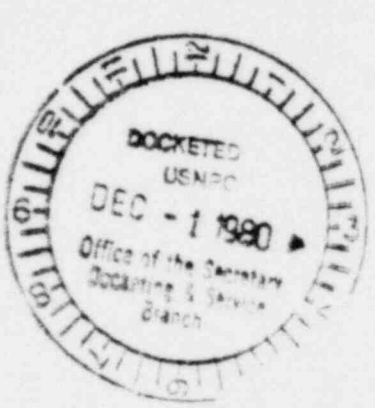

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of	)	
	)	Docket No. 50-409
DAIRYLAND POWER COOPERATIVE	)	(Liquefaction
	)	Show Cause)
(La Crosse Boiling Water Reactor)	)	

PETITION FOR REVIEW OF APPEAL BOARD DECISION

Dairyland Power Cooperative (Dairyland or DPC), the holder of Provisional Operating License No. DPR-45 for the La Crosse Boiling Water Reactor (LACBWR) and the licensee in the above-captioned proceeding, hereby submits its petition for review of ALAB-618, a Memorandum and Order issued by the Atomic Safety and Licensing Appeal Board on November 17, 1980, on the grounds that (1) this decision is clearly erroneous with respect to an important question of NRC law and policy, (2) if this decision is not reviewed, a substantial waste of the NRC Staff and licensee resources will result, and (3) the effectiveness and credibility of NRC's enforcement program will be irreparably damaged. In support of its petition, Dairyland states the following:

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THE DECISION BELOW

In ALAB-618, in response to a question certified to it by the Licensing Board, the Appeal Board ruled that the Licensing

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Board "is empowered to consider and determine de novo" the appropriate ground acceleration value to be utilized in this show cause proceeding for the purpose of determining whether the design and installation of a dewatering system is required in order to preclude the occurrence of liquefaction at the LACBWR site. ALAB-618 at 3. The Appeal Board did so in spite of the fact that the Order to Show Cause issued by the Director of Nuclear Reactor Regulation (NRR) on February 25, 1980 only required Dairyland to show cause why it should not design and install a dewatering system "to preclude the occurrence of liquefaction in the event of an earthquake with a peak ground acceleration of 0.12 g or less." Order to Show Cause at 8 (emphasis added).

The Appeal Board's decision misconstrued the operative paragraph of the Order to Show Cause in the following manner:

> Despite the reference in the show cause order to an 'earthquake with peak ground accelerations of 0.12g or less,' . . . no specific value was mentioned in the statement of the issues to be considered in any hearing on the order. Rather, as earlier noted, those issues were said to be simply whether a site dewatering system should be designed and then installed by a particular date. Significantly, the Commission's July 29 Order not merely framed the issues in identical fashion, but also did not allude at all to the 0.12g value. In these circumstances, the two orders are susceptible of the reading that, while the show cause order reflected the staff's 'conservative assumption of a maximum 0.12g acceleration at the La Crosse site, it was not the NRR Director's (or the Commission's) intent to foreclose examination of the validity of that premise in any hearing

> which might ultimately be held on the need for a site dewatering system to obviate liquefaction.
> ALAB-618 at 11 (emphasis added, citations omitted).

By its actions, the Appeal Board has transformed a show cause proceeding concerning the liquefaction potential of the LACBWR site at 0.12g into an open-ended and unnecessary inquiry into the appropriate magnitude of the safe shutdown earthquake at the LACBWR site.

GROUNDS FOR REVIEW

The Appeal Board has misconceived the significance of the 0.12g value and the manner in which it was incorporated into the Order to Show Cause. There was considerably more than a mere "reference" in the show cause order to the 0.12g value. In the ordering paragraph of the Order to Show Cause, the Director of NRR specifically

> ORDERED THAT the licensee show cause, in the manner hereinafter provided, why the licensee should not:
>
> 1. As soon as possible, but no later than May 27, 1980, submit a detailed design proposal for a site dewatering system to preclude the occurrence of liquefaction in the event of an earthquake with peak ground acceleration of 0.12g or less.
>
> * * * *
>
> 2. As soon as possible after NRC approval of the dewatering system identified above, but no later than February 25, 1981, make such system operational, or place the LACBWR in a safe cold shutdown position.
> Order to Show Cause at 8 (emphasis added).

