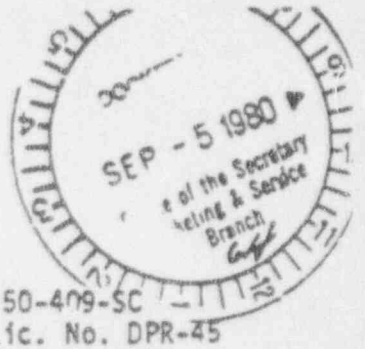
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
)
DAIRYLAND POWER COOPERATIVE)
(La Crosse Boiling Water)
Reactor))

Docket No. 50-409-SC
Prov. Op. Lic. No. DPR-45
(Order to Show Cause)

NRC STAFF'S ANSWER TO FREDERICK M. OLSEN'S
MOTION TO DISQUALIFY THE BOARD

On August 19, 1980, Frederick M. Olsen III moved that all members of the Atomic Safety and Licensing Board disqualify themselves from further consideration of matters in this proceeding. Mr. Olsen amended his motion on August 22, 1980. As the basis for his motion, Mr. Olsen alleges that the members of this Board failed to consider certain issues or admit evidence in the proceeding on expansion of the La Crosse facility's spent fuel pool. These actions of the Board, Mr. Olsen alleges, "have caused a complete and total loss-of-faith in the Board's ability to consider evidence and render a decision that is in the public interest as specified in the Atomic Energy Act of 1954". Motion at 3 (August 19, 1980).

As the Appeal Board noted in the Midland proceeding,

> "an administrative trier of fact is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a 'personal bias' against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual - as distinguished from legal or policy - issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues." Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 65 (1973)

Mr. Olsen has not demonstrated in his motion or affidavits that any of the above grounds exist for disqualifying the Board. Rather, the grounds for his motion

stem from his apparent dissatisfaction with several rulings of the Board in the spent fuel pool expansion proceeding regarding the admissibility of evidence and the scope of the proceeding. Mr. Olsen must establish, however, more than that the Board ruled incorrectly in order to establish that the Board is disqualified from presiding over this new proceeding. Even assuming that the Board's rulings were wrong, the Board's alleged errors are insufficient to show that the Board is partisan or otherwise incompetent to preside over this proceeding. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974).

In addition to showing no personal bias by the Board, Mr. Olsen has not shown that the Board has prejudged any of the issues in this proceeding. Although Mr. Olsen advances in this proceeding an issue identical to one he wishes were considered in the spent fuel pool expansion proceeding (i.e., economic costs to facilities as a result of the Three Mile Island accident), Mr. Olsen does not show how the Board's action on that matter in the spent fuel pool expansion case will affect the Board's determination whether or not to hear that issue in this proceeding. */ The Board's determinations in the spent fuel pool expansion proceeding do not predetermine the Board's action in this proceeding, nor do its former actions in any way indicate that it has prejudged the appropriate disposition of Mr. Olsen's request for a hearing or of his proposed issues in the proceeding on the Order to Show Cause. Cf. Nuclear Engineering Co.

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*/ For the reasons given in the Staff's answer to the requests for hearing, the Staff, of course, believes that this issue is outside the scope of any hearing that may be held in this proceeding. See NRC Staff's Response to Requests for Hearing (August 29, 1980).

(Sheffield, Illinois, *n*-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1 (1980), in which the Commission rejected the licensee's argument that the Board would be incapable of rendering a fair decision because the Commission's directives to the Board had effectively predetermined the Board's decision. In the absence of compelling reasons that clearly show otherwise, it must be assumed that the Board members are "intellectually disciplined and capable of judging" the matters in controversy in this proceeding. See id. at 5. The Board's rulings in an entirely different proceeding hardly portend that the Board will be incapable of resolving matters fairly in this proceeding.

Because Mr. Olsen has shown neither personal bias nor prejudgment of the issues by the members of the Board in this proceeding, his motion to disqualify the Board should be denied.

