ADJUDICATORY ISSUE

May 10, 1983 (NEGATIVE CONSENT) SECY-83-178

COMMISSION LEVEL
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For: The Commission

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-722 (WASHINGTON PUBLIC POWER SUPPLY SYSTEM)

Facility: WPPSS 2

Purpose: To advise the Commission of an Appeal Board decision [which, in our opinion, EX. 5

Review Time Expires: May 23, 1983

Petitions for Review: None

Discussion: This Appeal Board decision places before the Commission an issue which it addressed only last October: the extent to which the WPPSS 2 construction permit extension proceeding should hear a contention that the permittee has been "dilatory" in constructing that facility. The Appeal Board holds in this ALAB that the Commission intended to place a substantial burden on the proponent of such a contention, and that the intervenor, Coalition for Safe Power, failed to meet that burden. [We believe EX. 5

A brief recapitulation of the background of this case may be helpful.

Contact:
Peter G. Crane, OGC, 41465

[1]Under negative consent procedures no further action by OGC is contemplated unless otherwise directed by the Commission.

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The Washington Public Power Supply System (WPPSS) received a construction permit for WPPSS 2 in 1973. The construction permit stated a completion date of 1977, later extended to December 1, 1981. The NRC staff accepted the reasons cited by WPPSS as constituting "good cause" for the delays in construction, and it granted another extension to February 1, 1984. After the Coalition for Safe Power petitioned for intervention and requested a hearing, the Commission, in an order dated October 8, 1982, addressed the admissibility of the Coalition's various contentions. All but one it ruled inadmissible. A final contention, alleging that delays in construction had been under the full control of WPPSS management, it held potentially admissible. The Commission stated:

> To the extent [the coalition] 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. CLI-82-29, at 16.

The ALAB now before the Commission is the Appeal Board's affirmance of the Licensing Board's decision that the Coalition's revised contention was inadmissible.[1] The two Boards used different paths, however, to reach the same result.

As the Appeal Board points out, the Commission's October 1982 opinion created a two-pronged test for determining the admissibility of the Coalition's contentions. The first part of the test -- whether the delays were traceable to the applicant -- was easily met. The harder question was whether the delays were "dilatory", in the

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[2] The Licensing Board gave the Coalition an opportunity to supplement its contention on "mismanagement". The rewritten contention, which followed closely the language of the Commission's October 1982 opinion, stated that construction delays were under the full control of the WPPSS management; that the applicant was responsible for the delays; and that "the delays were dilatory and thus Applicant has not shown the 'good cause' as required by 10 CFR 50.55(b)."

sense that the Commission used the word. In briefs to the Licensing Board, the applicant reasoned that the Commission meant "intentional delay," while the Coalition argued that a less stringent definition -- "tendency to delay" -- should be used. The Licensing Board rejected the interpretations of both the Coalition and the applicant. It concluded that "dilatory" had been used by the Commission "as it is commonly used to describe litigation tactics, as intending to cause delay or being indifferent to the delay that might be caused." Memorandum and Order, at 6 (emphasis in original). The Licensing Board found that the Coalition had "particularized and supported only matters relating to alleged mismanagement that resulted in delays," but had failed to make the requisite showing of intent to cause delay or indfference to delay. (Emphasis added.) It therefore dismissed the Coalition's contention.

The Appeal Board, while acknowledging the question to be close, concluded that if the Licensing Board's definition were accepted, the Coalition's contention would have to be admitted, since the documentation it had submitted (e.g. Congressional and state legislative reports on WPPSS management problems) was "sufficient to support an inference that the applicant has been indifferent to the timely completion of the WPPSS 2 project." Decision at 8-9. The Appeal Board reasoned, however, that the Licensing Board had misconstrued the Commission's guidance, and that "dilatory", as used by the Commission, implied "the intentional delay of construction without a valid purpose." It reasoned that if the Licensing Board were correct in believing that the licensee's "indifference" to the possibility of delay was sufficient to entitle the Coalition to a hearing, then the two-pronged test established by the Commission would have little meaning. As the Appeal Board saw it, it was difficult to imagine a situation in which construction delay would be traceable to the licensee, and the licensee would not have been "at least indifferent" to the delay. Decision at 10.

