UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF THE APPLICATION OF COMMONWEALTH EDISION COMPANY, INTERSTATE POWER COMPANY AND IOWA-ILLINOIS GAS AND ELECTRIC COMPANY FOR CONSTRUCTION PERMIT AND EARLY SITE REVIEW, HEARING, AND PARTIAL INITIAL DECISION ON SITE SUITABILITY	)	Appeal from Atomic Safety and Licensing Board (John F. Wolf, Chairman; Dr. Robert L. Holton; and Glenn O. Bright)
	)	Dockets Nos. S50-599 S50-600

BRIEF IN SUPPORT OF APPEAL

This is the appeal of intervenors Citizens Against Nuclear Power, Inc., James Runyon and Edward Gogol (hereinafter sometimes referred to collectively as CANP) from the Orders of the Atomic Safety and Licensing Board denying their Joint Petition to Intervene.

Citizens Against Nuclear Power, Inc. is a not-for-profit Illinois Corporation concerned with protecting the public and the individuals comprising the organization from the environmental, economic and physical safety hazards of nuclear energy. Its members reside throughout Illinois, including the Carroll and Cook County regions.

James Runyon resides, is employed, and owns property in Rock Island, Illinois, about forty miles south of the proposed site.

Edward Gogol resides and owns property in Chicago, Illinois, about one hundred thirty three miles east of the proposed site.

The above organization and individuals filed a Joint Petition for Intervention in the early site review of a proposed nuclear facility in Carroll County, Illinois. On October 11, 1979, the Atomic Safety and Licensing

Board determined that Mr. Gogol lacked standing,(presumably due to insufficient proximity to the proposed site),and consolidated Citizens Against Nuclear Power, Inc. and James Runyon as CANP. The Board denied CANP contentions 1-14, reserving ruling on contention 15. On Ma_ 30, 1980, the Board ruled on all 15 CANP contentions, rejecting the same as issues in the early site suitability hearing.

The fifteen contentions may be summarized very briefly as follows:

1. Inaccuracies of Applicants' projected need for power;

2. (a) Availability of alternative sources of energy;
   (b) Depletion of uranium supply;

3. Financial qualifications of Applicants;

4. Invalidity of cost-benefit analysis based upon 40-year operating life;

5. Financial hardship on ratepayers;

6. Labor and capital efficiency of alternative sources of energy;

7. Amount of spent fuel to be stored at site and duration of said storage;

8. Possibility of site becoming permanent dump for spent fuel;

9. Possibility of site becoming a permanent low and intermediate level radioactive waste dump;

10. Failure of Applicants to indicate how decommissioning the plant would occur;

11. Invalidity of cost-benefit analysis based upon unknown and uncertain cost of waste disposal and decommissioning;

12. Ability of Applicants to obtain fuel;

13. Health consequences of licensing nuclear power plant;

14. Inadequacy of insurance to be obtained by Applicants in light of the Price-Anderson Act.

15. Lack of evacuation plan and improbability that suitable plan will be found.

CANP appeals from the denial of contentions 1, 2, 4, 6, 7, 8, 9, 10, 11, and 13 and from the denial of standing to Edward Gogol.

APPROPRIATENESS OF THIS APPEAL

The Practice Regulations of the NRC clearly allow CANP to take this appeal. 10 C.F.R. Sec. 2714a(b) provides: "An order wholly denying a petition for leave to intervene. . . is appealable by the petitioner on the question whether the petition. . . should have been granted in whole or in part." As discussed above, the Board has denied (1) the standing of Edward Gogol, (2) all CANP contentions, and (3) the Joint Petition to Intervene.

TIMELINESS OF THIS APPEAL

Under 10 C.F.R. Sec. 2.714(a)(a), the appeal must be taken within ten days after service of the Order. Whenever service is by mail, five days are to be added to the time within which the appeal must be taken. See 10 C.F.R. Sec. 2.710. If the deadline falls on a weekend or holiday, the due date is advanced to the following non-holiday weekday. Since the Order of the Board is dated May 30, 1980, the deadline for filing this appeal is June 16, 1980.

ISSUES

1. WHETHER THE ATOMIC SAFETY AND LICENSING BOARD ERRED IN RULING THAT N.E.P.A. DOES NOT REQUIRE ISSUES RAISED IN CONTENTIONS 1, 2, 4, 6, 7, 8, 9, 10, 11, AND 13 TO BE CONSIDERED AT EARLY SITE REVIEW PROCEEDINGS?

2. WHETHER THE ATOMIC SAFETY AND LICENSING BOARD ERRED IN RULING THAT THE STANDING OF AN INDIVIDUAL INTERVENOR CAN BE DENIED MERELY BECAUSE HE RESIDES MORE THAN FORTY MILES FROM A PROPOSED NUCLEAR POWER PLANT?

