

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'82 OCT -4 P1:46

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

CONSUMERS POWER COMPANY'S RESPONSE
TO RESUBMITTED CONTENTION BY MARY SINCLAIR

Applicant, Consumers Power Company, hereby re-
sponds to the "Resubmitted Contention by Mary Sinclair Based
On United States District Court of Appeals Memorandum Order",
and suggests that continued deferral, rather than acceptance,
is appropriate for this contention at this time.

FACTS

A review of the procedural history of this pro-
posed contention and of the U.S. Court of Appeals decisions
upon which it is based demonstrates that Ms. Sinclair's
motion for reconsideration of the contention is premature.

On June 18, 1982, Ms. Sinclair submitted a con-
tention for admission into the Midland operating license
proceedings which alleged:

The Environmental submission by Consumers and
staff have failed to analyze the absolute and
incremental effects on the environment (including
the cost-benefit and risk benefit considerations)
of the entire fuel cycle, as well as the serious
problem of the storage of nuclear wastes on site.
The U.S. District Court of Appeals of Washington,
D.C. struck down the S.3 Table on April 27, 1982,
which had been relied on for this purpose. Because
of this Court decision, Consumers Power Co. and
the NRC cannot comply with requirements of the
National Environmental Policy Act in their Final
Environmental Impact Statement.

("New Contentions by Intervenor Mary P. Sinclair", June 18, 1982, at p. 1)

The proposed contention referred to the April 27, 1982 decision of the U.S. Court of Appeals in Natural Resource Defense Council, Inc. v. NRC, _____ F.2d _____ (D.C. Cir. Docket Nos. 74-1586, 77-1448, 79-2110 and 79-2131), in which the court found invalid certain portions of the initial, interim and final versions of Table S-3. The Commission has employed Table S-3 in evaluating for purposes of NEPA the environmental impacts of the fuel cycle in over 90 construction permit and operating license proceedings to date.

At the prehearing conference on August 12, 1982, the Applicant argued that acceptance of the contention was premature, at best. It pointed out that the court's decision was not yet final because a mandate had not issued; technically, Table S-3 remained in effect and remained binding on this Board. (See Prehearing Conference Order, at p. 11). Responding to this argument, the Licensing Board deferred ruling on the admissibility of the contention, and explained:

Under these circumstances, we cannot accept contention 1 at this time, since it technically still constitutes an impermissible challenge to Table S-3.

Both the Applicant and NRC Staff opinion that the Commission may in the near future issue a policy statement describing how, or whether, Table S-3 (or the Court's recent decision) should be factored into adjudicatory proceedings such as this one. The Staff recommends that we defer ruling on this contention, and we agree that is the preferable course of action at this time. If the Commission's statement should permit litigation of questions such as are raised by contention 1, we

will be prepared (at Ms. Sinclair's request) to consider that contention under the standards enunciated by the Commission. (If a request is made shortly after issuance of the Commission's statement, Ms. Sinclair will not have to demonstrate good cause for the untimely submission of such a contention.)

(Prehearing Conference Order, at pp. 11-12).

On August 16, 1982, the D.C. Circuit Court of Appeals issued a Show Cause Order in the case of Aeschliman v. NRC, in which Consumers Power Company is an intervenor. In its Order, the court noted that the NRC is currently conducting a generic proceeding to reassess the "uncertainties" in the availability of safe nuclear waste disposal methods, and recognized that the "results of this proceeding will, in all probability, be utilized by the Commission to adjust its S-3 rule to conform to the requirements announced in NRDC v. NRC". The court added that it had urged the NRC to arrive at its "waste confidence" determination by June 30, 1983. (Show Cause Order, at p. 1). The court went on to hold that, because construction at Midland is substantially complete, "little would be gained by requiring the NRC to reevaluate its grant of the construction license." (Order, at p. 2). The court then ordered petitioners to file a statement to show cause why the court should not issue an order "permitting the Commission to comply with the mandate of NRDC v. NRC as part of the operating license proceeding now in progress for the subject facility." (Order, at p. 2).

On September 1, 1982, on motion of Baltimore Gas and Electric Co. and others, the D.C. Circuit Court of Appeals

entered an order staying the mandate of the court in NRDC v. NRC for 30 days, until October 1.

On September 9, 1982, Myron Cherry, attorney for the petitioners in Aeschliman and attorney for Mary Sinclair for the construction license issues in these proceedings, ^{*/} filed a "Show Cause Statement" in response to the Aeschliman order, arguing that Table S-3 issues should be litigated in the construction permit, rather than the operating license, phase of the Midland proceedings.

Four days later, Mary Sinclair resubmitted her Table S-3 contention, asking that it be admitted into the Midland operating license proceedings. She cited the Aeschliman Memorandum Order dated August 16, 1982 as the basis of her request.

On September 24, 1982, Baltimore Gas and Electric filed a petition for certiorari with the United States Supreme Court in a case which had been consolidated for appeal with NRDC v. NRC. ^{**/} The effect of this filing,

^{*/} See "Memorandum To Chairman Charles Bechhoefer From Mary Sinclair", September 13, 1982, stating that Myron Cherry is still involved in construction license issues on Ms. Sinclair's behalf on a pro bono basis.

