

6/8/81

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO PORTER COUNTY  
CHAPTER INTERVENORS' APPLICATION PURSUANT  
TO § 2.720(h)(2)(i)

I. INTRODUCTION

On May 19, 1981, Porter County Chapter Intervenors ("PCCI") filed with this Board an application pursuant to 10 CFR § 2.720(h)(2)(i) by which they sought an order requiring the attendance and testimony at a deposition of James G. Keppler. A Notice of Deposition of Mr. Keppler, who is the director of the Division of Resident and Regional Reactor Inspection, Region III, Office of Inspection and Enforcement ("IE"), was filed with the application.

The NRC Staff opposes Mr. Keppler's deposition for the following reasons: 1) PCCI proposes to examine Mr. Keppler on matters which are not relevant to any issue in the proceeding; 2) PCCI has failed to make the showing required by § 2.720(h)(2)(i), namely that exceptional circumstances, such as a case in which a particular named NRC employee has

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direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations, require the attendance and testimony of Mr. Keppler.

## II. DISCUSSION

- A. PCCI seeks to examine Mr. Keppler on matters which are not relevant to any issue in this proceeding.

Under the NRC's rules of practice, discovery "shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of the [§ 2.751a] prehearing conference." 10 C.F.R. § 2.740 (b)(1). Two of the matters on which PCCI seeks to examine Mr. Keppler, NIPSCO's technical competence and NIPSCO's quality assurance program, were mentioned in a memorandum from Mr. Keppler to James Sniezek, Director, Division of Resident and Regional Inspection, I.E. Mr. Keppler stated in the memorandum his opinion that the issues of this construction permit extension proceeding should include, among other things, matters concerning NIPSCO's technical competence and its quality assurance program. It is on these matters, among others, that PCCI now seeks to depose Mr. Keppler.

PCCI served Mr. Keppler's Memorandum on this Board and the parties to this proceeding on January 21, 1981 and subsequently used it as a basis for its proposed Contention 14, which was held to be inadmissible by this Board in an Order of March 30, 1981. In that Order the Board

noted that it had on previous occasions ruled on the issues contained in Contention 14 and that those issues had been held inadmissible because they went beyond the scope of this proceeding. Memorandum and Order, March 30, 1981, at 4.<sup>1/</sup>

In seeking to depose Mr. Keppler, PCCI is attempting for the third time to bring into contention matters rejected by the Board as irrelevant to this proceeding and repeatedly rejected by Staff as matters playing no part in the case it intends to present. Darrell Eisenhut, Director, Division of Licensing, Office of Nuclear Reactor Regulation, said in the letter to the Board forwarding both the subject memorandum and a memorandum from Mr. Sniezak to Mr. Eisenhut "...the enclosed documents [the two memoranda] do not alter the Staff position as represented in

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<sup>1/</sup> In its Order Following Special Prehearing Conference (August 7, 1980) the Board narrowed PCCI's proposed Contention 7 which sought to introduce many of the same issues as those later proposed in Contention 14:

"To the extent that Petitioners seek to establish that the delay was attributable to technical incompetence which brings into question Permittee's ability to construct a safe facility, we admit the contention as falling within the scope of this proceeding as delineated by Cook ALAB-129, supra. To the extent, however, Petitioners seek to litigate any alleged lack of technical ability not actually manifested in the delay in construction, that matter has already been determined in the CP proceeding and is not admissible here."

Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), 12 NRC 191 (1980). At 221-22.

its pleadings before the Board in this proceeding."<sup>2/</sup> Staff reiterated in its Response of March 26, 1981 that the recommendations of the IE Staff memoranda regarding the the scope of proceeding had not been adopted by the Director of the Division of Licensing.

For these reasons, the Staff opposes PCCI's application as it relates to the issue of overall technical competence and the adequacy of NIPSCO's quality assurance program.

B. PCCI has failed to make the showing required by § 2.720(h)(2)(i) for deposing named Staff personnel.

In accordance with 10 CFR § 2.720(h)(2)(i), the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations, require the attendance and testimony of named NRC personnel. The proviso suggests a three part test: 1) direct personal knowledge 2) of a material fact 3) not known to the witnesses made available. Without making the required showing PCCI concludes that Mr. Keppler's memorandum indicates "direct personal knowledge of material facts concerning the Bailly plant which are the subject of that memorandum and which could not be known to M. David Lynch, the witness thus far indicated as available by the Staff." PCCI makes no attempt to show that Mr. Keppler has direct personal knowledge of facts material to this case, but rather focuses on the subject of the memorandum, which concerns a

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<sup>2/</sup> Letter to the Board, from Darrell G. Eisenhut, dated January 16, 1981.

perceived need on the author's part "to broaden the Hearing issues to include the matters discussed in this memorandum." Mr. Keppler's memorandum states that it is his understanding that the issues in the Bailly Construction Permit Extension relate to "environmental conditions that may be caused by extension of the Construction Permit, the reasons for construction delay, and the competency of the utility as evidenced by the delays" and that it is his belief that certain other matters should be considered in the proceeding, namely: (1) anticipated modifications to the "one-of-a-type 645 Mwe Mark II BWR 5 design" and the increased costs attributable to the modifications; (2) need for upgrading the Quality Assurance organization and program identified in the construction permit application; and (3) the overall competence of the utility to construct and operate the facility in view of changed standards. Mr. Keppler's memorandum indicates an awareness of what the issues in the case are and expresses an opinion that the hearing issues should be broadened. It makes no representation whatsoever to the author's having "direct personal knowledge" of any factual matter which is material to this proceeding.

PCCI's showing on the third part of the test is based on a conjecture at best. PCCI does not know whether Mr. M. David Lynch, the Bailly project manager, who was designated by Staff as its witness in a letter of October 7, 1980 to counsel for PCCI, lacks direct personal knowledge of material facts known to Mr. Keppler. Although Staff made Mr. Lynch available for deposition at the NRC Staff Offices in Bethesda, Maryland

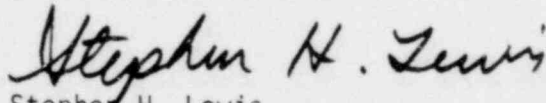


on October 30-31, 1980, or on other mutually convenient dates, PCCI moved to compel that the deposition take place in Chicago. Staff opposed PCCI's Motion and this Board issued a Memorandum and Order on January 19, 1981, restricting the location for Mr. Lynch's deposition to the Washington, D.C. metropolitan area unless Mr. Lynch were present in Chicago under circumstances which would permit the taking of his deposition. Consequently, Mr. Lynch has not yet been deposed by PCCI. Regardless of whether Mr. Lynch may lack knowledge of the subject matter on which Mr. Keppler's memorandum is based, that subject matter is totally irrelevant to any issue in this proceeding.

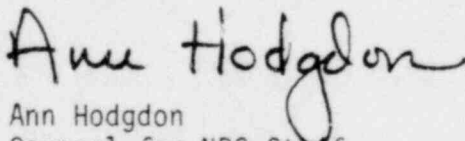
CONCLUSION

For the reasons discussed above, the Atomic Safety and Licensing Board should deny PCCI's application for failure to make the requisite showing under § 2.720(h)(2)(i).

Respectfully submitted,



Stephen H. Lewis  
Counsel for NRC Staff



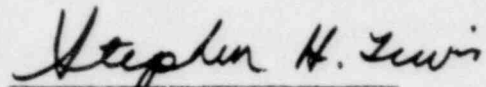
Ann Hodgdon  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 8th day of June, 1981



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

Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
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