UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF CONSUMERS POWER COMPANY

On May 13, 1977, the Atomic Safety and Licensing Board ("Board") ordered that Findings of Fact and a Brief for the suspension portion of this proceeding be filed by Consumers Power Company ("Licensee") by June 13, 1977 (Tr. 6164-6168). This brief will set forth Licensee's position on the legal standards governing this proceeding.

I. Introduction

The Nuclear Regulatory Commission ("Commission") has ordered that this Board be convened to (1) consider whether the Midland construction permits should be continued, modified or suspended pending the completion of the reopened proceedings mandated by Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976) and (2) conduct the remanded hearings on the remanded issues.[1]

1 Orders of the Commission issues August 16, 1976; September 14, 1976, November 5, 1976 and April 1, 1977.

The issues the Court of Appeals remanded for additional consideration by the Commission were (1) energy conservation as a partial or complete alternative to plant construction, (2) clarification of a report by the Advisory Committee on Reactor Safeguards ("ACRS"), (3) environmental costs of waste disposal and reprocessing ("fuel cycle issues"), and (4) restructuring the cost-benefit balance in view of the reconsideration of the fuel cycle and energy conservation issues. The court then went on to state:

> As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities. 547 F.2d at 632.

As originally mandated by the Commission in its General Statement of Policy of August 13, 1976, this Board was to address only the question of continuation, modification or suspension of the construction permits pending effectiveness of an interim fuel cycle rule. Subsequently, on September 14, 1976, the Commission directed the Board to also consider the other four remanded issues. As a result, the Board on September 21, 1976 scheduled a hearing on the question of suspension for October 5, 1976 at which oral testimony would be heard. On October 4, 1976, pursuant to a request by Intervenors other than Dow ("Intervenors"), the Board rescheduled the hearing for November 16, 1976, and by a subsequent order, required the submission of written testimony on November 5, 1976. On November 5, 1976 the

Commission issued an order which removed the fuel cycle issue from the proceeding, but directed that the Board continue its consideration of the remaining issues.[2] On November 9, 1976 Intervenors again requested a continuance, and on November 10, 1976 the Board rescheduled the hearing for November 30, 1976. In the interim, the Licensee filed with the Commission an Environmental Report Supplement on October 26, 1976.

The hearing commenced on November 30, 1976, ran for four days, and was adjourned until December 14, 1976, at which time a prehearing conference was held. Due to scheduling difficulties, the hearing did not recommence until January 18, 1977; four days of hearings were then held, after which the Board adjourned until January 31, 1977. Ten days of hearings were held, starting on that date and continuing through February 11, 1977, at which time the Board adjourned until February 15, 1977. After two days of hearings, the Board adjourned until March 7, 1977. Due to requests by Intervenors, however, the hearings did not resume until March 21, 1977, at which time four days of hearings were held.

On March 14, 1977, the Commission promulgated an interim fuel cycle rule (42 F.R. 13803). In an order issued April 1, 1977, the Commission directed the Appeal Panel to superintend the application of that rule in designated licensing cases (not including Midland) as well as in any other proceeding in which the fuel cycle issues was before

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2 Order of the Commission issued November 5, 1976.

it. CLI-77-10, NRCI-77/4 (April 1, 1977). The Appeal Panel dealt with the designated cases in ALAB-392, NRCI-77/4, (April 21, 1977), but an Appeal Board issued a separate memorandum and order in Midland. That order instructed this Board to consider the fuel cycle issue, in terms of the interim fuel cycle rule, in addition to the other matters pending before it; ALAB-396, NRCI-77/5 (May 4, 1977).

On May 9, 1977, the hearing recommenced and the last five days of the hearing took place. In all, thirty days of hearings were held in which a record of more than 6,200 pages was compiled.

While these proceedings were being conducted, the United States Supreme Court granted certiorari in the Aeschliman case. Consumers Power Co. v. Aeschliman, 45 U.S.L.W. 3570 (Feb. 22, 1977). The case is now pending before that Court and will be heard in the Fall 1977 term. As a result of the Supreme Court's action, Licensee filed, on March 4, 1977, a motion for a stay of this proceeding with the Commission, since the granting of certiorari raises the possibility that further proceedings may be either unnecessary or have to be conducted within a different time period with different prevailing conditions. On April 29, 1977, the Appeal Board, acting on behalf of the Commission, denied that motion in ALAB-395 stating:

> In any event, the decision whether or not to continue the administrative proceeding rests, in our judgment, with the court of appeals or the Supreme Court, forums which are open to Consumers Power Company. Unless the former recalls its mandate or the latter stays its effect, we deem it improper for us to call a halt to the pending proceedings. (Slip. Op. at 23.)

Thereafter, Licensee filed on May 24, 1977 a motion for recall of the mandate with the District of Columbia Court of Appeals. That motion has not yet been decided.

It is clear from the complex procedural history of this proceeding, that the hearing on whether to continue to modify or suspend the construction permits for Midland has its sole genesis in the hearing on the issues remanded by the Court of Appeals. Consequently, Licensee believes that the legal standards to be applied to the suspension hearing must be considered in light of the legal standards applicable to the hearing on the remanded issues. This position is reinforced by two facts. One, the issues which shape the suspension hearing must be defined and limited by the issues remanded by the Court of Appeals. (See Section II.A., infra.) Two, as pointed out in Licensee's Motion to Specify Issues filed January 13, 1977,[3] since the Board must consider the equitable factor of probability of success on the merits in reaching a decision on the suspension question, it initially must address the issues remanded by the Court of Appeals in this phase of the proceeding. Therefore, this brief will address the legal standards applicable to both the hearing

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3 That motion has yet to be ruled upon by this Board. Since Licensee's position on the legal standards set forth in that motion have not changed materially, large portions of this brief were taken from that filing.

on the remanded issues and the suspension hearing. Since the issues in the suspension hearing flow from the issues to be considered at the remanded hearing, the legal standards for the remanded hearing will be addressed first.

