12-10-74

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

BRIEF OF CONSUMERS POWER COMPANY IN
OPPOSITION TO MOTION TO CLARIFY ALAB-123

On November 20, 1973, the Saginaw Valley Nuclear Study Group, et al. ("Saginaw") filed a motion, addressed to the Atomic Safety and Licensing Appeal Board and entitled "Motion to Clarify ALAB-123 in Light of Memorandum and Order of the Commission in Niagara Mohawk Power Corporation Issued Under Date November 6, 1973" ("Saginaw Motion"). The Saginaw Motion was based on a purported conflict between one of the issues decided by the Appeal Board as part of its final order disposing of this proceeding[1] and the memorandum and order of the Commission in Niagara Mohawk Power Corporation (Nine Mile Point, Unit No. 2), Docket No. 50-410, dated November 6, 1973.[2] On November 26, 1973, the Appeal Board issued an order referring the Saginaw Motion "to the Commission for

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1/ ALAB-123, RAI-73-5, 331 (May 18, 1973).

2/ Hereinafter "Nine Mile Point 2".

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such disposition as it may deem appropriate."[1/] And on November 27, 1973, the Commission requested the participants in the Midland proceeding to submit their views concerning the Saginaw Motion. In accordance with that request, this brief in opposition to the motion is submitted on behalf of Consumers Power Company, to which the construction permits here involved have been issued.

Petitions for review of the Commission's action embodied in ALAB-123 are now pending before the United States Court of Appeals for the District of Columbia. Accordingly, we demonstrate below, first, that the Appeal Board's doubts concerning the timeliness of the Saginaw Motion were well founded. Exclusive jurisdiction of the matter is vested in the court, and, under the governing statutes, as well as its own regulations, the Commission is without authority to entertain the Saginaw Motion.

1/ ALAB-160, p. 3. In its memorandum and order the Appeal Board indicated that what the Saginaw Motion is really seeking is the "reopening of the Midland proceeding . . . ." It also expressed the view that it is "at best doubtful whether we now are empowered to entertain what is essentially a new attack by the Saginaw Intervenors upon the initial decision." However, since the Saginaw Motion is based exclusively upon the Commission's Nine Mile Point 2 memorandum and order, the Appeal Board felt that the Commission "is the body which should decide whether the sought reopening of the Midland proceeding is warranted." Id., p. 2.

In the event, however, that the Commission should reject our views in this respect, we go on to show, second, that there is in fact no conflict between the Commission's memorandum and order in Nine Mile Point 2 and the actions of any instrumentality of the Commission in this proceeding, including the Appeal Board and the Licensing Board. Nine Mile Point 2 involved a situation in which the intervenors made contentions concerning specific measures which they alleged might reduce or eliminate the need for the electrical power to be generated by the proposed plant. These included load shedding and various restrictions on the consumption of electricity, such as changes in the existing rate structure, imposition of restraints on wasteful users of electricity for residential or commercial heating and changes in advertising practices which lead to greater demand for electricity. However, the Licensing Board refused to extend an opportunity to the intervenors to submit any evidence at all with respect to any of these issues. The Commission took no position on the effectiveness or appropriateness of these measures. Nevertheless, it expressed disagreement with the view that "energy conservation must be altogether ruled out of licensing proceedings". The Commission therefore concluded it was error to "preclude the presentation of evidence on energy conservation . . . ."

By contrast, the Licensing Board in the Midland proceeding did not bar or preclude the introduction of any such evidence. Nor did the Appeal Board, as the Saginaw Intervenors incorrectly state, affirm any such erroneous "refusal to consider issues of energy conservation."[1/]

What the record of this proceeding discloses is that the procedures to effectuate the National Environmental Policy Act (NEPA; 42 U.S.C. § 432 et seq.) and to comply with the relevant Commission regulations (10 CFR Part 50, Appendix D) were faithfully followed by both the AEC Regulatory staff and the Licensing Board. Although Consumers Power Company had submitted its own projection of needs before the environmental hearing began, the AEC Regulatory staff initiated an independent inquiry into the projected demand to be supplied by the proposed plant. That inquiry was comprehensive, directed at expert and knowledgeable sources and in no way excluded expressions, estimates, views or opinions concerning energy conservation measures which might reduce the projected demand. Rather, the natural consequence of this extensive inquiry, as well as of the general invitation for public comment extended by the Commission, was to elicit available information concerning the impact of energy conservation on demand projections. No such information was received.

1/ Saginaw Motion, p. 3.

Nor did the Licensing Board deny parties to the proceeding an opportunity to introduce evidence respecting energy conservation in the hearing. Thus, in several forms the contention was made that demand could be reduced by a specific energy conservation measure which Consumers Power could take: the elimination of promotional advertising. The contention was admitted, but the intervenors introduced no evidence on the subject; and the only available information was that Consumers does not in fact engage in such advertising. Similarly, a number of contentions were made to the effect that energy conservation measures, which might or might not be instituted in the future by others than Consumers Power Company, would reduce future energy needs or that the energy conservation movement would have that impact: e.g., demands for air conditioners would be reduced in the future and, therefore, demands for electrical energy to power them might also be reduced. Such issues were also included in the hearing. In sum, the opportunity to introduce evidence was extended with respect to matters which could be described as falling within the somewhat general term, "energy conservation," and which also could reasonably be expected to have an impact on demand projections.

What the Licensing Board did not do was to undertake an inquiry into whether the activities of certain projected users of the energy to be produced by the plant -- e.g., the production of chlorinated hydrocarbons -- are "good" or "bad"

and modify projection demands on the basis of whatever value judgment it might reach concerning the various products or activities of the users. However, even with respect to such issues a complete bar was not imposed. Instead, Saginaw was invited to brief or argue those issues.

It did not accept the opportunity. Further, Saginaw refused to participate in the fourteen days of hearings held on environmental issues between May 17, and June 15, 1972, and never filed proper proposed findings of fact or conclusions of law with the Licensing Board. In these circumstances Saginaw cannot claim that it was denied the opportunity to introduce evidence relating to energy conservation. Accordingly, there was no "bar" or "preclusion" against the introduction of such evidence and it was appropriate for the Commission to cite the Midland proceeding with approval in its memorandum and order in Nine Mile Point 2.

Thus, to the extent that intervenors in this proceeding made any bona fide contention relating to the conservation of energy, they were extended the opportunity of introducing evidence with respect to that contention. Such evidence was not, in the words of the Commission's Nine Mile Point 2 memorandum and order, "barred at the threshold . . ."; nor did the Licensing Board in Midland otherwise "preclude the presentation of evidence on energy conservation . . . ." Accordingly, there is no conflict between the Nine Mile Point 2 memorandum and ALAB-123.

The points summarized above are discussed in greater detail below. However, a description of the lengthy administrative proceedings here involved and the background on which the contentions contained in the Saginaw Motion are now -- belatedly -- raised may aid the Commission in considering the Saginaw Motion in context.

I.

BACKGROUND

On January 13, 1969 -- almost five years ago -- Consumers Power filed an application with the AEC for a license to construct and to operate a dual purpose pressurized water nuclear power plant. The proposed plant, the Midland Nuclear Plant, Units 1 and 2, is designed to produce approximately 1300 megawatts of electricity and 4,050,000 pounds of process steam for use by The Dow Chemical Company. The plant is to be located on Consumers Power's approximately 1200-acre site in Midland County, Michigan. (App. Ex. 1) Of course the application contained technical and financial information, including a Preliminary Safety Analysis Report, extensively describing and discussing the site, the preliminary design criteria of the facility and various other safety-related considerations.

The Advisory Committee on Reactor Safeguards reviewed the application, and after identifying a number of items to be resolved during construction, concluded that the two units "can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public" (App. Ex. 4 and 5). The application was also subjected to rigorous and continuing review by the AEC's Regulatory staff. After almost two years of such review and consultation with many independent experts and government agencies concerning specialized subject matters (see Staff Safety Evaluation (SSE), p. 2, and Appendices C, D, E, F and G; following Tr. 1674), the

Staff, on 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).[1/]

By publication in the Federal Register on October 29, 1970 (35 F.R. 16749), the Commission announced that a public hearing would be held before an Atomic Safety and Licensing Board to consider whether a construction permit should be granted to Consumers Power. Timely petitions to intervene were filed by The Dow Chemical Company and the Midland Nuclear Power Committee in support of the application. Against the application, a joint petition to intervene was filed by the Saginaw Valley Nuclear Study Group, Citizens Committee for Environmental Protection of Michigan, Sierra Club, United Auto Workers of America, Trout Unlimited, West Michigan Environmental Action Council and University of Michigan Environmental Law Society ("Saginaw Intervenors"). A similar separate petition was filed by the Environmental Defense Fund (EDF). These petitions were granted

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1/ Thereafter in 1971 and early 1972, the application was further amended to update financial and corporate information, to reflect modification in its liquid "radwaste" system designed to reduce radioactive releases to very low levels, and to demonstrate compliance with subsequently adopted safety regulations of the Commission; and, on January 14, 1972, the Staff issued a Supplemental Safety Evaluation, which stated 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 health and safety of the public." (Staff Ex. 8)

by the Board by order dated November 24, 1970.[1/] And a late petition to intervene against the application, filed by six residents of the community of Mapleton, Michigan ("Mapleton Intervenors"), was also granted.

