UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

DOW MEMORANDUM CONCERNING PROCEDURAL GUIDELINES, ISSUE TO BE EXCLUDED, AND DOW'S ROLE AND CONTENTIONS

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ATOMIC ENERGY COMMISSION

In the Matter of)
)
CONSUMERS POWER COMPANY) Docket Nos. 50-329
(Midland Plant, Units 1 and 2)) 11-25-70 50-330

SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that copies of DOW MEMORANDUM CONCERNING PROCEDURAL GUIDELINES, ISSUE TO BE EXCLUDED, AND DOW'S ROLE AND CONTENTIONS dated November 25, 1970 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 30th day of November 1970:

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DOW MEMORANDUM CONCERNING PROCEDURAL GUIDELINES, ISSUE TO BE EXCLUDED, AND DOW'S ROLE AND CONTENTIONS

This memorandum is submitted by The Dow Chemical Company ("Dow") in an effort to help establish procedural guidelines for the conduct of this proceeding and to limit the categories of issues that may properly be litigated before this Atomic Safety and Licensing Board. It is Dow's objective by these suggestions to assist the Board in designing a program which will achieve a full and fair determination of this matter in the earliest possible time.

I
PROPOSED PROCEDURAL GUIDELINES

A. Basic Principles

To begin with, Dow believes it is important to articulate certain fundamental principles which should guide the search for solutions to the individual problems that face the Board. First among such principles, we suggest, is that the surest means to guarantee an expeditious proceeding is

for the Board to give each party sufficient assignments between pre-hearing and hearing sessions to maximize the productivity of each session. While this principle may seem self-evident, it stands four-square against the concept that one party should await the service of interrogatories by the other before it has any responsibility to proceed, or that another may await the receipt of a brief before its responsibilities in the proceeding begin. Similarly, this principle stands against the notion that interrogatories and briefs don't mix and only one or the other can be in progress at any one time.

In this regard, we believe the November 17th pre-hearing conference was an unqualified success: all parties were given important assignments which if properly carried out would have fully occupied their time between November 17th and December 1st.

The second fundamental principle to be followed, we believe, is that the Board itself must keep a firm hand on the proceedings, and that it would be sheer disaster to rely upon the adversaries to work out the conduct of either discovery or the hearing. Experience teaches that, in this type of matter equally with major court litigation, procedural techniques originally designed to serve the ends of justice are often employed as strategic weapons in the

adversary arsenal, often producing the opposite end result from the one intended. We regard the success of the November 17th conference as due in large measure to the fact that the Board took firm control of the proceeding.

Lastly, we believe it is desirable to state at this point the basic role which each party should have in this proceeding. We regard this to be necessary at this juncture because many of the suggestions and arguments at the November 17th conference presupposed an erroneous approach to this proceeding and Dow's role in it, and a proper understanding of the role of the parties is basic to a consideration of pre-hearing and hearing procedures.

First of all, in this regard, is the fact that the regulatory staff and the applicant are never true adversaries in an Atomic Safety and Licensing Board hearing. This is because the applicant's proposals do not reach the stage of public hearing until they have been found acceptable by both the regulatory staff and the Advisory Committee on Reactor Safeguards ("ACRS").

As a result, it is not the regulatory staff or the applicant that determines the issues that will be considered at the public hearing. Where the hearing is

uncontested, that role belongs to the Board itself: after the staff and the applicant review the application and indicate the facets of it which they believe most relevant to the Board's consideration, it is the Board that determines the scope and direction of the hearing as it raises matters in the application that it considers worthy of review by the applicant. Thus, for example, in the case of the Millstone Nuclear Power Station, the issue of the stretch capability of the Millstone nuclear power plant was reviewed with the Atomic Safety and Licensing Board following probing by the Board, although it was not originally presented to the panel by the applicant and the staff.* In other words, while the applicant has the burden of demonstrating the safety of its proposed plant, its posture is essentially defensive and in an uncontested proceeding it is the Board that assumes the role of questioner of the applicant's proposal if it believes the applicant's initial presentation is incomplete.

