L.P.D.R.

12/10/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE COMMISSION

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

ANSWER OF AEC REGULATORY STAFF TO
SAGINAW INTERVENOR'S MOTION TO CLARIFY ALAB-123

Pursuant to the Secretary's letter of November 27, 1973 to counsel in this proceeding, the AEC Regulatory Staff files this answer in opposition to the Saginaw Intervenors' November 20, 1973 "Motion to Clarify ALAB-123 In Light of Memorandum and Order of the Commission in Niagara Mohawk Power Corporation Issued Under Date November 6, 1973."[1/]

Introduction

The Saginaw Intervenors contend in their motion that, in this proceeding, they raised "energy conservation" issues; that such issues were ruled, as a matter of law, beyond the scope of the proceeding by the Licensing Board, and by the Appeal Board in ALAB-123, RAI-73-5, p.331 (May 18, 1973); and that these rulings of the Licensing Board and the Appeal Board are not

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1/ The motion was filed with the Atomic Safety and Licensing Appeal Board and subsequently referred to the Commission. See ALAB-160, RAI-73- ___ (November 26, 1973).

consistent with the position taken by the Commission in its recent Memorandum and Order in Niagara Mohawk Power Corporation (Nine Mile Point, Unit No. 2), Docket No. 50-410, RAI-73___ (November 6, 1973). On these grounds the intervenors request that the record of this proceeding -- in which a final agency decision (ALAB-123) has been issued and which is the subject of pending petitions for judicial review -- be reopened for consideration of their "conservation of energy" contentions.[2/] In the alternative, they request a "clarification decision mak[ing] clear how ALAB-123 and Niagara are consistent" (Motion, p.22).

What the Commission held -- and all that it held -- in Niagara Mohawk is that evidence on energy conservation may not be barred at the threshold. In that memorandum and order, the Commission stated:

> In view of our responsibilities under the National Environmental Policy Act, we cannot agree that the subject of energy conservation must be altogether ruled out of licensing proceedings. It is true that the parameters of our statutory power to compel conservation are not clear. But it does not follow that all evidence should therefore be barred at the

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2/ We note in passing that a question exists whether the Commission can remand this proceeding to the Licensing Board without first obtaining leave to do so from the United States Court of Appeals for the District of Columbia Circuit -- the court before which the judicial review proceeding is pending. See 28 USC § 2347(c); American Farm Lines v. Black Ball Freight Service, 397 US 532, 540 (1970), Greater Boston Television Corporation v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971). At this juncture, however, the Commission has merely sought the views of the parties on what the ultimate disposition of the instant motion should be.

threshold. See Long Island Lighting Co. (Shoreham), ALAB-156, decided October 26, 1973, pp.79-80; Consumers Power Co. (Midland), ALAB-123, May 18, 1973, RAI-73-5, p.352.

Accordingly, the Commission, pursuant to its inherent supervisory powers over its own proceedings, reversed and set aside certain prehearing orders that had precluded the presentation of evidence on energy conservation alternatives framed by the intervenors in that proceeding; directed the Licensing Board to schedule a prehearing conference on such alternatives; and required the intervenors, at that conference, to identify their witnesses who would address those alternatives and to specify the substance of the testimony to be offered.

"Conservation of energy", as that term was used by the Commission in Niagara Mohawk, refers to the issue whether, by utilizing methods of curtailing demand for electricity, it would be possible to reduce such demand to a level at which part or all of a proposed facility would not be needed.[3/]

3/ The underlying energy conservation issues in Niagara Mohawk were these:

1. Selective load shedding during periods of peak demand.

2. Changes in the rate structure by which electricity is marketed --e.g. (a) modifying the volume discount which results in lower per unit costs for electricity the more electricity that is used; (b) charging higher prices for electricity during periods of peak demand or (c) increasing the price of electricity to include all of the environmental costs of its production.

