

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

1/23/80

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO INTERVENTION PETITIONS  
AND RELATED FILINGS OF SEVERAL ORGANIZATIONAL  
AND GOVERNMENTAL ENTITIES\*

INTRODUCTION

On November 30, 1979, the Nuclear Regulatory Commission (NRC or Commission) published in the Federal Register (44 F.R. 69061) a "Notice of Opportunity for Hearing on Construction Permit Extension" (Notice). The Notice was published in connection with an application filed by the Northern Indiana Public Service Commission Company (NIPSCO or Applicant) to extend the latest date for completion of the construction of its Bailly Generating Station, Nuclear-1, from September 1, 1979 to December 1, 1987. The Notice provided an opportunity for any person whose interest might be affected by the proceeding to file a petition for leave to intervene pursuant to 10 C.F.R. §2.714 no later than December 31, 1979. Under the provisions of the Notice, such petition to intervene must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the proceeding, including the

\* These include: The Izaak Walton League, et al.; State of Illinois; Local 1010 of the United Steelworkers; the Lake Michigan Federation, et al.; and the City of Gary, Indiana, et al.

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reasons why petitioner should be permitted to intervene, and the specific aspect or aspects of the subject-matter of the proceeding as to which petitioner wishes to intervene. The Notice also specified that not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to 10 C.F.R. §2.751a or, where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner should file a supplement to the petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity.

The NRC Staff submits this response to five timely intervention petitions filed pursuant to the Notice by the following: the Izaak Walton League, et al., State of Illinois, Local 1010 of the United Steelworkers, the Lake Michigan Federation, and the City of Gary, Indiana, et al. For the reasons given below, the Staff believes that these several petitions fail to satisfy the pertinent "interest" and "aspects" requirements of 10 C.F.R. §2.714, and otherwise seek the introduction of issues outside the scope of this proceeding, and should be denied in their present form.

In the event their position on the scope of 10 C.F.R. §50.55(b) is not accepted, Petitioners Izaak Walton League, State of Illinois, Lake Michigan Federation, and the City of Gary, et al., joined in a petition for rulemaking concerning 10 C.F.R. §50.55(b) and alternative petition for waiver of or exception to

that regulation. Staff Counsel is advised that a notice of receipt of the petition for rulemaking and request for comments thereon will be published in the Federal Register in the near future. The petition for waiver is inadequate under the requirements of 10 C.F.R. § 2.758.

#### BACKGROUND

The unusually litigious history of the Bailly project is discussed in an earlier Staff response to several individual petitioners<sup>1/</sup> and need not be restated herein. It is sufficient to note, for present purposes, that the present petitioners participated to a greater or lesser extent in all of the construction permit and post-construction permit legal actions involving the Bailly facility. Petitioners Izaak Walton League, et al. were intervenors in the construction permit hearings before the NRC and on appeal in the federal courts. These petitioners were joined by the State of Illinois (as an interested state) as participants in the reopened hearings on the use of a "slurry wall" to keep the construction excavation dry. In November, 1976, all of the present petitioners (except Local 1010 of the Steelworkers and

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<sup>1/</sup> See "NRC Staff Response to Separate Petitions for Intervention Filed by George Schultz; Steven Laudig; and George and Anna Grabowski," dated January 16, 1980.

those named along with the City of Gary in its petition) initiated an unsuccessful attempt to suspend construction on the basis of certain developments which were alleged to have arisen since issuance of the construction permit.<sup>2/</sup> In November, 1978, all of the present petitioners (except those named along with the City of Gary in its petition) initiated an unsuccessful attempt to institute hearings in connection with the Applicant's foundation pile installation plans.<sup>3/</sup>

On February 7, 1979, the Applicant submitted an application for extension of time within which to complete construction of the Bailly facility. Among the reasons cited as "good cause" for the requested extension were the over two-year suspension of construction occasioned by the imposition of a stay of construction by the Court of Appeals for the Seventh Circuit,<sup>4/</sup> installation of the slurry wall, and the work stoppage since September, 1977 pending the outcome of the Staff's review of its pile installation plans.

#### INTEREST

As noted above, the provisions of 10 C.F.R. §2.714 require that a petition to intervene set forth with particularity the interest of the petitioners in the proceeding and how that interest may be affected thereby.<sup>5/</sup>

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2/ See Porter County Chapter of the Izaak Walton League, et al., 606 F.2d 1363 (D.C. Cir. 1979).

3/ See Bailly Memorandum and Order, CLI-79- , 10 NRC , (December 12, 1979).

4/ Porter County Chapter of Izaak Walton League of America, Inc., et al. v. NRC, 515 F.2d 513 (7th Cir. 1975); rev'd and remanded, 423 U.S. 12 (1975).

5/ BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

The general requirements respecting interest are set forth in the January 16, 1980 Staff response to separate intervention petitions filed in this matter. As particularly relevant to consideration of the present petitions, the Commission has held that to establish standing a petitioner must show (1) "injury in fact" and (2) an interest "arguably within the zone of interest" protected by the Atomic Energy Act or National Environmental Policy Act. Portland General Electric (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976). Since the present petitioners constitute either governmental or organizational entities, the Staff offers the following additional relevant observations.

