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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

WASHINGTON PUBLIC POWER)
SUPPLY SYSTEM)

(WPPSS Nuclear Project No. 1))

DOCKET NO. 50-460-CPA

LICENSEE'S RESPONSE TO APPEAL BY
COALITION FOR SAFE POWER OF LICENSING BOARD
ORDER DATED FEBRUARY 1, 1984, GRANTING
APPLICANT AND NRC STAFF MOTIONS
FOR SUMMARY DISPOSITION

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I. INTRODUCTION

On February 1, 1984, the Atomic Safety and Licensing Board in the captioned proceeding granted motions filed by the Washington Public Power Supply System ("Licensee" or "Supply System") and the NRC Staff for summary disposition. The Licensing Board ruled that Supply System had made a showing of "good cause" in support of a construction permit extension requested for WNP-1 and that the extension was for a reasonable period of time. Accordingly, the Licensing Board dismissed Intervenor's only admitted contention and terminated the proceeding. Intervenor subsequently brought this appeal.

II. FACTUAL BACKGROUND

On July 21, 1981, Licensee filed an application with NRC for an extension of its construction permit for WNP-1 from January 1, 1982 to June 1, 1986. In support of its request, Licensee stated that construction at WNP-1 was delayed because of

1. Changes in the scope of the project, including increases in the amount of material and engineering required as a result of regulatory actions, in particular those subsequent to the Three Mile Island accident;
2. Construction delays and lower than estimated productivity resulting in delays in installation of material and equipment and delays in completion of systems necessitating rescheduling of preoperational testing;
3. Strikes by portions of the construction work force;
4. Changes in plant design; and
5. Delays in delivery of equipment and materials.

Subsequently, Intervenor filed a petition seeking a hearing on the requested construction permit extension. The Commission itself considered the petition in order to provide guidance as to the scope of construction permit extension proceedings. The Commission ruled that of the several contentions Intervenor sought to raise, only one was potentially litigable if properly particularized and

supported.¹ That contention was whether "delays in construction have been under the full control of the WPPSS management."² The Commission then referred the proceeding to the Atomic Safety and Licensing Board to determine whether Intervenor satisfied the balance of the requirements governing standing and to preside over a hearing in the event one was held.

On January 11, 1983, the Licensee submitted a modification of its earlier construction permit amendment request to specify June 1, 1988, as the earliest construction completion date and June 1, 1991, as the latest construction completion date. The reason given in support of this extension request was a recommendation by the Bonneville Power Administration ("BPA") that the Licensee delay construction of WNP-1 for a period of two to five years. Licensee stated that without backing for continued construction by BPA Licensee would be unable to finance continued construction and that BPA recommended a construction deferral at WNP-1 for two to five years based on need for power projections it made.³ As a result of

¹ Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1231 (1982).

² Id.

³ See Licensee's Motion for Summary Disposition, November 14, 1983, at 12-21.

these events, the Licensing Board permitted Intervenor to submit an amended supplemental petition to intervene in which it raised its proposed contentions.⁴

In its March 25, 1983, Memorandum and Order, the Licensing Board admitted Intervenor to this proceeding. It further ruled that the single contention to be litigated was, as follows:

Petitioner contends that the [Licensee's] decision in April, 1982, to "defer" construction for two to five years, and subsequent cessation of construction was dilatory. Such action was taken without "good cause" as required by 10 C.F.R. 50.55(b). Moreover, the modified request for extension of completion date to 1991 does not constitute a "reasonable period of time" provided for in 10 C.F.R. 50.55(b).⁵

As the Licensing Board viewed this contention, it raised the questions of whether the Licensee demonstrated good cause for the delay and whether the requested extension completion date was for a reasonable period of

⁴ Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Docket No. 50-460-CPA, Memorandum and Order (Following First Prehearing Conference), February 22, 1983, slip op. at 7-8.

⁵ Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Docket No. 50-460-CPA, Memorandum and Order (Admitting Intervenor and Contention), March 25, 1983, slip op. at 4-5.

time.⁶ Discovery then commenced and continued until October 31, 1983.

During the discovery period, the Staff issued an Order granting the requested construction permit amendment,⁷ as the Commission observed it was free to do following normal Staff review.⁸

On February 1, 1984, the Licensing Board issued a Memorandum and Order in which it granted Motions for Summary Disposition filed by the Applicant and NRC Staff. The Licensing Board first held that because there was no material dispute that the construction of WNP-1 was slowed because of financing matters and a slower growth rate in demand for electrical power than was anticipated, the Supply System had shown "good cause" for its construction permit extension case.⁹ The Licensing Board also held that the requested construction permit extension was for a

⁶ Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Docket No. 50-460-CPA, Memorandum and Order (Admitting Intervenor and Contention), March 26, 1983, slip op. at 4-5.

