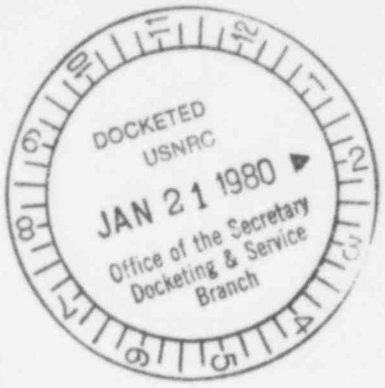

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-367
	)	
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	(Construction Permit Extension)
	)	
(Bailly Generating Station, Nuclear 1)	)	January 18, 1980

NIPSCO'S RESPONSE TO PETITIONS FILED IN RESPONSE TO NOTICE OF OPPORTUNITY FOR HEARING

William H. Eichhorn
EICHHORN, EICHHORN & LINK
5243 Hohman Avenue
Hammond, Indiana 46320

Maurice Axelrad
Kathleen H. Shea
LOWENSTEIN, NEWMAN, REIS,
AXELRAD & TOLL
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

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I. Background and Introduction

Construction Permit No. CPPR-104, issued on May 1, 1974, authorizes the Northern Indiana Public Service Company (NIPSCO) to construct the Bailly Generating Station, Nuclear 1. As issued, the Permit identified the latest date for completion of the facility as September 1, 1979. On February 7, 1979,

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*/ This document responds to the "Petition for Leave to Intervene" filed by Porter County Chapter of the Izaak Walton League of America; Concerned Citizens Against Bailly Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman; and Mildred Warner (hereinafter "Porter County Chapter Petitioners") on December 20, 1979; "Petition to Deny Permit" filed by Local 1010 of the United Steelworkers of America (hereinafter "Local 1010") on December 20, 1979; "Petition for Leave to Intervene" filed by the State of Illinois (hereinafter "Illinois") on December 21, 1979; "Petition for Leave to Intervene and Adoption of Other Petitions" filed by Lake Michigan Federation (hereinafter "Federation") on December 28, 1979; and "Petition for Leave to Intervene and Request for Hearing" filed by the City of Gary, United Steelworkers of America, Local 6787; the Bailly Alliance; Save the Dunes Council; and Critical Mass Energy Project (hereinafter "Gary Petitioners") on December 31, 1979.

NIPSCO applied to the Nuclear Regulatory Commission (NRC) for extension of that latest completion date to September 1, 1985. On August 31, 1979, that application was amended and NIPSCO requested that the date be extended to December 1, 1987, or 98 months after NRC concurs in resumption of pile placement.

On November 30, 1979, the NRC published a "Notice of Opportunity for Hearing on Construction Permit Extension" (44 Fed. Reg. 69061). The Notice stated that:

> . . . the Director of Nuclear Reactor Regulation has, in the exercise of his discretion, determined, in the circumstances obtaining here, that an opportunity for a public hearing should be afforded, particularly in light of recent expressions of citizen interest in this matter.
>
> Accordingly, notice is hereby given that . . . any person whose interest may be affected by this proceeding may file a request for a hearing in the form of a petition for leave to intervene with respect to whether, pursuant to 10 CFR 50.55(b), good cause has been shown for extension of the completion date for Construction Permit No. CPPR-104 for a reasonable period of time; i.e., with respect to whether, pursuant to 10 CFR 50.55(b), the causes put forward by the Permittee are among those which the Commission will recognize as bases for extending the completion date.

In response to that Notice, a number of petitions for a hearing and to intervene in the proceeding were received; they are listed in the footnote on page 1. Several of the petitions are essentially identical; one petition "adopts and incorporates by reference" petitions filed by others; all make similar claims of standing and identify similar issues as proper for

inclusion in this proceeding. Therefore, we have prepared this single "Response" which is addressed to all those listed petitions.*/

Although the Notice of Opportunity for Hearing is recent, the present situation is not "new" in that many of those who now seek to participate in a hearing have long been involved, before the AEC, NRC, and Federal courts, in contesting many of the same issues in which they now express interest. It therefore appears appropriate to outline for this Atomic Safety and Licensing Board ("Board"), the members of which have not previously been assigned to a Bailly proceeding, some of the pertinent history.

NIPSCO filed an application for a permit to construct the Bailly facility on the southern shores of Lake Michigan in August 1970. After extensive review by the Staff and months of proceedings before the Commission's Licensing Board, a construction permit was issued in May 1974. Shortly thereafter, construction of the Bailly facility was commenced and almost immediately halted under an injunction issued by the United States Court of Appeals for the Seventh Circuit at the request of many

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*/ We are also filing a separate Response to Letters Filed by Citizens Grabowski, Laudig, and Schultz.

of the present Petitioners. Issues raised by those Petitioners as to the validity of the Bailly construction permit have twice been before that Court of Appeals and twice before the Supreme Court of the United States.

Since the issuance of the construction permit nearly six years ago, construction progress has been limited due in large part to judicial reviews, and attendant stays, sought by many of the same persons who now request hearings on whether there is good cause for extending the Bailly construction permit. Appeals and other requests for relief in connection with the Bailly facility initiated by some of the Petitioners have been continuously ongoing either before the Commission or the courts since the issuance of the construction permit in 1974.

After completion of review of the application by the Staff and its issuance of the Safety Evaluation Report (SER), evidentiary hearings on the Bailly application commenced in October 1972 with many of the instant Petitioners as intervenors. The hearings lasted until November 1973, consuming more than 60 hearing days and resulting in the Licensing Board's April 5, 1974 decision authorizing the issuance of the requested construction permit. (7 AEC 557.)

The issuance of the permit was temporarily stayed by order of the Appeal Board following intervenors' request and thereafter their two requests to the Appeal Board for stays resulted in limiting construction activities until September 1, 1974. On August 29, 1974, the Appeal Board issued its decision which vacated the partial stay of construction activities, found all of the exceptions to be without merit, and affirmed the Licensing Board's decision authorizing the issuance of the construction permit. (8 AEC 244.)

This decision was immediately appealed to the United States Court of Appeals for the Seventh Circuit, where many of the present Petitioners filed their fourth request for a stay of the construction of the Bailly facility. The court of appeals granted the request for a stay on October 16, 1974, which effectively halted all construction. On April 1, 1975, the court of appeals rendered its decision invalidating the construction permit and permanently enjoined the construction of the Bailly facility. (Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 515 F.2d 513 (7th Cir. 1975).) The Supreme Court of the United States summarily reversed this decision and remanded the cause to the Court of Appeals for the Seventh Circuit for consideration of issues not dealt with in that

court's prior decision. (NIPSCO v. Porter County Chapter of the Izaak Walton League of America, Inc., 423 U.S. 12, (1975).)

In its ultimate decision, the court of appeals found all of Petitioners' claims to be without merit and affirmed the Commission action authorizing construction of the Bailly facility. (533 F.2d 1011 (7th Cir. 1976).) The Supreme Court denied certiorari in November 1976, thereby removing the last legal obstacle to construction of the Bailly facility. (Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 429 U.S. 945, (1976).)

On October 3, 1974, while the Bailly proceeding was pending before the court of appeals, the Commission ordered additional hearings before the Licensing Board to review the environmental effects, if any, of use of a slurry wall around the Bailly excavation to prevent the entry of groundwater into the excavation. (8 AEC 631.) Evidentiary hearings were conducted before the Licensing Board between October 31, 1974, and January 21, 1975. The Licensing Board found all of the Petitioners' objections to be without merit and authorized installation of the slurry wall (1 NRC 61); its decision was affirmed by the Appeal Board on December 17, 1975. (2 NRC 858.)

During the course of these proceedings, while the original challenge to the construction permit was pending before the courts and the slurry wall issue was pending before the Appeal Board, many of these same Petitioners were successful in persuading the Appeal Board to hold yet another hearing. That Board conducted an emergency hearing on November 11, 1974, to review the effect on groundwater levels occasioned by water seeping into the existing excavation at the Bailly site. At the conclusion of the evidence, the Appeal Board found the Petitioners' claims to be without merit and determined that the existence of the excavation at the Bailly site did not threaten the groundwater table level in any areas outside of the Bailly site. (8 ACE 841 (1974).)

In the same month as the Supreme Court's final denial of certiorari, many of the same parties sponsoring the instant petitions filed petitions with the Commission requesting the suspension and revocation of the Bailly construction permit and requesting a hearing to review alleged changes in factual circumstances since the original issuance of the permit. The Commission treated these petitions as requests for show cause proceedings under 10 C.F.R. § 2.206 and referred the matter to the Staff. After detailed review, the Staff found these requests to be without merit

and denied them on April 15, 1977. The Commission granted the request that it review the Staff's action and upheld the denial of the petition. (7 NRC 429 (1978).) That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed the Commission. (Porter County Chapter v. NRC, 606 F.2d 1362 (D.C. Cir. 1979).)

In October 1977 the same Petitioners again requested a stay of construction based on changes in the proposed pile foundation design. The Director denied these new requests since pile placement had been halted pending completion of a Staff review of pile placement technique. (Letter from Mr. Case to Mr. Vollen, dated November 17, 1977.)

In November 1978 all the present Petitioners requested a stay and a proceeding to consider the proposed use of short piles. This request was denied by the Commission on December 12, 1979. (Memorandum and Order, CLI-79-___, 10 NRC ___.)

When NIPSCO requested the extension of the construction permit in February 1979, requests by Porter County Chapter Petitioners and Illinois for a hearing soon followed. As above indicated, the Notice of Opportunity for Hearing was published on November 30, 1979, and the present petitions were filed in December.

