UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION'S RESPONSE TO SAGINAW-SIERRA'S COMMENTS IN CONNECTION WITH ORAL ARGUMENT

Bechtel Power Corporation and Bechtel Associates Professional Corporation ("Bechtel") hereby respond to Saginaw-Sierra's "Comments...In Connection with Oral Argument" ("Comments").

I

. INTRODUCTION

Bechtel objects to Saginaw-Sierra's use of ALAB-235[1] as somehow supportative of the substance of any of Saginaw-Sierra's allegations in its "Petition to Reopen the Record and/or for Reconsideration of Initial Decision" ("Petition to Reopen") filed with this Licensing Board on September 30, 1974. Additionally, Bechtel objects to Saginaw-Sierra's attempted use of ALAB-235 to shift the burden of proof or to crown the Petition to Reopen with a "prima facie validity." In ALAB-235 the Appeal Board merely granted Saginaw-Sierra's "Motion for Extension of Time" within which to file exceptions to the Initial Decision in this proceeding. The Appeal Board did not in any way either find

[1] Memorandum and Order, RAI-74-10 p. 645 (October 17, 1974).

merit in the Petition to Reopen or reverse the traditional rules governing reopening of hearings, as set forth in ALAB-138.[2] The parameters of ALAB 235 were specifically limited by the Appeal Board:

> Saginaw's motion before us asks only that its time to file exceptions be extended until the Licensing Board resolves the petition to reconsider. That petition brought to the Licensing Board's attention for the first time the fact that applicant is suing Bechtel on allegations of deficient performance in constructing another nuclear facility. The adequacy of Bechtel's performance at the Midland facility was a matter at issue in the proceedings below. Whether applicant's new allegations about Bechtel's inadequate performance at Palisades should be taken into account in evaluating the evidence of that organization's performance at Midland is a matter which cannot be dismissed out of hand as a dilatory tactic. In the circumstances, Saginaw's motion to extend the time to except until the Licensing Board rules on its petition raising this new development is an appropriate request.[3]

In granting only an extension of time to except to the Initial Decision, ALAB-235 did not pass on the merits of Saginaw-Sierra's Petition to Reopen and there was no indication that the Appeal Board considered the Petition to Reopen had "substance" as Saginaw-Sierra would have this Licensing Board believe. That this is so is made explicit by two facts: First, the Appeal Board did not direct the Licensing Board to reopen the record or to reconsider its Initial Decision. Second, the length of time granted by the extension clearly recognized the possibility that this Licensing Board might

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[2] In the Matter of Vermont Yankee Nuclear Power Corporation, RAI-73-7, p. 520, 522 (July 25, 1973).

[3] RAI-74-10, at pp. 648-649 (Emphasis supplied).

refuse to reopen the record or reconsider its Initial Decision. Thus, the Appeal Board left the Licensing Board free to handle the matter as it saw fit with the single proviso that the allegations should not be "dismissed out of hand as a dilatory tactic." ALAB-235 did not require, as Saginaw-Sierra contends, a "hearing inquiring into the underlying facts."[4]

II

The Oral Argument on Saginaw's Motion to Reopen was scheduled to address the question of whether or not a hearing inquiring into the underlying facts of Consumers Power Company's Palisades lawsuit should be held.

If this Licensing Board arrives at the conclusion that there may be a connection concerning the performance of Bechtel in the area of Quality Assurance Program implementation at Palisades and at Midland, that decision, in and of itself, does not dispose or answer the questions of relevance or materiality. Suppose this Board concludes that the allegations in Consumers' lawsuit merit examination. At that point, this Board must proceed to try any or all of those allegations since an allegation of liability is certainly not conclusive of liability. If this Board determines, after all the evidence is in, that Bechtel is liable to Consumers under one or more counts of the Complaint, it must then make a determination of whether the basis for that liability is relevant and material to the issues in this Show Cause proceeding. If the Palisades liability is determined to be relevant to the issues in the

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[4] "Comments of Saginaw Intervenors in Connection with Show Cause Oral Argument," p. 2 (December 2, 1974).

Midland Show Cause proceeding, then and only then would this Licensing Board be justified in reopening the record in this Show Cause proceeding.

