UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

IN THE MATTER OF	)	
	)	Docket Nos. 50-329
CONSUMERS POWER COMPANY	)	and 50-330
	)	
(Midland Plant, Units 1 and 2)	)	

OPPOSITION OF APPLICANT
TO SAGINAW INTERVENORS' MOTION
FOR EXTENSION OF TIME
IN WHICH TO FILE EXCEPTIONS

On December 29, 1972, the Saginaw Intervenors (Intervenors) filed a motion seeking 35 days, in addition to the 20 days provided by regulation, in which to file exceptions to the Atomic Safety and Licensing Board's Initial Decision of December 14, 1972.[1/] The Applicant, Consumers Power Company, is opposed to an extension of any duration. As is demonstrated below, at this stage the extension requested -- or indeed any meaningful extension -- would impose heavy and unjustified burdens and expense on the Applicant and work a serious disservice upon its customers.

Moreover, the basis of the motion is the "press of business" -- particularly other AEC proceedings, such as Point Beach Unit 2 (Docket No. 50-301) and the Emergency Core Cooling

---

1/ 10 CFR 2.762(a) requires participants, other than the regulatory staff, to file exceptions to Initial Decisions "within twenty (20) days after service . . . ." In this proceeding the twenty-day period extends to January 8, 1973, by virtue of the provisions of 10 CFR 2.710 relating to computation of time when service is by mail, and the last day of a time period is a Saturday or Sunday. The Saginaw Intervenors now request that they be allowed to file exceptions as late as February 12, 1973, thirty-five days after January 8, 1973.

System Proceeding (RM-50-1) which is occupying the time of Saginaw Intervenors' counsel. See Motion for Extension of Time, paras. 5, 7. However, throughout this proceeding the Intervenors have pursued a policy of delay and default, frequently based upon their counsel's commitments in other proceedings. They have confounded all efforts of the Atomic Safety and Licensing Board (Licensing Board) to hold an efficient and expeditious hearing and have vigorously attempted to obstruct the conduct of a meaningful proceeding. We detail some of this background below to show that the instant request for an extension should be viewed as an attempt to continue the same pattern on the appellate level.

On November 17, 1970 the Intervenors refused to specify their contentions, allegedly because of the absence of certain information (Tr. 69). Yet, they consistently refused to review documents voluntarily made available by the Applicant on December 1, 1970 (Tr. 389, 443, 612) and have yet to furnish the Licensing Board with any contentions beyond a vague description of areas of cross-examination.[2/]

On January 7, 1971 the Intervenors failed to comply with the Licensing Board's order of November 24, 1970 requiring the filing of interrogatories. When interrogatories were eventually filed on March 22, 1971, they were woefully deficient. See Board Orders dated May 13 and June 1, 1971.

2/ See letter from Myron M. Cherry to Chairman Murphy, June 10, 1971.

[redacted]

Thereafter the Saginaw Intervenors openly defied an order of the Licensing Board and were later found by that Board to be in default for failure to submit proposed findings of fact and conclusions of law. See Initial Decision of December 14, 1972, at p. 11. The failure is additionally significant because the Licensing Board's Post Hearing Order of June 28, 1972 provided a generous period of time -- until September 15, 1972 -- for the filing. The Intervenors' attempt to justify their default at that time is enlightening. The document they did file on September 15, 1972, stated that findings and conclusions were not submitted with respect to environmental matters because counsel for the Intervenors had chosen to occupy himself with the ECCS Hearings rather than participate in the environmental phase of this proceeding. (Counsel's failure to file is especially significant because it was made directly in the face of an earlier order which, while granting an extension of more than one month in which to file contentions with respect to the Applicant's Environmental Report,[3/] cautioned him against overextending himself and neglecting this proceeding.[4/]) As to findings with respect to radiological health

---

3/ Board Order dated January 6, 1972.

4/ In its order the Licensing Board stated: "We recognize that Counsel for intervenors are spread thinly over a number of cases; we have attempted to schedule hearings and meetings of the Board as to time and place with that consideration in mind. (Since opposing intervenors' Counsel are located in Saginaw, Michigan; Chicago, Illinois; Washington, D.C. and Suffolk County, N.Y. it is hard to accommodate everyone at once). At times we have done so to the inconvenience of the Board and of other Counsel. There are limits to the concessions which can properly be made. Unlike law suits the consequences of delay and postponement of this type of proceeding are potentially very serious. We will continue to try to accommodate hearing dates within reason but we cannot in good conscience regard participation in other proceedings to be a justification for not meeting deadlines. If Counsel are to continue to participate in more than one case at a time they simply must be prepared to make arrangements for handling the case load. Id. at 1-2. (emphasis supplied)

and safety matters, the Intervenors stated, in blatant contravention of 10 CFR 2.754(c):

> We have not . . . chosen to search the record and respond to this proceeding by submitting citations to matters which we believe were proved or disproved.

This default by the Saginaw Intervenors was not merely technical in nature. In formulating its decision the Licensing Board was seriously hampered by the failure of the Intervenors to file proposed findings of fact and conclusions of law. In some cases, it was extremely difficult for the Board even to determine whether or not particular issues were contested. Indeed, it expressly noted

> ". . . that the failure to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested." Initial Decision, p. 10, n.10.

Such difficulties were of no concern to the Intervenors, however. Their disdain for the efforts of the Licensing Board had been made very clear in their September 15 filing.

