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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
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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)	)	

MEMORANDUM OF CONSUMERS POWER COMPANY
IN RESPONSE TO APRIL 5, 1985 ORDER

I. Introduction

In its April 5, 1985 Memorandum and Order ("Order"), the Atomic Safety and Licensing Appeal Board ("Appeal Board") noted the "obvious seriousness of the involuntary dismissal of a license application" and called upon Consumers Power Company ("Consumers" or "the Company") and the Staff to readdress the dismissal question. The Appeal Board asked for further views on the fundamental issue of "whether dismissal of the operating license application [is] warranted because of the applicant's 'failure to pursue it.'"

The Appeal Board's characterization of the legal standard for dismissal creates a question of first impression. Prior case law gives no direction and little guidance as to the meaning of "failure to pursue." For the reasons expressed herein, Consumers believes that cases relating to intervenor standing are irrelevant to the question before the Appeal

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Board, and that the situation which best fits the present circumstances is that of construction permit extension cases, where extensions are granted for good cause shown. In those cases, the Appeal Board has held that an applicant's delay in construction for a valid business purpose is not frivolous or dilatory and hence constitutes good cause. A valid business purpose includes lack of financing or downturn in demand. "Failure to pursue," on the other hand, appears to be equivalent to dilatory delay. Consumers' delay falls within the "valid business purpose" language and therefore does not constitute "failure to pursue."

The Appeal Board also asked for particularized discussion of certain subsidiary questions, namely (1) on what basis an adjudicatory board, in determining the appropriate disposition of a license application, "should take into account the economic impact that a particular disposition might have upon the applicant, its shareholders, and its ratepayers;" and (2), "Why is not the dismissal of the operating license application for the failure to pursue it dictated by considerations of the evenhanded treatment of all parties to NRC adjudications?"

Consumers addresses the specific subsidiary considerations raised by the Appeal Board as well. Consumers asserts that no rule of law or policy prevents an adjudicatory board from taking into account the economic impact on the applicant of a decision regarding disposition of the plant.

Moreover, Commission policy authorizes the consideration of economic consequences to the applicant in speeding up licensing proceedings. It has been acknowledged by the Commission that the schedule of an operating license proceeding is, in significant measure, driven by the construction schedule.

Consumers does not doubt that there could be some potential harm to intervenors from indefinite delay in proceedings. However, "evenhanded treatment of all parties" demands that the potential harm to intervenors in some way be balanced against the potential harm to Consumers. We see the harm of maintaining the status quo for a finite time to the intervenors as minimal, and the potential harm to Consumers from immediate dismissal as great. The harm to Consumers from dismissal vastly outweighs the harm to intervenors from a finite delay.

Consumers also discusses additional procedural questions raised by the Order. The first is whether an adjudicatory board has jurisdiction to direct the withdrawal of an operating license application. The second is whether the Appeal Board need decide sua sponte the difficult procedural issues its Order raises. Consumers believes that the answer to both questions is negative. All of the considerations raised herein lead us to conclude that the Appeal Board should take no action with respect to the operating license proceeding or application.

II. Consumers Has Not "Failed To Pursue" Its Application Within The Proper Meaning Of The Term

In its Order of April 5, 1985, the Appeal Board asks the applicant and the Staff to address further the question of whether the Midland operating license applications should be dismissed for "failure to pursue." Order at 4. As Consumers has previously noted, no case has occurred prior to this time in which an operating license proceeding has been dismissed without the request or concurrence of the applicant and the voluntary withdrawal of the application. Thus, the legal standard for involuntary dismissal has never been elucidated at any level of NRC jurisprudence.[1/]

The Appeal Board suggests the phrase "failure to pursue" as the appropriate standard for involuntary dismissal of this proceeding. Consumers in its April 1 Memorandum suggested abandonment as a meaning for that term, but the Appeal Board rejected that suggestion as too limiting.[2/]

1/ 10 C.F.R. § 2.107 deals with the withdrawal of license applications but no Commission regulation authorizes the involuntary dismissal of a license application.