II. Hearing On The Remanded Issues

A. Jurisdiction of the Board

The Court of Appeals decision remanded to the Commission the five issues referred to on page 2 supra; thus, the Commission's authority on remand is limited to those issues. The principle that a tribunal's authority on remand is circumscribed was established by the United States Supreme Court as early as 1838 and remains the law of the land today.[4] That Court stated, in referring to a lower tribunal, that it:

> cannot vary it [the Supreme Court's decree], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.[5]

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4 In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1885); Sibbald v. United States, 37 U.S. 488, 492 (1838); Moore, Federal Practice ¶59.16 at 59-294, 59-295 (2d ed. 1974).

5 In re Sanford Fork & Tool Co., supra, note 4 at 255 (Emphasis supplied.) (Citations omitted.)

B. Scope of the Hearing on the Remanded Issues

The Court of Appeals did leave to the Commission's discretion the procedure by which the remanded issues were to be examined. As previously stated, the Commission determined that while the fuel cycle issue was to be covered by a generic hearing, the interim values which it promulgated were to be applied to this case and were to be covered by this Board in a hearing on the record.[6] The hearing on the remanded issues will be governed procedurally by the Commission's Regulations and applicable case law. It will necessarily require the filing of a Draft and Final Supplemental Environmental Statements. These Environmental Statements must include a revised cost-benefit analysis based on a review of only those issues remanded by the Appellate Court.[7] Thus, with regard to the hearing on the remanded issues, the only remaining question is the scope of the inquiry which the Board must make on those issues.

1. Energy Conservation

The Appellate Court stated that, with regard to the demand for electricity produced by the plant, energy conservation must be considered as an alternative, which, if implemented, might result in (1) no need for a generating

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6 See CLI-77-10, NRCI-77/4 (April 1, 1977) and ALAB-396, NRCI-77/5 (May 4, 1977).

7 See text accompanying notes 4 and 5, supra.

facility or (2) a need for a smaller generating facility.[8] To address such alternatives the Board must consider reasonable potential energy conservation measures and then determine whether the need for electricity to be produced by Midland can be eliminated or reduced by implementation of such measures. If the Board finds that the need for the electricity has been established, and that the need cannot be eliminated or substantially reduced by such energy conservation measures, it must then look to how those needs may be met.[9] This will require an analysis of alternative generating sources. The "need for power" section of the original Environmental Statement must therefore be revised to reflect current conditions regarding (1) the need for electricity to be produced by the Midland facility, factoring in the effects of energy conservation, and (2) alternative generating sources which may be available to meet these needs.[10]

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8 It should be noted that the Midland facility will generate both electricity for Licensee's integrated system and steam for the Midland chemical plant complex of The Dow Chemical Company.

9 Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station) ALAB-179, RAI-74-2 at p. 173 (February 28, 1974).

10 Since the major federal action before the Board is the licensing of a dual purpose facility, the electric generating alternatives must be considered in conjunction with steam generating alternatives.

Licensee's Findings of Fact ("Findings") at paragraphs 15 to 59 establish that the need for the power which will be generated by Midland has already been extensively and intensively examined in these proceedings. The results of this examination clearly show that (1) Licensee has adequately factored experienced and anticipated energy conservation effects into its need for power projections and (2) the power to be generated by Midland is crucial to the maintenance of reliable service to Licensee's customers in the early 1980's. Additionally, paragraph 106 establishes that Midland is the preferred alternative to supply that energy demand.

With regard to energy conservation issues, it is clear that Intervenors' "end product" argument is not an appropriate issue to be considered in this proceeding. In its discussion of Intervenors' position on "end product", the Court of Appeals in Aeschliman stated:

> Unfortunately, discussion of energy conservation by both Licensing and Appeal Boards was obscured by conflating two separate arguments advanced by the intervenors. In addition to arguing NEPA required consideration of energy conservation alternatives, the intervenors argued that the alleged "benefits" of the plant should be discounted by the environmental harm which would be done by the products manufactured from the power generated. In particular, the intervenors focused on certain alleged carcinogens produced by The Dow Chemical Co., a large potential customer of the Midland plant. See, e.g., Saginaw Environmental Contentions ¶34, III J.A. 118. This "end product" argument is not pressed on appeal. 547 F.2d 626 n. 8. (Emphasis supplied.)

Thus, since (as shown by the text accompanying notes 4 and 5, supra) the Board is limited to the issues remanded by the

Court of Appeals, the "end product" argument is not an issue which may be considered in this proceeding.

2. Dow

The Court of Appeals' decision also requires that changed circumstances regarding Dow's need for process steam from Midland and Dow's intention regarding continued operation of its existing fossil fuel facilities be taken into account in recalculating costs and benefits. Dow's need for process steam must therefore be described in the revised Environmental Statement. Once Dow's need is established, alternative steam generating facilities must be considered. As set forth in note 10, supra, these alternatives must be considered in conjunction with alternative electric generating facilities. The Court also required a reconsideration of Dow's intended operation of its existing fossil fuel facilities. That issue must also be discussed in the revised Environmental Statements.

