UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, et al. (Trojan Nuclear Plant)	)	Docket No. 50-344 (Proposed Amendment for Fuel Storage Pool Modificati

11/22/78

BRIEF IN SUPPORT OF EXCEPTIONS

I. EXCEPTIONS 9 THROUGH 12: FAILURE TO MAKE FINDINGS REGARDING NEED FOR THE MODIFICATION, AND ALTERNATIVES THERETO.

The bulk of Section K of the ASLB's Initial Decision of Oct. 5, 1978 is a mere summary of parties' positions and witnesses' testimony; the Board refuses to make findings, contending that "We therefore believe that we need not consider alternatives or the need for the modification in any detail...since it infringes upon those very prerogatives and duties of corporate management which we should eschew usurping." Initial Decision at 65-6. The Board apparently based its decision on an assumption that examination of "less damaging alternatives" is only required where "substantial adverse environmental impacts" are found by the Board. Decision at 66. The Board's failure to make findings in this matter violates the Commission's own regulations, the federal Administrative Procedure Act, basic administrative law, the National Environmental Policy Act (NEPA), and the requirements of procedural due process.

A. INTERVENOR'S CONTENTIONS AND POSITION AT HEARING

Garrett Contentions A1 and A2 basically argued that reduced power output from the Trojan plant would result in slower generation of spent fuel, slower filling of existing storage facilities, and a delayed need for the modification such that offsite storage would be available before any expansion of storage capability would be required. Such reduced power output would not result in any harm whatever to Applicant's customers, since hydropower as cheap as -- or cheaper than-- Trojan power is available to private Northwest utilities for about 6 months out of an average water year. This position was amply supported by the record in this proceeding; see this intervenor's Proposed Findings of Fact dated June 6, 1978. The Trojan plant, for example, has been shut down continuously since March 1978, and as of this date is still shut down; yet replacement power has been available at little if any additional cost, for a total of eight months to date.

The contentions in this proceeding are disputed questions of ultimate and supporting basic facts for which findings are required to be made; the very function of a pleading is to give notice of the ultimate facts under contest. Alabama Power Co., (Alan R. Barton Nuclear Plant, Units 1,2,3,4), 1 NRC 612 at 615. Garrett Contentions A1 and A2 read in relevant part:

> "The Licensee has not provided an adequate analysis of alternatives to the proposed...modifications....[such as] reduced power output from Trojan and a consequent reduction in the rate of generation of spent fuel....The explicit basis for the Licensee's application for expanded spent fuel storage is that off-site storage will not be available when needed. This...is speculative...The Licensee has not adequately demonstrated a present...need for expanded storage capacity...Moreover, for these same reasons, the Licensee has not demonstrated that "substantial harm to the public interest" would result if approval of the proposed modifications were to be delayed until after issuance of the [Generic Environmental Impact Statement]...."

The final sentence makes reference to language in the Commission's Policy Statement of Sept. 16, 1975 (40 FR 42802), which requires that deferral of the modification must result in "substantial harm to the public interest" before the modification is allowable.

An administrative agency has a duty to determine all of the issues which are properly and adequately raised by the evidence in a proceeding in order that one judicial review may effectively terminate the case. Du Bois v. Maine Employment Security Comm., 114 A 2d 359. This intervenor developed extensive material on the record on these issues, either through testimony of our witness or cross-examination of opposing witnesses. See our Proposed Findings of Fact, supra. The Commission has emphasized that full consideration must be given to appropriately framed energy conservation contentions, which would include reduced-power-output contentions by implication. Niagara Mohawk Power Corp (Nine Mile Point Unit 2), RAI-73-U 995. Need is a key and threshold factor to be determined in any cost-benefit balance. See 7 AEC 159 and 1 NRC 347.

