

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

CONSUMERS POWER COMPANY

(Midland Plant, Units 1 and 2)

}
} Docket Nos. 50-239
} 50-330

NUCLEAR REGULATORY COMMISSION STAFF'S BRIEF
IN OPPOSITION TO INTERVENORS' EXCEPTIONS TO THE
LICENSING BOARD ORDER OF SEPTEMBER 23, 1977

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Dated at Bethesda, Maryland
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STATEMENT OF THE CASE

The Consumers Power Company (Consumers) made its initial application for construction permits to construct two pressurized water nuclear reactors at Midland, Michigan, on January 13, 1969. Unit No. 1 is designed to have a gross electrical output of 506 MWe and will also generate large quantities of process steam. Unit No. 2 will have a gross electrical output of 855 MWe. Construction permits were issued to Consumers on December 14, 1972.

On July 21, 1976, after review of the orders of the U.S. Atomic Energy Commission granting construction permits for the Midland facility, the Court of Appeals for the District of Columbia Circuit in Nelson Aeschliman, et al. v. U.S. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir., 1976), cert. granted sub nom. Consumers Power Company v. Aeschliman, 45 U.S.L.W. 3570 (February 22, 1977) (Aeschliman) remanded a number of issues to the Nuclear Regulatory

Commission (Commission) for consideration, specifically, the fuel cycle issue adjudicated by the United States Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Counsel, et al. v. U.S. Nuclear Regulatory Commission, 547 F.2d 633 (D.C. Cir., 1976), the issue of energy conservation, the issue of a clarified letter from the Advisory Committee on Reactor Safeguards (ACRS), and the issue of changed circumstances regarding Dow's need for process steam.

3. By the Commission's Memorandum and Order of August 16, 1976,^{1/} the Commission reconvened the Atomic Safety and Licensing Board (Board) in this proceeding and directed it to consider the fuel cycle issue remanded by the Court of Appeals in accordance with the General Statement of Policy on Environmental Effects of the Uranium Fuel Cycle (41 Fed. Reg. 34707, August 16, 1976) (General Statement of Policy) to determine whether the outstanding construction permits for the Midland Plant should be continued, modified or suspended until an interim fuel cycle rule has been made effective.

^{1/} Consumers Power Company (Midland Plant, Units 1 and 2), CLI-76-114 NRC 65 (August 16, 1976).

The mandate in the Aeschliman case issued on September 3, 1976, and upon issuance, the Commission, expanded its instructions to the Licensing Board by its Memorandum and Order of September 14, 1976.^{2/} There, the Commission directed the Licensing Board to consider all issues remanded to the Commission by Aeschliman.

The Commission, by its Memorandum and Order of November 5, 1976,^{3/} instructed the Licensing Board to defer its consideration of the fuel cycle issue pending anticipated adoption of an interim fuel cycle rule based on the Commission's decision in Seabrook.^{4/} By its Memorandum and Order to the Licensing Board on November 5, 1976, the Commission reaffirmed that the Licensing Board was to continue its inquiry into the remaining Aeschliman issues.

The Licensing Board established procedures and scheduled hearings to take testimony on these issues. Hearings commenced in Midland, Michigan, on November 30, 1976.

^{2/} Consumers Power Company (Midland Plant, Units 1 and 2), CLI-76-14 4 NRC 163, 167 (November 5, 1976).

^{3/} Consumers Power Company (Midland Plant, Units 1 and 2), CLI-76-19 4 NRC 474, 475 (November 5, 1976).

^{4/} Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-76-17 4 NRC 451 (November 5, 1976).

The parties represented at the hearings were Consumers Power Company (Consumers), Dow Chemical Company (Dow), All Intervenors Other Than Dow (Intervenors) and the NRC Staff (Staff).

After four hearings days, the hearings were moved to Chicago, Illinois, with hearings running intermittently until May 13, 1977, when the record on the suspension question was closed.^{5/} The interim fuel cycle rule, referred to be the Commission when it instructed the Licensing Board to defer consideration of the fuel cycle, has been issued. (42 Fed. Reg. 13803, March 14, 1977). Accordingly, the Midland Appeal Board directed the Licensing Board to take up the fuel cycle issue when it restrikes the cost-benefit balance for the Midland facility in connection with the other issues before it at the remand proceeding.^{6/}

With regard to the issue of a clarified ACRS letter, the Licensing Board returned the original ACRS report, which was the subject of the

^{5/} It should be noted that Consumers filed a "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" in the Supreme Court of the United States. On February 22, 1977, the Supreme Court issued an Order granting the petition for certiorari and thereby taking review of every issue remanded for proceedings before the Nuclear Regulatory Commission by the Aeschliman decision. On March 4, 1977, Consumers filed a Motion before the Commission seeking a stay of orders in light of the changed circumstances, namely, the grant of certiorari by the Supreme Court. The Appeal Board denied Consumers' Motion. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395 5 NRC 772 (April 29, 1977).

^{6/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-396 5 NRC 1141, 1142.

Aeschliman decision, to the ACRS by a Board letter of October 14, 1976. In response to the Board's letter, the ACRS issued a "Supplemental Report on Midland Plant, Units 1 and 2" dated November 18, 1976. By letter dated January 28, 1977 to the ACRS, the Board raised three areas of comment on the November 18, 1976 response. In a March 16, 1977 letter to the Chairman of the Nuclear Regulatory Commission, the ACRS responded to these further requests of the Licensing Board.

The Staff has issued draft and final supplements to the original environmental statement regarding the Midland Plant. The "Final Supplement to the Final Environmental Statement related to Construction of Midland Plant Units 1 and 2" (FES) was issued in June, 1977.

The Staff issued its "Supplement No. 2 to the Safety Evaluation of the Midland Plant Units 1 and 2" in July, 1977. This supplement deals with the 11 items identified by the ACRS in its November 18, 1976 letter.

Findings of Fact and Conclusions of Law were filed by all parties to the proceeding and, on September 23, 1977, the Licensing Board issued its Order declining to modify or suspend the Midland licenses pending the outcome of the remand proceeding.

