UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

9/7/76

Before the Atomic Safety and Licensing Board

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

BRIEF OF CONSUMERS POWER COMPANY

This brief is submitted by Consumers Power Company ("Consumers Power" or "Licensee") in response to this Board's order of August 18, 1976, directing the filing of briefs on or before September 7, 1976, as to whether the construction permits for a nuclear power plant, known as the Midland Plant, Units 1 and 2, "should be continued, modified or suspended until an interim fuel cycle rule has been made effective." For the reasons set forth below, Licensee submits that the permits should be continued without modification and that it is not necessary to hold an evidentiary hearing for this Board so to conclude.

I. Background

A. The Court Decisions

On July 21, 1976, the United States Court of Appeals for the District of Columbia Circuit issued two decisions in companion cases entitled NRDC, et al. v. NRC (Nos. 74-1385 and 74-1586) and Aeschliman, et al. v. NRC (Nos. 73-1776 and 73-1867). Together the decisions (sometimes referred to in this brief as the "fuel cycle decisions") held that the National Environmental Policy Act ("NEPA"; 42 U.S.C. §4321, et seq.) requires the NRC to consider further the incremental environmental effects of fuel reprocessing and waste disposal in connection with the issuance of construction permits or operating licenses for nuclear power reactors.

The decisions affected permits and licenses issued both before and after the Commission's adoption, in 1974, of a regulation (10 CFR §51.20(e) and a related Table S-3) which deals with the environmental impact of the uranium fuel cycle. For purposes of NEPA cost-benefit assessment, the table quantifies the incremental environmental effects of the fuel cycle attributable to an individual reactor--including the environmental impacts of fuel reprocessing and waste disposal.

In considering applications for construction permits or operating licenses for individual reactors prior to the adoption of the fuel cycle regulation, Licensing Boards followed the "Vermont Yankee" line of decisions in assessing fuel cycle impacts of the reactor upon the environment. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Power Station), ALAB-56, 4 AEC 930 (1972). As in the instant proceeding, assessment of environmental impacts of the fuel cycle was basically limited to transportation of fuel to the reactor site, radioactive discharges and other environmental effects from the handling and use of fuel at the site, transportation of spent fuel elements to a reprocessing plant, and transportation of low level waste to burial grounds. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-60, 5 AEC 261 (1972). See also Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 54-56 (1973).1/

In the NRDC case the court held that in the absence of generic proceedings, i.e., of effective general rules, NEPA required that the environmental effects of reprocessing and ultimate waste disposal should have been

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1/ The basic rationale for this line of cases is set forth in further detail in Potomac Electric Power Co., (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 84-85 (1974).

dealt with in individual licensing proceedings. Slip Op., p. 12. However, the court also set aside and remanded those portions of Table S-3 pertaining to waste disposal and reprocessing because it concluded that the problems involved were not thoroughly explored and the factual issues not fully developed in the rulemaking proceeding. Slip Op., 13-44.

The thrust of the NRDC decision was, therefore, that the NRC and its predecessor, the AEC, had not, since the enactment of NEPA, adequately assessed the incremental environmental effects of fuel reprocessing and waste disposal in issuing construction permits and operating licenses. Thus, in the Aeschliman decision, which involved the instant construction permits for the Midland plant, the court merely held that the fuel cycle issues involved "are controlled by" the NRDC decision, and that: "On remand, the Commission shall undertake appropriate consideration of waste disposal and other unaddressed fuel cycle issues, and restrike the cost-benefit analysis, as necessary, in accordance with NRDC v. NRC, supra." Slip Op., p. 21 2/

2/ In Aeschliman the decision also determined that two other errors had occurred in the course of the administrative proceedings leading to the issuance of the construction permits. These related to consideration of energy conservation (Slip Op., pp. 5-16) and to the clarity or completeness of the ACRS report (Slip Op., pp. 16-21).

Since the Court's fuel cycle decisions were issued, the licensees (Consumers Power Company and Vermont Yankee Nuclear Power Corporation) directly affected have announced that they will file petitions for review in the Supreme Court and the NRC has advised the Court that the Solicitor General is considering whether to file a similar petition.

