UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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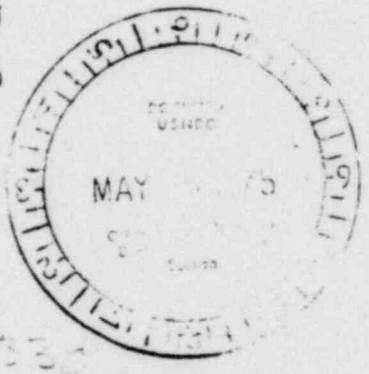

In the Matter of	50-329-330
CONSUMERS POWER COMPANY	Construction Permit Nos. 81 and 82
(Midland Plant, Units 1 and 2)	

Mr. Myron Cherry, Chicago, Illinois, for intervenors Saginaw Valley Nuclear Study Group, et al., appellants.

Messrs. Michael I. Miller and R. Rex Renfrow, III, Chicago, Illinois, for respondent Consumers Power Company, appellee.

Mr. P. Robert Brown, Jr., Detroit, Michigan, for intervenors Bechtel Power Corporation and Bechtel Associates Professional Corporation, appellees.

Mr. James P. Murray, Jr., for the Nuclear Regulatory Commission Staff.

DECISION

May 8, 1975

(ALAB-270)

The Licensing Board rendered an initial decision favorable to the respondent Consumers Power Company in this "show cause" proceeding on September 25, 1974; the Board thereafter denied the Saginaw Intervenors' motion to reopen the record and reconsider that decision on

March 4, 1975. See LBP-74-71, RAI-74-9, 584, and LBP-75-___, NRCI-75/3____. The Saginaw Intervenors have appealed from those decisions by excepting to them, but have not briefed their exceptions as the Commission's Rules of Practice require. [1/] Saginaw's briefing time having expired, Consumers now moves to strike the exceptions [2/] and, because no other party has appealed, to affirm the decisions below. The other parties, the regulatory staff and Bechtel (Consumers' architect-engineers), support Consumers' motion.

I.

The Saginaw Intervenors' opposition to the motion to strike is essentially twofold: First, they claim that without a Commission award of attorneys' fees and expenses they could not afford to file a brief, and assert that the Commission's failure to consider their request for such an award "on the merits" is the root cause of their inability to participate more fully. There is a very short answer to this claim. The Commission acted "on the merits" of Saginaw's request last July and denied their application "for lack of a

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1/ 10 C.F.R. §2.762(a).

2/ A motion for this purpose is authorized by 10 C.F.R. §2.762(e).

proper showing of need," noting that at least two of the organizations litigating under the Saginaw banner -- the Sierra Club and the United Auto Workers -- had substantial financial assets. CLI-74-26, RAI-74-7, 1 (1974). [3/] In these circumstances, the reluctance of those organizations to support litigation voluntarily undertaken may not be attributed to exiguous finances and does not excuse the failure to brief the exceptions.

The alternate justification put forward by the Saginaw Intervenors for not filing a brief is the assertion that their exceptions are based "entirely on legal grounds" which were "fully briefed" before the trial board. We need not decide whether such factors would justify a motion to dispense with a brief on appeal, for they are not present in this record. [4/]

3/ The Commission observed that at the time it ruled, the UAW's assets exceeded $127,000,000. See RAI-74-7 at 2.

4/ Saginaw did not file a timely motion to submit their appeal on their papers below. Rather, as noted, they allowed the briefing time (and more) to expire and they urge this ground only as a defense to the motion to strike their exceptions. The disposition we make of this motion, however, makes it unnecessary to decide whether any request to submit an appeal on the papers below must be made when the exceptions are filed and not after the briefing period has run.

