

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of )  
 )  
NORTHERN INDIANA PUBLIC SERVICE ) Docket No. 50-367  
COMPANY ) (Construction Permit Extension)  
 )  
(Bailly Generating Station, )  
Nuclear 1) )

BRIEF IN SUPPORT OF APPEAL FROM  
ORDER DENYING PETITION TO INTERVENE

The City of Gary, Indiana, United Steelworkers of America Local 6787, Save the Dunes Council, the Bailly Alliance and the Critical Mass Energy Project submit this brief in support of their appeal from the August 8, 1980 Order of the Atomic Safety and Licensing Board, which denied their request for intervention in this construction permit extension proceeding. Intervention was denied on the ground that petitioners' one contention -- that "good cause" for completion of Bailly could not be found in the absence of a showing that surrounding populations can be evacuated in the case of a nuclear accident -- was beyond the scope of the proceeding. In view of the fact that construction of Bailly is only 1% complete and that considerations of the public health and safety require an evaluation of the Bailly site from a population density standpoint now rather than after the entire plant is constructed, the Licensing Board erred in rejecting petitioners' sole contention.

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### Petitioners

Each of the petitioners has an interest which would be adversely affected by the operation of the Bailly facility, and thus were found by the Licensing Board to satisfy the standing requirements for intervention in this proceeding. See Order Following Special Prehearing Conference ("Order") at p. 40; Affidavits of Charles A. Ruckman, Henry L. George, Nickolas Contri, Charlotte Read, Jack Weinberg, and Richard Pollock.

1. The City of Gary, Indiana, with a population of approximately 160,000 people, is located six miles from Bailly, with the center of downtown Gary only 11.3 miles from the site. Because of the absence of adequate emergency evacuation plans or capability in the event of an accident, continued construction of Bailly poses a direct and immediate risk to the health and safety of citizens of the City of Gary.

2. United Steelworkers Local 6787 represents approximately 6,000 employees of the Bethlehem Steel Company's Burns Harbor Plant, which is adjacent to the Bailly site. In light of the absence of adequate emergency response capability, the proposed completion of Bailly directly threatens the health and safety of these workers.

3. The Bailly Alliance is a coalition of citizens and community organizations representing persons residing in 12 Northwest Indiana communities in close proximity to the Bailly facility. The continued construction of Bailly, when there is no capability for evacuation within a reasonable period of time, presents undue risk to the health and safety of the members of the Alliance.

4. Save the Dunes Council is a 27-year old organization established for the purpose of preserving and protecting for public use and enjoyment the Indiana Dunes National Lakeshore, which extends east, west, and south of the proposed Bailly site. In 1978, 1,031,307 citizens visited the National Lakeshore and another 1,113,000 citizens visited the Indiana Dunes State Park. Construction of the Bailly facility in the absence of adequate emergency response planning threatens the health and safety of visitors to the Lakeshore area.

5. The Critical Mass Energy Project, a branch of Public Citizen, Inc. in Washington, D.C., is a public interest organization dedicated to the development of safe and efficient energy technology. It has participated in numerous NRC proceedings, and recently petitioned the NRC to amend its regulations on preparedness for nuclear emergencies. Critical Mass seeks discretionary intervention in these proceedings, on the grounds that its expertise with respect to the issue of emergency planning will contribute substantially to the development of a sound record.

Statement of the Case and  
Proceedings Before the Licensing Board

On November 30, 1979, the Nuclear Regulatory Commission published a Notice of Opportunity for Hearing on a proposed amendment to construction permit CPPR-104, issued to the Northern Indiana Public Service Company ("NIPSCO") for construction of the Bailly Generating Station, Nuclear 1. The proposed amendment would extend the latest date for completion of the facility from September 1, 1979 to December 1, 1987. See 44 F.R. 69061.

The Commission's notice also provided that, by December 31,

1979, the permittee and any person whose interests may be affected by the proceeding could file a request for a hearing with respect to whether, pursuant to 10 C.F.R. § 50.55(b), good cause has been shown for the requested extension. The City of Gary, et al., and others filed timely petitions to intervene.