3. Cutting wasteful uses of electricity, such as space heating and

4. Reducing the volume of "promotional advertising" which fosters the demand for electricity. (Brief for Petitioners, September 17, 1972, fn. at p.6)

We note here that few of the contentions which are the subject of the motion fit the definition of "energy conservation" reflected in Niagara Mohawk. As a result of our analysis of the contentions, and in presenting our argument below, we have grouped the allegedly excluded contentions as follows: contentions challenging the applicant's estimates of future demand (contentions nos. 81, 87, 88, 89 and 92); contentions with respect to the end uses and other remote effects of the energy to be produced by the plant (contentions nos. 32, 34, 35, 73, 74, 76 and 85); contentions with respect to promotion of the use of electricity (contentions nos. 31, 47 and 75); and three miscellaneous contentions which appear to have not even a remote connection with the subject of energy conservation (contentions nos. 33, 49 and 72).[4/]

Argument

The intervenors have shown no reason for clarification or other reconsideration of any ruling or decision relating to the contentions which they allege to have been ruled beyond the scope of the proceeding. As discussed in parts A through D below, few of the contentions relate to "energy conservation" within the meaning of Niagara Mohawk. Most of the contentions were not in fact excluded from the proceeding. The only contentions that were

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4/ All contentions of the Saginaw Intervenors referred to herein are set forth in "Saginaw Valley Et. Al. Intervenors' Statement of Environmental Contentions", dated February 6, 1972.

treated as being beyond the scope of the proceeding -- those dealing with end uses and other remote effects of the energy to be produced -- were excluded on the basis of a sound application of the rule of reason. In all cases, the rulings and decisions of the Licensing Board and Appeal Board are consistent with the National Environmental Policy Act of 1969 (NEPA) and fully supported by the record. Moreover, the intervenors never made, with respect to any of these contentions, a preliminary showing of merit sufficient to warrant inquiry by the staff or the Licensing Board and its own motion.

A. Contentions Challenging the Applicant's Estimates of Future Demand

In this group of five contentions, the intervenors argued that the applicant's estimates of future demand did not take into account reductions in demand that might result from various energy conservation measures. Contention 81, according to the intervenors (motion, p.14), "raises the issue that demand may decrease because of a conservation movement which may inhibit improper or wasteful expansion of industry". Contention 87 asserts that there is no basis for the applicant's projection of increased room air conditioning, "particularly if the citizens are educated to conserve energy". Contentions 88, 89 and 92 are generally to the same effect; they are critical of the alleged failures of the applicant to factor into its projections, in addition to the environmental movement, "the possibility that rate structures will be revised so as to make

large use of electricity*** more expensive", and the possibility of increased "development of mass transit which would result in a relative decrease in the production [within the applicant's service area] of automobiles".

Contrary to at least an implication in the intervenors' motion, none of these contentions relating to the applicant's projections of demand was ever excluded from consideration in this proceeding. In the same prehearing order which the intervenors now attack in their motion, the Licensing Board, referring to these and other need-for-power contentions, said: "The need for power from the proposed plant is, of course, an issue in this proceeding".[5/] Nor, insofar as we have been able to determine, was the admissibility of these contentions ever put in question by any other ruling or decision in this proceeding, including ALAB-123. Therefore, even assuming, arguendo, that the contentions in the group relate to energy conservation within the meaning of Niagara Mohawk (we submit they do not), the intervenors have shown no possible inconsistency, with respect to these contentions, between the rulings in this proceeding and the Niagara Mohawk memorandum and order; their contentions regarding the applicant's estimates of future demand were not excluded at the threshold or at any other time.

5/ "Order With Respect to Environmental Issues". March 27, 1972, p.10.

No evidence was adduced, through cross-examination or otherwise, in support of these contentions. The intervenors failed to file an affirmative case in writing, to participate in the hearing, and to file proposed findings of fact and conclusions of law.[6/] The intervenors also never attempted to make any offer of proof on these subjects. The contentions themselves were not even verified by affidavit and were, in fact, drafted by an attorney and a biologist -- neither of whom demonstrated on the record any special expertise in load forecasting. (Tr. 5714-18) In short, any complaint the intervenors might have with respect to these contentions is the result of their own failure adequately to litigate their case.