As indicated above, the application here involved was filed on January 13, 1969. The procedures relative to consideration of the application were significantly affected by the subsequent passage of NEPA, which became effective on January 1, 1971, and by the decision of the United States Court of Appeals for the District of Columbia, on July 23, 1971, in Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109. After the enactment of NEPA but before the Calvert Cliffs decision, 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 Consumers Power 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). However, 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. (10 CFR Part 50, Appendix D)

1/ The Midland Nuclear Power Committee did not actively participate in the hearing; and Trout Unlimited and the Environmental Defense Fund subsequently withdrew from the proceeding.

Following issuance of the new regulations, Consumers filed its Supplemental Environmental Report, dated October 19, 1971, with amendments responsive 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). Thereafter, the AEC, employing the expert services of personnel at Argonne National Laboratory, undertook an independent environmental evaluation, contacting many of the local and state agencies (Final Environmental Statement, Staff Ex. 6, Appendix A; Tr. 7618-7624), and prepared and circulated for comment a new Draft Environmental Statement, dated January 7, 1972. Its availability was also announced in the Federal Register (37 F.R. 410, January 11, 1972).[1/]

1/ Comments were received from the intervenors in the proceeding and 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 Consumers Power to such comments, the Staff in March 1972 issued its Final Environmental Statement 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, FES) The Final Environmental Statement, the availability of which was also noticed in the Federal Register (37 F.R. 7012; April 7, 1972), further concluded that if certain additional actions were taken by Consumers Power, "from the standpoint of environmental effects the action called for is the issuance of a construction permit . . . ."

Although the additional steps taken in order to comply with NEPA obviously extended the proceeding, they did not suspend the consideration of the application. Hearings relating to radiological health and safety matters were held for 18 days beginning June 21, 1971. These hearings 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.

In addition, environmental matters were considered in detail during fourteen days of hearings held between May 17 and June 15, 1972. Among other things, these involved site characteristics, terrestrial ecology, water usage, the cooling system, fogging and icing, low level radiation effects, impact of nonradioactive plant effluents, synergism, effects of decommissioning, need for power and alternatives. Accordingly, there were 32 days of hearing; and the transcript exceeds 8900 pages.

On December 14, 1972 the Licensing Board issued a 64-page Initial Decision which considered in detail both radiological health and safety matters and environmental issues. The Initial Decision expressly determined, in accordance with Section 185 of the Act, section 102 of NEPA and the AEC regulations implementing these statutes (10 CFR 50.35(a); 10 CFR Part 50, App. D), that "[t]he appropriate action to be taken is to authorize issuance of the construction permit." (Initial Decision, paras. 80, 81; pp. 61-63) The Licensing Board therefore ordered that, upon specified conditions, the AEC's Director of Regulation "is authorized to issue a construction permit to Consumers Power Company . . . ." In accordance with the pertinent rules of the Commission, the decision became effective immediately upon issuance (id., para. 82, p. 64), and construction permits for the two units were issued on December 15, 1972.

Although, as indicated above, extensive hearings were held and interventions permitted, the role played by the opposing intervenors was somewhat less than would be expected of full and active parties in a contested proceeding. The nature of that role is of relevance to the validity of Saginaw's instant request for "clarification" or "reopening" and to the equities of the respective parties.

Although efforts were made at least to start to deal with environmental issues before the Staff's Final Environmental Statement was completed (See, e.g., Licensing Board Order of August 26, 1971), 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 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." The order also fixed dates for the Staff to file its draft and final Environmental Statements and required the opposing intervenors to make 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 a voluminous document containing numerous contentions.[1/] Consumers Power filed a response on February 25, 1972, and on March 27, 1972, the Licensing Board

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1/ Certain of those contentions constitute the basis of Saginaw's instant claim that they made, and the Licensing Board refused to consider, contentions relating to the conservation of energy. Saginaw's contentions are incorporated in the FES (Staff Ex. 6, App. E, p. 93, et seq.). The contentions of the Mapleton Intervenors (id., p. 166, et seq.) and of the Environmental Defense Fund ("EDF", id., p. 179, et seq.) are also incorporated in the FES.

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. This portion of the Board order and the Saginaw contentions are discussed in greater detail below. We note here, however, that the order also permitted the intervenors to "serve and file detailed, specific questions and requests for documents within fourteen days following . . . its date."

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 his inability "to relieve myself of my duties in the ECCS hearings [1/] . . ., 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

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1/ Counsel's clients in the ECCS proceeding were also represented by Thomas B. Arnold, Esq., and Anthony Z. Roisman, Esq. See "Consolidated Request to Participate," etc. in Docket No. RM-50-1, December 30, 1971.

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 decided to proceed on the schedule previously established (Tr. 5285); and the Saginaw Intervenors did not appear or otherwise participate in the environmental hearing which began on May 17, 1972.[1/]

The opposing intervenor participation in the post-hearing administrative proceedings was equally spotty. Although directed to do so, and in violation of the Commission's regulations (10 CFR §2.754(a) and (c)), neither filed adequate proposed findings of fact and conclusions of law. The Saginaw Intervenors expressly stated that as to environmental issues "they have no conventional findings of fact to set forth . . ." and as to radiological issues "they have not chosen to search the record and respond to this proceeding by submitting citations

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1/ The Mapleton Intervenors fully participated in the environmental portion of the hearing; but their participation in the radiological portion of the hearing, when the Saginaw Intervenors were active, was limited. Initial Decision of Licensing Board, p. 10, para. 9.

of matters which we believe were proved or disproved."[1] The proposed findings filed by the Mapleton Intervenors fell "far short of the specification and detail required by the Regulations, and do not serve the purpose for which they were required."[2]

Because of this, the Licensing Board stated:

> "The Board would like to note that the failure to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested."[3] (Emphasis supplied)

The Licensing Board also "noted" that "both Mapleton and Saginaw Intervenors are in default . . . ." However, apparently in part because the Commission's regulations do not impose any specific sanction for such default and in part in recognition of the active role these parties had played in influencing "the conduct of the proceeding," it left the question of the effect of the default "for consideration when and if there are exceptions to our decision." In the meantime, the Licensing Board decided to handle the matter as follows:

> "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

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1/ Initial Decision, para. 9, p. 10, N. 9.

2/ Id., para. 9, p. 10.

3/ Id., para. 9, p. 11.

> with those questions which we understand to be raised by the proposed conclusions in the light of earlier contentions by the intervenors."

Nevertheless, the Licensing Board stated that it was troubled "by the notion of opposing Intervenors that they can avoid the burden of proposed findings and at the same time reserve the right to attack the Board's decision once made."

In accordance with the Commission's regulations, both the Saginaw and the Mapleton Intervenors appealed the Initial Decision to the Commission's Atomic Safety and Licensing Appeal Board (Appeal Board or ALAB) by filing exceptions. The Appeal Board decided the matter in three different decisions or opinions.[1/] Although that Board is generally opposed to "a practice of piece-meal review of licensing board actions . . .,"[2/] it adopted the course because of special circumstances present in this case. In part those special circumstances relate to the repeated efforts by the Saginaw Intervenors to raise issues after they should have been raised or to reopen hearings on one ground or another.

The first such effort was a motion, filed by the Saginaw Intervenors on January 15, 1973, with the Licensing Board,

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1/ ALAB-101, RAI-73-2, p. 60, February 20, 1973 (relating to possible bias or predjudice on the part of the Licensing Board); ALAB-106, RAI-73-3, 182, March 26, 1973 (relating to quality assurance matters); and ALAB-123, RAI-73-5, 331, May 18, 1973 (dealing with all remaining exceptions).

