

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

7/17/81

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO REQUEST  
OF INTERVENORS CHRISTA-MARIA, ET AL.  
FOR PREPARATION OF AN  
ENVIRONMENTAL IMPACT STATEMENT



I. INTRODUCTION

The Staff of the Nuclear Regulatory Commission (Staff) hereby responds to the request of Intervenors Christa-Maria, et al., for the preparation of an environmental impact statement (EIS) concerning the ten years of additional operation which they allege will result from the requested expansion of the capacity of the Big Rock spent fuel pool. This request was filed on June 12, 1981. The Staff opposes the exercise of discretion on the part of this Atomic Safety and Licensing Board (Licensing Board) to order the preparation of an EIS on the grounds that:

1. The Licensing Board lacks the authority to require the Staff to prepare a document which is not required as a matter of law; and
2. Even if the Licensing Board had such discretionary authority, its exercise in the instant case would be improper.

DS07  
3  
1/1

## II. BACKGROUND

On January 17, 1980, the Licensing Board presiding in this proceeding issued its Order Following Special Prehearing Conference. Consumers Power Co. (Big Rock Point Plant), LBP-80-4, 11 NRC 117 (1980). In that Order the Board posed the following question to the parties:

"Where the facility has never been subjected to National Environmental Policy Act of 1969 (NEPA) review because it was licensed before NEPA, does a license amendment which would permit the continued operation of the facility either require or permit considering a cost-benefit analysis or the need for power in the license amendment proceeding, notwithstanding that the staff may issue a negative declaration?"

LBP-80-4, supra, 11 NRC at 133. In its decision on the question, the Licensing Board ordered the Staff to prepare an environmental impact statement concerning the environmental impacts of the proposed spent fuel pool capacity expansion and the additional term of operation such an expansion would allow. Consumers Power Company (Big Rock Point Plant), LBP-80-25, 12 NRC 355, 366 (1980).

The Licensing Board referred its ruling to the Atomic Safety and Licensing Appeal Board (Appeal Board) under 10 C.F.R. § 2.730(f). Id. The Appeal Board accepted this referral, and established a briefing schedule. Memorandum and Order of September 12, 1980. Oral argument on the issue was heard on January 9, 1981.

The Appeal Board issued its decision on March 31, 1981. Consumers Power Company (Big Rock Point Plant), ALAB-636, 13 NRC \_\_\_ (March 31, 1981). In its decision the Appeal Board reversed the Licensing Board, holding that NEPA did not require that an environmental impact statement

on continued plant operation be prepared where the proposed action would not change the environmental status quo. ALAB-636, supra, 13 NRC \_\_\_\_, slip op. at 26, 32-33. In its decision the Appeal Board noted that the Commission itself would not be precluded by NEPA or Commission regulations from ordering an environmental review of continued plant operation as a matter of policy. Id. at 31-32, n. 29. The Appeal Board further stated that it would not reach the issue of whether the Licensing Board had the discretion to do so, since the Licensing Board did not purport to exercise its discretion in this matter. Id.

Petitions for Commission review of ALAB-636 were filed by Intervenor Christa-Maria, et al., on April 20, 1981, and by Intervenor John O'Neill, II, on April 19, 1981. On June 12, 1981, the Commission decided not to review ALAB-636, thus making it the final decision of the agency in this matter. Memorandum to Board and Parties in the Big Rock Proceeding from S. J. Chilk (June 18, 1981).

