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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
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Before Administrative Judges:  
Charles Bechhoefer, Chairman  
Dr. Frederick P. Cowan  
Dr. Jerry Harbour

**SERVED OCT 29 1982**

In the Matter of	}	Docket Nos. 50-329 OM
	}	50-330 OM
CONSUMERS POWER COMPANY	}	Docket Nos. 50-329 OL
	}	50-330 OL
(Midland Plant, Units 1 and 2)	}	October 29, 1982

MEMORANDUM AND ORDER  
(New Contention of B. Stamiris)

On August 24, 1982, Ms. Barbara Stamiris an intervenor, submitted a new contention for the OL portion of this consolidated OL-OM proceeding. The contention raises several questions concerning the validity of the cost-benefit balance appearing in the Staff's Final Environmental Statement (FES). As a result of our Memorandum and Order dated September 2, 1982, which extended the time within which parties could file new contentions (or supplement earlier contentions) based on new information in the FES, Ms. Stamiris filed a timely addendum to her new contention on September 13, 1982. On September 23 and 28, 1982, the Applicant responded to the new contention and the addendum, respectively, opposing the admission of the entire contention. In a consolidated response to both the contention and the addendum, filed on September 28, the Staff offered no objection to a portion of the contention but opposed the addendum. On October 15, 1982, in

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accordance with our Order of October 5, 1982, Ms. Stamiris replied to the responses of the Applicant and Staff. For reasons set forth below, we admit a portion of Ms. Stamiris' new contention.

The contention reads as follows:

I contend that the new cost production, cost savings analysis of the FES, represented by revised table 2.1 (p. A-32) and the revised cost/benefit analysis (p. 6-4) and revised economic statements derived therefrom do not accurately and fully represent the cost/benefit balance of the Midland plant to the public, and should therefore not be accepted as presented.

In support thereof, Ms. Stamiris sets forth six bases. The addendum to the contention in effect sets forth another basis. We shall discuss each basis seriatim.

1. At the outset, however, we turn to the Applicant's claim that each of the costs challenged by Ms. Stamiris (either for accuracy or for failure of inclusion) appeared or failed to appear (as the case may be) in the Draft Environmental Statement (DES) and hence does not constitute new information appearing in the FES. While the Applicant's statement is true with respect to the precise costs listed, the overall cost-benefit balance in the FES is different from that in the DES--primarily because the benefits have been enhanced. As Ms. Stamiris points out, seven of the eight components of the benefits portion of the analysis increased, while the production costs remained the same. Moreover, both the Applicant and Ms. Stamiris submitted comments relating to the cost-benefit balance in the DES (Applicant, comment numbers 3, 13, 16-19, 99-101, 104-107, as designated in FES; Ms. Stamiris, comment number 2). Changes were made in the FES cost-benefit balance to accommodate many of the Applicant's proposed changes, but no changes were

made to reflect Ms. Stamiris' criticisms. Cf. pp. 9-16, 9-20, A-28, A-30 and 31, and A-47 and 48 of the FES with pp. 9-38 and A-95 and 96. In short, we regard the entire cost-benefit balance, as summarized in Table 6.1 of the FES, to be new information, inasmuch as many of its components differ markedly from those in the cost-benefit balance summarized in Table 6.1 of the DES. Cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC \_\_\_\_, \_\_\_\_ n.14 (August 19, 1982).

With that in mind, we turn to the various bases relied on by Ms. Stamiris to support her contention.

2. The first is the asserted use of "unrepresentative and inconsistent" methodologies for determining production costs and benefits (alleged cost savings). The Staff does not object to this basis as support for the contention. The Applicant's opposition is founded upon (1) disagreement with the merits of some of the allegations, and (2) its claim that the cost-benefit balance in the FES employed the same methodology as in the DES. At this stage of the proceeding we cannot reach the first assertion and, for the reasons previously stated, we do not accept the second. Although the same methodology may have been employed, the increases in benefits have skewed the results of the cost-benefit balance to the extent that, if Ms. Stamiris claims are accurate, the balance currently appearing in the FES would be inaccurate and misleading. We accept this basis for the contention (modified to incorporate the corrected figures which Ms. Stamiris indicates she accepts).

