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June 19, 1971

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In the Matter of Consumers Power Company
Midland Plant Units 1 and 2
Docket Nos. 50-329 and 50-330

Gentlemen:

At the conference on June 7, 1971, the intervenors were directed by the Board to file specifications as to the inadequacies which they contend "underlies the staff's or the applicant's work." (Tr. 1385) Their responses are contained in a June 10 letter from Mr. Cherry and a statement dated June 8, from Mr. Ginster. In applicant's view, neither document provides an adequate basis for further participation by intervenors. Accordingly, in the attached motions* applicant moves for an order that the referenced filings be stricken from the record and that the petitions for leave to intervene heretofore filed on behalf of the Saginaw intervenors and the Mapleton intervenors be dismissed.

The petitions for leave to intervene were filed on behalf of the Saginaw intervenors and the Mapleton intervenors in November 1970. Although the Board at prehearing conferences

*Motion dated June 19, 1971, for order striking contentions of the Mapleton intervenors and motion dated June 19, 1971, for order striking in its entirety the statement of proposed cross-examination set forth in Saginaw's intervenors' letter dated June 10, 1971.

held November 17 and December 1, 1970, directed that discovery proceedings get underway promptly, it was not until approximately March 22 that the Mapleton and Saginaw intervenors filed interrogatories; and, although applicant, in response to a demand from Mr. Cherry, produced its documents in Midland on December 1, 1970, Mr. Cherry refused to look at them at that time and failed to do so until early April 1971.

Annexed to this letter is a chronology (Attachment I) which summarizes the principal events in connection with prehearing discovery procedures in this case.

In addition to the information contained in the voluminous responses by applicant to Saginaw intervenors interrogatories, applicant made available to Saginaw intervenors substantially in excess of 15,000 pages of documents for inspection, of which over 8,000 pages of these documents were reproduced and delivered to Saginaw intervenors at their request. These documents included, among other things, all the Babcock & Wilcox topical reports (including proprietary reports) relied upon by applicant.

Attachment II is a list of the Babcock & Wilcox topical reports, copies of which have been furnished to the Saginaw intervenors.

Notwithstanding the time--approximately six months--heretofore available for discovery purposes and the vast amounts of information made available to them, the Saginaw and Mapleton intervenors have failed to specify a single specific respect (and grounds therefore), in which the application fails to comply with AEC regulations or in which the plant site or design is inadequate to protect the public health and safety. Plainly, from Mr. Cherry's letter of June 10, 1971, what he now seeks is further discovery in an effort to determine whether applicant or the staff have done their work adequately.

The Saginaw and Mapleton intervenors have failed in their filings of June 10 and June 8 to specify, even for purpose of cross examination, any specific respects in which they contend the application is defective or inadequate. The filings describe a number of broad areas but always in such general terms that they fail to provide any basis for the identification or limitation of issues even for purposes of cross examination.

In applicant's view the filings represent a callous and flagrant effort to flout all canons of good procedure, the

efforts of this Board and the rules of procedure of the Commission that prehearing procedures be used to define and limit the issues and that they be so defined and limited prior to commencement of the hearing.

Section 2.714 requires that the contentions of the petitioner to intervene be set forth "in reasonably specific detail." Section 2.752 imposes on the presiding officer in prehearing procedures a responsibility for:

> "(1) Simplification and clarification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining stipulations and admissions of fact and of the contents and authenticity of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence, including the preparation of written testimony; and
>
> (5) Such other matters as may aid in the orderly disposition of the proceeding."

Appendix A, 10 CFR Part 2, directs that:

> "In contested proceedings, the use of the prehearing conference to identify what matters are in controversy and to clarify their relationship to the issues before the Board is of primary importance."

It is obvious from the Saginaw latter of June 10 and the Mapleton statement of June 8, that after all the prehearing discovery and interrogatory proceedings, these intervenors have been unable to find any grounds for their general allegations of deficiencies in the application, and that is the reason for their failure to specify any deficiencies in their filings of June 10 and June 8.

Saginaw intervenors will doubtless complain that they have not had adequate responses to their interrogatory addressed to AEC; and that they have not received the documents referred to on page 2 and the first half of page 3 of the Board's order dated May 19, 1971. But in view of the cavalier manner in which Saginaw intervenors, having urged the need for discovery with respect to applicant, now blandly ignore the information made available to them, there is no reason to believe that their interest in the AEC materials is motivated by any other motive than delay and obstruction. They have advanced no reason and no good cause why the information available to them now is not fully adequate.

