UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

AEC REGULATORY STAFF'S BRIEF IN OPPOSITION TO EXCEPTIONS OF SAGINAW INTERVENORS

I. Introduction

Pursuant to section 2.762(c) of the Commission's Rules of Practice, 10 CFR Part 2, the AEC regulatory staff (staff) submits this brief in opposition to the exceptions of Saginaw Nuclear Study Group et al. (intervenors) to the Initial Decision of the Atomic Safety and Licensing Board (ASLB), dated December 14, 1972.[1/] In part II of this brief we address the exceptions seriatim and state the reasons why we believe each of them should be denied. In a number of instances we have concluded that an exception is adequately answered by one of our previous filings or by the applicant's

1/ "Exceptions of Intervenors Saginaw Valley Nuclear Study Group, Sierra Club, United Automobile Workers of America, West Michigan Environmental Action Council, Citizens Committee for Environmental Protection of Michigan and University of Michigan Environmental Society to Initial Decision of the Atomic Safety and Licensing Board Issued Under Date of December 14, 1972 Authorizing the Director of Regulation to Issue Construction Permits for Midland Plant, Units 1 and 2," dated January 15, 1973 (hereinafter "Exceptions"); "Motion and Supplement to Saginaw Valley, et al., Intervenor's Statement of Exceptions to the Initial Decision Filed on January 15, 1973," dated January 18, 1973.

reply to the intervenor's exceptions,[2] and have accordingly dealt with such exceptions summarily, giving appropriate references to the material on which we rely.

1. THE ASLB EXERCISED ITS DISCRETION SOUNDLY IN DISALLOWING CERTAIN INTERROGATORIES TO THE STAFF AND THE ACRS, AND ITS RULINGS IN THAT REGARD SHOULD THEREFORE BE AFFIRMED. (Exception II.A.)

Exception II.A. challenges the ASLB's rulings disallowing a number of intervenors' interrogatories addressed to the staff and the ACRS.

On March 22, 1971, the intervenors served a total of 337 interrogatories (some containing several parts) addressed to the Commission and the Advisory Committee on Reactor Safeguards (ACRS).[3] The interrogatories were filed pursuant to an ASLB order setting a filing date of January 7, 1971, which was later extended to March 22, 1971.[4] Since the Commission's Rules of Practice as amended in December 1970 provided for the service of interrogatories on the Commission,[5] the staff did not object to the utilization of this form of discovery by the intervenors. And since the intervenors never sought nor obtained approval for any specific number or type of interrogatories, the staff interposed no objection at

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2/ "Brief of Applicant, Consumers Power Company, in Opposition to Exceptions Filed by the Saginaw Valley Intervenors to the Initial Decision of the Atomic Safety and Licensing Board," dated January 29, 1973. (hereinafter "Applicant's Brief")

3/ "First Set of Interrogatories of Certain Intervenors Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards," dated March 22, 1971.

4/ "Pre-Hearing Conference Order," dated November 24, 1970; Tr. 600, 606-07.

5/ 10 CFR § 2.720(h)(ii) [35 F.R. 19500; December 23, 1970]

all until the interrogatories were in hand. However, after an opportunity to examine what the intervenors had filed by way of interrogatories, we entered both a general objection on grounds of burdensomeness and a series of specific objections to individual interrogatories on various other grounds.[6/]

In a series of rulings the ASLB directed the staff to answer certain of the interrogatories and sustained the staff's objections to the balance of the set.[7/] The interrogatories which the staff was not directed to answer were disallowed principally on grounds of burdensomeness.[8/] As the ASLB stated in ruling upon the interrogatories:

> The key to the problem posed by the interrogatories is that they are designed, in the main, not to elicit the underlying facts but to probe the staff's reason for their conclusion that the proposed reactor qualifies for a construction permit. The vice of the interrogatories is epitomized by No. 292 which would require the staff to "describe each fact, calculation and assumption" on the basis of which it concludes that fourteen separate systems "will be adequate to perform their intended functions." The interrogatory then goes on to require that the AEC make a detailed comparison of this to previously licensed reactors. In sum, what the intervenors seek in these interrogatories amounts to a written rationalization by the staff of each decision on safety which has been made in this and many other proceedings. To properly answer these interrogatories would, the Board is satisfied,

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6/ "Objections of AEC Regulatory Staff to 'First Set of Interrogatories of Certain Intervenors Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards,'" dated April 26, 1971.

7/ See ASLB telegrams of May 13, May 27 and June 1, 1971, and "Rulings on Interrogatories Addressed to the AEC Staff," dated June 1, 1971.

8/ See June 1, 1971 Rulings, n.7, supra, pp. 2-5. See also the ASLB Chairman's statement at Tr. 1879: "I would remind you, Mr. Cherry, that one of the reasons that your interrogatories were denied was that they were, in total, burdensome."

> require the staff to reexamine, rethink, and reconstruct at least two years of discussion, conferences, etc. on many diverse aspects of these complicated systems. It is perhaps not an exaggeration to say that complete answers to these interrogatories would require the staff to prepare a justification, intelligible to laymen, of the whole history of the development of pressurized water reactors, without, in the Board's view making a significant contribution to safety.9/ (emphasis in original)

Clearly, the ASLB had broad discretionary authority pursuant to section 2.718 of the Commission's Rules of Practice to confine discovery within reasonable bounds. In the absence of some demonstrated abuse of discretion affecting the substantial rights of the intervenors, the ASLB's rulings on these interrogatories should not be disturbed.10/ In this case, taking into account the number and type of interrogatories involved, as well as the absence of any substantial showing of prejudice,11/ it is apparent that the ASLB exercised its discretion soundly and that its rulings on interrogatories to the staff and the ACRS should be affirmed.

The ASLB's rulings on environmental interrogatories should be affirmed for similar reasons. Many of the intervenors' environmental interrogatories were simply resubmissions of interrogatories previously disallowed. They

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9/ Rulings, n. 7, supra, pp. 2-3.

10/ Cf. Bell v. Swift & Co., 283 F.2d 407, 409 (5th Cir., 1960) [Disallowance of interrogatories upheld even though the court thought "the trial judge erred."]

11/ The intervenors' showing of prejudice is a bald assertion that "[t]hese interrogatories were absolutely necessary and essential to the preparation of Intervenors' case and to an understanding by Intervenors ... of the basis upon which to make contentions regarding the issues to be contested and the issues in the proceeding." (Exceptions, p. 6)

were denied because the intervenors failed to show why the ASLB's earlier rulings no longer applied.[12/] Another interrogatory, attached to the intervenors statement of environmental contentions, called upon the staff to list "by category ... all documents ... which ... you reasonably agree is within the right of environmental inquiry." The ASLB properly denied this vague, argumentative interrogatory as "obviously defective."[13/]

In any case, the intervenors subsequent conduct amounted to a waiver of whatever objections they might have had with respect to the scope of discovery allowed on environmental matters. By order dated March 27, 1972, the ASLB allowed the intervenors one final opportunity for such discovery.[14/] No requests pursuant to this order were ever made by intervenors.

