

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OR ON 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) )



EMERGENCY MOTION FOR DIRECTED CERTIFICATION

All Intervenors except Dow Chemical Company hereby move the Appeal Board (in the absence of jurisdiction of the Appeal Board the Nuclear Regulatory Commission)\* for directed certification of an order of the Licensing Board dated February 25, 1977 which denies financial assistance to these Intervenors for the purposes of securing and paying for expert assistance as well as for counsel fees.

\* Because the subject of this certification in part deals with the Commission's release concerning financial assistance to participants in Commission proceedings published in the Federal Register on November 18, 1976 at 41 F.R. 50829 et seq., it is not precisely clear whether the Appeal Board has jurisdiction to accept the directed certification. On the other hand the issue is of such extreme importance and is critically tied to Intervenors' further participation that it is just that these Intervenors have a decision from some regulatory body within the Commission. For that purpose we are captioning our papers alternatively before the Atomic Safety and Licensing Appeal Board as well as before the Nuclear Regulatory Commission. We intend that one of those entities hear our plea and respond to our request. The necessity for this request for directed certification is based upon the concept and procedure outlined in Public Service Co. of New Hampshire (Seabrook units 1 and 2), ALAB 271, 1 NRC 475 (1975). Additionally, this filing alternatively before the Appeal Board or the Commission is contemplated by Appendix A to 10 C.F.R. part 2, and in particular Appendix A at V(f)(4) wherein the Commission has stated that:

"A question may be certified to the Commission or the Appeal Board, as appropriate, for determination 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."

The bases for our request for directed certification are as follows:

1. Although the Commission has ruled as of November 18, 1976 that financial assistance is not to be provided to participants in licensing procedures that policy statement is now subject to re-examination because of various recent events. Thus under date of December 3, 1976 the Court of Appeals for the Second Circuit in Greene County Planning Board v. FPC, \_\_\_\_\_ F 2nd \_\_\_\_\_, 45 LW 2319-20 ruled that the Federal Power Commission had the authority without further Congressional action to consider requests, under its broad powers of preserving the integrity of its hearings, to award financial assistance to participants. As one of the foundational bases for the Court of Appeals decision, the Court referred to recent communications by the Controller General which expressly indicated that the Nuclear Regulatory Commission had similar authority. This opinion was not before the Commission when it issued its policy statement;

2. While generally the policy statement indicates that participants in licensing proceedings are not entitled to financial assistance, the Commission premises in part, that judgment on the fact that the regulatory staff does provide an overall important understanding and analysis so that other participants while important are not critical to the process. This case is different as has been determined by the Licensing Board in an Order dated February 25, 1977;

3. In that order the Licensing Board calls attention to the fact that the proposed testimony of Dr. Richard J. Timm is important and should be the subject of introduction plus cross examination.

In underscoring the importance of receiving Dr. Timm's testimony the Licensing Board states at pages 1 and 2 of its Order that:

"Without it, [the Timm testimony] the only evidence in the record relating to the same areas of concern will be that of the Licensee and the Staff which are not diverse in general effect."

Thus the Board has recognized in this proceeding that the testimony of Dr. Timm is necessary to a completed hearing record, notwithstanding the participation of the Licensee and the Staff. This circumstance makes the case markedly different from that which was covered by the Commission in its policy statement;

4. The Licensing Board also (at page 3 of its Order) indicated that Intervenors' counsel was appearing in the proceeding at considerable financial loss and the Board acknowledged that "...his participation has been of value." As the Board has indicated in its Order (and at many times during the hearing) cross-examination by the Intervenors plus its proposed direct testimony is essential to bring out matters in the hearing record;

5. The hearing below is also of an unusual nature since the Regulatory Staff has been chastized for not having done an independent review, and Consumers Power Company<sup>4</sup> has admitted in memoranda that it manipulated testimony and had planned its procedures on the grounds that these Intervenors would run out of money. Thus Consumers Power Company was not concerned about the analysis by the Regulatory Staff or for that matter even by the Licensing Board and was only concerned that these Intervenors would be able to bring out all of the information which they have done. In fact at a meeting on September 21, 1976 in planning

for these hearings, Consumers stated its strategy as follows:

"Consumers assumes Cherry [Intervenors' counsel] will not appear because of lack of funds--...[S]ince probably no intervenor cross-examination [Consumers] will be able to finesse Dow-Consumers continuing dispute."

