

NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

BOSTON EDISON COMPANY, et al.

(Pilgrim Nuclear Generating Station,
Unit 2)

Docket No. 50-471

NRC STAFF RESPONSE TO CLEETONS'
MOTION #1: THAT BOARD HEARING WITH RESPECT TO
ISSUE OF FINANCIAL QUALIFICATIONS BE HELD IN
ABEYANCE UNTIL FINAL DECISION HAS BEEN ISSUED
BY THE MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES IN
MASSACHUSETTS DPU #19494*/

Intervenors Alan and Marion Cleeton (Intervenors) filed on January 25, 1979 the above-captioned motion, (Motion #1) requesting that the hearing on the financial qualifications of the Applicants be deferred. The Staff opposes Motion No. 1.

The grounds offered by the Intervenors for deferring consideration of the financial qualifications issue are as follows. The Massachusetts Department of Public Utilities (D.P.U.) will conduct a hearing on the reasonableness of Boston Edison's construction program, including the

*/ On January 25, 1979 Intervenor Cleetons filed four separate motions. The Staff will reply to Motions 1, 3, and 4. Motion 2 is moot because the Applicants have agreed to furnish the requested documents. "Applicants - Boston Edison Company, et al. Answer in Opposition to Intervenors - Cleeton Motions, etc., dated January 25, 1979," pg. 8.

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building of Pilgrim Unit 2. If the D.P.U. finds the construction program unreasonable, recovery of the cost of constructing Pilgrim Unit 2 may not be allowed. If rate relief is not granted, according to the Cleetons, Boston Edison will not be financially qualified to build and operate Pilgrim 2. Therefore, it is argued, the Board should await D.P.U.'s decision. Otherwise, there is the chance that the record may have to be reopened to take into account D.P.U.'s final decision.

The Staff opposes Motion No. 1 because: 1) the advantages of going forward outweigh the advantages of not going forward; 2) the D.P.U. has not made a final or interim decision which is contradictory to the conclusions of the Staff or Applicants and; 3) it is the Commission's general policy to proceed with its hearings even though other Federal or State agencies must act to approve the project.*/

D.P.U. Proceeding Relates to Need For
Power Rather Than Financial Qualifications

Although the issue in D.P.U. No. 19494 is whether BECO's energy demand forecasts are correct, rather than whether a specific rate relief request should be granted, the final decision can affect BECO's financial qualifications. Therefore, the wisdom of deferral of NRC hearings on financial qualifications must be considered in light of the bearing that a D.P.U. determination of need for power may have on the NRC proceeding.

*/ Since the Cleetons do not have any contentions on the issue of financial qualifications, they should not be granted the relief they seek. However, as explained in the text, the Staff believes the issue before the DPU is essentially one relating to the need for the plant. Since Cleeton Contention H questions the need for the plant, the Staff will not pose an objection to the right of the Cleetons to request deferral of a hearing on another party's contention.

Factors Which Board Must Consider In
Determining Whether To Defer Consideration
Of Financial Qualifications

A licensing board has the authority to defer consideration of certain issues, so long as it does not abuse its discretion. 10 CFR 2.718(e), Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975); accord, Allied General Nuclear Services, et al. (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975); Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-39, 4 AEC 727 (1971).

In Douglas Point, the Appeal Board enunciated three factors which should be considered prior to a licensing board deferral of consideration of any or all issues. The factors are: 1) the degree of likelihood that any early findings on the issues would retain validity; 2) the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issues; 3) the extent to which the hearing of the issues(s) at any early stage would, particularly if the issues(s) were later reopened because of supervening developments, occasion prejudice to one or more litigants. Douglas Point, supra, at 547. In Douglas Point the Board was confronted with a plant which had been deferred for several years; however, these factors should be applied by a licensing board regardless of whether construction is for the near future, as is the instant case, or in the distant future. Barnwell, supra, at 682.

