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September 13, 1971

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U.S. Atomic Energy Commission
Washington, D.C. 20545

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

Dear Sirs:

We are in receipt of a "notice of appeal" of the Mapleton Intervenors from the ASLB's order of August 26, 1971, denying their motion to dismiss the application in the above-entitled proceeding.* 10 CFR §2.730(f) provides that no interlocutory appeal may be taken from a ruling of the presiding officer without a referral by the presiding officer. The ASLB has made no such referral here and there is therefore no basis under the Commission's rules of procedure for an interlocutory appeal.**

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* For the convenience of the Appeal Board, that portion of the ASLB's order which pertains to Mapleton Intervenors' motion is attached to this letter.

** Moreover, there has been no finding or showing that interlocutory review is necessary "to prevent detriment to the public interest or unusual delay or expense" (§2.730(f)). Since, as we have shown, there can be no appeal at all, we do not in this letter reach the question whether the Mapleton Intervenors should have proceeded by exceptions rather than by notice of appeal.

Moreover, as to the substantive question raised, there is no merit to the Mapleton Intervenors' position.

Their appeal is from the ASLB's denial of their motion to dismiss the application. The ground for the motion is that Applicant has caused the procurement and partial manufacture of the reactor pressure vessel prior to obtaining a construction permit. Their contention is that such procurement and manufacture constitutes a violation of the Act. As we pointed out below, the validity of this practice is expressly recognized by a Commission regulation -- 10 CFR §50.10(b). While it is true that §101 of the Atomic Energy Act makes it unlawful to construct or manufacture a "utilization facility" without a construction permit and §11cc(2) of the Act permits the Commission to include within the definition of "utilization facility" "any important component part" of a nuclear reactor, the fact is that the Commission, in 10 CFR §50.2(b), has explicitly refused to include any component parts within that definition.

Congress has been apprised on more than one occasion of the Commission's policy in this regard (BACKGROUND MATERIAL FOR THE REPORT OF THE PANEL ON THE IMPACT OF THE PEACEFUL USES OF ATOMIC ENERGY TO THE JOINT COMMITTEE ON ATOMIC ENERGY, PEACEFUL USES OF ATOMIC ENERGY, Vol. 2 at p. 637, 84th Cong., 2d Sess. (Comm. Print 1956); Development, Growth, and State of the Atomic Energy Industry, Hearings Before the Joint Committee on Atomic Energy, 86th Cong., 2d Sess. 101-02 and 144 (1960); AEC Annual Report for 1960 at p.236) and has not indicated any disagreement with it. This is certainly some evidence that Congress acquiesced in the Commission's consistent view that the Act gives it discretion to permit the procurement or manufacture of component parts before the issuance of a construction permit. See Power Reactor Development Co. v. International Union, etc., 367 U.S. 396, 408-09 (1961)

The Mapleton Intervenors suggested in their motion that conclusion of the construction permit proceeding before manufacture of the pressure vessel is necessary to protect public safety by giving the Board control over the details of the manufacturing process. The ASLB held to the contrary. We pointed out that the Commission has decided to control the manufacture of pressure vessels not by licensing the construction of each vessel but by the Commission's continuing surveillance

and evaluation of the manufacturing processes and quality control and quality assurance programs of the manufacturers, its specific review of such programs at the construction permit stage, its requirements in 10 CFR §50.55(a) that vessels be built in accordance with specified codes and standards, its Compliance Division's inspection of the records of the manufacture and testing of each vessel, and its final review at the operating license stage. The bulk of the Mapleton Intervenors' "Notice of Appeal" (pp. 9-21) is devoted to the argument that this is bad policy. The proper place for such an argument is in a petition for rulemaking under 5 U.S.C. §553(e), not in an adjudicatory proceeding.

The Mapleton Intervenors have made no showing pursuant to the Commission's decision in the Calvert Cliffs case (CCH ATOMIC ENERGY LAW REPORTER ¶11,578.02) which would provide a basis for attack in this proceeding on the validity of §50.10(b) or other pertinent Commission regulations.

If, contrary to Applicant's position that the Mapleton Intervenors' notice of appeal should be dismissed, the Appeal Board should nevertheless decide to consider the appeal, we respectfully request the Appeal Board for opportunity to file a memorandum of law in which we may set forth in greater detail than in this letter the reasons why the order of the licensing board should be sustained.

Respectfully submitted,

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RL:sb

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II. The Mapleton Intervenors' Motion to Dismiss the Application, and Saginaw Intervenors' Motion of August 3, 1971, with Respect to Further Procurement and Construction.

A. The Mapleton Intervenors' motion to dismiss the application is denied. The motion is based on the erroneous argument that procurement of the pressure vessel in advance of a construction permit is a violation of the Atomic Energy Act. It is not. The practice of advance procurement has been expressly sanctioned by the Commission and is not inconsistent with safe construction. Finally, the argument that advance procurement will add pressure on the Board to permit construction is simply a new formulation of the argument rejected by the Supreme Court in PRDC v. International Union, 367 U.S. 396(1961) and in countless Board decisions since that time.