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Background

On May 27, 1982 Wisconsin Electric Power Company ("Licensee") informed the NRC that it intended to replace the two steam generators in Point Beach Nuclear Plant, Unit 1. The Staff determined that such an action would require a license amendment. On July 12, 1982, the NRC published its Proposed Issuance of Amendment to Facility Operating License in the Federal Register. 47 Fed. Reg. 30,125. On August 10, 1982, Decade filed its Petition for Leave to Intervene and Petition for Hearing ("Petition"). The Licensing Board was established on August 18, 1982, and notice of this action was published in the Federal Register on August 24, 1982. 47 Fed. Reg. 2

An on-the-record telephone conference was held among the Licensing Board, the Licensee, the Staff and Decade on September 27, 1982 (Tr. 1-38) to discuss scheduling. During the conference the Licensing Board indicated that November 15, 1982 would be a target date for a special prehearing conference to discuss proposed contentions (Tr. 36) and advised Decade of the factors to be considered in framing contentions, particularly the Board's requirement that bases for all contentions should reflect an understanding of the relevant documentation filed in support of the license amendment. Tr. 33-34.

On October 6, 1982 a telephone conference was held in a companion proceeding (Docket Nos. 50-266-OLA and 50-301-OLA) concerning the sleeving of steam generator tubes at Point Beach Nuclear Plant, Units 1 and 2. This companion proceeding involved the same Licensing Board and Licensee; Decade participated in the telephone conference with intervenor status. The purpose of the telephone conference was to schedule the evidentiary hearing for the sleeving proceeding and to set dates for the

filing of contentions and the special prehearing conference in this proceeding. Following a discussion of certain factors related to scheduling, the Licensing Board set the date for filing contentions as November 5, 1982 and stated that the special prehearing conference would follow the sleeving evidentiary hearing which was scheduled to begin November 17, 1982. Sleeving Tr. 1350-1351.^{1/}

The dates of the evidentiary hearing and the special prehearing conference were published in the Federal Register on October 21, 1982 (47 Fed. Reg. 46,915) and October 28, 1982 (47 Fed. Reg. 47,954).

On November 5, 1982, Decade supplemented its Petition by filing its Contentions Concerning Steam Generator Replacement ("Contentions"). Neither the Staff nor the Licensee filed written responses.

The evidentiary hearing in the sleeving proceeding was held in Milwaukee, Wisconsin on November 17 and 18, 1982. At the close of the evidentiary hearing in the companion case, the special prehearing conference in this proceeding was discussed. Sleeving Tr. 1881-1883 ff. Tr. 43. At that time Decade first informed the Licensing Board that it had a scheduling conflict the following day. Sleeving Tr. 1881. Decade's representative indicated that he had a meeting scheduled by the office of the Governor-elect (Sleeving Tr. 1882), but declined to further clarify the purpose or participants at the meeting. Sleeving Tr. 1883. The Licensing Board informed Decade's representative that if Decade was not represented at the special prehearing conference, there was a good chance Decade would default in this proceeding. Sleeving Tr. 1882.

^{1/} A transcript was prepared in the companion proceeding, Docket Nos. 50-266-OLA and 50-301-OLA which will be referred to as the Sleeving Transcript.

The special prehearing conference was convened on November 19, 1982. Decade was not represented. Tr. 42. The Licensing Board determined to proceed despite the absence of Decade (Tr. 44), and presentations were made by the Licensee and the Staff concerning the relevancy of and bases for Decade's Contentions. Tr. 45-97.

The Licensing Board issued its Order on December 10, 1982, dismissing Decade from this proceeding both for its willful nonappearance at the special prehearing conference and for the lack of adequate bases for its Contentions. On December 20, 1982, Decade filed a Notice of Appeal pursuant to 10 CFR § 2.714a with an accompanying brief in support. Decade bases its appeal of the Licensing Board's decision on two alleged errors. The errors asserted by Decade are: (1) the rejection of its contentions as either irrelevant or inadequately supported without an evidentiary hearing and (2) the dismissal of its Petition as a sanction for its failure to appear at the special prehearing conference on November 19, 1982, instead of the Licensing Board going forward with the special prehearing conference on the evening of November 18, 1982.

