

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

WISCONSIN ELECTRIC POWER COMPANY

(Point Beach Nuclear Plant,
Units 1 and 2)

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Docket Nos. 50-226
50-301

NRC STAFF'S ANSWER IN OPPOSITION TO WISCONSIN'S
ENVIRONMENTAL DECADE PETITION FOR REVIEW

Richard G. Bachmann
Counsel for NRC Staff

October 11, 1983

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DESIGNATED ORIGINAL

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I. INTRODUCTION

On September 23, 1983 Intervenor Wisconsin's Environmental Decade ("Decade") filed a Petition for Review of Appeal Board Decision ("Petition") pursuant to 10 C.F.R. § 2.786(b) requesting that the Commission undertake review of the Atomic Safety and Licensing Appeal Board's ("Appeal Board") Decision, ALAB-739, ___ NRC ___ (Slip Opinion, September 7, 1983). In ALAB-739 the Appeal Board affirmed the Initial Decision, LBP-83-4, 17 NRC 109 (1983) of the Atomic Safety and Licensing Board ("Licensing Board") issued on February 4, 1983 which authorized the issuance of a license amendment^{1/} for the Point Beach Nuclear Plant that allows degraded steam generator tubes to be repaired by sleeving. As discussed below, the NRC staff opposes the Petition and urges that it be denied.

^{1/} Pursuant to 10 C.F.R. § 2.764, the Staff issued the amendment on April 4, 1983. 48 Fed. Reg. 16153.

II. BACKGROUND

This license amendment proceeding was initiated on July 2, 1981, when Wisconsin Electric Power Company ("Licensee") filed its license amendment request which would permit the plant to operate with steam generator tubes that had degraded past the plugging limit when such tubes had been repaired by sleeving.^{2/} The Commission subsequently published a notice of opportunity for hearing. 46 Fed. Reg. 40359 (August 7, 1981). The Staff agrees with and adopts the Appeal Board's description of the early history of this proceeding set forth in previous decisions and referenced in ALAB-739. ALAB-739, Slip op. at 2, n.1.

On October 1, 1982, the Licensing Board issued its Memorandum and Order (Concerning Summary Disposition Issues), LBP-82-88, 16 NRC 1335 (1982) ("Summary Disposition Order"). As noted by the Appeal Board (ALAB-739, Slip op. at 2-3), the Licensing Board granted summary disposition of all but one of Decade's contentions and ordered a hearing on the following issue:

That the license amendment should be denied or conditioned because applicant has not demonstrated that eddy current testing is adequate to detect serious stress corrosion cracking or intergranular attack, in excess of the technical specification prohibiting more than 40 percent degradation of the sleeve wall, in sleeves that would be inserted within steam generator tubes. LBP-82-88, 16 NRC at 1337.

^{2/} The Licensing Board has provided a "Description of Sleeving" in its Initial Decision, LBP-83-4, 17 NRC 109, 111-112 (1983). See also Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1250 (1982).

The Licensing Board also explained its concerns pertaining to the issue as follows:

Were we to find that eddy current testing of sleeves is inadequate, we would be unable to assess the significance of that finding unless we are informed about the relationship of the inadequacy of the probability of occurrence of events of differing degrees of seriousness. Obviously, no system of measurement is perfect. Errors of measurement are to be expected. The significance of errors of measurement must be assessed in relationship to the resulting risks. (emphasis added) 16 NRC at 1338.

The Licensing Board further informed the parties as to the scope of its inquiry into the issue at the hearing:

We expect the hearing to address questions concerning the reliability of eddy current testing for detecting stress corrosion cracking in sleeved and unsleeved tubes (this latter evidence is relevant to our developing an adequate understanding of the ability to detect flaws in the sleeved tubes), the reliability with which rates of corrosion may be predicted within the tube-sleeve assemblies and the changing probability, over time, of undetected defects leading to a rupture of one or more sleeved steam generator tubes that: (a) will cause one or more leaks whose combined effect is not a serious safety problem, or (b) will cause one or more leaks whose combined effect is serious either because of the accompanying risk of release of radiation or because it would cause a serious risk of leading to a full or partial core melt condition. We are interested in expert opinion on these questions and in exploring the reasons for these opinions. Id.

