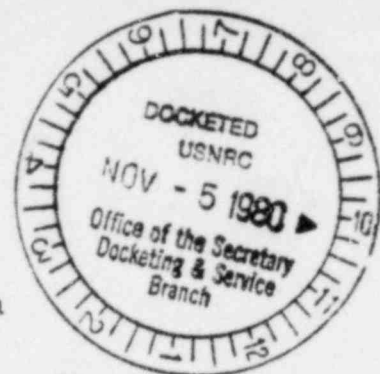


Nov 4, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Herbert Grossman, Esquire, Chairman
Dr. Richard F. Cole, Member
Dr. J. Ven Leads, Member



SERVED NOV 5 1980

In the Matter of)
WISCONSIN ELECTRIC POWER COMPANY)
(Point Beach Nuclear Plant,)
Unit 1))

Docket No. 50-266 CC
Modification of License

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ORDER DENYING HEARING

The Board has before it a request for hearing on a confirmatory order amending an operating license by imposing certain limiting conditions on the operations of the facility. The issue is whether a hearing should be granted where the petitioner contends that the confirmatory order did not go far enough to remedy the safety defects, but does not raise any litigable issue that the remedies imposed would themselves cause injury to petitioner's interests.

For the reasons discussed below, we deny the request for hearing.

STATEMENT

On November 30, 1979, the Director of the Office of Nuclear Reactor Regulation issued a Confirmatory Order amending "Facility Operating License No. DPR-24" which permitted Wisconsin Electric

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Power Company (the Licensee) to operate Point Beach Nuclear Plant, Unit 1 (the facility) only under certain limiting conditions. 44 Fed. Reg. 70608 (December 7, 1979). The Order indicated that these additional operating conditions were required to assure the safe operation of the facility because of a finding of extensive general intergranular attack and caustic stress corrosion cracking on certain of the external surfaces of the steam generator tubes.^{1/} It permitted any person whose interest might be affected by the Order to request, within 20 days, a hearing limited to the issues of whether the facts stated in Sections II and III of the Order (relating to the necessity for the additional operating conditions, the imposition of the additional operating conditions, and Licensee's agreement to these additional conditions) were correct, and whether the Order should be sustained.

By letter dated December 17, 1979, Wisconsin's Environmental Decade, Inc. ("Decade") requested a hearing. The request was one in a series of filings, meetings, Commission briefings and orders related to the question of steam generator tube integrity at Point Beach. The Licensee filed a response in opposition to the request for hearing on December 27, 1979,

^{1/} The additional operating conditions, for the most part, related to certain tests to be performed by Licensee and certain measures to be taken, such as plant shutdown and tube plugging, depending on the results of the testing. Accompanying the Confirmatory Order was a Safety Evaluation Report, also dated November 30, 1979, covering those operating conditions and including a favorable mention of Licensee's proposed reduction in the operating temperature of the hot leg of the reactor to retard leakage.

Subsequently, on January 3, 1980, the Director of Nuclear Reactor Regulation issued an Order Modifying Confirmatory Order of November 30, 1979, by imposing additional limiting conditions reducing the operating pressure in the primary system. 45 Fed. Reg. 2452 (January 11, 1980). The Modification Order was not served on Decade, which did not receive a copy until its time for filing a request for hearing had expired. Tr. 17-18, 26.^{2/}

On February 11, 1980, the Staff filed a motion to deny Decade's request for a hearing on the November 29th Confirmatory Order. Decade filed a reply to the Staff's motion on February 22, 1980. The Confirmatory Order was again modified on April 4, 1980, and Decade requested a hearing on that Modifying Order, as it had on the Confirmatory Order of November 30, 1979.^{3/}

By Order dated May 12, 1980, the Commission ruled on Decade's request for a hearing on the November 30, 1979 Confirmatory Order. It directed the Chairman of the Atomic Safety and Licensing Board Panel to empanel a Board to determine whether a hearing is required based on the principles set forth in the Commission's Memorandum and Order in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980). It further ordered that, if the Board determined that a hearing is required, the Board conduct an adjudicatory hearing solely on the

^{2/} "Tr." references are to the transcript of the July 30, 1980 prehearing conference.

