

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

3/7/80

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))	

NRC STAFF RESPONSE TO SUPPLEMENTAL
INTERVENTION PETITIONS

INTRODUCTION

Pursuant to the Board's "Order Setting Special Prehearing Conference," dated February 7, 1980, several individuals and others filed supplements to their initial intervention petitions. Those filing supplemental petitions include the Izaak Walton League, et al., State of Illinois, George Schultz, George and Anna Grabowski, and the City of Gary, Indiana, et al. Local 1010 of the United Steelworkers and the Lake Michigan Federation did not supplement their initial petitions. The Staff position on the supplemental petitions follows.

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DISCUSSION

Background and Scope of Licensing Action.

This matter arose upon the submission of an application to extend the completion date in the Bailly construction permit. Several petitions to intervene were filed pursuant to the notice of opportunity for hearing published in connection with this application. 44 F.R. 69061. These initial petitions addressed, to varying degrees, the petitioners' respective interests in the matter and the aspects of the action upon which intervention was sought pursuant to 10 C.F.R. §2.714. The Staff took the position that none of the petitions, as pleaded, met the referenced intervention requirements of 10 C.F.R. §2.714. In reaching that position, the Staff was governed by consideration of the scope of the requested licensing action (whether good cause exists to extend the construction permit expiration date) because the alleged injury to the petitioners' interest must be connected to the proposed action and the "aspects" or, at this stage, contentions relevant thereto.^{1/}

To summarize, the scope of a construction permit extension proceeding is prescribed by 10 C.F.R. § 50.55(b) which provides that a construction permit

^{1/} See NRC Staff responses to petitions, dated January 16 and 22, 1980 at 7-12.

may be extended for a reasonable period of time for good cause shown.^{2/} The parameters of the "good cause" showing under 10 C.F.R. § 50.55(b) have been established by the Appeal Board. Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973).

Patently, a construction permit extension proceeding is not the forum for re-litigating the grant of a construction permit nor "pre"-litigating any eventual operating license application. As a matter of "common sense," such a proceeding need not "embrace every safety or environmental issue which the need for the extension might possibly suggest." 6 AEC at 420. The Appeal Board recognized in Cook that the "fundamental purpose" of an extension hearing is "not to determine the safety or environmental aspects of the reactor in question." Id.

The Appeal Board concluded therein, however, that it could not always rule out consideration of possible safety and environmental issues associated with the asserted reasons for the delay in construction in such a proceeding. The Appeal Board indicated that the question to be answered in ascertaining whether "good cause" exists is broadly "whether the reasons assigned for

^{2/} This regulation states 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.

the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the [facility 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.

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 for the operating license hearing would not prejudice the intervenors. Id. It recognized that design changes in the course of a 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 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. 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 factors, 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 an operating license proceeding--and not before. Id. at 421.

The Appeal Board expressed difficulty in rationalizing why a different result should obtain simply because of the "fortuitous circumstance" that certain events required the Applicants to seek an extension of construction. 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 Applicant 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 both Commission and judicial sanction. See, e.g., Power Reactor Development Co. v. Electrical Workers, 367 U.S. 396 (1961); Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d (D.C. Cir. 1979); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), Commission Memorandum and Order, CLI-79- , 10 NRC --- (December 12, 1979).

Standing

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. The general requirements respecting interest are set forth in the separate Staff responses to intervention petitions filed in this matter.^{3/} One's interest in the instant matter must logically flow from the above discussion on the scope of a construction permit extension proceeding. Stated differently, the interest

^{3/} See NRC Staff response to petitions, dated January 16 and 22, 1980, at 4-7 and at 5-6, respectively.

asserted must be one which derives from the effects of construction over an extended period of time beyond that previously authorized.

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). A petitioner must have a direct stake in the outcome of the proceeding rather than merely be advancing personal preferences. See Allied General Nuclear Services, et al. (Barnwell Fuel Reprocessing and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).^{4/} Persons residing in close proximity to a reactor are presumed to have a cognizable interest in a licensing proceeding involving that reactor. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377, 393 (1979); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

Pursuit of everyday activities in the vicinity of a reactor site^{5/} or use of the surrounding area for recreational purposes^{6/} may, depending on the

^{4/} Where, as here, a hearing is not mandatory, the Licensing Board should take particular care to satisfy itself that potential intervenors do have a real stake in the proceeding. See Cincinnati Gas and Electric Company, et al. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 812 (1976).

^{5/} Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

^{6/} Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973).

circumstances, constitute an interest which could be affected by a possible harmful effect of the facility. Similarly, 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).

