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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

5-21-71

DOW MEMORANDUM IN OPPOSITION
TO SAGINAW/EDF APPLICATIONS
FOR DISCOVERY WITH RESPECT TO
ALLEGED INVALIDITY OF AEC
REGULATIONS.

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

This Memorandum is submitted in opposition to the Saginaw/EDF applications dated May 20 and May 17, 1971, respectively, for further discovery to support charges of invalidity of 10 CFR Part 50, Appendix D and other unspecified AEC regulations.

Although the Saginaw application is cast in terms of a motion to take depositions and to obtain other discovery and the EDF application in terms of an "offer of proof," both are requests to obtain discovery, in the hopes thereafter of obtaining evidence which might support an attack upon the validity of regulations promulgated by the AEC under the so-called "Calvert Cliffs" doctrine.

Saginaw adopts the EDF "offer of proof" approach, and this Memorandum will be directed primarily at the latter. To the extent that Saginaw seeks also to obtain

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discovery by way of oral rather than its earlier written interrogatories (depositions) and production of documents, it does not differ in any material respect from its written interrogatories to which objections were interposed, and with respect to which the Board has ruled by Order dated May 13, 1971. Accordingly this aspect of the Saginaw motion will not be discussed further herein.

The Saginaw/ EDF "offer of proof" is a misconception of the nature of the attack permitted by the Commission upon its Regulations, in a proceeding before a Licensing Board. The alleged "offer of proof" is in fact a request for discovery to support a charge of invalidity of the Regulations, rather than the necessary evidence of such invalidity. Thus on page 2 of the "offer," Saginaw/EDF state:

"We understand that the Board is willing to permit us to offer proof which if accepted could allow us to pursue further discovery..."*

Indeed, Saginaw/EDF even conceive of discovery of the second or subsequent degree, because they anticipate that the initial discovery referred to above will lead to

* Underlining added through this memorandum.

further discovery. Thus, at pages 4-5 of the "offer" it is stated:

"If the offer of proof is accepted and if the Board rules that the proof submitted entitles EDF to utilize discovery procedures to bring forth additional evidence then there will of course be additional factual conclusions for which EDF will seek evidence by discovery..."

All Saginaw/EDF have done is to identify what they regard to be the factual considerations involved in the application of AEC Regulations to the proposed Midland Plant;* state that they question the strength of such factual assumptions as supporting the Commission's conclusion; request that they have discovery to see whether in fact the factual conclusions are thus supported; and then proceed to recite, quod est demonstrandum, that the necessary Calvert Cliffs showing has been made.

Certainly Calvert Cliffs was not intended to lead to the procedure Saginaw/EDF suggest here, which would permit substantially unlimited attacks in any licensing proceeding on the validity of the Commission's Regulations.

* Saginaw/EDF are wrong in stating on page 2 of their "offer" that the three numbered items to which they refer on page 3 of their "offer" are the "three factual matters which underlie the application of portions of Appendix D to this proceeding."

Intervenors do not need our advice as to how they should go about making the necessary offer of proof as to the invalidity of a Regulation. They recognize on page 4 of the "offer" that "the burden of proof is on the Intervenors to demonstrate that there is no rational basis for the Regulation to be applied to this case (i.e., it is arbitrary and capricious)..." Surely they must know that any such offer must at least include affidavits in proper form, making a substantial factual showing of such magnitude as to call into serious question the Regulations under attack and at least prima facie establish that adoption was arbitrary and capricious.*

CONCLUSION

The fact that Saginaw/EDF suggest at least a two-step discovery procedure before they will have the

* EDF's footnote 4 on page 5 of its so-called "offer of proof" states:

"If environmental issues had been allowed in the proceeding from the outset there is no reason why the present schedule for hearings, or an early one, could not have been followed."

It would seem from the above that the absence of a final environmental statement is no longer regarded as an impediment to resumption of the Hearing.

evidence necessary to support their charges of invalidity of the AEC Regulations, is itself proof that the necessary showing has not been made.

Saginaw/EDF have not only not furnished the necessary "offer of proof," but instead an "offer of discovery," which sustains rather than questions the validity of Appendix D and the other Regulations under attack.

Dated: New York, N.Y.
May 21, 1971.

Respectfully submitted,

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