10/9/74

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Construction Permit
CONSUMERS POWER COMPANY	)	Nos. 81 and 82
	)	(Show Cause)
(Midland Plant, Units 1 and 2))		

MEMORANDUM OF CONSUMERS POWER COMPANY IN OPPOSITION TO THE PETITION OF THE SAGINAW INTERVENORS TO REOPEN THE RECORD AND/OR FOR RECONSIDERATION OF INITIAL DECISION

On September 30, 1974, Saginaw Intervenors moved the Atomic Safety and Licensing Board to (1) reconsider the Initial Decision and upon reconsideration reopen the record for further evidence, and/or (2) to reopen the record. The asserted basis for the motion is that "material, relevant and decisive information was not brought to the attention of the Licensing Board, which information may have a vital impact upon the decision." (Petition p. 1) The information consists of the "facts" alleged in a Complaint filed in the United States District Court for the Western District of Michigan by Consumers Power Company ("Consumers") against Bechtel Corporation and others arising from a dispute over the construction of the Palisades nuclear power plant. Consumers opposes the petition to reopen the record or reconsideration of the Initial Decision.

In Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-138, RAI-73-7 pp. 520-534 (July 31,

1973) the Appeal Board, in considering for the third time the question of reopening a hearing (see ALAB-124 in RAI-73-5 at p. 358 and ALAB-126 in RAI-73-6 at p. 393) established the principles which are to guide Licensing Boards in reopening an evidentiary record after the conclusion of a hearing. Those principles are as follows:

> (1) The timeliness of the motion, i.e. whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing; and (2) the significance or gravity of those issues. A board need not grant a motion to reopen which raises matters which, even though timely presented, are not of "major significance to plant safety" (ALAB-124, RAI-73-5 at 365). By the same token, however, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier (ALAB-124, RAI-73-5 at 365, fn. 10; see also ALAB-126, RAI-73-6 at 394).

Applying these principles to the issues raised in the Saginaw Intervenors' Petition, it is apparent there is no basis to reopen the show-cause hearing. On the question of timeliness, it need only be pointed out that, although the Complaint was filed on August 28, 1974, the primary thrust of Consumers' civil litigation against Bechtel deals with a January, 1966 contract for the construction of a facility which was essentially completed in 1970 and licensed to operate on March 24, 1971 (see Initial Decision of September 25, 1974 p. 55 footnote 132). Thus, to the extent the basic facts on which the civil litigation rests are relevant to the issues before this Board, such facts were available to the parties to this proceeding long before August 28, 1974.

Indeed, counsel for the Saginaw Intervenors participated in the Palisades operating license proceeding which took place in the years 1970 and 1971 and the Saginaw Intervenors, again represented by the same counsel, participated in the Midland construction permit proceeding during 1972 and 1973. In both proceedings, Bechtel's role as engineer-constructor for Consumers with respect to construction quality assurance was in issue. As a result, facts underlying Consumers' civil litigation against Bechtel were subject to discovery in each prior licensing proceeding.

Moreover, in this show-cause proceeding, the Saginaw Intervenors have made no prior contribution to the evidentiary record. Despite the availability of documents voluntarily produced by Consumers during the discovery process, the Saginaw Intervenors declined to examine them. Following the conclusion of the discovery process, although the Saginaw Intervenors had the burden of proof at the hearing (Initial Decision p. 15, par. 26), they filed no written testimony (Initial Decision p. 13, par. 21). they filed no trial brief (Initial Decision p. 14, par. 22), they did not participate in the evidentiary hearing (Initial Decision p. 16, par, 28), they did not file a memorandum requesting official notice be taken of certain documents alleged to constitute their case (Initial Decision p. 19, par. 35) and they did not file proposed findings of fact and conclusions of law. (Initial Decision p. 19, par. 35). With this history of inaction on the part of the

Saginaw Intervenors, it is apparent that their failure to present evidence of a particular type is unrelated to its alleged unavailability.

