

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant,
Units 1 & 2))

Docket Nos. 50-329 CP
50-330 CP

**MOTION TO STRIKE THE BRIEF OF
CONSUMERS POWER COMPANY FILED
IN THIS CASE UNDER DATE OF APRIL 5, 1982**



The Saginaw Nuclear Study Group (hereafter "Saginaw"), by its attorneys, hereby moves that the Atomic Safety and Licensing Appeal Board strike the "Brief of Consumers Power Company in Opposition to Intervenor's Exceptions" filed in this proceeding under date of April 5, 1982 and in support thereof states as follows:

1. The exceptions filed in this cause on behalf of the Saginaw Nuclear Study Group did not challenge any of the Licensing Board's findings of fact concerning the withholding of material evidence below. Rather, all of the exceptions dealt with the overall issue as to whether, given the findings of fact which the Licensing Board had made in this cause, the Board's legal conclusions and its failure to impose sanctions were appropriate. Br. In Support of Exceptions at p. 1.

2. Pursuant to 10 C.F.R. Sec. 2.762(b), Consumers was obligated to file a brief "in opposition to" Saginaw's exceptions. Consumers

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has not done so, but rather has undertaken to attack the Licensing Board's findings. That is improper, because: (a) Saginaw accepted those findings, and (b) Consumers has filed no exceptions of its own. Indeed, at page 2 of Consumers' Brief, Consumers expressly states that it intends to argue that "the Licensing Board substantially erred in its findings of fact" and also that "the Licensing Board erred in its determination and application of the governing legal standards."

3. Consumers has therefore filed a Brief, in effect, in support of exceptions to the Licensing Board's decision which Consumers never made, although it had full opportunity to do so. Particularly with regard to Consumers' lengthy attack on virtually all of the Licensing Board's findings of fact, that is an egregious violation of 10 C.F.R. Sec. 2.762(a). Pursuant to that Section, briefs are "confined to a consideration of the exceptions previously filed by the party." In this case, the only party who filed exceptions is Saginaw; and Saginaw's exceptions did not challenge the Licensing Board's findings of fact. To the contrary, Saginaw has expressly accepted those findings of fact for purposes of this appeal.

4. As Saginaw has noted in its March 30, 1982 Motion to strike the Brief filed herein by Dow Chemical Company, the filing of a Brief such as Consumers' works a real prejudice to both Saginaw and the Appeal Board. If Consumers' Brief is permitted to stand, this appeal will be in the intolerable posture of placing before the Appeal Board lengthy attacks on the Licensing Board's findings of fact, which will be totally un rebutted (because Commission rules do not provide for the filing of a reply brief by Saginaw), even though no

exceptions to the Licensing Board's findings of fact have ever been filed. That would, in effect, not only repeal the express requirement of 10 C.F.R. Sec. 2.762(a) that exceptions be filed, but reward Consumers for its failure to file exceptions, by permitting Consumers to indulge in one-sided and unrebuttable attacks on the Licensing Board's findings of fact. Surely such a distortion of the Commission's rules cannot be permitted. The two cases cited by Consumers in an attempt to justify its improper procedure here (Consumers' Brief at 2 n.2) fall far short of permitting a party who has filed no exceptions nevertheless to engage in a wholesale attack on the decision below under circumstances which preclude a reply. In Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 789 (1979), the Appeal Board held only that a non-appealing party may defendant 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. And in Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-282, 2 NRC 9, 10 n.1 (1975), the Appeal Board made it clear that its 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. Neither the Commission's rules nor the Board have made any provision for the filing of reply briefs in this case.

5. Consumers also argues that Saginaw may take no exceptions whatever. Consumers Brief at 1, 10-13. For the reasons set forth in Paragraph 5 at page 3 of Saginaw's March 30, 1982 Motion to strike the Brief of Dow Chemical Company, we believe both that Consumers' position has no merit and

that Consumers ought properly to have raised it, if at all, by Motion giving Saginaw an opportunity to respond.

Respectfully submitted,

SAGINAW VALLEY NUCLEAR STUDY GROUP,
One of the Intervenor other than Dow

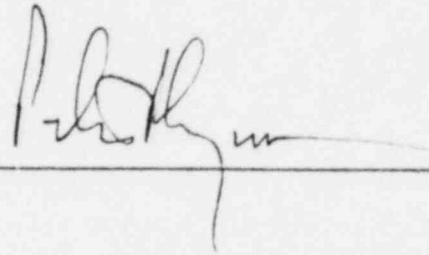
By: 

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PROOF OF SERVICE

I certify that a copy of the foregoing Motion to Strike the Brief of Consumers Power Company was served upon counsel for Consumers Power Company, Dow Chemical Company, the Regulatory Staff and the Secretary of the Nuclear Regulatory Commission (docketing) by mailing a copy of same, postage prepaid and properly addressed, on April 14, 1982. On the same date an original and three copies of the foregoing Motion were served upon the Secretary of the Appeal Board by postage prepaid and properly addressed mail.



A handwritten signature in dark ink, appearing to be "P. H. [unclear]", is written over a horizontal line.