UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

3-3-71

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

ORDER

I

The purpose of this order is: to formalize certain rulings of the Board announced orally by the Chairman at the meeting of counsel on January 21, 1971;* to rule on matters previously left open; to adopt a plan for the time of resumption of the hearing and the order of presentation of the evidence; to advise the parties of the views of the Board on the role of intervenors in this proceeding; and to suggest a method of dealing with environmental questions.

The Board shares the disappointment of Applicant and others at the failure of the Saginaw intervenors** to serve any interrogatories during February; however, Mr. Cherry's only firm commitment was to produce all interrogatories by March 22 and he is not in default. Nevertheless it is cause for concern that although the petitions for intervention were granted on November 17, 1970, and interrogatories originally required by January 7, nothing has been produced to date by intervenors except briefs on questions of law -- most of which are frivolous or clearly controlled by previous court or Atomic Energy Commission decisions.

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* So that all parties can have the rest of the order as early as possible, these rulings will be prepared separately.

** The intervenors represented by Mr. Cherry are referred to as the Saginaw intervenors and those represented by Mr. Ginster as the Aeschliman intervenors.

Accordingly, it seems appropriate at this time to make certain decisions as to the future conduct of the proceedings so that all parties will know what is expected and can plan their schedules. In the main, these decisions represent the adoption by the Board of suggestions by the Applicant as to timing, order of proof, etc. In adopting these suggestions the Board does not conceive that it is shifting the "burden of proof." Indeed, given the nature of the Board's function it is not clear that the burden of proof concept has any meaning in this proceeding. Nor does our acceptance of these proposals of itself bear significantly on intervenors' rights of cross-examination (but see our discussion of the need for informed questioning in III, below). Intervenors may choose to "make their case" by cross-examination. However, in a complicated field like this, orderly procedures would seem to dictate that as much of the evidence as possible be presented in advance of the hearing so that other parties can respond.

II

1. The hearing will reconvene in Midland, Michigan on May 17, 1971 at 10 A.M.

2. No later than April 15, 1971 the Saginaw intervenors and the Aeschliman intervenors shall serve answers to the interrogatories propounded by Applicant. Provided that if by April 1, 1971 the Aeschliman intervenors shall serve in writing an adequate, detailed statement of the bases of their legal contentions the Board may excuse specific responses to the interrogatories. In any event, objections by all intervenors to such interrogatories shall be served by April 1, 1971.

3. By May 1, 1971, intervenors will submit all of their direct evidence in writing in support of their contentions including written sworn testimony and copies of documentary evidence if any.

4. The Applicant, staff and intervenors supporting the application shall serve written evidence and supporting documents in opposition to the intervenors' contentions by May 15, 1971.

5. The application with amendments, correspondence, and other documents listed in Exhibit A to Applicant's motion dated November 30, 1970 shall be received in evidence. The Board is unclear as to the mechanics of effectuating that result prior to the hearing and requests that the Applicant advise it at the next meeting of counsel. (See paragraph 6 below.) The Board is aware of Saginaw intervenors' objection to such a procedure; however, the AEC Regulations seem clearly to provide that these documents shall be part of the record (10 C.F.R. § 2.743(g)). Any objection which intervenors may have to the probative value of parts of that record may, of course, be made at an appropriate time.

6. A meeting of counsel will be held at the House of Association of the Bar of the City of New York, 42 West 44th Street, on Friday, April 2, 1971, to be continued, if necessary, on Saturday, April 3, to discuss all matters not previously concluded.

III

The central problems of organizing this proceeding seem to revolve about the nature of the role of the intervenors in a proceeding of this kind. As all are aware, the Board has granted all requests for intervention including

those which were technically untimely and those as to which the demonstration of "interest" is less than crystal clear. In doing so, the Board feels it acted consistently with the policies of the Atomic Energy Commission to encourage public participation, and also with the clear trend of recent court decisions. See, e.g., Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965); Office of Communication of United Church of Christ v. Federal Communications Commission, 359 F. 2d 994 (D.C. Cir. 1966); Citizens Committee for Hudson Valley v. Volpe, 425 F. 2d (2d Cir. 1970). However, implicit in those decisions, or so it seems to the Board, is the premise that the granting of permission to intervene is not the end but only the beginning of the process of defining the proper role of intervenors in a proceeding of this kind.