The foregoing brief summary illustrates that Petitioners' instant request for a hearing is but another in a never-ending series of pleadings filed by these same Petitioners in various forums. All of these contentions, exceptions, claims, allegations, and requests have uniformly been found to be without merit.

The petitions reflect similar views of the permissible scope of any proceeding on a construction permit extension. They announce the desire to litigate many and broad issues. Our response is therefore lengthy and somewhat complex. To assist the Board, we shall briefly outline the organization of the response.

The response first addresses "standing" and concludes that these Petitioners do not satisfy NRC requirements for admission as of right because they have not alleged that they are persons "whose interest may be affected by the proceeding." Nor, we submit, should Petitioners nevertheless be admitted as a matter of discretion.

Second, assuming for the purpose of the Response that a hearing is to be held and that at least one Petitioner is admitted to the proceeding, we consider the scope of that proceeding. It bears emphasis that "scope" and

"standing" are different and separate questions. The Board may determine that, under the NRC's concept of standing, a petitioner must be admitted or that for other valid reasons a petitioner should be admitted in the exercise of discretion. However, that decision would in no way affect the permissible scope of the proceeding; that scope has been defined in the Notice to correspond to applicable NRC regulation and the Atomic Energy Act. It is clear that Petitioners, some of whom have chosen to state contentions in their petitions to intervene,*/ wish the proceeding to be of broadest scope.

Our Response (Section III) explains that the extension proceeding may properly consider only whether there is "good cause" for the extension of the completion date. In essence, Petitioners contend that this means consideration of whether there is <u>now</u> "good cause" for issuance of a construction permit. That is, have all requirements applicable to construction permits been met <u>and</u> have other "recent significant events" been considered and satisfactorily resolved? Adoption of this view would mean that the scope of an extension proceeding is even broader than that of the earlier construction permit proceeding. How-

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*/ Under NRC rules, they need not do so until 15 days before the special prehearing conference. (10 C.F.R. § 2.714.)

ever, the law clearly states that the proper scope of this proceeding includes the reasons which necessitate the extension, but not whether construction should have been authorized in the first place or should be authorized now.

We also respond to Petitioners' apparent view that construction should be stayed pending completion of the extension proceeding.

We are separately filing our Response to "Petition for Waiver of or Exception to 10 C.F.R. 50.55(b)"*/ and a Motion which asks the Board to establish a schedule for a prehearing conference and related filings.

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*/ Porter County Chapter Petitioners and Illinois have also filed petitions for rulemaking which ask the Commission to "amend or rescind 10 CFR §50.55(b)" and promulgate a new regulation interpreting the "good cause" requirement of Section 185 of the Atomic Energy Act. They also seek a suspension of any proceeding considering extension of the Bailly construction permit pending disposition of the rulemaking petition. We shall respond to that petition in due course, but for now, note only that the petition fails to specify any reasons for suspension of the extension proceeding and thus appears to merit summary denial.

II. Standing

A. Standing to Intervene as a Matter of Right

A person may intervene in a NRC licensing proceeding only upon a showing that his interest may be affected by that proceeding. (Atomic Energy Act, § 189(a), 42 U.S.C. § 2239(a) (1976); 10 C.F.R. § 2.714(a)(1). See also Notice of Opportunity for Hearing on Construction Permit Extension for Bailly, 44 Fed. Reg. 69061 (1979).) The Petitioners in this proceeding have not alleged facts showing that this proceeding on the extension of Bailly's construction permit may affect their interests. Although the Petitioners have advanced several arguments in support of their petitions to intervene, none of these are sufficient for intervention in this proceeding. Consequently, their petitions should be denied.

Both Porter County Chapter Petitioners and Illinois attempt to base their intervention on the fact that each has participated as a party in previous proceedings concerning the Bailly plant. However, prior participation in a proceeding involving the same plant does not confer automatic standing in all subsequent proceedings. Especially if the subsequent proceeding is more narrow in scope than the prior proceeding, it is incumbent upon a petitioner to plead specifically which of his interests may be affected by the outcome of the subsequent proceeding. (Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3),

LBP-75-22, 1 NRC 451, 455 (1975).)

The Petitioners allege that construction and operation of the Bailly plant will injure them, and they rely upon this injury as the basis for their standing to intervene. However, they neglect to "set forth with particularity" the precise manner in which construction or operation may affect their interests, as required by 10 C.F.R. § 2.714(a)(2). The simple assertion that construction or operation will affect their health, safety, or recreational interests is conclusory and fails to specify how construction or operation will affect these interests.

More importantly, an allegation of injury from construction or operation of the plant is insufficient, by itself, for standing to intervene in a proceeding to extend a construction permit. Extension of a construction permit is not an authorization of construction or operation. Construction and operation are authorized in other proceedings. The granting of an extension does not alter the manner of construction or the actual design or operation of the facility; the issuance of an extension only prolongs the time in which previously-authorized construction may be completed. Since an extension of a construction permit is not an authorization to construct or operate a facility, alleged injuries resulting from construction or operation are not injuries resulting from the extension proceeding. Therefore, such alleged injuries do not constitute adequate grounds for standing to intervene in this proceeding.

Analogous judicial decisions*/ make clear that a plaintiff only has standing to challenge the action of the defendant which actually injured him. The fact that one action of the defendant has injured the plaintiff does not give the plaintiff standing to challenge other actions of the defendant. (Burch v. Louisiana, ___ U.S. ___, 99 S.Ct. 1623, 1625 n. 4 (1979); New York Civil Service Comm'n v. Snead, 425 U.S. 457 (1976); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972); McGowan v. Maryland, 366 U.S. 420, 429 (1961). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 585 (1978) (a private party in an NRC proceeding had no standing to raise a claim that the notice of opportunity for hearing was defective because it failed to specify the rights of local governments to participate pursuant to 10 C.F.R. § 2.715(c)).**/ Therefore, while

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*/ The NRC has adopted notions of judicial standing for application to petitions to intervene as a matter of right. (Portland General Eletric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).)

**/ Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), might be argued to be an exception to the line of cases cited above. In Duke Power, plaintiffs established that "but for" the Price Anderson Act, there would be no potential injuries to them from construction and operation of a nuclear plant. The Supreme Court held that they had standing to argue that the Act would deprive them of due process in the event of a major accident. However, all Duke holds is that injuries which might be suffered as a result of the impact of Price Anderson were sufficient to confer standing in a forum which had jurisdiction to adjudicate the constitutionality of that legislation. Nothing in Duke indicates that the injury alleged to arise from a state of affairs not before the adjudicating body is sufficient to confer standing
(footnote continued on next page)

an allegation of injury resulting from construction or operation may be sufficient for standing to intervene in a construction permit or operating license proceeding, it does not confer standing in a proceeding on an extension of a construction permit.

Unless the Petitioners can establish that the extension will produce an additional or incremental injury to them above that authorized by the construction permit, they will not have standing to intervene in the proceed ng to extend the construction permit. The Federal Communications Commission, in proceedings on extensions of construction permits, has required just such a showing of incremental injury in order to obtain standing to intervene.*/ (Tri-State Televi-

(footnote continued)
with respect to a state of affairs properly before that body. This is not to say that the injury alleged by the Petitioners here could not conceivably confer standing upon them in other proceedings, e.g., a later operating license proceeding or a 10 C.F.R. § 2.206 petition. Consequently, there is no basis for the abandonment of the well-established rules of standing to enable these Petitioners to intervene absent a showing of injury flowing from a decision with respect to matters properly before this Board.

*/ The Federal Communications Commission operates under a statute which is similar to the Atomic Energy Act in many respects. Section 319 of the Federal Communications Act, 47 U.S.C. §319 (1976), establishes a bifurcated licensing procedure. The applicant for operation of a broadcasting facility must first apply for a construction permit, and then for an operating license following completion of construction. Section 319(b) states that the construction permit shall be automatically forfeited if the station is not ready for operation by the date specified in the permit, "unless prevented by causes not under the control" of the applicant.

sion, Inc., 43 FCC 2669 (1954); Channel 16 of Rhode Island, Inc., 10 Pike and Fischer R.R. 377 (1954).*/ In Southwest Broadcasting Co., FCC 69-832, 18 FCC 2d 858, 859 (1969), the FCC stated that it is a

> . . . well settled principle that standing to protest is not conferred by the grant of an application for extension of time to construct, absent a clear showing of added injury flowing from the extension itself.**/

Since the Petitioners have not alleged that the extension itself will inflict injury upon them in addition to any alleged injury previously caused by the issuance of the construction permit, they have no standing to intervene in this proceeding.

Porter County Chapter Petitioners and Illinois attempt to satisfy the interest requirement by stating that a denial of an extension would eliminate a potential threat to their interests and that a grant of an extension would increase the probability that the plant would be constructed. How-

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*/ In both Tri-State and Channel 16, petitioners alleged that operation of the completed facility would injure them. However, they were denied intervention because they failed to plead that the extension of the construction permit itself would produce an incremental injury to their interests.

**/ Nevertheless, the FCC granted standing to a petitioner who had failed to satisfy this requirement, because the petitioner had raised significant public interest considerations. This appears to have been similar to the NRC's practice of affording some petitioners discretionary intervention under certain circumstances.

ever, neither of these consequences will adversely affect the interests of the Petitioners. Any adverse effect from construction or operation which might allegedly accrue to the Petitioners was authorized by the issuance of the construction permit. The Petitioners have not alleged that the extension itself will affect the safety or environmental impacts of the plant in any way different from those evaluated earlier by the Commission. Therefore, the petitions to intervene must be denied for failure to allege that the extension will produce an incremental adverse effect upon the Petitioners' interest.

