

DOCKET NUMBER  
PROD. & UTIL. FAC. 50-329,330

LAW OFFICES  
**LOWENSTEIN AND NEWMAN**

1100 CONNECTICUT AVENUE, N. W.  
WASHINGTON, D. C. 20036

202 296-7585

May 20, 1971

ROBERT LOWENSTEIN  
JACK R. NEWMAN  
JEROME E. SHARFMAN

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 87544

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

Gentlemen:

We are in receipt of a letter bearing the initial date May 13, 1971 (succeeding pages of which are dated May 14) from counsel for the Saginaw intervenors setting forth what purport to be additional "motions" in this proceeding.

The letter and "motions" incorporated therein, as well as their earlier letter of May 11, 1971, arise out of a sudden interest on the part of the Saginaw intervenors in the adequacy of the Midland emergency core cooling systems (ECCS). Their new interest appears to have developed as a result of correspondence in other proceedings wherein the AEC Staff indicated that it is currently re-evaluating the effectiveness of ECCS systems for light water nuclear power reactors. We shall discuss each of the Saginaw motions in turn.

1. Mr. Cherry's earlier letter of May 11th alluded to "tests with respect to emergency core cooling systems" conducted at the Idaho Reactor Test Facility which he stated yielded "dubious" results. His motion was for "a description of the test...as well as a statement of the results." See p. 2 of his letter. In its telegram to the Board of May 13, 1971, Applicant stated that it had no objection to Mr. Cherry's motion for production of the reports of the tests.

8007151008

G

hearing

In Mr. Cherry's May 13th and 14th letter (hereinafter referred to simply as "Mr. Cherry's letter"), at p. 2, the Saginaw intervenors now expand their motion to cover "production of all of the documents which relate to the development of the test, running of the test, the results and the evaluation insofar as it affects the Midland Units."

We wish to make clear that we oppose this motion insofar as it requests anything beyond the reports of the test results. We understand that these are publicly available documents. Our objections are based upon several grounds. This additional request of Mr. Cherry's is so vague and broad as to be unmanageable. For example, it does not state what it means by "the evaluation", whose evaluation it refers to or how anyone is to determine to what extent, if any, any evaluation made by anyone "affects the Midland Units". If granted, this expanded motion will surely get us into endless problems of whether the Staff has complied. We suggest that the published test results can be analyzed by the Saginaw intervenors' experts, in the light of everything which has been published about the Idaho testing program, for the purpose of gauging their significance, if any, with regard to the proposed Midland plant. Consequently, there is no good cause for the granting of this motion in its expanded form.

2. The Saginaw intervenors' second motion is for an order "that no further communication between the ACRS, the AEC and anyone connected with the Midland Plant be held without full and complete disclosure to all parties." See p. 3 of Mr. Cherry's letter. The basis for this motion appears to be information given to Mr. Cherry by Mr. Restrick of Consumers concerning a meeting to be held between the ACRS and Babcock & Wilcox regarding its ECCS systems. Babcock & Wilcox has met and may well in the future have meetings in the regular course of business with the AEC Staff or the ACRS to discuss Babcock & Wilcox ECCS systems generally, without reference to the system of any particular plant. Generic discussions of this type are one mechanism by which the Commission executes its continuing responsibility for the regulation of the nuclear industry. Such discussions do not involve quasi-judicial matters and, typically, neither applicant nor intervenors in particular cases participate in them. They are not ex parte communications within the meaning of 10 CFR §2.780 because neither this Board nor the Commission nor those who advise them are participants. Indeed, if §2.780 were otherwise applicable, the communications would come within the exemption in §2.780(d)(2)

for "Communications requested by the Commission concerning... general health and safety problems and responsibilities of the Commission."

Of course, Babcock & Wilcox and Bechtel are involved in licensing proceedings concerning other nuclear plants in various stages of administrative review and this necessarily entails meetings with the staff and the ACRS regarding those plants. It would be absurd to suggest that all parties to this case must necessarily be privy to all such discussions in all of those other cases or that the scope of this proceeding should be broadened to encompass all issues raised in all of those cases. Yet, this would seem to be the result of granting the Saginaw intervenors' second motion.