2/ ALAB-106, supra, at p. 187.

to recall and revoke that board's Initial Decision of December 14, 1972, to declare the Licensing Board biased and requesting "a new hearing on all relevant issues." The motion was filed on January 15, 1973, over a month after the Initial Decision was issued. By order dated February 1, 1973, the Licensing Board denied the motion as both lacking in merit and untimely.

However, the substance of the motion was also incorporated in the Saginaw Intervenors' exceptions to the Initial Decision, and the Appeal Board apparently felt that the matter should be decided before it addressed the other exceptions. Like the Licensing Board, the Appeal Board concluded that the claim of bias was without merit, and in any event, had not been timely asserted. In the latter connection the Appeal Board found that counsel for Saginaw knew or should have known the facts on which the claim of bias was made in the summer of 1972 and that "[a]ny fair analysis" required the conclusion that this was a situation in which a party chose to "remain silent. . .and then, doubtless because of its disappointment, seek for the first time to asperse the objectivity of a quasi-judicial officer who joined in the challenged opinion."[1/] It is understood that the ruling of the Appeal Board in ALAB-101 is not an issue which the Saginaw Intervenors are raising in the proceedings now pending before the Court of Appeals for the District of Columbia.

1/ ALAB-101, supra, at RAI-73-2, pp. 62-63. In reaching this this conclusion the Appeal Board quoted from a Court of Appeals opinion disapproving such conduct.

In addition, in ALAB-115 RAI-73-4, p. 257, April 15, 1973, the Appeal Board rejected, as a post-argument brief not provided for in the regulations, an unsolicited letter from counsel for Saginaw Intervenors. That letter reargued the law and was submitted after all exceptions and briefs had been filed and oral argument heard.

As indicated above, ALAB-101 and 106 dealt with only two of the exceptions filed by the opposing intervenors. The "myriad of" remaining "numerous and broad-reaching exceptions"[1/] were dealt with in ALAB-123.[2/] The matter now before the Commission involves only one, or one class, of those exceptions.

1/ ALAB-123, supra, at pp. 331, 334.

2/ The exceptions were described as follows by the Appeal Board:

> "The more voluminous of the exceptions filed are those of the Saginaw Intervenors. Covering some 195 pages, those exceptions are divided into 7 major sections: an introduction; separate sections dealing with procedural and substantive matters affecting the radiological portion of the decision (14 and 6 exceptions, respectively); similar separate sections dealing with procedural and substantive matters affecting the environmental portion of the decision (10 and 12 exceptions, respectively); another section dealing with matters affecting the entire initial decision (7 exceptions); and a final section containing one 'miscellaneous' exception. The Mapleton Intervenors have filed 12 exceptions, 4 of which relate to the radiological portions of the decision, and the remainder of which concern environmental issues." (Ibid., p. 334)

The Commission did not review or amend the action of the Appeal Board, embodied in ALAB-101, 106 and 123. Accordingly, that action became the "final action" or "final decision" of the Commission. (10 CFR §§2.760, 2.762, 2.770, 2.785, 2.786) Thereafter, on July 15, 1973, the Mapleton Intervenors filed a petition for review of that action in the United States Court of Appeals for the District of Columbia Circuit;[1/] and, on August 6, 1973, the Saginaw Intervenors filed a similar petition for review.[2/]

By order dated November 14, 1973, the Court consolidated the two cases. In addition, November 30, 1973 was fixed as the date for Saginaw to file its brief in court and January 15, 1974, for the Government, Consumers Power Company and Dow to file their briefs.[3/] However, on November 20, 1973 the Saginaw Intervenors filed the instant motion to clarify with the Appeal Board. At the same time Saginaw requested the Court for a further extension of time to file its brief in light of the pending motion to clarify. The Court has not yet acted on Saginaw's request.[4/]

1/ Aeschliman et al v. United States of America Atomic Energy Commission and United States of America, D.C. Cir. No. 73-1776.

2/ Saginaw Valley Nuclear Study Group et al v. United States of America, D.C. Cir. No. 73-1867.

3/ Consumers Power and Dow intervened in both appeals in support of the AEC. The Mapleton Intervenors (Aeschliman), after receiving one extension of time, submitted a brief to the court on October 26, 1973. The November 30, 1973 date resulted from two extensions of time Saginaw received from the court.

4/ In addition, on December 3, 1973, the Director of Regulation, sua sponte, issued an order for Consumers to show cause why activities under the construction permits here involved should not be suspended. That order involves quality assurance matters in no way related to the instant motion, and proceedings with relation to it are pending.

II.

THE AEC HAS NO JURISDICTION TO RECONSIDER OR CLARIFY ALAB-123

It is submitted that the AEC no longer has jurisdiction to consider Saginaw's instant motion to "clarify" ALAB-123. As we have pointed out above, under the regulations of the Commission (10 CFR §§2.760, 2.762, 2.770, 2.785, 2.786), the decisions of the Appeal Board embodied in ALAB-101, 106 and 123 became the "final action" or "final decision" of the Commission. Thereafter the Commission proceeding with respect to the application for the Midland construction permits was completed.[1/] Accordingly, the Commission no longer has jurisdiction to conduct further proceedings with respect to the matter. This clearly applies to what the Appeal Board correctly assessed as the real thrust of the motion to clarify: an attempt to obtain "a remand of Midland to the Licensing Board 'for further proceedings to consider questions of energy conservation' (Motion, p. 22)."[2/] However, this conclusion applies equally even if the Saginaw Motion should be interpreted as one intended merely to obtain clarification. The principle is clear; an action or decision

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1/ If any issues relating to quality assurance were left open after the issuance of ALAB-123 they received "final disposition" by the Appeal Board in ALAB-152, RAI-73-10, p. 816. See ALAB-160, November 26, 1973, p. 2, n. 1.

2/ ALAB-160, supra, p. 2.

which is final is completed in the absence of special statutory provisions not present here. 1/

If there were any doubt with respect to the question, it would be dissipated by the fact that a judicial appeal from the Commission decision is pending. The general rule is clear:

> "While a case is in court the court's jurisdiction is said to be exclusive. The agency cannot act upon its order while the 'case' is 'in the court'." L. Jaffe, Judicial Control of Administrative Action, p. 709 (1965)

This general rule is embodied in the statutes governing judicial review of Atomic Energy Commission action. As provided by Section 189 of the Atomic Energy Act (42 U.S.C. §2239), judicial review of final decisions in proceedings involving licenses and construction permits is governed by the provisions of the Judicial Review Act of 1950, which has been amended, revised and reenacted as 28 U.S.C., Chapter 158. That law provides that after a petition for review has been filed pursuant to it "exclusive jurisdiction" vests in the court of appeals (28 U.S.C. §2342). And it has been said that in the absence of a remand by the court, there can be no "further administrative consideration." Greater Boston Television Corp. v. F.C.C., 149 U.S. App. D.C. 322, 337, 463 F.2d 268, 283 (1971).

1/ Of course, under the statutory (Atomic Energy Act of 1954, as amended §186; 42 U.S.C. 2236) and regulatory (10 CFR Part 2, Subpart B) regime, new proceedings to modify, suspend or revoke a license or permit may be instituted. However, this is an entirely different matter than extending a proceeding which has been terminated by a final action or decision. As we have noted above, an order to show cause why activities under the Midland construction permits should not be suspended has recently been issued, but the order involves issues entirely unrelated to the instant Saginaw Motion.

To be sure there are exceptions to this rule in cases where the governing statutes confer concurrent jurisdiction upon the courts and the agency. See, for example, Anchor Line Ltd. v. Federal Maritime Commission, 299 F.2d 124 (D.C. Cir. 1962), certiorari denied 370 U.S. 922 (1962), a case which arose under the Shipping Act of 1916. That act provides that "the Board may reverse, suspend, or modify upon such notice and in such manner as it deems proper, any order made by it." (46 U.S.C. §824) In Anchor Line it was held that the Federal Maritime Commission could act pursuant to this statutory provision to modify an order even though it was pending for review before a court of appeals pursuant to 28 U.S.C., Chapter 158.

Similarly, Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission, 248 F.2d 646 (D.C. Cir. 1957) involved provisions of the Communications Act which required filing of a petition for judicial review of an FCC order within 30 days after public notice of the order complained of (47 U.S.C. §402(d), but also permitted any party to petition the FCC for reconsideration during the same 30-day time period (47 U.S.C. §405). In that case one aggrieved party filed a petition for reconsideration, and another group of parties petitioned the court of appeals for review[1/] on the same day. In view of the provisions of the statute, it was held that both the court and the agency had jurisdiction.

