(2)

DR 1366

MEMORANDUM FOR: Mary E. Wagner, Attorney
Office of the Executive Legal Director

THRU: Darrel A. Nash, Section Leader
Licensee Relations Section
Office of State Programs

FROM: Jim C. Petersen
Senior Licensee Relations Analyst
Office of State Programs

SUBJECT: PROPOSED AFFIDAVIT IN RESPONSE TO WPPSS MOTION FOR SUMMARY DISPOSITION - WNP-1 CPA

Enclosed is my proposed affidavit in the subject proceeding. It addresses the licensee's motion for summary disposition of CFSP Amended Contention 2 and reaffirms my earlier conclusion in the previous affidavit.

Jim C. Petersen
Senior Licensee Relations Analyst
Office of State Programs

Enclosure:
As stated

Distribution:
Subject: WPPSS: WNP-1 Financial File
OSP:SLR R/F
Dir. R/F
R. Wood
J. Petersen
D. Nash
J. Saltzman

OSP:SLR	OSP:SLR	OSP:SLR
JPetersen:cb	DNash	JSaltzman
12/6/83	12/ /83	12/ /83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-460 CPA
	)	
(WPPSS Nuclear Project No. 1)	)	

AFFIDAVIT OF JIM C. PETERSEN
IN RESPONSE TO LICENSEE'S
MOTION FOR SUMMARY DISPOSITION OF
COALITION FOR SAFE POWER AMENDED CONTENTION 2

I, Jim C. Petersen, being duly sworn do depose and state:

1. I am employed by the U.S. Nuclear Regulatory Commission in the Office of State Programs. I am a NRC staff analyst currently assigned to the Washington Public Power Supply System (WPPSS or permittee) Nuclear Project No. 1 (WNP-1). I prepared an affidavit dated November 14, 1983 in support of the Staff's motion for summary disposition of CFSP Amended Contention 2. A statement of my professional qualifications was attached thereto. I certify that I have personal knowledge of the matters set forth herein with respect to the extension of the construction completion date of the WNP-1 project, and that the statements made are true and correct to the best of my knowledge.

2. I have reviewed the Licensee's Motion for Summary Disposition of CFSP Amended Contention 2 dated November 14, 1983 and the attached Statement of Material Facts, the Affidavit of Alexander Squire, and the other attachments. It is my opinion that these materials confirm the

conclusion in my earlier affidavit that BPA's involvement in the WNP-1 project is so substantial and so integral that it effectively has control over such decisions as the planned completion date of the project. Of particular note is a sequence of events described at p. 16 through p. 21 in the Licensee's Motion, in the Squire affidavit at 4 through 7 and in the Licensee's Statement of Material Facts at 5 through 9. It is reported therein that WPPSS developed and considered alternatives to the BPA recommendation that WNP-1 be deferred for two to five years. BPA advised WPPSS that none of the alternatives was acceptable, that the BPA recommendation was the only prudent course of action, and that BPA would not approve any WPPSS financing plan that did not follow the BPA recommendation. WPPSS adopted the BPA recommendation to defer WNP-1 from two to five years.

3. The WNP-1 Project Agreement between BPA and WPPSS provides that BPA has approval/disapproval authority over WPPSS' issuance of WNP-1 revenue bonds. WPPSS is obligated to issue bonds in such amounts and at such times so as to fulfill the WPPSS' budget and financial plan over which BPA has approval authority. Since WPPSS cannot sell bonds to finance construction of WNP-1 without BPA's approval, WPPSS effectively has control over the planned completion date of the project.

_____
Jim C. Petersen

SUBSCRIBED and sworn to before
me this day of , 1983

_____
Notary Public
My commission expires

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

2-1-54

1. ~~Direct~~
2. ~~Jones~~
3. ~~Bell~~
4. Farr

NRC Staff ~~it~~ successful ~~through~~ on ~~motions~~ & affidavits in getting a summary disposition in the WNP-1 CP-extension proceeding. The intervenor's contention was dismissed & the proceeding terminated.

Jim

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

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Jim -

Here's a copy of the WPPSS-1 CPA decision. As you'll see, your help was most appreciated!

Thanks

Hey

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Wagner Lyons
Gray PP

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Glenn O. Bright
Dr. Jerry Harbour

In the Matter of	Docket No. 50-460-CPA
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	(ASLBP No. 83-485-02 CPA)
(WPPSS Nuclear Project No. 1)	February 1, 1984

MEMORANDUM AND ORDER
(Granting Applicant's and NRC Staff's Motions for Summary Disposition)

M E M O R A N D U M

This is a proceeding to determine whether Applicant should be granted an amendment to extend the completion date stated in its construction permit. Intervenor contends that "good cause" does not exist for the extension of the construction permit completion date, as required by Section 185 of the Atomic Energy Act and 10 C.F.R.

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§ 50.55(b), and that the extension requested is not for a reasonable period.

Applicant and NRC Staff have moved for summary disposition on the basis of affidavits and other documents annexed to their respective motions. Intervenor opposes the summary disposition motions and requests that an evidentiary hearing be convened.

We grant Applicant's and NRC Staff's motions for summary disposition and dismiss Intervenor's admitted contention.

