UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

12-22-71

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

ORDER WITH RESPECT TO VARIOUS MOTIONS
FILED IN THIS PROCEEDING

The Board would like to acknowledge the receipt of many communications from interested groups and individuals urging an early resumption of the hearing. The Board is sympathetic to the desire to expedite the proceeding, and intends to do what it can to make sure that preliminary matters such as identification of issues and discovery are expedited. However, the Board feels constrained to comment that with respect to the major outstanding issues -- emergency core cooling system and environmental matters -- the AEC staff response to the applicant's filings has not been received, and that no purpose would be served by a hearing prior to receipt of those responses. This is not meant in any sense as a criticism of the staff, but a recognition that the new regulations have given the staff substantial new responsibilities and that it will take time for the staff to fulfill those responsibilities.

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1. The petition to intervene by the State of Kansas.

By a petition dated September 13, 1971, the State of Kansas through its attorney general has petitioned to intervene in this proceeding. In the alternative if the petition to intervene is denied Kansas requests permission to join in the pending interventions of others and in the event both the request to intervene and the request to join in pending intervention is denied the attorney general serves notice of intention to participate under 10 CFR § 2.713(c).

Since the filing of that petition, the Commission has published a Supplementary Notice of Hearing dated November 29, 1971, which seems, as to environmental issues, to meet any question of the timeliness of the petition. Counsel for Kansas has indicated to the Board that the State's interest in this proceeding is limited to the effect of wastes from this reactor on Kansas in light of the proposal to establish a permanent high-level waste repository in that State. On November 23, the Chairman by oral order granted the petition to intervene for the purpose of arguing the question of whether the impact on the State of ultimate waste storage is an issue in this proceeding and, if so, to participate fully with respect to that issue.

In order to focus the question of Kansas' intervention, the Board proposes to make the following ruling: the environmental effects of ultimate high-level waste storage are not an

issue in this proceeding; neither the applicant in its draft environmental statement, nor the staff in its detailed statement is required to consider the effects of high-level wastes after they leave the reprocessing plant, nor will any party be permitted to introduce evidence with respect thereto, or inquire into such effects by way of interrogatory or otherwise. Pursuant to § 2.730(f) of the Rules of Practice, the ruling of the Board is duly referred to the Appeals Board for further proceedings.

On or before January 15, 1972, all parties shall file any comments or arguments with respect to the proposed ruling, directing their attention both to the substance of the ruling and the proposed referral under § 2.730(f).

2. The request by Mapleton intervenors for a referral by the Board under § 2.730(f). In Part II of its order of August 26, 1971, the Board denied Mapleton intervenors' motion to dismiss the application. Mapleton intervenors have appealed the denial of that motion and their appeal has been met by the claim on the part of the staff that the order of the Board being interlocutory in nature is not appealable. (The Appeal has now been dismissed on that ground.) Mapleton intervenors have responded with the request "without prejudice, and to eliminate irrelevant technicalities" that the Board refer the question to the Appeal Board under § 2.730(f). As indicated in our earlier order we think the motion is without merit. It is highly technical and

has no discernible purpose except to undo all of the work which has already gone into this proceeding. The power of the Board to make referrals is one that ought to be used sparingly and only in those circumstances in which the Board itself feels a substantial question is raised; the request is therefore denied.

3. Part IA of the Board Order of August 26 (Issues other than the ECCS and Environmental Issues.)

(a) The order of August 26 prescribed that with respect to issues other than ECCS and environmental issues no further oral testimony would be taken except upon the specific order of the Board. Both the Mapleton intervenors and the Saginaw intervenors have objected to this portion of the order. The gist of the objections is that the order is in violation of their rights either under the Constitution or under the Administrative Procedure Act. The Board would like to restate its belief that the arguments based on the Constitution are frivolous and further to state that the Administrative Procedure Act (5 U.S.C. § 556 (d)) specifically provides that procedures requiring written testimony may be adopted except where there is prejudice to the parties. Neither the objections of Saginaw intervenors nor those of Mapleton intervenors set forth any basis for a claim of prejudice. Accordingly, the Board adheres to its earlier order.

