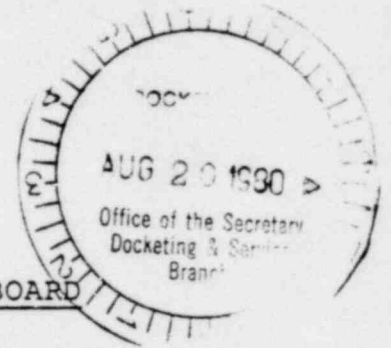


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of) Docket No. 50-367
NORTHERN INDIANA PUBLIC SERVICE) (Construction Permit
COMPANY) Extension)
(Bailly Generating Station,) August 18, 1980
Nuclear-1))
_____)

NIPSCO'S OBJECTIONS TO "ORDER FOLLOWING
SPECIAL PREHEARING CONFERENCE"

I. Introduction

On August 7, the Licensing Board in this proceeding issued its "Order Following Special Prehearing Conference"*/ which sets forth a number of rulings concerning admission of petitioners as parties to the proceeding and admission of contentions as issues in the proceeding. Pursuant to NRC regulations (10 C.F.R. § 2.751a(d)) and the Order (p. 69), NIPSCO files these objections to the Order.

We note that the Board previously issued a Provisional Order Following Special Prehearing Conference, requesting the filing of any objections to that Provisional Order. On June 30, 1980, NIPSCO filed its Objections to Provisional Order Following Special Prehearing Conference (hereinafter "NIPSCO's Objections"); the Staff and many petitioners did so as well. In

*/ The order was served by mail by the Office of the Secretary on August 8, 1980.

view of this previous round of argument, which the Board considered in developing the final order dated August 7, there is little need for detailed presentations. Our objections, therefore, will be brief and will incorporate by reference the arguments we have made in earlier filings.

II. Scope of Construction Permit Extension Proceeding

A. The Board's Determination of the Standards Governing Definition of the Scope of the Proceeding

Our views concerning the scope of a proceeding for extension of a construction permit have been expressed before and we shall not belabor previously made arguments. We refer the Board to the following pleadings:

NIPSCO's Objections to Provisional Order Following Special Prehearing Conference, pp. 2-4, 5-13 (June 30, 1980);

NIPSCO's Response to Supplemented Petitions to Intervene, pp. 20-25, 48-72 (March 7, 1980);

NIPSCO's Response to Petitions Filed in Response to Notice of Opportunity for Hearing, pp. 38-48 (January 18, 1980).

Two points deserve emphasis: First, the Board's Order fails to apply one element of the test established in Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, AL/B-129, 6 AEC 414, 420 (1973))--i.e., in order to be admissible, an issue must arguably cast serious doubt upon the ability of the applicant to construct a safe facility. Second, and more importantly, the Board's Order several times erroneously restates another element of the Cook test. The Order asserts that Cook

excludes from consideration in an extension proceeding only the issues which "should abide the operating license proceeding." (Order, p. 15, lines 8-9, emphasis added; also, Order, p. 16, lines 22-23; p. 22, lines 16, 19.) In fact, this test is quite different:

In the final analysis, then, the question here comes down to whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing. Put another way, we must decide whether the present consideration of any such issue or issues is necessary in order to protect the interests of intervenors or the public interest.

(Cook, supra, 6 AEC at 420, emphasis added.) This difference is perhaps subtle but certainly substantive. We respectfully urge the Board to reconsider its position and apply correctly each element of the Cook test.

B. Consideration of Short Piles Issue

No definitive ruling has yet been made concerning the admissibility of contentions seeking to raise this issue and it is therefore premature to object formally. However, we would like to refer the Board to our earlier discussion of this matter:

NIPSCO's Objections to Provisional Order Following Special Prehearing Conference, pp. 13-17 (June 30, 1980);

NIPSCO's Response to Supplemented Petitions to Intervene, pp. 49-51 (March 7, 1980).

