NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (F)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1163

September Term, 1980

People of the State of Illinois, et al.,
Petitioners

v.

Nuclear Regulatory Commission
and United States of America, Respondents

Northern Indiana Public Service Company,
Intervenor

PETITION FOR REVIEW OF AN ORDER OF THE NUCLEAR REGULATORY COMMISSION

Before: McGOWAN, TAMM and WALD, Circuit Judges

J U D G M E N T

This cause came on to be heard on a petition for review of an order of the Nuclear Regulatory Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order on review herein is vacated and the case is remanded to the Nuclear Regulatory Commission with directions to include the piling depth question in the pending certificate amendment hearing, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1163 - People of the State of Illinois v. NRC

MEMORANDUM

Petitioners seek judicial review of a Nuclear Regulatory Commission order denying requests for hearing on a proposed change in the design of the foundations of the Bailly nuclear plant on the southern shore of Lake Michigan in Porter County, Indiana, for which a construction permit was issued by the Atomic Energy Commission in 1974. The NRC held that the proposed shift from the use of long pilings to short pilings did not amount to the "granting, suspending, revoking, or amending of any license or construction permit" of such nature that a hearing would be required under section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a). Instead, the Commission held that the purported change was merely the resolution of an issue specifically left open at the time of the issuance of the construction permit. After reviewing the unique facts of this case, however, we are forced to conclude that the proposed change did amount to the type of modification for which a hearing is not only both desirable and feasible, but also one that was within the contemplation of Congress.

The "change" at issue is Northern Indiana Public Service Company's proposal, submitted in 1978--almost four years after construction had been underway and at a time when construction was less than 1% complete and suspended since 1977--to drive the foundation pilings for safety-related buildings at the Bailly plant only so far as the glacial lacustrine layer of the earth, rather than further down into the glacial till or to bedrock. The question for our decision is whether the NRC correctly found that the issue of pile depth was reserved in the construction permit for later decision pursuant to C.F.R. § 50.35(a), in which case the NRC need not conduct

another hearing, or whether NIPSCO actually committed itself to one particular piling depth at the time of the issuance of the construction permit, in which case the NRC must hold another hearing on the proposed modification.

This court's recent decision in Sholly v. Nuclear Regulatory Commission, No. 80-1691 (D.C. Cir. filed Nov. 19, 1980), cert. granted, 49 U.S.L.W. 3877 (May 26, 1981), does not relate to the present case. Sholly addressed the question of whether section 189(a) requires that the NRC hold a hearing even after it makes a finding that a proposed change presents "no significant hazards." In the present case, however, we are dealing with the predicate to such an inquiry: the determination whether the proposal even constitutes a "change" from the original construction permit or instead is merely a resolution of an earlier problem. In that regard, Sholly is not relevant.

Although the Commission certainly has presented at least a credible argument in favor of its conclusion that the issue was reserved for later determination, we think petitioners have brought to light several facts that are simply too weighty to be ignored. For instance, in its Preliminary Safety Analysis Report NIPSCO stated numerous times under oath that piles would be driven into glacial till or to bedrock. Section 2.5.4.3.1 stated that "Class I structures . . . will be supported by high-capacity non-displacement piles . . . [which] will be driven into the

glacial till . . . or to the rock surface." Again, the company affirmed in Section 2.5.4.3.2. that "Class I structures and certain other major units will be supported on high capacity pile foundations driven to the underlying glacial till or bedrock." Similar examples abound throughout the Report, and are the basis for the dissent of one of the five Commissioners sitting on this case. See PSAR, Sections 2.5.4.1. & 2.5.4.3.3.

Furthermore, the drawings submitted as part of NIPSCO's construction permit application also show the piles extending to bedrock or glacial till. See PSAR Figures 2.5-2.9 & 2.5-3.0.

Even the report of the AEC Regulatory Staff creates the same impression. In its Safety Evaluation Report on the Bailly construction permit application, the staff noted that "the applicant [NIPSCO] has indicated that Class I structures and some other major units will be supported by piles driven into the compact glacial till . . . or driven to the bedrock surface." SER, J.A. at 157.

Last, and most telling in our view, was the reaction of the NRC staff itself when confronted with NIPSCO's proposed change. When the permittee notified the staff that it had decided to drive the piles only to the upper levels of earth, as distinct from the glacial till or bedrock, the staff immediately suspended all construction activity on the Bailly nuclear power plant and spent some two years or more exploring the issue. In light of

the staff's own reaction to the short pilings plan, we are reluctant to assume that NIPSCO had never previously committed itself to any other piling length plan.

We are aware, of course, that neither the Commission nor the courts have ever delineated precisely the nature of a change requiring hearing under section 189(a), and that the Commission must be credited with some expertise in determining which types of structural changes are de minimis and which types require renewed hearing procedures. Furthermore, we are naturally wary of discouraging technological innovations during the course of nuclear plant construction. Nevertheless, in this case we are not squarely confronted with an issue of complex technological implications requiring substantial deference, but with one of fairness to the public, the ultimate question being what the public could reasonably have understood to have been settled in the construction permit. For the reasons described above, we are not satisfied by the Commission's handling of this matter.

We think that there is an easy solution to this dispute which would allow the public to air its views as to what appears to be a change in the original foundation plan and also allow NIPSCO to proceed with construction without undue delay. There is presently pending a hearing on a proposed amendment of the construction permit to change the completion date of the Bailly plant to 1989. It was represented to us at oral argument that it will not, in any event, be possible for construction to be resumed for six months from the present time.

Therefore, we have concluded that the case should be remanded to the Commission with directions to include the piling depth question in the pending certificate amendment hearing. It would not appear that such a hearing should consume much time or require a substantial delay in the hearing date, because the staff and the Advisory Committee have already done significant work on the problem and presumably will be ready, on short notice, fully to address the piling depth question. The ambiguities, to our mind at least, created by the permittee's departure from its original representation with respect to the piling depth argue strongly, as a practical matter, for the taking advantage of the pending certificate amendment to put to rest what could be a latent defect which casts a shadow ten years down the road.