UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUPPLEMENTAL STATEMENT OF
INTERVENORS OTHER THAN
DOW CHEMICAL COMPANY CONCERNING
RESPONSIVE FINDINGS AND RESPONSIVE
BRIEF OF CONSUMERS POWER COMPANY

By Order dated July 15, 1977, the Board permitted the filing of additional comments on the Briefs, Findings and related submissions of the parties concerning the suspension issue, provided that any additional comments reach the members of the Board in Bethesda, Maryland on or before July 27, 1977. This document is submitted in response to that Order, and discusses the Responsive Findings and Responsive Brief tendered by Consumers Power Company ("Consumers") on July 14, 1977.

Introduction

Before turning to a detailed examination of Consumers' Responsive Findings (Part I below) and Responsive Brief (Part II below), a brief overview concerning the positions taken by the parties and the seriousness of the situation before this Board

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is in order, so that the more detailed analysis which follows will be placed in its proper context.

The Impact of Continued Construction. First, it is important to remind ourselves that these suspension hearings were conducted--and the remanded hearings on the merits (yet to commence) will be conducted--because Intervenors obtained a decision by the Court of Appeals requiring: (i) further hearings, and (ii) a restriking of the entire cost-benefit analysis in light of the further hearings. Aeschliman v. NRC, 547 F.2d 622, 632 (D.C. Cir. 1976). Certiorari has been granted in that case, as in the companion case, Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976). But those decisions have not been reversed, and as the Appeal Board held in Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC ___ (April 28, 1977), the fact that the Supreme Court granted certiorari does not in the least affect the obligations of this Board concerning either the suspension hearings or the full remanded hearings on the merits.*

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* In fact, the Board's obligations fully to consider the facts as they presently exist, both in the environmental context of NEPA and in the crucial safety context of this Board's obligations under the Atomic Energy Act, will be unaffected regardless of what disposition the Supreme Court makes of the case. Consumers' argument that the Board must blind itself to all facts other than those specifically discussed by the Court of Appeals is not only wrong but directly contrary to Consumers' own statements to the United States Supreme Court. See pp. 10-12, 15-17, 27-29, below.

No one seriously doubts that the obligations of this Board, both in the suspension hearings and in the remanded hearings on the merits which have yet to be held, begin with and are colored by the proposition, both as a matter of fact and as a matter of law, that continued construction risks rendering impossible any fair and meaningful recalculation of costs and benefits. Consumers knows that; it told Dow as much on at least two separate occasions. Midland Intervenors' Exhibit 3 (Dow's notes of a July 15, 1975 Consumers-Dow meeting), p. 4; Midland Intervenors' Exhibit 25 (Dow's notes of a September 21, 1976 Consumers-Dow meeting), p. 3. Both Consumers' witness Keeley and Staff witness Crocker so admitted. Tr. 1066-68, 1138; Crocker Testimony, fol. Tr. 4177, p. 3. And the Appeal Board squarely so held in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC ___ (April 28, 1977), Slip Op. at 13-14: "The more that is expended, the less likely it is that, on account of environmental considerations, either the cost-benefit balance will be tipped against the plant or potential alternatives will remain feasible." Quite simply, that means--as Consumers has admitted by admitting that it bears the burden of proof on the suspension issue--that we begin consideration of the suspension issue with the proposition that, other things being equal, continued construction should not be authorized. It is, then, up to Consumers to persuade this Board, through evidence rather than sanctimonious pronouncements and ipse

dixits, that continued construction must be authorized, despite the acknowledged adverse effects of continued construction on a fair restriking of the cost-benefit analysis. Otherwise, as the Appeal Board pungently noted, Consumers will be "having its cake and eating it too."

Consumers' Method of Meeting Its Burden of Proof. We have previously commented on the Staff's Proposed Findings on the suspension issue. We pointed out that the Staff's ultimate conclusion defies its own Findings concerning the benefit of the Midland Plant to Dow (Staff Findings, ¶ 57), the ultimate cost of the plant (Id., ¶¶ 68, 79), Consumers' ability to complete the plant by the end of 1984 regardless of any suspension (Id., ¶¶ 69-70, 72, 80), and the combination of increased ECAR reserve margins (Id., ¶ 42) and decreased need for power (resulting from rejecting as unsupportable Consumers' derating of Palisades and its capacity sales to municipalities and cooperatives, (Id., ¶ 36), leading to the conclusion that a suspension will not unduly impair Consumers' reserves (see Tr. 1696-97, 1840-41).

Consumers' Responsive Findings are even less candid than the Staff's. Almost without exception, on every significant issue Consumers abandons reasoned argument in favor of a combination of three evasive tactics--refusing to analyze the issue because it is allegedly beyond this Board's jurisdiction (e.g., Responsive Findings, ¶¶ 6, 16, 20-21), obscuring

the facts by indulging in vituperative personal attacks on Intervenors' witness Dr. Richard Timm (e.g., Id., ¶¶ 29, 49, 73), and, when Consumers perceives that its approach of simply ignoring unpleasant facts will not suffice, indulging in outrageous and self-serving ipse dixits to make up for its lack of evidence (e.g., Id., ¶¶ 24-25, 37, 45, 54, 80). A particularly egregious example of the ipse dixit tactic is found in ¶ 45 of Consumers' Responsive Findings, at p. 40. The Board will recall that throughout the suspension hearings, we pressed Consumers (which could easily have done so) to provide some sort of meaningful evidence, other than its own unsupported say-so, concerning the power needs of the municipalities and cooperatives. The Board will also recall that throughout the hearings, no such evidence was produced by Consumers--a silence which led even the Staff (at ¶ 36 of its Proposed Findings) to reject Consumers' inclusion in its demand projections of sales to the municipalities and cooperatives. Despite that stubborn silence, however, we are now--almost two months after the record closed, and nearly half a year since Consumers ended its presentation of direct testimony--confronted with the astonishing and totally unsupported assertion that Consumers "has in fact reviewed the load forecasts of the cooperatives and they appear accurate."

