



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

20-709
May 12, 1980

MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Howard K. Shapar
Executive Legal Director

SUBJECT: REQUESTS FOR HEARING ON LACROSSE ORDER TO SHOW CAUSE

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On February 25, 1980, you issued an order to Dairyland Power Cooperative, the licensee of the LACBWR, that it show cause why it should not submit a proposed site dewatering system and, having obtained NRC approval of the system, why it should not implement the system by February 25, 1981, or place the LACBWR in a cold shutdown condition.

In its answer to the order dated March 25, 1980, the licensee provided information which it hoped would persuade the staff that the site dewatering system was unnecessary. In the event that the staff did not accept the licensee's view, the licensee made a contingent request for a hearing on the order. The staff has not finally determined whether the licensee has provided sufficient justification for not installing the system, but the staff has submitted additional questions to the licensee to assist the staff's evaluation.

In addition to the licensee's filings, the Coulee Region Energy Coalition (CREC), by Anne Morse and Frederick M. Olsen, III have submitted separate requests for a hearing on the February 25th order. It is apparent that both CREC and Mr. Olsen take the position that, at the very least, the licensee should be ordered to install a dewatering system or shut down the LACBWR by February 1981. CREC states that the Order to Show Cause was issued as a result of CREC's "motion" to suspend the LACBWR operating license (i.e., the 10 CFR 2.206 petition filed by Anne Morse which was granted in part and denied in part on February 29, 1980). Mr. Olsen believes that the cost of the dewatering system should be considered at a hearing, and if the system is found uneconomical, the LACBWR should be shut down.

Given the licensee's contingent request for a hearing and the unresolved issue as to whether or not the licensee should implement a dewatering system, CREC and Mr. Olsen have a right to demand a hearing or to intervene in a hearing initiated by

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the licensee. ^{1/} By the terms of 10 CFR 2.202, the issuance of the Order to Show Cause on February 25, 1980, had the effect of initiating a proceeding. When a proceeding has been initiated, section 189a. of the Atomic Energy Act requires that the Commission grant a hearing "upon the request of any person whose interest may be affected by the proceeding". A person who demands, as a matter of right, a hearing on an order (i.e., a proceeding) or seeks intervention in an existing hearing must show that he has an interest which "might be adversely affected if the proceeding has one outcome rather than another". Nuclear Engineering Company (Sheffield Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

The outcome of this proceeding is, of course, in doubt at this time, because the licensee has not agreed to install the dewatering system and the staff has not determined whether to order installation of the system. The licensee, as the party most directly affected by the order, has obvious rights to a hearing on the order; that is, the licensee's interest is "adversely affected" by being commanded to install a dewatering system over its objection. CREC and Mr. Olsen may argue that their interests are "adversely affected" because the proceeding may result in no order to install a dewatering system. They are, therefore, entitled to protect their interests from being injured by initiating or participating in a hearing on the order.

There are, then, two scenarios whereby CREC and Mr. Olsen may obtain a hearing. In either instance, CREC and Mr. Olsen could be "adversely affected", because the outcome of the proceeding may be that the licensee is not ordered to install a dewatering system:

- 1) If the staff rejects the licensee's basis for not installing the dewatering system, the licensee will presumably insist on its hearing rights. CREC and Mr. Olsen may then intervene in this hearing as provided in 10 CFR 2.714.
- 2) If the staff accepts the licensee's rationale and decides that no dewatering system need be installed, then CREC and Mr. Olsen may insist on their rights to a hearing. A proceeding having been begun by the staff upon issuance of the February 25th order, CREC and Mr. Olsen are entitled to protect their interest through a hearing from possible adverse outcome, i.e., no order to install a dewatering system. CREC and Mr. Olsen may pick up where the staff stopped and pursue installation of the dewatering system.

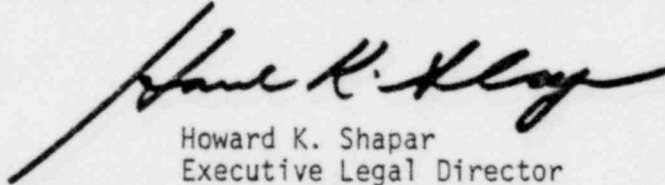
I wish to distinguish this situation from the case of a request for hearing on a confirmatory order. Under a confirmatory order, the licensee consents to new limitations on its license and in effect waives its right to a hearing. There is,

^{1/} This statement is also premised on our belief that CREC and Mr. Olsen can meet applicable "standing" requirements. We base this assumption on the past participation of these parties in the LACBWR licensing process.

of course, no suggestion of a waiver by the licensee in this case. Moreover, third parties generally do not have a right to a hearing under a confirmatory order, unless they claim that they are adversely affected by imposition of the order against the licensee. Typically, requests for a hearing on confirmatory orders are from persons who do not oppose the action ordered, but who claim that some additional action, such as license revocation, should be taken. These persons do not claim that they are adversely affected by the confirmatory order but by some action not taken. Under such circumstances, the Commission has recognized that these persons are not entitled to a hearing on the confirmatory order as a matter of right. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), Memorandum and Order (March 13, 1980). A similar result would obtain in this case if the licensee had consented under 10 CFR 2.202(d) to imposition of an order to install a dewatering system.

Because the Commission (either itself or through a board) must resolve the requests for a hearing on the order, it is appropriate to forward the requests to the Commission. I do not mean to imply by this memorandum that CREC and Mr. Olsen have satisfied all requirements for participating in a hearing. It is unclear, for example, whether either party has any contentions within the scope of the proceeding. Mr. Olsen poses a number of issues concerning the availability of information in the local public document room, issues which are certainly outside the scope of the order. Given the status of this order, however, CREC and Mr. Olsen have crossed an initial threshold indicating that they have at least the right to request a hearing.

Since there have been requests for a hearing on the Order to Show Cause, these requests should be referred to the Commission. I enclose a memorandum for your signature which transmits the requests and other related documents to the Secretary.


Howard K. Shapar
Executive Legal Director

Enclosure:
Memorandum

cc:
D. Eisenhut, D/DOR
D. Ziemann, ORB-2