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November 20, 1980

Mr. Harold Denton
Director, Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Denton:

Several requests for action under 10 C.F.R. § 2.206 in connection with Bailly Generating Station, Nuclear 1, are now pending before you.* By letter of April 9, 1980, Mr. Eichhorn, counsel for the Northern Indiana Public Service Company, addressed the first of those requests and urged that it be denied. We now wish to supplement the views earlier expressed and therefore furnish the enclosed comments for your consideration. We again urge denial of the requests for action.

Very truly yours,

LOWENSTEIN, NEWMAN, REIS,
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Counsel for NIPSCO

By: Kathleen H. Shea
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KHS:vd

Enclosure

*/ These requests are a letter from the State of Illinois to the NRC Chairman, dated November 13, 1979; "Supplement of Illinois to Letter of November 21, 1979" (sic), filed April 10, 1980; and "Request for Action to Suspend or Revoke Construction Permit," dated June 5, 1980.

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Comments of the Northern Indiana
Public Service Company on Requests
for Action under 10 C.F.R. § 2.206
with Respect to Bailly Generating
Station, Nuclear-1

Several requests have been filed with the Nuclear Regulatory Commission, seeking action under 10 C.F.R. Section 2.206 with respect to the Bailly Generating Station, Nuclear-1. The Illinois Attorney General has requested "a halt to future construction" of the facility (Illinois letter) and that "a hearing be instituted for the purpose of reviewing the adequacy of the siting for the Bailly plant and whether or not an emergency evacuation plan is even capable of being developed for the region in which the Bailly plant is located." (Supplement, p. 5.) The City of Gary, et al., have joined in "Illinois' request for action to suspend or revoke the construction permit for the Bailly Nuclear Power Plant." (Gary Request, p. 1.) The NRC Staff announced that the original letter from the Illinois Attorney General "is being treated as a request for action under

*/ These comments are directed toward (a) letter from Attorney General of Illinois to Chairman Hendrie (November 13, 1979) (hereinafter "Illinois letter"); (b) Supplement of Illinois to Letter of November 21, 1979 (sic) (April 10, 1980) (hereinafter "Supplement"); (c) Request for Action to Suspend or Revoke Construction Permit filed by the City of Gary, et al. (June 5, 1980) (hereinafter "Gary Request").

10 CFR 2.206" (45 Fed. Reg. 11,285 (1980).) The subsequent filings have acknowledged that they are submitted pursuant to 10 C.F.R. Section 2.206.*

These brief comments on the referenced requests are submitted on behalf of the Northern Indiana Public Service Company (NIPSCO), to which the construction permit for Bailly N-1 was issued.

Under NRC regulations, a Section 2.206 proceeding is not a vehicle for reconsideration of issues previously decided in licensing proceedings. That principle is firmly established and judicially affirmed. (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1978), aff'd, Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979); Consolidated Edison Co. (Indian Point), CLI-75-8, 2 NRC 173 (1975).)

*/ Petitioners asked that their requests be decided by the Commission itself or a licensing board, and not by the Staff. The argument is made that the Staff would be "inappropriate judges" because it is an adversary party in the Bailly construction permit extension proceeding. (Illinois Supplement, pp. 1-2; Gary Request, p. 3.) We understand that this argument has been found unpersuasive, as reflected in the original referral to the Staff (45 Fed. Reg. 11,285 (1980)) and its continued review. Clearly, the Commission has elected to establish a procedure under which requests such as these are decided by the Staff. Under challenge by these same petitioners, the validity of this procedure has been judicially affirmed. (Porter County Chapter v. NRC, 606 F.2d 1363, 1370-72 (D.C. Cir. 1979), aff'g Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429 (1978).) Petitioners have identified nothing which would lead to a different result here.

The fact is that siting and emergency planning--the topics upon which petitioners rely in seeking NRC action--were litigated in the Bailly construction permit proceeding. The Licensing Board's Initial Decision discussed at some length the "radiological issues concerning siting" which had been heard. These included "the adequacy of the exclusion distance . . . and the accuracy of selection of the population center distance . . . ; the ability to take protective action for persons in that portion of the National Lakeshore which was encompassed by a portion of the LPZ" (Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1) 7 AEC 557, 562 (1974).) The Board expressly found that "the Bailly site was properly evaluated using appropriate safety guides and satisfies the requirements of 10 CFR Part 100."* (7 AEC at 566.)

