

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

11-5-71

APPLICANT'S MOTION TO REFER QUESTIONS
TO THE COMMISSION

Pursuant to 10 CFR Section 2.730(f), Consumers Power Company, the Applicant in this proceeding, hereby moves that the Atomic Safety and Licensing Board refer to the Atomic Energy Commission certain questions, enumerated below, for a ruling by the Commission.

In pleadings recently filed with the ASLB, the intervenors in this proceeding have urged that the Board consider, hear evidence concerning and rule upon certain issues of alleged environmental impact described below, apparently on the theory that consideration and ruling upon those matters is required by the National Environmental Policy Act of 1969 (NEPA). It is Applicant's view that neither NEPA nor any other law requires that consideration be given in this proceeding to any of the issues raised by the intervenors and referred to herein. Moreover, consideration of those issues would expand the scope and protract the length of this proceeding beyond manageable dimensions.

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NEPA is a comparatively new statute which presents substantial difficulties in both interpretation and administration. One difficulty, illustrated in this proceeding, arises from issues suggested for consideration on the assumption that no meaningful limitations may be imposed upon the requirement, contained in Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), of agency consideration of "environmental impact" and "alternatives to the proposed action." In a highly complex and interdependent civilization any substantial new industrial enterprise can--particularly if an unbridled view of the chain of causation is adopted--have an ever expanding impact. Moreover, if one assumes unlimited ability to change the society in which the proposed power plant is to be built, the range of possible "alternatives to the proposed action" is almost endless, and a trial-type hearing with respect to which alternative is best would involve the broadest, most expansive type of reexamination of the entire range of that society's values.

Thus, consideration in a licensing proceeding of all the matters which might be in any way affected by a proposed power plant and of all conceivable alternatives to it, without any limitation, will inevitably lead an ASLB into social, philosophical and political issues as to which no statutory standards for determination exist. Of course, it will also

extend and prolong the proceeding, cause substantial additional expense to the participants and result in delays in providing the public with energy which is acutely needed.

Chairman Schlesinger seemed to recognize this in his speech to the Atomic Industrial Forum-American Nuclear Society Annual Meeting on October 20, 1971. He said there, referring to the questions of whether society should curb its appetite for energy and electric power and whether energy production should be determined solely in response to market demand, "The AEC lacks authority and consequently should avoid becoming entangled in the determination of broad social issues of this type."

We do not suggest that winnowing the material from the immaterial is an easy task. However, many of the issues suggested by the intervenors in this proceeding are of general importance and are common or similar to issues suggested for consideration in other proceedings. In these circumstances it would be most wasteful for each ASLB, separately, repetitiously, and possibly inconsistently, to attempt to grapple with these issues in separate licensing proceedings. If the business of the AEC is to be conducted with any degree of efficiency, the materiality of these matters should be determined before months of hearing time is expended upon them. Guidance is now required from the Commission concerning whether and, if so, how such issues should be handled. To

the extent possible, the ASLBs, as well as the parties, should be informed whether issues which are raised in such proceedings should be considered in them or may be excluded from consideration and, if they are to be excluded from consideration in adjudicatory proceedings, whether the Commission will be willing to entertain them in rule making proceedings.

The need for guidance from the Commission is emphasized by the fact that most of the questions raised by the intervenors and described below are typical of those which have been raised in a number of proceedings. Fortunately, Section 2.730(f) of the Commission's rules provides a means of obtaining such guidance. In the language of that provision, prompt decision by the Commission is necessary "to prevent detriment to the public or unusual delay or expense... ." Indeed, another ASLB has already adopted procedures designed to expedite receipt of guidance from the

Commission on an issue similar to one of those here involved by permitting an interlocutory appeal to the Commission from its refusal to permit the issue to be pursued in an operating license proceeding.

Such a procedure would serve the interests of all concerned, Applicant, intervenors and Commission staff alike. All would have an opportunity to file memoranda and to obtain from the Commission a determination of the issues which will be treated in this proceeding, thus avoiding the substantial delays and confusion which would otherwise be inevitable. In addition, since these issues are also similar to those involved in other proceedings, the Commission may wish to permit parties to those proceedings to participate in its deliberations on the issues proposed to be referred.

