

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In The Matter of)	
)	
NORTHERN INDIANA PUBLIC)	DOCKET NO. 50-367
SERVICE COMMISSION)	
(Bailly Generating Station)	(Construction Permit
Nuclear 1))	Extension)

REPLY TO NRC STAFF AND NIPSCO RESPONSE
TO PETITION FOR LEAVE TO INTERVENE

Pursuant to the notice published at 44 F.R. 69061 (November 30, 1979), the City of Gary, Indiana, United Steelworkers of America Local 6787, the Bailly Alliance, Save the Dunes Council, and the Critical Mass Energy Project have petitioned to intervene in this construction permit extension proceeding. The NRC staff and the Northern Indiana Public Service Commission ("NIPSCO") have opposed intervention on the grounds that petitioners have failed to demonstrate an interest that could confer standing to participate in this proceeding or one that falls within the scope of the required "good cause" finding of 10 C.F.R. § 50.55(b).

Petitioners hereby supplement their petition to intervene by addressing both of these contentions.

1. Petitioners Have Standing to Intervene.

In its response, the NRC staff does not challenge the standing of the City of Gary, Indiana to intervene in this

proceeding, given its governmental character and proximity to the Bailly site. NRC Response at 27. NRC challenges the standing of the remaining petitioners, however, on the grounds that they are general "public interest" organizations which have not demonstrated as a factual matter that the personal interests of their individual members will be affected by this proceeding. Id. While petitioners Steelworkers Local 6787, Save the Dunes Council and the Bailly Alliance alleged in their original filing that they have sought intervention on behalf of their members whose health and safety will be directly affected by the outcome here, these petitioners supplement their allegations with the affidavits attached hereto, demonstrating both that they are authorized to appear on behalf of their individual members, and that their members will suffer "injury-in-fact" should an extension of the construction permit be granted. 1/

The U.S. Supreme Court recently clarified the "injury-in-fact" test in Duke Power Co. V. Carolina Environmental Study Group, 438 U.S. 59 (1978). In that case, the plaintiffs who resided near a nuclear plant under construction were found to have standing due to the risk of future radiation injury from the routine emissions of a nuclear reactor. Just as

1/ Petitioners' affidavits have been approved by each of the individual representatives of the petitioner groups, but due to the short time available, counsel has not yet received the executed originals. As soon as they are received, executed copies will be filed and served on all parties.

"the emission of non-natural radiation [from a nuclear reactor is a] direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about emissions like those concededly emitted by nuclear power plants," Duke Power Co., 438 U.S. at 74, the risk posed by completion of a plant at a site where surrounding populations cannot be readily evacuated is also a direct and present injury to persons living and working nearby. See also United States v. SCRAP, 412 U.S. 699 (1973). As the Supreme Court further stated in Duke Power, parties have demonstrated "injury-in-fact" if they can then show that there is a "substantial likelihood" that they will benefit from the relief they seek. 438 U.S. at 72. Petitioners here will benefit if NIPSCO's request for an extension is denied, since their health, homes, and jobs will not be put at risk if construction of Bailly is discontinued.

As the petitioners' affidavits show, these organizations represent individuals who reside or work in, or who regularly visit for recreational purposes, areas in close proximity to the Bailly site. United Steelworkers of America Local 6787 represents approximately 6,000 workers employed adjacent to the site, the Bailly Alliance represents citizens who live very near to, in many cases within a few miles of, the plant, and Save the Dunes Council represents the interests of thousands of visitors to the Indiana Dunes National Lakeshore, which borders the Bailly site. All three groups are membership organizations, whose members have, either directly or through

their elected representatives, authorized Local 6787, Save the Dunes Council and the Bailly Alliance to represent their respective interests in challenging Bailly in this proceeding on the grounds of the lack of emergency response capability. See Affidavits of David C. Wilborn, Charlotte Read, and Jack Weinberg, attached hereto as Exhibits A, B, and C. As the NRC staff recognizes (Response at 6) and as the Supreme Court has made clear, such organizations have standing so long as their members, or any one of them, suffer the injury complained of. Warth v. Seldin, 422 U.S. 490, 511 (1975). Petit oners have demonstrated that they represent a health and safety interest of their members that will be affected by the outcome of this proceeding, and thus have standing to proceed.