A "public interest" or "special interest" group would not ordinarily possess independent standing to intervene in NRC licensing proceedings. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377 (1979) (National Lawyers Guild), Allied-General Nuclear Service, et al. (Barnwell Fuel Reprocessing and Storage Station), ALAB-328, 3 NRC 420 (1976) (ACLU). In this regard, the Supreme Court held that the Sierra Club could not derive standing to enjoin Federal agency approval of the commercial development of sections of a national game refuge adjacent to a national park upon its asserted "special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country." Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

The Court reasoned that:

a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved"

within the meaning of the [Administrative Procedure Act]. Id.; cited approvingly in Allens Creek, supra, 9 NRC at 391

There is, under the Atomic Energy Act and the Commission's regulations, no provision for private attorneys general. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 n. 6 (1976); Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-77-11, 5 NRC 481, 483 (1977).

A demonstrable environmental or health interest of an organization member affected by the outcome of a proceeding can serve to confer standing upon an organization. See, e.g., Public Service of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976). However, where an organization seeks to intervene on the basis of the asserted interests of its members, the organization must identify specific members whose interest might be affected by the proceeding, describe how such interests might be affected by the licensing action, and demonstrate that each of the members relied upon to confer standing has authorized the organization to act on his or her behalf. See Allens Creek, supra; Allied-General, supra; Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 487, 488-89 (1973). Absent express authorization, groups may not represent other than their own members, and individuals may not assert the interest of other persons. Tennessee Valley Authority (Watts Bar Nuclear Generating Station, Unit 1), ALAB-413, 5 NRC 1418 (1977); Shoreham, supra.

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ASPECTS OF THE PROCEEDING

In addition to the "interest" requirement of 10 C.F.R. §2.714, a petition must also set forth with particularity the specific aspect or aspects of the subject-matter of the proceeding as to which a petitioner wishes to intervene. The only relevant aspects of the proceeding are those which fall within the scope of the proceeding.<sup>6/</sup>

As regards the scope of this proceeding, 10 C.F.R. §50.55(b) provides that:

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 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.<sup>7/</sup>

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<sup>6/</sup> See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1) Licensing Board "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conferences" (September 21, 1979) (Restart), slip op. at 6.

<sup>7/</sup> The notice of opportunity for hearing published herein referenced this governing regulation. 44 F.R. 69061.

There is little additional guidance for ascertaining the proper subject matter (scope) of a given construction permit extension action to which a petitioner's specification of aspects must relate. Litigation of construction permit extension applications has been rare. Yet, the Appeal Board has had occasion to expound upon the parameters of the "good cause" criteria under 10 C.F.R. §50.55(b) in such a context. Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973). After noting the dearth of legislative history underlying the promulgation of Section 185 of the Atomic Energy Act,<sup>8/</sup> from which 10 C.F.R. §50.55(b) is derived, the Appeal Board concluded that it could not always rule out consideration of possible safety and environmental issues associated with the asserted reasons for the delay in completing construction. Specifically, the Appeal Board indicated that the question to be answered in ascertaining whether "good cause" exists, in its broadest terms, is "whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review<sup>9/</sup>-facility

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<sup>8/</sup> That section provides that every construction permit for a nuclear power plant must state "the earliest and latest dates for the completion of the construction" and that "[u]nless the construction ... of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date" (emphasis supplied). 42 U.S.C. §2235. These dates are express conditions of a construction permit and may not be extended except by amendment. Brooks v. AEC, 476 F.2d 924 (D.C. Cir. 1973).

<sup>9/</sup> Since the construction permits for the Cook facility were issued prior to January 1, 1970, an environmental review was conducted pursuant to Section C of then Appendix D to 10 C.F.R. Part 50.



operating license hearing. Put another way, we must decide whether the present consideration of any such issue or issues is necessary in order to protect the interest of intervenors or the public interest." Id. at 420.<sup>10/</sup>

In Cook, proposed plant design changes constituted one of the reasons assigned for the construction delays. The Appeal Board ruled that deferring consideration of operational safety problems associated with these design changes to the operating license hearing would not prejudice the intervenors. 6 AEC at 420. It recognized that design changes during the course of facility construction were common, if not "inevitable." Id. It explained, however, that, under the prescribed regulatory scheme, the safety implications of such design changes do not receive immediate licensing board scrutiny. Rather, it indicated that it was the responsibility of the Staff to monitor such matters and take corrective action, including, where necessary, the issuance of an order to show cause under applicable authority. Id.<sup>11/</sup> In this connection, the Appeal Board observed that:

[H]ad the design changes effected by the applicant in the present case, taken in conjunction with other fac-

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<sup>10/</sup> None of the safety issues raised by the several petitioners are associated with the reasons asserted in the construction permit extension as "good cause" for the requested extension. Even assuming such a nexus could be demonstrated, litigation of these issues can and should abide any eventual operating license hearings.

