

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

LICENSEE'S ANSWER TO
PETITIONS FOR WAIVER OF OR EXCEPTION TO
10 C.F.R. § 50.55(b)

Porter County Chapter Petitioners filed a "Petition for Waiver of or Exception to 10 C.F.R. §50.55(b)." They have been joined by the Gary Petitioners (Petition for Leave to Intervene and Request for Hearing, pp. 6-7 (December 31, 1979)) and the Federation (Petition for Leave to Intervene and Adoption of Other Petitions, p. 1 (December 28, 1979)). An identical Petition was also filed by the State of Illinois. This Response will refer simply to the "Petition" and "Petitioners."

Petitioners request "waiver of or exception to 10 C.F.R. §50.55(b)" in this proceeding regarding issuance of an extension to the construction permit for Bailly Generating Station. That regulation states in its entirety:

(b) If the proposed construction or modification 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 extend the completion date for a reasonable period of

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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.

The Petition is filed pursuant to 10 C.F.R. § 2.758 which prohibits attack on NRC regulations in individual licensing proceedings except through use of the procedures set out in 2.758(b) and (c). Under those procedures, a "party" to an adjudicatory proceeding may request waiver of or exception to a specified NRC regulation for that particular proceeding.*/

The only ground for requesting a waiver is that

. . . special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested.

(10 C.F.R. § 2.758(b).)

*/ Since none of the Petitioners have been admitted as a party, the Petition is, of course, premature. In any event, there is no need for the Board to rule on the Petition unless and until one or more of the Petitioners is admitted as a party.

On the basis of the petition, affidavit, and any response thereto, the presiding officer is required to determine whether the petitioning party has made a "prima facie showing that the application of the . . . regulation . . . to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the . . . regulation was adopted" (10 C.F.R. § 2.758 (c).) If the presiding officer concludes that the prima facie showing has not been made, the matter is considered no further. If he determines that a prima facie showing has been made, he certifies the matter to the Commission^{*/} for a decision as to whether the regulation should in fact be waived or an exception made. (10 C.F.R. § 2.758(c) and (d).)

These provisions establish three criteria which the Petitioners must satisfy to obtain a waiver of Section 50.55(b):

- 1) Petitioners must state with particularity what "special circumstances" exist.
- 2) Petitioners must establish that application of Section 50.55(b) in the context of these special circumstances would not serve the purposes for which it was adopted.
- 3) Petitioners must make a prima facie case for the waiver of Section 50.55(b).

Since the Petitioners have not satisfied these requirements of 10 C.F.R. § 2.758, the Petition should be denied.

^{*/} Certification to the Commission is an explicit exception to the usual rule.

Special Circumstances

The Petitioners have failed to set forth "with particularity" the special circumstances which allegedly justify a waiver of Section 50.55(b) in this case. The Petition does not attempt to identify any special circumstances, but merely incorporates "the Petition to Intervene."^{*} Only paragraph 5 of that document appears to be relevant. It identifies three possible special circumstances. These are that construction of Bailly is approximately one percent complete, that the extension sought by the Licensee is for a longer period than that contained in the original construction permit, and that "significant developments" have occurred since the issuance of the construction permit. The Petitioners have not offered any explanation of why these factors constitute special circumstances, and therefore they have not satisfied their burden under Section 2.758.

With regard to the fact that the facility is far from complete, we note that, in substantial part, some of these Petitioners are responsible for that fact. Within six days after the date of the Licensing Board's Decision which authorized issuance of the Bailly construction permit, some of the present Petitioners (in their former role as "Joint

^{*}/ The "Petition to Intervene" may be taken as that of either the Illinois or Porter County Chapter Petitioners; they are essentially identical.

Intervenors") were seeking "a stay of the construction permit." They repeatedly requested stays of construction from the Appeal Board.*/ When their appeals within the Commission were exhausted, they (joined by Gary Illinois) requested and obtained from the U.S. Court of Appeals for the Seventh Circuit a stay of construction at the site pending their appeals of the Commission's decision--appeals which were ultimately determined to be entirely without merit.**/ Having pressed for and obtained stays which in effect prevented construction at the Bailly site for approximately two years, Petitions would be hard pressed to allege that the failure to complete construction is a "special circumstance" requiring NIPSCO to show, in effect, that there is good cause for issuance of a construction permit.

The length of the extension sought potentially would be at issue in any proceeding--in that, if challenged, the licensee must demonstrate that the period requested is "reasonable." We fail to understand how that length is

*/ 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), Verified Motion for Stay of Construction (5/21/74), Motion to Continue Stay Provided By ALAB Orders 200 and 201 (8/16/74), and Emergency Motion for Stay (8/30/74).

**/ Porter County Chapter v. AEC, 515 F.2d 513 (7th Cir. 1975), rev'd, 423 U.S. 12 (1975), petition for review denied on remand, 533 F.2d 1011 (7th Cir. 1976), cert. denied, 429 U.S. 945 (1976).

a "special circumstance" to which application of Section 50.55(b) would not serve the purposes for which it was adopted.

