

8/29/80

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409-SC
(La Crosse Boiling Water Reactor)	)	Prov. Op. Lic. No. DPR-45 (Order to Show Cause)

NRC STAFF'S RESPONSE TO REQUESTS FOR HEARING

By order dated July 29, 1980, the Commission delegated the Atomic Safety and Licensing Board authority to consider and rule on two requests for hearing on the Director of Nuclear Reactor Regulation's (NRR) Order to Show Cause of February 25, 1980. In its August 5, 1980, Memorandum and Order, the Board invited the NRC Staff and the licensee to submit responses to the requests for hearing filed by Frederick M. Olsen III and by the Coulee Region Energy Coalition (CREC). For the reasons stated in this filing, these requests should be denied unless the requests can be amended to cure the defects noted below. The Board should provide both requesters an opportunity to cure the defects.

I. IN THE STAFF'S VIEW, THE LICENSEE HAS SHOWN CAUSE WHY IT SHOULD NOT DESIGN AND INSTALL A SITE DEWATERING SYSTEM

Before providing the Staff's views on the requests for hearing filed in this proceeding, the Staff brings to the attention of the Board that the Director of the Office of Nuclear Reactor Regulation (NRR) has determined

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that the licensee has shown good cause why it should not be required to design and install a dewatering system at the La Crosse site. Because the Director's determination will bear on the position the Staff takes in this case, the Staff wishes to bring this determination to the attention of the Board and the petitioners. A copy of the Director's determination (with NRR's safety evaluation) is attached as Enclosure 1. To put the Director's determination in context, a brief description of the events following issuance of the Order to Show Cause is given.

On February 25, 1980, the Director of NRR issued an Order to Show Cause to the Dairyland Power Cooperative (DPC) on the basis of the NRC Staff's concern over potential liquefaction of soils at the site of the La Crosse Boiling Water Reactor (LACBWR) if an earthquake with a peak acceleration of 0.12g occurred.<sup>1/</sup> 45 Fed. Reg. 13,850 (Mar. 3, 1980). Based on its preliminary analyses, the Staff concluded tentatively in February 1980 that liquefaction of soil might occur at the LACBWR site to such a degree that DPC should be required to take mitigating measures to assure future safe operation of the LACBWR. As discussed in the Order to Show Cause, 45 Fed. Reg. at 13,850, a dewatering system for the LACBWR site was proposed by the Staff as a way to deal with a possible liquefaction problem. In view of the Staff's preliminary conclusions concerning the potential liquefaction problem

<sup>1/</sup> The licensee had designated an earthquake producing a ground surface level peak acceleration of 0.12g as the "Safe Shutdown Earthquake" (SSE) in the licensee's October 9, 1974, Full Term Licensee Application. As noted in the Order to Show Cause the Staff has not yet established the SSE value for LACBWR, but has used the 0.12g figure as a benchmark from which the potential liquefaction problem has been evaluated.

at the LACBWR site and the possible mitigating effects of a site dewatering system, the Director of NRR issued the Order to Show Cause on February 25, 1980.

The Order required DPC to show cause why it should not:

- (1) Submit a design proposal for a site dewatering system; and
- (2) Make such a system operational, assuming the NRC approved the system by February 25, 1981, or place the LACBWR in a safe cold shutdown condition.

The Order to Show Cause did not obligate the licensee to design or install a dewatering system. Rather, the Order to Show Cause put the licensee on formal notice that, in the absence of the licensee's showing of good cause, the Director of NRR intended to modify the LACBWR license so as to require design and installation of a site dewatering system. Pursuant to 10 CFR 2.202, the Order provided the licensee an opportunity to show good cause why that action should not be taken.<sup>2/</sup>

The licensee answered the Order to Show Cause on March 25, 1980.<sup>3/</sup> Before the licensee's answer was submitted, Frederick M. Olsen III and CREC requested, on March 18th and 19th respectively, a hearing on the Order to Show Cause. As part of its evaluation of the licensee's answer, the Staff submitted requests for additional information to the licensee pursuant to 10 CFR 50.54(f). In submittals dated July 14, 1980, and July 25, 1980, the licensee formally responded to the Staff's requests for additional information. The Staff has prepared an evaluation of the licensee's response to

<sup>2/</sup> The Order to Show Cause was not immediately effective.