Contentions

In addition to the "interest" requirement of 10 C.F.R. § 2.714, a petitioner must also set forth the contentions he or she seeks to litigate. As a general precept, contentions must fall within the scope of the particular licensing action and be set forth with basis and particularity per the requirements of 10 C.F.R. § 2.714(b) and applicable case law. See, e.g., BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974). A major reason for requiring the articulation of specificity and basis is to help assure that other parties are put on sufficient notice of what they will have to defend against^{7/} and to ensure that the hearing process is invoked solely for the resolution of concrete issues.^{8/}

Several petitioners express an intent to submit additional contentions at a later stage. Any such future submissions must address the factors relative

^{7/} Philadelphia Electric Company (Peach Bottom, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

^{8/} Philadelphia Electric Company (Peach Bottom, Units 2 and 3), CLI-73-10, 6 AEC 173, 174 (1973).

to nontimely filings contained in 10 C.F.R. § 2.714(a). See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

The principles enunciated above should govern consideration of the five supplemental petitions in question. The Staff position on these pleadings follows.

SUPPLEMENTAL PETITIONS

Supplemental Petition of Izaak Walton League, et al.

Prior to the submission of the supplemental petition of the Izaak Walton League (IWL), et al., the Staff position on the matter of standing was given in its response to intervention petitions, dated January 23, 1980, at 13-14. To summarize, the Staff position was that, by virtue of their continued involvement with Bailly construction, IWL, et al. possess an interest which could provide a basis to confer standing in this proceeding, but that they had not adequately demonstrated how their professed interest could reasonably be affected by the outcome of this proceeding, which is an essential ingredient of standing under 10 C.F.R. § 2.714. The supplemental petition does not provide any additional information or argument in support of this aspect of their petition, and, accordingly, the Staff position is not changed.

Even if IWL, et al. 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, IWL, et al. have not addressed these factors or the appropriateness in general of granting their intervention as a discretionary matter. Thus, the Board has no basis for exercising such discretion in this proceeding.

Petitioners advance twelve contentions for litigation as issues in this matter. The majority of these contentions raise issues which fall outside the permissible scope of this action.

Contention 1 asserts that the factors assigned in the Applicant's construction permit extension application for its failure to complete construction by the date set forth in the construction permit were not beyond the Applicant's control. As a general proposition, this is a relevant area for inquiry under the provisions of 10 C.F.R. § 50.55(b). However, the apparent scope of the inquiry contemplated by IWL, et al. is impermissibly broad in some respects.

For example, one factor cited in the extension application as contributing to the Applicant's failure to complete construction in a timely manner is the need to conform to more numerous and detailed regulatory guides than were in

existence at the time of issuance of the construction permit. Petitioners argue that not only must these regulatory guides be identified, but that the Applicant must demonstrate its ability to comply with them. Supplemental petition at 6. There is no legal authority to support this proposition. On the contrary, were such a requirement to be imposed, it would effectively vitiate the two-stage licensing process wherein some issues that arise subsequent to the construction permit stage are resolved at the operating license stage. See Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1362 (D.C. Cir. 1979); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), Commission Memorandum and Order, CLI-79---, 10 NRC --- (December 12, 1979), appeal filed, No. 80--- (D.C. Cir. Feb. 7, 1980); see also Staff response to petitions, dated January 23, 1980, at 10-12.

Accordingly, while proposed Contention 1 provides the basis for an acceptable contention, it requires greater precision and specificity before it can be admitted.

Contention 2 alleges that a construction permit extension cannot be authorized for anything other than a specific date. The Applicant's August 31, 1979 supplement to its extension application requests an extension of construction until 1987 or "98 months after the NRC concurs in resumption of pile placement." Petitioners argue that the alternative relief quoted above is unavailable. Although the Staff views this issue as de minimis, it would appear to present an acceptable issue for consideration in this proceeding. Accordingly, the Staff would not oppose its admission.

Contention 3 seeks to litigate the factors set forth in the Applicant's August 31, 1979 supplement to its construction permit extension application as warranting an extension of the latest completion date until December 31, 1987. Petitioners single out two factors for express consideration in this regard. The first is the pace of Staff review of the Applicant's foundation design proposal. The second is the schedule for implementing any generic "requirements" arising from review of the Three Mile Island (TMI) accident. Petitioners do not contend that the reasonableness of the time period assigned for each of these events must be considered alone. Rather, they argue that the safety significance of these events must be considered as well. The Staff disagrees.

