UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

DOCKET NUMBER
PROD. & UTIL. FAC. 50-329,330

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

MEMORANDUM SUPPORTING DOW OBJECTIONS TO SAGINAW INTERROGATORIES

This Memorandum is submitted in support of The Dow Chemical Company's ("Dow") objections to the Interrogatories served by Intervenors Saginaw Valley Nuclear Study Group, et al. ("Saginaw") by mail on March 22, 1971.

All four groups of Interrogatories are entitled "First Set". To the extent that this suggests an effort to reserve a right to serve supplemental Interrogatories other than with respect to certain environmental matters in accordance with future Orders of the Hearing Board, we object so that silence not be considered acquiescence.

Nature of Required Good Cause Showing

The AEC Regulations require that "good cause" be shown in order for a party to obtain discovery. As stated in our November 25, 1970 Memorandum, the pertinent pages of which are reproduced and annexed for convenience, such "good cause" requires something more than simple relevance. We believe that it means that there must be a showing that the discovery sought is warranted by some area of substantial concern sufficient to justify the burden,

delay and other consequences of inquiring into the matter in depth. We believe the statements of the Board confirm this view.

In application, "good cause" will require the exercise of considerable discretion in balancing the conflicting equities of the desirability for disclosure against the resulting burden, delay and the like. At this late point in the Midland proceeding, more than one-third of a year after the first session, the degree of disclosure should be far more restrictive than it would have been on November 14, 1970, when the first conference of counsel was held; or on December 1, 1970, when the first Hearing was held; or on January 7, 1971, when the Saginaw Intervenors were originally directed to submit their Interrogatories; or on January 21, 1971, when they had been fully advised of the extent of objections of the other parties and of the intentions of the Board; or on February 11, when they were to have made a good faith submission of substantial partial Interrogatories; or at any other time earlier than March 22, 1971, when some two hundred fifty pages of Interrogatories were finally deposited in the mail -- without so much as a single Interrogatory having been previously served, despite the five Saginaw assurances that they would try to serve

something earlier.*

The degree of disclosure required at this late date should also be considered in light of the obvious purpose for which the Saginaw Intervenors have used the months of delay which they demanded and obtained, by

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*"I have stated in my affidavit that I would make every effort to submit them on a piecemeal basis." (At p. 548)

Chairman Murphy: "You did say, as part of your motion, that you would undertake to do piecemeal, to submit interrogatories in batches and as they became available. Or am I misremembering." Mr. Cherry: "...I would think that when a section is completed, you know, I would have no objection to mailing those on." (At p. 596)

"Yes, I would be more than willing to submit my interrogatories section by section. I can't tell you when I will have my first section done." (At p. 597)

"If anything more than my statement as a lawyer that I will do my best to put them in piecemeal is wanted, I am afraid I can't give it." (At p. 598)

"I will make every effort to begin filing interrogatories even earlier than the three-week period, but I do regard as an overall commitment of the Board that I have until the 22nd. I will file as many as I can as early as I can. And as soon as I get a section done, the proofreader will put it in the mail." (At pp. 606-07)

Even superficial review of the Saginaw Interrogatories confirms that they have been in process for a good long time, are in large part severable and that many were in fact in final form and could have been served long ago had the Saginaw Intervenors chosen to do so. Consider, for example, Saginaw/AEC Interrogatory 320, "there is no Interrogatory Number 320," indicating that subsequent numbers and cross-references had been selected earlier. Had all the pages been typed in one sitting on March 22 by several typists, there would have been many pages like Saginaw/Applicant page 117, indicating sectional typing.

approval of the Board or by default. Rather than ask questions directed to the merits of the safety issues, they have continued with impertinences and irrelevancies suggestive of what they will do with whatever additional time is given them.

Saginaw Has the Burden of Showing "Good Cause".

In an effort to pry loose as many as possible of the Saginaw Interrogatories at the earliest time, the other parties at the January 21 Hearing waived the requirement that Saginaw in the first instance make a showing of "good cause". Instead, the other parties agreed that they would answer whatever Interrogatories they considered proper or non-burdensome without a "good cause" showing.

This procedural shifting of the burden of coming forward with objections was not intended to and did not shift the burden of making a "good cause" showing. Accordingly, the Saginaw Intervenors must supply the necessary showing of "good cause" with respect to any Interrogatories to which a party objects on any ground.

