UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

OBJECTIONS OF BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION TO FIRST SET OF INTERROGATORIES DIRECTED TO BECHTEL CORPORATION

Bechtel Power Corporation and Bechtel Associates Professional Corporation (hereinafter "Bechtel") make the following objections to the "First Set of Interrogatories Directed to Bechtel Corporation" by the Saginaw Intervenors ("Saginaw").

As a preliminary matter, Bechtel notes that the Saginaw Interrogatories were directed to "Bechtel Corporation". Inasmuch as Bechtel Corporation is not a party to nor intervenor in this proceeding, the interrogatories have been treated as if filed upon Bechtel Power Corporation and Bechtel Associates Professional Corporation and will be objected to and answered by those entities and not Bechtel Corporation.

Bechtel's objections primarily relate to the fact that virtually all of the Saginaw Interrogatories call for totally irrelevant and immaterial information concerning each of Consumers Power Company's (Consumers) "activities which are or may be subject to regulation by the Atomic Energy Commission " (Saginaw Interrogatories to Bechtel, p. 2, ¶2), and, "each of the nuclear facilities as to which ... (Bechtel has) been a contractor or subcontractor."

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(Saginaw Interrogatories to Bechtel, p. 7, ¶12).

The Saginaw Interrogatories thus demonstrate a basic and total misconception of the scope of this Show Cause proceeding and ignore the statements of this Board at the First Pre-hearing Conference, the basis for the formulation of issues by the Director of Regulation in the Order to Show Cause, as well as the AEC Memorandum and Order dated December 20, 1973 (RAI-73-12 1082).

In addition to the overall objections relating to scope, Bechtel has certain narrower objections concerning specific interrogatories. This memorandum will first address the question of the demand for information concerning all of Consumers' and Bechtel's nuclear activities, and then the specific interrogatories seriatum.

I. SCOPE OF THIS PROCEEDING.

As indicated above, the Saginaw Interrogatories demand information involving all of the nuclear activities of Consumers and Bechtel. Bechtel requests that Interrogatories 12, 13 and 15 be stricken and that the remaining Interrogatories adressed to it be limited to construction of the Midland plant.

The tremendous scope of the Interrogatories is quickled gleaned from a review of them:

> "In connection with your answer to each category, and unless the facts are stated in your answer, include within your answer the facts upon which you rely for your answer. This directive is meant to preclude answering any interrogatories with 'yes' or 'no' and requests that you set forth the facts upon which you base any such answer. Unless otherwise stated, each

answer calling for information concerning Consumers Power Company is intended to call for information concerning each of its activities which are or may be subject to regulation by the Atomic Energy Commission." (¶2, p 2)

"Identify in connection with each of Consumers Power Company facilities as set forth in the definitional section each document ever received or reviewed, each meeting you have had (include dates and names of attendees) and each physical structure you have reviewed in connection with your analysis of first compliance with quality assurance regulations and second reasonable assurance of continuation with compliance with quality assurance regulations." (Interrogatory 7, p 5)

"With respect to each of the nuclear facilities as to which you have been a contractor or subcontractor, state:

(a) Are all of your quality-assurance and quality control plans identical? If they are not, state the differences for each of the relevant nuclear facilities. Include within your answer why there are differences and which plan is, in your judgment, the best to accomplish the purpose;

(b) List each quality-assurance, quality-control violation which has occurred at each such site and include whether the violation was reported to AEC officials;

(c) List each quality-assurance, quality-control incident which was not reported to AEC or which was not considered a violation but as to which discussion was had whether it was a violation." (Interrogatory 12 pp 7-8)

"With respect to the Palisades facility, explain in detail and characterize the type of quality-assurance and quality-control activities which occurred. Include within your answer the following: ...."(Interrogatory 13, p 8)

"What is your opinion of Consumers as a utility in the quality-assurance, quality-control area in light of your knowledge and experience with other utilities? Please include within your answer the facts upon which you base your answer and an identification of other utilities contained in your comparative answer. (Emphasis Added) (Interrogatory 15, p 9).

As is clear from the face of the Order to Show Cause, it relates only to "various activities performed under Construction Permit Nos. 81 and 82" (p 1, etc). Similarly, the stated issues pertain only to the construction of the Midland plant: "(1) whether the licensee is implementing its quality assurance program in compliance with Commission regulations, and (2) whether there is reasonable assurance that such implementation will continue throughout the construction process."