Intervenors filed their "Exceptions to Licensing Board Decision of September 23, 1977" (Intervenors' Exceptions) on September 30, 1977 and "Intervenors' Brief in Support of Exceptions to Licensing Board Decision of September 23, 1977" (Intervenors' Brief) on October 23, 1977. By Order of November 2, 1977, the Appeal Board required that briefs in opposition to Intervenors' filings be delivered to the Appeal Board and other parties in hand by November 14, 1977 and calendared oral argument in Chicago on November 17, 1977.

STATEMENT OF THE ISSUE

The conclusion by the Licensing Board to permit continued construction of the Midland facility pending the outcome of the remand proceeding is correct and should be upheld.

I. THE LEGAL CONTEXT

The Commission identified the legal standards to be applied to the remanded issues in the suspension proceeding in its General Statement of Policy. There, the Commission discussed the question of suspension in light of the inadequate examination of the fuel cycle issue and noted that "resolution of this question turns on equitable factors well established in prior practice and case law".^{7/} Such factors included: 1) the significance of adverse environmental impact in the interim; 2) the need for the project; 3) the foreclosure of reasonable alternatives by interim construction; 4) the effects of delay; 5) the possibility that the cost-benefit balance would be tilted through increased investment in the interim; 6) general public policy concerns; 7) the extent of the NEPA violation; and 8) the timeliness of the objections.

While the Commission's General Statement of Policy identified these equitable factors as bearing specifically on the question of whether a suspension or modification of a construction permit was in order on fuel cycle grounds, the same factors are applicable to the question of suspension or modification of the construction

^{7/} General Statement of Policy, p. 9.

permits during consideration of the other remanded issues, namely, energy conservation, the ACRS letter, and changed circumstances regarding Dow's need for steam. The Commission decision in Seabrook^{8/} confirms this position. The suspension question presented in Seabrook was broader than the question of suspension of fuel cycle grounds alone. In that context, the Commission expressed the following view:

. . . the question of suspension of the permits herein must at the least be decided on the basis of (1) traditional balancing of the equities, (2) consideration of any likely prejudice to further decisions that might be called for by the remand. At page 521.

It should be stressed that the suspension issue comes to the Appeal Board after a lengthy evidentiary hearing, thus providing a much more elaborate factual basis than this Commission has usually had to decide suspension or stay questions. Elsewhere it has often been necessary to make assumptions or rough estimates about the facts relevant to applying the equitable criteria, such as levels of demand, cost, etc.; here this record provides reasonable, current and detailed factual answers to most of these questions. A related point of importance is that the remand proceeding is much farther along the way to completion than is usually the case when interim suspension is considered. A great deal of the evidence that the Licensing Board received on the suspension question also has a bearing upon its ultimate decision on the merits of the remanded

^{8/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-3, 5 NRC 503 (March 31, 1977).

issues. The Licensing Board recently indicated that it anticipates that the record can be closed on the remanded issue with relatively little additional evidence.^{9/} Consequently, the period of time between the Appeal Board decision on the suspension question and the Licensing Board's decision on the merits of the remanded issues should be much shorter than the time from remand to date.

The predominant theme of Intervenors' brief is that the Licensing Board decided against them on the suspension question solely because of its giving Consumers the benefit of the costs already sunk into the Midland project. It is basically the Staff's position here that the question of sunk costs is not central in this case. When the equitable criteria are properly applied in light of the record evidence, we necessarily reach the conclusion that the factors balance against a suspension without regard to the amount of costs which Consumers have sunk into the project. We must frankly acknowledge that in our view the Licensing Board exhibited a fair amount of confusion on the sunk-cost question and did not appear to fully comprehend this Commission's Seabrook decision.^{10/}

^{9/} Order dated November 4, 1977, pp. 1-2.

^{10/} One of the areas of the Board's confusion was in its consideration (and ultimate rejection) of the possibility of disregarding sunk costs as a penalty for alleged applicant misconduct in the remand proceeding. The Licensing Board apparently believed that the Commission's Seabrook decision may have required such a penalty. But the Commission specifically indicated that the purpose of disregarding existing facts about completion costs would be to prevent an applicant from profiting by its wrongdoing. Yet the potential wrongdoing which the Board examined occurred, if at all, after the remand at a time when the predominant portion of the costs sunk into the project had already been incurred.

However, whatever confusion the Licensing Board had did not result in any prejudice to intervenors' position. Rather, it mainly resulted in the Licensing Board considering at great length certain questions of the economic cost of generating alternatives which have very little bearing upon a correct application of the equitable factors. We will show that on this record those factors balance against suspension without the sunk costs.

The Appeal Board has made the important point that the initial focus of an alternative analysis is on environmental factors, i.e., whether some available alternative would involve significantly less environmental harm than the Applicant's proposal.^{11/} The question of economic costs only becomes relevant if there is such an environmentally preferable alternative. If that alternative is more expensive, then the Commission will have to decide whether the environmental advantage is worth the additional costs.^{12/}

Obviously, if conservation were a complete alternative, it would be environmentally preferable. Extensive testimony by all parties have demonstrated this is not the case. While conservation has played an important role in reducing demand in Consumers' service area since 1972, the record evidence demonstrates that additional

^{11/} Tennessee Valley Authority (Hartsville Nuclear Units 1A, 2A, 1B and 2B) ALAB-367, 5 NRC 92, 103 (1977); Northern States Power Co. (Prairie Island Units 1 & 2), ALAB-244, 3 AEC 857, 862 (1974).

^{12/} Seabrook, CI-77-8, p. 528.

generating capacity is needed by the time Midland is scheduled to come on line. While Intervenor's witness, Dr. Timm, testified that the Midland facility was not needed on its currently projected schedule, Dr. Timm did propose as an alternative to Midland that Consumers install 800 MWe of fossil capacity by 1983. (Timm testimony, p. 83).^{13/} In addition, Dr. Timm suggested that Dow build its own steam-generating facilities. Thus, Intervenor's do not challenge the fact that additional electrical generating capacity is needed.

