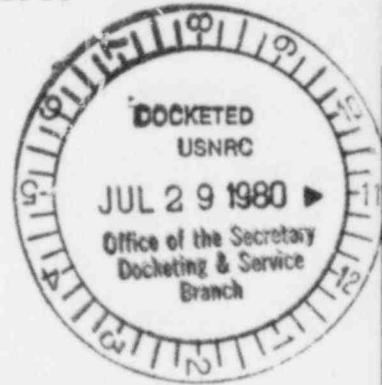


July 28, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)	
)	
WISCONSIN ELECTRIC POWER COMPANY)	Docket No. 50-266 CO
)	
(Point Beach Nuclear Plant,)	(Modification of License)
Unit 1))	

WISCONSIN ELECTRIC POWER COMPANY'S RESPONSE
TO WISCONSIN'S ENVIRONMENTAL DECADE, INC.'S
SUPPLEMENTAL FILING OF JULY 15, 1980

Pursuant to the Atomic Safety and Licensing Board's ("Board") "Order Setting First Prehearing Conference" dated June 25, 1980, Wisconsin Electric Power Company ("Licensee") hereby responds to Wisconsin's Environmental Decade, Inc.'s ("Decade") "Preliminary Contentions Made Prior to Discovery and Cross-Examination" dated July 15, 1980 ("Decade Contentions").

BACKGROUND

By "Confirmatory Order for Modification of License" dated November 30, 1979 ("November 30 Order") (44 Fed. Reg. 70608 (December 7, 1979)), the Director, Nuclear Reactor Regulation ("NRR"), established additional operating conditions for Point Beach Nuclear Plant, Unit 1 to ensure safe operation in light of an identified problem with steam generator tube degradation. The November 30 Order was issued after a series

of meetings with NRC Staff ("Staff") and a Commission briefing relating to the question of steam generator tube integrity at Point Beach Unit 1 and the attendant safety issues involved. The November 30 Order provided that any person whose interest may be affected by the Order may request a hearing with respect to the Order, in which event "the issues to be considered at such hearing shall be: (1) Whether the facts stated in Section II and III of this Order are correct; and (2) Whether this Order should be sustained." By request dated December 17, 1979, Decade requested a hearing.

Licensee opposed Decade's request for a hearing in a response dated December 27, 1980 (attached hereto as Exhibit A and incorporated herein by reference). Licensee argued that the Decade position should be denied because:

- (a) it fails to state the interest of Decade and how that interest may be affected by the proceeding;
- (b) it fails to set out matters in controversy within the issues set out for hearing in the November 30 Order;
- (c) it is only an attempt to subvert the Commission's rules, which do not permit a request for review of the Director's decision under § 2.206; and
- (d) it amounts only to a request for a rulemaking regarding the interface of the ECCS acceptance

criteria and steam generator tube integrity on a generic basis, which is not appropriate in this particular docket.

Staff also opposed Decade's petition in a "Motion to Deny Request for Hearing" dated February 11, 1980, joining Licensee in arguing that Decade had neither demonstrated that its interest may be affected by the proceeding nor that any harm might befall Decade as a result of the November 30 Order. The Staff further argued that Decade had not made a case which would warrant the Commission's granting a discretionary hearing. The Staff's February 11, 1980 Motion is attached hereto as Exhibit B. On February 22, 1980, Decade filed a response to the Staff's Motion (attached hereto as Exhibit C).

By Order dated May 12, 1980, the Commission ruled on Decade's request for a hearing. It directed the Chairman of the Atomic Safety and Licensing Board Panel to empanel a Board to determine whether a hearing is required based on the principles set forth in the Commission's March 13, 1980 Memorandum and Order in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980). It further ordered that, if the Board determines that a hearing is required, the Board conduct and adjudicatory hearing solely on the issues identified in the November 30 Order.¹

1 On January 3, 1980, after a second briefing of the Commis-

On May 15, 1980 the Board was designated to rule upon Decade's request for a hearing and to preside over the proceeding in the event that a hearing is ordered. By "Order Setting First Prehearing Conference" dated June 25, 1980, the Board stated that it would conduct a prehearing conference on July 30, 1980, and directed Decade to file a supplement to its petitions not later than 15 days prior to the special prehearing conference which shall include a list of specific contentions sought to be litigated. Licensee and Staff were requested to file any responses by July 28, 1980.