As conceded by Saginaw in its "Emergency Petition to the Atomic Energy Commission to Void Illegal Action of The Director of Regulation," "the Order to Show Cause (Part III) lists five charges, the majority of which deal with improper cadwelding in existence at the Consumers site. The Director of Regulation relied upon these charges as a primary ground for issuing the Order to Show Cause ..." (¶3, pp2-3). Saginaw then contended that the modification of the Show Cause Order precluded the consideration of the cadwelding issue at the hearing in this matter.

In denying the Emergency Petition, the Appear Board stated:

> "'Contrary to the petition's contentions, the modification of the lower case Show Cause Order did not foreclose consideration at the hearing of any of the issues framed by the initial Show Cause Order. As stated in the initial Show Cause Order, the issues at that hearing (if one is requested) shall be -- ... . This formulation plainly includes, but is not limited to cadwelding. The ultimate quality assurance issues are much broader." (RAI-73-12 at p 1083).

It cannot be fairly contended that the sentence, "The ultimate quality assurance issues are much broader," sanctions the attempted distortion of these proceedings into an inquiry into all of the past activities of

Consumers and Bechtel in the nuclear industry. Rather, the Order to Show Cause, and the Memorandum and Order of the Commission dictate the conclusion that the broad issues in this proceeding are limited to the implementation of the quality assurance program through the construction of the Midland plant. Thus, if either the AEC Regulatory Staff or the Saginaw Intervenors wish to raise contentions or specific issues and present evidence concerning any specific quality assurance activity involving the construction of the Midland plant, they may do so and these contentions and facts, if any, shall be considered, in addition to cadwelding, together with any affirmative showing by the applicant and Bechtel, in the determination of the ultimate issues as to whether or not the licensee is implementing its Midland quality assurance program in accordance with AEC regulations and whether or not there is reasonable assurance that such implementation will continue in the future.

As background to the question of the relevancy of the Saginaw demands, it is of some significance that the Regulatory Staff has advised this Board that, ... "(W)e are satisfied that the QA and QC problems there are now under control." (Transcript p 65) (Emphasis supplied).

In the face of this Regulatory Staff position, it is submitted that the usual burden upon Saginaw to demonstrate the relevance of its broad discovery demands is increased, and that exceptionally compelling reasons must be presented in order for this Board to require the tremendous, multi-year file search be undertaken.

Bechtel has been involved with different levels of responsibility in the engineering and construction of dozens of nuclear power plants. These

projects have involved a number of different quality assurance programs, different quality assurance regulations, different contractual responsibilities and requirements, different people and different utilities. An examination of such relationships and requirements, and "each quality-assurance, quality-control incident" at any site other than Midland not only is irrelevant, but fails to serve any substantial purpose, either in leading to evidence, clarifying issues or pursuing the resolution of this matter within a reasonable and responsible time frame. Counsel for Bechtel have investigated the burden imposed by the Saginaw Interrogatories and have determined that in order to answer the Interrogatories as to any single plant besides Midland a separate file search of an approximate average of two million to three million documents, and the interview of ten or more persons, if such persons can be found, would be required. This effort on a single plant basis would then have to be multiplied by the number of other plants involved. Even when the years required to comply with such requests (if it could ever be done) had gone by and the information assembled, it would be of no value since specific incidents at or different programs for other projects do not shed light on the central issue here: whether there has been and will be compliance with the Midland QA program by those persons who are implementing it throughout the construction of the plant.

Comparisons of the quality assurance programs applied on the various projects for which Bechtel has had varying responsibilities, and for which different regulations have existed, different circumstances have been present, and different relationships between Bechtel and the utilities have been involved are wholly irrelevant as are any opinions Bechtel may have as to the

relative abilities of Consumers Power Company and other utilities in the quality assurance arena. The issues are not whether or not some other program is better than the one here, or whether Consumers is as good as, better than, or worse than some other utility under other regulations and other circumstances, but, rather, whether or not Consumers and Bechtel have been implementing the Midland program at the Midland plant and whether or not there is reasonable assurance that they will do so in the future.

Recognizing that the Staff is "satisfied" (Transcript p 65), it is submitted that even if the Saginaw demands are somehow relevant to this proceeding, they are so broad and burdensome as to be wholly beyond proper discovery. It is perhaps illustrative that Bechtel has had as many as 12 people working for over 2 months on the collection and analysis of hundreds of thousands of documents generated for Midland in an attempt to determine which of those documents are relevant to this proceeding, and the task will not be completed for some time to come.