The Commission has specifically held that consideration of the adequacy of the Applicant's pile design plans should await the operating license stage of the process. See Bailly Commission Memorandum and Order, supra (December 12, 1979). Though nowhere explicitly addressed, implementation of any post-TMI "requirements" can and should abide litigation at any eventual operating license hearings consistent with the Commission's bifurcated licensing process. Cf. Porter County, supra, 606 F.2d 1362; Cook, supra, 6 AEC 414. Accordingly, this contention seeks litigation of issues outside the scope of this proceeding.

Contention 4 alleges that the additional period of construction which would be occasioned by a construction permit extension will have an adverse incremental environmental impact upon the adjacent Indiana Dunes National Lakeshore.

Contention 5 alleges that these adverse impacts cannot be adequately mitigated. Without conceding the merits of these contentions, the Staff believes that they present acceptable issues for adjudication in this proceeding and could further serve to provide a basis upon which Petitioner's interest could be affected by the outcome of this proceeding.

Contention 6 alleges that part of the reasons why the construction of Bailly was not completed by the expiration date in the construction permit was because of the decrease in need for electrical generating capacity in the Applicant's system and the escalating costs of plant construction. This contention lacks the requisite basis, is unduly speculative, and otherwise seeks the introduction of issues (need-for-power and financial capabilities) that are outside the scope of a construction permit extension proceeding.

Contention 7 alleges that the reason Bailly was not completed by the date provided in the construction permit stems from the lack of "thorough and adequate planning and design by NIPSCO, its contractors and subcontractors" as evidenced by its pile installation design. Supplemental petition at 14. Assuming arguendo that this presents a relevant issue for consideration, it lacks the requisite basis and could lead to the improper re-litigation of the Applicant's technical qualifications favorably decided at the construction permit stage.

Contention 8 alleges that the use of pilings under the reactor building which do not extend to bedrock will lead to unsafe differential settlement.

This contention lacks basis and, more importantly, presents an issue which the Commission has clearly decided can await consideration at the operating license stage.

Contention 9 alleges that the consequences of an accident such as occurred at TMI must be considered prior to a grant of the requested extension. Such an issue is clearly unrelated to the required "good cause" showing of 10 C.F.R. § 50.55(b) and otherwise beyond the permissible scope of this proceeding.

Contention 10 alleges that the Staff must now indicate whether or not it will perform a safety and an environmental evaluation of the construction permit extension application and, if it does not intend to do so, should be so ordered. As stated in its January 23, 1980 response to intervention petitions filed herein, the Staff intends to perform a safety and environmental evaluation of the proposed action to the extent required by law and the operative facts.

Petitioners essentially request the Board to intercede in the orderly administration of the Staff technical review process. Under the prescribed regulatory scheme, the Staff is entrusted with the responsibility for conducting the necessary review and evaluation of nuclear license applications. Licensing Boards are empowered to preside over the hearing portion of the process. The Commission has not delegated the authority to supervise the Staff's review of license applications to such Boards. As one Licensing Board succinctly noted:

Under the Commission's regulatory scheme, the staff is given the duty of reviewing applications for licenses (Section 2.102) The Commission has delegated to the licensing board power and duties with respect only to the hearing process (2.104 and 2.718). The staff's review and reporting function is largely completed in a setting outside the hearing process and therefore without the purview of the licensing board. The fact that the two areas of activity may proceed, for a time, concurrently, does not extend to the board any supervisory authority over that part of the process that has been entrusted to the staff. Northeast Nuclear Energy Company, et al. (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436 (1975); accord, New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978).

A safety evaluation report and environmental impact statement were prepared in connection with issuance of the Bailly construction permit. If the Staff determines that the requested extension will have a significant incremental impact on the environment, it will prepare an environmental impact statement as required by Section 102(2)(C) of the National Environmental Policy Act (NEPA). However, it is premature to reach that decision now and the Board is not empowered to compel such a decision at this juncture.

Contention 11 alleges that there are three broad categories of matters which must be considered in determining whether or not the Applicant has shown good cause for its requested extension: "(a) the status of construction; (b) the reasons why construction was not completed; and (c) significant developments relevant to public health and safety and to environmental considerations since the construction permit was issued." Supplemental response at 16-17.

Petitioners do not explain precisely what relevance or significance should be attached to their proposed category (a). Proposed category (b) parallels the applicable requirement of 10 C.F.R. § 50.55(b). Petitioners maintain that the third category is of "critical importance to the good cause" issue. Id. at 18. However, Petitioners cite no legal authority for this proposition which is contrary to the clear language of 10 C.F.R. § 50.55(b) and the Appeal Board decision in Cook, supra. If the Commission had intended or contemplated that a construction permit extension application embrace consideration of every development which has arisen since issuance of a construction permit, it could have done so. It did not; and with good reason. If a construction permit extension application were to provide such an occasion, agency action could never be finalized and activities undertaken in reliance thereon proceed. This would be antithetical to sound administrative policy and would be a disservice to the general public interest.

