UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 50-367
	)	(Construction Permit
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	Extension)
	)	
Bailly Generating Station, Nuclear-1	)	June 30, 1980

NIPSCO'S OBJECTIONS TO PROVISIONAL ORDER FOLLOWING SPECIAL PREHEARING CONFERENCE

I. Introduction

On May 30, 1980, the Licensing Board in the Bailly construction permit extension proceeding issued a Provisional Order Following Special Prehearing Conference (Provisional Order) which addressed various petitions to intervene and the substantive scope of this proceeding. The Board invited the conference participants to file objections to and comments on the Provisional Order in order to afford them the "fullest opportunity to present their positions and preserve them in the record." (Provisional Order, p. 5.) The Board stated that it would issue a final special prehearing conference order following receipt of comments on the Provisional Order. NIPSCO hereby submits its objections to and comments on the Board's Provisional Order. The discussion below also includes a number of recommendations for changes which, in our opinion, should be included in the final order.

This document first addresses the question of the scope of this proceeding and the Board's proposed interpretation and application of the Cook precedent. (See Section II. below.)

Turning to "standing," in Section III below we summarize our prior pleadings and argue that the Board's theory is incorrect and would result in admission of parties who do not have the requisite interest. Finally, we address the Board's proposed rulings with respect to Local 1010 and Lake Michigan Federation. (See Section IV. below.)

II. Scope of the Proceeding

A. Introduction

As we stated in our filing of March 7, 1980 (NIPSCO Response to Supplemented Petitions to Intervene," pp. 20-25), NRC precedent establishes a three-part test for determining which safety issues can be considered in an extension proceeding. (Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973), hereinafter frequently "Cook.")

1) The issues must arise from a cause of delay in construction;

2) The issues, in and of themselves, must arguably cast serious doubt upon the ability of the applicant to construct a safe plant; and

3) Consideration of the issues cannot appropriately abide the operating license proceeding.

We respectfully submit that the Board's Provisional Order incorrectly rejects the first requirement, fails to mention the second, and formulates an inappropriate standard for resolution of the third.

Before outlining the discussion which is to follow, we wish to note briefly that, in our opinion, the Provisional Order errs by ignoring the second part of the Cook test identified above. That requirement is essential to the integrity of the two-stage licensing process. If a board were permitted to review safety issues which do not cast serious doubt upon the applicant's ability to construct a safe plant, the scope of an extension proceeding would be significantly enlarged and could approach the scope of an operating license proceeding. The Appeal Board in Cook purposely included this test to limit the scope of the extension proceeding and to maintain the integrity of the two-stage licensing process.

In this Section II, Scope of the Proceeding, we shall first address the Board's treatment of the last aspect of the Cook test: Can consideration of the issue "abide" the operating license proceeding? (See Section II.B. below.) After stating our understanding of the Board's formulation of the test and its application, we explain that, in our opinion, the Board has devised a misleading and incorrect "standard" for determining whether an issue can or cannot "abide the

event" of the operating license hearing. The attempted reliance on 10 C.F.R. §§ 50.34 and 50.35(a) is misplaced; the proper standard is simply whether the issue is of such great importance that immediate hearing is necessary to protect the public's or the intervenors' interests.

In Section II.C., we examine the Board's discussion of the short pilings issue and conclude that the Board has seriously misunderstood the Commission's decision on that issue in December 1979. In our opinion, that decision forecloses examination of short pilings in this proceeding.

The Provisional Order suggests that a licensing board in a construction permit extension proceeding may consider issues which do not arise from the extension or a cause of the delay in construction. Our comments in Section II.D. below demonstrate that that suggestion is incorrect. A board has no jurisdiction to consider issues which do not arise from the extension or a cause for the delay; this limitation stems from Cook and other Commission precedent as well as the regulations and the notice of this proceeding.

The question of ash pond seepage is briefly discussed (see Section II.E.) in order to emphasize our position that the Board can now rule on this issue without waiting for motions for summary disposition.

B. Can Consideration of an Issue "Abide" the Operating License Proceeding?

1. Summary of the Board's Discussion

In deciding whether an issue can abide the operating license proceeding, the Board follows a two-part test. The first part involves determining the "standards" to be applied. (Provisional Order, pp. 20-22.) The Board turns to 10 C.F.R. §§ 50.91, 50.35(a), and 50.34 to make that determination.

Section 50.91 states, inter alia, that:

> In determining whether an amendment to 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 appears to equate the "considerations" referred to in § 50.91 with "standards to be applied during the construction permit proceeding to determine which matters should be deferred to the operating license stage . . . ." (Provisional Order, p. 21.) The Board concludes that these standards "are primarily discussed in 10 C.F.R. § 50.35(a)." (Id.) The Board appears to believe that matters deferred to the operating stage are other than the subjects listed in § 50.34. ("To a large extent, those are matters that are not spelled out in § 50.34 . . . .") (Id.) In the Board's view, issues which can abide the operating license proceeding are those that "have not been finally adopted by the Permittee as part of its design," as long as there is reasonable assurance

"that there will be a satisfactory resolution of the outstanding safety questions prior to operation of the facility and that the operation will not present undue risk to the public health and safety." (Id.)

The Board apparently distills these "standards" into the question: Whether, on the basis of the information now available, a particular issue "would be considered at a construction permit proceeding" if one were held now. (Id.) The same question is also stated by the Board as whether, on the basis of information now available, the particular issue "would have been heard at the construction permit proceeding." (Provisional Order, p. 22.)

If the Board decides that a particular issue "would have been heard" at the construction permit stage, then it turns to the second part of the test: that issue would be considered in the extension proceeding if consideration is "necessary in order to protect the interests of intervenors or the public interest." (Id., quoting 6 AEC at 420.) Thus, consideration of "lesser operational safety problems" may be deferred to the operating license stage. The Board apparently believes that this interpretation preserves the integrity of the two-stage process and is in accord with Section 50.91 "which requires the application in an amendment proceeding of the same standards used in construction permit

proceedings 'to the extent applicable and appropriate.'" (Id.)

2. NIPSCO's Comments

We respectfully submit that the first part of the Board's two-part test is incorrect. It incorporates an unnecessary and to some extent misleading diversion into 10 C.F.R. §§ 50.91, 50.35(a), and 50.34, which are misconstrued and/or misapplied. We can appreciate the intention behind the Board's resort to NRC regulations for assistance in applying the Cook test. However, such an attempt is futile since the Commission has not explicitly promulgated standards for determining which issues in an extension proceeding cannot abide the operating license proceeding, and efforts to apply regulations which have other objectives can only lead to inappropriate conclusions.

As above indicated, in its search for "standards," the Board apparently equates the term "considerations which govern the issuance . . . of construction permits" from § 50.91 with the "standards" that govern whether an issue cannot abide the operating license proceeding. In our opinion, such an equivalence is without a basis.

Section 50.91 requires the Commission to be guided in an amendment proceeding by the same considerations which govern construction permits only "to the extent applicable and appropriate." However, this sheds no light on which issues

associated with an extension can or cannot abide the operating license. Furthermore, it does not require the Board to apply, in an extension proceeding, every regulation which is relevant in a construction permit proceeding and there is certainly no compulsion to utilize § 50.35(a) and § 50.34 solely because they are applicable to a construction permit proceeding.

