UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

REPLY OF APPLICANT TO PLEADINGS
FILED BY SAGINAW AND MAPLETON INTERVENORS
ON SEPTEMBER 14 and 15, 1972

In its "Post Hearing Order," dated June 28, 1972, this Board directed (p. 2) that

> "4. Intervenors shall serve and file their proposed findings of fact and conclusions of law on or before September 15, 1972."

On September 14, 1972, Mapleton Intervenors filed a document entitled "Mapleton Intervenors' Proposed Findings of Fact and Conclusions of Law" and on September 15, 1972, Saginaw Intervenors filed a document entitled "Saginaw Valley et al Intervenors' Proposed Findings of Fact and Conclusions of Law".

10 CFR 2.754 provides in pertinent part as follows:

> "§2.754 Proposed findings and conclusions.
>
> "(a) Within twenty (20) days after the record is closed, or within such reasonable lesser or additional time as may be allowed by the presiding officer, any party to the proceeding may, or if so directed by the presiding officer, shall file proposed findings of fact and conclusions of law, briefs and a proposed form of order or decision. Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default and an order or initial decision may be entered accordingly.

* * *

> "(c) Proposed findings of fact shall be clearly and concisely set forth in numbered paragraphs and shall be confined to the material issues of fact presented on the record with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law shall be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. Proposed findings of fact and conclusions of law submitted by a person who does not have the burden of proof and who has only a limited interest in the proceeding may be confined to matters which affect his interests." (Emphasis supplied)

Although each of the pleadings referred to above labels itself "Proposed Findings of Fact and Conclusions of Law," neither in fact is what it is labeled, and both groups of intervenors are, and should be held to be, in default under the provisions of 10 CFR 2.754(a).

Except for the use of the phrase in the title of their pleading, the Saginaw Intervenors do not even purport to have filed findings of fact. With respect to the environmental issues here involved, they expressly state that

> ". . . they have no conventional findings of fact to set forth. Instead, Saginaw Valley et al Intervenors refer to their Statement of Environmental Contentions . . . ." 1/

Moreover, the Saginaw Intervenors state that they "await the decision . . ." of this Board, and if it "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." 2/

1/ Saginaw Pleading, p. 3.

2/ Id.

With respect to radiological health and safety matters, Saginaw Intervenors follow the same course. In blatant violation of the requirement of 10 CFR 2.754(c) concerning "exact citations to the transcript of record and exhibits . . . ." they state that they have not "chosen to search the record and respond to this proceeding by submitting citations of matters which we believe were proved or disproved."[3/] Instead, "as set forth in our environmental findings, we intend to pursue our legal remedies in the event it is necessary in respect to any initial decision which may be rendered by the Board."[4/]

Moreover, Saginaw Intervenors do not simply content themselves with this attempt to reserve their position on appeal. Instead, they discharge themselves of an intemperate and unjustified attack upon the impartiality of the Board and its members and upon the Commission and the utility industry. They also complain about its counsel's burden in the ECCS proceeding[5/] and then deliver themselves of a "few areas of legal concern . . . ." but "not as an exhaustive list . . . ."[6/]

3/ Id. p. 7.

4/ Id. p. 8.

5/ Counsel for Saginaw Intervenors indicates that his involvement in the ECCS proceeding (RM-50-1) prevented his appearance in this one. However, from time to time when he was occupied elsewhere he arranged for others, including co-counsel who had also entered appearances in the ECCS proceeding, to substitute for him at that proceeding. His failure to make similar arrangements with respect to this proceeding has not been satisfactorily explained. This is particularly so in view of the reminder of his obligation concerning this proceeding which the Board gave him in its order of January 6, 1972.

6/ Saginaw Pleading, p. 8.

These are so general and lacking in support that a detailed response is not required. Indeed, Saginaw's violation of the requirement to reference the record makes such a detailed response practically impossible. The failure to cite the record accomplishes two results in this regard. It permits Saginaw to make broad allegations unsupported by the record; and it unfairly places a heavy burden on the Board and the other parties to make the record search Saginaw should have made if they undertake to give serious consideration to the allegations.

In view of these considerations and Saginaw's default, we limit ourselves to a few comments concerning some of Saginaw's broad allegations.

