

6/19/78

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter Of  
CONSUMERS POWER COMPANY  
(Midland Plant, Units 1 and 2)

Docket Nos. 50-329  
~~50-330~~

ANSWER OF CONSUMERS POWER COMPANY  
TO SAGINAW VALLEY NUCLEAR STUDY GROUP'S  
PETITION FOR LEAVE TO INTERVENE

Consumers Power Company ("Consumers Power" or "Licensee"), pursuant to the Rules of Practice of the Nuclear Regulatory Commission (the "NRC" or the "Commission"), hereby answers the Petition for Leave to Intervene of the Saginaw Valley Nuclear Study Group ("Saginaw" or "Petitioner") in the operating license proceeding for the Midland Plant, Units 1 and 2.

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I. PETITIONER DOES NOT ADEQUATELY  
SET FORTH ITS IDENTITY OR ITS  
INTEREST IN THE PROCEEDING

In assessing the adequacy of a petition to intervene filed pursuant to 10 C.F.R. §2.714,\* the Atomic Safety and Licensing Board ("Licensing Board") must first determine whether the document sets forth "with particularity" the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene. That determination is to be made with particular reference to certain specified factors.\*\* The NRC has ruled that contemporary concepts of judicial standing are to be used in deciding whether a petitioner for intervention has a sufficient interest, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). See Sierra Club v. Morton, 405 U.S. 727 (1972) for a discussion of those concepts. Obviously, in order to fulfill these requirements, the petitioner must first adequately identify itself. Saginaw has failed to do so and its petition is therefore defective.

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\*/ This section, as well as other portions of the NRC's Rules of Practice, were amended effective May 26, 1978 (43 Fed. Reg. 17798). The portions of §2.714 dealing with the petitioner's description of its interest are essentially the same in both the old and the amended rule, however.

\*\*/ (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest. 10 C.F.R. §2.714(d).

Petitioner refers to itself as "Saginaw Valley Nuclear Study Group," which is described as "an unincorporated association comprised of citizens and residents of Michigan who are interested in the dissemination of information and stimulation of public awareness and involvement in the study of nuclear power" (Petition, ¶1). Aside from mentioning Mary P. Sinclair, the person who verified the Petition and who is to be included on the service list, nowhere in the Petition does Saginaw set forth the number or names of the persons who comprise the association, or give any evidence to support the assertion that some of them live in Midland, Michigan.

As NRC cases discussing standing to intervene make clear, an organization can represent only its own members, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977). Thus, it becomes essential to know the identity of those members whom Saginaw purports to represent. Furthermore, not only must the identity of the members of the organization whose interest may be affected and how such interest may be affected be shown, but there must also be a showing that the individual who signed the petition has been duly authorized to represent the petitioner and that the members either requested or consented to be represented by the petitioner in this proceeding. See Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687, 690 (1975), affirmed, ALAB-328, 3 NRC 420 (1976).



It is also evident that Saginaw cannot claim to represent some general group (consisting of the population of Michigan, for instance), for NRC practice does not permit anyone to act as a "private attorney general," Shoreham, LBP-77-11, supra at 484. Similarly, it is settled law that a person cannot claim standing by virtue of being a taxpayer or a ratepayer of the Licensee, Pebble Springs, CLI-76-27, supra; Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977). Saginaw, however, attempts to allege an interest in the proceeding as a ratepayer of Licensee in Paragraphs 4 and 8 of its Petition.

Saginaw relies upon the fact that it participated in the construction permit proceeding for the Midland Plant as a justification for its intervention in the instant proceeding (Petition, ¶1). This reliance is, however, misplaced since it has been held that participation in a prior licensing proceeding involving the same facility does not adequately establish petitioner's interest in subsequent proceedings. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LPB-75-22, 1 NRC 451, 455 (1975). It should be remembered, too, that there has been no showing that Saginaw, an unincorporated association, now includes the same people who intervened years ago.\*

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\*/ Furthermore, Mary P. Sinclair may be Saginaw's sole member. If that is the case, the Petition should be amended to name Ms. Sinclair as the petitioner, rather than Saginaw.

