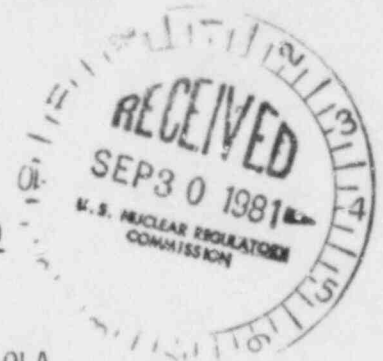


9/25/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

WISCONSIN ELECTRIC POWER COMPANY

(Point Beach Nuclear Plant,
Units 1 & 2)

Docket No. 50-266-OLA
50-301-OLA

(Repair to Steam Generator Tubes)

NRC STAFF BRIEF ON WISCONSIN ENVIRONMENTAL
DECADE'S PREFERRED CONTENTIONS 1, 2 AND 10

I. INTRODUCTION

On July 2, 1981, the licensee filed an application for amendments to its operating licenses for the subject units to permit repair of degraded or defective steam generator tubes by sleeving.

The Commission caused a Notice of Proposed Issuance of Amendment (Notice) to be published in the Federal Register on August 7, 1981 (46 Fed. Reg. 40359) which, inter alia, provided an opportunity for intervention pursuant to 10 C.F.R. § 2.714. During the interval of time between the licensee's filing and publication of the Notice, Wisconsin Environmental Decade (WED) filed on July 20, 1981 a petition to intervene. The Staff, subsequent to the publication of the Notice, treated the petition as a timely filed petition relating to the Notice and filed its response to the WED petition on August 27, 1981. In its response the Staff did not find that the "interest" requirement of 10 C.F.R. § 2.714 had been met in that WED itself had made no showing of interest nor had it identified any member who could demonstrate interest and standing and who authorized WED to represent its interest. WED

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amended its petition on August 31, 1981 and, in the Staff's opinion, cured the defect of standing and interest. (Tr. pp. 55 and 72).

The Licensing Board held a conference call commencing at 10:25 a.m., September 16, 1981. The application for amendment and the petition to intervene were discussed. The Board requested briefs from licensee and Staff on proposed contentions 1 and 2 (Tr. p. 37) which were, in the opinion of the licensee and Staff, defective in that they were beyond the scope of the Notice.^{1/} (Tr. pp. 29, 36-37). This brief provides the Staff's arguments in support of its view that those contentions and also contention number 10 are beyond the scope of the Notice and therefore the Board does not have any jurisdiction to consider the matters raised in the contentions. For this reason, the contentions should not be admitted.

II. DISCUSSION

Contentions 1, 2 and 10 as proffered by the petitioner state:

(1) Degradation of as few as one to ten steam generator tubes in a pressurized water reactor such as Point Beach could induce essentially uncoolable conditions in the course of loss of coolant accident, according to several independent scientific studies.

(2) Rupture of steam generator tubes in normal operation will release radiation to the environment from the secondary system, and, if the rupture is sufficiently severe, in amounts in excess of maximum permissible doses.

^{1/} A Notice of Hearing has not yet been issued in this proceeding, since the Licensing Board has not yet ruled upon any request for hearing and/or petition for leave to intervene. See 10 C.F.R. § 2.105(e). Notice of Proposed Issuance of Amendment which identifies the scope of the proposed action has been published in the Federal Register. 46 Fed. Reg. 40359 (August 7, 1981).

(10) The best evidence strongly suggests that the actual cost of the proposed sleeving program will exceed projected costs by more than a magnitude of four.