Since a facility must be constructed, then the question becomes whether some alternative facility (facilities) is (are) environmentally preferable. The original Midland decision specifically found that fossil generating capacity was not preferred to nuclear^{14/} at Midland because, inter alia, of air quality considerations. Although this was not an issue remanded by the Court of Appeals, it should be noted that nothing in the testimony during the suspension hearings alters this original conclusion. Ironically, Intervenor's case is no longer that there is an environmentally-preferable alternative; rather they now argue that Midland is not cost justified if sunk costs are ignored.

^{13/} "Testimony of Richard J. Timm on Behalf of All Intervenor's Except Dow Chemical Company" is found in the Special Transcript Volume of March 23, 1977.

^{14/} 5 AEC 214, 227 (1972).

It is unnecessary therefore to reach the question of "sunk costs" in this appeal in light of uncontroverted record evidence that energy conservation is not a complete or partial substitute for construction, that there is a need for the power and steam to be produced (whether by Midland or not) and that if generation facilities are to be constructed, there is not an environmentally preferable alternative to Midland.

Intervenors' concentration on the sunk cost question is thus a diversion from the real question here--the consideration of each equitable factor in light of the record evidence and the drawing of a reasonable balance. We turn to that inquiry.

II. THE EQUITABLE FACTORS WEIGH AGAINST SUSPENSION

The application of the equitable factors identified in the Commission's General Statement of Policy makes it clear that the Board's decision not to suspend pending remand was correct.

A. Significant Adverse Impacts

The determination required by the Appeal Board in this area is whether any significant adverse impacts are associated with continuation of the Midland project in the interim period until the remand issues are finally decided. The Staff's direct testimony filed in this proceeding examined environmental impacts through September, 1977, and found them to be minimal; however, the record supports the additional finding that the environmental impacts associated with continuation of the project through 1977 are minimal. Even if construction were to extend beyond 1977, significant adverse environmental impacts would be unlikely because the bulk of the environmental impacts associated with construction has already taken place.^{15/}

B. Need for the Project

It is under this equitable factor that two of the Aeschliman issues should be considered. The question before the Appeal Board is whether a need for the project has been established. This involves

^{15/} In its argument concerning each of the equitable factors identified by the Commission for consideration on the suspension question, the Staff will refer to the "Nuclear Regulatory Commission Staff's Findings of Fact and Conclusions of Law" filed on July 1, 1977 (Staff Findings) for the findings and record citations which support its argument. Paragraphs 13-20 of the Staff's Findings present the Staff summary of the evidence on adverse environmental impacts with record citations.

the determination, not only as to a need for the electricity to be generated by the Midland Plant, but also as to the need for the steam to be generated by the plant and supplied to Dow. The applicable issues remanded by Aeschliman and to be considered under this factor are:

1. whether or not energy conservation may obviate all or a part of the need for the electrical generation of the Midland Plant and therefore form a partial or complete alternative to continued plant construction; and
2. whether or not changed circumstances with regard to Dow's need for process steam may obviate the need for the portion of the Midland Plant designed to generate such process steam.

On both the need for electricity and the need for steam, the record supports an affirmative finding. On need for electricity, the record evidence is substantial. Extensive analysis by both Consumers and the Staff indicates a genuine need by Consumers for the Midland electrical capacity at the presently scheduled commercial operating dates for the units. In the case of the analysis of both Consumers and the Staff, energy conservation was explicitly identified and

considered and its effect on the projected need for electricity was analyzed. ^{16/}

On the issue of need for steam, it is well established in the record that Dow needs a new steam source beginning in 1980 and no later than 1984 to provide quantities of steam which justify the steam generating portion of the Midland Plant. However, Dow has the capability of supplying its own steam and has traditionally provided its own steam. The issue then is whether Dow will purchase the steam from the Midland plant. The testimony of two high Dow officials established Dow's intent to purchase steam from the Midland Plant. Dow's corporate position is that it will take process steam from the Midland Plant if presently projected costs and schedules are maintained. The issues of cost and schedules were fully explored at the hearing and the record evidence demonstrates that present costs and schedules for the Midland Plant are reasonable. ^{17/} Thus, the record supports an adequate commitment by Dow to take process steam from the Midland Plant.

^{16/} See Staff Findings, paragraphs 21-47.

^{17/} See Staff Findings, paragraphs 48-82.

C. Foreclosure of Reasonable Alternatives by Continued Construction

The Appeal Board must determine whether construction in the interim will foreclose any alternatives associated with the Aeschliman issues. This factor has received some interpretation in an Appeal Board decision on Seabrook.^{18/} There, the Appeal Board interpreted foreclosure of an alternative as meaning that an alternative would be made more difficult by continued plant construction rather than be absolutely precluded by it.^{19/} The question then before the Appeal Board is whether continued construction in the interim until a decision on the remand would make reasonable alternatives associated with the Aeschliman issues more difficult to implement.

With regard to conservation, the alternatives which would be foreclosed by continued construction would be either a smaller facility or complete elimination of the facility due to the effect of conservation. The record evidence, however, indicates that conservation would have neither effect. Rather,

^{18/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 258-259 (1976).

^{19/} Ibid., at fn. 49.

the record evidence indicates a need for the full electrical output of the Midland Plant and so the alternative of conservation cannot be judged reasonable and hence cannot be judged foreclosed by continued construction.^{20/}

With regard to the clarified ACRS letter, 11 items have been identified by the ACRS and each of these 11 items has been the subject of Staff testimony. On each item, it has been established that the item is either resolved for the Midland Plant or, in those instances where resolution is pending, the item can reasonably be left for later consideration at the operating license stage. Alternative resolutions will not be foreclosed by interim construction.^{21/}

With regard to the fuel cycle issue, the question of the foreclosure and alternatives by continued construction does not arise. The Commission expressed this view in its General Statement of Policy:

Since existing concepts for reprocessing and waste technology do not vary significantly with the design of nuclear power generating facilities, it is extremely unlikely that the revised environmental survey will result in any modification of these facilities. Only the possibility of discontinuing their construction or use is likely to be at issue.^{22/}

^{20/} See Staff Findings, paragraphs 21-47.

