UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NIPSCO'S BRIEF IN OPPOSITION TO APPEALS

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September 15, 1980

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NIPSCO'S BRIEF IN OPPOSITION TO APPEALS

I. Introduction

NIPSCO submits this Brief in opposition to two appeals taken pursuant to 10 C.F.R. § 2.714a (1980) by Dr. George Schultz and a group of petitioners consisting of the City of Gary, Indiana, United Steelworkers of America Local 6787, the Bailly Alliance, Save the Dunes Council, and the Critical Mass Energy Project (Gary Petitioners).*/ Both had been denied intervenor status in this proceeding by the Licensing Board.**/ The Board concluded that Dr. Schultz and the Gary Petitioners have standing to intervene but that neither had proposed an admissible contention. After explaining the

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*/ Letter from Dr. Schultz to Appeal Board (August 26, 1980); "Notice of Appeal" by Gary Petitioners (August 29, 1980).

**/ "Order Following Special Prehearing Conference" (Order), pp. 40-42 (August 7, 1980).

origin and status of this proceeding, we shall address application of the "one valid contention" and standing requirements. We agree with the Board's conclusion that the only contention offered by Petitioners is not admissible (although we reach that conclusion for different reasons). However, we object to the Licensing Board's conclusion that Petitioners have met applicable standing requirements. Therefore, we conclude that Petitioners should be excluded from the proceeding for either of these reasons.

By letter dated February 7, 1979,*/ Northern Indiana Public Service Co. (NIPSCO) applied for an extension of the latest date of completion of construction stated in its construction permit for Bailly Generating Station, Nuclear-1 (Bailly). On November 30, 1979, notice of this extension proceeding was published in the Federal Register, inviting

> any person whose interest may be affected by this proceeding [to] file a request for a hearing in the form of a petition for leave to intervene with respect to whether, pursuant to 10 C.F.R. 50.55(b), good cause has been shown for extension of the completion date for Construction Permit No. CPPR-104 for a reasonable period of time; i.e., with respect to whether, pursuant to 10 C.F.R. 50.55(b), the causes put forward by the Permittee are among those which the Commission will recognize as bases for extending the completion date. Petitions

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*/ This letter was subsequently supplemented by a letter dated August 31, 1979.

> for leave to intervene must be filed in accordance with the provisions of this Federal Register Notice and 10 C.F.R. 2.714 of the Commission's regulations.

44 Fed. Reg. 69,061. In response to this notice, numerous petitions to intervene were submitted to the NRC, including petitions by Dr. George Schultz*/ and the Gary Petitioners.**/

Dr. Schultz alleges that his life would be threatened if Bailly were permitted to operate without a "properly specified evacuation plan."***/ His sole contention states that adequate plans have not been developed for the evacuation of people (including prison inmates in Michigan City) in the area surrounding Bailly. Similarly, the Gary Petitioners allege that an accident at Bailly and the absence of adequate emergency plans for Bailly would threaten the health and safety of members of their organizations.****/ The Gary Petitioners' sole contention questions "[w]hether realistic evacuation and emergency plans can be implemented to adequately protect the

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*/ Letter (December 10, 1979).

**/ "Petition for Leave to Intervene and Request for Hearing" (December 31, 1979).

***/ "Amended Petition to Intervene," p. 2 (February 25, 1980).

****/ See "Petition for Leave to Intervene and Request for Hearing," pp. 2-3 (December 31, 1979). Critical Mass Energy Project seeks intervention as a matter of discretion and has not attempted to establish that its interests or its members' interests would be affected by this proceeding.

populations surrounding the proposed site of the Bailly One Nuclear Generating Station in the event of a nuclear accident."*/

As indicated above, the Licensing Board rejected both the petitions**/ and Dr. Schultz and Gary Petitioners have appealed. Since both raise essentially the same contention and claims regarding standing to intervene, we shall address their petitions together and refer to both as "Petitioners."

II. Petitioners' Contention Is Not Admissible In This Proceeding

A. Introduction

The sole contention of each of the Petitioners alleges that adequate evacuation plans cannot be developed for Bailly. The Licensing Board held, and the Petitioners do not dispute, that the issues raised by this contention are unrelated to any reason for delay in construction or to the extension itself. Order, pp. 24-32. The Licensing Board

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*/ "Contention of the City of Gary, Indiana, United Steelworkers of America Local 6787, Bailly Alliance, Save the Dunes Council and Critical Mass Energy Project" (February 26, 1980).

