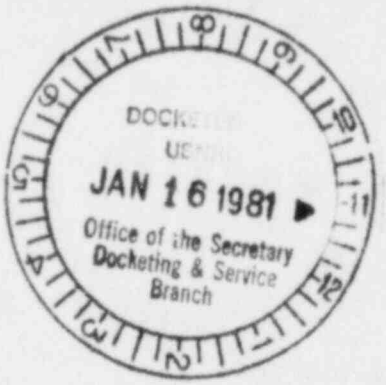
Jan 14, 1981




UNITED STATE OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| IN THE MATTER OF: | ) | |
| | ) | Docket No. 50-367 |
| NORTHERN INDIANA PUBLIC | ) | (Construction Permit |
| SERVICE COMPANY | ) | Extension) |
| (Bailly Generating Station, | ) | |
| Nuclear 1) | ) | |


OBJECTIONS TO MEMORANDUM AND ORDER OF DECEMBER 24, 1980
AND MOTION FOR CERTIFICATION

PEOPLE OF THE STATE OF ILLINOIS, by its attorney TYRONE C. FAHNER, Attorney General of the State of Illinois, pursuant to 10 C.F.R. §2.751(a)(d)*, objects to the Board's Memorandum and Order of December 24, 1980 and requests that the Board revise that Order in light of these objections or certify for determination to the Atomic Safety and Licensing Appeal Board the matters raised by these objections.

In support hereof, Illinois adopts and incorporates herein by reference "Porter County Chapter Intervenors' (1) Objections to Memorandum and Order of December 24, 1980, and Motion for Reconsidation, and (2) Motion for Certification or Referral" filed January 9, 1981. In addition, Illinois states the following:

1. Environmental Contentions. On page 5 of its Order the Board states that it is withholding ruling on the environmental contentions pending the Staff's determination of the type of environmental analysis to be made. Although the

*In that the Memorandum and Order of December 24, 1980 supplements the Board's Order Following Special Prehearing Conference issued August 8, 1980, the provisions of 10 C.F.R. §2.751a are applicable.



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Board then offers its views on the question, those views are apparently not at this point meant to be a ruling. Therefore Illinois withholds comment until a final ruling is made.

2. Newly-Filed Contentions. The Board has denied all of the newly-filed contentions except Contentions R-I 10-12, 14, and 15, which relate to the need for a new or supplemented environmental impact statement. The Board's denial of the other new contentions should be reconsidered for the following reasons:

The Board has misinterpreted the recent opinion of the Atomic Safety and Licensing Appeal Board in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC_____(November 29, 1980) ("ALAB-619"), and on the basis of that misinterpretation holds that the newly-filed contentions dealing with unresolved generic safety issues are outside the scope of the permit extension hearing in this case. In the Board's view, ALAB-619 limited the scope of permit extension hearings solely to issues admissible under Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2) ALAB-129, 6 AEC 414 (1973) ("Cook")-- that is, to health and safety or environmental issues which (1) arise from reasons associated with the requested extension and (2) cannot appropriately abide the operating license proceeding. Because the intervenors' generic safety contentions do not satisfy the first prerequisite, the Board believes that it "has no choice" but to reject them. (Order, pp. 3-4)

The Appeal Board, however, did not in ALAB-619 limit the scope of permit extension hearings to issues admissible under Cook. The Appeal Board expressly adknowledged that the two-pronged Cook test "was tailored to the particular facts of that case" and was "[n]either in terms nor by necssary implication. . .offered as an inflexible mold for passing judgment on the litigability in a permit extension proceeding of every variety of contention. . ." (ALAB-619, p.22) The Appeal Board emphasized the importance attached in Cook to "the totality of the circumstances"

and the need for a "common sense" approach to determining the scope of good cause proceedings.* (ALAB-619, pp. 22-23) Furthermore, the Appeal Board observed that where a compelling matter of safety was involved the two-step licensing process did not preclude consideration of such matter prior to the operating license stage. "Manifestly, if there currently exists substantial cause to believe that the Bailly site is unacceptable, now is the time to explore the matter further--rather than years hence when, following a substantial additional monetary investment, the facility is nearing completion at that site." (ALAB-619, p.22) Thus, the Appeal Board made clear that licensing boards are not restricted in good cause hearings to consideration of only those compelling safety issues which arise from the reasons assigned for the extension request.

3. Short-Pilings. The contentions concerning short pilings must be admitted in this proceeding because they satisfy the two-pronged test of Cook.

In its August 8, 1980 Order Following Special Prehearing Conference, this Board decided that the first prong is satisfied: "Unquestionably, the change to short pilings is a safety issue that arises from a reason for the delay in the completion of the facility." (p.15) As to the second prong, the Board need not find that the short pilings safety issue is in fact compelling and cannot abide the operating license stage, since, as the Appeal Board stated in ALAB-619, the intervenors' assertions to that effect must be taken as true for the purposes of ruling on admissibility, citing Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). (ALAB-619, p.21)

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* A careful reading of Cook indicates that there the petitioners concerned themselves only with issues arising from reasons associated with the requested permit extension and did not assert that other issues should be admitted as well. Thus the Appeal Board in Cook was not confronted with the question whether matters unrelated to the extension request are within the scope of a good cause proceeding.