^{21/} See Staff Findings, paragraphs 146-160.

^{22/} General Statement of Policy, August 16, 1976, p. 5.

This view was borne out on March 14, 1977 when the Commission issued its interim fuel cycle rule containing values and environmental impacts associated with the areas of waste disposal and reprocessing. No plant design modifications were associated with the issuance of the interim rule.

With regard to the Aeschliman issue of changed circumstances concerning Dow's need for process steam, no reasonable alternatives will be foreclosed by continued construction in view of Dow's commitment to take process steam from the Midland Plant. On the contrary, given Dow's concern about steam from the Midland Plant becoming available on its currently-projected schedule and at currently-projected cost, a suspension with attendant cost increases and scheduled delays could lead Dow to withdraw from this project. So, in this instance, a suspension of construction could foreclose an alternative.

D. Effects of Delay

Under this factor, the Appeal Board must determine what the impacts would be of a decision to suspend construction of the Midland Plant. A sound record has been established on this factor to aid the Appeal Board in its determination. A need for the electrical and steam portions of the facility

has been established. Suspension of the facility would imperil the supply of reliable electrical energy to Consumers' service area. In addition, substantial costs for replacement power have been proven.^{23/} Finally, a suspension of construction now may induce Dow to seek other ways of securing process steam, thereby rejecting the Midland plant. These identified delay costs are real in their impact on electric utility rates, power system reliability and continued viability of the Midland project as now structured.

Delay costs are a projection of the likely cost impact of a suspension and are one of the elements which it has been judicially determined should be considered when balancing the equities on a stay or suspension question.^{24/} Intervenors' suggestion that delay costs can fairly be analogized to the ordinary expenses of litigation is totally without support in reason or precedent.

E. Tilting the Cost-Benefit Balance Through Increased Investment

The issue before the Appeal Board with regard to this factor is whether continued construction of the Midland Plant during

^{23/} See Staff Findings, paragraphs 134-145.

^{24/} Coalition for Safe Nuclear Power v. AEC, 463 F.2d 954, 956 (D.C. Cir. 1972).

an interim period prior to a decision on the remand would likely tilt the cost-benefit balance away from a preferred alternative.

Here the record is substantial that continued construction of the Midland Plant would not tilt the cost-benefit balance. Extensive analyses have been performed by both Consumers and the Staff to identify alternatives to the Midland Plant and to examine those alternatives to see what the effects of continued construction would be on the cost-benefit balance. These analyses have not identified any environmentally preferable alternatives and also conclude that the Midland Plant is favored economically.^{25/} This is so even in the absence of the consideration of sunk costs.

The only remaining question with regard to the cost-benefit balance is consideration of the Aeschliman fuel cycle issue. This issue was not explicitly considered on the record at the suspension proceeding. On March 14, 1977, the Commission promulgated its interim fuel cycle rule containing values for environmental impacts associated with the nuclear fuel cycle. Failure to consider explicitly fuel cycle environmental impacts at the suspension proceeding should not affect the Appeal Board's determination. No environmentally-preferred alternative to the Midland Plant has been identified. The Midland Plant retains a large economic advantage in the cost-benefit balance even without a consideration of sunk

^{25/} See Staff Findings, paragraphs 87-133.

costs. There is no reasonable basis for supposing that fuel cycle impacts, analyzed by the Staff to be insignificant,^{26/} could tilt such a skewed balance.

F. General Public Policy Concerns

Under this factor, the Appeal Board must consider how the public at large and the general welfare would be affected by either suspension or continuation of the project.^{27/} On this factor the record supports a finding in favor of continuation. Adverse impacts of suspension on the ratepayers and shareholders of Consumers, the construction work force, state and local governments, and state and national energy policy which would result have been proven.^{28/}

G. The Extent of the NEPA Violation

Under this factor, the Appeal Board must consider the magnitude of the NEPA violation. This factor has been examined in the

^{26/} "Final Supplement to the Final Environmental Statement related to construction of the Midland Plant, Units 1 and 2" (June, 1977); NUREG-0275, pp. 3-1 to 3-4.

^{27/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 269 (1976).

^{28/} See Staff Findings, paragraphs 83-86.

context related only to the fuel cycle issue of Aeschliman.^{29/} There it was determined that the NEPA violation was "of some magnitude". In the case before this Board and in addition to the fuel cycle issue, we have the additional Aeschliman issue of energy conservation which adds marginally to the extent of the NEPA violation. In summary, a NEPA violation of some magnitude is present and this fact weighs somewhat against continued construction of the Midland Plant.

H. Timeliness of the Objections

Under this factor, the Appeal Board must determine whether the NEPA objections were timely raised. In the present instance, these objections were timely raised at the construction permit stage and this factor weighs against continued construction of the Midland facility.

Of the equitable factors identified by the Commission, two factors weigh against continued construction of the facility. These are the extent of the NEPA violation and the timeliness of the objections. The remaining factors weigh for continued construction of the Midland Plant until the remand proceeding is concluded. In balancing these factors it is clear that the equities weigh in favor of continued

^{29/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 265 (1976).

construction. In terms of real impact, the absence of significant adverse impact, the demonstrated need for the project, the absence of viable alternatives, the demonstrable effects of delay, the failure to tilt the cost-benefit balance and readily identifiable general public policy concerns must be given significantly greater weight than the extent of the NEPA violation and the timeliness of the objections raised. The Licensing Board's conclusion to continue the Midland facility construction permits until termination of the remand proceeding is soundly supported by the record evidence.