⁷ 48 Fed. Reg. 28768 (1983).

⁸ WNP-1 and 2, CLI-82-29, supra, 16 NRC at 1231.

⁹ Washington Public Power Supply System (WPPSS Nuclear Project No. 1), Docket No. 50-460-CPA, Memorandum and Order (Granting Applicant's and NRC Staff's Motions for Summary Disposition), February 1, 1984, slip op. ("February 1, 1984, Memorandum and Order") at 8-15.

"reasonable period of time."¹⁰ Accordingly, it dismissed Intervenor's single contention and terminated the proceeding. Intervenor thereupon brought this appeal.

III. SUMMARY OF ARGUMENT

The Licensing Board properly granted the Motions for Summary Disposition filed by the Licensee and Staff. There was no genuine issue as to the material facts regarding the basis cited by the Licensee in support of its showing of good cause for the requested construction permit extension. Nor was there any genuine issue with respect to the material facts regarding the reasonableness of the duration of the construction permit extension. Accordingly, the Licensing Board properly ruled in favor of the Licensee and Staff when it dismissed Intervenor's only contention and terminated the hearing.

IV. ARGUMENT

A. Overview of Argument

Intervenor has raised five separate arguments as to why the Licensing Board improperly granted summary disposition. Before responding to these specific arguments, Licensee will outline the overall issues Intervenor was endeavoring to raise before the Licensing Board and set forth why those issues did not involve genuine disputes of material fact.

¹⁰ Id. at 16-18.

The basic premise of Intervenor's case was that there will never be a need for the power generated from WNP-1 and that it will never be possible to finance the completion of construction of the project.¹¹ It endeavors to link these allegations to Section 185 of the Atomic Energy Act and 10 C.F.R. § 50.55(b) by arguing, as follows:

1. Licensee did not accurately represent its reasons for "good cause" when it indicated that construction was deferred due to a temporary lack of financing;¹² and
2. Licensee did not establish that its construction permit extension request was for a "reasonable period" of time given the likelihood that WNP-1 will never be finished.¹³

A recent decision by the Commission clearly indicates that Intervenor has endeavored to raise issues outside of the scope of this construction permit proceeding and that the Licensing Board properly granted the motions for summary disposition. In Public Service Company of New Hampshire (Seabrook Station, Unit 2)¹⁴ the Commission

¹¹ Appeal by Coalition for Safe Power of Licensing Board Order Dated February 2, 1984 Granting Applicant and NRC Staff Motions for Summary Disposition; March 19, 1984, ("March 19, 1984, Appeal") at 2, 4-5, 6-7, 8, 11, 13.

¹² Id. at 5-7, 8, 10-11.

¹³ Id. at 4-5, 8-9, 10-11.

¹⁴ CLI-84-__, __ NRC __, March 29, 1984, slip opinion.

unanimously rejected a petition to intervene filed by the Connecticut Division of Consumer Counsel in a construction permit extension proceeding. The petition raised issues as to whether those utilities building Seabrook, Unit 2 have the financial capability to complete it and whether the power to be generated by the plant will ever be necessary.¹⁵

The Commission rejected these and other related contentions as falling outside the scope of a construction permit extension proceeding. It first observed that under WNP-1 and 2, CLI-82-29, supra, "the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons to show 'good cause' justification for the delay."¹⁶ It then noted that in challenging good cause the proponent of a contention must articulate some basis to show that the applicant is responsible for the delay and acted intentionally and without a valid purpose.¹⁷ Applying

¹⁵ Public Service Co. of New Hampshire (Seabrook Nuclear Station, Unit 2), Docket No. 50-443 and 50-444, Request of Connecticut Division of Consumer Counsel to Deny Renewal of Construction Permit for Seabrook 2, October 16, 1983, at 5.

¹⁶ Seabrook Station, Unit 2, CLI-84-___, supra, March 29, 1984, slip op. at 4.