Intervenors Christa-Maria, et al., focusing on the Appeal Board's language in ALAB-636 concerning the discretionary preparation of environmental impact statements, now request the Licensing Board to exercise its discretion and order the Staff to prepare an environmental impact statement on the ten years of additional operation which they allege the proposed spent fuel pool capacity expansion would permit. In support of their position Intervenor argue first that 10 C.F.R. § 2.721(d) and Appendix A to 10 C.F.R. Part 2 of the Commission's regulations delegate to the Licensing Board the authority to order the Staff to prepare an EIS as a matter of policy, even though such an EIS would not be required as a matter of law. Request for Preparation of Environmental Impact Statement

(hereinafter Intervenors' request) at 2 (June 12, 1981). Intervenors next argue that the language in various sections of the Atomic Energy Act of 1954, as amended, (hereinafter Atomic Energy Act) concerning public health and safety provides the Licensing Board with the necessary discretion to order the preparation of an EIS in this case. Id. at 5. Both of these arguments are without merit. The Staff concludes that the exercise of the Board's discretion to require the preparation of an EIS in the circumstances of this case is neither authorized nor appropriate.

### III. ARGUMENT

#### A. The Licensing Board Lacks the Discretionary Authority to Order the Preparation of an Environmental Impact Statement as a Matter of Policy.

Licensing Boards are vested with the authority by the Commission's regulations to:

"...conduct such hearings as the Commission may authorize or direct, make such intermediate or final decisions as the Commission may authorize in proceedings to grant, suspend, revoke, or amend licenses or authorizations, and perform such other regulatory functions as the Commission may specify."

10 C.F.R. § 1.11. While the Commission has chosen to delegate certain of its adjudicatory responsibilities to either the Licensing Board or Appeal Board, 10 C.F.R. §§ 2.718 and 2.785, it has not chosen to delegate its policy-making authority to adjudicatory boards.

It is the Commission itself which has the authority to make policy decisions. See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5841(a)(3) which states: "In carrying out any of his functions under

the provisions of this section the Chairman shall be governed by general policies of the Commission...". As the Commission pointed out in Offshore Power Systems, Inc. (Floating Nuclear Plants), CLI-79-9, 10 NRC 257, 261 (1979): "Unlike the Board below, we are empowered to make policy as well as to apply it." Both Appeal Boards and Licensing Boards have long recognized that, where policy questions are concerned, the Commission alone must resolve the questions. Offshore Power Systems, Inc. (Floating Nuclear Plants), ALAB-500, 8 NRC 323 (1978); Exxon Nuclear Company (Nuclear Fuel Recovery and Recycling Center), ALAB-425, 6 NRC 199, 204 (1977); Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit 3), ALAB-186, 7 AEC 245 (1974); Exxon Nuclear Company (Nuclear Fuel Recovery and Recycling Center), LBP-77-38, 5 NRC 1447 (1977). The Licensing Board in Exxon, supra, correctly characterized the situation in which an adjudicatory board finds itself when confronted with policy questions when it stated: "...we believe an expression of our views upon policy matters is outside our bailiwick." Exxon, supra, 5 NRC at 1451.

In ALAB-636, supra, the Appeal Board held that NEPA did not require the preparation of an environmental impact statement on continued plant operation at Big Rock. Slip op. at 32-33. Intervenors are now requesting that the Licensing Board disregard this lack of a legal requirement, and order the preparation of an environmental impact statement on continued plant operation as a matter of policy. See Intervenors' request at 5. The argument they put forward as support for their view that the Licensing Board has such authority centers around

10 C.F.R § 2.721(d) of the Commission's regulations. This regulation is inapposite. It merely states:

"An atomic safety and licensing board shall have the duties and may exercise the powers of a presiding officer as granted by § 2.718 and otherwise in this part. ...[A]ny powers which could be exercised by a presiding officer or by the Chief Administrative Law Judge may be exercised with respect to such a proceeding by the chairman of the board having jurisdiction over it."

This regulation provides no delegation of any power to the Licensing Board to make policy decisions. The powers and duties of a presiding officer are set forth in 10 C.F.R. § 2.718. These powers and duties do not include the authority to make policy decisions. No other sections of the regulations clothe the Licensing Board with such policy-making authority. Therefore, an action by this Licensing Board ordering the preparation of an EIS as a matter of policy would not be consistent with the Commission's regulations. Reliance on Appendix A to 10 C.F.R. Part 2 does not aid Intervenors. Section VIII(b) of Appendix A concerns operating license proceedings, and relates to the Board's authority in those proceedings to raise serious safety and environmental issues on its own motion. This is a license amendment proceeding. In addition, even in operating licensing proceedings, Section VIII(b) does not allow Licensing Board's to make policy determinations.

