

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
WISCONSIN ELECTRIC POWER COMPANY)	Docket No. 50-266 CO
(Point Beach Nuclear Plant,)	(Modification of License)
Unit 1))	

NRC STAFF STATEMENT OF POSITION ON STANDING AND
RESPONSE TO SUPPLEMENTAL PETITION AND CONTENTIONS
OF WISCONSIN'S ENVIRONMENTAL DECADE, INC.

Background

The Licensee, Wisconsin Electric Power Company, holds Facility Operating License No. DPR-24 which authorizes the operation of the Point Beach Nuclear Plant, Unit 1, located in Two Creeks, Wisconsin, under certain specified conditions. The license is due to expire on July 25, 2008. On November 30, 1979, the Director of the Office of Nuclear Reactor Regulation (hereinafter Director) issued an Order confirming the Licensee's agreement to operate the facility in accordance with additional conditions which the Director believed were necessary to provide reasonable assurance for continued safe operation of Unit 1 for a period of 60 effective full power days.

On December 17, 1979, Wisconsin's Environmental Decade, Inc. (hereinafter Decade) requested a hearing with regard to the Order under the provision of Section VI of the Order which stated that "any person whose interest may be affected by this Order may within twenty days of the date of this Order request a hearing with respect to this Order." On December 27, 1979, the Licensee filed a response opposing Decade's request for a hearing. On

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February 11, 1980, the Staff filed a motion before the Commission requesting that Decade's request for a hearing be denied. Decade filed a response to that motion on February 22, 1980.

On January 3, 1980, the Director issued a second Order imposing additional conditions on the continued operation of the Unit 1 facility. As with the initial order, the Licensee had agreed to the addition of the license conditions prior to issuance of the Order. The Director issued a further modification of the November 30, 1979 Order on April 4, 1980, imposing further testing and monitoring requirements on the continued operation of the Point Beach facility. Decade requested a hearing on that Order in a petition filed on May 29, 1980.^{1/} The Licensee filed a response in opposition to Decade's request on June 12, 1980.

By Order dated May 12, 1980, the Commission directed the Chairman of the Atomic Safety and Licensing Board to appoint a Board to determine whether a hearing in response to Decade's initial request is required under the principles set forth in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980). The Commission further directed that if the Board should determine that a hearing is required, the Board should conduct an adjudicatory hearing solely on the issues identified in the Order.

On June 25, 1980, the Atomic Safety and Licensing Board designated to preside in this matter issued an Order setting a prehearing conference on

^{1/} The Director's November 30, 1979 Order and the modifications thereto of January 3, 1980 and April 4, 1980 are hereinafter referred to collectively as the "Director's Orders" or the "Director's enforcement Orders".

July 30, 1980.^{2/} The Board stated that it would consider all requests for hearings in light of the Commission's May 12, 1980 Order.

ARGUMENT

I. Standing to Request a Hearing

The question before the Board for consideration is whether or not Decade is entitled to a hearing as of right^{3/} on the Director's enforcement Orders issued to Wisconsin Electric Power Company for Point Beach Unit 1, under the principles set forth by the Commission in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980).

It is worth noting at the outset that the actions under consideration are enforcement actions, i.e., Orders issued by the Commission to impose a specific set of restrictions on a Licensee in order to deal with a relatively narrow set of circumstances. Enforcement actions generally occur when the Commission determines that some limitation should be placed on an already existing right to construct or operate a facility. Thus, enforcement actions

^{2/} The Staff is confident that the reference to prehearing conference was merely for convenience and was not intended to imply that a hearing will ultimately eventuate. We understand the July 30 conference between the petitioner, the Licensee, the Staff and the Board to be designed to assist the Board in making its threshold decision as to whether any hearing is required at all.

