UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	12-16-71
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	

APPLICANT'S ANSWER TO MOTIONS OF
SAGINAW VALLEY ET AL. INTERVENORS

Consumers Power Company, the Applicant in this proceeding, hereby answers the "Motions of Saginaw Valley Et Al. Intervenors," dated December 7, 1971, as follows:

I. Applicant strongly opposes Intervenors' Motion No. 1, which seeks to prohibit discussions between Applicant and the AEC Regulatory Staff unless either: 1) all other parties are notified in advance and are permitted to participate; or, if such advance notice and participation is impracticable, 2) all parties to the communication prepare and distribute to all other parties, within three days, a comprehensive and detailed summary of it.

The discussions to which Intervenors' Motion is directed are not some form of improper ex parte communications. Nor do Intervenors appear to argue that any question of ex parte communications is here involved. Certainly the AEC's Rules of Practice do not preclude the Regulatory Staff, itself a party in this adjudicatory proceeding, from entertaining off the record communications. 10 CFR 2.780(a).

The integrity of the decision makers in an administrative adjudication are in no danger because of any challenged discussions with the Regulatory Staff in this "contested proceeding", because the decision makers may not consult the Staff in such a proceeding. 10 CFR 2.780(e). And, of course, it is the integrity of the decision makers which the "ex parte" prohibition is designed to protect. 5 U.S.C.A. §554(d) (1967); see Attorney General's Manual on the Administrative Procedure Act, p. 15 (1947); see also Davis, Administrative Law Treatise, §13.12, p. 465 (Supp. 1970); see also Lovett, Ex Parte and the FCC: The New Regulations, 21 Fed. Communications B. J. 54,57 (1967). Thus with regard to Intervenors' motion, "ex parte" considerations are clearly irrelevant.

Although, Intervenors advert to the presiding officer's general powers to conduct the instant hearing in a fair and expeditious manner (Motion p.1; 10 CFR 2.718), they cite no authority, and we are aware of none, for the proposition that the challenged discussions violate any of their rights whatsoever. They will continue to possess adequate opportunity to contribute to the building of a record, and to controvert any part of that record with which they desire to take issue. 5 U.S.C.A. §554(c) (1967).

Intervenors imply (Motion p.3) that they fear "agreement outside the hearing room" between Applicant and the Regulatory Staff. However, the Staff is a full party and

if agreements between parties come about and the total conflict is thereby narrowed, this is clearly to the good of an administrative process which contemplates just such a process of informally limiting the issues, rather than prolonged litigation.

Moreover, in view of the Staff's clear mandate to represent broad public interests, Intervenors can hardly represent themselves as the sole bastion of public welfare. The public interest may be expected to receive full and fair consideration in the instant proceeding even if Intervenors' role remains somewhat less than ubiquitous.

Intervenors' motion may also be viewed as a unique attempt to promote a new and expanded form of discovery. In this respect we note that the AEC's Rules of Practice, at 10 CFR 2.740 et seq., devote considerable attention to prescribed discovery methods. Those rules regulate the procedures to be followed, applying well-recognized protections against abuse by any of the parties. The protections afforded the parties are, moreover, covered by a large body of existing law which apparently would be inapplicable to the disputes which would inevitably arise from the grant of the motion. Grant of the motion would also appear to be precluded by 10 CFR 2.718(l), which requires that action taken pursuant to §2.718 be compatible

with the remainder of the regulations, of which the discovery rules are a part.

Intervenors' assertion that grant of its motion will not unduly burden this proceeding is totally unconvincing. In addition to the time which would inevitably have to be devoted to disputes and their resolution, the necessity of advance notice to all parties before any discussion plus an opportunity for all to "participate" is obviously unworkable and might cause a virtual cessation of communications between parties, thereby greatly prolonging the proceeding. Alternatively, the subsequent reduction of all oral discussions to writing would further burden the parties. In addition, the setting out for the record of a fair and accurate summary of a given conversation could easily result in generating further dispute as to what actually was said or intended. Davis, supra, p. 469. Thus, it is readily apparent that the granting of Intervenors' motion would directly place a severe additional burden on an already slow moving proceeding. Such an action would hardly comport with the presiding officer's duty under 10 CFR 2.718 to "take appropriate action to avoid delay."

