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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
(Midland Plant, Units 1 and 2)		50-330

BRIEF OF CONSUMERS POWER COMPANY
IN RESPONSE TO THE ATOMIC SAFETY AND
LICENSING BOARD ORDER OF NOVEMBER 13, 1978

The Atomic Safety and Licensing Board ("Licensing Board") designated to rule upon intervention petitions and to preside over the evidentiary hearings related to the operating license proceedings for the Midland Plant, Units 1 and 2, issued a Memorandum and Order on November 13, 1978, requesting that the parties set forth their positions with respect to certain matters. In response to that Order, Consumers Power Company ("Consumers Power" or "Licensee") submits this brief which presents the answer of Consumers Power to the supplemental contentions of Mary P. Sinclair and Wendell H. Marshall and discusses the possible effect upon this proceeding of the November 6, 1978 Memorandum and Order of the Nuclear Regulatory Commission (the "NRC" or the "Commission") in the Midland Plant construction permit proceedings.

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I. SUPPLEMENTAL CONTENTIONS OF MARY P. SINCLAIR

By petition filed on June 5, 1978, Mary P. Sinclair requested a hearing and leave to intervene in the operating license proceedings for the Midland Plant on behalf of the Saginaw Valley Nuclear Study Group ("Saginaw"). The Licensing Board ordered a hearing on the application for operating licenses and admitted Mary Sinclair as a party to the proceeding; Saginaw was denied admission. The contentions contained in Ms. Sinclair's petition to intervene were not evaluated by the Licensing Board in its August 14, 1978 Memorandum and Order, however, for the Licensing Board stated that it was premature to rule upon the adequacy of the contentions as issues in controversy at that time. Pursuant to the provisions of 10 C.F.R. §2.714, Ms. Sinclair was permitted to amend or supplement her contentions on or before 15 days prior to the prehearing conference. Accordingly, Ms. Sinclair submitted supplemental contentions on October 31, 1978, which are "in some instances amendments of, and in other instances additions to," the June 5 petition.

Consumers Power has evaluated the supplemental contentions and has determined that certain of them are not admissible in this proceeding. The bases supporting this conclusion for each inadmissible contention will be set forth individually. Some of Ms. Sinclair's contentions do specify matters which may properly be litigated in this proceeding.

It is not appropriate for Consumers Power to respond to the merits of those contentions at this time; thus, silence on that subject should not be taken to indicate agreement with any of the allegations in those contentions. Furthermore, Consumers Power intends to move for summary disposition with regard to certain matters raised by Ms. Sinclair, as provided in 10 C.F.R. §2.749, at a later stage of these proceedings.

A. Legal Standards To Be Used In Evaluating The Sufficiency of Ms. Sinclair's Contentions

Before a judgment can be made as to which of Ms. Sinclair's supplemental contentions are admissible and which are not, the legal standards employed by NRC tribunals in evaluating contentions must be reviewed. The Commission's recently amended Rules of Practice provide that a petitioner shall file a supplement to his original petition to intervene setting forth "a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity." 10 C.F.R. §2.714(b). This requirement that the bases for contentions be set forth with specificity was carried over from the previous version of §2.714; thus, cases decided under the old rule are applicable to this proceeding.

Contentions which fail to provide the necessary specificity and factual bases required by §2.714 have never met with favor from Licensing Boards. In Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2),

LBP-76-10, 3 NRC 209, 212 (1976), general allegations which contained opinions about the safety of nuclear power plants were rejected, and the Licensing Board went on to quote from an Atomic Safety and Licensing Appeal Board ("Appeal Board") opinion on this subject:

> If facts pertaining to the licensing of a particular nuclear power plant are at issue, an adjudicatory proceeding is the right forum. But if someone wants to advance generalizations regarding his particular views of what applicable policies ought to be a role other than as a party to a trial-type hearing should be chosen. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2) ALAB-128, 6 AEC 399, 401 (1973).

Another Licensing Board decision which demonstrates how contentions are judged under the specificity requirement is Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-77-48, 6 NRC 249 (1977). In that case, the Licensing Board ruled that numerous contentions were inadmissible because they were conclusional, unparticularized and failed to provide the necessary specificity and factual bases as required by the Rules of Practice. The opinion went on to point out that:

> Contentions which are barren and unfocused are of no assistance to us in the resolution of the issues to be decided. See BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (1974). 6 NRC 249, 251.

In addition to those contentions which were denied admission because there were vague and unspecific, the Licensing Board ruled that another contention was inadmissible because it was "pure argument" and did not qualify as a contention, 6 NRC 249, 255.

A Licensing Board again faced the problem of unspecific contentions in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-50, 6 NRC 261 (1977). None of the petitioner's 117 contentions was found to be admissible as stated, for the petitioner had not set forth the bases for his contentions with particularity. Many of the contentions were challenges to the Commission's rules or dealt with generic issues which were not proper subjects of an operating license proceeding, and many were held to be "vague and/or nonspecific." 6 NRC 261, 264.

It is interesting to note that the Licensing Board in Shoreham made the following comment with reference to the inadequacy of the contentions:

> Section 2.714(a) clearly puts the onus on the petitioner to identify the contentions on which it wishes to intervene and set forth the basis of each contention. This is not too great a burden especially on this petitioner which had appeared in another NRC proceeding or Special Counsel who likewise is experienced in NRC proceedings. As the matter now stands neither the Applicant nor Staff are adequately apprised of the issues that petitioner seeks to raise. 6 NRC 261, 264.

That statement is particularly pertinent in evaluating the supplemental contentions of Ms. Sinclair, for she is represented by an attorney who has participated in many NRC proceedings over the years.

B. The Following Supplemental Contentions Submitted by Ms. Sinclair are Inadmissible

Contentions 1 and 2

These contentions seek to put into issue the competency of the NRC Staff with respect to the performance of its technical and managerial tasks related to the Midland Plant. This is a prime example of an attempt by Intervenor Sinclair to bring into this proceeding a "non-issue," for there can be no justification for turning the operating license proceeding for the Midland Plant into an investigation into the procedures, practices and general ability of the NRC Staff. The two findings mentioned in contentions 1 and 2 which must be made by this Licensing Board before an operating license may be issued, 10 C.F.R. §§50.57(a)(2) and 50.57(a)(3)(i), do not require that the Licensing Board make any such investigation.

