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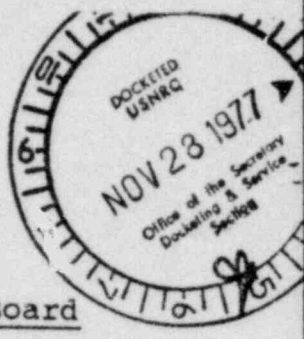

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

ADDITIONAL BRIEF OF INTERVENORS
OTHER THAN DOW CHEMICAL COMPANY

Pursuant to 10 C.F.R. § 2.770 and Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-282, NRCI-75/7, p. 10 n. 1 (1975), Intervenors other than Dow Chemical Company, by their attorneys, submit this additional Brief in opposition to Consumers Power Company's wholesale assault on the Findings of Fact in the Licensing Board's September 23, 1977 decision. In Part I of this Brief, we show that the real effect of Consumers' attacks on the Findings of Fact is to admit the two major premises of our argument. In Part II, we deal directly with Consumers' attempts to rewrite the Licensing Board's Findings of Fact. Finally, in Part III we respond to the question--raised by the Appeal Board during oral argument--of whether Consumers' attempt to conceal vital evidence from the Licensing Board, in and of itself, requires a halt to continued construction of the Midland plant.

I

IN ESSENCE, CONSUMERS--LIKE THE STAFF--ADMITS THE CORRECTNESS OF INTERVENORS' ARGUMENT

Intervenors' Exceptions and supporting Brief make two fundamental points:

-- that the Licensing Board's refusal to halt construction of the Midland plant rests on a completely erroneous interpretation of the law regarding "sunk costs," because

-- the Licensing Board's Findings of Fact on the relevant issues, almost without exception, support Intervenors and show that suspension should be ordered forthwith.

Apart from a lengthy repetition of their own proposed findings of fact (basically a bootstrap effort, since the Licensing Board did not adopt those findings), neither Consumers nor the Staff seriously challenges either of Intervenors' two basic points. Consumers' Brief (at pp. 54-66) attacks almost every one of the Licensing Board's Findings of Fact; even the Staff, though coyly refraining from any outright attack, invites the Appeal Board to disregard the Findings (Staff Br. at 24). Quite correctly, both Consumers and the Staff perceive the Licensing Board's Findings as inimical to their position, because (apart from the Board's "sunk costs" legal error) the Findings not only support but require a prompt halt to continued construction of the Midland plant.

As for the "sunk costs" issue itself, moreover, the Staff candidly confesses error (Staff Br., p. 9):

> "We must frankly acknowledge that in our view the Licensing Board exhibited a fair amount of confusion on the sunk-cost question and did not appear to fully comprehend this Commission's Seabrook decision."

Consumers itself admits that the Licensing Board's "repeated" use of the term "sunk costs" is "infelicitous" (Consumers Br., p. 6). While Consumers halfheartedly attempts to defend the Licensing Board's "sunk costs" analysis, its argument is no more than mathematical jugglery.

Consumers admits (Br. at 5) that "equating the sunk costs of a project which has not passed muster under [NEPA] with the costs of abandonment in weighing it against its alternatives is improper." Consumers also admits (Id.) that "if the Licensing Board had simply taken the amount Consumers Power had invested in Midland...and added them to the costs of alternatives as a cost of abandonment, the analysis would clearly be faulty." We agree--and we note that that is exactly what the Licensing Board did. See, e.g., the Licensing Board's decision at paragraph 62 ("assigning these sunk costs to the Dow alternative...."); paragraph 64 ("when sunk costs are applied [to Intervenors' alternative], the alternative becomes...more expensive....").

Even apart from those examples of the Licensing Board's explicit adoption of reasoning Consumers admits is

wrong, the treatment of "sunk costs" elsewhere in the Licensing Board's decision suffers from the same fatal error. Here we must take account of Consumers' mathematical sleight of hand. As far as we can tell, Consumers' argument (at pp. 5-6 of its Brief) is that even though "sunk costs" may not be considered, it is nevertheless proper to do either of two other things: take into account "the costs...associated with abandonment of Midland," and weigh the "to go" costs of Midland against the total costs of an alternative when comparing alternatives.

