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USNRC

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION <sup>81</sup> NOV 30 P2:26

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

SECRETARY  
OF SERVICE  
BRANCH

IN THE MATTER OF	)	
	)	Docket Nos. 50-329-OL
CONSUMER POWER COMPANY	)	50-330-OL
(Midland Plant, Units 1	)	50-329-OM
and 2)	)	50-330-OM

CONSUMERS POWER'S RESPONSE TO  
INTERVENOR'S NOVEMBER 16, 1981 AND  
NOVEMBER 17, 1981 REQUESTS FOR ADMISSIONS  
OF THE GENUINENESS AND AUTHENTICITY OF DOCUMENTS

Consumers Power Company ("Consumers Power"), pursuant to 10 C.F.R. §2.742(b), hereby objects to Intervenor Barbara Stamiris' November 16, 1981 Request for Admission of the Genuineness and Authenticity of Documents ("November 16, Request") and her November 17, 1981 Request of the NRC for Admission of Genuineness and Authenticity of Documents ("November 17 Request").

I.

BACKGROUND

These requests are Ms. Stamiris' fourth and fifth discovery motions since September, 1981. <sup>1/</sup> The November 16 Request asserts that five documents contradict the testimony of Consumers Power witnesses Gilbert Keeley and Stephen

1/ Ms. Stamiris has made discovery requests on September 28, 1981, October 23, 1981, and November 11, 1981.

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Howell. <sup>2/</sup> It demands that Consumers Power admit that (1) the five documents are genuine and (2) that these documents demonstrate that the "application of the surcharge was begun prior to January 26, 1979." All of the documents were available to Ms. Stamiris well before the start of the hearings in July 1981. <sup>3/</sup>

The November 16 Request goes on to "promise" that this will be the last "admission" request made by Ms. Stamiris. After the November 16 Request "she will consider it her burden to attempt to reopen this portion of the proceedings" if she wishes to enter anymore evidence.

Despite this promise on November 17, 1981, Ms. Stamiris filed a request on the NRC to admit the authenticity of its October, 1981 inspection report of Midland.

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<sup>2/</sup> These documents are: (1) Table 21A-2 from Consumers Power Response to NRC 10 CFR §50.54(f) Question 21 which states that the actual decision to use the preload option was made on December 15, 1978 (Attachment to the November 16 Request); (2) Table 21B-1 from the same Consumers Power Response to Question 21, which was an estimate of the schedule for plant construction using the preload option (Attachment B to the November 16 Request); (3) a graph (Figure 49) recording "the average surcharge in pounds/square feet" (Attachment C to the November 16 Request); (4) an outline of the grade levels of the preload plan at the diesel generator building as of February 15, 1979 (Attachment D of the November 16 Request); and (5) a graph of "the Average Diesel Generator Building Pedestal Settlement" which contains a dotted line at "November 1978", noted as "the Surcharge Line" (Attachment E of the November 16 Request).

<sup>3/</sup> In fact Ms. Stamiris introduced part of Consumers Power's Response to Question 21 at the hearings (Stamiris Exhibit 17). It was her decision not to introduce the Tables (Attachments A and B) at that time.

Evidentiary hearings were held in July, August, and October, 1981. In these hearings the NRC Staff, Intervenor and Consumers Power completed their presentations on all quality assurance aspects of the "Order Modifying Construction Permits," dated December 6, 1979, all managerial attitude issues raised in Ms. Stamiris' contentions 1(a), 1(b) and 3 and the examples outlined in her Answers to Interrogatories filed April 20, 1981.

During these hearings the following evidence was adduced. Both the NRC Staff and Consumers Power witnesses agreed that the preload option was considered by Consumers Power in November, 1978. <sup>4/</sup> Part of this consideration involved the preparation of the area to be surcharged so that if the preload option was chosen the surcharge could proceed. <sup>5/</sup> The preparation for the surcharge consisted of the installation of piezometers and other instruments for

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<sup>4/</sup> Kane, NRC Staff prepared testimony in response to Stamiris Contention No. 2 at p. 21, following Tr. 2530; Keeley, prepared testimony at pp. 9-10, following Tr. 1163.

<sup>5/</sup> Stamiris Exhibit 13, a letter from Bechtel to Consumers Power dated November 1, 1978 noted:

Recognizing that there will be some interval between obtaining the consultants' recommendation and embarking on whatever plan is ultimately approved, ...we outlined our plan for...preparation for the possible surcharging of the building area."