The applicant's role and that of the regulatory staff do not change when the proceeding becomes a contested one. The regulatory staff continues to take a secondary role and the applicant remains the one who must prove the

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* See In the Matter of the Connecticut Light and Power Company, CCH AEC Law Reports ¶ 11,255 at p.17,495-15 (1966).

safety and propriety of its proposal. But the role of questioner no longer is solely -- or even primarily -- that of the Board. Rather, it is the intervenors in opposition to the plant who assume the task of challenging the proposal. Their intention to perform this function was the sin que non of their intervention. And, once they have raised an issue which the Board considers worthy of consideration, it is the applicant -- as in the uncontested proceeding -- that must prove the issue to the satisfaction of the Board. Of course, the Board retains its power to raise other issues -- not raised by the opposing intervenors -- and as to these issues as well the applicant retains the burden of proof.

It is in this context that procedural guidelines should be formulated.

B. Method of Identification of Issues.

The Petitions filed by the intervenors in opposition to the proposed nuclear power plant place in controversy every issue which conceivably could be raised in connection with the creation and operation of a nuclear generating facility. In Part II of this memorandum Dow will contend that many of these issues, including all of those raised by the Environmental Defense Fund, must be excluded from consideration in this proceeding on legal grounds, because neither this Board nor the Atomic Energy Commission itself

was designed to cope with them.

Beyond that, however, is the fact that the Petition of the Saginaw Valley Nuclear Study Group et al. phrases its contentions in nothing but the most general terms. And it has already been established in the case law that, in the context of a construction permit hearing, "it is not enough to oppose responsible and competent engineering design with vague and non-specific objections."* Indeed, some of the opposing intervenors' contentions are so vague that they can be read as challenging basic precepts behind the adopted Congressional policy favoring private development of nuclear power.

Paragraph 30 of the Saginaw Valley Group's Petition epitomizes the problem that exists with the contentions in that petition. For that paragraph, which demands a wholesale "fishing-expedition" type of discovery into each and every "system and major component part" of the proposed plant, is a blanket admission that the opposing intervenors do not now -- and may never hereafter -- have any basis for challenging the design of the applicant's proposed plant. Surely, this kind of an allegation is far too sweeping to form the basis for further proceedings.

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* In the Matter of Public Service Company of Colorado (Fort St. Vrain Nuclear Generating Station), CCH AEC Law Reports ¶ 11,570 at p. 17,685-6 (1968).

Section 10 C.F.R. § 2.752 of the regulations provides that one of the objectives of pre-hearing conferences is "simplification and clarification of the issues." Clearly, this must be a prerequisite before the Board is in a position to decide how the hearing should proceed and what kind of discovery should be permitted.

Dow believes that this simplification and clarification of the issues can be accomplished on December 1st, as part of a second "pre-hearing" conference held following the conclusion of the scheduled hearing session. We believe that this simplification should be accomplished in the following way:

1. To start, applicant -- who has the burden of proof on all issues just as it would if the hearing were uncontested -- should indicate the issues which it would have dealt with in any event. To this end, applicant should either list specific issues it intends to cover or come prepared to submit its affirmative case into evidence, with cross-examination reserved to all parties.

2. The opposing intervenors should then be required to indicate with greater particularity -- although, at this juncture, not necessarily with complete precision -- those matters raised in each paragraph of their petition which they realistically intend to controvert. Of course, this should be done without prejudice to their right to

raise additional questions prompted by material developed during the course of the proceedings.

The point is that the opposing intervenors have an obligation to get down to brass tacks. They have the PSAR and they should read it. And they should use it to formulate concrete issues in the same manner that Atomic Safety and Licensing Boards and the Advisory Committee on Reactor Safeguards are capable of doing. It is simply not enough for the opposing intervenors to claim that they cannot do more than they already have done.

3. Of course, the Board should at all times during steps 1 and 2 indicate whether it believes the applicant and the intervenors have done enough. Indeed, it may be possible for the Board, with its experience in this field, to refine further the issues raised by the parties. And, in addition, the Board itself if necessary should pose additional issues which it believes also should be dealt with in depth by the applicant.

If this procedure is followed and the irrelevant legal issues are excluded, it would then be realistic for the Board to consider the nature and timetable of discovery and the conduct of the hearing.

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 differing methods of discovery are required on the same issue. In this regard, it seems particularly clear that the regulations do not contemplate both written interrogatories and 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 or 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

the remaining matters. And as discovery is completed on an issue it should be considered ripe for hearing despite the fact that other issues are still in the discovery stage.

