

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE UNITED STATES  
NUCLEAR REGULATORY COMMISSION

-----x  
In the Matter of :  
NORTHERN INDIANA PUBLIC :  
SERVICE COMPANY : (CP Extension)  
(BAILLY) :  
-----x

Docket Number  
50-367  
(CP Extension)

Nuclear Regulatory Commission  
Commission Meeting Room  
Fifth Floor  
4350 East-West Highway  
Bethesda, Maryland

Thursday, October 2, 1980

The above entitled matter came on for oral  
argument, pursuant to notice, at 10:00 a.m.

BEFORE:

ALAN ROSENTHAL, CHAIRMAN  
Atomic Safety and Licensing Appeal Board

DR. JOHN BUCK, MEMBER

MR. THOMAS MOORE, MEMBER

8010150177

1 APPEARANCES:

2 For NRC:

3 STEPHEN GOLDBERG, ESQUIRE  
4 Nuclear Regulatory Commission  
5 Washington, D. C. 20055

6

7 For NIPSCO:

8 WILLIAM EICHHORN, ESQUIRE  
9 5243 Hohman  
10 Hammond, Indiana 46320

11

12 For Porter County Chapter Intervenors:

13 ROBERT J. VOLLEN, ESQUIRE  
14 109 North Dearborn  
15 Chicago, Illinois 60602

16

17 For Gary Petitioners:

18

19 DIANE COHN, ESQUIRE  
20 WILLIAM SCHULZ, ESQUIRE  
21 Suite 700  
22 2000 P Street, N. W.  
23 Washington, D. C. 20036

24

25

C O N T E N T S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORAL ARGUMENT OF:

PAGE

Ms. Cohn,  
on behalf of  
Gary Petitioners

5

Robert J. Vollen,  
on behalf of  
Porter County Chapter Intervenors

26

William Eichhorn,  
on behalf of  
NIPSCO

45

Stephen Goldberg,  
on behalf of  
The Nuclear Regulatory Commission

65

300 7TH STREET, S.W., REPORTERS BUILDING, WASHINGTON, D.C. 20024 (202) 554-2345

## P R O C E E D I N G S

1  
2 CHAIRMAN ROSENTHAL: This Court is hearing oral  
3 argument this morning on the appeals of the City of Gary,  
4 Indiana, et al, George Schultz. So much of the Licensing  
5 Board's August 7, 1980, prehearing conference order has  
6 denied their petitions for leave to intervene in this  
7 construction permit extension proceeding. The argument is  
8 governed by the terms of our September 17 order. As  
9 indicated therein, a total of one hour is allotted to each  
10 side for the presentation of argument. The appellants and  
11 those supporting their position will be heard first, and may  
12 reserve a portion of their time for rebuttal.

13 As counsel may or may not be aware, on September  
14 30, we granted the motion of the Gary appellants to file a  
15 reply brief addressed to the standing question which had  
16 been raised by the applicant. That reply has been -- was  
17 rather attached to the motion.

18 I will now request counsel to identify themselves  
19 formally for the record, and we will start with the  
20 appellant, City of Gary, et al. Ms. Cohn?

21 MS. COHN: Good morning.

22 My name is Diane Cohn. With me is William  
23 Schultz, and we represent the City of Gary, et al.

24 CHAIRMAN ROSENTHAL: Thank you, Ms. Cohn. And the  
25 Porter County Chapter Intervenors. Mr. Vollen?

1 MR. VOLLEN: Thank you, Mr. Chairman. My name is  
2 Robert J. Vollen. I represent the group of organizations  
3 and individuals identified as the Porter County Chapter  
4 Intervenors, who participate here in support of the appeals  
5 of the City of Gary petitioners and Dr. George Schultz.

6 CHAIRMAN ROSENTHAL: I understand, Mr. Vollen,  
7 that you have a brief statement that was prepared by Dr.  
8 Schultz that you intend to present on his behalf in the  
9 course of your argument.

10 MR. VOLLEN: That is correct, Mr. Chairman.

11 CHAIRMAN ROSENTHAL: Thank you.

12 Let me ask you this. Either Ms. Cohn or Mr.  
13 Vollen, have you agreed upon a division of the time allotted  
14 to your side of the case?

15 MS. COHN: Yes, we have agreed that I will spend  
16 40 minutes presenting my argument, Mr. Vollen 20 presenting  
17 his, and the statement of Mr. Schultz.

18 CHAIRMAN ROSENTHAL: Thank you, Ms. Cohn.

19 For the applicant, Mr. Eichhorn?

20 MR. EICHHORN: My name is William Eichhorn,  
21 representing the applicant, Northern Indiana Public Service  
22 Company. With me this morning are Kathleen Shea and Steven  
23 Frantz.

24 CHAIRMAN ROSENTHAL: Thank you, Mr. Eichhorn.

25 For the NRC staff, Mr. Goldberg?

1 MR. GOLDBERG: Good morning, Mr. Chairman.

2 My name is Stephen C. Goldberg, and I represent  
3 the NRC staff in this matter.

4 CHAIRMAN ROSENTHAL: All right. I will ask the  
5 same question that I posed to the other side. Has there  
6 been agreement between applicant and the staff on division  
7 of the one hour allotted to that side?

8 MR. GOLDBERG: We will divide that hour equally.

9 CHAIRMAN ROSENTHAL: Equally? All right.

10 Ms. Cohn, I presume you are proceeding first on  
11 your side of the case.

12 ORAL ARGUMENT

13 ON BEHALF OF GARY PETITIONERS

14 BY MS. COHN

15 MS. COHN: Yes. Thank you. I would like to  
16 reserve ten minutes of my time for rebuttal.

17 The issue in this appeal is whether the Licensing  
18 Board properly denied intervention to the City of Gary,  
19 Indiana, United Steelworkers of America Local 6787, and to  
20 citizen groups representing individuals who live or work or  
21 visit the National Lake Shore located very near the Baily  
22 Nuclear Plant.

23 To answer this question, the Board has to decide  
24 whether the scope of this proceeding encompasses the one  
25 contention that the Gary petitioners have raised, namely,

1 that an extension should not be granted unless NIPSCO  
2 demonstrates that it is building Baily at a site where  
3 surrounding populations can be evacuated in the case of a  
4 nuclear accident.

5           In determining the scope of this proceeding, we  
6 would like to emphasize that this extension proceeding is  
7 unlike any other which has been or is soon likely to be  
8 presented to this Board. This case is essentially one of  
9 first impression, precisely because of the unique  
10 circumstances presented by Baily.

11           CHAIRMAN ROSENTHAL: Are you arguing that the test  
12 that was laid down in the Cook case is inapplicable here?

13           MS. COHN: No, we are arguing that the reasoning  
14 applied in the Cook case is controlling here, and supports  
15 the result which we urge, that is, namely, that we have a  
16 right to intervene in this proceeding. It is simply that  
17 this case is different than Cook, because unlike Cook, we  
18 have not raised an environmental issue that is related to  
19 the reasons for delay.

20           That was the only issue that the Board had to  
21 address in Cook. This is a different case. We are raising  
22 a new question.

23           CHAIRMAN ROSENTHAL: Didn't the Cook case hold  
24 that the issues in the construction permit extension  
25 proceeding must be related to the reasons underlying need

1 for the extension?

2 MS. COHN: I believe that that -- the language in  
3 Cook concerned safety issues related to the reasons for  
4 delay, but that was because that was the only issue  
5 presented there.

6 CHAIRMAN ROSENTHAL: But the Board did, did it  
7 not, lay down the standard that governed the scope of the  
8 construction permit extension proceeding?

9 MS. COHN: That is correct. The standard laid  
10 down was one which directed licensing boards to determine  
11 the scope of the good cause finding in each case based on  
12 the fact of that particular case.

13 CHAIRMAN ROSENTHAL: Do you have a copy of the  
14 Cook opinion at hand?

15 MS. COHN: Yes.

16 CHAIRMAN ROSENTHAL: Would you be so kind as to  
17 turn to Page 420, if you have a copy from the volume of the  
18 AEC reports, and if you would go down to a little more than  
19 halfway through the page, to where there is Number Two,  
20 beginning in the finer analysis? Do you see what I am  
21 referring to?

22 MS. COHN: Yes.

23 CHAIRMAN ROSENTHAL: All right. And follow that,  
24 if you will, with me. "In the final analysis, then, the  
25 question here comes down to whether the reasons assigned for



1 the extension give rise to health and safety or  
2 environmental issues which cannot appropriately abide the  
3 event of the environmental review facility operating license  
4 hearing.

5 "Put another way, we must decide whether the  
6 present consideration of any such issue or issues is  
7 necessary to protect the interest of intervenors of the  
8 public interest."

9 Now, why is that not a determination, right or  
10 wrong, on the part of this Board, that in a construction  
11 permit extension proceeding the issues are confined to those  
12 which are related to the reasons which have been assigned  
13 for the extension?

14 MS. COHN: Well, in reading the language that you  
15 have just quoted, I would emphasize the language which says,  
16 "The question here comes down to." In other words, in Cook,  
17 the question presented related to safety issues, a  
18 consideration of safety issues relating to the reason for  
19 delay, and the whole discussion immediately preceding the  
20 particular language which you have just read indicates quite  
21 clearly that, and I quote:

22 "It seems to us that the factors which the  
23 adjudicator should take into account in making its 'good  
24 cause determination' should be influenced by the totality of  
25 the circumstances which confront it, and as a result of this

1 sort of common sense approach that this Board took in Cook,  
2 it rejected the NRC staff's argument in that case that the  
3 only consideration that would weaken the scope was the  
4 consideration of whether there was good cause for the delay,  
5 whether the excuses for non-completion gave rise to good  
6 cause determination."

7           This Board said no, that where there are health  
8 and safety issues involved which the public interest  
9 requires a determination of at this point -- in other words,  
10 where these health and safety issues cannot abide with you  
11 at the operating license stage -- the scope of the good  
12 cause finding will include those health and safety issues.

13           CHAIRMAN ROSENTHAL: Do you distinguish Cook from  
14 this case, the factual situation, solely on the basis that  
15 in this case the facility is only 1 percent or so completed,  
16 whereas in Cook it was considerably farther down the line  
17 towards completion? That is the basis of the factual  
18 distinction?

19           MS. COHN: That is one factual distinction.

20           CHAIRMAN ROSENTHAL: What is another?

21           MS. COHN: Okay. On that point, I would point out  
22 that Cook clearly indicates itself, though the operating  
23 license hearing had already been noticed, we are certainly  
24 nowhere at the stage, the advanced stage that that plant was  
25 at in Cook.

1           CHAIRMAN ROSENTHAL: Just following that for a  
2 moment, even if we might agree with you that it makes little  
3 sense to defer consideration of -- consideration at the  
4 operating license stage, the staff has pointed to the fact  
5 that there is pending before the Director of Nuclear Reactor  
6 Regulation a petition for a show cause order under 2.206 of  
7 the Commission's regulations.

8           Now, if I recall correctly, your clients have,  
9 shall we say, joined in that petition, even though, as I  
10 recall, it was the State of Illinois, was it not, that was  
11 the initiator. Now, assuming that you are right, that this  
12 should not wait until the operating license hearings some  
13 years off when the plant presumably will be much farther  
14 along the road to completion, and I would say, speaking for  
15 myself, I think on that score you have a very good point,  
16 why isn't the staff right in its suggestion that there is  
17 another forum available for the consideration of this  
18 question?

19           MS. COHN: Well, I think I have two answers to  
20 that question, the first being that if we have a right to  
21 intervene here, which we contend we do, under Section 185 of  
22 the Atomic Energy Act, the mere possibility that there might  
23 be another forum open for raising the issue should not  
24 preclude the Gary petitioners from being permitted to  
25 intervene.

1           CHAIRMAN ROSENTHAL: I would agree with that, but  
2 you are asking us to adopt a common sense approach, you  
3 see. That is what Cook was all about. And you say common  
4 sense dictates that this issue be admitted to this  
5 proceeding, and I am responding that maybe common sense  
6 dictates it be heard at this juncture rather than waiting  
7 until the operating license level, but why isn't the common  
8 sense approach to leave it to the 2.206 remedy rather than  
9 load this proceeding on with an issue which is extraneous to  
10 the reasons why the construction permit extension is being  
11 sought?

12           MS. COHN: Certainly, as we have indicated, we  
13 have tried various routes for having this issue raised, but  
14 the reason why the possibility of a 2.206 proceeding is not  
15 adequate here is mainly the fact we have no assurance that a  
16 2.206 proceeding will be initiated.

17           The only response the State of Illinois has  
18 received thus far was from Mr. Denton, Director of Nuclear  
19 Reactor Regulation, indicating that it would not be sooner  
20 than next spring before basic preliminary analyses would be  
21 prepared to give the staff an initial indication of whether  
22 they would take action on that petition.

23           In addition, we know on the other hand that we  
24 have an ongoing proceeding here. We know there is going to  
25 be a hearing held. We know the hearing is going to entail

1 other environmental and safety issues. Other intervenors  
2 have been admitted whose contentions raise other  
3 environmental and safety issues, and those issues will be  
4 heard. This proceeding is going to determine whether an  
5 extension for construction is going to be granted, and we  
6 think it is not only an appropriate but a necessary forum in  
7 which emergency evacuation should be considered.

8 I would also point out that we do not believe that  
9 a 2.206 proceeding provides the same kinds of procedural  
10 protections to our rights as this proceeding affords us.

11 CHAIRMAN ROSENTHAL: Why is that?

12 MS. COHN: Because of the limited nature of  
13 appeal, limited cross examination opportunities. Here we  
14 have an ongoing proceeding in which we feel that this issue  
15 can appropriately be raised.