Beyond that, this Board has found that the short pilings question is in fact too major and sig. ficant a design feature to defer for later consideration:

> To begin with, it is clear that, had the short pilings design proposal been in the present posture at the time of the construction permit hearings, the matter would have been considered by the Licensing Board. Despite Permittee's insistence that it is the option of an applicant to defer [until] the operating license proceeding the consideration of design features such as the short pilings proposal..., it is inconceivable that a known design feature of this significance would not have been brought up by the Staff and heard by the Board, even if the applicant had sought to defer it.

(Order, pp. 5-6 ; emphasis added) It is hard to imagine a board stating in stronger terms that an issue is one which may not appropriately abide operating license proceedings. It should also be noted that the Staff by its actions has demonstrated that the short pilings proposal cannot be deferred: if that proposal were one which could abide the operating license stage, the Staff would not have stayed further construction pending evaluation but would have allowed construction to continue while an evaluation was made.

Under Cook the proponent of a contention must show nothing more than that the contention meets the two-pronged test in order to trigger the right to a public hearing. Then, on the basis of evidence adduced at the hearing, the Board approves or denies the particular design or other safety issue in question or determines that there is reasonable assurance that it will be satisfactorily resolved by the time the extended construction permit expires.

In requiring that the intervenors give "substantial reason for a board to deny the" pilings design change (Order, p.6), the Board adds a third prong to the Cook admissibility test. The Board thus also indicates a misconception of the burden of proof in a good cause proceeding. It is not necessary that the intervenors prove that the short pilings plan is unsafe. All they need show is that the pilings plan is too important a safety question to defer, and then NIPSCO

carries the burden of proving that the plan is safe (or of providing information sufficient to support a 10 C.F.R. §50.35 finding of reasonable assurance-- i.e., of proving that there is good cause for the Board to grant the permit extension request.

Furthermore, the statement that the intervenors have not given reasons compelling denial of the short pilings proposal indicates that the Board has already adjudged the merits of the short pilings contentions. The Board has also apparently found, without input from the intervenors concerning the Staff and NIPSCO's R & D program, that that program is adequate and reasonable assurance exists that the pilings question will be resolved in the future. Because Illinois is entitled to an adjudicatory hearing on the short pilings design proposal, Illinois is entitled to offer evidence disputing whether a §50.35 reasonable assurance finding can be made and whether any particular R & D program advanced by the applicant and Staff is adequate. The content of any R & D program necessitated by §50.35 is to be determined not on an ex parte basis but in the adjudicatory setting. The Board states at pages 6-7 of the Order:

> Whether any such [R & D] program sanctioned by the Board would agree in every particular with the extensive program already adopted by the Permittee and Staff, as summarized in the Staff's Response to the Board Questions (Lynch Affidavit, pp. 2-8) is not critical in deciding whether a hearing on that issue should be held at this juncture. Nothing submitted to the Board suggests that there exists any material insufficiency in the program already adopted to test the short pilings design. . . .

The possible similarity of a Board-sanctioned R & D program to the current Staff and Permittee R & D program is not only "not critical"; it is completely irrelevant. The only question before the Board at this point is whether under the Atomic Energy Act and the Nuclear Regulatory Commission's own rulings in Cook and ALAB-619 the intervenors' short pilings contentions are admissible in these construction permit extension proceedings.

In light of the foregoing, PEOPLE OF THE STATE OF ILLINOIS requests that the Board reconsider its Order of December 24, 1980 or certify to the Appeal Board the question of the admissibility of the intervenors' newly-filed and short pilings contentions.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: _____
ANNE RAPKIN
Assistant Attorney General

OF COUNSEL:

ANNE RAPKIN
Assistant Attorney General
Environmental Control Division

MARY JO MURRAY
Assistant Attorney General
Environmental Control Division

188 West Randolph Street
Suite 2315
Chicago, Illinois 60601
[312] 793-2491

DATED: January 14, 1981

CERTIFICATE OF SERVICE

I, ANNE RAPKIN, hereby certify that copies of Objections to Memorandum and Order of December 24, 1980 and Motion for Certification were served on each of the persons on the attached Service List by depositing in the United States Mail, postage prepaid, on this 14th day of January, 1981.

ANNE RAPKIN

SERVICE LIST

Herbert Grossman, Esq.
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Maurice Axelrad, Esq.
Kathleen H. Shea, Esq.
Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

William H. Eichhorn, Esq.
Eichhorn, Eichhorn & Link
5243 Hohman Avenue
Hammond, Indiana 46320

Diane B. Cohn, Esq.
William P. Schultz, Esq.
Suite 700
2000 P Street, N.W.
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 Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

George and Anna Grabowski
7413 W. 136th Lane
Cedar Lake, Indiana 46303

Dr. George Schultz
807 E. Coolspring Road
Michigan City, Indiana 46360

Richard L. Robbins, Esq.
Lake Michigan Federation
53 W. Jackson Boulevard
Chicago, Illinois 60604

Mr. Mike Olszanski
Mr. Clifford Mezo
Local 1010
United Steelworkers of America
3703 Euclid Avenue
East Chicago, Indiana 46312

Steven C. Goldberg, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert J. Vollen
Jane M. Whicher
BPI
109 North Dearborn Street
Chicago, Illinois 60602

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

Stephen Laudig, Esq.
21010 Cumberland Road
Noblesville, Indiana 46060