With regard to Dow's need for process steam, it is Licensee's position that once a need for the process steam has been established, a contract has been shown to exist whereby the Midland facility will supply that need and both Licensee and Dow have stated that it is their corporate intent to honor that contract and use Midland as the source of process steam for Dow, the Board may not inquire further. Thus, the Board must limit the evidentiary presentation on this issue to the need for the steam and the parties' present intent with regard to the source of the steam. The relevant and material

issue is the corporate position of the parties with regard to the contract, not the personal opinions of individuals within the corporations. Although this position is referred to as one of "relevance" and "materiality", it should be noted that this question is really one of substantive law. Professor Wigmore states, for example, that whether a person's intention or opinion is admissible depends upon whether his actions would, under substantive law, bind either him or the entity for which he is purportedly acting. If his actions would be legally binding, then questions on his intentions or opinions are admissible. Conversely, if his actions were not legally binding, his opinions or intentions are inadmissible. VII Wigmore on Evidence § 1967 at 107 (3rd ed. 1940). Since substantive law holds that, unless authorized by the corporation, an individual's opinions or acts cannot bind the corporation, National Surety Corporation v. Inland Properties, Inc., 298 F.Supp. 173 (E.D. Ark. 1968), aff'd., 416 F.2d 457 (8th Cir. 1969), it is clear that individual opinions or intentions as to a corporate position are inadmissible in this proceeding, unless the individual is one whose acts can legally bind the corporation with regard to the contract in question. This principle was recognized by an NRC Appeal Board in Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-367, NRCI-77/1, p. 92 (January 25, 1977), when it held that "the Advisory Council on Historic Preservation is entitled to have its considered, formal and final opinion on the matter conveyed to

this Commission, rather than any preliminary attitudes contained in correspondence which might have reflected only the opinion of staff members . . ." NRCI-77/1 at 115. In its Supplemental Interrogatory Response of February 28, 1977, Dow recognized this point when it stated that Dow's corporate position (to fulfill its contractual obligations with Licensee) remained unchanged and that no individual at Dow had the authority to change that decision.

As is shown by Licensee's Findings at paragraphs 50 to 59, no party has disputed that Dow needs a reliable source of process steam in the early 1980's. Additionally, paragraphs 55 to 58 clearly establish that Dow intends to fulfill its contract with Licensee to purchase steam from Midland as soon as Unit 1 goes into commercial operation.

Counsel for Intervenors, on the other hand, has stated that he intended to prove (1) that the contracts between Dow and Licensee are invalid or (2) that Dow will eventually back out of its contracts with Licensee, and, therefore, the construction permits held by Licensee should be revoked. Such inquiries are not only improper, but the evidence produced in these proceedings to date is contrary to both assertions.

With regard to the question of whether the Dow-Licensee contracts are valid, it is Licensee's position that neither this Board nor the Commission have any jurisdiction to determine the validity of those contracts. It is a fundamental principle of administrative law that "[w]hen Congress

passes an Act empowering agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." Stark v. Wickard, 321 U.S. 288, 309-10 (1944), citing Marbury v. Madison, 5 U.S. 137 (1803). This precept has been applied specifically to the Commission and its predecessor agency in two decisions, Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975) and Cotter Corp. v. Seaborg, 370 F.2d 686 (10th Cir. 1966). In Cotter, the Court of Appeals stated that "[t]he Atomic Energy Act is the source of the Commission's power to act in a governmental capacity", 370 F.2d at 691. Significantly, the Atomic Energy Act of 1954, as amended, does not grant the Commission the power to determine the validity of contracts. 42 U.S.C. § 2201. The Supreme Court has confronted the issue of whether a federal agency has the authority to determine the validity of a contract and has concluded that unless a federal agency is specifically granted authority by Congress to determine the validity of a contract, it may not do so. J. I. Case Co. v NLRB, 321 U.S. 332, 340 (1944). See also, 73 C.J.S. Public Administrative Bodies and Procedure, § 68 (1951). The National Environmental Policy Act (NEPA) likewise does not confer jurisdiction since its policies and goals are merely "supplementary to those set forth in existing authorizations of Federal Agencies", 42 U.S.C. § 4335. The District of Columbia Court of Appeals has held that to determine an agency's jurisdiction under NEPA, a court must first look to the agency's empowering legislation to determine if primary jurisdiction exists. That

Court further held that if primary jurisdiction over the matter does not exist, then NEPA cannot grant jurisdiction over that matter to the agency. Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972). Moreover, as is shown in paragraphs 55 to 58 and 79 of Licensee's Findings, both Licensee and Dow are continuing with this project in order to meet their contractual obligations of supplying and purchasing the steam to meet Dow's needs from Midland. Finally, the contracts between Dow and Licensee are relevant to this case only as evidence of the intent of the parties to supply Dow's established need for process steam from Midland. Consequently, since the parties have each affirmed their corporate intent to meet their contractual obligations, the contracts would stand as evidence of the intent of the parties, whether or not they were valid and enforceable in a court of law, which they clearly are.

