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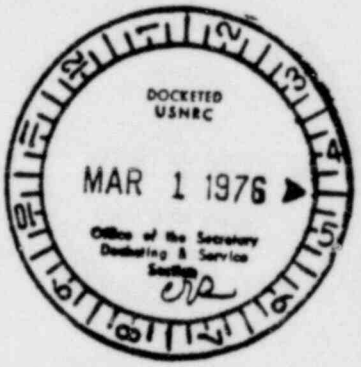

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. Lawrence R. Quarles
Michael C. Farrar

50-329

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

Mr. Michael I. Miller, Chicago, Illinois, argued the cause for petitioner Consumers Power Company; with him on the brief was Mr. R. Rex Renfrow, III, Chicago, Illinois. Mr. Paul Covalt also appeared on behalf of the Company.

Mr. James P. Murray, Jr. argued the cause for the Nuclear Regulatory Commission Staff; with him on the brief was Mr. William J. Olmstead.

OPINION ON RECONSIDERATION

February 27, 1976

(ALAB-315)

Opinion of the Board by Mr. Salzman and Mr. Farrar:

This case stems from a Commission order directing Consumers Power Company to "show cause" why its permit to construct the Midland nuclear power generating facility should not be suspended or otherwise modified for noncompliance with the Commission's quality assurance regulations. 1/

1/ See Consumers Power Company (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7 (1974).

The Commission referred the "show cause" proceeding to a Licensing Board for hearing. The Board resolved the matter in Consumers' favor and we affirmed its decision sua sponte in ALAB-283.[2]

Among other things, we ruled in ALAB-283 that Consumers had the "burden of proof" in the show cause proceeding; it is this procedural ruling which the company asks us to reconsider. As we held Consumers to have satisfied that burden, its petition raises only academic questions which we would normally forego.[3] The papers filed by the company and the staff (which supports the petition), however, suggest that those parties are laboring under some misconceptions about the procedural requirements our ruling on burden of proof entails. (See Part II, infra.) For this reason, notwithstanding our reluctance to decide abstract issues, we have elected to reconsider the question.

I.

1. Our decision on burden of proof rests on the Atomic Energy Act as interpreted by the Commission. Under that Act, a utility seeking permission to build a nuclear power plant must satisfy the Commission at a public hearing that

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2 / ALAB-283, NRCI-75/7, 11 (1975).

3 / See Northern States Power Company (Prairie Island Nuclear Generating Station), ALAB-252, 8 AEC 1175, 1177 (1975).

its application meets the prerequisites for that privilege. It is equally true that the Commission's award of a construction permit carries with it no concomitant right to operate the completed facility. Rather, to obtain an operating license, the Act requires the utility to shoulder once again the burden of proving to the Commission (at a public hearing if need be) that it has, inter alia, constructed the plant in conformity with its application, the Act, and the Commission's rules and regulations. And even at this late stage the Act permits the Commission to withhold the license for good cause. 4/

It was not happenstance that Congress structured Atomic Energy Act procedures in this manner. Rather, it was intentionally done to make certain that public safety was a paramount issue at every stage in processing applications for commercial use of nuclear power. As the Supreme Court has noted with approval, the Commission has interpreted the Atomic Energy Act to mandate "that the public safety is the first, last, and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." Power Reactor Company v. Electricians, 367 U.S. 396, 402 (1961), quoting from and upholding the Commission's earlier decision in that same case, In re

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4/ See ALAB-283, supra, NRCI-75/7 at 16-18 and the authorities there cited.

Power Reactor Development Company, 1 AEC 128, 136 (1959).[5]

Our decision in ALAB-283 on the correct placement of the burden of proof flowed directly from that Commission reading of the Atomic Energy Act. If public safety considerations are to be paramount in fact as well as in word, we think it ineluctable that the utility must bear the burden of proving compliance with Commission safety regulations not only at the beginning and at the end of the nuclear licensing process, but -- as in this case -- when called upon at some interim point to "show cause" why a construction permit should not be lifted for unsafe construction practices. Where nuclear power plants are involved, public safety is indisputably better served if a utility must stop construction practices it cannot prove safe; a decision that it may continue those practices because someone else cannot prove them unsafe is manifestly not one which places public safety considerations first. In our judgment, the allocation of the burden of proof adopted in ALAB-283 is compelled by the Atomic Energy Act; the arguments of the company, the staff and our dissenting colleague do not persuade us otherwise.

5/ Where the Commission had further stressed that it "regards the importance of public safety so highly that it considers that it does not lose jurisdiction of this subject even after a license has been issued, at any stage in the course of its construction, or, for that matter, even after a facility is in operation." Ibid.

2. The company and the staff appear to recognize that safety considerations can be affected by which side has the burden of proof. But the staff sees "the basic goal of the [Atomic Energy Act as] public health and safety in accordance with the Administrative Procedure Act."[6] And it reads Section 7(c) of that Act (5 U.S.C. §556(d)) to forbid placing that burden on the utility in "show cause" proceedings.

The parties' contentions in this regard are syllogistic. Their major premise is that section 7(c) of the APA[7] puts the burden of proof on "the proponent of [an] order" unless a statute provides otherwise; their minor premise is that Consumers was not the proponent of the show cause order

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6 / App. Tr. 47-48:

> MR. SALZMAN: "If the basic goal of the [Atomic Energy Act] is to insure that to the maximum extent feasible the safety of these [nuclear power] plants, do you think that is better achieved if a show cause order places the burden on the Staff, or if it places the burden on the company?"
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> MR. MURRAY [Staff counsel]: "Let me answer this way: if the basic goal of the statute were the public health and safety and no other goal, I would agree with you. The basic goal of the statute is public health and safety in accordance with the Administrative Procedure Act."

