

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

NORTHERN INDIANA PUBLIC
SERVICE COMPANY

(Bailly Generating Station,
Nuclear-1)

Docket No. 50-367
(Construction Permit Extension)

NRC STAFF RESPONSE TO MOTIONS FOR RECONSIDERATION
AND MOTIONS FOR CERTIFICATION OR REFERRAL FILED BY THE
PORTER COUNTY CHAPTER INTERVENORS AND THE STATE OF ILLINOIS

INTRODUCTION

On January 9, 1981, the Porter County Chapter Intervenor (PCCI) filed a motion for reconsideration of the Board's Memorandum and Order, dated December 24, 1980 (Order), and alternative motion for certification, pursuant to 10 CFR § 2.751a(d), or referral, pursuant to 10 CFR § 2.730(f), of such order to the Appeal Board. On January 14, 1981, the State of Illinois filed a substantially identical motion. The referenced Order denied admission of these intervenors' "newly-filed" contentions and short piling contention.

The intervenors object to the Order and seek its reconsideration and reversal on the grounds that the Board's reliance upon the recent Appeal Board decision entered in this proceeding (ALAB-619) on November 20, 1980 in support of its ruling was misplaced. The Staff does not agree. The Board's order is squarely in line with ALAB-619 and the Staff opposes the present motion for reconsideration.

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If the Board declines to reconsider its ruling, the intervenors move the Board to certify or refer its decision to the Appeal Board. The Staff opposes this Motion. The movants have not made the requisite showing that discretionary interlocutory review is appropriate under the circumstances of this case.^{1/}

DISCUSSION

1. Motion for Reconsideration

The admissibility of the challenged contentions was thoroughly briefed by all parties with an interest therein. The present motion essentially reiterates arguments previously advanced by PCCI and the State of Illinois in support of these contentions and properly rejected by the Board. The Staff has continually opposed the admission of these contentions on the grounds that they are outside the scope of the proceeding^{2/} or otherwise

^{1/} As relevant to this matter, 10 CFR § 2.730(f) provides that "[n]o interlocutory appeal may be taken to the Commission from a ruling of the [licensing board]. When in the judgment of the [licensing board] prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, [it] may refer the ruling promptly to the Commission." (emphasis added). Section 2.718(i) provides that a licensing board is empowered to certify questions to the Commission for its determination in the exercise of its discretion. Pursuant to 10 CFR § 2.735(b)(1), the Appeal Board has been authorized to exercise the authority and perform the functions which would otherwise have been performed by the Commission under 10 CFR §§ 2.718(i) and 2.730. A party seeking certification under 10 CFR § 2.718(i) must, at a minimum, establish that a referral under 10 CFR § 2.730(f) is proper. See, e.g., Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 615 (1976).

^{2/} See most recently NRC Staff comments regarding the newly-filed contentions, dated October 8, 1980.

inappropriate for present adjudicatory consideration.^{3/} Its position on this matter is well known and need not be repeated. Clearly, the recent Appeal Board decision in this proceeding strengthens that position.

In ALAB-619, the Appeal Board upheld this Board's denial of the intervention petition of the City of Gary, et al. on the grounds that the sole issue advanced in their petition, regarding emergency planning, was not litigable in this construction permit extension proceeding. Slip op. at 3. In arriving at this result, the Appeal Board concluded that where there is no "discernible relationship" between the issues addressed by petitioners and the substance of the extension request, a request for the initiation of a show-cause proceeding under 10 CFR § 2.206 provides not only an "adequate and immediately available" remedy for obtaining their present consideration by the NRC, but the "exclusive" one. Slip op. at 23. It reasoned that this is the case where, as in the appeal before it, "the supervening developments alleged to warrant termination of reactor construction concededly have nothing to do with the need for the permit extension - and thus cannot be said to evolve naturally from the extension application which is the source of the proceeding" Slip op. at 28. It noted that this was consistent with the "common sense" approach it advocated in its Cook decision.^{4/} Slip op. at 28-29. As if to emphasize the point, the Appeal Board observed that a

^{3/} See NRC Staff response regarding the short pilings issue, dated August 18, 1980.

^{4/} Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 & 2), ALAB-129, 6 AEC 414 (1973).

permit extension proceeding would become an "openended inquiry into the safety and environmental aspects of reactor construction and operation" if an "open invitation were given to those in petitioners' situation to freight it unnecessarily with matters far removed from those events which led to its commencement." Slip op. at 29. That is precisely the situation which would obtain if the "newly-filed" contentions, which are wholly unrelated to the grounds for the extension request, were admitted in this proceeding.^{5/} Accordingly, the Board properly found that ALAB-619 stood as a bar to the admission of issues such as these from consideration in this proceeding. Order at 4.

The short pilings contention stands on somewhat different footing since it concededly bears some relationship to the "reasons why construction could not be completed on schedule."^{6/} Therefore, consistent with the Appeal Board decision in Cook,^{7/} such an issue might be admissible in a permit extension proceeding if its consideration could not appropriately abide the operating license proceeding. All of the responsive pleadings on this subject reflect this common understanding. As this Board aptly observed, ALAB-619 "did not broaden the scope of Cook" in this regard. Order at 5 (emphasis in original); See ALAB-619, slip op. at 28. The Board, after fully

^{5/} These contentions raise concerns involving post-TMI considerations, Mark II Containment design, post-accident monitoring, ATWS and other broad safety issues.

^{6/} Slip op. at 28.

