

3/18/77

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
(Midland Plant, Units 1 and 2))	50-330

NRC STAFF ANSWER TO EMERGENCY
MOTION FOR DIRECTED CERTIFICATION

Introduction

By virtue of the decision of the Court of Appeals for the District of Columbia Circuit in Nelson Aeschliman, et al. v. U.S. Nuclear Regulatory Commission, Nos. 73-1776, 73-1876 (July 21, 1976) (Aeschliman), a number of issues were remanded to the Commission for consideration. The Commission reconvened the Licensing Board in its Memorandum and Order of August 16, 1976^{1/} and extensive hearings have taken place before that Licensing Board.

Hearings are to resume in Chicago, Illinois, on March 21, 1977. Throughout the proceeding, All Intervenors Except Dow Chemical Company (Intervenors) have requested financial assistance for counsel and/or experts from the Licensing Board. Consumers Power Company (Licensee) and the NRC Staff

^{1/} Consumers Power Company (Midland Plant, Units 1 and 2), CLI-76-11, NRCI-76/8 65 (August 16, 1976).

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(Staff) have opposed such requests on the authority of the Commission's "Statement of Considerations Terminating Rulemaking" (Statement)^{2/}

In letters to the Licensing Board dated February 19, 1977 and February 21, 1977, Intervenors continued to argue for financial assistance. The Licensing Board by Order dated February 25, 1976 denied Intervenor's request for financial assistance on the basis of the Commission's Statement. "All theories ignore the clear published Commission policy by which we are bound."^{3/} Intervenors in a conference call among the parties on March 11, 1977 requested that the Licensing Board certify the question to the Appeal Board. Both Staff and Licensee opposed Intervenor's motion and it was denied by the Licensing Board in an Order on March 11, 1977.

Intervenors filed on March 13, 1977 an "Emergency Motion for Directed Certification" (Motion) with the Atomic Safety and Licensing Appeal Board (Appeal Board) wherein Intervenors urged the Appeal Board to direct certification of the denial by the Licensing Board of Intervenors'

^{2/} In the Matter of Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, MRCI-76/11 494 (November 12, 1976).

^{3/} Board's Order, page 2.

request for financial assistance. Intervenors caption their Motion in the alternative: if the Appeal Board is without jurisdiction to entertain the question, Intervenors seek a determination from the Commission. The Staff opposes Intervenors' Motion.

Argument

I. The Appeal Board Has Jurisdiction over Intervenors

Intervenors' Motion is properly before the Appeal Board. The Appeal Board has the power to direct the certification of legal issues raised in a proceeding, which are thought deserving of early dispositive resolution. See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). By 10 C.F.R. §2.785(b), the Appeal Board has been delegated to exercise the certification authority which would otherwise have been exercised by the Commission under 10 C.F.R. §2.718(i). While it is permissible for the Appeal Board to certify questions to the Commission,^{4/} and for the Commission to sua sponte direct questions to it, it is not open to an Intervenor to petition the Commission directly for certification. See 10 C.F.R. s2.785(d).^{5/}

^{4/} See Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, NRCI-76/6 804, 807 (1976).

^{5/} Intervenors' reference to Appendix A to 10 C.F.R. Part 2 particularly V(f)(4) is inapposite. That section speaks to the discretion vested in Licensing Boards. In any event to the extent that the rules of Part 2 are inconsistent with Appendix A, the rules govern. See Appendix A, asterisked footnote.

II. Intervenors Make No Showing that the Public Interest
Will Suffer Absent Certification

The question before the Appeal Board then is whether or not to grant the requested certification on the issue of financial assistance for Intervenors in this proceeding. A required showing for certification was laid down in Seabrook, supra at p. 483:

We believe, then, that at the very minimum, a party asking that we invoke our Section 2.718(i) certification authority must establish that a referral would have been proper; i.e., that, failing a certification the public interest will suffer or unusual delay or expense will be encountered.

Intervenors make no argument that absent certification "unusual delay or expense will be encountered". The thrust of Intervenors' Motion is that "the public interest will suffer." But Intervenors' Motion does not demonstrate that this is so.

