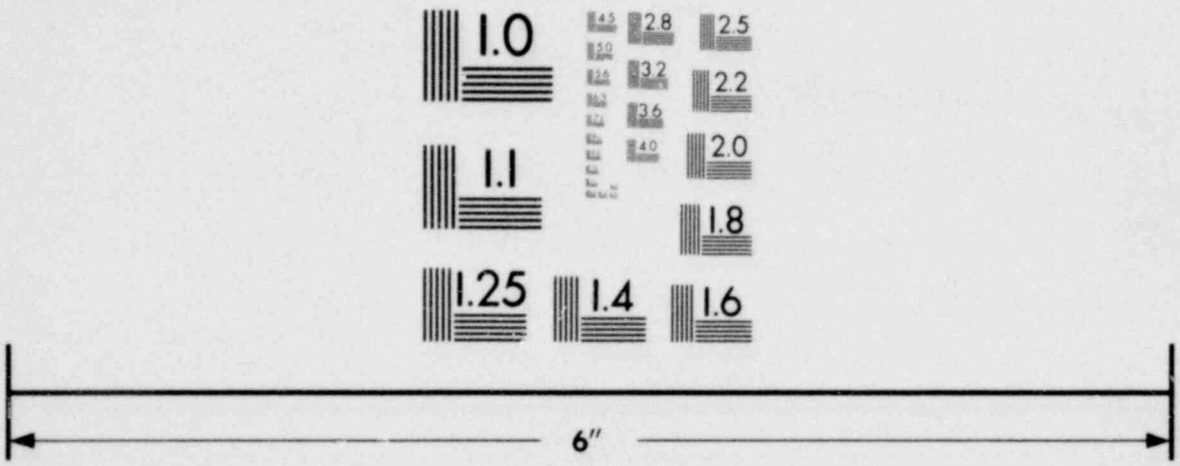

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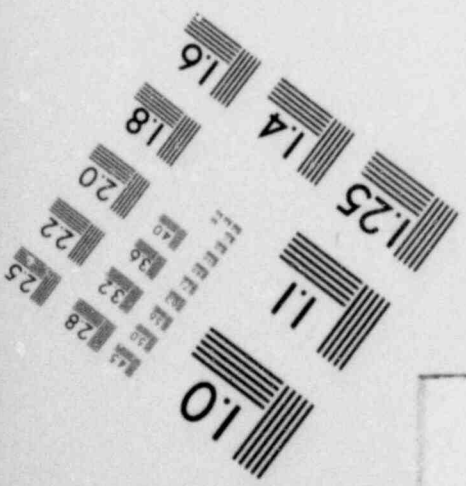

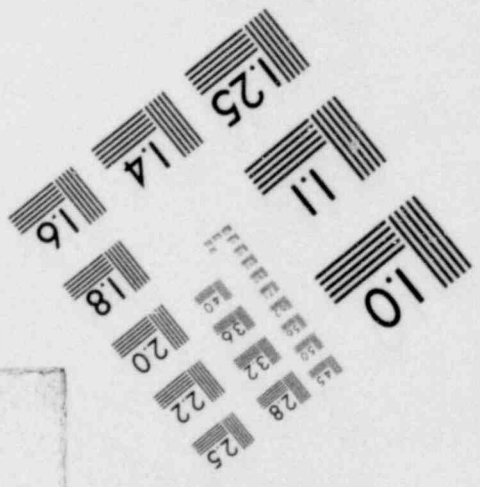

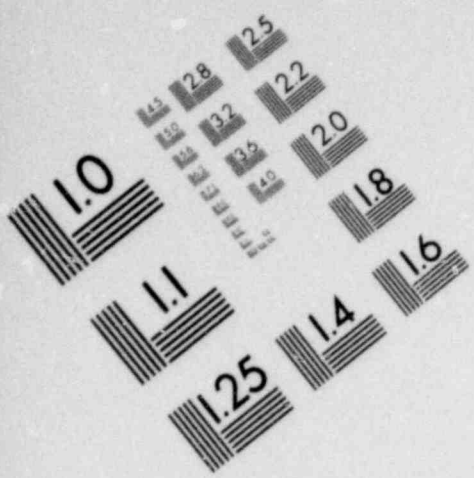

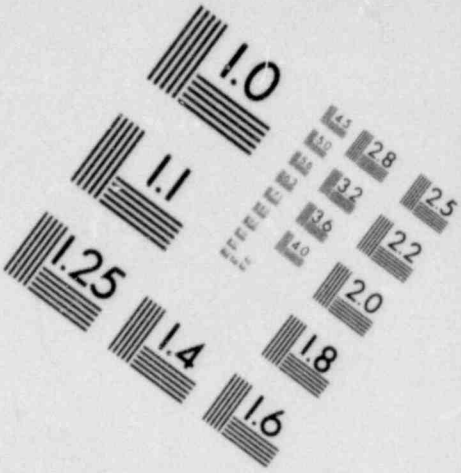

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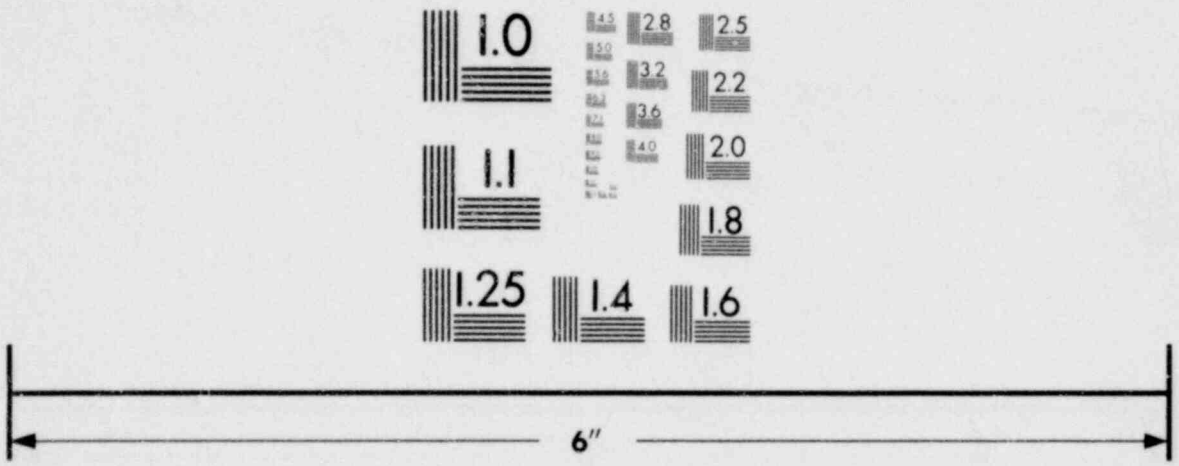

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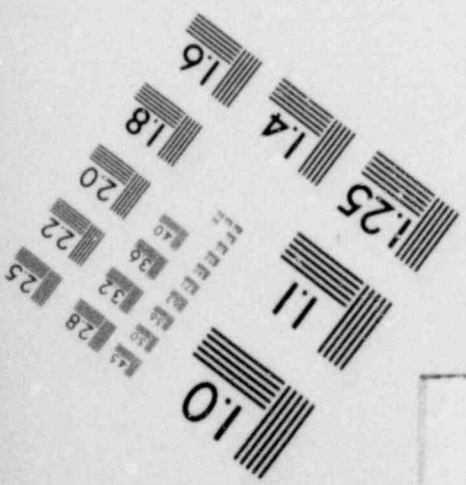