By so ordering, the Director could not have made it more clear that Dairyland was only required to either (a) design and install a dewatering system capable of precluding liquefaction in the event of an earthquake with a peak ground acceleration of .12g or less or (b) show cause why liquefaction would not be a problem in the event of an earthquake with a peak ground acceleration of 0.12g or less. In either case, Dairyland was only required to show cause with respect to 0.12g. As a result, the scope of the Order and, by definition the scope of this proceeding, were confined to the consideration of the liquefaction potential of the LACBWR site under earthquake conditions of .12g or less. 1/

Moreover, the Order to Show Cause also stated that

> In the event a hearing was requested the issues to be considered at such hearing shall be:
> (1) Whether the licensee should submit a detailed design proposal for a site dewatering system; and
> (2) Whether the licensee should make operational such a dewatering system as soon as possible after NRC approval of the system but no later than February 25, 1981, or place the LACBWR in a safe cold shutdown condition.
> Order to Show Cause at 10.

1/ If Dairyland had consented to the Order to Show Cause and agreed to design and install a dewatering system which was only capable of precluding liquefaction in the event of 0.12g, no hearing would have even been held in this proceeding. See Public Service Co. of Indiana (Marble Hill 1 and 2), CLI-80-10, 11 NRC 438 (March 13, 1980); Wisconsin Electric Co. (Point Beach 1), CLI-80- (May 12, 1980); Houston Lighting and Power Co. (South Texas 1 and 2), CLI-80- (Sept. 22, 1980). The scope of this proceeding is defined by the Order to Show Cause and cannot be expanded to consider ground acceleration values beyond 0.12g merely because, as the Appeal Board's decision seems to suggest, Dairyland did not consent to the order.

Obviously, the "detailed design proposal for a site dewatering system" referred to in issue No. (1) is the same "detailed proposal for a site dewatering system" for which Dairyland was ordered to show cause two pages earlier in the same order (i.e., one which would "preclude the occurrence of liquefaction in the event of an earthquake with peak ground acceleration of 0.12g or less.") In its July 29, 1980 Order establishing the Licensing Board to rule on requests for a hearing, the Commission also explicitly stated that

> If the Board determines that a hearing is required, the Board is instructed to conduct an adjudicatory hearing solely on contentions within the scope of the [two] issues identified in the February 25, 1980 Order.
> Commission's July 29, 1980 Order at 2.

The Commission then restated verbatim the two issues identified in the Director's Order. In light of these facts, it is inconceivable how the Appeal Board could conclude that these two orders were "susceptible" of any reading other than that the scope of this proceeding is confined to the liquefaction potential of the LACBWR site at 0.12g or less. Indeed, upon the completion of a soils properties investigation program and receipt of analyses from Dairyland showing that the soils under the key structures at the LACBWR site were safe against liquefaction at 0.12g, the Director of NRR -- the author of the Order to Show Cause -- concluded that Dairyland had shown adequate cause why it should not design and

install a dewatering system. 2/ Obviously, if the Director had intended that the Order should be "read" in the manner proposed by the Appeal Board, he would not have been able to conclude that Dairyland had shown cause to his satisfaction.

The Appeal Board's decision to unilaterlaly expand the scope of this enforcement proceeding beyond the parameters established in the Order to Show Cause is particularly surprising in light of the Commission's recent decisions in the Marble Hill,

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2/ The fact that this is how the orders were consistently interpreted by the parties to this proceeding, including the NRC Staff, prior to the Prehearing Conference called to rule on the requests for hearings, is evident from even a cursory review of the pleadings and technical submissions in this proceeding. Every submission and analysis that has been prepared to date by Dairyland and its consultants was predicated on the 0.12g value. Moreover, on August 29, 1980 -- prior to the Prehearing Conference -- the Director of NRR issued a Safety Evaluation Report (SER) which concluded that the soils under the key structures at the LACBWR site were safe against liquefaction effects at 0.12g. The Director thereupon determined that

> Dairyland Power Cooperative has shown adequate cause why it should not submit a detailed design proposal for a site dewatering system and why it should not make such a system operational by February 25, 1981, or shut down the La Crosse Boiling Water Reactor. See Enclosure 1 to NRC Staff's Response to Requests For Hearing (Aug. 29, 1980).

