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

Dear Administrative Judges:

In a letter dated September 10, 1984, Consumers Power Company ("Consumers" or "the Company") notified the Atomic Safety and Licensing Board ("Board") that the Company had announced complete shutdown of design, construction, and testing activities for the Midland plant and that the Company would not likely revive the project in the near future. In that letter, Consumers also indicated that it would file an additional report on the status of the Midland project with this Licensing Board 6 months from the time of the September 10 letter. On January 23, 1985, this Board issued its Partial Initial Decision on the technical aspects of remedial soils issues. Consumers Power Company (Midland Plants Units 1 and 2), LBP-85-2, slip opinion (Jan. 23, 1985). In LBP-85-2, the Board stated:

We agree . . . that the Applicant should file a 6-month status report. Such report should include recommendations as to future hearings. In particular, it should outline information discovered in the Dow-CPC litigation which would affect these proceedings, as to which Ms. Stamiris seeks further hearings. Such report should be filed on or before April 1, 1985.

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This letter constitutes the 6-month status report suggested in the September 10 letter and referred to by the Board.

Status of the Project

The Midland project remains in a shutdown condition. The objectives of current activities are preserving the accumulated project assets and preserving the option to complete one or both units under the appropriate conditions. Consumers has established an organization to perform the activities essential to accomplishing these objectives.

The project shutdown encompasses two distinct phases, the Demobilization Phase and the Surveillance and Maintenance Phase. The substantially complete Demobilization Phase governed the transition from an active construction project to a steady state situation in which the facility can be maintained in an appropriate condition. In the on-going Surveillance and Maintenance (S&M) Phase the Company plans and carries out activities to preserve the plant in its shutdown condition. This Phase will continue until a decision has been made regarding the ultimate disposition of the facility. Although the nominal transition date between the Demobilization Phase and the Surveillance and Maintenance phase was January 1, 1985, some surveillance and maintenance activities were initiated prior to that date and some demobilization activities extend beyond that date.

The activities of the Demobilization Phase included personnel destaffing, contractor demobilization, records collection and contract and purchase order closeout. The S&M Phase consists of a planned set of continuing activities requiring minimal resources while preserving the plant in its shutdown condition. These activities include system layup, preventive and corrective maintenance, soils monitoring, storage, corrosion monitoring, salvage and sales, and housekeeping. Part or all of each of the above activities is safety related. A Quality Assurance Program Plan covers the safety-related activities of the S&M Phase of the Project. The Plan was submitted to Region III on October 1, 1984. In addition to the specific quality-related activities listed above, the Plan provides for the normal quality assurance activities of certifying audit and inspection personnel, non-conformance management, evaluation of suppliers, determining reportability pursuant to 10 C.F.R. Part 21 and 10 C.F.R. § 50.55(e), and corrective action management.

The records management program is one of the more complex aspects of the Demobilization and Surveillance and Maintenance Phases. Consumers recognizes successful records management for its importance to continued plant

licensability. The Company's general approach has been to return the permanent project records to the appropriate document control center or project file as part of the shutdown. During the demobilization phase, individuals leaving the project turned in documents in their personal possession for collection and retention. Records in document control or record centers will be stored or maintained as they were in the centers prior to shutdown to facilitate retrieval and active use during the S&M Phase. Most documents turned in during shutdown are classified as inactive records and are managed under a storage program which assures their retrievability, but not on short notice.

As part of the demobilization activities the permanent equipment and facilities of the plant were placed in a safe, maintainable condition and turned over by the Bechtel Power Corporation and subcontractors to Consumers. Consumers developed a long-term layup and maintenance program to preserve the equipment and facilities during the Surveillance and Maintenance Phase. The generic engineering reviews and overall planning are complete. The generation and implementation of specific detailed criteria is continuing. All materials and equipment which would not be part of the permanent plant installation are being recovered, inventoried, and stored or salvaged.

The status of the soils work as of the July 16, 1984 shutdown was such that the tasks necessary to secure the underpinning in a safe layup condition were minor. Consumers wrote a series of letters to the NRC Staff in July and August which described the tasks necessary to secure the soils remedial work. These letters requested and obtained NRC concurrence to take the steps necessary to do so. As of December 1984, Consumers Power had provided Region III a draft proposal detailing the S&M monitoring requirements. Based on the NRC's general concurrence, Consumers implemented this monitoring program. Detailed monitoring requirements are still under review by NRR. Consumers will continue to keep NRC Region III informed as soils related shutdown activities are performed. The plant cooling pond dewatering, the last significant shutdown task related to soils work, was successfully completed in mid-December, 1984.

Future Hearings

In the September 10, 1984 letter, Consumers informed the Board that it had discontinued all licensing activities concerning Midland except those necessary to preserve the option to complete the plant. The Company requested that the Board not hold any further evidentiary hearings in the OM/OL proceeding at that time. In a letter dated October 26, 1984

to the Board, the NRC Staff also recognized that it would not be productive at that time to hold any further evidentiary hearings in the OM/OL proceeding for the Midland project. In its Partial Initial Decision, LBP-85-2, supra at 18, the Board also stated: "We agree that no further hearings should be held in the near future"

In September the Company stated that it had no plans either to withdraw its operating license application or to surrender the construction permits for the Midland facility. On November 5, 1984, Consumers furnished this Board with a copy of an affidavit of Mr. John D. Selby, Chairman of the Board of Consumers. In this affidavit, Mr. Selby had set forth in response to discovery requests in the Midland Rate Case Consumers' plans for the Midland project. Mr. Selby stated: "The Company is not planning to resume Midland construction or to spend any money for that purpose in 1985, 1986 or anytime in the future. The Company will not unilaterally resume Midland construction in 1985, 1986, or thereafter."

