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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges
Ivan W. Smith, Chairman
Dr. Dixon Callihan
Dr. Richard F. Cole

SERVED FEB 28 1984

In the Matter of
COMMONWEALTH EDISON COMPANY
(Byron Nuclear Power Station,
Units 1 and 2)

Docket Nos. STN 50-454 OL
STN 50-455 OL

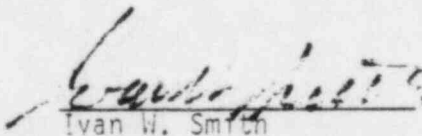
(ASLBP 79-411-04 OL)

February 27, 1984

MEMORANDUM

Attached for service in this proceeding is a letter from the Assistant United States Attorney enclosing the Order of Judge Roszkowski of the Northern District of Illinois with respect to in camera presentations in this proceeding.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

 Chairman
Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

February 27, 1984

U.S. Department of Justice

United States Attorney
Northern District of Illinois

*Pls. Copy to Appeal Board
of all Panel
~~Members~~
Members.*

KCS:brp

United States Courthouse

Chicago, Illinois 60604

February 24, 1984

Honorable Ivan W. Smith
Administrative Law Judge
Atomic Safety and Licensing
Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Dan M. Berkovitz
Office of General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Rockford Newspapers, Inc. v. NRC, et al.
83 C 20074 (USDC ND Ill. WD); Joseph W.
Johnston v. NRC, et al. - No. 83 C 3615
(USDC ND Ill. ED)

Gentlemen:

Enclosed please find a copy of an order entered by Judge Stanley J. Roszkowski on February 22, 1984 in the above-referenced cases. This order grants the defendants' motion to dismiss or, in the alternative, for summary judgment. With the entry of this order, this office is closing its files in these cases. If you have any questions concerning these cases, please contact the undersigned Assistant.

Very truly yours,

DAN K. WEBB
United States Attorney

BY:

Keith C. Syfert
KEITH C. SYFERT
Assistant United States Attorney
211 South Court Street
Rockford, Illinois 61101
(815) 987-4277

Enclosure

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
(WESTERN DIVISION)

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KS

Name of Presiding Judge, Honorable STANLEY J. ROSZKOWSKI

Cause No. 83C 20074

Date Feb. 22, 1984

Title of Cause Rockford Newspapers, Inc. vs Nuclear Regulatory Commission of
U. S. A.

Brief Statement
of Motion

ORDER

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and
Addresses of
moving counsel

Representing

Names and
Addresses of
other counsel
entitled to
notice and names
of parties they
represent.

DOCKETED
FEB 22 1984

Reserve space below for notations by minute clerk

It is ordered that defendants, Nuclear Regulatory Commission of U.S.A.,
Ivan Smith's, A. Dixon Callihan's and Richard Cole's, Motion to Dismiss
or, in the alternative, for summary judgment and defendant-intervenor,
Commonwealth Edison Company's, motion to strike and dismiss, plaintiff,
Johnson's, and plaintiffs-intervenors, Rockford League of Women Voters',
DeKalb Area Alliance for Responsible Energy's, Sinnissippi Alliance for the
Environment's and Business and Professional People for the Public Interest'
motion for summary judgment are granted. Plaintiff's and plaintiffs

Hand this memorandum to the Clerk.

intervenors' motions are denied. (Draft)

Counsel will not rise to address the Court until motion has been called.

Rozkowski

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

ROCKFORD NEWSPAPERS, INC.,

Plaintiff,

vs.

NUCLEAR REGULATORY COMMISSION
OF THE UNITED STATES OF
AMERICA, et al.,

Defendants.