I. BACKGROUND

On July 21, 1981, Applicant filed an application for an extension of its construction permit completion date from January 1, 1982 until June 1, 1986. On March 18, 1982, Intervenor, the Coalition for Safe Power (CSP), filed a request for hearing. On October 8, 1982, the Commission issued an Order, CLI-82-29, 16 NRC 1221, concerning CSP's request for hearing, which provided Commission guidance on the scope of construction permit extension proceedings and determined that only one contention raised by CSP would be litigable if properly particularized and supported. The Commission Order referred the petition filed by CSP to a licensing board to determine if the other hearing requirements of the Commission's regulations had been met and, if so, to conduct an appropriate proceeding.

On January 17, 1983, Applicant served on the Board and the parties copies of a request to the Staff that its pending amendment request for an extension to June 1, 1986 for completion of construction be modified to allow completion by June 1, 1991. Applicant stated therein its understanding that the request would be treated as a modification of the pending amendment rather than as a new amendment request.

The original requested extension, until June 1, 1986, was premised on the construction having proceeded slower than anticipated. Intervenor challenged that extension on the ground that poor management practices had resulted in delay and that, consequently, there was no good cause for the delay. Intervenor acknowledged that Applicant had not intentionally delayed construction.

The supplemental request for extension from June 1, 1986 until June 1, 1991, however, was necessitated by Applicant's intention to halt its construction for up to five years. Intervenor challenged that additional period of requested extension as not satisfying the "good cause" requirement of the Atomic Energy Act and Commission regulations, and the five-year period as not being a reasonable period of time.

In our Orders of February 23, 1983 and March 23, 1983, we rejected any contentions that might relate to the original period of

requested extension in the pending application, from January 1, 1982 until June 1, 1986. We determined that allegations of poor management practices resulting in construction delays are not sufficient to satisfy the Commission's guidance in CLI-82-29, supra, that equated a lack of good cause with being dilatory. Since Intervenor had made no showing that Applicant's requested extension until 1986 was the result of Applicant's being dilatory, we would not entertain any contentions regarding that time period.

However, with regard to the supplemental period of extension, from June 1, 1986 until June 1, 1991, we admitted the following contention:

Amended Contention No. 2

> Petitioner contends that the Permittee's decision in April 1982 to "defer" construction for two to five years, and the subsequent cessation of construction at WNP-1, was dilatory. Such action was without "good cause" as required by 10 CFR 50.55(b). Moreover, the modified request for extension of completion date to 1991 does not constitute a "reasonable period of time" provided for in 10 CFR 50.55(b).

It is this contention, the only one admitted in this proceeding, that Applicant and Staff move to dismiss in their respective motions for summary disposition.

II. STATEMENT

According to Applicant's discussion of the facts, it was the Bonneville Power Administration (BPA), an agency of the U.S. Government established by the Bonneville Project Act of August 20, 1937, that required the halt in construction of WNP-1. Applicant has under construction three nuclear projects, WNP-1, WNP-2, and WNP-3. The financing of WNP-1 has been solely through the sale of bonds. Under agreements to which Applicant and BPA are parties, Applicant has agreed to construct WNP-1 and has assigned 100% of the capability of the facility to BPA. BPA is accorded substantial oversight responsibility and contract approval authority. In addition, the issuance of all bonds is subject to approval by BPA. Because the construction of WNP-1 is financed entirely through the sale of bonds, Applicant asserts that BPA controls the pace of construction as a result of its authority to withhold approval for bond sales.

As Applicant further describes the situation, in April of 1982 BPA published a draft powerload forecast which indicated that WNP-1, WNP-2 and WNP-3 were needed in the region, but that short-term surpluses of electricity could occur prior to 1990. Therefore, BPA recommended that construction of WNP-2 and WNP-3 proceed at full pace while the completion schedule for WNP-1 be delayed for a period of up to five years. Applicant developed alternatives to the BPA recommendation, but BPA advised Applicant that none of these alternatives

was acceptable; that the BPA recommendation was the only prudent course of future conduct; and that BPA would not approve any financing plan inconsistent with its recommendation. As a result, Applicant decided to defer the construction of WNP-1, recognizing that BPA would not permit the sale of bonds needed to continue construction of the facility.

In support of its motion for summary disposition in Applicant's favor, Staff also relies upon BPA's refusal to approve further bond issuances for continued construction of WNP-1 as "good cause" for deferring construction. Staff agrees that Applicant would lack the financial resources to complete construction without BPA's support. Staff also relies upon one of the reasons cited by BPA for recommending deferral of WNP-1, a slower growth rate of electrical power demand than originally projected, as constituting a valid purpose for deferring construction. NRC Staff Motion at 5.

Intervenor, on the other hand, concludes that Applicant, rather than BPA, was responsible for the deferral of WNP-1. Intervenor submits that Applicant requested the deferral from BPA and concurred in it. Rosolie affidavit at 2; Intervenor's Answer to Summary Disposition Motions at 6-7. Intervenor asserts that Applicant had options other than deferral: it could have placed the project in indefinite mothball as it did with Projects WNP-4 and WNP-5; it could have terminated the Projects; or it could have entered into negotiations with

the private utilities owning 30% of WNP-3 in order to have them defer WNP-3, rather than having to defer WNP-1. Id at 7-9.

