



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 23, 1981

Wendell H. Marshall, Vice President
Midwest Environmental Protection
Associates
RFD 10
Midland, Michigan 48640



In the Matter of
Consumers Power Company
(Midland Plant, Units 1 and 2)
Docket Nos. 50-329 OM & OL and 50-330 OM & OL

Dear Mr. Marshall:

I have received your Mailgram in which you state

"...we wish to invoke the principles of the freedom of information act and have free copies of transcripts furnished to Ms. Stamiris at government expense. If not we want to know why not..."

I have not considered your request as a freedom of information act request on Ms. Stamiris's behalf because I have no knowledge that she has authorized you to act for her in that regard.

Attached is a copy of ALAB-625 - a very recent decision by the Atomic Safety and Licensing Appeal Board. The Appeal Board there dismisses an appeal taken by an Intervenor from a December 9, 1980 Licensing Board decision rescinding "any previous orders or issuances which adverted to and/or granted procedural assistance to any [i]ntervenors." (See p. 3 of ALAB-625). Your position is approximately the same as the Intervenor in ALAB-625. I think you will find that decision informative.

If you wish to make a freedom of information act request on your own behalf, it should be directed to Joseph M. Felton, Director, Division of Rules and Records, Office of Administration.

Sincerely,

William D. Paton
Counsel for NRC Staff

Enclosure: As stated

cc w/encl: Charles Bechhoefer, Esq.
Mr. Gustave A. Linenberger
Dr. Frederick P. Cowan
Frank J. Kelley
Myron M. Cherry, Esq.
Ms Mary Sinclair
Michael I. Miller, Esq.
James E. Brunner, Esq.

Ms. Barbara Stamiris
Mr. Steve Gadler
Ms. Sharon K. Warren
Atomic Safety and Licensing Board
Panel
Atomic Safety and Licensing Appeal
Board Panel
Docketing and Service Section

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

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Christine N. Kohl

In the Matter of
HOUSTON LIGHTING & POWER COMPANY
(Allens Creek Nuclear Generating
Station, Unit No. 1)

Docket No. 50-466

Mr. John F. Doherty, Houston, Texas, intervenor,
pro se.

MEMORANDUM AND ORDER

January 5, 1981

(ALAB-625)

1. Last July, the Commission established "a one-year pilot program of procedural assistance in adjudicatory proceedings on applications for licenses and amendments thereto, except for antitrust proceedings, to parties other than the applicant * * *". 45 Fed. Reg. 49535 (July 25, 1980). In the implementation of this program, several of the Rules of Practice were amended. Among other things, a new subsection (c) was added to 10 CFR 2.750, authorizing (except in anti-trust proceedings) the supplying "of one free transcript to a party, other than the applicant, upon request by that party". Id. at 49537.

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On December 3, 1980, the Comptroller General of the United States issued a letter decision (B-200585) in which he concluded that certain portions of the procedural assistance program, including that embodied in 10 CFR 2.750(c), were precluded by Section 502 of the Energy and Water Development Appropriation Act, 1981, Pub. L. No. 96-367, 94 Stat. 1331, 1345.^{1/} On the strength of this determination, the following day the Chairman of the Commission sent a memorandum to the Secretary and the Executive Director for Operations in which he ordered an immediate halt to the program to allow the General Counsel and the Commission "an opportunity to examine [the] decision and reach a conclusion as to what our future action should be". The Chairman went on to instruct that "[a]ny documents that are in the process of being transmitted should be held and no further processing should occur without further direction from the Commission".

2. On December 2, 1980, the Licensing Board had held a prehearing conference in this construction permit proceeding involving the proposed Allens Creek nuclear facility. One of the participants in the conference had been intervenor John F. Doherty. Together with other intervenors, Mr. Doherty had

^{1/} That Act contains the NRC appropriation for FY 1981. Section 502 provides that:

None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.

previously requested and been granted the procedural assistance authorized by 10 CFR 2.750(c).

On December 9, the Licensing Board entered an order in which it (1) called attention to the Comptroller General's ruling and Chairman Ahearne's directive in response thereto; and (2) rescinded, to the extent covered by the ruling and directive, "any previous orders or issuances which adverted to and/or granted procedural assistance to any [i]ntervenors". On December 10, the parties were orally notified of the substance of that order.

Dissatisfied with the termination of his entitlement to receive a copy of the transcript of the December 2 prehearing conference, Mr. Doherty seeks relief from us by way of "appeal". It is his apparent view that he has been retroactively deprived of the vested right to a free transcript which had been conferred upon him by the adoption of Section 2.750(c) last July. We are also told that he had relied on that alleged right to his detriment in that he does not now have any record of what transpired at the prehearing conference.

3. Because, insofar as here relevant, the Licensing Board's December 9 order was entirely interlocutory in character, Mr. Doherty's appeal from it is barred in terms by the Commission's Rules of Practice. 10 CFR 2.730(f); Public

Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 NRC 131 (1977), and cases there cited. Although the appellate papers might nonetheless be treated as a petition for directed certification under 10 CFR 2.718(i), ^{2/} Mr. Doherty would not be aided were we to do so.

The Licensing Board manifestly was bound by the immediately effective instruction of the Chairman of the Commission that, pending further Commission directive (and there has been none to date) no additional transcripts of adjudicatory proceedings were to be supplied to parties at public expense. That instruction likewise must be honored by us, as well as by all other components of the Commission (including the Office of the Secretary, which had general responsibility for the administration of the procedural assistance program). Thus, Mr. Doherty has pressed his grievance in the wrong forum.

In these circumstances, we need not undertake to consider Mr. Doherty's thesis that the Commission remained obligated to furnish him with a transcript of the December 2 prehearing conference even after the Comptroller General had authoritatively ruled that such a step would involve the unlawful expenditure

^{2/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

of appropriated funds. It is worthy of passing note, however, that a copy of that transcript is available for inspection in the local public document room for the Allens Creek facility located in the Sealy Public Library, Sealy, Texas. That community, in the neighborhood of the Allens Creek site, is approximately 45 miles from the center of Houston, where Mr. Doherty lives.^{3/} While no doubt he would prefer to have his own personal copy which could be consulted at his convenience, the fact remains that Mr. Doherty has ready access to the transcript at a not prohibitive distance from his residence. Unless and until the Commission determines that it is both legally permissible and desirable to reinstate the provisions of Section 2.750(c), it appears that he will have to take advantage of that access.

Appeal dismissed.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins

Barbara A. Tompkins
Secretary to the
Appeal Board

^{3/} Sealy and Houston are connected by a major interstate highway.