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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

WISCONSIN ELECTRIC POWER COMPANY
(Point Beach Nuclear Power Plant,
Unit 1)

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Docket No. 50-266

STAFF MOTION TO DENY REQUEST FOR HEARING



February 11, 1980

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Wisconsin Electric Power Company (the licensee), is the holder of Facility Operating License No. DPR-24, issued on October 5, 1970, which authorizes the operation of the Point Beach Nuclear Plant, Unit 1, under certain specified conditions. On November 30, 1979, the Director of the Office of Nuclear Reactor Regulation issued an Order amending the license to impose certain new conditions on operation of the Point Beach facility to which the licensee has agreed. By letter dated December 17, 1979, a copy of which is attached, Wisconsin's Environmental Decade (hereinafter Decade) requested that the Commission hold a hearing on the Order. For the reasons stated herein, the Staff moves pursuant to 10 CFR 2.730 of the Commission's Rules of Practice that the Commission deny this request for a hearing.

Background

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. Following the October 1979 inspection, the NRC Staff met with representatives of the licensee and its Westinghouse consultants on November 5, and again on November 20, 1979, to discuss the

operational experience at Point Beach Unit 1 and the present condition of the steam generators. At the request of the NRC, Point Beach Unit 1 was not returned to power until a thorough safety evaluation by the NRC Staff was completed.

On November 14, 1979, Wisconsin's Environmental Decade, Inc. requested that the Commission enter an order to prohibit the reopening of Point Beach at the end of the plant's refueling cycle and commence an investigation and hearing on the safety implications of tube degradation at Point Beach. ^{1/}

On November 20, 1979, the Commission formally referred Decade's petition to the Staff for treatment pursuant to 10 CFR 2.206.

As a result of information provided in discussions with the licensee and its representatives ^{2/} and in the Safety Evaluation Report ^{3/} prepared by the Staff, it was determined that additional operating conditions would be required to assure safe operation prior to any resumption of operation of Unit 1 after the refueling

^{1/} The bases of Decade's request were:

- 1) Resumed operation of the plant would violate certain limiting conditions for operation and would threaten public health and safety;
- 2) The NRC Staff's proposed bases (NUREG-0523) for continued operation of nuclear power plants experiencing significant steam generator tube degradation are inadequate to protect public health and safety; and
- 3) The Commission's existing regulations, technical specifications, and technical guidance are also inadequate to protect public health and safety.

^{2/} This information is documented in a letter dated November 23, 1979, from S. Burstein to H. R. Denton.

^{3/} Safety Evaluation Report Related to Point Beach Unit 1 Steam Generator Tube Degradation Due to Deep Crevice Corrosion, November 30, 1979.

outage. ^{3A/} The licensee in letters dated November 29, 1979, and November 30, 1979, agreed to the imposition of additional conditions. Those conditions were imposed in the Order which is the subject of the hearing request by Decade. Because the Staff believes that safe operation of the Point Beach facility could be maintained with implementation of the conditions newly imposed by the November 30 Order, Decade's 2.206 petition requesting an order prohibiting restart and a hearing on safety implications of tube degradation at Point Beach was denied.^{4/} The Commission did not overturn the decision.^{5/}

Decade's Request

Following the denial of its 2.206 request and the issuance of the Confirmatory Order imposing additional requirements on the licensee, Decade requested a hearing on the Order. The Director's Order provided "[a]ny person whose interest may be affected by this Order may within twenty (20) days of the date of this Order request a hearing with respect to this Order." Decade asserts that its interest and that of its members "are affected by the provision of said Order permitting the unit to re-open, notwithstanding the potential safety risks created by reopening." They further contend that

"all necessary factors were not considered in the order and that critical new facts have subsequently occurred... [t]here is inadequate support to justify these three bases for continued operation of Point Beach, from necessary factors that were not considered and from new information, and that an adjudicatory hearing is necessary to compile an adequate record on which to make a decision." (Decade's petition, at 3-4).

^{3A/} The Point Beach facility had been shutdown for refueling, not because of any action taken by the Commission. Thus, no action by the Commission was necessary for the plant to resume operation.

^{4/} In the Matter of Wisconsin Electric Power Company (Point Beach Nuclear Power Plant, Unit 1), Director's Decision Under 10 CFR 2.206, DD-79-22, 10 NRC _____. November 30, 1979.

^{5/} Memorandum for Leonard Bickwit from Samuel J. Chilk, Secretary of the Commission, Subject: SECY A-79-100A - SECY A-79-100, January 16, 1980.

