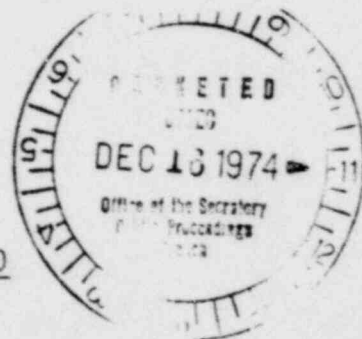


UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

AEC REGULATORY STAFF'S RESPONSE TO  
SAGINAW'S COMMENTS ON ORAL ARGUMENT

In its November 1, 1974 order this Board set out two specific subjects for the parties to address in oral argument on Saginaw's motion to reconsider and/or reopen the record. Those subjects are:

1. What is the relevancy and materiality of Consumers Power Company's lawsuit against Bechtel Corporation and Bechtel Company to the issues in this proceeding?
2. If the Board were to reopen the record to consider the Complaint, what additional evidence would be presented under what issues already specified in this proceeding?

Saginaw's comments fail to adequately address the first subject and completely ignore the second.

1. Relevancy and materiality to the issues in this proceeding. The issue in this proceeding is whether there is a reasonable assurance that QA implementation will continue to conform to Commission regulations. The key to this issue is not as Saginaw asserts (comments p. 8) whether the Consumer's litigation over Palisades "attacks the past and present ability of Bechtel to perform proper QA" but is rather a determination of whether future QA performance can be reasonably expected to comply with Commission regulations.

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Saginaw misreads the complaint when it asserts that continuing QA violations are alleged in the Palisades litigation. It is a fundamental precept of law that damage can continue to flow from an act without the act itself continuing. No facts or new evidence have been presented to this Board which would indicate QA implementation is "continuing" to be in violation at Midland. It is obvious that QA implementation by Bechtel can't continue to be in violation at Palisades since construction of that facility has long since terminated.

It is in this context that the Beaver Valley decision must be considered.<sup>1/</sup> The Appeal Board in that case finds that "actual performance at an ongoing construction project is a factor which must be taken into account in evaluating the likelihood that the established QA program for another project will be implemented." (emphasis added) The Palisades facility is completed and construction there is not ongoing. To adopt Saginaw's theory would be to forever bar a company from constructing a facility if it had committed a QA violation since such a violation could always be used to establish that a reasonable likelihood of QA implementation did not exist. This abhors Commission policy which is to allow offenders an opportunity to correct their problems and demonstrate compliance. Any other policy would encourage monopoly by gradually eroding all competition with perpetual bars.

For the foregoing reasons it is important to distinguish between relevancy and materiality, both of which should be established to justify reopening.

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<sup>1/</sup> In the Matter of Duquesne Light Company (Beaver Valley Unit 2), ALAB-240, RAI-74-11 (November 8, 1974).

Relevant evidence is such evidence as relates to or bears directly upon, the point or fact in issue, and proves or has a tendency to prove the proposition alleged.<sup>2/</sup> While evidence may be logically relevant, it may be inadmissible either because it proves or tends to prove that which is not in issue, as where it tends to prove a fact which is admitted.<sup>3/</sup> The basis for such an exclusion is that the offered evidence though relevant, is immaterial.<sup>4/</sup> To be material the evidence must go to substantial matters in dispute, or have a legitimate and effective influence or bearing on the decision in the case.<sup>5/</sup> The Appeal Board in Beaver Valley quite properly found QA at one plant relevant to QA performance at another but it is the ongoing QA at the first plant which makes such evidence material.

In analyzing the Staff's oral argument (comments p. 12), Saginaw misses the point. The Staff conceded the technical relevance of QA performance at Palisades but argued that there was no materiality or probative value in such evidence. This is so because such evidence is remote in time, tends to prove what is not in issue and tends to prove an admitted fact. It has not been argued in this proceeding that past quality assurance implementation was adequate. This proceeding was instituted because QA performance had not been satisfactory and the Staff sought to assure future implementation would not be defective. Something more than a law suit based on QA performance which ended well before this show cause proceeding began must be produced before the new evidence requirement for reopening the record can be met.

