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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPEAL BY COALITION FOR SAFE POWER OF
LICENSING BOARD ORDER DATED FEBRUARY 2, 1984 GRANTING
APPLICANT AND NRC STAFF MOTIONS FOR SUMMARY DISPOSITION

I. INTRODUCTION

On February 2, 1984 the Atomic Safety and Licensing Board in the above-captioned case issued a Memorandum and Order granting Applicant's and NRC Staff's Motions for Summary Disposition on Coalition's Contention No. 2, the sole contention admitted to the proceeding. This is an appeal of that Order to the Atomic Safety and Licensing Appeal Board pursuant to 10 CFR 2.760, 2.762 and 2.785.

II. SUMMARY DISPOSITION CANNOT BE HAD ON COALITION CONTENTION NO. 2 SUCH THAT IT IS USED TO DISMISS THE PROCEEDING IN ENTIRETY.

Section 2.749(d) of 10 CFR, concerning the authority of the presiding officer to dispose of certain issues in the pleadings, adds the following caveat to the use of motions for summary disposition:

> * * * in any proceeding involving a construction permit for a production or utilization facility, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall be issued.

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The Licensing Board incorrectly dismissed Coalition's sole admitted contention because in so doing terminated a proceeding involving the construction permit for WPPSS Nuclear Project No. 1. This proceeding directly affects the issuance or withholding of the construction permit itself: the effect, against which 2.749(d) is intended to protect, is the same as the grant of a construction permit. This prevents the issuance of permits without serious consideration by the assigned licensing boards of the issues involved in such a major federal action.

The existence of this entire proceeding, and more specifically the contention admitted for litigation, challenges the fundamental basis upon which the original construction permit was issued, namely the need for its power. There is no more important justification for the broad undertaking of nuclear power plant construction than the ultimate (and only benefit) of the electricity which is produced. If there is no need for this product, it does not matter, for example, how safe its operation might be or how little environmental damage it may cause. Thus, the Order, constituting as it does, both an initial decision terminating the proceeding and a ruling upon motion by the Staff and Applicant, violates this provision.

III. THE ORDER IS NOT SUFFICIENT TO CONSTITUTE AN INITIAL DECISION.

10 CFR 2.760, regarding initital decisions and their effect, provides in part that:

> (c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:
> (1) Findings, conclusions and rulings, with the reasons or basis for them on all material issues of fact, law or discretion presented on the record; * * *

Contrary to these requirements, the February 2 Order failed to make findings of fact, conclusions of law or rulings on relevancy, on all the material issues raised in the case, specifically those presented in "Intervenor's Answer to NRC Staff and Applicant Motions for Summary Disposition". Instead the Licensing Board "construed all the material facts in favor of intervenor" for the purpose of deciding the motion. This does not constitute a decision based on the record and "supported by reliable, probative and substantial evidence" but merely an expeditious manner with which to dispense with the genuine issues of material fact which are in dispute.

The single statement upon which this Order turns is:

> We nevertheless [after construing all facts in favor of the Intervenor, hypothetically] reach the position that Applicant has demonstrated good cause for delaying construction by demonstrating valid reasons for doing so even though there may be more prudent alternatives and the option selected may prove fruitless.

This is insufficient as a basis. The Licensing Board does not state how the Applicant has demonstrated valid reasons although it may be surmised that it means all the unnamed "uncontroverted material facts" of the next sentence (where it proceeds to say that perhaps there may not have been a

valid business purpose).

IV. THE LEGAL STANDARD GOVERNING MOTIONS FOR SUMMARY DISPOSITION WERE MISAPPLIED.

10 CFR 2.749 authorizes summary disposition where a party is entitled to judgement as a matter of law, where it is clear what the facts are and no genuine issues remain. The opposing party need not show that s/he will prevail on the issues but simply that there are genuine issues to be tried. See American Manufacturers Mutual Insurance Co. v. American Broadcasting Paramount Theaters, Inc., 388 F. 2d 272, 280 (2d. Cir. 1976); Pacific Gas & Electric Company (Stanislus Nuclear Project, Unit No. 1) LBP-77-45, 6 NRC 159, 163 (1977). The record must be viewed in the light most favorable to the party opposing the motion. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 8777 (1974).

It appears that the Licensing Board in the instant case believed it could discharge its duty by stating it had construed all the material facts in the opposing party's favor, as stated in Section III above, despite the fact that it failed to explain how the burden of proof had been met by either movant. As the record stands there remain genuine issues to be tried, including: the prudency of the action taken by the Applicant given the other alternatives; the effect of subsequent events on the schedule for completion of the project and the others included in Coalition's "Material Facts To Which There Are Genuine Issues To Be

Heard", dated December 13, 1983. The Intervenor submitted an affidavit regarding its ability to bring a witness to testify to the veracity of certain of its claims yet the Licensing Board did not weigh this in its ruling on the motions.