B. VIOLATION OF COMMISSION REGULATIONS

The Commission's regulations at 10 CFR 2.760 state: "An initial decision...will be based on the whole record and...will include: ...[f]indings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record...." (emphasis added). The ASLB erred when it chose to ignore material issues of fact that were the subject of contentions to which all parties had stipulated, and which had been extensively addressed during the course of the proceedings, without challenge as to their materiality at any time by the ASLB. Agency regulations have the force and effect of law, and are as binding as statutes enacted by a legislature. Public Utility Commission v. United States, 355 U.S. 534; People ex rel Jorgan v. Martin, 46 NE 464. An administrative agency does not have discretion to disregard a procedural rule. Service v. Dulles, 354 US 363; US ex rel Accardi v. Shaughnessy, 347 US 260. An agency must act within its granted authority. Social Security Board v. Nierotko, 327 US 358. An agency action is not valid if it does not conform with agency rules, particularly those rules designed to provide procedural safeguards for fundamental rights. NLRB v. Hopwood Retinning Co., 98 F 2d 97; Vitarelli v. Seaton, 359 US 535; Bridges v. Wixon, 326 US 126.

C. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT AND ADMINISTRATIVE LAW

In passing on an application of public convenience and necessity, an administrative agency is required to evaluate all factors bearing on the public interest. Federal Power Comm. v. Transcontinental Gas Pipe Line Corp., 365 US 1 (Commission could consider "end use" and "price" factors in ruling on application to transport gas). An administrative tribunal must consider all the relevant evidence. American Trucking Association v. US, 326 US 77; Anniston Mfg. Co. v. Davis, 301 US 337. Findings are not fairly reached unless material evidence which might impeach-- as well as that which might support-- the findings is heard and weighed. NLRB v. Indiana & M Elec. Co., 318 US 9. Express findings are necessary to protect parties against careless or arbitrary administrative action, and to (inter alia) enable courts to perform their function of review. Saginaw v. FCC, 90 F 2d 854, cert. denied 305 US 613; SEC v. Chenery Corp., 318 US 80. The presence of evidence from which a finding might have been made will not supply the lack; a reviewing court will not search the record to ascertain whether there is evidence from which the necessary finding could be made. Alabama Power Co. v. Ft. Payne, 187 So. 632; Atchison v. U.S., 295 US 193; Florida v. U.S., 282 US 194.

The Administrative Procedure Act is applicable to federal agencies generally, and its provisions apply in every case of adjudication required by statute. Annotation, 94 L ed 632; 2 Am Jur. 2d Sec. 202. In adjudication-type hearings governed by the APA, the act provides that no order may be issued without consideration of the whole record or such portions as cited by any party and as supported by and in accordance with reliable, probative, and substantial evidence. 2 Am Jur 2d Sec. 393.

D. VIOLATION OF PROCEDURAL DUE PROCESS

The Constitutional guarantee of procedural due process applies to, and must be observed in, administrative proceedings, particularly where proceedings are judicial or quasi-judicial. Galvan v. Press, 347 US 522; Morgan v. US, 298 US 468. Due process requirements mandate an agency's conformity to its applicable statutes and rules. Brownell v. We Shung, 352 US 180. Due process requirements are essential to maintenance of public confidence in the value and soundness of important governmental proceedings. Morgan v. US, supra.

E. VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT.

Section 102(2)(D) of NEPA requires an agency to "study, develop, and describe appropriate alternatives to a recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement is in addition to the NEPA requirement for an EIS or EIA. Environmental Defense Fund v. Corps of Engineers, U.S. Army, 470 F2d 289 at 296. "All possible approaches...including abandonment" must be considered which would alter environmental impact or cost-benefit balance. Calvert Cliffs Coordinating Comm. v. AEC, 449 F 2d 1109 at 1114. NEPA is not a "paper tiger," but rather sets a "high standard" for agencies

to follow. Calvert Cliffs, supra, at 1114. Moreover, NEPA applies at every important stage in a decision-making process-- and this is defined as any stage where alterations might be made to minimize environmental costs. Calvert Cliffs, supra, at 1118. Alternatives must be considered even if not within the scope of authority of the responsible agency, and even if they do not offer in themselves a complete solution to a problem; a "hard look" is required. NRDC v. Morton, 458 F2d 827 at 836-8. Since this reduced-power-output alternative was not considered at any time by the NRC staff in the EIA (the Staff did not even know that hydropower was available at all to the Applicant for cheap replacement power; Tr. at 5769), at the very least it should have been the subject of findings by the ASLB, which instead chose to totally ignore the issue.

