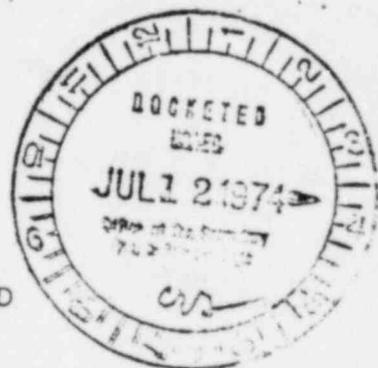


UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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



MEMORANDUM AND ORDER

The Board has before it the "Motion of Consumers Power Company to Impose Burden of Proof on the Proponent of An Order Suspending, Revoking Or Otherwise Modifying Construction Permit Nos. 81 and 82," filed by Consumers Power Company (Consumers) on June 10, 1974. The Board also has the AEC Regulatory Staff's "Response" to Consumers' Motion. Bechtel Power Corporation and Bechtel Associates Professional Corporation (Bechtel) also submitted a pleading supporting Consumers' Motion.

By the Motion, Consumers has requested the Board to enter an Order imposing on the Staff and any other party seeking suspension, revocation, or other modification of the construction permits Consumers holds for the Midland facilities the burden of proving that the construction permits should be altered. The Staff supports Consumers' Motion, except that the Staff disclaims being the proponent of the Show Cause Order, which initiated the evidentiary hearings scheduled to commence in this proceeding.

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For the reasons that follow, we are persuaded to grant Consumers' Motion and to reverse our ruling made earlier in these proceedings placing the burden of proof on Consumers (Tr. 48). We hold that the burden of proof shall be upon proponents of the Order seeking alteration of Consumers' construction permits. In this case, that burden is upon the Staff and the Saginaw Group (Saginaw), intervenors in the proceeding, to be shared by them.

I. HISTORY OF THESE PROCEEDINGS

On December 3, 1973, Consumers was ordered, by the AEC's Director of Regulation, to show cause why all activities under Construction Permit Nos. 81 and 82 for the Midland facilities, Midland Plant, Unit. 1 and 2, should not be suspended pending a showing by Consumers that it was in compliance with the AEC's regulations governing quality assurance, and that it would continue to comply with such regulations throughout construction. The Order issued by the Director of Regulation specified several instances of non-compliance with quality assurance requirements. More specifically, the Order stated that Commission inspections had revealed Consumers' nonconformance with quality assurance program requirements involving concrete work, had revealed inadequate record keeping, and had revealed serious deficiencies associated with cadweld splicing of concrete reinforcing bars. The December 3rd Order had also suspended

all cadwelding operations at the Midland plant site, pending further order and determination by the Director of Regulation. Thereafter, Consumers answered the Order claiming compliance with AEC quality assurance regulations, and urging that the Order to show cause be dismissed. On December 24th, the Saginaw intervenor (a party to Commission proceedings involving the Midland facilities) requested a hearing on the Order to Show Cause.<sup>1/</sup> On December 17, 1973, as a result of a special inspection, the Director of Regulation issued a Modification of Order to Show Cause which lifted the suspension of cadwelding activities at the Midland plant site. The modification, however, provided that all other provisions of the December 3, 1973, Order would remain in effect.

On January 21, 1974, the Commission issued a Memorandum Opinion and Order denying Saginaw's petition to revoke, denying Consumers' Motion to Dismiss, and granting Saginaw's request for hearing. The Commission specified the following issues to be decided by this Board: (1) whether Consumers 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. The Board was directed to determine whether Consumers' construction permits should

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<sup>1/</sup> On December 18, 1973, the Saginaw intervenor had also filed a petition to revoke the construction permits.

be modified, suspended, or revoked or whether other action is warranted by the record, in the event either of the two issues were decided adversely to Consumers. Consumers, Saginaw, Dow Chemical Corporation, and the Staff were made parties to the proceeding. Bechtel Professional Corporation and Bechtel Power Corporation, Consumers' architect-engineer for the Midland facilities, intervened.

