

UNITED STATES OF AMERICA

DOCKETED
USNRC

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

'82 DEC 23 10:33

Wisconsin Electric Power Company
POINT BEACH NUCLEAR PLANT UNITS 1 & 2
DOCKET NOS. 50-266 and 50-301
Operating License Amendment 2
(Steam Generator Replacement Proceeding)

DECADE'S BRIEF IN SUPPORT OF ITS
APPEAL FROM SPECIAL PREHEARING CONFERENCE ORDER
CONCERNING DENIAL OF PETITION TO INTERVENE

Wisconsin's Environmental Decade ("Decade") submits the following brief in support of its appeal from the Special Prehearing Conference Order, dated December 10, 1982.

FACTS

1. By letter dated May 27, 1982, the Licensee, Wisconsin Electric Power Company ("Licensee"), gave notice of its intention to replace the steam generators of its Point Beach Nuclear Plant Unit 1 ("Point Beach") during the fall 1983 refueling without first applying for a license amendment.

2. By letter dated June 22, 1982, the Decade objected to the Licensee's intention to replace the steam generators at Point Beach without first applying for a license amendment.

DS03

8212270323 821220
PDR ADOCK 05000266
G PDR

WED-PA-12/10/82-P:50266NRC.P55-3

3. By letter dated July 6, 1982, the Division of Licensing notified the Licensee that a license amendment would be required for the proposed replacement, and a notice was issued in the federal register of the opportunity for any person whose interest may be affected to petition for leave to intervene.

4. By pleading dated August 10, 1982, the Decade filed a Petition for Leave to Intervene and Petition for Hearing ("Petition").

5. By notice docketed August 19, 1982, the Nuclear Regulatory Commission ("Commission") established an Atomic Safety and Licensing Board ("Board") to rule on the Petition.

6. At a prehearing telephonic conference on October 6, 1982, a oral scheduling order was rendered by the Board which, among other things, required any amendments to the Petition to be served by November 5, 1982, and set hearings for November 17 to 20, 1982, to embrace in a prehearing conference the question of whether to accept the Petition and any amendment ("OLA-2"), and also in an evidenciary hearing a separate but related matter involving sleeving the steam generator tubes of Point Beach Unit 2 ("OLA-1"). OLA-1 Transcript pp. 1350 to 1352.

7. The Decade amended its Petition with the filing of its Contentions Concerning Steam Generator Replacement, dated November 5, 1982.

8. Hearings commenced in OLA-1 on November 17, 1982, during the course of which, in off-the-record conversations, the Board indicated a desire to be completed by the afternoon of November 19, 1982, and an intention to proceed with hearing on the evening of November 18, 1982, if that were necessary to meet the desired

completion time.

9. At approximately 4:30 p.m. on November 18, 1982, during a recess from the OLA-1 proceeding, the Decade's representative checked in with his office and learned, for the first time, that the Office of Governor-Elect Anthony Earl, who had been elected November 2, 1982, had scheduled a meeting with him at 11:00 a.m. the next day to discuss issues related to the new Governor's impending appointments and transition policies. At approximately 6:00 p.m., on November 18, 1982, the hearing in OLA-1 was completed and the Board announced that instead of going on to hear OLA-2, the hearing would be recessed until 9:00 a.m. the next day. The Decade requested the Board to recess for dinner and then return that evening, as originally contemplated, to hear OLA-2. The Licensee indicated that it might be willing to return after dinner, and the Staff stated it would be willing to meet at that time. On the grounds that it would be more orderly to recess until the next day, the Board denied the Decade's request and adjourned the hearing. OLA-1 Transcript pp. 1880 to 1883.

10. On the next day, November 19, 1982, the Decade was unable to be in attendance for the conference in OLA-2, and the Board went forward in the Decade's absence. OLA-2 Transcript p. 42

11. A Special Prehearing Conference Order was entered by the Board on December 10, 1982 ("Order") which held:

"* * * Because Decade willfully failed to attend the conference, it is declared in default of its hearing obligations and its petition is dismissed. In addition, Decade's petition also is dismissed because it did not file any relevant contention for which it adequately stated a basis."

