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10/20/77

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 SAGINAW INTERVENORS' MOTION FOR SUMMARY REVERSAL OR STAY OF CONSTRUCTION

I. Introduction

Construction Permits were granted to Consumers Power Company (Applicant) on December 15, 1972 by decision of the U.S. Atomic Energy Commission. Following review of that decision, the District of Columbia Circuit Court of Appeals remanded certain issues to the Nuclear Regulatory Commission for further proceedings.[1/] The Commission reconvened the Atomic Safety and Licensing Board (Licensing Board) directing it to consider initially whether the Midland construction permits should be continued, modified, or suspended. After extensive evidentiary hearings the Licensing Board issued an Order on September 23, 1977 holding that the construction permits should be continued in effect pending final decision on the remanded issues.

1/ Aeschliman, et al. v. NRC, 547 F.2d 622 (D.C. Cir. 1976).

All Intervenors Other Than Dow (Intervenors) filed exceptions to the Licensing Board's Order with the Appeal Board on October 1, 1977. The Applicant filed a Motion for Reconsideration with the Licensing Board on October 3, 1977. Intervenors subsequently filed with the Appeal Board a Motion for Summary Reversal of the Licensing Board's Order and/or a Motion for Stay of Construction Pending Remanded Hearings. Intervenors move the Board to summarily reverse the Licensing Board's decision to consider sunk costs in concluding not to suspend construction. Intervenors argue that the Seabrook decision[2/] is not applicable to the Midland issues and request the Appeal Board to refer its ruling to the Commission if it determines Seabrook is applicable. In addition or in the alternative, Intervenors move for an immediate stay of construction. The Staff opposes Intervenors' motions.

II. Intervenors' Motion Fails to State a Basis for Relief

Section 2.788 of the Commission's rules of practice sets forth the requirements with which a party seeking a stay pending rev iew on appeal must comply. While this Board has distinguished the tests set forth in paragraph "e" of that section previously in this proceeding,[3/] Intervenors' motions make no attempt to address the applicable legal criteria for the relief they seek. Consequently, it is necessary to examine first the standards of review for motions for stay and motions for summary reversal which are applicable to this proceeding, followed by a discussion of the sufficiency of Intervenors' argument.

2/ Public Service Company of New Hampshire, et al. (Seabrook Units 1 & 2), CLI-76-17, NRCI-76/11, 451 (November 5, 1976).

3/ ALAB-395, 5 NRC 772, 784 (1977).

10 CFR §2.788(e) is a codification of the Virginia Petroleum Jobbers Association v. FPC[4/] test for stays. While this test has been repeatedly applied in Commission proceedings, the four criteria enummerated in the rule may not be applicable to Intervenor's current motion for stay since the Commission has determined that in cases where a record has been found inadequate and remanded, the tests for stay are less stringent than those set forth in Virginia Petroleum Jobbers'.[5/] In such cases, however, the suspension question "must at the least be decided on the basis of (1) traditional balancing of equities and (2) consideration of any likely prejudice to further decisions that might be called for by the remand."[6/]

The standards for summary reversal are most stringent since what is sought is the extraordinary equitable remedy of reversal by an appellate authority without benefit of developed briefs and argument from the parties. The movant's right to such relief must be "indisputably clear."[7/]

4/ 259 F.2d 921, 925 (1958)

5/ Public Service Company of New Hampshire, et al. (Seabrook Units 1 & 2) CLI-77-8, 5 NRC 502 (1977).

6/ Id., p. 521; ALAB-395, supra n.3; This test was applied by the Licensing Board in para. 8.

7/ Communist Party of Indiana v. Witcomb, 409 U.S. 1235 (1972), J. Rehnquist, circuit justice.

A party moving on motion papers without usual briefs and full argument has a heavy burden to demonstrate that the merits of the claim so clearly warrant relief that expeditious action is justified.[8/]

Intervenors have not justified their motions under the appropriate legal tests. Intervenors made no attempt in their motions to demonstrate any injury or prejudice which might accrue to them if this Board were to await full briefing by the parties before acting on the matters in controversy. In this Board's October 12, 1977 Order the importance of having adequate briefs with supporting argument and record references was again called to Intervenors' attention.[9/] Having failed to show equities demanding a stay in the interim, prejudice to a party in interest, or an indisputably clear right to expeditious summary action, Intervenors' motions must fail.

8/ Metropolitan Washington Coal v. Dist. of Col., 511 F.2d 809, 813 (D.C. Cir., 1975); NRDC v. Morton, 458 F.2d 827, 832 (D.C. Cir., 1972); United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969).

9/ Presumably if Intervenors' exceptions without briefing had clearly established an adequate legal basis for resolving the issues on appeal, their motion to waive further briefing could have been granted.

