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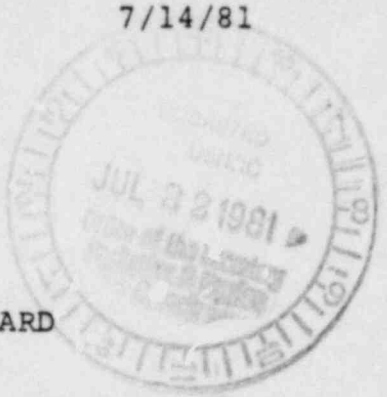
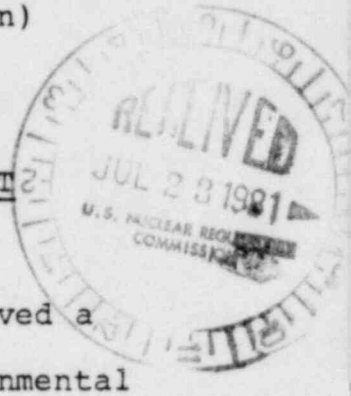


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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



RESPONSE OF CONSUMERS POWER COMPANY
TO INTERVENORS' REQUEST FOR
PREPARATION OF ENVIRONMENTAL IMPACT STATEMENT

Consumers Power Company ("Licensee") received a pleading entitled "Request for Preparation of Environmental Impact Statement" from Intervenors Christa-Maria, Mills, and Bier in an envelope bearing a U.S. postmark dated June 15, 1981. Licensee requested that this Board grant it until July 14, 1981 to respond to Intervenors' pleading. This Board granted Licensee the requested extension of time by order dated June 26, 1981.

Introduction

In its March 31, 1981, Decision (ALAB-636) in this proceeding, the Appeal Board held that NEPA does not require preparation of an environmental impact statement addressing the environmental effects of continued operation of the Big Rock Point Plant for the remainder of the plant's operating license. The Appeal Board noted that although continued

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plant operation was a secondary or indirect effect of spent fuel pool expansion, it would "simply resul[t] in maintenance of the environmental status quo". ALAB-636, slip op. at 26. The Board reasoned that "the whole purpose in considering . . . impacts of an action [under NEPA] is to determine if they have a cause-and-effect relationship with any environmental changes" and concluded that in this case there were no such changes to evaluate. Id.

Intervenors had argued before the Appeal Board that even if NEPA did not require the NRC Staff to prepare an EIS the Licensing Board had discretion to direct the Staff to do so, and that the Licensing Board's order should be sustained on that ground. The Appeal Board commented on this line of argument in a footnote:

> Nothing in our holding is intended to suggest, however, that the Commission itself could not, as a matter of policy, require evaluation of the environmental impacts of the continued plant operation resulting from a spent fuel pool expansion. Neither NEPA nor the agency's environmental regulations, 10 C.F.R. 51, preclude such an exercise of discretion. Cf. Offshore Power Systems (Floating Nuclear Power Plants, CLI-79-9, 10 NRC 257, 261 (1979).
>
> In this connection, Ms. Christa-Maria, et al., contend that the Licensing Board had discretion to order the preparation of an EIS on continued plant operation. Br. 21-25. Because the Board did not purport to exercise discretion but rather held that NEPA requires an EIS, we do not reach the issues of whether such

> discretion was the Board's to exercise and, if so, whether it properly exercised it.

Id. at 31-32, n. 29.

Relying on this footnote, Intervenors request this Board, as a matter of discretion, to order the preparation of an EIS not required by law.

A Licensing Board Lacks Discretion To Order The Preparation Of An EIS That Is Not Required By Law

In the footnote on which Intervenors rely, the Appeal Board stated that the Commission itself possesses discretion to require the preparation of an EIS "as a matter of policy" even when NEPA does not require one, citing the Commission's decision in Offshore Power Systems. Although the Appeal Board declined to reach Intervenors' contention that a Licensing Board possesses the same discretionary power, the passage in Offshore Power Systems that the Appeal Board relied on demonstrates that an adjudicatory board does not have discretion to make policy determinations. There the Commission held: "Unlike the Board below, we are empowered to make policy as well as to apply it". Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257, 261 (1979).[1/] In another context this Licensing

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1/ The question there was whether as a matter of policy a Licensing Board should be allowed to consider the environmental consequences of a Class 9 accident at a floating nuclear plant.