At the risk of being thought excessively argumentative, we respectfully reiterate that, contrary to the Board's view, the Commission's decision on the request for a hearing on the short piles proposal (Northern Indiana Public Service Co. (Bailly Generating Station-Nuclear 1), CLI-79-11, 10 NRC 733 (1979)) did not "merely reaffirm . . . the licensing board's implicit determination that, as of the time of the construction permit proceeding, the design of the pilings and the health and safety or environmental issues arising therefrom should probably await the operating stage." (Order Following Special Prehearing Conference, p. 22, emphasis in original.) The Commission was ruling in 1979--six years after the evidentiary record was closed in the construction permit proceeding--on then-current requests for a hearing on the use of "short piles." The Commission sought the technical views of the ACRS on the then proposed design of pilings and foundations, not on the design (or lack thereof) which had existed during the construction permit review. The Commission concluded that, at the construction permit stage, the "principal architectural and engineering criteria" for the piles foundation of the Bailly nuclear plant had been established but development of the design for that pile foundation had been "consciously--and appropriately--left for later determination" during construction. (10 NRC at 742.) It went on to find that the "short piles" are proposed as a resolution of one aspect of foundation design,

not a change from an earlier plan. Therefore, no construction permit amendment and no hearing were legally required. But the Commission went on to conclude as a substantive matter that the use of short piles presented no safety or other issues which would even "suggest that there would be any benefit in injecting an interim public hearing at this time."

(Id.)

Now this Licensing Board must determine whether the short piles raises any issue "which cannot appropriately abide" the operating license proceeding. Admittedly the Commission made its decision last December; but what has happened since then that could support a conclusion differing from the Commission's? We submit that petitioners have identified nothing upon which a reversal could stand and that, in fact, nothing has changed. The situation is thus the same as that addressed by the Appeal Board in Cook. The Board noted that safety issues associated with design changes^{*} are normally considered in the operating license proceeding.

It is hard to fathom why a different result should obtain simply because of the fortuitous circumstance that a combination of events--only one of which involved design changes--did require applicants to seek an extension for completion.

(Cook, supra, 6 AEC at 421.)

^{*}/ The Bailly situation, of course, involves design development rather than changes in design.

We again recommend that the Board withdraw its questions and reject the contentions which seek to raise the short piles issue.

C. Matters Not Related to Prolonged Construction

The Board has also considered whether issues "not directly related to the delay in construction and not arising from the reasons assigned for the extension" can nevertheless be admitted in a construction permit proceeding. However, the Board did not decide the matter for it found no such issue "that must be heard in advance of the operating license proceeding to protect the interests of the intervenors or the public." (Order, p. 29.) Since there is no ruling, we have no formal objection. However, we wish to record our disagreement with the Board's theory and reference our prior pleadings:

NIPSCO's Objections to Provisional Order Following Special Prehearing Conference, pp. 17-26 (June 30, 1980);

NIPSCO's Response to Supplemented Petitions to Intervene, pp. 48-72 (March 7, 1980).

III. Board Rulings on Contentions

A. The Board's Order admits Porter County Chapter Petitioners' Contentions 1 and 3^{*/} and Illinois Contention 2^{**/}

^{*/} These are found in Joint Intervenor's First Supplement to Petition for Leave to Intervene, pp. 3-6, 7-8 (February 26, 1980).

^{**/} This is found in Supplemental Petition of the State of Illinois, pp. 4-6 (February 20, 1980).

. . . to the extent that they assert that the reasons for the delay are other than offered by Permittee, that the actual reasons do not constitute good cause for the extension, and that the period of extension requested is unreasonable.