With respect to emergency planning, in the construction permit proceeding, a group of intervenors contended that the plan had "not been sufficiently developed." In addition, Bethlehem Steel Company intervened out of concern regarding the emergency plan insofar as it affects Bethlehem's adjacent Burns Harbor Plant.** The Staff's Safety Evaluation Report addressed emergency

*/ Part 100 is "Reactor Site Criteria."

**/ Bethlehem did not oppose the facility and did not seek imposition of additional requirements. (See 7 AEC at 568-69.)

planning for the Bethlehem facility. (Safety Evaluation by Division of Reactor Licensing, U.S. Atomic Energy Commission, in re Northern Indiana Public Service Co., Bailly Generating Station, Docket 50-367 (1972).) The Licensing Board examined preliminary planning for evacuation of Bethlehem employees and, recognizing the need for an emergency work force to remain, found planning satisfactory at that stage. The Board also found that "a satisfactory emergency plan can be developed for the National Lakeshore." (7 AEC at 569.) It concluded that NIPSCO's "emergency plan satisfies the requirements of Appendix E to 10 CFR Part 50."* (Id.)

The Appeal Board affirmed the Initial Decision without explicitly addressing siting or emergency planning issues. (North-ern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974).) Clearly, however, the Appeal Board reviewed and found no error in the Licensing Board's treatment of siting.**

Organizations which had intervened in the construction permit proceeding appealed the AEC decision to the Seventh Circuit Court of Appeals and were joined in the appeal by present petitioners

*/ Appendix E to Part 50 is "Emergency Plans for Production and Utilization Facilities."

**/ The Appeal Board recited that "The Licensing Board in this case evaluated the Bailly site in light of those governing Commission standards." "Those" standards were identified as 10 C.F.R. Part 100 and the Appeal Board cited the Initial Decision paragraphs 18-27, 7 AEC at 562-66, at which siting issues were discussed. (8 AEC at 255.)

Illinois and Gary. The court of appeals set aside the AEC decision on the ground that the agency had failed to comply with its own regulations concerning "population center distance."* (Porter County Chapter v. AEC, 515 F.2d 513 (7th Cir. 1975).) That view was summarily rejected by the Supreme Court and the judgment was reversed and remanded for consideration of other issues not previously decided by the court of appeals. (North-ern Indiana Public Service Co. v. Porter County Chapter, 423 U.S. 12, 96 S.Ct. 172 (1975).) On remand, the court held that the grant of the construction permit was valid and denied the petition for review. (Porter County Chapter v. AEC, 533 F.2d 1011 (7th Cir.), cert. denied, 429 U.S. 945, 97 S.Ct. 366 (1976).) Petitioners (including Illinois and Gary) argued that the Bailly site did not meet AEC siting requirements and that AEC had failed

*/ The regulation then in effect specified that the distance from the reactor to the nearest boundary of a densely populated center containing more than about 25,000 persons should be at least one and one-third times the distance from the reactor to the outer boundary of the "low population zone." For the Bailly site, the minimum "population center distance" was determined to be two miles. (10 C.F.R. § 100.11(a)(3), adopted 26 Fed. Reg. 1224 (1961). The provision was amended at 40 Fed. Reg. 26,526, 26,527 (1975) and is now codified in 10 C.F.R. § 100.11(a)(3) (1980).) The court concluded that the corporate boundary of the City of Portage (which would have a population in excess of 25,000 by 1980) was within 1.1 mile of the site; the court rejected the agency's interpretation that the regulation prescribed computation of the distance to the boundary of that portion of the population center at which dense population starts (in this case 4.5 miles), not necessarily to a political boundary.

to give sufficient weight to the density of the population around the Bailly site, particularly when Class 9 accidents are considered. These arguments were explicitly rejected by the court. (533 F.2d at 1015-18.)

Now petitioners Illinois and Gary seek to have litigated again the suitability of the Bailly site:

Illinois requests that a hearing be instituted for the purpose of reviewing the adequacy of the siting for the Bailly plant and whether or not an emergency evacuation plan is even capable of being developed for the region in which the Bailly plant is located.

(Supplement, p. 5.) The City of Gary, et al., requests:

that the Commission suspend or revoke the construction permit for Bailly pending a decision on whether the Bailly site remains feasible from an evacuation perspective.

(Gary Request, p. 3.)

Petitioners' requests are based upon their perception of certain factors and developments said to have arisen since the Bailly construction permit was issued. These allegedly include reduced acceptability of siting near urban areas in the post-TMI world, said to be evidenced by the Kemeny* and Rogovin**

*/ Report of the President's Commission on the Accident at Three Mile Island, "The Need for Change: The Legacy of TMI" (October 1979).

