

6/23/78

Reg. Cont.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO SAGINAW PETITION
FOR LEAVE TO INTERVENE

I. INTRODUCTION

On June 5, 1978, Saginaw Valley Nuclear Study Group (Saginaw) filed a petition for leave to intervene in this operating license proceeding. The NRC Staff does not oppose the petition at this time.

Recently, the Commission published amendments to its "Rules of Practice for Domestic Licensing Proceedings (43 Fed. Reg. 17798, April 26, 1978). The amendments, which became effective on May 26, 1978, included a new 10 CFR §2.714 governing requirements for intervention.^{1/} Under the new rule, intervention petitions should initially set forth the petitioner's interest, how that interest may be affected, reasons why intervention should be permitted and the specific aspects of the subject matter on which intervention is desired. Petitions must then be perfected by subsequently filing contentions at least fifteen days prior to the Special Prehearing Conference.

^{1/} Copies of the amendments were mailed to all parties of record in ongoing proceedings including Saginaw.

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The NRC Staff has examined Saginaw's petition in accordance with the requirements of the new rule. In addition, since Saginaw has set forth a number of contentions, the NRC Staff has examined them and noted objections where appropriate in order to permit clarification, amendment by Saginaw or argument and decision by the Board at the earliest opportunity.

II. SAGINAW'S STATEMENT OF THE REQUISITE INTEREST

Saginaw indicates that "[I]n summary, Petitioner and its members have the same interests now as they had in November, 1970. . .". In November 1970, Saginaw's counsel intervened for Saginaw and six other organizations. At the first Prehearing Conference on November 17, 1970 in Midland, Michigan, counsel for the Staff stated:

"Furthermore, with regard to the Saginaw Valley Nuclear Study Group, it is unclear as an indication of just how their interests are affected. I don't believe there is a clear statement in the petition which gives me that information." (Tr. 11)

Counsel for Dow Chemical in responding to the Staff's concerns indicated that the case law was then proceeding in the direction of admitting any responsible citizens' group. (Tr. 22). The Board Chairman indicated that he agreed with Dow's counsel and proceeded to grant all interventions. (Tr. 27, 29). The case law of standing has substantially retreated from the position then stated by Dow's counsel. [See e.g. Sierra Club v. Morton, 405 U.S. 727 (1972); Warth v. Seldin, 422 U.S. 490, 499 (1975)]. The Appeal Board has since required groups to

demonstrate that they have members suffering more than a generalized grievance as a result of the proposed action. [Tennessee Valley Authority (Watts Bar Units 1 & 2), ALAB-413, 5 NRC 1418 (1977) and cases cited therein.] Consequently, Saginaw is required to show more than the same interests they had in 1970 in order to meet the requisite interest test under 10 CFR §2.714. Saginaw states that it is an unincorporated association comprised of citizens and residents of Michigan, the majority of whom reside in Midland, Michigan. No members of that organization are identified. However, attached to the petition is a verification signed by Mary P. Sinclair. Ms. Sinclair states that she is a duly authorized representative of Saginaw. The verification, however, does not state that Ms. Sinclair is a member of Saginaw. Further, Ms. Sinclair does not state why she wishes Saginaw to represent her, what interests of hers may be injured by the proceeding nor what her specific concerns are. [See Allied General Nuclear Services (Barnwell), ALAB-328, 3 NRC 420, 423 (1976).]

Normally, these defects would cause the Staff to oppose an Intervention petition until the petitioning organization supplemented its petition with affidavits from individual members which cured the defects. Ms. Sinclair, however, has submitted other papers to various NRC authorities regarding matters arising from construction of the Midland facility. In a recent document dated June 9, 1978 forwarded to the Atomic Safety

and Licensing Board for Special Proceeding, a letter signed by Ms. Sinclair as "Chairman on behalf of the Saginaw Intervenors" was attached. The face of the letter indicated that she resided at 5711 Summerset Drive, Midland, Michigan 48640. Assuming that the Board is willing to take note of these filings made in other records, in order to establish the sufficient personal interest of at least one member of Saginaw in the proceeding, then the Saginaw petition might be found conditionally sufficient at this time. The proximity of Ms. Sinclair's residence to the proposed facility is sufficient to establish Saginaw's interest in this proceeding. [Northern States Power Co. (Prairie Island Units 1 & 2), ALAB-107, 6 AEC 188 (1973).]

