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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

NORTHERN INDIANA PUBLIC
SERVICE COMPANY

(Bailly Generating Station,
Nuclear-1)

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)
) Docket No. 50-367
) (Construction Permit Extension)
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NRC STAFF RESPONSE TO PORTER COUNTY
CHAPTER INTERVENORS' MOTION TO
SUSPEND LITIGATION PROCEEDINGS

INTRODUCTION

On November 13, 1980, the Porter County Chapter Intervenor (PCCI) filed a motion to suspend the captioned proceeding for an indeterminate period of time. Intervenor argues that it would be "difficult, unfair, wasteful and perhaps counterproductive"^{1/} to continue the present litigation until "one or more" of the following factors are resolved. These factors are: (1) a statement by the Applicant's First Vice President during deposition that the Applicant will undertake a reassessment of the Bailly project, including its completion, after receipt of the NRC Staff evaluation of its foundation pilings proposal;^{2/} (2) a statement contained in a letter from Applicant's counsel to the Board, dated November 3, 1980, that the Applicant then intended to amend its extension application to reflect a postponement in the anticipated

^{1/} Motion at 2.

^{2/} Motion at 3.

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in-service date;^{3/} (3) the Staff has not reached a determination as to whether a new environmental impact statement is required;^{4/} (4) the Staff has not issued its review of the foundation pilings proposal and the Board has yet to rule on the admissibility of the foundation pilings issue;^{5/} and (5) the Board has yet to rule on the admissibility of the "newly-filed contentions" of PCCI.^{6/} Porter County Chapter Intervenors acknowledge that they could voluntarily and unilaterally reduce the amount of litigative activity presently occurring in this proceeding, but submit that they could thereby run the risk of being denied later discovery and other prehearing procedures on the grounds they were not timely pursued.^{7/}

The Porter County Chapter Intervenors cite no legal authority in support of their motion nor is the Staff aware of any. Moreover, none of the factors advanced in the motion provide a valid justification for the relief requested.

These factors are either speculative in nature, immaterial to the conduct of the present litigation, or part of the orderly process of an NRC adjudication. Moreover, the PCCI's assertion that it will be deprived of the opportunity to conduct full and fair prehearing preparation relative to all contested issues is both speculative and unfounded. The expense of litigation is one voluntarily and knowingly assumed by PCCI when it initiated this

^{3/} Id. at 5. See letter from W. Eichhorn to Board members, dated November 3, 1980. This amendment has recently been filed. See letter from E. M. Shorb, Applicant, to H. R. Denton, NRC, dated November 26, 1980.

^{4/} Id. at 6.

^{5/} Id. at 8.

^{6/} Id. at 9.

^{7/} Id. at 2-3.

proceeding and sought the introduction of such a wide assortment of legal and factual issues. Accordingly, for these reasons, and those described more fully below, the Staff opposes the present motion.

DISCUSSION

It is a central tenet of NRC practice that licensing proceedings be concluded as expeditiously as possible in a manner consistent with due process of law. See 10 C.F.R. §§ 2.718 and 2.757; Appendix A to 10 C.F.R. Part 2. In matters of scheduling, while the convenience of litigants is entitled to recognition, the paramount consideration is the public interest which is usually served by as prompt a decision one way or the other as is possible consistent with the litigants' opportunity to be heard. Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975).

Given the broad and novel assortment of issues sought to be introduced into this proceeding, the Staff believes that the proceeding is moving forward as well as could be expected. At the same time, there is no prescribed schedule along which this or any proposed licensing action must be concluded. The Staff believes that these considerations militate against a suspension of the proceeding.

The present motion is the second such motion to be made by PCCI on analogous grounds. These intervenors moved during the March 13, 1980 prehearing conference in this matter to suspend the proceeding until the production of the Staff evaluation of the extension application. That motion was denied following considerable discussion on the record (Tr. 286-99). The Staff believes that the present motion is similarly infirm. The factors cited by the Porter County Chapter Intervenors in support of the present motion neither alone nor together provide justification for suspending the proceeding. The Staff now turns to a consideration of these five factors.

The first factor concerns a statement made by a NIPSCO officer in a deposition that NIPSCO will review the status of the Bailly project, including whether to complete construction, after the Staff review of the pile installation plans is complete.^{9/} This individual also noted that the Applicant presently intends to build Bailly.^{10/} The Applicant has prosecuted the present extension application in a diligent manner and otherwise fulfilled its responsibilities as a litigant in this proceeding.

The second factor alleged to provide a reason to suspend the proceeding concerns the representation by counsel for the Applicant, in his letter of November 3, 1980, that the Applicant had extended the anticipated in-service date for Bailly to 1979 and intended to amend its extension

^{9/} See transcript of deposition of Eugene M. Shorb, September 9, 1980, at 94-97.

