UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of CONSUMERS POWER COMPANY Midland Plant Units 1 and 2	Docket Nos. 50-329 50-330

SAGINAW, ET.AL., INTERVENORS' BRIEF IN SUPPORT OF OBJECTION TO INTRODUCTION OF ACRS REPORTS AND ISSUANCE OF CERTAIN SUBPOENAS

INTRODUCTION

Applicant intends to offer into evidence the Reports of the Advisory Committee on Reactor Safeguards (ACRS). Intervenors have announced their objection to the offer, unless one or more persons who prepared or supervised the Reports are available for cross-examination.

Intervenors' position is that the Act and the Rules of Practice require that the ACRS Reports must be a part of the substantive record and that no evidence, documentary or otherwise, may be received into evidence without providing parties to the proceeding an opportunity to test the truth and accuracy of the proferred submission by cross-examination. Since only a member of the ACRS is competent to testify as to the Reports, Intervenors' conclude that without such a proper witness, the Board may not receive the Reports into the record.*

Applicant and the regulatory staff jointly argue that the Board may properly receive the Reports without providing an opportunity for cross-examination. Their reasoning is that

*Intervenors, consistent with their objection, are moving the Board for the issuance of appropriate subpoenas requiring the testimony of an ACRS member.

since the Atomic Energy Act ("Act") and the AEC Rules of Practice require the Reports to be prepared specifically for each reactor docket and to become part of the evidence, the reports have an automatic entry and no one, not even the Board, should be concerned with the substance of the Reports. Indeed, their argument continues, the Board may deprive the Reports of any significance by formally recognizing that they are not part of the evidence and of no importance whatsoever to the safety issues in controversy.

All this, we are told, is to further the ends of justice by permitting applicant and staff to argue that the ACRS has fulfilled its statutory duty while, at the same time, not permitting that conclusion to be questioned.

We submit that the argument of Applicant and the Regulatory Staff is contrary to the requirements of the Act, the Administrative Procedure Act and basic principles of due process.

A. The provisions of the Atomic Energy Act requiring the preparation and consideration of ACRS Reports are not mere procedural requirements.

Section 29 of the Act (42 U.S.C., § 2039) codified into statutory form a practice which the AEC had for sometime followed, that is, submitting significant safety questions to an expert Committee on Reactor Safeguards. Thus, the ACRS was created to

> "... review safety studies and facility license applications referred to it and shall make reports thereon, shall advise the Commission with regard to the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards, and shall perform such other duties as the Commission may request." 42 U.S.C., § 2039. (Emphasis supplied).

To the general duties of the ACRS was added the specific duty of reviewing and passing upon each construction permit application in order to assess the adequacy of reactor safety. Thus Section 182b of the Act provides in pertinent part that:

"The Advisory Committee on Reactor Safeguards shall review each application... for a construction permit ... and shall submit a report thereon which shall be made part of the record of the application and available to the public except to the extent that security classification presents disclosure." 42 U.S.C. § 2232b.

The legislative history demonstrates that the JCAE was concerned with establishing a permanent statutory body which would make substantive decisions upon safety questions and then make their findings public and available for public scrutiny. Extracts from Senate Report Number 296 demonstrate this clearly:

"The Joint Committee deemed it desirable to establish formally such a body as an advisory committee to assist the Commission with respect to those facilities where the hazard is likely to be the greatest."

1954 U.S. Code Cong. and Adm. News p. 1813. (Emphasis supplied.)

"This Committee is to review license applications and to advise the Commission with respect to the hazards involved at any facility.

"The main reason for making this Committee a statutory committee was to ensure that any features of new reactors would be as safe as possible. This subject was felt to be so important as to require a committee established by statute.

"Another reason prompting the insertion of the provision in the bill was the strong reliance placed by the insurance companies on the continuance of the Commission safety programs, including the continuance of some body similar to the present Reactor Safeguard Committee."

1954 U.S. Code Cong. and Adm. News p. 1825. (Emphasis supplied.)

It is inconceivable that anyone, in the face of the reasons for the establishment of the ACRS, and particularly the Regulatory Staff, could sincerely assert that any public examination of an ACRS report is limited to whether or not a report is filed and should not include an examination of the report itself. Congress was concerned with safety, a mistress not well served by procedural niceties.

Moreover, the legislative history also shows that the substance of the findings of the ACRS were to be available to the public:

"Having established the Committee under the bill, it was thought that its functions would be best served if its reports should be made public, and if the facilities of the type on which its report were required should be licensed only after a public hearing.

"The Joint Committee concluded that full, free and frank discussion in public of the hazards involved in any particular reactor would seem to be the most certain way of assuring that the reactors will indeed be safe and that the public will be fully apprised of this fact."

1954 U.S. Code Cong. and Adm. News p. 1814. (Emphasis supplied.)

"The [ACRS] report of the committee is to be made public so that all concerned may be apprised of the safety or possible hazards of the facility. It is the belief of the Joint Committee that when the public is adequately and accurately informed that it will be in a better position to accept the construction of any reactors."

