

8/22/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

8/22/78

In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

Docket Nos. 50-329
50-330
(Remand Proceeding)



NRC STAFF OPPOSITION TO INTERVENORS' MOTION
TO SUSPEND CONSTRUCTION

I.
Introduction

Intervenors other than Dow Chemical Company (hereafter Intervenors) filed a Motion on August 2, 1978 to Suspend all Further Construction of the Midland plant pending further inquiry into the revised Consumers-Dow contract submitted to the Board and the parties on June 26, 1978. The NRC Staff opposes the motion.

II.
Background

Following the award of construction permits to Consumers Power Company (Applicant) in late 1972, Intervenors sought judicial review in the District of Columbia Court of Appeals.^{1/} That court remanded the matter to the Commission for further proceedings.^{2/} Since a remand was otherwise required, the court directed the Commission to consider whether changed circumstances had affected the Dow Chemical Company's (Dow) need for process

^{1/} See Consumers Power Company (Midland Units 1 & 2), LBP-72-34, 5 AEC, 214 (1972); aff'd ALAB-123, 6 AEC 331 (1973).

^{2/} Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976), rev'd and remanded, sub nom, Vermont Yankee Nuclear Power Corp. v. NRDC, 98 S.Ct. 1197 (1978).

steam, which it had contracted with the applicant to provide. This Board conducted hearings to determine whether to suspend construction pending consideration of the remanded issues in late 1976 and early 1977.

After this Board's Order of September 23, 1977 declining to suspend construction, the Appeal Board affirmed that decision on February 14, 1978.^{3/} Shortly thereafter, the United States Supreme Court reversed the Court of Appeals decision under which the remanded proceedings were being held.^{4/} Consequently, the Commission requested the parties' views concerning what issues remained for consideration.^{5/} Commission decision on its request is still pending. On June 26, 1978, the Applicant filed with the parties, the Commission, the Appeal Board, this Board and the recently established Licensing Board to consider Applicants' OL application, a revised general agreement between it and Dow concerning the terms and conditions on which Dow would purchase steam from the Midland plant.

III.

This Board has Jurisdiction to Deny Intervenors Motion

Given the present status of pending issues involving the Midland Project, it is appropriate to discuss jurisdictional questions. The renegotiated contract is currently under Staff review as part of its responsibilities to review the Applicant's submittals supporting its operating license application.^{6/} The Licensing Board appointed to rule on intervention

^{3/} ALAB-458, 7 NRC 155 (1978).

^{4/} 98 S.Ct. 1197, ___ U.S. ___ (1978).

^{5/} Commission Order of April 10, 1978 (unpublished).

^{6/} See 43 Fed. Reg. 19304 (May 4, 1978).

petitions and contentions probably will be called upon to determine whether to admit a contention concerning the revised general agreement in the near future.^{7/} This Board cancelled a scheduled prehearing conference on remanded construction permit issues following receipt of the Commission's Order requesting views as a result of the Supreme Court's decision.^{8/} The Staff's view expressed in its filing to the Commission was that the Supreme Court's decision finally disposed of the need for steam issue and that it could not be reexamined by the Court of Appeals on remand. The Commission, however, has not issued a decision concerning what modifications it wishes to make in this Board's jurisdiction, if any, as a result of the Supreme Court's decision. Consequently, it is clear that none of the decisions affecting this proceeding had the explicit or implicit effect of removing this Board's jurisdiction as initially granted by the Commission.^{9/} Thus, this Board still retains authority to rule on motions made before it concerning the issues originally assigned to it by the Commission.

^{7/} See Board's Order of May 14, 1978 (unpublished). Note: while dated May 14, 1978 the Staff received this order on August 16, 1978.

^{8/} See Board's Order of April 11, 1978 (unpublished).

^{9/} CLI-76-1, 4 NRC 65 (1976); CLI-76-14, 4 NRC 163 (1976). Shortly before filing this response the Staff received the Applicant's response to Intervenor's motion which argues that this Board lacks jurisdiction over this motion citing Houston Lighting and Power Co. (South Texas Units 1 & 2), ALAB-381, 5 NRC 582 (1977). That case which rejected a Board's order reopening a hearing where no CP or OL was pending before it, is inapposite here since this Board continues to have the remanded issues before it. While a Board cannot expand the jurisdiction expressly given it, that question is not involved here since the Dow Steam issue is directly before this Board. The Board may determine at any time that significant new information brought to its attention requires a suspension of construction to prevent prejudice to its decision on the merits of the issues before it. 4 NRC 166 n.1.