Finally, it should be noted that the organizations which have petitioned to intervene have not complied with the traditional standing requirements for organizations. Some*/ allege that construction of the plant would be contrary to their organizational interest in protecting natural resources and the environment. However, the courts and the Commission have repeatedly stated that such a special interest in a problem is insufficient for standing. (E.g., Sierra Club v. Morton, 405 U.S. 727, 737-40 (1972); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 421-22 (1976).) Additionally, all of these organiza-

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*/ Porter County Chapter, Concerned Citizens Against Bailly Nuclear Site, Businessmen for the Public Interest, Lake Michigan Federation, Save the Dunes Council, and the Critical Mass Energy Project.

tions have failed to identify at least one member who has interests which may be adversely affected by this proceeding, and who has authorized the organization to represent him. (Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979).)

B. Admission as an Interested State

In addition to its request for admission as a party under 10 C.F.R. § 2.714, */ Illinois has also requested admission as an interested State pursuant to 10 C.F.R. § 2.715(c).

Section 274(1) of the Atomic Energy Act, 42 U.S.C. § 2021 (1) (1976), bestows upon a State the right of participation in a proceeding in which activities will be conducted subject to a NRC license. 10 C.F.R. § 2.715(c) implements this section, and states that any "interested State" may be afforded participation rights. Previous NRC cases indicate that the requirement for interest under

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*/ Nothing in the Atomic Energy Act or the Commission's regulations, nor anything we could discover in AEC/NRC decisions suggests that a petition of a State under § 2.714 should be treated any differently than a petition by any other person under § 2.714. In fact, a State admitted under §2.714 is bound by the same procedural requirements applicable to other parties. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). Consequently, since Illinois has failed to establish that either its interests or its citizens' interests may be adversely affected by this proceeding, its petition under § 2.714 must be denied. See discussion under II.A, supra.

§ 2.715(c) is much less stringent than the requirement for interest under § 2.714.*/ Consequently, the Licensee will not contest the participation of the State of Illinois under § 2.715(c) if a hearing is held at the request of a petitioner under § 2.714.

However, it is clear that the request of an interested State alone is not sufficient to require a hearing. Section 274(l) of the Atomic Energy Act and § 2.715(c) of the Commission's regulations are quite specific in regard to the rights of a State participating under these sections. A § 2.715(c) State will be afforded "a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission" without the necessity of taking a position with respect to an issue. This includes the right to appeal a decision of the licensing board. (Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 176-180 (1976).) But in a hearing which is not required under the Act, it cannot raise issues which are not the subject of an admitted contention. (Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 n. 14 (1976).) Therefore, in a proceeding in which a hearing is not required, a § 2.715(c)

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*/ See Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977).

State will have "no forum for its views" unless a petitioner successfully intervenes under § 2.714. (Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 279 (1978).) Consequently, the privileges granted under § 2.715(c) do not include the right to request a hearing. This proceeding must be dismissed if no petitioner (including Illinois) receives standing to intervene under § 2.714. (See Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811, 814 (1978), aff'd ALAB-484, 7 NRC 984 (1978).)

C. Discretionary Intervention

In Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976), the Commission authorized the grant of discretionary intervention in cases where a petitioner failed to satisfy the requirements of intervention as of right. However, a petitioner will be granted discretionary intervention only upon a favorable balancing of the following six factors.

(a) Weighing in favor of allowing intervention--

(1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention--

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which the petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

(4 NRC at 616.) None of the Petitioners here qualifies for discretionary intervention under this test.

Factor 1

None of the Petitioners has offered any information which indicates the extent to which its participation may reasonably be expected to assist in developing a sound record, nor has any Petitioner discussed its ability to contribute to this proceeding. Consequently, these petitions only exhibit the Petitioners' desire to act as adversaries to NIPSCO in this proceeding. While the posture of an adversary may sometimes assist in expanding the record on some issues, this factor is only marginally beneficial to the Petitioners in the overall balancing test.

Factors 2 and 3

As previously noted, the Petitioners have alleged no property, financial, or other interests which may be adversely affected by this proceeding. To the extent that the Petitioners' interests may have been adversely affected by the issuance of the construction permit, there is no indication that the

Commission intended such interests, which are irrelevant to this proceeding, to be considered when granting discretionary intervention. Therefore, factors 2 and 3 do not weigh in favor of the Petitioners.

Factor 4

The Petitioners have means other than intervention in this proceeding to protect their interests. Almost all of the issues raised by the Petitioners concern safety and environmental issues. If any of these issues are valid, Petitioners can seek to raise them immediately in a 10 C.F.R. § 2.206 petition or later at the operating license proceeding. Therefore, this factor weighs against intervention.

Factor 5

Since the Petitioners have no interests which may be adversely affected by this proceeding, there is no necessity to inquire whether other parties can adequately represent the Petitioners' interests. Therefore, this factor does not benefit the Petitioners.

However, even if it is assumed that the Petitioners do have an interest at stake, factor 5 will not weigh in favor of granting discretionary intervention. Although the assumed interest would not be represented in the absence of a hearing, the fact that no hearing would be held if discretionary intervention is not granted weighs against the Petitioners. Whenever a petitioner seeks discretionary

intervention in a proceeding in which no hearing would be held but for the grant of discretionary intervention, the petitioner must establish "that some discernible public interest will be served by the hearing," and that the petitioner is prepared to make a "substantial contribution" on a "significant safety or environmental issue appropriate for consideration." (Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977) (emphasis added).) These Petitioners have not satisfied this burden. Therefore, in the overall balance, the absence of a hearing in this case weighs against the grant of discretionary intervention.

Factor 6

Factor 6 weighs strongly against granting discretionary intervention in this case. Although it is not necessary to resolve at this point the proper scope of issues cognizable at a hearing on an extension of a construction permit, NIPSCO notes that many of the issues sought to be raised by the Petitioners clearly fall outside the jurisdiction of this Board.*/ These Petitioners are obviously attempting to expand impermissibly the scope of this proceeding. Thus, without doubt, the participation of these Petitioners in the manner they propose will unduly delay this proceeding. This type of delay cer-

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*/ See discussion in Section III, infra.

tainly weighs heavily against admitting these Petitioners as parties.*/

Balancing

Since the Petitioners have not identified any interest which may be affected by this proceeding and have not established their ability to contribute to this proceeding, there are no factors weighing in favor of granting discretionary intervention. Consequently, given the fact that the Petitioners have other methods of raising issues of concern to them, and given the likelihood that their intervention would inappropriately broaden and delay this proceeding, they should not receive discretionary intervention.

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*/ In fact, a major reason that NIPSCO is seeking an extension of its construction permit is the delay caused by some of the present Petitioners. They obtained a stay of construction by unreported Order of the Seventh Circuit on October 16, 1974. The Order was made permanent by the decision in Porter County Chapter v. AEC, 515 F.2d 513 (7th Cir. 1975), rev'd sub nom. Northern Indiana Public Service Co. v. Porter County Chapter, 423 U.S. 12 (1975), petition for review denied, 533 F.2d 1011 (7th Cir. 1976).

III. Issues to be Considered in any Extension Prcceeding

A. Introduction

As stated in the Notice, this proceeding is being held pursuant to Section 185 of the Atomic Energy Act and implementing regulation 10 C.F.R. § 50.55(b) in order to determine whether there is, according to the language of these provisions, "good cause" for extending the Bailly construction permit. In an application dated February 7, 1979, and amended on August 31, 1979, NIPSCO identified and discussed the reasons why the Bailly plant would not and could not be completed by the original construction permit completion date of September 1, 1979. Among these reasons are the following. The Bailly construction permit was issued four months later than the date utilized to originally determine the latest construction completion date. There have been numerous and lengthy periods during which construction could not proceed pending resolution of various issues before the Commission and in the Federal courts. Additional time was required to remobilize contractors when construction resumed. Additional time was required for construction of a slurry wall which was not included in the original plans. For various reasons, greater time is now required to build nuclear power plants than appeared necessary at the time the Bailly construction schedule was developed.

Under NRC regulations, petitioners are not required to

identify the contentions which they wish to litigate in any hearing until 15 days prior to the holding of the prehearing conference. (10 C.F.R. § 2.714(b).) However, the petition filed by Local 1010 includes a section labelled "contentions" and other petitions give strong indications of the general subject areas, if not specific issues, which the Petitioners wish to litigate. These statements must be supplemented in advance of the prehearing conference and we shall respond to them in a timely fashion. (See NIPSCO's Motion for establishment of schedule filed separately.) None of the Petitioners have yet addressed the reasons identified by NIPSCO for failure to complete the facility. However, clearly their view of the scope of any proceeding to consider a construction permit extension differs substantially from our view. This section will, therefore, first address several potential issues raised by the petitioners which, although not yet properly refined contentions, appear to be within the proper scope of this proceeding. We then proceed to discuss those issues raised by the Petitioners which are clearly beyond the scope of the proceeding and over which this Board does not have jurisdiction.

