12-24-73

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
CONSUMERS POWER COMPANY	)	CONSTRUCTION PERMITS
(Midland Plant, Units 1 and 2)	)	Nos. 81 and 82

MOTION TO DISMISS
ORDER TO SHOW CAUSE

CONSUMERS POWER COMPANY (hereinafter "Consumers Power" or "Licensee") hereby moves to dismiss the Order to Show Cause of December 3, 1973 (hereinafter "Show Cause Order" or "Order"), on the ground that the Order was issued in violation of the governing provisions of the Atomic Energy Act and the Administrative Procedure Act and the Commission's own regulation implementing those statutes. That regulation expressly provides that, before any proceeding is instituted to modify, suspend or revoke a license, the Director of Regulation will serve upon the licensee a "written notice of violation." The notice must "state the alleged violation" and afford the licensee an opportunity to submit "a written explanation or statement in reply" including the corrective steps which have been or will be taken and the date when full compliance will be achieved. (10 CFR §2.201(a)).

Only two exceptions to this requirement are permitted. (10 CFR §2.201(c)) Neither is applicable here. One is when the Director of Regulation finds the violation is willful. No such finding was even

purported to be made here. Accordingly, this exception is not relevant. The other is when the Director of Regulation finds that "the public health, safety, or interest" requires the omission of such notice. The Director did make such a finding with respect to one aspect of the Licensee's operations - a finding which, as is demonstrated below, was not justified by the factual situation or the law. In addition, a written notice was issued with respect to violations concerning record keeping procedures. The Licensee responded in full to this notice and has never - in the Show Cause Order or otherwise - been advised, as the regulation requires (10 CFR §2.201(b)), that the corrective steps described by it are inadequate.

In any event, neither the written notice nor the "public health, safety, or interest" finding was directed to the issues which the Show Cause Order appears to set forth as the real basis for possible suspension of activities under the construction permits. Those issues are whether the Licensee is implementing its quality assurance program in compliance with Commission regulations and whether there is reasonable assurance that such implementation will continue throughout the construction process.

The foregoing contentions are described in greater detail below.

A. The Basic Procedural Requirements

In its present form, section 9(b) of the Administrative Procedure Act (5 USC §558(c)) provides that:

> "Except in cases of willfulness or those in which public health, interest, or safety

> requires otherwise, the withdrawal, suspension, revocation, or annulment of a license[1] is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements." (Emphasis supplied)

This statutory provision clearly applies to actions of the AEC. Section 181 of the Atomic Energy Act (42 USC §2231) provides that:

> "The provisions of the Administrative Procedure Act . . . shall apply to all agency action taken under this Act. . . ."

In addition, Section 186a of the Atomic Energy Act (42 USC §2236(a)), which deals with revocation of licenses and from which the power to suspend a license must be derived, specifies that "the Commission shall follow the provisions of section 9(b) of the Administrative Procedure Act in revoking any license."

The statutory right to notice and to "opportunity to demonstrate or achieve compliance" is implemented by 10 CFR §2.201.[2] The requirements for the service of written notice upon a licensee prior to the initiation of proceedings to modify, revoke or suspend a license and setting forth the contents of such notice are binding upon the Atomic Energy Commission. It is, of course, established that duly promulgated

---

1/ Of course a construction permit is a "license." See Section 185 of the Atomic Energy Act (42 USC §2235) and 10 CFR §2.4(i).

2/ That section is included in Subpart B of Part 2 of the Commission's Regulations. 10 CFR §2.200 states that Subpart B "prescribes the procedure in cases initiated by the regulatory staff . . . to modify, suspend or revoke a license . . . ." (Continued on next page.)

regulations have the effect and force of law, and that officials governed by such regulations are without legal authority to ignore or violate them to the detriment of the interests of a regulated party. See Vitarelli v Seaton, 359 US 535, 79 SCt 968 (1959); Service v Dulles, 354 US 363, 77 SCt 1152 (1957). For a comprehensive listing of authorities on this point, see United States ex rel. Checkman v Laird, 469 F2d 773, 780 (CA2, 1973), opinion of Leventhal, J. (sitting by designation).

