

DOCKET NUMBER
PROD. & UTIL. FAC. 50-346

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD:

Algie A. Wells, Chairman
Dr. John H. Buck
Dr. Lawrence R. Quarles

IN THE MATTER OF)
THE TOLEDO EDISON COMPANY)
and)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
(Davis-Besse Nuclear Power Station))

DOCKET NO. 50-346

DECISION

On May 19, 1972, the Atomic Safety and Licensing Board in this proceeding issued an initial decision which held that construction of the Davis-Besse Nuclear Power Station, Unit 1, should not be suspended pending completion of the final National Environmental Policy Act (NEPA) review. The authority and review function which would otherwise be exercised and performed by the Commission in this proceeding has been delegated to the Appeal Board.^{1/} Exceptions to the initial decision have been filed by The Toledo Edison Company and the Cleveland Electric Illuminating Company (permittees), by the Commission's regulatory staff and by the Coalition for

^{1/} Notice of hearing, dated April 12, 1972, 37 FR 7644 (April 18, 1972)

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Safe Nuclear Power, an intervenor in this proceeding. The permittees have filed a response to the exceptions of the other parties.

As background, the Director of Regulation on November 30, 1971, had determined, under the provisions of 10 CFR Part 50, Appendix D, Section E, that suspension of the Davis-Besse Construction Permit (No. CPPR-80, issued on March 24, 1971) need not be ordered during the period of NEPA environmental review. Notice of this determination was published in the Federal Register, affording interested parties the opportunity for a hearing. The intervenor here did not request from the Commission such a hearing but instead asked the United States Court of Appeals for the District of Columbia Circuit to issue a stay order pending the NEPA review.^{2/} On April 7, 1972, the Court rendered a decision remanding the record to the Commission for administrative consideration of specific matters outlined in the Court's opinion. The Court required that the Commission return the administrative record to the Court within sixty days of the remand decision - a time period which expires on June 6, 1972.

^{2/} The intervenor had previously petitioned the Court for review of the Commission's decision authorizing issuance of the construction permit, but the Court remanded the proceeding to the Commission for further environmental review, under regulations issued to implement the Court's decision in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Circuit 1971).

In remanding the case to the Commission for further proceedings, the Court required consideration of the factors specified in 10 CFR Part 50, Appendix D, Section E, together with one additional factor. As applied to this proceeding, the three factors in Section E, in summary, concern the nature and effect of continued construction during the NEPA review period, whether continued construction would foreclose subsequent adoption of alternatives that could result from the NEPA review, and the effect of delay in facility construction upon the public interest.^{3/}

The Court further pointed out that omitted from these factors and from meaningful exposition in the decision by the Director of Regulation not to suspend the permit is a

^{3/}The factors which appear in Section E.2 of Appendix D read as follows:

(a) Whether it is likely that continued construction or operation during the prospective review period will give rise to a significant adverse impact on the environment; the nature and extent of such impact, if any; and whether redress of any such adverse environmental impact can reasonably be effected should modification, suspension or termination of the permit or license result from the ongoing NEPA environmental review.

(b) Whether continued construction or operation during the prospective review period would foreclose subsequent adoption of alternatives in facility design or operation of the type that could result from the ongoing NEPA environmental review.

(c) The effect of delay in facility construction or operation upon the public interest. Of primary importance under this criterion are the power needs to be served by the facility; the availability of alternative sources, if any, to meet those needs on a timely basis; and delay costs to the licensee and to consumers.

consideration central to the Calvert Cliffs' decision, i.e., whether the environmental harm outweighs the economic cost of abandonment. It stated that:

"Since the decision reached on whether to go forward with the project depends, to some extent at least, on a balance of the environmental harm and the economic cost of abandonment, each additional increment to the amount of money invested in the project tilts the balance away from the side of environmental concerns.... On remand the Commission should consider in detail whether this additional irretrievable commitment of substantial resources might affect the eventual decision reached on the NEPA review." (Emphasis supplied.)

