1-29-73

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

IN THE MATTER OF	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	and 50-330
(Midland Plant, Units 1 and 2)	)	

BRIEF OF APPLICANT, CONSUMERS POWER COMPANY, IN OPPOSITION TO EXCEPTIONS FILED BY THE SAGINAW VALLEY INTERVENORS TO THE INITIAL DECISION OF THE ATOMIC SAFETY AND LICENSING BOARD

On December 14, 1972, the Atomic Safety and Licensing Board issued its Initial Decision in this proceeding. Thereafter, on January 15, 1973, the Saginaw Valley Intervenors, et al. (Saginaw Intervenors) filed a 195-page document entitled "Exceptions of Intervenors Saginaw Valley Study Group . . . ."[1/] For the reasons hereinafter set forth, the Applicant urges that each and every one of the Saginaw Intervenors' exceptions be denied.

INTRODUCTION

The dominant themes of the Saginaw Intervenors' Exceptions appear to be that (1) the Licensing Board unlawfully denied the Saginaw Intervenors many of their procedural rights, and (2) the Licensing Board was so overcome

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1/ Under 10 CFR 2.762(a) and 2.710 the last day on which exceptions could be filed was January 8, 1973. However, on December 29, 1972, the Saginaw Intervenors filed a motion requesting an extension of time for an additional 35 days. By order dated January 4, 1973, this Board extended the time until January 15, 1973.

by an irresistible impulse to grant the application forthwith that it refused to give all but the most perfunctory consideration to the facts and issues in the case and utterly failed to exercise any independent judgment. Nothing could be further from the truth.

As our discussion of specific exceptions will show, the Board not only did not unlawfully deny Saginaw Intervenors their procedural rights -- it even accorded them rights they should not have had. And instead of giving the application a once-over-lightly review, as Saginaw Intervenors imply, the Board painstakingly assured the development of a voluminous and complete record which it then weighed in full accordance with the governing law.

The January 15 exceptions typify Saginaw Intervenors' participation in this proceeding. Many of them are plainly not in accordance with 10 CFR 2.762(a), particularly because they fail to "specify precisely the portions of the record relied upon . . . ." Where there are references to the record such references are frequently inaccurate. Furthermore, any alleged failure of the Board to fully treat in its Initial Decision matters now regarded as important by Saginaw Intervenors must be considered in the light of their failure to file proper proposed findings and conclusions, in violation of 10 CFR 2.754(a) and (c) (See September 27, 1972 "Reply of Applicant to Pleadings Filed by Saginaw and Mapleton Intervenors on September 14 and 15, 1972"). The Licensing Board properly found that the intervenors had defaulted on this obligation (Initial Decision, Para. 9):

> "As Applicant has noted both Mapleton and Saginaw are in default; as Applicant has also conceded, it is not clear what should be done about the default. * * * We will treat as contested issues of fact those as to which intervenors introduced affirmative evidence

> or engaged in substantial cross examination. With respect to conclusions of law, we will attempt to deal with those questions which we understand to be raised by the proposed conclusions in the light of earlier contentions by the intervenors. We leave open the question of the effect of the failure to file adequate Proposed Findings and Conclusions for consideration when and if there are exceptions to our decision."

The intervenors' default, said the Board, "greatly complicated the task of the Board and made it virtually impossible to know whether particular issues are in fact contested." The Saginaw Intervenors' January 15 filing, like the Mapleton filing of January 3, "wholly ignores their earlier default and the Licensing Board's problems resulting from it, and blandly assumes that they come before this tribunal with all of the rights of litigants who have met their obligations below."[2/] We suggest here, as we did in the Reply to the Mapleton Exceptions, that an appropriate course of action for this Board to take would be to treat as not having been raised below -- and therefore not to constitute a proper subject of an exception -- any issue which the Licensing Board failed to deal with expressly or which the Saginaw Intervenors now claim that the Licensing Board misconstrued.

Quite apart from the question of what the Licensing Board should have covered at length in the Initial Decision, it is clear that the entire application was subjected to rigorous review, both before and during the hearing. The application to construct Midland Units 1 and 2 was filed, with the preliminary safety analysis report (PSAR), on January 13, 1969. The Initial Decision authorizing issuance of permits to construct the facilities was not issued until December 14, 1972 -- three years and eleven months later.

2/ January 16, 1973 "Reply of Applicant . . . to the Exceptions Filed by the Mapleton Intervenors . . . .", p. 3, where the default question is treated at greater length.

Prior to the hearing phase of the proceeding, the Staff met with the Applicant on numerous occasions to discuss the application and made a number of requests for additional information. The application was amended twenty-one times to provide such additional information and to update previously supplied information. Copies of the application and each amendment were served on the Mayor of the City of Midland, the Township Supervisor of Midland Township and the Chairman of the County Board of Supervisors by the Applicant as they were filed. Additionally, copies of the application and amendments were transmitted by the AEC to the Governor of the State of Michigan and were placed in the AEC's Public Document Room in Washington, D. C. as they were received.

In its review of the application, the Staff consulted with numerous independent experts on specialized subject matters, e.g., climate and meteorology (Air Resources Environmental Laboratory, National Oceanic and Atmospheric Administration, Department of Commerce); seismicity (U. S. Coast and Geodetic Survey, Environmental Science Services Administration, Department of Commerce and John A. Blume & Associates, Engineers); fish and wildlife (U. S. Fish and Wildlife Service, Department of the Interior), and geology and hydrology (U. S. Geological Survey, Department of the Interior) (Staff Safety Evaluation, p. 2, and Appendices C, D, E, F and G, following Tr. 1674). The ACRS also reviewed the application and held six sub-committee meetings including a site visit and four full committee meetings regarding the application (Applicant's Ex. 4 and Ex. 5).

After identifying a number of items to be resolved during construction of the Plant, the ACRS in its reports, dated June 18, 1970 and

September 23, 1970, reached a favorable decision and concluded that the Plant, Units 1 and 2, "can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public." (Applicant's Ex. 4 and Ex. 5) After almost two years of review, the Staff in its Staff Safety Evaluation ("SSE"), dated November 24, 1970, concluded, among other things, that "the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public; . . . ." (SSE, p. 87, following Tr. 1674). Subsequently, the Staff issued a Supplemental Safety Evaluation, dated January 14, 1972, which concluded that "the conclusions reached in our Safety Evaluation . . . are still valid and that the proposed facility can be constructed and operated at the proposed location without undue risk to the public health and safety." (Staff Ex. 8)

After the enactment of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), but before the decision in Calvert Cliffs Coordinating Committee Inc. v. AEC, 449 F2d 1109, 2 ERC 1779 (D.C. Cir. 1971), the AEC adopted (35 F.R. 5463, April 5, 1970) and then revised (35 F.R. 18469, December 4, 1970) environmental regulations. Pursuant to these regulations the Applicant filed an environmental report which was circulated and made publicly available for comment (35 F.R. 12795, August 12, 1970), and the Staff prepared a Draft Detailed Environmental Statement which was similarly circulated and made available (36 F.R. 3080, February 17, 1971).

On September 9, 1971 (36 F.R. 18071), the AEC again revised its regulations to comply with the Calvert Cliffs decision. This revision, with subsequent amendments, constitutes the presently governing AEC environmental regulations.

Following issuance of the new regulations, Applicant filed its Supplemental Environmental Report, dated October 19, 1971, with amendments in response to questions from the Staff, dated December 10, 1971, December 24, 1971 and January 7, 1972 (Applicant's Exhibits 38F-1, 38F-2, 38F-3, 38G, 38H and 38I, hereinafter collectively "ASER" or "Supplemental Environmental Report"). This is a three-volume document having approximately 6000 pages. The availability of the ASER was noticed in the Federal Register for January 5, 1972 (37 F.R. 104). The AEC employed the expert services of personnel at Argonne National Laboratory to aid it in its environmental evaluation. Staff and Argonne personnel visited the site and its environs and contacted many of the local and state agencies (Final Environmental Statement, Appendix A; Tr. 7618-7624). The AEC circulated for comment and noticed the availability of a new Draft Environmental Statement, dated January 7, 1972 (36 F.R. 410, January 11, 1972).

Comments were received from the Department of Transportation (United States Coast Guard); Department of Commerce (Bureau of Domestic Commerce, the National Bureau of Standards and the National Oceanic and Atmospheric Administration); Department of Health, Education and Welfare; Federal Power Commission; United States Department of the Interior; Department of Agriculture (Soil Conservation Service and Forest Service); Department of Housing and Urban Development; Environmental Protection Agency; Midland Township Supervisor; Midland Public Schools; East Central Michigan Economic Development District; Greater Midland Area Chamber of Commerce; Midland United Conservation Clubs; and the utility boards of the Cities of Grand Haven, Holland, Coldwater, Traverse City and Zeeland, Michigan and the Northern Michigan and Wolverine Electric Cooperative (Staff Ex. 6, Appendix E).

After evaluation and review of the numerous, generally favorable, comments from various agencies and the public and of responses by Applicant to such comments, the Staff in March 1972 issued its Final Environmental Statement (FES) which concluded "that the benefits to be derived from operation of the Midland Plant Units 1 and 2 outweigh the adverse effects identified in this statement." (Staff Ex. 6) The Final Environmental Statement, the availability of which was noticed in the Federal Register on April 7, 1972 (37 CFR 7012), further concluded that if certain additional actions were taken by Applicant, "from the standpoint of environmental effects the action called for is the issuance of a construction permit . . . ."

In accordance with section 189a of the Act (42 U.S.C. 2239(a)), a notice of hearing was first issued on August 29, 1970 (35 F.R 16749). Hearings on radiological health and safety matters were held for 18 days, beginning June 21, 1971. On December 4, 1971 a Supplemental Notice of Hearing on environmental matters was published. Fourteen days of hearing were conducted on such matters between May 17 and June 15, 1972. The transcript in the proceeding exceeds 8900 pages; and, as indicated above, exclusive of the time spent on limited appearances and prehearing conferences, 32 hearing days were spent considering evidence relating to radiological health and safety and environmental matters.

The hearings relating to radiological health and safety covered, among other matters, technical qualifications of the Applicant; the site, including its location, population and use characteristics, exclusion area and low population zone, population center distance; meteorology; emergency

power systems; process steam monitoring; safety analysis; quality assurance and emergency plans.3/

Environmental matters were considered in similar detail during the hearing. Among other things these involved site characteristics, terrestrial ecology, water usage, the cooling system, impact of nonradioactive plant effluents, synergism, effects of decommissioning, need for power and alternatives. However, the Saginaw Intervenors did not participate in any way in the environmental hearings. The background of their failure to do so is significant in relation to their claims of bias and other claims now being made.

During the environmental portion of the proceeding, as well as in its radiological phase, the Licensing Board patiently attempted to refine the issues and identify those which were contested and to move forward with discovery procedures. As early as its order of August 26, 1971, the Board attempted to secure from Saginaw Intervenors a specification of their environmental contentions and a commencement of discovery. However, effective progress was not possible because of the opposing intervenors' position that meaningful action in these areas would not be possible until the Staff's Final Environmental Statement was filed.

On October 19, 1971, the Applicant's Supplemental Environmental Report was filed, and the Board held a prehearing conference on November 23, 1971. On December 22, 1971, it issued a further order dealing with procedural matters. Among other things, it directed the opposing intervenors to file by December 31, 1971 their contentions identifying the alleged

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3/ The Applicant's Proposed Findings of Fact and Conclusions of Law, dated August 15, 1972, contain a thorough, useful and fully documented description of all matters of record and proceedings below. Among the factual matters it discusses in detail are those listed above.

inadequacies in the ASER, their positions concerning the issues as to which they believed sufficient data had been presented and "their requests for discovery which they believe is warranted by the issues they are raising." It also fixed dates for the Staff to file its draft and final Environmental Statements and required the opposing intervenors to make similar contentions and requests for discovery within specified periods following the availability of such documents.

However, on December 24, 1971, the Saginaw Intervenors filed a motion requesting that they not be required to file their contentions and requests for discovery by December 31, 1971, and that the Licensing Board not set any further deadlines until the next prehearing conference. The grounds stated for these requests were that the Saginaw Intervenors had not completed review of the ASER, that their counsel would be on a trip until January 6, 1972, and thereafter would be "busily engaged in preparation for upcoming ECCS Rule Making Hearings." By order dated January 6, 1972, the Board granted Saginaw Intervenors an extension until February 4, 1972. In that order the Board stated:

> "We will continue to try to accommodate hearing dates within reason but we cannot in good conscience regard participation in other proceedings to be justification for not meeting deadlines. If counsel are to participate in more than one case at a time they simply must be prepared to make arrangements for handling the case load."

On February 6, 1972, two days after the February 4 due date, Saginaw Intervenors filed some 70 pages of contentions, together with an attachment which stated that since there was some disagreement as to whether certain areas would be heard in the environmental hearing, they should not

be required to undertake discovery in the many areas that clearly were permissible subjects for the environmental hearing until 14 days after resolution of the disagreements by the Board. The February 6 filing did not contain any such discovery requests. The Applicant filed a response on February 25, 1972, and on March 27, 1972 the Licensing Board issued an order identifying the Saginaw contentions it would permit and those which it ruled out until their significance was demonstrated by the Saginaw Intervenors. That Board Order also stated:

> "Opposing intervenors have not, with minor exceptions, paid any attention to the Board's order that a good faith effort be made to make discovery requests as the environmental reports were filed. For the Board to allow, as Saginaw now requests, discovery to <u>begin</u> 14 days after the entry of this order would be to permit intervenors' intransigence to accomplish what their arguments did not.
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> "In the circumstances, the Board will not permit the process of discovery to delay the proceeding. On the other hand, written detailed questions would undoubtedly be useful in further refining the issues to be contested by intervenors and answers to these questions may save hearing time. Accordingly, intervenors may serve and file detailed, specific questions and requests for documents within fourteen days following the date of this order. It should be clearly understood that the preparation of such requests is not to delay the filings provided for elsewhere in this order, and that such requests bear a heavier burden of showing 'good cause' than would have been the case a few months ago. Notwithstanding that burden, the parties to whom the requests are made shall exert their best efforts to comply with reasonable requests."

Finally, the order set a hearing date of May 17, 1972, and a prehearing date of April 28, 1972. Saginaw Intervenors never filed any "detailed, specific questions and requests for documents." Instead, by letter dated April 15, 1972, their counsel indicated that he did not intend to comply

with any deadlines set forth in the March 27, 1972 order and requested that the May 17, 1972 date for hearing be adjourned indefinitely. The major basis for this request was that he was "unable to relieve myself of my duties in the ECCS hearings . . ., and that there is no other lawyer that knows the case and the Intervenors' position as I do . . . ."