Moreover, contrary to the suggestions of the Board, §§ 50.35(a) and 50.34 are not applicable to, or appropriate for use in, an extension proceeding. The Board finds these sections to be relevant because, according to the Board, they control the "standards to be applied during the construction permit proceeding to determine which matters should be deferred to the operating license stage." (Provisional Order, p. 21.) Unfortunately, the Board has misconstrued the nature of these sections.

Section 50.34(a) specifies the minimum information which is to be supplied by construction permit applicants in Preliminary Safety Analysis Reports (PSAR) and acknowledges that, at the construction permit stage, the information and design required to be submitted may still be preliminary.*/

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*/ The balance of § 50.34 identifies information which is to be furnished by operating license applicants.

Section 50.35(a) states the conditions under which the Commission may issue a construction permit when an applicant has not supplied all of the technical information necessary to complete the application and support the issuance of a construction permit which approves all proposed design features. Under the Commission's regulations, it is the option of the applicant to defer consideration of design features under § 50.35(a) or to submit a final design at the construction permit proceeding.*/ Thus, contrary to the Board's suggestion, § 50.35(a) does not serve to determine which issues "should be deferred to the operating license stage" (Provisional Order, p. 21, emphasis added); it only allows a construction permit applicant to opt to file an application which does not include the final design features. The relevance of § 50.35(a) (which permits an applicant to defer consideration of a final design) to Cook (which requires consideration of those safety issues otherwise within the scope of the proceeding which cannot abide the operating license proceeding) is not readily apparent.

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*/ A fuller appreciation of § 50.35(a) can be obtained if it is read in conjunction with § 50.35(b). Section 50.35(b) authorizes a construction permit applicant to submit all or part of the final design and request "Commission approval of the safety of any design feature or specification . . . ." Thus, § 50.35 presents the applicant with options: submit a final design and seek approval of it under § 50.35(b) or submit preliminary information and seek approval of "principal architectural and engineering criteria" under § 50.35(a) while deferring consideration of the final design to the operating license stage.

In fact, the standards for determining which issues may be deferred by an applicant under § 50.35(a) are not standards which can be used to determine whether an issue in an extension proceeding cannot abide the operating license proceeding. Under § 50.35(a), an issue may be deferred if:

1) the applicant has described the "principal architectural and engineering criteria for the design;"

2) further design information can reasonably be left for later consideration and will be supplied in the FSAR;

3) safety features which require further research have been identified; and

4) there is reasonable assurance that safety questions will be resolved prior to the latest date of completion.

Under Cook, an issue cannot abide the operating license proceeding if it is of such great importance that an immediate hearing is essential for the protection of intervenors' or public's interest. Thus, it can be seen that the standards of § 50.35(a) have, at best, only marginal relevance to the determination of whether an issue in an extension proceeding cannot abide the operating license proceeding.

Sections 50.34(a) and 50.35(a), whether singly or in combination, are unhelpful in identifying issues which "cannot appropriately abide the operating license proceeding." All matters covered by § 50.34(a) are addressed to some extent in a construction permit proceeding. The extent to which any particular matter listed in § 50.34(a) is there addressed depends upon the satisfaction of the four-part test of § 50.35(a); i.e., the Commission need only consider the "principal architectural and engineering criteria" (as distinct from the final design) if the test of § 50.35(a) is met. Thus, it can be seen that consideration of the matters listed in § 50.34(a) cannot be completely deferred until the operating license proceeding. The Cook test is a different and narrower test. Nothing in Cook implies that, just because an extension has been sought, there is any occasion to reexamine § 50.35(a) determinations. Instead, Cook asks whether, regardless of how § 50.35(a) was applied when the construction permit was issued or would be applied now, there is now an issue of such great importance that an immediate hearing is essential for the protection of intervenors' or the public's interests. We respectfully suggest that answering this narrow question is hampered, not assisted, by attempting to use as a partial screening mechanism the four-part test in § 50.35(a), which has completely different objectives.

The Board suggests (Provisional Order, p. 21) that an issue cannot abide the operating license proceeding if it

"would be considered at a construction permit proceeding" and apparently believes that that condition is met if the "matter" has "been finally adopted by the Permittee as part of its design." These views are equally without merit. It would appear that the Board has attempted to equate issues which "would be considered" in a construction permit proceeding with issues which cannot "abide" an operating license proceeding. These are, we submit, unrelated matters. The fact that a design is final, or that it "would be considered" in a construction permit proceeding, provides no insight into whether immediate consideration of the issue is essential to protect the public health and safety.

More fundamentally, there is no reason to assume that the finality of a design is at all relevant to the Cook test. Obviously, each aspect of the plant for which the applicant has presented the "principal architectural and engineering criteria" under § 50.35(a) must become a final design before completion of the plant. However, under normal circumstances, this final design receives adjudicatory review only at the operating license proceeding and not as the design becomes final. "It is hard to fathom why a different result should obtain simply because of the fortuitous circumstance that a combination of events . . . did require [the applicant] to seek an extension for completion." (Cook, supra, 6 AEC at 421.) In fact, under the Board's suggested test, the closer

a facility is to completion at the time of the extension proceeding (and therefore the more design which has become final), the greater the number of subjects which would be considered in the extension proceeding and not deferred to the operating license hearing. That result would obviously be illogical and contrary to what the Appeal Board intended in Cook.

3. Recommendations

We recommend that the Board's final order omit any reference to §§ 50.34, 50.35(a), and 50.91 and to the finality of design in its definition of "cannot appropriately abide the operating license proceeding." A more appropriate standard is whether the issue is of such importance that its immediate resolution is essential to protect the intervenors' interests or the public.*/ As the Appeal Board clearly stated in Cook, issues which normally would not receive adjudicatory review until the operating license proceeding should not be considered in an extension proceeding simply because of the fortuitous circumstance that the issue was a cause of delay in construction. (Cook, supra, 6 AEC at 421.)

C. Consideration of Short Pilings in the Construction Permit Extension Proceeding Has Been Foreclosed by the Commission.

1. Summary of Board's Discussion

The Licensing Board rejects the view that consideration of the short pilings issue has been foreclosed by the

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*/ The Appeal Board implied in Cook that the only safety issues which require immediate resolution are those that "present a safety problem during construction." See Cook, supra, 6 AEC at 420 n.6.

Commission. The Board discusses admissibility in the context of whether the piling issue can "abide" the operating license proceeding. It apparently proposes to decide that question through application of the general principles which we describe and criticize in Section II.B above. However, the Board reaches no conclusion and poses four questions to be answered by the Staff, NIPSCO, and willing petitioners. (Provisional Order, p. 23.)

2. NIPSCO's Comments

In our view, the short piling issue cannot be considered in this proceeding because the Commission has held that this issue can abide the operating license proceeding. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 740 (1979) hereinafter "Commission's Order.")