<sup>11/</sup> The Staff appreciates the view espoused by the Appeal Board that it cannot altogether ignore the prospect, in judging whether there is "good cause" for the extension, that one or more of the reasons assigned for the delay in completion "in and of themselves" could raise doubts about the ability of the Applicant to construct a safe facility. Id. at 420. The Staff does not believe that any of the reasons assigned for the delay herein signal such a situation nor do petitioners make such an allegation. As indicated in the application for extension, construction has been effectively suspended at the direction of the Staff since September, 1977 while the Applicant's pile installation proposal undergoes evaluation.

tors, not delayed the completion of construction beyond the latest completion date specified in 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. Id. at 421.

The Appeal Board expressed difficulty in rationalizing why a different result should be reached simply because of the "fortuitous circumstance" that certain events required the applicants to seek an extension of construction. Id.

Based on the circumstances of that case, the Appeal Board concluded that the scope of the "good cause" inquiry was properly limited to the reasons assigned by the Applicants for the need for an extension, leaving adjudicatory consideration of safety and environmental issues to the operating license hearing. Id. at 422.

The viability of the Commission's bifurcated licensing process (construction permit and operating license) has received recent Commission endorsement in connection with its consideration of petitions to initiate separate hearings respecting this same facility. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), Commission Memorandum and Order, CLI-79- , 10 NRC , (December 12, 1979). The petitions involved the Applicant's proposal to use shorter foundation pilings than originally contemplated at the time it received its construction permit in May, 1974.

Petitioners argued that the pile installation proposal constituted an amendment to the construction permit and involved a matter incapable of resolution after construction was completed. In denying the petitions, the Commission observed that the Atomic Energy Act favors the two-stage licensing process. The Commission noted that unresolved issues left outstanding at the construction permit stage or issues that arose subsequent thereto are resolved at the operating stage. Slip op. at 16. The Commission found nothing in the record to recommend the injection of an "interim" public hearing at this time. Id. The Commission observed that possession of a construction permit does not guarantee receipt of an operating license and that the risk that a plant will be denied a license, for any aspect of construction, is borne by the licensee. In this regard, the Commission cited approvingly from the opinion of the Court of Appeals for the District of Columbia in yet another case involving this facility and "most of the same principles."<sup>12/</sup> The Court stated therein: "It is not the public, but the utility, that must bear the risk that the safety questions its projects will be resolved in good time, may eventually prove intractable and lead to the denial of the operating license." Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1362, 1370 (D.C. Cir. 1979).<sup>13/</sup>

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<sup>12/</sup> Slip op. at 18.

<sup>13/</sup> This case arose on appeal from an April 20, 1978 decision of the Commission affirming the Director of Nuclear Reactor Regulation's denial of petitions, filed on November 26, 1976, seeking the suspension and revocation of the Bailly construction permit on the basis of developments (unrelated to the pile foundation) which were alleged to have arisen since issuance of the permit. See related Commission Memorandum and Order, CLI-78-7, 7 NRC 429 (1978). The alleged new developments included: escalation of construction and fuel costs, fuel availability, financial qualifications, need for power, legislation concerning the Indiana Dunes Lakeshore, and design concerns with the General Electric Mark II containment. 606 F.2d at 136.

The Commission stressed that its decision did not "in any sense whatsoever create a risk to the public health and safety," since unresolved safety questions must be considered in any hearing held on an operating license application and that reasonable assurance of safety must be affirmatively found as a precondition to the grant of an operating license. Slip op. at 18. The Commission observed that the NRC Staff had the foundation pile matter under review and that should it determine at any time, either on its own initiative or in response to a request pursuant to 10 C.F.R. §2.206, that substantial health and safety issues had been raised with respect to the activities authorized by the construction permit, it could initiate proceedings under 10 C.F.R. §2.202 or order the suspension of construction. Slip op. at 17. The Staff is mindful of this mandate and will not hesitate to exercise it if the situation warrants. No such situation is presented in this case.

The Staff now turns to consideration of the five petitions in question.

INTERVENTION PETITION OF IZAAK WALTON LEAGUE, ET AL.

Petitioners Izaak Walton League, et al. are comprised of several organizations and individuals. It is claimed that "the direct and immediate health, safety, financial, property, recreational and living interests of [the individual petitioners] will be substantially and significantly affected by the proceeding which may determine whether or not the Bailly plant will be constructed." Petition at 2. The Petition states that the organizational petitioners include among their purposes the protection of the Indiana Dunes National Lakeshore and Lake Michigan and that their corporate interests and those of their members will be directly affected by the proceeding. Id. The Staff believes that this is an inadequate specification of "interest" under the requirements of 10 C.F.R. §2.714.

