

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



IN THE MATTER OF:)

COMMONWEALTH EDISON COMPANY,)
et al.,)

(Carroll County Site))

Docket Nos. S50-599
S50-600

MOTION FOR RECONSIDERATION AND MEMORANDUM
IN SUPPORT OF MOTION

The PEOPLE OF THE STATE OF ILLINOIS, by WILLIAM J. SCOTT, Attorney General of the State of Illinois (Intervenor) move the Atomic Safety and Licensing Board to reconsider its order of October 10, 1979 and to enlarge the scope of the hearing in this cause and to accept into controversy the various contentions previously filed by Intervenor as indicated below. In the event that the Board does not admit such contentions Intervenor reserves the right to raise any of the contentions filed at the pre-hearing conference on September 19, 1979 for the early site review proceedings in the construction permit proceedings to follow.

I. BOARD SHOULD TAKE COGNIZANCE OF MODIFIED ADJUDICATORY PROCEDURES
AND FACTS OF THE CASE IN DETERMINING SCOPE OF HEARING

A. In ruling upon the Intervenor's Motion for Reconsideration Illinois requests the Board to consider the changing aspects of both Nuclear Regulatory Commission Proceedings and this specific cause of action. On November 15, 1979 the NRC took action to modify adjudicatory procedures by suspending 10 CFR 2.764 which is its rule of practice

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on issuance of licenses after adjudicatory decisions. As a temporary substitute for 10 CFR 2.764 the Commission specified procedures by which new licenses, permits and authorization may be issued. See Exhibit A attached. Although the Commission notice specified that the suspension of 10 CFR 2.764 would not affect adjudicatory matters such as partial initial decisions not authorizing issuance of new licenses on permits, the Board cautioned that

"(i)n reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still underway the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a licensing application. NRC notice "Modified Adjudicatory Procedures", Docket Nos. 50-556, 50-557, 50-522, 50-523, November 5, 1979."

Thus the Board should exercise extreme caution before excluding any issues from this hearing which may produce evidence which may be important in light of the Commission's new rulemaking.

B. In ruling upon the scope of this hearing and the contentions therein, the Board must also consider the ramifications of any findings that may be made in regard to the proposed site. Given the uncertainty of existing adjudicatory procedures and the hypothetical nature of the proposed construction of a Nuclear power station at Carroll County, Intervenor questions the validity of continuing an Early Site Review at this time; however it is conceded that existing law does not forbid

the conduct of such a hearing even though it may be one of duplicate hearings required due to supervening developments. See Hudson River Fishermen's Association v. F.P.C., 498 F2d 827 (2d. Cir. 1974). See also "General Considerations and Issues of Significance on the Evaluation of Alternative Sites for Nuclear Generating Stations under NEPA", Issue # 7, NUREG-0499, Supplement 1, December, 1978.

Presuming that intervenors must accept the concept of piecemeal hearings for construction permits, despite their dubious, ultimate value at the hypothetical construction date, it is incumbent upon the Board to allow the fullest exploration of those issues which may determine whether or not a nuclear plant shall, or should be, constructed at the Carroll County Site. The major emphasis of this hearing should be therefore an analysis of both environmental and safety issues that would make the proposed site unsuitable and a comparison with alternative sites which might be preferable.

We are aware that the determination of hearing scope is within the discretion of the Board, but such discretion should not be exercised to unduly narrow the issues presented at this time. The Appeal Board has recognized that an Early Site Review should inquire into a significant number of site related issues which deal with both safety and environmental implications of location and features of the site. Potomac Electric Power Co., (Douglas Point), ALAB-277,

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1 NRC 539, 548, 550 (1975).¹

"One of the logical and viable options would be to do as much of the site review as possible at the ESR in as many areas as possible, i.e. essentially do as much as is done now for a construction permit review within certain constraints of lack of knowledge of detailed system or plant design" Early Site Review... NUREG 0180, supra, at IV-1.

¹The factors to be used in determining issues which may be litigated in an early site review, at a time which may be many years prior to consideration of a construction permit, are (1) the degree of likelihood that an early findings on the issue(s) would retain their validity; (2) the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issue(s); and (3) the extent to which the hearing of the issue(s) at an early stage would, particularly if the issue(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants. Potomac, supra, 547; 10 CFR Part 2.605.