Having established that the Board may not determine the validity of contracts, the only remaining question is what matters the Board may inquire into as a result of the effect of the contracts. Again, the Supreme Court has prohibited an agency from considering the effect of a contract except as to its effect on matters within the agency's jurisdiction. J. I. Case Co. v. NLRB, supra, at 340. While, by virtue of the contractual relationship between Dow and Licensee, Dow's need for process steam and its intentions with regard to continued operation of its existing fossil fuel units are matters which may be considered by the Commission in making

its jurisdictional determination of whether to license the plant (just as the Commission would consider them if Dow had itself applied for a license to construct a nuclear plant in order to produce steam), these are the only matters which the Commission, and therefore this Board, may consider as a result or "effect" of the contractual relationship. Moreover, these are the only issues remanded by the Court of Appeals. Thus, the Board is limited to taking evidence on these two issues. As pointed out previously, no party to this proceeding has disputed Dow's need for process steam in the early 1980's. Additionally, paragraph 59 of Licensee's Findings establishes that Dow intends to retire its currently operating fossil fuel facilities as soon as it obtains a reliable source of process steam.

With regard to Intervenors' second point, that the Board should allow evidence on whether Dow may attempt to back out of its contracts in the future, it is clear that such testimony is both irrelevant and immaterial. Intervenors' assertion to the contrary is apparently based on the tortured reasoning that this Board should ignore the present intent of Dow and Licensee to fulfill their contractual obligations and make some sort of predictive finding as to their future behavior. In some instances administrative agencies, including the NRC, may base their decisions on predictions of future events. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station) ALAB-217, RAI-74-7 (July 11, 1974);

Market Street Ry. Co. v. Railroad Comm'n of California, 324 U.S. 548 (1945). Indeed, the Atomic Energy Act itself requires that predictions about the public health and safety be made when facility licenses are acted upon. But in all such instances, the predictions themselves are the ultimate facts required to be determined by the agency's enabling legislation or are matters peculiarly within the expertise of the agency. Neither of those circumstances is present with respect to a prediction regarding Dow's behavior. Neither the Board nor the agency has special expertise with respect to commercial relationships between large, publicly-held corporations, nor is a prediction as to Dow's conduct in the future an ultimate fact which this Board is required to find under the Commission's enabling act or its regulations. Furthermore, any predictive finding that Dow will withdraw from the Midland project would be contrary to the evidence presented in this proceeding. Licensee's Findings at paragraphs 50 to 59 establish that Dow must have a reliable source of steam by th end of 1984 and that it is relying on Licensee, pursuant to its contract, to supply that steam from Midland. Further, paragraph 79 establishes that Licensee's scheduled dates for commercial operation of Midland in 1981 and 1982 are reasonable and that Licensee will have the necessary capital to complete the plant on schedule. Thus, any ultimate factual finding that the construction permits should be revoked, based on the Board's prediction about Dow's future behavior,

would be contrary to the facts in this proceeding and would therefore be improper as not supported by substantial evidence. See Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Comm'n, 310 F.2d 606 (9th Cir. 1962); Morgan v. United States 298 U.S. 468 (1936).

3. Fuel Cycle Issues

Since the Commission has determined that the fuel cycle issues are to be handled on a generic basis, this Board is only required to factor the values set forth in the interim rule into the cost-benefit analysis for Midland. 10 CFR 2.758; Commission Memorandum and Order, CLI-77-10, NRCI-77/4 (April 1, 1977); and ALAB-396, NRCI-77/5 (May 4, 1977). Those values and their impact are currently before the Board (Board Exhibit 4 at 5.9-1). In view of the enormous economic advantage of Midland, it is readily apparent that the Commission's initial guidance is particularly appropriate for this proceeding:

> The values in the old rule and those in the interim rule are not substantially different, and therefore, although conceivable, it appears unlikely that the use of the interim rule values rather than those in the original rule could tilt a cost-benefit analysis. CCH Nuclear Reg. Rep. ¶30,171.01 at p. 27,924.

4. Cost Benefit Analysis

Once the remanded issues of energy conservation, the fuel cycle issues, Dow's need for process steam and its intention with regard to continued operation of its existing fossil units have been addressed, the results must be factored into a revised cost-benefit analysis. The original cost-

benefit analysis must be used as the basis for this review and changes thereto must be limited to the items impacted by the remanded issues set forth above.[11] As previously noted, each of these issues has already received a detailed review which establishes that the previous cost-benefit analysis will not be affected.

5. ACRS

The final issue remanded by the Appellate Court to be considered by this Board, clarification of the Midland ACRS letter, stands on a somewhat different footing than the other issues, since it will not necessitate revisions to the Environmental Statements. Indeed, after the ACRS clarified its original Midland letters on December 1, 1976,[12] the issue of the resolution at Midland of the expressed concerns received a detailed review. See Licensee's Findings at paragraphs 63 to 77.

In determining the scope of this issue, it is Licensee's position that the Board is limited to the eleven items set forth by the ACRS and that contentions may be sub-

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11 See text accompanying notes 4 and 5, supra.

12 The ACRS had issued two previous letters dated November 18 and 23, 1976 on this matter. However, the December 1, 1976 letter clarifies the previous correspondence and will be referenced by Licensee.

mitted on only those eleven items.[13] The only possible exception to this limitation emanates from the public health and safety responsibilities of the Commission. This exception relates to "significant safety-related issues," for which the record may be reopened so that they may be examined under the rule established in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-167, 6 AEC 1151 (1973). This standard is not easily met, however, as the Appeal Board demonstrated in Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404 (1975). In that case the NRC Staff revealed two new unresolved generic safety issues. However, the Appeal Board did not find it appropriate to direct the licensing board to examine those issues in the course of a supplemental hearing being held to consider construction permit amendments, stating:

> In short, it does not appear to us that the emergence of the new generic concerns amounts to the kind of extraordinary development which, under the standards established in Vermont Yankee, ALAB-167, supra, might call for a reopening of the record of the construction permit proceeding.14

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13 See the text accompanying notes 4 and 5, supra. It should also be noted that the doctrine of res judicata may be applicable to contentions relating to the ACRS issues, since the Court of Appeals did not require further hearings on them, and they may have been known to, or litigated by, the parties at the time of the original hearings or in the suspension phase of this proceeding.

