UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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In the Matter of

CONSUMERS POWER COMPANY

Midland Plant Units 1 and 2

Docket Nos. 50-329, 50-330

APPLICANT'S BRIEF IN SUPPORT OF ITS OBJECTIONS TO INTERROGATORIES ADDRESSED TO AEC AND ACRS

At the conference in New York on April 2 and 3, 1971, applicant, Consumers Power Company, objected to the interrogatories of Saginaw Valley Nuclear Study Group, et al., directed to the Atomic Energy Commission ("Regulatory Staff") and the Advisory Committee on Reactor Safeguards ("ACRS").* The Chairman, at that time, granted applicant leave to submit a brief in support of its objections by April 19, 1971. This is that brief.

BACKGROUND AND SUMMARY

On March 22, 1971, approximately four months after the granting of Saginaw intervenors' petition for leave to

* Hereinafter the Atomic Energy Commission Regulatory Staff and the Advisory Committee on Reactor Safeguards are sometimes collectively referred to as "AEC", unless the context otherwise requires.

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intervene in this proceeding, the Saginaw intervenors filed four sets of interrogatories. One set, consisting of 311 questions, was directed to the Dow Chemical Company. A second set was addressed to the Midland Nuclear Power Committee and contained approximately 243 questions. A third set of approximately 232 questions was addressed to applicant, Consumers Power Company. Promptly thereafter, on March 26, 1971, applicant sent a letter to the Board advising of those interrogatories to which applicant objected. Applicant further advised the Board that:

> "We believe that good grounds exist for objection to many other interrogatories. In the interest, however, of moving on with this proceeding on the schedule set forth in the Board's order dated March 3, 1971, we are not objecting at this time to any interrogatory not specified in the enclosure. If, however, it should develop that upon further examination of any of the remaining interrogatories problems in preparing responses should develop which were not apparent upon the preliminary review we have just completed, applicant reserves the right to file an objection."

At the conference in New York on April 2 and 3, 1971, the Chairman ruled upon many of the objections by Dow and applicant to the various interrogatories, deferring to a later time ruling upon other objections. On April 12, 1971, applicant filed its responses to the interrogatories together with objections to a number of additional interrogatories. It is noteworthy that of the 232 interrogatories addressed

to Consumers Power Company objection has been made only to all or parts of approximately 27.

In the interim the Saginaw intervenors have been afforded opportunity to probe through applicant's files and to obtain copies of documents. A list of the documents inspected by the Saginaw intervenors will shortly be filed with the Board. Copies of documents containing well in excess of 8,000 pages have been selected by intervenors and shipped to them.*

The fourth set of interrogatories served by Saginaw intervenors on March 22, 1971, is addressed to the AEC. They are set forth in 337 numbered paragraphs, of which the first 232 correspond to the 232 interrogatories directed to Consumers Power Company. With regard to each of these 232, the intervenors ask the AEC either to respond to the question or, if they have not considered the information called for by the interrogatory, to explain why they did not consider it in the course of the AEC evaluation.

Most of the remaining interrogatories 233 through 337 attempt to probe the factors which the ACRS and the AEC regulatory staff considered, the calculations they made, and the reasoning they followed in arriving at the conclusions

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* The intervenors did not commence their examination of documents until April 5, approximately four months after they were advised of the documents' availability.

expressed in the ACRS reports and the staff safety evaluation. In some cases the information sought in these interrogatories would duplicate that which is asked of applicant or Dow; and in some cases the information can equally well or better be provided by applicant or Dow. Applicant's objections to the interrogatories addressed to AEC are discussed generally in points I to III below. Point IV contains a listing of each of the AEC interrogatories together with an identification of the grounds for applicant's objections to such interrogatories.

This is the first occasion on which a party in a power reactor licensing proceeding has served interrogatories of such scope and depth, and such complexity, as to necessitate consideration of the questions discussed in this brief. For that reason the questions discussed herein have some degree of novelty if one looks solely to AEC precedent and regulations. The questions themselves are not novel, however, if considered in the broader context of the experience of other, older Federal administrative agencies and the experience of the judiciary, and in light of the regulations in 10 CFR Part 2. Viewed in such broader context, the questions are stripped of their novelty and for the most part require only the application of familiar principles and AEC regulations. For that reason and for the additional reasons set forth below, applicant urges this Board to decide

the questions presented herein and to proceed with this case. The matters involved are peculiarly within the discretion of this Atomic Safety and Licensing Board and are not such as would require certification to the Appeals Board or to the Commission for resolution.

The rationale of applicant's position in this memorandum, discussed in detail below, is simple: There should be no probing into internal decision-making processes of either the Regulatory Staff or the ACRS. Such probing would contravene the decision of U.S. v. Morgan and a host of subsequent decisions (Point I, below) and get this proceeding involved in matters too remote from the issues before the Board (Point II, below). If there is information of potential significance to the adjudication of the issues in this proceeding, which is the subject of an interrogatory propounded by the Saginaw intervenors, that information should be furnished promptly by the party best able to furnish it (Point III, below). Generally that party will be the applicant since it is his plant, since he has the information on which the design and safety features have been determined, and since he has the ultimate burden of proof in this proceeding on matters specified in the notice of hearing. To a large extent any information of this type has been presented to intervenors through the informal document review.

Multiple requests for the same information should not be allowed in the absence of a special showing of good cause (Point III).* Many of the interrogatories, if allowed, would improperly require staff to perform calculations and analyses not previously done (Point III).

Nowhere is there any showing of the "good cause" required by §2.740, 10 CFR Part 2, for these interrogatories. No justification is advanced why this proceeding should be prolonged, why the enormous burden of the AEC interrogatories should be imposed upon the AEC or why the time or effort of civil servants should be directed to gathering information for intervenors in their sweeping and indiscriminate dragnet search for evidence.

As was made clear in statements by the staff and at the conference held in New York on April 2 and 3, 1971, the staff and ACRS would be unable to answer the promulgated interrogatories for at least three months and the answering of the interrogatories would seriously impair the ability of the staff to participate in hearings on other plants and to continue review of other applications. (Tr. 678-80; 943-8)

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* Although many of the interrogatories addressed to AEC request AEC to produce documents, applicant's objections to the interrogatories and the arguments set forth in this brief are not intended to apply to documentary requests. Such requests have been made separately and are being responded to separately by the AEC in accordance with procedures adopted by AEC in recent amendments to 10 CFR Parts 2 and 9.

The proper resolution of questions as to the interrogatories which Saginaw intervenors have addressed to AEC is of transcendent importance to the conduct of this and other contested AEC power reactor licensing proceedings. Allowance of unnecessary and burdensome prehearing discovery procedures directed to the AEC can divert scarce and already overburdened staff personnel from what in the long run must be the overriding importance of evaluating the health and safety aspects of dozens of pending applications for the construction and operation of nuclear power plants, the development and issuance of reactor and radiation safety standards, and other matters. Such procedural mischief would also lead to unnecessary delays in the proceeding itself, particularly if the information is such that it has been provided by applicant or other parties or can be obtained by intervenors more promptly from the applicant or other parties.

Applicant has a clear and direct interest in raising these questions as to the proper scope of interrogatories to AEC because they will have a direct and major influence on the scope and timetable for this proceeding.

Applicant's argument is set forth in the balance of this brief under the following major points:

I Those interrogatories which attempt to probe the internal decision-making processes of both the staff and the ACRS are improper.

II Intervenors should not be allowed to conduct prehearing discovery for the purpose of determining the adequacy of the AEC staff or ACRS review. It is the adequacy of the PSAR and application for construction permit, not the AEC staff safety evaluation or ACRS report which is the issue with regard to contested matters in this proceeding.

III In the absence of any showing of "good cause" the Board should not impose on the AEC staff and the ACRS the burden of answering intervenors' interrogatories and should not delay this proceeding for that purpose. Moreover, the AEC staff and ACRS should not be required to make calculations and analyses in response to the interrogatories; and there can be no "good cause" for interrogatories addressed to AEC where the intervenors are able to fully explore the facts through other sources or other means.

IV In this section of the brief we refer to each of the interrogatories and describe by letter references the grounds for objection to the particular interrogatory.

V Conclusion

I

THOSE INTERROGATORIES WHICH ATTEMPT TO PROBE THE INTERNAL DECISION-MAKING PROCESSES OF BOTH THE STAFF AND THE ACRS ARE IMPROPER.

After exploring health and safety problems connected with the proposed Midland plant, the ACRS issued a report in which it found that the plant could be constructed without undue risk to the health and safety of the public.* The Commission staff, after years of studying the application and the PSAR and amendments thereto, issued its safety evaluation which made the same finding. Most of the interrogatories addressed to the AEC by the Saginaw intervenors** attempt to probe the factors which the ACRS and staff considered, the calculations they made, the knowledge they had and the reasoning they followed in reaching the conclusions expressed in the letters and the staff safety evaluation. It is Applicant's position that the Saginaw intervenors' attempt to go behind these documents and into the mental processes of the ACRS and the staff in issuing them is objectionable and improper, as a matter of law, and that they therefore should be stricken and the ACRS and the Staff directed not to respond to them.

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* A subsequent report considered design modifications and made the same finding with respect to the plant as modified.

