UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

INTERVENORS' RESPONSE TO
COMMISSION ORDER OF APRIL 10, 1978

Intervenors other than Dow Chemical Company, by their attorneys, respectfully submit this response to the Commission's Order of April 10, 1978, requesting the parties to state "what issues, if any, remain for further Commission consideration in light of the Supreme Court's decisions" in this case and in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.

It is the position of Intervenors that all of the issues tendered to the Licensing Board and to the Appeal Board in these proceedings since the July 1976 decision of the Court of Appeals remain appropriate and necessary for further consideration. These issues include all of those identified by the Appeal Board in ALAB-458, and by the Licensing Board in its March 9, 1978 Notice of Prehearing Conference.

The reason that all of these issues remain both appropriate and necessary subject for further consideration is simple. Whatever might be the case if the Commission record

in Midland had remained stagnant since the initial Licensing Board decision in 1972, in fact the record has not remained stagnant--rather the reverse. Since the decision of the Court of Appeals, more than 6,000 transcript pages of testimony and several hundred exhibits have been introduced before the Commission, and have materially and substantially altered the factual picture before the Commission. For example, and limited only to the issues identified by the Licensing and Appeal Boards:

1. The record shows that Consumers' demand projections (critical to its need-for-power claims) have dropped drastically since the initial decision in 1972.

2. The involvement of Dow Chemical Company in the Midland Project--a sine qua non of both the size and location of the Midland Project, as everyone frankly admitted in 1972--has become so reluctant, and the relations between Dow and Consumers have so drastically deteriorated, that as of September 1977 the Licensing Board could only characterize continued Dow involvement with the Project as "speculative."

3. The always obscure ACRS Report on Midland has not only failed to inform Intervenors or the public of what unresolved safety issues exist with regard to the plant; we now know that it has left the Commission Staff in the dark as well.* (So important is this ACRS issue, in fact, that the Appeal Board in ALAB-458, Slip Op. at 24-25, 43 n. 87,

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* And, it would appear, members of the Licensing Board also. See Tennessee Valley Authority (Hartsville Nuclear Plant), LBT-77-28, 5 NRC 1081, 1117-18 (1977).

emphatically directed the Licensing Board vigorously to pursue that subject whether the parties do so or not.)

4. There remains incomplete the "full airing and resolution" of the serious issues arising from the preparation of the written testimony of Dow's witness Joseph Temple. (The Appeal Board correctly regarded these issues, like the ACRS issues, as sufficiently important to require further exploration "whether or not the parties are themselves otherwise interested in pursuing these matters." ALAB-458, Slip Op. at 43 n.87.)

5. Finally, fuel cycle issues have never been considered in this case (except for occasional ex parte comments made without the benefit of evidence, briefing, or argument).

If we look at the record without limiting ourselves to the literal terms of the Licensing and Appeal Boards' lists of issues, we find that every significant fact about the Midland Project has undergone radical change in the six years since the original record was closed in 1972. Consumers' habitually optimistic and inflated demand projections have undergone a constant downward slide, beginning as early as 1974 (when, according to Consumers, "energy conservation" produced such a precipitous drop in demand projections as to force it to drop completely plans to construct the Quanicassee Nuclear Plant*), and continuing until as recently as January 31,

* Consumers Power Co. (Quanicassee Units 1 & 2), Dockets 50-475, 50-476, Applicant's Petition To Withdraw Notice Of Hearing (May 9, 1974) at 2-5.

1978, when Consumers' prior 5.2% annual growth rate projection dropped to 4.4% for 1978-82, 2.8% for 1983-87, and 2.1% for 1988-92--a drop of fully 60% in the last few months alone.

Throughout the period when these demand projections were being cut by as much as 60%, moreover, the costs of the Midland Plant were soaring--from a little over $500 million (on which the original 1972 decision was based) to the neighborhood of $2 billion. Thus not only is the Midland Project drastically less necessary than was thought in 1972, even in terms of Consumers' own projected demand, but the electricity it will produce has become ever more expensive.

Nor is that all. Since the original 1972 decision, the Commission itself has uncovered serious antitrust violations with regard to the Midland Project, leading to the 400-page ruling in ALAB-452. Dow Chemical Company refuses to concede that its contract with Consumers even remains valid or enforceable, let alone beneficial to Dow. The QA-QC violations which have bedeviled the Midland Project from the outset continue unabated, and add even more expense and "cost overruns" to the Project.