7 / The APA applies to Commission adjudicatory proceedings by its own terms. 5 U.S.C. §554. The Atomic Energy Act restates this requirement in Section 181, 42 U.S.C. §2231. Section 181, however, purports neither to enlarge nor to alter either the terms of the APA or the way it affects Commission proceedings.

and the Atomic Energy Act does not give the utility the burden of proof; and their conclusion is, accordingly, that that burden did not rest with the company in the show cause hearing. Consumers acknowledges that the Atomic Energy Act creates the two-step licensing procedure we described and that its construction permit will not ripen automatically into an operating license, but it contends that its construction permit was "complete when issued" and, accordingly, that the Administrative Procedure Act protects it against the burden of having to "reprove" its entitlement to that permit before it completes the nuclear plant and applies for an operating license.

These arguments are wide of the mark. The Administrative Procedure Act is not dispositive of which party bears the burden of proof in a federal administrative proceeding. Rather, as we noted in ALAB-283, on this matter the APA in terms yields to the requirements of the substantive statute, in this case the Atomic Energy Act. See NRCI-75/7 at 17.[7a/] Accordingly, it is to that Act one must look for guidance in deciding who is intended to bear that evidentiary burden in a Commission "show cause" proceeding. Such guidance is not limited to express statutory command. A congressional intent to place the burden of proof on a particular party may also be discerned from a statutory

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7a/ As we there noted, the pertinent provision of the Administrative Procedure Act, 5 U.S.C. §556(d), provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." (Emphasis added).

scheme as a whole, or from a review of its legislative history. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 34-37, rehearing and rehearing in banc denied, 523 F.2d 39 (7th Cir. 1975); Stearns Elec. Paste Co. v. E.P.A., 461 F.2d 293, 304-05 (7th Cir. 1972); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 593 (D.C. Cir. 1971).[8]

We concluded in ALAB-283 that the Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so, including a "show cause" proceeding. On reconsideration, we find the basis of that conclusion sound. To the extent other provisions of the Act bear on the question, we find them confirmatory of our judgment. For example, the Act allows the Commission to require a nuclear power plant to be modified to incorporate subsequent safety advances even after a construction permit is issued.[9] It also permits the

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8 / The petitioners and the dissent would distinguish away the cited decisions on their particular facts. Those cases speak for themselves. In our judgment, the factors relied on by the courts to conclude that the company in each of those cases had the burden of proving the safety of its product or operation in order to retain the right to market or to operate are less compelling than the factors which require a similar result here.

9 / 10 C.F.R. §50.54(h).

agency to deny an operating license for a plant built in full accord with a construction permit.[10] And it empowers the Commission, "at any time after the filing of the original application," to require a utility to provide it with additional information, under oath, for the express purpose (inter alia) of enabling the Commission "to determine * * * whether [the utility's] license should be modified or revoked."[11] These provisions counter any suggestion that a construction permit conveys immutable privileges, as the Company and staff suggest. Rather, the contention that a construction permit holder has "statutory rights" to build a nuclear power reactor "without having to prove at each stage of construction that it is proceeding in accordance with its permit and Commission requirements" (Staff Br. p. 5), is simply at war with the Commission's own pronouncements that "public safety is the first, last and permanent consideration" in these matters.[12]

10/ 42 U.S.C. §2235; Power Reactor Company v. Electricians, supra, 367 U.S. at 410-15.

11/ 42 U.S.C. §2232(a).

12/ The company, the staff and the dissent also argue that the Commission's Rules of Practice place the burden of proof on the proponent of a show cause order. Those rules are cast in general terms to cover many types of proceedings. That they are far from a model of perspicuity on this question is illustrated by the proceedings below. The Licensing Board initially ruled that the burden of proof was on the company, then reversed itself to hold that that burden was on the intervenors. See 8 AEC 112. Yet, when the intervenors defaulted and presented no evidence, the Board declined to dismiss the proceeding. See 8 AEC 584, 592. The key regulation, 10 C.F.R. §2.732, provides only that the applicant or the proponent of an order has the burden of proof "unless otherwise ordered by the presiding officer." The question, of course, is what the presiding officer should have ordered.

3. Nor does the staff's reading of the legislative history of the Atomic Energy Act persuade us that the burden of proof should not be on the utility. The staff asserts that (Brief p. 4):

> The legislative history of section 185 reveals that Congress was concerned with the two-phase licensing process it had developed and feared that the procedural safeguards afforded at the operating license stage might not be afforded at the construction permit stage and that if a facility were already built the Commission would be unlikely to refuse a license. Therefore section 185 was amended to require that ". . . the same procedural safeguards in the case of licenses be applied to construction permits." [Comments of Rep. Holifield on introducing the amendments, 100 Cong. Rec. 10309.]

The staff argues that this amendment to section 185 supports its position. As the staff sees it (Brief, p. 4):

> Procedural safeguards for licensees include the right to have charges against them proved when they are accused of violating license conditions including the conditions of construction permits. (Footnote omitted.)

The difficulty with this position is that the staff has misread the legislative history. To begin with, section 185 of the Atomic Energy Act was not amended.[13/] What did occur was that a different amendment to another proposed section of the Act -- section 189 -- was offered at the same session by Senator Hickenlooper, and this did pass. But the Senator's purpose was to add procedural safeguards to protect the public, not to aid the utilities. His amendment accomplished this by requiring a public hearing on an

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13/ See Power Reactor Development Company, supra, 1 AEC at 134, fn. 19. where the legislative history discussed here is set out in careful detail.

application for a construction permit in addition to the one then already required for a license to operate a nuclear facility. See Power Reactor Company v. Electricians, supra, 367 U.S. at 411-14.