Board itself has acknowledged the distinction between its discretion and that of the Commission. Order Following Special Prehearing Conference, LBP 80-4, 11 NRC 117, 127 (1980). ("Mr. O'Neill confuses the Commission's discretion with that of this Board.")

It is well settled that Licensing Boards possess only such powers as the Commission has conferred upon them, either by regulation or otherwise. Carolina Power and Light Co. (Shearon Harris Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25 (1980); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). The question therefore is whether the Commission has delegated to Licensing Boards its discretionary authority to require the preparation of an EIS not required by law. Such delegations of discretion would most likely be found in Part 51 of the Commission's regulations, "Licensing and Regulatory Policy and Procedures for Environmental Protection"; but neither Part 51 nor the proposed Part 51 expressly or impliedly confer such discretion on Licensing Boards. 45 Fed. Reg. 13749 ff. (March 3, 1980). Intervenors argue, however, that in the context of a licensing proceeding this kind of discretion is implicit in Section 2.718 of the Commission's regulations.

Section 2.718 imposes on presiding officers "the duty to conduct a fair and impartial hearing according to

law, to take appropriate action to avoid delay, and to maintain order," and confers on them "all powers necessary to those ends". The regulation enumerates eleven specific adjudicatory powers and then grants presiding officers power to take any other action necessary to those ends and consistent with law. This final clause is phrased very broadly, as it must be, for it would be impossible to specify all the powers needed by a tribunal to assure the conduct of a fair, expeditious and orderly proceeding. These implied powers, however, must be interpreted, under the principle of ejusdem generis, as similar to the powers enumerated, which are the powers of an adjudicatory tribunal to regulate the course of a proceeding. Within these limits, a Licensing Board unquestionably has broad discretion. Section 2.718 is not intended, however, to reach beyond adjudicatory procedure into the realm of agency policymaking.

The question whether a Licensing Board possesses specific authority not enumerated in Section 2.718 must be decided by the existence of a sufficient nexus between the authority claimed and the Board's duty to conduct a fair hearing, avoid delay and maintain order. In Kansas Gas and Electric Company, et al. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1, 5 (1977), for example, the question was whether a Licensing Board had authority to grant declaratory relief. The Commission noted that Section 2.718 granted presiding officers all powers

necessary to carry out their duty to avoid delay and concluded that declaratory relief was well suited to this end. The Commission therefore held that a Licensing Board possessed the power to grant such relief "provided there is the requisite connection between the rendering of a declaratory order and fulfillment of the board's duty to take appropriate steps to avoid delay in a proceeding otherwise before it." It is clear that the discretion to require the preparation of an EIS not otherwise required by law has no genuine nexus with the Licensing Board's duty to ensure a fair, expeditious and orderly proceeding on the issues within its jurisdiction.

This conclusion is buttressed by the express provisions of Section 2.206 of the Commission's regulations which makes it quite clear that the preparation of adequate environmental statements is the Staff's mandate, not the Boards'. In accordance with this division of functions, the Commission, in Section 2.206, has delegated to certain Staff Directors, rather than the Boards, its discretion to prepare an EIS as a matter of policy. Section 2.206(a) provides that any person may file a request with, for example, the Director of Nuclear Reactor Regulation for the institution of a proceeding "to modify, suspend or revoke a license, or for such other action as may be proper". (Emphasis supplied.) Section 2.206(c) provides that "the Commission may on its

own motion review that decision, in whole or in part, to determine if the Director has abused his discretion."

Directors' decisions under this regulation demonstrate that requests for the preparation of an EIS fall within the Staff's discretion. See Commonwealth Edison Company (Zion Station, Units 1 and 2), DD-80-11, 11 NRC 496, 499 (1980); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 2), DD-80-17, 11 NRC 596, 626-27 (1980); Virginia Electric Power Company (Surry Power Station, Units 1 and 2), DD-79-3, 9 NRC 577 (1979). Moreover, in Commonwealth Edison Company (Dresden Nuclear Power Station Unit No. 1), DD-80-24, 11 NRC 951 (1980), the Director of Nuclear Reactor Regulation held that his discretion under Section 2.206 included preparation of an EIS not required by NEPA. The Commission decided not to review the Director's decision for abuse of discretion, although then Chairman Ahearne commented emphatically that as a matter of Commission policy an EIS should not be prepared when it is not required. See Commissioner Ahearne's Memorandum to General Counsel, August 1, 1980, regarding SECY-A-80-101.

