UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Commissioners:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

In The Matter Of		
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket Nos. 50-397 50-460
(WPPSS Nuclear Project Nos. 1 & 2)	)	

ORDER

(CLI-82-29)

Pending before the Commission are two petitions for a hearing filed by intervenor Coalition for Safe Power (CSP). In both instances, CSP seeks to challenge separately filed requests of the Washington Public Power Supply System (WPPSS) for the extension of the construction completion dates for two of the units being constructed at its site in Benton County, Washington. In its hearing petitions, to which we give consolidated consideration under 10 CFR § 2.716, CSP seeks to have admitted for determination, over the objections of the NRC staff and WPPSS, a broad range of issues concerning the construction and operation of the two units by WPPSS. While the usual Commission procedure in such instances would be to refer these petitions to an Atomic Safety and Licensing Board for determination, because of the uncertainty the Commission perceives exists as to the proper scope of a construction

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permit extension proceeding, it has determined to take up this matter in the first instance in order to clarify for all concerned the nature of the issues that can be asserted in challenging a permit holder's extension request.

On March 19, 1973, WPPSS was issued a permit for the construction of Washington Nuclear Project No. 2 (WNP-2), the completion date for which was extended to December 1, 1981, in August of 1978. A permit for the construction of Washington Nuclear Project No. 1 (WNP-1) was issued on December 23, 1975, and set the latest date for completion of construction as January 1, 1982. Although no application for an operating license for WNP-1 has yet been docketed, a notice of opportunity for hearing with regard to WNP-2 was issued in July 1978 in response to a WPPSS OL application. Intervention was sought, but the Licensing Board concluded that none of the intervenors met the interest requirements of 10 CFR § 2.714 and denied the requests to intervene. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 30 (1979). No appeal was taken of that decision and, accordingly, the application for an operating license for WNP-2 presently is uncontested.

On July 21, 1981, WPPSS filed an application for an extension of its construction permit completion date for WNP-1 to June 1, 1986. Subsequently, on September 4, 1981, WPPSS filed an additional application requesting an extension of its construction permit completion date for WNP-2 to February 1, 1984. In both applications WPPSS indicated that under 10 CFR § 50.55(b) "good cause" existed for an

extension because construction has been delayed due to the following factors:

1. Changes in the scope of the project including increases in the amount of material and engineering required as a result of regulatory actions, in particular those subsequent to the Three Mile Island accident.

2. Construction delays and lower than estimated productivity, resulted in delays in installation of material and equipment and delays in completion of systems necessitating rescheduling of preoperational testing.

3. Strikes by portions of the construction work force.

4. Changes in plant design.

5. Delays in delivery of equipment and materials.

The extension request with regard to WNP-1 is still pending before the NRC staff. An order granting the WPPSS request for an extension with regard to WNP-2 was published in the Federal Register on February 2, 1982. 47 Fed. Reg. 4780. In that order, the Director of the Division of Licensing, Office of Nuclear Reactor Regulation, found that the requested extension involved no significant hazards consideration so that the extension could be issued without prior notice, that good cause was shown for the construction delays, that the requested extension was for a reasonable period, that the licensing action would not result in any significant environmental impact, and that pursuant to 10 CFR §

51.5(d)(4) no environmental impact statement, negative declaration, or environmental impact appraisal was required to be prepared.

CSP filed its petitions for a hearing on the permit extension requests for WNP-2 and WNP-1 on February 23 and March 18, 1982, respectively. In those petitions, CSP seeks to litigate identical issues as to both WNP-1 and WNP-2. These joint contentions include:

1. WPPSS lacks the technical ability to complete and/or operate the facilities in a safe manner.
2. Delays in construction time have been under full control of WPPSS management.
3. WPPSS lacks the management ability to complete and/or operate the facility in a safe manner.
4. WPPSS lacks the financial ability to complete and/or operate the facility in a safe manner.

In addition, as to WNP-1, CSP desires to challenge the extension request on the grounds that:

1. WPPSS was granted a construction permit on the basis of its ability to construct a safe nuclear plant and has, thus far, failed to do so.
2. The current financial status of WPPSS is threatened by previously unforeseen circumstances.
3. Newly instituted work incentive programs may effect continued construction and potential operation of the project.

Finally, as to WNP-2 alone, CSP alleges:

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3. Newly instituted work incentive programs may affect continued construction and potential operation of the project.