The Saginaw intervenors are evidently allocating to themselves the functions of the Atomic Energy Commissioners, the Advisory Committee on Reactor Safeguards and of this Board in an effort to conduct an evaluation of the adequacy of the staff reviews. What they overlook is that in an uncontested proceeding, or with regard to uncontested matters in a contested proceeding the Board is not expected to make a de novo review of the application. In an uncontested proceeding the function of the Board is to "test the sufficiency of the information contained in the application and the record of the proceeding and the adequacy of the staff's review to support the proposals of the Director of Regulation." As stated in 10 CFR Part 2, Appendix A, Section III(g):

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

in a contested proceeding the function of the Board is described in Section VI (d):

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

Consequently, if as is here clearly the case, opposition intervenors do not allege facts such as would create a contested issue on any matter, there is no basis for a hearing de novo on that matter. More than the repeated assertion of doubt or curiosity is required of an intervenor to create a contested issue; for this purpose, facts which contravene the applicant's position should be asserted.

At most, in the absence of adequate assertions of fact such as would create a contested issue, the function of the intervenor would be to assist the Board in performing the Board's responsibilities to make the safety evaluation called for by the rules applicable to contested proceedings.

In an earlier order (March 3, 1971), the Board analogized the role of the Saginaw intervenors to that of "private attorneys general." But that role can give them no preferred status to flout the directions of the Board or the rules of the Commission. Even a public attorney general is not above the law and must accept and meet the burdens and responsibilities imposed upon those who initiate litigation.

If, contrary to the contentions urged by applicant in the attached motions, the Board denies applicant's motions to dismiss the petitions filed by the Saginaw and Mapleton intervenors, then in the alternative the applicant hereby moves the Board for an order which specifies and limits the areas in which cross examination may be conducted by the intervenors. The specified areas and the nature and the extent of cross examination by these intervenors should be restricted by the Board so as to preclude the possibility of a de novo review of the application. The Board itself, consistent with the Commission's rules as to the Board's responsibility with regard to uncontested matters, should specify those particular subjects which it, the Board, desires to inquire into for the purpose of testing the adequacy of the application and the staff review (App. A, Sec. III(g)) and the Board should strictly confine intervenors' examination to these matters.

In order to avoid any delay in the conduct of this proceeding, applicant is prepared, pending a Board ruling upon the motion and alternative motions made herein, to proceed with testimony with regard to the applicant's compliance with 10 CFR Part 100. Applicant urges, however, that the Board itself specify with particularity those particular additional subjects on which it desires testimony from the applicant and the staff beginning at the reconvened hearing July 7 and concerning which applicant and the staff should be prepared to testify at that time. Applicant believes the Board's order should confine the role of the intervenors to one of assistance to the Board with regard to its inquiries into those topics. For that purpose applicant urges that the Board be prepared to maintain careful supervision over such assistance to assure that it is conducted reasonably, with adequate preparation and with adequate prior notice to the Board, the applicant and the staff of the particular subjects to be inquired into.

As stated by the Board in its order dated March 3, 1971:

> "Intervenors will be given a fair opportunity to make their cases and to examine into the case proposed by the Applicant and staff. However--and this is particularly true for those intervenors who are acting as 'private attorneys general' to assert public rather than private interests--the primary function of the intervenor is to assist the Board in making its safety evaluation.

"This point needs emphasis because our impression is that intervenors' counsel generally conceive their function differently. For example, in a letter to the Board dated December 15, 1970, counsel for the Saginaw intervenors has said that 'the intervenors contesting the issuance of a license are in a real sense defendants in this proceeding.' This characterization is, in turn, the basis for a number of conclusions; among them are that these intervenors' 'cases' will be made primarily defensively--by cross-examination; that they need not make their affirmative case until after they see whether they have 'destroyed' Applicant's case on cross-examination; and that they are entitled as defendants to the traditional benefit of the doubt.

"This conception of the intervenor as a defendant is, we believe, misleading. Intervenors are not defendants; insofar as they claim to be representing the public interest, they have voluntarily assumed a burden of representation of the public interest--not their own--and that burden will not always best be served by assuming the posutre of defendants.