The Commission's Order stemmed from requests in 1978 for a hearing on NIPSCO's proposed short pilings design. A number of petitioners*/ alleged that the proposed design constituted a change in design which could only be authorized by a construction permit amendment. The Commission, in a decision divided into two distinct rulings, concluded that no hearing was required by statute or regulation and refused to grant a hearing as a matter of discretion.

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*/ Those petitioners included the present petitioners: Porter County Chapter Petitioners, Illinois, Local 1010, Lake Michigan Federation, and the City of Gary.

In denying a request for a mandatory hearing, the Commission concluded that an amendment was not required. The proposed short pilings design is "less a change from an earlier plan than it is a proposed resolution of an area consciously--and appropriately--left for later determination" as contemplated by 10 C.F.R. § 50.35(a). The Commission stated:

> [W]e believe that there is reasonable assurance that the outstanding safety questions can be resolved, and resolved early in the construction process. We therefore see no reason to alter our view, reflected in the original issuance of the construction permit, that the facility can be constructed and operated without undue risk to the health and safety of the public. Our conclusion in this regard is in large part grounded on the report of the ACRS. . . . [W]e believe that the operating license review is . . . the appropriate forum for a hearing on the licensee's piling proposal.

(Commission's Order, 10 NRC at 742.)

We submit that it is clear from the preceding statement that, contrary to the view expressed in the Provisional Order (p. 20), the Commission was not merely reaffirming the implicit determinations made by the Licensing Board in the construction permit proceeding. In essence, the Commission was ruling that, as of the time of its decision, a hearing on the short pilings could abide the operating license proceeding.

This interpretation is supported by the Commission's heavy reliance upon the ACRS report on NIPSCO's short piling proposal. This report was specially prepared at the Commission's request in connection with the requests for a hearing, and it evaluated current information regarding NIPSCO's

present plans to utilize short pilings. If the Commission simply intended to reaffirm the Initial Decision at the construction permit stage, the ACRS report would have been irrelevant and would not have been used as a basis for the denial of a mandatory hearing.

More significantly, the Commission explicitly refused to order a hearing on the short pilings as a matter of discretion, and held that the operating license proceeding was the appropriate forum for consideration of the short pilings. The denial of a discretionary hearing was predicated upon the need to uphold the two-stage licensing process and upon the finding that deferral of a hearing on the piling issue would "not in any sense whatsoever create a risk to public health and safety." (Commission's Order, 10 NRC at 743.) It is difficult to imagine a more definitive ruling on the question of whether the short pilings issue can abide the operating license proceeding. Thus, not only is the Commission's Order relevant to this proceeding, it is determinative of the short piling issue under the Cook test.

It is also worth noting that the short piling issue can and should be excluded because it does not satisfy the second part of the Cook test -- i.e., the issue is not one which arguably casts serious doubt upon the ability of NIPSCO to construct a safe facility. The Commission also decided this question in its December decision where it stated:

> We therefore accept the ACRS's judgment that the proposal to use short pilings is not significant as a matter of engineering and will not require significant alteration of other facility design aspects, and that facility safety is not affected provided that certain measures are followed.

(Commission's Order, 10 NRC at 740.) The Commission's finding is dispositive.

3. Recommendations

We urge the Board to withdraw the questions stated at page 23 of the Provisional Order and confirm that the short piling issue will not be heard in this proceeding because it can abide the operating license proceeding and does not cast serious doubt on NIPSCO's ability to construct a safe plant.

D. Must the Issue Arise from the Extension or a Cause of the Delay in Construction?

1. Summary of the Board's Decision

The Provisional Order expresses the view that the Board's jurisdiction is not limited to issues arising from the extension or the reasons for the delay. (Provisional Order, pp. 25-26.) The Board apparently believes that Cook did not decide this question. In the Board's view, it has jurisdiction, "similar to what exists in the Staff under 10 C.F.R. § 2.202, to set for hearing significant health and safety issues that the Board determines at that time should not abide the operating license proceeding." (Provisional Order, p. 28.) According to the Board, this jurisdiction may be exercised if

"compelling reasons" are offered which indicate that there is no longer "reasonable assurance" that any "safety issue raised" will be satisfactorily resolved before the new construction completion date. (Id. at p. 27.) The Board apparently views the source of its jurisdiction to be the "common sense approach" of Cook and 10 C.F.R. § 2.760a.

2. NIPSCO's Comments

A licensing board in a construction permit extension proceeding has no jurisdiction to consider safety or environmental issues unless they arise from the extension or a cause of the delay in construction. This conclusion is mandated not only by the Cook decision but also by the notice of this proceeding, the regulations, and other Commission precedents.

The Appeal Board in Cook foreclosed any consideration of safety issues unrelated to the extension or a delay in construction. It stated:

> Thus, had the design changes effected by the applicants in the present case, taken in conjunction with other factors, not delayed the completion of construction beyond the latest completion date specified in the 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 the operating license proceeding--and not before.

(Cook), supra, 6 AEC at 421.) This can only be read as holding that safety issues unrelated to the cause of the delay are not appropriate for consideration in an extension proceeding.

Moreover, every previous decision which has addressed the scope of a proceeding involving an amendment to a license supports the proposition that only those safety and environmental issues related to the amendment are cognizable in that proceeding (e.g., only issues related to the extension or a cause of a delay are cognizable in an extension proceeding). Starting with Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974), boards have consistently held that only those issues "arising directly from the proposed change" are within the scope of an amendment proceeding; a "sufficient nexus" between the proposed amendment and the issue sought to be raised by an intervenor must exist before the issue may be admitted in an amendment proceeding. Consequently, in the absence of a nexus between an issue and the extension or the causes of delay in construction, the issue cannot be considered in an extension proceeding.

The Board has no inherent authority to exceed the constraints outlined in Vermont Yankee in order to consider safety issues which it believes are worthy of consideration but which are unrelated to the extension or causes of delay in construction. Licensing boards exercise only those powers delegated to them, and a board's actions can neither enlarge nor contract the jurisdiction conferred by the Commission. (Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units

1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).) The delegated powers of the Board are identified in the notice of this proceeding (44 Fed. Reg. 69,061 (1979)) and in the Commission's regulations, neither of which bestows jurisdiction upon the Board to consider safety issues in general. Consequently, this Board has no authority to investigate any or all safety issues, regardless of their importance to the public health and safety, if they are not encompassed by the extension or a cause of the delay.

