June 24, 1982

SECY-82-266

ADJUDICATORY ISSUE
(Affirmation)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: REVIEW OF ALAB-670 (IN THE MATTER OF CONSUMERS POWER COMPANY)

Facility: Palisades Nuclear Power Facility 50-255

Petitions For Review: None

Review Time Expires: July 26, 1982, as extended

Purpose:

Discussion:

Background

On March 9, 1981, the Director of the Office of Inspection and Enforcement issued a confirmatory order to improve the licensee's performance at the Palisades plant. 46 Fed Reg 17688 (March 19, 1982). That order, to which the licensee consented, in part restricted overtime for licensed operators at Palisades to a greater degree than the NRC's generally applicable limitations on overtime. See "Interim Criteria for Shift Staffing" (July 31, 1980 generic letter). The Utility Workers Union of America and the Michigan State Utility Workers Council (Union) requested a hearing on the overtime restrictions imposed by the order.

Contact:
Richard P. Levi, OGC, 41465
Sheldon L. Trubatch, OGC, 43224

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The Commission referred the Union's request for a hearing to an Atomic Safety and Licensing Board, instructing it to decide whether the Union should be granted a hearing and, if so, to conduct that hearing. Unpublished Order of May 29, 1981.

On July 31, 1981 the Licensing Board denied the request for a hearing. Consumers Power Company (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247 (1981). The Licensing Board held that the Union did not have standing entitling it to a hearing as of right. The Licensing Board reached this conclusion by finding that the Union's interests either did not constitute "injury in fact" or were outside the "zone of interests" protected by the Atomic Energy Act. As for a discretionary hearing, the Licensing Board held 1/ that the Commission's referral order precluded the Board from considering whether a discretionary hearing should be granted. The Licensing Board derived this conclusion from the prior NRC practice of not conducting discretionary hearings on enforcement orders. In the Board's view, this practice precluded the Board from offering a discretionary hearing unless such a hearing was explicitly permitted by the Commission's referral order. As the Board put it: "[I]t 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 ...." 14 NRC at 259. As an alternate ground for denying a discretionary hearing, the Board also found that the Union had not satisfied the six factors bearing on the exercise of discretion as set out in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). 2/

1/ The Board also rejected the argument that procedural due process required a hearing by finding that the Union had not established any "property rights" to overtime hours.

2/ Those factors are 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.

(Continued on following page)

In ALAB-670, the Appeal Board reversed the Licensing Board and ordered it to conduct a discretionary hearing. First, the Appeal Board found that the Commission's referral order had not barred consideration of a discretionary hearing. 3/ In the Appeal Board's view, the Commission's "decisions teach that hearing boards are empowered to allow intervention in appropriate licensing and enforcement cases in the absence of a specific and clear withdrawal of authority. Here, as we see it, the Commission's order does not clearly rescind that authority." Slip op. at 12. Then the Appeal Board examined each of the six factors listed in Portland General Electric Company, and, disagreeing with the Licensing Board's analysis of each factor, concluded that a discretionary hearing should be held.

Subsequently, the parties informed us that they were in the process of settling the issue of overtime and the Commission deferred its review of this decision. The NRC staff and the Union have reached a settlement, and on May 11, 1982 they filed a "Joint Motion to Terminate Proceeding." That Motion stated that on April 21, 1982 the NRC Administrator of Region III had issued "Partial Recission of Order" modifying the overtime restrictions in the March 9 Director's Order to

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2/ (Continued from preceding page)

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention--
(4) The availability of other means whereby petitioner's interest will be protected.
(5) The extent to which the petitioner's interest will be represented by existing parties.
(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

4 NRC at 16.

3/ The Appeal Board declined to consider the question of standing, finding that the issue as presented would probably never again arise in Commission proceedings.

comply with normal Commission policy on overtime as set forth in Nuclear Power Plant Staff Working Hours, 47 Fed.Reg. 7352 (Feb. 18, 1982), and that the Union had withdrawn its request for a hearing. On May 28, 1982 the Licensing Board granted the motion to terminate the proceeding, finding that the settlement and the "Partial Recission of Order" were fair and reasonable. The Appeal Board has advised OGC that it will not take any further action in this matter.

Analysis

Recommendation:

Leonard Bickwit, Jr.
General Counsel

Enclosures:
1. Licensing Board opinion
2. ALAB-670
3. Order terminating proceeding
4. Order

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, July 14, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, July 7, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for Affirmation at an Open Meeting during the Week of July 19, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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Attachment 1

Release

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

(Palisades Nuclear Power Facility)

Docket No. 50-255 SP

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

"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.
>
> 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."
>
> "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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No.(s) 50-255SP
	)	
(Palisades Nuclear Plant)	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
31st day of July 1981.