Just as the Petition was not timely filed, the issues raised are not of "major significance to plant safety" (ALAB-124 at 365, ALAB-126 at 523) and of marginal relevance and materiality to the issues in this proceeding. The Complaint deals with occurrences at the Palisades plant and has no connection whatsoever to the construction of the Midland Plant. Moreover, the "facts" alleged in the Complaint are of a rather peculiar nature. It is well established that pleadings in federal civil litigation need not plead "facts", as such, so long as the pleadings give the opposing party notice of the claim against it and contain a "short and plain statement of the claim". F.R.C.P. 8(a). Similarly, federal civil procedure contemplates that pleadings may be alternative and hypothetical. F.R.C.P. 8(e). The lack of significance of pleadings in federal practice is based on the theory that it is only at the conclusion of the discovery process that the contentions of the parties and the factual bases for such contentions will become sufficiently delineated so that a meaningful trial will take place. 2A Moore's Federal Practice ¶8.02. Thus, the "facts" which the Saginaw Intervenors have culled from the Complaint and which they assert should be a part of this evidentiary record are basically legal characterizations of Bechtel's conduct, such as "breach of warranty", "grossly negligent" and "willful and wanton". (Motion pp. 2-3). Since these

"facts" were authorized by counsel for the purpose of initiating federal civil litigation, their pertinence to the issues in this proceeding is nil.

Even if the "facts" alleged by Consumers in the civil litigation complaint were more substantial than the legal characterizations described above, it is clear that occurrences at the Palisades plant have little relevance to the show-cause proceeding. The two issues specified in the order to show cause issued by the Commission on December 3, 1973 are limited to whether Consumers is implementing its quality assurance program at Midland in compliance with Commission regulations and whether there is reasonable assurance that such implementation will continue throughout the construction process. During the course of the show-cause proceeding, the Saginaw Intervenors attempted to expand the issues in the proceeding to include a review of Consumers activities at its other nuclear facilities, including Palisades. The Board rejected this approach, holding only that the attitude of Consumers senior management personnel towards compliance with Commission regulations and license requirements was relevant and material to the issues in the show-cause proceeding (Order, May 14, 1974). This ruling was specifically approved by the Commission. Consumers Power Co. (Midland Plant Units 1 and 2) CLI-74-27, RAI-74-7 p. 4 (July 16, 1974) The primary thrust of the Complaint deals with the design and construction of Palisades. Those activities took place prior to the effective date of Appendix B to 10 CFR 50, the basic quality assurance regulation with which Consumers must comply in the construction of Midland.

Since the facilities are different and the regulatory standards under which the facilities were designed and constructed are different, an inquiry by this Board into the "facts" alleged in Consumers complaint against Bechtel would be a useless exercise.

Finally, the procedure contemplated by the Saginaw Intervenors with respect to the "facts" alleged in the Complaint is either meaningless or would result in this Board trying the issue of Bechtel's liability to Consumers for alleged breach of contract and negligence with respect to Palisades. The Appeal Board, in the Vermont Yankee decision held that if a motion to reopen the record is granted, there are further procedural steps which must be taken.

> [T]he Board must then proceed to consider whether one or more of the issues requires the receipt of further evidence for its resolution. If not, there is obviously no need to reopen the record for an additional evidentiary hearing. As is always the case, such a hearing need not be held unless there is a triable issue of fact. ALAB-138 at 523.

In this instance, the Complaint itself does not contain detailed factual allegations supporting its characterizations of Bechtel's conduct. Thus, the complaint itself would add nothing of any substance to the evidentiary record in this proceeding. If, however, a full-blown evidentiary hearing is undertaken into the factual substantiation for the charges in the Complaint, as well as Bechtel's factual defenses to those charges, this Board will become involved in a commercial dispute between Consumers

and Bechtel, in which the ultimate issue is not quality assurance compliance at Midland, but whether Bechtel owes Consumers money for breach of contract or negligence in connection with services rendered by Bechtel at the Palisades plant. Of course, the scope of that issue can only be determined after extensive discovery. While that issue will undoubtedly become a "triable issue of fact" at the conclusion of the discovery process, it is an issue that is only triable before the United States District Court for the Western District of Michigan and not before an Atomic Safety and Licensing Board.

For all the foregoing reasons, the Saginaw Intervenors' petition to reopen the record should be denied.

Respectfully submitted,

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DATED: October 9, 1974

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NOTICE OF FILING
AND
PROOF OF SERVICE

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PLEASE TAKE NOTICE that I have this day filed with the Atomic Energy Commission the Memorandum Of Consumers Power Company In Opposition To The Petition Of The Saginaw Intervenors To Reopen The Record And/Or For Reconsideration Of Initial Decision, a copy of which is hereto attached and herewith served on you.

Michael I. Miller
One of the Attorneys for Consumers Power Company

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