B. The NRC Response to the Fuel Cycle Decisions

The Commission responded to the fuel cycle decisions promptly. On August 13, 1976 (41 F. R. 34,707-09, August 16, 1976), it issued a "General Statement of Policy" the express purpose of which "is to indicate how the Commission intends to conduct its licensing activities pending resolution of the several legal questions raised by the decisions." The Statement may be summarized as follows:

1. The fuel cycle rulemaking proceeding will be reopened. Since oral hearing procedures are contemplated, completing it "could take fully a year."

2. In the meantime, a new environmental survey will be made by the NRC Staff which is expected to be completed by September 30, 1976.[3/]

3/ Subsequently, in a statement made to the Joint Committee on Atomic Energy on August 27, 1976, NRC Chairman Rowden stated that "work on drafting a new analysis is already under way to meet the September 30 schedule."

3. Following the completion of the revised survey the Commission will determine, on the basis of notice and comment rulemaking, whether to issue an "interim rule which would be an adequate substitute for Table S-3 pending issuance of the final rule." Such "an interim rule might be promulgated as early as December 1976, providing a basis for licensing at that time." 41 F. R. 34,708.

4. No full power operating license, construction permit or limited work authorization will be issued until the interim rule is adopted.

5. Until the interim rule is issued, hearings may be conducted up to the point of, but not including, licensing. However, in contested proceedings, issues relating to reprocessing and waste management are to be deferred pending completion of the interim rulemaking. This procedure is intended to avoid needless duplication in litigating those issues and delay. In uncontested proceedings, licensing will be deferred until the new rule is adopted.

6. If a petition to revoke or suspend any existing reactor permit or license on fuel cycle grounds is filed, the Commission will decide it by balancing a number of considerations described in greater detail

below. Regardless of whether or not action is initiated pursuant to 6., and depending upon the information submitted to it by the Staff (expected September 30, 1976) the Commission may, on its own motion, review each outstanding permit and license to determine, on a case-by-case basis, whether the permit should be revoked or suspended.

With respect to the Midland construction permits and the Vermont Yankee operating license, which were specifically at issue in the fuel cycle cases and as to which the opposing intervenors had requested suspension, the General Statement of Policy stated that the Commission would remand the proceedings to licensing boards to determine "whether the licenses should be continued, modified or suspended until an interim rule has been made effective." The statement went on:

> It is the Commission's understanding that resolution of this question turns on equitable factors well established in prior practice and case law. Such factors include whether it is likely that significant adverse impact will occur until a new interim fuel cycle rule is in place; whether reasonable alternatives will be foreclosed by continued construction or operation; the effect of delay; and the possibility that the cost/benefit balance will be tilted through increased investment. See Coalition for Safe Nuclear Power v. AEC. 463 F.2d 954 (D. C. Cir. 1972); San Onofre, Units 2 and 3, 7 AEC 986, 996-97 (June 1974).

> General public policy concerns, the need for the project, the extent of the NEPA violation, and the timeliness of objections are also among the pertinent considerations. See, e.g., Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 408 F.2d 927, 933934 (2d Cir. 1974), vacated on other grounds and remanded, 423 U.S. 809 (1975); Greene County Planning Board v. FPC, 455 F.2d 412, 424-425 (2d Cir.), cert. denied, 409 U.S. 849 (1972); City of New York v. United States, 337 F. Supp. 150, 163 (E.D.N.Y.) (three-judge court).

41 F. R. 34,709 (footnote omitted). The statement recognized that an evidentiary hearing would be required with respect to the other issues dealt with in the Aeschliman case (i.e., those relating to energy conservation and the ACRS) "barring further review." However, the statement expressly stated that those other issues should not be considered in an evidentiary hearing until "that decision has become final." Id. n 2.