Standing Requirement

In stating that interested persons could request a hearing, the Director's Order followed the requirement of section 189a, of the Atomic Energy Act of 1954, as amended, which provides:

"In any proceeding under this Act, for the...amending of any...construction permit..., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. 2239(a).

The Commission has held that judicial concepts of standing should be used in determining rights to a hearing and to intervention in an existing hearing under this language of section 189a. and under section 2.714 of the Commission's Rules of Practice. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613 (1976); Edlow International Company (SNM Export License), CLI-76-6, 3 NRC 563, 569 (1976). ^{6/}

^{6/} In Edlow, an export licensing case, the petitioners asked for leave to intervene and for a hearing. The Commission held that to establish a right to hearing the petitioners would have to establish that they possessed standing - i.e., an "interest" which may be "affected" by the proceeding in accordance with prevailing judicial principles. See also Transnuclear, Inc. (Applications for Low-Enriched Uranium Exports), CLI-77-24, 6 NRC 525 (1977). The Commission extended its ruling to reactor licensing cases in Portland General Elec. Co. by holding that petitioners wishing to intervene as a matter of right in a proceeding on an application for a construction permit (in which a hearing is mandatory under section 189 a.) must meet the judicial test for standing. In Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 645 (1975), Chairman Rosenthal of the Appeal Board presaged the Commission's decisions in concluding that it was "more probable than not" that both Congress and the Commission intended that judicial standing tests be applied to determine whether petitioners for intervention have the requisite "interest [which] may be affected" under section 189 a. See Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 1 & 2 (1976).

By applying judicial concepts of standing the Commission has recognized that to have an interest affected by an action of the Commission, a person must satisfy two tests. First, a petitioner "must allege some injury that has occurred or will probably result from the action involved"; 7/ or stated another way, that petitioner's interest will be adversely affected by the Order. 8/ Secondly, a petitioner must allege an interest "arguably within the zone of interest" protected by the Atomic Energy Act or the National Environmental Policy Act (NEPA). 9/

The petitioner here has not demonstrated that any interests of it are adversely affected by the Order, i.e., by the imposition of additional restrictive requirements upon the licensee. Decade asserts that "the Order permits the unit to reopen". Contrary to Decade's assertion, this Order did not permit the unit to restart. If the Order had not been issued, the licensee would have been free to restart without the need for authorization from the Commission. The Order only confirmed the commitment of the licensee to conduct operation of its facility when it restarted according to the new conditions specified in the Order.

As to those conditions imposed by the Order, the petitioner does not claim that operation of Point Beach in accordance with these additional conditions causes harm to it. Even though it only attributes "marginal value" 10/ to the new operational conditions, it does not allege any harm which will befall it as a result of

7/ Portland General Electric Company, supra p. 4.

8/ As the Appeal Board noted in Nuclear Engineering Co. (Sheffield Low-level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978), the test for standing to intervene is "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." (emphasis added.)

9/ Portland General Electric Company, supra p. 4; see Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 152 (1970).

10/ Decade's petition at 6.

compliance with the additional restrictive requirements of this Order. Yet such harm is exactly what is required for Decade to have standing to compel a hearing on the requirements of this Order.

As Decade has not shown that it is adversely affected by the Order, it is clear that its dissatisfaction is not with the action taken, but with the action not taken by the Commission. Decade argues in its petition that Point Beach should be closed pending resolution of four enumerated issues related to tube degradation and that an adjudicatory hearing on the generic steam generator tube degradation problem should be held. These actions are not within the scope of the present Order, ^{11/} and, indeed, the Commission would have to issue some other order to take the action contemplated by petitioner. Properly characterized, then, the request of Decade for actions in addition to that ordered by the Director is a renewal of its request for action under 10 CFR 2.206 of the Commission's regulations.

Decade's petition for additional action reflects its general interest in matters concerning Point Beach. However, a mere "interest in a problem" is insufficient to confer "standing" as a matter of right under section 189 a. ^{12/} The mere "fortuitous circumstance" that the Commission has issued an Order which happens to be related to a matter about which Decade has sought and continues to seek a hearing through a request for action under 10 CFR 2.206 does not entitle Decade

^{11/} The present Order serves the important purpose of providing notice of the action the Director intends to take, and as such sets a standard of relevance which governs the present proceeding. 5 U.S.C. 554(b); cf. Douds v. International Longshoreman's Association, 241 F.2d 278, 283 (3d Cir. 1957). Whether the present Order should have gone farther and imposed some additional restrictions on the Licensee's activities is not a question under this Order, but a question outside or beyond this Order. This is also clear from the fact that in order to take the actions requested by the petitioners a further order would be required.

