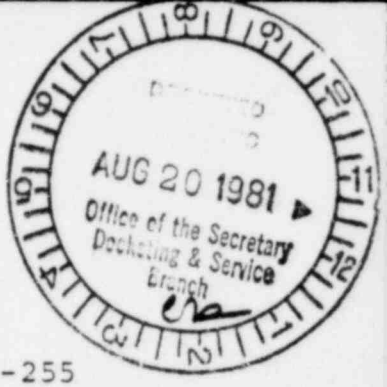

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of Docket No. 50-255

CONSUMER'S POWER COMPANY (EA 81-18)
(PALISADES NUCLEAR POWER FACILITY)

_____/

BRIEF ON APPEAL OF THE UTILITY
WORKERS' UNION OF AMERICA, AFL-CIO,
AND THE MICHICAN STATE UTILITY WORKERS COUNCIL

The Utility Workers' Union of America and its affiliate, the Michigan State Utility Workers' Council, appeal from the July 21, 1981, order of the Atomic Safety and Licensing Board denying its petition for Hearing on the March 9, 1981, Nuclear Regulatory Commission Order Confirming Licensee Actions to Upgrade Facility Performance.

INTRODUCTION AND STATEMENT OF FACTS

On March 9, 1981, the Nuclear Regulatory Commission issued an Order Confirming Licensee Actions to Upgrade Facility Performance with regard to the regulated operations at Palisades Nuclear Power Facility, located in Van Buren County, Michigan. This "Confirming Order" formalized several operational changes proposed by the licensee, Consumer's Power Company, and provided inter alia, that:

> Extended overtime on the part of licensed operators shall be avoided by restricting the

overtime for licensed operators as follows:

(1) No more than 4 overtime hours in any 24-hour period;

(2) No more than 24 overtime hours in any 7-day period;

(3) No more than 64 overtime hours in any 28-day period;

The Director of Region III may relax or terminate any of the preceding conditions in writing for good cause."
(Order, Part V, Section B; 46 Fed Reg 17688 (Mar 19, 1981).

On March 31, 1981, the Utility Workers' Union of America, and its affiliate, the Michigan State Utility Workers Council, the exclusive collective bargaining representative of the licensed operators at the Palisades facility, filed a petition with the Commission requesting a hearing on the overtime restrictions imposed by the March 9, 1981, order. This petition was filed pursuant to 10 CFR 2.714 and pursuant to Section VI of the Order, which authorized affected parties to request a hearing on the order within twenty-five days of its issuance.

The Union's request for hearing is grounded on the fact that the overtime restrictions -- proposed by the licensee and promulgated by the NRC without notice to or consultation with the licensed operators represented by the Union, in violation of their fundamental due process rights -- were a gratuitous and irrelevant response to unrelated problems. The overtime restrictions were conceived by the licensee when, evidently concerned by recently escalated NRC enforcement actions, it offered at a February 18, 1981, meeting with

NRC enforcement staff members to make several operational changes, including the overtime restrictions. At no time were the licensed operators at the facility informed of or accorded input into the proposal to restrict the amount of permissible overtime, despite the fact that they were directly affected, despite their collective bargaining rights, and despite their expertise.

Furthermore, although the licensee suggested that the operators' overtime hours be substantially limited to a level well below that otherwise permitted by the Commission's general standards, [1/] no reason has ever been demonstrated

---

1/ See attached criteria for shift staffing, issued July 31, 1980, by the Commission, by Darrell G. Disenhut, Director, Division of Licensing, which provides as follows:

> (1) An individual shall not be permitted to work more than 12 hours straight (not including shift turnover time).
>
> (2) An individual shall not be permitted to work more than 24 hours in any 48 hour period.
>
> (3) An individual shall not work more than 72 hours in any 7-day period.
>
> (4) An individual shall not work more than 14 consecutive days without having two consecutive days off.
>
> However, recognizing that circumstances may arise requiring deviation from the above restrictions, such deviation may be authorized by the plant manager or higher levels of management in accordance with published procedures and with appropriate documentation of the cause.

to justify the Commission's confirmation of the greater overtime restriction.

The Nuclear Regulatory Commission staff responded to the Union's hearing request in two briefs, dated April 20, 1981, and June 17, 1981, and urged that the Union's petition (should) be denied.

On May 29, 1981, the Commission referred the matter to an Atomic Safety and Licensing Board, directing the Board to determine whether the Union's hearing request should be granted.