The Gary petitioners sought intervention to raise only one contention -- that NIPSCO cannot demonstrate "good cause" for an extension absent a showing that realistic evacuation and emergency plans can be implemented for the Bailly site. Petitioners contended that circumstances which have arisen in the time since issuance of the construction permit in 1974 require a reexamination of the inherent problems with the Bailly site from the perspective of emergency preparedness.

The inherent factors to be considered include most significantly that Bailly is located nearby the combined high population centers of Gary, Hammond and East Chicago. According to the 1970 census figures, approximately 103,000 persons reside within a 10 mile radius of the plant.<sup>1/</sup> Over a thirty mile radius, the population density around Bailly is at least 780 persons per square mile. See Demographic Statistics Pertaining to Nuclear Power Reactor Sites, NUREG-0348 at p. T11 (1970 figures).

These figures do not, however, include the large "transient" populations in direct proximity to the site, such as the approximately 8,500 workers at the Burns Harbor Steel plant located 700

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<sup>1/</sup>The 103,000 figure was cited by Robert Collins, Director of Emergency Preparedness for the Office of State Programs, in documents accompanying his report to the Commission on State and Local Government Radiological Emergency Response Plans and Preparedness, in which he cited Bailly as one of 9 plants around the country requiring special attention due to high population factors.

feet away. To highlight the severity of the threat to health and safety in the event of an accident at Bailly, petitioners pointed out that the Bethlehem Steel Corporation has submitted an emergency plan to NIPSCO which demonstrates that a "residual work force" of about 170 workers would be required to remain at the Burns Harbor Steel plant for a minimum of 6 days to cool down the coke ovens in the event that operations are interrupted. An additional factor is the many thousands of recreational visitors to the Indiana Dunes State Park and National Lakeshore, of which the Cowles Bog Area lies a mere 800 feet from the site. Average daily attendance at the Lakeshore during the months between May and September is at least 35,000 for weekends and 25,000 for weekdays, with holiday attendance of approximately 40,000. Petitioners pointed out that, as a result of all of these population factors, Bailly was cited as the only nuclear plant, operating or under construction, that failed to meet all six siting criteria recommended in the recent Report of the Siting Policy Task Force (NUREG-0625).<sup>2/</sup>

Aside from the inherent factors which characterize the Bailly site, petitioners pointed out that this proceeding is also unique because Bailly is only 1% complete, and thus NIPSCO's request for an extension in effect seeks approval for a new permit to construct a plant. The heart of petitioners' contention is that, because circumstances have changed since the construction permit was granted, a construction permit for Bailly would be rejected today

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<sup>2/</sup>See Order at p. 30: Memorandum from R. Wayne Houston, Chief, Accidents and Analysis Branch, Division of Site Safety and Environmental Analysis, to Daniel R. Muller, Acting Director, Division of Site and Safety and Environmental Analysis (September 26, 1979).

on site suitability grounds. And because the public health and safety demand that the issue of whether the Bailly site is safe must be resolved before, and not after, the entire plant is built, petitioners contend that the question of whether emergency evacuation is feasible is crucial to determining whether good cause for an extension exists, and thus is properly within the scope of this proceeding.

On March 12 and 13, 1980, the Licensing Board held a Special Prehearing Conference to discuss the intervention petitions. In a Provisional Order dated May 30, 1980 and then in its final Order dated August 8, 1980, the Licensing Board found that the City of Gary petitioners would be adversely affected by the granting of the requested extension and thus had standing to intervene in this proceeding. The Licensing Board concluded, however, that petitioners' sole contention concerning siting and emergency planning was beyond the scope of the proceeding, and thus that they could not be admitted as parties.

In reaching this result, the Licensing Board agreed with petitioners that health and safety "issues that do not directly relate to the delay in construction and do not arise from the reasons assigned for the extension would be within the scope of this proceeding if the Board were to determine preliminarily that they must be heard in order to protect the interests of the intervenors or the public." Order at p. 25. The Board found, however, that the siting and emergency evacuation issue raised by the Gary petitioners did not meet that standard. While the Board acknowledged that "[p]etitioners have made a persuasive argument for reconsidering the suitability of the Bailly site before further

resources are committed to construction," it determined that such an evaluation could only be made by the Licensing Board in the event that the Commission formally amended present site suitability standards. Order at p. 30. Citing the additional fact that the Commission has directed the staff to review and submit a report on facilities situated in areas of high population density, the Board determined not to hear the siting issue in this proceeding. Order at pp. 31-32.<sup>3/</sup>

Because the Board's decision reflects a fundamental misunderstanding of applicable siting policies and because the issue of whether Bailly is being constructed in a safe place must be heard now in order to protect the interests of petitioners and the public, the City of Gary et al. submit this appeal.

