



April 22, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
WISCONSIN ELECTRIC POWER COMPANY)	Docket No. 50-266 (OLA2)
)	
(Point Beach Nuclear Plant,)	
Unit 1))	

ANSWER OF WISCONSIN ELECTRIC POWER COMPANY
IN OPPOSITION TO PETITION FOR REVIEW OF
APPEAL BOARD DECISION ALAB-719

On March 22, 1983, the Atomic Safety and Licensing Appeal Board issued ALAB-719 affirming the Atomic Safety and Licensing Board's December 10, 1982 Special Prehearing Conference Order ("Licensing Board Order") which dismissed a petition for leave to intervene in this proceeding. The petitioner below, Wisconsin's Environmental Decade ("Petitioner"), filed on April 7, 1982 a petition ("Petition") with the Commission for review of ALAB-719 pursuant to section 2.786(b) of the Commission's Rules of Practice, 10 C.F.R. § 2.786(b). Wisconsin Electric Power Company ("Licensee") herein submits that the Petition should be denied for failure to meet the requirements and

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standards for discretionary Commission review set out in 10 C.F.R. § 2.786 and for other reasons discussed below.

This proceeding involves the application by Licensee for authority to repair the two steam generators of Point Beach Nuclear Plant, Unit 1, by replacement of major components. A special prehearing conference was held on November 19, 1982 for the stated purpose of oral argument on Petitioner's petition for leave to intervene, including the acceptability of its contentions. Petitioner did not appear at the conference. In the subsequent Licensing Board Order, the Licensing Board found Petitioner in default and dismissed the intervention petition. The Licensing Board also dismissed the petition on the separate and independent ground that each of Petitioner's contentions was irrelevant to the requested license amendment, too vague for consideration, or unsupported by basis as required by 10 C.F.R. § 2.714(b).

Petitioner appealed the dismissal to the Appeal Board pursuant to 10 C.F.R. § 2.714a. In ALAB-719, the Appeal Board affirmed each of the Licensing Board's two grounds for dismissal, finding (1) that the Licensing Board's default ruling was not an abuse of its discretion, Id. (slip opinion at 16, 19) and (2) that Petitioner had failed brief adequately its claim that the Licensing Board had erroneously dismissed its contentions, Id. (slip opinion at 16-19).

Petitioner does not seek review of the Appeal Board's affirmance of the default ruling.^{1/} This is a particularly significant omission, for the default ruling, affirmed by the Appeal Board and unchallenged before the Commission, effectively moots the Petition. The default ruling by itself sustains the dismissal below, irrespective of any determinations the Commission might make on the matters raised by the Petition. For this reason alone the Petition should be denied.

The second Appeal Board ruling sustaining the dismissal below -- the determination that Petitioner had failed to brief adequately its claim that the contentions had been erroneously dismissed -- has been acknowledged by Petitioner, Petition at 5, but has not been otherwise addressed. Petitioner has presented no reasons why that ruling is in error. Thus, Petitioner has failed to raise before the Commission either of the two separate and independent rulings of the Appeal Board which sustained the Licensing Board's action. The Petition for review of ALAB-719 therefore cannot lie and must necessarily be denied.

Although precluded by the provisions of 10 C.F.R. § 2.786, Petitioner has improperly attempted to bypass the Appeal Board's decision and instead focus the Commission's attention

^{1/} Indeed, Petitioner has not even informed the Commission of the default ruling.

on the Licensing Board's decision. But here again, Petitioner has failed to state a case for its requested relief. In this regard, Petitioner has limited its argument to the Licensing Board's rejection of Contention 3 for failure to state adequate basis as required by 10 C.F.R. § 2.714(b). Petition at 5-6. The Licensing Board presented a detailed and comprehensive discussion of its reasoning in determining that adequate basis had not been provided for that contention. Licensing Board Order at 14-17. On appeal, the Appeal Board noted that Petitioner had done little more than quote its original contentions, and that Petitioner had not challenged the Licensing Board's analysis and conclusion concerning the basis that had been offered for any particular contention. ALAB-719 (slip opinion at 16-19). The same is true in the instant Petition. Petitioner paraphrases its contentions below,^{2/} but