On July 31, 1981, the Board issued its Memorandum and Order Ruling on Petition to Intervene, denying the Union's hearing request.

The Union submits that the Board's determination that the Union possesses no interest affected by the Commission's March 9, 1981, order is erroneous, being based upon a fundamental misunderstanding of the statutory and constitutional underpinnings supporting the Union's right to maintain established employment conditions. Furthermore, the Union asserts that it is entitled to a hearing in order that it may demonstrate that no safety issue exists to justify the gratuitous imposition of overtime restrictions to the Union's detriment. Finally, the Union maintains that, contrary to the Board's determination, the regulations of the Commission with regard to intervention support the Union's right to be heard in this matter.

Accordingly, the Union now appeals from the determination of the Atomic Safety and Licensing Board.

ARGUMENT

I. WHERE ESTABLISHED UNION INTERESTS ARE TO BE INJURED BY A COMMISSION DECISION, THE UNION HAS A FUNDAMENTAL RIGHT TO BE HEARD.

The Union possesses a direct, tangible and legally recognized and protected interest in the maintenance of contractually established employment rights and benefits. This Union interest, which springs from its bargaining agreement with the licensee and its right to collective bargaining under the National Labor Relations Act, is adversely affected by the Commission's decision to limit operator overtime below established levels. Thus, the Union possesses a fundamental right of due process requiring that it be afforded an opportunity to be heard regarding the Commission's decision.

The Atomic Safety and Licensing Board, however, incorrectly determined that the Union has no right to be heard in this matter. The Board adopted the NRC staff's position that "the Union's interest in 'maintaining valuable employment rights' does not rise to the level of a property interest protected by the Constitution . . . [since] the 'right to work overtime' is of course not guaranteed by an specific constitutional provision or by principles of English common law." (Memorandum and Order, p. 15.)

This determination is based on a fundamental misunderstanding of the constitutional and statutory protection

afforded to collectively bargained rights and benefits, and is clearly erroneous.

There can be no question that "parties whose rights are to be affected are entitled to be heard." Fuentes v Shevin, 407 US 67, 80 (1972). The Board stated, however, that:

> [B]ecause 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. (Memorandum and Order, p. 16)

This is simply not the case.

The right of the Union to bargain collectively to achieve binding labor agreements has been recognized and protected by Congress since 1935, when, under the authorization of the Commerce Clause of the United States Constitution, USC Const Art 1, §8, cl. 3, it enacted the National Labor Relations Act (LMRA), 29 USC 141 et seq. The Act was aimed

> [a]t encouraging the practice and procedure of collective bargaining and of protecting the exercise by workers of full freedom of association, of self-organization and of negotiating the terms and conditions of their employment . . . Republic Steel Corporation v NLRB, 311 US 7, 10 (1940)

According to the Supreme Court, the purpose of the Act was to "compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made." NLRB v Sands Mfg Co, 306 US 332, 342 (1939).

It was pursuant to this constitutionally authorized, congressionally mandated procedure that this Union[2] and the licensee have established a contractual employment relationship through which they have defined employment rights, benefits and working conditions. It is apparent that the Union possesses a legally protected interest in maintaining the direct, tangible and valuable employment interests arising from its relationship with the licensee.

Federal law protects these employment interests by making it an illegal "unfair labor practice" for an employer to unilaterally change a term or condition of employment without bargaining over the change with the Union. 29 USC §158(5), NLRB v Katz, 369 US 736, 743 (1962). The Union members' working hours, specifically including overtime hours, have been held to constitute an established term and condition of employment which may not be legally reduced without first conferring with or negotiating with the Union. NLRB v Amoco Chemicals Corp, 529 F2d 427, 430-31 (CA 5, 1976). The Union thus clearly possesses a legally recognized interest in the unaltered continuation of established overtime practices.[3]

---

[2] The Union is the exclusive bargaining agent of Palisades employees pursuant to an arbitration decision of the National Labor Relations Board. (Case No. 7-R1599, June 13, 1944).

[3] It should be noted in this context that rights and duties stemming from the collective bargaining relationship are not confined to those set forth in express provisions of a written collective bargaining contract. United Steelworkers v Warrior & Gulf Navigation Co, 363 US 574 (1960). Thus, the established overtime practice of the Union and the licensee is an existing term and condition of employment and is equally a part of the collective bargaining agreement although not expressed in it.