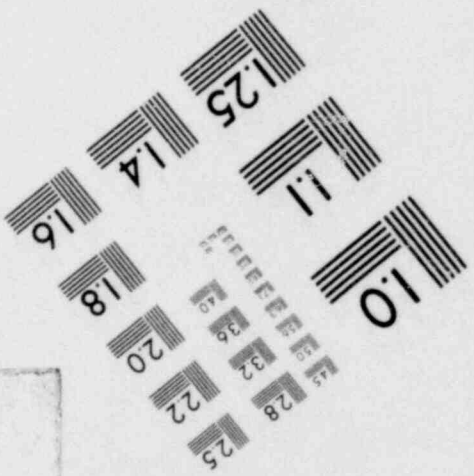

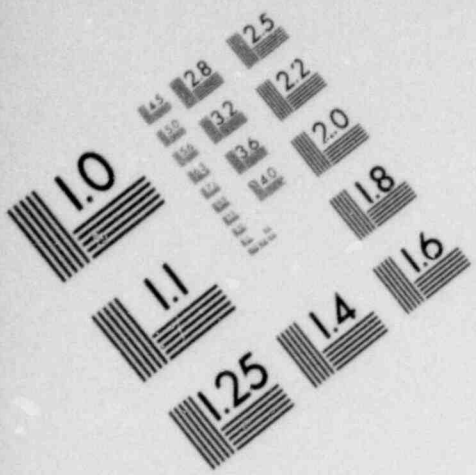

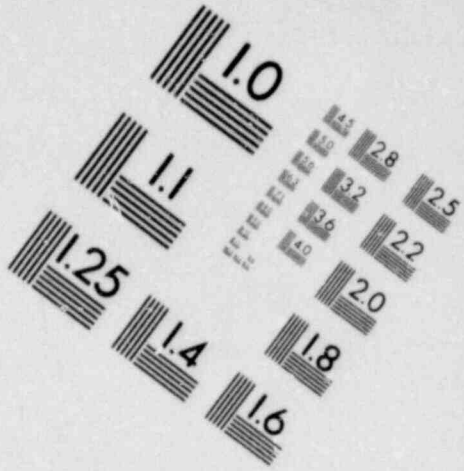

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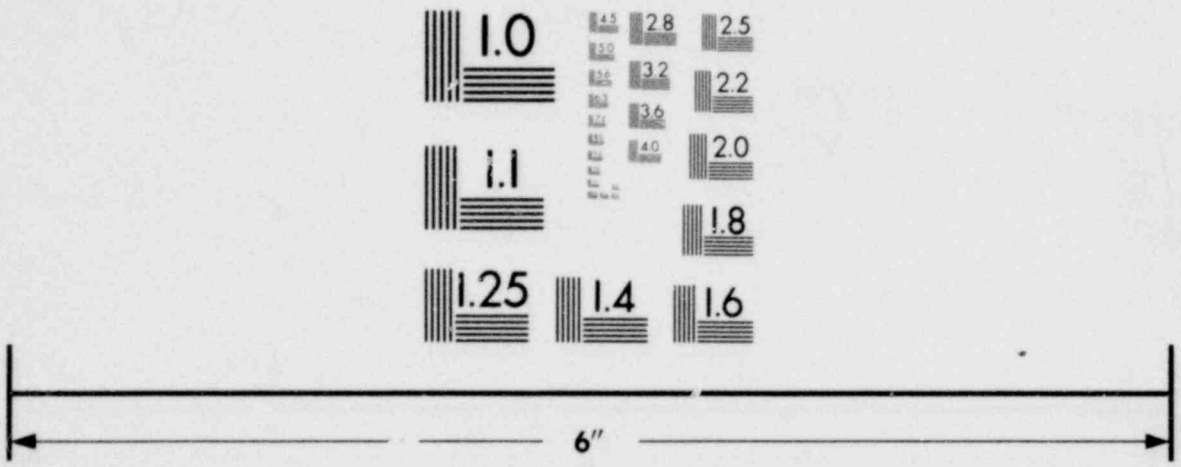

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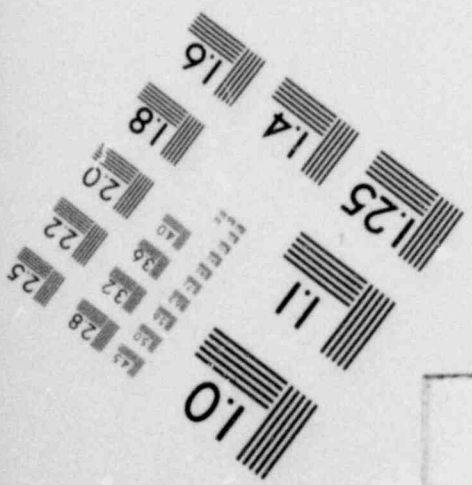
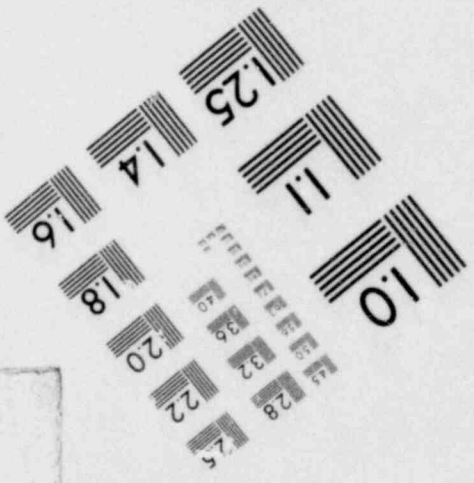




Christa-Maria's Contentions

Contention 1 seeks to delay the expansion of the spent fuel pool until the Commission has completed its "waste confidence" rulemaking proceedings and, if those proceedings determine that there is no reasonable assurance that facilities for off-site storage or permanent disposal of the spent fuel will be available before the expiration of the operating license, requests that the procedures to be established by the Commission under the waste confidence proceedings be followed to determine whether the spent fuel can be safely stored at this site. As clarified by Christa-Maria's counsel at the hearing (Tr. 74), the contention does not seek a delay of the hearing, but only of the issuance of the license amendment after all of the other factual issues have been heard.

Nevertheless, the granting or denial of the license amendment application is part of an individual facility licensing proceeding, which the Commission has ordered must continue without considering the issues involved in the rulemaking. [44 Fed. Reg. 61372, 61373 (Oct. 25, 1979)]. Only a further order by the Commission can alter this procedure. Treating the "contention" as a motion to delay the issuance of the license amendment, the Board denies it, without prejudice to Christa-Maria's resubmitting a formal motion at the conclusion of the hearing. We note the timely submission of the accompanying request that whatever procedures

are established by the Commission to determine the safety of long-term on-site storage be applied to this facility.

Contentions 2 and 3 were admitted pursuant to stipulation and the Board's admission of the stipulation. (Tr. 70.)

Contention 4 was withdrawn under the stipulation approved by the Board, subject to being re-asserted as a new contention within the same subject matter parameters before the close of discovery without objection as to lack of timeliness.

Contentions 5 and 6, concerning the effects of storing spent fuel at the site after the operating license has expired, were withdrawn under the stipulation subject to Chrisa-Maria's reservation of the right to re-file those contentions if the Commission determines in its generic rulemaking proceeding, prior to the conclusion of this proceeding, that on-site storage will be necessary after the expiration of the operating license. The staff and licensee reserved their right to take a position regarding the appropriateness of any such contention at the time it is filed.

Contention 7, relating to the release of radiation to the atmosphere through the containment ventilation system, was withdrawn at the hearing (Tr. 83-84), subject to being resubmitted with more specificity after discovery, under the same agreement as Contention 4, i.e., without the licensee or staff interposing an

objection on the grounds of lack of timeliness.

Contention 8 requires the N.R.C. to consider the consequence of a Class 9 accident on the prospective increase in the amount of radioactive spent fuel to be stored at the plant on the grounds that the occurrence at Three Mile Island No. 2 established the credibility of a Class 9 accident. The staff and licensee object to the consideration of a Class 9 accident as contrary to Commission policy, absent a substantial showing that special circumstances make a particular Class 9 accident more likely to occur at this facility. The licensee also denies that what occurred at Three Mile Island was a Class 9 accident and further asserts that, whether or not it was, Christa-Maria has failed to demonstrate the requisite nexus between the general allegations contained in Contention 8 and this licensing action. (Tr. 85-88.) In response, while still maintaining that the staff must consider all Class 9 accidents in each proceeding, counsel for Christa-Maria asserts as the nexus between a TMI-type accident and this proceeding, the lack of access to the containment at TMI because of radioactive contamination, and the consequences of not having access to the containment at this plant where the spent fuel pool is inside the containment.

We agree with the staff and licensee that even after Three Mile Island the Board must adhere to Commission policy of

not considering Class 9 accidents in a particular proceeding unless some special showing is made of why a certain kind of Class 9 accident would be more likely at the facility in question. As written, Contention 8 violates Commission policy against considering Class 9 accidents in general as expressed in the proposed annex to 10 C.F.R. Part 50, Appendix D [36 Fed. Reg. 22851 (Dec. 1, 1971)], is too broad to define the scope of the matters to be considered in litigation, and fails to establish the necessary connection (nexus) between the allegations and the proposed license amendment. (see Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978), affirmed CLI-79-9, 10 NRC __ (Sept. 14, 1979).

