

REILLY, LIKE AND SCHNEIDER

COUNSELLORS AT LAW

200 WEST MAIN STREET

BABYLON, N. Y. 11702

MOHAWK 9-3000

CABLE ADDRESS
RELIX

IRVING LIKE
BERNARD J. REILLY
WILBER B. SCHNEIDER
GEORGE HOFFMAN
EDWARD A. BROOKS JR.
PAUL R. ADES
ENRICO J. CONSTANTINO

April 27, 1972

Mr. R. C. De Young
Assistant Director for Pressurized Water Reactors
Division of Reactor Licensing
Atomic Energy Commission
Washington, D.C. 20545

Re: In the Matter of Consumers Power Company
Midland Plant, Units 1 and 2
Docket Nos. 50-329 and 50-330

Dear Sir:

Mapleton opposes applicant's request for a construction exemption contained in its letter of April 18, 1972.

1. The request is premature.

a) Applicant says it does not intend to resume work at this time, and requests the Commission to hold in abeyance authorization to resume work "until such time as the approximate date of receipt of the construction permit is sufficiently predictable and applicant makes a supplemental filing specifying the necessary date for the authorization".

b) It is highly presumptuous of applicant to assume that a construction permit will be received. Whether applicant should be granted a permit is the ultimate issue before the Atomic Safety & Licensing Board. Applicant has not met its burden of proof that the issuance of a construction permit will not unduly injure public health, safety and the environment. Environmental and ECCS issues remain to be resolved. The Midland ASLB environmental hearings have not yet been conducted, and the ECCS rule making hearings are not yet completed. The results of these hearings will help determine whether applicant obtains a construction permit.

2. Applicant has not shown that the alleged benefits of additional investment in resumption of the described site activities prior to receipt of the construction permit, will outweigh the environmental harm and will not pre-

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judice the NEPA process.

a) Applicant makes the strange argument that having almost ruined the ecology of the site as a result of construction activities pursuant to the prior construction exemption, applicant should now be permitted to complete its destruction. Under well recognized principles of equity, applicant is in the posture of one with unclean hands, and is estopped from benefitting from its own environmental wrongdoings.

b) In Coalition For Safe Nuclear Power v. AEC (U.S. Court of Appeals, D.C. Cir., No. 71-1396, April 7, 1972, 3 ERC. 2016), it was held that when the AEC undertakes to determine the question of suspension of a construction permit pending completion of a full N.E.P.A. review, it must weigh as a consideration central to compliance with the Calvert Cliffs' decision, whether the environmental harm outweighs the economic cost of abandonment. To weigh this factor, the AEC must consider in detail whether additional investment of resources in plant might affect the eventual decision reached on NEPA review.

The Court said:

"Since the decision reached on whether to go forward with the project depends to some extent at least, on a balance of the environmental harm, and the economic cost of abandonment, each additional increment to the amount of money invested in the project tilts the balance away from the side of environmental concerns."

The Court remanded the record to the AEC, instructing it to

"consider in detail whether this additional irretrievable commitment of substantial resources might affect the eventual decision reached on the NEPA review. The degree to which this expenditure might affect the outcome of the final NEPA process should be a paramount consideration in the decision on suspension reached after the hearings on remand." (underlining added)

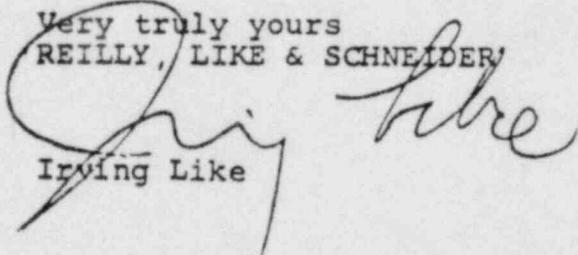
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c) The procedure prescribed in Coalition etc. v. AEC requires the denial of applicant's request for a construction exemption. The ASLB must be afforded the opportunity after the completion of the environmental hearings to determine the degree to which the resumption of site activities by applicant might affect the outcome of the final NEPA review. Since the issuance of a construction permit is dependent on the outcome of the NEPA process, it follows that no construction exemption can be given to applicant prior to receipt of a construction permit.

Very truly yours
REILLY, LIKE & SCHNEIDER


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IL:mc

cc.
ASLB members
Secretary
All counsel of record