> [W]e shall await the decision, if any, by the Atomic Safety and Licensing Board and review it for its support and legality. (citation omitted) In the event that such a decision does not comport with our view of the applicable law, we intend to submit, on a timely basis, exceptions to such initial decision, and seek such further appellate review as may be required. (emphasis added)

To be sure, in support of their motion for an extension of time, the Saginaw Intervenors refer to matters other than their

counsel's involvement with other proceedings. These include references to certain allegedly substantial and important legal issues associated with the Licensing Board's Initial Decision. See Motion for Extension of Time, paras. 10, 12, 13. However, in light of the problems presented by a continuously developing technology, and the interplay between the Atomic Energy Act and the National Environmental Policy Act,[5/] substantial problems are the rule not the exception in licensing proceedings of the type here involved. The twenty-day period for the filing of exceptions is imposed in the light of this situation. Reference to "major issues of law and policy" in the present context adds little except to suggest that counsel -- who has been carefully warned "to make arrangements for handling the case load . . ." -- simply has failed to do so.[6/]

5/ See Friendly, J, in City of New York v. United States, 337 F. Supp 150, 3 ERC 1570, 1577 (E.D.N.Y. 1972) describing the latter enactment as "a relatively new statute so broad yet opaque, that it will take even longer than usual fully to comprehend its import."

6/ Counsel for the Saginaw Intervenors is also active in the ECCS proceeding (RM-50-1). The record of that proceeding shows that he absented himself from it a number of times, and other counsel represented his clients instead. The motion for an extension does not indicate what efforts have been made to make similar arrangements for this proceeding or others in which counsel is contemporaneously involved.

In this connection it should be noted that an extension will not reduce the quantum of inconvenience; it will merely redistribute it among other participants. An extension at the request of the Intervenors will almost certainly impose burdens on other counsel which will interfere with meeting due dates in other proceedings.

Nor can the Christmas and New Year Holidays (Motion for Extension of Time, para. 8) be anything other than a prop. Obviously they came as no surprise, and their delaying effect could have been anticipated and made the basis of a motion for extension of time long before December 29, 1972.[7/] In this connection, it should also be noted that all due dates referred to in paragraph 5 of the Motion for an Extension were known at least two weeks before December 29, 1972. Thus the January 22, 1973 date for filing of comments on the draft environmental statement in the ECCS proceeding was published in the Federal Register on December 7, 1972 (37 F.R. 26052), and the Hearing Board Order providing that concluding statements be filed early in February was issued on December 14, 1972. In addition, Intervenors' counsel was advised by Appeal Board Order of December 15, 1972 that he would be immediately involved in proceedings in the Point Beach matter. See Wisconsin Electric Power Company, Point Beach Nuclear Plant, Unit 2, ALAB-86.

The default and delays perpetrated by the Saginaw Intervenors before the Licensing Board below have been costly and largely unjustified. Now, with their latest motion, the Intervenors make it clear that they are attempting to pursue an identical course at the appellate level, again justifying their inability to abide by the rules with claims of other, presumably more important, endeavors. The history of this proceeding alone would justify denial of an extension as inimical

---

7/ The motion for an extension was filed so late that, under 10 CFR 2.730(c) and 2.710, this opposition will not be due until January 8, 1973, the same day the exceptions must be filed!

to the administrative process. In addition, however, the grant would disserve the public interest and greatly increase the costs of the Applicant.

As explained in the attached affidavit of William E. Kessler, in order to begin construction, a minimum staff of 25 to 40 construction management engineers must be identified and relocated to the plant site -- a process which requires about one month (para. 6). Accordingly, if construction is to begin in April, the earliest probable feasible date (para. 7), this process should be started by the end of February.

It would be imprudent to begin the process of identification and relocation until the Initial Decision becomes final. It would also be imprudent to resume fabrication of the nuclear steam supply system before that time. In the absence of exceptions, the Initial Decision would become final forty-five days after December 14, 1972, or on or about February 1, 1973. See 10 CFR 2.760. If exceptions are filed on January 8, 1973, other parties will have up to fifteen days (to January 23, 1973) to oppose or support the exceptions (10 CFR 2.762), and this Board could, presumably, still issue a Final Decision before the end of February. However, a 35 day extension for the filing of exceptions would make it virtually impossible to meet an end-of-February time table for a final decision; and any extension short of 35 days would almost certainly have the same impact.

In short, any meaningful extension of time at this point -- i.e., any extension which might delay a final decision past the end of February -- would probably result in a day-for-day delay

in construction on the site. It would have a similar delaying impact upon fabrication, because any extension of time to file exceptions would also result in a delay in the remobilization of design work -- a necessary preliminary to the resumption of fabrication. (See Kessler Affidavit, para. 8.) As the Kessler affidavit demonstrates (para. 9), such delays will increase project costs by about $100,000 per day or $3,100,000 per month.

To subject the Applicant, or its customers, to such a burden would be unfair by any standard. This is particularly so because the only countervailing consideration would be the convenience of counsel for the Saginaw Intervenors, who has been expressly warned not to subordinate this proceeding to other activities. The public's need for electrical power, the financial consequences to the Applicant and the requirements of efficient administration all dictate that the motion be denied.

Respectfully submitted,

NEWMAN, REIS & AXELRAD
1100 Connecticut Avenue, N.W.
Washington, D. C. 20036

By Harold F. Reis
Harold F. Reis

Dated: January 4, 1973

Counsel for Consumers Power Company

Attachment