However, counsel for Christa-Maria did raise a particular issue (Tr. 91-92) regarding the possibility of a TMI-type accident which would prevent entry to the containment to fully maintain the spent fuel pool, which the Board itself indicated (Tr. 162) should be addressed in this proceeding when O'Neill's Contention IIE-2 was discussed. Accordingly, the Board denies Contention 8 as written, but admits Christa-Maria's Contention 8 and O'Neill's Contention IIE-2, re-written by the Board as follows:

> The occurrence of an accident similar to TMI-2 which would prevent ingress to the containment building for an extended period of time would render it impossible to maintain the expanded spent fuel pool in a safe condition and would result in a significantly greater risk to the public health and safety than would be the case if the increased storage were not allowed.

In view of the Board's acceptance of this restated contention which duplicates a proposed Board question (Tr. 162), the Board question is withdrawn.

Contention 9 asserts the inadequacy of emergency planning for the facility in light of the events at TMI-2. It requires that emergency planning be based upon a "worst case analysis" of potential accident consequences related to the spent fuel pool. It mentions as a particular, requiring the plan to take into account the significant increase in radioactive spent fuel to be stored at the plant under the license amendment.

The staff and licensee objected to what appeared to be the use of this proceeding concerning the proposed spent fuel pool expansion for a general attack upon the adequacy of the emergency plan, especially in light of the Commission's advance notice of proposed rulemaking concerning emergency planning published at 44 Fed. Reg. 41484 (July 17, 1979).

At the conference, Christa-Maria's counsel narrowed the scope of the contention (Tr. 113) to the question of whether the proposed spent fuel pool expansion itself, because of the increase in the storage of spent fuel, requires a change in the emergency plan. The licensee and staff (Tr. 115-117) indicated no objection to the contention as more narrowly limited at the conference for purposes of discovery, but asserted that the intervenor should have to

specify before the hearing the specific changes required in the emergency plan because of the increased fuel storage. Counsel for Christa-Maria agreed. (Tr. 117.) Accordingly, with that proviso, requiring more specificity before hearing, the Board accepts the contention reworded as follows:

> The expansion of the spent fuel pool requires a change in the emergency plan to take into account the significant increase in radioactive spent fuel that will be stored at the site.

John O'Neill's Contentions

Contentions IA, IB-1 thru 4, and IB-6 request an immediate suspension of this proceeding (unlike Christa-Maria's Contention 1, which requested a delay of the issuance of the license amendment after hearing) until the issue of long-term disposal of wastes is decided in the waste confidence rulemaking proceeding established at 44 Fed. Reg. 61372, October 25, 1979. Mr. O'Neill submits (Tr. 123-124) that under the notice of proposed rulemaking the Board has the discretion to not proceed with normal licensing procedures and should not under the circumstances of this proposed license amendment. Mr. O'Neill relies (Tr. 123), in particular, on the Notice's statement (44 Fed. Reg., 61373) that State of Minnesota v. N.R.C., 602 F.2nd 412 (D.C. Cir. 1979) supports the Commission's conclusion that licensing practices "need not" be altered during the rulemaking proceeding. As Mr. O'Neill points out (Tr. 123), "need not" is discretionary, rather than compelling, wording.

Mr. O'Neill confuses the Commission's discretion with that of the Board. The Notice of Proposed Rulemaking cited the D.C. Circuit Court's approval of the Commission's conclusion that licensing practices need not be altered during the rulemaking proceeding, upholding the Commission's discretion to so provide. The Notice of Proposed Rulemaking goes further, to actually provide that the on-site storage of radioactive waste for the duration of the license will continue to be adjudicated in individual facility licensing proceedings, subject only to whatever final determinations are reached in the rulemaking proceedings. This Board is not empowered to overrule the Commission's exercise of discretion. The request for a delay of the hearing is denied.

Contention IB-5 was discussed by the parties prior to the conference, made more specific in the written briefs submitted by Mr. O'Neill at the conference, and agreed to by the staff and licensee if rewritten with that specificity. The contention is rewritten by the Board and admitted, as follows:

> The corrosion and degradation of the materials of construction of the pool, pool liner, fuel elements, and racks (for example, concrete, stainless steel and aluminum) will be accelerated by the stresses caused by expansion and, as a result, the pool and racks will not retain their integrity through the remaining term of the operating license.

Contention IB-7 required the licensee to demonstrate its financial ability to maintain the fuel pool, including its increased

storage of radioactive waste. At the conference (Tr. 128), Mr. O'Neill limited the concerns about the licensee's solvency to the unexpired period of the license. The Board agrees with the staff's and licensee's position that there is no basis for a contemporaneous examination of the licensee's solvency, a matter that was examined when the construction permit and original license were granted. We do not understand this contention to be based upon the allegation of any financial strains that might occur because of the cost of the re-racking operation, the only possible nexus with this proceeding. If the licensee's financial ability to maintain the plant has been impaired since the granting of the original license (a matter not alleged by the intervenor), Mr. O'Neill should request the issuance of an Order to Show Cause under 10 C.F.R. § 2.202 - not the admission of a contention in a spent fuel pool expansion proceeding. The contention is denied.

Contention IB-8 requests a denial of the license amendment on the grounds that the licensee addressed only the issue of increased capacity of the spent fuel pool, but not the increased length of storage of the spent fuel. Intervenor contends that implicit in the original operating license was the consideration of the spent fuel pool as a one-year repository for each load of spent fuel, which was then to be shipped off-site. (Tr. 133-137.) The staff points out (Tr. 132-133) that there is nothing in the

original operating license that limits the storage to a single year, and that, moreover, the effects of long-term storage would be considered under Contention IB-5, which the parties agreed to admit.

There is some logic to Mr. O'Neill's position that only a short period of storage was contemplated in the original operating license, if only by the use of arithmetic, since only a few off-loadings of spent fuel could be accommodated in the limited spent fuel pool originally planned. Nevertheless, intervenor has not suggested (other than what has already been admitted in Contention IB-5) that the long-term storage of particular fuel elements poses any greater danger or produces any greater effect upon the environment than the continuous storage of different spent fuel elements over that same term of operating license where those elements are turned over with great frequency (i.e., stored for a year and then shipped off-site). Rather, Mr. O'Neill seems merely to raise the legal issue that the expansion of the fuel pool, with its implicit transformation of the license from short-term to long-term storage, should transform the request for a license amendment into a request for a new operating license. But even if a new operating license proceeding were called for, intervenor has not raised any specific issues in this contention that could be adjudicated in such a proceeding. Consequently, the contention must be denied. See, however, what has already been

admitted in Contention IB-5 and the Board's later discussion of Contention VIII.

Contention IIA contended that routine releases of radioactivity during the installation of new racks, through evaporation, through the walls and floor of the pool (especially the south wall), and during core off-loading, may cause health and environmental hazards, and that there is no safe level of radiation. The staff and licensee objected because the contention appeared to challenge the exposure standards contained in 10 C.F.R. Parts 20 and 50. At the conference, Mr. O'Neill (Tr. 141-142) indicated that his contention accepted the standards established by the regulations and alleged that those standards would be exceeded by the licensee's releases of radiation. He further specified (Tr. 142-144) that the releases covered are limited to occupational exposure and releases to the general public through the south wall of the pool. On that basis, the staff and licensee withdrew their objections to the contention. (Tr. 142-145.) Accordingly, the Board restates and accepts the following contention:

> The routine releases of radioactivity during the installation of new racks, the loading of those racks, and storage of fuel in the racks will exceed the limits imposed by 10 C.F.R. Part 20 on the exposure of workers, as will the releases of radioactivity through the south wall of the pool exceed the limits imposed by Appendix I to C.F.R. Part 50 on exposures to the general public.

Contentions IIB was agreed to by the staff and licensee as reworded at the conference (Tr. 146-147) and admitted here by the Board, as follows:

> The licensee's plan is deficient in failing to discuss the environmental hazards associated with small to medium leaks of radioactive water from the expanded spent fuel pool.

Contention IIC was discussed, modified, and accepted by the parties as modified, at the conference. (Tr. 147-152.) The Board accepts the modified contention, restated as follows:

> Licensee's plan, which provides for make-up water to replace water being lost from the pool at rates of up to 200 gallons per minute, is deficient because it does not consider the impact of the lost water on health and safety or on the environment.

Contention IID raised the prospect of a cataclysmic breach of the containment and loss of coolant, and a consequent impact on the environment, as the result of the crash of a B-52 bomber or sabotage by a political group or deranged employee. The staff objected (Tr. 152-153) on the grounds that the initiating events mentioned are Class 9 events, which the Board should not consider and that, even if one of the initiating events were considered credible, this license amendment proceeding is not the proper forum to deal with the general consideration of the effects of one of these initiating events. The licensee conceded (Tr. 153-154) that a B-52 crash is not a Class 9 accident because there is an Air Force low-level training air corridor in the vicinity, but objected on the

grounds that there is no nexus between the three additional racks in the pool and a B-52 crash or sabotage, and that considering the sabotage issue is a challenge to the Commission's regulations.

