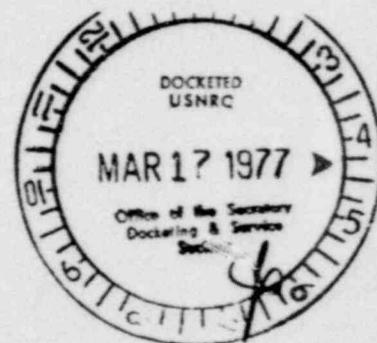


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

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

Docket Nos. 50-329
50-330

LICENSEE'S ANSWER TO
MOTION FOR IMMEDIATE
SUSPENSION OF CONSTRUCTION

3/17/77

Consumers Power Company (Licensee) hereby responds to the "Motion for Immediate Suspension of Construction" (Suspension Motion) addressed to the Commission on March 12, 1977, by Intervenors other than Dow Chemical Company (Intervenors).

On March 4, 1977, the Licensee filed a "Motion for Stay of Orders in the Light of Changed Circumstances" (Motion for Stay). The Intervenors' Opposition to Licensee's Motion for Stay was filed together with their Suspension Motion, and both are clearly interrelated. The Suspension Motion makes a number of allegations of a general nature, and, to the extent that any attempt is made to support those general allegations, it is purportedly contained in Intervenors' contemporaneous filing in opposition to any stay of the proceedings . . ."

(Suspension Motion, p. 2.) We do not believe that it is ^{not}

8007170 724

G

necessary to respond to any but the most relevant of the factual misstatements contained in the two documents; and to the extent we do so, it is in Part III of this Answer. Initially we believe it appropriate to call the Commission's attention to certain basic factors against which the Suspension Motion should be considered.

I.

Intervenors contend that construction must be halted "as a matter of law." (Suspension Motion, p. 1) A similar argument was made in a "Motion to Halt Construction of the Midland Facility. . ." etc., filed by the Intervenors with the Commission on September 3, 1976. The Commission denied that Motion in its Memorandum and Order of September 14, 1976 (CLI-76-14, NRCI-76/9, 163, 167). Beyond reiterating their views, Intervenors do not attempt to brief the issue. Rather, the Suspension Motion (p. 1) is primarily based upon the view "that construction must be stopped from a factual standpoint."

The information contained in Part III hereof demonstrates that suspension of construction is what is not required "from a factual standpoint." The Commission has also available to it a more temperate and less one-sided view of the facts than is contained in the Intervenors' filings of March 12. On March 15 there was

filed with the Commission the "NRC Staff's Answer to Applicant's Motion for a Stay of Orders in the Light of Changed Circumstances" (Staff's Answer). Although the bulk of that document is related to the legal issues involved in Applicant's instant Motion for Stay, the Staff's Answer does briefly advert to the factual conclusions which may be drawn from the record which has been developed to date in the remand proceeding before the Licensing Board. In connection with a discussion of the Commission's authority -- independent of any mandate -- to consider whether the outstanding Midland construction permits should be modified, suspended or continued, the Staff indicates its conclusions as follows: "In the Staff's view, the information contained in the record to date does not warrant modification, suspension or revocation of the Midland construction permits." ^{1/}
(Staff's Answer, p. 12.)

The Staff's Answer makes it clear that the only reason it believes the remand proceedings should continue

^{1/} The Staff further indicates that Licensee's position that the construction permits should not be modified or suspended "is amply supported on the record on all issues inquired into with the exception that Dow's commitment to take nuclear steam from Midland." (Ibid) That commitment is conditioned on the availability of the steam by the end of 1984 (the steam portion of the plant is now scheduled for commercial operation in March of 1982), and the cost of the plant not soaring to unacceptable levels such as might be caused by further substantial delays in construction. On this point, the Staff concludes that "an adequate
" (Ibid) The record on this

