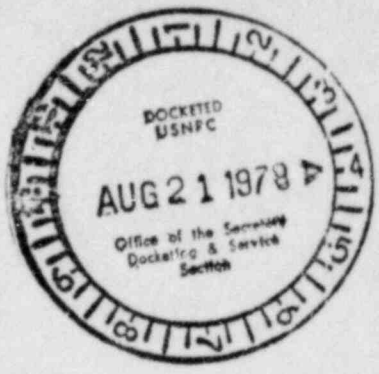

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	
	)	

OPPOSITION OF CONSUMERS POWER COMPANY
TO MOTION TO SUSPEND CONSTRUCTION

On August 2, 1978 All Intervenors other than The Dow Chemical Company ("Intervenors") moved this Atomic Safety and Licensing Board ("Licensing Board") to promptly direct Consumers Power Company ("Consumers Power" or "Licensee") to halt further construction of the Midland Plant. That motion was prompted by the recently executed renegotiated contracts between Consumers Power and The Dow Chemical Company ("Dow"). For the reasons set forth below, Consumers Power opposes the motion to suspend construction.

I. THIS LICENSING BOARD LACKS JURISDICTION TO GRANT THE RELIEF REQUESTED BY INTERVENORS

As the complex history of the Midland Plant proceedings has been set forth at length in previous pleadings and decisions, it will not be repeated here. The salient points to be kept in mind are, first, that the United States

Supreme Court on April 3, 1978 reversed the Court of Appeals' decision in Aeschliman v. Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976), which had caused the Nuclear Regulatory Commission (the "NRC" or the "Commission") to direct this Licensing Board to hold hearings on various issues related to the construction permits for the Midland Plant. Second, by Order dated April 10, 1978 the Commission requested that the parties state their views as to what issues, if any, remain for further NRC consideration in light of the Supreme Court's decision. All parties except Dow submitted briefs on that question, which is now awaiting determination by the NRC.

In view of the procedural posture of this case, Intervenors have brought their motion to the wrong tribunal. As the suspension hearings have long been concluded and there are no other proceedings pending before this Licensing Board, there is no authority for the Licensing Board to suspend construction of the Midland Plant or to take any other action regarding Licensee. See Houston Lighting and Power Company (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582 (1977). Rather, the Commission is now vested with jurisdiction over whatever remains of the construction permit proceeding by virtue of its April 10, 1978 Order, and it is to that body that Intervenors should have presented their motion.

Despite the fact that Intervenors' motion must be denied on jurisdictional grounds, Licensee will address the substance of that pleading to demonstrate that the motion lacks any merit and would not be granted even if it were before the proper tribunal.

II. INTERVENORS HAVE NOT PRESENTED ANY ARGUMENT WHICH WOULD JUSTIFY SUSPENDING CONSTRUCTION OR REOPENING THE RECORD

Intervenors have moved "to halt all further construction of the Midland nuclear plant pending further inquiry into the terms of and circumstances surrounding the revised Consumers-Dow contract of which a copy was transmitted to the Commission under date of June 26, 1978." This is essentially an attempt to reopen the evidentiary record of the 1976-77 suspension hearing on the issue of the Dow-Consumers Power contractual relationship. For several reasons, which Licensee will discuss below, such an attempt is doomed to failure.

A. The Commission Has the Necessary Information

Consumers Power has already provided the Commission with copies of the recently signed renegotiated contracts between Licensee and Dow. Thus, the NRC now possesses all the information required and there is no need to reopen the record for further inquiry.

Intervenors, however, have relied upon this fact to create a false impression. The motion states, in reference

to the fact that Licensee transmitted copies of the renegotiated contracts to the Commission, that "Intervenors agree with Consumers that the Dow issue continues to be vitally important in this case." This is most certainly not the position of Consumers Power. Rather, Licensee's transmittal letter of June 26, 1978 sets forth the history of the Midland Plant construction permit proceedings and notes that the question of what issues, if any, remain for further consideration in light of the Supreme Court's decision is presently before the Commission. It was in this context that Licensee stated that the Commission should be aware of the recently renegotiated contracts between Consumers Power and Dow.