2. THE ASLB'S RULINGS ON INTERROGATORIES DID NOT FORECLOSE PRESSURE VESSEL FAILURE AS AN ISSUE IN THE PROCEEDING. (Exception II.B.)

In Exception II.B. the intervenors assert that the ASLB's rulings on their interrogatories 92 and 210[15/] both foreclosed pressure vessel

12/ "Order With Respect to Various Motions Filed in This Proceeding," dated December 22, 1972, p. 16.

13/ "Order With Respect to Environmental Issues," dated March 27, 1972, p. 3.

14/ Id. at pp. 2-3.

15/ "First Set of Interrogatories of Certain Intervenors Director to Consumers Power Company," dated March 22, 1972.

failure as an issue in this proceeding and prevented them from obtaining information with which to make a showing of special circumstances warranting inquiry into that issue.[16/]

In asserting that the ASLB foreclosed pressure vessel failure by its rulings on interrogatories 92 and 210, the intervenors read far more into these rulings than the facts allow. Neither of these interrogatories called for an evaluation of the credibility of pressure vessel failure. Interrogatory 92 called upon the applicant to

> Describe in detail the basis for your belief, specifying each fact, calculation and assumption thereof, of the adequacy of the volume of water in the borated water storage tanks to provide continued cooling to both proposed Midland Units in the event of a simultaneous LOCA and a pressure vessel fracture.

If anything, this interrogatory assumes pressure vessel failure and inquires as to some of the consequences thereof.

Interrogatory 210 also appears to call for an analysis of the consequences of an assumed pressure vessel failure:

> State if in your analysis of a LOCA and each other accident which would result in three percent of the fuel melting, if you considered the possibility of a steam explosion that could rupture the primary containment vessel. Describe in detail each fact, calculation and assumption upon which you base your answer. If you have not done such an analysis, then state why not.

16/ See Memorandum and Order of the Commission dated October 26, 1972, in Consolidated Edison Company of New York (Indian Point Unit No. 2), Docket No. 50-247, p. 4, n.5.

If the applicant had made an analysis of such an event and could answer the first sentence in the affirmative, he apparently would have been required by the second sentence to describe his analysis; otherwise, the second sentence is meaningless.[17/]

Thus, neither of these interrogatories raised the question whether inquiry into pressure vessel integrity should be permitted. Nor did the ASLB decide that question. In disallowing these interrogatories, the ASLB clearly assumed that the consequences of pressure vessel failure would be unacceptable and held only that it would not require the applicant to undertake an analysis that could, in the ASLB's view, only come to that conclusion. In the ASLB's language, the interrogatories were disallowed because they "call[ed] for analysis of the consequences of an accident which if found to be a credible accident would require denial of the construction permit."[18/]

Far from foreclosing inquiry into pressure vessel failure, these rulings practically invited the intervenors to come back with some basis for such an inquiry. This they never did. Intervenors now suggest that the ASLB's rulings denied them information that would have enabled them

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17/ If the applicant had made no such analysis, he presumably could have responded to the third sentence by stating that the postulated event was considered incredible.

18/ "Rulings With Respect to Objections to Interrogatories Addressed to Various Parties by Saginaw Intervenors," dated May 13, 1971.

to make such a showing. (Exceptions, p. 10-11) However, as shown above, the interrogatories actually called for information on the results, not the possible causes, of a hypothetical pressure vessel failure.

3. INTERVENORS HAVE MISCONCEIVED THE STATUTORY ROLE OF THE ASLB AND MISCONSTRUED THE INITIAL DECISION AS IT DESCRIBES THE ASLB'S REVIEW IN THIS PROCEEDING. (Exception II.C.)

In Exception II.C., intervenors argue that the Atomic Energy Act of 1954, as amended (Act), requires the ASLB to make an independent de novo review as to uncontested safety matters and that the ASLB in this proceeding improperly relied upon the application, safety evaluation, and ACRS letter in reaching conclusions with respect to such matters.

First, there is nothing in the language of the Act or its legislative history that indicates that Congress intended that ASLB's should duplicate the safety evaluations conducted by the applicant, staff, and ACRS. The Commission's regulations applicable to this proceeding provided that "as to matters which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the regulatory staff and ACRS and they are authorized to rely upon the testimony of the regulatory staff and the applicant, and the conclusions of the ACRS, which are not controverted by any party." 10 CFR Part 2, App. A, § V.(d); 33 F.R. 8587. The premise for intervenors' argument in this exception - that the ASLB must conduct an independent

de novo safety review of uncontested safety matters - is in error.

Second, contrary to intervenors' inferences, the ASLB did apply its independent technical expertise to uncontested safety matters, as the portion of the Initial Decision cited by intervenors indicates. While the ASLB did not choose to comment in detail on all safety matters in its Initial Decision, the ASLB did discuss those aspects of the application that were new or unusual, those that were contested, and those for which specific findings were required to be made. Such an approach, as indicated above, is consistent with applicable law.

In addition, intervenors cannot be heard to complain with respect to conclusions of the Initial Decision regarding uncontested issues. If intervenors had any real concerns on these matters, they had only to raise these concerns as contested issues during the hearing and thereby obtain a more detailed discussion in the Initial Decision.

Finally, there can be no prejudice to intervenors from reliance on ACRS conclusions with respect to uncontested safety matters for, while such reliance would have been entirely proper as indicated above, the ASLB placed no such reliance on the ACRS letter.[19/]

19/ E.g., Tr. 1884.

4. THE ASLB PROPERLY EXERCISED ITS DISCRETION TO CONFINE INTERVENORS' CROSS-EXAMINATION WITHIN THE BOUNDS OF REASON AND MATERIALITY. (Exception II.D.)

Exception II.D. relates to statements made by the Chairman of the ASLB at Tr. 1893 and Tr. 2102 to the general effect that intervenors would be required to make some affirmative showing to justify further cross-examination concerning assumptions used in the staff's evaluation of the Midland Plant under 10 CFR Part 100. The intervenors argue that this action abridged their "right" of cross-examination pursuant to the Administrative Procedure Act and the Commission's Rules of Practice. (Exceptions, pp. 17-18)

The ASLB's statements were made in reference to a line of cross-examination concerning the 50% halogen release assumption (from TID 14844) used in the staff analysis.[20/] The general purpose of this cross-examination was to show that the basis for the TID 14844 halogen release assumption is largely technical judgment; that the confidence limits associated with that judgment are such that a larger release could be assumed; and that if such larger release were assumed in the staff analysis, the staff's calculated thyroid dose might exceed Part 100 guidelines.[21/]

First of all, the intervenors' argument appears to be based on the false premise that their right to cross-examination was absolute. Under section

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20/ See Tr. 1866-81.

21/ E.g., Tr. 1908-11.