^{12/} Portland General Electric Co., supra p.6, at 613; see also Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

to a hearing under this Order. Cf. Indiana & Michigan Electric Co., et al., (Donald C. Cook Nuclear Plant, Units 1&2) ALAB-129, 6 AEC 414, at 421 (1973).

There must be some recognizable potential injury to petitioner as a result of the Director's Order for it to be adversely affected and thereby entitled to a hearing as a matter of right.^{13/} In the instant proceeding, the Staff believed that certain additional, restrictive conditions should be imposed to govern operation of the Point Beach facility; the Licensee has consented to this action; and Decade neither shows that it is harmed by this action nor contends that it should not go into effect.^{14/} Therefore, while the Commission could in its discretion hold hearings concerning the tube degradation issue, in general, or at Point Beach, the Commission is clearly not required under this Order to provide such a hearing at the demand of Decade.

^{13/} In licensing proceedings, the Commission has recognized that sufficient interest may be demonstrated by claims that the person requesting the hearing lives within the geographical zone that might be affected by the normal or accidental release of fission product from the facility in question due to the proposed action. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973). Indeed, persons residing in close proximity to a reactor site and who clearly fall within this geographical zone are presumed to have a cognizable interest in licensing proceedings involving that reactor. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station), ALAB-535 9 NRC 377, 393 (1979). However, this is not an initial licensing proceeding. The Point Beach facility has a license to operate, subject to NRC requirements, and there should be no presumption of "standing" due to residential proximity to contest an action which imposes additional conditions on normal operation unless there is a demonstration that harm could come to the petitioner by the action of imposing those additional conditions. No such demonstration has been made here. Indeed, Decade concedes that the new requirements have at least "marginal value". See also notes 11 & 12, supra.

^{14/} In this proceeding, but for Decade's request for a hearing, the only result is the effectiveness of the Order, because the licensee has agreed to operation of the facility in accordance with conditions imposed by the Order. "There must be a concrete demonstration that harm to the petitioner...will or could flow from a result unfavorable to it--whatever that result might be." Nuclear Engineering Co., supra n.8.

Discretionary Hearing

The Commission, if it so desired, could order a hearing on the additional limiting conditions for operation of the Point Beach facility imposed by the Order, even though it is not legally required to grant a hearing in response to Decade's request. ^{15/} However, several factors militate against such a hearing in this case.

First, what Decade, in essence, seeks is a hearing on whether the operating license for Point Beach should be suspended pending final resolution of the steam tube degradation issue, i.e.,

"The portion of the Confirmatory Order permitting the licensee to resume operation should be reversed." Decade's petition at 4.

A hearing for that purpose is precisely what was sought by Decade in its 2.206 petition of November 14, 1979. In response to that request, the Director of Nuclear Reactor Regulation in his November 30, 1979, decision concluded that it was not necessary to prohibit resumption of Point Beach operations pending a hearing on tube degradation. Notwithstanding Decade's December 17, 1979, letter to the Commission reiterating its belief that a more complete and accurate record be developed prior to the Commission's decision on whether to review the Director's November 30, 1979, decision, the Commission did not overturn the 2.206 decision and, thus, allowed it to become the final decision of the agency on that issue. Consequently, it would be inappropriate to now conduct a hearing on that question.

Second, the limited scope of the action ordered here should not be the

^{15/} The Commission can hold hearings as it deems necessary in exercising its authority in the administration and enforcement of the Atomic Energy Act. Section 161 c., 42 U.S.C. 2201(c). Similarly, as it recognized in Portland General Electric Company, 4 NRC at 616 the Commission may at its discretion permit intervention in a proceeding by persons who do not meet the tests for intervention as a matter of right. The Commission has broad discretion in establishing the scope of intervention rights. See BPI v AEC, 502 F.2d 424 (D.C. Cir. 1974).

pretext for embarking on an adjudicatory hearing on the generic steam generator tube degradation problem. Apart from any merits of a hearing on that problem, this order with limited scope, which imposes conditions on a single license, is clearly not the appropriate forum for consideration of a generic issue of this kind.

Finally, in analogous circumstances the Commission has applied the factors listed in 10 CFR 2.714 to determine whether to conduct a discretionary hearing or to grant discretionary intervention in a hearing. Edlow International Company, supra, 3 NRC at 578; Portland General Electric Company, supra, 4 NRC at 616. Application of those factors in this case demonstrates that a discretionary hearing is not warranted.

