

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

WASHINGTON PUBLIC POWER SUPPLY
SYSTEM, et al.

(WPPSS Nuclear Project No. 2)

)
)
)
)
)

Docket No. 50-397-CPA

NRC STAFF BRIEF IN OPPOSITION TO APPEAL FILED BY
THE COALITION FOR SAFE POWER FROM LICENSING BOARD'S
MEMORANDUM AND ORDER DENYING PETITION TO INTERVENE

William D. Paton
Counsel for NRC Staff

March 25, 1983

3/25/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
WASHINGTON PUBLIC POWER SUPPLY)	Docket No. 50-397-CPA
SYSTEM, <u>et al.</u>)	
(WPPSS Nuclear Project No. 2))	

NRC STAFF BRIEF IN OPPOSITION TO APPEAL FILED BY
THE COALITION FOR SAFE POWER FROM LICENSING BOARD'S
MEMORANDUM AND ORDER DENYING PETITION TO INTERVENE

I. INTRODUCTION

On February 22, 1983 the Licensing Board issued a Memorandum and Order denying a petition to intervene filed by the Coalition for Safe Power (CSP) with respect to an extension of the latest completion date for construction of WPPSS Nuclear Project No. 2 (WNP-2). On March 10, 1983 CSP filed a Notice of Appeal and a brief in support of its appeal from the Licensing Board's Memorandum and Order. As discussed below, the Staff believes the Licensing Board's denial of CSP's request for hearing should be affirmed.

II. STATEMENT OF THE CASE

On January 27, 1982 the Office of Nuclear Reactor Regulation issued an Order extending the construction completion date for WNP-2 from December 1, 1981 to February 1, 1984. 47 Fed. Reg. 4780. Subsequently, CPS filed with the Commission on February 23, 1982, a timely request for

hearing with respect to the granting of the extension. Both the Staff and the permittee opposed the request. The permittee argued that CSP had failed to make the necessary showings to support its request for hearing and had not specified a valid contention. The Staff concluded that CSP had demonstrated sufficient standing but had not set forth specific aspects to be litigated as required by 10 C.F.R. § 2.714 and urged that the petition be denied.

In an Order dated October 8, 1982 (CLI-82-29) the Commission acknowledged that the usual procedure would have been to refer the petitions to an Atomic Safety and Licensing Board for determination, but that because of the uncertainty the Commission perceived to exist as to the proper scope of a construction permit extension proceeding, it would in the first instance, clarify the nature of the issues that could be asserted in challenging a permit holder's extension request.^{1/} The Commission first rejected several contentions set forth by CSP in its request for hearing: it ruled that some were inappropriate because they neither challenged the WPPSS reasons for delay nor sought to show that other reasons, not constituting good cause, were the principal basis for delay;^{2/} it further determined that those contentions contesting the Staff's finding of "no significant hazards consideration" in issuing the construction permit extension without prior notice were not matters that should be considered by a licensing board in a construction permit extension

^{1/} Id., CLI-82-29, pp. 1 and 2.

^{2/} Id., pp. 14 and 15.

proceeding; and finally it rejected the contention which asserted that delays were due to WPPSS violations of NRC regulations, since admission of such a contention in a construction permit extension proceeding would be contrary to the overall intent of the Atomic Energy Act and the Commission's regulations.^{3/}

The only contention that the Commission found litigable was one which alleged that "delays in construction have been under the full control of the WPPSS management." In so finding, the Commission stated that to the extent CSP was "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."^{4/} The Commission referred CSP's petition to the Atomic Safety and Licensing Board Panel for further consideration consistent with its Order.^{5/}

CSP supplemented its request for hearing with respect to WNP-2 on January 10, 1983, by submitting a new contention which reads as follows:

Petitioner contends that delays in the construction of WNP-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).

In its response, the NRC Staff argued that CSP had not satisfied the requirements of 10 C.F.R. § 2.714(b) nor complied with the guidance provided by CLI-82-29. The Staff asserted that CSP had failed to properly particularize and support its contention that the delays were

^{3/} Id., p. 16.