2/ (Cont'd) 10 CFR §2.201 requires that:

> "(a) Before instituting any proceeding to modify, suspend, or revoke a license or to take other action for alleged violation of any provision of the Act or this chapter or the conditions of the license the Director of Regulation will serve on the licensee a written notice of violation, except as provided in paragraph (c) of this section. The notice of violation will concisely state the alleged violation and will require that the licensee submit, within twenty (20) days of the date of the notice or other specified time, a written explanation or statement in reply including:
>
> "(1) Corrective steps which have been taken by the licensee, and the results achieved;
>
> "(2) Corrective steps which will be taken; and
>
> "(3) The date when full compliance will be achieved.
>
> "(b) The notice may require the licensee to admit or deny the violation and to state the reasons for the violation, if admitted. It may provide that, if an adequate reply is not received within the time specified in the notice, the Director of Regulation may issue an order to show cause why the license should not be modified, suspended or revoked or such other action be taken as may be proper.
>
> "(c) When the Director of Regulation finds that the public health, safety, or interest so requires, or that the violation is willful, the notice of violation may be omitted and an order to show cause issued."

B. Exceptions to the Notice Requirement

Of the two exceptions to the notice requirement recognized by the Administrative Procedure Act and by 10 CFR §2.201, the first is "willfulness." However, the Show Cause Order makes no mention of "willfulness." Accordingly, this motion will focus upon the second exception required to dispense with notice: a finding that the "public health, interest or safety"[3/] so requires.

The only reference to "the public health, interest or safety" appears at page 4 of the Show Cause Order, in the following context:

> "In view of the foregoing, it is found that, pending a further order and determination by the Director of Regulation, the public health, interest or safety requires continued suspension of the cadwelding activities."

The "public health, safety, or interest" exception has been given substance by the Commission through regulatory publications and through decisions of the Commission itself and of hearing examiners acting within the Commission's adjudicatory framework. Considerable guidance is provided by the "Criteria for Determining Enforcement Action"[4/] (hereafter "Enforcement Criteria") issued by this Commission on September 26, 1972 (Release No. P-298). The Enforcement Criteria sets forth three categories of enforcement actions. Suspension of a license is in the third, and most serious, category. The criterion for "immediate suspension of a license, or a portion thereof" is "as necessary

---

3/ Section 9(b) of the Administrative Procedure Act refers to the "public health, interest, or safety." 10 CFR §2.201 refers to "public health, safety, or interest." The difference in phraseology makes no difference in substance, and the phrases are used interchangeably in this Motion.

4/ CCH, Atomic Energy Law Reporter, Para 5532.

to remove an immediate threat to the health or safety of licensee's employees or the public" (Emphasis supplied). This is the standard adopted by the Director of Regulatory Operations in a letter to Virginia Electric and Power Company which accompanied a Notice of Proposed Imposition of Civil Penalties. Explaining why the enforcement action, the second class of action provided by the Enforcement Criteria, was sought, instead of a suspension, the Director said "the deficiencies . . . do not present an immediate threat to the health and safety of the public and thereby necessitate suspension of plant operations."5/ The same standard was applied in a hearing examiner's decision In the Matter of New York Shipbuilding Corporation, Byproduct Material License No. 29-2204-2, Initial Decision, 1 AEC 707, 721-2 (May 31, 1961), which held that ongoing use of radioactive material by unauthorized persons "amounted to a threat to the health and safety of respondent's employees and to members of the public."