^{3/} The question of whether or not a discretionary hearing should be granted in response to Decade's request is not before this Board. The Commission's Order directing that an Atomic Safety and Licensing Board be established to consider Decade's request stated that the Board was "to determine whether a hearing is required" (emphasis added). Commission Order, May 12, 1980, at 2. See also, Commissioner Bradford's dissent at 2: "In this case, the Commission goes further and declines to apply the discretionary tests itself or to permit the Board to do so."

are much more focused in scope than initial licensing actions which consider a much broader range of issues in determining whether the action should be taken.

A. The Standard to be Applied. In Marble Hill, the Director of the Office of Inspection and Enforcement issued an "Order Confirming Suspension of Construction" to Public Service Company of Indiana (PSI) for Marble Hill Units 1 & 2 because of concerns over the adequacy of the Licensee's quality assurance program. The Director's Order confirmed the Licensee's commitment to suspend safety-related construction. PSI stated that it would comply with the terms of the order and that it did not desire a hearing. Two groups, Sassafras Audubon Society (SAS) and Knob & Valley Audubon Society (KVAS) requested a hearing on the Order.

It is settled agency law, as the Commission noted in Marble Hill, at 439, that judicial concepts of standing are to be used to determine hearing rights under Section 189a of the Atomic Energy Act. Thus, the Commission has recognized that an interest of a person requesting a hearing must be adversely affected to compel the holding of a hearing under Section 189a at the request of that person. Under such a standing test, in the context of an enforcement action, it must appear (1) that petitioners have or will be injured in fact, i.e., adversely affected by the Director's decision and 2) that the petitioners' interest is arguably within the zone of interests protected by the Atomic Energy Act.^{4/}

^{4/} Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613 (1976).

In Marble Hill, SAS and KVAS requested a hearing on the basis that their interests were adversely affected by the Director's Order because it would permit resumption of construction without addressing matters which they alleged could threaten the public health and safety. The Commission characterized the SAS position as alleging that "it is entitled to a hearing as a matter of right to explore facts not (in its view) considered in the Order as a possible basis for suspension or revocation of the licensee's construction permits." Marble Hill at 440.

The Commission noted, however, that the terms of the Director's Order set forth very specific issues to be considered in the event a hearing was requested and those issues did not include consideration of different or further remedies.^{5/} The Commission went on to conclude that such a limitation on the scope of proceedings in enforcement actions was permissible. Marble Hill at 441. Thus, it held, any interested person must assert injury from the action or actions required by the Order, not from failure to order some different or more extensive relief. The Commission said that potential parties in the Marble Hill case had to assert injury on the basis of adverse effects due to the suspension of construction, not on the basis of adverse effects related to eventual resumption of construction.

In this case, as in Marble Hill, the Licensee has consented to the imposition of the conditions contained in the Director's Order. Thus, under

^{5/} The issues to be considered at a hearing in this case are similar to those in Marble Hill. They are:

- (1) Whether the facts stated in Section II and III of the Order are correct; and
- (2) Whether this Order should be sustained.

the Marble Hill principles, potential litigants in this case must base any claim to compel a hearing under the Orders on an assertion that they could be harmed by the ordered changes in the envelope of conditions surrounding operation of the Point Beach facility which resulted from the remedy chosen by the Director, i.e., harmed by the additional conditions imposed by the Director's Orders. Standing to require a hearing cannot be predicated on allegations that the person is harmed by the status quo, i.e., by operation of the facility under the conditions which existed prior to the ordered changes. Nor can it be predicated on the assertion that the ordered conditions do not go far enough and operation of the facility under the ordered conditions may be less safe than under some other set of conditions which could or ought to have been ordered. Such allegations do not describe an injury which results from any of the actions mandated by the Orders.