To put this problem in perspective, it is useful to call to mind the nature of this proceeding and how it differs from a judicial proceeding. At least as to radiological hazards* the role of the Board in this proceeding is, in its essence, to make findings as to the safety of a reactor of the general design proposed in the particular locality. The difficulties of performing that role in the context of a public hearing are not inconsiderable;** however, for now all that needs to be said is that the Board does not conceive its function as that of "an umpire blandly calling balls and strikes." Even where the proceeding before the Board is uncontested, the Board must be satisfied as to safety, and in this respect there is not any substantial

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* We will discuss below the function of the Board with respect to environmental matters.

** For the views of the Chairman see Murphy, Atomic Safety and Licensing Boards; An Experiment in Administrative Decision Making on Safety Questions, 33 Law and Contemporary Problems 566 (1968).

difference between the uncontested and contested proceeding. Thus, we are not concerned with who has made the best case but only with the ultimate findings on the question of safety.

Intervenors will be given a fair opportunity to make their cases and to examine into the case proposed by the Applicant and staff. However -- and this is particularly true for those intervenors who are acting as "private attorneys general" to assert public rather than private interests -- the primary function of the intervenor is to assist the Board in making its safety evaluation.

This point needs emphasis because our impression is that intervenors' counsel generally conceive their function differently. For example, in a letter to the Board dated December 15, 1970, counsel for the Saginaw intervenors has said that "the intervenors contesting the issuance of a license are in a real sense defendants in this proceeding." This characterization is, in turn, the basis for a number of conclusions; among them are that these intervenors' "cases" will be made primarily defensively -- by cross-examination; that they need not make their affirmative case until after they see whether they have "destroyed" Applicant's case on cross-examination; and that they are entitled as defendants to the traditional benefit of the doubt.

This conception of the intervenor as a defendant is, we believe, misleading. Intervenors are not defendants; insofar as they claim to be representing the public interest, they have voluntarily assumed a burden of representation of the public interest -- not their own -- and that burden will not always best be served by assuming the posture of defendants.

If this were a different kind of proceeding, it might not matter too much what posture intervenors take. However, the Board must pass on very complex matters. Over two years have gone by since the filing of the application for a construction permit. The proposed reactor has been examined in detail by the regulatory staff of the Commission. It has also been subjected to examination by the Advisory Committee on Reactor Safeguards. A mountain of documents has accumulated. It seems almost self-evident that competent counsel, not under any compulsion to limit the time devoted to the case, can, by utilizing the normal litigation techniques of cross-examination, pretrial examination, etc., prolong the hearing almost indefinitely. In our view such prolongation would not be in the public interest.

Enough has been said to indicate that the Board feels free to make rules governing the participation of intervenors in the light of the stated objectives of this proceeding. We will not try now to give detailed answers to still abstract questions, but, instead will, from time to time in the course of this proceeding, make specific rulings on particular questions in the light of what has been said here. For the moment, we will content ourselves with the following general observations as to how we intend to proceed.

As indicated above, the request for a construction permit for a nuclear reactor involves some very complex technical questions. Although we believe that as a general rule a litigated proceeding must be conducted by counsel, we believe that counsel, unsupported by technically qualified personnel, are unlikely to make a significant contribution to safety. Uninformed requests for documents, interrogatories, depositions and

cross-examination can impose an enormous burden on the proceedings, especially because the traditional test of relevance is too broad to act as a serious limitation in a case of this kind. If relevance is the only test, there is almost no end to the inquiry which could be made. Should the Board permit cross-examination on the underlying physics of reactor technology, for example? This is not the first pressurized water reactor for which a construction permit has been requested. A number of similar reactors have been built in the United States and at least some of them have been operating over some time. Surely, some familiarity with that learning would not be an unreasonable requirement.

