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DOCKET NUMBER
PETITION RULE PRM-50-25
-50-25a
(45FR 7653)

April 7, 1980

Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

RE: Docket Nos. PRM-50-25 and
PRM-50-25a

Dear Mr. Chilk:

On December 20, 1979, the State of Illinois and a group of petitioners (Porter County Chapter of the Izaak Walton League of America, Inc., Concerned Citizens Against Bailly Nuclear Site, Businessmen for the Public Interest, Inc., James E. Newman and Mildred Warner) (Petitioners) filed two essentially identical petitions requesting the Nuclear Regulatory Commission (Commission) "to amend or rescind" 10 C.F.R. § 50.55(b) of the Commission's regulations. A notice of these petitions was published in the Federal Register inviting written comments or suggestions concerning the petitions from any person who desired to submit them.1/ Pursuant to this notice, Northern Indiana Public Service Company (NIPSCO)

1/ 45 Fed. Reg. 7,653 (1980).

Acknowledged by card. 5/2

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hereby submits its comments on this petition.2/

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 good 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The Petitioners claim that this section should be amended or rescinded "so as to give effect to the statutory purpose" of Section 185 of the Atomic Energy Act (Act), 42 U.S.C. § 2235, which states in its relevant part:

> All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

2/ Pursuant to § 50.55(b), NIPSCO has applied for an extension of the construction permit for its Bailly plant (Docket No. 50-367). The Petitioners have requested a hearing on that application.

The Petitioners allege that, in order to make the "good cause" determination under Section 185, the Commission must "consider a broad range of issues" and that Section 50.55(b) should be amended to require a consideration of "whether the permittee has shown good cause for continued construction of the plan[t] in light of all the circumstances at the time of considering the application." They assert that, if the "good cause" requirement of Section 50.55(b) is limited to the reasons why construction was not completed in a timely fashion, the regulation will "frustrate the statutory purpose" of Section 185. 3/ See Petition for Rule Making of State of Illinois (December 20, 1979).

In our comments on the Petitioners' request for a rulemaking proceeding, we shall first review the legislative history of Section 185. That history, together with similar provisions in other statutes, leads to the conclusion that the congressional purpose in enacting Section 185 was to deter delays in construction. Reduction of delays was designed to maximize the utilization of special nuclear material, which was a scarce resource at the time the Act was passed. Given this purpose of the section, the definition of "good cause" is solely related to the reasons that construction was not completed, which establishes the compatability of the regulation with Section 185. The Petitioners have offered no basis for their interpretation of Section 185, and we will show that their interpretation conflicts with the two-step licensing procedure embodied in the Atomic Energy Act. Consequently, NIPSCO respectfully submits that the Commission should decline to institute a rulemaking proceeding to amend or rescind Section 50.55(b).

3/ The Petitioners have offered this same interpretation of "good cause" in the proceeding concerning extension of the Bailly construction permit and have petitioned for a waiver of or exception to § 50.55(b) if the licensing board in that proceeding does not accept the Petitioners' interpretation. Petitioners have stated that, if the licensing board accepts their interpretation or if their request for waiver of § 50.55(b) is granted, their rulemaking petitions would be moot and their petitions may be deemed to be withdrawn. They have also requested that the Bailly proceeding be suspended pending completion of this rulemaking proceeding if their petitions are not rendered moot. See 45 Fed. Reg. 7,653 (1980); Petition for Rule Making of State of Illinois (December 20, 1979).

I. Legislative History of Section 185

The Act does not define "good cause" and the legislative history is practically devoid of any meaningful insight into the term. The only substantive interpretation of Section 185 in the legislative history was provided in the hearings before the Joint Committee on Atomic Energy. Proposed Amendments to the Atomic Energy Act of 1946: Hearings on S.3323 and H.R. 8862 Before the Joint Committee on Atomic Energy, 83rd Cong., 2d Sess. 117-118 (1954), reprinted in Legislative History of the Atomic Energy Act of 1954, at 1751-52 (1955). This piece of the legislative history is relevant in two respects. First, it reveals that, in substantial part, Section 185 was patterned after the Federal Communications Act. Second, it establishes a link between Section 185 and the principle, then incorporated in the Act, that the Federal Government would own all special nuclear material and allow private licensees to lease it.