Louis A. Pusateri
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

SERVICE LIST

Elizabeth S. Bowers, Esq., Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Wasnington, D.C. 20555

Counsel for NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

M.I. Miller, Esq.
Isha, Lincoln & Beale
One First National Plaza, Suite 4200
Chicago, Illinois 60670

Consumers Power Company
ATTN: Mr. Dave Bixel
Nuclear Licensing Administrator
212 West Michigan Avenue
Jackson, Michigan 49201

Judd L. Bacon, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Theodore Sachs, Esq.
Marston, Sachs, Nunn, Bates, Kadushin
and O'Eare
1000 Farmer
Detroit, Michigan 48226

Attachment 2

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Christine N. Kohl

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

Mr. Theodore Sachs and Ms. Laura J. Campbell, Detroit, Michigan, for the appellants, Utility Workers Union of America, AFL-CIO, and the Michigan State Utility Workers Council.

Mr. Judd L. Bacon, Jackson, Michigan, for the licensee, Consumers Power Company.

Mr. Stephen G. Burns for the Nuclear Regulatory Commission staff.

DECISION

March 31, 1982

(ALAB-670)

Opinion of the Board by Mr. Moore (in which Mr. Rosenthal and Ms. Kohl join):

The union serving as collective bargaining agent for the licensed operators at the Palisades Nuclear Power Facility [1/]

1/ Appellants are the Utility Workers Union of America, AFL-CIO, and the Michigan State Utility Workers Council (collectively "union").

appeals the denial of its hearing petition challenging a "confirmatory order" issued by the NRC's Director of the Office of Inspection and Enforcement. The order restricts overtime for the licensed operators at that Consumers Power Company's plant to a degree greater than the agency's generally applicable limitations on such work. The union asserts that the ordered restriction lacks any factual basis and is unsupported by any reasonable safety considerations; rather, the overtime proscription was adopted by the Director after the licensee proposed it as part of a "make peace" offering following a period of stepped up enforcement actions against the company.[2/] The Licensing Board held that the union lacked standing to challenge the order and that the Commission's referral of the hearing petition precluded the Board from granting discretionary intervention to the union. LBP-81-26, 14 NRC 247, 250-259 (1981). The Board also expressed the view that discretionary intervention for the union would, in any event, be inappropriate. Id. at 259-262.

We reverse. We do not believe that the Commission's referral order barred the grant of discretionary intervention or, in the circumstances presented, that such intervention should have been withheld. In permitting the union to intervene, we heed

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2/ See Reply of Utility Workers Union in Support of Hearing May 28, 1981, at 2.

the Commission's counsel in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), that "our regulatory responsibilities can best be carried out by allowing intervention as a matter of discretion to some petitioners who do not meet judicial standing tests." We eschew the opportunity to resolve the standing question, however, because we hold considerable doubt that, as presented, this issue is likely to arise again in Commission proceedings. 3/

3/ Although standing questions occasionally surface in NRC adjudications outside the context of construction permit, operating license or license amendment proceedings, such instances are infrequent. Here, the standing issue arises in an enforcement action. Moreover, the question of the union's standing takes a form that makes it most unlikely to recur. In order to meet the "injury in fact" component of the familiar two-pronged standing test applicable to Commission proceedings (see Pebble Springs, supra, 4 NRC at 613-614), the union, as representative of its members, alleges that the confirmatory order caused a garden variety pocketbook injury to the employment opportunities of the Palisades' operators.

But it is the union's "zone of interest" argument that sets this case apart from the standing questions common to Commission proceedings. Rather than assert an interest within the penumbra of the statutes ordinarily administered by the Commission, the union alleges an interest arguably within the zone of interest of the federal labor statutes. In a federal court such an asserted interest seemingly would present no barrier to meeting the zone test. See Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) per curiam (plaintiff travel agents found within zone of interest of one statute -- the Bank Service Corporation Act -- when, as revealed by underlying opinions (408 F.2d 1147 (1st cir. 1969), vacated, 397 U.S. 315 (1970), on remand, 428 F.2d 359 (1st Cir. 1970), reversed, 400 U.S. 45, supra), they had alleged that actions by a national bank pursuant to a ruling of the Comptroller of the Currency violated National Bank Act's "incidental powers" restrictions). See also Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). In the setting of

(FOOTNOTE CONTINUED ON NEXT PAGE)

I.

On March 9, 1981 the Director of I&E issued an "Order Confirming Licensee Actions to Upgrade Facility Performance"[4] which, as the title implies, reflects the licensee's prior consent to be bound by the terms of the order. Sections II, III and IV of the order describe its history.