Finally, as to WNP-2 alone, CSP alleges:

1. Delays of twelve months due to WPPSS violations of NRC regulations do not constitute good cause. WPPSS was granted a construction permit on the basis of its ability to build a safe plant.

2. The NRC staff ignored WPPSS construction history in concluding with regard to its "no significant hazards consideration" finding that "neither the probability nor the consequence of postulated accidents previously considered will be increased nor will any safety margins associated with this facility be decreased."

3. The NRC staff ignored the financial condition of WPPSS in concluding with regard to its "no significant hazards consideration" finding that "neither the probability nor the consequence of postulated accidents previously considered will be increased nor will any safety margins associated with this facility be decreased."

Both WPPSS and the NRC staff have sought dismissal of the CSP hearing requests on several grounds, including the assertion that the various contentions either fall outside the scope of the issues litigable in a construction permit extension proceeding or are too vague to be litigated. It is this issue that has prompted the Commission to consider the CSP petitions in the first instance.

Under section 185 of the Atomic Energy Act, 42 U.S.C. § 2235, a construction permit as issued "shall state the earliest and latest date for the completion of construction . . . ." In addition, that provision indicates that "[u]nless the construction . . . of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder shall be forfeited, unless upon good cause shown, the Commission extends the completion date." The Commission's regulation governing construction completion date extensions, 10 CFR § 50.55(b), provides that "upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date." From these two provisions it is apparent that the focus of any construction permit extension proceeding is to be whether "good cause" exists for the requested extension. Likewise, this requirement of "good cause" is the focal point of any consideration of the scope of the contentions that can be admitted at such a proceeding.

In determining the proper bounds for admissible contentions in a construction permit extension proceeding we do not necessarily mark upon a clean slate. Previously, the Atomic Safety and Licensing Appeal Board has faced the issue of what is the scope of such a proceeding. In the first instance, Indiana and Michigan Electric Company (Donald C.

Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973), Appeal Board review was sought of an Atomic Safety and Licensing Board decision dismissing intervenor contentions as outside the scope of a construction permit extension proceeding. Despite the pendency of an environmental review-operating license proceeding to which the same intervenors were a party, they had sought to have admitted to the construction permit extension proceeding contentions relating to the health and safety and environmental impacts of the changes in plant design that the permittee put forward as part of its "good cause" for the extension. The Appeal Board, finding the legislative history of Section 185 and the language of 10 CFR § 50.55(b) inconclusive in ascertaining any intent about the scope of an extension proceeding, stated that such a determination should be based on "common sense" and the "totality of the circumstances" so as to ascertain "whether the present consideration of any such issue or issues is necessary in order to protect the interest of intervenors or the public interest." 6 AEC at 420. More specifically, the Appeal Board indicated that it was concerned with "whether the reasons assigned for the extension give rise to health and safety or environmental issues which cannot appropriately abide the event of the environmental review-facility operating license hearing." Id. Reviewing the proposed contentions, the Appeal Board found the intervenors' health and safety concerns relating to plant design clearly could abide the operating license proceeding in which they could be given full consideration by the Licensing Board. Further, as to the concerns over the environmental impact of such design changes, the

Appeal Board noted that the intervenors had, in effect, waived the introduction of such an issue by not responding to an agency offer to contest a staff determination that it would not suspend the Cook facility's construction permit pending full environmental review in conjunction with the operating license proceeding. Accordingly, intervenors' contentions not being admissible in the proceeding and they having made no challenge to the sufficiency of the permittee's asserted reasons in support of the extension, the Appeal Board affirmed the Licensing Board's determination to dismiss the intervenors' contentions and its finding that good cause existed for the extension.

Some seven years later in Northern Indiana Public Service Co. (Bailly Generating Station, Unit 1), ALAB-619, 12 NRC 558 (1980), the Appeal Board was again confronted with a Licensing Board's denial of an intervenor request to convene a proceeding to consider whether a construction permit extension should be granted. In contrast to the Cook case, however, in Bailly the facility in question was less than one percent complete, six and one-half years after issuance of the construction permit. Intervenors sought the admission of contentions relating to the suitability of the site, which were not related to any of the permittee's justifications for the extension. The Appeal Board, noting the Cook opinion's general admonition that scope determinations should be based on a "common sense" approach that considers the "totality of the circumstances," indicated that, despite the lack of any direct ties between the intervenors' contentions and the permittee's reasons why construction was delayed, in the absence of any alternative

