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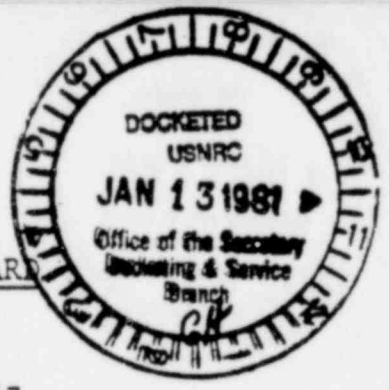

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

PORTER COUNTY CHAPTER INTERVENORS' (1) OBJECTIONS TO MEMORANDUM AND ORDER OF DECEMBER 24, 1980, AND MOTION FOR RECONSIDERATION, AND (2) MOTION FOR CERTIFICATION OR REFERRAL

Porter County Chapter of the Izaak Walton League of America, Inc., Concerned Citizens Against Bailly Nuclear Site, Businessmen for the Public Interest, Inc., James E. Newman and Mildred Warner ("Porter County Chapter Intervenors"), by their attorneys, hereby (1) object to the Board's Memorandum and Order dated December 24, 1980 ("Order"), pursuant to 10 CFR §2751a(d)*, and move the Board to reconsider and reverse the rulings in the Order; and (2) in the alternative, move the Board to certify to the Atomic Safety and Licensing Appeal Board, pursuant to 10 CFR §2.751a(d), or to refer to the Appeal Board, pursuant to 10 CFR §2.730(f), the issues and the rulings on the admissibility of Porter County Chapter Intervenors' "newly filed" and short pilings contentions.

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* The Order addresses matters left undecided by the Order following Special Prehearing Conference, dated August 7, 1980.

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1. Objections and motion for reconsideration

a. The Board applied an improper standard.

Porter County Chapter Intervenors respectfully submit that the Board has misconstrued the recent Appeal Board decision in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC ____ (November 20, 1980) ("Bailly"). This Board concluded from the Bailly decision that in order for a contention to be admitted in any good cause for extension proceeding it must meet both of two separate tests. This Board said that the Appeal Board in Bailly:

> read into the Cook decision a determination (Op. 17) that had previously escaped this Board, that an intervenor in an extension proceeding could "only" litigate issues that (1) arose from the reasons assigned to the requested extension and (2)could not abide the operating license proceeding. (Order, p.3.)

To be sure, the Appeal Board in Bailly did describe its decision in Cook in almost those terms.* However, it did so only, and explicitly, in describing the rationale for the decision in Cook, not in articulating the legal standard for admissibility of contententions in all construction permit extension proceedings.

This Board apparently overlooked the fact that the test upon which it relies was explicitly limited by the Appeal Board to the facts of the Cook case. The Appeal Board said the Cook test that contentions be "rooted in the reasons assigned for

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* A very important difference in terms is that the Order here refers to "an" intervenor, but the page of the Bailly decision cited refers to "the" intervenors, referring specifically to those in Cook.

the delay in completing construction" was "tailored to the particular facts of that case." (Bailly, p. 22, emphasis supplied.) It further explained that:

> Neither in terms nor by necessary implication was it [that test] offered as an inflexible mold for passing judgment on the litigability in a permit extension proceeding of every variety of contention in every conceivable setting. Indeed, that it was not intended to have any such effect is indicated by the importance we attached to looking at the "totality of the circumstances" and invoking a "common sense" approach in determining the scope of the "good cause" inquiry in the specific case. See 6 AEC at 620. (Id. at 22-23.)

Thus, contrary to this Board's understanding, the Appeal Board did not erect an inflexible and mechanistic two-part test for the admissibility of contentions which automatically excludes issues unrelated to the reasons assigned for the extension.* Rather, the Appeal Board reiterated the importance of a "common sense" approach which considers the "totality of the circumstances" in determining the contentions to be admitted. (Id.)

There is no doubt that a common sense approach to the totality of the circumstances surrounding Bailly compels the conclusion that both the newly filed and short pilings contentions are appropriate for consideration in this proceeding. The Bailly plant remains less than 1% completed - "in the very incipient stages of construction" (Bailly, p.3) - and each of these contentions presents a matter of great significance which was not and could

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* As this Board undoubtedly will recall, its August 7, 1980 Order "at least intimated (order, pp. 24-29) a view that in appropriate circumstances it might consider issues unrelated to the reasons given for its construction delay." (Bailly, pp. 6-7.) There is absolutely nothing in the Appeal Board Bailly decision to indicate disagreement with that view.

not have been considered in the construction permit hearing.

