UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Elizabeth S. Bowers, Chairman
Dr. Peter A. Morris
Dr. Jerry R. Kline

SERVED JUL 31 1981

In the Matter of		
CONSUMERS POWER COMPANY	)	Docket No. 50-255 SP
(Palisades Nuclear Power Facility)	)	July 31, 1981

MEMORANDUM AND ORDER
RULING ON PETITION TO INTERVENE

The Atomic Safety and Licensing Board denies the petition of Utility Workers Union of America, AFL-CIO and its Michigan State Utility Workers Council for Hearing on Order Confirming License Actions to Upgrade Facility Performance.

I. BACKGROUND

On March 31, 1981, the Utility Workers Union of America, AFL-CIO and its Michigan State Utility Workers Council (hereinafter "the Union") requested a hearing, pursuant to 10 C.F.R. § 2.714(a)(2) and the March 9, 1981 confirmatory order of the Director of the Office of Inspection and Enforcement. The Order of March 9, 1981 Confirming License Actions to Upgrade Facility Performance, to which the Licensee consented, provides, in part, certain restrictions on overtime for licensed operators. 46 Fed. Reg. 17688 (Mar. 19, 1981). On April 20, 1981, the NRC Staff filed its

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"Response to Utility Workers Union of America's Request for a Hearing" (hereinafter, "Answer"), which concluded that the Union's petition should be denied.

On May 28, 1981, the Union filed a "Reply Brief in Support of Request for Hearing . . .". (hereinafter, the "Reply")

On May 29, 1981, the Commission referred the Union's request for a hearing to an Atomic Safety and Licensing Board (hereinafter, the "Board") and directed the Board to decide whether the Union's request for a hearing should be granted.

On June 3, 1981, this Board was established to rule on the request for hearing and to preside over the proceeding in the event that a hearing is ordered.

On June 17, 1981, the Staff filed its "Response to Utility Workers Union of America's 'Reply Brief in Support of Request for Hearing . . .'". (hereinafter, the "Response")

In brief, the Union's position, as stated in its petition and Reply, is that it is entitled to a hearing on the Order of the Director of the Office of Inspection and Enforcement, as provided for by Commission rules, and has a right to be heard under constitutional rights to due process. The Staff, in its answer to the petition and its Response to the Reply, disagrees. It concludes that the Union has not established a legal right to a hearing and that the holding of a discretionary hearing would be wasteful of the Commission's resources and would concern primarily matters beyond the Commission's purview. We proceed to examine the issues in detail.

II. PETITIONER'S STANDING

The March 9, 1981 confirmatory order of the Director of the Office of Inspection and Enforcement states that:

(1) "Any person who has an interest affected by this Order may request a hearing on this Order within 25 days of its issuance."

(2) "If a hearing is requested by a person other than the licensee, that person shall describe in accordance with 10 C.F.R. § 2.714(a)(2) the nature of the person's interest and the manner in which that interest is affected by this Order." 46 Fed. Reg. 17688 (Mar. 19, 1981).

The Union's request was dated March 31, 1981, and was, therefore, timely filed.

The Union's request for a hearing states its "reasons and grounds" in its Petition and elaborates in its Reply, in which the Union also asserts that overtime restrictions were proposed and promulgated by the Licensee and the NRC without notice to or consultation with the licensed operators represented by the Union, in total disregard and in violation of their fundamental due process rights.

The Commission rule governing intervention requires that "The petition shall set forth with particularity the interest of the petitioner in this proceeding, how that interest may be affected by the results of this proceeding, including the reasons 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." 10 C.F.R. § 2.714(a)(2). Paragraph (d) states that "The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on

petitions to intervene and/or requests for hearing shall, in ruling on a petition to intervene, consider the following factors, among other things:

(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 interests in the proceeding.

(3) The possible effect of any order which may be entered into the proceeding on the petitioner's interest.

The Staff's Response to the Reply (which incorporates the views held in its answer to the petition) correctly points out (p.5) that in enforcement cases, as in licensing cases, this Commission applies judicial concepts of standing in determining rights to a hearing under section 189a of the Atomic Energy Act. To have "standing" one must first allege some injury that has occurred or will probably result from the action involved. One must, in addition, allege an interest arguably within the zone of interests protected by the Act. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980); Wisconsin Electric Power Co. (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2, CLI-76-27, 4 NRC 610, 613 (1976).