Even the requests for such documents limited to Consumers' construction projects are irrelevant. To begin with, Big Rock, Fermi-I, and the basic construction of Palisades were completed prior to the promulgation of 10 CFR Part 50, Appendix B, and thus were constructed under entirely different regulations, requirements and QA programs. Bechtel was not even involved in the construction of Fermi-I and is not aware of Consumers participation therein. Although Bechtel was involved in the construction of Big Rock, that plant has been on stream for many years, and few, if any of Bechtel's Big Rock personnel, and none of the quality assurance staff, have been employed at Midland. There are some employees working at Midland who

worked on the basic con truction at Palisades, but, again, none on the quality assurance staff.

Bechtel is organized on a project basis. The project team for the construction of the Midland plantis tremendously different from that of Palisades, and the quality assurance teams are completely different. Furthermore, Bechtel Power Corporation established an Ann Arbor area office in July, 1972, and that office now has the primary responsibility for the Midland project. Previously, the Palisades project had been handled out of San Francisco as had the Midland project during its early stages. While the Bechtel personnel at the Ann Arbor area office do consult with staff functional groups in San Francisco regarding specific questions, the Ann Arbor area office provides a multi-project staff function which, ordinarily, handles any questions which arise.

It is to be noted that the quality assurance incidents at Palisades and at Midland during the exemption construction have been litigated at the Palisades and Midland hearings, including the changes in the QA programs which were made subsequent to Palisades. In fact, many matters from Palisades were re-litigated at Midland, and further litigation of them within the limited scope intended for this hearing is totally unwarranted.

As to Quanicassee, that project is still in the stage of early design, no public hearing has been held and the quality assurance programs of Consumers and Bechtel have not yet been ruled upon as they have in Midland.

Legal Authorities Relating to Scope of Discovery

There is no authority for the proposition that the past performance of the dissimilar types of large corporations involved here is relevant to the course of performance on one particular project.

Although past performance of the same people under identical Quality Assurance programs might have some remote relevance to prove evil or willful conduct, such conduct is not at issue here, as recognized by the Commission in its Memorandum and Order of January 21, 1974, RAI-74-1-7. In discussing exceptions to the notice requirements of the Administrative Procedure Act, the Commission stated:

> A second exception involves cases of willful violation. It has no application here. fn 7, RAI-74-1 at p 10 (Emphasis added).

Moreover, the Commission, in this same Memorandum and Order, elaborated on the issues as defined in the Order to Show Cause:

> The issues ... as stated in the Order, make clear the Director's concern with the licensee's overall performance, now and in the future, in the quality assurance area. RAI-74-1-11 (Emphasis added).

Absent from the Commission's definition of the issues is any reference to past activities.

Since the discovery standard of 10 CFR §2.740 is identical to Federal Rule of Civil Procedure 26(b)1, federal cases provide an analogy.

Federal courts facing similar discovery problems involving past corporate operations have limited the scope of discovery to the transaction or subject matter in suit.

In Diffie v H. F. Wilcox Oil & Gas Co, 4 FRD 240 (WD Okl 1944), plaintiff sought an accounting of the production from an oil and gas well, alleging that defendant had commingled oil produced from this well with other wells owned by defendant in the area and had failed to account to plaintiff for the entire production of the well. Similarly, plaintiff there sought, by means of discovery deposition, to have defendant disclose information concerning the production and sales of oil not only from the well in which plaintiff had an interest, but also from all other wells owned by defendant in the field. Plaintiff also sought to examine the books and records of defendant having to do with all of the wells. The court limited discovery to those documents relating to the well involved:

> It is thus apparent their suit is based upon speculation and not upon known facts. It partakes of the nature of a bill of discovery. The principle upon which such a bill rests is well expressed in General Film Company v Sampliner, 6 Cir., 232 F. 95, 98, where the court said: '* * * It is the rule that in order to entitle a defendant in an action at law to a discovery of evidence in his adversary's possession it must appear that defendant has good ground for asserting the fact that the evidence will so disclose, and usually he is required to give the sources of his information. "A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill', and will be dismissed." Carpenter v Winn, supra, 221 U.S. at page 540, 31 S. Ct. 683, 55 L. Ed. 842, and cases there cited. ***'
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> There is nothing in the bill of complaint, aside from the conclusion of the pleader, that would justify

the wide scope intended to be covered by the deposition. 45 FRD 240, 241.