Because this Board's Order established and applied an erroneous legal standard based upon a misunderstanding of the Appeal Board's Bailly decision, Porter County Chapter Intervenors object to the Order and urge the Board to reconsider its rulings. Upon reconsideration, and by application of the appropriate standard, the newly-filed and short pilings contentions should be admitted.

b. Even applying the improper standard, the short pilings contentions should be admitted.

Assuming, arguendo, that the Board continues to adhere to the two-part test set forth in the Order, Porter County Chapter Intervenors nonetheless maintain that reconsideration is appropriate and that the Board should reverse itself on the ruling denying the Intervenors' short pilings contentions.* It is clear that the Board concluded that the short pilings contentions meet the first part of the test - that they arise from the reasons assigned for the requested extension (Order, p. 5). Although it is less clear, it appears that the Board concluded that these contentions did not meet the second part of the test - whether the short pilings contentions can appropriately abide the operating license proceeding - because:

> we have no basis for finding that the absence of a board's approval of that specific testing program constitutes a compelling reason for determing that a hearing should be held now, rather than at the operating license stage. (Order, p. 7.)

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* The Order denied the newly filed contentions solely on the ground that they do not satisfy the first part of the test - relatedness. (Order, p. 4.) For that reason, we do not address the need for clarification of the statements in the Order concerning the application of the second part of the test to those contentions (Order, pp. 2-3).

That conclusion is largely a decision on the merits of the contentions and is based upon a series of misconceptions and erroneous legal premises and conclusions.

It appears that the Board has required that for a contention to satisfy the second part of the test - that the matter cannot abide the operating license proceeding - an intervenor has the burden of making a prima facie evidentiary showing, without discovery, to that effect. (Order, pp. 2-3; 5-7.) The Order cites no authority for that proposition, and we know of none. To the contrary, in ruling on admissibility, this Board must accept the assertions of the contention, including the assertions that the short pilings issue should be heard now, as true. (Bailly p. 21; Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB - 590, 11 NRC 542 (1980); Missippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).) When viewed in that light, the contentions certainly meet the standard of asserting that consideration of the short pilings issues cannot abide the operating license stage.

In another apparent misallocation of burden, the Board suggests that intervenors have an obligation to show a "substantial reason for a board to deny the design change" (Order, p. 6). There is no possible legal basis for such a suggestion. Moreover, in making it, the Board appears to have lost sight of the fact that this hearing is not about approval or denial of a design change, but is about whether NIPSCO can meet its burden of showing good cause for the construction permit amendment it seeks.

The Board also concludes that only a preliminary review of the design could be made at this time, either by a construction permit board or by this Board. We are not aware of the basis, without any hearing having been held, for that conclusion. Contrary to the Board's statement (Order, p. 6), Porter County Chapter Intervenors do not admit as much. Our statement which the Board quotes must be read in context:

> ...the finding of "reasonable assurance" made at that time did not deal specifically with the short pilings proposal. Unlike many of the component parts of the proposed Bailly plant, the foundation pilings are not susceptible to the same type of laboratory-like analysis that follows from use in similar nuclear power plants. Indeed, an evaluation of pilings requires consideration of essentially an unknown quantity - i.e., the subsoil composition. Accordingly, a greater degree of scrutiny to find the requisite assurance of safety is required for the pilings foundation than for other more common aspects of the plant. (Porter County Chapter Intervenors' Responses to the Board's Questions on the Short Pilings Issue, filed August 25, 1980, at p. 4.)

To construe this statement as an admission that no decision could be reached now, more than six years after the constuction permit hearings and well after NIPSCO's soil testing and placement of test piles, is an unfair reading of Porter County Chapter Intervenors' submission.

Moreover, even if it were true that only a preliminary review could be made now, that does not change the propriety of a hearing being held on a significant issue which has never been considered. As the Board points out, in its present stage of development the short pilings issue would be considered in a hearing, if it were at the construction

permit hearing stage. (Order, p. 5) The fact that NIPSCO chose not to make its proposal until after it received its construction permit does not reduce the meaningfulness of a hearing on the proposal. In fact, we believe that a Board could make a despositive finding, even before implementation, that a foundation design in which the pilings do not go to bedrock does not afford reasonable assurance that a plant which adequately protects the public health and safety can be built. The fact that tests may be required after installation, if that ever occurs, does not preclude a decision on the design before the installation is undertaken.

