

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

50-329

MEMORANDUM AND ORDER

By a petition filed September 30, 1974, the Saginaw Intervenor (Saginaw) have invited this Board to reopen the record and/or reconsider its Initial Decision, issued September 25, 1974^{1/}, which concluded in the above-captioned proceeding that (a) Consumers Power Company (Consumers) was implementing its quality assurance program in compliance with the regulations of the Nuclear Regulatory Commission; (b) that there is reasonable assurance that such implementation will continue throughout Consumers' construction of the Midland Plant, Units 1 and 2; and (c) that Construction Permit Nos. 81 and 82 issued to Consumers for the Midland Plant, Units 1 and 2, should not be suspended, modified or revoked.

1/ RAI 74-9, 584



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After very careful consideration of Saginaw's petition,^{2/} we decline the invitation for the reasons which appear hereinafter.

I. The Petition

On September 30, 1974, Saginaw filed a "Petition to Reopen the Record and/or for Reconsideration of Initial Decision" in this proceeding. The basis for Saginaw's petition was a Complaint filed by Consumers on August 28, 1974 against five defendants, including Bechtel Corporation and Bechtel Company, in the United States District Court for the Western District of Michigan, Southern Division. The Complaint alleges breach of contract and negligence against the defendants in connection with the construction of the Palisades Plant, a nuclear plant located in Covert Township, Van Buren County, Michigan. Bechtel Corporation and Bechtel Company are the architect engineers for the Palisades Plant, as well as for the Midland Plant, Units 1 and 2. Saginaw contends that the Complaint challenges the qualifications of Bechtel to provide quality control and quality assurance to Consumers in the construction of the Midland Units, a matter relevant and material to this Board's determination that there is reasonable assurance Consumers will implement its quality assurance program throughout the construction process.

^{2/} Also before us are various other pleadings and letters from the parties supplementing the original petition and responses thereto. These include Consumers' notification to us of a cutback in construction activities and changes in its quality assurance program at Midland, as well as corresponding changes by Bechtel. We have also considered these matters in weighing Saginaw's petition.

Consumers, Bechtel and the Staff oppose Saginaw's petition on various grounds. Each relied in part on the decisions of the Appeal Board in Vermont Yankee Nuclear Power Corp., ALAB-138, RAI-73-7, pp. 520-534 (July 31, 1973), which sets forth guidelines applicable to reopening of an evidentiary record after conclusion of an evidentiary hearing. In Vermont Yankee, the Appeal Board indicated two factors which require consideration in passing upon a petition to reopen an evidentiary record.

"(1) The timeliness of the motion, i.e. whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing; and (2) the significance or gravity of those issues. A board need not grant a motion to reopen which raises matters which, even though timely presented, are not of 'major significance to plant safety' (ALAB-124, RAI-73-5 at 365). By the same token, however, a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier (ALAB-124, RAI-73-5 at 365, fn. 10; see also ALAB-126, RAI-73-6 at 395)."

Consumers argues that application of these factors to Saginaw's petition readily establishes no basis to reopen the proceeding. First, Consumers states that although the Complaint was not filed until August 28, 1974, the facts on which the litigation rests were available to all parties in this proceeding long before August 28, 1974. Thus, Consumers essentially argues that Saginaw's petition is not timely filed. Moreover, Consumers asserts that the issues raised by Saginaw's petition deal with occurrences at the Palisades Plant, and are not of major signi-

ficance to plant safety. Thus, they are of marginal relevance and materiality to this proceeding. Consumers points out that the Complaint includes only allegations, and those concern activities which took place prior to the effectiveness of Appendix B to 10 CFR Part 50, the basic quality assurance regulation with which Consumers is required to comply throughout the construction of the Midland Plant. Finally, Consumers claims that a reopening of the record in this proceeding would result in this Board trying the issue of Bechtel's liability to Consumers for alleged breach of contract, and negligence with respect to Palisades, which is not a triable issue of fact herein.

The Staff asserts similar arguments, which may be summarized as stating that nothing in the Complaint alleges or proves that Consumers is not making adequate repairs at Midland, or that Consumers is allowing the facility to be constructed in an unsafe manner.

Bechtel also opposes Saginaw's petition on substantially the same grounds, but in addition argues that the petition is procedurally defective for failure to include affidavits or other evidence supporting the facts relied upon as required by 10 CFR §2.730(b). Bechtel also suggests that this Board no longer has jurisdiction over this proceeding, and thus, has no authority to rule on Saginaw's petition.