#### ARGUMENT

THE LICENSING BOARD ERRED IN EXCLUDING PETITIONERS' SOLE CONTENTION, NAMELY WHETHER BAILLY IS EVACUABLE IN THE EVENT OF A NUCLEAR ACCIDENT.

The Licensing Board concluded that, even though petitioners have demonstrated a health and safety interest that confers standing to intervene, their interest in emergency planning is not cognizable within the scope of this proceeding. Petitioners submit that it would be contrary to the Atomic Energy Act and to all notions of protection of the public interest to consider only after a plant

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<sup>3/</sup>While the Board invited the City of Gary to appear as an interested municipality pursuant to 10 C.F.R. § 2.715(c) notwithstanding the fact that its sole contention regarding emergency evacuation was not admitted (Provisional Order at pp. 39-40), Gary chose instead to pursue its claim that its emergency evacuation contention is properly within the scope of this proceeding. See Affidavit of Charles A. Ruckman.

has been built whether it has been built in a safe place. We demonstrate below that significant health and safety issues which have arisen since issuance of a construction permit are necessary to a consideration of whether good cause for an extension exists, and that the public interest requires an evaluation of siting and emergency response capability before construction at Bailly is allowed to proceed. It was thus inappropriate for the Licensing Board to deny petitioners' request to intervene.

A. The Licensing Board Correctly Found that Intervening Significant Health and Safety Matters that Cannot Be Resolved at the Operating License Stage Are Within The Scope of This Proceeding.

In ruling on the admissibility of petitioners' contention, the Licensing Board first articulated a standard to determine what health and safety issues were properly within the scope of this extension proceeding. The Board seemed to conclude that compelling health and safety or environmental issues that have arisen since the construction permit proceeding would be within the scope of this proceeding "if the Board were to determine preliminarily that they must be heard in order to protect the interests of the intervenors or the public." Order at p. 25. Petitioners agree that this standard is correct.

The Atomic Energy Act has created a mechanism for triggering public scrutiny through hearings at various stages of the licensing process. Section 185 provides that if construction of a facility is not completed by a date specified in the construction permit, that "permit shall expire and all rights thereunder be forfeited unless, upon good cause shown, the Commission extends the completion



date." A presumption is thus created which requires the applicant to make a showing of "good cause" to overcome a statutory bar to completion.

In Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973), the Appeal Board interpreted the scope of the "good cause" inquiry. This Board determined that "[w]hether 'good cause' exists in a particular case obviously is dependent upon the facts of that case," concluding that the factors to be taken into account in making a "good cause" determination should be influenced by the "totality of the circumstances" involved. 6 AEC at 420. This Board thus concluded that a finding of "good cause" may require consideration of health and safety or environmental issues, and not just the applicants' excuses for non-completion, if the totality of the circumstances demonstrate in a particular case that consideration is "necessary in order to protect the interests of intervenors or the public interest." 6 AEC at 420.

While the health and safety issues raised in Cook related only to the reasons assigned for the delay in construction, the Licensing Board correctly determined here that, under the reasoning in Cook, an extension proceeding could encompass other compelling health and safety issues as well. These would include those significant issues which have arisen since the construction permit proceeding and which, for reasons affecting the public health and safety, cannot abide review at the operating license stage. See Cook, supra, 6 AEC at 420. As the Board found, Cook urged the use of a "common sense approach" in considering compelling safety issues necessary to protect the public interest, and common sense

dictates that such issues may be present even if unrelated to the reasons assigned for the extension. See Order at pp. 27-28.

As a result, the Licensing Board properly concluded that it would have jurisdiction to consider such compelling safety matters which have arisen since the construction permit was granted where petitioner "has made a convincing prima facie showing that the safety matter alleged will not be satisfactorily resolved by the new completion date . . ." Order at 28-29. Petitioners demonstrate below that they have met this test and that the Licensing Board thus erred in denying their request to intervene.