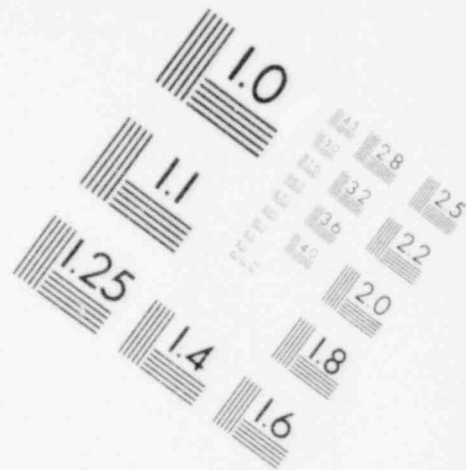
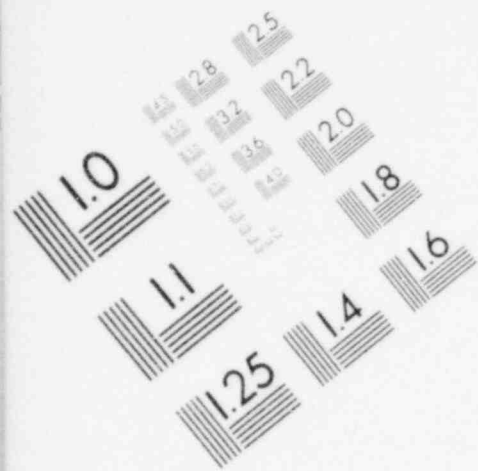
16 CHAIRMAN ROSENTHAL: If the 2.206 petition were  
17 granted, and there was a show cause proceeding instituted,  
18 why wouldn't you have the same adjudicatory rights in that  
19 proceeding as you would have in this one?

20 MS. COHN: Assuming a show cause order is not  
21 issued, that is our primary concern.

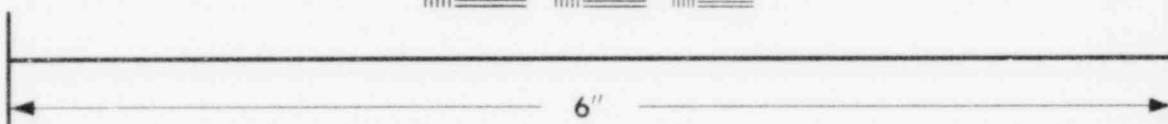
22 CHAIRMAN ROSENTHAL: That has nothing to do with  
23 cross examination.

24 MS. COHN: No, I am sorry.

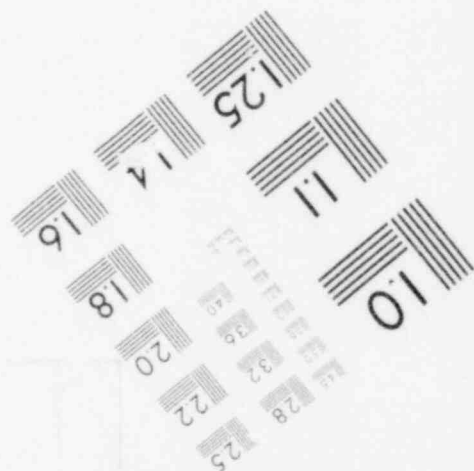
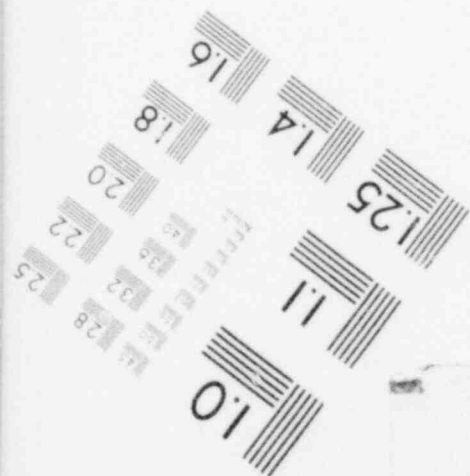
25 CHAIRMAN ROSENTHAL: You are saying, I take it, if

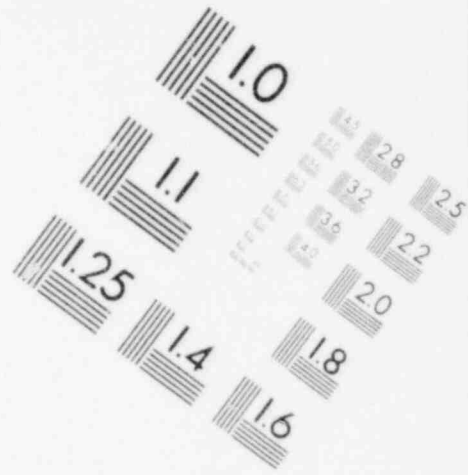
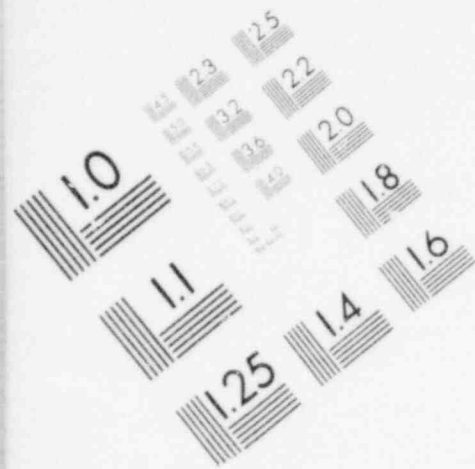


**IMAGE EVALUATION  
TEST TARGET (MT-3)**

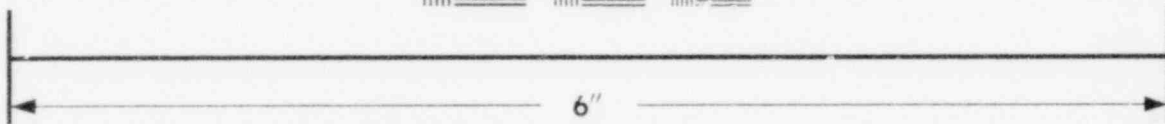


**MICROCOPY RESOLUTION TEST CHART**

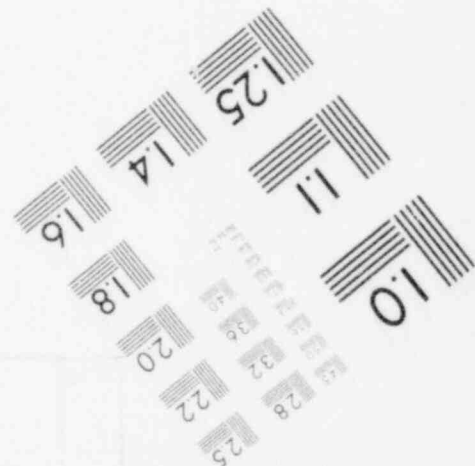
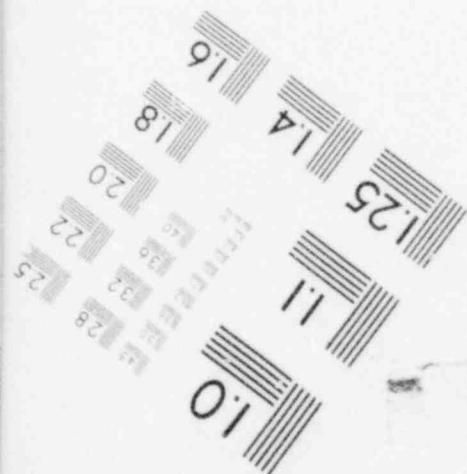




**IMAGE EVALUATION  
TEST TARGET (MT-3)**



**MICROCOPY RESOLUTION TEST CHART**



1 the director were to turn you down, you would not have at  
2 least within the Commission, any appellant rights. You are  
3 dependent upon the Commission on its own initiative  
4 reviewing the Director's determination to reverse it.

5 MS. COHN: That is exactly right.

6 CHAIRMAN ROSENTHAL: Okay.

7 MS. COHN: You had asked just a couple of minutes  
8 ago about what other factual distinctions can be made  
9 between Bailly and Cook. We have already identified the  
10 fact that Bailly is only 1 percent complete.

11 MR. MOORE: You use the figure 1 percent  
12 frequently in your brief. What is the origin of that figure?

13 MS. COHN: To tell you the truth, I know that the  
14 only amount of construction that has been undertaken is  
15 basically the digging of the hole in the ground, and that  
16 since the time construction has been suspended because of  
17 difficulties encountered in driving pilings and the fact  
18 that NIPSCO has had to apply to the NRC staff for a change  
19 in its piling construction, I at this point -- This figure  
20 has been accepted, and without challenge, by NIPSCO  
21 throughout this entire proceeding.

22 It escapes me right now where that figure  
23 originated, but I have not heard anything from NIPSCO to the  
24 contrary.

25 MR. MOORE: It would be suspect. It is a suspect



1 figure, though. It is one that you are not --

2 MS. COHN: Perhaps it would be more accurate to  
3 say that Bailly is simply a hole in the ground than to say  
4 it is 1 percent complete.

5 DR. BUCK: Are you talking about the construction  
6 progress or the amount of money spent?

7 MS. COHN: I am referring solely to the amount of  
8 construction undertaken.

9 DR. BUCK: And you might think there would be  
10 considerably more money spent on this project to this point  
11 percentagewise.

12 MS. COHN: Certainly, but of course there would be  
13 a considerable amount of additional outlay --

14 DR. BUCK: I was trying to find out exactly what  
15 you are talking about.

16 CHAIRMAN ROSENTHAL: I take it you point is  
17 whether it is 1 percent or some other percent, that it is  
18 clear they have a long way to go before they finish.

19 MS. COHN: That is exactly right. That is exactly  
20 right. And our point is here, the issue -- the contention  
21 we raised which related to the question of whether  
22 evacuation of Bailly is feasible is not, as in Cook, the  
23 kind of routine design change that would ordinarily occur  
24 during construction of a plant. In fact, which the Appeal  
25 Board found was inevitable during the construction of a

1 plant which has historically been found to be capable of  
2 resolution at the operating license stage without prejudice  
3 to the intervenors in the public, in contrast to that  
4 situation in Cook, what we raised here is the fundamental  
5 question of whether this plant is being built in the right  
6 place, whether surrounding populations under the  
7 Commission's new emergency evacuation policies within a  
8 ten-mile radius of this plant can be evacuated within a  
9 reasonable period of time.

10 DR. BUCK: Where do you get the idea that the  
11 population has to be evacuated under the new regulations?

12 MS. COHN: The policy underlying the new  
13 regulations is that feasible evacuation plans will be a  
14 condition for operation of a plant.

15 DR. BUCK: But does that say that everybody within  
16 ten miles has to be evacuated? They have to be protected, I  
17 believe, is the way the policy statement reads.

18 Now, how do you connect protected with mandatory  
19 evacuation?

20 MS. COHN: Well, I read the new regulations as  
21 indicating that a class -- in light of the possibility of a  
22 class mine accident, that evacuation has now attained new  
23 importance in terms of protection of the public.

24 DR. BUCK: Can you show me where the policy  
25 statement requires the evacuation out to ten miles?

1 MS. COHN: I do have the regulations here. I do  
2 not believe we have to determine in this proceeding whether  
3 every single person within ten miles of the Baily plant can  
4 be evacuated, and how they will be. That is what we are  
5 trying to raise. The only question here --

6 DR. BUCK: Isn't the policy statement one that  
7 requires a means of protecting people?

8 MS. COHN: I do not disagree with that, if that is  
9 -- the point here really is that --

10 DR. BUCK: Wait a minute. It isn't. You are  
11 addressing in your brief that everybody has to be evacuated,  
12 not protected. You have not used the word "protected" in  
13 your brief at all, as far as I can see. It is always  
14 "evacuated."

15 As I recall, this plant went through a site  
16 evaluation hearing in which the evacuation and the low  
17 population zone and protection of people and so on was  
18 considered. Now, I know of nothing which says that the  
19 Commission now says that the whole ten miles has to be  
20 evacuated, or the people are in any more danger now than  
21 they were when we went through the site hearing before.

22 MS. COHN: There was one fundamental difference  
23 between what we think now and what we thought when Baily  
24 was evaluated at the construction permit hearing, and that  
25 difference is as a result of the accident at TMI. The NRC

1 staff now recognizes that Class 9 accidents are a real  
2 possibility, and should be accounted for in emergency  
3 planning and procedures, and as a result, whereas back in  
4 1974 the only thing considered was an initial analysis for  
5 protection of people within a 1.5 mile low population zone.

6 Now, everybody unanimously agrees that that kind  
7 of analysis is not sufficient in terms of adequate  
8 protection of the public.

9 DR. BUCK: Granted. I can grant that argument,  
10 but where in that policy change does it say that everybody  
11 has to be evacuated? There are other means of protection,  
12 are there not?

13 MS. COHN: If there are other means of protection,  
14 we do not know -- Our contention is that there are not  
15 adequate means of protection for the population surrounding  
16 Bailly.

17 DR. BUCK: What do you base that on?

18 MS. COHN: We base that on the demographics of the  
19 site, the fact that it is located 800 feet from a steel  
20 plant which cannot be totally shut down sooner than six  
21 days. We base it on the fact that it is located 700 feet  
22 from a national lake shore, where we could have up to 40,000  
23 visitors per day, and we base it on the fact that within a  
24 ten-mile radius of this site, there is a population in  
25 excess of 100,000 or so.

1           We base it on the fact that Baily has been  
2 identified by the siting task force as being the only  
3 nuclear power plant in this country to fail every one of its  
4 criteria for siting of nuclear power plants.

5           So, we say there is a siting problem with Baily,  
6 yes.

7           DR. BUCK: Now, when this plant went through its  
8 site review, wasn't the steel plant there?

9           MS. COHN: Yes, sir.

10          DR. BUCK: All right. Wasn't the lake shore there?

11          MS. COHN: Yes, but --

12          DR. BUCK: Now, let me finish my questions,  
13 please. Weren't those things considered in the site review?

14          MS. COHN: What has changed is not the  
15 demographics. What has changed is the way we account for  
16 them or think about them, or our whole emphasis on emergency  
17 planning, what is new, what has arisen really in the last  
18 couple of years and since the accident at Three Mile Island.

