ORIGINAL

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DEPOSITION OF JAMES F. HANES

Place - Midland, Michigan

Date - Monday, 14 May 1979 **Pages** 1-76

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DEPOSITION OF JAMES F. HANES

Dow Center
Patrick Road and Abbot Street
Building 2030
Executive Wing
Midland, Michigan
Monday, 14 May 1979

Deposition of JAMES F. HANES, called for examination at 9:15 a.m., before Helen M. Ra[illegible]ge, a notary public in and for the County of Midland, State of Michigan, when were present on behalf of the respective parties:

WILLIAM J. OLMSTEAD, Esq., Office of Executive Legal Director, U. S. Nuclear Regulatory Commission, Washington, D. C., on behalf of the NRC Regulatory Staff.

WILLIAM C. POTTER, Jr., Esq., Fischer, Franklin, Ford, Simon & Hogg, 1700 Guardian Building, Detroit, Michigan;
R. L. DAVIS, Esq., Michigan Division, Legal Department, 47 Building, Midland, Michigan 48640; and
LESLIE F. NUTE, Esq., Dow Chemical Company, Midland, Michigan 48640, on behalf of Dow Chemical Company.

GERALD CHARNOFF, Esq., and ALLEN WEISBARD, Esq., Shaw, Pittman, Potts & Trowbridge, 1800 M Street, N.W., Washington, D. C., 20036, on behalf of Consumers Power Company.

RONALD G. ZAMARIN, Esq., Isham, Lincoln & Beale, One First National Plaza, Chicago, Illinois 60603, on behalf of Consumers Power Company.

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EXHIBITS:

(None.)

P R O C E E D I N G S

MR. OLMSTEAD: We'll go on the record.

Whereupon,

JAMES F. HANES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

MR. OLMSTEAD: All right, Mr. Hanes, I'm William J. Olmstead, counsel for the Nuclear Regulatory Commission Staff.

We are taking this deposition as part of the Staff's discovery proceedings leading to hearings in July on the issues set forth in the Licensing Board's prehearing conference order of ' ' 3, 1979, on the issues of whether there was an attempt by parties or attorneys to prevent full disclosure of or to withhold relevant information from the Licensing Board in the suspension hearing; whether there was a failure to make affirmative full disclosure on the record of material facts relating to Dow's intentions regarding performance under its contract with Consumers; whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions; whether any of the parties or attorneys attempted to mislead the Licensing Boar . concerning preparation and presentation of the Temple testimony; and the fifth issue, which we will not be dealing with here, is what sanctions should be

imposed, if any.

Staff has requested your deposition because the minutes of some meetings indicated that you had a role on behalf of Dow Chemical Company with regard to the Dow-Consumers steam contract from the Midland nuclear unit.

DIRECT EXAMINATION

BY MR. OLMSTEAD:

Q As a preliminary matter, I'd like you to state your full name, address and current employment.

A I'm James F. Hanes. I live at 4455 Arbor Drive, Midland, Michigan. My present title is Associate General Counsel of Dow. I'm a vice president of Dow Chemical, USA, which is not a separate corporation but an operating entity.

Q Is this the same position you held during the period July 1, 1976 --

A Well, no, not really. We had two different legal departments at that time, and I was General Counsel of Dow, USA, but I was also vice president then. We have now put the two legal departments together, and I'm Associate General Counsel of the corporate legal department.

Q Did you have any role for Dow Chemical Company with regard to the nuclear steam contract prior to July 1, 1976?

A No.

Q When did you first become aware of the decision

of the District of Columbia Court of Appeals involving the Midland facility and the Dow Midland nuclear steam contract?

A Well, I heard about it just shortly after the decision came down, was told about it. I, in fact, read it.

Q Who told you about it?

A Lee Nute, I believe, called and told me about it.

Q Did that necessitate your taking any action at the time?

A No.

Q When did you first become aware that as a result of that court decision you were going to have to prepare any information for Dow Chemical Company with regard to the nuclear steam contract, or to advise with regard to the nuclear steam contract?

A You're talking about me, personally?

Q Yes.

A I guess my first real involvement was when Mr. Oreffice appointed me to a review team to review what Dow's posture should be.

Q When was that?

A That was, I guess, in early September, 1976.

Q Was that before or after the Midland Division's recommendations relevant to the contract?

A That was after.

Q What activities did you undertake as a result of that assignment?

A The first thing I did was I got out the Consumers contract with Dow and read it. I had never really read it before. I had read bits and pieces of it.

Then I met with this special group. I don't think we had a name -- sort of a task force that Mr. Oreffice had appointed. And we divided up the responsibilities. And my area or portion was the legal area.

We met several times on that, as to what more information did we need, where should we get it, how should we go about this review.

Q Do you recall the members of that task force?

A Well, Al Klomparens was the chairman of it. Roger Gohrband was on it.

MR. CHARNOFF: How do you spell that?

THE WITNESS: G-o-h-r-b-a-n-d.

Jerry Decker -- I don't know whether Jerry was a full member, but he did advise us some.

Mac Whiting was on it.

BY MR. OLMSTEAD:

Q How many meetings did the task force have before they came up with a Dow task force position to the Board of Directors?

A Oh, I would guess half a dozen.

Q Over what period of time?

A Something like, well, a month probably, or less maybe.

MR. POTTER: May I interrupt just a minute, Mr. Olmstead?

I'm not sure Mr. Hanes had completed delineating who the members of the team were. I don't want to leave the question if he may have forgotten some.

THE WITNESS: I guess without looking at some minutes or something, I kind of ran out of names. I'm sure there were one or two more. I was trying to think who was involved in what.

But that was most of them I think. It wasn't a large group.

BY MR. OLMSTEAD:

Q I'd like to get the time period down a little closer.

Consumers Power was notified of the Dow Midland position somewhere around September 13. Was the task force meeting before that time?

A Probably, but not much. Maybe a week. I'm not sure.

Q And the Dow Corporate USA position was communicated, I believe, before October 1?

A Right.

Q So the task force essentially met over a two week period, is that correct?

