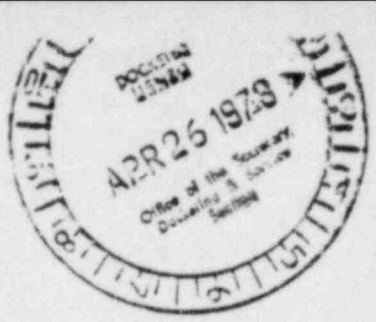

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the United States Nuclear Regulatory Commission

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

STATEMENT OF CONSUMERS POWER COMPANY
WITH REGARD TO WHAT ISSUES REMAIN FOR
COMMISSION CONSIDERATION

By Order dated April 10, 1978 the Nuclear Regulatory Commission (the "NRC" or the "Commission") requested that the parties to this proceeding state their views as to what issues, if any, remain for further NRC consideration in light of the United States Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, ____ U.S. ____ (April 3, 1978), rev'g Aeschliman v. Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976). Consumers Power Company ("Consumers Power") submits this statement in response to the Commission's Order.

I. HISTORY OF THE PROCEEDINGS

In 1972 permits were issued authorizing construction of the Midland Plant, which consists of two nuclear reactors

designed to produce electricity for the system of Consumers Power and process steam for The Dow Chemical Company ("Dow"). Following administrative appeals, petitions for review of the orders granting the construction permits were filed in the Court of Appeals for the District of Columbia Circuit by two groups which had previously intervened before the Commission ("Intervenors"). The Court of Appeals' review resulted in a determination to remand the orders granting the construction permits to the NRC "for further proceedings in conformity with . . . [the] opinion." Aeschliman, supra, 547 F.2d at 632.

Following that decision by the Court of Appeals, an Atomic Safety and Licensing Board ("Licensing Board") conducted an evidentiary hearing to determine whether to continue, modify or suspend the construction permits pending a decision on the remanded issues. Its decision not to modify or suspend the construction permits was affirmed by the Atomic Safety and Licensing Appeal Board ("Appeal Board"). Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-77-57, 6 NRC 482 (1977); ALAB-458, 7 NRC ___ (February 14, 1978) (hereafter "App. Bd. Op.").

On March 9, 1978 the Licensing Board issued a Notice of Prehearing Conference which detailed matters to be considered at the hearing on the remanded issues in accordance with portions of the Appeal Board's opinion discussing

the scope of the remand hearing. The March 9 Order also established dates for holding a prehearing conference and for the submission of certain materials by the parties to the Licensing Board in advance of that conference.

Prior to the time any further submittals were due to the Licensing Board, the Court of Appeals' Aeschliman decision was reversed on April 3, 1978 by the United States Supreme Court's unanimous (7-0) opinion in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council ("Vermont Yankee").

II. EFFECT OF VERMONT YANKEE ON THE ISSUES REMANDED BY AESCHLIMAN

The starting point for any analysis of the Supreme Court's reversal of Aeschliman is the long-established rule that when a paramount appellate court reverses the judgment of a lower appellate court, which had in turn reversed the decision of a trial court, the original judgment of the lowest tribunal is thereby revived. See Allen v. Belford, 35 F. Supp. 111 (E.D. Okla. 1940); Coit v. Sistare, 85 Conn. 573, 84 A. 119 (1912); 5 Am. Jur. 2d Appeal & Error §995, at 382 (1962). Cf. National Nut Co. v. Kelling Nut Co., 61 F.Supp. 76, 80 (N.D. Ill. 1945). When applied to this case, that rule requires that the Commission's original action approving the authorization of the Midland Plant construction

permits be reinstated.*

It is with this premise firmly in mind that the four issues dealt with in Aeschliman -- energy conservation, the report of the Advisory Committee on Reactor Safeguards ("ACRS"), the environmental effects of the fuel cycle, and the Dow-Consumers Power contractual relationship -- should be examined. What remains of each issue in the wake of the Supreme Court's Vermont Yankee decision will be considered below.