The Court added that this additional factor should be of "paramount consideration" in the decision on suspension.

In reaching its decision that construction need not be suspended during the period of NEPA review,^{4/} the Licensing Board made findings and conclusions to the effect that continued construction during such period will have a "rather small" adverse impact on the environment, that redress of that impact can reasonably be effected should modification, suspension, or termination of the permit result from the ongoing NEPA review, and that the continued construction will not foreclose subsequent adoption of alternatives in facility

^{4/} All parties agreed that the NEPA review period would be completed by December 31, 1972. (Initial Decision, par. 2.)

design. The Board further found that delay in construction will seriously hamper the permittees in meeting the electrical power needs of consumers, and that the "irretrievable commitment of resources during the review period can reasonably be expected to have a negligible effect on the outcome of the NEPA review." (Initial Decision, Conclusions, par. F.4. - (emphasis added).)

The Board based this conclusion on its finding that the unrecoverable cost if the plant were abandoned on June 1, 1972, would be \$89,572,000 while the cost of abandonment added during the NEPA review period (June 1, 1972 to December 31, 1972) would be \$28,639,000. (Initial Decision, par. 63.)

The exceptions of both the staff and the intervenor focus primarily on the Licensing Board's exclusion of certain proffered testimony. In reaching its decision, the Licensing Board ruled that it would receive evidence concerning the environmental impact of continued construction, examples of reasonable alternatives,^{5/} the effect that continued construction would have on such alternatives, including the alternative of ultimately abandoning the plant, and the effect which

^{5/} The Licensing Board discusses the evidence received on various types of alternatives for several aspects of the plant in paragraphs 36 through 43 of the Initial Decision. It references these discussions to the transcript. (See, e.g. pp. 157-160 (discussion of alternatives to once-through cooling system, such as a cooling tower and cooling ponds); pp. 300-303 (discussion of alternatives to the present gaseous and liquid rad-waste systems.))

delay in construction or operation of the plant would have on the public interest. (See TR. 47.)

The Board, however, concluded that the environmental effects of operation of the plant and the effects of construction after the NEPA review period were irrelevant to the issues of the proceeding, and it excluded evidence proffered by each of the parties on this subject.

The Appeal Board has reviewed the record of this proceeding, together with the submissions of the parties, with a view toward ascertaining whether the action of the Licensing Board in excluding evidence of the environmental effects of the plant's operation, and of construction following the NEPA review period, was consistent with the Court's remand action and with the notice of hearing establishing the ground rules for this hearing. The rationale for the staff's exception appears to be that since the NEPA review will require a cost-benefit balance, there must be some preliminary estimate of that balance in order to assess the likelihood of whether, should such balance be close, an additional irretrievable commitment of financial resources during the NEPA review period will "tip the scales" in favor of a particular determination involving adoption of an alternative.

The Appeal Board has considerable doubt as to the practicality of the staff's approach which in our view is not required by the Court's decision. We fail to see how a tentative balancing of total environmental interests at this stage, based on rough and necessarily incomplete environmental evidence, can be made with sufficient precision to be meaningful and hence relevant to the Court's directive. This is particularly evident in light of the significance of qualitative factors in the final NEPA balancing, and the even greater effect such factors would have on any tentative balancing based on incomplete data.

Moreover, to proceed along the lines proposed by the staff and intervenors would require the Board to impose arbitrary limits on both the extent of evidence offered and the extent of cross-examination.^{6/} Additionally, undertaking a preliminary NEPA review at this stage, based on incomplete evidence, could well affect - indeed prejudice - the final outcome of the NEPA review more than would the additional investment to be made in the Davis-Besse plant during the NEPA review period.

^{6/} The Board was of the view, and all parties agreed, that a full NEPA review was not required in this proceeding.