Frey v. Chrysler Corporation, 41 FRD 174 (WD Pa 1966), involved personal injuries allegedly suffered by plaintiff when the accelerator in a new 1965 Chrysler Imperial he had purchased two days earlier stuck as he was driving down a hill. Plaintiff sought, by means of interrogatories, to discover whether the "type" of throttle linkage assembly used in 1965 Imperials was used on other models and types of automobiles manufactured by defendant, and, if so, the name of each model and type on which used and the period of time when used. Defendant objected on grounds of relevancy and overbroadness. The court agreed that the use of the word "type" was too vague and limited the scope of discovery to installation of the same throttle linkage assembly as was installed in the 1965 Chrysler Imperial. Where, as currently before the Board, the requested discovery involves different employees, different utilities, different QA programs and different and evolving regulations and interpretations, the discovery should be denied.

In Freid v United States, 212 F Supp 886 (SD NY 1962), ten alleged stockholders of the Delaware Lackawanna and Western Railroad Company brought an action to enjoin in part or to void entirely an order of the ICC authorizing a merger of the Company with the Erie Railroad Company. Plaintiffs maintained that the hearing examiner erroneously excluded a 1958 study, performed by the First Boston Corporation, which recommended against the merger of these two companies and a third company. The examiner excluded the study on the grounds that the recommendations

as to a three carrier merger were irrelevant to the two carrier merger which took place. The court upheld the examiner's action, stating:

> Moreover, the Examiner is not required to compel the production of every item of evidence which a party desires. He may, in his discretion, deny a request for production of evidence which is merely cumulative or immaterial to the issues presented. 212 F Supp 886, 896.

In United States v Security State Bank & Trust, 473 F 2d 638 (5th Cir 1973), the Secretary of Agriculture, in the course of an investigatory proceeding, subpoenaed from the bank "all deposit and withdrawal slips, bank drafts, cashier's checks, certified checks, money orders, loans, debit and credit memoranda, or similar negotiable instrument", purchased by or issued to named individuals during the months of July through October, 1970. The subpoena stated that the examination of these records was "essential" to a certain investigation concerning the named individuals trading in egg shell futures. The court held that the mere allegation that the records were "essential" to the investigative proceeding was not enough to warrant production:

> As noted above, neither the government nor the appellants offered any evidence at the enforcement hearing. The only materials that were brought before the court, aside from the briefs and the arguments of counsel, were the pleadings, the subpoena itself, and the affidavit of the agent who had served the subpoena on the bank.
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> The strongest showing that emerged from any of these materials was the bare, unsworn allegation that production of the records sought in the subpoena was 'essential to an investigation concerning trading in the September 1970 egg shell future on the Chicago Mercantile Exchange.' The duty of the district court was to determine the propriety of the subpoena on the basis of this showing. The question for decision is whether an adequate basis existed for enforcement of the subpoena in the face of the slender showing made by government. We answer in the negative. 472 F2d 638, 642-643.

Clearly, a fair application of the rationale of the Security State Bank case requires that so much of Saginaw's Interrogatories as relate to plants and utilities other than Midland should be denied as irrelevant.

Particularly in point is Bullard v Universal Millwork Corp, 25 FRD 342 (ED NY 1960), which involved an action for lumber sold and delivered and for conversion. In certain of its interrogatories plaintiff sought information of various types of lumber contracts entered into by defendant with other persons from 1955 to the date of the suit. The court limited the scope of those interrogatories as follows:

> ... the scope of these interrogatories is broad and sweeping, going far beyond the date of the disputed transaction and embracing transactions with strangers to the action. The interrogatories are allowed only with respect to transactions between the parties in April, 1955, and are hereby modified accordingly. 25 FRD 342, 344 (Emphasis supplied).

The Circuit Court for the District of Columbia has reaffirmed the Commission's power and discretion to exclude irrelevant material. In Siegel v Atomic Energy Commission, 400 F2d 778 (DC Cir 1968), an intervening property owner sought review of an order of the AEC granting an application for a permit to construct a nuclear reactor, alleging that construction would endanger his property by subjecting it to possible enemy attack. The court held that the Atomic Energy Act did not contemplate that the Commission would take such an issue into consideration in its decision to issue a permit to construct a nuclear plant. As to petitioner's contention that his efforts to cross-examine were unduly restricted, the court stated:

> [The Administrative Procedure Act] also provides that 'the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence ***,' which the Commission by regulation has done. 10 CFR §2.743. Here again, therefore, petitioner is thrown back upon the hard fact that the Commission need not hear evidence which it is otherwise entitled to regard as outside the perimeter of the issues. 400 F2d 778, 784-785. (Emphasis added)