**/ "Three Mile Island: A Report to the Commissioners and to the Public" by the Nuclear Regulatory Commission Special Inquiry Group (January 1980).

reports. Reference is also made to "the six proposed siting criteria identified in NUREG-0625 Report of the Siting Policy Task Force" which criteria the Bailly site allegedly "fails to satisfy" (Supplement, pp. 3-4; see also Gary Request, p. 3.) In addition, petitioners note that new emergency planning requirements are being developed which, they say, cannot be satisfied at the Bailly site. (Supplement, p. 4.)

Petitioners are correct in one limited respect: new standards for siting and emergency planning are being or have been developed. New regulations on emergency planning became effective on November 3, 1980. (45 Fed. Reg. 55,402, to be codified in 10 C.F.R. §§ 50.33(g), 50.47, 50.54(q), App. E.) An advance notice of proposed rule making on siting criteria was published in July 1980. (45 Fed. Reg. 50,350.) However, in neither case is reconsideration of the Bailly site required.

The emergency planning regulation imposes new requirements which must be met by applicants for and holders of operating licenses and by applicants for construction permits. The regulation does not establish any new emergency planning requirement which must be satisfied by present holders of construction permits before they become applicants for operating licenses.

With respect to siting, the only existing regulatory criteria are those contained in Part 100. As the Commission indicated in the advance notice, it "is considering the adoption of modified or additional regulations concerning the siting of nuclear power

reactors." (45 Fed. Reg. 50,350, emphasis added.) However, nothing has yet been proposed, let alone adopted. The "criteria" of NUREG-0625 referred to by petitioners are not even Task Force recommendations. The express recommendation of NUREG-0625 with respect to demography is the following:

Revise Part 100 to change the way protection is provided for accidents by incorporating . . . population density and distribution criteria.

* * * *

3. Incorporate specific population density and distribution limits outside the exclusion area that are dependent on the average population of the region.

(NUREG-0625, p. 46.) The Task Force did not, however, recommend any specific population limits for adoption. After recording the conclusion that "Part 100 should be modified to eliminate the determination of the population center distance," the Task Force stated:

This should be replaced by a combination of population density limits and limits on populations clustered in sectors. These limits should be established for annular rings extending out from the exclusion zone to a distance (perhaps 20 miles) beyond which there would be no population limitations. The population criteria should be more limiting closer to the site than for the more distant rings.

The Task Force has not completed a definitive study on the population densities or distribution, and distances given in the following paragraph are to illustrate the concept. If the Commission accepts this recommendation, the Task Force anticipates that a study would

be made to establish whether a technical basis for the numbers chosen could be developed, or, alternatively, to establish the numbers on some other basis.

* * * *

It is the judgment of the Task Force that beyond about 20 miles the societal risk is sufficiently low to warrant no specific limits on population.

(NUREG-0625, pp. 49-50, emphasis added.)

The Task Force set out the following numerical values solely "to illustrate the concept" (emphasis added):

<u>Area</u>	<u>Population Density at Beginning of Operation</u> *
Exclusion area-5 mi.	1/2 regional average or 100 persons/mi. ² , which- ever is greater
5-10 mi.	3/4 regional average, or 150 persons/mi. ² , which- ever is greater
10-20 mi.	2 times regional average or 400 persons/mi. ² , which- ever is greater

Petitioners neglect to note that these values were not even proposed, and of course, these values neither have been adopted nor constitute regulatory requirements.

*/ In addition, the population within 5 miles should not be expected to more than double during plant life, and no more than one-half of the allowed number of persons within the zone at any distance should be permitted within any single 22-1/2° sector.

The Commission's Advance Notice of Rulemaking: Revision of Reactor Siting Criteria characterizes the numbers in NUREG-0625 as "examples" of specific population density and distribution limits which could be adopted but again does not propose adoption of those or any numbers. The Notice identifies other possible sets (250, 375, and 1,000 persons/mi.²; 30, 50, and 100 persons/mi.²) and, in fact, discusses an alternative "three tier" approach and invites public comment on it as well. (45 Fed. Reg. 50,350 at 50,354 (1980).) Furthermore, the Notice expressly states:

This rulemaking is intended for application to facilities for which an application for a construction permit is filed after October 1, 1979.*

(45 Fed. Reg. at 50,350.)