On August 16, 1976, the Commission issued a memorandum and order in these dockets directing that, in accordance with the General Statement of Policy, an Atomic Safety and Licensing Board

> for the Midland facility be reconvened, for the limited purpose of considering, in light of the facts and the applicable law, whether the construction permits for that facility should be continued, modified, or suspended until an interim fuel cycle rule has been made effective. The Board is directed to call for briefs from the parties on that issue, followed by evidentiary hearings if necessary. No hearing on the merits of the other issues assigned for reconsideration

> by the court of appeals in the Aeschliman v. NRC decision will be appropriate until the decision of the court of appeals has become final. 4/

In view of the facts that the General Statement of Policy and the August 16 order deal only with fuel cycle issues, that the Licensee has advised the court that it will petition for a writ of certiorari, and that the Commission is considering similar action, it is clear that the Commission intended that the proceeding initiated by its August 18 order not consider issues other than the fuel cycle issue. In consequence, the subsequent orders of the Atomic Safety and Licensing Board Panel and of this Board so limited the proceeding. On August 17, the Panel issued an order which established this Board "for the limited purpose of considering whether construction permits for that facility should be continued, modified or suspended until an interim fuel cycle rule has been made effective" and designated its members. In turn, this Board's order of August 18, 1976, directed

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4/ On the same day a similar order was issued in the Vermont Yankee Docket (No. 50-271). On August 26, 1976, Consumers Power Company filed a motion with the Commission requesting it to reconsider and withdraw its memorandum and order of August 16, 1976, which initiated this proceeding. The Commission, which has not yet acted upon the motion, has directed that responses be filed by September 7, 1976.

> that the parties to the proceeding, including the NRC Staff, file briefs on or before Tuesday, September 7, 1976, on whether the construction permits for the Midland facility should be continued, modified, or suspended until an interim fuel cycle rule has been made effective. Those briefs should also indicate whether the parties consider an evidentiary hearing to be necessary on this issue and, if so, the briefs should contain an indication of the evidence the parties might expect to produce.

II. The Midland Construction Permits Should Continue in Effect Unmodified Pending the Adoption of the Interim Rule

The foregoing review of the background of this proceeding demonstrates that the inquiry which this Board has been directed to undertake is a very specific and limited one. The General Statement of Policy expresses the Commission's belief that "an interim rule might be promulgated as early as December 1976 . . ." To be sure, unforeseen problems might delay the Staff analysis or the completion of the subsequent proceeding leading to the adoption of the interim rule. Nevertheless, it is clear that the Commission expects an interim rule to be in effect in a matter of months -- perhaps less than four. The task before this Board, therefore, is to apply the "equitable factors" identified in the General Statement of Policy to determine whether the Midland construction permits should be continued, modified or suspended during

that indeterminate, but brief, period of time. The opinion of the Court in Aeschliman, itself, as well as governing judicial and NRC precedent and the undisputed facts all point to but one conclusion: The permits should continue in full, unmodified effect during that period.5/

A. The Aeschliman Decision

Any consideration of the matter of modifying or suspending the Midland construction permits pending the adoption of an interim rule must necessarily occur within the context of the Court's decision in the Aeschliman case. The action of the Court there weighs heavily against any modification or termination of the permits during the course of further proceedings.

It is most significant that the Court of Appeals deliberately chose not to vacate the construction permits. As the Commission has itself recognized, the Court allowed the permits to remain in effect pending further action.

5/ As we show below that conclusion is not dependent upon a quantification of the relevant criteria. In the event, however, that this Board should disagree, the Licensee reserves the right to present testimony and evidence relating to increased project costs, lay-offs of personnel, ability to meet load in the early 1980's and all other criteria which may be considered relevant.

See 41 F. R. 34,707. In the face of specific requests for both reversal and injunctive relief, as well as remand, the Court deliberately chose only to remand; it did not vacate. See Aeschliman v. NRC, Slip Op., pp. 16, 21, 23; Brief for Petitioners in No. 73-1867 at 68 (Feb. 25, 1974); Reply Brief for Petitioners in No. 73-1867 at 33 (June 20, 1974); Appellate Brief for Petitioners in No. 73-1776 at 42 (Oct. 26, 1973).