^{7/} 6 AEC at 420.

considering the briefs submitted by the parties on this specific matter, decided that present adjudication of the short pilings issue was unwarranted and that its deferral until the operating license stage was appropriate. Order at 5, 7. The Staff agrees with this ruling for the reasons given in its brief on the matter^{8/} which relied heavily on the Commission's December, 1979 decision not to initiate an immediate hearing on the short pilings issue following such a request by PCCI and others.^{9/}

2. Motion for referral or certification

The Board's Order of December 24, 1980 completes its decision on the intervention petitions and contentions addressed therein. In its order admitting PCCI and the State of Illinois as parties to the proceeding,^{10/} the Board admitted certain proposed contentions and rejected others. The Commission's regulations prohibit an intervenor from taking an interlocutory appeal from an order ruling upon his intervention petition as a matter of right unless that order has the effect of denying the petition in its entirety. 10 CFR § 2.714a; Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980). The proper recourse for such intervenor is to take an appeal following the entry of the licensing board's initial decision. 10 CFR § 2.762(a); Allens Creek,

^{8/} See n. 3 supra.

^{9/} Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733 (1979), petition for review docketed, No. 80-1163 (D.C. Cir., Feb. 8, 1980).

^{10/} Order Following Special Prehearing Conference, dated August 7, 1980.

supra, 11 NRC at 473 n. 1; See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20 (1976).

This is consistent with the general prohibition against interlocutory review of a licensing board ruling. 10 CFR § 2.730(f). However, 10 CFR § 2.730(f) does provide a licensing board with the discretion to refer a ruling for prompt appellate review if it determines that such disposition is "necessary to prevent detriment to the public interest or unusual delay or expense."^{11/} As relevant to the present motion, the Appeal Board has firmly evidenced its disinclination to entertain an interlocutory appeal of a licensing board ruling admitting or denying specific contentions unless such ruling is clearly on a "collision course with governing legal principles." Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, 407, reconsid. den., ALAB-330, 3 NRC 613, rev'd in part sub nom USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976); See also Marble Hill, supra, 4 NRC 20 (1976). Since this Board's December 24, 1980 Order is wholly consonant with the Appeal Board decision in ALAB-619, it is entirely improbable that the Appeal Board would accept referral of the controverted ruling given its past decisions in their area. It is even more difficult to imagine the Appeal Board reaching a different result than this Board did in its Order. Intervenors, nevertheless, argue that immediate review of the ruling in question is in the public interest. In fact, just the opposite is true. The Staff believes

^{11/} See n. 1, supra.

that the general public interest is best served by maintaining a constancy and finality in NRC decision-making. This constancy would be lost if licensing board decisions were subject to frequent challenge with the result that they could not be effectuated until they had undergone interlocutory review. In addition, the grant of the present motion would introduce fresh uncertainty into the proceeding by leaving the final identity of issues in controversy unresolved. This would hamper the ability of the parties to proceed with necessary case preparation. The parties are entitled to proceed in good faith reliance on the finality of decisions affecting the substance and conduct of a proceeding.

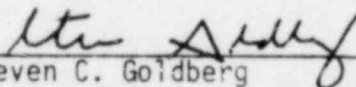
Intervenors further argue that referral of the subject ruling is necessary to prevent undue delay and expense. They allege that this would be occasioned if the Board's Order is reversed on appeal following issuance of the initial decision. The Staff does not agree. This possibility is common to all litigation and is, therefore, anything but "unusual" or unique to this case. Even more importantly, the grant of the instant motion does not remove this risk. These intervenors, for example, may well elect to appeal the Board's earlier rejection of other proposed contentions following the entry of an initial decision. Moreover, the Board may ultimately deny the requested extension, thereby obviating any prospect for the "delay" of which intervenors complain. Indeed, the Commission's rules reflect a deliberate decision not to interrupt the orderly administration of an NRC licensing proceeding with the introduction of interlocutory review except in carefully delineated circumstances. 10 CFR § 2.730(f).

While denial of the present motion has the potential for lengthening the post-decisional process if the intervenors later elect to take an appeal following the rendition of an initial decision, the grant of the motion has the even greater potential for delaying the pre-decisional process by enmeshing the parties in time-consuming and potentially protracted appellate litigation. Combined with the resultant uncertainty it would introduce regarding the subject matter of this proceeding, this would threaten an incalculable delay in the issuance of an initial decision in this matter.

CONCLUSION

In light of the above, the Staff opposes the present motions for reconsideration and motions for certification or referral.

Respectfully submitted,


Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of January, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO MOTIONS FOR RECONSIDERATION AND MOTIONS FOR CERTIFICATION OR REFERRAL FILED BY THE PORTER COUNTY CHAPTER INTERVENORS AND THE STATE OF ILLINOIS in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of January 1981.

*Herbert Grossman, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward W. Osann, Jr., Esq.
Suite 4600
One IBM Plaza
Chicago, Illinois 60611

*Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert L. Graham, Esq.
One IBM Plaza
44th Floor
Chicago, Illinois 60611

*Mr. Glenn O. Bright
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

George and Anna Grabowski
7413 W. 136th Lane
Cedar Lake, Indiana 46303

Kathleen H. Shea, Esq.
Lowenstein, Newman, Reis, Axelrad
and Toll
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Diane B. Cohn, Esq.
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Robert J. Vollen, Esq.
c/o BPI
109 North Dearborn Street
Chicago, Illinois 60602

John Van Vranken, Esq., Chief
Northern Region
Environmental Control Division
188 West Randolph Street
Chicago, Illinois 60601

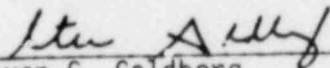
Clifford Mezo, Acting President
Local 1010
United Steelworkers of America
3703 Euclid Avenue
East Chicago, Indiana 46312

William H. Eichhorn, Esq.
Eichhorn, Morrow & Eichhorn
5243 Hohman Avenue
Hammond, Indiana 46320

*Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555


Steven C. Goldberg
Counsel for NRC Staff