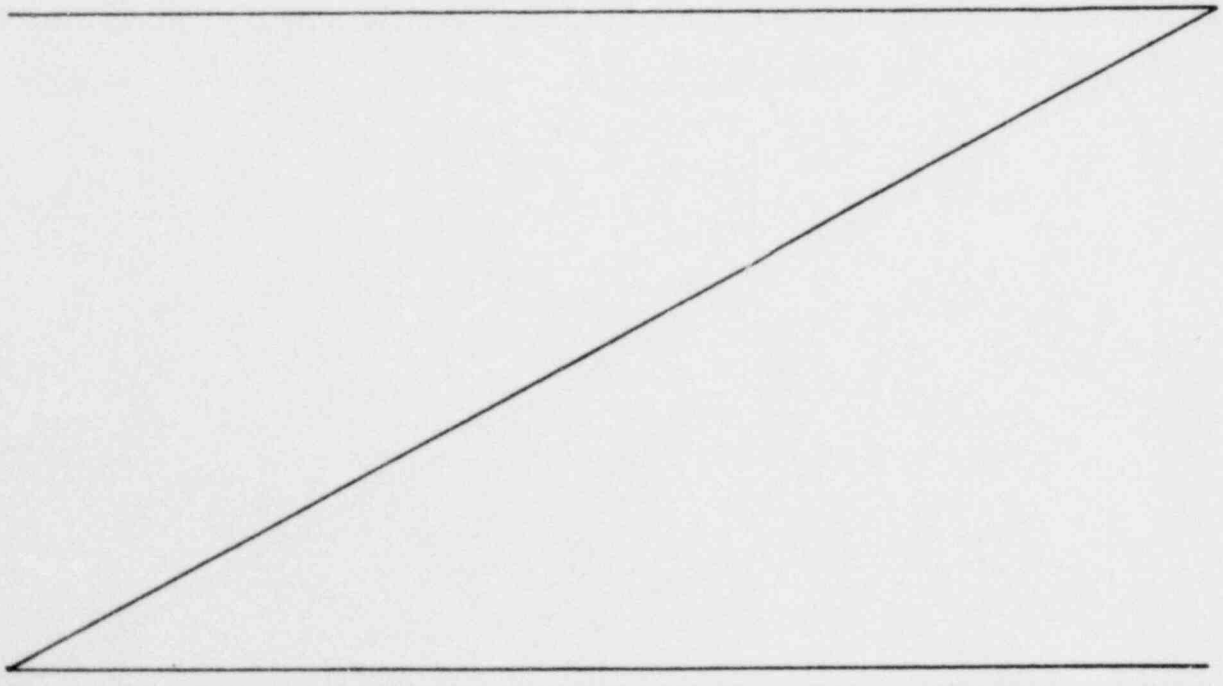
The fact that the Board has jurisdiction to review NIPSCO's request for an extension does not provide it with inherent jurisdiction to review safety issues which may have arisen during construction. It is the function of the Commission's Staff, not of adjudicatory boards, to determine whether safety issues have arisen during construction and to assure that plants are constructed safely and that construction permit conditions are satisfied. (Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-356, 4 NRC 525, 536 (1976); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-162, 6 AEC 1139 (1973). See also Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977).) The jurisdiction and authority of a board are not expanded simply because an unrelated, albeit important issue may have arisen during construction.

The Board's suggestion that § 2.760a is a source of jurisdiction to consider safety issues in general is without merit. Section 2.706a does not expand the scope of a proceeding; it only permits a board in a contested proceeding on an application for an operating license to consider on its own motion uncontested issues which are within the scope of that proceeding. Thus, even if § 2.760a, or the policy which underlies it, were pertinent to the instant proceeding, it would enable the Board to consider on its own motion only uncontested issues which are within the scope of the proceeding. It cannot be cited as authority for this Board to consider issues which are unrelated to the delay in construction.

Moreover, the Board possesses no power "similar to what exists in the Staff under 10 C.F.R. § 2.202" (Provisional Order, p. 28) to set for hearing significant issues which the Board believes should be considered in an adjudicatory context. (See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978), aff'd ALAB-470, 7 NRC 473 (1978).) As the Appeal Board stated in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592 (1977), "licensing board have no independent authority to initiate any form of adjudicatory proceeding." The Commission, in promulgating Subpart B of 10 C.F.R. Part 2, has determined that it should be the duty solely of the

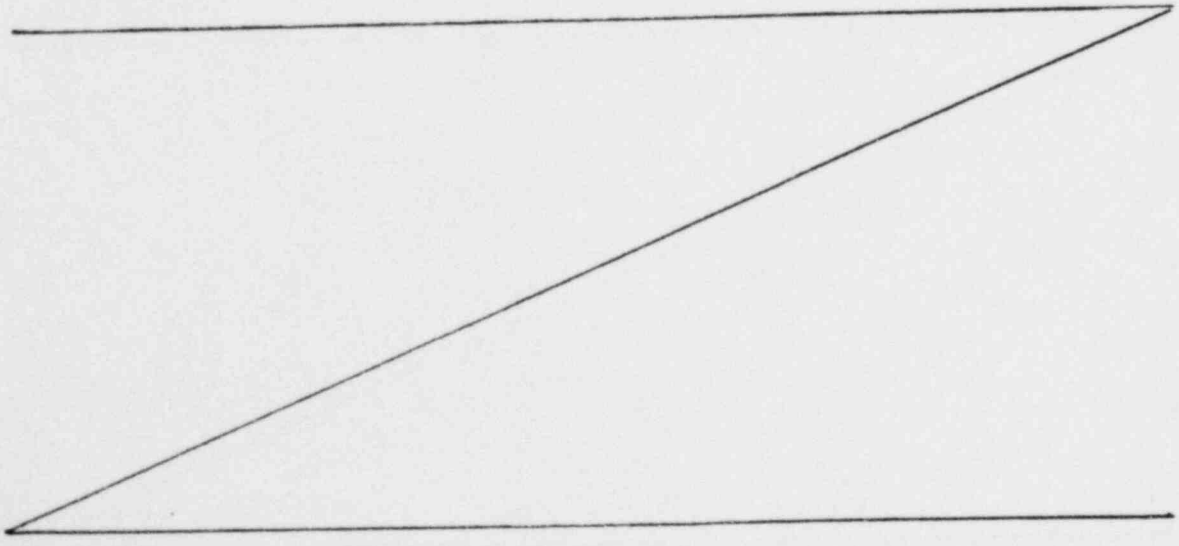
Staff to decide when an adjudicatory hearing is necessary to consider a significant issue. No such authority has been granted to licensing boards. If a board were to determine that issues beyond the scope of the hearing notice upon which it was convened are sufficiently significant to warrant a hearing, it would have limitless jurisdiction and would be assuming the responsibilities of the Staff.

Policy reasons also militate against the exercise of such alleged authority by the Board. First, the decision to institute a § 2.202 proceeding is essentially a prosecutorial decision. (Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975).) It would be particularly inappropriate for an adjudicatory board to be cast in such a role.



Additionally, the decision to initiate a § 2.202 proceeding is uniquely an administrative function. In ruling on a petition under § 2.206, the Director is not required to accord presumptive validity to the facts asserted in the petition; he obtains and assesses information from a variety of sources. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432-33 (1978).) A § 2.202 proceeding is initiated only if, after a review of all relevant information, the Director finds that "substantial health or safety issues" have been raised. (Indian Point, supra, 2 NRC at 176.) Since a licensing board has no independent sources of information, it is not equipped to determine whether a § 2.202 type hearing is warranted.

The Board also suggests that it may determine whether "reasonable assurance" still exists that safety issues can be



satisfactorily resolved by the completion date.*/ Such a determination would require the Board to reopen and reconsider matters decided in the construction permit proceeding. Absent authorization from the Commission, the Board has no power to take such action, regardless of policy reasons, regardless of the issue, and regardless of the fact that material changes have occurred since the construction permit proceeding. (Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 590-91 (1977).)

