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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
CONSUMERS POWER COMPANY)	Construction Permit
(Midland Plant, Units 1 and 2))	Nos. 81 and 82
)	(Show Cause)

STAFF BRIEF ON CONSUMERS PETITION FOR
RECONSIDERATION OF ALAB-283

I. Introduction

On July 30, 1975 this Atomic Safety and Licensing Appeal Board issued a decision (ALAB-283) holding inter alia that the Licensing Board erred in determining that the burden of proof in a show cause proceeding lay with the Commission's Staff or other proponent of the order. The decision distinguished New York Shipbuilding Corp., 1 AEC 707 (1961) on the grounds that it involved a byproduct material license rather than a construction permit. ^{1/} The decision grounded the distinction on the fact that a permit-holder must ultimately prove compliance with Commission regulations before an operating license may be issued. ^{2/} On August 19, 1975 Consumers Power Company (Consumers)

^{1/} ALAB-283, p. 15

^{2/} Id. p. 14

petitioned for reconsideration of that ruling or in the alternative for certification of the issue to the Commission on the grounds that it involved a major policy decision. It is the Staff's contention that the burden of proof in a show cause proceeding is always on the proponent of the order although the burden of going forward with the evidence may properly be on another party or parties.

II. Summary of the Argument

1. A construction permit, issued under the authority of the Atomic Energy Act of 1954, as amended, is a license for the purpose of enforcement.
2. The burden of proof or persuasion should be placed on the advocate or proponent of the order in an enforcement proceeding. The nature of a given proceeding (e.g. licensing, enforcement, etc.) determines what party is the proponent.

III. A Construction Permit is a License for the Purpose of Enforcement

Consumers is the holder of a construction permit issued pursuant to section 185 of the Atomic Energy Act of 1954. ^{1/} That provision

^{1/} 42 U.S.C. § 2235

requires the Commission to issue the permit in the absence of any good cause showing why issuance would not be in accordance with the Act's provisions. Consumers does not dispute the fact that as an applicant for a construction permit it had the burden of proof to show compliance with the Act, nor does it dispute that it will have the burden of proof when it seeks an operating license.^{1/} In both cases, Consumers will be the proponent of an order of the Commission which would authorize the issuance of a license. This position is consistent with 10 CFR § 2.732 which places the burden of proof on the applicant or the proponent of an order unless otherwise ordered by the presiding officer.

This Board's decision placing the burden of proof states "[i]n these circumstances we can not perceive why the legislature would have wanted the burden shifted elsewhere if a question of compliance arises in the intervening construction phase". To illustrate its point the Board cites Stearns Electric Paste Co. v. EPA.^{2/} However, that case involved a statute designed specifically to impose the burden of proof on the registrant.^{3/} Section 185 of the Act does not place the burden

^{1/} Consumers Petition pp. 8, 14.

^{2/} 461 F.2d 293 (1972)

^{3/} See 7 U.S.C. § 135b(c) where the statute requires an application for registration to be filed when the Administrator either refuses registration or cancels a registration. Therefore the burden of proof is logically on the applicant.

of proof on a permit holder after permit issuance but before a operating license is sought. That section clearly states "for all other purposes of this Act, a construction permit is deemed to be a license."^{1/} Section 185 is concerned with granting a permit. Another purpose of the Act is found in section 186 which involves revocation of licenses and requires the provisions of the Administrative Procedure Act to be followed when so doing.^{2/}

The legislative history of section 185 reveals that Congress was concerned with the two-phase licensing process it had developed and feared that the procedural safeguards afforded at the operating license stage might not be afforded at the construction permit stage and that if a facility were already built the Commission would be unlikely to refuse a license.^{3/} Therefore section 185 was amended to require that "... the same procedural safeguards in the case of licenses be applied to construction permits".^{4/} Procedural safeguards for licensees include the right to have charges against them proved when they are accused of violating license conditions including the conditions of construction permits.^{5/}

^{1/} 42 U.S.C. § 2235

^{2/} 42 U.S.C. § 2236(b)

^{3/} Comments of Rep. Holifield on introducing the amendments, 100 Cong. Rec. 10398.

^{4/} Id.

^{5/} 5 U.S.C. 556(d). See also 2 Davis Administrative Law Treatise § 14.14 (1958). Note that Prof. Davis commenting on a CAB regulation specifically placing the burden of proof on a license applicant states "If a petitioner for an approval or license is charged with a specific infraction which the petitioner denies, one may doubt whether the provision would be followed according to its literal terms."

This Board has suggested that since the ultimate burden of showing compliance rests with the permit holder seeking an operating license, it would be illogical to shift the burden elsewhere during the intervening construction phase. Although such an argument has cursory appeal, it ignores important statutory rights to which the permit holder is entitled, e.g. a right to proceed with its authorized activities without having to prove at each stage of construction that it is proceeding in accordance with its permit and Commission requirements. The burden should be and is on those contending that the permit is being violated to make a prima facie showing before the applicant is forced to defend. This is what the Administrative Procedure Act requires and is consistent with the rule that the proper allocation of the burden of proof is an essential rule of evidence which must be observed by administrative agencies in adjudicatory proceedings. ^{1/}

^{1/} Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1949) holding that the SEC failed to assume the burden of proof in respect to the propriety of its proposed action.

