

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of  
CONSUMERS POWER COMPANY  
(Midland Plant, Units 1 and 2)

Docket Nos. 50-329-OL  
50-330-OL

MEMORANDUM AND ORDER

Mr. Wendell H. Marshall, President of the Mapleton Intervenors, filed a petition for leave to intervene dated September 8, 1978 pursuant to 10 CFR §2.714 on behalf of the Mapleton organization. The Applicant opposes the petition by its answer dated September 28, 1978. The NRC Staff, by answer dated October 3, 1978, supports the individual intervention of Mr. Marshall but would require additional information pertaining to the status of Mapleton Intervenors.

Several issues are raised by the petition and Applicant's opposition to it including the identity of the Mapleton organization and its members, Mr. Marshall's authority to represent Mapleton, and Mapleton's authority to represent its members in this proceeding. Even assuming the petition to be Mr. Marshall's personal petition, Applicant questions whether the petition is adequate although it seems to concede

that Mr. Marshall has demonstrated cognizable interests in the proceeding. Applicant's Answer pp.5-6. Also, Applicant opposes the petition on the grounds of timeliness.

Some of the issues raised by the Mapleton petition were also present in the Saginaw petition. The Board's rulings in the Memorandum and Order of August 14 on those issues are applicable here.<sup>1/</sup> First we rule that the Applicant is entitled to a current showing concerning the identity of the Mapleton members, an indication of their interest in the proceeding and Mr. Marshall's authority to represent those interests. With respect to Mr. Marshall as an individual, we rule that his interest in the proceeding is adequately set forth in the petition, noting that he resides one and one-half miles from the Midland plant site. Finally, we rule that appropriate contentions may satisfy the "aspect" requirements of the intervention rules for the purpose of preliminary evaluation of the petition.<sup>2/</sup>

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1/ We are mailing a copy of our Memorandum and Order of August 14, 1978 to Mr. Marshall and Mapleton's legal counsel.

2/ 10 CFR §2.714(a)(2) provides:

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including 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.

But Applicant makes the point that if Mr. Marshall's contentions cannot be litigated in the proceeding, they cannot be "aspects" of the subject matter of the proceeding as to which he wishes to intervene, as set forth in §2.714 (a)(2). Applicant bases its argument upon the assertion that the nine contentions of Mr. Marshall's petition are but a restatement of the issues raised by the Mapleton Intervenors and resolved at the construction permit hearing. Applicant's Answer p.6. There are no "aspects" set forth in the petition except for the 9 contentions. We agree with the logic of Applicant's reasoning and note that Applicant has correctly cited the law in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2) CLI-74-12, 7 AEC 203 (1974).<sup>3/</sup>

In the Alabama Power decision the Commission ruled that:

In our view, an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Accordingly we are in full agreement with the conclusion reached by the Appeal Board that "res judicata and collateral estoppel should not be entirely ruled out of our proceedings, but rather applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors in the particular case ...." (ALAB-182, RAI-74-3 210 at 216).

7 AEC 203, 204.

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<sup>3/</sup> With respect to issues under NEPA, see also 10 CFR §51.23(e).

Applicant is asserting the affirmative defense of res judicata to the Intervenor's petition. But Applicant does nothing in support of its res judicata position. There is no citation to the record of the construction permit hearing; not even a reference to a published decision or order in which the challenged issues are said to have been ventilated and resolved.<sup>4/</sup> Therefore the Board cannot rule upon Applicant's res judicata position until a definite showing of its applicability has been made as we rule below.

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<sup>4/</sup> The Applicant and the NRC Staff have made several references to the construction permit proceeding. While it is obvious that that proceeding will have important relevance to the operating license proceeding, the parties should not assume that this Board will automatically ferret out every passing reference to it. We do not have practical access to the papers in the C.P. proceeding nor is it appropriate that we conduct an independent search of that record. Hereafter we shall expect each party to provide copies of any portion of the construction permit filings upon which it relies, or to provide some other practical means by which the Board, other parties, and the public may understand the significance of the reference to the earlier proceeding. Published orders and decisions may be referred to by citation, of course. Where official notice is to be relied upon the Board shall require that the provisions of 10 CFR §2.743(i)(1) be satisfied.

The Board will defer ruling upon the question of good cause for late filing and the standards for accepting late-filed petitions until the special prehearing conference required by 10 CFR §2.751(a).

The Board orders that:

1. Mr. Marshall will be given temporary status as an intervenor pending the Board's final determination on the adequacy of his intervention petition.

2. On or before 15 days before the special prehearing conference conducted pursuant to 10 CFR §2.751(a), Mapleton Intervenors may file an amended petition demonstrating that they have an interest in this proceeding within the purview of 10 CFR §2.714 and otherwise conforming with the Board's observations concerning the right to intervene and be represented.

3. Mr. Marshall and/or Mapleton Intervenors may file amended contentions on or before 15 days before the special prehearing conference.

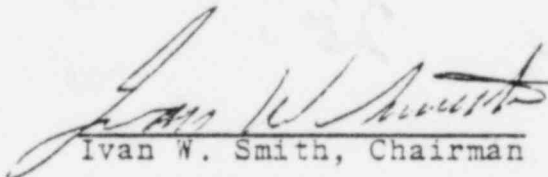
4. Nothing in paragraphs numbered 1 through 3 above shall operate to prevent the Applicant from contending and the Board from ruling that the petition dated September 8, 1978 filed by Mr. Marshall is basically defective and that intervention should be denied.

5. If it is Applicant's position that "the aspects of the subject matter of the proceeding as to which petitioner wishes to intervene" have been resolved in the construction permit proceeding and are therefore res judicata, Applicant may file a brief in support of this position, with record support, on or before 15 days before the special prehearing conference.

6. Mr. Marshall and a representative of Mapleton Intervenor or their respective counsel shall attend the special prehearing conference.

BY ORDER OF THE BOARD.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Ivan W. Smith, Chairman

Dated at Bethesda, Maryland  
this 12th day of October, 1978.