Furthermore, Intervenor asserts that the Board should go behind the decision to halt construction (whether made by Applicant or BPA) to consider the reasons for not financing continued construction at this point. Intervenor asserts that the reasons given by Staff and Applicant as inducing the BPA decision (which Intervenor asserts was Applicant's decision) to defer construction, a temporary lack of financial resources and a slower growth rate of electrical demand, are not the full story. It contends that escalating rates caused by the WPPSS construction program was a significant factor; that the private utilities would not agree to deferring WNP-3 in lieu of WNP-1, although WNP-1 was more complete; that more recent analyses by BPA show electrical growth to be even less than projected; and that there may be no future financing available to resume construction. Intervenor would like to call an expert witness to support its position that there will be a lack of need for power from WNP-1 (in addition to a consequent lack of future financing) in order to support a finding that there is no good cause to extend the construction completion date, notwithstanding that there might have been good cause to delay construction. In other words, whatever causes exist to delay construction, such as currently low electrical demand and temporary lack of financing, are more extreme, namely, even lower electrical demand

and a permanent lack of financing, so as to require cancellation of construction. Id. at 10-11.

Intervenor also contends that the requested extension of completion date is not for a reasonable period of time by dint of its being insufficent. According to Intervenor, BPA and Applicant may well be considering a 5-12 year deferral of WNP-1, not a 2-5 year deferral, according to other documents. Furthermore, because of the downward trend in forecasting electrical demand and the unavailability of financing within the time period requested, Intervenor contends that Applicant cannot meet its burden of proving that financing will exist to resume construction within the five-year period requested. Intervenor's Answer at 12-16. Finally, Intervenor asserts that the safety and environmental significance of the requested delay must be considered for at least the reasons that there is some concern over equipment deterioration during the extensive delay in completion of construction and that the original cost-benefit analysis at the construction permit stage is completely outdated. Id. at 16-19.

III. OPINION

A. Good Cause

Section 185 of the Atomic Energy Act, as amended, 42 U.S.C. § 2235, states, in pertinent part:

> All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

In furtherance of this section, 10 C.F.R. § 50.55 reads in pertinent part, as follows:

> (a) The permit shall state the earliest and latest dates for completion of the construction or modification.
>
> (b) If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

In its guidance to this Licensing Board in CLI-82-29, supra, the Commission interpreted the foregoing statute and regulation as affording only a narrow scope to this proceeding within which Intervenor was free to prove only that "WPPSS was both responsible for the delays and that the delays were dilatory and thus without 'good cause'." 16 NRC at 1231. In Washington Public Power Supply System (WPPSS Nuclear

Project No. 2), ALAB-722, 17 NRC 546, involving only WNP-2, the Appeal Board elaborated on those directions from the Commission to the Licensing Board. It interpreted "dilatory conduct in the sense used by the Commission" as meaning "intentional delay of construction without a valid purpose." Id. at 552. Consequently, it held 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." Id. at 553. Since, with regard to WNP-2 there had not been any Intervenor allegation of intentional delay (Applicant sought no halt in construction, as here, but had only suffered involuntary delays in meeting its construction schedule), the Appeal Board affirmed the Licensing Board's dismissal of Intervenor's contentions.

In the instant case, Applicant has made a strong showing of not "intentionally" causing the halt in construction, with affidavit and documentary support of its position that the Bonneville Power Administration caused the delay by withholding its approval of bond issuances for further construction, the only avenue for financing available to Applicant. Intervenor makes no attempt to dispute BPA's power to control the pace of construction through its control over the financing of the project, but insists that it was Applicant, rather than BPA, who instigated the decision to defer construction and that BPA only concurred in it. Intervenor seeks the opportunity to prove that

Applicant's decision to delay construction, not having been compelled by BPA, was also without a valid purpose.

Although we see little in Intervenor's transmittals to us in opposition to the motions for summary disposition to support its position that the recommendation of deferral was instigated by Applicant, rather than BPA, we would not grant the motions for summary disposition on that score. Corporate dealings and motivations are sufficiently arcane, notwithstanding the matters placed upon the public record in the form of corporate minutes, resolutions, and recommendations, to afford a litigant the right to go behind these records to seek the testimony of participants in the corporate transactions. Intervenor has not taken discovery depositions, possibly for lack of finances, but that would not preclude it from examining for the first time at an evidentiary hearing the appropriate officials of WPPSS and BPA to identify the actual decision-maker. However, even if we could place the intention to delay on Applicant, rather than BPA, we would still have to hold for Applicant on the undisputed material facts relating to the purpose for the delay, on which we find very little disagreement among the parties.

Without dispute, what prompted the decision to delay construction was a lack of financial resources to complete the construction of WNP-1 and WNP-3, and the forecast of no electrical demand for the output of WNP-1, at the targeted completion date of July 1, 1986.

Intervenor, in fact, posits that the situation is more precarious than given by Applicant -- that there will be a lack of financing and a lack of demand for electrical power even after a five-year hiatus in construction. Intervenor's Answer at 10-11, 14-16; Rosolie Affidavit at 3-4.

In ALAB-722, supra, the Appeal Board indicated that "an intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electrical power than that originally projected would constitute delay for a valid business purpose." 17 NRC at 552, fn. 6. Since there is no dispute that the lack of financing and slower growth rate of electrical power caused the decision to defer construction, we should have little hesitation in deciding that Applicant's delay in construction met the Appeal Board's test of being for a valid business purpose. Intervenor, however, relies on further dictum in ALAB-722 (id. at 553) that the "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." Intervenor asserts that there is not merely a temporary lack of financial resources, but a permanent one, and a long-term lack of electrical demand that would negate any reasons for completing a plant. Intervenor's Answer at 10-11.