It is undisputed that at both construction and operating license hearings the burden is on the utility to prove its entitlement to the permit or license. No support for the staff's position -- that the utility does not have the burden of proof in a "show cause" proceeding -- can be derived from an amendment to the Atomic Energy Act which (1) changed hearing procedures for the public's benefit and (2) did so by creating a new proceeding in which the burden of proof was once again placed squarely on the utility. If anything, the amendment in question cuts against the staff's arguments.[14/]

4. The reasoning of our dissenting colleague essentially tracks that of the applicant and staff and is in

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14/ The staff also relies on section 9(b) of the Administrative Procedure Act (5 U.S.C. §558(c)) to support its contention that a respondent utility cannot be required to bear the burden of proof in a show cause proceeding. (Br. p. 6). Such reliance is misplaced. That section generally requires written notice of violations and opportunity to achieve compliance before agencies invoke proceedings to suspend or revoke licenses. By its own terms, however, section 9(b) does not apply to cases "in which public health, interest, or safety requires otherwise." The Commission itself declared this to be such a case two years ago when Consumers sought to invoke that section in an effort to block the show cause hearing altogether. Midland, supra, CLI-74-3, 7 AEC at 10.

relevant part answered in the preceding pages. The dissent does make two additional points which we think should not pass unchallenged. The first concerns the practical significance of the placement of the burden of proof. Quoting from ALAB-283, Dr. Quarles correctly points out that (infra, p. 34): "[w]hich party bears the evidentiary burden becomes a significant question * * * only where the evidence on an issue is evenly balanced or if the trier is in doubt about the facts." The dissent goes on to add, however, that "[i]n a practical, as distinguished from a theoretical, sense this situation is unlikely to occur in a licensing hearing." Ibid. We do not share our colleague's confidence in this regard. Rather, we note that the likelihood that evidence can be in equipoise -- and a decision consequently turn on which party bears the burden of proof -- is neither unknown in administrative proceedings nor without practical significance for federal safety hearings. See, e.g., Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, supra, 523 F.2d at 42 (7th Cir. 1975)(dissenting opinion of Judge Pell).

We also cannot accept Dr. Quarles' suggestion (infra, p. 41), that there could be "no compromise of safety" if the burden of proof in show cause proceedings were not on the utility because it would, ultimately, have to shoulder that burden when it came time for it to seek an operating

license. To the contrary, we think this case itself illustrates a situation in which safety might have been compromised by such a procedure.

It is to be recalled that the "show cause" order was based on the discovery of a possible pattern of deficiencies in Consumers' cadwelding operations.[15/] ("Cadwelding is a process for fusing together metal bars used in reinforced concrete construction and represents a critical step in construction of the [nuclear] facility."[16/]) Consumers sought to have the "show cause" order dismissed without a hearing on the theory that its cadwelds were not scheduled to be covered by concrete for several weeks and so "were accessible for any necessary inspection, repair or replacement" and therefore posed no threat to safety.[17/] The Commission declined to dismiss the order, rejecting the Company's argument as one which "blinks the realities of the situation" because it "gives insufficient recognition to the fact that cadweld deficiencies represent potential latent defects in the structure housing the reactor" and that "this stage of construction is the only one at which such deficiencies can be detected."[18/]

15/ Midland, supra, CLI-74-3, 7 AEC at 10.

16/ Ibid.

17/ 7 AEC at 11.

18/ Ibid.

Had the evidence on this question at the show cause hearing been evenly balanced and the burden of proof not on Consumers, the show cause order would have had to be dismissed and the company permitted to continue its questionable cadwelding practices. We think this plainly could have had an adverse impact on the safety of the reactor. It is no answer to say that Commission inspectors could examine each new cadweld until the plant was completed. As the Commission stressed earlier in this very case, its "inspection system is not designed to and cannot assume such tasks."[19/]

To be sure, it would have been possible to wait until the company eventually applies for an operating license and then relitigate the issue of cadwelding deficiencies with the burden of proof on the company. But by that time the plant would have been built and the cadwelds encased in concrete. Obviously, this is hardly a satisfactory solution from a safety standpoint. No legal strictures mandate that result. With all deference to our dissenting colleague, we decline to adopt a rule on burden of proof which would require resort to this cumbersome procedure of dubious effectiveness.

5. It is by no means unprecedented for Congress to have placed the burden of proof on a party called upon to respond

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19/ Ibid.

to a show cause order. To cite as examples but two enactments dealing with public health and safety, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§801 ff., and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §135, both impose similar requirements. In administrative proceedings under either of those statutes, one charged with disregarding governing safety standards has the burden of proving his compliance. A respondent's failure to carry that burden can mean the removal of his product from the marketplace or the closing down of his mining operation, Congress having deemed the safety considerations at stake more important than any financial detriment to the party involved. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, supra; Environmental Defense Fund v. Ruckelshaus; supra; Stearns Elec. Paste Co. v. E.P.A., supra; Southern National Mfg. Co. v. E.P.A., 470 F. 2d 194, 196-97 (8th Cir. 1972); Dow Chemical Company v. Ruckelshaus, 477 F. 2d 1317, 1324 (8th Cir. 1973).

Nonobservance of this Commission's rules poses at least as serious a threat to public health and safety as transgressions against the pesticide regulations or the coal mine safety laws. It is therefore hardly anomalous for Congress to have mandated the use of similar procedures in enforcement cases under all three acts.

6. No unfairness flows from placing the burden of proof in show cause proceedings on the utility building the reactor. Particularly where, as here, the issue is whether a nuclear

plant is being built in accordance with Commisson regulations, the company or its contractors are the ones most likely to possess the requisite information and to be aware of the relevant construction details. A rule that places the burden of proving a fact on the party who presumably has peculiar means of knowledge enabling him to prove its truth or falsity is neither novel nor untoward, particularly when the ultimate issue is one of public safety. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, supra, 523 F. 2d at 36. See also 9 Wigmore, Evidence §2486 (3rd ed.).

