

McDERMOTT, WILL & EMERY

111 WEST MONROE STREET

CHICAGO, ILLINOIS 60603

312-FRANKLIN 2-2000

CABLE ADDRESS
"MILAM"

51-329

2

November 27, 1970

Arthur W. Murphy, Esq., Chairman
Atomic Safety and Licensing Board
Columbia University School of Law
Box 38
435 West 116th Street
New York, New York 10027

Dr. David B. Hall
Los Alamos Scientific Laboratory
Post Office Box 1663
Los Alamos, New Mexico 87544

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

Dr. Clark Goodman
University of Houston
3801 Cullen Boulevard
Houston, Texas 77004

Re: Consumers Power Company - Midland Plant
Units 1 and 2 - Docket Nos. 50-329 and 50-330

Gentlemen:

We have reflected upon the prehearing conference in this docket and feel compelled to address the Board. We are aware as citizens that the resolution of any controversy involves the accommodation of several interests. We are also aware as citizens that the interests of the environment have not been adequately represented in licensing proceedings, and that this "licensing without representation" has brought us to a point of crisis and confrontation.

Senator Edmund Muskie, in commenting upon the first Report of the Council on Environmental Quality in Hearings Before the Subcommittee on Air and Water Pollution (August 11, 1970), stated the issues succinctly:

8007100 580

G

Handwritten mark

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page two

"The report underlines the need to change our crisis response to environmental problems. Statutory deadlines, mandatory change, and governmental restrictions on mobility are the byproducts of poor planning in the past.

"The problems we face today should have been dealt with in the fifties. But we did not. So, today, the environmental crisis is accepted as inevitable . . .

"Air and water pollution controls may restrict the location, if not the construction of new powerplants. Some industrial facilities will cease to operate . . .

"As the report points out, the Nation lacks a national energy policy, a national transportation policy and a national land-use policy.

"But a national energy policy which does not consider environmental protection as a pre-condition of planning will be worse than a lack of policy . . .

"How is the nation to balance its demand for energy with the environmental problems that energy production creates? . . .

"None of these problems can wait until the next critical pollution episode. The Nation cannot afford crisis response to environmental problems."

Finally, we are aware, as counsel and adviser for some of the intervenors in this case, that the interests which they assert are being met with an insincere response, labeled as delaying tactics, and are being analyzed in a spirit that does injustice to the sincerity with which these issues are raised.

In his closing remarks on November 17, 1970, the Chairman recognized as necessary an accommodation between the demands of public hearings and the demands of our growing need for electrical power. This statement is disturbing,

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page three

since the intervenors seek a public hearing not as an end in itself, but rather as a method by which environmental and other important interests are considered in equal prospective with our national energy problem.

The present inability of the Atomic Energy Commission to cope with public hearings is clear; it is also clear that the recent increase in public hearings was engendered by the Atomic Energy Commission's earlier inability adequately to consider and resolve the myriad problems it faced and ignored. Indeed, since a large segment of the public has lost confidence in the Atomic Energy Commission's ability to deal with all of these policies equally and fairly and has also lost faith in the willingness of our various government and industry leaders to resolve sensibly the accommodation between man and his environment, public hearings have become the only way by which the voice of concerned citizens can be heard.

These considerations lead us to conclude that the overriding procedural issue in this docket is quite simple:

Will the hearing in regard to the various complex substantive issues actually be "expedited" or "delayed" if the available procedure is rushed and a full hearing, with its necessarily attendant pre-hearing considerations, is not afforded to all parties?

We so state the issue because the denial or circumventing of procedural rights must eventually affect substantive rights.

The Palisades hearing, involving a high degree of similarity with the parties and issues present in the Midland hearing,* has gone on for six months, involving some forty hearing days. The Palisades hearing has in large part resulted in such a large number of hearing days, not because of any

*The siting of nuclear plants twice the size of any yet in use and essentially within the heart of a populous community is, of course, an issue peculiar to Midland.

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page four

tactics of delay by the intervenors, but rather because the Applicant began the hearing by combatting every effort toward a free and open discovery procedure. Moreover, the Atomic Energy Commission Regulatory Staff there is still placing barriers in the way of the resolution of the Palisades case and so the "delay" continues. Of course, it can be said that the delay would never have taken place if the intervenors had not intervened. Such a response, however, is specious.

