

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD:

Walter W. K. Bennett, 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 July 9, 1972 the Atomic Safety and Licensing Board in this proceeding issued an initial decision, on remand by the Commission, 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)^{1/} review. The Commission has delegated to the Atomic Safety and Licensing Appeal Board the authority and review function which would otherwise be exercised and performed by it.^{2/} Exceptions to the initial decision have been filed by the Coalition for Safe Nuclear Power, an intervenor in this proceeding. Exceptions seeking clarification of the initial decision have also been filed by the Toledo Edison Company and the Cleveland Electric Illuminating Company (permittees).

1/ 42 USC 4321 et seq.

2/ Commission Memoranda and Orders dated April 12, 1972 (37 F.R. 7644, April 18, 1972) and June 29, 1972.

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By way of background, the initial decision stems from a decision of the United States Court of Appeals for the District of Columbia Circuit dated April 7, 1972.^{3/} The Court remanded the record to the Commission for administrative consideration of matters outlined in its decision, including a request by intervenor Coalition for Safe Nuclear Power and others for a stay of construction of the Davis-Besse plant pending final NEPA review.

The Director of Regulation had previously, on November 30, 1971, determined^{4/} that the construction permit issued for the plant need not be suspended pending the NEPA review. Instead of seeking a hearing before the Commission, as it had a right to do, the intervenor asked the Court to issue a stay order pending the NEPA review. In remanding the record to the Commission for further administrative consideration, the Court directed that paramount detailed consideration be given to balancing the environmental harm against the irretrievable commitment of substantial resources. The Commission on April 12, 1972, by Memorandum and Order and Notice of Hearing^{5/}, directed that a hearing be held by a specified Atomic Safety and Licensing Board (Licensing Board),^{6/}

^{3/} Coalition for Safe Nuclear Power vs. USAEC, No. 71-1396 (D.C. Cir., April 7, 1972).

^{4/} Pursuant to 10 CFR Part 50, Appendix D, Section E.

^{5/} 37 F.R. 7644 (April 18, 1972).

^{6/} The Licensing Board was designated to preside at the hearing in accordance with the provisions of §191 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2241, and implementing Commission regulations, 10 CFR §2.721.

and that such Board render a "de novo decision", based upon the factors specified in the regulations and in the Court's remand, before May 19, 1972. On May 19, 1972 the Licensing Board, after due notice^{7/} and three days of hearing^{8/}, issued a comprehensive initial decision concluding that construction should not be suspended. The Appeal Board, after considering exceptions filed by the parties in detail, affirmed the initial decision.^{9/}

The Commission on June 5, 1972, on its own motion^{10/}, reviewed the Appeal Board decision and remanded the matter to the Licensing Board. The Commission held that the court remand did not limit the consideration of environmental harm to the pre-NEPA review period, as the Licensing Board had ruled.^{11/} Accordingly, the Commission directed that the "record on remand should contain evidence dealing with environmental effects of post-NEPA review construction activities and plant operation." It added:

"This may be done by requiring a preliminary estimate of cost-benefit balance resulting from full NEPA review or by any other means, which the Licensing Board may deem appropriate to avoid undue protraction of the proceeding."

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- ^{7/} Notice and Order dated April 21, 1972.
^{8/} May 2, 3, and 4, 1972.
^{9/} Decision dated June 2, 1972.
^{10/} 10 CFR 2.786.
^{11/} See Transcript pages 71-87; 117-119; 461-2, 447-50 of May 2-4 hearings wherein the Licensing Board excluded evidence of the effect of operation on environment and limited its consideration to the pre-NEPA review period, i.e., December 1971.

In addition, the Commission dealt with the permittees' waiver of consideration of the additional investment to be made during the review period. It directed that in making its determination, the Licensing Board should first consider the effect of the incremental expenditures and then, alternatively, should exclude those expenses as waived. The Commission otherwise specifically affirmed the Appeal Board's denial of the exceptions filed by permittees and intervenors to the initial decision of May 19, 1972.^{12/} Since insufficient time for rehearing remained the Commission secured from the Court of Appeals an extension of time to file its remand^{13/}; and fixed midnight of the fifth day following the date of the initial decision as the last date for the Appeal Board to file its decision.^{14/}

We now take up the exceptions seriatim.