Intervenor's argument flies in the face of the Commission's directives to us in CLI-82-29, supra. There the Commission, in no uncertain terms, focused exclusively on the "reasons that have contributed to the delay in construction," rather than good cause for completing construction. 16 NRC at 1228; see also Id. at 1229, 1230 and 1231. While ALAB-722, supra, appears to be at some variance with the Commission's directives to us to focus exclusively on causes for delay, rather than for completing construction, even that dictum would require a judgment about whether the plant should be completed only if Applicant has not first satisfied the test of either not being responsible for the delay or having delayed construction for a valid purpose. Since the Applicant, in this case, has halted construction, either intentionally or at the direction of BPA, for the valid reasons of a lack of financial resources and a slower growth of electric power, we need not reach a value judgment on the advisability of completing the plant.*/

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*/ The Appeal Board has not illuminated the basis for its focus on the future, rather than on Applicant's past conduct, seemingly at variance with the Commission's directives to us, other than to conclude that this is called for by Section 185 of the Atomic Energy Act. 17 NRC at 553. Consequently, we offer no opinion on why the Appeal Board would permit an inquiry into the advisability of building a plant when it is for the benefit of an applicant that has failed the Commission's test of not being dilatory but would not permit such inquiry for the benefit of an intervenor wishing to scrap the plant. An applicant for a construction permit extension has, presumably, already satisfied its

[FOOTNOTE CONTINUED]

Intervenor also seeks a hearing on the other options it asserts were available to Applicant in place of its deferral of construction for the five-year projected period. These other asserted options of placing the project in indefinite mothball, terminating the project or negotiating with private utilities who own 30% of WNP-3 to delay WNP-3 instead, might have been more "prudent" according to Intervenor. Roslie Affidavit at 2-3; Intervenor's Answer at 9. Nothing stated by Intervenor in its answer or submitted in support of it raises any question about the decision to delay construction being at least a rational business decision, albeit not the decision Intervenor might have made under the same circumstances.

We see no merit in the Board's seeking to substitute its own judgment for that of Applicant in selecting one of a number of rational alternatives available to Applicant. The one apparently favored by Intervenor (ibid.), of halting construction on WNP-3 rather than WNP-1, cannot support a denial of the requested extension. If

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[FOOTNOTE CONTINUED]

requirement of demonstrating the need for power at the construction permit stage and should not have to demonstrate that need again unless, under special circumstances, such a demonstration is deemed necessary at the operating license stage. See 10 C.F.R. §§ 51.21 and 51.23(e), and Statement of Consideration at 47 Fed. Reg. 12940 (March 26, 1982).

the Applicant is attempting to salvage both nuclear plants by temporarily halting construction on one of them, that cessation of construction activities has a valid purpose regardless of which plant is chosen. We see no reason to attempt to force the cancellation of the plant chosen to be delayed (through a revocation of the construction permit) merely because some reasonable persons would have chosen to delay the other plant. Nor do we see any justification for the Board to question the reasonableness of Applicant's decision of deferral because Applicant did not choose, instead, either of the other two more extreme alternatives suggested by Intervenor of indefinite mothballing or termination.

We are not faced with an allegation that Applicant has actually decided to abandon the plant. Had Intervenor made such an allegation and offered some factual support for it we would not be so quick to grant summary disposition in favor of Applicant. A finding by us of abandonment might permit us to dismiss Applicant's application as being moot. See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980). Here, Intervenor has not gone beyond an attempt to prove that future power demands and lack of financing will cause an abandonment of the plant when Applicant is faced with resuming construction. If Intervenor were convinced that Applicant had irrevocably decided to abandon the plant, it is doubtful that that it would continue to expend its resources on its interventions in this and the operating license proceedings.

B. Reasonable Period of Time

Intervenor also challenges the reasonableness of the period of time requested for the extension. Intervenor asserts that the five-year requested extension is unreasonable because it is insufficient. It would like the opportunity to prove that the plant could not be completed by 1991. Intervenor's Answer at 11-16.

We cannot fairly read into the Atomic Energy Act or the regulations thereunder any basis for challenging the reasonableness of the period of requested extension on grounds of insufficiency. Were there some overall time (rather than reasonableness) limitation on the total construction period or on the period that might be requested which Applicant is attempting to circumvent by requesting the needed time in increments, we might be persuaded otherwise. However, no such limitation is apparent to us. By requesting an insufficient period Applicant could only injure itself because it would then be forced to apply for another extension and demonstrate good cause anew in order to complete the plant, when its original "good cause" demonstration could have supported an extension for the total period required.

Perhaps we would view differently Intervenor's arguments with regard to the insufficiency of the period requested if we could accept its further argument that the total period of extension must be examined with regard to the safety and environmental aspects of the

deferral of construction. Indeed, Intervenor's argument that there may be equipment deterioration during a lengthy delay in construction that should be considered during a construction completion date extension proceeding (Intervenor's Answer at 17) has considerable superficial appeal. Certainly, one cannot easily disassociate the question of whether an extension should be granted from the realization that the granting of the extension might well lead to a deterioration in equipment. Similarly, one could postulate environmental effects from the prolongation of the construction period. However, were we to choose the most propitious moment for evaluating the effects of a prolonged or delayed construction period on safety and the environment, we would choose a time after the effects became apparent, namely, at the operating license stage. A hearing at this juncture would be mostly speculative. We note that the Licensing Board in the WNP-1-OL operating license proceeding, composed of the same members as here, has admitted a contention (Contention 20) that questions unnamed construction defects that might result from Applicant's method of preserving the construction during the period of deferral. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC ____ (October 14, 1983). slip op. at 31-34.