(b) The August 26 order required that Saginaw intervenors' evidence with respect to quality assurance; Saginaw intervenors' evidence with respect to the claimed synergistic effects of Dow effluents; and Mapleton intervenors' evidence with respect to their contentions No. III and IV be filed on or before September 15, 1971. Neither Saginaw nor Mapleton intervenors have made any attempt to produce that testimony, unless the sworn testimony of Charles W. Huver submitted by Mapleton is intended as such. Their inaction is apparently based on the view that the decision of the Court of Appeals for the District of Columbia in the Calvert Cliffs case makes irrelevant the distinction between radiological and environmental issues as previously understood in this case. We do not agree with that view, and, accordingly, we propose to continue with the radiological aspects of the proceeding.

(c) With respect to quality assurance the Board notes that Saginaw intervenors did not indicate their intention to deal with quality assurance until well after the hearing commenced. In the Board's view they have had ample time to prepare any material on quality assurance which they might wish to offer. Nevertheless, the Board hereby extends Saginaw intervenors' time for

filing any evidence with respect to quality assurance or quality control until December 31, 1971. At the November 23 conference the Chairman ruled that the December 15 date specified in the proposed order would be enforced. Because the publication of the written order has been delayed, the time has been extended.

(d) With respect to synergistic effects, Saginaw intervenors' letter of September 30, 1971, states that they no longer regard the matter of synergistic effects as a radiological issue but consider that it has been transmuted into an environmental issue. The Board disagrees. It may be that evidence with respect to the synergistic effects of Dow effluents may be a factor in the Board's consideration of environmental factors; however, the question has been raised in this proceeding as to the validity of Part 20 of the AEC regulations in light of the claimed effects of radioactive releases in combination with Dow effluents. Counsel for Saginaw intervenors repeatedly advised the Board in the course of the hearings last summer that he was negotiating with unnamed experts to examine the list of effluents produced by Dow Chemical Company and give testimony with respect to them. Nothing in the Calvert Cliffs decision or the new Regulations changes the posture of this proceeding with respect

to that issue. Accordingly, the Board will allow Saginaw intervenors until December 31, 1971, to file any testimony they have with respect to the synergistic effects of radioactive releases with those chemicals listed on the Dow Chemical submission. After that time no evidence with respect to that matter will be received.

(e) By the same token, the Mapleton intervenors will be allowed until December 31, 1971, to produce their written testimony in support of their contentions No. III and IV. Mapleton intervenors have had more than adequate notice that their presentations in this respect would be required in writing and, by any conceivable test, have had adequate opportunity to have such testimony prepared. The Mapleton Intervenors' argument that contentions III and IV are environmental raises doubt as to whether they do in fact challenge the validity of Part 20. (For the record it should be noted that this argument is in flat contradiction to their earlier argument that the issues were radiological.) If they do intend to do so now is the time. The failure to file such evidence will be construed by the Board as an abandonment of their challenge to the validity of the regulations concerned. In addition,

although it is not yet clear to the Board exactly how the environmental effects of radiological phenomena are to be treated for environmental purposes, it may very well be that the failure of intervenors to introduce the testimony at this point may foreclose any opportunity to introduce it later. At the very least the Board contemplates that it will insist upon a showing of good cause for re-opening as environmental issues, matters as to which an adequate opportunity for presentation of evidence was given in the radiological hearing.

In view of the uncertainty as to the intention of the intervenors to make any filings pursuant to Paragraphs c, d and e above, the Board will now now set a date for responses thereto. However, at an appropriate time the Board will either issue an order on its own motion or at the request of any of the parties.

