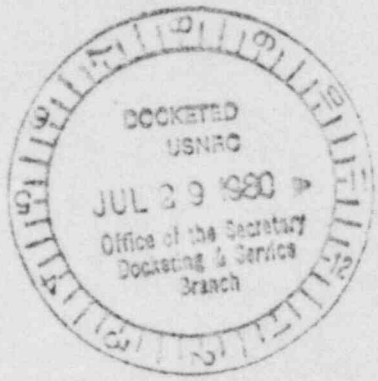
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Thomas S. Moore

SERVED JUL 29 1980

In the Matter of	)	
COMMONWEALTH EDISON COMPANY, et al.	)	Docket Nos. S50-599 S50-600
(Carroll County Site)	)	

Mr. Jan L. Kodner, Chicago, Illinois, for the appellants, Citizens Against Nuclear Power, Inc., James Runyon and Edward Gogol.

Messrs. Michael I. Miller and Alan P. Bielawski, Chicago, Illinois, for the applicants, Commonwealth Edison Company, et al.

Messrs. Steven C. Goldberg and Bradley W. Jones for the Nuclear Regulatory Commission staff.

DECISION

July 29, 1980

(ALAB-601)

I

On April 5, 1979, the Commonwealth Edison Company, the Interstate Power Company and the Iowa-Illinois Gas and Electric Company (applicants) applied for permits to construct Units 1 and 2 of the Carroll County Station on a site located in Carroll

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County, Illinois, approximately five miles southeast of Savanna and three miles east of the Mississippi River. The application was accompanied by a request for an early site review, hearing and partial initial decision on site suitability issues.

Acting upon this request, the Commission issued a notice of hearing which established a licensing board and provided that any person whose interest might be affected could seek leave to intervene in conformity with the terms of 10 CFR 2.714(a). 44 Fed. Reg. 26229, 26230 (May 4, 1979). The notice indicated that, pursuant to 10 CFR 2.606 and 2.761a, the Board was to "make findings on issues of site suitability for which early consideration is sought and [to] render a partial decision". Id. at 26229. In this connection, it stated:

> The application for construction permits with a request for an early site review identified as the issues of site suitability for which early consideration is sought the following: whether, from both an environmental and safety standpoint, the Carroll County site is suitable with respect to: geology, hydrology, meteorology, terrestrial and aquatic ecology, water use, regional demography, community characteristics, economy, historical and national landmarks, land use, noise considerations, and aesthetics. In the event the Board

> makes favorable findings on these issues, the partial decision shall remain in effect either for a period of five years or until the applicant for the construction permit has made timely submittal of the remaining information required to support the application and the proceeding for a permit to construct a facility on the site identified in the partial decision has been concluded, unless the Commission, Atomic Safety and Licensing Appeal Board, or Atomic Safety and Licensing Board, upon its own initiative or upon motion by a party to the proceeding, finds that there exists significant new information that substantially affects the earlier conclusions and reopens the hearing record on site suitability issues.
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> With respect to the Commission's responsibilities under NEPA, and regardless of whether the proceeding is contested or uncontested, the Board will, in accordance with 10 CFR §51.52(c): (1) determine whether the requirements of Section 102(2)(A), (C), and (E) of NEPA and 10 CFR Part 51 have been complied with in this proceeding; (2) independently consider the final balance among conflicting factors contained in the record of the proceeding; and (3) determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, the suitability of the site with respect to the factors reviewed.

Ibid.

Among the intervention petitions filed was that submitted jointly by James Runyon, Edward Gogol and Citizens Against Nuclear Power (CANP), hereinafter "petitioners". According to the petition, (1) Mr. Runyon resides, owns property and is employed in Rock Island, Illinois, some 40 miles south of the proposed site;

(2) Mr. Gogol lives and owns property in Chicago, approximately 133 miles east of the site; and (3) both of these individuals belong to CANP, an organization said to be concerned with protecting its members and the general public "from the environmental, economical and physical safety hazards of nuclear energy".[1/]

Thereafter, the petitioners filed an amended petition, specifying the 15 contentions which they wished to litigate in the proceeding. One or more of the contentions dealt with each of the following subjects: the need for the power to be generated by the proposed facility; alternative energy sources; the applicants' financial qualifications; feasibility of decommissioning the facility; economic costs of operating and decommissioning the facility; the overall cost/benefit balance for the facility; waste disposal; availability to the applicants of uranium fuel; the applicants' ability to build and operate nuclear plants without undue risk to the public health and safety; adequacy of insurance coverage; and the ability to provide for emergency evacuation in the event of a serious accident.