Petitioners were intervenors in the construction permit hearings and parties to several subsequent legal actions involving Bailly. Therefore, the Staff will concede that they have an interest which could provide a basis to confer standing in this matter. It is not readily apparent, however, how their unspecific "health, safety, financial, property, recreational, and living" or environmental interest will be affected by the outcome of this limited proceeding which involves merely the prospect that previously authorized plant construction will occur over an extended period of time. This showing, the equivalent of an "injury in fact," is an essential ingredient of standing under 10 C.F.R. §2.714.<sup>14/</sup> Nor, in any case, are Petitioners'

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<sup>14/</sup> See Pebble Springs, supra, 4 NRC at 613.

interests set forth with adequate "particularity" to satisfy the further requirements of that regulation.

This licensing action is clearly distinguishable in kind from proceedings which confer a "substantive" grant of authority, such as construction permit, operating license, or even spent fuel pool expansion proceedings. The instant action involves a request to extend the time for the performance of previously approved activities. In proceedings of the former type, the Appeal Board has stated that close proximity, standing alone, is enough to establish the requisite interest. North Anna, supra, 9 NRC at 56. In reaching that conclusion, the Appeal Board observed that it was not in a position at the intervention stage to "rule out as a matter of certainty the existence of a reasonable possibility that expansion of the spent fuel pool capacity [at issue therein] might [as actually alleged] have an adverse impact upon persons living nearby." Id. It posited that whether the petitioners concerns proved justified or not was a matter to be left for evidentiary consideration. Id. The Staff cannot perceive of a "real possibility" that a grant of the requested extension, in and of itself, could have a "direct and immediate" effect upon petitioner's "health, safety [or] financial" interests. See petition at 2. Petitioners' alleged "property, recreational, living" and proffered organizational interests are too vague to speculate upon a possible impact thereon. See Petition at 2. These "interests" need particularization before this can be done.

Even if petitioners are not entitled to intervene as a matter of right, the Board could grant the petition for leave to intervene as a matter of discretion. In this consideration, it should be guided by the circumstances of the case and the factors set forth in 10 C.F.R. §2.714(d). Pebble Springs, supra, 4 NRC at 616. However, petitioners have not addressed these factors or the appropriateness in general of granting its intervention as a discretionary matter. Thus, the Board has no basis for exercising such discretion in this proceeding.

Petitioners do not explicitly identify the aspects of the proceeding as to which intervention is sought as further required by 10 C.F.R. §2.714.<sup>15/</sup> Petitioners do list a number of matters which they urge must be addressed in the proceeding. These matters are said to include those identified in paragraphs 1 through 11 in Petitioners' "Joint Supplement to Request for Hearing," dated June 29, 1979, prior to publication of the Notice herein. Petition at 6. Petitioners also identify other "recent significant events" whose impacts they assert must also be considered. Petition at 7.

Paragraphs 1 through 11 of the Joint Supplement (at pp. 4-10) raise the following concerns: (1) post-TMI studies; (2) recent developments such as the required shut-down in 1979 of five nuclear plants because of earthquake design, the 1979 Interagency Review Group on Nuclear Waste Management to the President, and the 1978 Risk Assessment Review Group Report to the NRC (NUREG/CR-0400);

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<sup>15/</sup> Petitioners do state that they wish to intervene as to "all aspects of the subject matter of the proceeding," hardly the "particular[ized]" showing required under 10 C.F.R. §2.714. Petition at 3.

(3) the Mark II containment design; (4) foundation pile installation; (5) post-accident monitoring; (6) unresolved generic safety issues; (7) ATWS; (8) occupational exposure; (9) spent fuel storage; (10) nuclear system material failure; and (11) the need to prepare an environmental impact statement.

Paragraph 11 has the following subparts: (a) consideration of paragraphs 1 through 10 above from an environmental standpoint; (b) need for power; (c) construction cost increases; (d) population density; (e) dewatering impacts and the slurry wall effects to date upon the Indiana Dunes,<sup>16/</sup> and (f) Class 9 accidents. The present petition adds the following items to the listing of issues: (a) the Kemeny Commission Report; (b) cost increases; (c) the present NRC licensing "pause"; (d) an undisclosed Commission Statement on plants in heavily populated areas; (e) the Report of the Siting Policy Task Force (NUREG-0625); (f) the TMI-2 Lessons Learned Task Force Final Report (NUREG-0585); and (g) the Staff position that TMI was a Class 9 accident. Petition at 7.

In general, these matters embrace issues already litigated during lengthy construction permit hearings, issues considered in other post-construction permit actions, issues to be considered at the operating license stage of review, or issues of developing Commission policy. It is clear on their face that none of these matters are relevant to the required "good cause" criteria of 10 C.F.R. §50.55(b) nor do they bear any reasonable nexus to the reasons assigned in the extension application for the delay in construction so as

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<sup>16/</sup> The Staff does not understand this to be a concern over any additional impacts which could result from an extended period of construction, a potentially relevant aspect of the proceeding.



to be cognizable under Cook. The only possible matter that could fall within this latter category is the pile installation issue which the Commission has already determined should await the operating license stage.<sup>17/</sup> The Petitioners will have an opportunity to request a hearing at that time. If the plant, as built, is unacceptable, it could be denied an operating license.