7(c) of the Administrative Procedure Act, 5 USC 556(d), and section 2.743 (a) of the Commission's Rules of Practice, a party is entitled to conduct only "such cross-examination as may be required for a full and true disclosure of the facts." The intent of this language was stated in the House Committee report underlying the Administrative Procedure Act as follows:

> The provision on its face does not confer a right of so-called "unlimited" cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the "full and true disclosure of the facts" stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is - as the section states - whether it is required "for a full and true disclosure of the facts." In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings.22/

Thus, in an appropriate case, an ASLB may, pursuant to its general powers under 10 CFR 2.718 and in accordance with the Administrative Procedure Act and 10 CFR 2.743(a), terminate cross-examination that promises little of substance and threatens unnecessary delay in the proceeding. And if an ASLB may

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22/ Administrative Procedure Act - Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at p. 271.

terminate such cross-examination altogether, it follows that an ASLB can also require some affirmative showing as a condition to the continuation of cross-examination objectionable on these grounds.

In this case the ASLB properly applied this principle. The judgmental and non-mechanistic nature of the TID 14844 assumption was already established in the record.[23/] Further cross-examination was not needed to establish this point, which the ASLB was prepared to officially notice in any event.[24/] Nor was there any need for cross-examination to demonstrate the effect that a higher assumed halogen release would have on the staff's thyroid dose calculation.[25/] Thus, the intervenors' cross-examination was not calculated to add substantial new information to the record.

Second, even if it is assumed that the ASLB did not have such discretion to regulate the scope of cross-examination or did not exercise such discretion properly in this instance, the proposed line of cross-examination was properly excluded as immaterial. Surely, the Commission must be presumed to have been aware of the nature of the TID 14844 halogen release assumption when 10 CFR Part 100 was promulgated. Indeed, Part 100 notes that this document "contains a procedural method and a sample

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23/ Tr. 1866-68.

24/ Tr. 1914.

25/ Tr. 1893.

calculation that result in distances roughly reflecting current siting practices of the Commission," and that these calculations "may be used as a point of departure for consideration of particular site requirements."[26/] Therefore, while TID 14844 is not itself a Commission rule, it is nevertheless clear that the use of the 50% halogen release assumption represents an approach which is fully consistent with the intent of Part 100.

Finally, we would note that the theory of this line of cross-examination was flatly inconsistent with intervenors' current theory (Exception III.D.) that Part 100 evaluations must be made in accordance with TID 14844.[27/]

5. THE INTERVENORS' ARGUMENT THAT THE ASLB IMPOSED THE BURDEN OF PROOF UPON THEM IS BASED ON STATEMENTS TAKEN OUT OF CONTEXT. (Exception II.E.)

In Exception II.E., intervenors argue that the ASLB imposed the burden of proof upon them rather than upon the applicant as required by 10 CFR 2.732.

In part, this exception is based on the statements relied upon by the intervenors in their Exception II.D. Since we have already addressed ourselves to those statements in response to Exception II.D., we shall

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26/ 10 CFR Part 100, "NOTE."

27/ Exceptions, p. 53-11.

only note here that the statements involved pertained to the scope of cross-examination that would be allowed and had nothing whatever to do with the location of the burden of proof.

The only additional references in this exception are to the ASLB's Order of "March 3, 197[1]," and to a statement by one technical member of the ASLB at Tr. 1048. Neither of these citations supports intervenors' argument.

As regards the March 3, 1971, Order it is plain that statements therein were made only in the context of giving fair notice that the ASLB intended to exercise its authority so as to confine the evidentiary hearing within manageable and reasonable bounds.[28/] No specific rulings in this regard were made by the March 3 order; rather, the ASLB simply furnished such guidance as it could at that time, with the full intention of making its specific determinations on an ad hoc basis with consideration of all pertinent factors, including the needs of the intervenors.[29/] Further, the ASLB in this order specifically accepted intervenors' contention that they were entitled to make their case through cross-examination.[30/]

28/ "Order," dated March 3, 1971, pp. 3-8.

29/ Id. at p. 7.

30/ Id. at p. 2.

Thus, the March 3, 1971 order in no way suggests that the ASLB placed the burden of proof on the wrong party.

The intervenors have also exaggerated the significance of one technical member's remarks at Tr. 1047-48. In context, the technical member's remarks were in the nature of an affirmation of his intent to discharge his responsibilities, coupled with a demand that intervenors, as presumably responsible parties to the proceeding, render such assistance to him as they could.

6. INTERVENORS HAVE NOT MADE A SHOWING SUFFICIENT TO WARRANT REOPENING THE RECORD FOR CONSIDERATION OF NEW MATTERS. (Exception II.F.)

Exception II.F. is in substance a motion to reopen the record. It relates to eight matters, not previously identified in this proceeding, which the staff had under consideration during 1972 prior to the issuance of the Initial Decision. The intervenors argue that these matters go to the validity of the Initial Decision because the staff has, to this extent, "amended its position" as set forth in its Safety Evaluation, dated November 12, 1970,[31/] and Supplemental Safety Evaluation, dated January 14, 1972.[32/]

By way of background, this proceeding involves an application filed in January 1969 and initially approved by the staff in November 1970.[33/]

31/ Tr. 1674.

32/ Staff exhibit no. 8.

33/ For a chronological account of the staff's review, commencing with the filing of the application, see the staff's Safety Evaluation, n.31 supra, at pp. 88-92.

A hearing on radiological health and safety matters commenced on June 21, 1971, and ended on July 23, 1971, after seventeen hearing days. Although the record on radiological matters was not finally "closed" until June 28, 1972,[34/] it had been open only for limited purposes since the completion of the 1971 hearings.[35/]

The matters raised in Exception II.F. all arose long after the completion of the radiological hearings. Indeed, most of them arose after the record was formally closed.

Seven of the intervenors' eight new matters are raised on the basis of staff letters to the applicant during the period from late June to mid-December 1972. Intervenors' item 1 is a letter dated June 29, 1972, requesting verification of valve wall thicknesses. Items 2 and 4, letters dated respectively September 15, 1972, and October 24, 1972, relate to routine inspections by the Directorate of Regulatory Operations. Item 3 is a letter dated September 29, 1972, which directs the applicant's attention to the Quad Cities flooding occurrence and requests an appropriate design review. Item 5, a letter dated November 20, 1972, requests a "fuel densification" analysis. Item 6 is a Directorate of Regulatory Operations

34/ See "Post Hearing Order," dated June 28, 1972, establishing a schedule for the filing of proposed findings of fact and conclusions of law. The order also provided for certain limited additions to the record, none of which related to radiological matters.

35/ See "Order" dated August 26, 1971; "Order" dated March 10, 1972.

"bulletin," dated December 1, 1972,[36/] which requests the applicant to determi. . whether any valve operators of a potentially defective make and model are scheduled for installation in the Midland Plant. Item 7 is a letter dated December 15, 1972, requesting an analysis and other information needed to determine the consequences of a postulated break, outside containment, of a pipe containing high energy fluid.

The intervenors' eighth item is claimed to have arisen "in the summer of 1972, prior to the conclusion of the hearing." (Exceptions, p. 25) This item relates to the consequences of a postulated break in a core flooding tank line -- a matter which the staff has in fact had under consideration since some time in the spring of 1972.