1/ 28 U.S.C. Chapter 158 also governs judicial review of actions of the Federal Communications Commission.

However, the Atomic Energy Act contains no provision similar to those in the Shipping and Communications Acts which operate to continue agency jurisdiction over a proceeding in some circumstances even after judicial review has been initiated.[1/] Therefore, 28 U.S.C. 2342, which vests "exclusive jurisdiction" in the United States Court of Appeals, is in no way limited with respect to review of Atomic Energy Commission action. Accordingly, the Commission now lacks jurisdiction to consider the Saginaw motion to clarify.

Nevertheless, in the event the Commission decides it has jurisdiction to consider or act on the motion -- or decides to view it as a request to file a petition to remand -- we demonstrate in the remainder of this brief that, however viewed, the motion is entirely lacking in merit.

1/ AEC regulations provide that a party may petition for reconsideration of an Appeal Board's final decision within 10 days. 10 CFR §2.771 (1973). In addition, the Commission itself may, within 20 days after the date of a decision or action by an Appeal Board, "direct that the record of the proceeding be certified . . . for review." 10 CFR §2.786 (1973). On June 7, 1973 the Commission issued an order extending the time within which it would initiate its review until July 10, 1973. However, no petitions for reconsideration were filed in this proceeding; nor did the Commission order the record certified to it for review.

III.

NO ISSUES RELATING TO THE CONSERVATION OF ENERGY WERE BARRED FROM CONSIDERATION IN THIS PROCEEDING

Any review of how energy conservation matters were addressed in this proceeding should be undertaken in the light of the Commission's regulations governing NEPA procedures and environmental considerations. (10 CFR Part 50, Appendix D) As has been noted above, Appendix D was substantially revised following the Calvert Cliffs decision prescribing the elaborate procedures to meet the requirements of NEPA. These procedures were carefully followed in the instant proceeding, and in order to place the Saginaw Intervenors' current contentions in perspective, we are required to describe what actually occurred in the course of the proceeding in relation to Appendix D. For purposes of convenience, we first describe the preliminary procedures which were not necessarily related to a contested hearing. Thereafter we describe the contentions made in connection with the hearing and how they were determined.

(a) Agency efforts to assess environmental issues. Section A of Appendix D, which sets forth the basic procedures to be followed, requires each applicant to submit an environmental report. In cases, such as the Midland proceeding, where the applicant submitted such a report prior to the

Calvert Cliffs decision, Section D.1. of Appendix D requires that the applicant's environmental report be supplemented to include discussion of NEPA considerations as detailed in Appendix A.

In compliance with this requirement Consumers prepared and submitted the three volume Supplemental Environmental Report referred to in our discussion of the background of this proceeding. Part 2 of the report contained Consumers' analysis of projected electric demand, and of its ability to meet this demand with and without the Plant; it consisted of 44 pages of text, graphs and tables (ASER, Part 2). Consumers did not merely project aggregate demand; instead, as described at page 2-2, it broke down and detailed its projections:

> "Energy sales forecasts are developed by class of service (residential, domestic, residential space heating, commercial, industrial, streetlighting, and other). The preparation of such forecasts is based primarily on historical trends modified to reflect other data indicating changes in these trends such as population forecasts, projections of various economic indicators, projected energy use and customer saturation for major appliances, and other factors judged to have an effect on future sales. The total sales forecast for a given year is derived by combining the individual class of service forecasts for that year. Applicant's total electric sales forecast for each year through 1980 is shown on the summary sheet of Exhibit 1. For the ten-year period ending in 1980, sales are projected to increase to 38,209 million kWh, almost a twofold increase. The breakdown of this total by classes of service is contained in Exhibit 1."

Figures and graphs demonstrating the derivation of forecasts for each class of service are included in the ASER.

Sections A.6 and A.7 of Appendix D contain detailed and elaborate provisions designed to attract a broad range of views concerning the need for the proposed plant. In outline these include widespread distribution of the applicant's environmental report, the independent preparation by the AEC Regulatory staff of a draft detailed statement of environmental considerations, in accordance with the Guidelines of the Council on Environmental Quality (36 F.R. 7224, April 23, 1971), circulation of both documents to state and federal public officials and agencies having an interest or expertise in subjects covered by these reports with requests for comments, arrangements to make the environmental report and the draft statement available to the public and public announcements of their availability and the opportunity to comment.[1/]

The procedures prescribed by Appendix D were followed meticulously and thoroughly in this proceeding. In connection with preparation of its draft detailed environmental statement (Staff Ex. 5), the Regulatory staff contacted, among others, the United States Environmental Protection Agency, the Michigan Public Service Commission, and the Federal Power Commission whose views were considered in the staff's independent projections of demand embodied in the draft statement.[2/]

1/ This comprehensive procedure for meeting agency obligations imposed by NEPA was cited with approval in Greene County v. FPC, 455 F2d 412, 3 ERC 1595, 1601 (2nd Cir. 1972).

2/ Staff Ex. 5, pp. 1-2.

After the draft statement was prepared, comments concerning it were then formally requested (FES, Staff Ex. 6, pp. ii, iii) from the EPA, the FPC, The Governor of Michigan and others, in compliance with the CEQ guidelines. Of course, the CEQ itself was asked to comment, and the general public was offered an opportunity to comment (37 F.R. 104, January 11, 1972).

The FPC responded with comments (FES, Staff Ex. 6, App. E, pp. 15-21) detailing the need for the capacity to be provided by the Midland Plant and concluding that "the capacity represented by the Midland Units 1 and 2 is needed to assist in meeting the Applicant's and the Michigan Pool's 1977 and 1978 summer and winter peaks and to provide reasonable reserve margins for adequacy and reliability of electric service." (Id., p. 21). No other Federal or State agency or official directed specific comments to the load projections on which the conclusion in the draft statement concerning the need for power was based. Thereafter, the AEC staff prepared the FES, which fully supported the need for power from the proposed plant.[1/]

In the FES the staff stated

> "Recognizing the virtually boundless range of considerations which might be argued to be relevant to an environmental review of a nuclear power reactor, the AEC regulatory staff has endeavored to apply a 'rule of reason' in determining the scope of this statement. For example, this statement addresses the environmental impact of only those activities in the 'nuclear fuel cycle' which are considered proximate to the proposed action . . . Similarly, this statement

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1/ FES, Staff Ex. 6, Chapters X and XI.

> discusses the subject of demand for energy from the standpoint of actual anticipated demand, and not from the standpoint of what the relevant demand should or should not be upon consideration of the desirability or utility of the uses of the energy produced by the plant . . . ." (Emphasis supplied) 1/

As will be shown below, this position is similar to the position ultimately taken by the Licensing Board and the Appeal Board concerning the inappropriateness of a licensing board making judgments concerning whether a particular use to which energy is put, e.g. the production of medicine or chemicals or other products, is "good" or "bad." However, this position is not inconsistent with consideration of the impact of "energy conservation", including the possible future impact of energy conservation measures which might be taken in the future by an applicant -- with respect to matters within its powers -- or by others on the projections of the demand for energy which the proposed plant will have to meet.

To the contrary, it is difficult to imagine a procedure more calculated to bring to the Licensing Board's attention any facts bearing on Consumers' actual anticipated demand and means of conservation that might reduce that demand. Certainly agencies like the Federal Power Commission and the Michigan Public Service Commission can be expected to possess

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1/ FES, Staff Ex. 6, pp. XII-11-12.

the most reliable data on the accuracy of demand projections. Likewise, these agencies could have been expected to offer any suggestions of energy conservation measures that might be available to reduce the demands on Consumers Power Company.[1/] No information indicating that such measures might reduce demand was obtained from any state or federal agency.[2/] Nor was such information obtained from any other source. The only comments touching this matter were from the intervenors in this proceeding and those comments are described below.

Of course the preparation of environmental statements was merely a preliminary step to the determination of the environmental issues in this proceeding. Under Section A.10 of Appendix D the FES must be offered in evidence in any proceeding for the issuance of a construction permit and "[a]ny party to the proceeding may take a position on and offer evidence on environmental aspects of the proposed licensing

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1/ Consumers' rates and terms and conditions of service are pervasively regulated by the Michigan Public Service Commission and the Federal Power Commission. Michigan law requires that Consumers provide adequately the electric needs of its customers. Michigan Consolidated Gas Co. v. Austin, 373 Mich. 123, 128 N.W. 2d 491 (1964); Traverse City v. Consumers Power, 340 Mich. 85, 64 N.W. 2d 894 (1954).