¹⁷ Id. at 2-3, citing Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546 (1983).

this precedent, the Commission concluded that the proffered contentions fell outside of the scope of the construction permit extension proceeding, as follows:

[Petitioner's] allegations do not attack the sufficiency of applicant's asserted reasons for the delay. Rather, they raise questions about the need for power, cost of completion and financial consequences to both the utility and to the ratepayers. These questions are far beyond the scope of a construction permit extension proceeding, which is confined to the factual basis asserted for the delay.¹⁸

The contentions raised in Seabrook Station, Unit 2, CLI-84-___, supra, are virtually identical to the issues Intervenor raised here. In both proceedings, organizations opposed construction permit extension requests on the grounds that the licensees were unable to finance construction of the authorized facilities and that the power to be generated by such facilities would never be needed. Therefore, just as these issues were not admissible in Seabrook Station, Unit 2, CLI-84-___, supra, so they were not properly before the Licensing Board in this case. Accordingly, the Motions for Summary Disposition were properly granted.

¹⁸ Id. at 5, footnote omitted.

B. The Licensing Board Properly Used
Summary Disposition When Dismissing
Intervenor's Only Contention and
Terminating this Proceeding

Intervenor argues that the Licensing Board improperly terminated this proceeding by granting summary disposition. Apparently, Intervenor believes that the result of this case, extending the WNP-1 construction permit, is tantamount to issuing the permit in the first instance, because its contention challenging the need for power to be generated by WNP-1 attacks the fundamental basis upon which the construction permit was issued.¹⁹ Thus, Intervenor concludes that Section 2.749(d) prohibits the use of summary disposition.

Intervenor misapprehends the applicable legal requirements governing the use of summary disposition in connection with the issuance of construction permits. Section 2.749(d) proscribes the use of summary disposition to determine "the ultimate issue as to whether [a construction] permit shall be issued." This is because a hearing on the issuance of a construction permit is mandatory under the Atomic Energy act. The Act does not require such mandatory hearings on construction permit amendments. On its face Section 2.749(d) does not govern the issuance by NRC of a construction permit amendment.

¹⁹ March 19, 1984, Appeal at 2.

Section 2.749(d) is intended to prohibit the use of summary disposition (except for subordinate issues) only in proceedings "involving a construction permit where a hearing is required by law."²⁰ Section 189(a) requires a mandatory hearing whenever an application for a construction permit for a power reactor is filed. It states in this regard that NRC "shall hold a hearing . . . on each application under Section 103 . . . for a construction permit for a facility."

In contrast, Section 189(a) states with respect to construction permit amendments that, "In cases where a construction permit has been issued following the holding of . . . a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to a construction permit . . . without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. . . ."

The instant proceeding involves the issuance of a construction permit amendment for a facility in which the mandatory construction permit application hearing has already been held.²¹ It does not involve the issuance of a construction permit. As a result, there is no legal

²⁰ 37 Fed. Reg. 15127, 15129 (1972) (emphasis added).

²¹ Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 1 and 4), ALAB-309, 3 NRC 31 (1976).

requirement under Section 189(a) that a mandatory hearing on the requested construction permit amendment take place. Nor, therefore, is such a requirement imposed by Section 2.749(d). Accordingly, the limitation on the use of summary disposition set forth in that rule does not apply. For these reasons, the Licensing Board did not violate Section 2.749(d) when it granted summary disposition on Intervenor's only contention and terminated the proceeding.

C. The Licensing Board Memorandum
and Order Was in Accordance
With 10 C.F.R. § 2.760

Intervenor argues that the Licensing Board Memorandum and Order did not satisfy 10 C.F.R. § 2.760 because the Memorandum and Order was not supported by reliable, probative and substantial evidence. Intervenor asserts in this regard that the Licensing Board could not have satisfied Section 2.760 because it construed all material facts in favor of Intervenor for purposes of deciding the Motions for Summary Disposition, rather than making findings as to alleged issues of material fact.²²

This argument is incorrect for numerous reasons. First, as Intervenor states, when a motion for summary disposition is pending before a licensing board, "the record must be viewed in the light most favorable to the

²² March 19, 1984, Appeal at 3.

party opposing the motion."²³ The Licensing Board recognized this obligation and "construed all of the material facts in favor of intervenor."²⁴ Doing so did not constitute "merely an expeditious manner with which to dispense with the genuine issues of material fact which are in dispute."²⁵ Rather, the Licensing Board assumed that each of the material allegations raised by Intervenor was true. Given this procedural posture of the hearing, as a matter of both law and logic, Intervenor may not now argue that the Licensing Board erred by construing all material facts in its favor and not making formal findings of fact.