Dow Objections To Non-Saginaw/Dow Interrogatories

Dow has not made any objections to the Saginaw Interrogatories directed in the first instance to other

parties, except to the extent that those Interrogatories are repeated or incorporated by reference in the Saginaw/ Dow Interrogatories.

However, Dow will object to such other Interrogatories if response will jeopardize the May 17 trial date. Thus, Dow has no objection if Applicant chooses to respond to the Saginaw/Applicant Interrogatories, for example, in sufficient time for Saginaw to process such responses without interference with the May 17 schedule. However, if the timetable for responses and processing is such that jeopardy results, Dow requests the right to object on the ground that "good cause" has not been shown sufficient to warrant further delay of the trial.

We do think it appropriate to add an expression of concern that any response to the Saginaw Interrogatories will be seized upon as a cause for delay of the May 17 date. The lengthy Interrogatories are in large part on their face completely immaterial to any real inquiry into the safety issues of the Midland nuclear plant; some are indeed so irrelevant or impertinent as to be embarrassing. They seem to have been drafted by simply proceeding down the Petitions and PSAR in law student fashion, line by line, or with earlier allegations of bad motive and bad faith in mind, and not with an eye to inquiring into what might be

the important safety issues to be resolved; for example, no question has even been asked about Dow's brine mining over the years and its geological significance. The Saginaw Intervenors apparently had not yet even bothered to inspect the volume of Applicant's documents made available to them beginning December 1, 1970, and accordingly did not even know when serving the interrogatories the extent to which the information sought had long since been available to them.*

We have resisted the temptation to object to everything the Saginaw Intervenors have asked of any party, although their record in this proceeding to this point suggests this may be a mistake similar to that of Applicant's efforts to satisfy Saginaw counsel by its voluntary production of documents on December 1, 1970.

Explanation of
Dow Objections.

Below are set forth eleven separate categories of objections Dow has specified with respect to the Saginaw/ Dow Interrogatories. In each case where objection has been made, Dow asks that Saginaw specify the alleged "good cause"

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*Let us hope that they have now finally begun. "Upon the filing of the interrogatories I will dispatch two people to begin looking at documents while the answers are being prepared." (Statement of Saginaw counsel, January 21, 1971 at p. 558)

in support of that Interrogatory and that Dow have an opportunity to respond.

Dow has not objected to a number of Interrogatories, the Responses to which will have been served on the Saginaw Intervenors as much in advance of the April 2 Hearing as possible. Some of the Interrogatories to which Dow will have responded are just as improper as those to which objection is interposed. The reason for not objecting in such cases will be because disclosure does not create an undue burden or involve any possible jeopardy to the May 17 trial date and, as stated at the January 22 Hearing, will take less time and trouble to answer than will objection, response and argument. With this explanation, Dow hopes that it will not be faced with the contention that an objectionable question must be answered because it is similar in subject to one which has been answered voluntarily.

Dow's specific categories of objection, in addition of course in all cases to the lack of a showing of "good cause", are as follows:

> A. Standing: Interrogatories inquiring into allegations of a Petition to Intervene that bear upon the Petitioner's standing and interest. The granting of a Petition does not enlarge the issues.*

*See, In re Public Service Co. of Colorado, CCH Atom. En. L. Rep. ¶11,570 at p. 17, 685-2, Initial Decision, A.S.L.B. (Arthur W. Murphy, Chairman), September 16, 1968

B. Publicity: Interrogatories inquiring into matters relating to community support for or against the proposed nuclear plant. The issue in this proceeding is whether the proposed plant is safe, not whether the community is in favor of or against it.

C. Other Episodes: Interrogatories inquiring into alleged occurrences on other occasions, such as the "Rocky Flats" episode. What has happened at other times and in other circumstances is immaterial, and inquiry into such matters could be even more lengthy than into whether or not the Midland Nuclear plant should be constructed. Furthermore, some of this material involves classified information.

D. Opinions: Interrogatories inquiring into opinions, legal, scientific or otherwise. Except in unusual cases, which are not involved in the present interrogatories, such opinion evidence is as available to the Saginaw intervenors as to anyone else. In most cases, such interrogatories seem designed only to obtain information for use on cross-examination.