Counsel for the NRC Staff also supported this interpretation of the Order to Show Cause at the Prehearing Conference, but, as noted in ALAB-618, for some reason departed from this view in its brief on the certified question. ALAB-618 at 8.

Point Beach, and South Texas proceedings cited earlier. 3/ All of these decisions reflect a Commission policy to confine the scope of enforcement proceedings to issues identified by the Director and to avoid duplicative and wasteful inquiries into issues which go beyond those contemplated by the Director at the time the order initiating the proceeding is issued. This is because, as the Commission observed in Marble Hill, the

> public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. 11 NRC at 441. 4/

3/ In Marble Hill, the Commission denied two requests for a hearing on an "Order Confirming Suspension of Construction" of Marble Hill Units 1 and 2 issued by the Director of the NRC Office of Inspection and Enforcement to the Public Service Company of Indiana. The Commission denied these requests because they sought consideration of enforcement remedies beyond those contemplated in the Director's order and the consideration of issues beyond those specifically identified in the Director's order. Public Service Company of Indiana (Marble Hill 1 and 2), CLI-80-10, 11 NRC 438 (March 13, 1980). Shortly thereafter, in Wisconsin Electric Power Co. (Point Beach 1), CLI-80-__ (May 12, 1980), the Commission reaffirmed the rationale contained in the Marble Hill decision and directed the Licensing Board to confine the scope of a license amendment proceeding solely to the specific issues identified by the Director of Nuclear Reactor Regulation in his Order amending the license. Finally, in Houston Lighting and Power Co. (South Texas 1 and 2), CLI-80-__ (Sept. 22, 1980), the Commission denied a request for a hearing in a show cause proceeding which sought to raise issues which went beyond the scope of the issues identified in the Order to Show Cause.

4/ In keeping with this policy, the fact that Dairyland has already shown cause to the satisfaction of the Director of NRR why it should not be reuqired to design and install a dewatering system at LACBWR would itself seem to militate against the need for any hearings in this proceeding, let alone confining the proceeding to the issues identified in the Order to Show Cause.

The policy choice which the Commission has made to avoid the wasteful diversion of the resources of the NRC Staff applies with equal force to the resources of licensees and licensing boards. There is simply no point in exploring issues in an enforcement context which can more appropriately be explored elsewhere, if, indeed, there is any need to explore them at all. 5/

The Commission cannot, and must not, permit the Appeal Board to subvert this policy by reading into an Order to Show Cause a semantic distinction that has no basis in law or fact. The Appeal Board's decision does a grave disservice to the credibility of the Director of NRR and can only serve to undermine the overall effectiveness of the Commission's enforcement policy. 6/ In this

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5/ In the NRC Staff's Brief On The Certified Question, dated October 24, 1980, the Staff stated that the use of the 0.12g value was appropriate and apprised the Appeal Board that, due to the schedule of the ongoing review of eleven selected plants, including LACBWR, as part of the Systematic Evaluation Program, it would not be in a position to present "definitive testimony and further analyses" on other aspects of the seismic hazard at the La Crosse site until June 1981 at the earliest. Thus, even if hearings on the appropriateness of the 0.12g value were necessary, or even desirable, they could not be conducted for some time. If any hearings were held on this issue, the appropriate forum would be the ongoing full term operating license proceeding for LACBWR. See Houston Lighting and Power Co. (South Texas 1 and 2), CLI-80-__ (Sept. 22, 1980).