We believe this procedure makes sense for at least three reasons. In the first place, the matter before this Board is highly complicated and involves a multitude of different issues. Looked at realistically, the hearing is necessarily going to have to consider matters in an organized issue-by-issue sequence whenever the hearing begins. The mind of man cannot function otherwise without absolute chaos resulting. That being so, it simply makes no sense to require that the hearing on each issue await completion of discovery on all other issues. What makes sense is for the panel to consider each issue as it is ready to be aired and for it to prepare tentative findings as to that issue. Of course, any preliminary finding could be affected by additional material that is uncovered during discovery on other issues and none of this can be done on non-isolatable matters. But these considerations are no reason why an issue-by-issue hearing starting December 1 cannot proceed.

Moreover, it seems apparent that some issues logically precede others, particularly those which would be dispositive of this entire proceeding if decided adversely to the applicant. From the standpoint of overall economy,

it makes sense to deal with those issues as soon as they are ready for disposition. Thus, for example, if the applicant is not financially or technically qualified, we would quickly reach the end of the inquiry. There would be no need to also consider whether the individual component systems of the plant meet Part 20 standards. Similarly, if the plant should not be located in Midland, it will not be built as designed. For Dow can purchase the process steam only if the plant is located in Midland.

By the same token, if it is decided that the applicant is qualified and the plant as designed could safely be located in Midland, the parties -- and Dow in particular -- would be in a position to proceed with their planning, since they would know that a plant will be built in Midland and that the remaining questions concern only whether the plant that is finally constructed is built according to the existing plans or with modifications designed to somehow make it even safer.

Frankly put, we see little to be said in opposition to this method of procedure. And it is far from novel. It is explicity provided for by Rule 42(b) of the Federal Rules of Civil Procedure in regard to cases tried in the federal district courts. Rule 42(b) states:

> "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, . . ."

It is also recommended in the Manual for Complex and Multidistrict Litigation that was adopted by the Judicial Conference in 1969. In a particularly apt phrase, that Manual begins with the observation that "there are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management." The Manual goes on to list a wide variety of issues which have often been the subject of piecemeal disposition.* Thus, for example, a question of release or statute of limitations is often tried first since it will be dispositive of the entire case. Or trial as to a patent's validity can precede trial of an infringement claim or of a claim that the patent was misused in violation of the antitrust laws. Similarly, the issues of liability are often separated from the question of damages, and claims arising under one law are separated from those under another law, and so on.** And such a procedure is followed at the very time that the parties are continuing their discovery on remaining issues.*** Indeed, in some cases

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* Manual For Complex and Multidistrict Litigation, p. 106 et. seq.

** Citations of cases are contained in the Manual.

*** See, e.g., Metal Film Co. v. Metlon Corp., 272 F. Supp. 64 (S.D.N.Y. 1967).

the courts go even further and stay discovery on the issues which are not logically first until the potentially dispositive issues are determined.*

In that manner, we believe that if this Board followed an issue-by-issue approach to the hearing and discovery it could considerably expedite this matter, could shorten it if it is to terminate adversely to the applicant, and could do much to permit the parties to plan. At the very least, we see the following isolatable issues, which would logically follow in the order presented:

1. Whether the applicant and its contractor are financially qualified.

2. Whether the applicant and its contractor are technically qualified.

3. Whether the plant could be safely located in Midland if constructed as proposed, which assumes the levels of emissions claimed by the applicant and involves inquiry into the issues of population density, geological conditions and meteorological conditions.

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* See, e.g., Momand v. Paramount Pictures Distributing Co, 36 F. Supp 568 (D. Mass. 1941); Di Biase v. Federi:A/B Walship, 32 F.R.D. 41 (E.D.N.Y. 1963); Sogmose Realties, Inc. v. Twentieth Century Fox Film Corp, 15 F.R.D. 496 (S.D.N.Y. 1954); Air King Products Co. v. Hazeltine Research, Inc, 10 F.R.D. 381 (E.D.N.Y. 1950).

4. Whether the location of the proposed plant in proximity to the Dow chemical plant produces adverse synergistic effects.

5. Whether the maximum hypothetical accident outlined in the PSAR accurately states the outer limits of possible danger and, if not, what that accident is and what its consequences would be.

