

9/22/82 DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'82 SEP 24 A11:07

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICES
BRANCH

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

CONSUMERS POWER COMPANY'S BRIEF IN OPPOSITION TO STAMIRIS'
MOTION FOR PARTIAL INITIAL DECISION ON QA
ADEQUACY IN SOILS REMEDIAL WORK PRIOR
TO COMMENCEMENT OF REMEDIAL UNDERPINNING EXCAVATIONS

In her motion dated September 4, 1982, Intervenor Barbara Stamiris seeks an order from this Board halting any further construction activities with respect to the remedial underpinning work planned for the auxiliary building and service water pump structure. Ms. Stamiris asserts that protection of the public health and safety as well as "expedience" will be enhanced if "contested hearings" on the subject of the adequacy of quality assurance for the remedial underpinning work are completed and a partial initial decision issued before construction of the underpinnings begin.

Consumers Power Company ("Consumers") opposes the motion. In essence, the motion is based on a misunderstanding of the jurisdiction of the Board under the December 6, 1979 order and the overall relationship between a Licensing

8209270165 820922
PDR ADOCK 05000329
PDR
9

DS03

Board and the Staff. Moreover, the motion ignores the import of this Board's order of April 30, 1982 which recognized the limited supervisory role over day to day construction activities which can be implemented by a licensing board. In these circumstances, only a wholly unjustified and unsupportable mistrust of the NRC Staff's conduct of its oversight responsibilities can be the basis for Ms. Stamiris' motion.

I

The jurisdiction of this Board is essentially limited to ordering NRC Staff supervision of the remedial underpinning activities.

In the portion of this proceeding which is designated "OM", this Board's jurisdiction is derived from an order dated December 6, 1979 issued jointly by two components of the NRC Staff, the Office of Nuclear Reactor Regulation and the Office of Inspection and Enforcement.^{1/} As described in this Board's April 30, 1982 order, the December 6, 1979 order prohibited, inter alia, the construction of the underpinnings for the auxiliary building and the service water pump structure pending submission of an application for an amendment to the construction permits for the Midland plant and the issuance of such amendments

^{1/} The powers and duties of a licensing board in an operating license proceeding are outlined in 10 CFR §2.104(c).

by the NRC, ordinarily in the person of the Director of the Office of Nuclear Reactor Regulation. This Board, constituted at Consumer's request, is to decide whether the facts underlying the December 6, 1979 order are correct and whether that order should be sustained.

Sustaining the December 6, 1979 order would result in no more than the filing by Consumers of an application for a construction permit amendment; NRC Staff review of such an application; issuance of a construction permit amendment; and construction of the facility (including the remedial work) in accordance with the terms of the amendment. Such construction would be subject to the normal oversight activities of the Staff. The December 6, 1979 order does not contemplate any day to day supervisory responsibilities over construction of the remedial work by this Board. But just such an expansion of the Board's jurisdiction is contemplated by the instant motion. As set out in the following sections of this brief, the NRC Staff is conscientiously fulfilling its review and inspection functions. No further conditions to the commencement of remedial work are authorized under the terms of the December 6, 1979 order, nor are any necessary.

II.

This Board's April 30, 1982 Order and the implementation of that Order by Consumers and the NRC virtually exhausts the board's authority to regulate the remedial construction activities.

From December, 1979 until the Board's April 30, 1982 Order, Consumers operated under a voluntary commitment to undertake soils remedial work only with Staff review and approval. In the April 30 Order, this Board found "no indication on the record that Consumers has failed to honor this commitment." (April 30 Order at p. 11). In addition, the Board found that "Consumers' voluntary agreement has resulted in adequate Staff surveillance of the proposed remedial actions covered thereby, prior to Consumers' commencement of the remedial actions." (April 30 Order at p. 12). However, the Board took note of certain disagreements between the NRC Staff and Consumers as well as varying interpretations of the scope of the Company's voluntary commitment. The Board then ordered the issuance of construction permit amendments prohibiting remedial work "in the absence of Staff approval" (April 30 Order at p. 19). The Board further ordered that the remedial activities be governed by a Staff-approved Quality Assurance Plan. In substance, the April 30, 1982 Order transferred control of the remedial work from the Company and its voluntary commitment to obtain NRC Staff approval of remedial work to the NRC Staff which was ordered

to give "explicit prior approval" to such activities.^{2/} No more could have been obtained by the NRC Staff with respect to uncompleted remedial activities if the December 6, 1979 order had been wholly sustained. In the words of this Board, "the most stringent condition we could impose ... would be to prohibit such [remedial] activities pending submission of an amendment to the application and issuance of construction-permit amendments" (April 30 Order at p. 9, n. 21).

