

October 24, 1980



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
DAIRYLAND POWER COOPERATIVE)	Docket No. 50-409
(La Crosse Boiling Water)	(Liquefaction)
Reactor))	(Show Cause)

LICENSEE'S RESPONSE TO
CERTIFIED QUESTION

Dairyland Power Cooperative (Dairyland or DPC), the holder of Provisional Operating License No. DPR-45 for the La Crosse Boiling Water Reactor (LACBWR) and the licensee in the above-captioned proceeding, hereby submits its response to the question certified to the Appeal Board by the Licensing Board on September 30, 1980 and accepted by the Appeal Board on October 1, 1980. Dairyland's position is that the issue of the magnitude of the safe shutdown earthquake at the LACBWR site goes beyond the scope of this proceeding and that the Licensing Board has no authority to consider this issue. In support of its position, Dairyland states as follows:

In the Order to Show Cause issued by the Director of the Office of Nuclear Reactor Regulation on behalf of the Nuclear Regulatory Commission on February 25, 1980, the Director specifically

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ORDERED THAT the licensee show cause, in the manner hereinafter provided, why the licensee should not:

1. As soon as possible, but no later than May 27, 1980, submit a detailed design proposal for a site dewatering system to preclude the occurrence of liquefaction in the event of an earthquake with peak ground acceleration of 0.12g or less.

* * * *

2. As soon as possible after NRC approval of the dewatering system identified above, but no later than February 25, 1981, make such system operational, or place the LACBWR in a safe cold shutdown position. Order to Show Cause at 8 (emphasis added).

By so ordering, the Director could not have made it more clear that Dairyland was only required to either (a) design and install a dewatering system capable of preventing liquefaction in the event of an earthquake with a peak ground acceleration of .12g or less or (b) show cause why liquefaction would not be a problem in the event of an earthquake with a peak ground acceleration of 0.12g or less.

In either case, the scope of the Order and, by definition the scope of this proceeding, were confined to the consideration of the liquefaction potential of the LACBWR site under earthquake conditions of .12g or less. The Order to Show Cause specifically stated

In the event a hearing was requested the issues to be considered at such hearing shall be:

- (1) Whether the licensee should submit a detailed design proposal for a site dewatering system; and
- (2) Whether the licensee should make operational such a dewatering system as soon as possible after NRC approval of the system but no later than February 25, 1981, or place the LACBWR in a safe cold shutdown condition.

Order to Show Cause at 10.

Obviously, the "detailed design proposal for a site dewatering system" referred to in issue No. (1) is the same "detailed proposal for a site dewatering system" for which Dairyland was ordered to show cause two pages earlier in the same order (i.e., one which would "preclude the occurrence of liquefaction in the event of an earthquake with peak ground acceleration of 0.12g or less.") In its July 29, 1980 Order establishing the Licensing Board to rule on requests for a hearing, the Commission also explicitly stated that

If the Board determines that a hearing is required, the Board is instructed to conduct an adjudicatory hearing solely on contentions within the scope of the [two] issues identified in the February 25, 1980 Order.
Order at 2.

The Commission then restated verbatim the two issues identified in the Director's Order. In light of these facts, it is inconceivable how any question could exist concerning the proper scope of this proceeding. Dairyland was only required to show cause with respect to .12g or less and every submission and

analysis that has been prepared to date by Dairyland and its consultants has been predicated on the .12g value.

The Licensing Board's doubts over the scope of this proceeding are even more mystifying when viewed in the light of the explicit guidance which the Commission recently provided to its Licensing Boards concerning the limited scope of enforcement proceedings in its Marble Hill and Point Beach decisions.

In Marble Hill, the Commission denied two requests for a hearing on an "Order Confirming Suspension of Construction" of Marble Hill Units 1 and 2 issued by the Director of the NRC Office of Inspection and Enforcement to the Public Service Company of Indiana. The Commission denied these requests because they sought consideration of enforcement remedies beyond those contemplated in the Director's order and the consideration of issues beyond those specifically identified in the Director's order. Public Service Company of Indiana (Marble Hill 1 and 2), CLI-80-10, 11 NRC 438 (March 13, 1980). Shortly thereafter, in Wisconsin Electric Power Co. (Point Beach 1), CLI-80-___, 11 NRC ___, ___ (May 12, 1980), the Commission reaffirmed the rationale contained in the Marble Hill decision and directed the Licensing Board to confine the scope of a license amendment proceeding solely to the specific issues identified by the Director of Nuclear Reactor Regulation in his Order amending the license.

