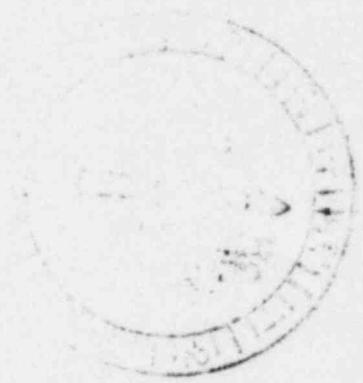


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges: 43

Richard S. Salzman, Chairman
Dr. John H. Buck
Christine N. Kohl



In the Matter of)
)
CONSUMERS POWER COMPANY)
)
(Midland Plant, Units 1 and 2))

Docket Nos. 50-329 OM & OL
50-330 OM & OL

Mr. Wendell H. Marshall, Midland, Michigan, pro se.

Mr. William D. Paton for the Nuclear Regulatory
Commission staff.

MEMORANDUM AND ORDER

December 17, 1980

(ALAB-624)

In its October 24, 1980, prehearing conference order, the Licensing Board denied Wendell H. Marshall's petition for leave to intervene in the "OM" proceeding instituted to amend applicant's construction permits. The Board found Mr. Marshall's only contention to be inadmissible for lack of sufficient specificity. It also noted that the contention was untimely without justification and thus could be rejected pursuant to 10 C.F.R. §2.714(a) (slip op. 12).

In the same order, however, the Board consolidated the OM proceeding with the one pending on the utility's application

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for an operating license (the "OL" proceeding) for a hearing on the soil settlement issues common to both cases.^{1/} The Board therefore pointed out that, because Mr. Marshall is already an intervenor in the OL proceeding, the consolidation will thus permit him to participate in the OM proceeding (ibid.). The Licensing Board explicitly stated that such participation will include the right to conduct cross-examination on all issues and the right to request permission to sponsor a witness in the OM proceeding.

Mr. Marshall appeals the denial of his petition to intervene in the OM proceeding, and the staff has replied in opposition.^{2/} As discussed below, we affirm the Licensing Board's decision, but on a ground somewhat different than that stated by the Board.

The Commission ordered the hearing in the OM proceeding for the limited purpose of considering the following issues -- (1) whether the facts set forth in Part II of the Director's Order of December 6, 1979, concerning soil construction activities under and around safety-related structures and systems, are correct; and (2) whether that order, which prohibits

^{1/} The OM proceeding is confined to soil settlement issues. See orders of December 6, 1979, and March 14, 1980 (as amended May 20, 1980).

^{2/} The staff opens its argument in opposition to the appeal by urging that Mr. Marshall has failed to "brief" his case by "adequately" addressing the Licensing Board's rejection of his sole contention. The staff thus asks us to "disregard" Mr. Marshall's arguments. While Mr. Marshall's 12-page pleading is not a paradigm of clear (FOOTNOTE CONTINUED ON NEXT PAGE)

certain soil-related activities pending issuance of an appropriate amendment to the construction permits, should be sustained. Despite this narrow focus of the OM proceeding, Mr. Marshall offered the following contention in support of his petition to intervene (dated August 27, 1980):

In the event of an accident at the Midland Nuclear Plant which is being built on the Tittabawasse River, in the City of Midland, Michigan, massive quantities of radioactive materials especially in the event of a Class 9 accident, will find their way into the river which flows into Saginaw Bay, the drinking water supply of the Midland-Saginaw area population.

The contention further urges that the staff's environmental impact statement for Midland include consideration of Class 9 accidents. At its September 10, 1980, prehearing conference, the Board gave Mr. Marshall the opportunity to clarify his contention. In response to the Chairman's questioning, Mr. Marshall referred to the soil compaction matter, the cooling pond dike, and the diesel generating system (Tr. 363-368). He also stated, however, that his August 27 filing concerned "several jurisdictional problems" (Tr. 361), was "more elaborate" than the narrow OM proceeding (Tr. 363), and "incorporate[d] here all of the various things that are wrong with this complex to begin with" (Tr. 366).

2/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
legal writing and advocacy, we note that he is appearing pro se. Taking that fact into consideration, we think the more appropriate course is simply to make due allowance for any inadequacies in his papers.

In view of these statements and the August 27 contention itself, we believe that the real gist of Mr. Marshall's contention is his concern about the possibility of a Class 9 accident that might result in contamination to the Midland water supply.^{3/} This contention, if admitted, would have improperly expanded the very narrow scope of the OM proceeding. Thus, that reason, more than the lack of specificity, supports the Board's rejection of the contention.

Although our principal basis for rejecting Mr. Marshall's contention differs from that of the Licensing Board, we fully agree with its separate, alternative ground for rejection -- untimeliness (slip op. 12 n.6). Mr. Marshall filed his contention almost two weeks after the August 14, 1980, deadline explicitly set in the Licensing Board's order of July 24, 1980. He has offered no coherent or plausible excuse for the delay and thus has failed to establish the requisite "good cause" and other factors set forth in 10 C.F.R. §2.714.^{4/}

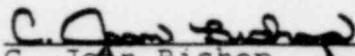
3/ Comparison of the Marshall contention accepted in the OL proceeding with the one found inadmissible in the more limited OM proceeding is revealing. The former contention (filed October 31, 1978) states: "Present geological conditions, according to newspaper accounts, is [sic] causing the settling of the generator building at the Nuclear Power Plant site." This shows that Mr. Marshall could have framed a similar contention focusing on the soil settlement issue in the OM proceeding but instead chose to raise the very different Class 9 accident matter.

4/ Since the order clearly set the time for filing contentions, Mr. Marshall is precluded from arguing that, as a pro se litigant, he had difficulty in interpreting the Commission's rules and time limits for filing.

Insofar as it rejected Mr. Marshall's only contention and thereby denied his petition for leave to intervene, the Licensing Board's October 24, 1980, order is affirmed.^{5/}

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board

Dr. Buck did not participate in this order.

^{5/} Mr. Salzman is of the view that the Board's denial of intervention for want of the requisite specificity in the only contention proffered is an additional ground for affirmance.