The Appeal Board, noting that the dictionary definition of "dilatory" supported either its own view or that of the Licensing Board, reviewed a variety of legal sources, all of which suggested that "dilatory", as used in a legal context,

implies "intentional action without a valid purpose," rather than mere "passive responsibility." The Appeal Board also observed that Section 185 of the Atomic Energy Act envisions that the Commission will decide whether there is good cause to extend the completion date -- an essentially prospective judgment, rather than one which looks retrospectively at the applicant's past conduct. The Appeal Board noted that the Commission's implementing regulation, 10 CFR 50.55(b), was somewhat inconsistent with the statute in that regard, as it focuses on whether the applicant was responsible for the delay. The Appeal Board nevertheless interpreted the regulation and the Commission's further guidance as suggesting that unless the applicant is responsible for the delay and has delayed intentionally and without valid purpose, there shall be no contested construction permit proceeding at all. Since the Coalition had never claimed that the delays were intentional and without valid purpose (let alone particularized such a claim), the contention therefore had to be dismissed. The Appeal Board also noted that 10 CFR 2.206 provides a mechanism for raising health and safety issues during the course of construction, and that the Commission had recently proposed legislation to eliminate Section 185's requirement that construction permit include a completion date.

Analysis: [In our view,

EX -

We believe that

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EX. 5

James A. Fitzgerald
Assistant General Counsel

Attachment: ALAB-722

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Monday, May 23, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Stephen F. Eilperin, Chairman
Christine N. Kohl
Dr. Reginald L. Gotchy

SERVED APR 12 1983

In the Matter of	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET Al.	)	Docket No. 50-397 CPA
(WPPSS Nuclear Project No. 2)	)	

Nina Bell, Portland, Oregon, for petitioner Coalition for Safe Power.

Nicholas S. Reynolds and Sanford L. Hartman, Washington, D.C., for the applicant Washington Public Power Supply System.

William D. Paton for the Nuclear Regulatory Commission staff.

DECISION

April 11, 1983

(ALAB-722)

The issue before us on appeal is a narrow one: whether the contention of the Coalition for Safe Power concerning the applicant's asserted mismanagement of construction of the WPPSS 2 nuclear power plant is sufficiently particularized for litigation in this construction permit extension proceeding. The Licensing Board ruled that it was not, and hence denied the Coalition's petition for intervention. Memorandum and Order of Feb. 22, 1983 (unpublished). We

affirm the Board's ruling, but for somewhat different reasons.

I. Background

Tracking Section 185 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2235, the Commission's regulations provide that, if a nuclear power plant is not completed by the latest date specified in a construction permit, "the permit shall expire and all rights thereunder shall be forfeited." 10 CFR § 50.55(b). This lapsing of rights is subject to the proviso "[t]hat upon good cause shown the Commission will extend the completion date for a reasonable period of time." Ibid. The regulation further specifies a number of causes of delay beyond the control of a permit holder as illustrative of bases for extending a construction permit completion date. Ibid.

On March 19, 1973 the Commission issued the applicant Washington Public Power Supply System (WPPSS) a permit for the construction of WPPSS 2. The permit called for the plant to be completed by September 1977, a date subsequently extended to December 1, 1981.[1] On September 4, 1981, WPPSS filed an application for a further extension, this one

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[1] In the meantime WPPSS filed its application for an operating license. The Commission published a notice of opportunity for hearing (43 Fed. Reg. 32338 (July 26, 1978)), but the only prospective intervenors were found to lack standing to intervene. See LBP-79-7, 9 NRC 330 (1979). Accordingly, the operating license application is uncontested.

to February 1, 1984. The plant is now approximately 95 percent complete. Prehearing Conf. Tr. 54. As the "good cause" basis for its extension request WPPSS gave several reasons why it was assertedly not responsible for the construction delays.[2] The Director of the Division of Licensing, Office of Nuclear Reactor Regulation, agreed and granted the extension request. He published notice of that action in the Federal Register, thus prompting the Coalition for Safe Power (Coalition) to petition for intervention and to request a hearing on the already effective permit extension. See 47 Fed. Reg. 4780 (Feb. 2, 1982); Coalition

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[2] In particular, WPPSS cited 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, resulting in delays in installation of material and equipment and 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.