B. The Petitioners Made a Sufficient Showing That The Evacuation Issues Cannot Be Resolved By the New Completion Date of the Facility.

The sole issue which the Gary petitioners attempted to raise before the Licensing Board concerned the feasibility of evacuation of the Bailly site. This is precisely the type of issue which falls within the standard adopted by the Licensing Board since it will be impossible to resolve the siting issue by the new completion date if petitioners are correct that the Bailly site is too densely populated for an effective evacuation plan.

On the facts, it is difficult to imagine a worse site for a nuclear power plant. As discussed above, see p. 4-5, supra, the plant is 800 feet from a recreational park which is attended by at least 25,000 to 40,000 per day during the spring and summer, and 700 feet from a steel plant which employs a total of approximately 8,500 workers. In fact, the steel plant is unevacuable since it requires a residual work force of 170 for 6 days in the event that operations are interrupted. Finally, the site is approximately 6 miles from the city of Gary, Indiana; a total of

12 cities and towns lie within a 10 mile radius of the plant.

The high density of the population surrounding the Bailly site is especially relevant to the issue of whether an extension should be granted in light of recent events. The most significant recent event is, of course, the accident at Three Mile Island, where the NRC recommended at one point that the State of Pennsylvania consider evacuation within 20 miles of the reactor. That accident has led the Commission itself to recognize the need for more effective emergency response capability. In proposing new rules, the Commission stated that it now regards "emergency planning as equivalent to, rather than secondary to, siting and design in public protection," a position which it acknowledged is a "depart[ur]e from its prior regulatory approach to emergency planning." 44 F.R. 75169 (Dec. 19, 1979). On August 19, 1980, the Commission published final rules which require workable evacuation plans within an Emergency Planning Zone ("EPZ") of 10 miles as a condition for operation of a plant. 45 F.R. 55402 et seq. Moreover, the new regulations require consideration at the construction permit stage of evacuation capability within a 10 mile EPZ. See 45 F.R. at 55411.

The significance of TMI is that the accident makes it apparent that a Class 9 accident could occur. Recognizing this fact, the Commission has also issued an interim statement of policy requiring that consideration be given to the environmental effects of Class 9 accidents in weighing alternative sites under the National Environmental Policy Act. See 45 F.R. 40101 (June 13, 1980).<sup>4/</sup>

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<sup>4/</sup>NRC's obligations under NEPA underscore the necessity for reevaluating the Bailly site now. Indeed, the Council on Environmental [footnote continued on p. 12]

In contrast, population density at the Bailly site relative to population density at alternative sites was never considered at the initial construction permit proceeding specifically because of the perceived improbability that a Class 9 accident could occur.

As a result of studies begun both before and after the accident at TMI, the siting and evacuation planning approach upon which Bailly was approved has now been rejected unanimously by the GAO, a joint NRC-EPA Task Force on Emergency Planning, the House Government Operations Committee, and the Rogovin Special Inquiry Group on Three Mile Island, who have all called for more emphasis on emergency planning and who have cautioned against the siting of plants near urban centers.<sup>5/</sup> In fact, Bailly was the only

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[footnote continued:]

Quality has recently issued the opinion that "in determining whether to act to extend NIPSCO's construction permit, the NRC's obligations under the Atomic Energy Act are supplemented by the National Environmental Policy Act." See letter from Gus Speth, Chairman, Council on Environmental Quality to Tyrone C. Fahner, Attorney General, State of Illinois, (August 18, 1980) at p. 2. (Attached hereto as Exhibit A). CEQ specifically found that new developments -- including the accident at Three Mile Island, subsequent studies concerning that accident, and the fact that Bailly failed to meet all six siting criteria contained in the Siting Policy Task Force Report -- required the preparation of a supplemental environmental impact statement. As CEQ concluded: "[c]onsideration of this new information might indicate, among other things, the need to modify plant design, select an alternative site, implement certain emergency preparedness measures, or reconsider the construction permit altogether."