**/ Order, pp. 40-42. The Licensing Board offered to admit the City of Gary as an interested municipality under 10 C.F.R. § 2.715(c), but Gary declined to accept this offer.

characterized its Provisional Order as having

> hypothesized that 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.

Id. at 25. In the final Order, this principle was stated as follows:

> any jurisdiction the Board may have to consider these matters is strictly limited to situations in which the petitioner has made a convincing prima facie showing that the safety matter alleged will not be satisfactorily resolved by the new completion date of the facility . . .

Id. at 28-29. However, the Board found it unnecessary to actually decide whether it has such jurisdiction since it concluded that the proposed contention does not meet this standard. It found confirmation for this conclusion in recent action by Congress and the Commission. Id. at 30-32. Therefore, the Board rejected the petitions to intervene filed by Gary Petitioners and Dr. Schultz. Id. at 40-42. We agree with the Licensing Board's rejection of this contention but for reasons additional to those upon which the Board based its rejection.

B. Issues Unrelated To The Extension Or To Causes Of Delay In Construction Are Not Cognizable In An Extension Proceeding

In order to decide whether the Petitioners' contention is admissible in this proceeding, it is first necessary to

determine the scope of the proceeding. The sccpe of a proceeding and the jurisdiction of a licensing board are confined "ab initio to the issues identified in the notice of hearing which triggered the proceeding." Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 709 n.7 (1979); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534; 9 NRC 287, 289 n.6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-316, 3 NRC 167, 170-71 (1976). A board can neither enlarge nor contract the jurisdiction conferred upon it by the Commission. Public Service Co. of Indiana, supra; Consumers Power Co. (Midland Plant), ALAB-235, 8 AEC 645, 647 (1974). The reason for such a limitation is clear. Licensing boards are delegates of the Commission, empowered by it to preside over such adjudicatory proceedings as the Commission deems necessary to help administer its responsibilities.

The Notice of this proceeding states that a hearing may be sought

> with respect to whether, pursuant to 10 C.F.R. 50.55(b), good cause has been shown for extension of the completion date for Construction Permit No. CPPR-104 for a reasonable period of time; i.e., with respect to whether, pursuant to 10 C.F.R. 50.55(b), the causes put forward by the Permittee are among those which the Commission

> will recognize as bases for extending the completion date.*/

44 Fed. Reg. 69,061 (1979). This Notice clearly restricts the extension proceeding to whether "good cause has been shown for the extension" and it does not authorize the Licensing Board to initiate a general inquiry into safety issues regarding Bailly.

The leading precedent describing the scope of a "good cause" determination within the context of a construction

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*/ The referenced regulation provides:

> If the proposed construction . . . of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

10 C.F.R. § 50.55(b) (1980). The regulation implements Section 185 of the Atomic Energy Act which specifies:

> The construction permit shall state the earliest and latest dates for the completion of the construction . . . . Unless the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

42 U.S.C. § 2235 (1976).

permit extension proceeding is Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant), ALAB-129, 6 AEC 414 (1973). Cook states that the "fundamental purpose of [a "good cause"] hearing is . . . not to determine the safety or environmental aspects of the reactor in question." Id. at 420. The Appeal Board rejected the argument that, "in all circumstances, the 'good cause' hearing must embrace every safety or environmental issue which the need for the extension might possibly suggest." Id. (emphasis in original). Instead, safety issues were held to be within the scope of an extension proceeding if "one or more of the causes assigned for the delay in and of themselves were arguably to cast serious doubt upon the ability of the applicant to construct a safe facility . . . ." Id. (emphasis in original). The Appeal Board summarized its ruling thusly:

> In the final analysis, then, the question here comes down to whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. Put another way, we must decide whether the present consideration of any such issue or issues is necessary in order to protect the interests of intervenors or the public interest.

Id.