A. Energy Conservation

In the original Midland construction permit proceeding, the Licensing Board rejected consideration of energy conservation alternatives. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-72-34, 5 AEC 214 (1972). That decision was affirmed by the Appeal Board, which held that conservation was implicitly considered in both the cost-benefit analysis and electricity demand projections, and that in view of Intervenors' failure to introduce evidence on these matters, further discussion was not required under the "rule of

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*It should be noted, however, that the Supreme Court's decision is not yet final. The mandate of the Court will issue twenty-five days after the judgment was entered or April 28, 1978. The filing of a petition for rehearing, which must occur within twenty-five days after decision, will stay the mandate until disposition of the petition, and, if the petition is denied, the mandate will issue forthwith. Supreme Court Rules of the United States, 28 U.S.C. Rules 58 and 59 (1977).

reason" standard. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331 (1973).

Subsequently, the Commission ruled in another case that while its statutory power to compel conservation was not clear, it did not follow that all evidence of energy conservation issues should therefore be barred at the threshold, Niagara Mohawk Power Corporation (Nine Mile Point, Unit No. 2), CLI-73-28, 6 AEC 995 (1973). Intervenors then moved the Commission to clarify the Appeal Board decision and reopen the Midland Plant proceedings.

In declining to reopen the proceedings, the Commission, in May, 1974 first ruled that it was required to consider only energy conservation alternatives which were "reasonably available," which would in their aggregate effect curtail demand for electricity to a level at which the proposed facility would not be needed, and which were susceptible to a reasonable degree of proof. It then determined, after a thorough examination of the record, that not all of Intervenors' contentions met these preliminary requirements. It further determined that the Licensing Board had been willing at all times to take evidence on the remaining energy conservation contentions, which had been allowed. The Commission stated that, "at this emergent stage of energy conservation principles," before Licensing Boards need explore energy conservation alternatives, Intervenors "must state clear and reasonably specific energy conservation

contentions in a timely fashion. Beyond that, they have a burden of coming forward with some affirmative showing if they wish to have these novel contentions explored further." Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 32 (1974).

The Aeschliman court found that the Commission's rejection of energy conservation on the basis of the "threshold test", i.e. that Intervenors come forward with an affirmative evidentiary showing, was capricious and arbitrary and remanded the issue to the NRC for further proceedings. (Aeschliman, 547 F.2d at 629-30.)

The Supreme Court reversed Aeschliman on the issue of energy conservation, rejecting in toto the holding of the Court of Appeals with respect to what was required of the Commission by the National Environmental Policy Act ("NEPA"). The rationale of the Court of Appeals, in the words of the Supreme Court, "basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise." (Vermont Yankee, Slip op. at 28.)

Specifically, the Supreme Court found that judged by the information available to the Licensing Board at the time of the hearings, the board's actions were well within the proper bounds of its statutory authority. Furthermore,

the Supreme Court stated that the Court of Appeals had seriously mischaracterized the Commission's "threshold test" as placing "heavy substantive burdens on intervenors." The Commission's procedure was found to be within the agency's permitted discretion. Vermont Yankee, Slip op. at 30-32.

It is therefore now apparent that the remand of this matter to the Commission by the Court of Appeals was completely in error. The Appeal Board's February 14, 1978 decision raised nothing concerning energy conservation which was not a result of the now discredited Aeschliman decision. Therefore, nothing remains to be considered by the NRC with respect to energy conservation, and this "issue" may be laid to rest at last.*

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*Before leaving the topic of energy conservation once and for all, a few words regarding Intervenors' "end-use" argument are in order. Despite the fact that the Court of Appeals stated in a footnote that "[t]his 'end product' argument is not pressed on appeal," (Aeschliman, 547 F.2d at 626 n.8), and thus the issue was not remanded to the NRC for further consideration, Intervenors have tried to resurrect it from time to time in these proceedings. Lest such an attempt be made again, it should be noted that the Appeal Board went out of its way to dispose of the end-use concept in its February 14 decision. Not only did the Appeal Board cite to two previous decisions in which it had held that "this 'end-use' argument has no place in our proceedings," but it also explained why consideration of end-use is beyond both the province of the NRC and the mandate of NEPA. The Supreme Court's opinion is completely silent on the end-use argument.