Background

In its order dated August 26, 1971, the Board requested "that all opposing intervenors file by September 30, 1971 a preliminary statement of their views on environmental questions." In purported compliance with this directive, the opposing intervenors filed written statements at the end of September which we do not believe actually did define their position on the environmental issues. However, the statements did refer to the kinds of NEPA issues which the intervenors think should be considered in this proceeding. These cover a broad range of social, political and economic issues.

We recognize, of course, that the ASLB ordinarily rules on the scope of issues when objections are made in the course of pre-hearing procedures and at the hearing itself. However, with respect to the NEPA type issues here involved the Board has little to guide it. The only applicable regulation is the latest version of Appendix D to 10 CFR Part 50, the most relevant portion of which is the following segment from its preamble: ^{*/}

"The effect of the revised regulations will be to make the Atomic Energy Commission directly responsible for evaluating the total environmental impact, including thermal effects, of nuclear power plants, and for assessing this impact in terms of the available alternatives and the need for electric power.

The Commission intends to be responsive to the conservation and environmental concerns of the public. At the same time the Commission is also examining steps that can be taken to reconcile a proper regard for the environment with the necessity for meeting the Nation's growing requirements for electric power on a timely basis."

There is no doubt that views may differ concerning the effect of this language and as to which issues are within the

^{*/} In the operative portion of Part A of Appendix D, which discusses what will happen at the hearing, the regulation states (in paragraph 10):

Any party to the proceeding may take a position and offer evidence on environmental aspects of the proposed licensing action in accordance with the provisions of Subpart G of 10 CFR Part 2.

There is no definition of what constitutes such "environmental aspects".

scope of the hearing and which are not. However, at a minimum, the generality of the language is such that an ASLB can derive no real guidance from it in ruling on the materiality of many issues that can be and are being raised. On the other hand, it is important that the propriety of issues be authoritatively determined promptly so that the parties do not go through a long hearing only to find that various issues were wrongfully included or excluded.

A way out of this dilemma has been suggested by the ASLB in the Vermont Yankee case. The Natural Resources Defense Council, an opposing intervenor, had moved that the Board require consideration of the environmental effects of the reprocessing of spent fuel and of the transportation and disposal of the high level radioactive wastes generated by such reprocessing. The Board heard argument on October 21, 1971 (Tr. 2149-92). At the conclusion of the argument, the Board stated that it needed "further guidance from the Commission". It therefore announced that it would deny the motion and permit a direct appeal to the Commission (Tr. 2187-90), thus bypassing the usual appeal to the Appeal Board. See 10 CFR §2.785.

This procedure was explained by Vermont Yankee ASLB Chairman Jensch as follows (Tr. 2189-90):

"[T]his involves a new regulation, Appendix D, issued September 9, 1971, under a new statute which Congress enacted, the Environmental Policy Act, and it has been the impression of the Board that the Atomic Energy Commission, certainly at the outset, will make all decisions in reference to the scope of activity to be conducted in its name respecting national environmental policy matters.

And this does involve an interpretation of the scope of the regulations that the Commission has issued. And while it may not be a challenge to the Commission, it certainly is an appeal to the Commission on its own regulation and, of course, the Atomic Safety and Licensing Board did not issue the regulation."

The Issues Which Should Be Referred

In view of the foregoing, we believe that the issues described below should be referred to the Commission for ruling. Although we state briefly our position and the reasons for our view that each of the described issues should not properly be included within this proceeding, a more detailed expression of position will, of course, be supplied if the issues are referred as requested.

1. Is the wisdom of Dow Chemical Company's decision to maintain its manufacturing operations in Midland, as opposed to moving them elsewhere or discontinuing them altogether, a proper issue in this proceeding?^{*} The breadth of the questions which

^{*}/ This issue is raised in items 63, 64 and 65 in EDF's Statement of Subjects, in categories L and N of Saginaw Intervenors' motion for production of documents and item 4 of Saginaw Intervenors' Preliminary Statement on Environmental Matters, all dated September 30, 1971.

the intervenors would have the Board look into here are staggering.

Thus, the Saginaw Intervenors state in their item 4:

"Since Dow Chemical and Consumers have urged the idea that the nuclear power plant is necessary 'to save Midland from economic destruction' it would appear that an adequate NEPA analysis would examine into that assertion. Should industry in Midland be expanded at the cost of the environment or should the environmental effects of expansion be minimized by spreading it throughout the United States in other areas where Dow exists? What are the relative costs of energy production in Midland, Michigan versus Freeport, Texas, the latter being the site where Dow can expand and already has facilities? What is the expansion to be used for? For example, if, as it is asserted, the Dow facilities which are to be expanded and for which the process steam is allegedly needed are plants which will produce chlorinated hydrocarbons which have carcinogenic effects, should the National Environmental Policy Act encourage such a plant to be built. Therefore, in this sense, the question is not whether process steam is needed but whether the environment needs another facility which pollutes the atmosphere and creates chemicals and compounds which may have adverse effects upon man and his environment."