Furthermore, the two reports cited in contention 1 cannot turn the vague topic of the NRC Staff's competency into an issue in this proceeding. The first report mentioned is a five-year old study of the licensing process which does not merit any comment, and the other is a recent General Accounting Office ("GAO") report which recommends certain

changes in the NRC's procedures for inspecting nuclear plants under construction. The fact that the GAO believes that improvements could be made in the inspection process (some of which have already been implemented by the Commission) does not create a new issue for this operating license proceeding.

Ms. Sinclair seeks to bolster the argument in contentions 1 and 2 that the competency of the NRC Staff is a litigable issue by alleging that Consumers Power will not comply with Commission rules and regulations without constant monitoring by the NRC Staff. However, Ms. Sinclair supports the allegation by referring to an Appeal Board decision from 1973. This ignores the fact that the quality assurance and quality control programs of Consumers Power have subsequently been closely reviewed and approved by a Licensing Board and an Appeal Board, Consumers Power Company (Midland Plant, Units 1 and 2), LBP-74-71, 8 AEC 584 (1974), affirmed, ALAB-283, 2 NRC 11 (1975), clarified, ALAB-315, 3 NRC 101 (1976). In addition, the inspection reports referenced by Intervenor Sinclair merely demonstrate that the Commission's inspection and enforcement procedures are working properly--they do not provide a basis for investigating the NRC Staff's competency. Indeed, Ms. Sinclair's citations to a string of inspection reports itself refutes any insinuation that the NRC Staff is not being diligent in inspecting Consumers Power's compliance with all regulatory standards. These inspection

reports cover a wide variety of asserted non-conformance with regulatory standards, all of which must be resolved to the satisfaction of the NRC Staff. In addition, inspections will continue after the Midland Plant is in operation.

In summary, contentions 1 and 2 are inadmissible because they attempt to raise a subject, the competency of the NRC Staff, which is not a proper issue at an operating license proceeding. The Licensing Board is not required to make a finding concerning that subject, and the contentions do not set forth any reasons with the requisite specificity which would justify making the competency of the NRC Staff an issue.

Contention 4

This contention is inadmissible because it is nothing more than a generalized attack on the use of nuclear power because of alleged unresolved safety problems. While Consumers Power acknowledges that certain of the NRC's Task Action Plans do provide the basis for admissible contentions in this proceeding, the bald statement that the Midland Plant cannot be licensed because there exist 133 unresolved generic issues in the nuclear industry, not all of which even apply to pressurized water reactors such as the ones for which operating licenses are sought here, does not set forth a viable contention. To say that the findings required by 10 C.F.R. §§50.57(1), 50.57(2) and 50.57(3)(ii) cannot be made on account of those 133 unresolved generic issues is hardly specific enough to meet the NRC's pleading requirements.

Contention 4 is an example of the type of conclusional and unspecific statements ruled inadmissible in Offshore Power Systems and Shoreham, supra. Especially in view of the fact that other of the supplemental contentions submitted by Ms. Sinclair do set forth acceptable contentions concerning specific Task Action Plans, there is no reason to burden this proceeding with such a broadside attack on the nuclear industry.

Contention 5

Contention 5 is similar to contentions 1 and 2 in that it seeks to litigate a non-issue, this time the alleged lack of independent inquiry conducted by the NRC Staff. Once again it is clear that this type of rambling and generalized attack upon the abilities of the NRC Staff falls far short of the specific and supported statement necessary to set forth an admissible contention.

As part of this contention Ms. Sinclair refers to the attorney conduct question which arose out of the suspension hearings in the Midland Plant proceedings. Since Ms. Sinclair filed the supplemental contentions, however, the Commission issued a Memorandum and Order on November 6, 1978, which states that this question should be explored by the Licensing Board in the reopened construction permit proceeding along with the radon issue. Since the attorney conduct issue is soon to be resolved by another NRC tribunal,

at the express direction of the Commission, it would not be appropriate to explore that topic in the operating license proceeding. Because none of the findings which this Licensing Board must make before an operating license may be issued are affected by the vague criticism of the NRC Staff's independence, there is no basis for admitting contention 5 as an issue in this hearing.

Contentions 6 and 7

These contentions attempt to put into issue, through innuendos and vague allegations, the issue of Consumers Power's conformance with quality assurance requirements. However, these contentions fail to set forth viable issues because they lack the specificity and factual bases required of contentions by Licensing Boards.

Contention 7 also refers to the nonconformance reports mentioned in contention 1 as an example of Consumers Power's so-called tendency to argue with the NRC Staff and make excuses rather than attempt to correct violations. That statement demonstrates clearly that Ms. Sinclair does not understand the system she is criticizing, for the reports she refers to were written from Bechtel to Consumers Power, not to the NRC Staff. Furthermore, the nonconformance reports and the IE Inspection Reports demonstrate that the quality assurance and quality control systems of Consumers Power and the inpection practices of the NRC are working properly, they do not indicate that any problems exist which warrant exploration by a Licensing Board.

In connection with quality assurance and quality control, contention 7 alleges that "[i]t also appears that documents may have been 'doctored' in connection with welding certifications at the Midland site." As this is the only statement in contention 7 which approaches the standard of specificity required of contentions, if quality assurance and quality control is admitted as an issue in this proceeding, that issue should be limited to the question of welding certifications.

Another topic which contention 7 attempts to bring into the operating license hearing is the attorney conduct issue previously discussed in Consumers Power's response to contention 5. That topic is not a proper issue in this proceeding for the reasons set forth in that response.

In summary, there is nothing in contentions 6 and 7 which set forth the bases for a contention with the specificity required to state a litigable issue in this proceeding.

