

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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9/29/76

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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Docket Nos. 50-329  
50-330

BRIEF OF THE NRC STAFF IN RESPONSE  
TO THE BOARD'S SEPTEMBER 21, 1976 ORDER ON THE  
QUESTION OF SUSPENSION OF CONSTRUCTION PERMITS

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September 29, 1976

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## I. Background and Introduction

Pursuant to the Board's Order of September 21, 1976, this brief will address the question of whether or not the construction permits of the Consumers Power Company to build the Midland Plant, Units 1 and 2 should be continued, modified or suspended pending completion of reopened hearings considering all of the issues remanded by the Court of Appeals. As this Board is aware, the Staff has previously filed a brief on the question of whether the Midland construction permits should be continued, modified or suspended until an interim fuel cycle rule has been made effective. <sup>1/</sup> The Staff wishes to incorporate by reference that pleading and will deal in the instant brief only with the effects of the additional remanded issues--consideration of the energy conservation alternatives and clarification of the Advisory Committee on Reactor Safeguards (ACRS) report--on the suspension question.

## II. Procedural Questions

This Board's Order of September 21, 1976 noted that the Commission, in its Order of September 14, 1976, directed that the parties "define all required steps" which must be taken pursuant to the remand of the Court

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<sup>1/</sup> See Brief of the NRC Staff In Response to the Board's August 18, 1976 Order, filed September 2, 1976.

of Appeals. The Court of Appeals in Aeschliman v. NRC,<sup>2/</sup> in addition to its consideration of the fuel cycle issues, held that energy conservation should have been considered in the Environmental Impact Statement (EIS) as an "alternative" under the National Environmental Policy Act <sup>3/</sup>(NEPA) and that the report of the ACRS had to be clarified. The Staff has reviewed the court's holding and has carefully analyzed the steps which must be taken to comply with the decision and the time necessary to effect such compliance. The Staff has determined that the Applicant must submit supplemental information to enable the Staff to prepare a supplemental draft EIS on matters affected by the remand on the energy conservation issue, circulate it for comments, and finalize it. In that statement the cost/benefit balance will be restruck and the statement must take into account changed circumstances including those regarding Dow's need for process steam. The Staff estimates that such a procedure will take six months. It may also be necessary to hold a hearing on the energy conservation issue which would involve an additional amount of time of about four months. Thus, the remand proceedings on this issue will take about ten months from the time the Applicant files its supplemental information on these issues. Such information is expected to be filed at the end of October. Clarification of the ACRS report should not take as long as consideration of the energy conservation issue since the lengthy circulation for comment procedures fixed by rule for impact statements are not built into the ACRS process.

<sup>2/</sup> Nos. 73-1776 and 73-1867 (D.C. Cir., July 21, 1976).

<sup>3/</sup> 42 U.S.C. §§4321, et seq.

The Commission made it clear in its General Policy Statement <sup>4/</sup> that the period of suspension for consideration of the fuel cycle issues was to be assumed to be the period until an interim fuel cycle rule could be promulgated. The earliest an interim rule could be expected is December, 1976, a period of three months from now. However, since it is expected to take about ten months to resolve the energy conservation issue, the Staff's analysis of the suspension question assumes the larger period of suspension of about 10 months from the time the Applicant files its supplementary information.

### III. Legal Standards

The Staff noted in its previously filed brief that the Commission set forth five equitable factors which were to be assessed and balanced to determine whether outstanding licenses should be continued, modified or suspended pending resolution of the fuel cycle issues through promulgation of an interim rule. Pursuant to the Commission's statement of policy this Board must consider:

1. whether it is likely that significant adverse impact will occur until a new interim fuel cycle rule is in place
2. whether reasonable alternatives will be foreclosed by continued construction or operation

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<sup>4/</sup> 41 Fed. Reg. 34707 (1976).

3. the effect of delay
4. the possibility that the cost/benefit balance will be tilted through increased investment
5. general public policy concerns, the need for the project, the extent of the NEPA violation,<sup>5/</sup> and the timeliness of objections.

Though the Commission's policy statement was directed to the fuel cycle questions, the statement served as the Commission's response to the court decisions in both Vermont Yankee and Aeschliman. Indeed, in its statement the Commission acknowledged the need for a hearing on all of the remanded issues in Aeschliman. The factors which the Commission established in its statement were recognized as "equitable factors well established in prior practice and case law" and are of general applicability to the question of suspension. Thus, these same factors should be applied to determine whether or not the construction permits should be suspended pending resolution of the issues of energy conservation and clarification of the ACRS report as well as to the question of suspension pending resolution of the fuel cycle issues.