From some of the remarks of the Chairman and the other members of the Board on November 17, we are forced to conclude that they are unaware of the significance of the issues being raised in the Palisades case. It is inconceivable that an Atomic Safety and Licensing Board could begin a hearing today without having reviewed the problems and understood the issues which have arisen in the Palisades case. It is also inconceivable that one member of the Midland Board could have addressed an inquiry to intervenors' counsel as to whether the intervenors were challenging the whole Atomic Energy Commission licensing procedure. Our answer is sincerely respectful, but direct: the system is indeed under attack.

As Harold P. Green noted in his article "Reasonable Assurance of No Undue Risk," Notre Dame Lawyer, June 1968, reprinted in "Scientist and Citizen," June-July 1968:

"Despite the statutory provisions for licensing reactors 'in a goldfish bowl' with public hearings and public disclosures on safety analyses, in actual practice the regulatory procedures tend to stifle public awareness and discussion of the safety issues.

"These deficiencies exist even though the AEC regulatory program is probably the most thoroughly studied and analyzed of any in the nation's history. Almost every year the Joint Committee on Atomic Energy holds extensive hearings on the regulatory and licensing program, and the AEC itself has engaged in very considerable introspection."

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page five

Professor Green's next sentence conceptualizes the problem we are now facing:

"But the thrust of such analysis in recent years has been primarily to consider ways in which the licensing program can be streamlined to facilitate future licensing decisions and to accommodate the present and coming flood of nuclear power plant license applications."

As Professor Green points out, when the Atomic Energy Commission has been faced with a problem, it has not attempted to resolve the problem. Rather, it has sought to avoid it and sweep it under the rug. The Palisades hearing has apparently not prompted objective changes but indeed merely more of the same. We refer to recent proposals to eliminate public hearings at the operating license level.

We have been disturbed by the lack of independence shown by the Regulatory Staff in these hearings. To put the matter more plainly, the role of the AEC Staff Counsel has been to help the Applicant secure a license or permit, instead of publicly subjecting the Applicant to a thorough and objective cross-examination. The contention that the Regulatory Staff has resolved behind closed doors all of the safety issues, or that the ACRS has written its usual form letter approving the site, is no answer at all. There is no "reasonable assurance of no undue risk" to the public and the environment if decisions reached behind closed doors are not examined in the light of a public hearing.

We were also quite disturbed by the position taken by the Dow Chemical Company in its Petition to Intervene. It raised no issues of safety or concern, and it stated as its single reason for intervening its desire to obtain a construction permit for the Applicant at the earliest possible date. The Applicant, having been through the Palisades case, was quick to realize that problems of delay are prompted by unrealistic attitudes as to orderly pretrial preparation; but Dow has not learned the lesson of Palisades and wishes to plunge us into a befuddled and obfuscated hearing where we

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page six

will not know from one day to the next where we are going. Dow's counsel tells us such a procedure is justified because Dow has prepared its own safety report and is satisfied, notwithstanding the fact that Dow's report had to be prepared without all the facts since the final design is not yet completed. Dow's counsel, moreover, was quick to add that although it was willing to stand on its safety report, the report would not voluntarily see the light of day.

We are concerned that this Atomic Safety and Licensing Board will not have sufficient time to review the problems it faces. We are concerned that this Board consists of part-time members and cannot devote its full attention to analysis of the many papers and documents in this case. We are concerned that one member of the Board came to the pre-hearing conference without having seen the Staff's Safety Evaluation Report but was prepared to proceed with the full hearing on December 1. We are concerned that one Board member feels that because construction permits have always been issued prior to resolution of the final design of a given nuclear plant, it is all right to proceed in the same manner in this docket.

Because of our impression that this Board is not familiar with the issues raised in the Palisades case, we set them forth briefly. We do this for reasons noted and also because we are aware of the large responsibility and public trust which this Board must discharge in the course of a resolution of the complex issues, several of which will be of first impression, in this docket.

We then offer once again suggestions for a responsible resolution of this controversy.

