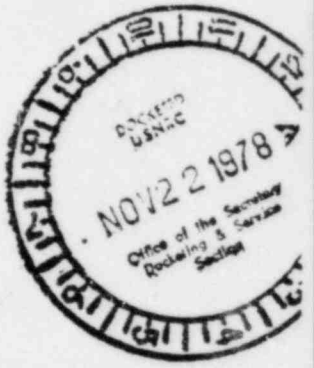
11/21/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION Hdqtrs. PDR



BEFORE THE COMMISSION

In the Matter of	)	
	)	
ROCHESTER GAS AND ELECTRIC CORPORATION, ET AL.	)	Docket No. STN 50-485
	)	
(Sterling Power Project Nuclear Unit No. 1)	)	

NRC STAFF RESPONSE TO PETITION FOR REVIEW OF ECOLOGY ACTION OF OSWEGO

The Nuclear Regulatory Commission Staff (Staff) opposes the petition of Ecology Action of Oswego (EA or Petitioner) under 10 CFR 2.786 for Commission review of the October 19, 1978, decision of the Atomic Safety and Licensing Appeal Board (ALAB-502) in the captioned proceeding. The issues raised do not present important questions of fact, law or policy which warrant Commission review. The Staff separately discusses each issue below.

The Ginna Alternate Site (EA's Point One)

EA first claims that the Appeal Board misinterpreted the "obviously superior" standard for evaluating alternative sites established by the Commission in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 522-536 (1977) and as a result erred in not finding the Ginna alternative "obviously superior" to the proposed Sterling site.[1/] This claim is without factual or legal merit as neither the Licensing Board

[1/] Petition for Review of Ecology Action of Oswego, dated November 6, 1978, at 2.

or the Appeal Board found the Ginna site to approach being "obviously superior" over the Sterling site.[2/] In Seabrook, the Commission stated that a proposed site may not be rejected for an alternative where the alternative is "marginally better," but only when it is "obviously superior." 5 NRC at 530. The Licensing Board in this proceeding found:

> . . . although comparison of the two sites is quite similar, a small advantage must be accorded the Ginna site on environmental considerations. [3/]

And again when considering closed-cycle cooling:

> Based on the factors listed above and other evidence in the record, the Board finds no alternate site is obviously superior to the Sterling site. [4/]

The Appeal Board, after discussing the environmental attributes of both sites and noting the Commission's recognition of the imprecision of cost-benefit analysis and the wide margin of uncertainty inherent in any site evaluation stated:

> These observations ring true as applied to the evaluation of the two sites in issue here. Indeed, were we called upon to determine on the record brought to us which site was on balance the best choice from an environmental standpoint, our task would be a most difficult one. Fortunately, however, we need not make that determination. All that we must decide is whether Ginna is "obviously"--in other words, clearly and substantially--superior to Sterling. In our judgment, in light of the record evidence discussed above (taken in conjunction with the fruits of our own examination of the sites), that question requires a negative answer. [5/]

[2/] The Commission's "obviously superior" standard was expressly upheld in New England Coalition on Nuclear Pollution v. NRC (Nos. 77-1219/1306/1342/1013 1st Cir.) (August 22, 1978, slip opinion at 13).

[3/] Initial Decision, LBP-77-53, 6 NRC 350, 416 (1977).

[4/] Id., at 430.

[5/] ALAB-502 at 23-24 (footnote deleted).

There is no substantial advantage of the alternative over Sterling. The most that can be said for the Ginna site based on the Licensing Board and Appeal Board decisions is that it may be "marginally better" than Sterling. No matter how "obviously superior" be defined, it is clear that both the Licensing Board and the Appeal Board found that the alternative site did not meet that standard.

It, thus, would be inappropriate in this case to attempt to more closely define that phrase--where no matter what definition is used it cannot change the results of this case. A litigated case is not an appropriate forum for rendering an advisory opinion. See Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 463 (1978); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978). Without facts that could create a difference, there is no purpose in reviewing the Appeal Board's definition.

