

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) )

RESPONSE OF CONSUMERS POWER COMPANY  
TO COMMENTS OF SAGINAW INTERVENORS  
IN CONNECTION WITH THE ORAL ARGUMENT

On November 18, 1974, the Atomic Safety and Licensing Board ("Board") heard oral argument in Chicago, Illinois on Saginaw Intervenors' motion to reopen the record. All parties, except Saginaw Intervenors, were present at the oral argument. Following a number of conference calls between the Board and the parties, Saginaw Intervenors filed on December 2, 1974 a motion for leave to file comments on the oral argument and the comments themselves. On December 12, 1974, the Board granted the request of Saginaw Intervenors to file their comments and ordered the remaining parties to file their responses on December 17, 1974.

Saginaw Intervenors have commented on three aspects of the oral argument before the Board: (1) the legal principles governing its motion to reopen the record; (2) a critique of the positions taken by the parties and the Board during oral argument; and (3) a purported analysis of the complaint filed by Consumers Power Company ("Consumers") in the United States District Court for the Western District of Michigan. As we show below, Saginaw Intervenors have misapplied the applicable legal principles and

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mischaracterized the comments of the parties at the oral argument, as well as Consumers' federal district court Complaint.

The first portion of Saginaw Intervenors' comments purport to discuss the law which is applicable to motions to reopen the record. This discussion consists in large part of a subjective analysis of what the Saginaw Intervenors believe, or perhaps hope, the Atomic Safety and Licensing Appeal Board ("Appeal Board") meant in its opinion which granted a motion for extension of time to file exceptions in this proceeding.\* Suffice it to say that ALAB 235 does not purport to grant Saginaw Intervenors' motion to reopen the record, nor does it purport to alter the burden of persuasion with respect to a motion to reopen the record. The decision with respect to reopening the record rests solely with this Board, in accordance with well-established legal principles which are all but ignored in Saginaw Intervenors' comments.

If one sets aside this subjective analysis and instead concentrates on the opinions of the Appeal Board and the Federal Courts which discuss motions to reopen, the following legal principles emerge:

(a) A rehearing is not a matter of right, but is rather a matter of discretion to be invoked by the presiding judicial authority, rather than a reviewing body;\*\*

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\* In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2) ALAB 235, RAI 74-10 at p. 645 (October 17, 1974).

\*\* Interstate Commerce Commission et al. v. City of Jersey City et al., 322 U.S. 503 at pp. 513-515 and 517 (1944); accord, United States v. Interstate Commerce Commission et al., 396 U.S. 491 at pp. 520-521 (1970).

(b) the moving party has the burden of proof;\*  
i.e., "to justify the granting of a motion to  
reopen the moving papers must be strong enough,  
in the light of any opposing filings, to avoid  
summary disposition;" \*\*

(c) the moving party must establish that:

(1) the motion is timely filed,\*\*

(2) the matters raised are of major signifi-  
cance to plant safety,\*\*

(3) the evidence presented is material to the  
issues in the proceeding and is not merely  
cumulative or impeaching;\*\*\* and

(4) the newly discovered evidence will require  
a result different from that which was initially  
reached.\*\*\*\*

As shown below, when the facts and circumstances of this  
case are measured against these principles, it is clear that the  
Saginaw Intervenors have not met their burden and thus their motion  
to reopen must be denied.

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\* 10 CFR 2.732; and Unarco Industries Inc. v. Evans Products  
Company, 403 F.2d 638 (7th Cir., 1968).

\*\* In the Matter of Vermont Yankee Nuclear Power Corporation  
(Vermont Yankee Nuclear Power Station) ALAB-138, RAI-73-7 at p.  
523 (July 31, 1973).

\*\*\* Kansas City Southern Railway Company v. Cagle, 229 F.2d 12  
at p. 15 (10th Cir., 1955), cert denied 76 S.Ct. 697.

\*\*\*\* In the Matter of Northern Indiana Public Service Company  
(Bailly Generating Station, Nuclear-1) ALAB-227, RAI-74-9 at p.  
418 (Sept. 5, 1974).

The second portion of the Saginaw Intervenors' comments consists of a "critique" of the oral argument at which the Saginaw Intervenors did not appear. This critique consists in large part of what Consumers believes are misrepresentations of their position before the Board and an unwarranted, ad hominem attack on counsel for the other parties to this proceeding and this Board. Reply to each of these misrepresentations would unduly prolong this memorandum. However, one blatant mischaracterization of counsels' argument deserves a rebuttal. The Saginaw Intervenors persist in characterizing words such as "negligence" as facts. These words are the legal standards by which the defendants' conduct is to be measured by the trier of fact in the federal district court litigation. Thus, the occurrences, documents and conversations which took place at Palisades are matters which are known to Consumers, Bechtel and the AEC. Those occurrences, documents and conversations have previously been considered by the ASLB which passed on Consumers' entitlement to a provisional operating license and are a matter of continuing regulatory oversight by the Directorate of Regulatory Operations. The legal context within which those occurrences, documents and conversations were considered was the Atomic Energy Act and the pertinent regulations, including quality assurance regulations. The same occurrences, documents and conversations may be the subject of the federal court litigation. The only uncertainty, referred to in the oral argument, is whether or not the same occurrences, documents and conversations, when considered in a different legal context, meet the common-law standards of negligence or breach of contract.