** These include most of interrogatories 233 to 337 and 1 to 232, insofar as they require the ACRS and the staff to disclose what they did not consider and why they did not consider it. See interrogatories marked A in the Table of Objections at p. IV-4, infra.

United States v. Morgan, 313 U.S. 409 (1941) involved judicial review of a determination by the Secretary of Agriculture of reasonable rates for market agencies in the Kansas City Stockyards for certain past years, under the Packers and Stockyards Act. Justice Frankfurter, writing for the Court, stated (at 421-22):

> "[T]he district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to thi examination. The proceeding before t .e Secretary 'has a quality resembling that of a judicial proceeding.' Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See Chicago, B & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593. It will bear repeating that although the

> administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. United States v. Morgan, 307 U.S. 183, 191."

This statement of the Supreme Court has come to be known as the Morgan doctrine. It has been applied consistently over a long period of time in an extensive and wide variety of Federal cases.* See, e.g., Citizens to Preserve Overton Park v. Volpe, 39 U.S.LAW WEEK 4287 (Sup. Ct., March 2, 1971) (doctrine reaffirmed but exceptions to it explained); Chicago, Burlington & Quincy Ry. v. Babcock, 204 U.S. 585 (1907) (examination of tax assessment board members as to the operation of their minds in valuing and taxing railroad property held improper); Freeman v. Seligson, 405 F.2d 1326, 1339 (D.C. Cir. 1968) (disclosure of "intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions" in the Department of Agriculture held improper); Warren Bank v.

*No attempt has been made here to trace the doctrine in state decisions.

Camp, 396 F.2d 52, 56-57 (6th Cir. 1968) (deposition of Comptroller of Currency and two subordinates to see why he decided to grant a national bank charter held improper) Braniff Airways v. CAB, 379 F.2d 453, 462 (D.C. Cir. 1967) (Court examined evidence in deciding that Board's notation voting procedure and the signing of the order were proper but indicated that there would have to be a very strong showing before an agency's internal procedures would be examined for irregularities); Handler v. Secretary of Labor, 379 F.2d 88 (D.C.Cir. 1967) (examination of the Secretary of Labor with respect to his decision to fire an employee held not permissible in an action challenging the dismissal); 88 (D.C. Cir. 1967) (examination of the Secretary of Labor with respect to his decision to fire an employee held not permissible in an action challenging the dismissal); Indiana & Michigan Elec. Co. v. FPC, 365 F.2d 180, 184-85 (7th Cir.), cert. denied, 385 U.S. 972 (1966), affirming 30 FPC 391 (1963) (FPC's refusal to permit pre-hearing depositions of the Chairman, the Secretary and a staff member or to honor a request for documents and data relating to the "bases, criteria, expert opinion, studies and analyses" underlying the issuance of the order to show cause initiating the proceeding affirmed on appeal from the agency's final decision); Davis v. Braswell Motor Freight Lines, 363 F.2d 600, 603-05 (5th Cir. 1966) (held: subpoena

requiring NLRB regional director to testify in an action not involving the NLRB and to produce communications between him and the general counsel's office discussing the actions they would take concerning a labor dispute and revealing the Board's tentative opinions as the validity of various changes made by the employer and the unions should have been quashed); NLRB v. Sun Drug Co., 359 F.2d 408, 413 (3rd Cir. 1966) (held: NLRB not required to show, by evidence outside of its report, that it did not consider an improper factor in reaching its decision and such evidence would be improper, absent a prima facie showing of misconduct); Coro, Inc. v. FTC, 338 F.2d 149, 152-53 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965), affirming 14 Ad L 2d 150, 153 (FTC 1963) (FTC's refusal to permit general exploration by means of staff testimony and documents into its policies and practices with respect to its disposition of cases by stipulation in effort to prove that FTC didn't adhere to them in not offering respondent a stipulation affirmed); United Airlines v. CAB, 281 F.2d 53, 56 (D.C. Cir. 1960) (Examiner's denial of request for production of staff report to Board in connection with request for expedited hearing at the hearing itself affirmed); North American Airlines v. CAB, 240 F.2d 867, 874 (D.C. Cir. 1956) (Board's denial of discovery of staff studies, internal memoranda and recommendations of Board's experts to its members in order to

show that regulations applied in adjudicatory proceeding were arbitrarily designed and improper affirmed); Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947), cert. denied, 333 U.S. 867 (1948) (held: summary of evidence produced by SEC's staff to help SEC in examining the record need not be produced for the record because it is an internal memorandum used in the decisional process); NLRB v. Botany Worsted Mills, 106 F.2d 263 (3rd Cir. 1939) (petition for issuance of interrogatories to the Board members inquiring into their reading of the record, their reading of the examiner's report and exceptions thereto, the preparation of the Board's decision and the Board's ex parte consultation with its own counsel denied); Miller v. Smith, 292 F.Supp. 55, 57-59 (S.D.N.Y. 1968) (internal memoranda containing recommendations to Coast Guard Commandant concerning an administrative appeal to him may not be seen by party seeking judicial review of his decision); Hussey v. United States, 271 F.Supp. 650, 655 (N.D. Cal. 1967) (motion to require ICC to answer interrogatories re the effect of its internal staff memoranda and recommendations on the making of its decision denied); Ingham v. Smith, 274 F.Supp. 137, 145 (S.D.N.Y. 1967) (held: advisory opinions to Coast Guard Commandant on administrative appeal to him need not be produced as part of the record on judicial review of his decision);

Carl Zeiss Stiftung v. V.E.B. Carl Zeis . Jena, 40 FRD 318, 325-26 (D.D.C. 1966), aff'd per curiam on the opinion below sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C Cir.), cert. denied, 389 U.S. 952 (1967) (subpoena requiring Attorney General to produce documents bearing on the Government's relationship with and attitude toward plaintiff foreign corporation before and during prior litigation to which the Government was a party quashed); McLeod v. General Electric Co., 257 F.Supp. 690, 702 (S.D.N.Y. 1966) (reversed on other grounds, 366 F.2d 847 (2d Cir. 1966) (motion to quash a subpoena duces tecum requiring the NLRB to produce statements obtained by their investigators, internal memoranda and all documents considered by Board members in deciding to bring this action granted); SEC v. Shasta Minerals & Chemical Co., 3 FRD 23 (D. Utah 1964) (discovery by defendant in action by SEC into "the intra-commission memoranda, discussions and disclosures" upon the basis of which the SEC ordered the investigation not permitted); Rechany v. Roland, 235 F.Supp. 79, 81 n.2 (S.D.N.Y. 1964) (same holding as Ingham v. Smith, supra); Zuzich Truck Line v. United States, 224 F.Supp. 457, 462 (D. Kans. 1963) (ICC upheld in its refusal to permit a carrier in a proceeding against it to obtain production of an ICC field investigator's report to his superiors to determine at whose instigation the investigation was commenced and of other documents

in ICC's files to ascertain the interpretation placed on its permit by ICC employees internally in another proceeding); Walled Lake Door Co. v. United States, 31 FRD 258, 260 (E.D. Mich. 1962) (Held: plaintiffs in action to set aside an ICC decision not entitled to production of ICC internal memoranda, draft reports and staff recommendations); Union Savings Bank v. Saxon, 209 F.Supp. 319 (D.D.C. 1962) (held: deposition of Comptroller of the Currency in action to review his issuance of a branch bank certificate, in which he was charged with illegal acts personal to him, could be had but could not go into the workings of his mind in reaching a decision); Continental Distilling Corp. v. Humphrey, 17 FRD 237, 241 (D.D.C. 1955) (plaintiff in action to set aside order of Internal Revenue Bureau concerning the labeling of its whiskies held "not entitled to discovery of the mental operations by which defendants arrived at their opinions or made their judgments"); Kaiser Aluminum & Chemicals Corp. v. United States, 157 F.Supp. 939, 945-47 (Ct. Claims 1958) (Government, defendant in suit for breach of contract, not required to produce a memorandum written to the War Assets Liquidator by his special assistant advising him on the question of entering into the contract at issue); WHDH, Inc., 21 RR2d 400 (FCC March 8, 1971) (petition to reopen comparative licensing decision to inquire into the reasons for which a former commissioner joined in the majority decision and whether he read

the entire opinion for which he voted was denied on the ground, inter alia, that these are not proper subjects of inquiry under Morgan); Sioux Empire Broadcasting Co., 18 FCC 2d 549 (1969) (motion for bill of particulars providing its analyses of the data on which it relied in making a determination concerning possible overlap between radio station signal contours denied, where the party was referred to the publicly available data which was used and could take further measurements itself to resolve the question); Polymers, Inc., 23 Ad L 2d 127 (NLRB 1968) (motions to examine Board official who conducted disputed representation election and to examine Board's internal memoranda re objections to it denied); School Services, Inc., 21 Ad L 2d 680, 681-84 (FTC 1967) (motion for the taking of depositions and production of documents to show that the Commission did not have a sufficient basis for commencing the proceeding denied); Statesman Life Ins. Co., 20 Ad L 2d 629, 630-32 (FTC 1966) (request for production of a confidential memo of the Commission re the closing of a similar case denied for both lack of good cause and Morgan considerations); Seeburg Corp., 20 Ad L 2d 603, 614-17 (FTC 1966) (respondents' request for the production of intra-agency memoranda re its settlement proposals to the Commission prior to the issuance of the complaint denied); Graber

Mfg. Co., 18 Ad L 2d 579, 586 (FTC 1965) (request for production of documents evidencing FTC's knowledge of and attitude toward the activities of respondent's customer denied); New York-San Francisco Nonstop Case, 30 CAB 1467 (1960)(request for production staff report on the question of granting an expedited hearing denied at the hearing itself); Mid-South Broadcasting Co., 12 RADIO REG. 1447, 1450 (FCC 1955) (request for production of report of a Commission field investigation prepared by a staff member for the Commission assistance prior to hearing denied); American Rolling Mill Co., 43 NLRB 1020, 1025 (1942) (post-hearing motions for the production of communications between various Board agents before and during the hearing to prove that respondent was denied a fair and impartial hearing denied in the absence of a showing of impropriety by the Board's agents in the moving papers).

