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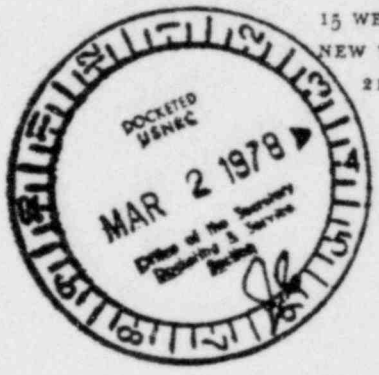

Jerome Nelson, Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Jerry:

I have just finished reading, with great dismay, the McTiernan Review of the Midland Matter (9/27/77). I am deeply disturbed by the fact that it reflects OIA's use of so-called legal "niceties" -- I would call them evasions of the clear intent of the law -- to excuse the conduct of Consumers and the Staff in the Midland proceeding. The fundamental legal principle which must prevail if the licensing process is to be effective is that all arguably relevant data must be fully disclosed. Undeniably Consumers sought to prevent that from occurring in this case and the fact that it failed is a monument to the tenacity and acumen of Myron Cherry, not to any reformation of Consumers. For its part, the Staff apparently continued to pursue the philosophy that its duty is to defend its position in the hearing, not to fully reflect all divergent relevant positions. This case is a classic example of why that approach is not in the public interest.

In the memo, McTiernan assumes that because Dow-USA will honor the contract it is legally permissible to seek to "down play" -- I would say suppress -- the existence and extent of the Dow-Michigan position. This conclusion is dangerously faulty. First, the parties cannot be allowed to define the issue and then only produce information relevant to the issue as they define it. This would merely put a premium on disingenuous argument which could be used to avoid full factual disclosure. Consumers knew that at least some parties felt the data was relevant. It was obligated to fully disclose that data -- not only under the threat of action by opposing counsel or in response to discovery -- and then argue about its relevance for the hearing. Second,

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McTiernan misses the whole point of the hearing by implicitly accepting the theory that Dow's present attitude is the relevant issue. The issue is whether Dow will buy the steam if Midland is built. The answer to that will be clearly affected by the attitude of Dow-Michigan. It is therefore vital to the case that Dow-Michigan's attitude be fully disclosed.

In another part of the McTiernan memo, he applauds Consumers for being forthright in presenting data on the contract dispute and notes that the existence of a dispute had been reported in the press. What is totally lacking in the memo is an appreciation of the crucial legal difference between newspaper reports and hard testimony and between the reluctant downplayed testimony of a muzzled witness and the candor required for effective hearings. Someone should remind OIA that the sworn oath by each witness is to tell the "truth, the whole truth, and nothing but the truth." In no sense did Consumers attempt to fulfill this requirement and that is and should be a violation of the law. According to McTiernan, Consumers is innocent of criminal conduct because it was ineffectual. But the focus should be on the criminal intent which was clearly present.

McTiernan's response to the Hoefling memo is just as shocking, maybe even more shocking. The Staff cannot be allowed to become so committed to a position that it ignores a totally acceptable contrary view of the legal issue as framed by Hoefling. Even more than Consumers, the Staff has a duty to full disclosure unrestricted by the theories of its case. In addition, McTiernan passes over without comment the extraordinary statement that part of the reason the Staff took a legal position against the relevance of Dow's future attitude as to the need for Midland was "the fact that such speculation could have the effect of stopping construction after millions of dollars had been spent." What possible justification can there be for such an attitude in a regulatory agency or in a staff charged with the duty to see that the licensing board is fully apprised of all relevant facts and issues? At the root of the Staff attitude in this case is the Staff's legally indefensible generic belief that the licensing boards should not really decide the issues in these cases and it is the Staff's duty to give the licensing board

as narrow a view of the case as possible to avoid delay or interference. This attitude has been dominant in the Staff during all the years I have practiced before the Commission.

I believe it is time for higher authority to take control of the ethical and policy issues in Midland and to take decisive action. First, NRC should not be prosecutor, judge and jury on charges of illegal conduct by parties appearing before it. Consumers' conduct, as revealed on the record, at least provides probable cause for legal action and at this point the matter should be referred to Justice for its independent assessment of the case. Frankly, McTiernan does not appear to understand the issues and in any event an internal audit process is inappropriate for evaluating the legality of actions taken by an outside entity in NRC proceedings. Second, the issues raised by the Staff conduct should be fully explored generically at the Commission level. I propose the Commission initiate a possible rulemaking with an advance notice in the Federal Register to consider amendments to 10 CFR Part 0 to define clearly the role of the Regulatory Staff. Included should be the following issues:

1. Is the duty of the Staff to take and defend a position, or to see to it that the record is fully developed? Can it do both?

2. To whom is NRC responsible? The Commissioners, the licensing boards, ELD, the public? Any combination of the above?

3. To whom is ELD responsible? The Commissioners, the licensing boards, NRR, the public? Any combination of the above?

4. Depending on the answers to the previous questions, how should the Staff carry out its duties and what are its responsibilities to the Commissioners, the public, the applicants and licensees, and other parts of the Commission?

The Staff should express its views on these subjects (not previously reviewed by the Commissioners, General Counsel,

OPE, etc.) simultaneously with the Federal Register notice. The Staff should not need more than one month to prepare such a document. If it takes longer than that, it would mean the Staff has never even figured out for itself what its duties are. If that is the case, the Federal Register notice should be filed with that admission.

I have sent this only to you within the Commission out of an abundance of caution with respect to the ex parte rules. I urge you to distribute it to the Commissioners and staff personnel at the earliest date to get their views. As you will see, I have distributed this to interested persons outside the agency because I believe the issues raised by the McTiernan memo are sufficiently vital that further inputs to the Commission at this time are essential. I have not released this to the press and am asking those to whom it is sent to similarly avoid relasing it to the press until you and the Commissioners have had some time to take action. I hope that you will give the issues raised here the level of serious and personal attention which I believe they warrant.

Sincerely,

Anthony Z. Roisman
Staff Attorney

cc: Myron M. Cherry, Esq.
Henry R. Myers
Frank M. Potter, Esq.
E. Kevin Cornell
Robert Pollard
J. G. Speth
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No.(s) 50-329
	)	50-330
(Midland Plant, Unit Nos. 1 and 2)	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
2nd day of March 1978.

Eugenia M. Pleasant
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
CONSUMERS POWER COMPANY	)	Docket No.(s) 50-329 50-330
(Midland Plant, Units 1 and 2)	)	

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