^{10/} Id. at 90.

application accordingly. That amendment has now been filed.^{11/} The reasonableness of the extension period requested (irrespective of the actual date) is a matter in controversy upon which discovery has begun and can proceed unabated. The November 26, 1980 amendment does not identify any additional reasons the plant was not completed by the original completion date (September 1, 1979) set forth in the construction permit. Those reasons were advanced in the Applicant's February 7, 1979 extension application. Discovery on that aspect of the application has begun and can proceed unabated. The necessity to seek an extension of the requested completion date does not provide any grounds for the suspension of this proceeding.^{12/}

The third factor cited in support of the motion is the fact that the Staff has yet to finally determine whether an environmental impact statement is required in this proceeding. The Staff has indicated that it will do so on the basis of an environmental impact appraisal to be completed by January 15, 1980.^{13/} That is approximately six weeks away. If the Staff determines that an impact statement is not required, the validity of that

^{11/} See n. 3 *infra*.

^{12/} Cf. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-2, 1 NRC 39 (1975) wherein it was concluded that the announced deferral of the inservice date for a plant which was the subject of a pending hearing did not necessarily necessitate postponement of such hearing.

^{13/} See letter from Staff counsel to the Board members, dated October 31, 1980.

determination can be immediately adjudicated on the strength of the environmental impact appraisal and any related pleadings. If the Staff determines that a statement is required, the statement will take some added time to prepare.

The fourth factor cited in the motion is the Staff's failure to complete its safety evaluation of the Applicant's pile installation proposal and the Board's failure to yet rule on the admissibility of a contention concerning this issue. Since the evaluation is unrelated to a matter in issue, its completion date is wholly immaterial to the scheduling of this proceeding. The Staff believes that the evaluation is unnecessary to a ruling on the litigability of the pile installation matter and the Staff would urge a prompt Board ruling in that regard on the basis of the pleadings (and Staff affidavit) filed by the parties on that matter.

The final factor raised in the motion concerns the Board's failure to rule on the admissibility of the "newly-filed contentions" advanced by PCCI and others. The last responsive pleading on these matters was filed on October 14, 1980.^{14/} The Staff has already stated its position that these proposed contentions present issues that are extraneous to this construction permit extension proceeding. Nonetheless, in the interest of expedition, the Staff would urge a prompt Board ruling on the admissibility of such contentions. Obviously, if any such contentions were admitted,

^{14/} See State of Illinois motion to file instanter attached "Reply to Staff and NIPSCO Responses on Newly Filed Contentions."

discovery may then proceed on such issues. Discovery on these matters before their admission as matters in controversy is unavailable.^{15/} At the same time, discovery on the matters central to this extension request, namely, whether there are valid grounds for the delay in construction and the requested extension is not dependent on the admission of any of the "newly-filed contentions." Discovery on these matters has already begun which can and should proceed unabated.

The grant of the requested motion would seriously disrupt the orderly administration of this proceeding without justification. According to PCCI, if this proceeding were suspended, it would apparently be incumbent upon some other party to seek its resumption.^{16/} This would have the likely effect of placing the burden on a party who has not requested this particular hearing to obtain its completion in order to satisfy the singular interests of the party requesting the hearing in the first place. This is both inequitable and unwarranted. A multi-party adjudication cannot be controlled by the litigative convenience of a single party.

The only injuries PCCI allegedly suffers as a result of the current pace and status of the proceeding is the financial cost of the litigation and the supposition that it could be denied ample discovery on possible later-admitted contentions.^{17/} The former does not constitute a cognizable ground

^{15/} See 10 C.F.R. § 2.740.

^{16/} Motion at 10.

^{17/} Motion at 2-3.

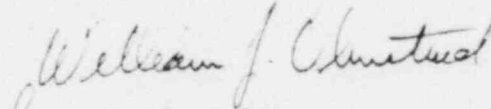
for obtaining the requested suspension,^{18/} particularly in light of the fact that PCCI has generated much of the litigation activity in this proceeding with the attendant financial expense.

Finally, there is no basis in either the history or conduct of this proceeding which would lend credence to the companion concern that PCCI will not be afforded an ample opportunity to develop its direct case in this matter.

CONCLUSION

For the foregoing reasons, the Staff opposes the present motion to suspend this proceeding.

Respectfully submitted,


for Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of December, 1980

^{18/} For purposes of determining whether hearings before a licensing board should be stayed, the Appeal Board has concluded that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Allied-General Nuclear Services, et al.* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 685 (1975), quoting *Renegotiation Board v. Bancroft Co.*, 415 U.S. 1 (1974).

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SOUTHERN INDIANA PUBLIC
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(Perry Generating Station,
Nuclear-1)

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PORTER COUNTY CHAPTER INTERVENORS' MOTION TO SUSPEND LITIGATION PROCEEDINGS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 2nd day of December, 1980.

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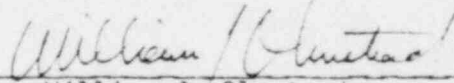
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