These cases illustrate the application of the Morgan doctrine in pre-trial discovery in administrative and court litigations, at trial in administrative and court litigations, on petitions for reconsideration, on motions to reopen and in judicial review of administrative action. They show that it has been applied to trial testimony, pre-trial depositions, demands for the production of documents, interrogatories and requests for bills of particulars. While no case

has been found applying the doctrine to the reactor licensing activities of the AEC or to procedures precisely like it (indeed, we don't believe there are any), the foregoing cases are nevertheless instructive and controlling here. They show that, no matter whether the government conduct which is sought to be probed is quasi-judicial, quasi-legislative, executive or quasi-military, no matter whether the officials whose thought processes or intra-agency utterances are the subject of inquiry are Cabinet members or the most subordinate of bureaucrats, no matter whether the material sought would be helpful to the party seeking it or not and no matter whether the Government decision sought to be looked behind is substantive or procedural or preliminary or final, the Morgan doctrine still applies.* Its consistent application by a wide variety of courts and agencies in a vast panoply of situations, procedures and contexts shows that it has become a basic rule of Federal administrative law and that any departure from it (other than under the terms of the two recognized exceptions to the doctrine outlined by the Supreme Court

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* As we shall show, there are two exceptions to the doctrine, neither of which applies here. See our discussion of Citizens to Preserve Overton Park v. Volpe, infra.

in Citizens to Preserve Overton Park v. Volpe, supra, which as we shall show, do not apply here) would be an aberration lacking in precedent and inconsistent with the important public policies in which the Morgan doctrine finds its roots.

The AEC regulatory staff safety evaluation and the ACRS reports in this proceeding are the administrative findings which satisfy the findings requirement enunciated in Overton Park as being necessary to bring the deliberative process leading up to them within the doctrine of U.S. v. Morgan.

The AEC staff safety evaluation embodies the findings and conclusions of the AEC regulatory staff after almost two years' review of t' PSAR and amendments. It is issued pursuant to AEC regulations (10 CFR Part 2, Appendix A, I(d); II(e), (f); VI(b), (d); III(g)(1)). It embodies the administrative findings on which the Director of Regulation in an uncontested proceeding would grant the application for construction permit or operating license, subject to review by the Atomic Safety and Licensing Board. U.S. v. Morgan, and the policy considerations upon which Morgan is based, are no less applicable to the staff safety evaluation because a licensing board is charged with the responsibility in certain uncontested cases to review its adequacy, or because intervenors may, subsequent to its issuance, oppose the grant of the license application. In the United States it is only the final decisions of the U.S. Supreme Court which are not reviewable by higher authority.

The Advisory Committee on Reactor Safeguards is an independent advisory committee established under Section 29 of the Atomic Energy Act of 1954, as amended. It is required to review each application for a construction permit for a nuclear power reactor and to "submit a report thereon which shall be made part of the record of the application and available to the public...." (Sec. 182 b.) The ACRS reports in this proceeding, dated June 18, 1970, and September 23, 1970, constitute the ACRS' statutory report pursuant to Sec. 182 of the Act.

The Morgan doctrine "forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 FRD 318, 325-26 (D.D.C. 1966) aff'd per curiam on the opinion below sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F. 2d 979 (D.C.Cir.), cert. denied, 389 U.S. 952 (1967). It precludes inquiry into what knowledge the agency had of facts relevant to the proceeding. See Graber Mfg. Co., 18 Ad L 2d 579 at 583 and 586 (FTC 1965). It means that a party is not entitled to intra-agency analyses of data on which it relied to reach a technical conclusion so long as the data itself is available to the party and the agency has issued a report explaining the reasoning on which its decision is based. See Sioux Empire Broadcasting Co., 18 FCC 2d 549 (1969):

It can be seen, then, that the interrogatories marked A in the Table of Objections at p. IV-4, infra. come within the broad sweep of the Morgan doctrine. It is also clear that the interrogatories at bar do not come within the exceptions to the doctrine which were explicitly spelled out only last month by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, 39 U.S. LAW WEEK 4287 (March 2, 1971).

The Department of Transportation Act and the Federal-Aid Highway Act prohibit the Secretary of Transportation from authorizing the use of Federal funds for the construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, he can approve construction through parks only if there has been "all possible planning to minimize harm to the park." In Overton Park, the Secretary authorized the use of federal funds to build a highway through a public park in Memphis. Certain citizens groups sought to enjoin the construction, contending that the Secretary violated his duty under the statutes by not making formal findings or giving any indication of why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park. They also claimed that he was wrong on the merits of these issues and that he did not make an independent determination but merely relied on the judgment of the Memphis City Council. The Citizens groups had sought, in the District Court, to take the deposition of a former federal highway administrator who had participated in the

decision to route the road through the park. The District Court and the Court of Appeals "refused to order the deposition of the former Federal Highway Administrator because those courts believed that probing of the mental processes of an administrative decisionmaker was prohibited." Id. at 4289.

The Court held that judicial review was proper. Id. at 4292. It further held that there was no legal requirement that formal findings be made and therefore did not remand the case to the Secretary for the making of such findings. Ibid. However, it held that judicial review had to be on the whole administrative record, which had not been put before the reviewing courts. It therefore stated (at 4293):

> "Thus it is necessary to remand in this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. United States v. Morgan, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may

> be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decision-makers themselves. See Shaughnessy v. Accardi, 349 U.S. 280(1955).
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> The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a 'post hoc rationalization' and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible."

The case at bar does not fall within the exceptions clearly demarcated by the Supreme Court in Overton Park. The ACRS letters and the Staff's Safety Evaluation are "administrative findings that were made at the same time as the decision." And the Saginaw intervenors have made no "strong showing of bad faith or improper behavior" on the part of the ACRS or the Staff. They therefore may not probe into the mental processes behind the formulation of the ACRS letters and the Safety Evaluation.

Moreover, the mere possibility that discovery will turn up some irregularity is not enough to sustain the interrogatories. As was stated in Coro, Inc. v. FTC, 338 F.2d 149 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965), subpoenas probing the internal decision-making process of an administrative agency

> "are not issued on bare suspicion. They are not licenses for extended fishing expeditions in waters of unknown productivity

in the vague hope of 'catching the odd one'. See Bowman Dairy Co. v. United States, 341 U.S. 214, 221, 71 S.Ct. 675, 95 L.Ed. 879 (1951)."

Accord, School Services, Inc., 21 Ad L 2d 680, 683 (FTC 1967); see American Rolling Mill Co., 43 NLRB 1020, 1025 (1942); cf. Polymers, Inc., 23 Ad L 2d 127 (NLRB 1968). The following remarks made in Braniff Airways v. CAB, 379 F.2d 453, at 462 (D.C. Cir. 1967) are very much in point:

> "We do not intend that the attention we have paid to these arguments be interpreted as giving disappointed litigants a license to rummage through the internal processes of an administrative agency, searching for some irregularity, or the hint of one, on which to base a challenge to the validity of the decision. In a few highly unusual cases it may be appropriate to examine the procedures followed in making an institutional decision, see United Savings Bank v. Saxon, 209 F.Supp. 319 (D.D.C. 1962). The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize. 'Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected.' United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). We cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations. See Willapoint Oysters, Inc. v. Ewing, supra, 174 F.2d at 696."

Thus the interrogatories marked A in the Table of of Objections at p. IV-4, infra cannot be justified on the theory that they may turn up improprieties in the review of the application by the staff or the ACRS. The papers on the motion to compel answers to the interrogatories must themselves make a strong showing of such improprieties. They make no such showing whatsoever.

The Morgan case itself indicates that the Morgan doctrine is based on the principle that to examine a judge as to his deliberative processes in deciding a case "would be destructive of judicial responsibility." 313 U.S. at 422. In this vein, Judge Wyatt stated, in Miller v. Smith, 292 F.Supp. 55, at 57 (S.D.N.Y. 1968):

> "The principle behind such rulings is the same as that which would deny litigants access to memoranda of a law assistant, usually called a law clerk, to a judge. The responsibility for decision is that of the judge alone; discussion with his assistants (and their memoranda to him) are wholly irrelevant."

Accord, Chicago, Burlington & Quincy Ry. v. Babcock, 204 U.S. 585, at 593 (1907).

Although the ACRS and the staff are not judicial officials or themselves members of a regulatory agency, they have issued their findings in an adjudicatory proceeding and, therefore,

in a real sense, the safety evaluation and ACRS letters are quasi-judicial decisions, albeit preliminary. Thus, the same considerations which require the secrecy of the deliberations of quasi-judical officials militate in favor of protecting the secrecy of their deliberations.

