

April 10, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



IN THE MATTER OF)
)
NORTHERN INDIANA)
PUBLIC SERVICE COMPANY)
(Bailly Generating Station,)
Nuclear-1))

DOCKET NO. 50-367
(Construction Permit
Extension)

PORTER COUNTY CHAPTER INTERVENORS'
BRIEF IN SUPPORT OF CONTENTION 1

In seeking an extension of its construction permit for the Bailly nuclear plant, NIPSCO claimed that construction of the plant was not completed by the latest completion date for a variety of reasons, many of which were assertedly "beyond NIPSCO's control." (See NIPSCO's letters of February 7 and August 31, 1979 to Harold R. Denton.) For example, the February 7, 1979 letter states that after issuance of the construction permit, "because of a variety of delays beyond NIPSCO's control, NIPSCO has been able to achieve only the equivalent of approximately 14 months of construction." (Emphasis supplied). The letter then goes on to specify those events which assertedly constitute the "variety of delays beyond NIPSCO's control," including the length of time the Court of Appeals stay halted construction, the amount of time for remobilization of contractors, the time for construction of the slurry wall, and the length of the NRC Staff review of NIPSCO's foundation pile design.

8005210012

In response to NIPSCO's claim that the delays were beyond its control, Porter County Chapter Intervenors submitted Contention 1, contained in our First Supplement to Petition for Leave to Intervene, dated February 26, 1980, in which we assert, inter alia, that the delays relied upon by NIPSCO for its failure to have completed construction, were not, in fact, beyond its control. Thus, we contend that contrary to NIPSCO's assertions, the delays, and the length thereof, claimed by reason of the Court of Appeals stay, the remobilization of contractors, the construction of the slurry wall, and the Staff review of the foundation piles were not beyond NIPSCO's control. Rather, we asserted that the amount of delay could have been reduced or avoided by NIPSCO and that the reasons for failure to have completed construction were not beyond NIPSCO's control. Contention 1 further disputes that the reasons given by NIPSCO are in fact the reasons for non-completion and seeks to litigate what in fact the reasons were for NIPSCO's failure to complete construction, and whether those reasons were or were not beyond the control of NIPSCO.

At the special Prehearing Conference on March 13, 1980, the Chairman requested that briefs be filed, within four weeks of the Prehearing Conference, on the issue of whether the reasons for non-completion of construction must have been beyond NIPSCO's control in order for those reasons to satisfy the "good cause" requirement of Section 185 of the Atomic Energy Act and 10 CFR §50.55(b).

Apparently NIPSCO changed its position from the time it wrote its February 7, 1979 letter, when it claimed that the reasons for non-completion were beyond its control, to the time of the prehearing conference, when it claimed that legally it does not matter whether the reasons were beyond its control or within its control. Nonetheless, because NIPSCO's existing application for extension, with which this proceeding is concerned, asserts that the reasons for non-completion were beyond NIPSCO's control, the Board need not decide, at least at this juncture, whether that assertion was unnecessary surplusage. In other words, there can be no doubt that so long as NIPSCO's factual assertions remain part of the record, intervenors must be permitted to litigate the accuracy of those assertions.

Moreover, NIPSCO's apparent current position -- that whether the failure to meet the completion deadline was within its control or beyond its control is legally irrelevant -- is insupportable. The reasons for non-completion of construction are part of the factors to be considered when the Board looks at the "totality of the circumstances" to determine whether NIPSCO has shown "good cause" for the extension it seeks. Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), 6 AEC 414, 420 (1973).^{*} To the extent that the reasons for non-completion were beyond NIPSCO's control

*As we argued at the Prehearing Conference, the other factors in the "totality of the circumstances" include the status of construction, incremental risks or harm arising from an extended period of construction, safety or environmental questions arising out of the reasons for delay, and significant issues arising after the issuance of the construction permit which could not have been considered prior to its issuance and which affect the issue of whether good cause exists for continued construction.

they weigh in favor of NIPSCO's meeting its burden of showing good cause for the extension. On the other hand, to the extent that the reasons for non-completion were within NIPSCO's control, those reasons weigh against good cause. It must be remembered that the burden is on NIPSCO to show good cause for the extension it seeks, not good cause for failure to have completed construction by September 1, 1979.

Both the language of 10 CFR§50.55(b) and the Appeal Board decision in Cook make clear that whether the reasons for non-completion were within or beyond the control of NIPSCO is relevant. The regulation uses the phrase "acts beyond the control of the permit holder." Cook specifies that to the extent that the reasons why completion deadlines were not met are part of the "good cause" consideration, the applicant has the "burden of establishing that the failure to complete the construction...by the latest dates specified in the construction permits was due (in large measure at least) to circumstances beyond their control." (6 AEC at 416). In sum, whether or not the reasons for non-completion were within or beyond NIPSCO's control is clearly relevant to the good cause consideration.

It should also be noted that regardless of the Board's disposition of the legal issue of whether in order to constitute good cause the reasons for NIPSCO's non-completion must have been beyond its control, Porter County Chapter Intervenor's Contention 1 still presents viable issues to be litigated in this proceeding. That is, apart from whether the reasons

for non-completion asserted by NIPSCO were within or beyond its control, we still dispute that the reasons given by NIPSCO were in fact the reasons for non-completion. Thus, there is a question of fact, to be resolved following a hearing, as to whether, and if so, the extent to which, each of the reasons asserted by NIPSCO was a factor in the failure to meet the completion of construction deadline of September 1, 1979.

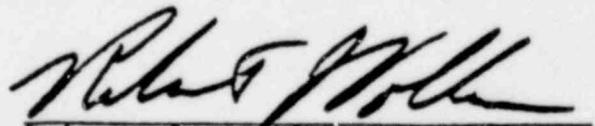
Finally, the NRC Staff's position on the legal issue addressed here should be noted. That position appears to be that whether the factors assigned by NIPSCO for its failure to complete construction were within or beyond NIPSCO's control "is a relevant area for inquiry under the provision of 10 C.F.R. §50.55(b)." (NRC Staff Response to Supplemental Intervention Petitions, dated March 7, 1980, p. 9).

CONCLUSION

Porter County Chapter Intervenors' Contention 1 should be admitted as a matter to be litigated in this proceeding.

Dated: April 10, 1980

Respectfully submitted,



Robert J. Vollen, one of
the Attorneys for Porter
County Chapter Intervenors

Robert J. Vollen
109 N. Dearborn St.
Chicago, IL 60602
(312) 641-5570