In any event, many of these matters have already been considered in this docket. Certain of the matters were addressed at the construction permit or "slurry wall" hearings.<sup>18/</sup> Others provided the partial bases for Petitioners' unsuccessful petition of November 26, 1976 to suspend the Bailly construction.<sup>19/</sup> The issue of foundation pile installation formed the substance of Petitioners' unsuccessful petition of November 1, 1978 to suspend construction.<sup>20/</sup> The balance of these issues, to the extent specifically relevant to the Bailly facility, will be considered at the operating license hearings if ordered. Design changes during construction and developments in the NRC regulatory process are to be expected. The matter of nuclear construction, licensing, and regulation is not a static process. At the same time, not every such "change" requires licensing board scrutiny prior to the eventual submission

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17/ See Bailly Commission Memorandum and Order, supra, (December 12, 1979).

18/ See, e.g., paragraphs 7 and 11(c), (d), and (e) of Petitioners' June, 1979 filing.

19/ See, e.g., paragraphs 3, 11(b), (c), and (e) of the above-referenced filing.

20/ See Bailly, Commission Memorandum and Order, supra, (December 12, 1979).

of an operating license application. Cf. Cook, supra. If this were not true, a construction permit could never issue without being subject to the interdiction of periodic hearings. Such a result would frustrate the regulatory scheme established by statute and regulation. This scheme should not be abrogated simply because certain events combined to require a construction permit extension. See Cook supra, 6 AEC at 421; see also Bailly Commission Memorandum and Order of December 12, 1979. If Petitioners believe that an unsafe or environmentally harmful activity or practice is or will occur prior to the operating license application, their remedy is to seek appropriate Commission action under 10 C.F.R. §2.206 as Petitioners are well aware.

With regard to Petitioners' claim that a safety evaluation and environmental impact statement (EIS) must be prepared,<sup>21/</sup> the Staff intends to perform a safety and environmental evaluation of the proposed action to the extent required by law and the operative facts. If the Staff determines that the action will have a significant impact on the environment, it will prepare an EIS pursuant to the requirements of §102(2)(c) of NEPA. It is premature to reach that decision now.

Petitioners next argue, without explanation, that the reasons asserted in the construction permit extension application are not the reasons why the Applicant failed to complete construction on a timely basis and, further,

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<sup>21/</sup> Petition at 8.

are not among those which the Commission recognizes as bases for extending the completion date under 10 C.F.R. §50.55(b). Even assuming that these represent relevant aspects of the proceeding upon which intervention is sought, they are not specified with the requisite "particularity" as required by 10 C.F.R. §2.714.

Finally, Petitioners seek the introduction of two separate issues. First, Petitioners contend that this Board should consider the validity of the Commission's finding, in the Notice, that, pursuant to 10 C.F.R. §50.91, the amendment does not involve a significant hazards consideration. Petition at 3. Second, Petitioners contend that this Board should consider whether the construction permit extension application was "timely and sufficient" such that, pursuant to 10 C.F.R. §2.109, the permit will not be deemed to have expired until the application has been determined. Petition at 4.

With regard to the first matter, since the Commission determined, as a matter of discretion, to provide the opportunity for a hearing prior to issuance of the proposed amendment, it is immaterial whether the action involves a "significant hazards consideration" or not, as that term is used in Section 189 of the Atomic Energy Act and 10 C.F.R. §50.91.<sup>22/</sup>

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<sup>22/</sup> Section 189(a) provides, in material part:

The Commission may dispense with [thirty days' prior notice and publication of licensing actions taken] with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

1815 283

Section 189 of the Act authorizes, in those cases which do not involve significant hazards considerations, that the licensing action on a proposed amendment may be taken, noticed in the Federal Register, and then be the subject of a hearing upon the request of an interested party. The "significant hazards consideration" provision is a procedural concept that relates only to the question of whether a proposed licensing action must be the subject of thirty days' prior notice. Such prior notice was provided in this instance making it irrelevant whether a "significant hazards consideration" is present the issue of whether a "significant hazards consideration" is present now moot.

With regard to the second matter, the Administrative Procedure Act provides that when a licensee has made a "timely and sufficient" application for a license renewal, the license will not expire until the application has been finally determined. 5 U.S.C. § 558(c). The parallel Commission regulation provides that where an application for renewal is filed at least 30 days prior to the expiration of an existing license, such license will not be deemed to expire until the application has been finally determined. 10 C.F.R. §2.109. In the present case, the Bailly construction permit was to expire on September 1, 1979. On February 7, 1979, as supplemented on August 31, 1979, the Applicant filed an application for extension of construction which assigns several grounds under 10 C.F.R. §50.55(b) for the requested extension. The application is a matter of public record, is timely on its face, and speaks for itself.

1815 284

As to petitioners' argument that the application for a license renewal is not sufficient, this argument is premature. The issues of the appropriateness vel non of consideration of this challenge to the renewal application and the Board's jurisdiction to entertain such challenge should await the the Board's determination of the admission of parties to this proceeding. Clearly, a challenge to the renewal application cannot be raised by a non-party.

Petitioners' separate petition for rulemaking and petition for waiver will be discussed later.