2/ The Appeal Board concluded (Order at 3 n.5) that "In all but the most formal sense . . . the applicant seemingly has abandoned an intention itself to complete the facility . . . ." However, the Company has not abandoned all intent to build the facility itself, but rather has deactivated construction of the plant. Along with this deactivation it wishes to keep its options open for a

(Footnote Continued)

The phrase "failure to pursue," and the related phrases "failure to prosecute" and "want of prosecution," have been used in a handful of NRC cases involving dismissal of intervenor contentions following egregious inaction, usually including failure to respond to licensing board orders. E.g., Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-52, 18 N.R.C. 256 (1983); Mississippi Power & Light Company (Grand Gulf Nuclear Station, Unit No. 1), LBP-84-39, 20 N.R.C. 1031 (1984); Duke Power Company (Catawba Nuclear Station, Units 1 & 2), LBP-82-16, 15 N.R.C. 566 (1982). Dismissal is the most severe sanction the Commission metes out to participate in licensing proceedings, Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 N.R.C. 1400 (1982), and it is not favored. Licensing boards have typically found that intervenors who engaged in conduct sufficient for finding of a failure to pursue or failure to prosecute warranting dismissal had in effect abandoned their contentions. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1),

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(Footnote Continued)
finite period of time. Affidavit of John D. Selby dated November 1, 1984. In other words, it seeks a hiatus. In this era of uncertainty for electric utilities, a hiatus in construction and operating licensing is not unreasonable. See Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 N.R.C. 780, 801 (1983) (five year hiatus).

LBP-82-115, 16 N.R.C. 1923 (1982); Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-43, 18 N.R.C. 122 (1983). The difference between "failure to pursue" and "abandonment" is therefore difficult to discern from intervention cases.[3/]

Another possible meaning for "failure to pursue" could be "inducing delay for frivolous reasons." The only situation analogous enough to give guidance in an operating license delay case is construction permit extension cases. In construction permit extension cases, the statutory issue is whether there is "good cause" for the extension. Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 N.R.C. 1221 (1982). There the Commission indicated that if the construction permit holder were both responsible for delays in construction and if the delays were dilatory the delays might be without good cause. Id. at 1231. In Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 N.R.C. 546 (1983), the Appeal Board construed the Commission's term "dilatory" to mean something akin to "frivolous," i.e., "intentional delay of

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3/ Cases under Rule 41(b) of the Fed. R. Civ. P. are not helpful because the circumstances and conduct of such litigation are so different from a licensing proceeding. E.g., Cherry v. Brown-Frazier-Whitney, 548 F.2d 965 (D.C. Cir. 1976). However, courts do concur that expedition for its own sake is not the goal. Alamance Industries, Inc. v. Filene's, 291 F.2d 142, 145 (1st Cir. 1961).

construction without a valid purpose." Id. at 552. In particular, the Appeal Board stated that delay for a valid business purpose was not frivolous or dilatory:

> Thus, for example, an intentional slowing of construction because of a temporary lack of financial resources or a slower growth rate of electric power than had been originally projected would constitute delay for a valid business purpose. As with these examples, the purpose and the action taken must be consistent with the Atomic Energy Act and implementing regulations.

Id. at n. 6. Accord, Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-84-9, 19 N.R.C. 497 (1984). In the instant case, the prospective delay occurs primarily because of an inability to obtain financial support for the continued construction of the plant, and there is some hope that this condition is temporary. This condition falls within the Appeal Board's "valid business purpose" language. The Appeal Board cannot therefore conclude that the proposed delay is frivolous.