These passages from Cook clearly indicate that any consideration of safety in an extension proceeding is limited to

the "reasons assigned for extension." Alleged safety issues unrelated to a cause of delay in construction are beyond the scope of an extension proceeding. If there was any doubt regarding that ruling, the Appeal Board dispelled it with this final remark:

> Thus, had the design changes effected by the applicants in the present case, taken in conjunction with other factors, not delayed the completion of construction beyond the latest completion date specified in the permits, there would be no question that (absent a show cause proceeding) any safety issues associated with those changes would have been considered by the Licensing Board in the operating license proceeding--and not before. It is hard to fathom why a different result should obtain simply because of the fortuitous circumstance that a combination of events--only one of which involved design changes--did require applicants to seek an extension for completion.

Id. at 421.*/

The Appeal Board in Cook was correct in ruling that safety issues unrelated to causes of delay in construction are not within the scope of extension proceedings. This result is mandated not only by NRC/AEC precedents but also by the Atomic Energy Act and the Commission's regulations.

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*/ The Licensing Board held that Cook does not preclude consideration of safety issues unrelated to delay in construction because the intervenors in Cook only raised safety issues related to the delay in construction. Order, p. 25. Obviously, this holding is inconsistent with the statements quoted above.

Initially, it should be noted that amendment proceedings in general are restricted in nature. Not every health and safety issue dealing with a facility is cognizable in such a proceeding. The scope of an amendment proceeding is limited to those issues which have a reasonable nexus to the amendment. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 221-22 (1976). If a safety issue is not related to a cause of delay in construction, it has no nexus to a request for an extension. Thus, it cannot be part of the "good cause" inquiry.

More importantly, expansion of construction permit extension proceedings to include an evaluation of safety issues unrelated to causes of delay in construction would contravene the two-step licensing process established by Section 185 of the Atomic Energy Act. Consideration of such issues in an extension proceeding would disrupt the two-step licensing process by interjecting an intermediate step in which safety issues could be litigated or relitigated.

Section 185 of the Act creates an orderly structure for consideration of safety issues. Safety is initially reviewed in the construction permit proceeding. Issues which arise during construction or which were left unresolved at the construction permit stage are monitored by the NRC Staff

during construction and then are reviewed at the operating license stage. The continuing Staff review and the opportunity for another proceeding at the operating license stage assure that the plant will comply with all applicable requirements before it is allowed to operate.

There is simply no reason to interrupt this orderly procedure in order to hold a hearing on safety issues unrelated to an extension. The Atomic Energy Act does not require that every safety-related issue be resolved prior to the operating license proceeding. See Power Resources Development Co. v. International Union of Electrical Workers, 367 U.S. 396 (1961). Changes in design and developments which occur after the issuance of the construction permit are analyzed at the operating license stage and there is no requirement that an adjudicatory proceeding consider these issues as they arise. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733 (1979); Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979). More importantly, the health and safety of the public will not suffer if formal consideration of these issues is deferred until the operating license proceeding, because

> [i]t is not the public, but the utility, that must bear the risk that safety question it projects will be resolved in good time, may eventually prove

> intractable and lead to the denial of the operating license.

Id. at 1370. Finally, if the NRC Staff determines during its continuing review, or as result of a petition filed under 10 C.F.R. § 2.206, that recent developments present substantial health and safety issues which cannot await the operating license proceeding, it may institute a proceeding under 10 C.F.R. § 2.202. See Bailly, 10 NRC at 743.

Thus, it is readily apparent that the existing structure of the NRC's review provides assurance that a safe plant will be constructed. Transformation of an extension proceeding into a proceeding in which health and safety issues unrelated to the extension are considered would only serve to increase licensing and administrative costs without providing an improvement in the ultimate safety of the plant.

As we have demonstrated, the Atomic Energy Act, the Commissioner's regulations, Cook, and other precedents preclude the admission of contention unrelated to a cause of delay in construction in an extension proceeding. Consequently, the Petitioners' contention should be rejected and their petitions to intervene should be denied.

C. The Contention Is Not Admissible Even Under The Licensing Board's Standard

The Gary Petitioners support the Licensing Board's holding that Cook does not preclude consideration of all safety

issues unrelated to the delay in construction.*/ However, they object to the Licensing Board's conclusion that their contention does not meet the standard established by the Board.

As we have shown in the immediately preceeding section, the Licensing Board's interpretation of Cook is incorrect, and safety issues unrelated to cause of delay in construction are beyond the purview of this proceeding. Consequently, the Petitioners' arguments can be rejected without further analysis. However, even if it is assumed that Cook can be interpreted to sanction a consideration of some safety issues unrelated to causes of delay in construction, the Petitioners' contention remains inadmissible.