The Union argues in its Reply that it meets these requirements. There appears to be little dispute between the Staff and the Union that these are the appropriate measures to apply in determining whether the Union has a right to a hearing in this proceeding.

A. Economic Interest

The Reply states that the Palisades facility licensed operators represented by the Union indisputably possess a real and substantial interest in the maintenance of contractually protected employment rights. To the extent this interest is economic, it is a specific, particularized and contractually-mandated interest clearly possessed by the licensed workers. It is plainly not an economic interest of the generalized or diffuse sort claimed by power company ratepayers, which have frequently held to be not cognizable before this Commission. [sic]. (citation omitted). The Union's direct and substantial employment-related interests stand to be affected by the Commission's action and clearly support its right to be heard as an interested party. (Reply, p.6).

The Staff argues that "The maintenance of 'contractually protected employment rights' is an economic interest and therefore not within the 'zone of interests' protected by the Atomic Energy Act". (Response, p.7). The Staff observes that the Union's argument is apparently that economic interests, to the extent that they are specific and not generalized, can serve as a basis for standing. This argument is refuted by the Staff in adducing the following: (Response, p.8 ff).

1. NRC cases that hold economic interests to be outside the "zone-of-interests" protected by the Atomic Energy Act have not made such holdings contingent upon the specific or generalized nature of the economic interest asserted.12/

12/ It is not altogether clear why the economic interests alleged by the Union are any more "specific" than those alleged by ratepayers. In any event, even assuming arguendo that the Union's interests are more "specific", there is no basis to say that economic interests that are specific in nature can serve as a basis for standing in NRC proceedings.

2. The Atomic Safety and Licensing Appeal Board, in denying intervention status to a petitioner who alleged potential harm to real estate investments, has stated flatly: "Moreover, it is now settled that an interest which is purely economic in character does not confer standing to intervene under the Atomic Energy Act . . ." (citation omitted).
3. Discussion and citation of several other cases that have held economic interests to be outside the "zone of interests" protected by the Atomic Energy Act that have done so in circumstances outside the ratepayer context.

We agree with the Staff in concluding that, whether particularized or generalized, economic interest, and specifically the Union's admittedly economic interest in maintaining contractually protected employment rights is an interest that is not within the "zone of interests" protected by the Atomic Energy Act and therefore can not serve as a basis to request a hearing as a matter of right.

B. Maintenance of Safe Conditions

The Reply states (p.6) that it surely cannot be disputed that workers in nuclear facilities possess a unique interest in having a voice in decisions designed to address the maintenance of safe conditions within the nuclear facility at which they are employed. It then quotes from 10 C.F.R. Part 19, Notices, Instructions and Reports to Workers;

Inspections,[1/] and asserts that it would appear obvious that whenever (original emphasis) action is contemplated to change working conditions of operators of regulated facilities, ostensibly in the interest of improving safety, that those licensed workers who participate in the regulated activity on a daily basis should be consulted as a matter of course.

It is not obvious at all to this Board that the conclusion that "those licensed workers who participate in the regulated activity on a daily basis should be consulted as a matter of course" flows from the requirements and opportunities of 10 C.F.R. Part 19, regardless of whether Licensee management considers such consultation necessary or desirable. Further, we hold that it is management's responsibility and prerogative to decide those work practices that it deems proper to achieve both safe and productive work practices of its own organization. While meaningful input may indeed flow from consultation with licensed workers, this does not imply that such consultation need take place "as a matter of course".

The Reply continues by stating that there can be no more valuable resource in the development of the safe operations of a radiological facility than the licensed workers who have training and experience with regard to their employment responsibilities, and are intimately acquainted with the effects of working conditions, i.e., overtime standards,

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1/ Which relates to: Posting of notices to workers, Instructions to workers, Notification and reports to individuals, Presence of representatives of licensees and workers during inspections, Consultation with workers during inspections and Requests by workers for inspections.

on their own ability to perform in a safe manner. We are not convinced that where substantial overtime benefits become a motivating factor for employment and may affect the morale of the workers, that they can be completely objective in assessing the balance between acceptably safe performance and substantial overtime hours.

