U.S. NUCLEAR REGULATORY COMMISSION

In the matter of
CPCo. Midland Plant
Units 1 & 2

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

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

6/29/81

INTERVENOR REQUEST FOR APPELATE REVIEW CERTIFIED OR DIRECTION OF THE COMMISSION

I. Request Meets Criteria for Certification of Review

Having been unable to contact Judge Bechhoefer by telephone (6/26/81) to seek his possible referral of this appeal, and due to the severe time constraints associated with the July 7, 1981 hearing, I respectfully request this Appeal Board to undertake this review on its own discretion. The June 15, 1981 Memorandum & Order of the Board made several rulings on motions and requests to which I take exception. However, I seek to appeal only the denial of my Motion for Summary Disposition in this pleading, for it most clearly meets the standard of exceptional circumstances which warrant appelate review at this stage of the proceeding.

The decision to which I take exception will, if not reversed, have a profound effect on the due process of law by denying full and fair consideration of the very issues on which this hearing is based. The decision in question, due to its connection with the proposed Quality Assurance Stipulation between the Staff and the Applicant, will set the course of the whole proceeding, define the

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issues to be considered and the basis on which the Licensing Board decision will be made. Concisely,a ruling in my favor on this motion would limit the issues to be considered in making "reasonable assurance " QA judgements to those from the past and present. A denial of my motion would lead to a hearing in which "reasonable assurance" QA judgements are based instead on the present and future.

Unfortunately, the NRC "reasonable assurance " judgement did not await the commencement of the hearing or the ruling on my Motion for Summary Disposition which would set the acceptable parameters of basing "reasonable assurance" judgements in this hearing. The NRC has offered its conclusion on this ultimate question prior to the hearing, as a prerequisite condition of an agreement with the Applicant not to litigate the five year period of QA deficiency which led to the Dec. 6, 1979 Order. The proposed terms of this agreement have been closely guarded in a "confidential" memo on the subject.

Using the critera set forth by this Appeal Board on p. 4 of the Feb. 20, 1981 Thornburg Ruling, it is apparant that 1) the public interest is"seriously harmed"by a proceeding which fails to address the QA breakdown on which the Dec. 6 Order was based, or how and why the soil settlement problems occurred (except for my meager efforts); 2) review now,would lessen the delay which would occur with reversing an initial decision, the only other means of addressing such preliminary matters; 3)failure to address the issue would affect the basic structure of the proceeding in such a pervasive and unusual

manner as to determine the very essence of the proceeding.

Based on the aforementioned cosiderations, and their ultimate effect on NRC regulation intended to safeguard public health and safety, I hereby seek appeiate review of these issues prior to commencement of the hearing.

Regretfully this appeal comes only a week before the hearing is scheduled to begin, and without the awaited CA Stipulation decision. However, based on statements made in conference calls and on p.6 of the June 15, Memorandum & Order, "that the Board would assure that (my) rights were not prejudiced by an agreement between the Applicant and Staff.." I expect the proposed CA Stipulation to be approved. As stated at the end of my 6/24/81 Objection to the CA Stipulation, I feared that a formal denial by the Licensing Board would be of little consequence now in view of the surrounding circumstances anyway.

For these reasons, and because I do not wish to delay the hearing set for July 7th, I will proceed with my appeal on the denial of my Summary Disposition Motion in the hopes that the Appeal Board can begin this essential clarification of "the ground rules" before the proceeding begins.

I might add that I have already attempted to seek such clarification in my 6/5/81 Request (#4, p.6 of 6/15 Memorandum). Following the referenced explanation during the 6/12 conference call, I respectfully requested that Judge Bechhoeffer answer my request in writing as I considered these to be very important questions and I remained confused (ie. I did not receive a satisfactory answer).

That request was denied.

II. Arguments Opposing Denial of 4/14/81 Intervenor Motion for Summary Disposition

In requesting a ruling on my Motion for Summary Disposition, I seek: 1) an appelate definition on acceptable evidence; 2) a ruling that past QA performance (prior to Dec.6, 1979) must be fully considered in the final "reasonable assurance" judgement; and 3) an appelate decision on the weight accorded the evidence allowed.