<sup>3/</sup> The licensee submitted corrections and revisions to its answer on April 3, 1980.

the Order to Show Cause and the Staff's requests for additional information, which is attached to this filing as Enclosure 1. For the reasons set forth in the Staff's evaluation, the Director of the Office of Nuclear Reactor Regulation has determined that the licensee has shown good cause why it should not be compelled to design and install a site dewatering system.

II. STAFF'S VIEWS ON THE REQUESTS FOR A HEARING FILED BY CREC AND  
FREDERICK M. OLSEN III.

A. Standards to be Applied in Determining Whether a Hearing is  
Required on the Order to Show Cause

The question before the Board is whether a hearing is required in response to the requests of CREC and Mr. Olsen. It is worth noting from the outset that the action under consideration is an enforcement order, i.e., an Order to Show Cause issued by the Director which requires the licensee to show good cause why it should not be further ordered to take or refrain from some action. Enforcement orders generally are issued when the Commission determines that some limitation may be necessary on a pre-existing authorization to construct or operate a facility. Enforcement proceedings are focused, thus, more narrowly than initial licensing proceedings in which a broad range of issues is considered in determining whether the license should be issued.

Hearings on enforcement orders are not mandatory. Under section 189a. of the Atomic Energy Act of 1954, as amended, the Commission must grant, however, a hearing

"[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license...upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. 2239(a).

The issuance of the Order to Show Cause had the effect of instituting a proceeding within the meaning of section 189a. of the Atomic Energy Act. See 10 CFR 2.202(a). In determining rights to a hearing and to intervene in hearings on such proceedings under the Atomic Energy Act, the Commission applies judicial concepts of "standing". Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). To satisfy the test for standing, a petitioner must show (1) that he has been or probably will be injured in fact, i.e., "adversely affected if the proceeding has one outcome rather than another",<sup>4/</sup> and (2) that such injury is arguably within the "zone of interests" protected

<sup>4/</sup> Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

by the statute governing the proceeding.<sup>5/</sup> Portland General Electric Co., supra, 4 NRC at 613.

In licensing proceedings, the Appeal Board has ruled that a petitioner in geographic proximity to a reactor site can be fairly presumed to have an interest which might be affected by construction or operation of the reactor. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974); see also Virginia Electric & Power Co. (North Anna Nuclear

<sup>5/</sup> The Commission's general requirements for petitions to intervene and petitions for hearing are set forth in 10 CFR 2.714. See also 10 CFR 2.700. Under 10 CFR 2.714(a)(2), a petitioner must submit a written petition setting forth his interest in the proceeding and how that interest may be affected by the results of the proceeding. The petitioner must also state the aspects of the proceeding for which intervention or a hearing is sought and the reasons why the petitioner should be permitted to intervene. Under 10 CFR 2.714(a)(2), the petitioner must also make particular reference to the factors in 10 CFR 2.714(d), i.e.:

- (1) the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding;
- (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and
- (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest.

Although 10 CFR 2.714 does not expressly apply to requests for hearings under orders issued pursuant to 10 CFR 2.202, and though the Order to Show Cause did not set forth the specific content required of requests for hearing, the substantive factors listed in 10 CFR 2.714 are clearly relevant to the Board's determination whether CREC and Mr. Olsen have established that they are entitled to a hearing. The factors listed in 10 CFR 2.714 essentially follow the general requirements for establishing "standing" in NRC proceedings.

Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (1979). Although geographic proximity to the facility in issue may bear on the possible impact of the proceeding on the petitioner's interest, geographic proximity alone is insufficient to establish "standing" to request a hearing on enforcement orders. Unlike licensing proceedings, which involve consideration of a broad spectrum of issues bearing on the initial authorization to construct or operate a facility, enforcement orders under 10 CFR 2.202 and 2.204 establish generally narrow proceedings to consider matters pertaining to a previously issued authorization. Petitioners for a hearing under an enforcement order must allege injury that flows from the imposition or denial of the remedy proposed in the order. Public Service Co. of Indiana, supra, 11 NRC at 440-42. Therefore, in this proceeding on the Order to Show Cause to DPC, the petitioners must establish that they are adversely affected if this proceeding results either in imposition of an order to DPC to design and install a dewatering system or in no imposition of such an order. Put another way, the petitioners cannot establish standing on the basis that they are injured by the failure to consider more extensive or different remedies, e.g., license suspension or revocation, in the proceeding.

B. Unless a More Specific Showing is Provided, CREC and Mr. Olsen Have Not Established That a Hearing is Required at Their Request.

1. CREC's Request for Hearing

CREC has been granted intervention in proceedings concerning issuance of the full-term operating license for the LACBWR and expansion

of the LACBWR spent fuel pool. With respect to an affected interest in this proceeding, CREC states

"The interest of CREC in this matter is obvious, as the Order of February 25, 1980, was issued as a response to a Motion to Suspend Provisional Operating License DPR-45, which I [Anne Morse] filed on behalf of the coalition with the Office of Nuclear Reactor Regulation on May 21, 1979."

The "Motion to Suspend" to which Ms. Morse refers was a petition under 10 CFR 2.206 filed by Ms. Morse on behalf of CREC. A copy is attached as Enclosure 2. Ms. Morse's petition alleged and requested the following with respect to the liquefaction issue:

"Whereas, the recent WES [Waterways Experiment Station] analysis of the LACBWR relative to the NRC's SEP, entitled Liquefaction Analysis for La Cross (sic) Nuclear Power Station (Reference 3), casts doubt upon the ability of LACBWR to meet the requirements of 10 CFR 100.10(4)(c)(1), and

Whereas, DPC has requested a reanalysis and completion of said reanalysis is not expected for several months, and

Whereas, the negative implications of the completed WES cannot be overstated relative to the conservative operation of LACBWR,

We, therefore, request that the NRC order DPC to cease further operation of LACBWR until such time as said reanalysis is completed." Petition at 2.

In a decision issued on February 29, 1980, the Director of NRR denied the petition on this and the other grounds that Ms. Morse claimed warranted suspension of the LACBWR's operation. Dairyland Power Cooperative (LACBWR), DD-80-9, 11 NRC 392 (1980). The Commission did not overturn the Director's decision. See Enclosure 3. Although the Director denied the request for suspension, he informed Ms. Morse that



her petition had been granted in part by issuance of the Order to Show Cause on February 25, 1980. Thus, to the extent that the NRC Staff shared the petitioner's concern that the liquefaction issue be resolved at the LACBWR site, the petition was granted.

Beyond its reference to the 10 CFR 2.206 petition, CREC provides no information from which to evaluate whether CREC has shown injury in fact to establish "standing" in this proceeding. The fact that CREC filed a 2.206 petition has no bearing on whether it has a cognizable interest affected by this proceeding. Any person, regardless of their interest or "standing", may file a 10 CFR 2.206 petition. In addition, the fact that the Director may have granted CREC's 2.206 petition in part does not confer standing in this proceeding. See Public Service Co. of Indiana, *supra*, in which the Commission denied the request for hearing by a petitioner whose 10 CFR 2.206 petition had been granted in part. Moreover, while the petition asked that the LACBWR's operation be suspended pending a reanalysis of liquefaction potential at the La Crosse site, the 10 CFR 2.206 petition took no position with respect to whether or not a site dewatering system was necessary. The petition evinces a general concern that the liquefaction issue be resolved at La Crosse, but such general interests in a problem are not sufficient by themselves to render CREC "adversely affected" by one or more of the possible outcomes of the proceeding on the Order to Show Cause. See Nuclear Engineering Co., *supra* note 4, 7 NRC at 741-43, quoting Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972).