Essentially, the Petitioners are requesting that the Licensing Board reopen and reconsider (or, in the words of the Gary Petitioners, undertake a "reevaluation" of)**/ the findings regarding emergency planning made by the licensing board in the construction permit proceeding.***/ The Gary Petitioners allege that such a reconsideration is mandated by the occurrence of significant new developments, in particular the

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*/ "Brief in Support of Appeal from Order Denying Petition to Intervene," (Brief), pp. 8-10 (August 29, 1980).

**/ Brief, p. 14.

***/ Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-74-19, 7 AEC 557, 568-69 (1974).

promulgation of new emergency planning regulations*/ and the issuance of an advance notice of proposed rulemaking on siting criteria.**/ The Licensing Board properly rejected these arguments and the Gary Petitioners' Brief justifies no other conclusion.

The new emergency planning regulations establish a framework in which holders of operating licenses, applicants for operating licenses, and applicants for construction permits are each subject to specified revised requirements. No new or different requirements are imposed upon holders of construction permits. Thus, the simple fact is that the new regulations incorporate the Commission's decision that holders of construction permits need not demonstrate compliance with the revised regulations until the operating license proceeding. Consequently, the new emergency planning requirements provide no basis for reconsideration of emergency planning in construction permit extension proceedings.

Similarly, the advance notice of proposed rulemaking on siting criteria cannot be cited to justify reconsideration of

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*/ These regulations were published at 45 Fed. Reg. 55,402 (August 19, 1980). They become effective on November 3, 1980.

**/ 45 Fed. Reg. 50,350 (July 29, 1980). According to the Gary Petitioners, other significant new developments include the TMI accident, the Statement of Interim Policy on Accident Considerations, 45 Fed. Reg. 40,101 (June 13, 1980), Regulatory Guide 4.7, and the issuance of studies on siting, such as NUREG-0625. See Brief, pp. 10-15.

the Bailly site in this proceeding. The advance notice is not a regulation, and Bailly is only subject to the existing siting regulations contained in 10 C.F.R. Part 100. NIPSCO has previously demonstrated compliance with those regulations*/ and, as the Licensing Board has correctly noted, an extension proceeding is not an appropriate occasion for "relitigation of a matter that was already determined by a licensing board in the construction permit proceeding on standards in 10 C.F.R. Part 100 that [have] not yet been changed."**/

Gary Petitioners imply that Bailly does not meet current Part 100 regulations because those regulations embody "flexible guides." Brief, p. 13. They assert that "new knowledge," such as the TMI accident, must be taken into account in determining whether the Bailly site is adequate. Id. However, the Commission has considered that "new information" in deciding to take the actions recorded in the advance notice of proposed

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*/ Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-74-19, 7 AEC 557, 561-66 (1974).

**/ Order, pp. 30-31. The Supreme Court itself has noted with regard to an extension of the expiration date contained in a NPDES permit:

> [Petitioners] may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification [extension] that did not even purport to affect those conditions.

Costle v. Pacific Legal Foundation, _____ U.S. ____, 100 S.Ct. 1095, 1106 (1980).

rulemaking on siting criteria. The Commission has ordered reviews of existing sites to examine whether modifications in design, equipment, or operating procedures might be necessary. However, this case-by-case review of plans with construction permits or operating licenses is to be performed by the NRC Staff, not by the licensing boards. 45 Fed. Reg. at 50,350-51. Since the Commission has thus prescribed how the alleged "new information" cited by the Petitioners is to be applied to holders of construction permits, such as NIPSCO, licensing boards are foreclosed from independently initiating a site review based on such "new information." Consequently, the Licensing Board was correct in ruling that the advance notice does not require or authorize a consideration of new siting criteria in this proceeding. See Order, pp. 31-32.

In any case, the existence of significant new developments would not constitute a sufficient ground for reconsidering a safety issue in a construction permit extension proceeding. It is not unusual for significant developments to occur during the course of a lengthy construction period and, under normal circumstances, these developments would receive adjudicatory consideration during the operating license proceeding, and not before then. "It is hard to fathom why a different result should obtain simply because of the fortuitous circumstance that a combination of events . . . did

require applicants to seek an extension for completion." Cook, 6 AEC at 421. Under Cook, the proper standard is not whether significant new developments have occurred, but whether the issue is such that it cannot abide the operating license proceeding and whether immediate consideration of the issue is necessary to protect the public interest.*/ Id. at 420.

