

UNITED STATES OF AMERICA  
 NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 50-367
NORTHERN INDIANA PUBLIC	)	
SERVICE COMPANY	)	(Construction Permit
	)	Extension)
Bailly Generation Station,	)	
Nuclear 1	)	Dated: 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

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During the course of the prehearing conference of March 12-13, 1980, in this proceeding, the Atomic Safety and Licensing Board (Board) directed the parties to file statements of their positions with respect to two (2) matters. Specifically, the Board invited the parties to address the issue of whether, in order to constitute "good cause" the causes of delay in construction must be beyond the applicant's control and, secondly, whether the issue of ash pond seepage may properly be considered in this proceeding in view of the fact that the prior Licensing Board passed on the question of dewatering. We address those issues below.

I. Beyond the Control

At the prehearing conference, the Board invited the parties to brief the issue of "whether it was necessary [under 10 C.F.R. § 50.55(b)] that the applicant not have control" over the causes of delay in construction. (P. TR. p. 185.)<sup>1/</sup> It appeared to be the position of Illinois that good cause cannot be established if the reasons for the delay were within the control of the applicant. The Porter County Chapter Petitioners<sup>2/</sup> seemed to take a slightly different stance; namely, the fact that a reason for the delay was within the control of the licensee is legally relevant to the weight to be afforded that reason in the determination of good cause.<sup>3/</sup> We will address both of these issues.

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<sup>1/</sup> References to transcript pages hereinafter shall be as follows:

P. TR. p. \_\_\_\_ = Prehearing Conference Transcript, March 12-13, 1980.

CP. TR. p. \_\_\_\_ = Construction Permit Proceeding Transcript.

<sup>2/</sup> Porter County Chapter of the Izaak Walton League of America, Inc.; Concerned Citizens Against Baily Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman and Mildred Warner.

<sup>3/</sup> Neither Illinois nor the Porter County Chapter Petitioners have briefed their respective position in previous pleadings. This fact, together with the unreliability of the prehearing conference transcript, makes it impossible to characterize the position of these petitioners with confidence. We invite petitioners to advise us promptly if our statements of their positions are incorrect.

Section 50.55(b) states:

If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

The language of this section does indicate that acts "beyond the control" of the applicant can serve as a basis for an extension. However, it does not restrict the grounds for an extension exclusively to acts "beyond the control" of the applicant. Section 50.55(b) also recognizes developmental problems, fires, explosions, and strikes as a basis for an extension, any of which could be within the control of an applicant in a particular situation. More importantly, the section recognizes "other things" as a basis for an extension, and it does not limit "other things" to acts beyond the control of the applicant.<sup>4/</sup> Thus, § 50.55(b)

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<sup>4/</sup> We also note that the section would be redundant if Illinois' argument is accepted, since "other things" and "other acts beyond the control" would have an identical meaning. Since a regulation should be interpreted so that its words are not redundant or surplusage, "other things" must mean something different than "other acts beyond the control." See Wilderness Society v. Morton, 479 F.2d 842, 856, cert. den., 411 U.S. 917 (1973).

on its face contravenes the arguments of Illinois.

The very position asserted by Illinois was rejected in Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973).

To be sure, [§ 50.55(b)] indicates to an applicant that, if it is confronted with a consequential construction delay arising from one of the specified causes or "other acts beyond [their] control", it may on the basis thereof seek an extension of the latest completion date stated in its permit. By negative implication, it might also be taken as some indication that a cause of delay which was not beyond the applicant's control might not be recognized as a basis for granting the extension. However, to us at least, the Section does not carry the inevitable message that "good cause" for an extension will be deemed to exist simply because of the existence of one or more of the listed factors--i.e., that in no circumstances will the Commission or its adjudicatory boards take into account any other consideration in the making of the statutory "good cause" determination.

(6 AEC at 419.)

Finally, the consistent practice of the agency demonstrates conclusively that the regulation imposes no requirement that the causes of delay must be beyond the permit holder's control in the sense advocated by Illinois or, indeed, in any sense. Construction delays resulting from the exercise of judgment by a permittee have long been recognized to constitute "good cause." These have included

such volitional events as facility redesign<sup>5/</sup> or the determination to delay construction for financial reasons<sup>6/</sup>

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5/ Portland General Electric Co. (Trojan Nuclear Plant), Order of January 17, 1975; Florida Power Corp. (Crystal River Nuclear Generating Plant, Unit 3), Order of February 12, 1975; Consolidated Edison Co. (Indian Point Nuclear Generating Unit No. 3), Order of February 28, 1975; Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), Order of April 15, 1975; Duquesne Light Co. (Beaver Valley Power Station, Unit 1), Order of June 17, 1975; Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), Order of July 1, 1975; Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), Order of July 30, 1975; Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), Order (undated) 1975; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), Order of October 5, 1976; Virginia Power & Light Co. (North Anna Power Station, Unit 1), Order of September 28, 1977; Commonwealth Edison Co. (LaSalle County Station, Units 1 & 2), Order of May 31, 1978; Washington Public Power Supply System (WPPSS Nuclear Project No. 2), Order of August 29, 1978.