Design changes during construction and developments in the NRC regulatory process are anticipated. The matter of nuclear construction, licensing, and regulation is a dynamic process. Not every "change" therein requires licensing board scrutiny prior to the eventual submission 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 combine 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 will occur prior to the operating license application, their remedy is to seek appropriate Commission action under 10 C.F.R. § 2.206.

Contention 12 incorporates by reference and reasserts all other contentions set forth in, or incorporated by reference in, Petitioners' initial intervention petition. The Staff responded to that petition on January 23, 1980 and adheres to its position taken with respect to the other proposed issues raised therein. See Staff response at 15-18.

Accordingly, the Staff believes that the petition of the Izaak Walton League, et al. fails to meet the "interest" requirement of 10 C.F.R. § 2.714 in its present form. Petitioners have met the corollary "contention" requirement of that regulation by the advancement of at least one acceptable contention.

Supplemental Petition of the State of Illinois

The supplemental petition of the State of Illinois does not address the State's standing in this proceeding. The Staff position on this matter is given in its response to intervention petitions, dated January 23, 1980, at 21-22. To summarize, the Staff position is that the State possesses an interest which could provide a basis to confer standing in this matter but it has not adequately particularized how its purported interest could reasonably be affected by the outcome of this proceeding, as required by 10 C.F.R.

§ 2.714. The supplemental petition does not provide any additional information or argument in support of this aspect of the petition and, accordingly, the Staff position is not changed.

Petitioner advances eight contentions for litigation as issues in this matter. The majority of these contentions raise issues which fall outside the permissible scope of this action.^{9/}

Contention 1 asserts that no construction permit extension may be granted until an environmental impact statement is prepared. It is argued that the impact statement prepared in connection with the Bailly construction permit is invalid due to developments which have allegedly arisen since its issuance. These developments include an alleged reduction in need-for-power and new "regulations and policy" regarding siting and emergency evacuation plans. Supplemental petition at 3.

There is no legal authority cited to support the proposition that an environmental review of a construction permit extension application must embrace such considerations. Nor is there any basis for the implicit assumption that the conduct of previously evaluated construction activities over an

^{9/} By pleading, dated February 27, 1980, Petitioners Izaak Walton League, et al. (Joint Petitioners) joined in and adopted proposed Illinois contentions 1, 4, 5, 6, 7, and 8. If a hearing is ordered in this matter to which both Joint Petitioners and State of Illinois are parties, and these specified contentions are admitted, the Staff requests that prosecution of these contentions be consolidated pursuant to 10 C.F.R. § 2.715a.

extended period of time will entail a significant incremental environmental impact so as to bring the environmental impact statement requirement of Section 102(2)(C) of NEPA into play.

The Staff intends to conduct an evaluation of all reasonable impacts attributable to the extension of the construction period beyond those previously evaluated. It is premature to determine, without some factual basis to so demonstrate, whether a significant incremental environmental impact will be occasioned by the requested extension. Accordingly, the Staff believes that this contention is inadmissible at this time.

Contention 2 asserts that the reasons assigned in the construction permit extension application for the delay in the completion of construction were within the control of the Applicant. It is argued that the Applicant was responsible for the circumstances underlying the construction delay in two particular respects. First, it is alleged that the delay resulting from the need to construct a slurry wall was due to the Applicant's inadequate assessment of the environmental effects of its construction plan. Supplemental petition at 5. Second, it is alleged that the delay in construction since September 1977, while the Staff reviews the Applicant's pile foundation plans, was within the control of the Applicant. It is claimed in this regard that problems experienced in pile design were due to inadequate research and design of the foundation by the Applicant and its contractors.

Id.

In principle, this contention raises an appropriate issue for adjudication under the provisions of 10 C.F.R. § 50.55(b). However, evidentiary consideration of the two examples singled out by the State as matters beyond the control of the Applicant should not be permitted to devolve into litigation of the merits of the Applicant's actual construction dewatering plans, a matter which was previously litigated in a proceeding in which the State participated and is thus barred by res judicata, or into the merits of the current foundation pile plans which the Commission has already determined should await consideration at the operating license stage. See Bailly Commission Memorandum and Order, supra (December 12, 1979).