And EDF (item 65) would have the Board consider the effect of Dow's relocation on the economy of Midland, "including the possible development of a tourist and recreation industry to replace Dow." A related proposed issue concerns the alternatives available to Dow "if the plant is not built including improved fossil plant production of steam and discontinuation of operations in Midland which require steam...."*/

*/ EDF Statement, Item 63. See also items 62 and 64 of EDF's Statement of Subjects, categories K and L of Saginaw Intervenors' Motion for production of documents and item 5 of Saginaw Intervenors' Preliminary Statement on Environmental Matters.

As we have emphasized, we believe that issues such as these should be excluded from the proceeding. At the very least, the Board should require instruction from the Commission as to the extent to which it should consider them before it becomes bogged down in them.

2. Is it a proper issue in this proceeding to look into the relative economic, conservation and environmental merits of using coal, oil or atomic power for producing electricity?^{*/}

This general question would be virtually the same in every licensing proceeding. In essence, it is the question of what our national energy policy should be--a question which only Congress is in a position to decide.

3. Is the question of whether the demand for electricity should be met a proper issue in this proceeding?^{**/} NEPA and

Appendix D appear to require an Applicant to show that the projected demand for power justifies the construction of the proposed plant. Intervenors, however, go one step farther and say the Board must consider whether admitted demand should be met. For example, EDF (item 57) asks for consideration of "public programs to discourage the unnecessary use of electricity

^{*/} This issue is raised in categories B, F and G of Saginaw Intervenors' motion for production of documents and item 3 of their Preliminary Statement on Environmental Matters.

^{**/} This issue is raised in item 57 of EDF's Statement of Subjects, in category D of Saginaw Intervenors' motion for production of documents and in item 2 of Saginaw Intervenors' Preliminary Statement on Environmental Matters.

by the general public and industry, rate schedules which impose substantially higher charges for electricity use during peak demand periods, rationing of electricity during peak periods, etc." We believe that the statements contained in Chairman Schlesinger's speech of October 20, 1971, referred to above, are correct and the principles there espoused dispose of these issues. However, the materiality of this issue is a matter which should be decided by the Commission.

4. Is it proper to conduct a NEPA review of all aspects of the uranium fuel cycle in this proceeding? The Mapleton Intervenors, in their letter to the Chairman of September 28, 1971, take the position, "that all adverse environmental effects and social and economic costs associated with the nuclear fuel cycle, to wit, mining, milling, feed material preparation, fuel enrichment, fuel fabrication, reactor operation, transportation, fuel reprocessing, and ultimate high-level radioactive waste storage and disposal should be considered in this proceeding." See also the Kansas Petition to Intervene, items 28-30 and 32 of EDF's Statement of Subjects, category W of Saginaw Intervenors' motion for the production of documents and item 13 of Saginaw Intervenors' Preliminary Statement on Environmental Matters. The questions of reprocessing of spent fuel and offsite storage of radioactive wastes were raised in the Pilgrim case and held by the Board

there, in its Memorandum and Order of October 28, 1971, to be not relevant to the proceeding.

This question raises profound policy issues which go beyond the facts concerning any proposed nuclear power plant. These issues are inherently legislative and not determinable within the framework of case-by-case administrative adjudication. Indeed, the Commission already has regulations dealing with these subjects. See 10CFR Parts 20, 30, 40, 50 (especially §50.2(a)(3), §50.10 and Appendices D and F and 35 Fed. Reg. 17530 (1970)), 60, 71 and 73. The only rational way to deal with these questions is by rulemaking, where all interested parties can be heard in one proceeding and where the Commission itself can make the decision.

5. Are the Applicant's past expenditures to promote the use of electricity, if any, relevant to this proceeding?
The Saginaw Intervenors (item 2 of their Preliminary Statement on Environmental Issues) not only propose this as a NEPA question but also the question of whether Applicant should be required to invest money to promote a decrease in the use of electricity. These kinds of questions are patently irrelevant under both NEPA and the Atomic Energy Act and the Commission should rule them out of bounds at the outset.