II. ISSUES PRESENTED

The issues now before this Appeal Board are:

1. Whether the Licensing Board properly dismissed Decade from this proceeding for failure to file one good contention.
2. Whether the Licensing Board's action in dismissing Decade from this proceeding for willful failure to appear at the special prehearing conference was within its authority and was the sanction of dismissal appropriate in the circumstances of this case.

III. ARGUMENT

A. The Licensing Board Properly Dismissed Decade for Failure to File One Good Contention.

Section 2.714(b) of the Code of Federal Regulations states in pertinent part:

"Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. (Emphasis added)

The Licensing Board's dismissal of Decade's Petition was grounded in part on Decade's failure to file at least one contention which satisfied 10 C.F.R. § 2.714(b). The Licensing Board found that the proposed contentions were either irrelevant to this proceeding or that Decade had not stated a basis for them with sufficient particularity. Order at 7.

As a general matter, for the contentions proposed to be admissible, they must fall within the scope of the issues set forth in the Federal Register Notice of Hearing in this proceeding.^{2/} See Northern Indiana Public Service Company (Bailly Generating Station Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 171 (1976). Further, the petition must comply with the requirements

^{2/} The proposed amendment would revise the conditions of the operating license to permit repair of steam generators by replacement of major components including tube bundles. 47 Fed. Reg. 30125, July 12, 1982.

of 10 C.F.R. § 2.714(b) and applicable Commission case law. See, e.g., Duquesne Light Co. (Beaver Valley, Units No. 1), ALAB-109, 6 AEC 243, 245 (1973); Northern States Power Co. (Prairie Island, Unit Nos. 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974). 10 C.F.R. § 2.714(b) requires that a list of contentions which petitioners seek to have litigated be filed along with the bases for those contentions set forth with reasonable specificity. A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974).

The purpose of the basis requirement of 10 C.F.R. § 2.714(b) is to assure that the contention in question does not suffer from any of the infirmities listed above, to establish sufficient foundation for the contention to warrant further inquiry of the subject matter in the proceeding, and to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra, at 20. From the standpoint of basis, it is unnecessary for the petition "to detail the evidence which will be offered in support of each contention." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426

(1973). However, the degree of specificity with which the basis for a contention must be alleged involves a licensing board's judgment on a case by case basis. Peach Bottom, supra, at 20. Finally, in examining the contentions and the bases therefore, a licensing board is not to reach the merits of the contentions. Duke Power Co. (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra, at 20; Grand Gulf, supra, at 426.

In this proceeding, the Licensing Board explicitly informed Decade that the proposed contentions and bases therefor should refer to and address relevant documentation available to Decade. The Licensing Board particularly noted the Point Beach steam generator replacement application as relevant documentation. Further, the Licensing Board observed that reference to such documentation should demonstrate that Decade sufficiently understood the proposal so that it did not seek to raise a matter fully considered in, or inconsistent with, the application. Tr. 33-34; See also, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-184 (1981).

In its Appeal brief, Decade failed either to address the relevancy of its proposed contentions to the proposed action or to demonstrate the adequacy of the bases for its contentions. In fact, the major portion of Decade's brief on this issue is the restatement of its contentions "with the bases omitted." Appeal at 10-14. Moreover, the sole legal argument advanced by Decade consists of citations to a number of court decisions apparently in support of the proposition that contentions cannot be dismissed without a hearing where material facts are in dispute. Appeal at 9-10. The cited decisions are inapposite. The decisions all relate