There was, on the other hand, ample evidence in the record to support the applicant's projections of future demand. The applicant presented detailed forecasts of electrical sales through 1980; converted these sales forecasts to estimates of peak demand for electricity; and related such projections to its existing generation, its construction and retirement program, and projections for the Michigan Electric Power Pool (Applicant's Ex. 38F-1, §2; Applicant's Ex. 38G, revised Ex. 1 to §2; Applicant's Ex. 38K, pp.108-114) The projections of sales growth were by class of service, based primarily on historical trends modified to reflect other data which indicated

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6/ See, e.g., ALAB-123, 73-5 at pp.332-333, 352.

changes in those trends. The change factors included population forecasts, projections of various economic indicators, projected energy use, customer saturation for major appliances, as well as certain other factors which might have affected future sales. (Applicant's Exhibit 38F-1, §2.2) A witness from the Federal Power Commission (FPC) testified regarding factors to be considered in determining the need for power; the FPC's review of applicant's projections; and the FPC's review of the Michigan Electric Power Pool (Tr. 8012-8149). The witness further testified that the differences between the FPC projections and applicant's projections are insignificant (Tr. 8148-49) and confirmed that historically the applicant's projections have been accurate (Tr. 8093). The staff compared the applicant's projections with data gathered from other sources, including population increase trends in the United States, and concurred in the reasonableness of the applicant's projections. (FES, staff Ex.6, § X; Tr. 8090-91).

Based on this evidence, the Licensing Board correctly concluded (Initial Decision, pp.37-38), "that the applicant's projections of need are reasonable".

B. Contentions with Respect to the End Uses and Other Remote Effects of the Energy to be Produced by the Plant

In this group of seven contentions the intervenors argued, in substance, that the benefits of the plant, upon consideration of the end uses and other

remote effects of the energy to be produced, are either nonexistent or outweighed by costs.[7/] Contentions 32, 73 and 74 all refer to the "social stimuli" that affect demand for electricity, arguing that "the proposed plant may not be licensed *** unless [inter alia] it is demonstrated that [the] demand for electricity represents useful social stimuli considering the long range rationalization of our national energy policy" (contention 74), and that such social stimuli should be changed or eliminated (contentions 32 and 73). These contentions of course reflect a judgment, never particularized by the intervenors, that some end uses of electricity are more "valid" than others. Thus, in contentions 73 and 76, the intervenors argued directly for an analysis, in this proceeding, of the various end uses of electricity, with a view to determining which end uses should be encouraged and which discouraged. Other remote effects of the energy to be produced are addressed in contentions 34 and 35 which asserted, in effect, that the Licensing Board should attempt to factor into its decision-making the effects on the community of Midland, Michigan and the environment generally (Will "Dow Chemical expansion *** result in undesirable products, such as, for example, the creation of chlorinated hydrocarbons or 2-4-5-T"? -- contention 34) of the

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7/ These contentions develop a theme stated in contention no. 29: "There are no benefits to be derived from operation of the proposed Plant, and, alternatively, all risks and costs greatly outweigh any alleged or asserted benefits".

changes that might occur in Dow operations as a result of energy to be produced by the plant. Finally, in contention 85, the intervenors asked the Board to determine whether, as the applicant had asserted, the proposed plant would "maintain and enhance *** living standards".

Except to the extent these contentions may be construed as urging selective curtailment of end uses or the changing of "social stimuli" responsible for demand, they do not relate to "energy conservation" within the meaning of Niagara Mohawk. The intervenors never specified any "invalid" end uses which, if curtailed, would eliminate the need for the proposed plant in whole or in material part. Nor did they identify the "social stimuli" which, if changed, would bring about the same result. For that matter, they never made altogether clear what they meant by the term "social stimuli".

The Licensing Board did treat as beyond the scope of the proceeding any inquiry into the social values of the end uses of the power to be produced, and any inquiry as to whether Dow and economic growth are "good" or "bad" for Midland.[8/] However, in this connection, the Board did make the following

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8/ "Order With Respect to Environmental Issues", March 27, 1972, p.8. See also Tr. 5915, where the Chairman of the Licensing Board stated:

> [W]e do not believe that it is possible for this Board or perhaps anybody in the world to make any kind of a sensible judgment on the question which I understand to be implicit of whether or not the Dow Chemical Company is a net good or a net bad to the City of Midland,
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> That seems to us to be clearly beyond the scope of an environmental hearing, and indeed beyond the capacity of mortal man to figure out.

offer to which the intervenors never responded: "To the extent that Saginaw disagrees with applicant's claim of benefit, it may make its own quantification for consideration by the Board".[9/] The substance of these rulings was reiterated in the Initial Decision, at p.38, and affirmed in ALAB-123, RAI-73-5, 331 at 351-52, 357.