Similarly, in Detroit T & I R Co v Banning, 173 F2d 752 (6th Cir 1949), testimony of comparable circumstances was held improperly admitted. There plaintiff, a member of defendant's switching crew, was injured during a 'flying switch' operation when the impact of the moving car, on which plaintiff was standing, with a stationary car threw him to the ground. On appeal from a judgment for plaintiff, defendant maintained that the trial court erroneously admitted plaintiff's testimony that he had never ridden on a freight car that came into contact with another portion of the train at so high a rate of speed as the one involved in the accident. The court reversed the judgment, holding that such testimony had been improperly admitted:

> We believe the testimony was improperly admitted. Several factors can affect the speed at the time of impact, variable under different operations, irrespective of the initial speed given to the free rolling cars. It is a well established rule of evidence that circumstances under which other comparable conduct occurs should be substantially similar. 173 F2d 752, 756 (Emphasis added)

Application of the rationale of the Detroit T & I R case to the present case, which involves questions concerning different people on different projects and/or at different utilities, different quality assurance programs and different regulations requires the conclusion that the Saginaw Interrogatories

should be modified and stricken as requested.

As stated infra, it is estimated that there is an average of approximately two million to three million documents relating to the construction of each nuclear facility. The time and expense involved in producing these documents alone would be enough to substantially delay a final determination by this Board.

Moreover, the issue before the Board is whether quality assurance is being implemented and will be implemented at Midland pursuant to a specific QA program. Introduction of matter relating to prior projects and other QA programs, even assuming arguendo that prior projects and different programs are remotely relevant, would only serve to confuse the issues. Proposed Federal Rule of Evidence 403 recognizes the danger in situations such as this:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In Olin Mathieson Chemical Corp v Allis-Chalmers Mfg Co, 438 F2d 833 (6th Cir 1971), the court, citing an earlier version of FFRE 403, recognized the propriety of excluding evidence of another transaction involving different facts and circumstances. The case concerned the death of an employee of Olin Mathieson which occurred when a transformer purchased by Olin from Allis-Chalmers erupted with burning oil. Allis-Chalmers argued that the accident was caused by negligence in operating

the transformer. Olin sought to introduce evidence of a later malfunction to prove that the transformer itself was defective. The court found that the later (November) malfunction was not similar to the earlier (June) incident and that the trial court did not err in excluding evidence of the later incident:

> Evidence of the November failure is, we believe, in marked contrast to that of the June incident on several important points. It is true that the malfunction in November occurred on Unit 7 transformer. However, the transformer and its equipment had been completely re-manufactured and had been operating normally since September 15, 1968. The testimony indicated that the malfunction occurred just after an operator in the control room had made a routine adjustment on the unit. He then stepped back and heard the explosion.
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> No one was near the unit, much less working on it at the time of the explosion in November. The positions of the tap changing mechanisms in the November incident were different, and although evidence indicated that the size of the arc on both occasions was about the same, the locations of the arcing on the tap changing mechanisms for each incident were different.
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> Reference to the Proposed Rules of evidence for the United States District Courts and Magistrates, 46 FRC 161 (1969) seems appropriate. Rule 4-03 thereof states:
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> 'Rule 4-03, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
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> (a) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.' 46 FRD at 225.
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> The rule makes exclusion of evidence such as that in the present case not merely discretionary, but mandatory. The note under the rule explains that the probative value of evidence must be weighed against the harm likely to result from its admission. It was within the spirit of this section

> that the trial judge made his ruling, and we find no error in his decision. 438 F2d 833, 836-839 (Emphasis added).

The Manual For Complex Litigation has dealt with the same problem as it relates to discovery. Section 0.22 identifies classes of potentially complex cases, among which are "cases involving requests for injunctive relief affecting the operations of a large business entity." Section 2.40 of the Manual provides:

> To keep discovery within bounds of reason and relevancy, the court should explore the desirability of establishing limits of time and subject matter for the remaining discovery on the merits. If appropriate, the court should fix a date in the past and should order that matters occurring prior thereto may not be discovered. Further in accordance with the provisions of Rule 26, FR Civ P, the court should order that no discovery be permitted on irrelevant matters and on stipulated or uncontroverted facts.

Courts have also recognized that burdensome and oppressive discovery transcends the "bounds of reason and relevancy". That the discovery requested by Saginaw is burdensome is more than adequately demonstrated by the number of documents involved which would require years to review and produce, and which, once produced would have no value because of the difference in the circumstances encountered.