Both the legislative history of the Administrative Procedure Act and the Attorney General's interpretation of Section 9(b) support a similar construction of the "public health, interest, or safety" standard. Thus a hearing examiner's Initial Decision In the Matter of Hamlin Testing Laboratories, Byproduct Material License No. 21-6514-1, 1 AEC 338, 349 (September 25, 1963), cites the legislative history of Section 9(b) as requiring some "urgency" as a prerequisite to omission of notice. The Attorney General's Manual on the Administrative Procedure Act (1947), p 91, referring to Section 9(b) as offering "another chance" to an errant licensee, offers the following comment:

5/ In the Matter of Virginia Electric and Power Company (Surry Power Station, Facility License Nos. DPR-32 and DPR-37), letter dated May 15, 1973.

> "Also, 'another chance' need not be given where 'the public health, interest, or safety requires otherwise.' The latter phrase refers to a situation where immediate cancellation of a license is necessary in the public interest irrespective 'of the equities or injuries to the licensee.' Sen. Rep. p 26 (Sen. Doc., p 212). For example, in case of an accident involving aircraft, the Administrator of Civil Aeronautics may suspend the license of the pilot pending investigation. The public safety and interest require such immediate suspension." (Emphasis supplied)

In summary, the Enforcement Criteria promulgated by this Commission, together with issuances of the regulatory staff and decisions of officers of this Commission, combine with the Atomic Energy Act, the Administrative Procedure Act and its legislative history and with the interpretation of that Act by the Attorney General of the United States to enunciate a clear standard with respect to the factual finding that must precede any conclusion that the "public health, interest, or safety" require dispensing with the written notice otherwise provided by law. The facts must disclose an urgent or immediate threat. No such threat was or could be shown here.

C. The Facts of This Case[6/]

Under Section 9(b) the written notice to which a licensee is entitled must describe both "the facts or conduct which may warrant the action," and the "alleged violation" on which suspension may be based. In the absence of such notice the precise basis of the instant Show Cause Order is difficult to determine. The Show Cause Order:

> (1) refers to three specific instances of violations that occurred over a period of more than three years;

6/ Contemporaneously with the filing of this Motion Consumers Power has filed an "Answer to Order to Show Cause" which recites the relevant facts in detail. This Motion discusses the facts only as they bear upon the relief requested.

(2) attaches, and apparently relies on, a memorandum dated November 26, 1973, and authored by the three members of the Appeal Board panel that previously approved issuance of the construction permits; and

(3) sets for hearing, if one is requested, two broad issues that relate to Consumers Power's quality assurance program generally.

The first instance of violation arose in 1970 and was discussed in an Appeal Board Decision (ALAB-106, RAI-73-3, p 182, March 26, 1973). Consumers Power has complied with all the conditions specified in ALAB-106. In fact, the Appeal Board found in ALAB-147 (RAI-73-9, p 636, September 18, 1973) that "there is now reasonable assurance that appropriate QA action is now being taken by the applicant" and that apart from a deficiency in the QA organization of the architect-engineer, there was no problem respecting that organization requiring corrective action. The memorandum (p 3) of the members of the Appeal Board panel so states, and there is no allegation in the Show Cause Order that any matter related to the 1970 violations remains outstanding or uncorrected.

The second instance of violations referred to in the Show Cause Order arose out of an inspection conducted in September, 1973. A notice of violation, pursuant to 10 CFR §2.201, was mailed to Consumers Power on October 24, 1973. Consumers Power responded on November 23, 1973, within the thirty-day period specified by the notice, and, pursuant to paragraph (a) of the section, described the corrective action that had been, and was scheduled to be, taken to achieve compliance and also specified the date when full compliance would be achieved. The Show Cause Order, however, contains no finding, or even allegation, that Consumers Power's compliance

was inadequate[7] or that any matters relating to the September, 1973, violations remain outstanding or uncorrected. Accordingly, it seems clear that neither the first two instances of violation referred to in the Show Cause Order nor the notice issued in connection with the second can be the basis of the instant suspension proceedings. Nor can any action related to those proceedings constitute either the "written notice" required by statute and regulation or a basis for dispensing with such notice.

