LAW OFFICES
MYRON M. CHERRY
ONE IBM PLAZA
CHICAGO, ILLINOIS 60611
(312) 565-1177

RELATED CORRESPONDENCE

February 19, 1977

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

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

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

Re: Midland Proceedings Suspension Hearings
Docket Nos. 50-329 and 50-330

Gentlemen:

This letter will confirm my conversation yesterday afternoon with Dr. Luebke concerning the Midland and Mapleton intervenors continued, active participation in this proceeding. As instructed by Chairman Coufal, I telephoned his office at approximately 2 o'clock Chicago time, February 18, 1977, to report to him and in his absence, also pursuant to earlier direction, I spoke with Dr. Luebke.

This letter of confirmation is also pursuant to the direction of Chairman Coufal that I report my conversation to the various parties. Each of the parties was aware, in advance, of the procedure of the telephone conversation and subsequent confirming report letter; and each party had no objection to the procedure.

Our position, as well as the substance of my remarks to Dr. Luebke in yesterday's telephone conversation are as follows. This report, however, is in significantly more detail than my conversation with Dr. Luebke. My conversation with Dr. Luebke was mostly general in nature, lasted approximately 5 minutes and did not concern itself with the specifications, reasons, and details contained herein. Specifically, for example, while I make reference to the record and evidence below, I did not discuss these matters with Dr. Luebke, and I did not raise any matters of contest with Dr. Luebke, although such matters are set out herein for supporting reasons.

Basically I reported to Dr. Luebke only conclusions concerning our financial plight and a request for financial assistance, but I did not argue the matter at all or in the detail set forth in this report letter.

1. I, my clients and Dr. Timm have labored in connection with these hearings for some time now. I believe we have all provided a valuable assistance to the hearing record and to the Board and on more than one occasion the Board, on the record, has called attention to the fact that our participation is both meaningful and necessary to a full and complete record. It is useful to highlight several points to appreciate what might have happened had we not been present.

As this Board knows, Consumers Power Company, whose license is under critical attack, planned its participation in these hearings in part upon the absence of myself, under the assumption that if I were not there no one else would do an active probing of the underlying facts. There is even a suggestion on the hearing record that Consumers Power Company's attorneys, and in particular the law firm of Isham, Lincoln and Beale, had contrived a scheme (which went hand in hand with my inability to be present at any hearings) to go to Washington and "prepare" the regulatory staff and particular Mr. Lawrence Brenner for these hearings. Thus the initial strategy of Consumers was to hide evidence; to seek to take advantage of the fact that I might not be present so that the "Dow-Consumers problem" could be finessed; and then to urge the regulatory staff to take its historic ', typical position of supporting the utility at all costs.

It is further clear from the hearing record that Consumers Power Company attempted to manipulate Joseph Temple's testimony and to urge Dow to provide a "non-knowledgeable witness" so that all of the facts would not come out. Moreover, as the record of this proceeding demonstrates (see, e.g., Midland Intervenor's Exhibit 25) Consumers Power Company threatened Dow with blackmail, if Dow did not support Consumers Power position, without regard to whether such a position by Dow would be truthful or honest. Consumers simply did not care and neither, apparently, did its counsel. Further, Consumers Power Company adopted what I have referred to on the record as the "Falahee strategy" (Mr. Falahee being a senior attorney in-house to Consumers) which consisted of delaying the suspension proceedings in any way possible (described by Falahee as "dragging its feet") with the specific intent that the suspension hearings would consume a large portion of time while further construction of the Midland facility was taking place.

I believe that the cross-examination done by us also shows the bankruptcy of Consumers' "need for power arguments," and reveals the total inadequacy of Consumers "unique" probability encoding method for load forecasting. Furthermore, our participation has demonstrated

beyond doubt that the regulatory staff has not done an independent review, and has willfully failed through its lawyers and its technical staff, to evaluate all of the evidence in advance of the hearing. In fact almost all of the important evidence brought out by the Intervenors in this proceeding, all of which emanated either from Dow or Consumers, was never reviewed by the regulatory staff since it did not bother to seek such information. Yet it was available to the staff, as it was to us, if the staff had determined to do more than pay lip service to its critical obligations.

Finally, the hearing record also shows that as a result of the Mapleton and Midland Intervenors having demonstrated the lack of a firm relationship between Dow and Consumers, as well as the existence of real alternatives, the continuing adherence to the Dow-Consumers contract is both impermissible under general principles of commercial law, as well as the important concepts contained in the National Environmental Policy Act and the Atomic Energy Act, as amended.

We repeat that none of this information probably would have seen the light of day without our participation, and in fact Consumers counted on that fact. Moreover, in light of the circumstances the regulatory staff's participation in this proceeding can only be described as "public malpractice."