Accordingly, the Staff believes that the petition of the Izzak Walton League, et al. fails to meet the "interest" and "aspects" requirements of 10 C.F.R. §2.714 and should be denied in its present form.

INTERVENTION PETITION OF THE STATE OF ILLINOIS

The State of Illinois requests participation in this proceeding as both an intervenor under 10 C.F.R. §2.714 and an interested state under 10 C.F.R. §2.715. The issues sought to be raised by the State fully embrace those sought to be raised by other prospective parties.<sup>23/</sup> The Staff does not believe the State of Illinois has met the intervention requirements of 10 C.F.R.

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<sup>23/</sup> A state which has intervened in a proceeding under 10 C.F.R. §2.714 may participate as an interested state under 10 C.F.R. §2.715 on issues in the proceeding not raised by its contentions. USERDA (Clinch River Breeder Reactor Plant), ALAB-357, 4 NRC 383 (1976).

§2.714 in this case. The Staff has no objection to Illinois' participation as an interested state in the event a hearing is otherwise ordered.

Petitioner claims that thousands of its citizens "live, work, and use recreational facilities" in proximity to the Bailly site. Petition at 2. It then states that "the direct and immediate health, safety, financial, property, recreational, and living interests of those individuals will be substantially and directly affected by the proceeding which may determine whether or not the Bailly plant will be constructed. Id.

Petitioner participated as an interested state in the "slurry wall" hearings and other post-construction permit legal actions involving Bailly. Therefore, the Staff will concede that it has an interest which could provide a basis to confer standing in this matter. Its specification of interest is substantially identical to that of Petitioners Izaak Walton League, et al. and is similarly deficient. Specifically, Petitioner does not adequately particularize how its purported interest could reasonably be affected by the outcome of this proceeding, an essential ingredient of standing under 10 C.F.R. §2.714.

The petition of Illinois is in all other respects identical to the petition of the Izaak Walton League, et al. and elicits the same Staff position on the matter of "aspects" and otherwise. Accordingly, the Staff believes that the petition of the State of Illinois fails to meet the "interest" and "aspects"

requirements of 10 C.F.R. §2.714 and should be denied in its present form. It has no objection to Illinois' participation in this proceeding as an interested state if a hearing is otherwise ordered.

INTERVENTION PETITION OF LOCAL 1010 OF THE UNITED STEELWORKERS

Petitioner Local 1010 of the United Steelworkers of America (Local 1010) indicates that it is the representative of the steelworkers at the Inland Steel Indiana Harbor Works in East Chicago, Illinois, located within 20 miles of the Bailly site. Petition at 1. It indicates that its main objection to Bailly is its location directly adjacent to the Indiana Dunes and Lake Michigan, the only source of drinking water for Chicago, Illinois. Petition at 10. Petitioner references additional steel mills which are asserted to employ members of Local 1010. Petitioner also states that it represents 5800 member employees of the Bethlehem Steel Burns Harbor Plant located within 700 feet of the Bailly site. Petition at 11. Petitioner expresses a concern over the ability to safely evacuate these persons, and the alleged financial harm to the steel industry, presumably in the event of some radiological accident.

Members of Local 1010 conduct substantial activities (employment) within the geographical zone of interest that could provide a basis to confer standing on Local 1010 in this matter. Cf. Allens Creek, supra; North Anna, supra. The petition fails, however, to identify any individual member with a personal interest in the proceeding, show how that personal interest may be affected by the proceeding, and demonstrate that Local 1010 is authorized to represent

such interest in this proceeding. These are necessary requirements to establish organizational standing. See Aliens Creek, *supra*, 9 NRC at 393; Duquense Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 487, 488-89 (1973).

Petitioner's "objection" to the siting of the Bailly plant and general interest in emergency evacuation plans and potential economic loss are not matters that derive from some impact which will be occasioned by the present action. The suitability of the Bailly site was extensively litigated in construction permit hearings. A nuclear accident cannot occur during plant construction with its potential attendant economic impact and evacuation risk. The proper time to litigate a concern over these matters is upon submission of an operating license application where such an opportunity will be afforded.

Instead of identifying the aspects of the proceeding as to which intervention is desired, Petitioner proposes several "contentions" for admission. These "contentions," although numbered differently, are clearly derived from, and similarly worded to, the issues raised in paragraphs 1 through 11 of the June 29, 1979 filing of Petitioners Izaak Walton League, *et al.* discussed above. The Staff believes that these matters do not fall within the limited scope of this proceeding as defined by 10 C.F.R. §50.55(b) and are generally unrelated to any of the reasons assigned for the extension so as to be cognizable under Cook.

Accordingly, the Staff does not believe that the petition of Local 1010 meets the "interest" and "aspects" requirements of 10 C.F.R. §2.714 and should be denied in its present form.