However, counsel for Saginaw Intervenors did appear at the April 28, 1972 prehearing conference, during the course of which argument was heard on his request for indefinite adjournment of the hearing. The Applicant and Dow opposed the request. So too did counsel for the Staff for the following reason:

> "I would like to say, if there is any possibility of working out a reasonable compromise date whereby Mr. Cherry could remain fully active in both cases, that I would certainly be in favor of exploring it. I think he is entitled to that consideration. But that really does not seem to be possible in this case. So I would urge the Board to deny the motion." (Tr. 5253)

The Board did deny the motion and decide to proceed on the schedule previously established (Tr. 5285); and Saginaw Intervenors did not appear or otherwise participate in the environmental hearing which began on May 17, 1972.

We have summarized these aspects of the proceeding's history in order to place the general nature of the Saginaw Intervenors' complaints in context. To do so, we believe, sufficiently illustrates that they are unfounded. Further confirmation of this conclusion may be found in Applicants' August 15, 1972 Proposed Findings. If anything, the Licensing Board was generous to a fault in providing the Saginaw Intervenors with opportunities to identify and develop their contentions. Yet the intervenors repeatedly ignored reasonable procedural ground rules, failed to adequately specify

their contentions, failed even to be present at the environmental hearing, and defaulted in their obligation to file proper proposed findings and conclusions.

We turn now to specific discussion of the Saginaw Exceptions.[4/] Generally we attempt to deal with them in the order in which they are set forth by the Saginaw Intervenors. However, some appear either repetitive or so closely related that it seems best to deal with them together. Consequently some of the exceptions are discussed in an order different than that set forth by Saginaw Intervenors.

Exception II.A.

In excepting to the Licensing Board's ruling on interrogatories directed to the Regulatory Staff and the ACRS in the early part of 1971, Saginaw Intervenors fail to indicate the context in which they were filed and the matter which they sought to elicit. Saginaw Intervenors defaulted on their obligation to file interrogatories by January 7, 1971 without any prior request for an extension of that deadline. Later they defaulted on a good faith obligation to the Board to file a "substantial batch" of interrogatories by February 11, 1971 (Tr. 600, 606-607), setting forth clearly specious reasons for their default (See "Applicant's Proposed Findings . . . ", dated August 15, 1972, Para. 27, pp. 21-22). On March 22, 1971, they filed 337 complex interrogatories on the Staff and the ACRS. Of these, 232 duplicated interrogatories served on the Applicant; the bulk of the remainder sought to explore in elaborate detail the thought processes of the Staff.

4/ As we have pointed out above, many of the contentions contained in the January 15, 1973 filing of the Saginaw Valley Intervenors do not meet the requirements of 10 CFR 2.762(a), and some relate to matters other than the Initial Decision. Our use of the term "exception" here is not a recognition of the validity of that designation. It is merely a convenient way to key this Brief to the Saginaw contentions it addresses.

At that time, AEC's regulation regarding interrogatories required a showing of good cause (10 CFR §2.740), but no such showing was made with respect to those filed on March 22, 1971. Nevertheless, the Applicant proceeded to answer more than 210 of the 232 interrogatories directed to it. Both Applicant and the Staff thoroughly briefed the question of "good cause" in regard to the interrogatories directed to the Staff and ACRS (See "Applicant's Brief in Support of Its Objections to Interrogatories Addressed to AEC and ACRS," April 19, 1971; "Objections of AEC Regulatory Staff to 'First Set of Interrogatories of Certain Intervenors Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards.'" April 26, 1971; and the Staff's reply brief on the subject, May 26, 1971).

The Board correctly ruled that the interrogatories were burdensome, both as a result of their number and the type of information they sought to elicit. The interrogatories did not seek facts but sought instead to explore the thought processes of the Staff over the previous two years. As stated in the Order of June 1, 1971:

> "It is perhaps not an exaggeration to say that complete answers to these interrogatories would require the staff to prepare a justification, intelligible to laymen, of the whole history of the development of pressurized water reactors, without, in the Board's view making a significant contribution to safety." pp. 2-3

In its Order the Board correctly weighed the intervenors' failure to show good cause or demonstrate need for the answers, and the burden that would be imposed on the Staff and ACRS by requiring answers, against the likelihood that the answers might make a significant contribution to the evaluation of the safety of the plant and found that it was not necessary for

the Staff to answer interrogatories in addition to those it had previously been ordered to answer. This decision was clearly a proper exercise of the powers conferred upon Licensing Boards by 10 CFR 2.718 to regulate the course of a hearing and dispose of procedural requests. Nothing in the Saginaw Intervenors' exceptions indicates that this necessary discretionary authority was abused in any way.

Moreover, in light of the vast quantity of factual material and documentation made available to the intervenors (see "Applicant's Proposed Findings of Fact . . . ", August 15, 1972, Para. 28, pp. 23-24), it is clear that Saginaw Intervenors' ability to participate fully in the proceeding was not affected by the ruling on their interrogatories to the Staff and ACRS.

Saginaw Intervenors' recital of the sequence of events related to the interrogatories that they filed during the environmental portion of the proceeding is at variance with what actually occurred. Rather than waiting until March 27, 1972 to rule on the interrogatories filed by Saginaw Intervenors on September 30, 1971, as stated on page 8 of the Exceptions, the Board made its ruling on December 22, 1971. This ruling was that the interrogatories propounded were identical to certain interrogatories that were propounded in the radiological portion of the hearing and which had been previously answered or as to which objections had been previously sustained. No showing of good cause for the interrogatories was made and there was no statement as to why the previous answers were insufficient or why the previous objections were no longer valid.

Exception II.A. also makes contentions relating to the Licensing Board's failure to permit the Saginaw Intervenors to direct interrogatories

to the ACRS. These contentions are treated in our discussion of Exceptions II.H. and II.I. below.

Exception II.B.

This exception misrepresents the record in this proceeding -- surprisingly so in light of the fact that the Applicant previously pointed out to the Saginaw Intervenors the inaccuracy of the statement that the Board's Order of May 13, 1971 prohibited inquiry into reactor pressure vessel failure. (See "Reply of Applicant to Pleadings Filed By Saginaw and Mapleton Intervenors on September 14 and 15, 1972", September 27, 1972.) Applicant did answer several interrogatories directed to the possibility of reactor vessel failure. (See Applicant's responses to Saginaw Interrogatories, Nos. 22, 23, 52, 25, 87, 88 and 89, April 13, 1971.) The particular interrogatories cited in this exception, however, dealt with the occurrence of reactor pressure vessel failure in conjunction with separate improbable events which required assumption of multiple unrelated failures. Interrogatory 92 asked that the consequences of simultaneous LOCAs and pressure vessel failures in both units be considered. Interrogatory 210 asked that reactor pressure vessel failures as a result of a LOCA or other accident involving the melting of more than 3% of the fuel be evaluated. As pointed out in Applicant's objections to the interrogatories, a melting of 3% of the fuel would require assumption of multiple failures of independent engineered safeguards and that no such accident was credible. (See Applicant's Letter to Board, dated April 13, 1971.) Furthermore, the Board's Order of May 13, 1972 sustaining the objection to Interrogatory 92 made it very clear that the Board was not foreclosing the subject of reactor pressure vessel failure. The order specifically directed Applicant "to describe the

research or other work being done on the question of the possible effects of thermal shock as a result of the injection of water in the event of a LOCA." (Board Order, May 13, 1971.) Applicant responded to this direction at the hearing on July 21, 1971, introducing Babcock & Wilcox Company Topical Report BAW-10018, "Analysis of the Structural Integrity of a Reactor Vessel Subjected to Thermal Shock" as Applicant's Ex. 33. The Saginaw Intervenors did not indicate a desire to examine reactor pressure vessel failure in their July 10, 1971 enumeration (not "exhaustive") of areas of cross-examination. Saginaw Intervenors were never denied the right to probe into or present evidence on reactor pressure vessel failure. Finally, the Board's treatment of this matter of reactor pressure vessel failure is in accord with the Commission's decision regarding the treatment of reactor pressure vessel failure in the Matter of Consolidated Edison Company (Indian Point Unit No. 2), Dkt. No. 50-247, October 26, 1972.

Exception II.C.

In this exception the Saginaw Intervenors contend that the Licensing Board "erred in not making an independent review of all safety-associated issues . . .", even those issues which were not raised by the Intervenors or the Staff. Appendix A, Part 2 of 10 CFR dictates denial of this exception. At the time of the hearing, section III(g) of Appendix A provided, with respect to uncontested hearings, that,

> "(1) 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 provisional 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."

With respect to contested proceedings, section VI(d) provided:

> "(d) Participation by board members: 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."[2/]

If the two provisions are read together, it is clear that the Licensing Board is required independently to "determine controverted matters . . ." in contested proceedings. However, the contention made by the Saginaw Intervenors is that with respect to uncontroverted matters the Board should do again what the Staff spent over three years doing -- even with respect to matters which neither the Staff nor anyone else participating in the hearing controverts. Exception II.C. admits that this is not required by Appendix A; nevertheless, it argues that the regulation is

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2/ In its present form Appendix A is to the same effect. See subparagraphs 1 and 2 of section V(f) (37 F.R. 15127).

illegal because the Atomic Energy Act, as amended, in fact requires a complete de novo investigation by the Licensing Board. The argument flies in the face of any sensible view of administrative law, and we can discern nothing in the Atomic Energy Act which would compel the agency to follow such a procedure.

Moreover, in Exception II.C. (pp. 13-14) the Saginaw Intervenors misstate the regulations in a very material respect. They state that the language of Appendix A "directed the Board members in contested proceedings to . . . 'rely upon the testimony of the Regulatory Staff . . . .'" (Emphasis supplied.) In fact, as is shown above, the language provides that "they are authorized to rely upon the testimony of the regulatory staff. . . ." (Emphasis supplied.)[6/] Accordingly, nothing in the regulations prevents a Licensing Board from performing the same task with respect to uncontested issues in contested proceedings as it does with respect to such issues in an uncontested proceeding, i.e., to "test the sufficiency of the information contained in the application and the record of the proceeding and the adequacy of the staff's review . . . ." This is precisely what the Board did in the instant proceeding. See Initial Decision, Para. 11.

Exception II.D.

The Saginaw Intervenors' cross-examination on specific subjects was indeed terminated on several occasions. However, their right to commence cross-examination was never improperly limited.

6/ The same misstatement of the language of Appendix A is contained in Exceptions II.A. and II.I. Intervenors also mistranslate the regulation's reference to "testimony of the Regulatory Staff and the Applicant, and the conclusions of the ACRS" as "the conclusions of the applicant, ACRS, and the Regulatory Staff."

This is one more allegation which must be viewed in the context of the record. Saginaw Intervenors refused to specify their contentions until such time as discovery had been completed (Tr. 67, 98). Following completion of discovery on radiological health and safety matters, Saginaw Intervenors were ordered to file a specification (Tr. 1385) and merely filed a not "exhaustive" statement of their proposed areas of cross-examination. (See "Applicant's Proposed Findings . . . ", dated August 15, 1972, Para. 28.) The hearing thus began with no specification of contentions from the Saginaw Intervenors as required by the applicable regulation then in effect (10 CFR §2.714). As a result of this, Applicant moved for dismissal of the intervention, detailing the defaults of Saginaw Intervenors and the bases for striking their intervention. (See Applicant's Letter to Board, dated June 19, 1971, with Attachment 1 and attached "Motion For Order Striking In Its Entirety The Statements Of Proposed Cross-Examination Set Forth In Saginaw Intervenors' Letter Dated June 10, 1971".)

Although it refused to strike the intervention, the Board did make it clear that before cross-examination would be allowed there would have to be some specification by the Saginaw Intervenors why a particular kind of inquiry ought to be made (Tr. 1383) and if, after preliminary questioning in an area by the Saginaw Intervenors, the Board felt that further questioning would not be fruitful, it would require that the Saginaw Intervenors justify continuation of cross-examination (Tr. 1524-25). In fact, the Board held 18 days of hearing on the radiological health and safety issues. Approximately 14 of these days were devoted to cross-examination by the Saginaw

Intervenors of Applicant, Staff and Dow witnesses. The Board only terminated cross-examination after it was clear, on the basis of a substantial amount of cross-examination, that further cross-examination would be unfruitful (e.g., Tr. 1894). Saginaw Intervenors were never required to make a prima facie showing to commence cross-examination on any subject. However, after being given an extensive opportunity in an area, they were sometimes required to make a showing as to why they should be permitted to continue with what appeared to be an unfruitful line of questioning (e.g., Tr. 1894). The conduct of the Board was perfectly proper and, if anything, unduly favored the Saginaw Intervenors.

Saginaw Intervenors erroneously argue that they, having failed to specify contentions or place any specific matters into contest, had an absolute right to continue discovery (see Saginaw Intervenors' letter of June 10, 1971) by cross-examination in the hearing. We continue to believe that they had no right to participate in the hearing at all and that their presence was permitted only through the Board's overgenerous exercise of its discretion. In any event, the Board's rulings limiting cross-examination were properly within the Board's duty "to take appropriate action to avoid delay, and to maintain order . . . including the powers to: * * * (e) Regulate the course of the hearing and the conduct of the participants." (10 CFR §2.718) The course of action chosen by the Board is in compliance with the Administrative Procedures Act. It has recently been ruled that a party in an administrative proceeding cannot simply fail to controvert the veracity of sworn statements and then succeed in a demand for the right of cross-examination. Ashworth Transfer, Inc. v. U.S., 315 F. Supp. 199 (D.C. Utah

1970). Additionally, unless material facts are in dispute in a hearing there is no right to cross-examination and confrontation. National Trailer Convoy, Inc. v. U.S., 293 F. Supp. 634 (Okla. D.C. 1968). The Saginaw Intervenors' right to cross-examine, if any such right existed at the time of the hearing, was clearly limitable by the Board in the reasonable exercise of its control of the proceeding.

Exception II.E.

The Board did not grant the Applicant's request that the burden of going forward with the evidence be placed on Saginaw Intervenors (see "Memorandum in Support of Applicant's Motion on the Order of Presentation of Evidence at the Hearing and For the Submission of Written Testimony and Documentary Evidence," dated December 4, 1970; Tr. 1894). The record clearly indicates that Applicant accepted the burden of proof and of going forward by offering its direct evidence at the commencement of the hearing and making its witnesses available for cross-examination. Had Saginaw Intervenors not chosen to cross-examine the Applicant or the Staff or to offer affirmative evidence, there would have been an uncontested proceeding and the Board could have proceeded to a decision in reliance on the testimony of the Applicant and the Staff.

The Saginaw Intervenors cite no instance where the Applicant failed to satisfy its burden of proof. Once a prima facie case satisfying such burden has been introduced, opposing intervenors have the burden to present to the Board some reason why the Applicant's evidence is not sufficient. (See "Memorandum in Support of Applicant's Motion on the Order

of Presentation of Evidence at the Hearing and For the Submission of Written Testimony and Documentary Evidence," dated December 4, 1970.)

