UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE DETROIT EDISON COMPANY	)	Docket No. 50-341
(Enrico Fermi Atomic Power Plant, Unit No. 2)	)	(Operating License)

APPLICANTS' MOTION FOR LEAVE TO COMMENCE LIMITED DISCOVERY AGAINST PETITIONERS DRAKE AND CEE AND ALTERNATIVE REQUEST FOR WAIVER

Introduction

On October 10, 1978, Mrs. Martha Drake, acting for herself and for Mr. Dan Drake, served upon Applicants' counsel by hand a petition for leave to intervene in this operating license proceeding. On the preceding day, Mr. David Hiller[1/] filed and served by mail a similar petition on behalf of an unincorporated association, Citizens for Employment and Energy ("CEE"). Both petitions, filed in response to the Federal Register notice commencing this proceeding,[2/] were timely.

The Detroit Edison Company in its own behalf and as agent for Northern Michigan Electric Cooperative,

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1/ As to the identity of Mr. Hiller, see paragraph 7 of the attached Affidavit.

2/ 43 Fed. Reg. 40,327 (1978).

Inc. and Wolverine Electric Cooperative, Inc. (collectively, "Applicants"), joint applicants for an operating license for the Enrico Fermi Atomic Power Plant, Unit No. 2 ("Fermi 2"), respectfully request that pursuant to §§ 2.718 and 2.721 of the Commission's Rules of Practice, 10 C.F.R. §§ 2.718, 2.721, this Board permit limited discovery against Mr. Dan Drake and CEE. Such discovery is necessary for Applicants to determine whether petitioners possess the necessary interests requisite to intervention and is authorized under the Commission's practice. Discovery at this juncture will quickly resolve the critical threshhold question of whether intervention should be granted, and thus a hearing commenced, on the operating license application.

Argument

I.

LIMITED DISCOVERY IS NECESSARY TO DETERMINE WHETHER MR. DAN DRAKE AND CEE POSSESS THE NECESSARY INTERESTS REQUISITE TO INTERVENTION.

Because this is an operating license proceeding, there will be no hearing absent a successful intervention petition. Accordingly, before triggering such a hearing with the resultant commitment of time and resources, it is of utmost importance to verify the underpinnings of any intervention petition. Cf. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC

1418, 1422 (1977). Applicants seek limited discovery to accomplish that end.

The joint Drake petition recites that both Mrs. Martha Drake, and Mr. Dan Drake acting through Mrs. Drake, are individually seeking intervention. Mrs. Drake recites that she resides in Petosky, Michigan, which is some 310 miles from the Fermi 2 site in Monroe. Simply put, she resides at too great a distance from the plant to be able to allege the required injury. Cf. Dairyland Power Cooperative (La Crosse Boiling Water Reactor), ALAB-497, 8 NRC ___ (Sept. 20, 1978).

However, Dan Drake's alleged interest is not as easily resolved. The joint Drake petition recites that "They claim standing on grounds that Dan lives [in Ann Arbor, Michigan] within 50 miles of the plant." (Emphasis added.) Dan Drake, however, did not sign the petition. Nor has he given any indication whatsoever of a personal desire to intervene or to shoulder the responsibility coincident with intervention. Although Mrs. Drake has opposed Detroit Edison's attempts to construct and operate Fermi 2 in several different proceedings over the course of several years,[3/] to Applicants' knowledge Mr. Dan Drake has not

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3/ See, e.g., Drake v. The Detroit Edison Co., 443 F. Supp. 833 (W.D. Mich. 1978), 453 F. Supp. 1123 (W.D. Mich. 1978): The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 (1978)

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previously joined in these efforts. Given the importance of his residence and participation in this proceeding, and given Mrs. Drake's own impediment to standing, it is critical that a limited form of discovery be commenced to verify Dan Drake's interest in this proceeding.

Applicants' concern is heightened by Mrs. Drake's similar arguments in the Fermi 2 construction permit amendment proceeding. There, in her amended petition for leave to intervene, Mrs. Drake sought to premise her intervention on the interests of a "Daniel H. Drake, petitioner's son, [w]ho has been admitted to the University of Michigan Medical School."[4/] Her argument was rejected out of hand by both the Licensing (Intervention) Board and the Appeal Board. The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, aff'd, ALAB-470, 7 NRC 473, 474-75, n.1 (1978). The instant joint Drake petition, viewed against this background, suggests that the only real party in interest in this proceeding is again Mrs. Drake.