III. INTERVENORS' PARTICULARIZATION OF LICENSING BOARD ERRORS IS NOT SUPPORTED IN LAW OR FACT

Intervenors argue^{30/} that the Licensing Board committed other errors which were "far from insignificant". Presumably, Intervenors intend to argue that these particularized errors are of such a magnitude as to warrant either a remand by the Appeal Board to the Licensing Board for further consideration, or a reversal of the Licensing Board's determination to continue the construction permits for the Midland facility. Intervenors' allegations are not supported by either the law or the facts, and form no basis for a reversal of the Licensing Board determination not to suspend the construction permits.

Reviewing these issues, the Appeal Board is not bound by the findings of the Licensing Board. Toledo Edison Co., et al. (Davis Bessee Nuclear Power Station, Units 1, 2, and 3) ALAB-385, 5 NRC 621,629 (1977). The Appeal Board may examine the record for support for the findings of the Licensing Board or may substitute its judgment for that of the lower board where the record will fairly sustain such a judgment.^{31/} Thus, in responding to Intervenors' arguments of particularized error, the Staff responds to Intervenors' arguments by reference to the record evidence.

^{30/} See Intervenors' Brief, pages 26 through 50.

^{31/} Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 12 No. 4 (1977); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 402-05 (1976).

A. The Alleged Fuel-Cycle Errors

Intervenors center their arguments on the application of the interim fuel cycle rule to the suspension proceeding. No evidence was presented during the suspension proceeding on the environmental impacts associated with the fuel cycle. In the Staff's view, such a course of action by the Licensing Board was justified by the circumstances of the case. The suspension proceeding had been a lengthy one and the Licensing Board was making all efforts to expedite the proceeding and conclude it when the Appeal Board directed the Licensing Board to consider the uranium fuel-cycle issue.^{32/} At this time, the suspension proceedings were near termination and additional evidence on this issue was left for the remand proceeding.

Such a course of action by the Licensing Board was justified by the record it had before it. At this suspension hearing, the question of the environmental impacts associated with the fuel cycle (an issue which had not been treated in the original environmental review of the Midland facility) is a relevant one on the question of whether the cost-benefit balance would be tilted by further investment. As discussed above,^{33/} a clear need for the Midland Plant was demonstrated;

^{32/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-396, 5 NRC 1141, 1142 (May 4, 1977).

^{33/} Staff Brief, pages 13 to 15.

no environmentally preferable alternative to Midland was suggested in the record; and economic analysis demonstrates significant cost advantages for Midland even in the absence of consideration of sunk costs. Thus the cost-benefit balance for Midland cannot be regarded as being particularly close. In similar circumstances this Board has noted that the environmental effects of the fuel cycle, as reflected in the values of Table S-3 of the Commission's interim rule, are sufficiently small that they cannot tilt the cost-benefit balance.³⁴ The Staff reaches a similar conclusion in its FES prepared for the remanded proceeding. Defferal of the fuel cycle issue was thus justified in the light of these strong preliminary indications that its impacts do not have a major weight in cost-benefit balances.

B. The Alleged Need for Power Errors.

Intervenors argue that the record does not establish a need for steam and electricity from the Midland facility at the time presently estimated for completion of the facility. Intervenors begin their argument, illogically, by claiming that if a need can be satisfied

³⁴ / Public Service Co. of New Hampshire (Seabrook Station Units 1 and 2), ALAB-422, 6 NRC 33, 103-04 (1977).

elsewhere, as they allege is the case with Dow, this obviates the need for the facility at issue. This argument is unsupportable on its face. If a need for a facility has been established, the question of how to satisfy that need involves an examination of which alternative would be environmentally preferred. Intervenors cannot point to an environmentally preferred alternative to the Midland Plant.

For the case at hand, the record clearly establishes that Dow needs a new source of steam as soon as possible for its present facilities are old and cannot be made to operate safely and reliably beyond 1984. (Temple testimony, pp. 3-5; Tr. 2669-71; Orrefice Tr. 2733). In addition, Dow must replace its present process steam facilities as soon as possible to comply with state and federal air-quality requirements. (Temple testimony, p. 5; Orrefice, Tr. 2709; 2733). Furthermore, although there are a series of questions surrounding the Dow commitment to take process steam from the Midland facility, it is well established in the record that Dow is presently committed to the Midland project. (Temple testimony, p. 2; Orrefice, Tr. 2690). So Intervenors claim that there is no evidence that the steam-generating portions of the Midland Plant are needed, must be rejected.

On the issue of need for the electrical generating portion of the Midland facility, substantial evidence supports a need for the facility at the presently estimated completion dates. Consumers employed a probability encoding technique which demonstrated a need for the Midland facility as presently scheduled. (Heins Testimony)^{35/} Energy conservation experience and expectations were specifically examined. (Heins Testimony p. 6). While the probability encoding technique employed by Consumers is highly subjective, the 5.2% annual growth rate developed by this method was confirmed by an independent study using Consumers' more traditional analysis by class of customer. (Board Exhibit No. 4, p. 1.1-17). This traditional methodology included an evaluation of historical data and an assessment of trends for conservation including price elasticity, more efficient use of appliances, more efficient types of appliances (Heins Testimony, pp. 3-6) and insulation. (Bickel Tr. 2014).

Additionally, the Staff performed an extensive analysis of the need for the Midland facility. The Staff's analysis examined the Michigan Electric Coordinated System (MECS) which is composed of Consumers and Detroit Edison because these utilities are highly integrated and the Staff determined that need for the Midland facility must be viewed in the context of the combined capacity and demands of both Detroit Edison and Consumers (Feld Testimony, p. 2).^{36/} The growth rates

^{35/} "Testimony of Gordon Heins" follows Tr. 1648.

^{36/} "NRC Staff Testimony of Sydney E. Feld on need for facility" follows Tr. 4375.

examined by the Staff took account of conservation as well as other inhibiting factors on growth. (Feld testimony, p. 4). The Staff also reviewed two independent analyses that projected growth in electricity demand on the MECS. (Feld Testimony p. 9). These analyses generally support the forecasts of Consumers. (Feld Testimony, p. 9; p. 15; p. 18). The Staff also examined a comprehensive econometric model concerned with future energy growth developed by the Federal Energy Administration (FEA). The model predictions indicate that Consumers and Detroit Edison were underestimating MECS peak demand by approximately 100 MWe. (Feld Testimony, p. 23).