(f) Under Paragraph IA-4 of the Order of August 26, the Board left open the possibility that the rulings of the Appeal Board on then pending questions might have an effect upon other matters. Since that time the Appeal Board has ruled on both open questions. The Appeal Board ruling with respect to production of documents by the

AEC staff does not change the status of the proceedings. However, the decision by the Appeal Board on the documents of the Westinghouse Corporation seems to make necessary an evidentiary hearing on the underlying question of the proprietary nature of the documents. As the Board understands the ruling of the Appeal Board, unless there is a finding by the Atomic Safety and Licensing Board that the claim that the information sought is proprietary the documents must be made available to intervenors. We had not in fact made such a finding because we felt that the absence of need relieved the Board of the obligation to do so.

At the November 23, 1971, conference (which was attended by counsel for Westinghouse) it was agreed to treat the question as though it had arisen by the issuance of a subpoena under § 2.720. Following that suggestion, Westinghouse has filed a motion to quash the subpoena on various grounds. The motion to quash is hereby denied. On or before January 15, 1972, Westinghouse shall file with the Board and serve on Mr. Cherry its arguments and supporting data, if any, (by affidavit) to sustain the claim that the information in question is proprietary. Unless otherwise

ordered by the Board, or authorized by Westinghouse, the information filed by Westinghouse shall be subject to the same restriction on disclosure as the documents themselves. On or before January 8, 1972, Mr. Cherry shall advise counsel for Westinghouse (and the Board) of the names of additional individuals to whom he wishes to show the documents and other information for the purpose of contesting the proprietary nature of the documents. In addition to the names , Mr. Cherry shall identify the occupation, employment of such persons, and give such other information as is pertinent to the problem of safeguarding the confidentiality of the information pending the Board decision. If Westinghouse is agreeable, counsel shall arrange a stipulation along the lines of the protective order now in effect. If not, the reasons for their objection shall be stated in the January 15 filing. At that time the Board will fix a date for Mr. Cherry to submit counter arguments and supporting information.

4. ECCS.

(a) The Board hereby rescinds that portion of its August 26 order directing that intervenors file statements within 15 days after the applicant files its information on the emergency core cooling system.

(b) Motion II of Saginaw intervenors is denied. The emergency core cooling system is an unresolved issue in this proceeding and, as has been agreed by the parties previously, will be treated as a separate issue for resolution. If at the close of that portion of the hearing the Board feels that applicant has not satisfied the regulations, a construction permit will not issue. The thrust of the motion made by Saginaw intervenors would require that the AEC set aside or dismiss an application for a construction permit whenever developments during the course of the hearing caused the staff to ask for additional submissions. To require the dismissal of the application in such cases would be a regression to archaic rules of pleading and would not in any way add protection to the public health and safety.

(c) On November 26, 1971, the Commission issued a notice of a public rule making hearing with respect to acceptance criteria for emergency core cooling systems. It is not clear what effect that hearing will have on pending adjudicatory proceedings such as this, but it seems likely that the effect will be substantial. Tentatively the Board has concluded that it should concern itself only with the issue whether the ECCS of this reactor complies with the acceptance criteria.

Since the requests for discovery filed to date deal with questions as to the validity of the criteria as well as compliance, the Board denies all pending requests without prejudice to renewal as to matters of compliance alone. (The Board notes in passing that B&W has dropped its claim that certain ECCS information is proprietary so that the refusal by Mapleton intervenors to treat it as proprietary is now moot). At the meeting of Counsel on January 5, 1972, Counsel should be prepared to discuss with the Board what can and should be done with respect to ECCS matters in light of the rule-making hearing.

5. Environmental Matters. The following schedule for dealing with environmental procedural matters, is designed to encourage all parties to exercise their best efforts in good faith to refine the contested environmental issues in this proceeding, with a view towards disposing of those which are ripe for hearing or other action at the earliest reasonable time.

The Board appreciates that any schedule fixed at this time, before the draft and final environmental statements are available, and when important and difficult questions of law are still undecided, must necessarily be tentative and subject to change when the facts and guidelines are known. It anticipates that applications for extensions of time or other relief may be

necessary, and does not propose to administer sanctions so long as the parties in fact do exercise their best efforts in good faith.