As this Licensing Board is aware, parties to NRC proceedings have an affirmative duty to keep the appropriate tribunal, and other parties, abreast of changing circumstances which bear on their cases. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976) and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623 (1973). Because of this obligation Consumers Power transmitted copies of the contracts to the Commission and to everyone on the service lists of both the construction permit and operating license proceedings. This action in no way negated or altered the position of Consumers Power, as expressed in its April 24, 1978 brief to the Commission, that "nothing remains

to be considered regarding the Dow-Consumers Power contractual relationship," Licensee Brief at 19.

B. There is No Significant Issue Requiring Reopening the Record

Intervenors have not even attempted to allege the type of facts necessary to justify reopening the record in the suspension proceeding, for Commission precedent is clear that that is an unusual step. Decisions by the Atomic Safety and Licensing Appeal Board ("Appeal Board") have established that the proponent of a motion to reopen the record has a heavy burden, and that the motion must be both timely presented and addressed to a significant safety or environmental issue. Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 332 (1978); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-167, 6 AEC 1151, 1152 (1973); Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). In addition, it must be established that a different result would have been reached initially had the new information been considered. Wolf Creek, supra; Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

Not only have Intervenors failed to come forward with this type of a showing, but it should also be noted that the question of the Dow-Consumers Power relationship

does not involve a safety issue, and as the Appeal Board pointed out in its February 1978 decision concerning the Midland Plant, no environmental or NEPA issue is presented by the Dow-Consumers Power situation. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 167 (1978) (hereinafter "Midland Plant").

Turning to the substance of Intervenors' argument, it quickly becomes apparent that their assertions regarding the renegotiated contracts are without merit and that nothing in those contracts justifies reopening the record of the suspension proceeding. First, the fact that Dow has culminated months of negotiations by executing the new contracts is proof that that company continues to be vitally interested in participating in the Midland Plant, for businessmen do not enter into such complex and important agreements lightly. The Appeal Board, in assessing Dow's intentions regarding the former contracts in a February 1978 decision, found that "extensive probing on this point at the suspension hearing yielded convincing evidence that Dow's present intention is to adhere to the contract's terms." Furthermore, as the Appeal Board stated, "[w]e must take Dow's present intention as controlling . . . .," Midland Plant, ALAB-458, 7 NRC at 167 n.45, 168. To find that Dow's current intentions, as to contracts which were executed less than two months ago and which resolved the parties' many disputes, is somehow "speculative" when the Appeal Board has already determined that

Dow intended to honor the old contracts, would be patently ludicrous.

Intervenors rely heavily on the fact that the new contracts give Dow the option of terminating its participation in the Midland Plant to bolster their argument that Dow's participation is "speculative." This theory is erroneous in two respects. First, while it is true that Dow may withdraw from the project under several different conditions, it is equally true that the contract requires Dow to pay a substantial sum of money (an amount totalling millions of dollars) to Consumers Power in order to terminate.

The practical result of that fact is that Dow would not terminate its participation in the Midland Plant except for the most drastic of reasons. Including a termination provision in a contract does not indicate that the parties lack confidence in either each other or the venture itself. Instead, it is the act of rational businessmen who attempt to provide in their contracts for contingencies that may occur, even if remote.

Intervenors also ignore the fact that the previous Dow-Consumers Power contracts, executed in December 1967 and January 1974, also contained provisions which enabled Dow to withdraw from the project. Although the withdrawal provisions are different in the 1967, 1974 and 1978 contracts, the important fact is that each of those contracts did contain terms allowing Dow to cease its participation in the Midland

Plant. The Commission reviewed the 1974 contracts, which included withdrawal provisions, and concluded that there were no changed circumstances which warranted reopening the construction permit proceedings. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-15, 7 AEC 311 (1974).

