

October 20, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

In the Matter of _____
NORTHERN STATES POWER COMPANY, _____
et al. _____
(Tyrone Energy Park, Unit 1) _____

Docket No. STN-50-484

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ORDER
(CLT-80-36)

On June 16, 1980, the Director of the Office of Nuclear Reactor Regulation issued to NSP an Order to Show Cause why the construction permit for the Tyrone Energy Park should not be revoked. (45 Fed. Reg. 42093, June 23, 1980). In this Order the Director stated that the licensee had informed NRC of its decision to cancel the Tyrone project and had requested NRC to terminate all proceedings in the Tyrone docket. The Director had subsequently received a petition from the Badger Safe Energy Alliance which requested, pursuant to 10 CFR 2.206, a proceeding to revoke the Tyrone permit on the basis of the announced cancellation. The Order provided that if a hearing were requested the issue would be "Whether, on the basis of the Licensee's announced decision to

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cancel construction of the Tyrone Energy Park, Unit 1 facility, this Order should be sustained."

Dakota Commissions, in a filing dated July 11, 1980, requested leave to intervene out of time, to file comments, and to request a hearing, and moved for a 12-month deferral of Commission action on the revocation of the permit. The basis for these requests was asserted to be that some portion of the substantial costs of the cancellation of the project, estimated to exceed \$100 million, would be passed on by NSP to Dakota ratepayers, a result which might be avoided if NSP successfully pursued its application for a Certificate of Need in Wisconsin, the "only major regulatory approval needed prior to construction of the Tyrone Unit." (Petition at 4). Revocation, the Dakota Commissions argued, would foreclose this possibility by deterring NSP from continuing with the project even if a change in the Wisconsin regulatory climate should occur. Dakota Commissions requested a hearing only if the Commission were unable to grant the deferral request on the record then before it. (Petition at 5) The suggested basis for Commission action was, in the view of the Dakota Commissions, "the Commission's exclusive authority over construction operation (sic) and licensing of nuclear plants, and the Commission's interest in promotion and development of atomic energy nationwide..." (Petition at 6).

NSP opposed the Commissions' request in a filing dated July 22, 1980. In regard to the cancellation itself, the NSP

Answer stated that NSP had cancelled, or was in the process of cancelling, all Tyrone-related contracts, and that NSP had "no further intention ever to construct Tyrone Energy Park under such Construction Permit." (NSP Answer at 4). NSP also questioned whether the Dakota Commissions had standing to request a hearing, citing to NRC cases holding that an interest in electric rates does not fall within the zone of interests protected by the Atomic Energy Act.

Intervenor Northern Thunder, in comments filed July 23, 1980, argued on various grounds that the requests of the Dakota Commissions should be denied, and urged that the NRC proceed with revocation.

The Answer of the NRC staff, filed July 30, 1980, focused on the standing question. In the staff's view, the Dakota Commissions did not have the requisite interest in the proceeding to support a claim of standing, nor had the Commissions satisfied the "injury in fact" aspect of standing. The staff opposed the granting of a hearing as a matter of discretion, and set forth reasons why, in its view, the revocation should not be deferred, inter alia, that no factual basis existed for the possibility that NSP would actually pursue the project further. (Staff Answer at 8).

On August 18, 1980, the Dakota Commissions submitted a second filing which contested the standing issue raised by NSP and the staff, and argued that the NRC was required to take into

account the economic implications of its actions, in this case the effect of the revocation on power supply and cost to electric consumers in the affected region. This filing concluded by clarifying that the Commissions sought a hearing only if needed to examine the merits of the deferral proposal.

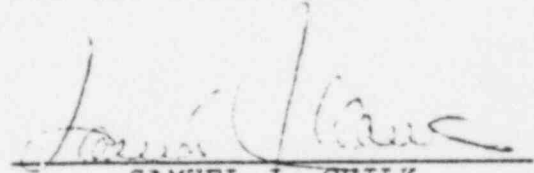
For reasons explained below, the Commission declines to defer revocation of the Tyrone permit and denies Dakota Commissions' request for hearing.

Separate opinions by Chairman Ahearne and Commissioner Hendrie, and Commissioners Gilinsky and Bradford are attached.

It is so ORDERED.

For the Commission




SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

the 30 day of November 1980

VIEWS OF CHAIRMAN AHEARNE AND COMMISSIONER HENDRIE

I. Standing

The Commission's previous decisions establish that judicial concepts of standing will be applied to determine intervention and hearing rights. Public Service Company of Indiana, (Marble Hill Nuclear Generating Station, Units 1 and 2) CLI-80-10, 11 NRC 438, 439 (1980). To have standing a petitioner must show injury attributable to the action proposed, and the interest alleged by the petitioner must fall within the zone of interests protected by NEPA and the Atomic Energy Act. Portland General Electric Company, (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976). We find that in this case Dakota Commissions fail to meet either of these tests.

The Commission has traditionally looked to the decisions of the Supreme Court of the United States for guidance in applying judicial standing doctrines. We find one of those decisions especially relevant to application of the "injury in fact" test in this matter. In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), the Court phrased this test in the following terms:

In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art III limitation. (426 U.S. at 38).

In the case now before the Commission, the Dakota Commissions allege that economic injury to their ratepayers will result from the termination of the Tyrone Energy Park. We take this as given. This injury derives, however, not from the proposed revocation of the license but from the termination of the project. Deferral of the revocation would not redress the harm alleged.

Even if deferral of the revocation could in some way encourage revival of the project, the NRC cannot base its actions upon such a promotional rationale. We need not belabor the point that the NRC is a licensing and regulatory agency, entrusted with the public health and safety and the protection of the environment. Whether or not to pursue a particular nuclear power project is a decision left to the licensees, and to other government agencies having a proper interest in power supply and electric rates. The NRC cannot order that a plant be built. Thus, it cannot fashion relief which would in any way redress the harm to Dakota ratepayers caused by the cancellation of the Tyrone project. The reasoning of the Supreme Court in Welfare Rights persuades us that the Dakota Commissions lack standing in this case because any permissible exercise of our licensing authority would indeed be "gratuitous."

Dakota Commissions also rely upon 10 CFR 2.715(c), which permits "interested State[s]" to participate in licensing hearings without assuming full-party status. We find this position inapplicable in the circumstances of this case. Section 2.715(c) grants states and state agencies special status in NRC proceedings.

However, a request under this section does not itself trigger a hearing.

II. Discretionary Hearing

We would decline to order a hearing on the deferral question as a matter of discretion. The Order to Show Cause makes clear that the Director is convinced the Tyrone Project is terminated, and we have no evidence before us to the contrary, despite the speculation of the Dakota Commissions that the licensee may yet make use of the construction permit. The licensee's filing before us is unequivocal that the project is abandoned. We are certain that if the licensee harbored any intent to pursue this project at some near future date, it would vigorously oppose revocation of the construction permit, which could only be re-acquired through the full process of re-application and hearings. On the record before us if we find that a hearing on whether revocation should be delayed would serve no useful purpose.

CONCURRING VIEWS OF COMMISSIONERS GILINSKY AND BRADFORD:

We agree that these requests should be denied. If the Nuclear Regulatory Commission were to grant the relief sought, it would not redress the injury alleged. NRC cannot force a licensee to build a nuclear facility. In this case, the licensee has unequivocally stated that it has no intention to construct the Tyrone facility. Thus, our treatment of the CP will have no affect on the ultimate fate of the project and the treatment of cancellation costs. For the same reasons, it is equally clear that the decision to terminate the Tyrone CP is not a "major federal action significantly affecting the quality of the human environment" for the purposes of the National Environmental Policy Act of 1969.