It is abundantly clear that consideration of Petitioners' proposed emergency planning contention in this proceeding is not necessary to protect the health and safety of the Petitioners and that this issue can appropriately abide the operating license stage. First, it should be noted that the Commission's new emergency planning regulations provide for the consideration of detailed emergency plans at the operating license proceeding, not at the construction permit proceeding. Thus, the Commission itself has recognized that the issue of emergency planning can abide the operating license proceeding. Additionally, the health and safety of the public will not be jeopardized if consideration of emergency planning is deferred until the operating license proceeding. Emergency planning for the Bailly facility must meet applicable

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*/ It should be noted that under the Gary Petitioners' "significant new developments" test, more issues would likely be subject to consideration in an extension proceeding the closer that proceeding approaches the operating license proceeding. This conclusion is obviously inconsistent with the result reached in Cook.

requirements when operation is authorized. Thus, the Petitioners' health and safety will not suffer in the least if emergency planning is not considered in this proceeding. Consequently, under the ruling in Cook, emergency planning would not be cognizable in this proceeding even if it were related to a cause of delay in construction.

Finally, the Petitioners have not made the prima facie showing required by the Licensing Board's order. They simply allege that the area surrounding Bailly is too densely populated to be safety evacuated. However, they refer to no studies or information substantiating their allegations or tending to prove that the Bailly area could not be safely evacuated in spite of its population density. In short, the Petitioners' conclusory statements do not suffice as a prima facie showing that adequate emergency plans cannot be developed for Bailly.

Thus, even under the Licensing Board's theory regarding the scope of this proceeding, the Petitioners have not established that their contention is admissible. Consequently, the Petitioners' sole contention must be rejected, and their petitions to intervene must be denied.

III. The Petitioners Have Not Established Standing To Intervene In This Proceeding

A. Introduction

The Petitioners allege that their health and safety may be adversely affected by the absence of adequate evacuation plans in the event of an accident at Bailly. Over the objections of NIPSCO and the NRC Staff, the Licensing Board ruled that this allegation was sufficient to establish the Petitioners' standing to intervene in this proceeding. The Licensing Board held that it "will admit as having 'standing' to challenge Permittee's assertion of good cause for the extension those petitioners who are in a position to allege injury from operation of the facility." Order, p. 9. We respectfully submit that the Licensing Board has applied an improper standard for determining whether a petitioner has standing to intervene in a construction permit extension proceeding.

B. The Petitioners Do Not Have Standing Because They Have Not Alleged That They May Be Adversely Affected By The Extension Proceeding

A person may intervene as a matter of right in a NRC licensing proceeding only upon a showing that his interest may be affected by that proceeding. Atomic Energy Act, § 189(a), 42 U.S.C. § 2239(a)(1976); 10 C.F.R. § 2.714(a)(1). See also Notice of Opportunity for Hearing on Construction Permit Extension for Bailly, 44 Fed. Reg. 69,061 (1979). The mere fact that a petitioner has an interest which may be affected by the

plant in question does not afford him standing to intervene in every proceeding involving that plant; standing to intervene under Section 189(a) of the Atomic Energy Act is afforded only to those persons who have an interest which may be adversely affected by a possible outcome of the particular proceeding itself. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), CLI-80-10, 11 NRC 438, 439-42 (1980).*/

In our view, an allegation of injury from construction or operation of a plant is insufficient, by itself, for standing to intervene in a proceeding to extend a construction permit. Extension of a construction permit is not an authorization of construction or operation. Construction and operation are authorized in other proceedings. The granting of an extension does not alter the manner of construction or the actual design

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*/ The general principle that standing is limited by the nature of the proceeding is not peculiar to NRC proceedings. Judicial decisions clearly indicate that a plaintiff possesses standing to challenge only those actions of a defendant which actually injured or may injure the plaintiff. A plaintiff does not have standing to challenge any or all actions of a defendant simply because the plaintiff may have been injured by one particular action of the defendant. See Burch v. Louisiana, ___ U.S. ___, 99 S.Ct. 1623, 1625 n.4 (1979); New York Civil Service Comm'n. v. Snead, 425 U.S. 457 (1976); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972); McGowan v. Maryland, 366 U.S. 420, 429 (1961). Similarly, the fact that a petitioner may have standing to intervene in one proceeding involving a particular plant does not enable that petitioner to intervene automatically in all proceedings involving that plant. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 NRC 451, 455 (1975).

