

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

PDR

1-3-71

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of  
NORTHERN STATES POWER COMPANY  
(Monticello Nuclear Generating  
Plant, Unit 1)

Docket No. 50-263

APPLICANTS REPLY TO AEC REGULATORY STAFF'S  
EXCEPTIONS TO THE ATOMIC SAFETY AND  
LICENSING BOARD'S ORDER AUTHORIZING  
AMENDMENT TO THE EXISTING  
PROVISIONAL OPERATING  
LICENSE AND TO THE  
REGULATORY STAFF'S  
REQUEST FOR A STAY

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1. On December 24, 1970, the Atomic Safety and Licensing Board (board) in this matter issued the above-captioned order authorizing the Director of Regulation to amend the applicant's existing provisional operating license (which authorizes the applicant to load fuel, and, in order to permit certain testing, operate the facility without the reactor vessel head in place at power levels not in excess of 5 megawatts thermal (mwt)). The amendment authorized would be for operation at a power level of up to 500 mwt and with the reactor vessel head in place.

2. The regulatory staff notes that its "position continues to be that the record in this proceeding supports an initial decision authorizing the issuance of a license for the full power level (1670 mwt) or for an intermediate power level such as sought by the applicant in its motion of

Leaving (initials)

September 24, 1970 (in the range of 50% to 88% of full power) or for 500 mwt as contemplated in the captioned order."

3. The regulatory staff's exceptions relate solely to the staff's alleged concern that the order failed to "meet certain formal requisites" in that it does not set forth detailed findings of fact and certain procedural information as prescribed in 10 CFR Part 2, Section 2.760. This section of the Commission's Rules of Practice is based upon Section 8 of the Administrative Procedure Act of 1946, as amended, 5 U. S. C. §557, which provides, in pertinent part, that:

"...when a hearing is required to be conducted ... [a]ll decisions, including initial, recommended and tentative decisions are part of the record and shall include a statement of --

(A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

4. The foregoing provisions of Section 8 of the Administrative Procedure Act are the equivalent of Rule 52(a) of the Federal Rules of Civil Procedure which, in pertinent part, provides that:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."

5. Although it may not be the preferred practice, it is not reversible error under rule 52(a) "where the findings are filed after the entry of judgment" when this does not prejudice the appellant. <sup>1/</sup> The Licensing Board, in paragraph 2 of the Order dated December 24, 1970, states that it will issue an initial decision authorizing the issuance of a full power provisional operating license. That initial decision will no doubt be issued prior to January 15, 1971 <sup>2/</sup> and will presumably contain detailed findings of fact and in all other respects satisfy the formal requisites of 10 CFR 2.760 and Section 8 of the Administrative Procedure Act. Such findings as they apply to full power operation, by definition, will support the limited power temporarily authorized in the Licensing Board's Order of December 24, 1970. Upon issuance of that initial decision the parties' right to file exceptions will mature. The alleged deficiencies in the December 24, 1970 Order in no way prejudice the rights of any of the parties.

6. It has been held that an order by an administrative agency granting temporary operating authority to an applicant need not "contain a statement of findings and conclusions, together with the reasons or basis therefor." Bell Lines, Inc. v. United States, 306 F. Supp, 209 at 217 (S.C. W.Va. 1969),

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<sup>1/</sup> Moore's Federal Practice, §52.06[4] at p. 2729. Gibbs v. Buck, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed.1111 (1939).

<sup>2/</sup> Section VI (g)(2) Appendix A, 10 CFR Part 2. The parties filed their proposed findings of fact and conclusions of law on November 30, 1970.

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affirmed, 397 U. S. 818, 25 L.Ed.2d 804, 90 S.C. 1517 (1970). In Bell Lines, Inc., supra, the I.C.C. had granted temporary authority to a motor freight carrier to expand its services in the eastern United States pending decision by the I.C.C. in the question of permanent authority for the services. Competing motor carriers contended that the order granting temporary authority was invalid "because of failure to comply with the requirements of Section 8 of the Administrative Procedure Act, 5 U.S.C.A. Section 1007 (now 5 U.S.C.A. Section 557), that orders contain a statement of findings and conclusions, together with the reason or basis therefor." Ibid. The Court rejected this contention, stating that "[o]bviously these requirements of the Administrative Procedure Act do not apply to the Commission's temporary authority orders here considered." Ibid.

7. The need for expedited effectiveness of the licensing authorizations in this proceeding was determined by the Licensing Board when it granted Applicant's Motion for Expedited Effectiveness of the Licensing Board's decision granting the Applicant authority to load fuel and conduct low power testing without the reactor vessel head in place. <sup>3/</sup>

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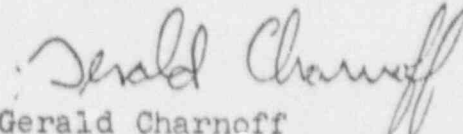
<sup>3/</sup>Initial Decision Authorizing Provisional Operating License for Fuel Loading and Low Power Start-up Testing, dated August 24, 1970.

Given the extraordinary delays that have so long encumbered this particular proceeding and the public interest in the soonest possible availability of power production from the Monticello facility, the Licensing Board's Order of December 24, 1970, was an appropriate exercise of its discretion.

8. While stating that the Order of December 24, 1970 was apparently intended to be effective immediately, the staff notes that the Order is silent as to its effective date. The Applicant agrees with the staff's view that the Order was intended to be effective immediately. This is supported by the prior finding of the Licensing Board granting expedited effectiveness to the decision granting fuel loading and low power testing authority. In any event the ten day effectiveness period prescribed in 10 CFR §50.57(e) for issuance of operating licenses, if applicable to the Order, will have elapsed on January 4, 1971.

9. For the foregoing reasons the Applicant urges the Atomic Safety and Licensing Appeal Board to promptly deny the staff's request that the captioned order be stayed pending the issuance of the initial decision in this matter.

Respectfully submitted,

  
Gerald Charnoff  
Counsel for Applicant  
Northern States Power Company

Dated January 3, 1971