B. Grounds Asserted by NIPSCO

Porter County Chapter Petitioners and Illinois contend that "the grounds asserted by NIPSCO" for the extension do not constitute "good cause." They go on to allege

that the reasons asserted "are not the reasons why NIPSCO failed to complete construction" and "are not among those which the Commission recognizes as bases for extending the completion dates." (Petition, paragraph 10.) Although the statement is lacking in the specificity and detail needed to enable the reader to be certain what is intended to be put in issue, this appears to be a potentially valid contention and we await refinement of the statement. Meanwhile, we confirm that the reasons asserted in the NIPSCO applications are in fact the reasons for non-completion of construction and that these and similar reasons have been previously found by NRC to constitute reason for extension. (Louisiana Power & Light Company (Waterford Steam Electric Station, Unit No. 3) (July 19, 1979) (delay in receipt of construction permit); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit 1) (July 8, 1976; Feb. 1, 1978; and July 11, 1979) (staff review of safety-related issue); Salem Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2) (July 1, 1975) (labor-related problems); Consolidated Edison Company (Indian Point Nuclear Generating Station, Unit No. 3) (Feb. 28, 1975) (unexpected work resulting from design changes.) See Hudson River Fisherman's Association v. F.P.C., 498 F.2d 827 (2nd Cir. 1974) (delay in construction of power plant caused by compliance with a court decision justifies an extension).)

C. Reasonable Period of Time

Porter County Chapter Petitioners and Illinois allege that the requested extension of the latest completion date from September 1, 1979, to December 1, 1987, is not "a reasonable period of time" within the meaning of 10 C.F.R. § 50.55(b) because it is in excess of eight years and is a period longer than permitted for construction pursuant to the original construction permit. (Porter County Chapter Petitioners' Petition, p. 8.) Petitioners do not state their views as to the meaning of "a reasonable period of time" as used in § 50.55(b), but merely submit that a time period in excess of eight years is not reasonable. No authority or reason is given as to why a period in excess of eight years should be considered unreasonable or why an extension of construction time in excess of the originally-estimated construction time should not be permitted.

We assume that Petitioners' purpose is to provide the Board with advance notification of their intent to file contentions covering these allegations. NIPSCO will more fully respond to such contentions, including any basis provided therefor by Petitioners, at the appropriate time. However, we cannot let Petitioners' current allegations go unchallenged and will therefore comment briefly.

Section 50.55(b) of 10 C.F.R. provides in part:

> . . . That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date. [Emphasis added.]

A fair reading of the above regulation indicates the Commission's intent to provide a reasonable period of time beyond the originally stated completion date to complete construction where completion of construction was interrupted or delayed by valid reasons, including factors beyond the control of the permit holder.

There is nothing in the Atomic Energy Act or the regulations which would arbitrarily limit the period of time for which an extension could be granted. In each case it is obvious that the determination must be made on the basis of the specific factual situations. This is borne out by each of the NRC precedents that we have reviewed, which demonstrate a consistent practice by the Commission of determining the reasonable amount of time required to complete the remaining work, including, in some instances,*/

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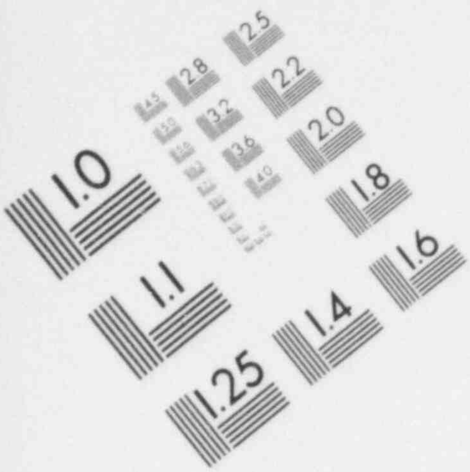
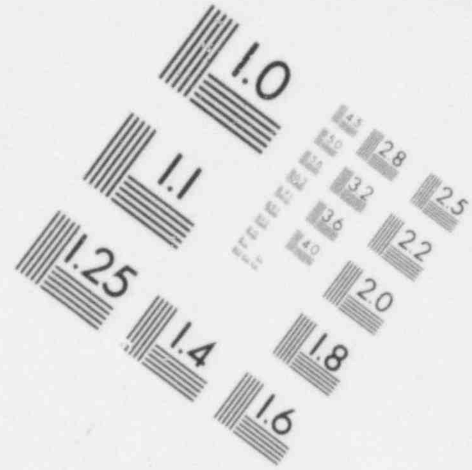
*/ See, e.g., Consumers Power Company (Midland Plant, Units 1 and 2), Docket Numbers 50-329 and 50-330, Order Extending Construction Completion Dates (November 17, 1978). The Staff evaluation accompanying the order extending the latest completion dates
(footnote continued on next page)





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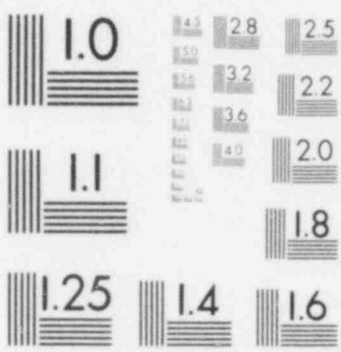

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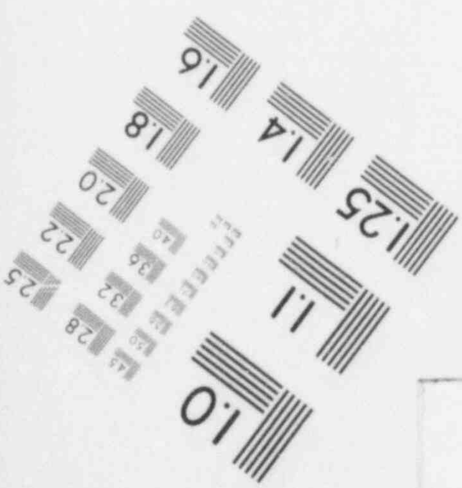

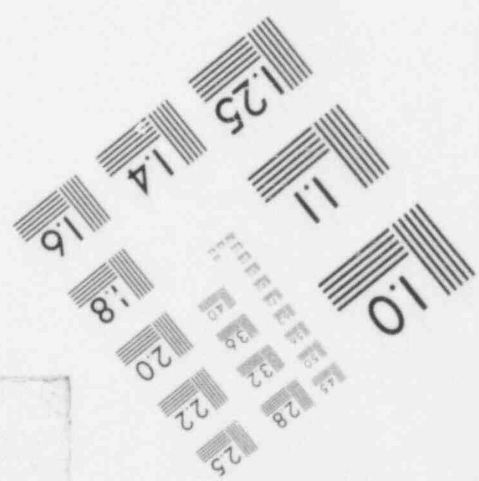

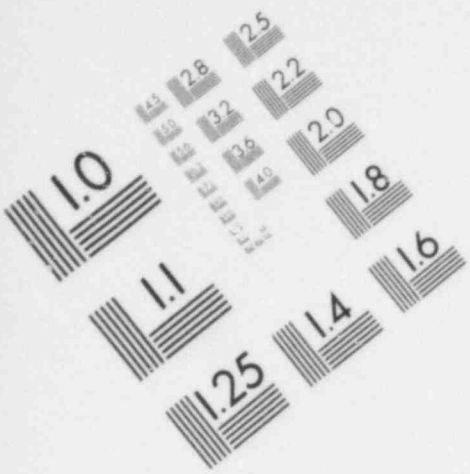

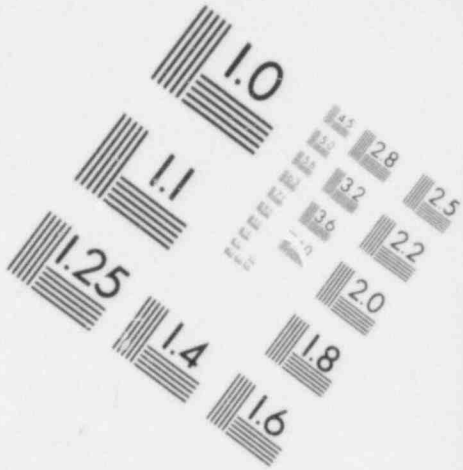

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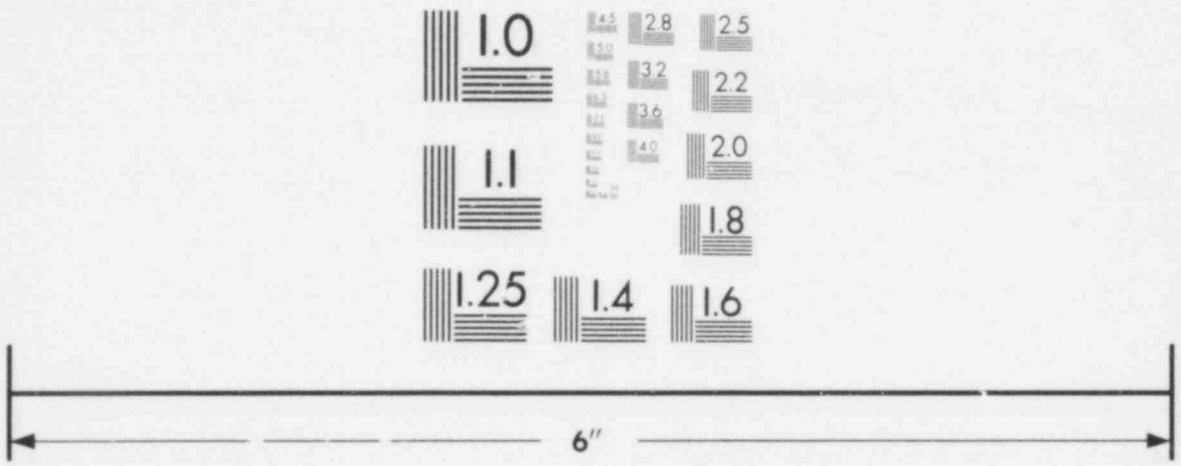

