UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

April 16, 1973

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

MOTION TO REJECT OR STRIKE APRIL 9, 1973,
LETTER OF COUNSEL FOR SAGINAW INTERVENORS

Applicant, Consumers Power Company, hereby moves the Appeal Board to reject or to strike, and to ignore, a letter, dated April 9, 1973, and addressed to the Chairman from Myron M. Cherry, Esq., counsel for the Saginaw Intervenors. The letter attempts to brief again, and to bolster, an exception already briefed and argued.

The letter is, in effect, a supplemental brief, not provided for in the regulations and not requested by the Appeal Board. The ostensible occasion for the filing is the statement that "several recent cases have come to Saginaw Intervenors' attention . . . ." However, all of these "recent" cases were decided before the oral argument; they go back in time as far as 1951. Moreover, many of the cases are so frequently cited that they have become part of the vernacular of the law relating to public intervention and environmental protection. Accordingly, the justification for the filing is transparently flimsy. There is and there can be no good

cause for the filing of a supplemental brief or legal memorandum, whether in the guise of an informal letter or otherwise.

By way of background, Saginaw Exception IV.A. (pp. 55 et seq.) reads as follows: "The Licensing Board Failed to Independently Review All Issues of an Environmental Nature Whether Contested or Uncontested." Without record citation, and therefore in violation of the requirements of 10 CFR 2.762(a) that "exceptions shall specify precisely the portions of the record relied upon . . .,"[1/] assertions were made in support of the exception that the Licensing Board "took no independent initiative . . ." with respect to environmental matters. (p. 56) It was also contended (p. 57) that the Board "must take the initiative and do its own analysis even to the point of doing independent research."

The exception represents a singular concoction of factual error, poor law and bad grace: bad grace because it comes from parties who walked out on and deserted the environmental phase of the hearing. They failed even to file proposed findings of fact and conclusions of law to assist the Licensing Board in its decision with respect to the record before it. In effect, the contention that the Board should have played a more active

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1/ 10 CFR 2.762 was revised on March 2, 1973, to be applicable to initial decisions rendered on or after that date. The revision, however, retained the requirement of specification of "the precise portion of the record relied upon." (38 F.R. 5265)

role, "even to the point of doing independent research . . .," is a claim that the Board was obligated to complete the task on which Saginaw Intervenors reneged.[2/]

The unsupported "factual" allegation concerning the Licensing Board's alleged failure to take independent initiative was also clearly erroneous. With citations to examples, the AEC Regulatory staff noted in its Brief in Opposition to the Saginaw Exceptions (p. 28) that the hearing transcript "reflects considerable initiative and independent analysis by the ASLB with respect to environmental matters."

In addition, the Applicant's Brief in Opposition to Saginaw's Exceptions demonstrated (pp. 50, et seq.) that Exception IV.A. thoroughly confuses the role of the various organs of the agency -- i.e., of its operating and regulatory staffs and its adjudicatory bodies -- with each other and with the agency itself. The brief referred to the case law under NEPA[3/] which requires the AEC independently to investigate

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2/ In this connection the Licensing Board noted that the failure of the intervenors "to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested." Initial Decision of December 14, 1972, para. 9, p. 10, n. 10.

3/ The Applicant's Brief expressly addressed itself to three of the cases cited by the Saginaw Intervenors in their supporting discussion of Exception IV.A.: Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F2d 1109 (D. Cir. 1971); Greene County v. FPC, 455 F2d 412 (2nd Cir. 1972); and EDF v. Hardin, 325 F. Supp. 1401 (D.C.D.C. 1971).

and balance the environmental aspects of proposed licensing actions and noted that the AEC has recognized that obligation and has adopted regulations which set forth the procedures and actions which are to be taken to implement the obligation. 10 CFR Part 50, Appendix D. Applicant's brief also pointed out that section A.11 of Appendix D spells out the role of atomic safety and licensing boards with respect to environmental issues and that the Licensing Board in this proceeding expressly and correctly recognized and described its duties under NEPA and Appendix D.[4/] To be sure, Appendix D prescribes an active role for licensing boards; however, the Licensing Board below fully met its obligations, elucidating the issues, identifying areas of concern, making independent findings of fact and independently balancing environmental considerations. The Applicant's brief also pointed out that nothing in the cases requires the Board to do "independent research." The brief made it clear that the obligations of the AEC under NEPA had been met.

After all the exceptions and briefs in opposition had been filed, this Appeal Board issued an order on February 12, 1973 (ALAB-100), setting the matter for oral argument and stating that it expected "the parties to focus primarily on" five enumerated "areas of inquiry." One of these was

> "3. Saginaw Intervenors' exception IV.A., with particular reference to the requirement, if any, that a Licensing Board engage in independent research (see p. 57 of Saginaw Intervenors' exceptions)."

4/ Initial Decision, para. 43, p. 34.

When, after some delay, argument was finally heard on March 14, 1973, Issue No. 3 was not initially argued by Saginaw's lead counsel, Mr. Cherry, but by his associate, Robert L. Graham, Esq. Mr. Graham was subjected to probing questions concerning the relative functions of licensing boards, as adjudicatory tribunals, and the AEC Regulatory staff under NEPA and with respect to the meaning of "independent research."[5/] Mr. Cherry then picked up the argument and addressed substantially the same questions.[6/] Although Mr. Cherry was also closely questioned, the Saginaw Intervenors were not requested by the Board to file any further memoranda, briefs or other written documents concerning Exception IV.A.