DECADE LACKS STANDING TO BE AFFORDED A HEARING
ON THE NOVEMBER 30 ORDER

The Commission directed the Board to be guided by the principles of Marble Hill in determining "whether a hearing is

(continued)

sioners on this issue, the Director, NRR, issued an Order modifying the November 30 Order, which added an additional operating condition for Point Beach Unit 1 requiring an operating primary coolant pressure of 2000 psia. (45 Fed. Reg. 2452 (January 11, 1980).) Licensee is not aware of any request by Decade for a hearing respecting the January 3 Modification, although Decade complained in a letter to the Commission that it had not received a copy of the January 3 Modification until "five days after the twenty days permitted to request a hearing had expired." Letter from K. Falk, Decade General Counsel, to Commission dated February 11, 1980. On April 4, 1980, the Director, NRR, issued a second modification to the November 30 Order. (45 Fed. Reg. 25197 (April 14, 1980).) By request dated May 29, 1980, Decade seeks a hearing on the April 4 Modification. By Response dated June 12, 1980, Licensee opposed Decade's request. By letter dated July 10, 1980 the Director, NRR, recommended that the Commission refer Decade's most recent petition to the Board. However, at the time of this filing, Licensee is not aware that the Commission has taken any action regarding the Decade May 29 Request.

required" on the November 30 Order. In Marble Hill the Commission discussed whether petitioners therein had standing to assert the right to a hearing respecting an "Order Confirming suspension of Construction" at that plant. The Commission in Marble Hill also discussed when a discretionary hearing might be appropriate. In limiting the question for the Board to determining "whether a hearing is required", we believe the Commission did not delegate to the Board the authority to grant a discretionary hearing -- although Decade also fails to meet the test for a discretionary hearing in any event. Here, we address the requirement of standing.

Marble Hill reaffirms the two-prong test for standing articulated in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976):

First, one must allege some injury that has occurred or probably will result from the action involved. Under this "injury in fact test" a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing. One must, in addition allege an interest "arguably within the zone of interest" protected by the statute. (4 NRC 610, 613.)

Staff's "Motion to Deny Request for Hearing" carefully analyzed Decade's petition in Light of the Portland General test and found it lacking.

Decade responded to Staff's analysis in its February 22, 1980 filing. Decade asserts that the November 30 Order adversely affects its interest for the following reason:

It now being understood that the unit was ordered to not restart without prior written approval, it follows that the Confirmatory Order served to provide that authorization -- without which the plant would still be shut down today. Therefore, the acknowledged interest of the Decade in keeping the facility off-line until the tube degradation problem is fully solved has been injured by the Confirmatory Order. February 22 Response at 3 (emphasis in original).

This is precisely the analysis rejected by the Commission in Marble Hill. There petitioners argued that the order suspending construction adversely affected their interest because "it would permit resumption of construction without addressing a number of matters alleged by petitioners as threatening to public health and safety." The Commission rejected the right of petitioners to assert standing because they desired to address "remedies beyond those already granted." 11 NRC 440. Decade in its statement of contentions alleges only that the Staff has "failed in important respects to remedy significant safety concerns." Decade Contentions at 1 (emphasis supplied). Decade has not shown how the November 30 Order adversely affects its interest; it seeks an alternative remedy -- to shut down Point Beach. Marble Hill, as suggested by the Commission, is directly on point. Decade lacks standing because the November 30 Order, which places more restrictive operating conditions on Licensee in its operation of Point Beach, Unit 1, does not in any way adversely affect Decade's interest. Moreover, even if it is argued that Decade's interest was so affected, it is significant that none of the contentions filed

on July 15 allege that the added restrictive conditions imperil Decade's interest.

Decade's only response to the Staff's challenge to its standing is to assert that agency inaction is sufficient to confer standing. February 22 Response at 5. Decade's statement of a general principle of administrative law is not applicable to this situation. In order to have standing to request a hearing on the instant agency action -- issuance of the November 30 Order -- Decade must show that it has been adversely affected by the issuance of the Order compared with the non-issuance of the Order. Marble Hill makes very clear that petitioners cannot assert standing by arguing injury from agency inaction in failing to adopt an alternative remedy. See Commission's May 12 Order (Dissenting View of Commissioner Bradford).