The letter goes on to describe the preparations as installation of instruments for monitoring settlement and the placement of a layer of sand in the building for frost protection.

monitoring the building settlement and the placement of a two to three foot layer of sand in and around the building for frost protection. 6/ The NRC Staff was kept fully informed of these preparation activities. 7/

The actual decision to use the surcharge was made in December, 1978. 8/ The NRC Staff was formally informed of the decision on January 5, 1979. 9/

The sequence of loading for the surcharge was described by the consultants in November, 1978. 10/ The initial 10 feet of fill was to be placed in and around the building; readings of the instruments should be taken for two weeks; another 10 to 20 feet of fill should then be placed. 11/ This sequence, begun on January 26, 1979, was

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6/ Keeley prepared testimony pp. 8-10, following Tr. 1163; Howell, Tr. 2885-2892; Stamiris Exhibit 1 (November 2, 1978 meeting noting need for frost protection layer and instrument monitoring); Stamiris Exhibit 7 December 4, 1978 meeting with NRC noting surcharge preparation activities); Stamiris Exhibit 10 (October 18, 1979 meeting re instrument placement and frost protection layer); Stamiris Exhibit 13 (Bechtel letter outlining surcharge preparation dated November, 1978.).

7/ Stamiris Exhibit 7 (notes from December 4, 1978 meeting with NRC Staff, Consumers Power, Bechtel and Bechtel consultants) at 4.

8/ Keeley, Tr. 1243.

9/ Howell, prepared testimony Attachment 6, following Tr. 2802 (January 5, 1979 letter to NRC) (letter also describes surcharge preparation activities including the placement of the frost protection).

10/ Stamiris Exhibit 16 at p. 5 (November 1978 consultant meeting).

11/ Id.

followed. <sup>12/</sup>

At the hearing Ms. Stamiris attempted to make Mr. Howell admit that Consumers Power actually started its "preload remediation [sic] plan" when it began the preload preparations in October and November, 1978. <sup>13/</sup> Mr. Howell refused to admit this:

- A. The answer to that question is no. I think we're dancing around something that I believe was covered in Mr. Keeley's testimony, that if I remember correctly that there were some actions taken to move forward on moving and acquiring instrumentation before the final decision was made of preload or not preload, and to me that action is not an improper or an inconsistent one with good management.

It is a prudent thing to do, perhaps, to have some contingency plans or to proceed down the two paths in parallel until further information is gathered, if that's what you're getting at. That's my position.

- Q. Do you believe that -- would you agree with my characterization, then, that the preload plan had been adopted for all practical purposes sometime in October with the qualifications that you just gave?

- A. No, I would not. I think I just said why. <sup>14/</sup>

On October 2, 1981, the Atomic Safety and Licensing Board, in its Memorandum (Concerning Telephone Conference Call September 25, 1981 and Applicant's Motion for Partial Decision) closed the record and granted permission to all

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<sup>12/</sup> Keeley prepared testimony at pp. 8-10, following Tr. 1163.

<sup>13/</sup> Stamiris Tr. 2885.

<sup>14/</sup> Howell, Tr. 2885-86

parties to file proposed findings of fact and conclusions of law on these issues. For the reasons set forth below Consumers Power objects to Ms. Stamiris' requests in their entirety.

## II.

### DISCUSSION

- A. The documents in November 16 Request are cumulative and do not contradict any evidence already in the record.

The requests for admission in Stamiris' November 16 Request are cumulative and do not contradict any evidence in the record. The record, as noted, contains all the relevant information concerning the preload preparations. <sup>15/</sup> The only purpose of the motion is to demonstrate, through use of the "surcharge" labels in Attachment C and E, that the preload started before January, 1979. This is also "cumulative." Ms. Stamiris attempted this exact admission -- also based on the preload preparations -- at the hearings in August, 1981. Through Stephen Howell, Consumers Power made its position clear that at the time of the preparations

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<sup>15/</sup> Attachment A states Consumers Power made the decision to use the preload option on December 15, 1978, this agrees with Mr. Keeley's testimony. Attachments C and E show that the instruments placed in October, 1978 were monitoring the effect of the sand placed as frost protection. However, by definition of the consultants, the preload application did not begin until fill totalling 10 feet was begun to be placed. Both graphs in Attachments C and E show the increase in fill beginning in late January, 1979. Attachment B is an estimate of the preload schedule effect and Attachment D is a plan of the diesel generator building grade levels as of February, 1979. It is unclear how either of these documents are relevant.

