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UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

CONSUMERS POWER COMPANY

(Midland Plant, Units 1 and 2)

Docket Nos. 50-329
and 50-330

APPLICANT'S RESPONSE TO
SAGINAW INTERVENORS' "MOTION"
TO ENFORCE ALAB-106

I. Introduction

Pursuant to the Initial Decision of an Atomic Safety and Licensing Board (Licensing Board),^{1/} Consumers Power Company (Consumers Power; Applicant) was issued permits, on December 15, 1972, authorizing the construction of its Midland Plant, Units 1 and 2.^{2/} Thereafter, exceptions to the Initial Decision were taken by certain intervenors. The Atomic Safety and Licensing Appeal Board (Appeal Board) considered all exceptions and, as a result, issued three separate decisions,^{3/} the net effect of which was to affirm the Initial Decision of the Licensing Board subject to certain conditions.

1/ Consumers Power Co. (Midland Plant, Units 1 and 2), Initial Decision dated December 14, 1972.

2/ 37 Fed. Reg. 28,312 (1972).

3/ Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101 RAI-73-2 (Feb. 20, 1973); ALAB-106, RAI-73-3 (Mar. 26, 1973); ALAB-123, RAI-73-__ (May 18, 1973).

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The Appeal Board's first decision, ALAB-101, rejected a charge of disqualifying bias made by the Saginaw Intervenors against the Chairman and other members of the Licensing Board. The second decision, ALAB-106, made the continuing effectiveness of the Applicant's construction permits dependent on the submission of certain reports concerning quality assurance and quality control at the Midland construction site. The Appeal Board's third and final decision - ALAB-123, issued on May 18, 1973 - rejected all of the remaining exceptions. Since a petition for reconsideration of that decision was not filed by any party,^{4/} the Appeal Board's action is now subject to administrative review by the Commission only.^{5/}

Under date of June 6, 1973, the Saginaw Intervenors (Intervenors) submitted by mail a filing captioned "Saginaw Intervenors' Motion to Enforce ALAB-106" (hereinafter "filing"). In essence, the filing alleges that Consumers Power has not fulfilled the conditions of ALAB-106^{6/} and that the construction work at the Midland site is unsatisfactory.^{7/} It requests the Appeal Board to order the Directorate of Regulatory Operations to perform a complete survey and inspection

^{4/} The Commission's Rules of Practice provide for the filing of a petition for reconsideration within ten days after the date of the decision. 10 CFR §§ 2.771, 2.785 (1973).

^{5/} See 10 CFR § 2.786 (1973); In the Matter of Consumers Power Co., (Midland Units 1 and 2), Commission Order dated June 7, 1973.

^{6/} Filing, pp. 5-6.

^{7/} Filing, pp. 6-7.

of the construction site and furnish a detailed report concerning all work performed to date and all material at the site. In addition, the Appeal Board is requested to enjoin Consumers Power "from exercising rights pursuant to the construction permits until such time as aforesaid survey and report is accomplished, submitted, and verified."^{8/}

II. Jurisdiction

The jurisdiction of the Appeal Board is appellate in nature.^{9/} As part of the Commission's procedures for the orderly disposition of Licensing Board issuances, Appeal Boards review the Initial Decisions of presiding officers in all proceedings on applications under Part 50 of the Commission's regulations for facility licenses and construction permits.^{10/} Decisions and actions of Appeal Boards are subject to administrative review only by the Commission itself.^{11/}

In the instant proceeding, the Appeal Board has fully exercised and discharged its functions. With the issuance of ALAB-123, affirming the Initial Decision of the Licensing Board subject to the modification directed in ALAB-106, the responsibility delegated to the Appeal Board was discharged. When a petition for reconsideration was

^{8/} Filing, pp. 8-9. In an addendum the Intervenors also request that they be furnished with copies of certain other reports.

^{9/} 10 CFR § 1.21 (1973); 34 Fed. Reg. 13,360 (1969).

^{10/} See 10 CFR Part 2, Appendix A, IX(a).