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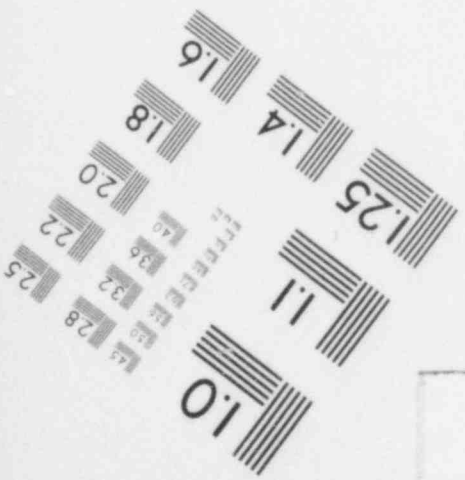

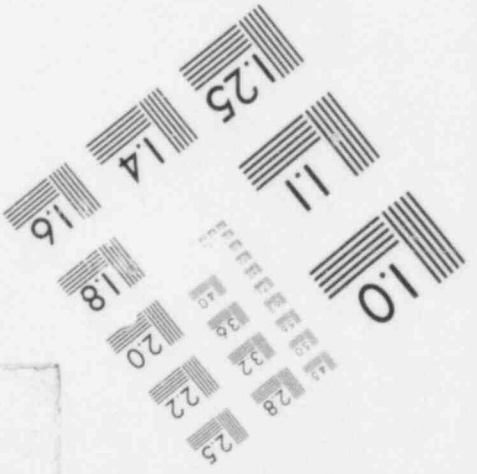

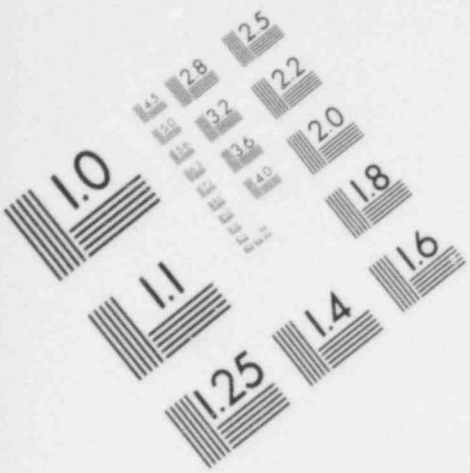

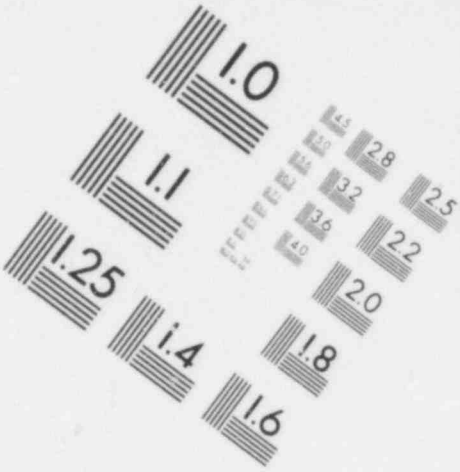

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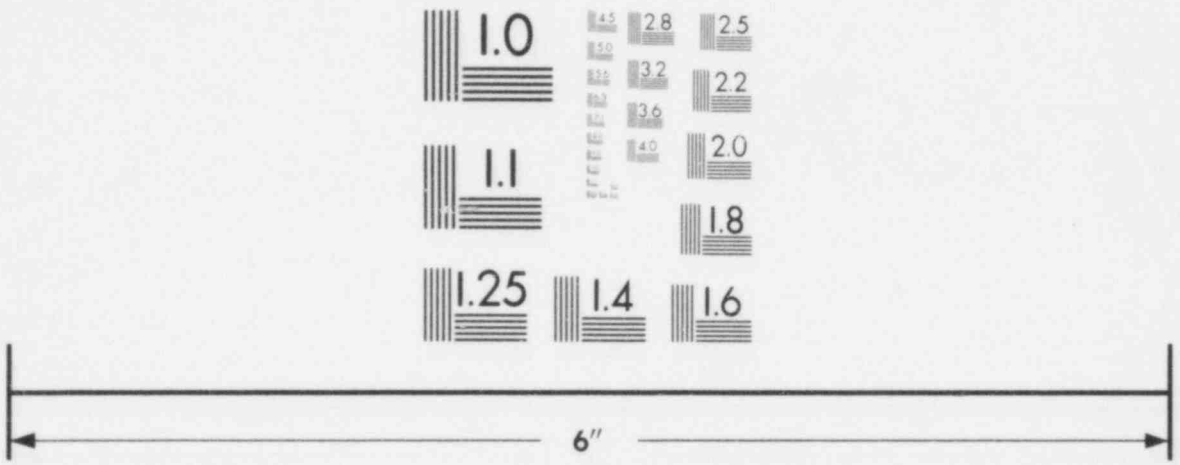

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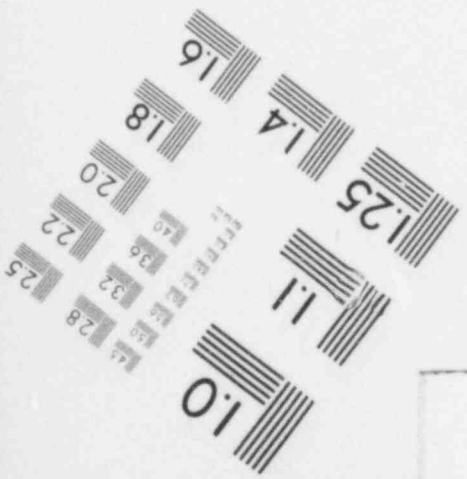

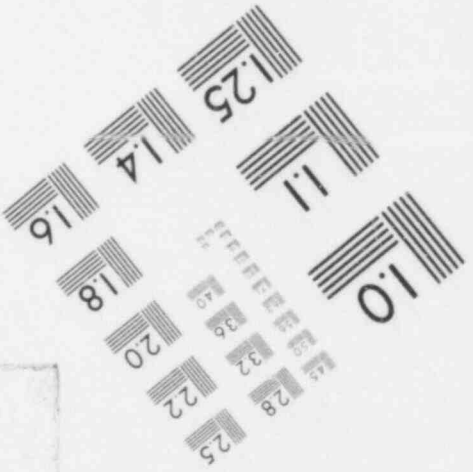

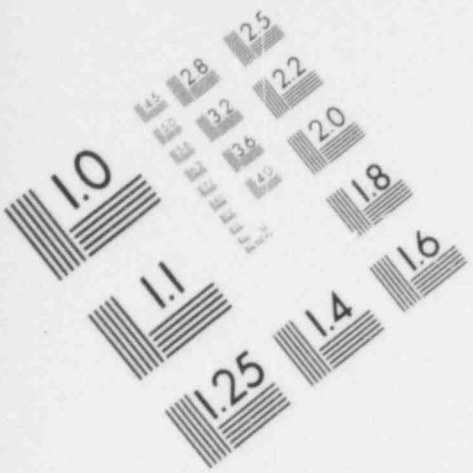

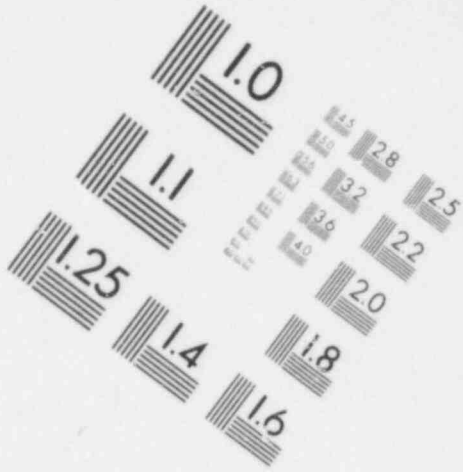

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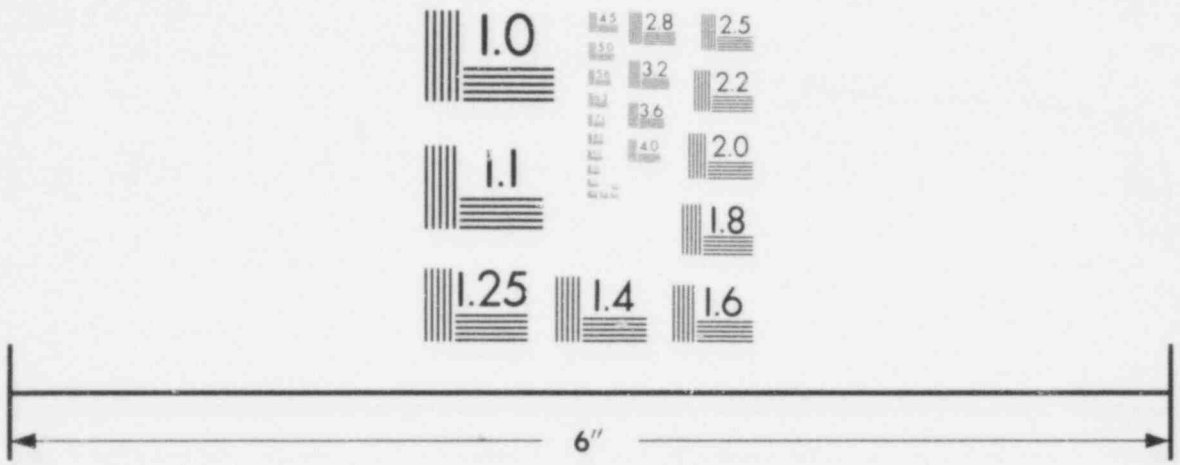