BASIS FOR APPEAL

The Board has dismissed the petition, first, for the alleged default by Decade, and, second, for the Decade's alleged failure to present relevant contentions with adequate bases. Order, at p. 1. For the reasons set forth below, Decade asserts that the dismissal on both grounds is contrary to law.

Failure to Attend Conference

Decade does not dispute that it failed to attend the prehearing conference, nor does it dispute that it was advised by the Board that the failure to attend could result in dismissal. It does contend, however, that, in light of the circumstances, dismissal of the Petition instead of going forward with the prehearing conference on the evening of November 18, 1982, was unreasonable, discriminatory and unduly harsh.

First, the original schedule contemplated proceeding with hearing on the evening of November 18, 1982. ¶8, supra. Thus, the Decade's request to proceed that night did not conflict with what would have otherwise occurred anyway, if it were not for the fact that the previous stage of the proceeding went more quickly than anticipated due to the cooperation of all the parties.

Second, the opposing parties indicated that they could be present that evening to proceed with the prehearing conference following the close of the evidentiary hearing. ¶9, supra. Although it is obvious they would be fresher in the morning, the entire proceeding has been marked by acceleration and expedition, and an evening hearing would not have been an extraordinary event that would be injurious to anyone's interests. Indeed, evening

hearings have been routine. Evening hearings had already been held the night of November 17, 1982, as one example during this phase of the proceeding, OLA-1 Transcript p. 10,000, as well as in earlier phases, OLA-1 Transcript p. 486.

Third, the real harm arising out of the Decade's absence from the prehearing conference attaches to its own interests, not to the Licensee, for the opposing counsel was able to aggressively advance his position without rebuttal from the intervenor. Thus, there is no overriding need to impose the harsh remedy of dismissal.

Fourth, the Decade had met all of its prior obligations to the Board and parties, Order, at p. 4, and, an examination of its filings shows, we believe, a high degree of workmanlike professionalism. This serves to demonstrate that its absence cannot be construed as a wanton disregard of the Board's wishes, but rather of a reluctant response to an overriding competing demand on its extremely limited resources.

Fifth, the Decade was not remiss in delaying notification of its scheduling conflict until after the schedule was established on October 6, 1982. The schedule in this proceeding was set prior to the Wisconsin election results on November 2, 1982, which led to the conflicting meeting, and the conflicting meeting was set by the Office of the Governor-Elect at the last minute without any control by us. ¶9, supra.

Sixth, the conflicting meeting was of enormous importance to us, and our decision to attend was in conformance with the advice given to us by the Board itself. During limited appearances at an evening hearing held on November 17, 1982, at which the Board

responded to the citizens' concerns over safety by stating that the concerns were outside the Board's jurisdiction, the Chairman indicated:

"If you feel that the plant cannot be made safe because of problems that exist in the plant now, the principal remedy you could try is a rulemaking procedure before the Nuclear Regulatory Commission in which you argue that without certain changes plants that don't meet those requirements [sic] must be shut down. That is more in the nature of a political process to ask for a rulemaking.

"And, in addition, if you feel that nuclear power is not a solution for this country's problems, the Congress is extremely important.

"Our problem is that we do serve under the laws of the United States. The government of the United States I believe is a good system. I just don't want you to stop if your concerns are of this political nature, to stop before this Board. And, incidently, I don't think this is a small turnout on an issue of this kind. This is a very impressive turnout from this community."

OLA-1 Transcript p. 10,032. [Emphasis added.]

Among other things, the Governor-Elect makes appointments to the state Public Service Commission and Wisconsin Division of Energy, where decisions are made that may implicate the safety and operation of Point Beach. Those appointments were being discussed and made in the period when the conflicting meeting was scheduled. If we did not attend that conflicting meeting at the time provided, it is unlikely that we could have been rescheduled before those appointments were tentatively determined. Since the Board advised the concerned citizens in Wisconsin to pursue the political nature of their concerns in the appropriate forum, it ought to behoove the Board to not penalize a citizen for doing so.

