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January 15, 1990

BEFORE THE

ATOMIC SAFETY AND LICENSING APPEAL BOARD
U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of	Docket No. 70-25-ML
ROCKWELL INTERNATIONAL CORPORATION	ASLBP No. 89-594-01-ML
Rocketdyne Division	
(Special Nuclear Materials License No. SNM-21)	

Motion for Reconsideration

In response to your Memorandum and Order dated December 21, 1989, I find it necessary to raise the following points and respectfully request that you reconsider the actions taken:

1. The Memorandum and Order devotes a number of pages attempting to support the Appeal Board's claim that the Presiding Officer in the Rockwell relicensing proceeding "appears to be engaging in a form of judicial activism (i.e. discovery) unprecedented in NRC licensing proceedings." This is clearly not the case. 10 CFR 2.1233 states explicitly: "The presiding officer also may, on his or her initiative, submit written

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questions to the parties to be answered in writing, under oath or affirmation, and supported by appropriate documentary data, informational material, or other written evidence." Additionally, please note that there is absolutely no statement in the regulations that this must occur after the evidentary filings by the parties. If the Appeal Board wishes the regulations did so read, it should petition the Commission for rulemaking. Attempting to add provisions to regulations when they are not there is precisely the kind of "judicial activism" of which the Appeal Board accuses, incorrectly, the Rockwell case presiding officer.

Indeed, the presiding officer in this case has even greater authority pursuant to the regulations to obtain relevant information than he has exercised to date. For example, 10 CFR 2.1209 states that "The purpose of this provision is to make it clear that the presiding officer has the authority under AEA section 161 v, 42 U.S.C. 2201(c) to issue a subpoena for documents or witnesses if, in the course of conducting proceeding, he or she determines that the information is necessary for the full and fair exploration of the issues involved and finds that the information will not be supplied voluntarily. The issuance of such an order is solely within the power and discretion of the presiding officer." The presiding officer, thus has even more authority than he has chosen to exercise.

It is clear that the presiding officer is not engaging in a form of judicial activism; on the contrary, he appears to be "doing his job" to ensure a reasonable record upon which to make important public health and safety findings.

2. On page 13 of the Memorandum and Order, the Appeal Board states that it is the NRC staff—not the presiding officer—who determines what information is relevant to a pending application and hearing requests. However, it is explicitly stated in 10 CFR 2.1231 that final authority in this regard rests with the presiding officer, not the NRC staff: "The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file." Judge Bloch was in full accordance with CFR rules.

3. On page 13 it is further stated: "The Presiding Officer here has turned this process on its head by requiring the applicant and staff to supply extensive information—of dubious relevance..." The information the presiding officer requested was clearly relevant due to questions regarding Rockwell's past operations. The central issue in this proceeding has been whether Rockwell can operate in a safe manner given its past, recently described by EPA, DOE, and the state health department, of an extensive history of accidents and environmental contamination.

4. On page 22, as prime support for the Appeal Board's extraordinary claim that settlement conferences must be on the record and public, 13 NRC at 456 is cited. Quite frankly, the citing by the Appeal Board of 13 NRC at 456 is perplexing as there is nothing in the cited passage to support the Appeal Board's claim. (See attachment A). Nowhere does it state that the meetings cannot be held in private nor without a court reporter present. The citation in question merely says that settlement conferences with the licensing board present are encouraged; it is entirely silent as to the matter the Appeal Board relies upon the citation for as its support for its claim that these conferences must be public and on the record.

Such a claim is, furthermore, contrary to long Commission practice and the practice in virtually all other legal and administrative settings. Settlement conferences, including when a presiding officer is present, are routinely off-the-record and not public, in order to encourage settlement.

A settlement conference with the presiding officer in attendance, in my opinon, and, apparently, that of the other parties as well, could be beneficial. As in any other off-record discussion (e.g., conference calls on scheduling matters), a presiding officer is expected to limit the discussion in his presence to areas permissible in such off-record settings. But that is all a very standard practice. Therefore, we see no reason why the presiding

officer and Rockwell cannot attend settlement negotiations as previously agreed to by all parties.

The appeal board's action can only have the effect of contradicting NRC policy of encouraging settlement, since Rockwell refuses to participate in such conferences if they are indeed public. Indeed, it has already had the effect of canceling the settlement conference previously scheduled with Judge Bloch for January 26, because Rockwell declines to participate if the conditions ordered in the Appeal Board Memorandum and Order were to be required—that the sessions be on-record and public.