EA's further assertion, without citation to any authority, that the Appeal Board's definition of "obviously superior" constitutes a clear violation of NEPA is of no moment. First it must be emphasized that the Appeal Board did not use a standard of "greatly superior" as Intervenors allege, but used the standard as we showed of "obviously superior." That standard of obviously superior is in accord with law. As stated in New England Coalition v. NRC, supra, at 13, 14 in affirming Seabrook, supra:

> The obvious superiority standard, as it is explained in the Commission's opinion, says nothing about whether or how the required studies will be performed. Rather it goes to what the Commission will do with findings

> that the studies will generate. The standard is designed to guarantee that a proposed site will not be rejected in favor of a substitute unless, on the basis of appropriate study, the Commission can be confident that such action is called for. Given the necessary imprecision of the cost-benefit analyses involved and the fact that the proposed site will inevitably have been subjected to far closer scrutiny than any alternate site, we cannot say that it is unreasonable to insist on a high degree of assurance that the extreme action of denying an application is appropriate. This is especially so since NEPA does not require that a plant be built on the single best site for environmental purposes. All that NEPA requires is that alternative sites be considered and that the effects on the environment of building the plant at the alternative sites be carefully studied and factored into the ultimate decision. 6/

The standard used by the Appeal Board was in accord with law.7/

EA's final argument on the alternate site issue is that the Appeal Board improperly substituted its own observations and judgment for those of the witnesses in discussing the harm associated with land clearance at Sterling and in concluding that Ginna is not obviously superior to Sterling.8/ This

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6/ New England Coalition v. NRC, slip opinion at 13-14.

7/ Petitioner also claims that the Licensing Board found Ginna to be "obviously superior" to Sterling in its Initial Decision and that the Appeal Board erred in overturning that determination. (Petition for Review at 3). As we have shown, this claim is patently incorrect because it flies directly in the face of the Licensing Board's findings, quoted supra, that Ginna holds only a small advantage over Sterling and is not obviously superior even though it is presently a reactor site.

8/ Petition for Review at 3, 4. Intervenor seeks to make much of the fact that there are mature hardwood trees on the site and the Appeal Board states the site is populated essentially with second or third growth trees." Nothing is contradictory in these statements. Further as found, mature hardwoods are common to the area. Initial Decision, supra at 416.

complaint is groundless. A fair reading of ALAB-502 shows unmistakably that references made in its opinion to its site visits were intended simply to confirm that the Appeal Board could readily apprehend the foundation for the Licensing Board's decision on particular issues, a necessity if it is to carry out its appellate review responsibilities efficiently.[9/] Rather than substituting its own judgment for that of the witnesses, the Appeal Board flatly stated:

> The Licensing Board carefully analyzed the various attributes of the two sites, with particular reference to those factors stressed by Ecology Action--namely, transmission lines, aesthetics and land clearing requirements. [10/] (emphasis supplied).

With respect to aesthetic considerations, for example, the Appeal Board was perfectly clear:

> We see no reason, however, to disturb the Licensing Board's finding to the contrary. More specifically, our own inspection of the two sites confirmed what the Board found the record to establish (see p. 12, supra): that each site has certain advantages and disadvantages from the standpoint of minimizing aesthetic effects and that, on balance, the difference between them is slight.[11/]

Read in the proper context, the Appeal Board's other references to its own site visits say nothing beyond the proposition underscored just above.

[9/] See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-104, 6 AEC 179, fn. 2 (1973).

[10/] ALAB-502 at 11.

[11/] Id., at 21. See also Initial Decision at 415. The Appeal Boards have full power to review, to accept evidence, review evidence and make findings of fact. 10 CFR §§2.785(b)(1). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42 (1977).

The Delay Factor (EA's Point Two)

EA asserts that NEPA requires reconsideration of the Ginna v. Sterling site comparison because of the 4-year delay in the facility's in-service data, again without the citation of authority. Petitioner specifically premises this assertion on the proposition that Ginna appears to be obviously superior to Sterling.[12/] This claim is without merit because the premise is incorrect. As previously discussed, neither the Licensing Board nor the Appeal Board have found Ginna to be "obviously superior" to Sterling from an environmental viewpoint. Therefore, economic costs associated with the delay in the operation date of Sterling is irrelevant to the site comparison. See Seabrook, 5 NRC at 535-536.

Appeal Board Rejection of Other Objections (EA's Point Three)

A. EA renews its assertion that the delay in the facility's in-service date would reasonably be expected to change the NEPA cost-benefit analysis on alternatives and to increase the cost of the project.[13/] Such generalized assertions do not warrant Commission review. EA fails to state any specific reason in its petition how or why the cost-benefit analysis would change as a result of the delay and makes no showing that any change would be significant. No basis appears for Commission review of this issue and it should not be granted.[14/]

12/ Petition for Review at 4.

