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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 } Docket Nos. 50-329
) 50-330
(Midland Plant, Units 1 and 2))

NRC STAFF RESPONSE TO INTERVENORS' MOTION
TO WAIVE FILING OF BRIEF

I. INTRODUCTION

On July 2⁷, 1976, after review of the orders of U.S. Atomic Energy Commission granting construction permits for the Midland facility, the Court of Appeals for the District of Columbia circuit in Aeschliman, et al. v. U.S. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir., 1976), cert. granted sub nom. Consumers Power Company v. Aeschliman, 45 U.S.L.W. 3570 (February 22, 1977) (Aeschliman) remanded a number of issues to the Nuclear Regulatory Commission (Commission) for consideration. The Commission reconvened an Atomic Safety and Licensing Board (Board) in this proceeding and directed it to consider the issues remanded by the Court of Appeals in Aeschliman and to determine whether the outstanding construction permits for the Midland facility should be continued, modified or suspended. The Licensing Board established procedures and scheduled hearings to examine the question of whether the Midland facility should have its construction permits continued, modified or suspended in the interim until a full remand proceeding could take place. These suspension hearings commenced on November 30, 1976 and the record was closed on May 13, 1977. Parties to this suspension proceeding were Consumers Power Company (Consumers), Dow Chemical Company (Dow), All Intervenors Other Than Dow (Intervenors)

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and the NRC Staff (Staff). All parties filed findings of fact and conclusions of law concerning the suspension issue. On September 23, 1977 the Licensing Board issued its order declining to modify or suspend the construction permits pending the outcome of the remand proceeding. In that order, however, the Board stated that it was not certain that it had issued an appealable order and it thought it important that the order be reviewed. Consequently, the Board referred its rulings to this Appeal Board.

On October 1, 1977, Intervenors filed "Exceptions to Licensing Board Decision of September 23, 1977" (Exceptions) and also a "Motion to Waive Filing of Brief" (Motion).^{1/} Although 10 CFR §2.762(a), provides that a brief in support of exceptions shall be filed within fifteen days after filing exceptions, Intervenors seek to have the Appeal Board waive that requirement. While the Appeal Board has cognizance of the matter as a result of the Licensing Board's referral and is in the best position to determine whether or not it wishes the parties to brief any of the issues, the Staff, nevertheless, opposes Intervenors' Motion given the key importance of the brief in appellate proceedings.

^{1/} Intervenors evidence uncertainty in various correspondence accompanying their Exceptions and Motion as to the proper forum before which their Exceptions and Motion should be filed. Pursuant to 10 CFR §§2.762 and 2.785, both pleadings are properly before the Appeal Board.

II. ARGUMENT

1. The Requirement of a Brief in Support of Exceptions Should Not Be Waived Absent Extraordinary Cause

The positions of the parties with supporting argument on questions of law and record references on questions of fact must be clearly presented to the appellate tribunal. Section 2.762(a) states:

A brief in support of exceptions shall be filed within fifteen days thereafter.... The brief shall be confined to a consideration of the exceptions previously filed by the party and, with respect to each exception, shall specify, inter alia, the precise portion of the record relied upon in support of the assertion of error. (10 CFR §2.762(a)).

Exceptions not briefed are considered waived. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, NRC , at n.4 (October 7, 1977); Union Electric Co. (Callaway Units 1 & 2), ALAB-347, 4 NRC 216 (1976); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 414 (1976).

While extraordinary circumstances may exist which would warrant waiver of the briefing requirement, the Appeal Board has noted extreme reluctance to take this step.^{2/} In Grand Gulf the Board stated:

^{2/} Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973).

At least in the absence of a showing of extraordinary cause which has not been attempted in this instance, we will not entertain an appeal under Section 2.714a in circumstances where the appellant fails to file the required brief in support thereof. This is so irrespective of whether the appellant is represented by counsel. In the enforcement of the Rules of Practice, this Board may (and indeed did here) make some allowance for the fact that a party before it is proceeding pro se. But considerations of fairness to other litigants, as well as of the orderly administration of the adjudicatory process, preclude the granting to any appellant of a waiver of as fundamental a requirement of the Rules as that relating to the submission of a brief detailing the basis for his appeal.

