BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OR IN THE ALTERNATIVE

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

RESPONSE TO INTERVENORS' (EXCEPT THE DOW CHEMICAL COMPANY) EMERGENCY MOTION FOR DIRECTED CERTIFICATION

3-18-77

Consumers Power Company (Licensee) hereby opposes the March 13, 1977 Motion of all Intervenors except The Dow Chemical Company (Intervenors) for directed certification of the Licensing Board Order of February 25, 1977 denying any financial assistance to the Intervenors.* The Motion arises from the Licensing Board's denial of a motion to certify the issue on March 11, 1977. Licensee strongly opposes this Motion on both procedural and substantive grounds.

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* Because the Licensing Board has already ruled on the issue of financial assistance, Licensee believes that it would be more accurate to designate the procedure involved here as a "referral." Certification involves the submission of a legal issue to a higher tribunal for its consideration without a ruling having been made on that issue by the certifying body. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-152, RAI-73-10, at 818 n. 6 (October 5, 1973). However, the distinctions between certification and referral have apparently become blurred. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, NRCI-75-5 at 482-83 (May 21, 1975).

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PROCEDURAL STANDARDS

It is clear that Intervenors' motion is devoid of any grounds which meet the strict standards of referral or certification. The interlocutory appeal procedure is intended to be an exceptional one. The rules state that certification is only appropriate "when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interest of a party." Appendix A to 10 C.F.R. Part 2, at V.(f)(4).

The standard for referral is equally strict:

> No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission and notify the parties either by announcement on the record or by written notice if the hearing is not in session. (emphasis added)

10 C.F.R. §2.730(f). Appeal Boards have interpreted this standard as requiring a showing that there must be a "potential of truly exceptional delay or expense" if the issue is not referred. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, RAI-73-4, p. 259. (April 17, 1973).

Accord, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-271, NRCI-75-5, pp. 478-86 (May 21, 1975); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Power Station), ALAB-217, RAI-74-7, pp. 61-78 (July 11, 1974). No unusual delay or added expense will occur in the present case if the question of financial assistance awaits the normal review process.

SUBSTANTIVE DISCUSSION

The Nuclear Regulatory Commission (Commission) has already made a clear determination that financial assistance should not be awarded to Intervenors in agency proceedings:

> ...the Commission has determined not to initiate a program to provide funding for participants in its licensing, enforcement and antitrust proceedings, and, as a general proposition, in its rulemaking proceedings. These determinations rest upon both policy considerations and the limited extent of the Commission's present authority to extend financial assistance under the Comptroller General's ruling. 41 F.R. 50829*

The Comptroller General's decision cited (and discussed at length) by the Commission (41 F.R. 50829-50830) ruled that the question of whether to provide financial aid is basically one of "whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations" and that only the Commission itself could make a determination on that question. 41 F.R. 50830.

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* The Commission exempted only the GESMO proceeding "because of the extraordinary importance and far-reaching ramifications of that particular proceeding." 41 F.R. at 50829.

The Commission then considered whether it could make affirmative findings on the standards which the Comptroller General's ruling found would have to be met before financial assistance could be granted. These standards were presented in the two questions of (1) whether it could find that it "'cannot make' necessary licensing or rulemaking determinations - such as that a proposed facility can be constructed and operated without undue risk to the health and safety of the public (10 C.F.R. 50.35) - unless financial assistance is extended to participants who require it"; and (2) whether funded participation is "essential" to its disposition of such issues. Id. The Commission found that it could not make an affirmative finding on either of those questions and made the ultimate determination that financial assistance would not be granted.

Consequently, Intervenors' citation to Greene County Planning Board v. FPC, ___ F.2d ____, 45 L.W. 2319-20 (2nd Cir. 1976) is inapposite. In Greene County, the court was merely advising the FPC that it had the authority to award fees, based on the Comptroller General's decision relating to the NRC, and remanded to the FPC for reconsideration in light of that decision. In contrast, in the circumstances of the present case, the NRC has already acknowledged that it has such authority, and has passed on the matter with express reference to the Comptroller General's decision. File No. B-92288, at 41 F.R. 50830. Moreover, Greene County is distinguishable because it involved a case of already successful Intervenors who may have played an "essential role" in proceedings. 45 LW at 2320.