During the limited appearance statements, the Board was informed (Tr. 17) of a B-52 crash in the vicinity in January of 1972. Furthermore, that possibility had never been the subject of a licensing procedure. (Tr. 159.) Notwithstanding that the possibility of an air crash is now being considered under the staff's Systematic Evaluation Program (Tr. 154), the Board agrees that the possibility of such an accident's occurring should be considered at a licensing proceeding in view of the alleged increased danger in storing additional fuel.

However, we agree with the licensee that there is no nexus between the sabotage issue and this proceeding. The Commission has provided for an orderly manner for considering the prevention of sabotage at nuclear facilities and the intervenor has made no showing to suggest that the increased number of fuel elements stored in a pool should require a change in the plan.

Accordingly, the Board admits the following rewritten contention:

> The licensee has not adequately provided for the protection of the public against the increased release of radioactivity from the expanded fuel pool as a result of the breach of the containment due to the crash of a B-52 bomber.

Contention IIE-1 alleges that, since the Three Mile Island accident, Class 9 accidents must be taken into consideration. Because the reference is to Class 9 accidents in general, and not to any particular Class 9 accident that might have some particular relevance to this proceeding, the contention is denied. See Offshore Power Systems (Floating Nuclear Power Plants), supra.

Contention IIE-2 raised the possibility of a Class 9 accident causing a release of radiation into the containment building. The Board accepts as this contention its restatement of Christa-Maria's Contention 8. See discussion, supra.

Contention IIE-3 raised the prospect of criticality being reached because of the closer storage of spent fuel in the additional racks. At the conference (Tr. 178), Mr. O'Neill indicated that the contention was limited to situations not involving a gross distortion of the racks. The staff and licensee (Tr. 172-174) indicated that they have no objection. Accordingly, the Board admits the contention, restated as follows:

> The application has not adequately analyzed the possibility of criticality occurring in the fuel pool because of the increased density of storage without a gross distortion of the racks.

Contention IIE-4 stated that the containment shell is inadequate protection from massive gamma ray radiation, and

cited a newspaper article which referred to a possible loss-of-water accident involving the increased storage of spent fuel as proposed in the license amendment. The staff and licensee objected on the grounds that no specific scenario was given for suggested accidents, other than a Class 9 accident, which should not be considered, and, further, that there was nothing to connect the consideration of the adequacy of the containment shell to an enlarged spent fuel pool.

The Board considers the adequacy of the containment shell to protect the public from any accident involving the expanded fuel pool to be a proper subject for consideration in this proceeding. Accordingly, we admit the following re-stated contention:

> In the event of an accident which results in a substantial release of radioactivity from the expanded fuel pool, the containment building does not provide adequate shielding to protect the public health and safety.

Contention IIF states that no consideration was given to the concentrating of fission products in the food-chain resulting from the release of radiation from the increased number of fuel assemblies stored. The staff and licensee objected on the grounds that, with regard to routine releases of radiation, the intervenor was challenging the standards established in Appendix I to 10 C.F.R. Part 50 and that, with regard to accidental releases, there was a lack of basis and specificity because no specific accidents were discussed that could cause the discharge of spent fuel pool water

into Lake Michigan, which was contrary to the design base of the plant. In response, Mr. O'Neill indicated (Tr. 190) that he is not challenging the N.R.C. standards for radiation, but relying upon instances in which measured radiation would be increased through the food-chain in excess of those standards. Furthermore, with regard to accidental releases, he was relying (Tr. 190) upon past instances of leakage from the spent fuel pool that had been referred to in a limited appearance statement (see Tr. 34-36).

Without determining whether there is any factual support to intervenor's contention, the Board restates the contention, and admits it in a form that should obviate the objections, as follows:

> Because of the expansion of the spent fuel pool, routine releases, and accidental releases similar to those that have already occurred, of effluents will no longer meet the guidelines of Appendix I, Sections II and IV of 10 C.F.R. Part 50 because, in violation of Appendix I, Section III A.1, the required calculations do not estimate bio-accumulation factors in a manner appropriate to this site.

Contention IIG originally made some very general criticisms of the proposed spent fuel pool expansion. As a result of the Board-ordered consultation with the staff and licensee prior to the conference, Mr. O'Neill submitted a revised contention which, as further refined during the conference, proved acceptable to the staff and licensee. The Board accepts the revised, two-part contention, restated as follows:

(a) Administrative controls proposed to prevent a cask drop over the pool are inadequate. These are mentioned on pages 4 - 9 of the application. Administrative controls have proved inadequate in the past in preventing incidents and are frequently violated at the plant.

(b) Fuel has escaped the racks and remained undiscovered for a considerable time. Because the design of the new rack does not specifically address this occurrence, the design is deficient.

Contention III consisted of expressions of Mr. O'Neill's statements of interest in the proceeding to support his intervention. He withdrew this contention. (Tr. 202.)

Contention IV stated that an adequate evaluation could not be made of the proposed modification of the pool because actual manufacturing specifications had not been presented. The parties agreed (Tr. 203-205) that this contention would be withdrawn, subject to being re-introduced in more specific form before the conclusion of discovery without objection for lack of timeliness, under the same agreement covering Christa-Maria's Contentions 4 and 7.

Contention V is an attack on the Price-Anderson Act. It is denied.

Contention VI questioned whether there had been "grandfather" exemptions given to the licensee for its storage pool which would render that pool unsafe for the proposed expansion. Although the staff objected (Tr. 206, 207) on the grounds of lack of

specificity, the intervenor and licensee were agreeable (Tr. 206-207) to a withdrawal of this contention under the same agreement applying to Contention IV and Christa-Maria's Contentions 4 and 7. The Board agrees to the stipulation of the intervenor and licensee.

Contention VII requested a review of general plant safety. At the conference, Mr. O'Neill indicated (Tr. 208-210) that he was referring to the past history of reportable incidents which suggested to him past mismanagement in the operation of the plant and a likelihood of future mismanagement of an expanded fuel pool. Upon prodding from the staff (Tr. 210), Mr. O'Neill indicated (Tr. 211) a willingness to limit his contention to past incidents involving the spent fuel pool, rather than including the general operating history of the plant. The staff continued to object on grounds (Tr. 211) that an enforcement proceeding, rather than this licensing amendment proceeding, would be the appropriate forum to deal with the licensee's technical competence. The licensee continued to object (Tr. 211-213) on the grounds of Mr. O'Neill's lack of specificity in detailing the particular instances of alleged mismanagement, although the licensee would not object to deferring this contention pending discovery to allow Mr. O'Neill to raise specific instances on which he relies.

The Board agrees with Mr. O'Neill that the ability of the licensee to manage an expanded spent fuel pool, as evidenced by

its past practices, is within the scope of a proceeding to license any expansion of the spent fuel pool. A determination of the licensee's competence must necessarily be based upon an accumulation of prior practices, although the intervenor would have to specify each instance upon which he relies some time before the hearing. Furthermore, notwithstanding Mr. O'Neill's concessions at the conference, we are unpersuaded that the alleged mismanagement of the plant in general should have no bearing on determining the licensee's ability to manage an expanded spent fuel pool. Accordingly, with the understanding that the intervenor must list the incidents upon which he relies in advance of the hearing, we admit the following restated contention:

> Because of the licensee's history of mismanaging the plant, especially the spent fuel pool, it has demonstrated an inability to properly manage an expanded spent fuel pool

Contention VIII, in addition to again requesting a review of general plant safety, contended that the granting of the license would permit the plant to operate past the year 1981, that the plant produces very little electricity compared to modern nuclear generators, and that the closing of the plant would not cause great hardship. At the conference (Tr. 215-216), the intervenor further contended that under a cost-benefit analysis the closing of the plant would not cause undue hardship because it produced little and

expensive power, which could easily be replaced. The licensee objected (Tr. 217) on the grounds that what is being considered for licensing is not continued plant operation, but rather an expansion of the spent fuel pool which may not have a significant environmental impact. The licensee pointed out (Ibid.) that the staff is expected to issue an environmental impact assessment indicating that the proposed pool expansion does not have a significant environmental impact, so that the alternative of shutting down the plant need not be considered.