A It seemed like it was a little longer than that to me. Probably three weeks, anyway. We had quite a lot to do, so that's why we broke down into subcommittees, if you will, to look at different pieces of it.

Q How much of your time were you devoted to the task force?

A Oh, probably more than half my time.

Q What persons did the task force primarily have contact with?

A Well, we had contact with the Michigan Division people. Several different people had contact with Consumers people. We did some independent -- I didn't, but others made independent contacts to determine costs of such things as nuclear fuel, inflationary impact.

I'm sure they contacted a lot of people within Dow.

Q Did you personally have contacts with Consumers people?

A No, not until the meeting on September 21 when Mr. Falahee came to town.

A Did you personally have contact with the Midland Division, Dow Chemical?

Q I visited with Lee Nute several times.

Q Did you meet with Mr. Temple?

A I don't believe so. I don't recall. I may have been in meetings he was in, but I certainly didn't meet with him on my part of the study review.

Q You indicated that one of the first things you did was to read the Dow-Consumers steam contract as it existed at that time?

A Yes.

Q This was after the 1974 modifications?

A Yes.

Q Did you communicate any legal advice with regard to that contract?

MR. POTTER: To whom?

MR. OLMSTEAD: To anybody.

THE WITNESS: I did ultimately, yes. I had some reactions to various parts of that.

BY MR. OLMSTEAD:

Q To whom did you --

A I talked with Lee Nute. I talked with Paul Oreffice. I talked with Al Klomparens, who was chairman of that group.

I talked with a number of people.

Q Did you speak to these people individually or in groups?

A Primarily individually. It was a rather complex

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contract. It went into a lot of different things.

Q Do you recall any discussions concerning material or positions which should be included in Dow's testimony concerning the contract relations with Consumers?

A I didn't really get into the testimony aspect, the preparation of testimony. My main job was really to review what Dow's position should be with respect to that contract, as part of that group.

Q In the task force were there differences of opinion on what the position should be?

A Not really, no.

Q Did the task force take more than one position during the course of the review? Did they have a tentative conclusion, or . . .

Let me clarify that. Did the task force have a tentative position which they recommended to Dow, USA prior to the September 21 meeting with Consumers Power?

A No, not that I was aware of. They were still in the investigatory stage, and that meeting was part of our investigation.

Q What would you describe as the general attitude towards the forthcoming hearings before the Nuclear Regulatory Commission?

MR. POTTER: Excuse me, Mr. Olmstead, I'm not clear. Are you asking for his personal feelings, or is he

being asked to convey others'?

MR. OLMSTEAD: His feelings of what the group's position was towards these hearings.

THE WITNESS: I guess we felt these hearings very important, that these were critical as to whether or not there was going to be a nuclear power plant here in Midland. And if the license got held up, that it was going to create major problems of many kinds for the company.

BY MR. OLMSTEAD:

Q Would you say that there was an attitude communicated -- and I don't care about what source -- about the likelihood of suspension of these hearings?

A Not really, until we talked with the Consumers people.

See, at that time we didn't even consider ourselves a party. We had asked to be let out. There was no ruling on that. We were not included in the communications. About the only information we got as to what was going on was what Lee Nute learned on the telephone either from the Consumers people or from the NRC people. We were really outside of the communications. We didn't know what was going on.

Q Did anyone with whom you dealt regarding the steam contract express the belief that Consumers' license

was in serious jeopardy?

A Consumers expressed that opinion, yes.

Q Anybody from Dow Chemical?

A I guess we had no basis to disagree with Consumers. I'm sure that we felt that this was very serious.

Q Do you recall any conversations during this period of time concerning any of the parties other than Consumers Power to the licensing proceeding, which would be intervenors other than Dow, Myron Cherry, Mary Sinclair, the NRC Staff?

A I had no contact with any such people. I never met Myron Cherry. I've never seen him. I didn't go to any of the hearings.

Q Several of the meeting notes supplied by Dow Chemical during the course of the remanded hearing indicate that you were present at meetings on September 21, 1976 and September 24, 1976, with Consumers Power Company.

Do you recall being at those meetings?

A Yes, I was.

Q Were you at any of those other meetings with Consumers Power Company?

A No.

Q On the September 24 meeting, have you read Mr. Klomparens' notes of that meeting?

A I wasn't even aware he took any notes. No, I

have not.

Q If you don't mind, I'd like to have you take a minute and look at it.

MR. OLMSTEAD: I'm handing him a copy of some handwritten notes dated September 21, 1976, entitled, "Meeting with Consumers Power Attorneys."

THE WITNESS: You asked me about the 24th meeting.

Yes, I have seen the minutes of the 21st meeting.

BY MR. OLMSTEAD:

Q I asked you if you were at both meetings, and you said yes. And then I asked you if you had read the meeting notes of September 21.

A That isn't the way I heard the question.

Q I'm sorry.

MR. CHARNOFF: Nor did I. I heard it in terms of the 24th.

BY MR. OLMSTEAD:

Q I'm sorry. I meant the 21st.

MR. POTTER: Excuse me. Just so the record is clear on that point, you have tendered to Mr. Hanes the September 21, 1976 notes of Mr. Klomparens and asked him whether he had ever read those before, is that correct?

MR. OLMSTEAD: That's correct.

MR. POTTER: And Mr. Hanes, your answer was?

THE WITNESS: I had seen the notes of the 21st

meeting. I thought he asked about the 24th.

MR. CHARNOFF: Excuse me. Off the record.

(Discussion off the record.)

MR. OLMSTEAD: Back on the record.

We have all agreed that we are looking at the September 21, 1976 meeting notes of Mr. Al Klomparens.

MR. CHARNOFF: Mr. Olmstead, those are the notes that are in handwritten form on lined paper that were attached to Consumers Power Company's --

MR. OLMSTEAD: That's correct.

BY MR. OLMSTEAD:

Q Would you look at Mr. Klomparens' notes, at the sentence on the first page that states, in parentheses, Rex . . . no, it's on the third page -- the sentence that states, "(Rex)'If Dow takes its position, the NRC will suspend construction of the plant.'" "(Jim)'We may ultimately lose its entire construction license.'"