For all of these reasons Saginaw's Petition is defective for failing to state clearly who are its members, what are their interests in the proceeding, and where they reside.\* Without that information, the Licensing Board cannot make a decision as to whether Saginaw has set forth a sufficient interest under the requirements of §2.714 to give it standing to intervene in this proceeding.

II. CERTAIN OF PETITIONER'S CONTENTIONS ARE IMPROPER AND SHOULD BE DISALLOWED OR STRICKEN

The second determination which the Licensing Board must make in assessing Saginaw's Petition is whether it has sufficiently identified "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene," 10 C.F.R. §2.714(a)(2). The instant Petition contains a section entitled "Statement of Contentions" (Petition, ¶'s 10-34). As the amended version of §2.714 is more liberal than the old rule in this regard, Saginaw's contentions will be evaluated using the new "aspect of the subject matter" standard.

Under NRC practice, a petitioner who satisfies the interest requirement will be granted intervention if he states

\* Not everyone living within the State of Michigan has standing merely because the Midland Plant is located there; the cases establish narrower geographical restrictions for standing purposes. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 190, affirmed, CLI-73-12, 6 AEC 241 (1973); Watts Bar, ALAB-413, supra.

one contention within the scope of the proceeding with a proper factual basis. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973). This rule is retained in amended §2.714(b). Therefore, at this state of the proceeding, Saginaw must specifically set forth at least one proper "aspect of the subject matter" of this proceeding as to which it wishes to intervene; otherwise, it could not possibly meet the "one good contention" rule at a later date.

In judging Saginaw's Petition in this respect, the Licensing Board should remember that it has no duty to recast contentions offered by a petitioner to make them acceptable under the regulations. Commonwealth Edison Co. (Zion Station Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974). Furthermore, because no hearing is mandated by statute in an operating license case, a Licensing Board should "take the utmost care" to satisfy itself that the "one good contention" rule is met, since absent a successful intervention no hearing at the behest of the Petitioner need be held. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). These same rules should apply to the specification of subject areas.

Turning to the specifics of the instant Petition, some of the purported subject areas are improper and must be



disallowed by the Licensing Board. Certain subject matters as raised are clearly improper for consideration at the operating license stage and should be disallowed for that reason. Other of Saginaw's contentions contain matter which is impertinent and which therefore should be stricken.

A. Matters Outside the Scope of the  
Operating License Proceeding

Saginaw sets forth contentions in Paragraphs 17, 19, 20 and 24, all of which generally concern the economics of the Midland Plant or of alternatives. The thrust of those arguments is that the nuclear facility is not "economically justifiable" either for Licensee or for The Dow Chemical Company ("Dow"), which will buy process steam generated by the Midland Plant and electricity from Licensee's system. These contentions are all defectively drawn, however, in light of the requirements for the consideration of economic issues in licensing proceedings laid down in an Atomic Safety and Licensing Appeal Board ("Appeal Board") decision in this docket. As stated, these contentions attempt to raise issues which are outside the scope of the operating license proceeding.

On February 14, 1978, the Appeal Board dealt exhaustively with the topic of economic analysis under NEPA and found that it had no place in a cost-benefit analysis

of the Midland Plant once it had been established that the nuclear plant was the environmentally-preferable alternative.

Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC \_\_\_\_ (February 14, 1978). That opinion is directly on point.

At the suspension hearing and in that Board's decision, extraordinary attention was paid to the relative financial costs of various alternatives. But there was no serious suggestion that any of those alternatives was preferable to Midland from an environmental standpoint. . . .

That's being so, we do not perceive that financial matters are as crucial as the Board below thought they were. Unless the proposed nuclear plant has environmental disadvantages in comparison to possible alternatives, differences in financial cost are of little concern to us. . . .