14 Georgia Power Company, supra, at 413.

The argument that the items should be considered because there was a hearing scheduled for another purpose in which the generic safety issues could be ventilated did not persuade the Appeal Board. "[T]hat there may be an already available forum does not mean that issues not ripe for adjudicatory consideration should nonetheless now be heard."[15] Thus, unless a party can meet the burden imposed by Vermont Yankee and Vogtle, contentions relating to the ACRS issue must be limited to the eleven items set forth in the December 1, 1976 letter to the Board.

Even if the Board should reject this legal approach, the ACRS issues have been fully discussed and ventilated already in this proceeding. As demonstrated in Licensee's Findings at paragraphs 76 to 77, not only have the eleven items identified by the ACRS been reviewed, an analysis of each generic topic raised by the ACRS through 1976 has been identified and its applicability to and resolution at Midland has been reviewed.

III. Hearing on the Suspension Question

A. Jurisdiction of the Board

Once the examination of legal standards applicable to the hearing on the remanded issues is completed, the Board must turn to an analysis of how those standards relate to the legal standards applicable to the suspension hearing. It should be clear from the foregoing discussion that this

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15 Ibid.

"suspension" hearing is atypical. Each of the issues remanded by the Court of Appeals has already received extensive analysis by the parties and the Board in this proceeding. Thus, the Board has available a much greater amount of information upon which to make a decision than a Board would have in a typical suspension hearing. This fact must be taken into account when analyzing the factors upon which this Board must make a decision. This Board must also keep in mind the reason the Commission provided this Board with the discretion to hold a suspension hearing.

The reason is rooted in the Court of Appeals decision in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). That decision held that where a NEPA analysis had not been done by the Commission, it could not continue to license new projects or allow continued construction and operation of those projects which had been licensed after the date of the enactment of NEPA, until such a review, including a cost-benefit analysis, had been completed. Faced with this requirement, the Commission promulgated Appendix D to 10 CFR Part 50. This regulation, as expanded by the Court of Appeals in Coalition for Safe Nuclear Power v. AEC, 436 F.2d 954 (D.C. Cir. 1972) and subsequently interpreted by the Commission in Toledo Edison Electric Company (Davis Bessie Nuclear Power Station), 4 AEC 912 (1972), authorized a review of previously issued licenses by the Commission's Staff to determine whether

it was likely that the ultimate cost-benefit analysis would favor construction or operation of the project. The results of this review were then applied to the project until a complete cost-benefit analysis could be provided. In addition to this review, the Commission offered interested parties an opportunity to contest its findings at a public hearing. This approach was approved by the Court of Appeals in Coalition for Safe Nuclear Power v. AEC, supra. Likewise, in the instant proceeding, even though a NEPA analysis had previously been completed, there was some question as to whether the original cost-benefit analysis could be revised within a short period of time to reflect the results of the review of the remanded issues. If such a review could be accomplished prior to or soon after the conclusion of the suspension hearing, there would be no need for such a hearing. Since the Commission did not have information as to when the review and revised cost-benefit analysis would be completed, it left the question of whether to hold a suspension hearing to this Board. Thus, it follows that when a suspension hearing is held, the revised cost-benefit analysis is not an issue to be considered by the Board. Instead, this Board must consider the remanded issues within the confines of the equitable factors delineated by the Commission and reach an interim decision on whether the construction permits should be modified, suspended or continued pending completion of the revised cost-benefit analysis. This interim decision by the

Board is to be reached by balancing the equitable factors set forth by the Commission and will then remain in effect until a revised cost-benefit analysis can be completed.

The equitable factors set forth by the Commission were enumerated as follows:

> It is the Commission's understanding that resolution of this question turns on equitable factors well established in prior practice and case law. Such factors include whether it is likely that significant adverse impact will occur until a new interim fuel cycle rule is in place, whether reasonable alternatives will be foreclosed by continued construction or operation; the effect of delay; and the possibility that the cost/benefit balance will be tilted through increased investment. See Coalition for Safe Nuclear Power v. AEC, 436 F.2d 954 (D.C. Cir. 1972); San Onofre, Units 2 and 3, 7 AEC 986, 996-97 (June 1974). General public policy concerns, the need for the project, the extent of the NEPA violation, and the timeliness of objections are also among the pertinent considerations. See, e.g., Conservation Society of Southern Vermont Inc. v. Secretary of Transportation, 403 F.2d 927, 933-34 (2d Cir. 1974), vacated on other grounds and remanded, 423 U.S. 809 (1975); Greene County Planning Board v. FPC, 455 F.2d 412, 424-425 (2d Cir.), cert. denied, 409 U.S. 849 (1972); City of New York v. United States, 337 F.Supp. 150, 163 (E.D. N.Y.) (three-judge court).16

Within this frame of reference, the scope of the issues remanded by the Court of Appeals and their relationship to the factors set forth by the Commission to resolve the suspension question may be analyzed. The factors set forth by the Commission themselves become issues in terms of evidentiary presentation, as well as findings. Certainly, the

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16 NRC General Statement of Policy, August 13, 1976 at p. 9.

remanded issues are pertinent to some of these factors, but as to others, the factor itself becomes an issue unrelated to the remanded issues. Therefore, this analysis with regard to the suspension hearing will track the factors set forth by the Commission rather than the issues remanded by the Court of Appeals.

