ISHAM, LINCOLN & BEALE

COUNSELORS AT LAW

EDWARD S. ISHAM, 1872-1902
ROBERT T. LINCOLN, 1872-1889
WILLIAM G. BEALE, 1885-1923

ONE FIRST NATIONAL PLAZA
FORTY-SECOND FLOOR
CHICAGO, ILLINOIS 60603
312-786-7500 TELEX: 2-5288

WASHINGTON OFFICE*
1050 17TH STREET, N. W.
WASHINGTON, D. C. 20036
202-833-9730

CHARLES A. BANE
DEAN A. ESLING
WILLIAM W. DARROW
FREDERICK R. CARSON
RICHARD G. FERGUSON
RICHARD B. OGILVIE
ROBERT E. CRONIN
EILEEN STRANG
ROBERT WOOD TULLIS
RICHARD D. CUDAHY*
RICHARD E. POWELL
A. DANIEL FELDMAN
PHILIP F. PURCELL
SHARON L. KING
JON R. LINO

MICHAEL I. MILLER
DONALD J. McLACHLAN
DAVID J. ROSSO
DONALD E. VACIN
JOHN L. McCAUSLAND
LAURENCE D. LASKY
ROBERT A. YOLLES
C. RICHARD JOHNSON
PETER C. JOHN
GERALD D. MINDELL
GERRY D. OSTERLAND
JOHN W. ROWE
PAUL F. HANZLIK
DONALD B. HILLIKER

GENE C. DAVIS
ALEXANDER HEHMEYER
OF COUNSEL

ASSOCIATES

LAWRENCE S. ADELSON
GEOFFREY A. ANDERSON
CARYL ANN BARTELMAN
MARGARET C. BAXTER
EUGENE H. BERNSTEIN
JOHN G. CAMERON, JR.
O. KIRBY COLSON, III
HARLAN M. DELLSY
CLARK EVANS DOWNS
EDSELL M. EADY, JR.
ROBERT L. ESTEP
DAVID J. FISCHER
MARY L. FITCH
JAMES A. FLETCHER
JOSEPH GALLO*
ROBERT E. GANJA
MARTHA E. GIBBS
MICHAEL J. GILL
REYNALDO P. GLOVER
CHRISTINE McK. HEHMEYER

ROBERT W. KLEINMAN
ROBERT H. LOEFFLER*
JOHN E. LOPATKA
EDWARD W. MALSTROM
HUGH R. McCOMBS, JR.
WILLIAM S. McKAY, JR.
TERRY F. MORITZ
PAUL M. MURPHY
GLENN E. NELSON
JAMES R. NOWACKI
THOMAS GRADY RYAN
STEPHEN K. SAWYIER
PAUL W. SCHROEDER
DAVID M. SPECTOR
DAVID M. STAHL
PHILIP P. STEPTOE, III
PAMELA B. STROBEL
ROBERT H. WHEELER
RONALD G. ZAMARIN

April 10, 1978

Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

DOCKETED USNRC
APR 14 1978
Office of the Secretary Docketing & Service Section

Re: Consumers Power Company
(Midland Plant, Units 1 & 2)
Special Proceeding
Docket Nos. 50-329 SP, 50-330 SP

Dear Mr. Chilk:

We are counsel to Consumers Power Company in connection with matters coming before the Commission which may affect the Company's Midland Plant, a nuclear facility currently under construction pursuant to Commission Construction Permits 50-329 and 50-330. We ask that you bring this letter to the attention of the Commissioners in connection with their consideration of a proposed settlement in the above-captioned special proceeding. The settlement proposal was transmitted to the Commission by Valentine B. Deale, Esq., Chairman of the Atomic Safety and Licensing Board for Special Proceeding on March 21, 1978.

This letter sets forth the objections of Consumers Power Company to certain of the terms and conditions of the proposed settlement of the special proceeding. By order of the Atomic Safety and Licensing Board Panel dated November 7, 1977, as amended by order of December 7, 1977, a licensing board was established to conduct a special proceeding for the purpose of considering charges preferred against certain attorneys under 10 CFR §2.713 by the Chairman of the Atomic Safety and Licensing Board considering certain issues pertaining to the construction permits for the Midland Plant. Those charges resulted from motions by the NRC Staff to censure and suspend attorney Myron M. Cherry, counsel for

8007280 724
G

THIS DOCUMENT CONTAINS POOR QUALITY PAGES

all Intervenors other than The Dow Chemical Company, and counter motions by Mr. Cherry to discipline and suspend James Tourtellotte and Milton Grossman, counsel for the NRC Staff. The conduct which formed the basis for those charges occurred during the course of hearings related to Consumers Power Company's Midland Plant which were ordered by the Nuclear Regulatory Commission following a remand of the Commission's decision issuing construction permits for that facility by the Court of Appeals for the District of Columbia Circuit.*

Although Consumers Power Company was neither a party to nor an intervenor in the special proceeding, it objects to portions of the Motion and Stipulation which were transmitted to the Commission for its consideration by the special Licensing Board. The objections of Consumers Power Company are premised upon the fact that the Motion and Stipulation, if approved by the Commission, would cause to be stricken from the record of the Midland Plant proceedings letters, motions, portions of the transcript, and decisions of the Licensing Board, the Appeal Board and the Appeal Panel.** It must be emphasized that these items comprise a part of the record not of the special proceeding, but are an integral part of the record of the proceeding mandated by the Court of Appeals in the Aeschliman decision and ordered by the Nuclear Regulatory Commission.