The construction permit amendments were issued on May 26, 1982. Thereafter, because of disagreements between the Staff and Consumers regarding the scope of the Staff's approval, a procedure was established for explicit prior written approval of remedial construction activities. (8-13-82 transcript at p. 8322-8323, referring to Work Authorization Procedure effective 8-12-82).

^{2/} Ms. Stamiris cites Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978) to support the proposition that the Board should not have given this responsibility to the Staff. In Public Service Company of Indiana, the Appeal Board noted that a licensing board should generally not delegate open matters to the Staff for posthearing resolution. (7 NRC at 318). The situation at hand is clearly distinguishable since this Licensing Board will be able to review the resolutions reached by Consumers and the Staff at the hearings yet to be held in the OM proceeding.

The Staff has notified Consumers that its approval of the remedial work (including the underpinning activities which are the focus of Ms. Stamiris' motion) will not be piecemeal. (Letter from Darrell G. Eisenhut to J. W. Cook dated May 25, 1982). Moreover, Staff satisfaction with Consumers' Quality Assurance Plan and its implementation is integral to such approval. (NRC and CPCo Work Authorization Procedure dated August 12, 1982 at §2.1; April 30 Order at p.21) As of the date of this response, the NRC Staff has not given its specific written approval so that full-scale construction of the underpinnings may begin. Clearly, the procedures envisioned by the April 30, 1982 order are being observed by the NRC Staff and Consumers.

III.

There is no threat to the public health and safety which requires immediate public hearing which are themselves a diversion of Staff and Consumers resources from implementation of the remedial work.

Under the terms of the April 30, 1982 order and its implementing procedures, Staff review of and concurrence with Consumers' remaining remedial work will be detailed and comprehensive. There is simply no present threat to the public health and safety from construction of the underpinnings. That fact was recognized by the Staff itself in the issuance of the December 6, 1979 Order, which permitted construction to continue pending the outcome of any hearings which were requested. It was also implicitly recognized in the April 30, 1982 Order in which the Board held that construction could continue, subject

to explicit Staff approval (See April 30 Order at p. 18).

Nothing has occurred since the issuance of the April 30, 1982 Order which suggests that any more stringent controls on the remedial activities are appropriate. Ms. Stamiris attaches to her motion a list of non-conformance reports, stop work orders and other documents which set forth problems in the implementation of the soils remedial work. Many of them precede the issuance of the April 30, 1982 Order and were specifically referred to in that Order. The others, with one exception, represent the effective functioning of the quality assurance plan. That is, non-conformances are being identified and corrected and, when necessary, construction is halted pending resolution or correction of the matters described in the documents. The one other event described in the attachment to Ms. Stamiris' motion is an investigation of an alleged deliberate misstatement by Consumers' employees to an NRC Staff inspector. The substance of that investigation deals with the scope of the Staff's approval of construction activities prior to the April 30, 1982 Order. In any event, this matter is also fully susceptible to a full evidentiary presentation prior to the operation of the plant, the first occasion on which any conceivable threat to the public health and safety could occur.

Ms. Stamiris asserts repeatedly that the underpinning excavation work will irrevocably commit Consumers to this course of remedial action and, in some undisclosed manner, preclude this Board from later resolving QA and safety issues. (Motion at p. 2-3). However, as described above, the Staff has been given the responsibility of reviewing and approving just this type of soils activity. (April 30 Order at p. 21). Moreover, in testimony cited by Ms. Stamiris in her Motion, the point was made that the reversibility of remedial actions and the question of whether a remedial action might preclude other possible remedies in the future are criteria considered by the Staff in determining whether or not to approve proposed remedial actions. (Motion at p. 3; 7-7-81 hearing transcript at p. 1137). Finally, the risk that remedial action might prove unsuccessful, be irreversible and preclude other remedial action is a risk which is borne by Consumers. The Board always has the ultimate sanction of refusing to grant an operating license, and, if necessary, this power can be wielded as a final means of insuring public health and safety.