2/ In contrast, both federal and state agencies commented in the Nine Mile Point 2 proceeding on energy conservation means that might be utilized to reduce anticipated demand. See Brief for Petitioner to United States Court of Appeals for the Second Circuit, Ecology Action, et al. v. AEC, No. 73-1857, p. 31.

action . . . ." Section A.11 provides that in a contested proceeding the licensing board "will decide any matters in controversy among the parties . . . ." It also provides that the 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."

Accordingly, the procedures were fully adequate for the parties to make contentions and introduce evidence concerning "energy conservation" in connection with and during the hearing. Unlike the situation in Nine Mile Point 2, the parties were never precluded from introducing such evidence. They simply failed to do so. To establish this it is necessary to describe the hearing and related procedures in detail.

(b) The environmental contentions, evidence and determinations related to the hearing. The first significant attempt to address the environmental issues after the Calvert Cliffs decision was contained in a Licensing Board order of August 26, 1971, requesting the opposing intervenors to "file by September 30, 1971, a preliminary statement of their views

on environmental questions". Although the intervenors expressed the view that the order was premature, they did purport to make some attempt to comply. Thus, in a brief letter to the Board, the Mapleton Intervenors stated that they believed that "all adverse environmental effects and social and economic costs associated with the nuclear fuel cycle . . ." should be considered. The letter made no reference to matters which could be considered as raising any issues relating to the "conservation" of energy.[1/] EDF filed a much more extensive document containing 74 items.[2/] These, of course, covered many "environmental" considerations including the question of the effect of the construction of the plant "on the economy of Midland including the possible development of a tourist and recreation industry to replace Dow."[3/] However, EDF also suggested consideration of programs to discourage the unnecessary use of electricity and of rate schedules which imposed substantially higher charges for the use of electricity during peak demand periods and the rationing of electricity during such periods.[4/] The Saginaw

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1/ See letter of September 28, 1971, to the Chairman of the Licensing Board from Irving Like, Esq., counsel for the Mapleton Intervenors.

2/ See "Environmental Defense Fund's Statement of Subjects Which Must Be Thoroughly Explored as Part of and Included in the Applicant and Staff Environmental Analysis," September 30, 1971.

3/ Id., p. 14, para. 65.

4/ Id., p. 12, para. 57.

Intervenors filed a more detailed document than the Mapleton Intervenors but a less extensive one than EDF.[1/] Although the document did raise a question concerning "what creates demand" and the promotion of the uses of electricity by utilities,[2/] the basic thrust of the Saginaw filing related to the location of the plant in Midland, its proximity to Dow and the use of the energy produced by the plant by Dow: e.g., to "produce chlorinated hydrocarbons which will have carcinogenic effects . . . ."[3/]

However, the foregoing merely constituted preliminary statements of the opposing intervenors' views. To the extent that they were willing to articulate their basic positions with respect to environmental matters, these were subsequently included in their comments on the Draft Environmental Statement. These comments, the Licensing Board's ruling on them in its March 27, 1972 "Order With Respect to Environmental Issues"[4/] and how the intervenors responded to that order demonstrate conclusively that the standards later articulated by the Commission in its memorandum and order in Nine Mile Point 2

1/ "Exhibit B to Intervenors Motions Filed September 30, 1971, Preliminary Statement of Saginaw Valley et al. Intervenors on Environmental Matters in Accordance with Page 4 of the Board's Order of August 26, 1971", September 30, 1971.

2/ Id., p. 4, para. 2.

3/ Id., p. 5, para. 4.

4/ The Saginaw Motion (p. 15) erroneously refers to the order as dated March 28, 1972.

were in fact followed in the Midland proceeding. The Licensing Board in the Midland proceeding did not bar "at the threshold . . ." or otherwise "preclude the presentation of evidence on energy conservation . . . ."

For example, in the comments which EDF filed on the Draft Environmental Statement it made two specific contentions. One related to the fuel cycle. The other reads as follows:

> "2) The Staff analysis of the alternatives to the Midland Nuclear Power Plant must include a full analysis of ways to reduce electric demand, of the benefits or cost of not meeting the electric demand, of the development of new alternate methods for meeting electric demand, of alternate methods of sharing the electric output from this plant to reduce the need for other electric generating facilities, and of alternate methods for the distribution of electric power including improved interties, greater use of interruptible loads, rate structures which discourage wasteful electric consumption, etc."1/

As to this contention, the Licensing Board ruled as follows in its March 27, 1972, order (pp. 14-15):

> "Item (2) raises a number of questions with respect to the treatment of electrical demand. The Board has, at least inferentially, stated its view that an analysis of ways to reduce demand is not appropriate in this proceeding. However, this and other aspects of Item (2) seem appropriate for briefing. Accordingly, EDF shall file briefs in support of its contention in Item (2) on or before April 25, 1972." (Emphasis supplied)2/

Obviously this language suggests doubt on the Licensing Board's part. However, equally obviously the invitation to brief the

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1/ FES, Staff Ex. 6, App. E, pp. 182-183.

2/ The Saginaw Motion (p. 18) quotes the language of the Licensing Board order set forth above, but omits the two underscored sentences.

issue did not constitute a "bar" or "foreclosure." EDF never accepted the invitation. Instead, on April 21, 1972, it filed a petition to withdraw its petition to intervene in the proceeding and took no further part in it.

Any doubts as to the Licensing Board's willingness to consider "energy conservation" issues are wholly dissipated by its ruling on the comments of the Mapleton Intervenors. That group filed four comments designated "a", "b", "c" and "d."[1/] Item (a) dealt with the nuclear fuel cycle; item (d) referred to alternatives to the proposed nuclear facility, and item (b) dealt with decommissioning the plant. Item (c) reads as follows:

> "c - The extent to which the projected demand for electric power in applicant's service area is caused by its own advertising and promotion of the sale of electric power, and whether a discontinuance or reduction of such advertising and promotion would obviate the need for the proposed reactor, or would warrant a reactor of smaller size."

In its order of March 27, 1972, the Licensing Board ruled:

> "Item (a) raises a question with respect to the fuel cycle not presently at issue in this proceeding. Items (b) and (c) are at issue. Item (d) is not intelligible to the Board." (Emphasis supplied)

1/ FES, Staff Ex. 6, App. E, p. 168.

Accordingly it is clear that the question of the extent to which advertising and promotion influenced demand was placed "at issue" by the Licensing Board.

The Saginaw Intervenors filed a 70-page statement containing 119 environmental contentions.[1/] It divided them into 16 general groups or categories. For this reason the Board in its order of March 27, 1972, stated (p. 4): "We will deal with the contentions by groups except when necessary to refer to specific items." In its instant motion Saginaw refers (pp. 11-14) to seventeen of its contentions as "energy conservation issues" (p. 11) and states that those issues "were ruled, as a matter of law, beyond the scope of the licensing proceeding." These statements are not correct; they mischaracterize both what Saginaw contended and wha the Board did.

Saginaw's contentions 31, 32, 33, 34 all fell under the category "VI. Alleged Benefits", which included contentions 29 through 38B. Contentions 31, 32, 33, 34 read as follows:

> 31. The additional electricity available from the proposed Plant is not a benefit. Additional electric generation through nuclear power merely creates risks and costs to the environment. Moreover, at a time when our alleged energy demands are increasing, it is not beneficial to continue to add to the production of electricity without increasing our understanding how any demand for electricity is created. And, thus, to the extent that electricity demand is created by virtue of promotional activities or other such efforts of Applicant and the Atomic Energy Commission, any increase of electricity is not a

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1/ On February 18, 1972, Consumers Power filed a reply, also very extensive, to the Saginaw contentions.

benefit, but an unwarranted cost to the environment. Applicant, other utilities, the Atomic Energy Commission, the Federal Power Commission and the nuclear industry have created an artificial demand for electricity, and no environmental analysis should reward such efforts.

32. Neither Applicant nor the Regulatory Staff has considered the possibility of changing the present social stimuli to society which could result in decreased demand for electricity, thereby not requiring the production of electricity from the proposed Plant. Elsewhere in this statement, we will set forth more specifically our contentions with respect to Applicant's projected load forecasts which we believe are invalid and in some instances untrue.