In addition, since its July 21, 1976 decision, the fact that construction was continuing at Midland has been repeatedly called to the attention of the Court in connection with pleas for expeditious issuance of the mandate.[6/] Yet, issuance of the mandate was stayed until

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6/ See Opposition of Petitioners in 73-1867 and 73-1776 to Consumers Power Company's Request for an Extension of Time within which to File a Petition for Rehearing (Aug. 2, 1976); Letter from Myron M. Cherry (Attorney for Petitioners) to George A. Fisher (Clerk of the U.S. Ct. of App. for the D. C. Cir.) dated Aug. 4, 1976. On page 2 of their August 2 pleading the Petitioners averred:

> A delay of this Court's mandate . . . will permit Consumers Power Company to continue its present course of constructing a nuclear power plant in Midland, Michigan, notwithstanding the fact of this Court's Opinion which has required new hearings.

See also "Affidavit of Myron M. Cherry in Support of Petitioners' Opposition to (1) Nuclear Regulatory Commission's Request for a Stay Pending Determination to Seek Certiorari to the Supreme Court and (2) Consumers Power Company's Motion for a Stay Pending Good-Faith Intervention to Seek Certiorari," apparently dated August 24, 1976, p. 9 [hereinafter cited as Cherry Affidavit].

September 2, 1976.7/ The principal significance of issuance of the mandate relates to whether the NRC has any jurisdiction at all to modify or suspend the construction permits. Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D. C. Cir. 1971). Nevertheless, in view of the emphasis which intervenors here have placed on the alleged relevance of the mandate to the continuation of construction, the Court's delay in issuing it underscores the deliberateness with which the Court, rather than setting aside or vacating the orders granting construction permits for the Midland reactors, remanded them "for further proceedings in conformity with our opinion." Aeschliman v. NRC, Slip Op., p. 23.

In simply remanding, and refusing to vacate or reverse, the Court was no doubt aware of the strong possibility that the error it had identified would not affect the final result. In fact, in the almost three years the case was before it, the Court was able to identify only three errors (concerning which the Licensee will, and the Government may, seek further judicial review) in a record of more than 25,000 pages. With respect to the relevant error, the fuel cycle issue, it is likely that the Commission will reach the same conclusion on remand. In Judge Tamm's view, "it [is] almost inevitable that, after

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7/ As of this date we have not been advised as to whether the mandate has in fact issued. See FRAP, Rule 41(a).

fully considering the problems and alternative methods of waste disposal and storage, the Commission will reach the same conclusion . . ." NRDC v. NRC, Slip Op., p. 5 (Tamm, J., separate statement concurring in result).

B. The Judicial Precedent and the Equitable Factors

The Aeschliman Court's action in simply remanding was not only proper in view of the specific circumstances of the particular case in question; it was fully consistent with established judicial practice. Its decision not to vacate the Midland construction permits represents an appropriate exercise of a court's power, on review of administrative orders, to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S. Ct. 301, 307 (1939). When an administrative order is presented for review to a court it has, after determining that error has been committed, several options: It may affirm on the ground that the error was not prejudicial; it may vacate or reverse the order and remand for further proceedings; or, based on the specific circumstances of the case, it may remand for further proceedings but leave the order below fully effective pending the outcome of the remanded case.

This last approach has been followed both in review proceedings generally, and in cases arising under NEPA. For example, in American Smelting and Refining Co. v. FPC, 494 F.2d 925 (1974), cert. denied, 419 U.S. 882, 95 S. Ct. 149 (1974), the District of Columbia Circuit found that a temporary FPC gas curtailment plan was erroneous in specified respects and required further proceedings. But the Court permitted the curtailment plan to remain in effect pending the outcome of additional administrative action to cure the defects. Similarly, in a leading case under NEPA, a three-judge District Court headed by Judge Friendly determined that further proceedings under NEPA were required to support an ICC abandonment order previously issued and in effect. However, in remanding the order to allow the agency an opportunity to comply with the requirements of NEPA, the order was not vacated but permitted to stand. City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).[8/] More particularly, with respect to Commission proceedings, Courts have allowed permits and licenses to