Is the reference to Jim, there, identifiable?

A I think it was Jim Falahee, F-a-l-a-h-e-e. There's just one "l" I think. It's probably not spelled right here.

MR. CHARNOFF: Off the record.

(Discussion off the record.)

MR. OLMSTEAD: On the record.

BY MR. OLMSTEAD:

Q Do you recall anything else that Mr. Falahee might have said about that matter?

A I'm trying to get the context, where we were here.

(Pause.)

I think all of these statements following that one were some of the things Mr. Falahee said. He reviewed the various positions that Dow might take and how he would feel that they would impact on the license, his evaluation of how different Dow postures would affect the licensing procedure.

Q As a result of those communications, did you have any comment in that meeting?

A I remember my participation in that meeting was mostly listening. I can remember reacting strongly twice in that meeting. The first one was when a comment was made by Rex Renfrow that perhaps we should have a witness who was not familiar with positions Joe Temple had taken. And the other was when Jim Falahee said he was going to sue us for $600 million if we didn't support Consumers' position.

There was quite a bit of discussion as to what constituted support of Consumers' position, and I think these notes just reflect parts of those conversations.

But we did explore quite a few things.

Q Did you have occasion to communicate to any other person who was not in attendance at that meeting any of the substance of that meeting?

A I talked to Paul Oreffice and brought him up to date on what had happened, yes.

Q And what did you tell him with regard to Mr. Falahee's remarks?

A I told him, on the question of a witness -- I guess that was one point when I really came up strong -- that was the first point where I came up strong, that any Dow witness would be a knowledgeable witness and that he would testify fully and completely as to the facts as he saw them, that there weren't going to be any questions about any Dow witness that was presented.

The other thing, on the lawsuit --

Q Let me stop you there.

Why did you feel that it was necessary at that time?

A Because of the suggestion that was made, and I guess in hindsight I guess probably that was not intended to be made when we came in, but there was discussion -- some discussion as to the Dow witness question about Joe Temple, because of his publicized statement. And then this came out that maybe the Dow witness should be someone not familiar with Joe Temple's position.

Q What publicized statement are you referring to?

A Joe Temple's statement that he felt that the Consumers' arrangement was not in the best interests of Dow, or not good for Dow.

Q Which had been made when?

A I don't know the date. It was before this task force was convened. In fact, Joe had suggested that somebody review the position he had taken.

Q Was his position publicly known before July 1976?

A I don't believe so.

Q You started to mention you also communicating to Mr. Oreffice some contract information.

A Well, we discussed some parts of the contract and my review of the contract, and some of the obligations that Dow had. We talked about possible -- well, we talked about the possibilities, well, maybe Dow had a case that maybe we could get out of the contract, based either on a frustration of the original intent, because of all of these endless delays, and we also talked about the question of whether or not Consumers had used its best efforts.

Q Had Dow considered attempting to get out of the contract, to use your words, before the Court of Appeals decision, do you know?

MR. POTTER: Would you repeat the question?

MR. OLMSTEAD: Had Dow considered attempting to

get out of the contract -- to use Mr. Hanes' words -- before the Court of Appeals decision?

THE WITNESS: I'm not aware of it. I don't know whether -- I don't know what the answer to that is.

I know that there were concerns about the provisions of that contract, there were attempts to renegotiate parts of it, and it hadn't got very far. But I don't know whether we had seriously considered the possibilities of getting out legally.

BY MR. OLMSTEAD:

Q Was it the generally held opinion that Dow could be relieved of its responsibilities under the contract because of a breach by Consumers?

MR. POTTER: I have an objection to the phraseology of the question.

I don't see how Mr. Hanes can testify to the generally held opinion. He could testify what he understood.

BY MR. OLMSTEAD:

Q Was it your view that Dow could get out of the contract because of a breach by Consumers?

A My opinion at this time was that we did not have a good enough case that we should take this on, that the contract was binding and that we would have to live up to it.

Q Were there other opinions among legal counsel for

Dow to the contrary?

MR. POTTER: Are you confining that to in-house counsel?

MR. OLMSTEAD: Either retained counsel or in-house counsel.

MR. POTTER: I'm going to object to any communications with outside counsel relating to the contract, but I have no objections to testimony relating to in-house counsel.

MR. OLMSTEAD: I think there already is some privilege with regard to that sort of thing made by Mr. Wessel, at least, and --

MR. POTTER: Well, I will concede that you can inquire into questions with Mr. Wessel. As to any other outside counsel, we are going to object on the specific issue of advice relating to the Consumers Power contract.

MR. OLMSTEAD: Okay. I think the deposition lists your objection, but the question can be answered.

MR. POTTER: Not to the privileged -- again, we have no objection to your inquiring into conversations with counsel in house relating to the question you just asked, or to questions involving Mr. Wessel. But beyond that, we're raising the privilege. And obviously the privilege is of no use or benefit if we answer the question.

So I assert the privilege as to outside counsel, and advice relating to the Consumers Power contract and the

relationship between Dow and Consumers on the contract.

MR. OLMSTEAD: Okay. I think the privilege has been waived. But if you'll answer the question with those restrictions, and if I find it necessary to come back I will do that.

THE WITNESS: Will you repeat the question?

MR. CHARNOFF: Off the record.

(Discussion off the record.)

MR. OLMSTEAD: On the record.

BY MR. OLMSTEAD:

Q I will rephrase the question now, in light of the objection.

Mr. Wessel was outside counsel to Dow Chemical at the time, and there was a legal staff, Midland Division, to Dow, USA.

Was there legal advice or legal opinions, other than your own, which were contrary to your own concerning Dow's case for breach of contract against Consumers at this time?

MR. POTTER: Again, I just want to caution you, because I don't fully understand. Now, are you limiting it to advice either from Mr. Wessel or the in-house counsel? Is that correct?

MR. OLMSTEAD: That's correct.

THE WITNESS: I guess Mr. Wessel thought there

was a better possibility of us prevailing in this kind of an action than I thought there was.

BY MR. OLMSTEAD:

Q Had anyone among those people we're talking about communicated that thought to Consumers, to your knowledge?

A Not to my knowledge.

