APPENDIX A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	

APPLICANT'S MEMORANDUM IN OPPOSITION
TO THE MAPLETON INTERVENORS' OBJECTIONS
TO THE BOARD ORDER OF AUGUST 26, 1971

By the Board's order of August 26, 1971, the Mapleton intervenors were required to file their written evidence with respect to their contentions 3 and 4 by September 15, 1971. They have not done so.* Instead, one of their counsel, Mr. Like has written a letter dated September 14, 1971 which is, in effect, a motion for reconsideration of the Board's August 26th order. As such, it comes so late as to raise serious doubt as to the bona fides of the intervenors; the letter should not be allowed to excuse the Mapleton intervenors from meeting the deadlines imposed in that order.

*They did file an affidavit of Professor Ernst Eckert on the feasibility of supplying process steam to Dow by means other than piping from a nuclear plant at the proposed site. This has nothing to do with their contentions 3 and 4 but does relate to their contention 5, which both the Board and Mr. Like regarded from the outset as a non-radiological issue under NEPA (See Tr. 3204, 3206 and 3207). Although it is helpful to have Professor Eckert's affidavit in terms of laying the groundwork for the NEPA phase of this proceeding, its submission does not serve the purpose of paragraph IA of the Board's August 26th order, which, as its heading shows, was to conclude the submission of evidence on "issues other than ECCS and environmental issues." (Initial caps omitted).

1. The Use of Written Evidence

The Mapleton intervenors take exception to the Board's order that "no further oral evidence will be received except by leave of the Board," asserting that it violates due process and §556(d) of the Administrative Procedure Act. At the hearing on July 12, 1971, after having been reminded that he would have to submit written evidence on contentions 3 and 4 (Tr. 3196), Mr. Like similarly asserted that to require written testimony would violate the due process clause and the Administrative Procedure Act (Tr. 3197). The Chairman said he disagreed but invited Mr. Like to file a brief on that, if he wanted to (Tr. 3198). Mr. Like filed no such brief but waited until the day before his evidence was due and made the same bald allegation of illegality. We submit that his continuing failure to support his assertion is itself indicative of its lack of foundation. However, we will briefly show that the law on this subject is contrary to the Mapleton assertion.

The Mapleton intervenors appear to rely on that part of the next to last sentence of §556(d) which states: "A party is entitled to present his case or defense by oral or documentary evidence...." They ignore the last sentence of §556(d) which provides, insofar as is relevant: "In... applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for

the submission of all or part of the evidence in written form". Section 2.743(b) of the Commission's rules provides in conformity with this sentence:

> "Where the interest of any party will not be prejudiced, the parties are encouraged to submit all or part of the direct testimony of witnesses in written form, unless objections are presented and unless otherwise ordered by the presiding officer."

In implementation of that provision, Judge Henry Friendly, writing for a three-judge District Court in Long Island RR v. United States, 318 F. Supp. 490, 498-500 (E.D.N.Y. 1970), stated that §556(d) means that a party may not complain about an agency's requiring the submission of evidence in written form unless he can show that this prejudiced him in the presentation of his case.* No such showing has been made here and no prejudice has been alleged.

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*Of course, if the written evidence of opposing parties were to produce material disputed issues of fact, the Mapleton intervenors could request and the Board could consider whether there is a need for cross-examination with regard to those particular issues. Clearly, in the absence of material disputed issues of fact there is no right to cross-examination, either under the Constitution or the Administrative Procedure Act. Ashworth Transfer, Inc. v. United States, 315 F. Supp. 199, 202-03 (D. Utah 1970); Allied Van Lines Co. v. United States, 303 F. Supp. 742, 748-49 (C.D. Cal. 1969); National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634, 636 (N.D. Okl. 1968).

Mapleton's argument that the requirement of written evidence discriminates against the intervenors because not similarly applied to applicant and staff is so much bunk. The Applicant has submitted the PSAR, its environmental report, various technical topical reports and much additional evidence in writing. In addition, the applicant will submit further written evidence with regard to ECCS and a written supplemental NEPA report. AEC staff has submitted a written Staff Safety Evaluation as well as additional written evidence. The staff will file a written detailed environmental statement. Applicant and staff are required by paragraph IA3 of the Board's August 26th order to submit written responses to the intervenors' submission filed under paragraph IA2.

In cases of such complex factual and technical evidence involving potentially such wide-ranging issues as the present proceeding, the Board is clearly justified in imposing the requirement of written evidence. In the absence of such a requirement, it is hard to see how this case could ever be brought to a conclusion.