See Letter to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, from G. D. Bouchey, Director, Nuclear Safety, WPPSS (Sept. 4, 1981).

Coalition Request for Hearing (Feb. 22, 1982).[3]

The Commission itself initially addressed the Coalition's intervention request "in order to clarify for all concerned the nature of the issues that can be asserted in challenging a permit holder's extension request." CLI-82-29, 16 NRC __, __ (Oct. 8, 1982) (slip opinion at 2). The Commission reviewed the structure of the Atomic Energy Act with its two-stage licensing process and deduced from it no congressional intent to require the "periodic relitigation of health, safety, or environmental questions" in the context of construction permit extension proceedings. Id. at __ (slip opinion at 11). The Commission deems the operating license proceeding, and the opportunity of any person to request the NRC staff at any time to institute a show-cause proceeding, sufficient to assure an available forum in which to raise these questions. Id. at __ (slip

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[3] The Coalition has not questioned the Director's authority to issue the extension without prior notice. We see no reason to discuss that possible issue in this opinion because, in any event, applicant's timely request for an extension would likely continue its construction permit authority in effect until the request was acted upon. See Administrative Procedure Act, Section 9(b), 5 U.S.C. § 558(c); 10 CFR § 2.109. See also Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980), vacated and remanded "to consider the question of mootness and, should the cases not be moot, for further consideration in light of Pub. L. No. 97-415." 51 U.S.L.W. 3610 (U.S. Feb. 22, 1983).

opinion at 11-13). Accordingly, the Commission decided that under its regulations the focus of a construction permit extension proceeding should be the "reasons that have contributed to the delay in construction, and whether those reasons constitute 'good cause' for the extension." Id. at ___ (slip opinion at 11). The admissibility of a particular contention is to be judged therefore on whether it falls within that scope and otherwise meets the Commission's pleading requirements. See 10 CFR § 2.714(b).

Applying that principle, the Commission ruled inadmissible a series of the Coalition's contentions that dealt primarily with health, safety, and environmental matters. These contentions neither challenged the applicant's reasons for its construction delay nor sought to show that other reasons, not constituting good cause, were the principal bases for the delay. CLI-82-29, supra, 16 NRC at ___ (slip opinion at 14-15). The Commission further ruled that only one of the Coalition's contentions -- alleging that "delays in construction have been under the full control of the WPPSS management" -- fell within the proper scope of a Section 185 construction permit extension proceeding. As to that one contention, the Commission decided that "[t]o the extent [the Coalition] 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." Id. at __ (slip opinion at 16).

The Commission referred that issue to the Licensing Board, which allowed the Coalition an opportunity to flesh out its "mismanagement" contention. As supplemented, the Coalition's contention tracks the language of the Commission's opinion and is supported by references to congressional and state legislative reports that discussed the WPPSS management problems. Supplement to Request for Hearing and Petition for Leave to Intervene (Jan. 10, 1983) ("Supplemental Petition").[4] The cited congressional report refers to severe quality assurance problems, lost records, inadequate testing data, falsification of certain records, and WPPSS difficulties in managing a large array of contractors. Id. at 2. The Washington State Senate Energy and Utilities Committee is quoted as having concluded that

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[4] The contention that the Coalition seeks to have admitted reads as follows:

> Petitioner contends that delays in the construction of [WPPSS 1 and 2] have been under the full control of the WPPSS management. The Applicant was responsible for the delays and the delays were dilatory and thus Applicant has not shown the "good cause" as required by 10 CFR 50.55(b).

Supplemental Petition at 1. Although the Coalition's pleading refers to WPPSS 1 as well as WPPSS 2, the Licensing Board's decision before us for review is confined to WPPSS 2.

"WPPSS mismanagement has been the most significant cause of cost overruns and schedule delays on the WPPSS projects." Id. at 3.