The third group of violations, which occurred in November, 1973, involved allegedly "serious deficiencies associated with cadweld splicing of concrete reinforcing bars." As of the time the Show Cause Order was issued Consumers Power had not received any written notice of violation[8] with regard to these deficiencies, and it was working diligently to correct the violations, as it understood them from verbal communications with the

---

7/ The October 24, 1973, notice of violation expressly referred to 10 CFR §2.201. In turn, paragraph (a) of that section provides that a show cause order modifying, suspending or revoking a license may be issued "if an adequate reply is not received." Obviously the intent of the regulation is that no further proceedings affecting the license will be prosecuted unless the reply is not "adequate." Otherwise the opportunity to "demonstrate or achieve compliance" required by Section 9(b) would be meaningless.

8/ On November 9, 1973, James G. Keppler, Regional Director, Directorate of Regulatory Operations, Region III, addressed a letter to Consumers Power confirming his understanding that work on cadwelding had been stopped by Consumers Power and would not be restarted until outstanding problems had been resolved. In addition, the letter referred to "serious deficiencies associated with implementing your cadwelding program . . ." without defining those deficiencies. It is clear that this letter was not a written notice within the meaning of 10 CFR §2.201(a) which provides that such a notice must "concisely state the alleged violation and . . . require that the licensee submit, within twenty (20) days of the date of the notice or other specified time, a written explanation or statement in reply." The November 9, 1973 letter did neither.

AEC inspectors. Because the Director of Regulation suspended cadwelding operations pending further order, it might be assumed that these violations are the basis of the Show Cause Order.

However, if the cadwelding matter should be regarded as the basis of the Order, the violation of the written notice provisions of the regulations is flagrant. The November 13, 1973 "Notification of an Incident or Occurrence" referred to in the Appeal Board members' memorandum of November 26, 1973 was never served upon the Licensee. The latter memorandum (p 3) states that "[t]he only reasonable conclusion which we can draw . . ." from the inspection referred to in the November 13 document is that the "assurances we have received from the applicant were false and that, in point of fact, it and the architect-engineer still have not manifested both an ability and a willingness to take the steps necessary to insure proper QA activities." Of course, this memorandum was never served on the Licensee either, prior to issuance of the Order to Show Cause. The failure to serve written notice, or at least the two written memoranda, on the Licensee denied it the opportunity to provide a written statement explaining the corrective steps which have been and were planned to be taken--an opportunity which 10 CFR §2.201(a) expressly requires.

This conclusion is emphasized by the fact that the Show Cause Order is heavily dependent upon the Appeal Board members' memorandum. The Order states (pp 2-3) that the memorandum

> "raised serious questions concerning the licensee's implementation of quality assurance (QA). The Appeal Board memorandum warrants examination of the question whether applicant will meaningfully comply with its own quality assurance program and with Commission regulations (10 CFR Part 50, Appendix B) throughout the construction process."

As was pointed out in the "Answer to the Order to Show Cause," the authors of the Appeal Board members' memorandum admitted their lack of jurisdiction to take official cognizance "of the matter" or to "issue any orders with respect thereto"; and apparently were writing simply as concerned citizens or, at most, as concerned employees of the AEC who had no direct responsibilities with respect to the matter. Nevertheless, using strong language and an accusatory tone, they made it abundantly clear that if they still had official responsibility they "would have ordered forthwith a cessation of all construction activities . . . ." In substance, the memorandum was, and must be treated as, a request or petition for the Director of Regulation to do what its authors could not.

However, it appears from the memorandum that this request was triggered solely by the brief, conclusory and undetailed November 13 document. There is nothing whatsoever in the memorandum to indicate that the Appeal Board members had any knowledge of the details of the matter or of the extensive corrective steps already taken by the Licensee. These are detailed in the "Answer to Order to Show Cause" filed contemporaneously with this motion, and in the AEC inspection reports[9/] prepared after the date of the memorandum of the Appeal Board members and after the date of the Order to Show Cause.

In these circumstances adherence to the "written notice" provisions of the governing statute and regulation was especially necessary.