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(construction permit amendment proceeding): ALAB-475, 7 NRC 752, 754 (1978) (antitrust). Mrs. Drake also filed at least one petition pursuant to 10 C.F.R. § 2.206 (Nov. 19, 1977), and intervened in proceedings before the Michigan Public Service Commission.

4/ See Amended Petition of Martha G. Drake, NRC Docket No. 50-341, filed February 1, 1978. A copy of this pleading is attached as an appendix to Applicants' motion.

Applicants submit that the critical threshold facts with respect to Dan Drake's intended participation can best be disclosed by deposition. Should, therefore, this Board grant Applicants' motion, counsel for Applicants intend to notice his deposition, to be held in Ann Arbor, within one month from the Board's order. Applicant submits that a short deposition limited to the issues discussed above will quickly resolve the question of his interest in the proceeding and will not unduly burden Mr. Drake.

It is equally important to verify the intervention prerequisites hinted at -- but certainly not asserted "with particularity" -- by CEE. CEE alleges that it has one member (presumably an individual and not one of CEE's organizational members) who "resides within one mile of the Fermi 2 plant." Petition at 1. Depending on the number of other members (if any) in the vicinity, CEE's interest as an organization may be de minimis. Moreover, the implied economic interests of CEE's members (Petition at 2) are not detailed.

Accordingly, should this Board grant Applicants' motion, Applicants intend to notice the deposition of that CEE member alleged to reside within one mile of Fermi 2. The deposition will be confined solely to determining the facts concerning CEE's "interest" in requesting an operating license hearing.

For the very same reasons that discovery is warranted in the case of Dan Drake, it is warranted for CEE. A time-consuming and costly operating license hearing should not be convened unless a valid intervention petition has been filed. Applicants submit that under the circumstances of this case, the fastest and most economical method for scrutinizing CEE's petition is to conduct the limited discovery requested. This approach may well avoid protracted litigation involving answers, amended petitions, additional answers, and appeals on the question of intervention.

II.

THIS BOARD IS EMPOWERED TO PERMIT LIMITED DISCOVERY ON THE ISSUE OF INTERVENTION.

Sections 2.718 and 2.721(d) of the Commission's Rules of Practice vest in this Licensing Board broad powers necessary to conduct the proceeding and "to take appropriate action to avoid delay." In addition to the blanket delegation of power contained in 10 C.F.R. § 2.718(l), § 2.718(d) specifically authorizes the Board to "[o]rder depositions to be taken."

Moreover, nothing in the Commission's Rules of Practice forbids Applicants' request. Although 10 C.F.R. § 2.740(b)(1), which provides that "discovery shall begin only after the prehearing conference provided for in

§ 2.751a", might at first reading be construed to bar Applicants' requested discovery, upon analysis it is clear that no such barrier exists. Any limitation on discovery in § 2.740(b)(1) applies only to discovery on the merits. Section 2.740(b)(1) specifically provides that discovery "shall relate only to those matters in controversy which have been identified . . . in the prehearing order entered at the conclusion of [the first] prehearing conference." See also Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station) LBP-77-13, 5 NRC 489, 492 (1977). Given this limitation on the scope of discovery, it logically follows that the discovery which is barred until the occurrence of the first prehearing conference must be discovery on the merits of the parties' cases. By contrast, Applicants here seek only limited discovery on the threshold question of intervenors' alleged standing. Accordingly, § 2.740(b)(1) does not bar Applicants' request.

Moreover, the Commission's discovery procedures have often been analogized to those existing under the Federal Rules of Civil Procedure. The Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975): Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974). The Federal Rules of Civil Procedure governing discovery have also been considered to provide necessary guidance in interpreting

the Commission's rules. See Davis Besse, supra, at 760; Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (1975).