1954 U.S. Code Cong. and Adm. News p. 1826.

We see nothing to justify the suggestion of secrecy; we see nothing to justify a position that the ACRS report is not to be considered in a hearing; and we see nothing to support the position that the reports are to be part of the evidence but are not subject to substantive analysis.*

Finally, when Congress in 1966 amended the Act to provide that the ACRS did not have to review amendments to construction permits or operating licenses if they did not involve "significant hazards," Congress reaffirmed its earlier position as to the importance of ACRS reports and their substantive relationship to public hearings.

"This amendment will not in any way affect the Commission's present practice of referring to the ACRS all documents filed with the Commission by an applicant although a formal ACRS review and report will not be required in all cases. Similarly, this amendment will not affect the authority of the ACRS, on its own motion, to review reactor and radiation safety problems and report its findings to the Commission or to the Atomic Safety and Licensing Board, as appropriate.

1966 U.S. Code Cong. and Adm. News p. 2215. (Emphasis supplied.)

And as we demonstrate below in B, in order for the public or a party to this proceeding to have the assurance Congress intended, the Reports must be subject to cross-examination.

*Without intending to be facetious, we would point out that there is no way to test the accuracy of an ACRS Report without critical analysis. To hold otherwise would mean that any document could be submitted as compliance with Section 182b of the Act so long as it was called an ACRS Report. Congress could not have intended such a result.

B. Any evidentiary submission must be subject to cross-examination.

Now that it has been demonstrated that Congress created the ACRS and required it to render reports in order to close statutorily an important "gap" in safety analysis, it is clear that the substance of the ACRS Reports is important to this hearing. Therefore, the Reports, if offered at all, must be offered for the truth and reliability of their contents and they must be subject to cross-examination.

Section 2.743 of the Rules of Practice (10 C.F.R. § 2.743(g)) requires that:

"...there shall be offered in evidence... reports if any of the ACRS..."

Thus, the AEC recognizing the importance of the ACRS study affirmatively requires that the deliberations of that statutorily created body be considered at the hearing. There is no suggestion that the ACRS report may be offered to demonstrate its completion without giving a party an opportunity to show that the report is inadequate or is based upon data which is erroneous. Moreover, section 2.743(g), which requires the offering into evidence of the ACRS report, also requires the offering of the PSAR and other documents, all of which are and will be subject to cross-examination. Accordingly, there is no basis for distinguishing between the ACRS report and the PSAR, insofar as rights of cross-examination are concerned.

The language of section 2.743(g) is in terms of "offering" and not in terms of "receipt." This is a further indication that the ACRS Report must be subject to cross-examination, since not all offered evidence is received and no evidence may properly be

received without the right of cross-examination. 10 C.F.R. Part 2. § 2.743(a); 5 U.S.C. § 556(d); McCormick, Law of Evidence, pp. 6-7, 40-44 and 113-20 (Hornbook Series, West Pub.)(1954); 3 Davis, Administrative Law, § 15.10, pp. 403-404, (West Pub.) (Nothing short of opportunity for cross-examination...is appropriate for disputed adjucative facts at the center of controversy); Southern Stevedoring v. Voris, 190 F.2d 275 (5th Cir. 1951); Powhatan Mining Co. v. Ickes, 118 F.2d 105 (6th Cir. 1941)(the more liberal the practice in admitting testimony, the more imperative it is to preserve the essential rules of evidence by which rights are asserted or defended); and Application of Plainfield-Union Water Co., 94 A.2d 673 (N.J. 1953).

CONCLUSION

Congress intended that the public should be fully informed as to reactor safety. The ACRS was established to assist in the analysis of safety and in the dissemination to the public of the discussion of significant safety questions.

The logic is inescapable that the substance of ACRS reports is important and critical to the decisions of interested parties. Thus applicant would not proceed without ACRS approval, the staff may not have come to its conclusions without reliance upon the ACRS review (Staff Safety Evaluation pp. 19, 45, 48, and 81-82), and the Board surely would start an inquiry if an unfavorable ACRS report had ultimately issued. As a matter of fact the Staff recommended against the siting of the proposed Midlant Units after the first ACRS Report (Letter, Morris to Applicant, March 28, 1969) and the applicant amended its PSAR in order to comply with ACRS recommendations.

Accordingly, all parties have relied upon ACRS deliberations and the ACRS report has directly affected the proceedings herein.

The ACRS Reports must be offered into evidence and in order to be received, all parties must be afforded the right to cross-examination thereof.

Since a Regulatory Staff employee or even the Secretary of the Commission has no competance to testify as to the preparation and substance of the ACRS Reports, the Board should issue the subpoena requiring the testimony of Mr. Hendrie in order to afford adequate cross-examination.

Respectfully Submitted,

Attorney for Saginaw Valley et. al. Intervenors

Dated: June 21, 1971

CERTIFICATION

I certify that a copy of the aforesaid Brief and a copy of the Hendrie subpoena was served upon all counsel of record, members of the ASLB and the Secretary of the AEC by mailing postage prepaid or in open hearing on June 21, 1971.

Myron M. Cherry