Finally, we have prepared and offered the voluminous testimony of Dr. Timm, whose credentials are so persuasive that the Licensing Board on several occasions has stated that it wants to hear Dr. Timm's testimony and any cross-examination.

However, despite our efforts the funding of the Mapleton and Midland Intervenors has run into serious difficulty.

2. Yesterday I informed Dr. Luebke that despite my efforts and the efforts of others to secure funds to pay past fees, expenses and costs due me and Dr. Timm we have been unable to do so.

I, Mary Sinclair (one of the Midland Intervenors) and others acting on our behalf have previously telephoned more than a dozen foundations who generally are able to support nuclear interventions, and we have been turned down on each occasion because everyone's funds are committed. Additionally, funding which I hoped would be available through the end of the suspension hearings has been suspended and past bills owed to Dr. Timm and myself (including a large amount of out-of-pocket expenses paid personally by me) have not been fully paid. Both Dr. Timm and I continued to work for a

while in the hope that we would be able to secure further commitments for financing and/or have our past bills paid; but we all have been unsuccessful. Subsequent to the conclusion of the regulatory staff's direct case, and since February 16, 1977 I renewed my efforts to seek funding either for past bills or for further participation, and once again my efforts proved unsuccessful. Additionally, all others who have been seeking to obtain funds have reported to me that their efforts have also proved unsuccessful.

Accordingly, it is my judgment that we cannot find sufficient funds to continue, and it would be an intolerable burden upon myself and Dr. Timm to require us to continue in light of the large amounts presently outstanding and the enormous workload yet to be concluded.

3. Based upon the circumstances of this case and the observations by the Licensing Board that both my participation and Dr. Timm's participation is necessary for a complete hearing record, I confirm my request made to Dr. Luebke yesterday that the Atomic Safety and Licensing Board and the Nuclear Regulatory Commission now has an obligation to secure financing to enable us to continue to participate. I believe that there is sufficient legal authority requiring both the Board and the NRC to assist us, and I so explained my position to Dr. Luebke. Some or all of the following information was transmitted to Dr. Luebke:

(a) The Government Accounting Office has recently issued a Report dated December 3, 1976, entitled "The Cost of Intervention" and bearing GAO Document No. B-139-703. I am informed that this Report supports the position that the NRC has the authority to and should provide assistance to intervenors. I am further informed that the Report deals specifically with the responsibility of the NRC;

(b) In a conversation which Mrs. Sinclair had with and aide to Commissioner Galinsky, Mrs. Sinclair was informed that the NRC may be changing its attitude and ultimately may fund intervenors, basing its decision in part on the aforementioned GAO Report. However, Mrs. Sinclair was advised by Commissioner Galinsky's aide, (whose first name is Sidney but whose last name is unknown to me) that the NRC did not intend to take up the matter until after more Commissioners were appointed. This result is, of course, a continuing exhibition of the NRC's traditional insensitivity to intervenors;

(c) Both the Atomic Energy Act and the National Environmental Policy Act require mandatory public hearings.

How can an agency implement mandatory public hearings without helping out those members of the public whose participation is necessary in order to have a public hearing? This thought alone opts for financial assitance from the NRC;

(d) I also advised Dr. Luebke that Max Paglin, who I understand has been doing a great deal of work on gathering information to provide financial assistance to intervenors should be contacted by the Board since he may have useful information; and

(e) The NRC has paid for outside experts (like Dr. Timm and myself) in numerous proceedings (see e.g., Pebble Springs Docket) where the regulatory staff's participation needs supplementation.

I was told by Dr. Luebke that Chairman Coufal on the basis of the information I tendered him, and, in line with the Board's remarks on the record, would now seek to find funds to assist the Intervenors in this case.

4. I further told Dr. Luebke that I believe that funds must be sought both for Dr. Timm and myself, and not just for Dr. Timm or myself. I cannot continue in this case without the valuable assistance of Dr. Timm (who will be absolutely necessary to me in the preparation of findings which I have now been directed to prepare), and I do not believe that it is fair to ask Dr. Timm to come to these proceedings without benefit of counsel. This latter issue is clearly important since the Board is not in a position to protect Dr. Timm from trickery or unfair tactics, and it is clear even now that the regulatory staff and Consumers Power Company are only interested in the destruction of Dr. Timm's testimony, not a fair hearing on Dr. Timm's testimony. We believe that in fair presentation Dr. Timm's testimony will stand the test of any cross-examination, but I believe that fairness dictates that I be able to counsel Dr. Timm and participate in any such cross-examination. Dow Chemical, of course, cannot be counted on to help provide a fair backdrop for Dr. Timm since, notwithstanding the order of the Licensing Board that Dow actively participate in the proceedings, Dow has adopted the position of "benign neglect" regarding these hearings as well as the overall public interest, save, of course, Dow's narrow interests.