6/ Florida Power Corp. (Crystal River Nuclear Generating Plant, Unit 3), Order of February 12, 1975; Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), Order of April 15, 1975; Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), Order of May 13, 1975; Indiana & Michigan Electric Co. (Donald C. Cook Nuclear Plant, Unit 1), Order of January 20, 1976; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), Order of August 3, 1976; Arkansas Power & Light Co. (Arkansas Nuclear One, Unit 2), Order of September 28, 1976; Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), Order of November 5, 1976; Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), Order of August 18, 1977; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), Order of January 16, 1978; Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Order of July 19, 1979.

or to adjust to changes in the need for power.<sup>7/</sup>

Porter County Chapter Petitioners' argument is equally unpersuasive. As we understand the argument, they are alleging that the good cause determination must consider, as one factor in the totality of the circumstances, whether the reason for delay was within the control of the applicant. This carries the implied assertion that a reason which is beyond the control of the applicant is entitled to greater weight in determining whether good cause exists than is a reason within the control of the applicant. We are aware of no basis for such an argument and it has no support in the practice of the agency.

After an extensive review of prior construction permit extensions, we have discovered no case in which the Commission has assigned a lesser weight to a reason within the control of the applicant than to a reason beyond the control of the applicant. In fact, the Commission has treated both types of causes in an identical fashion. (See, e.g., Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), LBP-73-16, 6 AEC 379, 382-84, aff'd, ALAB-129, 6 AEC 414 (1973).)

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<sup>7/</sup> Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Unit 2), Order of January 15, 1974; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), Order of August 3, 1976.

The Commission has previously granted an extension of a construction permit even though the entire delay in construction was within the control of the applicant. (See Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), LBP-77-2, 5 NRC 261, 273-75, aff'd, ALAB-375, 5 NRC 423 (1975).) In other cases previously cited in our footnotes, reasons within the control of the applicant were found, in part, to constitute "good cause" for an extension. Thus, the Commission has held that some reasons within the control of the applicant justify a delay in construction. If a reason within the control of the applicant justifies the delay caused by that reason, there is no necessity to inquire further for the purpose of assigning a relative weight to the reason for the delay. In short, either the delay is justified or it is not; the issue of "control" is completely irrelevant to the determination of "good cause" if the reason given for a delay justifies that delay.

## II. Dewatering

During the course of the prehearing conference, the Porter County Chapter Petitioners contended that the environmental effects of dewatering under the extended construction permit must be considered in this proceeding. Their argument rests in part upon the fact that seepage from

ash ponds on the Bailly site is to be eliminated by sealing of the ponds whereas, according to Petitioners, prior assessments of the environmental effects of dewatering had assumed leakage of the ponds.<sup>8/</sup> The Board instructed the parties to submit briefs on the issue of whether it is appropriate to consider ash pond seepage in this proceeding in view of the fact that the Licensing Board in the construction permit proceeding had passed on the question of dewatering. (P. TR. p. 227.) We respectfully submit that the issue of ash pond seepage may not be evaluated in this proceeding.

The background and history of the review of construction dewatering in the Bailly proceeding are useful to consideration of Porter County Chapter Petitioners' argument. We shall therefore briefly outline the Licensing Board's review in the construction permit proceeding and in the slurry wall proceeding.

The issue of dewatering arose in the construction permit proceeding when a contention was submitted by the

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<sup>8/</sup> Four ash ponds on the Bailly site were constructed in conjunction with two coal-fired generating units presently operating at the site. These ponds act as a series of settling basins for the fly ash sluiced from the fossil units into the ponds. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-74-19, 7 AEC 557, 604 (1974). It is estimated that approximately 1 million gallons of water per day seep from these ponds into the ground water. Id. at 605.

same group of intervenors which are known in this proceeding as the Porter County Chapter Petitioners. They alleged in essence that dewatering would cause permanent damage to portions of the Indiana Dunes National Lakeshore by lowering the ground water and/or draining ponds and bogs. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-74-19, 7 AEC 557, 589 (1974).) Extensive testimony of expert witnesses was submitted by NIPSCO,<sup>9/</sup> the NRC Staff<sup>10/</sup> and Intervenors.<sup>11/</sup>