"If this were a different kind of proceeding, it might not matter too much what posture intervenors take. However, the Board must pass on very complex matters. Over two years have gone by since the filing of the application for a construction permit. The proposed reactor has been examined in detail by the regulatory staff of the Commission. It has also been subjected to examination by the Advisory Committee on Reactor Safeguards. A mountain of documents has accumulated. It seems almost self-evident that competent counsel, not under any compulsion to limit the time devoted to the case, can, by utilizing the normal litigation techniques of cross-examination, pretrial examination, etc., prolong the hearing almost indefinitely. In our view such prolongation would not be in the public interest.

"Enough has been said to indicate that the Board feels free to make rules governing the participation of intervenors in the light of the stated objectives of this proceeding. We will not try now to give detailed answers to still abstract questions, but, instead will, from time to time in the course

of this proceeding, make specific rulings on particular questions in the light of what has been said here. For the moment, we will content ourselves with the following general observations as to how we intend to proceed.

"As indicated above, the request for a construction permit for a nuclear reactor involves some very complex technical questions. Although we believe that as a general rule a litigated proceeding must be conducted by counsel, we believe that counsel, unsupported by technically qualified personnel, are unlikely to make a significant contribution to safety. Uninformed requests for documents, interrogatories, depositions and cross-examination can impose an enormous burden on the proceedings, especially because the traditional test of relevance is too broad to act as a serious limitation in a case of this kind. If relevance is the only test, there is almost no end to the inquiry which could be made. Should the Board permit cross-examination on the underlying physics of reactor technology, for example? This is not the first pressurized water reactor for which a construction permit has been requested. A number of similar reactors have been built in the United States and at least some of them have been operating over some time. Surely, some familiarity with that learning would not be an unreasonable requirement.

"As indicated by the Board early in this proceeding, we believe that the original proposed time schedule of the proceeding did not make it possible for an intervenor adequately to prepare to participate in a complicated matter of this kind. However, the corollary of that conclusion is that with adequate time for preparation of the case the intervenors should have availed themselves of the opportunity to secure a technical evaluation of the documents now on file and the general literature on pressurized water reactors. It is, therefore, our intention to insist, where appropriate, that particular lines of inquiry, requests for documents, etc., be based on technical evaluation of available information. We will not

try at this time to predict how this requirement will work in specific instances. No doubt in many cases, the overall requirement of fairness to the intervenor may justify resolutions of doubt in his favor but not to the extent that the proceeding is threatened.

"We realize that such a course will put a burden on intervenors; however, particularly for those intervenors who claim to be representing the public interest, we do not feel that the burden is too high a price to pay for the assertion of those rights. At the same time, the Board confesses some uneasiness about those intervenors who are asserting essentially private interests. It would seem appropriate in some instances to distinguish between them and the 'private attorneys general.' However, even as to them, a totally uninformed inquiry will not be tolerable."

Applicant submits that the time has come for the Board to enforce its order of March 3, 1971.

Respectfully yours,

Robert Lowenstein
Attorney for Applicant
Consumers Power Company

Attachment I. Chronology
II. Babcock & Wilcox Topical Reports furnished to Saginaw intervenors
III. Motion to strike Saginaw statement
IV. Motion to strike Mapleton statement

cc: (with attachments)
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ATTACHMENT 1

CHRONOLOGY

The Saginaw intervenors stated, in paragraph 79 of their intervention petition, that they prepared it with "a realistic dearth of information." That was November 12, 1970. Since that time, huge amounts of information concerning the proposed Midland plant have been made available to them.

Mr. Cherry was given his own personal copy of the PSAR by the applicant at the first prehearing conference on November 17, 1970 (See Tr. 109). At that conference Mr. Cherry spoke of his need for documents (Tr. 98) and applicant offered to have all of its documents listed and on hand at the December 1 hearing (Tr. 122). Applicant did bring all of its documents (including the "proprietary" documents) to Midland on December 1 and offered them to Mr. Cherry (Tr. 389, 443), but Mr. Cherry refused to look at them, stating that he intended to make no motion for the production of documents until they have been identified pursuant to answers to his interrogatories (Tr. 443-46).

At the conference held on January 21, applicant confirmed the continued availability of the documents, but Mr. Cherry did not accept the invitation to examine them (Tr. 612-14).