^{4/} Id., p. 16.

^{5/} Id., p. 17.

dilatory.^{6/} The permittee argued that CSP had failed to establish standing and further failed to set forth a contention with reasonable basis and specificity. The permittee's position was similar to the Staff in that it asserted that CSP failed to establish a basis for its claim that WPPSS was both responsible for the construction delays and that such delays were dilatory.^{7/}

A prehearing conference was held on January 26, 1983 in Richland, Washington at which all parties appeared and presented arguments on the issue addressed here. In its Memorandum and Order dated February 22, 1983, the Atomic Safety and Licensing Board denied CSP's request for hearing on the grounds that CSP had failed to particularize and support a contention within the scope of a construction permit extension proceeding as delineated by CLI-82-29; i.e., while CSP adequately particularized and supported its claim that WPPSS was responsible for the delays, it failed to support its contention that the delays were dilatory. The Board construed the word "dilatory" to mean intending to cause delay or being indifferent to the delay that might be caused. The Board specifically held (1) that CSP acknowledged that permittee did not intentionally cause a delay and (2) that CSP had alleged an indifference to delay but had failed to particularize and support that allegation.^{8/} The specific basis for this appeal is CSP's claim that the Board erred in finding that

^{6/} NRC Staff Response, January 24, 1983, p. 11.

^{7/} Permittee's Response January 24, 1982 Answer, p. 24-25.

^{8/} Licensing Board's February 22, 1983 Memorandum and Order, pp. 5-6. Since there was no other petitioner to intervene, the Licensing Board also dismissed the proceeding.

while CSP appears to have alleged an indifference to delay, it failed to particularize and support that allegation.^{9/}

III. ISSUE PRESENTED ON APPEAL

A. Whether CSP Sufficiently Particularized and Supported Its Claim That Delays In Construction Were Dilatory

IV. ARGUMENT

Resolution of the issue raised by CSP requires first, determining the correctness of the Licensing Board's interpretation of the word "dilatory" and second, application of CSP's factual allegations to the correct definition of "dilatory".

CSP takes various positions as to the meaning of "dilatory" in the context of this proceeding. It claims at one point that the word "dilatory" encompasses a range of behaviors from "tending to cause delay" to "intending to cause delay".^{10/} It also expresses apparent agreement with the permittee's summary of its (CSP's) position that "dilatory" means "indirectly causing without intent."^{11/} CSP also claims that the Licensing Board "came to the same conclusion" when it interpreted "dilatory" to mean "intending to cause delay or being indifferent to the delay that might be caused."^{12/}

^{9/} CSP's February 22, 1983 Brief, p. 1.

^{10/} CSP's February 22, 1983 Brief, p. 1.

^{11/} Id., p. 2.

^{12/} Id., p. 2.

The Licensing Board set out the definition of "dilatory" as found in Black's Law Dictionary, revised fourth edition at 544: "tending or intending to cause delay or to gain time or to put off a decision." The Licensing Board reasoned that, in this proceeding, the Commission could not have intended "dilatory" to mean "tending to cause delay."

[N]either could we interpret dilatory in its broadest sense as "tending" to cause delay, without rendering the Commission's directions meaningless. If the Commission had intended to use dilatory in its broadest sense, it would not have established a 2-part test, because if Permittee 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. 13/

The Board concluded:

"We understand the Commission to have used the term "dilatory" in a middle sense, as it is commonly used to describe litigation tactics, as intending to cause delay or being indifferent to the delay that might be caused. We interpret the instructions of the Commission as requiring CSP to particularize and support an allegation that Permittee either intended to delay, or took actions resulting in delay because it was indifferent to delay."14/

The Staff agrees that, as used by the Commission, "dilatory" does not mean "tending to cause delay." If it did have that meaning, the Commission's expression "delays were dilatory" would have to be construed to mean delays that tend to cause delay. The Staff submits that since the Commission could not have intended that "dilatory" mean "tending to cause delay" (which is one of its two defined meanings), it must have intended it to mean "intending to cause delay."