^{3/} Although not part of the filings in this proceeding, Decade also filed a petition for entry of an order to show cause to enjoin Licensee from reopening the facility at the end of its refueling cycle then in progress, dated Nov. 14, 1979, and a similar petition for order to show cause, dated March 14, 1980. These petitions were denied by Director's Decisions under 10 C.F.R. § 2.206 dated Nov. 30, 1979 and June 10, 1980, respectively.

issues identified in the Confirmatory Order. ^{4/}

On May 15, 1980, this Board was designated to rule upon Decade's request for hearing and to preside over the proceeding in the event that a hearing were ordered. It issued an order scheduling a prehearing conference for the purpose of considering all requests for hearings in light of the Commission's May 12, 1980 Order, discuss specific issues that might be considered at an evidentiary hearing, and consider possible further scheduling in the proceeding. ^{5/} The Order provided for Decade's filing a supplement to its petition no later than 15 days prior to the conference to include a list of specific contentions sought to be litigated in the proceeding. The Licensee and Staff were requested to file responses to any supplemental petition prior to the conference.

In compliance with the Board's Order, Decade filed on July 15, 1980 a document entitled "Petitioner's Preliminary Contentions Made Prior to Discovery and Cross-examination". An examination of that document and Decade's request for hearing on the November 30, 1979 Confirmatory Order, filed on December 17,

^{4/} Although the Commission's May 12, 1980 Order noted (p. 1.) that the Commission had before it a request for hearing on two orders (presumably the November 30, 1979 and April 4, 1980 Orders), it referred to the Board (p. 2) only the request on the November 30, 1979 Order.

^{5/} The prehearing was held at 9:30 a.m. on July 30, 1980 at the Carlton Motel, 1515 Memorial Drive, Two Rivers, Wisconsin 54241

1979, reveals that all of the issues raised relate to the alleged inadequacy of the remedies proposed in the Order. Decade readily admits (Tr. 34-35, 82) that it has raised only issues for litigation to the effect that the Confirmatory Order did not go far enough in remedying the steam generator tube degradation problems and that more drastic remedies are necessary. Because of the apparently critical absence (under Marble Hill, supra, discussed below) in Decade's pleadings of any litigable contentions alleging injury from the remedies imposed by the Director's Orders, and Decade's concessions to that effect, it was not considered necessary at the pre-hearing conference to discuss the particulars of each contention. Tr. 91.

However, in its February 22, 1980 reply to the Staff's motion in opposition to Decade's request for hearing, Decade raised an issue -- not to be litigated, but for the purpose of supporting its standing in this proceeding -- that alleges potential harm from one of the operating conditions resulting from the Confirmatory Order. In lowering the operating temperature of the hot leg of the reactor, as proposed by Licensee and incorporated in the Safety Evaluation Report of November 30, 1979 accompanying the Confirmatory Order, the steam pressure was reduced, increasing the differential pressure between the primary system and the steam pressure, and increasing the stress across the tubes. This aggravated the leakage problems and required a compensating reduction in primary pressure,

which Licensee instituted and which was incorporated as an additional operating condition in the January 3, 1980 Modifying Order. However, this reduction in primary pressure adversely affected the departure from nucleate boiling ratio (DNBR), which is the potential harm alleged by Decade, even though the Staff and Licensee insist (Tr. 40, 85-86; Safety Evaluation Report, January 3, 1980) that the DNBR margin is well above the safety limits because of certain compensating measures prescribed in the January 3, 1980 Order. Decade confirms (Tr. 16-17, 34-35) that it does not intend to litigate this issue but raises it merely to support its standing to intervene by showing a potential injury from the Confirmatory Order itself, and not merely from the proposed remedies' not going far enough to alleviate the safety problems.

At the time of the prehearing conference, Decade had not yet filed an indication that any of its members resided in the immediate geographic area of the facility and had authorized Decade to represent him in the proceeding. Decade agreed to file the requisite statement within a week after the conference, and Licensee indicated it would interpose no objection on grounds of late filing. Tr. 92-93. Affidavits complying with the requirements of representation and authorization were duly filed on August 1, 1980, and the Board accepts them as complying with the requirements of the regulations.