In the face of Aeschliman, Vermont Yankee and the Appeal Board's February 14 decision, it is clear that Intervenors' end-use argument was never an issue in these proceedings and cannot be resuscitated at this late date.

B. ACRS

The original Midland ACRS report in this case made reference to "other problems related to large water reactors" which had been identified in previous ACRS reports. Intervenors sought discovery, including interrogatories, document requests, subpoenas and requests for depositions of ACRS members, regarding these "other problems." All of Intervenors' requests were denied. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331 (1973).

The Court of Appeals agreed with Intervenors that further explication of the ACRS report was necessary, but agreed with the Commission that discovery from individual ACRS members was not the proper way to obtain it. After reviewing the legislative history of the ACRS, and the function of the ACRS report, the Aeschliman court concluded that:

> At a minimum, the ACRS report should have provided a short explanation, understandable to a layman, of the additional matters of concern to the committee, and a cross-reference to the previous reports in which those problems, and the measures proposed to solve them, were developed in more detail . . . . Since the ACRS report on its face did not comply with the requirements of the statute, we believe the Licensing Board should have returned it sua sponte to ACRS for further elaboration of the cryptic reference to 'other problems.' 547 F.2d at 631.

Therefore, the Court of Appeals remanded this issue to the NRC for further consideration. (Aeschliman, 547 F.2d at 630-32.)

The Supreme Court disagreed totally with the conclusions reached in Aeschliman regarding ACRS, stating that "[a]gain the Court of Appeals has unjustifiably intruded into the administrative process." The Supreme Court reviewed the functions of the ACRS report and came to its own conclusion: "In light of all this it is simply inconceivable that a reviewing court should find it necessary or permissible to order the Board to sua sponte return the report to ACRS. . . . . This is surely, as respondent Consumers Power claims, 'judicial intervention run riot.'" The Supreme Court then observed that, "we find absolutely nothing in the relevant statutes to justify what the court did here." (Vermont Yankee, Slip op. at 34-35.)

A comparison of the Vermont Yankee and Aeschliman decisions reveals that the ACRS issue which the Court of Appeals remanded to the Commission for further consideration has been completely foreclosed by the Supreme Court's opinion. In fact, the original ACRS report has already fulfilled its statutory function and no further hearings need be conducted with respect to the generic problems referred to in that report.

If nothing had transpired between the Aeschliman and Vermont Yankee decisions, discussion of the ACRS report could end here. In the interim, however, the Appeal Board's decision purported to guide the Licensing Board's consideration

of the ACRS issue at the remand hearings.

The basic thrust of the Appeal Board's analysis of the ACRS issues requires the Licensing Board merely to follow the dictates of the Aeschliman opinion:

> We reject outright any suggestion by the parties that once the ACRS identifies the 'unresolved safety issues' it had in mind, no more need be done at the hearing. Regardless of how they might think they can parse the court's opinion [i.e., Aeschliman], there must be at least an explanation of why -- if this is the case -- each safety problem is well enough in hand for this plant so that construction should be allowed to continue. See River Bend. App. Bd. Op. at 25 n.54 (emphasis supplied).

Because the Supreme Court has held that the Court of Appeals was wrong in finding that the ACRS report should have been returned to the committee for clarification, the Appeal Board's instruction to the Licensing Board on this point has been rendered moot. While it is true that the Supreme Court indicated that "[t]he Commission very well might be able to remand a report for further clarification . . . .," there is nothing in the February 14 decision which indicates that the Appeal Board was making an independent judgment to seek clarification of the report rather than merely implementing the Court of Appeals' opinion. Absent the directive of the Aeschliman opinion, the Appeal Board's statements regarding the ACRS issue cease to be meaningful. (Vermont Yankee,

S'ip op. at 35.)*

The one ACRS topic which remains to be discussed is the effect of the River Bend** decision, referenced by the Appeal Board, on this proceeding. In River Bend, the Appeal Board concluded that the NRC Staff's Safety Evaluation Report ("SER"):