Mr. Selby further indicated that the only circumstance which would allow Consumers to consider resuming construction on the plant would be support of appropriate governmental officials to complete the plant as being in the public interest coupled with availability of an infusion of sufficient outside funds to complete the plant. Mr. Selby also indicated that by keeping the plant properly maintained and retaining the construction permits, the Company has a more marketable product because it will be able to keep a documented NRC Quality Assurance Program in place. If no interest in finishing the plant materializes, the Company will, no later than 1987, "do whatever is necessary to claim an abandonment loss for federal income tax purposes."

The status of the project has not changed since the fall of 1984. The Company still wishes to maintain for a finite time the option of reactivating the project, but has no present plan to reactivate. The Company has altered neither its intention to maintain the Midland facility construction permits nor its intention not to unilaterally resume construction in the future unless circumstances change as outlined above.

Consumers therefore requests that this Licensing Board take no action either to terminate the present licensing proceedings or to hold any further hearings on any subject until such time as Consumers announces a decision on the fate of the project. The Company will notify the Board promptly of any decision regarding the disposition of the project, whether

it be reactivation of construction, abandonment, or some other alternative.

Reporting Requirements

Consumers will continue to provide reports of conditions pursuant to 10 C.F.R. 50.55(e). In the September 10, 1984 letter, Consumers sought permission to discontinue submitting audit and nonconformance reports to this Board. Separately, in a September 11, 1984 letter to H.R. Denton, Consumers requested that submittals pursuant to ALAB-106 be deferred. It has been agreed that ALAB-106 reporting requirements will be continued. The Partial Initial Decision requests that one copy of audit and nonconformance reports be provided to the Board. The Company will meet its obligation to supply the Board with these reports by placing the Board Chairman on distribution for the ALAB-106 report.

The NRC Staff and Consumers are still discussing the appropriate monitoring and reporting requirements pertaining to soils remedial work during the period of shutdown. The monitoring requirements proposed to Region III in December, 1984 are being implemented.

Disclosure of Developments in the Dow Litigation

In the January 23, 1985 Partial Initial Decision, LBP-85-2, supra at 18, the Board requested Consumers to "outline information discovered in the Dow-CPC litigation which would affect these proceedings." The standard governing an applicant's duty to disclose new information to a Board originated in Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 A.E.C. 623, 625-26 (1973) and has been followed in numerous cases thereafter. In McGuire, the Appeal Board identified the underlying ground for the disclosure rule as the risk that a Licensing Board might make a decision based on incomplete, outdated, or erroneous evidence:

If the presiding board and other parties are not informed in a timely manner of such changes, the inescapable result will be that reasoned decision-making would suffer. Indeed, the adjudication could become meaningless, for adjudicatory boards would be passing upon evidence which would not accurately reflect existing facts.

Id. Along the same line, the Appeal Board more recently noted:

A review of our case precedents . . . shows that the "Board notification obligation" of an applicant or licensee seems to pertain more to matters that could affect the course of the litigation, such as a change in the license application or an event that would moot or resolve some issue.

Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 N.R.C. 1350, 1358 n.6 (1984). McGuire states and Three Mile Island suggests implicitly that imminence of some decision is a major factor in evaluating the timeliness requirement. Of course, a decision to reactivate or abandon the Midland project would require prompt notification of the Board in the circumstances of this case, but the matter in the Dow litigation hardly rises to such a level of urgency.

The Applicant is also bound not to make material false statements under § 186a of the Atomic Energy Act of 1954 by omitting to disclose information that appears to raise serious issue. Id. Materiality relates not only to the apparent significance of information but also to its relation to issues before the tribunal and to the imminence of any decision by it. The Commission has stated: "There is no obvious boundary between material information and trivia, but clear cases of both exist, and a careful attention to context along with a healthy dose of common sense will resolve most problems." Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480, 487 (1976). According to the Commission, the degree of materiality of information is also related to the imminence of a decision. Id. at 487-88. Only when the record in that case is closed and a decision has been rendered will the Company and the Board be in a position to judge materiality, which must be done in the context of the entire record and the court's findings of fact.

Since this Board is not currently adjudicating anything (see LBP-85-2), and since, we assume, no hearings are planned in the foreseeable future, the governing case law simply does not require that Consumers keep the Board completely current on every development in the Dow litigation. In any event, the case law recognizes that a licensee has a reasonable time within which to evaluate new information before the possibility of a disclosure requirement ripens into a present duty. See Three Mile Island, ALAB-774, supra at 1359; United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-22, 16 N.R.C. 405, 408 (1982). Here,

it is not reasonable for the Company to digest and evaluate the significance of bits and pieces of the Dow litigation record before the record in that case has been closed and a decision has been rendered.

We have already requested that this Licensing Board not conduct further hearings in this case until Consumers announces a decision on the future of the project. During this time period, Consumers requests that it be excused from providing the Board with interim information regarding the Dow litigation except as it may be already required to be included in nonconformance reports or reports of conditions pursuant to 10 C.F.R. § 50.55(e).

At an appropriate time Consumers will inform the Board of any significant information bearing on issues relevant to the licensing proceeding which have been disclosed in the totality of the Dow litigation record, including providing a copy of the court's findings of fact and conclusions of law.

Conclusion

For all of the foregoing reasons, Consumers respectfully requests this Licensing Board to take no action with respect to this proceeding until further notification by the Company. The Company also requests that the Board not require interim reports on the Dow litigation. Finally, Consumers commits to informing the Board forthwith of any significant change in the status of the project regarding reactivation of construction, abandonment, or some other alternative.

Sincerely,

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