Section II relates that, over the past several years, the NRC has cited the Palisades facility for numerous infractions of agency regulations. Inspections during the period September 1979 to September 1980 disclosed 41 items of noncompliance. The same period produced two enforcement actions. One, pending at the time of the order, involved a proposed civil penalty of $450,000 for a continuing violation of containment integrity. The second entailed a penalty of

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3/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) an NRC administrative proceeding, however, it raises questions not readily amenable to resolution. Because we doubt the standing question presented by the union petition is likely to recur, we see no present necessity to decide the matter when our opinion would provide little practical guidance for future cases.

4/ 46 Fed. Reg. 17688 (March 19, 1981).

$16,000 for employee errors in misaligning valves for safety-related equipment. As a consequence of licensee's conduct, the NRC graded the facility's performance for reactor operations and radiation protection "below average" among Region III licensees for the 1979-80 period.

Section III of the order recites the licensee's most recent infraction of agency rules: the January 6, 1981 failure of an electrical repairman to follow required procedures. This error caused a one-hour isolation of the 125 volt station batteries in violation of the technical specifications in Consumers' operating license and resulted in an "immediate action letter" to the licensee prescribing short term corrective actions.

The brief operating history recounted in the second and third sections of the order led the Director in section IV to conclude "that major changes in the licensee's management controls are necessary to assure that the licensee can operate the Palisades facility without undue risk to the health and safety of the public."[5/] To meet the agency's concerns, Consumers proposed a program to upgrade performance

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5/ Id.

and assure safe operation at Palisades. Thereafter the licensee made certain additional commitments and, in section V of the challenged order, the Director confirmed all of these undertakings along with the earlier prescriptions contained in the agency's immediate action letter. As relevant here, paragraph B of that section states:

> 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. 6/

The final section of the Director's order contains the routine language of a notice of hearing; i.e., any person having an interest affected by the order may request a hearing in accordance with the Commission's regulations. It concludes, however, with the statement that "[i]f a

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6/ Id. at 17689.

hearing is held, the issue to be considered at such hearing shall be: Whether, on the basis of the matters set forth in Sections II and III of this Order, this Order should be sustained."[7/]

In response to the Director's order, the union filed with the Commission a timely petition seeking a hearing to challenge the validity of the confirmatory order's overtime restriction. In its petition, the union states that it is the exclusive bargaining agent for the licensed operators at the Palisades facility. It asserts that the order's overtime limitation on Palisades operators is more restrictive than the Commission's otherwise applicable standards established as interim criteria for shift staffing.[8/] The

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7/ Id. at 17690.

8/ The interim shift staffing criteria are contained in a letter dated July 31, 1980 addressed to all licensees and applicants for licenses from the Director, Division of Licensing, Office of Nuclear Reactor Regulation. They provide that:

(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.

petition therefore states (Pet. at 3) that the "employment opportunities" of its members are "adversely affected." The union seeks to have the overtime restriction set aside, alleging (id. at 2) that the restraint was proposed, not by the Commission, but by the licensee without notice or consultation with the union, and that "no reason was demonstrated or existed or was pertinent . . . to occasion greater restriction on overtime than is otherwise required by the Commission's general standards, or is permitted to the licensee under its collective bargaining obligations to the Union under the National Labor Relations Act."

The NRC staff opposed the union's hearing petition. It claimed that (i) the union is not entitled to a hearing because it lacks standing and (ii) a discretionary hearing would neither be a wise use of agency resources nor concern the health and safety mandate of the NRC.[9/] Rather than rule on the union petition, the Commission referred the matter to the

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9/ The licensee filed no opposition to the union petition. Rather, it informed the Commission that if the petition were granted the company wished to participate as a party in the subsequent hearing. Before us, however, Consumers filed a brief because it interpreted our order establishing a briefing schedule as a direction to file one. The licensee now argues that the union lacks standing to challenge the Director's order but that the Commission erected no bar to the Licensing Board's grant of discretionary intervention. On the question of whether the union should be allowed to intervene, the licensee takes the carefully crafted position that it is a close question which, on balance, disfavors union intervention.

Board below stating that:

> The Commission hereby refers the March 31, 1981 request for a hearing to an Atomic Safety and Licensing Board to be appointed by the Atomic Safety and Licensing Board Panel Chairman to decide whether the Union should be granted a hearing. If the Licensing Board determines that a hearing is required, it should conduct the hearing.10/

II.

The Licensing Board held that the Commission's order referring the hearing petition divested the Board of all discretion to allow the union to intervene. It reasoned that the phrase "should be granted" in the referral order must be read in context with the word "required" in the following sentence so as to limit the Board's authority. This interpretation was appropriate, it said, because "[t]he use of discretionary hearings is rare in general, and unheard of in the context of an NRC enforcement action." 14 NRC at 259. Therefore, the Board concluded that "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 . . . ." Id.

10/ Commission order, May 29, 1981 (unpublished).

