

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Victor Gilinsky  
Richard T. Kennedy  
Peter A. Bradford  
John F. Ahearne



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

Docket No. 50-329  
50-330

MEMORANDUM AND ORDER

On April 10, 1978, we issued an order requesting the parties to this above-captioned proceeding to state their views as to what issues, if any, remain for Commission consideration at a reopened Midland proceeding in light of the Supreme Court's decisions in Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council and Consumer Power Co. v. Aeschliman, 55 L.Ed.2d 460 (1978). The parties' submissions principally discussed the five matters identified by the Appeal Board:

1. Appraisal of the environmental impact of the nuclear fuel cycle.
2. Consideration of the possible effects of energy conservation in reducing or eliminating the need for a plant of this size.
3. Consideration of whether changed circumstances have affected the Dow Chemical Company's need for process steam which it is to receive from one of the units under an existing contract.

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4. Consideration of "unresolved safety issues," "design problems," "other problems" and their "resolution," "additional matters of concern to the committee," and "clarifications of the ambiguities" involved in the ACRS letters and reports, as discussed in the Aeschliman opinion and referred to by the Appeal Board.
5. A full airing and resolution of charges "relating to an alleged, albeit unsuccessful, attempt by the applicant to prevent full disclosure of the facts relating to Dow's intentions with regard to its contract." Both this matter and the merits of the ACRS's unresolved safety issues are to be explored further by the Licensing Board, whether or not the parties are themselves otherwise interested in pursuing these matters. [Citations omitted.]

In addition, Intervenors other than Dow suggested that we also consider Consumers' continuing history of Quality Assurance and Quality Control (QA-QC) violations and lack of financial qualifications to complete the Midland project. For the reasons discussed below, we conclude that in light of the Supreme Court's decision, current Commission practice, and the presently expected initiation of the operating license proceeding, the only issue identified above which remains as framed for consideration by the Licensing Board is the airing and resolution of the charges relating to Consumers' conduct. However, the Licensing Board will also address the issue of the environmental effects of radon as required by subsequent Commission actions.

1. No issue now remains in the matter of the environmental impact from the portions of the nuclear fuel cycle considered by the Court of Appeals. Those parts of Table S-3 are not an issue currently before the Commission because the Supreme Court in Vermont Yankee reversed the

Court of Appeals decision upsetting the waste management and reprocessing aspects of Table S-3.<sup>1/</sup> Furthermore, this proceeding is not now affected by the Supreme Court's remand proceeding in the Court of Appeals.<sup>2/</sup>

However, the environmental effects of radon are in issue here because the Commission has deleted the radon term from Table S-3.<sup>3/</sup> In the statement accompanying this amendment the Commission stated that the record on environmental issues will be reopened to hear evidence on radon releases if proceedings are still pending before a Licensing or Appeal Board.<sup>4/</sup> A proceeding was pending here when the Commission issued its statement. Thus, by the plain terms of the Commission's statement, the Licensing Board must consider the radon issue.<sup>5/</sup> However, the generic nature of this issue leads us to conclude that the interests of the parties will best be served by structuring the Licensing Board's review of this issue in accordance with the procedure set out by the Appeal Board in ALAB-480.<sup>6/</sup> The radon evidentiary record and decision in the

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<sup>1/</sup> 55 L.Ed.2d at 482.

<sup>2/</sup> Id.

<sup>3/</sup> 43 Fed. Reg. 15613 (1978).

<sup>4/</sup> Id. at 15616.

<sup>5/</sup> The policy considerations supporting the statement of April 14, 1978 are equally applicable to any pending proceeding. Consequently, we do not find that our conclusion in that statement should be qualified by the reason a proceeding is pending.

<sup>6/</sup> Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-480 (May 30, 1978).

Perkins<sup>7/</sup> proceeding will be served on the parties to this proceeding. Within 21 days after service, the parties may request in writing that the Licensing Board (a) receive additional written evidence on the radon question; (b) call for a further hearing on the Perkins record; or (c) consider objections to any aspect of the Perkins radon proceeding. The request shall set forth with specificity the respects in which the Perkins record is deemed to be incomplete, inaccurate, or objectionable, as well as precisely how such defects should be remedied.