There is persuasive legal authority to the effect that circumstances under which other comparable conduct occurs should be substantially similar to the circumstances at issue before evidence of that conduct is admissible.[5] In Curns v Martin, 193 NW 2d 214 (ND 1971) it was held:

> ...As a general rule, the commission of an act cannot be proved by showing the commission of similar acts by the same person or his agents or employees at other times and under other circumstances, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity as to some particulars. Generally, also, exclusion is required of all evidence of similar or comparable facts, acts, or conduct which are incapable of raising any reasonable presumption or inference as to any principal and material fact or matter in dispute.... 193 NW 2d at 216.

It is Bechtel's contention that the circumstances within which the Palisades allegations arose are such as to make any comparison between those past allegations of conduct at Palisades and present and future conduct at the Midland Plant meaningless.

III

ARGUMENT RE RELEVANCY AND MATERIALITY OF THE PALISADES COMPLAINT TO THE ISSUES OF QUALITY ASSURANCE IMPLEMENTATION AND REASONABLE ASSURANCE OF FUTURE COMPLIANCE WITH QUALITY ASSURANCE REGULATIONS AT MIDLAND

The allegations against Bechtel in Consumers Power Companys' Complaint are irrelevant and immaterial, per se, to the issues properly before

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[5] See Bechtel's Objections to the First Set of Interrogatories Directed to Bechtel from Saginaw Sierra, pp. 9-21 and cases cited therein.

this Licensing Board in this Show Cause proceeding.

(A) The issues which this Licensing Board must decide, and has already decided, concern present and future implementation of the Midland Quality Assurance Program. Extensive oral and written testimony has already been presented in this proceeding to the effect that a viable Quality Assurance Program does not mean that mistakes in the various phases of constructing a nuclear power plant will not occur.[6] The fact that mistakes or violations may occur, and eventually be the subject matter of a lawsuit, does not mean that the Quality Assurance Program at that particular plant is not working.

Consumers Power Company has conceded that the Palisades lawsuit concerns only steam generator tubes, core internals vibration and condenser tubes.[7] With respect to steam generator tubes and core internals vibration problems, the AEC has maintained surveillance over these problems and has not found it necessary to issue quality assurance violations since the Palisades plant has not operated in violation of the technical specification requirements.[8] With respect to condenser tube problems, the condenser is not a Class I component and, hence, not within the parameters of AEC jurisdiction. Thus, the Palisades lawsuit appears to present a situation that grew out of a set of occurrences which did not constitute or indicate a lack of quality assurance implementation. Bechtel neither designed nor fabricated

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6 For example, inter alia, Tr. pp. 202.

7 Oral Argument, Tr. p. 8.

8 Oral Argument, Tr. pp. 8-9.

either the steam generator tubes or the condensor tubes. Thus, to the extent that the lawsuit concerns those items, Bechtel's involvement is, at this juncture, only marginal.[9] Accordingly, the allegations in the Complaint are irrelevant since there is no showing that the occurrences from which they arose involved quality assurance implementation problems.

(B) Palisades was constructed under the regulations, codes, standards and criteria in existence between 1965 and 1970. Midland, on the other hand, is being constructed under the more elaborate regulations, codes, standards and criteria in existence today.[10] Although Bechtel's performance in the area of quality assurance at Palisades was a subject at the Palisades provisional operating license hearing,[11] Saginaw-Sierra would have this Licensing Board believe that a violation of quality assurance regulations at Palisades gives rise to a "prima facie assumption" that Bechtel will be unable to comply with the more complex regulations at Midland.[12] What Saginaw-Sierra fails to comprehend is the fact that this Licensing Board determined that at the time of the Initial Decision in this Show Cause proceeding the Midland Quality Assurance Program was being implemented and that there was reasonable assurance that it would continue to be implemented in the future.[13]

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9 Oral Argument Tr p. 9.

