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UNITED STATES OF AMERICA
BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	50-330A
Midland Plant, Units 1 and 2	)	

JOINT PETITION FOR ORDER DIRECTING CERTIFICATION OR, IN THE ALTERNATIVE, MOTION TO CLARIFY ALAB-452

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Michigan Municipal Electric
Association

April 18, 1978

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Pursuant to 10 C.F.R. Section 2.718(i) and Public Service Company of New Hampshire (Seabrook Station, Units I and II), ALAB-271, 1 N.R.C. 478 (1975), all the parties to this matter respectfully request that the Atomic Safety and Licensing Appeal Board (Appeal Board) direct certification to it of so much of the Atomic Safety and Licensing Board's oral order of April 13, 1978 in which it incorrectly construed ALAB-452 in this proceeding by denying the parties adequate time to complete settlement negotiations. In the alternative, the parties move the Appeal Board to clarify ALAB-452 pursuant to 10 C.F.R. Section 2.730, so as to assure that its remand mandate therein is not construed in a manner inconsistent with the Commission's policy encouraging settlement of matters in controversy, 10 C.F.R. Section 2.759.

INTRODUCTION

At a prehearing conference on April 13, 1978, the parties advised the Licensing Board that there is a reasonable

probability a settlement can be reached as to license conditions and all other antitrust issues which divide them and that, as a practical matter, preparation for and conduct of hearings cannot proceed simultaneously with settlement discussions. The parties therefore urged the Board to defer hearings for a reasonable period during the pendency of settlement discussions and offered to report to the Board if it appeared the discussions were not progessing to an expeditious and favorable conclusion.

At the prehearing conference of April 13 the Licensing Board considered and rejected the request of the parties that hearings be deferred for this purpose. Rather, the Board established May 8 for filing proposed license conditions and prehearing briefs by each party and ordered hearings to begin on June 6. The apparent rationale for the Board's ruling was that its only duty, pursuant to the remand mandate of ALAB-452, is to hold hearings and decide what antitrust conditions should be imposed on the Midland licenses and that any delay of those hearings, no matter on what basis, is inconsistent with ALAB-452.

Following this ruling, in response to a joint motion of the parties, the Board declined to certify but held that it had "no objection" to the parties seeking Appeal Board review of its order. For the reasons set out below, we urge the Appeal Board to clarify ALAB-452, or to direct certification of the

hearing Board's order of April 13, 1978, so as to permit the parties a reasonable opportunity to settle this case.

DISCUSSION

A. Background of the Board's Ruling

ALAB-452, which ordered the instant proceeding remanded to the Licensing Board to formulate appropriate antitrust license conditions, was issued December 30, 1977. In an order issued January 13, 1978, the Commission requested the views of the parties as to whether it should defer "its review of this matter until after the decision on remand of this matter and Appeal Board review of it" (p. 2). In response, the Intervening municipal and cooperative systems urged Commission deferral, observing inter alia that settlement of the case would moot the necessity of Commission review.[1/] Consumers Power's reply to this observation was that settlement as to license conditions alone would not eliminate the Company's need to seek review of ALAB-452, i.e., any settlement must deal not only with license conditions but also settle all of the issues raised directly or indirectly by ALAB-452.[2/]

1/ Response of Michigan Municipals and Cooperatives to the Commission's January 13, 1978 Order, p. 2.

2/ Reply of Consumers Power Company to Responses of other Parties, p. 5.

On February 16, 1978, the Commission decided not to entertain petitions to review ALAB-452 prior to completion of the remand phase of the proceeding. The Licensing Board immediately convened a "Conference with Counsel" for March 2, 1978. At the conference the parties advised the Licensing Board that settlement discussions were about to begin and that preparation for hearing and settlement negotiations could not proceed simultaneously. Nevertheless, on March 3, 1978, the Board ordered the filing of pre-hearing briefs on April 7 and the hearings to begin on May 8.

Following two settlement meetings, all of the parties jointly moved the Board to suspend the dates established in its March 3 order.[3/] The parties stated that, in their view, "there is a reasonable probability of settlement, not only of license conditions but of the entire case . . . " Specifically, the parties told the Board as follows:

> It should be noted that discussions between the Company and the neighboring systems concern not only conditions to the Midland licenses but also agreements of some complexity to implement those conditions and otherwise resolve differences between the Company and the systems. Thus, successful negotiations would result not only in license condition provisions agreeable to all, but would also eliminate the necessity for the Company to seek Commission and judicial review of ALAB-452.

3/ See Motion of all Parties for Suspension of Rates Established by March 3 Order, filed March 23, 1978, p. 3.

> 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.