Finally, the Board's proposed standard threatens to destroy the two-stage licensing process. The Board may believe that its proposed requirement is a fairly restrictive standard.

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*/ The Provisional Order at pages 26-27 states:

> The test as we see it is 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 such reasonable assurance with regard to a safety issue raised, that it will be satisfactorily resolved by the new completion date.

It is unclear whether the Board's test is intended to encompass 1) only those issues considered under § 50.35(a) at the construction permit proceeding; or 2) those issues and issues which have arisen since the construction permit proceeding; or 3) any issue for which the Staff could institute a § 2.202 proceeding. If, despite arguments to the contrary, the Board should adopt this test, it may wish to clarify the ruling in this regard.

However, in reality, the proposed ruling would establish barriers which may not be difficult to overcome. It is a simple matter to allege that reasons are "compelling" although subsequent complete analysis would show that the allegations are unsupported or incorrect. Since the Board may be unable to determine which reasons are "compelling" without an evidentiary hearing, and since licensing boards have been admonished by the Appeal Board in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC _____ (April 22, 1980), not to prejudge the merits of factual contentions, the Board's proposed criteria are likely to allow numerous safety and environmental issues to be improperly admitted into this proceeding. The result would be a trifurcated licensing process.

3. Recommendations

The Board has indicated that it discerned

> no issue in the contentions raised, that are not directly related to the delay in construction or do not arise from the reasons assigned for the extension, that must be heard in order to protect the interests of the Intervenors or the Public.

(Provisional Order, p. 28). We concur in that conclusion; in particular, we endorse rejection of the emergency planning contention proposed by Gary Petitioners and others. However, we urge the Board to modify its ruling and to reject all

suggestions that it has jurisdiction over issues unrelated to the extension and the reasons for delay.

F. Ash Pond Seepage

1. Summary of the Board's Discussion

In the Provisional Order, the Board declines to resolve the question of ash pond seepage at this stage in the proceeding because, in its view, the construction permit decision does not clearly indicate whether the licensing board had accounted for ash pond seepage in its calculation of the potential drawdown from dewatering. The Board states, however, that this issue may be suitable for summary disposition at a later stage of the proceeding.*/

2. NIPSCO's Comments

The Provisional Order concludes that the ash pond issue involves a question of a fact and therefore may not be rejected at this stage of the proceeding. However, if a contention which raises factual questions is objectionable for legal reasons, the Board may reject it without waiting for motions for summary judgment and without conducting an evidentiary hearing on the contention.**/ We respectfully

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*/ The Provisional Order properly acknowledges that ash pond seepage is not an issue in and of itself but may be an issue only as it relates to the incremental effects of the extended period of dewatering. (See Provisional Order, pp. 30-31.)

**/ The Board itself rejected contentions pertaining to emergency planning and siting for this very reason.

submit that the ash pond issue is objectionable on two different legal grounds and should therefore be rejected.

First, the sealing of the ash ponds has no nexus to the requested extension. Consequently, it is outside the scope of this proceeding, whether or not the licensing board in the construction permit proceeding accounted for the effects of ash pond seepage upon the potential drawdown from dewatering. The ash ponds could have been sealed at any time before, during, or after construction -- or not at all. The sealing of the ash ponds is completely independent of and unrelated to NIPSCO's request for an extension and therefore is not an appropriate matter for consideration in this proceeding.

Second, sealing of the ash ponds cannot be considered in this proceeding because it is clear from the record that, in making the findings recorded in the initial decision which authorized issuance of the construction permit, the board excluded ash pond seepage when assessing the potential drawdown from dewatering. The findings in the construction permit proceeding are still binding upon the Board and are not subject to reconsideration in this proceeding.

This second issue is not a question of fact as that term is traditionally used. As established by our filing of April 10, 1980 ("Response of Northern Indiana Public Service

Company to Issues Identified for Briefing by the Atomic Safety and Licensing Board at the Prehearing Conference of March 12-13, 1980," pp. 7-15), the Board can rule on the ash pond issue without considering any documents other than the initial decision and the hearing transcript of the construction permit proceeding. Both the initial decision and the hearing transcript are part of the official record of the proceeding. The Board has conceded that it may review one part (the initial decision) of the official record without creating a question of fact*/, and there is no reason to distinguish between different parts of the same official record in this regard. The Board would rely upon the official record not for the truth of the statements contained therein but in order to determine what the record reveals. Consequently, the Board may use all of the official record without violating the principles of Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station. Unit 1), ALAB-590, 11 NRC _____ (April 22, 1980).

3. Recommendations

We recommend that the Board reconsider its proposed ruling in the Provisional Order and directly rule on this

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*/ See Board's discussion of res judicata and collateral estoppel at p. 33 of the Order.

issue. The record shows that the licensing board at the construction permit stage excluded ash pond seepage from its consideration and therefore no seepage contention should be admitted.

If the Board would like additional briefs on this subject, or if the Board believes that the position of the participants has not been adequately presented, we would have no objection to an additional briefing period prior to the issuance of a decision on this issue.

If, notwithstanding the foregoing arguments, the Board prefers to continue to relegate this matter to motions for summary judgment, it would be helpful to the parties to have the Board clarify how it intends to have the matter treated in such a motion. As we understand the Board's statements, it would be appropriate to file a motion for summary judgement immediately, based upon whether the licensing board in the construction permit proceeding took credit for ash pond seepage in its calculation of potential drawdown from dewatering. We further presume that a negative answer with respect to this question would completely dispose of the ash pond issue in this proceeding.

III. Standing to Intervene

A. Introduction

In this Section III, we summarize the Board's theory of standing (see Section III.B.) and our argument previously made regarding standing (see Section III.C.) We urge the Board to revise its position on standing. (See Section III.D.)

B. Summary of the Board's Discussion

The Provisional Order states that "a person may intervene only upon a showing that his interests may be affected by that proceeding." (Provisional Order, p. 8.) The Board further states that an injury from operation of a facility is an interest which may be affected by an extension of the construction permit for that facility. The Board reasons that a person who is injured from operation would also be injured by an extension because an extension would obviate the need for a new construction permit hearing which hearing would protect the interests of a person who alleges injury from operation. The Board claims that those who allege injury from operation sustain an

> 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 claimed lack of "good cause") did not relate to health and safety or environmental matters.

(Provisional Order, p. 9.)

C. NIPSCO's Comments

The Board correctly acknowledges that a person may achieve standing to intervene in a proceeding only upon a showing that he has an interest which may be affected by that proceeding. (See § 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1976); 10 C.F.R. § 2.714(a).) However, the Board then proceeds to emasculate that principle by proposing to rule that injury from operation is an interest which may be affected by an extension proceeding.

