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September 20, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-329-OM
CONSUMERS POWER COMPANY	)	50-330-OM
	)	50-329-OL
(Midland Plant, Units 1 and 2)	)	50-330-OL
	)	

Dear Chief Judge Bechhoefer:

Enclosed for your information is a copy of petitioners' response to the August 16, 1982 memorandum Order in Aeschliman.

Sincerely,

Philip P. Steptoe

PPS:es

Enc.

cc Service List w/ enclosure

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NELSON AESCHLIMAN, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Nos. 73-1776
	)	and 73-1867
UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,	)	
	)	
Respondents.	)	

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SHOW CAUSE
STATEMENT OF PETITIONERS PURSUANT
TO COURT'S ORDER OF AUGUST 16, 1982

In its Memorandum Order of August 16, 1982, the Court suggested that -- even though it has set aside the NRC's "original, interim, and final Table S-3 rule" as unreliable and "inadequate" under NEPA, and even though the NRC's efforts to promulgate a proper rule may not yield a result until June 1983 or later — nevertheless "little would be gained" by requiring the NRC to reexamine the construction permit at issue in this case because "construction of the [Midland] facility... is substantially completed."

We respectfully disagree. We further respectfully disagree with the Court's proposal that this review proceeding — twice decided in petitioners' favor by this Court[1] — should now be dismissed, and the NRC be permitted to substitute operating license proceedings for the job it should have done at the construction permit stage, merely because continued construction of the Midland plant has produced an apparent fait accompli. Pursuant to the Court's August 16, 1982 Order, we set forth herein the bases for our disagreement with the Court's proposed disposition of this case.

1. Initially in Aeschliman v. NRC, 547 F.2d 622 (D.C.Cir. 1976), rev'd sub nom. Vermont Yankee Nuclear Corp. v. NRDC, 435 U.S. 519 (1978); and a second time in NRDC v. NRC, ____ F.2d ____ (D.C.Cir., April 27, 1982). On both occasions this Court held the NRC's "Table S-3 rule" invalid and inadequate under NEPA. The Supreme Court's decision did not (as is obvious from the text quoted in the Court's August 16, 1982 Order) validate that NRC rule. It did, however, reject some additional grounds for reversal of the NRC which this Court had articulated in its original Aeschliman decision.

First. The Court's Order suggests that the NRC can "comply with the mandate of NRDC v. NRC as part of the [Midland] operating license proceeding." But the NRC has already refused to consider a "Table S-3" contention in the Midland operating license proceeding. Patently that augurs ill for any bona fide compliance with NRDC v. NRC at the Midland operating license stage. In effect, the NRC itself has already rejected that course. Even were this Court to command the NRC to reverse itself, the history of these proceedings leaves no doubt that the result before the Commission would be marked by the "thoroughgoing reluctance" noted by the Court in Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1119 (D.C.Cir. 1971). That is no substitute for the active, thoughtful consideration which NEPA requires.

Second. In any event, this Court has long since recognized that there is a fundamental difference between construction permit proceedings and operating license proceedings — a difference the Court's proposed disposition here would completely overlook. As this Court pointed out in Calvert Cliffs, supra, 449 F.2d at 1128, by the operating license stage:

> "... the situation will have changed radically. Once a facility has been completely constructed, the economic cost of any alteration may be very great....Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.
>
> "By refusing to consider requirement of alterations until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress....[T]he [operating] license hearing (and any public intervention therein) may become a hollow exercise." [Emphasis added.]

That is precisely why, in Calvert Cliffs, this Court would not permit the Commission to slough off environmental concerns until the operating license stage. The Court's proposed disposition here is wholly irreconcilable with that long-settled rule. Indeed, because the Commission has long since made it clear that its environmental consideration at the operating license stage will be skewed by taking into account the full range of construction activities ("sunk costs") up to that point, see (e.g.) Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 N.R.C. 503, 532 (1977), the Court's proposed disposition here would be tantamount to an invitation to the NRC to ignore the fuel cycle issues yet again.

Third. What we have already said foreshadows our final, and most fundamental, disagreement with the Court's proposed disposition of this case. Simply and bluntly, the Court's proposed disposition would have the effect of rewarding the Commission's unlawful conduct. This Court struck down the "Table S-3 rule" in 1976. It reaffirmed that decision last April, in NRDC v. NRC. Throughout, this Court has warned both the Commission and Consumers Power Company that its rulings were not to be ignored. For example, in an Order entered in this case on October 27, 1977 this Court explicitly warned that "continuation of construction pending resolution of the remanded issues is at the risk of intervenor Consumers Power Company." Yet the Court now proposes to dispose of this case in a way which would repeal all that, and set at nought one of the governing principles of Calvert Cliffs, supra. Far from recognizing that Consumers was "at risk" by continuing construction, the Court would now permit that very fait accompli to excuse the NRC from the construction-permit-stage NEPA analysis which this Court has time and again held should have been performed years ago. In a nutshell, the Court's proposed disposition would contravene — indeed, flatly contradict — the Court's own warning to Consumers

and the Commission, quoted above. And to the extent the proposed disposition is based (as it seems to be) purely on the fact of continued construction, it would also contravene the firm rule of Calvert Cliffs, supra, 449 F.2d at 1115, that "[c]onsiderations of... delay or economic cost will not suffice to strip [NEPA] of its fundamental importance."

There is, we respectfully submit, a better way. This Court ought not to nullify its own decisions (Calvert Cliffs) and prior Orders (e.g., the Order of October 27, 1977 quoted above). This Court ought not to send a tacit signal to the Commission and the nuclear industry that the Court's rulings can successfully be evaded if one but waits long enough, and builds apace in the meantime. Rather, this Court should direct the Commission to comply fully with the mandate of NRDC v. NRC in this case, by reevaluating the Midland construction permit in light of a valid "Table S-3 rule," and restriking the cost-benefit analysis with no credit allowed for Consumers' continued construction activities since the date of this Court's original decision in 1976.[2] Only in that way can the integrity and force of this Court's decisions — including its rulings in this case — be preserved.

Respectfully submitted,

One of Petitioners' Attorneys

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2. This would be no idle exercise. Even more than a year after this Court's original Aeschliman decision, an NRC Licensing Board found in substance that it was only Consumers' continuing construction and "sunk costs" which warranted allowing matters to proceed while the still-unresolved issues remanded by this Court were considered. Absent that "bootstrapping," the outcome of a valid cost-benefit analysis obviously is a matter of grave doubt. See Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-77-57, 6 N.R.C. 482, 488-89, 496-98 (1977).

PROOF OF SERVICE

I hereby certify that on September 7, 1982, I: (i) transmitted to the Clerk of the above-captioned Court by Federal Express Messenger, for presentation to the Court, the original and three copies of the foregoing Show Cause Statement, and (ii) mailed copies thereof to counsel for respondents by depositing a copy in the United States mail, postage prepaid and properly addressed, prior to the hour of 5:00 p.m.

One of Petitioners' Attorneys