In our view, the Appeal Board should be guided by what the Supreme Court recently quoted with approval in United States v. I.C.C., 396 U.S. 401, 420 (1970), from its earlier holding in I.C.C. v. Jersey City, 322 U.S. 503, 514 (1944):

> Administrative consideration of evidence - particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it - always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is essentially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order, litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or

36/ Intervenors give December 1, 1972, as the date of this item. Our own records indicate that the bulletin was forwarded to the applicant on December 6, 1972.

> some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

Here the application of this principle is particularly appropriate since a refusal to reopen the record clearly would not mean that the issues raised by intervenors would escape scrutiny. Indeed, the Commission's regulations contemplate that at the construction permit stage some safety issues will ordinarily be deferred for later consideration.[37/] Under the most optimistic assumptions, operation of these reactors is still years hence. During the long construction period, the staff will continue its review of these matters and take such actions as are appropriate.[38/] The entire project will be subjected to another intensive safety review by the staff at the operating license stage. Furthermore, pursuant to the Act and the Commission's regulations, there will be a further opportunity for a hearing on these facilities in connection with any proposed issuance of operating licenses.

In any case, the intervenors have not even attempted to demonstrate that these new matters could have affected the result reached in the Initial Decision.[39/] This appears to reflect misplaced reliance on the Appeal

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37/ See 10 CFR § 50.35(a).

38/ It is worth emphasizing that a power reactor remains subject to AEC regulatory review and surveillance from the earliest stages of its involvement in the licensing process to the end of its useful life as an operating facility.

39/ In fact, these are all matters which can be dealt with satisfactorily during the construction period.

Board's Memorandum and Order in Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-86 (December 15, 1972). ALAB-86 involved an operating license and is therefore distinguishable from the instant case. Intervenors' burden here is to demonstrate that their new matters are "of substance" in this construction permit proceeding. This they have not done.

Finally, we would note our view that the intervenors have not satisfactorily explained their failure to raise these matters earlier in the proceeding. For example, intervenors' counsel has long been aware of the fuel densification and accumulator line break matters.40/ Additionally, all of the items of correspondence referred to in Exception II.F. were on file in the Commission's Public Document Room, where intervenors' counsel in fact

40/ ALAB-86 records that intervenors' counsel first raised the fuel densification issue in the Point Beach 2 proceeding on August 16, 1972. Surely counsel should not be heard to imply that he appreciated the litigational potential of this issue in Midland only after consulting a member of the staff on December 13, 1972. (Exceptions, p. 27, n.6) Likewise untimely is the accumulator line break matter, which these intervenors (as constituents of the Consolidated National Intervenors) raised in the ECCS rulemaking proceeding on March 22, 1972, with their counsel in this proceeding present and participating. (ECCS Transcript at 12388-93)

found them during his unexplained "spot check" of January 2, 1972. (Exceptions, p. 26.)41/

41/ Intervenors make much of the staff's alleged "breach of obligation" to forward copies of these items to intervenors' counsel. They assert that but for the staff's failure in this regard these matters would have been raised on a timely basis. (Exceptions, p. 28) But cf. "Affidavit of Myron M. Cherry in Support of Motion to Recall and Revoke Initial Decision on Grounds of Bias," pp. 3-4 (other activities of counsel prevented him from acting until January 7, 1973, on information he acquired in summer of 1972); "Motion and Supplement to Saginaw Valley et al., Intervenors' Statement of Exceptions to Initial Decision Filed on January 15, 1973," pp. 3-4 (other activities of counsel during spring and summer of 1972 prevented him from reading mail received in April 1972). We are aware of neither a Commission rule nor any order in this proceeding which required the staff to communicate such matters to intervenors' counsel. Nevertheless, at some fairly early point in the proceeding we did in fact establish a practice whereby the intervenors were furnished with copies of letters to the applicant originating in the former Division of Reactor Licensing (DRL). Such copies were furnished not by staff counsel but by DRL administrative personnel acting in the ordinary course of business. During the spring of 1972, as the result of an error, this practice was discontinued.

7. THE INTERVENORS HAVE MADE NO SUBSTANTIAL SHOWING WHY THE APPLICATION SHOULD BE RESUBMITTED TO THE ACRS. (Exception II.G.).

Exception II.G. asserts that by reason of the safety-related items referred to in Exception II.F., the application in this proceeding must be resubmitted to the ACRS for review.

Much of what we have already said in response to Exception II.F. applies as well to this exception. Accordingly, we simply note here that counsel's opinion or characterization of any of these technical matters is not sufficient basis for requiring either a reopened hearing or further ACRS review.

8 THE ACRS LETTER WAS ACCORDED THE PROPER LEGAL STATUS BY THE ASLB. (Exceptions II.H. and II.I.)

After having argued (Exception II.C.) that the ASLB cannot rely on the ACRS letter, intervenors next argue that the ACRS letter must be relied upon (Exception II.I.), although its receipt into evidence for a much more limited purpose was improper (Exception II.H.). Intervenors make no effort to explain this inconsistency.

The evidentiary question raised by intervenors in Exception II.H. has already been addressed by the Appeal Board. In Wisconsin Electric

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The evidentiary question raised by intervenors in Exception II.H. has already been addressed by the Appeal Board. In Wisconsin Electric

Power Company, et al. (Point Beach Unit 2), ALAB-78 (1972) the Appeal Board denied a similar exception, pointing out that the letter there as here was not admitted for the truth of any of its conclusions and that the fact that the letter identified certain problem areas which in turn were addressed by applicants and staff did not indicate that the letter was admitted for its truth. In addition, since the fact of ACRS review is evident from the staff's safety evaluation, intervenors cannot by simple references to ASLB statements regarding the fact of ACRS review even establish that the ACRS letter was relied upon to establish this fact.

As to Exception II.I., suffice it to say that ACRS letters which have not been received into evidence for the truth of their conclusions cannot be used as evidence establishing safety problems impeaching the ultimate safety conclusion reached by the ASLB based upon the evidence in the record. In any event, the matters discussed in the ACRS letters in this proceeding have been otherwise addressed in the record in a satisfactory manner.[42/]

9. THE ASLB CORRECTLY DECLINED TO ENTERTAIN A CHALLENGE TO THE COMMISSION'S INTERIM CRITERIA. (Exception II.J.)

We agree with the applicant (Applicant's Brief, p. 34) and the intervenors

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42/ See Wisconsin Electric Power Company, et al. (Point Beach Unit 2), ALAB-78 (1972); Safety Evaluation, Tr. 1674, at pp. 81-82 and text referenced therein.

(Exceptions, p. 44) that denial of this exception is required by previous decisions of the Appeal Board. See also "AEC Regulatory Staff's Brief in Opposition to Exceptions of Mapleton Intervenors," dated January 22, 1973, at pp. 9-10.

10. THE ASLB'S FINDINGS IN REGARD TO CURRENTLY UNRESOLVED SAFETY QUESTIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE. (Exception II.K.)

Exception II.K. should be denied for reasons stated by the applicant. (Applicant's Brief, p. 36.)

11. THE ASLB CORRECTLY DECLINED TO PERMIT INQUIRY INTO COMPARATIVE SPRAY REMOVAL TECHNOLOGY AND CORRECTLY APPLIED THE COMMISSION'S REGULATIONS IN FINDING THAT THE WESTINGHOUSE REPORTS ON SPRAY REMOVAL TECHNOLOGY WERE PROPRIETARY. (Exception II.L.)