Meetings with the AEC Regulatory Staff and the ACRS have never been public or adversary and it is doubtful whether this Board has jurisdiction to control ACRS or AEC Regulatory Staff meeting procedures. In addition, it would be improper to prohibit meetings between the Staff and any other party, for the Staff is a litigant in this proceeding, not a judge. To prevent the Staff from communicating privately with other parties or non-parties would necessarily hinder its ability to participate in the proceeding effectively or to continue to perform its continuing regulatory responsibilities.

Participation as a party in contested proceedings is only one of the Staff's responsibilities. It has additional responsibilities to perform licensing evaluations and to review the adequacy of nuclear reactor construction and operation.

The unreasonableness of intervenors' demand to attend such meetings is patent. It would be impossible for the Staff or ACRS to inform themselves adequately as to technical aspects of power reactors' design, construction and operation if their meetings with applicants or their contractors were to be opened to the public. Be that as it may, however, this Board has no authority to require that this be done.

For the reasons set forth, this motion should also be denied.

3. The Saginaw intervenors also move that "a complete transcript of any communications thus far had between the AEC and ACRS and the Applicant or Babcock & Wilcox or Bechtel concerning or involving the Midland Units, whether involving the ECCS system or not, be immediately produced for inspection and copying by Intervenor." See Mr. Cherry's letter at p.3.

This motion, which also is plainly aimed at opening new avenues of discovery, should be denied for the following reasons:

a. Insofar as the motion is addressed to the ECCS, the Saginaw intervenors have made no showing that good cause exists for granting it. They have already received extensive information concerning the Midland plant's ECCS from the PSAR, all of Applicant's documents which have been made available to them and Applicant's answers to their interrogatories on that subject. Moreover, they will presumably obtain the results of the Idaho tests. Therefore, there is no justification for a "fishing expedition" into the files of the Commission or the Applicant and its contractors.

b. The motion comes too late. The Saginaw intervenors have had ample opportunity during the last six months to conduct extensive discovery and the Applicant and the Staff have made available to them thousands of documents. Any request at this late date for additional wide-ranging discovery would require a strong showing of good cause which has not been presented.

c. The motion is broad in the extreme. It requests the production of documents without, in any way, identifying the manner in which such documents are relevant to any issue in this proceeding. Indeed, its generality and lateness cast serious doubt as to whether it is made in good faith. In any event, the motion is without merit and should be denied.

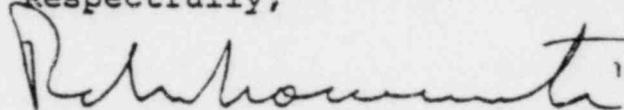
Before closing, we should like to make a general comment. Saginaw intervenors seem to be seizing at random upon every pretext which comes to hand, first to delay discovery and now, at the eve of the hearing, to extend discovery. The fact that the AEC Regulatory Staff is "conducting a re-evaluation" of ECCS systems for water-cooled nuclear power plants does not provide any basis for intervenors initiating new discovery procedures particularly where, as here, it is so plainly an afterthought. There is no reason to assume that the Staff re-evaluation of the Babcock & Wilcox ECCS system design in light of the Idaho tests will result in the Staff's withdrawal of its earlier approvals; but, if that unlikely eventuality should occur, it is for the Staff to do and it is quite capable of advising the Board as to any such withdrawal. Clearly, the Staff does not need assistance from the Saginaw intervenors in advising the Board of the outcome of its re-evaluation and the basis therefor. If the Saginaw intervenors have competent evidence which they believe is sufficient to raise an issue

as to the adequacy of the Midland Plant ECCS, they have only to include such evidence with their direct testimony in the manner prescribed by the Board in its March 3rd Order. As noted in Applicant's telegram dated May 13, 1971:

"If an issue develops with regard to effectiveness of emergency core cooling systems for Midland units, applicant will be prepared to introduce evidence which will demonstrate the adequacy and effectiveness of these systems."

The time has long since passed for initiating new inquiries which would delay the hearing, especially where, as here, the intervenors have shown no cause but seem merely to be seizing upon Staff activity as the basis for their inquiries.

Respectfully,



Robert Lowenstein  
Attorney for Applicant

RL:sb

cc: William J. Ginster, Esq.  
James A. Kendall, Esq.  
Anthony Z. Roisman, Esq.  
Thomas F. Engelhardt, Esq.  
Milton R. Wessel, Esq.  
James N. O'Connor, Esq.  
Myron M. Cherry, Esq.  
Algie A. Wells, Esq.  
Stanley T. Robinson, Esq.