Either of those approaches, however, accomplishes precisely the same thing as adding "sunk costs" to the cost of an alternative--which, as we have seen, even Consumers admits is improper. The "costs of abandonment" of Midland to which Consumers points are in large part the very "sunk costs" Consumers agrees we may not consider. And crediting Midland with the amount of "sunk costs" incurred to date--which is what happens if we consider only the remaining costs of completion in comparing alternatives--is precisely the same thing as debiting an alternative with the amount of "sunk costs" incurred to date. The difference between the two approaches is merely verbal. It is exactly the same as saying that, on the one hand, two plus two equals four and, on the other hand, two equals four minus two. The statements are identical.

In short, the briefs of Consumers and the Staff compel two conclusions. The first conclusion is that the Licensing Board was wrong about "sunk costs." The Staff confesses error on that point, and Consumers' attempt to defend what the Board did fails abysmally. Second, the approach both Consumers and the Staff take to the Licensing Board's Findings of Fact eloquently shows that they read those Findings in the same way that we do--as a compelling argument in favor of suspension.*

II

CONSUMERS' ATTEMPT TO REWRITE THE FACTUAL PORTIONS OF THE LICENSING BOARD'S DECISION IS WITHOUT MERIT

At pages 54 through 66 of its Brief, Consumers attacks almost all of the Licensing Board's crucial Findings of Fact. None of Consumers' arguments can survive examination of the record.

First. At pages 55-56, Consumers offers the incredible proposition that the Dow-Consumers relationship

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* Our own Exceptions, of course, also attack several of the Licensing Board's Findings of Fact. But the difference between our approach to the Findings and that of Consumers (leaving aside for the moment the Staff's tacit abandonment of all of the Licensing Board's findings) is this. for the most part, we assert that, while the Board's Findings of Fact are essentially correct, they do not go far enough. Consumers, on the other hand, seeks outright reversal of the Board's Findings.

is one of only secondary significance. The short answer is that the Final Environmental Statement in this case conceded, five years ago, that if Dow were not involved in the Midland project one unit of the project "would be canceled and consideration would be given to transferring the other unit to a different site." Consumers itself admitted, in its April 1, 1973 Answers to Interrogatories (No. 173 at p. 173-1), that the Midland project would be completely uneconomical without Dow participation. Those facts, without more, amply justify the conclusion of the Licensing Board (Decision, ¶ 24) that if Dow withdraws from the Midland project "the circumstance will be one of a plant at a site for which only very limited alternatives were explored, designed in substantial part for a purpose which will not be fulfilled.

Consumers then goes on to assert that the Licensing Board's Findings of Fact concerning Dow, and all of the great mass of evidence introduced with regard to the Dow-Consumers relationship, is "extraneous." That is ridiculous. Consumers rests its argument on the fact that it and Dow have signed contracts. But that by no means ends the inquiry. If, for example, Dow had formally repudiated the contracts and publicly announced its intent to proceed no further under them, or if Dow had sued Consumers for breach of contract, that information would certainly be

highly relevant. To ignore facts of that sort would be to blind ourselves to reality, and to exalt form over substance. Yet the evidence before the Licensing Board was every bit as damning as, and almost identical to, the kind of evidence just mentioned. Far from announcing that Dow intended to "abide by its contract," the two senior Dow officials most closely involved with the Midland project repeatedly stated that Dow regarded a suit against Consumers for breach of contract as a "realistic option;" that Dow would live up to its version of its contractual obligations (which included the possibility that, because of an unsatisfactory response to its earlier formal request for assurance of performance, Dow no longer had any contractual obligation to Consumers); that Dow and Consumers were in the midst of serious and heated negotiations going to the very core of their contractual relationship; that Dow's Michigan Division had publicly expressed the view that the Midland contracts were detrimental to Dow; that from an economic point of view Dow's interest in the Midland project was marginal at best (and, according to the Staff, may already have vanished in light of nuclear fuel cost increases); and that Dow's entire relationship with Consumers had become an adversary one.*