F. ASLB ORDER MUST BE SET ASIDE

The failure of an administrative agency to make express findings of fact where required renders the agency determination void and invalid. US v. Chicago, M. St. P. & PR Co., 294 US 499; Florida v. US, supra; US v. Fish, 268 US 607; Michcta R. & Light Co. v. Public Utility Comm.,260 US 48. Failure to consider factors which an applicable statute requires to be considered will avoid an agency's determination. Service v. Dulles, 364 US 363; Brimstone R. & Canal Co. v. US, 276 US 104. The inadequacy of findings alone is ordinarily sufficient reasons for reversing a determination. NLRB v. Fansteel Metallurgical Crp., 306 US 240. A statutory requirement of findings is a matter of substance, not a technicality, and courts will not sustain agency determinations which have failed to comply. Saginaw Broadcasting Co. v. FCC, 96 F2d 554, cert. denied 305 US 613.

II. EXCEPTIONS 1 THROUGH 8: INADEQUATE EIA; NEED FOR EIS.

A. INADEQUATE ENVIRONMENTAL IMPACT APPRAISAL

A primary inquiry to be made at the outset of a proposed project is whether there exists a genuine need for it. Vermont Yankee Nuclear Power Corp. (Vt. Yankee Nuc. Pwr. Stn.), 7 AEC 109 at 175. Full attention must be given to the possibility of energy conservation, and cost-benefit analyses must measure the costs and benefits of alternatives to the project. Niagara Mohawk Power Corp. (Nine Mile Point Unit 2), RAI-73-11 995; Consumers Power Co. (Midland Units 1 and 2), RAI-74-1 19; NRDC v. Morton, supra; Calvert Cliff's, supra; EDF v. Corps of Engineers, 470 F 2d 289. See also cases and arguments cited in section I(E) above, incorporated herein by reference. The NRC Staff's Environmental Impact Appraisal (EIA) for this proceeding did not meet required standards, since it failed to evaluate, inter alia, the reduced-power-output alternative to the modification, despite an admission by the responsible Staff person under cross-examination that he saw no real obstacles to such an alternative. Tr. 5765-7.

Moreover, the EIA is further inadequate for the following reasons: The EIA was prepared primarily by nuclear engineers with little training in environmental or social sciences or economics. Tr 5693, 2209, 5762-3, 5767; NRC response to Garrett interrogatory 4 on EIA, 1 on EIA. The NRC relied primarily on information from the Licensee, and pro-

vided little independent analysis. Tr. 2226; NRC responses to Garrett interrogatories 2 & 7 (EIA). The alternative of reduced power output to decrease spent fuel generation was not considered at all; the NRC staff, in fact, made a "conscious decision" to ignore this option. Tr 5761-66. An absolute need for Trojan's power was assumed, and never evaluated. Tr 5829, 5737-8, 5741, 5743; NRC response to Garrett interrogatory 18 (EIA). The NRC Staff was totally unaware of even the existence of cheap hydro replacement power; the Licensee's claims that replacement power was "unavailable" were not verified by NRC Staff. Tr 5769, 5776-7, 5788. The NRC Staff never considered the alternative of deferring the expansion of storage pool capacity. Tr 5745. The reduced generation of spent fuel was at no point considered a benefit in any cost-benefit analysis. Tr 5750. The alternative of plant shutdown was carelessly and insufficiently evaluated. Tr 5736, 5736-7, 5734-5. Consideration of other alternatives in the EIA was cursory, superficial, pro forma, and not tailored specifically to the Trojan site. Tr 5722-3, 5723, 5727, 5724-5. The cost-benefit "balance" was inadequate; the only costs considered are financial costs, and the only benefit considered is generation of electricity. EIA at 27; NRC response to Garrett interrogatory 11A (EIA). The cumulative impacts of a nationwide complex of similar spent fuel pool expansion projects was ingored in the EIA. NRC response to Garrett interrogatories 19(b) and 12 (EIA).