An analysis of these contentions will show not only that they would demand of the Board a consideration of the end uses of the power from the plant, but also that they would require the Board to consider a broad range of societal factors in order to determine that one end use is "better" than another. It is clear that, given this choice, the staff, the Licensing Board, and the Appeal Board on review were in complete compliance with NEPA and the Commission's regulations implementing that statute. NEPA, of course, imposes an affirmative duty on each Federal agency to consider, and to give equal weight to, the environmental impact of its proposed action, and the alternatives to the proposed action, in its decisionmaking process, Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Greene County Planning Board v. FPC, 455 F.2d 412 (D.C. Cir. 1972). However, it is clear that even though the agency may be required to discuss the environmental impact of alternatives to an action which is beyond its jurisdiction to implement, the requirement is not an open-ended one. Natural Resources Defense Council

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9/ "Order With Respect to Environmental Issues", March 27, 1972, p.8.

v. Morton, 458 F.2d 827 (D.C. Cir. 1972) holds that the consideration of impacts is subject to a rule of reason the application of which narrows the study of impacts to those alternatives to the proposed action which are neither "remote" nor "speculative", and which would be available within the same time frame as the original proposal. (Id. at 837.) Surely a study of the scope demanded by Saginaw Intervenors in this matter does not fall within the rule of reason laid down by Morton.

C. Contentions with Respect to Promotion of the Use of Electricity

Contentions 31, 47 and 75 all raise questions involving alleged promotion of the use of electricity. Together these contentions assert that the applicant and others are conducting advertising campaigns and other promotional activities which create a "false" or "artificial" demand for electricity (contentions 31 and 47), particularly in peak periods (contention 47), and which cannot "validly be rewarded" (contention 75); that "all of the electricity to be generated from the proposed Plant is, therefore, not necessary for Applicant's franchised area" (contention 47); and that, accordingly, the plant "will not provide any benefit to electrical users and *** represents an unwarranted cost to the environment" (Id.).

The intervenors concede (motion, p.17) that promotional advertising was allowed as an issue in the proceeding but suggest that other promotional

activities were excluded (Id.). Notably, the intervenors cite no preclusive ruling with respect to such other promotional activities. In fact there was none. Accordingly, the record on promotional activities is fully consistent with the Commission's memorandum and order in Niagara Mohawk.

Any complaint the intervenors may have with respect to the matter of advertising and other promotional activities is the result of their own failure adequately to litigate their case. What we have pointed out in regard to the intervenors' participation in another area (see part A supra) is equally applicable here. The intervenors never made any showing, evidentiary or otherwise, that might reasonably have led the Board to suspect, let alone conclude, that the need for the plant could be eliminated in whole or in material part by curtailing promotional activities.[10/] In ALAB-123, RAI-73-5 at 352, the Appeal Board summed up the matter of promotional advertising as following:

> As for the contention that the demand for electricity was artificially stimulated by the applicant's advertising, the Board stated that no evidence had been offered to support that contention; and that absent some evidence that applicant was creating abnormal demand, it [the Board] would

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10/ In its March 27, 1972 Order With Respect to Environmental Issues, at p.9, the Board called upon the intervenors to specify in their affirmative case "the portion of the demand attributable to advertising by applicant and the basis of that conclusion". The intervenors never responded to that request.

not consider the questions. We do not believe the Board acted unreasonably.[11/]

The Appeal Board's conclusion is, of course, equally valid for promotional activities generally.

D. Miscellaneous Contentions

In this part of our answer we address three miscellaneous contentions (Nos. 33, 49 and 72) which, as noted in the Introduction above, appear to have not even a remote relationship to the subject of energy conservation.