Evidently we are expected to accept that statement, simply because Consumers has made it. If that were the test,

we might as well dispense with regulation. We would simply ask each utility to review its own analysis and pronounce itself satisfied with what it had done. By no stretch of the imagination can that sort of thing be considered to meet Consumers' burden of proof.*

The Importance of the Suspension Ruling. In short, just as the Staff's Proposed Findings (and its argumentative report on the inconsistencies between Consumers' positions in this proceeding and in the pending Michigan rate case) have simply supported the point made at ¶¶ 36-37 of our Proposed Findings concerning its failure to conduct any independent analysis of the issues and its tendency to rely uncritically on whatever Consumers puts forth, so the 81 pages and 340 footnotes of Consumers' Responsive Findings serve primarily as further evidence of Consumers' contemptuous dismissal of these proceedings as a futile exercise in support of a forgone conclusion. In all honesty, this record does not disclose a single instance of genuinely independent analysis of any of the critical issues by the Staff, or of a genuine search for

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* Consumers' footnote 181 purports to provide authority for its demand that we accept without question its purported review of the municipalities' and cooperatives' load forecasts. But the Lapinski Testimony cited merely refers to the transcript; and the transcript consists in turn only of what Mr. Heins termed "my understanding of the understanding" (Tr. 1787), coupled with Mr. Heins' unexplained and unsupported statement that "we think [the load forecasts] may be accurate" (Tr. 1789). Less than a page later, Mr. Heins admitted that the forecasts might not be accurate (Tr. 1790). In short, Consumers' citation of "authority" for its remarkable ipse dixit consists entirely of another ipse dixit.

information by the Staff as opposed to uncritical blanket reliance on Consumers. It does not disclose a single Consumers Power Company witness forthright enough to admit that there are two sides to this case, and that Consumers' "judgments" and "assessments" and "estimates" are not the last word, to be accepted without inquiry. It does not even disclose a Dow witness willing to volunteer the truth about the bitter and bruising Consumers-Dow dispute over issues fundamental to the Midland project, other than through the impetus of Intervenors' cross-examination. Saddest of all, the defects in this record have evoked from Consumers (and in large part the Staff) not an honest response, but rather attacks on Dr. Richard Timm (who has been willing, at considerable risk to his job, to work for little or no pay in the public interest during the course of these proceedings), and wholesale attempts to slough off the serious problems disclosed by this record on the ground that the Board is not permitted to consider them.

In one sense, the suspension issue presented by this record is narrow. The issue is not whether nuclear power is good or bad; it is not even whether the Midland nuclear project is good or bad. The issue is simply whether continued construction of the Midland project should be suspended so that the serious problems disclosed by this record can be fully and fairly examined without the significant and increasing

risk that Consumers' continued construction will accomplish by fait accompli what Consumers' evidence has completely failed to support. On this record, and in terms of that narrow issue, it is manifest that construction cannot proceed. Ipse dixit arguments aside, no one can really claim that a halt in construction during the remanded hearings on the merits will adversely affect either power supplies or the Dow contract. As we explained in our Proposed Findings (and as the Staff agrees), there is more than time enough to complete the remanded hearings during a halt in construction and still permit a Dow-Consumers connection if the record ultimately so warrants.

In a far broader sense, however, the issues facing with this Board go to the very heart of administrative regulation of the nuclear industry. This Board is well aware, and has frequently mentioned, the major public interest implications of the suspension issue. This case is something of a bellwether, and will widely be regarded as an indication of how seriously the Commission takes its environmental and safety obligations in the face of prevarication and outright dishonesty on the part of an applicant. If on this record--after reversal by a Court of Appeals of a Commission decision, and under circumstances where even the Staff has concluded that the chief beneficiary of the project and its sole environmental raison d'etre might even now conclude that the project is no more than a hideously expensive white elephant (Staff

Findings, ¶ 57)--the Board does not deny Consumers' request to continue construction, a signal will have been given to the entire industry that environmental considerations really do not matter and that half truths, evasions, and deliberate distortions and suppression of evidence are perfectly acceptable.

We cannot and do not believe that this Board will allow such a result.

I.

CONSUMERS' RESPONSIVE FINDINGS ARE ESSENTIALLY WORTHLESS

We turn now to an analysis of Consumers' Responsive Findings. Even a cursory examination of those Findings reveals that--despite their length--they do not seriously question the great bulk of Intervenors' Findings. Even where Intervenors' Findings are challenged, moreover, in instance after instance the challenge falls far short of any meaningful rebuttal.

A. The Dow Issue.

Consumers largely misses (or attempts to evade) the point in its Responsive Findings concerning the Dow-Consumers relationship. Although it emphasizes the fact that in 1974 the Consumers-Dow contract was amended to provide for certain minimum requirements (¶ 2), Consumers omits completely the fact that those requirements are less than half of the Dow purchases described in the original Environmental Impact State-

ment in this case, and on which the cost-benefit analysis was based. See Intervenors' Findings, ¶¶ 4-5. In addition, Consumers omits to mention the fact that--although Consumers refers to projected electrical purchases by Dow--Dow has no intention whatever of making any such purchases beyond the bare minimum necessary to fulfill its contractual obligations (Tr. 2385-89), and indeed would make no electricity purchases in the event that Dow generates its own process steam (Tr. 2405).

