

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

85 APR -4 10:34

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

CENTRE OF SECRETARY
DOCKETING & RECORDS

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

MEMORANDUM OF CONSUMERS POWER COMPANY

In its Order of March 13, 1985 ("Order"), the Atomic Safety and Licensing Appeal Board ("Appeal Board") directed the parties to file memoranda on two issues: (1) whether the Appeal Board should vacate the Atomic Safety and Licensing Board's ("Licensing Board's") Partial Initial Decision in Consumers Power Company (Midland Plant, Units 1 and 2), LBP-85-2, 21 N.R.C. ___, slip opinion (January 23, 1985) ("LBP-85-2") on grounds of mootness and thereby strip it of any precedential effect; and (2) whether the Appeal Board should remand the operating license portion of the proceeding to the Licensing Board with instructions to dismiss the operating license application for failure to pursue it. Consumers Power Company ("Consumers" or the "Company") submits that the Partial Initial Decision, which decides the technical adequacy of some of the soils remedial activities at the Midland site, is not moot because the Company has not abandoned the Midland project. Therefore, neither vacation of

8504050246 850401
PDR ADDCK 05000329
PDR

DS03

LBP-85-2 nor dismissal of the operating license applications is warranted.

I. It Would Be Unjust And Improper To Vacate LBP-85-2 Since It Affects The Construction Permits For Midland

A. Vacating LBP-85-2 Would Deprive Consumers Of Important Rights

The Company opposes vacation of LBP-85-2 and dismissal of the operating license applications as legally improper. There is, in addition, a compelling equitable consideration which militates against a decision to vacate LBP-85-2, namely, the adverse impact such a decision would have on the Company, its shareholders, and its customers.

Consumers has invested more than \$4 billion in the Midland facility, which is over 85% complete. Consumers has not abandoned the Midland project, although it halted construction in July, 1984. The Company wishes to preserve the option of either selling the plant as a licensable nuclear generating facility or resuming construction itself if sufficient funds become available and if appropriate government officials propose resumption of construction as being in the public interest.

Vacating LBP-85-2 would greatly diminish the feasibility of either sale or resumption of construction

because it would adversely affect the construction permits.^{1/}

The Licensing Board's decision, which relates to technical adequacy of the soils remedial work, concludes that the

^{1/}

LBP-85-2 decided principally issues related to the Midland construction permits. The December 6, 1979 Order Modifying Construction Permits issued jointly by the Acting Director of NRR and the Director of I&E and Ms. Stamiris' contentions arising out of it were the basic framework within which the parties and the Licensing Board developed the evidentiary record underlying LBP-85-2. The issues resolved in LBP-85-2 were substantially all construction permit issues associated with the Order of Modification and Ms. Stamiris' contentions.

The Order Modifying Construction Permits made clear that the principal issue the NRC Staff sought to have resolved was the adequacy of acceptance criteria for the construction of safety-related soils and foundation systems and structures, a construction permit issue. Moreover, in LBP-85-2 the Licensing Board made construction permit type findings relating to the Order of Modification. LBP-85-2, supra at, e.g., 10, 16, 140.

It is unclear to what extent, if any, the Licensing Board in LBP-85-2 decided issues going to the operating license contentions in the consolidated proceeding. Those contentions dealt primarily with the settlement of the diesel-generator building, an issue specifically not decided by LBP-85-2. See LBP-85-2, App. A, pp. A-4 - A-5; LBP-85-2 at p. 13. Any attempt to separate out those elements of the decision which go only to operating license issues is doomed to failure, given the substantial overlap of factual findings on such issues as seismicity between the OM and OL contentions. In any event, the Licensing Board refused to reach any "reasonable assurance" conclusions of law regarding the OL issues.

Certain factual findings have pertinence to both the OL and OM contentions. For example, the Licensing Board's findings regarding seismicity are pertinent to all contentions going to the adequacy of soils remedial measures whether those measures relate to the diesel-generator building or other safety-related structures. However, to the limited extent that any operating license issues may have been resolved, those decisions are tentative and explicitly subject to later revision. LBP-85-2, supra at, e.g., 16, 140, 358.

concepts and designs embodied in the proposed and partly constructed soils remedial measures, such as underpinning, pipe rebedding, seismic analysis, foundation redesign, and other matters are technically adequate.^{2/} The Licensing Board resolved these technical issues in order to preclude the necessity for relitigation of the same issues if work on the project should ever be resumed. LBP-85-2, supra at 4. Moreover, no party to the case has indicated any intent to object within the time period for appeal, even as extended.

The need for relitigation of these issues would greatly diminish the value of the Midland facility as a nuclear station. A potential buyer or investor would want assurance that the remedial foundation concepts and designs were likely to be found adequate and that the litigation process which established their adequacy need not be repeated. The continued vitality of the Licensing Board's technical findings is therefore very important to the Company's ability to market or gain governmental approval and financing for the facility as a nuclear project.