5/ The original construction permit for Bailly was granted on the basis of a 188 meter exclusion area (the smallest at any site in the country) and a 2,400 meter low population zone. The standards applicable at the time Bailly was approved have now been rejected by the Commission and every other body which has studied the implications of Three Mile Island. See Comptroller General of the United States, "Areas Around Nuclear Facilities Should Be Better Prepared for Radiological Emergencies," EMD-78-11 (Mar. 30, 1979); "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans In Support Of Light Water Nuclear Power Plants," NRC/EPA Task Force on Emergency Planning (Dec. 1978); [footnote continued on p. 13]

nuclear power plant, operating or under construction, that failed to meet all six siting criteria recommended in the Report of the Siting Policy Task Force (NUREG 0625). This fact alone is sufficient to meet the prima facie standard adopted by the Licensing Board.

In nevertheless rejecting petitioner's contention, the Licensing Board placed particular emphasis on the fact that NRC has not adopted new regulations on siting since the construction permit for Bailly was issued. See Order, pp. 29-32. While we agree that the Board could not apply regulations which have not yet been adopted, the Board mistakenly and mechanically assumed that the fact that Bailly was found to have met the NRC Regulations in 1975, when the construction permit was granted, means that it automatically meets the currently applicable regulations. To the contrary, those regulations by their own terms are intended to be flexible guides to making siting decisions, and are designed to accommodate new knowledge. See 10 C.F.R. §§ 100.1(a) and (b). Thus the Board was obligated to apply the current siting regulations in light of Three Mile Island, the NRC's new emergency planning policies, its recognition that a Class 9 accident is possible and the other events which have intervened since the construction permit was issued.

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[footnote continued:]

H.R. Rep. No. 96-413, 96th Cong., 1st Sess. 1979 ("Emergency Planning Around U.S. Nuclear Power Plants: Nuclear Regulatory Commission Oversight"); A Report to the Commissioners and to the Public, "Three Mile Island" (4/5/79).

The NRC's current siting criteria require that "special attention" be given to alternative sites where facilities are proposed to be constructed in areas of high population density. Regulatory Guide 4.7, General Site Suitability for Nuclear Power Stations at p. 9. No such special consideration has ever been made in relation to Bailly. The question then becomes whether under Cook, the "totality of the circumstances" are such that the public interest requires a reevaluation now, or whether siting and emergency response factors can await consideration at the operating license stage.

In answering this question, the fundamental factor that makes this extension proceeding unique is that Bailly is only 1% complete. It simply is contrary to all notions of protection of the public interest to argue, as do NIPSCO and the NRC staff, that siting and emergency planning factors at Bailly should be fully considered only after the entire plant has been built. The NRC staff's contention that it is only the utility that bears the risk of deferring such consideration until after full construction of the plant ignores the effect on the equities of the question of whether a plant is 1% constructed, or 99% complete. Moreover, such an approach ignores the implication for utility ratepayers of the question of who will bear the costs of an eventual decision, after construction is complete, that the Bailly site cannot be safely evacuated and thus that the plant will never operate. The more likely eventuality is, however, that after full resources are committed to finishing construction at the present site, the Bailly plant will operate regardless of the risk to surrounding populations.

This becomes a critical factor under the "common sense" approach of Cook. Since this plant is only 1% complete, in fact nothing more than a hole in the ground, the applicant should be required to meet the safety standards currently applicable to construction. If the applicant cannot meet those standards, then little would be lost since construction has barely begun.

It seems clear to the Gary petitioners that the Bailly site could not meet today's siting and emergency planning criteria. But that is not the issue that need be decided in this appeal. Rather the issue is whether the petitioners have made a prima facie showing that there are serious siting and evacuation issues which cannot await the operating licensing proceeding for resolution, and which are therefore sufficient to justify their intervention. Certainly the combination of the TMI accident and the high density of the population surrounding the Bailly plant raises just such an issue, and accordingly the Bailly petitioners should have been allowed to intervene.

C. The Licensing Board Erred In Deferring to the Commission Rather Than Determining In This Proceeding Whether Bailly Is Being Built At An Evacuatable Site.