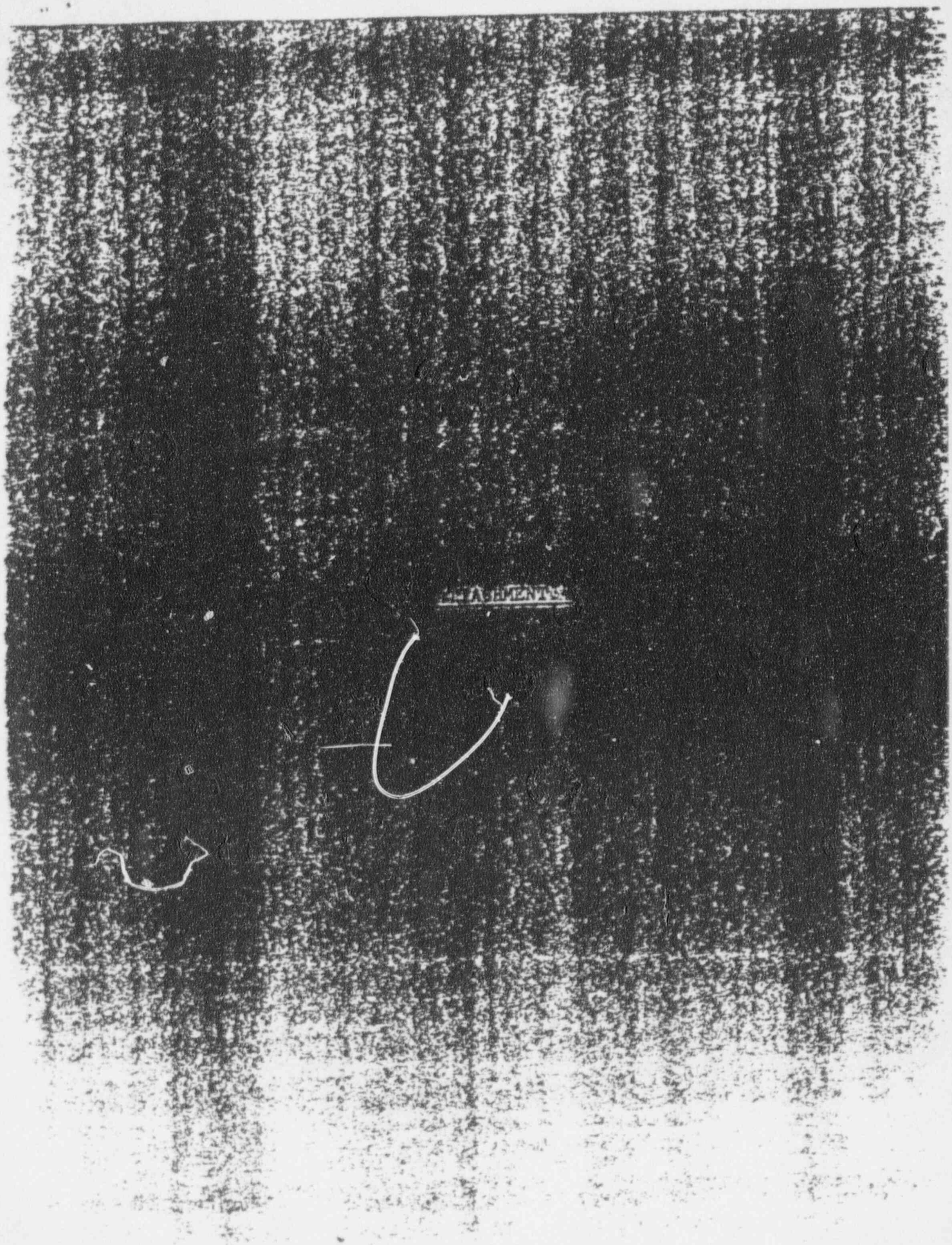
Respectfully submitted,

Stephen G. Burns
Counsel for NRC Staff

Karen D. Cyr
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of September, 1980.

ATTACHMENTS



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
Dr. George C. Anderson
Ralph S. Decker

SERVED SEP 22 1980

In the Matter of	)	
	)	
DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409-SC
	)	Prov. Op. Lic. DPR-45
(La Crosse Boiling Water Reactor)	)	

MEMORANDUM AND ORDER
DENYING MOTION TO
DISQUALIFY LICENSING BOARD

(September 19, 1980)

On August 19, 1980, Mr. Frederick M. Olsen, III, then a petitioner for intervention in this show-cause proceeding,[1/] filed a motion for disqualification of the Atomic Safety and Licensing Board assigned by the Commission to consider and rule on the pending intervention petitions and to conduct a hearing if required.[2/] On August 22, Mr. Olsen filed an amendment to his motion. The motion was opposed by the

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1/ At a prehearing conference on September 11, 1980, the Board granted Mr. Olsen's petition and admitted him as a party to the proceeding. A Prehearing Conference Order recording this determination will be issued in the near future.

2/ See Commission Order dated July 29, 1980, published at 45 Fed. Reg. 52290.