is because the issuance of the mandate in Aeschliman v. NRC by the United States Court of Appeals for the District of Columbia Circuit requires the Commission to proceed. (Staff's Answer, pp. 5-8.) ^{2/} Indeed, the Staff expresses its concern "that, on most issues, moving forward with these proceedings may be unwise, inefficient and even pointless." ^{3/} (Staff's Answer, p. 11) The Staff explicitly recognizes the "anomaly," the "inequity," and the "administrative inefficiencies" pointed out in the Motion for Stay. (Staff's Answer, p. 9) In short, it is only what the Staff regards as the compulsion of the mandate, rather than the facts or the equities or common sense, that makes it believe the Commission is required to continue to maintain the remand proceedings in force.

For the reasons initially set forth in its instant Motion for Stay, the Licensee believes that the Commission now has the authority to issue the requested stay. The relationship between a federal administrative agency and a reviewing appellate court does not impose upon the Commission the obligation of playing the role of Sorcerer's

^{2/} The Intervenor's Opposition (pp. 2-7) also treats the mandate as leaving the Commission wholly without discretion concerning the need to conduct remand proceedings.

^{3/} The reservation which may be implied by the phrase "most issues", presumably relates to the Consumers - Dow relationship referred to above and discussed in

Apprentice - helpless to stop what once it started. Nor is continuation of the "unwise, inefficient and even pointless" proceedings here involved a short term matter. Intervenors emphasize "that further detailed hearings are absolutely necessary." (Suspension Motion, p. 2) And no party has taken issue with Licensee's statement that, after the hearings before the Licensing Board have been concluded, "the Appeal Board and the Commission itself will be involved in the remanded proceedings for many months in the future." (Motion for Stay, p. 8)

If, nevertheless, the Commission concludes that the mandate does leave it without discretion, the obvious action for it to take is to resort, itself, to one of the judicial remedies referred to by the Staff. The Staff emphasizes that judicial remedies for the situation "are open to the Licensee", that "appropriate remedies exist should the Licensee choose to seek them." ^{4/} (Staff's Answer, pp. 9, 11) However, the obligation is not that of the Licensee alone. Although the Licensee is deeply affected, the Commission is the object of the mandate. It

^{4/} The Staff has frankly stated that it has "been unable to find any case law . . ." on the compulsive impact of the mandate in a situation like the instant one. (Staff's Answer, p. 6.) It has been Licensee's view that, in the absence of any direct precedent, basic principles governing administrative-judicial relationships would probably impel a court to deny a request to stay administrative action unless such relief was first requested from the Commission. It is for this reason that Licensee is requesting relief from the

surely has an interest in the nature of the proceedings it conducts, and the judicial remedies referred to by the Staff are equally open to the Commission.

In that connection, we call to the Commission's attention the fact that the remand hearing is now scheduled to reconvene before the Licensing Board on Monday, March 21. The Licensee requested the Board to defer that hearing until the Commission acts on the instant Motion for Stay. The Staff opposed this request, not on the merits but because it believes that under an outstanding instruction from the Commission the Licensing Board had no choice but to continue; and the Licensing Board denied the request. Accordingly, we also suggest that if the Commission does determine to invoke the judicial remedies referred to by the Staff it should direct the Licensing Board to stay the proceedings before that body until the court has acted. Surely the "discretion to determine the schedule under which the remanded proceedings are to be conducted in the light of all the relevant circumstances . . ." (Staff's Answer, p. 7) confers at least enough authority upon the Commission to grant so limited a stay.

Conceivably the Commission may agree with Licensee and the Staff that continuation of the current proceedings

is anomalous, unacceptable and administratively inefficient, but accept the view of the law propounded by the Staff and the Intervenors, yet, for some reason conclude that it would be inappropriate to seek judicial relief itself. In that event its order should clearly reflect its view with regard to the inadvisability of going forward with the current proceedings and its rationale for believing that it is compelled to do so; and the hearings before the Licensing Board now scheduled to begin on March 21 should be stayed by the Commission for a reasonable period of time so that the Licensee may make a timely request for judicial relief of the type suggested by the Staff.