Factor 1. The Degree of Likelihood that any Early Findings on the Issue(s) Would Retain Their Validity

In considering the first factor, as well as the others, some weight must be given to the likelihood of a decision from the State agency adverse to BECO. In other words, the Board should consider the likelihood of the State agency refusing to certify the need for a plant or granting rate relief to cover the cost of the capital expenditures. Such an analysis was done in Barnwell, supra, where the Appeal Board applied the traditional factors for considering a stay*/ (including likelihood of success on the merits) in determining whether a board's decision to go forward with hearings should be reversed.

There are two possible outcomes of the D.P.U. proceeding, either of which could influence this Board's findings on the issue of need for power and/or financial qualifications. The first is that the D.P.U. will find BECO's construction program reasonable. The second, of course, is that the DPU's decision will be unfavorable to BECO. It is the Staff's position that in either case, it is likely that the Board's findings will remain valid.

Board's have given substantial weight to a State's final position on the need for a plant, and the attendant rate relief that would be granted after such a finding by the State regulatory body having jurisdiction over such matters. Carolina Power and Light Company (Shearon Harris

*/ See, 10 C.F.R. 2.788(e); Virginia Petroleum Jobber's Assn. v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958).

Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234 (1978), Public Service Company of New Hampshire (Seabrook Nuclear Generating Station, Units 1 and 2), ALAB-422, 6 NRC 33, 73 (1977). Although substantial weight is given to the State's final position, it is not binding on the Commission: Shearon Harris, supra, at 241; Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 40 (1974).

A close examination of what the Massachusetts agencies have done to date indicates that, although there may be room for improvement in BECO's methodology for predicting demand, no State agency has concluded that Pilgrim 2 is not needed. The Energy Facilities Siting Council (E.F.S.C.) noted in E.F.S.C. No. 78-12 (October 27, 1978) (referred to also as Phase I of D.P.U No. 19494) that BECO's attempt at forecasting was reasonable and done in good faith, but that there were still problems that had to be resolved. E.F.S.C. No. 78-12, unnumbered pgs. 5, 6, 7. The E.F.S.C. also recognized the inherent difficulties of forecasting and identified specific areas which needed improvement. Id., at unnumbered pgs. 5, 6.

The E.F.S.C. also was careful to point out that "this [decision] can have no effect on the Company's proposal to build the nuclear power plant known as Pilgrim II. . . . The Council, by its ruling today, cannot and is not prohibiting construction of Pilgrim II." Id., at .

unnumbered pg. 10. This exemption of Pilgrim No. 2 from the E.F.S.C.'s jurisdiction has been upheld by the Commonwealth Supreme Judicial Court. Id. Thus, no action of the E.F.S.C. can affect the validity of a decision of this Board with respect to the need for power or financial qualifications issue.

The D.P.U. has made no final or interim statement concerning the reasonableness of BECO's construction program and there is no indication as to when such a decision will be made. Since the E.F.S.C. did not reject outright the forecast made by BECO, it is not unreasonable to assume that D.P.U. will find for BECO. Even if the D.P.U. finds that there is no need for Pilgrim Unit No. 2 generating capacity, this Board, based on the extensive direct testimony of the Applicants, Staff, and the intervening Attorney General of the Commonwealth on the issue of need for power, can still find the Applicants' forecast and the Staff's independent forecast reasonable. State agencies are not infallible, and this Board is competent to make findings independent of the D.P.U.'s assessment. Shearon Harris, supra, at 241.

Of course, if the D.P.U. makes a determination that BECO cannot recover the cost of Pilgrim Unit 2, it is unlikely that any finding by this Board that BECO is financially qualified to building Pilgrim would retain its validity. In light of the fact that the Staff in SER supplement No. 4 contemplates that there may be lower rates of return than anticipated by BECO (though not so low as to require a negative finding

on the financial qualifications issue), no particular finding--for or against the Applicants--by the Board can be considered a foregone conclusion. In short, there is sufficient uncertainty about the outcome of the various proceedings that there is absolutely no warrant to assume now that a finding of this Board would not retain its validity after final action by D.P.U.

Factor 2. The Advantage, if any, to the Public in having an Early, Though not Necessarily Conclusive, Resolution of the Issues.