The Critical Mass Energy Project 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. See Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). As the attached affidavit of Richard Pollock demonstrates (Exhibit D), Critical Mass has participated in numerous proceedings before NRC and Congress on the issue of emergency planning, has served as consultant to special NRC study groups relating to emergency planning, and has assisted local governments in conducting emergency evacuation drills. Critical Mass has no property or other financial interest in this proceeding, but its aim in promoting consideration of emergency planning and proper siting

in the commercial licensing process may be affected by the outcome here. Given its expertise, CMEP's participation will enhance, not delay, the proceeding, particularly if intervention as of right is granted to other petitioners who seek to participate with respect to the emergency planning issue.

2. Consideration of Whether Bailly is Evacuatable
in the Event of a Nuclear Accident is Properly
Within the Scope of this Proceeding.

The NRC staff and NIPSCO contend that, even if petitioners can demonstrate a health and safety interest that would confer standing to intervene, their interest in emergency planning is not cognizable within the scope of this proceeding. They suggest that NIPSCO should now be permitted to proceed to construct an entire plant, and that only at the operating license stage should the question of emergency response capability be addressed. 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 has been built whether it has been built in a safe place.

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 . . . forfeited . . ." A presumption is thus created which requires the applicant to make a showing of "good cause" to overcome a statutory bar to completion. And the Appeal Board has specifically

recognized in the decision upon which the NRC staff so heavily relies, that a finding of "good cause" may require consideration of safety or environmental issues beyond the narrow question of the applicant's 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." Indiana and Michigan Electric Company, 6 AEC 414, 420 (1973).

The fundamental question of whether a plant proposed to be built in a highly populated area is capable of being safely evacuated in the event of a nuclear accident is one which, we submit, cannot reasonably abide eventual review at the operating license stage. 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.

While NIPSCO and the NRC staff contend that the issue of emergency response capability was preliminarily considered at the time a construction permit for Bailly was issued, this argument ignores the fact that even the NRC now concedes that its prior requirements on emergency planning were inadequate. As NRC stated recently in issuing proposed rules, the Commission

now regards "emergency planning as equivalent to, rather than secondary to, siting and design in public protection," a position which it acknowledges is a "depart[ure] from its prior regulatory approach to emergency planning." 44 F.R. 75169 (Dec. 19, 1979). In contrast to Bailly's 2,400 meter low population zone, the Commission has now proposed that an emergency planning zone of at least 10 miles serve as the minimum distance from a plant within which workable evacuation must be a condition of operation. Although experts contend that even this figure is too low,^{2/} it is at least clear that the Commission now views its prior standards, upon which emergency response capability at Bailly was considered in only the most limited way, as wholly inadequate.^{3/}

The NRC staff and NIPSCO suggest that the Board need not address the emergency planning issue in this proceeding because petitioners can alternatively seek the initiation of a

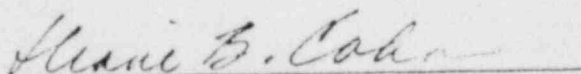
^{2/} See the recently released Rogovin Report, Three Mile Island, A Report to the Commissioners and to the Public, at p. 131.

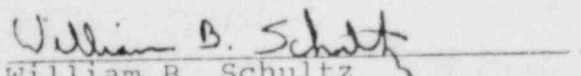
^{3/} The Commission's reevaluation of its prior standards stemmed in large part from the accident at Three Mile Island. See 44 F.R. at 75169-75170. Even NIPSCO suggests that TMI has given rise to changed circumstances which are relevant to the question of whether "good cause" for an extension exists, by stating that additional time will be required due to "indications that NRC reviews arising from the Three Mile Island incident will extend the schedule of all plants under construction." If issues arising from the accident at TMI can provide the basis for granting more time for construction to proceed, they are equally relevant for showing why "good cause" exists for denial of an extension. A new consideration of emergency preparedness is clearly required as a result of Three Mile Island.

show cause proceeding pursuant to 10 C.F.R. § 2.206. It is plain, however, that petitioner's rights to develop a record through hearing procedures are far more circumscribed under the alternative NIPSCO and the staff suggest. Moreover, under part 2.206, the burden would not be on NIPSCO to demonstrate that Bailly can be safely operated, which is where the burden should lie, but upon petitioners to demonstrate that construction should not continue. Such a proceeding could also be duplicative of effort which the Licensing Board will expend in the current proceeding. Most importantly, however, it is petitioners' view that the public health and safety demand that construction at Bailly simply should not continue until it has been determined that evacuation is possible around this site, and petitioners should not be directed to pursue alternative and possibly time-consuming review routes when the Board is considering approval of a construction permit extension at this time.

For all of these reasons, the contention raised by petitioners, i.e., that NIPSCO cannot demonstrate "good cause" for an extension absent a showing that realistic evacuation and emergency plans can be implemented, is an appropriate aspect of this proceeding which petitioners should be permitted to address.