Similarly, although Consumers repeatedly tells us that Dow intends to abide by its "contractual obligations" (e.g., ¶ 3), Consumers totally omits the crucial fact that throughout the suspension hearings--and in its own Findings--Dow has deliberately avoided any statement as to what it conceives those "contractual obligations" to be. As a matter of Dow corporate policy, in fact, one of the "realistic options" open to Dow is to determine that any "contractual obligations" it might have had are no longer binding as a result of Consumers' breaches of contract. See Intervenors' Findings, ¶¶ 40, 47, 50.

Finally, Consumers demonstrates with respect to the Dow issue the same evasive tactics it uses in other areas. It insists that this Board has no jurisdiction to consider the Dow question (¶ 6), and that the ultimate NEPA cost-benefit analysis does not in any way depend on whether the Midland project is economically advantageous or disadvantageous

to Dow (¶ 10). Both assertions are nonsense. In the first place, the final Environmental Impact Statement in this proceeding squarely premises the entire cost-benefit analysis on the Dow relationship, and makes it clear that if the Dow relationship becomes unstable or is terminated, the Midland plant is a futile exercise. As paragraph 46 of the Licensing Board's initial decision noted, the "chief benefits" claimed for the Midland plant "are the production of electricity (and process steam) and the elimination of the air pollution from Dow's present fossil-fuel steam plant." Page XI-3 of the final Environmental Impact Statement is quite forthright:

> "If [Consumers] were not to supply process steam to [Dow], one unit of the Midland nuclear power plant would be canceled and consideration would be given to transferring the other unit to a different site, probably the existing Palisades site."

In light of those statements, and the obviously central role the Dow relationship plays in the cost-benefit analysis, it is nothing short of absurd for Consumers to insist that in restriking the cost-benefit analysis this Board may not consider the Dow dispute. That argument becomes outrageous, in fact, when we note that Consumers has told the United States Supreme Court exactly the opposite. At page 47 of Consumers' Brief on the merits in that court, Consumers states:

> "The hearings pursuant to the mandate of the Court below have dealt further with the Dow relationship, and <u>the Commission itself</u>

is of course empowered either sua sponte or on motion by a party to again determine whether any modification of its position is warranted."

In short, Consumers' position is as lacking in candor as it is devoid of merit.

Nor is it true that this Board must make some sort of "prediction" concerning Dow's intentions. We need only take Dow's own statements, through Messrs. Temple and Oreffice, at face value. Consumers itself admits that Dow's "intentions" are relevant (see, e.g., ¶ 13), and on this record it is by no means difficult to determine what Dow's intentions are. As the Staff itself has recognized (Staff Findings, ¶ 57), if Dow were to conduct a corporate review of its position right now it might well conclude that the Midland plant has become disadvantageous and pursue the other "realistic options" open to it. Consumers does not challenge the accuracy of our description of the testimony in ¶¶ 42-51 of our Proposed Findings. Its previous attempts to prevent the Board from considering that testimony (see, e.g., Tr. 266) were uniformly rejected by the Board during the hearings, and should be rejected now.

B. Consumers' Ability To Finance the Midland Project.

Paragraphs 12 through 14 of Consumers' Responsive Findings, which concern its ability to finance the Midland

project, consists entirely of ipse dixits and wishful thinking. Nowhere does Consumers deny--because it cannot--that it has demanded a $400,000,000 loan from Dow in order to help finance the project, a demand Dow's President characterized as "extortion." See Tr. 2724. Nowhere does Consumers deny, again because it cannot, that Consumers has treated the hypothetical sales to municipalities and cooperatives--so doubtful that the Staff, quite properly, declined to include those sales in its own Findings (¶36)--as so important to Consumers' ability to finance the Midland project that it has asked Dow to agree to amend the Consumers-Dow contract so that those sales can be made.* Nowhere does Consumers even acknowledge, let alone deal with, the fact that, as recognized by the Staff's Findings (¶68), the costs of the Midland project may exceed two billion dollars by the time the plant is completed, at which point the plant will clearly be uneconomic to Dow. As for Consumers' claim that it has "demonstrated . . . the reasonableness" of rejecting Bechtel's Forecast 2 (¶ 14), the record speaks for itself. Consumers' "demonstration" consists solely of a unilateral decision by one of its employees to disregard not only Forecast 2 but also the carefully thought out conclusions of Consumers' own in-house review team. It is absurd (although not surprising, in light of Consumers' general approach to the facts in this case) for Consumers to claim that it has demonstrated the reasonableness of that unilateral

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* See Midland Intervenors' Exhibits 29 (Consumers' September 14, 1976 file memorandum) and G7 (Dow's notes of a September 13, 1976

determination--a determination never subjected to cross-examination, and never even fully explained.

C. The ACRS Report.

Perhaps the high watermark of Consumers' novel approach to facts is its discussion, at ¶¶ 15-19 of its Responsive Findings, of the ACRS issue. Consumers begins [¶ 15] by flatly contradicting the conclusions reached by this Board in the Board's letter to the ACRS of January 28, 1977. We need not dwell on that point. As both the Board's letter and the comments of Drs. Remick and Leeds in Tennessee Valley Authority (Hartsville Nuclear Plant), LBP-77-___, 5 NRC ___ (April 28, 1977), make clear, the ACRS has not yet complied with the direction of the Court of Appeals. Indeed, if we are to judge from the ACRS' March 16, 1977 letter to the Chairman of the Commission, the ACRS has no intention of complying with what the Court of Appeals directed.