As we have shown in previous filings in this proceeding ("NIPSCO Response to Supplemented Petitions to Intervene," dated March 7, 1980, pp. 8-16; "NIPSCO's Response to Petitions Filed in Response to Notice of Opportunity for Hearing." dated January 18, 1980, pp. 12-18), an alleged injury from operation or construction is not an injury caused by the extension since the extension does not authorize construction or operation. Thus, an alleged injury from construction or operation is not an interest which may be affected by an extension proceeding and therefore is insufficient for standing to intervene in such a proceeding. To achieve standing in a construction permit extension proceeding, a person must allege an incremental injury flowing from the extension itself, as distinct from an injury from operation or construction. (See Southwest Broadcasting Co.,

18 F.C.C. 2d 858 (1969); Metromedia, Inc., (1967) 10 Rad. Reg. 2d (P & F) 626; Valley Telecasting Co., (1955) 12 Rad. Reg. (P & F) 196e; Channel 16 of Rhode Island, Inc., (1954) 10 Rad. Reg. (P & F) 377; and Tri-State Television, Inc., 43 F.C.C. 2669 (1954).)*/ Consequently, those petitioners**/ who have only alleged injury from operation or construction must be denied standing to intervene in this proceeding.

The Board's proposed ruling that injury from operation is an injury from the extension constitutes an evasion of the basic provisions of § 189 of the Act and § 2.714 of the Commission's regulations. Under the Board's theory, the alleged injury-in-fact which satisfies the "interest" requirements of § 189 and § 2.714 is the absence of a new construction permit hearing. However, this "injury" is insufficient for standing.***/ The absence of a new con-

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*/ In these cases, the Federal Communications Commission explicitly held that injury from operation is insufficient for standing to intervene in an extension proceeding, thus rejecting the proposed holding of the Board.

**/ Dr. Schultz, Gary Petitioners, and Lake Michigan Federation.

***/ Additionally, it should be noted that no petitioner in this proceeding has alleged in injury from the absence of another construction permit proceeding. It cannot be assumed that these who allege injury from operation would also consider themselves injured by the absence of a construction permit proceeding. (See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 392-93 (1979).)

struction permit hearing is an injury only if the absence is "in violation of the Atomic Energy Act." (Provisional Order, p. 9.) If the permitee obtains an extension in compliance with the Act, the petitioners who allege injury from operation have not suffered an "injury" under the Board's own theory of standing. Thus, for the Board to rule that the absence of a new construction hearing is an injury to the petitioners in this proceeding, it must either be prejudging the case or speculating that any extension would be "in violation of the Atomic Energy Act." Either alternative is an impermissible course of action by the Board.

D. Recommendations

The Board appears to recognize that injury from operation would be insufficient for standing to intervene were it not for the Board's theory regarding a "new construction permit hearing."*/ Thus, in essence, the Board is proposing to grant standing indirectly to those who allege injury from operation in a situation in which it could not directly grant standing to these same persons. We believe that it would be inappropriate for the Board to undermine long-settled principles of standing in such a manner. We therefore urge the Board to adopt the position concerning standing outlined in our prior filings listed above.

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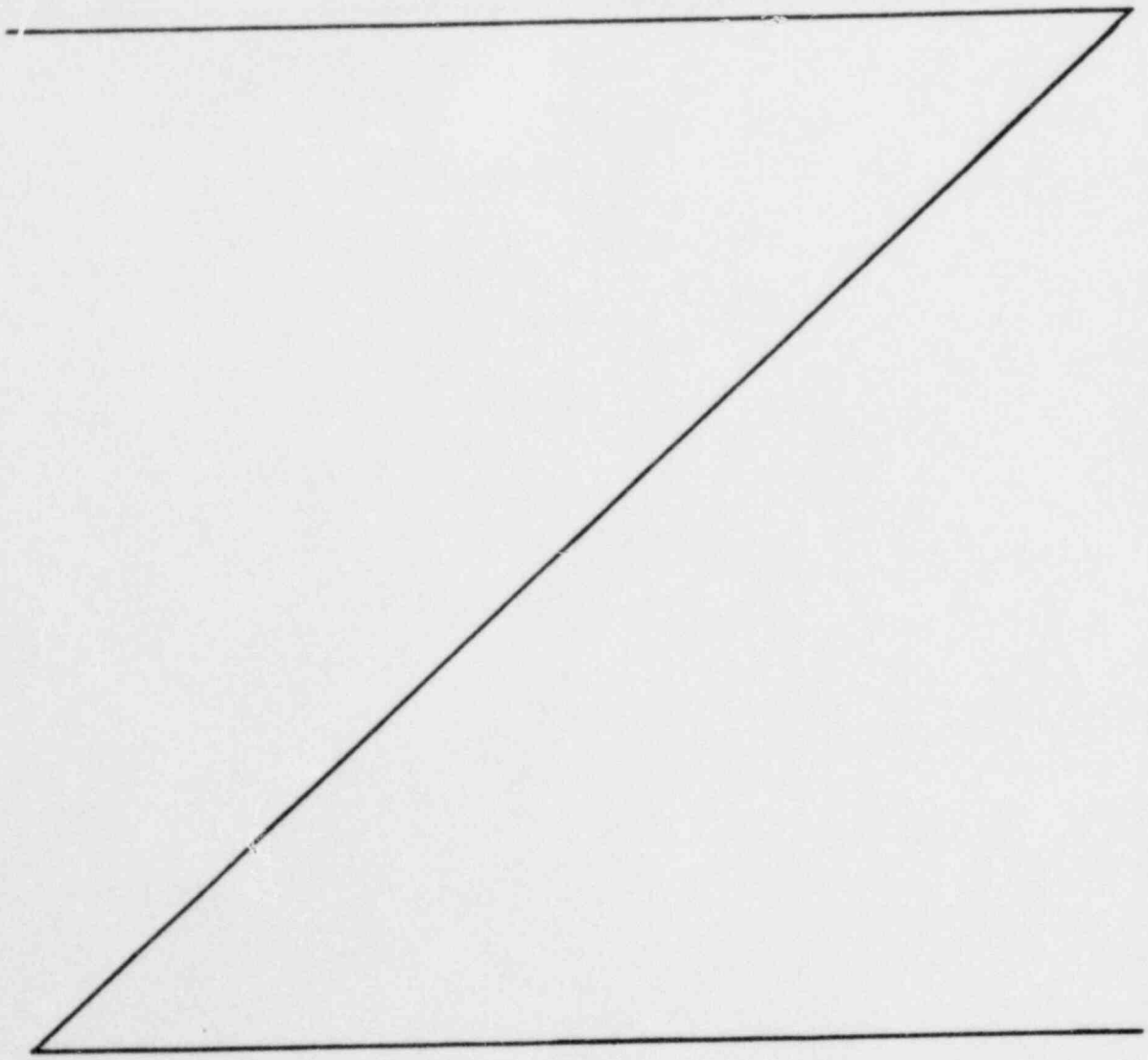
*/ The Board admits as much in acknowledging that neither construction or operation is authorized by an extension proceeding. (Provisional Order, p. 8.)

IV. Specific Petitioners

A. Introduction

In this Section IV, we address specific aspects of the Board's proposed rulings on the admission of several petitioners. We object to the conclusions that Local 1010 has identified an admissible contention and that Lake Michigan Federation has standing to intervene.