Respectfully submitted,


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Attorneys for Petitioners

February 26, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

NORTHERN INDIANA PUBLIC)	DOCKET NO. 50-367
SERVICE COMPANY)	
(Bailly Generating Station,)	(Construction Permit
Nuclear 1))	Extension)

AFFIDAVIT OF DAVID C. WILBORN

David C. Wilborn declares and states as follows:

1. I am President of the United Steelworkers of America Local Union 6787, which is seeking to intervene in this construction permit extension proceeding.
2. Local 6787 represents approximately 6,000 employees of the Bethlehem Steel Company's Burns Harbor Plant, which is immediately adjacent to the site of the Bailly One Nuclear Generating Station.
3. In the event of a nuclear accident at Bailly, the health and jobs of these members of Local 6787 would be seriously threatened. This fact is compounded by the lack of adequate evacuation plans to protect employees of the Burns Harbor Plant in the event that an accident should occur.
4. For this reason, on April 5, 1979, a meeting of the general membership overwhelmingly approved a resolution authorizing the officers and executive board of Local 6787 to take appropriate action to challenge the construction of Bailly in view of the lack of emergency evacuation planning. A true

copy of the resolution is attached to this affidavit.

5. Because of the risk to the health and livelihood of the members of Local 6787, NIPSCO's request for a construction permit should be denied unless it can demonstrate that realistic evacuation and emergency response plans can be implemented.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ .

David C. Wilborn

Whereas: The Northern Indiana Public Service Company proposes to build the Bailly Nuclear One Generating Station on a site immediately adjacent to Bethlehem Steel's Burns Harbor Plant and

Whereas: The recent Nuclear accident at Three Mile Island Nuclear Generating Station near Harrisburg, Pennsylvania is, although the most serious, only the latest in a long series of accidents in Nuclear Power Generating facilities, and

Whereas: Such an accident, should it occur at the proposed Bailly Nuclear One Plant would seriously threaten the health, and jobs of the members of Local 6787 working at the Burns Harbor Plant and

Whereas: If in the event of such an accident the evacuation of the employees of Bethlehem Steel should become necessary, the present evacuation plan would prove inadequate in that it is inspecific, out of date, and untested, and

Whereas: The radioactive emissions of nuclear generating facilities in normal operation have been shown to cause significant and unacceptable increases in the rates of cancer, genetic birth defects and infant mortality among populations immediately surrounding the plants and

Whereas: It is the responsibility of Local 6787 USWA to protect the lives, health and jobs of its membership and the surrounding community.

Therefore be it resolved that,

The membership of Local 6787 USWA hereby goes on record as being opposed to the construction of the Bailly Nuclear One Generating Station and hereby instructs the officers and executive board of Local 6787 USWA to take whatever actions it deems necessary to stop the construction of Bailly Nuclear One including accepting the offer of the Public Citizen's Litigation Group to take legal action against NIPSCO and the Nuclear Regulatory Commission in regard to the proposed evacuation plan for the Burns Harbor Plant.

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AFFIDAVIT OF CHARLOTTE READ

Charlotte Read declares and states as follows:

1. I am a member and Executive Director of Save the Dunes Council, a 27-year old membership organization established for the sole purpose of preserving and protecting the Indiana Dunes for public use and enjoyment. In the 2-1/2 decades since the group's formation, we have spearheaded citizen efforts to pass legislation establishing the Indiana Dunes National Lakeshore in 1966, and enlarging it in 1976. We are currently engaged in similar efforts to pass federal legislation which would again enlarge the park.

2. Save the Dunes Council seeks to intervene in these proceedings on behalf of its approximately 2000 members who are visitors to, and users and supporters of the Indiana Dunes National Lakeshore. Some of the members of the Council, including myself, also reside within or near the boundaries of the Lakeshore.

3. The continued enjoyment of the Indiana Dunes is now threatened by construction of the Bailly One Nuclear Generating

Station. The Indiana Dunes National Lakeshore extends east, west, and south of the site of the proposed Bailly nuclear plant, with the boundary of the Lakeshore's Cowles Bog Area lying a mere 800 feet from the site of the reactor building. Despite the close proximity of Bailly to the Lakeshore, which attracts thousands of visitors each day during peak season, it has never been shown that these populations could be evacuated within a reasonable time in the event of a nuclear accident. Of course, due to the fact that the Lakeshore is located directly adjacent to the Bailly site, visitors to the lakeshore could be unknowingly exposed to radiation in the event of a release before any evacuation measures can be undertaken.