Thus, the Licensing Board had set the stage, prior to the hearing, not only for litigation of the adequacy of eddy current testing, but also for an exploration of the probability and seriousness of undetected flaws in steam generator tubes. See ALAB-739, Slip op. at 3 (Appeal Board's characterization of Licensing Board's directions).

The evidentiary hearing was held on November 17 and 18, 1982 in Milwaukee, Wisconsin. Both the Licensee and the Staff submitted direct testimony and presented qualified witnesses to address the issue as

stated by the Licensing Board and to answer the concerns of the Board.^{3/} See LBP-83-4, 17 NRC at 131, 132. Decade presented no witnesses, submitted no direct testimony and filed no formal findings pursuant to the Licensing Board's request. Id. at 112. As noted above, the Licensing Board issued its Initial Decision on February 4, 1983. Decade appealed the decision by filing exceptions on February 14, 1983 and its Brief in Support of Exceptions to Board's Initial Decision ("Brief") on March 16, 1983.

The Appeal Board determined that Decade had raised two issues on appeal: (1) the Licensing Board should not have summarily dismissed as irrelevant Decade's contention concerning the effects of steam generator tube failures and (2) the Licensing Board erred in not first ascertaining the probability and consequences of steam generator tube failures before deciding on the issue of safety of sleeved tubes. ALAB-739, Slip op. at 4-5, 7. The Appeal Board agreed with the Licensing Board as to the irrelevance of Decade's contention on the effects of steam generator tube failures, noting that Decade had failed to provide any link between sleeving and tube failures. Id. at 5-7. Likewise, the Appeal Board rejected Decade's assertion that the Licensing Board was bound to explore the probability and consequences of tube failures, thus creating a new safety standard, before ruling on the safety of tube sleeving. Id. at 7-9. Accordingly, the Appeal Board affirmed the

^{3/} For the views of the Staff on the probability of a core melt, See Testimony of Ledyard B. Marsh, fol. Tr. 1822.

Licensing Board's Initial Decision.^{4/} On September 23, 1983, Decade filed the instant Petition seeking Commission review of ALAB-739.

III. DISCUSSION

The Commission's Regulations provide the procedure for parties to petition the Commission for a discretionary review of a decision or action of the Atomic Safety and Licensing Appeal Board. 10 C.F.R. § 2.786. Such a petition may only be filed on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy. 10 C.F.R. § 2.786(b)(1).

Section 2.786 establishes a framework and sets forth criteria against which a petition for review should be judged. Among the requirements is that a petition shall contain:

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Atomic Safety and Licensing Appeal Board and, if they were not why they could not have been raised. (emphasis added)
10 C.F.R. § 2.786(b)(2).

As a consequence, a petition will not be granted to the extent that it relies upon matters which could have been, but were not raised before the Appeal Board. 10 C.F.R § 2.786(b)(4)(iii). Although the Commission has

^{4/} In addition to rejecting Decade's assertions of error by the Licensing Board, the Appeal Board conducted its usual sua sponte review of the Initial Decision. ALAB-739, Slip op. at 9. With one minor exception, the Appeal Board agreed with the Licensing Board's conclusions. Id. at 9-10. However, the Appeal Board did discover the need for more information concerning the ability to inspect the upper sleeve joint. Id. at 10, n.9. Such information was requested from the Staff in a companion Memorandum and Order issued with the Appeal Board's Decision on September 7, 1983. Id.

the ultimate discretion to review any decision of its subordinate boards, petitions for review of matters of law or policy^{5/} "will not ordinarily be granted" unless important environmental, safety, common defense, antitrust, procedural or public policy questions are involved. 10 C.F.R. § 2.786(b)(4).