1/ Although the petition was filed a week after the deadline specified in the notice of hearing, it was accompanied by an explanation of the tardiness. In any event, it was not denied below on untimeliness grounds.

special prehearing conference on September 19, 1979, the ing Board considered the various intervention petitionth regard to these petitioners, both the applicants and C staff urged (1) that Mr. Gogol lacked standing to intein view of the geographical distance between his Chicsidence and the proposed facility site; and (2) none of thendered contentions was appropriate for litigation in a site review hearing (as distinguished from the lateings which must precede a grant of the construction permiication).[2] The Board took the standing question underement.[3] It did, however, rule orally upon the accepty of the joint petitioners' contentions. Fourteen of the rejected; judgment on the fifteenth (that dealing with ncy evacuation) was reserved.[4]

ober 10, the Board issued an unpublished order. Althcnding (at p. 2) that CANP and Mr. Runyon had the requitanding to intervene, it stated (without elaboration)"Ed Gogol is not made a party hereto for lack of stand Insofar as the contentions were concerned, the

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Board made no mention whatsoever of the fourteen which it had orally rejected at the prehearing conference. Rather, the order was confined to the identification (at pp. 3-13) of (1) those contentions (contained in other petitions) which had been "tentatively accepted", and (2) those contentions as to which judgment was being reserved. In the latter category was petitioners' fifteenth contention, as to which the Board announced (consonant with its oral ruling) that a determination of its acceptability would be held in abeyance to await "the publishing of the Three Mile Island NRC Staff report or further Commission action" (id. at p. 12).

The order concluded with the notation that the participants could "submit briefs in support of any contentions which were previously filed and which have now been rejected by the Board" (id. at p. 13). Subsequently, the petitioners filed a brief in which they argued at some length that consideration of their contentions is mandated by the National Environmental Policy Act -- a subject the Board's oral rulings had not addressed.

On May 30, 1980, the Licensing Board entered a second unpublished order, denying the petition. In that order, the Board made no reference whatever to the petitioners' NEPA

claim. Rather, the Board simply stated (at p. 11): "Contentions 1; 2; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14; and 15 are rejected as issues in the early site suitability hearing. Many, if not all, of these contentions will, if offered, be acceptable at later hearings in this matter".

Invoking 10 CFR 2.714a, the joint petitioners have taken this appeal. They complain of both the rejection of their contentions[5/] and the determination that Mr. Gogol lacked standing to intervene. In response, the applicants and the staff urge affirmance.

II

As has been seen, the two orders below are not very illuminating insofar as they relate to the questions raised by the appeal before us. To begin with, although the October 1979 order did announce the Licensing Board's conclusion that Mr. Gogol lacked standing to intervene, it neither set forth specifically the basis for that conclusion nor referred to the

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5/ More specifically, the appeal focuses on ten of those contentions, which it is said (Br. p. 4) relate to "issues which must be considered at some time in the Carroll County proceedings pursuant to [NEPA]". The remaining five contentions not embraced by the appeal were those dealing with such matters as economic burden on ratepayers; financial qualifications; uranium fuel availability; inadequacy of insurance coverage; and emergency evacuation.

: the Board presumably thought dispositive (i.e., that :ioner resided at a considerable distance from the pro- ɹlity site). Nor does it appear that the Board passed ogol's alternative argument that he should be allowed tpate in the proceeding as a matter of discretion.[6/] and General Electric Co. (Pebble Springs Nuclear Plant, ud 2), CLI-76-27, 4 NRC 610, 614-17 (1976); see also, rvice Co. of Oklahoma (Black Fox Station, Units 1 and 397, 5 NRC 1143, 1145 (1977).

the same is true of the Board's treatment in both c the question of the present litigability of the con- dvanced in the petition. The October 1979 order did note of the summary oral rejection of fourteen of tentions during the course of the prehearing confer- e alone cite the pages of the conference transcript at w rejection appears. It was thus left to us to can- ntire transcript in search of the Board's rulings. rd to the fifteenth contention (as to which the Octo- b reserved judgment), the May 1980 order did not explain ws then being rejected. Further, the latter order did nnt the petitioners' NEPA argument which had been

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advanced in their brief (submitted with the Board's authorization in the interval between October and May).