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Licensee and by the NRC Staff.[3/] For reasons set forth herein, and as announced at the prehearing conference, we are denying the motion and referring the denial to the Atomic Safety and Licensing Appeal Board for its review.

As reflected in the affidavits accompanying the motion and the amended motion, the sole ground for which disqualification is sought is certain assertedly erroneous evidentiary rulings made by this same Board in the proceeding involving the spent fuel pool expansion of the La Crosse reactor.[4/] Those rulings are said to have resulted in an inadequate record in that proceeding and, as stated by Mr. Olsen, "have caused a complete and total loss-of-faith in the Board's ability to consider evidence and render a decision that is in the public interest* * *."

That ground, however, is not one which provides a basis for disqualification of a Board or its members.[5/] The grounds

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[3/] At the September 11, 1980 prehearing conference, Mr. Olsen provided the Board and parties with an "Answer to NRC Staff and Applicant's [sic] Responses to a Motion to Disqualify the Board". Although such a filing is not authorized under NRC rules (see 10 CFR § 2.730(c)), we invited responses from the Licensee and Staff (Tr. 6) and have taken this material into account in reaching our decision on disqualification.

[4/] An initial decision authorizing the requested expansion, subject to specified conditions, was issued on January 10, 1980. LBP-80-2, 11 NRC 44.

[5/] This is so irrespective of the correctness of the rulings in question. Any party may, of course, appeal evidentiary rulings. Mr. Olsen was not a party to the spent fuel pool proceeding, and no other party appealed the rulings in question.

which can serve as a basis for disqualification were outlined by the Appeal Board in the Midland proceeding:

> * * * an administrative trier of fact is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual--as distinguished from legal or policy--issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgement of factual issues.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973); see also Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), ALAB-164, 6 AEC 1143 (1973); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974) ("To establish that a hearing was biased, something more must be shown than that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan").

Because Mr. Olsen's motion, including the accompanying affidavits, makes no assertions which fall within the scope of matters which can give rise to disqualification, that motion must be, and hereby is, denied. In accordance with the

requirements of 10 CFR § 2.704(c), this denial is referred to the Appeal Board[6/] for its review.[7/]

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer
Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland
this 19th day of September 1980.

6/ By Order dated September 12, 1980, the Commission delegated its review authority and functions in this proceeding to the Appeal Board.

7/ In connection with this referral, the Appeal Board's attention is directed to: (1) Mr. Olsen's Motion for Disqualification, dated August 19, 1980; (2) Mr. Olsen's Amended Motion, dated August 22, 1980; (3) the NRC Staff's Answer, dated September 4, 1980; (4) the Licensee's Response, dated September 5, 1980; (5) Mr. Olsen's "Answer" to the responses of the Staff and Licensee, served on the parties at the September 11, 1980 prehearing conference; and (6) discussion at the prehearing conference, at Tr. 5-7.

9/11/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
DAIRYLAND POWER COOPERATIVE
(La Crosse Boiling Water Reactor) } Docket No. 50-409

ANSWER TO NRC STAFF AND APPLICANT'S RESPONSES TO A.R.C.E.
TO DISQUALIFY THE BOARD

To start, on page 1 of Applicant's (not "Liscensee" as erroneously stated) response, Applicant states that Frederick Olsen is a CREC member. Mr. Olsen is not a CREC member, and has not been since January, 1980, when he broke with the group over a strategy disagreement with CREC's executive officers. Mr. Olsen continues to closely scrutinize CREC's activities.

On page 2 of NRC Staff's response, it is stated that the board's alleged errors are insufficient to show the board to be partisan or otherwise incompetent. To ignore the largest cost factors (excluding decommissioning and waste storage) in a hearing specifically concerned with Lacbwr plant economics is without doubt grounds for disqualification in future proceedings. A simple promise "not to do it again" will not suffice. Richard Shimshak, Lacbwr plant manager, has repeatedly stated that TMI-2 accident related costs would be the economic undoing of his plant.

On page 2 of Applicant's response, it is stated that Mr. Olsen said that the board was biased. I did not so state. I stated that I lacked faith in the board's ability. But to address the question of whether or not Frederick Olsen considered the board to be biased, I need only refer the reader to the last sentence of the board's memorandum and order of 5 August 1980. Here, the board states that liquefaction matters must be handled expeditiously. The only party to benefit from such expeditiousness would be the applicant. Surely, with Lacbwr's poor economic picture, the public would not be harmed by the thorough treatment of matters that the law demands. This expeditiousness that the

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the board feels is necessary now contrasts sharply with the lack of expeditiousness shown by the board in all other matters (such as the spent fuel and full term liscense proceedings). This lack of expeditiousness can certainly also be viewed as bias on the board's part, because it allows Applicant to keep Lacbwr operating without a liscense.