Saginaw Intervenors' reliance on the quoted statement by Dr. Hall (p. 20) is ludicrous. Dr. Hall was merely informing Saginaw Intervenors that it was not the duty of the Board to satisfy the intervenors that the reactor was proper, but that each party to the proceeding, if it sought to prevail, had to convince the Board of the propriety of its position. This was made abundantly clear in the preceding statements made by Dr. Hall, particularly: "It is my understanding that it is the Board, these three members of the Board who have to make the finding. I don't know anything in the law, the rules and regulations that says that you have to be satisfied with the safety of this." (Tr. 1047, lines 20-24)

Exception II.F.

This exception appears to involve allegedly new information affecting the safety of the Plant. The facts alleged are neither clear nor complete, and the legal arguments are somewhat obscure. Nevertheless, we attempt below to identify the arguments made by the intervenors and show why those arguments are without merit and the exception should be denied in all respects.

1. The Initial Decision is neither incomplete nor invalid as a result of nonconsideration of the items of correspondence.

The Intervenors first appear to argue that the items of correspondence listed on p. 24 of their Exception constitute an amendment of the Staff's Safety Evaluation and Supplemental Safety Evaluation; and that therefore the

Initial Decision is incomplete and invalid because (a) the Staff's conclusions in these dockets are called into question, and (b) since these matters were not brought to the Board's attention, it either failed to review all questions or relied upon an incomplete Staff evaluation.

The Intervenors cite no support in the regulations or elsewhere for their novel theory of implied amendment of the Staff's Safety Evaluation, nor for the alleged obligation to inform the Board of peripheral correspondence, particularly correspondence which occurred after the closing of the record in this proceeding on June 15, 1972 (Tr. 8945).[7/] The Intervenors fail to understand the nature of the continuing role played by the Staff with respect to aspects of the proposed facility which are not properly in issue in this proceeding.

The items of correspondence listed as 1, 2 and 4 on page 24 of the Exception are letters to the Applicant from the AEC Regional Director of Regulatory Operations, Glen Ellyn, Illinois pertaining, respectively, to information obtained during inspection of other facilities as to necessity for documentation of valve wall thicknesses; inspection of the Midland

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7/ All seven items of correspondence cited on pages 27-28 of the Exceptions were dated after the closing of the record, as were, of course, the responses of the Applicant cited on page 28. In the intervenors' Motion and Supplement dated January 18, 1973 they cite as further support the letters contained in Appendix A to a letter from Regulatory Staff counsel dated January 11, 1973. Items 3-9 of such Appendix A also were dated after the closing of the record (the letter dated April 19, 1972 referred to in item 3 had been served on all of the parties at the time of submission to the AEC). As indicated in Appendix A, the letter constituting item 1 merely forwarded Draft Criteria on Industrial Security to the Applicant while the letter constituting item 2 merely forwarded to Applicant a letter to libraries on Local Public Document Rooms and requested that Applicant monitor the contents of the Local Public Document Room in Midland, Michigan.

plant site with respect to such matters as winterizing of structures and storage of materials; and inspection of facilities of Applicant's contractor where items are fabricated and stored. Such correspondence and replies thereto by the Applicant will continue through the procurement, construction, installation and testing period and even after receipt of an operating license. The Commission, prior to issuance of an operating license, will have to satisfy itself that the facility has been constructed in accordance with all applicable requirements. But these compliance matters have nothing to do with the issues involved in the issuance of a construction permit. Even if this correspondence indicated a violation of applicable requirements which had to be remedied -- and this correspondence did not -- such violations and their remedies would be pertinent at the time an operating license is under consideration, not at the construction permit stage of a proceeding.

Item 6 deals with a similar type of problem. It is described in a Directorate of Operations Bulletin (No. 72-3 of December 6, 1972) relating to failures of valve operators manufactured by a particular company between 1969 and mid-1971 and identified as "Limitorque Models SMB-00 and SMB-000." Applicant has not yet ordered valves for the Midland plant and will take the bulletin into account when it does so. The reference to these items of hardware constitutes a glaring example of an attempt by the Saginaw Intervenors to magnify a routine regulatory procedure into a significant and unresolved safety issue.

Items 3, 5 and 7 are letters to the Applicant from the Staff and typical of those sent to applicants and licensees generally. They

refer to concerns of an industry-wide nature: failures of non-category I equipment; fuel densification; and piping system breaks outside of containment. The letters request information regarding analysis and design which will have to be completed prior to consideration of issuance of an operating license for the proposed facility. They do not pertain to matters which must be considered and resolved prior to issuance of a construction permit.

Item 5, which relates to fuel densification and is the only letter discussed by the intervenors, is a good example of this category. The Saginaw Intervenors assert at page 27 of the Exceptions that, had they been aware of the letter, they could have moved to reopen the record or to have those issues considered by the Licensing Board, citing Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-86 (December 15, 1972). But ALAB-86 is clearly distinguishable from the present proceeding. ALAB-86 pertained to the issuance of an operating license; if intervenors therein had not been permitted to litigate the fuel densification question they would have been deprived of a forum in which to participate in the resolution of that issue. At the operating license stage, operation is imminent and thus the need to evaluate such concerns in order to protect the public health and safety becomes very important. At the construction permit stage, direct impact on the public health and safety is remote in time and such matters do not need to be resolved prior to issuance of a construction permit.

In the instant proceeding, if fuel densification is still a problem at the operating license stage, it will be addressed at that time. Obviously, the Staff has to be able to bring to an applicant's attention

at the earliest possible date matters which must be properly accomplished during the course of final design, without such matters becoming the basis for reopening the construction permit proceeding.

The Saginaw Intervenors completely mischaracterize the nature of item 5 when they state that, although they "were generally aware of the fuel densification problem in the summer of 1972, intervenors did not know that the Regulatory Staff had determined that fuel densification was an issue in construction permit hearings". The Staff has not so determined. It requested information in its letter of November 20, 1972, so that these matters could be determined in an expeditious and orderly basis but not because they are in any way related to the issuance of the construction permit or any matter involved in the construction permit proceeding. Obviously, Intervenors, who admit they knew of the fuel densification question in the summer of 1972, realized that it did not pertain to the issuance of a construction permit; otherwise they would have raised it immediately. It was not an issue in the summer and it did not become an issue in the winter. Nothing that the Staff did or failed to do indicates otherwise.

For the reasons set forth above none of the cited correspondence raises any issue which would make the Initial Decision incomplete or invalid.[8/]

[8/] Intervenors' Motion and Supplement dated January 18, 1973, cites as further support the letters contained in Appendix A to the letter from Staff Counsel dated January 11, 1973. Items 1 and 2 thereof have been discussed above. The letter from the Staff of June 30, 1972 referred to in item 3 simply concurs in the Applicant's request that consideration of authorization of continuation of limited construction activities be deferred until the Applicant requests resumption thereof. Items 4 - 7 duplicate items identified in intervenors' Exception II.F. Item 8 is the Applicant's response to Items 6 and 7. Item 9 merely transmits the construction permits.

To permit these intervenors to delay completion of this proceeding on such spurious grounds would completely frustrate the administrative process.9/

2. There was no prejudice arising out of any failure of any "obligation" to provide correspondence to intervenors.

The Saginaw Intervenors state they were deprived of their opportunity to contest matters set forth in the various items of correspondence because neither the Staff nor the Applicant provided copies to the Saginaw Intervenors.

That the items cited did not involve matters which would have been contestable in this construction permit proceeding is fully set forth above. Thus, the Saginaw Intervenors were not prejudiced by any failure to receive the cited correspondence.

Moreover, even if such matters were contestable, there was no violation of any "obligation" to Saginaw Intervenors which would permit them to be raised at this time.

In connection with their failure to receive correspondence, Saginaw Intervenors variously refer to "rules governing this proceeding"

9/ See Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514 (1944): "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence -- particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it -- always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

(p. 23), "Regulatory Staff's Obligation" (p. 27), "Regulatory Staff's failure to have executed its obligation" (pp. 27-28), and "Applicant and the Regulatory Staff were under an obligation" (p. 28). Nowhere, however, do Intervenors cite any Commission rule or regulation or any order in this proceeding that would impose an obligation upon the Staff or the Applicant to provide correspondence to intervenors, and with good reason. There is no such rule, regulation or order.

If the Saginaw Intervenors are referring to an "obligation" which arose outside of a rule, regulation or order, they have neither cited the source of such alleged obligation in the record nor described the scope of such obligation or its duration. To the extent that the Staff or the Applicant, in the absence of any rule, regulation or order, voluntarily and cooperatively provided correspondence to the intervenors in the course of the hearing, cessation of such voluntary practice upon the closing of the record[10/] would certainly not be unexpected. Saginaw Intervenors cannot argue that any of the items were kept secret from them since they admit that the documents were placed in the Public Document Room -- that is in fact where intervenors found them and where they could have found them shortly after dispatch any time that they had cared to look. In any event any deviation from an undertaking to provide correspondence to the Intervenors as a courtesy should not be the basis for drastic action.[11/]

10/ Although the items listed under 1 and 2 of Appendix A of the AEC letter of January 11, 1973, predated the closing of the record they are clearly innocuous and intervenors' non-possession thereof cannot be conceived of as prejudicial.

11/ Obviously, even more serious omissions can occur during the course of a long drawn-out proceeding such as this. Thus counsel for Dow filed letters with the Licensing Board pointing to four occurrences in which the Saginaw Intervenors failed to serve Dow with pleadings. See letters to Chairman Murphy from Milton R. Wessel, Esq., dated September 24, 1971 and September 14, 1972.

3. Intervenors provide no support for their allegation that the Staff has determined that the Babcock and Wilcox ECCS design is unsafe.

On page 25, intervenors allege that the Regulatory Staff had determined in the summer of 1972 that the Babcock and Wilcox ECCS design is considered to be unsafe, presumably because "if one postulates an accumulator line break between the check valve and the pressure vessel, the Commission's design criteria will not be met".

The intervenors cite no evidence, within or outside of the record, in support of this naked allegation, which should be summarily dismissed. To do otherwise would make a shambles of the orderly administrative process by permitting vague, unsubstantiated allegations to form the basis of re-opening of proceedings, to the prejudice of other parties.

Moreover, it should be noted that intervenors chose not to raise in this proceeding any issue with respect to whether the ECCS design satisfies the Commission's criteria. If the intervenors had a concern with respect to the particular issue of the accumulator line break they could have raised it during the proceeding.[12/] The intervenors cannot be permitted to ignore an issue during the course of the proceeding and raise it at this late date, regardless of any alleged new views of the Staff.

Finally, it should be pointed out that, as noted in the Initial Decision's discussion (Para. 42) of any new requirements that might arise out of the ECCS rule making hearing, none of the major components of the

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12/ That the accumulator line break is not a new issue to the intervenors is evidenced by the fact that counsel to the intervenors took part in the questioning of Babcock and Wilcox witnesses on this subject on May 22, 1972 in the ECCS rule making hearing (RM-50-1, Tr. 12,388-93).

ECCS will be shipped prior to the spring of 1974 without prior AEC approval unless the ECCS rule making is terminated earlier. Thus even if a change in the design should be required because of the results of the rule making hearing or of any further Staff review, there would be ample opportunity for such change to be implemented.

Exception II.G.

Subsequent to the last ACRS letter, September 23, 1970, no major redesign of the Plant was made. Saginaw Intervenors indicate that their concern is with the emergency core cooling system. Subsequent to publication of the Interim Acceptance Criteria, analysis of the ECCS was performed utilizing the approved B&W evaluation model. This analysis indicated no necessity for redesign and thus the design of the ECCS remained as it was on September 23, 1970. The radioactive waste treatment systems were modified to prevent liquid discharges and provide greater hold-up of gaseous wastes (see Applicant's Ex. 38-E). As this modification represented an improvement in waste control and resulted in no significant change in radiological health and safety analyses associated with the Plant, ACRS review was not necessary. Saginaw Intervenors have been fully aware of these facts for over a year now and have never raised this issue before in this proceeding.

Exceptions relating to the ACRS:
Exceptions II.H., II.I., and Part of II.A.

Exceptions II.H., and II.I. and part of Exception II.A. relate to the ACRS. Exceptions II.A. and II.H. essentially make the same contention: they argue that the Licensing Board should have permitted the intervenors

to conduct an examination into the probative weight of the favorable ACRS reports of June 18, 1970 and September 23, 1970 (Applicant's Ex. 4 and Ex. 5), through interrogatories (Exception II.A.) or otherwise (Exception II.H.).[13/]

Of course, the principal, if not the only reason for the desired questioning was the Saginaw Intervenors' wish to explore "the underlying basis for the ACRS conclusions . . ." (Exception II.A., p. 7) and because those intervenors "do not believe that one can show compliance with the Atomic Energy Act by admitting a letter into evidence with the express caveat that it is not being offered for the truth of what it says." (Exception II.H., p. 33).

The answer to these contentions has been most recently provided in Arkansas Power & Light Company (Arkansas Nuclear One (Unit 2)), ALAB-94, January 18, 1973, pp. 18-19, where the Appeal Board set aside a finding to the effect that an ACRS letter "is further proof" with respect to the health and safety issue relating to the facility there involved. In that proceeding the Appeal Board stated:

> "Contrary to the implication of this finding, the contents of an ACRS report cannot, of themselves, serve as an underpinning for findings on the health and safety

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13/ In the first paragraph of Exception II.H. (p. 33) the Saginaw Intervenors state: "moreover, the Board refused to issue a subpoena either for the attendance of someone to attest to the validity of the ACRS letter or for someone to be available for cross-examination as to its contents." With respect to one of the letters, this seems to imply that the intervenors were denied an opportunity to question whether it was in fact from the ACRS. If this implication is intended, it cannot be meant seriously. The Saginaw Intervenors clearly admitted that they had no question as to the provenance of that letter. (See Tr. 1541)

> aspects of licensing proceedings. It is quite true that Section 182b. of the Atomic Energy Act, 42 U.S.C. 2232(b), and a regulation of the Commission, 10 CFR 2.102, require both that the ACRS render a report on every docketed application for a construction permit or operating license and that the report be made a part of the record. But, since the persons responsible for the report (the members of the ACRS) are not subject to being examined by the parties or the Board with reference to its contents, the report cannot be treated as having been admitted into evidence for the truth of any of the statements therein. Rather, its introduction into the record must be deemed to be for the limited purpose of establishing compliance with the requirements of the statute. See, ALAB-78, supra, at p. 31. This being so, the report may not be assigned any independent probative value." (footnote omitted; emphasis supplied)14/

The Licensing Board in this proceeding has made it clear that its rulings were based on this precise view of the law. In the Initial Decision (p. 1, n.1) it states that the ACRS letters were admitted "for the sole purpose of showing compliance with the statute and not as evidence of the truth of any statement therein." (See also Tr. 1690; 1895-1896.)

