UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-460-OL
	)	
(WPPSS Nuclear Project No. 1)	)	

APPLICANT'S MEMORANDUM REGARDING THE SCHEDULING AND RENOTICING OF FUTURE PROCEEDINGS

I. INTRODUCTION

During the Special Prehearing Conference in the captioned proceeding, the Board provided the opportunity for participants to address in written memoranda the matter of future hearing schedules (in the event a hearing is held) and the question of future additional public notice.[1] These issues arose following a decision by the Washington Public Power Supply System ("Applicant") to seek an extension of the earliest and latest construction completion dates for WNP-1 to June 1, 1988 - June 1, 1991. As set forth below, Applicant urges the Board to move forward with the proceeding. Applicant also submits that it will not be necessary to renotice this proceeding

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1 Washington Public Power Supply System Nuclear Projects Nos. 1 & 2, Transcript of January 26 and 27 Special Prehearing Conference ("Tr.") at 226.

should hearings be deferred and that in any event renoticing should have no effect on issues decided by the Board on or before the date of such notice.

II. FUTURE SCHEDULING

A. Legal Standards

There is ample precedent directly on point that governs how the Board should proceed in the instant case. First, in Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2),[2] the Appeal Board was faced with the question of whether evidentiary hearings should proceed, notwithstanding a decision by the applicant to postpone construction of Douglas Point for a period of five years. Rejecting the conclusion of the Licensing Board that the hearings should be deferred,[3] the Appeal Board found that there was no legal barrier precluding early adjudication of at least some of the issues which had to be resolved prior to issuance of a construction permit. The Appeal Board stated, as follows:

> [B]oth the Atomic Energy Act and [the National Environmental Policy Act] are singularly free of provisions purporting to fix the precise time at which evidence is to be gathered and findings made. Just as clearly, the Commission's regulations do not attempt to dictate such matters.[4]

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2 ALAB-277, 1 NRC 539 (1975).

3 Potomic Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), LBP-75-7, 1 NRC 233 (1975).

4 Id. at 544.

In addition, the Appeal Board noted that while the final decision on an application under review must be premised on the best information available at the time, ". . . it scarcely follows perforce that no issues can be heard and no findings can be made until the eleventh hour."[5]

The Board then provided the following guidance:

> It seems to us that a variety of factors appropriately should be taken into account in reaching [a decision on whether evidentiary hearings should be held if it should turn out that the applicant will not require the requested permit or license for several years]. Principal among them are: (1) the degree of likelihood that any 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 any early stage would, particularly if the issue(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants.[6]

Four years later, in Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2)[7] the Appeal Board was again confronted with a situation in which a

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5 Douglas Point, supra, ALAB-277, 1 NRC at 544.

6 Id. at 547. See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), LBP-75-66, 2 NRC 776 (1975) (issuing findings of fact notwithstanding indefinite construction delay based on guidance of Douglas Point, supra, ALAB-277, 1 NRC 539), aff'd, ALAB-301, 2 NRC 853 (1975).

7 ALAB-570, 10 NRC 679 (1979) ("TMI-2").

licensee sought the prompt litigation of an issue in its operating license proceeding well in advance of the date during which actual operations were likely to commence. The Appeal Board first turned its attention to Douglas Point, supra,[8] noting that the criteria set forth in that case "were evolved in a markedly different context" from that of TMI-2, supra.[9] It nevertheless assumed "that the Douglas Point criteria should be instructive in situations of this kind."[10] Applying each of those criteria to the TMI-2 operating license proceeding, it concluded that a hearing on the outstanding issue should proceed.[11]

These decisions teach, first, that there is no legal impediment either in the Atomic Energy Act or NRC regulations to proceeding with a licensing hearing well in advance of actual construction or operation for which NRC authorization is sought. The decisions also demonstrate that the criteria evolved in Douglas Point, supra, are applicable to both construction permit hearings and operating license proceedings such as the instant case.

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8 ALAB-277, 1 NRC 539.

9 ALAB-570, 10 NRC at 683.

10 Id.

11 Id. at 684-85.

Applicant, therefore, submits that the Board should apply such teachings here.[12]

B. Application of the Standards

Before suggesting how the Douglas Point criteria should be applied here, two preliminary observations are necessary. First, the Applicant has requested that the earliest and latest construction completion dates for WNP-1 be extended until June 1, 1988 - June 1, 1991. Accordingly, there is no basis for concluding that the potential issues in this proceeding concern a plant which will not be operating until 1991. To the contrary, it is just as likely that such issues concern a facility which will be completed and operating by 1988.