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<sup>5/</sup> General Statement of Policy, supra note 4., at 34709.

The only difference in the application of the Commission's factors to the question of whether to suspend pending completion of the reopened proceedings on the energy conservation and ACRS issues is in the length of time which must be considered in assessing the factors. When the Commission applied the factors to the fuel cycle question, it indicated that the period of time to be considered was the period until an interim fuel cycle rule could be put in place. As was noted above, it is estimated that resolution of the energy conservation issue will take about ten months from the time Applicant files its supplemental information. Therefore, the factors must be assessed assuming this period of suspension.

The increase in the amount of time which must be considered by this Board as the period of possible suspension as well as the addition of the issues of energy conservation and the ACRS report necessitates the taking of evidence by this Board on the factual issues contained in the Commission's five factors. Legal analysis of the facts adduced during the hearing can be most effectively completed in post hearing briefs or, if the Board prefers, in oral argument at the close of the hearing. The Staff does not at this time have sufficient factual information before it upon which to base a decision on the suspension question. Therefore, this brief will be limited to a discussion of the evidence which the Staff expects to see produced at the hearing upon which it will base an analysis of the five factors set forth by the Commission.

IV. Factual Requirements

A. Significant adverse impacts pending completion of the reopened hearings

The Staff, in its brief on suspension pending completion of an interim rule on the fuel cycle issue, attempted to determine the adverse impacts which might occur in the period prior to completion of the interim rule. The Staff submitted the Affidavit of Edward L. Jordan, Acting Branch Chief for Construction and Engineering Support of the NRC Region III, Office of Inspection and Enforcement which set forth the activities scheduled to occur in the next few months. The Staff has been unable to acquire similar projections of construction activities scheduled to occur over the longer period of suspension. Thus, evidence on the present status of the site and projected activities for the suspension period is expected to be produced by Applicant at hearing. The Staff will then be in a position to determine the impacts of such activities and the significance of such impacts.

B. Foreclosure of alternatives

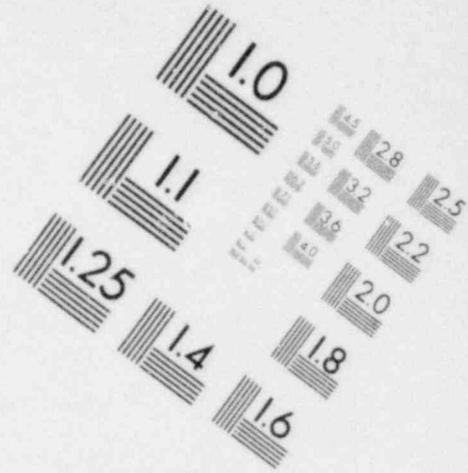
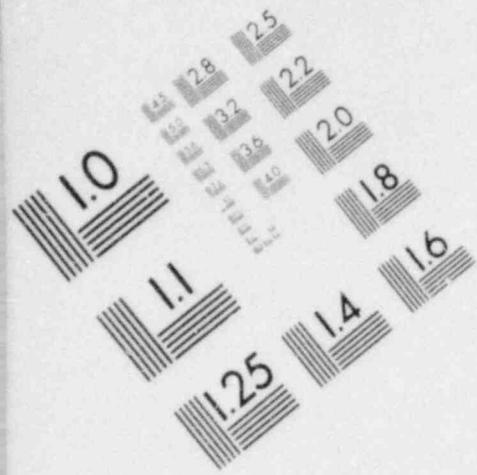
The Staff stated in its earlier brief that the alternative of modification of the plant was not relevant to the issues of reprocessing and waste management but that modification of the plant might be a reasonable alternative to consider in light of the energy conservation issue. Considering the alternative of modification would entail discussion of the

possibility of delaying the Midland facility or reducing its size. Thus, this Board must take evidence on the feasibility of reducing the size of the facility and on whether this alternative would be foreclosed by continued construction.

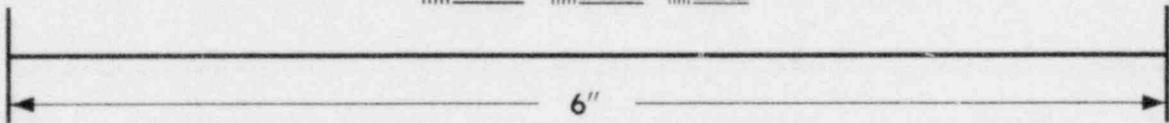
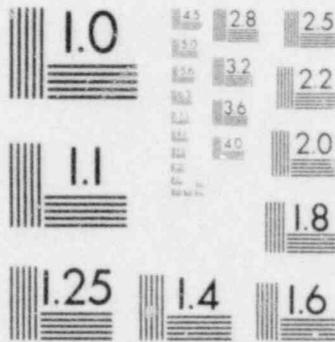
The Board must also consider whether or not the alternative of abandonment would be foreclosed by continued construction.