Second, 10 C.F.R. § 2.760, upon which Intervenor relies, is rooted in Section 557(c) of the Administrative Procedure Act.²⁶ Under that provision the agency's decision must "simply be 'sufficiently clear so that a court is not required to speculate as to its basis.' O-J Transport Co. v. United States, 536 F.2d 126, 130 (6th Cir. 1976), cert. denied, 429 U.S. 960 (1976). . . ."²⁷

²³ Id. at 4.

²⁴ February 1, 1984, Memorandum and Order at 18.

²⁵ March 19, 1984, Appeal at 4.

²⁶ Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 368 (1978).

²⁷ Lodi Truck Service v. United States, 706 F.2d 898, 901 (9th Cir. 1983).

In this regard the Appeal Board has previously held that a licensing board decision "meets the requirements of the Administrative Procedure Act and the Commission's Rules of Practice if it sufficiently informs a party of the disposition of its contentions."²⁸

Intervenor believes that Section 2.760 was not satisfied, apparently because the Licensing Board failed to state how in its view the Licensee demonstrated valid reasons for seeking an extension of the WNP-1 construction permit.²⁹ This simply is not the case. The Licensing Board reviewed Intervenor's Answer to NRC Staff & Applicant's Motions for Summary Disposition and found that "without dispute" the construction of WNP-1 was delayed due to a lack of financial resources.³⁰ It then addressed Intervenor's legal argument that the Licensing Board should render a judgment in the construction permit amendment proceeding as to why the plant should be completed, even though the decision to defer construction was made for valid business reasons. In this regard, the

²⁸ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), quoting Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 321 (1972); see Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 n.4 (1980).

²⁹ March 19, 1984, Appeal at 3.

³⁰ February 1, 1984, Memorandum and Order at 11-12.

Licensing Board examined the applicable precedent. After explaining its rationale, the Board concluded correctly that the argument raised by Intervenor was inconsistent with previous Commission guidance.³¹ In short, the Licensing Board clearly satisfied Section 2.760 by setting forth with sufficient clarity the basis for each aspect of its decision. Therefore, Intervenor's argument to the contrary should be rejected.

D. The Legal Standards Governing Motions for Summary Disposition Were Properly Applied

Intervenor believes that the Licensing Board erroneously granted summary disposition because there remain genuine issues to be tried, "including the prudence of the action taken by the Applicant given alternatives" to the construction deferral and the reasonableness of the duration of the requested construction permit extension.³² Intervenor also claims that the Licensing Board ignored an affidavit it submitted regarding its ability to testify on certain of its claims.³³

This argument reveals the fundamental misunderstanding of Intervenor as to the scope of this proceeding. First, there is no material dispute raised by Intervenor's assertion that Licensee could have adopted

³¹ Id. at 12-13.

³² March 19, 1984 Appeal at 4.

³³ Id. at 5.

what Intervenor believes were alternatives more prudent than deferring WNP-1. This argument apparently is based on the requirement that a licensee seeking an extension of its construction permit establish "good cause" under Section 185 of the Act and 10 C.F.R. § 50.55(b).

Intervenor apparently reasons that to demonstrate good cause the Licensee was obliged to show that it had valid business purposes for deferring WNP-1 and that if there were alternatives available to deferral which were more prudent, such valid business purposes could not exist.

The simple answer to this argument is that if adopted it would transform the NRC into an agency charged not just with regulating the health and safety aspects of nuclear energy but also with overseeing business decisions of its licensees. Intervenor has cited no authority for such an expansive reading of the "good cause" requirement, no doubt because such authority does not exist. As the Appeal Board pointed out, "an intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electrical power than that originally projected would constitute delay for valid business purpose."³⁴ The Appeal Board does not suggest that the NRC should second guess the underlying basis of

³⁴ WNP-2, ALAB-722, supra, 17 NRC at 552 n. 6, cited with approval in Seabrook Station, Unit 2, CLI-84-___, supra, March 29, 1984, slip op. at 5 n. 2.

those business decisions by litigating their correctness. Yet, this is precisely what Intervenor asked the Licensing Board to do.

That the Intervenor was properly proscribed from litigating whether the decision by Licensee to defer construction at WNP-1 was prudent is also borne out by Seabrook Station, Unit 2, CLI-84-___, supra. As indicated earlier, the Commission has been clear that "questions about the need for power, cost of completion and financial consequences to both the utility and ratepayers [are questions] far beyond the scope of a construction permit extension proceeding, which is confined to the factual basis asserted for delay."³⁵ Therefore, the Licensing Board acted correctly when it ruled that Intervenor's claims regarding these alternatives did not constitute a material dispute of fact that was litigable in a construction permit extension proceeding.