or operation of the facility; the issuance of an extension only prolongs the time in which previously-authorized construction may be completed. Since extension of a construction permit is not an authorization to construct or operate a facility, alleged injuries resulting from construction or operation are not injuries resulting from the extension proceeding. Therefore, such alleged injuries do not constitute adequate grounds for standing to intervene in this proceeding.

Standing to intervene in a construction permit extension proceeding must be predicated upon a showing that the extension of construction will produce an additional or incremental injury beyond that previously authorized by the construction permit. The Federal Communications Commission has required just such a showing of incremental injury in order to obtain standing to intervene in its proceedings on extension of construction permits for broadcasting facilities.*/ See Southwest Broadcasting Co. 18 F.C.C. 2d 858 (1969); Metromedia, Inc., (1967) 10 Rad. Reg. 2d (P&F) 626; Valley Telecasting Co.

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*/ The Federal Communications Commission operates under a statute which is similar to the Atomic Energy Act in many respects. Section 319 of the Federal Communications Act, 47 U.S.C. § 319 (1976), establishes a bifurcated licensing procedure. The applicant for operation of a broadcasting facility must first apply for a construction permit and then for an operating license following completion of construction. Section 319(b) states that the construction permit shall be automatically forfeited if the station is not ready for operation by the date specified in the permit, "unless prevented by causes not under the control" of the applicant.

(1955) 12 Rad. Reg. (P&F) 196e; Channel 16 of Rhode Island, Inc., (1954) 10 Rad. Reg. (P&F) 377; and Tri-State Television, Inc., 43 F.C.C. 2669 (1954).*/ In Southwest Broadcasting Co., 18 F.C.C. 2d at 859, the FCC stated that it is a

> well settled principle that standing to protest is not conferred by the grant of an application for extension of time to construct, absent a clear showing of added injury flowing from the extension itself.

Therefore, while an allegation of injury resulting from construction or operation may be sufficient for standing to intervene in a construction permit or operating license proceeding, it does not confer standing in a proceeding on an extension of a construction permit.**/

The Petitioners base their standing to intervene in this proceeding upon the allegation that their health and safety may be adversely affected in the event of an accident at Bailly

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*/ In both Tri-State and Channel 16, petitioners alleged that operation of the completed facility would injure them. However, they were denied intervention because they failed to plead that the extension of the construction permit itself would produce an incremental injury to their interests.

**/ As a possible objection to the requirement that a petitioner allege an incremental injury flowing from the extension itself, it might be argued that the requirement, although correct as a matter of legal theory, would be so rigorous in practice that all intervention in extension proceedings would be foreclosed. However, such an objection would lack merit, as evidenced by NIPSCO's admission that several intervenors presently before the Licensing Board have satisfied this test. See "NIPSCO's Response to Various Filings," pp. 14, 20, 22 (April 14, 1980).

and in the absence of adequate evacuation plans for Bailly. However, this alleged injury plainly could only result from operation of Bailly. The Petitioners have made no allegation that the extension itself will in any way augment the extent of this alleged injury. Since the Petitioners have not alleged that the extension will inflict injury upon them in addition to any alleged injury previously caused by the issuance of the construction permit, they have no standing to intervene in this proceeding.*/

The Licensing Board held that it "will admit as having 'standing' to challenge Permittee's assertion of good cause for the extension those petitoners who are in a position to allege injury from the operation of" Bailly. Order, p. 9. However, as we have previously stated, the extension of the construction permit for Bailly will not affect the nature or the degree of any alleged operational injury which was authorized

