

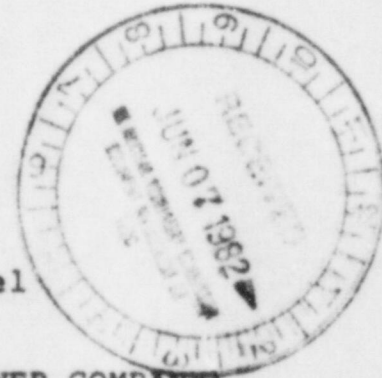
3 June 1982



SECY 82-224

CF

ADJUDICATORY ISSUE
(Information)



For: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-674
(IN THE MATTER OF CONSUMERS POWER COMPANY)

Facility: Midland Plant, Units 1 & 2

Purpose: To inform the Commission of an Appeal Board decision for which no petitions for review have been filed and which, in our opinion, should not be reviewed.*

Petitions For Review: None

Review Time Expires: June 14, 1982

Discussion: In ALAB-674, the Appeal Board affirmed the Licensing Board's denial of intervenor Marshall's request to halt further construction of the Midland Plant pending resolution of the potential effects of an electromagnetic

* This paper has been issued as an adjudicatory information item because the General Counsel considers this to be a matter of minor significance.

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pulse (EMP) on the facility, LBP-82-28 15 NRC _____, (April 12, 1982). The Licensing Board found that the substance of the EMP issue was beyond the scope of this consolidated proceeding which is limited to soil settlement issues arising from Consumers' application for an operating license and the NRC staff's Order modifying the construction permits (hereinafter "OM/OL Proceeding"). 1/

Additionally, the Licensing Board cited 10 CFR 50.13 2/ as an express bar to consideration of

1/ Initially, the staff raised the soil settlement issue as an enforcement matter. Order Modifying Construction Permits (December 6, 1979). After Consumers requested a hearing on the staff's order, the Commission delegated its authority to the Licensing Board for the operating license proceeding. Notice of Hearing, 45 Fed. Reg. 18214 (March 20, 1980), as amended, 45 Fed. Reg. 35949 (May 28, 1980). That board first initiated the OM proceeding on the staff's order. Subsequently, the Licensing Board consolidated the OM Proceeding with the soil settlement issues in the OL Proceeding to "avoid repetitive litigation of factual questions." Prehearing Conference Order B (October 24, 1980).

In ALAB-624, 12 NRC 680 (1980), the Appeal Board upheld the Licensing Board's rejection of Mr. Marshall's petition to intervene in the OM Proceeding because his only contention related to the issue of Class 9 accidents which was beyond the "narrow focus" of that proceeding. Id. at 681.

2/ 10 CFR 50.13 states:

Attacks and destructive acts by enemies of the United States; and defense activities.

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

the EMP issue. The Appeal Board affirmed the denial of Mr. Marshall's request, but based its decision on the principle that the requested remedy of suspension of construction was outside the jurisdiction of this Licensing Board. The Appeal Board suggested that the proper procedure for Mr. Marshall to request relief would be for him to file a petition to the Director of NRR under 10 CFR 2.206.

In our view, the Appeal Board's decision is correct. To the extent that the Licensing Board for the OM/OL Proceeding has jurisdiction over construction, it is limited to soil settlement issues. See footnote 1. Jurisdiction over all other aspects of construction was vested in a separate Licensing Board which resolved construction-related health and safety issues some time ago. ^{3/} Under NRC precedent, these circumstances precluded the Licensing Board for the OM/OL Proceeding from asserting jurisdiction to grant the suspension of the construction permit and required the petitioners to seek a remedy under 10 CFR 2.206. In Houston Light and Power Company (South Texas Project, Units 1 & 2), ALAB-381, 5 NRC 582 (1977) the Appeal Board held that a Licensing Board cannot reopen a

^{3/} LBP-72-34, 5 AEC 214 (1972), aff'd, 6 AEC 331 (1973). The Licensing Board for the construction permit proceeding on December 22, 1981 had jurisdiction over only two remaining issues, alleged attorney misconduct at the remand proceeding and radon. Unpublished Commission Memorandum and Order (November 6, 1978). That Licensing Board issued a decision on these issues more recently, but its jurisdiction will not terminate until the time expires for Commission review of an Appeal Board decision on that Licensing Board decision. 10 CFR 2.717(a). However, the pendency of those issues does not authorize the Licensing Board for the construction permit to consider the EMP issue. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-6 (1978).

terminated construction permit proceeding to consider antitrust issues. 4/ The Appeal Board based that decision on the policy that there must be an end to litigation sometime and was concerned that finality would be disturbed if the Licensing Board could reopen a terminated construction permit proceeding to examine a new safety or environmental question. 5 NRC at 591. This reasoning is applicable to this proceeding. The Licensing Board for the construction permit resolved all safety matters raised before it and issued the construction permits. The staff raised the soil settlement issue much later as an enforcement matter which the Commission then delegated to the Licensing Board for the operating license proceeding. Under these circumstances, the Appeal Board acted consistently with NRC practice in holding that the Licensing Board for the OM/OL Proceeding lacked jurisdiction to consider whether to halt construction pending consideration of EMP.

For these reasons, we believe that the Appeal Board's decision does not warrant review.

Recommendation: No review.

Sheldon L. Trubatch
Sheldon L. Trubatch *By Peter Crane*
Acting Assistant General Counsel

Attachment: ALAB-674

4/ See also, Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-530, 9 NRC 261 (1979) (Appeal Board has no jurisdiction to reopen a hearing after final agency action); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB513 (1978); Carolina Power and Light (Shearon Harris Nuclear Power Plant), CLY-79-5, 9 NRC 607 (1979).

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

In the Matter of)
)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 & 2))
)

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

MEMORANDUM AND ORDER

May 5, 1982

(ALAB-674)

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

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

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

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

2/ See 10 CFR 50.13, which provides:

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

suspending the previously issued construction permit, pending resolution of the EMP issue.—^{3/}

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

^{3/} See, e.g., Marshall letters to the Licensing Board dated December 16, 1981; March 22, 1982; March 25, 1982. Intervenors do not purport to seek admission of a contention relating to the EMP issue.

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

powerless to grant the relief that intervenors requested.^{5/}

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

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

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

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

with the Director of Nuclear Reactor Regulation (NRR).^{6/}

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

^{6/} We decline to speculate on how the Director might rule on such a petition. We simply hold that intervenors have chosen the wrong forum -- i.e., this adjudication -- in which to seek a halt to construction.

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

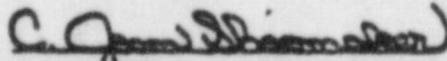
^{7/} We are mindful of intervenors' procedural rights and sensitive to the appearance of unfairness in deciding the matter at hand without hearing further from the parties. But the papers before the Licensing Board were extremely brief and none even mentioned 10 CFR 2.206. See Marshall letters, note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

it is in the best interest of all the parties (especially these pro se intervenors) to avoid further unwarranted and unproductive expenditure of their resources.

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

It is so ORDERED.

FOR THE APPEAL BOARD



C. Jean Shoemaker
Secretary to the
Appeal Board