Indeed, it is possible that Bechtel could be found liable to Consumers for breaches of duty in the design and construction of Palisades notwithstanding full compliance with the Commission's quality assurance regulations.

The final portion of the Saginaw Intervenors' comments deals with the complaint filed in the Western District of Michigan by Consumers. The defendants named in this suit include Combustion Engineering, Inc., Bechtel Corporation, Bechtel Company, Ingersoll Rand and Wolverine Tube Division of Universal Oil Products Company. The complaint deals basically with steam generator tube performance, core internals vibration and condensor tube performance\* at the Palisades Plant and has no connection whatsoever with the construction of the Midland plant. The "facts" alleged in the Complaint are no more than the facts necessary to comply with the pleading requirements of the Federal Rules of Civil Procedure. 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."\*\* Similarly, federal civil procedure contemplates that pleadings may be alternative and hypothetical.\*\*\* 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

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\* Tr. of Oral Argument at p. 8.

\*\* F.R.C.P. 8(a).

\*\*\* F.R.C.P. 8(e).

sufficiently delineated so that a meaningful trial will take place.\* Thus, the Saginaw Intervenors contend that the words "willful and wanton", "gross negligence" and "dangerous instrumentality" used in the Complaint to describe aspects of Bechtel's conduct at Palisades requires inquiry into the facts and circumstances underlying these allegations. These terms are not facts, but are rather legal characterizations of standards of conduct under Michigan law, designed to put the defendants on notice that Consumers is alleging breaches of those standards of conduct. The trier of fact, after all the evidence has been adduced, must determine whether or not the defendants have in fact violated those standards of conduct.\*\*

Moreover, Saginaw Intervenors' contentions to the contrary, there are no specific allegations in the Complaint concerning Bechtel's quality assurance program. Moreover, with the exception of paragraph 84 of Consumers' complaint, each of the paragraphs of the Complaint cited by Saginaw Intervenors as demonstrating "continuing poor QA work" (Comments p. 14) deal only with Consumers' allegations of continuing injury as a result of Bechtel's past breaches of duties it owed to Consumers. Paragraph 84 asks alternatively for specific performance of the Consumers-Bechtel contract in the event money damages are an inadequate remedy.

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\* 2A Moore's Federal Practice ¶8.02.

\*\* For a discussion of Michigan law on this subject, see: La Croix v. Grand Trunk Western Railroad Company, 379 Mich. 417 (1967) and Tien v. Barkel, 351 Mich. 376 (1952).

The issue now before the Board is whether or not to reopen an evidentiary proceeding which is limited to the two issues specified by the Atomic Energy Commission ("Commission") in its December 3, 1973 order to show cause, i.e., 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 in the future. 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 in its Order of May 14, 1974 that only 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. This ruling was specifically approved by the Commission.\*

The Appeal Board has subsequently held that an "applicant's and architect-engineer's 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

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\* Consumers Power Co. (Midland Plant Units 1 and 2) CLI-74-27, RAI-74-7 at p. 4 (July 16, 1974).

another project will be implemented."\* In the same opinion, the Appeal Board also stated in dicta that it expected the Commission's Regulatory Staff ("Staff") to look more closely at an applicant's past performance before they express assurance that a satisfactorily drawn QA program will be fully and properly implemented.\*\* However, when the evidentiary record of this proceeding is reviewed, the applicability of the Beaver Valley decision to this proceeding in view of the Commission's earlier ruling on the scope of the proceeding and the fact that Consumers' Palisades plant was not an ongoing construction project is nil. The evidentiary record included (1) the evolution of Consumers' quality assurance program from 1970 to the present,\*\*\* (2) a discussion of Consumers' original philosophy of Quality Assurance and the changes which took place in this philosophy,\*\*\*\* (3) statements of Consumers' management position on compliance

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\* In the Matter of Duquesne Light Company, et al. (Beaver Valley Power Station, Unit 2) ALAB 240; RAI 721-12 at p. \_\_\_\_\_. (Nov. 3, 1974) (Emphasis added).

\*\* Id.

\*\*\* See generally testimony of Keeley Tr. 458 at pp. 1-38.

\*\*\*\* Testimony of Howell, Tr. 485 at pp. 4-6.

with the Commission's rules and regulations,\* (4) the Board inquiry into certain allegations concerning the operation of the Palisades plant,\*\* and (5) the basis of the Staff's position that there was reasonable assurance that Consumers would satisfactorily implement their Quality Assurance program.\*\*\* In its testimony, the Staff indicated that, in reaching a conclusion on the ability of a utility to implement a satisfactory Quality Assurance program, they looked at the utilities' past performance and that they had done so in the instant proceeding.\*\*\*\* In its Initial Decision, this Board based many of its findings relating to assurance of future implementation on the testimony cited above.\*\*\*\*\* Thus, the initial decision and the evidentiary record in this proceeding satisfy the concerns expressed by the Appeal Board in its Beaver Valley opinion. In addition, the record fully answers many of the questions which the Saginaw Intervenors claim will be raised for the first time if the record is reopened, e.g., the present working relationship between Bechtel and Consumers is specifically discussed in the

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\* Testimony of Youngdahl, Tr. 519 at p. 6, and Testimony of Howell, Tr. 485 at p. 4.