The Saginaw intervenors did not examine applicant's documents until April 5 and 6, 1971. A list of those examined was transmitted to the Board with Mr. Restrick's letter of April 27, 1971. Copies of over 8,000 pages of these documents were shipped to the Saginaw intervenors on April 12, 1971.

At the conference on December 1, 1971, the Board fixed January 7, 1971, as the date for the filing of interrogatories by the intervenors (Tr. 434-5). Mr. Cherry waited until his time was up and then moved for an extension of time until March 22. This extension was granted at the January 21 prehearing conference, over the objections of Dow and applicant, along with the imposition of a "good faith obligation" to serve a "substantial batch of interrogatories" by February 11 (Tr. 600, 606-07). Mr. Cherry waited until February 12 and then wrote the Chairman a letter stating that he would not file any interrogatories on February 11, but that he would "try to serve some interrogatories early in March." He did not serve any interrogatories before serving 232 of them on the applicant on March 22, 1971. Applicant objected to a few but filed two large volumes of answers to most of them on April 13, 1971.

The Mapleton intervenors also served interrogatories on the applicant on March 22, 1971. They were answered on April 13, 1971, except for one which was objected to.

On November 30, 1970, applicant moved that each party file a list of its relevant documents and a preliminary witness list by December 15, 1970. Applicant, as stated, provided its documents on December 1 and its witness list on December 15, 1970. The Saginaw intervenors filed a non-exhaustive list of their documents on June 15, 1971, and have yet to file a witness list.

Applicant's motion of November 30, 1970 also asked that intervenors opposing the application submit all of their direct evidence in writing and copies of documentary evidence by April 1, 1971, and that applicant and supporting intervenors submit all of their evidence in writing, both testimonial and documentary, within 20 days thereafter. The motion contemplated a May 1, 1971 hearing date.

At the time of the January 21, 1971 prehearing conference, this motion had not yet been ruled on. At that time, Mr. Lowenstein, speaking in support of it, said (Tr. 582-83):

> "But we do think there is a time for the discovery of evidence, and that is now and during these next few months. Then we think there is a time for the opposition intervenors, since we have already laid out ours, to come forth and say what they are basing their case on, what is the shape of their case, what is the evidence, who are their witnesses and what are their documents.
>
> "Until they have done that we really can't do anything very meaningful."

On March 3, 1971, the Board issued its order on applicant's motion. It set a hearing date of May 17. It required that

opposing intervenors' direct evidence be submitted in writing by May 1 and that applicant, staff and supporting intervenors submit their evidence in writing by May 15. The Board there stated (at p.7):

> "As indicated by the Board early in this proceeding, we believe that the original proposed time schedule of the proceeding did not make it possible for an intervenor adequately to prepare to participate in a complicated matter of this kind. However, the corollary of that conclusion is that with adequate time for preparation of the case the intervenors should have availed themselves of the opportunity to secure a technical evaluation of the documents now on file and the general literature on pressurized water reactors. It is, therefore, our intention to insist, where appropriate, that particular lines of inquiry, requests for documents, etc., be based on technical evaluation of available information."

On May 18, 1971, the Board issued another major order. It moved the hearing date to June 21. It also stated, in paragraph 5:

> "In its order dated March 3, 1971, the Board ordered that opposing intervenors file all of their direct evidence in support of their contentions in writing, including written sworn testimony and copies of documentary evidence, if any, in advance of the hearing. In view of the delay which has been occasioned by the dispute with respect to the interrogatories addressed to the AEC staff, the Board will not require intervenors to file their direct evidence on the issue of the safety of these reactors. However, the Board believes that the principle of advance submission by all parties is sound and consistent with the requirements of fairness and the Administrative Procedure Act and that there is no similar justification for

> intervenors not filing their direct evidence, if any, on the following issues, in advance of the hearing and they are hereby directed to do so by June 7, 1971:
>
> (a) Whether the applicant is technically qualified to design and construct the proposed facility.
>
> (b) Whether the applicant is financially qualified to design and construct the proposed facility.
>
> (c) Whether the issuance of a construction permit will be inimical to the common defense or security."

As to these issues, with respect to which they were ordered to submit evidence in advance, the Saginaw intervenors, in their "Response" served May 28, 1971, at pp. 14-15, stated that they were not contesting one issue and that they had no direct evidence as to the other two.