On page 3 of Applicant's response, Applicant states that Mr. Olsen appears to have misperceived "the actual significance" of a limited appearance statement -- that a limited appearance statement is not evidence. A limited appearance statement may not be evidence, but it may pose questions that the board has a duty to see answered. To quote Title 10 of the Code of Federal Regulations, Chapter 1, Appendix A, part V., (a) (4):

> A person making a limited appearance statement may not only want to state his position, but to raise questions that he would like to have answered. This should be permitted to the extent that the questions are within the scope of the proceeding as defined by issues set out in the notice of hearing, the prehearing conference order, or any later orders. Usually such persons should be asked to make their statements and raise their questions early in the proceeding so that the board will have an opportunity to be sure that relevant and meritorious questions are properly dealt with during the course of the hearing.
>
> (emphasis added)

Mr. Olsen's questions were relevant, as they concerned mandatory expenditures during the three year period being discussed at the 1979 spent fuel hearings at La Crosse. Mr. Olsen's questions were meritorious, in that Mr. Olsen appeared to be the only person attending the October 1979 hearings who knew anything about the TMI-2 retrofit cost issue. Certainly, DPC employees showed only ignorance. The board and NRC staff seemed to believe that the recommendations concerning TMI-2 retrofits were somehow not binding, and therefore not relevant. For a question to be properly dealt with, it must be properly answered.

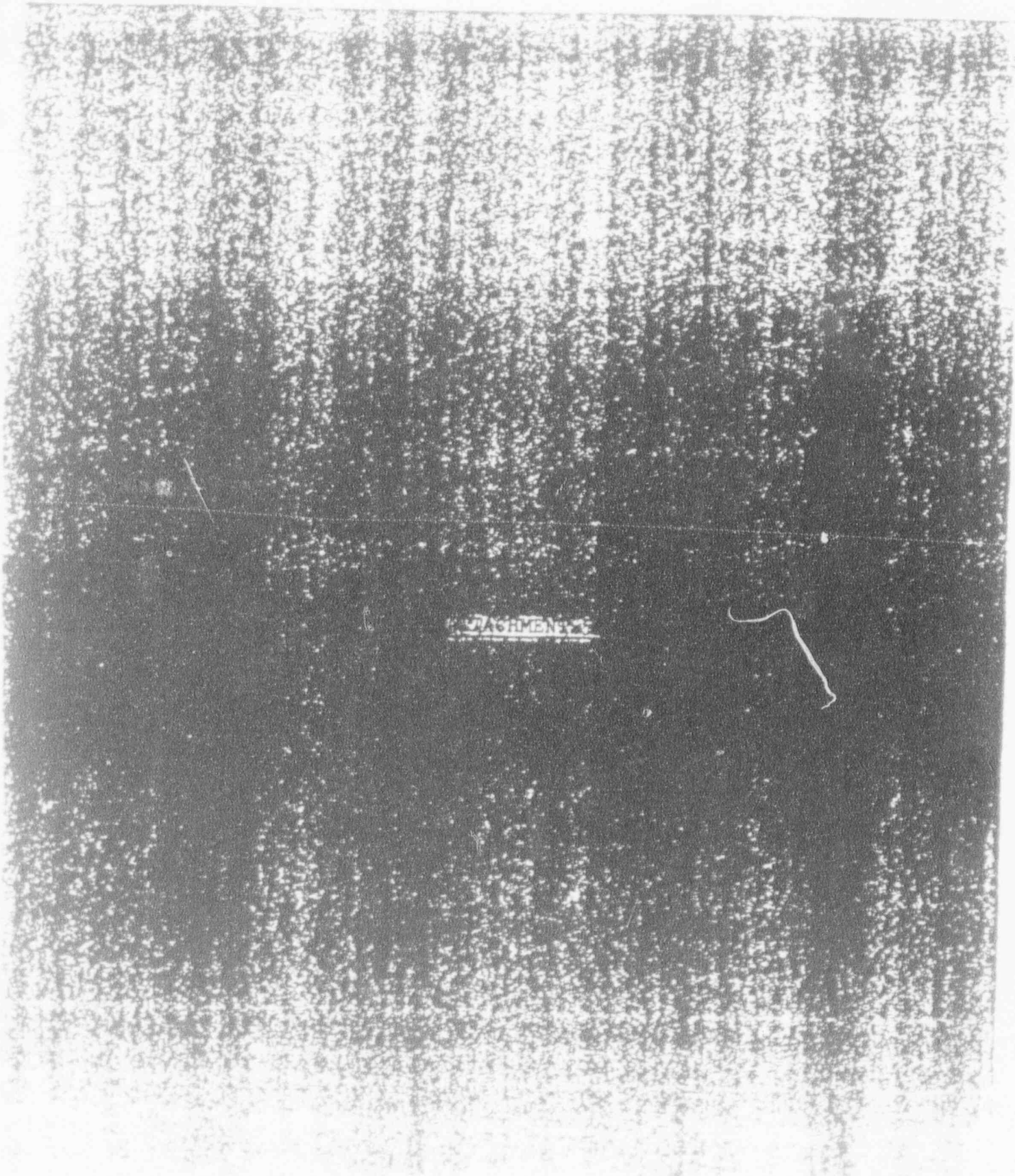
Neither NRC Staff nor Applicant disputes part III. of Frederick Olsen's Motion to disqualify the Board. This alone can be considered grounds for disqualification, as the board has a duty to develop a sound record. Even if the concept of reactor vessel conversion had been considered and then discarded, in our current period of uncertainty regarding the de-commissioning of power reactors, the concept may (and will) be of use elsewhere, and therefore should have been included in a sound record.