Second, Intervenor claims that a material dispute of fact exists as to the adequacy of the duration of the construction permit extension requested by Licensee. As a basis for this claim, Intervenor alleges that (1) more recent projections suggest that WNP-1 may not be completed until after 1991, the consequence of which would be to render the requested construction permit insufficient and

³⁵ Seabrook Station, Unit 2, CLI-842___, supra, March 29, 1984, slip op. at 5.

(2) the total period of time authorized for construction is so long as a result of the disputed construction permit extension that such extension is unreasonable by virtue of safety and environmental questions resulting from plant degradation.

Again, Intervenor's factual arguments regarding the insufficiency of the requested construction permit extension are outside the scope of this proceeding. These arguments are premised on 10 C.F.R. § 50.55(b) which provides that "upon good cause shown the Commission will extend the completion date [of a construction permit] for a reasonable period of time [emphasis added.]" 10 C.F.R. § 50.55(b) in turn is based on Section 185 of the Act.

There is no indication in Section 185 or its legislative history that the inclusion of earliest and latest construction completion dates in a construction permit was intended to place any time limits on the construction of power reactors and, therefore, on the duration of construction permit extensions, as Intervenor suggests.³⁶ If anything, Congress was sensitive to the fact that the civilian electric utility industry would be making considerable investments in power reactors. Implicit in this sensitivity is the recognition that the electric utility industry would want its investment to

³⁶ March 19, 1984, Appeal at 9.

yield results (electrical energy) within the shortest period of time.³⁷ As a result, no incentive from Congress in the form of construction completion deadlines was needed to assure prompt construction of power reactors.

Nor does the reference in 10 C.F.R. § 50.55(b) to a reasonable period of time establish such limits. There is no meaningful "legislative history" accompanying this rule, which was promulgated in 1956, and certainly no basis to conclude that the Commission intended when it promulgated Section 50.55(b) to impose deadlines by which power reactors were to be constructed. The only possible inference which can be drawn from the Statement of Considerations accompanying the rule is that Section 50.55(b) was intended merely to implement authority granted NRC (then the Atomic Energy Commission) in Section 185 of the Act.³⁸

Given this regulatory framework, the Licensing Board correctly dismissed Intervenor's claims that the duration of the construction permit extension was insufficient. The Licensing Board properly concluded that there simply is no regulatory or statutory basis for challenging a construction permit extension on the grounds of

³⁷ See Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 412 (1961).

³⁸ 21 Fed. Reg. 335 (1956).

insufficiency. It reasoned that absent an overall limitation on the total period authorized under Section 185 or 10 C.F.R. § 50.55(b), Licensee "could only injure itself [by seeking an insufficient construction permit extension] because it would then be forced to apply for another extension . . . when its original 'good cause' demonstration could have supported an extension for the total time required. . . ."39

The Licensing Board properly dismissed Intervenor's claim that the duration of the requested construction permit extension was unreasonable due to its insufficiency for an additional reason. Based on past NRC practice, the inquiry into the reasonableness of a construction permit extension has focused on whether the extension sought is for a reasonable period of time, given the reasons offered by a licensee in support of its showing of good cause. It has not focused on whether the total period of time authorized to construct a power reactor given the construction permit extension is reasonable. For example, if a licensee relies upon a one-year labor dispute to establish that its construction permit should be extended, the reasonableness of the extension should be measured against the length of the dispute. Similarly, if design changes required by NRC slow construction by six months,

39 February 1, 1984, Memorandum and Order at 16.

thereby triggering a need to extend the construction permit, the reasonableness of the extension should be evaluated in terms of the time needed to complete the design changes.

This approach was taken by the Licensing Board in Georgia Power Co. (Vogtle Nuclear Power Plant, Units 1 and 2).⁴⁰ There, the Licensing Board concurred with the evaluation by the Staff when it examined whether the length of the delay experienced by the Licensee, "and thus whether the amount of time requested by the Licensee [was] reasonable under the circumstances."⁴¹

Moreover, the past practice of the NRC Staff in implementing 10 C.F.R. § 50.55(b) has been to evaluate the reasonableness of the requested construction permit extension in terms of whether it is commensurate with the delays resulting from the good cause cited by the licensee in support of its extension request. For example, on December 21, 1981, the Staff issued an Order extending the latest construction completion date for the Callaway Plant, Unit No. 1 for a number of reasons, including lack of financing. In its evaluation of the construction permit extension request, the Staff specifically assessed the duration of the request in terms of whether its

⁴⁰ LBP-77-2, 5 NRC 261, 274, aff'd, ALAB-375, 5 NRC 423 (1977).

