

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'83 FEB 18 P1:59

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

SERVED FEB 18 1983

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

Docket Nos. 50-329 CP
50-330 CP
(Remand Proceeding)

STATEMENT OF THE COMMISSION

(CLI-83- 2)

The Commission now has before it the latest controversy originating from the Midland construction permit proceeding, a proceeding "now in its second decade." ALAB-691, 15 NRC ____ (September 9, 1982 (Slip Opinion at 1). We will not repeat here the Appeal Board's discussion of the procedural history leading up to the instant dispute. See, Slip Op. at 2-8. Nor do we believe it necessary to review in detail the particular facts giving rise to this case. For the limited purposes of this statement, it is sufficient to note that the present controversy resulted from evidence adduced in 1976 suggesting possible improper conduct on the part of the applicant (Consumers Power Company), Dow Chemical Company and their respective attorneys over the course of six weeks in 1976 while preparing for Show Cause proceedings ordered by the Commission in response to Aeschliman v. NRC, 547 F.2d (633 (D.C. Cir.

1976), rev'd sub nom., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

Following hearings ordered by the Commission to resolve this question,^{1/} the Licensing Board concluded that Consumers, Dow and their attorneys had failed to fully discharge their duty of disclosure and that some of the attorneys may have acted improperly in seeking to limit disclosure.^{2/} LBP-81-63, 14 NRC 1768, 1800-1801 (1981). Notwithstanding these conclusions, the Licensing Board determined that sanctions were neither warranted nor appropriate. Id. On appeal, the Appeal Board affirmed the Licensing Board's finding that sanctions were unwarranted and inappropriate. ALAB-691, 15 NRC at ____, Slip Op. at 40. In doing so, however, the Appeal Board based its action on that Board's conclusion that the prefiled written testimony at issue did not omit any material information required to be disclosed under Section 186 of the Atomic Energy Act, as amended, 42 U.S.C. 2236. The Appeal Board further determined that any implied criticism of the conduct by counsel was unjustified. Id. at 27 and 32.

^{1/} Memorandum and Order of November 6, 1978 (unpublished).

^{2/} There is no dispute that Consumers affirmatively disclosed much of the information at issue as part of the discovery process and that Dow's witness candidly answered all questions posed to him at the 1976 hearing. The specific issue posited before the Licensing Board was whether Consumers and/or Dow had a duty to disclose such information as part of Dow's prefiled, written direct testimony submitted to the Suspension Board in 1976.

No petitions for review have been filed with the Commission. Moreover, we have determined that the decision of the Appeal Board does not present a case "of exceptional legal or policy importance" sufficient to require our sua sponte review under 10 CFR 3.786(a). Accordingly, the time has come to close the book on this chapter of the Midland CP proceeding. However, in declining to exercise our discretion to take review in this matter, we believe it important to make an observation regarding the type of conduct and attitudes at issue below.

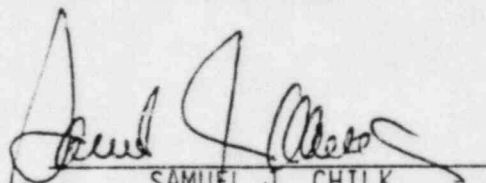
A deliberate false statement or withholding of material information would warrant the imposition of a severe sanction. The time and resources committed to an adjudicatory probing of the facts of this case are evidence of our concern over allegations of this sort. Not only are material false statements and omissions punishable under Sections 234 and 186 of the Atomic Energy Act, but deliberate planning for such statements or concerns on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where those plans are not carried to fruition. Moreover, we want to warn parties and their attorneys that when they engage in conduct which skirts close to the line of improper conduct, they are running a grave risk of serious sanction if they cross that line.

Commissioner Gilinsky dissents from the Commission decision not to take review.

Commissioner Roberts concurs in the decision not to take review but dissents from the Commission decision to issue this Statement.



For the Commission*


SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this 18th day of February 1983.

*Commissioner Roberts was not present when this Statement was approved but had previously indicated his disapproval. Had Commissioner Roberts been present he would have affirmed his prior vote.