^{11/} 10 CFR § 2.786. A party may, however, within ten days of an Appeal Board's decision, petition for reconsideration. 10 CFR § 2.771.

not filed within ten days of the date of ALAB-123, the Appeal Board's jurisdiction in this proceeding was terminated^{12/} and its action became subject only to review by the Commission itself, acting on its own motion.^{13/}

This does not mean, of course, that the conditions imposed by ALAB-106 are unenforceable and only part of "a lofty statement."^{14/} All of the subject conditions have been incorporated into the Applicant's construction permits.^{15/} They are, thus, fully enforceable under the Commission's regulations.^{16/} The responsibility for such enforcement lies with the Director of Regulation through the Directorate of Regulatory Operations.^{17/}

In sum, the jurisdiction of the Appeal Board has terminated and the relief sought, if any were appropriate, is solely within the

^{12/} Except, of course, in case of a remand by the Commission.

^{13/} See 10 CFR §§ 2.771, 2.785, 2.786 (1973). See also In the Matter of Consumer Power Co., (Midland Units 1 and 2), Commission Order dated June 7, 1973, extending to July 10, 1973 the time within which the Commission may review the Appeal Board's decision in this proceeding.

^{14/} Filing, p. 4.

^{15/} ALAB-106 provided, by its terms, that "the initial decision, and the construction permits issued as a result thereof, are hereby modified to the extent indicated in this opinion." RAI-73-3 at 187. See also 38 Fed. Reg. 14,182 (1973).

^{16/} See 10 CFR §§ 2.200-.205, 50.100 (1973).

^{17/} See generally 10 CFR § 2.200-.205.

purview of the Director of Regulation. The filing is, therefore, procedurally defective and a nullity, and should be summarily dismissed.^{18/}

III. Merits

Although the Appeal Board should decline to accept the Interveners' filing, the Applicant nevertheless desires to respond, since the filing misconstrues the requirements of ALAB-106 and mischaracterizes conditions at the site.

ALAB-106 makes the continued effectiveness of the Applicant's construction permits contingent upon four conditions. The first of these, which serves as the focus of the Interveners' filing, reads as follows:

By April 9, 1973, or the date of resumption of construction activities (whichever is later), the applicant shall furnish a complete report to this Board, with copies to all other parties to this proceeding, on the quality assurance action being undertaken by the applicant and/or its architect-engineer to assure that the construction work already performed and the materials now on the site are in satisfactory condition. This report, in addition to covering actual construction work and materials, shall also cover inspection and calibration of instrumentation to be used in the QA program.^{19/}

^{18/} Cf. Consumers Power Co. (Midland Units 1 and 2), ALAB-115, RAI-73-4 at 257 (April 17, 1973). The Appeal Board has, of course, retained jurisdiction in certain cases after issuing a decision. Compare ALAB-106 with, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, RAI-73-__, (May 23, 1973). When it is appropriate to retain jurisdiction the Appeal Board leaves no uncertainty but clearly indicates that it is doing so. See, e.g., id. at 4.

^{19/} Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, RAI-73-3 at 186 (March 26, 1973).

On May 25, 1973, more than one week before the resumption of construction, the Applicant filed its report with the Appeal Board, the Regulatory Staff, and all other parties to this proceeding.^{20/} The report contained: (1) a description of the inventory and inspection control procedures being undertaken to assure that the construction work already performed and the materials stored on site are in satisfactory condition, (2) an identification of the qualifications and responsibilities of specialists performing the inspections and examinations, (3) a description of the calibration procedure utilized for controlling the accuracy of measuring and test equipment employed in the quality assurance program, and (4) a summary of the results of inspections which had been conducted as of the date the report was prepared. The report, as submitted by the Applicant, complies with both the letter and spirit of ALAB-106. Should the report be found wanting by the Director of Regulation, however, he possesses complete power to take such action as may be necessary to enforce all of the terms and conditions of the construction permits, including those incorporated pursuant to ALAB-106.^{21/}

^{20/} "Applicant's Report on Quality Assurance Action Being Undertaken to Assure Satisfactory Condition of Work Already Performed and Materials Now on Site" dated May 25, 1973 [hereinafter "Applicant's Report"].