C. The effect of delay

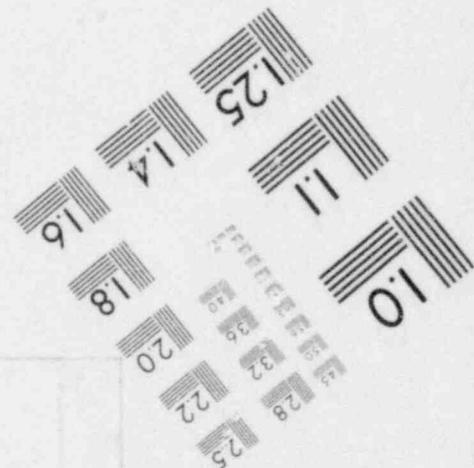
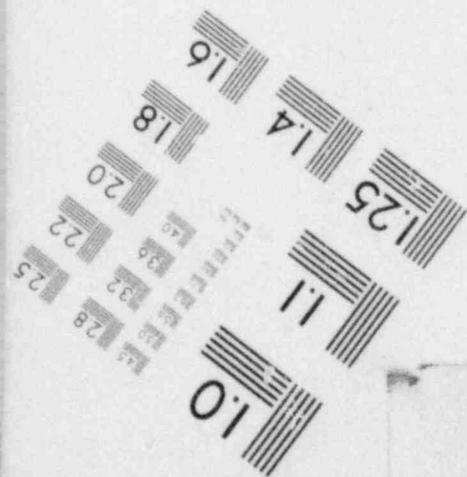
When the first brief was filed, hard dollar figures on the costs of delay were not available to the Staff. Such figures are still not available and, in fact, the period of possible suspension has been lengthened. The lengthening of the possible period of suspension will certainly have an effect on delay. Thus, this Board must determine the costs of delay for the full suspension period. The evidence on costs of delay should include evidence on cost increases attributable to escalation, increases in the Allowance for Funds Used During Construction (AFUDC) attributable to the delay, the costs of shut-down and start-up, and the socio-economic impacts of the lay-off of the large number of construction workers presently on the site.

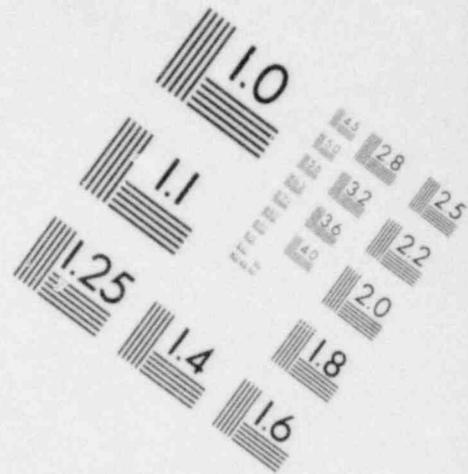
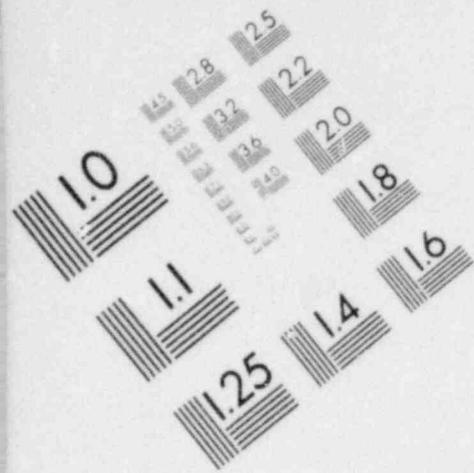