9/ RO Inspection Report No. 050-329 and 330/73-10, dated December 14, 1973, and covering inspections conducted on November 6-8, 15 and 20-21, 1973 (hereinafter "Inspection Report No. 73-10"); RO Inspection Report No. 050-329 and 330/73-11 dated December 11, 1973 and covering an inspection conducted on December 6-7, 1973 (hereinafter "Inspection Report No. 73-11").

Certainly if a private citizen had made the same kind of complaints to the Director of Regulation and requested or petitioned for suspension of activities under a license, it is inconceivable that the Director would have deprived the licensee of the legally required notice and opportunity to respond before initiating suspension proceedings. Such notice and opportunity to respond was even more necessary in this case than in cases where the complaint or petition is filed by a private citizen; for notwithstanding their lack of official responsibility in this matter, the positions which the members of the Appeal Board occupy carry heavy weight with the AEC. The situation, therefore, was one in which the Licensee had obviously provoked the ire of individuals who are important AEC officials and who, apparently, were not fully acquainted with the facts. In these circumstances, elementary fairness as well as due process demanded scrupulous adherence to the procedural protections of written notice and an opportunity to be heard before suspension proceedings were initiated.

In point of fact, Inspection Reports Nos. 73-10 and 73-11 supply an excellent example of how the "second chance"[10/] provisions of Section 9(b) of the Administrative Procedure Act and of 10 CFR §2.201 should work. Inspection Report No. 73-11 describes in detail the substantial action that Consumers Power has taken to resolve the problems - both those directly related to cadwelding and those of a possibly broader nature - raised in Inspection Report No. 73-10; and Inspection Report No. 73-11 demonstrates that that action brought

---

10/ Note: Procedural Safeguards for Licensees: Section 9(b) of the APA, 75 Harv. L. Rev. 383 (1961).

Consumers Power into compliance with the AEC's quality assurance regulations. Thus, the report states that "No violations of AEC requirements were identified during the inspection . . . ." The report also stated that the AEC inspectors had concluded

> "that CP management had adequately analyzed the circumstances associated with the violations and discrepancies identified during the RO:III review of site Cadwelding activities, and had prescribed corrective action measures which, if properly implemented, provide adequate assurance that future problems of a similar nature should not occur."11/

Accordingly, the Director of Regulation subsequently determined that:

> "[a]s a result of this inspection . . . the licensee now has appropriate procedures for cadwelding operations and that all cadweld personnel have been appropriately trained."12/

In view of this determination, the Director decided that the "public health, interest or safety does not require the continued suspension of cadwelding activities at the plant site . . ." and modified the Show Cause Order "to delete the prohibition therein on the resumption of cadwelding operations at the site."13/

This history of the events which took place preceding and subsequent to November 26, 1973, when the Appeal Board members wrote their memorandum, makes it clear that the failure to follow the procedures prescribed by Section 9(b) of the Administrative Procedure Act and 10 CFR §2.201 led to the very situation which those measures are

---

11/ Inspection Report No. 73-11, pp 2, 5.

12/ Modification of Order to Show Cause, December 17, 1973, p 2.

13/ Ibid.

designed to avoid. Written notice to Consumers Power together with the extension to it of an opportunity to supply "a written explanation or statement in reply" detailing the corrective steps it had taken or planned to take would have disclosed (1) that all cadwelding activities had been suspended, (2) that adequate steps had been taken to assure that, upon resumption, those activities would fully conform to the Commission's requirement, and (3) that Consumers Power had "prescribed corrective action measures" designed to prevent future problems of a similar nature. In these circumstances it seems highly unlikely that the regulatory authorities vested with the responsibility to protect the public safety would have deemed it necessary to initiate proceedings to modify Consumers Power's construction permits or limit activities pursuant to them. At a minimum, the Licensee was entitled to have these facts considered before suspension proceedings were initiated.