At the initial prehearing conference held in this proceeding, the Staff announced that it no longer supported entry of an order which would suspend, modify or otherwise alter Consumers' construction permits (Tr. 32-33, 48-49). The Staff's announced position effectively placed Saginaw as the only party to the proceeding supporting modification of Consumers' permits. The Board ruled that Consumers had the ultimate burden of proof and was required to demonstrate why its construction permits should not be suspended, revoked or otherwise modified (Tr. 68).

## II. THE APPLICABLE LEGAL STANDARD

The Atomic Energy Act and the Commission's Rules of Practice provide that the proponent of an order for suspension, revocation or modification of a construction permit bears the ultimate burden of proof. Section 181 of the Atomic Energy Act, 42 USC § 2231, provides that the provisions of the Administrative Procedure Act "shall apply

to all agency action taken under this chapter, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act. . . ." See also, Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C. Cir. 1968).

The Administrative Procedure Act includes within the definition of "agency action" as "the whole or a part of any agency. . .sanction." 5 USC § 551(13). An agency "sanction" is defined as "requirement, revocation or suspension of a license," 5 USC § 551(10)(F). Thus, the suspension, revocation or other modification of Consumers' construction permits is an "agency action" since "license" is defined to include "the whole or a part of an agency permit." 5 USC § 551(8).

The show cause order was entered pursuant to the Atomic Energy Act of 1954, and the hearing is being conducted pursuant to § 189(a) of the Atomic Energy Act. Hence, the provisions of the Administrative Procedure Act clearly apply. The Administrative Procedure Act expressly provides that the proponent of an order has the burden of proof. 5 USC § 556(d). Moreover, the Commission's Rules of Practice intended to implement the Administrative Procedure Act also provide that the proponent of an order has the burden of proof. Thus Section 2.732 of the Commission's Rules of Practice provides:

"Unless otherwise ordered by the presiding officer, the applicant or proponent of an order has the burden of proof" 10 CFR § 2.732 (1974).

The Board's review of the various legal authorities cited by Consumers in its Motion, as well as the Board's independent review of other legal authorities, establishes that administrative agencies have consistently imposed the burden of proof on the proponent of an order modifying an existing permit of license. Thus, in In the Matter of New York Shipbuilding Corp., 1 AEC 707 (1961), a by-product material licensee was ordered to show cause why its license should not be revoked and its application for license amendment denied. The order alleged, inter alia, that the licensee failed to maintain records of surveys made to establish restricted area boundaries during radiographic operations and to label containers in which by-product material was stored as required by 10 CFR §§ 20.201, 20.203(f) and the conditions of the license. With respect to each of these allegations, the presiding officer determined the burden of proof was upon the Staff.

In show cause proceedings before other administrative agencies, it has been held that the burden of proof is on the agency as proponent of the order. In Radio Station WTIF, Inc., 1 P&F RADIO REG.2d 682 (Rev.Ed. 1963), it was held that the Federal Communications Commission had the

burden of proof as to revocation issues in a combined renewal of broadcast license and revocation proceeding. In Admission to Conference Membership - Pacific Coast European Conference, 18 Ad. L.2d 571 (FMC 1966), the Federal Maritime Commission ordered the respondent, an association of common carriers, to show cause why certain shipping conference agreements should not be disapproved for failure to comply with Shipping Act requirements relating to admission to and withdrawal and expulsions from conference membership. In response to arguments that the show cause order should not be construed as shifting the ultimate burden of proof, the Commission stated:

"The fact that proceedings were initiated by order to show cause on the agency's own motion does not shift the burden of proof to respondents. An agency may not by choice of a particular form of proceeding shift the burden of proof to one upon whom the law doesn't place it. The burden of proof in a show cause proceeding, the same as in any other proceeding before the agency is upon the proponent of the order." Administrative Procedure Act, § 7(c), 5 USC § 1006 (now 5 USC § 556).