Furthermore, the early review may not culminate in a limited work authorization, which may be had only "upon completion of a full environmental review." Potomac, supra at 544 n.3 Therefore, the procedure allows early partial decisions, with the understanding that "the final decision on an application under review would rest on the best information available at the time of rendition of that decision.. (A)ny findings which might be made on a record developed well in advance of final decision must be regarded as subject to reconsideration," due either to new or additional information, or new or altered standards. Potomac, supra. at 545

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In the absence of any new information adduced at the C.P. stage, all that would be required for a site which was found acceptable at the ESR would be a determination of whether the actual plan, design and operating characteristics are within those assumed at the Early Site Review Stage. NUREG 0180 at I-2. As part of any ESR procedure a thorough evaluation of alternatives is necessary. The Appeal Board has stated that the Staff's most important task is to determine whether an application should be rejected because the plant ought to be built elsewhere. Boston Edison Co., (Pilgrim) ALAB 479, 7 NRC 774 (1978). Not only may a proper NEPA analysis at the ESR serve to alert the applicant to the ultimate deficiency of a proposed site, but it may also alert the applicant to correctible contentions, which, if not detected early would lead to ultimate rejection of the site. Although later reevaluation of alternate sites would remain possible, should it prove necessary, Public Service Company of New Hampshire, (Seabrook) LBP-77-043, 6 NRC 134 (1977), it would be wasteful and uneconomical not to make the best evaluation of alternatives at the earliest point. "The same alternative site review requirements established for a Construction Permit should apply to approval of a site in an Early Site Review". NUREG 0499, Supplement 1, supra at 6. In order to avoid a "Seabrook" situation a complete alternative site review, culminating in a finding of "obviously superior", should be done at an early date. Rochester Gas and Electric Corp. (Sterling) ALAB-502, 8 NRC 383, 1978. Under this NEPA standard, an applicant

proposed site may be found acceptable if, after giving each reasonable alternative a hard look, none is found "obviously superior" to it. Boston Edison Co. (Pilgrim) (C.P. NEPA Site Suitability), ALAB 479, 7 NRC 774 (1978); Seabrook, supra; Kleppe v. Sierra Club, 427 U.S. 390, 410 f.n. 21 (1976).

It must be stressed that Early Site Review may and should include environmental health and safety issues which may relate to the suitability of any particular location as a site for a nuclear reactor. "Early Site Reviews for Nuclear Power Facilities," NUREG-0810 Office of Nuclear Reactor Regulation, May, 1977, at II-1, "Public Safety is the first, last and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." Power Reactor Development Corp. v. International Union of Electrical Radio and Machine Workers, 367 U.S. 396, 402 (1961) (emphasis added): cited Petition for Emergency and Remedial Action, UNION OF CONCERNED SCIENTISTS, CLI 78-006, 7 NRC 400, 1978, at 404.

In summary, for an Early Site Review to be most effective the Board must utilize all available tools to assure a complete analysis of feasible alternatives. Such analysis should not be limited to only innocuous uses of each site, but must include the predictable effects of credible accidents and decommissioning on each site considered. It is not necessary to look at the specific plant design to achieve this goal. The Board must merely review the typical effect of an hypothesized event at a typical plant for each of the alternative sites to determine the impact on each of the sites. Full cost benefit and alternative analysis of site perogatives at the Early Site Review is absolutely essential to satisfy the public interest and to assure that the site selected will provide maximum safety.

II. ISSUES AND CONTENTIONS

A. Reservations:

The People of the State of Illinois reserve the right to resubmit contentions 1,2,4(a),10,13 and 18 at the construction Permit Stage of these proceedings.

1. Environmental Impact Statement

Intervenor understands that the Nuclear Regulatory Commission Staff intends to issue an Environmental Impact Statement to cover the Early Site Review in this case. Should such an EIS not be issued, Intervenor reserves the right to resubmit Contention 1 in this proceeding.

2. Need for Power

This issue must be litigated no later than the Construction Permit Stage. Pennsylvania Power and Light Co. Allegheny Electric Cooperative (Susquehanna) LBP 79-6, 9 NRC 291. Intervenor reserves the right to resubmit Contention 2 in this proceeding should it appear that the ESR is expanded to ultimately award an LWA-1.

B. Cost Benefit Balancing

Cost Benefit balancing, Contention 3, is a part of the necessary NEPA analysis. As stated in part I of this memorandum, this environmental analysis should be undertaken at the earliest point in a license review. Cost benefit analysis also includes an analysis of decommissioning costs which should also be considered

an integral part of the initial NEPA analysis² (See § II (F)
infra); cost benefit balancing also includes analysis of alternate
sources of power, as set forth in State's contention 4a.

Finding G-6 of the Kemeny Commission Report³ Supports
Intervenor's position that cost benefit analysis is best considered
at an early date.

WHEREFORE Intervenor requests the Board to reverse its ruling
on Contention 3 and to reinstate cost-benefit balancing as an issue
in this proceeding.

² Potomac, supra, 546-547, realized the advantages of a cost benefit
balancing including costs of constructing and operating, even at the
early site review stage.

Once the Final Environmental Statement has been released,
however, it may well be possible both to pinpoint and to
measure with reasonable precision and certainty, many of
the environmental costs which will be involved in constructing
and operating the reactor. Where this can be done, a useful
purpose conceivably would be served by having those costs
considered at an early hearing--notwithstanding that the
striking of the final NEPA balance may still be some time off.