While Intervenors' exceptions in this matter are somewhat more elaborate than is initially required in some respects, they fail to comply with all the requirements for briefing exceptions. While many of the exceptions contain supporting argumentation, which is not required for exceptions but is required for briefs, the factual assertions are not supported by reference to the precise portion of the record upon which they are based. Virtually no authority is cited to support the propositions of law and fact upon which the exceptions are based. Unless the other parties and the Board are given the benefit of more precise argument from Intervenors concerning their exceptions, it will be extremely difficult to address whatever issues Intervenors are raising on appeal. Consequently, Intervenors' Motion should be rejected absent a showing of "extraordinary cause".

2. Intervenors Have Made No Showing of Extraordinary Cause
in Support of Their Motion

The Appeal Board in Grand Gulf indicated that it might entertain waiver of the briefing requirement of Section 2.762 upon a showing of "extraordinary cause". Intervenors argue several grounds in support of their Motion. These grounds fall short of "extraordinary cause".

Intervenors argue that the Appeal Board has before it an "emergency appeal involving narrow legal issues".^{3/} The precise nature of the emergency is not indicated. The Licensing Board considered the question of suspension based on an extensive record and detailed findings of fact and conclusions of law submitted by the parties and found that the construction permits should be left in effect pending the outcome of the remand proceeding. Intervenors do not state what harm, if any, they would suffer by continued construction in this interim period. The Staff disagrees with Intervenors' further claim that the appeal involves only narrow legal issues. The legal questions before the Licensing Board during the suspension proceeding were numerous and complex. Paragraphs 6 through 9 of the Licensing Board's order were devoted to a discussion of the appropriate legal standards for the Board to apply to the suspension issues. The complex legal principles

^{3/} Intervenors' Motion, page 1.

and standards identified had to be applied to the factual record and a complicated balancing and weighing of the equities performed.

Secondly, Intervenors argue that their position concerning the legal issues is set forth in Intervenors' Exceptions, and also in their findings and legal briefs filed before the Licensing Board.^{4/} It is true that Intervenors have set forth, in cursory form, their legal positions in the Exceptions they have filed. For example, in their Exception No. 6,^{5/} Intervenors argue that the Licensing Board's decision is "erroneous as a matter of law" regarding its treatment of sunk costs. Mere statements of a legal position with no statutory or cause law to support them do not meet the applicable briefing requirements.

Intervenors' third ground for waiver is that the entire record in this proceeding may well be before the Appeal Board for its review.^{6/} Intervenors fail to note a fundamental distinction. The Appeal Board, sua sponte, may and does review Licensing Board decisions, even in the absence of appeals. In such an endeavor, the Appeal Board performs such a review as it feels is appropriate. However, when an appeal is taken, and exceptions are filed, the Appeal Board must be informed of the precise nature of the

^{4/} Intervenors' Motion, pages 1-2.

^{5/} Intervenors' Exceptions, page 4.

^{6/} Intervenors' Motion, page 2.

legal argument and the record citations which support positions asserted by appellants, so that its' fundamental function of examining a decision upon the request of a party aggrieved may be expeditiously and responsibly carried out. Intervenors, in essence, simply wish to be heard by the Appeal Board without informing the Board of the nature of their concern.

III. Conclusion

The Appeal Board has repeatedly recognized that the requirement of a brief of support of exceptions is of key importance in the appeal process. The grounds offered by Intervenors in support of their motion fail to meet the requisite tests. Consequently, the motion should be denied.

Respectfully submitted,

William J. Olmstead

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of October, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION TO WAIVE FILING OF BRIEF", dated October 11, 1977 in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class or air mail, this 11th day of October, 1977:

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