The Licensee proposed and the NRC has ordered a limit on overtime hours as a way to upgrade performance at the Palisades facility. Major changes in the Licensee's management controls, including the avoidance of extended overtime, were found necessary, by the Director, to assure that the Licensee could operate the Palisades facility without undue risk to the health and safety of the public.

In any event, the Director's Order in no way inhibits consultation by the Licensee with licensed operators nor the licensed operators from having a voice in decisions designed to address the maintenance of safe conditions within the nuclear facility at which they are employed. In particular, whether the Director's Order, insofar as it relates to restriction of overtime hours, is upheld or not, the protections afforded by 10 C.F.R. Part 19, will remain available to the Palisades workers.

Because the Union's interest in having licensed operators have a voice in safety-related decisions affecting the Palisades workers has not been "injured-in-fact", by the Director's Order, that interest cannot serve as a basis for standing to request a hearing on the Director's Order.

C. Effect on Employee Morale

The Reply states (p.8) that the Commission, further, should not overlook the potentially dangerous effect on employee morale and performance that may be the result of ignoring or failing to adequately consider the safety-related suggestions and perceptions of highly trained and experienced nuclear facility personnel. Taken in context with the next sentence, the Union appears to imply that the "unilateral decision to restrict operator overtime in the Palisades facility" might have such a dangerous effect on employee morale and performance.

To the extent that the licensed operators earn less money in the future, as a result of the Director's Order, this might indeed affect morale. To the extent that the safety-related performance of the Palisades licensed operators would be degraded, if no hearing were held on the Director's Order, this would be totally inconsistent with their unique interest in the maintenance of safe conditions within the nuclear facility at which they are employed.

As before, the economic interest is not within the "zone-of-interests" protected by the Atomic Energy Act. The Union has not, in fact, alleged that the restriction on overtime hours has made the facility less safe.

The effect on employee morale cannot serve as a basis to request a hearing as a matter of right.

D. Employment Opportunities

The Reply states (p.8) that the unilateral decision to restrict operator overtime in the Palisades facility may also have an adverse impact on the employment opportunities of the affected workers, further supports the Union's claim of interest in being heard in this matter. It is not clear what the Union has in mind here, since it is not alleged that there would be any decrease in the number of jobs nor the opportunities for advancement. We see no basis for concluding that restriction on overtime hours would have an adverse impact on employment opportunities of the affected workers. Even if it did, we would not find this matter to be within the "zone of interests" protected by the Atomic Energy Act.

E. Physical Proximity

The Reply states that the physical proximity of workers in nuclear facilities to radioactive operations, standing alone, sufficiently establishes the requirements for Union standing (citations omitted).

The Staff position (Response, p.14) is that the "physical proximity of workers in nuclear facilities to radioactive operations" is not a sufficient basis to establish standing in NRC proceedings in the absence

of any allegation that safety-related or environmental concerns will be adversely affected by the proceeding. Conceding that those who live within close proximity to a nuclear facility are presumed to have a cognizable interest, the Staff asserts that it is important to recognize that the "close proximity" test only raises a presumption of standing. What is really "presumed" by the "close proximity" test is that the potential litigant will in fact be able to show an injury to an interest protected by the Atomic Energy Act. If he or she cannot, then the presumption fails.

The Staff position is amply supported by at least two cases (which the Staff avers the Union has misread). In denying a petition to intervene in an NRC licensing proceeding by an association of lawyers, the Atomic Safety and Licensing Appeal Board stated:

> "The alleged fact that there are Guild members who live in the general vicinity of the Allens Creek site does not alter matters. To be sure, persons who live in close proximity to a reactor site are presumed to have a cognizable interest in licensing proceedings involving that reactor. Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (January 26, 1979). But there is no like presumption that every individual so situated will deem himself potentially aggrieved by the outcome of the proceeding (an essential ingredient of standing). Some may and some may not. Because of this consideration, the petitioner organization in North Anna did not and could not content itself with the simple assertion that it had members living in the shadow of the facility there in question. To establish its representational standing, it additionally supplied the statement of one of those members, which explicitly identified the nature of the invasion of her personal interest which might flow from the proposed licensing action." (footnote omitted)

Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979). In a similar vein, the Atomic Safety and Licensing Board has stated:

> "In proceedings involving license applications, the Appeal Board has ruled that a petitioner who resides or is employed in geographic proximity to a reactor site, and who has expressed concerns over reactor safety or environmental impact, can be fairly presumed to have an interest which might be affected by construction or operation of a reactor." (emphasis added)

Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 373 (1980).

