



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before The Commission

In the Matter of
CONSUMERS POWER COMPANY
(Big Rock Point Nuclear Plant)

Docket No. 155-CLA
(Spent Fuel Pool Expansion)
March 10, 1981

Motion and Supporting Brief
for Official Notice by the Commission

Intervenor Leithauser hereby motions that the Commission take official notice of his status as an intervenor in regards to the Need-for-Power-Issue in the above matter.

In the above captioned proceeding in which one issue is now before the Appeals Board, the A.S.L.B. issued an order on February 25, 1981 in which they support their position with two arguments. On the second point, the status of Intervenor Leithauser, the Appeals Board is clearly in error.

On page 3 of that Order, the Appeals Board states that "the Licensing Board, however, did grant Mr. Leithauser leave to brief a N.E.P.A. issue the Board was to consider further... Mr. Leithauser, therefore is not a party to this proceeding..."

The question of Intervenor Leithauser's status was decided long ago. Although the original petition to intervene was denied (due to Intervenor Leithauser's failure to submit at least one contention with reasonable specificity to spent-fuel licensing prior to the special pre-hearing conference.) in the Order following Special Pre-Hearing Conference (Jan. 18, 1980) of the A.S.L.B., the Licensing Board ruled that "Mr. Leithauser, if he desires, may also brief this question within

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the time limit and submit, with his brief, a motion to reconsider his petition to intervene on this issue if the issue is admitted into the proceeding" (emphasis mine) (page 34).

Intervenor Loithauser did in fact respond to the Licensing Board's invitation when the Need-for-Power Issue (N.E.P.A. applicability) was before the Licensing Board, filing both a Motion to Intervene on the single issue and his Brief in support of consideration of the Need-for-Power Issue.

The Motion to Intervene (captioned "Motion to Be Heard on the Need-for-Power Issue") was granted and his brief accepted on March 19, 1980 when the Licensing Board issued its "Order Accepting Late-filed Briefs" which states in full:

"The motions of intervenor John O'Neill, II and John Loithauser to file their briefs on the Need-for-Power Issue out of time are granted. The Briefs will be accepted and filed."

In the Motion the Board referred to Intervenor Loithauser phrased his Motion "... that his brief on the Need-for-Power Issue be accepted and accorded the same status as others." (emphasis mine) (page 1). According to "Words and Phrases" Vol. 5A, West Publishing Co. "...a brief is an abridged statement of the party's case - a summary of the points or questions in issue." (Lamy v Lamy 12 F650, 411.1. (Johns) 43)

The Appeals Board itself has on at least three occasions recognized Mr. Loithauser's status as an intervenor on this issue. On page 2 of its letter of September 12, 1980 inviting C. Foster Knight, Acting General Counsel of the Council on Environmental Quality, the opportunity of filing a vrief amicus curiae, the Appeals Board first refers to Mr. Loithauser as a

participant and later fails to note some unique status for intervenor Leithausen in its final words of that letter. (Enclosures: cc: All Parties)

The Appeals Board over three months later in its order of December 19, 1980 states: "We have now received a brief from another intervenor John A. Leithausen" (emphasis mine) (page 1) This order was necessary to correct the Board's order of December 12, 1980 for the reasons it puts forth. In its order dated December 31, 1980, the A.S.L.A.B. more frequently identifies John Leithausen as an intervenor. The Order begins: Intervenor John Leithausen has moved..." In foot note 1 on page 2 (in response to pro se intervenor John O'Neil's query of the Appeals Board as to the error found in its order dated December 12, 1980) the Appeals Board "directs Mr. O'Neils attention to our order of December 19, 1980 with respect to the intervenor status of Mr. Leithausen and the delayed receipt of his brief." (emphasis mine) In paragraph 3 of the same page the Appeals Board states that "...only one counsel may argue on behalf of all intervenors jointly (O'Neil, Leithausen and Christa-Maria et al)." (emphasis found in Board's Order)

As this was the last Order issuing from the Appeals Board prior to the Order in question this matter could not have been raised by intervenor Leithausen before the Appeals Board issued the Order of February 25, 1981 because in the earlier Orders, the Appeals Board had clearly recognized Mr. Leithausen's status as an intervenor. (The later Order came in response to a request made to the Appeals Board by Intervenor Leithausen). One can thus only speculate as to how the Appeals Board arrived at its second argument. "...There is a general provision that prompt

notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding." 5U.S.C. Section 1005(d). As Intervenor Leithauser's petition to intervene was docketed on March 17, 1980, the Appeals Board Order of February 25, 1981, a full eleven months later can hardly be considered prompt notice.

It is necessary for the Commission to take official notice of this point of law in order to rectify this gross procedural error on the part of the A.S.L.A.B. which if entered into the record without correction would effectively deny Intervenor Leithauser's right to protect both his liberty and property, where that right has already been recognized by the A.S.L.A.B. It is also necessary to obviate delay and a multiplicity of actions.

Furthermore, "In administrative proceedings of a judicial or quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play." (F.C.C. v Peotenville Broadcasting Co. 304 U.S. 134)

Although seemingly unnecessary due to the clarity of the situation found in the record, in light of the Appeals Board Order, it would perhaps be beneficial to note that "...great liberality as to form and substance is to be indulged especially where the applicant is unrepresented by Counsel." (Fallo v Industrial Commission 722d 284. see also: Roberts v Knoxville Transit Lines 259 U.S. 2d 983)

I would merely state in passing that I am not an attorney nor am I represented by Counsel. I live on our wholly-owned 40 acre farm with my wife in Levering, Michigan.



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NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)	Docket No. 155-OLA
CONSUMERS POWER COMPANY)	(Spent Fuel Pool Expansion)
(Big Rock Point Nuclear Plant)))	March 14, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion and Supporting Brief for Official Notice by the Commission" in the above-captioned proceeding have been served on the following by deposit in the U.S. Mail, first class on March 14, 1981.

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