The advantage in going forward is that there will be a resolution by the NRC of whether the Applicants in this proceeding are financially qualified to build Pilgrim 2. The Applicants have submitted updated financing plans. In addition, BECO has provided alternative plans which encompass various levels of rate relief that may be granted by the D.P.U. The Staff has reviewed these financing plans and the results of this review are found in SER Supplement No. 4. All that remains is the formal presentation of this evidence and the opportunity of the Board and parties to test the underlying bases for these conclusions. After this process takes place, the Board can make the appropriate findings and this proceeding, in so far as the health and safety aspects are concerned, can be concluded. There appears to be no advantage in waiting for the D.P.U. to make its decision. If a party has evidence to demonstrate that BECO is not financially qualified, then this should be presented for the Board's consideration at the hearing.

This issue should be resolved now. If the Board finds against the Applicants, that should be known now rather than later. On the other hand, if the Applicants are found financially qualified and the plant is found safe and environmentally sound, it should be promptly approved.

Barnwell, supra, at 684-85.

Factor 3. The Extent to Which the Hearings of the Issue(s) at An early Stage Would, Particularly if the Issues were Later Reopened Because of Supervening Development, Occasion Prejudice to One or More of the Litigants

No party to this proceeding, except possibly the Applicants, would be prejudiced if supervening developments caused the issue of financial qualifications or need for power to be reopened.

A reopening of the record on financial qualifications or need for power could result in suspension of construction. The Applicants in this proceeding give no indication that they are unwilling to take that risk, which is no different than the risk inherent in every construction permit case.

The movant has not indicated how it might be prejudiced. At most, the speculative possibility of a subsequent reopening of the record might require an increase in expenditure of intervenors' time and resources. This potential injury is not an irreparable injury and should not be considered as prejudice to the intervenor. Barnwell, supra, at 864.

In summary, an evaluation of the three factors that a Board should consider when contemplating the deferral of certain issues demonstrates that the Board should hear the issue of financial qualifications as soon as possible.*/

Commission Policy

The Commission recognizes that several Federal and State agencies have jurisdiction over various aspects of nuclear projects; however, the Commission need not defer its actions until the other agencies act.

As a general rule it is the practice of the Commission to pursue its administrative procedures while other State and local proceedings are under way. Such a practice is hardly a waste of time; on the contrary, it is efficient, economical and expeditious course. See Southern California Edison Co. (San Onofre Nuclear Generating Station), ALAB-171, RAI-74-1, 37 at 39 (January 21, 1974). A ponderous, indeed arbitrary "protocol" for licensing processes among local, state and federal authorities would be irresponsible in view of the enormous economic and social costs necessarily entailed. Wisconsin Electric Power (Koshkonong Nuclear Plant, Units 1 and 2) CLI-74-45, 8 AEC 928 at 930 (1974).

Intervenors' reliance on San Onofre, supra, is misplaced. In that case, the State had acted affirmatively to preclude the building of certain nuclear power plants. The Licensing Board had issued an Initial Decision and the case was before the Appeal Board. Under the circumstances, the

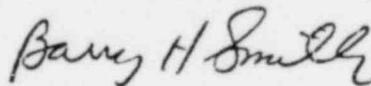
*/ In the Staff's January 16, 1979 letter to the Board, a request was made to hear the issue of financial qualifications sometime between the weeks of March 4 and 18, 1979.

Appeal Board thought it wise to postpone oral argument. However, it noted that if a State precludes construction, it does not mean a Licensing Board is obligated to bring the proceedings to a halt. San Onofre, supra, at 40. In the instant case, no State agency has acted affirmatively to preclude construction and even if it had, the Board is not required to automatically defer hearing the remaining issues.

Conclusion

In conclusion, the advantages of going forward outweigh the advantage of deferral of a hearing on the financial qualification issue. This is particularly true in light of the fact that no State agency has acted affirmatively to preclude construction of Pilgrim Unit 2 and the Commission's policy not to stay its hand while other Federal or State agencies are contemplating their decisions. Accordingly, Intervenor's Motion No. 1 should be denied.

Respectfully Submitted,



Barry H. Smith
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of February, 1979.