In short, we think the arguments pressed by the company, the staff and our dissenting colleague elevate procedural niceties over public safety. We see no legal justification for this. We therefore reaffirm our ruling in ALAB-283 that, in show cause proceedings, the construction permit holder has the burden of proving that it is building its nuclear plant in conformity with that permission and the Commission's safety regulations.20/

20/ Consumers' reads our decision in ALAB-283 to suggest that the "allocation of the burden of proof would be different [i.e., on the staff rather than on the company] if the show cause proceeding involved a license to operate * * * rather than a license to construct a nuclear facility." It believes any such distinction unjustified. (Br. pp. 12-14).

Where the evidentiary burden lies in a case involving the possible withdrawal of an operating license was not in issue in ALAB-283 and, obviously, is not before us now. Accordingly, we need not and do not reach that issue. We reserve judgment for a case which presents it.

II.

1. The parties express concern that our burden of proof ruling might be understood to require a show cause respondent to "disprove unsubstantiated allegations" and, accordingly, they assert that "[t]he burden should be and is on those contending that the [construction] permit is being violated to make a prima facie showing before the applicant is forced to defend."[21/] (Their concern is for future cases, not this one. We wish to make clear at the outset that the staff's inspection reports were placed in evidence in this proceeding, that the company was aware of the quality assurance violations of which it was accused, and that a prima facie case concededly had been established against Consumers.[22/])

21/ See, Consumer's brief, p. 14-15; staff br. p. 5.

22/ App. Tr. 12-13:

> MR. FARRAR: "Why don't the [Staff] inspection reports themselves constitute or carry the Staff's or whoever has the burden of going forward?"
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> MR. MILLER: [Counsel for Consumers] "In this instance under my formulation it was clear, although the licensee went first in the proceeding, that the Staff in fact satisfied the prima facie showing I would require to bear its burden, to avoid a dismissal."

Given the history of this case, that concession is hardly surprising. See ALAB-283, supra, NRCI-75/7 at 13 and cases cited at fn. 6, ibid.

We agree that a show cause respondent is entitled to know what it is charged with and to be presented with the evidence against it before it is called upon to respond with evidence in its own behalf. The parties are mistaken in their belief that our ruling on burden of proof requires a different result. To the contrary, the reference in ALAB-283 to our Maine Yankee decision (see NRCI-75/7 at 17) was intended to indicate that the rule on burden of proof in a show cause proceeding operated just as it does in construction permit proceedings. On the page of that decision to which we made express reference, we said (6 AEC at 1018):

> while the applicant has the ultimate burden of proof on the question of whether the permit or license should be issued, a party which contends that, for a specific reason, the permit or license should be denied has the burden of going forward with evidence to buttress that contention. Once it has introduced sufficient evidence to establish a prima facie case, the applicant must assume the burden of proof on the contention.

Stated another way, the term "burden of proof" applies not to the initial burden of going forward with evidence but to the ultimate burden of persuasion. And Maine Yankee certainly lends support to the argument that a party in a

show cause proceeding who seeks the suspension or modification of a construction permit has the obligation to make out a prima facie case for doing so based on competent evidence. Only after that had been done would the respondent company be required to bear the ultimate burden of proof; i.e., to persuade the Board by a preponderance of the evidence that the relief demanded was in fact not appropriate. And we also recognize that this is the practice followed in analogous cases under the coal mine safety statutes[23/]

23/ Precisely this procedure is followed in cases under section 105(a) the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §815(a). A company called upon to show why its right to operate should not be curtailed for violation of applicable safety regulations bears the ultimate burden of proof of compliance, but the initiator of the proceeding must first establish a prima facie violation before the company need respond. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, supra, 523 F.2d at 39-40 (1975). As the Seventh Circuit observed in that case, this construction "accords with the intent of Congress as expressed in the following Committee comment on section 7(c) of the Administrative Procedure Act (now codified as 5 U.S.C. §556(d)): 'That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.' Sen. Doc. No. 248, 79th Cong., 2nd Sess., 258, 270 (1946)."

and the pesticide laws.[24/]

Nevertheless, we overlooked in ALAB-283 (and the parties did not call our attention to) the Commission's most recent direct pronouncements on the burden of going forward and the ultimate burden of persuasion. In Consumers Power Company (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 31 (1974), the Commission said that traditional concepts of those burdens (on which our 1973 Maine Yankee decision relies) "are not necessarily completely dispositive in agency licensing proceedings." In that construction permit proceeding, the Commission went on to indicate that it would have been sufficient to trigger the utility's ultimate burden of persuasion

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24/ In Environmental Protection Agency proceedings involving health and safety questions under the pesticide laws, as we noted, the ultimate burden of proof is always on the company to prove entitlement of its product to registration. But the allocation of the initial burden of going forward varies with the nature of the case and the issues presented. Thus, for example, the EPA rules place the burden of going forward on the company where the hearing arises from the company's objection to the denial of a new application for registration. 40 C.F.R. §164.80(a). But where the EPA staff or an intervenor proposes that an existing registration be cancelled or its classification changed, "the proponent of [that proposal] has the burden of going forward to present an affirmative case * * *." Ibid. Finally, where the Administrator himself calls for an investigatory hearing at which stated issues leading to possible deregistration are to be studied (7 U.S.C. §136d(b)(2)(Supp. II), 40 C.F.R. §164.23), the agency staff "has the burden of going forward to present an affirmative case as to the statement of issues." §164.80(a), 164.2(r).

on intervenor's energy conservation contentions had the latter but come forward with evidence "sufficient to require reasonable minds to inquire further" on those issues. 7 AEC at 32, fn. 27. The Commission cited in support of its ruling the District of Columbia Circuit's similar holding in United Church of Christ v. F.C.C., 425 F.2d 543, 546-50 (1969).