In addition to finding that the petitioners had not made a prima facie showing, the Licensing Board based its determination not to hear the siting and emergency planning issues in this extension proceeding on the fact that the Commission has directed the staff to review and submit a report to the NRC on existing sites in highly populated areas. See Order at pp. 31-32, 45 F.R. 50350-51 (July 29, 1980). Under the controlling decisions of this Board,

however, such action by the Commission does not preclude the adjudication of otherwise appropriate contentions in this proceeding.

Once the Commission has decided upon a rulemaking to resolve a particular issue, it is generally true that Licensing Boards should refrain from adjudicating in individual license proceedings contentions that touch upon the subject of the rulemaking. See In the Matter of Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974) ("... consideration in adjudicatory proceedings of issues presently to be taken up by the Commission in rulemaking would be, to say the least, a wasteful duplication of effort."); In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 163 (1974) ("Once that [rulemaking] proceeding was initiated, it would have been singularly inappropriate to undertake to duplicate it in an individual reactor licensing proceeding.") In the absence of such a rulemaking proceeding, however, it is appropriate for issues to be resolved in individual adjudications, notwithstanding the fact that such issues may also be raised in conjunction with other nuclear power plants. See Douglas Point, supra, 8 AEC at 84; NRDC, Inc. v. NRC, 547 F.2d 633, 641 (D.C. Cir. 1976) ("absent effective generic proceedings to consider [issues of an "irreversible and irretrievable" nature, these issues] must be dealt with in individual licensing proceedings.").

Here, the Commission has, in an advance notice of proposed rulemaking, indicated its intent to more formally articulate siting policies, but only for future plants, specifically



including those for which an application for a construction permit is filed after October 1, 1979. With respect to Bailly and other plants either in construction or operation and which are located in highly populated areas, the Commission has determined that, until it decides whether and how to proceed on a generic basis, decisions on continued operation or construction will be made on a case-by-case basis. See 45 F.R. 50351-52.<sup>6/</sup> The fact that the Commission has directed the staff to prepare a report to assist in these case-by-case determinations does not constitute a directive from the NRC that such issues are not to be resolved in individual adjudicatory proceedings.

In fact, the absence of any time schedule for the staff's review indicates that no imminent Commission action is planned which would serve to excuse the Licensing Board from the need to resolve petitioners' contention now. Indeed, in a recent letter to one of the other intervenors in this proceeding, Harold R. Denton, Director of the Office of Nuclear Reactor Regulation, indicated that even if the Staff decides to focus on Bailly on a priority basis, any review of preliminary risk assessment reports would not be completed "until about Spring 1981." See letter from Harold R. Denton to Dean Hansell, Assistant Attorney General, State of Illinois (July 31, 1980) (attached hereto as Exhibit B). It is thus clear that no immediate action by the

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<sup>6/</sup> The fact that Congress, in the 1980 Authorization Bill, gave the NRC the discretion not to apply new demographic requirements for siting to existing plants but to determine the more difficult question of how to protect the public health and safety at such locations on a case-by-case basis reinforces petitioners' argument that it is appropriate for the Licensing Board to consider siting and evacuation issues unique to Bailly in this proceeding. See H.R. Rep. No. 96-1070, 96th Cong., 2d Sess. 1980 (Conference Report).

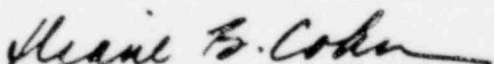
Commission will be taken, while construction of Bailly could be renewed at any time.

There is thus no ongoing Commission action which can serve to absolve the Licensing Board of its responsibility to determine whether Bailly is being built at a site that can be evacuated in the event of a nuclear accident. To the contrary, the Commission's recent actions highlight the importance of emergency planning and the need to consider the issues raised by the Gary petitioners. As indicated above, the Licensing Board is required to apply policies as they presently exist under the Commission's siting and new emergency planning regulations and under the National Environmental Policy Act to determine now, and not after the plant is built, whether it is located in a safe place. If the Board nevertheless determined to seek some further guidance from the NRC, we submit that it can do so only if it defers making its "good cause" finding, and construction, until such time as the siting and emergency planning issues are resolved.

#### CONCLUSION

For all of the foregoing reasons, petitioners' contention that good cause for completion of Bailly should not be found in the absence of a specific showing of adequate emergency response capability in the event of a nuclear accident is within the scope of this proceeding.