Contentions 1, 2, 4, 6, 7, 8, 9, 10, 11, and 13 are issues which must be considered at some time in the Carroll County proceedings pursuant to the National Environmental Policy Act (NEPA), 42 USC 4321 et seq. The Statute provides that "all agencies of the Federal Government shall . . . (E) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be evoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . ." (emphasis supplied). 42 USC 4332.

In its Regulations, the Nuclear Regulatory Commission (NRC) sets forth actions which require NEPA environmental impact statements. 10 CFR 51.5 (a) Early site review is not specifically included in the Section 51.5(a) list of activities. However, a NEPA environmental impact report is mandated by the Statute and the Regulations because an early site review is "a major Commission action", "which significantly affects the quality of the human environment." 10 CFR 51.5(a)(10); 42 USC 4332. This conclusion is amply supported by existing case law interpreting NEPA.

In Scientists' Institute for Public Information, Inc. v. A.E.C., 481 F. 2d 1079 (D.C. Cir., 1973), plaintiffs brought an action for declaratory relief that the AEC was required to issue a NEPA environmental impact statement

for its Liquid Metal Fast Breeder Reactor Program (LMFBR). The AEC's position was that a NEPA statement would not be required for the development program but rather for individual fast breeder facilities. The AEC further contended that even if such a statement was required for the program, it would not be meaningful or even necessary until the program had developed further. The Appellate Court held that a NEPA environmental impact statement was indeed required at the infancy of the program:

> "The Commission takes an unnecessarily crabbed approached to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of the broad agency programs. Indeed, quite the contrary is true. Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." 481 F. 2d at 1087.

The Court then held that "the program constitutes 'major federal action' within the meaning of the Statute." Id. at 1088

> "Thus there is 'Federal action' within the meaning of the Statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. (citations and footnotes omitted). In each of the instances the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party - private or governmental - to take action affecting the environment. The Commission does precisely the same thing here by developing a technology which will permit utility companies to take action affecting the environment by building LMFBR power plants. Development of the technology serves as must to affect the environment as does a Commission decision granting a construction permit for a specific plant. Development of the technology is a necessary precondition of construction of any plants." (emphasis supplied)

The analogy of the Appellate Court's decision to the early site selection proceeding is apparent. Commission (or ASLB) approval of the appropriateness

of a site serves as much to affect the environment as does a Commission decision to grant a permit to construct a specific plant. The site selection process is a logical part of the chain of contemplated actions herein. Approval of a site is a necessary precondition of construction of a nuclear power plant.

Courts have found major federal action where the proposed activity would "tip the scale" towards an activity which would clearly affect the environment. See Natural Resources Defense Council v. United States Nuclear Regulatory Commission, 539 F. 2d 824 (2nd. Cir., 1976, cert. granted, 430 U.S. 944 (1977), vacated and remanded to consider question of mootness, 434 U.S. 1030 (1978)), (interim NRC licensing of use of plutonium in light water reactors and interim licensing of related nuclear fuel recycle activities prior to completion of generic environmental impact statement on uranium and plutonium mixed oxide fuel).

> "This is not a case where the proposed activity has independent utility, or where the proposed interim activity is "substantially independent" of the issue of wide-scale use. Rather, the interim activity is clearly tied to the anticipated wide scale use and would commit substantial resources to the mixed oxide fuel technology. Here the activity which will be permitted involves construction of nuclear separation and reprocessing facilities, conversion of light water reactors to use of mixed oxide fuel, and the implementation of "interim" safeguards for the transportation of a deadly and highly radiotoxic nuclear material. Each of these steps will tip the scale towards a favorable final decision on wide-scale use. Each of these steps will move the nationa towards the use of a hazardous nuclear fuel the implications of which are not fully understood. We accordingly conclude that the order below constitutes major federal action which has not been accompanied by an adequate NEPA analysis."

539 F. 2d at 844. See also Scientists' Institute, supra, 481 F. 2d at 1093-94. ("by the time commercial feasibility of the technology is conclusively demonstrated, and the effects of application of the technology certain, the purposes of NEPA will already have been thwarted. Substantial investments will have been made in development of the technology and options will have been precluded without consideration of environmental factors.")

Once again, analogies abound between these rules and the instant situation. If applicants proceed with the site suitability proceeding, they will be diverting manhours and capital away from possible alternatives, such as coal and solar energy. If the Carroll County site is approved, the scale will be tipped towards construction of a nuclear facility. NEPA requires that environmental factors be considered before options are precluded by the applicants' and Commission's actions herein.