One of the most basic policy considerations underlying the Morgan doctrine has been made quite clear on more than one occasion.

Thus, the Court stated in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 FRD 318, at 326 (D.D.C. 1966), supra:

> "The rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, but expressions assisting the reaching of a decision are part of the decision-making process. ***It is evident that to demand predecision data is at once to probe and imperil that process."

Mr. Justice Reed, sitting as a retired judge in Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, at 945-46 (Ct. Claims 1958), expressed this policy quite eloquently:

> "Here the document sought was intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal government the kind that every head of an agency or department must rely upon for aid in determining a course of

action or as a summary of an assistant's research. In the case of governments, '[t]he administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community.' Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

There is a public policy involved in this claim of privilege for this advisory opinion--the policy of open, frank discussion between subordinate and chief concerning administrative action.

When this Administrator came to make a decision on this $36,000,000 contract, with intricate problems of accounting and balancing of interests, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion."

Similar concerns were expressed by the Court of Appeals in NLRB v. Botany Worsted Mills, 106 F.2d 263, at 267 (3rd Cir. 1939):

"The essence of the discussion of a common cause and the judgment ensuing upon that discussion must lie in freedom of expression. If those present during the discussion are aware that their

> sentiments, either tentative or final, may be revealed by their fellow participants, it is clear that caution or worse would remove all candor from their minds and tongues. The logic of this position requires the preservation from questioning of each member of the general body. Each one's action or reaction is part of the common pool; to cast suspicion upon anyone of them is to muddy the general waters. To illustrate simply, if Mr. X is asked, 'Did you read the record?', what is to prevent his fellow member, Mr. Y, from being asked, 'Did Mr. X act as if he had read the record?'; and so ad infinitum. Thus the freedom of deliberation is indirectly restrained."

As was stated in Congressional testimony by Norbert A. Schlei, Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel during the Johnson Administration, "If an internal report, proposal, analysis, or recommendation is to be worth reading, it must be a free expression and not confined to matters 'cleared for publication'." Quoted in Seeburg Corp., 20 AdL 2d 603, at 617 (FTC 1966).

These considerations should weigh heavily in rulings on attempts to probe the deliberative processes of the Staff and the ACRS in reaching their recommendations and conclusions as to whether the construction and operation of nuclear reactors can be accomplished without undue risk to the public health and safety. One can hardly imagine a more delicate, difficult or important task than that performed by the staff and the ACRS in these matters. It is therefore of the utmost importance that members of the Staff and the ACRS be able to operate with complete internal freedom of expression in the course of their deliberations. Secrecy at this stage is not

dangerous or inimical to the public interest, for they do issue formal findings expressing their opinions and conclusions and the actual facts or issues which may be in dispute are subject to rigorous analysis and testing in the hearing procedures before the Atomic Safety and Licensing Board. Moreover, as we shall show in Point II, infra, once issues are put into dispute, the Board tries them de novo and is not merely reviewing findings made by the staff or ACRS. Accordingly, protection of the integrity of the internal deliberations of the staff and ACRS does not interfere in the slightest with the fullest and most rigorous of public hearings possible on every aspect of every contested issue.

Moreover, to turn the hearing into an examination of how good a job the staff and the ACRS did in regard to contested issues is to divert it from the legally relevant crucial issue under the Atomic Energy Act -- whether the issuance of the permit will be inimical to the health and safety of the public. This diversion from the relevant legal issue results in "an inversion of the administrative process" and this is another policy consideration underlying the Morgan doctrine. See the concurring statement of Commissioners Jones and Reilly in Statesman Life Ins. Co., 20 Ad L 2d 629, at 634-35 (FTC 1966). The ACRS reports and the Safety Evaluation are only

preliminary decisions leading to the hearing and the deliberations leading up to them are therefore not relevant or necessary in the hearing on the merits. As was stated by the CAB in New York-San Francisco Nonstop Service Case, 30 CAB 1467, at 1468 (1960):

> "The protestations of petitioners do not justify production of a staff study prepared to assist the Board in determining the public need for expeditious hearing, and neither Trans World nor United has suffered any resulting prejudice from denial of their requests for disclosure. Clearly, petitioners had no need of the report in order to meet its substance in waging their case on the merits, for the staff study played no part in the record upon which the ultimate decision to authorize increased service was made. The report was prepared in connection with the Board's determination whether to order a hearing, an action which stands on its own, and was not counted in the economic data which were adduced at the hearing and upon which the outcome of the proceeding rested."

See United Airlines v. CAB, 281 F.2d 53, 56 (D.C. Cir. 1960). What will be determinative as to the contested issues here will be the evidence at the hearing and not the weight accorded to any preliminary decision. See paragraph VI(d) of Appendix A to the AEC Rules of Practice, 10 CFR Part 2; cf. Handler v. Secretary of Labor, 379 F.2d 88 (D.C. Cir. 1967). In McLeod v. General Electric Co., 257 F.Supp. 690, at 702 (S.D.N.Y. 1966), rev'd on other grounds, 336 F.2d 847 (2d Cir. 1966), Judge Frankel stated: "In any event, 'the adequacy of the investigation is judicially tested only

by the Board's subsequent ability to sustain its initial determination that the investigation disclosed reasonable cause to believe that a violation occured.' Madden v. International Hod Carriers', Etc., Union, supra, 277 F.2d at 693." In this case, the adequacy of the ACRS reports and the safety evaluation with regard to the contested issues will be tested only by the ability of the Applicant and the staff to obtain a favorable decision from this Board on the basis of the evidence adduced at the hearing.

The Morgan doctrine is recognized in the Freedom of Information Act, 5 J.S.C. §552, enacted in 1966. Section 552(b)(5) provides that the Act does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In discussing this sub-section, H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966) states (at 10):

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision

> or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S.1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

It has been held that the Freedom of Information Act preserves the Morgan doctrine inviolate . See, e.g., Freeman v. Seligson, 405 F.2d 1326, 1339 (D.C. Cir. 1968); Miller v. Smith, 292 F.Supp. 55 (S.D.N.Y. 1968); Polymers, Inc., 23 Ad L 2d 127, 132 n.5 (NLRB 1968); Statesman Life Ins. Co., 20 Ad L 2d 629, 631-32 (FTC 1966); Seeburg Corp., 20 Ad L 2d 603, 615-17 (FTC 1966).

There is one additional policy consideration behind the Morgan doctrine which we have not yet discussed. That was succinctly stated by the Court of Appeals in NLRB v. Botany Worsted Mills, 106 F.2d 263, at 267 (3rd Cir. 1939) when it remarked that, if the Morgan doctrine were not adhered to in the case of regulatory agencies, "the function of deciding controversies might soon be overwhelmed by the duty of answering questions about them". The interrogatories at bar are a vivid demonstration of that unhappy prospect. Mr. Kartalia, attorney for the Staff, stated at the conference on April 2, 1971 (Tr. 678): "We are estimating right now

that several months would be involved if we had to answer those interrogatories, and that is assuming that every person we need will be in a position to give first priority to the Midland interrogatories." And he added (id.at 680):

> "I think a real policy issue is involved here. The Staff has many important public functions bearing on nuclear safety and this is not to say that the Midland record should suffer because of it. We are prepared to assume and carry out our duty to see that the record is complete, but we think that every effort should be made to avoid imposing on the Staff unnecessary burdens such as these interrogatories."

Three months to answer the interrogatories plus a reasonable time for intervenors' counsel to study the answers would delay the commencement of this hearing until some time in August. This would mean that we might not be able to conclude the hearing before the start of school in September, at which time the Board members in this case will cease to be available for any sustained period of time.

Additional work for the Staff and the delay entailed in this case would therefore be great, but the additional work for the Staff and the delay in all other contested cases would be much greater. Contests in reactor licensing cases are becoming both widespread and intense. Once the door is

opened for this kind of delaying tactic by intervenors in one case, it is likely to be used in all cases; for delay is the greatest weapon that opponents of nuclear power have. Concommitantly, delay is the greatest obstacle the nation faces in maintaining an adequate supply of electricity. We ask the Board to consider carefully the warning sounded by the Third Circuit back in 1939 before opening the flood-gates of full-scale pre-hearing discovery against the Staff and ACRS in these cases.

II.

INTERVENORS SHOULD NOT BE ALLOWED TO CONDUCT PREHEARING DISCOVERY FOR THE PURPOSE OF DETERMINING THE ADEQUACY OF THE AEC STAFF OR ACRS REVIEW. IT IS THE ADEQUACY OF THE PSAR AND APPLICATION FOR CONSTRUCTION PERMIT, NOT THE AEC STAFF SAFETY EVALUATION OR ACRS REPORT WHICH IS THE ISSUE WITH REGARD TO CONTESTED MATTERS IN THIS PROCEEDING.

In this portion of the brief we attempt to clarify the nature of the issues before the Board with respect to contested matters in this proceeding. The nature of the issues before the Board with respect to contested matters will have direct bearing upon the scope of the interrogatories which intervenors should be permitted to direct to the parties, particularly the AEC staff. In addition, clarification of the nature of these issues is important in planning other prehearing and hearing procedures and in defining the role and responsibilities of the Board and of the AEC staff at both the prehearing and hearing stages. As will be seen below, Commission regulations do provide specific guidance on these subjects.