IV. The Burden of Proof Should be Placed
on the Advocate or Proponent of an
Order in an Enforcement Proceeding

The instant proceeding involves the possible suspension or revocation of a license (construction permit). Section 186 ^{1/} of the Act requires the Commission to follow section 9(b) of the Administrative Procedure Act in revoking any license including construction permits. ^{2/} Except in cases of wilfulness or where the public health, safety or interest requires, section 9(b) requires that a licensee be given an opportunity to demonstrate and achieve compliance before revoking the license. ^{3/}

The Staff, of course, under the circumstances in this case had the burden of proving that (1) the licensee had violated the terms of its license, Commission regulations, orders, or the Atomic Energy Act, (2) that the violations were either intentional in nature or were inimical to the public health, safety or interest, or that the licensee failed to come into compliance after proper notice of violation had been assessed, and (3) that the sanction proposed was appropriate in the circumstances.

^{1/} 42 U.S.C. § 2236. "Any license may be revoked...for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application." (emphasis added)

^{2/} 42 U.S.C. § 2236(b). Section 181 (42 U.S.C. § 2231) also provides: "The provisions of the Administrative Procedure Act shall apply to all agency action taken under this Act and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act."

^{3/} 5 U.S.C. § 558(c). See Shuck v. SEC, 264 F.2d 358 (D.C. Cir. 1958).

The show cause order consisted of dual considerations at the time of its issuance. Initially the Director of Regulation found that the public health, safety and interest required immediate suspension of construction, basing his claim upon the cadwelding deficiencies. At that point no opportunity to achieve compliance had to be afforded since the nature of the violations coupled with a public health, safety or interest finding was sufficient to sustain the immediate suspension of construction under the permit.

Shortly thereafter Consumers answered the show cause order and satisfactorily demonstrated compliance with Commission regulations in so far as the public health, safety or interest considerations were concerned. The Director modified the show cause order and construction activities at Midland were allowed to resume.

However, the show cause order also required a showing that there were reasonable assurances that the same Quality Assurance violations would not reoccur. This provision of the show cause order invokes the application of that provision of § 9(b) which allows the licensee time to demonstrate compliance.

The controversy concerning who is to bear the burden of proof in the subsequent hearing, therefore, centers on the second issue.

The unqualified provisions of 10 C.F.R. § 2.732 with respect to this specific proceeding state:

"Unless otherwise ordered by the presiding officer, the applicant or proponent of an order has the burden of proof."

Similarly, APA § 7(c) [5 U.S.C. § 556(d)] provides:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

Whether an applicant for a license, a licensee or another party must carry the burden of persuasion in a given situation turns upon the nature of the proceeding and upon the posture of the applicant in that proceeding. Thus, while Consumers Power Company was the "applicant" throughout the Midland licensing proceeding, upon the grant of the construction permit procedural rights inured to the licensee, including the right not to reprove its rights to the existing license by bearing the burden of proof in a show cause proceeding. ^{1/}

Burden of proof signifies the ultimate risk of non-persuasion. ^{2/} The burden encompasses the duty of ultimately establishing any given proposition on which parties are at issue. McCormick § 307 n.1 defines burden of proof as "that inference which predominates over two equally probable but inconsistent inferences".

Burden of proof must be distinguished from the burden of going forward with the evidence, which pertains to the duty an adverse party must meet in coming forward with an affirmative showing of evidence

^{1/} Administrative Procedure Act, Section 9(b) and 7(c) via Section 181 of the Atomic Energy Act of 1954. See also 2 AM JUR 2d Administrative Law § 381 (1961).

^{2/} Wigmore, Evidence § 2.485.

after a prima facie case has been established by the proponent. The burden of going forward with the presentation of evidence may shift during the balance of the proceeding, depending on the issues presented by the parties, while the burden of proof never shifts. ^{1/}

In this case the Staff established violations of the Commission's QA requirements and the repetitive nature of those violations in the show cause order. Consumers did not deny the violations but contended it had subsequently achieved compliance and that it would continue in compliance in the future. Thus the burden of going forward with the evidence was with Consumers.

In United Church of Christ v. FCC, 425 F.2d 543 (1969) the court held that the burden of going forward with the evidence must be met by some affirmative showing, falling short however of a prima facie case but sufficient to require reasonable minds to inquire further.