Apparently recognizing the weakness of its position, Consumers next (¶ 16) asserts that in any event the ACRS' "other problems" are irrelevant here. Once again, that is nonsense. Both Staff witness Crocker (as Consumers admits) and Consumers' witness Keeley directly testified that without further explanation from ACRS they could not tell whether, in what way, or at what cost the ACRS' "other problems" could be resolved during the construction process. Although Consumers

attacks our reference to Mr. Keeley's testimony, the fact is that Mr. Keeley squarely testified that "I have no idea" how much it will cost Consumers to comply with all applicable regulatory guides (Tr. 1073-74); that Midland Intervenors' Exhibit 3, a Consumers' document stating that "if Consumers has to comply with all the NRC guides, it will have a very adverse economic effect on the project," is correct (Tr. 1055-56); that the amount Consumers has budgeted for implementation of regulatory guides--on which Consumers heavily relies in ¶ 18 of its Responsive Findings--is based on "no hard facts" (Tr. 3719); and that continuing construction will foreclose, or at the very least render substantially more expensive, compliance with applicable regulatory guides and ACRS items (Tr. 1066-68).*

That lack of information alone shows that, contrary to Consumers' attempts to sweep them under the rug, the unresolved ACRS items in this proceeding are far from irrelevant. They may have a direct and significant impact on the cost of the Midland plant, and thus on the cost-benefit analysis. In addition, it must not be overlooked that the ACRS conclusion

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* We might add that it is sheer nonsense for Consumers to assert that it has already made appropriate allowance for resolution of all outstanding ACRS items, when even the Commission Staff concedes (as Mr. Crocker did) that it has no idea how much resolution of those items will cost, or even what the ACRS means by stating that "due consideration" must be given to those items. See ¶ 53 of Intervenors' Proposed Findings.

that the Midland plant will not present an undue health or safety hazard specifically depends upon "due consideration" being given to those unresolved matters during construction. What the ACRS June 18, 1970 Report said is: ". . . if due consideration is given to these items, the nuclear units proposed for the Midland plant can be constructed with reasonable assurance that they can be operated without undue risks to the health and safety of the public." In other words, until we know what the ACRS meant by "due consideration", and what it meant by "these items," we cannot say with assurance that the Midland plant will even be safe--let alone that resolution of the outstanding items will not affect the cost-benefit analysis.

D. The QA-QC Issues.

Most of Consumers' attack on our Findings concerning QA-QC issues consists of the familiar, shopworn argument that this Board must blind itself to serious and continuing safety problems because the Court of Appeals did not specifically direct that they be considered. To state that proposition is to refute it. In the first place, Consumers itself has admitted that the continuing QA-QC problems may have "a very adverse economic effect on the project" and "result in a big potential cost exposure for Consumers". Midland Intervenors' Exhibit 3 (the accuracy

of which was conceded by Consumers' witness Keeley, Tr. 1055-56). Obviously, then, QA-QC matters cannot be ignored in restriking the cost-benefit analysis. Since Consumers admits that the cost-benefit analysis must be restruck in light of currently available information (¶ 21) and that a Licensing Board "may raise issues, such as QA-QC, on its own prerogative pursuant to 10 C.F.R. § 2.760a" (¶ 21), the conclusion is inescapable that the serious and continuing QA-QC problems disclosed by this record must be further investigated. Nor can Consumers' attempt to minimize the seriousness of those problems be given credence. At ¶ 23 of its Responsive Findings, Consumers admits that resolution of only one of the continuing QA-QC problems may cost as much as $800,000; that forcefully suggests the magnitude of the problems and their impacts on the ultimate cost-benefit analysis. (It is irrelevant, of course, whether it is an insurance company or Consumers, or for that matter Dow, which must pay for Consumers' negligence. The significant point is that the negligence continued to occur, despite the repeatedly expressed concerns of the Appeal Board, see ¶¶ 10, 56 of our Proposed Findings, to such a degree that as recently as April 29, 1977 the Commission's Region III Office expressed doubt to Consumers as to the functioning of the entire QA-QC program. See ¶ 56 of our Findings.)

In fact, Consumers' entire attempt to downgrade the significance of its QA-QC problems is seriously disingenuous.

As stated in ¶ 56 of our Proposed Findings--without challenge from Consumers anywhere in its Responsive Findings--Consumers itself has admitted both the seriousness of its continuing QA-QC problems and the dissatisfaction of the Commission with Consumers' performance. Midland Intervenors' Exhibit 68, p. 21.

E. Need for Power.

The weakness of Consumers' rebuttal of our Proposed Findings concerning the need for the power to be generated by the Midland plant during the interim period of a suspension (Responsive Findings, ¶¶ 26-39) appears from the extent to which Consumers feels itself obliged to magnify a typographical error concerning the identification of its short-term budget forecast into a major issue. Indeed, virtually the entire discussion of Consumers' load forecast in its Responsive Findings consists of little more than personal attacks on Dr. Timm and nitpickings over minor points. Consumers' tactics, it would appear, are designed principally to obscure the fact that Consumers does not challenge most of the substance of our Proposed Findings. Consumers does not deny that its own Energy Forecast Executive Review Committee believes that there is a 50% chance that its load growth will not exceed 5% (Intervenors' Findings, ¶ 66), or that its long-range forecast is based essentially on subjective and unverifiable considerations, as its own witnesses

repeatedly testified (Id., ¶ 65), or that Michigan foresees no net change in State population (Id., ¶ 67), or that its witnesses are unfamiliar with existing energy conservation programs, and even with the plans of its customer, General Motors, regarding energy conservation (Id., ¶¶ 65, 67). Consumers effectively admits that its long-range forecast (like its verifying study) failed to explicitly consider price elasticity--as its own witnesses testified on cross-examination, see ¶ 67 of our Proposed Findings. It asserts that General Motors has no commitment to reduce its energy consumption, even though Midland Intervenors' Exhibit 21, p. 2, flatly asserts GM's "corporate goal of 5% savings in total energy use" for the year 1976 alone. And Consumers' statement that its verifying study "reflects conservation programs by GM as well as price elasticity" (¶ 37), to take but one example, is completely false. Mr. Bickel specifically admitted that he had not considered the potential impact of price increases on GM energy consumption (Tr. 2007), and it is ridiculous to claim that he considered GM energy conservation efforts when he admitted that he was not even familiar with GM's own submission to Consumers in that regard (Tr. 1985).*

