EXHIBIT A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (D)

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

JUDGMENT

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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 50-367
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	(Construction Permit Extension)
(Bailly Generating Station, Nuclear-1)	)	

The continued deposition of EDMUND A. SCHROER, taken at the instance of the Porter County Chapter Intervenors, pursuant to agreement as to time and place and pursuant to the Federal Rules of Civil Procedure, taken before Ronald E. Knight, R.P.R. and Notary Public in and for the County of Lake and State of Indiana, at the Industrial Relations Conference Room, Northern Indiana Public Service Company, 5265 Hohman Avenue, Hammond, Indiana, on the 12th day of June, 1981, at the hour of 10:15 in the morning.

A To the extent that it was allowed in the rate base, in a rate proceeding, yes.

Q And if it is amortized or expensed, then the immediate effect is not upon the rate payers but upon the shareholders of the company?

A Again, using the word "immediate," I think that that would be the result. However, as I think I indicated in my prior testimony, that where you have an ongoing rate case procedure on a fairly regular basis as we have, that ultimately the rate payer is going to bear the burden without regard to the accounting handling for a shorter time frame.

Q Do you know in what respect the Sargent & Lundy 1979 cost estimate was felt by the company to be deficient?

A I do not.

Q Who would know that?

A Mr. Shorb.

MR. VOLLEN: Let's go off the record.

(A short recess was had.)

MR. VOLLEN: Back on the record.

I have no further questions of Mr. Schroer at this time. I think we ought to note for the record that we are still

seeking production of additional documents from the company about which Mr. Schroer's testimony may be relevant. Particularly I'm talking about board minutes.

Some you've agreed to give us, Mr. Eichhorn; others, as you know, we're seeking via an order from the Licensing Board.

When we receive those documents, which we're going to receive, it may become necessary to depose Mr. Schroer on those. But as of right now I have no further questions.

I suppose I also ought to note for the record what I said this morning, that unless we can find some other means to learn about what decision, what management decision he makes and when he makes it with respect to the company's plans for construction, we may have to recall him to ascertain that.

MR. EICHHORN: Okay. So there's no misunderstanding, I want the record to declare that I'm not agreeing to further deposition of Mr. Schroer. You've found it

necessary to put your desire on the record. I want to put my lack of agreement on to your desire.

MR. VOLLEN: Surely.

MR. EICHHORN: As far as accommodating you on the decision of the company, as to when it makes that decision to go forward, we can agree to advise you on the date that the decision is finalized by the company. That advice will be in writing, so there will be no misunderstanding.

MR. VOLLEN: Okay. Just to see if we can't get our understanding of that clear. The ambuguity I see in that, Bill, is in the phrase "finalized by the company." Because Mr. Schroer's testimony was about his making the decision and his uncertainty as to whether or not he needed board approval, whether it would go to the board. And there might be a long time lag, theoretically, between his making the decision and going to the board.

If by "finalized" you mean board action or board approval of it, that can be a long period of time.

And secondly, when you say "finalized," there may be action taken before it is finalized.

You know the reason for my concern about knowing when progress is going to be made is that our position is that construction ought not to resume prior -- ought not -- cannot really resume prior to final action granting construction permit extension. We disagreed with you on that and you with us. No uncertainty on that, as to different legal positions. But we do want to know if the company does plan to resume construction as we said in the notice we filed with the board sufficiently in advance of the actual construction so that the issue can be litigated in a responsible way from everybody s standpoint. So we don't have to start litigating whether or not you can resume with the bulldozers at the edge of the excavation, about to start pushing dirt.

That's the reason for the request to know what the plans are.

MR. EICHHORN: Okay.

MR. VOLLEN: Can you tell me and are

you willing to tell me what you mean by "finalized"?

MR. EICHHORN: Yes. I mean to tell you that we are not going to give you information regarding a decision until it becomes the company position. Now, whatever that takes -- I'm not going to give you a decision that stands a chance of being reversed internally.

MR. VOLLEN: I understand.

MR. EICHHORN: When it becomes the final company position -- not when Mr. Shorb decides or necessarily when Mr. Schroer says, "I've made the decision but I want to talk it over with somebody." When it becomes finally the company position, we'll notify you in writing so there's no misunderstanding what the decision is.

MR. VOLLEN: Good. That part is fine.

What I want to know is: Are you going to give me the information before any implementation is made?

MR. EICHHORN: Mr. Schroer just reminded me, and properly so, that if there should be a resumption of full scale construction before there's a final

decision made, you will be notified of that.

MR. VOLLEN: That's really -- I want to know about the resumption of construction activity.

MR. EICHHORN: All right.

MR. VOLLEN: And you'll let me know when the decision to resume is made, is that it?

MR. EICHHORN: Right.

MS. MURRAY: Let me ask a question. What do you mean by "full scale"?

MR. EICHHORN: I'm not going to be deposed. We'll tell you when the decision is made to resume construction. If the physical activity takes place before that decision is made, we will advise you physical activity towards construction is taking place.

MR. VOLLEN: Or is going to take place, when you make the decision to do it.

MR. EICHHORN: Yes. Right.

MR. VOLLEN: Okay.

MR. EICHHORN: Do you have any questions, Steve?

MR. LEWIS : I don't have a question.

I just want to state two things for the record.

First of all, it's particularly valuable, particularly to counsel of the Staff, to communicate. So I thank all of the parties for that.

As to this advice letter that you're speaking of, Mr. Eichhorn, I assume there will be copies to all parties?

MR. EICHHORN: Sure.

MR. LEWIS: Those are my only comments.

MR. EICHHORN: I have no redirect.

Thank you, Mr. Schroer.

MR. VOLLEN: Thank you, Mr. Schroer.

MS. WHICHER: Thank you, Mr. Schroer.

(FURTHER DEPONENT SAITH NOT.)

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Witness

Subscribed and Sworn to before me this ___ day of _____, 1981.

_____

Notary Public