Although, Decade was the sole petitioner to file a request for hearing, at the prehearing conference a representative from the State of Wisconsin appeared and filed with the Board a petition for leave to participate as an Interested State pursuant to 10 C.F.R. § 2.715(c). Tr. 7. It further requested (Tr. 7-8; Petition, p. 1) that the Board grant the hearing requested by Decade or, in the alternative, certify the matter to the Commission for another decision, but took no position with regard to the merits of Decade's contention and did not want its petition considered as filed by a party under 10 C.F.R. § 2.714. Neither the Licensee (Tr. 9) nor the Staff (Staff Response to Petition of the State of Wisconsin, Aug. 13, 1980) object to Wisconsin's appearing under § 2.715(c) if a hearing is granted in this proceeding but, like the Board, do not consider Wisconsin's petition as initiating a request for hearing. Since we are denying Decade's petition for the reasons discussed below, Wisconsin's petition is also being denied.

Decade's Position

In support of its position that a hearing should be held, Decade argues that Marble Hill, supra, and the Commission's May 12, 1980 Order in this case were incorrectly decided under § 189 of the Atomic Energy Act and the case law interpreting "interest" in determining standing, which Decade insists should encompass injury that may result from inaction of the agency (Tr. 11, 27); that even if Marble Hill were correct, it should not apply to this proceeding

because the Confirmatory Order of November 30, 1979 permitted a resumption of operations when the plant had been shut down under verbal orders from the N.R.C. not to reopen the plant without written authorization (Tr. 12); that the Confirmatory Order is not an enforcement order as in Marble Hill to which the Commission's narrow interpretation of standing applies (Tr. 26-27, 74-75); that the November 30 Order did cause Decade an injury in fact in that it resulted in a change to a lower pressure in the primary system which adversely affected the departure from nucleate boiling ratio, this lower pressure being reflected in the January 3, 1980 Modification of Confirmatory Order (Decade Ans. to Staff Opp, to Hearing, February 22, 1980, pp. 3-4; Tr. 13, 15-16, 60-61); and that, even if a hearing is not required as a matter of right, the facts compel such a hearing as a matter of discretion to answer the major unresolved safety questions regarding the tube degradation problem (Decade Ans. to Staff, February 22, 1980, p. 6). The latter request, for a discretionary hearing, was directed to the Commission prior to its May 12, 1980 Order, not the Board. However, the State of Wisconsin supports (Tr. 55-57) the right of the Board to offer a discretionary hearing once the Board determines that Decade has standing, as Wisconsin insists it has on the basis of the safety issue arising from the decrease in pressure that Decade has raised for standing purposes.

The Licensee's and Staff's Position

The Licensee (Licensee's Response to Decade Contentions, July 28, 1980, pp. 4-7) and Staff (Staff Motion to Commission, February 11, 1980, pp. 4-7; Staff Statement on Standing and Supplemental Petition, July 25, 1980, pp. 3-11) challenge Decade's standing on the basis of the Marble Hill rationale that only an injury that arises from the conditions of the Order, and not from the allegation that the Order does not go far enough, can serve as a foundation for standing. Decade does not dispute (Tr. 34-35) that the issues raised in its contentions are based upon the Confirmatory Order's not going far enough, rather than that the restrictions imposed in themselves cause harm. The possible injury from the reduction in pressure's adversely affecting the departure from nucleate boiling ratio was conceded by Decade (Tr. 16-17) as raised only to show possible injury to supply a foundation for standing, but not as a litigable issue in the proceeding. Decade insists (Tr. 62, 75) that, although the reduced pressure issue is a legitimate one, Decade cannot raise it as a contention due to a lack of resources which requires it to concentrate only on its fundamental concerns regarding the tube degradation problems.

Licensee confesses confusion (Tr. 35-37) over Decade's assertion of the reduction in pressure issue for purposes of standing but not as a litigable issue in the proceeding, a litigating

posture which Licensee considers frivolous (Tr. 63-64). The Licensee and Staff further contend that Decade's reliance upon that reduced pressure issue is misdirected because the decrease in pressure was not a direct result of the November 30 Confirmatory Order, but incidental to it; it was directly related only to the January 10 Modification Order on which Decade did not file any petition and, in any event, the reduction in pressure was a self-imposed restriction by the Licensee within already authorized limits and not compelled by the Staff. Tr. 36, 38, 40, 52-53, 73-74, 86-87.