NIPSCO's witnesses explained that a dry excavation would be maintained during construction by utilizing well points arranged in a rectangular pattern around the perimeter of the excavation. (CP. TR. p. 4635.) They estimated that approximately 3,000,000 gallons of water per day or about 2,000 gallons per minute would be pumped from the excavation by the well point system. (CP. TR. p. 4669.) The excavation would be dewatered to a depth of approximately (-)4 feet elevation. (Bailly, supra, 7 AEC at 589.) Dewatering would be necessary only for the period of time required to pour

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<sup>9/</sup> Testimony of Chauvin, following CP. TR. p. 4634; CP. TR. pp. 4635-78; Testimony of Dunn and Gerhold, following CP. TR. p. 9429; CP. TR. pp. 9430-34; CP. TR. pp. 9440-9500; Testimony of Annambhotla and Brissette, following CP. TR. p. 10,335; CP. TR. pp. 10,336-98.

<sup>10/</sup> CP. TR. pp. 7041-89; CP. TR. p. 9566.

<sup>11/</sup> CP. TR. pp. 8731-8820.

the base mat and construct as much of the foundation as needed to overcome the uplift pressures of the ground water. (CP. TR. pp. 4647-48.) Deep dewatering would occur only for a "fraction of the construction period." (Bailly, supra, 7 AEC at 590.)

NIPSCO's witnesses provided estimates of the effects on ground water levels of construction dewatering, which estimates did not account for the "recharging effect" of the ash pond leakage. (Testimony of Annambhotla and Brissette, following CP. TR. p. 10,335, pp. 5-6.)<sup>12/</sup> Thus, in effect, the estimates assumed that the ponds had been sealed. The

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<sup>12/</sup> In explaining the calculations of the drawdown of the ground water table which were accepted by the Board in the Initial Decision, Dr. Annambhotla stated:

The calculations, in my judgment, are based on the best available procedure for the given site conditions. The calculations follow the procedure given in pages 297 and 323 of "Foundation Engineering" by Leonards. However, the recharging effect due to the ash ponds are not accounted for in this analysis, which makes the analysis more conservative than the true conditions. (Following CP. TR. p. 10,335, p. 5.)

He further stated:

Even the deepest drawdown, to elevation (-)4 feet, which will occur only for a fraction of the construction period, will produce drawdown of the groundwater table, of about 4.2 and 3.0 feet at distances of 600 feet and 1000 feet east of plant excavation, neglecting the influence of ash ponds. (Id. at 6.)

estimates were therefore conservative -- i.e., they over-estimated the potential drawdown. The Licensing Board agreed with the assessment by NIPSCO's witnesses that deep construction dewatering would cause a drawdown of the ground water table of about 4.2 feet and 3.0 feet at distances of 600 feet and 1,000 feet, respectively, to the east of the excavation. (Bailly, supra, 7 AEC at 589-90.) The Board further stated that beyond 1,000 feet from the excavation drawdown effects from dewatering would be slight and that areas outside a radius of 1 mile from the site "such as Cowles Bog and the more distant parts of the Lakeshore, are not likely to be affected." (Id. at 590.) The Board concluded that, when the environmental impacts associated with dewatering were added to the other environmental impacts of construction and operation of Bailly N-1, the combined environmental impact would be "negligible." (Id. at 612.)

NIPSCO also planned to conduct a program to monitor ground water levels and pond levels in the National Lakeshore which would detect any effects upon ground water levels during the course of construction dewatering. Both NIPSCO and the NRC Staff concluded that, if such a monitoring program indicated any adverse effects upon the ground water levels or interdunal pond levels, sufficient remedial action could be taken to offset those impacts by either adding

water directly to the ponds or recharging the ground water level east of the excavation. (Attachment to Dunn and Gerhold, following CP. TR. p. 9429, p. 3; CP. TR. p. 4638; CP. TR. pp. 7051-52, 7062.) The Licensing Board noted that "[i]f . . . this detailed monitoring program indicates that dewatering does have an effect in the Indiana Dunes National Lakeshore, appropriate remedial steps can be taken . . . ." (Bailly, supra, 7 AEC at 590.) The Board specifically found that NIPSCO's proposed monitoring program

contains the necessary steps for detection of any effects on the interdunal ponds of dewatering activities during construction and the mitigation of such effects by replacement of compatible water or recharging of ground water and will prevent any significant adverse environmental impact to the National Lakeshore.

(Id. at 591.) Thus, dewatering has been thoroughly examined and its effects upon the National Lakeshore were found to be insignificant even when no credit was taken for any recharge from the ash ponds.