Contention 3 asserts that, in order to demonstrate "good cause" for the requested extension, the Applicant must show that it was not in large measure responsible for the events leading to the delay in construction and that the reasons it assigns for the necessary extension do not give rise to health and safety or environmental issues. Supplemental response at 7. However, the contention does not raise a definitive issue along these lines. Rather, the only specific allegation in the contention is that the extension of construction will lead to irreparable environmental damage to the Indiana Dunes National Lakeshore due to continued construction dewatering. Thus construed, this contention is essentially identical to proposed contentions 4 and 5 of the Izaak Walton League, et al., and would be similarly admissible. However, if a hearing is ordered in this matter to which both the Izaak Walton League, et al. and the State of Illinois are parties, and the Izaak

Walton League, et al. contentions 4 and 5 and Illinois contention 3 are admitted pursuant to 10 C.F.R. § 2.715a, the Staff requests that they be consolidated.

Contention 4 alleges that the consequences of a Class 9 accident must be considered in this proceeding. No logical nexus is drawn between this issue and any of the reasons assigned in the construction permit extension application as "good cause" for the requested extension and, otherwise, raises an issue outside the scope of this proceeding under 10 C.F.R. § 50.55(b) and Cook, supra.

Contention 5 asserts that, in determining whether good cause exists to issue a construction permit extension, the Board must consider whether the Applicant can competently build and operate a safe reactor. Supplemental petition at 13. The State cites no legal authority for this proposition and the Staff is aware of none. The Commission has already found, after extensive hearings, that the Applicant is "technically qualified to design and construct the proposed facility." See Bailly Construction Permit CPPR-104, dated May 1, 1974, at Section 1(F). Absent initiation of a request for agency action under 10 C.F.R. § 2.206, this finding may not be collaterally attacked. Further, there is no reasonable nexus drawn between this issue and any of the reasons asserted in the construction permit extension application as good cause for the requested extension, nor is it otherwise within the scope of this proceeding as defined by 10 C.F.R. § 50.55(b) and Cook, supra.

Contention 6 asserts that the Bailly construction permit extension application is inadequate in that there is no updated discussion of the characteristics of the site, principally its alleged proximity to large population centers and the past effects of construction upon the ecology of the site. The salient site characteristics and its suitability as a reactor site were litigated in the construction permit hearings to which the State could have become a party. It is thus barred from seeking the introduction of such issues in this proceeding.

In any event, the suitability of the site is not an issue that falls within the scope of this proceeding. Whatever deficiencies are alleged to exist in the site must be raised in another avenue. In fact, the State of Illinois has done so. In a letter from W. Scott, Illinois Attorney General, to then Chairman Hendrie, dated November 13, 1979, a halt in the construction of Bailly was sought on the principal grounds of population density. A copy of this letter is attached to the NRC Staff response to intervention petitions filed herein, dated January 16, 1980. This matter is under NRC consideration pursuant to a decision by the Director of Nuclear Reactor Regulation to treat the letter of Mr. Scott as a request for action under 10 C.F.R. § 2.206.^{10/} This ensures that the State's concerns in this regard will receive appropriate NRC consideration.

Citing the Cook decision, supra, contention 7 asserts that several of the causes for delay in the completion of construction, in and of themselves,

^{10/} A copy of this determination was sent to the Board and parties in a letter, dated February 26, 1980.

cast serious doubt on the Applicant's ability to construct a safe facility. It is argued that issues to be considered in this connection include the modification in pile design, changes in soil structure due to pile tests and borings, the Mark II containment design, the need to entirely reanalyze the Bailly plant pursuant to current regulatory requirements and criteria, and post-TMI recommendations.

The Appeal Board in Cook states 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. 6 AEC at 420. None of the safety issues raised in Illinois' proposed contention 7, however, are associated with the reasons asserted in the construction permit extension application as "good cause" for the requested relief. Even assuming such a nexus could be demonstrated, litigation of these issues can and should abide any eventual operating license hearings. If the Staff believed otherwise, it would be incumbent upon it to take appropriate action. 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 plans undergo evaluation.

Contention 8 asserts that before it may grant a construction permit extension, the Board must consider "(1) those features of the planned construction

which could be related to a TMI type of accident and (2) generic safety problems which may lead to future accidental occurrences of any sort."

Supplemental response at 17-18. It is further argued that in reviewing potential safety problems, the Board must explicitly consider: (1) generic unresolved technical issues relevant to the Bailly reactor design, (2) safety issues described in NUREG-0510, issued January, 1979 (of which certain are itemized), and (3) safety issues resulting from the TMI-2 accident, including several specified recommendations allegedly listed in NUREG-0560.