Midland Intervenors Exhibit 25, p. 2, marked in the hearings below on February 1, 1977. The Staff did nothing to bring this shocking tactic to the attention of the hearing Board, and without these Intervenors, the dishonesty would have been concealed. Consumers has made a mockery of the hearing below and without participation of Intervenors, Consumers will continue to do so. If the Appeal Board or NRC refuse financial assistance, they will, in effect, be helping Consumers and Dow execute their plan of silence and dishonesty.

6. In letters to the Licensing Board which are already of record in this proceeding from Intervenors' counsel dated February 19, 1977 (8 pages) and dated February 21, 1977 (3 pages plus a 2-page attachment), Intervenors set out the circumstance of their inability to raise funds. This situation still adheres and it is absolutely necessary for the Appeal Board or the Commission to review the denial of Financial assistance in such a way as to assure that the testimony of Dr. Timm will be made available to the hearing Board and subject to cross-examination, and that Intervenors' valuable participation thus far will continue;

7. There is an emergency nature to this request for certification because of the hearings which will commence on March 21, 1977. Intervenors also ask that the Appeal Board or the Commission, if they direct certification, call for Briefs on the matter on

a short schedule so as not to place the Intervenors in a position of having to either default in the proceedings, ask for delays, or simply participate in a more limited extent;

8. On this record there is just cause for the Appeal Board or the Commission to re-evaluate the denial of financial assistance particularly in light of the Licensing Board's Order that the Intervenors here have been extremely important in ferreting out information which would not have been available otherwise. Thus this case is not a situation where without Intervenors, both the Board and the Staff would have brought out certain information and made a complete record, and the Intervenors' assistance is merely an additive; rather, here the situation is such that without Intervenors, Consumers Power Company and Dow Chemical Company would have, by their inaction and manipulation, distorted the hearing record to the detriment of the public health and safety, as well as to the integrity of the hearing record itself;

9. A review of the hearing record thus far also shows that the Staff is fearful of taking a position against Consumers and is literally "throwing the case" by its lack of scrutiny, understanding or inquiry;

10. Contrary to the statements in the policy statement, here the Intervenors have been better prepared than the Staff and have brought out information that the Staff simply refused to do in the late fall in the preparation of these hearings. In addition, here considering the grant of financial assistance (an ongoing

proceeding where the Licensing Board had deemed it necessary that Intervenor and their expert witness participate) is critically important and, of course, extremely different than the situation where the Commission is asked to grant financial assistance on a cold record. Here Intervenor has earned their status, paid their dues by raising substantial funds of money, but as the above noted correspondence indicates, simply completely run out of funds. Moreover, financial assistance here will not delay the proceedings, but merely will serve to quickly end them since Intervenor will not be faced with the Hobson's choice of asking for a delay in the proceedings to raise more funds or simply to forego their rights completely;

11. Also this is a proceeding wherein Intervenor has earned their entitlement to the proceeding by virtue of the July 1976 Court of Appeals decision in the Aeschliman case. Thus these Intervenor has proved the merit of their position, the earnestness and sincerity of their participation, and not to reconsider the broad policy consideration against financial assistance in this case would be a travesty of justice particularly in light of the Greene County decision recently in the Second Circuit Court of Appeals.

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For all of the above reasons, Intervenor request the Atomic Safety and Licensing Appeal Board, or as appropriate, the Nuclear Regulatory Commission to order certification and review the denial by the Licensing Board of financial assistance contained in

the Licensing Board's Order of February 25, 1977. Because these proceedings are ongoing, Intervenors ask that this request for certification be given expedited consideration.\*

Respectfully submitted,



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Attorney for All Intervenors  
except Dow Chemical Company

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\* The Intervenors made an oral request in a conference call among all the parties for the Licensing Board's direct certification of its Order of February 25, 1977 and in an oral ruling also given on the telephone dated Friday, March 11, 1977, the Licensing Board denied the request for certification.

CERTIFICATION

I certify that six (6) copies of the foregoing request for directed certification was served upon the Secretary of the Commission and four (4) copies on the Appeal Board in this proceeding by postage prepaid mail on March 13, 1977, and that similar copies were sent in the same manner and on the same date to counsel for Dow Chemical Company, the Regulatory Staff, and Consumers Power Company.



A handwritten signature in dark ink, appearing to be "John H. ...", is written above a solid horizontal line.

March 13, 1977