In light of that testimony, the Licensing Board's reluctance to give much weight to the Dow-Consumers contracts was entirely justified. Those contracts have been completely

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* The evidence on these points is massive. See, e.g., Tr. 323, 407, 409, 414-17, 439-44, 460, 664-65, 939-40, 2288-91, 2296-2301, 2309, 2311-12, 2320, 2322, 2394-95, 2405-19, 2427-33, 2456-59, 2466, 2492-95, 2505-07, 2516, 2522-24, 2553-55, 2699, 2707-19, 2723-24, 2730; Board Ex. 1; Midland Intervenors' Ex. 25.

overhauled before; even if Dow does not pursue its "realistic option" of abandoning them outright, they will be overhauled again in ways which will further worsen the deteriorating cost-benefit balance for the Midland project. And in light of the explicit statements of Dow's counsel during the suspension hearings that the validity of the Consumers-Dow contract itself is in issue, that the status of the contract is "uncertain," and that "Dow is antagonistic to Consumers in the legal sense" (Tr. 664, 908, 939-40, 955, 2432-33), the Licensing Board's conclusion that the likelihood of Dow's purchasing steam and electricity from the Midland project is "speculative" is indisputably correct.

Second. Quite correctly, Consumers regards the Board's somewhat terse findings on the need for the electricity to be produced by the Midland project as having to some degree accepted Intervenors' position. Consumers Br., pp. 56-57. While Consumers understandably dislikes that finding, it offers nothing other than its own testimony to support any contrary result. Yet what we learn from Consumers' testimony--as is fully explained in our opening Brief--is that Consumers' demand projections have consistently overestimated the need for power, and have consistently been downgraded as events develop. We also learn that, contrary to Consumers' ipse dixit that "conservation has now been fully considered," a finding the Licensing Board emphatically did not make, Consumers' own witnesses admitted that their "consideration" of energy conser-

vation was no more scientific than wetting a finger to find out which way the wind is blowing. See Tr. 1911, 1918-20, 1990, 1994, 3262-63, 3326, 4471-72.

Third. Correctly conceding that its position has been rejected by both the Board and every other party (Consumers Br., p. 57), Consumers nonetheless insists that its AFUDC projections should be included in computing delay costs. On the immediately following page of its Brief (p. 58), however, Consumers itself admits that the AFUDC income item "is not cash, but merely an accounting procedure." Furthermore, Consumers' argument makes no sense. Consumers claims that in the event of a suspension-induced construction delay, Consumers will have to raise additional outside capital to pay for construction expenses. But the construction needs will not change during any suspension period. A suspension does not affect what will be built, but only when the building will occur. If in truth Consumers must pay for construction on a continuing interim basis, then the principal effect of a suspension will be to defer those payments for a period of time. Nor will that cause additional interest and service charges to accrue. Consumers' whole AFUDC argument is based on its need for outside capital to pay for construction.*

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* A need, we note, of possibly critical proportions. Consumers has demanded a $400 million interest-free loan from Dow in order to finance construction--a demand Dow, not surprisingly, regards as "extortion." Tr. 2710-11, 2723-24. On this record, in fact, it is at best doubtful that Consumers can meet the financial responsibility requirements of 10 C.F.R. § 2.104(b)(1)(iii). See pp. 18-19 of our opening Brief.

But if construction (and hence payment for it) is deferred pending the outcome of the remanded hearings, then Consumers' need to raise outside capital is also deferred. Thus Consumers' AFUDC argument is meaningless.

At pp. 59-61 of its Brief, Consumers also attacks the Board's finding, based on the testimony of Intervenors' witness Dr. Timm, that under the peculiar circumstances of this case--where considerable construction and materials acquisition has already occurred--a delay in construction will ultimately result in a net benefit to Consumers' ratepayers. On this point, it is sufficient to say that even the Staff's witness Arnold Meltz agrees that the time value of money, and the "credit" which will result from the nine or 15 month addition to the life span of the Midland plant prior to decommissioning, must be taken into account in analyzing delay costs. See Tr. 5595-5640; Timm Rebuttal Affidavit, ¶¶ 37-41.