B. Local 1010

1. Summary of the Board's Discussion

The Board proposes to admit Local 1010 as a party on the ground that Local 1010's Contention 10-B satisfies the one valid contention requirement of 10 C.F.R. § 2.714(b). The Board found that the Contention 10-B, read in conjunction with the affidavit and statement of Joe Frantz, evidenced Local 1010's attempt

> to fashion, out of its originally-submitted, broad Contention 10-B, a narrow contention limited to the incremental effects of the further period of site-dewatering, pursuant to the suggestions at the prehearing conference that such contention would be admissiable.

(Provisional Order, p. 38.)

2. NIPSCO's Comments

Local 1010 is participating in this proceeding without benefit of a counsel of record, and some procedural allowances for pro se petitioners are appropriate. However, the Board's proposal to rewrite Contention 10-B goes far beyond any reasonable allowance; in fact, there is no indication that Local 1010 ever intended to raise a dewatering contention.

The specific language of the Contention is crucial:

> Recent studies on the impact of the construction and operation of the Bailly plant on the Indiana Dunes National Lakeshore conducted by scientists of the National Park Service concluded that the

> Bailly plant will exacerbate the harm currently being caused to the Indiana Dunes National Lakeshore from the operations of the fossil fuel plant on the same site. In addition, discussions held in connection with these studies resulted in recommendations for the review and possible improvement of the monitoring program on the Bailly plant construction, and mitigation of damage done to the Indiana Dunes National Lakeshore by the Bailly plant.
>
> These significant new facts and evidentiary developments on an issue of vital environmental importance require that the Commission revise its Final Environmental Statement, re-analyze the cost-benefit conclusion on the issuance of the construction permit for the Bailly plant, and re-analyze its comparison of the costs and benefits of the permit issuance to the costs and benefits of alternative courses of action.

(Petition to Deny Permit, pp. 8-9.) As is immediately observable, the contention does not mention dewatering and has no apparent connection to dewatering.

Contention 10-B was filed by Local 1010 in its Petition to Deny Permit (December 20, 1979). Contention 10-B (like almost all other contentions set forth in that Petition) was copied from an earlier filing by the Porter County Chapter Petitioners and Illinois. (Joint Supplement to Requests for Hearing dated June 29, 1979.) In fact, the origin of contention 10-B is actually found in 1976 requests for insti-

tution of a show cause proceeding with respect to Bailly.*/ Contention 10-B is neither novel nor the creation of Local 1010.

A review of the show cause petitions which form the basis of this contention reveals that the concern of petitioners there was unrelated to dewatering. The subject of those petitions -- and Contention 10-B -- is alleged damage to the Indiana Dunes National Lakeshore said to be caused by changes in the chemical composition of the interdunal ponds as a result of ash pond seepage. The petitioners were concerned that the discharge of various waste waters from operation of the nuclear facility into the ash ponds of the coal-fired plants would exacerbate the alleged harm caused by chemicals in the ash pond seepage. Thus, Contention 10-B, as written, has absolutely no relevance to dewatering.

The Board proposes to interpret the Contention as stating "a narrow contention limited to the incremental effects of

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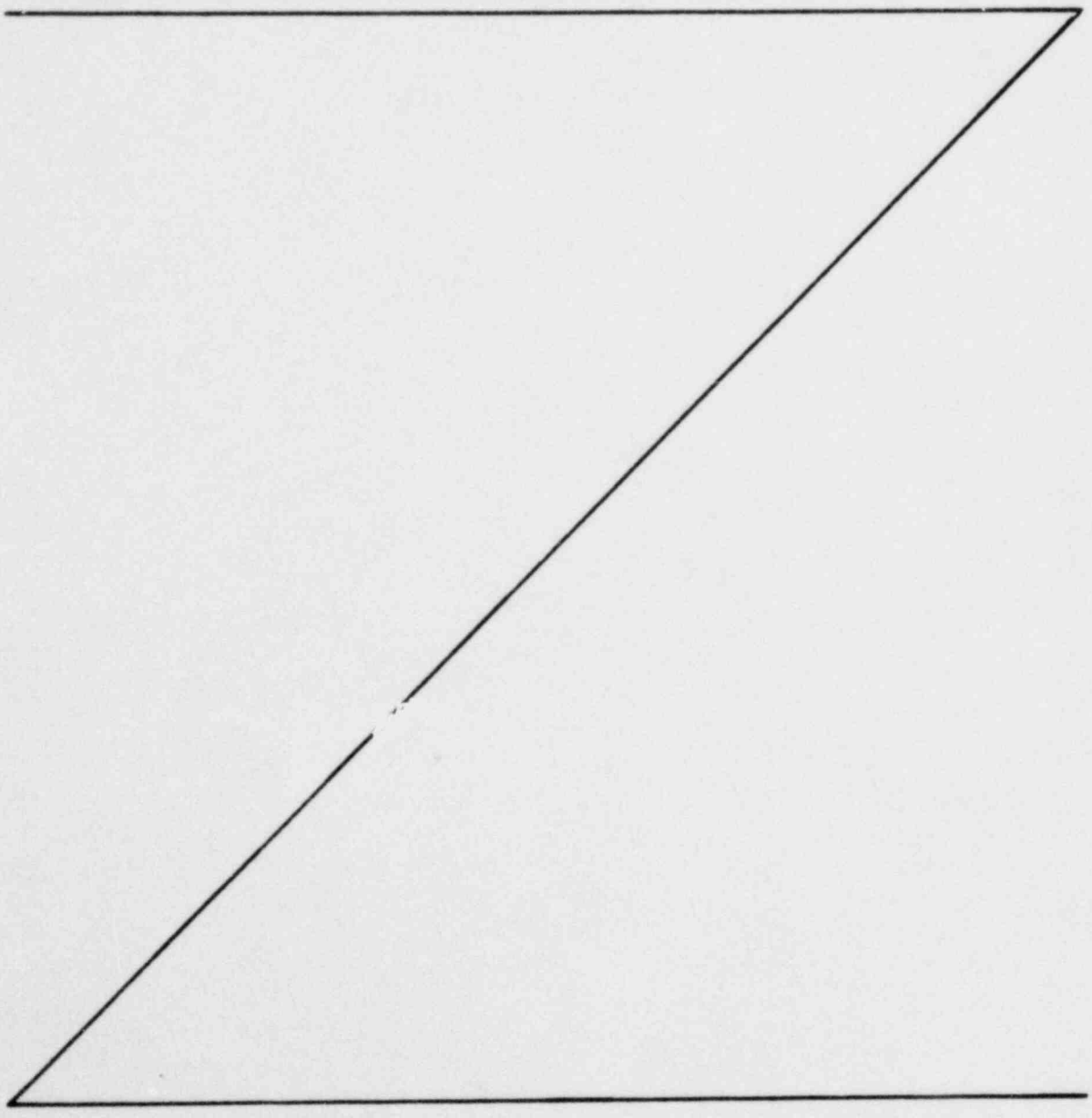
*/ "Request to Institute a Proceeding, and Motion, to Suspend and Revoke Construction Permit No. CPPR-104," by Porter County Chapter, et al., dated November 24, 1976, pp. 27-28; "Request and Motion to Institute a Proceeding to Suspend and Revoke Construction Permit No. CPPR-104," by Lake Michigan Federation, dated November 29, 1976, pp. 6-8; "Motion, Petition and Request to Institute a Proceeding to Revoke or Suspend Construction Permit No. CPPR-104," by City of Gary, dated November 30, 1976, pp. 25-27; "Request to Institute a Proceeding, and Motion, to Suspend and Revoke Construction Permit No. CPPR-104," by Illinois, dated December 15, 1976, pp. 23-24.

of the further period of site-dewatering . . . ." (Provisional Order, p. 38.) The Board assumes that Local 1010 attempted to transform the Contention into a narrow dewatering contention, "pursuant to the suggestions at the prehearing conference that such a contention would be



admissible." (Id.) The sole basis for this assumption is the affidavit and statement of Mr. Frantz. However, those documents pertain only to the standing of Local 1010 and do not attempt to raise any new contentions. One sentence in Mr. Frantz's statement may have influenced the Board:

> Our contention 10-B of "Petition to Deny Permit" contends that further construction of Bailly will harm the Indiana Dunes National Lakeshore Park of which many of our Members are users.

