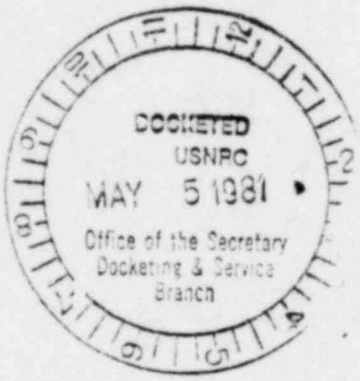

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-155-OLA
CONSUMERS POWER COMPANY	)	(Spent Fuel Pool
	)	Expansion)
(Big Rock Point Nuclear Power Plant))		

CONSUMER POWER COMPANY'S MOTION TO STRIKE
AND RESPONSE TO PETITIONS FOR REVIEW

Consumers Power Company ("Licensee") hereby requests that the Commission strike, as unauthorized pleadings, the "Petition for Review of Decision of the Atomic Safety and Licensing Appeal Board That a[n] Environmental Impact Statement Is Not Required as a Matter of Law" of Intervenors Christa-Maria, Mills and Bier, dated April 17, 1981, the "Motion for Full Commission Review" of Intervenor O'Neill, dated April 19, 1981, as well as the "Motion For Review of Decision" of Mr. John Leithauser, dated April 23, 1981.[1/] Moreover, Licensee submits that this case does not warrant that the Commission review the Appeal Board's decision on its own motion.

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1/ Although Mr. Leithauser is not an Intervenor in this proceeding, the Appeal Board granted him leave to brief the issues.

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A. INTERVENORS' PLEADINGS ARE UNAUTHORIZED

The petition of Intervenors Christa-Maria, et al., and the motion of Mr. Leithauser are brought under section 2.786 of the Commission's Rules of Practice, 10 C.F.R. § 2.786. The motion of Intervenor O'Neill, although not specifically referencing section 2.786, is presumably brought under the same section because no other rules of practice are applicable. Under section 2.786(b)(1), a party may file with the Commission a petition for review of a decision or action by an Atomic Safety and Licensing Appeal Board "other than a decision or action on a referral or certification under . . . [§] 2.730(f)." The decision by the Appeal Board of which Intervenors seek review here is a decision on a certification under section 2.730(f), as the petition of Christa-Maria itself states on page 2. On September 12, 1980, the Atomic Safety and Licensing Board issued an order in this proceeding and referred its ruling to the Appeal Board under section 2.730(f); the Appeal Board accepted the referral in an unpublished order issued the same day, and on March 31, 1981 issued thereon the decision of which review is sought here.

Furthermore, under section 2.786(b)(9), "[e]xcept as provided in this section and § 2.788, no petition or other request for Commission review of a decision or action of an

Atomic Safety and Licensing Appeal Board will be entertained."[2/] Because the Appeal Board rendered its decision on certification, under section 2.786(b)(9), Intervenors' pleadings are ones that will not be entertained, and Licensee requests that the Commission strike them as unauthorized.

B. COMMISSION REVIEW OF THE APPEAL BOARD'S DECISION WOULD NOT BE APPROPRIATE

Section 2.786(a) of the Commission's rules provides that the Commission may review a decision of the Appeal Board on its own motion "in cases of exceptional legal or policy importance." Under section 2.786(b)(4)(i), similar criteria apply to the Commission's grant of a properly brought petition for review:

> A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy.

The issue raised on this appeal and in Intervenors' petitions for review is a matter of law. Not only was the Appeal Board's

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2/ Section 2.788 provides for applications for a stay of a decision pending filing of a petition for review. Intervenors do not attempt to invoke its provisions and could not, inasmuch as they are not entitled to petition for review of the Appeal Board's decision.

decision correct, but this issue is not one of major legal importance warranting exercise of the Commission's discretionary power of review.

1. The Appeal Board's Decision Was Correct

The Appeal Board's carefully reasoned decision correctly resolved the issue before the Board, and Intervenors' imputations of legal error are unjustified. The Appeal Board held that in determining whether an amendment to a nuclear plant's operating license to permit the expansion of the spent fuel pool constitutes a "major federal action" for NEPA purposes, the Staff need consider only the pool expansion itself and not the continued period of plant operation that the expansion may make possible. The Board noted that continued plant operation was a "secondary" or "indirect" effect of pool expansion, but reasoned that "the whole purpose in considering primary or secondary impacts of an action" under NEPA "is to determine if they have a cause-and-effect relationship with any environmental changes." Appeal Board Deicison at 26. Because in this case continued plant operation merely represents a maintenance of the environmental status quo, there are no environmental changes to evaluate, apart from any changes produced by the increased number of spent fuel assemblies that the expanded pool will accommodate.

In Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), the court held that there was no major federal action requiring preparation of an EIS under NEPA when the proposed federal action would not change the environmental status quo. In Westside Property Owners v. Schlesinger, 597 F.2d 1214 (9th Cir. 1979), the court held that where a federal action had been approved before NEPA, a later action relating to it but which did not increase its environmental impacts was not a major federal action. Intervenor Christa-Maria argues that these precedents supporting the Appeal Board's analysis are inapplicable because they dealt with federal actions having less environmental impact than the operation of a nuclear power plant. This argument is irrelevant because the question before the Board was not how large the present impacts of plant operation are, but whether the continuation of these same impacts over the remainder of the license term must be considered when an amendment is sought without which the plant may have to shut down. The cases support the Board's conclusion that a proposed federal action that will not change the environmental status quo is not a major federal action having a significant effect on the environment.

The main point of Intervenors Christa-Maria, et al., in their petition for review is that because the Big Rock plant received its operating license long before the

effective date of NEPA, no EIS was prepared on it; therefore, they argue, since an EIS covering continued plant operation would not be duplicative, it is required for any federal action that may permit such operation. As the Appeal Board correctly reasoned, however, it is illogical to conclude "that an action that otherwise may not have a significant effect on the environment is transformed into one that does have such an effect simply by the absence of an environmental review of a different, prior action." Decision at 36, n. 36.

The only real significance of the fact that Big Rock was licensed before NEPA is, as Licensee argued before the Appeal Board, that any environmental review of plant operation during the term of the operating license at this time would constitute an impermissible retroactive application of NEPA. The Appeal Board did not decide the issue of retroactivity. The Board did, however, correctly distinguish Minnesota PIRG v. Butz, 498 F.2d 1314, (8th Cir. 1974), the decision chiefly relied on by Christa-Maria for the contention that there would be no retroactive application of NEPA in the present case. The Board noted the factual dissimilarity of Butz, a case involving "[r]enewal of old contracts and negotiation of new ones for activities on federally-administered land." Decision at 21. In this case, the amendment sought by Licensee would not extend the term of Big Rock's operating license.

2. This Case Does Not Present A Significant Legal Issue for Review

Furthermore, aside from the correctness of the Appeal Board's decision, this case is not one that warrants Commission review as presenting a significant issue of law or policy that could affect the environment or the other interests listed in section 2.786. As the Appeal Board recognized, "[t]he situation presented by this case is unusual, if not unique." Decision at 18. Licensee knows of no other case to which this decision would be applicable.[3/] The decision is, therefore, without precedential value and thus does not warrant Commission review as presenting a significant legal question.

Intervenor Christa-Maria admits this, but argues that the Commission should review the decision at this stage because it will eventually have to decide this issue when it reviews the Licensing Board's grant or denial of the license

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3/ In Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB 617, 12 NRC 430 (1980), the Appeal Board withheld action, pending its decision in this case, on a question certified to it by a Licensing Board. The decision ultimately rendered in this case by the Appeal Board on March 31, 1981, however, will not have precedential effect on the La Crosse case. The issue certified in La Crosse was whether the Licensing Board, in the context of a spent fuel expansion proceeding, had jurisdiction to inquire into the need for the power to be generated by the facility. Although the need-for-power issue was briefed by the parties in this case, the Appeal Board did not decide it, and the Board's decision here should thus not influence the outcome in La Crosse.

amendment. This is not a proper consideration, however, under section 2.786. Moreover, Christa-Maria's assumption that the Licensing Board's final decision will inevitably be reviewed by the Commission is incorrect; such review would be discretionary and would also be governed by section 2.786, with the same considerations applicable. Indeed, Christa-Maria's incorrect assumption illustrates why the Commission's rules do not grant parties a right to seek review of an Appeal Board decision made on a certification under section 2.730(f): such decisions are interlocutory in character. The Appeal Board's decision does not significantly affect the environment or any other interest enumerated in section 2.786(b)(4) because it does not determine the outcome of the proceeding before the Licensing Board. This is why such interlocutory appeals are appropriate for Commission review only "in cases of exceptional legal or policy importance," when the Commission undertakes such review of its own motion. Because of the unique situation of the Big Rock plant, this case clearly does not possess such importance.

For all the reasons given above, Licensee requests that the Commission strike as unauthorized pleadings the petition of Ms. Christa-Maria and the motions of Messrs. O'Neill and Leithauser. Furthermore, Licensee submits that the Appeal Board's decision is inappropriate for Commission review because

the question that it presents does not possess legal or policy significance; Licensee therefore requests that the Commission not undertake such review on its own motion.

Respectfully submitted,

Joseph Gallo

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Peter Thornton /ds

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Dated: May 4, 1981

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NUCLEAR REGULATORY COMMISSION

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	)	Docket No. 50-155-OLA
CONSUMERS POWER COMPANY	)	(Spent Fuel Pool
	)	Expansion)
(Big Rock Point Nuclear Power Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of CONSUMERS POWER COMPANY'S MOTION TO STRIKE AND RESPONSE TO PETITIONS FOR REVIEW in the above-captioned proceeding were served on the following by deposit in the United States mail, first-class postage prepaid, this 4th day of May, 1981.

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