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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



In the Matter of )  
CONSUMERS POWER COMPANY )  
Midland Plant, Units 1 and 2 )

Docket Nos. 50-329A  
50-330A

To the Nuclear Regulatory Commission:

REPLY OF CONSUMERS POWER COMPANY  
TO RESPONSES OF OTHER PARTIES

On January 27, 1977, the Department of Justice ("Department"), the NRC Staff ("Staff") and the intervening Michigan Municipals and Cooperatives ("Muni-Coops") filed responses to the Commission's order of January 13, 1977. In their responses, the Department and the Staff urge deferral of Commission review of ALAB-452 until after the remanded license condition-remedy phase of the proceeding is complete. The response of the Muni-Coops expressed "no objection to immediate review of ALAB-452," although it suggested that the Commission might wish to defer.

Consumers Power Company ("Consumers Power") hereby replies to these pleadings and, for the reasons described below, submits that they offer no reasonable basis for Commission deferral of reviewing ALAB-452.

1. In its January 27 filing, Consumers Power pointed out that immediate review of ALAB-452 will help alleviate present uncertainty about the Commission's antitrust responsibilities

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and thus provide much needed guidance to the remand proceeding in this case, to other on-going antitrust proceedings before the Appeal Board and Licensing Boards, and to the industry generally. Only the Staff addresses this point and it concedes that the Appeal Board and Licensing Boards "would be benefitted by such guidance." (p. 3) Nevertheless, the Staff supports deferral of Commission review of ALAB-452 because deferral "would not prevent those Boards from deciding matters before them based on existing precedent." What the Staff ignores is that there is no Commission precedent on the issues raised by ALAB-452 since Midland is the first fully-litigated antitrust proceeding under Section 105c to come before the Commission. Thus, in the absence of immediate review, antitrust decisions by the boards continue without Commission guidance, and may be erroneous and require further time-consuming litigation.

2. Likewise, immediate review of ALAB-452 could well conserve resources in the remanded license condition-remedy phase of this proceeding. A reversal of ALAB-452 would obviate the need for any remand proceeding. In addition, contrary to the suggestion of the Muni-Coops (p. 2), the mandate of the remand tribunal would be significantly affected even if the Commission modifies only some of the Appeal Board's findings in ALAB-452. That is, even assuming arguendo that some relief is deemed appropriate, the nature of that relief will vary with the extent to which the Appeal Board's findings are affirmed. Thus, deferral of review could require yet another round of remand

proceedings if the Commission modifies ALAB-452 in any substantial respect.

Given the complexity of the case and what we deem to be the many errors of ALAB-452, the prospect for at least some such modification is readily apparent.<sup>1/</sup> Deferral of Commission review of ALAB-452 is, accordingly, a prescription for waste and delay. The Staff concedes as much, recognizing that a remand proceeding without benefit of Commission review "might make the efforts expended in the remand hearing either unnecessary, duplicative or misdirected" (p. 4). Although the Staff's reference was only to the infirmity of concurrent Commission review and remand proceedings, its conclusion is equally applicable to remand proceedings which precede Commission review of ALAB-452.

3. Each of the other parties herein urge that ALAB-452 is somehow not final, and that the record is somehow not complete or ripe for review, because of the pendency of

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<sup>1/</sup> Muni-Coops urge that affirmance of ALAB-452 is likely because this case is "indistinguishable" from Otter Tail Power Co. v. United States and more recent cases holding that electric utilities are not "immune from the full impact of the federal antitrust laws." This assertion conveniently ignores the fact that at no time in the proceeding has Consumers Power claimed immunity from the antitrust laws. Moreover, if this case is "indistinguishable" from any Supreme Court precedent, it would hardly have required a 432-page decision to so establish.

the remedy-license condition phase of the case.<sup>2/</sup> In support of this argument, the parties note only that consideration of appropriate license conditions requires review of the entire record.

This argument completely misses the point. The remedial phase of the proceeding will produce no evidence or findings relevant to ALAB-452's conclusions that Consumers Power violated the antitrust laws prior to the close of the record in 1974. The decision is final and the record is complete with respect to those conclusions. Thus, the remand proceedings will add nothing -- except delay -- to the Commission's ability to review ALAB-452.

4. Although, as noted above, Commission deferral of review could render the remand proceedings moot or unnecessary, the converse is not true. That is, the remand proceedings will not eliminate the need for Commission review of ALAB-452. We acknowledge that remand proceedings could well produce license conditions to which the Company does not object; they could even produce the conclusion that no license conditions are appropriate because of "public interest" considerations. See Section 105(c)(6).

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<sup>2/</sup> The Muni-Coops cite (p. 2) 1947 and 1934 cases for the proposition that ALAB-452 is not a final order. Those cases involved pre-hearing interlocutory issues about jurisdiction, unlike the instant proceeding in which Consumers Power has been found in violation of the anti-trust laws and only the nature of the remedy remains at issue. Brown Shoe, Inc. v. United States, 370 U.S. 294 (1962) is thus controlling here. See our January 27 response, p. 5.

But that result would still require Consumers Power to seek review of ALAB-452 because, as noted in our January 27 response (p. 5), that decision's conclusions concerning antitrust violations could have serious impacts far beyond the four corners of this proceeding. The suggestion of the Muni-Coops (p. 2) that the parties may be able to reach a settlement or agreement as to license conditions is therefore irrelevant since such a settlement will not eliminate the Company's need to seek review of ALAB-452.

In short, the results of the remand proceedings will neither assist the Commission's review of ALAB-452 nor render moot the need for such review. It is therefore clear that Commission review will not delay completion of this proceeding since that review must be undertaken at some point.

We understand the desire of the other parties to delay the day when ALAB-452 is subjected to review and possible reversal since that decision reflects the views and philosophies which they have long espoused. But these parochial concerns do not invalidate the clear public interest considerations favoring review now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of February, 1978, served a copy of the foregoing REPLY OF CONSUMERS POWER COMPANY TO RESPONSES OF OTHER PARTIES by mail, postage prepaid, upon the following persons:

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