Contention 8

In this contention, Ms. Sinclair attempts to revive an issue which has been put to rest by the United States Supreme Court and the Commission. It is true that the 1970 ACRS letter relating to the Midland Plant was criticized by the Court of Appeals in Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976). However, subsequent to the Licensing and Appeal Board decisions in the Midland Plant suspension hearings, relied upon in contention 8, the Supreme

Court reversed the Aeschliman decision on the issue of the ACRS letter, Vermont Yankee Nuclear Power Corp. v. NRDC, 98 S. Ct. 1197 (1978). On November 6, 1978, the Commission issued a Memorandum and Order which held that, in view of Vermont Yankee and the fact that a Supplement to the Safety Evaluation Report had been issued which covered the items raised by the ACRS letter, no issue remained for consideration by the Licensing Board conducting the construction permit proceedings. Thus the Appeal Board's instructions that the ACRS matter be considered were vacated by the Commission. (Commission Order at 5-6)

The Order did go on to state that unresolved safety issues could be considered at the operating license proceeding. Nothing in contention 8 properly raised those issues, however, for merely mentioning the phrase "unresolved safety issues" does not set forth a safety question with sufficient specificity to create an issue in this proceeding. Clearly, it is time that the 1970 ACRS letter for the Midland Plant was set aside for once and all. A new ACRS letter for the operating license proceeding will be issued next year. At that time, parties may submit supplemental contentions if new issues are raised by the 1979 ACRS letter. Those contentions, of course, must satisfy the requirements of 10 C.F.R. §2.714(a)(3).

Contention 9

This contention seeks to bring into the operating license proceeding as a litigable issue the question of the participation in the Midland Plant of The Dow Chemical Company ("Dow"). The Midland Plant is a dual-purpose facility, for it will produce both electricity and process steam. Dow will purchase process steam from the nuclear plant and electricity from the Consumers Power system. However, Ms. Sinclair has not demonstrated a sufficient reason to justify investigating Dow's participation in the Midland Plant at the operating license proceeding, in view of several facts.

First, this matter was thoroughly ventilated at the 1976-77 suspension hearings involving the Midland Plant. The Appeal Board, in its decision resulting from those hearings, assessed Dow's intentions regarding the contracts then in effect between Dow and Consumers Power and 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. . . .," Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 167 n. 45, 168 (1978).

Secondly, since that time Dow and Consumers Power have culminated months of negotiations by executing new contracts for process steam and electricity in June 1978. Ms. Sinclair attempts to use this fact to show that Dow's participation is somehow speculative. This ignores reality, however, for businessmen do not enter into such complex and important agreements lightly. Furthermore, to find that Dow's current intentions, as to contracts which were executed less than six 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.

Lastly, in its Memorandum and Order of November 6, 1978, the Commission stated that:

> No issue remains in the matter of Dow's need for process steam. The Supreme Court noted that the Commission, after consideration of changed circumstances, had properly refused to reopen the proceeding on this matter. In addition, the Appeal Board found that Dow presently intends to live up to its contract. Order at 5 (footnotes omitted).

Ms. Sinclair also relies heavily on the fact that the new contracts give Dow the option of terminating its participation in the Midland Plant to bolster her 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 con-

ditions, 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.

The argument in contention 9 also ignores 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).

Another argument presented in contention 9 to justify examining the Dow question in this proceeding is

that the new contracts give Dow "favorable" rates for electricity and steam, rates which have not yet been approved by the Michigan Public Service Commission. To state this argument is to reveal its flaw, however, for the fact is that Dow will be charged for steam and electricity at whatever rates are set by the Michigan Public Service Commission. Therefore, the question of the rates to be charged Dow is not a litigable issue in this proceeding.

For all of the reasons set forth above, Ms. Sinclair has not presented a viable issue in contention 9; Dow's participation cannot be litigated in the operating license hearing.

Contention 10

The thrust of contention 10 is that the Midland Plant cannot be justified economically and cannot, therefore, survive the cost-benefit analysis required by 10 C.F.R. §51.20(b) and 51.21.* This contention does not state a viable issue for the simple reason that it misapprehends the nature of the cost-benefit balance demanded by the National Environmental Policy Act ("NEPA"). Contrary to Ms. Sinclair's theory, economics, in the sense that term is used in contention 9, does not play a role in the cost-benefit balance.

* Section 51.20(b) applies to the cost-benefit balance which is struck at the construction permit stage, and thus has no application here.

This fact was brought out in the suspension hearings for the Midland Plant. The Appeal Board dealt exhaustively with the topic of economic analysis under NEPA in its February, 1978 opinion and found that economics had no place in a cost-benefit analysis of the Midland Plant once it had been established that the nuclear plant was the environmentally-preferable alternative. ALAB-458, 7 NRC 155, 161-63. That opinion is directly on point.

> 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. . . .
>
> That Act [NEPA] requires us to consider whether there are environmentally preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place. Manifestly, nothing in NEPA calls upon us to sift through environmentally inferior alternatives to find a cheaper (but dirtier) way of handling the matter at hand. ALAB-458, 7 NRC 155, 161-62 (footnotes omitted) (emphasis in original).

Because Ms. Sinclair has made no allegation that an alternative to the nuclear facility would be environmentally-preferable, the economics of the Midland Plant cannot be an issue in the operating license proceeding. Therefore, contention 10 is inadmissible.

Contention 11

Contention 11 ties together the economic argument of contention 10 with the question of Dow's participation in the Midland Plant found in contention 9. This combination is no more viable as an issue than its components, however, for the economics of the nuclear plant to Dow is simply not of interest in this proceeding. The cost-benefit balance mandated by NEPA weighs the benefit from the Midland Plant, electricity and process steam, against the environmental costs which will result from the plant's operation. The economic cost of the project to Dow does not enter into the equation. As the Appeal Board has stated:

> 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 155, 168.

One other point should be made. Contrary to the statements in contention 11, the Michigan Public Service Commission does not have to approve the new Dow-Consumers Power contracts. Aside from setting rates for process steam

and electricity, the Michigan Public Service Commission has no authority to consider the provisions of the new contracts.

Therefore, Ms. Sinclair has not set forth any issues in contention 11 which are admissible in the operating license proceeding.

Contention 12

This is another attempt by Intervenor Sinclair to bring a non-issue into this proceeding, in this case the safety of the nuclear power industry. As other NRC tribunals have indicated, however, the licensing of an individual plant is not the proper forum in which to stage a debate on the desirability of nuclear power, see McGuire, ALAB-128, supra, and Browns Ferry, LBP-76-10, supra.

The Rasmussen Report and the Lewis Committee's review of it, and the other reports referenced in contention 12, have no direct bearing upon the operating license proceeding for the Midland Plant. Thus, what they say is irrelevant to this case, and the reports do not prevent a valid cost-benefit balance from being conducted for the Midland Plant.