III. The Appeal Board Should Take Into Account The Economic Impact Of Involuntary Dismissal On The Company And Its Shareholders And Ratepayers

The loss of the operating license proceeding and, most of all, the operating license application, would be likely to diminish the interest of any prospective buyers of the project. The loss of the opportunity to sell the plant is admittedly an economic consequence. The Appeal Board implies

that it might not be able to consider "the economic impact that a particular disposition might have upon the applicant, its shareholders, and its ratepayers" in making a decision on whether to dismiss the proceeding.[4/]

This licensing proceeding is not ordinary litigation. The Commission has acknowledged that the driving force behind the need to complete operating license proceedings in a timely fashion is the need to complete the proceedings prior to the completion of construction. The primary factor behind that need is cost to the utilities: "If these proceedings are not concluded prior to the completion of construction, the cost of such delay could reach billions of dollars." Statement of Policy on Conduct of Licensing

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4/ The cases which the Appeal Board cites in the Order in support of that proposition, Detroit Edison Co., (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 N.R.C. 473, 476 (1978) and Houston Lighting and Power Co., (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 N.R.C. 239, 242 (1980), relate solely to intervenors' standing as of right to intervene in a licensing proceeding. These cases are limited to the holding that a person with an interest in electric rates or an equity interest in a potential owner of a share of a nuclear power plant does not satisfy the test of § 189.a of the Atomic Energy Act of 1954 (as amended), 42 U.S.C. § 2239.a, for admission as a party to a licensing proceeding, namely, whether that person's "interest may be affected." Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610, 613-14 (1976). None of these decisions speak to the question of whether economic interests, especially those of the applicant, can be considered once the proceeding is underway.

Proceedings, CLI-82-8, 13 N.R.C. 452, 453 (1981).[5/] If it is permissible to take economic consequences into account for purposes of acceleration of proceedings, it certainly must be permissible to take them into account with respect to deceleration of a proceeding.[6/]

Absent a threat to the public health and safety, there is simply no reason for the NRC to make it more difficult for an applicant to recoup a part of its investment. In Washington Public Power Supply System (WNP Nos. 4 & 5), DD-82-6, 15 N.R.C. 1761 (1982), the Director of Nuclear Reactor Regulation refused to revoke the applicant's construction permits, even though applicant's board of

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5/ The Commission sometimes considers economic impacts even in making safety decisions. 10 C.F.R. § 20.1(c) specifically mandates consideration of economics in relation to benefits from preventing release of radioactive substances, and 10 C.F.R. Part 50, Appendix I places a value of $1,000.00 on a man rem of whole body exposure for the purpose of deciding whether further efforts to prevent release of radioactive substances are warranted. See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 56-57 (1978). The Commission has also stated that "Requirements proposed to achieve incremental reductions in risk should be evaluated on a cost benefit basis, insofar as practicable." U.S. Nuclear Regulatory Commission Policy and Planning Guidance 1985, NUREG-0885, Issue 4, at 8 (February 1985).

6/ The applicant's investment in the facility may be considered in deciding whether to suspend construction permits: "No rule of law or equity of which we are aware forbids taking that fact into account." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 N.R.C. 155, 70-71 (1978).

directors had voted to terminate the projects. His basis for the decision was that WPPSS was trying to sell the projects: "Although the NRC has no interest in seeing that WPPSS salvages a portion of its investment in the projects, there is no reason for the NRC to obstruct WPPSS' efforts when public health and safety is not affected by WPPSS' actions." Id. at 1767. Thus, there is no reason in law or policy for the Appeal Board to disregard economic hardship to the Company, its shareholders, and its ratepayers.

IV. Evenhanded Treatment Of Parties Dictates That The Slight Potential Harm To The Intervenors Should Be Balanced Against The Serious Economic And Other Harms To Consumers

A. A Finite Delay In Final Resolution Of The Midland Proceeding Will Not Unduly Prejudice Intervenors

Intervenors Stamiris and Sinclair, in urging the Appeal Board to remand the operating license case to the Licensing Board with instructions to dismiss, allude to absolutely no prejudice which would accrue to them should the status quo simply continue for a finite period.[7/] The only conceivable legal prejudice to intervenors would be deprivation of an immediate termination of the operating license proceeding (unsought by Intervenors until the Appeal

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7/ Intervenor Marshall did not respond.