B. Decade Has Not Met the Standard to Compel the Holding of a Hearing. In its initial request for a hearing, Decade bases its request for a hearing "on the grounds that all necessary factors were not considered in the Order and that critical new facts have subsequently occurred." Decade Petition, December 17, 1979 at 2. These grounds are strikingly similar to those found to be inadequate by the Commission in Marble Hill.^{6/} Decade is alleging injury, as did SAS, from actions not taken. Decade, as did SAS, seeks to

^{6/} Marble Hill, supra at 440. "SAS pursues a line of argument which may be phrased as follows: its interests are 'adversely affected' by the Director's Order because it will permit resumption of construction without addressing a number of matters alleged by SAS as potentially threatening to public health and safety. SAS asserts that it is entitled to a hearing as a matter of right to explore facts not (in its view) considered in the order as a possible basis for suspension or revocation of the licensee's construction permits."

initiate a hearing to present information in support of some remedy other than that imposed by the Orders at issue. The Commission in Marble Hill clearly held that such allegations cannot serve as the basis for standing to request a hearing as of right.

In its February 22, 1980, filing,^{7/} Decade attempts a different approach. Decade argues that what the Director's November 30 Order really does is authorize the Point Beach facility to operate because the plant was shut down prior to issuance of the Order and, at the request of the NRC Staff, the licensee had agreed to keep the plant shutdown until it received "written approval" from the NRC Staff. (See Decade Petition, February 22, 1980, at 2-3). Decade contends that because the steam tube degradation problem is not fully solved at the Point Beach Unit 1 facility, it is harmed by the operation of the Point Beach facility. However, the Director's Order does not authorize operation of the facility. To the contrary, it places restrictions on operation. Wisconsin Electric Company already has the right to operate the Point Beach facility under the conditions set forth in License No. DPR-24 until July 25, 2008.^{8/}

^{7/} Decade also asserts this claim briefly in its December 17, 1979, filing, but it is explained in more detail in the February pleading.

^{8/} Whether or not the Licensee agreed voluntarily to remain shut down in November 1979 until some sort of written approval was received from the Staff does not alter the fact that it already had an authorization from the Commission to operate the Point Beach facility. Even if the November 30 Order had not been issued, the Licensee would have been free legally to restart without further authorization from the Commission. Moreover, if the Licensee had started up the plant, and the Commission believed that operation of the facility was creating a threat to the public health and safety, the Commission would have had to issue an order suspending the operating license for Point Beach Unit 1 in order to remove its authority to operate.

Once a facility has been granted an operating license, each time that facility shuts down and then resumes operation does not become the occasion for a relicensing action.^{9/} The Licensee has been granted a license to operate the facility following a broad-based inquiry from which the Commission concluded that under all the relevant circumstances and criteria the license which had been applied for should be granted. The operation of that facility under the terms of its license may then continue until the license expires or the Commission determines, for substantiated reasons, that in the interests of public health and safety, changes to or additional restrictions must be placed on the terms of the operating license or the license should be revoked.

The Director's Order in this case imposed additional conditions on the pre-existing authorization to operate the facility. The party who usually has an interest effected by such an enforcement action is the licensee, whose license to operate is being restricted in some way. The Commission has established other mechanisms whereby people, who do not have an interest which may be adversely affected by the specific limitations imposed by an enforcement order, but who believe that circumstances warrant institution of a proceeding, may seek such a proceeding. That mechanism is a "2.206 petition,"^{10/} which involves a decision by the Director, review of that decision

^{9/} Cf. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266, n. 6 (1979) and Northern States Power Company (Prairie Island Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 46, n. 4 (1978). In those cases, in the context of examining environmental consequences, the Appeal Board rejected an argument that a license amendment proceeding on spent fuel pool expansion was really a re-licensing of plant operations because, but for the expansion of storage capacity, the plant would have to cease operations.

^{10/} The phrase refers to petitions authorized by 10 CFR 2.206 of the Commission's regulations.

by the Commission, and opportunity to appeal the decision to the federal courts. See, Marble Hill at 442. The Commission may also at times, as noted in Marble Hill, broaden the scope of enforcement hearings or initiate discretionary hearings. But neither of those steps was taken in this case. Consequently, any proceeding which may be involved on these Orders has a very narrow scope and those interests which may be adversely affected by the Order are also very limited. Decade's allegations of harm from continued operation of the facility do not describe an injury resulting from an action mandated by the Director's Orders. Therefore, such allegations do not satisfy the requirement that a person seeking a hearing as of right must have an interest which could be adversely affected by the Director's Orders. In summary, Decade has advanced no adequate claims that any of its interests could be adversely affected by the actions specifically ordered by the Director's Orders.