The Board defers ruling on this contention. It expects, as does licensee, that the staff will issue a "negative declaration" stating that an environmental impact statement, containing a cost-benefit analysis, need not be prepared because the proposed amendment does not significantly affect the quality of the human environment. Nevertheless, the Board is not satisfied that the issuance of a negative declaration resolves the issue of whether, in this case, a cost-benefit analysis or other weighing of the need for power is required. See, for example, Part III "Jurisdiction to Consider Need for Power of the January 10, 1980 Initial Decision in Dairyland Power Cooperative (La Crosse Boiling Water Reactor), Docket No. 50-409 (SFP License Amendment), attached as Exhibit.

Accordingly, the Board requests that the parties brief the following question by February 15, 1980: Where the facility

has never been subjected to National Environmental Policy Act of 1969 (NEPA) review because it was licensed before NEPA, does a license amendment which would permit the continued operation of the facility either require or permit considering a cost-benefit analysis or the need for power in the license amendment proceeding, notwithstanding that the staff may issue a negative declaration?

Mr. Leithauser, if he desires, may also brief this question within the time limit and submit, with his brief, a motion to reconsider his petition to intervene on this issue if the issue is admitted into the proceeding.

Discovery

Prior to the conference, the staff, licensee, and intervenor Christa-Maria agreed to an 11-step schedule culminating with hearings commencing 154 days after the issuance of the SER and EIA. Because of a possibility that the prospective date for the commencement of the hearings (Step 11) would conflict with Mr. O'Neill's work commitments, the Board agreed to the first ten steps of the hearing schedule, as follows:

1. Informal discovery commenced on December 5, 1979. All parties agree to use informal discovery procedures and to abide by the Commission's regulations concerning the time for responding to discovery. Formal discovery on the admitted contentions commences with the issuance of this Order.

2. SER and EIA estimated to issue by mid-February 1980.

3. Requests for additional discovery permitted within 20-days after issuance of SER and EIA.

4. Replies to discovery requests under 3. due within 40 days of SER and EIA issuance.

5. Filing any new contentions based on new information contained in SER and EIA within 47-days of SER and EIA issuance.

6. Responses to new contentions filed under 5. due within 54-days after SER and EIA issuance.

7. Motions for summary disposition filed within 74-days after SER and EIA issuance.

8. Replies to motions for summary disposition filed within 94-days after SER and EIA issuance.

9. Board ruling on summary disposition motions is expected within 114-days after SER and EIA issuance.

10. Written testimony filed on remaining issues 134-days after SER and EIA issuance.

The Board will, of course, entertain requests to extend the time limits. Any delays permitted the parties or taken by the Board in meeting the schedules will defer the succeeding steps accordingly, unless the Board specifies to the contrary.

The Board requests that the staff supply the Board, and each of the parties who has not yet received them, with copies of the 1976 German Report No. 290 and 1978 revision (see Tr. 170).

Finally, the Board poses the following question to the Staff:

Is the information contained in the document, "Board Notification-Licensee Regulatory Performance Evaluation" dated February 1979, and sent to the ASLBP members under a covering letter from William D. Paton, of relevance to this case? If so, provide detailed information with respect to its relevance.

This Order is subject to appeal to the Atomic Safety and Licensing Appeal Board pursuant to the terms of 10 C.F.R. §2.714a. Objections to this Order may also be filed by parties as provided by 10 C.F.R. § 2.751a(d).

Dr. Oscar H. Paris and Mr. Frederick J. Shon concur in this Order.

BY ORDER OF THE BOARD

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

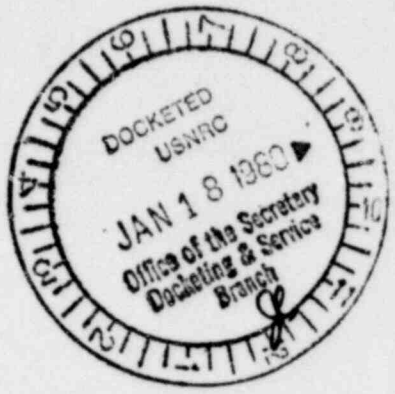
Herbert Grossman

Herbert Grossman, Chairman

Dated at Bethesda, Maryland,
this 17 day of January, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD



Charles Bechhoefer, Chairman
Dr. George C. Anderson, Member
Ralph S. Decker, Member

In the Matter of	)	
	)	
DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409
	)	(SFP License Amendment)
(La Crosse Boiling Water Reactor)	)	

INITIAL DECISION
(January 10, 1980)

Appearances

Messrs. O. S. Hiestand, Jr. and Kevin P. Gallen, Washington, DC, for Dairyland Power Cooperative, Applicant

Mr. Robert H. Owen, Jr., Madison, WI, and Messrs. George R. Nygaard, Mark Burmaster, and Ms. Anne K. Morse, La Crosse, WI, for the Coulee Region Energy Coalition, Intervenor

Ms. Colleen Woodhead and Messrs. Richard J. Goddard and Edwin J. Reis, for the Nuclear Regulatory Commission Staff

EXHIBIT

EXHIBIT

III. JURISDICTION TO CONSIDER NEED FOR POWER

A. The need for the power generated by LACBWR was initially raised by CREC as a matter to be resolved in the companion operating license proceeding, in terms both of the economic cost-benefit balance not favoring issuance of a full-term operating license and of the Applicant's failure to stress energy conservation programs which would obviate the need for LACBWR.[18/] At the special prehearing conference, however, CREC took the position that the operating license proceeding (or at least the environmental phase of that proceeding) should be considered prior to, or at the same time as, the spent fuel pool expansion proceeding (Tr. 11, 13, 73, 131, 143, 153). If that time sequence for considering issues had been adopted, we would not have been faced with the enigma of possibly authorizing a major license amendment without any inquiry as to whether the amendment (and the potential environmental and financial impacts brought about by such amendment, including those emanating from continued operation of the reactor) was in fact necessary or desirable. The inquiry would already have been undertaken, albeit as part of the operating license proceeding, and the answer there reached would also govern this proceeding. Northern State Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46 n. 4 (1978), remanded on other grounds sub

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18/ CREC Contentions 19 and 22. We formally accepted these contentions (which incorporated claims from certain of CREC's other contentions as initially submitted) by our Order of November 30, 1979 (unpublished).

nom Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

The possibility that it might not be necessary to incur either the environmental impacts or the financial costs of the spent fuel pool expansion (to say nothing of the environmental effects of continued reactor operation) was strongly emphasized by those who made limited appearance statements at the second prehearing conference. See, e.g., Pre. Conf. Tr. 318-19, 327, 340-42, 346, 350, 363-64, 389, 392. The statements tended to undercut the conclusion in the EIA that, if expansion were not authorized and the reactor had to cease operation, there would be an extra expense to ratepayers for purchased power (EIA, Staff Exh. 1A, p. 13). Complaints were also expressed that the Applicant was unduly secretive with respect to the release of information about its operation. Pre. Conf. Tr. 318-19, 326, 328-31, 343, 350-51.[19/] Furthermore, it was stressed that the operations of Dairyland, an agricultural cooperative, were not subject to the oversight of the Wisconsin Public Service Commission; as a result, NRC was viewed as the only agency which could look at the need-for-power questions (Pre. Conf. Tr. 300-01, 317). Although these limited appearance statements are not evidence, and cannot be considered by us as such, they did raise a question as to whether further inquiry on

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19/ We commend the Applicant's attorney for proposing to recommend to Dairyland that it undertake an informational program to keep the public better informed on developments at the plant. Pre. Conf. Tr. 374-75.

our part might not be desirable. When, in responding to questions raised in the limited appearance statements, the Applicant and Staff failed even to allude to the need-for-power assertions,[20] we concluded that the questions raised were of sufficient importance to warrant elucidation on the public record.

Postponing the consideration of the need-for-power issue to the operating license proceeding would perhaps have been sufficient if, at the time of the prehearing conference, we had some assurance that this review could have been carried out shortly after the completion of the spent fuel pool proceeding. This had been our contemplation when, in 1978, we initially established the schedule for this license amendment proceeding. If that schedule could have been followed, the only risks to the public would have been the incurring of impacts (both environmental and financial) of carrying out the pool expansion prior to any review of the need for LACBWR.[21] Further operation (at least to any significant extent) would not likely have occurred prior to the conclusion of the environmental review. But at the second prehearing conference, the Staff announced that the issuance of the FES had been

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20/ Prior to most of the limited appearance statements, the Applicant had made a brief one-sentence statement concerning increasing demand in its service area. Pre. Conf. Tr. 309.