Similarly, in In the Matter of Commonwealth & Southern Corp., 11 SEC 138 (1942), a holding company was ordered to show cause why its corporate structure should not be reduced to a common stock basis. The SEC stated that neither the purpose nor the effect of the order was to cast the burden of proof on the respondent. Thus, such an order was not to be regarded in the same light as a show cause

order in an ordinary lawsuit. 11 SEC at 140 n. 2. See also, In re H.T.L., 31 Ad. L.2d 103 (Bd. Imm. App. 1942) (in deportation hearings, issuance of show cause order does not shift burden of proof from government to respondent); In the Matter of Patterson & the State of Ohio, Docket No. 3, 3A Ad. L. 48f, 117-1 (Civil Service Commission 1943) (in proceeding to show cause why Federal funds should not be withheld because of violations of the Hatch Act, the burden of proving the violation is on the Commission). No reports of show cause proceedings were found in which the burden of proof was placed on the respondent.

These cases are consistent with the rule generally asserted that in administrative proceedings the party making a claim or charge has the burden of proof. See, K. Davis, Administrative Law Treatise, § 14.14 (1958). For example, in Dayco Corp. v. Federal Trade Commission, 362 F.2d 180 (6th Cir. 1966), the court reviewed a Trade Commission decision which found a manufacturer of auto parts in violation of the Clayton Act, Robinson-Patman Act and FTC Act. The court found that the Commission failed to meet the burden of proof assigned to it by its own rule, 16 CFR § 314, which provided that parties supporting a complaint have the burden of proof. The court read the Administrative Procedure Act, 5 USC § 1006 (now § 556) as supporting such a rule.

Nor does issuance of a show cause order containing factual allegations constitute a prima facie case sufficient to bear the burden of proof. An order to show cause why a licensee should not be suspended is sufficient to establish a prima facie case in the sense that the agency is entitled to a ruling revoking or suspending a license, should the licensee fail to answer or to produce any evidence. In the Matter of Mistrot M. Sullivan, d/b/a Southwestern Radiological Service Co., 2 AEC 1 (1962). However, in itself a show cause order does not appear sufficient to establish a presumption of prima facie evidence sufficient to shift the burden of proof going forward with evidence. In this instance, of course, Consumers has answered and is prepared to present evidence at the hearing.

In In the Matter of Susott, 5 CAB 119 (1941), the Civil Aeronautics Board issued an order requiring the respondent, an airline pilot, to show cause why his pilot certificate should not be suspended or revoked. At the opening of the hearing, in response to a request for a ruling, the hearing examiner ruled that the burden of proving the allegations of the show cause order was on the government. The Board found the ruling correct:

"The issuance of a show cause order does not in any way constitute evidence that the acts in the order were committed or create a presumption that the respondent was at fault. Nor do [sic] the finding of the Board in the administrative investigation of the accident in which the respondent was involved constitute evidence."

Accordingly, in view of the foregoing, the Board is persuaded to reverse its earlier ruling placing the burden of proof on Consumers. We hold that such burden, in this proceeding, is properly upon the Staff, as the initiator of the show cause order, and upon Saginaw, which requested a hearing. This burden should be shared by these parties. Furthermore, the Board will require the Staff to go forward with its evidence in the first instance to be followed by Saginaw. Consumers and Bechtel will follow with their presentations.

ATOMIC SAFETY AND LICENSING BOARD

By: \_\_\_\_\_

*Michael L. Glaser*

Michael L. Glaser  
Chairman

Date: July 12, 1974

UNITED STATES OF AMERICA  
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In the Matter of )

CONSUMERS POWER COMPANY )

(Midland Plant, Units 1 and 2) )  
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Docket No.(s) CPPR-81  
CPPR-82

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (s\*     ) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Atomic Energy Commission's Rules and Regulations.

Dated at Washington, D. C. this  
14th day of July 1974.

Regina A. Dawson  
Office of the Secretary of the Commission

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In the Matter of )  
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CONSUMERS POWER COMPANY ) Docket Nos. CPPR-81,82  
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