We cannot accept the Licensing Board's reading of the Commission's referral order or its reasoning in support of that interpretation. Nothing in the pertinent language of the order demonstrates that the Commission intended to restrict the Board's authority exclusively to determining whether the union has standing and thus is entitled to intervene as a matter of right. In our view, the Commission's order says two things: (1) a licensing board is to decide whether the union should be granted a hearing; and (2) if so, the same board should proceed with the hearing.[11/] Accordingly, we find no limitation on the authority of the Licensing Board to grant discretionary intervention to the

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11/ The operative language of the Commission's order states that a 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 the hearing." We reject the Licensing Board's view that the phrase "should be granted" ineluctably must be read in context with the word "required" in the following sentence. Indeed, to read the referral order in this fashion condones a redundancy. To place all emphasis on the word "required" and read it as a proscription on the Board's authority, in effect, renders superfluous the clause "to decide whether the union should be granted a hearing" in the previous sentence of the order. We think the more reasonable reading is to give equal meaning to all the Commission's words thereby placing all parts of the order on the same footing without any duplication or unwarranted emphasis.

union.[12/]

In addition, we reject the Licensing Board's suggestion that the past dispensation of discretionary intervention to parties in Commission proceedings prejudices the future grant of such intervention. In Pebble Springs, supra, the Commission held that the agency could best fulfill its regulatory responsibilities in licensing proceedings by permitting broader public participation than is mandated by section 189a of the Atomic Energy Act of 1954.[13/] It then provided guidelines for the exercise of board discretion in ruling on intervention requests. 4 NRC at 616. Subsequently, in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980), the Commission was confronted with a hearing petition challenging a confirmatory enforcement

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12/ Moreover, at the time it referred the union's petition to the Licensing Board, the Commission had before it the staff's opposition which argued, inter alia, that a hearing should not be ordered as a matter of discretion. See NRC Staff's Response to Utility Workers Union of America's Request for a Hearing, April 20, 1981, at 6-10. In this circumstance, we believe that if the Commission intended to remove the Licensing Board's discretion to allow the union to intervene, it would have done so unmistakably.

13/ 42 U.S.C. §2239(a).

order. It paraphrased its Pebble Springs holding and again stated that "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." Id. at 442. Although the Commission ultimately denied discretionary intervention in Marble Hill, it nevertheless fully examined the question and extinguished any notion that consideration of discretionary intervention in enforcement actions was inappropriate. Thus, contrary to the view expressed by the Licensing Board, we think the Commission's Marble Hill and Pebble Springs decisions teach that hearing boards are empowered to allow intervention in appropriate licensing and enforcement cases in the absence of a specific and clear withdrawal of authority. Here, as we see it, the Commission's order does not clearly rescind that authority.[14/]

14/ We find singularly unpersuasive the staff's argument (Br. at 25) that the "brevity and routine nature" of the referral order, in conjunction with the general agency policy encouraging licensee consent to enforcement orders, evidences the Commission's intent to divest the Licensing Board of authority to permit discretionary intervention. As discussed above, if any inference properly may be drawn from the brevity and routine nature of the referral order, it is a conclusion opposite to that proffered by the staff. See also note 12, supra.

III.

Having found no limitation on the Licensing Board's authority to grant discretionary intervention, we now must decide whether the union petition presents circumstances warranting such a grant. In its Pebble Springs decision, the Commission suggested that hearing boards balance the following six factors drawn from the Rules of Practice 15/ to determine whether a petitioner should be granted discretionary intervention in an agency proceeding:

(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.

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

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

(b) Weighing against allowing intervention -

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

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

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

4 NRC at 616.

15/ See 10 CFR §2.714(a) and (d).

Although the Licensing Board labeled its interpretation of the Commission's referral order "dispositive" of the intervention question, it nevertheless proceeded to express the view that the Commission's discretionary intervention criteria militated against union participation. 14 NRC at 259-262. We disagree. In the circumstances, denial of the union's hearing request was an abuse of discretion. A proper application and balancing of the criteria for guiding the exercise of discretion favors union intervention.

We shall address each of the six factors seriatim. Before doing so, however, two additional points deserve emphasis. First, for the purpose of resolving this appeal from the denial of a hearing petition, we accept as true all material allegations of the union petition.[16/] We do this because the propriety of the Licensing Board's ruling must be measured against the record made by the litigants. Here, of course, the record consists primarily of the Director's order and the union's petition. Second, to apply properly each of the Commission's

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16/ Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976). See Florida Power & Light Company (St. Lucie Nuclear Power Station, Unit No. 2), ALAB-420, 6 NRC 8, 13 (1977). Cf. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 109 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

factors, a clear understanding of the allegations comprising the union challenge to the Director's overtime limitation is crucial. Admittedly, the petition is more conclusory and abbreviated than good pleading would suggest. But its gist is plain. It alleges that the overtime proscription placed on the Palisades operators by the confirmatory order is a greater restriction than the agency's otherwise applicable overtime standard[17/] and that this greater restriction[18/] is

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17/ See note 8, supra.