II. Purpose of Section 185

The two-step licensing procedure established by the Atomic Energy Act is not unique. Section 319 of the Federal Communications Act, 47 U.S.C. § 319 (1976), also established a two-step procedure and Section 13 of the Federal Power Act, 16 U.S.C. § 807 (1976), contains somewhat similar provisions.

An applicant for a broadcasting facility must first obtain a construction permit.

> Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

Federal Communications Act § 319(b), 47 U.S.C. § 319(b) (1976).4/ Upon completion of construction, the applicant may obtain a license to operate if he has satisfied the

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4/ Section 319(b) was adopted without change from a part of § 21 of the Radio Act of 1927, Ch. 169, 44 Stat. 1162 (1927).

terms of his application and permit and if no other circumstances would make the operation of the facility "against the public interest."

The structure established by the Federal Power Act is slightly different. Initially, an applicant receives a license which authorizes the applicant to construct and to operate a dam or related structure designed to improve navigation or generate power. However, under Section 13 of the Act, the licensee must

> commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in

> equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

The purposes of these two provisions are quite similar. Broadcasting frequencies are limited resources and, to the extent that a licensee delays in constructing his broadcasting facility, he is depriving the public and other applicants of the use of a frequency. Similarly, sites appropriate for construction of water project works are limited and, to the extent that a licensee delays in constructing his water project, he is depriving the public of the benefits of the project and reducing the number of available sites for water projects. Thus, Section 319(b) and Section 13 were designed to encourage licensees to expedite construction and to ensure that a scarce resource would not be allocated to a specific licensee who allowed it to remain indefinitely and needlessly idle. See Bay State Broadcasting Co., 12 FCC 898, 898-99 (1948); WHAS, Inc., 5 Pike and Fischer Radio Regulation 436a, 447 (1949).

Section 185(b) of the Atomic Energy Act parallels the referenced section of the Federal Communications Act and the Federal Power Act. At the time the Atomic Energy Act was passed, fissionable material was also a scarce resource.5/ The Government retained ownership of all special nuclear material under Section 52 of the Act and the Atomic Energy Commission was delegated the responsibility to distribute it to particular licensees. Atomic Energy Act § 53, 42 U.S.C. § 2073 (1976). Consequently, it would appear that Section 185(b) has the same purpose as that of its counterparts in the Federal Communications Act and the Federal Power Act; namely, to act as a deterrent to those licensees who, without a valid reason, do not complete construction and thereby deprive the public of the benefit of a scarce resource.

As special nuclear material became more plentiful and civilian use of it grew, Congress repealed Section 52 of the

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5/ See S. Rep. No. 1325, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 1305, 3110-12.

Act, permitting licensees to own special nuclear material and prohibiting power reactor licensees from leasing special nuclear material from the Commission. Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964). Later, the Commission terminated its program for allocation of special nuclear material among licensees. 32 Fed. Reg. 4,055 (1967). Thus, while Section 185 presently has only marginal utility because of the existence of an adequate supply of special nuclear material, it remains as a vestige of a time when special nuclear material was a Government-owned commodity in limited supply.