3. Ms. Stamiris' second basis is that there is a lack of supporting data for production cost estimates. There is no requirement, however, that

any quantum of supporting data be provided in the FES. Moreover, as the Applicant and Staff point out, Ms. Stamiris does not here claim that the production cost estimates are inaccurate. We therefore reject the second basis. We note, however, that the accuracy of replacement energy costs which the basis cites may be considered under bases 1 and 3, and that supporting data (if any) for the production cost estimates appearing in the FES would be a proper subject for discovery.

4. As her third basis, Ms. Stamiris claims that the reliance of the FES on cost savings as one of the benefits of plant operation is invalid. The Staff offers no objection to this basis. The Applicant asserts that cost savings were utilized in the DES and therefore that Ms. Stamiris' contention is untimely. We reject that position on the ground that the alleged cost savings set forth in the FES are considerably greater than in the DES and hence constitute new information. The Applicant also asserts that Ms. Stamiris' claim lacks basis but in support thereof provides only arguments going to the merits of the contention, upon which we cannot rule at this stage of the proceeding. We therefore accept this basis for the contention.

5. Ms. Stamiris' fourth basis for the contention is that the cost savings increase is not justified--i.e., is inaccurate, as a result of an overemphasis on purchased power. The Staff offers no objection to this basis. The Applicant asserts a lack of basis and specificity, as well as untimeliness. We view this basis as integral to the third basis for the contention and accept it on the same grounds. We note, however, that we are not accepting any claim based on need for power or (for the reasons we set

forth with respect to the second basis) for an alleged lack of supporting data.

6. Ms. Stamiris' fifth and sixth bases assert that cost considerations allowed one party cannot be denied another party and that a valid cost-benefit balance must take into account all costs. In substance, Ms. Stamiris is claiming that increased costs of construction have been taken into account in assessing benefits but not costs, and that a valid cost-benefit balance must consider increased costs of construction beyond those estimated at the construction permit stage.

In our Prehearing Conference Order of August 14, 1982, LBP-82-63, we rejected a claim by Ms. Stamiris (in her proposed contention 1.a) that increased costs of construction should be taken into account in assessing the costs of plant operation. We relied particularly on a statement by the Commission in a recent rulemaking (47 Fed. Reg. 12940, 12942 (March 26, 1982)), as well as the earlier ruling by the Commission that "sunk costs" are as a matter of law not appropriately considered in an operating license cost-benefit balance. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 534 (1977). The Applicant and Staff assert that Ms. Stamiris, through her fifth and sixth bases, is merely reasserting the contention which we rejected, and they both urge us to reject the fifth and sixth bases of the new contention for the same reasons we rejected the earlier contention 1.a.

In support of her fifth and sixth bases, Ms. Stamiris has advanced several new arguments. She first claims that the Commission's rulemaking statement incorporates sufficient flexibility to permit consideration of

increased construction costs in situations (as here) where such increases assertedly are exceptionally great. We disagree. As we understand it, the flexibility to which Ms. Stamiris is referring permits an exception to the general proscription against considering need for power and alternative energy source issues at the OL stage of review only upon a showing of "special circumstances" in accordance with 10 CFR § 2.758. The Commission has indicated that such a showing would be of the nature "that an alternative exists that is clearly and substantially environmentally superior." 47 Fed. Reg. at p. 12941, emphasis supplied. In other words, increased costs by themselves would not constitute a special circumstance, irrespective of their magnitude. For that reason, we do not accept Ms. Stamiris' reading of the Commission's rulemaking language.

There is more substance to Ms. Stamiris' next argument, to the effect that increased costs have been used to enhance the benefits of the plant and hence should also be factored into the cost side of the balance. As Ms. Stamiris points out, if that were the case, the analysis would fail to present a "fair assessment to the public" of the benefits and costs of the facility. On the other hand, sunk costs are not to be considered in an OL cost-benefit balance. As the Commission stressed in its Seabrook decision, CLI-77-8, supra, the Federal action being considered in an OL proceeding such as this one is the licensing of operation of an already constructed facility, not the construction of the facility. 5 NRC at 541. "Money spent is spent." Id. at 534. The increased construction costs have already been incurred. The only question is who will pay those costs--the ratepaying public or the utility's shareholders. The determination of how

those costs will be allocated, however, is not within the purview of NRC. Rather it is a question for state, local or regional determination.

