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October 3, 1976

Daniel M. Head, Esq., Chairman
Atomic Safety and Licensing Board
Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Consumers Power Company
(Midland Plant, Units 1 & 2)
Nos. 50-329 and 50-330

Dear Chairman Head:

In light of recent developments (including the Seabrook decision and receipt of the Staff's brief), I should like to revise some of the remarks which I made in my letter dated September 27 1976.

First, now that the Staff has indicated in its brief filed under date of September 29, 1976, that a period of six months will be required in connection with the revised impact statement, I believe that my projections in terms of the time required for the remanded hearings are now significantly closer (and could go beyond) the two years I mentioned in my previous letter, and I believe that the minimum of six months is no longer a reasonable estimate.

Secondly, I should like to point out that in light of the Appeal Board's decision in Seabrook, there is additional precedent, binding on the ASLB, which opts for an immediate shutdown of the Midland facility. I understand that Seabrook decision in part held that there was no way of determining a time period for the adoption of an interim rule on fuel cycle and further, the Appeal Board held, that the Commission's policy statement did not even contain an obligation to adopt an interim rule at any point. Accordingly, reading the Seabrook decision together with the Aeschliman and N.R.D.C. cases in the Court of Appeals, it is clear that it is impermissible for the Staff or Consumers to argue or for this Board to rely upon the assertion that within three months the commission will have a satisfactory rule governing fuel cycle. This, added to the Staff's admissions in its brief of September 29 as to its present inability to make any judgments on the outcome of the hearing or its length, demonstrates the necessity for promptly shutting down Midland.

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I should also like to point out that the Staff's brief of September 29 relies upon multiple errors of law. First of all, the need for power issue is irrelevant to the suspension issue (insofar as reliance upon continued construction is concerned) because of the requirement to analyze energy conservation. Thus since energy conservation was improperly foreclosed below, there can be no reliance, in the suspension hearings, on need for power. Particularly is this so since the plant is projected for use in the 80's and as the Seabrook and other decisions have indicated, need for power projections that far in advance are simply useless.

In addition, costs of delay which the Staff wishes to rely upon are also impermissible because the Court of Appeals in Aechliman required that the new cost benefit analysis be structured without regard to sunk costs. Since costs of delay presume a valid basis for the present construction permit (which assumption is barred as a matter of law in this case), such costs of delay are irrelevant.

Finally, since a new cost benefit analysis is ordered (and cannot rely upon costs already incurred), the analysis must be done anew and, accordingly, any further investment will, contrary to the National Environmental Policy Act, represent commitments in advance of decision making and by definition, as a practical matter, tilt the cost benefit analysis. Particularly is this so since the hearing process must assume that energy conservation and the other issues are as likely to opt for a changed facility or abandonment as they are not. Indeed, in light of the increasing demands on our society to deal with energy conservation, the balance of speculation (if that's what it is) certainly tips in favor of shutting down the facility.

I confirm receipt of information that the hearings of October 6 will be lifted and that the Board has not as yet scheduled a new date. For my part, I must inform the Board that my schedule continues to be committed and that unless I hear from the Board rather promptly, I may be in a position where I cannot even participate in hearings until a week or so beyond the November 15 date earlier set out.

I realize that the Board's order does not necessarily permit any replies to the briefs filed. On the other hand, in light of recent events, I trust the Board will accept this letter as a good-faith attempt by myself to keep the Board current as to our views to assist the Board.

Respectfully,

Myron M. Cherry
Attorney for Saginaw and
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MMC/ldh
cc: See Page 3

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