Nevertheless, now comes the wholly unsolicited letter of April 9, 1973, which begins (p. 1) by saying "several recent cases have come to Saginaw Intervenors attention" and that the cases are being presented to the Appeal Board "in the event your research has not disclosed them." The "recent cases" cited were decided between 1951 and 1972 -- all, of course, well before the oral argument. They include (p. 2) such landmark decisions as United Church of Christ v. FCC, 359 F2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F2d 608 (2d Cir.

5/ AB Tr. 5, 30-38.

6/ AB Tr. 39-46.

1965); and Greene County v. FPC, 455 F2d 412 (2d Cir. 1972).[7/] The description of the cases as "recent," the implication that they have only now "come to the attention" of counsel for Saginaw Intervenors and the suggestion that research conducted by the Appeal Board "has not disclosed them" insults the intelligence. One must therefore conclude that this language represents nothing but a transparent excuse to file an additional brief or memorandum -- after argument and without leave of the Appeal Board.

We are not without sympathy for the impulses which may have led to the letter. Rare is the lawyer who has not, in the long, sleepless watches of the night after oral argument composed what he conceived to be a far, far better presentation than the one he or his associate made the previous day in court. But however deep our sympathy may be, it cannot make excusable the inexcusable or acceptable the unacceptable. The April 9, 1973, letter is inexcusable and unacceptable.

The letter continues to make allegations of fact which are unsupported by the record, thereby repeating Saginaw Intervenors' previously established pattern of violation of 10 CFR 2.762.

7/ As pointed out in n. 3, supra, the Greene County case was one of those originally cited by the Saginaw Intervenors in support of Exception IV.A.

Thus, the letter states (p. 4), without citation and unequivocally, that "the Licensing Board has merely rubber-stamped the impact statement and the environmental findings of the Regulatory Staff" and claims to have "demonstrated" at the oral argument that "the Licensing Board has been content to sit back like an umpire . . . ." (p. 1) A review of the transcript of the oral argument before the Appeal Board discloses no such "demonstration." And, as we have pointed out above, the record[8/] discloses that the facts are contrary to what these statements allege.

Nor, is the letter's treatment of the law any more reliable than its treatment of the facts. Except for the initial statement (p. 1) that the parties had been asked to focus on it at oral argument, the letter makes no reference whatsoever to the contention, originally made in Exception IV.A. and which was one of the principal subjects of the oral argument on March 14, 1973, that the Licensing Board should have engaged in "independent research." Accordingly, not only does the letter fail to clarify the contention, it also leaves it unclear whether the contention has been abandoned.

The bulk of the letter appears to be devoted to a discussion of cases in which agencies have not sufficiently canvassed the facts and alternatives. However, the letter continues to confuse the distinction between the Licensing Board and the agency, totally ignores the question whether the role conferred upon the

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8/ If this Board desires further record citations to the active, inquisitive and evocative role played by the Board, the Applicant will supply them.

Board satisfies NEPA (as the Applicant has demonstrated)[9] and fails to address the question raised in oral argument concerning the limitations imposed upon the Licensing Board's functions by virtue of its status as an adjudicatory body. Without leave of the Appeal Board, even additional illumination of the legal issues would not constitute a justification for filing a supplemental memorandum or brief after oral argument. Obfuscation of the issues certainly cannot provide such justification.

Of course, the basic objection to the letter of April 9, 1973, is that it offends the principal that fairness to litigants and the efficient and evenhanded administration of both the law and the public's business requires that at some point argument end and a decision be made.

The continued and unrestricted filing of pleadings and briefs can only lead to unjustified delay. It is for this reason that 10 CFR 2.762, in the form here applicable, fixes the time when exceptions may be filed and when briefs in opposition or in support of them are to be filed; and does not provide for additional, supplemental or reply briefs.[10] Nevertheless, this is exactly what the letter is. It expressly avows (p. 1) that its purpose is "to assist you and the Atomic Safety and Licensing Appeal Board in making

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9/ See Applicant's Brief in Opposition, pp. 53-54.

10/ The revision of 10 CFR 2.762, effective as of March 2, 1973, makes no relevant change in this respect.

your decision on exception IV A . . . ." As we have already pointed out, it begins by purporting to "present" to the Appeal Board "several recent cases . . . in the event your research has not disclosed them . . .," and it ends (p. 5) with a pious expression of hope "that this review of the case law . . . proves helpful to the Atomic Safety and Licensing Appeal Board in rendering its decision on Exception IV A." This is the language of a brief.

We do not suggest that the Appeal Board could not request supplemental information or legal memoranda after oral argument; but here it did not do so. Nor do we suggest that it would be improper to file a memorandum or brief if a new development -- factual or legal -- should occur after oral argument which significantly affects a proceeding. Even in such circumstances, however, a motion for leave to file for good cause shown is the necessary prerequisite.[11/] No such motion was made here; and in view of its content, no such good cause showing is possible.

11/ The Saginaw Intervenors at least had the grace to allege that "good cause" had "been shown" for them to file the AEC-ACRS correspondence attached to their "Motion and Supplement" of March 28, 1973, and for this Board to consider new contentions related to that correspondence. However, as the Answer of the AEC Regulatory Staff, dated April 10, 1973, and the Opposition of the Applicant, dated April 9, 1973, demonstrate, no "new" information is involved and the Motion and Supplement is not in fact supported by good cause.

Applicant therefore moves that Mr. Cherry's letter of April 9, 1973, be rejected or stricken and ignored.

Respectfully submitted,

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Dated: April 16, 1973

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion to Reject or Strike April 9, 1973, Letter of Counsel for Saginaw Intervenors", dated April 16, 1973, in the above-captioned matter, have been served on the following in person or by deposit in the United States mail, first class or airmail, this 16th day of April, 1973.

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