Q Now, your discussions that you were having with Mr. Oreffice as a result of the September 21 meeting I assume were before the September 24 meeting?

A Yes.

Q Did you communicate the substance of the September 21 meeting to anyone else?

A Not that I recall, to anybody else who wasn't there. Just Lee Nute, Al Klomparens and I were there. We talked about it. But they were there.

Q Okay.

So you had a meeting with Mr. Oreffice at which Mr. Nute, Mr. Klomparens and yourself were present following the September 21 meeting?

A I don't know whether they were there when I talked with Paul or not. We had so many interactions here that I don't recall whether they were there or not.

Q Do you recall the reaction of Mr. Oreffice?

A Well, he supported my position with respect to the witness, that any witness Dow provided would be

knowledgeable, and there wouldn't be any question about that.

And I guess there was never any doubt in my mind that that would be the case.

Q In regard to the witness which might be tendered by Dow Chemical, did anyone suggest to you, or did you suggest, that it might be advisable to avoid the full disclosure of the extent of the Dow-Consumer contract to the NRC licensing proceeding?

MR. CHARNOFF: Can I have the question back, please?

(Whereupon, the reporter read from the record, as requested.)

THE WITNESS: No, I don't recall us even discussing contract relationships with Consumers.

BY MR. OLMSTEAD:

Q With regard to providing a witness to Consumers?

A No.

See, that meeting started out with Rex Renfrow bringing us up to date on where the whole licensing thing stood, what generally was going to be Consumers' approach to it, and we were talking about such things as economic desirability from Dow's standpoint, we were talking about such things as Dow's use of the steam, was this even a socially desirable use of steam, to make these terrible chemicals. And the talk was more along that line, to update

us as to where the whole procedure stood.

We didn't get into any differences or try to renegotiate our contract with Consumers. And we didn't talk about witnesses talking about those things.

Q You were in attendance at a meeting with Consumers Power again on September 24, 1976?

A Yes, I was.

Q Are you aware of any notes of that meeting?

A I took some notes of that meeting.

Q Have they been made available to us?

A They were the typed notes, I think, of the meeting.

MR. POTTER: They have been produced.

BY MR. OLMSTEAD:

Q Do you recall Mr. Oreffice being at that meeting?

A Yes.

Q Do you recall the position that he stated at that meeting?

A Well, at the conclusion of the meeting -- let's see . . . the meetings kind of run together.

Q I don't happen to have his notes right here, but --

MR. POTTER: Whose notes are you looking at?

MR. OLMSTEAD: Well, the notes I have of that

meeting are Mr. Nute's notes, Intervenor's Exhibit 27. But--

MR. POTTER: He has a set of notes. They have been produced. They're his own.

MR. OLMSTEAD: All right, he can refer to those.

THE WITNESS: I guess what -- I don't remember whether it was at that meeting, or later, that we officially told Consumers what the Dow position was. Mr. Oreffice mostly listened at that meeting, as I recall.

MR. POTTER: The record should reflect the witness is presently reviewing the notes that he took at the 9-24-76 meeting.

THE WITNESS: Well, as the notes show, Paul outlined what he'd asked the review panel to do, which is the group I was a party on, and basically he told us he wanted us to review the whole situation and to come up with what Dow's position was. And we took that seriously.

We were starting from ground zero, and we were to come in and recommend what Dow's position should be.

I guess where I'm troubled, I don't remember whether Paul came in at the end of that meeting -- I think it was at the end of that meeting he came in and said that Dow's -- I guess he delayed that. I'm not sure what the timing was on when he decided what Dow's position was going to be. I think that was a later meeting.

BY MR. OLMSTEAD:

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Q Do you recall any remarks made by Mr. Falahee at that meeting?

A No, he didn't have much to say at that meeting either. But Mr. Aymond pretty much covered the same ground Mr. Falahee had taken at our earlier meeting.

Q Then you don't recall Mr. Falahee saying anything about the contract between Consumers and Dow?

A About the legal -- lawsuits, and so on? I don't know whether he or Aymond said it, but they reviewed the whole situation as to what they felt support of Dow as required in the contract was.

Q Was there any discussion in that meeting concerning what the result would be if the Board was aware of Dow's trouble with the Consumers contract?

MR. CHARNOFF: Which Board are you referring to?

MR. OLMSTEAD: The NRC Licensing Board.

THE WITNESS: No. As I recall the meeting, it was more aimed at what would the Licensing Board react to based on Dow testimony. I don't think it was . . . as I recall, it wasn't anything about our differences in interpretation of the different provisions of the contract.

BY MR. OLMSTEAD:

Q And the different positions of the Dow testimony was reviewed?

A Right.

Q And what were those positions?

A Well, one was that if Dow supported the project actively, wants to buy steam and electricity from the plant, they felt that that would be very positive and they were very confident of their ability to get a license.

If Dow took the position that the attractiveness of the project has been impaired, further delays could tip the balance on the project from positive to negative, they felt this could increase the risks of suspending construction but the odds would still be very good.

If Dow gave lip service to the contract between Dow and Consumers, but indicated it did not like the deal any more, the odds would be reduced to 50-50, and this would be a high-risk situation.

If Dow --

Q Okay, stop with that option.

In your opinion, was that Dow's position at that time?

A No, that was not Dow's position.

Q Which of the options you've read so far most accurately reflected Dow's position at that time?

MR. CHARNOFF: Objection. I think that's been asked and answered. First of all, are you talking about Dow, Michigan, Dow, USA? I think he has said there was no Dow corporate position during the course of this time.

THE WITNESS: Oreffice had not yet made Dow's position at that time. Now, if you want to know what ultimately was Dow's position --

BY MR. OLMSTEAD:

Q I don't want to know what ultimately was Dow's position. The review group had made its recommendations and the corporate board was to consider this matter within four days of this meeting. I'm interested in knowing if Dow, USA or the review group was generally leaning to one of those positions as set forth in the September 24 meeting at that time.

A I guess as I recall the situation, the review board -- first of all, we did not feel bound in any way by Joe Temple's earlier comments and feelings. We recognized Joe's posture and the pressures he was under, because of delays and other problems, in connection with the future of the Midland plant.