Second, the Board has yet to rule on the admissibility of petitioner's proposed contentions, and in many instances it is difficult to discern the scope of those contentions. Accordingly, in those instances Applicant has attempted to apply the Douglas Point criteria to the

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12 In both Douglas Point, supra, and TMI-2, supra, the Licensing Boards had already admitted intervenors to the proceedings, which had progressed well beyond the instant proceeding. However, this factual distinction has no bearing on the applicability of those decisions. Moreover, there are no legal prohibitions or prudential considerations to prevent the Board from now resolving the preliminary matter of intervention, and we do not interpret the Board's request for memoranda as implying that the Board even contemplates deferring ruling on the petition to intervene.

broad areas of concern raised by petitioner. If those concerns become more particularized, then a more refined application of the criteria may be possible.[13]

First, petitioner is apparently attempting to raise a number of concerns relating to the design of WNP-1. These concerns are reflected in proposed contention three (alleged need to "harden" plant against electromagnetic pulses); proposed contention four (alleged failure to protect against ash fall); proposed contention six (alleged inability to remove decay heat using natural circulation); proposed contention seven (alleged inadequacies with the PORV); proposed contention nine (alleged need for non-safety-grade systems, equipment and components to meet safety-grade criteria); proposed contention ten (alleged "over sensitivity" of B&W once through steam generator); proposed contention eleven (alleged failure to satisfy environmental qualifications); proposed contention twelve (alleged inadequacies of intake/discharge structures); proposed contention thirteen (B&W ECCS model allegedly unsatisfactory); proposed contention fourteen (alleged failure to meet fire protection requirements); proposed

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13 By applying the Douglas Point criteria to the proposed contentions, Applicant does not intend to concede that any of the proposed contentions are admissible. To the contrary, as set forth in its "Response In Opposition to Supplement to Request for Hearing and Petition for Leave to Intervene," filed January 24, 1983, Applicant submits that petitioner has submitted no litigable contentions.

contention sixteen (alleged inadequacies of emergency diesel generators); and proposed contention seventeen (alleged failure of seismic Category I systems). Each of these proposed contentions could be construed in part as alleging that even if Applicant satisfied all of the commitments it made to NRC and installed and tested in accordance with the FSAR every structure, system or component referenced in these proposed contentions, that as a result of some "design flaw" all applicable requirements would not be satisfied.[14]

So construing the proposed contentions, application of the criteria in Douglas Point, supra, indicates that these contentions can be litigated now. With respect to the first criterion, there is a strong likelihood that any early findings on these proposed contentions would retain sufficient validity to warrant their resolution as early as possible. Many of the design features questioned by petitioner are fundamental to the construction and operation of WNP-1, such as the systems used for the removal of decay heat, the classification of safety and non-safety grade systems, equipment and components, and Seismic Category I systems. Given that the design

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14 Proposed contentions eight (alleged inadequate instrumentation for detection of core cooling) and fifteen (alleged failure to complete plant specific failure mode analysis), which would have fallen within this category of proposed contentions, were withdrawn by petitioner during the Special Prehearing Conference (Tr. at 183 and 212).

reflected in the FSAR is by definition "final," there is no basis to conclude that modifications to such fundamental plant systems, equipment or components will be initiated by Applicant or required by NRC. Consequently, it is entirely appropriate to resolve these issues as expeditiously as possible. Moreover, since these issues apparently involve engineering as opposed to construction issues, their resolution does not hinge on the resumption of construction activities.

Criterion two -- the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issue -- also suggests the need to expeditiously resolve basic design issues. Clearly, the public interest is best served by resolving expeditiously all outstanding issues and thereby assuring maximum regulatory stability.

The last criterion of Douglas Point, supra, addresses the extent to which any of the parties would be prejudiced by early resolution of these issues. Again, this factor weighs in favor of litigating basic design contentions now. In the unlikely event that significant new information arises in the future, petitioner may always move to reopen the record in accordance with the NRC Rules of Practice and thereby bring this matter to the attention of the Board. Therefore, overall resolution of these "design issues" at the present time is entirely appropriate.

Second, petitioner has proposed a number of contentions addressing quality assurance (contentions 5 and 20). For example, the proposed contention that alleges inadequacies currently existing in plant construction is now ripe for resolution, given the Douglas Point criteria. If petitioner alleged the existence of certain welding defects, whether in fact they exist can now be decided by the Board. Clearly, such a finding would retain its validity. In addition, prompt resolution of this type of issue is in the interest of the Staff, Applicant, petitioner and of, course, the public. Finally, if significant new information bearing directly on the Board's findings on such issues arises, petitioner would be free to move to reopen the record and as such would not be prejudiced by early resolution of the matter.