To be sure, that Commission decision was not made in the context of a "show cause" proceeding. It also involved National Environmental Policy Act issues rather than radiological health and safety questions. Be that as it may, we are reluctant to conclude at this juncture and on this record that an intervenor must bear a heavier burden when alleging health and safety violations than when asserting environmental mistakes.[25/]

These considerations -- together with the "advisory" nature of this opinion (see p. 2, supra) -- incline us to caution. We therefore rule that to withstand a respondent's motion to dismiss a show cause proceeding, the staff (or intervenor if there be one) must at the minimum come forward initially with evidence sufficient to cause a reasonable licensing board to inquire further. Such a demonstration of a legitimate basis for further inquiry requires the respondent to satisfy its burden of proof, i.e., to persuade

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25/ Cf., Citizens for Safe Power v. N.R.C., 525 F.2d 1291, 1302-03 (D.C. Cir. 1975) (concurring opinion of Chief Judge Bazelon).

the Licensing Board that no sanctions against it are warranted based on that evidence. Whether in any given situation the evidence necessary to trigger respondent's burden of proof must be the equivalent of a prima facie case, however, is matter best resolved on the facts of an actual case presenting the question. We therefore reserve judgment on this issue until that case presents itself. (As we observed earlier, evidence sufficient to constitute a prima facie case against the utility company was concededly introduced in this proceeding[26/]).

2. Finally, in the event we reject its argument, the company asks us to certify the question of burden of proof in show cause proceedings to the Commission. (The staff, while not endorsing the request, offers no objection.) We decline to do so. Information supplied at our behest in the appendix to the staff's brief reveals that, since January 1, 1970, only one other "show cause" proceeding involving a construction permit or an operating license has been referred to a licensing board hearing. In the circumstances, it is our judgment that the issue does not merit certification under Commission standards. 10 C.F.R.

26/ See note 22, supra.

§2.785(d). In any event, the Commission is routinely made aware of all our decisions and will be free to review our conclusions here if it wishes to do so.

On reconsideration, ALAB-283 clarified; motion to certify denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

DISSENTING OPINION OF DR. QUARLES

In this decision, my colleagues have agreed that our earlier opinion in ALAB-283 warrants clarification. But they nevertheless have affirmed the conclusion we previously reached.

On reconsideration and further reflection, I concur in my colleagues' discussion of the burden of going forward; but I find their ultimate position on the burden-of-proof question to be contrary to applicable legal requirements and not called for in the interest of sound public policy. I must therefore respectfully dissent.[1/]

A. 1. It is clear -- and it has not been seriously disputed by any party -- that the Administrative Procedure Act (APA), 5 U.S.C. §551 et seq., applies to this show-cause proceeding as it does to all Commission adjudicatory proceedings. Section 181 of the Atomic Energy Act, 42 U.S.C. §2231, makes the APA applicable to "all agency action" under the Atomic Energy Act;[2/] agency action is defined to include, inter alia, "the whole or a part of an agency * * * order * * * [or] sanction." 5 U.S.C.

1/ I agree with my colleagues that no certification to the Commission is warranted. This decision is, of course, subject to Commission review under 10 CFR §2.786.

2/ The majority asserts that the APA is not dispositive of the burden of proof but rather yields to the Atomic Energy Act (p. 6, supra). By virtue of Section 181 of that Act, provisions of the APA are incorporated as provisions of the Atomic Energy Act. That being so, the statutory reallocation permitted by the APA must be more specific than would be the case if the APA were not so incorporated.

§551(13), which is incorporated by reference into 42 U.S.C. §2231. An agency "sanction" is defined by the APA as including "the whole or a part of an agency * * * requirement, revocation, or suspension of a license." 5 U.S.C. §551(10). The potential consequences of this proceeding clearly fall within the scope of the term "sanction."3/

Given the APA's applicability to this proceeding, the burden-of-proof question is governed by the particular terms of the APA bearing on that question. Section 7(c) of that Act, 5 U.S.C. §556(d), provides that:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

Similar, although not identical, language appears in the Commission's Rules of Practice (10 CFR §2.732):

> Unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof.

In the normal proceeding involving an application for a construction permit or an operating license, the burden of proof is thus on the applicant for such permit or license;

3/ In addition, Section 186 of the Atomic Energy Act, 42 U.S.C. §2236, specifically requires the Commission to "follow the procedures of section 9(b) of the Administrative Procedure Act [5 U.S.C. §558(b)] in revoking any license."

that applicant is in fact the "proponent" of an order authorizing the issuance of such permit or license. In a show-cause proceeding such as this one, however, there is in fact no "applicant." Consumers Power Co. has obtained its construction permit, and it is not yet an operating license applicant. What is being sought is an order revoking or modifying an outstanding permit or license; the proponent of such an order is the staff (which, pursuant to 10 CFR §2.202, has issued the show-cause order) or the intervenor (which, pursuant to 10 CFR §2.206, has successfully caused the staff to issue a show-cause order). Under both the APA and the Commission's rules, therefore, the burden in such a situation would fall on the staff or intervenor unless an exception to the general rule were found to be applicable.[4/] In the only prior Commission ruling on this question, a hearing examiner placed the burden on the staff in a case arising after issuance of

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4/ I need not here treat whether the presiding-officer exception authorized by 10 CFR §2.732 is, or must be, co-extensive with the statutory exception authorized by the APA. For here, the presiding officer (i.e., the Licensing Board) did not seek to invoke any exception to the general rule, but imposed the burden of proof on the staff and intervenors as proponents of a revocation order. LBP-74-54, 8 AEC 112 (1974). As discussed infra, my colleagues believe that a statutory exception to the APA is applicable.

the license in question. New York Shipbuilding Corp., 1 AEC 707 (1961), reversed on other grounds by Commission, 1 AEC 842 (1961).

2. In ALAB-283, this Board found that a statutory exception governed the burden-of-proof question, and my colleagues here have reiterated that conclusion. The statutory exception is said to be derived from the Atomic Energy Act -- not by virtue of any express terms therein but rather as a necessary consequence of the two-step licensing process established thereby.