In addition to showing interest, Saginaw must demonstrate that this interest is within the scope of interests protected by the Atomic Energy Act or NEPA and that this interest would suffer an injury in fact. [Portland General Electric Co. (Pebble Springs Units 1 & 2), CLI-76-27, 4 NRC-610 (1976)]. While Saginaw lists any number of injuries (Petition pp. 3-6) not cognizable under the relevant statutes, it indicates that the interests which it represents will be affected by effluents emitted from the facility. (Petition p. 6). This is a sufficient threshold demonstration to satisfy the second part of the interest test.

While Saginaw does not indicate the specific aspects of the subject matter on which intervention is desired, its statement of contentions reveals a broad interest in all aspects of the proposed licensing action. The Staff believes that the process of formulating contentions will sufficiently identify the specific matters on which Saginaw wishes to participate. Consequently, Saginaw's petition is presently sufficient pursuant to the amended §2.714. It will, of course, have to be perfected by 15 days prior to the Special Prehearing Conference.

III. SAGINAW'S CONTENTIONS

A. Legal Principles Governing the Admission of OL Contentions.

Although the Staff recognizes Saginaw's right to refine and amend its contentions until 15 days prior to the Special Prehearing Conference, it seems appropriate at this time to indicate the Staff's position regarding those contentions identified by Saginaw in its petition.

The Commission has clearly stated that contentions previously litigated in its proceedings will not be subject to adjudication in operating license proceedings unless a special showing of justification is made. [Consolidated Edison Company of New York (Indian Point, Unit 3), CLI-74-28, 8 AEC 28 (1974); Joseph M. Farley Nuclear Plant (Units 1 & 2), CLI-74-12, 7 AEC 203 (1974); See Also Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1-3), ALAB-319, 3 NRC 188, 189-90 (1976)]. The Commission precludes attempts to relitigate the same

contentions resolved in earlier proceedings under an administrative doctrine akin to res judicata and collateral estoppel. These doctrines must be applied, however, with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case. [Alabama Power Company, (Farley, Units 1 & 2), ALAB-182, 7 AEC 210, 216 (1974)].

Saginaw has made no effort to show any changed circumstances or special interest factors with regard to the bulk of its contentions. Therefore, to the extent that Saginaw's statement of contentions is a rehash of issues already ventilated and resolved throughout the course of litigation over construction permits for the Midland facility, the Staff strongly objects to admission of such contentions as issues in controversy between the parties in this proceeding. The NRC Staff also objects to those contentions which Saginaw has previously sought to litigate and which have been rejected as inappropriate for consideration. In addition, contentions which attempt to raise new issues which both could and should have been presented and resolved along with issues previously adjudicated, should similarly be rejected. (Farley, ALAB 182, 216, supra).

B. Saginaw's Specific Contentions

Saginaw contends (petition, para. 10-12) that the Staff lacks technical and managerial competence to fulfill its statutory responsibility. This contention is allegedly based on a 1973 task force report. Saginaw previously raised this issue in an NRC proceeding involving Consumers construction permit, offering no evidence, tendering no witnesses and attempting no cross-examination. [Consumers Power Company (Midland Units 1 & 2) (show cause), ALAB-270, 1 NRC 473, 475 (1975).] Absent the requisite showings required for OL contentions, Saginaw's attempt to put the Staff's compliance reviews at issue must fail. Saginaw makes no attempt to demonstrate new information or to show why it did not pursue this matter at the time it was afforded an opportunity to do so. Saginaw's attempt to raise matters which occurred during the time when earlier Midland proceedings were in progress should be rejected.

Paragraphs 13 and 14 raise QA-QC contentions which Saginaw previously put forward in the Midland Show Cause proceeding. [Consumers Power Company (Midland Units 1 & 2) (Show Cause), LBP-74-71, 8 AEC 584 (1974)]. These contentions should not be admitted here absent Saginaw's compliance with the criteria set forth in Farley, supra.

Saginaw's paragraph 15 alleges that Consumers has not presented a meaningful risk assessment as required by 10 CFR §51.20(a) and (b). An unidentified, unpublished Brookhaven document is referenced. This contention is vague and lacks sufficient specificity to be admitted in its present form.