Respectfully submitted,

  
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Attorneys for the City of Gary, et al.

Dated: August 29, 1980

EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY

Exhibit A

722 JACKSON PLACE, N. W.  
WASHINGTON, D. C. 20006

August 12, 1980

RECEIVED

AUG 18 1980

WILLIAM J. SCOTT  
~~ATTORNEY GENERAL~~

Honorable Tyrone C. Fahner  
Attorney General  
State of Illinois  
Chicago, Ill. 60601

Dear Attorney General Fahner:

The Council has reviewed your office's letter, dated May 27, 1980, regarding the application of the National Environmental Policy Act ("NEPA") to the future decisions concerning the Bailly Generating Station, Nuclear-1 ("Bailly-1").

Our review of the matter indicates that the initial construction permit for Bailly-1 was issued on May 1, 1974. Since that time virtually no construction has taken place, and the construction permit has expired. Pursuant to the intent of the Atomic Energy Act, unless the permit is extended by order of the Nuclear Regulatory Commission ("NRC"), the Northern Indiana Public Service Company ("NIPSCO") will forfeit all rights to construct Bailly-1.

Your office has suggested that there have been certain significant new developments since the final EIS on Bailly-1's construction permit was issued in 1973, such as:

1. The issuance of WASH-1400, The Reactor Safety Study (October, 1975) and its reevaluation by H. Lewis' Risk Assessment Review Group in NUREG/CR-0400 (1978).
2. The accident at Three Mile Island and the subsequent studies of the accident, including the Report by the President's Commission on The Accident At Three Mile Island, and the report of the Special Inquiry Group to the Nuclear Regulatory Commission.
3. The September 26, 1979, NRC memorandum from R. W. Houston, Chief of the NRC's Accident Analysis Branch, to Daniel P. Muller, Acting Director of the NRC's Division of Site Safety and Environmental Analysis, indicating that the Bailly-1 facility failed to meet proposed siting criteria contained in the report of the NRC Siting Policy Task Force (NUREG-0625) (1979).
4. The Council's letter of March 20, 1980, to the NRC and the Council's report entitled, NRC's Environmental Analysis of Nuclear Accidents: Is it Adequate?

In our letter of March 20, 1980, we urged the Commission to move quickly to revise its policy on accident analysis in environmental impact statements. The review of NRC EISs by the Environmental Law Institute for

the Council had revealed that none of the EISs prepared to date by the NRC for land based reactors has included an analysis of what were formerly known as "Class 9" or worst case accidents. We stated our conclusion that the NRC's new accident analysis policy should require discussion in EIS's of the environmental and other consequences of the full range of accidents that might occur at nuclear reactors, including core melt events. Such analyses, we noted, could improve the Commission's siting, design, licensing, and emergency planning decisions.

On June 13, 1980, the Commission published a new Interim Policy for the consideration of environmental consequences of nuclear accidents under NEPA. The NRC concluded that there is a need to include in EISs a discussion of the "site specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in the . . . melting of the reactor core." 45 Fed.Reg. 40101. The Interim Policy was ambiguous on whether supplements must be prepared for existing EISs that have already been issued for construction permits. However, the Commission stated:

" . . . it is the intent of the Commission that the staff take steps to identify additional cases that might warrant early consideration of either additional features or other actions which would prevent or mitigate the consequences of serious accidents. Cases for such consideration are those for which a Final Environmental Statement has already been issued at the Construction Permit stage but for which the Operating License review stage has not yet been reached." 45 Fed.Reg. 40101, 40103.

The NRC acknowledged that substantive changes in plant design features as a result of such analyses "may be more easily incorporated in plants when construction has not yet progressed very far." Id.

As indicated in the memorandum enclosed with this letter from our General Counsel's Office, in determining whether to act to extend NIPSCO's construction permit, the NRC's responsibilities under the Atomic Energy Act are supplemented by the National Environmental Policy Act. NEPA requires the NRC to consider environmental factors to the fullest extent possible in its new decision about Bailly-1. The Council is of the view that for this decision, the NRC may simply adopt all or portions of its prior final EIS pursuant to 40 CFR §1506.3 and prepare a supplement dealing with the developments indicated above. Consideration of this new information might indicate, among other things, the need to modify plant design, select an alternative site, implement certain emergency preparedness measures, or reconsider the construction permit altogether. As stated by the U.S. Court of Appeals for the Second Circuit:

"Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated,

considered and discussed in the light of alternatives, not before. Otherwise, the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir., 1975).