For the foregoing reasons, Applicant submits that Intervenors' Motion No. 1 should be denied.

II. For the reasons set forth above, Applicant also opposes Intervenors' Motion No. 4. The additional delays inherent in reconstructing discussions which have occurred over a five-month period, and the inevitable disputes as to the accuracy of any such reconstructions render this motion particularly at variance with the spirit of 10 CFR 2.718.

III. Applicant also opposes Intervenors' Motion No. 3, which seeks permission to communicate informally with agents of the Regulatory Staff. Like Motion No. 1, this motion appears to seek an expanded form of "discovery," which is subject to all of the objections discussed above and is not authorized. As indicated in the discussion of Motion No. 1, we know of no reason why the parties to this proceeding may not communicate with each other to the extent they regard such communication to be in their best interests. Conversely, the privilege of refraining from such communication is available to any party upon an appraisal of its own interests and available resources. There is no authority for or reason why the decision maker should seek to inject itself into this area of litigants' prerogatives.

Intervenors, however, do appear by this motion to seek the Board's Order to the Staff to bring about such discussions. Intervenors have not detailed, and we do not see, how 10 CFR 2.718 can be fairly read to allow the presiding

officer to force parties to communicate off the record in contravention of their perceptions of their particular interests.

IV. Motions No. 2 and 5 request that the Regulatory Staff be required to produce documents, correspondence and related information without, in our view, adequate justification for the sweeping orders to produce which are sought. However, since the burdens of such discovery would fall entirely upon the Regulatory Staff, we take no position with respect to those motions.

Dated: December 16, 1971

Respectfully submitted,

LOWENSTEIN, NEWMAN & REIS
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

By Harold F. Reis
Harold F. Reis

Attorneys for Applicant
Consumers Power Company

Of Counsel,

Harold P. Graves
Robert Lowenstein
John K. Restrick
Richard G. Smith

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Answer to Motions of Saginaw Valley et al. Intervenors", dated December 16, 1971, in the above-captioned matter have been served on the following in person or by deposit in the United States mail, first class or airmail, this 16th day of December, 1971.

Arthur W. Murphy, Esq., Chairman
Atomic Safety and Licensing Board
Columbia University School of Law
Box 38, 435 West 116th Street
New York, New York 10027

Dr. Clark Goodman
Professor of Physics
University of Houston
3801 Cullen Boulevard
Houston, Texas 77004

Dr. David B. Hall
Los Alamos Scientific Laboratory
P.O. Box 1663
Los Alamos, New Mexico

William J. Ginster, Esq.
Suite 4
Merrill Building
Saginaw, Michigan 48640

James A. Kendall, Esq.
135 N. Saginaw Road
Midland, Michigan 48640

Anthony Z. Roisman, Esq.
Berlin, Roisman and Kessler
1910 N Street, N.W.
Washington, D.C. 20036

Thomas F. Engelhardt, Esq.
U.S. Atomic Energy Commission
Washington, D.C. 20545

Milton R. Wessel, Esq.
Kaye, Scholer, Fierman, Hays and Handler
425 Park Avenue
New York, New York 10022

James N. O'Connor, Esq.
The Dow Chemical Company
2030 Dow Center
Midland, Michigan 48640

Myron M. Cherry, Esq.
109 N. Dearborn Street
Suite 1005
Chicago, Ill. 60602

Algie A. Wells, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Atomic Energy Commission
Washington, D.C. 20545

Irving Like, Esq.
200 West Main Street
Babylon, New York 11702

Stanley T. Robinson, Esq.
Chief, Public Proceedings Branch
Office of the Secretary of the Commission
U.S. Atomic Energy Commission
Washington, D.C. 20545

Harold F. Reis

Harold F. Reis