A. Introduction

Saginaw intervenors have made frequent statements as to their desire to conduct very extensive prehearing deposition and discovery procedures with respect to the AEC in order to provide them with information concerning the

adequacy of the safety evaluation and ACRS reports* (see, e.g., Tr. pp.688-91 and 954-59) and many of the interrogatories addressed to AEC would appear to have no other purpose. Illustrative of these interrogatories is Interrogatory 254 which would require AEC to:

> "Describe in detail each fact and factor determined from the review of the Oconee Nuclear Station Units 1, 2 and 3 and the subsequent review of the Babcock and Wilcox Topical Reports which formed a part or basis for your conclusion that based on such reviews (in whole or in part) the Midland plant design is acceptable with regard to core physics, core thermal, core hydraulic, and core mechanical design."

As discussed above (Point I), such inquiries are not permissible under the doctrine of U.S. v. Morgan. In addition, as demonstrated in this section of the brief, such inquiries should not be allowed because the adequacy of the staff and ACRS safety evaluations is too remote from, and is not germane to, the contested issues before the Board.

It is the adequacy of applicant's application and other proof at the hearing which is the issue in this proceeding, insofar as the contested matters are concerned. Although there may well be areas where the distinction

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* As noted above, we are using the abbreviation "AEC" to refer collectively to AEC regulatory staff and ACRS. In addition, in this Section II of the brief in using the phrase "AEC safety evaluation" we refer collectively to the AEC staff safety evaluation and the two ACRS reports in this proceeding. Where we wish to refer separately to those documents, we will use the terms "staff safety evaluation" and "ACRS reports".

between adequacy of the application and adequacy of the AEC staff safety evaluation becomes blurred, it is nevertheless important to keep the two conceptually separate. To allow inquiry into the adequacy of the AEC evaluation, as distinct from the application, would divert this proceeding into endless byways not substantially germane to the issues. It would in addition delay the consummation of this proceeding by imposing upon the AEC excessive burdens, and it would confuse the role of the staff with the responsibilities of the applicant.

Applicant is prepared to meet its burden of demonstrating the adequacy of its application with respect to any matter which is contested in this proceeding. Applicant believes that it is the function and duty of this Board to decide such matters on the record of evidence adduced at the hearing, and not on the basis of the staff safety evaluation. We submit that if applicant meets the burden of persuading the Board as to the adequacy of its plans with respect to any contested matter, the Board must find in applicant's favor on that point whether the staff has evaluated the matter adequately or not.

We are not unmindful that this Board is not deprived of its responsibility with regard to the adequacy of the AEC evaluation as to uncontested matters merely because intervenors contest the award of a construction permit; and we

are not unmindful that the staff has an important, though limited, role with respect to contested issues. We will consider these aspects subsequent to our discussion of the applicable Commission regulations.

B. Applicable Commission Regulations

The nature of the hearing and the role of the Board with respect to contested, as distinguished from uncontested, issues is not a novel question. The Commission has furnished guidance on this subject to the Board and the parties in its regulations.

Appendix A to the Commission's Rules of Practice (10 CFR Part 2) is a statement of general policy which "explains in detail the procedures which the Atomic Energy Commission expects to be followed by atomic safety and licensing boards in the conduct of proceedings relating to the issuance of construction permits for nuclear power and test reactors...." (Appendix A, Intro., CCH Atomic Energy Law Rep. ¶14,144y)

As specified in the Introduction to the Appendix (p.20,071):

> "The provisions of section I through V of the following Statement are, for the sake of convenience, set out in the framework of the uncontested proceeding. They are applicable also, however, to the contested proceeding except as the context would otherwise indicate,

> or except as indicated in section VI. Section VI sets out the procedures specifically applicable to the contested proceeding." (Atomic Energy Law Rep., ¶14,144y)

In an uncontested proceeding:

> "Boards are neither required nor expected to duplicate the review already performed by the regulatory staff and the ACRS and they are authorized to rely upon the testimony of the regulatory staff and the applicant, and the conclusions of the ACRS, which have not been controverted by any party. The role of the board is to decide whether the application and the record of the proceeding contain sufficient information and the review of the application by the Commission's regulatory staff has been adequate, to support the findings proposed to be made by the Director of Regulation and the issuance of the construction permit proposed by the Director of Regulation. The board will not conduct a de novo evaluation of the application, but rather, will test the sufficiency of the information contained in the application and the record of the proceeding and the adequacy of the staff's review to support the proposals of the Director of Regulation. In doing so, the board is expected to be mindful of the fact that it is the applicant, not the regulatory staff, who is the proponent of the construction permit." (Appendix A, Sec. III(g), CCH Atomic Energy Law Rep. ¶14,144y)

Separate guidance is provided in Section VI of Appendix A, which is entitled "Procedures Applicable to Contested Proceedings". As noted in paragraph (a) of Section VI:

> "This section sets out certain differences in procedure from those described in sections I-V above, which are required by the fact that the proceeding is a 'contested proceeding.'"

Section VI defines how the role and responsibilities of licensing board members differ in contested proceedings

from uncontested proc lings.

Paragraph ( ), ection VI provides that:

> "In contested proceedings, the board will determine controverted matters as well as decide whether the findings required by the Act and the Commission's regulations should be made. Thus, in such proceedings, the board will determine the matters in controversy and may be called upon to make technical judgments of its own on those matters. As to matters which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the regulatory staff and the ACRS and they are authorized to rely upon the testimony of the regulatory staff and the applicant, and the conclusions of the ACRS, which are not controverted by any party. Thus, the board need not evaluate those matters already evaluated by the staff which are not in controversy."

Paragraph (b) of Section VI defines the "issues to be decided by the board" in the event a proceeding is contested. It states that "in a contested proceeding, the board will determine:"

> "(1) Whether in accordance with the provisions of 10 CFR 50.35(a)
>
> (a) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;
>
> (b) Such further technical or design information as may be required to complete the safety analysis and which can reasonably be left for later consideration, will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features and components; and

(d) On the basis of the foregoing, there is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and (ii) taking into consideration the site criteria contained in 10 CFR Part 100, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;

(2) Whether the applicant is technically qualified to design and construct the proposed facility;

(3) Whether the applicant is financially qualified to design and construct the proposed facility;

(4) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public.

It will be observed from the foregoing specificatic of the issues, that each is phrased in terms of the adequacy of the information, designs and programs furnished or described by the "applicant". Nowhere is there a reference to the adequacy of the AEC safety evaluation or other AEC work.

It is thus evident that the Commission views the "issues to be decided by board", and the role of the Board, as depending upon whether a matter before the Board is contested or uncontested. In an uncontested proceeding, and with regard "to matters not in controversy" in a contested proceeding, the Board need not duplicate the regulatory staff and ACRS review; and "the board is authorized to rely upon the testimony of the regulatory staff and the applicant, and the conclusions of the ACRS, which have not been controverted by any party." (See Section III(g)(1); and Section VI(b)).

The notice of hearing issued in this proceeding,* pursuant to which this hearing is being held, specifically implements the foregoing provisions of Appendix A. After stating that the Director of Regulation "proposes to make affirmative findings on Item Nos. 1-3** and a negative finding on Item 4...as the basis for the issuance of construction permits to the applicant", the notice of hearing then specifies the differences in responsibilities of the board which depend upon whether this proceeding and various matters therein are contested or uncontested.

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* 35 Fed. Reg. 16749, Oct. 29, 1970.

** The items referred to in the notice of hearing correspond in haec verba to the "issues to be decided by board"--specified in Appendix A, Section VI procedures as applicable to contested proceedings. These issues are quoted above at p.II-6 to 7.

The notice states:

> "In the event that this proceeding is not a contested proceeding, as defined by 10 CFR §3.4 of the Commission's 'Rules of Practice', the board will, without conducting a de novo evaluation of the application, consider the issues of whether the application and the record of the proceeding contain sufficient information, and the review by the Commission's regulatory staff has been adequate, to support the findings proposed to be made in the construction permits proposed to be issued by the Di-Director of Regulation.
>
> "In the event that this proceeding becomes a contested proceeding, the board will consider and initially decide, as the issues in this proceeding, Item Nos. 1 through 4 above as the basis for determining whether construction permits should be issued to the applicant."

C. Discussion

It is clear from the AEC regulations and notice of hearing that the distinctions urged by applicant are the very distinctions which the Commission itself has drawn in adopting its regulations and framing the notice of hearing.

In brief, the Commission has defined the nature of the issues and the responsibilities of the Board with respect to contested matters in contested proceedings and, although to a lesser extent, the role of the staff.*

Recognition that it is the adequacy of applicant's PSAR and other proof at the hearing, not the adequacy of the AEC safety evaluation with respect to contested issues, is important and will have important consequences in shaping

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* As emphasized in Appendix A, 10 CFR Part 2, "The board is expected to be mindful of the fact that it is the applicant, not the regulatory staff, who is the proponent of construction permit" (See Sec. III(g), Appendix A).

the scope and content of prehearing procedures as well as the hearing. If, as we believe, the adequacy of the staff's safety evaluation is not in issue in the contested proceeding with respect to contested matters, there is further compelling reason (in addition to the reasons underlying the doctrine of U.S. v. Morgan) for limiting the scope of discovery with regard to AEC and for imposing severe limitations on the taking of depositions of the AEC on interrogatories. Specifically, there would be no "good cause" to allow burdensome interrogatories to the AEC as to the basis for AEC reasoning, the mental processes of the AEC, or why the AEC did or did not take certain factors into account in reaching its conclusions. On the contrary, such matters should be excluded from the scope of permissible interrogatories as too remote from the issues before the Board.