forum it might be willing to allow intervenors to air their site suitability concerns presently, before a substantial additional monetary investment was made. Having so stated, however, the Bailly Board found that 10 CFR § 2.206 did afford that alternative. Intervenors questioned whether the opportunity given by section 2.206 to request the NRC staff to institute a show-cause proceeding under 10 CFR § 2.202 to suspend the permit was sufficient; however, the Board indicated it was unwilling to assume that the staff would not fulfill its obligation to give "careful and responsible" evaluation to intervenors' concerns or that the Commission, in exercising its sua sponte review authority over a staff decision not to take any action, would not fulfill its obligation to fully examine the grounds assigned by the staff for refusing to institute a section 2.202 proceeding. The Appeal Board declared that it was not willing to denote section 2.206 as an exclusive remedy, but because the contentions in the proceeding before it had "nothing whatever to do with the need for the permit extension," the Board concluded it was appropriate to leave intervenors' site suitability concerns for consideration in the context of section 2.206 and thus affirmed the Licensing Board's decision denying the petitions to intervene.[1/]

In both Cook and Bailly, the Appeal Board noted that the purpose of

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1/ The Licensing Board had dismissed the intervenors' petitions on the ground that the Commission had taken upon itself the task of considering the site suitability of all reactors under construction in areas of high population density. The Appeal Board expressed no opinion as to the propriety of this determination. 12 NRC at 573 n.18.

a construction permit extension proceeding is not to engage in an unbridled inquiry into the safety and environmental aspects of reactor construction and operation, 6 AEC at 420; 12 NRC at 573, an observation in which we wholeheartedly concur. Moreover, if properly read, the Cook and Bailly decisions stand for two principles that are totally consistent with that proposition: (1) A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and (2) prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. As such, the result in both those cases -- dismissal of the contentions in question as outside the scope of the extension proceeding -- was correct.

Relying on the Appeal Board's characterization of the test for admissibility of contentions under section 185 and 10 CFR § 50.55 as requiring a consideration of the "totality of the circumstances," intervenors have continued to seek to have contentions on a wide range of subjects admitted at extension proceedings. The cited Appeal Board decisions were not reversed or otherwise modified by the Commission and they therefore represent, at this juncture, controlling Commission precedent. However, because the number and type of contentions that CSP seeks to have admitted here highlights possible views about the scope of an extension proceeding, we take this opportunity to reexamine the scope

of construction permit extension proceedings and provide further guidance.

Although the congressional intent behind section 185 may be somewhat ambiguous, we discern no intent on the part of Congress to require the periodic relitigation of health, safety, or environmental questions in agency adjudications between the time a construction permit is granted and the time the facility is authorized to operate. Rather, interested persons have been legislatively afforded a particular opportunity to raise such issues in the context of a proceeding in which the agency determines whether an operating license will be granted. 42 U.S.C. § 2239(a). Consistency with the congressionally mandated two-step licensing process suggests a construction of section 185 that limits the scope of litigable issues with regard to the extension of a construction permit.

In line with this interpretation of section 185 is the language of the Commission's regulation implementing section 185. 10 CFR § 50.55(b) speaks in terms of Commission consideration of "developmental problems attributable to the experimental nature of the facility" and "acts beyond the control of the permit holder." Its thrust is clearly that the Commission's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension. This same limitation should apply if any interested person seeks to challenge the request for an extension.

This, of course, does not mean that those who wish to raise health, safety, or environmental concerns before the agency have no remedy prior

to the operating license proceeding. This opportunity is afforded to all persons under 10 CFR § 2.206, which allows any person to seek the institution of a show-cause proceeding under 10 CFR § 2.202. The invocation of this procedure under section 2.206, which does not depend on the fortuity of a delay in the completion of a plant that triggers a permit extension request, requires that the NRC staff give serious consideration to requests for regulatory action concerning a licensed facility so long as the request specifies the action sought and sets forth the facts that constitute the basis of the request. The staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity or, if it believes no show-cause proceeding or other action is necessary, by advising the requestor in writing with a statement of reasons explaining that determination. Further, the Commission reviews each of these decisions sua sponte to insure that the staff's decision is not an abuse of discretion. Past practice clearly indicates that, as the Appeal Board in Bailly concluded, the agency has "faithfully discharged" its responsibility to give full consideration to petitions seeking relief under section 2.206. See, e.g., Virginia Electric Power Co. (Surry Nuclear Power Station, Units 1 and 2), CLI-80-4, 11 NRC 405 (1980) (granted by the Commission requiring EIS on repair of steam generators at Surry 1); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), DD-80-9, 11 NRC 392 (1980) (granted in part by the staff by issuing order to show cause to resolve issue of whether certain measures were required to preclude liquefaction at the site); Consolidated Edison

Company of New York, Inc. (Indian Point Units 1-3), DD-80-5, 11 NRC 351 (1980) (granted by the staff with respect to Unit 1 by issuing order to show cause why operating license should not be revoked and why decommissioning plan should not be submitted).

