UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

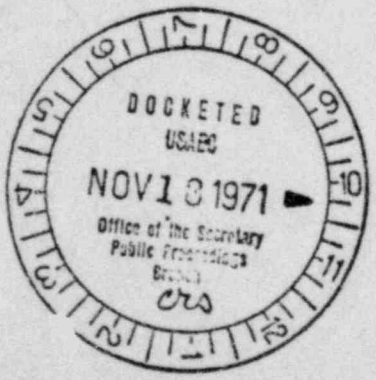
In the Matter of	)	11-17-71.
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
(Midland Plant, Units 1 and 2)	)	50-330

ANSWER OF AEC REGULATORY STAFF TO APPLICANT'S MOTION TO REFER QUESTIONS TO THE COMMISSION

By motion filed November 5, 1971,* the applicant in this proceeding, Consumers Power Company (applicant), requested that the presiding Atomic Safety and Licensing Board (Board) certify directly to the Commission for determination certain enumerated questions. The questions relate to what the scope of inquiry should be in the pending proceeding regarding matters arising under the National Environmental Policy Act of 1969 (NEPA), and are based upon filings by certain intervenors herein.

The questions which the applicant proposes for certification to the Commission are captioned by the applicant as follows:

> "1. Is the wisdom of Dow Chemical Company's decision to maintain its manufacturing operations in Midland, as opposed to moving them elsewhere or discontinuing them altogether, a proper issue in this proceeding?" (footnote omitted)



* Supplemented on November 9, 1971.

"2. Is it a proper issue in this proceeding to look into the relative economic, conservation and environmental merits of using coal, oil or atomic power for producing electricity?" (footnote omitted)

"3. Is the question of whether the demand for electricity should be met a proper issue in this proceeding?" (footnote omitted)

"4. Is it proper to conduct a NEPA review of all aspects of the uranium fuel cycle in this proceeding?"

"5. Are the Applicant's past expenditures to promote the use of electricity, if any, relevant to this proceeding?"

"6. Is the environmental and operational feasibility of the fast breeder reactor program relevant to this proceeding?"

"7. Are questions of land use and zoning relevant to this proceeding?"

The applicant proposes that some of these topics should be briefed and considered before the Commission on a consolidated basis, i.e., with participation by parties to this and other proceedings, since some of the topics have also been asserted as proper for consideration in other pending licensing proceedings, i.e., Vermont Yankee, Docket No. 50-271 and Boston Edison, Docket No. 50-293.

At the outset it is the position of the AEC regulatory staff (staff) that if the Board should determine any question proper for certification, then that certification should be to the Appeal Board. The Commission's rules do not provide for certification by a licensing board directly to

the Commission.[1/] As discussed below, it is the staff's position that question 4 posed by the applicant should be certified to the Appeal Board, but that the others should not. Further, it is our view that the Appeal Board, in turn, should exercise its discretion to certify this question to the Commission as a novel question of law and policy pursuant to 10 CFR §2.785(d). The Commission's rules do not contemplate that a licensing board would take action to foreclose the Appeal Board's opportunity to make that judgment.

Questions 1 through 3 and 5 through 7, inclusive, should not, in our view, be certified for two reasons. First, the applicant has not made a sufficient showing that certification of each of these questions would meet the guidance of 10 CFR 2, Appendix A, III(g)(2), which provides, in pertinent part:

> "A question may be certified to the Commission for its determination when the question is beyond the board's authority, or when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party..."

1/ 10 CFR 2, 10 CFR 2.785(b) and 10 CFR 2, Appendix A, VII, refer specifically to 10 CFR 2.718(i) and 10 CFR 2, Appendix A, III (g)(2), respectively, both of which pertain to certification, in describing the Commission functions to be performed by the Appeal Board.

Second, some of the questions, as stated, are sufficiently diffuse that it appears likely that they would encompass matters ordinarily proper for consideration as well as matters ordinarily not proper for consideration, and should be resolved in the context of a record. For example, under question 2, it may be obvious that a single agency such as the AEC cannot and should not establish a national policy for all means of electric power generation, but the agency's consideration of alternatives might well include some assessment of the respective environmental impacts of such alternatives.

It appears at this time that the matters posed in such questions should be dealt with by the Board, which is the body in the best position to develop a record in the context of the particular situation.

The staff agrees that question 4, on the other hand, should be certified. The question, in effect, poses intervenors' challenge to a position communicated to affected licensees and applicants as well as other interested persons under cover of a letter dated September 3, 1971, from the then Director of Regulation. The letter and pertinent enclosure are attached.

With respect to applicant's proposal for consolidated consideration, the staff would have no objection to such consideration of question 4, if deemed appropriate.

For the reasons stated herein, questions 1 through 3 and 5 through 7, inclusive, should not be certified, and question 4 should be certified by the Board to the Appeal Board, pursuant to 10 CFR 2.718(i) and 2.785(b), and, in turn, by the Appeal Board to the Commission, pursuant to 10 CFR 2.785(d).

Respectfully submitted,

Thomas F. Engelhardt

Thomas F. Engelhardt
Trial Counsel

Dated at Bethesda, Maryland,
this 17th day of November, 1971.