We repeat: none of these developments involve matters dehors the Commission record in Midland. All of them are part of the Commission's already existing record in this case. The Supreme Court decision, of course, did not focus on that record as it has developed in the six years since the original 1972 decision, nor could the Court

have done so given the approach the Court adopted. Rather, the Supreme Court held only that on the 1972 record the Commission had not erred.*

The governing principle here is straightforward, and not only is untouched by the Supreme Court's rulings but in fact was urged upon that Court by Consumers itself (which repeatedly reassured the Court that reversing the Court of Appeals would not require blind adherence to a 1972 decision in the teeth of 1978 facts). The Court of Appeals for the Sixth Circuit stated the principle in Environmental Defense Fund v. TVA, 468 F.2d 1164, 1176 (6th Cir. 1974), by pointing out that NEPA requires not merely an initial examination, but also "constant reevaluations of projects already begun" in order "to determine whether alterations can be made...or whether there are alternatives to proceeding with the projects as initially planned." Other courts, e.g., Hudson River Fishermen's Ass'n v. FPC, 498 F.2d 827, 832-33 (2d Cir. 1974), and the Council on Environmental Quality, see 40 C.F.R. § 1500.13, agree. This Commission itself made the point

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* The Supreme Court did not hold even that much, of course, with regard to the fuel cycle issues. On the contrary, it remanded the fuel cycle matters to the Court of Appeals for a determination of the question--deliberately left open by the Supreme Court--of whether the record on which the original fuel cycle rulemaking was based was adequate to support the result reached. Thus there is nothing in the Supreme Court decisions which alters the conclusion of the Appeal Board in ALAB-458, and the Licensing Board in its March 9, 1978 Order, that fuel cycle matters remain to be considered in Midland.

emphatically in Commonwealth Edison Co., ALAB-153, 6 AEC 821, 823-24 (1973):

> "...[I]t is not proper to resolve a major environmental question on the basis of a set of facts existing in the past if there is good reason to believe that there may be an appreciable, and material, change in the factual situation."

See also Consolidated Edison Co., ALAB-188, 7 AEC 323, 407 (1974).

Here there is much more than "good reason" to suspect that matters have changed. Here there are 6,000 pages of proof, already of record before this Commission, that matters have changed dramatically indeed. Even the partial and preliminary examination of the facts conducted in connection with the suspension-of-construction issue yielded information which seriously troubled the Licensing Board, and led the Appeal Board not only to concede that at first blush it "might be expected [that] the cost-benefit balance [had tipped] against the plant," ALAB-458, Slip Op. at 23, but also to conclude that further exploration of several issues was essential whether the parties themselves thought so or not.

To stop now on the sole basis of the Supreme Court decision:

> -- would ignore Consumers' repeated reassurances to that Court that its decision would not bring the Commission's ongoing regulatory responsibilities to a halt;

-- would inject into the Supreme Court decision something the Court did not purport to hold;

-- would ignore the clear mandate of NEPA as interpreted by the courts, the Council on Environmental Quality, and this Commission;

-- and would stultify completely this Commission's regulatory duties and powers.

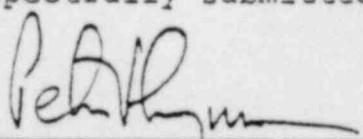
Whatever the reason for which it was compiled, there is now before the Commission an extensive record raising extremely serious questions about the viability of the Midland Project. Those questions must be answered. The Supreme Court's decision provides no warrant whatsoever for shunting them aside or for attempting to "unring the bell." To the contrary, the Supreme Court's repeated references to the thoroughness of the nuclear regulatory process merely reinforces the importance of living up to that thoroughness in this case, by not arbitrarily truncating the ongoing inquiry into the host of unanswered and extremely serious questions posed by the present record.

Conclusion

For the reasons set forth herein, Intervenors other than Dow Chemical Company submit that all of the questions posed by the Licensing Board's March 9, 1978 Notice of Prehearing Conference (and in addition the further questions raised by Consumers' continuing history of QA-QC violations, by ALAB-458, and by the substantial evidence of record that Consumers lacks the financial wherewithal to complete the Midland Project with-

out massive outside assistance) remain essential topics for further Commission consideration. Nothing in the Supreme Court's Opinion remotely suggests otherwise.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I mailed copies of the above and foregoing Intervenors' Response to Commission Order of April 10, 1978 to counsel for Consumers Power Company, Dow Chemical Company, and the Nuclear Regulatory Commission Staff and to the Docketing and Services Section of the Commission by first class mail, postage prepaid, this 24th day of April, 1978.

Peter Flynn