A DISCRETIONARY HEARING IS NOT WARRANTED IN THIS CASE

Decade argued to the Commission that even if it is not entitled to a hearing, the Commission should commence a hearing in the exercise of its discretion. February 22 Response at 6. The Commission chose not to grant a hearing in its discretion, but rather referred the petition to the Board to determine "whether a hearing is required" and, if so, "to conduct an adjudicatory hearing solely on the issues identified in the Order." These directions to the Board do not delegate

to it the discretion to commence a hearing if one is not required -- i.e. if petitioner does not have standing or has not proposed a contention, otherwise acceptable, within the scope of the issues set forth in the November 30 Order.

Even if the Board were to interpret the Commission's May 12 Order as delegating to it the discretion to order a hearing, a discretionary hearing is not warranted here. Staff, in its "Motion to Deny Request for Hearing" discussed the factors which militate against a discretionary hearing in this case. Licensee adopts Staff's arguments at Exhibit B, pages 8-10.

The issues (see Decade Contentions) which Decade would raise in any hearing are the same issues which it has raised, and have been considered and rejected by the Staff and Commission, on a number of previous occasions. Decade raised the same issues in its § 2.206 petition of November 14, 1979. The Director, NRR, rejected Decade's arguments in his decision of November 30, 1979. The Commission did not overturn the § 2.206 decision. The Commissioners have been formally briefed by the Staff on the Point Beach steam generator tube degradation problem on two occasions. At the November 28, 1979 public meeting, Decade had an opportunity to brief the Commissioners on its concerns. Decade raised the same issues again in a § 2.206 petition concerning Point Beach Unit 2. The Director, NRR, after preparing the Staff's third Safety Evaluation Report

on steam generator tube degradation at Point Beach, denied Decade's petition. In requesting a hearing on the November 30 Order, Decade is in effect attempting to appeal the denial of its § 2.206 petition. Decade has not presented or suggested additional facts, not considered by the Commission, which might warrant a discretionary hearing. See Marble Hill, supra, at 442-443.

DECADE HAS FAILED TO STATE A CONTENTION COGNIZABLE
IN ANY HEARING ON THE NOVEMBER 30 ORDER

The contentions raised by Decade do not meet the requirements of the November 30 Order, or of § 2.714(b) and § 2.758 of the Commission's Rules of Practice. In summary fashion, those requirements are:

- (a) The contention raised by a petitioning intervenor must be within the scope of the issues identified in the November 30 Order;
- (b) The petitioner must indicate the bases for the contention set forth with reasonable specificity; and
- (c) The contention must not constitute an attack on Commission regulations or on matters that are (or are about to become) the subject of general rulemaking by the Commission.

The November 30 Order stated: "In the event a hearing is requested, the issues to be considered at such hearing shall be:

- (1) Whether the facts stated in Section II and III of this Order are correct; and
- (2) Whether this Order should be sustained."

Sections II and III of the November 30 Order read as follows:

II

Inservice inspections of the Point Beach Unit 1 steam generators performed during the August 1979 and October 1979 outages indicated extensive general intergranular attack and caustic stress corrosion cracking on certain of the external surfaces of the steam generator tubes. As a result of information provided in discussions with the licensee and its representatives, which is documented in a letter dated November 23, 1979 from S. Burstein to H. R. Denton, and the staff's Safety Evaluation Report, dated November 30, 1979, on Point Beach Unit 1 Steam Generator Tube Degradation Due to Deep Crevice Corrosion, it was determined that additional operating conditions would be required to assure safe operation prior to resumption of operation of Unit 1 from the current refueling outage.

III

The licensee in letters dated November 29, 1979 and November 30, 1979 has agreed to additional conditions which are necessary to provide reasonable assurance for safe operation of Unit 1 for a period of 60 effective full power days.

None of Decade's contentions challenge the facts in Sections II and III of the November 30 Order, nor do the contentions challenge whether the November 30 Order should be sustained. As discussed supra, Decade may not raise issues or remedies beyond the scope of the November 30 Order.

The Commission made it clear that any hearing would be "solely on the issues identified in the [November 30] Order." May 12 Order at 2 (emphasis supplied). The Commission has authority to limit the scope of issues, and a licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding. See Marble Hill, supra, at 440-441; Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 fn. 6 (1979).

While Decade's contentions are related to the importance of steam generator tube integrity, which is also the subject of the November 30 Order, they contend that the additional conditions imposed on Licensee by the November 30 Order were not sufficient to remedy Decade's safety concerns. Because Decade's contentions are not cognizable by this Board in a proceeding on the November 30 Order, this does not mean that Decade is without recourse to press its concerns. As discussed supra, Decade has done so in petitioning the Commission pursuant to § 2.206. The Director, NRR, was unpersuaded by Decade's arguments (in general the same ones raised in Decade's Contentions) and denied its petition. The Commission did not overturn the Director's decision. If Decade believes that the Commission's decision is in error, as a matter of law, it has recourse to the courts. Decade may not appeal the denial of its § 2.206 petition by demanding a hearing in regard to the November 30 Order.