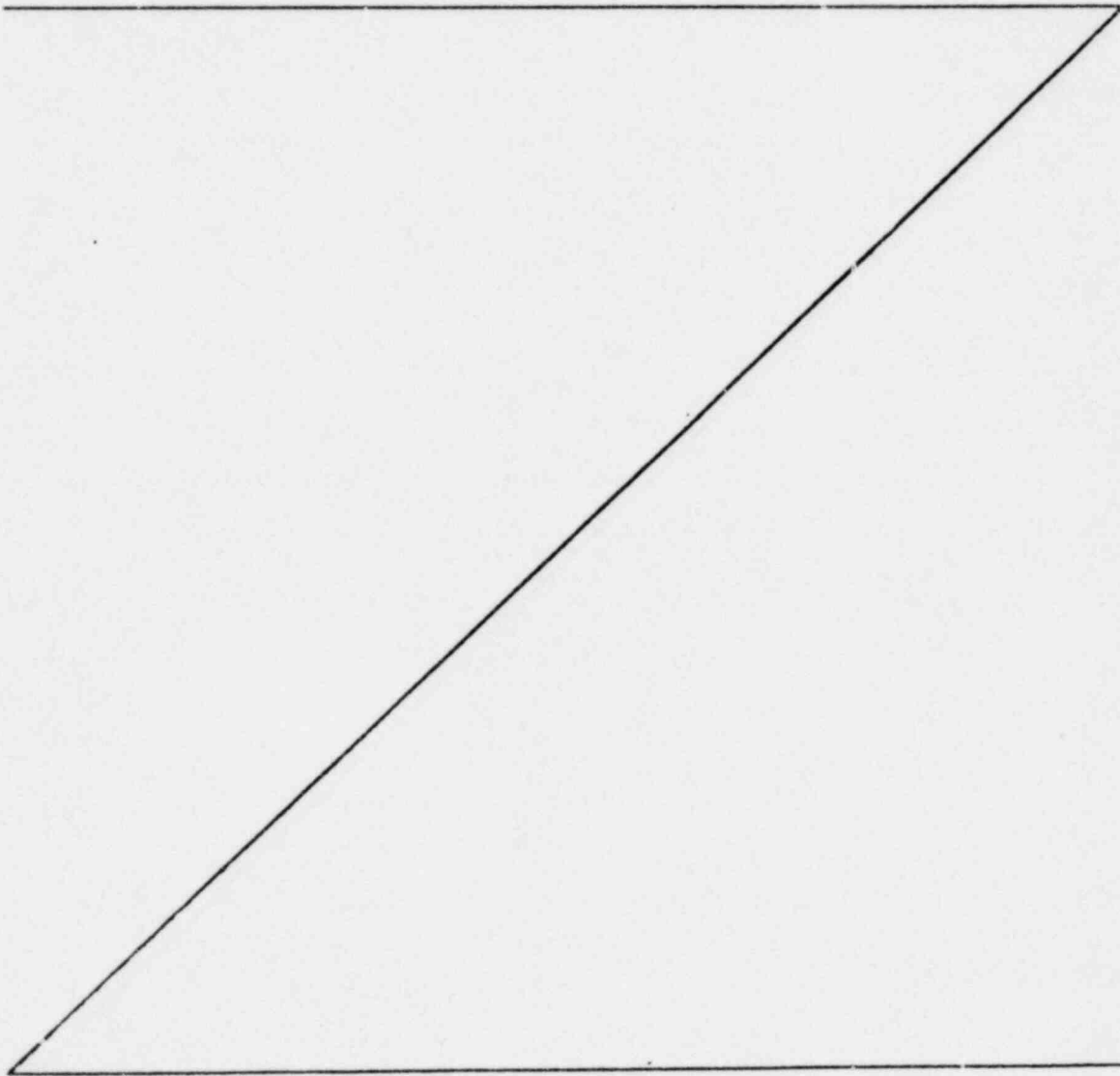
(Order, p. 53.)

The language of the contentions is imprecise, rambling, and diffuse; it would appear certain that there will be disputes as to what is within an admitted contention and what is the permissible scope of discovery. To minimize or avoid such problems and to provide requisite specificity, we urge that the Board make clear that, as to any alleged "actual reason" for the delay other than those identified by NIPSCO, the admitted contentions are limited to the specific reasons listed by Porter County Chapter Petitioners and Illinois. Without such specificity, in our opinion, the contention does not satisfy 10 C.F.R. § 2.714 and the scope of discovery could become unlimited.

In Contention 6,^{*/} Porter County Chapter Petitioners have identified two reasons which, they contend, caused the delay in construction -- i.e., need for power and increase in the estimated cost of building the facility. Technical competence has also been identified as a cause of delay by Porter County

^{*/} Joint Intervenors' First Supplement to Petition for Leave to Intervene, pp. 13-14 (February 26, 1980).