Decade's papers can be read as suggesting that elements of the Director's enforcement order pose some safety risks.^{11/} However, not only is no support for such a suggestion provided, it is belied by two facts. First, Decade has submitted no contentions on these alleged safety risks from the reduction in primary coolant pressure.^{12/} Second, it is clear that contrary to Decade's

^{11/} Decade's Petition, February 22, 1980, at 3-4.

^{12/} Decade Petition, February 22, 1980, at 3-4. Decade also asserted that it may be harmed by the reduction in operating temperature of the hot leg in the primary coolant system. However, this reduction in temperature was not ordered by the Director, but rather was instituted by the licensee under existing terms of its license. Thus, any allegations of harm from that action cannot serve as the basis to request a hearing under this Order. See Marble Hill, supra.

assertion, the effect of the ordered reduction in pressure is to make reactor operation safer rather than less safe.

It is of course true, as noted by the Staff in the Safety Evaluation Report attached to the January 3, 1980 Order, that "this change to a lower pressure adversely affects the departure from nucleate boiling ratio (DNBR) and requires justification that the reactor is still adequately protected." SER at 1. However, the Staff's analysis in the SER demonstrates that the Point Beach facility meets all applicable safety criteria when operated at a pressure of 2000 psia and that "no significant reduction in margin has been made in the overtemperature- ΔT set point over that previously set by the Staff."^{13/} SER at 6. Moreover, given the fact that the reduction in pressure produces no problems in other operating parameters or systems, the Staff found that it is "prudent and necessary" to implement the reduction in pressure as soon as possible to reduce steam generator tube degradation. SER at 6. Thus, the effect of reduction in primary coolant pressure benefits safety, i.e., it produces a reduction in the rate of steam generator tube degradation, the condition which is the central concern addressed throughout Decade's filings. Decade cannot legitimately claim that it is adverse^{14/} affected by an action when the effect of the action is positive - a reduction in risk due to a reduction in the rate of steam generator tube degradation.

^{13/} The SER goes on to note that the finding of no significant reduction in margin in the overtemperature- ΔT set point was not essential to its ultimate conclusion that Point Beach meets all applicable safety criteria but that it provides additional assurance of safe operation.

Finally, Decade's assertion that it is harmed by the agency's inaction, i.e., its failure to take sterner actions in the Order or its failure to suspend the Point Beach operating license,^{14/} does not establish any harm to it as a result of the actions which were the subject of the Director's Order. As previously noted, the Commission has established a separate procedure, submittal of a petition pursuant to 10 CFR 2.206, for an interested person to seek enforcement actions beyond those adopted by the Director. Marble Hill at 442. Decade did submit a petition to the Commission on November 14, 1979, requesting the Commission to suspend the operating license of the Point Beach Unit 1 facility. The Director denied Decade's request in a decision issued November 30, 1979. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), DD-79-22, 10 NRC 728. The Commission declined to overturn the Director's decision.^{15/} Decade has been free to seek review of that decision in the federal courts. But the necessity or desirability of other possible actions are neither litigable nor redressable within the scope of any proceeding on the Director's Orders. See Marble Hill, supra, at 441.

C. Decade Has Not Established Its Authority to Invoke Representational Standing. There is one additional deficiency in Decade's petitions. It appears that Decade bases its interest in this proceeding on the proximity of some of its members to the Point Beach Unit 1 facility. There is no

^{14/} Decade's petition, February 22, 1980, at 5.

