

April 9, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )

CONSUMERS POWER COMPANY )

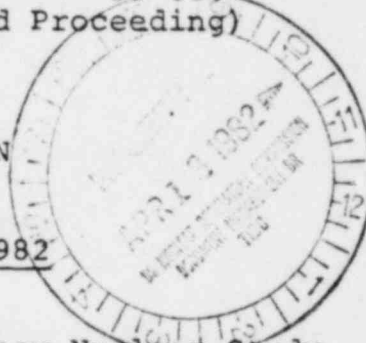
(Midland Plant, Units 1 and 2) )

Docket Nos. 50-329

50-330

(Remand Proceeding)

CONSUMERS POWER'S ANSWER TO MOTION  
OF SAGINAW VALLEY NUCLEAR STUDY  
GROUP TO STRIKE THE BRIEF OF DOW  
CHEMICAL COMPANY FILED MARCH 22, 1982



By motion dated March 30, 1982, Saginaw Nuclear Study Group ("Intervenor") moves to strike the brief of Dow Chemical Company submitted on March 22, 1982 in response to the brief and supporting exceptions taken by Intervenor. Consumers Power Company opposes Intervenor's motion.

Intervenor asserts two grounds for its request that the Appeal Board strike Dow's brief. First, Intervenor maintains that Dow improperly challenged some of the findings of the Licensing Board below. Second, Intervenor disputes Dow's assertion that Intervenor defaulted below, and therefore waived its right to take exception to the Licensing Board's partial initial decision (PID) of December 23, 1981. Both of Intervenor's arguments are faulty.

Contrary to the assertions of Intervenor, it is firmly established that in N.R.C. proceedings, a party who has not been adversely affected by the outcome of a decision

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may, nevertheless, except from findings of the licensing board once the decision has been otherwise appealed. Thus, the Appeal Board in Black Fox stated:

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.

Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 789 (1979). See also Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-282, 2 N.R.C. 9, 10 (1975).

Intervenor next takes issue with Dow's assertion that Intervenor is in default and, consequently, cannot take exception to the PID. In support of this argument, Intervenor references two footnotes in the PID (notes 70 and 86), and the Appeal Board's Order denying an extension of time to the "Mapleton Intervenors." See Appeal Board Order of January 18, 1982. Intervenor appears to infer from these citations that the Licensing Board and the Appeal Board have recognized Intervenor's continuing party status irrespective of Intervenor's defaults below. This argument is specious.

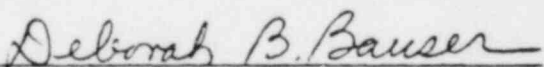
None of the citations to which Intervenor refers addresses in any fashion Intervenor's double default; rather, they are references to Intervenor's sporadic participation in the instant proceeding. In this case, Intervenor not only failed to participate in the remand proceeding or to file

a brief or proposed findings at the conclusion of the evidentiary hearing, but again failed to file proposed findings when given a second opportunity to do so by the Licensing Board. See PID, slip op. at 9-10. Consistent with the N.R.C.'s Rules of Practice, 10 C.F.R. § 2.754(b), the Appeal Board may find Intervenor in default and, accordingly, deny Intervenor's exceptions to the PID. See, e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-280, 2 N.R.C. 3, 4 at n.2 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 A.E.C. 857, 864 (1974).<sup>\*/</sup>

In summary, Consumers Power believes that Dow was entitled to take exception to the Board's findings of fact once Intervenor had appealed the PID, and that Dow's assertion that Intervenor waived its right to appeal is correct. Consumers therefore urges the Appeal Board to deny Intervenor's Motion to Strike the Brief of Dow Chemical Company.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

  
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<sup>\*/</sup> Intervenor also states that it ought to have the opportunity to respond to Dow's assertion that Intervenor waived its right to take exception to the PID. Without regard to the merits of this argument, Intervenor's Motion to Strike is such a rejoinder; yet Intervenor notably fails to explain in any way its double default below.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Consumers Power's Answer to Motion of Saginaw Valley Nuclear Study Group to Strike the Brief of Dow Chemical Company Filed March 22, 1982" were served this 9th day of April, 1982, by U.S. mail, first class, postage prepaid, upon the following:

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