As NRC Staff and Applicant have not given any solid reasons against the granting of the Motion to disqualify, and as a change in Atomic Safety and Liscensing Board is materially no different than a change in judge for civil and other judicial proceedings, Mr. Olsen urges that, in the public interest (which the NRC Staff and Applicant never mentioned in their responses), his Motion to Disqualify the Atomic Safety and Licensing Board be GRANTED.

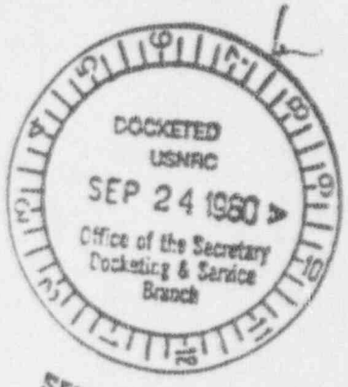
RESPECTFULLY SUBMITTED,

Frederick M. Olsen III

FREDERICK M. OLSEN III


ATTACHMENT 5

ATTACHMENT 1



SERVED SEP 24 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Thomas S. Moore

In the Matter of	)	
DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409 SC
(La Crosse Boiling Water Reactor)	)	

DECISION

September 24, 1980

(ALAB-614)

This is a show cause proceeding involving the outstanding provisional operating license for the La Crosse nuclear power facility. On August 19, 1980, Frederick M. Olsen, III, then a petitioner for intervention in the proceeding,[1/] moved to disqualify the entire Licensing Board which had been assigned by Commission order[2/] to conduct it. On September 19, 1980, that Board denied the motion and, as required by 10 CFR 2.704(c), referred its action to us for review.

1/ We understand that Mr. Olsen's intervention petition was recently granted and therefore he now is a party to the proceeding.

2/ The order was entered on July 29, 1980. See 45 Fed. Reg. 52290 (August 6, 1980).

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On an examination of the papers filed below for or against the disqualification motion, we conclude (1) that there is no necessity to call for further submissions to us; and (2) that the motion is patently without substance. We therefore affirm summarily the ruling below.

1. The three members of this Licensing Board were also assigned to the separate and distinct proceeding involving the application for an amendment to the La Crosse provisional operating license to enable an expansion of the capacity of the facility's spent fuel pool.[3/] The sole basis offered for seeking their disqualification here is that they had mishandled that proceeding. In this connection, Mr. Olsen complains principally of their failure to have required the development of a full evidentiary record on certain matters which he maintains were relevant to the disposition of the license amendment application. This asserted failure is said to "have caused a complete and total loss-of-faith in the Board's ability to consider evidence and render a decision that is in the public interest as specified in the Atomic Energy Act of 1954".[4/]

3/ See LBP-80-2, 11 NRC 44 (1980).

4/ Motion, p. 3.