It is clear on their face that none of these designated 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 to be cognizable under Cook. Each of these issues, to the extent specifically relevant to the Bailly facility, will be considered at the operating license stage, at which Petitioner will have the opportunity to request a hearing. If the plant, as built, is unacceptable, it could be denied an operating license. The fundamental purpose of a construction permit extension hearing is, "after all, not to determine the safety and environmental aspects of the reactor in question." Cook, supra, 6 AEC at 420. These aspects are first considered at the construction permit stage and considered further at the operating license stage of the process. If Petitioner believes that an unsafe or environmentally harmful activity or practice will occur prior to the operating license application, the remedy is to seek appropriate Commission action under 10 C.F.R. § 2.206.

Accordingly, the Staff believes that the petition of the State of Illinois fails to meet the "interest" requirement of 10 C.F.R. § 2.714 in its present form. However, Petitioner has raised at least one acceptable contention so as to comply with the "contention" requirement of such regulation.

Supplemental Petition of George and Anna Grabowski

Petitioners Grabowski filed a supplemental petition which evokes concern over their health and safety to which the Staff is not insensitive. Their brief initial petition emphasized their apprehension over the population density surrounding the plant and the need to assure adequate evacuation potential.

It is the utmost concern of the NRC to assure that Bailly can be safely constructed and operated. The Staff is sympathetic with Petitioners' frustration over its inability to litigate operational safety issues in this proceeding, but that is simply not the purpose or nature of this narrow action.

Petitioners, by virtue of their residence and conduct of activities in proximity to the Bailly site, clearly fall within the geographical zone of interest which could provide a basis to confer standing in this proceeding. However, Petitioners have not alleged an interest which could reasonably be affected by the outcome of this proceeding. Such an interest could conceivably derive from the impacts of continued construction activity over an extended

period of time. Petitioners' principal concern, however, is radiological health and safety. However justified this concern might be in a construction permit or operating license proceeding, it is not cognizable within the scope of this proceeding.

Petitioners identify five alleged "injuries" they will assertedly suffer if the construction permit extension is granted. Their first concern is over the potential health effects of plant operation. However, as already noted, this is not the proceeding which will determine whether Bailly will be allowed to operate. Cf. Cook, supra, 6 AEC at 420. This will be the subject of a separate operating license application for which Petitioners may request a hearing. Second, Petitioners claim that eight additional years of plant construction would cause them serious stress and apprehension. These interests do not reasonably fall within the "zone of interests" protected by either the Atomic Energy Act or NEPA in an action of this nature.^{11/} This interest is far too attenuated and is not susceptible to a reasonable degree of proof. The third alleged "injury" is an interest in being free from having to read newspaper articles concerning the Applicant's plans for Bailly construction. This is similarly not an interest which falls within the "zone of interest" cognizable under the separate statutes implemented by the

^{11/} The novel question of whether psychological distress is an issue which is cognizable under the Atomic Energy Act or NEPA is one which the Commission has requested briefs upon in the TMI-1 restart hearings. The Staff answered that question in the negative in its written brief, dated October 31, 1979. That case deals with the request for resumption of operation of TMI-1 and takes place in a general environment in which public sensibilities are acute following the TMI-2 accident.

NRC. The fourth asserted "injury" is the need to continue efforts to halt construction of Bailly, if the requested extension is granted. This is not a cognizable interest in this proceeding. Lastly, Petitioners claim that continued construction of Bailly will delay the search for energy alternatives. This proceeding is not designed to take into consideration alternate energy sources. Such alternatives were considered in the construction permit hearings and are otherwise irrelevant to the scope of this proceeding.

Petitioners identify three aspects of the proceeding upon which intervention is sought. The Staff will construe these as a statement of Petitioners' proposed contentions herein.

Contention 1 asserts that the stay of construction imposed by the Court of Appeals for the Seventh Circuit in the Bailly matter is not among the factors the Commission will recognize as providing "good cause" for delaying construction under the terms of 10 C.F.R. § 50.55(b). This presents an acceptable issue concerning the interpretation to be accorded a Commission regulation. However, Petitioners proceed to criticize the Applicant's direct case in those hearings as the apparent basis for this contention. If this is indeed the thrust of proposed contention 1, it is misguided. The judicially-imposed stay was ultimately lifted by the Supreme Court. Therefore, the stay was ultimately determined to be unwarranted. This proceeding is not the occasion to relitigate any aspect of that complex construction permit litigation. If a judicial stay of construction constitutes a cognizable ground for an

Applicant's failure to complete construction, the inquiry is at an end. Who bears responsibility for the stay and whether it was well-founded is immaterial.