Decade has raised three issues in its Petition for which Commission review is sought. It has labeled the issues as follows:

1. Linkage between sleeving and failure;
2. Applicable rules require an assessment of safety;
3. Importance of inspectability concern. Petition at 3, 5, 9.

Decade's first two concerns meet the standard of 10 C.F.R. § 2.786(b)(2)(ii) in that they were previously raised before the Appeal Board.^{6/} Decade's third issue does not. A careful reading of Decade's appeal brief reveals no mention of inspectability of the upper sleeve joint as a matter before the Appeal Board. Decade's assertion (Petition at 9-10) that this issue was raised before the Licensing Board is not responsive to the requirement of 10 C.F.R. § 2.786(b)(2)(ii). Section 2.786, by its own terms, contemplates a review of Appeal Board, not Licensing Board, decisions or actions. Nor does Decade's Petition contain a statement as to why this matter could not have been raised before the

^{5/} Decade does not allege any errors of fact by the Appeal Board as contemplated in 10 C.F.R. § 2.786(b)(4)(ii).

^{6/} As noted supra, the Appeal Board "determined" that Decade appeared to raise these two issues on appeal. ALAB-739 at 4. At the same time, however, the Appeal Board commented on Decade's failure to conform its appellate filings to the Commission's Rules of Practice, which made it difficult to accurately discern which of its exceptions it pursued in the Brief. Id., n.4.

the Appeal Board in accordance with 10 C.F.R. § 2.786(b)(2)(ii). Moreover, Decade's third issue does not come within the exception of matters raised sua sponte by the Appeal Board. The Appeal Board did follow its "long standing practice" of conducting a sua sponte review of the Initial Decision and the underlying record. ALAB-739 at 9. And, as noted supra, n.4, the Appeal Board requested further information from the Staff on inspectability. Neither of these actions constitutes "a matter raised sua sponte by an Appeal Board" pursuant to 10 C.F.R. § 2.786(b)(4)(iii). Accordingly, Decade's third issue, concerning inspectability of the upper sleeve joint should be summarily rejected as not having been raised before the Appeal Board without explanation of why it could not have been raised, pursuant to 10 C.F.R. § 2.786(b)(2)(ii).

As stated above, the Staff believes that Decade's first two issues in its Petition were raised before the Appeal Board within the meaning of 10 C.F.R. §§ 2.786(b)(2)(ii) and (b)(4)(iii). These issues constitute matters of law, and, in the case of the second issue, application of Commission policy. Before discussing the substance of Decade's issues, it is important to note that 10 C.F.R. § 2.786 is not a vehicle to pursue an appeal as of right. As stated in that section the Commission may, in its discretion, review decisions or actions of an Appeal Board "in cases of exceptional legal or policy importance." 10 C.F.R. § 2.786(a). A petition for review must be filed "on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy." 10 C.F.R. § 2.786(b)(1). Decade does not assert, nor does it provide any information to demonstrate that its issues are

"important" within the ambit of section 2.786 of the Commission's Regulations. Moreover, on their face, the issues raised by Decade do not appear to raise an important question of fact, law or policy. Rather, they simply constitute matters upon which Decade's views have been rejected by the Boards below. Since, pursuant to 10 C.F.R. § 2.786(b)(4)(i), the Commission will not ordinarily grant a petition for review unless such "important" matters are raised, and Decade has not met this requirement, Decade's Petition should be denied on this basis.