So we felt that we could take a more objective view, and it didn't ever enter any of our minds that we weren't fully authorized, and felt free to come in with some kind of a recommendation different than Joe Temple's.

The review board generally felt positively about the plant. Our biggest concerns were more delays and the position that was going to put Dow in with respect to power, and the ability to continue to run the Midland plant.

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The different parts of the review board, we came in and the economic review indicated that it was still attractive economically.

The safety people came in and felt that safety-wise it still was attractive.

I felt that the contract was binding on us and if we were going to rewrite it, we would certainly insist on some different provisions, because nobody had foreseen all the intervening things that had happened.

There wasn't any question, I think, that our board felt that if, indeed, we could make Consumers aware and devoted to keeping the current schedule, that this was the best way to go.

Q Okay, but there were some options presented to Dow concerning the positions they could take in NRC proceedings, the options which you were just reading.

Did Dow agree that those were viable options that they could take?

MR. POTTER: Again, just to caution, are you talking about the Dow Michigan Division, Dow, USA, or the Dow Chemical Company?

MR. OLMSTEAD: I'm talking about the Dow that he was involved with as part of this review group.

MR. POTTER: Okay, which is Dow, USA.

THE WITNESS: Dow, USA, right.

My feeling was that this second one, that the attractiveness of the project has been impaired, further delays could tip the balance from positive to negative, felt that this may increase the risk of suspension.

I think that probably that, clearly, of these four listed, would describe the posture that we were in as the review panel.

MR. CHARNOFF: Just to clear that up -- excuse me -- you said that was your feeling?

THE WITNESS: Yes.

MR. CHARNOFF: You weren't speaking for Dow at the moment in answering that question?

THE WITNESS: As a member of this panel my evaluation at that time would be this most closely approximated -- and the review panel really hadn't come out with a positive recommendation and the U.S. Area board hadn't really come to a conclusion.

BY MR. OLMSTEAD:

Q Following the September 24 meeting, and before the recommendations of the review group that you were a member of to the Dow corporate board, did you have further discussions with any officials of the Dow Chemical Company or other employees of Dow concerning the September 24 meeting?

A Yes. The review panel certainly got together.

And then before the final decision was made, we all met with the U. S. Area board.

Q Was the review panel's recommendation to the corporate board a unanimous recommendation?

A I believe it was. I don't recall any dissen.

Q Did you have any other meetings before you met with the corporate board with people who were not members of the review board?

A I didn't.

Q Did you attend the corporate board meeting when the recommendations of the review board were made?

A We're talking about the U. S. Area board?

Q Right.

A That's not a separate corporation to us. The corporate board is the Dow Chemical Company.

I did attend the presentation to the U. S. Area board.

Q And approximately how long did that meeting last?

A Oh, I would say an hour, maybe an hour and a half at the most.

Q Was there any negative discussion in that meeting that you recall?

MR. CHARNOFF: Excuse me --

MR. POTTER: What do you mean, "negative discussion?"

MR. OLMSTEAD: Negative, opposing the review group's recommendations.

THE WITNESS: I don't recal any.

We went through -- each of the subcommittees went through its evaluation, its activities, presented their views of their part of the job.

I guess I recall it very specifically, in that I was the only one that didn't have any slides and numbers and charts and graphs. And I kind of wound it up, from the legal review standpoint.

BY MR. OLMSTEAD:

Q Okay.

Following the action of Dow, USA Area Board, did you have any occasion to follow up with any further discussions with Consumers' personnel?

A No.

Q Did you have any further role as to the matter of the Dow-Consumers steam contract?

A Well, I visited with Lee Nute from time to time. He would bring me up to date on where they stood.

But I didn't get actually involved in any of the detail. I didn't follow through on legalities with Lee and Milt Wessel and outside counsel.

Q Did you have any contact with Mr. Nute or with other counsel involved in preparation for the NRC hearings

concerning the form that the Temple testimony would be presented to the Licensing Board in?

MR. POTTER: Let me caution the witness, there should be no discussion of any communications between outside counsel, other than Mike Wessel, in answering that question.

THE WITNESS: Lee brought me up to date a couple of times in the course of these discussions, and I was aware that his testimony was going to go in in a question-and-answer form.

BY MR. OLMSTEAD:

Q Okay.

Did you express an opinion on that?

A I guess I concurred in their judgment. As I said earlier, --

Q Their judgment?

A That this was an appropriate way to do it, that Dow, in our view, was not a party at that time and that there was no withholding of information, or confusion in that connection.

Q After Dow was made a party by the Licensing Board, did you have further discussions about the Temple testimony?

A Only in a reporting kind of a way, because that was when the hearing was already on and they just reported

back to me what was going on from time to time.

Q Did Mr. Nute work under your supervision?

A Yes, he did.

Q But he worked for Dow Midland Division and you were the general counsel for Dow, USA?

A Yes.

Q Is there a general counsel for Dow, Midland?

A No. If there were, it would have been Lee Nute. He was their lead attorney.

MR. OLMSTEAD: That completes the questions I have of Mr. Hanes.

MR. CHARNOFF: Could we take about a three-minute break?

MR. OLMSTEAD: Fine with me.

(Recess.)

MR. OLMSTEAD: Back on the record.

CROSS-EXAMINATION

BY MR. CHARNOFF:

Q Mr. Hanes, my name is Gerald Charnoff, and I'm here today as counsel for Consumers Power Company.

I think you indicated that at the time of the period of interest, which was 1976, in September, you were general counsel of Dow, USA. I take it you've been with Dow Chemical for many years?

A Thirty years.

Q That's many.

An attorney during that whole period of time?

A No, I was a chemical engineer for the first two years, and I've been involved in labor relations and industrial relations, and I was general manager of a plant for awhile.

So it's not all been as an attorney.

Q Roughly how many of those years were as an attorney, can you remember, or estimate?

A Oh, twenty-one.

Q And as an attorney during that twenty-one year period you have attended, I take it, a lot of meetings within the Dow Chemical framework and within Dow and with other people representing other groups meeting with Dow, is that right?