Even if Decade had raised a contention arguably within the scope of the issues identified in the November 30 Order, each of Decade's contentions are defective. Decade has not supplied the "bases for each contention set forth with reasonable specificity." 10 C.F.R. § 2.714(b).² Because Decade's contentions simply do not address the issues set forth in the November 30 Order, Licensee does not propose in this response to undertake to indicate for each contention its defective nature.³ Licensee will be prepared to do so, if necessary, at the July 30 special prehearing conference.

2 While the state of the law within the Commission regarding the "bases" requirement is somewhat unsettled as a result of the Appeal Board's decision in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980), it is clear that Decade (unlike pro se petitioner in Allens Creek) has failed in its July 15 supplemental filing to provide even the modicum of support for its proposed contentions. Allens Creek can also be distinguished because there petitioner was a layman without the assistance of counsel and was not "held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Allens Creek, supra, at 546; Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). Here, Decade is represented by counsel who filed the contentions. Furthermore, it is the view of at least some members of the Atomic Safety and Licensing Board Panel that the "bases" requirement for contentions, established originally in Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973), was not changed by Allens Creek. Memorandum For R. M. Lazo from O. Paris, C. Bechhoefer and F. Shon dated May 27, 1980; cf. Memorandum for L. Bickwit from R. Lazo dated May 16, 1980. We agree and read Allens Creek as going no further than reaffirming Grand Gulf. See Allens Creek, supra, at 547-548.

3 For example, Contentions (1), (2) and (4) provide no bases. Contention (3) is a "so what" proposition. Contention (5) alleges the existence of "unsubstantiated assumptions" with no specifications

Degradation of steam generator tubes due to various corrosion mechanisms is a generic problem affecting a significant number of licensees with Westinghouse (as Point Beach) and Combustion Engineering nuclear plants. The Commission has addressed this question in a number of different contexts both generically⁴ and in the context of a particular identified problem at a plant such as Point Beach.⁵ If Decade's contentions go to the ability of ECCS to deal with a failure of steam generator tubes occurring in conjunction with a design basis loss of coolant accident, it is an impermissible challenge to

(continued)

of which assumptions are being challenged. Contention (6) simply misrepresents the staff finding. This demonstrates the wisdom of § 2.714(b), which requires the bases for each contention set forth.

4 See NRR, Summary of Operating Experience with Recirculating Steam Generators (NUREG-0523) (January 1979), in which the Staff presents its analysis of the basis for continued operation with severe steam generator tube degradation.

5 The Appeal Board held an evidentiary hearing on the steam generator tube degradation issue in Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) ALAB-343, 4 NRC 169 (1976) and ALAB-427, 6 NRC 212 (1977). During the course of the hearing the Appeal Board heard evidence on the effects of steam generator tube failures concurrent with a LOCA. 4 NRC at 197-198. The Appeal Board found, with respect to the Prairie Island facility, that there was reasonable assurance that the public health and safety will not be endangered as the consequence of tube failures. Id. at 202. This finding was reaffirmed after considering additional information concerning steam generator tube denting. 6 NRC at 220. While the specific finding was limited to the Prairie Island facility, the Appeal Board was cognizant of the generic implications of the issue and indicated its preference for dealing with the question on a generic basis. 4 NRC 201-202; 6 NRC at 220.

the ECCS Evaluation Models (10 C.F.R. Part 50, Appendix K). Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 404-406 (1973). (See Decade Contentions (1), (2), (5), (7) and (8) which appear to challenge the ECCS model and assumptions; Contentions (3), (4) and (6) may also be intended to relate to ECCS criteria but it is not clear from the broad wording of the contentions.) If the Commission were to determine it useful to consider the steam generator tube degradation issue further in a formal proceeding, it would seem more appropriate to do so generically rather than in the context solely of Point Beach Unit 1's situation.