That Act [NEPA] requires us to consider whether there are environmentally preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place. Manifestly, nothing in NEPA calls upon us to sift through environmentally inferior alternatives to find a cheaper (but dirtier) way of handling the matter at hand. ALAB-458, Slip. op. at 9-11 (footnotes omitted) (emphasis in original).

An examination of the contentions purportedly raised by Saginaw in Paragraphs 17, 19, 20 and 24 reveals that Petitioner has not demonstrated or even alleged that the Midland



Plant is environmentally inferior to a specified alternative. In the absence of such a showing Petitioner may not raise economic issues in a NEPA context. Therefore these economically-oriented subject areas must be disallowed.

Saginaw again attempts to raise subject areas which may not be considered at the operating license stage in Paragraphs 30-32 of the Petition. The contentions constitute an improper attack upon the rules of the NRC, for those paragraphs seek to challenge the Commission's fuel cycle rule (Table S-3 to 10 C.F.R. §51.20(e)). Under the procedures set forth in 10 C.F.R. §2.758 a party may not challenge the validity of an NRC rule in a licensing proceeding. If that party seeks a waiver or exception of that rule under §2.758(b), he must demonstrate "special circumstances"; such a waiver or exception can be granted only in unusual and compelling circumstances. Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972). Furthermore, a showing of special circumstances requires more than a mere allegation thereof, Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-126, 6 AEC 399, 402 n.10 (1973). As Petitioner has done nothing more than make a generalized attack upon the subject of waste management, Paragraphs 30-32 do not state specific areas of interest in which Saginaw may assert contentions in this proceeding. The fact that Table S-3 is an interim rule does

not change any of the conclusions with respect to Saginaw's Petition.

The last area in which Petition seeks to raise matters not appropriate for consideration in the instant proceeding involves a reference to "accident mechanisms" in connection with their analysis in the Environmental Report (Petition, ¶'s 15-16). These contentions are so vague that it is impossible to discern what type of accident Petitioner is referring to. However, if Petitioner is alluding to a Class 9 accident, it is beyond cavil that such a contention is outside the scope of this proceeding, for it was established in Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975) that the NRC does not have to consider such an accident in a NEPA review.\*

B. Matters Which Are Offensive  
And Should Be Stricken

In addition to those contentions which improperly attempt to raise economic issues, certain portions of Saginaw's contentions contain matter which is highly inappropriate and offensive and should be stricken from the Petition.

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If Petitioner is alluding to a safety issue involving an accident possibility attributable to a design feature of the plant mandated by NRC regulations, then it is clear that Petitioner must show "special circumstances" involving the Midland Plant before such a contention may be considered. Consolidated Edison Co. of New York (Indian Point Unit No. 2), CLI-72-29, 5 AEC 20, 21 (1972). There must be a showing that the potential for occurrence of the accident passes some test of credibility.

Portions of Paragraphs 10, 11 and 12 cast aspersions upon the character and competence of the NRC Staff. Such unwarranted attacks upon the Commission's Staff are an affront to the dignity of the Commission and of this proceeding. Therefore, Licensee believes it is important that this Licensing Board should exercise its general power under 10 C.F.R. §2.718 and strike those portions of Paragraphs 10, 11 and 12 which are offensive. Such a procedure is authorized under Rule 12(f) of the Federal Rules of Civil Procedure which permits a court to strike from any pleading matter which is impertinent or scandalous. See Hohensee v. Watson, 188 F.Supp. 941 (M.D.Pa. 1959). As the NRC looks to the Federal Rules of Civil Procedure in conducting the agency's proceedings, this course of conduct is proper. Cf. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station). LBP-77-13, 5 NRC 489 (1977).