to considerations relevant to whether or not to grant summary judgment. However, the instant proceeding is at the pleading stage. The question before the Licensing Board was whether the Petition raised a matter within the scope of the proceeding with adequate basis to be admitted as a contention. This is a threshold test, and it appears that Decade has confused the standards for admissibility of contentions with those which govern summary disposition, found in 10 C.F.R. § 2.749. Indeed, all of the cases cited by Decade in its Appeal Brief dealt with the issue of summary judgment, that is to say, a decision by the court to summarily dismiss a case without trial based on the facts. See 10 C.F.R. § 2.749. In the instant proceeding, the Licensing Board did not, nor was it permitted to, reach the underlying facts supporting Decade's contentions. Rather, the Licensing Board applied the standards of admissibility set forth in the Commission's regulations and case law and determined that none of Decade's proposed contentions was admissible and that Decade's Petition should be dismissed for failure to file one good contention.

1. The Licensing Board Correctly Rejected Proposed Contention 3 for Lack of Basis.

During the special prehearing conference held on November 19, 1982, neither the Licensee nor the Staff objected to the admission of proposed Contention 3 on grounds of irrelevancy to the proceeding.^{3/} Rather, both Licensee and Staff maintained that Proposed Contention 3 lacked the requisite basis.

^{3/} As conceded by Licensee's counsel, the Contention does refer to a characteristic of the proposed steam generators, the elimination of the tubesheet crevice.

Decade's proposed Contention 3 contains four subparts, (a) through (d). Each subpart will be discussed in turn.

3(a) Residual Stresses.

In subpart 3(a), Decade alleges that "(t)he newly situated roll stressed transition zone will be subject to stress assisted cracking due to residual stresses from the hydraulic expansion process." Contentions at 9. As a basis for this subpart, Decade correctly quotes the Licensee's Steam Generator Repair Report (p. 2-8) which states that the steam generator tubes will be hydraulically expanded to the full depth of the tubesheet holes. Decade then quotes from an Edison Electric Institute report dated August 1, 1974, to show that this process might cause residual stresses. As the Licensing Board noted (Order at 15), the report upon which Decade relies is irrelevant to this proceeding. The report deals with a mechanical tube "roll", rather than the hydraulic expansion process used in the proposed Point Beach steam generators. As such, the report cannot serve as a basis for this contention. This is not a situation where the Licensing Board reached the merits of the contention. Rather, the Board correctly determined that even if there are problems with residual stresses from the mechanical roll, those problems do not support a contention dealing with hydraulically expanded tubes.

Decade also quotes a letter dated December 10, 1979 from C.M. Stallings (VEPCO) to H.R. Denton (NRC) which concerns residual stresses from tube bending. Since the proposed contention deals with problems from hydraulic expansion of the tubes in the tube sheet, problems associated with tube bending cannot supply the requisite basis.

Finally, Decade seizes upon "an inexplicable statement" made by the Licensing Board after rejecting subpart 3(a). Appeal at 14-15. Decade implies that the basis for its proposed contention, and the contention itself, were rejected because of a statement made by Licensee's counsel. Appeal at 15. A reading of the Licensing Board's statement in context (Order at 15-16) reveals that the Licensing Board had already found there was no basis for this proposed contention. The Licensing Board's concern went to certain safety reviews which were not a part of Decade's proposed contention 3. Order at 15. Decade's allegation that the Licensing Board's "ruling does violence to the proper tests applicable" at this stage of the proceeding (Appeal at 15) is unsupported by the record.

3(b) Sludge Deposits

In the second subpart of proposed Contention 3, Decade essentially alleges that the all volatile water chemistry used in the proposed steam generators will subject the "roll transition zone" to extensive corrosive attack. For a basis, Decade quotes from a 1972 Westinghouse paper which states that the use of "zero solids treatment" (i.e. all volatile chemistry) is not recommended. At the special prehearing conference it was noted that the paper refers to a different type of reactor with a different type of steam generator. Tr. at 86. Nothing in Decade's alleged basis has a nexus to the proposed steam generators, and the Licensing Board was correct in rejecting it.