^{21/} See ALAB-106, RAI-73-3 at 186; 10 CFR §§ 2.200-.205.

Two additional points bear mentioning. First, the Saginaw Intervenor's filing refers to "a large crack in the concrete near the reactor building which raised serious questions about the safety of the foundation." The filing appears to further describe the crack as "in the concrete near the site of the reactor building" and has attached a photograph of that crack taken "sometime ago."^{22/} The photograph and the description in the filing were insufficient to make it possible to determine either the location or significance of the crack.^{23/} Moreover, counsel for the Saginaw Intervenor disclosed to counsel for the Applicant that the photograph was in fact taken a few months after the concrete was poured in the fall of 1970. Of course, this was well before the 18 days of hearings relating to radiological health and safety matters, including quality assurance matters, which were held in this proceeding beginning on June 21, 1971. The filing makes no contention that the photograph was not in the hands of the Saginaw Intervenor at the time of those hearings; nor does it advance

^{22/} Filing, pp. 6-7. The Applicant has been seriously inconvenienced by the failure of the Intervenor to provide it with a satisfactory copy of the photograph. This deficiency in the service of the filing upon the Applicant resulted in the expenditure of tens of man-hours just to determine that the picture, by itself, was worthless as a means of evaluating the crack or establishing its location. See note 23 *infra*.

^{23/} The photograph contained no means of referencing either scale or orientation. The filing described the crack as being located "at the base of the site of the reactor at the east access loop." There is, however, no such thing as an "access loop" nor did the filing indicate whether the crack was in a floor or wall section of concrete.

any other reason for the Saginaw Intervenors' failure to raise the matter during those hearings or at any time prior to the filing.

Following an identification by Intervenors' counsel, on a PSAR drawing, of the approximate location of the crack pictured in the photograph, the Applicant believes it has located the crack. The Intervenors' photograph appears to show a portion of a vertical Class 4 crack^{24/} located on the inner wall of the No. 1 Containment tendon access gallery opposite a point 345 feet from the middle of the auxiliary building access door, measured in a clockwise direction (or 5 feet measured in a counterclockwise direction). Mr. Francis W. Joyce, a Supervisory Civil Specialist, Quality Control, employed by Bechtel Power Corporation, has examined the crack, has concluded that it appears to be essentially the same as the crack shown in the photograph attached to the Intervenors' filing, that it is a normal drying shrinkage crack showing no evidence of shear type motions, and that it will not impair the structural integrity of the concrete. His affidavit to that effect is attached hereto.

In any event, the Applicant and its architect-engineer are conducting a comprehensive inspection of the structural concrete at the site as part of the program described in the May 25 report.^{25/} Deficiencies identified as a result of the inspection, if any, will be corrected.

^{24/} A Class 4 crack is one having a width of .030 inches to .040 inches.

^{25/} See Applicant's Report, pp. 4-5.

Secondly, the Intervenor's mention "the rusting of material on on the site."^{26/}

As described in the Applicant's May 25 report, materials at the site will be inspected for damage due to "rusting."^{27/} This inspection will employ such techniques as visual examinations, dimensional measurements, pit depth measurements and microscopic examinations.^{28/} Defects will be corrected or the material will not be used.

IV. Conclusion

In sum, the Appeal Board has no jurisdiction to entertain the Intervenor's filing and should dismiss it summarily. However, even when considered on their merits, the allegations contained in the filing have no basis in fact and require that the requested relief be denied.

Respectfully submitted,

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Attachment

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^{26/} Filing, p. 6

^{27/} See Applicant's Report, pp. 6-15.

^{28/} Id., pp. 6-7. Some liner plate sections have already been examined and found to be satisfactory, subject to the necessity of cleanup and repriming. See id., Part II, Inspection 2.0.