A Licensing Board is authorized by 42 USC § 2241 and its jurisdiction is established by the Commission's rules and regulations (10 C.F.R. Part 2) and by the Commission's Notice. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646 (1974); see 10 C.F.R. § 2.717(a). A Licensing Board has only the jurisdiction and power which NRC delegates to it. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-577, 11 NRC 18, 25, reversed other grounds in part, CLI-80-12, 11 NRC 514 (1980); New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279 (1978); and, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). But it has the power in the first instance to rule as to the scope of its jurisdiction when it is challenged, Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741 (1980). However, the Licensing Board's action cannot either enlarge or contract the jurisdiction conferred upon it by the Commission. Midland, ALAB-235, supra, at 646, and Shearon Harris, supra. To determine what the jurisdiction of the Licensing Board is to be, the Appeal Board has stated that one must look to the notice of hearing in a particular case. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592 (1977). See Detroit Edison Company (Enrico

Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 385 (1978); Midland, ALAB-235, supra. It is, of course, a well established principle of law that a tribunal may not act where it has no jurisdiction, and that the tribunal cannot itself enlarge its jurisdiction. Page v. Wright (CCA 7, 1940) 115 F.2d 449, 453, and See Rule 12(h)(3) of the Rules of Civil Procedure for the United States District Courts.

The Notice issued by the Commission in this proceeding states:

"The Amendments would revise the provisions in the Technical Specifications to permit repair of degraded or defective steam generator tubes by sleeving in accordance with the licensee's application for amendment dated July 2, 1980.

....

By September 8, 1981, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene." (46 Fed. Reg. 40559), emphasis supplied).

The Notice refers to the licensee's application for amendment and that application dated July 2, 1981 states:

"The purpose of these license amendments is to incorporate certain changes into the Point Beach Nuclear Plant Technical Specification to permit repair of degraded or defective steam generator tubes by sleeving. Specifics of these Technical Specification changes and a discussion of the steam generator tube sleeving process are provided below and in the attachments."

Thus, the jurisdiction of this licensing board extends only to those issues raised by intervenors which relate to the possible environmental and safety consequences of the sleeving process itself and the operation

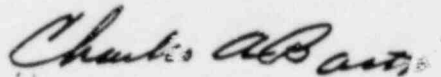
of sleeved steam generator tubes. The words of Contentions 1, 2 and 10 clearly indicate that they do not concern the possible environmental or safety effects of the sleeving process or of operating the units with sleeved tubes and, therefore, they are beyond the jurisdiction of the licensing board in this proceeding.

Further, in regard to Contention 10, during the conference telephone call on September 16, 1981, Ms. Kathleen M. Falk, Counsel for WED stated that the National Environmental Policy Act (NEPA) requires NRC to look at economic costs (Tr. p. 40, lines 4 & 5). Ms. Falk provided no citation to authority for the proposition of law that NEPA requires consideration of purely economic costs - nor does the Staff know of any court case standing for that proposition. The Appeal Board has held that economic costs are not to be litigated in a proceeding since economic interests are not within the scope of the interests sought to be protected by the Atomic Energy Act. Kansas Gas & Electric Co. et al. (Wolf Creek Generating Station, Unit 1, ALAB-424, 6 NRC 122, 128 (1977)); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1420-21 (1977); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-376, 5 NRC 426 (1977); Public Service Co. of Oklahoma et al. (Black Fox Nuclear Power Station, Units 1 & 2), LBP-77-17, 5 NRC 657 (1977). Nor are such interests within the zone of interests protected by the National Environmental Policy Act. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), ALAB-333, 3 NRC 804 (1976).

III. CONCLUSION

For all the foregoing reasons, the Staff urges that Contentions 1, 2 and 10 of WED should not be admitted.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of September, 1981.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF BRIEF ON WISCONSIN ENVIRONMENTAL DECADE'S PREFERRED CONTENTIONS 1, 2 AND 10 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 25th day of September, 1981.

Peter B. Bloch, Chairman
Administrative Judge
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. Hugh C. Paxton
Administrative Judge
1229 - 41st Street
Los Alamos, New Mexico 87544

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

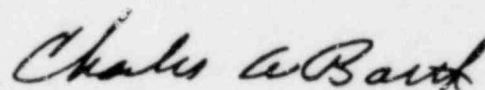
Kathleen M. Falk
Wisconsin's Environmental Decade
302 East Washington Avenue
Suite 203
Madison, Wisconsin 53703

Gerald Charnoff, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Atomic Safety and Licensing Appeal
Board
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
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *



Charles A. Barth
Counsel for NRC Staff