21/ As will be seen, the Staff in its EIA judged the environmental impacts of the pool expansion alone to be not great enough to affect significantly the quality of the human environment, and in this Decision we are accepting that evaluation (p. 102, infra).

delayed until the end of 1980, and that the reports which the Staff would issue in conjunction with its safety review of the full-term operating license would not be completed for two years — i.e., until the fall of 1981 (Pre. Conf. Tr. 284). That would have resulted in the postponement of the evidentiary hearing on environmental matters until March or April of 1981 at the earliest (allowing at least 45 days for ruling on motions for summary disposition) and, under such schedule, a delay of the issuance of a partial initial decision on environmental matters until the summer of 1981. In other words, LACBWR would have been permitted to operate for over a year with the capacity of its spent fuel pool expanded before there would have been any complete review of the need for this facility.

Those circumstances shaped our perspective of the timing for consideration of the need-for-power questions. Instead of those questions being reviewed almost simultaneously with the spent fuel pool expansion, their consideration would not have been completed until more than a year after final action on the license amendment. Given our conclusion that the need-for-power questions were of sufficient importance to warrant elucidation on the public record in the same time frame as our consideration of the spent fuel pool expansion, it became apparent to us that consideration of need for power should not be delayed in its entirety until the operating license hearings. We therefore determined that a hearing on some aspects of need for the power

produced by LACBWR should be held at the earliest possible date, prior to the issuance of any authorization of expansion of the spent fuel pool.

It is true that, on October 29, 1979 — after the conclusion of the evidentiary hearing, and concededly as a result of urging by this Board (Tr. 976) — the Staff advised us and the parties that the FES is now scheduled for issuance early in 1980. We need not determine whether, if we had been aware of that schedule, we would nevertheless have ordered hearings on the need-for-power questions as part of the spent fuel pool expansion proceeding. Because those hearings have already been held, and because we conclude we have jurisdiction over such questions, we will proceed to make findings of fact and conclusions of law based on the evidentiary record before us.

B.1. In asserting that we lack jurisdiction to consider the need for LACBWR in the spent fuel pool expansion proceeding, the Applicant advances essentially three lines of reasoning. First, citing the Appeal Board's decision in Prairie Island, ALAB-455, supra, as well as a number of licensing board decisions, it claims that the issue of "need for power" (which it also characterizes as an "alternative to continued operation") has been ruled to be beyond the scope of this type of proceeding. Second, it asserts that we have failed to identify circumstances (within the meaning of 10 CFR §2.760a) which would permit us to consider an issue beyond the contentions raised by a party and

admitted as issues in controversy into this proceeding. Finally, the Applicant claims that, even assuming we had authority to consider need for power, we abused our discretion by raising the issue at such a late date.

For its part, the Staff also claims that we have not fulfilled the regulatory requirements for considering issues beyond those raised by parties; it asserts that there are no significant environmental effects stemming from expansion of the capacity of the spent fuel pool (or, indeed, stemming from continued operation for three years) which would constitute a "serious" environmental matter, within the meaning of 10 CFR §2.760a. Further, it claims that the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, is not retroactive and that an impact statement need not be prepared either with respect to continued operation of the facility (which began operation prior to the passage of NEPA) or with respect to a license amendment not engendering significant environmental impacts. In that connection, the Staff equates the performance of an environmental review with the preparation of an impact statement. It recognizes that where supplementary Federal actions are needed after the passage of NEPA to allow continuation of activities approved before the passage of NEPA, an environmental impact statement may be required; but it contends that such requirement does not come into play "[w]here the supplementary action does not substantially change that which was originally authorized."

(It lists four facilities licensed before the passage of NEPA where spent fuel pool expansion had been authorized without the preparation of an environmental impact statement.)

In addition, the Staff likewise relies on Prairie Island, ALAB-455, supra, for the proposition that the only environmental inquiry permitted is "whether the amendment still would bring about significant environmental consequences beyond those contemplated at the time of the grant" of the operating license. It further disclaims any intent to rely on incremental decision making as proscribed by cases such as Scientists' Institute for Public Information (SIPI) v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).

Finally, the Staff claims that, under the Commission's regulations, no environmental weighing of the benefits of a proposed action is to be made unless it is first determined that the action either "significantly affects" the environment or "has substantial adverse environmental impacts" (and hence requires preparation of an impact statement). It cites a number of licensing board decisions which concluded that no cost-benefit balance or weighing of alternatives is required in the absence of a showing that a proposed action will have significant environmental impacts, and one Appeal Board decision which ruled that, in the particular circumstances, there was no necessity of searching out alternatives to actions not involving any such impacts. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979).

2. We need not dwell long on the Applicant's argument that we abused our discretion (to the extent we might have had such discretion) by raising the need-for-power issue at a late date. We did not become aware of the potential magnitude of the problem and hence of the importance of the issue until we had listened to the limited appearance statements to which we previously referred. Nor did we know about the significant delay in the issuance of the FES until the September, 1979 prehearing conference. We acknowledge that we then set a rather expedited schedule for the evidentiary hearing on the need-for-power issue, but we were motivated by a desire to conclude our consideration of the spent-fuel-pool expansion in a time frame which (assuming approval of the amendment) would disrupt the Applicant's schedule as little as possible. We recognize the inconvenience which our scheduling may have imposed, but we do not regard such inconvenience as a valid reason for our eschewing consideration of an issue which we consider to be important. Cf. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973).

3. Nor is there any merit to the Applicant's and Staff's claims that the circumstances permitting us to examine issues sua sponte, pursuant to 10 CFR §2.760a, do not exist. As we previously stated (Pre. Conf. Tr. 420), we regard the need for LACBWR, in the context of the limited appearance statements touching upon and raising questions concerning such need, as a serious environmental

matter, within the meaning of 10 CFR §2.760a. Indeed, if we view the issue (as the Applicant seems to do) as an exploration of the alternative of doing nothing, there are a number of judicial decisions which have indicated the importance of such exploration. E.g., Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1135 (4th Cir. 1974); Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975). We also regard the combination of circumstances surrounding this individual proceeding — in particular, the lack of any previous NEPA review of the question, the extended delay in the operating license review, the depth of feeling of those who expressed concern about NRC's authorizing an activity which produces both environmental and financial impacts without even inquiring as to whether the activity is necessary or desirable, and the claimed (and not controverted) lack of any forum other than NRC where that issue might be considered — as constituting "extraordinary circumstances" within the meaning of that section.22/ We find these circumstances place the question we have raised well within the boundaries of the authority provided by 10 CFR §2.760a for us to raise issues sua sponte.

4. Both the Applicant and Staff rely on the Appeal Board's decision in Prairie Island, ALAB-455, supra, for the proposition that a licensing board has no authority to consider need for power (or the alternative of "doing nothing") in a proceeding considering

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22/ Effective November 30, 1979, the Commission deleted the "extraordinary circumstances" criterion of 10 CFR §2.760a. In doing so, it commented that the "amended rules eliminate an apparent constraint on boards as well as more accurately reflect current NRC adjudicatory board practice," of which it indicated its approval. 44 Fed. Reg. 67088 (November 23, 1979).

spent fuel pool expansion. The entire relevant part of that decision appears in footnote 4 and reads as follows:

> Because the practical effect of not now increasing the capacity of the Prairie Island spent fuel pool would be that that facility would have to cease operation, the MPCA [intervenor] appears to believe that what is being licensed is in reality plant operation. Therefore, according to MPCA, the license amendment could not issue without a prior exploration of the environmental impact of continued operation and the consideration of the alternatives to that operation (e.g., energy conservation). We do not agree. The issuance of operating licenses for the two Prairie Island units was preceded by a full environmental review, including the consideration of alternatives. See LBP-74-17, 7 AEC 487 (1974), affirmed on all environmental questions, ALAB-244, 8 AEC 857 (1974). Nothing in NEPA or in those judicial decisions to which our attention has been directed dictates that the same ground be wholly replowed in connection with a proposed amendment to those 40-year operating licenses. Rather, it seems manifest to us that all that need be undertaken is a consideration of whether the amendment itself would bring about significant environmental consequences beyond those previously assessed and, if so, whether those consequences (to the extent unavoidable) would be sufficient on balance to require a denial of the amendment application. This is true irrespective of whether, by happenstance, the particular amendment is necessary in order to enable continued reactor operation (although such a factor might be considered in balancing the environmental impact flowing from the amendment against the benefits to be derived from it).