19          DR. BUCK: Is the steel plant within the low  
20 population zone?

21          MS. COHN: Yes.

22          DR. BUCK: Was that fully considered as far as  
23 evacuation is concerned?

24          MS. COHN: No. I would say on the basis of  
25 present knowledge, it was not fully considered.

1 DR. BUCK: Then you are challenging what has  
2 already been decided on this plant?

3 MS. COHN: We are saying -- we are not seeking  
4 relitigation of every sit in issue raised in the  
5 construction permit hearing. We are saying that on the  
6 basis of new knowledge of new Commission regulations, new  
7 Commission policy on emergency planning, all -- every study  
8 in the last couple of years which has indicated that you do  
9 not site a nuclear power plant in areas of high population  
10 density, support a new determination now and before Bailly  
11 is built, and not after, as to whether the public will be  
12 adequately protected.

13 CHAIRMAN ROSENTHAL: Isn't that the fifth  
14 candidate for a Section 2.206 proceeding? There is a  
15 construction permit proceeding -- there was a construction  
16 permit proceeding, as Dr. Buck noted. Certain issues were  
17 litigated, including the suitability of the site from the  
18 standpoint of population, distribution, demographics, and  
19 certainly conclusions were reached.

20 Now, you are telling us now that the situation has  
21 changed, not with respect, perhaps, to the site itself, but  
22 with respect to the approach that is taken. Assuming you  
23 are right, isn't that exactly what the rules of practice  
24 contemplate are to be litigated if at all prior to the  
25 operating license level through the vehicle of a 2.206?

1 MS. COHN: A 2.206 proceeding, the initiation of  
2 one, lies in the discretion of the Director of Nuclear  
3 Reactor Regulations.

4 CHAIRMAN ROSENTHAL: It always does. That is the  
5 way the Commission has had it. Maybe the Commission is  
6 wrong about that. Maybe the possibility of new developments  
7 having a crucial impact on whether a plant should be built  
8 is such that the Director's decisions on 2.206 petitions  
9 should be automatically reviewed by the Commission, but the  
10 Commission chose to do it different.

11 Now, why shouldn't we respect both, one, the  
12 Commission's judgment that a show cause proceeding or the  
13 request for an initiation of a show cause proceeding is the  
14 manner in which one brings to the Commission's attention new  
15 developments, and two, that the Director's decision is not  
16 subject to -- is not to be subject to appeal, but rather, it  
17 is up to the Commission on its own initiative to decide  
18 whether to review it.

19 One may agree or disagree with that, but that  
20 seems to me offhand to be the policy that the Commission has  
21 seen fit to adopt.

22 MS. COHN: Well, I guess I go back again to the  
23 fact that we read the Atomic Energy Act as also indicating  
24 that this applicant must show good cause for an extension,  
25 and we feel --

1           CHAIRMAN ROSENTHAL: Whatever that means.

2           MS. COHN: Whatever that means, and we feel -- and  
3 if we have raised an issue that is appropriate to  
4 determining whether good cause for an extension exists, that  
5 we should be able to participate in this proceeding.

6           CHAIRMAN ROSENTHAL: That is the question that is  
7 before us, whether this is an issue which is appropriate to  
8 be considered in an extension proceeding.

9           May I ask you this? Do you regard there as being  
10 any limits on the safety or environmental issues which are  
11 appropriately raised in a construction permit extension  
12 proceeding? Any kind of new development bearing upon some  
13 determination that was made in the construction permit  
14 proceeding is fair game? Or is there some test that you  
15 would have us adopt that would put your evaluation  
16 contention on one side of the line and leave the bulk of the  
17 changed circumstances on the other?

18          MS. COHN: We agree there is a limit, and we think  
19 there should be a threshold requirement made in the nature  
20 of the kind of standard that the licensing board set out in  
21 its order, which is that there be -- that we are required to  
22 make a prima facie showing that there has been a significant  
23 intervening health or safety or environmental issue which  
24 the public health and safety require be determined now.

25          CHAIRMAN ROSENTHAL: Prima facie showing?



1 Evidentiary showing? What kind of showing?

2 MS. COHN: I believe simply that we show as a  
3 matter -- I don't believe an evidentiary showing is  
4 required, but simply that an allegation be made that a  
5 significant health and safety issue has arisen since the  
6 construction permit was granted, and which cannot abide with  
7 you at the operating license stage.

8 CHAIRMAN ROSENTHAL: These are volatile times. I  
9 would suppose an astute lawyer would have not the slightest  
10 difficulty in coming up with an allegation addressed to  
11 virtually every finding that was made in the construction  
12 permit level.

13 MS. COHN: I think again you have to look at the  
14 circumstances of every case. Here we are clearly not  
15 raising a panoply of health and safety issues already  
16 litigated at the construction permit stage. We are raising  
17 an issue which goes to a fundamental question that we submit  
18 cannot be resolved after the plant is built.

19 It is based upon changes in policies and  
20 approaches which have arisen since the construction permit  
21 was granted, and we think that the combination of all the  
22 factors surrounding Bailly, all the factors I have already  
23 indicated, demonstrate that if there is a set of  
24 circumstances in which a health and safety issue of this  
25 kind is within the scope of an extension proceeding, this

1 evacuation contention is that set of circumstances.

2 MR. MOORE: Assume for the moment that the  
3 contention were admitted. By what standard would the  
4 evacuation problem then be judged in an adjudicatory hearing  
5 on that matter?

6 MS. COHN: Well --

7 MR. MOORE: What regulations would be applicable?

8 MS. COHN: Well, again -- Well, first, I would  
9 like to indicate that there is already in progress a number  
10 of different studies concerning evacuation times for Baily,  
11 so we do not have to start from Ground Zero. NIPSCO has  
12 just recently submitted a report to the NRC staff on  
13 evacuation times compiled by its contractor. FEMA has hired  
14 another contractor to prepare a report on evacuation times  
15 at Baily, and I am referring now to evacuation within a  
16 ten-mile radius.

17 So, we do not have to start at Ground Zero. We at  
18 least have some information already being compiled and  
19 already being submitted to the NRC.

20 MR. MOORE: What is the ultimate standard by which  
21 the evacuation would have to be judged?

22 MS. COHN: Well, we think that all presently  
23 operative regulations, including the Commission's new  
24 emergency planning regulations, should serve as a guide, and  
25 a determination should be made on the basis of all of this

1 information whether evacuation is feasible.

2           That is merely a threshold determination about  
3 whether -- we do not have to see the absolute details of an  
4 evacuation plan presented, but the threshold finding should  
5 be made about whether evacuation is feasible.

6           DR. BUCK: In what length of time?

7           MS. COHN: We have not yet determined what length  
8 of time.

9           DR. BUCK: Has anybody?

10          MS. COHN: I am not sure. I don't know. I think  
11 it would again vary within the circumstances of every plant,  
12 but these are standards and tests that we believe we can  
13 work out before the Licensing Board. The only issue, here  
14 again, is whether we have the right to intervene to attempt  
15 to do that.

16          DR. BUCK: Well, barring the fortuitous  
17 circumstances of having a hearing coming along on a  
18 different matter, what would you have done about this?

19          MS. COHN: We will -- What we would have done is  
20 to try what we are doing right now. We are trying every  
21 opportunity which has presented itself to try and have this  
22 issue raised.

23          DR. BUCK: What opportunity do you have? I am  
24 asking you, what would you have done specifically?

25          MS. COHN: Well, we have joined in the State of

1 Illinois' request for a 2.206 proceeding.

2 DR. BUCK: Okay.

3 MS. COHN: But the point is -- the frustrating  
4 fact is not being assured of a forum to raise this issue in.

5 CHAIRMAN ROSENTHAL: We understand the limitations  
6 of a 2.206 insofar as the petitioner is concerned, but I  
7 think what Dr. Buck is getting at is, if the construction  
8 permit deadline -- completion deadline in the Bailly permit,  
9 instead of being, as I think it was, 1979, had been in 1998,  
10 so that this proceeding would not have been necessary, at  
11 least not at this time, I take it you would have had no  
12 alternative but to pursue the 2.206 remedy, as inadequate as  
13 you may feel it is. Isn't that so?

14 MS. COHN: That is not -- that is so.

15 CHAIRMAN ROSENTHAL: So you are really seeking  
16 here to seize on the fact that the completion date specified  
17 was 1979, in order to get your evacuation contention into a  
18 different proceeding?

19 MS. COHN: Yes, that is correct, and I plead the  
20 Atomic Energy Act gives us the right to do that. The Atomic  
21 Energy Act sets out the latest completion dates, and in an  
22 extraordinary case like this, where virtually no  
23 construction has been begun for five or six years, that it  
24 is an appropriate time, the most appropriate time to  
25 determine whether good cause for continuing to build this

1 plant exists, and we believe emergency evacuation is  
2 relative to that.

3 CHAIRMAN ROSENTHAL: The other distinctions you  
4 had between this case and Cook, aside from the plant, this  
5 plant is not very far along the road to completion, what  
6 were the other distinctions?

7 MS. COHN: The other distinction I made was that  
8 as opposed to Cook, where what was being raised was a design  
9 change which the Board found could be accounted for at the  
10 operating license stage, we believe that our contention  
11 raises a health and safety issue that is fundamentally  
12 different.

13 CHAIRMAN ROSENTHAL: If you want to save ten  
14 minutes for rebuttal --

15 MS. COHN: I believe I have already run over.  
16 Thank you.

17 CHAIRMAN ROSENTHAL: Mr. Vollen?

18 It is good to see you again, Mr. Vollen.

19 In this proceeding, which, along with one or two  
20 others, I would suppose, notably Seabrook, never seems to  
21 come to an end. Granting, as I do, that it is up here this  
22 time in a somewhat different posture.

23 ORAL ARGUMENT

24 ON BEHALF OF PORTER COUNTY CHAPTER INTERVENORS

25 BY ROBERT J. VOLLEN

1 MR. VOLLEN: Thank you, Mr. Chairman. It is good  
2 to see you again in this proceeding. I hope some day this  
3 proceeding, the Bailly proceeding, will come to an end.

4 As the Chairman indicated, I have been asked by  
5 Dr. George Schultz, one of the appellants, to read a  
6 statement to the Appeal Board. With the Board's indulgence,  
7 I will do that at this time.

8 "To the Atomic Licensing Appeal Board from George  
9 E. Schultz. I regret being unable to attend this hearing  
10 since I believe I have information concerning the  
11 evacuability of the Indiana State Prison, Michigan City,  
12 Indiana, which the Appeals Board should be aware of when  
13 considering the legitimacy of my opposition to the Bailly  
14 site.

15 "I have many serious concerns about the  
16 suitability of the Bailly site, but in the interest of  
17 brevity, I will list only some of the concerns I have  
18 regarding the men in the Indiana State Prison.

19 "The prison houses over 1,700 men currently. It  
20 is a maximum security facility where the most serious  
21 offenders in the state are sent for mostly long-term  
22 incarceration."Over one-third of the men are 'lifers,' one  
23 of the very highest percentages of any prison in the world.

24 The prison is over 110 years old, and in my  
25 opinion, overcrowded and understaffed. Along with some nice

1 guys, the prison houses some of the most vicious, deceitful,  
2 and dangerous men imaginable. The security provisions there  
3 are necessarily rigid and extreme. The thought of  
4 evacuating this population in a safe fashion is staggering,  
5 even under the most ideal conditions. The thought of  
6 evacuating these men under conditions when the rest of the  
7 area's population is also being evacuated seems like a  
8 criminal joke.

9            "As a psychologist, I am trained to observe how  
10 people do behave rather than how they should behave. It  
11 seems clear to me that under the conditions of an  
12 evacuation, it is very likely that the following is how  
13 people will behave, no matter what the established policy or  
14 'official plan.'

15            "One, there will undoubtedly be a goodly number of  
16 inmates who will view the evacuation as a possible chance to  
17 escape the almost intolerable conditions of incarceration.  
18 It is not inconceivable that cohorts of inmates may attempt  
19 to precipitate a nuclear crisis in order to provide an  
20 opportunity for escape during evacuation. The 200 or so men  
21 on 'lockup' in the prison will be especially difficult to  
22 deal with safely.

23            "Two, the area's communities will be concerned and  
24 preoccupied with the evacuation of its citizens in schools,  
25 hospitals, nursing homes, et cetera. The priorities of the

1 community will pre-empt the personnel needed to do any  
2 reasonable evacuation of the prison. City and state police  
3 will be busy, as will National Guard, et cetera.

4 "Three, the prison is usually undermanned, with  
5 relatively poorly paid staff members. It is inconceivable  
6 that they by themselves could effect an evacuation,  
7 especially under conditions when their own families and they  
8 themselves should be escaping to safer environments.

9 "Four, safety may demand that evacuation be  
10 completed within hours, whether human factors may cause the  
11 evacuation to take days. Can anyone show me an evacuation  
12 plan at all for these men? Has an evacuation of this size  
13 prison population ever been tried under nuclear emergency  
14 conditions anywhere? To me, it is inconceivable to wait  
15 until after the plant is built to broach this most serious  
16 issue of evacuation of the area's people and the prison  
17 population.

18 "The public has a right to thoroughly examine any  
19 evacuation plan which affects their life and safety before  
20 the need arises and before \$1 billion of their utilities  
21 moneys are spent.

22 "Please require public hearings on evacuation and  
23 other serious issues before the plant is built.

24 "Thank you for seriously considering these  
25 matters. Dr. George Schultz, 807 East Cool Spring, Michigan



1 City, Indiana, 46360."

2 CHAIRMAN ROSENTHAL: Thank you, Mr. Vollen, for  
3 having brought Dr. Schultz's statement to us.

4 MR. VOLLEN: You are welcome, Mr. Chairman.

5 The organizations and individuals which I  
6 represent, which have been referred to in the pleadings as  
7 the Porter County Chapter Intervenors, support the appeals  
8 of the Gary petitioners and of Dr. Schultz. We think that  
9 this Board ought to reverse the determination of the  
10 licensing board and admit them and direct they be admitted  
11 as parties, and their contentions concerning the feasibility  
12 of an evacuation plan be considered in this hearing.