In summary, the Council has concluded that the NRC should prepare and circulate a supplement to the EIS on the Bailly-1 construction permit prior to rendering a decision on the pending request for a permit extension. The NRC must also issue a record of its new decision in compliance with 40 CFR §1505.2.

By a copy of this letter, we are providing our conclusions on this issue to the NRC and NIPSCO.

Sincerely,



GUS SPETH  
Chairman

Enclosure

cc: Members of the Commission  
President of NIPSCO

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Nuclear 1) )

CERTIFICATE OF SERVICE

I hereby certify, this 29th day of August, 1980, that copies of the Notice of Appeal and Brief of the City of Gary, Indiana, United Steelworkers of America Local 6787, Save the Dunes Council, the Bailly Alliance, and the Critical Mass Energy Project were served by hand upon those on the following list marked by an asterisk, and by mail, first class postage prepaid, upon the remainder:

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

Exhibit B

JUL 31 1980

Mr. Dean Hansell  
Assistant Attorney General  
Environmental Control Division  
188 West Randolph Street  
Suite 2315  
Chicago, Illinois 60601

Dear Mr. Hansell:

I am responding to your letter dated May 8, 1980 to the Commissioners and to me in which you request a meeting following the release of a report being prepared by the Federal Emergency Management Agency (FEMA). I believe that the FEMA study to which you are referring is the study of evacuation times around several nuclear power plants, including Bailly, that was conducted by Wilbur Smith and Associates. It is my understanding that FEMA has received a draft of that report and has sent the draft to appropriate State and local officials for comment on the accuracy of the assumptions made by the contractor. I also understand that FEMA intends to publish that report within the next two months.

We would certainly participate in a meeting of the appropriate NRC and FEMA officials, State of Illinois officials, and representatives from Wilbur Smith and Associates to discuss that FEMA report. Mr. Brian Grimes (301 492-7415), who is the Program Director of the NRC Emergency Preparedness Office, will contact you within a few weeks after we receive the FEMA report to schedule the meeting.

With regard to your concern about the feasibility of evacuation around the Bailly site, you should be aware that the NRC staff does not consider the difficulty of evacuation planning as the only criterion in judging the acceptability of a nuclear power plant site. In this regard, the staff is presently conducting an internal review of nuclear power plants under construction in accordance with a task recently assigned<sup>1/</sup> by the Commission which stated in part:

"However, it is also the intent of the Commission that the staff take steps to identify additional cases that might warrant early consideration of either additional features or other actions which would prevent or mitigate the consequences of serious accidents. Cases for such considerations are those for which a Final Environmental Statement has already been issued at the Construction Permit stage but for which the Operating License review stage has not yet been reached. In carrying out this directive, the staff should consider relevant site features, including population density, associated with accident risk in comparison to such features at presently operating plants. The staff should also consider the likelihood that substantive changes in plant design features which may compensate further for adverse site features may be more easily incorporated in those plants when construction has not yet progressed very far."

<sup>1/</sup> Published in the F. R., June 13, 1980 (45 F. R. 40101).

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Mr. Dean Hansell

- 2 -

We have already identified the Limerick facility in Pennsylvania as one which warrants such early consideration and we are presently considering a number of other priority candidate facilities, including the Bailly plant. Those additional plants selected will be requested to perform a preliminary risk assessment study for their respective sites. We do not anticipate completing our review of the results of these risk assessment studies until about Spring 1981.

In light of the foregoing considerations, I am suggesting that we delay for a number of months our response to your Request for Action made pursuant to Section 2.206 of 10 CFR Part 2. My basis for this delay is that we will be able to respond in an authoritative manner to your Request for Action only after we have reviewed the Bailly risk assessment study. If you have any objections to this delay in our response, we can discuss this matter in our forthcoming meeting.

Sincerely,

Original Signed by  
H. R. Denton /

Harold R. Denton, Director  
Office of Nuclear Reactor Regulation