\*\* Tr. 546-656.

\*\*\* Tr. 355-395 and 404-429.

\*\*\*\* Tr. 379-381.

\*\*\*\*\* In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2) Initial Decision paragraphs 58-82 (September 25, 1974).

testimony of Gilbert S. Keeley\* while the evolution of this relationship is discussed in both Mr. Keeley's and Stephen H. Howell's testimony.\*\*

The moving party, the Saginaw Intervenors, has brought forth no new evidence other than the filing of a complaint which on its face does not mention a violation of the Commission's Quality Assurance criteria. Even assuming arguendo that the complaint provides a basis for reopening the record, there has been no showing by the Saginaw Intervenors that any evidence produced at a new hearing would not be cumulative or used entirely for impeachment. This is especially true in view of the Board's inquiries into the AEC's decision-making process and the Consumers testimony on the evolution of its Quality Assurance program.\*\*\* Nothing presented by the Saginaw Intervenors, including its counsels' arguments, provides any basis to believe that a result different from that set forth in the Initial Decision would be forthcoming if a new hearing was held.

Finally, it should be noted that the Saginaw Intervenors have not suggested what the scope of any reopened hearing would be. An inquiry into the filing of the complaint would be irrelevant and would involve problems of attorney-client and work product

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\* Tr. 458 at pp. 1-38.

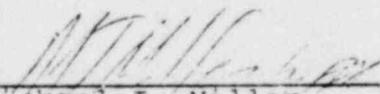
\*\* Id. and Tr. 485 at pp. 6-25.

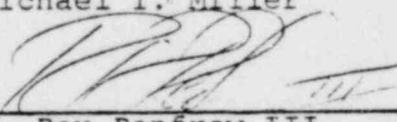
\*\*\* See discussion at pp. 5-7, supra.

privilege. An inquiry into the facts underlying the complaint would involve either a reiteration of material previously considered in the Palisades provisional operating license proceeding or a determination of Bechtel's liability to Consumers. An inquiry into the Bechtel-Consumers relationship with respect to quality assurance at Midland has been conducted by this Board, although the Saginaw Intervenors chose not to participate in the evidentiary hearing. The petition to reopen the record is no more than a mischevious attempt to further delay the conclusion of this matter and is wholly without substance. The time has come to end this proceeding. The motion to reopen the record should be denied.

Dated: December 17, 1974

Respectfully submitted,

  
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Michael I. Miller

  
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R. Rex Renfrow III

Attorneys for Consumers Power  
Company

ISHAM, LINCOLN & BEALE  
One First National Plaza  
Suite 4200  
Chicago, Illinois 60603  
(312) 786-7500

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NOTICE OF FILING  
AND  
PROOF OF SERVICE

TO: Mr. Richard S. Salzman  
Chairman  
Atomic Safety and Licensing Appeal Board  
U.S. Atomic Energy Commission  
Washington, D. C. 20545

Mr. Michael C. Farrar  
Member  
Atomic Safety and Licensing Appeal Board  
U.S. Atomic Energy Commission  
Washington, D. C. 20545

Dr. Lawrence R. Quarles  
Member  
Atomic Safety and Licensing Appeal Board  
U.S. Atomic Energy Commission  
Washington, D. C. 20545

Atomic Safety and Licensing Board Panel  
U.S. Atomic Energy Commission  
Washington, D. C. 20545

Docketing and Service Section  
Office of the Secretary of the Commission  
U.S. Atomic Energy Commission  
Washington, D. C. 20545

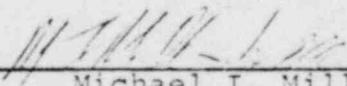
Mr. James P. Murray, Jr.  
Chief Rulemaking & Enforcement Counsel  
U.S. Atomic Energy Commission  
Washington, D.C. 20545

John G. Gleeson, Esq.  
The Dow Chemical Company  
2030 Dow Center  
Midland, Michigan 48640

Myron M. Cherry, Esq.  
One IBM Plaza  
Suite 4501  
Chicago, Illinois 60611

Laurence M. Scoville, Jr., Esq.  
Clark, Klein, Winter, Parsons  
& Prewitt  
1600 First Federal Building  
1001 Woodward Avenue  
Detroit, Michigan 48226

PLEASE TAKE NOTICE that I have this day filed with the Atomic Energy Commission the Response Of Consumers Power Company To Comments Of Saginaw Intervenors In Connection With The Oral Argument, a copy of which is hereto attached and herewith served on you.

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

DATED: December 17, 1974

ISHAM, LINCOLN & BEALE  
One First National Plaza, Suite 4200  
Chicago, Illinois 60603  
(312) 786-7500