7 NRC at 46-47 (emphasis supplied).

A careful reading of this decision indicates that it is not applicable to the case at bar. Here, unlike in Prairie Island, there has not yet been a NEPA environmental review and, accordingly, there never has been an exploration of the need for

the power produced by LACBWR or (in contrast) an examination of "doing nothing" and allowing the plant to shut down as a result. The Prairie Island holding is founded wholly upon the lack of any requirement in NEPA to re-examine matters which had been thoroughly considered in an earlier proceeding. (NEPA itself explicitly includes language designed to encourage the avoidance of "duplication of effort and expense." 42 U.S.C. 4345(2).)

The Applicant characterizes the dissimilarity between this proceeding and Prairie Island, to which we have just alluded, as "a classic case of a distinction without a difference." As grounds for that argument, it attempts to show that need for power has in fact been considered at an earlier date, so that the ruling in Prairie Island would indeed be applicable in the instant factual situation. It cites the 1962 LACBWR contract between Dairyland and the Atomic Energy Commission which provided, inter alia, that Dairyland was to purchase the plant if two conditions were met; namely,

> 1. The reactor plant 'can reasonably be expected to serve as a reliable source of steam to meet Nuclear Power Plant requirements while operating as a base load plant * * *,' and
>
> 2. The 'probable cost of energy produced * * * will not exceed the cost of energy that would otherwise be produced in a hypothetical new fossil-fuel power plant of comparable size and location * * *.'

Because the sale to Dairyland in fact was consummated, the Applicant asserts that these conditions must have been satisfied. It further asserts that the issuance of the provisional operating license to Dairyland was necessarily based "on the mutual recognition by DPC and the Commission that the reactor plant was economical and was needed to meet DPC's power needs."

We do not agree. The contractual conditions in question establish no more than that the plant was considered at the time of transfer to be a reliable source of base load energy and the electricity it would produce would be no more costly than that from a new fossil fueled plant. The satisfaction of the two conditions — which for present purposes we will agree took place — in no way constitutes an exploration of whether the power produced by LACBWR were needed, much less a determination that it was needed.

Moreover, the agreement by two contracting officers concerning the two contractual provisions in no way can be deemed equivalent to a NEPA review. No impact statement was prepared; no public participation was solicited or permitted; the satisfaction of the two conditions was not open to review in either the construction permit (authorization) or provisional operating license proceedings. Indeed, both those proceedings predated the passage of NEPA (although the issuance of the provisional operating license

did not occur until sometime after the passage of that Act). That being so, the conditions required by Prairie Island for obviating the NEPA review of benefits or alternatives in a spent fuel pool expansion proceeding are not present in this case, and Prairie Island (or its progeny) do not deprive us of authority to consider need for power in this proceeding.

The other Appeal Board and Licensing Board decisions cited by the Applicant or Staff are distinguishable on the same basis: none involved a situation where there had not previously been an environmental review of benefits and alternatives. Trojan, ALAB-531, supra; Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811 (1978). Under the earlier Prairie Island ruling, there was no need in any of those proceedings to replow ground already covered and to reconsider the benefits from or alternatives to further operation of the reactors in question.

The Staff also calls our attention to four facilities licensed before the passage of NEPA (Dresden, Ginna, Oyster Creek, and Yankee Rowe) where spent fuel pools were expanded. Although not expressly stated, we presume that none of those facilities had had any environmental review prior to authorization of the spent fuel pool expansion. We note, however, that none of those proceedings was apparently the subject of an adjudicatory hearing; hearings in those situations are not mandatory and only occur if

properly requested by an interested party. 10 CFR §2.105. If there had been such a hearing, and if a party or the licensing board in question had desired to consider need for power or alternatives, we could not say that such consideration would have been inappropriate or beyond the licensing board's jurisdiction. In any event, the fact that there may not have been such a review in those cases serves as no precedent for determining our jurisdiction here to consider need for power or alternatives.

In sum, it is clear that our authority to consider need for power or alternatives is not barred or even undermined by any NRC decision cited to us or of which we are aware. We turn now to the source of our authority to consider such questions.

5. The basic thrust of both the Applicant's and Staff's positions is that NEPA only imposes obligations on an agency in situations where a major federal action results in significant environmental impacts and hence requires the preparation of an impact statement. Put another way, benefits and alternatives become irrelevant absent the presence of significant environmental impacts which would cause NRC to prepare an environmental impact statement. We disagree.

To begin with, we acknowledge that the impacts of this spent fuel pool expansion are not great enough to require the preparation of an environmental impact statement. (Our findings of fact on this question appear in Part IV of this Decision.) But

there are a number of bases for our nevertheless concluding that we have authority to consider benefits from or alternatives to the proposed action (particularly the alternative of "doing nothing").

First, the Appeal Board in Prairie Island stated that the environmental impact flowing from a license amendment might be balanced against the benefits to be derived from it (7 NRC at 46-47, n.4); the statement was made in the context of a spent-fuel-pool expansion proceeding where, as here, the environmental impacts emanating from the amendment were not deemed large enough to warrant preparation of an environmental impact statement. Moreover, although the statement only suggested that consideration could be given to the benefits of continued reactor operation flowing from the amendment, surely it cannot be read to preclude a contrary showing that reactor shutdown might be beneficial (at least in a situation where that question had not previously been explored). What is important is the balancing which was sanctioned.

Second, the consideration of alternatives (including the alternative of "doing nothing") is governed by two separate sections of NEPA. Section 102(2)(C)(iii), 42 U.S.C. §4332(2)(C)(iii), requires consideration of alternatives in impact statements. It is only applicable in situations where an impact statement must be prepared — i.e., where there is a proposed action "significantly affecting the quality of the human environment." Section 102(2)(C). As we have seen, we find that

situation not to prevail here. But Section 102(2)(E), 42 U.S.C. §4332(2)(E), also requires the consideration of alternatives.[23/] That requirement is imposed whether or not a proposal involves significant environmental impacts. A proposed action not involving significant impacts may nevertheless be halted if alternatives (particularly the alternative of taking no action) have not been adequately considered. Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 93;[24/] Environmental Defense Fund, Inc. v. Corps of Engineers, supra, 492 F.2d at 1135; Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697-98 (2d Cir. 1972); Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971); see also Natural Resources Defense Council v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 296 (8th Cir. 1972), certiorari denied, 412 U.S. 931 (1973); Monarch Chemical Works v. Exon, 466 F. Supp. 639, 650 (D. Neb. 1979); accord, Environmental Defense Fund Inc. v. Callaway, 497 F.2d 1340, 1341 (8th Cir. 1974) (per curiam).

These courts have treated the obligations under Section 102(2)(C)(iii) and current Section 102(2)(E) to be entirely separate. The latter requirement is said to "ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of

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23/ Prior to 1975 (P.L. 94-83), subpart (E) of Section 102(2) was lettered as subpart (D). The wording of the subpart was not changed by that amendment.

24/ The Staff attempts to distinguish this case on the ground that it is "predicated on avoiding environmental harm." Even were that so, it is still clear that there need not be sufficient impact to call for the preparation of an impact statement. All there need be is "differing impacts on the environment," whether or not they be significant. Ibid. That situation clearly obtains here (see pp. 53, 63, 86, infra).

the project) which would alter the environmental impact and the cost-benefit balance." Calvert Cliffs, supra, 449 F.2d at 1114. In appropriate circumstances, the Section 102(2)(E) discussion may be incorporated into an impact statement. E.g. Environmental Defense Fund v. Corps of Engineers, supra, 470 F.2d at 296. But again, the obligations imposed by the two sections are separate and distinct, and Section 102(2)(E) comes into play irrespective of the magnitude of environmental impacts in question and irrespective of whether an impact statement must be prepared.

The applicability of Section 102(2)(E) of NEPA does depend upon there being a "proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332 (2)(E). That situation was found to exist in connection with a proposal to erect a public housing project at a given location, where the controversy centered on the appropriate use to be made of an urban renewal site. Trinity Episcopal School Corp. v. Romney, supra. And it was found to exist in conjunction with the proposed construction of three electrical transmission towers along an interstate highway through the New Haven harbor area. City of New Haven v. Chandler, 446 F. Supp. 925 (D. Conn. 1978). Although we need not establish a boundary for the applicability of that section, it seems clearly to come into play in a situation where, as here, we are presented with a construction project costing over a million dollars and involving environmental impacts which, even though not sufficient to require preparation of an impact statement, are manifestly different from those resulting from "doing nothing" (e.g., the potential purchase of needed power, the differing impacts which would then be incurred, or the possibility that LACBWR power would not be needed and, if that were so, the avoidance of impacts of reactor operation).