6. Whether the tertiary steam system fully meets the requirements of the regulations.

7. Whether each of the other systems or component parts of the proposed plant meets regulation standards.

Ordering Discovery and Briefing.

If this procedure is adopted, discovery also must follow an issue-by-issue approach. In other words, assuming that the first task assigned to the opposing intervenors is the preparation and service of interrogatories upon the applicant, it would make sense for the interrogatories to be submitted on an issue-by-issue basis. After all, the intervenors will write them on an issue-by-issue basis and the applicant will answer them the same way. That being so, it makes sense to have the intervenors serve each group of interrogatories as they are written, so that the applicant can begin writing his answers, rather than holding all interrogatories for a single submission. In light of the fact that the opposing intervenors have indicated that their

interrogatories will be voluminous, requiring all interrogatories to be served at once will only produce unnecessary delay. And the interrogatories can provide for any necessary document production by coupling each interrogatory with a request for the documents used in preparation of the interrogatory answer or relevant thereto -- if documents are to be produced in addition to interrogatory answers.

Moreover, since opposing intervenors' interrogatories deal mainly with matters which clearly fall within the Board's jurisdiction, they can be drafted and served on applicant before opposing intervenors address themselves to the legal issues considered in Part II of this memorandum.* In that way, the applicant's staff can be framing responses to opposing intervenors' interrogatories while the intervenors are briefing legal issues. And, to the extent that any party would be required to do two things at the same time (i.e., prepare briefs and deal with discovery matters) it would be applicant -- which has indicated its desire for an expedited proceeding -- rather than opposing intervenors.

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* After all, opposing intervenors have already conceded that the service of interrogatories need not await the Board's disposition of the legal issues.

Other Hearing Procedure.

Dow has two other procedural proposals concerning the conduct of the hearing which can be dealt with at this time:

1. We believe the hearing could be considerably expedited if the direct testimony of witnesses were presented in the form of prepared written statements as comtemplated by 10 C.F.R. § 2.743(b). The witnesses could then take the stand for any cross-examination.

2. If pre-hearing oral depositions are taken of persons who are later witnesses at the hearing, the cross-examination by the party taking the deposition should be restricted to matters not covered at the deposition and the deposition should be introduced and accepted into evidence in place of cross-examination.

To accomplish all of the objectives set forth above and to assure that all parties proceed apace, we respectfully suggest that the Board designate at the December 1 conference explicit assignments to be performed by each party according to a prescribed timetable and that it schedule at that time a series of hearing and pre-hearing sessions extending over at least the next several months, occurring at no more than bi-weekly intervals.

II

ISSUES WHICH SHOULD BE EXCLUDED FROM THIS PROCEEDING AS A MATTER OF LAW

It is Dow's position that neither this proceeding nor the Atomic Energy Commission itself was designed to cope with all of the various matters that may be involved in the creation and operation of a nuclear generating plant. Rather, the overall regulatory scheme involves a multitude of different governmental bodies. Permits, licenses or other approvals of one form or another must be obtained, for example, from the Federal Power Commission, the Food and Drug Administration, the Federal Water Pollution Control Administration, Department of the Interior, and the Securities and Exchange Commission, and from numerous state and local agencies.

Thus, for example, Dow believes that environmental questions such as thermal and air pollution are beyond the scope of this proceeding and outside the Atomic Energy Act, not because environmental questions are irrelevant, but because the Atomic Energy Commission is only one of many federal, state and local agencies which are involved with reviewing Consumers Power's application and the resolution of environmental questions was placed elsewhere. In this regard, Consumers Power's July 24, 1970 Environmental Report lists six different state

agencies* and seven distinct local governmental authorities** from which it has or is required to obtain approvals on environmental matters.

And the proof positive that even the AEC did not delegate all of its area of responsibility to the Atomic Safety and Licensing Board is the fact that byproducts licensing is something which this panel was not convened to consider.