III. Definition of "Good Cause"

Any interpretation of "good cause" naturally should reflect the purpose of Section 185. It was not designed to void the construction permits of all licensees who failed to complete construction but only of those who failed to complete construction without good cause and who thereby prevented use of a valuable, scarce resource. Thus, the definition of "good cause" should relate to the reasons why the licensee did not finish construction in a timely fashion. If the licensee can establish that the delay in construction was justified, it has shown good cause for an extension of the construction permit.6/

Section 50.55(b) accords with this interpretation of "good cause." That regulation was first promulgated shortly after the enactment of the Atomic Energy Act of 1954 7/ and was clearly intended to implement Section 185. The regulation states that the Commission will recognize the following factors, among other things, as a basis for good cause:

6/ Arguably, the "good cause" requirement should vary depending upon the availability of supply. If the supply is sufficient to meet all demands, there is little reason to employ a rigorous definition of "good cause." See Channel 16 of Rhode Island, Inc. v. F.C.C., 440 F.2d 266, 275 (D.C. Cir. 1971).

7/ See 21 Fed. Reg. 355 (1956). The accompanying statement of consideration provides no insight into the purpose of § 50.55(b).

> 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 . . . .

Every factor mentioned is related solely to a cause in delay of construction. Given this wording of Section 50.55(b), it appears that the Atomic Energy Commission intended the regulation to encompass only an evaluation of those reasons for which construction was not completed by the latest date of completion contained in the permit. Thus, the purpose of both Section 185 and Section 50.55(b) supports an interpretation of "good cause" which is restricted to the reasons for the delay in construction. Therefore, Section 50.55(b) does comply with the purpose of Section 185, and we respectfully submit that the Petitioners' request to amend or rescind the regulation should be denied.

IV. Petitioners' Interpretation of "Good Cause"

The Petitioners claim that "good cause" of Section 185 should "consider whether the permittee has shown good cause for the continued construction of the plan[t] in light of all the circumstances at the time of considering the application." Petition for Rule Making by the State of Illinois (December 20, 1979), p. 3, emphasis added. The petitions for leave to intervene in the Bailly proceeding which were incorporated in the petition for rulemaking demonstrate that the Petitioners interpret "good cause" to include a consideration of all "significant developments" related to safety and the environment which have occurred since the issuance of the construction permit.8/ In essence, the Petitioners contend that a permit extension gives rise to an intermediate proceeding to reconsider the factual findings made in the construction permit proceeding in light of developments occurring after that proceeding.

The Petitioners proffer their interpretation of Section 185 in a conclusory manner and provide no support or argument whatsoever for their interpretation of "good cause."

8/ See Petition for Leave to Intervene of the State of Illinois filed in Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1) (December 20, 1979), p. 5.

It is difficult, if not impossible, to determine the basis for the Petitioners' contention that Section 50.55(b) and Section 185 are incompatible. For this reason alone, the Commission should reject this petition. See 10 C.F.R. § 2.802. Furthermore, the Petitioners' interpretation of "good cause" is wholly inconsistent with the purpose of Section 185, the legislative history of that section, and the interpretation embodied in Section 50.55(b) and applicable Commission precedent. Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973). In short, the Commission should also deny the petition because it totally lacks merit.

Additionally, the Petitioners' interpretation of "good cause" does not comport with the policy behind the Atomic Energy Act. The Act establishes a system in which the safety (and environmental) consequences of licensing the construction and the operation of a plant are considered in two separate steps. The Petitioners are in effect arguing that the construction permit extension proceeding should be transformed into a third, intermediate step in which safety and environmental issues related to construction and operation are investigated or reinvestigated. Such a suggestion reveals a fundamental misconception of the purpose of the two-step licensing process.

Safety and environmental issues are initially reviewed in the construction permit proceeding. Issues which arise during construction or which were left unresolved at the construction permit stage are monitored by the NRC Staff during construction and then are reviewed at the operating license stage. The continuing Staff review and the operating license proceeding ensure that the plant will comply with all applicable requirements before it is allowed to operate.