5. The very taking of these various actions on the Appeal Board's own motion is very troubling. No party had complained; no motions for interlocutory appelate relief had been filed; no injury has been asserted by any party to the proceeding. Indeed, the presence of the presiding officer in the settlement conferences had been welcomed by all parties, and the off-record nature of them had been insisted upon by one of the parties, Rockwell. Furthermore, in taking the matter up on its own motion, the Appeal Board provided no opportunity for affected parties to respond to the Appeal Board's motion. The Appeal Board is both the author of the motions at hand and the judge of its own motions; thus excluding the affected parties from responding to the Appeal Board's own motions is doubly

a serious departure from fair practice and carries with it the clear appearance of being arbitrary and capricious.

I take particular exception to the statement on page 2, footnote 1. Since neither Rockwell nor any of the intervenors have filed complaints and there are no injured parties, it is, therefore, wholly inappropriate for the Appeal Board to intervene at this time. The Presiding Officer's orders, in my opinion, have not "fundamentally alter(ed)" the proceeding before it got under way. In particular, the presiding officer's action in requesting information for the record is an entirely appropriate effort to enable a fair hearing and to have a reasonable record upon which to assess the history of the licensee's operation of the facility whose renewal request is the matter at issue in the proceeding. In fact, perhaps the central contested issue in this proceeding, raised by essentially all of the intervenors, is whether the past record of accidents and environmental releases, criticized in a series of recent DOE, EPA, and State Health Department reports, should preclude renewal of Rockwell's license to possess and continue to use Special Nuclear Materials at the site in question. The presiding officer was merely exercising the authority granted him to obtain a record necessary for ruling on the contested matters in the proceeding. This was entirely appropriate.

In raising the matters that it did, however, on its own motion, with no complaint filed by any party and long before an initial

decision is issued, and then ruling on its own motion without first permitting the affected parties to provide briefs on the motion the Appeal Board raised on its own initiative, the Appeal Board has acted in an arbitrary and capricious fashion and violated fundamental procedures.

Conclusion

I urge the Board to reconsider its actions to date and, furthermore, to refrain in the future from such micro-management of the case below. Let the process take its course, and, in the standard procedure for such matters, decide whether error has occurred if parties appeal the outcome after an initial decision has been reached. This micro-management of day to day operations of the licensing proceedings by the Appeal Board, taken on its own motion when no party has asserted any injury nor filed any complaint and while the proceeding is just beginning, is extremely disruptive to the process and goes far beyond the appropriate role of the Appeal Board.

Respectfully submitted,

Jon Scott

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by the Board that a greater number of interrogatories is justified. Pending a Commission decision on the proposed rule, the Boards are reminded that they may limit the number of interrogatories in accordance with the Commission's rules.

Accordingly, the boards should manage and supervise all discovery, including not only the intitial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission again endorses the policy of voluntary discovery, and encourages the boards, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery. Each individual board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone conference calls, and status report conferences on the record. In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

E. Settlement Conference

Licensing boards are encouraged to hold settlement conferences with the parties. Such conferences are to serve the purpose of resolving as many contentions as possible by negotiation. The conference is intended to: (a) have the parties identify those contentions no longer considered valid or important by their sponsor as a result of information generated through discovery, so that such contentions can be eliminated from the proceeding, and (b) to have the parties negotiate a resolution, wherever possible, of all or part of any contention still held valid and important. The settlement conference is not intended to replace the prehearing conferences provided by 10 CFR 2.751a and 2.752.

F. Timely Rulings on Prehearing Matters

The licensing boards should issue timely rulings on all matters. In particular, rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding. Such rulings may eliminate the need to adjudicate one or more subsidiary issues. Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question. Rulings on procedural matters to regulate the course of the hearing should also be rendered early.

If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission. A board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding.

G. Summary Disposition

In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

H. Trial Briefs, Prefiled Testimony Outlines and Cross-Examination Plans

All or any combination of these devices should be required at the discretion of the board to expedite the orderly presentation by each party of its case. The Commission believes that cross-examination plans, which are to be submitted to the board alone, would be of benefit in most proceedings. Each board must decide which device or devices would be most fruitful in managing or expediting its proceeding by limiting unnecessary direct oral testimony and cross-examination.

I. Combining Rebuttal and Surrebuttal Testimony

For particular, highly technical issues, boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand at the same time so that each witness will be able to comment immediately on an opposing witness' answer to a question. Appendix A to 10 CFR Part 2 explicitly recognizes that a board may find it helpful to take expert testimony from witnesses on a round-table basis after the receipt in evidence of prepared testimony.

J. Filing of Proposed Findings of Fact and Conclusions of Law

Parties should be expected to file proposed findings of fact and conclusions of law on issues which they have raised. The boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law.

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ROCKWELL INTERNATIONAL CORPORATION '90 JAN 19 P4:49 Docket No.(s) 70-25-ML

(Rocketdyne Division, Special
Nuclear Materials License SNM-21)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Reconsideration have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec.2.712

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