Furthermore, Ms. Sinclair has not set forth facts with sufficient specificity to establish that there is a safety question which has a bearing upon the Midland Plant and thus upon this proceeding. To the extent that the

statements in contention 12 assert that the Environmental Statement for the Midland Plant must consider Class 9 accidents, the contention is an improper challenge to the validity of NRC regulations and runs afoul of 10 C.F.R. §2.758.

Therefore, because contention 12 is merely a generalized diatribe against nuclear power, it is inadmissible as an issue in this proceeding.

Contention 15

Once again, Intervenor Sinclair co-mingles the concepts of the economics of the Midland Plant, in itself and with relation to Dow, with Dow's commitment to the project. And again the result is an inadmissible contention. In the response of Consumers Power to contentions 9, 10, and 11, Licensee has explained why the matters of the economics of the nuclear plant and Dow's participation in the project are irrelevant to this proceeding. As contention 15 is basically a restatement of those old arguments, based upon a misconception of what the NEPA cost-benefit analysis requires, there is no reason why this contention should fare any better than its predecessors. It, too, fails to present a litigable issue.

Part (c) of contention 15 adds the allegation that the process steam and electricity from the Midland Plant

will be "uneconomically priced and unsalable, and a burden on Consumers' ratepayers." The answer to this, of course, is that the rates for the process steam and electricity will be established by the Michigan Public Service Commission. Therefore, there is nothing for the Licensing Board to consider with respect to rates.

Contentions 16, 17, 18 and 19

These contentions all concern the general topic of the need for the power to be produced by the Midland Plant, and the subtopics of energy conservation and the loss of load probability ("LOLP") criterion used by Consumers Power None of those contentions establishes a valid issue for the operating license proceeding, however. This is true because Ms. Sinclair does not demonstrate that there has been a sufficient change in Consumers Power's need for power projections to warrant a re-investigation of the subject at this hearing.

In general, need for power, as well as other environmentally-related issues, may be re-examined at the operating license stage if information has changed since the time of the construction permit proceedings. 10 C.F.R. §§51.21, 51.23(e). In the case of the Midland Plant, however, the need for power issue has already been re-examined subsequent to the 1971-72 construction permit proceedings. During the suspension hearings held as a result of Aeschliman,

supra, the parties explored the question of need for power in great detail; Consumers Power, the intervenors (which included Ms. Sinclair) and the NRC Staff all presented witness on the subject. Those hearings were held from November 1976 through May 1977. Thus, need for power statistics five to six years more recent than those presented at the construction permit hearings were reviewed by the Licensing Board, the Appeal Board and the Commission.

The Appeal Board, in its February 1978 decision, found that there was a need for the power to be produced by the Midland Plant and that the need for that power would not be so decreased by energy conservation that any substantial portion of the nuclear facility's capacity would be superfluous. ALAB-458, 7 NRC 155, 165-67, 168-69, 173 (1978). The NRC cited the Appeal Board's conclusion in the Commission's November 6, 1978 Memorandum and Order regarding the Midland Plant.

Given the fact that the need for power projections of Consumers Power have so recently been reviewed and approved by NRC tribunals, Ms. Sinclair would have to establish that there had been a significant change in demand projections since the suspension hearings before the subject could be re-litigated at the operating license hearings. Clearly, Ms. Sinclair's contentions 16, 17, 18 and 19 fail to set forth with specificity any facts which demonstrate such a significant change.

Moreover, when considering the need for power question, it is important to keep in mind what the Midland Plant Appeal Board called the "'substantial margin of uncertainty' inherent in any forecast of future electric power demands," ALAB-458, 7 NRC 155, 167 n. 43 (1978), quoting from Niagara Mohawk Power Corporation (Nine Mile Point, Unit 2), ALAB-264, 1 NRC 347, 365-66 (1975). See also Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 184-85 (1978). As one Appeal Board has remarked regarding need for power forecasts:

> Given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service--and the severe consequences which may attend upon a failure to discharge that responsibility--the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made. Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978).

The two subtopics raised in contentions 16-19 do not set forth separate subjects for consideration. Rather, energy conservation is "just one factor which must be considered along with many others in connection with need for power projections," according to the Midland Plant Appeal Board, ALAB-458, 7 NRC 155, 165 (1978). Similarly, the LOLP index and reserve margins are merely components of the energy forecasting process. Because Ms. Sinclair's con-

tentions do not establish need for power as an admissible issue in this proceeding, energy conservation and the LOLP criterion are similarly inappropriate for consideration at the operating license hearing.

Contention 20

In this contention, Ms. Sinclair alleges that Consumers Power and the NRC Staff have failed to analyze the environmental effects of the uranium fuel cycle, which allegedly invalidates the cost-benefit balance for the Midland Plant. What this paragraph amounts to is an attack upon the validity of the Commission's interim fuel cycle rule, Table S-3, which Intervenor Sinclair terms "illegally and invalidly developed and promulgated." It has long been established, however, that a party may not challenge the validity of an NRC rule in a licensing proceeding. Under the provisions of 10 C.F.R. §2.758, which sets forth this principle, a party who seeks a waiver or exception of an NRC rule in an individual proceeding must demonstrate "special circumstances;" such a waiver or exception can be granted only in unusual and compelling circumstances. Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972); Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-126, 6 AEC 399, 401-02 (1973).

In addition, portions of contention 20 consist of generalized statements criticizing the entire waste management program. As Consumers Power has pointed out earlier, however, an individual licensing proceeding is not the proper forum in which to launch a debate on nuclear power.

As far as the specific question of the interim fuel cycle rule is concerned, that rule has recently been applied to the Midland Plant during the suspension permit proceedings. The Appeal Board found that the cost-benefit balance originally struck for the nuclear facility before Table S-3 was adopted, was not materially altered, ALAB-458, 7 NRC 155, 163-65 (1978). Ms. Sinclair's al egation in contention 20 that the rule was applied to this proceeding "on an improper and ex parte basis" cannot stand, for the Appeal Board stated in its February, 1978 Midland Plant decision that:

> Like the Board below, we are bound by and must give effect to the judgments made by the Commission in this regard. Absent any change mandated by either the Commission (as a result of the rulemaking proceeding now underway to formulate a permanent rule) or the courts, the environmental effects of the fuel cycle must be taken as insubstantial. ALAB-458, 7 NRC 155, 164 (footnote omitted).