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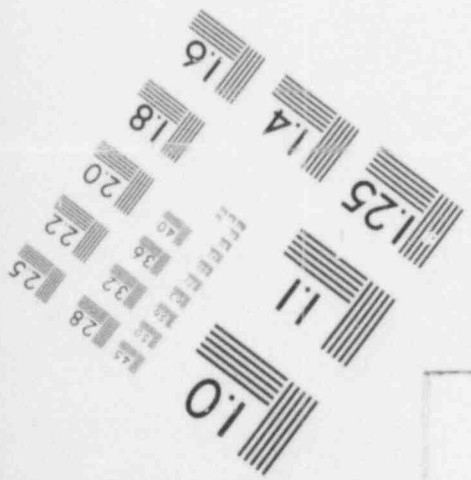

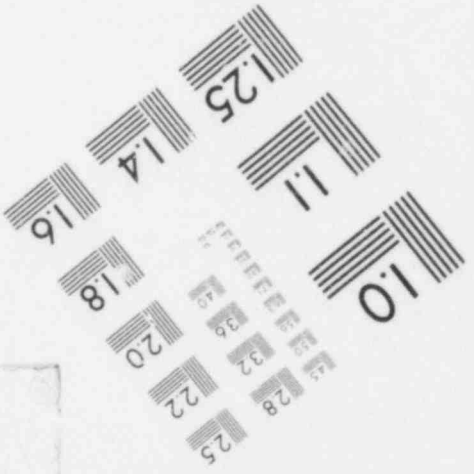

a reasonable allowance for additional delays which might result from similar factors. The periods of extensions granted have run from a few months to more than five years.*/

In applying the consistent NRC interpretation of "reasonable period of time" to the circumstances surrounding construction of Bailly, it is clear that the requested

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(footnote continued)
for Units 1 and 2 for a period of 46 months and 22 months, respectively, reads in part as follows:

"Based upon the estimate of the time required to perform the remaining work by the Office of Inspection and Enforcement and by the Caseload Forecast Panel, we believe the permittee's earliest estimate of the time to complete construction of the remaining work is not unreasonable, though slightly optimistic based on the past history of labor productivity. However, we concur that the construction permit extension request reflects a reasonable estimate of the time required to complete the remaining work, plus a reasonable allowance for additional delays which might result from the same or similar delaying factors cited above. However, in the event of unusual difficulties in correcting the settlement of certain structures recently discovered to be occurring at the site, this estimate may have to be revised."

*/ Pacific Gas & Electric (Diablo Canyon, Units 1 and 2), Docket Numbers 50-245 and 50-323, Orders Extending Construction Completion Dates issued July 1974, March 1976, February 1978, December 1978, June 1979 and September 1979, which granted extensions of construction completion dates for Units 1 and 2 totalling 5 years, 6 months and 5 years, 2 months, respectively. Virginia Electric Power Co. (North Anna Units 3 and 4), Docket Numbers 50-404 and 50-405, Order Extending Construction Completion Dates issued May 1979, extending the latest completion dates for Units 3 and 4 from December 31, 1978, and December 31, 1979, to December 31, 1983, and December 31, 1984, respectively.

period of time is reasonable. For reasons discussed in NIPSCO's application for extension, although NIPSCO has possessed a construction permit since 1974, it has been able to accomplish only a small amount of construction to date. The appropriate length of time by which the construction completion date should be extended in this proceeding is that period of time reasonably required to complete construction, plus a reasonable period of time to allow for unforeseeable contingencies.

As demonstrated in NIPSCO's amendment to its Request for an Amendment to CPPR-104, dated August 31, 1979, the time required to complete the remaining work is approximately 74 months from commencement of concrete placement.*/ The amendment further stated that an additional period of 9 months after commencement of construction is required to reach the point of concrete placement and that 15 months should be allowed to provide for uncertainties, including those associated with the timing of resumption of pile placement.

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*/ This time period compares favorably with the document entitled "NRC Caseload, Planning projections for fiscal years 1981-85" (March 1979), which contains the updated results of a model developed by the NRC Staff to depict the average time required to construct nuclear power plants. That document shows that the median construction schedule for nuclear reactors is about 77 months from the commencement of placement of concrete to loading of nuclear fuel.

Based on these factors and assuming NRC concurrence in resumption of pile placement would be received by October 1, 1979, NIPSCO concluded that a reasonable latest date for completion of construction was December 1, 1987.*/ The amended latest completion date would allow a "reasonable period of time" under the circumstances to complete the remaining work and provide for unforeseen contingencies.

D. Environmental Impact Statement

Porter County Chapter Petitioners**/ argue that the granting of an extension would be a major federal action significantly affecting the quality of the human environment, requiring the preparation of an environmental impact statement. Petitioners allege as a basis for their position that the "application is a request to build 99% of a nuclear power plant." (Petition, p. 8.) The Petitioners' contention that an environmental impact statement must be prepared may be within the jurisdiction of the Board to consider -- to the extent that consideration is limited to the impacts associated with the extension itself. However, the suggestion that, before

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*/ Since NRC Staff concurrence in resumption of pile placement has not yet been received, a portion of the requested period of time to allow for contingencies has expired and, if such concurrence is not received soon, the requested latest date for completion of construction may have to be reevaluated.

**/ Illinois, the Federation, and Local 1010 express the same or similar views.

the extension is authorized, the environmental impacts of construction and operation of the facility must again be considered is incorrect.

The Petitioners' argument is essentially that this Board must re-examine the environmental impacts associated with construction and operation of the plant. This contention has been repeatedly rejected by the Appeal Board in analagous situations. For example, in the proceeding to amend an operating license to permit expansion of a facility's spent fuel pool, the Appeal Board held:

> 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 [Intervenor] appears to believe that what is being licensed is in reality plant operation. Therefore, according to [the Intervenor], the license amendment could not issue without 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).

(Northern States Power Co. (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-455, 7 NRC 41, n.4 (1978), remanded on other grounds, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).)*/

The most that the NRC is required to do is consider whether the grant of the extension has significant environmental impact. Presumably the Staff will conduct its normal

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*/ Other cases have clearly held that an amendment proceeding may only consider the incremental environmental impacts of the amendment itself. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 n.6 (1979) [generation of spent fuel during operation need not be considered as an environmental impact of an amendment to expand a spent fuel pool]; Portland General Electric Company (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744 (1978), aff'd ALAB-534, 9 NRC 287 (1979) [an EIS need not be issued in conjunction with an authorization of interim operation, since interim operation does not involve environmental impacts which differ from those considered in previous proceedings]; Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 415 (1975) ["The Board's role in the environmental sphere will be limited to assuring itself that the ultimate NEPA conclusions reached in the initial decision are not significantly affected by such new developments as the reduction in size of the overall facility and the sought extension of completion dates." In reviewing an application for an extension of a construction permit, the Board may not review environmental issues which were considered and decided in the initial decision]; Boston Edison Company (Pilgrim Nuclear Power Station, Unit 1), LBP-74-57, 8 AEC 176, 184 (1974), aff'd ALAB-231, 8 AEC 633 (1974) [only the adverse effects of future operation in excess of that of present operation need be considered].

environmental impact appraisal we believe, will conclude that a negative declaration is appropriate. In fact, because of the absence of environmental impacts associated with construction permit extensions, the Staff has consistently made negative declarations in extension cases.*/

*/ E.g., Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), 44 Fed. Reg. 76892 (1979); Virginia Electric and Power Company (North Anna Power Station, Unit No. 2), 44 Fed. Reg. 75245 (1979); Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), 44 Fed. Reg. 64132 (1979); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit No. 2), 44 Fed. Reg. 62632 (1979); Louisiana Power and Light Company (Waterford Steam Electric Station, Unit No. 3), 44 Fed. Reg. 43823 (1979); Virginia Electric and Power Company (North Anna Power Station, Units No. 3 and 4), 44 Fed. Reg. 29546 (May 21, 1979); Long Island Lighting Company (Shoreham Nuclear Power Station), 44 Fed. Reg. 29545 (May 21, 1979).

E. Significant Hazards Consideration

Both Porter County Chapter Petitioners and Illinois have stated that this proceeding should consider whether the NRC did in fact find that the extension involved no "significant hazards consideration" and, if it did, whether "the procedure by which it so found was a fair and legal procedure and whether the finding is a justifiable, correct, or supportable finding." (Petition for Leave to Intervene, p. 3.)

The question raised by these Petitioners is entirely academic and without relevance to this proceeding. A "significant hazards consideration" is material only to the question whether notice of opportunity for a hearing must be given in advance of issuance of an amendment to a construction permit or operating license. (Atomic Energy Act, § 189(a), 42 U.S.C. § 2239 (1976); and 10 C.F.R. § 50.91.) But in this case, the NRC has exercised its discretionary authority under 10 C.F.R. § 2.105(a)(4) to publish a Notice (44 Fed. Reg. 69061), even though it found that no significant hazards consideration exists. Publication of that Notice moots any need to investigate the decision regarding the significant hazards consideration. Even if a significant hazards consideration were involved, the only consequence would be publication of a notice which has already been done.

A similar issue was raised in Consumers Power Company (Big Rock Point Nuclear Plant), LBP-74-15, 7 AEC 297, 297-298 (1974). Although the AEC Staff had determined that an amendment involved no significant hazards consideration, an intervenor was afforded an opportunity for a hearing. The Board held that there was no need to consider whether the Staff's determination "was sufficient and proper, and validly made, under applicable statutory and regulatory provisions," since an opportunity for hearing had been offered and the interests of the intervenor were not prejudiced. The Board concluded:

> Thus, the intent of the Commission and the Congress is being served, and it is not necessary for the present purposes to reach the issue of the validity of the standard applied by the Staff.