II.

The Intervenors appear to urge that, because of information developed in the record of the remand proceeding thus far, there is now a need for the Commission to proceed with additional hearings on its own, independent of the court's mandate, and consider suspension of the Midland construction permits. To the extent that this may be a reference to the "show cause" procedures contained in the Commission's regulations, those regulations are inapplicable. None of the officers referred to in 10 C.F.R. § 2.202 is involved in any proposal for such

action, and the Suspension Motion does not address the officials referred to in 10 C.F.R. § 2.206.

More important, this Answer demonstrates that the factual basis for any further hearing is lacking. However, should the Commission choose to view the Motion as suggesting that it order the NRC Staff to undertake a show cause proceeding, Consumers Power Company requests an opportunity to respond concerning the propriety of such course of action, particularly with respect to any issue of special concern to the Commission not adequately dealt with in this pleading.

The question raised by the Staff of whether the Commission itself may wish to consider taking action of such a type should be answered in the negative in light of the merits and the Staff's view that: "[T]he information contained in the record to date does not warrant modification, suspension or revocation of the Midland construction permits." Accordingly, there is no basis for any further proceedings at this time.

Finally, it should be emphasized that the Staff's question is wholly unrelated to the merits of Licensee's request for a stay of the remanded proceedings and is not advanced as a reason for denying that request. To the contrary, the question is merely a reminder of the

Commission's continuing authority "[s]hould the effectiveness of the mandate be stayed." (Staff's Answer, p. 11)

III.

Intervenor's factual assertions in paragraphs 2 and 3 of their Suspension Motion, as expanded upon in their Memorandum opposing Licensee's Motion for Stay, that Licensee's position on need for power and on its contractual relationship with Dow, are not supported by the record before the Licensing Board are simply incorrect. With regard to need for power, there are no less than three independent studies in the record of this proceeding, as well as an evaluation of each of these studies, which support Licensee's position.

The Licensee's Forecast is reflected in the testimony of Messrs. Hines, Rickel and Mosely at Tr. 1644 at pp. 1-16 and see Tr. 1650-1742; 1749-1860; 1866-2024; 3319-3322; 3389-3454; and 3995 at pp. 1-16. This Forecast shows that Licensee's load requirements will rise at a rate of approximately 5.2% per year for the period in question and that Licensee must have the Midland units on line in 1981 and 1982 respectively to meet those forecasted demands. In addition to this study, the Governor's

Advisory Commission on Electric Power Alternatives published, in February, 1976, a Forecast for the State of Michigan which included the Detroit Edison System, as well as Licensee's system. The conclusion of this study was that Licensee's Forecast was conservative. See Tr. 4375 at pp. 15-18. The final study was conducted by the Michigan Public Service Commission and is reflected at Tr. 4375 at pp. 10-15. This study also concluded that Licensee's Forecast of projected demands was conservative. Finally, the Staff evaluated each of these studies in order to make its own independent assessment of the forecast methods and projected load requirements of the combined Detroit Edison-Licensee system. The staff concluded that Licensee's Forecast was reasonable. See Tr. 4375 at p. 23. Thus, the record clearly supports Licensee's position on the need for the power to be produced by the Midland facility.

With regard to the Dow-Consumers relationship, Dow stated at the beginning of this proceeding that "at the present time, circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982" and that "under the present circumstances, as known to Dow, the nuclear alternative remains the most attractive one economically." Tr. 220 at pp. 2 and 3.

On February 28, 1977, in further answer to Interrogatories propounded by the Staff, Dow set forth its position on continued participation in the Midland project. This position which was taken after 21 days of hearing, many on issues which directly affect the Dow-Licensee relationship, is as follows:

14. If Dow were under no contractual obligation to purchase steam and electricity from the Midland Nuclear Facility, would Dow still choose to purchase steam and electricity from that facility under current economics and circumstances as perceived by Dow? Explain.