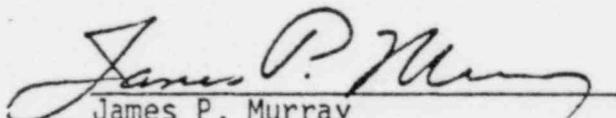
1. The nature of the petitioner's right under the Act to be made a party to the proceeding: The petitioner's right to be made a party is dependent on the presence of an interest which may be affected by the proceeding. As fully discussed above, Decade is not adversely affected by this proceeding.
2. The nature and extent of the petitioner's property, financial or other interest in the proceeding: Decade has demonstrated a general interest in matters concerning the Point Beach facility. But there is no recognizable potential injury to petitioner which could befall Decade as a result of the Director's Order.
3. The possible effect of any order which may be entered in the proceeding on the petitioner's interest: The effect of a proceeding on this order would be to uphold the order; Decade has not demonstrated that it is adversely affected by the imposition of this Order.
4. The availability of other means whereby petitioner's interest will be protected: As noted above, the bases cited by Decade in requesting a hearing on this Order, constitute, in reality, a renewal of its earlier 2.206 request. The Commission has already evaluated the Director's decision on that request and decided not to overturn it. If Decade is not satisfied with that result, its remedy now lies with an action in the Court of Appeals.

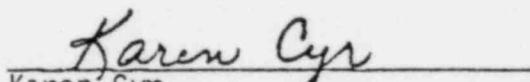
5. The extent to which the petitioner's interest will be represented by other parties: This factor is not particularly applicable here, because unless Decade's request is granted there will not be a hearing where parties' positions would be represented.
6. The extent to which petitioner's participation will inappropriately broaden or delay the proceeding: Unless Decade's petition is granted, there will be no hearing. Consequently, granting this request for a hearing would inappropriately broaden the scope of the hearing because it would establish for litigation matters to which the licensee does not object and which do not adversely affect the petitioner.

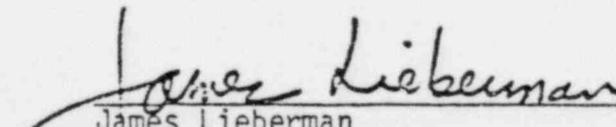
Conclusion

Decade is not entitled to a hearing as a matter of right on the Director's Order nor is a discretionary hearing warranted by the circumstances of this case. For these reasons, the request of Decade for a hearing should be denied.

Respectfully submitted,


James P. Murray
Counsel for NRC Staff


Karen Cyr
Counsel for NRC Staff


James Lieberman
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of February, 1980.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

WISCONSIN ELECTRIC POWER COMPANY
(Point Beach Nuclear Power Plant
Unit 1)

Docket No. 50-266

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF MOTION TO DENY REQUEST FOR HEARING 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 11th day of February, 1980.

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U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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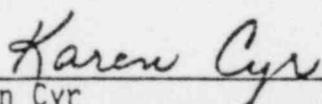
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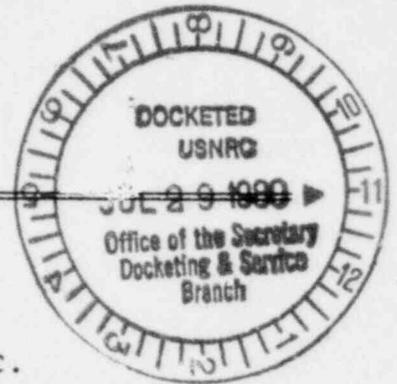
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UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION



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

ANSWER OF WISCONSIN'S ENVIRONMENTAL DECADE, INC.
IN OPPOSITION TO STAFF MOTION TO DENY REQUEST FOR HEARING

(Steam Generator Tube Degradation Matter)

INTRODUCTION

By motion dated February 11, 1980, the Staff has asked the Commission to deny the Decade's December 17, 1979 request for hearing on the November 30, 1979 Confirmatory Order in the above-captioned matter. This is to reply to the Staff motion in opposition.

Staff contends that the Decade's request for a hearing on the Confirmatory Order should be denied on the following grounds:

- (1) The Decade does not have standing to secure a hearing as a matter of right because:
 - (a) At the time the Confirmatory Order was entered, "the unit was free to restart" and the "Order did not permit the unit to restart" (see: Staff Motion to Deny Request for Hearing, dated February 11, 1980, at 5); and
 - (b) The Confirmatory Order cannot be enforced because it only resulted in "the imposition of additional safety requirements upon the licensee."

- (2) The Decade should not be afforded a hearing because it is in the discretion of the Commission's discretion to be declined to overturn the Staff's motion (see: Id., at 8 to 9).

DUPLICATE DOCUMENT

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ANO 8003140143

No. of pages: 7

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