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In the Matter of Consumers Power Company
Midland Plant, Units 1 and 2
Docket Nos. 50-329 & 50-330

Gentlemen:

This is in response to the Mapleton intervenors' letter of September 14, 1971, requesting reconsideration of certain aspects of the presiding Atomic Safety and Licensing Board's "Schedule of Further Proceedings" (Order dated August 26, 1971, Part I). Our comments on the Mapleton intervenors' letter are set forth below under headings that correspond to the principal subjects covered by the letter.

1. Oral evidence

The Board's order of August 26 provides, with respect to "issues other than ECCS and environmental issues", that "[n]o further oral evidence will be received except by leave of the Board." (Emphasis by the Board.) The Mapleton intervenors object to this ruling on the ground that they have a right as a matter of due process and by provision of the Administrative Procedure Act to present their evidence in the form of oral testimony.

We note that the Board on an earlier occasion rejected the argument on which the intervenors now rely (Tr. 3197-98). As we understand the Board's ruling at that time, the intervenors are barred from reiterating this argument unless they choose to submit a brief on the question involved. (Id.) No such brief has been provided by the intervenors in this instance.

In any case, the intervenors' argument is frivolous. In the absence of a showing of prejudice, there is no reason why the Board may not require written testimony in lieu of oral testimony. The adoption of such a procedural ruling is, in fact, expressly authorized in section 2.743(b) of the Commission's "Rules of Practice", which is in turn authorized by section 7(d) of the Administrative Procedure Act, 5 U.S.C. §556(d). The intervenors' due process contention, for which they provide no citation of authority, is similarly insubstantial. See Yakus v. U. S., 321 U. S. 414 (1944). See also 2 Davis, Administrative Law Treatise §14.16 (1958).

2. The intervenors' failure to file certain written evidence

Under the order of August 26, the Mapleton intervenors were to have filed, on or before September 15, 1971, their written evidence on Contentions III and IV of their "offer of proof" dated July 8, 1971. No such evidence has been filed. In their letter of September 14, the intervenors attempt to justify this default on the ground that the September 15 filing date was unreasonably short and prescribed in violation of Appendix D to 10 CFR Part 50.

In our view, the filing date of September 15 was entirely reasonable under the circumstances of this case. The Mapleton intervenors have been parties to this proceeding for more than nine months. Their original petition to intervene contained vague allegations of potential radiological hazard similar to Contentions III and IV. Moreover, on July 13, 1971, the Board specifically advised the Mapleton intervenors that they would be required to file written evidence with respect to these contentions (Tr. 3210). If the intervenors had been reasonably diligent in the investigation and preparation of their case, they would have experienced no difficulty in meeting their September 15 filing date.

Furthermore, the establishment of the September 15 filing date was in no way inconsistent with Appendix D to 10 CFR Part 50. Indeed, section D.1 of Appendix D specifically directs this Board to "proceed expeditiously with the aspects of the application related to the Commission's licensing requirements under the Atomic Energy Act" pending submission of the applicant's environmental report and the AEC regulatory staff's detailed environmental statement. This provision clearly applies to the issues of potential radiological hazard raised by Contentions III and IV.

3. Testimony of Dr. Ernst Eckert

The Mapleton intervenors served with their letter an affidavit by Dr. Ernst Eckert on the subject of steam transport. This proposed testimony

relates, in our judgment, to an environmental issue. We assume, therefore, that the Eckert affidavit is not an item of evidence to which the staff must respond under section I.A.3 of the Board's order of August 26.

4. Additional witnesses

We are opposed to the intervenors' attempt to expand their witness list to include four additional witnesses on radiological matters. For the reasons stated above, we believe that the intervenors have forfeited any right to present evidence on Contentions III and IV, which are the intervenors' only radiological contentions. Moreover, the proposed testimony of two of the witnesses (Whitelow and Lyon), as described in the intervenors' letter, appears to go beyond the scope of Contentions III and IV. In any event, these four witnesses should have been identified in the July 8 "offer of proof".

5. Additions to the record after September 30, 1971

The Board's order of August 26 contemplates no additions to the record after September 30, 1971, on issues other than ECCS and environmental issues. The Mapleton intervenors object to this ruling on the ground that "[t]he distinction between environmental and non-environmental issues is not clear and may be subject to differing interpretations".

In our view, the Board's ruling was proper. As noted above, the Board has been directed by the Commission to proceed expeditiously with aspects of the application related to the Commission's licensing requirements under the Atomic Energy Act pending submission of the applicant's environmental report and the staff's detailed statement. This directive provides, in our judgment, ample authority for the Board's ruling. The intervenors have had many months to prepare their case on "issues other than ECCS and environmental issues". They should not be permitted to gain more time for the purpose of completing what can be completed now. Of course, to the extent the applicant's environmental report and the staff's detailed statement raise new issues, the intervenors should be given an appropriate amount of additional time in which to prepare their case on such issues.

6. ECCS

The Mapleton intervenors object also to the ruling in the Board's order of August 26 which requires them to file, "within 15 days after receipt of the applicant's next filing on ECCS", a detailed statement of the nature of the affirmative ECCS evidence which they intend to offer in this proceeding.

We believe that this ruling was also proper. The intervenors cannot reasonably defer all preparation on ECCS matters until the applicant has made its next filing. Much information on this subject is available to the intervenors now, and should be under review by them now. We see no reason why the intervenors should not be in a position to file a substantial statement at the time specified in the Board's order.

7. Discovery on environmental issues

The Board's order of August 26 directs all parties to file all motions for discovery on environmental issues by September 30, 1971, and directs the intervenors to file, by the same date, a preliminary statement of their views on environmental questions. The intervenors object to these rulings on the ground that they are inconsistent with Appendix D to 10 CFR Part 50.

We do not read Appendix D as precluding all environmental discovery pending submission of the applicant's environmental report and the staff's detailed statement. Much environmental discovery can take place now. In addition, the intervenors surely can identify what they now see as the environmental issues in this proceeding. The intervenors, of course, may be able to justify further discovery and changes in their contentions upon the basis of new evidence contained in the applicant's environmental report or the staff's detailed statement. This, however, is no reason for postponing what can be done at this time.

Sincerely yours,

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