In response to that joint motion, the Board suspended the filing and hearing dates and set April 13 for a pre-hearing conference. At that conference, the parties advised the Board that several additional settlement meetings had been held and that the parties remained optimistic that a favorable outcome would be forthcoming. The Board asked numerous questions of the parties in response to their affirmations that pre-hearing filings and hearings should be deferred for a reasonable period during the settlement discussions. The transcript of the conference, which is attached,[4/] contains numerous grounds in support of deferral. Among them are the following:

1. As the Staff counsel pointed out, the settlement meetings to date confirm that these meetings and preparations for hearing are each extremely time-consuming. Consequently, as a practical matter, settlement cannot be carried out simultaneously with the preparation of testimony and briefs or the conduct of hearings. (Tr. 50-51)

2. The counsel for the Department of Justice observed that there is a strong public interest in encouraging

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4/ Because the transcript is a part of the public file of this proceeding, it is being attached only to the copies of this motion which are being provided to the Appeal Board members.

efforts of the private parties to agree not only as to license conditions but also as to underlying agreements which implement those conditions and put to rest all of the antitrust issues between the parties. Such agreements would not only remove the need for further proceedings concerning ALAB-452 but would also reduce the possibility that the Commission would be burdened with future enforcement actions between the parties. (Tr. 56-61).

3. As counsel for the Applicant and the Intervenors emphasized, the potential delay resulting from unsuccessful settlement discussions is far outweighed by the resource saving which will accrue to both private and public parties if settlement is achieved. This is particularly so since the license conditions in question relate to nuclear units which will not be operable until 1981. (Tr. 63-66, 76-79).

Following extensive discussions between counsel and Licensing Board members, the Board ruled as follows: the joint request for deferral of hearing dates was rejected, pre-hearing filings were ordered May 8, and hearings were set to begin June 6. The Board also stated that, although convinced as to the correctness of the ruling, it had "no objection" to efforts by the parties to seek Appeal Board review of it. (Tr. 96-98).

B. The Necessity for Certification of the Licensing Board's Ruling and Immediate Clarification of ALAB-452

For the reasons noted above, the Board's order effectively precludes the settlement of the case at this time.

The Licensing Board's April 13 ruling did not challenge the parties' representatives as to the likelihood or desirability of settlement. Rather it apparently read ALAB-452 as requiring that hearings on the license condition phase of the case begin immedately -- without regard to its impact on settlement of the case. We believe that the ruling thereby misconstrued ALAB-452 in a manner which could irrevocably jeopardize the public interest, and which is contrary to the specific policy of the Commission to encourage settlement, 10 C.F.R. Section 2.759.

Review of the Board's ruling in the manner we propose is clearly consistent with the Commission's regulations. This Board has recognized that review of an arguably interlocutory order is proper where "the public interest will suffer or unusual delay or expense will be encountered." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 1 NRC 478, 483 (1975). Likewise, the Appeal Board has undertaken review where a licensing Board's ruling "either (1) threatened ... immediate and serious irreparable impact which, as a practical matter, could not be alleviated by later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station Units 1 and 2), 5 NRC 1190, 1192 (1977). See also Consumers Power Company (Midland Units 1 and 2), 4 NRC 207, 210 (1976) (dissenting opinion by Mr. Saltzman). These standards are more than satisfied here.

The public interest considerations favoring settlement of issues before a Licensing Board are embodied in section 2.759 of the Commission's Rules of Practice.[5/] The Rules provide that settlements are "encouraged" and direct "the presiding officer and all of the parties to those proceedings" to "take all appropriate steps to carry out this purpose." The public interest considerations favoring settlement of the instant proceeding are particularly compelling. The antitrust issues raised herein first came before the agency in 1971 and have been the subject of numerous hearing days, countless

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5/ The Commision's rule reflects traditional legal principles favoring settlements in lieu of litigation. See, e.g., Williams v. First National Bank, 216 U.S. 582 (1910); Lewis v. S.S. Baune, 534 F.2d 1115, 1122 (5th Cir. 1976). This principle has been incorporated by § 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(c), which commands agencies to "give all interested parties [such] opportunity for ... the submission and consideration of ... offers of settlement," as time and the public interest permit. According to Professor Davis, "[t]he legislative history of this provision shows that 'parties must be afforded opportunity for the settlement of cases .... because agencies ought not engage in formal proceedings where the parties are perfectly willing to consent to judgments or adjust situations informally.'" 1 K. Davis, Administrative Law Treatise § 4.02, at 240 (1958) (quoting remarks by Rep. Walter) (emphasis added). See, Texas Eastern Transmission Corp. v. FPC, 306 F.2d 345 (5th Cir. 1962), cert. denied, 375 U.S. 941 (1963); Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 224-26 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960). Principles favoring settlement in lieu of litigation apply with even more force when, as here, the dispute between the parties is complex and litigation would therefore be lengthy and costly. See, e.g., Schlegel Mfg. Co. v. USM Corp., 525 F.2d 775, 783 (6th Cir. 1975), cert. denied, 425 U.S. 912 (1976); Pfizer Inc. v. Lord, 456 F.2d 532, 542-43 (8th Cir. 1972), cert. denied, 406 U.S. 976 (1972).