2. We need not now pass upon whether there is substance to Mr. Olsen's charges.[5/] As the Board below correctly observed in denying the motion, the disqualification of a licensing board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding. Rather, an administrative trier of fact is subject to disqualification only

> if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

Mr. Olsen has not alleged, let alone established, the existence of any facts which might conceivably satisfy any of those tests. In this connection, it is long settled that "[t]o establish that a hearing was biased, something more must be shown than

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5/ Not being a party to the spent fuel pool proceeding, Mr. Olsen could not appeal from the initial decision rendered therein (LBP-80-2, fn. 3, supra). See 10 CFR 2.762(a). Although the NRC staff did file an exception to that decision, it related to an entirely discrete Licensing Board determination. We have not as yet acted on the exception or completed the review on our own initiative of the decision as a whole.

that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan". Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974), citing Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), ALAB-164, 6 AEC 1143 (1973).[6/]

Affirmed.

6/ In his response below to the applicant's and staff's oppositions to his disqualification motion, Mr. Olsen stressed that the motion had not asserted that the Licensing Board was biased but, rather, had only questioned the "ability" of its members. He went on to suggest, however, that bias nonetheless might be inferred from the Board's purported lack of expedition in the conduct of both the spent fuel pool proceeding and another (still-pending) proceeding involving the conversion of the La Crosse provisional license to a full-term operating license. (In this regard, Mr. Olsen took note of the Board's statement in an August 5, 1980 order that the instant show-cause proceeding would be completed with dispatch).

Leaving aside the fact that the disqualification motion itself made no such claim, we find wholly insufficient cause for indulging in Mr. Olsen's assumption that the various La Crosse proceedings have been given disparate treatment for the applicant's benefit. There are, of course, many legitimate -- and indeed often compelling -- reasons why one proceeding will move forward more rapidly than another. And, as the Board below noted in its August 5 order, the Commission's July 29 order (see fn. 2, supra) conveys the message that there is to be expeditious disposition of the issues presented in this proceeding.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

Mr. Moore did not participate in the consideration or disposition of this matter.

March 31, 1981

SECY-81-207

ADJUDICATORY ISSUE
(Information)

For: The Commission

From: James A. Fitzgerald, Assistant General Counsel

Subject: BACKGROUND OF ADMINISTRATIVE JUDGES' CONCERNS ARISING OUT OF ALAB-590

Purpose: To report the results of an OGC survey of the NRC administrative judges about the Appeal Board decision in ALAB-590.

Discussion: The Appeal Board in ALAB-590, 11 NRC 542, reversed a Licensing Board denial of Mr. F. H. Potthoff's petition to intervene in the Allens Creek proceeding on the ground that he failed to provide a basis for his contention that a marine biomass farm would be environmentally preferable to Allens Creek. A divided Appeal Board found that the Licensing Board, in rejecting the contention, had disregarded the long-standing administrative practice that the underlying factual support for a contention is not a proper subject for examination in a decision whether to permit intervention. E.g., Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). The Appeal Board found that Potthoff, a pro se litigant, contended only that the biomass farm was a viable alternative that had been neglected in the NRC FES and that he

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Mark E. Chopko, GC
X-43224

should not have been held to a basis for "preferability." This decision drew a vigorous dissent from Dr. Buck who urged not only that the majority opinion was in error in accepting what in his view was a frivolous contention, but also that the Commission should review this case to address the "basis" requirement for contentions. While this case was pending before the Commission, the Acting Chairman of the Licensing Board Panel and several Licensing Board members filed separate memoranda with the Commission -- some urging review because ALAB-590 was seen as an evisceration of the contention requirement for intervention and others urging no review because ALAB-590 was seen as a confirmation of present practice. These filings were extraordinary in view of the nature of the case and its practical effect on Allens Creek.

EX. 5

Under NEPA it is the agency's duty to fully explore alternatives to the proposed action. A challenge to the performance of that duty is surely cognizable in the proceeding. This did not mean that Mr. Potthoff would prevail on the merits; in fact he has not.1/ What it means is that he presented enough information that on its face gave the other parties adequate notice of his concern and supported going forward to a merits evaluation.

Members of various Boards questioned the validity of an intervention policy that permitted such a contention to be accepted in the first place. This dispute was placed before the Commission. On June 10, the Commission discussed ALAB-590 and the views expressed by the various Board members

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1/ On February 2, the Appeal Board affirmed the Licensing Board's grant of summary disposition to the applicant on the Potthoff biomass farm contention. Because that was his only contention, Mr. Potthoff has been dismissed from the proceeding. Dr. Buck, who dissented in ALAB-590, stated in a separate opinion that this procedure "served no purpose other than to consume unnecessarily the time of the parties, the Board below, and this Board." Slip op. at 15. See SECY-A-81-131 (March 2, 1981).