13 It seems to me it ought to be emphasized that such  
14 a determination by this Board to reverse the Licensing Board  
15 does not mean that an emergency plan must be developed now.  
16 It does not mean that an emergency plan cannot be developed  
17 or can be developed. All it means -- I think it needs to be  
18 emphasized -- is that the question of developing an  
19 evacuation plan, whether such a plan can be developed some  
20 time prior to operation of the plant, gets addressed now  
21 rather than after the plant is built.

22 We are only talking about what can be heard, not  
23 any determination on the merits.

24 CHAIRMAN ROSENTHAL: What is your view as to this  
25 proceeding vis-a-vis the 2.206 route?

1           MR. VOLLEN: I think that 2.206 petition is a way  
2 to raise the question. It is not, however, it seems to me,  
3 a fortuitous circumstance that this proceeding is here. It  
4 is a circumstance that arises in the language of the Cook  
5 case out of the totality of the circumstances. The fact is,  
6 in the over 60 months that NIPSCO had a construction permit  
7 for Bailly, it did not get it built. That is not  
8 fortuitous. That is a result of all the circumstances, not  
9 the least of which, if you read the application, is the fact  
10 of the TMI accident.

11           So, it all does fit together, and the point is  
12 that to say that there is a 2.206 proceeding is to beg the  
13 question of whether or not a good cause for extension  
14 proceeding needs to consider this kind of issue, or indeed  
15 this particular issue.

16           CHAIRMAN ROSENTHAL: As I suggested to Ms. Cohn,  
17 it seems to me that what the appellants have to rely on is  
18 the proposition that it makes good sense to consider the  
19 site suitability issue now as opposed to later, and  
20 therefore it should be brought into this proceeding even  
21 though site suitability is really extraneous to the reasons  
22 why the utility needs this extension, and if that is really  
23 what it does come down to, it seems to me that in order to  
24 establish the good sense it requires the inclusion of the  
25 issue in this proceeding, and you have to establish that

1 there is not another vehicle available for pressing the  
2 issue at this point.

3 MR. VOLLEN: I think, Mr. Chairman, that to  
4 characterize the appellants as having to rely on good sense  
5 is really to understate vastly the support for their  
6 position. What the appellants rely on chiefly, I think, is  
7 the language of the Atomic Energy Act, which says that  
8 NIPSCO has to show good cause for the extension. We know  
9 that there is precious little data available as to what good  
10 cause means, and I think we all know -- all the parties seem  
11 to have agreed in their briefs -- that the most learning on  
12 the subject is this Board's decision in the Cook case.

13 CHAIRMAN ROSENTHAL: In the Cook case, if I can  
14 quote one sentence, "Section 185 does not purport to define  
15 'good cause,' and moreover, there is nothing in its terms  
16 which permits the drawing of any particular inference as to  
17 what Congress may have thought should be the bounds of the  
18 Commission's good cause inquiry."

19 Now, we thought in Cook that one got no assistance  
20 at all from the Act or its legislative history, and now you  
21 are telling us that the Act is the fount of the appellant's  
22 claim of entitlement to have this issue included in the  
23 proceeding.

24 MR. VOLLEN: If I may read two additional  
25 sentences from this Board's decision in Cook, talking about

1 the phrase "good cause" which appears in the statute, I  
2 quote:

3           "Whether good causes exists in a particular case  
4 obviously is dependent upon the facts of that case. A  
5 corollary to that axiomatic proposition, it seems to us, is  
6 that the factors which the adjudicator should take into  
7 account in making its good cause determination should also  
8 be influenced by the totality of the circumstances which  
9 confront it."

10           And later on in that same paragraph -- on that  
11 same page, the Board referred to the propriety of using a  
12 common sense approach.

13           So, what we are saying is, it is not simply good  
14 sense, it is common sense based on the specific facts of the  
15 Bailly situation and the particular circumstances here, and  
16 all of those together.

17           CHAIRMAN ROSENTHAL: One of those circumstances is  
18 that there is a 2.206 remedy available which has been  
19 invoked by the State of Illinois and now by the appellants.

20           MR. VOLLEN: It has been invoked. I suspect -- I  
21 suspect that if that petition were granted, and if a show  
22 cause proceeding were initiated there, it might be a far  
23 different case than this, although I think it is true that  
24 the standard is different in a show -- the substantive  
25 standard is different in a show cause case than it is in a

1 good cause case, but without reaching that question, we do  
2 not have the situation where you have two different hearings  
3 considering the same issue.

4 In an exercise of administrative discretion and  
5 sound policy, this Board or the Commission or even the  
6 Licensing Board might say, well, wait a second. We ought  
7 not to be considering the same issue at the same -- in two  
8 different proceedings at the same time. But in point of  
9 fact, where we are now is that the issue is not being  
10 considered in either hearing. We cannot be put in the Catch  
11 22 situation where you say there is another one possible,  
12 and you cannot litigate it here.

13 CHAIRMAN ROSENTHAL: Do you think that a  
14 construction permit extension proceeding is open to the  
15 litigation of any issue previously litigated so long as  
16 there is an allegation of changed circumstances?

17 MR. VOLLEN: No, and I do not believe, Mr.  
18 Chairman, that anyone in this Bailly good cause for  
19 extension proceeding is seeking to relitigate issues that  
20 have been litigated before.

21 CHAIRMAN ROSENTHAL: You are seeking to relitigate  
22 site suitability. If I recall correctly, this Board gave  
23 its blessing to the Bailly site in terms of Part 100. As I  
24 understand it, it was in the Seventh Circuit. It was in the  
25 Supreme Court. It was back in the Seventh Circuit.

1 MR. VOLLEN: And then back in the Supreme Court  
2 again.

3 CHAIRMAN ROSENTHAL: Back in the Supreme Court  
4 again. Why isn't this perhaps perfectly justifiably an  
5 endeavor to relitigate site suitability based upon  
6 developments which occurred after the construction permit  
7 proceeding came to an end?

8 MR. VOLLEN: Because none of those proceedings or  
9 decisions by Boards or the Commission or the Courts dealt  
10 with the issue of whether a feasible evacuation plan in  
11 light of 1980 events and in light of the Commission's  
12 regulations which become effective in 1980, whether such a  
13 plan can feasibly be developed for the Bailly site.

14 CHAIRMAN ROSENTHAL: You say there have been  
15 changed circumstances which require a reconsideration of the  
16 suitability of this site from an evacuation standpoint.  
17 Isn't that it? The changed circumstances being the ones  
18 that you just enumerated.

19 MR. VOLLEN: When you say reconsideration, it  
20 implies, I think, that there has been --

21 CHAIRMAN ROSENTHAL: Reconsideration of the  
22 conclusions reached. There was a conclusion reached in the  
23 Bailly construction permit proceeding that this site was  
24 suitable. Now, what is being sought is a reconsideration of  
25 that ultimate conclusion based upon alleged changed

1 circumstances. Isn't that right?

2 MR. VOLLEN: In that broad sense of  
3 reconsideration, yes. I must agree with you. In the same  
4 sense, of course, this proceeding seeks a reconsideration of  
5 the determination as to whether or not the Bailly plant  
6 should be built, because if the construction permit  
7 extension is not granted, then the Bailly plant cannot be  
8 built.

9 Now, it is true, it was determined in 1974, when  
10 the construction permit was issued, that the plant can be  
11 built, so in that broad sense, yes, we are seeking -- the  
12 proceeding seeks a reconsideration of that.

13 CHAIRMAN ROSENTHAL: And that is what 2.206 was  
14 put in the regulations to accommodate, wasn't it?

15 MR. VOLLEN: I do not think so. I do not think  
16 2.206 was designed to accommodate an alternative to vitiate  
17 the statutory purpose of having a good cause for extension  
18 proceeding when a latest completion date has expired.

19 It seems to me, Mr. Chairman, that the premise of  
20 your question is that the real scope of a good cause  
21 proceeding is the reasons why construction was not  
22 completed, and as Ms. Cohn said, there isn't any law or  
23 theory, I suggest, to support that reading.

24 Cook did not say that, and indeed, if Cook had said  
25 that because of the clear statement in the opinion that the

7  
1 intervenors did not raise any issues other than those  
2 related to the delay, if Cook had said that, it would have  
3 been dictum, because the issue was not presented in Cook.  
4 What we have from Cook is the fact that in the absence of  
5 any clear indication from Congress or the Commission as to  
6 what good cause means, this Board has said, you need to use  
7 a common sense approach and look at the totality of the  
8 circumstances.

9           One of the totality of the circumstances, it seems  
10 to me, ought to be emphasized, and that is the incremental  
11 effect on the parties and the Board -- and the Board, this  
12 Board reversing and saying that emergency planning or the  
13 feasibility of emergency planning ought to be considered.  
14 That is not, I suggest, very likely to have a significant  
15 impact.

16           As Ms. Cohn said, there is going to be a hearing.  
17 There are numerous parties that have been admitted. There  
18 are going to be issues that are going to be addressed.  
19 Discovery is under way already. The subject matter which  
20 the Gary petitioners and Dr. Schultz seek to have litigated  
21 in that proceeding that is going on is a subject matter that  
22 is not new to NIPSCO or to the staff. It is a subject  
23 matter that is being addressed now in terms of studies of  
24 evacuation time, and I suggest the real difference of  
25 permitting that subject to be addressed in the licensing



1 Board hearing is really that instead of just NIPSCO and the  
2 staff addressing the questions from the public, from  
3 intervenors will be permitted on the subject as well. It  
4 will be done out in the open at this stage, rather than  
5 later on, after the plant is built.

6 Mr. Moore, I think the answer to your question as  
7 to the source of the 1 percent status of completion of  
8 construction is a Commission report on the status of  
9 completion of construction, dated 1978. I do not have the  
10 precise citation to it now. It can be furnished.

11 CHAIRMAN ROSENTHAL: You would agree, I take it,  
12 that does not reflect actually the percentage of the overall  
13 investment that has been made?

14 MR. VOLLEN: In point of fact, we don't know the  
15 percentage of the overall cost. The latest estimate as to  
16 the cost of Bailly is over a year old, and that was \$1.1  
17 billion. That is the latest cost the company predicts.

18 The company has acknowledged recently, as a matter  
19 of record in this proceeding, that that figure is out of  
20 date, that the figure now is higher. We also know that they  
21 have spent approximately \$124 to \$130 million. We don't  
22 know what percentage of the total estimated costs the actual  
23 expenditures are at this point. It seems to me that not the  
24 good sense but the common sense approach and the totality of  
25 the circumstances concerning Bailly make such a compelling

1 case for the consideration of this issue in this proceeding  
2 that you really need to ask the opposite side of the  
3 question: What good reasons are there for not directing the  
4 Licensing Board to permit this issue to be addressed at this  
5 time?

6 I suggest that the only reason that has been  
7 offered by NIPSCO or by the staff is a mechanistic, unseeing  
8 theory that to do so would be to violate, to interfere with  
9 the two-stage licensing process contemplated by the Atomic  
10 Energy Act. I suggest to you that that issue is a red  
11 herring.

12 To be sure, there is a two-stage licensing  
13 process. There is a construction permit, and there is an  
14 operating license, but there is also another hearing stage.  
15 That is what Congress said. When an applicant, when a  
16 holder of a permit seeks an amendment to that permit, and  
17 that is what NIPSCO is doing by this construction permit  
18 extension, seeking an amendment, there is a hearing as of  
19 right at the request of any interested persons.

20 So, the question now is not whether there should  
21 be a third stage, this specter that NIPSCO and the staff are  
22 raising that we are going to ruin the whole licensing  
23 process. There is a third stage that is built into the  
24 statute. The question is, what should be considered at that  
25 stage?

1           There is going to be a hearing that will consider  
2 a number of issues. It seems to me that common sense under  
3 the totality of these circumstances dictates that that  
4 hearing consider whether in light of everything that has  
5 happened since 1974, a feasible evacuation plan can be  
6 developed for Bailly.

7           DR. BUCK: May I ask one more question? You made  
8 the statement, there is discovery going on now, and plans  
9 made to look at the feasibility of the evacuation plans and  
10 so on. Why does putting the situation into this hearing  
11 advance that cause at all? Do you still not have to wait  
12 until the discovery is done, until the criteria that are to  
13 be set up for emergency plans are finalized, and all of the  
14 study done on the Bailly plant before this can be answered?

15           So, why delay this hearing when there is another  
16 -- when it is already under way under 2.206 with all  
17 discovery, with all the plans being made? You still have to  
18 have those, even to do it under this hearing.

19           MR. VOLLEN: I think, Dr. Buck, that there may be  
20 some confusion about the facts. There is not, to my  
21 knowledge, any 2.206 proceeding concerning Bailly --

22           DR. BUCK: What was your discovery statement?

23           MR. VOLLEN: There is the Licensing Board in the  
24 August 7 order, part of which is before this Appeal Board.  
25 They ordered that my clients and others be admitted as

1 parties, so that there is going to be a hearing on the  
2 construction permit extension proceeding. It is in that  
3 proceeding now addressing other issues in evacuation or  
4 emergency planning in connection with which discovery is  
5 going on. That hearing is going to address the question of  
6 why NIPSCO did not get the plant completed.

7           It is in that hearing, sir, that the discovery is  
8 going on on those already admitted contentions.

9           DR. BUCK: What does that have to do with the  
10 study and the discovery and that sort of thing that has to  
11 go on on evacuation?

12           MR. VOLLEN: As of right now, that does not deal  
13 with evacuation planning.

14           DR. BUCK: Have the criteria for emergency plans  
15 been set up by the Commission? Is that one of the reasons  
16 why you cannot go ahead with a hearing on emergency plans at  
17 the present moment?