Concededly, the National Labor Relations Board has exclusive jurisdiction to remedy these unfair labor practices.[4/] But, the Union sets forth these labor law principles to illustrate that it possesses an indisputable legal interest, arising from its statutorily protected bargaining relationship with the licensee, which is entitled to due process protection. The Commission's action to limit, for whatever reason, the established operator working hours necessitates that, in accordance with fundamental due process, the Union be afforded a hearing. Thus, in this forum the Union seeks to enforce the due process clause's mandate that existing property rights be protected against governmental interference without an opportunity to be heard.

The Board has adopted the staff's position that "no federal or state statute affords the workers represented by the Union with a guarantee of overtime hours." (Memorandum and Order, p. 15.) On the contrary, the National Labor Relations Act clearly affords the workers represented by the Union a guarantee that an established condition of employment, here overtime practices, will not be unilaterally changed by their employer. To the extent a governmental agency may change such working conditions, it may not do so without first extending to those whose legal right is affected an opportunity to be heard. Klein v Califano, 586 F2d 250, 257 (1978).

4/ The Union has, in fact, filed an unfair labor charge against Consumer's Power Company with the National Labor Relations Board, charging a unilateral change in a term and condition of employment.

II. THE UNION HAS A RIGHT TO DEMONSTRATE THAT NO SAFETY ISSUE EXISTS REGARDING OPERATOR OVERTIME, THAT THE OVERTIME RESTRICTIONS WERE IMPOSED WITHOUT ADEQUATE CONSIDERATION, REASON OR BASIS, AND THAT THE UNION'S RIGHTS HAVE BEEN GRATUITOUSLY INJURED.

In refusing the Union's request for hearing, the Atomic Safety and Licensing Board denies the Union an opportunity to demonstrate that no genuine safety issue exists with regard to current operator overtime practices, that the limitation of hours to the detriment of the Union and its members has nothing to do with safety, and that the licensee's and Commission's use of "safety" to justify its action is unwarranted and false.

A legitimate purpose of the Commission is to ensure the operation of nuclear facilities without undue risk to the health and safety of the public, and to that end it may regulate plant activity. 42 USC §2201(i)(3). The Commission, however, has no authority to gratuitously interfere with and limit established working hours, to the Union's detriment, where there exists no correlation between safety and the action taken, and none has been claimed. Thus, the Union possesses a right to be heard to challenge the Commission's action on the basis that it is unrelated to any safety interest, and therefore affects valuable Union interests for no apparent reason.

February, 1981, the licensee, anxious to mollify the Commission following a five year period marred by numerous instances of noncompliance with regulatory requirements and

the imposition of an operating license modification as well as almost $460,000 in civil penalties, presented the NRC enforcement staff with a "Make peace" offer, which included an unwarranted and totally gratuitous limitation on permissible operator overtime hours. The licensee's effort to appease the Commission at the Union's expense was rubber stamped by the Commission in its March 9, 1981 confirming order. The Union, apparently, was expected to sit still and submit to the giving away of its rights by the employer, despite the fact that no basis has ever been demonstrated to support a finding that existing operator overtime practice contributed in any way to any safety violation or to justify the Order's substantial reduction in permissible overtime.

The Board's conclusion that the order restricting overtime "was based on sound footing in that it was based upon the unique safety-related circumstances in existence at the Palisades facility" -- a determination based entirely upon the unsupported representations contained in the NRC staff brief -- can have no bearing on whether the Union, which has not been heard, has a right to be heard to refute the Commission's reliance on spurious safety concerns to justify an unwarranted overtime restriction.

The Union is, of course, highly interested and concerned with the avoidance of undue risk to health and safety of plant personnel and the public, as well as being greatly concerned with assuring the continued operation of the facility. It is obvious that if it is unsafe for the plant

to operate without a change in procedure, then such change must and should be made. However, the Union vehemently objects to a knee-jerk response imposing a program change made without due consideration, basis or need, especially where such change detrimentally affects the interests of Union members without their knowledge or input.

The primary function of legal process is to minimize the risk of erroneous decisions. Government officials, including this Commission, are constitutionally required to minimize such risks of error and unfairness whenever it conducts procedures which may threaten established rights and interests. Jacksonville Shipyards, Inc v Perdue, 539 F2d 533, 546 (1976)(Department of Labor Benefits Review Board proceeding). The Union's members stand to be injured by what amounts to uncritical acceptance by the enforcement staff of the licensee's gratuitous bid to restrict the overtime of its licensed operators. The Union has not yet been afforded a hearing, and plainly deserves and has a right to be heard.