In Greene v Raymond, 10 FR Serv 2d 881 (D Colo 1966), a personal injury suit, plaintiff propounded a long list of interrogatories in an attempt to determine the legal relationship between defendant and Standard Oil. The court observed that the interrogatories were "disproportionately broad and demanding", and further stated:

> Relevancy is the principal inquiry for general objections that the interrogatories are burdensome or onerous to answer, too many in number, or related to matter immaterial to any issue raised by the pleadings are usually held to be insufficient. See Kainz v Anheuser-Busch, Inc., ND Ill 1954, 15 FRD 242; Shrader v Reed, D Neb 1951, 11 FRD 367; and Hoffman v Wilson Line, Inc., ED Pa 1946, 7 FRD 73. However, objections of undue burden and expense have been sustained where the court was impressed that the research required would be particularly time consuming and expensive and the value to be derived is relatively minimal.
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> See Tivoli Realty v Paramount Pictures, D Del 1950, 10 FRD 201, and Cinema Amusements v Loew's, Inc., D Del 1947, 7 FRD 318. Even more frequently, interrogatories too indefinite or all-inclusive have been struck down. See Wedding v Tallant Transfer Co., D Ohio, 1963, 37 FRD 8; Stovall v Gulf & South Am. S.S. Co., D Tex 1961, 30 FRD 1952; and Webster Motor Car Co., v Packard Motor Car Co., DDC 1955, 6 FRD 350. Such inquiries, too broad in scope, are regarded as irrelevant. 10 FR Serv 2d 681, 682 (Emphasis added).

McCullough v Dairy Queen, Inc., 4 FR Serv 2d 615 (ED Pa 1961), involved a relationship between plaintiff and defendant under a licensing contract allowing defendant to use plaintiff's trade name within a certain area. Although the court stated, "We would hesitate at this late date, practically on the eve of the trial, to order plaintiffs to gather together and produce these documents for the defendant," the court's primary emphasis was on the burden involved in producing the documents:

> However, not only is the motion untimely, but it also places upon the plaintiffs the burden of compiling an enormous quantity of material, the bulk of which is not even remotely concerned with the issues in this case. The irrelevancy of the documents sought can be demonstrated / the following example: One of the main issues in the case involves the contractual relationship between the owners of the tradename 'Dairy Queen' and their licensee, the defendant Dairy

> Queen, Inc. (The contract involved in the dispute gave the defendant the right to use and to license others to use the tradename 'Dairy Queen' within a certain area of Pennsylvania). Another issue in the case (raised by the answer) is whether the plaintiffs have come into court with unclean hands because of their alleged violation of the antitrust laws. Specifically, the defendant charges the plaintiffs with attempting to illegally extend their patent monopoly on a certain freezer used in the Dairy Queen business by trying to 'tie in' use of that freezer with license agreements for use of the tradename 'Dairy Queen'.
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> Against this background of issues raised by the pleadings, the defendant now argues that it has the right to examine every contract ever made in any State of the Union by the plaintiffs involving the right to use the patented freezer and every contract involving the right to use the tradename 'Dairy Queen'. In addition, the defendant wishes to examine all reports, correspondence, memoranda, papers, etc., which pertain to the negotiation of such contracts. Merely to state these requests is to show that they are manifestly burdensome, oppressive, and unlimited in scope. 4 FR Serv 2d 615, 616 (Emphasis added.

Assuming arguendo that dissimilar matters relating to performance on different construction projects have some remote relevance to performance on the Midland project, such matters are clearly not material to the issues before the Commission. While authorities regarding materiality might not ordinarily be dispositive in a discovery setting, it is submitted that they apply here not only because the Regulatory Staff has said that it is "satisfied" (Transcript p 65), but because of the tremendous burden Saginaw attempts to place upon Consumers, Bechtel, and the Board. Not only will substantial periods of time and money be expended, but they will be wasted because the matters produced after the file search will be immaterial and thus inadmissible

in any event. It is submitted that the parties should not be put to such a burdensome task where nothing useful will come of it.

Materiality, as a distinct concept from relevancy, has been aptly defined in McCormick on Evidence, 2d Ed. §185:

> In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial.
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> Relevancy, in legal usage, embraces this test and something more. Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, however, is the tendency of the evidence to establish a material proposition.

In this connection it is important to reemphasize that the issues before the Commission are whether the quality assurance program on this particular project has been implemented and will continue to be implemented throughout the construction phase.

It is also important to refer again to the substantial differences between this construction project and previous construction projects, as detailed in this brief. Because of these factors, it is submitted that not only are prior projects irrelevant, but they are also immaterial to the issues before the Board.

Courts have not hesitated to exclude evidence on the grounds of immateriality alone.

