



10/19/81

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|                                  |   |                                   |
|----------------------------------|---|-----------------------------------|
| In the Matter of                 | ) | Docket No. 50-266                 |
| WISCONSIN ELECTRIC POWER COMPANY | ) | 50-301                            |
| (Point Beach Nuclear Plant,      | ) | (Repair to Steam Generator Tubes) |
| Units 1 & 2)                     | ) |                                   |

NRC STAFF OBJECTION TO LICENSING BOARD'S  
MEMORANDUM AND ORDER DATED OCTOBER 13, 1981

I. Introduction

On October 13, 1981, the Atomic Safety and Licensing Board issued a Memorandum and Order Concerning the Admission of a Party and its Contentions (Order). In the Order the Board provided that objections to the Order may be filed by a party pursuant to 10 C.F.R. § 2.751a(d). Accordingly, for the reasons discussed below, the NRC Staff hereby objects to certain portions of the Board's Order, and requests that the Board revise the order in light of the objections presented.

II. Discussion

A. THE SINGLE ISSUE PROPOUNDED BY THE BOARD IS NOT A PROPER CONTENTION TO BE LITIGATED IN THIS PROCEEDING

In its October 13, 1981 Order the Board stated:

We also have concluded that Decade's contentions should be simplified by being combined into the following single issue: "Wisconsin Electric Power Company has not demonstrated that Point Beach Nuclear Plant, Units 1 and 2, will operate as safely with its degraded steam generator tubes sleeved as it would if they were required to be plugged." 1/

DS07  
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1/1

1/ Order at 1.

DESIGNATED ORIGINAL

Certified By DS

DS07

The Staff objects to the formulation of the single issue by the Board as the record in this proceeding does not support a determination that Intervenor wishes to litigate such a contention and the findings required by 10 C.F.R. § 50.57 are not compatible with the Board's issue. The Staff will discuss each of its objections in turn.

In the original Petition<sup>2/</sup> of Wisconsin's Environmental Decade (WED), ten contentions were submitted. In its Order, the Board admitted Contentions 3, 4, 5 and 7 "to be tried within the scope of the simplified issue ..."<sup>3/</sup> While the Staff in its Response of October 7, 1981<sup>4/</sup> opposed admission of Contentions 4, 5 and 7 due to lack of basis, the Staff believes the contentions themselves are specific enough to be litigable. During the conference call of September 16, 1981, the Licensee also stated that it had no problem with specificity.<sup>5/</sup> The Board has now determined that the four contentions meet the requirement of 10 C.F.R. § 2.714, in that the bases for each contention have been set forth with reasonable specificity.<sup>6/</sup>

However, the Board has also concluded that these four admittedly specific contentions should be simplified by being combined into the single issue drafted by the Board. The Staff does not believe that the clear

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<sup>2/</sup> Petition of Wisconsin's Environmental Decade for Admission as a Party, Hearing and Environmental Impact Statement dated July 20, 1981.

<sup>3/</sup> Order at 6.

<sup>4/</sup> NRC Staff Response to Wisconsin Environmental Decade's Bases for Contentions Dated September 24, 1981.

<sup>5/</sup> Tr. at 19, 29.

<sup>6/</sup> Order at 3-6. While the Staff does not agree that basis was shown for Contentions 4, 5 and 7, it is not reasserting its basis arguments at this time. Rather, the thrust of the Staff's objection is to the Board's action of consolidating the four contentions into a single issue and the Board's formulation of that issue.

language of Contentions 3, 4, 5 and 7, along with their alleged bases, can be construed to support the Board's issue. While each of the contentions allege a potential problem if the proposed sleeving repair program is undertaken, none of the contentions explicitly state or imply that the Intervenor is comparing the safety of the two methods. Further, there is nothing in the record to indicate WED's willingness to litigate its contentions within the framework of the Board's issue that the plant would operate "as safely" with the tubes sleeved rather than plugged. Rather, the record indicates the contrary. During the September 16, 1981 conference call, in response to a Board question, WED counsel stated:

We are saying that both plugging and sleeving have not worked in the past, and that both are experimentation programs as far as the applicant is concerned. Tr. 33, 34.

Therefore, since the record in this proceeding does not support a determination that the Intervenor WED wishes to litigate the Board's issue, the Staff submits that the issues in this proceeding should be limited to admitted Contentions 3, 4, 5 and 7, and that the Board's issue should be eliminated.

Second, the findings required by 10 C.F.R. § 50.57 are not compatible with the Board's issue. Whether an amendment to a license would allow the Licensee to operate "as safely" as before the amendment should not be an issue. The key sub-section is 10 C.F.R. § 50.57(a)(3) which requires a finding that:

There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter.

