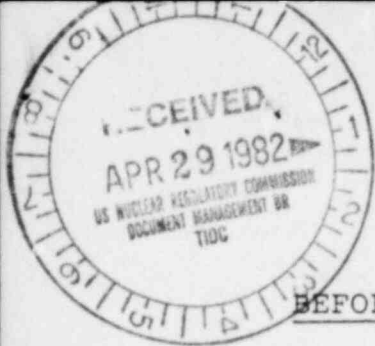


April 28, 1982



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
1982

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

APR 29 10:33

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 INTERVENOR TO STRIKE THE BRIEF OF
CONSUMERS POWER COMPANY FILED APRIL 5, 1982

The Saginaw Nuclear Study Group ("Intervenor") has filed a motion with the Appeal Board to strike the Brief of Consumers Power Company in Opposition to Intervenor's Exceptions, dated April 5, 1982. Consumers Power Company opposes Intervenor's motion.^{1/}

The grounds which Intervenor asserts in support of its motion to strike Consumers Power's brief are virtually identical to the arguments previously asserted by Intervenor in its motion to strike the brief of Dow Chemical Company, which Intervenor filed on March 30, 1982. Consumers Power's answer opposing Intervenor's earlier motion to strike addressed Intervenor's arguments; hence, we will only summarize here the position we have previously articulated. See Consumers Power Answer dated April 9, 1982.

^{1/} Attached to Intervenor's motion to strike is a certificate of service which indicates that a copy of Intervenor's motion was sent to Consumers' counsel by mail on April 14, 1982; however, to date no such copy has been received by us. On April 27, 1982, we did obtain a copy of the motion from NRC Staff counsel, which reflects NRC Staff's receipt of the motion on April 20, 1982.

8204300474

DS03
50/1

First, however, we cannot let stand Intervenor's repeated cry that Consumers and Dow are out of order in arguing the facts litigated below, since Intervenor is the appealing party, and Intervenor did not challenge any of the Licensing Board's factual findings. It is true that Intervenor fashioned its exceptions and supporting brief as challenges solely to the Licensing Board's conclusions of law, asserting that it took no exception to the Board's findings of fact for purposes of this appeal. In fact, however, if one examines the substance of Intervenor's arguments, strong exception is taken by Intervenor to a number of the factual determinations made by the Board.

Thus, for example, Intervenor states in its brief that Mr. Temple's testimony was "not open and not honest," and "materially incomplete and misleading," see Intervenor's Brief in Support of Its Exceptions at 6-7 and 9, findings which the Licensing Board did not make. Compare Partial Initial Decision ("PID") at 33-34 (Board refers to Temple recognition that insofar as the goal was to tell in complete detail everything that was going on, his testimony was not open, honest or consisting of all the relevant information; however, Temple did feel he had given complete answers to the questions asked.) Similarly, Intervenor repeatedly argues that Consumers deliberately undertook to suppress what they knew to be material information, and that Dow was knowingly coerced into joining this improper exercise.

See Intervenor's Brief in Support of Its Exceptions at 1, 3, 9, 13, 21, 23-24, 25. Yet nowhere in the PID are such factual assertions made; to the contrary, the Board clearly states that "there is no evidence any attorney deliberately intended to engage in unethical conduct, or to willfully deceive the Board." PID at 40.

In sum, Intervenor may have found it advantageous to couch its appeal in terms of taking exception only to the conclusions of law of the Licensing Board, and not to the findings of fact. But so characterizing its actions does not make it so; and the characterization does not conform to Intervenor's arguments in support of its exceptions.

As to Intervenor's assertion that Consumers Power cannot take exception to findings of fact of the Board since Intervenor did not challenge these findings, Intervenor simply is wrong. In Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 N.R.C. 775, 789 (1979), the Appeal Board made clear that it was perfectly legitimate for a party troubled by the findings made by a licensing board but not by the outcome of a decision, to challenge the findings once the case was otherwise appealed. In Black Fox, the applicant was thus permitted to challenge the Board's findings on the health effects of routine low-level emissions, even though the result reached by the Board was favorable to the applicant. 10 N.R.C. at 789-790. The rule well illustrated in Black Fox

is fully applicable here. See also Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-282, 2 N.R.C. 9, 10 n.1 (1975). While Intervenor begrudges the application of the 1975 Midland decision to this case, Midland specifically holds that where an appellee challenges findings or conclusions of the Board below "the appellant(s) will have an opportunity to respond to the challenge by way of the reply brief(s)." Contrary to Saginaw's assertion, the Midland decision was not predicated upon the express provision in that case for reply briefs. It was a general determination. While Intervenor complains now that allowing Consumers to challenge findings would be unfair to him, since he has had no opportunity to reply, this argument rings hollow where Intervenor never has and still has not requested such an opportunity.

In summary, notwithstanding Intervenor's interpretation of the law, Consumers Power believes it is entitled to take exception to the Board's findings of fact once Intervenor appealed the PID. Therefore, Intervenor's motion should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

Deborah B. Bauser

Gerald Charnoff, P.C.

Dean D. Aulick, P.C.

Deborah B. Bauser

Counsel for Consumers Power Company

1800 M Street, N.W.

Washington, D.C. 20036

(202) 822-1000

April 28, 1982

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
)	50-330
(Midland Plant, Units 1 and 2))	(Remand Proceeding)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Consumers Power's Answer to Motion of Intervenor to Strike the Brief of Consumers Power Company Filed April 5, 1982" were served this 28th day of April, 1982, by U.S. mail, first class, postage prepaid, upon the following:

Christine N. Kohl, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles, Esq.
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William C. Potter, Jr., Esq.
Fischer, Franklin, Ford, Simon & Hogg
1700 Guardian Building
Detroit, Michigan 48226

R. L. Davis, Esq.
Michigan Division Legal Dept.
Dow Chemical
Midland, Michigan 48640

William J. Olmstead, Esq.
William D. Paton, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Myron M. Cherry, Esq.
Cherry & Flynn
Three First National Plaza
Suite 3700
Chicago, Illinois 60602

Deborah B. Bauser

Deborah B. Bauser