> should contain a summary description of those generic problems under continuing study which have both relevance to facilities of the type under review and potentially significant public safety implications. This summary description should include information of the kind now contained in most Task Action Plans.*** More specifically,

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*In a footnote to its decision, the Appeal Board remarked that on January 28, 1977 the Licensing Board had written to the ACRS indicating that the Committee's supplemental report had not alleviated all of the Board's concerns. The Appeal Board then commented: "We assume that, although its decision did not refer to that letter, the Board will not without explanation drop the concerns it had." (App. Bd. Op. at 24 n. 52) For the reasons set forth above, the Appeal Board's remarks are rendered of no consequence in the wake of Vermont Yankee. However, to clarify the record on this point, it may be noted that the ACRS did answer the Licensing Board's January 28, 1977 letter. On March 16, 1977 the Chairman of the ACRS wrote a letter to the Commission, which was forwarded to the Licensing Board, which responded to each of the Licensing Board's inquiries. See also letter of Richard K. Hoefling, counsel for the NRC Staff, to the Licensing Board dated April 8, 1977 and letter of R. Re: Renfrow III, counsel for Consumers Power, to the Licensing Board dated April 20, 1977.

**Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).

***"Task Action Plans" and their predecessors, "Technical Safety Activities Reports" describe ongoing or contemplated NRC Staff inquiries of a generic character intended to serve one or more of several broad objectives, e.g., the improvement of the tools used by the NRC Staff in its review of reactors and the more precise assessment of the designed safety margins (and thus the reliability) of the component parts of the facility. River Bend, 6 NRC at 768.

> there should be an indication of the investigative program which has been or will be undertaken with regard to the problem, the program's anticipated time-span, whether (and if so what) interim measures have been devised for dealing with the problem pending the completion of the investigation, and what alternative courses of action might be available should the program not produce the envisaged result. 6 NRC at 775.

Any attempt to apply River Bend as a separate source of authority for now considering ACRS topics related to the Midland Plant would be improper. The Midland Plant is clearly not in the same procedural posture as the River Bend Station was at the time of that decision. There, the Appeal Board was reviewing the second and third partial initial decisions of the Licensing Board (on health and safety and uranium fuel cycle matters) rendered in the course of the plant's construction permit proceedings. Here, on the other hand, the Midland construction permits have become final as a result of Commission review procedure. Reopened proceedings occurred only because of the Court of Appeals' remand, which was in turn found to be improper by the Supreme Court.*

It is therefore apparent that the only circumstance in which the inquiry required by the River Bend decision may

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*The remand was not found to have been entirely erroneous on the nuclear fuel cycle issue. That issue is discussed in Section II C below.

be undertaken with respect to the Midland construction permits would be if the Commission now determined to reopen the evidentiary record here. However, Commission precedent is clear that reopening the record of a proceeding is an unusual step. Two Appeal Board decisions, Vermont Yankee* and Vogtle**, have discussed the requirements for that procedure. Significantly, these cases also differed procedurally from the Midland Plant situation, for in both Vermont Yankee and Vogtle, although hearings had ended, the initial decisions were still before the Appeal Board for review.

The rule first laid down in Vermont Yankee is that "a party advocating the extraordinary step of reopening a hearing must assign some substantial basis for its request that at least must establish that it is raising a significant safety-related issue," 6 AEC at 1152. This standard is not easily met, however, as the Appeal Board demonstrated in Vogtle.

In that case the NRC Staff revealed two new unresolved generic safety issues. However, the Appeal Board did not find it appropriate to direct the Licensing Board to examine those issues in the course of a supplemental hearing

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*Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-167, 6 AEC 1151 (1973).

**Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404 (1975).

being held to consider construction permit amendments, stating:

> In short, it does not appear to us that the emergence of the new generic concerns amounts to the kind of extraordinary development which, under the standards established in Vermont Yankee, ALAB-167, supra, might call for a reopening of the record of the construction permit proceeding. Whether they [generic safety concerns] will ripen into such an issue remains to be seen; if so, there will be time enough on the operating license level for the staff (and, if an adjudicatory hearing is held, the Licensing Board) to deal with them appropriately.*

The argument that the items should be considered because there was a hearing scheduled for another purpose in which the generic safety issues could be ventilated did not persuade the Appeal Board. "[T]hat there may be an already available forum does not mean that issues not ripe for adjudicatory consideration should nonetheless now be heard."** The Vogtle argument is especially persuasive in this case, where, as will be demonstrated, there is no need to hold a hearing on any issue. It is significant that no decisions have been discovered in which the Commission reopened other proceedings in which construction permits had already become final through the NRC review process in order to apply River Bend retroactively.

Finally, reopening consideration of ACRS items now would be a redundant exercise in light of the fact that Consumers Power is already in the process of applying for

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*Vogtle, 2 NRC at 413 (emphasis supplied).

**Id.

its operating license for this facility. The Midland Plant review schedule adopted by the NRC Staff calls for the issuance of the SER on March 30, 1979 and the issuance of a supplement to the SER on July 13, 1979. The timetable for the remainder of the operating license proceedings which Consumers Power has recommended to the NRC Staff calls for public hearings on the operating license to begin in September, 1979. On April 17, 1978, the NRC issued a notice of opportunity for hearing on the Midland operating license. Given the proximity of these dates, at which time the unresolved generic safety items will be fully explored, it would be a waste of the Commission's limited resources to engage in hearings which would only duplicate the review which will be conducted at the operating license proceedings.

C. Fuel Cycle

As the Court of Appeals correctly stated, the fuel cycle issue in this case is controlled by Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), which invalidated the Commission's rule. The Aeschliman court then remanded the issue of the environmental effects of the fuel cycle to the Commission for further consideration, 547 F.2d at 632. In the light of Natural Resources Defense Council, the NRC promulgated an interim amended fuel cycle rule on March 14, 1977. Thereafter, in the Vermont Yankee decision, the Supreme Court reversed the Court of Appeals' decision in Natural Resources

Defense Council and remanded the issue to the Court of Appeals for a further review of the fuel cycle rule in order to determine whether the rule was "arbitrary and capricious". Slip op. at 13-14 n. 14, 26-27.*

Consumers Power believes that, as the Supreme Court has determined that the Court of Appeals erroneously remanded all issues other than the fuel cycle matter, the Midland Plant case is now in exactly the same procedural posture as that of other facilities which held valid construction permits, for which the NRC review process had been completed, when Natural Resources Defense Council was decided. Therefore, application of the interim fuel cycle rule to the Midland Plant should be handled in the same manner as it was for those other facilities.** Reversal and remand of the Natural Resources Defense Council case has no effect on this process.

An additional matter relative to the fuel cycle issue arose on April 14, 1978 when the NRC published an amendment, effective on that date, to the interim fuel cycle rule. 43 Fed. Reg. 15613 (1978). The amendment clarified that Table

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*The Supreme Court has also recently granted the petition for certiorari in the case involving the original fuel cycle rulemaking, vacating the judgment below and remanding to the Court of Appeals for further consideration in light of Vermont Yankee. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., No. 76-548, ___ U.S. ___ (April 7, 1978).

**This is especially true in view of the fact that the Appeal Board has already held that the amended fuel cycle rule does not materially alter the cost-benefit balance originally struck for the Midland Plant. App. Bd. Op. at 13-15.

S-3 does not cover estimates of radon releases or health effects of the fuel cycle; thus, these issues may be litigated in individual cases.

However, the Commission determined that where licenses have already been issued, it is not necessary now to reopen those proceedings. Rather, upon completion of programs designed to gather additional information on the environmental impacts of mining and milling, the NRC may reevaluate existing licenses if the data warrants it. 43 Fed. Reg. at 15615. In situations in which licenses have been issued but proceedings are still pending before Licensing or Appeal Boards, however, the Commission ruled that the records shall be reopened for the limited purposes of receiving new evidence on radon releases and on health effects resulting from radon releases. 43 Fed. Reg. at 15616.