We believe that the most "common sense" approach to the interpretation of section 185 and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. The avenue afforded for the expression of health, safety, and environmental concerns in any pending operating license proceeding, or in the absence of such a proceeding, in a petition under 10 CFR § 2.206 would be exclusive despite the pendency of a construction permit extension request.[2/] This does not mean, however, that no challenge can be made to an application for an extension of a construction permit completion date. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Certainly, the factual

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2/ In Bailly, the Appeal Board interpreted the Cook decision as indicating that section 2.206 was not an exclusive remedy because that opinion did not mention the availability of such a procedure. In fact, there was no need for the Appeal Board in Cook to discuss the availability of any show-cause procedure because the Board found that the opportunity afforded for the litigation of the design contention in the pending environmental review-operating license proceeding in which the intervenors were parties was sufficient to protect their interests.

basis for the reasons for delay asserted are always open to question in that the permit holder cannot invent reasons that did not exist. Moreover, the permit holder cannot misrepresent those reasons upon which it seeks to rely for, as the Appeal Board in Cook noted, any determination of the sufficiency of a permit holder's reasons for delay "would be influenced by whether they were the sole important reasons for the delay or whether, instead, the delay was in actuality due in significant part to other causes (which perhaps might have indicated that the applicants have been dilatory in the conduct of the construction work and that this factor was the principal explanation for the need for an extension of the completion deadlines)." 6 AEC at 417. An intervenor is thus always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute "good cause."3/

Turning to a consideration of those contentions intervenor CSP wishes to introduce in this instance, we find most are outside the scope of the proceeding. Of the joint contentions it seeks to litigate as to both WNP-1 and WNP-2, see p. 4 supra, numbers 1, 3, and 4 are inappropriate because they neither challenge the WPPSS reasons for delay nor seek to show that other reasons, not constituting good cause, are

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3/ Because such issues are not before us, we express no opinion about the permissible scope for contentions that challenge a staff finding concerning the agency's National Environmental Policy Act responsibilities with regard to an extension of a construction completion date or that challenge any additional requested revisions of a construction permit made in conjunction with an application for an extension.

the principal basis for the delay. So too with CSP contentions 1, 2, and 3 relating to WNP-1. Accordingly, all these contentions must be dismissed as improper.

CSP contentions 2 and 3 relating to WNP-2, see p. 5 supra, are also subject to dismissal. These contentions are relevant not to its challenge to the "good cause" for extension of the construction completion date but rather are a contest to the staff's finding of "no significant hazards consideration" in issuing the permit extension without prior notice under section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a). To whatever extent such a determination may be litigable as to other license revisions, in this context the CSP challenge has no practical import. A finding that the staff was incorrect in its decision regarding this procedural matter would have no effect on the continuing substantive validity of the WPPSS construction permit pending any final agency action on the merits of the extension request. 10 CFR § 2.109; see 5 U.S.C. § 558(c). Accordingly, we find no basis for requiring that these contentions be considered by a Licensing Board.

Likewise inadmissible, although for a somewhat different reason, is CSP's first contention relating to WNP-2, by which it asserts that delays were due to WPPSS violations of NRC regulations. It might be argued that this contention should be admitted because it seeks to establish that a reason other than those given by the permit holder is a principal cause of delay and that such a reason does not constitute "good cause"; upon closer examination, however, we believe the admission

of such a contention in a construction permit proceeding on that basis would be contrary to the overall intent of the Atomic Energy Act and the Commission's regulations. If a permit holder were to construct portions of a facility in violation of NRC regulations, when those violations are detected and corrections ordered or voluntarily undertaken, there is likely to be some delay in the construction caused by the revisions. Nonetheless, such delay, as with delay caused by design changes, must give "good cause" for an extension. To consider it otherwise could discourage permit holders from disclosing and correcting improper construction for fear that corrections would cause delays that would result in a refusal to extend a construction permit, a result obviously inconsistent with the Commission's efforts to ensure the protection of the public health and safety.[4/] This contention thus is not litigable.