THE PALISADES PROCEEDING

Prior to the intervention in the Palisades proceedings, operating and construction licenses issued by the Atomic Energy Commission were the subject of essentially perfunctory proceedings. The Applicant already had the Regulatory Staff's approval

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page seven

and the Rules of Practice of the Atomic Energy Commission did not permit Atomic Safety and Licensing Boards to make a de novo review of the evidence. Construction and operating licenses were issued, therefore, on a given afternoon and if a hearing was held, it was of short-lived duration both in time and scope. It has only been, we think, because of the foresight and independence of the Atomic Safety and Licensing Board in charge of the Palisades case that the issues have begun to be resolved in a judicious manner.

The following are among the more important issues at Palisades. Some of them have already been decided in part by the Palisades Board and the Atomic Safety and Licensing Appeal Board. All of them will soon be the subject of a decision by the Court of Appeals for the District of Columbia.

1. Does the National Environmental Policy Act apply with full force and vigor to the Atomic Energy Commission, and has the Atomic Energy Commission's response been an adequate implementation of its obligations?

2. Is the Atomic Energy Commission's Compliance Division adequately protecting the health and safety of the public?

In this regard, we would point out that prior to the beginning of the Palisades case, the Safety Evaluation Report was considered to be the final word by the Atomic Energy Commission regarding the Palisades Plant. After some thirty-five days of cross-examination by intervenors disclosed serious deficiencies in the building of the Plant, it is questionable whether, without evidentiary repair, the Palisades Board can issue a license at all, and we fully believe that the Atomic Energy Commission Compliance Staff will in any event subject the Palisades Plant to a thoroughgoing reinspection. What would have happened had the intervenors not become involved?

3. Can the Regulatory Staff submit its unsubstantiated opinion in a public hearing as to the safety of the plant without disclosing the records and documents upon which its opinion is based?

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page eight

Whether documents in the possession of the Division of Reactor Licensing and the Division of Compliance are privileged in a public hearing has been the subject of considerable debate in the Palisades case and at this very moment the Atomic Energy Commission's Regulatory Staff is formulating its position. The Palisades proceeding has brought this issue to light and has already resulted in the liberalization of what documents the public is entitled to see.

4. What significance does the Freedom of Information Act have upon the Atomic Energy Commission's decision to classify certain documents as privileged?

The Palisades case has raised this issue and the Palisades Board has ordered the Regulatory Staff to justify its position on privilege by a date certain. It has been the Regulatory Staff's refusal to act expeditiously in this regard that is currently causing the "delay" in the Palisades proceeding.

Finally, there have been many other procedural issues raised, such as the composition of an Atomic Safety and Licensing Board, and substantive issues in addition, such as the right of the Atomic Energy Commission to issue a license authorizing radioactive emissions at Part 20 limits when evidence shows that no more than five or six percent of the Part 20 limits will ever be exceeded. We urge the Board to familiarize itself with the issues raised in Palisades and, as is so common in our jurisprudence, utilize the precedents therein.

It is these issues which this Board will face in coming months in this case. A resolution of these issues now will tend to serve justice. Movement in the opposite direction will be a disservice to the Atomic Energy Commission, the public and the investment being made and contemplated to be made by Consumers Power Company and Dow Chemical Company.

* * * *

We would reoffer some of the suggestions made at the pre-hearing conference and adopted in principle by counsel for Applicant and the Regulatory Staff. We believe that all legal

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page nine

issues should be resolved first, and the primary issue before this Board is its legal right to hold proceedings under the present Notice of Hearing.

1. Can an Atomic Safety and Licensing Board adequately discharge its duties when it is a part-time Board and unable to devote the energy necessary to analyze the various submissions, their underlying documents and the transcript?
2. Must not an Atomic Safety and Licensing Board now be composed of persons with environmental backgrounds so that adequate consideration can be given to the issues required by the National Environmental Policy Act?
3. Can Atomic Safety and Licensing Boards be composed of members who are directly or indirectly connected to the Atomic Energy Commission and therefore have a vested interest in the promotion of nuclear power instead of an objective viewpoint with respect to evidence?
4. Can a Notice of Hearing be issued when the full and final design of the plant is not yet set forth?
5. Should a hearing proceed in advance of the resolution of legal issues which will control the breadth and scope of discovery?
6. Must not the Regulatory Staff, the Applicant and their supporting intervenors, in advance of any initiation of hearings, produce all of the documents, including internal memoranda, upon which they rely to support their opinions?
7. Can the Atomic Energy Commission persist in issuing licenses in violation of 10 C.F.R. 100 and the guidelines set forth in TID-14844?
8. Can the Commission hold any hearings for construction of nuclear power plants obviously intended for commercial use but licensed under a section of the Atomic Energy Act dealing

Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page ten

with research and development reactors, whose admitted standards are less stringent than those for commercial reactors?