With respect to Saginaw's issue B and in the light of the extensive testimony by B&W as to its QA and QC programs on the pressure vessel (Tr. 3889-3924, 4010-4051; 4065-69; 4095-4140) and Applicant's testimony that it and Bechtel had audited such programs (Tr. 4021, 4340, 4542), there is no basis for Saginaw's statement that QA and QC were nonexistent.

Legal issue D fails to mention that the Board repeatedly offered Saginaw's counsel an opportunity to show that the ECCS failed to comply with the regulations, that the regulations were invalid or that the ECCS rule making deprived him of rights that he would have had at the licensing proceeding and that he refused to do any of these things (Board Order, dated March 10, 1972; Tr. 5297).

Legal issue G completely misrepresents the record regarding pressure vessel failure and again represents an effort to create confusion out of a complex record. The Board's Order[1/] disallowing Interrogatory 92 did not do so on the basis that pressure vessel failure was incredible, but on the basis that the interrogatory asked that the consequences of simultaneous LOCAs and pressure vessel failures in both units be considered. The Board, following its disallowance of Interrogatory 92, specifically required Applicant to supply information on its research into thermal shock on the reactor pressure vessel. Applicant did in fact specifically answer interrogatories dealing with reactor pressure vessel failure. (See Answers to Interrogatories 22, 23, 52, 25, 87, 88 and 89.) Applicant, in addition, submitted further evidence on thermal shock at the hearing in the form of B&W Topical Report BAW-10018, "Analysis of the Structural Integrity of a Reactor Vessel Subjected to Thermal Shock" (Applicant's Ex. 33). Saginaw's statement of topics for cross-examination, dated June 10, 1972, made no mention of pressure vessel failure and it was never denied the right to pursue that matter.

Mapleton Intervenors' pleading of September 14, 1972 is also only a sham compliance with the Board's Order of June 28, 1972. It does contain a heading labeled "Findings of Fact," followed by 37 numbered paragraphs. However, in clear violation of 10 CFR 2.754(c), supporting references to transcript citations or exhibits are wholly

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1/ Saginaw mistakenly states the order was dated May 17, 1971. It was in fact dated May 13, 1971.

lacking. The reason for this is obvious. The "findings of fact" are not findings of fact at all. They are merely a rehash of unsupported contentions which Mapleton Intervenors previously filed in this proceeding. This is graphically illustrated by the table contained in attachment A hereto, which compares the proposed "Findings of Fact" with previously filed contentions. So little thought or effort went into this self plagiarism that even the same misspellings have been preserved. (See "teratogenic" [sic] in Contention 24, dated April 17, 1972, and finding 17, dated September 14, 1972.) Indeed, a number of the proposed findings are not only unsupported by the record but are distortions of the record. For example, finding 2 is unsupported by the sworn testimony of Mapleton's own witness, Dr. Epstein (Tr. 6[illegible]-52), finding 12 is contrary to the uncontradicted evidence of Applicant and Staff that releases will be within AEC standards (Applicant's Ex. 38F-1, p. 4.2-7; Applicant's Ex. 38M; Staff Ex. 6, p. V-23), and finding 14 is total contrary to the Staff's uncontradicted evidence that appropriate bioaccumulation factors were used in calculating doses (Staff Ex. 6, p. V-26).

In addition, Mapleton Intervenors have included in their pleading a section entitled "Conclusions of Law," but like Saginaw's "areas of legal concern," they are so general, unsupported by citation and at times opaque, as to render a detailed response unnecessary. By way of example, we merely note that conclusion of law 6 is so vague as to be totally meaningless; conclusion 7, in addition to being vague and general, contains an argument which Mapleton Intervenors have refused

to define further since the Board first ordered specification in December of 1970; and conclusion 7 omits reference to the fact that Mapleton did not produce Dr. Huver as a witness. Moreover, the second half of conclusion 7 is not comprehensible in the absence of any specifics.

From the foregoing, it is clear that, in contravention of this Board's Order of June 28, 1972, and 10 CFR 2.754(a) and (c), both the Saginaw Intervenors and the Mapleton Intervenors have failed to file proposed findings of fact and conclusions of law. However, the appropriate action which should be taken in the circumstances is not equally clear. Under 10 CFR 2.754(a) the failure to file proposed findings of fact and conclusions of law "when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly." Presumably, at the minimum the Board will enter an initial decision "accordingly"; i.e., it will proceed to prepare that decision without such assistance as it might otherwise have had from proposed findings and conclusions filed by the intervenors in good faith and in compliance with the regulations.