After the Bailly construction permit was issued and prior to commencement of construction dewatering, NIPSCO proposed to install a slurry wall around the excavation which wall would act as a water barrier and eliminate or greatly reduce the amount of dewatering required to maintain a dry excavation. The Commission directed that the record be reopened to consider the environmental effects, if any,

associated with construction of the slurry wall. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 AEC 631 (1974).) After a hearing in which Porter County Chapter Petitioners and Illinois participated, the Licensing Board concluded, inter alia, that there was a high likelihood of the wall's eliminating the need for dewatering by well points. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-75-3, 1 NRC 61, 71 (1975).) If the slurry wall were not as successful as anticipated, NIPSCO would utilize well point dewatering as originally planned. In such event, the Staff was directed to review the monitoring program, taking action to assure its continued effectiveness and to mitigate any possible adverse effects. (Id. at 87.)

Additionally, the Joint Intervenors<sup>13/</sup> in the construction permit proceeding contended that ash pond seepage would pollute the Indiana Dunes National Lakeshore and that discharges to the ash ponds of effluents associated with construction and operation of the nuclear plant would contribute to that pollution. (Bailly, supra, 7 AEC at 604.) The Final Environmental Statement (FES)<sup>14/</sup> relating to the construction of the Bailly facility (February, 1973)

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<sup>13/</sup> Porter County Chapter Petitioners in the instant proceeding.

<sup>14/</sup> NRC Staff Exhibit 5 in the construction permit proceeding.

had also noted that possibility and suggested that, if monitoring of interdunal ponds and Cowles Bog revealed any such effect, appropriate remedial measures should be taken to prevent such seepage. One of the remedial measures identified in the FES was "hardsurfacing or otherwise sealing the existing ash ponds . . . ." (NRC Staff Exhibit 5 at V-20.) The issue of ash pond seepage was thoroughly reviewed by the Board which conditioned the construction permit as follows:

Prior to discharging to the site's ash settling ponds any liquid effluents attributable to site preparation, construction or operation of the Bailly Generating Station, Nuclear 1, if the required monitoring program indicated any evidence that ash pond seepage is causing a change in the chemical composition of the interdunal ponds, the Applicant will take remedial action as needed to assure that the Nuclear 1 effluents do not contribute significantly to any such changes.

(Bailly, supra, 7 AEC at 604-606, 629.) It is therefore clear that the Licensing Board in the construction permit proceeding was fully aware that the ash ponds might be sealed.

It is evident that the Board in the construction permit proceeding did not rely upon ash pond seepage in determining the drawdown occasioned by construction dewatering at the Bailly site. As we demonstrated above, the calculations of drawdown accepted by the Board were not influenced by any recharge effect from ash pond seepage. Rather, the

Board accepted the calculations which had been made without regard to ash pond seepage and noted that such calculations were "conservatively high." (Id. at 589.) Thus, it is not appropriate at this point in time to determine what change in drawdown might be occasioned by the absence of ash pond seepage. To do so would be tantamount to reconsideration of a matter which was previously reviewed in the original construction permit proceeding.<sup>15/</sup>

Petitioners have wholly failed to demonstrate any nexus between the sealing of the ash ponds and the requested extension of the completion date stated in Construction Permit No. CPPR-104. 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 of the construction permit and it is therefore not an appropriate matter for consideration in this proceeding.

Accordingly, for all of the foregoing reasons, we urge the Board to decline to consider ash pond seepage in this limited proceeding.

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<sup>15/</sup> Similarly, Porter County Chapter Petitioners seek to reopen questions concerning adequacy of the monitoring program and the remedial actions. These matters were litigated earlier and responsibility for overseeing them during construction was clearly assigned to the NRC Staff. Bailly, supra, 1 NRC at 87. No argument has been advanced which could possibly justify the requested reopening.

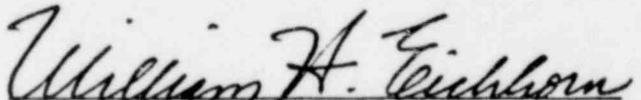
III. Conclusion

As we have demonstrated above, it is not necessary under 10 C.F.R. § 50.55(b) that an applicant have control over the causes of delay in construction in order to determine whether good cause for the requested extension exists; nor is it necessary or appropriate in this proceeding to consider the question of ash pond seepage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "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" dated April 10, 1980, were served on the following by deposit in the United States mail, postage prepaid, or by hand delivery this 10th day of April, 1980.

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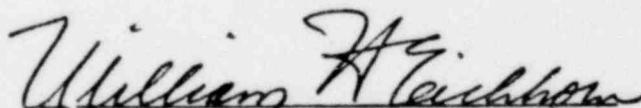
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