There are several reasons why the discretion of the Staff under Section 2.206 to prepare an EIS not required by law should preclude an implied delegation of the same discretion to a Licensing Board under Section 2.718. The existence of a discretionary power presupposes the ability

to exercise an informed discretion, with full comprehension of its consequences. The preparation of an EIS requires significant allocations of money and time by the Staff, which necessarily involve diversion of these resources from other tasks. Where an EIS is not required by law, allocation of Staff resources becomes a paramount policy consideration. The NRC Staff has been delegated discretion to require preparation of an EIS under Section 2.206 because the cognizant Directors are in the better position to exercise this discretion with a full understanding of the impact of their decisions upon the resources of their organizations. A Licensing Board, on the other hand, does not possess a similarly informed basis for such discretionary decision-making.

Furthermore, the delegation of such discretionary authority to a Licensing Board would be duplicative and would lead to an unwarranted intrusion on the Staff's inherent prerogative to manage its own resources. Implicit in the Directors' discretion to prepare an EIS is the discretion not to prepare one. But if a party could ask the Licensing Board to exercise the same discretion under Section 2.718 as the Staff has under Section 2.206, the Board would in effect have the power to overrule the Directors' decisions. Such a result is clearly inconsistent with the review provisions of Section 2.206, which solely vest review of the Directors' decisions in the Commission.

Intervenors also point out that a Licensing Board is empowered in some instances to raise issues sua sponte; Intervenors infer from this that a Board has discretion to order preparation of an EIS not required by law. Intervenors are correct that under Section 2.760(a) of the Commission's regulations a Licensing Board may raise "a serious safety, environmental or common defense and security matter" sua sponte in the course of an operating license proceeding. Intervenors' mistake, however, is to suppose that a Board's authority to raise environmental issues pertinent to the proceeding before it implies a discretionary power to establish environmental policy for the agency by ordering the preparation of an environmental document that the Appeal Board has determined is not required in the context of that proceeding.

Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-380, 5 NRC 572 (1977), the only case cited by Intervenors, does not support their conclusion as to the application of Section 2.760(a). There the Staff, at the applicant's request, amended an LWA for a nuclear facility to allow the applicant to construct facility transmission lines. At a subsequent evidentiary hearing the Licensing Board raised sua sponte the question whether such activity could be undertaken under an LWA. The Board held that it could not. The Appeal Board reversed the Licensing

Board's decision, not because the Licensing Board had abused its discretion but because its holding was erroneous as a matter of law. The Hartsville case is not apposite because it dealt with a determination of a matter of law rather than the question of a Licensing Board's power to exercise a discretionary act.

Assuming That This Board Has Discretion To Order the Preparation of an EIS, It Should Not Exercise That Discretion

Intervenors urge this Board to exercise its discretion to order the preparation of an EIS that the Appeal Board has determined is not required by law,[2/] yet Intervenors do not allege a single fact in support of this request. This makes Intervenors' request frivolous. Had Intervenors brought their request before the Staff under Section 2.206,

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2/ The Licensing Board lacks the authority to direct the NRC Staff to prepare an EIS. The Commission has held that Licensing Boards do not possess the authority to direct the Staff in carrying out its functions. In Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980), the Commission found it "clear that the Boards do not direct the Staff in performance of their administrative functions [although] the Commission does have authority to do so . . . as part of its inherent supervisory authority . . . ." The Licensing Board, nevertheless, either could call the matter to the Commission's attention through its opinion ruling on the question at bar or certify the question to the Commission. Id. at 517.

they would have been obliged to set forth facts justifying the relief sought; if this Board possesses similar discretion, it should adopt a similar standard.

In Public Service Company of Indiana et al. (Marble Hill Nuclear Generating Station Units 1 and 2), DD-79-21, 10 NRC 717, 719 (1979), the Director of Nuclear Reactor Regulation set out criteria for evaluating requests for action under § 2.206:

> Petitioners shall specify the action requested and set forth the facts that constitute the basis for the request. The factual basis of the petition should identify new information regarding the issue under consideration, and that new information should identify a significant unresolved safety issue or a major change in facts material to the resolution of environmental issues. The petitioner should also specify a nexus between the issues raised and the facility with respect to which the petitioner requests relief. [Citations omitted.]

