

August 20, 1971

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

Gentlemen:

This letter responds to the Engineer intervenors' letter of August 10, 1971, to the Chairman of the Atomic Safety and Licensing Board (Board), including the "Notice for Subpoenas" set forth therein.

As an undersigned and the Engineer intervenors' letter, their position may be summarized as set forth below. The staff's comments are provided following each numbered item.

1. The Engineer intervenors are opposed to the closing of the record on 8/24/71, and the safety matters considered to that date. They also request the submission of proposed findings with respect to each matter, all as proposed by the applicant and the Board. They also assert that intervenors are entitled to a "fair trial" of witnesses who have already testified on safety matters which have "environmental overtones".

Staff Comment

We initially supported the concept of closing the record on matters considered to date and requiring the submission of interim proposed findings with respect to each matter. However, in view of the

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decision of the United States Court of Appeals for the District of Columbia Circuit in Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., CADC Nos. 24,839 and 24,871, July 23, 1971, we no longer believe that any useful purpose would be served by the submission of interim proposed findings. It is our position that the record through July 23, 1971, should be closed, subject to being reopened to the extent necessary and appropriate pursuant to the further Commission rulemaking mandated by the Court's decision.

2. The Saginaw intervenors propose that the Board and the parties proceed now to determine the effect of the Court's decision on this proceeding as to

- (a) evidence taken to date (including the staff safety evaluation and the applicant's PSAR) and possible modifications or supplements thereto;
- (b) the scope of future proceedings;
- (c) the legality of the notice of hearing; and
- (d) intervenors' burden of going forward in view of issues as to which the applicant assertedly has not made a prima facie case.

Staff Comment

As noted above, the Court, in the Calvert Cliffs decision, ordered further rulemaking by the Atomic Energy Commission. The implementation of the decision with respect to all affected proceedings is a matter which is presently under consideration by the Commission. Pending the receipt of guidance from the Commission with respect to the effect of the decision on pending proceedings, any determination as to its effect by the parties or the Board would be premature and very likely counter-productive.

3. The Saginaw intervenors are anticlimactically opposed to any suggestion of proceeding separately on safety and environmental issues.

Staff Comment

In the Commission's statement on the Court's decision in Calvert Cliffs dated August 4, 1971, copy enclosed, licensing boards were urged to proceed as far as possible on matters not affected by the Court's

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decision. Thus, for example, at such time as sufficient material is available for presentation on the emergency core cooling system (ECCS) issue to warrant a further hearing session, it would be appropriate for this Board to schedule such a hearing. In our view, matters considered in the interval between the Court's decision and the Commission's implementation of that decision should be treated in the same way as matters considered prior to the Court's decision. Thus, we should go forward now with the development of a record on matters, such as the ECCS issue, but not preclude reopening of the record to the extent necessary and appropriate for the consideration of environmental matters after receipt of the Commission's guidance.

4. Saginaw intervenors propose (a) that the staff perform a cost-benefit analysis and reevaluate its position on the matter of issuance of a construction permit for the Midland facilities; (b) that, if the staff still favors issuance of a permit, the staff submit a proposed list of safety matters requiring re-evaluation under NEPA in light of the Court's decision which, with comment thereon by the other parties, would form the basis for a Board ruling on the safety matters having environmental implications to be reopened; and (c) that the staff propose the other environmental issues to be considered which, with comments thereon by other parties, would form the basis for a Board ruling on the scope of environmental issues to be considered and on discovery with respect thereto.

Staff Comment

For the reasons stated in our comment on item 3. above, we believe that it would be inappropriate to consider these proposals at this time. With respect to NEPA matters, these will be dealt with in accordance with the forthcoming Commission guidance. Discussion of the nature and timing of further submissions by the staff on NEPA matters should be postponed until that guidance is received.

The Saginaw intervenors state that discovery on environmental matters cannot be completed until the complete written direct cases of applicant and staff are available, that they do not plan to serve interrogatories on such matters until that time, and that in the interim they desire to begin discovery with requests for voluntary production of documents in as broadly stated categories labelled A through Y.