Exception II.L. should also be denied for the reasons stated by the applicant. (Applicant's Brief, pp. 36-38.)

12. THE INITIAL DECISION MAKES CLEAR ITS FACTUAL BASIS, SUFFICIENTLY INFORMS THE INTERVENORS OF THE DISPOSITION OF THEIR CONTENTIONS, AND IS THEREFORE ADEQUATE. (Exception II.M.)

Exception II.M. challenges nineteen different ASLB findings and conclusions on grounds of alleged failure to provide reasons and bases.

At the outset we would note that this exception is being made by parties who declined to furnish the ASLB with "conventional [proposed] findings of fact" and took it upon themselves to "await the decision, if any,

by the [ASLB] and review it for its support and legality."[43/] This conduct not only amounted to a violation of an ASLB order but deprived the ASLB of a definitive statement of the intervenors' contentions.[44/] Had the intervenors filed proper proposed findings, including exact citations to the record as required by 10 CFR § 2.754(c), the Initial Decision undoubtedly would have been issued in a much different form, perhaps obviating the objections in Exception II.M.

Be that as it may, the Initial Decision nevertheless makes clear its factual basis and sufficiently informs the intervenors of the disposition of their contentions (to the extent such contentions were ascertainable). As such, the Initial Decision is adequate.[45/] The ASLB was not required to set forth its reasons and bases in evidentiary detail. Nor was the ASLB required under the circumstances to spell out clearly implicit bases of its Initial Decision, such as acceptance of the applicant's and staff's testimony where no contradictory evidence was offered by intervenors.[46/]

43/ "Saginaw Valley et al. Intervenors' Proposed Findings of Fact and Conclusions of Law," dated September 15, 1972, p. 3.

44/ Initial Decision, para. 9.

45/ Memorandum and Order, Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-33 (December 4, 1973; Memorandum and Order, Trustees of Columbia University in the City of New York, ALAB-62 (July 28, 1972).

46/ These intervenors, we note, produced only one witness, who testified only on evacuation plans.

13. INTERVENORS' CONTENTIONS IN REGARD TO WITHHELD STAFF DOCUMENTS HAVE ALREADY BEEN RESOLVED BY THE APPEAL BOARD, AND THEIR CONTENTIONS IN REGARD TO DOCUMENTS ALLEGEDLY WITHHELD BY THE ACRS AND DOW ARE IMPROPERLY PRESENTED. (Exception II.N.)

Exception II.N. relates to documents withheld by the staff, and to documents allegedly withheld by The Dow Chemical Company and the ACRS.

To the extent this exception relates to staff and ACRS documents it should be denied for the reasons already stated by the Appeal Board in ALAB-33.[47/]

To the extent this exception relates to documents allegedly withheld by the ACRS and Dow, it should be denied for failure to specify the ruling or rulings, if any, to which the exception is directed.[48/]

14. THE ASLB CORRECTLY DECLINED TO ENTERTAIN A CHALLENGE TO THE VALIDITY OF THE COMMISSION'S INTERIM CRITERIA. (Exception III.A.)

Exception III.A. is clearly foreclosed by previous decisions of the Appeal Board.[49/]

47/ Memorandum, Consumers Power Company (Midland Plant, Units 1 and 2), September 3, 1971.

48/ 10 CFR § 2.762(a).

49/ Memorandum, Consolidated Edison Co. (Indian Point #2), ALAB-46 (March 10, 1972); Memorandum and Order, Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-83 (December 4, 1972); Memorandum and Order, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-57 (June 20, 1972); Decision, Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78 (November 10, 1972).

15. INTERVENORS' CONTENTIONS IN REGARD TO ALLEGED NONCONFORMANCE WITH THE COMMISSION'S INTERIM CRITERIA ARE IN FACT CHALLENGES TO THE INTERIM CRITERIA, AND EVEN IF THEY ARE NOT CHALLENGES TO THE INTERIM CRITERIA, THEY ARE FORECLOSED BY REASON OF WAIVER, ABANDONMENT OR UNTIMELINESS. (Exception III.B.)

In Exception III.B. the intervenors present certain contentions regarding alleged nonconformance with the Commission's Interim Criteria.

We agree with the intervenors (Exception, pp. 53-4, -5, -6) that under ALAB-46 these contentions must be treated and disposed of as challenges to the Interim Criteria.[50/]

However, even when these contentions are considered as relating to nonconformance with the Interim Criteria, Exception III.B. should be denied. Intervenors have either expressly waived their rights to litigate the Midland Plant's conformance with the Interim Criteria,[51/] or have abandoned their contentions in this area by failure to object to, or seek reconsideration of, the ASLB's Post Hearing Order of June 28, 1972, which, among other things, declared that no such issue had been raised in the proceeding.[52/] Moreover, even if there was no express waiver or abandonment, these particular contentions were not presented to the ASLB in a timely manner and therefore should not be entertained by the Appeal Board.

50/ See n.49 supra.

51/ Tr. 5297.

52/ Post Hearing Order, pp. 2-3.

For the foregoing reasons, Exception III.B. should be denied.

16. THE ASLB GAVE PROPER CONSIDERATION TO POSTULATED RADIOLOGICAL ACCIDENTS IN ITS INITIAL DECISION. (Exception III.C.)

In Exception III.C. intervenors assert that the Initial Decision was in error for failing to contain an analysis of pressure vessel failure, core-meltdown from failure of unspecified engineered safety features, a simultaneous "MHA" in both reactors at Midland, and a "MHA" together with the largest credible accident at the Dow Chemical or Dow Corning facilities.

At the outset we would point out that the exception consists only of assertions by counsel for intervenors without a single citation to the record. Second, the Commission's "Memorandum and Order" in Consolidated Edison Company of New York (Indian Point Unit No. 2) (October 26, 1972) requires a showing of special circumstances before pressure vessel failure need be considered - a showing that has not been made in this proceeding. As to failure of safety features, the record establishes that there is reasonable assurance that any engineered safety features required to function will indeed function in the event of postulated credible accidents, and intervenors have cited to no contrary evidence. As to simultaneous "MHA's" (by which we assume intervenors to be referring to postulated accidents chosen for 10 CFR Part 100 evaluation purposes), the Commission's site criteria in 10 CFR Part 100 provide that simultaneous

accidents need not be considered unless it appears that an accident in one facility would initiate an accident in the other. 10 CFR § 100.11 (b)(1); Wisconsin Electric Power Company, et al. (Point Beach Unit 2), ALAB-31 (1971). The record in this proceeding does not support such a connection between the two accidents. The same reasoning would apply to simultaneous accidents at Midland and the Dow facilities.

17. THE ASLB'S FINDING AND CONCLUSIONS REGARDING 10 CFR PART 100, EMERGENCY PLANNING, SYNERGISM AND QUALITY ASSURANCE ARE SOUND AND SUPPORTED BY SUBSTANTIAL EVIDENCE. (Exceptions III.D., E. and F.)