By the time the hearing convened the Staff was satisfied that Consumers had shown a reasonable assurance that it would comply with the Commission's Quality Assurance requirements thereby obviating the need to prove what sanction should be imposed since compliance had been achieved and the violations did not meet the tests of intent or public health, safety or interest required by the APA. The Licensing Board

^{1/} 2 AM JUR 2d Administrative Law § 381 (196.).

accepted the fact of the previous violations and properly had evidence presented on the remaining issue of future compliance. This taking of evidence did not shift the burden of proof from the Staff (or Saginaw in this case) however. ^{1/}

In essence the question remaining in this proceeding was not whether the violations were committed but whether a sanction was appropriate in the circumstances. On this issue the Staff has the burden of proving a sanction is appropriate. The Staff believed the public interest would not be served by license revocation and put forward evidence tending to show no sanction was appropriate in the circumstances. Saginaw as the only party advocating an order imposing a sanction then should have had the burden of showing that the public interest, health or safety required a sanction and that revocation was the appropriate sanction.

Other federal agencies uniformly follow these rules. The Federal Power Commission in a parallel licensing review situation, held that a party seeking imposition of a condition has the burden of proving that such conditions are required. ^{2/} The Massachusetts Municipal Electric

^{1/} Admission of Conference Membership - Pacific Coast European Conference, 18 AdL 2d 571 (FMC, 1966). See also 2 AM Jur 2d Administrative Law § 381 (1962).

^{2/} Municipal Electric Ass'n. of Massachusetts v. FPC, 414 F.2d 1206 (D.C. Cir. 1969). It should be noted that once a licensee is given notice of a proposed license condition with which a licensee does not consent, the ensuing proceeding is in all respects an enforcement proceeding subject to APA requirements. See 10 CFR §§ 2.200, 2.201 and 2.204.

System Intervenor's sought to impose a restriction on a proposed FPC pumped storage project construction and operating license. The restriction would have required the applicants to admit the Massachusetts municipals to a regional electric coordination council, theretofore composed exclusively of investor-owned companies. The FPC held that the proponents of the license qualifications had not convinced the Commission and therefore failed in their allocated burden of proof. ^{1/}

Accordingly the Intervenor's support of license sanctions or "conditions" based on Consumers' Quality Assurance noncompliance can be analogized to the Massachusetts intervenors who similarly sought the imposition of conditions on the license granted to the private power companies.

Adjudicatory proceedings of other agencies dealing with health and safety safeguards are in accord with the above propositions. A provision of the Federal Coal Mine Safety Act places the burden on the Director of the Bureau of Mines to prove that methane has been found in a mine. The Coal Mine Safety Board of Review puts the burden on the Director to produce evidence to support the position taken. It also places upon the Director the "risk of non-persuasion." ^{2/}

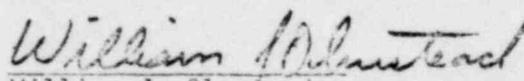
^{1/} Municipal Electric Ass'n. of Massachusetts v. FPC, 414 F.2d 1206 (D.C. Cir. 1969).

^{2/} Rebecca Coal Co. v. Dir. of the U.S. Bureau of Mines, 3 AdL 2d 878 (FCMSB of Rev. 1953). See also, McCormick § 335 n.1 on the definition of the risk of non-persuasion; Pacific Gas & Electric Company v. Securities and Exchange Commission, 127 F.2d 378 (1942); Mississippi River Fuel Corporation v. Federal Power Commission, 121 F.2d 159 (1941); and Rules and Instructions for Inspection and Testing of Locomotives other than Steam, 8 AdL 2d 477, 303 ICC 199 (1958).

Conclusion

For the foregoing reasons, the Staff supports petitioner's request that the Appeal Board reconsider its decision in ALAB-283. The Staff has no objections to certification in accordance with this Board's jurisdiction and discretion.

Respectfully submitted,


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Dated at Bethesda, Maryland
this 3rd day of September, 1975.

APPENDIX

By letter dated August 25, 1975 this Board requested that background information concerning show cause orders issued by the Staff be included as a part of this brief. A search of the Staff's files has disclosed the information tabulated below. The table does not include orders imposing civil penalties or orders modifying licenses which have the same procedural requirements. The information provided covers the period January 1, 1970 to date with the exception of show cause orders issued to collect delinquent material license fees on which no hearings have been requested or held.

<u>Show Cause Issued to:</u>	<u>License Type</u>	<u>Hearing</u>	<u>Requested by:</u>
1. Trail Clinic (pending)			Licensee
2. Carolina Power & Light (Brunswick)	CP/OL	no	
3. West Virginia Univ.	Byproduct	no	
4. VEPCO (North Anna)	CP	yes	Stipulation of Parties
5. NFS (Erwin Tenn.)	SNM	no	
6. Consumers (Midland)	CP	yes	Intervenor
7. Green Bay X-Ray	Byproduct	yes	Licensee
8. ISOMEDIX	Byproduct	no	

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)	Nos. 81 and 82
(Midland Plant, Units 1 and 2))	(Show Cause)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Staff Brief on Consumers Petition for Reconsideration of ALAB-283" dated September 3, 1975 in the captioned matter have been served on the following by hand delivery or by deposit in the United States mail, first class or air mail, this 3rd day of September, 1975.

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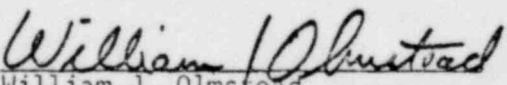
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