⁴¹ Id.

reasonableness was commensurate with the factors cited by the licensee there in support of its showing good cause.⁴² A similar inquiry was undertaken in response to a construction permit extension request sought for Waterford 3, which was also triggered in part by difficulties in financing.⁴³

When viewed in this light, it is clear that the Licensing Board properly granted summary disposition as to Intervenor's claim that the requested construction permit extension was unreasonable because it was insufficient. The length of the construction permit extension in dispute was from two to five years. Under current circumstances during that period financing to complete construction of WNP-1 will probably not be available. Further, inability to finance construction constitutes good cause.⁴⁴ Therefore, because the length of the extension is

⁴² Evaluation of Request for Extension of Construction Permit No. CPPR-139 for the Callaway Plant, Unit 1, Docket No. STN 50-483, Dec. 21, 1981 at 2.

⁴³ Evaluation of Request for Extension of Construction Permit No. CPPR-103 for the Waterford Steam Electric Station, Unit No. 3, Docket No. 50-382, Nov. 9, 1981 at 2. Because this evaluation and the evaluation in Callaway, supra, n. 43 constitute official NRC records, the Appeal Board may afford them the same weight as an affidavit even though they are not formally part of the record in this proceeding. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-90, 6 AEC 11, 15 n. 4 (1973).

⁴⁴ Seabrook Station, Unit 2, CLI-84-__, supra, March 29, 1984, slip op. at 5 n. 2.

commensurate with the factor relied upon by Licensee in establishing good cause, the construction permit extension is for a reasonable period of time.⁴⁵ Accordingly, the Licensing Board properly granted summary disposition as to Intervenor's claim that the requested construction permit extension was for an insufficient period of time.⁴⁶

Similarly, the Licensing Board correctly found that no material issues existed as to the reasonableness of the construction permit extension because of the total period of time for which construction of WNP-1 was authorized. As discussed above, there is no statutory or regulatory basis upon which to argue that reactor construction must

⁴⁵ As stated earlier, the Commission has ruled that with respect to good cause, questions regarding need for power and costs of completion are outside the scope of a construction permit proceeding. Seabrook Station, Unit 2, CLI-84-___, supra, at 5. Intervenor's claim that the requested extension is unreasonable due to its insufficiency is a question that would be litigated with Seabrook Station, Unit 2, CLI-84-___ to bar the litigation of such issue in the context of "good cause" but permit them to be litigated within the context of whether a construction permit extension was for a reasonable period of time.

⁴⁶ Licensee recognizes that the Licensing Board did not rely upon this theory when granting summary disposition. However, it is well-established that the Appeal Board is free to affirm a Licensing Board based on a theory not relied upon by the Licensing Board but advanced before it. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

be completed within a certain period of time.⁴⁷ In addition, to the extent Intervenor desired to raise health, safety or environmental issues to challenge the reasonableness of the construction permit extension,⁴⁸ such issues are not within the scope of a construction permit extension hearing.⁴⁹

Finally, Intervenor argues that the Licensing Board impermissibly failed to consider an affidavit Intervenor submitted which set forth its ability to call a witness who would testify that there is no need for the power from WNP-1 by 1991 or anytime thereafter; that the cost of power from WNP-1 renders it an uneconomic energy option; and that the Northwest Power Planning Council does not support the operation of WNP-1 prior to 1996.⁵⁰ The short answer to this argument is that the testimony Intervenor offered failed to address any material issue before the Board. The question of whether in the future there will ever be a need for the power to be generated by WNP-1 does not bear on whether Licensee had good cause to defer the construction of WNP-1 such that an extension of its

⁴⁷ See notes 36-38, supra, and accompanying text.

⁴⁸ March 19, 1984, Appeal at 10.

⁴⁹ WNP-1 and 2, CLI-82-29, supra, 16 NRC at 1228.

⁵⁰ Affidavit of Nina Bell, Staff Intervenor, at 1-2, attached to Intervenor's Answer to NRC Staff & Applicant's Motions for Summary Disposition, December 3, 1983.

construction permit was needed⁵¹ or whether the duration of the extension is for a reasonable period of time.⁵² Therefore, the Licensing Board properly accorded the affidavit little or no weight when granting summary disposition.