In their view (Tr. 30-31, 38, 44-47) an enforcement-type proceeding such as a confirmatory order proceeding is not the proper forum for a petitioner to assert that the Order does not go far enough. A petitioner making that contention has recourse to the Commission via a 10 C.F.R. § 2.206 petition and, if it is denied by the Director and Commission, has recourse to Courts. A Notice of Opportunity for Hearing on a confirmatory order is designed for the Licensee or someone else aggrieved by the action. It should not be utilized to "force-fit" into the proceeding a petitioner who contends the Order does not go far enough. The proper recourse for such a petitioner is either a § 2.206 petition or a generic rulemaking proceeding, which Staff contends (Tr. 83-84) would be the proper forum for a hearing on the steam generator tube problems raised by Decade.

The Licensee (Tr. 31, 87) and Staff (Tr. 51) deny Decade's contention that a confirmatory order is not an enforcement order to which the limitations on standing enunciated in Marble Hill apply. To them, revocations, suspensions, and modifications of licenses, including those initiated by the Licensee and confirmed by order of the Commission, are all types of enforcement proceedings in which the alleged injury to the petitioner must arise from the actions taken, not from the allegation that the Order should have gone further.

OPINION

The November 30, 1979 Confirmatory Order

We are not unimpressed with Decade's position that "standing" has not been limited by the courts to allegations of injury in fact resulting from the action complained of, but also includes allegations of agency inaction in the subject area. Nor do we consider frivolous, Decade's raising the prospect of an injury in fact from an issue it raises for purposes of standing, which it does not desire to litigate. We note that petitioners have been given standing in the past on the basis of allegations of injuries that were unconnected to contentions they raised. See, e.g., Gulf States Utility Company (River Bend Station, Units 1 and 2),

ALAB-183, 7 AEC 222, 226 fn. 10 (1974), where a petitioner was given standing on the basis of an alleged injury from the consequences of a Class 9 accident although the contentions admitted by the Licensing Board were unrelated to the consequences of any kind of accident.

Nor, for that matter, do we accept without question the proposition put forward by the Staff and Licensee that an incidental result of a confirmatory order (operation of the primary system at a reduced pressure which may have a potentially injurious effect) cannot serve as a basis for standing because it was not directly required in the Confirmatory Order, was covered in a subsequent order on which no hearing was requested, and was within the existing authority of the Licensee.

Be that as it may, we need not reach the question of standing in order to decide whether a hearing should be granted to Decade. As we read the Marble Hill opinion and the Commission's Order of May 12, 1980 in this proceeding, the Commission has already directed the result of dismissing the petition and has left us with what amounts to a ministerial act in ordering it. In Marble Hill, in determining that the petitioners did not have standing, the Commission approved the terms of the Director's enforcement order restricting the scope of any hearing to the facts underlying the

imposition of the enforcement remedies ordered and the question of whether the enforcement order should be sustained. It specifically prohibited going beyond the remedies proposed to a consideration of additional or more drastic remedies.

Although Decade raises an interesting question of whether a confirmatory order is in the nature of the enforcement order considered in Marble Hill, that question is academic in light of the Commission's declaration in its May 12, 1980 Order that this Board apply the principles of Marble Hill to this proceeding and restrict an adjudicatory hearing solely to the issues identified in the confirmatory order (which was worded almost identically to the Marble Hill enforcement order in limiting the scope to the truth of the facts set forth underlying the remedies proposed and the question of whether those remedies should be sustained). As the Commission pointed out in Marble Hill, there is ample judicial precedent for the Commission to limit the scope of its enforcement proceedings from including a consideration of more drastic remedies. It has chosen to do so and has provided a separate procedure under 10 C.F.R. § 2.206 for interested persons to seek enforcement actions beyond those proposed by the Staff. While Decade may question the wisdom of that procedure by which the Director of Nuclear Reactor Regulation decides on the enforcement remedy, the scope of any hearing that might be held on that remedy, and the granting of requests for action under

§ 2.206 which question the sufficiency of the remedy, the Commission has approved that procedure in Marble Hill and its May 12, 1980 Order in this proceeding under its unquestioned authority to do so.