Thus, the Union cannot assert standing in this case by virtue of the "close proximity" test unless it can also show that it has an interest protected by the Atomic Energy Act (a "cognizable interest") that has been adversely affected by the Director's Order in a way that is environmentally or safety-related. The Union has not demonstrated such an interest. It is again important to emphasize that the Union has not alleged that the Palisades facility is less safe as a result of the Director's Order. Instead, the interests the Union describes are either outside the "zone of interests" protected by the Atomic Energy Act or have not been adversely affected by the Director's Order. As a result, the "close proximity" of the workers represented by the Union to the Palisades facility is not itself a basis upon which to presume standing to request a hearing.

In summary, the interests asserted by the Union are either outside the Atomic Energy Act's "zone of interests" or have not been "injured in fact." The Union does not have a right to a hearing as a matter of

law to challenge the Director's Order restricting overtime hours at the Palisades facility.

III. DUE PROCESS RIGHTS

The Reply states that the Union's procedural due process rights have been violated. The Staff Response (p.22) concludes that since no property right of the Union has been affected, the Due Process Clause of the Constitution does not require a hearing in this case.

The Union states (Reply, p.4) that there is no more fundamental legal proposition than the proposition that "parties whose rights are to be affected are entitled to be heard." Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

The Staff, however, notes (Response, p.21) that the key question is whether any constitutionally guaranteed rights of the Union have been affected by the Director's Order.

The Reply states (p.4) that the Union indisputably possesses a direct and tangible interest in maintaining valuable employment rights and benefits arising out of its contractual relationship with the Licensee. These interests are economic and non-economic, and include the right to future overtime compensation and the right to maintain safe working conditions. Further the Reply states (p.5) that while the due process clause does not create (original emphasis) rights in the Union, it does mandate that existing property rights (emphasis supplied) be protected from governmental interference without an opportunity to be heard.

It appears to us that the Union acknowledges that to be entitled to a hearing its property rights must be affected. (Reply, pp.4-5). While the Staff Response (p.18) says that the Union characterizes its interest as a "property right", it does not, in fact, explicitly do so. In any event, to examine whether the Union is entitled to a hearing under the due process clause the Response (p.18 ff) proceeds as follows:

> The Fifth Amendment of the Constitution states that "No person shall . . . be deprived of life, liberty, or property without due process of law." This clause has long been interpreted to mean that an individual must be afforded an opportunity to be heard by the Government when the Government takes action that affects a life, liberty, or property interest. See, e.g., Grannis v. Ordean, 234 U.S. 385, 394 (1918); McVeith v. United States, 78 U.S. 259, 267 (1870). The crucial task, however, is to determine those interests that are defined as life, liberty, or property interests such that they are deserving of due process protection. In the context of defining property interests that merit due process protection, courts have looked to the Constitution itself,25/ English common law principles,26/ and, more recently, the notion of "legal entitlements"27/ as sources of property interests. "Legal entitlements" are created either by federal or state statute,28/ or by "mutually explicit understandings"29/ between the government and the individual claiming the entitlement. Absent some effect on a property interest as defined by these various sources, the Due Process Clause does not serve as a basis upon which to establish hearing rights.
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> Denying a hearing to the Union does not in any way conflict with any of these tenets of due process described above. Indeed, section 189a. of the Atomic Energy Act and the hearing

25/ See Tribe, American Constitutional Law, p. 507 (1978).

26/ Id.

27/ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

28/ Id.

29/ Perry v. Sinderman, 408 U.S. 593, 601 (1972).

rights it affords to individuals who have been adversely affected by Commission action are the very embodiment of due process. Thus, to the extent that a hearing is not required by section 189a. of the Atomic Energy Act, 30/ the Union has been afforded all the process that it is constitutionally due.