V. THE LICENSING BOARD ERRED IN INTERPRETING THE REASONS FOR DELAY.

The Licensing Board was unduly narrow in its interpretation of Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 1 and 2), CLI-82-29, 16 NRC 1221 (1982) which established among other things, that the inquiry of a CPA proceeding should be into the reasons which have contributed to the delay in construction. The Commission itself quoted from Indiana & Michigan Electric Company (D.C. Cook, Units 1 and 2), ALAB-129, 6 AEC 414 (1973) therein, that a determination should be based on "common sense" and the "totality of the circumstances". It also stated:

> that, despite the fact that a holder of a construction permit must establish reasons "founded in fact" explaining the delay, that it
>
> > * * *cannot misrepresent those reasons and because it might, "[an] intervenor is thus always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute "good cause."

The Appeals Board in Washington Public Power Suppy System (WPPSS No. 2) ALAB-722, 17 NRC ___ (slip op. at 9) gave an

example of reasons which would fulfill NRC's requirements a slowing in the need for power and a temporary lack of funds. In this case, the Intervenor alleged that a permanent lack of need and lack of funds were reasons for the "delay" and further that the impact on rates perceived by the Bonneville Power Adminstration was another major reason. Despite the explicit language in WPPSS 1 & 2, the Licensing Board ignored this issue the Intervenor had placed in controversy.

On page 12 of the Order the Board, in applying the example of the Appeals Board gave in ALAB-722 in essence concluded that the mere allegation by the Applicant or Staff that there was a slowing in need for power and a temporary lack of financing was enough to constitute a showing of "valid business purpose". It failed to consider Intervenor's arguement that the lack of need and lack of financing were more or less permanent, despite Intervenor's ability to produce a witness to support its claims. Instead it placed the temporary vs. permanent question in the context of the Appeals Board dictum of ALAB-722 which it then deemed invalid.

The result of this is that the Applicant has had to make no showing of the veracity of its claim that the need and financing problems are only temporary, although the Intervenor overcame its burden for the purposes of the motion for summary disposition. This both misreads the literal interpretation of the examples given in ALAB-722 and

makes a mockery of the Commission's regulations and the National Environmental Policy Act. Most importantly, it is directly in contradiction with the Commission's holding that the reasons for delay are to be litigated. The Board has already determined that mismangement which caused the delay over the period during which construction was ongoing was not intentional and therefore not at issue. It admitted Contention No. 2 which addressed the 2-5 year period and yet it catagorically refuses to allow litigation of the reasons for the 2-5 year delay, the very subject of this case.

The Board then places the issue of the reasons for delay in the context of the dictum of ALAB-722 which Intervenor contends requires a finding, where appropriate, on the good cause for extending the permit, whereupon the Board rules against it on a matter of law. Intervenor disputes the Board's interpretation of the Commission's holding in WPPSS 1 & 2 that an inquiry into the good reasons for extension is prohibited. In fact, the Commission would look foolish to consider the reasons for delay and not take them under consideration as reasons to extend or to not extend, if there is a nexus between the reasons for delay and the future of the plant.

For example, if the only reason advanced by all parties was need for power and the Board were to hold an evidentiary hearing looking into this issue as a reason for delay and it determined that there was a lack of need for the plant such

that the plant was properly delayed. If the Board then failed to conclude that the plant would or would not be needed, after it had examined for other purposes the fundamental reason for the plant in the first place -- its electricity -- the NRC would have been indulging itself in an exercise merely to fulfill the requirements of the law. But at the same time it would have also failed to protect the interests of the public as required by D.C. Cook, supra.

VI. THE LICENSING BOARD DECISION EFFECTIVELY RENDERS 10 CFR 50.55(b) MEANINGLESS.

10 CFR 50.55(b) is a regulation codifying sections of the Atomic Energy Act passed by Congress. It is not a provision which can be waived without an act of Congress or similar formal procedure. The Licensing Board in this case has construed the meaning and intent of this secion, as well as the relevant cases, so narrowly as to render the law utterly without meaning. This occured in several ways.

Example 1

Intervenors asserted that the 2-5 year deferral requested by the Applicant is 1) not reasonable due to its insufficiency 2) not reasonable because there is a 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 (i.e. the halt to construction of WNP-3, changes in the need for power forecasts done by the Bonneville Power Adminstration) affected the schedule as to cause a 5-12 year delay. The

Licensing Board considers these arguements at page 16 of its Order, concluding that because there is no set time period established to be "reasonable" by the regulation, that Intervenors may not argue that the Applicant is requesting a shorter period than it is acutally contemplating. The Licensing Board makes two errors in this regard. First, it fails to recognize the fact that there must be a period of time which the Commmission would consider unreasonable, notwithstanding the fact that that period is not quantified in the regulations. (Clearly, Applicant stands a greater risk of approaching this period where the Commission would draw the line and say it was unreasonable the greater the number of years it requests.) On the other hand, if the Applicant comes in and requests 2-5 years and in five years repeats the request, each time the Commission rules on a period which appears to be more reasonable than the actual total required to complete the plant. This is not speculation on the part of the Intervenor -- the documents discussing the 5-12 year period were produced by BPA. Applicant in this case has actually misled the Board and the Commission by not bringing this to its attention. In sum the Licensing Board essentially states that there is no time period which it could consider unreasonable, thus rendering 10 CFR 50.55(b) moot. To allow any extension without making the required finding makes a mockery of the Commission's own regulations.