Although the Board does not identify from whose standpoint the requirement of a research and development program would be the "most drastic remedy" conceivable (Order,p. 6), its conclusion in that regard again overlooks the ultimate issue in this proceeding. A determination that, in light of the lack of assurance of safety of the short pilings design (a determination to be made after an evidentiary hearing), good cause does not exist for the extension sought by NIPSCO and therefore that its application for an amendment is denied, would, it can be speculated, be viewed by NIPSCO as more drastic. The point, however, is not how drastic a remedy can be conceived, but rather that the issue here is "good cause."

Finally, the Board has found as a matter of fact on the merits of Intervenors' short pilings contentions that there is no "material insufficiency" in the program adopted by NIPSCO

and the staff for testing the short pilings foundation. (Order, p. 7.) This finding is used as the basis for the Board's conclusion that the absence of Board approval of the program is not enough to provide a basis for finding that the issue must be heard now. Only admissibility, not the merits of the contnetion, is before the Board at this juncture. See, Houston Lighting and Power Company (Allens Creek Generating Station, Unit 1) ALAB-590, 11 NRC 542, 551 (1980). The Board should decide upon the significance of the change in foundation design, the adequacy of the short pilings proposal, the substantiality of the test program and whether NIPSCO can show good cause, after a hearing where all parties have been given a full and fair opportunity to present and cross-examine evidence.

2. Motion for Certification or Referral

In the alternative, if the Board declines to reconsider and reverse its rulings on the short pilings and newly filed contentions, Porter County Chapter Intervenors move the Board to exercise its authority under 10 CFR §2.718(i) and certify pursuant to 10 CFR §2.751a(d), or refer pursuant to 10 CFR §2.730(f), or both certify and refer to the Atomic Safety and Licensing Appeal Board the questions of admissibility of contentions R-I 1-9 and 13 ("newly filed contentions") and Intervenors' short pilings contentions.

Under 10 CFR §2.730(f), the Board may refer a ruling to the Commision if prompt final resolution is "necessary to

prevent detriment to the public interest or unusual delay or expense." In turn, 10 CFR §2.785(b) delegates to the Appeal Board the authority to hear such a referral issue in place of the Commission. See, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). The questions of the admissibility of the newly filed and short pilings contentions are appropriate matters for referral. Indeed, the nature of the issues and of this proceeding suggest that a final resolution of their admissibility now will avoid unneccessary and extraordinary delay and expense to all parties to this construction permit amendment proceeding. If the hearing on NIPSCO's requested amendment is held without these issues being admitted, and the Appeal Board or the Commission subsequently determines that they should have been admitted, discovery will need to be re-opened, and this Board must reconvene the hearing. If the short pilings contention is now denied and subsequently admitted, it is possible that additional construction work will have taken place with the inevitable prejudicial effect on the decision-maker. Cf., Public Service Company of New Hampshire (Seabrook Units 1 and 2) CLI-78-14, 7 NRC 952, 959, (1978). The avoidance of this delay, effort and expense by referral now to the Appeal Board is certainly in the best interests of all parties and of this Board. Because the proceedings are still in the early stages of discovery, it can be expected that the Appeal Board will resolve the issues well before the hearing date is set.

Certification of issues arising during the special prehearing conference is authorized by 10 CFR §2.751a(d). Appendix A to

10 CFR Part 2 suggests that certification is appropriate when:

> a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party. (§V(f) (4).)

That standard is met here. This is only the second contested construction permit extension proceeding ever held, and the only one concerning a plant in the very preliminary stages of construction. As recognized in the Order (p.5.), there is no definitive statement of what standards govern the admissibility of issues in such a proceeding. In light of the Appeal Board's recent Bailly decision, and, in our view, this Board's misunderstanding of it, consideration of the legal issue by the Appeal Board at this time is particularly appropriate.

Accordingly, Porter County Chapter Intervenors move, in the alternative, this Board to certify, or refer, or both certify and refer, to the Atomic Safety and Licensing Appeal Board the issues of whether the newly-filed and short pilings contentions are admissible in this proceeding.

Dated: January 9, 1981

Respectfully submitted,
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By: 
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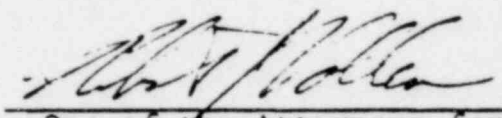
CERTIFICATE OF SERVICE

I hereby certify that copies of Porter County Chapter Intervenors' (1) Objections to Memorandum and Order of December 24, 1980, and Motion for Reconsideration, and (2) Motion for Certification or Referral were served on each of the persons on the attached Service List by deposit in the U.S. Mail, postage prepaid, on this 9th day of January, 1981.

Robert J. Vollen



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