No. 83 C 20074

ORDER

Before the court is defendants, Nuclear Regulatory Commission of the United States of America's, Ivan Smith's, A. Dixon Callihan's and Richard Cole's, motion to dismiss or, in the alternative, for summary judgment. Also before the court is defendant-intervenor, Commonwealth Edison Company's, motion to strike and dismiss, plaintiff, Johnson's, and plaintiffs-intervenors, Rockford League of Women Voters', DeKalb Area Alliance for Responsible Energy's, Sinnissippi Alliance for the Environment's and Business and Professional People for the Public Interest's, motions for summary judgment. The court's subject matter jurisdiction is asserted to rest upon 5 U.S.C. § 552b(h)(1). For the reasons set forth herein, defendants and defendant-intervenors motions are granted. Plaintiff's and plaintiffs-intervenors' motions are denied.

BACKGROUND

The present action arises out of the alleged activities of the Nuclear Regulatory Commission's Atomic Safety and Licensing Board ("ASLB") in threatening to, and in actually closing, various meetings to the public. Plaintiffs, a private individual and a local newspaper, brought these consolidated actions seeking an order declaring that the ALSB is bound by the so-called federal "Sunshine Act," 5 U.S.C. § 552b, and, further, enjoining it from future violations.

The facts of the case are basically uncontested. In May and August of 1983, the ALSB indicated portions of future evidentiary hearings pertaining to the issuance of a license for the Byron nuclear power plant might be closed to the public. According to plaintiff, Johnson, in one instance, the ALSB announced it was "going to decide at the next day's hearing what portion of the hearing would be closed." In both instances, the plaintiffs were unsuccessful in obtaining injunctive relief to enjoin the holding of such evidentiary hearings. Ultimately, however, no evidentiary hearings were ever closed to the public.

On August 9th and 10th, 1983, the ALSB did hold in camera, ex parte meetings with the NRC staff and Office of Investigation to determine what information each had regarding pending investigations and inspections at the Byron plant. The purpose of the meetings was to determine whether or not an evidentiary

presentation regarding pending inspections was appropriate and, if so, whether that evidentiary presentation should be open or closed to the public. The ALSB was apparently concerned that the premature public disclosure of incomplete investigations and inspections might give rise to unwarranted concern in the surrounding community. Based upon the information disclosed during the meetings, the ALSB decided not to hold any type of evidentiary hearing. Consequently, the information presented at the in camera, ex parte meetings could not be considered by the ALSB in making its ultimate licensing determination. 10 C.F.R. § 2.760.

On August 17, 1983, the ALSB closed the evidentiary record "until further order." The ALSB also noted, however, that it did not "foreclose all possibilities that it might inquire again into the status of pending inspections and investigations." No such additional inquiries were undertaken.

On January 13, 1984, the ALSB issued a decision denying defendant-intervenor, Commonwealth Edison's, request for a license to operate the Byron facility. With the issuance of that decision, the ALSB proceedings were terminated. Additional proceedings would only be undertaken by the ALSB in the event of a motion to reconsider or reversal on appeal.

Defendants and defendant-intervenor now seek to dismiss plaintiffs' amended complaints on the grounds that they fail to

allege a case or controversy within the subject matter jurisdiction of this court. Even if plaintiffs' complaints do allege a case or controversy within the court's jurisdiction, defendants and defendant-intervenor contend that case or controversy is now moot. Finally, even if plaintiffs' complaints do allege a case or controversy that is not moot, defendants and defendants-intervenor contend the ALSB is not subject to the Sunshine Act.

I. Justiciability

Title 5 U.S.C. § 552b(h)(1) provides, in relevant part:

The district courts of the United States shall have jurisdiction to enforce the requirements of [the Sunshine Act] by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises... (Emphasis added).

Despite the broad language of the Act, the declaratory judgment statute does not vest the court with subject matter jurisdiction over a claim in which no case or controversy within the meaning of Article III, § 2 is present. United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). In Nuclear Engineering Co. v. Scott, 660 F.2d 241 (7th Cir. 1981), the court stated:

The test to be applied to determine the existence of an actual controversy in the context of a declaratory judgment action is 'whether...there is a substantial controversy, between parties having adverse legal

interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' (citations omitted). Id. at 251-52.