By implication at least, Saginaw Intervenors seem to assert that this Board either cannot or will not do more. This seems to be the only possible meaning that can be attributed to their expressed intention, in the event they are dissatisfied with the initial decision, to file "exceptions", seek "further appellate review" and otherwise "pursue our legal remedies."

However, without precisely defining what action may be taken, the Commission's regulations do in fact confer additional authority

upon the Board. Thus 10 CFR 2.707, as amended (37 Fed. Reg. 15131, July 28, 1972), relating to "Default" provides that "On failure of a party to file a pleading within the time prescribed in this part . . . the Commission or the presiding officer may make such orders in regard to the failure as are just . . . ." (footnote omitted). Similar authority is conferred by subsection (e), (f) and (l) of 10 CFR 2.718. Subsection (e) vests in the presiding officer authority to: "Regulate the course of the hearing and the conduct of the participants." Accordingly, the Commission's regulations do in fact authorize the Board to do more than to merely sit by, observe the default and proceed to attempt to meet its obligations as best it can.

The timely and proper manner in which to raise any issues based on the record or the proceeding to date is in proposed findings and conclusions of law. To refuse to raise such matters at that appropriate time and then to file exceptions to the Board's order on the basis of matters available in the record but not drawn to the Board's attention in proposed findings of fact or conclusions of law subverts the whole process. The philosophy expressed by courts in refusing to review issues not raised in a timely and proper manner before the agency should be applicable to the present situation and offer some guidance as to the course of action to be pursued by the Commission. The guiding principle has been clearly expressed:

> ". . . orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction . . . . * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless

> the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37; 73 S Ct 67; 97 L. Ed 54, 58 (1952)

To the same effect:

> ". . ., ordinarily a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the grounds of essential procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level." First-Citizens B & T Co. v. Camp, 409 F2d 1086, 1089 (4 Cir 1969)

Although intervenors have raised many objections over the course of this proceeding, much has transpired in the hearing and since such objections were raised and it is unreasonable to expect the Board and other litigants to pick and choose which issues are still being actively pursued by intervenors and the basis for any factual assertions. One agency, the Federal Communications Commission, has provided an explicit remedy, similar to that adopted by the courts:

> "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when directed to do so, may be deemed a waiver of the right to participate further in the proceeding." 47 CFR §1.263

What, if any, action should be taken can best be considered in the light of "the proper role of intervenors in a proceeding of this kind." See Board Order of March 3, 1972, in this proceeding, at pp. 3-5. There the Board noted that it had "granted all requests for intervention, including those which were technically untimely and those as to which the demonstration of 'interest' is less than crystal

clear." It believed these actions to be consistent with the "policies of the Atomic Energy Commission to encourage public participation, and also with the clear trend of recent court decisions." However, the Board then went on to examine the "proper role of intervenors". It emphasized the necessity that they acquaint themselves with the technical issues and attempted to alleviate what it regarded as the difficulties intervenors would have in the circumstance in doing so with respect to environmental issues. In the course of its analysis the Board stated:

> "Intervenors will be given a fair opportunity to make their cases and to examine into the case proposed by the Applicant and Staff. However -- and this is particularly true for those intervenors who are acting as 'private attorneys general' to assert public rather than private interests -- the primary function of the intervenor is to assist the Board in making its safety evaluation." (Emphasis supplied)

Obviously the filing of sham findings by the intervenors constitutes a total failure to "assist the Board." In effect it constitutes a determination by the intervenors to abandon their responsibilities with respect to the trial stage of the proceeding and to make their cases in succeeding stages of the proceeding instead. Applicant believes that this is not an election that should be open to a party and that the intervenors have thereby forfeited their rights to participate in the later stages of the proceeding or, at least, to make any arguments as to facts or law which could have been made in the proposed findings of fact and conclusions of law. Indeed, it is difficult to conceive what other meaning could be attributed to the word "default" in this context. Applicant therefore reserves the right so to contend in subsequent stages of this proceeding.

