

*Reg. Files*

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman  
Michael C. Farrar  
Richard S. Salzman



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APR 20 1978

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In the Matter of \_\_\_\_\_  
CONSUMERS POWER COMPANY \_\_\_\_\_  
(Midland Plant, Units 1 & 2) \_\_\_\_\_  
\_\_\_\_\_

Docket Nos. 50-329A  
50-330A

Mr. Fredric D. Chanania for the Nuclear Regulatory Commission staff.

Messrs. Donald L. Flexner, Melvin G. Berger and John D. Whitler, Washington, D.C., for the Attorney General of the United States.

Messrs. William Warfield Ross and Keith S. Watson, Washington, D. C., for the applicant Consumers Power Company.

Mr. Robert A. Jablon, Washington, D. C., for the intervening Michigan municipalities and cooperatives.

MEMORANDUM AND ORDER

April 19, 1978

(ALAB - 468)

1. In ALAB-452, 6 NRC \_\_\_\_ (December 30, 1977), we determined that the operation of the Midland nuclear generating facility would "maintain a situation inconsistent with the antitrust laws" within the meaning of Section 105c(5) of

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the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135(c)(5). On the basis of that determination, we remanded the cause to the Licensing Board with instructions to fashion an appropriate remedy. By order of February 17, 1978, the Commission announced that it would defer a decision on whether to review ALAB-452 (either on its own motion or on a petition for review filed by a party) until after "completion of the contemplated licensing board remand proceedings, and Appeal Board review of those proceedings."

On March 2, 1978, the Licensing Board held a conference with counsel for all of the parties, "to discuss the issues appropriate to be taken up at an evidentiary hearing, and to consider scheduling and other procedural subjects necessary for an expeditious hearing and disposition of the remanded matters".<sup>1/</sup> At that conference, the Board was informed that the parties were embarking upon "renewed and serious" settlement negotiations. Counsel for the NRC staff suggested that "the next 30-day period be devoted to" these negotiations and that at the end of the period the parties and the staff report to the Board respecting the likelihood that a settlement would be reached (Tr. 7).

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<sup>1/</sup> See Licensing Board order (unpublished) of March 3, 1978.

This suggestion was endorsed by the other parties (Tr. 13, 26-29, 31). The following day, the Board entered an order in which, "in order to comply with" ALAB-452, it scheduled a prehearing conference for April 13, 1978 and directed that an evidentiary hearing commence on May 8, 1978.<sup>2/</sup>

On March 23, all of the parties jointly moved the Board to suspend the schedule established in that order. The motion represented (at pp. 1-3) that two meetings had been held to discuss settlement and that "it now appears that there is a reasonable probability of settlement, not merely of the license conditions but of the entire case". The Board was further told that

Although it is too soon to estimate with precision how long it will take to complete settlement negotiations, experience suggests that at least several months of effort is required. The time and effort required to accomplish settlement expeditiously does not permit simultaneous preparation of testimony and pleadings since the same individuals are essential to both processes. Thus, it is not possible, practically speaking, to proceed with settlement and to meet the deadlines established in the Board's March 3 order.

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<sup>2/</sup> Ibid. The order went on to specify that the parties were to make certain written submissions to the Board by April 7.

Id. at p. 3 (footnote omitted). On March 28, the Board granted the motion and indicated that it would nonetheless confer with counsel on April 13, at which time it would receive reports respecting the progress of the negotiations and would also discuss the rescheduling of the suspended proceedings. In this connection, the Board stated that it was "desirous of providing the parties a reasonable opportunity to reach agreement on proposed license conditions but [was] not now prepared to postpone indefinitely the prehearing conference and the evidentiary hearings."

At the April 13 conference, the parties informed the Board that several additional meetings had taken place and that counsel still believed that a settlement was achievable. Accordingly, the parties requested the Board further to defer pre-hearing filings and the hearing itself for a reasonable period while the negotiations moved forward. In support of the request, the staff reiterated the point previously made that it would be a practical impossibility to carry on the negotiations and to prepare for trial simultaneously (Tr. 50-51).