Section 185 of the Act, 42 U.S.C. §2235, clearly contemplates the two-step licensing process. Prior to operating a nuclear plant, an applicant must obtain both a construction permit and an operating license. At both the construction-permit and operating-license stages, the burden of proof is on the applicant -- i.e., the proponent of the order in question. But, beyond these discrete stages, ALAB-283 went on to place the burden of proof on the licensee with respect to all compliance questions arising in the interim between issuance of a construction permit and an operating license:

> * * * we cannot perceive why the legislature would have wanted that burden shifted elsewhere if a question of compliance [with applicable Commission regulations] arises in the intervening construction phase.

NRCI-75/7 at 17.

In support of that proposition, ALAB-283 placed strong reliance on a case arising under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §135, where the court had remarked that "we see no reason why the location of the burden of proof should depend on the timing of the [agency's] first awareness of a compliance problem * * *." Stearns Elec. Paste Co. v. E.P.A., 461 F.2d 293, 305 n. 38 (7th Cir. 1972). My colleagues here continue to cite that case. While the court may have correctly interpreted the statute in question -- its ruling was in accord with extensive legislative history which it cited -- I am now convinced that this case is inapposite to the question before us, the burden of proof in a show-cause proceeding under the Atomic Energy Act.[5/]

Under FIFRA, the burden of proof which the Stearns court allocated to the manufacturer involved only a showing that a product is effective and safe when used as directed on the label. This positive requirement is far narrower than the negative proof which ALAB-283 (and my colleagues here) would require from licensees. Unlike

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5/ Both ALAB-283 and my colleagues here also cite Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), another case arising under FIFRA which in my opinion is inapplicable to the present situation for much the same reasons as Stearns.

here, where the licensee would be called upon to relitigate questions already considered in a hearing, it involved a question which had not previously been subjected to any adjudicatory consideration. Moreover, the particular statutory provisions involved were specifically designed to alleviate the situation where (prior to the statute's amendment) a potentially dangerous product was permitted to be marketed during the period when the Government was developing the data necessary to remove it from the market. No comparable danger attends the continued effectiveness of an NRC construction permit. See Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-[illegible]1, NRCI-75/9 404, 413 (September 24, 1975); cf. 10 CFR §2.202(f).

In this decision, my colleagues also rely on a case arising under the Federal Coal Mine Health and Safety Act of 1969, where the court placed the burden of proof on a coal mine operator whose mine had been shut down by a safety inspector through an "imminent danger" order. Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25, petition for rehearing denied, 523 F.2d 39 (7th Cir. 1975). But there, unlike here, a specific regulation allocated the burden of proof to the mine operator (43 C.F.R. §4.587). The question presented was whether the

regulation was inconsistent with the APA, and the court found particular language in the Coal Mine Safety Act which enabled it to conclude that the APA's statutory-exception language was applicable. The Atomic Energy Act includes no comparable language.

Indeed, the situation is to the contrary. Neither FIFRA nor the Coal Mine Safety Act has any equivalent to the terms of §185 of the Atomic Energy Act, which provide that a construction permit "is deemed to be a 'license'" for all purposes other than certain ones not pertinent to the allocation of the burden of proof in a show-cause proceeding. This provision clearly indicates that the construction-permit proceeding and subsequent issuance of the construction permit is a discrete step, and not a continuing action requiring the burden of proof to remain with the applicant. It negates any inference that the existence of the two-step process necessarily must be construed as a statutory allocation of the burden of proof to other than the proponent of an order. In that regard, it is significant that where the Atomic Energy Act makes inapplicable a provision of the APA, it does so explicitly. See Section 191a. of the Atomic Energy Act, 42 U.S.C. 2241(a).

In sum, my colleagues concede the rationale of ALAB-283 requires that a statutory exception to the normal burden-of-proof rule be found. They perceive such an exception not in any express statutory terms but rather in the necessary implications of a statutory policy. I see no such necessary implications. Indeed, the Act appears expressly to reject the theory founded upon the two-step licensing procedure and to provide instead for an equivalency in the treatment of construction permits and operating licenses and the procedures incident to show-cause proceedings with regard to either. That being so, I would apply the normal burden-of-proof rule of the APA.

3. One area in which the burden-of-proof discussion in ALAB-283 is unclear, if not incorrect, is in its failure to acknowledge the differing perceptions of the term "burden of proof." That term is, of course, the one used both in the APA and in NRC regulations. But Black's Law Dictionary (Rev. 4th ed., p. 246) indicates that it can be used to mean both "the duty of producing evidence as the case progresses" and "the duty to establish the truth of the claim by preponderance of the evidence." The first meaning, in my view, should more properly be denominated as the "burden of going forward." But I believe the term as it was used in ALAB-283, while contemplating only the second

meaning, is susceptible of interpretation as also comprehending the first. My colleagues have apparently recognized this lack of clarity in ALAB-283 and, in their opinion, have expressed views on the "burden of going forward" with which I generally agree.

In our own licensing decisions, we have differentiated between the two concepts. In the construction-permit proceeding involving the same reactors under review here, we stated:

> The ultimate burden of proof on the question of whether the permit or license should be issued is, of course, upon the applicant. But where, as here, one of the other parties contends that, for a specific reason * * * the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).[6/]

6/ Later in that same proceeding, the Commission indicated that at least in some circumstances, something less than a prima facie case would have to be shown by intervenors. CLI-74-5, 7 AEC 19, 32 n. 27 (1974). But an "affirmative showing" must in all cases be made. See further discussion, pp. 36-37, infra.