This leaves only joint contention 2 supporting CSP's hearing request, which charges that "delays in construction have been under the full control of the WPPSS management." To the extent CSP is seeking to show that WPPSS was both responsible for the delays and that the delays were dilatory and thus without "good cause" this contention, if properly particularized and supported, would be litigable. See 10 CFR § 2.714.

4/ That is not to say that violations of NRC regulations and the issues of health, safety, and management competence they may raise cannot be brought forth. Indeed, the expression of such concerns may be proper by way of a petition under section 2.206 or when the applicant seeks an operating license.

Accordingly, in line with the dictates of this order, the hearing petitions filed by CSP are referred to the Atomic Safety and Licensing Board Panel, the Chairman of which should designate a Board to determine whether the other hearing requirements of the Commission's regulations in 10 CFR § 2.714 have been met and, if so, to conduct an appropriate proceeding under 10 CFR Part 2, Subpart G, and 10 CFR Part 50. However, the pendency of any Board proceedings will not affect the NRC staff's authority, upon a finding of "no significant hazards consideration," to issue an immediately effective amendment relevant to the WPPSS construction completion extension request for WNP-1.[5/] Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-23 (1981). In addition, pursuant to 10 CFR § 2.785, the Commission's review functions with respect to any ensuing proceedings on the extension of the construction completion date shall be exercised by an Atomic Safety and Licensing Appeal Board.

Commissioners Gilinsky and Ahearne dissent from this Order. Commissioner Gilinsky's separate views are attached.

5/ In its response to the CSP hearing petition, the NRC staff stated that, based on its evaluation to date of the WPPSS request, it had determined that the extension does not involve a significant hazards consideration. The staff further indicated that it has not yet completed its evaluation of whether, under 10 CFR § 50.55(b), there is good cause for the delay in construction and whether the requested extension period is reasonable.

It is so ORDERED.

For the Commission[6/]

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, DC,
this 8th day of October, 1982.

6/ Commissioner Roberts was not present when this Order was approved. Had Commissioner Roberts been present at the meeting he would have voted with the majority. To enable the Commission to proceed with this case without delay, Commissioner Ahearne, who was a member of the minority on the question up for decision, did not participate in the formal vote.

SEPARATE VIEWS OF COMMISSIONER GILINSKY

Today's eighteen-page decision is yet another example of this Commission's tendency to immerse itself in the procedural trivia of a case. One of our Licensing Boards, to whom this request for a hearing should have been referred, could have applied our regulations competently to the facts of this case. The Commission's only contribution has been to reject the Appeal Board's observation that "common sense" and the "totality of the circumstances" should be considered when deciding upon the scope of a hearing on the extension of a construction permit.

At the same time, there is a safety aspect to this case which the Commission might have looked into, and which suggests that our regulations, and the Atomic Energy Act, need some adjustment. Section 185 of the Atomic Energy Act provides that, if construction of a plant is not completed by the date specified in the construction permit, that permit "shall expire ... unless upon good cause shown" the Commission decides to extend the completion date. Our regulations provide that, in making this decision, we will consider "... among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder" as grounds for an extension.[1]

[1] 10 CFR 50.55(b)

When these provisions were adopted in the 1950s, a developmentally inclined Commission wanted to have a means of encouraging licensees, some of which were subsidized, to meet construction deadlines. The relevance of requiring licensees to show "good cause" (i.e. events beyond their control) to the NRC's present regulatory responsibilities is far less clear. Indeed, it seems that this requirement continues to exist only because no one has thought about its purpose since its adoption.

If there are to be hearings on construction permit extensions, such hearings should deal with whether improvements in safety since the issuance of the construction permit require that the design of the plant be modified and with any issues that can more easily be resolved prior to the completion of construction. For example, in the Bailly proceeding, it would have made more sense to decide the site suitability and short pilings issues prior to the start of construction than to postpone these issues to the operating license hearing.

It is ironic that this Commission, which professes interest in devising a more rational licensing process, should eliminate any possibility of construction permit extension hearings serving a useful purpose and rule that such hearings must deal only with lawyers' arguments about the responsibility for delays and the existence of good, as

opposed to bad, cause. Such issues seem to lend themselves naturally to obstructionism and delay. The Appeal Board was at least capable of imagining that such hearings could play a useful role. Instead of issuing today's opinion, the Commission should have directed the General Counsel to prepare a proposed amendment to the Atomic Energy Act providing for sensible hearings on construction permit extensions.