The opinion then goes on to deal with the complaint of intervenors (including Ms. Sinclair) that the Licensing Board had evaluated the fuel cycle matter without giving them sufficient opportunity to be heard; the Appeal Board found that there was "no merit" in that complaint. ALAB-458, 7 NRC 155, 164 n. 30 (1978).

In summary, contention 20 does not set forth an admissible issue for consideration in this operating license proceeding.

Contention 21

Contention 21 also seeks to raise the question of nuclear waste storage, and must similarly be denied admission as a contention in this proceeding. Contrary to the assertions in contention 21, the environmental impacts of storing nuclear waste at the Midland Plant site have been considered by Consumers Power. Final Safety Analysis Report, §§9.1.2.2, 11; Environmental Report, §§3.5, 3.5.1.4. Obviously, these matters are also covered by Table S-3.

The remainder of contention 21 consists of another general attack upon the nuclear waste management program of this country, with reference to the off-site storage question. This is hardly a proper subject for discussion at the operating license proceeding for an individual plant. Furthermore, to the extent that it is an attack upon the fuel cycle rule, it is improper for the reasons discussed in the response to contention 20.

Because contention 21 has not set forth a viable issue, it must be denied admission.

Contention 22

This contention is inadmissible for the reason that it does not set forth with specificity the bases for the contention. Once again, Intervenor Sinclair attempts to

raise the question of the environmental effects of nuclear wastes, but in such a vague fashion that it is impossible to discern exactly what is meant. Because this contention runs afoul of the specificity requirement discussed in Section I.A., supra, it must be denied admission as an issue.

Contention 23

This contention criticizes Consumers Power's Environmental Report for omitting the responses to the 71 questions propounded to Licensee by the NRC Staff in May, 1978. Simply put, the contention is inaccurate, for there are currently only three questions which have not yet been responded to by Consumers Power. The present schedule calls for those questions to be answered by January, 1979.

In any event, contention 23 fails to state an admissible issue, for the vague statement that the Environmental Report is "grossly inadequate" hardly meets the degree of specificity required by NRC practice. Furthermore, an appropriate contention cannot be framed by relying upon what the questions asked of Consumers Power allegedly prove, without analyzing the responses.

Contention 25

This contention attempts to raise the issue of whether or not Consumers Power will be able to obtain a discharge permit from the Michigan Department of Natural Resources. This is not a proper issue in an NRC proceeding,

however, for the grant or denial of the NPDES permit under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 is exclusively within the jurisdiction of the Michigan Department of Natural Resources. Thus, to hold a debate in the operating license proceeding on whether or not a state agency will grant the permit would accomplish nothing.

As an Appeal Board has stated with reference to the inter-relationship of state and federal agency jurisdiction in the nuclear licensing process,

> We are mindful that . . . regulatory jurisdiction over at least some aspects of nuclear power projects is exercised by a number of Federal and state agencies. And we can readily agree that it would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974) (footnote omitted).

This quotation was relied upon by another Appeal Board in reaching the decision not to suspend construction because of the possibility that another agency would take action which was adverse to the nuclear facility. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-442, 6 NRC 741, 748 (1977).

Furthermore, contention 25 is in error when it asserts that this Licensing Board cannot make the finding

required by 10 C.F.R. §50.57(a)(2) because the NPDES permit may not be granted. That finding, which states that the nuclear plant will operate in conformity with the application, the Atomic Energy Act and the rules of regulations of the NRC, is not affected by the §401 NPDES permit, which is issued under a different federal law. An Appeal Board has made clear that "AEC [NRC] licensing is in no way dependent upon the existence of a 402 permit." Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58 (1974) (footnote omitted).

For these reasons, contention 25 fails to state an issue which is litigable in this proceeding.

Contention 26

This contention relates to the proposed sales of undivided ownership interests in the Midland Plant to various co-operative and municipal electric utilities. The thrust of contention 26 is that, because these potential buyers have not been listed as co-applicants for construction permits or operating licenses, the proposed sales are illegal and various findings cannot be made.

This contention can only be termed premature. Consumers Power is well aware of the requirement that co-owners of nuclear facilities be co-applicants for licenses. However, at this juncture no ownership interest in the Midland Plant has passed to any entity and Consumers Power has not received any consideration for the proposed sale.

At the appropriate time, and before any ownership interest is tranferred, Consumers Power will file the papers necessary to amend the applications for construction permits and operating licenses so as to make any potential co-owners of the facility co-applicants.

Therefore, there in nothing in contention 26 which creates an issue for the operating license proceedings.

Contention 52

This contention is merely a generalized reference to all the generic safety contentions contained in Ms. Sinclair's supplemental petition. As such, the statement is not particularized enough to constitute an issue in this proceeding. Furthermore, a summary of this nature could add nothing to the ventilation of the issues at the operating license hearing.

Contention 53

Contention 53 makes the vague and conclusional claim that the Environmental Report and cost-benefit analysis for the Midland Plant are inadequate and were "illegally and invalidly prepared." Thus, this is a prime example of the type of unspecific statement, mingled with pure argument, which was held inadmissible in Offshore Power Systems, LBP-77-48, supra. Because that type of statement is not sufficient to raise the adequacy of the Environmental Report or the cost-benefit analysis as issues in this proceeding, contention 53 must be denied.

Contention 54

Similar to contention 53, the subsequent contention criticizes the adequacy of the cost-benefit analysis of the Midland Plant on a variety of grounds. In this statement Ms. Sinclair again demonstrates a complete misunderstanding of the nature of the cost-benefit balance required by NEPA. As explained in Consumers Power's responses to previous contentions, the economics of the Midland Plant are not an issue in this proceeding, as the Appeal Board made clear in its February, 1978 decision. Contention 54, however, continues to criticize the ACRS reports for failing to factor the cost of compliance with ACRS concerns into the cost-benefit analysis, ignoring the fact that the Appeal Board considered that exact point and soundly rejected it. With respect to the cost of resolving ACRS problems, the Appeal Board stated:

> Thus, an increase in monetary costs may well not alter the plant's cost-benefit balance at all, for the benefit side will increase correspondingly. In short, once it has been determined that a generating facility is needed to meet real demand, that no environmentally preferable type of facility or site exists, and that all cost-beneficial environmentally protective auxiliary equipment has been employed, the final cost-benefit balance will almost always favor the plant, simply because the benefit of meeting real demand is enormous--and the adverse consequences of not meeting that demand are serious. ALAB-458, 7 NRC 155, 169 (footnotes omitted).