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8/ See Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208 (D. Mass. 1975), aff'd, Essex County Preservation Ass'n v. Campbell, Slip Op., No. 75-1392 (1st Cir. June 18, 1976). See also Arizona Public Service Comm'n v. FPC, 483 F.2d 1275 (D. C. Cir. 1973); Simmans v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974).

remain in effect while, at the same time, remanding for further consideration of both health and safety (York Committee for a Safe Environment v. NRC, 527 F.2d 812 (D. C. Cir. 1975)) and environmental matters (Coalition for Safe Nuclear Power v. AEC, 463 F.2d 954 (D. C. Cir. 1972)).

In the instant proceeding the Commission has directed this Licensing Board to consider the limited question of whether or not the Midland construction permits should continue in effect during the pendency of a generic rulemaking concerning the environmental impacts of fuel reprocessing and waste management. An interim rule might be expected by December. See 41 F. R. 34,708. But, before the rule making is complete, full consideration of fuel cycle impacts -- as required by the Aeschliman decision -- will, of course, be impossible. This circumstance, however, poses no bar to the continued effectiveness of the permits. In fact, an examination of the appropriate factors indicates quite clearly that any modification or suspension of the Midland construction permits would be improper.

In one of its earlier NEPA decisions, Coalition for Safe Nuclear Power v. AEC, 463 F.2d 954 (1972), the District of Columbia Circuit had occasion to consider a

question similar to that facing this Board. The case itself arose shortly after that same Court had ruled, in Calvert Cliffs v. AEC, 449 F.2d 1109 (1971), that an environmental analysis was required for reactors which had been under construction, but not operating, prior to the effective date of NEPA. In considering whether or not reactor construction activities should be suspended pending completion of environmental reviews, the Court approved of four factors "to be considered and weighed in the determination of the question of suspension of a construction permit pending completion of a full N.E.P.A. review." Id., p. 956. Applied here, as the General Statement of Policy does, those factors are: Whether it is likely that significant adverse impact will occur before a new interim fuel cycle rule is in place; whether continued construction will foreclose subsequent adoption of alternatives with respect to the fuel cycle; the effect of delay in facility construction upon the public interest; and the possibility that the ultimate cost/benefit balance will be prejudiced as a result of continued expenditures for plant construction. See 41 F. R. 34,709. Consideration of these factors dictates that construction at Midland should continue.

First, the environmental effects of operation of the plant are not involved in this proceeding. All that is involved is the environmental effect of continued construction during the limited period of time until the interim rule is made effective. That must be de minimis.

The fact is that the total environmental impact of site preparation and construction of the complete plant is small. See Final Environmental Statement, pp. IV-1 to IV-4 ("FES," March 1972). Moreover, it is beyond dispute that virtually all adverse environmental impact associated with construction has already occurred. Construction began at the site under an AEC exemption issued in July of 1970 and was suspended by the Licensee in November 1970, when it became apparent that there would be an extensive delay before issuance of the construction permits. The permits were issued in December 1972. See Consumers Power Co. (Midland Plant Units 1 & 2), LBP-74-71, 8 AEC 584, 585 (1974). As early as March 1972, however, site clearing and dredging to widen the Tittabawassee River had been completed and the major terrestrial impact of the Midland project had already been realized. See FES, pp. IV-1 to IV-2; V-12 to V-13 (March 1972). Currently, as intervenors in the Commission's Midland licensing proceeding (Petitioners in the Aeschliman case) have noted,

construction is estimated to be about fifteen percent complete. Cherry Affidavit, p. 4. Moreover, no nuclear fuel will be irradiated and no nuclear waste will be generated by the facility until construction of the first unit is complete and an operating license has been issued. In short, no significant adverse impact will occur as a result of the continued construction of the Midland facility before a new interim fuel cycle rule is in place.

Second, no reasonable fuel cycle alternatives will be foreclosed by continued construction. "Since existing concepts for reprocessing and waste technology do not vary significantly with the design of nuclear power generating facilities, it is extremely unlikely that the [Commission's] revised environmental survey will result in any modification of these facilities." 41 F. R. 34,708.