^{**/} Consumers Power Company also expects to file a petition for certiorari in these consolidated cases in the near future, through its attorneys LeBoeuf, Lamb, Leiby & McCrae. A copy of the petition will be sent to the Board after it is filed and the Applicant will keep the Board up to date on other relevant pleadings filed in the case.

according to the terms of Rule 41(b) of the Federal Rules of Appellate Procedure, is to stay the effect of the mandate until final disposition of NRDC v. NRC by the Supreme Court.

ARGUMENT

The procedural history and the current status of the D.C. Circuit's opinion in NRDC v. NRC makes it clear that Ms. Sinclair's present motion for reconsideration of her Table S-3 contention is premature.

In its Prehearing Conference Order dated August 14, 1982, this Board ruled that Ms. Sinclair's Table S-3 contention could not be accepted, because Table S-3 remained in effect. It is even clearer today than it was at the time of the prehearing conference that Table S-3 is still in effect. The mandate of the D.C. Circuit has been stayed until the final disposition of NRDC v. NRC by the United States Supreme Court. Because of the stay of the mandate, Table S-3 remains valid and the proposed contention "still constitutes an impermissible challenge to Table S-3" (See Prehearing Conference Order, at p. 12).

Nothing else which has transpired since the Board's Prehearing Conference Order suggests that a Table S-3 contention should now be admitted into these proceedings.

The Aeschliman show cause order was not a ruling that Table S-3 issues should be litigated as a contention in this case. Rather, it noted that the NRC was currently conducting generic rulemaking proceedings whose results would probably be used to adjust the S-3 rule to the NRDC v.

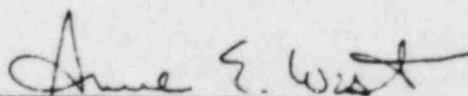
NRC requirements, and ordered the petitioners to show cause why the Commission should not be allowed to show compliance with those requirements during the course of the present OL proceedings. The Commission was not required, or even advised, by the court of appeals to consider S-3 issues in individual operating license proceedings. Moreover, the "mandate of NRDC v. NRC", on which the order was based, (Show Cause Order, at p. 2), has been stayed indefinitely.

In its Prehearing Conference Order, the Board deferred ruling on the proposed S-3 contention until the Commission issued a policy statement describing how or whether Table S-3 issues should be factored into adjudicatory proceedings such as this one. The Commission has not yet issued such a statement. Until it does, the Board's decision to defer ruling on an S-3 contention should stand.

CONCLUSION

Consumers Power Company respectfully suggests that Ms. Sinclair's motion for reconsideration of her proposed Table S-3 contention is at best premature at this time, and that a ruling on the contention should continue to be deferred until the Commission issues its policy statement.

Respectfully submitted,



One of the Attorneys for
Consumers Power Company

Isham, Lincoln & Beale
Three First National Plaza
Suite 5200
Chicago, IL 60602
(312) 558-7500

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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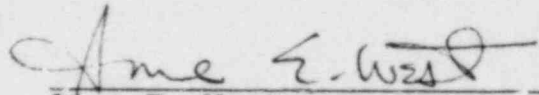
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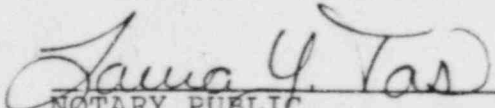
CERTIFICATE OF SERVICE

I, Anne E. West, one of the attorneys for Consumers Power Company, hereby certify that a copy of "Consumers Power Company's Response to Resubmitted Contention by Mary Sinclair Based on United States District Court of Appeals Memorandum Order" was served upon all persons shown in the attached service list by deposit in the United States mail, first class, this 28th day of September, 1982.



Anne E. West

SUBSCRIBED AND SWORN TO
before me this 28th day
of September, 1982.



NOTARY PUBLIC

My Commission Expires
September 10, 1984.

SERVICE LIST

Frank J. Kelley, Esq.
Attorney General of the
State of Michigan
Carole Steinberg, Esq.
Assistant Attorney General
Environmental Protection Div.
720 Law Building
Lansing, Michigan 48913

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

Mr. Wendell H. Marshall
4625 South Saginaw Road
Midland, Michigan 48640

Charles Bechhoefer, Esq.
Atomic Safety & Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

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

Admin. Judge Ralph S. Decker
Route No. 4, Box 190D
Cambridge, Maryland 21613

Mr. D. F. Judd
Bacock & Wilcox
P.O. Box 1260
Lynchburg, Virginia 24505

James E. Brunner, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Steve Gadler
2120 Carter Avenue
St. Paul, Minnesota 55108

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

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

Ms. Mary Sinclair
5711 Summerset Street
Midland, Michigan 48640

William D. Paton, Esq.
Counsel for the NRC Staff
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

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

Barbara Stamiris
5795 North River Road
Route 3
Freeland, Michigan 48623

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

Lee L. Bishop
Harmon & Weiss
1725 I Street, NW #506
Washington, D.C. 20006