Exceptions III.D., E. and F. should be denied for the reasons stated by the applicant. (Applicant's Brief, pp. 44-49)

18. THE ASLB ADEQUATELY DISCHARGED ITS RESPONSIBILITIES UNDER APPENDIX D OF 10 CFR PART 50. (Exception IV.A.)

In Exception IV.A. the intervenors take the ASLB to task for alleged failure to make an independent analysis of environmental issues.

We are in substantial agreement with the applicant's analysis of this exception. (Applicant's Brief, pp. 50-54) In addition to what has already been said by the applicant, we would note that the hearing transcript above reflects considerable initiative and independent analysis by the ASLB with respect to environmental matters.[53/]

53/ See, e.g., Dr. Goodman's extensive interrogation of staff witnesses on May 31, 1972. (Tr. 7368-7542, 7556-72).

19. INTERVENORS HAVE MADE NO SHOWING THAT THE ASLB'S COST-BENEFIT DETERMINATION FAILS TO COMPLY WITH NEPA AND APPENDIX D OF 10 CFR PART 50. (Exception IV.B.)

Exception IV.B. relates to the ASLB's conclusion, expressed in paragraph 45 of the Initial Decision, that it was not possible to "make a calculation of the costs and benefits and decide [the final cost-benefit balance] on the basis of arithmetic."

The intervenors' argument in this exception appears to be based on the major premise that the National Environmental Policy Act of 1969 (NEPA) and the Commission's regulations in Appendix D of 10 CFR Part 50 required the ASLB to arrive at an arithmetical cost-benefit determination. This position is clearly untenable for the reasons already given by the applicant. (Applicant's Brief, pp. 54-56) Indeed, in a footnote to this exception intervenors concede the invalidity of their argument. (Exceptions, pp. 61-62, n.18) In

In any event, the intervenors offer no factual basis for concluding that the ASLB erred in its judgment that full quantification of costs-benefits was not possible. In support of this exception the intervenors offer not a single citation to the evidentiary record. Nor do they even point to any specific cost or benefit which they believe the ASLB could have quantified but did not.

20. THE ASLB GAVE SUCH CONSIDERATION AS WAS APPROPRIATE TO THE INTERRELATIONSHIP OF THE PROPOSED FACILITIES AND THE DOW CHEMICAL COMPANY COMPLEX. (Exception IV. C.)

We are in substantial agreement with the applicant's analysis of Exception IV. C. (Applicant's Brief, pp. 56-58).

21. THE ASLB'S REFUSAL TO GRANT THE INTERVENORS AN INDEFINITE ADJOURNMENT OF THE ENVIRONMENTAL HEARING WAS NEITHER A DENIAL OF DUE PROCESS NOR AN ABUSE OF DISCRETION IN THE CIRCUMSTANCES OF THIS CASE. (Exception IV. D.)

Exception IV. D. relates to the refusal of the ASLB to grant an indefinite adjournment of the environmental hearing which had been requested by intervenors on the grounds that their counsel had a conflicting commitment to participate in the ECCS rulemaking proceeding, Docket No. RM-50-1.

In the absence of agreement among the parties and the ASLB as to an appropriate time for the environmental hearing, it was the ASLB's responsibility to fix a time with "due regard ... for the convenience and necessity of the parties or their representatives, as well as [ASLB] members."[54/] No single party was entitled to have controlling weight given to his particular interests. Rather, the ASLB was required to take into consideration and balance the convenience and necessity of

54/ Supplementary Notice of Hearing on Application for Construction Permits (36 F.R. 23169, December 4, 1971).

all parties. This is in fact what the ASLB did in this proceeding when the date for the environmental hearing was established.[55/]

In the circumstances of this case, the ASLB was well within the ambit of sound discretion in scheduling the environmental hearing for May 17, 1972. First, unnecessary delay was inherently prejudicial to the proponents of the proposed facilities. Second, all parties except the intervenors were in a position to participate in a hearing commencing on May 17.[56/] Third, the intervenors offered no alternative date and demanded nothing less than an indefinite adjournment.[57/] Fourth, the intervenors had known for months that environmental matters were being considered by the staff on a schedule which contemplated the issuance of the Final Environmental Statement in the spring of 1972.[58/] Fifth, and finally, the intervenors had long been on notice that their attorney's participation in other proceedings would not be allowed to interfere with the timely completion of this proceeding.[59/]

55/ Tr. 5252-53.

56/ The Mapleton Intervenors, whose interest and position in the proceeding were generally similar to the Saginaw Intervenors', were among the parties who fully participated in the environmental hearing.

57/ Tr. 5253.

58/ Letter dated December 3, 1971 from staff counsel to the ASLB.

59/ Order dated January 6, 1972.

22. THE INITIAL DECISION, WHEN CONSIDERED IN ITS ENTIRETY, DEMONSTRATES THAT THE ASLB PROPERLY WEIGHED THE BENEFITS AND COSTS OF THE PROPOSED FACILITIES AND DID NOT APPLY A PRESUMPTION IN FAVOR OF PRODUCTION OF ELECTRICITY. (Exception IV. E.)

We are in substantial agreement with the applicant's analysis of this exception. (Applicant's Brief, pp. 59-62).

23. THE ASLB SATISFIED NEPA BY CAREFULLY ANALYZING THE COSTS AND BENEFITS OF THE APPLICANT'S PROPOSED FACILITIES. (Exception IV. F.)

In Exception IV. F. the intervenors assert that in the context of this licensing proceeding involving only two proposed reactors, the ASLB was required to perform a cost-benefit analysis of "each [Commission] regulation which has environmental significance, including but not limited to regulations contained in Part 20, Part 50 and Part 100, and the Interim Acceptance Criteria of June, 1971." (Exceptions, p. 80, n. 26)

This exception is frivolous. Intervenors do not and cannot provide legal authority for such a far-reaching interpretation of NEPA. What NEPA does require is an analysis of the costs and benefits of the applicant's proposed facilities. Such an analysis was performed by the ASLB in this proceeding. In its analysis the ASLB specifically took into account the costs associated with both normal and potential accidental releases of radioactivity to the environment.[60/] The ASLB concluded,

60/ E.G., Initial Decision, Paras. 61, 67.

for the purposes of its cost-benefit analysis, that these costs are minimal.[61/] These conclusions are fully supported by the record.[62/]

24. The ASLB GAVE PROPER CONSIDERATION TO THE ALTERNATIVE OF NOT CONSTRUCTING THE PLANT. (Exception IV. G.)

In Exception IV. G. intervenors argue that the initial decision was in error in failing to consider the alternative of not constructing the Midland plant at all.

While we agree that abandonment as an alternative must be considered, we believe that it has been given proper consideration by the ASLB. First, abandonment was considered in the context of weighing the projected risks and benefits of the proposed Midland facilities with a view to probable abandonment should the balance be unfavorable. (E.g., Initial Decision at 36-39). Second, abandonment was considered in the context of comparing the risks and benefits of the proposed Midland facilities and several alternatives, considering abandonment of Midland and construction of alternative facilities (E.g., Initial Decision at 53-57). Intervenors at this point also raise an issue concerning curtailment of certain end uses of the electric power to be produced which will be discussed infra.