A final area in which Intervenors err in their analysis of the Dow-Consumers Power contractual relationship concerns the emphasis which the motion places upon whether the contracts are economically advantageous to Dow. Once again, Intervenors have chosen to ignore a decision directly on point which runs counter to their theories. The Appeal Board disposed of this economic argument once and for all when it held that economic analysis had no place in a NEPA cost-benefit analysis of the Midland Plant once it had been established that the nuclear plant was the environmentally-preferable alternative. As the Appeal Board stated in its February 14, 1978 decision:

> At the suspension hearing and in that Board's decision, extraordinary attention was paid to the relative financial costs of various alternatives. But there was no serious suggestion that any of those alternatives was preferable to Midland from an environmental standpoint. . . .
>
> This being so, we do not perceive that financial matters are as crucial as the Board below thought they were. Unless the proposed nuclear plant has environmental disadvantages in comparison to possible alternatives, differences in financial cost are of little concern to us. . . . Midland Plant, ALAB-458, 7 NRC at 161-62.

Furthermore, the Appeal Board made specific reference to the question of the economics of the Midland Plant from Dow's perspective when it commented:

> Whether or not it is in Dow's best financial interests to honor its contract is not for us but for Dow to determine. Midland Plant, ALAB-458, 7 NRC at 168.

It must be remembered that the Appeal Board's decision is the "law of the case" for any further proceedings regarding the construction permits.* Therefore, Intervenors' argument regarding the economics of the Midland Plant is without merit.

In addition to the fact that Intervenors have not demonstrated that there is any justification for suspending construction and reopening the record, Intervenors have ignored a strong reason for not doing so. The Supreme Court's April 3, 1978 opinion in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, which essentially upheld the 1972 grant of construction permits for the Midland Plant, has resolved the Dow question. In reference to the brief statement in Aeschliman concerning

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* "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be an end of the matter." U.S. v. United States Smelting Refin. & M. Co., 339 U.S. 186, 198 (1950). This doctrine has been held to have a "rightful and reasonable application to the workings of administrative agencies," Retail Clerks Union v. NLRB, 463 F.2d 316, 322 (D.C.Cir. 1972).

Dow,** the Supreme Court found that this was not an independent basis for remanding the grant of the construction permits and, furthermore, that the Commission had reconsidered the "changed circumstances" and had refused to reopen the proceedings on that ground. The Commission's actions in this regard were approved by the Court, which disposed of the Dow topic in a footnote, Vermont Yankee, slip op. at 33 n. 22. Because the Dow-Consumers Power relationship has already been considered at levels from the Commission to the United States Supreme Court, and because the NRC already has copies of the renegotiated contracts, there is no need to order a re-examination.

Finally, much of Intervenors' argument that construction of the Midland Plant should be suspended is based upon the fact that the Commission ordered a suspension of construction activities at another nuclear facility in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-__, 7 NRC ___ (June 30, 1978).** The Seabrook decision is totally inapplicable, however, for there the Commission ordered a suspension while the still

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* "As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities." 547 F.2d at 632 (footnote omitted).

** The commission lifted the suspension by an Order dated August 10, 1978.

uncompleted construction permit proceedings were remanded to correct various deficiencies in the comparison of alternatives mandated by NEPA.

The grant of construction permits for the Midland Plant, on the other hand, was approved by an Appeal Board, became the final action of the Commission when that body declined to review the decision, and was upheld by the United States Supreme Court. Thus, there has been a valid assessment of alternatives under NEPA for the Midland Plant. Furthermore, the Dow question is not an NEPA issue. Therefore, comparison of the proceedings regarding Midland Plant and Seabrook Station indicates that Intervenors have both misread and misapplied the Commission's decision in the latter case in a vain attempt to support an argument that is without merit.

CONCLUSION

In summary, Consumers Power believes that this Licensing Board is without jurisdiction to grant the relief sought by Intervenors. However, even if the motion were before the appropriate tribunal it would have to be denied for the reasons set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "OPPOSITION OF CONSUMERS POWER COMPANY TO MOTION TO SUSPEND CONSTRUCTION" in the above-captioned proceeding, have been served on the following parties by United States Mail, first-class postage prepaid, this 17th day of August, 1978:

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