³ "Licensing of a nuclear plant is a two-step process. First, the company
must obtain a construction permit (CP) and several years later must
obtain an operating license (OL). The CP stage does not require
complete design plans, and therefore the full safety review does not
occur until the OL stage. By then, hundreds of millions of dollars
have been spent or committed in the construction process. Therefore,
the ultimate safety review may be influenced by economic considerations
that can lead to a reluctance to order major changes at the OL stage.
"Report of Kemeny Commission."

C. Accidents

At the September 19, 1979 Special Pre-hearing Conference the Board announced that they would only consider the site specific effects of a typical plant, operating normally at the proposed site. Therefore, all contentions regarding accidental or non-routine discharges of radiatic were excluded, including the State of Illinois contentions 6(d)(iv), 14 and 18.⁴

The National Environmental Policy Act requires consideration of environmentally preferable alternatives to a given proposal. See §1, supra. Consumers Power Co. (Midland) ALAB-458, 7 NRC 155 (1978). This analysis should include effects of accidents on each proposed alternative. In Midland, the Appeal Board found the facts that certain fuel cycle impacts were presumed to be small and would not come into play until after operation began did not exclude them from consideration at the Construction Permit Stage. The Appeal Board held that such considerations must be taken into account at whatever point a comparison of alternatives was being drawn. 7 NRC 165, f.n. 31 (1978).

⁴At the Special Prehearing Conference Illinois' Contentoin Number 14(a) was admitted. However, the Order of October 10, 1979 did not include 14(a). Therefore, the State is unsure of the status of this contention. The Applicant itself had no objection to Illinois' contention 14(a) and (b), therefore, to the extent that the Applicant determines the scope of the hearing, it has not opposed this expansion of the scope. To preserve its rights to enter on Contention 14(a) Illinois requests the Board to rule that 14(a) is admitted as an issue in controversy must be taken into account of whatever point a comparison to alternatives was being drawn. 7 NRC 165, f.n. 31(1978).

The principle that applied to the fuel cycle in Midland applies equally to the effect of accidents on the site suitability review in the instant proceedings. The Applicant has recognized this premise to be true as can be seen by Proposed Findings 14 and 15, which put forth accident emergency planning as an issue which must be factored into the determination of site suitability.

Contentions have been accepted by this and other Boards regarding possible aircraft accidents and possible explosions in the area of the proposed reactor. In fact, it has been held that effects of possible airplane accidents must be considered. Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 846 (1973), and Potomac Electric Power Company (Douglas Point Nuclear Generating Station) ALAB-277, 539, 548 (1975). The State's contentions 6 (d) (iv), 14(a) and (b), and 18 are just as much site suitability related as these accepted contentions. Just as the Applicant is required by 10 CFR Part 100 to take into account possible fault activity, possible tornados and other weather events, airplane accidents and explosions in determining site suitability, so it should ~~have~~ to take into account inevitable human error and inevitable depreciation of unit parts, as the effects of those things relate to the site. Also, there should at least be consideration of the likelihood of risk and probable effects of non-routine discharges at this particular site, as discussed in the State's contentions 6(d) (iv) and 14(a) and (b).

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Issues regarding suitability of the site in terms of non-routine occurrences, which experience has shown will most certainly occur, are particularly appropriate at the early site review stage, when the Applicant has greater flexibility to reassess the use of the proposed site as opposed to another alternative site. In the present case it may be found that non-routine emissions would cause very great harm to the inhabitants of the Mississippi Fish and Wildlife Refuge, while similar emissions at another site where fewer species were naturally present could be relatively harmless. Also with regard to contention 14, the ground waters at various sites would be affected differently by accidental emissions depending on ground permeability. Certainly ability to contain possible accidental releases, preventing contamination of surrounding waters and the environment, is a factor of site suitability. A further reason to consider the effect of accidents on ground water is Applicant's Proposed Finding 44 which addressed the issue. Illinois and the other intervenors should not be precluded from litigating this contention which is within the scope of issues determined by the Applicant.

WHEREFORE Intervenor prays that the Board reconsider its order and reinstate Illinois' Contentions 6(d)(iv), 14(a) and (b) and (18) as issues in controversy in this proceeding.

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D. In the Board's ruling Contention 11, which deals with nuclear waste management as it affects the site, was not admitted. We urge the Board to apply the reasoning in § I supra to this contention, as the questions raised here may affect both the alternative site analysis and the cost-benefit analysis for this site. At the very least, the Board should take this contention under advisement, pending the outcome of the Nuclear Regulatory Commission rulemaking on the probability that away from reactor spent fuel facilities will be available by 2007-2009. See Minnessot v. NRC, 602 F2d 412 (D.C. Cir. 1979) and "Storage and Disposal of Nuclear Waste" Notice of Proposed Rulemaking, 44 FR 61372, October 25, 1979.