In view of the fact that Decade admittedly has not raised any issue for litigation within the scope of the Director's Order (i.e., which challenges as injurious the remedies proposed by the Director), the petition must be dismissed whether or not Decade can support its standing to intervene. Decade has failed to raise a specific aspect of the subject matter of the proceeding, as defined in the Director's Order and approved by the Commission, that could qualify it to intervene under the requirements of 10 C.F.R. § 2.714(a)(2).

Similarly, although the State of Wisconsin has suggested a mechanism for granting a hearing, by deciding the issue of standing in Decade's favor and accepting the tube degradation issues as a matter of the Board's discretion, in its May 12, 1980 Order in this proceeding the Commission has precluded such an exercise of discretion by instructing the Board that any adjudicatory hearing that might be held be conducted "solely on the issues identified in the [Confirmatory] Order."

The January 3, 1980 Modification of Confirmatory Order

We need also consider the extent to which this Board may consider the January 3, 1980 and April 4, 1980 Modifications of Confirmatory Order. The Licensee and the Staff object to the Board's

considering a hearing on the January 3, 1980 Order because Decade has not petitioned for a hearing on that Order. Tr. 23, 64-65. Moreover, the Staff insists (Tr. 23-24, 65-66) that the January 3, 1980 Order, while styled as "modifying" the November 30, 1979 Confirmatory Order, did not actually do so and only imposed an additional restriction that was unrelated to the November 30, 1979 Order.

Decade counters that it never filed a request for a hearing on the January 3, 1980 Order because it received that Order after the time for filing a petition had expired. Tr. 24-25, 26. It condemns (Tr. 25) as "egregious" and an 'affront against the citizens of Wisconsin" the Staff's failure to serve it with a copy of the January 3, 1980 Order, considering Decade's intensive involvement in bringing the steam generator tube problems to the attention of the Staff and public, a grievance with which the Board has considerable sympathy.^{6/} We think the Staff and Licensee would do well to reread Carolina Power & Light Company (Shearon Harris Nuclear Plant, Units 1, 2, 3 and 4), ALAB-184, 7 AEC 229, 237 (1974), regarding the considerations of fairness that require the giving of notice of significant developments within the regulatory framework to parties who

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Decade had submitted formal filings to the Commission regarding the steam generator tube degradation problems prior to the issuance of the Jan. 3, 1980 Order on Nov. 14, 1979; Nov. 26, 1979; Nov. 28, 1979; Dec. 12, 1979 and Dec. 17, 1979. The Nov. 28, 1979 filing was directly related to the proposed reduction in operating pressure which was the subject of the Jan. 3, 1980 Order. On Jan. 2, 1980, the day before the Order was issued, Decade had participated in a conference before the Commissioners at which the proposed reduction in operating pressure and its potentially adverse consequences were discussed.

are already involved with the reactor in the regulatory process. Nevertheless, because Decade has not filed a petition for hearing on the January 3, 1980 Order, even belatedly, nor raised any issues (except with regard to standing) that might be considered as arising from the January 3, 1980 Order, that Order is not before the Board for consideration.

We do not intend to suggest that the Board could not consider any issues raised by petitioner in its request for a hearing on the November 30, 1979 Order as they might have been affected by the January 3, 1980 Order, or even issues that might have arisen from the January 3rd Order to the extent that they relate to the November 30, 1979 Order. Indeed, for the Board to consider the Director's remedies in their original form after they had been modified would reduce a hearing to a consideration of hypotheticals. However, we need not decide that question because Decade has not raised any issue for litigation within the scope of the November 30, 1979 Order or the January 3, 1980 Order either in its pleadings on the November 30, 1979 Order or by any belated petition for hearing on the January 3, 1980 Order.

The April 4, 1980 Modification of Confirmatory Order

Decade filed a formal petition for hearing on the April 4, 1980 Modification of Confirmatory Order, which the Director of

Nuclear Reactor Regulation recommended to the Commission be referred to this Board for consideration in conjunction with the consideration of the November 30, 1979 Order. No action has been taken. Decade vigorously objects (Tr. 20; Decade letter to Commission, July 26, 1980) to any summary referral of that request for hearing by the Commission to the Board or the Board's consideration of that request on its own volition, that might avoid a formal vote on that request by the Commission (which Decade speculates might be favorable to it because of the change in the make-up of the Commission). The Licensee apparently (Tr. 20-23) would have no objection to our considering the request for hearing on the April 4, 1980 Order but recognizes that the request is not before the Board and could not be considered over the objections of any party. The Staff (Tr. 23) would have no objection to our considering the request on that April 4, 1980 Order pending some kind of subsequent referral from the Commission.