In addition to these basic issues, there are, of course, several factual issues relating to the safe design of a facility twice the size of any yet operating and involving a first attempt to produce steam from nuclear energy for use in the manufacture of commercial products.

This Board is faced with the problem stated in another of Senator Muskie's remarks in the August 11, 1970 hearings before the Subcommittee on Air and Water Pollution. The remarks were specifically directed to the Atomic Energy Commission:

"It does underline one point that we consider very important: That as one develops new technologies, it is important to look way ahead, to the whole process. It is not just the creation of electrical power, but everything that goes with it, and when we talk of a national energy policy in the report, it is addressed just to this question, and we can't just look at the building of a particular powersite, but how that fits into overall national needs." (Emphasis supplied.)

We hope that this communication will serve to reopen discussions at the December 1 hearings as to how we may proceed realistically, and whether in light of the Commission's present position on the environment, a position soon to be critically reviewed in the courts, the most expeditious judicial resolution would be either to await a decision in the Palisades case or have the legal issues here take precedence over factual submissions and be decided in advance of any hearing, through the courts, if warranted, so that the legal issues confronting every Atomic Safety and Licensing Board can be resolved in advance and give the Commission, the utilities and the public the predictability they deserve.

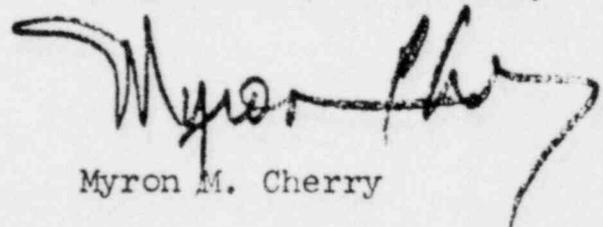
Arthur W. Murphy, Esq.
Dr. David B. Hall
Dr. Clark Goodman
November 27, 1970
Page eleven

This Board has the obligation to prevent or obviate any wasted money, time and effort which will result from a hearing which does not consider all the issues and hence is illegal.

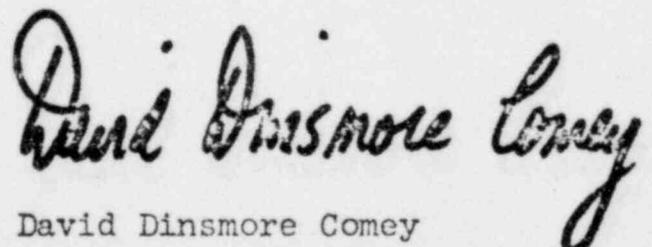
We are certain that no interest can be served by decisions which tend to assure that efforts expended in this hearing will be for naught. As a matter of fact, the Courts of Appeals for the Seventh and D.C. Circuits, in the denial of temporary injunctive relief in the Palisades case, recently commented upon the Atomic Energy Commission's refusal to hear and consider environmental issues, saying:

"While we are denying the relief requested, we do concur in the observation of the District of Columbia Court of Appeals which warned that the A.E.C. in excluding such [environmental] evidence 'is courting the possibility that if error is found a court will reverse its final order, condemn its proceedings as so much waste motion, and order that the proceeding be conducted over again in a way that realistically permits a de novo consideration of the tendered evidence.' Thermal Ecology Must Be Preserved, et al. v. The Atomic Energy Commission and Consumers Power Company, No. 18687, 7th Cir., August 24, 1970, and Thermal Ecology Must Be Preserved, et al. v. Atomic Energy Commission, No. 24458, D.C. Cir., July 29, 1970. (Emphasis supplied.)

Respectfully submitted,



Myron M. Cherry



David Dinsmore Comey