Finally, the Board has held that contentions 3 and 4 are challenges to Part 20 of the Commission's regulations (Tr. 2953-54, 2955, 2956-57, 3209-10). Therefore, they are not properly at issue here unless the Mapleton intervenors make a proper showing, by offer of proof, that there is substantial doubt of their validity as applied to this case.

Calvert Cliffs Memorandum, CCH ATOMIC ENERGY LAW REPORTER ¶11,578.02. The rule of the Calvert Cliffs Memorandum has not been affected by anything in the D.C. Circuit's decision in Calvert Cliffs.

2. The Health and Safety Issues

The Mapleton intervenors argue in their letter (pp. 1-4) that it is improper, under the new Appendix D to Part 50, to require any evidence to be submitted, even as to radiological or health and safety issues, before the filing of a revised environmental report and a detailed statement by the applicant and staff. This position is in conflict with the provision in Section D1 of Appendix D which directs the Board in pending hearings to "proceed expeditiously with the aspects of the application related to the Commission's licensing requirements under the Atomic Energy Act pending the submission of Environmental Reports and Detailed Statements...." This aspect of the Board's order is in direct implementation of that provision.

Mr. Like, at pp.2-3 of his letter, argues that Mapleton contentions 3 and 4 are really environmental and that it was therefore improper to require evidence to be filed in support of them by September 15th. This is inconsistent with the statement of Mr. Ginster, at the hearing on July 9th, in which he argued that they were health and safety issues, not environmental issues, and thus within

the Board's jurisdiction under the old Appendix D (Tr. 2954). Patently, these contentions relate to radiological hazards and therefore were part of this proceeding before the D.C. Circuit's Calvert Cliffs decision.

The Mapleton intervenors allege (letter, p.3) that their experts need additional time to prepare testimony as to contentions 3 and 4 because of trips abroad or academic commitments. Normally, we would be hard pressed to oppose a reasonable extension of time for such reasons but we think that, in ruling on this request, the Board should consider the many unexplained failures of the Mapleton intervenors to meet deadlines set by the Board in this proceeding.

The Board's order dated December 8, 1970 required them to set forth the legal issues they would raise by December 11, 1970. They defaulted on that order. The matter was taken up at the January 21 hearing and they were ordered to file a statement of their contentions within 20 days thereafter (Tr. 544-46). At the May 1 conference, Mr. Ginster admitted being in default and promised to file a statement of factual and legal contentions, as well as the names of his expert witnesses, within two weeks (Tr. 1218-19). His statement of June 8, 1971 was filed in response to that directive. The Board found it inadequate and asked the Mapleton Intervenors for an additional specification of contentions on June 24, 1971, Mr. Ginster having been absent during the earlier days

of the hearing. These were finally supplied on July 12, 1971.

The Board's order of May 18, 1971 required any offer of proof by any intervenors with regard to the validity of Part 20 to be filed by June 7, 1971. The Mapleton intervenors defaulted on this obligation, too. Moreover, the Mapleton intervenors were told on July 9th and 13th that the Board would require a written showing in support of their contentions 3 and 4 (Tr. 2956-57, 2960, 3209-10). As they have been on notice of this requirement since May and were specifically told that it applied to their contentions 3 and 4 two months ago, their plea of insufficient time should not evoke sympathy.

Mapleton intervenors' general statement that they were unable to submit testimony by September 15th because of trips abroad and academic commitments is not worthy of respect in this proceeding. Nothing is set forth as to why the ample notice of the Board requirements was inadequate or as to why Mapleton intervenors did not request additional time earlier. No facts were set forth to show that the trips or academic commitments could not be postponed. The statement is insolent in its disregard of intervenors' responsibilities to conduct this proceeding in good faith and to use their best effort to adhere to the time schedules set forth by the Board.

In view of their blatant disrespect for, and disregard of, Board deadlines in the past, preclusion on contentions 3 and 4 would be proper.

3. ECCS

Mr. Like argues (letter, p.5) that 15 days is not enough time in which to respond to intervenors' next submission on ECCS. This may or may not be true but what the order requires is not a response to applicant's submission but "a detailed statement of the nature of the affirmative evidence which they intend to offer [on ECCS] in sufficient detail to provide Applicant an opportunity to prepare to meet it." This is something which they should have been working on since July 13th, when they were told they could participate on this issue (Tr. 3204-05) and should still be working on now.