18/ Although the union petition does not quantify the greater overtime limitation placed on the Palisades operators by the confirmatory order, the Licensing Board correctly calculated the maximum difference in permissible overtime under the confirmatory order and the July 31, 1980 criteria (see note 8, supra) as 64 hours in any 28-day period. 14 NRC at 263. In addition, we note that the overtime restrictions in the July 31, 1980 criteria, unlike the restrictions in the confirmatory order applicable only to Palisades operators, apply to the whole group of plant personnel performing safety-related functions. See Attachment to Reply of Utility Workers Union, May 28, 1981.

The July 31, 1980 overtime criteria were superseded by a new Commission policy announced in NUREG-0737, "Clarification of TMI Action Plan Requirements," at 3-6 (November 1980). Even though the NUREG-0737 policy was published several months before the union filed its request for a hearing, the union petition fails to mention the new policy. In any event, this overtime policy applies to those plant personnel performing safety-related functions and provides:

> (1) An individual should not be permitted to work more than 12 hours straight (not including shift turnover time).

(FOOTNOTE CONTINUED ON NEXT PAGE)

not supported by the events set forth in the order or by any other reasonable safety justification. Coupled with this assertion is the union's proffered explanation why the Director's overtime restriction lacks a proper foundation: the operator

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18/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

(2) There should be a break of at least 12 hours (which can include shift turnover time) between all work periods.

(3) An individual should not work more than 72 hours in any 7-day period.

(4) An individual should not be required to work more than 14 consecutive days without having 2 consecutive days off.

NUREG-0737 at p. 3-7.

On February 18, 1982 the Commission further liberalized its policy on nuclear power plant staff working hours. 47 Fed. Reg. 7352 (February 18, 1982). The new policy applies to those plant staff performing safety-related functions and provides that:

a. An individual should not be permitted to work more than 16 hours straight (excluding shift turnover time).

b. An individual should not be permitted to work more than 16 hours in any 24-hour period, nor more than 24 hours in any 48-hour period, nor more than 72 hours in any seven day period (all excluding shift turnover time).

c. A break of at least eight hours should be allowed between work periods (including shift turnover time).

d. The use of overtime should be considered on an individual basis and not for the entire staff on a shift.

47 Fed. Reg. at 7353.

overtime limitation was proposed, not by the agency, but by the licensee (without notice or consultation with the union) in order to divert the Commission from further enforcement actions against Consumers' Palisades facility.[19/]

Turning to the first factor for gauging the proper exercise of discretion in ruling on intervention requests -- the extent the petitioner's participation would assist in developing the record -- the Licensing Board found that the union could provide no assistance. Id. at 260. The Board stated (id.):

> 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.

19/ See Union Pet. at 1-2; Reply of Utility Workers Union, May 28, 1981, at 2. Stripped of the union's diplomatic phrasing, it alleges that there is no factual or safety basis for the greater overtime restriction because the Director unwittingly approved the licensee's unfair-labor-practice scheme to limit operator overtime when he accepted Consumers' package of remedies designed to deflect further enforcement actions. Or, stated otherwise, had the Director independently analyzed the greater operator overtime restrictions instead of merely rubber-stamping them as part of a larger package, he would have found no basis or necessity for the limitation.

The principal difficulty with the Licensing Board's reasoning is that it overlooks the focus of the record that would be developed in a hearing. It also ignores the very foundation of the union's challenge to the Director's order. As mandated by the Director, the sole litigable issue in any hearing would be whether, on the basis of the operating history recited in sections II and III of the order, the order should be sustained. 46 Fed. Reg. at 17690. Hence, the only record to be developed necessarily must be keyed to the events recited in the order and to a consideration of whether they support the order's various provisions. This dovetails precisely with the essence of the union's allegation that the facts set forth in the Director's order show neither the need for the restriction nor any causal relationship between overtime and the recited licensee deficiencies. Rather than focus on the single litigable issue and its relationship to the union's challenge, the Licensing Board mistakenly perceived the safety significance of the union's allegations.[20/] In our view, the representative

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20/ In reaching its conclusion, the Board fell prey to the staff's sophistic argument that, because the petition did not allege the overtime restriction made the

(FOOTNOTE CONTINUED ON NEXT PAGE)

of the licensed operators at Palisades is ideally suited to present evidence and otherwise assist in developing the record on the question of whether operator overtime was a causative factor in the events recited in the Director's order. Consequently, this factor weighs in favor of union intervention.