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<sup>2/</sup> 1 Wharton on Evidence § 20.

<sup>3/</sup> 1 Jones on Evidence § 4.5, p. 392 (6th edition 1972).

<sup>4/</sup> Id.

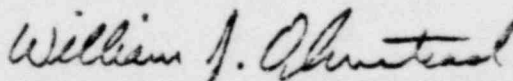
<sup>5/</sup> Black's Law Dictionary (4th edition 1957).

2. Additional evidence to be presented under specified issues in this proceeding. Saginaw fails to address the second specific subject upon which this Board requested argument. At one point Saginaw contends "the record stands as showing that Bechtel did not meet the QA rules in effect at Palisades ... giving rise to the prima facie assumption that Bechtel will have difficulty in meeting rules even more complicated." (comments p. 3) What Saginaw is really arguing is not that it has any newly discovered evidence but that it disagrees with the Board's initial decision and wants a different result. The only "new evidence" Saginaw offers is the same Palisades petition it filed with its motion to reopen. This is clearly not the new evidence contemplated by this Board in its order setting oral argument. No attempt is made by Saginaw to tie any new evidence to a specified issue in this proceeding as requested by the Board. The crucial question is whether Saginaw has new evidence not previously before the Board in this proceeding which would be material to the issue of future implementation of the QA program at Midland.

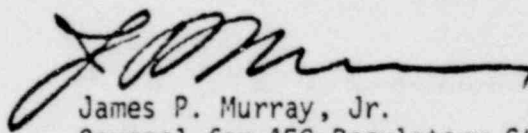
For the foregoing reasons and those stated in Staff's motion in opposition of October 9, 1974, the Staff believes Saginaw's motion to reopen is defective and should be denied. However, the Staff believes the Board should be informed of new developments which may affect the issues in this proceeding. On December 5, 1974, Nucleonics Week reported allegations that quality assurance violations at Midland were occurring. These allegations were made anonymously by workers at the Midland facility and initially reported in the Ann Arbor Sun. The Regulatory Staff (following its normal procedure in such matters) is conducting an investigation of these

charges and that investigation is still in progress. Consumers Power had also reported a quality assurance problem to regional inspectors which is also being checked.<sup>6/</sup> No new information has been discovered at this time and inspectors have informed enforcement counsel that the investigation probably will not be complete until mid-January or later. While these matters occurred after the record in this proceeding was closed the Board may wish to withhold its ruling on the motion to reopen until the Staff is able to finish its current quality assurance investigation at Midland. If the Board chooses to deny the motion to reopen and facts are found to support the recent allegations, the Board can be assured that the Staff will take appropriate action in the form of a new order.

Respectfully submitted,



William J. Olmstead  
Counsel for AEC Regulatory Staff



James P. Murray, Jr.  
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland  
this 13<sup>th</sup> day of December, 1974.

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<sup>6/</sup> It should be noted that an adequate QA program need not be totally free of any defect whatsoever. Rather as Mr. Vetter's testimony indicates "Compliance ... does not mean that a history of zero violations', nor a complete absence of quality assurance/quality control problems, is required to demonstrate compliance." (Vetter's testimony at p. 17).

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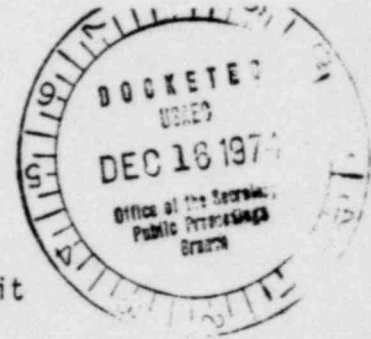
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CERTIFICATE OF SERVICE

I hereby certify that copies of "AEC REGULATORY STAFF'S RESPONSE TO SAGINAW'S COMMENTS ON ORAL ARGUMENT", dated December 13th, 1974 in the captioned matter have been served on the following by hand delivery or by deposit in the United States mail, first class or air mail, this 13th day of December, 1974.

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