B. Scope of the Hearing on the Suspension Question

1. Significant Adverse Impact

The first factor set forth by the Commission is whether it is likely that significant adverse impact will occur until an initial decision is reached on the issues remanded by the Court of Appeals. It is clear that the impact to be evaluated is the environmental impact from the construction which will occur during the period it takes to reach an initial decision. As demonstrated by Licensee's Findings in paragraphs 12 to 14, this impact is minimal.

2. Need for the Project

Another factor set forth by the Commission is the "need for the project". This factor is directly related to the factor of effect of delay since some of the costs caused by delay, such as purchased power, will depend on when the electricity and steam from the project are needed. This factor is also tied to the remanded issue of whether implementation of energy conservation measures might decrease

the projected electrical need for the project. Finally, evidence as to Dow's need for the process steam to be supplied by Midland must also be considered. Licensee's position on the scope of this inquiry has been set forth at pp. 10 to 16, supra. As pointed out in paragraphs II.B 1 and 2, supra, each of these issues has been considered in detail and it is clear that both the steam and electricity from Midland are needed in 1981 and 1982.

3. Effect of Delay

A third factor set forth by the Commission is the "effect of delay". The "effect of delay" factor is not directly related to any of the remanded issues. Instead, findings must be made on the financial impact on Licensee, and ultimately, its customers and shareholders, that would result from the delay, as well as the impact on the economy of Licensee's service area and the socio-economic impacts of delay on the Midland community. Licensee's Findings at paragraphs 78 to 94 establish that the impact of delay would adversely affect Licensee, its customers and shareholders, as well as the economy within its service area and the Midland community. Finally, it is also clear from Licensee's Findings at paragraph 95 that a suspension might well put Dow in a position where it has no choice but to choose another alternative to supply its need for steam -- an alternative which would be inferior and therefore, less preferable, from Dow's point of view, than purchasing steam from Midland.

4. Foreclosure

A fourth factor set forth by the Commission is "whether reasonable alternatives will be foreclosed by continued construction or operation". In addressing this factor, the first decision of the Board must be to identify the items for which alternatives must be considered. Since the purpose of a suspension hearing is to make a preliminary determination pending a full hearing[17] and since the full hearing is limited to the issues remanded by the Court of Appeals,[18] it is clear that the items for which alternatives must be considered are those which are raised by the remanded issues.[19]

a. Energy Conservation

The alternatives which relate to implementing energy conservation measures that might eliminate or substantially reduce the demand for electricity include building the plant as planned, building a smaller plant or building no plant at all. As previously noted at pp. 7 to 10, supra, energy conservation and its impact on Licensee's projected

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17 See pp. 20 to 23, supra.

18 See text accompanying notes 4 and 5, supra.

19 It should be noted that under this factor the alternative could already be foreclosed. Evidence and Findings reflecting this fact would be proper since if an alternative is already foreclosed, continued construction could not have an impact on its implementation.

electrical loads have been considered in detail and it is clear that even after taking the effects of energy conservation into account, Midland is needed in 1981 and 1982 to provide Licensee's customers with reliable electrical service. Consequently, building a smaller plant or building no plant at all are not feasible alternatives to the construction of Midland.

b. Dow

The alternatives to Midland supplying process steam to Dow include Dow either building new steam generating units or continuing to use its existing units. Alternatives to continued operation of Dow's fossil fuel facilities include continued operation, modificatiions to or shutting down such facilities.[20] As shown by Licensee's Findings in paragraphs 62 and 106, the most economical and feasible course of action is to supply Dow with process steam from Midland. However, continued construction at Midland will not foreclose Dow from building an alternative facility.

c. ACRS

The alternatives which must be considered as a result of the clarified ACRS letter are somewhat more difficult to ascertain since the ACRS item is safety-related and the factors listed by the Commission have previously been applied only to environmental matters. However, Commission

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20 As set forth in note 10, it is not proper to consider Midland as a single-use facility as an alternative to Midland as a dual-purpose facility. As a result, any alternative facility to supply Dow steam must be considered in conjunction with an alternative electric generating facility.

decisions indicate that it would be appropriate to review the items now set forth by the ACRS in its letter of December 1, 1976 to determine if continued construction during the interim period might foreclose the adoption of design changes relating to items which were open at the time the construction permits were issued but which have subsequently been resolved by the ACRS. Conversely, it would not be appropriate at a suspension proceeding to consider items for which the ACRS has yet to adopt a generic resolution since by definition there would be no design alternatives to foreclose. While there have been no court or Commission cases dealing directly with this matter, it is clear that the Commission can issue a construction permit even though there are unresolved generic questions. As the Appeal Board in Vogtle stated:

> It is long-settled that the Commission may issue a construction permit for a nuclear power reactor in the face of yet unresolved generic safety concerns, leaving those concerns for resolution prior to the time that the reactor obtains an operating license. Power Reactor Development Co. v. Electrical Union, 367 U.S. 396 (1961); 10 CFR 50.35(a).

Furthermore, that same Appeal Board has taken the position that even in a reopened proceeding, the mere existence of an unresolved generic safety question does not require that such an issue be ventilated.[22] In short, at a suspension hearing it would appear appropriate to have evidentiary pre-

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21 Georgia Power Company, supra, at 412.