Fourth. Consumers next attacks paragraph 8 of the Licensing Board's decision, apparently under the misapprehension that the Board decided to exclude entirely "the question of probability of success on the merits" from its thinking. Consumers' Br. at 63-64. That, however, is not what the Board did. What the Board did was simply to conclude that it need not attempt to precisely define a "probability of success" standard, because it had concluded that "any party has a substantial chance of success" at

the remanded hearings. Indeed, as our opening Brief demonstrates in detail, once the unfair and improper "sunk costs" factor is removed from the balance, any "probability of success" analysis gives the edge to Intervenors.

Thus none of Consumers' attacks on the Licensing Board's Findings of Fact--attacks, we note, which cover virtually every major area of Board inquiry in this case--has any substance. Far from demonstrating error as to the Findings of Fact, Consumers has simply underscored the remarkable extent to which those Findings support the conclusion that a prompt halt to construction is mandated by this record.

III

RESPONSE TO THE APPEAL BOARD'S QUESTION DURING ORAL ARGUMENT

A question posed by the Appeal Board during the November 17, 1977 oral argument remains to be answered.

The question is whether Intervenors ever moved for a halt to construction because of Consumers' suppression of evidence concerning the Dow dispute. The suppression of evidence, as the Appeal Board recognized during oral argument, could justify suspension of construction on two different, but closely related grounds--first, on the ground that Consumers' attempted concealment inevitably (as the Licensing Board found, Decision, ¶ 10) leads to the suspicion that other and more successful attempts at doctoring the evidence were

made, and second, on the ground that Consumers' actions demonstrate its unfitness to operate a nuclear plant in the context of a regulatory system which depends heavily on prompt, accurate, and candid utility reporting.

As the Board will recall, Consumers' counsel conceded during oral argument that Intervenors had moved for suspension of construction on the ground of Consumers' suppression of evidence. In view of that admission, we need not rehearse each of the numerous occasions on which Intervenors sought a suspension prior to the end of the suspension hearings; we will simply point to Intervenors' December 31, 1976 Motion for immediate suspension, Motion for sanctions against Consumers, and Memorandum concerning pending issues. Among other things, that Memorandum points out that there is a presumption: (i) that one who falsifies evidence has something to hide, and (ii) that proof of one instance of concealed evidence implies the occurrence of others. See Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1909); Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939). Obviously those presumptions apply to Consumers' overall candidness with

the Commission--not just to Consumers' behavior during the suspension hearings.*

Thus it is clear that Intervenors have fairly tendered the question of whether Consumers' manipulation of the evidence and other slipshod conduct is grounds not only for an immediate suspension pending development of a record untainted by dishonesty, but also for reexamining whether Consumers is fit to operate a nuclear power plant in light of the Commission's heavy (and unavoidable) reliance on accurate licensee reporting and self-policing.**

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* We might add that--as we urged before the Licensing Board--Consumers' general lack of candor and slipshod approach to its regulatory responsibilities has also manifested itself in the QA-QC area. Four years ago the Appeal Board addressed that problem, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-106, 6 AEC 182, 184-85 (1973); but matters have not improved, as indicated by the April 29, 1977 Region III letter to Consumers and the repeated discovery of infractions during Staff inspections. Both in view of the continuing lack of candor and safety commitment shown by these things, and because of the critical importance of QA-QC matters, the pattern of misbehavior shown by Consumers requires further investigation. See Cleveland Electric Illuminating Co. (Perry Plant, Units 1 & 2), ALAB-443, 6 NRC ___ (Nov. 8, 1977), Slip Op. at 18.