4. Because of the lack of consideration given emergency planning, on September 5, 1979, the Board of Directors of Save the Dunes Council, which is elected by our general membership, voted to take all appropriate action to oppose construction of Bailly. The Board voted specifically to join the City of Gary, Indiana, United Steelworkers Local 6787, the Bailly Alliance, and the Critical Mass Energy Project in petitioning the Nuclear Regulatory Commission to stop construction, unless and until it has been demonstrated that evacuation of the Lakeshore can be accomplished in the event of a nuclear accident.

5. Unless NIPSCO makes such a showing in this proceeding, Save the Dunes Council contends that the requested construction

permit extension should be denied.

In accordance with 28 U.S.C. § 1746, I
declare under penalty of perjury that
the foregoing is true and correct. Executed
on _____.

CHARLOTTE READ

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AFFIDAVIT OF JACK WEINBERG

Jack Weinberg declares and states as follows:

1. I reside at 7515 Oak Avenue in the City of Gary, Indiana. My residence is located approximately 8 miles from the proposed site of the Bailly One Nuclear Generating Station.
2. I am a member of the Bailly Alliance, a coalition of individuals and community groups representing persons residing in 12 northwest Indiana communities in close proximity to the Bailly site. I am also a member of the Bailly Alliance steering committee, which consists of representatives elected at meetings of the general membership, as well as representatives of member community groups. I have voted along with the membership and the steering committee to authorize the Bailly Alliance to intervene in this proceeding on our behalf.
3. Because I and other members of the Bailly Alliance reside in communities adjacent to or in close proximity to the Bailly site, our health and safety will be jeopardized in the event of a nuclear accident. This risk is aggravated by the lack of acceptable evacuation plans for the highly populated areas surrounding the Bailly site.

4. For this reason, the Bailly Alliance seeks to intervene in this proceeding to oppose extension of the construction permit, unless NIPSCO demonstrates that realistic emergency evacuation plans can be implemented.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.

JACK WEINBERG

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AFFIDAVIT OF RICHARD P. POLLOCK

Richard P. Pollock declares and states as follows:

1. I am Director of the Critical Mass Energy Project, a branch of Public Citizen, Inc. in Washington, D.C.

2. CMEP is a public interest organization dedicated to the development of safe and efficient energy technology. As part of its activities, Critical Mass has participated in numerous proceedings before Congress and the NRC in an effort to promote the implementation of effective requirements for preparedness in the event of nuclear emergencies.

3. On August 6, 1975, CMEP, in conjunction with the Public Interest Research Group, filed a petition for rulemaking with the NRC on emergency planning for nuclear accidents. On May 9, 1979, CMEP filed a second rulemaking petition with the NRC on emergency planning, which is still pending before the Commission. CMEP has also filed numerous comments in response to NRC proposals on emergency planning for nuclear accidents, most recently in response to proposed new rules for 10 C.F.R. Part 50 and Appendix E, published in the Federal

Register on December 19, 1979.

4. As Director of CMEP, I have testified in numerous Congressional hearings on the subject of nuclear emergency and evacuation planning. These include hearings before the House Subcommittee on Environment, Energy and Natural Resources (May 7, 1979) and the U.S. Senate Government Affairs Committee (May 9, 1979).

5. I have also served as a consultant to Sandia Laboratories under contract to the NRC for the transportation of radioactive materials in urban environments. Part of the panel's work revolved around emergency planning for radiological accidents related to nuclear cargo shipments. Most recently, I served as consultant to the National Academy of Public Administration for the NRC's Special Inquiry Group into the accident at Three Mile Island. The subject was "Reactor Crisis Management - Emergency Planning" and is part of Volume II of the Rogovin Report.

6. I have also appeared before the U.S. Civil Defense Council and the U.S. Conference of Mayors and the National League of Cities to address emergency planning and preparedness. I authored a feature article on emergency planning for the monthly magazine of the National League of Cities, entitled "Planning Against a Nuclear Emergency in Your City." (Nation's Cities, February 1978).

7. Finally, CMEP has directly promoted the need for routine evacuation tests and drills. I assisted the officials

of Waterford, Connecticut in 1978 when the township prepared an evacuation drill for the three cities surrounding the Millstone nuclear site. I served as an observer for the evacuation test conducted in December, 1979 in Wilmington, North Carolina for an exercise conducted around the Brunswick nuclear power plant.

8. Because of my extensive work related to issues concerning emergency planning, I would be prepared to testify and believe that I could substantially contribute to the development of a fuller record in this proceeding.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.

RICHARD P. POLLOCK