Contention 2 asserts that the delay attributable to the ongoing Staff review of the Applicant's pile installation proposal does not provide a cognizable ground upon which to justify failure to complete construction under 10 C.F.R. § 50.55(b). This is an acceptable contention. Petitioner further argues, however, that the proposed pile installation plan lacks merit. This aspect of the contention is inadmissible. The Commission has already determined that the technical merit of the foundation pile proposal should await the operating license stage. See Bailly Commission Memorandum and Order, supra (December 12, 1979).

Contention 3 asserts that the installation of the slurry wall is not a cause which can be relied upon to provide a basis for not completing construction in a timely manner under 10 C.F.R. § 50.55(b). This is an acceptable contention so long as it does not entail litigation of the merits of the decision to install the slurry wall.

Contention 4 asserts that, in determining whether there is good cause for extending the construction permit, the Board should consider the following: "Do we really need this plant? In light of all the new evidence, is it still a worthwhile risk? Has NIPSCO shown that they can be trusted to tell

the truth to the public?" Supplemental petition at 6. These factors are unrelated to the reasons assigned in the construction permit application for the requested extension and are otherwise beyond the scope of this proceeding.

Accordingly, the Staff believes that Petitioners Grabowski have not satisfied the "interest" requirement of 10 C.F.R. § 2.714. Petitioners have met the "contention" requirement of that regulation.

Supplemental Petition of the City of Gary, Indiana, et al.

Petitioners Gary, Indiana, et al. are comprised of several organizations, including Local 6787 of the United Steelworkers, the Bailly Alliance, Save the Dunes Council, and the Critical Mass Energy Project. The supplemental petition is accompanied by the affidavits of individual members of all organizational petitioners.^{12/} Affiant members of Local 6787, the Bailly Alliance, and Save the Dunes reside, engage in employment, or conduct recreational activities in close proximity to the Bailly site and allege that their health and safety interests (presumably radiological) will be adversely affected by the outcome of the proceeding. Petitioner Critical Mass Energy Project seeks discretionary intervention in this proceeding on the grounds that its expertise with regard to emergency planning will

^{12/} The affidavit submitted on behalf of Local 6787 of the United Steelworkers is signed by its president. He does not provide his residence or actual place of employment, nor does it appear on the face of the affidavit that his personal interests are being relied upon to confer standing on the organization. Rather, he states that Local 6787 has authorized him to intervene upon its collective behalf in this proceeding.

contribute substantially to the development of the sound record. Supplemental petition at 4. An affidavit of its Director accompanies the supplemental petition. It is stated therein that Critical Mass has participated in numerous proceedings before the NRC and Congress regarding the subject of emergency planning, served as a consultant to special NRC study groups concerning emergency planning, and has assisted local governments in conducting emergency evacuation drills.

Petitioners cite approvingly the Supreme Court opinion in Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978), for the proposition that a person who resides near a nuclear plant has standing as a result of the risk of radiological injury from routine plant operation. Supplemental petition at 2-3. However, the nature of the litigation involved in Duke Power Company is distinguishable from that involved herein. Duke Power Company involved a post-construction permit suit for declaratory judgment challenging the constitutionality of the Price-Anderson Act. The majority^{13/} opinion articulated a two-pronged test for standing requiring, first, proof of a "distinct and palpable injury" and, second, a "fairly traceable" causal link between such injury and the challenged conduct. 438 U.S. at 72. With regard to the first prong of the test, the Court found that the plaintiffs therein (who also participated in the construction permit hearings involving the subject reactors) possessed a cognizable health and safety interest, among others, with respect to the plants in question. With regard to the

^{13/} Three Justices filed separate opinions sharply critical of the Court's ruling on standing. 438 U.S. at 94-103.

second prong of the test, the Court found that the plaintiffs had made a satisfactory showing of a "substantial likelihood" that such plants could not be completed or operated absent ("but for") the statutory guarantees provided by the Price-Anderson Act so as to provide a causal connection between their alleged injury and the challenged conduct. Consequently, the Court found that their interest could be fairly redressed by the grant of the requested declaratory relief. In arriving at this result, the Court relied heavily upon the factual findings reached by the District Court below after several days of hearings on the question of standing and ripeness. 438 U.S. at 72.

However, nothing in Duke justifies the broad interpretation of the "causal link" urged by Petitioners particularly where two other completely adequate forums have been provided to redress injuries of the type alleged, viz, the earlier construction permit proceeding and the operating license application for which an opportunity for hearing will be subsequently required. Duke does not require a Licensing Board to admit persons to a proceeding where the interests alleged to be affected are not causally related to the action being considered.