Within the same 21 days a party may file a memorandum with the Licensing Board addressed to two questions: (a) whether the Perkins evidentiary record supports the generic findings and conclusions of the Perkins Licensing Board respecting the amount of the radon emissions in the mining and milling process and resultant health effects; and (b) whether the radon emissions and resultant health effects are such as to tip the NEPA balance against continued construction of the Midland plant.<sup>8/</sup> (A party who has filed a request to supplement the evidentiary record adduced in Perkins might, of course, choose to defer the submission of a memorandum on these two questions pending the outcome of his request and any supplementation of the record which may be ordered.)

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<sup>7/</sup> Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), Docket Nos. STN 50-488, 50-489, 50-490.

<sup>8/</sup> In confronting this question, the party could either accept the Perkins Licensing Board's generic findings or employ his own analysis of the Perkins record (presumably set forth in response to the first question).

2. No issue remains in the energy conservation matter because the Supreme Court reversed the Court of Appeals remand to the Commission.<sup>9/</sup> Furthermore, the Appeal Board found that energy conservation will not decrease demand enough to render superfluous any substantial portion of Midland's capacity.<sup>10/</sup>

3. No issue remains in the matter of Dow's need for process steam. The Supreme Court noted that the Commission, after consideration of changed circumstances, had properly refused to reopen the proceeding on this matter.<sup>11/</sup> In addition, the Appeal Board found that Dow presently intends to live up to its contract.<sup>12/</sup>

4. No issue remains for the Licensing Board in the matter of unresolved safety issues referred to in the ACRS letters and reports. The Supreme Court reversed the Court of Appeals' holding that the Licensing Board should have returned the ACRS report to the ACRS for further elaboration.<sup>13/</sup> And since the decision in Aeschliman, the staff has prepared Supplement No. 2 to the Safety Evaluation Report in which it found that each item identified by the ACRS has been resolved to the satisfaction of the ACRS and the staff, or is capable of resolution prior

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<sup>9/</sup> 55 L.Ed. 2d at 486.

<sup>10/</sup> 7 NRC at 166-67. A letter of October 18, 1978 from Consumers Power Company informing the Commission of its latest short-term forecast update was received after the Commission concluded its consideration of these matters. The parties remain free to file any appropriate motions before the Licensing Board.

<sup>11/</sup> 55 L.Ed. 2d at 486 n. 22.

<sup>12/</sup> 7 NRC at 167.

<sup>13/</sup> 55 L.Ed. 2d at 487-88.

to the issuance of the operating license. The absence in the staff report of some indication of a problem which will create serious safety concerns, and the fact that the construction and operating license proceedings will overlap, lead us to believe that in this instance the remaining unresolved safety issues can be more profitably considered under the standards appropriate to an operating license proceeding.<sup>14/</sup> Therefore, the Appeal Board's instructions to the Licensing Board to consider this matter are vacated.

5. The only other matter remaining for Commission consideration is the airing and resolution of charges arising from the alleged attempt by Consumers to prevent full disclosure of the facts relating to Dow's intentions with regard to its contract. The Vermont Yankee decision had no effect on this matter because the charges arose from Consumers' alleged actions at the post-Aeschliman suspension proceeding before the Licensing Board. Furthermore, nothing has happened since the Appeal Board's decision in ALAB-458 which would warrant our modifying its instructions to the Licensing Board to further explore the charges at a future hearing.<sup>15/</sup> Thus, there is no reason for us to reverse our earlier decision not to review ALAB-458 on this matter.

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<sup>14/</sup> It must be emphasized that this decision is limited to this unique situation and is in no way intended to modify the Appeal Board's decision in Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).

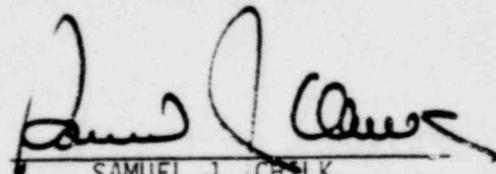
<sup>15/</sup> 7 NRC at 177, n.87.