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* Consumers' ¶ 37 also accuses us of a "misconception" concerning Dow's commitment to the FEA Energy Conservation Program. The misconception is Consumers', not ours. We pointed out Dow's familiarity with that program not to question the accuracy of Dow's load forecasts, but rather to show the extraordinary weakness of the information on which Mr. Bickel based his predictions. Mr. Bickel admitted (and Consumers does not dispute) that he was "not particularly
(Footnote continued on the following page.)

There is little point in engaging in a line-by-line refutation of Consumers' nitpicking efforts. It is important to point out, however, that Consumers' entire argument seems to assume that it is Intervenors who bear the burden of proof in this case. For example, Consumers accuses Intervenors of not having prepared an independent load forecast for Consumers' system (¶ 30), which ignores the fact that it is up to Consumers--not Intervenors--to present, and to support with hard evidence rather than ipse dixits, a demonstration of need for the Midland plant. Consumers has simply not done its job, and it cannot claim that Intervenors are somehow obliged to remedy its deficiencies. Consumers essentially admits that its forecasting methods are at best doubtful, in fact, by abandoning attempts to justify its methods in favor of the claim that "it is . . . the result of the forecasting analysis that is essential." (¶ 39.) What that statement overlooks, of course, is that results reached by improper methods--or, as in the case of the "probability encoding" analysis, methods impossible to objectively retrace or verify--are no substitute for the kind of hard evidence

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(Footnote continued from the preceding page.)

familiar" with the FEA program, Tr. 1990; we simply pointed out that his ignorance, difficult to justify on any basis, becomes startling indeed when coupled with the fact that Dow--intimately involved with the Midland project and its major proposed customer--is affirmatively committed to the FEA program.

required to satisfy the burden of proof which Consumers bears.

F. Reliability and Reserve Requirements.

Paragraphs 40 through 55 of Consumers' Responsive Findings, which concern reliability and reserve requirements, need not detain us long. Those paragraphs omit completely the fact that the Commission Staff itself has concluded that neither the Palisades derating nor the sales to municipalities and cooperatives should be included in determining reserve needs (Staff Findings, ¶ 36). They omit the fact that Consumers' own witness testified that, if Palisades is not derated and the sales to municipalities and cooperatives are excluded, Consumers' reserve requirements will be ample during any suspension period (Tr. 1840-41). While making much of the asserted difference in result which occurs if Dow's demands are taken from Midland Intervenors' Exhibit 18 rather than Midland Intervenors' Exhibit 30 (¶ 42), Consumers omits to note that, as shown by Table A to Dr. Timm's Rebuttal Affidavit, the overall differences in calculation are insignificant and do not substantially affect the conclusion that Consumers improperly handled the Dow sales in projecting its reserve requirements. Although it befogs the question with a great deal of irrelevant argument (¶ 50), Consumers does not deny that its projected unit availabilities are attainable, given its substantial maintenance budget increase and

the fact--also not denied--that it will have six years to regain the overall unit availability lost during only three years of sharply reduced maintenance budgets. And throughout its discussion of reserve requirements, Consumers relies heavily and without explanation on what it has "found" or "concluded" (e.g., ¶ 54)--a practice which not only is no substitute for proper evidence, as we have previously pointed out, but also adds no weight whatever to Consumers' arguments. It will be recalled that Consumers also "concluded" to ignore the findings of its own in-house review team, as well as Bechtel's formal Forecast 2, in estimating the cost of the Midland plant. The weakness of that sort of "conclusion" needs no explanation.* In addition, Consumers' reference to "the impact of the reduction in pumped storage operation" (¶ 66) is dealt with in Intervenors' response to the Feld/Gundersen Report on the inconsistencies between Consumers'

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* It should also be mentioned that Consumers repeatedly engages in cries of "prudent planning", in order to excuse the weaknesses which result when the lack of factual basis for its assumptions is exposed. Although ECAR projected reserves are now known to be very substantially higher than those on which Consumers based its planning, Consumers wants to ignore that because the reserves may not materialize. Although a Palisades derating is manifestly unlikely to occur, Consumers insists that we should include that in planning reserve requirements because it is "prudent" to anticipate the worst. The trouble with that is that, as Consumers' Mr. Mosely admitted (Tr. 3318), "it hurts the company as well as the customers if you overestimate" demand or reserve needs. Consumers' consistent retreat into "prudence" is nothing more than a smokescreen intended to cover the deficiencies of its analysis.

rate case filings and its filings in this proceeding, at pp. 6-7. Since both Purchase 10 purchases and economically dispatched purchases are available on peak (which is the sole necessary condition concerning pumped storage), the alleged reduction in pumped storage operation produced by having purchase power available during on-peak periods is exactly the same whether the purchased power is "forced" without regard to its cost (as happens under Purchase 10) or is economically dispatched. Consumers omits to point out that even the Feld/Gundersen Report concluded that some 12.3% of the total Purchase 10 amount--or 110,000 MWhr--could have been generated more cheaply by Consumers even in the 1982, five-month suspension case, despite the fact that that case is unrepresentative and involves comparatively small amounts of Purchase 10 purchases. See the Feld/Gundersen Report at pp. 36-37, and Intervenors' Response to the Report at pp. 5-6. (Pages 4-5 of Intervenors' Response to the Feld/Gundersen Report also discuss the weaknesses of the "iterative run" technique to which Consumers refers at ¶ 69 of its Responsive Findings. As ¶ 22 of Dr. Timm's Rebuttal Affidavit and his Attachments B2 and B3 demonstrate, those "iterative runs" are totally meaningless for practical purposes, and certainly do not support Consumers' assertion that Purchase 10 has no effect on its replacement power cost estimate.) Finally, it should be noted that Consumers' own Responsive Findings (at ¶ 66) prove Intervenors' point that