3(c) Detectability

As a basis for this subpart Decade quotes from the testimony of a Staff witness in the companion sleeving proceeding. The testimony tends

to indicate a problem with detecting cracking of tubes. However, the testimony refers to potential problems at sleeve to tube joints, and in no way is addressed to the hydraulic expansion of steam generator tubes in the tubesheet. Therefore, the testimony is irrelevant to the contention and the Licensing Board was correct in rejecting it as a basis for Subpart 3(c).

3(d) Unconstrained Leakage

Decade provided no basis for this subpart. See Tr. at 97. Accordingly, the Licensing Board was correct in rejecting subpart 3(d).

2. The Licensing Board Correctly Rejected Proposed Contentions 1, 2, 4, 5 and 6 as Outside the Scope of this Proceeding.

The Licensing Board ruled that Decade's Petition failed to demonstrate that proposed contentions 1, 2, 4, 5 and 6 are relevant to the proposed proceeding and, in addition, that proposed contentions 5 and 6 are without basis. Order at 6-12. Decade's brief accompanying its Appeal of the Licensing Board's Order does not address these findings by the Licensing Board. For the reasons set forth below, the Staff argues that these proposed contentions were not admissible because they are outside the scope of the instant proceeding or lack adequate basis.

First Contention

The Licensing Board correctly ruled that Decade's first proposed contention "fails to indicate any way in which a grant of the license amendment would adversely affect the condition of the plant". Order at 10. This proposed contention alleging that degradation of the steam

generator tubes "could induce essentially uncoolable conditions in the course of a loss-of-coolant-accident ("LOCA") . . .", raises a general concern about degradation of steam generator tubes. There has been no showing in the proposed contention or its basis how this concern relates to the specific repair proposed in the amendment. See Bailly, supra, at 565; Peach Bottom, supra, at 20-21. Accordingly, Decade's Petition has failed to indicate how this proposed contention falls within the scope of the instant proceeding.

Moreover, it appears that Decade seeks to litigate a general concern about degradation of steam generator tubes which could have been raised at the time when issuance of a license to operate Point Beach Nuclear Plant, Unit 1, was before the Commission. This issue is not within the scope of the instant proceeding. See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46 n.4 (1978); Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 n.6 (1979).

Second Contention

The Licensing Board correctly ruled that Decade's second proposed contention "does not, directly or indirectly, refer to the steam generator replacement project that is the subject of this proceeding." Order at 11. This proposed contention states a general concern that rupture of steam generator tubes during normal operation may release radiation to the environment from the plant's secondary side in excess of maximum permissible doses. Decade's Petition has completely failed to indicate any relationship between this proposed contention and the repair contemplated by the proposed amendment. See Bailly, supra, at 565; Peach

Bottom, supra, at 20-21. Accordingly Decade has failed to establish how this proposed contention falls within the scope of the instant proceeding.

Fourth Contention

The Board correctly ruled that Decade's fourth proposed contention "addresses issues that are not specifically related to the license amendment." Order at 11. This proposed contention entitled "Balance of Plant" raises concerns about the balance of the plant and not the steam generators or their repair. Specifically, the proposed contention asserts a need to replace the condensers as well as the pumps and piping in the feedwater system and to add a condensate polisher. Decade has failed, however, to establish in the proposed contention or its basis how the specific repair proposed by the amendment raises a safety concern which would affect the balance of plant. See Bailly, supra, at 565; Peach Bottom, supra, at 20-21. Accordingly, Decade's Petition has failed to indicate how this proposed contention falls within the scope of the instant proceeding.