The plain language of this sub-section requires "reasonable assurance" that the health and safety of the public will not be endangered by the activities to be undertaken by the Licensee. It is a mandate for an independent determination of the safety of the activity, rather than inviting comparisons. For this reason, the Staff submits that the issue propounded by the Board is not contemplated by the regulations to be an appropriate issue in controversy in this proceeding.

Therefore, it is the Staff's position that the issue propounded by the Board should not be litigated in this proceeding, and that admitted Contentions 3, 4, 5 and 7 alone should be the subject of litigation.

B. THE PROCEDURES GOVERNING DISCOVERY AGAINST THE STAFF SHOULD BE CLARIFIED

In the interest of expediting this proceeding, the Staff agrees that some liberalization of the discovery rules should be considered. However, the Board's Order is unclear as to how the Board's proposed procedures would apply to discovery on the Staff. The Staff seeks clarification as to the manner the proposed procedures are intended to modify the Commission's regulations governing discovery against the Staff. Discovery against the Staff by means of interrogatories is governed by 10 C.F.R. § 2.720(h)(2)(ii) of the Commission's regulations, rather than by 10 C.F.R. § 2.740. Under 10 C.F.R. § 2.720(h)(2)(ii), interrogatories to the Staff must be filed with the presiding officer. If the presiding officer (in this case the Licensing Board) determines that the information sought by the interrogatories is necessary to a proper decision in the proceeding, and that the information is not reasonably available from another source, then the Board may require the Staff to answer the interrogatories.

As the Appeal Board noted in Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB 613, 12 NRC 317, (1980), discovery against the Staff is on a different footing than discovery against other parties in a proceeding. The Appeal Board pointed out that the Commission's regulations (10 C.F.R. § 2.790(a)) require Staff documents that are relevant to licensing proceedings be made routinely available in the NRC Public Document Room. Id. at 323. These documents should, as the Appeal Board noted, reasonably disclose the basis for the Staff's position, thus obviating any need for formal discovery against the Staff. Id. If a document is not available in the Public Document Room, a party may serve a request on the Executive Director for Operations (EDO) without leave of the presiding officer pursuant to 10 C.F.R. § 2.744.

The Staff is willing to discuss with WED its proposed discovery against the Staff, in an effort to reach an agreement. The statement of purpose ordered by the Board<sup>7/</sup> will be very helpful in reaching that agreement. While the Staff, in recognition of the need to expedite discovery, is also willing to receive interrogatories directly, rather than through the Board as required by 10 C.F.R. § 2.720(h)(2)(ii), the Staff believes the statement of purpose accompanying an interrogatory to the Staff must show that the information sought is necessary to a proper decision in the proceeding and is not reasonably available from another source.

As far as documents made available pursuant to 10 C.F.R. § 2.790 are concerned, the Staff has informed the Board and the parties<sup>8/</sup> that it will make its best efforts to issue its safety evaluation report and any appro-

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<sup>7/</sup> Order at 9.

<sup>8/</sup> Letter from Stuart A. Treby to the Administrative Judges dated October 12, 1981.

priate environmental determinations regarding the demonstration program by October 28, 1981.<sup>9/</sup> Until such time as these documents are issued, the Staff will place all other relevant documents in the Public Document Room. As in the case of interrogatories, the Staff is willing to receive a request for documents pursuant to 10 C.F.R. § 2.744 directly. However, the Staff believes such a request must be accompanied by a statement of purpose specifically addressing its relevancy as required by 10 C.F.R. § 2.744(a).

For the reasons discussed above, the Staff requests that the Board revise its Order to clarify the procedures for discovery against the Staff.

### III. Conclusion

Pursuant to 10 C.F.R. § 2.751a(d), the Staff objects to certain portions of the Board's Order and requests that the Board revise the Order to:

- A. Eliminate the contention formulated by the Board as the simplified consolidated issue in this proceeding and provide that the only issues in controversy in this proceeding are those matters raised individually by Contentions 3, 4, 5 and 7.
- B. Clarify the procedures for discovery against the Staff.

Respectfully submitted,



Richard G. Bachmann  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 19th day of October, 1981

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<sup>9/</sup> The Staff's best estimate of the issuance date of its safety evaluation report and any appropriate environmental determinations regarding the large scale sleeving program proposed by the Licensee's amendment to its license is the latter part of November, 1981.

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713(b), 10 CFR Part 2, the following information is provided:

|                  |   |  |
|------------------|---|--|
| Name             | - | Richard G. Bachmann  |
| Address          | - | U.S. Nuclear Regulatory Commission<br>Office of the Executive Legal Director<br>Washington, DC 20555 |
| Telephone Number | - | Area Code 301 - 492-7290   |
| Admission        | - | Supreme Court of the State of California   |
| Name of Party    | - | NRC Staff<br>U.S. Nuclear Regulatory Commission<br>Washington, DC 20555                              |



Richard G. Bachmann  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 19th day of October, 1981