33. Applicant and Regulatory Staff assert that the proposed Plant would create a benefit resulting from shutting down Dow Chemical's fossil fired facilities. There is no serious analysis, however, as to whether Dow Chemical can purchase power from other of Applicant's generating facilities, or whether indeed, in the long run, it would be less costly to the environment to require Dow Chemical to retrofit or update its facilities to provide for fossil fuel generation of electricity without resultant pollutants. In the long run, it would make more sense to require Dow Chemical and others (by denying electricity from the proposed Plant) to investigate ways and means of generating electricity through conventional means or other means not now known to man which could result in less risks and costs than the generation of electricity through nuclear power plants. The assertion that the generation of electricity from the proposed Plant is a benefit because it shuts down fossil fired plants is in reality trading one risk for another. Thus, before such a conclusion is sound, one must evaluate the effects of pollutants from conventional power sources against the effects of normal and abnormal releases of radiation. Since Dow Chemical has been polluting Midland for several decades with its fossil fired facilities, sufficient information should be available to determine what the effects have been and then one could compare them with known effects of radiation upon man and the environment.

34. Applicant and the Regulatory Staff assert that the proposed Plant will provide economic growth for the Midland Community and enable Dow Chemical to expand its facilities by virtue of having available to it low cost energy. There is no discussion, however, as to whether the Midland Community should encourage expanding industry or whether other uses should be found for the land and resources which will be required in such expansion. Moreover, since Dow Chemical presently has available to it in its organization areas, admittedly low cost energy areas, within which it could expand, there must be an analysis of the environmental effects of the Dow Chemical expanding in Midland as opposed to elsewhere in order to justify the suggestion that Dow Chemical's expansion is a benefit. Finally, in any such analysis, if it is determined that the character and type of the Dow Chemical expansion will result in undesirable products, such as, for example, the creation of chlorinated hydrocarbons or 2-4-5-T, then the subsidization of Dow Chemical by virtue of the construction and operation of the proposed Plant results in additional costs to the environment without any concurrent benefits.

A review of these contentions discloses that, as the Licensing Board stated in its order of March 27, 1972 (p. 7), with respect to all of Group VI, they "are long on rhetoric and short on specificity." Of course, the generality of the rhetoric permits Saginaw now to argue that contentions concerning the impact of energy conservation on demand were raised. Thus contention 31 refers to promotion of demand by Consumers Power Company and other utilities, by the nuclear industry and by federal agencies; and contention 32 refers, admittedly without specifics, to "the possibility of changing the present social stimuli" [1/] to society which could result in decreased

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1/ The Saginaw Motion (p. 12) states that the contention "raised the question of various methods which 'could result in decreased demand for electricity . . . .'" (Emphasis supplied) A reading of the contention discloses that it does not even use the word "methods" and that what the contention clearly lacks is any description of any method or measure which might decrease demand.

demand for electricity . . . ." To the extent that either of these contentions raised any factual issue which the Licensing Board could consider, that issue would be related to the impact of possible promotional and advertising activity by Consumers on demand. This of course was dealt with when the Licensing Board admitted that issue. The remainder of contentions 31 and 32 were obviously merely "rhetoric" and too general and conclusory in nature to be treated as raising evidentiary issues at all.

Contention 33 was in part of the same nature. Thus it contained a suggestion that Dow "investigate ways and means of generating electricity . . . through means not now known to man which could result in less risks and costs than the generation of electricity through nuclear power plants." The Licensing Board treated the suggestion as "silly" and not "helpful."[1/] However, to the extent that contention 33 raised any real environmental issue as to realistic alternative sources of energy for Dow, these were considered in the proceeding.[2/]

Contention 34 was basically a request for the Board to examine into the uses to be made of the power produced by the

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1/ Order of March 27, 1972, p. 7.

2/ Initial Decision, pp. 57-58, para. 76.

plant, the alternatives to such uses and their social values -- e.g., should energy be made available to Dow for the manufacture of "chlorinated hydrocarbons." The Licensing Board took the position it would not be feasible for it to consider "the social value of the end uses of the power to be produced" and "whether economic growth is 'good' or 'bad' for Midland is not susceptible of factual analysis." However, again the Board did not bar the issues. It stated that "To the extent that Saginaw disagrees with Applicant's claim of benefit, it may make its own quantification for consideration by the Board."[1/] Of course, Saginaw never did so.

Moreover, even with respect to the contentions in Group VI as to which it took the dimmest view, the Licensing Board did not foreclose further consideration. As we have noted, the Board stated that it was dealing "with the contentions by group except where necessary to refer to specific items." With respect to all of the contentions in Group VI, the Board stated:

> "The basic assumption -- that nuclear plants are inherently more harmful than fossil fuel plants -- amounts to an argument that nuclear plants cannot be built as a matter of law. Saginaw may brief that question if it chooses."[2/]

Saginaw never accepted the invitation.

1/ Order of March 27, 1972, p. 8.

2/ Ibid.

Contention 47 reads as follows:

> 47. Intervenors contend that Applicant and the Regulatory Staff have been engaged in promotional efforts to create a false demand for electricity; and all of the electricity to be generated from the proposed Plant is, therefore, not necessary for Applicant's franchised area. Accordingly, the construction and operation of the proposed Plant will not provide any benefit to electrical users and the proposed Plant represents an unwarranted cost to the environment. Intervenors further contend that Applicant, by virtue of advertising campaigns directed toward further use of electricity during peak periods, as well as advertising campaigns deficient in explaining to users in its franchised area methods of decreasing peak period use of electricity, have contributed in whole or in part to the demand for electricity from the proposed Plant; and accordingly, for this additional reason, the proposed Plant represents an unwarranted cost to the environment.

Even the Saginaw Motion concedes that the Licensing Board did not foreclose this issue relating to promotional advertising. 1/ Instead it requested further specification from Saginaw on this and related issues. The Board directed that

> "In its affirmative case, Saginaw should (1) specify the portion of the demand attributable to advertising by Applicant and the basis of that conclusion; state the criteria by which the Board is to distinguish "valid" from "invalid" demand; (2) the factual basis for the allegation that demand can be satisfied from other sources; and the factual basis for the assertion that the plant is a subsidy to Dow." 2/

Again Saginaw did not respond.

1/ Saginaw Motion, p. 9.

2/ Order of March 27, 1972.

Contention 49 reads as follows:

> 49. Applicant and the Michigan Public Service Commission have illegally created an incentive for continual construction of generating facilities when they are unnecessary. The rate structure imposed upon Applicant by the Michigan Public Service Commission encourages Applicant to create unwarranted costs upon the environment. Because Applicant's ability to receive a fair return on its invested capital is directly related to outstanding amounts of unamortized construction and other capital costs, Applicant has an incentive to continue to construct power facilities, whether necessary or not in order to maintain an artificially high rate structure. Specifically, Intervenors contend that Applicant is failing to use existing generating facilities to the extent of their useful lives and it is taking such facilities out of baseload or peaking service after such facilities have been amortized and removed from consideration of Applicant's rate structure. Thus, the proposed Plant represents an attempt to construct a facility in order to maintain an artificially high rate structure and, as such, it represents an unwarranted cost to the environment.

Saginaw now contends that the thrust of Contention 49 was to the effect that the existing rate structure "encourages rather than discourages demand."[1/] A fair reading of the contention discloses that it had nothing at all to do with demand. Instead it was concerned with a rate structure allegedly embodying financial incentives encouraging the construction of new plants, whether needed or not. It had nothing to do with energy conservation in the sense of reducing demand or use of energy. Saginaw was not contending that the existing rate structures

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1/ Saginaw Motion, p. 13.

improperly promote consumption, but that ratemaking based on return on investment creates an incentive for additional capital investment. Moreover, the Licensing Board was clearly correct in concluding the contention to be a challenge to "the legality of the rate structure promulgated by the Michigan Public Service Commission" and that "that [challenged] rate structure is not an issue in this proceeding."[1/]

The Saginaw Motion (pp. 11, 13) states that Contention 72 directly raises the conservation [i.e. energy conservation] issue by urging a consideration of the "actual cost of generating electricity." This is what Contention 72 actually said:

> 72. The Regulatory Staff has failed to consider the actual cost of generating electricity through nuclear power. The actual cost includes such direct and indirect costs as increased cancer and leukemia, medical costs relating to those and other diseases from radiation exposure, and costs of decommissioning the proposed Plant when its defined useful life is over. The failure of the Regulatory Staff to have considered these costs, as well as the cost of disposal of high and low level radioactive wastes results in the Draft Detailed Statement being insufficient as a matter of law.

Of course this contention has nothing to do with energy conservation. In any event, the Board did not rule out the contention. It stated it should be briefed,[2/] but Saginaw never did brief it.