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*/ The Gary Petitioners have argued before the Licensing Board that they have an "interest" in this proceeding because they "will benefit if NIPSCO's request for an extension is denied." "Reply to NRC Staff and NIPSCO Response to Petition for Leave to intervene" (Reply), p. 3 (February 26, 1980). In support of this novel theory, the Gary Petitioners refer to Duke Power Co. v. Carolina Environmental Study Group, Inc. 438 U.S. 59 (1978). They state that Duke Power stands for the proposition that injury from operation of a nuclear power plant coupled with the "'substantial likelihood' that they will benefit from the relief they seek" is sufficient for standing. Reply, p. 3. However, the Gary Petitioners neglect to mention that the court in Duke Power found that the injury from operation was causally related to the suit. In the instant case, alleged injury from operation of Bailly will not be caused by the extension, and thus Duke Power is inapplicable.

by the construction permit. Consequently, injury from operation is not an incremental injury produced by the extension itself, and it cannot suffice as an interest which may be affected by this particular proceeding. Thus, the Licensing Board's holding conflicts with the Atomic Energy Act and the Commission's regulations and it should be reversed by the Appeal Board.*/

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*/ Although the Licensing Board did not articulate any reasoning in support of its holding in the Order, it did appear to rely upon the reasoning contained in its "Provisional Order Following Special Prehearing Conference," (Provisional Order), pp. 8-9 (May 30, 1980). The Provisional Order states that a person who would have standing to intervene in a new construction permit proceeding for Bailly would sustain an

> injury-in-fact from the Licensee's being erroneously permitted to dispense with new construction permit hearings in violation of the Atomic Energy Act (as would be the case if there were no good cause for the requested extension) even if the violation (i.e., the claimed lack of "good cause") did not relate to health and safety or environmental matters.

The Licensing Board seems to view the absence of a new construction permit proceeding for Bailly as constituting an "injury in fact" sufficient for standing in the extension proceeding if the construction permit for Bailly were to be extended "in violation of the Atomic Energy Act." Furthermore, the Licensing Board stated that it must assume that the Petitioners' contention is meritorious for the purpose of determining whether an extension would be "in violation of the Atomic Energy Act." Order, p. 8. The Licensing Board's reasoning

[footnote continued on next page]

C. Conclusion

The Licensing Board has devised an inappropriate test for standing to intervene in a construction permit extension proceeding. Under applicable law, standing in such a proceeding is predicated upon a showing of incremental injury flowing from the extension itself. Since the Petitioners have not

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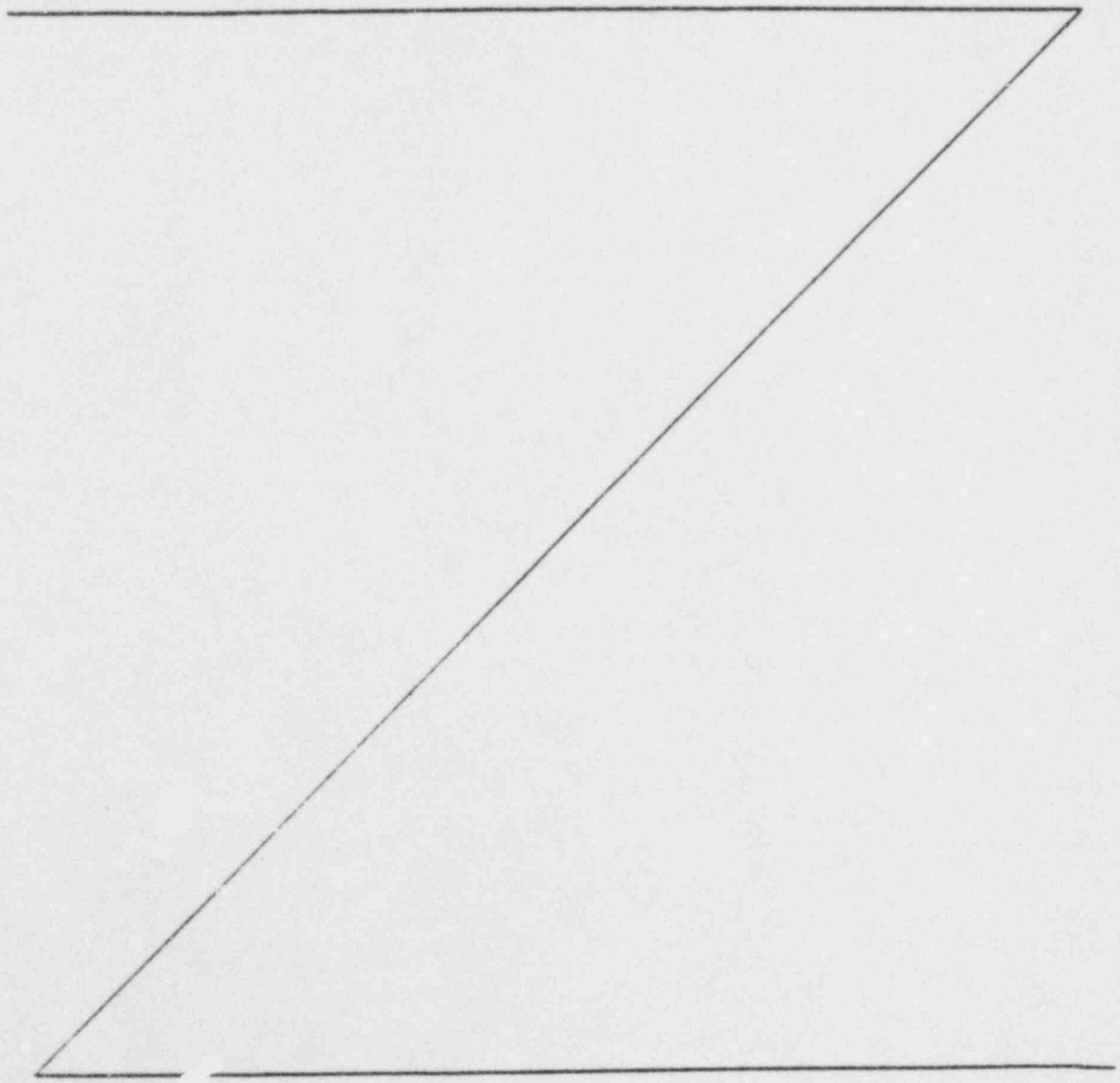
[footnote continued from previous page]