It is very likely that the term "burden of proof" as used in the APA was intended to include the "burden of going forward" as discussed by us in ALAB-123. In treating the term as used in the APA, the Attorney General, referring to a portion of the legislative history of the APA, opined that

> There is some indication that the term "burden of proof" was not employed in any strict sense, but rather as synonymous with the "burden of going forward." [Attorney General's Manual on the Administrative Procedure Act, 1947, at p. 75.]

In support of that conclusion, the Attorney General cited a statement from the Senate Report on the APA:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. 7/

The scheme outlined in ALAB-123 is, in my view (as well, apparently, as that of my colleagues) equally applicable to this show-cause proceeding. The licensee

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7/ S. Rept. 79-752, reprinted in Administrative Procedure Act, Legislative History, U. S. Government Printing Office, 1946, at p. 208. The same language appears in House Report 79-1980, reprinted in same volume as the Senate report, at p. 270.

previously had met its burden of demonstrating its entitlement to the construction permits. When the staff or another party asserts that the construction permits should be taken away or limited, it must come forward with at least some showing of evidence which would demonstrate that such result is warranted. That burden is not satisfied solely by the issuance of a show-cause order (unless, of course, no response were submitted to that order, Mistrot M. Sullivan, d/b/a Southwestern Radiological Service Co., 2 AEC 1 (Hearing Examiner, 1962)). Rather, some affirmative showing is required. Only after that showing has been made does the burden of going forward shift to the licensee. After the licensee has come forward with its case (and after any rebuttal evidence which may be received), it is for the board to determine the result which a preponderance of the evidence suggests should obtain.

It is at that stage that the "burden of proof," as that term should properly be interpreted, comes into play. At that stage, where credible evidence has been introduced on both sides of the question, the proponent of the order should properly have the burden of demonstrating, by a preponderance of the evidence, that the particular points which have been raised are sufficiently serious to undercut the previous consideration given to the question and, as a result, to justify the abrogation or

limitation of the outstanding license. It is true, of course, that, as we pointed out in ALAB-283 -- in a statement which logically should apply only to "burden of proof" in its ultimate sense, but to which ALAB-283 may have accorded broader implications -- "[w]hich party bears the evidentiary burden becomes a significant question * * * only where the evidence on an issue is evenly balanced or if the trier is in doubt about the facts." NRCI-75/7 at 18. In a practical, as distinguished from a theoretical, sense this situation is unlikely to occur in a licensing hearing. The only really significant burden question which is likely to arise is as to which party has the burden of "going forward." As to that, I think it clear that, under the APA and Commission regulations, the proponent of an order has that burden. To the extent that ALAB-283 implied a different result, I agree with my colleagues that it is an incorrect application of governing legal principles.

4. As is apparent, I would support the result reached by the Licensing Board on the burden-of-proof question. In its well-reasoned opinion, that Board extensively analyzed that question as it had arisen in show-cause proceedings not only before the AEC but also before other administrative agencies -- in particular, the Federal Communications Commission, the Federal Maritime Commission,

the Board of Immigration Appeals, the Civil Service Commission, the Federal Trade Commission, the Civil Aeronautics Board, and the Securities and Exchange Commission (as well as the general discussion in K. Davis' Administrative Law Treatise).

In ALAB-283, however, we discounted as "not material" the cases arising in other agencies cited by the Licensing Board, on the ground that they "are decisions under different statutes administered by other agencies which, moreover, turn on economic rather than public health and safety considerations." NRCI-75/7 at 18. The Stearns case, and the Old Ben case on which my colleagues rely here, also were decisions under different statutes administered by other agencies. And while they may have involved health and safety considerations, they scarcely did so any more than Matter of Susott, 5 CAB 119 (1941), one of the cases cited by the Licensing Board involving a CAB show-cause proceeding on the question of suspension or revocation of an airline pilot's certificate.[8/]

8/ It is true that the F.C.C. case relied on by the Licensing Board involved an economic matter. But it should be recognized that when Congress added the civil penalty provision (which is applicable in many show-cause proceedings) to the Atomic Energy Act, it used F.C.C. rules on this subject as a guide. See Hearing on "AEC Omnibus Legislation-1969," Joint Committee on Atomic Energy, September 12, 1969, at p. 29.

On reconsideration, I have given some weight to the burden-of-proof holdings of these cases. The distinction between economic and public-health-and-safety questions may be a valid one, but I am aware of no authority which would require that such distinction per se be used as a basis for allocating the burden of proof in a proceeding, absent some more specific statutory basis or expression of Congressional intent. Indeed, it would appear that even when public health and safety is involved, as in some cases involving the suspension or revocation of a pilot's certificate, that burden is on the government. See also McKee v. Bradway, 19 Ad. L. 2d 715 (CAB 1966); Leyden v. FAA, 315 F. Supp. 1398 (E.D.N.Y. 1970); cf. Day v. NTSB, 414 F.2d 950 (5th Cir. 1969), where the burden was put on the pilot in a situation where §7(c) of APA was not applicable and where a regulation specifically placed the burden on such pilot.

5. If one begins with the proposition that the initial burden of going forward in a show-cause proceeding is on the staff or an intervenor, the next question is the extent to which those parties must go to satisfy that burden. In civil litigation, a party with the burden of going forward must establish a "prima facie case" -- i.e., a case which,

if not rebutted, leads to the result sought by the proponent thereof. See definition in Black's Law Dictionary, Rev. 4th ed., at p. 1353. But, as the Commission has indicated in another context, "[e]stablished rules of burden of proof governing conventional civil litigation are not necessarily completely dispositive in agency licensing proceedings where affirmative public interest findings are requisite." CLI-74-5, supra, 7 AEC at 31. In that case, the Commission required the intervenors to come forward with an "affirmative showing" which is "sufficient to require reasonable minds to inquire further." Id. at 32. See also United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969). I find that "affirmative showing" to be appropriate in a show-cause proceeding such as this: the staff or intervenors must come forward with an affirmative showing which is sufficient to cause a reasonable licensing board to inquire further -- i.e., a legitimate basis for further inquiry must be demonstrated. Where public health and safety is involved, no higher showing is warranted.9/

B. In the previous portions of this opinion, I have spelled out my reasons for concluding that, under applicable statutes and regulations, the initial burden of going

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9/ My colleagues appear to agree but think this case an inappropriate vehicle in which to decide the question. See pp. 20-21, supra.

forward falls upon the staff or the intervenors in this proceeding, and that the burden does not shift to the licensee until the staff or intervenors have put forth an affirmative showing which would cause a reasonable licensing board to inquire further as to whether the license or permit should be revoked, suspended or modified. Over-all, however, after receipt of all evidence, the burden of proof or persuasion remains with the staff or intervenors. I must stress that this result is warranted not only as a matter of law but also as a matter of sound policy.