As with regard to the January 3, 1980 Order, the Board does not have before it any litigable issues arising from the April 4, 1980 Order that are within the scope of the November 30, 1979 Order, nor any request for hearing on the April 4, 1980 Order that has been referred to us. Consequently, we cannot consider the April 4, 1980 Order.

The August 8, 1980 Authorization to Restart

By letter to the Board dated August 26, 1980, Decade requested permission to supplement its previous filings in support of an adjudicatory hearing based upon new information, which it relates in the letter, pertaining to the Office of Nuclear Reactor Regulation's authorizing the resumption of operation of the facility after an inspection conducted in accordance with the April 4, 1980 Modification Order. Decade complains that the authorization to restart was not issued by an order providing an opportunity for an adjudicatory hearing, but only by a letter dated August 8, 1980, which procedure Decade contends constitutes an admission that the prior orders should have permitted an intervention by persons complaining that more drastic remedies were necessary. Staff and Licensee respond by indicating that an order was not necessary for the action taken, which did not entail additional conditions; that the written authorization was in accordance with the terms of the April 4, 1980 order; and that the Staff did not change its procedures by the issuance of the written authorization without order, as contended by Decade, so as to concede Decade's legal arguments.

We do not see how any alleged change in Staff procedures subsequent to the issuance of the November 30, 1979 Order can affect our disposition of the request for hearing on that Order.

At most, the August 3, 1980 authorization could affect only issues arising from the April 4, 1980 Order to which it was related and over which the parties have agreed we have no jurisdiction. Consequently, the August 8, 1980 authorization to restart cannot affect this proceeding.

Decade's Request for Certification or Interlocutory Appeal

Finally, Decade moves in the alternative (Decade Motion, July 30, 1980; Tr. 91-94), if we should deny the request for hearing, for an order certifying to the Commission the question of whether the opinion in Marble Hill should be rejected and not applied to this case or, in the further alternative, if certification is also denied, for an order permitting Decade to file an interlocutory appeal directly to the full Commission. Decade premises its motion on the change in the make-up of the Commission which resulted when Commissioner Kennedy's term expired on June 30, 1980, and the resulting two-two line-up among the Commissioners who had voted on the Marble Hill and May 12, 1980 Orders.

As pointed out by the Board (Tr. 95) and verified by the Staff (Staff Response, August 22, 1980), a certification to the Commission would go first to the Appeal Board under the specific delegation of 10 CFR § 2.785(b)(1), the procedure that Decade attempts to avoid. Furthermore, a denial of the petition is

not an interlocutory order, but a final one, to which an appeal can be taken immediately to the Appeal Board. Consequently, a certification to the full Commission by this Board would have no practical effect because a direct acceptance by the Commission would be contrary to its procedures.

Of equal importance, Decade's suggestion that this Board go behind the Commission's Order of May 12, 1980 to question the current make-up of the Commission and the possibility that it might reverse its position, is improper. We are bound by the May 12, 1980 Order and cannot speculate on the views of individual Commissioners that might presage a change in Commission policy.

CONCLUSION

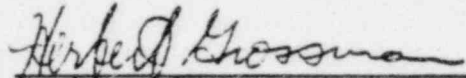
For the reasons stated above, Decade's petition for hearing on the November 30, 1979 Confirmatory Order is denied. In view of the fact that no issues have been raised on which a hearing may be held either in Decade's petition or supplemental contentions or in the State of Wisconsin's petition for leave to participate as an Interested State filed on July 30, 1980, Wisconsin's petition is denied.

Decade's request for certification to the Commission or for permission to file an interlocutory appeal is also denied.

Under 10 C.F.R. § 2.714a(a), petitioners have ten (10) days after service of this Order to appeal to the Atomic Safety and Licensing Appeal Board.

Board members Dr. Richard F. Cole and Dr. J. Venn Leeds join in this Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Herbert Grossman, Esq., Chairman

Dated at Bethesda, Maryland
this 4th day of November, 1980.