Nevertheless, in Exception II.H. (p. 35) the Saginaw Intervenors cite two transcript references (Tr. 1893, 2102) to demonstrate that, contrary to what the Licensing Board has repeatedly stated, it "was indeed relying upon the fact of ACRS review as an indication that the reactor was safe." However, the discussion at those points in the transcript in fact related to the bases for the assumptions used by the Applicant and the Regulatory Staff to calculate doses. No one -- not even the Saginaw

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14/ In ALAB-94, above, the Appeal Board cited two earlier rulings to the same effect. Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78 (November 10, 1972), p. 31; and an order issued on January 26, 1972, pp. 2-5, in the ECCS proceeding (RM-50-1).

Intervenors' counsel -- even referred to the ACRS letters, or to the ACRS itself, at those points in the hearing.

Finally, with respect to the ACRS, Exception II.I. (p. 37) argues in the caption that the Licensing Board failed to rely upon the conclusions of the ACRS as required by 10 CFR Part 2, Appendix A, Section VI. The same point appears to be made in Exception II.A. (p. 7), where it is stated that the same regulation "required the Licensing Board to rely upon the conclusions of the ACRS on a matter not contested." (Emphasis supplied.) However, as we have pointed out in our discussion of Exception II.C., the regulation does not impose any such requirement upon Licensing Boards. The regulation merely provides that a Licensing Board is "authorized," not "required," to rely upon the review already performed by others and "need not evaluate those matters . . . not in controversy."

All of this misdescription of the regulations appears to be merely a preface to the main point of Exception II.I: that letters of the ACRS written in other contexts or with respect to other plants indicate that the ACRS later somehow changed its favorable judgment with respect to the plant here involved as expressed in its letters of June 18, 1970 and September 23, 1970. It is implied that this is particularly clear with respect to ECCS matters. See Saginaw Exceptions, pp. 39-40. So far as the ECCS issue is concerned, it is addressed below. The later letters are neither supplied nor quoted and are certainly not in evidence; and the Appeal Board cannot now consider the contention without acting on wholly unverified allegations. In any event, it seems hardly likely that the later ACRS letters referred to in Exception II.I. make any point other

than that the ACRS believes that efforts should be made to deal with problems identified by an ongoing technology. Certainly it is not alleged that they repudiate or recall the letters of June 18, 1970 and September 23, 1970.15/

Exceptions relating to the ECCS Interim Acceptance Criteria: Exceptions II.J., III.A. and III.B.

In Exception II.J. the Saginaw Intervenors contend that the Licensing Board invalidly foreclosed them from raising issues relating to emergency core cooling. However, these intervenors never raised any issue concerning the Midland plant's compliance with the Interim Acceptance Criteria (Tr. 5297), and they expressly recognize that their contention is precluded by the Appeal Board decisions to which they refer in their Exceptions (p. 44). Those decisions16/ are discussed in the Applicant's Reply of January 16, 1973 (pp. 11-13), to a similar exception filed by the Mapleton Intervenors.

In Exception III.A. the argument is made that the Licensing Board should have certified to the Appeal Board the issue of the validity of the

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15/ It should be noted that all of the ACRS letters referred to by the Saginaw Intervenors (p. 39) were written before the Initial Decision was issued on December 14, 1972. If they were really regarded as significant newly discovered evidence, the Saginaw Intervenors could have moved to reopen the hearing before that decision was issued. 10 CFR 2.718(j) Moreover, two of the letters were dated well prior to the time the Saginaw Intervenors filed their Proposed Findings of Fact and Conclusions of Law on September 15, 1972, yet that document did not make the argument made here. The Licensing Board did not have an opportunity to consider this argument, and it should not be considered here.

16/ Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2) ALAB-78 (November 10, 1972), pp. 19-21, Vermont Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-57 (June 20, 1972); Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-83 (December 4, 1972), pp. 19-21.

procedure pursuant to which the Interim Acceptance Criteria were adopted. However, Exception III.A. expressly recognizes that this issue has been resolved unfavorably to the position of the Saginaw Intervenors in Matter of Consolidated Edison Co. (Indian Point #2), ALAB-46 (March 10, 1972), pp. 2-3.

Finally, Exception III.B. seems to contend that the evaluation models used to establish compliance with the criteria, including the B&W model, are not in fact adequate to establish compliance with Interim Acceptance Criteria 3 and 4 and that, therefore, the Licensing Board should have considered evidence in addition to that involving the use of the evaluation model to establish such compliance. A simpler way of stating the keystone of the argument is that the evaluation models are inadequate. However, this is one of the issues included in the ECCS rule making proceeding. (RM-50-1)[17/] The authorities referred to above make it clear that it is not to be considered in individual licensing proceedings.

Moreover, as the Licensing Board noted in paragraph 42 of the Initial Decision, the Applicant's schedule for shipping major components to the plant site is such that even if the ECCS criteria or the evaluation models are modified as a result of the presently pending ECCS proceeding, the Midland Plant can readily be modified to meet any new requirements.

For the foregoing reasons, the conclusions reached by the Licensing Board in paragraphs 39-42 of the Initial Decision are correct, and Exceptions II.J., III.A. and III.B. are without merit.

17/ All of the intervenors in this proceeding are participants in the ECCS rule making proceeding. See Consolidated Request to Participate, etc. filed on behalf of the Consolidated National Intervenors on December 30, 1971 and the Hearing Board's Order of January 24, 1972 in Docket No. RM-50-1.

Exception II.K.

The application listed the research and development projects undertaken to confirm various aspects of Applicant's design or to confirm predictions of behavior (PSAR Applicant's Ex. 1-A, §1.5; PSAR Applicant's Ex. 1-B, Amendment 5, Item 1.1, pp. 1.1-1 to 1.1-11). The only one of these projects that Saginaw Intervenors pursued was iodine spray removal analysis, on which the Board made a specific finding referencing the extensive testimony presented on the subject (Initial Decision, Para. 34). The ACRS letters identified certain matters that could be resolved during construction. The Board specifically probed several of these areas at the hearing (Tr. 2478-81; Written Questions of Dr. Hall, June 1971, Tr. 2920-21). The Staff concluded that Applicant's programs were timely, were reasonably designed to accomplish their respective development objectives, would provide adequate information on which to base analysis of design and performance and should lead to acceptable design of the systems involved (Staff Safety Evaluation, p. 80). The Initial Decision in conformance with the applicable regulations clearly relies on the testimony of the Applicant and the Staff in regard to these uncontested matters. Again this is not a matter as to which Saginaw Intervenors have previously indicated concern. Furthermore, it was not covered in their proposed findings of fact and conclusions of law.

Exception II.L.

This exception deals with two legal matters which arose in the same context. The first relates to "comparative" or "best available" technology. During the course of the proceeding Saginaw Intervenors sought

to cross-examine witnesses for Applicant and Staff regarding the (1) comparative effectiveness of the iodine spray removal system of Babcock & Wilcox (the system being used in the Plant) and of the Westinghouse Electric Corporation and (2) the adequacy of the B&W spray system on the basis of Westinghouse reports which Westinghouse claimed to be proprietary. Saginaw Intervenors' counsel had acquired such reports in the Point Beach #2 proceeding (AEC Docket No. 50-301) under a protective order which did not permit their disclosure in this proceeding (Tr. 2050-2062).

The Board ruled that it did not need to evaluate the comparative effectiveness of the two systems or to determine the "best available technology" and that instead its duty was to determine that Applicant had established that its system would meet applicable AEC safety standards (Tr. 2114). This decision was upheld by the Atomic Safety and Licensing Appeals Board. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-35 (September 21, 1971), pp. 2-3. The decision has since been followed in Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78 (November 10, 1972) at p. 34. The Board there stated that:

> "The Commission's health and safety regulations require that a proposed reactor satisfy applicable licensing requirements. The fact that other systems might be used for a particular task in other reactors is not relevant."

Accordingly, to the extent that Exception II.L. deals with the comparative technology issue, it is without merit.

The second contention made in the Exception relates to proprietary protection accorded Westinghouse. As noted above, the Saginaw Intervenors

wished to compare the effectiveness of the spray removal systems of B&W and Westinghouse. Westinghouse objected to use of its documents to cross-examine into the adequacy of the B&W system on the grounds that there would be no way to protect the documents from disclosure to B&W and other competitors (Tr. 2060). The Board, after reading the Westinghouse reports, the B&W reports and articles from the available literature, and, without deciding whether the Westinghouse documents were in fact proprietary, concluded that the information in the Westinghouse reports was unnecessary for purposes of cross-examination (Tr. 2301). The Appeal Board upheld the Licensing Board's ruling on the mistaken impression that the latter had found the Westinghouse reports to be proprietary (ALAB-35, supra, at pp. 4-7). The Licensing Board therefore ordered Westinghouse to demonstrate the proprietary nature of its reports, which it did by affidavit of Robert A. Wieseman.

After hearing arguments from all interested parties, the Licensing Board concluded, on the basis of its own examination of the documents and the available literature, that the information contained in the Westinghouse reports had in fact been developed as a result of Westinghouse's own experimentation and expense; and on the basis of Mr. Wieseman's affidavit that the documents are customarily held in confidence by Westinghouse and not customarily made available to the public (Board Order of March 16, 1972).

The Board therefore found the documents to be in fact proprietary in accordance with applicable AEC regulations (10 CFR §2.744). Saginaw Intervenors, having shown no need for the documents in spite of several Board invitations to demonstrate such need (Tr. 2058, 2726-27, 2734-35), were not permitted to use them. Accordingly, the second contention contained in Exception II.L. is as devoid of merit as the first.

Exceptions II.M. and IV.H.

Exception II.M. (PP. 52-58) refers to "the requirement to state reasons and conclusions in an administrative decision . . . ." In this connection the exception cross-references Exception VI.H. (Sic, IV.H., pp. 82-96) in which authorities are cited to the effect that administrative decisions must contain statements of reasons, etc. Exception II.M. then enumerates 19 instances in which this requirement was allegedly violated "in the radiological portions of the Initial Decision." Exception IV.H. lists 38 instances in which the Initial Decision allegedly omits a required statement of reasons with respect to environmental matters.

The established rule was stated in Trustees of Columbia University in the City of New York, ALAB-62 (July 28, 1972), p. 2, as follows: "A decision meets the requirement of the Administrative Procedure Act, as well as the Commission Rules of Practice, if it sufficiently informs a party of the disposition of its exceptions."[18/] In Matter of Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-83 (December 4, 1972), p. 52, the test was stated in terms of whether the decision "makes clear its factual basis and sufficiently informs parties of the disposition of their contentions." (Footnote omitted)

The Initial Decision contains a full and wholly coherent discussion of the findings and conclusions of the Board and the reasons therefor, as well

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18/ Footnote omitted. In support of this statement of the law the Appeal Board cited NLRB v. Wichita Television Corp., 277 F.2d 597, 585 (10th Cir. 1960); North American Van Lines, Inc. v. U.S., 217 F.Supp. 837, 843 (N.D. Ind. 1963).

as the reasons the Board rejected those contentions of the Intervenors it understood to be raised.

The Licensing Board reviewed the entire record (Para. 79); however, in its decision it devoted "its attention to those aspects of the proposal which are new or unusual, to contested issues, and to those specific matters as to which we are required to make findings." (Para. 11). Paragraph 12 summarizes the "aspects of the Plant of primary interest . . ." and the "contested radiological issues." The remainder of Part II of the Initial Decision discusses each of those matters and the Board's findings or conclusions with respect to them as well as the reasons therefor.

In Part IV of the Initial Decision the environmental benefits are identified (Paras. 46, 49, 71-75), and the need to balance them against environmental costs is recognized (Paras. 43-45). Paragraph 54 summarizes the environmental "disbenefits claimed by the Intervenors . . . ." It is clear that in paragraphs 43 through 78 of the Initial Decision the environmental costs, as well as the contentions of the Intervenors are identified and considered and the conclusion is reached that the benefits outweigh the costs. Finally, in paragraph 79 the Licensing Board states that,

> "All the proposed findings and conclusions submitted by the parties which are not incorporated directly or inferentially in this Initial Decision are herewith rejected for the reason that there is not reliable, probative, and substantial evidence in the record to justify their acceptance, or because they are unnecessary to the rendering of this Initial Decision."

The Initial Decision thus clearly states the basis of the Board's reasoning and findings and conclusions and for its disposition of those of the Intervenors' exceptions and contentions it was able to discern. The fact that the Saginaw Intervenors list 57 statements with which they disagree or which

they would have had the Board consider in greater detail does not in any way weaken this conclusion. Indeed, such a list comes with particularly poor grace from parties who did not file "proper proposed findings or conclusions . . . ." (Para. 9). Although they did not bother to specify their contentions adequately, the Intervenors expect the Licensing Board to be far more specific in its decision than the law requires.

Exception II.N.

The matter of production of Staff and ACRS documents during the radiological portion of the proceeding was determined by the Atomic Safety and Licensing Appeal Board in its September 3, 1971 decision (ALAB-33). The documents involved were privileged under applicable regulations. The Appeal Board reviewed the documents involved and concluded that it would not be in the public interest to release them to Saginaw Intervenors. In light of the vast amount of material made available to Saginaw Intervenors and their total failure to utilize the material to prepare specific contentions or an affirmative case of any sort, it is clear that the unavailability of the subject documents did not handicap Saginaw Intervenors (See "Applicant's Proposed Findings . . .", August 15, 1972, Para. 28). They had all of the facts relating to the Plant and their only motive for seeking these documents was to explore the thought processes of the Staff.

On page 52-5 of this exception, Saginaw Intervenors indicate that the Appeal Board rulings were based on the conclusion that disclosure of the documents would interfere . . communication between the Staff and utilities. There is no basis for such a statement. The decision makes it clear that the documents involved are internal working papers and that the complete and candid communication to be protected is among members of the Staff.

Saginaw Intervenors also express frustration regarding discovery of documents from Dow Chemical Company. On December 3, 1970, Dow made available to Saginaw Intervenors a list of 51 documents in Dow's possession. Saginaw Intervenors never filed any motion for production of Dow documents, much less a motion supported by a showing of good cause. Having failed to make any reasonable effort to acquire such documents, they cannot now complain that such documents were illegally withheld from them.

At the top of page 52-7, Saginaw Intervenors complain that at the environmental phase of the hearing, the Board let their request for documents sit for some five months after it was filed on September 30, 1971 and then shortly before trial ordered them to recast their request. This is a misstatement of the record. The Board's decision on that request, rather than being on the eve of trial, March 27, 1972, as alleged by Saginaw Intervenors, was made on December 22, 1971. The Board's December 22, 1971 Order found the request "burdensome on its face." In spite of the burdensome nature of the request, Applicant did not object to a large number of the requests and volunteered to make such documents available to Saginaw Intervenors in the same manner as had been done with documents in the radiological portion of the proceeding (Tr. 5047). Saginaw Intervenors never took advantage of this offer.