Clearly, the Midland Plant falls into the first category, because, but for the erroneous Aeschliman decision there would have been no further proceedings in connection with the construction permits for the Midland facility. Thus, no action needs to be taken at this time because of the amendment to the fuel cycle rule.*

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*The question of what effect the Supreme Court's remand of the fuel cycle issue to the Court of Appeals has upon the Midland Plant construction permits has been rendered moot by the NRC's announced intention to complete the current rulemaking proceedings related to the amended rule. See Vermont Yankee, Slip op. at 13 n. 14.

D. Dow

The remaining issue from the Aeschliman opinion which must be disposed of pertains to the Dow-Consumers Power contractual relationship by which Dow will purchase certain amounts of electricity and process steam from the Midland Plant.

After the construction permits for the Midland Plant had been issued, Intervenors moved the Commission to reopen the record on the ground that renegotiation of the Dow-Consumers Power agreement substantially altered elements of the cost-benefit analysis. That motion was denied, as was a similar motion made by Intervenors a short time later. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-7, 7 AEC 147 (1974); Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-8, 7 AEC 149 (1974). On April 11, 1974, after calling for all relevant contracts, the Commission again affirmed its decision not to reopen for changed circumstances, noting that Dow still intended substantial takes of electricity and process steam, and intended to maintain its fossil-fueled facilities "primarily on a stand-by basis." Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-15, 7 AEC 311, 312 (1974).

After the Court of Appeals had dealt with the energy conservation, ACRS and fuel cycle issues, it made the

following statement with respect to the Dow-Consumers Power contractual relationship:

> As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities. 547 F.2d at 632 (footnote omitted).

In its Vermont Yankee opinion, the Supreme Court quoted this passage and went on to comment:

> As we read the Court of Appeals opinion, however, this was not an independent basis for vacating and remanding the Commission's licensing decision. It also appears from the record that subsequent [sic] to the Court of Appeals' decision the Commission reconsidered the changed circumstances and refused to reopen the proceedings at least three times, and possibly a fourth. We see no error in the Commission's actions in this respect. Slip op. at 33 n.22 (citations omitted).

In view of the Supreme Court's opinion on the Dow issue (and the fact that under Vermont Yankee the issue of energy conservation alternatives is not remanded to the Commission, and, therefore, no recalculation of costs and benefits is necessary with respect to that issue), nothing remains to be considered regarding the Dow-Consumers Power contractual relationship. This is especially true in light of the Appeal Board's April 14 decision, which commented that the evidence adduced thus

far regarding the Dow issue "appears to be unusually comprehensive." The Appeal Board then went on to say that:

> And, to repeat, extensive probing on this point at the suspension hearing yielded convincing evidence that Dow's present intention is to adhere to the contract's terms. App. Bd. Op. at 22.

Given the Appeal Board's finding on this point and the Supreme Court's comments regarding Dow, this issue has been definitively put to rest.

III. THE ISSUE OF THE PREPARATION OF THE TESTIMONY OF JOSEPH G. TEMPLE, JR.

During the course of the evidentiary hearing conducted on the suspension issues, the Licensing Board raised questions regarding the conduct of Consumers Power with respect to the preparation of the direct testimony of a witness presented by Consumers Power, Joseph G. Temple, Jr., a Dow employee. Tr. 502-03, 516. Mr. Temple's testimony related to the intention of Dow to adhere to its contract with Consumers Power.

Thereafter, Consumers Power requested the Licensing Board to find that there was no impropriety involved in Consumers Power's presentation of the Dow witness. "Memorandum of Licensee, Consumers Power Company and its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence", dated December 30, 1976, including Attachments A-P and affidavits of R. Rex Renfrow III ("Renfrow Affidavit"),

David J. Rosso, and Judd L. Bacon. Although the Licensing Board had indicated it would defer consideration of the question, it made certain statements on the subject in its Order not to suspend Midland construction. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-77-57, 6 NRC 482, ¶¶10,11; see, Tr. 1003-04, 1507, 2364, 2366, 2369; Order of Licensing Board, dated June 15, 1977. Consumers Power objected to the statements and requested the Board to reconsider them. The Board did so in a November 4, 1977 restatement of Paragraphs 10 and 11 of its Order. "Consumers Power Company's Petition For Reconsideration of Portions of Board's September 23, 1977 Orders", dated October 3, 1977; Licensing Board Order, November 4, 1977.