The issues which Dow believes should be excluded from this proceeding are those which have not been assigned to this Board. For the most part they are issues which either (1) fall within the province of an agency other than the Atomic Energy Commission, or (2) are Atomic Energy Commission issues which the Commission has not given this Board the authority to deal with. The particular issues involved and the reasons why Dow believes they should be

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* State of Michigan:
- Department of Aeronautics
- Department of Public Health
- Department of Natural Resources
- Air Pollution Control Section, Division of Occupational Health, Department of Public Health
- Public Service Commission, Department of Commerce
- Water Resources Commission, Department of Natural Resources

** Midland County:
- Board of Supervisors
- Drain Commissioner
- Road Commissioner

Midland Township:
- Building Inspector
- Township Board
- Zoning Board of Appeals

City of Midland:
- City Commission

excluded by the Board are as follows:

A. With regard to The Petition of the EDF.

None of the environmental issues raised in the petition of the EDF is properly before this Atomic Safety and Licensing Board, since the AEC's jurisdiction was not expanded by the Environmental Protection Act and, on the issue of health and safety, is limited to effects arising from radioactive emissions. This matter will be the subject of a separate legal memorandum that Dow will submit to coincide with the submission by the EDF of its memorandum, which the Board set for on or about January 7th, 1971.

B. With respect to the Petition of the Saginaw Valley Group of Intervenors.

1. The contentions in Paragraphs 24, 71 and 74.

The contentions set forth in the above numbered paragraphs of the Petition of the Saginaw Valley Group of intervenors are not properly before this Board because the regulations under which the Board is to act clearly provide that the Board can issue a construction permit although not all systems in the proposed facility have been designed, and the Supreme Court of the United States has upheld the validity of such regulations.

The regulations themselves are crystal clear

on this point. 10 C.F.R. § 50.35(a) provides:

> "When an applicant has not supplied initially all of the technical information required to complete the application and support the issuance of a construction permit which approves all proposed design features, the Commission may issue a construction permit if the Commission finds that (1) the applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public; (2) such further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration, will be supplied in the final safety analysis report; (3) safety features or components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components; and that (4) on the basis of the foregoing, there is reasonable assurance that, (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and (ii) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public."

The predecessor to 10 C.F.R. § 50.35, which also permitted the issuance of construction permits prior to submission of all technical information required in the application, was upheld by the Supreme Court in Power Reactor Development Co. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396 (1961). The Court

found that the regulation was "a valid exercise of the rule-making power conferred upon the AEC by statute. . ." 367 U.S. at 407.

The Commission's regulations permitting a construction license to issue even though all systems are not fully designed is nothing more than an acknowledgment of the fact that engineering must often await on-the-scene experience. And it also assures that the plant can be adapted to incorporate the latest in ever-changing technology. The Supreme Court explicity alluded to this point in upholding the regulation:

> "[N]uclear reactors are fast developing and fast changing. What is up-to-date now may not, probably will not, be acceptable tomorrow. Problems which seem insuperable now may be solved tomorrow, perhaps in the very process of construction itself. We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision." (367 U.S. at 408.)

2. The contentions in Paragraphs 27, 42-47 and 50.

The contentions contained in the above numbered paragraphs of the Saginaw Valley Group's Petition should be excluded because they challenge the standards of Part 20 of the regulations and demand that the Board go beyond Part 20 of the regulations. This the Board cannot do.

The Atomic Energy Commission explicity held in

the Calvert Cliffs case that an Atomic Safety and Licensing Board's inquiry into a proposed nuclear power plant's effect on the health and safety of the public is limited to the standards found in Part 20 of the Atomic Energy Commission's regulations and that the Board cannot go beyond those regulations for the reasons urged by the opposing intervenors.* The dispositive character of this decision is enhanced by the fact that it was rendered by the Commission in a matter that was not appealed by any of the parties, for the purpose of reversing what was only a dictum of an Atomic Safety and Licensing Board. The AEC stated:

> "[T]he Commission's licensing regulations establish the standards for reactor construction permit determinations; and ... the findings in proceedings such as the instant one must be made in accordance with those regulations. Further, it should be clear that our licensing regulations -- which are general in their application and which are considered and adopted in public rule making proceedings wherein the Commission can draw on the views of all interested persons -- are not subject to amendment by boards in individual adjudicatory proceedings. (CCH AEC Reports at p. 17,701-5).

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* In the matter of Baltimore Gas and Electric Co, (Calvert Cliffs Nuclear Power Plant), CCH AEC Law Reports ¶ 11,578 (1969).