1/ Saginaw contends that "the rate structure" was one of the issues involved in the Nine Mile Point 2 proceeding (Saginaw Motion, p. 18, n. 1). However, what was involved there were possible "changes in the rate structure" that might reduce consumption (see, e.g., Docket No. 50-410, Tr. p. 128), not a challenge to the legality of that structure.

2/ Order of March 27, 1972, p. 10.

Contentions 73 and 74, which fall within Group X, read as follows:

> 73. The issue of demand for power or need for power is not a function of a simple application of projected figures to rated generating capacity. In the last two decades, we have seen a demand for electricity multiply, at least as interpreted by the utilities, the power industry, the Atomic Energy Commission, and other administrative agencies. A simple arithmetic extension of the present demand curve, as so asserted, makes it clear that in a very short period of time our economy will not be able to meet such a demand. There has been a failure to do any analysis as to means to create a decrease in demand for electricity or an elimination or curtailment of industrial and other uses of electricity which could be decreased or eliminated so the economy does not suffer in terms of goods and services. From a long range environmental standpoint, the social and scientific stimuli currently being injected into our economy encouraging peak uses of electricity must be eliminated. It is in this sense, as well as in the more practical sense of an analysis of actual figures produced by Applicant and the Regulatory Staff, against which any need or demand for power must be analyzed.
>
> 74. Intervenors contend that under the National Environmental Policy Act the proposed Plant may not be licensed unless it is demonstrated that the electricity allegedly needed from the proposed Plant, is unavailable to Applicant and/or the users in Applicant's area from any other source and, unless it is demonstrated that such demand for electricity represents useful social stimuli considering the long range rationalization of our national energy policy.

These contentions are basically restatements of the Group VI Contentions 31, 32, 33 and 34, discussed above. Thus, they referred to "a curtailment of industrial and other uses of electricity which could be decreased or eliminated so that the

economy does not suffer in terms of goods or services . . . (Contention 73); and a requirement that the "demand for electricity represents useful social stimuli . . ." (Contention 74). They were treated in the same manner by the Licensing Board, i.e. it did not foreclose the issues which they raised. It said with respect to Group X:

> "The need for power from the proposed plant is, of course, an issue in this proceeding. Needs for electric energy generally are relevant to that question, but factual inquiries into what are 'useful social stimuli considering the long range nationalization [sic] of our national energy policy' are not feasible. Saginaw may, of course, postulate its own view of socila [sic] validity, and argue the proposition at an appropriate time."1/ (Emphasis supplied)

Saginaw never did "argue" the proposition.

Contentions 75 and 76 read as follows:

> 75. Intervenors contend that any demand for electricity generated by advertising or promotional efforts or by competition among public utilities to encourage the use of electricity cannot validly be rewarded pursuant to the National Environmental Policy Act.
>
> 76. Intervenors contend that in making an analysis of the promotional or advertising aspects of any demand for power, one must analyze actual advertising figures the results of advertising campaigns, and a comparison of those results with statistics in areas, if any, where promotional advertising as a function of demand has not taken place. Moreover, any environmental analysis must

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1/ Id., at pp. 10-11.

> consider whether a demand is created by encouraging the public to use unnecessary or non-utilitarian products which use large amounts of energy in the course of fabrication and production. Thus, if any portion of Applicant's demand is directly related to the production of such goods, an analysis has to be made as to whether the production of such goods should be encouraged or whether by a denial of electricity, one encourages the production of alternative goods which have similar end uses, but which require substantially lesser amounts of electrical energy to produce.

To the extent that these deal again with promotional advertising, the matter has been discussed above.

However, Contention 76 is also directed to whether particular products are "unnecessary or non-utilitarian" and whether energy should be made available for their production. The Saginaw Motion (p. 14) describes Contention 76 as raising "the question of wasteful uses of electricity . . . ." In fact, the contention does not contain that language, and if it raises any such issue it is only in connection with the question whether there should be "a denial of electricity" for "unnecessary or non-utilitarian products." This subject is clearly far broader than energy conservation. In any event, these contentions fell within Group X concerning which Saginaw was offered, but did not accept, "an opportunity to argue the proposition at an appropriate time."

Contention 81 reads as follows:

> 81. Applicant's projection assumes a continued growth and development of industry in the State of Michigan. Applicant has not adequately assessed the fact that there is a national and statewide conservation movement which may severely inhibit increases in industry. Applicant also has not considered the possibility that industry in Michigan will seek to expand elsewhere and, thus, not be available to support an alleged increase in demand.

This presumably is what the Board was addressing when it stated that "[T]he need for power from the proposed plant is, of course, an issue in this proceeding." If Saginaw had not deserted the proceeding, it could have addressed the issue. Obviously there was no bar or foreclosure.

Contention 85 reads as follows:

> 85. Applicant asserts that the proposed Plant is necessary to provide "a plentiful and inexpensive supply of electricity . . . to maintain and enhance the living standards. . . ." Applicant has failed to analyze, however, either the need to conserve energy resources, a need which appears to be environmentally more sound than a need to make energy resources more plentiful. Applicant does not state whose living standards are going to be increased by the proposed Plant, and it does not analyze whether any substantial segment of the population's living standards may be decreased as a result of the proposed Plant in terms of a degraded environment which would adversely affect health, life, and property.

This contention is wholly lacking in specificity. To the extent that it is comprehensible, it seems to be arguing, generally, that the environmental disadvantages of the plant may outweigh the environmental advantages. Of course this is exactly what the proceeding was about, and, as we point out above, the fourteen days of environmental hearings were devoted to the question of the matters which adversely or beneficially affect "health, life

or property." These included the elimination of polluting fossil fuel plants, water usage, effluents, etc. Therefore, to the extent that Contention 85 raised any issue it was dealt with.

Contentions 87, 88, 89 and 92 read as follows:

> 87. There is no basis for Applicant's assumption that room air conditioners will increase from 160,000 to 360,000 in four years and that they all will be used at peak periods, particularly if the citizens are educated to conserve energy.
>
> 88. Applicant has misanalyzed the projected growth of its major users of electricity such as General Motors and Dow Chemical. The projected increases in production and uses of electricity by such major users are inordinately high in light of the rate of population for the applicable base period and the national movement to conserve electricity. Concomitantly, Applicant has failed to factor into its projection the possibility that rate structures will be revised so as to make large use of electricity on a per unit basis more expensive thereby discouraging the increased use of electricity.
>
> 89. Applicant has erroneously assumed that the Gross National Product will continue to spiral. The relationship which the Applicant asserts exists between the automobile industry and the Gross National Product does not take into consideration that many metropolitan areas, including those in the State of Michigan, are encouraging the development of mass transit which would result in a relative decrease in the production of automobiles.
>
> 92. Applicant has not provided any support and, accordingly, its analysis is unsound, with respect to its claim for the need for electricity will provide jobs for an increased number of adults. Once again, Applicant's projections have failed to take into account the environmental movement and the demands of society for industrial progress and national growth consistent with environmental protection.

The contentions were not excluded. The Board stated: "The need for power from the proposed plant is, of course, an issue in this proceeding."[1/] Had Saginaw participated in the hearing it could have introduced evidence addressed to the issues. Such evidence was not introduced. On the other hand, as we have shown, extensive and authoritative evidence supporting the power projections were introduced in the proceeding.

The foregoing review of the contentions actually raised by Saginaw and how the Licensing Board acted on them discloses the total invalidity of Saginaw's contention that it made and the Board excluded contentions "similar to (and in some cases identical to, e.g., rate structure) those raised by the Intervenor in the Niagara docket."[2/] To be sure, one contention concerning energy conservation was made in various different forms relating to promotional advertising.[3/] As conceded by Saginaw, the contention was admitted;[4/] but as Saginaw fails to mention, no evidence was introduced with respect to the matter,[5/] and the only information concerning it is to the effect that the Company did not engage in such advertising.[6/]

Another class of contentions may have used the word "conservation" but merely raised factual issues concerning Consumers' projections of the demand. These related to the future uses of air conditioners[7/] and automobiles,[8/] the future energy needs of

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1/ Order of March 27, 1972, p. 10.

2/ Saginaw Motion, p. 20.

3/ Contentions 31, 47, 75, 76.

4/ Saginaw Motion, p. 20.

5/ Initial Decision, p. 38, para. 48.

6/ Tr. 5997.

7/ Contention 87.