This sentence, when taken in context, can only be viewed as relating to the standing of Local 1010 to intervene in this proceeding. There is no indication that Mr. Frantz intended to raise a new contention regarding dewatering or to modify Contention 10-B. In any case, it is difficult to understand how the sentence which we quote can serve as a basis for a dewatering contention since it does not even mention dewatering.

3. Recommendations

It appears that the Board may have intermixed arguments regarding standing and the admissability of contentions although. As the Board itself has correctly acknowledged, these two issues are and should be quite separate. (Provisional Order, pp. 6-7.) There is no reason to interpret the Contention as raising the dewatering issue simply because Local 1010 has claimed standing based upon dewatering. As originally submitted, the contention does not

pertain to dewatering, and none of Local 1010's subsequent filings have amended it to incorporate the dewatering issue. Consequently, we continue to assert that Contention 10-B is outside of the scope of this proceeding, and that Local 1010 has not submitted one admissible contention. Therefore, Local 1010 should not be admitted as a party to this proceeding.

C. Lake Michigan Federation

1. Summary of the Board's Discussion

The Board proposes to conclude that the Lake Michigan Federation has standing based upon the affidavit of James D. Griffith. Mr. Griffith stated:

> Because I utilize Lake Michigan as a sailor, swimmer and fisherman, with a boat moored in Wilmete Harbor, my health and safety will be jeopardized in the event that the waters of Lake Michigan are adversely impacted by construction of the plant at the Bailly site.

(Affidavit of James D. Griffith (March 28, 1980).) The Board states that this satisfies the requisites of standing, assuming that injury from construction is sufficient for standing to intervene in this proceeding. (Provisional Order, p. 43.) */

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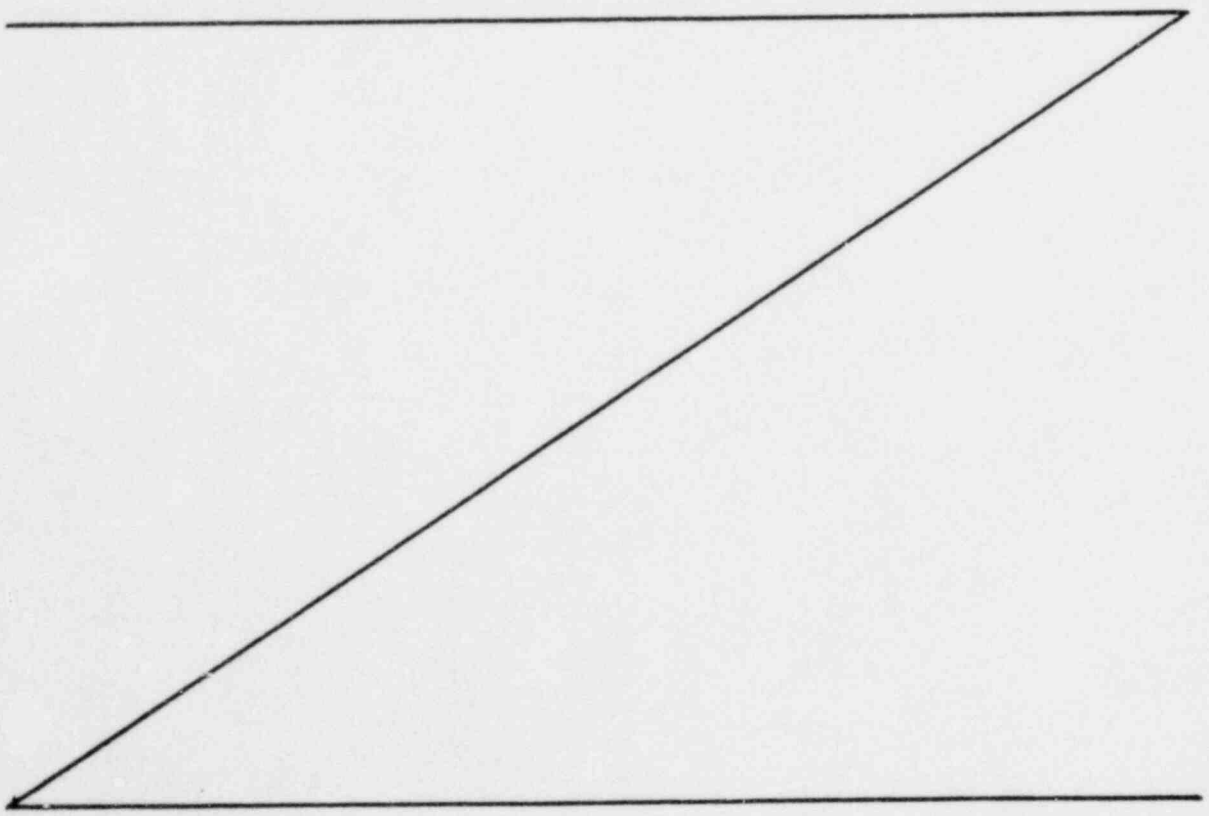
*/ The Board nevertheless proposes to deny the Federation's petition on the ground that the organization had not submitted one valid contention within the required time. The Board also refuses to admit late-filed contentions (actually, late-adopted contentions of others) upon a balancing of the five factors of 10 C.F.R § 2.714(a). We fully concur in the judgments proposed by the Board in this respect.

2. NIPSCO's Comments

Even under the Board's proposed theory of standing, this affidavit does not establish that Mr. Griffith may be injured by construction of Bailly. We refer the Board to the discussion at pp. 2-6 of "NIPSCO's Response to Various Filings" (April 14, 1980) which, in our opinion, demonstrates that Mr. Griffith's allegations are insufficient to establish his interest in this proceeding.

3. Recommendations

The petition of the Lake Michigan Federation should be denied for lack of standing as well as the failure to identify a valid contention.



V. Conclusion

In these comments, we have attempted to indicate our points of disagreement with the Board's Provisional Order and to suggest necessary revisions or clarification for the final order. The fact that we have not repeated all of our previous arguments presented in the prehearing conference or contained in our prior pleadings should not be construed as a waiver of those arguments.

Respectfully submitted,

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