In these circumstances, Ms. Stamiris' proposal that contested QA hearings be held before the Staff and Consumers resolve difference is contrary to the Staff's plan which this Board accepted in its Memorandum (Telephone Conference Call of July 12, 1982) dated July 13, 1982. There would be unnecessary

delay in starting underpinning excavations resulting in increased expenditures of time and money. Time would necessarily have to be spent by Consumers, the NRC Staff, and the Board in preparing and hearing testimony and in resolving these issues in a written decision. These same matters may well be resolved informally between Consumers and the NRC Staff in accordance with the process outlined in the July 12, 1982 conference call. Resolution of these issues will not shield any earlier differences between the Staff and Consumers from examination on the public record. The Board has specifically requested that any differences in position between Consumers and the Staff be presented to it as part of any evidentiary submissions (July 13, 1982 Order at p. 2). ^{3/}

It is also apparent that the process suggested by Ms. Stamiris' motion is going to be neither efficient nor effective. Given the nature of NRC hearings and the practice of using prefiled prepared testimony, the Board typically acts on the basis of historical information. In this situation, the

^{3/} Ms. Stamiris attempts to compare the instant motion with Consumers' Motion for an Initial Partial QA Decision filed September 2, 1981. (Motion at p. 4, 9-10). The comparison is invalid since Consumers' Motion for an Initial Partial QA Decision was filed at a time when it was believed that the record on QA was complete and, therefore, that an early decision on QA would benefit the public by obviating waste. In contrast, Ms. Stamiris' proposal would necessitate delay in underpinning work until after further hearings are completed and thereby waste both time and money.

facts presented to the Board cannot possibly reflect the current status of the project and the Board's written decision will of necessity be an historical rather than a current view of Quality Assurance implementation. The Board acts as the final check on QA adequacy. However, the litigating process simply does not lend itself to speedy resolution of technical issues, including implementation of quality assurance, on a day to day basis.

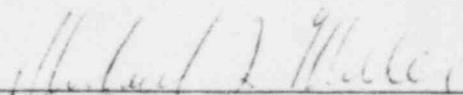
The Staff, with its technical resources, oversees the day-to-day adequacy of QA. Acting on current information, the Staff acts responsibly to insure public health and safety in the planning and implementation of remedial work and QA. The Staff has the responsibility of overseeing the work of Consumers as it takes place and is obligated, together with Consumers, to report the resolution of these issues to the Board.

IV.

Conclusion

For all the foregoing reasons, the motion should be denied.

Isham, Lincoln & Beale
3 First National Plaza
Chicago, Illinois 60602
(312) 558 7500
Dated: September 22, 1982



Michael I. Miller

One of the Attorneys for
Consumers Power Company

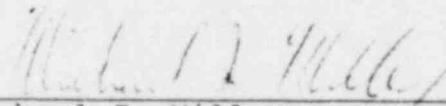
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 |) | 50-330-OL |
| and 2) |) | |

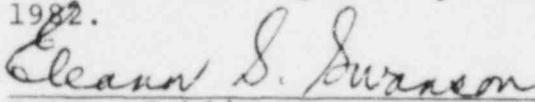
CERTIFICATE OF SERVICE

I, Michael I. Miller, one of the attorneys for Consumers Power Company, hereby certify that a copy of "Consumers Power Company's Brief In Opposition to Stamiris' Motion For Partial Initial Decision on QA Adequacy in Soils Remedial Work Prior to Commencement of Remedial Underpinning Excavations" was served upon all persons shown in the attached service list by deposit in the United States mail, first class, this 22nd day of September, 1982.



Michael I. Miller

SUBSCRIBED AND SWORN before
me this 22nd day of September,
1982.



Notary Public

My Commission Expires January 14, 1983

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.
Cherry & Flynn
Suite 3700
Three First National Plaza
Chicago, Illinois 60602

Mr. Wendell H. Marshall
4625 S. 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 Raton, Florida 33433

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

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

Steve Gadler, Esq.
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

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

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

Lee L. Bishop, Esq.
Harmon & Weiss
1725 "I" Street N.W. #506
Washington, D. C. 20006