and decided not to take review.[2] At the same time, however, the Commission directed us to study what sparked the filing of various memoranda from the Boards and what might be done about it, including whether the Grand Gulf/Allens Creek standard should be changed. As you will recall, the Commission's discussion focused on the policies for and against the current low threshold for judging the adequacy of contentions at the intervention stage. On the one hand, it was noted that technical members must feel frustrated by not being able to use their expertise to weed out unmeritorious contentions at this stage. (See also n.1, supra.) On the other hand, the view was expressed that in adjudication issues should be rejected for lack of merit, not on a judge's intuition and calculation but on a record developed by the parties -- the danger being that only conventional issues would be accepted.[3] [We believe

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2/ In a one-page order, the Commission, with the Chairman dissenting, announced it would not review ALAB-590 and stated it did not read that decision as departing from the standard set in Grand Gulf. After this order, we would regard any decision interpreting ALAB-590 as eliminating the basis requirement as error and a candidate for reversal.

3/ These concerns paralleled the issues raised in the Licensing Board memoranda. It was suggested that ALAB-590 represented an overly legalistic approach that was irrational and wasteful for a technical agency (Deale) and had stripped the "basis-for-contention" requirement of meaning (Lazo). On the contrary, it was noted that there was a danger in letting technical judgment go unchecked because only the conventional issue would survive and that ALAB-590 had only confirmed what had always been the law (Paris, et al.).

Unless the contention is frivolous on its face or discloses some illegality or is unsupported by the plain language of the basis asserted, the contention must be admitted.

What follows is our report on the causes of the reaction to ALAB-590. A presentation of alternatives on how the contention standard may be changed is now the subject of a separate OGC task arising out of SECY-81-111 (February 17, 1981).

Administrative Judges' Opinions

We have discussed the ALAB-590/contention situation at a meeting of the Licensing Board panel and with Alan Rosenthal and John Buck of the Allens Creek Appeal Board. From these discussions, we have identified several reasons to explain why ALAB-590 should have caused such concern from Board members while the case was still pending before the Commission.4/

(1) Concern among the judges about the nature of the role the Commission intends its adjudicatory boards to play in dealing with public participants. Some judges alluded to their dual role in the Commission's system -- they are at the

4/ In one of its Shearon Harris decisions, the Commission encouraged its adjudicatory boards to advise the Commission on situations that the Commission should address, where the boards were powerless to act. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 514 (1980). The concerns expressed reflect that policy. In our view,

same time judges ruling on particularized matters in adjudication and the Commission's agents representing the agency's authority to the public. There is considerable balance in these roles, and they are aware of this most acutely in ruling on intervention petitions. Some judges specifically indicated that they would welcome Commission guidance here: What does the Commission want of them? To what extent does it want the Boards to indulge members of the public and hear unreasonable issues? What is the NRC trying to accomplish by pleadings? What is the hearing supposed to accomplish? These invitations for guidance suggest the need for some Commission action, either to bless the current approach (with some further direction) or to change it.

(2) Differing views on the wisdom of the current threshold for contentions. Perhaps the dichotomy of views is best exemplified by the opinions of Dr. Buck and Mr. Farrar in ALAB-590. Dr. Buck was disturbed at the thought that the NRC process should require that the biomass contention be heard, with an appropriate reference to Dickens. Mr. Farrar conceded that this case might be perceived as a "bad result," but it was nonetheless the price NRC pays for having an open system of adjudication. Some judges feel that the current threshold (10 CFR 2.714 as interpreted in Grand Gulf) is sensible and workable. They see it as "easily applied," and are concerned that raising the threshold will cut off some good but novel contentions. Moreover, since the Commission allows an intervenor to make his case entirely on cross-examination, one

judge indicated it would be inconsistent to raise a high threshold to entry to the proceeding itself. On the other hand, some would like to see the Commission be more conservative in allowing "losing" contentions into the proceeding. These judges believe it is wasteful to go forward with insubstantial contentions. Summary disposition, while more efficient than hearing, nevertheless is "not so easy." It takes resources, discovery time, etc. One judge felt that it was somewhat fraudulent to go to hearing on a specious issue, particularly to the intervenor who is misled into believing he might prevail.