18           MR. VOLLEN: The reason, as I understand it, why a  
19 hearing on emergency planning or the feasibility of  
20 emergency planning for Bally cannot go ahead is because the  
21 Licensing Board said it was outside the scope of the  
22 hearing that is going on which this Board is being asked to  
23 reverse, and because also the Director of Nuclear Reactor  
24 Regulations has not seen fit to act upon -- to grant the  
25 2.206 petition?

1 DR. BUCK: Has he given you any statement why he  
2 has not acted upon that?

3 MR. VOLLEN: To my knowledge, no. Ms. Cohn can  
4 answer that more directly than I can. But I think he has  
5 said, it is not time yet.

6 DR. BUCK: That is my point. They won't know  
7 until next spring what the criteria are going to be and what  
8 the requirements are necessary for an emergency plan. Then  
9 how can you hold a hearing? You can hold a hearing, but how  
10 do you make a decision?

11 MR. VOLLEN: I think, Dr. Buck, that as of  
12 November 3, when Commission regulations as to emergency  
13 planning go into effect, everyone, the Boards and the  
14 parties, will know that much. The question of whether or  
15 not, as of now, when a hearing should be held in our view,  
16 not that NIPSCO satisfies those criteria, but whether it now  
17 appears that they will be able to satisfy them some seven or  
18 eight years from now, when, as, and if it ever builds the  
19 plant and seeks an operating license, that can be  
20 addressed. Those regulations are there. The parties can do  
21 discovery about what the demographics are, what the physical  
22 features are, where people are located, how long it  
23 takes to --

24 DR. BUCK: That is exactly what 2.206 is designed  
25 to do, is it not?

1 MR. VOLLEN: In the discretion of the Director of  
2 Nuclear Reactor Regulation, a show cause hearing could be  
3 held. In our view, that kind of issue where a plant after  
4 more than five years has not gotten built, and where you  
5 have had the enormous number of significant events since it  
6 received a construction permit, it is exactly what ought to  
7 be considered.

8 DR. BUCK: What you are saying is, you don't  
9 believe that a matter such as this should be left to the  
10 discretion of the Director of Regulation.

11 MR. VOLLEN: I am not really saying anything  
12 negative with respect to the Director. I am saying  
13 positively with respect to what ought to be considered in a  
14 good cause proceeding, that is a parallel line. It seems to  
15 me that this Board really need not reach the question of  
16 whether the Director will or will not, should or should not  
17 grant the 2.206 petition.

18 DR. BUCK: If there was no good cause proceeding  
19 going on, you would have to go to 2.206. Isn't that correct?

20 MR. VOLLEN: I think that is correct.

21 CHAIRMAN ROSENTHAL: Thank you, Mr. Vollen.

22 MR. MOORE: One final question. Assuming that the  
23 contention is not admitted in the construction permit  
24 extension proceeding, and assuming further that the 2.206  
25 petition that has been filed by the State of Illinois is

1 denied, are there any other remedies available to bring this  
2 -- to litigate this matter or to have it looked at?

3 MR. VOLLEN: I am not aware of any available to  
4 petitioners, that is to say, intervenors, City of Gary, or  
5 Dr. Schultz, available within the Commission. I think the  
6 Director of Nuclear Reactor Regulation could always on his  
7 own institute a proceeding, but I think other than  
8 petitioning under 2.206 or this existing good cause  
9 proceeding, I am not aware of any.

10 CHAIRMAN ROSENTHAL: Thank you, Mr. Vollen.

11 We will take a ten-minute recess, and then we will  
12 hear, I assume, first from Mr. Eichhorn. Is that correct?

13 MR. EICHHORN: Correct.

14 CHAIRMAN ROSENTHAL: Thank you.

15 (Whereupon, a brief recess was taken.)

16 CHAIRMAN ROSENTHAL: Mr. Eichhorn, before you  
17 commence your argument, I would ask your indulgence. We  
18 would request Mr. Goldberg, to provide a brief statement as  
19 to why the present status of the Director's consideration of  
20 the 2.206 petition and to, assuming that that petition has  
21 not as yet been acted upon by the Director, what is the  
22 staff's present best estimate as to how it will progress?

23 Mr. Goldberg, if you would come up, and all we  
24 want is the statement at this point, and if there is any  
25 discussion about it, we will wait until your turn for

1 argument comes up.

2 MR. GOLDBERG: Yes, Mr. Chairman.

3 I am authorized to represent on behalf of the  
4 Office of Nuclear Reactor Regulation that a Director's  
5 decision on the pending 2.206 petition will be issued by the  
6 end of this calendar year.

7 CHAIRMAN ROSENTHAL: End of this calendar year.

8 All right. Thank you.

9 All right, Mr. Eichhorn. You may now proceed.

10 I might say at the outset that it is also a  
11 pleasure to have you once again before us.

12 ORAL ARGUMENT

13 ON BEHALF OF NIPSCO

14 BY WILLIAM EICHHORN

15 MR. EICHHORN: Thank you, Mr. Chairman. It is a  
16 pleasure to see you. I certainly wish it were under  
17 different circumstances.

18 I want to point out that certainly NIPSCO agrees  
19 with the ultimate conclusion of the Licensing Board in this  
20 proceeding with respect to intervention petition filed by  
21 the group known as the Gary Petitioners and Dr. Schultz.

22 We indicated in our briefs that it is our position  
23 that while we agree with that position of the Board, we do  
24 have slightly different reasons for reaching that same  
25 conclusion. While the Licensing Board did develop a



1 discussion of scope of such a proceeding, and found that the  
2 question of emergency planning and evacuation did not fall  
3 within that scope, we think the scope of such a proceeding  
4 is more appropriately determined first, of course, from the  
5 notice issued by the Commission for the opportunity of  
6 hearing and for discussion of the question of scope and the  
7 findings set forth in the Cook decision.

8 I need not repeat the language that I believe to  
9 be the definition of scope of such a proceeding as the Board  
10 has previously done so in earlier -- during earlier  
11 arguments.

12 CHAIRMAN ROSENTHAL: Do you, Mr. Eichhorn, dispute  
13 the suggestion of your adversaries that it makes precious  
14 little sense for this evacuation issue to abide the event of  
15 the operating license proceeding by which time the plant  
16 presumably would be much farther along the road to  
17 completion with considerably greater amounts of money  
18 invested in it.

19 MR. EICHHORN: I do indeed.

20 CHAIRMAN ROSENTHAL: I would be interested in  
21 hearing you on that, because frankly, and I speak only for  
22 my self, that to me is a very strong point in favor of your  
23 adversaries. Whether it leads to the conclusion that this  
24 is the appropriate forum to consider the issue is another  
25 matter, but I found it very difficult to understand the

1 argument of yourself and I think it was also the staff's  
2 argument that this should abide the event of the operating  
3 license proceeding. This is a site suitability question.

4           It seems to me if in fact -- I don't know whether  
5 this is true or not, but this is what your adversaries wish  
6 to litigate -- in fact, there is reason to believe that this  
7 site is not suitable for the location of a nuclear power  
8 plant that should be determined now and not the fact of a 70  
9 or 80 or 80 or 100 percent completed plant.

10           So, I would be very interested in knowing right  
11 now why you think otherwise.

12           MR. EICHHORN: I concur in what you are saying,  
13 but let me say that I think the Commission has established a  
14 method of regulation, hearing, and review that adequately  
15 protects the public health and safety in all instances.

16           Now, the question is whether or not we want to do  
17 an injustice to the question of scope in this particular  
18 hearing in order to get to a matter that, if you will, for  
19 common sense reasons we think we should get to, we then have  
20 to assume, Number One, that the staff will not do its job of  
21 continually reviewing --

22           CHAIRMAN ROSENTHAL: Why do we have to assume  
23 that? We can assume that the staff will continue to do its  
24 job properly, but under your thesis, the fruits of the staff  
25 inquiry will not come to light until the operating license.

1 MR. EICHHORN: Not necessarily. If there is a  
2 matter of substantial safety involved, certainly the  
3 Commission through its staff under 2.202 or 2.206 request  
4 have the opportunity to look into that, make their  
5 investigation, and if necessary conduct a hearing.

6 CHAIRMAN ROSENTHAL: You would leave it entirely  
7 then to the staff?

8 MR. EICHHORN: No. There is another point, if I  
9 may, on these particular questions of site suitability, and  
10 granted there are changed circumstances -- no one is arguing  
11 about that -- I am just saying that changed circumstances  
12 don't necessarily change the principles of scope in a  
13 particular proceeding, the Commission has looked into the  
14 questions of siting, the question of emergency planning, and  
15 has taken certain action with respect to those matters, and  
16 has given direction to the staff to make certain studies,  
17 and to prepare certain reports, and to report back to the  
18 Commission, and so the Commission has spoken on this.

19 It is not a matter that is being neglected. It is  
20 not something that is necessarily going to be left for seven  
21 or eight years down the road for hearing in this particular  
22 case. There are many ongoing studies. There are criteria  
23 being developed for signing, and -- but the Commission has  
24 established the method of communication and decision-making  
25 in those instances. That is, the Commission has directed

1 the staff to make studies, to review plans, if you will, and  
2 to report back to the Commission.

3 They have not directed that they -- such issues  
4 are necessarily right for every ongoing hearing. So, I think  
5 we do have a scope question, and if we are going to do an  
6 injustice to it --

7 CHAIRMAN ROSENTHAL: A scope question. We, as I  
8 noted earlier this morning, had concluded in Cook that the  
9 statute provided precious little guidance as to what the  
10 scope of a construction permit extension proceeding was, and  
11 this was essentially left by the statute to be determined on  
12 a case by case basis, taking into account the totality of  
13 circumstances.

14 Now, where do you find any rigid standard laid  
15 down by the Congress or the Commission or anyone else with  
16 regard to the scope of one of these proceedings?

17 MR. EICHHORN: Well, we do not find that rigid  
18 standard laid down, and obviously and clearly such a search  
19 was made in the Cook case, and I think a well-reasoned  
20 decision was arrived at, and a definition of scope was  
21 provided in that decision.

22 I would like to call your attention to a specific  
23 statement in that case which I think holds true in this  
24 case, that the fundamental purpose of that hearing,  
25 referring, of course, to a CP extension hearing, is, after

1 all, not to determine the safety or environmental aspects of  
2 the reactor in question.

3 Now, if we say, well, common sense says that we  
4 ought to look at emergency plans and site suitability in  
5 determining good cause, then why not look at every other  
6 issue that is safety related? I think it broadens the scope  
7 of such a hearing beyond that which would -- this Board  
8 specifically found not to be the scope of such a hearing in  
9 the Cook case, and it does an injustice to any precedent  
10 that is established as far as scope is concerned in these  
11 proceedings.

12 CHAIRMAN ROSENTHAL: Your opponents argue that  
13 Cook presented quite a different situation, in that in Cook,  
14 unlike here, the plant was much farther along the way to  
15 completion, and here, you are dealing with a plant -- I  
16 realize the 1 percent figure has been bandied about -- but  
17 let's agree, a plant in the early stages of construction,  
18 and where the issue that is sought to be litigated is one  
19 that goes to site suitability, now, why aren't your  
20 adversaries correct when they say that that is quite a  
21 different situation than the one that is present here, and  
22 given the observations in the Cook opinion about taking into  
23 account the totality of circumstances, et cetera, a  
24 different result should obtain?

25 MR. EICHHORN: All right. Well, my adversaries

1 are saying, Number One, that there is a small amount of  
2 construction done, and Number Two, there have been changed  
3 circumstances, and therefore the scope should be broader in  
4 this case than in Cook, but if you will look -- well, let me  
5 start that over again.

6           If you are looking for changed circumstances,  
7 there are going to be more changed circumstances as the  
8 completion of the plant nears its end. That is, a plant  
9 that is almost complete in construction is going to have  
10 several design changes that the Bailly plant does not have,  
11 and so you are going to have an opportunity for more changed  
12 circumstances closer to the time of completion of a plant,  
13 and certainly that argues toward a broader scope of hearing  
14 the nearer the plant is to completion than it does in this  
15 instance.

16           Secondly, I think that if you are going to look  
17 toward the amount of construction to determine the scope of  
18 such a hearing, you are in effect saying, why should we not  
19 relitigate all matters that were considered during the  
20 construction permit hearing, because in effect there has not  
21 been a lot of construction going on, and we ought to start  
22 all over again?

23           CHAIRMAN ROSENTHAL: Maybe it could be narrowed  
24 down to say that you open it up to further consideration of  
25 issues going to site suitability in circumstances where

1 there are alleged and I take it from what you say conceded  
2 changed circumstances. Couldn't it be narrowed at least to  
3 that extent?

4 MR. EICHHORN: Well, even if you say that you can  
5 establish a principle of scope that is -- that talks  
6 specifically about issues, these particular issues, I think  
7 the Commission has spoken to and has determined how they  
8 will be handled, at least for the time being, and that it is  
9 not within the jurisdiction of the Licensing Board at this  
10 point in time to eschew the Commission's clear mandate in  
11 these proceedings, these matters, and broaden its own  
12 jurisdiction to decide it on its own for a particular case.

13 CHAIRMAN ROSENTHAL: Are you saying that these  
14 issues are not justiciable at this point because the  
15 Commission has left them for later determination?

16 MR. EICHHORN: No, the Commission is in the  
17 process of making determinations with respect to site  
18 studies, if you will.

19 CHAIRMAN ROSENTHAL: That may be right, but I do  
20 not know that that goes to the question as to whether the  
21 contention is admissible or not. That may go to whether the  
22 contention can be litigated in the sense that there is a  
23 standard against which it can be measured. I don't see how  
24 that goes to the question of admissibility as being within  
25 or without the scope of the proceeding.