Seventh, the Board has, it would appear, responded to improper pressures from the Commission, such as to become biased

against the intervenors. By the Commission's orders restricting further the already limited opportunity for public participation, by its constraints on the proper exercise of sua sponte discretion for licensing boards, and by its selective intrusion into licensing board and appeal board actions to overturn rulings favorable to full public disclosure, the Commission has deliberately fostered an atmosphere which has polluted the impartiality which is required of a fact-finder. This is, no doubt, the reason why even its hand picked law judges are resigning or threatening to resign in order to retain their integrity.

The abuse of scheduling by the Board in this proceeding, in response to these improper pressures, tends to show a pattern of bias. This is shown by the original scheduling order which set detailed filing requirements to run simultaneously in OLA-1 and OLA-2. OLA-1 Transcript p. 1348. (It may be noted, as well, that related state regulatory commission proceedings involving Point Beach, for which the Licensee has an entirely separate litigation team, also ran concurrently.) Because the Decade has limited financial resources, we explained to the Board that such a decision is tantamount to foreclosing our opportunity to be adequately represented. OLA-1 Transcript pp. 1345 to 1346. As is well known, Commission proceedings are exceedingly complex, to such an extent to make it impossible for another Decade staff member to walk in cold and meaningfully participate.

Apparently, the Decade's legitimate needs were overridden because of the Licensee's claimed need for a speedy ruling. OLA-1 Transcript p. 1348. That being the case, however, it should not

be unreasonable to go forward with a previously scheduled evening hearing in order to avert an unavoidable scheduling conflict that arose for the intervenor when time pressed against him. In the hands of a truly impartial decision-maker, the granting of expedition ought not be a one-edged sword.

To demand, as the Board does, Order at p. 5, a second Decade staff member to have duplicated all of the work of its official representative so as to be prepared to stand in at any time is unreasonable. That would have meant leaving other major environmental degradation, such as toxic waste contamination of groundwater, to go unattended. To have not attended the meeting in the Governor-Elect's office when a time was offered, as the Board suggests, Order at p. 6, would have meant risking not receiving a second opportunity until it would have been too late.

Therefore, the Board's dismissal for alleged default should be reversed.

Failure to State Relevant Contentions with Adequate Basis

The Decade submitted twenty two pages containing seven contentions, along with detailed bases. Each one of them has been summarily rejected by the Board without hearing as either irrelevant or inadequately supported. Order, at p. 1. For the reasons set forth below, the ruling should be reversed.

It must be emphasized that, at this juncture, the Board was not ruling on the merits of the proceeding. The sole question was whether facts necessary to reach a decision had been properly placed in controversy such as to require a trial before disposition. 10 C.F.R. §2.714(b).

Under the statutes and constitutional principles which govern this agency, the public has a right to be heard to challenge opposing facts when his or her substantial interest may be affected by government action. 42 U.S.C. §§554 and 2239. Fifth and Fourteenth Amendment to the United States Constitution.

Because of the preliminary nature of the proceeding and the absence of a complete record at this point, any person opposing a hearing on the contentions bears a heavy burden of proof. Adickes v. S.H. Kress & Co.(1970), 398 U. S. 144, 151. The person opposing admission must make a clear showing that virtually no genuine issue of material fact exists. Suchomajcz v. Jumel Chemical Co.(3rd Cir. 1975), 524 F. 2d 19, 24.

