

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman  
Dr. John H. Buck  
Thomas S. Moore

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In the Matter of )  
\_\_\_\_\_) )  
CONSUMERS POWER COMPANY ) Docket Nos. 50-329 OM & OL  
\_\_\_\_\_) ) 50-330 OM & OL  
(Midland Plant, Units 1 & 2) )  
\_\_\_\_\_)

MEMORANDUM AND ORDER

May 5, 1982

(ALAB-674)

Intervenor Mr. Wendell H. Marshall, by letter dated April 21, 1982, "appeals" a Licensing Board memorandum and order denying his request to halt further construction of the Midland facility. See 15 NRC \_\_\_, LBP-82-28 (April 12, 1982). Intervenor argues that construction should stop pending resolution of the potential effects on Midland of an electromagnetic pulse (EMP) ostensibly generated from the high altitude detonation of a nuclear weapon. The Licensing Board found that "this matter is not relevant to the soils

matters which are presently before this Board,"<sup>1/</sup> and, beyond that, consideration of EMP in this operating license proceeding is expressly barred by a Commission regulation. Id. at \_\_\_ (slip opinion, p. 2).<sup>2/</sup>

1. The Licensing Board memorandum explains why, in its view, the substance of the EMP issue is beyond the scope of this licensing proceeding. We think the better answer, however, is that intervenor has requested a remedy that the Board is not authorized to grant -- i.e., stopping the construction already under way at Midland and effectively

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1/ This is a combined operating license application and construction permit modification proceeding. The latter portion is explicitly confined to soil settlement issues. See Order Modifying Construction Permits (December 6, 1979) and Notice of Hearing, 45 Fed. Reg. 18214 (March 20, 1980), as amended, 45 Fed. Reg. 35949 (May 28, 1980). It was consolidated with the operating license application, which also involves numerous soil settlement issues, in order to "avoid repetitive litigation of factual questions." See Prehearing Conference Order (October 24, 1980), p. 13.

2/ See 10 CFR 50.13, which provides:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

suspending the previously issued construction permit, pending resolution of the EMP issue.<sup>3/</sup>

A licensing board for an operating license proceeding, such as the one involved here, is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the board sua sponte. 10 CFR 2.760a; Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). Pursuant to that mandate, a board can authorize or refuse to authorize the issuance of an operating license. It does not, however, have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend such a previously issued permit.<sup>4/</sup> Thus, the Board below was

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<sup>3/</sup> See, e.g., Marshall letters to the Licensing Board dated December 16, 1981; March 22, 1982; March 25, 1982. Intervenor does not purport to seek admission of a contention relating to the EMP issue.

<sup>4/</sup> The Commission or an appeal board, of course, has the power to suspend or stay the issuance of a construction permit in conjunction with its review of a licensing board decision authorizing that permit, or upon court remand of such a decision. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715 (1977); id., ALAB-366, 5 NRC 39, aff'd with modifications, CLI-77-8, 5 NRC 503 (1977); Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-352, 4 NRC 371 (1976).

powerless to grant the relief that intervenor requested.<sup>5/</sup>

This does not mean that intervenor is totally without recourse in his attempt to halt construction pending resolution of the EMP issue. The Commission's Rules of Practice specifically provide (10 CFR 2.206(a)):

Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to §2.202 to modify, suspend or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, and shall be filed either: (1) By delivery to the Public Document Room at 1717 H Street NW., Washington, D.C., or (2) by mail or telegram addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

Thus, despite the fact that his request is beyond the scope of this adjudication, intervenor may pursue the matter by filing an appropriate petition under 10 CFR 2.206

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<sup>5/</sup> The fact that this proceeding involves not only an operating license application but also a proposed amendment to the Midland construction permit does not enlarge the Licensing Board's remedial powers vis-a-vis that permit so as to encompass intervenor's request here. As we explain at note 1, supra, the permit modification portion of the proceeding is limited to soil settlement issues.

with the Director of Nuclear Reactor Regulation (NRR).<sup>6/</sup>

2. Because intervenor's forum for seeking a halt to construction clearly lies elsewhere, we dispense with briefing and summarily affirm the Licensing Board's ruling on this alternative ground. As seen from the discussion above, the peculiar circumstances of intervenor's appeal are such that briefing and prolonged consideration of the matter would not have contributed to its disposition.<sup>7/</sup> Indeed, we believe that, because our course is necessarily so clear,

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<sup>6/</sup> We decline to speculate on how the Director might rule on such a petition. We simply hold that intervenor has chosen the wrong forum -- i.e., this adjudication -- in which to seek a halt to construction.

We do note, though, that intervenor has already informally contacted the staff about the effect of EMP on Midland. In reply, he received a letter (dated November 24, 1981) from the NRC's Executive Director for Operations. This does not, however, preclude intervenor from invoking the Commission's formal procedures for dealing with such matters, embodied in 10 CFR 2.206, especially if he has more information to provide.

<sup>7/</sup> We are mindful of intervenor's procedural rights and sensitive to the appearance of unfairness in deciding the matter at hand without hearing further from the parties. But the papers before the Licensing Board were extremely brief and none even mentioned 10 CFR 2.206. See Marshall letters, note 3, supra, and the December 28, 1981, and January 25, 1982, letter-responses of the applicant and NRC staff, respectively. In the circumstances, it is unlikely that full briefing before us would have yielded any additional arguments or information.

it is in the best interest of all the parties (especially this pro se intervenor) to avoid further unwarranted and unproductive expenditure of his resources.

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The Licensing Board's April 12, 1982, memorandum and order (LBP-82-28) is affirmed on other grounds.

It is so ORDERED.

FOR THE APPEAL BOARD

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C. Jean Shoemaker  
Secretary to the  
Appeal Board