Answer

Dow requires a dependable supply of steam and electricity sufficient to supply the needs of its Midland plant. Currently, Dow obtains its steam and electricity from its own power plants, but those plants are antiquated and alternative sources must be obtained in the near future. In September, 1976, Dow concluded, as part of the corporate review of the Midland Nuclear Project, that, based upon the information there provided, the Midland Nuclear Plant retained an economic advantage over the alternatives considered. Dow's official position as a company remains unchanged. No person in Dow's employ has any authority or power to change this position. To date, Dow has not been advised of changes which it considers sufficient to require that it undertake a new analysis.

With regard to the hypothetical question as to what Dow would do if it were under no contractual obligation to purchase steam and electricity from the Midland Nuclear Facility, Dow's decision as to its future sources of steam and electricity would, as a matter of

good business practice, depend on its cost-benefit analysis of the relative merits of the nuclear and other alternatives available, considering, inter alia, the relative costs, commitments and reliability involved in each alternative. That situation is not before Dow or the Board at this time; and therefore, this hypothetical question cannot be answered.

Two other related interrogatory answers which are also significant as to Dow's intent to support the Midland Project are:

8. Has Dow undertaken any formal efforts in initiating a project to replace the existing steam facilities with fossil fired facilities? Explain. Please inform the NRC Staff on a continuing basis of any additional efforts or initiatives taken by Dow to replace the existing facilities.

Answer

No.

15. If Dow were assured of a reliable source of steam and electricity from the Midland Nuclear Facility by the end of 1984, in what circumstances would Dow consider construction of its own fossil fuel generating facilities?

Answer

Section 11 of the Contract for Steam Service between Dow and Consumers Power provides that, upon retirement of Dow's existing fossil fuel generating facilities, Dow may generate and utilize in its Midland Plant an amount of steam not exceeding 1,640,000 lbs/hr. of steam at a pressure not exceeding nominal 175 psig

from any facility owned and operated by Dow, as standby or auxillary to the steam to be provided by Consumers Power. Dow has not yet decided what type of facilities it will install under this provision.

Given the assumptions set forth in this question, Dow presently has no plans to construct fossil fuel generating facilities at the Midland Plant other than those discussed above.

Thus, Dow's commitment to support the Midland Project was clear at the beginning of this proceeding and remains so today.

However, it should be pointed out that the uncertainty caused by the Aeschliman decision, and this hearing on whether Licensee will be allowed to continue to build Midland, does pose a threat to the continuation of the Dow-Consumers relationship. Counsel for Dow referred to this uncertainty during a colloquy with the Licensing Board concerning the procedure to be followed during the suspension proceeding stating:

Mr. Wessel: Yes, Mr. Chairman.

There is an additional element here which I think is critical, if I may address it a bit.

Because it has been assumed the suspension hearing could be acted upon now, and a suspension ordered or not ordered, and then at some later point there could be a hearing on the full remand proceeding, and action taken; I think from what I have heard of the schedules, the preparation, the length of the proceedings, it is very likely at least if the suspension hearing itself should result in a suspension, that for practical purposes that means that Dow no longer has nuclear power from the Midland plant as an alternative.

Mr. Wessel: I don't think we question the nature or the length of the hearings, Mr. Chairman; the question that is critical, as far as I am concerned, is whether or not the Board might grant an interim order of suspension, which in effect, would be operative for a period of six or eight or ten months, or a year and then make it impossible for Dow to proceed with its nuclear alternative.

Because even there, even though the Board reversed its decision later on on the remand date, that reversal would have come at a point in time when there no longer was any way in which Dow could reverse its course.
Tr. 904 and 905.