This same argument applies to the cost of the other unresolved generic items referenced in contention 54.

Therefore, because of the misapprehension of the nature of the cost-benefit analysis, contention 54 does not state an admissible issue.

Contention 55

Contention 55 involves the claimed synergistic interaction of releases of radioactivity from the Midland Plant with chemicals from the adjacent Dow plant. This supplemental contention is inadmissible on the ground of res judicata.

Consumers Power has previously discussed the application of this doctrine to an operating license proceeding in the Brief of Consumers Power Company In Support of Its Position That Mr. Marshall's Petition To Intervene Is Barred by Res Judicata, filed October 31, 1978. The essential point of res judicata in this context is that "an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage." Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

Like Ms. Sinclair, Mr. Wendell H. Marshall also attempted to raise the question of synergism at the operating license stage. As Consumers Power pointed out, however, synergism was one of "the major contested issues" in the construction permit proceeding. Consumers Power Company

(Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 344 (1973). An analysis of those portions of the construction permit proceeding record which consider the synergism issue is provided in the October 31, 1978 Brief at pages 8-9.

The Licensing and Appeal Board decisions from the construction permit hearings clearly demonstrate that the synergism issue was ventilated and resolved at the previous stage of these proceedings. As Ms. Sinclair has not alleged any changed circumstances which would warrant re-opening the synergism question, contention 55 must be denied admission on the ground of res judicata.

Contention 56

This contention incorporates by reference Paragraph 9 of Ms. Sinclair's Petition for Leave to Intervene of June 5, 1978, which contained certain "Reservations." Consumers Power objected to several of those reservations as improper in its June 19, 1978, answer to Ms. Sinclair's petition (Answer at 14-17); Licensee reasserts those objections here.

In an August 14, 1978 Memorandum and Order, this Licensing Board commented with respect to those reservations that "[t]he Board will not now rule upon the reservations except to observe that it recognizes no right of the petitioners unilaterally to bind the Board and the parties simply by reciting its intentions to take certain actions." (Order at 7.) Consumers Power agrees with this statement

and urges the Licensing Board to disregard Ms. Sinclair's reservations for the reasons stated in Licensee's Answer of June 19, 1978.

C. Conclusion

For the reasons set forth above, the following supplemental contentions of Ms. Sinclair are inadmissible: 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 52, 53, 54, 55, 56.

II. SUPPLEMENTAL CONTENTIONS OF WENDELL H. MARSHALL

Mr. Wendell H. Marshall has previously filed a late petition for leave to intervene in the operating license proceedings for the Midland Plant, Units 1 and 2. Consumers Power opposed that petition on various grounds, including the fact that the questions Mr. Marshall wished to litigate had already been resolved at the construction permit proceedings, in which Mr. Marshall and a group called the Mapleton Intervenors participated.

This Licensing Board gave Mr. Marshall temporary status as an intervenor pending a final determination on the adequacy of his petition. The Order of October 12, 1978, also gave Consumers Power the opportunity to file a brief in support of its position that the aspects set forth in the petition for leave to intervene were barred from consideration at the operating license stage of the proceedings by the doctrine of res judicata. That brief was filed on October 31, 1978.

Subsequently, Mr. Marshall sent a mailgram to the Chairman of the Licensing Board setting forth six additional contentions on behalf of the Mapleton Intervenors. Consumers Power, in accordance with the Licensing Board's Order of November 13, 1978, will respond to thoses contentions seriatim and will demonstrate that none of the supplemental contentions forms an adequate basis to support the petition of Mr. Marshall and the Mapleton Intervenors. Thus, that late-filed petition to intervene must be denied.

A. Legal Standards Applicable To Mr. Marshall's Supplemental Contentions

One of the prime legal concepts of interest in evaluating Mr. Marshall's supplemental contentions is the principle of res judicata. The legal standards underlying the application of res judicata to an operating license proceeding have been set forth in detail in the Licensing Board's Order of October 12 and in Consumers Power's Brief filed October 31; those standards will not be repeated here. It suffices to say that "an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage," Alabama Power Company (Joesph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974). As will be clearly shown, certain of the new contentions submitted by Mr. Marshall were resolved at the construction permit stage.

Another legal principle to keep in mind when reviewing Mr. Marshall's supplemental contentions is that his original petition was filed out of time. Therefore, it is to be judged by the standards set forth in 10 C.F.R. §2.714 (a)(1). Of course, the specificity requirement described in Section I.A. is equally applicable to Mr. Marshall's contentions.

B. Mr. Marshall's Supplemental Contentions Do Not Support His Petition to Intervene

Contention 1

The first supplemental contention contained in Mr. Marshall's mailgram appears to be a restatement of aspect 9 from the original petition. That aspect, which similarly raised the question of the Midland Plant as a nuisance, was disposed of in the October 31 Brief filed by Consumers Power. That Brief pointed out that Mr. Marshall had previously filed a suit against Consumers Power in the Michigan courts seeking, inter alia, a declaratory judgment that the Midland Plant would constitute a public or private nuisance. As explained in the Brief, the Court of Appeals affirmed the trial court's grant of summary judgment for Consumers Power on the nuisance question, the appellate court agreeing that Mr. Marshall had not stated facts sufficient to show that the building of the nuclear facility would necessarily or inevitably create either a nuisance per se or per accidens. Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975), appeal denied, 397 Mich. 822 (1976).

Thus, Mr. Marshall attempts in his new contention to rely upon a case which he lost to bolster his argument that the Midland Plant will create a nuisance. Clearly, the issue of nuisance, which is purely a question of state law, has been decided adversely to Mr. Marshall by the Michigan courts. There can be no justification for re-litigating this question at an NRC proceeding, for the concept of nuisance does not fall within the ambit of issues germane to the Atomic Energy Act or the National Environmental Policy Act.

Contention 1 is therefore barred by the doctrine of res judicata.