In Public Service Electric and Gas Company, et al. (Salem Nuclear Generating Station, Units 1 and 2, Hope Creek Generating Station, Units 1 and 2), DD-80-18, 11 NRC 620 (1980), an intervenor requested preparation of an EIS in a spent fuel pool expansion proceeding after the Staff had prepared an EIA. In denying the request, the Director commented:

> It is clear the Staff has addressed, both generically and for the Salem facility specifically, the environmental effects of expansion of the spent fuel pool. Mr. Donelson has not provided any information which would suggest a major change in facts

> which would warrant any further consideration of this issue. [Citation omitted.]

11 NRC 627. Likewise, Intervenors in this case have made no factual showing warranting a favorable exercise of the Licensing Board's discretion to require the preparation of an EIS.

The lack of merit in Intervenors' request is illustrated by the fact that Intervenors have apparently not even read the Environmental Impact Assessment prepared by the Staff. Intervenors assume that the EIA addresses only the incremental impacts of expanding the spent fuel pool and ignore the existing impacts of plant operation. In fact, the Staff's documents include an evaluation of the radiological impacts of the existing Big Rock Point waste treatment systems which concludes that the systems are "capable of reducing releases of radioactive materials in liquid and gaseous effluents to 'as low as is reasonably achievable' levels in accordance with the requirements of 10 CFR Section 50.34a, and therefore, are acceptable". Evaluation By The Office Of Nuclear Reactor Regulation Of The Big Rock Point Plant Waste Treatment Systems With Respect To The Requirements of Appendix I To 10 CFR Part 50, May 1981, at p. 11. Intervenors urge that "no one knows the effects of the use of plutonium enriched bundles at the plant" (Request at 4), but in fact the Staff's evaluation of radiological impacts took into account the mixed oxide fuel at Big Rock.

See Environmental Impact Appraisal, § 5.3.6. at page 10. In seeking any other support for Intervenors' request, we are relegated to the mere baseless hyperbole suggesting that the environmental effects of continued operation of the Big Rock Point Plant may be somehow comparable to the ingestion of rat poison.

Quite apart from the dubious merits of Intervenor's request, preparation of an EIS addressing continued plant operation in this case would be not only unnecessary but useless. Part of the Appeal Board's reasoning in ALAB-636 was that preparation of an EIS for a facility fully completed and operative since 1962 would not serve the basic purpose of preparing such a statement, which is to identify aspects of a project that can be changed to mitigate adverse environmental impacts. The Appeal Board's reasoning supports the conclusion that preparation of an EIS on continued plant operation in this case is not only not required but also would serve no useful purpose, since NEPA "is not an authorization to undo what has already been done."[3/]

3/ Our conclusion is further fortified by the very purpose of a NEPA inquiry -- to identify aspects of a project that can still be changed to mitigate possibly detrimental environmental effects. See Virginians for Dulles, supra at 446. For example, in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1332 (4th Cir. 1972),

Given the judgment that preparation of an EIS on continued operation would serve no useful purpose and, more importantly, the fact that Intervenors make no factual showing to justify their request, it would be an abuse of discretion for this Board to decide the preparation of an

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> approval for the federal highway involved had 'not been given, construction contracts [had] not been awarded, and actual construction on the highway itself [had] not begun' at the time of the NEPA challenge. Since the project was far from complete, modifications to mitigate environmental effects were easily possible, and the court therefore required an EIS for any further action. In this case, however, the reactor at Big Rock has been fully completed and operative since 1962, and the necessary 'Federal action' (i.e., approval of the license amendment to expand the spent fuel pool) purportedly would not provide any opportunity to alter plant operation.
>
> NEPA 'is not an authorization to undo what has already been done.' Jones v. Lynn, supra at 890. And just as we concluded in Trojan, supra at 266 n.6, and Prairie Island, supra at 46 n.4, that NEPA does not require duplicative environmental analyses, so too must we conclude that 'to formulate an EIS [on continued plant operation] under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.' Solomon, supra at 1003. [Footnotes omitted.]

ALAB-636, slip op. at 30-31.

