

3/25/77

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. 50-329

50-330

NRC STAFF'S ANSWER TO INTERVENORS' MOTION
FOR IMMEDIATE SUSPENSION OF CONSTRUCTION

INTRODUCTION

The Intervenor, other than Dow Chemical Company (Intervenor) by their "Motion For Immediate Suspension of Construction" (Motion) filed before the Commission on March 12, 1977, urge the Commission to immediately suspend the Consumers Power Company's construction permits for the Midland Plant, Units 1 and 2. The Commission by Order, dated March 18, 1977, delegated its authority to act on this Motion to the Atomic Safety and Licensing Appeal Board (Appeal Board) pursuant to 10 CFR §2.785 of the Commission's Rules of Practice. For the reasons set forth in this response, the Staff opposes the Motion.

By the Commission's Memorandum and Order of August 16, 1976, the Commission directed an Atomic Safety and Licensing Board (Licensing Board) to consider, in light of the remand by the United States Court of Appeals for the District of Columbia Circuit in Nelson Aeschliman, et al. v. U. S. Nuclear Regulatory Commission, Nos. 73-1776, 73-1876 (July 21, 1976) (Aeschliman), whether the construction permits for the Midland Plant should be continued, modified, or

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suspended until an interim fuel cycle rule is in effect. Consumers Power Company (Midland Plant, Units 1 and 2), CLI 76-11, NRCI-76/8 65 (August 16, 1976). The Licensing Board was directed to consider this issue in light of the facts and applicable law and to hold an evidentiary hearing if necessary.

On September 3, 1976, the Intervenors filed a motion with the Commission to halt construction of the Midland Plant pending resolution of the issues remanded by the Court of Appeals in Aeschliman, or in the alternative, to amend the Commission's Order of August 16, 1976 by ordering the Licensing Board to consider the additional issues remanded in Aeschliman. The additional issues are energy conservation, clarification of the ACRS letter, and changed circumstances with regard to the Dow-Consumer's relationship. The Commission denied the Intervenors' motion for suspension stating that "the question of modification or suspension of the Consumer Power ... licenses is not appropriate for summary disposition and should be decided 'in formal proceedings in light of the facts and applicable law.'" Consumers Power Company (Midland Units 1 and 2), CLI-76-14, NRCI-76/9 165, 167 (September 14, 1976). The Commission granted the Intervenors' motion to consider the remainder of the remanded issues.

The Licensing Board ordered an evidentiary hearing on the question of suspension pending the outcome of the reopened proceeding on the issues remanded for consideration by the Court of Appeals in Aeschliman. Consumers

Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, unpublished Licensing Board Notice and Order Setting a Hearing on Continuation, Modification, or Suspension of Construction Permits (September 21, 1976).

On September 27, 1976, the Intervenor filed a motion before the Licensing Board to adjourn any hearing in connection with the suspension proceedings and resolve the suspension issues solely on the basis of legal briefs or, in the alternative, defer the evidentiary hearing to a later date. By Order, dated October 4, 1976, the Licensing Board denied the Intervenor's motion for suspension and ordered a continuation of the evidentiary hearing. Consumers Power Company (Midland Plant, Units 1 and 2) Docket Nos. 50-329, 50-330, unpublished Licensing Board Notice and Order Rescheduling Hearing (October 4, 1976). The Licensing Board's denial of the Intervenor's September 27, 1976 motion was based upon the Commission's August 16, 1976 General Statement of Policy on the Environmental Effects of the Fuel Cycle (General Statement of Policy), 41 Fed. Reg. 34707, which indicated that the suspension issues are not appropriate for summary disposition, and upon a finding that the record then did not have sufficient facts to permit a reasoned determination on the suspension matter. Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, unpublished Licensing Board Memorandum (October 21, 1976).

Notwithstanding the fact that the Licensing Board has not had the opportunity to render an initial decision in this matter because the evidentiary hearing has not been completed, the Intervenors have again renewed their motion to suspend the licenses to construct the Midland Plant.

ARGUMENT

Intervenors' Motion is frivolous. Its premise is that apart from the legal arguments which the Commission previously rejected "construction must be stopped from a factual standpoint" (p. 1); yet the motion states no facts. Intervenors argue that the case made on the record by the licensee and the Staff is insufficient; yet, the motion never cites the record. The present motion is in essence a motion for summary judgment -- submitted to the appellate tribunal rather than the fact-finding tribunal and wholly unencumbered by any reference to the evidentiary facts developed on the record. Intervenors have not even attempted to suggest any reason why this Appeal Board, acting on behalf of the Commission, should truncate the fact-finding process which the Commission set in motion.

It is fair to assume that the Commission referred the suspension issue to the Licensing Board because it wanted the Licensing Board to develop a factual record with respect to the equitable factors that bear upon the

suspension question. Under established Commission practice, it is the responsibility of a Licensing Board, which presides at the receipt of the record evidence to make "for the appraisal ab initio of the record." Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-78, 5 AEC 319, 322 (1972). Intervenors have suggested no reason why it would be desirable for the Appeal Board to substitute itself for the Licensing Board as the initial fact finder.

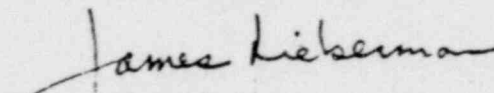
Intervenors do no more than to assert that the record clearly supports their view regarding the important issues of need for power and Dow Chemical Company's intention to purchase steam. Yet a review of the Licensee's answer to this motion is sufficient to demonstrate that substantially different views can be taken as to the state of the record to these issues. Indeed, if the Staff were preparing its proposed findings on the basis of the record as it now stands, it would conclude that this record does not warrant suspension of the Midland construction permits.

CONCLUSION

We believe it manifest that the evidentiary proceeding which the Commission established in order to accumulate necessary information to

apply the equitable factors to the suspension question should be allowed to continue in its normal course and that Intervenors' Motion should be denied.

Respectfully submitted,


James Lieberman
Counsel for NRC Staff

Dated in Bethesda, Maryland
this 25th day of March, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' MOTION FOR IMMEDIATE SUSPENSION OF CONSTRUCTION" dated March 25, 1977 in the above-captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of March, 1977:

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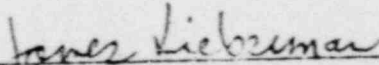
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