

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE TO SAGINAW VALLEY'S MOTION
TO STRIKE THE BRIEF OF CONSUMERS POWER COMPANY

Michael N. Wilcove
Counsel for NRC Staff

Dated: May 4, 1982

DESIGNATED ORIGINAL

Certified By

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I. INTRODUCTION

On April 14, 1982, Saginaw Valley Nuclear Study Group (Saginaw Valley) moved to strike the brief filed by Consumers Power Company (Consumers) in response to the Saginaw Valley brief in support of exceptions to the Licensing Board's Partial Initial Decision.^{1/}

For the following reasons, the Staff opposes Saginaw Valley's motion.

II. BACKGROUND

On December 22, 1981, the presiding Atomic Safety and Licensing Board issued a Partial Initial Decision determining that, notwithstanding its findings with respect to the conduct of certain parties in connection with the presentation of direct testimony, sanctions were neither

^{1/} The Staff received the motion on April 27, 1982, through the Commission's internal distribution system. At that time a copy was sent by the Staff to counsel for Consumers Power Company who had apparently not received the motion.

necessary nor appropriate. Saginaw Valley filed exceptions to the Partial Initial Decision on January 17, 1982, and a supporting brief on February 22, 1982. Dow, Consumers and the Staff filed briefs in opposition to Saginaw Valley's brief on March 22, 1982, April 5, 1982 and April 15, 1982 respectively. Saginaw Valley moved to strike Dow's brief on March 30, 1982 and Consumers' brief on April 14, 1982. Dow and Consumers filed responses in opposition to the motion to strike Dow's brief dated April 9, 1982 and the Staff filed its response on April 16, 1982. Consumers filed a response to Saginaw Valley's motion to strike Consumers' brief on April 28, 1982. Saginaw Valley's arguments in both of its motions are virtually the same.

III. DISCUSSION

A. Saginaw Valley argues that because it was the only party which filed exceptions in this proceeding and those exceptions do not challenge the findings of the Licensing Board, the other parties may not now challenge the Board's findings. As the Staff noted in its response to Saginaw Valley's motion to strike Dow's brief, that argument has no merit. The Appeal Board, in Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979) (Black Fox), clearly stated that:

It is correct that parties satisfied with the result on an issue may not themselves appeal. But if the other side appeals, they are free to defend a result in their favor on any ground presented in the record, including one rejected below.

See also, Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 fn.1 (1975) (Midland); Niagara Mohawk Power Corporation (Nine Mile Point Plant, Unit 2, ALAB-264, 1 NRC 347, 357 (1975) (Nine Mile Point).

The Licensing Board did not impose sanctions against the parties. The result of the decision was therefore in Consumers' favor as it was in Dow's. Now that Saginaw Valley has appealed the decision, Consumers is free to defend the result on any ground which the record supports, including one rejected by the Licensing Board.

Saginaw Valley attempts to distinguish both Black Fox and Midland. With respect to Black Fox, Saginaw Valley states in its motion that:

In ... [Black Fox], the Appeal Board held only that a non-appealing party may defendant [sic] a result in its favor "on any ground presented in the record, including one rejected below." Obviously that does not contemplate a wholesale assault on a decision from which a party has taken no appeal.

The Black Fox opinion contains no indication that the Appeal Board sought to limit the grounds upon which a successful party may defend the result of a licensing board's decision. Rather, Black Fox conforms to the Appeal Board's earlier decisions in Midland and Nine Mile Point without imposing any limitations.

With respect to Midland, Saginaw Valley stated that the Appeal Board's "willingness to allow non-appealing parties to challenge findings of fact or conclusions of law was predicated upon the Board's express provision in that case for reply briefs." However, the Midland Appeal Board stated that:

It is often the case that a party will be entirely satisfied with the result but, at the same time,

will not subscribe to some of the findings of fact or conclusions of law contained in the initial decision. In such circumstances, although normally precluded from taking an independent appeal, that party will be free to challenge any or all of those findings or conclusions in defending the result (should it be appealed by some other party which is seeking a different result). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, NRCI-75/4R 347, 357 (April 8, 1975). In the event that the appellee(s) should pursue this course here, the appellant(s) will have an opportunity to respond to the challenge by way of the reply brief(s).

2 NRC at 10. (emphasis added). This is the language of a general discussion of law, not of a special privilege granted to the parties in a particular case. Accordingly, Saginaw Valley's attempt to distinguish Midland from this proceeding fails.

The Staff also notes that Consumers' brief goes beyond challenging the findings of the Licensing Board. It specifically argues that even if the Board's findings were correct, sanctions would still be inappropriate. (See, e.g. Brief of Consumers Power Company in Opposition to Intervenor's Exceptions, pp. 13-15, 34-40.) While the Staff believes that none of Consumers' brief should be stricken, those sections of Consumers' brief which defend the Board's determination without challenging the findings are proper even by Saginaw Valley's standards.

B. Consumers, as did Dow, asserts that Saginaw Valley's lack of participation in this proceeding prevents it from taking exceptions to the Partial Initial Decision. As it did in its motion to strike Dow's brief, Saginaw Valley challenges that assertion. Saginaw Valley again argues that because 10 C.F.R. § 2.762 does not provide for a response to the briefs submitted in opposition to Saginaw Valley's brief, Consumers

should have made that assertion in a motion, thereby affording Saginaw Valley an opportunity to respond. As it did in its response to Saginaw Valley's motion to strike Dow's brief, the Staff notes that to the extent that Saginaw Valley feels the need to respond to the briefs submitted and can show good cause therefor, it has the right to seek leave of the Appeal Board to do so. Beyond that, Saginaw Valley's motion again states only an unsupported conclusion that there is no merit to the assertion that Saginaw Valley is precluded from appealing the Partial Initial Decision. It therefore provides no support for the motion to strike Consumers' brief and should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Staff opposes Saginaw Valley's "Motion to Strike the Brief of Consumers Power Company Filed In This Case Under Date of April 5, 1982" and urges that it be denied.

Respectfully submitted,



Michael N. Wilcove
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of May, 1982

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)	(Remand Proceeding)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SAGINAW VALLEY'S MOTION TO STRIKE THE BRIEF OF CONSUMERS POWER COMPANY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of May, 1982:

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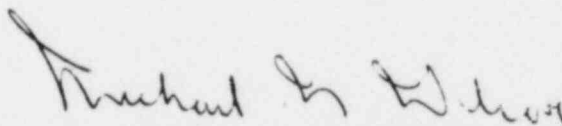
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