Unquestionably, substantial amounts of effort and resources were expended in resolving the technical adequacy of the soils remedial measures. The actions presently

^{2/} The Board reserved judgment on some open questions which are described in LBP-85-2, supra at 10-17.

contemplated by the Appeal Board would render valueless public resources already committed to the litigation process and now irretrievable. Such a result would be both wasteful and unfair to all existing and potential future parties to the proceeding.

Clearly, only the most compelling circumstances should lead to a result which could impose significant hardship upon the Company and vitiate the worthy efforts of the participants. It appears that the only present circumstance which favors vacating LBP-85-2 and dismissing the operating license applications is the desirability of maintaining the docket of the Licensing Board and the Appeal Board in a current status. Without deprecating the importance of docket management by the judicial boards of the NRC, this factor should be balanced against the severe consequences of vacation and dismissal to the Company and the other parties to the proceeding.^{3/} When the Appeal Board strikes such a

^{3/} Consumers does recognize the Appeal Board's "sensitive regard" for the state of its own docket. Cf. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 54 (1978). However, docket clearing is fundamentally a housekeeping concern. The Appeal Board is free to keep its own docket clear by not engaging in review of LBP-85-2 until such action becomes necessary. It should not undertake to clear the Licensing Board's docket, since Midland creates little work for the Licensing Board, and allocation of Licensing Board work load is really the task of the Chairman of the Licensing Board Panel.

balance it should find that no alteration in the status of LBP-85-2 or the operating license applications for Midland is warranted.

B. There Is No Factual Basis For A Finding That The Company Has Abandoned The Midland Construction Permits

In his Affidavit of November 1, 1984, Mr. John D. Selby, Chairman of the Board of Consumers, stated, inter alia, "In order to maximize recovery [of amounts invested in Midland], the Company intends to carry out two years of surveillance and maintenance activity on the plant and has taken steps to have its NRC construction permits continued." Mr. Selby stated that Consumers does not contemplate an abandonment decision until 1987. In its status report to the Licensing Board, also dated April 1, 1985 (served concurrently herewith), Consumers restates its intention to retain its construction permits and to maintain the facility in a licensable condition in the hope that it can be sold as an entity.^{4/} The standard for mootness is clear abandonment

^{4/} For example, a Quality Assurance plan, which has been submitted to the NRC Staff for approval, is in place for surveillance and maintenance activities. Project records are being maintained so that resumption of construction, if it occurs, will not be hampered by the absence of necessary documentation.

rendering further proceedings entirely academic.^{5/} Given the present state of the record, it is uncontroverted that the construction permits have not been abandoned.

In the circumstances of this case, it is apparent that LBP-85-2 is not moot insofar as it decided issues relating to the order modifying the Midland construction permits. Whether operating license issues were decided is indeterminate. Thus, there is no basis for vacating LBP-85-2.

C. There Is No Need To Remove Precedential Effect From LBP-85-2

Since LBP-85-2 is not moot, the Appeal Board has no basis to "strip it of any possible precedential effect."^{6/} Nor is there any need to do so. Given the unique nature of the soils issues in the present case, the likelihood of significant precedential impact of LBP-85-2 is small. One portion of the decision, the mixed conclusions of law and fact regarding tectonic province and use of probabalistic analysis

^{5/} Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 N.R.C. 153, 154 (1980). See infra at pp. 8-9.

^{6/} Order at 2. The Appeal Board cites Northern States Power Co., (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 55 (1978), as precedent for vacating LBP-85-2. There, however, all parties agreed that the affected portion of the decision was moot and the applicant sought to strip the Licensing Board's decision of precedential effect. Neither of those conditions is present here.

to satisfy Appendix A to Part 50, might have have some precedential effect, but that effect would not be significant.

In any event, since no one has appealed LBP-85-2, its conclusions do not carry precedential effect. As the Appeal Board itself has noted, "we do not give stare decisis effect to licensing board conclusions on legal issues not brought to us by way of an appeal [i.e., in sua sponte review]." Duke Power Company (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 N.R.C. 979, 981 n.4 (1978). Thus, even with sua sponte review, LBP-85-2 would have no more than res judicata effect.

II. Circumstances Do Not Justify Dismissal Of The Operating Licensing Applications

A. The Operating License Proceeding Is Not Legally Moot

The Appeal Board suggested in its Order that the Midland operating license issues may be moot, observing that the operating license proceeding is "deeply comatose." However, the proper legal standard for deciding mootness is whether the Company has "clearly abandoned" any plans to construct and operate the Midland facility, thereby rendering the hearing issues "entirely academic." Puerto Rico Electric

Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 N.R.C. 153, 154 (1980).^{7/}

The facts in the Midland case do not support a finding of abandonment rendering the issues in the operating license case entirely academic. In its September 10, 1984 letter to the Licensing Board the Company made clear its intention to maintain not only the construction permits but the operating license applications. The Licensing Board's analysis of the mootness question for the Midland proceeding is also instructive. The Board acknowledged the improbability that the Midland project would be reactivated in the near future, but recognized the Company's desire to "preserve its options." The Board found that the Company has no plans to withdraw its operating license application or to surrender its construction permits. LBP-85-2, slip opinion at 4.