6. Is the environmental and operational feasibility of the fast breeder reactor program relevant to this proceeding? This issue is raised in Item 3 of Saginaw Intervenors' Preliminary Statement on Environmental Matters. Their argument is that this is relevant because uranium produced by the fast breeder will eventually be needed to operate the proposed plant --a contention which applicant does not concede. In the sense that this issue deals with the source of fuel it can be regarded as merely a particular aspect of the fuel cycle issue discussed above. In any event, the issues raised will doubtlessly be dealt with at great length in the NEPA statement on the fast breeder program and are too remote and extensive to be taken up in a power plant licensing proceeding.

7. Are questions of land use and zoning relevant in this proceeding? The Saginaw Intervenors state (in item 11 of their Preliminary Statement on Environmental Matters): "We believe there are also issues of land use since it is our information that certain portions of residential land were rezoned in order to accommodate the proposed Midland Units." The suitability of the proposed plant site, from the standpoint of protecting the public health and safety, has always been an issue in these proceedings under the Atomic Energy Act and evidence with respect to this question was already introduced in the pre-Calvert Cliffs portion of this proceeding. While NEPA may make relevant certain other elements of site suitability,

such as aesthetics or the long term effect on the site of a nuclear power plant's operation there, we submit that it certainly does not bring within the ambit of the Commission's jurisdiction questions of zoning and land use which are governed by local law. In other words, while a zoning decision by a local government body doesn't bind the Commission on any NEPA questions, by the same token, NEPA doesn't give the Commission jurisdiction to review the decisions of local government bodies made under local or state laws. A Commission ruling to this effect now would be very helpful in marking out the limits of issues as to site suitability under NEPA.

Conclusion

The grant of this motion would make it possible for the Commission to rule on whether the issues described above should be the subject of decision by the ASLB. Such a Commission ruling would avoid either the erroneous inclusion or exclusion of evidence and thereby prevent protracted and unnecessary delay due to the unfortunate timing of developments not directly related to it. These include the issuance of the new Interim Criteria on ECCS and the D.C. Circuit's invalidation of the prior version of Appendix D to 10 CFR Part 50 in Calvert Cliffs Coordinating Committee v. AEC. Grant of the motion would also serve the public interest in expediting a final decision on the Application, so that a possibly meritorious project will not be destroyed by increases in costs and economic

uncertainty resulting from years of delay in the administrative process.

Applicant is aware that the power of a Board to make referrals of the type here requested should be used sparingly. However, the situation presented by this proceeding is clearly one in which the power should be invoked. Most of the questions which have been raised here are also being raised, with only slight variations, in other contested AEC licensing proceedings. We think it is of the utmost importance that the Commission rule on the materiality of these questions now so that discovery and hearings in all of these and related proceedings may proceed expeditiously and efficiently, so that serious delays are not caused by possibly erroneous rulings of different Atomic Safety and Licensing Boards in different cases, and so that the Applicant will be able to meet the projected demand of its customers for electricity in the years ahead.

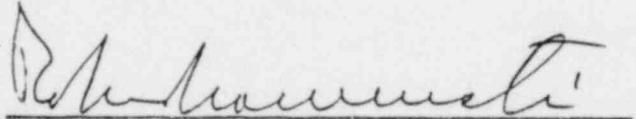
In making this motion, the Applicant assumes that the Commission will afford all the parties to this proceeding--including itself and the intervenors--an opportunity fully to express their views concerning the materiality of the questions certified, and concerning who should decide them and in what kind of proceeding. In addition, we believe it may be appropriate for the Commission to adopt a procedure

permitting participation by parties to other proceedings which would be affected by the Commission decision. In this connection Applicant also suggests that, with its certification, the Board propose to the Commission a schedule for the filing of memoranda by the interested participants.

Applicant therefore moves, pursuant to 10 CFR Section 2.730(f), that the Board refer the questions enumerated above for decision by the Commission.

Dated: November 5, 1971

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Motion to Refer Questions to the Commission", dated November 5, 1971, in the above-captioned matter have been served on the following in person or by deposit in the United States mail, first class or airmail, this 5th day of November, 1971.

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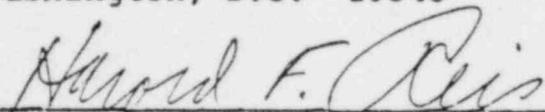
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