Contrary to NEPA requirements, the EIA did not consider all relevant factors affecting the agency's decision; a "hard look" was not taken-- the evaluation was pro forma at best; the study was not objective; the NRC Staff began with its conclusion and then worked backward to justify that conclusion; discussion of alternatives was short, superficial, and did not constitute the "study, development, and description" required by NEPA; no systematic interdisciplinary approach was used as required by NEPA, Sec. 4332(A); indirect effects of the modification were ignored; there was no evaluation to the "fullest possible extent." Moreover, the NRC's own regulations require at least "careful consideration" (10 CFR 51.1) which was clearly lacking.

B. <u>THE TROJAN MODIFICATION IS IMPERMISSIBLE PRIOR TO COMPLETION OF THE COMMISSION'S GENERIC EIS ON SPENT FUEL STORAGE</u>

For reasons discussed in section I(A) above, reduced power output permitting a deferral of this license modification would not result in substantial-- or indeed any-- harm to the public interest. In a policy statement issued at 40 FR 42801-2 (Sept. 16, 1975), the Commission stated that modifications could continue only "subject to certain conditions" which were to be "applied, weighed, and balanced" in each individual case. Of the five factors mentioned in the policy statement, only one militates in favor of modification; one is neutral; and three militate against it. <u>See</u> Oregon's Proposed Findings of Fact and Conclusions of Law filed in this proceeding, Section M, incorporated herein by reference. The fifth factor is the most weighty factor; it requires that for modification to be allowable, deferral of the modification must result in "substantial

harm to the public interest." In short, the modification must be clearly needed; need is the primary inquiry to be made at the outset of a proposed project. Vermont Yankee, supra at 175. The policy statement itself underscores the importance of the "need" factor; the policy statement's very existence is based upon an extensive discussion of a perceived "need" for modifications existing in other parts of the country.

However, the Pacific Northwest is not like the rest of the country. The region has access to considerable hydropower which is available to the Licensee in unlimited quantities for a large part of a typical year, as even the Licensee's witnesses admitted on cross-examination. Tr 6469; Exhibit 8 (Garrett). Moreover, Northwest utilities have overbuilt in recent years, assuming that growth levels would increase at the 5-6% levels of the 1950's and 1960's; they have, however, dropped substantially. Many of the region's thermal generating facilities, including Trojan, are not yet needed to full capacity. Under such circumstances as have been discussed above and on the record in this proceeding, the spent fuel pool modification is not needed at this time, and the Commission's policy statement of 40 FR 42801 therefore requires that the Trojan modification wait at least until the Generic EIS on Spent Fuel Storage is issued by the Commission.

III. CONCLUSIONS

For reasons outlined above, it is requested that

(1) the ALSB Initial Decision in this proceeding of Oct. 5, 1978 be set aside, and the Licensee be required to return the Trojan spent fuel storage facilities to the status existing prior to the filing of the Initial Decision; and

(2) proceedings to date in this matter be declared null and void as premature; and

(3) the Licensee be required to refile its request for expanded spent fuel storage capability, if it so chooses, after issuance of the Commission's Generic Environmental Impact Statement on spent fuel storage.

Respectfully submitted,

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Dated this 22nd day of November, 1978.

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached document have been served or the following by deposit in the United States mail, first class, this 22 day of Nov 1978:

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