In Curns v Martin, 193 NW 2d 214 (ND 1971), plaintiff construction company alleged that defendant supplied it with defective concrete, causing dissatisfaction to plaintiff's customers and injury to plaintiff's reputation. In connection with this claim, plaintiff sought to introduce evidence that work performed by plaintiff with concrete from a supplier other than defendant turned out well and that work performed by other contractors with concrete supplied by defendant turned out badly. The trial court excluded this evidence and the North Dakota Supreme Court affirmed, holding that such evidence was immaterial:

> Assuming for the sake of argument only that the evidence offered but refused would have proved that the defendant at other times to other persons during the summer of 1969 supplied bad mixes, and that work of the plaintiffs when supplied by others turned out well because of the good mixes of others, we do not believe that that evidence was material in proving that the mix supplied to the plaintiffs for the Swindler Addition was defective.
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> The law we apply is stated to be the general rule.
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> ' ... as a general rule, the commission of an act cannot be proved by showing the commission of similar acts by the same person or his agents or employees at other times and under other circumstances, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity as to some particulars. Generally, also, exclusion is required of all evidence of similar or comparable facts, acts, or conduct which are incapable of raising any reasonable presumption or inference as to any principal and material fact or matter in dispute ...' 29 Am Jur 2d Evidence §298, pp 342, 343; 193 NW 2d 214, 216 (Emphasis added).

Accordingly, Bechtel submits that Interrogatories 12, 13 and 19 should be stricken in their entirety and that each Interrogatory filed by Saginaw should be modified to the extent that it requests information regarding other nuclear projects because it is beyond the central issue here -- the implementation of the quality assurance programs at Midland. Such information is not only irrelevant, immaterial, and devoid of substantial purpose, but so burdensome as to delay these proceedings beyond any reasonable limit.

II. SPECIFIC OBJECTIONS OTHER THAN SCOPE

The majority of the balance of Bechtel objections go to Saginaw's Interrogatories which request legal conclusions. While combined questions of law and fact may, under some circumstances, be permissible, abstract questions of law, such as the facts necessary to domonstrate abstract compliance with unspecified regulations, and pure questions of law are clearly impermissible.

> "Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time." (FRCP 33(b)).

Interrogatory 1 states:

> "1. Define the words 'compliance with quality assurance regulations' as those words are employed and as you understand them in the Commission's Show Cause order in this proceeding. Include with your answer each fact which you claim must exist in order to conclude that compliance with quality assurance regulations exists."

The phrase "compliance with quality assurance regulations", as set forth in the Interrogatory, does not appear in the Order to Show Cause. Bechtel objects to defining the words as they were employed by the Director of Regulation, but will answer Interrogatory 1 to the extent of its understanding of the meaning of those words.

Bechtel objects to the second sentence of Interrogatory 1 because it requests an abstract legal opinion, namely, each fact necessary to establish compliance with quality assurance regulations, which opinion is the ultimate question in this particular matter. While FRCP 33 permits, under certain circumstances, a request for opinions or contentions that relate "to fact or the application of law to fact", there is no AEC rule, rule of administrative procedure or Federal Court rule which approves an interrogatory whose purpose is solely to request another party to a proceeding to provide a legal conclusion.

Interrogatories 2 through 5 request Bechtel to provide the ultimate legal conclusion in this case to whether or not Consumers Power Company has been in compliance with quality assurance regulations and whether there is reasonable assurance that it will be in such compliance in the future. Ignoring the fact that the Interrogatories involve all Consumers Power's facilities, the bare conclusion requested is of no significance. In answer to other Interrogatories, and in testimony, Bechtel and Consumers will provide facts which, together with evidence from the Staff and Saginaw, will become the basis for this Board to conclude as to whether Consumers has implemented its quality assurance program and will do so in the future.

Interrogatory 6 states:

> "6. In your judgment, which of the following is responsible for assuring reasonable assurance with Q.A.-Q.C. regulations at the Midland plant facility:
>
> (a) Consumers Power Company;
> (b) Certain named individuals at Consumers Power Company;
> (c) Bechtel Corporation;

(d) Certain named individuals at Bechtel Corporation;
(e) Atomic Energy Commission or any part thereof; and
(f) Certain named individuals at the Atomic Energy Commission or any part thereof.
Please explain your answer in detail."

Interrogatory 6 is objectionable because it calls for a legal conclusion as to statutory, regulatory, contractual, and employment responsibilities within and among Consumers Power Company, Bechtel, AEC, and "certain named individuals" at each of those entities. The question of responsibility for quality assurance is clearly determined by Criterion I of Appendix B to 10 CFR Part 50, as has been recognized by this Board at the first pre- hearing conference (transcript pp 7-8, 20). It would seem that time might be more profitably spent answering those Interrogatories which have been properly framed, a[illegible]ch, by themselves, may require more time than that heretofore allowed by this Board.