A deferral of consideration of the safety and environmental effects of the delay in construction to the operating license stage not only makes the most sense, but it comports with the Commission's interpretation of § 185 of the Atomic Energy Act as not requiring the

relitigation of health, safety or environmental questions between the time a construction permit is granted and the time the facility is seeking authorization to operate. CLI-82-29, supra, 16 NRC at 1228. And, since the health, safety and environmental effects of the prolonged construction are not to be questioned at this juncture, Applicant also can derive little benefit from understating the period needed for completion of construction, as alleged by Intervenor.

C. Legal Standard

Under 10 C.F.R. § 2.749, this proceeding should be dismissed if the filings indicate that there is no genuine issue as to any material fact. In deciding Applicant's and NRC Staff's motions for summary disposition we have construed all of the material facts in favor of Intervenor. We have assumed, notwithstanding the strong evidence offered to the contrary by Applicant, that the decision to halt construction was Applicant's, not BPA's. We have accepted Intervenor's assertions that there were more prudent alternatives to a temporary halt in construction, such as cancellation of the facility, placing it in mothball, or halting construction on WNP-1. We have also assumed for the purpose of deciding this motion that the period of extension requested isn't sufficient and that the economic situation will eventually cause an abandonment of the facility. We nevertheless reach the position that Applicant has demonstrated good cause for delaying construction by demonstrating valid reasons for doing so even though

there may be more prudent alternatives and the option selected may prove fruitless. Having found good cause for the deferral of construction on the uncontroverted material facts, we must grant Applicant's and Staff's motions for summary disposition without inquiring further into the advisability of constructing the nuclear plant.

O R D E R

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 1st day of February, 1984,

ORDERED

That Applicant's and NRC Staff's motions for summary disposition in favor of Applicant are granted and Intervenor's sole contention is dismissed, terminating the proceeding.

Within ten (10) days after service of this Memorandum and Order, which constitutes a final disposition of this proceeding before the Licensing Board, Intervenor may take an appeal to the Appeal Board by filing a notice of appeal pursuant to 10 C.F.R. §§ 2.762 and 2.785. A supporting brief would then be due within thirty (30) days after the notice of appeal is filed.

Pursuant to 10 C.F.R. § 2.760 of the Commission's Rules of Practice, this Memorandum and Order will constitute the final decision of the Commission thirty (30) days from the date of issuance unless an appeal is taken in accordance with 10 C.F.R. § 2.762 or the Commission directs otherwise. See also 10 C.F.R. §§ 2.785 and 2.786.

THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland,

February 1, 1984.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

2-7-5

1. ~~Darrell~~
~~2 Jerry~~
~~3 Bill~~
4. Jim

NRC Staff at WPPSS ... successful through ... motions & affidavits in getting a summary disposition in the WNP-1 CP ... proceeding. The intervenor's contention is dismissed & the proceeding terminated.

Jim

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

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Jim -

Here's a copy of the WPPSS-1 CPA decision. As your help was *not* appreciated!

Thanks

Wm

J

LBP-84-9

II
Wayne Lyons
Only PP

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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Dr. Jerry Harbour

In the Matter of	Docket No. 50-460-CPA
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(WPPSS Nuclear Project No. 1)	February 1, 1984

MEMORANDUM AND ORDER
(Granting Applicant's and NRC Staff's Motions for Summary Disposition)

MEMORANDUM

This is a proceeding to determine whether Applicant should be granted an amendment to extend the completion date stated in its construction permit. Intervenor contends that "good cause" does not exist for the extension of the construction permit completion date, as required by Section 185 of the Atomic Energy Act and 10 C.F.R.

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§ 50.55(b), and that the extension requested is not for a reasonable period.

Applicant and NRC Staff have moved for summary disposition on the basis of affidavits and other documents annexed to their respective motions. Intervenor opposes the summary disposition motions and requests that an evidentiary hearing be convened.

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I. BACKGROUND

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However, with regard to the supplemental period of extension, from June 1, 1986 until June 1, 1991, we admitted the following contention:

Amended Contention No. 2

> Petitioner contends that the Permittee's decision in April 1982 to "defer" construction for two to five years, and the subsequent cessation of construction at WNP-1, was dilatory. Such action was without "good cause" as required by 10 CFR 50.55(b). Moreover, the modified request for extension of completion date to 1991 does not constitute a "reasonable period of time" provided for in 10 CFR 50.55(b).

It is this contention, the only one admitted in this proceeding, that Applicant and Staff move to dismiss in their respective motions for summary disposition.

II. STATEMENT

According to Applicant's discussion of the facts, it was the Bonneville Power Administration (BPA), an agency of the U.S. Government established by the Bonneville Project Act of August 20, 1937, that required the halt in construction of WNP-1. Applicant has under construction three nuclear projects, WNP-1, WNP-2, and WNP-3. The financing of WNP-1 has been solely through the sale of bonds. Under agreements to which Applicant and BPA are parties, Applicant has agreed to construct WNP-1 and has assigned 100% of the capability of the facility to BPA. BPA is accorded substantial oversight responsibility and contract approval authority. In addition, the issuance of all bonds is subject to approval by BPA. Because the construction of WNP-1 is financed entirely through the sale of bonds, Applicant asserts that BPA controls the pace of construction as a result of its authority to withhold approval for bond sales.