Nor does recognition that the Show Cause Order is directed at the more general problem concerning the likelihood of continued future compliance, rather than merely to the violations or discrepancies to which it specifically referred, operate to dispense with the requirement of written notice. Section 9(b) is clear: it applies to any grounds - whether specific or general - for the institution of agency proceedings designed to suspend, revoke or annul a license. Before such proceedings are instituted, the licensee must be given notice "in writing of the facts or conduct which may warrant the action . . . ." To the same effect is 10 CFR §2.201(a). And whether viewed simply in the light of the cadwelding problem or in the light of the broader

problem relating to the likelihood of future compliance, Inspection Reports Nos. 73-10 and 73-11 disclose the importance of conforming with Section 9(b).

Nor can grounds related to "the public health, safety or interest" justify the lack of advance notice in writing, however the bases of the Order to Show Cause are viewed. The only reference to "public health, interest or safety" appearing in the Show Cause Order relates to cadwelding and to the Director of Regulation's original finding concerning the need for continued suspension of the cadwelding activities. However, the Show Cause Order contains no factual reason why the written notice could not have been afforded to Consumers Power -- and there could be none.

So far as cadwelding is concerned, there are two very good reasons why the "public health, interest, or safety" could not have suffered from adherence to the regular written notice procedure. Cadwelding is a procedure by which metal reinforcing bars are joined; the function of the bars is to reinforce concrete that will be poured at a later date. The Midland plant is in a relatively early stage of construction. The cadwelds were not scheduled to be covered by any concrete before February 1974, so they were accessible for any necessary inspection, repair or replacement. Accordingly, there was no possibility that any deficiency in cadwelding could have presented a health or safety hazard to the public or Consumers Power's employees. Second, the November 9, 1973, letter referred to above, clearly establishes that Consumers Power <u>had already agreed to stop cadwelding work</u> until authorized by AEC inspectors to restart.

So far as any issues broader than cadwelding violations are concerned, the facts remain that the Midland plant is years away from completion and that cadwelding had already been stopped voluntarily. No urgency or immediate threat to health and safety existed, and no conceivable harm to any person could have resulted from following the notice procedures specified by statute and the Commission's regulations. No "public health, interest or safety" finding, supporting a decision not to give written notice, could properly have been made in the circumstances.[14/] If there were any doubt about the matter, it must be dispelled by the inspection reports. Except for two reports[15/] which do not address the question, each of the eleven inspection reports prepared in 1973 states, with minor variations in language, that "No safety matters were identified." Indeed, this was the precise language used in the inspection report which described the cadwelding violations.[16/]

It follows from the foregoing that the Commission failed to meet the requirement of prior written notice, imposed by its own

---

14/ Compare with the Order for Modification of License In the Matter of Boston Edison Company (Pilgrim Nuclear Power Station, Docket No. 50-293) August 24, 1973. The Director of Regulation justified his findings that "the public health, safety, and interest" required immediate effect of the order by detailing a potentially dangerous existing condition in an operating reactor.

15/ RO Inspection Report No. 050-329 and 330/73-01, March 28, 1973, and RO Inspection Report No. 050-329 and 330/73-04, June 28, 1973. The former was a special management meeting and the latter a vendor audit surveillance inspection of a Babcock & Wilcox Company facility at Mount Vernon, Indiana.

16/ Inspection Report No. 73-11, p 4.

regulations and the Administrative Procedure and Atomic Energy Acts, before instituting the instant proceeding to suspend activities under the construction permits and that no circumstance justifying dispensing with such prior written notice has existed. Accordingly, the Order to Show Cause was illegally initiated, it must be dismissed and no further proceedings pursuant to it may be conducted.

Respectfully submitted,

Harold F. Reis
Newman, Reis & Axelrad
1025 Connecticut Avenue, NW
Washington, DC 20036
(202) 833-8371

/s/ Judd L. Bacon

Judd L. Bacon
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201
(517) 788-1366

Attorneys for Consumers Power Company

Dated: December 24, 1973