

UNITED STATES OF AMERICA  
before the  
NUCLEAR REGULATORY COMMISSION

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POOR QUALITY PAGES

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In the Matter of )  
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CONSUMERS POWER COMPANY )  
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(Midland Plant, Units 1 & 2) )  
\_\_\_\_\_)

Docket Nos. 50-329  
50-330

MOTION OF CONSUMERS POWER COMPANY  
TO RECALL SHOW CAUSE PROCEEDINGS

Consumers Power Company, which holds construction permits Nos. 81 and 82 for the construction of the Midland Plant, Units 1 and 2, hereby moves the Nuclear Regulatory Commission to reconsider its memorandum and order of August 16, 1976, issued in these dockets and directing that an Atomic Safety and Licensing Board for the Midland facility be reconvened for the purpose of considering "whether the construction permits for that facility should be continued, modified or suspended until an interim fuel cycle rule has been made effective." Consumers Power Company also moves that similar modifications be made in the Commission's General Statement of Policy of August 13, 1976.

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Considerations relating to orderly administration and the relationship of judicial and administrative processes, as well as elementary fairness to the parties affected, demonstrate that the proceeding initiated by the August 16, 1976 order should not have been issued at that time and that the order should be withdrawn or suspended at least until the Supreme Court has either refused to review the fuel cycle cases (Natural Resources Defense Counsel, et al. v. NRC, D. C. Cir. Nos. 74-1385 and 74-1586; Aeschliman, et al. v. NRC; D. C. Cir. Nos. 73-1776 and 73-1867) or has granted petitions for certiorari and completed its review of those cases. Consumers Power Company respectfully suggests that the action recommended herein should be taken for the reasons set forth below.\* In the event that this motion is not granted upon this pleading Consumers Power Company requests oral argument before the full Commission on an expedited basis.

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\*/ There is pending before the Commission a motion filed in Docket No. 50-271 by Vermont Yankee Nuclear Power Corporation and requesting the recall of a similar order, also issued by the Commission on August 16, 1976, with respect to the Vermont Yankee Nuclear Power Station. The motion contends that the Commission lacked the legal authority to reconvene the proceeding. Consumers Power Company supports the legal arguments made in the Vermont Yankee motion, and incorporates them herein by reference.

1. In motions for stay of mandate filed with the U.S. Court of Appeals for the District of Columbia, Consumers Power Company, Vermont Yankee Nuclear Power Corporation and the group of utilities which intervened in the NRDC cases have all advised the Court that they intend to file petitions for certiorari with the Supreme Court. The NRC has also asked for a stay of mandate "to provide the Solicitor General an opportunity to determine whether to seek Supreme Court review of these cases." It is therefore now clear that Supreme Court review will be sought on the issues which are involved in the fuel cycle cases and which are of vast importance to the regulation of nuclear facilities. The Supreme Court will almost certainly determine this fall whether to grant such review.

2. The technicalities of whether a mandate has or has not issued aside, it makes no sense to put already issued construction permits and operating licenses in jeopardy at this time. If the Supreme Court determines to review the cases, full implementation of the Court of Appeals decisions would be inappropriate while the cases are pending before the Supreme Court. On the other hand, if the Supreme Court declines to review the cases, any delay in implementing the

principles they adopt against any Commission licensee or permittee will have only been for the comparatively brief period of time it will take the Supreme Court to decline to issue the writ.

3. We do not contest the Commission's judgment, announced in the General Statement of Policy, to initiate on an expedited basis a revised and adequately documented fuel cycle survey, possibly to be followed by an interim fuel cycle regulation. Indeed we agree it is appropriate for the Commission to take such action. However, neither that action nor the fuel cycle decisions require that any license or permit be put at peril while Supreme Court review is being sought.

The Midland construction permits were issued on December 15, 1972, almost four years ago. Construction has proceeded since then at a cost to date of more than three hundred million dollars. No party to the proceeding requested

a stay of the order authorizing the issuance of the permits, and the Court of Appeals took more than one and one half years from the date of argument (November 27, 1974) to issue its decision on July 21, 1976. In these circumstances equity cries out against the construction permits being put at risk until Supreme Court review is either completed or foreclosed. Similar equities can no doubt be demonstrated to exist with respect to Vermont Yankee. Moreover, in this posture of the matter, the invitation contained in the General Statement of Policy for proceedings to be instituted for "the suspension or modification on fuel cycle rule grounds of any other nuclear power plant license ..." is not merely unfair to all such licensees; it is an invitation to administrative anarchy.