All inferences, doubts or issues of credibility must be resolved in favor of the party seeking admission of the contentions. United States v. Diebold(1962), 369 U.S. 654, 655. Bohn Aluminum & Brass Corp. v. Storm King Corp.(6th Cir. 1962), 303 F.2D 425. United States ex rel. Jones v. Rundle (3rd Cir. 1971), 453 F.2d 147, 150. Catalano v. Target Sales (9th Cir. 1979), 605 F.2d 1097, 1101. Mutual Fund Investors v. Putman Management Co. (9th Cir. 1977), 553 F.2d 620, 624. Judgment should not be entered without trial by a trier of fact when a contrary inference might be drawn from the evidence. United States v. Diebold, supra, at 655. Once a tribunal finds that material facts are in dispute, it must leave the resolution of that dispute to another day. United States ex rel. Jones, supra, at 150. Any dispute regarding a material fact is sufficient to require the case to be tried rather than disposed of without trial. Ortiz v. Ciba-Geigy Corp. (N.D.Ill. 1980), 87

F.R.D. 723, 724. Indeed, even if the basic facts are not in dispute, dismissal is not appropriate if contrary inferences may be drawn from them. United States v. Diebold, supra., at 655. Lastly, when there is a case of a complex nature involving public issues of far-flung import, dismissal without trial is particularly inappropriate. Kennedy v. Silar Mason Co. (1947), 334 U.S. 249, 256.

Under these controlling tests, dismissal of the contentions is unsustainable.

The contentions, with the bases omitted, can be summarized as follows:

1. Tube Failures Under LOCA Conditions. Degradation of as few as one to ten steam generator tubes in either the existing or the proposed steam generators at Point Beach Nuclear Plant Unit 1 ("Point Beach") could induce essentially uncoolable conditions in the course of a loss-of-coolant-accident ("LOCA"), a condition which was not considered by the Nuclear Regulatory Commission ("Commission") with regard to the existing generators prior to licensing the facility, in the Final Safety Analysis Report or in any subsequent license amendment proceeding, nor which is addressed in the application for the proposed generators.

These factors from secondary-to-primary leakage through degraded steam generator tubes act to lower the threshold for admitting contentions such as to make a matter with a low probability justiciable, even if it might otherwise not be so, due to the large consequences from its occurrence. Further, inasmuch as these factors were not evaluated as part of the original operating license, it is necessary that they be evaluated in this proceeding to amend the operating license prior to its being approved.

2. Tube Failures Under Normal Operating Conditions. Rupture of steam generator tubes during normal operation may release radiation to the environment from the plant's secondary side in excess of maximum permissible doses to the extent that:

(a) Iodine. The iodine levels in the primary coolant exceed presently effective Westinghouse Standard Technical Specifications for reactor coolant iodine activity.

(b) Unconsidered Leakage. The primary-to-

secondary leakage is greater than bounded in the Final Safety Evaluation Report for Point Beach ("FSAR") or in the Steam Generator Replacement Report due to such things as multiple tube failures or single tube ruptures greater than assumed in the design basis analysis.

(c) Safety Valve. The secondary side safety valve set point is exceeded and does not properly reseal for an extended period.

(d) Main Steam Line Break. Primary leakage through a ruptured tube overfills the steam generator and floods the main steam line with water that causes a main line steam break.

(e) Condensor. The condenser is removed from service during a tube rupture accident due to mechanical or economic reasons and the iodine partitioning function is lost.

These factors from primary-to-secondary leakage though degraded steam generator tubes act to lower the threshold for admitting contentions such as to make a matter with a low probability justicible, even if it might otherwise not be so, due to the large consequences from its occurrence. Further, inasmuch as these factors were not, in large part, evaluated as part of the original operating license, it is necessary that they be evaluated in this proceeding to amend the operating license prior to its being approved.

3. Elimination of Crevice. The proposed steam generator will eliminate the tubesheet crevice where corrosive impurities have concentrated in the past by hydraulically expanding the new tubes to the full depth of the tubesheet holes. At the same time as the crevice is eliminated, however, this process will shift the roll stressed transition zone (between the expanded and unexpanded part of the tube) from near the bottom of the tubesheet hole to a point level with and above the upper surface of the tubesheet. This will create four interrelated problems:

(a) Residual Stresses. The newly situated roll stressed transition zone will be subject to stress assisted cracking due to residual stresses from the hydraulic expansion process.