13/ Ibid.

14/ It is noted that the Appeal Board has deferred consideration of need for power while the State of New York Board on Electric Generating Siting and Environmental reviews the need for the Sterling facility. See ALAB-502, at 4-8. Need for power, when the facility will be built, and the cost-benefit analysis are, of course, interrelated.

B. Next EA faults the Appeal Board for not considering statements by Niagara Mohawk on the availability of uranium. As the Appeal Board found, this exception was so insubstantial as to be unworthy of discussion.[15/] A new trial may only be granted on the basis of alleged new facts, where it is shown that the new evidence is not merely cumulative or impeaching but is of such a character that on a new trial it will probably produce a different result. McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381, 410 (10th Cir. 1965) cert. denied, 383 U.S. 933 (1965).[16/] EA did not show that these Niagara Mohawk statements would produce a different result. It only sought to introduce the statements to impeach prior testimony. The statements were not offered as positive evidence of the truth of the matters therein and could not effect the outcome of the proceeding.

In addition, the Licensing Board, after careful consideration, determined that nuclear fuel and operating costs were less than those for coal[17/] and

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15/ ALAB-502 at 25, fn. 28. In denying this motion and other claims advanced on appeal by EA, the Appeal Board added: "Suffice it to say that most of the claims go to factual matters and the record manifestly provides adequate support for the Licensing Board's findings on the particular point in issue." Id., at 25. See also "NRC Staff's Response to Board Order of April 12, 1978," dated April 28, 1978.

16/ The Appeal Board has applied this judicial standard to our proceedings. Northern Indiana Public Service Company (Bailly Generating Station, Unit 1), ALAB-227, 8 AEC 416, 418 (1974); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973).

17/ Initial Decision, 6 NRC at 395.

that nuclear fuel would be available for the lifetime of the plant.[18] The Licensing Board also concluded that the nuclear alternative is environmentally preferable to the coal alternative.[19] The two Niagara Mohawk excerpts which EA offered would clearly not lead to a different result in this case.[20]

Therefore, the Staff believes that the Appeal Board correctly denied EA's motion to reopen the record on the cost and availability of uranium.

C. EA's final assertion is that it was not allowed to supplement the values in Table S-3 at the hearing, while the Staff's witness Dr. Gotchy's testimony on the comparative health effects of the coal and the uranium fuel cycle used source terms for uranium milling and occupational exposure not included in Table S-3.[21] Primarily, this issue should not be considered as this proceeding is still pending on issues relating to the environmental impact of radon releases arising from the mining and milling of uranium.[22]

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[18] Id., at 398.

[19] Id., at 432.

[20] NRC Staff's Response to Board Order, supra, at 5.

[21] Petition for Review, p. 5.

[22] ALAB-502, supra at 27.

Moreover, Dr. Gotchy did not challenge any value established in Table S-3, but only supplemented the Table as to matters not purported to be covered therein so that the overall health effects of coal and nuclear power plants could be compared. As the Licensing Board found:

> [Dr. Gotchy] testified that in every instance where there was a value in Table S-3, or its backup documents NUREG-0116 and NUREG-0216, he used that value. Tr. 4227. Since the purpose of his testimony was to compare the overall health effects of the two types of plants, he required some additional data. Typical items in this category were health effects from normal operation of the power plants and accidents during the mining and transportation phases of the fuel cycles, including occupation risks. For these other effects, data from the "Final Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors" were used when they were available. When data were not available from these sources, the best available data were used, including where appropriate the "Reactor Safety Study" (WASH-1400). 23/

This last assertion is without merit and should not be considered.

For all of the above reasons, the Staff believes that the instant Petition for review does not present any important question of law, fact or policy, and should be denied.

Respectfully submitted,

Edwin J. Reis

Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 21st day of November, 1978

23/ Initial Decision, 6 NRC at 4. See also "Staff Brief in Opposition to Intervenor's Exceptions and in Support of Applicant's Exceptions," November 2, 1977, p. 29.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITION FOR REVIEW OF ECOLOGY ACTION OF OSWEGO" 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 21st day of November, 1978:

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