The Staff specifically examined whether or not these forecasts gave adequate weight to future conservation savings. (Feld Testimony, p. 23). Consumers is actively involved in promoting conservation measures among its customers. Consumers has included conservation responses in its latest forecast. (Feld Testimony, p. 25). The Staff determined that Consumers and Detroit Edison had adequately accounted for conservation in their present forecasts. (Feld Testimony, p. 28). In addition, the Staff examined the results of an econometric forecasting model developed specifically for the NRC Staff by the Oak Ridge National Laboratory, which is capable of forecasting electricity sales by state^{37/}

^{37/} "NRC Staff's Rebuttal Testimony of Sydney E. Feld on Forecast Methodology and Alternative Rate Designs" is found on the Special Transcript Volume of March 23, 1977.

The growth rate being forecast by this model for the State of Michigan for the period 1975 to 1990 is slightly higher than the growth rate being forecast by MECS. The Staff's extensive analysis of a number of independent studies and methodologies generally supports Consumers' forecasts and establishes a need for the Midland facility at the presently estimated completion dates.^{38/}

Additionally, the forecasts that were presented at the suspension proceeding may tend to underestimate electrical demand because of the potential for increased growth in electrical consumption due to substitution of electrical energy for oil and natural gas. (Feld Testimony, pp. 29-35; Gundersen Testimony, p. 5)^{39/} Also the Staff evaluated the need for base-load capacity on Consumers' system. The analysis consisted of a quantitative comparison of projected base-load demand and base-load capacity for the years 1981 to 1983. (Feld Testimony, p. 9). The results of this analysis are presented in Table 2 of the Feld testimony demonstrating that a one year delay in the Midland Plant would produce deficits in base-load capacity. Intervenors' argument that a need for the Midland facility has not been established in the record must be rejected.

^{38/} The extensive analysis performed by the Staff in this area and the limited cross-examination of Staff witnesses by Intervenor on this issue makes difficult an appreciation of Intervenors' claim in the footnote on page 30 of Intervenors' Brief that "in the face of this, the Staff support on the "need" issue is a farce".

A more proper observation is that Intervenors, by their actions, have conceded the integrity and accuracy of the Staff's analysis. One further comment is in order. Intervenors attached to their Brief a letter of September 16, 1977 from Consumers to the Licensing Board informing the Board of minor changes in Consumers' short-term sales forecast. While these changes will have an effect on ultimate demand, they are minor. Nonetheless, Intervenors selectively choose the two numbers for the year 1979 and manipulate them to give the impression that 1979 demand projections was overstated by 38.5%. This is inaccurate. The growth rate for the year 1979 has been altered by 38.5%. The effect on 1979 demand projections will, of course, be much less -- on the order of two percent.

^{39/} "Testimony of Walter J. Gundersen" follows Tr. 5101.

C. The Alleged Cost of Delay Errors

A factor to be properly considered in balancing the equities on the question of suspension is the cost involved with a delay in the Midland project. Intervenors attempt, somewhat inartfully, to isolate the cost of delay as the only factor which weighs in favor of suspension. That the majority of the equitable factors weigh in favor of continued construction is well established in the record.

Intervenors' further arguments that costs of delay are equivalent to sunk costs was discussed above.^{40/} Turning to the facts on cost of delay, there was conflicting testimony on the increased cost for the Midland project due to delay. The cost of delay analysis performed by the Staff^{41/} identified costs associated with allowance for funds used during construction (AFUDC), cost increases due to escalation and additional costs associated with shutdown and startup activities. (Meltz' testimony, p. 3, 4, 6). Dr. Timm, Intervenors' witness, testified that the approach examined by the Staff failed to consider the time value of money. (Timm testimony, p. 66).^{42/} Assuming that Dr. Timm is correct, the end result would be a zero effect on the ratepayers.

^{40/} Staff Brief, page 19.

^{41/} "NRC Staff testimony of Arnold H. Meltz on the Financial Costs of Delay (Excluding Replacement of Power)" follows Tr. 4573.

^{42/} "Testimony of Richard J. Timm on Behalf of All Intervenors Except Dow Chemical Co." is found in the Special Transcript Volume of March 23, 1977.

In any event, however, substantial delay costs do arise from the purchase of replacement power required due to a suspension.^{43/} Staff's analysis assumed little or no growth on Consumers' system and further assumed that the energy deficit could be made up internally through utilization of existing capacity. This extremely conservative analysis produced replacement power costs ranging from 3.8 to 5.3 million dollars per month for a coal-fired facility, and 9 million to 12.5 million dollars per month for an oil-fired facility depending upon the Midland Plant's capacity factor assumed. This conservative Staff analysis demonstrates conclusively that real costs of a substantial magnitude are associated with the suspension of construction of the Midland facility--even a suspension of three months or six months.

Furthermore, there exists a real potential that, in the event of a suspension of construction, Dow will choose to withdraw from the project rather than accept the risk of requiring new generation in 1984 with the future of the Midland facility uncertain.

The record is clear that real costs for replacement power will be incurred should the Midland facility be delayed. Intervenors' argument that there is another side to the coin of delay costs, namely, the savings which accrue by avoiding expenditures on continued construction, suffers from Intervenors' inability to establish any viable alternative to continued construction of the Midland facility.

^{43/} "NRC Staff testimony of Sidney E. Feld on Cost of Replacement Power Resulting From Suspension" follows Tr. 4509.