Saginaw Intervenors also neglect to deal with the real subject of the Order of March 27, 1972, namely, their total failure to avail themselves of the opportunities for discovery offered by the Board. The Board's Order of December 22, 1972 had set specific dates for the filing of interrogatories and requests for document production. As more fully discussed in Applicant's Proposed Findings of Fact, Paragraphs 150 and 151, Saginaw Intervenors on February 6, 1972 refused to file any detailed discovery requests and the

Board in its Order of March 27, 1972 found it necessary to chastise Saginaw Intervenors for their failure to make any good faith effort at discovery.

Exceptions III.A. and III.B. (See response to II.J.).

Exception III.C.

This exception is largely incomprehensible as a result of Saginaw Intervenors' apparent misunderstanding of the type of safety analysis performed on a plant. The maximum accident analyzed is an accident substantially in excess of the accident referred to in this exception. Rather than assuming operation of the emergency core cooling system to prevent melt-down, the Staff's design basis accident (DBA), which is the same as Applicant's maximum hypothetical accident (MHA), assumes in accordance with 10 CFR §100.11 (a)(fn. 1) a hypothetical accident with results not exceeded by any accident considered credible. This is equivalent to a substantial melt-down of the core with subsequent release of substantial quantities of fission products (Tr. 1946-50, 1867-68). The performance of degraded safety systems and barriers is then analyzed to determine if the resultant doses to the public are within the limits prescribed by 10 CFR Part 100 (See "Applicant's Proposed Findings. . .", August 15, 1972, Paras. 110-112; 114-118).

Saginaw Intervenors' interpretation of the 10 CFR Part 50, Appendix A, definition of LOCA, does not agree with the Commission's. Since promulgation of this regulation the Staff has consistently required compliance with this regulation by analysis of the spectrum of breaks possible in the piping composing the reactor coolant system. The consistent practice of the AEC and its Staff indicates that it was never intended that this definition be interpreted in the manner proposed by Saginaw Intervenors. Proper respect should

be given to this practical administrative construction of provision by an agency of its own regulation. (See PRDC v. Electrical Workers, 367 U.S. 396, 408 (1969)).

Contrary to Saginaw Intervenors' assertion that the safety analysis assumes that all engineered safeguards work, the analysis requires the assumption that only half of the active engineered safeguards are available during the accident (Tr. 2320). As to analysis of simultaneous MHA in both reactors, 10 CFR Part 100 makes it clear that it is not necessary to evaluate such an occurrence if the reactors are sufficiently independent that an accident in one will not initiate an accident in the other. 10 CFR §100.11(b). Applicant and Staff took this into account in evaluating the design of the Plant (See "Applicant's Proposed Findings of Fact . . . ", August 15, 1972, Para. 119). Similarly, analysis of simultaneous accidents at Dow and the Plant were not analyzed because the two facilities will be sufficiently independent that an accident at one facility would not initiate an accident at the other (See "Applicant's Proposed Findings of Fact . . . ", August 15, 1972, Para. 120). Neither of these matters were raised by Saginaw Intervenors' Proposed Findings of Fact. It is clear that Applicant, Staff and Board gave adequate consideration to the concerns apparently contained in this garbled exception.

Exception III.D.

In this exception two contentions relating to evaluation of the Plant site appear to be made. The first relates to deviations from TID 14844 on the basis of assumptions contained in Staff Safety Guide No. 4. The second contention relates to the adequacy of the emergency plans.

(1) Extensive testimony was presented to demonstrate that Staff Safety Guide No. 4 was the basis for analysis, to identify each instance where deviation was made from the calculations contained in TID 14844 and to demonstrate the basis for each deviation from TID 14844 (See "Applicant's Proposed Findings of Fact . . .", Paras. 110-112, 113-118). It again appears that Saginaw Intervenors have ignored the record. Applicant is unable to fathom the connection that Saginaw Intervenors see on p. 53-13 between the emergency core cooling system and accident assumptions used for site evaluation for purposes of 10 CFR Part 100. The presence of the ECCS was not utilized to justify deviation from TID 14844. The purpose of an ECCS is to prevent any core melt-down. The releases utilized for the safety analysis are equivalent to those from a substantial melt-down (Tr. 1867-68). Therefore, it must be assumed that any ECCS present has failed to perform and that no credit has been taken for performance of the ECCS. Since the ECCS complies with the Interim Acceptance Criteria, there is no basis for assuming its failure and thus the analysis performed is extremely conservative. Although Saginaw Intervenors did not agree that the releases utilized were equivalent to a substantial melt-down, they refused to produce any affirmative evidence pursuant to the Board's invitation (Tr. 1890-93).

(2) With respect to emergency plans, Saginaw Intervenors mischaracterize both the regulatory requirements and the record. As stated in the introduction to Appendix E to 10 CFR Part 50,

> "Procedures used in the detailed implementation of emergency plans need not be described in the preliminary . . . safety analysis report."

Part II of Appendix E provides in regard to emergency plans that what is necessary at the PSAR stage is sufficient information "to assure compatability of proposed emergency plans with facility design features, site layout,

and site location with respect to access routes, surrounding population distributions, and land use." This was the criterion utilized by the Board (Para. 32). Extensive testimony was heard on this matter and there is clear support in the record for the Board's conclusions (See "Applicant's Proposed Findings . . .", Paras. 134-137).

This exception assumes that the plan must provide for evacuation of the City of Midland, although there is no evidence in the record indicating any conceivable need to evacuate the City of Midland. So far as evacuation of the low population zone is concerned, it is only necessary that employees walk at most a distance of 3/4 mile, with over 80% having less than 1/4 mile to walk (Applicant's Ex. 22, Appendix K, Attachments 7 and 8). Saginaw Intervenors indicate that if evacuation of the low population zone took more than two or three hours, the dose calculation permitted by Part 100 would be exceeded. This is clearly incorrect. The two-hour dose calculation pursuant to Part 100 is for the dose received at the exclusion area boundary. 10 CFR §100.11(a)(1). There are no members of the public or employees of Dow or Dow Corning regularly located within the exclusion area boundary (Initial Decision, Para. 15). Thus, even assuming that the 144 Dow employees having more than 1/2 mile to walk to the boundary of the low population zone could not make it in two to three hours, they would not get a calculated dose in excess of the guidelines of Part 100 in the event of an MHA since the calculated dose at the exclusion area boundary does not exceed the guidelines of Part 100 (Applicant's Ex. 22, Appendix K, Attachments 7 and 8; Staff Safety Evaluation, p. 65, and Errata, dated June 21, 1971).

This exception indicates no basis for questioning the propriety of the Board's decision. The record fully supports the conclusions of the Board concerning the adequacy of the emergency plan.

Exception III.E.

In this exception the Saginaw Intervenors contend (pp. 53-21 - 53-23) that the Licensing Board failed adequately to analyze the effects of synergism both with respect to radiological health and safety and environmental issues. The Initial Decision notes that allegations relating to both types of adverse effects were made by the intervenors (Para. 64), and "[a]lthough repeatedly invited to submit evidence in support of their claims of synergism, Saginaw Intervenors never did so." (Para. 65) Mapleton, Applicant and the Staff did submit evidence on synergism. The Licensing Board concluded that

> ". . . the [Mapleton] evidence fails to establish that, at the levels of concentration involved here, there will be any interaction which would tend to increase radiation effects from the Plant, or the chemical effects from Dow. And when one considers the testimony of Applicant and Staff witnesses, the evidence is overwhelming against a finding of 'synergism'." (Para. 66)

This finding was wholly justified by the record. The testimony of three highly qualified witnesses presented by Applicant (Tr. 8795-8909) and of one witness presented by the Staff (Tr. 7466-7569) was, in substance, that there would be no synergistic effect (See e.g., Tr. 7564, 8896).

Exception III.F.

This exception contends that the Board erroneously concluded that Applicant has adopted a quality assurance and quality control program

consistent with the requirements of 10 CFR Part 50, Appendix B. Additionally, it contends that Applicant is incapable of, and cannot be relied upon to, perform an adequate quality assurance and quality control program.

AEC regulations require that the application describe a quality assurance program to meet the requirements of 10 CFR Part 50, Appendix B (10 CFR §50.34(a)(7)). This the application did (PSAR Applicant's Ex. 1-A, Appendix B; PSAR Applicant's Ex. 1-C, Amendment No. 6). The Staff stated that the program met the requirements of 10 CFR Part 50, Appendix B (Staff Safety Evaluation, pp. 72-73). Although Mr. Grier of the Compliance Division (now Directorate of Regulatory Operations) indicated that the Compliance Division had not satisfied itself that Applicant had met Appendix B to 10 CFR 50, this was clearly in the context of review of the details of implementation of the program rather than the adequacy of the program itself. He also indicated that the overall review of Applicant's compliance had taken place on the Compliance Division's second inspection (Tr. 4578; Tr. 4579-80), at an early stage in development, and that a significant amount of work had been done on the manuals since that time (Tr. 4582). Saginaw Intervenors fail to allege any defect in the program described in the application.

The Saginaw Intervenors attempt to make much of Mr. Grier's testimony. However, they ignore the fact that both he and Mr. Gower (also of the Compliance Division) testified that the discrepancies found at Midland were typical problems that would normally be found in relation to construction activities (Tr. 4608-09).

In addition, the extensive testimony contained in the record of the proceeding does not support the contentions of the Saginaw Intervenors regarding implementation of the program. (See "Applicant's Proposed Findings . . .", Paras. 128-133.) In regard to Saginaw Intervenors' allegation that the evidence indicates that Applicant is incapable of and cannot be relied upon to implement a quality assurance program, it is important to consider the following facts. Mr. Grier testified that quality control and quality assurance at the Palisades Plant was acceptable (Tr. 4559; See also Palisades testimony accompanying Applicant's letter to Board, dated July 30, 1971). The testimony, also, indicated that the quality assurance programs of Applicant had been substantially expanded and revised since completion of construction of the Palisades Plant (Tr. 4236-4241; written testimony of Dr. Bernsen, dated July 29, 1971, pp. 1-2, 14-17).

However, all this is beside the point. In this proceeding, what the Board had to determine was whether the program met the requirements of the regulations. The Board had the quality assurance program before it and properly judged that the program did meet the requirements of Appendix B to 10 CFR Part 50 (Para. 28).

The Board in addition properly ruled that enforcement of the detailed implementation of the program was the responsibility of the Directorate of Regulatory Operations and that it must be assumed that it would properly perform its function. (See PRDC v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 416-17 (1961); In the Matter of Arkansas Power and Light Company, [Arkansas Nuclear One (Unit 1)] ALAB-94 (January 18, 1973) at pp. 10-11.)

Exception IV.A.

In this exception the Saginaw Intervenors contend that the Licensing Board failed to independently review all issues of an environmental nature whether contested or uncontested. The exception represents a basic misunderstanding of the environmental review mandated by NEPA and a misreading of the cases cited in the exception.

At page 55, the exception concedes that (1) the Staff is not the decision-maker and (2) that the ASLB, in this instance, is the decision-maker. The exception further argues that the "Staff" is not "the Agency" because it is not empowered to make any "ultimate findings" with respect to environmental matters. The exception, at page 57, then states:

> "The authorities are legion (even at this early stage in the development of NEPA) that the agency (and, hence, here the Licensing Board) must take the initiative and do its own analysis even to the point of doing independent research."

The contention is frivolous.

The organization of the AEC makes the functions of the Staff and the ASLB, with respect to NEPA, significantly different. The Staff performs a technical analysis of the impact of the facility and makes recommendations to the decision-makers in the AEC. The Staff thus provides the technical back-up for the ASLB.

Based on the Staff analysis, the decision-maker, in this case the ASLB, must in a contested proceeding, " . . . determine . . . whether, in accordance with Appendix D of Part 50, the construction permit should be issued as proposed."19/

19/ 10 CFR 2, Appendix A, Section V(f)(1).

Section 11 of Appendix D of Part 50 requires in part, that:

> "11. In a proceeding for the issuance of a construction permit for a production or utilization facility described in paragraph 1, the atomic safety and licensing board will (a) determine whether the requirements of section 102(2) (C) and (D) of the National Environmental Policy Act and this appendix have been complied with in the proceeding, (b) independently consider the final balance among conflicting environmental factors in the record of the proceeding for the permit with a view to determining the appropriate action to be taken, and (c) determine, after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, whether the permit should be issued, denied, or appropriately conditioned to protect environmental values.
>
> "In a contested proceeding for the issuance of a construction permit for such a facility, the Atomic Safety and Licensing Board will also (d) decide any matters in controversy among the parties and (e) determine whether, in accordance with this appendix, the construction permit should be issued as proposed."

The Board is informed of the NEPA considerations by the Staff's Final Environmental Statement ("FES") which includes comments from Federal and State agencies and the public. The ASLB must determine whether it has been fully informed by the FES of the environmental factors involved in the case and then must make a decision based on the facts in the record and independent of the Staff's conclusions or recommendations based on such facts.

The Calvert Cliffs case does not require "independent research" with respect to the environmental considerations disclosed by an adequate FES. The Calvert Cliffs decision, while not requiring duplicative NEPA review, does require an independent review of Staff proposals by the Board. Thus, the court said:

> "Of course, consideration which is entirely duplicative is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function."20/

Significantly, however, the court also said:

> "The word 'accompany' in Section 102(2)(C) must not be read so narrowly as to make the act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the 'detailed statement,' be considered through agency review processes." (Emphasis added) (Footnote omitted)21/

NEPA does not require the Board to duplicate the analysis of the Staff respecting the environmental effects of the Plant. What is forbidden is blind acceptance of the Staff's conclusions. However, the Licensing Board may give such weight, as evidence, to the Final Environmental Statement as it deems necessary and proper. What the cases require to be independently arrived at by the Board are the conclusions to be drawn from the Final Environmental Statement and the other evidence in the record.

Greene County v. FPC, 455 F2d 412, 3 ERC 1595 (2nd Cir. 1972) is consistent with the above analysis. There, the court said:

> "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again act as umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the

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20/ 2 ERC at 1785.

21/ 2 ERC at 1784-85.

> applicant's statement will be based upon self-serving assumption. (Footnotes omitted)[22]

Thus, the objection of the court in Greene County was not that the FPC decision-maker had failed to make an independent balance of NEPA considerations. Rather, the failure of the agency was in not independently gathering the facts upon which the hearing examiner could base such balance.[23] In the instant proceeding, the Staff, acting for the agency, has prepared a detailed statement of environmental factors independent of the submissions of Applicant, and the Board has considered such environmental factors independent of the Staff's recommendations.

The court in Greene County expressed approval of the AEC regulations implementing the Calvert Cliffs decision in the following language:

> "Though we conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement, we are of the view that it did not seek improperly the advice of other agencies on the basis

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22/ 3 ERC at 1599-1600. The FPC staff had submitted written testimony in the agency proceeding. However, the court said:

> "It is clear to us that this testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes." 3 ERC at 1600.