Board raised the possibility). The difference in effect between a suspended proceeding and a terminated proceeding is mainly clerical. Assuming any dismissal would be without prejudice, no finality would follow from either result.[8/]

If we assume that the project is to be one day reactivated, the victory involved in terminating the proceeding immediately would be hollow. First, it is not established that dismissal of the proceeding would necessitate enforced withdrawal of the application. Even if the application is withdrawn, Consumers can simply file another operating license application. In that case, the NRC will renotice the hearing. If, however, Consumers voluntarily withdraws the license application, it is extremely unlikely ever to refile it. If Consumers picks up the licensing process, intervenors then have the opportunity to oppose the application on the merits. In either event, the resolution of the proceeding would have a finality not achievable at the present time.[9/]

8/ Dismissal with prejudice is harsh and punitive and therefore disfavored. E.g., Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967, 974 (1981); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125, 1132 (1981).

9/ Midland is not unique in having operating license proceedings continue with little activity for a lengthy period. In Northern States Power Company (Monticello

(Footnote Continued)

B. Immediate Dismissal Would Cause Irreparable Harm To Consumers

In addition to the grave economic consequences of possible loss of the ability to sell the plant, premature dismissal of the operating license proceeding would result in the irretrievable waste of all of the human and economic resources committed thus far to the operating license proceeding. Involuntary withdrawal of the operating license application itself would also cause irreparable harm to Consumers or its successor. Withdrawal of the application and later refiling would most likely result in the assignment of a wholly new set of NRC Staff reviewers who will likely be unfamiliar with the plant. Thus, a great deal of institutional memory would be lost. Withdrawal and refiling would most likely require refiling of the Final Safety Analysis Report, Staff rewriting of the Safety Evaluation Report, and relitigation of several issues. The new application would, of course, require a new application fee,

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(Footnote Continued)
Nuclear Generating Plant, Unit 1), ALAB-611, 12 N.R.C. 301, 303 n.2 (1980), the proceeding to convert a provisional license to a full-term operating license "dragged on" for at least 8 years. In Washington Public Power Supply System (WPPSS Nuclear Project Unit No. 1), LBP-83-66, 18 N.R.C. 780, 801 (1983), the licensing board contemplated keeping the operating license proceeding alive despite a proposed five year hiatus in construction.

and the redundant Staff safety review would itself generate additional and unnecessary licensing fees.

V. The Appeal Board Does Not Have Jurisdiction To Force The Director Of Nuclear Reactor Regulation To Dismiss The Operating License Application

Licensing (and appeal) boards have no power to direct the Director of Nuclear Reactor Regulation to take any action with respect to an operating license application other than to authorize him to make or not make certain findings for the issuance of an operating license. 10 C.F.R. §§ 2.760a, 50.57(a). Nowhere in the regulations or cases is there to be found any authority for the boards to interfere with the discretionary authority of the Director to maintain on the docket or to process operating license applications.

Licensing boards dealing with operating license cases, and derivatively appeal boards reviewing licensing board actions, have limited jurisdiction. It is well established that in an operating license proceeding the board's jurisdiction "is limited to resolving matters that are raised . . . as legitimate contentions by the parties or by the board sua sponte." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-674, 15 N.R.C. 1101, 1103 (1982). In fact, when there are no matters in controversy there is no operating license hearing. E.g., Mississippi Power & Light Company (Grand Gulf Nuclear Station, Unit No. 1), LBP-84-39, 20 N.R.C. 1031 (1984). Indeed, "it is not [the Licensing

Board's] responsibility, but that of the Director of Nuclear Reactor Regulation to make the finding required by Section 50.57(a)(1) as a precondition to the issuance by the Director of an operating license." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 N.R.C. 565, 567 (1984) (citing Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 A.E.C. 381, 410-11 (1974).

This is not a case such as Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 N.R.C. 867 (1980), where the inability to make findings on lingering issues undermines the vitality of a permit or license already issued. Here the only action under consideration is whether the Director of Nuclear Reactor Regulation keeps the Midland applications on the docket, a totally discretionary matter. Thus, neither the Appeal Board nor the Licensing Board has any jurisdiction to order dismissal or revocation of the applications as distinguished from the proceedings.

