

March 10, 1983

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In the Matter of
CONSUMERS POWER COMPANY
(Big Rock Point Plant)
Docket No. 50-155
(Spent Fuel Pool Modification)

Dear Members of the Appeal Board:

This letter constitutes the response of the NRC Staff to the Licensee's letter dated February 18, 1983 and the Intervenor's letter dated February 24, 1983.

In its letter, the Licensee forwarded to the Appeal Board the deposition of Staff experts Dr. Walter L. Brooks and Mr. Daniel B. Fieno. The deposition had been taken on December 29, 1982 and January 10, 1983. As stated in the Licensee's letter, the deposition was enclosed "for your information."

The Intervenor has protested the distribution of the deposition to the Appeal Board, since the material contained therein is not in the record of this proceeding, and the deposition is not yet complete. The Intervenor also requested the Appeal Board to remand this case to the Licensing Board so that it could entertain a motion by the Licensee to reopen the record in this proceeding.

The Staff believes it was not inappropriate for the Licensee to have submitted the subject deposition to the Appeal Board. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-626 (1973). However, it would be inappropriate for this Board to consider the deposition in a substantive determination of this appeal, as it is not in evidence in this proceeding. See Administrative Procedure Act, § 7(d), 5 USC § 556(d); Public Service Co. of Indiana (Marble Hill

Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 191 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 402-05 (1976).

Should the Licensee or any other party feel that the material might be considered at this stage of the proceeding, an appropriate course would be for that party to move to reopen the record upon a showing that the deposition contains significant new evidence which could change the determination herein. See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-452, 7 NRC 320, 338 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-5 (1981).

Sincerely,

Richard G. Bachmann

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