At the same time, however, the Board recognizes the many differences of view among the parties in this vigorously contested adversary litigation. It interds to keep tight continuing control over these proceedings, and will not tolerate ex parte action by any party in violation of this schedule.

A. Applicant's Environmental Report.

(1) On or before December 31, 1971 opposing intervenors will each serve and file in writing with respect to Applicant's Environmental Report:

(i) their contentions identifying the alleged inadequacies in such report, if any;

(ii) their positions as to those issues for which they believe sufficient data is presented; and

(iii) their requests for discovery which they believe is warranted by the issues they are raising.

(2) Responses, if any, to opposing intervwnors' submissions in 1(a) will be served and filed on or before January 10, 1972.

B. Draft Detailed Statement of Environmental Considerations.

(1) On or before January 14, 1972, the AEC staff will serve and file its draft detailed statement of environmental considerations, unless upon written application on ten days' notice to all parties and for good cause shown, such time has been previously extended by the Board.

(2) On or before February 4, 1972, opposing intervenors will each serve and file in writing with respect to the Draft Statement, their contentions, positions and requests, in the same form as with respect to Applicant's Environmental Report in 1(a) (i), (ii) and (iii) above.

(3) Responses, if any, to opposing intervenors submissions in 2(b) will be served and filed on or before February 14, 1972.

(4) Supplemental "contentions, positions and requests" responsive to the comments of agencies to whom the Draft Statement has been circulated may be made at any time up to February 28, 1972.

C. Final Detailed Statement of Environmental Considerations.

(1) On or before March 15, 1972, the AEC staff will serve and file its final detailed statement of environmental considerations, unless upon written application on ten

days' notice to all parties and for good cause shown, such time has been previously extended by the Board.

(2) On or before April 5, 1972, opposing intervenors will each serve and file in writing with respect to the final statement, their contentions, positions and requests, in the same form as with respect to the Environmental Report in 1(a)(i), (ii) and (iii), and the Draft Statement in 2(b)(i), (ii) and (iii) above.

(3) Responses, if any, to opposing intervenors submissions in 3(b) will be served and filed on or before April 15, 1972.

6. Saginaw Motions dated September 30, 1971.

(a) Motions I and II are explicitly dealt with earlier in this Order.

(b) Motions III and IV are implicitly covered in the Board's rulings on ECCS matters.

(c) Motion V is denied. The Board cannot function (as the motion would have it do) as the Compliance Division. If Saginaw intervenors feel the record as to quality assurance, when completed, is such as to deny the construction permit they can request appropriate findings and conclusions.

(d) Motions VII and VIII (there is no Motion VI) are covered by the Board's Order with respect to environmental matters.

(e) Motion IX is denied as burdensome on its face without prejudice to submission of reasonable requests for documents as provided under Paragraph 5 above.

(f) Motion X is denied (except as to those Interrogatories which the parties have agreed to answer) without prejudice to the filing of an appropriate set of interrogatories in accordance with Paragraph 5 above. The motion wholly fails to satisfy the requirement of good cause; although it states that these interrogatories (as to which objections were previously sustained) have been reviewed and found "directly relevant to environmental matters," many of them seem clearly, on their face, to involve radiological or irrelevant issues. To the extent that interrogatories are addressed to the Staff their Motion makes no attempt to show why the reasons given by the Board in its June 1, 1971, rulings are not still valid.

(g) Motion XI is denied without prejudice to renewal at appropriate times under Paragraph 5 above.

(h.) Motion XII and XIII are covered by the rulings on the Westinghouse documents.

For the Atomic Safety and Licensing Board

Arthur W. Murphy, Chairman

December 22, 1971

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

12-22-71.

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	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329, 330
(Midland Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) ORDER WITH RESPECT TO VARIOUS MOTIONS FILED IN THIS PROCEEDING dated December 22, 1971, and (2) letter from Mr. Murphy to Counsel of Record dated December 22, 1971, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 22nd day of December 1971:

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