The Licensing Board apparently weighed the second factor against union intervention as well. Its entire consideration of the nature and extent of the petitioner's property, financial or other interest in the proceeding consisted of a single sentence: "Conceding that the Union's interest is economic . . . this interest is not arguably within the 'zone of interests' protected by the Atomic Energy Act." 14 NRC at 260.

20/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

facility less safe, any possible union contribution to the record would be to nonsafety-related issues falling outside the health and safety mandate of the NRC. Although we thought it obvious, a challenge for lack of basis to a putative safety decision of the agency -- in this case the Director's overtime limitation on the Palisades operators -- is as much within the health and safety mandate of the NRC as a claim that a particular agency decision renders a facility less safe.

The union seeks to protect its members from the potential financial loss resulting from the Director's limitation on the number of overtime hours the licensed operators at Palisades may work. This interest is concededly economic. As such, the union's interest is squarely within one of the types of interest (i.e., financial) that the Commission's second factor lists as deserving favorable consideration when determining the question of discretionary intervention. See p. 13 , supra. Furthermore, the operator's pocketbook injury may well prove to be considerable. See note 18, supra. Accordingly, the Licensing Board should have weighed this factor positively for union participati . Instead, the Board considered it negatively because it roneously concluded that, in order to fall within the bounds of the second factor, the union's asserted interest must fall within the zone of interest of the Atomic Energy Act. But the zone of interest inquiry is relevant only to the question of standing and whether a petitioner is entitled to intervene as a matter of right. See note 3, supra.[21/] Discretionary intervention, on the

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21/ As is evident from the result in Virginia Electric and Power Company (North Anna Power Station, Units

(FOOTNOTE CONTINUED ON NEXT PAGE)

other hand, is generally intended to allow participation by those petitioners "who do not meet the tests for intervention as a matter of right." Pebble Springs, supra, 4 NRC at 616.

The third factor -- the possible effect of any order on petitioner's interest -- was also incorrectly weighed by the Board against union intervention. Unlike the normal licensing proceeding where some speculation may be involved in ascertaining the possible effect of future orders on a

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21/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

1 and 2), ALAB-363, 4 NRC 631 (1976), following deferral, ALAB-342, 4 NRC 98 (1976), discretionary intervention is not precluded because a petitioner asserts an economic interest outside the zone of interest of the Atomic Energy Act.

No contrary inference should be drawn, as the staff suggests (Br. at 27-28), from our decision in Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 475 (1978). Our textual remarks accompanying note 2 of ALAB-470 regarding the zone of interest test and the lower Board's treatment of it were intended to be confined to the question of petitioner's standing. They were not aimed at the issue of discretionary intervention -- a subject we addressed exclusively in note 2 of that opinion. Therefore, ALAB-470 should not be read as an endorsement of the notion espoused by the Licensing Board in Fermi, LBP-78-11, 7 NRC 381, 388 (1978), that economic interests outside the zone of interest of the Atomic Energy Act weigh against discretionary intervention when considering the Commission's second factor.

petitioner's interest, application of the third factor to a confirmatory enforcement order lacks such guesswork. As we have seen, the union seeks to protect the paychecks of its members from what it claims is the Director's baseless limitation on the amount of overtime operators may work. Allegations of such an immediate and substantial injury to the Palisades operators, directly attributable to the Director's overtime restriction, weigh in favor of union intervention. But, in applying this factor, the Licensing Board miscast the union's interests and its challenge to the confirmatory order. It viewed the union challenge as a labor dispute between Consumers and its employees with the Director as a bystander who should not referee the dispute. 14 NRC at 260. Insofar as the NRC is concerned, however, any labor dispute between the union and licensee is secondary to the union's challenge to the Director's overtime restriction. The Director issued the order and it is the Director who will enforce it. Similarly, only the Director can modify the overtime restriction. Thus, far from being a bystander, the Director is the central player in the union challenge to the overtime restriction.

Balanced against the first three factors on the intervention scale are three others -- the availability of other

means to protect the petitioner's interest, the extent the petitioner's interest will be represented by existing parties and the extent the petitioner's participation will inappropriately broaden or delay the proceeding. Because it believed another forum was available to hear any union grievance against Consumers, the Licensing Board found the fourth factor disfavored union intervention. Id. at 261. The Board then judged the fifth factor irrelevant and concluded that the sixth factor weighed against intervention because union participation would inappropriately broaden the proceeding by leading to a hearing that otherwise would not be held. Id. at 262. We disagree with the Board's analysis of these three factors as well.