CONCLUSION

A hearing is not warranted in this case because:

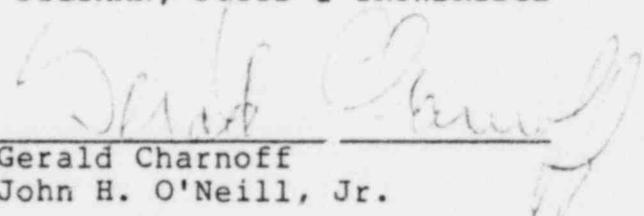
- (a) Decade has failed to state its interest and how that interest may be affected by a proceeding on the November 30 Order;
- (b) Decade has not raised one contention that addresses the issues within the scope of the November 30 Order;
- (c) Decade's contentions are defective in that they fail to establish the bases for each contention with reasonable specificity;
- (c) Decade is attempting to do no more than impermissibly appeal from NRR's denial of a § 2.206 petition alleging the same contentions;

- (e) Decade's contentions attempt to challenge impermissibly a Commission rule (10 C.F.R. Part 50, Appendix K); and
- (f) A discretionary hearing is not warranted because the authority to grant a discretionary hearing was not delegated to the Board and, even if it were, Decade has not demonstrated an ability or inclination to raise an issue not considered previously by the Commission in a number of contexts.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By


Gerald Charnoff
John H. O'Neill, Jr.

Counsel for Wisconsin
Electric Power Company

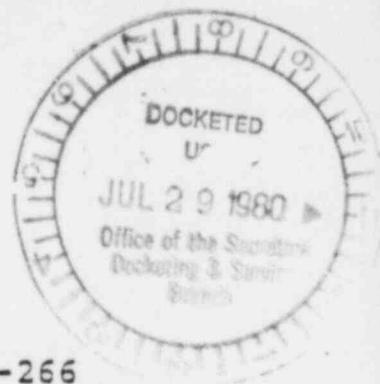
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Telephone: (202) 331-4100

Dated: July 28, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION



In the Matter of)	
)	
WISCONSIN ELECTRIC POWER COMPANY)	Docket No. 50-266
)	
(Point Beach Nuclear Plant,)	(Modification of
Unit 1))	License)

LICENSEE'S RESPONSE TO REQUEST BY
WISCONSIN'S ENVIRONMENTAL DECADE, INC.
FOR HEARING ON CONFIRMATORY ORDER

By "Confirmatory Order for Modification of License" dated November 30, 1979 ("Order") (44 Fed. Reg. 70608 (December 7, 1979)), the Director, Nuclear Reactor Regulation ("NRR"), established additional operating conditions for Point Beach Nuclear Plant, Unit 1 to ensure safe operation in light of an identified problem with steam generator tube degradation. The Order provided that any person whose interest may be affected by the Order may request a hearing with respect to the Order, but that "any request for a hearing shall not stay the effectiveness of [the] Order." The Order also provided that the issues to be considered at the hearing were limited to (i) whether the facts stated in Section II and III of the Order. The Order should be sustained. By Wisconsin's Environmental Decade hearing and argues, notwithstanding Order to the contrary, for a stay of the Order.

DUPLICATE DOCUMENT
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Wisconsin Electric POWER COMPANY
 231 W. MICHIGAN, P.O. BOX 2046, MILWAUKEE, WI 53201

December 21, 1979

Mr. Harold R. Denton, Director
 Office of Nuclear Reactor Regulation
 U. S. NUCLEAR REGULATORY COMMISSION
 Washington, D. C. 20555

Attention: Mr. A. Schwencer, Chief
 Operating Reactors Branch 1

Gentlemen:

DOCKET NO. 50-266
STEAM GENERATORS
POINT BEACH NUCLEAR PLANT, UNIT 1

On November 5 and November 20, 1979, meetings were held in Bethesda with representatives of the NRC Staff to present information and data related to recent Unit 1 steam generator tube problems. This information was confirmed by our letter to the NRC of November 23, 1979.

Our Licensee Event Report (LER) No. 79-017/01T-0, dated November 16, 1979, provided information in regard to eddy current examination results obtained during the most recent Unit 1 refueling in October. A listing of plugged tubes, defect size and defect location for each steam generator was included in the LER. Among other things, this LER indicated there were two tubes in "A" steam generator and two tubes in "B" steam generator with defects at the top of the tubesheet and one tube in the "B" steam generator with a defect one-half inch above the tubesheet. This letter is in response to your Mr. Trammell's request for further information in respect to the

LER No. 79-017/01T-0 generator eddy current October of the inspection and the location that three tubes had been physically analyzed. The results of the three tubes were discussed with you documented in our November 23 letter to the observations and conclusions where it is stated:

ts

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