10 Oral Argument Tr pp. 21-22.

11 Oral Argument Tr. p. 12.

12 Comments, p. 3.

13 Initial Decision, p. 59.

Even assuming arguendo past quality assurance program implementation problems at Palisades, there is extensive evidence in the Midland record concerning the various changes made by Consumers Power Company and by Bechtel to upgrade and improve their respective Quality Assurance programs since 1970.[14] Thus, the programs currently in existence at Midland bear little relationship to the Palisades Quality Assurance Program. It is inconceivable, therefore, that the mere assumed fact of a Quality Assurance Program implementation problem occurring sometime between 1965 and 1970 could prima facie give rise to an assumption of Quality Assurance Program implementation problems in 1974 and later. The changes which the various Quality Assurance organizations and programs have undergone since 1970, and the current attitude among Consumers' senior management personnel toward Quality Assurance have created a situation wherein, still assuming arguendo past Quality Assurance Program implementation problems at Palisades, this Licensing Board properly concluded that the Midland Quality Assurance Program was being implemented in accordance with AEC regulations and that there was reasonable assurance that said implementation would continue throughout the construction process.

(C) Since the Complaint contains no allegation of continuing inadequate performance on the part of Bechtel,[15] there is no connecting factor between the alleged events of 1965 to 1970 at Palisades which are the subject of Consumers' lawsuit and the current and future performance of Bechtel at Midland.

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[14] Initial Decision, pp. 23-25, 38-58.

[15] Oral Argument, Tr. pp. 13-14.

(D) In addition to the more elaborate regulations, criteria, standards and codes which have come into existence since 1970, and in addition to the promulgation of Appendix B, and in addition to the various changes in the respective Quality Assurance programs and organizations of Consumers Power Company and Bechtel since 1970 and in addition to the changed attitude of Consumers' senior management personnel toward quality assurance, the following facts also concern the relevance and materiality of the Palisades Complaint to this Midland Show Cause proceeding:

1. The basic issues are different. Palisades appears to involve construction, design and/or procurement activities. This proceeding concerns Quality Assurance Program implementation.

2. There has been no carry over of Quality Assurance personnel from Palisades to Midland.[16]

3. Consumers has consulted outside experts with respect to the adequacy of its Midland Quality Assurance Program and has implemented most of the experts' recommendations.[17] The use of these experts was initiated after 1970.

4. Extensive indoctrination and training programs in the area of Quality Assurance have been implemented at Midland through formalized programs which were not in existence at Palisades.[18]

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16 Oral Argument, Tr. p. 22.

17 Initial Decision, pp. 39-43.

18 Initial Decision, pp. 44-46.

5. The subcontractors of the components which are presently the subject of the Palisades lawsuit are not in all instances the subcontractors at Midland.[19]

6. This Midland Show Cause hearing has specifically excluded questions concerning the operation of a nuclear power plant.[20] However, as Consumers Power Company conceded at the oral argument, the operation of the Palisades plant may be a critical issue in the defense of the various allegations in the Complaint.[21]

These facts require the conclusion that the events with which the Palisades lawsuit is concerned are, regardless of the veracity of any allegation contained in the Complaint, irrelevant and immaterial to any issue properly before this Licensing Board.

IV

CONCLUSION

Allegations of inadequate performance prior to 1970 at another nuclear power plant on the part of Bechtel are irrelevant and immaterial to the issues of current and future Quality Assurance Program implementation at

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19 Oral Argument, Tr. pp. 22-23.

20 Initial Decision, p. 9.

21 Oral Argument, Tr. p. 9.

Midland. An allegation is not a fact, but even if the allegation was probative evidence, the various events which have occurred since completion of Palisades have rendered any comparison between Palisades and Midland meaningless. That this is so is reinforced by this Licensing Board's findings and conclusions of law that the Midland Quality Assurance Program is being implemented in compliance with Commission regulations and that there is reasonable assurance that such implementation will continue throughout the construction process.

Saginaw-Sierra has not been able to meet its burden for reopening the record in this proceeding or for reconsidering the Initial Decision. Accordingly, the time has come to put an end to this Show Cause proceeding. The Supreme Court has recognized the fact that new circumstances may arise between the time an administrative hearing is closed and the decision promulgated, but has not found it wise or expedient to grant rehearings as a matter of right in such instances reasoning that "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening, U.S. v. I.C.C., 396 US 491, 520 (1970).

Respectfully submitted,

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Dated: December 17, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Bechtel Power Corporation and Bechtel Associates Professional Corporation's Response to Saginaw-Sierra's Comments in connection with Oral Argument dated December 17, 1974 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 17th day of December, 1974.

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