is defective on several grounds. First, the merits of a contention and the standing of a petitioner are two separate and distinct concepts. See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). Therefore, it is inappropriate to review a petitioner's contentions for the purpose of determining his standing. Second, a licensing board is not required to afford presumptive validity to a petitioner's assertions, and a board may initiate a factual investigation into a petitioner's assertions to determine whether the petitioner may actually sustain an injury-in-fact which is sufficient for standing. See Consumers Power Co. (Midland Plant), LBP-78-27, 8 NRC 275, 277 n.1 (1978). Thus, the Licensing Board may not assume that an extension would automatically contravene the Atomic Energy Act simply because a petitioner is denied standing. Finally, under the Licensing Board's theory, the Petitioners could be granted standing in this proceeding only if it is presumed that the Licensing Board and the Appeal Board will make an error of law which would render the extension "in violation of the Atomic Energy Act." Obviously, the presumption that such an error of law will be made is speculative and conjectural and is an inappropriate basis for affording Petitioners standing to intervene. In short, we are aware of no legal basis for the novel theory that the absence of a hearing that might be held if the applicant is unsuccessful in a pending proceeding constitutes an "injury in fact" which provides a petitioner with standing to intervene.

alleged that their interests will sustain an incremental injury as a result of a possible outcome of this proceeding, they lack the requisite standing to intervene. Consequently, the Licensing Board's ruling on standing should be reversed, and the denial of the Petitioners' requests to intervene in this proceeding should be affirmed.



IV. Petitioners' Appeals Should Be Dismissed

The Petitioners' requests to intervene in the extension proceeding are objectionable for two separate reasons. First, the sole contention is inadmissible in this proceeding since it is not related to a cause of delay in construction and is not otherwise cognizable in this proceeding. Second, they have not established their standing to intervene since they have not alleged that this proceeding may affect their interests. Consequently, we respectfully submit that the Appeal Board should dismiss the Petitioners' appeals and affirm the Licensing Board's denial of their petitions to intervene.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 50-367
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	(Construction Permit Extension)
(Bailly Generating Station, Nuclear-1)	)	September 15, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of Nipsco's Brief in Opposition to Appeals was served on the following by deposit in the United States mail, postage prepaid, on this 15th day of September, 1980:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	Docket No. 50-367
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	(Construction Permit Extension)
(Bailly Generating Station, Nuclear-1)	)	September 16, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of NIPSCO's Brief in Opposition to Appeals dated September 15, 1980 was served on the following by deposit in the United States mail, postage prepaid, on this 16th day of September, 1980:

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