Chapter Petitioners^{*/} and Illinois.^{**/} Since no other "reason" has been alleged and no basis for any other "reason" identified, the contention should not be left as an ambiguous invitation to an unlimited fishing expedition.



^{*/} Id. at 14-15.

^{**/} Supplemental Petition of the State of Illinois, p. 13 (February 20, 1980).

B. Technical Competency

The Board has admitted PCCP Contention 7 and Illinois Contention 5 dealing with the question of technical competency of NIPSCO, its contractors, and subcontractors "[t]o the extent that Petitioners seek to establish that the delay was attributable to technical incompetence which brings into question Permittee's ability to construct a safe facility" The Order further states "[w]e specifically do not admit the portion of Illinois 5 which requires that NIPSCO and its contractors prove in this proceeding that they are technically competent in order to receive the extension." (Order, p. 60.) Thus, it is clear that the admitted contention is much more narrow than the overall review of technical qualification of an applicant at the construction permit stage. However, the precise breadth of the issue is not entirely clear from the language of the Order and additional clarification is requested.

We assume the Board intended only to permit PCCP and Illinois to attempt to demonstrate that the conduct of Permittee, its contractors and subcontractors with respect to the piles foundation and slurry wall was a cause of the delay in completing construction prior to the construction permit expiration date and that such conduct demonstrates a lack of technical competency to construct a safe facility. We request clarification of the Order with respect to this admitted contention and a specific statement limiting the discovery and evidence on this

issue to the conduct of the Permittee, its contractors, and subcontractors which allegedly caused the delay.

C. Dewatering Effects

The Board's Order limits contentions regarding dewatering effects^{*/} to "the incremental effects on the environment from the additional period of dewatering." (Order, p. 55.) We therefore understand that those portions of the dewatering contentions which, on the face of their language, have no connection with "incremental effects" are necessarily rejected.^{**/} We also understand that the sealing of the ash ponds is not an issue in this proceeding unless and until the Petitioners establish that the calculations referenced by the Board "did not fully eliminate the recharging effect of the ash pond seepage." (Order, p. 59.) Finally, we understand that sealing of the ash ponds may thereafter be an issue in this proceeding only as it relates to the incremental effects of the prolonged period

^{*/} PCCP Contentions 4 and 5 (Joint Intervenors' First Supplement to Petitions for Leave to Intervene (February 26, 1980)); Illinois Contention 3 (Supplemental Petition of the State of Illinois (February 20, 1980)); Grabowski, p. 7 (Grabowski's Second Supplementary Petition (April 2, 1980)); Local 1010 Contention 10B (Steelworkers Local 1010 Petition to Deny Permit (December 20, 1979)).

^{**/} These include paragraphs B. and E. and the first sentence of paragraph C. of Illinois Contention 3 (Supplemental Petition of the State of Illinois, pp. 9-11 (February 20, 1980)); the fourth paragraph of PCCP Contention 4 and paragraphs B., C., and E. and the first sentence of paragraph D. of PCCP Contention 5 (Joint Intervenors' First Supplement to Petitions for Leave to Intervene, pp. 11-13 (February 26, 1980)).

of dewatering, and that the sealing of the ash ponds in and of itself has no significance to this proceeding. If these understandings are correct, we have no objection on these points; if not, we request clarification.

D. Explicit Rulings on All Contentions

The Board's Order does not rule explicitly on every contention. The status of many can be inferred, but we suggest that the petitioners and we are entitled to unequivocal rulings in order to facilitate appeals and discovery. We therefore request modification of the Order to rule on all contentions. We have prepared the following list of contentions which it appears that the Board has not explicitly addressed and we indicate the disposition which we presume the Board has made based upon its other rulings.

1. December 20, 1979, Petitions (Porter County Chapter and Illinois)

7 a), c), f), g) (TMI-related matters):

rejected (on basis stated (Order, p. 61) by Board in rejecting PCCP 9, Illinois 4, Local 1010 4).