If, by reference to its 10 CFR 2.206 petition, CREC intended to establish its interest by pointing to the Director's failure to grant CREC's request for suspension of the LACBWR license, then CREC has not established that it is adversely affected by this proceeding. Under Public Service Co. of Indiana, *supra*, a petitioner cannot base his standing on alleged injury from failure to

consider more extensive relief under an enforcement order. 11 NRC at 442. Thus, CREC cannot allege that it is injured by the failure to consider suspension of the LACBWR's operation within the scope of this proceeding. As the Order to Show Cause, the Commission's Order designating the Board in this proceeding, and the Board's Memorandum and Order of August 5, 1980, clearly state, the issues to be considered in this proceeding concern only whether the licensee should be required to design and install a dewatering system.

Beyond the lack of sufficient allegations of the effect of the proceeding on its interest, CREC's request for a hearing is defective in another respect. Although organizations may participate in a proceeding as the representative of its members,<sup>6/</sup> an organization must establish when requesting a hearing in a representative capacity that it does represent and has been duly authorized to represent at least one member of the organization who has an interest affected by the proceeding. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979). In order to establish such derivative standing, the organization must allege more than that it has members who reside in the vicinity of the facility; rather, an organization should generally describe its membership and must identify at least one member who has a cognizable interest which may be affected by the outcome of the proceeding. Id., 9 NRC at 390, 394. In addition, the member with the affected interest must have

<sup>6/</sup> Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-549, 9 NRC 644 (1979).

authorized the organization to represent his interests. Id., 9 NRC at 396. CREC has made no such representation that it has been authorized to represent one of its members who has an interest affected by this proceeding. In the absence of such a showing, the Board should deny CREC's request for a hearing.

2. Frederick M. Olsen III's Request for Hearing

Frederick M. Olsen III states that he is a resident of La Crosse, Wisconsin. Mr. Olsen does not provide any information which would indicate the nature of any interest of his that is affected by this proceeding. His request merely states that he desires a hearing on the two issues identified in the Order to Show Cause and on five other issues which do not, with one exception, even concern installation of a dewatering system.

Four of the five additional issues concern the costs of implementing the Three Mile Island "Lessons Learned" requirements, access to information directly from the licensee, the condition of the local public document room, and the Commission's policy on holding hearings near the site of the facility affected by the hearings. These four issues do not establish that Mr. Olsen has an interest affected by this proceeding. Mr. Olsen cannot, of course, predicate his standing on the failure of the Order to Show Cause to take action to remedy his concerns about the costs of the "Lessons Learned" requirements, access to information from DPC and in the local public document room, and on the Commission's hearing policy. Public Service Co. of Indiana, supra, 11 NRC at 442. Moreover, these issues are wholly unrelated to the issues set forth for

consideration in the Order to Show Cause and in the Commission's Order of July 29, 1980, which designated this Board. As the Commission has restricted any hearing in this proceeding to contentions within the scope of the Order to Show Cause, the Board is not empowered to admit these issues as contentions.

In his remaining additional issue (paragraph 4 in his request for a hearing), Mr. Olsen states

"The economics of plant operation with operating dewatering systems should be considered. If the benefit half of a risk/benefit ratio is small enough, if the need for power is small enough, if competitive forms of alternative power can be shown to be available now, the Commission should shut down LACBWR."

Even if Mr. Olsen could show that he would be harmed economically by installation of a dewatering system, purely economic injury does not confer standing under either the Atomic Energy Act or the National Environmental Policy Act (NEPA).<sup>7/</sup> The Commission does not have the responsibility for assessing whether operation of a nuclear plant is the most financially advantageous way for a utility to provide needed

<sup>7/</sup> Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). Threatened economic harm is not sufficient to invoke NEPA unless that harm "will or may be occasioned by the impact that the Federal action would or might have upon the environment." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-21 (1977). The Order to Show Cause was issued, of course, on the basis of considerations related to the Atomic Energy Act, not NEPA. In any event, issuance of an Order to Show Cause is not subject to NEPA requirements concerning preparation of environmental impact statements and environmental appraisals. 10 CFR 51.5(d)(1). Cf. 40 CFR 1508.18(a) [CEQ regulations], in which the bringing of enforcement actions is excluded from the definition of "major federal action".