Purchase 10--which, according to Consumers' own work papers (Midland Intervenors' Exhibit 37), automatically requires a purchase of power without regard to cost whenever the reserve level falls below 20% on Consumers' system--is a completely unrealistic assumption. At ¶ 66, Consumers squarely admits that it does not automatically purchase power whenever the reserve level falls below 20%.

G. Costs of Alternatives.

The short answer to Consumers' discussion of the costs of alternatives (¶¶ 72-89 of its Responsive Findings) is that the discussion is almost entirely devoted to an irrelevancy. Consumers spends a great deal of time hammering away at Midland Intervenors' Exhibit 46, on the ground that that exhibit contains errors. But Midland Intervenors' Exhibit 46R corrects those errors (if "errors" they were), and also bases its calculation on updated information beyond that which was available when Midland Intervenors' Exhibit 46 was prepared.* Accordingly, Consumers' labored argument is beside the point. Similarly, Consumers' ¶ 86, asserting that errors continue to be reflected in Midland Intervenors Exhibit 46R, completely ignores the detailed response to those alleged errors in ¶¶ 32-36 of Dr. Timm's Rebuttal Affidavit.

In short, Consumers' argument concerning alternatives to the Midland plant consists almost exclusively of a red herring.

* In addition, Consumers' ¶ 62 notes that Dow used Consumers' own figures in preparing Dow's examination of alternatives (Midland Intervenors' Exhibit 26). But Dow--independently of Intervenors--there concluded that, on Consumers' own figures, the Midland project is very likely not Dow's cheapest option. See ¶ 50 of Intervenors' Proposed Findings (which Consumers nowhere challenges).

It also includes examples of one of Consumers' favorite defensive tactics--attempting to infer by innuendo the existence of a fact concerning which it has produced no evidence of record. At ¶ 80, Consumers attempts to imply that "environmental review requirements in Michigan have changed." But Consumers never asserts that, in fact, any such change has taken place; nor does Consumers tell us what the hypothetical change is, or explain why it would "increase the lead time" required to construct a new generating facility. Thus the entire reference to some unknown change in environmental regulations must be disregarded. It serves only to indicate how far afield Consumers is required to go in order to prop up its otherwise unsupportable case.

As we pointed out in commenting on the Staff's Proposed Findings, the Staff has admitted (at ¶¶ 126 and 132 of its Proposed Findings) that the only way Intervenors' suggested alternative to the Midland project can be shown to be economically disadvantageous is by considering the very "sunk costs" which Aeschliman, 547 F.2d at 532 n.20, prohibits. Consumers' Responsive Findings do not alter that conclusion.

H. Conclusion.

Because of time constraints and because we do not wish unduly to add to the volume of paper confronting

this Board, we have deliberately kept the foregoing analysis of Consumers' Responsive Findings as brief as possible. Even so, the analysis shows plainly that Consumers--after 81 pages of argument and 340 footnotes, during which it is fair to assume Consumers has raised every attack it can concerning Intervenors' Proposed Findings--has completely failed to present any serious challenge to the facts on which Intervenors' Findings are based, or to redress or even explain away the glaring deficiencies in Consumers' presentation during the suspension hearings. The Responsive Findings are a tissue of ipse dixits, unsupported conclusory statements, omissions, inaccuracies, and ad hominem attacks. Like Consumers' initial Findings, they deal with unpleasant facts and plain deficiencies in Consumers' reasoning by ignoring them outright.

Taken as a whole, the Responsive Findings support Intervenors' position, by the very weakness of their attack on that position. The simple fact that Consumers' dozens of "experts" and attorneys can come up with nothing more persuasive than the Responsive Findings is itself an eloquent proof of why construction must be halted here, and of Consumers' failure to justify continuing construction pending the remanded hearings.

II.

CONSUMERS' RESPONSIVE BRIEF IS WITHOUT MERIT

A few brief comments concerning Consumers' Responsive Brief are in order.

First. As to Consumers' attempt to limit this Board's jurisdiction solely to the precise issues remanded by the Court of Appeals, we repeat that Consumers' argument is not only contrary to its own statements to the United States Supreme Court (see pp. 10-12, supra), but also insupportable. As we pointed out at pp. 16-17, supra, Consumers itself admits that the cost-benefit analysis in this case must be restruck on the basis of all currently available information; both common sense and the Court of Appeals' ruling require no less. Consumers also admits that this Board is in no way obliged to blind itself to serious and continuing safety problems in reaching an ultimate determination concerning whether the Midland project should proceed. See pp. 16-18, supra. Both the duty to consider all of the presently available evidence and the duty to consider all pertinent safety issues, however, arise not from the decision of the Court of Appeals but rather from the Commission's own decisions and this Board's own obligations under NEPA and the Atomic Energy Act.