As Applicant further describes the situation, in April of 1982 BPA published a draft powerload forecast which indicated that WNP-1, WNP-2 and WNP-3 were needed in the region, but that short-term surpluses of electricity could occur prior to 1990. Therefore, BPA recommended that construction of WNP-2 and WNP-3 proceed at full pace while the completion schedule for WNP-1 be delayed for a period of up to five years. Applicant developed alternatives to the BPA recommendation, but BPA advised Applicant that none of these alternatives

was acceptable; that the BPA recommendation was the only prudent course of future conduct; and that BPA would not approve any financing plan inconsistent with its recommendation. As a result, Applicant decided to defer the construction of WNP-1, recognizing that BPA would not permit the sale of bonds needed to continue construction of the facility.

In support of its motion for summary disposition in Applicant's favor, Staff also relies upon BPA's refusal to approve further bond issuances for continued construction of WNP-1 as "good cause" for deferring construction. Staff agrees that Applicant would lack the financial resources to complete construction without BPA's support. Staff also relies upon one of the reasons cited by BPA for recommending deferral of WNP-1, a slower growth rate of electrical power demand than originally projected, as constituting a valid purpose for deferring construction. NRC Staff Motion at 5.

Intervenor, on the other hand, concludes that Applicant, rather than BPA, was responsible for the deferral of WNP-1. Intervenor submits that Applicant requested the deferral from BPA and concurred in it. Rosolie affidavit at 2; Intervenor's Answer to Summary Disposition Motions at 6-7. Intervenor asserts that Applicant had options other than deferral: it could have placed the project in indefinite mothball as it did with Projects WNP-4 and WNP-5; it could have terminated the Projects; or it could have entered into negotiations with

the private utilities owning 30% of WNP-3 in order to have them defer WNP-3, rather than having to defer WNP-1. Id at 7-9.

Furthermore, Intervenor asserts that the Board should go behind the decision to halt construction (whether made by Applicant or BPA) to consider the reasons for not financing continued construction at this point. Intervenor asserts that the reasons given by Staff and Applicant as inducing the BPA decision (which Intervenor asserts was Applicant's decision) to defer construction, a temporary lack of financial resources and a slower growth rate of electrical demand, are not the full story. It contends that escalating rates caused by the WPPSS construction program was a significant factor; that the private utilities would not agree to deferring WNP-3 in lieu of WNP-1, although WNP-1 was more complete; that more recent analyses by BPA show electrical growth to be even less than projected; and that there may be no future financing available to resume construction. Intervenor would like to call an expert witness to support its position that there will be a lack of need for power from WNP-1 (in addition to a consequent lack of future financing) in order to support a finding that there is no good cause to extend the construction completion date, notwithstanding that there might have been good cause to delay construction. In other words, whatever causes exist to delay construction, such as currently low electrical demand and temporary lack of financing, are more extreme, namely, even lower electrical demand

and a permanent lack of financing, so as to require cancellation of construction. Id. at 10-11.

Intervenor also contends that the requested extension of completion date is not for a reasonable period of time by dint of its being insufficent. According to Intervenor, BPA and Applicant may well be considering a 5-12 year deferral of WNP-1, not a 2-5 year deferral, according to other documents. Furthermore, because of the downward trend in forecasting electrical demand and the unavailability of financing within the time period requested, Intervenor contends that Applicant cannot meet its burden of proving that financing will exist to resume construction within the five-year period requested. Intervenor's Answer at 12-16. Finally, Intervenor asserts that the safety and environmental significance of the requested delay must be considered for at least the reasons that there is some concern over equipment deterioration during the extensive delay in completion of construction and that the original cost-benefit analysis at the construction permit stage is completely outdated. Id. at 16-19.

III. OPINION

A. Good Cause

Section 185 of the Atomic Energy Act, as amended, 42 U.S.C. § 2235, states, in pertinent part:

> All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

In furtherance of this section, 10 C.F.R. § 50.55 reads in pertinent part, as follows:

> (a) The permit shall state the earliest and latest dates for completion of the construction or modification.
>
> (b) If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

In its guidance to this Licensing Board in CLI-82-29, supra, the Commission interpreted the foregoing statute and regulation as affording only a narrow scope to this proceeding within which Intervenor was free to prove only that "WPPSS was both responsible for the delays and that the delays were dilatory and thus without 'good cause'." 16 NRC at 1231. In Washington Public Power Supply System (WPPSS Nuclear

Project No. 2), ALAB-722, 17 NRC 546, involving only WNP-2, the Appeal Board elaborated on those directions from the Commission to the Licensing Board. It interpreted "dilatory conduct in the sense used by the Commission" as meaning "intentional delay of construction without a valid purpose." Id. at 552. Consequently, it held 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." Id. at 553. Since, with regard to WNP-2 there had not been any Intervenor allegation of intentional delay (Applicant sought no halt in construction, as here, but had only suffered involuntary delays in meeting its construction schedule), the Appeal Board affirmed the Licensing Board's dismissal of Intervenor's contentions.

In the instant case, Applicant has made a strong showing of not "intentionally" causing the halt in construction, with affidavit and documentary support of its position that the Bonneville Power Administration caused the delay by withholding its approval of bond issuances for further construction, the only avenue for financing available to Applicant. Intervenor makes no attempt to dispute BPA's power to control the pace of construction through its control over the financing of the project, but insists that it was Applicant, rather than BPA, who instigated the decision to defer construction and that BPA only concurred in it. Intervenor seeks the opportunity to prove that

Applicant's decision to delay construction, not having been compelled by BPA, was also without a valid purpose.