Throughout the Petition Saginaw also makes gratuitous and unsupported statements which are derogatory of Licensee in regard to such areas as QA/QC performance, Consumer Powers' financial, technical and managerial competence and Licensee's conduct in past hearings (Paragraphs 5, 11, 12, 13, 14, 18, 19, 21, 23). Petitioner resorts to vicious ad hominem attacks upon Licensee -- attacks which have their only bases in myth and outdated information -- rather than specify proper subject areas which have a basis in fact.



These comments should also be stricken under the authorities cited above.

C. Other Matters

In several instances Saginaw's contentions attempt to raise subject areas in a very vague fashion. Paragraphs 16 and 17 complain of a defective ACRS report, Paragraph 25 maintains that Licensee's Environmental Report is invalid for certain reasons and Paragraph 33 alludes to questions propounded to Consumers Power by the NRC Staff on May 22, 1978. As discussed briefly in Section II B, Saginaw attempts to raise the subject areas of Licensee's QA/QC performance as well as its financial and managerial qualifications in Paragraphs 11-14, 21 and 23.

Petitioner's contentions are not only so vague that they cannot withstand scrutiny by the Licensing Board, but they are also based, apparently, upon the state of facts that existed at the construction permit stage of this proceeding. Without discussing whether or not these areas, if well pled, would be proper for consideration, it is clear that as presently formulated these contentions are based on factors not pertinent to the operating license proceeding.

Saginaw's contentions concerning the Dow-Licensee contracts (Petition, ¶'s 18, 22, 24) are also improper, as

they are based upon a state of facts which does not exist. Contrary to Petitioner's assertions, Dow is not considering rejecting further involvement in the project. In a press release date June 9, 1978, Dow and Licensee announced that a tentative agreement has been reached on renegotiated contracts involving the Midland Plant. The contracts have been signed by Dow and will be presented to Licensee's Executive Committee for approval on June 21, 1978. In view of these developments, Saginaw's statements are completely untrue and have no relevance to the operating license hearing.

The only contentions in Saginaw's Petition which have not yet been dealt with involve the need for the power to be produced by the Midland Plant, an area which includes such things as energy conservation and reserve margins (Petition, ¶'s 26-29). Need for power is a proper area for consideration at the operating license stage, but only to the extent that changed or additional information developed since the construction permit stage is involved, 10 C.F.R. §§51.21, 51.23(e), 51.26(a). To the extent that Saginaw's Petition alleges new or changed information, it asserts a proper subject area upon which contentions may later be submitted.

III. PETITIONER IMPROPERLY SETS  
FORTH SOME "RESERVATIONS"

In a section entitled "Reservations," Saginaw states that "this petition to intervene if filed subject to the following reservations..." (Petition, ¶9). Leaving aside the question of the propriety of this procedure, Licensee objects to the substance of several of the attempted reservations.

First, Saginaw states that it intends to seek attorneys' fees and costs and that the failure to grant such fees and costs "may affect Petitioner's ability to participate," (Petition, ¶9a). In view of the fact that the Commission has issued a definitive policy statement which makes clear that the NRC will not give financial assistance to intervenors, Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI- 76-23, 4 NRC 494 (1976), and the fact that an Appeal Board has applied that rule to deny financial assistance in a previous Midland Plant case involving Saginaw's current counsel, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772 (1977), there is no basis for Petitioner to seek attorneys' fees and costs in the instant proceeding. Such a motion could only be considered frivolous and a waste of the time and resources of the Licensing Board. Additionally, Saginaw must be prepared to participate in this proceeding without Commission



assistance; an intervenor is not permitted to step in and out of participation in a particular issue at will, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390 (1975).

Saginaw also states as a reservation that it intends to amend its contentions from time to time (Petition, ¶ 9b). Consumers Power recognizes that contentions may be amended, but reminds Petitioner that this may be done only in accordance with NRC rules. After a specified point in the proceedings, contentions may be amended "only with approval of the presiding officer, based on a balancing of [certain] factors ..." 10 C.F.R. §2.714(a)(3).