In view of the foregoing considerations, we believe that the Licensing Board appropriately applied the Court's remand decision to this proceeding. We note that in restricting the issues, the Board stated that it "assumes every conceivable environmental finding, those favorable and unfavorable to plant operation." (Initial Decision, par. 7.) Under such assumption, it found that the additional irretrievable commitment of resources which would occur if construction were not suspended was so small, in relation to the total actual expenditures to date, that a reasonable or prudent man could conclude that "these irretrievable [incremental] costs would not affect in any significant manner the essential decisions reached in the NEPA review." (Initial Decision, par. 66.)

Commission regulations afford a Licensing Board considerable discretion in determining whether to accept proffered evidence and permit cross-examination and, particularly, to determine the relevance of particular evidence to a proceeding.^{7/} We believe that the Licensing Board acted within the scope of permissible discretion and consistently with the Court's decision, the notice of hearing, and the Commission's regulations. Accordingly, the exceptions on this point are denied.

^{7/}10 CFR Sec. 2.718

Intervenor's exceptions also raise two procedural issues. First, the Coalition contends that the participation of the regulatory staff as a party to the suspension hearing violated its rights to a fair adversary hearing. The intervenor distinguishes this hearing from a construction permit hearing on the basis that this hearing is "adversary," and that there is no basic relevancy in the staff's participation. The notice of hearing specifically provided that the staff be a party, and for this reason we affirm the Licensing Board's denial of the intervenor's motion to strike the regulatory staff as a party. In this respect, we note the mandate of court decisions that the Commission, in applying the provisions of NEPA, not "simply...sit back, like an umpire, and resolve adversary contentions at the hearing," but that it independently consider broader aspects of its regulatory responsibilities.^{8/} The staff's participation as a party is consistent with those rulings.

Intervenor's second procedural exception relates to its not being allowed to cross-examine each witness as direct examination was completed, to failure of the Licensing Board to strike certain evidence which apparently was hearsay in

^{8/} Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971); see also Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

nature, and to the appearance "as a party" of a Federal Power Commission witness. Although represented by counsel, the FPC witness appeared on behalf of the regulatory staff. The other procedural rulings of the Licensing Board which the intervenor questions were well within the appropriate discretion which a licensing board must exercise in supervising the conduct of a hearing.

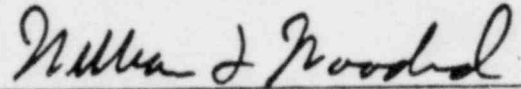
The permittees' exceptions indicate that the Board's decision is clearly correct, but they seek modification of the Initial Decision in three respects. First, they contend that the Board erred in failing to consider permittees' waiver of all consideration in developing the cost-benefit evaluation of the additional investment to be made during the NEPA review period. We are of the opinion that consideration of the additional investment during the NEPA review period was mandated by the Court's decision, and we affirm the Licensing Board in that respect. Permittees further question the exclusion by the Licensing Board of evidence concerning the effectiveness of the present systems for collecting, processing and controlling radioactive effluents, and the receipt by permittees of a water quality certification from the Ohio Water Pollution Control Board. We consider

this evidence to be of questionable relevance to the issues defined by the Court's decision and the notice of hearing and we accordingly find no abuse of discretion by the Licensing Board in excluding this evidence.

For the foregoing reasons, the exceptions of all parties are denied. This decision constitutes final action by the Commission, subject to further review by the Commission on its own motion pursuant to 10 CFR Section 2.786.

It is so ORDERED.

By the Atomic Safety and Licensing
Appeal Board



William L. Woodard
Executive Secretary

Dated: June 2, 1972

Req files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
THE TOLEDO EDISON COMPANY, ET AL.)
(Davis-Besse Nuclear Power Station)
Unit 1))

6-2-72.
Docket No. 50-346

CERTIFICATE OF SERVICE

I hereby certify that copies of the DECISION issued by the Appeal Board dated June 2, 1972 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 2nd day of June 1972:

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