Intervenors cited various sections of the Atomic Energy Act which they argue gives the Commission broad discretion to protect the health and safety of the public. They then argue that this discretion has been delegated to the Licensing Board. Intervenors' request at 5. None of the cited sections delegate to the Licensing Board the authority to make

policy determinations while considering health and safety matters in adjudicatory proceedings. In fact, the cited sections relate to different functions of the Commission, and do not concern adjudicatory proceedings. For example, section 2201(i)(3) pertains to the authority of the Commission to prescribe any regulations it determines necessary to conduct the activities authorized pursuant to the Atomic Energy Act. Certainly, the Board does not have authority to prescribe regulations. Section 2232(a) discusses what information shall be contained in license applications filed with the Commission. Intervenors have failed to explain how these particular sections apply to the question of preparation of an EIS. They argue that an EIS is necessary for the protection of the public health and safety in this proceeding, but fail to state any reasons for this view. In making this argument they are implying that the Appeal Board has ignored the public health and safety in determining that an EIS on continued plant operation was not required. No evidence has been presented to either the Appeal Board or to this Licensing Board which could lead these boards to believe that the lack of an EIS on continued plant operation would present a risk to the health and safety of the public. Therefore, this argument is without merit.

In addition it must be remembered that Intervenors filed a petition for review of ALAB-636 with the Commission. In their petition Intervenors made some of the same arguments they are now presenting to the Licensing Board. For example, they argue that an EIS might lead to further information on the health and safety consequences of the continued operation of Big Rock. Petition for Review of Decision of the Atomic Safety and Licensing Appeal Board that a Environmental Impact Statement

is not Required as a Matter of Law at 6 (April 20, 1981). The Commission declined to review ALAB-636. Memorandum to Board and Parties in the Big Rock Proceeding from S. J. Chilk (June 18, 1981).

Intervenors now argue before the Licensing Board that the preparation of an environmental impact statement would provide information about the presently existing environmental impact of the Big Rock Point facility, and would alleviate the anxiety of local residents about the plant. Intervenors' request at 4-5. These arguments boil down to the argument that, for policy reasons, it would be desirable to have an environmental impact statement covering the continued operation of the Big Rock facility. Since the Commission has neither chosen to make this decision itself nor delegated its policy-making authority to this Licensing Board to so decide, Intervenors' argument must fail. Their request for the preparation of an environmental impact statement must be denied.

- B. It Would be an Abuse of Discretion, Assuming the Board had such Discretion, for this Licensing Board to Require the Preparation of an Environmental Impact Statement Covering the Continued Operation of the Big Rock Facility.

The Commission has delegated to the Staff the authority to review, evaluate, and process applications for licenses and license amendments. 10 C.F.R. § 1.61; NRC Manual Chapter 0123-021; Northeast Nuclear Energy Company (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436, 437 (1975). The Staff's evaluation responsibilities are independent of the Licensing Board's responsibilities. Offshore Power Systems, Inc.



(Floating Nuclear Plants), ALAB-489, 8 NRC 194, 206 (1978); New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978).

Adjudicatory boards do not have the power to direct the Staff in the performance of its administrative functions. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); NEP, supra, 7 NRC at 279; Montague, supra, 1 NRC at 437. The role of Licensing Boards is analogous to the relationship between reviewing courts and administrative agencies. Off-shore Power Systems, ALAB-489, supra, 8 NRC at 203. This is particularly true in the case of license amendment proceedings since the Boards are not required to make the extensive independent findings required of them in construction permit proceedings.<sup>1/</sup> As the Appeal Board noted, the Staff's function is an important one and should not be bypassed. See ALAB-636, supra, 13 NRC\_\_\_, slip op. at 39.