Without attempting to canvas all the Federal discovery rules, Fed. R. Civ. P. 30 clearly contemplates discovery as requested by Applicants. On the question of intervention, petitioners Dan Drake and CEE may be considered equivalent to plaintiffs; Applicants to defendants. Under Fed. R. Civ. P. 30(a), a defendant may take a plaintiff's deposition (even without leave of court) at any time after commencement of the action. See also 4A Moore's Federal Practice ¶ 30.54[1] at 30-62 (1978) noting that a "defendant may serve the notice to take depositions at any time after the filing of the complaint." Rule 30(a) (as does 10 C.F.R. § 2.740a(a)) also permits the taking of the deposition of any person, regardless of party status. Rule 30(b)(6) expressly recognizes that an association may be deposed. The existence of these comparable discovery procedures permitted under the Federal Rules strongly suggests that § 2.740(b)(1) should not be construed to bar Applicants' requested discovery.

Applicants have found no Commission or Board decisions squarely barring discovery on the question of intervention. Although in proceedings challenging i) the denial of intervention (and indirectly challenging the

validity of 10 C.F.R. § 2.714) and ii) what was termed an "early" notice of hearing, intervenor arguments suggesting that discovery was needed to frame contentions (i.e., prior to intervenors being granted intervenor status) were rejected, (Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, recon. denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973): Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974)), a close reading of those cases shows each to be inapposite.

First, the discovery suggested by the prospective intervenors in each case -- as an aid in framing contentions -- by definition involved the merits of the case. As discussed above, Applicants here seek discovery only on the preliminary issue of intervenors' standing. More importantly, in each case the Appeal Board and the Commission rejected an argument that discovery was necessary on the grounds that the applicant(s) in the respective cases had already made a vast amount of technical and environmental material publicly available, thus eliminating any need for discovery. Prairie Island, supra at 192; Koshkonong, supra at 929.

The emphasized availability of information upon which to frame contentions in Prairie Island and Koshkonong simply underscores the need for discovery in the

instant case. Applicants have no publicly available information as to the standing of Mr. Drake or CEE. With the recent change in the Commission's intervention requirements[5/], such petitions need not now even be filed under oath.[6/] In short, Applicants now lack any vehicle to test vague (but often critical) allegations concerning standing in intervenors' petitions. Limited discovery should be permitted to remedy this situation.

III.

SHOULD THE LICENSING BOARD DETERMINE THAT DISCOVERY IS BARRED BY SECTION 2.740, THE BOARD SHOULD CERTIFY THE QUESTION TO THE COMMISSION PURSUANT TO 10 C.F.R. § 2.758(d).

As discussed above (Arguments I and II, supra), Applicants submit that limited discovery is both necessary and authorized under the Commission's Rules of Practice. Should this Board hold, however, that limited discovery on the issue of standing is barred by the general provisions of 10 C.F.R. § 2.740, Applicants respectfully request that the question be treated as a petition pursuant to § 2.758 for the waiver of § 2.740.

Section 2.740 is part of the Commission's Rules of Practice and thus must be considered as "issued in

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5/ 43 Fed. Reg. 17,801 (1978).

6/ Compare 10 C.F.R. § 50.30(b).

its program for the licensing . . . of . . . utilization facilities." 10 C.F.R. § 2.758(a). As set forth in Argument I, supra, and in the attached affidavit of Eugene B. Thomas, Jr., Applicants need additional information to respond to the allegations of standing made on behalf of Mr. Drake and CEE. The application of § 2.740(b)(1), which limits discovery on the merits to a period after the first prehearing conference, to the instant proceeding would not serve the purposes for which the discovery limitation provision was enacted.

Applicants submit that their motion and accompanying affidavit satisfy the prima facie showing required by § 2.758(d), and that the Licensing Board, pursuant to 10 C.F.R. § 2.758(d), should certify the question to the Commission.

Conclusion

For the foregoing reasons, Applicants respectfully request that this Board enter an order permitting Applicants to commence discovery against Mr. Dan Drake and CEE on the issues and under the procedures discussed herein. Alternatively, if the Board should deny Applicants' motion, Applicants request that pursuant to § 2.758,

a waiver from the Commission's rules limiting discovery be granted.

Respectfully submitted,

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