Third, petitioner has proposed several contentions addressing environmental and site-related issues, viz., proposed contention two (alleged failure to address somatic, teratogenic and genetic effects of ionizing radiation) and proposed contention eighteen (interactivity of WNP-1 with surrounding nuclear and chemical facilities). Under the Douglas Point criteria both proposed contentions can be litigated now. Clearly the outcome of these proposed contentions does not in any way hinge on construction activities and as such is likely to retain a high degree of validity. Moreover, there is

obviously a strong interest both to the public and the litigants in having such proposed issues resolved. Lastly, because petitioner may, under the Rules of Practice, move to reopen the record, prompt resolution of this matter will not occasion prejudice to any of the litigants.

Fourth, petitioner has raised in proposed contention nineteen a number of issues involving emergency planning. Because the off-site emergency plan for WNP-1 is virtually identical to that of WNP-2, and because the plan for WNP-2 is in its final stages of development, there is no reason to delay resolution of this proposed contention. No reason exists for concluding that findings made in connetion with this issue will not remain valid. Moreover, because of the possible public interest in this proposed contention, prompt resolution of the matter is desirable. Finally, no party will be prejudiced by early disposition of the matter. Accordingly, we urge the Board to proceed with the hearings and findings on those issues ripe for adjudication.

III. NOTICE

During the Special Prehearing Conference, the Board requested a discussion of whether the Commission itself might decide to renotice this operating license proceeding and, if so, how such action would impact the Board's decision concerning the future scheduling of this

proceeding.[15] Applicant submits, first that there is little likelihood of the Commission issuing additional notice in this proceeding. Applicant further submits that, in the highly unlikely event the Commission did renotice this proceeding, such notice would most likely preclude the relitigation of issues already decided in the absence of significant newly acquired information or changed circumstances. Accordingly, the Board should move forward with these proceedings.[16]

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[15] Tr. at 226.

[16] Although the Board did not raise the prospect of reissuing notice for this proceeding itself, Applicant nonetheless wishes to note that significant questions surround its authority to do so. First, it is well-established that "licensing boards have no independent authority to initiate any form of adjudicatory proceeding." Houston Lighting & Power, et al. (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582, 592 (1977). See also, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 30 (1980) ("authorization to conduct an adjudicatory proceeding pursuant to a notice of hearing issued by the Commission does not carry with it by necessary implication the power to order the initiation at a later date of a separate and distinct proceeding.") Renoticing this entire proceeding would, in Applicant's view, be tantamount to initiating an independent adjudicatory hearing. Applicant would be subject to the risk of having to litigate entirely new issues raised by entirely new parties which could have and should have endeavored to bring these to the attention of the Board by the deadline already passed.

Second, if genuinely new issues or parties arise, they may always be admitted to this proceeding pursuant to 10 C.F.R. 2.714(a). Thus, the effect of affording a second round of general public notice and again allow "open intervention" is to rewrite Section 189 of the Atomic Energy Act, 42 U.S.C. §2239, which requires

(footnote continued)

First, as a matter of law the Commission need only afford interested members of the public one opportunity to intervene in an operating license proceeding. Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239. Indeed, 10 C.F.R. §§2.104(a) and 2.105(a) and (d) on their face are drafted in terms of the Commission issuing in the Federal Register a single notice of hearing and a single notice of opportunity of a hearing. Section 2.104(a) provides that "[i]n the case of an application . . . in which the Commission finds that a hearing is required in the public interest, the Secretary will issue a notice of hearing to be published in the Federal Register. . . [emphasis added]." Similarly, Section 2.105(a) and (d) state, as follows:

> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will . . . cause to be published in the Federal Register a notice of proposed action. . . .

(footnote continued from previous page)
only one opportunity for hearing. A second round of intervention also would circumvent Section 2.714(a) by allowing anyone to raise any issue, notwithstanding the September 15, 1982 deadline established in the original notice of an opportunity for a hearing. In addition, such additional notice would render the September 15, 1982 deadline for filing intervention petitions a nullity. Manifestly, the Board in its delegation of authority from the Commission was not given the power to circumvent Section 2.714 or to modify the deadline established by the NRC for intervention. See September 16, 1982 Establishment of Atomic Safety and Licensing Board, Washington Public Power Supply System, Docket No. 50-460-OL, ASLBP No. 82-479-06-OL.

> (d) The notice of proposed action will provide that, within thirty . . . days from the date of publication of the notice in the Federal Register . . .
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> . . .
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> (2) Any person whose interest may be affected by the proceeding may file a petition for leave to intervene. . . [emphasis added].