There is simply no reason to interrupt this orderly procedure to hold a safety and environmental hearing during construction. Initially, it should be noted that not every safety-related issue need be resolved prior to the operating license proceeding. See Power Resources Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396 (1961). Changes in design and developments which occur after the issuance of the construction permit are analyzed at the operating license stage and there is no requirement that an adjudicatory proceeding consider these issues as they arise. See Northern Indiana Public Service Co. (Bailly Generating

Station, Nuclear 1), Memorandum and Order of the Commission (December 12, 1979); Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979). More importantly, the health and safety of the public will not suffer if formal consideration of these issues is deferred until the operating license proceeding, because

> [i]t is not the public, but the utility, that must bear the risk that safety questions it projects will be resolved in good time, may eventually prove intractable and lead to the denial of the operating license.

Id. at 1370. If the NRC Staff determines during its continuing review, or as a result of a petition filed under 10 C.F.R. § 2.206, that recent developments present substantial health and safety issues that cannot await the operating license proceeding, it may institute a proceeding under 10 C.F.R. § 2.202. 9/ See Memorandum and Order of the Commission in Bailly, supra, slip op. at 17. The Petitioners' contention that an extension proceeding was intended as a mechanism for evaluating safety and environmental questions which have arisen since the construction permit proceeding is simply inconsistent with the policies to which the above referenced decisions refer.

Finally, if Congress had intended a permit extension proceeding to include a review of safety and environmental issues, it could have explicitly provided for such a review. First, Congress could have required the applicant to show good cause for "continued construction of the

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9/ In fact, the Court of Appeals for the D.C. Circuit has recently stated that the Commission may use Section 186(a) of the Act to revoke a construction permit which does not satisfy current regulatory standards, even though the construction permit met all applicable standards when it was first issued. Ft. Pierce Utilities Authority v. United States, 606 F.2d 986, 966 n. 10 (D.C. Cir. 1979). Thus, the NRC Staff and the Petitioners are not left without an alternative means of immediately questioning the safety of a plant if the Petitioners' interpretation is rejected.

plan[t]" or to show good cause for licensing the plant. 10/ Second, Congress could have allowed construction permits to expire, thereby forcing licensees who had not completed construction to repeat the construction permit review process. The fact that Congress pursued neither of these possibilities can be taken as an indication that Congress did not intend to adopt the Petitioners' interpretation of "good cause."

10/ In this respect, it is instructive to note the last portion of Section 185 of the Act, which states:

> Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a 'license'. (Emphasis added.)

Thus, the term "good cause" appears twice in Section 185, once regarding extension of a construction permit and once regarding issuance of an operating license. The "good cause" provision regarding extension stands unmodified: "unless upon good cause shown, the Commission extends the completion date." The "good cause" provision regarding the operating license is qualified by the language emphasized above. It is logical to assume that this qualification was not unintentional; i.e., that Congress intended the two "good cause" clauses to have different meanings. If Congress had intended the extension proceeding to include a safety and environmental analysis, it would have qualified "good cause" as it did in the provision regarding the operating license proceeding.

V. Conclusion

The purpose of Section 185 indicates that "good cause" should be limited to the reasons why construction was not finished by the latest date for completion. Consequently, Section 50.55(b) is entirely consistent and compatible with the statute. The Petitioners have presented no argument which would indicate to the contrary and, therefore, their petition for rulemaking should be dismissed. 11/

Respectfully submitted,

Lowenstein, Newman, Reis,
Axelrad & Toll

Counsel for Northern Indiana
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By: Kathleen H. Shea
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11/ The Petitioners' request for suspension of the proceeding considering extension of the Bailly construction permit pending disposition of this rulemaking petition should also be denied. The Petitioners have offered absolutely no basis for this request, and have addressed none of the factors which are relevant to requests for suspensions. See, e.g., 10 C.F.R. § 2.788(e).

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of a letter from Kathleen H. Shea to Mr. Samuel J. Chilk, Secretary, dated April 7, 1980, commenting on Petition for Rulemaking filed by the State of Illinois and other Petitioners, was served on the following by deposit in the United States mail, postage prepaid, or by hand delivery this 7th day of April, 1980.

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