E. Content and Meaning of Documents: Interrogatories inquiring into the meaning or effect of documents, which speak for themselves. The ultimate meaning and significance will be for the Hearing Board to determine, if appropriate, upon the basis of the documents and argument.

F. Developmental Matters: Interrogatories inquiring into developments which led up to a final system described in the PSAR. An example is with regard to development of the tertiary steam system for supplying process steam to Dow. The earlier design of a secondary steam system and the reasons for changing to a tertiary system introduce wholly new and immaterial issues, of no apparent significance insofar as the safety features of the tertiary system are concerned.

The issue here is whether the plant as proposed is safe, not whether another earlier system may be less safe than the final system.

G. Business Confidence: Interrogatories inquiring into areas which Dow regards as confidential business information and which it would prefer not be revealed to its competitors. It includes detailed cost information, such as with respect to arrangements with Applicant not previously made public, methods of production using Applicant's process steam and the like.

H. Jurisdiction: Interrogatories inquiring into matters which are outside the jurisdiction of the Hearing Board, such as with respect to the possibility of sabotage.*

I. Redundancy: Interrogatories asked of several different parties and with respect to which another party than Dow, usually Applicant, is more well qualified to respond by reason of information, participation or otherwise. These include the first 232 Interrogatories directed initially at Consumers Power, but incorporated by reference in Interrogatory 1-232 to the AEC and the Dow and Midland Intervenors. Discovery is designed to elicit information -- not for purposes of cross-examination; accordingly, there is no reason why more than one party should be required to furnish the same information.

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*Siegel v. Atomic Energy Commission, 400 F.2d 778 (D.C. Cir. 1968); In re Virginia Electric & Power Co., CCH Atom. En. L. Rep. ¶11,593 at p. 17,733-6, Initial Decision, A.S.L.B., February 9, 1971; In re Pacific Gas & Electric Co., CCH Atom. En. L. Rep. ¶11,590, Initial Decision, A.S.L.B., December 8, 1970; In re Florida Power & Light Co., CCH Atom. En. L. Rep. ¶11,259, Memorandum & Order, A.E.C., February 20, 1967.

J. Information of Other Parties: Interrogatories directed only to Dow, and not to other parties, requesting information which is either available only from another party or which that other party would have in more complete and/or readily-available form.

K. Remoteness: Interrogatories seeking information whose relevance is so slight and the burden of response in terms of time and/or effort so substantial by comparison, that objection for lack of good cause is justified.

CONCLUSION

Dow requests that the Hearing Board rule on all objections to Interrogatories on April 2 and April 3 and fix a schedule for responses which will not jeopardize the present schedule calling for reconvening of the Hearing on May 17, 1971.

Dated: New York, N. Y.
March 30, 1971.

Respectfully submitted:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

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C. "Good Cause" for Discovery.

The regulations governing discovery in connection with this proceeding specifically require that "good cause" be established before discovery will be permitted. Thus, 10 C.F.R. § 2.740 (a), dealing with depositions and interrogatories, states that:

> "On motion and for good cause shown, the Commission may order that the testimony of any party or other person be taken by deposition on oral examination or written interrogatories." (emphasis added).

And 10 C.F.R. § 2.741 (a), relating to document production, provides that:

> "On motion of any party showing good cause and on notice to all other parties, the Commission may . . .[o]rder any party to produce and permit the inspection . . . of any designated documents." (emphasis added).

Unless all meaning is to be read out of the "good cause" requirement, it is clear that the regulations grant the parties less than an unfettered right to explore the records and conclusions of each other. What these limits should be must be considered on a case-by-case basis, but certain guidelines seem clear:

1. For one thing, there would seem to be no basis for permitting the applicant to have discovery of the opposing intervenors. The applicant's task -- no different than in the uncontested proceeding -- is to establish the safety and desirability of its proposed plant. The applicant

should already have at its command all the facts needed to make its presentation. After all, the applicant should have been ready to proceed if the hearing had been uncontested. And surely any inquiry into the bias or prejudice of the intervenors is irrelevant.

2. By a parity of reasoning, the latitude to be given to the intervenors in a contested proceeding should be determined in the context of the fact that they perform the function that is the Board's in an uncontested proceeding. Accordingly, if the Board in an uncontested proceeding would not engage in a wholesale "fishing expedition" into the files and the thoughts of the applicant, there is no basis why such an expedition should be permitted the intervenors. "Good cause" simply cannot mean that it is enough that the applicant has information at its disposal which the intervenor would like to review.