Cross-examination and the preparation of findings are not the only reasons why continued participation of Dr. Timm and I are mandatory. Consumers and the regulatory staff have announced the intention to file further testimony February 28, 1977. While I appreciate the Board's interest and ability to deal with that testimony, it is clear on this hearing record that if the testimony to be proffered on February 28, 1977 (if it is finally received) is

not subjected to the scrutiny of myself and Dr. Timm, then Consumers and the regulatory staff may be in a position to continue to distort the truth to their own mutual advantage.

5. As I have informed the Board on earlier occasions, the United States Court of Appeals decision in July 1976 required as a matter of law, an automatic suspension of construction, in order that the remanded hearing be held without massive construction and spending taking place. The NRC, however, disagreed with us and ordered the current suspension hearing. The suspension hearing may last (to its conclusion) almost a year and in the process, unless financial assistance is granted by the NRC, will have destroyed the viability of the Midland and Mapleton Intervenors. Thus we will not be in a position later to participate in the very remanded hearing which was ordered by the Court of Appeals pursuant to our earlier appeal. It is ironic indeed that the very persons who caused the remanded hearing (yet to commence) may not be in a position to participate in that hearing because the NRC has engaged in lengthy (and in my judgment, according to law) unnecessary suspension hearings which resulted in a depletion of our resources.

For all of these reasons I believe that fairness and law require that financial assistance be provided for us.

6. Some of the suggestions I have for the method of financial assistance, none of which I passed on to Dr. Luebke, are as follows:

(a) The regulatory staff should be obligated to provide financial assistance to Dr. Timm and myself and treat us as a contracting party providing valuable information just as if the regulatory staff had solicited a research project, as they do all the time from Oak Ridge, Argonne, Battelle Northwest, Westinghouse or General Electric;

(b) Consumers Power Company could be ordered to pay the cost of our financial assistance by requiring Consumers to absorb that cost as part of its fees paid to the Nuclear Regulatory Commission;

(c) Dow Chemical could be ordered to actively solicit funds from one or more sources in order to ensure that this hearing will be a truly open and public hearing;

(d) The Board could find the funds from its administrative fund. The Board could make findings that Dr. Timm is a Board witness and I am a necessary Board advocate thus justifying the costs as necessary to the hearing --- like a court reporter or a Board administrative assistant: and

(e) The Nuclear Regulatory Commission can finally have the decency to meet the financial assistance question head-on and provide such assistance in cases where, as here, the need for assitance is overwhelming.

If the Board wishes I will provide further theories and will upon request actively assist the Board in any way deemed proper.

7. Finally I informed Dr. Luebke that I have decided not to withdraw from the proceedings at this point on the hopes that the Board will be successful in securing financing for Dr. Timm and myself. Because of the Board's commitment actively to seek funds, and my resultant reliance on that Board commitment, I will continue as an attorney in this case until I am advised by the Board that their efforts have proved unsuccessful. However, under the circumstances, the Board must resolve this before any further hearings are scheduled in these proceedings to ensure that no unfair advantage is taken of Dr. Timm or myself.

* * *

I now await the Board's good efforts and hope and trust that the Board will be successful. For without necessary financing and the Mapleton and Midland Intervenors participation (including myself and Dr. Timm) the hearing can no longer be called a public hearing.

* * *

For all of the above reasons and because I hope the Board will be successful in obtaining necessary financial assistance for Dr. Timm and myself, I reaffirm my request made earlier to the Board that any further suspension proceedings be scheduled considering the commitments of both myself and Dr. Timm. As I indicated on the record, on March 8 I am arguing a case before the First Circuit Court of Appeals in Boston and will not be available for any hearings until beginning March 9. Dr. Timm is available for cross-examination March 9, 10, 11, 12 and 13 but is not available the week of March 14. I am scheduled before the Public Service Commission of Wisconsin on a matter that will consume my time March 14, 15 and possibly March 16. If this proves to be a problem I will attempt to reschedule the matter, although I advise the Licensing Board that the Public Service Commission of Wisconsin has already refused to reschedule a matter that earlier conflicted with these Midland hearings. Finally, I am set for trial before the U. S. District Court in Philadelphia on a matter that begins April 4, 1977.

Because of scheduling problems as well as the already abnormal length of these suspension proceedings, I urge the Board to apply the highest standard possible when analyzing whether any testimony submitted on February 28 ought to be a part of these suspension proceedings, rather than remanded hearings.

I await your early advice as to what Dr. Timm and I do next.

Respectfully,

Myron M. Cherry

MMC:js

cc: Lawrence Brenner, Esq.
Mr. C. R. Stephens
David J. Rosso, Esq.
R. Rex Renfro, Esq.
L. F. Nute, Esq.