II. Oral Argument

Because of the importance of the matters raised by Saginaw's petition, we scheduled oral argument on November 18, 1974. We directed the parties to address the questions of relevancy and materiality of the complaint to the issues in this proceeding, and to inform the Board what additional evidence would be presented under what issues if the proceeding were reopened.

The Board held oral argument on the scheduled date. Counsel for Saginaw, however, failed to appear. The Board attempted to contact counsel, and delayed commencement of oral argument. After being unable to contact counsel, the Board proceeded with oral argument. Consumers, Bechtel and the Staff reiterated essentially the same arguments each offered in opposition pleadings to Saginaw's petition. On November 19, 1974, counsel for Saginaw contacted the Board and apologized for being absent from oral argument. Counsel advised the Board that he had been ill, and did not reach his office until noon on the date scheduled for oral argument. Counsel stated that his office had failed to accurately docket the date for oral argument which actually led to his absence from oral argument. Counsel stated his absence could be termed excusable neglect. In view of these circumstances, counsel for Saginaw requested leave to file written comments on oral argument in order that Saginaw would

not be precluded from presenting its position to the Board because of counsel's failure to appear at oral argument. This Board instructed Saginaw to file such comments accompanied by a motion indicating good cause for their acceptance. We also granted leave to Consumers, Bechtel and the Staff to file written answers to any such comments which Saginaw might file, and indicated that were we to grant Saginaw's motion, we would give consideration to the other parties' written answers to Saginaw's written comments.

On December 2, 1974, Saginaw filed a motion for leave to file written comments on oral argument, as well as its comments. In the motion, Saginaw's counsel set forth the same reasons he had previously given for his failure to appear. Consumers, Bechtel and the Staff filed responses to Saginaw's comments.

The Board has carefully considered Saginaw's motion for leave to file written comments on oral argument. We grant the motion and accept the comments which accompanied the motion, as well as the responses thereto filed by the other parties. However, while we believe that the reasons given by counsel for Saginaw justify our finding good cause for a grant of the motion for leave to file written comments, we cannot condone counsel's failure to appear at oral argument. Such failure is, in our view, an extremely serious matter. Counsel for a party to a

proceeding before this Commission has the responsibility to comply with every procedural and substantive matter involving such proceeding. Counsel for Saginaw has failed to carry his responsibility.

III. The Petition Fails to Present Matters Which Warrant Reopening of the Record and/or Reconsideration of Initial Decision

A petition to reopen the record must, in our view, be supported by newly-discovered evidence, must show that the facts relied on by petitioning party could not, with due diligence, have been known or been discovered at the time of evidentiary hearing, and must show that the new evidence, if true, would affect the decision involved. Assessed against these criteria, we find that Saginaw's petition must be denied. Assuming arguendo that Saginaw's petition meets the first two of these criteria, the matters presented in the petition, namely, allegations of negligence and breach of contract on the part of Bechtel at Consumers' Palisades Plant would not, whether or not true, affect our decision. There is nothing in the Complaint which challenges Consumers' or Bechtel's quality assurance program at the Midland facility. The Complaint challenges Bechtel's conduct in complying with contractual requirements and in performing certain obligations at the Palisades facility which had been constructed much earlier and under different Commission

quality assurance regulations. The ensuing litigation over the Palisades Plant between Consumers and Bechtel simply does not encompass the quality assurance matters which were before us in the evidentiary record in this proceeding. Even if Consumers were to establish Bechtel's liability and recover damages, the result would not affect our conclusion that there is reasonable assurance that Consumers will implement its quality assurance programs throughout the construction of the Midland Plant. While it is true that the Consumers-Bechtel relationship is an ongoing relationship, which is certainly pertinent to any evaluation of an applicant's quality assurance program, the record before us convincingly established that this relationship, together with the Commission's inspection program, can be relied upon to provide reasonable assurance that Consumers will implement its quality assurance program in conformance with the Commission's requirements throughout the construction of the Midland Plant.

We therefore conclude that Saginaw's petition fails to present reasons which warrant a reopening of the record, or reconsideration of our Initial Decision.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

Lester Kornblith, Jr.
Lester Kornblith, Jr., Member

Emmeth A. Luebke
Emmeth A. Luebke, Member

Michael L. Glaser
Michael L. Glaser, Chairman

Dated at Bethesda, Maryland,
this 5th day of March 1975.