

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

6/24/80

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 OBJECTIONS TO PROVISIONAL ORDER
FOLLOWING SPECIAL PREHEARING CONFERENCE

INTRODUCTION

On May 30, the Licensing Board issued a "Provisional Order Following Special Prehearing Conference" (Order) which, inter alia, ruled on the several intervention petitions filed in the captioned proceeding. Due to the poor quality, and questionable accuracy of the transcript of the conference, the Board indicated that it would issue its order on a "provisional" basis and allow the conference participants to file objections thereto before issuing a final order.

The Staff finds it necessary to submit objections to the Order. Certain of the objections are in the nature of "comments" to portions of the Order which appear to misstate the Staff position on the matters under discussion in apparent reliance upon the poor transcription of the conference. The Staff also object to several legal rulings contained in the Order. The Staff comments/ objections follow.

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DISCUSSION

A. Comments

The Staff believes that its position on the issues before the Board in this proceeding have not been correctly stated in the following respects. On page 10 of the Order, the Board states that the Staff "does not disclose what type of safety or environmental issues could be heard by the board" in this matter. The Staff believes that this statement is not accurate. The Staff has taken the position that, consistent with the Appeal Board decision in Cook,^{1/} this Board may consider health and safety or environmental issues arising from the reasons assigned for the extension which cannot abide the operating license stage and whose present consideration is necessary in order to protect the interest of intervenors or the public interest.^{2/} The Staff also indicated that, under Cook, it was appropriate to inquire whether any of the reasons assigned for the extension "in and of themselves" could raise doubts about the ability of the Applicant to construct a safe facility.^{3/}

At page 31-32 of the Order, the Board states that the "Staff . . . apparently recognized [in its brief on ash pond seepage], by referring to the underlying testimony of the expert witness in that proceeding, that the [construction permit] licensing board's decision read alone does not establish a

1/ Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973).

2/ See NRC Staff response to intervention petitions, dated January 23, 1980, at 9-11 and n. 10; NRC Staff response to supplemental intervention petitions, dated March 7, 1980, at 3-4.

3/ Id.

full determination of the ash pond seepage questions raised by the Inter-venors here.⁴ This is not entirely correct. The Staff relied on the decision of the licensing board alone to support its claim that, to the extent ash pond seepage is relevant to a consideration of the environmental effects of nuclear construction dewatering upon the Indiana Dunes National Lakeshore and adjacent areas, the matter was fully litigated during the Bailly construction permit hearings and is barred from reconsideration in this matter under the principles of collateral estoppel.^{4/}

Since issuance of the construction permit, the Applicant has sealed the ash ponds.^{5/} To the extent construction dewatering continues after the effects of ash pond on the Lakeshore and environs have been eliminated, the environmental effects of dewatering may properly be considered in this proceeding.

At page 35 of the Order, the Board states that the Staff "objected to the [Porter County Chapter Petitioners'] failure to file . . . individual statements [of interest and authorization] by referring to page 17 of the special prehearing conference transcript. The referenced statement at Tr. 17 was incorrectly attributed to Staff counsel by the reporter. In actuality, the statement appears to be that of the Board Chairman. The Staff did not raise the objection attributed to it.

^{4/} NRC Staff Brief on the Finality of Ash Pond Seepage and Construction Dewatering Considerations at the Bailly Construction Permit Stage, dated April 10, 1980, at 1-2.

^{5/} Staff Brief at 4 and referenced affidavit.

At page 41 of the Order, the Board states that "prior to, and during, the special prehearing conference, the Staff . . . objected to granting party status to Illinois under 10 C.F.R. § 2.714." This is not entirely correct. At Tr. 62-63, Staff counsel indicated that it had no objection if the assertion by Illinois counsel that its citizens could be adversely affected by the environmental impacts of prolonged dewatering formed the basis for Illinois' standing under 10 C.F.R. § 2.714. The Staff had previously determined that Illinois had advanced at least one acceptable contention.^{6/}

B. Objections

1. Standing to Intervene

The Staff objects to the Board's theory of standing to intervene in a construction permit extension.^{7/} The Staff believes that the standing requirements articulated in its several responses to intervention papers filed herein should be applied.^{8/}

In order to possess standing to intervene in an NRC adjudication, a person must possess an interest which "may be affected" by the proceeding at bar. 10 C.F.R. § 2.714(a)(1).^{9/} The legal effect of a construction permit extension action is to extend the time to complete previously authorized construction for "good cause shown." 10 C.F.R. § 50.55(b); Cook, supra. An extension

^{6/} See NRC Staff response to supplemental petitions, dated March 7, 1980, at 19.

^{7/} Order at 5-9.

^{8/} See NRC Staff response to intervention petitions, dated January 16 and 23, 1980, at 7-12, and NRC Staff response to supplemental intervention petitions, dated March 7, 1980, at 5-7.