It is sheer sophistry to say that the Court of Appeals, when directing that the cost-benefit analysis be restruck, intended to preclude the Commission from considering facts which its own decisions indicate must be taken into account in any cost-benefit analysis. That would amount to concluding that the Court of Appeals overruled Commonwealth

Edison Co., ALAB-153, 6 AEC 821, 823-24 (1973), Duquesne Light Co., ALAB-408, 5 NRC ___ (June 2, 1977), and the Appeal Board's QA-QC decision in this very case, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-106, 6 AEC 182, 184-85 (1973). But the Court of Appeals, of course, did no such thing. On the contrary, the Court of Appeals' decision to reject Intervenors' QA-QC arguments was explicitly based, Aeschliman, 547 F.2d at 632 n.21, on the fact that the Appeal Board had taken affirmative action concerning QA-QC matters and would continue to supervise Consumers' QA-QC performance. Similarly, Consumers' attempt to downgrade the significance of the ACRS' refusal to comply with this Board's requests not only contradicts its own statements to the United States Supreme Court (where it has taken the position, at p. 35 of its Brief on the merits, that the ACRS determination by the Court of Appeals was both "substantive" and itself an independent ground for the remand), but also ignores the Commission's statement to the Supreme Court (at p. 67 of the Federal Respondents' Brief on the Merits) that safety "is a major function of the Commission" and that the "independent expert technical advice" provided by ACRS is needed by the Commission in order to fully perform its safety function. Obviously, if the ACRS Report is a necessary element of an adequate safety determination, as the Commission says, and if the Court of Appeals considered the Report's inadequacies so important as to provide an independent basis for remand, as

Consumers says, an adequate and clear report is essential to this proceeding. In addition, as is explained at ¶¶ 56-57, 81 of our Proposed Findings, the record here shows that further QA-QC and ACRS exploration is indispensable not only to proper resolution of safety issues but also to a proper restriking of the cost-benefit analysis. See also pp. 14-18, supra. In light of all that, it is ridiculous for Consumers now to argue that this Board may not consider those issues or that those issues are unimportant.

Second. Consumers' attack on our formulation of the test to be applied on the suspension issue (Responsive Brief, pp. 6-8) is unfounded. In the first place, it is obvious that if, as in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), a "more deliberate investigation" of "serious, substantial, difficult" questions is required before the revised cost-benefit analysis can be struck--and even Consumers does not dispute that that is true--what is called for is a halt to continued construction, not a continuation of construction. Consumers' attempt to confuse the matter by putting Intervenors in a position of a party seeking an injunction cannot succeed. As we pointed out at pp. 2-3, supra, consideration of the suspension issue in this case must begin with the presumption that, absent strong reasons to the contrary, construction should not be allowed to continue. Put another way, Consumers must carry a heavy burden of proof before it can be permitted, in

the words of the Appeal Board, to "have its cake and eat it too." As the Staff correctly recognizes, that has nothing to do with probability of success on the merits of the remanded hearings. Rather, it has to do with the integrity of the very hearing process itself. What Consumers overlooks is the fact that continued construction risks effecting the outcome of the remanded hearings--in other words, risks irreparably altering the status quo in a manner which strikes at the very heart of the ultimate decision this Board must make. As long as there are any "serious, substantial, difficult and doubtful" questions concerning what that ultimate decision will be--an unavoidable conclusion from this record--the present status quo should be preserved, and construction halted, so that the decision will not be affected, consciously or otherwise, by continuing expenditures on the Midland project and so that alternatives to the project (including redesign of the project, both for economic reasons and to meet developing safety problems) will not become unfeasible. That continued construction will both affect the ultimate cost-benefit decision and foreclose alternatives to the Midland project in its present form is indisputable. As we pointed out at pp. 2-5, 10-11 of our Brief on the suspension issues and in ¶¶ 81-82 of our Proposed Findings, Consumers and the Staff have both recognized that continued construction will affect the outcome of the cost-benefit analysis and will

foreclose alternatives.*

Third. At pages 10-12 of its Responsive Brief, Consumers attempts to argue that--contrary to the perfectly straightforward and explicit language of the Court of Appeals in Aeschliman--"sunk costs" can be taken into account in this proceeding. The short answer to Consumers' argument lies simply in the fact that the Court of Appeals, as quoted by Consumers at p. 11 of its Responsive Brief, did not say that "sunk costs" could be considered, even in the context of abandonment of the facility. To the contrary, the Court of Appeals said: "sunk costs are not appropriately considered costs of abandonment." To be sure, the Court added that replacement costs may be considered, if under the circumstances some sort of replacement facility can be anticipated as a consequence of abandonment. But replacement costs, obviously, are the costs of the alternative facility--for example, the alternative facilities discussed in Midland Intervenors' Exhibit 46R. In no sense do they include the sunk costs of the abandoned project (which the Court of Appeals carefully differentiated from replacement costs).

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* Consumers' contrary claim in its Responsive Brief is based solely on its conclusion that the outcome of the full remanded hearings on the merits will necessarily be a decision to proceed with the Midland project as presently planned. That reasoning, of course, not only partakes of substantial arrogance in its bland assumption that this Board will do whatever Consumers wants, but also is completely circular. It assumes the very ultimate conclusion which, for purposes of this suspension hearing, is by hypothesis open to doubt--a hypothesis amply justified by the record made so far.

Consumers' argument on this point is not only unsupported by the language it quotes, but plainly contrary to what NEPA requires. As we pointed out at pp. 16-18 of our Brief on the suspension issue, the reason "sunk costs" cannot be considered is precisely because to consider them would be to allow Consumers to frustrate the cost-benefit analysis which lies at the heart of NEPA, in the very process of pretending to proceed with it. That is the process the Appeal Board described as "having your cake and eating it too." But the "incremental cost analysis" Consumers now urges upon us is simply another version of that very thing. Whether we consider sunk costs by adding them up and looking at the total amount (which even Consumers admits we cannot do), or by adding them up and then subtracting them from a hypothetical total so that a figure for "incremental costs" is obtained, we are still looking at sunk costs. We are still altering the cost-benefit analysis on the basis of how much money has already been spent on the project under discussion. And that is precisely what we may not do.