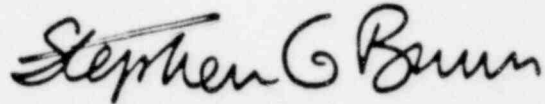
power. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB -458, 7 NRC 155, 163 (1978). Thus, to the extent Mr. Olsen alleges potential economic harm, he has not alleged injury to an interest cognizable in this proceeding. Even if this interest were cognizable under the Atomic Energy Act or NEPA, Mr. Olsen could not base standing on an allegation that license revocation should be considered in this proceeding and thus, unless revocation is considered, Mr. Olsen may be adversely affected. Public Service Co. of Indiana, supra, 11 NRC at 442. For the same reasons that support rejection of Mr. Olsen's issue concerning economic costs of a dewatering system as a basis for finding he has an interest affected by this proceeding, the Board should also decline to admit Mr. Olsen's issue in any hearing in this proceeding.

### III. CONCLUSION AND PROPOSED DISPOSITION OF REQUESTS FOR A HEARING

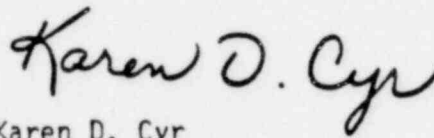
CREC and Mr. Olsen have not provided information which would establish that they have interests affected within the meaning of section 189a. of the Atomic Energy Act. Thus, they have not shown to date that a hearing is required on the Order to Show Cause as a result of their requests for hearing. The Staff recognizes, however, that neither the Commission's rules nor the Order to Show Cause specifies the extent to which the requesters should set forth the basis for their requests. Accordingly, the Board should provide CREC and Mr. Olsen an opportunity to amend their requests for a hearing to demonstrate, if possible, how their interests may be adversely affected by this proceeding. In addition, CREC should establish that it is authorized to represent at least one of its members who has an interest

affected by this proceeding. Unless CREC and Mr. Olsen make a sufficient showing of interest, their requests for hearing should be denied.

Respectfully submitted,



Stephen G. Burns  
Counsel to NRC Staff



Karen D. Cyr  
Counsel to NRC Staff

- Enclosure 1: Letter to F. Linder from H. Denton enclosing safety evaluation report.
- Enclosure 2: 10 CFR 2.206 petition filed by Ann Morse.
- Enclosure 3: Memorandum for L. Bickwit, OGC, from S. Chilk, SECY.

Dated at Bethesda, Maryland  
this 29th day of August, 1980.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
DAIRYLAND POWER COOPERATIVE  
(La Crosse Boiling Water Reactor)

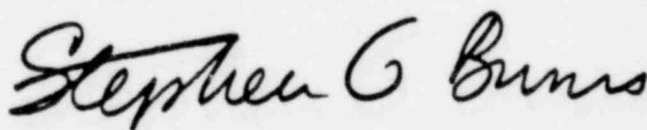
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Docket No. 50-409-SC  
Prov. Op. Lic. No. DPR-45  
(Order to Show Cause)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

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Stephen G. Burns  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 29th day of August, 1980.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

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(La Crosse Boiling Water Reactor)

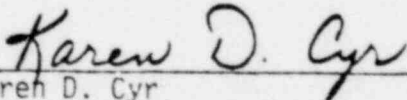
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\_\_\_\_\_  
Karen D. Cyr  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 29th day of August, 1980.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S RESPONSE TO REQUESTS FOR HEARING and NOTICES OF APPEARANCE FOR STAFF COUNSEL 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 29th day of August, 1980.

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