Third, suspension of construction would have serious economic and social effects. Again, as intervenors have noted, Consumers Power Company has already expended hundreds of millions of dollars in connection with the construction of the Midland facility and is continuing to spend and build on a large scale. Cherry Affidavit, p. 4. The project is already seven years behind schedule and the estimated cost of the facility has increased from less than $400 million to more than $1.5

billion. Id., pp. 10-11.[9] Even without reference to precise figures, it is clear that halting construction would put hundreds of workers out of jobs,[10] further delay the project, and increase its cost. Under the Coalition decision such "delay costs to the licensee and the consumers" are properly to be considered and weighed in determining whether construction should be permitted to continue at Midland. 463 F.2d at 956. Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973), is to the same effect.

Nevertheless, under the rule of the Aeschliman case, at least, the costs of continued construction cannot

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9/ By March 1972, after almost a year and a half of the 1970-73 suspension of construction, the estimated construction cost of the Midland facility had risen to $554 million. FES, p. XI-6. Early in 1975, budget constraints forced a severe cutback in construction activity at the site. By then, the estimated cost of the facility was $940 million. It was revised to $1.4 billion during 1975 due to the then projected delay in the commercial operation dates of the units, and further refinement of the estimate of the scope of work. See Licensee's 1975 Annual Report, pp. 10, 24; Appendix A to Quarterly Report for the Fourth Quarter of 1975 submitted to NRC in these dockets by Letter from S. H. Howell to B. C. Rusche, dated March 2, 1976. As noted in the report, and Mr. Roger Boyd's reply thereto dated May 13, 1976, the Licensee announced, in December 1975, the resumption of a normal construction program. More recently, the estimated cost of the Midland facility has increased from $1.4 billion to $1.67 billion, as disclosed in Licensee's Amendment No. 1 to Form S-7 Registration Statement to the Securities and Exchange Commission (Registration No. 2-56950), p. 4 of Prospectus dated August 19, 1976, for 2,000,000 shares of Preference Stock.

10/ The FES (p. IV-1) refers to "700 construction, supervisory and clerical workers" in the area of the site.

prejudice the outcome of the ultimate cost/benefit balance. According to the Court, any reanalysis of costs and benefits must not include sunk costs as costs of abandonment. Aeschliman v. NRC, Slip Op. p. 21n.20. Thus, if it becomes appropriate to consider the alternative of abandoning the project under Aeschliman, the cost/benefit balance will be independent of percent plant completion. Under the decision, such costs as replacement costs -- which are not a function of construction status -- may be considered; but not past expenditures. Id. Accordingly, the ultimate outcome of the NEPA cost/benefit balance for Midland cannot be prejudiced by continued expenditures now, no matter what their rate or duration.

In brief, consideration of each of the factors presented in the Coalition case requires that construction continue. Moreover, since there is no "compelling basis for halting construction" (Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849, 93 S. Ct. 56 (1972)) the equities should be considered. See, e.g., Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974), rev'd on other grounds, 531 F.2d 637 (1976).

As is clear from the foregoing discussion, the equities, too, require that the Midland construction permits be neither modified nor suspended, and that construction be allowed to continue. In addition, since the issuance of the Midland construction permits almost four years ago, construction has proceeded, without interruption, at costs ranging into the hundreds of millions of dollars. During that time no party sought a stay pending the appeal; and the Court of Appeals itself took almost three full years (more than one and one half years after the date of oral argument) to issue its decision. In such circumstance equity cries out against jeopardizing construction, at least until Supreme Court review is either complete or foreclosed.

In addition, at the very minimum, nothing should be done to disturb the permits before September 30. At that time the revised environmental survey will be available and the Commission will decide whether or not the resumption of all licensing would be appropriate. See 41 F. R. 34,708; Testimony of NRC Chairman Rowden Before the Joint Comm. on Atomic Energy, Tr. pp. 62-63 (Aug. 27, 1976). To suspend the Midland construction permits on the basis of the fuel cycle decisions, and then -- a few days later -- have the Commission find that they present no bar to continued licensing after all, would transcend both fairness and logic.