8/ Contention 89.

major users[1] and the impact of the environmental movement on demand.[2] These contentions were admitted when the Board ruled that "the need for power from the proposed plant is, of course, an issue in this proceeding."[3]

Another class of contentions now claimed to involve "energy conservation" in fact involved health[4] or environmental issues generally,[5] including possible alternative sources of energy which might be environmentally more attractive.[6] These matters were, of course, considered in the course of the hearing.[7] In fact, only two types of contentions were disallowed. One of these was embodied in Contention 49 which alleged the illegality of the rate structure approved by the Michigan Public Service Commission. As pointed out above, in context the contention related to capitalization and amortization practices, not to the uses of energy.

The second class of contentions related to whether the products manufactured from the energy to be generated by the

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1/ Contention 88.

2/ Contentions 81, 92.

3/ Order of March 27, 1972, p. 10.

4/ Contention 72.

5/ Contention 85.

6/ Contention 33.

7/ Initial Decision, p. 34, et seq. Re health issues, see, e.g., pp. 49-51, 55-57, paras. 65-67, 73-76.

plant are environmentally good or bad. This point was made expressly in Contentions 34 and 73. Although opaque, Contentions 32 and 74, with their references to the impact of "social stimuli" or "useful social stimuli" on demand, apparently were intended to convey the same general meaning.[1/] The Licensing Board ultimately refused to do so. In connection with this issue, the Board ruled

> "48. Intervenors have suggested at various times that the Board must go behind the characterization of 'demand' made by the Applicant to determine whether an appropriate alternative to satisfying the demand would be to set limits on particular uses of electricity. The Board declines to do so. So far as appears from the record, the postulated demand is made up of normal industrial and residential use and it is, in our view, beyond our province to inquire into whether the customary uses being made of electricity in our society are 'proper' or 'improper'." [2/]

The Saginaw Motion (pp. 18-19) refers to this language and to scattered sentences elsewhere in the Initial Decision referring to the need for electricity as demonstrating the Licensing Board's legal position that "conservation of energy is not an appropriate issue in this proceeding."

This argument is wholly unjustified. Paragraph 47 of the Initial Decision[3/] summarizes the overwhelming evidence introduced in the proceeding to demonstrate the validity of the

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1/ If Contentions 32 and 74 meant something else, e.g., a rate structure which resulted in the conservation of energy, the intervenors could have made this point in the brief they were invited to, but did not, file.

2/ Initial Decision, p. 48.

3/ Initial Decision, pp. 37-38.

projections concerning the need for electricity and notes that "[i]ntervenors do not seriously challenge the projections. . ." As we have shown above, those predictions were based upon collections of data and views which permitted consideration of energy conservation measures on demand. Moreover, the intervenors were offered an opportunity to show how energy conservation developments -- e.g., the future use of automobiles or air conditioners, or the future needs of major uses -- could affect demand. No such evidence was introduced. Accordingly, when the Licensing Board referred to "postulated demand" for electricity in paragraph 48 and in its other reference to "power needs" and "needed electricity", it was referring to what the record disclosed -- and in compiling that record consideration of genuine issues relating to the impact of energy conservation was not excluded.

In context, therefore, it is clear that when the Licensing Board in paragraph 47 excluded judgments concerning "uses being made of electricity as 'proper' or 'improper'. . ." it was addressing itself to issues such as whether Consumers should supply energy to Dow to manufacture chlorinated hydrocarbons or General Motors to manufacture automobiles -- or, for that matter, emission control devices. In short, what the intervenors wanted the Board to do was to assess the social utility of every conceivable use of energy and if it found a

use not to represent "useful social stimuli" not to include it as part of demand.[1/]

This Saginaw now contends was an energy conservation argument. However, this is not what the Commission's memorandum and order in Nine Mile Point 2 even suggested. What it suggested is that measures the utility could take directly to reduce the need for energy consonant with its duty to supply power to its customers, e.g., elimination of promotional advertising and the possibility of adopting rate schedules which might reduce demand, should not peremptorily be eliminated from consideration in a hearing. No evidence with respect to such measures was offered in the Midland proceeding and, therefore, none was rejected.

Nor did ALAB-123 or any of the other Appeal Board Decisions cited by Saginaw[2/] indicate that energy conservation

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1/ It should be noted that the Saginaw Intervenors wished the Board to undertake that task even though they failed to act on invitations to brief or argue the matter. If there were any doubt about it otherwise, this failure clearly justified the Licensing Board in stopping where it did. What the intervenors were really asking for was that the Board take action designed to deny energy for uses it (or they) deemed to be improper. This went far beyond Natural Resources Defense Council v. Morton, 458 F2d 827 (D.C. Cir. 1972), the leading "rule of reason case." There the court held the Secretary to be obliged to explore a wide range of alternative means of meeting the demand for oil or gas. The case does not suggest he should have appraised the demand in terms of uses of the products which he regarded to be proper or improper.

2/ Saginaw Motion, pp. 20-21.

issues -- as opposed to general inquiries into whether end uses are socially good or bad -- were precluded from the Midland proceeding or are barred in all licensing proceedings. Indeed, they held the opposite. ALAB-123 expressly stated that

> "As for the contention that the demand for electricity was artificially stimulated by the applicant's advertising, the Board stated that no evidence had been offered to support that contention; and that absent some evidence that applicant was creating abnormal demand, it [the Board] would not consider the question. We do not believe the Board acted unreasonably." (Emphasis supplied) 1/

Nothing in this language indicates that energy conservation issues relating to projections of demand should be precluded. Similarly in the Shoreham proceeding the Appeal Board approved two findings of the Licensing Board. The first was that the applicant's projections of power needs were reasonable. The second was that evidence had been "adduced" by the intervenor to show that power load could be reduced by public education concerning conservation measures, but that "that evidence" provided no useful information concerning future demand. 2/

Thus, in both ALAB-123 and in the Shoreham proceeding the Appeal Board was dealing with situations in which the Licensing Board either heard, or was willing to hear, evidence concerning the impact of conservation of energy proposals on projections of need for power. In effect, in each case the Appeal Board approved licensing board action

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1/ RAI-73-5, p. 352.

2/ Long Island Lighting Company (Shoreham Nuclear Station), ALAB-156, pp. 79-8; RAI-73-10, p. 852.

which did not "rule out","bar at threshold" or otherwise "preclude the presentation of evidence on energy conservation." For these reasons ALAB-123 and the Shoreham decisions were cited with approval in the Commission's memorandum and order in Nine Mile Point 2. Consequently the Appeal Board decisions are not in conflict with the memorandum and order and there is no need either to clarify ALAB-123 or, certainly, to hold further evidentiary proceedings.[1/]

1/ To be sure, both ALAB-123 (RAI-73-5, p. 352) and Shoreham (ALAB-156, pp. 80-85; RAI-73-10, at pp. 852-854) reiterate the position that licensing boards should not undertake inquiries into whether the end uses of electricity are "proper" or improper. See also Wisconsin Electric Power Co. (Point Beach 2), ALAB-137, RAI-73-7, pp. 491, 497-498. In the latter proceeding the Appeal Board indicated that the evidence should be directed toward defining "the parameters of the actual need for power which the applicants are likely to be called upon to meet." Ibid. These decisions in part rely upon the "rule of reason" cases interpreting NEPA. Natural Resources Defense Council v. Morton, 458 F2d 827, 837 (D.C. Cir. 1972); Scientists Institute v. AEC, 481 F2d 1079, 5 ERC 1418, 1425-1426 (D.C. Cir. June 12, 1973); EDF v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972).

IV.

CONCLUSION

The history of this proceeding discloses that the intervenors have litigated in accordance with their own rules and on their own timetable. Saginaw failed to participate in the environmental hearing; Saginaw and Mapleton defaulted in their obligations to file proposed findings of fact and conclusions of law, thereby both violating the Commission's regulations and, as the Licensing Board said, "greatly complicating" its task; issues which could have been raised in a timely manner were not; extensive and continuous delays have been requested and received.

Now that this prolonged administrative proceeding has finally been completed and is ripe for judicial review, a wholly specious need to "clarify" a non-existent conflict in Commission decisions or for further proceedings has been asserted. We believe that we have demonstrated above that the claim of conflict between the Commission's memorandum and order in Nine Mile Point 2 and the rulings in this proceeding is wholly without merit. It is requested that the Commission expeditiously so rule.

Respectfully submitted,

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Dated: December 10, 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 Consumers Power Company in Opposition to Motion to Clarify ALAB-123", dated December 10, 1973, in the above-captioned matter, have been served on the following in person or by deposit in the United States mail, first-class or airmail, this 10th day of December, 1973.

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