Interrogatory 8 states:

"8. Do you believe that evidence of willful failure by Consumers Power Company to report any violation of any Atomic Energy Commission regulation is relevant evidence as to whether there is reasonable assurance that Consumers Power Company will comply or continue to comply with quality assurance regulations concerning the Midland facility. If not, state why not."

Once again, we have an extremely clear example of a request for a legal conclusion; this time for the conclusion as to whether or not, "any violation of any Atomic Energy Commission regulation is relevant evidence in this proceeding. (emphasis supplied) Not only are questions of evidence left to the Board and the lawyers, but it must be emphasized that this pro-

ceeding does not involve a willful failure to report any AEC violation (see Memorandum and Order of the Commission, RAI 74-1-7, January 22, 1974). The only issues here are whether or not there has been, and in the future will be, reasonable assurance of compliance with specific AEC Regulations regarding quality assurance.

Interrogatory 9 requests the same type of information requested in Interrogatory 1, and is objectionable for the reasons heretofore stated.

These Interrogatories are impermissible because they request legal conclusions. The case of Spector Freight Systems v Hohenstein, 58 FRD 162 (ND Ill 1973), is demonstrative of this point. In pertinent part, the Spector Court held:

> "Interrogatory 52 requires plaintiff to state generally the nature of testimony that certain people having knwoledge of relevant facts are competent to give. Interrogatory 54 requests plaintiff to 'state in reasonable detail the type of testimony which plaintiff considers William Hohenstein is competent to give against defendant.' The plaintiff has refused to answer these interrogatories.
>
> Both interrogatories (52 and 54) base their request for information from putative witnesses on their competency to testify. Such a determination as to the competency of a witness to testify is not a matter for determination by the parties. The competency of a witness to give testimony is strictly a question of evidence for the court to rule on at trial. A party is not permitted to obtain through discovery a pure conclusion of evidence law or an opinion which calls for a degree of expertise which the other party is not expected to possess. Roberson v Great American Insurance Companies of New York, 48 FRD 404 (DC Ga 1969); Uinta Oil Refining Company v Continental Oil Company, 226 F Supp 495 (D.C. Utah 1964). The defendant Home has deposed or will depose, or has the opportunity to depose all the persons identified in plaintiff's answers. Home knows as well as Spector the nature of the witness' testimony. The defendant Home is able to predict the competency of a witness to

> testify as the plaintiff Spector. Requiring answers to these interrogatories will not result in a narrowing of the issues presented, nor will it accomplish any other legitimate purpose. Thus, since the defendant's interrogatories ask for information outside the competency of the plaintiff, the plaintiff Spector will not be required to answer these interrogatories."
> (p 164) (emphasis supplied).

Interrogatory 10 (c), (d), (e). Bechtel objects to answering these interrogatories for the reason that these questions go solely to its interest in this proceeding, and are thus irrelevant. Bechtel's interest in the proceedings, as set forth in its Petition to Intervene, is no longer at issue inasmuch as the Board determined that Bechtel had a requisite interest in the proceeding at the first pre-hearing conference (Transcript p 20). Furthermore, the question of whether or not Bechtel has the type of interest which permits it to become a party to the proceeding is neither relevant nor germane to the questions of whether or not Consumers and Bechtel have properly implemented their quality assurance programs in the past and whether there is reasonable assurance that they will do so in the future.

CONCLUSION

It is submitted that this proceeding was instituted to inquire into the implementation to-date of the Consumers and Bechtel Quality Assurance Programs in the construction of the Midland facility. Neither the Order to Show Cause nor the subsequent Commission decisions which discussed it, nor any rule or regulation of the Commission provide any support whatsoever for Saginaw's typical and expected attempt to expend this hearing to, if not beyond, the brink of impossibility.

Even if limited to the construction of the Midland plant, and nonobjectionable inquiries, the Interrogatories propounded by Saginaw will require extensive time to answer. There are hundreds of thousands of pieces of paper documenting the Midland construction which must be reviewed for relevancy, possible production and for information with which to answer even the proper Interrogatories.

Information relating to other plants and other utilities is not only irrelevant and immaterial, but is wholly devoid of any substantial purpose, and, to the extent set forth herein, should be stricken.

Respectfully submitted,

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Dated: April 29, 1974

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Objections of Bechtel Power Corporation and Bechtel Associates Professional Corporation to First Set of Interrogatories directed to Bechtel Corporation, dated April 29, 1974 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 29th day of April, 1974:

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