Although we see little in Intervenor's transmittals to us in opposition to the motions for summary disposition to support its position that the recommendation of deferral was instigated by Applicant, rather than BPA, we would not grant the motions for summary disposition on that score. Corporate dealings and motivations are sufficiently arcane, notwithstanding the matters placed upon the public record in the form of corporate minutes, resolutions, and recommendations, to afford a litigant the right to go behind these records to seek the testimony of participants in the corporate transactions. Intervenor has not taken discovery depositions, possibly for lack of finances, but that would not preclude it from examining for the first time at an evidentiary hearing the appropriate officials of WPPSS and BPA to identify the actual decision-maker. However, even if we could place the intention to delay on Applicant, rather than BPA, we would still have to hold for Applicant on the undisputed material facts relating to the purpose for the delay, on which we find very little disagreement among the parties.

Without dispute, what prompted the decision to delay construction was a lack of financial resources to complete the construction of WNP-1 and WNP-3, and the forecast of no electrical demand for the output of WNP-1, at the targeted completion date of July 1, 1986.

Intervenor, in fact, posits that the situation is more precarious than given by Applicant -- that there will be a lack of financing and a lack of demand for electrical power even after a five-year hiatus in construction. Intervenor's Answer at 10-11, 14-16; Rosolie Affidavit at 3-4.

In ALAB-722, supra, the Appeal Board indicated that "an intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electrical power than that originally projected would constitute delay for a valid business purpose." 17 NRC at 552, fn. 6. Since there is no dispute that the lack of financing and slower growth rate of electrical power caused the decision to defer construction, we should have little hesitation in deciding that Applicant's delay in construction met the Appeal Board's test of being for a valid business purpose. Intervenor, however, relies on further dictum in ALAB-722 (id. at 553) that the "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." Intervenor asserts that there is not merely a temporary lack of financial resources, but a permanent one, and a long-term lack of electrical demand that would negate any reasons for completing a plant. Intervenor's Answer at 10-11.

Intervenor's argument flies in the face of the Commission's directives to us in CLI-82-29, supra. There the Commission, in no uncertain terms, focused exclusively on the "reasons that have contributed to the delay in construction," rather than good cause for completing construction. 16 NRC at 1228; see also Id. at 1229, 1230 and 1231. While ALAB-722, supra, appears to be at some variance with the Commission's directives to us to focus exclusively on causes for delay, rather than for completing construction, even that dictum would require a judgment about whether the plant should be completed only if Applicant has not first satisfied the test of either not being responsible for the delay or having delayed construction for a valid purpose. Since the Applicant, in this case, has halted construction, either intentionally or at the direction of BPA, for the valid reasons of a lack of financial resources and a slower growth of electric power, we need not reach a value judgment on the advisability of completing the plant.*/

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*/ The Appeal Board has not illuminated the basis for its focus on the future, rather than on Applicant's past conduct, seemingly at variance with the Commission's directives to us, other than to conclude that this is called for by Section 185 of the Atomic Energy Act. 17 NRC at 553. Consequently, we offer no opinion on why the Appeal Board would permit an inquiry into the advisability of building a plant when it is for the benefit of an applicant that has failed the Commission's test of not being dilatory but would not permit such inquiry for the benefit of an intervenor wishing to scrap the plant. An applicant for a construction permit extension has, presumably, already satisfied its

[FOOTNOTE CONTINUED]

Intervenor also seeks a hearing on the other options it asserts were available to Applicant in place of its deferral of construction for the five-year projected period. These other asserted options of placing the project in indefinite mothball, terminating the project or negotiating with private utilities who own 30% of WNP-3 to delay WNP-3 instead, might have been more "prudent" according to Intervenor. Rosclie Affidavit at 2-3; Intervenor's Answer at 9. Nothing stated by Intervenor in its answer or submitted in support of it raises any question about the decision to delay construction being at least a rational business decision, albeit not the decision Intervenor might have made under the same circumstances.

We see no merit in the Board's seeking to substitute its own judgment for that of Applicant in selecting one of a number of rational alternatives available to Applicant. The one apparently favored by Intervenor (ibid.), of halting construction on WNP-3 rather than WNP-1, cannot support a denial of the requested extension. If

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[FOOTNOTE CONTINUED]

requirement of demonstrating the need for power at the construction permit stage and should not have to demonstrate that need again unless, under special circumstances, such a demonstration is deemed necessary at the operating license stage. See 10 C.F.R. §§ 51.21 and 51.23(e), and Statement of Consideration at 47 Fed. Reg. 12940 (March 26, 1982).

the Applicant is attempting to salvage both nuclear plants by temporarily halting construction on one of them, that cessation of construction activities has a valid purpose regardless of which plant is chosen. We see no reason to attempt to force the cancellation of the plant chosen to be delayed (through a revocation of the construction permit) merely because some reasonable persons would have chosen to delay the other plant. Nor do we see any justification for the Board to question the reasonableness of Applicant's decision of deferral because Applicant did not choose, instead, either of the other two more extreme alternatives suggested by Intervenor of indefinite mothballing or termination.

We are not faced with an allegation that Applicant has actually decided to abandon the plant. Had Intervenor made such an allegation and offered some factual support for it we would not be so quick to grant summary disposition in favor of Applicant. A finding by us of abandonment might permit us to dismiss Applicant's application as being moot. See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980). Here, Intervenor has not gone beyond an attempt to prove that future power demands and lack of financing will cause an abandonment of the plant when Applicant is faced with resuming construction. If Intervenor were convinced that Applicant had irrevocably decided to abandon the plant, it is doubtful that that it would continue to expend its resources on its interventions in this and the operating license proceedings.