In this regard, the Company has repeatedly stated that it will attempt to sell the plant as a licensable nuclear power plant. Alternatively, if appropriate governmental agencies and officials propose resumption of construction by Consumers Power Company as being in the public interest, and the financial community or someone else is willing to commit

^{7/} As we have shown above, LBP-85-2 deals with construction permit issues and is not moot. Even if the decision related solely to operating license issues, however, the factual predicate for a finding of mootness is lacking.

the funds necessary to enable completion, the Company will consider resuming construction. To better foster either possibility, Consumers has committed to carry out two years of Staff approved surveillance and maintenance activities.^{8/} Affidavit of John D. Selby, dated November 1, 1984, furnished to Licensing Board November 5, 1984. See also Consumers Power Company Letter to Administrative Judges, dated April 1, 1985. Moreover, since the mootness issue is dependent on a factual determination of abandonment,^{9/} it would be inappropriate for the Appeal Board to make such a finding of fact in the first instance. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 N.R.C. 153, 155 (1980).

B. The Present Status of Midland Does Not Justify Involuntary Dismissal Of The Operating License Applications

The case law indicates that conditions more definitive than suspended construction and an inactive hearing process are necessary to cause a proceeding to be dismissed. In Long Island Lighting Company (Jamesport Nuclear Power

^{8/} Of course, the Company is committed to inform the Licensing Board promptly of any change in its plans for Midland.

^{9/} The Appeal Board in its Order characterized the dismissal grounds as "failure to pursue" the operating license. As this Memorandum indicates, supra at p. 8, the issue is whether Consumers has clearly abandoned the project thereby rendering the hearing issues entirely academic.

Station, Units 1 and 2), ALAB-628, 13 N.R.C. 24 (1981), the applicants represented to the Appeal Board that Jamesport would not be built irrespective of the outcome of a pending appeal. The applicants had also voluntarily moved to terminate the proceeding as moot. In Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-84-51, 20 N.R.C. 1478 (1984), the applicant's board of directors had formally voted not to build the second unit, resulting in a finding of definitive abandonment. In Cincinnati Gas & Electric (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 N.R.C. 765 (1984), the applicant voluntarily moved for dismissal of the operating license application, representing, inter alia, that the nuclear steam supply system would be modified to preclude its operation as a "utilization facility" within the meaning of the Atomic Energy Act of 1954.

Here, Consumers is pursuing alternatives that may result in completion of the facility. The Company is strenuously resisting dismissal, not seeking it. It is not representing that the facility will not be built irrespective of any NRC decision. Consumers' board of directors has not voted not to build the plant. Consumers has not disabled the Midland units as nuclear utilization facilities but instead has taken steps to maintain Midland as a licensable nuclear facility. Thus, the conditions that would warrant dismissal are simply not present in the instant case.

CONCLUSION

Consumers believes, on the basis of its current intentions to continue to hold the Construction Permits for the Midland plant and to attempt to sell the plant as a licensable nuclear facility, and on the basis of its its receptivity to a change in attitude by governmental bodies toward the plant which might enable the Company to complete the facility, that neither the OM proceeding nor the operating license proceeding is moot. The Company therefore requests that the Appeal Board not take any action to vacate LBP-85-2 or dismiss the operating license applications.

Respectfully submitted,

Michael I. Miller (KW)
Michael I. Miller

Frederick C. Williams
Frederick C. Williams
Two of the Attorneys for
Consumers Power Company

Michael I. Miller
Isham, Lincoln & Beale
Three First National Plaza
Chicago, Illinois 60602
(312) 558-7500

Frederick C. Williams
Isham, Lincoln & Beale
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9730

Dated: April 1, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I, Frederick C. Williams, one of the attorneys for Consumers Power Company, hereby certify that copies of the foregoing Memorandum Of Consumers Power Company were served upon all persons shown in the attached service list by deposit in the United States mail, first class, postage prepaid, this 1st day of April, 1985.

Frederick C. Williams
Frederick C. Williams

Frank C. 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
6132 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

Lynne Bernabei, Esq.
Thomas Devine, Esq.
Louis Clark, Esq.
Government Accountability Project
of the Institute for Policy Studies
1901 Q Street, N.W.
Washington, D. C. 20009

Samuel A. Haubold, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Steve Gadler, Esq.
2120 Carter Avenue
St. Paul, Minnesota 55108

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

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

Ms. Mary Sinclair
5711 Somerset 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 Staminis
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

Alan S. Rosenthal
Chairman
Atomic Safety and Licensing
Appeal Panel
E/W 532
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Thomas S. Moore
Atomic Safety and Licensing
Appeal Panel
E/W 532
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555