1 MR. EICHHORN: Well, yes. Are we talking about the  
2 site suitability issue?

3 CHAIRMAN ROSENTHAL: I am talking about -- Let me  
4 try to put my problem in concrete terms? Here we have a  
5 petitioner -- petitioners contending that this site is not  
6 suitable for the placement of a nuclear power plant. Now,  
7 their contention may be meritorious or it maybe totally  
8 lacking in any substance. The question, of course, before  
9 us does not go to the merits of the contention, but simply  
10 goes to whether it is within the scope of the proceeding.

11 Here is the contention. Let's assume for present  
12 purposes that it is meritorious. In point of fact, this is  
13 an unsuitable site. Now, one might say that there is no  
14 good cause to extend the completion date and to allow the  
15 plant to go forward in circumstances where that plant is  
16 going forward on a site which is unsuitable for the  
17 placement of a nuclear power plant.

18 Now, if one viewed it that way, one would be  
19 compelled to conclude, would one not, that this contention  
20 is a proper ingredient of a good cause determination? So,  
21 tell me where I have -- I know I have gone astray. I can  
22 see it from your smile, and I am sure you are about to tell  
23 me where it is.

24 MR. EICHHORN: I certainly cannot agree with you.  
25 I will accept your assumptions for the sake of argument, but



1 I would like to point out that the site was found to be  
2 suitable in a hearing. Now we have changed circumstances.  
3 The Commission is looking to the changed circumstances, if  
4 you will, and re-evaluation of siting criteria, and has  
5 directed how that determination and investigation will be  
6 conducted, and the lines of communication for achieving that  
7 goal, and that is that the staff has been directed to make  
8 reports and to report to the Commission.

9           There has been nothing in any of the current  
10 siting regulations that indicates that ongoing hearings  
11 should consider these issues at this time, that holders of  
12 construction permits should consider these matters at this  
13 time. The Commission just simply has not made that  
14 determination yet.

15           CHAIRMAN ROSENTHAL: You are saying the issue is  
16 not justiciable.

17           MR. EICHHORN: That is correct.

18           CHAIRMAN ROSENTHAL: If I understand you  
19 correctly, you are advocating -- you are saying it does not  
20 make any difference whether an issue of this kind is or is  
21 not within the scope of this kind of proceeding. This  
22 particular issue, in or out of the scope of the proceeding,  
23 is not justiciable for the reasons you just stated.

24           MR. EICHHORN: That is correct, and I think that  
25 is true with respect to emergency plans.

1           CHAIRMAN ROSENTHAL: All right. That is what you  
2 were saying.

3           MR. EICHHORN: The Commission has established  
4 regulations that will be effective in November with respect  
5 to emergency planning, but they did not indicate that any  
6 additional action should be taken at this time with respect  
7 to holders of construction permits.

8           MR. MOORE: Did they indicate that any additional  
9 action should not be taken?

10          MR. EICHHORN: No, but they indicated the  
11 necessary action, and certainly their treatment of the  
12 various stages of applicability of the regulations was very  
13 thorough, and their silence with respect to current holders  
14 of construction permits is rather persuasive in my mind,  
15 that they did not intend additional action to be taken by  
16 holders of construction permits at this time. There is a  
17 statement of what should be obtained in an application for  
18 construction permit. There is a statement which should be  
19 contained in the application for the operating license  
20 permit, and how those will be reviewed, and also how  
21 operating plants will be reviewed against these new  
22 regulations.

23          CHAIRMAN ROSENTHAL: I am having some trouble in  
24 determining to what extent this argument rests on the fact  
25 that we are talking about evacuation rather than some other

1 safety issue.

2           Supposing, for example, that instead of the  
3 contention being that there is an evacuation problem with  
4 this site, the contention was that three months ago there  
5 was an Intensity 9 earthquake at the site which rendered  
6 that site totally unsuitable for a nuclear power plant.  
7 Make it Intensity 11, just to make the example extreme.

8           We wil assume that has nothing to do with the  
9 reasons assigned for needing the extension. Would you in  
10 that circumstance argue that this new seismic development  
11 could not be the basis of a contention in a construction  
12 permit extension proceeding?

13           MR. EICHHORN: Yes. Again, I think that type of  
14 thing again does an injustice to the question of scope, of  
15 what originally I think and this Board at one time thought  
16 under Cook was to be a rather limited hearing. Now, this is  
17 not to say that there is going to be any jeopardy to the  
18 public health and safety. We still have the Commission  
19 staff, we have the Inspection and Enforcement Divisions,  
20 that are going to see that plants are safely built, and you  
21 have the operating license permit, which requires a review  
22 of all safety issues before the plant is allowed to operate.

23           CHAIRMAN ROSENTHAL: You would have no trouble  
24 about a board holding that there was good cause to grant a  
25 construction permit extension and allow the plant to go

1 forward in circumstances where there remained undetermined  
2 the impact of site suitability, of a Class 11 earthquake --  
3 Intensity 11 earthquake. Do you think the Board could go  
4 ahead and make that determination on the basis that we are  
5 going to leave that to the staff and to the operating  
6 license proceeding?

7 MR. EICHHORN: Yes, I think there is an argument  
8 for that, and the example you use makes it relatively easy,  
9 I mean, for the reason that it is very difficult for me to  
10 conceive any possibility that the staff could turn their  
11 back on such a situation and not investigate it.

12 CHAIRMAN ROSENTHAL: I know, but as you well know,  
13 you test out theories with hypotheticals that are extreme.

14 MR. EICHHORN: Yes. But as this Board again noted  
15 in Cook, but for the fortuitous circumstances of a hearing  
16 being conducted because of a requested extension, these  
17 matters would not be the basis of -- for a hearing except  
18 through an action by the staff, and why should a different  
19 result obtain simply because this hearing is going on?

20 MR. MCORE: To some extent, isn't that always the  
21 case whenever there is a hearing? An event takes place that  
22 can be labeled fortuitous, and that argument be made. For  
23 instance, if the operating license proceeding were going on,  
24 a hearing were going on, and it happened during the pendency  
25 of that hearing, that the Intensity 11 earthquake took

1 place, and there were no seismic contentions in the hearing,  
2 isn't it, according to your line of reasoning, as I see it,  
3 you would label that fortuitous and say, but why consider  
4 it?

5 MR. EICHHORN: No, but certainly not in that  
6 instance, Mr. Moore, because the operating license is indeed  
7 a safety review of the plant and its facilities.

8 MR. MOORE: But only those contentions that are  
9 put into issue.

10 MR. EICHHORN: Not under 2.760A. I think the  
11 Commission certainly has the right, opportunity, and duty,  
12 if you will, to look at issues of safety even when they are  
13 not contested.

14 MR. MOORE: We bring them up ourselves.

15 MR. EICHHORN: So I think your analogy is not the  
16 same in that instance, as we are talking about here. I  
17 think we have got to remember that we are looking at a  
18 limited hearing that may or may not take place during the  
19 course of construction of a facility, and the fact that it  
20 does occur should not be the basis for relitigating a whole  
21 host of issues that would otherwise not have been litigated  
22 until the operating license permit proceedings.

23 I think that does an injustice to the regulatory  
24 scheme which had been established and developed by the  
25 Commission over a period of years, and creates needless

1 waste of resources on the part of all concerned.

2 CHAIRMAN ROSENTHAL: You, I take it, have opposed  
3 the 2.206 petition that was filed by Illinois?

4 MR. EICHHORN: That is correct.

5 CHAIRMAN ROSENTHAL: Did you oppose it simply on  
6 the merits that there was no basis for their concerns about  
7 the suitability of the site, or did you argue that this was  
8 an inappropriate time to consider suitability?

9 MR. EICHHORN: Well, I guess I am not prepared to  
10 fully respond to that, Mr. Rosenthal.

11 CHAIRMAN ROSENTHAL: I can get, I assume, your  
12 papers.

13 MR. EICHHORN: I have been advised that we have  
14 not yet filed that.

15 CHAIRMAN ROSENTHAL: You have not filed it?

16 MR. EICHHORN: No.

17 CHAIRMAN ROSENTHAL: Did you have any opportunity  
18 to do that? Refresh me on the rule.

19 MR. EICHHORN: I think we have the opportunity.

20 CHAIRMAN ROSENTHAL: The petition was filed last  
21 December, wasn't it?

22 MR. EICHHORN: That is correct.

23 CHAIRMAN ROSENTHAL: No response has been filed up  
24 to this point by your client?

25 MR. EICHHORN: That is correct.

1           CHAIRMAN ROSENTHAL: Do you think that it would be  
2 a good response to the director that irrespective of the  
3 merits of the allegations on the part of the State of  
4 Illinois, that, Director, you should not invoke your show  
5 cause authority, but leave it for the operating license  
6 proceeding?

7           MR. EICHHORN: Mr. Chairman, I would hate to make  
8 that commitment here. It has been some time since I have  
9 looked at the request.

10          CHAIRMAN ROSENTHAL: Generically. I am trying  
11 really to get to the foundation of the argument that you are  
12 advancing. It seems to me to me, if I had not misunderstood  
13 you, that it is quite appropriate to leave all of these  
14 matters, all of these new developments, to either, one, the  
15 staff doing something about them on its own initiative, or  
16 two, the OL proceeding.

17          It seems to me to follow from that that you are  
18 really suggesting that it should not be open to someone at  
19 this point to file a request, as did Illinois, for a 2.206.

20          MR. EICHHORN: No, I am not saying that the  
21 opportunity to file a 2.206 request is not present.

22          CHAIRMAN ROSENTHAL: The opportunity is clearly  
23 present. The regulation allows that. But really what you  
24 are saying is that that kind of petition in these  
25 circumstances should be summarily denied by the Director.

1 MR. EICHHORN: Well, I do not want to make that  
2 statement either, Mr. Rosenthal. I don't think that is my  
3 position. We would have to look at the merits of that, and  
4 I would be glad to address it on the merits.

5 MR. MOORE: Is it your position that there are no  
6 circumstances in a construction permit extension proceeding  
7 under which an issue may be raised other than the reasons  
8 for the extension?

9 MR. EICHHORN: No. We accept the position stated  
10 in the Cook decision as being the accurate statement of  
11 scope, and I find that definition of scope, if you will, to  
12 be the same as Mr. Rosenthal pointed out earlier, that being  
13 that in the final analysis, then, the question here comes  
14 down to whether the reasons assigned for the extension give  
15 rise to health and safety or environmental issues which  
16 cannot appropriately abide the event of the environmental  
17 review facility operating license hearing.

18 MR. MOORE: Then is it your position if you adopt  
19 that that it is within the sole power of the Permit E filing  
20 for the extension to limit in his application the assigned  
21 reasons for the delay, and hence the limit -- limit the  
22 inquiry?

23 MR. EICHHORN: No, not necessarily. Certainly if  
24 other reasons for delay or for the extension are adduced  
25 through evidence at the hearing, and there are safety or



1 environmental questions arising from those reasons, I think  
2 that they are appropriate.

3 MR. MOORE: Can you tell me what your client's  
4 present projections are as to resumption of construction or  
5 is that more appropriately addressed to staff?

6 MR. EICHHORN: Well, to a certain extent it is.  
7 We are in a posture where we are awaiting completion of  
8 staff review, and we have been in that posture for some time.

9 MR. MOORE: You have no projections, optimistic  
10 projections as to when you might like to resume construction?

11 MR. EICHHORN: Well, we are also involved in a  
12 proceeding here for a construction permit amendment. The  
13 company position as stated in its financial prospectuses  
14 with respect to that, and I believe that position is, and  
15 don't hold me to that, but I believe that position is that  
16 upon release of the piles, and depending on the conditions  
17 that are set forth in that release, and a review of the  
18 status of this proceeding at that time, if it should come  
19 before termination of this proceeding, the company will make  
20 a decision as to what it will do at that time.

21 CHAIRMAN ROSENTHAL: You are not legally precluded  
22 from going ahead with construction prior to the resolution  
23 of the extension proceeding?

24 MR. EICHHORN: Certainly not.

25 I see my time has expired. The Board did ask for

1 a couple -- very brief statement with respect to standing.

2 CHAIRMAN ROSENTHAL: We did not ask for it. We  
3 indicated you were free to make one if you wish. You can,  
4 if you wish.

5 MR. EICHHORN: I only want to urge that we are  
6 looking toward a common sense approach, if you will, to use  
7 the words of my adversaries, with respect to standing. That  
8 is, when a petitioner is seeking to take part in a hearing,  
9 that demonstrates interest that could be harmed by that  
10 hearing before the standing is determined.

11 CHAIRMAN ROSENTHAL: Thank you.

12 DR. BUCK: May I ask a question? I ask it now so  
13 that intervenors can answer the same question in rebuttal.

14 The Licensing Board in one of its orders brought  
15 up the fact that the Congress in passing the appropriations  
16 bill amended the Atomic Energy Act, particularly Section  
17 108, and the 108B included a clause which says, except that  
18 regulations promulgated under this section shall not apply  
19 to any facility for which an application for a construction  
20 permit was filed on or before October 1, 1979.

21 Now, what in your opinion or how in your opinion  
22 does the supply to the Commission's regulations, rules and  
23 regulations which they put out on August 19, 1980, and to  
24 this case in particular?

25 MR. EICHHORN: I am vaguely familiar with what you

1 are referring to, Dr. Buck. I don't know the details of  
2 that legislation.

3 DR. BUCK: This is an amendment to Section 108.  
4 Let me read the whole paragraph for you. It says the  
5 regulations promulgated pursuant to this section -- No, this  
6 is particularly concerned with the demographic requirements  
7 and so on -- shall provide that no construction permit may  
8 be issued for a utilization facility to which this section  
9 applies after the date of such promulgation unless the  
10 facility complies with the requirements set forth in such  
11 regulations, and then it goes on to say, except that  
12 regulations promulgated under this section shall not apply  
13 to any facility for which an application for a construction  
14 permit was filed on or before October 1, 1979.