B. Reasonable Period of Time

Intervenor also challenges the reasonableness of the period of time requested for the extension. Intervenor asserts that the five-year requested extension is unreasonable because it is insufficient. It would like the opportunity to prove that the plant could not be completed by 1991. Intervenor's Answer at 11-16.

We cannot fairly read into the Atomic Energy Act or the regulations thereunder any basis for challenging the reasonableness of the period of requested extension on grounds of insufficiency. Were there some overall time (rather than reasonableness) limitation on the total construction period or on the period that might be requested which Applicant is attempting to circumvent by requesting the needed time in increments, we might be persuaded otherwise. However, no such limitation is apparent to us. By requesting an insufficient period Applicant could only injure itself because it would then be forced to apply for another extension and demonstrate good cause anew in order to complete the plant, when its original "good cause" demonstration could have supported an extension for the total period required.

Perhaps we would view differently Intervenor's arguments with regard to the insufficiency of the period requested if we could accept its further argument that the total period of extension must be examined with regard to the safety and environmental aspects of the

deferral of construction. Indeed, Intervenor's argument that there may be equipment deterioration during a lengthy delay in construction that should be considered during a construction completion date extension proceeding (Intervenor's Answer at 17) has considerable superficial appeal. Certainly, one cannot easily disassociate the question of whether an extension should be granted from the realization that the granting of the extension might well lead to a deterioration in equipment. Similarly, one could postulate environmertal effects from the prolongation of the construction period. However, were we to choose the most propitious moment for evaluating the effects of a prolonged or delayed construction period on safety and the environment, we would choose a time after the effects became apparent, namely, at the operating license stage. A hearing at this juncture would be mostly speculative. We note that the Licensing Board in the WNP-1-OL operating license proceeding, composed of the same members as here, has admitted a contention (Contention 20) that questions unnamed construction defects that might result from Applicant's method of preserving the construction during the period of deferral. Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC ____ (October 14, 1983), slip op. at 31-34.

A deferral of consideration of the safety and environmental effects of the delay in construction to the operating license stage not only makes the most sense, but it comports with the Commission's interpretation of § 185 of the Atomic Energy Act as not requiring the

relitigation of health, safety or environmental questions between the time a construction permit is granted and the time the facility is seeking authorization to operate. CLI-82-29, supra, 16 NRC at 1228. And, since the health, safety and environmental effects of the prolonged construction are not to be questioned at this juncture, Applicant also can derive little benefit from understating the period needed for completion of construction, as alleged by Intervenor.

C. Legal Standard

Under 10 C.F.R. § 2.749, this proceeding should be dismissed if the filings indicate that there is no genuine issue as to any material fact. In deciding Applicant's and NRC Staff's motions for summary disposition we have construed all of the material facts in favor of Intervenor. We have assumed, notwithstanding the strong evidence offered to the contrary by Applicant, that the decision to halt construction was Applicant's, not BPA's. We have accepted Intervenor's assertions that there were more prudent alternatives to a temporary halt in construction, such as cancellation of the facility, placing it in mothball, or halting construction on WNP-1. We have also assumed for the purpose of deciding this motion that the period of extension requested isn't sufficient and that the economic situation will eventually cause an abandonment of the facility. We nevertheless reach the position that Applicant has demonstrated good cause for delaying construction by demonstrating valid reasons for doing so even though

there may be more prudent alternatives and the option selected may prove fruitless. Having found good cause for the deferral of construction on the uncontroverted material facts, we must grant Applicant's and Staff's motions for summary disposition without inquiring further into the advisability of constructing the nuclear plant.

O R D E R

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 1st day of February, 1984,

ORDERED

That Applicant's and NRC Staff's motions for summary disposition in favor of Applicant are granted and Intervenor's sole contention is dismissed, terminating the proceeding.

Within ten (10) days after service of this Memorandum and Order, which constitutes a final disposition of this proceeding before the Licensing Board, Intervenor may take an appeal to the Appeal Board by filing a notice of appeal pursuant to 10 C.F.R. §§ 2.762 and 2.785. A supporting brief would then be due within thirty (30) days after the notice of appeal is filed.

Pursuant to 10 C.F.R. § 2.760 of the Commission's Rules of Practice, this Memorandum and Order will constitute the final decision of the Commission thirty (30) days from the date of issuance unless an appeal is taken in accordance with 10 C.F.R. § 2.762 or the Commission directs otherwise. See also 10 C.F.R. §§ 2.785 and 2.786.

THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland,

February 1, 1984.

DEC 7 1983

MEMORANDUM FOR: Mary E. Wagner, Attorney
Office of the Executive Legal Director

THRU: Darrel A. Nash, Section Leader
Licensee Relations Section
Office of State Programs

FROM: Jim C. Petersen
Senior Licensee Relations Analyst
Office of State Programs

SUBJECT: PROPOSED AFFIDAVIT IN RESPONSE TO WPPSS MOTION FOR SUMMARY DISPOSITION - WNP-1 CPA

Enclosed is my proposed affidavit in the subject proceeding. It addresses the licensee's motion for summary disposition of CFSP Amended Contention 2 and reaffirms my earlier conclusion in the previous affidavit.

Jim C. Petersen
Senior Licensee Relations Analyst
Office of State Programs

Enclosure:
As stated

Distribution:
Subject: WPPSS: WNP-1 Financial File
OSP:SLR R/F
Dir. R/F
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OFFICE	OSP:SLR	OSP:SLR	OSP:SLR			
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