61/ Ibid.

62/ See, e.g., Final Environmental Statement, pp. V-30, VI-1 to VI-6; Tr. 7554-66.

25. THE INITIAL DECISION MAKES CLEAR ITS FACTUAL BASIS, SUFFICIENTLY INFORMS THE INTERVENORS OF THE DISPOSITION OF THEIR CONTENTIONS, AND IS THEREFORE ADEQUATE. (Exception IV.H.)

Exception IV.H., which challenges some thirty-eight different ASLB findings and conclusions on grounds of alleged failure to provide reasons and bases, is similar to Exception II.M. and should be denied for the same reasons. (See par. 12 supra.)

26. THE FINAL ENVIRONMENTAL STATEMENT CONFORMS WITH THE REQUIREMENTS OF NEPA. (Exception IV.I.)

In Exception IV.I. intervenors argue that certain alleged contrary scientific facts and opinions have not been discussed in the final environmental statement, that the statement therefore fails to conform to the requirements of NEPA, and that the Initial Decision was defective in failing to remedy this deficiency. The exception includes a list of the alleged contrary scientific facts and opinions on the subject of ECCS effectiveness, pressure vessel failure, adequacy of valves, fuel densification, "unresolved safety issues" in every ACRS letter ever written, reliability of nuclear facilities in general, genetic effects of radiation, and adverse effects associated with Dow Chemical products encouraged by production of electricity and steam by the Midland Plant.

Greene County Planning Board v. FPC, 3 ERC 1595 (2d. Cir. 1972), cited

by intervenors, states nothing regarding any requirement that contrary scientific fact or opinion be discussed in environmental statements, and EDFv. Corps of Engineers, as cited by intervenors, does not exist. Committee for Nuclear Responsibility v. Seaborg. 3 ERC 1126 (D.C. Cir. 1971) did hold that the decision maker in that case was required to be informed of responsible opposing scientific views. The court stressed that only responsible opposing views need be referenced and stated that there was some discretion on the part of the agency in determining which opposing views to include.

Exception IV describes the alleged responsible opposing scientific views in only the most vague and general terms - for the most part the precise nature of the alleged view and how it should be regarded as "opposing" conclusions reached in the final environmental statement and Initial Decision are left to speculation. This is not surprising, since we have only intervenors' counsel's assertions that such responsible opposing scientific views exist. This is not a proceeding such as that in Committee for Nuclear Responsibility v. Seaborg where the decision making process is an informal one. Here the Commission's regulations contemplate that a party who believes that the environmental statement is deficient or in error will present proof in support of his position. The case cited above does not stand for the proposition that every statement of counsel in a formal adjudicatory proceeding must be regarded as responsible opposing scientific opinion.

It is interesting to note in this respect that although the court in Committee for Nuclear Responsibility v. Seaborg had the statement before it, it expressly did not rule that the statement was inadequate, but held only that plaintiffs should have an opportunity to make their submissions on the point discussed on the opinion.

In any event the detailed statement in this proceeding and the hearing record cover a wide range of subjects including accidents involving environmental effects, environmental effects of routine releases of nuclear materials, and reliability of nuclear facilities. The hearing record itself and the comments on the draft environmental statement which are included in the final statement cover hundreds of pages, and necessarily include any responsible opposing scientific opinion expressed through these mediums. Thus the final environmental statement (and Initial Decision) comply fully with any requirement that may be derived from Committee for Nuclear Responsibility v. Seaborg.

27. THE ASLB WAS NOT REQUIRED TO PERFORM A COST-BENEFIT ANALYSIS OF 10 CFR PART 100 AND APPENDIX E OF 10 CFR PART 50. (Exception IV. J.)

Exception IV. J. asserts that the ASLB was required to perform a cost-benefit analysis of 10 CFR Part 100 and Appendix E of 10 CFR Part 50. As such, it appears to duplicate pro tanto Exception IV. F. In any case, these two exceptions are similar and should be denied for the

same reasons. (See para. 23 supra.)

28. THE RECORD FULLY SUPPORTS THE ASLB'S FINDING THAT THE RISK OF A CLASS 9 ACCIDENT IS INSUBSTANTIAL. (Exception V.A.)

We concur in the applicant's analysis of Exception V.A. (Applicant's Brief, pp. 66-68)

29. THE ASLB GAVE ADEQUATE CONSIDERATION TO ISSUES RELATED TO NEED FOR POWER. (Exceptions V.B., V.C., V.D., and V.E.)

In Exceptions V.B., C., D., and E. intervenors argue that the Initial Decision was in error in failing to consider whether applicant is artifically creating demand by advertising techniques, whether the demand for electricity should be curbed by some conservation of energy program so as to entirely eliminate the need for the plant, and environmental effects of end uses of the electricity to be generated.

The report cited by intervenors, "Effects of Calvert Cliffs and Other Court Decisions Upon Nuclear Power in the United States," prepared by the Library of Congress, hardly serves as any legal precedent. While the cases cited by intervenors do generally stand for the proposition that a broad range of public interest factors must be considered in decisionmaking, none of the cases deal with the questions of advertising, selective curtailment of end uses, and environmental effects of end uses. Indeed, the Court in Udall v. FPC, 387 U.S. 478 (1967), discussed the issues relevant to FPC approval of the High Mountain Sheep dam in terms

of "future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." Id. at 450. The approach in the Initial Decision in this case is entirely consistent with this mandate taken in its broadest terms.

Furthermore, the essence of NRDC v. Morton, 458 F.2d 980 (D.C. Cir. 1972) is that there is a "rule of reason" to be applied to NEPA's mandate. In this proceeding the ASLB concluded that the record supports no finding other than that the demand for electricity "is made up of normal industrial and residential use," and that the record presents no evidence on intervenors' advertising contention (Initial Decision at p. 38). The ASLB further found that the applicant's and staff's projections of power needs were not seriously challenged by intervenors (Initial Decision at p. 37). Under these circumstances, the ASLB's decision to give no additional consideration to intervenors' contentions regarding advertising, selective curtailment of end uses, and environmental effects of end uses, was a reasonable one.

Also in Exceptions V.B., C., D., and E. intervenors argue that inadequate consideration was given to the question of interconnections that might reduce the need for the plant. However, the Initial Decision states that "outside sources are unavailable," Initial Decision at p. 53, and the

record contains a thorough discussion of this matter (E.g., Tr. pp. 8070-8071, 8076-78). Thus intervenors' argument on this point is unfounded.

30. THE LIMITATIONS IMPOSED IN THIS PROCEEDING ON INQUIRY INTO THE "URANIUM FUEL CYCLE" WERE REASONABLE AND THEREFORE CONSISTENT WITH NEPA. (Exception V.F.)

Exception V.F. is foreclosed by ALAB-60, the Appeal Board's Memorandum and Order dated July 19, 1972, in this proceeding.

31. THE ASLB WAS NOT REQUIRED TO CONDUCT A REVIEW OF MICHIGAN WATER QUALITY STANDARDS. (Exception V.G.)

In Exception V.G. intervenors argue that the ASLB was in error in failing to conduct a cost-benefit analysis of applicable State water quality standards.