In the present case, defendants and defendant-intervenors contend the ALSB's tentative threats to close upcoming evidentiary hearings to the public never amounted to an actual case or controversy, since the ALSB never reached a definite decision to close the evidentiary hearings. Similarly, defendants and defendant-intervenor contend the in camera, ex parte meetings actually held by the ALSB on August 9 and 10, 1983, which plaintiff, Rockford Newspapers, Inc., allege violated the Sunshine Act, do not give rise to a case or controversy because they were not objected to by the plaintiffs and did not play any role in the ALSB's final determination.

While the issue is not without some difficulty, the court is inclined to find the instant action presents a case or controversy within the meaning of Article III, § 2. The ALSB has steadfastly taken the position that it is entitled to close portions of its evidentiary hearings to the public on little or no notice. The ALSB's position with respect to the application of the Sunshine Act is clearly demonstrated by two events. First, in May, 1983, the ALSB indicated it might close a portion of the next day's hearing to the public. Second, after the plaintiffs had failed in their attempt to obtain a temporary restraining order with respect to the May hearing, the ALSB

apparently took the same position with respect to another potential hearing in August. Thus, despite being aware of the plaintiffs' contention that such a hearing would violate the provisions of the Sunshine Act, the ALSB demonstrated its willingness to hold a closed session with little or no notice to the public.

Moreover, the attorney representing the defendants during the August 8, 1983, motion for a temporary restraining order made the ALSB's position clear. First, he definitely stated that "the licensing board does not believe that they are subject to the Sunshine Act nor should they be required to follow any procedure required in the Sunshine Act." (Transcript of Hearings before Judge Nordberg, 8/8/83, p. 67-68). Second, defendants' counsel refused to agree to postpone, for a period of one week, any in camera evidentiary session the ALSB decided to convene. (Id. at 72-73).

Under these circumstances, the court concludes the defendants' pattern of conduct has given rise to a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the exercise of jurisdiction. To hold otherwise would be to deprive the plaintiffs of the preemptive action Congress intended to afford them through the enactment of § 552b(h)(1). With the ALSB having taken the position that its meetings are subject to being closed

with little or no notice, the plaintiffs could well be deprived of any opportunity to challenge the closing of a future hearing until after the actual closing.

Finally, the meetings of August 9-10, 1983, arguably give rise to more than just a potential violation of the Act. While defendants and defendant-intervenors contend the plaintiff acquiesced in the holding of those meetings, conceding they were not within the scope of the Sunshine Act, it is not totally clear from the record that such is the case. Thus, in addition to the near violations of the Sunshine Act outlines above, at least one plaintiff has alleged an actual violation.

Nor does the court consider the issue moot as a result of the ALSB's licensing decision. Central Soya Co., Inc. v. Consolidated Rail Corp., 614 F.2d 684, 686-87 (7th Cir. 1980). Along with the court in Hunt v. Nuclear Regulatory Commission, 468 F.Supp. 817, 819 (N.D. Okl.) aff'd 611 F.2d 332 (10th Cir. 1979), cert. denied, 445 U.S. 906 (1980), this court concludes that the issue presented by this action is one of great public concern which is "capable of repetition, yet escaping review." Roe v. Wade, 410 U.S. 113, 125 (1973). This conclusion is not altered by the issuance of the ALSB's licensing decision. As the plaintiffs point out, Commonwealth Edison has indicated it will attempt to change the ALSB's ruling and there is at least a fair likelihood that some additional ALSB proceedings may be under-

taken as a result of a motion to reconsider or a contrary decision on appeal. Thus, the court concludes this action presents a case or controversy appropriate for determination here.