1815 288



INTERVENTION PETITION OF LAKE MICHIGAN FEDERATION

Petitioner Lake Michigan Federation (Federation) is described as a "citizens" organization serving individual and civic and environmental organizations in Indiana, Illinois, Michigan and Wisconsin whose efforts are directed, inter alia, toward "decisions concerning power plant siting, energy conservation and the preservation and expansion of [public] parks." Petition at 2. Petitioner indicates that it seeks to intervene on its own behalf and that of its individual members and not on behalf of its member organizations. Petition at 3. Its individual members are said to own property and reside near the Bailly site and conduct a variety of recreational and other activities at the Indiana Dunes, Cowles Bay, and Lake Michigan in the vicinity of the site. Petition at 3. The Federation and its individual members claim to have a "substantial interest herein in opposition to the construction and operation of the Bailly site at the proposed site." Id. This specific interest is assertedly in "preserving and improving the environmental, economic, recreational, and aesthetic benefits of the Indiana Dunes National Lakeshore, Cowles Bay National Landmark, Lake Michigan and surrounding beach, park, fishing, boating, and public access areas, which interest has been, is being, and will continue to be adversely affected by the construction and operation of the Bailly plant." Id.

The Federation's organizational interest in power plant siting, energy development and the environment is inadequate to confer individual standing upon the Federation in this matter. Cf. Sierra Club v. Morton, supra; Allens Creek, supra. The Federation can seek to derive standing in this proceeding from

the described personal interest of its individual members. See Marble Hill, supra, 3 NRC 328. In order to do so, it must identify specific members whose interests might be affected by the proceeding, describe how their personal interests might be affected by the proposed action, and demonstrate that such members have authorized the organization to act on their behalf. See Allens Creek, supra; Barnwell, supra; Beaver Valley, supra. This showing has not been made in the present petition.

The balance of the petition adopts and incorporates by reference the petition and related filings of the Izaak Walton League, et al. and the State of Illinois and thus elicits the same Staff position on the matter of "aspects" and otherwise. See discussion, supra at 13. Accordingly, the Staff believes that the petition of the Lake Michigan Federation fails to meet the "interest" and "aspects" requirements of 10 C.F.R. §2.714 and should be denied in its present form.

INTERVENTION PETITION OF THE CITY OF GARY, INDIANA, ET AL.

Petitioners identify themselves and their interest in this proceeding as follows. The City of Gary, Indiana is situated six miles from the Bailly site and is concerned over the alleged absence of emergency evacuation plans in the event of a nuclear accident. United Steelworkers Local 6787 represents a number of employees at the Bethlehem Steel Company's Burns Harbor Plant adjacent to the Bailly site and is concerned over the alleged absence of adequate emergency response capability. The Bailly Alliance is a "coalition of citizens and community organizations representing persons" residing

1815 290

in close proximity to the Bailly site and is concerned over the alleged absence of evacuation capability. Save the Dunes is an organization "established for the purpose of preserving and protecting for public use and enjoyment the Indiana Dunes National Lakeshore" and is concerned over the alleged absence of adequate emergency response planning. Petition at 2. The Critical Mass Energy Project is a "public interest organization dedicated to the development of safe and efficient energy technology." Petition at 3.

Critical Mass is said to have recently petitioned the NRC to amend its emergency planning regulations. The Staff does not believe that any of these joint petitioners has demonstrated the requisite "interest" in this proceeding under the requirements of 10 C.F.R. §2.714.

All these petitioners single out emergency planning as their common interest in this proceeding. Given its governmental character and proximity to the Bailly site, the City of Gary is presumed to have an interest that could provide a basis for standing in this action. Local 6787 expresses its interest in terms of those of its members employed adjacent to the site which could serve to provide a basis for its standing in this action. The remaining organizations can be characterized as "public interest" or "special interest" groups who do not possess individual standing under applicable case law based on their separate statements of interest herein. Cf. Sierra Club v. Morton, supra; Allens Creek, supra. The personal interest of an individual member of these latter organizations could provide a basis to confer standing on these groups. However, the petition fails to identify an individual member with an interest in the proceeding, indicate how that interest will be affected

by the proposed action, and demonstrate that the organizations are authorized to represent such interest. See, e.g., Allens Creek, supra. The statement of interest of Local 6787 is similarly deficient.

In any event, the common interest of all these petitioners in emergency planning or evacuation is one which could not reasonably be affected by the outcome of this limited proceeding (an extended construction period) so as to show an "injury in fact," a prerequisite for standing under 10 C.F.R. §2.714 and applicable case law. See Pebble Springs, supra, 4 NRC at 613.

Petitioners seek to intervene in this proceeding "solely with respect to a consideration of whether realistic evacuation and emergency plans can be implemented." Petition at 3. This subject is one that does not fall within the limited scope of the required "good cause" finding under 10 C.F.R. §50.55(b), is unrelated to any of the reasons assigned for the extension so as to be cognizable under Cook, supra, and is a matter that can, and should, abide litigation at the eventual operating stage.

The subject of emergency planning on a "preliminary" basis<sup>24/</sup> was litigated in the Bailly construction permit proceeding<sup>25/</sup> and will be thoroughly considered by the Staff on a "final" basis<sup>26/</sup> in connection with the eventual operating license application for the facility. The Commission's requirements

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<sup>24/</sup> See 10 C.F.R. Part 50, Appendix E, Section II.