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Staff Comment

The extremely broad scope of many of the document requests makes it likely that, whatever the scope of this proceeding may turn out to be in the light of further Commission guidance, some of the requests will be objectionable on grounds of good cause and relevancy and may form the basis for a request for protective orders. However, it would be premature for the parties to register specific objections or for the Board to rule on these document requests until the scope of the proceeding has been more clearly defined. In the meantime, we would agree that the parties should discuss informally whether there are any areas of obvious pertinence as to which voluntary arrangements for further production of documents may be made. Counsel for Saginaw intervenors characterizes their document requests as a "good faith" attempt to begin discovery, but we must note our distress at such patently frivolous requests as the examples quoted below:

"N. All documents dealing with chemical explosions at Dow's Midland complex and elsewhere, whether at a Dow facility or not, within the past 20 years. This category fairly calls for the source of each such explosion, the character of the explosion, the chemicals or other explosives involved, the damages incurred and the physical characteristics of the explosion such as the direction of the blast and the geographical area affected by the blast;

"P. All documents dealing with or showing the reliability, in terms of maintenance and forced outage, of each nuclear power plant in the United States and for each fossil fuel plant in the United States. There is no time limitation with respect to nuclear power plants, but with respect to fossil fuel plants, documents reflecting information earlier than 1982 are not called for;

"Q. All documents dealing with releases by any chemical or nuclear and chemical combination of any chemical, solid, or gaseous, to the atmosphere or to the rivers and streams over the past 20 years. This category calls for a specific description of each such chemical, solid, or substance, whether released normally or abnormally, how such chemical was released, what steps were taken to prevent any such future release and whether such steps have been successful. This category of documents also fairly calls for the concentration of such releases and the effects it has had upon rivers and streams and the atmosphere." (Emphasis added.)

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6. Saginaw intervenors oppose any reconvened evidentiary sessions until all matters noted above have been resolved, and suggest that no prehearing conference be held until "substantial work required by this letter has been accomplished."

Staff Comment

See our comment on item 5.

7. Saginaw intervenors urge the Board to certify questions relating to the Westinghouse proprietary reports as Saginaw proposed them and not as counterstated by the other parties.

Staff Comment

This matter has become moot as a result of the Board's certification of questions to the Atomic Safety and Licensing Appeal Board dated August 18, 1971.

Motion

8. The Saginaw intervenors move the Board for an order providing for the issuance of subpoenas to three U. S. light water nuclear steam supply system vendors who compete with the applicant's vendor, the Babcock and Wilcox Company. The requested subpoenas would, in summary, direct the production of all of the respondents' documents on ECOS, whether proprietary or not, including but not limited to those which compare one vendor's ECOS with another's. The intervenors seek these documents for the purpose of making comparative analyses.

Staff Response to Motion

The Board has already ruled in connection with the Saginaw intervenors' attempt to obtain Westinghouse proprietary reports that the function of the Board is limited to determining whether the applicant's proposed facility meets AEC safety criteria and that, accordingly, discovery will not be allowed for the purpose of inquiring into whether the facility also represents the "best available technology" (Certification of Questions to the Appeal Board, dated August 18, 1971).

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Moreover, the Atomic Safety and Licensing Appeal Board, in its Memorandum and Order dated August 16, 1971, in the Point Beach 2\* proceeding, stated

"[I]n a given [reactor licensing] case, the only question to be considered is whether the proposed reactor satisfies applicable licensing requirements. If so, the fact that other systems were used with respect to other reactors at other sites is not relevant."

Accordingly, the Saginaw intervenors' Motion for Subpoenas should be denied.

Respectfully submitted,

David E. Kartalia  
Counsel for  
AEC Regulatory Staff

Enclosure:  
Statement

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\* In the Matter of Wisconsin Electric Power Company and Wisconsin-Michigan Power Company (Point Beach Nuclear Plant, Unit 2), Docket No. 50-801.

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