^{9/} See Nuclear Engineering Co. (Sheffield Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

proceeding does not authorize commencement of construction or plant operation. Those authorizations evolve from separate and distinct licensing proceedings which carry with them the opportunity for evidentiary hearings. A person's interest in a construction permit extension proceeding cannot be co-extensive with his or her interest in a construction permit or operating license proceeding as the Board, in effect, found to be the case. Similarly, since the "fundamental purpose" of an extension proceeding is not to assess the safety of the plant in question,^{10/} and operational safety issues are not otherwise litigable within the scope of this proceeding, an interest in safe plant operation can neither be fully protected nor redressed in such proceeding. Thus, such a claim cannot provide a basis to confer standing in the proceeding at bar.^{11/}

The Board correctly observes that, were the extension not granted, the Applicant's construction permit would expire and a new construction permit application would be needed in order to then renew construction. Order at 8. From that, the Board reasoned that a person who would possess an interest in that "renewed" construction permit proceeding possesses an equivalent interest in the extension proceeding. As the Board states: "[these] are the persons who can claim injury-in-fact from the Licensee's being erroneously permitted to dispense with new construction permit hearings in violation of the Atomic Energy Act (as would be the case if there were no good cause for the requested extension) even if the violation (i.e., the

^{10/} Cook, supra, 6 AEC at 420.

^{11/} Cf. Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), Commission Memorandum and Order, 11 NRC ____ (March 13, 1980).

claimed lack of 'good cause') did not relate to health and safety or environmental matters." (emphasis added) Order at 8-9. The problem in this reasoning is that authorization for an extension upon a showing of "good cause" would be neither "erroneous" nor a "violation" of statute but rather clearly provided for by Section 185 of the Atomic Energy Act and the Commission's regulations appearing at 10 C.F.R. § 50.55(b).

The standing theory espoused by the Board ignores the nature and effect of a construction permit extension action within the Commission's overall licensing scheme. Furthermore, the Board improperly permits standing in some hypothetical proceeding, which could ensue only after the disposition of the instant proceeding, if at all, to provide standing in this proceeding.

2. Scope of the Proceeding

The Staff objects to the Board's theory on the scope of the proceeding.^{12/} The Staff believes that the position taken on this matter in its several responses to intervention petitions filed herein is correct as a matter of law and should be adopted by the Board.^{13/}

The scope of a construction permit extension proceeding is prescribed by 10 C.F.R. § 50.55(b) which provides that a construction permit may be extended for a reasonable period of time for good cause shown. Section

^{12/} Order at 17-28.

^{13/} See NRC Staff responses to intervention petitions, dated January 16 and 23, 1980, at 7-12, and NRC Staff response to supplemental petitions, dated March 7, 1980, at 2-5.

50.55(b) identifies those types of matters which could provide the basis for an extension.^{14/} This strongly suggests that the requisite showing is one of good cause for the delay in construction.

In addition to ascertaining whether there is good cause for the extension, 10 C.F.R. § 50.55(b) requires a finding that the requested extension period is "reasonable." Apart from the reasons for the delay and the extension period, the incremental adverse environmental and safety effects of the prolonged period of construction may be considered. Further, the Appeal Board in Cook, supra, concluded 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 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." 6 AEC at 420.

While the Board's theory of the scope is not entirely clear, it is evident that the Board fashioned a theory different than that briefed by the parties. To begin with, the Board indicated that a significant health and safety

^{14/} This regulation provides, in material part, that:

[t]he 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.

issue or environmental matter need not relate to the requested extension or arise from a reason assigned for the extension in order to qualify for possible adjudication in an extension proceeding. This is clearly beyond the ambit of Cook. The Board reasoned that it possessed jurisdiction to hear "significant matters affecting health or safety" in this proceeding compelling enough to warrant the Staff's initiation of a 10 C.F.R. § 2.202 show cause order, whether or not it has done so. Order at 26. The Board provides no legal authority for this proposition nor is the Staff aware of any. The Board fashions the following test for the admission of such matters: "whether, taking into consideration the construction permit Board's determination under 10 C.F.R. § 50.35(a)(4) that there was 'reasonable assurance' that all safety matters would be satisfactorily resolved before the construction completion date in the original application, this Board has strong reason to believe that there no longer is reasonable assurance with regard to a safety issue raised, that it will be satisfactorily resolved by the new completion date." Order at 27. Again, there is no legal authority for this novel proposition. The "test" clearly exceeds the bounds of the Cook decision.^{15/}

^{15/} The application of the Board's admissibility test is similarly unclear. It is not clear how safety matters that have arisen since issuance of the construction permit are to be treated under this standard. For example, will the Board decline to adjudicate such a matter unless there is "strong reason" to believe that there is not "reasonable assurance" that such an issue can be resolved by the new completion date whether or not the matter was considered at the construction permit stage? Or are such matters automatically in issue because they did not form a part of the construction permit board's decision? If this test is finally adopted by the Board, the Staff would urge that the Board do so with a clear indication that the former interpretation is the correct one.