The regulations themselves make this clear. Indeed, the regulations make clear that "good cause" is not established merely by the fact that the material available to the applicant is relevant to the issues involved in the hearing. For after stating, in the paragraphs quoted above, that "good cause" is a prerequisite for discovery, the regulations specifically provide that any discovery which is permitted will encompass all materials relevant to the subject matter of the discovery: 10 C.F.R. § 2.740 (d) provides

that "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the hearing;" and 10 C.F.R. § 2.741 provides that the documents that are discoverable upon good cause are those that are "relevant to the subject matter involved in the pending action (10 C.F.R. § 2.741(a)(1))" or appear "reasonably calculated to lead to the discovery of admissable evidence (10 C.F.R. § 2.741(b))". Manifestly, the regulations would be redundant if relevancy alone were the test of "good cause". Accordingly, the opposing intervenors should be required to affirmatively establish their need for discovery individually as to each contention they intend to raise.

3. By the same token, because good cause is a requirement for each type of discovery, the opposing intervenors should be required to establish why <u>differing methods</u> of discovery are required on the same issue. In this regard, it seems particularly clear that the regulations do not contemplate both written interrogatories <u>and</u> oral depositions of the same party on the same matter. Rather, 10 C.F.R. § 2.740(a) establishes these two forms of discovery as alternative:

> "On motion and for good cause shown, the Commission may order that the testimony of any party or other person be taken by deposition on oral examination <u>or</u> written interrogatories." (emphasis added).

Oral depositions seem particularly inappropriate in our context. The issues here involve engineering and scientific matters; they do not involve the kind of issues that normally require oral testimony (e.g., eye witness reports or statements of conversations). Consequently, there would seem to be no reason to permit oral depositions of applicant's experts or staff if applicant's data has already been elicited through written interrogatories and/or document production. Indeed, there would seem to be no reason to allow oral depositions -- which are time consuming and would tend to be incomplete and inaccurate in regard to the types of issues involved here -- where written interrogatories or document production could achieve the same end; or to allow document production where a written interrogatory will produce a succinct distillation of a stack of papers.

Moreover, it should not be sufficient to establish "good cause" for an oral deposition that the proposed deponent will be a witness at the hearing and the deposition would be helpful to the intervenors in preparing cross-examination. If such a basis for a deposition is sustained, the discovery process will be perverted into a full-blown advance hearing. It is significant in this regard that the Federal Trade Commission, whose experience with contested administrative proceedings far exceeds that of the AEC, has

specifically provided in its regulations that the "good cause" requirement precludes depositions having that limited objective.* We submit that the FTC's experience should profitably be followed here.

In sum, the only discovery that should be permitted is that by the opposing intervenors which is clearly required by a demonstrated need going beyond mere relevancy and the scope and nature of the discovery allowed should be tailored to accomplish the objective of the search with the greatest expedition and without redundancy.

In this connection, Dow would like to raise its objection to the applicant's offer to turn all of its documents over to the opposing intervenors. While we appreciate that the offer was made in a spirit of judicious concern for a full and complete airing of the issues, we believe it contravenes all of the principles enumerated

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* 16 C.F.R. § 3.33(a) provides in part as follows:

> "Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden of any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing."

above and will prove self-defeating. For we are certain that many of the applicant's documents deal with incontestable aspects of the project, many others are irrelevant, and, without doubt, a considerable number contain data that could be distilled into relatively succinct interrogatory answers. The consequence of turning the documents over to the intervenors en masse will mean that the intervenors will have to wade through them, which can only produce unwarranted delay.

D. Ordering the pre-hearing and hearing procedures.

Assuming that a start can be made on December 1 toward simplifying and clarifying the issues, and that the guidelines for discovery can be established at that time, we believe the next priority is to determine the order in which matters should proceed, bearing in mind at all times the ultimate goal of achieving a sound consideration of all relevant issues in an expeditious manner.

We believe that the sound approach is to contemplate an issue-by-issue hearing with discovery proceeding in tandem with hearing sessions. Lest there be any misunderstanding, we do not mean that discovery should still be in progress on an issue when that issue is being considered at the hearing. We mean that the hearing should proceed on isolatable issues where no discovery is needed and as to which discovery is completed at the same time that discovery is in progress on