



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of |) | Docket No. 50-367 |
| |) | |
| NORTHERN INDIANA PUBLIC SERVICE |) | (Construction Permit |
| COMPANY |) | Extension) |
| |) | |
| (Bailly Generating Station, |) | September 26, 1980 |
| Nuclear-1) |) | |
| |) | |

NIPSCO'S REPLY TO STATE OF
ILLINOIS MEMORANDUM IN SUPPORT OF
THEIR NEWLY-FILED CONTENTIONS AND TO
PORTER COUNTY CHAPTER INTERVENORS'
ARGUMENTS IN SUPPORT OF THE ADMISSIBILITY
OF "NEWLY-FILED CONTENTIONS"

The Licensing Board's August 7, 1980, "Order Following
Special Prehearing Conference" (Order) permits the parties to
submit arguments in support of or opposition to the revised

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contentions of the Porter County Chapter Intervenors and Illinois and to reply to those arguments. (Order, p. 52.) NIPSCO filed its arguments ("Response to Revised Contentions") on August 28, 1980; "Porter County Chapter Intervenors' Arguments in Support of the Admissibility of 'Newly-Filed Contentions'" (PCCI Arguments) was served on the same date. On September 11, 1980, "State of Illinois Memorandum in Support of Their Newly-Filed Contentions" (Illinois Memorandum) was filed. Pursuant to the Board's Order, NIPSCO hereby submits its reply to the PCCI Arguments and to the Illinois Memorandum.

NIPSCO's earlier "Response to Revised Contentions" identifies the reasons for rejection of the newly-filed contentions. Several additional points warrant comment. As before, our comments are limited to the contentions which pertain to health and safety matters.

First, and most importantly, the newly-filed contentions raise issues which have already been considered and rejected by the Licensing Board. Most of them are essentially identical to contentions proposed in the "Petition to Deny Permit" filed by Local 1010 (Dec. 20, 1979). Table No. 1 indicates which of the newly-filed contentions raise issues already held by the Board to be outside of the scope of this proceeding.

TABLE NO. 1

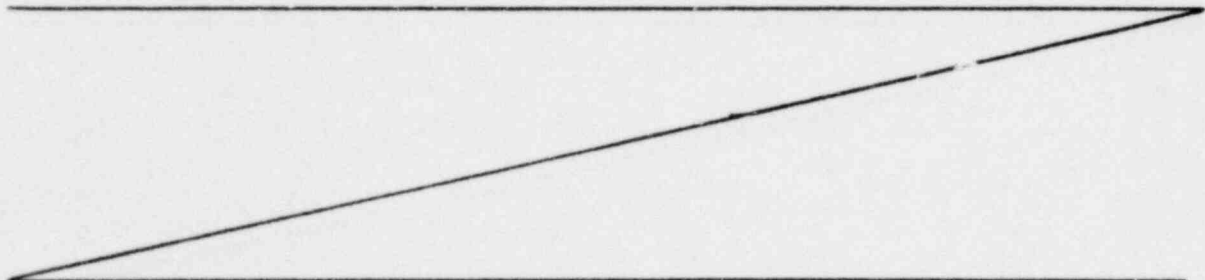
| <u>R-I CONTENTION</u> | <u>LOCAL 1010 CONTENTION</u> | <u>ISSUE HELD OUTSIDE SCOPE</u> |
|---|----------------------------------|-------------------------------------|
| 1 (TMI Accident) | 4 | Order, p. 61 [*] |
| 3 (Mark II) | 1 | Order, pp. 65-66 |
| 4 (Post Accident Moni- tering) | 3 | Supp. Order, ^{**} pp. 5-6 |
| 5 (Unresolved Generic Safety Issues) | 5 | Supp. Order, pp. 5-6 |
| 6 (ATWS) | 6 | Supp. Order, pp. 5-6 |
| 7 (ALARA) | 7 | Supp. Order, pp. 5-6 |
| 8 (Spent Fuel Pool Size) | 8 | Supp. Order, pp. 6-7 |
| 9 (Material Failures) | 9 | Supp. Order, pp. 5-6 |
| 13 (Financial Capability) | None | Order, pp. 59-60 ^{***} |

* The Order also rejected PCCP 4 and Illinois 4, both of which pertained to the TMI accident.

** "Order Supplementing Order Following Special Prehearing Conference" (Aug. 25, 1980).

*** The Order rejected the similar contention PCCP 6, which pertained to the financial capability of NIPSCO.

Second, both Illinois and the Porter County Chapter Intervenors appear to have misinterpreted the Board's Order. As we read the Board's Order, a contention which raises safety issues not related to a reason for the delay in construction might be admissible in an extension proceeding only if a "petitioner has made a convincing prima facie showing that the safety matter alleged will not be satisfactorily resolved by the new completion date of the facility" (Order, pp. 28-29.*) Illinois and the Porter County Chapter Intervenors argue that the contentions are admissible under the test stated in the Board's Order, which they paraphrase, but Illinois neglects to mention the requisite prima facie showing (see Illinois Memorandum, p. 2) and Porter County Chapter Intervenors apparently admit that they cannot meet the standard. (See PCCI Arguments, p. 2.) Without the requisite prima facie showing, issues unrelated to a reason for the