D. The Alleged Errors in Discussing Alternatives to the Midland Project.

Intervenors apparently concede that the alternatives analyzed by both Consumers and the Staff of coal or oil-fired facilities owned by Consumers and supplying steam to Dow are not viable. Intervenors appear to focus their arguments on alternatives which have Dow constructing its own separate steam-generating facilities. Intervenors argue that the record shows a likelihood that Dow will withdraw from the Midland project and go its own way. Intervenors focus on the economic question of whether continued Dow support for the Midland facility is cost-justified. When Dow conducted its corporate review on September 27, 1976, Dow concluded that the Midland Plant retained a cost advantage, although the difference in cost between the Midland Plant and a coal-fired alternative had narrowed appreciably. (Temple, p. 5, Orrefice, Tr. 2699).^{44/} Since that corporate review, the nuclear fuel costs have increased considerably above the figures used by Dow.^{45/} Subsequent to receiving this information, Dow reiterated its commitment to the Midland project.^{46/}

^{44/} "Testimony of Joseph G. Temple, Jr." follows Tr. 220.

^{45/} See Staff Findings, paragraph 57.

^{46/} See "Dow's Further Responses to Interrogatories" of February 28, 1977, specifically response to Interrogatory No. 14. Paragraph 1 states "To date, Dow has not been advised of changes which it considers sufficient to require that it undertake a new analysis." This interrogatory response was admitted into the record by the Licensing Board's Order on Rebuttal Evidence of September 23, 1977. See also "Supplemental Response of Consumer Power Co. and Dow Chemical Co. to Interrogations of Intervenors other than Dow" filed November 4, 1977, wherein Dow and Consumers have agreed to undertake intense negotiations to resolve outstanding contract differences.

Thus Dow currently remains committed to the Midland project.

Nevertheless, one of the issues fully explored at the hearing was whether Dow could feasibly develop facilities to generate its own process steam as an alternative to the purchase of steam from Consumers. A coal-fired steam generating plant was found to be the most reasonable alternative for Dow to generate its own process steam and electricity.^{47/}

Dow's analysis of alternatives summarized in Intervenors' Exhibit No. 25 indicates that the Midland Plant is clearly preferable at a 30% return on investment (ROI) and marginally preferable at a 15% ROI. However, this evaluation did not take into consideration the new higher nuclear fuel costs presented by Consumers at the hearing. Consumers has also examined the alternative of Dow generating its own process steam and electricity.^{48/} The results of the analysis are presented in columns 4 and 5 at page 7 of the Brzezinski testimony. There, Consumers concluded that either at a 15% or a 30% ROI, the Dow alternative of generating its own process steam and electricity was not economically preferred. The Staff also examined as an alternative to the Midland Plant a combination of facilities which could result if Dow decided to provide its own process steam and electricity requirements.^{49/} The

^{47/} See Staff Findings, paragraphs 113 and 114.

^{48/} "Testimony of Richard F. Brzezinski" follows Tr. 4959.

^{49/} "NRC Supplemental Direct Testimony of Sidney E. Feld on the Alternative of Dow Generating its Own Steam and Electric Power" follows Tr. 5169.

results of the Staff analysis are presented in Table 1 of the Feld testimony. That table compared the Midland Plant with the alternative of self-generation by Dow, plus a reduced sized coal electric plant to be constructed by Consumers. As that table shows, the Midland Plant has a cost advantage of 1.775 billion dollars even absent any consideration of sunk costs. (Feld testimony, Table 1).

In addition, Intervenors also presented testimony on a Dow alternative to the Midland Plant. That alternative would have Dow construct facilities and generate all its electrical and process steam requirements using coal-fired boilers, and would have Consumers construct an 800 megawatt electric coal-fired electric generating facility. (Timm testimony, p. 83). The results of Intervenors' analysis are presented on Intervenors' Exhibit No. 46. This exhibit shows a cost advantage of 150 million dollars for the Dow alternative with no account taken for costs already sunk, i.e., the actual completion costs for the Midland Nuclear Units. Sunk costs in the project approximate 400 million dollars. (Keely testimony, p. I 3).^{50/} Taking account of the actual completion costs would thus result in a cost disadvantage of approximately 250 million dollars for the Dow alternative. Thus, in all instances, when sunk costs are considered, no alternative associated with Dow developing its own steam generating facilities proves to be preferred to the Midland facility. These analysis focus only on economic costs and do not address the environmental disadvantages attendant to the coal alternatives.

^{50/} This Keely testimony follows TR. 602. It should be noted that this value was projected for December 1, 1976. Due to continued construction, this value will have increased.

It should be noted further that Intervenor's alternative assumed that Consumers would construct only 800 megawatts of electrical generation capacity. The record evidence develops a need for the full 1300 MWe of electrical generation to be provided by the Midland facility.^{51/} Were Intervenor's alternative properly adjusted to account for 1300 MWe of electrical generating capacity, that alternative would be even further disadvantaged.

E. The Alleged ACRS Errors

Intervenor's direct their argument concerning the clarified ACRS letter of November 18, 1976 to the question of whether or not that letter adequately clarifies the items identified and so meets the test laid down by Archilman. While this is the ultimate question which must be resolved at the remand proceeding, it was not the question which was before the Licensing Board at the suspension proceeding. Rather, the primary duty of the Licensing Board was to determine if a substantive safety issue had been identified and, if so, take appropriate action.^{52/} The record on the eleven identified ACRS items is clear. There are no safety concerns. Extensive testimony by the Staff regarding these eleven items establish that the items are either currently resolved, or that resolution of the item can adequately be left for a later determination. (Crocker pp. 1-20).^{53/}

^{51/} Staff Brief, pages 13 to 15.

^{52/} Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 997 (1974).

^{53/} "Analysis of ACRS Report of 11-18-76" follows Tr. 4177. The word "draft" appearing in the heading of this testimony was deleted by Mr. Crocker orally at the hearing and he adopted that testimony as his final testimony. (Tr. 4133).