Furthermore, in this case, the "unresolved conflicts concerning alternative uses of available resources" may also be viewed as centering on whether a resource (LACBWR) should be used or not used pending a final determination of the question whether LACBWR's provisional license should be converted to a full-term license. As so viewed, the "alternative uses" question is somewhat different from that presented by the judicial precedents cited, in that it is circumscribed from the point of view of time and cast in terms of "use" versus "non-use" of a resource. As we previously suggested, it is unfortunate that the timing of the environmental review of the application for conversion to the full-term operating license was such that it could not be accomplished prior to or in conjunction with this SFP proceeding, because that review clearly is broad enough to include the question posed here.

Although the question is a close one, we believe that §102(2)(E) requires NRC to consider at this time the alternative of taking no action. In the absence of any prior assessment of the need for LACBWR, the impacts of the SFP expansion and the reactor's continued operation, on an interim basis, should be compared to the impacts of its shutdown pending review of the application for a full-term operating license. If LACBWR were not to be needed during this interim period, it would be better to defer act[illegible] on DPC's request for authorization to expand the spent fuel pool storage capacity until it is determined whether the facility should be authorized a full-term operating license. While this of course would result in a decision not to use a resource (LACBWR), it would prevent a needless expenditure of other resources prior to consideration of the long-term need for and acceptability of LACBWR, a consideration which will properly focus on the overall costs and benefits of LACBWR.

A third basis for our considering either need for power or the alternative of "doing nothing" is that the Staff has discussed these matters in its EIA. Under the heading of "Alternatives" (§7.0), the EIA states as follows:

> Shutdown of Facility
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> If LACBWR were forced to shutdown for lack of space to store spent fuel, there would be the loss of the economic benefit from the facility (generation of electric energy) and a cost associated with purchase of replacement energy and maintaining the facility in a standby condition far in excess of the cost of the proposed modification.
>
> The licensee estimates that the loss of revenues from the idle plant would be about $28,800/day. This is consistent with comparable data for other operating reactors.

EIA (Staff Exh. 1A) §7.4, p. 13. In summarizing the alternatives, the EIA concludes that "[a]lternative (4), plant shutdown, would be much more expensive than the proposed action because of the need to provide replacement power" (EIA, §7.5, p. 13).

The assertions made in the limited appearance statements directly contradict the conclusions reached by the Staff in its EIA. The EIA is, of course, part of the Staff's case in support of the license amendment. If we have jurisdiction to consider the EIA, we likewise have jurisdiction to entertain information tending to contradict conclusions reached in the EIA.

The Applicant and Staff each draw our attention to the fact that the Commission's regulation dealing with EIAs (10 CFR §51.7(b)) makes no mention of any requirement to discuss alternatives

or to perform a cost-benefit balance, whereas, in contrast, the regulations dealing with impact statements explicitly require discussion of those topics (10 CFR §§51.20(a) and (b), and 51.23). We cannot agree, however, that the silence with respect to whether to discuss alternatives or perform a cost-benefit balance in an EIA means that these subjects are inappropriate for an EIA. Moreover, the EIA here did in fact include such subjects. We do not know what authority the Staff was relying on when it included a discussion of alternatives and a cost-benefit balance in its EIA, but we presume it must have been §102(2)(E) of NEPA, which we heretofore have considered. In any event, we conclude both that it was proper for the Staff to include these subjects in its EIA and that, as a result, our consideration of information tending to contradict the Staff's conclusions was also appropriate and within our jurisdiction.

Finally, there are several other bases on which our jurisdiction to consider need for power and alternatives may be founded. Even though a project was authorized prior to the enactment of NEPA, subsequent Federal involvement in the project, by way of approving changes, has been held to trigger the need for an environmental review — even though the impacts of the change were less adverse, or at least no more severe, than those approved earlier. Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974); Hart v. Denver Urban Renewal Authority, 551 F.2d 1178 (10th Cir. 1977); State of Wisconsin v. Callaway, 371 F. Supp. 807 (W.D. Wis. 1974). So-called "continuing projects" begun prior to the passage of NEPA have also

been found to require an environmental review. Lee v. Resor, 348 F. Supp. 389, 397 (M.D. Fla. 1972).

In addition, a preliminary review at this time might be warranted in the operating license proceeding (over which we clearly have been delegated authority). The very delay in that proceeding might well mandate such a review. Cf. Northwest Airlines v. CAB, 539 F.2d 748 (D.C. Cir. 1976). In that connection, we reiterate that the Applicant has heretofore received only an 18-month provisional operating license which under its own terms expired in 1974. Its continued validity is maintained as a matter of law (10 CFR §2.109) but only as a result of the NRC's delay in completing its review of the full-term operating license application. No party disputes that such application requires a full NEPA environmental review. Even though NRC regulations impose no time limit on such continued validity, it is clear to us that at some point in time the NRC's lack of action must be deemed fatal to the continuation of the provisional license. Otherwise, the Applicant could conceivably operate LACBWR for another 30 years or so without the completion of any environmental review. We need not determine the exact date after which a license extension pursuant to 10 CFR §2.109 becomes unreasonable in order to find that, in the circumstances of this proceeding, at least a preliminary environmental review of continued operation is appropriate at this juncture.

In short, we conclude that there are several independent bases which confer jurisdiction upon us to consider need for power

(or the alternative of doing nothing) at this time.

C. Prior to the evidentiary hearing, the Applicant asked us to certify or refer the jurisdictional question we have just discussed to the Appeal Board for its review. We declined to do so at that time, because we felt that the delay (assuming we were upheld by the Appeal Board and a hearing would still be held) would make it impossible for us to render a decision in the time frame in which the Applicant sought approval of the license amendment.

We recognize, of course, that the legal question we have discussed may well be considered a close question. We also recognize that, because it has prevailed on the merits, the Applicant would not normally be permitted to appeal our decision. See, e.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973).[25/] Furthermore, although we have not investigated the question, our ruling may well be relevant to other proceedings where applicants are seeking to expand the capacity of their spent fuel pools without having earlier been subjected to an environmental review.[26/] For these reasons, we announced at the

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25/ If another party were to appeal this Decision, the Applicant could, of course, defend the result reached "on any ground presented in the record, including one rejected" by us. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC ___, ___ (December 7, 1979) (slip op. p. 27).

26/ The applicability would be limited, of course, to proceedings where a review of benefits or alternatives was sought by a party or by a licensing board. 10 CFR §2.105.

hearing that we would refer this ruling to the Appeal Board (Tr. 281). Pursuant to 10 CFR §2.730(f), we find that prompt decision on this question would be in the public interest and hereby refer it to the Appeal Board (see 10 CFR §2.785(b)(1)) for its determination.27/

One further comment is also in order. We have characterized the jurisdictional question as one which many may regard as a "close question." Despite this characterization, we strongly believe that there are several bases upon which our jurisdiction properly rests; but we recognize that the arguments for the contrary position are not frivolous. In such a situation, however, we believe it important to resolve any doubts in favor of an on-the-record hearing on the issues in question (i.e., need for

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27/ In conjunction with this referral, we call the Appeal Board's attention to the following documents:

1. Applicant's Request for Reconsideration, or, in the alternative, Certification or Referral to the Appeal Board, dated October 1, 1979.
2. Pre. Conf. Tr. 392-438 (September 21, 1979).
3. Tr. 246-281 (October 3, 1979).
4. CREC's Proposed Findings of Fact, dated October 31, 1979, par. 121-123.
5. NRC Staff's Brief in Opposition to Licensing Board's Sua Sponte Consideration in this Proceeding of the Need for LACBWR, dated November 5, 1979.
6. Applicant's Reply to CREC's Proposed Findings of Fact, dated November 7, 1979, Part V.

power and the alternative of "doing nothing"). With respect to those issues, the views of those who made limited appearance statements at the second prehearing conference were both strongly held and diligently presented. As it turned out (see Part IV, infra), some of those views had at least a plausible foundation; others proved to be neither factually well founded nor based upon a broad enough perception of applicable factors to produce a sound conclusion. Faced with such strongly held differences of opinion, it is important to resolve the questions in a public forum, unless clearly prohibited by applicable rules.

The Atomic Energy Act designates the public adjudicatory hearing as such a forum (42 U.S.C. §2239(a)). It provides a unique vehicle for obtaining answers in public to controversial questions. In doing so, it also provides an effective method for implementing the "full disclosure" goals of NEPA. To have allowed the Applicant and Staff to have worked out answers to the need for power questions (or the alternative of "doing nothing") without public participation, or to have permitted them to avoid these questions altogether, would scarcely have answered the outstanding questions. Nuclear power is sufficiently controversial that its problems or apparent problems must be dealt with and resolved on the merits in full view of the public. The Atomic Energy Act and NEPA demand no less.