That being so, we do not believe that we can consider increased construction costs in our review of the OL cost-benefit balance. But, for reasons pointed to by Ms. Stamiris, we do not believe that the Staff can base any portion of the benefit side of the cost-benefit balance in the FES upon increases in construction costs. We are thus accepting bases five and six, but only to the extent they assert that the FES improperly relies on increased costs to justify any of the benefits underlying the cost-benefit balance. In that connection, we initially perceive at least two potential problems in this regard. First, the capital costs portion of replacement power costs should not be considered for the same reason we consider capital costs inappropriate for an OL cost-benefit balance--i.e., "money spent is spent." It is not for us to determine the group in society which should bear those costs. Second, we have considerable doubt whether tax payments (based on either high or low levels of construction costs) can be given any consideration in terms of the benefits emanating from the facility. See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 177 (1974); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-336, 4 NRC 3, 4 (1976); Illinois Power Co. (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 46 (1976). Whether any weight has been given to items such as local taxes is, of course, a matter going to the merits of Ms. Stamiris' claim and hence must be left open for future consideration.

7. The addendum to the contention constitutes a seventh basis. By its terms, it is based on a lack of information on dewatering costs in the DES, as well as the FES. Technically it should therefore be considered to be untimely. Given the changes to the FES cost-benefit balance which we have described, however, we decline to reject the addendum on that ground. Furthermore, acceptance of the addendum would enable us to assess more accurately the cost-benefit balance in the FES than would otherwise be the case and hence will improve the record in this regard. Accordingly, we accept the addendum as an additional basis for Ms. Stamiris cost-benefit contention.

8. In sum, we are accepting Ms. Stamiris' contention, as supported by the first, third, fourth, and fifth and sixth (to the extent indicated) bases, and the addendum. In rewritten form, the contention is set forth in the appendix to this opinion. As previously established for new contentions, discovery requests must be filed within 15 days of service of this Memorandum and Order (i.e., by November 18, 1982).

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Based on the foregoing, it is, this 29th day of October 1982

ORDERED

1. That Ms. Stamiris' new FES cost-benefit balance contention, as set forth in the Appendix to this Memorandum and Order, and as limited by the earlier discussion herein, is hereby accepted.



2. That discovery requests on this contention must be filed within 15 days of service of this Memorandum and Order.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

## APPENDIX

Cost-benefit balance contention (includes as subparagraphs (f) and (g) portions of related contentions of Ms. Stamiris which have previously been admitted):

The new production-costs and cost-savings analyses of the FES, represented by revised table 2.1 (p. A-32) and the revised cost/benefit analysis (p. 6-4) and revised economic statements derived therefrom do not accurately and fully represent the cost/benefit balance of the Midland plant to the public, and should therefore not be accepted as presented, for the following reasons:

(a) The cost-benefit analysis employs unrepresentative and inconsistent methodologies in deriving production cost estimates and benefits.

(b) The cost-benefit analysis improperly relies on cost savings as a benefit of operations.

(c) Even if the cost-benefit analysis may utilize cost savings as a benefit, the cost savings set forth in the FES are unjustified, in that they are based to too great an extent on purchased power.

(d) The cost-benefit analysis improperly factors in increased construction costs in computing the benefits of the facility, and improperly relies on local taxes as a benefit.

(e) The cost-benefit analysis improperly omits dewatering operating expenses as a cost of operation.

(f) The cost of decommissioning in the cost benefit analysis is understated, in that it estimates only \$235 million for decommissioning while CPC estimated about \$500 million for Big Rock and Palisades in 1980.

(g) The cost-benefit analysis estimates about a 36-year lifespan for the facility despite the shorter life expectancy and/or derated capacity of Unit I due to its defective weld (SER, p. C-10).