

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of)
)
CONSUMERS POWER COMPANY)
)
(Midland Plant, Units 1 and 2))
)

OFFICE OF GENERAL COUNSEL
DOCKETING & SERVICE
Docket Nos. 50-329 OM & OL
50-330 OM & OL

In Answer to MEMORANDUM OF THE CITY AND
COUNTY OF MIDLAND, STATE OF MICHIGAN
WITH RESPECT TO APPEAL BOARD
ORDERS OF APRIL 5, 1985 AND MARCH 13, 1985

I. INTRODUCTION

Now comes the Mapleton Intervenor with respect to the petition for the Amicus Curiae Brief presented by and on behalf of the "City and County of Midland, Michigan" to participate together with motion by Bechtel to participate as Amicus Curiae and concurring with the mootness theory in its entirety as advanced by the United States Court of Appeals Licensing Appellate Division.

First off: Bechtel is not a party to this consolidated construction permit modification proceedings but is a "Johnny-come-lately" and we believe they also should not be granted admissions.

Secondly: Mapleton wishes to state that Mapleton has "standing". Accordingly, Mapleton wishes to point out that the sovereign State of Michigan has but one Attorney General whose name is Frank J. Kelley. He is a party to this action and he has "standing".

After the court's strong insistence in "Doremus" that a state tax payer lacks "standing" in a case which is not a "pocket book action", whereas, for the Atomic Safety and Licensing Board, in the hearing before that board, the United States' staff's expert witnesses, namely to wit: the resident agent on site, over the site specific, United States Federal Inspector Resident Agent Mr. Ron Cook, serving on a panel before the Atomic Safety and Licensing Board under oath put his hand to God and on cross examination gave evidence to that board that because of faulty workmanship and material, concluded this had resulted in irreparable shoddy workmanship at the Midland Nuclear Plant.

This has not been refuted by either re-direct examination or re-cross of the witness or by substituting any other witness to contradict his expert testimony and therefore must stand and be held as true. Now in addition thereto, following his testimony, on this same subject and subject matter, the United States Government Staff's expert witness, a United States Federal Inspector of the Midland Nuclear Plant, Dr. Landsman, fully sworn and under oath and serving on the same panel at the same time, before the Atomic Safety and Licensing Board chaired by Chairman Charles Bechhoefer, gave evidence as follows: on cross examination gave evidence to the effect that he was aware that the resident agent Ron Cook had given notice to the media by publication in newspapers serving the citizenry of the Saginaw Valley placing them on notice as to the shoddy workmanship at the Midland Nuclear Plant. Then further on cross examination, Dr. Landsman as a Federal Inspector and an expert in his field gave testimony before the board leading one to conclude that the situation at this particular nuclear construction site at Midland, Michigan was so bad, notwithstanding the fact that it was 85% done, that it poised an endangerment to affect the public health

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and safety of the citizenry in its entirety of Midland County. Then elaborating further on cross examination, he expanded the foregoing to include all adjacent counties and their citizenry adjacent to the boundaries in circumference touching upon Midland County.

Now, to date, nobody but nobody in any kind or manner whatsoever has challenged or rebutted the expert testimony in this connection of Dr. Landsman, the U.S. Federal expert witness and Federal Building Inspector.

Now then Mapleton, despite the fact that their counsel petitions for admissions in the Amicus Curiae Briefs presume this to be on the basis of municipal tax loss approach whereas under Michigan law the law imposes a duty upon Municipal elective officials to protect the public health and safety, and whereas Municipal Officials are not often held accountable for their actions in the free exercise of "their official abuse of discretion" the Mapleton Intervenors, under the circumstances of the intervention of Frank Kelley, the Attorney General of Michigan in this matter, both the city of Midland and the County of Midland being quasi law making bodies subservient to the paramount authority of the sovereign state of Michigan requests they be denied Amicus Curiae Intervention on the basis of mootness as advanced by the Appellate Court for lack of "standing", until such time that they can refute the testimony before the Atomic Safety and Licensing Board as given by the expert witnesses and prove conclusively beyond a shadow of a doubt that the citizenry of Midland City and Midland County, by disregarding the expertise witnesses would not at some future date wind up in a comparable position as depicted by Samuel Taylor Coleridge under his title and designation of *The Ancient Mariner*. It's interesting to note at this point that the Consumers Power Company officials have obtained permission from the Michigan Department of Natural Resources to fire, if they wish, a cannon in a 21-gun salute every week to the members of the albatross family namely and to wit, the great numbers of sea-gulls that have already arrived at the Nuclear site.