Finally, turning to the "[g]eneral policy concerns" mentioned in the Commission's Statement, there is no doubt as to the need for the project. The Midland plant will be utilized to provide nuclear base-load capacity for the Michigan Electric Power Pool. See FES, pp. X-1 to X-2. Generation not supplied by the plant will have to be provided by other available alternatives, which consist only of facilities utilizing valuable and versatile fossil fuels. Id., p. XI-1. The sooner the Midland generating capacity becomes available, the sooner these resources can be conserved.[11/]

As for "the extent of the NEPA violation," there may be no pertinent violation at all. With respect to the fuel cycle issue, Judge Tamm specifically stated:

> I further agree with the conclusion of the majority that it is impossible to determine from the record before us whether the Commission has fulfilled its statutory obligation under NEPA . . .

NRDC v. NRC, Slip Op., pp. 1-2 (Tamm, J., separate statement concerning in result). In any event, this is clearly

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11/ The question of precisely when the Midland plant will be absolutely necessary to meet load demands -- in view of the Court's decision in Aeschliman with respect to conservation -- will be the subject of another proceeding, along with the matter of the ACRS letter. 41 F. R. 34,709n.2.

not one of those "most flagrant cases" calling for suspension. See generally Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 539 (1974).

Third, with respect to "the timeliness of objections," although the fuel cycle matter was raised early in the proceeding, this cannot be a reason to halt construction. Under the circumstances of the instant case (where the Commission's decision was part of a deliberate policy implemented through a line of opinions) the fact that the waste management issue was timely raised can only be of neutral weight.

C. The Controlling NRC Precedents

Finally, it is important to note that permitting the continuation of construction at Midland is not only required by the relevant judicial precedent; it is a necessary outcome under the law applied in licensing cases by the Commission itself. In considering whether or not permits and licenses should remain in effect during the pendency of remand proceedings the Appeal Board has followed the consistent practice of leaving such permits and licenses undisturbed absent reason to believe that the pendente lite continuation of the activities in question might pose, in itself, a threat

to health and safety or the environment. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986 (1974). For example, when the Appeal Board remanded the San Onofre case, supra, to the Licensing Board, it did not stay the effectiveness of the construction permits which had been issued. One of the principal questions raised on appeal related to the refusal of the Licensing Board to permit Intervenors to defer the presentation of the major portions of their affirmative case on certain stipulated radiological health and safety issues. As to this matter the Appeal Board specifically concluded that "in the totality of circumstances the . . . Intervenors should have been provided upon their request with a longer period in which to prepare their affirmative case on the stipulated health and safety issues." Id. at 987. At the same time, however, the Appeal Board found no inherent threat to the public health and safety in allowing construction work to proceed and, therefore, did not order the suspension of the construction permits. Id. at 997.

On the environmental side, the Appeal Board has also allowed construction permits -- and even operating licenses -- to remain in effect during the pendency of

remand proceedings. In the Zimmer case, for example, the Appeal Board determined that certain findings of the Licensing Board respecting one of the environmental aspects of the proposed facility could not be upheld on the basis of the record and that additional development was necessary. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), ALAB-79, 5 AEC 342 (1972). Specifically, the Appeal Board determined that there was insufficient foundation in the record for any conclusion that the Staff had considered the dry cooling tower alternative and, even assuming that there had been such consideration, that the record did not reveal the factors -- technical, environmental or economic -- which had led the Staff to reject that alternative. Id. at 343. In allowing the construction permit to remain in effect, the Apepal Board specifically noted it was following a precedent which had first been set in the Point Beach operating license case (Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972)). Id. at 349.

More recently, in a proceeding involving Unit 2 of the St. Lucie Nuclear Power Plant, the Appeal Board left standing an order authorizing the issuance of a Limited Work Authorization (LWA), but remanded the case to the Licensing Board for further consideration of alternative sites. Florida Power and Light Co. (St.