In addition, the Union's interest in "maintaining valuable employment rights" does not rise to the level of a property interest protected by the Constitution. Presumably this interest is manifested in the "right" to work overtime. The "right to work overtime" is of course not guaranteed by any specific constitutional provision or by principles of English common law. Furthermore, the Union has no legal entitlement to overtime hours. No federal or state statute affords the workers represented by the Union with a guarantee of overtime hours. Moreover, any expectation the workers have to overtime hours has certainly not been fostered by any "mutually explicit understanding" between the NRC and the Union. Indeed, the understanding that exists between the NRC and the workers represented by the Union is best described as one in which the workers will not be able to undertake any activities, including overtime work, to the extent that such activities adversely impact on safety.

As a final note, the cases relied upon by the Union do not support its argument that the Due Process Clause of the Constitution entitles the Union to a hearing in this case. The Staff recognizes of course that the NRC "enjoys no special position or privilege that can justify an abridgement of constitutional rights to due process. Union of Concerned Scientists v. Atomic Energy Commission, 499 F.2d 1069 (1974)." [sic]31/ Furthermore, Fuentes v. Shevin, 407 U.S. 67, 80 (1972) does, as the Union indicates, state that "parties whose rights are to be affected are entitled to be heard."32/ The key question, however, is whether any constitutionally guaranteed rights of the Union have been affected by the Director's Order. These two cases clearly do not state that a Union has any constitutionally protected right to work overtime.

30/ See text at Part II, supra.

31/ Union's Reply Brief at 4.

32/ Id.

Moreover, Board of Regents v. Roth, 408 U.S. 564 (1972) and Klein v. Califano, 586 F.2d 250 (3d. Cir. 1978) are more supportive of the Staff's view than of the Union's. The Roth case is most instructive. In seeking to define "property interests", the Supreme Court stated in Roth:

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."
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> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Klein Court made clear that "the underlying property interest must derive its source from state or federal statute or rule . . . ." Klein v. Califano, 586 F.2d 250, 257 (3d Cir. 1978). Thus, because the Union's asserted interest in protecting overtime hours is not derived from a statutory source, or from any understanding between the NRC and the Union, the Union has not established any "property right" to overtime hours that has been impacted by the Director's Order. Since no property right of the Union's has been affected, the Due Process Clause does not require a hearing in this case.

We conclude, based on the above, that the Union's procedural due process rights have not been violated. The Union is not entitled to a hearing on the grounds of the Due Process Clause.

IV. COMMISSION DISCRETION

The Union claims (Reply, p.9) that it is entitled to be heard as a matter of discretion. The Commission has broad discretion to provide hearings or permit interventions in cases where these avenues of public participation would not be available as a matter of right. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) CLI-80-10, 11 NRC 438, 442 (1980). The Staff concludes that the Union should not be granted a hearing as a matter of discretion.

The Staff first argues (Response, p.22) that the Commission's Order of May 29, 1981 (referring the Union request for a hearing to an Atomic Safety and Licensing Board) does not ask the Board to decide whether a discretionary hearing should be held. Although the Commission undoubtedly could have ordered a discretionary hearing in this case, it did not choose to do so. Furthermore, there is no indication in its order of May 29, 1981 that the Commission intended to confer upon this Board the rarely used authority to grant a discretionary hearing.

The Commission's Order of May 29, 1981, referring the Union's request for a hearing to the Atomic Safety and Licensing Board stated that the Board was:

> "to decide whether the Union should be granted a hearing. If the Licensing Board determines that a hearing is required, it should conduct a hearing."

The phrase "should be granted" is most appropriately read in context with the word "required" in the following sentence of the Commission's Order. That is, the Commission has asked the Board to decide whether a hearing should be granted by directing it to determine whether a hearing is required in this case. Indeed, by using the word "required", the Commission's Order makes clear that the Board is not to consider the issue of a discretionary hearing.

As support for this reading of the Commission's Order, the use of discretionary hearings in past Commission practice should be considered. The use of discretionary hearings is rare in general, and unheard of in the context of an NRC enforcement action. The Commission has emphasized that, to the extent possible, NRC enforcement resources are better utilized when not directed to the conduct of hearings. The Commission has stated that:

> "public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions."