Petitioner also alleges a "right to participate by offering evidence, cross-examining witnesses and seeking discovery" in connection with contentions of other parties or of the Licensing Board "in accordance with well established principles of law" (Petition, ¶ 9d). While the right to cross-examine as to contentions of another party was established in Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, affirming ALAB-252, 8 AEC 1175 (1975), and ALAB-244, 8 AEC 857 (1974), the cases cited by Saginaw, the Appeal Board expressly stated that it was not holding that the right went so far as to authorize one intervenor to introduce affirmative

evidence with regard to issues place in contest by another party. "On such an issue, in order to do more than engage in cross-examination of the witnesses called by other parties, the intervenor must seek and obtain leave of the Licensing Board to amend his intervention petition to assert the issue on his own behalf," Prairie Island, ALAB-244, supra at 869 n.17. See also Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). No decisions authorizing a right to discovery in such situations have been found. Similarly, no cases which permit any of the activities mentioned by Saginaw in the context of issues raised by the Licensing Board have been discovered.

Finally, Consumers Power questions Saginaw's Reservation (e) which attempts to reserve "the right to present legal arguments" on various subjects, including the constitutionality of the Price-Anderson Act (Petition, ¶ 9e). If Petitioner has contentions on these issues it should set them forth specifically as such, rather than disguising them as "reservations." Furthermore, Petitioner cannot challenge the validity of NRC regulations in this proceeding, but must proceed under the rules established in 10 C.F.R. §2.758, which Saginaw has not done in its Petition. See, e.g., Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-76-38, 4 NRC 435 (1976). As for the questions of the "comingling of promotional and regulatory responsibilities

in the NRC" and the constitutionality of the Price-Anderson Act, it is clear that Petitioner is bringing them to the wrong forum. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 518 (1973); cf. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC \_\_\_\_ (May 9, 1978).

IV. CONCLUSION

For the reasons set forth above Consumers Power believes that Saginaw has not properly set forth its interest in the proceeding and therefore requests that the Licensing Board deny the Petition to intervene or require Saginaw to amend it so as to state Petitioner's interest with particularity. Alternatively, the Licensing Board must limit Saginaw's participation, under the authority of 10 C.F.R. §2.714(f), to the subject area(s) described by Petitioner which are appropriate for consideration in this proceeding and in which Saginaw has made a proper showing of specificity pursuant to §2.714(a)(2). Lastly, Licensee requests that those portions of the Petition specified above be stricken as impertinent.

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June 19, 1978



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Before the Atomic Safety and Licensing Board

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(Midland Plant, Units 1 and 2) )

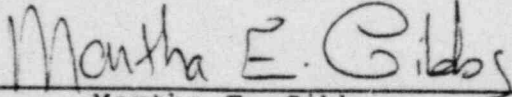
) Docket Nos. 50-329  
) 50-330  
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DESIGNATION OF PERSONS UPON WHOM SERVICE SHALL BE MADE

Consumers Power Company, pursuant to 10 C.F.R. §§2.708(e) and 2.712(b), designates the following persons to be served on its behalf with copies of all papers filed in the above-captioned proceeding:

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer Of Consumers Power Company To Saginaw Valley Nuclear Study Group's Petition For Leave To Intervene," "Answer Of Consumers Power Company To Petition Of The Attorney General Of The State of Michigan For Leave to Intervene," "Notice Of Appearance Of Michael I. Miller," "Notice Of Appearance Of Ronald G. Zamarin," "Notice Of Appearance Of Martha E. Gibbs," "Notice Of Appearance Of Judd L. Bacon," and "Designation Of Persons Upon Whom Service Shall Be Made," in the above-captioned proceeding have been served upon the following by deposit in the U.S. Mail, first class, postage prepaid, this 19th day of June, 1978:

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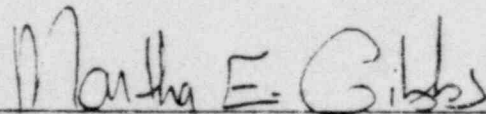
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