Given the Commission's recent pronouncements on this subject, it is clear that the Commission has delegated the

responsibility for defining the scope of show cause and enforcement proceedings to the NRC Staff. ^{1/} In this case, the scope of this proceeding is limited to the specific issues identified in the ordering paragraphs of the Director of Nuclear Reactor Regulation's February 25, 1980 Order to Show Cause. The enforcement remedy proposed in that Order is limited to the design and installation of a dewatering system that would preclude liquefaction in the event of the occurrence of ground acceleration of .12g or less. The Director did not propose an enforcement remedy beyond this; i.e., the design and installation of a dewatering system to preclude liquefaction at an acceleration greater than .12g. The Order to Show Cause expressly refers to "a peak ground acceleration of .12g or less." (emphasis added). Thus, under Marble Hill and its progeny the Licensing Board is without the authority in this proceeding to raise the issue of whether .2g or some other ground acceleration value greater or less than .12g should be considered.

By refusing to accept the .12g value contained in the Order to Show Cause and by certifying the question of the appropriate magnitude of the ground acceleration value associated with the safe shutdown earthquake (SSE) at the LACBWR site, the Licensing Board is attempting to second guess the technical judgment of the Director of Nuclear Reactor Regulation and expand the scope of this

^{1/} Even in construction permit proceedings, the NRC Staff has primary responsibility for determining whether certain issues should be considered. See e.g., Public Service Co. of Oklahoma (Black Fox 1 and 2), CLI-80-8, II NRC 433 (1980) (Class 9 accidents).

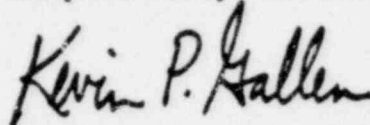
proceeding beyond that specified in the Director's Order to Show Cause and the Commission's own Order of July 29, 1980. This is directly contrary to the Marble Hill doctrine and beyond the authority delegated to the Licensing Board by the Commission in its July 29, 1980 Order in this very proceeding.^{2/}

At the prehearing conference, the Board sought to justify its position on the grounds that the Director of Nuclear Reactor Regulation has already concluded that Dairyland has adequately responded to the Order to Show Cause, and therefore, was merely an advocate of a position. The Board's rationale, however, misses the point. The Intervenors requested a hearing with respect to the Order to Show Cause and the Licensing Board is only authorized to conduct a hearing with respect to the specific issues identified in the Order to Show Cause. The fact that Dairyland has shown cause to the satisfaction of the Director and the Director has accepted Dairyland's response does not change the scope of the Director's Order or the Order of the Commission with respect to this proceeding. Unless or until the Director establishes a requirement greater than .12g for the LACBWR site and directs Dairyland to show cause with respect to that requirement, the Board does not have any independent authority to conduct a hearing on any other basis.

^{2/} The net effect of the Board's proposed expansion of the scope of this proceeding would be to direct the Director of Nuclear Reactor Regulation to reconsider his technical judgment that .12g is the appropriate ground acceleration design value for the LACBWR site. In this regard, the Commission itself also recently emphasized that Licensing Boards should not direct the Staff in the performance of its administrative functions and "Boards may not act beyond their delegated authority." Carolina Power & Light Co. (Shearon Harris 1 - 4), CLI-80-12, 11 NRC 514, 517 (1980) (emphasis in original).

For all the foregoing reasons, the certified question should be denied and the Licensing Board instructed to restrict its inquiry to the issues stated in the Order to Show Cause and the July 29, 1980 Order. ^{3/}

Respectfully submitted,



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Dated: October 24, 1980

^{3/} In light of the relative recentness of the Commission's decisions in Marble Hill and Point Beach confirming the scope of enforcement proceedings to issues identified in the Director's Order, there is obviously no need for the Commission itself to address this matter further. Moreover, the Licensing Board's concerns over the appropriateness of the .12g value are largely illusory. The NRC Staff's request that WES analyze the liquefaction potential at 0.2g, as well as 0.12g, was apparently only intended to obtain a better frame of reference for use in connection with the SEP Program, not to indicate any lack of confidence in the appropriateness of the 0.12g value. In fact, the report prepared for NRC by the TERA Corporation in connection with the SEP Program indicates that the 0.12g value for the LACBWR site is conservative and that the use of 0.10g would be more appropriate. Finally, the Board's concern over the 0.2g value used at Tyrone is misplaced. As indicated in Appendix F to Kansas Gas & Electric (Wolf Creek 1), DD-80-3, 11 NRC 175 (1980) (Revised Director's Denial of Requests Under 10 C.F.R. : § 2.206), the NRC Staff considered the .12g horizontal ground acceleration value for the SSE at Wolf Creek to be conservative even though the Wolf Creek plant was located in the same Central Stable Region Tectonic Province as the Tyrone plant and a 0.2g value was used at Tyrone. In this Appendix, the Staff also

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intimated that, in light of "the low level of seismicity in the vicinity of the Tyrone site," it would probably have utilized a lower value for Tyrone if the applicants had provided sufficient supporting bases and pursued the issue further. Accordingly, there is no need for the Appeal Board to refer this matter to the Commission as suggested, in the alternative, by the Licensing Board.

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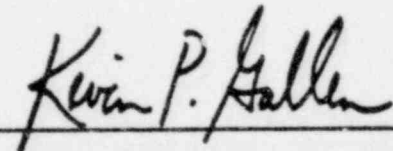
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