* NIPSCO of course preserves its previously-stated objections to the Board's view of admissibility. See, e.g., "NIPSCO's Brief in Opposition to Appeals" (September 15, 1980).

delay in construction cannot be admitted under the Board's Order.*

Similarly, at several places the Porter County Chapter Intervenors suggest that recent developments have occurred since the issuance of the construction permit which cast doubt upon a finding of "reasonable assurance."** However, the "reasonable assurance" test set forth by the Board is only relevant with respect to issues related to a reason for

* Additionally, both Illinois and the Porter County Chapter Intervenors state that issues "directly related to the prolonged period of construction" are admissible. Illinois Memorandum, p. 2; PCCI Arguments, p. 2. To the extent that the intervenors are arguing that safety or environmental issues (such as the dewatering contention admitted by the Board, Order, pp. 54-55) directly caused by a prolonged period of construction are admissible, we have no objection. However, no safety or environmental issue raised by the intervenors other than dewatering qualified for admission on this basis. To the extent that the intervenors are attempting to expand this "category" to include issues such as the TMI accident (see Illinois Memorandum, p. 3), their arguments lack a basis in the Board's Order and are otherwise without merit. In fact, the TMI accident has been rejected by the Board as an admissible contention. See Order, p. 61.

** PCCI Arguments, pp. 3-4, 4, and 5. See also Illinois Memorandum, p. 2. Porter County Chapter Intervenors also state that they "should be allowed to litigate NIPSCO's technical ability to alleviate these problems prior to the requested latest completion date." PCCI Arguments, p. 4. This contention is raised for the first time in the August 28 pleading and the Porter County Chapter Intervenors have not addressed the five factors of 10 C.F.R. § 2.714(a) for admission of such a late-filed contention. Moreover, the Board has already held that NIPSCO's present technical competence is outside of the scope of this proceeding. Order, p. 60.

for the delay in construction. (See Order, pp. 16-17.) The newly-filed contentions are unrelated to a reason for the delay, and thus are subject to the requirement that the intervenors make a prima facie showing. (See Order, pp. 28-29.) Since the intervenors have not attempted to establish a prima facie showing that any safety issues raised in these contentions will not be resolved by the latest date of completion, the revised contentions are not admissible under the Board's Order.

Third, the Porter County Chapter Intervenors allege that Contentions R-I 1, 2, 4, 7, and 9 relate to a reason for the delay in construction because NIPSCO referred to the TMI accident and Commission regulations and guidelines in its letters of February 7, 1979, and August 31, 1979, to the NRC.* However, it is obvious from review of these letters that the TMI accident and Commission regulations and guidelines, the substance of which intervenors seek to litigate, were referred to only in the context of the requested length of the extension. The substance of the accidents, regulations, etc. is irrelevant in that context and these issues are therefore not entitled to admission as contentions.

Additionally, both Illinois and the Porter County Chapter Intervenors argue that Contention R-I 13 (pertaining to NIPSCO's

* Illinois also argues that "TMI is listed by NIPSCO as a reason for delay." Illinois Memorandum, p. 3.

financial capability) should be admitted as a contention related to a reason for the delay in construction, on the ground the intervenors have alleged that the increased cost of construction of Bailly is a reason for delay. (Illinois Memorandum, p. 4; PCCI Arguments, p. 6.) However, we note that the Board has already held that NIPSCO's financial capability is outside of the scope of this proceeding. (Order, pp. 59-60.) There is no basis in the Board's Order for the argument that this issue should be automatically admitted simply because the intervenors have alleged that it is related to a reason for the delay.

Finally, the Porter County Chapter Intervenors state that they "should be allowed sufficient discovery to enable them to establish a prima facie showing that the safety matters cannot be timely resolved." (PCCI Arguments, p. 2.) However, this request is contrary to the Commission's regulations and precedents, and it should be denied.

Under NRC regulations (10 C.F.R. § 2.740(b)(1) (1980)) discovery is limited "to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference." That is, the regulations restrict discovery to contentions which have been admitted in the proceeding.*

* "Once the key issues in controversy are identified in the special prehearing conference order (§ 2.751a(d)), discovery may proceed and will be limited to those matters." 10 C.F.R. Part 2, Appendix A, § IV(a).

(Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977).)

This principle precludes the Porter County Chapter Intervenors' request for discovery to establish the admissibility of their contentions under the Board's requirement for a prima facie showing. As the Appeal Board has previously held with regard to a similar request, discovery is not to be used to enable a petitioner to set forth with particularity the basis for a contention. (Northern States Power Co. (Prairie Island Nuclear Generating Plant), ALAB-107, 6 AEC 188, 191-92, aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).) There is simply no reason to incur the delay and expense of discovery if the intervenors are unable to fashion an admissible contention from information which is readily available to the public. (See Id., 6 AEC at 192.*)

* In fact, the inability of the Intervenors to make a prima facie showing strongly suggests that immediate consideration of the safety issues raised by the Intervenors is not necessary to protect their interests.

For the foregoing reasons and the reasons stated in "NIPSCO's Response to Revised Contentions," the revised safety contentions should be rejected.

Respectfully submitted,

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