

9/25/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety And Licensing Board

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))

Docket Nos. 50-329
50-330

ANSWER OF CONSUMERS POWER COMPANY TO PETITION
FOR LEAVE TO INTERVENE OF WENDELL H. MARSHALL
ON BEHALF OF THE MAPLETON INTERVENORS

Consumers Power Company ("Consumers Power" or "Licensee"), pursuant to the Rules of Practice of the Nuclear Regulatory Commission (the "NRC" or the "Commission"), hereby answers the late-filed petition of Wendell H. Marshall on behalf of the Mapleton Intervenors for leave to intervene in the operating license proceeding for the Midland Plant, Units 1 and 2. For the reasons explained below, both Mr. Marshall and the Mapleton Intervenors must be denied leave to intervene in this proceeding.

I. INTRODUCTION

By a letter addressed to the NRC* Wendell H. Marshall sought leave to intervene in the operating license

* Page 1 of Mr. Marshall's letter is dated September 8, 1978; page 2 is dated September 6, 1978. However, the envelope is postmarked September 13, 1978, which is the date Consumers Power assumed as the time of filing for the purpose of calculating the day on which Licensee's Answer was due.

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proceeding for the Midland Plant on behalf of the Mapleton Intervenor; Mr. Marshall represented that he was the President of that organization. Because the letter was filed with the Commission more than three months after the June 5, 1978 deadline for petitions for leave to intervene specified in the Federal Register notice related to the Midland Plant proceeding (43 Fed. reg. 19304), this Atomic Safety and Licensing Board ("Licensing Board") must rule on the petition in accordance with the requirements specified in 10 C.F.R. §2.714(a)(1)(i-v) pertaining to nontimely filings, in addition to the traditional standards delineated in other portions of §2.714.

In evaluating the Mapleton Intervenor's petition Consumers Power will first discuss whether Mr. Marshall's letter meets the basic test for granting intervention outlined in §2.714(a)(2):

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.*

* The paragraph (d) referred to above enumerates the following factors:

- (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. 10 C.F.R. §2.714(d).

As the second step in determining whether intervention should be granted in this instance, Licensee will evaluate five specific items which are relevant in the case of a late-filed petition.

II. THE PETITION FAILS TO MEET THE REQUIREMENTS FOR INTERVENTION

The first area in which the Mapleton Intervenors fail to comply with NRC procedure for intervention concerns the fundamental requirement that the petitioner adequately identify itself. The letter merely mentions the "Mapleton Intervenors" without describing in any way what type of organization it is, its purposes or its members. Rather, the petition contains only the vague statement that the members of the Mapleton Intervenors live in the general vicinity of the Midland Plant. In addition, Mr. Marshall calls himself the President of the Mapleton Intervenors but does not indicate that he is authorized to represent the members, whoever they may be, in this proceeding. The only member besides Mr. Marshall who is mentioned in the petition is Steve J. Gadler, who is referred to as the Executive Secretary. The letter does not indicate that Mr. Gadler joins in the request to intervene, however.

Consumers Power's objections to the adequacy of this petition with respect to the identification of the Mapleton Intervenors are virtually identical to the objections Licensee raised with regard to the intervention

petition of the Saginaw Valley Nuclear Study Group ("Saginaw") previously filed in this proceeding. In that instance this Licensing Board denied admission to Saginaw on the ground that the petition presented insufficient information with respect to the identity and interest of the organization; the member of the group identified in the petition, Mary Sinclair, was admitted individually as a party. Saginaw was given an opportunity to demonstrate its eligibility to be admitted as a party prior to the special prehearing conference. (Licensing Board Order at 10)

Consumers Power believes that the Mapleton Intervenor should similarly be denied admission as a party; this conclusion is reinforced by the fact that this petition is even more defective than was the petition to intervene submitted by Saginaw.

As NRC cases discussing standing to intervene make clear, an organization can represent only its own members.* Thus, it becomes essential to know the identity of those members whom the Mapleton Intervenor purport to represent. Furthermore, not only must the identity of the members of the organization whose interest may be affected and how such interest may be affected be shown, but there must also be a showing that the individual who signed the petition has been duly authorized to represent the petitioner and that the

* Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977).

members either requested or consented to be represented by the petitioner in this proceeding.*

Furthermore, the Mapleton Intervenors cannot rely upon the fact that they participated in the construction permit proceeding for the Midland Plant as a justification for being admitted as a party in the operating license proceeding. NRC case law holds that participation in a prior licensing proceeding involving the same facility does not adequately establish petitioner's interest in subsequent proceedings.** It should be remembered, too, that there has been no showing that the Mapleton Intervenors, an unincorporated association, now include the same people who intervened years ago.

As was the case with the Saginaw petition, the letter in question appears to be more the personal petition to intervene of Wendell H. Marshall than that of the Mapleton Intervenors. Thus, Consumers Power believes it is appropriate to consider the petition in that light. Viewed as the request to intervene of Mr. Marshall alone, however, the petition is still defective. Although Mr. Marshall does state that he lives approximately one-and-a-half miles from the nuclear plant, and one may discern from the petition that he has interests which fulfill the requirements of

* Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687, 690 (1975), affirmed, ALAB-328, 3 NRC 420 (1976).

** Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 NRC 451, 455 (1975).

§2.714(d), the facts are hardly set forth with the particularity demanded by the intervention rules. See §2.714(a)(2).