Example 2

The Licensing Board also contends that, to the extent this issue of reasonableness is tied to safety and environmental issues, it is improper to litigate at this juncture. Despite the reasoning of the Board with respect to when the most propitious moment would be for litigation, it essentially removes the law (50.55(b)) from the books. Under its reasoning, even if the Applicant requested a 50-year delay, it would be more propitious to determine the effects of the delay -- and thus the reasonableness of the request -- at the operating license stage. Judging the reasonableness of the time period, however, is a matter which by law is to take place at the time the extension is considered. The Licensing Board has created a record such that no matter how long a delay has been requested its reasonableness cannot be challenged because 1) its accuracy cannot be placed at issue and 2) its effect cannot be placed at issue. Intervenor is at a loss to see what tools are left for the Commission to determine if a requested extension is in fact for a "reasonable period of time".

Example 3

The Licensing Board puts the Intervenor in a similar Catch-22 situation regarding the issue of the prudency of the decision to mothball WNP-1 in lieu of the other available alternatives. The Board's consideration of this issue resulted in its determination that 1) there was no

justification for the Board to "question the reasonableness of Applicant's decision" and 2) had the Intervenor alleged that the Applicant had actually decided to abandon the plant, it would have considered the issues differently. The Licensing Board agrees that the issue of whether the decision to delay (and thus cause the need for the extension) had a rational business purpose is a matter upon which it may rule. But it then establishes that, in fact, the issue is out of reach of the Intervenor because it considers the reasonableness of the decision to delay a question better left to the Applicant. This decision suggests the Board need only rubberstamp the opinion of the Applicant that it acted with prudence in order to satisfy the requirements of the law.

The Board then goes on to state that had the Intervenor alleged abandonment it would have treated the question differently. The motion for summary disposition to which the Intervenor was responding did not allege abandonment and thus the issue was not raised for litigation in this case. It is doubtful whether such a contention would have been admitted had it been offered. (Certainly, this Intervenor believes that the plant has been abandoned despite the application considered herein: the plant may be deferred up to 12 years, if not more, at which time it will almost certainly be unlicensable; funds for restart do not appear to be forthcoming as both BPA and the Northwest Power

Planning Council now ignore the existence of this plant altogether; forecasts for the region continue to plummet.) The Licensing Board then gives as a basis for its conclusion that the Intervenor does not believe abandonment has actually occured: "If Intervenor were convinced that Applicant had irrevocably decided to abandon the plant, it is doubtful that that [sic] it would continue to expend its resources on its interventions in this and the operating license proceedings." Order at 15. It is not for the Board to interpret the Coalition's reason for intervention in this case or any other. The Licensing Board in indulging itself in this logic places the Intervenor in yet another Catch-22.

The reason it has expended any resources on the now-suspended operating license proceeding is not to have intervened in a timely manner could have jeopardized its right to participate as a party were restart ever to occur. Abandoned or not, the Coalition believes that the Applicant is not entitled by law to an extension to its construction permit.

Example 4

The fourth example is the Licensing Board's interpretation of the word "intentional" -- a part of the definition of dilatory made in ALAB-722, supra. The Intervenor showed that the Applicant had requested the BPA recommendation and concurred entirely in it. The Intervenor showed that Applicant had based its entire case

on the recommendation itself, not the underlying reasons for the recommendation. Thus, although the Applicant does not claim lack of financing or lack of need for power as the reasons for the delay, the Licensing Board takes them as its own reasons in finding for the Applicant. The Intervenor also shows that one main reason for the BPA recommendation was the effect of WNP-1 on electric utility rates, a point which is ignored by the other parties and the Licensing Board. In fact the Board states twice that the reasons for the recommendation have not been contested.

In sum, if "intentional" does not pertain to the Applicant making a decision, it is unclear how it could possibly be construed to mean anything. What occured was not an act of god, it was done and brought about by the will of the Applicant, notwithstanding the opinion of its mortage holder. If the Applicant seeks to make the case that the BPA has control over the plant, it should seek a transfer of ownership from the Commission rather than to use the relationship of the two entities as a legal shield. The Licensing Board construed the law so narrowly as to prohibit any possible showing of dilatory conduct on the part of the Applicant.

Dated this day, the 19th
of March, 1984.

Nina Bell
Coalition for Safe Power

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPEAL BY COALITION FOR SAFE POWER OF LICENSING BOARD ORDER DATED FEBRUARY 2, 1984 GRANTING APPLICANT AND STAFF MOTIONS FOR SUMMARY DISPOSITION" in the abovecaptioned matter have been served on the following by deposit in the U.S. Mail, first class, postage prepaid on this 19th day of March, 1984:

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