The posture of the suspension proceeding is important. Both Licensee and Staff have presented their pre-filed testimony.^{6/} Intenor has pre-filed their direct written testimony and cross-examination of Intervenors' witness, Dr. Timm, is scheduled to commence March 21, 1977. A transcript in excess of 4500 pages has been developed. The suspension proceeding is

^{6/} Both Licensee and Staff contemplate presenting supplemental direct and rebuttal testimony and have filed such testimony with the Board.

close to its end. The only question which would justify the emergency-nature of Intervenors' Motion would be the availability of Dr. Timm for cross-examination. Intervenors have never taken the position that, absent financial aid, they could not continue in these proceedings or that Dr. Timm would not appear. And the Licensing Board so noted in its February 25 Order:

We have not received from him or his clients an unequivocal release of Dr. Timm so that anyone other than these Intervenors has the freedom to deal with Dr. Timm as a free agent.
At pp. 2-3.

Nor do Intervenors indicate in their Motion that, absent financial assistance, Dr. Timm cannot appear. We have only a vague allusion in the Motion's footnote that the issue of financial assistance is "critically tied to Intervenors' further participation." On page 4 of their Motion, Intervenors argue that the Appeal Board should act "to assure that the testimony of Dr. Timm will be made available to the hearing Board." Nothing more is said in the entire pleading as to how the public interest will suffer if the Appeal Board fails to act. Intervenors have failed to make the showing required for certification by Seabrook.

III. The Commission's Statement on Financial Assistance

Apart from the lack of an adequate showing that the public interest requires an interlocutory appeal, Intervenor's Motion must fail for the further reason that the Licensing Board ruling was obviously correct. On the issue of financial assistance, we have clear and recent direction from the Commission. In its Statement, the Commission explicitly discussed the issue of financial assistance in licensing proceedings and rejected it:

On the bases of these considerations, as set forth hereafter, the Commission has determined not to initiate a program to provide funding for participants in its licensing, enforcement and antitrust proceedings, and, as a general proposition, in its rulemaking proceedings. At p. 495.

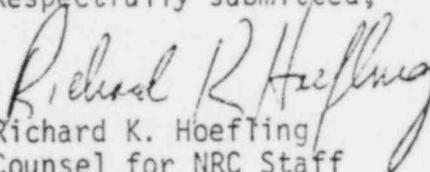
The Commission made only a limited exception with regard to the GESMO proceeding and in that limited case, the Commission indicated that it would seek a specific appropriation from Congress. In view of such an explicit guidance from the Commission, there can be no substantial question as to the correctness of the Licensing Board ruling.

If Intervenor believe that the circumstances in this licensing proceeding are so distinct, unusual and compelling as to require the Commission to reconsider its position,^{7/} they are free to petition the Commission for rule making under 10 C.F.R. §2.801.

Conclusion

Intervenor's Motion fails to meet the showing required by Seabrook to warrant certification. Furthermore, the Appeal Board must give controlling weight to the Commission's Statement on financial assistance. These considerations require denial of Intervenor's Motion.

Respectfully submitted,


Richard K. Hoefling
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of March, 1977

^{7/} Intervenor in their Motion makes numerous allegations charging the Staff with failure to perform an independent review (p. 3), with failure to uncover allegedly dishonest tactics on the part of the Licensee (p. 4); with failure to develop a complete record by a lack of scrutiny, understanding or inquiry (p. 5). None of these allegations are supported nor could they be. These allegations are simply a continuation of the reckless diatribe in which Intervenor have engaged throughout this proceeding. The Staff offers the comment that a petition by Intervenor for rule making before the Commission should deal in fact, not allegation, and references should be made to the record. The Commission would have little difficulty in dealing with Intervenor's petition if it were so presented.

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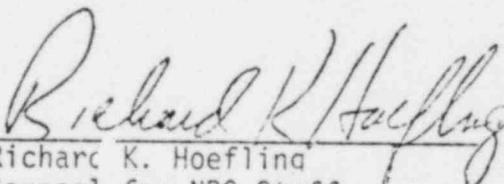
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