Note that fuel cycle problems are subject to consideration at early site reviews at least in the context of being "off site activities affecting safety", NUREG 0180 at IV-2. Additionally it should be noted that the transportation aspects of Contention 11 cannot be disposed of by resort to Table S-4. The questions raised by this contention deal not only with radioactive effect of packaged materials in normal transit, but also with real aspects of the particular site and its environs, such as amount of local emergency support and load capacity of local roads.

WHEREFORE Intervenor moves the Board to reconsider its ruling and to reinstate Contention 11 as an issue in controversy, or in the alternative, to rescind its ruling and hold the decision on Contention 11 in abeyance until the NRC has made its findings on permanent fuel disposal.

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E. Decommissioning

Decommissioning, the subject of Contention 12, is an appropriate issue for litigation at an Early Site review. NUREG 0180 at IV-2. Public Service Co. of Oklahoma, (Black Fox), LBP-77 046, 6 NRC 167, 1977. Decommissioning is related in part to the physical usage of the site, and should be considered as part of the NEPA alternative analysis. This function was envisioned as part of the total site analysis by the Applicant and NRC.

Once a site has been selected, the applicant conducts a detailed local study of the environs, including surveys of the biota, collection of physicochemical data and other information from which potential environmental impacts of construction, operation and decommissioning of the proposed nuclear power plant are made. NUREG-0499, Supplement 1 supra at 4. (emphasis added).

Discussion of alternative siting issues are threshold issues, they must be evaluated early in the proceedings before the point is reached when it is no longer ultimately productive to consider the issue because "comparative forward costs and comparative proximity to the provision of needed (or desirably substitutable) power so favor the partially constructed site that there is no real possibility that an alternative site could be obviously superior to it" Id. at 71. General guidelines as to what sorts of information concerning decommissioning an applicant must supply appear in Regulatory Guide 4.2 "Preparation of Environmental

Reports for Nuclear Power Stations" (NUREG-0099, July 1976) §5.8 Contentions which concern the health effects of decommissioning have been admitted, Pennsylvania Power and Light Co. Allegheny Electric Cooperative, (Susquehanna) LBP-79-6, NRC 291 (1979).

The costs of decommissioning (both environmental and economic) necessarily comprise a portion of the cost-benefit analysis which the Commission must make. Id. See §B, supra.

That Applicants chose to withdraw finding # 131 from their Proposed Findings should not influence the Board in making its decision. Were the Applicants Proposed Findings the sole basis for development of issues in this proceeding there would have been no purpose in having would be intervenors submit contentions; therefore the NRC clearly envisioned having the Board use its discretion to admit contentions and to generate Board questions on relevant issues not proposed by the Applicant.

WHEREFORE Illinois moves the Board to reconsider its prior ruling and to reinstate Contention 12 as an issue in controversy at this proceeding.

F. Three Mile Island Issues

In making its rulings at the Pre-Hearing Conference the Board announced it would hold in abeyance certain contentions pending final outcome of NRC evaluation of Three Mile Island.

Contentions held in abeyance were Iowa Socialist Party's number 1(a)(i), Iowa Public Interest Research Group, Inc.'s number 7, Citizens Against Nuclear Power's number 15, and Jo Davies County Ad-Hoc Committee's number 1 b.⁴ The Board rejected the State of Illinois' contention number seventeen (17) which is also related to the Three Mile Island event. Intervenor contends that Illinois contention 17 should also be held in abeyance pending the outcome of the TMI evaluation.

Contention number 17(b) v, at least, specifically raises the same issue as did the other Intervenor's contentions: evacuation. Also, contentions 17(b) iv, vi, and vii raise issues regarding the suitability of the site from a safety and environmental standpoint,

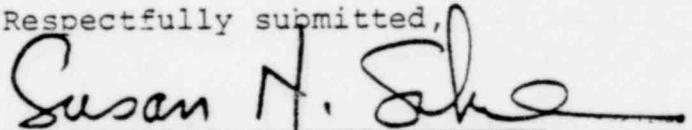
⁴Jo Davies County Contention I b was not listed in the Memorandum of Special Prehearing Conference and Order, we assume by inadvertence.

in light of pending TMI study results. Given the similar nature of other contentions being held under advisement, and given the explicit rationale for delaying the decision in regard to any contentions which touch upon TMI, it would be inconsistent for the Board not to revise its ruling on contention 17.

Furthermore, all arguments under II.C. relating to accidents may be made regarding these TMI based on contentions.

WHEREFORE Illinois prays the Board to reconsider its ruling of September 19, 1979 and to hold Illinois contention 17 in abeyance until such time as it rules on the other TMI related contentions which are currently under advisement.

Respectfully submitted,



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