pleadings and a 432-page decision of this Appeal Board. Given the magnitude of resource investment in the case to date and the importance of the case to the parties, additional proceedings before the Licensing Board, the Appeal Board, the Commission and reviewing courts could consume many years.[6/] The resource expense, both public and private, of such undertakings would be enormous.[7/]

Moreover, the continued litigation of the case will only exacerbate the differences and difficulties which have plagued relations between Consumers Power and its smaller neighboring systems for many years. The ability of Consumers Power and its smaller systems to work cooperatively to plan and share future facilities can only be retarded by continued litigation (or threat of litigation) over antitrust issues. Thus, antitrust conditions imposed on the Midland licenses are much more likely to accomplish their desired goal if the disputes and issues which gave rise to them are settled to the satisfaction of all.

Recognition of these facts led the parties to initiate settlement discussions as soon as the Commission decided not to entertain an appeal from ALAB-452 at this juncture. The parties acknowledged that it was a favorable time to settle

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6/ Tr. 62-63

7/ Tr. 63-64

the case since major resource commitments were necessary to litigate the remand phase of the case and parties would be less amenable to settlement after such resources had been expended.

The parties therefore notified the licensing Board of their desire to pursue settlement negotiations, and of the prospects for settlement, at a March 2 conference of counsel, in a March 23 pleading, and at an April 13 pre-hearing conference. See pp. 3-5, supra. On these occasions, the parties pointed out that the imminence of pleading and hearing dates made settlement extemely difficult, if not impossible. This is because intense settlement negotiations and preparations for hearings generally involve the same principals and management officials who do not have sufficient time to devote to both tasks. Moreover, these individuals are key personnel and cannot delegate their responsibilities in a matter as important as this. Perforce, the pendency of hearings leaves insufficient time and resources available for meaningful settlement negotiations.

Just as important, it is extremely difficult to foster attitudes of settlement and compromise among parties if simultaneously they are preparing for an adversary proceeding on the very same issues which are the subject of negotiations. That is particularly true here, where there is a long history of unresolved controversies among the parties. To expect settlement discussions to bear fruit under these circumstances ignores the realities of human nature.

It is significant to note that there is no claim by any entity, including the Licensing Board, that a delay of several months to pursue settlement will adversely affect any public or private interest. It is also significant that this is a joint motion, including counsel for the intervening municipal and cooperative systems -- those who would be the direct beneficiaries of antitrust license conditions.

The Licensing Board apparently deemed these considerations to be irrelevant. The Board's only justification for its ruling was that it must "proceed with the performance of its duties without waiting for the negotiations of the signed [settlement] agreements." According to the Board, "we owe our duty to the appeal board to proceed [to hearing] expeditiously, and we plan to do so." (Tr. 96)

In the view of the parties, the Licensing Board's ruling reflects a misreading of this Board's remand mandate in ALAB-452. It appears that the Licensing Board mistakenly believed that ALAB-452 compels it to proceed immediately to hearings on license conditions regardless of the impact that this action has upon settlement negotiations and regardless of the progress that those negotiations are making.

It is also the parties' view that the Appeal Board did not, through its remand mandate in ALAB-452, mean to exempt the Licensing Board from the strictures of Section 2.759 or authorize it to pursue a course of action which effectively

denies the parties an opportunity to negotiate a settlement in the public interest.

For the reasons discussed above, the parties jointly urge this Appeal Board to direct certification of the Licensing Board's April 13, 1978 ruling denying the parties adequate time to complete settlement negotiations. In the alternative, the parties urge the Appeal Board to clarify its remand mandate in ALAB-452 accordingly.

We also urge this Appeal Board to rule expeditiously on the instant Motion. Because the Licensing Board's order of April 13 calls for pre-hearing pleadings to be filed May 8, the parties will be compelled to abandon settlement negotiations and return to hearing preparation by the end of this week. Since that course of action could irreparably jeopardize the

prospects for settlement, the public interest requires immediate resolution of the matters discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Joint Petition for Order Directing Certification or, In the Alternative, Motion to Clarify ALAB-452, dated April 18, 1978, in the captioned matter, have been served upon the following by deposit in the United States mail, first class, this 18th day of April, 1978.

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