Just as Consumers' legal arguments are incorrect (as we have seen), they are also still a further indication of Consumers' inability to deal with the actual record in this case. In each instance, Consumers' legal arguments represent an attempt either to avoid the issues (as by claiming that this Board is forbidden to consider them) or

to change them (as by suggesting that we should all simply assume Consumers will win on the merits, or by insisting that sunk costs be taken into account).* What Consumers does not do, either in its Responsive Findings or in its Responsive Brief, is to come to grips with the issues as they really exist. We submit that the reason Consumers does not deal with the issues is the same reason which underlies its attempt to manipulate testimony in the suspension hearings, its reliance on ipse dixits rather than evidence, and its attempts to mask the shortcomings in its presentation through a series of personal attacks on other witnesses: Consumers knows that, on a fair analysis of the facts, its position is insupportable.

CONCLUSION

We are angry! We are angry not only for ourselves but for the licensing process which has been put upon by Consumers' arrogance and the Staff's negligence.

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* Similar problems appear in Consumers' attempt to deal with the preparation of the Temple Testimony, pp. 13-25 of its Responsive Brief. However, we see no need to respond to Consumers on that subject. The factual record is so damning, and Consumers' attempts to obscure its improper conduct so weak, that no refutation is necessary. One example will suffice. Although admitting that it tried to present a witness unaware of the Consumers-Dow dispute, Consumers claims that its suggestion "cannot be considered the taking of an action intended to deceive this Board" because in the end, Mr. Temple was the Dow witness. Responsive Brief, p. 21. What that overlooks, of course, is the fact that Mr. Temple became the witness only because Dow insisted upon it--not because Consumers, as it tries to imply, voluntarily selected him. See Tr. 2570, 2703-04.

Can the Board find one witness of the Regulatory Staff who did any independent analysis on a critical issue?

Can the Board find one Regulatory Staff witness who did not rely entirely on Consumers' information and analysis on all critical issues?

Can the Board find one Regulatory Staff witness who took his job seriously enough to travel to Michigan or to speak to the municipals or cooperatives or go seek information from Dow Chemical in order to arrive at a conclusion upon which sound regulatory judgments can be made?

Can the Board find one Dow witness who affirmatively (and without the cross-examination of the Intervenors) thought seriously enough about the important issues in this case to stand up and be counted and through direct evidence tell the truth?

Can the Board find one Consumers' witness who was honest enough to admit that just maybe there was another side to the story offered by the utility, which has already spent $400 million in pursuit of what may be an unattainable objective and certainly an objective which has not been critically analyzed?

Is the Board willing (in the face of the dishonesty and deceit in this record) to accept Consumers' "judgment" when that very same utility did not seriously

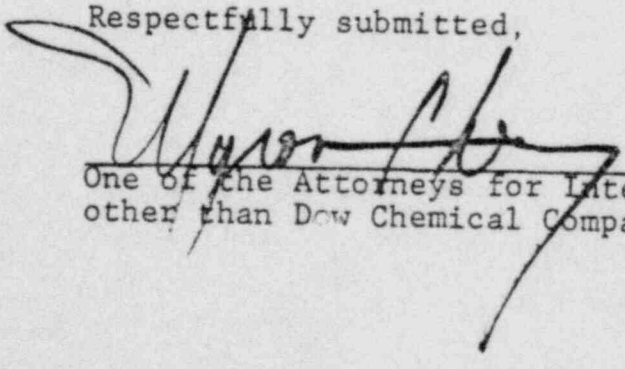
consider that the hearing process (without the Intervenors--see Midland Intervenors' Exhibit 26) could affect its destiny?

The answers to all of these questions in any serious way must all be No. And the saddest part of this whole case is that thedefects in the record have engendered not honest response by Dow, the Applicant or the Regulatory Staff, but rather attacks on Dr. Richard Timm, who risked his job to work for little o no pay in the public interest, and attacks upon Intervenors' lawyers, who have been adamant and unwilling to put up with the incredible arrogance that marks the history of nuclear utilities and Staff regulation.

The granting or denial of suspension, of course, will have real and significant meaning to the entire regulatory process and every single utility, utility lawyer and Regulatory Staff employee is looking to this decision as a bellwether to determine whether the arrogance of Consumers and the negligence of the Staff pays dividends.

We respectfully suggest that this Licensing Board, on this record, need not be timorous in reaching a decision to halt construction. The record supports--and demands--no other conclusion.

Respectfully submitted,



One of the Attorneys for Intervenors other than Dow Chemical Company

Myron M. Cherry
Peter A. Flynn
One IBM Plaza
Suite 4501
Chicago, Illinois 60611
(312) 565-1177

PROOF OF SERVICE

I hereby certify that that "Intervenors' Response to Objections by Consumers Power Company to the Admission into Evidence of Certain Additional Exhibits Offered by Intervenors," "Supplemental Statement of Intervenors Other than Dow Chemical Company Concerning Responsive Findings and Responsive Brief of Consumers Power Company," and a letter to the Board dated July 26, 1977 were delivered by Federal Express messenger to arrive in the Board's hands by July 27, 1977, A.M., in the office of Frederic J. Coufal, Esq., Chairman, and that copies were mailed to Mr. C. R. Stephens, Chief, Docketing and Service Section, Office of the Secretary of the Commission, Washington, D. C., to counsel for Consumers Power Company, the Regulatory Staff and Dow Chemical Company, postage prepaid and properly addressed on July 26, 1977.

Myron M. Cherry