Expunging a broad range of documents from the record of an NRC proceeding would be unorthodox in any case; given the fact that Consumers Power Company did not participate in the special proceeding, and therefore in formulating the proposed settlement agreement, and the fact that the Commission has before it only the Motion and Stipulation from the special proceeding, not the record of the entire Midland proceeding on review, such a wholesale "cleansing"

---

* Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C.Cir. 1976), rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, ___ U.S. ___ (April 3, 1978).

** Appendices A and B to Motion and Stipulation.

of the record is erroneous.*

Specifically, Consumers Power Company objects to striking from the record of the Midland Plant proceeding all those items listed in Appendix A to the Motion and Stipulation. The fourteen items listed in that Appendix embrace letters to the regular Licensing Board; a letter to Dr. Lawrence R. Quarles from Mr. Cherry, copies of which were sent to all parties in the regular Midland Plant proceeding; and motions, responses and an affidavit all submitted to the regular Licensing Board. All of these items form a portion of the record in Consumers Powers Company's case involving the Midland Plant.

The second set of objections of Consumers Power Company relates to the proposed striking from the record of certain of the items set forth in Appendix B to the Motion and Stipulation. Numbers 1, 2, 3, 4 and 7 of that Appendix

---

* The highly unusual nature of the proposed striking of portions of the record is underscored by the dearth of NRC decisions in which this procedure is discussed. The only analogy which Consumers Power Company could discover involved the editing of an Appeal Board opinion by the Commission in the exercise of its power to vacate; all parties had agreed that certain portions of the decision should be vacated. However, the Commission warned that:

> There are limits, of propriety if not law, on the selective editing of an opinion of a lower tribunal through the exercise of our power to vacate. In the unusual circumstances of this case, however, and in the interest of terminating already protracted litigation, we are reluctantly adopting that course here. Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit No. 3) CLI-75-14, 2 NRC 835, 840 n.10 (1975).

It is significant that in that case the Commission vacated portions of the opinion, rather than excising them as is proposed here. Furthermore, the Appeal Board opinion was properly before the Commission for review.

refer to memoranda and/or orders of the Licensing Board, the Appeal Board and the Appeal Panel in the Midland Plant regular proceeding. Consumers Power Company believes that striking these decisions from the record of the Midland Plant proceeding would be even more improper than striking the items set forth in Appendix A. The opinions of the lower tribunals of the NRC, in addition to forming the record relating to a particular nuclear plant, comprise the body of case law which establishes precedents for future decision by NRC tribunals. As such, these opinions must be untainted by after-the-fact revisions at the behest of parties who did not seek review of those decisions in the normal and proper fashion. Any attempt to summarily strike the decisions from the record is unseemly.*

The last portion of the proposed settlement agreement to which Consumers Power Company objects is the statement set forth in Appendix C to the Motion and Stipulation. According to Paragraph 7 of that motion, "the Nuclear Regulatory Commission or appropriate members of its staff shall furnish notice containing the language set forth in Appendix C hereto to all persons to whom the Commission or any member of its staff disseminated any letter, press release, document or any other information, describing, concerning or relating to the Special Proceeding or any matters at issue therein, informing all such persons of the disposition of the proceeding." Consumers Power Company does not argue with the concept that a statement should be distributed to the persons enumerated in Paragraph 7; what is objectionable, however, is the misleading nature of the statement set forth in Appendix C. Any statement which is to be disseminated in connection with the special proceeding should make clear that the proceeding was terminated by agreement of the parties, with the approval of the Commission, and that the termination does not in any way indicate an opinion by the special Licensing Board or by the Commission as to the validity of the charges or the propriety of

---

* Items 5 and 6 of Appendix B are orders establishing the special Licensing Board. Consumers Power Company expresses no opinion on the propriety of striking them from the record.

the conduct which underlay those charges. Because Consumers Power Company was a party to the proceeding at which the conduct occurred which gave rise to the charges, it has a legitimate interest in seeing that the Commission provides an accurate explanation of the termination of the special proceeding. Such a qualifying statement is common in settlement agreements ending commercial litigation.

For the reasons set forth above, Consumers Power Company respectfully requests that the settlement agreement in the special proceeding be modified in accordance with the views expressed in this letter.

Very truly yours,

Michael I. Miller

Michael I. Miller

MIM:sf

cc: (See Service List)