4. The disorder which must be caused by the proceedings for the "modification or suspension of outstanding licenses" initiated by the General Statement of Policy is already being demonstrated. Three such proceedings have now been commenced. These are the Midland and Vermont Yankee proceedings, earlier referred to, and the Seabrook proceeding now before the Appeal

Board.\*/ We do not here burden the Commission with the details of the schedules for briefing and oral argument which have been established in those cases. A review of these schedules, however, will demonstrate that the schedules will operate so as to deprive the parties in the Licensing Board proceedings of the benefit of guidance from the Appeal Board's decision in the Seabrook proceeding. Moreover, the schedules will deprive the parties of the benefit, in preparation for briefing and argument, of the results of the environmental survey scheduled to be completed by September 30. Indeed, in its order of August 24, 1976, in the Seabrook proceeding the Appeal Board even indicated that its decision might issue before the survey becomes available. Obviously the Commission expects the results of the survey to have substantial impact upon the issues which the General Statement of Policy states should be considered in connection with

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\*/ On August 24, 1976, the Atomic Safety and Licensing Appeal Board ordered that proceedings be held before it on a motion requesting that "the construction permit for the Seabrook Plant be suspended until a licensing board ..." can give proper consideration to the incremental effects of re-processing and waste disposal. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2); Docket Nos. 50-443/444.

proceedings such as have now been initiated in Midland, Vermont Yankee and in Seabrook: i.e., whether "significant adverse impact will occur until a new interim fuel cycle rule is in place;" the "effect of delay;" etc. Moreover, the General Statement of Policy suggests that the completion of the environmental survey by September 30, 1976, together with grants of a stay of mandate might operate to "provide the basis for resumed licensing."

5. These matters are not noted in a spirit of criticism of the actions of the Commission's licensing bodies. Indeed, the tone of urgency conveyed by the General Statement of Policy and the August 16 orders would understandably suggest to those bodies that they should move expeditiously. What has happened is that licenses and permits are now being placed in peril before it is known whether this is necessary (i.e., before it is known whether the Supreme Court will agree to review the fuel cycle cases and possibly reverse them in one or more respects) and even before appropriate internal NRC guidance (i.e., the completion of the survey and, for the licensing boards, the Appeal Board's Seabrook decision) becomes available to the NRC adjudicating bodies. Obviously as more litigants take up the invitation

to challenge licenses and permits extended by the General Statement of Policy, the situation will only become more confused and difficult.

6. In our view the General Statement of Policy is a rule or regulation which, under the Administrative Procedure Act (5 U.S.C. 551, 553) and the Commission's own regulations (10 CFR, Subpart H), should not have been issued without prior notice and opportunity for comment. But, whether or not the Commission agrees that it was legally required to do so, surely the issues involved were significant enough for the Commission to have invited and received comment before placing so much at risk.

7. The construction permits and operating licenses which are now being, or may shortly be, imperilled were obtained as the result of great expenditures of effort and money. They represent years of work and massive financial investment in good faith by many individuals and institutions in reliance upon the licenses and permits issued by the Commission and its predecessor, the Atomic Energy Commission. All represent the result of the cooperation of many private, local, state and federal institutions.



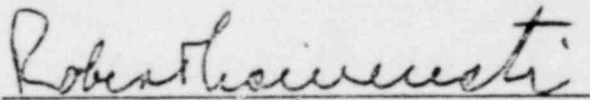
The nuclear plants covered by these permits and licenses represent one of the nation's electric energy options supported and encouraged by the Congress and the policies of all presidents since adoption of the Atomic Energy Act of 1954. The permits and licenses were issued only after this Commission or its predecessor determined that they met all statutory requirements. Even if it may ultimately be necessary to put them in jeopardy, this should not be done hastily, prematurely or without hearing from those affected.

For the foregoing reasons, Consumers Power Company respectfully requests the Commission (1) to modify its General Statement of Policy so as to eliminate the need at this time for proceedings for the modification or suspension of permits and licenses on fuel cycle grounds as now provided therein, (2) to withdraw its order of August 16, 1976, relating to Consumers Power Company and all similar orders, and (3) to terminate licensing and Appeal Board orders initiating such proceedings, all pending further order of the Commission at such time as Supreme Court review of the fuel cycle decisions is completed or foreclosed.

In the event that the Commission does not feel that it may take the requested action on the basis

of this motion alone, we respectfully request that the matter be set down for oral argument before the full Commission on an expedited basis.

Respectfully submitted,

  
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Dated: August 26, 1976

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CERTIFICATE OF SERVICE

I certify that copies of the attached "Motion of Consumers Power Company to Recall Show Cause Proceedings" were served upon the following by deposit in the United States mail, postage prepaid and properly addressed, on August 26, 1976.

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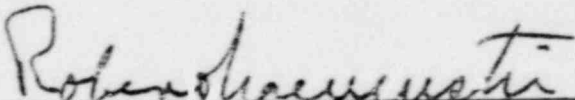
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