A Yes, I have.

Q And do you often take notes at those meetings?

A Yes.

Q When you take those notes do you find that you note down the significant statements that are made by the parties at these particular meetings, or do you try to?

A I usually try to note the things that are significant to me.

Q When you were attending the meetings that Mr. Olmstead identified when you discussed with him the

September 21 and September 24 meetings, did you take notes of those meetings?

A I took notes of the September 21 and the 24, yes.

Q I think we identified a document -- or you were talking from a document that has Midland 64 on it -- on my copy -- which is the minutes of September 24.

Am I correct, Bill, that the designation is "Midland-64?"

MR. OLMSTEAD: Yes.

BY MR. CHARNOFF:

Q I'd like to also show you a document that we submitted with the designation of record.

(Document handed to the witness.)

We submitted that document as Attachment A, and it bears the date of September 21, 1976. We believe those are your notes of that meeting. Is that correct?

A These were typed, I believe, from my handwritten notes, yes.

MR. POTTER: By way of further identification, on the right-hand corner are those the notes that have the names of Jim Falahee, Rex Renfrow and Judd Bacon in the upper right-hand corner?

THE WITNESS: Yes. It looks like I may have mis-spelled Falahee too, with two l's..

MR. CHARNOFF: No r, but two l's.

444 NORTH CAPITOL STREET
WASHINGTON, D.C. 20001
(202) 347-3700

BY MR. CHARNOFF:

Q And that's a series of further pages of those notes, is that right?

A Yes.

Q Now, when you had these notes reproduced, what did you do, you just took your notes after the meeting and gave them to the secretary to type up?

A I think I gave my notes to Lee Nute, and Lee had them typed. I didn't have my secretary do it.

Q I see.

Is that basically the approach you used in developing the notes of the September 24 meeting too?

A Yes. I was, I think, more conscious of taking detailed notes in the 24th meeting. I don't know whether I was officially assigned that role or not, but my 24th notes are more complete than the 21st. But they're still far from being verbatim.

Q Was there someone who was assigned to develop the official notes of the September 21 meeting?

A No.

Q So, there weren't -- whereas your notes of September 24 might be considered to be the official Dow notes of that meeting, as far as you're concerned there was no such designation of the September 21?

A I don't think that I was the official secretary

on the 24th, either. I think that when we got through I had more comp[illegible]otes than anybody else, so they were adopted.

Q Okay. Insofar as September 21 is concerned, your notes are not an official set of notes?

A No. I just took these for my own edification. This dates way back to my law school days when I tried a case in moot court and we won the case, but the jurors came in and they criticized me for not taking notes. They felt that I should have taken notes to impress them with what I was doing.

So ever since then I've taken notes.

Q I wish everyone would have a colorful story like that for every set of notes they take.

Was there an official set of notes for the September 21 meeting, though, taken?

A No, I think each person did their own thing.

Q After the meeting was over on September 21 you just handed your notes to Mr. Nute, is that it?

A It wasn't immediately after then. In fact, I think it was more than a month later. I just put them in the file, my personal file.

Q Did you -- let's see, at the September 21 meeting you were there with Mr. Nute and --

A Mr. Klomparens.

Q Mr. Klomparens. The three of you. Did you get together after the meeting of the 21 and decide what the highlights of that meeting were?

A We discussed that really at quite some length, yes.

Q And did you work with Mr. Klomparens and Mr. Nute in terms of reducing the sense of those significant statements into some sort of written document, notes or otherwise?

A No.

Q So you didn't work with Mr. Klomparens or Mr. Nute in terms of development of their notes?

A No.

Q Have you reviewed the notes of Mr. Klomparens and Mr. Nute?

A I have not reviewed Mr. Nute's. I've reviewed Mr. Klomparens'.

Q Just this morning here?

A No, I reviewed them last week.

Q I see.

A I was going to review Mr. Nute's, but I couldn't find him.

Q You mean for purposes of this deposition?

A Yes.

Q Do you recall seeing Mr. Nute's or Mr. Klomparens' notes at any time before this?

A I've seen Mr. Nute's, but it's been a couple of years ago. I haven't looked at them since then.

Q That was after -- you would have seen his notes after they were reduced to writing and circulated or filed, rather than in the course of their preparation?

A Right.

Q So you had nothing to do with the preparation of his notes?

A That's correct.

Q What was the purpose of that September 21 meeting, do you recall?

A From my standpoint as a member of the review panel, the purpose was to educate me as to what was involved in the hearings, bring me up to date on anything that Consumers wanted to input for our consideration. They were well aware of this review process, and it was mainly to educate me and let me make a more informed report to my group.

Q Now, educate you as to the likely outcome of those then pending NRC hearings, or --

A Well, it was more basic than that. It was -- I think if you'd look at the notes here, what are the issues, what is Dow's role. And they describe the difference between suspension hearing from a big hearing that was supposed to come on later. And I really hadn't been close

to this process at all, and they were trying to fill me in. I had asked Lee Nute some of these questions, and Consumers hadn't been keeping him up to date.

So it was to update him too.

Q Okay. Now, on page 3 of the notes of the September 21 meeting, the last page, in the middle of the page there's some reference to G. Decker. Is that Jerry Decker you mentioned earlier?

A Yes.

Q And he, you said, was either on or an adviser to your little task force?

A I'm convinced he was not on that panel or task force, but he was an adviser. Jerry was an expert in energy of all kinds, and we did call on him for input.

Q Was he an employee of Dow at that point?

A Yes, he was.

Q Is he still an employee of Dow?

A No, he's vice president of Kaiser Aluminum Chemical, and he's responsible for their energy program.

Q What was his role at Dow at that point? Was he a member -- was he employed by Dow, Michigan, Dow, USA Dow Chemical Corporation? Or all three?

A Jerry's role changed, but I think he was always Dow Chemical Corporation. He was an adviser to Mac Whiting, and he was working on broad energy projects of one kind or

another. Mining coal was an area he was very interested in, and we got quite a bit of publicity on that.

But I would say he was the Corporation, rather than U. S. Area, and he reported to Mac Whiting at that time, I believe.