22 Id. at 413.

sentations and findings on those concerns identified by the ACRS in its letter of December 1, 1976 which have been resolved since the Midland Construction Permits were issued to determine whether continued construction would foreclose the adoption of the resolution set forth by the ACRS. Evidence and findings as to those items which are still pending resolution should be excluded. Regardless of whether the Board adopts this legal position, the record in this proceeding is more than sufficient for the Board to reach a decision. The issues identified in the ACRS letter of December 1, 1976 as well as all other items raised by the ACRS, through 1976, whether resolved or not, have been analyzed. The analysis shows that continued construction would not foreclose the adoption of design alternatives that would satisfy the ACRS's concerns. Licensee's Findings at paragraphs 63 to 76. In addition, the impact on cost and construction schedules has been analyzed and shown to be minimal. Id. at paragraph 77.

d. Fuel Cycle Issues

The impacts of the fuel cycle issues will not come into play until after the plant begins operation. Therefore, continued construction at this time cannot foreclose the adoption of alternatives with regard to those issues. In addition, Licensee's Findings at paragraph 109 establish that the impact of this issue on the cost-benefit analysis is minimal.

5. Tilting of the Cost-Benefit Balance

The next factor set forth by the Commission is the "possibility that the cost-benefit balance will be tilted through increased investment". Findings on this factor must be directed to whether this increased investment would tilt the cost-benefit analysis away from the alternative of abandonment.[23] It is clear from the Aeschliman case, in this analysis, that "sunk costs" cannot simply be added to the cost of an alternative, but it is equally clear that if the need for the project is established, the cost of abandoning the project under review and building a replacement generating source must be included.[24] While Intervenors have consistently ignored this principle, the Commission's decision in Seabrook makes it clear that these abandonment costs must be taken into account. Seabrook establishes that this Board must analyze the situation as it exists today and include the consequences which would flow from a decision to either complete or abandon Midland. This analysis must be based on an incremental cost analysis of the situation today, not a hypothetical situation which disregards the current status of

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23 Coalition for Safe Nuclear Power v. AEC, 436 F.2d 954 (D.C. Cir. 1972).

24 Aeschliman, supra, at pp. 21-22, n. 20; and Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, NRCI-77/3 (March 31, 1977) (Slip Opinion at 47-53)

Midland and the effects which would be caused by abandoning it and switching to an alternative at this late date. Finally, Licensee's Findings at paragraphs 96 to 109 establish beyond a doubt that continued construction will not tilt the balance away from the alternative of abandoning Midland.

6. Probability of Success on the Merits

For guidance in resolving the suspension question the Commission referred the Board to the General Statement of Policy (the Statement) issued by the NRC on August 13, 1976 and supplemented on November 5, 1976. Although the Statement enumerates the equitable factors discussed above which the Board should weigh in determining the question of suspension vel non, the Licensee believes that the key to resolving the suspension proceeding is contained in the language the Commission employed to introduce it: "It is the Commission's understanding that resolution of this question turns on equitable factors well established in prior practice and case law," (emphasis supplied). Clearly the Commission intended that the concept of equity be the touchstone of the suspension test. For this reason, the Board must consider an entire range of equitable factors, much as a court does when sitting in equity. Thus, the specific factors mentioned in the Statement cannot be taken as the exclusive considerations that the Board is to weigh.[25]

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25 This fact was recognized by the dissenting member of the Atomic Safety and Licensing Appeal Board in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, NRCI-76/9, p. 235 at 276. (Sept. 30, 1976): "The door is left open, however, for adjudicatory boards to look at other equitable considerations."

Therefore, the Board must also evaluate the probability of the Licensee's ultimate success on the merits in the hearings on the remanded issues as one of the equitable factors when passing upon the suspension question. This equitable factor was established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), which required the deciding tribunal to weigh the probability that the petitioner will ultimately prevail on the merits in determining whether to grant the extraordinary relief requested.[26] Because in this proceeding it is the Licensee who bears the burden of proving that the equities weigh against suspension of the construction permits,[27] it is the Licensee's probability of prevailing on the merits in the remand proceedings which must be weighed by the Board in reaching its decision.

The probability of success on the merits test is an excellent example of an equitable factor "well established in prior practice and case law". Since its formulation as one part of a four-pronged test in Virginia Petroleum Jobbers (in the context of an attempt to stay agency proceedings pending court review of an agency order), the standard

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26 "Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?" 259 F.2d at 925.

27 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, supra, n. 29, at 21; Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-346, NRCI-76/9, p. 214 (Sept. 9, 1976).

has been adopted in a long line of cases arising under NEPA in which plaintiffs sought to enjoin construction projects because of the absence of, or deficiencies in, an environmental impact statement (EIS). The fact that the Commission recognized that this factor should be considered by the Board is apparent from its citation in the Statement's discussion of equitable factors of Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974), vacated on other grounds and remanded, 423 U.S. 809 (1975), rev'd on other grounds, 531 F.2d 637 (2d Cir. 1976). In that case the Court of Appeals affirmed the lower court's refusal to enjoin a highway project in the face of a deficient EIS. The refusal was based in part upon the district judge's finding that the outcome of the case was not in doubt, for abandonment of the project in question as a result of a revised EIS was found to be "a very remote possibility", 508 F.2d at 936-37.

Other circuits have also applied and approved the probability of success on the merits test in ruling on or reviewing a request for extraordinary relief premised upon a defective EIS. In weighing the equities in such situations courts have phrased the "success" factor in the following ways: Are the moving parties likely to prevail on the merits, Conserv. Council of North Carolina v. Costanzo 528 F.2d 250, 252 (4th Cir. 1975) and Alpine Lakes Protection Society v. Schlapher, 518 F.2d 1089, 1090 (9th Cir. 1975).