23/ This was also the failure of the agency in EDF v. Hardin, 325 F. Supp. 1401, 2 ERC 1425 (DCDC 1971) which is cited in the exception. At 1426 the court said:

> "Section 4332(C) requires the initiating agency to prepare and distribute an environmental impact statement concerning proposed programs. This statement is to contain the results of the research conducted during the planning phase together with adequate documentation. The statement must be sufficiently detailed to allow a responsible executive to arrive at a reasonably accurate decision regarding the environmental benefits and detriments to be expected from program implementation."

> of PASNY's application. Section 102(2)(C) compels the agency to seek this advice before preparing its statement. Section 102(1), however, directs that 'To the fullest extent possible' regulations should be interpreted and administered in accordance with the policies of NEPA. In this regard, it would be instructive for the Commission to consult the rules of the Atomic Energy Commission, 36 Fed. Reg. 18071 (Sept. 9, 1971), promulgated after the decision in Calvert Cliffs charged the AEC with a 'crabbed interpretation of NEPA [which made] a mockery of the Act.' 449 F.2d at 117. The Atomic Energy Commission, although it still requires an applicant to submit its environmental report, prepares a draft report of its own in advance of seeking the advice of other federal agencies. Then, on the basis of comments received from these agencies and all interested parties, it prepares its final detailed statement, which is offered in evidence at a contested hearing." (Footnote omitted) (Emphasis in original)[24/]

It is clear from the Initial Decision that the ASLB critically considered all the facts brought before it by the Staff and the other parties. It rendered a decision based on those facts, and that decision constituted an independent balance of NEPA considerations.

Exception IV.B.

The thrust of Exception IV.B. (pp. 59-63) appears to be that the ASLB erred in not quantifying certain costs and benefits of the proposed plant. There is much discussion in the exception, with case citations, of the requirement of NEPA that a cost-benefit analysis of the "proposed action" be performed. Significantly, however, the portions of the exception dealing with the failure of the Board to quantify all costs and

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24/ 3 ERC at 1601.

benefits is unsupported by any legal citation. Indeed, intervenors concede that quantification of environmental values is not always possible or necessary (Exception IV.B., note 18) and the courts agree. Thus, in City of New York v. U.S., 344 F. Supp. 929, 939, 4 ERC 1646 (E.D. NY 1972), the court, per Friendly, J., said:

> "The State nevertheless seems to argue that because the Commission's analysis was couched in terms of alternatives and evidenced some uncertainty as to the precise environmental consequences of abandonment [of railroad operations], it falls short of the level of refined and systematic considerations required by NEPA, cf. Calvert Cliffs', supra, 449 F.2d at 1113. We disagree. Because of the very nature of this case, the Commission had to grapple with a large number of factors which are not readily reduced to certainty . . . . But the Commission's report evidences no uncertainty as to its ultimate conclusion that in light of all relevant factors, the abandonment 'will not have a significant environmental impact.'"25/

It is clear that the Staff has balanced the costs of the proposed Midland Plant against its benefits (FES, XI.B). Moreover, Paragraph 45 of the Initial Decision indicates that the Board considered whether quantification of costs and benefits was proper, and concluded that quantification of the many diverse values was unwarranted.26/ The Board has stated that

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25/ See also EDF v. Corps of Engineers, 325 F.Supp. 749, 2 ERC 1260, 1266 (E.D. Ark. 1971), where the court said: "The Court is not here stating that an environmental impact statement, as required by §102(2)(C), would be inadequate simply because the defendants and the Council on Environmental Quality had not identified and developed the methods and procedures to quantify such values. The NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had an environmental impact while awaiting compliance with §102(2)(B). It would suffice if the statement pointed out this deficiency. The decisionmakers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria."

26/ Intervenors would strain the meaning of Paragraph 45 to state that because the Board has not quantified costs and benefits and produced a magic ratio, it has failed to do a cost-benefit balance.

an arithmetical balance was not possible, not, as intervenors imply, that a cost-benefit balance has not been done. Thus, the Board, in paragraphs 46-70 of the Initial Decision, balanced costs and benefits of the proposed action, concluding in Paragraph 70:

> "As noted above, the Board is satisfied that the costs outweigh the benefits."

Exception IV.C.

In this exception the Saginaw Intervenors contend that it was error not to treat Dow Chemical Company as a joint applicant and that error also resulted because "no environmental analysis was made of the environmental effect of selling or not selling process steam to Dow Chemical." (p. 63)

The first argument appears to be based on the fact that the Plant would not have been located at Midland but for the agreement to produce process steam for Dow (Para. 76), because of the arrangements concerning the supply of water to the Applicant by Dow, because Dow is constructing the steam supply pipes outside the Plant and because Dow allegedly "had an active hand in designing not only the steam supply system but the radioactive monitoring system." (Saginaw Exceptions, p. 64.) Even if accurate, none of these alleged facts would have operated to make Dow a joint applicant. Consumers Power Company is constructing the Plant, has full control of it and is solely responsible to the appropriate authorities for its construction and operation and for the services the Plant will supply to the Company's customers generally, including Dow. Intervenors cite no authority to support their argument; nor can they.

The second argument is also without merit and is based upon a distortion of fact. The fact that the Plant would not have been located where it will be but for the desire to serve one large customer is suddenly transmuted into "a decision to situate a plant in Midland for the sole purpose of granting one industrial user an obvious economic advantage." (Saginaw Exceptions, p. 65; emphasis in original.) From this it is argued that the Licensing Board had an obligation, which it failed to meet, to consider "the totality of the environmental consequences of the sale of process steam to Dow . . . ." (Id, p. 67) What would constitute an adequate consideration of "the totality of environmental consequences" is never made clear.

The fact is that the Licensing Board was particularly sensitive to the radiological health and safety and the environmental consequences of the dual-purpose nature of the Midland Plant as well as its proximity to Dow. See, e.g., Initial Decision, Paras. 12, 14, 16, 46, 54, 56, 64, 65, 66, 76. Among the costs and benefits it specifically considered were "the elimination of the air pollution from Dow's present fossil-fuel plant . . . " (Para. 46), insulating the process steam from radiation and monitoring Dow's products from coming into contact "with contaminated steam . . . " (Para. 56), the alternatives of location of the Midland Plant "elsewhere and the independent supply of steam to Dow by some other source . . . ", and the possibility that Dow might build a fossil steam generating plant, thus increasing pollution, if the Midland Plant should not be built at the proposed site (Para. 76).[27]

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[27] As regards Saginaw Intervenors' citation and discussion of the staff's "Guide To the Preparation Of Environmental Report For Nuclear Power Plants, August, 1972", it must be pointed out that it is only a proposed guide and has been subjected to severe criticism. Even were it effective, it would not be a regulation but only a guide; it would not therefore be a requirement as alleged by Saginaw Intervenors.

What the Board refused to do was to consider "the environmental benefits from closing down some or all of Dow's operations." (Para. 76) The record is replete with references to the fact that if the nuclear plant is not built, Dow will continue production at Midland using its present fossil plant or new fossil plants. (e.g., FES XI.A.2.) Products are being produced now and products will continue to be produced whether or not the nuclear plant is ever constructed. Evaluation of the environmental effects of Dow's products is not a reasonable course of action. The substitution of one source of steam for another does not create any different environmental effects from Dow's products.

In short, it considered all of the reasonably proximate consequences of the construction of the Midland Plant but refused to consider the environmental consequences of Dow's continuation of operations. This view of the limit of its functions was wholly reasonable and is consistent with the [illegible] approved interpretation of the requirements of NEPA. National Resources Defense Council v. Morton, 458 F2d 827, 3 ERC 1558, 1561, 1562, 1564 (D.C. Cir. 1972); EDF v. Corps of Engineers, ___ F2d ____, 4 ERC 1721, 1725 (8th Cir. November 28, 1972); see also Applicant's Reply of January 16, 1972 to Mapleton Intervenors' Exceptions, pp. 21-22. In reality, the contention about the failure to consider the "totality of the environmental consequences of the sale of process steam to Dow . . .," comes down to a complaint about the Licensing Board's refusal to embark upon an environmental investigation which would have guaranteed that this proceeding would, for all practical purposes, never come to an end.

Exception IV.D.

The record on this matter is discussed above in the Introduction and in detail in "Applicant's Proposed Findings . . .", Para. 152. Mr. Cherry was warned four months ahead of the hearing, when the ECCS rule making was just commencing, that he must make adequate preparation to handle his case load (Board Order, January 6, 1972): Instead of requesting a few weeks' accommodation he sought an indefinite adjournment (Mr. Cherry's letter of April 15, 1972). However, during much of the Midland environmental hearing, the ECCS rule making proceeding, which was Mr. Cherry's purported reason for being unavailable for the Midland hearing, was in adjournment or was being handled by Mr. Cherry's co-counsel and he was elsewhere (Letter of April 15, 1972; Record of ECCS Rule Making Proceeding, Dkt RM-50-1, May 30-June 16, 1972).

Saginaw Intervenors' absence must be viewed as their own choice or the choice of their attorney, and the Board's ruling was the only possible one in the circumstances. The Board's attitude toward Saginaw's counsel and his claim concerning other commitments was more than patient. A holding to the contrary by this Board on this record would be a precedent which would go far to remove any effective control over hearings by Atomic Safety and Licensing Boards.

Exception IV.E.

The gist of this exception is that the Licensing Board improperly subordinated environmental values to an assumed need for the production of electricity, i.e., "that the Initial Decision applied a test which gave overriding weight to the production of electricity and need for power and

treated environmental values as a stepchild." (p. 74) Three sentences selected from the 25 pages which the Initial Decision devoted to the discussion of the environmental issues in this proceeding constitute the sole support advanced for the contention. They do not in fact support it.

Since the contention ignores what was said in the 25-page Board discussion of environmental issues, it may be useful to summarize that discussion. What the Initial Decision first did was to identify the long-term benefits which would be derived from the plant -- the production of electricity (Paras, 46-49) and the elimination of pollution from Dow's fossil fuel steam plant and other sources (Paras. 46-49, 71, 75). The Board then expressly recognized the need to balance or weigh those benefits against the long-term environmental costs. (Paras. 43, 44, 45) The bulk of Part IV of the Initial Decision is primarily devoted to this task. Paragraph 54 summarizes the "disbenefits claimed by Intervenors . . . ." These are further identified and considered in detail in the Initial Decision. See Paras. 51 (terrestrial ecology); 52 (bird and animal life, as well as flora); 56 (process steam contamination); 55-61 (environmental impact of radioactivity); 62, 78 (aquatic environment); 64, 67 (synergism); 67, 74 (accidents); and 68 (decommissioning). And in Paragraph 70 the Licensing Board concludes that "the benefits outweigh the costs." The foregoing procedure fully met the obligations imposed upon the Board by NEPA and Appendix D of Part 2 of 10 CFR.

Perhaps the real complaint of the Saginaw Intervenors is that the Licensing Board allegedly determined the need for power "without analyzing the purposes for [which] such assumed electricity would be used or whether such electricity would engender adverse environmental circumstances" (p. 73).

However, what the Saginaw Intervenors ignore is Paragraph 48 of the Initial Decision in which the Board concluded that the record supports no finding other than the postulated demand for electricity "is made up of normal industrial and residential use and, it is, in our view, beyond our province to inquire into whether customary uses being made of electricity in our society are 'proper' or 'improper'." The Board concluded that its function was so limited "absent some evidence that Applicant is creating abnormal demand . . . ."

This was a wholly appropriate position for the Board to take. The evidence which established the need was overwhelming. That evidence is summarized in Paragraph 47, which notes that it was "not seriously challenged . . ." by the intervenors; and we need not repeat it here. It is in the light of this record that the Licensing Board made the statement in Paragraph 49 about which the Saginaw Intervenors complain:

> "It would require some evidence of special environmental damage to outweigh the benefit and there is no suggestion of such special damage in the record."

It is therefore clear that what is being discussed is the record in this proceeding. In context, the language of Paragraph 49 simply does not support the accusation that environmental values were treated "as a stepchild."

Saginaw Intervenors also single out language in Paragraph 53 of the Initial Decision which states that

> "Given our prevailing values there is no way in which the loss of flora and fauna <u>in a site of this kind</u> can outweigh the benefits of supplying needed electricity." (Emphasis supplied)

This language follows a discussion, beginning at Paragraph 53, "of the cost of the damage to terrestrial ecology at the site." (Emphasis supplied) In the course of the discussion of the site the Board finds that "there is nothing unique about it . . ." with respect to plant or wildlife species and that, if not used for this plant, it will probably "be used for some other industrial, or possibly residential, development . . . ." (Para. 51) Thus the Board's comparison of the need for electricity as against "the loss of flora and fauna in a site of this kind . . ." also fails to support the existence of a general bias against environmental considerations.

Finally, Exception IV.E. quotes the last sentence of Paragraph 73 concerning the use of atomic energy for the production of electricity. The same sentence was referred to in Mapleton's Exception 5. Applicant's Reply (see pp. 13-15) to the Mapleton exceptions describes the context in which the sentence was used and demonstrates that the language neither expresses nor implies an attitude which improperly favors electric production as against environmental considerations.

Exceptions IV.F. and IV.J.

These exceptions contend that the Board blindly relied on AEC safety regulations (i.e., 10 CFR Part 20, 10 CFR Part 50 and 10 CFR Part 100) in its environmental evaluation of the Plant and that the Board erred by not performing a NEPA evaluation of the safety regulations themselves. These exceptions misrepresent the procedure which the Board followed and misconceive the Board's duty under NEPA.

The Board's responsibility in regard to the AEC safety regulations is to satisfy itself on the record before it that the Plant as

proposed will comply with such safety regulations. This the Board did in the radiological health and safety portion of the proceeding.

In the environmental portion of the proceeding, its review has little to do with these safety regulations, as such. The environmental review is for the purpose of analyzing the impact of the proposed Plant on the environment, assuming compliance with the safety regulations. Thus, after having satisfied itself that Part 20 would be complied with, the Board then recognized its additional NEPA-imposed duty to "take into account the environmental impact of radiation releases even within the standards." (Initial Decision, Para. 73, p. 55) Likewise, in regard to 10 CFR Part 50, accidents were individually analyzed and the potential releases of such accidents and the probabilities of such accidents evaluated in making a judgment as to their environmental effect (Initial Decision, Paras. 67 and 74).

Footnote 26a (p. 96b), offered by Saginaw Intervenors to support Exception IV.J., alludes to the hypothetical accident evaluated pursuant to 10 CFR Part 100. This accident is an incredible event utilized for the purpose of assuring that location of the Plant at the proposed site will create no unreasonable risks to the health and safety of the public. However, an accident having the effects of the accident analyzed for purposes of 10 CFR Part 100 is a Class 9 accident, and therefore of such low probability of occurrence that the environmental risk is extremely low (See response to Exception V.A.; FES p. VI-3). AEC does not require environmental

analysis of an event of such low probability[28/] and such analysis can serve no useful purpose in the proceeding.