Public Service Company of Indiana, supra. In addition to this concern for Inspection and Enforcement resources, it also should be remembered that the Commission is concerned with applying all agency resources in the area where they are most needed, which currently is in the conduct of licensing and not enforcement proceedings. Given these concerns, it is inconceivable to suggest that the Commission without any clear directive

so stating, wanted the Board to consider whether a discretionary hearing should be held in this Licensee-consented enforcement action.

Were this argument not dispositive of the question of granting a discretionary hearing, and we believe it is, some factors bearing on the exercise of discretion are provided in Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). These are listed and discussed as follows:

A. Weighing in favor of allowing intervention

1. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

The Union (Reply, pp. 9-11) states that the Commission should, as a matter of discretion, permit the Union to be heard as a participant possessing unique knowledge and experience which would provide a valuable contribution to the decision-making process. Further, it states that the Union, as representative of licensed facility operators plainly has a significant and singular ability to contribute in a substantial manner as to the effects of overtime and other working conditions on safety in plant operation. It alleges Commission recognition of the unique position of nuclear facility workers to provide vital information in the context of enforcement of plant regulations, by reference to 10 C.F.R., Part 19. Finally, the Union asserts that by their failure to solicit and consider the observations of the Palisades plant workers, the Licensee and the

Commission have ignored the Union's established employment interests and have overlooked what is undoubtedly their most valuable source of knowledge in their efforts to improve the safety record of the Palisades facility.

To judge the potential for the Union to assist in developing a sound record, it is appropriate to review the record leading to the Director's Order.

The Staff has stated that the Commission's Order of March 9, 1981, cited the numerous safety problems at Palisades. The Staff states that the Union has not alleged that Palisades has been made any less safe as a result of the restricting of overtime hours. Thus, any "contribution" the Union would make to the record would be to non-safety related issues. To the extent that the Union's "rights" are not related to safety, it is true - and irrelevant - that such rights would not be represented by the NRC because such considerations would be outside the NRC's mandate for protecting the health and safety of the public.

The Board has determined that the Union cannot assist in developing a record beyond the one that already exists.

2. The nature and extent of the petitioner's property, financial or other interest in the proceeding.

Conceding that the Union's interest is economic, as discussed supra, this interest is not arguably within the "zone of interests" protected by the Atomic Energy Act.

3. The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

Reconsideration of the confirmatory order of the Director of the Office of Inspection and Enforcement conceivably could satisfy the Union's concern. To the extent, however, that the concern relates to lack of consultation with the Union by Consumers Power in committing to actions to assure safe operations of the Palisades facility, the NRC should not provide a tribunal to resolve what are essentially labor disputes between a Licensee and its employees.

To the extent that the restrictions on overtime for licensed operators would be sought to be changed, i.e., made less restrictive, it is not persuasive, nor relevant, to argue, as the Union does, that they should not be imposed because they are more restrictive than this Commission's standards otherwise applicable, as set forth in the interim criteria for shift staffing, issued July, 1980, by the Commission, by Darrell G. Eisenhut, Director, Division of Licensing. Notwithstanding these (Eisenhut) criteria, which would have applied to the Palisades facility absent the Order, the enforcement history, which revealed to the NRC Staff a number of significant items of noncompliance that resulted from inadequate management control of licensed activities or from personnel error, demonstrated that major improvements in the Licensee's program were necessary to assure that the Licensee can operate the Palisades facility without undue risk to public health and safety. The restrictions on overtime work committed to by Consumers Power were accepted by the Director, because they appeared to be a reasonable approach to begin

to remedy the Licensee's inadequate performance at Palisades. The Staff's Answer (pp. 9-10) states that sound enforcement policy dictates that the Office of Inspection and Enforcement be able to confirm by order, in the interest of the potentially favorable effect on public health and safety, a Licensee's efforts to gain better control of its operations through its proposed restrictions on its license. Further, the viability of such consent orders is undermined if discretionary hearings are held to hear issues that reach beyond the Commission's interest in public health and safety.

It is apparent from a close reading of the Director's Order that restrictions in addition to those defined in the Eisenhut letter would have been imposed on the Palisades licensed operators even if they had not been proposed by the Licensee. We find that the Director's confirmation Order was entirely appropriate and consistent with the Commission's practice.