To the extent that the Board relies on the provisions of 10 C.F.R. § 50.91 in arriving at this "test,"^{16/} such reliance is misplaced. Section 50.91 provides that "in determining whether an amendment to a license or construction permit will be issued to the applicant the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate." The Board then apparently imports the standards established in 10 C.F.R. § 50.35 to determine which matters outstanding at the construction permit phase should be deferred to the operating license stage. Order at 21. Section 50.91, however, is a regulation of general applicability to construction permit amendments. Section 50.55(b), by contrast, is specifically applicable to the action at bar, namely, a permit extension proceeding and, thus, prevails over the more general provisions of 10 C.F.R. § 50.91. Stated differently, in light of the clear provisions of 10 C.F.R. § 50.55(b), the standards governing issuance of a construction permit are neither "applicable" nor "appropriate" to extension proceedings by virtue of 10 C.F.R. § 50.91. In sum, the Staff does not believe that the Board has set forth an adequate basis in law for so dramatic a departure from established precedent in a proceeding such as this.

3. Short Pilings

The Staff does not agree with the Board that the issue of short pilings should be litigated in this proceeding notwithstanding the Commission's

^{16/} See Order at 20.

December 12, 1979 decision^{17/} declining to initiate a hearing on this issue at the separate request of several persons and groups to do so. The Staff position on the admissibility of the short pilings issue is set forth in its several responses to intervention petitions filed herein.^{18/}

The Commission determined in its December 12, 1979 decision that litigation of the short pilings proposal could and should abide the operating license proceeding unless the Staff deemed it necessary to initiate proceedings pursuant to 10 C.F.R. § 2.202. Since the short pilings proposal arguably arises from a reason for the delay in completion, its consideration as a potential issue in this proceeding is appropriate under Cook if it is first determined that it cannot abide the operating license phase. The Board argues that it is not bound by the decision of the Commission that this issue can abide the operating license stage because that decision was rendered in a separate context. Order at 24.

It is true that the Commission did not squarely decide whether the short pilings matter should be litigated in this extension proceeding (an issue not before it). Nonetheless, its reasoning that the matter can and should abide operating license review, while not dispositive, should apply with equal force to this proceeding.

^{17/} Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733 (1979).

^{18/} See NRC Staff response to intervention petitions, dated January 16 and 23, 1980, at 12 and 17 respectively, and NRC Staff response to supplemental petitions, dated March 7, 1980, at 11.

4. Ash Pond Seepage

The Staff believes that the Board wrongly decided that it could not reject aspects of the ash pond seepage contentions as a matter of law. Order at 33. As indicated in its brief on this matter,^{19/} the Staff believes that, to the extent that ash pond seepage or its effects may continue for a period of time contemporaneous with additional construction site dewatering, this represents a matter which, judging from the face of the construction permit decision alone, was adjudicated at the construction permit phase and is thus barred from relitigation under the principles of collateral estoppel. To the extent that construction dewatering continues following the elimination of the effects of ash pond seepage, this presents a litigable issue in this proceeding.

The Staff offers no further objections to the Order with one caveat. The Board indicates, on the last page of the Order, that its final order will contain a ruling on contentions. If the Board's "provisional" theory on the scope of the proceeding is retained in its final order, the Staff requests that the Board defer ruling on contentions until the parties offer a position on the admissibility of the proposed contentions in the context

^{19/} See n. 4, supra.

of such a theory. The present Staff position on most^{20/} of the contentions advanced herein is set forth in its March 7, 1980 response to supplemental petitions.

CONCLUSION

For the reasons given above, the Staff submits that the Provisional Order should be modified in accordance with the comments and objections thereto detailed herein.

Respectfully submitted,



Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of June, 1980

^{20/} Local 1010 of the United Steelworkers did not supplement the statement of contentions contained in its initial intervention petition. The Staff position on those contentions is set forth in its response to intervention petitions, dated January 23, 1980, at 24.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OBJECTION TO PROVISIONAL ORDER FOLLOWING SPECIAL PREHEARING CONFERENCE" 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 24th day of June, 1980.

*Herbert Grossman, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward W. Osann, Jr., Esq.
Suite 4600
One IBM Plaza
Chicago, Illinois 60611

*Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert L. Graham, Esq.
One IBM Plaza
44th Floor
Chicago, Illinois 60611

*Mr. Glenn O. Bright
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

George and Anna Grabowski
7413 W. 136th Lane
Cedar Lake, Indiana 46303

Kathleen H. Shea, Esq.
Lowenstein, Newman, Rois, Axelrad
and Toll
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dr. George Schultz
110 California Street
Michigan City, Indiana 46360

Robert J. Vollen, Esq.
c/o BPI
109 North Dearborn Street
Chicago, Illinois 60602

Richard L. Robbins, Esq.
Lake Michigan Federation
53 West Jackson Boulevard
Chicago, Illinois 60604

John Van Vranken, Esq., Chief
Northern Region
Environmental Control Division
188 West Randolph Street
Chicago, Illinois 60601

Clifford Mezo, Acting President
Local 1010
United Steelworkers of America
3703 Euclid Avenue
East Chicago, Indiana 46312

William H. Eichhorn, Esq.
Eichhorn, Morrow & Eichhorn
5243 Hohman Avenue
Hammond, Indiana 46320

Diane B. Cohn, Esq.
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

*Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Elizabeth Ann Lipton
for Steven C. Goldberg
Counsel for NRC Staff