At the conference on June 7, 1971 the Board directed the Saginaw intervenors "that there has got to be some specification by you [i.e., the Saginaw intervenors] as to why a particular kind of inquiry ought to be made before we can allow it" (Tr. 1383); that:

> "...we [i.e., the Board] have to know better than we do now what it is that leads you [Saginaw intervenors] to question the conventional wisdom, if you want to call it that, in a particular area.***But I would say that by the 17th I would like to see you with a specification, at least as far as you have gone in your own analysis at that time in detail of what it is you expect to establish. Even if it is only an identification of an inadequacy which underlies the Staff's or the applicant's work.
>
> "If you do that, then we can decide something about the inadequacy." (Tr. 1385)

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> "As I say, at this particular point in time I am not prone to foreclose anything on the basis and absence of specification, but at the time of the hearing it seems to me I might -- the Board might very well feel this and it would certainly help everybody if you would indicate." (Tr. 1389)

As for the Mapleton intervenors, the Board's order dated December 8, 1970 required them to set forth the legal issues they would raise by December 11, 1970. They defaulted on that order. The matter was taken up at the January 21 hearing and they were ordered to file a statement of their contentions within 20 days thereafter (Tr. 544-46). At the May 1 conference, Mr. Ginster admitted being in default and promised to file a statement of factual and legal contentions, as well as the names of his expert witnesses, within two weeks (Tr. 1218-19). His statement of June 8 was filed in response to that directive.

ATTACHMENT 2

BABCOCK & WILCOX TOPICAL REPORTS
MADE AVAILABLE TO INTERVENORS

BAW - 1338	The Problem of Prompt Detection of Gross Fuel Failures (Proprietary)	8/69
BAW - 10001	In-Core Instrumentation Test Program	8/69
BAW - 10002	Once-Through Steam Generator Research and Development Report (Proprietary)	8/69
BAW - 10002, Sup. 1	Once-Thr ugh Steam Generator Research and Development Report	
BAW - 10005	Internals Vent Valve Evaluation (Proprietary)	7/69
BAW - 10006, Rev. 1	Reactor Vessel Material Surveillance Program	5/70
BAW - 10007	Control Rod Drive System Test Program	6/69
BAW - 10007, Sup. 1	Control Rod Drive System Test Program Supplement 1	6/70
BAW - 10008, Part 1	Reactor Internals Stress and Deflection Due to Loss-of-Coolant Accident and Maximum Hypothetical Earthquake	6/69
BAW - 10008, Part 1, Rev. 1	Reactor Internals Stress and Deflection Due to Loss-of-Coolant Accident and Maximum Hypothetical Earthquake	6/69
BAW - 10008, Part 2	Fuel Assembly Stress and Deflection Analysis for Loss-of-Coolant Accident and Seismic Excitation	10/69
BAW - 10008, Part 2, Rev. 1	Fuel Assembly Stress and Deflection Analysis for Loss-of-Coolant Accident and Seismic Excitation (Proprietary)	6/70
BAW - 10009	Effect of Fuel Rod Failure on Emergency Core Cooling	6/70

BAW - 10010,	Part 1 Stability Margin for Xenon Oscillations - Modal Analysis	8/69
BAW - 10010,	Part 2 Stability Margin for Xenon Oscillations - One Dimensional Digital Analysis	2/70
BAW - 10010,	Part 3 Stability Margin for Xenon Oscillations Two- and Three-Dimensional Digital Analyses	4/70
BAW - 10012	Reactor Vessel Model Flow Tests Part 1 and Part 2	10/69
BAW - 10015	Multi-node Computer Code Analysis of Loss-of-Coolant Accident	2/71
BAW - 10017,	Rev. 1 Stability and Compatibility of Sodium Thiosulfate Spray Solutions - Research and Development Report	5/70
BAW - 10018	Analysis of the Structural Integrity of a Reactor Vessel Subjected to Thermal Shock	5/69
BAW - 10022	Effectiveness of Sodium Theosulfate Sprays for Iodine Removal (Proprietary)	11/70
BAW - 10023	Computer Codes and Methods Used in Performing LOCA Analysis	1/71
BAW - 10024	Effectiveness of Sodium Thiosulfate Sprays for Iodine Removal (Nonproprietary Version of BAW-10022)	1/71
BAW - 10027	Updated nonproprietary version of BAW-10002 --Once-Through Steam Generator Research and Development Report	