There is no validity to this exception. The Board correctly made a review of the environmental impact of the expected operation and potential accidents associated with the proposed plant.

Exception IV.G.

This exception contends that no consideration was given to the alternative of not constructing the Plant. But that is exactly what the consideration of the need for the project and analysis of its costs and benefits is all about. Obviously, if benefits exceed costs and the alternative is the best means of meeting the power needs, as the Board found with respect to this plant, the proper alternative is to proceed with the project.

As discussed in our response to Exception IV.E., the Initial Decision (Para. 48) adequately addresses Saginaw Intervenors' contention that the possibility of cutting back on the uses of power should have been considered.

Exception IV.H. (See Exception II.M.).

Exception IV.I.

This exception complains of the failure of the Final Environmental Statement (FES; Staff Ex. 6) to "disclose reliable scientific fact and opinion contrary to the positions taken by the agency . . ." and of the failure of the Licensing Board "to rectify the error."

28/ AEC document "Scope of Applicant's Environmental Reports with Respect to . . . Accidents", September 1, 1971.

There was in fact no error. The basic law on the question is contained in the first "Cannikin" decision, Committee for Nuclear Responsibility Inc. v. Seaborg, 463 F 2d 783, 787; 3 ERC 1126 (D.C. Cir. 1971), where the court held that an environmental impact statement should set

> "forth the opposing scientific views and should not take the arbitrary and impermissible approach of completely omitting from the statement . . . any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects. Only responsible views need be included and hence there is room for discretion on the part of the officials preparing the statement . . . ." (Emphasis in original, footnote omitted)

An examination of the FES discloses that it fully meets this test. The document is a comprehensive one. It covers a wide range of subjects and these are systematically discussed and considered. Among them, for example, are "Adverse Effects that Cannot be Avoided" (FES, pp. VII-1, et seq.) and "Reliability" (Ibid. p. XII-6).29/ Nevertheless, Exception IV.I. (p. 95) states that the FES fails to consider the "[r]eliability of generation of electricity from nuclear power plants . . . ." In addition the FES contains, in Appendix E, 183 pages of comments on the Draft Detailed Statement, including the comments of all of the opposing intervenors in this proceeding.

A close examination of Exception IV.I discloses that it begins with a generalization about "full disclosure" and then merely lists some items which it claims are not included in the FES. But it never addresses the question whether the allowable area of "discretion on the part of the officials preparing the statement . . ." has been abused, and clearly there has been no such abuse.

29/ The discussion of reliability contains references to information and literature comparing the reliability of nuclear and fossil fuel plants. The data considered is not favorable to nuclear plants in all respects.

The FES was admitted in evidence. Had the intervenors wished to controvert or supplement it, they would have had the opportunity to do so through the introduction of direct evidence or cross-examination. The Licensing Board would then have had before it evidence to support modification of the FES on the basis of "findings and conclusions different from those in the detailed statement . . . ." See 10 CFR Part 50, App. D, section 11. Having elected not to appear at the environmental hearing, Saginaw Intervenors should not be permitted to object to alleged inadequacies at this appellate stage of the proceeding.

Exception IV.J. (See Exception IV.F.).

Exception V.A.

This exception alleges that there is no basis for assuming that Class 9 accidents have a very low probability and that therefore the Board was in error in not considering the environmental effects of Class 9 accidents. To the contrary, the record in this proceeding indicates that in the opinion of the Staff, accidents with more severe consequences (i.e. Class 9) have a probability of occurrence so small that their environmental risk is extremely low (Final Environmental Statement, Staff Ex. 6, p. VI-3). The Staff concluded that where one took into account the probability of occurrence, the annual potential radiation exposure to the population due to accidents is well within naturally occurring variations in natural background radiation (Final Environmental Statement, Staff Ex. 6, p. VI-3). No evidence to the contrary was introduced by any party and no party sought to cross-examine Staff witnesses on this matter. The record amply supports Paragraphs 67 and 74 of the Initial Decision.

The Saginaw Intervenors seek to challenge the conclusion of the Board on the basis of various documents not in the record. Obviously, the Board is not permitted to rely on such material. Saginaw Intervenors cite two documents as indicating the incorrectness of the Board's decision (1) the Draft Environmental Statement in the ECCS Rule Making Dkt. RM-50-1, dated December 8, 1972, and (2) the draft "The Safety of Nuclear Power Reactors and Related Facilities," WASH-1250, dated December 1972.

However, the conclusions of both of these documents, rather than supporting Saginaw Intervenors' contentions, are in complete agreement with the conclusions in the record of this proceeding. The ECCS Draft Statement provides:

> "Because of the extreme precautions taken to forestall and prevent Class 9 events, the probability of their occurrence is so small that the associated environmental risk is extremely low. This conclusion is derived from the safety reviews of nuclear power plants that are undertaken by the AEC in licensing these facilities. The conclusion that accidents in this category are sufficiently low in probability that their impact on the environment need not be considered is based on the technical judgment of the AEC staff rather than on statistical methods. This judgment has been the result of continuous studies by the staff, the nuclear industry, AEC contractors, the ACRS, and others in this country and abroad, especially over the last 5 years." (p. 8)

WASH-1250 does not indicate that the probability of a Class 9 accident is 10^{-3} per year as alleged by Saginaw Intervenors. Table 6-9 is based on a study referenced by the AEC. It indicates that the probability of a primary coolant pipe rupture is 10^{-3} per year. This is not a Class 9 accident. It is a Class 8 accident since it would involve only loss of coolant (10 CFR Part 50, Proposed Annex to Appendix D). It is obvious that such a rupture may involve a small or a large pipe and may range from a relatively

small accident having no off-site consequences to a quite large accident having some off-site consequences. This table does not permit one to make any judgment about the probability of a major LOCA (which is a Class 8 accident), except that its probability is something less than 10^{-3} per year.

Additionally, Saginaw Intervenors totally ignore the text of WASH-1250 which puts Table 6-9 in context (See pp. 6-40 to 6-45). As indicated in Table 6-8, p. 6-42, and on p. 6-43, the probability of a very minor release to the environment (numerically comparable to normal annual releases from a reactor) is about 10^{-3} per year, one in one thousand. The probability of significant releases is much smaller. It is further indicated that the risk is about one fatality from 370 contemporary 1000 MWe plants during their normal service life of 30 years, based on a risk of 9×10^{-5} per year per plant (WASH-1250, p. 644). It is further stated that these calculations are clearly an overstatement of the risk (WASH-1250, p. 6-44). As stated by the Board, the probabilities are "vanishingly small." (Para. 74)

The Initial Decision correctly reflects the record in this proceeding and Saginaw Intervenors' references do not support the conclusions they attempt to draw nor do they cast doubt upon the conclusions of the Initial Decision.

Exceptions V.B., V.C. and V.D.

These three exceptions are largely duplicative of other exceptions, cite almost no specifics in their support, and where citatiors are provided, they are generally incorrect. The first point made is that the Board failed to take into account Applicant's ability to obtain electricity from neighboring utilities and that neither the Initial Decision nor the hearing contain

any discussion of this alternative (p. 105). This is simply not so. The Initial Decision specifically states that "outside sources are unavailable," (Para. 70) and references consideration given to the interconnection with Canada (Para. 47). In addition to thorough discussion by Applicant and Staff in their respective filings, extensive testimony on this subject was presented by the witness from the FPC. (Tr. 8070-71; 8076-78; See "Applicant's Proposed Findings . . .", Para. 280).30/

The proposal to reduce the demand or analyze the uses to be made of electricity is responded to in response to Exception IV.E., supra.

Exception V.E.

This exception contends that the Board failed to consider whether Applicant's advertising artificially stimulated demand.

Saginaw Intervenors cite two reasons why the Board should have considered this issue. The first, that the Board has an independent obligation to review all issues whether contested or uncontested, is refuted by our response to Exception IV.A. The second is that the PSAR and financial records and data in the record allegedly demonstrate that Applicant has spent "a significantly high percentage of its available funds" for advertising or promoting electricity. However, the Intervenors do not

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30/ Saginaw Intervenors state in footnote 30 at the bottom of page 105 that "It is, of course, well known that Applicant is integrated into the Mid America Intertie Network (MAIN)." Applicant must express its chagrin at being the last to know. Applicant is under the distinct impression, as expressed in its Supplemental Environmental Report, the Staff's Final Environmental Statement and testimony at the hearing, that it was, and is, part of the East Central Area Reliability Counsel (ECAR). (ASER, Applicant's Ex. 38F-1, §5.3; FES Staff Ex. 6, p. X1-1; Tr. 8070-71)

reference any specific facts allegedly contained in those documents; and Applicant has found nothing in the documents to support the Intervenors' statement. In fact, during the course of the hearing, Applicant's counsel informed the Board

> "that the Applicant does not advertise for the purpose of increasing or promoting the use of electricity. We are under an order from the Public Service Commission of the state of Michigan in that regard, I am advised. In any event, we don't do it." (Tr. 7997)

Had they possessed evidence to the contrary, the Intervenors could have introduced it at the hearing. This is another example of making allegations of fact before this body which should have been made and considered at the hearing. Moreover, the allegation is incorrect.

Exception V.F.

This exception takes exception to the various rulings of the Appeal Board regarding the treatment of the environmental effects of the nuclear fuel cycle in individual reactor proceedings. In the Matter of Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-56 (June 6, 1972) and ALAB-73 (October 11, 1972); In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-60 (July 11, 1972). No further discussion of this subject appears necessary.

Exception V.G.

The AEC is not required to evaluate and analyze state water quality standards. The duty of the AEC was as set forth in the Calvert Cliffs' decision:

> "Certifying agencies do not attempt to weigh that damage against opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh

> the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action - the agency to which NEPA is specifically directed."
>
> * * *
>
> "Water quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage." Calvert Cliffs' Coordinating Comm. v. AEC, 449 F2d 1109, 1123, 1125, 2 ERC 1779 (D.C. Cir 1971)

Thus, having received the certification, the duty of the AEC was to evaluate the effects, costs and benefits of the Plant regardless of the Michigan standards and certification. The certification merely says the state is satisfied. The AEC duty was not to determine whether the state should have been satisfied, but to determine whether the AEC is satisfied in light of its cost-benefit analysis.

The Initial Decision and the record clearly indicate that this is what was done (Para. 63; "Applicant's Proposed Findings of Fact . . . ", Para. 177, 187-195). The Board states that "discharges . . . are significantly lower than those permitted by the [state] standards for thermal releases and total dissolved solids." (p. 48) Additionally, the Staff required Applicant to reduce its discharges of phosphates (Initial Decision, Para. 78) and to place limitations on its release of chlorine (Final Environmental Statement, Staff Ex. 6, p. iv; Tr. 7391-7394; Staff letter of July 24, 1972). Extensive analysis of the effects of nonradioactive discharges apart from the State Water Quality Standards was made by the Staff

and in the Final Environmental Statement and at the hearing (Final Environmental Statement, Staff Ex. 6; See "Applicant's Proposed Findings of Fact . . . ", Para. 187-195). Reliance was not placed on the State Water Quality Standards. An independent evaluation was made of the costs resulting from the proposed discharges.

Exception V.H.

The Board's finding regarding the environmental and other costs related to decommissioning (Para. 68) is based on an extensive record which meticulously analyzed the alternative methods of decommissioning and the steps undertaken in decommissioning (See "Applicant's Proposed Findings . . .", Paras. 230-235). As in any case where a task of the magnitude being considered has not previously been done, judgment about it must be made on the basis of extrapolation from similar smaller tasks that have been performed. Obviously it is not possible to detail the exact methods, costs and effects that will occur as a result of decommissioning a plant 35 to 45 years from today. However, extensive testimony based on analysis of experience at plants that have been decommissioned was considered and judgment made on the basis of that experience. (Tr. 6893-97, 8222-40).

Exception V.I.

Applicant has thoroughly responded to the substance of this exception in its response to an essentially identical contention made by Mapleton Intervenors (Mapleton Intervenors' Exception 10).

Exceptions V.J. and V.K.

With respect to the first of these exceptions, it is true that Saginaw Intervenors raised the question of nuclear plant reliability in their contentions. The Final Environmental Statement took such contentions into account (FES, Staff Ex. 6, p. XII-6) and the witness for the Federal Power Commission also discussed the relative availability of nuclear plants and fossil-fired plants (Tr. 8085, 8086). Both of these sources indicated that reliability of nuclear plants and fossil plants are roughly equivalent although experience with large nuclear plants was quite limited. There being no evidence to the contrary, the Board properly concluded that nuclear and large fossil units could be evaluated as alternatives without explicit reference to reliability factors. There is no factual support for Saginaw Intervenors' contention of unreliability of nuclear plants.

Exception V.K. alleges that the Board failed to consider effects on economic operation of withdrawal of government subsidies of uranium fuel or depletion of uranium supplies during the life of the plant. Again these are matters that were mentioned with no citation of basis in Saginaw Intervenors' contentions. Applicant does not know what alleged subsidies are referred to by Saginaw Intervenors. Mapleton Intervenors asked about subsidies at the hearing but the testimony demonstrated that the purported subsidies did not exist. (Tr. 7034-38, 7924-36). It was hardly necessary to mention the subsidy point in the Initial Decision where there was no contrary evidence and no indication of intervenors' concern (see proposed

findings of Saginaw and Mapleton Intervenors, September 14, 1972 and September 15, 1972, respectively).

Extensive evidence demonstrated the continued availability of uranium and the economics relating to its availability. (ASER Applicant's 38F-1, §5.2-3; FES Staff Ex. 6, p. XII-5; Tr. 6587-94, 7920) This testimony clearly demonstrated the availability of uranium over the life of the plant. The Board's conclusion that nuclear fuel had a significant cost advantage over coal or oil was clearly made on the basis of the evidence that uranium would be available and that there were no significant subsidies of nuclear fuel (Para. 71).31/

The record clearly discloses consideration of these matters on the record and the Board's Initial Decision gave them the attention they deserved.

Exception V.L.

Exception V.L. states, in part, that:

> "The legal issue presented by this Exception is whether the procedure inherent in Section 50.35 is still valid given the requirements of NEPA to analyze and come to a judgment in advance of irretrievable commitments of resources."

Section 50.35 of the Commission's regulations permits certain issues with respect to the plant to be left for resolution during construction. Intervenors argue that by allowing construction to proceed, the Commission's regulations violate NEPA with respect to items left unresolved pursuant to 10 CFR 50.35.

31/ In fact, footnote 24 (p. 54) of the Initial Decision specifically indicates the Board's consideration of the fuel availability matter.