III. COMMISSION REGULATIONS SUPPORT THE UNION'S RIGHT TO BE HEARD.

A. The Union Has Standing To Request A Hearing.

Section 2.714 of Nuclear Regulatory Commission Regulations, 10 CFR 2.714, permits any person whose interest may be affected by a Commission proceeding to request intervention in the proceeding, or to request a hearing. The Palisades facility operators represented by the Union possess a real and substantial

interest in the maintenance of legally protected employment rights. These interests are clearly more than purely economic, being based, as discussed above, on federal labor legislation designed to promote and protect various constitutional freedoms including the freedom of association and the freedom of contract.

Furthermore, these operators, who must be licensed in accordance with Commission regulations, possess a unique interest in Commission enforcement proceedings involving the safety of the Palisades operations by virtue of their singular status as workers employed within that radiological facility. This interest is especially apparent where the effect of Commission-ordered program changes involves the working terms and conditions of the workers themselves.

The Commission has specifically recognized the special safety concerns inherent in employment whereby workers engage in activities licensed by the Commission by promulgating regulations attributing special status to the role of workers in maintaining safe conditions. In Section 19 of the Nuclear Regulatory Commission Regulations, 10 CFR 19.1, et seq, the Commission provides, inter alia, for:

1. The posting of notices to workers regarding licensed operations, operating procedures and violations by the licensee (10 CFR 19.11);
2. The issuance of instructions to workers with regard to radioactive materials, exposure to radiation, and areas restricted within the facility (10 CFR 19.12, .13);

3. The presence of a worker's representative during all safety inspections of the premises by Commission inspectors (10 CFR 19.14);

4. Private consultation between Commission inspectors and workers regarding occupational hazards (10 CFR 19.15);

5. Requests by workers for inspection of the work place for which there may be no employer retaliation (10 CFR 19.16).

The Union maintains that whenever 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. There can be no more valuable resource in the development of the safe operations with a radiological facility than the licensed workers who have day-to-day experience with plant operations.

Although the Board acknowledges that "meaningful input may indeed flow from consultation with licensed workers," it denies that such consultation should take place as a matter of course." (Memorandum and Order, p. 7.)

Whether or not plant safety consultation between the Commission, the licensee and the workers should routinely take place in developing safe facility operations -- and the Union asserts that clearly it should -- where program changes are made, ostensibly in the interest of safety, which directly involve

and affect the working conditions of the plant operators, it is inconceivable that these plant operators should not be consulted.[5/]

It is plain that the Union possesses very real and substantial employment and safety interests arguably within the zone of interests under the jurisdiction of this Commission. It is also plain that this interests stand to be irreparably injured if the Union is continued to be denied its rightful participation in a decision making process which vitally concerns it.

5/ The Board's apparent concern regarding the workers' capability to "objective[ly] . . . assess the balance between acceptably safe performance and substantial overtime hours" (Memorandum and Order, p. 8) is unwarranted and insulting. To suggest that highly trained, experienced and professional workers in a nuclear facility would unnecessarily risk personal and public safety for any reason is entirely without basis.

B. The Union Is Entitled To Be Heard As A Matter Of Commission Discretion.

The Commission has broad discretion to provide hearings or permit intervention of a participant possessing unique knowledge and experience which would provide a valuable contribution to the decision-making process, even where that party is not otherwise entitled to be heard. Portland General Electrice Company (Pebble Springs Nuclear Plant, Units 1 & 2, CLI 76-27 [1975-1978 Transfer Binder]) Nuclear Reg Rep (CCH) ¶30,127.01 (1976).

In determining whether to permit intervention or a hearing under 10 CFR 2.714 as a matter of discretion, the Commission looks primarily to whether the petitioning party is "equipped to make a substantial contribution to the development of a sound record" with regard to the matter. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2) ALAB-470 [1975-1978 Transfer Binder], Nuclear Reg Rep (CCH) ¶30,291.01, fn. 4 (1978). As the Commission explained in Portland General Electric Co (Pebble Springs Nuclear Plant, Units 1 & 2), supra,

> [p]ermission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them." [1975-1978 Transfer Binder] Nuclear Reg Rep (CCH) $30,127.04.

