LAW OFFICES

MYRON M. CHERRY

ONE IBM PLAZA

CHICAGO, ILLINOIS 60611

(312) 565-1177

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Dr. Emmeth J. 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 Suspension Hearing

Gentlemen:

I have now had an opportunity to reflect on the status of the case concerning suspension and discussions we had at the conclusion of the hearings in Chicago on Friday last concerning the production of other witnesses and further information.

Several things become clear and shall form the basis as to how my clients shall proceed in this case and how I believe the Board also must proceed:

1. This is a suspension case where the applicant has the burden of proving that a suspension of the license pending a full and complete hearing on the remanded issues (including an overall fresh and up-to-date cost-benefit analysis, which includes the costs and benefits associated with the remanded issues, as well as an updated examination of all costs and benefits) will not prejudice significantly the applicant in connection with the overall evaluation of the plant.* While we have taken a position that the Court of Appeals' decision demands a shutdown pending the remanded hearing (we understand that the Commission has rejected that, although we have renewed our motion before the Board based upon the facts we now know), it is still clear that the fundamental issue before the Licensing Board is whether there is sufficient time to have a remanded hearing fully and fairly analyzing all the facts without rushing to judgment by continuing to allow Consumers to build. We now believe that we have sufficiently demonstrated that this is true for at least the following reasons:

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*If the applicant proved this, then the rights of Intervenors to a fair hearing and the demands of NEPA for a new cost-benefit analysis would undoubtedly overrule applicant's proof and prevent further spending on a proposal not yet fully evaluated.

(a) Dow Chemical Company is willing to wait until 1984 for process steam, information gained from Dow's Answers to Interrogatories. This being so, a re-scheduling of the process steam from early 1982 to December, 1984 gives the applicant a two and one-half year leeway. Based upon the evidence thus far, a one-year shutdown only results in a 15-month delay in the schedule. Fifteen months added on to March, 1982 is still within the December, 1984 schedule.

(b) During the 1981-84 schedule, Consumers' only other argument is that it needs energy for its own system to service its customers. The evidence overwhelmingly demonstrates that such energy is available from a variety of sources (whether or not Palisades is operable) and thus, the rescheduling of the Midland plant from an operational standpoint is not a sufficient deterrent to prevent a full and expansive hearing.

2. While we intend to pull together all the existing facts in some rebuttal argument or testimony, certain things are now apparent, not the least of which is that Consumers' affirmative presentations by Mr. Heins and the other witnesses have not been sufficient to carry Consumers' burden of proof. We believe the Board will be similarly impressed with our presentation when we finish cross-examination of Mr. Keeley's testimony on alternatives and rescheduling costs, but the cross-examination of the Heins testimony has led us to the following quandry:

(a) First, it is clear the applicant has not carried its case, yet the tenor of the hearing is that somehow applicant must continually be given further opportunities to bring further witnesses until it finds the right witness who will somehow say the right things so that the Licensing Board can continue the license in effect. This is an intolerable state of events for my clients because it becomes a war of attrition and totally distorts the basic adversary procedure of cross-examination.

(b) We do not believe Intervenors have a continuing obligation to show any more than the witnesses tendered by applicants have made an insufficient showing, and Intervenors should not be required to continually show that the next round of witnesses on the same issues will be similarly bankrupt. That state of events is just a continual no-win situation for Intervenors.

(c) Next, as We have stated above the issue in this proceeding is not whether the plant should be built; rather whether the plant can be shut down so as not to prejudice an orderly remanded hearing which has been required by the Court of Appeals. Viewed properly this way, we believe that the cross-examination thus far of the Heins testimony is sufficient for our purposes (and the Board's from a legal standpoint) to demonstrate that the applicant has failed to carry its burden of proof.

3. I should like to reiterate that Intervenors do not have a bottomless pit of time, resources or patience. If the Intervenors' responsibility is to continue to demonstrate that applicant's witnesses have not supported the testimony, only to be faced with another round of witnesses, we will shortly find ourselves enmeshed in the remanded proceedings under financial constraints where Intervenors will no longer be able to stay around with the clear implication that Intervenors' rights on the suspension issues have been nullified. We need not remind the Board that a prompt decision is necessary even if the prompt decision suggests that the license be suspended. After all, if the license is suspended that does not mean that if the applicant makes a good case on the remanded hearings, it cannot be reinstated; however, if we proceed to continue construction while Intervenors engage in the "obligation" of proving that applicant's witnesses have not made a careful analysis, only to be faced with a new round of witnesses, the plant will just continue to be built and all aspects of fairness and due process will be chucked aside.

4. Because of the important obligations which will be encumbent upon us and because of the valuable contribution we have already made (particularly in light of the Regulatory Staff's failure to have been objective at all, as well as the "contrived neutrality"of Dow Chemical Company), this Board cannot afford to try this case without Intervenors---and Intervenors cannot afford to try this case if the standards and criteria are that Intervenors keep cross-examining until finally applicant may find some witness who may be persuaded to say the right things.