To illustrate this point we can refer again to Interrogatory 254, which requests the AEC to:

> "Describe in detail each fact and factor determined from the review of the Oconee Nuclear Station Units 1, 2 and 3 and the subsequent review of the Babcock and Wilcox Topical Reports which formed a part or basis for your conclusion that based on such reviews (in whole or in part) the Midland plant design is acceptable with regard to core physics, core thermal, core hydraulic, and core mechanical design."

Obviously if the adequacy of the staff safety review is not in issue with regard to "core physics, core thermal, core hydraulic, and core mechanical design", then the identification of the particular factors which the staff relied upon in their review of the Oconee units or which the staff relied upon in their review of the B&W topical reports is not important. What will be important, if there are contested issues at the hearing with regard to those subjects, will be the information presented to the Board by applicant and intervenors concerning the adequacy of applicant's design, whether or not the particular factors presented to the Board were considered by the staff.

Similarly, there are important practical consequences at the hearing stage. As at the prehearing stage, an important difference concerns the role of the AEC staff. The Board has decided that intervenors should file their direct evidence, in writing, on May 1, to be followed by applicant's direct evidence, in writing, two weeks later. Presumably, there will be examination and cross-examination of applicant's and intervenors' witnesses, with applicant having the ultimate burden of proof on all contested issues. The question at that stage before the Board under the Commission directives discussed above (as well as Section 554 of the Administrative

Procedure Act)* will be whether the applicant has met the burden of persuading the Board on the basis of evidence adduced at the hearing as to the adequacy of its plans. We submit that the Staff Safety Evaluation and the report of the Advisory Committee on Reactor Safeguards, at the hearing stage, will have no probative value with regard to contested matters; it is the record of evidence before the Board and not the previous extra-judicial hearsay statements of the ACRS or the staff which would be important.**

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* The Administrative Procedure Act is applicable to this proceeding pursuant to the provisions of Sections 181 and 189 of the Atomic Energy Act of 1954, as amended. Under Section 554 of the Administrative Procedure Act the decision of the Board with regard to contested matters must be based on the record of hearing.

** AEC licensing boards have ruled that the ACRS report may be received in evidence in the record of the hearing solely to show compliance with a statutory requirement, and not as evidence of the truth or falsity of its contents. See, e.g., the initial board decision in matter of Florida Power and Light Company, Docket Nos. 50-250, 50-251, CCH Atomic Energy Law Rep., ¶11.259, p.17,497-3, where the Board stated:

> "The ACRS report was received into evidence to show compliance by the Commission with the direction of Congress that an ACRS report be prepared and be submitted as a part of the application, but no evidentiary value was given the ACRS report, lacking the opportunity for cross-examination which was sought by one intervenor."

For somewhat different reasons, the applicant is here suggesting essentially that the staff safety evaluation be regarded as satisfying a regulatory requirement of the Commission, but not given probative value, with regard to contested matters.

With regard to contested matters in this proceeding, we believe the role of the AEC staff is not to justify their earlier safety evaluation but rather to act as the "public attorney general" with regard to the evidentiary record adduced before the Board. This responsibility can be carried out by submitting additional staff evidence if the staff believes the record may be incomplete, cross-examining witnesses of applicant and intervenors if staff believes there has been significant error in their testimony, aiding the Board by providing testimony evaluating the record of the hearing; in short, to act as a "public attorney general" by assuring a complete record and aiding the Board to sift and evaluate any conflicting evidence.*

It would obviously impair the objectivity of the staff and its ability to assure a complete record and to furnish advice on the record to the Board with regard to contested matters if the staff were required at the same time to defend the adequacy of its earlier review. The entire proceeding would also become distorted because of

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* In a contested proceeding, the staff must perform its role of aiding the Board without engaging in ex parte communication with the Board. Section VI(h) of Appendix A provides that the Board and the staff may not engage in ex parte communications or consultation in contested proceedings. Section V, however, allows such ex parte communication and consultation "in initial licensing procedures other than contested proceeding." This is another distinction between the contested and uncontested hearing.

the high probability that the evidence adduced at the hearing with regard to contested matters would include much material which had not been submitted, or submitted in the same form, to the AEC staff. Thus, for example, intervenors would in all probability submit evidence which had not previously been furnished to the AEC to refute the adequacy of the applicant's proposed designs and applicant would in all probability be able to submit more recent and more detailed information than had previously been furnished on the same subject to the AEC.

D. Conclusion

The Board should limit interrogatories to the AEC so as to exclude all those which seek to elicit the bases for AEC reasoning, the mental processes of the AEC, identification of particular factors considered or not considered by the AEC, and similar information underlying the AEC staff safety evaluation or the ACRS report.

III

IN THE ABSENCE OF ANY SHOWING OF "GOOD CAUSE" THE BOARD SHOULD NOT IMPOSE ON THE AEC STAFF AND THE ACRS THE BURDEN OF ANSWERING INTERVENORS' INTERROGATORIES AND SHOULD NOT DELAY THIS PROCEEDING FOR THAT PURPOSE. MOREOVER, THE AEC STAFF AND ACRS SHOULD NOT BE REQUIRED TO MAKE CALCULATIONS AND ANALYSES IN RESPONSE TO THE INTERROGATORIES; AND THERE CAN BE NO "GOOD CAUSE" FOR INTERROGATORIES ADDRESSED TO AEC WHERE THE INTERVENORS ARE ABLE TO FULLY EXPLORE THE FACTS THROUGH OTHER SOURCES OR OTHER MEANS.

Contrary to Saginaw intervenors' apparent attitude that they have an absolute right to unlimited discovery, the intervenors' request that the AEC and ACRS respond to the interrogatories is clearly addressed to the discretion of the Board.

The AEC regulations specifically provide that discovery may proceed by way of written interrogatories only "for good cause shown" (10 CFR §2.740). In the present case, where intervenors have delayed filing their proposed interrogatories for two and one-half months after the January 7, 1971, date fixed by the Board, and when substantial delay in the proceeding would result from the proposed interrogatories, there should be a compelling showing of good cause at least sufficient to outweigh the disadvantages to AEC and applicant before the interrogatories are allowed. No such cause has been shown, and we believe none can be.

Any review undertaken by the staff is merely review of the plant design, specifications and supporting information furnished by the applicant to the staff. Applicant has furnished all of this data to Saginaw intervenors and a great deal more. Considering the substantial detriment to the applicant and the administrative process that would result if the staff and ACRS were required to answer the interrogatories and considering the fact that Saginaw intervenors through interrogatories to applicant, review of applicant's documents, and access to the public records, have fully adequate opportunity to review the Midland plant, the Board should exercise its discretion not to delay this proceeding by imposing on the staff and the ACRS the onerous burden of answering these interrogatories.

The provision for "good cause" in AEC's rules is not an idle statement but is a real limitation upon the right to ask interrogatories. The United States Supreme Court, in a case involving the ordering of a medical examination under Rule 35 of the Federal Rules of Civil Procedure*, ruled that the:

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* Case law discussed in regard to "good cause" necessarily involves Rules 34 (document production) and 35 (ordering of examinations) of the Federal Rules of Civil Procedure rather than Rule 33 (interrogatories) because of the fact that "good cause" prior to 1970 was an essential element in discovery under Rules 34 and 35, while it was not a limitation on Rule 33. However, the principle of "good cause" discussed in document production cases is equally applicable to consideration of "good cause" for interrogatories under AEC regulations and therefore we believe these cases to be relevant and controlling.

> "...good cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule [Rule 34]. This is obviously true as to the 'in controversy' and 'good cause' requirements of Rule 35. They are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that such condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant." (Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964))

Similarly in Bentz v. Cities Service Tankers Co., 41 FRD 294 (S.D. N.Y. 1966):

> "This [good cause] is more than relevance; it requires a showing of some 'special circumstances' entitling movant to production of documents." (at p.294)

* * *

> "Movant's only attempt to show good cause is his conclusory statement that he 'does not have any other means of procuring the facts and information...' This flat conclusion, unsupported by an explanation, is not a showing of good cause." (at p.295)

In Freeman v. Seligson, 405 F.2d 1326, 1336 (D.C. Cir. 1968), the court quoted with approval the following language from Boeing Airplane Co. v. Coggeshall 280 F.2d 654, 659 (D.C. Cir. 1960) and 4 Moore Federal Practice §34.08 (2d Ed. 1966):

> "'[g]ood cause' may ordinarily be sustained by a claim that the requested documents are necessary to establishment of the moving party's claim or that denial of production would cause the moving party 'undue hardship or injustice'." (Freeman v. Seligson, supra p. 1336)

In United States v. 5 Cases, Etc., 9 FRD 81, 83 (D. Conn. 1949) aff'd 179 F.2d 519, Cert. denied 339 U.S. 963 (1950), the court states:

> "What constitutes 'good cause' is a difficult question, and as the learned editor has suggested in 2 Moore's Federal Practice, Sec 34.04, considerations of practical convenience are of prime importance. But even under the most liberal construction of this rule, mere assertions of threatened prejudice are not enough. The Court must be satisfied that the production of the requested document is necessary to enable a party to prepare his case, or that it will facilitate proof in progress at the trial."