(b) Sludge Deposits. The zone will be subjected to extensive corrosive attack, in addition to and compounded by stress assisted cracking, because it is located directly under deposits from impurities in the bulk secondary water that cannot be entirely eliminated in a pressurized steam generator of the existing or proposed design operating with an all volatile water chemistry treatment and also is in a deposition area subject to alternate wetting and drying.

(c) Detectability. It will be more difficult for eddy current testing to detect stress-assisted defects or corrosion in the transition zone than in the unexpanded portion of the sleeve.

(d) Unconstrained Leakage. Through-wall defects in the stressed and corroding transition zone of the proposed steam generators, unlike defects in the transition zone of the existing generators, will be unconstrained by the surrounding wall of the tubesheet, and the resulting secondary-to-primary in-leakage will lead to the safety concerns discussed in the First Contention and primary-to-secondary leakage, to the concerns in the Second Contention.

These problems with eliminating the crevice create a justiciable controversy as to whether the proposed steam generators, by their design, will suffer tube degradation, and do so in more ominous locations, and thereby fail to comply with applicable Commission regulations, 10 C.F.R. §50.40(a) ("the health and safety of the public will not be endangered"), and 10 C.F.R. Part 50 App. A Crit. 14 ("pressure boundary shall * * * have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture"), such as to mandate denial of an operating license amendment.

4. Balance of Plant. The replacement of the lower assemblies and moisture separators of the Point Beach steam generators will not serve to repair or substitute for other interrelated structural weaknesses in the balance of the plant, including the following:

(a) Condensers. The major source of corrodents in the steam generators in the past has been from leaks through failing condensor tubes. The condensers at Point Beach will not be replaced even though they do not meet present construction standards and remain a continuing source of tertiary-to-secondary in-leakage.

(b) Feedwater System. A new source of corrodents in the proposed steam generators may come from other plant components operated under the new water chemistry. The AVT water chemistry treatment that will be used may corrode pumps and piping that feed water to the steam generator of older plants such as Point Beach using copper based alloys, and cause degradation of the tubing from copper oxides. These components with copper alloys which modern standards discourage will not be replaced.

(c) Condensate Polishers. Because AVT does not absorb impurities, this water chemistry treatment is frequently coupled in new plants with a condensate polisher to remove the inevitable corrodents that will be part of the feedwater. No condensate polisher is proposed for inclusion within the operating license amendment.

These problems with corrosive impurities from other impaired plant components that will not be replaced or from the failure to install new components as a necessary adjunct to this license amendment, create a justiciable controversy as to whether the proposed steam generators, by their limited scope of repair, will continue to suffer tube

degradation and thereby fail to comply with applicable Commission regulations, 10 C.F.R. §50.40(a) ("the health and safety of the public will not be endangered"), and 10 C.F.R. Part 50 App. A Crit. 14 ("pressure boundary shall * * * have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture"), such as to mandate denial of the operating license amendment.

5. All Volatile Treatment. The water chemistry treatment intended for use in the proposed steam generators is an all volatile treatment ("AVT"), instead of a congruent phosphate treatment that had originally been used in the existing generators. This creates four new problems:

(a) Solids Removal. AVT fails to perform the function of removing impurities from the bulk secondary water that had been performed by phosphates and which may otherwise lead to corrosive conditions in the steam generators.

(b) Detection. This problem of unprecipitated impurities with AVT is compounded in a pressurized steam generator such as Point Beach because detection is done largely in the bulk water and not in localized areas where corrodents concentrate and deposit.

(c) Feedwater Train. Excessive hydrazine with AVT can decompose producing ammonia which, in the feedwater train, can corrode copper-based alloys and allow corrosion products to enter the steam generator.

These problems with AVT create a justiciable controversy as to whether the proposed steam generators, in operation, will suffer from corroding tubes and thereby fail to comply with applicable Commission regulations, 10 C.F.R. §50.40(a) ("the health and safety of the public will not be endangered"), and 10 C.F.R. Part 50 App. A Crit. 14 ("pressure boundary shall * * * have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture"), such as to mandate denial of the operating license amendment.