VI. The Appeal Board Should Not As A Matter Of Sound Policy Decide The Issues Raised By The April 5 Order

The most unusual feature of the Appeal Board's Order is that, sua sponte, it calls for the resolution of difficult and novel procedural questions which need not and should not be decided, especially now. Since none of the questions

discussed above relates to a threat to the public health and safety or to a significant environmental impact, and since they will in any event be mooted by the passage of a finite period of time, the Appeal Board should not consider them at this time.[10/]

While LBP-85-2, which triggered the Appeal Board's review, decided substantive health and safety issues, the questions now raised by the Appeal Board go solely to a procedural matter, the status of the Midland operating license proceeding and applications. The Atomic Safety and Licensing Board ("Licensing Board") in LBP-85-2 observed that "absent withdrawal of the application for operating licenses, the proceeding is technically alive." Consumers Power Company (Midland Plant, Units 1 and 2), LBP-85-2, 21 N.R.C. 24, 32 (1985).

The Appeal Board has held explicitly that it will not ordinarily examine, sua sponte, rulings on such procedural matters. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 N.R.C. 1245, 1262 (1982);

10/ In its March 13, 1985 Order at 2, the Appeal Board stated that it was "disinclined to conduct a review sua sponte of LBP-85-2" to avoid "further expenditure of public resources on the substantive issues presented." The Staff responded that the appropriate course was for the Appeal Board to defer action. That approach is all the more warranted with respect to the issues now before the Appeal Board.

Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 968 (1982); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 N.R.C. 741 (1977).[11/] The status of the instant proceeding, as the words imply, is not a substantive issue, but a procedural one. This Appeal Board, therefore, by its own guidelines, should not be conducting a sua sponte review of the Licensing Board's determination of the status of the Midland operating license proceeding.

A more important reason why the Appeal Board should not decide the issues which it has raised sua sponte is that they will become moot in a finite period of time. See Affidavit of John D. Selby, supra n.2. Thus, there is no real need to decide now the unprecedented procedural issues which the Appeal Board has thrust upon itself.

There is, finally, a danger in creating an unfortunate precedent on the subject of involuntary dismissal. Other plants across the country have shut down construction. Some are in indeterminate status because of uncertainties in

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11/ The broadest statement of the Appeal Board's sua sponte practice is that it will review "any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues." Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 N.R.C. 887, 890 (1982); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 N.R.C. 799, 803 (1981).

forecasts of demand, financing, and local governmental constraints, but may be reactivated. E.g., WPPSS Nuclear Project No. 1, supra at n.2. A decision by this Appeal Board that delay in construction and delay in operating license review and hearings warrants involuntary dismissal will have reverberations at places other than Midland. A decision that nuclear projects in a deactivated status should have their operating license proceedings involuntarily dismissed and their operating license applications involuntarily withdrawn is contrary to a Commission policy to preserve future options for suspended nuclear projects. The Commission recently expressed this policy in its direction to the Staff, beginning in fiscal year 1987, to be "prepared to deal with the possible restoration of construction on deferred plants." NUREG-0885, supra n.4, at 10. This Appeal Board should not make it more difficult for the Staff and the Commission to carry out that policy.

VII. Conclusion

Consumers has neither abandoned the Midland application nor delayed it in a dilatory manner, i.e., for a reason that is not for a valid business purpose. Thus, Consumers has not "failed to pursue" the applications within any reasonable meaning of that term. The Nuclear Regulatory Commission may take into account economic impacts on the

applicant in making procedural decisions and should not obstruct efforts of an applicant to reactivate or sell a facility in the absence of a hazard to the public health and safety. Evenhanded treatment of participants means weighing the slight harm to Intervenors against the irreparable harm to Consumers. Finally, since Consumers is asking for a finite time period in which to determine the disposition of the project, there is no need for and indeed there are policy considerations against the Appeal Board determining the abstruse legal questions presently before it on its own motion.

Respectfully submitted,

Michael D. Miller (FCW)
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 19, 1985

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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 in Response to April 5, 1985 Order were served upon all persons shown in the attached service list by deposit in the United States mail, first class, postage prepaid, this 19th day of April, 1985.

Frederick C. Williams

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

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 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

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