B. Weighing against allowing intervention

4. The availability of other means whereby petitioner's interest will be protected.

The Staff's answer (p.9) assumes that there are tribunals, including state and federal labor relations agencies, to hear the Union's grievances against Consumers Power Company. We don't believe this to be an unwarranted assumption and also agree that this agency simply is not one of those tribunals.

5. The extent to which the petitioner's interest will be represented by existing parties.

This factor is not relevant to this proceeding, since the particular interest of the intervenor is not within the "zone of interests" protected by the Atomic Energy Act.

6. The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

There have been no other petitions for a hearing on the Director's confirmatory order. To grant petitioner's request, based on his reasons and grounds, would inappropriately broaden the proceeding; in fact, lead to a hearing that otherwise probably would not be held.

V. BASIS FOR OVERTIME RESTRICTIONS

The Union claims (Reply, p.11) that the overtime restrictions were apparently imposed without adequate consideration, reason or basis. It further characterizes the Order as a gratuitous action. While acknowledging the history of operations at the facility over the past five years reflects many instances of noncompliance with regulatory requirements and that some instances of regulation violation have involved personnel error, the Union claims it is unaware of any basis for finding that operator overtime practices contributed in any way to any violation or for justifying the Order's substantial reduction in permissible overtime.

The Staff Response (p.27) states that the restrictions on overtime hours was imposed to ensure that the safety of near-term operations at

the Palisades facility would not be adversely impacted by the special long-term changes required at Palisades (as necessitated by the incidents described). Further, the Staff feared that the Licensee might increase overtime hours worked by the Palisades operators in order to fully implement the long-term changes and to offset any hours that might be lost through operator attrition. As a result, in order to ensure that the overall safety of the facility would be protected, the Director ordered that the restriction on operator overtime hours be imposed. Contrary, then, to the Union's position, the Director's Order rested on sound footing in that it was based upon the unique safety-related circumstances in existence at the Palisades facility.

Although both the Staff and the Union supply the overtime hour restrictions that are contained in the Order and in the Eisenhut letter (Attachment "A" of the Union's Reply), neither provides a comparison of what those restrictions actually permit. Neither does the Union quantify the overtime hours that would "be substantially limited to a level well below that otherwise permitted by the Commission's general standards" (i.e., those restrictions contained in the Eisenhut letter). The results of such calculations would have no bearing on our conclusion here. We note, however, that under the Order overtime hours are explicitly limited to 64 in any 28-day period. Under the Eisenhut restriction, a worker who worked eight normal hours a day each of the first five days of a seven day week, four hours of overtime each of the first five days, 12 hours of overtime on the sixth day and no hours on the seventh day, could accumulate

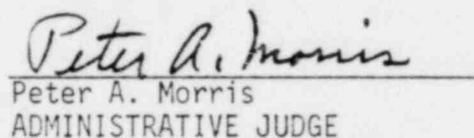
128 hours of overtime in a 28-day period. The difference in maximum permissible overtime hours could, therefore, be 64 hours in a 28-day period.

VI. CONCLUSION

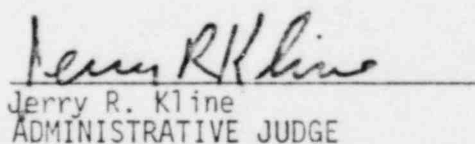
The Union has not established a legal right to a hearing on the confirmatory order of the Director of the Office of Inspection and Enforcement. A discretionary hearing, based on the reasons and grounds of the Union's petition, and as discussed in its Reply Brief, would concern matters not arguably within the "zone of interests" protected by the Atomic Energy Act. For the reasons discussed in this Memorandum and Order, the Union's petition for a hearing is DENIED.

IT IS SO ORDERED.

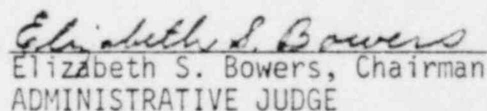
THE ATOMIC SAFETY AND
LICENSING BOARD



Peter A. Morris
ADMINISTRATIVE JUDGE



Jerry R. Kline
ADMINISTRATIVE JUDGE



Elizabeth S. Bowers, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 31, 1981