* * *

Having said all of this, we intend to proceed for our part on the following basis:

1. We do not want to cross-examine members of the Executive Energy Review Committee, since we believe we have already shown the bankruptcy of that Committee's approach by cross-examination of applicant's existing witnesses. At an appropriate time, we

intend to finish cross-examination on the need for power of applicant's existing witnesses on the remaining issues of loss of load probability and production cost modeling. If the applicant's existing witnesses cannot satisfactorily answer questions concerning these matters, we shall not (nor do we feel any obligation to) ask or force the applicant to bring another round of witnesses who can support their testimony.

2. We shall complete our cross-examination of applicant's existing witnesses (including Messrs. Aymond and Youngdahl) and if those witnesses are, in our judgment, insufficient to demonstrate applicant's case, we shall not take the extraordinary step of helping applicant find the "right witness". That is solely a function of applicant's burden of proof and applicant having failed in that regard, suspension must ultimately follow.

* * *

We intend to move forward with the remaining cross-examination in such a way that the hearing can be concluded as quickly as possible and hopefully even before the conclusion of the presently scheduled additional two weeks of hearings. We can do this on the basis of the information we already have, but not if applicant is continuously given the opportunity to bring in new witnesses to support their position. This is not necessary or proper in a suspension hearing and the time to bring in the new witnesses is in the remanded hearing where the time constraints and fairness are such that applicant will be truly penalized for not carrying their burden of proof, rather than as is now, Intervenors are penalized for applicant's not carrying their burden of proof.

I shall now list those matters I believe are outstanding and requiring ruling by the Board:

1. Dow's motion to withdraw as a party and the obligation of Dow to provide affirmative evidence of its position as a party.

2. The preparation of the Temple testimony, both from the standpoint of the allegations that the applicant has willfully avoided truthful facts, a procedure which the record fairly reflects was aided and abetted by applicant's counsel.

3. The obligation of the Regulatory Staff and the applicant to answer outstanding interrogatories.

4. Our motion to suspend the license as a sanction or for other relief in the nature of sanctions for the conduct of applicant.

5. Our renewed motion to suspend the license based upon existing facts (filed with our motion for sanctions at the end of 1976).

6. Claims of privileged documents by the applicant which were turned over to the Board earlier.

7. Claims of privileged documents in connection with the work product privilege regarding the Temple testimony claimed by applicant. The Board should note that Dow has opposed such claim in work product and the Board should further note that applicant's claim is based upon a common privilege with Dow which Dow not only fails to assert, but with which Dow effectively disagrees.

8. The misrepresentations in applicant's counsel's affidavits which have been effectively challenged by Dow, the other party to the factual occurrences.

9. Our outstanding motion that an EIS is required in connection with suspension which motion was renewed with our late December, 1976 filing.

10. While not part of a formal motion, but clear from the proceedings so far, the question of what to do with the Regulatory Staff's obvious failure to have done any independent analysis in its thinking and far worse, adopting whole hog the position of the applicant as the Staff's own position. In connection with the future of the Regulatory scheme, this aspect probably suggests the most serious of all prospects.

* * *

We do not mean to suggest in this letter that we are critical of the Licensing Board's handling of this proceeding. Indeed, we believe based upon the evidence so far, that the Licensing Board cannot help to feel as we do that applicant's proof so far is wanting from a substantitive standpoint.

We believe, however, that last week's proceedings, and particularly the discussion at the end of Friday, have somehow slipped us into considering issues reserved for the remanded hearing and we want to emphasize the more limited scope of the suspension hearings. Once it is clear (as we believe we have shown and we will conclusively show after cross-examination of Mr. Keeley's

testimony) that we cannot have a fair remanded hearing without rescheduling the start-up date of the plant and, under all the circumstances the rescheduling is fair, the license should be suspended immediately. Otherwise, the suspension proceedings become a sham precursor for just continuing applicant's construction of a facility which may not be being built in compliance with the law.

One last point. Applicant has continuously insisted that all it must show at the suspension hearing is that it has a probability of winning on a remanded hearing. This is a mischaracterization of the issues in the suspension proceeding, since the primary focus of the suspension hearing is as we have stated earlier. Indeed, since specific contentions as to the remanded hearing have not yet been filed (and need not be filed until completion of discovery, a procedure which is still ongoing), it is clear that applicant's "probability of winning" at the remanded hearing argument can have no meaning since the issues on remand (ACRS, etc.) have even yet to be framed.

We respectfully urge that the Board consider carefully the thoughts raised in this letter, which we are sure it will do. We believed it was necessary to write this letter so that we all do not lose the focus of where we are proceeding.

Respectfully,

Myron M. Cherry
Attorney for all Intervenors
except Dow Chemical Company

MMC:es

cc: Service list