The intervenor asserts three exceptions. The first states that the Licensing Board erred in failing to order a halt in construction, since the applicant (permittees)

"failed to introduce any evidence upon the 'paramount issue' of, 'whether this additional irretrievable commitment of substantial resources might affect the eventual decision reached on the NEPA review.'"

Intervenor adds that, in anticipation of the importance of this issue, it moved to secure the AEC Director of Regulation as a witness, but that the Board denied this request.

^{12/} Memorandum and Order dated June 5, 1972.

^{13/} Per Curiam Order No. 71-1396, D.C. Cir., July 27, 1972.

^{14/} Memorandum and Order dated June 29, 1972.

In our opinion, the record is replete with evidence upon which the Licensing Board could ascertain whether the additional irretrievable commitment of resources during the NEPA review period might affect the eventual decision reached on the NEPA review. Not only are the resources which will be irretrievably committed identified, but the record also includes considerable information concerning the effects of future construction and operation of the reactor, alternatives to the reactor or component parts thereof, and data upon which a preliminary cost-benefit analysis might be undertaken.^{15/} It should be noted further that the intervenor specifically declined to present any evidence at all, on any subject.^{16/}

Furthermore, it was within the bounds of permissible discretion for the Licensing Board to deny the intervenor's motion to have the Director of Regulation testify. Under Commission regulations, the Director of Regulation is required to make available witnesses to testify "regarding any matter, not privileged, which is relevant to the issues in the proceeding". Those rules also specifically provide

^{15/} See, e.g., permittees' Exhibit 5, "Cost and Benefit Analysis Supplement to Environmental Report".

^{16/} Tr. 3147.

that the "attendance and testimony of... named AEC personnel ... may not be required by the presiding officer, by subpoena or otherwise". However, "upon a showing of exceptional circumstances" a board may certify to the Commission the question whether the attendance and testimony of named AEC personnel should be required.^{17/}

The Licensing Board denied the motion on the ground that "exceptional circumstances" had not been shown. We see no reason to disturb this finding. The regulatory staff made available two witnesses to testify, in a general manner, as to the various processes that are involved in drafting and publishing the final NEPA statement. As the Licensing Board indicated, since all facts are not yet known, a full NEPA review is not to be undertaken at this time; the Director of Regulation thus could not -- even if made available -- shed any light on the final cost-benefit decision to be made. With respect to the general procedures on which the intervenor said it desired testimony by the Director of Regulation, it is apparent that the intervenor failed to take advantage of the presence of the witnesses that were there, who, according to the Board, were fully capable of discussing the Commission's NEPA processes. Thus, there is an adequate basis in the record for the Licensing Board's ruling that there were no exceptional

^{17/} 10 CFR §2.720(h)(2) (emphasis supplied).

circumstances which would justify certifying to the Commission the question of the need of the Director of Regulation to testify in the proceeding. Intervenor's first exception is thus denied.

Intervenor's second exception asserts that the Commission erred in allowing the AEC regulatory staff to be a party to the remand proceedings, on the ground that such participation violated the intervenor's "rights to due process of law". This exception substantively repeats one previously made by the same intervenor in this proceeding, and which we dealt with in detail in our Decision of June 2, 1972.^{18/} We found both that the staff's participation was dictated by the Notice of Hearing, and that it was consistent with -- if not mandated by -- the Commission's broad regulatory responsibilities. That part of our June 2 Decision was affirmed by the Commission's Memorandum and Order of June 5, 1972. No new grounds having been advanced for precluding participation as a party of the regulatory staff, intervenor's second exception is denied.