Failure to give full faith and credit to the testimony on record by the two Federal expert witnesses testifying within the scope of their expertise, might have a tendency to, in the future, invoke by reason of and especially because of negligence, the performance of a discretionary function, the ~~Federale~~ Federal Torts Claims Act. We'd like to point out now that the Attorney General has stated redundantly that Michigan has no need for the electricity to be generated by this plant and in conjunction with the expertise testimony of Dr. Ron Cook and Dr. Landsman, notwithstanding the fact that they did not say in their testimony, we, Mapleton, say that Midland City or the County of Midland does not intend its use for lighting "underground novelties" such as cemeteries. They didn't have it in Coleridge's time and they don't need it now. Let's keep it that way.

Attached you will find an affidavit from the affiant John Selby, President of Consumers Power Company in which he states among other things that they would not spend any more resources in the construction of the Midland Nuclear Plant. In consequence whereof, Mapleton wishes that they be denied the license application as the plant does not, as they represent, present substance for sale insofar as the applicant license is non transferable. It is not a negotiable asset by reason of the fact that it is not negotiable and not transferable. Now then, as to the question relating to the Construction License of the prime contractor, Bechtel Construction Company, inasmuch as Bechtel has not taken an active part in these hearings to date and has not that we know of filed an amicus curiae brief, we request the Construction License be vacated by reason of the fact that the construction company does not have "standing".

In answer to number 5 of petitioners brief, the only approach that is justifiable to petition for amicus curiae is the basis of Municipal Taxes, however, until such time as the testimony of the U.S. staff expert witness before the Atomic Safety and Licensing Board Court has been impeached, the position of the partitioners is not well taken and Mapleton requests under the circumstances that the Atomic Safety and Licensing Appeal Board does not lend legality to their claim, under the circumstances that the Atomic Safety and Licensing Appeal Board holds with their previous decision to vacate both the application for license of Consumers Power Company and the construction license as well, as it can serve no other purpose to the citizenry of Midland City, Midland County or the State of Michigan at this site specific but to cause irreparable damage in the future may have a tendency to make countless thousands mourn.

Therefore, that history should not repeat itself and there should be no recurrence through negligence as in that Texas City disaster which resulted in a "discretionary function they said" they held to be an exception to the act, that is to say the Federal Torte Claims Act as referenced under the title and designation "Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 1956, 97L ed. 1427 (1953)". See the full discussion of the case 25.09, Public law 378, 84th Congress, 1st session proved Aug. 12, 1955. House of Rep., #2024, 83d Cong. 2nd sess., P.9 (1955). See also similar statement in Sen. Rep. #684, 84th Cong., 1st sess, p.19, (1955).

At the same time the Mapleton Intervenors have had extensive litigation -- one such action resulted in a case before the Michigan Appellate Court claimed to be a landmark case and brought by Mapleton President entitled Marshall v. Consumers Company, a Michigan Appellate Court case, in an attempt to abate the nuisance in the construction of the Midland Nuclear Plant at Midland, Michigan. That case indicates also the tort feature of damages allowing for a suit to be brought for damages. The Mapleton Intervenors takes exception to both the staff's conjecture and Consumers Power Attorneys in their use of the word "finite" and would appreciate the Appeal Board taking judicial notice of their own allegations of Mootness and interpret this word "finite" wherever it's used by them, as Mapleton sees it, "infinite" which means endless in time. Moreover through the litigation pending presently with Consumers Power Company, it would have a tendency to indicate fight from the very beginning that their working agreements in this venture had the appearance and the earmarks of an illegal unlawful perpetuity which now currently finds them involved in a legal nif-naw.

Now in conclusion, Mapleton believes based on the foregoing and in response to the appeal board order suggesting that the appropriate course of action might be to (1) vacate the Atomic Safety and Licensing Board (LBP - 85 - 2) decision, and (2) having the Operating License Application dismissed, Mapleton Intervenors through their President Wendell H. Marshall believes and so represents hereto that the Atomic Safety and Licensing Board decision should not be vacated but that the operating license and the construction license should both be dismissed on the basis set forth by the Atomic Safety and Licensing Appeal Board that to hold otherwise would be against public interest of Mapleton and public policy as well and would as the Atomic Safety and Licensing Appeal Board has set forth amount to being "special privilege" not granted to Intervenors and that the Atomic Safety and Licensing Appeal Board does not have a license to justify perpetuating an infinite perpetuity to perpetuate the "old wife's tale" of what they could do some time in the future and if not at that time in the future comply with the recommendation of United States Agent Tamale in the office of the United States Internal Revenue at Detroit, Michigan who instructed them to demolish it by one-half and then come back and approach them.

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In the Matter of

CONSUMERS POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of MAPLETON INTERVENORS BY WENDELL H. MARSHALL, PRESIDENT, RESPONSE TO APPEAL BOARD ORDER OF MARCH 13, 1985 in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, on this 25th day of April, 1985.