We call attention to these matters for the purpose of enlisting the cooperation of the Board below in insuring that its future orders in this proceeding either (1) explicate the foundation for each ruling contained therein; or (2) in the event that the ruling was earlier announced and explained orally, contain an express reference to where the explanation can be found. In this connection, we assume the Board's awareness of its obligation to make known the underpinnings of its determinations on all significant matters of law and fact. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410-11 (1978) and cases there cited. We might remand the matter for the Licensing Board to explain fully the basis of its decision. But no such remand is necessary here. For it is possible to decide the appeal at hand even without the benefit of the reasoning which led the Board to its undeveloped conclusions.

A. The appropriate starting point in our examination of the merits of the appeal is the petitioners' attack upon the total dismissal of their petition for want of a now litigable contention. In this regard, petitioners maintain that ten of

the fifteen contentions put forth by them[7] raise issues which must be explored in this early site review proceeding -- rather than deferred for scrutiny at such time as the Licensing Board may be called upon to address the issuance of a construction permit or limited work authorization.

1. It is settled that, in determining whether it is empowered to entertain a particular issue, a licensing board must respect the terms of the notice of hearing published by the Commission for the proceeding in question. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); see also, Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25-26, reversed in part on other grounds, CLI-80-12, 11 NRC 514 (1980). Here, the notice of hearing was most explicit in identifying the issues which are to be considered in this early site review proceeding. See pp. 2-3, supra. Each of them is concerned with one aspect or another of the suitability of the Carroll County site for the placement of a nuclear power facility. As is equally obvious, none of the ten contentions currently before us comes within their scope. Indeed, petitioners themselves implicitly so concede.

7/ See fn. 5, supra.

In thus delineating with some precision the ambit of the proceeding, the Commission was giving effect to its regulations governing early site reviews. See 10 CFR 2.101(a-1), 2.600-2.606. We need not rehearse those regulations in detail here. Suffice it to say that they contemplate that any early review, hearing and partial initial decision will be confined to those site suitability issues as to which the applicant has (1) sought such action and (2) supplied the information required to be furnished in its preliminary safety analysis report (PSAR) and environmental report (ER).[8/] In keeping with this contemplation, Section 2.604(a) provides that:

> Where an applicant for a construction permit for a utilization facility subject to this subpart requests an early review and hearing and an early partial decision on issues of site suitability pursuant to §2.101(a-1), the provisions in the notice of hearing setting forth the matters of fact and law to be considered, as required by §2.104, shall be modified so as to relate only to the site suitability issue or issues under review.[9/]

8/ An applicant invoking the early site review procedures need provide at the time its application is filed only that PSAR and ER information "which relates to the issue(s) of site suitability for which an early review, hearing and partial decision are sought * * *". 10 CFR 2.101(a-1)(1). The remainder may be later furnished.

9/ Section 2.104(b) prescribes the content of a notice of hearing in a construction permit proceeding.

: pe assert, however, that an early site
suidetn constitutes a "major Federal action
sigiy athe quality of the human environment"
witheanction 102(2)(C) of NEPA, 42 USC 4332
(2): th, we are told, it is not sufficient
forff mpare (as it intends to do) an environ-
mencct sconfined to the site suitability is-
sueshicy decision has been sought by the ap-
pliatheing to the petitioners, fulfillment
of corssitates a full staff environmental
assof ted project, including an appraisal of
ther thhich would be generated by it. By
theken,rgument goes, the Licensing Board has
a s oblo conduct a complete NEPA review in
theof tuitability proceeding.

he aand the staff regard this thesis to be
an siblupon the Commission's early site review
reg. S 2.758. We perceive no need, however,
to n thon. It is clear to us that the peti-
tioe mited the NEPA command. More particularly,
we sfiae statute imposes no obstacles to the
Coms ad the bifurcated environmental review
proctiae regulations in question.

a. To begin with, the fundamental premise undergirding petitioners' reasoning is faulty. An early site review does not, of itself, amount to "major Federal action significantly affecting the quality of the human environment". It neither does nor can authorize any work on the site which might produce environmental effects. In order for such work to commence, the applicant must have in hand either a construction permit or a limited work authorization. Neither of those documents can issue unless and until a full environmental review has been undertaken and completed by both the staff and the Licensing Board. 10 CFR 50.10(e), 51.5(a)(1), 51.52.