The "developments" since May 1, 1974 (when the construction permit was issued), which Petitioners cite as "special circumstances" are various; some are said to have been identified in "Prior Requests" filed by the Petitioners, some are identified in the Petition to Intervene, and "still others may be identified during discovery and prior to the commencement of hearings" (Petition to Intervene, p. 5.)

The fact that safety and other developments have arisen since the issuance of the construction permit certainly is not unusual. Given the long period needed to construct a nuclear plant, similar developments have occurred during the construction of most, if not all, plants. Thus, recent developments can hardly be classified as "unique and special circumstances" as the Petitioners have attempted to do.

In our view, none of the "developments" is relevant to the question whether "good cause" has been shown for extension of the Bailly construction permit. We note that some of them were previously litigated in the Bailly construction permit proceeding. For example, anticipated transients without scram (referred to in Joint Supplement to Requests for Hearing, pp. 7-8) was litigated and the Licensing Board concluded that:

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. . . adequate provisions will be incorporated in the design of the Bailly nuclear facility to assure adequate protection against the effects of common mode failures and anticipated transients without scram.

(Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), 7 AEC 557, 578 (1974), aff'd, ALAB-224, 8 AEC 244 (1974).) Need for power and potential impacts of the nuclear facility upon the Indiana Dunes National Lakeshore (referred to in Joint Supplement to Requests for Hearing, p. 10) were fully litigated before the Licensing Board. (7 AEC 557, 587-613, 615-20 (1974), aff'd, ALAB-224, 8 AEC 244, 258-64, 270-71 (1974).) The decisions reached by the agency were ultimately affirmed on appeal. (Porter County Chapter v. AEC, 515 F.2d 513 (7th Cir. 1975), rev'd, Northern Indiana Public Service Co. v. Porter County Chapter, 423 U.S. 12 (1975); petition for review denied on remand, Porter County Chapter v. AEC, 533 F.2d 1011 (7th Cir. 1976), cert. denied, 429 U.S. 945 (1976).)

Other "developments" now cited by Petitioners were previously alleged by some of the same Petitioners to require the Commission to institute a show cause proceeding and/or suspend construction of the Bailly facility. For example, "Mark II containment design questions" (referred to in Joint Supplement to Requests for Hearing, p. 5) fall into this category. They were raised by Petitioners in a "Request to Institute a Proceeding and Motion, to Suspend and Revoke

Construction Permit No. CPPR-104" filed November 24, 1976 (see pp. 30-31). The NRC Staff concluded that the action requested was not warranted. (Response to Request for Order, April 15, 1977.) That determination was affirmed by the Commission (CLI-78-7, 7 NRC 429 (1978)) and sustained on appeal. (Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).)

Another "development" on which Petitioners have previously sought a hearing is the proposed use of shorter piles in the foundation for Bailly (referred to in Joint Supplement, pp. 5-6). They requested a hearing, with a stay of construction pending that hearing and judicial review. (Petition with Respect to Short Pilings Proposal, filed by the State of Illinois, Porter County Chapter, Concerned Citizens Against Bailly Nuclear Site, Business and Professional People for the Public Interest, James E. Newman, Mildred Warner, George Hanks, City of Gary and Lake Michigan Federation on November 1, 1978.) The Commission recently denied that request, holding that the Petitioners were not entitled to a hearing on the piles question as a matter of right and that there was no reason to order a hearing as a matter of discretion:

[W]e believe that the operating license review is . . . the appropriate forum for a hearing on the licensee's piling proposal.

* * * *

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As we view the record before us, especially the views of the ACRS, we find nothing to suggest that there would be any benefit in injecting an interim public hearing at this time.

(Memorandum and Order of the Commission, slip op. at 16 (December 12, 1979).)

The Petitioners are attempting to use Section 2.758 to relitigate issues which have already been considered by the Commission and the courts. These issues are not relevant to whether NIPSCO has shown good cause for an extension, and they hardly constitute "special circumstances" which justify a waiver of Section 50.55(b). Section 2.758 was not intended as a means of reopening issues which have been reviewed in previous proceedings.

A number of the "developments" cited by the Petitioners are related to the accident at TMI-2--e.g., the report of the Kemeny Commission, the licensing "pause" announced by the NRC, Final Report of the Lessons Learned Task Force (NUREG-0585). (Petition for Leave to Intervene, p. 7.) Petitioners are certainly correct in observing that these "developments" have occurred since the Bailly construction permit was issued. However, they do not even suggest how these developments justify waiver of 10 C.F.R. § 50.55(b) in connection with the Bailly construction permit extension.

We submit that these "developments" do not justify waiver of Section 50.55(b). Reviews and analyses of the

TMI-2 accident have produced many reports, recommendations, and new initiatives, with more to follow in all probability. Some new requirements have already been imposed upon operating reactors as a result of the TMI Lessons Learned. The NRC Staff has prepared a draft Action Plan for implementing other recommendations, with suggested schedules for the implementation. The Plan is now being reviewed by the ACRS and the Commission. An orderly, systematic, generic approach has been adopted for evaluation of the TMI accident, development of new policies, and implementation of new requirements flowing therefrom. Section 2.758 was not intended as a means by which a licensing board could preempt or anticipate the Commission's consideration of generic issues.