^{15/} Memorandum for Leonard Bickwit from Samuel J. Chilk, Secretary of the Commission, Subject: SECY A-79-100A - SECY A-79-100, January 16, 1980.

doubt that an organization may participate in a proceeding as the representative of its members. Houston Lighting and Power Company (South Texas Project, Units 1 & 2), ALAB-549, 9 NRC 644 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). However, when intervening in a representative capacity, an organization must establish that it does represent and is duly authorized to represent the interests of individuals who have an interest which could be affected by this proceeding. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979). No such representation has been made by Decade in any of its filings under the Director's Orders.

II. CONTENTIONS

As the Staff has outlined in the preceding section, Marble Hill makes it clear that any proceeding which takes place under an enforcement order is necessarily one limited in scope. Assuming a petitioner can allege that some or all of the specific actions called for by the Director's Order may adversely affect its interests, then a hearing will be conducted to determine whether, in light of that adverse effect on petitioner's interest, the facts stated in the Order provide an adequate basis to sustain the ordered actions. Thus, contentions which are litigable in such a proceeding must focus on (1) those aspects of the ordered actions which harm the petitioner, i.e., how the remedy imposed by the Director has made the facility less safe than it had been; and (2) why, on the basis of that harm, the order should not otherwise be sustained. What are clearly not acceptable are contentions

which claim harm due to the ordered actions because they did not go far enough or claim harm due to actions or circumstances which were not ordered by the Director.

Under this test, none of Decade's contentions are within the scope of the proceeding which could be held on this Order. Decade's stated position, addressed by its contentions, is that "the actions of the Staff have failed in important respects to remedy significant safety concerns". Decade's Petition, July 15, 1980, at 1.

Under Marble Hill, whether or not remedies other than those imposed by the Director could or should be ordered, is clearly not a question within the scope of a proceeding on the Director's Orders. Marble Hill at 442. Decade's assertions that "continued operation of Point Beach...poses an undue threat to the public health, safety and interest" and that "it is an inadequate basis for continued operation at Point Beach" to rely upon various Staff findings are all clearly addressing potential harm to petitioner from failure to grant more extensive relief.^{16/}

Thus, Decade has not met the requirement of 10 CFR §2.714 that it present at least one valid contention, and its request for a hearing should be denied on that basis as well as for failure to establish the requisite interest.^{17/}

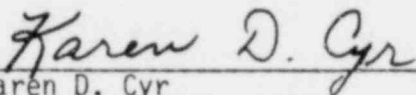
^{16/} Moreover, as the Staff has explained above, the Director's Orders are not relicensing actions, but rather impose stricter conditions under which the licensee may operate the facility.

^{17/} Cf. Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424 (1973).

Conclusion

Decade has not alleged any interest which is adversely affected by the terms of the Director's Order. Under the principles set forth in Marble Hill, they have not met the injury-in-fact test and therefore do not have standing to request a hearing as a matter of right on the Director's Orders. Furthermore, Decade has not set forth any valid contentions because those submitted are all directed toward demonstrating why more drastic remedies should have been imposed. Such issues are not properly within the scope of any proceeding on this enforcement action.

Respectfully submitted,



Karen D. Cyr
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of July, 1980.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

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

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Docket No. 50-266 C0
(Modification of License)

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF STATEMENT OF POSITION ON STANDING AND RESPONSE TO SUPPLEMENTAL PETITION AND CONTENTIONS OF WISCONSIN'S ENVIRONMENTAL DECADE, INC. 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 25th day of July, 1980.

Herbert Grossman, Esq. *
Chairman
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Richard F. Cole *
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. J. Venn Leeds *
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board Panel *
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Kathleen M. Falk, Esq.
Wisconsin Environmental Decade
302 East Washington Avenue, Suite 205
Madison, Wisconsin 53703

Gerald Charnoff, Esq.
Shaw, Pittman, Potts and Trowbridge
1800 M Street, N. W.
Washington, D. C. 20036

Wisconsin Electric Power Co.
ATTN: Mr. Sol Burstein
Executive Vice President
231 West Michigan Street
Milwaukee, Wisconsin 53201

Docketing and Service Section *
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Karen D. Cyr

Karen D. Cyr
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of July, 1980.