Even assuming arguendo that the issues Decade wishes to raise are appropriate for Commission review, Decade has misinterpreted the applicable law and policy and its Petition should be denied on these grounds. Decade's first claim is that that Appeal Board erroneously upheld the Licensing Board in its summary disposition of Decade's contention concerning the consequences of steam generator tube failures. Petition at 3. This matter arose in the context of summary disposition when Decade filed its Motion Concerning Litigable Issues before the Licensing Board on July 21, 1982.^{7/}

In its Summary Disposition Decision, the Licensing Board dismissed Decade's contention as irrelevant since no showing had been made that tube sleeving was connected to tube failure. LBP-82-88, 16 NRC at 1342. In its brief before the Appeal Board, Decade's only attempt at connecting sleeving to tube failure was an assertion concerning the possibility of concentration of impurities in the annulus between a tube

^{7/} An explanation of the procedure used by the Licensing Board may be found in LBP-82-88, 16 NRC 1335, 1339-1341 (1982) and ALAB-739, Slip op. at 2, n.2.

and its sleeve. Brief at 6, cited in Petition at 3. Based on this bare assertion, Decade leaps to the conclusion that sleeving induces tube failures. Id., cited in Petition at 5. This argument was properly rejected by the Appeal Board. Decade's allegation concerning "concentration effects" in the tube-sleeve annulus was summarily disposed of by the Licensing Board on the facts. LBP-82-88, 16 NRC at 1348. Decade did not seek review of that dismissal before the Appeal Board; rather, Decade attempted to use its rejected allegation to demonstrate a link between sleeving and tube failure. Petition at 6. The Appeal Board, upon a consideration of the applicable caselaw, affirmed the Licensing Board on the basis that, absent any showing that sleeving produces tube failures, an allegation of the consequences of such failures is irrelevant and beyond the scope of the instant proceeding. ALAB-739, Slip op. at 5-7. The Appeal Board properly applied the Commission's caselaw and Commission review of this portion of the decision of the Appeal Board is not warranted.

Decade's second claim of error deals with the level of assurance necessary for the Licensing Board to determine if the proposed sleeving process is safe. See ALAB-739, Slip op. at 7. Specifically, in Decade's own words:

Contrary to the Appeal Board's assertions, the statutes and rules require a rational decision-making process in which conclusions as to adequate levels of safety cannot be meaningless boiler plate, but rather must be based upon a probabilistic [sic] assessment of probabilities and consequences. Concocting a standard ostensibly pegged to presently evaluated risks is arbitrary when the existing risks have, themselves, never been evaluated. Petition at 9.

Irrespective of Decade's views on what is required by the "statutes and rules," the Commission has not imposed such requirements. As correctly stated by the Appeal Board, "C[on]sideration of the probability and magni-

tude of steam generator tube failures is not required by the Commission's existing regulations." ALAB-739, Slip op. at 8.

Moreover, the Commission has made the following policy statement:

The qualitative safety goals and quantitative design objectives contained in the Commission's Policy Statement will not be used in the licensing process or be interpreted as requiring the performance of probabilistic risk assessments by applicants or licensees during the evaluation period. ... The staff should continue to use conformance to regulatory requirements as the exclusive licensing basis for plants.

Policy Statement on Safety Goals for the Operation of Nuclear Power

PL- 48 Fed. Reg. 10772 (March 15, 1983).

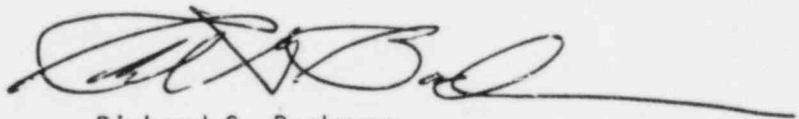
Finally, as noted p. 3, supra, the Licensing Board did inquire into the possibility of undetected sleeve flaws and the seriousness of their occurrence. See ALAB-739, Slip op. at 9.

Therefore, Decade's second claim of Appeal Board error is without merit and should be denied.

IV. CONCLUSION

For the reasons discussed above, the Commission should deny Decade's Petition for Commission Review of ALAB-739.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard G. Bachmann', with a long horizontal line extending to the right.

Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of October, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO WISCONSIN'S ENVIRONMENTAL DECADE PETITION FOR REVIEW" 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 11th day of October, 1983:

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A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', written over a horizontal line.

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