

DOCKETED
USNRC

WED-10/29/81-P:50266NRC.P15

'81 NOV -4 P4:14

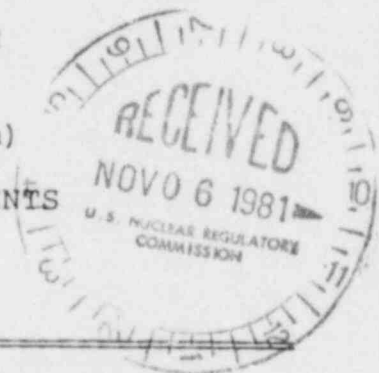
ere UNITED STATES OF AMERICA

OFFICE OF SECRETARY
DOCKETING & NUCLEAR REGULATORY COMMISSION
BRANCH

Before the Atomic Safety and Licensing Board

Wisconsin Electric Power Company
POINT BEACH NUCLEAR PLANT UNITS 1 & 2
Docket Nos. 50-266 and 50-301
Operating License Amendment
(Steam Generator Tube Sleaving Program)

DECADE'S RESPONSE TO THE CHAIRMAN'S COMMENTS
ON ORDER TO SHOW CAUSE



During the telephone conference held on October 26, 1981, the Chairman of the Atomic Safety and Licensing Board ("Board") in the above-matter advised the intervenor Wisconsin's Environmental Decade, Inc. ("Decade") of what he "perceive[d] to be some difficulties, apparent difficulties at least in Decade's understanding of what we had meant by showing cause." See Transcript, at pp. 219. The Chairman went on to state, in part:

"Although we are at an early stage in this proceeding, and allowances must be made for Decade not being completely informed, it must nevertheless carry the burden of showing us that there are one or more important issues concerning the demonstration program which should be admitted to a hearing. For cause to be shown, Decade must demonstrate that there is an important genuine issue. It can do this by showing that there is an important issue that is not fully determined by the record in this case."

See Transcript, at pp. 220 to 221. [Emphasis added]

In the short time available, which is prior to the time when it has been possible to review all of the filings, and which is

8111050576 811029
PDR ADDOCK 05000266
G PDR

DS03
S
11

also prior to the time when discovery is complete, the Decade makes this filing to respond to the Chairman's comments.

At the same time, this is to briefly comment further on the Licensee's Motion for Summary Disposition of Decade Contentions 3 - 6 As Related to Interim Operation of Unit 1, in light of the NRC Staff Answer In Support of Licensee's Motion for Summary Disposition, because of the common thread that runs between the two. That is to say, the effect of the Board's order to show cause is to ask essentially the same question of the intervenor's contentions as does the summary disposition motion.

The test for whether summary disposition is appropriate (or presumably whether a show cause order ought to be entered) is set forth in 10 C.F.R. §2.749(d):

"The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. * * *"

Thus, under the rules, for a motion for summary disposition to be granted, it must be found that:

1. There is not one single issue of "material fact";
and
2. The movant is entitled to relief "as a matter of law".

In interpreting the foregoing provision, the Commission has made it clear that a movant's motion must be "strictly" scrutinized because granting summary disposition is such a harsh remedy. Cleveland Electric Illuminating Co., supra, at p. 755.

Consequently, the Commission has held that a motion for summary disposition must be decided in the light most favorable to the party opposing the motion. Gulf States Utility Co.(River Bend Station Units 1 & 2), N.R.C. 246, 248(1975).

Furthermore, it cannot be disputed that the burden of proof is on the applicant, not the intervenor, in determining a summary disposition motion. Cleveland Electric Illuminating Co.(Perry Nuclear Power Plant Units 1 & 2), 6 N.R.C. 741, 754(1977).

Even though it is premature, in the Decade's view, to require the factual showing responsive to a motion for summary disposition at this point in time, it is already clear that there are many material facts at issue in the sense the Chairman has indicated--by showing that "there is an important issue that is not fully determined by the record in this case".

For example, Contention 3 relates to the strength of the joints between the tube and sleeve. The Staff's Safety Evaluation Report references several studies which are alleged to have been done at San Onofre, but admits that "[s]imilar confirmatory tests are in progress for the actual Point Beach configuration, with the exception of the collapse test." See Safety Evaluation by the Office of Nuclear Reactor Regulation Supporting Amendment No. ___ to Facility Operating License No. DPR-24, undated, at p. 5.

That is to say, the laboratory test results are not even in for the specific Point Beach situation for normal operating conditions, and, apparently, no tests are even being run on the most critical scenario, "the collapse test", which relates to the safety concerns of the American Physical Society.

Contention 4 relates to new corrosive environments in sleeved tubes. The Staff report admits:

"Confirmatory testing of the corrosion and stress corrosion cracking resistance of both the upper and lower joints of the Point Beach configuration is in progress."

Id., at p. 5.

Contention 5 relates to inspectibility of sleeved tubes.

Again, the Staff report acknowledges that:

"Eddy current inspection of the sleeve joints will present some difficulties particularly for the 'reference' type upper joint. The sleeve joints contain a number of features which will produce competing ECT signals making it more difficult to discriminate sleeve or tube wall defects at these locations. * * * Westinghouse is currently investigating ECT procedures to further improve the inspectibility of these regions * * *."

Id., at 6.

This short and preliminary recitation, alone, demonstrates that there are important issues that have not yet been fully determined as evinced by the fact that relevant underlying studies have not yet been completed.

For these reasons alone, the Decade has met the Chairman's amplification of the appropriate test by showing that the existing record does not determine several major issues. The obvious reason the Staff arrives at a different conclusion is that it is confusing the ultimate decision in the case with the preliminary question of whether further investigation through the hearing process is necessary. Intervenors are not obligated to concur with the Staff's conclusions in order to secure their basic right to a hearing.

As for the Licensee's burden to show its entitlement to relief "as a matter of law", that issue was previously discussed

in Decade's Preliminary Response to Why the Licensee's Motion for Interim Relief Should Not Be Granted, and will not be repeated here, except to note that that filing thoroughly refuted any possible legal entitlement for summary disposition or interim relief.

DATED at Madison, Wisconsin, this 29th day of October, 1981.

WISCONSIN'S ENVIRONMENTAL DECADE, INC.

By

KATHLEEN M. FALK
Director of Legal Affairs

114 North Carroll Street
Suite 208
Madison, Wisconsin 53703
(608) 251-7020

in Decade's Preliminary Response to Why the Licensee's Motion for Interim Relief Should Not Be Granted, and will not be repeated here, except to note that that filing thoroughly refuted any possible legal entitlement for summary disposition or interim relief.

DATED at Madison, Wisconsin, this 29th day of October, 1981.

WISCONSIN'S ENVIRONMENTAL DECADE, INC.

By

KATHLEEN M. FALK
Director of Legal Affairs

114 North Carroll Street
Suite 208
Madison, Wisconsin 53703
(608) 251-7020

ers

CERTIFICATE OF SERVICE

'81 NOV -4 P4:14

I certify that true and correct copies of the foregoing document will be served this day by depositing copies of the same in the first class mails, postage pre-paid ~~DOCKETING & SERVICE~~ ^{DOCKETING & SERVICE} addressed, or by personal service upon the following: ^{BRANCH}

Peter B. Bloch, Chairman
Atomic Safety & Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Hugh C. Paxton
1229 -41st Street
Los Alamos, New Mexico 87544

Dr. Jerry R. Kline
Atomic Safety & Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing & Service
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Richard Bachmann
Office of Executive Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Bruce W. Churchill
Shaw Pittman Potts and Towbridge
1800 M Street N.W.
Washington, D. C. 20036

Dated: _____