Intervenors Christa-Maria, et al., are asking this Licensing Board to exceed its authority and direct the Staff in the performance of its work. They base this request on the Board's ability to "take 'any other action' consistent with the Atomic Energy Act and the regulations of the

---

<sup>1/</sup> Compare Part 2, Appendix A, Section VI(c) (Posthearing Proceedings, Including the Initial Decision) with 10 C.F.R. § 51.52(d) ("In any proceeding in which a hearing is held for the issuance of a permit, license, or order, or amendment thereto...where the Director of Nuclear Reactor Regulation...has determined that no environmental impact statement need be prepared for the particular action in question, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action covered by NEPA and this part in accordance with the provisions of Subpart G of Part 2 of this chapter. In such proceedings, the presiding officer will decide any such matter in controversy among the parties.")

NRC." Intervenors' request at 2. This argument ignores the fact that the language of 10 C.F.R. § 2.718 does not constitute a delegation to the Board of the authority to control the work of the Staff. See, e.g., NEP, supra, 7 NRC at 280.

Intervenors also rely on the cases of Tennessee Valley Authority (Hartsville Nuclear Plant Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572 (1977), and Offshore Power Systems, ALAB-489, supra, as support for their theory that this Licensing Board has the discretion to order the preparation of an EIS. Their reliance upon Hartsville is misplaced. In Hartsville the Appeal Board was dealing with an issue raised by a Licensing Board in connection with issuance of a limited work authorization (LWA). The Licensing Board in Hartsville was not determining how the Staff should conduct its environmental review. They were merely considering whether a certain activity not previously considered by them should be allowed at the LWA stage of plant construction. This was not an exercise of discretion by the board to direct the Staff in the performance of its administrative functions. Rather, the decisions of both the Licensing Board and Appeal Board discussed whether the construction of off-site transmission lines is an activity to be encompassed in an LWA as a matter of law.

Intervenors cited Offshore Power Systems, ALAB-489, supra, to support their position that the Board has the discretion to order the Staff to prepare an EIS, due to the broad power of the Board over the hearing process. The Appeal Board in Offshore Power Systems was not concerned with directing the Staff as to the type of review to be performed. The Appeal Board specifically pointed out that the order in question was a

Licensing Board's scheduling order. Offshore Power Systems, ALAB-489, supra, at 198. The Licensing Board directed the Staff as to when to produce the Final Environmental Statement, not whether to produce it. Therefore, this case lends no support to Intervenors' position.

The Staff has conducted its environmental review of the application submitted to it by the Licensee. The Staff determined that the proposed expansion would not significantly affect the quality of the human environment. Environmental Impact Appraisal issued May 15, 1981. The role of the Licensing Board in this proceeding should be to consider the adequacy of this determination in light of the matters placed in controversy by the parties. After such an examination, the Board should then make either positive or negative findings with regard to those matters in controversy. In any event, however, it should deny Intervenors' request for the preparation of an environmental impact statement on continued plant operation.

C. Intervenors' Request for Preparation  
of an EIS as a Matter of Policy Constitutes  
a Late-Filed Contention which does not  
meet the Requirements of 10 C.F.R. § 2.714.

Intervenors now ask the Licensing Board to require the preparation of an EIS covering continued operation of the Big Rock facility for various policy reasons. This request was not one of the nine contentions filed by Christa-Maria, et al., before the special prehearing conference in 1979. See Restatement of Contentions of Christa-Maria (November 20,

1979).<sup>2/</sup> The environmental portions of this license amendment proceeding are governed by 10 C.F.R. § 51.52(d) of the Commission's regulations.

Section 51.52(d) states:

"In any proceeding in which a hearing is held for the issuance of a permit, license, or order, or amendment thereto...where the Director of Nuclear Reactor Regulation...has determined that no environmental impact statement need be prepared for the particular action in question, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action covered by NEPA and this part in accordance with the provisions of Subpart G of Part 2 of this chapter. In such proceedings, the presiding officer will decide any such matters in controversy among the parties."