We therefore submit that the developments in neither emergency planning regulations nor siting criteria can possibly serve as the basis for relitigation of the acceptability of the Bailly site.

In fact, the Commission has determined the method by which questions of siting criteria and emergency planning are to be treated, at least initially, with respect to sites for which construction permits--but not operating licenses--have been issued.

*/ This is consistent with Section 108(b) of the NRC Appropriation Authorization Act of 1980 (Pub. L. No. 96-295, 94 Stat. 783 (1980).)

The Advance Notice concerning siting criteria records that:

The Commission has directed the Staff to re-view existing sites in order to examine whether additional modifications in operating procedures, design, or equipment might be necessary For plants that have construction permits or operating licenses, this review would be in the form of a report submitted to the Commission for its consideration in making case-by-case decisions.

(45 Fed. Reg: at 50,351, emphasis added.) We submit that the Commission's intention and planned approach could scarcely be more clear. The Commission has deliberately specified that at this particular early stage of its reexamination of siting criteria only one mechanism--to the exclusion of all others, including Section 2.206--would be employed for such review, if any, as may be warranted of existing construction permits and operating licenses. That mechanism is the prescribed report by the Staff to the Commission, which would itself determine on a case-by-case basis whether additional consideration is warranted.

Such an approach has obvious merit for at least two substantive reasons. First, it permits the Staff to establish priorities for reviewing existing sites, thereby enhancing protection of the public interest rather than mindlessly succumbing to the persistence of indefatigable litigants who continuously rush in with hearing requests. Second, and perhaps most important, if additional consideration is to be given to existing,

approved, licensed sites, the chosen approach will permit the Commission to identify the factors that would have to be weighed in such review. In the absence of such direction from the Commission, there would be no basis for the review: the site has already been found to satisfy Part 100; since the Advance Notice of Rulemaking has proceeded no further, there would be no differing criteria and compensating factors that could be used in any new review by the Staff.

With respect to emergency planning, the Commission has chosen--deliberately we submit again--to defer until the operating license stage assessment of whether sites for which construction permits have been issued comply with new regulations. There are also good reasons for that Commission determination. First and foremost, it is clear that no deficiency in emergency planning for a plant under construction could pose a threat to public health or safety. Given the finite resources of the agency, one can scarcely fault it for deciding to allocate the manpower available to assess emergency planning capability first to plants already operating or soon to do so--the only plants which could conceivably give rise to a situation requiring activation of an emergency plan.

The Commission therefore required operating licensees to submit within 60 days after the amended regulation is effective emergency plans which meet the new standards and the response plans of state and local governments. All of these plans must be imple-

mented by April 1, 1981. Thereafter, if the NRC finds that the state of emergency preparedness does not provide reasonable assurance that appropriate protective measures can and will be taken, the Commission will determine whether to shut the reactor down or take other appropriate enforcement action. (45 Fed. Reg. 55,402 at 55,410 (1980), to be codified in 10 C.F.R. § 50.54(q).) Thus, even with operating reactors, the pace for achieving compliance with augmented emergency planning requirements is deliberate and considered.

A new operating license will not be issued until the NRC finds that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of an emergency. This is the requirement and schedule which the Commission has chosen to impose now on plants for which construction permits have been issued. Not only is there no reason to deviate from the course chosen by the Commission, but we respectfully suggest that the Director of Nuclear Reactor Regulation has no authority to do so.

The appropriate action for the Director of Nuclear Reactor Regulation is therefore to deny the pending petitions. There is not an adequate basis for suspending or revoking the Bailly construction permit. No risk to public health and safety exists. Furthermore, the Commission has concluded that, for facilities

of the Bailly category, compliance with revised emergency planning requirements need not be demonstrated until the operating license stage. The Commission has also chosen another course (not a Section 2.206 proceeding) by which it will decide whether there should be a review at this time of the suitability of existing licensed sites (including Bailly).

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,)	November 20, 1980
Nuclear-1))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of a letter to Harold Denton, Director, Nuclear Reactor Regulation, NRC from Kathleen H. Shea with attached Comments of the Northern Indiana Public Service Company on Requests for Action under 10 C.F.R. § 2.206 with respect to Bailly Generating Station, Nuclear-1 were served on the following by deposit in the United States mail, postage prepaid, on this 20th day of November, 1980:

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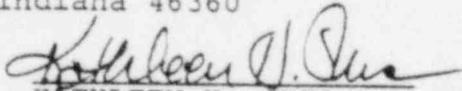
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