The scope of the instant action, and the nature of the interest which could necessarily be affected thereby, is circumscribed by regulation. It can not be as liberally construed as one involving a statutory challenge with broad implications for the future of nuclear generation. The Appeal Board has

expressly stated that a construction permit extension proceeding is not fundamentally designed to "determine the safety and environmental aspects of the reactor in question." Cook, supra, 6 AEC at 420. Rather, it is aimed at ascertaining whether previously authorized construction activities should be allowed to take place over an extended period of time.

Significantly, Petitioners' sole and common interest in this proceeding is in the subject of emergency planning and evacuation. These are not matters which can be adjudicated in this proceeding under the ambit of 10 C.F.R. § 50.55(b) and the Cook, supra, decision. Thus the interest Petitioners seek to protect (namely, implementation of acceptable emergency and evacuation plans for the plant) cannot be protected. Stated another way, the specific relief which Petitioners seek to obtain through participation in this proceeding cannot be redressed by any decision which may issue herein unless their interest is construed as simply one of preventing continued construction of the Bailly facility under any terms and conditions. The Staff does not understand this to be the interest of Petitioners in this matter.

The sole contention raised by Petitioners herein is that the Applicant cannot demonstrate "good cause" for an extension absent a showing that realistic evacuation and emergency plans can be implemented. Supplemental petition at 8. 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 as to be cognizable under Cook, supra, and is a matter that can, and should, abide litigation at

the eventual operating stage. The Commission's requirements regarding emergency planning are the subject of proposed rulemaking^{14/} and may well change over the course of Bailly construction. The adequacy of 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' interest or the public interest is harmed by undertaking consideration of this matter at the operating license phase. Cf. Cook, supra. If Petitioners believe that adequate emergency and evacuation plans 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 as the Illinois Attorney General has done on a closely related matter.

Accordingly, the Staff believes that the petition of the City of Gary, Indiana, et al. fails to meet either the "interest" or "contention" requirements of 10 C.F.R. § 2.714 and should be denied in its present form.

Supplemental Petition of Dr. George Schultz

The supplemental petition of Dr. Schultz essentially constitutes a restatement and reemphasis of the position espoused in his initial intervention petition. Petitioner asserts that his constitutional right to life is

^{14/} 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).

threatened by the nuclear plant and its lack of a "properly specified evacuation plan" for the inmates of the maximum security prison in Michigan City and the surrounding communities. Supplemental petition at 2. Petitioner does not expressly advance any particular contentions for litigation. His fundamental concern, however, is clearly over the alleged absence of a "workable evacuation plan." Supplemental petition at 3.

The Staff position on Petitioner's standing in this proceeding is given in its response to intervention petitions, dated January 16, 1980, at 13-14. That position is that Petitioner clearly falls within the geographical zone of interest that could provide a basis to confer standing in this matter, but he has to specify how that interest may be affected by the outcome of the instant proceeding, a prerequisite for standing under 10 C.F.R. § 2.714 and interpretative case law.^{15/} Stated differently, Petitioner does not allege an interest which could reasonably derive from the nature of the proposed action, namely, authorization to extend the time for the performance of previously authorized activities. It is noted, in connection with consideration of the supplemental petition of the City of Gary, et al., that the subject of emergency preparedness, in general, and evacuation plans, in particular, is one that clearly falls outside the scope of this proceeding. The subject of emergency planning on a "preliminary" basis was litigated in the Bailly construction permit proceeding and will be thoroughly considered

15/ See Pebble Springs, supra, 4 NRC at 613.

by the Staff on a "final" basis in connection with the eventual operating license application for the facility.

Accordingly, the Staff believes that the petition of George Schultz does not satisfy either the "interest" or "contention" requirements of 10 C.F.R. § 2.714 and should be denied in its present form.

CONCLUSION

For the foregoing reasons, the Staff believes that none of the subject intervention petitions (as supplemented) satisfy the pertinent "interest" requirements of 10 C.F.R. § 2.714. The petitions of the Izaak Walton League, et al., State of Illinois, and George and Anna Grabowski meet the corresponding "contention" requirements of that regulation. Unless and until petitioners can perfect their showing of "interest" in this matter, their petitions for intervention must be denied.

Respectfully submitted,



Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of March, 1980

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 SUPPLEMENTAL INTERVENTION PETITIONS" 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 7th day of March 1980, except as hereinafter provided. Copies of this pleading were hand carried on this same date to the offices of those identified below with a double asterisk. By prior mutual agreement, in addition to mailing, service upon Mr. Vollen is to be effected on the 8th day of March, 1980 through the office of Mr. Eichhorn.

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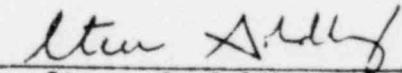
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