Mr. Wessel: . . . I don't think I've made myself clear. I don't want to get involved in what is obviously some kind of strategic discussion between the parties as to whether they want a full hearing, a combined hearing, and so forth. I'm trying to communicate to the Board that although a denial of an order during the suspension hearing would not necessarily preclude alternatives, the granting of an order of suspension, even though it's stated to be only tentative, preliminary, temporary and so forth, might well, in effect, be determinative of the entire case.
Tr. at 906.

Intervenors have recognized this uncertainty and by tactics such as the instant Motion to Suspend and their actions to prolong this proceeding, have attempted to accomplish indirectly what they have not been able to accomplish directly, i.e., the termination of the Dow-Consumers relationship.

IV.

Licensee today received a "Statement by the Dow Chemical Company in Response to Motion for Stay" (Dow statement). In it Dow calls the Commission's attention to Dow's continuing need for a dependable supply of steam and electricity and to the fact that it cannot rely on its own plants beyond 1984. The Dow statement reminds the Commission of Dow's testimony before the Licensing Board, "that, under the present circumstances as known to Dow, the nuclear alternative remains the most attractive one economically". However Dow emphasizes its deep concern that any delay in construction might operate to prevent the Midland plant from being ready for operation until after the end of 1984. Thus Dow furnishes the Commission with another strong reason for denying the Suspension Motion.

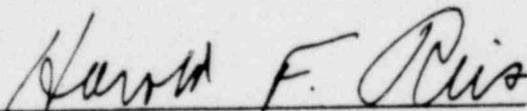
Dow also suggests that the present hearings should continue in order to avoid possible delay if the Supreme Court should affirm the decision of the Court of Appeals; however any decision to suspend construction "should be held in abeyance pending final disposition by the Supreme Court." Whether it would be possible for the Commission to hold such a decision in abeyance is a question which the Dow statement does not address. In addition, Dow is mistaken in believing that, even if such a course could be followed, delay will be avoided. As was pointed out in the

Motion for Stay (p. 17):

Even if the Supreme Court should affirm the Court of Appeals in all respects or in part, such issues, if any, as are ultimately before the Commission as a result of the Supreme Court's decisions will have to be considered at some time in the future, when, no doubt, circumstance will differ from those existing today. The question of continuation, modification or suspension of the construction permits would have to be viewed in the context of the circumstances then existing."

Accordingly, even in the circumstances envisaged by the Dow statement, hearings held at this time would save little or no time in the future.

Respectfully submitted,



Harold F. Reis

Lowenstein, Newman, Reis &
Axelrad
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036

Counsel for Consumers Power Company

March 17, 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Commission

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

CERTIFICATE OF SERVICE

I certify that copies of the attached Licensee's Answer to Motion for Immediate Suspension of Construction, dated March 17, 1977, were served upon the following by deposit in the United States Mail, postage prepaid and properly addressed, on the 17th day of March, 1977.

Mr. C. R. Stephens
Chief, Docketing and Service Section
Office of the Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard K. Hoefling, Esquire
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Myron M. Cherry, Esquire
Suite 4501
One IBM Plaza
Chicago, Illinois 60611

L. F. Nute, Esquire
The Dow Chemical Company
2030 Dow Center
Midland, Michigan 48640

Milton R. Wessel, Esquire
4 Little Lane
White Plains, New York 10605

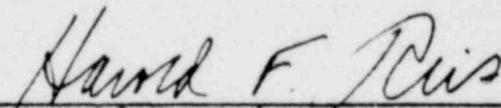
Howard J. Vogel, Esquire
2750 Dean Parkway
Minneapolis, Minnesota 55416

The Honorable Curt T. Schneider
Attorney General
State Capitol Building, 1st Floor
Topeka, Kansas 66612

Fred J. Coufal, Esquire, Chairman
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Emmeth A. Luebke, Member
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. J. Venn Leeds, Jr., Member
10807 Atwell
Houston, Texas 77096



Harold F. Reis

Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D. C. 20036
(202) 833-8371

March 17, 1977

Counsel for
Consumers Power Company