Has appellant established that there is a possibility of success on the merits, State of Ohio ex rel. Brown v. Callaway, 497 F.2d 1235, 1241 (6th Cir. 1974); Is there a substantial likelihood that plaintiff will prevail on the merits, Canal Authority of State of Florida v. Callaway, 498 F.2d 567, 572 (5th Cir. 1974).

In addition to being well established in the case law, the probability of success on the merits test is ingrained in the area of administrative decision making, for it has been employed by the Commission's predecessor agency, the Atomic Energy Commission (the AEC), in situations nearly identical to the case at bar. In 1972, the AEC considered whether the previously issued construction permits for the Davis-Besse and Diablo Canyon nuclear facilities should be suspended pending the outcome of a NEPA review mandated by a judicial decision. The licensing board in each case, after balancing the equitable factors, refused to suspend construction, based in part upon the following findings:

In Diablo Canyon:

> In this Board's view, it appears highly unlikely that abandonment of the proposed facility will be required following the NEPA review. Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 4 AEC 914, 928 (1972).

* * *

In Davis-Besse:

> The Board finds that there is negligible probability that the scheduled NEPA review, in light of the consideration of environmental effects of plant operation considered above, will recommend either the abandonment of the plant or substantial modification in its design. . . . The Board therefore finds no justification for suspending construction of the Davis-Besse plant pending NEPA review of the effects of non-radioactive discharges to the environment resulting from plant operation. . . .
>
> . . . [t]he probable outcome of the NEPA review would not be unfavorable to the eventual licensing of the Davis-Besse plant for power production. The Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), 5 AEC 31, 34 (1972).

That those licensing boards found probability of success on the merits to be a pertinent equitable factor to consider in determining suspension vel non is strong precedent for applying that test in the Midland proceeding, as the differences between the two situations are neglible. Indeed, the Commission in Propcsed Rule 2.788, 41 F.R. 54207 (Dec. 13, 1976), has recognized that this factor must be taken into account in evaluating the need for suspension. It is also apparent that the Commission itself is relying on this factor in connection with its decisions on the suspension proceedings resulting from Aeschliman and its companion case relating to the fuel cycle.[28] The NRC issued a Supplemental General Statement of Policy on November 5, 1976 in which it announced its intention to resume licensing on a conditional basis; to

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28 Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir.) July 21, 1976.

decline to institute proceedings against the holders of construction permits, limited work authorizations and operating licenses on fuel cycle grounds; and to suspend the show cause-type proceedings which had been initiated by others (with the exception of the Midland proceeding which was to go forward on the non-fuel cycle issues remanded by Aeschliman). One of the two bases upon which these decisions rest is the Commission's assessment of the "probability of success" of the revised Table S-3 to 10 CFR Part 51 and its supporting environmental survey:

> Second, the breadth and quality of the present analysis of reprocessing and waste management impacts set forth in the supplemental survey lead the Commission to believe it improbable that the assessment that such impacts are slight will prove to be dramatically in error.29

Additionally, the Commission in its last pronouncement on Seabrook implicitly adopted this test. Public Service of New Hampshire, et al., supra. Since the Commission factored into its decision-making process the probability of success factor, Licensee suggests that it is equally incumbent upon this Board to weigh the Licensee's probability of success on the merits in determining whether to revoke the Midland permits.

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29 Commission Supplemental General Statement of Policy issued November 5, 1976 at 1-2. See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, NRCI 76/11, p. 451 (Nov. 5, 1976).

A final consideration which militates in favor of the Board's inclusion of this equitable factor in its deliberations is the fact that the Board now has before it a detailed presentation on each of the remanded issues, and therefore, is in a position to evaluate the probable outcome of the remanded proceeding. To ignore this detailed presentation would not only be legally unsupportable, it would also be patently illogical.

This record is replete with well-documented evidence demonstrating: (1) after factoring in the historical and anticipated effects of energy conservation, there is a need for the power to be produced by Midland beginning in 1981 and 1982; (2) Dow needs the process steam generated by the nuclear plant as soon as possible and intends to retire its existing fossil fuel units as soon as a reliable supply of steam is available from Midland; (3) the items identified by the ACRS in its letter of December 1, 1976, have been resolved or are in the process of being timely resolved for Midland, and (4) the small effects of the interim fuel cycle rule and the revised Table S-3 could affect the cost-benefit balance only marginally, as that analysis demonstrates a tremendous economic advantage for the nuclear plant. As Licensee has shown convincingly that there is a high degree of probability that it will succeed on the merits at the forthcoming hearing, to continue with this project which will

in all probability be approved, cannot result in any prejudice to the other parties or to the decision yet to be reached.

7. Balancing the Equitable Factors

After the Board has reached a decision on each of the equitable factors, it must balance those factors to reach its ultimate conclusion on whether to suspend. Normally, this balancing would require weighing the factors which favor suspension against those factors which militate against suspension. In this case, however, after an extensive review of the equitable factors, as well as the remanded issues, it is clear that none favor suspension. Indeed, each and every one of them strongly militates against suspension.

IV. Conclusion

Based on the foregoing, Licensee respectfully requests that this Board order that the construction permits for Midland Units 1 and 2 be continued in effect without modification pending the outcome of the hearing on the remanded issues.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the enclosed "Licensee's Proposed Findings Of Fact and Conclusions Of Law" and "Brief Of Consumers Power Company", dated June 13, 1977 in the above-captioned proceeding, have been served on the following by deposit in the United States Mail, first class, postage prepaid, this 13th day of June, 1977.

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