

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Reg. Files

April 28, 1978



50-329,330 SP

Valentine B. Deale, Esq.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Deale:

The Commission has considered the proposal for settlement of the Midland special proceeding incorporated in the "Motion and Stipulation" dated March 13, 1978, which you transmitted to us by letter of March 21, 1978.

In essence all of the parties have agreed to a settlement which would insofar as is possible place all parties and the record in the position they would be if nothing had ever happened in this matter. The terms withdraw all charges and terminate the proceeding with prejudice. They further provide that (1) there will be no record of the proceedings nor of the charges and letters which led to them, and (2) notice of withdrawal of charges and termination of the proceedings will be published and also sent to all parties with whom there had been correspondence about the proceedings. These features of the proposed settlement seem to us to be straightforward and worthy of Commission approval. We do not find persuasive the contrary arguments advanced by counsel for Consumers Power Company in his letter to the Secretary dated April 10, 1978.

The final term of the settlement, paragraph 9, is unilateral in nature and states --

9. that Myron M. Cherry enters into this stipulation on the further condition that the Nuclear Regulatory Commission shall pay actual out-of-pocket expenses not in excess of \$1,000 incurred by or on behalf of Myron M. Cherry in connection with the Special Proceeding.

An agency of the government is not as free as a private party to deal in a settlement. There is a serious question whether the Commission has the legal authority in these circumstances to make a payment such as Mr. Cherry requires. Were the Commission disposed, on policy grounds, to make this payment, the question of its authority to do

8007810 642

POOR ORIGINAL

April 22, 1978

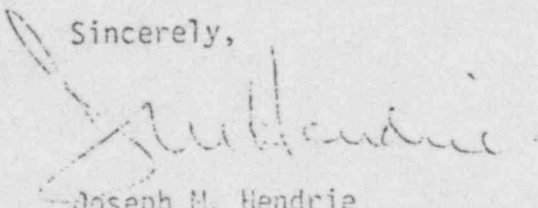
so would first have to be resolved in the affirmative by the Comptroller General. We need not, however, seek a formal ruling of the Comptroller because we believe that the proposal for payment is unsound on policy grounds.

Normally private attorneys participating in our proceedings, whether they represent intervenors, utilities, or others, pay their own expenses. It seems to us that the usual practice should obtain in this case.

We have considered the fact that the involved staff attorneys will be able to walk away without expense and the possible argument that, therefore, so should Mr. Cherry. Such an argument seems flawed. The analogy between private practitioners and government lawyers in this situation is imprecise. Government employees are entitled to representation by counsel and payment of associated expenses when they are charged with misconduct in the performance of their official duties. Such support is justified on the theory that government employees must feel free to do their duty as they see it, without fear of personal financial consequences. The private attorney is not discharging a similar public trust. Moreover, even were Mr. Cherry to prevail on the merits, he would not be entitled to have his expenses paid by NRC. Payment in the settlement context should not stand on a different footing.

In light of these considerations, the Commission declines to approve paragraph 9 of the proposed settlement. We are aware that the settlement by its own terms may not be approved in part and rejected in part. We have presented this discussion of the payment issue for the understanding of the Board and the parties. We ask the board to explore with the parties the possibility of reaching an agreeable settlement without proposed paragraph 9.

Sincerely,



Joseph M. Hendrie

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
CONSUMERS POWER COMPANY)	Docket No.(s) 50-329SP
)	50-330SP
(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
1st day of April May 1978.

Peggy T. Downing
Office of the Secretary of the Commission

POOR ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

SERVICE LIST

Valentine B. Deale, Esq.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Margaret M. Laurence, Esq.
5007 King Richard Drive
Annandale, Virginia 22003

Gary L. Milhollin, Esq.
1815 Jefferson Street
Madison, Wisconsin 53711

William J. Olmstead, Esq.
Thomas F. Engelhardt, Esq.
Counsels for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

T.S.L. Perlman, Esq.
1776 "F" Street, N.W.
Washington, D.C. 20006

Myron M. Cherry, Esq.
One IBM Plaza
Chicago, Illinois 60611

Milton V. Freeman, Esq.
Rosalind C. Cohen, Esq.
Arnold and Porter
1229 - 19th Street, N.W.
Washington, D.C. 20036

Harold F. Reis, Esq.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Judd L. Bacon, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Joseph Gallo, Esq.
Isham, Lincoln & Beale
1050 - 17th Street, N.W.. Suite 701
Washington, D.C. 20036

Michael I. Miller, Esq.
Caryl A. Bartelman, Esq.
Isham, Lincoln & Beale
One First National Bank Plaza
Chicago, Illinois 60603

Grace Dow Memorial Library
1710 West St. Andrew Road
Midland, Michigan 48640