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September 24, 1977



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Dr. Emmeth A. Luebke
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: In the Matter of Consumers Power Company (Midland Plant,
Units 1 and 2) Docket Nos. 50-329 and 50-330

Gentlemen:

We are responding to the Board's recent order requiring the parties to inform the Board by September 30, 1977 about scheduling matters for the remanded hearing and outstanding discovery requests.

We regret to inform the Board that we are presently unable to respond to that order for the following reasons:

Yesterday we read with profound shock and amazement the Licensing Board's decision. That decision finds for the Intervenor on almost every fundamental issue, but then inexplicably concludes that the Licensing Board is powerless to remedy any of the defects because of the amount of money that has been spent. An extension of that reasoning simply means that every Atomic Safety and Licensing Board decision which becomes immediately effective is beyond review.

Every utility which has a construction permit starts to spend money. What this Board has told every utility is that if they spend that money fast enough, not even a Court of Appeals decision can be fairly implemented.

In light of the Board's decision and particularly in light of paragraph 66 and the second sentence of paragraph 72, of what value would Intervenor's participation (or anyone's participation) be in the hearings now planned by the Licensing Board? We have been told we lost because Consumers spent a lot

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of money and that the continuation of spending renders the ultimate outcome inevitable.

I must say that, given the result reached by the Board (particularly in light of the thousands of dollars which my clients and I have spent on this proceeding, many thousands of which I shall never recover as counsel), I wonder why the Board didn't focus on these issues a year ago, since the clear import of the Board's decision is that nothing revealed by Intervenors at the licensing hearing can outweigh the so-called sunk costs. The rule of law formulated by the Board is even beyond the argument of any of the parties.

Having now set forth our frustration with the Initial Decision, you can perhaps understand why we are unable to deal with setting up a schedule for remanded hearing or dealing with outstanding (or yet to begin) discovery requests.

Our bottom line suggestion is that the Licensing Board hold off on scheduled remanded hearings or even on dealing with the issue for at least the next 30 days so that the Appeal Board can focus on the referred ruling and we have an opportunity to consider our other options including going directly to the Court of Appeals. I am sorry we can not be more specific, but if you reflect on the implications of the Licensing Board order, as I am sure the Board has in light of its referral to the Appeals Board, you will agree with me that the course of procedure I have suggested is the only sensible way to proceed.

However, the Board need not be idle in the interim. In light of the findings of outright dishonesty against Consumers and their attorneys contained in paragraphs 10 and 11 of the findings, the Board should consider what sanctions it will impose. The Board having found (Finding 10, last sentence) that there is a suspicion, even a presumption, that unrevealed dishonest ploys have been successful, I should think that the Board has to move further on that score. Indeed, having found that Consumers was dishonest (and may still have concealed important deficiencies), I wonder how the Board can feel comfortable in letting construction proceed in the face of those allegations. Since the Board recognized that it was our participation, not the Staff's "diligence" which revealed the now-known dishonest tactics, the Board surely can not rely upon continued review by the Staff. This indeed is a dilemma which has now worked to the

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apparent advantage of the utility which is accused in the first instance.

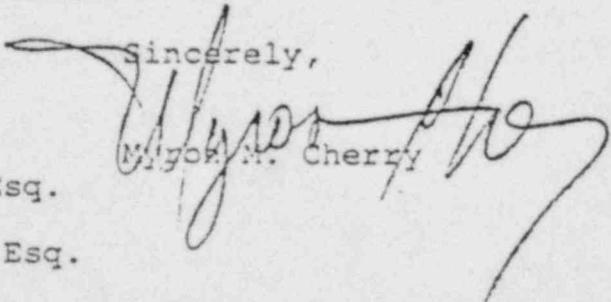
Finally, we ask that the Board promptly deal with the scurrilous charges that have been leveled against myself. In light of the record, we ask that the Board come down hard on the Staff's continued reluctance to ferret out dishonesty and to do any kind of a sincere regulatory review.

We are currently preparing papers both within and without the Commission dealing with the decision and we will advise the Board as soon as we have a clear idea of scheduling and substance concerning the remanded hearing. If the Board wishes to have a conference call among attorneys to discuss any of these issues, I should like to advise the Board that I will be on the West Coast for the beginning days of the week of September 26.

While I appreciate the Board's efforts over the past year, I can not help but conclude that we all wasted a lot of time. Everybody knew a year ago that Consumers had, at its own risk, spent \$300,000,000, and as you can see, I am still quite frustrated as to why it has taken so long for the Board to advise us, as it has, that it believes it is powerless to make any changes in the light of that spending. Perhaps I could understand the Licensing Board's rule of law had our arguments been "Johnny-come-lately", and I appreciate the frustration the Board felt on this score, in paragraphs 26 and 27 of the decision. But a rule of law which rewards dishonesty and money doesn't do very much to encourage public participation --- and on this record, where would the Board be without public participation other than a part-time arbiter between a dishonest utility and a blindfolded Staff.

Although I am sure it need not be stated, none of my remarks herein is intended to be disrespectful in any way. The Licensing Board, however, has adopted a rule of law apparently after a good deal of frustration, as appears from the findings. This letter is just to underscore that we share in your frustration, although we obviously disagree that the Board is powerless to remedy the situation.

Sincerely,


Myron M. Cherry

MMC:SP

cc: Caryl A. Bartelman, Esq.
Secretary, NRC ✓
Richard K. Hoefling, Esq.
L. F. Nute, Esq.