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July 22, 1980

Mr. William O. Miller
Chief, License Fee Management Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Docket Nos. 50-329, 50-330

Dear Mr. Miller:

Your letter dated July 3, 1980, to Mr. Judd Bacon was referred to me for research and response. You will recall that your letter set forth the reasons for the staff judgment that Consumers Power Company should submit a fee with its December 19, 1979, Application for Construction Permit Amendments.

After careful consideration and reflection, I am unable to endorse your argument for excluding the proposed amendments from the rule in footnote 2 to 10 CFR 170.22, which excepts such amendments from the license fee requirements.

While it is true that the December 6, 1979, Order does not specifically order Consumers to submit amendments to its CP, there is nothing in footnote 2 which requires that the Commission have ordered the permitee to submit an amendment. The language in footnote 2 states that the amendments must have "resulted directly from" 2.204 orders, not that the amendments themselves must be "ordered" pursuant to 2.204. If your argument were correct, then the Commission could in all cases avoid the impact of its own rules by structuring its 2.204 order so as to avoid directly requiring the licensee to submit amendments, while putting the licensee in a position where its choice is either to submit amendments or to shut down its project. Such an order has both the practical and the legal effect of requiring the submission of amendments. Further, your interpretation would give the Commission unbridled discretion to choose among permitees subject to 2.204 orders for purposes of charging application fees, by a simple choice as to the technical wording of its order under 2.204. Such discretion is permitted by neither the APA nor the Due Process Clause.

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Notwithstanding the above, requiring application fees in this case would subvert the NRC's own policies, as set forth in footnote 2 of 10 CFR 170.22 and in 42 FR 22156 (5/2/77), Item 6, which was referred to in Mr. Bacon's letter of April 3, 1980. These policies apply regardless of the technical wording of the order or of the technical structuring of the order-amendment sequence. Since the litmus test for regulatory construction is the purpose for which the regulation was promulgated, policy considerations rather than semantics should be controlling.

Your letter also states a more substantive argument for requiring payment of amendment fees, based on the fact that Consumers had undertaken remedial action on its soils problems. It is unclear to us how the policies referred to above are furthered by requiring license fees from those who voluntarily choose to take remedial action and not from those who wait until ordered to do so pursuant to a 2.204 amendment. Such is the clear implication of your argument. Also, neither the individual interests of the NRC nor the health and safety of the public are adversely affected by voluntary remedial action conducted in full sunshine.

In meetings related to the soils question the staff led Consumers to believe that it could undertake remedial action, at its own risk, and provide simultaneous assurances through 50.54f responses. The following from the mirutes of an October 16, 1979, meeting documents that staff posture:

> "The staff noted that the response to its 10 CFR 50.54 requests for acceptance criteria for remedial actions (e.g. questions 4,6, etc.,) had not resulted in identification of criteria in advance of remedial action. Rather, the reply notes that the criteria will be determined during or after remedial action. The staff stated that this approach by the applicant does not provide for timely staff feedback at the outset, but rather the staff must await results of the program to determine what acceptance criteria were used and if they are acceptable. Thus, remedial action is being conducted entirely at the applicant's own risk." (Summary of July 18, 1979, meeting on soils deficiencies at the Midland Plant Site, October 16, 1979, at page 2, published by NRC.)

At some point the staff became dissatisfied with this approach, which led to its issuance of the December order. However, the change in staff posture put Consumers in the position of having undertaken remedial steps prior to the issuance of the 2.204 order. To now charge a license fee on that basis seems, at the very least, unfair.

For the reasons noted above, we again respectfully request that you reconsider your position on this issue. Thank you for your cooperation.

Very truly yours,

James E. Brunner

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