Again in Union Carbide Corp. v. Filtrol Corp., 278 F.Supp. 553 (C.D. Cal. 1967), the requirements of "good cause" were summarized as follows:

> "For good cause to be present the moving party must make a showing not only that the documents are relevant, and are in possession of the other party, but that the documents sought are necessary for proof of the case and either cannot readily be obtained in any other way or that obtaining them another way would involve tremendous expense that the moving party should not in fairness be expected to bear."

Moore's Federal Practice concludes:

> "In short, any showing that failure to order production would unduly prejudice

> the preparation of the party's case, or cause him hardship or injustice, would support the order.
>
> Thus while there was wide variation in the appraisal of practical considerations in particular cases, these considerations resolved themselves into a judgment as to the extent to which the moving party's not having the documents would embarrass it in its preparation for trial. Inevitably this judgment turned upon the party's ability to explore fully the facts of the case through other sources or by other means.' (4 Moore's Federal Practice, §34.08 pp.34-70, 72 (2 Ed. 1970))

Intervenors have made no showing of "good cause" for the interrogatories. Because the Midland Plant is designed by applicant and its contractors and therefore all facts are in the possession of applicant and not the staff, it is clear that interrogation of the staff is not necessary to establish the health and safety of the proposed plant and denial of answers will not cause intervenors "undue hardship or injustice", because as intervenors have stated they have numerous experts available to analyze the plant (Tr. 696-97). An important consideration in any decision as to "good cause" is the impact on the proceeding from such a decision. In this proceeding, rather than facilitating proof or progress at the trial, these interrogatories could delay commencement by at least three months with no indication of compensating benefits. On the contrary, there is a substantial detriment resulting to the applicant from delay and to the

AEC from disruption of its internal processes and of its reviews of other plants.

A

THE AEC STAFF AND ACRS SHOULD NOT BE REQUIRED TO MAKE CALCULATIONS AND ANALYSES IN RESPONSE TO THE INTERROGATORIES

It is a commonly applied limitation on discovery that when data is available to both parties, the party seeking the information should do his own research, including compilation, analyses and calculations. 8 Wright & Miller, Federal Practice and Procedure §2174, p.552 (1970). An early statement of this rule was in Byers Theaters v. Murphy, 1 FRD 286, 289 (W.D. Va. 1940);

> "It is also obvious that one party should not be allowed to require another to make investigation, research or compilation of data or statistics for him which he might equally well make for himself." See also Klein v. Leader Electric Corp., 81 F.Supp. 624 (N.D. Ill. 1948)

In Needles v. F.W. Woolworth Co., 13 FRD 460, 461 (Ed. Pa. 1952) the court stated:

> "Defendant's objection to this interrogatory on the ground that the answer requires the compilation of statistical data and that the information is equally accessible to the plaintiffs is so well taken that plaintiff's counsel in his brief did not see fit to offer opposition to the objection."

Courts will not often require a party to examine, analyze or

audit facts which are available to the other party. In Porter v. Central Chevrolet, 7 FRD 86 (N.D. Ohio 1946) the moving party presented interrogatories requiring defendant to examine his own books, which books were readily available to the movant. The court sustained defendant's objection stating:

> "The information sought to be elicited is contained in the books and records of the defendant corporation. The interrogatories, if ordered to be answered, can only be answered by reference to the very records which the administrator has a right to inspect, and which the complaint indicates already have been partially examined.
>
> What the administrator is attempting to do is to require the defendant to examine, analyze, audit, compile and correlate information from its books and records and then to state its conclusions about what those records reveal." at p. 88. See Dusek v. United Air Lines, 9 FRD 326 (N.D. Ohio 1949)

Additionally:

> "Interrogatories should not impose upon the opposing party a duty to make inquiry and investigations." Sagarra v. Waterman Steamship Corporation, 41 FRD 245 (D.C. P.R. 1966)

In United States v. 5 Cases, etc., supra, pursuant to a libel issued under the Food, Drug and Cosmetic Act, five cases of oil were seized as being adulterated or misbranded. Claimant to the oil moved for an order requiring the government to produce true and exact copies of each and every

chemical test and analysis on samples from the oil. Following a discussion of "good cause", the court found:

> "Concededly the claimant has had opportunity to make its own tests and analyses which may be offered in evidence in defense against a forfeiture. With such authentic evidence within ready reach, I cannot find that the claimant will suffer unfair prejudice if not accorded a preview of the government evidence." (p.83)

The above case actually involved a situation where the adversary was seeking tests that had already been made. In effect the court was saying that if a party has the basic facts necessary for the calculation or analysis, there is no good cause for the other party to make the calculation or analysis for his adversary or to furnish a calculation or analysis already made.

In Sioux Empire Broadcasting Co., 18 FCC 2d 549 (1969), applicant for a construction permit for an AM radio station sought from the Federal Communications Commission (FCC) "its analysis of the data upon which it relied, including, but not limited to, graphs and other studies which it may have made of such data" in determining that an overlap [illegible]th another radio station was indicated and that a full hearing would be required. The FCC refused to furnish the analyses on the bases, *inter alia*, that data on the public record was sufficient for applicant to make analyses, and that the FCC determination was based on such publicly available data.

This line of authority has been summarized as follows:

> "Consequently interrogatories that require a party to make extensive investigation, research, or compilation or evaluation of data for his adversary are in many circumstances improper." 8 Wright & Miller supra p. 550

Based on the above line of authority and the general concept of good cause, it is clear that where the basic facts on which AEC staff conclusions are based are available to the intervenor through its discovery of applicant and from the public record, the AEC is not required to undertake analyses and compilations for the benefit of intervenors or to furnish intervenors with its analyses and compilations. As provided in the Board's Order of March 3, 1971:

> "It is, therefore, our intention to insist, where appropriate, that particular lines of inquiry..., be based on technical evaluation of available information." (p.7)

This Order recognizes the necessity of intervenors making a technical evaluation if they wish to delve into the case in the detail which they are attempting. This duty to perform technical evaluation should include a duty to make their own calculations and evaluations from the basic data rather than seek to place this burden on the AEC staff.

An example of an interrogatory requiring the staff to make compilations, calculations and analyses that it may not otherwise have made is interrogatory to AEC Number 276:

> "List each acceptable method for the control of hydrogen other than purging to prevent 'additional' thyroid and whole body doses at the outer boundary of the low population zone, subsequent to a LOCA. Include within your answer what additional doses, if any, would result from each such alternate system and whether you intend to require that an acceptable alternate system must result in no such additional doses and if not, why not. If in your answer you make reference to other than textual (exclusive of footnote) matter in the PSAR, or reference to other than textual (exclusive of footnote) matter in your Safety Evaluation, then set forth completely the text of each such reference or attach a copy."

An answer to this interrogatory would require the staff to analyze the application of each of a number of systems to the Midland Plant. There is clearly no good cause for a question of this sort. In addition the first part of this interrogatory is objectionable as requesting the AEC to compile information readily available from public records and technical journals to anyone with a technical background.

To the extent that the interrogatories would require the staff or ACRS to compile or analyze information available to the intervenors through public records, technical journals, documents available from applicant or applicant's answers to interrogatories, objection to answering them should be sustained.

B

THERE CAN BE NO "GOOD CAUSE" FOR INTERROGATORIES ADDRESSED TO AEC WHERE THE INTERVENORS ARE ABLE TO FULLY EXPLORE THE FACTS THROUGH OTHER SOURCES OR OTHER MEANS

It is a well established rule that good cause for discovery cannot be shown where the information sought is readily or more easily available to the movant from another source or by another means. 4 Moore's Federal Practice (2 Ed. 1970) §34.08 pp.34-70, 72. In Freeman v. Seligson, supra, the trustee in bankruptcy petitioned for the inspection of half a million documents in the possession of the Secretary of Agriculture. The court held that there was a requirement of good cause for such production and that mere relevance was not sufficient. The referee in bankruptcy had in fact found that the documents were essential to the trustee's investigation. The court stated,

> "Ordinarily this would have put the matter suitably to rest, but here we cannot be sure. The Secretary informs us that some of the items requested are already available to the trustee as public records; and we are unable to tell what, if any, consideration was given to possible resort to other sources for at least some of the material. From what does appear, many of the documents sought are exclusively under the Secretary's control, and others are obtainable from third parties, if at all, only at great inconvenience. But we think that, particularly with so large a demand as the subpoena here makes, a determination on good cause requires that all reasonable alternatives be explored." at p.1337.

The court specifically provided:

> "But to the extent that the trustee is able to conveniently obtain from his New York adversaries information identical to that sought by the subpoena, good cause for the request made here is lacking." at p.1337.

In United States v. 5 Cases, etc., supra, the court as discussed above found that the claimant would suffer no unfair prejudice from the fact that he couldn't get the results of government tests since he had full opportunity to make his own tests and analyses.