Contention 2

Contention 2, which is vague to say the least, is no more than the naked assertion that there exists such a thing as "illegal discharges and spills of radioactivity" from the Palisades Plant--whether in the past, present or future is impossible to say. Aside from the fact that contention 2 is unintelligible, it is obviously not an appropriate issue to be litigated at a hearing on the Midland Plant for it does not even relate to that facility. As Mr. Marshall has not attempted to tie contention 2 into the factual context of the operating license proceeding for the Midland Plant, that contention cannot be admitted in this hearing.

Contention 3

Contention 3 stands on a different footing from the other additional contentions set forth in Mr. Marshall's mailgram, for at first blush it appears to describe an issue which may properly be considered at the operating license proceeding. While the description of the situation involved in contention 3 is not technically accurate, it does relate to the fact that one of the buildings at the Midland Plant is settling. This condition has been reported to the NRC Staff pursuant to 10 C.F.R. §50.55(e).

However, this same subject is raised in a contention submitted by Mary P. Sinclair, who has already been admitted as a party in the operating license proceeding. Paragraph 24 of Ms. Sinclair's supplemental contentions filed on October 31, 1978, discusses the alleged "serious and unresolved questions" related to the "sinking" of a building at the Midland Plant site.

In assessing whether Mr. Marshall's contention 3 is admissible, the fourth factor listed in 10 C.F.R. §2.714 (a)(1) should be considered; that factor concerns "[t]he extent to which the petitioner's interest will be representing by existing parties." Clearly, the interest of Mr. Marshall and the Mapleton Intervenors in exploring their contention 3 will be adequately represented by Ms. Sinclair, whose contention 24 raises the same issue. Consumers Power has not objected to the admission of that contention in this proceeding.

For this reason, Mr. Marshall's third contention does not set forth an adequate basis for his admission, or that of the Mapleton Intervenors, to this proceeding.

Contention 4

Supplemental contention 4 contained in Mr. Marshall's mailgram, concerning icing and fogging problems, is virtually indentical to contentions 4 and 5 which were set forth in Mr. Marshall's original petition to intervene. Consumers Power has already responded to those contentions, and shown that the icing and fogging questions were definitively resolved at the construction permit phase of this proceeding, in the Brief filed on October 31. The reasoning set forth in that brief, and the citations to those portions of the Initial Decision authorizing the grant of construction permits and the Appeal Board decision which affirmed that authorization, are equally applicable to show that the fogging and icing issues which Mr. Marshall attempts to raise in his supplemental contention 4 are barred by res judicata.

As Mr. Marshall has not set forth any new facts or changed circumstances with regard to the fogging and icing questions, contention 4 does not present a permissible issue for litigation in the operating license proceeding.

Contention 5

This contention merely repeats what Mr. Marshall

presented in the sixth contention of his original petition to intervene; Licensee's response to that contention is applicable here. As Consumers Power explained in its October 31 Brief, the question of the effects of the storage of spent fuel, as well as of other parts of the fuel cycle, are covered by the Commission's Table S-3. To the extent that contention 5 constitutes an attack upon the NRC's regulations, it is improper for the reasons set forth in the response of Consumers Power to Ms. Sinclair's contention 20.

To the extent that Mr. Marshall's contention merely seeks to re-litigate this issue, the answer is that the fuel cycle rule has been applied to the Midland Plant and found not to affect the cost-benefit balance of the nuclear facility. This is also described in greater detail in the response to supplemental contention 20 submitted by Ms. Sinclair. Thus, there can be no justification for examining that issue in the operating license proceeding.

For the reasons set forth above, contention 5 in Mr. Marshall's supplemental petition does not set forth an issue which can be admitted in this proceeding.

Contention 6

The last of Mr. Marshall's supplemental contentions states that "[p]resent technology prevents nuclear plants from operation with zero emission." It is immediately obvious that contention 6 fails to state a litigable issue, however. Simply put, nothing in the Atomic Energy Act or

the NRC rules and regulations requires a nuclear plant to operate "with zero emission;" thus, this question cannot be made an issue in this proceeding. If contention 6 is viewed as an attack on the Commission's rules regarding radioactive releases, it is improper for the reasons set forth in response to Ms. Sinclair's supplemental contention 20.

Furthermore, to the extent that contention 6 raises the general issue of radioactive releases from the Midland Plant it is barred by res judicata. Contentions 1(a), 1(c) and 8 in Mr. Marshall's original petition to intervene in the operating license proceeding for the Midland Plant concerned the subject of radioactive releases. As Consumers Power demonstrated in its Brief of October 31, 1978, that issue was ventilated and resolved at the construction permit proceedings for the Midland Plant. Mr. Marshall has not presented any new information which would warrant relitigating the subject at this hearing.

For the reasons set forth above, contention 6 does not constitute an admissible issue in this proceeding.

C. Conclusion

In view of the fact that all but one of Mr. Marshall's original and supplemental contentions are inadmissible, and that the one contention which could be considered valid has also be raised by an intervenor who has previously been admitted as a party in this proceeding, Mr. Marshall's late-filed petition to intervene must be denied under the standards ennunciated in 10 C.F.R. §§2.714(a)(1) and 2.714(b).

Should this Licensing Board decide to admit Mr. Marshall as a party in the operating license proceeding, his participation should be limited to whichever issue or issues the Licensing Board determines have been properly raised by Mr. Marshall's petition, as provided in 10 C.F.R. §2.714(f). Alternatively, Mr. Marshall's participation in the proceeding should be ordered consolidated with the participation of Ms. Sinclair, pursuant to 10 C.F.R. §2.715a. Either of these steps would provide for a more orderly operating license proceeding, and would thus serve the underlying objectives of the Commission's Rules of Practice.

III. POSSIBLE EFFECT OF THE COMMISSION'S ORDER OF NOVEMBER 6, 1978, UPON THIS PROCEEDING

On November 6, 1978, the Commission issued a Memorandum and Order which delineated the issues which remained for NRC consideration in the reopened Midland Plant construction permit proceedings. This Licensing Board has asked the parties to express their views on the possible effect of that Order upon the operating license proceedings in this docket. In order to put that question in perspective, a brief review of the procedural history of the Midland Plant is necessary.

In 1972, permits were issued authorizing construction of the Midland Plant. Following administrative appeals, petitions for review of the orders granting the contruction permits were filed in the Court of Appeals for the District

of Columbia Circuit by two groups which had previously intervened before the Commission. Review by the Court of Appeals resulted in a determination to remand the orders granting the construction permits to the NRC "for further proceedings in conformity with . . . the opinion." Aeschliman v. NRC, 547 F.2d 622, 632 (D.C. Cir. 1976).