Fifth Contention

The Licensing Board correctly ruled that this proposed contention was irrelevant and without basis. Order at 12. The proposed contention raises the concern of the use of the all volatile treatment (AVT) with the proposed steam generators. In its Order the Licensing Board noted that the AVT system has been used at Point Beach since the mid-seventies and is not a new system to be used as a part of the proposed amendment. Id. at 11. The Licensing Board also noted that the AVT system is required by the NRC through the plant's technical specifications. Id. Furthermore,

Decade has completely failed to establish how the repair proposed by the amendment raises any concerns in light of the existing AVT system. See Bailly, supra, at 565; Peach Bottom, supra, at 20-21. Accordingly, Decade's Petition has failed to indicate how this proposed contention falls within the scope of the instant proceeding.

Sixth Contention

The Licensing Board correctly ruled that this proposed contention is irrelevant and without basis. Order at 12. This proposed contention raises a general concern about operator performance at Point Beach. Decade does not establish how its concern about operator performance is relevant to the repair proposed by the amendment. See Bailly, supra, at 565; Peach Bottom, supra, at 20-21. Accordingly, Decade's Petition has failed to establish how this proposed contention falls within the scope of the instant proceeding.

In sum, Decade has failed to establish in its Petition or its brief accompanying its Appeal how proposed contentions 1, 2, 4, 5 and 6 fall within the scope of the instant proceeding. Accordingly, the Licensing Board correctly ruled on these contentions and Decade's Appeal should be denied.

3. The Licensing Board Correctly Rejected Decade's Proposed Contention 7 for Failing to Meet the "Specificity" Requirement of 10 CFR § 2.714(b).

In ruling that Decade's proposed Contention 7 is not an admissible contention the Licensing Board correctly concluded that the proposed contention did not meet the requirement of 10 CFR § 2.714(b). 10 CFR

§ 2.714(b) requires that the bases for each contention must be set forth with reasonable specificity. The Licensing Board's ruling was based on the fact that the proposed contention and its basis do not "find any problem with the repair project" and that the proposed contention and basis are so vague that the parties would not be put on notice of what they would be required to prove.^{4/} Order at 13 and 14. The Staff agrees.

Decade's proposed Contention 7 entitled "Unspecified Problems with Proposed Steam Generators" asserts that the proposed Model F Westinghouse steam generators "may be expected to experience new forms of tube degradation of an undefined nature that cannot be specifically anticipated at this time. . ." Decade does not state what degradation raises this concern or that such degradation would even occur at all. Accordingly, this assertion is so vague that the parties could not possibly know "at least generally what they will have to defend against or oppose". Peach Bottom, supra at 20.

Further, the Staff agrees with the Licensing Board that "[t]here is a missing logical link between its alleged basis and the inference of inadequacy of this steam generator repair". Order at 14. The basis asserted in support of Decade proposed Contention 7 concerns problems encountered in other plants. There is no explanation how such problems may occur at Point Beach as a result of the proposed amendment. In short, Decade's basis for proposed Contention 7 does not support the contention and fails, therefore, to show that the contention "applies to the facility at bar". Peach Bottom, supra at 21. Accordingly, the Licensing Board

^{4/} See Peach Bottom, supra at 20.

correctly ruled that proposed Contention 7 should not be admitted in this proceeding.

In ruling on the admissibility of proposed Contention 7 the Licensing Board did not reach the merits of the proposed contention nor was the Board calling for Decade to detail evidence in support of the contention. This is clearly not the function of the Licensing Board. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-551 (1980). Rather, the Licensing Board here simply ruled that Decade's Petition failed to satisfy the requirement of 10 C.F.R. § 2.714 that the basis for a contention be set forth with reasonable specificity. In short, the basis set forth by Decade for proposed Contention 7 is so vague and lacking in specificity that the parties cannot determine what they would have to defend against or oppose and how the contention applies, if at all, to the facility at bar within the context of the proposed amendment. Peach Bottom, supra at 20 and 21.

B. The Licensing Board's Action in Dismissing Decade for Willful Failure to Appear at the Special Prehearing Conference Was Within its Authority and Was Not an Excessive Sanction.