The court concluded:

> "With all deference, I cannot see the necessity of a court order to enable a claimant to pierce 'the dark veil of secrecy over pertinent facts' when without such an order he can poke his head within the veil and make his own observation of the facts." (p.83)

In G & P Amusement Co. v. Regent Theater Co., 9 FRD 721, 724 (N.O. Ohio 1949) the court stated:

> "Good cause is not shown when the mover has the information sought or can obtain the documents or information therein through other methods than the rules of discovery. Conversely when such information is only in the documents which are to be produced, at least a partial showing of good cause has been made."

And in United States v. National Steel Corporation, 26 FRD 603, 605 (S.D. Tex. 1960), it was stated that before discovery will be ordered:

"The information must normally be unobtainable by other means, or alternative modes are much more troublesome. 4 Moore's Federal Practice §34.08."

In Dellameo v. Great Lakes S.S. Co., 9 FRD 77, 78 (N.D. Ohio 1949), the court refused the motion for production of documents on the grounds that:

"By the exercise of any reasonable amount of diligence and energy the plaintiff has every opportunity of securing the information that he seeks from papers possessed by the defendant."

A specific example of an interrogatory addressed to the AEC which, though worded differently, asks for the same information as an interrogatory addressed to applicant is Interrogatory to AEC Number 270:

"Describe in detail each fact, calculation and assumption which formed a part of your review and analysis of the following proposed Midland Units' designed limits:

(a) The ability to limit the peak clad temperature to well below the clad melting temperature;

(b) The ability to limit the full clad-water reaction to less than one percent of the total clad mass;

(c) The ability to terminate the clad temperature transient before the geometry necessary for cooling is lost, and before the clad is so embrittled as to fail upon quenching; and

(d) The ability to reduce the core temperature and then maintain core and coolant temperature levels in the subcooled condition until accident recovery operations can be accomplished.

If in your answer you make reference to other than textual (exclusive of footnote) matter

> in the PSAR, or reference to other than textual (exclusive of footnote) matter in your Safety Evaluation, then set forth completely the text of each such reference or attach a copy."

This calls for essentially the same information as Interrogatory to applicant Number 229:

> "Describe in detail, stating each fact, calculation and assumption, what experimental verification supported by analysis you have obtained at all temperatures related to a LOCA to verify that the situation is controllable. If in your answer you make reference to other than textual (exclusive of footnote) matter in the PSAR, then set forth completely the text of each such other references or attach a copy."

Of course all of the first 232 interrogatories addressed to the staff and ACRS ask for similar basic factual information. Additionally, while many of the interrogatories addressed to the staff do not request factual information sought by interrogatories to applicant they do ask for factual information duplicative of material provided to intervenors by way of applicant's documents and available to intervenors as public documents.

It is clear that in the present case where intervenors have obtained, or could obtain if otherwise allowable, the requisite information from applicant, either through interrogatories or review of documents, that there can be no "good cause" for requesting the same information from the AEC staff. Additionally where, as is the present case,

the party from whom the information is sought will be unable to answer within three months (and possibly much longer) while the party to the case on whom the burden of proof rests can much more quickly answer proper questions, there appears to be no good cause for allowing the interrogatories.

IV.

IN THIS SECTION OF THE BRIEF WE REFER TO EACH OF THE INTERROGATORIES AND DESCRIBE BY LETTER REFERENCES THE GROUNDS FOR OBJECTION TO THE PARTICULAR INTERROGATORY

The following table identifies the particular objection represented by each of the letters "A" through "H" used in designating the grounds for objection to each of the AEC interrogatories.

A. This refers to the doctrine of U.S. v. Morgan; to attempts to inquire into the mental process and reasoning of the AEC. This grounds corresponds to Point I, above.

B. In addition to their impropriety under U.S. v. Morgan, interrogatories which attempt to inquire into the mental process and reasoning of the AEC are directed to the adequacy of staff review, a matter which is not germane with regard to contested issues. This ground corresponds to Point II.

C. This refers to the intervenors' failure to show any "good cause" for the interrogatories and corresponds to Point III.

D. This refers to the objection that the interrogatory would require the staff to make compilations or analyses. This ground corresponds to Section A, Point III.

E. This refers to the objection that the factual information sought by the interrogatory is available to intervenors

by other methods including:

(1) Public records of this and other AEC proceedings.

(2) Technical journals, books, and other available publications.

(3) Documents made available to intervenors by applicant.

(4) Applicant's answers to interrogatories.

(5) Applicant's proof to be adduced at the hearing in this proceeding.

F. This refers to the objection that the interrogatory would require the staff to hypothesize incredible events or speculate as to non-existing situations.

G. This refers to the objection that the information sought by the interrogatory is too remote from the issues in the proceeding.

H. This refers to the objection that the information sought by the interrogatory is not required to be considered by the AEC until the operating license stage.

As will be seen from the foregoing table, A and B correspond to Points I and II of this brief. C, D, and E refer to grounds of objection discussed under Point III; namely, the lack of any showing of "good cause" (C); that the staff would be required to make compilations or analyses for the applicant (D); and that the information sought is available to intervenors by other methods than from the AEC (E).

The objections represented by letters F, G and H have not been discussed previously in this memorandum. F, which refers to a requirement on the staff to hypothesize incredible events or assume non-existing situations, was discussed at length at the conference in New York on April 2 and 3, 1971, and further discussion would appear to be redundant at this time. G refers to obvious "lack of relevance". Discussion of that point would also appear to be unnecessary at this time.

The ground for objection represented by H--matter not required to be considered until the operating permit stage--was also discussed at the conference on April 2 and 3, 1971, with regard to such matters as final detailed design, operating procedures, and procedures for protection against sabotage. Here, too, we think discussion would be redundant at this time.

If desired by the Board, applicant will be pleased, at a conference with the Board, to explain further the specific grounds for objection to each of the various interrogatories.

TABLE OF OBJECTIONS

1 - 232	A,B,C,E
233	C,D,F
234	C,G
235	A,B,C
236	A,B,C
237	A,B,C
238	A,B,C
239	A,B,C,G
240	A,B,C,H
241	A,B,C,D
242	C,D,E
243	C,G
244	A,B,C,E
245	A,B,C,E
246	A,B,C,E
247	A,B,C,D,E,H
248	A,B,C,D,E
249	C,D,E,G
250	A,B,C,D,E,F,H
251	C,E
252	A,B,C,D,E
253	A,B,C,D,E
254	A,B,C,D,E
255	C,D,E
256	A,B,C,D,E
257	A,B,C,E
258	A,B,C,E
259	A,B,C,E
260	A,B,C
261	A,B,C,E
262	A,B,C,E
263	A,B,C,E
264	A,B,C,E
265	C,D,E,F
266	A,B,C,E
267	A,B,C,D,H
268	C,D,E
269	A,B,C,D,E
270	A,B,C,E
271	A,B,C,E
272	A,B,C
273	A,B,C,E,
274	A,B,C,E
275	A,B,C,E
276	C,D,E,G,H
277	A,B,C,D,G
278	A,B,C,E
279	C,D,E,
280	C,D,E
281	C,D,E

282	C,D,E
283	C,D,E,F
284	A,B,C
285	A,B,C,D,E
286	C,E
287	A,B,C,D,E
288	C,E
289	C,D,E
290	C,H
291	C,G (matters subject to other licensing proceedings (DOT and AEC))
292	A,B,C,D,E
293	A,B,C,D,E,G
294	C,D,E,G
295	A,B,C,E
296	C,E,H
297	A,B,C,E
298	A,B,C,E
299	C,D,G
300	A,B,C
301	A,B,C,H
302	A,B,C,H
303	A,B,C,E
304	A,B,C,E
305	A,B,C,D,E
306	A,B,C,E
307	A,B,C
308	A,B,C,E
309	A,B,C,E
310	A,B,C,E
311	A,B,C,D
312	A,B,C
313	A,B,C,E
314	A,B,C,E
315	A,B,C,E
316	A,B,C
317	A,B,C,D,E
318	A,B,C
319	A,B,C,D,E,G
321	A,B,C,G
322	A,B,C,E,G
323	C,D,E
324	A,B,C,E
325	C,H
326	A,B,C,F
327	A,B,C,E
328	A,B,C,E
329	A,B,C,E
330	A,B,C,E
331	C,G,H
332	A,B,C,G
333	C,D,E

334	A,B,C,D,E
336	C,E,G
337	A,B,C,E,G,H

V.

CONCLUSION

For reasons set forth above applicant urges the Board to deny the Saginaw intervenors' "request" (no motion having been filed) for order requiring AEC to answer Saginaw intervenors' proposed interrogatories dated March 22, 1971, except for interrogatory No. 335. No objection is made to interrogatory No. 335.

Respectfully submitted,

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Dated April 19, 1971

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UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Brief in Support of its Objections to Interrogatories Addressed to AEC and ACRS, dated April 19, 1971, in the above-captioned matter have been served on the following in person or by deposit in the United States mail, first class or airmail, this 19th day of April, 1971.

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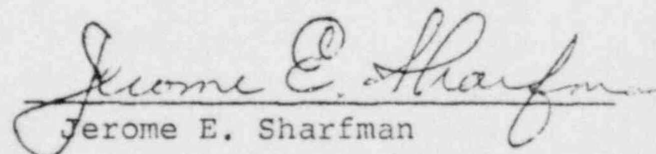

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