The Union is a party "equipped to make a substantial contribution to the development of a sound record" with regard

to their employment responsibilities and the effect of working conditions, i.e., overtime standards, on their own ability to perform in a safe manner, and as to whether safety interests justify the overtime reduction. It is clear that the licensee and the Commission possess little interest in raising and examining these important issues. Furthermore, the Union, as representative of licensed facility operators, possesses singular experience and knowledge in this regard. It is plain that a record regarding the safety need for reduction of operator overtime cannot be considered sound without the input of the operators themselves.

The Board, however, failed to grant a discretionary hearing, having determined that the language of the Commission's routine referral order[6/] mandated that the Board decide only whether the Union "should be granted" a "required" hearing as a matter of right. (Memorandum and Order, pp. 17-19.) According to the Board's reasoning, the Commission had already decided, without saying so, that the Union was not entitled to be heard as a matter of discretion. This "implied denial" of a discretionary hearing is supported only by reading between the lines of a routinely issued document formally ordering the Board to investigate the request, and

---

[6/] 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.

can hardly be considered "dispositive of the question of granting a discretionary hearing," as was concluded by the Board.

The Board also concludes that the Union could not assist in developing a record beyond the one that already exists, that the Order will not affect any protected union interest, and that the Union is requesting the Commission to resolve what is essentially a labor dispute between the Union and the licensee. (Memorandum and Order, pp. 19-22.)

As discussed above, no record has been made which includes the vital observations of the operators themselves as to the effect of overtime work on their own ability to perform safely. Furthermore, no record has been developed regarding any connection between safety and the Commission's reduction of overtime, an action ostensibly justified by safety needs.

With regard to the Board's impression that the Union is seeking to resolve a labor-management dispute before the Commission which involves concerns outside of the Commission's jurisdiction, this characterization of the Union's purpose in requesting a hearing is incorrect and unwarranted. As the licensed operators' representative, the Union seeks to be heard before the Commission in order to protect rights of its members which have been gratuitously injured by the Commission in an action which the Union maintains is unrelated to safety and thus outside of the Commission's authority. The

Union further maintains that it should be allowed to supplement the currently existing record with evidence raising these substantial issues of law and fact which will not otherwise be raised. The Union petitions quite properly in this forum to preserve vital occupational interests of the Palisades employees in the forum where those interests are threatened.

The Commission gave legal effect to a program change pointlessly reducing operator overtime. In so doing, it has failed to solicit or consider the observations or input of Palisades plant workers, ignored the Union's established employment interests and has overlooked what is undoubtedly their most valuable source of knowledge in their efforts to improve the safety record of the Palisades facility. Certainly the Union, on behalf of these workers, should be granted an opportunity to be heard on this matter before the Nuclear Regulatory Commission, in the exercise of the Commission's discretion.

CONCLUSION

For the above reasons, the Union requests that the Atomic Safety and Licensing Appeal Board reverse the decision denying the Union's request for hearing.

Respectfully submitted,

MARSTON, SACHS, NUNN, KATES,
KADUSHIN & O'HARE, P.C.

BY: Theodore Sachs (JSC)
THEODORE SACHS (P-19287)

BY: Laura J. Campbell
LAURA J. CAMPBELL (P-32217)
Attorneys for Union
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

August 17, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of — Docket No. 50-255

CONSUMER'S POWER COMPANY — (EA 81-18)
(PALISADES NUCLEAR POWER FACILITY)

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

MARY ROBERTS, being first duly sworn, deposes and says that she is employed by the law firm of MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C., attorneys for the Union, and that on the 18th day of August, 1981, she served a true copy of a Brief on Appeal of the Utility Workers' Union of America, AFL-CIO, and the Michigan State Utility Workers Council upon attorneys of record in the above cause by mailing same in a postage-paid envelope, plainly addressed as follows:

Ronald E. Mount
Stephen G. Burns
Karen D. Cyr
Counsel for NRC Staff
Office of Executive Legal Staff
U. S. Nuclear Regulatory Comm'n
Mail Stop 9604
Washington, D.C. 20555

Atomic Safety & Licensing
Appeal Board
Nuclear Regulatory Comm'n
Washington, D.C. 20555

Judd L. Bacon, Managing Attorney
Consumers Power Company
212 W. Michigan Ave.
Jackson, MI 49201

Mary Roberts
MARY ROBERTS

Subscribed and sworn to before
me this 18th day of August, 1981.

Diane Kujat
DIANE KUJAT, Notary Public
Wayne County, Michigan
My Commission Expires: 6/6/82