15 MR. EICHHORN: I understand, and I expect that,  
16 yes, in general, that clearly it would not apply.

17 DR. BUCK: Do you consider that this in a sense  
18 grandfathers this, and what does it grandfather it for?

19 MR. EICHHORN: With respect to site suitability --  
20 with respect to that particular thing, perhaps that is  
21 correct. It does not prevent the Commission as they are  
22 doing from looking into site suitability and seeking  
23 recommendations from staff with respect to changes in  
24 operating plants that may make them safer, looking at sites  
25 of other plants, and making recommendations with respect to

1 operating procedures or proposed operating procedures.

2 DR. BUCK: It does not hold up construction, in  
3 other words. Is that what you are saying?

4 MR. EICHHORN: No, I do not think so.

5 DR. BUCK: Thank you.

6 CHAIRMAN ROSENTHAL: Thank you, Mr. Eichhorn.

7 Mr. Goldberg?

8

ORAL ARGUMENT

9

ON BEHALF OF THE NUCLEAR REGULATORY COMMISSION

10

BY STEPHEN GOLDBERG

11

MR. GOLDBERG: Good morning, Mr. Chairman.

12

The staff submits that the disposition of the  
13 present appeals turns on the answer to a single question,  
14 namely, what is the nature of a construction permit  
15 extension proceeding? In order to arrive at an answer to  
16 that question, the staff believes that it is informative to  
17 look first at what it is not. It is clearly not a new  
18 construction permit proceeding, nor is it the equivalent of  
19 an eventual operating license proceeding.

20

Rather, under the Commission's regulations which  
21 appear at Section 50.55B, it is solely a determination of  
22 whether there are valid reasons for not completing a  
23 particular facility on a timely basis. As has already been  
24 noted, the single issue raised in appellant's petitions,  
25 namely, emergency planning and evacuation, is unrelated to

1 any of the reasons assigned by the applicant for  
2 non-completion of this facility.

3           CHAIRMAN ROSENTHAL: That is true, but it may be  
4 related to whether it is good cause to permit the utility to  
5 go ahead and finish the plant.

6           MR. GOLDBERG: I would submit, Mr. Chairman, that  
7 that is not the pappropriate focus for a construction permit  
8 extension proceeding. Section 50.55B of the regulations  
9 provides that a construction permit extension can be granted  
10 upon a showing of good cause. It then goes on to identify  
11 certain factors which could provide the basis for the grant  
12 of such an extension.

13           All of these factors provide reasons for not  
14 completing the facility. They do not introduce reasons why  
15 the facility should be completed. If we were to adopt the  
16 position of the appellants, namely, that a construction  
17 permit extension proceeding should in effect be a proceeding  
18 to reconsider the grant of a construction permit at the  
19 outset, we would be doing violence to the Commission's  
20 two-stage licensing process, which has been endorsed by this  
21 Commission and the Courts on numerous occasions included in  
22 the cited authority in the staff's appeal brief by  
23 introducing a third substantive safety proceeding into the  
24 process. which is not contemplated by the regulations, nor  
25 is it borne out by the Commission practice over time in

1 which there have been dozens of construction permit  
2 extension proceedings.

3           CHAIRMAN ROSENTHAL: Do you accept, Mr. Goldberg,  
4 the Licensing Board's formulation of the Cook standard as  
5 being that health and safety issues may be litigated in an  
6 extension proceeding even though they do not directly relate  
7 to the delay in construction and do not arise from the  
8 reasons assigned for the extension if the Board were to  
9 determine preliminarily that they must be heard in order to  
10 protect the interests of the intervenors of the public.

11           I ask that question because Ms. Cohn relies very  
12 heavily on that Licensing Board characterization of Cook,  
13 and Mr. Eichhorn, on the other hand, in his brief attacked  
14 this standard as being a misapplication or misinterpretation  
15 of Cook, and the staff, if my memory serves me correctly,  
16 did not attack the Licensing Board standard, and therefore  
17 possibly by implication accepted it.

18           The Licensing Board again clearly indicates in its  
19 view, in order to be within the scope, the issue need not  
20 arise from the reasons assigned for the extension.

21           MR. GOLDBERG: Mr. Chairman, the staff does not  
22 accept that formulation of the scope of an extension  
23 proceeding, and made its views twice known to the Licensing  
24 Board in exceptions to their first provision 1 and later  
25 final special prehearing conference order which designated

1 the parties to be admitted in this proceeding.

2           It believes first that that is an inappropriate  
3 expansion of the scope designated by this Appeal Board in  
4 Cook, so that the safety issue no longer must bear some  
5 nexus to the grounds for the extension. And as I would  
6 further note, the staff, of course, did not urge the Appeal  
7 Board in Cook to adopt the standard that it ultimately did  
8 devise, and we would submit that this might be an occasion  
9 to reconsider in light of experience with construction  
10 permit extensions what the proper scope of a construction  
11 permit extension should be.

12           CHAIRMAN ROSENTHAL: You are asking for  
13 reconsideration of Cook and the adoption of the position the  
14 staff advanced in Cook? Did we there reject it?

15           MR. GOLDBERG: We don't believe it is necessary to  
16 reach that question here, because we do not have an issue  
17 that is related to a reason assigned for the extension, so  
18 even the Cook standard for the scope for admission of safety  
19 issues comes into play, but we would submit that if in the  
20 consideration of the present appeals, this Appeal Board is  
21 to be persuaded that an extension proceeding should be  
22 something more than an inquiry into whether or not there are  
23 valid grounds for not completing the facility, that it take  
24 this occasion to articulate such a standard.

25           We would contrast the provisions of 50.55B which

1 simply require good cause for non-completion with the  
2 requirements of 50.35 relative to the grant of a  
3 construction permit and 50.57 relative to the grant of an  
4 operating license where the Commission did prescribe  
5 substantive safety findings that must be met in order for  
6 the grant of those respective licenses.

7           There is not a similar specification of  
8 substantive safety issues for the grant of a construction  
9 permit extension.

10           CHAIRMAN ROSENTHAL: All I can say is this, that  
11 if the staff was dissatisfied with the Cook articulation, it  
12 seems to me that it should have sought to have us overrule  
13 legislatively. You have a rulemaking division in the office  
14 of the Executive Legal Director which as far as I can see  
15 has no hesitancy when it disagrees or the head of that  
16 office disagrees with Appeal Board decisions to come up with  
17 a charitable or uncharitable amendment, as the case may be.

18           So, speaking again just for myself, the suggestion  
19 made this morning that we might wish to reconsider Cook and  
20 confine the inquiry to how good, bad, or indifferent the  
21 reasons assigned for the extension might be, falls on quite  
22 deaf ears.

23           MR. GOLDBERG: I will not press that matter  
24 further. I do not believe, given the nature of the issues  
25 sought to be introduced, that we have to reach a



1 re-exposition of the scope theory.

2           Turning now to the specific issue raised in the  
3 appellant's petitions, namely, the subject of emergency  
4 planning, I would note that that is, as has been pointed  
5 out, the subject of a pending request for action under  
6 Section 2.206, and if the Director of Nuclear Reactor  
7 Regulations finds there is merit to that petition, he will  
8 initiate appropriate procedures.

9           CHAIRMAN ROSENTHAL: Your adversaries indicate  
10 that that is all well and good, but it is a half loaf,  
11 because the Director in his wisdom, if he chooses not to  
12 institute the 2.206 -- grant the request, they have no  
13 appellant remedy.

14           MR. GOLDBERG: It is only half a loaf if you  
15 accept the proposition, which I would submit certainly if  
16 the petition is not granted, there is the risk that there  
17 will not be present evidentiary hearings to explore this  
18 question.

19           However, the terms of Section 2.206 assure  
20 Commission consideration of any ultimate Director's  
21 determination, and the Commission is free to fashion some  
22 sort of proceeding if it believes it is warranted, but this  
23 avenue for obtaining consideration of issues during the  
24 course of construction of a facility has been endorsed by  
25 the Commission very recently.

1           CHAIRMAN ROSENTHAL: Is it the contemplation of  
2 the Commission that the Director is going to take a year to  
3 act on a 2.206 petition? As I understand it, Illinois filed  
4 this petition last December, did it not?

5           MR. GOLDBERG: Correct.

6           CHAIRMAN ROSENTHAL: You told us earlier this  
7 morning that the Director will act on it according to the  
8 latest information by the end of the year. That translates  
9 itself into a full calendar year. Is that standard for the  
10 Director, or is there some special consideration here that  
11 warranted -- on the face of things seems to have been an  
12 unduly long period of time under consideration?

13           MR. GOLDBERG: The applicable regulation does not  
14 specify an express time period within which the disposition  
15 of Section 2.206 requests must be arrived at, and in fact,  
16 without apologizing for the length of time it has taken the  
17 Director to formulate a position here, there have been  
18 instances when requests have remained outstanding for longer  
19 than this period of time, but I think importantly,  
20 obviously, this is an important issue. It is an issue which  
21 the staff has attempted to enlist the support of the Federal  
22 Energy Management Agency in giving consideration to this  
23 issue.

24           The relationship between the NRC and FEMA is one  
25 of recent origin, and the relationship can be expected to be

1 more cooperative and improve over time. Also, there is some  
2 recognition that this is a plant that is in the early stages  
3 of construction. It does not pose any risk to the health  
4 and safety of the public, and we do not look at it as an  
5 unreasonable length of time to take to determine the merits  
6 of that particular action.

7           If there are any further proceedings or  
8 requirements that are necessary as a result of that, there  
9 is ample time to implement those without affecting the  
10 public health and safety.

11           I would also submit that this extension proceeding  
12 should not be looked at in isolation from the entire Bailly  
13 process. As noted in our appeal brief, Bailly has been  
14 marked by a particularly litigious history, both during the  
15 course of construction permit hearings and including at  
16 least two unsuccessful attempts to initiate  
17 post-construction permit hearings on a variety of issues.

18           While I have the utmost respect for opposing  
19 counsel in this argument, I would submit that what we have  
20 is an additional effort by many of the same litigants to  
21 litigate many of the same issues in yet another forum, and I  
22 feel that due process and reasonable administrative practice  
23 would commend that there has to be an end at some point to  
24 the litigation of whether or not Bailly should receive a  
25 construction permit.

1           CHAIRMAN ROSENTHAL: Do you deny that there have  
2 been changed circumstances which might apply to the question  
3 of the suitability of the site?

4           MR. GOLDBERG: The only circumstances I am aware  
5 of is the possible implementation of new siting criteria  
6 which as Dr. Buck has indicated with regard to the NRC  
7 appropriation authority and indeed the Commission's advanced  
8 notice of proposed rulemaking may or may not be applied to a  
9 facility such as Baily for which a construction permit was  
10 submitted in October -- before October, 1975 -- 1979.

11           CHAIRMAN ROSENTHAL: Your opponents point to the  
12 Three Mile accident and different, if I may put it this way,  
13 focus upon evacuation that resulted therefrom, whether they  
14 are right or wrong about that. They have not had a chance  
15 to litigate it up to this point, have they? And to talk  
16 about this -- the Baily case having been in a number of  
17 different forums and subject to a wide variety of papers  
18 hither and yon which I think we are all familiar with, but  
19 this particular question which they seek to litigate in this  
20 proceeding, they have not had prior opportunity to do so,  
21 have they?

22           MR. GOLDBERG: Of course, the entire matter of  
23 nuclear licensing and regulation, as the courts and this  
24 Commission have acknowledged, a dynamic process. There are  
25 always going to be developing criteria during the course of

1 plant construction. There is always going to be new  
2 information. The staff is committed to factor in all of the  
3 considerations which have been advanced here this morning,  
4 and in the various petition papers filed before this --  
5 before the Atomic Safety and Licensing Board in arriving at  
6 a reasonable determination in connection with Section 2.206  
7 petition, whether or not these would suggest that a  
8 proceeding should be instituted to suspend construction of  
9 the Bailly facility.

10 That provides a present real avenue to obtain  
11 consideration of those issues, and it ultimately will be  
12 reviewed by the Commission should it differ with the  
13 Director's decision on that score.

14 CHAIRMAN ROSENTHAL: If that remedy were not  
15 available, would you still rest on the two-step licensing  
16 process?

17 MR. GOLDBERG: I do not think, given the Court  
18 decisions, many of which have arisen in connection with  
19 aspects of the Bailly project, including the pile foundation  
20 matter, which I think can be analogized to emergency  
21 planning considerations. Certainly, the question of the  
22 adequacy of a pile foundation is one that is central to the  
23 issue of whether or not a plant can be safely built and  
24 operated at the Bailly facility, and yet the Commission took  
25 the position that the risk that the pile foundation will not

1 prove satisfactory at the operating license stage is borne  
2 by the applicant.

3 I see no basis for departing from that same  
4 rationale in this instance, particularly given the language  
5 of 50.55B, which does not seem to require that we embark on  
6 a fresh assessment of whether or not a previously licensed  
7 facility should be built.

8 CHAIRMAN ROSENTHAL: In the final analysis, your  
9 position, then, I take it, is this, that if there were not a  
10 vehicle for exploring into site suitability at this point,  
11 and it had to wait until the operating license proceeding  
12 commenced, and it were then determined that the site were  
13 not suitable, and the plant was then 90 percent complete and  
14 had to be scrubbed, so be it.

15 Is that really what it comes down to?

16 MR. GOLDBERG: Yes. Of course, that assumes the  
17 unavailability of the 2.206 avenue.

18 CHAIRMAN ROSENTHAL: That is why I asked you if  
19 that were unavailable, you would still be pressing the  
20 two-step licensing process concept, and your answer was yes.