6/ An effective enforcement program depends, in large measure, on the confidence of all licensees in the Commission's ability to adopt and follow a coherent and consistent policy which recognizes the legitimate expectations of licensees. The cornerstone of any such policy is the fact that licensees should be able to take the NRC Staff at its word. Public Service Co. of Oklahoma (Black Fox 1 and 2), CLI-80-35, 12 NRC __ (Decision on Certified Question) (dissenting views of Commissioner Hendrie).

regard, it must be noted that Dairyland, as a Commission licensee, has certain rights which entitle it to fair and equitable treatment at the hands of the Commission. The Appeal Board may feel free to run roughshod over these rights, but the Commission itself simply cannot ignore them. Cf. Consumers Power Co. (Midland 1 and 2), CLI-73-38, 6 AEC 1082, 1083 (1973). If permitted to stand, the Appeal Board Order would effectively change the ground rules of this proceeding in midstream and penalize Dairyland for relying on the obvious wording and intent of the Order to Show Cause, as well as the interpretation of the scope of the Order originally propounded by the author of the Order and the NRC Staff, and undertaking a comprehensive soils investigation program, with the encouragement and approval of the NRC Staff, designed to evaluate the liquefaction potential of the site at 0.12g. The Commission cannot, and must not, sit idly by and permit this to happen.

For all of the foregoing reasons, [7/] Dairyland believes

7/ Dairyland previously raised these issues with the Appeal Board in Licensee's Response to Certified Question (Oct. 24, 1980). It should also be noted that the Licensing Board's concerns over the appropriateness of the 0.12g value, which prompted the certified question, are largely illusory. The NRC Staff has taken the position that the 0.12g value is sufficiently conservative. The Staff's original request that the Corps of Engineers analyze the liquefaction potential at 0.2g, as well as 0.12g, was apparently only intended to obtain a better frame of reference for use in connection with the SEP Program, not to indicate any lack of confidence in the appropriateness of the 0.12g value. In fact, the report prepared for NRC by the TERA Corporation in connection with the SEP Program indicates that the 0.12g value for the LACBWR site is conservative and that the use of 0.10g would be more appropriate.

that the Commission must review ALAB-618 and reverse the decision contained therein.

Respectfully submitted,

Kevin P. Gallen

for O. S. Hiestand
Attorney for
Dairyland Power Cooperative

OF COUNSEL

Kevin P. Gallen

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Dated: December 1, 1980

7/ cont.

Finally, the Board's concern over the 0.2g value used at Tyrone is misplaced. As indicated in Appendix F to Kansas Gas & Electric (Wolf Creek 1), DD-80-3, 11 NRC 175 (1980) (Revised Director's Denial of Requests Under 10 C.F.R. § 2.206), the NRC Staff considered the .12g horizontal ground acceleration value for the SSE at Wolf Creek to be conservative even though the Wolf Creek plant was located in the same Central Stable Region Tectonic Province at the Tyrone plant and a 0.2g value was used at Tyrone. In this Appendix, the Staff also intimated that, in light of "the low level of seismicity in the vicinity of the Tyrone site," it would probably have utilized a lower value for Tyrone if the applicants had provided sufficient supporting bases and pursued the issue further. Accordingly, there is simply no need to review the appropriateness of the 0.12g value at this time within the context of this proceeding.

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DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409
	)	(Liquefaction
(La Crosse Boiling Water Reactor)	)	Show Cause)
	)	

CERTIFICATE OF SERVICE

Service has on this day been effected by personal delivery or first class mail on the following persons:

Charles Bechhoefer, Esq., Chrm.
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Ralph S. Decker
Route 4
Box 190D
Cambridge, Maryland 21613

Dr. George C. Anderson
Department of Oceanography
University of Washington
Seattle, Washington 98195

Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

John Ahearne, Chairman
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Steven Burns, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Karen Cyr, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard Shimshak
Plant Superintendent
Dairyland Power Cooperative
La Crosse Boiling Water Reactor
Genoa, Wisconsin 54632

Fritz Schubert, Esquire
Staff Attorney
Dairyland Power Cooperative
2615 East Avenue, South
La Crosse, Wisconsin 54601

Coulee Region Energy Coalition
P. O. Box 1583
La Crosse, Wisconsin 54601
Attn: Anne Morse

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

Mr. Frederick M. Olsen, III
609 N. 11th Street
La Crosse, Wisconsin 54601

Victor Gilinsky, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Peter Bradford, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Joseph Hendrie, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Thomas S. Moore
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Kevin P. Gallen

O. S. Hiestand

Dated: December 1, 1980