IV.
Intervenors Motion Should be Denied

Since the Board took extensive evidence on the Dow-Consumers contact arrangement as part of its responsibility to determine whether or not to suspend applicant's construction permits, Intervenors motion should be construed as one to reopen the record to received new evidence.^{10/} In considering the motion the Board is called upon to determine whether the revised general agreement provides a basis for concluding that a different result would have been reached on the suspension question if the agreement had been available to the Board for its consideration.^{11/} The record might also be reopened if the general agreement tended to show that significant testimony in the record was false.^{12/} If the Board believed the revised agreement warranted reopening the record to complete the evidence, it has the discretion to do so.^{13/} A stay, however, would only be justified where the new evidence tended to show a different result in the balancing of the equitable factors would have been reached had the evidence been available. Intervenors have utterly failed to show how the availability revised agreement would have affected the Board's decision on suspension in any particular way.

^{10/} See e.g., Toledo Edison and Cleveland Illuminating (Davis-Besse Units 1-3 and Perry Units 1 & 2), ALAB-430, 6 NRC 457 (1977); Duke Power Co. (Catawba Units 1 & 2), ALAB-359, 4 NRC 619 (1976); Northern Indiana Public Service Co. (Bailly Nuclear -1), ALAB-227, 8 AEC 416 (1974); CLI-74-39, 8 AEC 631 (1974).

^{11/} ALAB-227, Supra.

^{12/} ALAB-430, Supra.

^{13/} Cleveland Electric Illuminating Co. (Perry Units 1 & 2), ALAB-443, 6 NRC 741 (1977).

At page 2 of their motion Intervenors state that the "revised contract does not allay the concerns correctly expressed by the Licensing Board in its September, 1977 decision herein...". Thereupon Intervenors rehash Dow's testimony at the remand hearings and conclude that it is consistent with the revised contract in that Dow may at some future time determine not to take steam from Midland. Such an argument is of no avail to Intervenors because the Appeal Board concluded that the Dow testimony indicated a present intention by Dow to take process steam from the Midland plant.

The remainder of Intervenors' motion argues the impact on need for power and alternative site issues should Dow not elect to purchase steam under the revised agreement. These points cannot support Intervenors' motion unless they first demonstrate that the revised contract puts before the Board significant new factual information which would reasonably be anticipated to affect its original determination.

Far from being a significant change from the positions taken by Consumers and Dow at the hearing, the revised contract significantly and specifically supports earlier testimony. For example, Joseph G. Temple, General Manager of Dow's Midland Division indicated in his direct testimony that the revised agreement must have a specifically stated deadline for commencement of a reliable steam supply. (Tr. 220 p. 7). The revised contract provisions are consistent with the Temple testimony except that

it now specifically provides that Dow cannot terminate the agreement for failure to supply steam on or before December 31, 1984 (agreement p. 56). During the course of this Board's consideration of this matter, the date when Dow could reasonably treat the contract as void for failure to supply steam was speculative and subject to being interpreted as early as 1982.

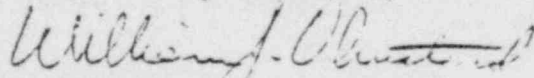
The Appeal Board determined that Dow's present intention was controlling on the steam question.^{14/} The revised contract clearly indicates Dow's intention to purchase steam from Consumers. In light of the above, it is clear that Intervenors' motion must fail.

V.

Conclusion

Intervenors have failed to show any new or significant information which would have affected the Board's earlier decision on whether or not to suspend Applicant's construction permits. Consequently, the motion to suspend construction must be denied.

Respectfully submitted,



William J. Olmstead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of August, 1978

^{14/} ALAB-458, 7 NRC 155, 167 n. 45 (1978).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENORS' MOTION TO SUSPEND CONSTRUCTION" dated August 22, 1978, in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 22nd day of August, 1978.

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