In addition, however, the Applicant respectfully suggests that the Board should also take action concerning the matter now. The Board is in a far better position than any appellate body to determine the impact of the defaults and to place them in the perspective of the intervenors' participation in the hearing and of such assistance, if any, as the intervenors provided the Board. Moreover, the default related to compliance with an order of this Board. Failure of the Board to act may lead an appellate body to infer that this Board either concluded that no default existed, or that even if it did, that this Board determined that no action was required.

It is the Applicant's view that the intervenors have totally and deliberately failed in meeting the obligations which they undertook when they requested to become parties to this proceeding. They have failed to make any real effort to participate in the trial aspect of this proceeding; instead, they have done only so much as they believed would make it possible for them to participate in succeeding stages. Applicant submits that a party should not be permitted to abdicate its responsibilities at one stage of the hearing and be free to participate in all respects at later stages.

For the reasons set forth above, this Board should, at a minimum, make an express determination that the Mapleton and Saginaw Intervenors are in default. In addition, the Applicant respectfully suggests that the Board may consider it appropriate to take further action or to institute additional proceedings with respect to the consequences to the intervenors of the default. Participation by intervenors in proceedings such as this is a comparatively recent and

evolving phenomenon. To date, the principal legal emphasis has been placed upon problems of standing and the right to intervene. Comparatively little consideration has been given to the responsibility of intervenors, particularly those who take on some of the functions of "private attorneys general," once their right to become parties in a proceeding has been recognized. Frequently, one significant consequence of such participation has been delay -- which, in proceedings of this type, imposes substantial additional costs upon applicants and may seriously disserve the public by preventing utilities from meeting urgent energy needs.

These disadvantages might be compensated for if in fact the public interest was more effectively represented in the proceeding as a result of the intervention. But if such representative participation is deliberately withheld, a serious problem in the administration of the law is presented. The problem affects all who have business before the agency or are dependent upon it for essential services. However, because of its public responsibilities to administer the law efficiently and to serve the public interest, it seems to us the special responsibility of the administrative agency involved, in this case the Atomic Energy Commission, and its organs, in this case the Board, to attempt to meet the problem.

We do not here undertake to advise the Board as to how the problem should be met. As noted above, the regulations of the Commission do not precisely specify the action or proceeding which would be appropriate in the event of default. Nevertheless, it appears that the rules

authorize a substantial range of possible action relating to limitations on the extent of the intervenors' further participation in this proceeding. Such action might be taken by the Board itself or it could certify the question of the appropriate action in the circumstances to the Atomic Safety and Licensing Appeal Board or to the Commission itself through the Appeal Board. See 10 CFR 2.718(i) and 2.785(b).

We believe that what has occurred in this proceeding makes it incumbent to consider possible actions with respect to the default of the Mapleton and Saginaw Intervenors. However, in that connection, we emphasize that it would be most inequitable to take any action which would in any way delay the issuance of the Board's initial decision or otherwise delay completion of this proceeding or add to the procedural burdens of the Applicant.

Respectfully submitted,

/s/ John K. Restrick
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Dated: September 27, 1972

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Attachment A

Table Relating Mapleton Intervenors' Proposed Findings of Fact to Their Contentions

Finding of Fact No.	Contention Date	Contention No.
1	4/17/72	1
2	7/08/71	III
3	4/17/72	3
4		
5	4/17/72	9
6	4/17/72	10
7	4/17/72	12
8	4/17/72	13
9	4/17/72	14
10	4/17/72	15
11	4/17/72	16
12	4/17/72	19
13	4/17/72	21
14	4/17/72	22
15	4/17/72	23
16	4/17/72	24
17	4/17/72	25
18	4/17/72	26
19	4/17/72	29
20	4/17/72	30
21	4/17/72	31
22	4/17/72	33
23		

Finding of Fact No.	Contention Date	Contention No.
24	4/17/72	36
25	12/29/71	4
26	12/29/71	26
27	12/29/71	27
28	12/29/71	28
29	12/29/71	10
30	12/29/71	11
31	12/29/71	13
32	12/29/71	17
33	12/29/71	21
34	12/29/71	22
35	12/29/71	23
36	12/29/71	24
37	12/29/71	25

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Reply of Applicant to Pleadings Filed by Saginaw and Mapleton Intervenors on September 14 and 15, 1972" have been served on the following by deposit in the United States mail, first class, this 27th day of September, 1972:

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