Furthermore, the Commission decision does not allow for exceptions in individual cases. In disagreeing with a dissenting Commissioner, the Commission stated that "we cannot agree with Commissioner Gilinsky's suggestion that the Comptroller General's standards provide the basis for submissions by parties on a case-by-case basis." 41 F.R. at 50830. Intervenors assertion that "this case is different" (at p. 2) is, therefore, irrelevant. The breadth of the Commission's decision is further shown in its discussion of whether the issue of financial assistance is an appropriate one for ultimate resolution by Congress, where it made the following statement: "we do not recommend that Congress provide funding for ordinary licensing or rulemaking proceedings." 41 F.R. at 50831.

Consequently, the Commission has already expressly ruled on this matter and the Appeal Board is bound by that decision.

It is also important to review the history of these particular Intervenors with regard to this issue; they have never proved indigence. The Commission's recent decision noted this fact:

> In the summer of 1974, acknowledging that the law in this area was not clear, the Atomic Energy Commission denied a request for financial assistance from intervenors in the Midland show cause proceeding for lack of an adequate showing of need, without reaching the statutory authority question. In that proceeding, one of the groups associated with the funding request was the United Auto Workers of America, an organization then having a net worth in excess of $100 million. 41 F.R. at 50829

The United Auto Workers are still listed as one of the Intervenors in this proceeding, as is the Sierra Club. These are hardly indigent institutions. (If, in fact, these institutions no longer support the position of Intervenors, it is incumbent on Intervenors' counsel to acknowledge this termination of support on the record and to withdraw them as Intervenors.) Intervenors' counsel's "threats" to withdraw from the proceedings because of lack of funds (which have taken up innumerable transcript pages, eg., Tr. 3500-16, and have absorbed several hours of hearing time on various days, time which would better have been spent on the substantive issues) must be viewed in the light of claims of indigence which go back several years, but which to date have not forestalled Intervenors' participation.

For the rest, the self-serving declarations in Intervenors' motion deserve no response. They are gross mischaracterization of the record, a tactic which has characterized their participation in these proceedings.* They have delayed the

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* For example, Intervenors have claimed on numerous occasions that they have "ferreted out" essential information not presented by the other parties. In particular, these claims have been made with respect to the Dow-Consumers relationship. It should be noted in this regard that Mr. Temple testified for Dow, at the beginning of these proceedings, that Dow had undergone a review of the economics of the Midland Plant and the result of that review was that "at the present time, circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982," that "under the present circumstances as known to Dow, the nuclear alternative remains the most attractive one economically," but that there would be "continuous review" of the matter. Tr. 220 at pp. 2, 3. After 21 days of hearing, many of which concerned the Dow-Consumers relationship, Dow reiterated its position in its Further Answers to Staff Interrogatories (February 28, 1977): "In September, 1976, Dow concluded, as part of the corporate review of the Midland Nuclear Project, that, based upon the information then provided, the Midland Nuclear Plant retained an economic advantage over the alternatives considered. Dow's official position as a company remains unchanged. No person in Dow's employ has any authority or power to change this position. To date, Dow has not been advised of changes which it considers sufficient to require that it undertake a new analysis." (Answer No. 14)

proceedings, accused each of the other parties of misconduct innumerable times, announced more than once that they were about to make startling disclosures of "hot" items (which, of course, never materialized) (Tr. 3768), and made threats of withdrawal and lawyers' speeches ad nauseum.

In conclusion, it is important to note the policy considerations involved in the Commission's decision not to finance participation in agency proceedings. Principally, funding of Intervenors involves support of "a viewpoint which is not subject to control or oversight by the public's elected representatives and which may or may not reflect the views of many members of the public." 41 F.R. at 50831. Public funding in this case is particularly inappropriate for precisely that reason. Intervenors are accountable to no one and to date they have acted accordingly. Licensee believes that the awarding of funds would only promote their irresponsible conduct.

Respectfully submitted,

Caryl A. Bartleman

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for Consumers Power Company

March 18, 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "Response to Intervenors' (Except The Dow Chemical Company) Emergency Motion For Directed Certification", dated March 18, 1977, have been served upon the following by hand delivery in Washington, D.C. this 18th day of March, 1977:

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The following parties have been served by deposit in the U.S. mail, first class, postage prepaid, this 18th day of March, 1977:

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March 18, 1977