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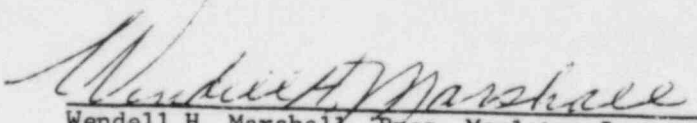
Ms. Mary Sinclair
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C. Jean Shoemaker
Secretary to the Appeal Board
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Wendell H. Marshall
Wendell H. Marshall
President, Mapleton Intervenors

We therefore ask that both the Applicant License and the Construct: License be set aside for valid cause heretofore by this Atomic Safety and Licensing Appeal Board on the basis of mootness and other causes which could result in irreparable injury to the citizenry of the sovereign State of Michigan, therefore claiming the Appeal Board's motion to vacate is justified entirely for "good cause" and that accordingly as the Appeal Board has stated should without question both be vacated.

Respectfully submitted by Mapleton Intervenors
by their president, Wendell H. Marshall


Wendell H. Marshall, Pres. Mapleton Intervenors
4625 S. Saginaw Road, R.F.D. #10
Midland, Michigan 48640

Dated at Midland, Michigan
this 25th day of April, 1985

Encl. 2: Certificate with Official List
Photocopy of Affidavit of Affiant John D. Selby, Chairman
of the Board of Consumers Power Company

3A-AB-69

Question:

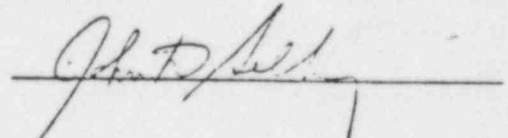
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In Mr. Spring's testimony, Page 7, he stated that it was assumed that a decision will be made in 1987 to abandon the Midland Plant. Why is Consumers Power waiting until 1987 to finalize the abandonment decision? Please provide any studies that support that decision.

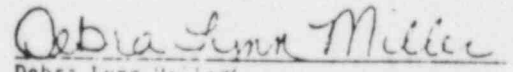
Answer:

Consumers Power Company is not waiting until 1987 to finally determine what it will be doing with the Midland plant now that construction has ceased. 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 resume Midland construction in 1985, 1986 or thereafter. Only 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 the funds necessary to enable completion, will the Company consider resuming construction. In order to maximize recovery, 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. It has also solicited bids on the \$300 million of nuclear fuel which would have been used at Midland in an effort to dispose of the fuel. The surveillance and maintenance activity will cost approximately \$10 million per year plus property taxes. 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-approved quality assurance program in place during that period. The Company's plan is to allow two years to see whether some outsider who is interested materializes. In the meantime, the Company will sell any component or system in the plant that does not prevent possible use of the plant as a whole. If there is no one interested in finishing the entire plant, the Company will no later than 1987 do whatever is necessary to claim an abandonment loss for federal income tax purposes. The income tax implications of this decision have been explained by Mr. Schwass and Mr. Spring. See the response to 3A-AG-107 and 3A-AG-186.

John D. Selby, being first duly sworn, states that the above response is true and correct to the best of his knowledge, information or belief.



Sworn to before me and subscribed in my presence this 1st day of November, 1984.



Debra Lynn Miller
Notary Public, Jackson County, Michigan
My Commission Expires:

al

Wednesday, April 24, 1985

Daily News Editori

Midland Daily News

Otto Wick Jr., Publisher

Bruce E. Coury, General Manager

Gordon C. Britton, Editor

Norman C. Rumble, Publisher Emeritus

Selby's retirement will change little

There was a great difference between the treatment Consumers Power Co. President John Selby received from stockholders at last year's annual meeting and this year's.

Last year, stockholders accorded Selby the status of the beleaguered underdog who was fighting the good fight to finish the Midland nuclear plant. Many stockholders stood up at the meeting and praised him, plainly indicating they agreed with the way he was managing the nuclear project.

This year, the dissatisfaction of shareholders with the way the nuclear project was managed was quite evident, and Selby bore the brunt of the wrath.

The reason for Selby's fall from favor is evident — the nuclear project was canceled last summer, and shortly after, some of the utility's dividends met the same fate. That made the matter a simple pocketbook issue, and stockholders wanted to yell at the man who's responsible, at least by title.

Our view

But Selby is not wholly responsible and by facing the stockholders alone at this year's annual meeting without even a vice president to defer questions to, he was playing politics again.

By making himself the lightning rod for the current of dissatisfaction, Selby was telling stockholders, in essence, that he was the only one responsible and that they shouldn't be mad at the utility. Hadn't he already agreed to take early retirement, to be a sacrificial lamb?

The act took courage, but in reality, Selby is not the only one to blame. External delays, cumbersome regulation and mismanagement all took their toll.

Stockholders and the rest of us shouldn't be deceived. The man at the top doesn't pull all the strings, and Consumer Power will be little changed by one manager's early retirement.