13/ Licensing Board Memorandum and Order, February 22, 1983, pp. 5-6.

14/ Id., pp. 6.

Whether permittee intentionally caused delay is not at issue here. The Licensing Board held that CSP acknowledged that permittee did not intentionally cause a delay in constructing either Units 1 or 2.^{15/} The Staff agrees. In the first page of its March 10, 1983 brief, CSP quotes its representative, Mr. Rosolie: "The intent would not necessarily have to be of itself intentional."

Thus, the issue is the correctness of the Licensing Board's alternate interpretation of dilatory -- "being indifferent to the delay that might be caused." As discussed below, while the Staff does not agree that that meaning was intended by the Commission, we do agree that if that were the correct meaning, CSP has failed to particularize and support that allegation.

The Licensing Board cites no authority to support its view that "being indifferent to the delay that might be caused" is a meaning that the Commission could have intended. In fact, the Licensing Board even indicated that the Commission may have intended to equate "dilatory" with intentional delay but concluded that it (the Licensing Board) could not justify such a narrow interpretation.^{16/} The Staff submits that the Commission would not have used the word "dilatory" if it had intended a meaning not found within the definition of that word.

Even assuming that "being indifferent to the delay that might be caused" is an appropriate construction of "dilatory", the Staff agrees with the Licensing Board that CSP has failed to particularize and support such a contention. CSP attempts to particularize and support the

^{15/} Licensing Board Memorandum and Order, February 22, 1983, p. 5.

^{16/} Id., p. 5.

contention at issue here on the first five pages of its supplement to its request for hearing. Without question, CSP's factual allegations address repeated instances of mismanagement. At no point in CSP's supplement, however, does it even refer to an indifference to the delay that might be caused. There is not even a claim that the alleged mismanagement is the result of indifference to the delay that might be caused.

In its appeal brief, CSP cited a March, 1981 report to the Washington State Senate Energy and Utilities Committee entitled "WPPSS Inquiry". There is no basis to conclude from the referenced material that WPPSS was indifferent to delays. In fact, the report references WPPSS' efforts to deal with these problems. For example, at page 40 the Committee states that, "Mr. Ferguson [Managing Director] . . . has assembled a new team of top management personnel to work with him in implementing necessary changes."

The Staff believes CSP's request for hearing should have been denied for failure to particularize and support a contention that permittee intended to cause delay. The Staff also believes that, assuming that "being indifferent to the delay that might be caused" is a correct alternative meaning of "dilatatory", CSP's request for hearing was correctly denied for failure to particularize and support that contention.

V. CONCLUSION

For the reasons stated above, the Licensing Board's denial of CSP's request for hearing should be affirmed.

Respectfully submitted,

William D. Paton

William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of March 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

(WPPSS Nuclear Project No. 2)

}
} Docket No. 50-397
}

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO APPEAL FILED BY THE COALITION FOR SAFE POWER FROM LICENSING BOARD'S MEMORANDUM AND ORDER DENYING PETITION TO INTERVENE" 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 25th day of March 1983:

- | | |
|--|---|
| *Stephen F. Eilperin, Chairman
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | Gerald C. Sorensen
Manager, Licensing Programs
Washington Public Power Supply System
300 George Washington Way
Richland, Washington 99352 |
| *Christine N. Kohl
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | Nicholas S. Reynolds
Debevoise & Lieberman
1200 Seventeenth St., N.W.
Suite 700
Washington, D.C. 20036 |
| *Dr. Reginald L. Gotchy
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | Eugene Rosolie
Coalition for Safe Power
Suite 527
408 South West Second St.
Portland, Oregon 97204 |
| *Herbert Grossman, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | *Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 |
| *Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | *Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 |
| *Dr. Jerry Harbour
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 | *Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. |
| | State of Washington
Energy Facility Site Evaluation Council
Mail Stop PY-11
Olympia, Washington 98504 |

William D. Paton
William D. Paton