Contention 33

The intervenors characterize this contention in their motion (at p.12) as "rais[ing] the conservation issue of denying electricity to some customers and in particular Dow Chemical Company". The issue actually raised by this contention was whether Dow should be forced, through denial of construction permits for the Midland Plant, to look to some other source,

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11/ It should be noted that the issue of promotional advertising was raised not only by the Saginaw Intervenors but by the Mapleton Intervenors, who fully participated in the hearing on environmental issues without adducing any evidence to support their position. The Mapleton Intervenors' promotional advertising contention was stated in their "Motion for Discovery/comments on Regulation Staff's Draft Detailed Statement on Environmental Considerations", February 4, 1972, at p.3; and was accepted as an issue in the proceeding at p.14 of the Board's March 27, 1972 "Order With Respect to Environmental Issuess".

including self-generation, for its electricity and process steam.[12/] We fail to see how this issue relates in any way to energy conservation.

In any case, the "no plant" alternative was considered in the proceeding. (See ALAB-123, RAI-73-5 at p.351.) The intervenors were afforded every opportunity to demonstrate that, on nuclear safety or environmental grounds, the proposed construction permits should be denied with the result that Dow would have to look to other sources.

In addition, the intervenors had the opportunity to demonstrate that an alternative site for the proposed plant should have been selected. Due to the economics of transporting process steam, the selection of any alternative site sufficiently remote from Midland to satisfy the intervenors, would, as a practical matter, force Dow to continue generating its own process steam. (See Initial Decision, p.57) The Board considered the question of alternative sites, and in that context noted that Dow's most practical alternative, if an alternative site for the proposed reactors were to be selected, would be to build a new fossil fuel generating plant. (Initial Decision, pp.57-58) The Board rejected the concept of an alternative site on the basis that no available alternative site had advantages over the proposed site sufficient to outweigh the air pollution which would be caused by any new fossil plant that

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12/ The intervenors' suggested alternative sources included, inter alia, "means not now known to man".

Dow might build. (Id.) The record fully supports these findings. (See, e.g., Final Environmental Statement, staff ex. 6, at pp. XI-2 and XL-3)

Contention 49

The Licensing Board, in its "Order With Respect to Environmental Issues" of March 27, 1972, correctly ruled that "[Contention 49] challenges the legality of the rate structure promulgated by the Michigan Public Service Commission; that rate structure is not an issue in this proceeding." (Order, p.10) In the instant motion, the intervenors assert, however, that Contention No. 49 calls into question "the Michigan Public Service Commission's rate structure applicable to applicants' marketing of electricity arguing that the existing rate structure encourages rather than discourages demand." In point of fact Contention No. 49 does not even refer to "demand", much less discuss the encouragement or discouragement thereof. Rather, the contention attacks as illegal (presumably under Michigan law) the Michigan Public Service Commission's rate structure, contending that it is designed to encourage the applicant to replace existing generating facilities with new facilities as soon as their costs are amortized in order "to maintain an artificially high rate structure." Contrary to their present assertion (motion, p.18), intervenors' contention no. 49 does not raise the entirely separate "issue of modifying the rate structure as a means of conserving electricity".

Contention 72

The intervenors claim that their Contention No. 72 "directly raises the conservation [of energy] issue by urging a consideration of the 'actual cost of generating electricity'." (Motion, p.13) However, the substance of that contention was that the staff had failed in its Midland Final Environmental Statement to consider "such direct and indirect costs ['of generating electricity through nuclear power' (emphasis added)] as increased cancer and leukemia, medical costs relating to those and other diseases from radiation exposure, and costs of decommissioning *** as well as the cost of disposal of high and low level radioactive wastes". Clearly this is a challenge to nuclear power which has nothing at all to do with the matter of enrgy conservation. In any case, the record fully supports the Board's conclusions with respect to radiological matters. See Initial Decision and ALAB-123.

CONCLUSION

For the foregoing reasons, the instant motion should be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 10th day of December, 1973

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of AEC Regulatory Staff to Saginaw Intervenor's Motion to Clarify ALAB-123", dated December 10, 1973, have been served on the following by deposit in the United States mail, first class or air mail, this 10th day of December, 1973.

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