As noted, the applicant contends that labor difficulties, low productivity, and materials and engineering delays were beyond its control and justified the extension of its permit. The Coalition, however, argues that these problems are the fault of management, the principal cause of construction delays at WPPSS 2, and evidence of the absence of good cause for applicant's request. See id. at 4-5. In short, while the Coalition does not claim that the applicant consciously set out to delay construction of the plant, it is the Coalition's position that WPPSS' documented mismanagement has prevented the timely construction of the plant. That claim, the Coalition contends, is cognizable in a construction permit extension proceeding and sufficiently particularized in its petition. See Prehearing Conf. Tr. 50-53.

II. Analysis

The Commission's opinion propounds a two-pronged test for determining whether the Coalition's contention is within the scope of this construction permit extension proceeding. First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatory." If both prongs are met, the delay is without "good cause". CLI-82-29, supra, 16 NRC at __ (slip opinion at 16).

Plainly, the Coalition satisfies the first aspect of the Commission's test. The legislative reports on which it relies cite serious management failures and lay those failures directly on the applicant's doorstep. The troublesome questions are what the Commission meant by "dilatory", and whether the Coalition has met that prong of its test. The Licensing Board rejected both the applicant's suggestion that "intentional delay" was meant, and the Coalition's position that a "tendency to delay" was all that was necessary. Memorandum and Order at 5. Instead, the Board took a middle path, believing the Commission to have used the term "as it is commonly used to describe litigation tactics, as intending to cause delay or being indifferent to the delay that might be caused." Id. at 6 (emphasis in original). While the Board found that the Coalition had alleged indifference by the applicant to the delays it had caused, it nevertheless ruled that the Coalition had "particularized and supported only matters relating to alleged mismanagement that resulted in delays" and that that was insufficient. Ibid.

If we were to agree with the Licensing Board's understanding of the Commission's guidance, we would be constrained to reverse the Board. In our view, the documentation the Coalition submitted of applicant's persistent mismanagement problems is sufficient to support an inference that the applicant has been indifferent to the

timely completion of the WPPSS 2 project. No further particularization in support of that inference is necessary.[5]

However, in our view, the Licensing Board has misconstrued the Commission's guidance. The question is undoubtedly a close one, but we agree with the position taken by the applicant and the NRC staff that dilatory conduct in the sense used by the Commission means the intentional delay of construction without a valid purpose.[6] The ordinary usage of the term allows for such a reading, and the Commission's opinion and the policy reasons it advances support a more restrictive meaning than the Licensing Board assigned.

The dictionary definition of dilatory -- "tending or intended to cause delay or to gain time or to put off a decision" -- could support either the Licensing Board's

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[5] This is not to say that the mismanagement claims are accurate. At the pleading stage all that is required is that the contention be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

[6] Thus, for example, an intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. As with these examples, the purpose and the action taken must be consistent with the Atomic Energy Act and implementing regulations.

reading or our own.[7] However, the Licensing Board's reading that dilatory conduct is demonstrated by allegations of applicant indifference accords the second prong of the Commission's two-pronged test little, if any, meaning. The first prong already requires that the delay be traceable to the applicant, either through its action or inaction. It is difficult to posit a situation of such applicant-caused delay where the applicant has not been at least indifferent to the construction delay. Thus, the Commission must have meant something more than "passive responsibility" by its use of dilatory.

So too, case law usage tilts more toward the meaning we have ascribed. For example, the Supreme Court in Polk County v. Dodson, 454 U.S. 312, 323 n.14 (1981), implied that the comment (found in the American Bar Association Standards for Criminal Justice) that it is unprofessional

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[7] See Black's Law Dictionary 411 (5th ed. 1979). We agree with the Licensing Board that the Commission could not have used dilatory as meaning "tending to cause delay" without rendering the Commission's guidance meaningless.

> If the Commission had intended to use dilatory in its broadest sense, it would not have established a 2-part test, because if [applicant] were responsible for the delays, its actions would a fortiori be dilatory in its broadest sense since one's acts cannot have caused delay without having tended to cause delay.

Memorandum and Order at 6.

for lawyers to present "dilatory or frivolous motions" refers to intentional action without a valid purpose. Reflecting a similar theme of intentional action without a valid purpose is the Court's caveat that, "[i]n the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive," leave to amend a complaint should be freely given. Foman v. Davis, 371 U.S. 178, 182 (1962). See also Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962).