Q Could you identify for us just who Mac Whiting is?

A Mac Whiting was a member of the Dow Board of Directors. He was sort of an expert in long-range planning. He was very much involved. And he retired from the Board, but he's still a consultant on energy matters for the company.

Q Okay.

Now, you have a reference to Mr. Decker, with a dash, and a statement, "contractual fight."

Now, Mr. Decker was not at the meeting on September 21, correct?

A Right.

Q Could you tell me what that line item in your moot court notes there tell us?

A That was, I guess, a reflection of the fact that I was kind of upset that Mr. Decker had apparently been to Jackson visiting with Consumers' people and he apparently made some kind of a statement along the lines that, "Hey, it would be terrible for Dow and Consumers t get into a

contractual fight."

And I was upset. I made that note to follow up on, number one, what was Mr. Decker doing talking about contractual matters? That was outside the scope of his activities. And I did get back to Mr. Decker and told him that contractual matters were my province and suggested that he stick -- he was being helpful, or trying to be helpful.

Q And that was -- he's now at Kaiser Engineering?

A That has no relation. He got a nice promotion when he took that job.

Q So someone at the meeting on the 21 referred to Mr. Decker's visit to Jackson?

A It must have been Mr. Falahee or Mr. Bacon, I would guess. I don't remember the details. I just remember my reaction.

Q Now, just above that there is a statement that reads:

"If live up to contract but no longer economically viable. . ."

A I think it says, "will sue Dow for contract..."

Q Yes, I assume it says, "will sue Dow for contract violation." I assume those two sentences don't quite connect, do they?

A Well, I think this is my shorthand for what appears in more detail in the 24 meeting which Mr. Aymond

approved. But this was the first time that I realized I was faced with a possible lawsuit for $600 million, and I was listening very carefully.

Q This was a statement made by Mr. Falahee?

A Yes.

Q How was that statement made? With some sort of emotion, or calm? Was it a statement that that was a consequence of one position? Was it an informative type of statement? What kind of statement was it?

A I considered it rather emotional. At least it aroused my emotions.

Q Well, it aroused your emotions, because of the size of the --

A Yes, that's right. And it was also said fairly emotionally, rather intensively.

Q Was it said because someone asked what happens if these kinds of positions get taken, and therefore one consequence might be a lawsuit?

A Well, we were exploring testimony and general approaches, and what should a Dow witness be. And I don't remember the immediate thing that triggered it, but Mr. Falahee came forth and said that the contract required that we support Consumers Power, and we discussed at some length what support Consumers Power meant. And at some point in time he came out with this statement that if we didn't

support Consumers Power as he interpreted supporting Consumers Power, we were going to have a lawsuit.

Q Did you understand that to be his statement that these are the consequences that flow, or was it some sort of an intimidation?

A I don't know what his intention was, but I felt that somebody was trying to intimidate me. That was my reaction.

Q Now, you said that there was some discussion of--and I think you attributed this to Mr. Renfrow -- that perhaps there should be some witness other than Mr. Temple--I believe that was your statement to Mr. Olmstead this morning--or perhaps a witness who was unaware of Joe Temple's position.

A Unaware of Joe Temple's position I believe is what I said.

Q How did that statement -- what's the background for that statement? I think you said that you didn't believe that that was a statement that was previously thought out before the meeting by Mr. Renfrow, or . . . how did that discussion come up?

A I believe it started with a discussion about Joe Temple's announced posture, and this was pretty generally known by then. And the question, well, having announced that position, what kind of witness is Joe going

to be?

Q Was there anybody from Dow who expressed some concern about what kind of --

A I think Lee Nute expressed some concerns along these lines, and I guess Joe was certainly the most knowledgeable person but he was so close to the details, and with his responsibilities being the operation of Michigan Division, I guess I personally felt that he was emotionally involved as well as logically involved.

Q Okay.

If we could step back for a minute, the issue of Joe Temple's prior positions were put on the table, you said, and that people were generally aware of it. I guess people within the Company and people outside the Company, is that what you said?

A Yes. As far as I know. I think it was in the newspapers, as I recall.

Q And you think Mr. Nute raised the question of Mr. Temple's capability to represent Dow?

A Yes, one of the basic questions was who is Dow's witness going to be, and Temple was the only name mentioned. And the concern was raised, okay, with Joe already having been quoted the way he had, how effective a witness is he going to be?

Q And in the context of perhaps the Dow testimony,

would not be consistent with his earlier statements?

A No, I wasn't concerned about the testimony being consistent.

I guess . . . I was on the panel, and I felt there was a very strong possibility the panel would not agree with Joe Temple's conclusions. So here you have a man who maybe had committed or recommended in one way, and here a panel is coming in and overruling him and saying, no, that's not the Company position.

That was the only question. Nobody ever had any reservations about Joe being excellent and an honest witness. It was just a question of his having been involved and then overruled.

Q So there was some conversation that you and Mr. Nute participated in that reflected these series of prior statements by Mr. Temple and what effect that would have on his being a witness, is that right?

A Right.

Q And I take it the people -- let's say Mr. Klomparens was with you too. Was he discussing this subject at the time, or was it basically you and Mr. Nute?

A I don't remember Klomparens getting into that discussion. He may have, but I don't remember it. He mostly listened.

Q And on the other side it was mostly Mr. Renfrow

reacting, or Mr. Falahee, or Mr. Bacon?

A I think it was mostly Mr. Renfrow.

Q Do you recall how or who first raised the question of Temple's prior statements, saying his ability to testify in light of that -- was it you, or Mr. Nute or Mr. Renfrow?

A I don't remember. It wasn't me.

Q Okay. So somewhere in the context of that discussion, Mr. Renfrow said perhaps we should have a witness who is not familiar with Mr. Temple's position, is that what you recall being said?

A Something along those lines.

I remember that when that came out my reaction was rather violent. I gave a short -- what I hoped was an impressive little speech about Dow's witness was going to be knowledgeable, and he would fully disclose all the facts. And the matter was dropped at that point.