6. Operator Performance. An extremely high degree of operator performance is required both to properly maintain the proposed steam generators to prevent new corrosion and to respond to tube rupture accidents. Operator performance at Point Beach has seriously eroded in the past two years and no longer provides that necessary margin of safety.

These problems with operator performance create a justiciable controversy as to whether the maintenance of the proposed steam generators will lead to continued tube degradation and as to whether operator response to tube rupture accidents will be adequate and thereby fail to comply with applicable Commission regulations, 10 C.F.R. §50.40(a) ("the health and safety of the public will not be endangered"), and 10 C.F.R. Part 50 App. A Crit. 14 ("pressure boundary shall * * * have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture"), such as to mandate denial

of the operating license amendment.

7. Unspecified Problems. The proposed Model F Westinghouse steam generators may be expected to experience new forms of tube degradation of an undefined nature that cannot be specifically anticipated at this time, just as first the Model 51 and later the Model D steam generators, which succeeded the existing Model 44 steam generators, experienced new and unanticipated forms of degradation.

This inability to anticipate the entire scope of potential problems creates a justiciable controversy to support any inquiry reasonably related to whether the proposed steam generators will continue to suffer from tube degradation, and thereby fail to comply with applicable Commission regulations, 10 C.F.R. §50.40(a) ("the health and safety of the public will not be endangered"), and 10 C.F.R. Part 50 App. A Crit. 14 ("pressure boundary shall * * * have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture"), such as to mandate denial of the operating license amendment.

The focus of the Board's ruling is on the Third Contention, relating to the elimination of the crevice causing residual stresses in the steam generator tubes in a dangerous location. Order at p. 14. Licensee countered that it has other information -- not included in its application nor anywhere else in the preliminary record -- to suggest that a new process "reduces" these stresses. OLA-2 Transcript p. 72.

In an inexplicable statement, the Board found:

"We do wish to reiterate a concern we expressed at the hearing, however. We commented that the hydraulic expansion of the tube into the tubesheet eliminates the crevice and is the principal change being made in the repaired steam generator. Yet the application does not contain the results of tests that support the safety of this change, which has some effect on the location of residual stresses in the tubes. Tr. 82, 79-80. We do not consider it to be an adequate explanation that 'the NRC knows about these tests' or that the tests are proprietary. Tr. 82-83.

"It is our belief that the Commission has two purposes in conducting safety reviews. First, it must assure the safety of the public and the environment. Second, it must compile a public record that is complete and gives confidence in the correctness of its conclusions. At this point, the record does not meet this second criterion, which we believe the Commission intends to fulfill. However, we find the on-the-record statements of counsel for applicant

that extensive laboratory tests have been conducted to be reassuring. * * *." [Emphasis added.]

We submit that this ruling does violence to the proper tests applicable at such a preliminary stage of this proceeding. First of all, the Licensee has not even alleged that the problem has been eliminated, but rather has limited his defense to a claim that the problem has been "reduced" without any reference to whether that reduction is adequate to protect safety. Secondly, and even more importantly, a reputable citation has been rejected on the basis of a "statement of counsel" without any evidentiary basis whatsoever in order to justify denying the public its right to a hearing. This is completely unsupportable and must be reversed.

Unfortunately, the four working days permitted by the schedule for appeal in which to prepare this brief is insufficient to complete our argument, but if the Appeal Board grants us an extension of time, we would request the opportunity to do so. In the absense of such an extension, we would direct the Appeal Board's attention to the matters stated in our Contentions Concerning Steam Generator Replacement, dated November 5, 1982.

Respectfully submitted,

WISCONSIN'S ENVIRONMENTAL DECADE, INC.

by

Peter Anderson 42
PETER ANDERSON
Co-Director

114 North Carroll Street
Madison, Wisconsin 53703
(608) 251-7020
Dated: December 20, 1982