As indicated by the Board early in this proceeding, we believe that the original proposed time schedule of the proceeding did not make it possible for an intervenor adequately to prepare to participate in a complicated matter of this kind. However, the corollary of that conclusion is that with adequate time for preparation of the case the intervenors should have availed themselves of the opportunity to secure a technical evaluation of the documents now on file and the general literature on pressurized water reactors. It is, therefore, our intention to insist, where appropriate, that particular lines of inquiry, requests for documents, etc., be based on technical evaluation of available information. We will not try at this time to predict how this requirement will work in specific instances. No doubt in many cases, the overall requirement of fairness to the intervenor may justify resolutions of doubt in his favor but not to the extent that the proceeding is threatened.

We realize that such a course will put a burden on intervenors; however, particularly for those intervenors who claim to be representing the

public interest, we do not feel that the burden is too high a price to pay for the assertion of those rights. At the same time, the Board confesses some uneasiness about those intervenors who are asserting essentially private interests. It would seem appropriate in some instances to distinguish between them and the "private attorneys general." However, even as to them, a totally uninformed inquiry will not be tolerable.

IV

With respect to environmental issues, the existing regulations treat cases (such as this) where the notice of hearing was published before March 4, 1971 very differently from that where the notice is issued thereafter. The intervenors have challenged both the conformity of those regulations with existing law and the conformity with those regulations of the Staff's action here. Up to now the Board has postponed arguments on environmental issues until the release of the Staff's Final Statement on Environmental Considerations. Intervenors have seen a draft statement and one intervenor, Environmental Defense Fund, Inc. (EDF) , has made informal comments.

Obviously, it would be desirable to dispose of environmental issues at the same time as radiological issues. To that end the Applicant has suggested that the Board now order intervenors to serve interrogatories on environmental matters. EDF has vigorously opposed the suggestion. The Board is sympathetic to the idea that we hear all issues at once so as to avoid having to reopen the hearing if the AEC regulations are subsequently declared invalid. There is however, considerable justice in the EDF position that it should not be required to try issues which may not be considered.

Perhaps even more important, however, is that no guidelines have been developed for the Board as to what are proper issues and by what criteria they are to be decided. (The absence of guidelines and the need for time to develop them seems a marked weakness in intervenors' arguments that Boards must now pass on all environmental questions.) We conclude, therefore, nothing can be done to avoid substantial delay if the present regulations are held invalid. There may, however, be steps which should be taken to make sure that other environmental issues do not delay the proceeding.

Those issues would seem to be:

1) The threshold question whether the Board should hear argument on the validity of the AEC regulations.

2) If it does hear argument can the Board pass on the validity of the regulations or must it certify it to the Commission?

3) Whatever the Board may decide as to validity, there is still the question of the Staff's compliance with those regulations here.

These questions would seem to be largely, if not entirely, questions of law, which could be briefed as soon as the Final Environmental Statement is issued. However, intervenors might want to ask factual questions about that Statement and, if so, interrogatories limited only to information relevant to a challenge to the compliance with the regulations might be useful. If that is the case, time could be saved by ordering that such interrogatories be served in the near future.

The Board requests, therefore, that counsel advise it by letter as soon as feasible of their views on the following matters:

1. Assuming that the proceeding will be governed by existing regulations, what, if any, factual issues will be raised?

2. If there are such issues, should interrogatories be required now?

3. Can the Board pass on the validity of the AEC regulations, or alternatively hear argument on that question? (Counsel should explain, briefly, the reasons for their views.)

4. What would be an appropriate time in advance of the hearing for legal arguments on the question of validity (if they are to be heard) and compliance?

In view of the time schedule the Board strongly urges the Aeschliman and Saginaw intervenors to avoid duplicating the work of the Environmental Defense Fund (EDF). Given EDF's wide experience and competence in this area it seems likely that they will adequately discharge their responsibility as "private attorneys general." We do not mean to preclude any intervenor from asking questions on environmental issues but only to suggest that intervenors not take on burdens which will interfere with their efforts in other areas.

For The Atomic Safety and Licensing Board

Arthur W. Murphy, Chairman

New York, N.Y.

March 3, 1971