As intervenors point out, the two-step procedure reflected in 10 CFR 50.35 has been expressly approved by the Supreme Court. PRDC v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396 (1961). What the Saginaw Intervenors contend is that the enactment of NEPA rendered the two-step process invalid.[32/] The argument apparently is that NEPA requires an environmental judgment to be made "with respect to a completely designed facility" (p. 123) rather than with respect to one for which the principal architectural and engineering criteria have been identified, but for which the detailed design is still to be developed and approved. However, ongoing detailed design is essential for a project as large as a nuclear power plant which takes four to six years to construct -- even after its principal features have been identified.

The Saginaw argument was specifically rejected in EDF v. Corps of Engineers, 348 F. Supp 916, 938-939, 4 ERC 1409, 1423 (N.D. Miss. 1972), where the Corps' environmental impact statement for the proposed Tennessee-Tombigbee Waterway was attacked because it failed to disclose methods "of disposing of 260 million cubic yards of excavated dirt in a way that will not adversely affect the environment." As with respect to the instant proceeding the evidence showed that various proposals were being considered to deal with the problem. The court stated:

> "The evidence convinces the court that environmental design arts are being employed in the project's advanced engineering stages which will lessen the potential adverse effects of the spoil. Contrary to

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32/ Intervenors argue in footnote 32 (Exceptions p. 125) that PRDC no longer applies because there is no longer a mandatory hearing at the operating license stage. This argument is specious, since a hearing may still be had at that stage by any person whose interest may be affected. Atomic Energy Act of 1954, as amended, §189a; 10 CFR 50.58(b).

> opinions expressed by some of plaintiffs' witnesses, it would be wholly impracticable to require that the ultimate environmental design for the disposition of this material be included in the EIS. To rule otherwise would require an agency to compile virtually complete engineering data merely to prepare an impact statement. An undertaking of such magnitude is beyond the scope of § 102(2)(C)."

In addition, the concept of a "completely designed facil..." assumes that no changes in detail would be made during the construction period, thereby even foreclosing those which might represent safety or environmental improvements. This is exactly the result which the Supreme Court wished to avoid in the VRDC case where it said (at 408):

> "The Commission, furthermore, had good reason to make this distinction. For nuclear reactors are fast-developing and fast-changing. What is up to date now may not, probably will not, be as acceptable tomorrow. Problems which seem insuperable now may be solved tomorrow, perhaps in the very process of construction itself."

Exception VI.A.

This exception argues that the Commission's rules and regulations permitting issuance of a construction permit prior to the final decision are illegal.

The principal ground for this exception appears to be NEPA. Saginaw Intervenors cite no reason for holding the rules and regulations unlawful under NEPA. They argue that no substantial commitment of resources should be made prior to the making of environmental decisions. However, environmental decisions have been made. The regulations provide an opportunity for a party to seek delay of the immediate effectiveness of the Initial Decision (10 CFR §§2.764(a)) If good cause is shown for such delay,

the Initial Decision will not become immediately effective and the construction permit will not issue. There is nothing contrary to NEPA in this arrangement.

Their other ground is that the APA does not permit the challenged procedure. Saginaw Intervenors cite the whole of the APA without designating any particular section. We have been unable to locate a provision supporting this contention in the APA. Additionally, the reasons cited above in opposition to Saginaw Intervenors' first ground make it clear that Intervenors have been provided full procedural rights.

Exceptions VI.B., VI.C. and VI.D.

These exceptions constitute a loosely related collection of charges of impropriety, allegedly consisting of bias on the part of the Licensing Board (Exception VI.B.), prejudicial mingling of promotional and regulatory authority (Exception VI.C.) and improper ex parte communications (Exception VI.D.).

The charge of bias (made in Exception VI.B.) is in substantial part a restatement of some of the arguments contained in the "Motion and Supporting Argument to Require the Presiding Officer to Recall and Revoke the Initial Decision and to Declare the Atomic Safety and Licensing Board Biased" which the Saginaw Intervenors filed on January 17, 1973. Oppositions to the Motion were filed by the Applicant and Dow on January 17, 1973, and by the Staff on January 23, 1973. We believe that these filings clearly demonstrate that the charge of bias is without merit, insufficient and untimely. However it does not appear to be necessary to repeat their contents at this time, since the matter is now before the Licensing Board. See the

Appeal Board's Memorandum and Order of January 11, 1973 in this proceeding.[33/] ALAB-91.

Nevertheless, we do note that the Saginaw Intervenors mobilize, as alleged additional "evidence" of bias, actions of the Licensing Board with which they are in disagreement and to which they have already taken exception. For example, the Saginaw Intervenors charge, on page 133, that the Licensing Board did not make an independent review of uncontested environmental matters. This is identical to Exception IV.A. The contention made on page 135 that the Licensing Board did not conduct a cost benefit analysis with respect to radiological regulations is also made in Exception IV.F. Likewise, the contention made on page 140 that Dow Chemical Company and Consumers Power Company should have been treated as "joint Applicants" is identical to Exception IV.C.

We have already addressed these exceptions and demonstrated that the Licensing Board dealt with them correctly. They cannot be evidence of bias.

Exception VI.C. is a mutant of the argument that the AEC is unconstitutionally constituted because both regulatory and promotional powers have been conferred upon it. That argument is made in Exception VI.E., and we deal with it in our discussion of that exception. In Exception VI.C. the Saginaw Intervenors additionally contend that this "separation was breached by the

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33/ The Saginaw Intervenors have raised the matter with this Board on the theory that it is an "exception to a denial of" their January 17, 1973 motion. They had stated in that motion that they would treat it "as denied for purposes of appeal . . ." if it was not decided by January 19, 1973. (see Saginaw Exceptions, pp. 129-130) They continue to take that position despite ALAB-91.

Licensing Board below." Two examples are advanced to support this argument. One relates to the last sentence of paragraph 73 of the Initial Decision, which relates to the Atomic Energy Act and the production of electricity. We have discussed this sentence in connection with Saginaw's Exception IV.D. and in greater detail in our January 16, 1973 Reply (see pp. 13-15) to the Mapleton Exceptions. The other example relates to the report[34/] to the Administrative Conference to which the Saginaw Intervenors' basic claim of bias is related. Neither reference supports the conclusion that the Chairman of the Licensing Board or its other members regarded their function as promotional.

Exception VI.D. should be read in conjunction with the "Motion and Supplement" which the Saginaw Intervenors filed on January 15, 1973.[35/] Exception VI.D. argues from the fact that Chairman Murphy consulted with others in preparing the report that an illegal ex parte communication has occurred. The "Motion and Supplement" of January 15, 1973 (pp. 4-5), extends this argument into a charge that a distribution of the report by Roger C. Cramton, Chairman of the Administrative Conference of the United States, to Atomic Energy Commission Chairman Schlesinger, Director of Regulation Muntzing, and others (including counsel for Saginaw), "represents a violation of the Commission's ex parte rules." The argument is "that Mr. Cramton, acting on behalf of Chairman Murphy, a member of the Licensing Board, has communicated and

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34/ That report, as revised, was later published as a law review article. See Murphy, "The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup De Grace?", 72 Colum. L. Rev. 963, 987-988 (1972).

35/ Their request to file this document was granted by the Appeal Board's Order of January 23, 1973 in this proceeding.

solicited the advice of persons within the Commission which solicitation is prohibited by the Commission's ex parte Rules of Practice."

The Commission's rules, however, only prohibit communications regarding substantive matters "at issue." 10 CFR §2.780(a). And 5 U.S.C. §554(d), cited by the intervenors, relates only to consultation with respect to "a fact in issue." Obviously, the article was neither a "matter at issue" nor "a fact in issue" in this proceeding.

Exception VI.E.

Exception VI.E. argues that intervenors have been denied due process of law in this proceeding because the AEC has both "promotional" and regulatory responsibility with respect to the nuclear industry. The exception is an unsupported broadside against the entire AEC administrative process.38/

However, no cogent legal argument with respect to the separation of such duties is advanced by intervenors in the exception; nor is factual support presented for the allegations contained in the exception. In any event, the issue of the separation of the "promotional" and "regulatory" duties of the AEC is now pending before the United States District Court for the District of Columbia in Conservation Society of Southern Vermont, Inc., et al. v. AEC, et al. (DC DC No. 19-72).

38/ Bayside Timber v. Board, 3 ERC 1078 (Cal. Ct. App. 1971), the only authority cited by intervenors, is inapposite. There the delegation itself was constitutionally defective because no standards for the exercise of the delegated authority were set out. Moreover, the regulatory authority was delegated by the state legislature to private parties with a direct pecuniary interest in the regulation. No such delegation to private parties is present in the instant situation.

There is no reason to consider the contention in this forum. Indeed, this Board has no authority to do so. 3 DAVIS, ADMINISTRATIVE LAW, §20.04 (1958; 1970 Supp.)

Exception VI.F.

Saginaw Intervenors state that the Board in Paragraph 79 of the Initial Decision "expressly states that the Board has review [sic] and relied upon the entire record . . . 'including the limited appearances statements . . . .'" Yet the word "relies" never appears in Paragraph 79. The Board merely states that it has reviewed the entire record, including limited appearance statements. The purpose of the limited appearances is to permit members of the public to express their views on the proposed plant and raise any questions which concern them. (10 CFR Part 2 Appendix A, III.(b), V.(b)(4)) Obviously, the Board cannot rely on their statements as evidence but should give consideration to any legitimate questions which are raised. Saginaw Intervenors do not cite one instance in which a limited appearance statement is the basis for a conclusion in the Initial Decision.

Exception VI.G.

Saginaw Intervenors argue that 10 CFR §50.11 and 50.12 are invalid because they permit fabrication of major portions of the reactor prior to receipt of a construction permit. Applicant is somewhat confused by this exception since the cited sections have nothing to do with the fabrication of equipment prior to receipt of a construction permit. However, for purposes of our response, we will assume that Saginaw Intervenors' intended reference was 10 CFR §50.10(b)(2) which does permit procurement and manufacture prior to receipt of a construction permit.

This whole exception is a challenge to a Commission rule (10 CFR §50.10(b)(2) and perhaps 10 CFR §50.55a) without any attempt to comply with applicable Commission regulations relative to such challenges. Since this challenge was previously made in this proceeding (see "Motion of Saginaw Valley Nuclear Study Group, Et Al . . . .", dated August 2, 1971, and responses thereto) the challenge is governed by the Commission's Memorandum In the Matter of Baltimore Gas and Electric Company (Calvert Cliffs Plant), Dkt. Nos. 50-317 and 50-318 (August 8, 1969) rather than by 10 CFR §2.758. As such they have totally failed, as they did when they first filed the motion, to make the requisite showing.

In any event, their argument in support of this exception is without merit. Basically, it is to the effect that 10 CFR §50.10(b)(2) is illegal because fabrication of components is a commitment of resources prior to completion of a NEPA review. Saginaw Intervenors fail to point out that NEPA does not merely speak of "commitments of resources" but of "any irreversible and irretrievable commitments of resources" pursuant to a federal action significantly affecting the quality of the environment (§102(c)). Parts and components not yet built into a plant do not represent an irreversible and irretrievable commitment of resources nor does the manufacture or procurement of such parts constitute an action significantly affecting the environment.

Exception VII.A.

In Exception VII.A., Intervenors argue that even assuming the validity of the construction permits, the Licensing Board should have required that certain additional conditions be incorporated in the construction

permits. They also contend that the Board should maintain continuing jurisdiction over the case to supervise compliance with such conditions during construction. The exception states:

> "Accordingly, Intervenors except to the construction permit, unless each condition noted in the Initial Decision, the Safety Evaluation, and all ACRS letters are reflected as a condition of the construction permit."

The Intervenors identify only ambiguously the conditions which they suggest should have been included in the construction permits. Since they did not choose to suggest specific conditions as part of their proposed findings and conclusions, their sudden concern as to the conditions which were, in fact, included should clearly be ignored.

However, to the extent that this exception does identify conditions which could properly be included within the construction permits they are already reflected in the permits within one or more of the following provisions thereof:

(1) The initial portion of Paragraph 2, which provides:

> "This permit shall be deemed to contain and be subject to the conditions specified in Sections 50.54 and 50.55 of said regulations, is subject to all applicable provisions of the Act, and rules, regulations, and orders of the Commission now or hereafter in effect."

(2) Paragraph 2.C., which provides:

> "This construction permit authorizes the applicant to construct the facility described in the application, and the hearing record, in accordance with the principal architectural and engineering criteria set forth therein."

(3) Paragraph 2.E., which specifically includes all of the construction permit stage provisions of Paragraph 78 of the Initial Decision, including the surveillance and monitoring program

which incorporates the program referred to in Paragraph 69 of the Initial Decision.

The Intervenors have not identified the deficiencies in these provisions.

To the extent the Intervenors refer to the ACRS letters they mischaracterize the intent and purpose of the letters as they relate to a construction permit. The ACRS letters do not require that unresolved items of nuclear safety which are to be resolved during construction be inserted as conditions in the construction permit. If the recipient of the permit does not resolve such items he will, of course, not be able to make the demonstrations necessary for the issuance of an operating license. (10 CFR §50.57(a)(3) and (b))

Footnote 35 to Exception VII.A. requests that a condition with respect to the NEPA cost-benefit balance at the operating license stage be imposed on the construction permit. No such condition is necessary or proper. The Applicant and the AEC must perform a proper NEPA cost-benefit analysis at the operating license stage or no operating license may issue. What is to be included and excluded in such analysis is a matter of law and, thus, no condition on the construction permit is necessary to assure that such cost-benefit analysis will be proper under NEPA.

Intervenors request the Licensing Board to maintain continuing jurisdiction over the case on the highly questionable assumption that the AEC staff and every other division of AEC, except the board, will not perform its lawful duties and enforce the terms of the construction permits. The Supreme Court in the PRDC case, supra, said:

> "We cannot assume that the Commission will exceed its powers, or that these many safeguards [in the Act] will not be fully effective." (pp. 415-16)

The Appeal Board has recently rejected the assumption that the Staff will not perform its duties under the Act. In the Matter of Arkansas Power and Light Company, (Arkansas Nuclear One [Unit 1]) ALAB-94 (January 18, 1973) at pp. 10-11. Such an assumption should similarly be rejected by the Appeal Board here.

There is no reason to modify the construction permits in any manner.

CONCLUSION

For the reasons stated above, the Applicant submits that the exceptions of the Saginaw Intervenors should be denied.

Respectfully submitted,

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Dated: January 29, 1973

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

IN THE MATTER OF	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	and 50-330
(Midland Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "Brief of Applicant, Consumers Power Company, in Opposition to Exceptions Filed by the Saginaw Valley Intervenors to the Initial Decision of the Atomic Safety and Licensing Board", dated January 29, 1973, have been served on the following in person or by deposit in the United States mail, first class, this 29th day of January, 1973.

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