Purposes of § 50.55(b)

The Petitioners must establish that the application of Section 50.55(b) in the context of the circumstances mentioned above would not serve the purposes for which it was enacted. However, the Petitioners' request for waiver of Section 50.55(b) is almost totally devoid of any discussion of the purposes of Section 50.55(b) and offers no explanation of why these purposes would not be served by application of the Section in this case.

Petitioners do not explicitly state what effect they desire to achieve through the requested waiver of or excep-

tion to 10 C.F.R. § 50.55(b). However, they state that the Petition will be moot and may be deemed withdrawn if their "position with respect to 'good cause' is sustained in the proceeding." (Petition, paragraph 3.) They also characterize that position as requiring "that a broad range of issues be considered in the proceeding in order to make a determination of whether NIPSCO has shown good cause for the construction of the Bailly plant." (Id., paragraph 2, emphasis added.) Thus, apparently Petitioners want 10 C.F.R. § 50.55(b) waived or excepted to in order that NIPSCO will be required to prove in this proceeding that there is good cause for the construction of the Bailly plant.

As support for their conclusion that Section 50.55(b) was intended to require a licensee to show good cause for construction of a plant, the Petitioners state only the obvious: that Section 50.55(b) was adopted to implement Section 185 of the Atomic Energy Act. The Petition does not specifically address the purpose of that statute. As discussed above, one can surmise that, in Petitioners' view, the purpose of Section 185 is to require the applicant for a construction permit extension to demonstrate again that the plant should be constructed. But, the unsupported assertion can scarcely be said to make a prima facie showing.

Petitioners' views as to the purposes of Section 185 are not only unsupported, but are contrary to the two-step

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licensing process established by the Atomic Energy Act. As the Appeal Board concluded in Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414, 420 (1973), under Section 185 and 10 C.F.R. § 50.55(b), the purpose of a proceeding on an extension of a construction permit is not to determine the safety or environmental aspects of the reactor. In the two-step licensing process established by the Atomic Energy Act, those questions are determined first at the construction permit stage. At the operating license stage, opportunity for a hearing is afforded to examine safety and environmental aspects of the completed plant, including developments which have arisen since the construction permit was issued.^{*/} Thus, the Atomic Energy Act establishes a two-step process, not a continuous hearing process, and Section 185 does not conflict with the statutory scheme. Under the Atomic Energy Act, the question in connection with an extension of a construction permit is the "good cause" for the extension, not whether construction should be authorized.

Finally, the Petitioners have also failed to discuss why the purposes of Section 185 would not be served if

^{*/} Between those two stages, members of the public who wish to raise timely questions about safety or environmental aspects can request institution of a show cause proceeding. (10 C.F.R. § 2.206.)

Section 50.55(b) is applied in the context of the alleged "special circumstances" of this case. The Petitioners have not shown why the circumstances of this case demand different treatment than the circumstances in other construction permit extensions, and they have not offered any reasoning for their conclusion that application of Section 50.55(b) would be contrary to the purposes for which Section 185 was enacted.

Prima Facie Case

Section 2.758(c) requires that the Petitioners make a prima facie showing that the application of Section 50.55(b) in this case would not serve the purpose for which it was adopted. The Petitioners have failed to satisfy this burden.

The Petition for Waiver consists of nothing except unsupported allegations. Consequently, it must be denied under Section 2.758(c).

Additional Comments

It is apparent from the Petition to Intervene and the Petition for Waiver that the Petitioners have developed an interpretation of Section 50.55(b) and seek its adoption by the NRC. The Petitioners are not asking that Section 50.55(b) be waived because of the alleged existence of special circumstances; they are only requesting that Section 50.55(b) be waived if the Board does not accept the Petitioners' interpretation of Section 50.55(b).

However, Section 2.758 was not designed as a mechanism by which a party, dissatisfied with a licensing board's interpretation of a regulation, could seek a more favorable interpretation from the Commission. A mere disagreement among the parties or between a party and the Board regarding the interpretation of a regulation is not an appropriate ground for certifying an issue to the Commission under Section 2.758. As Section 2.758(b) states, the "sole ground" for certification is that application of Section 50.55(b) to the "special circumstances" in this case would not serve the purposes for which Section 50.55(b) was adopted. Consequently, the Petitioners' attempted use of Section 2.758 as a method of obtaining a favorable interpretation of Section 50.55(b) is not consistent with the purpose and language of Section 2.758 and should be rejected.

Conclusion

The Petitioners have failed to establish a prima facie showing that application of Section 50.55(b) to the alleged "special circumstances" in this case would not serve the purpose for which Section 50.55(b) was promulgated. It appears that the Petitioners are employing Section 2.758 improperly to obtain an interpretation of Section 50.55(b) which is

favorable to them. Consequently, this petition should be denied.

Respectfully submitted,

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