**IMAGE EVALUATION  
TEST TARGET (MT-3)**

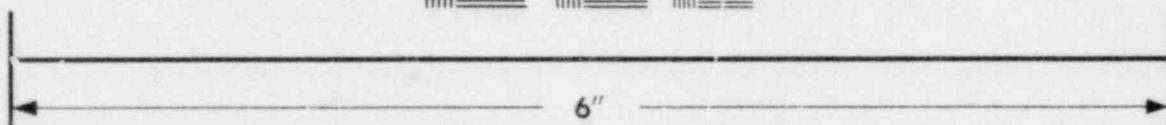


**MICROCOPY RESOLUTION TEST CHART**

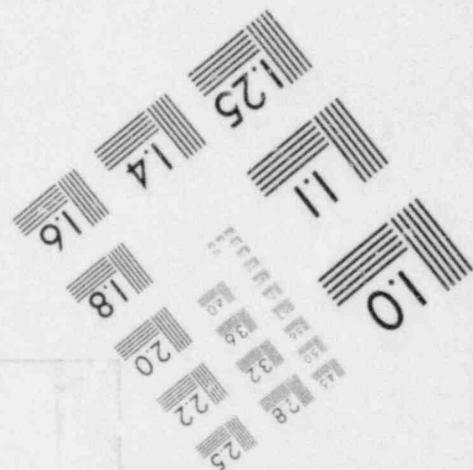
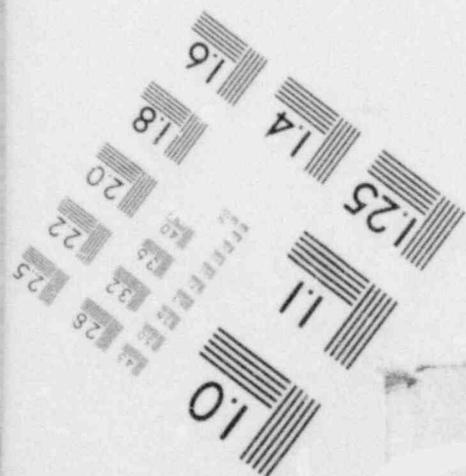




**IMAGE EVALUATION  
TEST TARGET (MT-3)**



**MICROCOPY RESOLUTION TEST CHART**



Several compensating factors may also be relevant to this analysis. Increased costs due to escalation might be offset to some extent by payments in inflated dollars when construction is complete. The ability to accelerate other units might also offset increases from AFUDC and from inflation. Finally, as the Staff noted previously, costs of shut-down and start-up would not have been incurred had construction not begun prior to completion of judicial review. These costs are, however, real costs which may be considered by this Board though the weight given to such costs may be less than that given to other factors.

D. Tilting of the cost/benefit balance by increased investment

Even if one assumes that investment during the interim could "tilt" the cost/benefit analysis, the effect of investment on the cost/benefit analysis cannot be determined without some knowledge of how close the cost/benefit analysis is likely to be. This, in turn, cannot be determined without some knowledge of the impacts from reprocessing and waste management, from energy conservation alternatives, and from specific changed circumstances regarding Dow's need for process steam and its intentions as to continuation of its fossil fuel generating facilities. Yet these impacts are inestimable at this early stage of the Staff's analysis.

While the Commission has determined that waste management is to be considered in a rule-making proceeding rather than in individual case-by-case analysis, energy conservation and the "changed circumstances" issue may be considered in the present case. Consequently, while some data will be available to this Board on possible "tilt" of the balance, the final cost/benefit balance cannot be restructured in the hearing on suspension.

On the other hand, if interim investment carries no weight or is found not to be relevant to potential tilt of the cost/benefit analysis, such interim investment will, of course, not be a factor in restructuring the balance.

E. Public policy concerns

Pursuant to the Commission's criteria, the need for power must be factored into this analysis. To determine the need for power this Board must examine relevant economic evidence including Applicant's and the Michigan Pool's projected reserves, their projected demand and load factors and Dow's need for process steam from Unit 2. The need for power factor will weigh heavily in the decision on whether or not to continue construction of the plant.

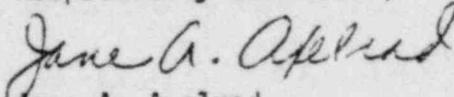
The extent of the NEPA violation was discussed in the Staff's previous pleading. It suffices here to state that the failure to consider the alternative of energy conservation while a violation of NEPA, is of the same degree as the failure to consider the fuel cycle question.

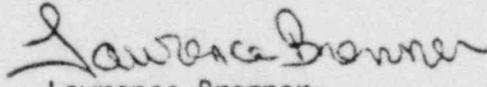
The issues of energy conservation and deficiencies in the ACRS report were brought up in a timely fashion. Therefore, no question of fact or law is associated with this point.

V. Conclusion

A balancing of the five equitable factors set forth by the Commission requires a detailed inquiry into the existing factual situation and into projections for the suspension period. This Board must determine what the facts are and must, then, balance the Commission's equitable factors to decide the question of whether or not to suspend the Midland construction permits. Only after the facts are established will the Staff be able to take a position on the question of whether or not to suspend.

Respectfully submitted,

  
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Dated at Bethesda, Maryland  
this 29th day of September,  
1976.