7 b) (cost):

rejected (on basis stated (Order, p. 59) by Board in rejecting PCCP 6).

7 d), e) (siting):

rejected (on basis stated by Board at pp. 29-32 of the Order).

8 (SER required):

rejected (on basis stated by Board at pp. 24-29).

9 (EIS required):

deferred (on basis stated (Order, p. 61) by Board in connection with Contentions PCCP 10 and Illinois 1).

10 (NIPSCC-cited reasons for failure to complete are not real reasons and do not constitute "good cause"; requested period of extension is not reasonable):
rejected, PCCP 1 and 3 and Illinois 2 are admitted instead (Order, pp. 52-54).

2. February 20, 1980, Supplement (Illinois)

3.E. (impact of dewatering on seismic response, load-bearing capacity, and core melt):

accepted in part (limited to incremental effects of dewatering by Order, pp. 54-55);

rejected in part (core melt aspect rejected by Order, p. 61).

7.D. (re-review of plant design in light of new regulations, Reg. Guides, etc.):

rejected (on basis stated by Board at pp. 24-29).

8 (TMI-related matters, unresolved safety issues):

rejected (on basis stated (Order, p. 61) by Board in rejecting PCCP 9, Illinois 4, Local 1010 4 and on basis stated by Board at pp. 24-29).

3. December 20, 1979, Petition of Local 1010

- 3 (Post-accident monitoring)
- 5 (Unresolved safety issues)
- 6 (ATWS)
- 7 (ALARA)
- 8 (Spent fuel pool size)
- 9 (Material failures)
- 10A (Lakeshore legislation)
- 11 (Increased costs of construction)
- 12 (Energy conservation):

all rejected (implicit in Board's discussion at pp. 38-40 of the Order; see also pp. 24-29, 59-60).

4. Grabowski's Supplement^{*/} dated February 23, 1980, and Second Supplement dated April 2, 1980

- 1 (Judicial stay is not "good cause");
- 2 (Pile review is not "good cause");
- 3 (Slurry wall installation is not "good cause"):
uncertain (Rejection can be inferred from the fact that the Order explicitly admits (p. 54) only the dewatering contention at p. 7 of the Second Supplement. On the other hand, admission could be intended on the theory

^{*/} Contentions 1-4 appear at pp. 5-6.

and conditions stated by the Board (pp. 52-54)
with respect to PCCP 1, 3 and Illinois 2.)

4^{*}/ (Need for power):

rejected (on basis stated (Order, pp. 59-60) by
Board in connection with Contention PCCP 6).

(Evacuation):

rejected (on basis stated by Board at pp. 29-32).

(Alternatives):

rejected (on basis stated by Board at pp. 24-29).

*/ At pp. 11-12 of the Second Supplement, Mr. and Mrs. Grabowski
provide "more specificity" for Contention 4 in the Supplement.

IV. Conclusion

NIPSCO urges the Board to again consider the arguments made in this "Objections," without, of course, waiving any arguments previously made whether or not referenced herein.

In particular, we request the Board to:

- A) reexamine the question of the permissible scope of a construction-permit-extension proceeding and correctly apply the Cook test;
- B) withdraw its questions regarding "short piles" and reject contentions seeking to raise that issue;
- C) clarify the scope of certain admitted contentions on the reasons for delay and dewatering effects;^{*/} and
- D) make explicit findings regarding the admission or rejection of all proposed contentions.

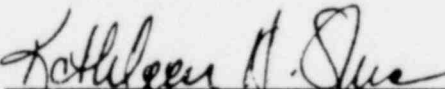
^{*/} The contentions are PCCP 1 and 3 and Illinois 2; PCCP 7 and Illinois 5; and PCCP 4 and 5, Illinois 3, Grabowski, p. 7.

Finally, we respectfully request that the Board act promptly upon all objections filed by participants in order to avoid any further delay in the proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NIPSCO's Objections to Order Following Special Prehearing Conference was served on the following by deposit in the United States mail, postage prepaid, on this 18th day of August, 1980:

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