These provisions reflect the requirements of Section 189(a) of the Act, which provides "interested persons" with the opportunity for a hearing on operating license applications.[17] Clearly, Section 189(a) on its face does not require more than one opportunity for a hearing. Nor has Applicant been able to discover any instances in which Section 189(a) has been construed as requiring such multiple notices. To the contrary, the Staff of the Joint Committee on Atomic Energy in the past has concluded that the Commission "has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of the procedures."[18] Consequently, there is little real likelihood that the

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17 42 U.S.C.A. §2239(a).

18 Report on the Regulatory Program of the Atomic Energy Commission (Feb. 1961), reprinted in 1 Staff of Joint Com. on Atomic Energy, 87th Cong., 1st Sess., Improving the AEC Regulatory Process 588 (Comm. Print 1961), as cited in Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 249 (1982).

Commission would issue a second notice of opportunity for a hearing, thereby affording another possible hearing on the WNP-1 OL application.[19]

That the Commission is unlikely to require additional notice in these proceedings is also borne out by a number of recent policy decisions reflecting a desire on the part of the Commission to expedite the licensing process. First, in Kerr-McGee Corporation, supra, (West Chicago Rare Earth Facility),[20] the Commission denied a request by certain petitioners to hold a formal adjudicatory hearing on a materials license amendment. The Commission held that such hearing was not required either under Section 189(a) of the Atomic Energy Act or under NRC regulations and that as a matter of policy such hearings were not in the public interest.

Second, the Commission is currently engaged in the development and implementation of basic reforms in the hearing process. These reforms are designed to expedite the hearing process without impairing the ability of the Commission to protect the public health. As currently

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19 Because a licensing board cannot act outside of the Commission's Rules of Practice, it would also be inconsistent with these provisions for the Board to issue additional public notice. See 10 C.F.R. §2.704(a).

20 CLI-82-2, 15 NRC at 245.

proposed, they would more aggressively limit the opportunity for formal adjudicatory hearings in operating license proceedings.[21]

Third, the Commission recently issued a Statement on Conduct of Licensing Proceedings,[22] which provided guidance to the licensing boards on the use of tools intended to reduce the time for completing licensing proceedings. The Policy Statement emphasized the need to expedite licensing hearings consistent with the rights of all parties.

The underlying and consistently articulated philosophy behind these Commission policy decisions is that the licensing process has become too cumbersome and that steps must be taken to improve that process. In light of this Commission philosophy, it is highly unlikely that in this proceeding the Commission would issue a second notice of opportunity for a hearing, thereby requiring the Board to begin these proceedings anew at a later date. Clearly those with an interest in this proceeding have been given one valid opportunity to request intervention. The Atomic Energy Act requires no

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21 See February 22, 1983 Memorandum from Samuel J. Chilk, Secretary, U.S. Nuclear Regulatory Commission to the Commissioners, "NRC Legislative Proposal for Licensing Reform" and SECY-82-447, "Draft Report of the Regulatory Reform Task Force," November 3, 1982.

22 CLI-81-8, 13 NRC 452 (1981).

more, and it would be contrary to Commission policy to provide them with yet another opportunity to seek intervention.

Finally, even in the highly unlikely event that the Commission would renotice this proceeding, such renotice would most likely have no effect on issues already decided by the Board. There is absolutely no basis for concluding that such notice would carry with it the opportunity to relitigate issues already decided, regardless of whether the intervenor attempting to do so satisfied NRC standards for reopening the record.[23] To the contrary, issues already decided by the Board in all likelihood would remain decided unless those standards are satisfied.[24]

In sum, no reason exists to defer this operating license proceeding. As best as can be discerned from the proposed contentions, any areas of concern raised by petitioner are now ripe for resolution, and all parties are required to participate seasonably in the trial of issues that are ripe by filing testimony and by otherwise fulfilling the responsibilities of parties to NRC

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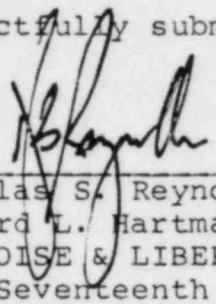
23 See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, reconsideration denied, ALAB-141, 6 AEC 576 (1973).

24 Douglas Point, supra, ALAB-227, 1 NRC at 545 (early findings open to reconsideration only if "supervening developments or newly available evidence so warrant.")

adjudications. Nor is it likely that there will be any future public notice of these proceedings. The Licensing Board, therefore, should continue on with this proceeding.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-460-OL
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Memorandum Regarding the Scheduling and Renoticing of Future Proceedings", in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 28th day of February, 1983:

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