Consumers Power was not starting the surcharge. Indeed, all the documents in evidence discussing the preload preparations and all the testimony concerning them make it clear that the instrumentation and fill placements in November, 1978 were not the start of the preload but merely preparatory. <sup>16/</sup>

The documents which are the subject of the November 16 Request merely reflect that Consumers Power continually monitored the frost layer load placed on the diesel generator building in November, 1978. When the loading sequence of the surcharge actually began in January, that frost protection layer became part of the preload: the surcharge preparations were incorporated into the surcharge program.

None of this contradicts the evidence already in the record. The answer given by Mr. Howell to Ms. Stamiris on August 4, 1981 remains unchanged. The preload program was not "adopted" or "started" in October or November, 1978, "with qualifications." It commenced, when Mr. Keeley stated it commenced, on January 26, 1979, when the loading sequence to 10 feet of fill began.

- B. Both the November 16 and November 17 Requests are untimely and improper.

As noted in all of Consumers Power's previous responses to Ms. Stamiris' discovery motions, discovery in this proceeding has been long over. There is an explicit

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<sup>16/</sup> See, supra, footnote 6, page 4.

Protective Order forbidding any further discovery. As such both Requests are untimely and must be denied.

Further, the Requests are an improper use of discovery. Ms. Stamiris intends to use these documents in her findings of fact. Section 2.754(c) of the NRC Regulations states that findings of fact are confined to that which has already been "presented on the record." The record in this case, for the issues involved in the initial findings of fact, is closed. Admitting the authenticity of the documents does not include them in the record. 10 CFR Part 2, Appendix A, V(e)(1). Therefore, they could not be used in the finding of fact.

C. Ms. Stamiris has not made the proper showing to reopen the record.

In her November 16 Request, Ms. Stamiris "promises" that she won't make another request if this one is granted. <sup>17/</sup> She claimed that in the future, were she to make another request, she would make it her "burden" to reopen the record. This misstates the law: it is her burden now to reopen the record. To do so she must make a showing that there is "significant new evidence not included in the record, that materially affects [or could affect] the decision." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362-63 (1981).

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<sup>17/</sup> Of course, the very next day, without any showing of relevancy and without any motion to reopen the record, Ms. Stamiris made another request.

The documents in the November 16 Request are hardly "new evidence." They were available long before the hearings began. More fundamentally, even if they were admitted they would not and could not materially affect the decision. Consumers Power never concealed, from anyone, that in November, 1978 two to three feet of fill was placed in the diesel generator building. Nor did it hide the fact that this preparatory fill became part of the preload when the preload began in January, 1979. That sometime after the preload began, on some charts, the preload preparations are labeled as "surcharge" activities does not mean that Consumers Power hastily and irrevocably opted to use the preload in November, 1978.

The document of the November 17 Request -- the October 1981 NRC Inspection Report -- does qualify as "new evidence". However, Ms. Stamiris has not even attempted to articulate its relevancy. Indeed, it would be difficult to articulate any. It reports on a routine inspection of electrical installation activities at the Midland Plant. This in no way relates to the subjects of this hearing -- soils placement, quality assurance and managerial attitude.

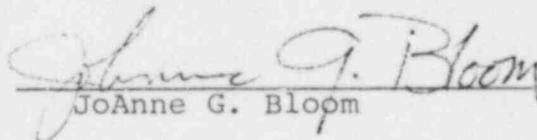
### III.

#### CONCLUSION

Ms. Stariris' November 16 and November 17 Requests for Admission of the Genuiness and Authenticity of Docu-

ments must be denied for the above reasons.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I, JoAnne G. Bloom, hereby certify that a copy of Consumers Power's Response to Intervenor's November 16, 1981 and November 17, 1981 Requests for admissions of the Genuiness and Authenticity of Documents was served upon all persons shown in the attached service list by deposit in the United States mail, first class, excluding where marked by an asterisk, in which case service was by Federal Express, this twenty fourth day of November, 1981.

*JoAnne G. Bloom*  
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