Beyond any safety concerns, the eleven identified ACRS items could impact upon the NEPA considerations before this Board. This potential impact is two-fold. The first concerns the foreclosure of alternatives and the Crocker testimony referred to above establishes that no alternatives related to the ACRS items will be foreclosed by continued construction. The second concerns the impact on plant cost and schedules associated with the ACRS items. Cost and schedule have their greatest impact on the issue of Dow's need for steam. Cost escalation and schedule extension could affect Dow's commitment to the nuclear plant. However, record evidence was developed as to the impact on these ACRS items and other potential regulatory requirements on cost and schedule which demonstrated that present cost and schedule projections are reasonable. (Keely, Tr. 1077; 1078; 1394; 1421-42). Consumers has examined the impact on plant costs and schedule of the generic items identified by the ACRS in its "Status of Generic Items Relating to Light-Water Reactor, Report No. 4 of April 10, 1976" (ACRS Generic Report).^{54/} This analysis indicates that Consumers has included an estimate for the cost of resolution of such items in its current estimate of 1.67 billion dollars for plant capital costs. Consumers has also isolated areas of potential impact on plant schedule by items identified in the Generic ACRS Report. No hard impacts were identified.^{55/}

^{54/} Consumers' Exhibit No. 32.

^{55/} Ibid.

The NRC Staff also examined the cost and schedule impact of the Generic ACRS Report. In response to Intervenor's Interrogatory No. 9^{56/} the Staff examined cost and schedule impacts. The Staff did identify schedule impacts for compliance with these generic ACRS items ranging from 10 to 28 weeks. (Powell Interrogatory Response No. 9, page 5, February 7, 1977). In summary, the cost and schedule impacts of compliance with ACRS items have been examined and quantified and no adverse effect on the cost-benefit balance has been established.

In light of this record, Intervenor's argument that the cost and schedule impacts associated with the 11 ACRS items identified in November and the ACRS generic items have not been considered must fail.^{57/}

^{56/} "Additional NRC Staff's Answers to Interrogatories of Intervenor's dated January 3, 1977" dated February 7, 1977, and "Additional NRC Staff's Answers to Interrogatories of Intervenor's dated January 3, 1977" dated February 23, 1977 were apparently admitted into the record of this proceeding by the Board's Order concerning Rebuttal Evidence of September 23, 1977.

^{57/} The Staff takes vigorous exception to several statements by Intervenor's at page 46 of their Brief. The cross-examination of Mr. Crocker did not reveal a "total ignorance of the meaning of the ACRS report". Rather Mr. Crocker correctly explained the status of the ACRS generic items for which resolution is pending. Examination of these items is of a continuing nature with no time limit set for resolution and with each item, due to its singular nature, considered on an ad hoc basis. Reference to the language "due consideration" requires continuing Staff examination of the ACRS item, and such an examination may continue indefinitely for the item is not a problem related to the safe operation of a specific nuclear power plant, but an item whose consideration ACRS feels appropriate to enhance reactor safety generally. (Crocker, Tr. 4213-4227).

Absent the identification of any substantial safety problem in the eleven items identified by the ACRS in its November 18, 1976 report, the Board was fully justified in permitting continued plant construction.^{58/}

F. Other Matters

In this portion of their Brief, Intervenors attempt to preserve unbriefed exceptions before the Appeal Board. It should be noted that Intervenors' Exception No. 58 is not referred to anywhere in their Brief. Exceptions Nos. 1, 4, 11, 12, 13, and 23 are referred to in the most cursory fashion at page 49 of Intervenors' Brief. Such treatment of these exceptions hardly meets the intent of the rule requiring briefing. Section 2.762(a) states:

A Brief in support of exceptions shall be filed within 15 days thereafter. . . . The Brief shall be confined to a consideration of the exceptions previously filed by the party and, with respect to each exception, shall specify, inter alia, the precise portion of the record relied upon in support of the assertion of error.

Exceptions not briefed are considered waived.^{59/} Intervenors' reference

^{58/} Intervenors' argument related to alleged quality assurance deficiencies at the Midland facility is clearly beyond the jurisdiction of the Licensing Board and of this Appeal Board. The Commission reconvened the Midland proceeding with explicit instructions to deal only with the Aeschilman issue. For issues beyond the scope of the Aeschilman decision, the proper course for a party wishing to raise such an issue is a petition under 10 CFR §2.206 to institute a proceeding under 10 CFR §2.202 to modify, suspend, or revoke a license, or for such other action as may be proper. The Licensing Board properly recognized its limited jurisdiction. See paragraph 69 of the Licensing Board's Order.

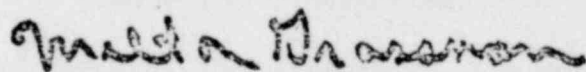
^{59/} Florida Power and Light Company (St. Lucie Nuclear Power Plant Unit 2), ALAB-435, _____ NRC _____, at n. 4 (October 7, 1977); Union Electric Company, (Callaway Units 1 and 2), ALAB-347, 4 NRC 216 (1975); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 414 (1976).

to the exceptions and a restatement of its content is not acceptable and the exceptions so treated should be considered waived. With regard to each of the exceptions so treated and with regard to exception 58 which was omitted entirely, the Staff is not in a position to respond for the exceptions are general and vague, their relevance is unclear, and record citations in support are lacking.

IV. CONCLUSION

The record demonstrates conclusively that there is a need for the power and steam to be generated by the Midland facility. No environmentally preferable alternative exists. An examination of the equitable factors identified by the Commission reveals that on balance construction should not be suspended pending a decision on the merits at the remand proceeding. Consequently, this Board should sustain the Licensing Board's decision not to suspend.⁶⁰ //

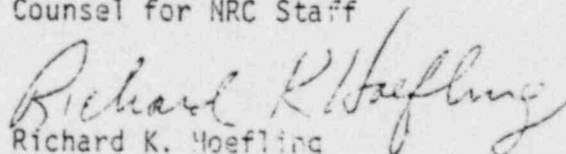
Respectfully submitted,



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Dated at Bethesda, Maryland
this 14th day of November, 1977.

⁶⁰ Attached to the Staff's Brief is the "Affadavit of Lawrence P. Crocker" presenting the Midland Plant cost and schedule information available to the Staff and requested by the Appeal Board.