III. Sunk Costs May be Considered Where Conservation is Not a Complete Substitute for Construction

Intervenors' primary legal justification for their motions is that the Aeschliman decision specifically prohibits consideration of sunk costs.[10/] That decision, however, does no more than cite Union of Concerned Scientists v. AEC[11/] for the proposition that an alternative to be considered is complete abandonment of the project and that when considering the abandonment alternative, it is not appropriate to take sunk costs into account in the cost-benefit balance.[12/] But, when considering other alternatives, such as those Intervenors suggested, where other non-nuclear facilities would necessarily be constructed, then replacement costs are appropriately considered.[13/] It is also appropriate to consider that one alternative may be brought into operation more easily than another.[14/]

The Licensing Board specifically relied on Seabrook in paragraph 9 of its Order.[15/] If the Order could be fairly read to hold that sunk costs are appropriately considered as costs of abandonment in circumstances in which energy conservation is a complete alternative to construction, then Intervenors would be correct in taking exception. No testimony by any party, however,

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[10/] Intervenors' October 8, 1977 Motion, p. 3.
[11/] 499 F.2d 1069, 1084 n. 37 (D.C. Cir. 1974)
[12/] 547 F.2d at 632 n. 20.
[13/] Seabrook, supra, 5 NRC 534.
[14/] Id.
[15/] To which Intervenors except in their Order 1, 1977 exceptions.

showed that energy conservation was a complete substitute for construction. As indicated in paragraph 65 of the Order even the alternative analysis performed by Intervenors proposed smaller coal fired facilities.

IV. Intervenors Have Alleged No Equities Justifying a Stay

Intervenors argue that the Licensing Board found that Consumers attempted to prevent Board inquiry into the Consumers-Dow contract dispute, thereby undermining the Commission's NEPA process and also that allowing work to continue will prejudice the ultimate outcome.

The Licensing Board also discusses the possibility of disregarding sunk costs as a punitive measure necessitated by Consumers "consideration" of a less than candid trial strategy concerning the steam contract. The Board indicates in paragraph 11 of its order that it is uncertain whether Consumers' conduct was the type of situation which the Commission had in mind in Seabrook. The Licensing Board reasons that if Consumers' conduct was the type of undermining of the NEPA process to which the Commission referred, a penalty of ignoring sunk costs would be too harsh in this instance.

The Commission's Seabrook observations apply to the integrity of the NEPA process. The Licensing Board's findings are to the effect that the integrity of the NEPA process was in fact maintained. While the Licensing Board stated there was evidence that "Licensee has considered conducting its share of this proceeding in such a way as to not disclose important facts to the Board"[16/] it went on to find that:

> "[T]he Dow-Consumers matter was aired; the Dow witnesses furnished were highly knowledgeable men...; and Licensee has not slowed the suspension hearing." (Order, para. 10)

Thus all the possible relevant facts were disclosed. In any event, were sunk costs to be ignored because of Consumers conduct relating to the steam contract, it would not avail Intervenors much. The sunk costs to be ignored would be only those which were incurred during the period of the NEPA violation. Thus in this matter the only costs which would be ignored would be those incurred after the remand from the Court of Appeals but before full disclosure of the contract dispute to the Board. These costs are a small part of the sunk costs at issue in this proceeding.

While Intervenors argument that allowing construction to continue will prejudice the outcome can be a strong one,[17/] it is inadequate to justify a stay in this instance. The Licensing Board specifically found that if

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16/ Order Para , (emphasis added). It should be noted that Consumers has a pending motion for Reconsideration before the Licensing Board concerning this statement.

17/ See Public Service Company of Indiana, Inc. (Marble Hill Units 1 & 2) ALAB-437, 6 NRC , (1977) and cases cited therein.

sunk costs were appropriately considered the possible alternatives were already foreclosed (paragraph 66). If sunk costs are not to be considered then Intervenors' argument is mooted.

Finally, it is not necessary for purposes of deciding Intervenors' stay motion to determine whether the Licensing Board applied the correct standard where Intervenors have attempted no showing that they are likely to prevail on this point.[18/] Intervenors have not alleged sufficient equities on the face of their motions to counterbalance the substantial equities found by the Board favoring continued construction.

V. Conclusion

While the remand required a review of energy conservation, the Dow/Consumers steam contract, the ACRS letter and fuel cycle issues, the extensive record developed continues to show a need for the project which weighs against suspension. Specifically the Licensing Board found that the need for the project, the effects of delay, the foreclosure of alternatives

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18/ The Toledo Edison Company, et al. (Davis-Besse Units 1, 2 & 3 and Perry Units 1 & 2), ALAB-385, 5 NRC 621, 634 (1977).

caused by construction and investment, and the cost advantage over the plant's life of the use of nuclear fuel all weighed against Intervenors' case for suspension. (Order para. 71). Thus the public interest, injury to the Applicant and Dow in the event of suspension and the needs of Consumers customers clearly demonstrate that the proper balance of equities requires that Intervenors motions be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 20th day of October, 1977

Milton J. Grossman
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