21 MR. GOLDBERG: Yes, I would, because the staff has  
22 been given the responsibility which it takes very seriously  
23 as evidence in the Bailly project by its own imposition of a  
24 stay of construction while it examines the adequacy of the  
25 pile installation proposal. It takes very seriously its

1 Commission implementation of the instruction in the 1980  
2 Authorization Act, is in its publication of advance notice  
3 of proposed rulemaking on reactor siting, and not in the  
4 Commission's implementation of new emergency planning  
5 requirements, but as to the applicability of the new  
6 requirement on emergency planning, I would note that they  
7 impose requirements upon a construction permit, and  
8 operating license applicant, but do not impose requirements  
9 upon plants under construction.

10 In other words, there is no present requirement  
11 that a plant under construction must be presently upgraded  
12 to satisfy operating license level requirements in the area  
13 of emergency planning, which could be the net effect of  
14 litigating the present adequacy of the emergency planning in  
15 this proceeding.

16 CHAIRMAN ROSENTHAL: Supposing that we were to  
17 agree with your adversaries that the contentions under  
18 consideration are within the scope of this proceeding, and  
19 were to instruct the Licensing Board to admit the  
20 petitioners as intervenors and also to accept the  
21 contentions for litigation, what do you perceive would be  
22 the standard against which those contentions would be  
23 measured?

24 MR. GOLDBERG: Frankly, I think there would be  
25 considerable doubt. It seems to me we have criteria that

1 are applicable for a construction permit applicant, and we  
2 have certain criteria that are applicable for an operating  
3 license applicant, and it really is uncertain what criteria  
4 we would apply in terms of judging the present sufficiency  
5 of the Bailly emergency plans.

6 CHAIRMAN ROSENTHAL: It could be. Just to give a  
7 concrete example of this, you heard Mr. Vollen deliver Dr.  
8 Schultz's prepared statement. Dr. Schultz focused on the  
9 problems that would be attendant upon evacuating the Indiana  
10 State Prison. Now, is it clear as you understand it under  
11 the existing regulations that might apply to Bailly that the  
12 evacuation or the evacuability of the prison population  
13 would have to be considered?

14 MR. GOLDBERG: My understanding, Mr. Chairman, is  
15 that Indiana State Prison lies approximately 12 or so miles  
16 from the Bailly facility.

17 CHAIRMAN ROSENTHAL: That is my understanding.

18 MR. GOLDBERG: The new rules require at the  
19 construction permit stage preliminary consideration and at  
20 the operating license stage final consideration for plans  
21 that will ensure that protective measures can be implemented  
22 in the event of an emergency to protect a population within  
23 a ten-mile radius.

24 Those rules also indicate that the precise area of  
25 the emergency protection zone is not fixed in any given



1 instance, so it could be that certain demographic  
2 considerations or other particular considerations that are  
3 peculiar to a site could be taken into account, and the  
4 staff has invited Dr. Schultz and has used this forum again  
5 today to invite him to participate with us in the course of  
6 our deliberation over the merits of the 2.206 petition in  
7 trying to see whether or not there is any reason that we  
8 have to believe that effective emergency plans cannot be  
9 implemented for the Bailly facility.

10 DR. BUCK: Mr. Goldberg, going back to my question  
11 that I asked Ms. Cohn, effective emergency plans do not  
12 necessarily require evacuation of any particular person  
13 within any particular range. They require protection. Is  
14 that not correct?

15 MR. GOLDBERG: That is correct, Dr. Buck.

16 DR. BUCK: Thank you.

17 MR. GOLDBERG: Evacuation is an extreme form of  
18 protective action that could be required in the event of a  
19 nuclear accident.

20 DR. BUCK: The thing that bothered me about the  
21 hearing and the PL 96-295 is that the Federal Register  
22 notice of the rules and regulations issued on August 19  
23 specifically states that they are in conformance with PL  
24 295. I do not see how they can be in conformance with PL  
25 295 and really insist that this plant meet some unknown

1 emergency plans at this particular moment.

2 Am I correct in that interpretation?

3 MR. GOLDBERG: Not being the architect of those  
4 regulations, I --

5 DR. BUCK: I am not a lawyer. I only know what I  
6 read here.

7 MR. GOLDBERG: I am, unfortunately, but have no  
8 more insight into the intention of the Commission in  
9 structuring the new rule along those lines than you might  
10 have.

11 CHAIRMAN ROSENTHAL: Did you indicate might or  
12 might not be that the Illinois -- Indiana prison would have  
13 to be taken into account? I thought you said, well, it is  
14 basically a ten-mile provision, but that on a case to case  
15 basis it might be more than ten miles.

16 MR. GOLDBERG: It is certainly conceivable,  
17 although I am by no means indicating that it will, that  
18 consideration will be given to what measure of protective  
19 action is necessary in the event of an emergency.

20 CHAIRMAN ROSENTHAL: By regulation or --

21 MR. GOLDBERG: In context of the staff's  
22 consideration of the adequacy of emergency planning at the  
23 Bailly facility.

24 CHAIRMAN ROSENTHAL: Do you envisage that in a --  
25 let's move this on to the operating license proceeding.

1 Assume it was coming up today rather than this construction  
2 permit extension proceeding. As you see it, could there be  
3 litigated in that operating license proceeding whether  
4 adequate protective measures have been taken for the prison  
5 population?

6 MR. GOLDBERG: Yes, I could conceive an issue that  
7 would allege that the emergency planning should encompass  
8 this particular facility. I am not committing the staff  
9 here today as to what its position would be, or in fact it  
10 would require an emergency plan that might include actions  
11 up to and including the evacuation of that particular  
12 facility.

13 MR. MOORE: What is the staff's present best  
14 estimate as to when construction could resume at Bailly if  
15 the applicant wanted it to go forward?

16 MR. GOLDBERG: We indicated to the Licensing  
17 Board, Mr. Moore, that we will issue all evaluation of the  
18 pile foundation proposal on or about October 15 of 1980,  
19 this month. Assuming that that report is favorable, there  
20 is no longer any bar to proceeding with construction.

21 Precisely what period of time might be required to  
22 remobilize the construction force, I cannot answer, but  
23 there would be nothing from proceeding with plant  
24 construction.

25 The point has also been made by the appellants and

1 a party in support of their appeal that the disposition of  
2 the present appeal will have a limited impact on the scope  
3 of the present extension proceeding. In fact, the staff  
4 would submit that that is not the case at present. The  
5 Licensing Board has not found that there is any necessity to  
6 admit for present litigation any safety issue.

7 I would suggest that if the Appeal Board were to  
8 reach the conclusion that emergency planning was the kind of  
9 issue that requires present adjudication in this extension  
10 proceeding, that the scope of the existing proceeding would  
11 be substantially expanded with the considerable additional  
12 expenditure of resources on behalf of all parties.

13 It would, moreover, perhaps even have more  
14 profound implications for the practice of treating  
15 construction permit extensions which, as I alluded to  
16 earlier, there have been dozens in the past and several  
17 pending. In fact, in one case, nine separate extensions  
18 were granted, and that is in the Diablo Canyon facility  
19 which, as this Appeal Board may be aware also was and is a  
20 highly contested project, with issues including seismicity  
21 being among the matters that are in controversy.

22 So, we would just like to take the view that this  
23 appeal should not be seen as merely affecting the interest  
24 of the Gary and Dr. Schultz petitioners alone.

25 I have nothing further.

1           MR. MOORE: You earlier indicated you were  
2 authorized to state that it was the Director's present  
3 intention to determine whether the 2.206 petition would be  
4 granted or denied by the end of this year. In the  
5 Director's letter of July 31, 1980, to the Assistant  
6 Attorney general of the State of Illinois which is appended  
7 to the brief of the appellants, it was the Director's  
8 intention to undertake certain risk studies in determining  
9 -- to help him determine the status of the Bailly petition,  
10 and that those would not be completed until the spring of  
11 1981.

12           Do you know whether those risk studies will be  
13 completed before the Director's decision, or whether in  
14 reaching his decision those will be dispensed with?

15           MR. GOLDBERG: Mr. Moore, my answer to Chairman  
16 Rosenthal earlier is on -- would replace the representations  
17 made in the July letter to Mr. Hansel. The decision has not  
18 been reached whether or not to require those additional  
19 studies.

20           CHAIRMAN ROSENTHAL: Thank you, Mr. Goldberg.

21           Ms. Cohn, you have ten minutes.

22           MS. COHN: Going back to the Chairman's  
23 observation that the statute provides precious little  
24 guidance as to what good cause means, I would like to try  
25 and explain one more time why I believe that whatever we

1 think good cause means, the availability of another  
2 proceeding, namely, a 2.206 proceeding, should have nothing  
3 to do with it, and that is basically because whenever we  
4 have a safety or environmental issue raised with respect to  
5 an extension proceeding, the argument can be raised in every  
6 case that there is always this alternative forum in which  
7 the safety issue can be raised.

8           Therefore, if we deny our contention on the  
9 availability of a 2.206 proceeding in this case, one would  
10 assume that the same would hold true for every other  
11 proceeding, and I believe that in Cook this Board already  
12 determined that that should not be the ultimate result, and  
13 instead, that the question of what good cause means is one  
14 that should be determined on the basis of the facts and  
15 particularly whether common sense tells us that the issue  
16 being raised is one that cannot await review at the  
17 operating license stage.

18           In this respect, we think that this case is not  
19 too far afield from the Chairman's hypothetical about Class  
20 11 earthquake, and that is because we have here very recent  
21 recognition about the possibility of Class 9 accidents  
22 coupled with the identification of Bailly as being perhaps  
23 the worst site in the whole country from a population and  
24 therefore emergency planning perspective.

25           Therefore, we would suggest that what the Board

1 has to do is independently determine what the scope of this  
2 proceeding is and what the scope of a good cause finding  
3 requires.

4           One last point with respect to the 2.206  
5 proceeding, aside from the fact that we have no assurance as  
6 to how the Director of Nuclear Reactor Regulation will  
7 exercise his discretion as to whether to institute one or  
8 not, we would also like to point out that in this  
9 proceeding, NIPSCO has the burden of demonstrating that good  
10 cause for an extension exists, whereas in a 2.206  
11 proceeding, the staff or the Gary petitioners, if  
12 participating in that proceeding, would in fact have the  
13 burden of demonstrating that circumstances warrant  
14 suspension or relegation of a construction permit.

15           I believe that on the burden of proof, the  
16 substantive standard may be somewhat different.

17           With respect to Dr. Buck's question --

18           CHAIRMAN ROSENTHAL: I am not so sure you are so  
19 right on your view of where the burden of proof lies in a  
20 show cause proceeding. Are you familiar with our Midland  
21 decision?

22           MS. COHN: I have to confess I am not.

23           CHAIRMAN ROSENTHAL: To the consternation of the  
24 applicants and generally and I think the staff as well, we  
25 held that on certain matters the burden in a show cause

1 proceeding rested with the licensee.

2 MS. COHN: That is reassuring. Thank you for  
3 pointing that out.

4 CHAIRMAN ROSENTHAL: I don't think that as yet has  
5 been overturned by the Commission, although an effort was  
6 made to get the Commission to do so.

7 MS. COHN: With respect to Dr. Buck's question, in  
8 which he raised the effect on our position of the  
9 appropriate -- the NRC appropriations bill, we agreed that  
10 new regulations that will be promulgated some time in the  
11 future have not been promulgated thus far. Those are not  
12 what should determine the outcome here.

13 What we are saying is that we have to apply  
14 whatever criteria, standards, or policies are in effect  
15 today, and that under these criteria, for example, if Bailly  
16 were to be the subject of a new construction permit hearing  
17 on the question of site suitability, it is our position that  
18 this site would not be approved, and applying those  
19 standards, we believe that the licensing Board can  
20 appropriately make a determination about, as a threshold  
21 matter, as to whether evacuation is feasible.

22 DR. BUCK: Even though it was essentially  
23 grandfathered by the Act?

24 MS. COHN: It was grandfathered with respect to  
25 whatever new specific criteria are adopted some time in the



1 future. We don't even know what those criteria will be, but  
2 we do know that the Commission has indicated that the fact  
3 that new siting criteria will not apply to existing  
4 construction permits, does not mean there is not a public  
5 health and safety issues raised by the fact that there are  
6 existing plants located in areas of high population density,  
7 and that something has to be done about them.

8           Finally, with respect to Mr. Goldberg's last point  
9 about what the scope of the hearing which the licensing  
10 board will be conducting is, he indicated that the Board has  
11 not admitted any other safety issues, and therefore the  
12 admission of the Gary contention would significantly expand  
13 the scope of the hearing already going on.

14           I would just like to point out that that depends  
15 on what you call a safety issue. There have in fact already  
16 been contentions admitted, for example, which relate to the  
17 questions of whether the reasons for not getting Bailly  
18 built indicate that NIPSCO does not have the proper  
19 competence for completing the plant in a safe manner.

20           The issues of the pilings proposal which raises  
21 some safety matters is also still under consideration, and  
22 there are environmental contentions that have already been  
23 admitted.

24           DR. BUCK: Was there a contention on competence?

25           MS. COHN: I am not exactly sure of the wording.

1 I believe Mr. Vollen can maybe specify if what I have said  
2 is not clear.

3 DR. BUCK: Maybe I just don't remember it. It  
4 does not mean there is not one there.

5 MS. COHN: But I believe that to be the case.  
6 Unless there are further questions, I am through.

7 CHAIRMAN ROSENTHAL: Thank you very much, Ms. Cohn.

8 As I indicated before, it is nice in a sense to  
9 have the Bailly case and some of its participants back with  
10 us.

11 On behalf of the entire Board, I would like to  
12 thank counsel for their informative and helpful arguments.

13 On that note, the appeals of the City of Gary, et  
14 al., and George Schultz, will stand submitted.

15 (Whereupon, at 12:25 p.m., the hearing was  
16 concluded as described above.)

17

18

19

20

21

22

23

24

25

POOR ORIGINAL

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

---

in the matter of: Northern Indiana Public Service Company (Bailly)

Date of Proceeding: October 2, 1980

Docket Number: 50-367 (Extension)

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

David S. Parker

Official Reporter (Typed)



(SIGNATURE OF REPORTER)