(3) The Appeal Board interpreted the contention differently than the Licensing Board did. Mr. Potthoff had urged that a large marine biomass farm would be "environmentally preferable" to Allens Creek. The Licensing Board found that no basis for the "environmental superiority" of the proffered alternative had been demonstrated. The Appeal Board, however, said Potthoff's papers clearly indicated his concern that a viable alternative had been overlooked in the FES. The Board found that an examination of the superiority of an alternative is a merits determination, the decision that the large marine biomass farm was not shown to be an environmentally superior alternative was error, and the Licensing Board should have found a basis for the contention that a biomass farm was a viable alternative. A theory of the Appeal Board decision is that a reasonable basis for viability is all that needs to be established and a Board may not examine superiority as well in deciding whether to allow the contention at the intervention stage.

The Appeal Board was implicitly critical of the Licensing Board's interpretation of Mr. Potthoff's pro se pleadings. On this level, the Appeal Board decision is perceived as an invocation to read less stringently the pleadings of a pro se litigant, notwithstanding their plain words. This result was in fact urged by intervenor TexPIRG in its brief in support of Potthoff's appeal. While there is solid caselaw support for the Appeal Board's departure from the words of the pleading to its general intention, because the result was to allow an apparently absurd contention into the hearing, there was strong opposition directed at ALAB-590. As a matter of law, however, the decision was well-founded.5/ The judges may have reacted more to the result in fact than the policy itself. The feeling was also expressed that the Appeal Board should not have taken the lower Board to task when it was construing the contention to be "viability," not "preferability." Had Mr. Potthoff expressed a more usual alternative, the same degree of concern might not have been expressed.

It is well-settled that a complaint drafted by a pro se litigant must be liberally construed in view of his lack of professional sophistication. Merckens v. DuPont, Glore Forgan & Co., 514 F.2d 20 (2d Cir. 1975), citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). In Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944), Judge Clark, a "home drawn" complaint against a motion to dismiss drafter of the Federal Rules of Civil Procedure, sustained stating that, under the rules, Mr. Dioguardi was only required to make "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. 8(a). This practice is well-respected by the federal judiciary. The Commission's pleading rule, 10 CFR 2.714, is interpreted analogous to the federal rules. See SECY-A-80-16, supra.

(4) Mr. Potthoff offered additional bases to the Appeal Board. At the prehearing conference, Mr. Potthoff explained that he intended by his marine biomass contention that the farm "would grow kelp and take it in and have it decay into alcohol or methane or something like that" (Tr. 931) as an energy source and his basis was "project independence, which says a biomass farm could be ready *** in 1986." (Tr. 932). The Licensing Board said that basis was insufficient to show that a marine biomass farm was environmentally superior to a nuclear plant. In his brief on appeal, Mr. Potthoff pleaded that he believed the Licensing Board would just take notice of the obvious environmental advantages to a marine farm -- no radionuclides and less land irrevocably committed to nuclear energy production. Neither of these assertions was made to the Board below and both directly related to the biomass contention. In our discussions with the judges, the Allens Creek Licensing Board Chairman remarked that had that additional information been presented initially the Board would have reached a different conclusion on intervention. This suggested to us a feeling on the part of the judges that the Appeal Board reversed the Licensing Board on a record that includes information not presented below. The Appeal Board decision, however, does not cite this information and could not rely on it to reverse the Licensing Board. In ALAB-582, decided in February 1980 in that same docket, the Board refused to reverse a lower decision on information only first adduced on appeal. ALAB-582, 11 NRC

239, 242. [redacted] EX. 5

Points 1 and 2 suggest that some change is needed to 10 CFR 2.714. Points 3 and 4 indicate administrative reasons for the concerns raised about ALAB-590 -- principally issues of inter-Panel relations.

Preliminary Conclusions

EX. 5

Coordination: This paper has been reviewed by members of the Licensing Board Panel and Judges Rosenthal and Buck. Written comments are attached.

James A. Fitzgerald
Assistant General Counsel

Attachments:
1. Memo, 3/20/81, Rosenthal to Fitzgerald
2. Memo, 3/24/81, Buck to Fitzgerald

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

March 20, 1981

MEMORANDUM FOR: James A. Fitzgerald
Office of the General Counsel

FROM: Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Panel

SUBJECT: OGC REPORT ON ALAB-590

In response to your March 19 memorandum, I have nothing to add to the report prepared by your office on ALAB-590. It seems to me

EX. 5

It is my understanding, however, that Jack Buck will be commenting on the report. He will transmit his comments directly to you.

As you are undoubtedly aware, Bill Reamer has sent me a copy of the draft amendments to 10 CFR 2.714, with a request that any comments regarding those amendments be submitted by Thursday, March 26. I have circulated the draft among the members and senior professional staff of the Appeal Panel. Some of them may wish to express an opinion on the amendments; in any event, I very likely will do so.

ATTACHMENT 1

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