This does not mean that NEPA has no bearing upon an early site review. As recognized in the notice of hearing here (see p. 3, supra), the review has to be conducted in conformity with that statute insofar as it encompasses issues pertaining to the suitability of the proposed site from an environmental standpoint. For this reason, the Licensing Board will have before it so much of the staff's environmental impact appraisal as addresses those issues. The significance of our determination regarding the operative effect of an early site review is, once again, simply that such a review need not entail an assessment of environmental concerns which are unrelated to the suitability of the proposed site.

b. The purpose served by an early site suitability review is illumed by our decision in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2),

ALAB-277, 1 NRC 539, 546-47 (1975).[10/] As there pointed out, such a review -- even if conducted well in advance of the ultimate determination on the construction permit application -- might disclose either that the site does not meet applicable safety standards or that it has environmental shortcomings which (at least if not remediable) would very likely lead to its rejection. Such a disclosure at the threshold would benefit the public as well as the applicant. In the instance of a site which was found unsatisfactory per se, for example, it would obviate "wasteful expenditures of both time and money * * * by alerting the applicant promptly to the need to find a better location for its plant". Id. at 546.

The value of early findings on any licensing issue -- whether safety or environmental -- is heavily influenced by the degree of likelihood that those findings will lose their validity over the passage of time. With respect to suitability findings based upon the physical characteristics of the site and its environs (e.g., local geological and weather conditions), that risk would not appear substantial. Douglas Point, supra, 1 NRC at 546. But the same is not true of early determinations on such issues as need for power, which has been singled out by the petitioners (Br. p. 7) as the one "most urgently warrant[ing] consideration" at this time. If recent experience teaches anything, it lays to rest

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10/ Douglas Point was specifically alluded to by the Commission in connection with its promulgation in 1977 of the early site suitability review regulations. See 42 Fed. Reg. 22882 (May 5, 1977).

any serious doubt that predictions of future electricity demand are fraught with uncertainty and, more probable than not, will require significant revision from year to year.

Thus, there is every practical reason why any early site review should be limited to issues of the type described in the notice of hearing published in this case. In this connection, the fact that an applicant has requested such review on a particular issue does not insure that it will be forthcoming. The regulations reserve to the Commission the discretion to deny the request if, inter alia, it appears that an early partial decision on the issue "would not be in the public interest considering (i) the degree of likelihood that any early findings * * * would retain their validity in later reviews * * *". 10 CFR 2.605(b)(2).

c. Our attention has been directed by the petitioners to no judicial authority which might lend any support to the notion that NEPA forbids an early appraisal of the suitability of a proposed nuclear power facility site unless accompanied by the evaluation of all other environmental aspects of plant construction and operation.[11/] And there is evidence that, for its part, the Council on Environmental Quality does not discern any inconsistency between the statute and the Commission's early site review regulations. In commenting upon the

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11/ Without belaboring the point, the decisions cited by them simply do not stand for that proposition.

regulations when still in draft form, the Council expressly endorsed what it perceived to be their underlying concept -- "namely, that genuine consideration of alternative nuclear facility sites is more likely to occur if an applicant has not invested substantial amounts in site-specific design at the time of site review".12/

B. It follows from the foregoing that the Licensing Board correctly concluded that none of the joint petitioners' contentions is now litigable. Consequently, the outright denial of their petition was mandated.

In these circumstances, it is unnecessary to reach the question whether Mr. Gogol lacked standing to intervene. We can also pass the question whether, not having been taken within ten days of the entry of the October order, the appeal on that issue was untimely. See 10 CFR 2.714a.

12/ See April 27, 1977 letter from the Council to the Chairman of this Commission (appended to the staff's brief as Attachment A), at p. 1. The Council did go on to note a few concerns respecting the manner in which the concept was implemented in the draft which had been submitted to it. In all respects here material, its suggested revisions to accommodate those concerns were thereupon adopted by the Commission.

The denial of the joint petition for leave to intervene is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board