After hearing from all of the parties, the Board orally announced that it would "proceed with the performance of its duties without waiting for the negotiations of the signed

agreements"; adding that "we owe our duty to the appeal board to proceed expeditiously, and we plan to do so" (Tr. 96). Accordingly, it rescheduled the prehearing conference for May 12, 1978 and the commencement of the hearing for June 6, 1978 (Tr. 98). On behalf of all of the parties, the applicant then moved that this ruling be referred to us (Tr. 98-99). The motion was denied, with the observation by the Licensing Board Chairman that the parties could call upon us to review it (Tr. 100).

The parties have now taken that step. In a joint petition signed by counsel for each of them, we are asked to direct certification of the April 13 oral ruling under the authority of 10 CFR 2.718(i), as construed in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975). Alternatively, the parties would have us clarify our mandate in ALAB-452 to reflect that it does not impose an obstacle to deferring the remanded proceedings for an additional period pending the further pursuit of settlement negotiations.

2. We have recently had occasion to emphasize that "we enter the scheduling thicket cautiously" and, as a general rule, only where confronted with a claim of deprivation of due process. Public Service Co. of Indiana (Marble Hill

Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC \_\_\_\_, \_\_\_\_ (February 16, 1973) (slip opinion, p. 13). As there observed, the responsibility for the conduct of hearings has been delegated to the licensing boards and that delegation must be thought to carry with it broad discretion to shape the course of the proceedings. In this instance, however, special considerations are present which appear to warrant our intercession.

A close reading of the transcript of the April 13 conference strongly suggests to us that the Licensing Board is forging ahead with the hearing on license conditions not because that is its own best judgment on how to proceed, but because it thinks our mandate requires it. To be sure, the Board quite properly evinced -- at not only that conference but the earlier one as well -- its own concern that the proceedings not be unduly delayed. At the same time, however, it did not take issue with the uniform view of the parties that a negotiated compromise (at least if acceptable to the Board) would be superior to an imposed solution. Nor did it express a belief that the negotiations now in progress are unlikely to produce agreement. Moreover, it did not disparage the representations of the parties that those negotiations would be seriously impeded if they had

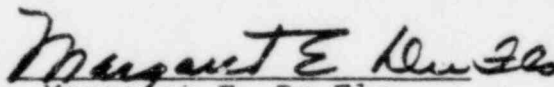
to take on simultaneously the obligations associated with pre-trial preparation and the hearing itself. Rather, it would seem that the Board has taken ALAB-452 as a direction -- overriding all other considerations -- that the hearing on the license conditions be started and completed at the earliest possible date.

That is not the message we intended to convey and we regret that our opinion did not make this clear. We did anticipate that any renewed endeavors to reach a settlement would be instituted with reasonable expedition and that the Licensing Board would monitor their progress because the road to settlement is rarely marked plainly. The best route is often overlooked at first glance; experience teaches, however, that when parties know that judgment will be visited upon them unless they focus on the problem at hand promptly, "it concentrates [the] mind wonderfully." Nonetheless, no public or private interest would have been properly served by any direction on our part which went beyond insuring that settlement efforts were pursued diligently. We certainly did not mean to impose a regime which severely impairs the chances that an acceptable settlement might be achieved.

In the circumstances, we are constrained to vacate the schedule established by the Licensing Board in its April 13 oral ruling and to instruct that Board to reconsider the matter in accordance with what we have just said. More particularly, the Board should now take those steps which it believes appropriate to encourage a settlement and thus to avoid unnecessary litigation. In this regard, we assume that the Board will wish to obtain progress reports from the parties at regular intervals both (1) to satisfy itself that the negotiations are being diligently carried on; and (2) to insure that, should settlement become unlikely, the evidentiary hearing will then take place with no unnecessary further delay.

It is so ORDERED.

FOR THE APPEAL BOARD

  
Margaret E. Du Flo  
Secretary to the  
Appeal Board



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this  
20<sup>th</sup> day of April 1978.

Peggy T Downing  
Office of the Secretary of the Commission

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