

DOCKET NUMBER
PROD. & UTIL. REG. 50-346

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



In the Matter of)
)
THE TOLEDO EDISON COMPANY)
and)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY)
)
(Davis-Besse Nuclear Power)
Station))

Docket No. 50-346

REFERRAL OF RULING TO ATOMIC SAFETY AND LICENSING APPEAL BOARD

JURISDICTION

As provided by the Rules of Practice, the Atomic Safety and Licensing Board (hereinafter called the Board) appointed to hear subject case, hereby refers to the Atomic Safety and Licensing Appeal Board its ruling of 27 January 1971 (Transcript 1194). A copy of the Board's written order is attached.

ISSUE

The following question is presented herewith for determination by the Appeal Board:

In view of the paramount interest in conducting a fair and orderly proceeding, whether under the circumstances of this case the definition of the Board's

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authority, as set forth in its order, is compatible legally with authority granted to the Director of Regulation.

FACTS

The application which gave rise to this proceeding was filed 1 August 1969. By letter dated 4 June 1970 the Applicant requested an exemption from 10 CFR 50.10(b) in order to perform certain construction work. Upon complying with several requests for information sought by the Commission, the Applicant then was granted an exemption on 10 September 1970 which authorized certain construction work prior to the issuance of a construction permit.

A notice of hearing dated 30 October 1970 designated this Board to conduct the hearing. A prehearing conference was held on 23 November 1970; the hearing began as scheduled 8 December 1970. While the Board was in session, the Applicant on 7 January 1971 communicated directly with the Director of Regulation seeking an amendment to the exemption dated 10 September 1970 to permit further construction work. The additional construction work included installation of the containment vessel inside the wall of the shield building up to grade level, and placement of the concrete fill inside and outside the containment vessel bottom head and installation of embedments within the inside fill concrete. (T. 1188) This amended

exemption was sought on the ground that "...This once realistic assumption [that a construction permit would be forthcoming by 31 January 1971] has been undermined by a number of unusual circumstances which have prevented the public hearing, which began on December 8, 1970, from proceeding to a prompt and orderly conclusion."

The "unusual circumstances" set forth in the Applicant's 7 January 1971 letter were rulings of the Board. Copies of the proposed exemption were provided the Board and parties on 11 January 1971.

At the hearing held 25 January 1971, Intervenor Living in a Finer Environment, Irwin I. Oster, and William Peany, hereinafter collectively referred to as LIFE, moved,

"...this Board deny the Applicants any right to an exemption under the laws pertaining to the construction of a nuclear plant until such time as these hearings have been concluded, or in the alternative, that these hearings be recessed until such time as it has been determined whether or not the Applicant will receive an exemption from the operation of the law." (T. 1035)

The Board heard argument on the motion and stated it would consider the record and enter its order on the motion the following day. Accordingly, the Board on 26 January stated,

"The Board has considered the motion and finds it has no authority to deny the applicant an extension under law and the AEC regulations pertaining to the construction of a nuclear plant until such time as the hearings are concluded.

Further, the Board finds insufficient grounds to recess these hearings until such time as a determination has been made whether or not the Applicant will receive the sought for extension.

Accordingly, the Board orders the motion denied."
(T. 1086-1087)

LIFE thereupon requested the Board to certify to the Commission the question whether the Board had authority to do either of the acts requested in its motion. (See discussion T. 1087 et seq.) The Board requested counsel for LIFE to provide it with a copy of LIFE's motion in writing together with a legal memorandum citing legal authority in support of the motion.