Pursuant to this section Intervenors are required to raise environmental issues by filing contentions which meet the basis requirements of 10 C.F.R. § 2.714(b). In the case of a contention which, like this one is filed late, Intervenors must bear the additional burden of discussing the five factors set forth in 10 C.F.R. § 2.714(a)(1). Intervenors have not discussed these factors. They have made no attempt to state this issue in the form of a contention and provide the basis for that contention set forth with reasonable specificity. Therefore, the Intervenors' request is procedurally defective and should be denied.

---

<sup>2/</sup> Intervenors state that there is a contention concerning the consideration of alternatives under Section 102(2)(E) of NEPA pending before the Licensing Board. Intervenors' request at 6. The Staff is unaware of any contention filed by Christa-Maria, et al., to this effect. Intervenors took the position before the Licensing Board in response to the Board's question that Section 102(2)(E) would require consideration of alternatives. However, a position in a legal brief does not constitute a contention which meets the requirements of § 2.714. Intervenors' request that any hearing on this "contention" take place after September 15, 1981, is irrelevant and should be denied.

D. The Staff Objects to Intervenors' Request that they be Given Until August 10, 1981 to Reply to Filings of Other Parties.

The procedures governing the filing and answering of motions are set forth in 10 C.F.R. § 2.730 of the Commission's regulations. Section 2.730(c) states:

"...The moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary."


Intervenors' "request" for the preparation of an EIS must be treated as a motion filed under § 2.730. Therefore, they would have no right to reply to the filings of other parties in response to their motion.

Intervenors have not sought the permission of the Licensing Board to reply to other filings. Instead they assumed they had the right to do so. Their assumption is incorrect. They have not stated any reason why they should be allowed to make such a reply. The Staff objects to any provision of an opportunity for further briefing concerning Intervenors' request. They should be willing to rest on the position taken in their original request for preparation of an EIS as a matter of discretion.

IV. CONCLUSION

For the reasons set forth above, (1) Intervenors' request for the preparation of an environmental impact statement should be denied; and (2) Intervenors' request for time to reply to the filings of other parties should be denied.

Respectfully submitted,



Janice E. Moore  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 17th day of July, 1981.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )

CONSUMERS POWER COMPANY )

(Big Rock Point plant) )

Docket No. 50-155

(Spent Fuel Pool Modification)

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO REQUEST OF INTERVENORS CHRISTA-MARIA, ET AL., FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT 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 17th day of July, 1981.

\*Herbert Grossman, Esq., Chairman  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

\*Dr. Oscar H. Paris  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

\*Mr. Frederick J. Shon  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Philip P. Steptoe, Esq.  
Michael I. Miller, Esq.  
Isham, Lincoln & Beale  
One First National Plaza  
Suite 4200  
Chicago, Illinois 60603

Joseph Gallo, Esq.  
Isham, Lincoln & Beale  
1120 Connecticut Ave, N.W., #325  
Washington, D. C. 20036

John A. Leithauser  
Leithauser and Leithauser, P.C.  
Opal Plaza, Suite 212  
18301 Eight Mile Road  
East Detroit, MI 48021

John O'Neill, II  
Route 2, Box 44  
Maple City, Michigan 49664

Christa-Maria  
Route 2, Box 108c  
Charlevoix, MI 49720

Ms. JoAnne Bier  
204 Clinton  
Charlevoix, MI 49720

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

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

\*Docketing and Service Section  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Herbert Semmel, Esq.  
Urban Law Institute of  
The Antioch School of Law  
1624 Crescent Place, N.W.  
Washington, D. C. 20009

Mr. Thomas Dammann  
Route 3, Box 241  
Charlevoix, MI 49720

Judd L. Bacon, Esq.  
Consumers Power Co.  
212 West Michigan Avenue  
Jackson, MI 49201

Mr. Gordon Howie  
411 Pine  
Boyne City, MI 49712

Mr. Jim Mills  
Route 2, Box 108  
Charlevoix, MI 49720

JANICE E. MOORE  
Janice E. Moore  
Counsel for NRC Staff