E. The Licensing Board Properly
Interpreted the Reasons for Delay

The Intervenor next argues that the Licensing Board improperly narrowed the inquiry into whether Licensee made an adequate showing on why an extension of the WNP-1 construction permit was warranted. Specifically, Intervenor apparently contends that the Licensing Board made two errors. First, Intervenor claims that it was precluded improperly from showing that the real reason for a delay in the construction of WNP-1 was a permanent (as opposed to temporary) lack of financing and downward spiral in electrical demand such that output from WNP-1 will never be needed. Second, Intervenor claims that given what it believes is a permanent condition barring the resumption of construction, the Licensing Board improperly failed to require the Licensee to justify continued plant construction.⁵³

⁵¹ See notes 16-18, supra, and accompanying text.

⁵² See notes 36-49, supra, and accompanying text.

⁵³ March 19, 1984, Appeal at 6-7.

Again, Intervenor's argument is misplaced. This argument is nothing more than an attempt by Intervenor to litigate need for power and financial qualifications issues by framing its argument in terms of whether good cause exists for the requested construction permit extension. Thus, Intervenor is attempting to circumvent the Commission's teaching that the good cause showing required by Section 185 and 10 C.F.R. § 50.55(b) goes to the "reasons that have contributed to the delay in construction."⁵⁴ As the Licensing Board found,⁵⁵ there was no disagreement as to the reasons for the construction delay necessitating a construction permit extension. It is those reasons which bear on the question of good cause for the requested construction permit extension.⁵⁶ Therefore, the Licensing Board properly granted summary disposition on this point.

The attempt by Intervenor to litigate possible future construction delays is also apparent in its claim that the Licensing Board improperly failed to require the Licensee to justify continued construction. Intervenor bases its argument on the following dictum in WNP-2, supra:

⁵⁴ Seabrook Station, Unit 2, CLI-84-___, supra, March 29, 1984, slip op. at 4; WNP-1 and 2, CLI-82-29, supra, 16 NRC at 1228.

⁵⁵ February 1, 1984, Memorandum and Order at 11.

⁵⁶ Seabrook Station, Unit 2, CLI-84-___, March 29, 1984, slip op. at 4.

We recognize that the Commission's implementing regulation, 10 C.F.R. § 50.55(b), does not track the statute in all respects and focuses on whether the applicant was responsible for the delay. But as we discern the Commission's intent, its regulation and guidance suggest that, unless the applicant was responsible for the delays and acted in a dilatory manner (i.e., intentionally and without a valid purpose), a contested construction permit extension proceeding is not to be undertaken at all. Moreover, even if a properly framed contention leads to such a proceeding and is proven true, the statute and implementing regulations do not erect an absolute bar to extending the permit. A judgment must still be made as to whether continued construction should nonetheless be allowed.⁵⁷

This language indicates that a judgment must be made as to whether continued construction should be allowed but only after a finding is made that the construction permit holder was responsible for delays in construction and acted in a dilatory manner.⁵⁸ There is no dispute here that the construction delays at WNP-1 were for valid purposes.⁵⁹ Therefore, the Licensing Board was not required to address whether continued construction of WNP-1 is justified.

⁵⁷ WNP-2, ALAB-722, supra, 17 NRC at 553.

⁵⁸ Id.

⁵⁹ Seabrook Station, Unit 2, CLI-84-__, supra, March 29, 1984, slip op. at 4-5.

F. The Licensing Board Decision
Does Not Render 10 C.F.R.
§ 50.55(b) Meaningless

Intervenor next cites four examples which it claims demonstrate that the Licensing Board construed Section 50.55(b) so narrowly as to "render the law utterly without meaning."⁶⁰ For the most part, these examples are reformulations of arguments raised by Intervenor and addressed earlier in this brief. Nevertheless, Licensee addresses each of these examples below.

Example One. Intervenor asserts that the Licensing Board improperly read out of Section 50.55(b) the requirement that a construction permit extension be for a reasonable period of time by declining to allow Intervenor an opportunity to litigate whether the two to five year construction deferral requested by Licensee "is (1) not reasonable due to its insufficiency (2) not reasonable because there is safety and environmental significance to the length of time of an extension and (3) not accurate because it can be shown that events subsequent to the request . . . affect the schedule as to cause a 5-12 year delay. . . ."⁶¹ The linchpin of Intervenor's argument is that there "must be a period of time which the Commission

⁶⁰ March 19, 1984, Appeal at 8.

⁶¹ Id.

would consider unreasonable"⁶² and that such period goes to the total period of time needed to construct the facility in question.