The policy reasons advanced by the Commission suggest the same result. The Commission's opinion points out that 10 CFR § 2.206 affords all persons the opportunity to raise whatever health, safety, or environmental concerns the construction or operation of a nuclear power plant may cause them. The Section 2.206 remedy is taken seriously, is available at all times, and provides the bridge the Commission expects a litigant to use in most instances between the construction permit and operating license proceedings. CLI-82-29, supra, 16 NRC at __ (slip opinion at 11-12).[8] The import of the Commission's opinion is

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[8] Indeed, here, the Coalition did not even seek to intervene in the WPPSS 2 operating license proceeding. See LBP-79-7, supra, 9 NRC 300. The fact that the operating license is uncontested, however, does not mean that an operating license automatically issues. We take this occasion to repeat what we said in South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1),

(FOOTNOTE CONTINUED ON NEXT PAGE)

that a construction permit extension proceeding should not have a much greater scope than is statutorily mandated.[9]

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

ALAB-642, 13 NRC 881, 895-96 (1981), affirmed sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982):

> [A]n operating license may not issue unless and until this agency makes the findings specified in 10 CFR 50.57 -- including the ultimate finding that such issuance "will not be inimical to * * * the health and safety of the public".

[9] The Commission has recently forwarded proposed legislation to Congress that seeks, among other things, to eliminate the requirement of Section 185 of the Atomic Energy Act to specify a construction completion date. See Letters to the Honorable Thomas P. O'Neill, Jr., and the Honorable George H. Bush from Chairman Nunzio J. Palladino (Feb. 21, 1983). The Commission's legislative proposal is relevant not because a legislative proposal alters existing law, but rather because it reinforces the view that the Commission would not by regulation expand Section 185 proceedings to discretionary areas. It thus suggests that the narrower definition of dilatory was the one meant by the Commission. The section-by-section analysis accompanying the Commission's proposal explains that:

> This legislation would delete the requirement for specification of the earliest and latest completion dates for construction permits. The existing provision has produced unnecessary paperwork and expenditure of resources without assuring that construction is diligently pursued. Moreover, the provision in current section 185 for earliest and latest completion dates made sense when it was included in the Act in 1954 because the Federal Government would be owning the fuel and would need to allocate special nuclear material between the civilian nuclear power and defense programs. It was important for AEC to predict completion dates (and hence operation commencement dates) with accuracy so that civilian requirements for special nuclear material could be predicted accurately and planned for properly. The Federal Government no longer allocates fuel

(FOOTNOTE CONTINUED ON NEXT PAGE)

In this connection, we note that the ultimate "good cause" determination called for by Section 185 of the Atomic Energy Act is whether good cause exists to extend the construction completion date. The statutory focus is not so much (or at least, not exclusively) on an applicant's past conduct, but rather on the future. Plainly then, that ultimate "good cause" determination is expected to encompass a judgment about why the plant should be completed and is not to rest solely upon a judgment as to the applicant's fault for delay.

We recognize that the Commission's implementing regulation, 10 CFR § 50.55(b), does not track the statute in all respects and focuses on whether the applicant was responsible for the delay. But as we discern the Commission's intent, its regulation and guidance suggest that, unless the applicant was responsible for the delays and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such

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> and has a much lesser need to predict completion dates accurately. Thus, the provision is no longer needed to serve the purpose for which it was adopted.

Id., Enclosure 2 at Section 101.

a proceeding and is proven true, the statute and implementing regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed.

We need not attempt to define what kinds of issues might bear upon this ultimate "good cause" determination. Suffice it to say that on this record the Coalition never claimed (let alone particularized) that the applicant's delays in constructing WPPSS 2 were intentional and lacking a valid purpose. Coalition Brief (March 10, 1983) at 2, 4; Prehearing Conf. Tr. 51. For that reason the Licensing Board's decision dismissing the intervention petition and request for hearing is affirmed.[10]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[10] As noted the Coalition can pursue its allegations, if it so chooses, through the 10 CFR § 2.206 procedure.