With respect to this matter, two issues are outstanding: first, whether it was improper not to include the interim position of the Dow Michigan Division with respect to the contract in the prepared testimony of Mr. Temple, and second, whether Consumers Power improperly attempted to influence Dow's testimony by suggesting that the Dow witness be someone who was unaware of the Dow Michigan Division's position with respect to the contract.

All material facts necessary to resolve the first issue have been put forward and are uncontroverted. Consumers Power did not seek to dissuade Dow from including the Michigan Division position, which was not a Dow corporate decision, in Mr. Temple's direct testimony. Licensee's December 30,

1976 Memorandum, especially Attachment D (¶III) and Renfrow Affidavit ¶¶5, 6, 7. "Dow Memorandum Regarding Hearing Preparation", dated December 22, 1976; "NRC Staff Memorandum In Response To The Atomic Safety and Licensing Board's Order Regarding Preparation of Testimony of Dow Witness Temple", dated December 30, 1976; Intervenors' Memorandum, dated December 31, 1976. Further, it has been shown that all documents pertinent to the interim position were voluntarily made available to all parties by Consumers Power prior to and at the time of the hearing. Licensee's December 30 Memorandum, Attachment L; Renfrow Affidavit ¶9; Tr. 504. Moreover, the Appeal Board found that the only material position was the ultimate Dow corporate position, not the interim position of the Michigan Division. App. Bd. Op. at 21-22, n. 45.

With respect to the second issue, facts remain to be presented. Following submittal of the December 30 Memorandum and affidavits, material pertaining to this issue in the form of notes purportedly taken by another Dow employee, L.F. Nute, of a September 21, 1976 meeting with Consumers Power representatives, were provided at the hearing and admitted into evidence. Midland Intervenors' Exhibit 25. Consumers Power intends to submit a supplemental affidavit refuting some of the statements in these notes (upon which the Licensing Board based its findings in ¶¶9 and 10).

Upon receipt of this additional evidence by affidavit, the Board will have before it a record on the issues of the preparation and submission of testimony regarding Dow's intention with regard to its contract that is complete, as to which there can be no dispute as to any material fact, and upon which the Board will find absolutely no impropriety or questionable conduct on the part of Consumers Power.* For, in fact, the only evidence of an attempt to influence the testimony of the Dow witness is shown in Mr. Temple's own testimony on cross-examination that Consumers Power told him "To tell the truth". Tr. 2661-62.

CONCLUSION

For the reasons set forth above, Consumers Power believes that the issues requiring further consideration because of Aeschliman -- energy conservation, the ACRS report, the fuel cycle rule and the Dow-Consumers Power contractual relationship -- have all been disposed of by either Vermont Yankee or the Appeal Board's decision reviewing the suspension

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*In this regard, the Board should also consider the notes taken by other Dow employees of the same meeting, which contradict the notes of Mr. Nute. These are Mr. Hanes' notes, marked as Midland Intervenors' Exhibit 71, and Mr. Klomparens' notes, marked as Document #14 of "Dow Priority 2" documents, which were submitted to the parties on December 8, 1976 and conditionally offered by Licensee's Motion For Admission of Exhibits, dated June 7, 1977.

hearings. No further proceedings are required in connection with those issues. As for the question concerning the preparation and presentation of the Joseph G. Temple testimony, Consumers Power believes that this may be dealt with adequately by the submission of affidavits.

Respectfully submitted,

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April 24, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the United States Nuclear Regulatory Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "STATEMENT OF CONSUMERS POWER COMPANY WITH REGARD TO WHAT ISSUES REMAIN FOR COMMISSION CONSIDERATION," dated April 24, 1978 in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, postage prepaid and properly addressed, this 24th day of April, 1978:

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