EIS was appropriate. Given the realities of available Staff resources, forceful policy considerations argue against preparing an EIS not required by law. This is the view expressed by Chairman Ahearne in an August 1, 1980, Memorandum to the General Counsel regarding SECY-A-80-101 -- Director's Grant in Part and Denial in Part of 2.206 Relief (In the Matter of Commonwealth Edison Company). There the Director had ordered preparation of an EIS although he had determined that it was not required by NEPA. The Commission did not review the Director's decision for abuse of discretion but then Chairman Ahearne commented:

> If the NRC had a surfeit of people and funds and if EIS's did not add any time to the regulatory process, then perhaps doing EIS's when they are not needed might be acceptable (although not a responsible use of taxpayers' funds)--but since neither condition is the case, EIS's should not be done when they are not required. [Emphasis in original.]

Preparation of an unnecessary EIS as foreseen by Commissioner Ahearne would prejudice the Licensee. In its Answer to Request For Continuance By Intervenors filed on June 2, 1981, Licensee pointed out that, as indicated by the affidavit of Mr. Carl Larsen attached thereto, the Big Rock Point Plant will be operating without full core discharge capability after the next scheduled outage for refueling and plant modification unless one or more of the new racks is

installed during the time period of the outage. As Mr. Larsen's affidavit states, this outage is expected to commence on January 1, 1982. If this Board ordered the Staff to prepare an EIS, the preparation would likely consume at least a year and Licensee's application would be delayed during this period. Licensee would thus be faced with the unsatisfactory alternatives of either accepting for more than a year the added financial risk of operating without full core discharge capability, or suspending plant operations.

Finally, it is undisputed that a licensee is entitled to due course consideration of its application and that a Licensing Board has the duty to take appropriate action to avoid delay in the proceeding, a duty recently reemphasized by the Commission in its "Statement of Policy on Conduct of Licensing Proceedings," issued on May 20, 1981. This proceeding has already been delayed for fifteen months by the Staff's delay in completing its environmental and safety assessments and for an additional two months to benefit the Intervenors' participation in this case. To delay this proceeding substantially further for an EIS which is unnecessary, which would serve no useful purpose, and for which no good cause has been shown, would consitute a clear abuse of discretion.

Assuming This Board Has Discretion to Order The Preparation of an EIS, and That Exercise of Such Discretion is Warranted, Such an Order is Prohibited as an Impermissible Retroactive Application of NEPA

Licensee argued before the Appeal Board that because Big Rock was licensed before the date of NEPA, any environmental review of plant operation during the term of the operating license would constitute an impermissible retroactive application of NEPA. Brief of Consumers Power Company In Opposition to Order Requiring Impact Statement at 13-21. Licensee pointed out there that such environmental review could not avoid the prohibition on retroactive application of the statute under either the rationale that the plant was a continuing project or the rationale that the amendment sought was in itself a further major federal action. The Appeal Board did not determine whether preparation of an EIS addressing continued operation would violate the ban on retroactive application because that Board held that in any case such review was not required by the statute.[4/]

4/ In its Memorandum of April 22, 1981, this Board remarked in a footnote: "The Appeal Board disclaimed any reliance upon the prohibition against a retroactive application of NEPA . . . Such reliance could have served to distinguish this situation from a license renewal application." Slip Opinion at 2, n.2. Licensee finds this reference puzzling. In a license renewal application the issue of retroactivity clearly would not arise. The suggestion, however, if such it be, that the present proceeding is similar to a license renewal is both novel and erroneous. No reasonable interpretation of the nature of this proceeding would permit construing Licensee's application for a license amendment to expand the capacity of the Big Rock spent fuel pool as a request for a renewal of the Big Rock operating license.

Nonetheless, the Appeal Board discussed a case that buttresses Licensee's position on this issue. In Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), a hydroelectric power plant was licensed shortly before the date of NEPA. When approval for related transmission lines was sought after that date, the court held that the agency had to comply with NEPA requirements as to them, but disagreed with petitioners that the power plant itself should be subjected to the environmental analysis: "we see no basis for applying NEPA retroactively to the licensing of the basic project which became final nearly six months prior to the effective date of the Act." 455 F.2d at 424.

Conclusion

Accordingly, for the reasons given above, Licensee requests that this Board find that it lacks discretion to order preparation of an EIS addressing continued plant

operation or, in the alternative, that this Board declines to exercise such discretion.

Respectfully submitted,

Joseph Gallo

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Dated: July 14, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF CONSUMERS POWER COMPANY TO INTERVENORS' "REQUEST FOR PREPARATION OF ENVIRONMENTAL IMPACT STATEMENT" in the above-captioned proceeding were served on the following by deposit in the United States mail, first-class postage prepaid, this 14th day of July, 1981.

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