In considering the fourth factor and concluding that the National Labor Relations Board was the appropriate tribunal to hear the union complaint, the Board perpetuated its mistaken view that the union grievance is against the licensee and that this agency is, in effect, only a bystander. As we previously suggested, the Director's order, not the licensee's action, is the central object of the union challenge. More importantly, only the NRC is suited to adjudge a challenge to the factual support and safety significance of the overtime

restriction. No other agency may go behind the Director's order or has the appropriate expertise to review any alleged safety significance of the overtime restriction. Thus, unless and until the Director's order is modified by the NRC, the union cannot obtain complete relief. In the circumstances, we do not think this factor should be credited against union intervention.

Similarly, the fifth factor does not tip the balance against union participation. Although the Board indicated this factor was irrelevant,[22/] we think it is significant that both existing parties to the challenged order -- the licensee and the NRC staff -- allegedly oppose the interests of the Palisades operators. According to the union's petition, it was the licensee that proposed (without prior consultation with the union) the overtime restriction that the Director subsequently adopted. The union's interest, therefore, will not be represented by the existing parties.

22/ The Licensing Board concluded that the fifth factor was irrelevant because the "interest of the intervenor is not within the 'zone of interests' protected by the Atomic Energy Act." 14 NRC at 262. As we earlier stated (see pp. 20-21, supra), whether a petitioner's asserted interest falls within the zone of interest of the Atomic Energy Act is not germane to determining the appropriateness of discretionary intervention.

Finally, with regard to the sixth factor, the Board noted that union intervention will lead to a hearing that otherwise would not be held since no other petitions challenging the confirmatory order were filed. But, contrary to the Licensing Board's view, we are not persuaded that this fact by itself renders a hearing on the union petition inappropriate. In previous operating license proceedings, we have suggested that "[i]f the petitioner is unequipped to offer anything of importance bearing upon plant operation, it is hard to see what public interest conceivably might be furthered by nonetheless commencing a [discretionary] hearing at his or her behest." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977). The same standard should apply to a petition challenging a confirmatory enforcement order. Here the union meets that test. It seeks to demonstrate that there is neither a safety justification nor a causal relationship between operator overtime and the events relied upon by the Director to support the overtime restriction. Clearly such a union presentation bears directly upon the safe operation of the Palisades plant, even though the union challenge does not conform to the more traditional type of claim that an agency decision falls

short of assuring safe operation of a plant. A different result is not warranted because the union asserts that an agency decision goes too far without an adequate factual foundation or safety justification.

Moreover, the particular circumstances of this case suggest an additional reason for permitting the union to challenge the Director's overtime restriction. The Director's order, on its face, does not appear to demonstrate any causal connection between operator overtime and the events recited in sections II and III of the order that purport to support the overtime restriction. Further, the Director's overtime restriction is applicable only to the Palisades licensed operators. It does not apply to any other plant personnel responsible for performing safety-related functions. Yet the single event recited in section III as partial support for the confirmatory order seemingly relates to an electrical repairman, not a licensed operator. This apparent inconsistency, coupled with the Commission's generally applicable overtime policy that applies to all plant personnel performing safety-related functions (see note 18, supra), raises sufficient questions as to the scope of the Director's

order so as to warrant further inquiry. Permitting the union to intervene should resolve the unexplained aspects of the Director's order.

Accordingly, we think that a proper balancing of the Commission's six factors for guiding the exercise of discretion on intervention requests favors union participation.

The Licensing Board's order of July 31, 1981 is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The concurring opinion of Mr. Rosenthal follows, p. 28 et seq.

Concurring opinion of Mr. Rosenthal:

For the asserted purpose of furthering the safety of plant operation, the Director of the Office of Inspection and Enforcement has imposed a limitation upon licensed operator overtime at the Palisades facility which is more stringent than the generally applicable one. At bottom, the question here is whether the affected individuals (through their duly recognized collective bargaining agent) should be given the opportunity to be heard on the warrant for the Director's action; i.e., on whether, inter alia, there is, in fact, a safety justification for that action. For me, the mere statement of the question suggests its answer. Surely, there must be some adjudicatory forum available in which these operators can challenge as arbitrary an order of an NRC official, issued in purported fulfillment of the responsibilities vested in him by the Atomic Energy Act, which assertedly cuts against their pecuniary interests both immediately and substantially.[1/] And what outside forum might possibly be better equipped than one within this Commission itself to pass an informed judgment upon the existence of a relationship between the

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1/ Even though formally addressed to the licensee, the focus of the order is, of course, upon the employment activities of the operators and it is they who likely will bear its brunt.

Director's imposed overtime limitations and the safe operation of this nuclear facility?

In the particular circumstances at hand, I have no quarrel with resting our reversal of the order below on discretionary intervention principles without coming to grips with the seemingly more difficult question of standing to intervene as a matter of right. For the end result is the same irrespective of how the union's ticket of admission might read: the operators will have the chance to demonstrate the validity of their claim that (stated broadly) the requisite link between the prescribed overtime limitation and reactor safety is missing.[2/] Whether they will succeed in that endeavor remains, of course, to be seen.