To begin with, Saginaw's exceptions are not confined, as suggested, to pure issues of law. They challenge, inter alia, the sufficiency of the evidence to support the findings below concerning respondent's implementation of the Commission's "quality assurance" regulations (exception 3) and the adequacy of the Commission's own inspection program (exception 9). Such exceptions raise, at best, mixed questions of law and fact which manifestly cannot be decided in the abstract; their resolution turns on matters of proof. [5/] Saginaw's failure to brief them deprives us precisely of that assistance which the Rules of Practice are designed to have an appellant provide, i.e., to flesh out the bare bones exceptions "with the precise portion of the record relied on in support of the assertion of error," 10 C.F.R. § 2.762(a), and to present us "with sufficient information or argument to allow an intelligent disposition of [the] issue[s]." [6/]

Neither is the assertion correct that Saginaw's position is fully presented in the papers it submitted to the Licensing Board. On the contrary, our perusal

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5/ E.g., Saginaw's Exception No. 3 is as follows: "There is no rational support for the conclusion that QA implementation will continue throughout the construction process. RAI-74-9, 600 et seq."

6/ United States v. White, 454 F.2d 435, 439 (7th Cir. 1971), discussing the analogous provision of the Federal Rules of Appellate Procedure.

of the record reveals that Saginaw offered no evidence, tendered no witnesses and attempted no cross-examination. Moreover, they filed neither a trial brief nor proposed findings of fact although expressly invited to do so by the Licensing Board despite their lack of participation at the hearing. Essentially the only Saginaw papers in the record which outline their position are a six-page motion to reconsider the initial decision and reopen the record and their "comments" concerning the oral arguments presented by other parties on that motion. 7/ The contents of those documents fall far short of being equivalent to a brief in support of exceptions as required by the Rules of Practice.

The Saginaw Intervenors have displayed a similar disdain for the Commission's Rules of Practice on earlier occasions. And they have previously been admonished by us that "the right of participation in an administrative proceeding carries with it the obligation of a party to assist in 'making the system work' and to aid the agency in discharging the statutory obligations with which it is charged." 8/ The Rules of Practice

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7/ The Licensing Board accepted those written comments despite Saginaw's failure to attend the oral argument (which was held in Chicago for their counsel's convenience) or to advise that Board in advance of the expected absence. See NRCI-75/3 at ____.

8/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, RAI-73-5, 331 at 332 (1973).

were not promulgated capriciously. They were drafted to insure that, when followed, the arguments and positions of all parties -- applicants, staff and intervenors -- would be spread fully upon the record in order to permit fair rebuttal by those holding opposing views and to facilitate our ultimate evaluation of the competing contentions. Disregard of the Rules frustrates those salutary purposes and burdens rather than assists the adjudicator's task. We see no reason why, having previously instructed the Saginaw Intervenors about the necessity of proceeding in accordance with the Rules, we need continue to excuse their inability (or unwillingness) to follow the course all other parties must take, particularly in circumstances where (their contrary assertions notwithstanding) they have contributed little to the development of the record. [9/] We therefore grant the motion to strike their exceptions and dismiss the Saginaw Intervenors from this appeal.

9/ In responding to interrogatories propounded to them by respondent, the Saginaw Intervenors admitted that they were in possession of no facts relevant to this proceeding not known to the other parties and the staff. Saginaw's answers to Consumers' interrogatories, dated June 4, 1974, pp. 2-3.

II.

We decline at this time to affirm the decisions below. An order directing a company to "show cause" why its license should not be suspended is not a matter to be treated lightly. See New York Shipbuilding Corporation, 1 AEC 842, 844-45 (1961). This is particularly so where non-compliance with the Commission's quality assurance regulations is at issue, a problem which has plagued the construction of this facility. See, e.g., ALAB-123, supra, n. 7; ALAB-147, RAI-73-9, 636 (1973); and ALAB-152, RAI-73-10, 816 (1973). We therefore think it inappropriate to depart from our customary practice in uncontested cases of reviewing the entire record sua sponte.

The motion to strike is granted; the Saginaw Intervenors are dismissed as parties to the proceeding; jurisdiction over the case is retained pending completion of our review sua sponte.[10/]

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Romayne M. Skrutski
Secretary to the
Appeal Board

10/ The remaining parties need file no further papers unless we ask for their views on some specific issue.