(T. 1089-1092)

Counsel for LIFE thereupon submitted in writing a copy of the motion and a memorandum of law. (T. 1112 et seq.) The Applicant introduced Applicant's Exhibit No. 4, an affidavit by Howard W. Wahl of the Bechtel Company, project manager for the station. (T. 1178, 1186)

The Board after considering the motion, the legal memorandum, the affidavit and oral arguments ordered,

"...that the Director of Regulation not issue an extension of the exemption sought by the (letter) of January 7, 1971 until after the filing of this Board's initial decision in this matter." (T. 1194)

Counsel for the parties then argued the merits of referring this ruling to the Appeal Board. (T. 1195-1205) The Board took the matter under advisement (T. 1205), subsequently informing the parties that the ruling would be referred to the Appeals Board (T. 1225); requested (T. 1225) and received informal suggestions from the parties regarding the proposed form and content of its communication to the Appeals Board. (T. 1488-1490)

LEGAL AUTHORITIES

The following excerpts from AEC regulations set forth the broad authority of the Board to conduct a fair and orderly proceeding:

"An atomic safety and licencing board shall have the duties and may exercise the powers of a presiding officer as granted by §2.718 and otherwise in this part..." (§2.721 (d))

Section 2.718 provides in part as follows:

"A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the powers to:

* * *

(e) Regulate the course of the hearing and the conduct of the participants.

(f) Dispose of procedural requests or similar matters.

* * *

(k) Issue initial decisions; and

(l) Take any other action consistent with the Act, this chapter, and the Administrative Procedure Act of 1946."
(§2.718 (e), (f), (k), and (l)) (Emphasis added)

Section 2.717(b) provides:

"The Director of Regulation may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding."

The foregoing section of the regulation, inasmuch as it expressly authorizes a presiding officer to modify an order of the Director of Regulation, clearly implies that the presiding officer could suspend such an order or suspend the issuance of such

an order "as appropriate for the purpose of the proceeding." Furthermore, since a presiding officer is so authorized in a proceeding wherein a licensee is a party, then it would appear the authority of the presiding officer would be no less in a situation where, as in the instant case, an applicant for a permit, who has not yet achieved the legal status of licensee, initiates the proceeding.

Section 1.12 of AEC regulations provides in part:

"The Director of Regulation discharges the licensing and other regulatory functions of the AEC, except where final decision rests with ... an atomic safety and licensing board, or the Commission after hearing."

This section supports the contention that during the time an atomic safety and licensing board is performing its function, the board is discharging the licensing function of the AEC at that stage of the proceeding with respect to the matters before it, and therefore the board may take such reasonable steps as are necessary to provide for an orderly proceeding.

DISCUSSION

The Board's order does not in any way affect the validity of the outstanding exemption granted to the Applicant on

10 September 1970, and the Applicant is still free to continue construction under that authorization.

The Board's order does not grant or deny the proposed amended exemption. Accordingly, the circumstances considered by the Appeal Board in the decision of 22 January 1971, Docket 50-322 (Shoreham, No. 1), are not present.

The pendency of the requested exemption cast a cloud over the proceeding because the mere possibility that such an exemption could be granted while the issues in this proceeding were actively under contention (including, among other things a basic challenge to the validity of the radiation standards under which the plant was designed and will operate), was deemed to be highly prejudicial to the good order and fundamental integrity of the proceeding.

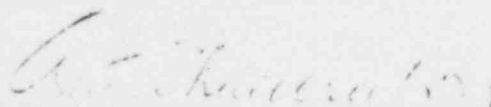
In order to protect the bona fides of the proceeding and continue with the hearing, the Board ordered the Director of Regulation to suspend final action on the requested exemption until the Board had the opportunity of receiving all the evidence in this case, and after appropriate review, making its initial decision.

Involved here is the matter of accommodating the proper exercise of powers of two legal entities in the AEC regulatory system, namely, the Director of Regulation, and the Board sitting in this contested proceeding.

CONCLUSION

As noted above an atomic safety and licensing board has broad legal authority under the regulations to conduct a fair and impartial hearing. There are no provisions in the regulations which expressly or impliedly prohibit a board from issuing an order such as is the subject of this referral to the Appeal Board. The order of the Board was consistent with the intent and purpose of the regulations. Accordingly, the Board urges that the Appeal Board determine that under the circumstances of the case its order was within the scope of its authority and should be sustained.

ATOMIC SAFETY AND LICENSING BOARD



Walter T. Skallerup, Jr.
Chairman

Date 18 February 1971