^{2/} The Petition contains some severe mischaracterizations of the proceedings below. Petitioner would lead us to believe that it has set forth its contentions in the Petition, when in fact they are new revisions of the contentions with many self serving additions. For example, the version of Contention 5 in the Petition suggests the use of a "new" water chemistry treatment with the repaired steam generators. Petition at 3. This was not alleged in the contention advanced below, and is not true. Another example is Contention 3. That contention below did not allege that the repaired steam generators would create "another more serious safety problem." Petition at 3.

Petitioner also states that the Licensing Board held that the concerns raised in its contentions were "so unfounded" that no hearing was necessary. Petition at 4. That is not what happened. As summarized by the Appeal Board, ALAB-719 (slip opinion at 17 n.33), most of the contentions were rejected as irrelevant to the requested license amendment, one was rejected

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presents no argument on why the Licensing Board's analysis in rejecting Contention 3 was in error.^{3/} Thus, even if the Licensing Board's ruling on Contention 3 could have been properly placed before the Commission for review, the Commission has been presented with no factual or legal argument or analysis, or any basis whatsoever, for finding error by the Licensing Board.

Because Petitioner has presented no cognizable basis for appeal of ALAB-719, its Petition would necessarily have to be denied under any ordinary appellate standards. But to obtain discretionary Commission review, Petitioner has an even greater burden. The Commission's review procedures in 10 C.F.R. § 2.786 were established to constitute a "discretionary review system, based in part on the certiorari practice of various federal agencies and the United States Supreme Court." 41 Fed. Reg. 54,206 (December 13, 1976). Discretionary Commission

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for failure to present an issue capable of adjudication, and one was rejected for failure to state an adequate basis.

^{3/} Petitioner asserts that the Appeal Board's request for additional information in its March 22, 1983 Order accompanying ALAB-719 necessarily means that Petitioner should have been granted a hearing. However, Petitioner does not attempt to relate that request to the Licensing Board's determination that Petitioner had failed to state adequate basis for Contention 3, nor does Petitioner explain why the request should necessarily serve to cure Petitioner's defective petition for leave to intervene.

review of Appeal Board decisions is undertaken only "in cases of exceptional legal or policy importance," 10 C.F.R.

§ 2.786(a), and a petition for such review must comply with specific requirements set forth in 10 C.F.R. § 2.786(b)(2) and (4). In addition to the mootness of the Petition, and the failure to present an issue cognizable on appeal, the Petition falls far short of satisfying the requirements of 10 C.F.R. § 2.786.

Having failed to properly present the Appeal Board's rulings for review, Petitioner has not raised a question of "exceptional legal or policy importance." Certainly the Appeal Board's finding that Petitioner had failed to adequately brief its appeal of the Licensing Board's rejection of Contention 3 does not rise to this level of importance, and Petitioner does not so assert.^{4/} This is by now a well established principle in Commission case law, and the issue can hardly be said to warrant discretionary Commission review under 10 C.F.R. § 2.786(a).

As noted above, the Petition cannot be held to constitute a challenge to the Licensing Board's analysis leading to the rejection of Contention 3, since Petitioner has failed to

^{4/} In promulgating 10 C.F.R. § 2.786, the Commission stated that "[t]he petition should explain why a case is important enough to merit Commission attention." 41 Fed. Reg. 54,206 (December 13, 1976).

address that analysis before the Appeal Board (or the Commission). But even if that analysis could have been properly raised before the Commission, basis decisions under 10 C.F.R. § 2.714(b) are routinely considered by licensing boards and appeal boards, and there is nothing to suggest that the basis ruling in this case is a matter of "exceptional legal or policy importance." Thus, the Petition fails on all counts to meet the standard for discretionary Commission review as set forth in 10 C.F.R. §§ 2.786(a).5/