** Another point which arose during oral argument is whether there may be a "sliding scale" of sunk costs, based on a finding that Consumers was not really "aware" of the energy conservation ethic until the Court of Appeals' remand a year ago. As we said during oral argument, such a "sliding scale" is unworkable; it relies too heavily--and inappropriately, given Consumers' conduct in this case--on a licensee's self-serving version of its knowledge and intent. Also, such a test would allow a licensee to evade NEPA simply by purchasing a legal opinion as to the "status of the law" at any given time. NEPA does not work that way. In any event, Consumers is clearly chargeable with knowledge of the nature and importance of energy conservation matters even before the mid-1972 Midland environmental hearings. President Nixon had committed the Nation to energy conservation, and the Court of Appeals had addressed the point, before those hearings began; and the Licensing Board (Decision, ¶ 20) was "easily able to conclude" that Intervenors had timely raised those issues. See 117 Cong. Rec. 18049, 18052 (June 4, 1971); 118

(Footnote continued on the following page.)

CONCLUSION

For the reasons set forth herein and in their opening Brief, the Intervenors other than Dow Chemical Company urge prompt reversal of the Licensing Board's September 23, 1977 decision, and an immediate suspension of further construction of the Midland plant pending the conclusion of the remanded hearings in this case.

We reaffirm our statements at oral argument that if there is a fair remanded hearing, at which Intervenors have the same chance of success as any other party (i.e., where construction is halted and sunk costs are not continually credited to the project), we intend to appear and challenge the need for power arguments made by Consumers (which we assumed arguendo during the suspension hearing, in order to posit a realistic alternative even on that assumption, but which we do not admit); the end-use argument (which we have not abandoned, contrary to the Court of Appeals' footnote in Aeschliman, and which the Commission must consider under NEPA regardless of whether we stress it); and the myriad of other economic and environmental issues which are established by this record.

(Footnote continued from the preceding page.)

Cong. Rec. 3140-42 (Feb. 8, 1972); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972). The latest possible date on which Consumers became chargeable with knowledge is November 6, 1973, when the Commission itself formally conceded the importance and relevance of energy conservation matters in license proceedings. Niagara Mohawk Power Corp. (Nine Mile Point, Unit No. 2), 6 AEC 995 (1973).

We urge the Appeal Board not to treat a suspension pending the remanded hearings as tantamount to a death warrant for the Midland plant. It is not, on this record and given Dow's ability to use its present facilities until at least 1984; that leaves ample time to hold a fair remanded hearing and finish the Midland plant if that is the ultimate ruling. On the other hand, as is painfully evident from this record, a failure to halt construction does represent a death warrant, not only for the remanded hearings but for the Commission's entire regulatory mission.

We also urge the Appeal Board not to be intimidated by Consumers' repeated references to the money it has already spent on the project (amounts, we might add, which are untested in the record and, as Mr. Grossman indicated at oral argument, which were not subject to independent Staff scrutiny), because the amount spent is not the issue. Rather, the issue concerns the legality of regulatory proceedings. Society and the regulatory scheme can afford $500 million, if that is necessary to vindicate the Commission's authority in the face of Consumers' attempts to subvert regulation through a fait accompli. But we cannot afford--at any price--an unregulated nuclear industry.

Respectfully submitted,

One of the Attorneys for Intervenors other than Dow Chemical Company

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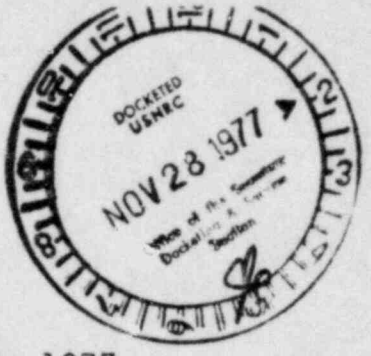

PROOF OF SERVICE

I certify that on Monday, November 28, 1977, copies of the above and foregoing Additional Brief of Intervenors other than Dow Chemical Company were delivered by Messenger to the Secretary of the Appeal Board of the Nuclear Regulatory Commission and were mailed to all other parties before the Commission and to the Commission Staff by first class mail, postage prepaid.

One of the attorneys for Intervenors other than Dow Chemical Company