Other Matters

Intervenors also suggested that the Commission should consider Consumers' alleged continuing history of QA-QC violations and lack of financial qualifications to complete the Midland project. These items are clearly beyond the scope of the matters identified by the Appeal Board for consideration at a reopened proceeding. Furthermore, intervenors present no new information on these items beyond the evidence already before the Appeal Board. Therefore, Intervenors have not sustained their burden of demonstrating the possibility of a significant safety-related issue warranting reopening a hearing.<sup>16/</sup> Thus, the reopened proceeding should not be expanded to consider other matters not identified in the Order of April 10, 1978.

It is so ORDERED.

For the Commission.

  
 SAMUEL J. CHILK  
 Secretary of the Commission

Dated at Washington, D.C.,  
 this 6<sup>th</sup> day of November, 1978.

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<sup>16/</sup> Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-107, 6 AEC 1151, 1152 (1973).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s)\* upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this 9th day of Nov 1978.

George T. Downing  
Office of the Secretary of the Commission

- \* 1-Mailgram W. Marshall dtd 11/2/78
- 2-Comm. Memo & Order dtd 11/6/78

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*11/2/78*

IVAN A SMITH ESQUIRE  
ATOMIC SAFETY AND LICENSING BOARD  
US NUCLEAR REGULATORY COMMISSION  
  
WASHINGTON DC 20555



DEAR SIR,

DOCKET NOS 50-329 AND 50-330  
MIDLAND PLANTS UNITS 1 AND 2  
SINCE YOU PULLED ALL INTERESTED PARTIES BY TELEPHONE CONFERENCE IN  
REGARDS COLONEL STEVE GADLER PROFESSIONAL ENGINEER OF ST PAUL MINNESOTA  
TO ACT IN MY PLACE INSTEAD TEMPORARY FOR NOW CONSUMER'S POWER WAS ALSO  
INCLUDED AND REGISTERED NO OBJECTIONS HOWEVER TODAY THEY FAIL TO FILE A  
COPY OF THERE BRIEF ENTITLED "BRIEF OF CONSUMER'S POWER COMPANY, IN  
SUPPORT OF IT'S POSITION THAT MR MARSHALL'S PETITIONS TO INTERVENE IS  
BARBED BY, YES, JUDICATA DATED OCTOBER 31 1978 BY ISHEM, LINCOLN, AND  
BEALE SUITE 4200 1 FIRST NATIONAL PLAZA CHICAGO ILLINOIS 60603 IS  
RESPECTFULLY BY MICHAEL I MILLER AND MARTHA E GIBBS ATTORNIIES FOR  
CONSUMERS POWER COMPANY, UNDER THE CIRCUMSTANCES TIME IS OF THE ESSENCE  
I AM SURE YOU CAN APPRECIATE THIS THEREFORE I WISH TO TREAT THIS AS AN  
OVERSITE AND REQUEST THAT IT BE CORRECTED BY CONSUMER'S POWER ATTORNIIES  
FURNISHING A COPY OF THE FOREGOING SERVICE OF PAPERS AND THINGS TO  
INCLUDE MY AGENT COLONEL STEVE GADLER PROFESSIONAL ENGINEER 2120 CARTER  
AVENUE ST PAUL MINNESOTA I TRUST THIS WILL BE TAKEN CARE OF TODAY VERY  
TRULY YOURS,

WENDELL H MARSHALL  
PRESIDENT FOR MAPLETON INTERVENORS  
RFD 10 MIDLAND MI 48640

A COPY OF THIS MESSAGE WAS SENT TO MR WENDELL H MARSHALL PRESIDENT  
FOR MAPLETON INTERVENORS RFD 10 MIDLAND MI 48640 AND TO CONSUMER'S  
POWER CO ATTN ISHAM LINCOLN AND BEALE 1 1ST NATIONAL PLAZA CHICAGO  
IL 60603.

20:44 EST

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*Rec'd - 11/6/78*