I submit that acceptable evidence be limited to that from the past and present, because "evidence" from the future is not really evidence at all by virtue of the simple fact that it has not yet happened. Therefore the suggestion (p.2 & 3, Memorandum) that such concerns are more appropriately addressed as evidentiary objections during the course of the hearing, is incorrect. For I do not, nor have I ever sought to exclude any evidence on the subject of QA as the Staff suggests (p.2, Memorandum). I do however object to testimony about the future, such as QA "plans", being considered evidence.

The Staff assessment repeated on p.2 that "Intervenor does not seek summary disposition of the issue of CPC's QA implementation (emphasis added) after the Dec. 6, 1979 modification order but seeks to have us not consider certain information when deciding

that issue", is precisely correct. The information that I seek not to have considered is that which has not yet happened. Plans and commitments, whether stated orally or on paper simply fail to meet the requirements of evidence because they do not have a basis in fact. The fallacy of basing judgements on such testimony is most recently and clearly pointed out in results of LBP 74-71, and the ensuing period of "QA breakdown" to which Mr. Keppler and others testified in the Staff's 4/14/81 Motion for Summary Disposition.

In submitting "that Applicant's promises, commitments, intentions, and plans for the future regarding QA, do not constitute genuine issues to be heard in this soil settlement proceeding," I have established "the absence of a genuine issue of material fact" regarding the future. For, despite the "issue" that remains between myself and the Applicant on these considerations, no party can produce facts about the future. Just as I do not wish to pretend to do so, neither should any party. In fact, if such testimony were allowed, I would be denied my legal right to controvert that testimony. Therefore, acceptable evidence should be limited to that concerning the past and the present.

Lastly, on p. 3 is the statement that the denial of my motion is "without prejudice to the submission of evidentiary motions at an appropriate time." Yet the qualification offered in the next sentence "..however we note that the Commission's rules permit the introduction of relevant, material and reliable evidence..." makes me reluctant to await the ultimate ruling of the Licensing Board.

The second requested ruling "that past OA performance (prior to Dec.6, 1979) must be fully considered in the final "reasonable assurance judgement," is unavoidably tied to the proposed OA Stipulation just as my Motion for Summary Disposition is directly related to that Stipulation. For the failure of my initial attempts to thwart this stipulation agreement(as set forth in the attachment to my 6/24/81 Objection to the Stipulation) led to my Motion for Summary Disposition regarding bases of "reasonable assurance"OA judgements.

Having set forth related arguments on pages 2 and 3 of my Motion, I concluded that "if reasonable assurances must be sought to estimate future performance, then those assurances must be based on the only measurable evidence available: that of past performance."

This second request is perhaps the most difficult ye. I feel compelled to seek appelate assurance of this issue due to the open encouragement offered on the Stipulation over the past several months. Indeed, Judge Bechhoefer indicated on 6/12/81 that he was likely to accept parts 1 and 2 of the Stipulation while requiring the submission of evidence on part 3. I consider this a difficult request because just as I feared that "reasonable assurances" once given can hardly be taken back, I similarly fear that "full consideration " can hardly be compelled..

The third question to which I seek a decision regards the weight accorded the evidence which is allowed. Under the circumstances discussed in this appeal, much delay and objection would be avoided if the question were decided now rather than "await a ruling on the merits of the particular question" as suggested (p.3 of Memorandum).

I submit that the weight accorded evidence be in direct proportion to the period of time it covers. For example, it would be unfair to the Applicant, to make an ultimate QA judgement based on five weeks of poor QA in the past, if it were followed by five years of good QA. Similarly it is unfair to make an ultimate QA judgement based on five weeks of recent improved QA * when it is preceeded by five years of poor QA. The QA stipulation, without benefit of a hearing, has already done precisely that; and if it is accepted, will also eliminate litigation by the Staff and Applicant of the preceeding five years of QA performance cited in the Dec. 6, 1979 Order.

Therefore I submit that the practice of according unequal weight to various time periods, as already prematurely applied by the NRC in giving its "reasonable assurance", must be ruled improper by this Appeal Board and not allowed to govern the conduct of the proceeding.

If these are unusual requests to be put before an Appeal Board at this time, I submit that the unusual circumstances of the past several months leading up to the present situation demand their submission and answer prior to the commencement of the hearing.

* according to 5/22/81
Region III Inspection

Respectfully Submitted,

Barbara Stamiris

cc: ASLAB Members
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