Intervenor's final exception asserts that the

"applicant's and staff's evidence was conclusive of the fact that the NEPA review being carried out is only a 'pro forma ritual' and being made without regard to the individualized wildlife refuge location of the Davis-Besse plant site."

Although the basis for this exception is not entirely clear,

^{18/} See p.9 of that Decision.

it appears from the record as a whole that intervenor is questioning the lack of any specific evidence of the effects of radioactivity on wildlife in the vicinity of the reactor.

At least three witnesses -- two called by the permittees and one by the staff -- testified to the effect that man is the biological entity most sensitive to radiation, and therefore that an installation designed to operate without significant harm to man will operate also without significant harm to fish or migratory birds.^{19/} Dr. Goldman explained this conclusion as resulting "from the more complex human structure and systems in comparison to the simpler systems of the lower life forms."^{20/} Dr. Frigerio pointed out that:

"man is the most radiosensitive organism we know... man is highly organized and a relatively small disorganization is less easily repaired by man and as a consequence damage propagates and results in severe objective criteria relative to lower organisms.

"In addition to this man has a much longer life span so that he has a much greater possibility of showing damage toward the end of his long life span than a short life span organism would."^{21/}

Furthermore, as the Licensing Board pointed out, this expert testimony was "uncontroverted".^{22/}

^{19/} See in particular Tr. 2938-9 (Dr. James E. Martin); Tr. 2992-3, 3021-3 (Dr. Morton I. Goldman); Tr. 3086, 3172 (Dr. Norman Frigerio).

^{20/} Tr. 2993.

^{21/} Tr. 3086.

^{22/} Initial Decision, Par. 17.

Under these circumstances, it was not an abuse of discretion for the Licensing Board to accept the evidence of record with respect to the effect of radiation on wildlife in the vicinity of the reactor, and to reach a conclusion with respect to the probable outcome of the NEPA review. Intervenor's third and final exception is accordingly denied.

We now turn to the exception of the permittees. They state that the initial decision is "clearly correct and is supported by substantial evidence", but they seek clarification of the statement in paragraph 12 of the initial decision that "matters involving non-radioactive materials are not in issue in the present case", and the statement in paragraph 17 that the radioactive aspects of Davis-Besse operation are "the only matter at issue in the current proceedings." Although these statements may be somewhat ambiguous, it is clear from the initial decision as a whole that the Licensing Board was only expressing its view that the radioactive aspects of Davis-Besse operation was the only issue being actively controverted by the intervenor in this proceeding. The Licensing Board's view is clearly correct. Substantial non-radiological evidence was admitted into the record by stipulation and without sponsorship by live witnesses.^{23/} To the extent that the statements in paragraphs 12 and 17 may be construed to mean otherwise, they are hereby modified.

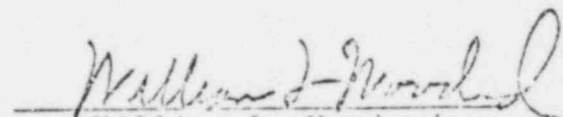
^{23/} See Tr. 2627-57.

Apart from the exceptions filed by the parties, the Appeal Board has reviewed the entire record of this proceeding. That record now includes the evidence which the Commission in its June 5 Memorandum and Order found was improperly excluded. It also includes a supplemental cost-benefit analysis^{24/} and a supplement to the environmental report.^{25/} We are of the opinion that the record now comports with the requirements of applicable Court and Commission rulings in this case and that it includes substantial evidence to support the initial decision of the Licensing Board. Accordingly, except as to the clarification described above, that decision is affirmed.

In the absence of further review by the Commission on its own motion pursuant to 10 CFR §2.786, this decision will constitute the final action of the Commission in this proceeding to determine whether the Davis-Besse construction permit should be suspended pending the full NEPA review.

It is so ORDERED.

ATOMIC SAFETY AND LICENSING
APPEAL BOARD


William L. Woodard
Executive Secretary

Dated: July 13, 1972

^{24/} See permittees Exhibit 5.

^{25/} Tr. 3076 et. seq.