Thus, the holder of a construction permit has already proven before a licensing board that it has met and will comply with the applicable regulations. The permit (which represents a major financial commitment of the permit holder, as well as substantial public-interest considerations) should not be revoked or limited absent a preponderance of evidence warranting that result. Given these considerations, it is perfectly understandable why the burden should shift from the applicant at the construction-permit stage to the staff or another party thereafter and back to the applicant at the operating-license stage.

In their opinion here, my colleagues advance as one reason for allocating the burden of proof to the construction-permit holder that information relating to compliance

with the permit or applicable regulations is in the possession of the permit holder. In this case, that might have been true, but it is not always or perhaps even normally so. For instance, where the staff seeks to impose new requirements on a permit holder, any information justifying such a course of action would likely be in the staff's possession. And if an outside scientist should attempt to have a license modified because of a development of which he (perhaps uniquely) is aware, the relevant information might well be in his control. See e.g., Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2, 3), CLI-75-8, NRCI-75/8 173 (August 4, 1975).

My colleagues cite the situation leading to this show-cause order (alleged faulty cadwelding practices) as demonstrating that placing the burden of proof on other than the licensee could result in an unsafe condition, at least in the equipoise situation. To the contrary, the specific circumstances here illustrate the extreme unlikelihood of evidence being evenly balanced. The question was whether the licensee was properly implementing its quality assurance program and whether there was reasonable assurance it would continue to do so.

The alleged violations which triggered the show-cause order concerned cadwelding. These alleged violations dealt with excessive voids, filler material left in the welds and improper storage of the material. Each of these factual matters was capable of positive verification. Thus I fail to see how this evidence could be evenly balanced, and hence a board be forced to permit continued questionable practices.

As for the general quality assurance practices, the charge was that the licensee had failed to provide adequate documentation. The evidence on this question consists of documentation, again susceptible to factual determination. Assuming the answer to the first issue in the show-cause order[10/] is positive, it is inconceivable that the Commission inspection staff would not assure a continuation of proper implementation even if the Board had found the evidence on this issue evenly balanced and had hence decided for the licensee, i.e., that there is a reasonable assurance that such implementation will continue.[11/]

10/ "Whether the licensee is properly implementing its quality assurance program, [etc.]."

11/ If read literally, the majority opinion would appear to require an applicant to establish the absolute safety of a plant: "[w]here nuclear power plants are involved, public safety is indisputably better served if a utility must stop construction practices it cannot prove safe * * *" (p. 4, supra, emphasis supplied). Commission regulations
(CONTINUED ON NEXT PAGE)

Significantly, placing the burden of proof on the staff or another party in a show-cause proceeding involving a construction permit represents no threat to safety. As I have commented, the ultimate burden of proof becomes significant only when the evidence from both sides appears equal. And as I have stressed, in the real world the likelihood of such a development is extremely remote. In a public-interest proceeding such as this one, the licensing board must satisfy itself -- irrespective of the allocation of the burden of proof -- that any questions which it may have concerning the matter before it are satisfactorily answered. The technical members of a licensing board would undoubtedly probe by questioning the evidence, so a technical, and hence possible safety, consideration could hardly remain in equipoise. That is exactly what the Licensing Board did here.

Even if the very unlikely situation of equipoise prevailed, there would still be no compromise of safety. For,

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11/ (CONTINUED FROM PREVIOUS PAGE)

impose no such requirement; indeed, it is generally conceded that there is no such thing as proof of absolute safety. The regulations instead call for a showing of "reasonable assurance that * * * the proposed facility can be constructed and operated * * * without undue risk to the health and safety of the public." 10 CFR §50.35(a)(4).

in any event, at the operating license stage, the applicant will have the burden of demonstrating, inter alia, that "the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of [the Atomic Energy] Act and of the rules and regulations of the Commission * * *." Section 185, Atomic Energy Act, supra. The circumstance that the burden of demonstrating lack of compliance with the construction permit might lie elsewhere does not vary that obligation one iota. Even if a question were raised in a show-cause proceeding, and the staff or other proponent were unsuccessful in meeting its burden, the same question could be relitigated at the operating license stage and possibly decided adversely to the applicant who then would have the burden of proof; for in no event could a failure of proof in the earlier show-cause proceeding be considered a bar to a later ruling in a proceeding with a different allocation of the burden of proof. See One Lot Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232 (1972). It is inconceivable that a licensee who obtained a favorable decision only on the basis of the equipoise situation would risk its operating license later when the

burden has shifted back to it. The licensee would undoubtedly take corrective steps to avoid this very real risk.

In sum, for the reasons stated, I would reverse the burden-of-proof ruling of ALAB-283 and uphold the ruling of the Licensing Board on this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No.(s) CPPR-81
	)	CPPR-82
(Midland Plant, Unit Nos. 1 and 2)	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
4th day of March 1976.

Robin V. Douglas
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No.(s) CPPR-81
	)	CPPR-82
(Midland Plant, Units 1 and 2)	)	(Show Cause)
	)	
	)	
	)	
	)	

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