As discussed above, there is no time limit set forth either in Section 185 of the Act or 10 C.F.R. § 50.55 establishing the total number of years by which a power reactor must be completed.⁶³ Additionally, whether a construction permit extension is of a reasonable duration is measured in terms of the good cause for the extension.⁶⁴ Lastly, environmental and safety issues do not go to the question of whether a construction permit is for a reasonable period of time.⁶⁵ Accordingly, Intervenor in example one raised issues outside of the scope of this proceeding and not material to the issues pending before the Licensing Board. It was for this reason that the Licensing Board correctly dismissed such issues.

Example Two. Intervenor apparently contends that the Licensing Board ignored the "reasonableness" requirement of Section 50.55(b) when it barred litigation of the health and safety effects of the requested construction

⁶² March 19, 1984, Appeal at 9.

⁶³ See notes 36-38, supra, and accompanying text.

⁶⁴ See notes 40-46, supra, and accompanying text.

⁶⁵ See notes 48-49, supra, and accompanying text.

permit extension when such extension was granted.⁶⁶ This argument itself demonstrates that Intervenor did in fact endeavor to raise health and safety issues during the construction permit extension proceeding, contrary to Commission directive.⁶⁷ Accordingly, it confirms that the Licensing Board properly granted summary disposition.

Example Three. Intervenor believes that the Licensing Board rendered Section 50.55(b) meaningless by ruling that while Intervenor could challenge whether Licensee had a rational purpose in deferring construction, "in fact the issue is out of the reach of the Intervenor because [the Board] considers the reasonableness of the decision to delay a question better left to the Applicant."⁶⁸ This characterization of the decision by the Licensing Board is not entirely accurate. The Licensing Board in fact considered whether Intervenor set forth any basis for concluding that Licensee did not have a rational basis for deferring construction of WNP-1. The Licensing Board concluded that Intervenor failed to allege any facts supporting such an argument.⁶⁹

⁶⁶ March 19, 1984, Appeal at 8.

⁶⁷ See note 49, supra, and accompanying text.

⁶⁸ March 19, 1984, Appeal at 11.

⁶⁹ See February 1, 1984, Memorandum and Order at 11. The issue of whether Licensee abandoned WNP-1 was not before the Licensing Board, as Intervenor states.

(footnote continued)

Example Four. Intervenor asserted that the Licensing Board narrowly construed the word "intentional" as used in WNP-2, ALAB-722, supra, and in so doing precluded litigation of whether in fact the Licensee itself initiated the BPA recommendation upon which it then based a showing of good cause.⁷⁰ The short answer to Intervenor's argument is that the Licensing Board granted summary disposition assuming that Licensee initiated the BPA recommendation. The Board then dismissed Intervenor's claim because there were no material disputed facts as to the purposes for the delay.⁷¹ This disposition of Intervenor's claim was premised on its failure to show that there were material facts in dispute both as to whether Licensee acted intentionally and without a valid business purpose to delay construction. As was made clear

(footnote continued from previous page)

March 19, 1984, Brief at 11. The only reason the Licensing Board raised abandonment apparently was to illustrate a claim Intervenor could have made which the Board might have viewed as precluding summary disposition. Therefore, the Licensing Board was simply providing in dictum its views on how a licensee's claim as to good cause could be challenged. The Licensing Board clearly was not placing Intervenor in a "catch-22." Id. at 12.

⁷⁰ Id. at 12-13.

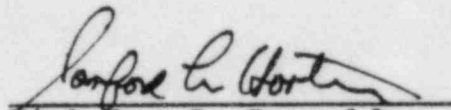
⁷¹ February 1, 1984, Memorandum and Order at 11.

in WNP-2, ALAB-722, supra, unless both prongs of that standard are satisfied, a challenge to a construction permit extension cannot succeed.⁷²

V. CONCLUSION

In view of the foregoing, Licensee submits that the Licensing Board properly granted Licensee's and Staff's Motions for Summary Disposition and dismissed the proceedings. The decision of the Licensing Board should be affirmed.

Respectfully submitted,



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April 23, 1984

⁷² WNP-2, ALAB-722, supra, 17 NRC at 553.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing
"Licensee's Response to Appeal by Coalition for Safe Power
of Licensing Board Order Dated February 1, 1984, Granting
Applicant and NRC Staff Motions for Summary Disposition"
in the captioned matter were served upon the following
persons by deposit in the United States mail, first class,
postage prepaid, this 23rd day of April, 1984:

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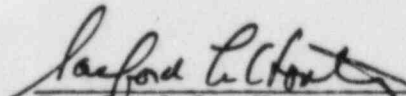
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