(7 AEC at 298.)

Additionally, the Commission, through its Staff, has the responsibility for determining whether an application for an amendment involves a significant hazards consideration. (See 10 C.F.R. § 50.91.) The Licensing Board has not been delegated any authority, either in the Commission's Rules of Practice or in the Notice of Opportunity for Hearing, to make its own determination of whether the amendment involves a significant hazards consideration. Therefore, the Board has no jurisdiction to review the conduct of the Staff in regard to this matter. (See discussion in Section III. F., infra.)

F. Matters Beyond the Scope of This Proceeding

1. Radiological Health and Safety Matters

Porter County Chapter Petitioners request a hearing of sweeping scope.*/ They acknowledge that, under Section 185 of the Atomic Energy Act (42 U.S.C. § 2235 (1976)), the central issue is whether NIPSCO has shown "good cause" for the requested extension of the Bailly construction permit. (Petition, p. 6.) However, the Petitioners characterize the request as one for authorization to construct 99% of the Bailly facility. (Petition, p. 5.) They allege that, in order to resolve the "good cause" issue, any proceeding must address an extensive list of "matters" related to radiological health and safety identified in their earlier pleadings and "events" listed in the Petition. (Petition, pp. 6-7.) These include:

> ° "The Three Mile Island accident . . . its consequences, and the studies of and about it . . . ." (Joint Supplement to Requests for Hearing, p. 4 (June 29, 1979).)

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*/ Illinois' petition is essentially identical; the Federation petition adopts that of Porter County Chapter Petitioners; Local 1010's petition raises many of the subjects in very similar language and labels them "contentions."

- "[T]he required shut-down in 1979 of 5 nuclear power plants because of potentially inadequate design to withstand earthquakes; the 1979 Interagency Review Group on Waste Management Report to the President that significant uncertainties remain in the ability to safely dispose of radioactive waste and spent fuel from nuclear plants; and the 1978 Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission (NUREG/CR-0400)." (Id. at 5.)
- "[Q]uestions . . . about the safety of the Mark II containment system. . . ." (Id. at 5.)
- "[S]hort pilings foundation for Class I safety structures at the Bailly plant. . . ." (Id. at 5.)
- "Nuclear Regulatory Guide 1-97 (sic). . . which governs post-accident monitoring. . . ." (Id. at 6.)
- "[N]umerous generic safety issues which have not yet been resolved." "The Reed Report." (Id. at 7.)

- "ATWS . . . a major cause of accidents in boiling water reactors . . . ." (Id. at 7.)
- "[W]orker exposure in attempting to mitigate the effects of the less-than-Class 9 accident." (Id. at 8.)
- "[S]ufficient size for the spent fuel pool without the artificial mechanism of dense storage." (Id. at 8.)
- "[A]dequacy of boiling water reactor designs with reference to pipe cracks, vessel cracks, sparger cracks, and control rod failure." (Id. at 9.)
- "The Report of the President's Commission on the Accident at Three Mile Island . . . ." (Petition for Leave to Intervene, p. 7)(December 20, 1979).)
- "The 'pause' in the licensing of nuclear plants announced by members of the Commission . . . ." (Id. at 7.)
- "The Commission's statement that consideration must be given to shutting down operating nuclear plants, including the Zion plant, because of their proximity to heavily populated areas." (Id. at 7.)

- "Developments in the standards for the siting of nuclear plants . . . ." (Id. at 7.)
- "The TMI-2 Lessons Learned Task Force Final Report (NUREG-0585) . . . ." (Id. at
- Preparation by the Staff of a "Safety Evaluation." (Id. at 8.)

Gary Petitioners separately assert that "good cause" for completion of the Bailly facility should not be found in the absence of a specific showing of adequate emergency response capability in the event of a nuclear accident. Their petition identifies recommendations and factors with respect to emergency planning and siting which allegedly should be considered during the course of a proceeding to extend the construction completion date for the Bailly facility. It is not clear whether the intent is to identify specific contentions or to give the Board advance notice that contentions covering these allegations will be filed. In either event, any contentions on these subjects are not admissible.

Porter County Chapter Petitioners essentially espouse an unlimited scope for the proceeding which would embody every issue that they wish to litigate concerning the safety or environmental effects of the construction or operation of Bailly. This position is a repetition of

their continuing fruitless attempts to reopen the prior Bailly proceeding or initiate a new one to examine or re-examine issue after issue.*/ However, their position not only conflicts with the Notice, precedent, regulation,**/ and statute, but is wholly inconsistent with the basic system adopted in the Atomic Energy Act and implemented in the NRC's regulations.

To begin with, the Board is without jurisdiction to entertain the general category of issues advanced by these Petitioners. A licensing board's jurisidction in a limited proceeding such as this is confined "ab initio to the issues identified in the notice of hearing which triggered the proceeding." (Virginia Electric & Power

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*/ Joint Intervenors' Verified Petition for a Stay of Construction Permit (4/11/74); Verified Motion to Extend Temporary Stay Pending Application to the Court of Appeals (4/30/74); Motion to Continue Stay Provided by ALAB Orders 200 & 201 (8/16/74); Emergency Motion for Stay (8/30/74); Request to Institute a Proceeding, and Motion to Suspend and Revoke Construction Permit No. CPPR-104 (11/24/76); Petition to the Commissioners to Suspend and Revoke Construction Permit No. CPPR-104, or, in the Alternative to Set Aside Decision of the Director, Office of Nuclear Reactor Regulation (5/5/77); Petition with Respect to Proposed Construction and Monitoring Changes (10/27/77); Petition with Respect to Short Pilings Proposal (11/1/78).

**/ Petitioners confirm the doubtful validity of their arguments under the applicable regulation and prior NRC precedent by simultaneously requesting that the regulation be waived or an exception granted or that a rulemaking be undertaken.

Company (North Anna Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 709 n.7 (1979); Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).) The Board can neither enlarge nor contract the jurisdiction conferred upon it by the Commission. (Public Service Company of Indiana, supra; Consumers Power Company (Midland Plant Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).) The reason for such a limitation is clear. Licensing Boards are delegates of the Commission empowered by this body to preside over such adjudicatory proceedings as the Commission deems necessary to help administer its responsibilities. (Id.; 42 U.S.C. § 2241 (1976).)

In developing their theories of the permissible scope of any proceeding to consider extension of the Bailly construction permit, Porter County Chapter and Gary Petitioners appear to have ignored the Notice to which they are responding.

The Notice states that a hearing may be sought

> . . . with respect to whether, pursuant to 10 CFR 50.55(b), good cause has been shown for extension of the completion date for Construction Permit No. CPPR-104 for a reasonable period of time; i.e., with respect to whether, pursuant

to 10 CFR 50.55(b),*/ the causes put forward by the Permittee are among those which the Commission will recognize as bases for extending the completion date.

44 Fed. Reg. 69061 (1979). Thus, the Notice restricts the scope of the hearing to whether there is good cause

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*/ The referenced regulation provides:

> If the proposed construction . . . of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of of the permit holder, as a basis for extending the completion date.

10 C.F.R. § 50.55(b).) The regulation implements Section 185 of the Atomic Energy Act which specifies:

> The construction permit shall state the earliest and latest dates for the completion of the construction . . . . Unless the construction . . . of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless good cause show, the Commission extends the completion date.

(42 U.S.C. § 2235 (1976).)

for an extension, not to whether there is good cause for construction. Consequently, the Petitioners' attempt to introduce issues which are totally irrelevant to an extension conflicts with the Notice and excedes the jurisdiction of the Board.

Some of the issues Petitioners now raise were issues in the hearing prior to the issuance of the construction permit.*/ Petitioners will also have an opportunity to raise some of these issues prior to issuance of an operating license for Bailly. (10 C.F.R. § 2.105.) But they do not have the opportunity to litigate any issues beyond the scope of this proceeding, simply because of the happenstance that an opportunity for hearing is provided. As the Appeal Board said when discussing whether design changes, which had contributed to a delay in construction, should be considered in an extension proceeding:

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*/ None of the Gary Petitioners was a party to the Bailly construction permit hearing; therefore those Petitioners are perhaps unaware that many of their alleged concerns were addressed in the Bailly PSAR and during the course of the evidentiary hearings prior to issuance of the construction permit. For example, preliminary evacuation plans for Bethlehem Steel employees, including the residual work force, and Indiana Dunes National Lakeshore visitors were specifically discussed and evaluated in the PSAR and during the course of the hearings. (See PSAR § 13.10, Amendment 16; Transcript of hearing, pp. 625-724 (Oct. 12, 1972); Initial Decision, 7 AEC 557 at 568-569.)

> Thus, had the design changes effected by the applicants in the present case, taken in conjunction with other factors, not delayed the completion of construction beyond the latest completion date specified in the permits, there would be no question that (absent a show cause proceeding) any safety issues associated with those changes would have been considered by the Licensing Board in the operating license proceeding -- and not before. It is hard to fathom why a different result should obtain simply because of the fortuitous circumstance that a combination of events--only one of which involved design changes--did require applicants to seek an extension for completion.

(Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414, 421 (1973).*/)

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*/ The scope of NRC proceedings to consider license amendments is generally limited. (Portland General Electric Company (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 70 n.9 (1979) (in a proceeding to determine whether interim operation should be authorized pending completion of seismic studies, ECCS calculational errors and undue occupational exposures are beyond the scope of the proceeding); The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, aff'd, ALAB-470, 7 NRC 473 (1978) (proceeding involving amendment to permit changed ownership; matter such as violations of construction permit and environmental concerns beyond the permissible scope); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46-47 n.4 (1978), remanded on other grounds, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979) (an amendment proceeding need only consider the environmental impact of the amendment itself; environmental issues reviewed in previous proceedings need not be re-examined); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 411 (1975) (scope limited to proposed amendments and matters raised directly by them; unresolved generic safety issues excluded); Boston Edison Company (Pilgrim Nuclear Power Station, Unit 1), LBP-74-57, 8 AEC 176, 184, aff'd, ALAB-231, 8 AEC 633 (1974) (only the adverse environmental effects of operation in excess of that presently authorized need be considered).)

Petitioners cannot successfully argue that to permit completion of construction without examining or re-examining all of the issues which allegedly have developed or changed since the Bailly construction permit was issued, will somehow threaten the public health and safety. That argument was laid to rest by the Commission recently--in the specific context of the one of the issues which these Petitioners apparently now insist must be litigated in connection with the Bailly construction permit extension In refusing to order institution of a proceeding to examine "shorter" piles for the Bailly facility--either as a matter of right or in the exercise of its discretion--the Commission noted:

> It will undoubtedly be objected that a serious error in the design of the pilings could, as a practical matter, be uncorrectable if detected only after the plant is completed. This may well be so. However, it is a fundamental precept of the Atomic Energy Act, emphasized by the Supreme Court in Power Reactor Development Corp. v. AEC, 367 U.S. 396 (1961), that possession of a construction permit is not a guarantee that the licensee will receive an operating license. If the utility's pilings proposal -- or any other aspect of the facility -- fails to pass muster at the operating review stage, the plant will simply not be allowed to operate. This risk is borne by the licensee.

Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), Memorandum and Order of the Commission, Slip op. at 17 (December 12, 1979).) The Commission quoted with favor the U.S. Court of Appeals for the

District of Columbia in yet another case involving the Bailly facility and many of the present Petitioners.

> It is not the public, but the utility, that must bear the risk that safety questions it projects will be resolved in good time, may eventually prove intractable and lead to the denial of the operating license.

(Porter County Chapter v. NRC, 606 F.2d 1363, 1370 (D.C. Cir. 1979).)

In summary, Petitioners have made no attempt to relate the issues which they suggest to the causes for the permit extension nor, we believe, can they. The radiological health and safety issues which they seek to raise have no place in an extension proceeding.

2. "Sufficient and Timely" Issues

The construction permit for Bailly states that the latest date for completion of construction is September 1, 1979. On February 7, 1979, well in advance of 30 days prior to the expiration date, NIPSCO filed a letter application with the NRC to amend the construction permit by extending the expiration date to September 1, 1985. On August 31, 1979, NIPSCO filed a letter amendment to the February application to further extend the expiration date of the construction permit to December 1, 1987.

The Administrative Procedure Act provides that "When the licensee has made timely and sufficient application for a renewal . . . in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." (5 U.S.C. § 558(c) (1976).) Correspondingly, under 10 C.F.R. § 2.109, the NRC has provided that, if an application for an extension of the completion date is filed at least thirty days before the construction permit expires, the permit will remain in effect pending a determination of whether "good cause" exists for extending the completion date.

On November 26, 1979, the Staff issued a notice on behalf of the Commission under 10 C.F.R. § 2.105 entitled,

Notice of Opportunity for Hearing on Construction Permit, which stated:

> The Permittee filed the application for extension of the completion date more than thirty (30) days prior to the date for expiration of the permit. Pursuant to the Administrative Procedure Act and 10 C.F.R. § 2.109 of the Commission's regulations, the construction permit will not be deemed to have expired until the application has been finally determined.

The determination has, therefore, been made that NIPSCO's application was "timely and sufficient . . . in accordance with [the NRC's] rules." (5 U.S.C. § 558(c) (1976).)

Pursuant to the Notice of Opportunity, several persons have requested a hearing on the proposed extension of the construction permit. Illinois and the Porter County Chapter Petitioners have claimed in their respective petitions */ that:

> [t]here appears to be doubt that the application was filed more than 30 days prior to the construction permit expiration date of September 1, 1979 . . . . Moreover, from the face of the application there is substantial doubt whether it is timely and sufficient within the meaning of the Administrative Procedure Act. (5 U.S.C. §558 (c).) Accordingly, this proceeding should consider the correctness of the factual and legal conclusions contained in the . . . Notice of Opportunity.

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*/ The Federation adopted these petitions.

Although these Petitioners' intentions are not explicitly stated, they apparently believe that the Board is authorized to review the correctness of the conclusions contained in the Notice of Opportunity, in addition to resolving the question of whether good cause exists for extending the construction permit. This Licensing Board has no such authority.

As we have pointed out, the jurisdiction of the Board is confined in the first instance to the issues identified in the Notice which triggered the proceeding. Here the Notice permitted interested persons to request a hearing solely as to whether

> . . . good cause has been shown for extension of the completion date for Construction Permit No. CPPR-104 for a reasonable period of time; i.e., with respect to whether, pursuant to 10 CFR 50.55(b), the causes put forward by the Permittee are among those which the Commission will recognize as bases for extending the completion date.

A review of the correctness of the determination that NIPSCO's application satisfied the requirement of § 2.109 and the Administrative Procedure Act in tolling the expiration date of the construction permit would be wholly outside of the scope of the proceeding which could be requested under the Notice. This Board may not so expand the scope of the proceeding to encompass matters not specified in the Notice.

The review of the application and the determination of whether it tolls the expiration date are matters entrusted by the Commission to the NRC Staff, which, as evidenced by the conclusions stated in the Notice, has made such determinations on behalf of the Commission. If the application had not tolled the expiration date, it would have been the NRC Staff's responsibility, on behalf of the Commission, to take appropriate enforcement action following expiration of the construction permit.

This distinct separation of function between licensing boards and the Staff has been recognized in earlier cases and in various contexts. (See, e.g., Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 709 (1979); New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-81 (1978); Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 and 2), (LBP-78-19, 1 NRC 436 (1975).) In the New England Power Co. case, the licensing board, convened to rule on an application for a construction permit, found that it did not have jurisdiction to supervise or otherwise interfere with the Staff's independent function in processing and determining the adequacy of an initial application for a construction permit.

Apart from any possible issue concerning the jurisdiction of this Licensing Board, Petitioners' requested procedure for determining whether there has been a "timely and sufficient" application for a renewal under A.P.A. Section 558(c) would render the provision a virtual nullity. The purpose of this provision is to protect the holder of those rights which a license conveys during the period when an agency is considering the substantive issue of whether the license should be renewed; in this case, whether there is good cause for granting an extension. The provision represents a determination of Congress that an applicant who has timely filed for a renewal should not be penalized by an agency's failure to act before the license lapses. (Attorney General's Manual, pp. 91-92; Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Railroad Co., 353 U.S. 436, 443-444 (1957) (Burton, J. dissenting).) The clear intent of the provision, therefore, is that an agency will make a rapid determination of whether the application for a renewal is "timely and sufficient" before commencing the more lengthy adjudicatory or other procedures utilized to determine whether the license should be renewed. Petitioners' assertion that the construction permit should be suspended pending adjudication turns the clear intention of the procedure on its head.

The "timely and sufficient" issues are beyond the scope of this proceeding.

IV. Stay of Construction

In conjunction with their request that this Board hear a spectrum of issues ranging far beyond whether there is good cause for extending the Bailly construction permit, several of the Petitioners appear to be asking the Board to stay construction pending completion of any extension proceeding. */ Even if the Board were authorized to issue a stay of construction, **/ no justification has been offered in support of such a request. To grant the request would be a drastic action, involving suspension of a construction permit issued by the Commission in 1974 after full adjudicatory proceedings and affirmed on judicial appeal. In addition, we note that the Director of Nuclear Reactor Regulation has already refused to institute a Section 2.206 proceeding sought by some of the present Petitioners for many of the same reasons recited in these petitions to intervene. Ordin-

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*/ Porter County Chapter Petition and Illinois Petition, Paragraph 13; City of Gary Petition, Paragraph 11.

**/ Petitioner's request assumes, of course, that regardless of Section 558(c) of the Administrative Procedure Act (5 U.S.C. §558(c)) and other limitations on the scope of the Board's jurisdiction, this Board has authority to issue such a stay. See discussion in Section III.F., supra.

arily, determinations of the Director under this provision are not subject to review by this or any other Licensing Board; intra-agency relief in this case would have had to come from the Commissioners themselves. (Detroit Edison Company, (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-466, 7 NRC 457 (1978).) In any event, the Director's determination was affirmed by the Commission and, like the issuance of the construction permit, affirmed by a United States Court of Appeals. Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

Petitioners have not offered any justification for issuing a stay in these circumstances. In determining whether a stay should be granted, the Commission customarily utilizes the test set down in Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), and codified in 10 C.F.R. § 2.788. The four factors making up this very stringent test have not even been addressed. */

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*/ The four factors are: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of the stay would harm other parties and; (4) where the public interest lies.

Accordingly, for all these reasons, no stay of construction can be granted by this Board.

Respectfully submitted,

William H. Eichhorn, Esquire
EICHHORN, EICHHORN & LINK
5243 Hohman Avenue
Hammond, Indiana 46320

Maurice Axelrad, Esquire
Kathleen H. Shea, Esquire
LOWENSTEIN, NEWMAN, REIS,
AXELRAD & TOLL
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

BY: William H. Eichhorn
WILLIAM H. EICHHORN

BY: Kathleen H. Shea
KATHLEEN H. SHEA