UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	:	
CONSUMERS POWER COMPANY	:	Docket Nos. 50-329 & 50-330
Midland Plant Units 1 and 2	:	5-21-71

APPLICANT'S REPLY BRIEF IN SUPPORT OF ITS OBJECTIONS TO INTERROGATORIES ADDRESSED TO AEC AND ACRS

Applicant submits this brief in reply to the Saginaw intervenors' brief dated May 15, 1971 concerning objections to their interrogatories to the staff and ACRS. We believe that most of the arguments made in the Saginaw brief are adequately dealt with in Applicant's initial brief. We shall merely add a few comments.

I.

The Saginaw intervenors seek to reverse the Board's preliminary ruling of May 1 (Tr. 1126) sustaining the objection to all of the interrogatories insofar as they are addressed to the ACRS. We believe that the Board's preliminary ruling was correct. The ACRS has never become a participant in licensing proceedings. The integrity of its deliberations should be protected so as to encourage the free and uninhibited exchange of ideas in its vitally important work. Moreover, as noted below (infra at p. 3), the ACRS report is not received as evidence of the matters asserted therein and intervenors who

are dissatisfied with it are, in any event, free to attack the underlying merits of the issues as to safety and health within the framework of the hearing process.

II.

The Saginaw intervenors argue (Brief, pp.24-25) that they need to have these extensive interrogatories answered by the staff and the ACRS in order to be able to prepare for the hearing and even to decide what issues to contest. We believe that the Saginaw intervenors should have known what issues they wanted to contest when they petitioned to intervene. Be that as it may, however, we think there can be no doubt that the Saginaw intervenors have had the opportunity to obtain sufficient information from Applicant and Dow, in addition to that contained in the PSAR, other documents of record and documents supplied to them by the Staff, to finally define the contested issues and prepare for hearing.

III.

The Saginaw intervenors seem to imply (Brief, pp. 2, 5 and 6) that, because 10 C.F.R. §2.720(h)(2)(ii) provides for the service of interrogatories on the staff, the staff must be required to answer any and all interrogatories that anyone serves upon it. This is patently absurd. Section 2.720(h)(2)(ii) is only a procedural rule, as its inclusion in Part 2 of 10 C.F.R. indicates. The rule explicitly provides for objections to interrogatories. In this case, such objections have been made and the question before the Board is how to rule on them.

IV.

The Saginaw intervenors argue (Brief, pp.14-15) that general objections to interrogatories may not be entertained. We therefore wish to reiterate that Applicant has made specific objections to designated interrogatories. See Part IV of Applicant's initial Brief.

V.

The Saginaw intervenors argue (Brief p.24) that they are entitled to discovery probing into the basis for the ACRS report and staff safety evaluation because these documents will be offered into evidence and they need discovery in order to be in a position to challenge their probative value. It has been held that the ACRS report is "received into evidence to show compliance by the Commission with the direction of Congress that an ACRS report be prepared and be submitted as a part of the application," but that "no evidentiary value" is given to it and that, therefore, an intervenor may not cross-examine with respect to it. In re Florida Power & Light Co. (Turkey Point Plants 3 and 4), CCH Atomic Energy Law Reporter ¶11,259 (Atomic Safety and Licensing Board 1967). The staff safety evaluation is not required by statute (see footnote 3 at p.8 of the Saginaw intervenors' Brief) and is not itself of significance with respect to contested issues (see Point II of our initial Brief). Since the staff will be represented at the hearing by technical personnel who may furnish testimony with respect to contested matters and be

available for cross-examination, the Saginaw intervenors have no need for discovery into the mental processes underlying the staff safety evaluation.

VI.

In Point I of our initial Brief, we took the position that the interrogatories in question are improper under the Morgan doctrine, applied in a long series of court and administrative agency cases. The Saginaw intervenors reply to this with the argument (Brief, pp. 6-7, 11-12, 15-18) that the cases we cited applying the Morgan doctrine all involved discovery into the mental processes underlying administrative findings which constituted an agency decision made in "an adjudicatory or quasi-judicial proceeding" (id. at 17) and that, because the ACRS report and staff safety evaluation are not agency decisions made in an adjudicatory or quasi-judicial proceeding, the Morgan doctrine is inapplicable here. This is simply not so.

Of the cases we cited in our initial Brief, the following did not involve discovery into the mental processes underlying an agency decision made in an adjudicatory or quasi-judicial proceeding: Freeman v. Seligson, 405 F.2d 1326, 1339 (D.C. Cir. 1968) (disclosure of "intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions" in the Department of Agriculture held improper); Davis v. Braswell Motor Freight Lines, 363 F.2d 600, 603-05 (5th Cir. 1966)

(held: subpoena requiring NLRB regional director to testify in an action not involving the NLRB and to produce communications between him and the general counsel's office discussing the actions they would take concerning a labor dispute and revealing the Board's tentative opinions as the validity of various charges made by the employer and the unions should have been quashed); North American Airlines v. CAB, 240 F.2d 867, 874 (D.C Cir. 1956) (discovery of staff studies, internal memoranda and recommendations of Board's experts to its members leading up to adoption of regulations by CAB, in order to show, in a subsequent adjudicatory proceeding, that the regulations were arbitrarily designed and improper was held to have been properly denied); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), aff'd per curiam on the opinion below sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967) (subpoena requiring Attorney General to produce documents bearing on the Government's relationship with and attitude toward plaintiff foreign corporation before and during prior litigation to which the Government was a party quashed); Kaiser Aluminum & Chemicals Corp. v. United States, 157 F.Supp. 939, 945-47 (Ct. Claims 1958) (Government, defendant in suit for breach of contract, not required to produce a memorandum written to the War Assets Liquidator by his special assistant advising him on the question of entering into the contract at issue); Graber Mfg. Co., 18 Ad L 2d 579, 586

(F.T.C. 1965) (request for production of documents evidencing F.T.C.'s knowledge of and attitude toward the activities of respondent's customer denied).

The argument (Saginaw Brief, p.25) that the Morgan doctrine should not bar discovery where the information sought is needed by the party seeking it in order to prepare for the hearing has been made and rejected. See, e.g., Indiana & Michigan Electric Co., 30 F.P.C. 391 (1963), aff'd, 365 F.2d 180 (7th Cir.), cert. denied, 385 U.S. 972 (1966); Mid-South Broadcasting Co., 12 Radio Reg. 1447, 1450 (F.C.C. 1955). Besides, in view of the extensive discovery already had of Applicant and Dow, the Saginaw intervenors' claim of need is totally without foundation.

Finally, as shown at pp. I-16 to I-27 of our initial Brief, the policies underlying the Morgan doctrine apply equally to the interrogatories at bar.

CONCLUSION

For all the foregoing reasons, Applicant's objections to the interrogatories addressed to the staff and ACRS by the Saginaw intervenors should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Reply Brief In Support of Its Objections To Interrogatories Addressed To AEC And ACRS, dated May 21, 1971, in the above-captioned matter have been served on the following in person or by deposit in the United States mail, first class or airmail, this 21st day of May, 1971.

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