Lucie Nuclear Power Plant, Unit 2), ALAB-335, NRCI-76/6 830 (Jun. 29, 1976) [hereinafter cited as Lucie 2]. In so doing the Appeal Board stated:

> [L]ittle consequential environmental damage would occur if the limited work thus far authorized were permitted to go forward while the open questions are being resolved. In this circumstance, we find it appropriate to leave the limited work authorization in effect while the Board below undertakes the additional proceedings which are required. See Southern California Edison Co. (San Onofre Units 2 and 3), ALAB-212, 7 AEC 986, 996-97 (1974).

Lucie 2, supra, p. 842.

Thus, the Appeal Board has considered the question of continued license and permit effectiveness in many contexts.[12/] The basic approach, however, is always consistent. The essential factor is whether or not the continuation of activities might pose, in itself, a threat to health and safety or to the environment.

Applied to Midland, construction between now and the adoption of an interim rule involves no threat to the health and safety of the public and, as discussed above, little if any risk of incremental adverse

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12/ See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-124, 6 AEC 358 (1973); Commonwealth Edison Co. (La Salle County Nuclear Station, Units 1 & 2) ALAB-153, 6 AEC 821 (1973).

environmental impact. Accordingly, by the Commission's own standard, construction should be allowed to continue.

III. Conclusion

Based on the foregoing analysis, it is clear that convening an evidentiary hearing would be superfluous. The essential facts are undisputed. If construction is suspended pending the adoption of an interim fuel cycle rule substantial additional costs will be incurred, many individuals will be laid off and undesirable delays will ensue. All that remains is for this Board to apply the relevant law and equities. Since there are no benefits associated with halting construction at Midland -- but substantial harm and risk -- precise quantification of the negative impacts is unnecessary. The proper course is for this Board to issue an order continuing the Midland construction permits in full effect and terminating this proceeding.

In reaching this conclusion, we should like to emphasize the importance of the Commission's policies and actions which provide the context and background within which the Board is expected to decide whether the Midland construction permits should be continued for the relatively brief period until an interim fuel cycle rule has been made effective.

The Commission has ruled out consideration of fuel cycle impacts on a case-by-case basis in contested proceedings (which clearly include the present case). Instead, the Commission has adopted the approach of considering these impacts generically in the interim and in the definitive rulemaking. The Commission has indicated it is likely that licensing can be resumed when the interim proceeding is concluded.[13/]

In their opinions in the NRDC case, Judge Bazelon and Judge Tamm both made it clear they set aside Table S-3 for technical legal reasons. Both recognized that the Commission may reach the same conclusions on remand. See, e.g., NRDC v. NRC, Slip Op., p. 41n.60. Moreover, the Commission's General Statement of Policy

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13/ See 41 F. R. 34,708; Testimony of NRC Chairman Rowden before the Joint Comm. on Atomic Energy, Tr. p. 30. Mr. Rowden stated: "I believe there is a high level of confidence in the scientific and technological community and those involved in this process that the basic technology for dealing with long-term waste storage is at hand. There are technical problems that have to be resolved. The basic issues that have to be resolved now are those that relate to putting the technology into what we call the process, social process, legal process, satisfying procedural requirements. I have stated before in this committee in the testimony I gave in May, and I have stated in other forums, that I believe that our primary task is getting on with the job, making a selection as far as the technology to be utilized, picking out the sites on a demonstration or other basis, and moving forward on a time scale which will satisfy the public."

and the Chairman's recent testimony suggest that will be the probable result. Finally, the Commission has recommended to the Department of Justice the filing of a petition for certiorari with the Supreme Court to review the fuel cycle decisions, and the utility parties have stated their intention to file such petitions. In light of these circumstances, which strongly suggest the likelihood that fuel cycle environmental impacts will be found not to tilt the cost-benefit balance against nuclear plant licensing, all of the considerations weigh heavily in favor of leaving the permits in effect without further proceedings.

Respectfully submitted,

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Dated: September 7, 1976

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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 "Brief of Consumers Power Company", dated September 7, 1976, were served upon the following by deposit in the United States Mail, postage prepaid and properly addressed, on this 7th day of September, 1976.

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