Following that decision by the Court of Appeals, a Licensing Board conducted an evidentiary hearing to determine whether to continue, modify or suspend the construction permits pending a decision on the remanded issues. The decision not to modify or suspend the construction permits was affirmed by the Appeal Board. Consumers Power Company (Midland Plant, Units 1 and 2), LBP-77-57, 6 NRC 482 (1977), affirmed, ALAB-458, 7 NRC 155 (1978).

On April 3, 1978, before the hearing on the remanded issues was scheduled to begin, the Aeschliman decision was reversed by the United States Supreme Court's opinion in Vermont Yankee Nuclear Power Corp. v. NRDC, 98 S.Ct. 1197 (1978). Subsequently, the Commission requested that the parties to the construction permit proceeding state their views as to what issues, if any, remained for NRC consideration in light of Vermont Yankee.

The Commission's November 6, 1978 Order set forth which issues remained to be considered in the construction permit proceeding. While no issue considered by the Court of Appeals in Aeschliman was left for resolution, two other

issues had emerged in Aeschliman's wake which the Commission ordered to be considered by the Licensing Board. The first involved the environmental effects of radon, which became litigable in individual proceedings when the NRC removed the values for radon from Table S-3, 43 Fed. Reg. 15613 (1978). The second issue concerned an attorney conduct question which arose during the Midland Plant suspension hearings.

An examination of the history of the Midland Plant proceedings thus makes clear that the Commission's recent Order has no effect whatsoever upon the operating licensee proceedings. The suspension hearings were required because of deficiencies which the Court of Appeals perceived in the construction permit proceedings, and the two matters left for resolution result directly from the suspension hearings. The attorney conduct question relates to events which transpired during those hearings, and the radon matter is only an issue because the construction permit proceedings were technically pending at the time of the Commission's radon pronouncement.

Furthermore, the fact that the construction permit Licensing Board will be re-striking the cost-benefit balance for the Midland Plant to consider the environmental effects of radon should not be a cause for concern in the operating license proceedings. Decisions from other Licensing Boards which have reopened the records on environmental matters to consider the radon question indicate that that issue will not affect the cost-benefit balance for the Midland Plant.

In Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), LBP-78-25, 8 NRC 87, 100 (1978), the Licensing Board concluded that the health effects associated with increasing the value for releases of radon-222 during the uranium fuel cycle were insignificant in striking the cost-benefit balance for the Perkins facility. The Licensing Board similarly concluded that the environmental impact of radon-222 emissions was negligibly small and had no effect on the environmental cost-benefit balance in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102, 144 (1978).

Therefore, as the two open issues relate to the construction permit hearings and will be resolved by the Licensing Board which conducted the suspension hearings, there is no reason for the existence of those issues to impinge in any way upon the operating license proceedings to be conducted by this Licensing Board. The two proceedings are distinct and may proceed simultaneously, each on its own path, without interfering with one another.

Nothing in the text of the Commission's November 6, 1978 Order leads to a different conclusion. In fact, a reading of the Commission's Order demonstrates convincingly that the Commissioners expected and intended that the two proceedings would run concurrently. The only matter discussed in the Order which entails references to the operating license proceeding is the question of the ACRS letters and

reports regarding the Midland Plant. The Commission stated that no issue remained in that area, and then went on to consider the general question of unresolved safety issues, stating:

> The absence in the staff report [Supplement No. 2 to the Safety Evaluation Report] of some indication of a problem which will create serious safety concerns, and the fact that the construction and operating license proceedings will overlap, lead us to believe that in this instance the remaining unresolved safety issues can be more profitably considered under the standards appropriate to an operating license proceeding. Order at 6 (footnote omitted) (emphasis supplied).

This quotation clearly shows that the Commissioners were fully aware of the fact that the reopened construction permit hearings and the operating license hearings would occupy the same time frame. Indeed, that was the Commission's justification for removing the issue of unresolved safety concerns from the jurisdiction of the construction permit Licensing Board.

To have construction permit and operating license hearings proceed simultaneously may not be the ordinary course of events, but the Midland Plant proceedings have been far from ordinary. Already one of the most protracted cases of nuclear plant licensing in the history of the Commission, it would be senseless to take any action which would delay the licensing process further. There is no reason why the construction permit Licensing Board should

not resolve the radon and attorney conduct questions while this Licensing Board proceeds apace with the matter of the operation licenses for the Midland Plant.

For these reasons, the November 6, 1978 Order of the Commission has no effect whatsoever on this proceeding.

Respectfully submitted,

Michael I. Miller

Martha E. Gibbs

Attorneys for
Consumers Power Company

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 786-7500

November 28, 1978

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	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "BRIEF OF CONSUMERS POWER COMPANY IN RESPONSE TO THE ATOMIC SAFETY AND LICENSING BOARD ORDER OF NOVEMBER 13, 1978" in the above-captioned proceeding have been served upon the following parties by United States Mail, first-class postage prepaid, this 28th day of November, 1978:

Ivan W. Smith, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Mr. Lester Kornblith, Jr.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Dr. Frederick P. Cowan
6152 N. Verde Trial
Apt. B-125
Boca Raton, Florida 33433

Ms. Mary Sinclair
5711 Summerset Street
Midland, Michigan 48640

Colleen P. Woodhead, Esq.
Counsel for the NRC Staff
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Myron M. Cherry, Esq.
1 IBM Plaza
Suite 4501
Chicago, Illinois 60611

Mr. C. R. Stephens
Chief, Docketing and Service
Section
Office of the Secretary
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Frank J. Kelly, Esq.
Attorney General of the
State of Michigan
Stewart H. Freeman, Esq.
Assistant Attorney General
Gregory T. Taylor, Esq.
Assistant Attorney General
Environmental Protection Div.
720 Law Building
Lansing, Michigan 48913

Mr. Wendall H. Marshall
4645 South Saginaw Road
Midland, Michigan 48640

Mr. Steven J. Gadler
2120 Carter Avenue
St. Paul, Minnesota 55108

Martha E. Gibbs
One of the Attorneys for
CONSUMERS POWER COMPANY

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 786-7500

November 28, 1978