

6/15/79

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING 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 IN
OPPOSITION TO CONSUMER'S MOTION
FOR SUMMARY DISPOSITION

On March 30, 1979, Consumers Power Company filed a Motion for Summary Disposition concerning the matters set forth in Part II of the Licensing Board's Order Concerning Remanded Issues, dated January 4, 1979. That portion of the Board's Order concerned the charges relating to the conduct of Consumers and its counsel in the construction permit suspension proceeding which the Board was directed by the Commission and Appeal Board to air and resolve whether or not the parties were themselves interested in pursuing the matter. (Unpublished Order dated November 6, 1978). On April 19, 1979, the NRC Staff filed a response opposing that Motion as premature. In its Order dated May 3, 1979, this Board deferred ruling on Consumers Motion until after completion of discovery and allowed the Staff and other parties until June 15, 1979 to file whatever response they deemed appropriate. The NRC Staff continues to oppose the motion.

The Commission's Rules of Practice (10 C.F.R. §2.749) permit the filing of motions for summary disposition concerning material facts as to which there

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is no genuine issue to be heard. This Licensing Board has repeatedly stated (most recently during today's 11 A.M. conference call) that it had not, as yet, preferred any charges. Rather, the forthcoming hearings are for the purpose of conducting an in-depth on-the-record hearing into the issues identified in the Board's May 3 and June 12 Orders. Since no charges are as yet identified and placed in issue, it is most difficult to determine whether the facts, as identified by Consumers, are disputed, much less material. For this reason alone, ruling on Consumers' motion at this point would be premature.

With the foregoing caveat in mind, the NRC Staff has no substantial disagreement with the facts stated by Consumers in paragraphs 1-10, 13-15, 18, 20-22, and 25-27. The NRC Staff does take issue, however, with certain aspects of the remainder of Consumers' statement of facts as to which it contends there is no material issue.

In paragraphs 11, 12 and 19, Consumers indicates that Consumers' attorneys at no time suggested tendering witnesses at the suspension hearings who did not have knowledge of Dow's Michigan Division position on the Dow-Consumers steam contract. The depositions of Mr. Nute (Tr. 132) and Mr. Hanes (Tr. 15, 44 and 64) put this statement in issue.

In paragraph 17, the decision of the Dow U.S.A. board is characterized as contrary to the Michigan Division position and as "authoritative". The NRC Staff believes this is a conclusion rather than a statement of fact and must await completion of this proceeding for final determination. 319

Paragraphs 23 and 24 concern whether Dow representatives wanted more information in the Temple testimony and whether Mr. Temple disclosed all relevant information in his direct testimony. Mr. Wessel's deposition, among others, raises factual matters which may be construed to dispute this conclusion. See Wessel Tr. 203. Further, while Consumers does not allege otherwise, it should be noted for the record that the NRC Staff did not state in its December 30, 1976 memorandum that Mr. Temple's direct testimony fully revealed the reasons "why" the Dow corporate decision was made, if Mr. Temple knew.

For the foregoing reasons, the NRC Staff opposes Consumers' motion for summary disposition.

Respectfully submitted,



William J. Olmstead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of June, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO CONSUMERS' MOTION FOR SUMMARY DISPOSITION" dated June 15, 1979 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 15th day of June, 1979.

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