<sup>25/</sup> See, e.g., Bailly, supra, 7 AEC at 568.

<sup>26/</sup> See 10 C.F.R. Part 50, Appendix E, Section III.

regarding emergency planning are the subject of proposed rulemaking<sup>27/</sup> and may well change over the course of the Bailly construction. The adequacy of the emergency plans for the facility should reasonably be judged against the applicable Commission regulations in effect at the time of the operating license. It is not apparent to the Staff how petitioners' interests or the public interest is harmed by undertaking consideration of this matter at the operating license phase. Cf. Cook, supra.

If petitioners believe that an adequate evacuation plan cannot be developed for the Bailly plant, their remedy is to seek the initiation of a show cause proceeding under 10 C.F.R. §2.206. Cf. Bailly, Commission "Memorandum and Order," supra, (December 12, 1979) (pile installation petition).

Accordingly, the Staff believes that the petition of the City of Gary, et al. does not satisfy either the "interest" or "aspects requirements of 10 C.F.R. §2.714 and should be denied in its present form.

PETITION FOR RULEMAKING AND PETITION FOR WAIVER

Petitioners Izaak Walton League, et al., State of Illinois, Lake Michigan Federation, and City of Gary, et al. have joined in a petition for rulemaking regarding 10 C.F.R. §50.55(b) and a separate petition for waiver of, or exception to, that regulation. With regard to the petition for rulemaking, Staff

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<sup>27/</sup> See Proposed Rule published December 19, 1979 (44 F.R. 75167); Proposed Rule published September 19, 1979 (44 F.R. 54308); see also Advance Notice of Proposed Rulemaking published July 17, 1979 (44 F.R. 41483).

Counsel is advised that the Commission will publish a notice of receipt of the petition for rulemaking and request for comments in the Federal Register in the near future, and that a decision whether or not to initiate rulemaking could be made in approximately 60 to 90 days therefrom.

In their joint petition for waiver, it is argued that "the purpose for which 10 C.F.R. §50.55(b) was adopted was to implement the provision of Section 185 of the Act permitting extension of the latest completion date in a construction permit only upon good cause shown. The application of 10 C.F.R. §50.55(b), if it is interpreted so as to limit matters to be considered in this proceeding to the reasons why construction was not completed by the latest date in the construction permit would not serve but would frustrate the purpose for which 10 C.F.R. §50.55(b) was adopted and the purpose of Section 185 of the Act."<sup>28/</sup>

The Staff cannot understand this circular reasoning. If Petitioners' basic argument is that "good cause" means something other than the clear prescription in 10 C.F.R. §50.55(b) or that 10 C.F.R. §50.55(b) improperly implements Section 185 of the Atomic Energy Act, the argument is unsupported. It is axiomatic that an agency's regulations are entitled to a strong presumption of validity.<sup>29/</sup> Petitioners provide no legal authority to support their interpretation of 10 C.F.R. §50.55(b) or the intendment of Section 185 of the Act and the Staff is aware of none.

The Appeal Board has already noted, in a case ignored by Petitioners, that the legislative history of Section 185 of the Act provides no insight into

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<sup>28/</sup> Petition for waiver of Izaak Walton League, et al. at 2-3.

<sup>29/</sup> See, e.g., Cook, supra, 6 AEC at 419.

the meaning of the term "good cause" as used therein. Cook, supra, 6 AEC 418. In any event, the Appeal Board provided its interpretation of the scope of the "good cause" showing in 10 C.F.R. §50.55(b) as discussed earlier. The Commission did not take review of that decision. Thus, the Staff believes that the scope of 10 C.F.R. §50.55(b) has received Appeal Board scrutiny. The Staff believes that this interpretation is dispositive of Petitioners' argument respecting 10 C.F.R. §50.55(b) and that the requisite showing required for waiver under 10 C.F.R. §2.758 has not been met.

CONCLUSION

For the foregoing reasons, the Staff believes that the subject petitions fail to meet the pertinent "interest" and "aspects" requirements of 10 C.F.R. §2.714 in their present form. The regulations, nonetheless, permit petitioners to amend their petitions without prior Board approval at any time up to fifteen (15) days prior to the holding of the first prehearing conference. 10 C.F.R. §2.715(a)(3). The Staff has no objection to participation by the State of Illinois as an interested state under 10 C.F.R. §2.715 in the event a hearing is otherwise ordered in this matter. The Staff opposes the joint petition for waiver (exception) of 10 C.F.R. §50.55(b) herein. Notice of receipt of the joint petition for rulemaking will be given in the near future.

Respectfully submitted,



Steven C. Goldberg  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 23rd day of January, 1980.

1815 295

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENTION PETITIONS AND RELATED FILINGS OF SEVERAL ORGANIZATIONAL AND GOVERNMENTAL ENTITIES in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of January, 1980.

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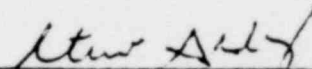
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1815 297