In paragraphs 16 and 17 Saginaw refers to "cryptic references" by the ACRS and the "incomprehensible ACRS report" arguing that it is impossible to determine how serious the "other problems" identified by the ACRS may be. The United States Supreme Court commented that the view that the ACRS reference to "other problems" made it impossible to determine how serious such problems were, bordered on the "Kafkaesque". [Vermont Yankee, et al. v. Aeschliman, et al., ___ U.S. ___, 46 L.W. 4301, 4309 (1978)]. The Staff will not oppose reasonably specific safety contentions formulated as a result of ACRS reviews and subsequently issued Safety Evaluation Reports. Saginaw's present contentions, however, are not sufficient.

The contentions contained in paragraphs 18, 19, 20, 22, 23 and 24 concern the Dow-Consumers steam contract, construction costs and related matters. Saginaw fully participated in the recently concluded hearings conducted as a result of the Court of Appeals remand in Aeschliman. The Licensing Board and Appeal Board both ruled against Saginaw on these very matters. In addition, Saginaw has been kept current on recent events affecting the Dow - Consumers relationship. Consequently, the contentions contained in those paragraphs should be rejected unless Saginaw formulates contentions

which meet the Farley criteria and adequately account for the current position of Dow and Consumers as revealed through recent ongoing discovery.

Saginaw's contention in paragraph 21 is made pursuant to 10 CFR §50.57(a)(4). Assuming that Saginaw ultimately is able to make this contention sufficiently specific to enable an understanding of the alleged defects in Consumers financial qualifications to operate the Midland facility, the contention may be acceptable for litigation in this proceeding. Previous issues in this proceeding, however, have involved Consumers financial qualifications to construct and operate and the Staff's position on this contention assumes that significant new information may now be available concerning this matter.

Paragraph 25 and 33 of Saginaw's petition references its other contentions as a basis for alleging deficiencies in Consumers' Environmental Report. To the extent that the referenced contentions are not cognizable in this proceeding, this contention should be likewise rejected. The contentions further lack sufficient specificity to otherwise determine their adequacy.

Saginaw raises need-for-power contentions in paragraphs 26-29. Need-for-Power was the subject of the recent hearings following the Aeschliman remand. Saginaw alleges no new facts or circumstances. Both the Licensing Board and Appeal Board (ALAB-458) found that there continues to be a demonstrable need for the Midland facility. These contentions should not be admitted in the OL proceeding.

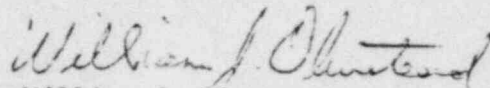
Paragraphs 30-32 in large part amount to a impermissible attack on the Commission's Interim fuel cycle rule. The Commission is currently conducting a rulemaking to determine whether or not to modify the incremental values expressed in Table S-3 of the rule. It is well settled that no challenge of any kind, is permitted in an individual adjudicatory proceeding to a regulation that is the subject of ongoing rulemaking. [Wisconsin Electric Power Co. (Point Beach, Unit 2), ALAB-78, 5 AEC 319 (1972); Pacific Gas & Electric Co. (Diablo Canyon, Units 1 & 2), ALAB-410, 5 NRC 1398, 1402 (1977).]

IV. CONCLUSION

Provided the Board is willing to take note of Saginaw's filings in other related Midland proceedings, it may find that Saginaw has demonstrated the threshold requisite interest to intervene pursuant to the Commission's amended rule, §2.714. Saginaw's contentions at this time are not sufficient to perfect their intervention petition but the Commission's rules of practice now allow amendment of contentions

until 15 days prior to the Special Prehearing Conference. Consequently, the Staff does not object to Saginaw's petition at this time.

Respectfully submitted,



William J. Olmstead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of June, 1978.

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(Operating Licenses Proceeding)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the captioned matter. In accordance with 10 C.F.R. §2.713(a), the following information is provided:

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Supreme Court of Kansas
Name of Party: NRC Staff

William J. Olmstead

William J. Olmstead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of June, 1978.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SAGINAW PETITION FOR LEAVE TO INTERVENE" and "NOTICE OF APPEARANCE of WILLIAM J. OLMSTEAD", both dated June 23, 1978, in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 23rd day of June, 1978.

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