In addition, by failing to address the grounds upon which the Appeal Board sustained the Licensing Board's dismissal of the intervention petition below, Petitioner has failed to comply with the requirements for a petition for Commission review set forth in 10 C.F.R. § 2.786(b)(2). In not mentioning the default ruling, and in not addressing the Appeal Board's ruling of failure to adequately brief, Petitioner has not presented a "concise summary of the decision or action of which review is sought," a "concise statement why in the petitioner's view the decision or action is erroneous," or a "concise statement why Commission review should be exercised." 10 C.F.R. §§ 2.786(b)(2)(i), (iii) and (iv).

5/ Similarly, section 2.786(b)(4)(ii) precludes review of matters of fact unless the Appeal Board has resolved a factual issue in a clearly erroneous manner contrary to the resolution of the same issue by the Licensing Board. That, of course, is not the situation here, where the Appeal Board affirmed the decision of the Licensing Board below.

Rather than present arguments on why the specific Appeal Board rulings below were in error -- which rulings are all but ignored in the Petition -- Petitioner instead launches a broad harangue against the Commission's generic policies with respect to steam generator tube leakage. Petition at 1, 6-9. Licensee's amendment application and the rulings of the Appeal Board below become lost in the shuffle and seem to be used merely as an excuse for Petitioner to request the Commission to convene hearings on what Petitioner alleges to be "one of the major generic safety issues presently afflicting most pressurized water reactors in this country." Petition at 1, 9 (emphasis supplied).

A request for such a hearing is clearly out of place in the context of the instant proceeding. The request, and the arguments advanced in support of the request at pages 6-9 of the Petition, bear no relationship to the Appeal Board decision for which review is sought. That decision, as discussed above, involved affirmance of Petitioner's dismissal for default, which Petitioner does not mention, and for failure to adequately brief its assertion of Licensing Board error, which Petitioner has not addressed.^{6/}

^{6/} Petitioner's criticism of the Commission's generic policies and its request for a hearing on generic safety issues was not brought before the Appeal Board. Petitioner's December 20, 1982 appeal to that Board was limited to the Licensing Board's finding of default and the Licensing Board's rejection of Petitioner's contentions. Reliance on the generic safety

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By the same token, Petitioner's demand for a hearing to address generically the issue of steam generator tube leakage has not been related to the specific amendment request pending before the NRC Staff.^{7/} Licensee, which is currently authorized to operate the Point Beach unit with its existing steam generators and which is meeting all current NRC regulations, criteria, and guidance for its steam generators, is seeking approval to improve its steam generators. Petitioner's arguments for a generic safety hearing are directed to the adequacy of the current standards rather than the ability of the improved steam generators to meet the current standards. Concerns of this type are more appropriately considered in a petition for rulemaking.

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ment is therefore precluded by the provisions of 10 C.F.R. § 2.786(b)(4)(iii) which provides that a petition for discretionary Commission review will not be granted to the extent that it relies on matters that could have been but were not raised before the Appeal Board. Contrary to the requirements of 10 C.F.R. § 2.786(b)(2)(ii), Petitioner has failed to inform the Commission that this matter was not raised before the Appeal Board, and has failed to provide an explanation of why it could not have been raised.

^{7/} The referenced actions and quotations portraying Petitioner's generic concerns and are not related to the specific application for license amendment at issue. For example, the Commission's May 12, 1980 Order discussed by Petitioner, Petition at 7-9, involves the criteria for holding a hearing in an enforcement proceeding, and has no bearing on the instant license amendment proceeding.

For all of the foregoing reasons, Licensee submits that the matters raised in the Petition are not properly reviewable by the Commission under 10 C.F.R. § 2.786, and the Petition should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By



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Dated: April 22, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of Wisconsin Electric Power Company in Opposition to Petition for Review of Appeal Board Decision ALAB-719" were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 22nd day of April, 1983.



Bruce W. Churchill

Dated: April 22, 1983

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