4. Distinction Between NEPA and non-NEPA Issues

The Mapleton intervenors argue (letter, p.4) that no line may be drawn between the environmental and non-environmental issues. We discussed this question at pp. 3-5 of our letter to the Board of August 18th and will not repeat that discussion here. Suffice it to say that the Commission itself draws this distinction in Section D1 of the new Appendix D when it directs Boards to proceed expeditiously with the radiological issues while waiting for environmental reports and detailed statements to be filed.

5. Discovery and Statement of Issues on NEPA Issues

The Mapleton Intervenors argue (letter, p.5) that there should be no NEPA discovery before the detailed statement is

filed. However, Section D of the new Appendix D doesn't prohibit it and it will move this protracted proceeding along. It is consistent with "the Commission's continuing objective of minimizing undue delay in the conduct of its licensing proceedings" reiterated at p.3 of the new Appendix D. Of course, if the supplement to the environmental report or the detailed statement raises new matters, this would be without prejudice to intervenors seeking discovery as to those matters. Thus, no one would be prejudiced and the proceedings would be expedited.* Similarly, the intervenors statements of their views on NEPA questions would be without prejudice to supplementation if necessary in the light of the later filings.

6. Proposed Filings

As the August 26th order made partial proposed findings optional, there is no cause at this time for anyone to be concerned about the Board's invitation for any parties to file them before the hearing is concluded.

September 23, 1971

Respectfully submitted,

Lowenstein and Newman

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*This was the basis for our understanding in August with counsel that discovery should proceed and which we reported to the Board in our letter dated August 18, 1971 (p.2).

APPENDIX B

LEGAL DEPARTMENT

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CONSUMERS POWER COMPANY

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June 10, 1971

Air Mail
Special Delivery
Registered

Mr. Kenneth R. McCue
Apt. 801
400 North River Road
West Lafayette, Indiana 47906

Dear Mr. McCue:

Pursuant to our conversation at the prehearing on June 7, 1971, attached hereto are the following B&W proprietary drawings:

142139E-6	Arrangement Reactor Vessel Sections
142138E-6	Arrangement Reactor Vessel Long. Section
27105F-1	Internals General Arrangement
148645E-1	Plenum Cover Assembly
115563D-0	Control Rod Assembly
111432D-0	Core Support Shield Details
27101F-0	Core Barrel Assembly
27099F-0	Upper Grid Assembly
148658E-1	Upper Grid Rib Section
148652E-0	Lower Grid, Flow Distributor and Guide Tube Assembly
27100F-3	Lower Grid Assembly
148664E-1	Lower Grid Top Rib Section
109503D-0	Lower Grid Distributor Plate
163389E-0	Flow Distributor Assembly
32806F	Mark B3 Fuel Assembly
115676D	Pressurized Fuel Rod Assembly
148668E-1	Control Rod Guide Details
148667E-1	Rod Guide Brazement
163615E-0	Incore Instrument Guide Tube Assembly

You may refer to pages 3-29 through 3-85 of the PSAR for a detailed description of thermal, hydraulic and mechanical design information as a supplement to the information contained in the drawings. Pursuant to our agreement at the prehearing conference, these drawings are furnished pursuant to the protective order previously agreed upon by the parties. It is understood that intervenors shall at no time challenge or claim relief from the protective order or the proprietary nature of this information. The drawings and information contained therein are to be used and available only to Mr. Myron Cherry, Mr. David Comey, Mr. Ken McCue and Mr. Orlando Doyle. All notes made pertaining to the drawings and the information contained therein are to be turned over to B&W no later than the termination of the hearing on the Midland proceeding. Intervenors shall make no copies of these drawings or of the notes.

It is further understood that Consumers Power Company or the Babcock & Wilcox Company shall be permitted to review the doctoral dissertation being prepared by Mr. McCue on the regulatory process of the Atomic Energy Commission to ensure that none of this proprietary material is contained therein.

Will you please sign this letter in the lower left-hand corner and return a copy of this letter to me to indicate your receipt of these drawings and your agreement with the provisions contained in this letter?

Yours very truly,

John K. Restrick

JKR/pb

Myron M. Cherry

Kenneth R. McCue

David D. Comey

Orlando Doyle

The additional documents listed below have also been furnished and received pursuant to the agreement described in this letter:

✓ 207624 Internals Vent Valve

✓ 128707 E Outlet + Subassembly - Rev. 7 outlet nozzle

✓ 148154 E Plenum Assembly

KRM c