Furthermore, under the revised rules regarding intervention a petitioner must specify the aspect or aspects of the subject matter of the proceeding as to which he wishes to intervene; contentions are not required to be filed with the petition. Although Mr. Marshall indicates several aspects of the proceedings in which he is interested, a cursory examination of the subjects listed in the petition as items one through nine demonstrates that these subjects are but a restatement of the issues raised by the Mapleton Intervenor at the construction permit hearings. While this Licensing Board indicated in its August 14, 1978 Memorandum and Order that it would be premature at this stage to rule on the adequacy of these "aspects of the subject matter" as issues in controversy (Licensing Board Order at 6), Consumers Power is compelled to point out that NRC cases make clear that "an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage." Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974). Mr. Marshall has not even hinted at the existence of any changed circumstances or other special reasons which would justify relitigating these issues. Therefore, Consumers Power will strongly object to admitting into this proceeding as contentions matters related to the "aspects of the subject matter" set forth in Mr. Marshall's petition.

III. THE PETITION DOES NOT MEET THE
STANDARDS FOR NONTIMELY FILINGS

The Commission's Rules of Practice provide that nontimely filings will not be entertained absent a determination by the Licensing Board that the petition should be granted based upon a balancing of five specified factors in addition to the normal requirements for intervention. A balancing of those five factors demonstrates that the petition to intervene should not be granted, whether it is considered that of Mr. Marshall or of the the Mapleton Intervenors.

A. Good Cause, If Any, For Failure To
File On Time

Mr. Marshall has not alleged any facts which show good cause (or any cause) for his failure to file the petition on time. As the petitioner has participated in previous Commission proceedings, he must be presumed to be familiar with NRC rules and procedures. Furthermore, in his letter, Mr. Marshall specifically referred to the Federal Register notice which explained the method of intervening in the operating license proceeding and stated that petitions should be filed by June 5, 1978. In any event, federal law provides that Federal Register notice constitutes actual notice to all persons whether or not such notice is actually seen. 44 U.S.C. §1508.

The Mapleton Intervenors were not inadvertently left off the service list for the operating license proceeding

as Mr. Marshall states in his petition. There was no "service list" for this proceeding at the time the Federal Register notice appeared. Furthermore, as the letter makes clear that the petitioner knew he was not being represented by Mr. Cherry in the operating license proceeding, there is no excuse for the petition being filed three months late. Similarly, Mr. Marshall's statements with respect to what happened in a Court of Appeals case concerning the Midland Plant has no relevance to the matter at hand and does not furnish an excuse for filing the petition out of time.

B. Availability of Other Means Whereby
Petitioner's Interest Will Be Protected

Consumers Power is not aware of any means other than this proceeding whereby petitioner's interests will be protected. However, this is not enough to outweigh the three other factors which are adverse to the admission of Mr. Marshall (or the Mapleton Intervenor) as a party. Cf. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460 (1977); Public Service Electric and Gas Company (Hope Creek Generating Station, Units 1 and 2), LBP-77-9, 5 NRC 474 (1977).

C. Extent To Which Petitioner's
Participation May Reasonably Be
Expected To Assist In Developing
A Sound Record

Nothing in Mr. Marshall's petition indicates that either he or the Mapleton Intervenor possess any expertise at all in relevant areas or would bring in experts who could

be of assistance in exploring the technical environmental and safety issues which may arise in the proceedings. Thus there is absolutely no evidence to even remotely suggest that granting the petition to intervene would materially contribute to the development of an improved evidentiary record in this proceeding. This factor has been relied on heavily by NRC tribunals in denying untimely petitions.

Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642 (1977); Perkins Nuclear Station, ALAB-431, supra; Hope Creek Generating Station, LBP-77-9, supra.

D. Extent To Which The Petitioner's
Interest Will Be Represented By
Existing Parties

In the instant proceeding there are at least three entities which can adequately represent Mr. Marshall's (or the Mapleton Intervenor's) interest in the operating license proceedings. First, as stated by one licensing board, "[t]he NRC Staff represents the interests of the public in this and all NRC proceedings." Jersey Central Power & Light Company (Oyster Creek Nuclear Generating Station), LBP-77-58, 6 NRC 500 (1977). Second, Mary Sinclair has been admitted as a party to this proceeding and appears to have the same type of environmental and safety concerns about the nuclear facility as does petitioner. The presence of another party with similar interests was an important factor in denying a late-filed petition in Perkins Nuclear Station, ALAB-431,

supra. Third, the State of Michigan has been admitted as an interested state pursuant to §2.715(c); the Attorney General of Michigan has expressed a special interest in environmental issues and is certainly qualified to represent the interest of petitioner as well as that of the citizens of Michigan in general.

E. Extent To Which The Petitioner's
Participation Will Broaden The
Issues Or Delay The Proceeding

As the issues in this proceeding have not yet been delineated and no schedule for hearings has been adopted, the admission of petitioner would not be detrimental in those respects.

A balancing of the factors listed above weighs heavily in favor of denying admission as a party to Mr. Marshall and the Mapleton Intervenors. Not only has no cause been shown for the failure to file on time, but there is no evidence that petitioner's participation would assist in developing a sound record. Furthermore, any interest petitioner has in this proceeding will be adequately represented by two existing parties and the State of Michigan as a participant. In striking the balance it should also be kept in mind that the petition is defective under the NRC's requirements for intervention as demonstrated in Section II, above.

IV. CONCLUSION

For the reasons set forth above, the Mapleton Intervenor and Mr. Marshall should be denied permission to intervene in this proceeding.

Respectfully submitted,

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September 28, 1978.

Before the Atomic Safety and Licensing Board

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Atomic Safety and Licensing
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