Since the record is clear that an independent analysis of the costs and benefits of the proposed facility including water quality costs, was conducted, intervenors' argument in Exception V.G. must be that the water quality standards themselves should have been subject to collateral attack by the ASLB. Intervenors offer no explanation how an individual licensing proceeding could contribute anything resembling a complete record on the costs and benefits of a generally applicable standard or what useful purpose this would serve in light of the independent nature of the water quality impact evaluation. The cases cited by intervenors only stand for the proposition that water quality impact of the facility

must be independently evaluated, not that the standards themselves should be collaterally attacked. Furthermore, the ASLB's approach in this respect is consistent with the Commission's recent regulations implementing Section 511 of the FWPCA as amended by P.L. 92-500, 80 Stat. 816 (1972) (38 F.R. 2679, January 29, 1973).

32. THE ASLB'S FINDINGS IN REGARD TO DECOMMISSIONING AND FOGGING ARE FULLY SUPPORTED IN THE RECORD. (Exceptions V.H. and V.I.)

Exceptions V.H. and V.I. respectively challenge the ASLB's findings on decommissioning and fogging.

The ASLB's findings on these matters are in fact fully supported by a substantial evidentiary record of which the intervenors make no mention. As regards decommissioning, we are in agreement with the applicant's views. (Applicant's Brief, p. 72). Our position on the adequacy of the record to support the ASLB's findings in regard to fogging is set forth in the AEC Regulatory Staff's Brief in Opposition to Exceptions of Mapleton Intervenors, at pp. 17-18.

33. THE ASLB GAVE SUCH CONSIDERATION AS WAS APPROPRIATE TO MATTERS OF PLANT RELIABILITY, SUBSIDIES AND URANIUM RESOURCES. (Exceptions V.J. and V.K.)

We agree with the applicant's analysis of Exceptions V.I. and V.K. (Applicant's Brief, pp. 73-74)

34. SECTION 50.35 OF 10 CFR PART 50 IS FULLY CONSISTENT WITH NEPA. (Exception V.L.)

We agree with the applicant's analysis of Exception V.L. (Applicant's Brief, pp. 74-76)

35. SECTION 2.764 OF THE COMMISSION'S RULES OF PRACTICE IS IN NO WAY INCONSISTENT WITH NEPA OR THE ADMINISTRATIVE PROCEDURE ACT. (Exception VI.A.)

We concur in the applicant's analysis of Exception VI.A. (Applicant's Brief, pp. 76-77)

36. INTERVENORS' ACCUSATIONS OF IMPROPRIETARY ON THE PART OF THE ASLB AND ITS CHAIRMAN ARE ENTIRELY WITHOUT MERIT. (Exceptions VI.B., VI.C., and VI.D)

We generally concur in the applicant's comments on Exceptions VI.B., VI.C., and VI.D. (Applicant's Brief, pp. 77-80)

37. THERE HAS BEEN NO DENIAL OF DUE PROCESS BECAUSE OF THE COMMISSION'S "CONFLICTING PROMOTIONAL AND REGULATORY RESPONSIBILITIES." (Exception VI.E.)

In Exception VI.E., intervenors assert that the combination of developmental and regulatory responsibilities in one agency is impermissible and unconstitutional. The exception also lists various imagined aspects of the Commission's regulatory process that intervenors dislike.

The entire exception is devoid of any supporting citations to the record

or legal precedent - except a reference to Bayside Tinker v. Board, 3 ERC 1078 (Cal. Ct. App. 1971) which dealt with delegation to private parties, a matter not in issue here. Furthermore, intervenors' general argument on this point has already received Commission consideration. In Long Island Lighting Company (Shoreham Nuclear Power Station Unit No. 1), Docket No. 50-322 (Commission, October 28, 1970), the Commission stated that it was unaware of any support for the movant's charge that the AEC cannot "constitutionally and validly discharge simultaneously the contradictory missions of development and regulations." Id. at 12. Intervenors' argument on this point is without legal merit. If intervenors desire a change in the Commission's basic enabling statute, then this is a matter for Congress to decide.

38. INTERVENORS' ASSERTION THAT THE ASLB RELIED ON LIMITED APPEARANCE STATEMENTS IS PATENTLY FRIVOLOUS. (Exception VI.F.)

We concur in the applicant's analysis of Exception VI.F. (Applicant's Brief, p. 81)

39. THE COMMISSION'S REGULATIONS IN 10 CFR §§ 50.11 AND 50.12 ARE VALID AS APPLIED TO THIS PROCEEDING. (Exception VI.G.)

In Exception VI.G. intervenors argue that the Commission's regulations permitting fabrication of components of the facility before issuance of a construction permit are illegal because NEPA requires preparation of a final environmental statement before commitments of resources, because the

items procured may not represent up to date technology, and because adequate inspection cannot be carried out by the Commission.

Intervenors cite no cases in support of their argument that NEPA requires completion of a final environmental statement prior to any commitment of resources in cases such as this and the decision in Coalition for Safe Nuclear Power v. AEC, 3 ERC 2016 (D.C. Cir. 1972) indicates to the contrary. In Coalition the Court acknowledged that each additional increment of financial resources may tilt the balance away from the side of environmental concerns, but did not require that the construction of the plant be halted pending completion of the environmental statement.

Furthermore, intervenors do not explain how any alleged illegality in 10 CFR §§ 50.10 and 50.12 could affect the validity of the final environmental statement or Initial Decision. For example, there is no explanation how, if at all, any alleged commitments of resources affected the conclusions by the staff in the final environmental statement and the conclusions of the ASLB in its Initial Decision regarding cost-benefit analysis.[63/] There is no necessity for the Appeal Board to

63/ It does not appear that any commitments of resources by applicant prior to issuance of a construction permit had any significant effect on the staff's conclusions in its cost-benefit analysis. Tr. 7759-7760.

decide tne abstract question raised by intervenors in this proceeding. Intervenors' arguments regarding up-to-date technology and inspection are not supported by the record.

40. THE INTERVENORS' ARGUMENTS AS TO FURTHER CONDITIONING OF THE CONSTRUCTION PERMITS AND CONTINUING REVIEW BY THE ASLB ARE ENTIRELY WITHOUT MERIT. (Exception VII.A.)

We agree with what the applicant has stated with respect to Exception VII.A. (Applicant's Brief, pp. 82-83) We would add, however, that implementation of the intervenors' proposal for continuing ASLB review is precluded by section 2.717(a) of the Commission's Rules of Practice.64/

III. Conclusion

For the foregoing reasons, each of the intervenors' exceptions should be denied.

Respectfully submitted,

David E. Kartalia

David E. Kartalia
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 2nd day of February, 1973.

64/ For a statement of the purpose of section 2.717(a), see 31 F.R. 12775, September 30, 1966.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "AEC Regulatory Staff's Brief in Opposition to Exceptions of Saginaw Intervenors" in the captioned matter have been served on the following by deposit in the United States mail, first class or airmail, this 2nd day of February, 1973:

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