II. APPLICATION OF THE SUNSHINE ACT

The Sunshine Act generally provides that "[m]embers shall not jointly conduct or dispose of agency business other than in accordance with" its provisions. 5 U.S.C. § 552b(b). The Act defines the term "member" as "an individual who belongs to a collegial body heading an agency." Id. at § 552b(a)(3). The term "agency" is defined as:

[any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency] headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency. §§ 552(e), 552b(a)(1).

Through the enactment of the Sunshine Act, "Congress sought to ensure the continuing fidelity of the federal government to one of the core principles of our representative democracy: 'government should conduct the public's business in public.' S.Rep.No. 94-354, 94th Cong., 1st Sess. 1 (1975)" Philadelphia Newspapers, Inc. v. Nuclear Regulatory Commission, slip op., No. 83-1698, at p. 8-9 (D.C. Cir. 2/10/84). By its

very terms, however, the application of the Act is limited to multi-member agencies. Pan American World Airways, Inc. v. CAB, 684 F.2d 31 (D.C. Cir. 1983) and Common Cause v. NRC, 674 F.2d 921 (D.C. Cir. 1982). Thus, despite the broad objectives of the Act, agencies headed by a single individual are not governed by its provisions.

The Nuclear Regulatory Commission is undisputedly an agency governed by the provisions of the Sunshine Act. Philadaelphia Newspapers, Inc. v. NRC, supra. The NRC is an independent regulatory agency headed by a collegial body composed of two or more individual members, a majority of whom were appointed to their positions by the President with the advice and consent of the Senate. The sole issue in the present case is whether the activities of the ALSB are also governed by the Act.

By its very terms, the business conducted by the ALSB is outside the scope of the Act. The administrative law judges making up the ALSB fail to constitute "members" who "shall not jointly conduct or dispose of agency business except in accordance with" the Act. § 552b(a)(3) and (b). The administrative law judges are not appointed by the President with the advice and consent of the Senate. Thus, their activities are not governed by the Act.

This literal interpretation of the Act is supported by the comments of both its principal sponsors. Both the Senate and

House sponsors indicated the Act was intended to deal with commissioners' meetings. See Comments of Congresswoman Abzug (8/31/76, Cong. Record H. 9259) and Senator Chiles (8/31/76, Cong. Record S. 15044). Moreover, the only reported decision considering the relevance of the Act to the activities of the ALSB, held the Act was not applicable. Hunt v. NRC, 468 F.Supp. 817 (N.D. Okl.) aff'd 611 F.2d 332 (10th Cir. 1979), cert. denied, 445 U.S. 906 (1980).

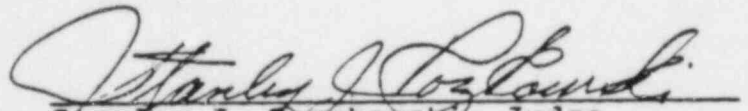
The plaintiffs' principal argument is that the NRC Commissioner's must not be allowed to escape the application of the Sunshine Act by delegating their authority to an entity such as the ALSB. While this court shares the concern of the plaintiffs that federal agencies not be allowed to escape the provisions of the Sunshine Act through informal decision making or delegation of their authority, the instant case does not appear to present such a situation. The NRC Commissioners did not create an entity unauthorized by Congress. Nor did the Commissioners delegate responsibilities which Congress vested solely in them. To the contrary, Congress has expressly provided:

...the Commission is authorized to establish one or more atomic safety licensing boards...to conduct such hearings at the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions

of this chapter, any other provision of law, or any regulation of the Commission issued hereunder.... 42 U.S.C. § 2241(a).

Clearly, this case does not present an example of multimember agency delegating authority to escape the public proceedings mandated by Congress. Congress itself has authorized both the existence and function of the ALSB. Thus, the court holds the ALSB is not subject to the provisions of the Sunshine Act. Consequently, defendants' and defendar -intervenor's motions are granted, and plaintiff's and plaintiffs-intervenors' motions are denied.

ENTER:


Stanley J. Roszkowski, Judge
United States District Court

Dated: Feb. 22, 1984