I accordingly join fully in the opinion for the Board. In doing so, however, I am constrained to record my doubt that, had we been compelled to reach it, the standing issue could have been decided against the union simply on the basis that only an economic interest is involved. To be sure, it is now

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2/ I do not understand the union to assert that, even if such a link does exist, the Director nonetheless lacked the power to impose the limitation in the execution of his statutory duty to protect the public health and safety. See Sections 103b. and 161i. of the Atomic Energy Act of 1954, as amended, 42 USC 2133(b) and 2201(i).

settled that threatened economic injury (e.g., the possibility of increased utility bills) does not confer standing under the Atomic Energy Act to intervene in a construction permit or operating license proceeding concerned with other than antitrust issues. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). But this is a quite different type of proceeding and there is at least room for question whether it likewise is controlled by the teachings of those cases.[3/]

3/ Among other things, in sharp contrast to the order which the union seeks an opportunity to attack, the grant of a construction permit or operating license application does not serve affirmatively to impose restrictions upon otherwise lawful activities of any person and the economic impact upon members of the public (e.g., ratepayers) of such licensing action is both incidental and indirect. Although a decision on its operative significance can be left for another day, the very existence of this manifest distinction commends caution in the mechanical transfer of standing principles from one type of proceeding to another.

Attachment 3

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

James A. Laurenson, Chairman
Dr. Peter A. Morris
Dr. Jerry R. Kline

In the Matter of	)	Docket No. 50-255-SP
CONSUMERS POWER COMPANY	)	
(Palisades Nuclear Power Facility)	)	May 28, 1982

MEMORANDUM AND ORDER APPROVING JOINT MOTION TO TERMINATE PROCEEDING

I. JURISDICTION AND PROCEDURAL HISTORY

On March 9, 1981, the Director of Inspection and Enforcement issued an "Order Confirming Licensee Actions to Upgrade Facility Performance." This Order included restrictions on overtime work of licensed operators more restrictive than the Commission's general standards applicable to overtime work. On March 31, 1981, the Utility Workers Union of America, AFL-CIO and the Michigan State Utility Workers Council, (hereinafter "the Union"), filed a "Petition for Hearing." On May 29, 1981, the Commission issued an Order referring the "Petition for Hearing" to the Atomic Safety and Licensing Board Panel to

decide whether the Union should be granted a hearing and, if so, to conduct the hearing. The Atomic Safety and Licensing Board constituted to decide this matter denied the "Petition for Hearing" on July 31, 1981. On March 31, 1982, the Atomic Safety and Licensing Appeal Board reversed the Licensing Board, permitted the Union to intervene, and remanded the matter to the Licensing Board for further proceedings. Pursuant to motions by the NRC Staff and orders of the Commission, the time for filing a motion for the Commission to review the Appeal Board decision has been extended until June 9, 1982. On May 11, 1982, the Staff and Union filed a "Joint Motion to Terminate Proceeding."

II. JOINT MOTION TO TERMINATE PROCEEDING

The Joint Motion states:

> "[O]n April 21, 1982, the Administrator of NRC Region III issued a 'Partial Rescission of Order' that adjusted the terms of the Director's Order of March 1981. The revised restrictions are consistent with the Commission's policy statement on Nuclear Power Plant Staff Working Hours, 47 Fed. Reg. 7352 (Feb. 18, 1982)."

The "Partial Rescission of Order" revises the work hour or overtime restrictions to conform to the Commission's general policy on nuclear power plant staff working hours, 47 Fed. Reg. 7352. The "Partial Recission" also notes that the initial Order of March 9, 1981 was promulgated because "the Staff was concerned that operators at the plant, who already appeared to be working excessive amounts of overtime, would be required to work increased overtime...." However, since the

time this Order became effective, the Staff stated that Consumers Power Co., the licensee, improved its control over operation of the plant and the concern about excessive overtime hours "has been substantially ameliorated." In view of the "Partial Rescission," the Union withdrew its request for hearing and moved jointly with the Staff to terminate this proceeding. Consumers Power Company did not oppose the motion.

The Commission recognizes and encourages fair and reasonable settlement of contested issues. 10 CFR § 2.759. We have considered all of the factors enumerated above. We conclude that the settlement and "Partial Rescission of Order" are fair and reasonable and should be approved.

ORDER

WHEREFORE, IT IS ORDERED this 28th day of May, 1982, at Bethesda, Maryland, that the Joint Motion to Terminate this proceeding is GRANTED and this proceeding is hereby DISMISSED.

James A. Laurenson, Chairman

Dr. Peter A. Morris

Dr. Jerry R. Kline

Attachment 4