3. Paragraphs 53-71, 77 and 73.

The contentions in the above numbered paragraphs deal with issues raised in the Environmental Protection Act, and other environmental considerations, and should be excluded for the same reasons that the contentions of the EDF should be excluded.

III
DOW'S ROLE AND CONTENTIONS IN THIS PROCEEDING

Dow has made it absolutely clear that it favors -- rather than opposes -- the proposed nuclear facility. It's role, therefore, is not that of challenger or questioner. Unlike the opposing intervenors or the Board, it does not fall to Dow to delineate possible areas where the applicant's proposal should be reviewed in depth.

Moreover, Dow has made clear that it has intervened in this proceeding only because it was aware that this proceeding would be a contested one. Had it not been so, Dow would have relied on the Board and the applicant for a thorough review of the proposal. Dow would have entered a limited appearance to make known its position on the merits but it would not have sought a continuing role in the proceeding. In other words, Dow believes that the role of proving the safety of the proposed nuclear plant is -- as always -- the applicant's.

Third, Dow has said that its primary reason for intervening is its belief that it can be helpful to the Board in developing procedures for expediting this proceeding. Dow indicated in its Petition to Intervene and at the November 17th converence that the procedural timetable of this proceeding is a matter of critical importance to it in view of the fact that a delay in reaching a conclusion in this matter would adversely affect Dow and the Midland community even if a construction permit were eventually to issue. It is because of this concern that this memorandum has dealt at length with procedural questions and how the issues before this Board can properly be simplified and narrowed.

All of this, however, is not to say that Dow will not participate in the Board's consideration of the merits of the applicant's proposal. Of course, once the opposing intervenors and the Board have outlined the issued to be seriously controverted, it will be Consumers Power -- as the applicant -- that must prove the safety of the proposed plant. Dow does not pretend to have expertise in the construction or operation of nuclear power plants and it does not intend to duplicate the role of Consumers Power at this hearing.

On the other hand, Dow does have significant expertise in radioactivity and biochemistry. Dow employs over 1,900 research scientists at Midland, which has one of

the greatest concentrations of research Ph.D's in the world. Dow's biochemistry laboratory is one of the finest in the country. It also operates at Midland one of the finest radio-chemistry laboratories in the country, which since 1966 has had its own research atomic reactor. Indeed, Dow was one of the pioneers in private radio-activity research and in the use of radioactivity in spectrometry.

Dow has indicated that it has satisfied itself that the proposed facility can safely be located in Midland. And Dow has been deeply concerned with the quality of the process steam to be supplied to Dow from the nuclear plant. And it is Dow's chemical plant that is located adjacent to the site of the proposed nuclear facility, so that it is Dow that can be most helpful in determining whether the proximity of the chemical and nuclear plants have any adverse synergistic effects.

Therefore, while Dow does not now know which of the issues raised by the opposing intervenors in their Petition will become truly contested issues, Dow will be prepared, if appropriate, to introduce evidence at least in support of the following contentions:

1. That the proposed nuclear facility can be safely located in Midland insofar as concerns population density, meteorological conditions and geological conditions.

2. That the construction and monitoring of the tertiary steam system, through which process steam will be supplied to Dow, will assure that the radioactivity in the steam will even be below the level of the Lake Huron make-up water.

3. That the proximity of the proposed nuclear facility to Dow's chemical plant will not result in any harmful synergistic effects.

In addition, Dow may wish to introduce evidence with regard to other subjects which hereafter are put in issue.

IV
CONCLUSION

For all the reasons considered above, Dow respectfully requests that the Board adopt pre-hearing and hearing procedures along the lines set forth in Part I of this memorandum and that it exclude the legal issues raised in Part II of this memorandum.

Dated: New York, New York
November 25, 1970

Respectfully submitted
KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

By _____

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CERTIFICATE OF SERVICE

I, Milton R. Wessel, Esq., a member of the firm of Kaye, Scholer, Fierman, Hays & Handler, trial counsel to The Dow Chemical Company in the above matter, hereby certify in accordance with the provisions of 10 C.F.R. § 2.712(e)(2) that on November 25, 1970, I served a copy of the above Memorandum, by postage prepaid mail, upon the attorneys for each of the parties, whose names and addresses are listed below:

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