Finally, the case of Gage v. Commonwealth Edison Company, 356 F. Supp. 80 (N.D.Ill., 1972) is particularly worthy of note. In that case, plaintiff landowners sought injunctive relief against defendant Commonwealth Edison Co. from acquiring certain property for its proposed LaSalle County nuclear plant prior to the AEC environmental analysis. The District Court ruled against the plaintiffs, holding that there had been no federal action by the AEC, as it had done no more than receive Edision's application for a construction permit in that case. However, the Court did set forth what would constitute federal action under NEPA:

> "The Court notes than in La Raza, supra, the case upon which plaintiffs principally rely, and in the other cases considered which have found federal action present, the common denominator was the factor of location approval by an agency of the federal government. Thus, it appears that the AEC's alleged failure to prepare an environmental impact statement prior to an applicant's land acquisition cannot constitute federal action absent either prior federal action (amounting to location approval)or a clear statutory duty so to act." (emphasis supplied) 356 F. Supp. at 85.

The previously cited authorities clearly demonstrate that an early site suitability proceeding is a major Federal (Commission) action as warrants applicability of NEPA. Of the ten rejected NEPA-related contentions, that one relative to the need for power most urgently warrants consideration.

"'Need for power' is a shorthand expression for the 'benefit' side of the cost benefit balance which NEPA mandates for a proceeding considering the licensing of a nuclear power plant. A nuclear plant's principal 'benefit' is of course the electric power it generates. Hence, absent some 'need for power', justification for building a facility is problematical." (emphasis supplied) Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 405 (10/29/76).

The need for building a nuclear facility must be the threshhold issue for a licensing board to tackle. Why go through the bother of all other actions relative to appropriateness of the site, safety considerations, etc., if the plant is not needed? Further, the Commission's own regulations relative to the site selection process mandate consideration of this issue. 10 CFR 2,101 (a-1)(1) requires information as to the range of postulated facility design and operation parameters. Under 10 CFR 2,603, the applicant must describe its long range plans for ultimate development of the site. The preliminary safety analysis report must analyze and evaluate major structures, systems and components of the facility which bear significantly on the acceptability of the site, assuming that the facility will be operated at the ultimate power level contemplated by the applicant. 10 CFR 50, 34 (a)9LO. How can operation parameters, extent of ultimate site development, or ultimate power levels be responsibly computed if it is not known how much power will need to be generated? The answer is they cannot; hence any attempts at compliance with 10 CFR Section 2,101 (a-1)(1), 2,603 and 50.34(a)(1) are invalid unless the need for power to be generated by the proposed facility is first calculated.

ARGUMENT - - APPELLANT GOGOL WAS IMPROPERLY REFUSED PARTICIPATION FOR LACK OF STANDING.

Appellant Gogol was presumably refused participation from this proceeding due to his geographical proximity to the proposed site, approximately 133 miles east thereof. This was the principal reason advanced by Applants for his dismissal - lack of standing. Applicants contended that Mr. Gogol resides outside the foreseeable zone of interest to be protected (currently a 40 miles proximity to the site). This conclusion is invalid for several reasons. In the event of a meltdown or other nuclear disaster, airborne radioactivity could be transported well over 133 miles from the stricken facility by wind. Releases from a nuclear power plant do not simply vanish at an imaginary barrier 40 miles away from the site. Finally, the Kemeny Commission and a NRC Commissioner both admit the substantial chances of the occurence of another nuclear accident similar to or even worse than Three Mile Island within the next twenty years. For these reasons, it is submitted that Appellant Gogol has standing to participate (or be consolidated with CANP and James Runyon) in these proceedings.

CONCLUSION

NEPA requires full consideration at the early site review stage of rejected contentions 1, 2, 4, 6, 7, 8, 9, 10, 11, and 13. Additionally, Nuclear Regulatory Commission Regulations require a showing of a need for the power to be generated by the proposed facility and calculation of the extent of the demand.

Edward Gogol possesses standing and should be allowed to participate (or be consolidated with CANP and and James Runyon) in the site review proceedings.

For the above reasons, the Order of the Atomic Safety and Licensing Board should be reversed insofar as it denies CANP's Petition for Intervention and rejects contentions 1, 2, 4, 6, 7, 8, 9, 10, 11, and 13 and denies the standing of Edward Gogol.

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NOTICE OF FILING
AND PROOF OF SERVICE

On the 12th day of June, 1980, I, Jan L. Kodner, attorney for Appellants, Citizens Against Nuclear Power, Inc., James Runyon and Edward Gogol, filed the following documents: Notice of Appeal and Brief in Support of Appeal, by mailing the same to the following parties:

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