The Licensing Board found that Decade's failure to attend the Special Prehearing Conference was willful and that appropriate sanctions should be assessed. Order at 2. It concluded that the appropriate sanction was dismissal of Decade's Petition, or in the alternative, the acceptance of the truth of all statements made by Licensee or Staff at the Special Prehearing Conference, which also would result in dismissal of Decade's Petition. Id. at 7. Decade does not dispute that it failed to attend the Special Prehearing Conference, nor does it dispute that it

was advised by the Licensing Board that the failure to attend could result in dismissal. Decade contends that dismissal of the Petition, instead of going forward with the prehearing conference on the evening of November 18, 1982, was unreasonable, discriminatory and unduly harsh. Appeal at 4.

Pursuant to 10 C.F.R. § 2.718, a licensing board has the power and the duty to maintain order, to take appropriate action to avoid delay and to regulate the course of the hearing and the conduct of the participants. The powers of a licensing board to maintain order and regulate the course of a proceeding were given further explication by the Commission in Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981):

When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

The general guidance given in the policy statement indicates that when a participant fails to meet its obligations, a board should consider

the imposition of sanctions against the offending party.^{5/} Id. at 454. Also, the policy statement notes that "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Id. In Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1411 (1982), the Appeal Board recognized "that the Licensing Board is entitled to a substantial degree of deference in the management and conduct of proceedings before it." The undisputed facts of this proceeding are that Decade failed to attend a conference which had been scheduled for over a month, that the Licensing Board had advised Decade that its request for a change in the time of the conference would not be granted and that Decade's failure to attend the conference could result in sanctions. In these circumstances, the Licensing Board, pursuant to 10 C.F.R. § 2.718 had the power to assess sanctions.

As read by the Appeal Board in Byron, the Commission's Policy Statement requires that a board apply a four-factor test in determining the appropriate sanctions to be imposed for a default: (1) the relative importance of the unmet obligation and its potential for harm to other parties or the orderly conduct of the proceeding; (2) whether the default is an isolated incident or a part of a pattern of behavior; (3) the

^{5/} In two recent cases, Licensing Boards have imposed sanctions against a participant in a proceeding who failed to meet its obligations. See Consumers Power Co. (Palisades Nuclear Power Facility); Order of Dismissal (November 8, 1982); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1); Memorandum And Order Confirming Ruling On Sanctions For Intervenors' Refusal To Comply With Order To Participate In Prehearing Examinations (December 22, 1982).

relative importance of the safety or environmental concerns raised by the party; and (4) all of the circumstances. Admittedly, the Appeal Board in Byron did not agree with the Licensing Board that an intervenor in that proceeding should be dismissed. However, in this proceeding, the Licensing Board carefully distinguished Byron in its factual context. Order at 6. The Licensing Board also considered the factors stated by the Commission in selecting a sanction. Order at 2-6. In its Appeal, Decade addressed none of those factors to demonstrate why dismissal was not an appropriate sanction.

Under the circumstances of this case, the Licensing Board did not exceed the authority granted to it under the Commission's Regulations and case law in dismissing Decade's Petition for willful failure to appear at the special prehearing conference.

IV. CONCLUSION

For the reasons stated above, the Licensing Board's Order dismissing Decade's Petition for Intervention should be affirmed.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff



Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of January 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

WISCONSIN ELECTRIC POWER COMPANY)

(Point Beach Nuclear Plant,)

Unit No. 1))

Docket No. 50-266-OLA 2

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO APPEAL OF WISCONSIN'S ENVIRONMENTAL DECADE" 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 4th day of January, 1983.

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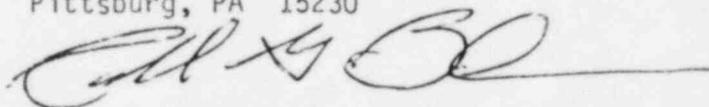
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