Q Mr. Renfrow, then, didn't say that he wants a witness who was not knowledgeable about the facts? That wasn't his thrust, I take it? His statement was, in light of the concern about Temple's earlier statements, that perhaps there ought to be someone other than Temple, is that basically what he was saying?

A I think it was a little broader than that.

But, as I say, in retrospect I guess I don't

know just how broad it was. But he felt there ought to be someone divorced from Temple's earlier conclusions and maybe unaware of that.

At that point in time I don't think there was anyone in Midland unaware of what Joe Temple said.

Q Did you understand that to be an effort by Mr. Renfrow to conceal the Temple position?

A I guess I don't know what his motivations were, but my reaction was we are not going to put on a Dow witness in that kind of context. And I got it out on the table right now that we're not going to do that. And that's the way it's going to be. And the thing was dropped. It wasn't pursued.

Q So Renfrow didn't quarrel with that statement by you at all?

A No.

Q Nor did Mr. Bacon?

A No.

Q Nor Mr. Falahee?

A No.

Q Nor Mr. Nute?

A No.

Q So it was, in effect, a --

A Nor Mr. Oreffice when I later told him.

Q Well, I just want to focus in on the September 21

meeting.

So it was effectively agreed by the six of you present that there would be a knowledgeable Dow Company witness presented, fully familiar with --

A No such agreement was expressed, but it wasn't pursued. I chopped off the discussion, and I intended that that was the end of it.

Q Now, you said you didn't have the impression that Renfrow had developed this line of thinking before the meeting. What was the basis for that sort of statement?

A Well, it wasn't led up to in any kind of a logical way. We just kind of dropped into it.

Q So you had no impression --

A This was my reaction.

Q So you had no impression that Renfrow came into that meeting with a design to exclude a knowledgeable Dow witness from this hearing?

A I didn't have that feeling.

Q I see.

Now, this whole thing was characterized in terms of somebody being unaware of Temple's position. Was there any discussion of a person unaware of or unfamiliar with the Dow Michigan recommendation to the Dow USA board that there be a review of the contract?

A I don't recall any discussions of that nature.

Q So the whole context of unawareness was in terms of Joe Temple's prior statements, prior positions, rather than the Dow Michigan recommendation, is that correct?

A I don't know how you separate those two.

Q But it was focused in on the public statements that Joe Temple had made earlier?

A Well, it was talking about the facts that led up to Temple's statements, and then Temple's position. I don't know how you separate that into little pieces. It was all kind of lumped together.

Q Now, as of September 21 there was no Dow USA position?

A That's correct.

Q There was a Dow Michigan recommendation that there be a Dow USA position developed?

A That's correct.

Q And it was accompanied by some finding, if you will, by the Dow Michigan group that perhaps the contract was not in Dow's interest?

A That's correct.

Q Was there any discussion at that meeting on the 21 that you or the Consumers' people present would not have wanted to tell the Licensing Board or the Licensing process that there had been a Dow Michigan recommendation to review the Dow-Consumers contract?

A I don't recall that being discussed.

Q Okay.

Now, you then said that you met with Mr. Oreffice between the 21 and the 24, and you weren't able to identify the exact setting for that particular meeting.

I take it Mr. Oreffice was located here in Midland?

A Yes.

Q And, therefore, you might have met him in the hall, or you might have met him in his office?

A Probably in his office.

Q Okay.

At that time you told Mr. Oreffice of these two matters that struck you strongly; namely, the question of who the witness ought to be and the potential of a lawsuit?

A Probably the second one first, the potential of a $600 million lawsuit, which was something that doesn't happen to us very often.

Q And you can't recall whether that meeting with Mr. Oreffice was alone or with some other people in Dow?

A If there had been anybody else along it probably would have been Lee Nute. But I rather think it was alone.

Q And Mr. Oreffice also agreed with you that it ought to be a knowledgeable witness presented by Dow?

A Yes.

Q And that it was to be Temple or anyone else?

A (Pause.)

Q Or did you focus in on that question?

A I believe he said it should be Joe Temple, at that time. But we didn't really seriously discuss anyone else.

Q I think in answer to a question by Mr. Olmstead you said no one suggested the desirability of avoiding any discussion before the Licensing Board of the contract situation with Consumers Power Company, is that right?

A I don't recall any discussions.

Q Okay. So just to button up this last issue, the witness question, then the strict discussion of the unaware witness was in the context of all of these prior statements Joe Temple had taken, and a discussion of let's have someone who is unaware of Joe Temple's prior position, rather than in the context of any attempt to withhold from the Licensing Board a discussion of the Dow-Consumers contract situation?

A I would agree with that.

Q One of the statements you made about the task force -- you said the task force was composed of people who were independent of Joe Temple in the sense that you said they would take an independent view, because Mr. Temple, you said, was under certain other pressures, was your language to Mr. Olmstead. What were those other pressures?

A Well, Joe Temple was involved in, as I mentioned, running the Midland plant. That was his future. That was his responsibility.

We had Michigan State people here, quality control people, on his back about using his fossil-fired plants. We had EPA in the background. They were unhappy with using those plants, those plants were getting old. He was fast approaching a time where if he had to have some independent steam generating capacity, it had to be on the drawing board and some commitments had to be made.

So he was in a posture where he had to know whether there was going to be a nuclear plant operating out here or not, because the timing was critical, the expenses were mounting. He was under a lot of pressures from that point of view, that if this plant is going to run we have to have economical power and steam.

Q So his view of the Consumers Power Company's Midland project was primarily colored by his concern over the reliability or availability -- the dates of the availability of that particular plant?

MR. POTTER: Excuse me. I have an objection at this point.

I don't see how Mr. Hanes could really testify effectively on what the thought processes were of Mr. Temple and what caused him to conclude what he did. With that

objection on the record, go ahead and answer.

THE WITNESS: Well, I was aware of the pressures that he was under, and I agree with Mr. Potter that I don't know all of his internal thought processes, but certainly Joe was under a lot of pressures.

BY MR. CHARNOFF:

Q And Mr. Oreffice set up this group of somewhat more objective people because you wanted to get a total objective look of the Dow-Consumers relationship, without its being in the context of the specific needs of the Midland Division, and in the context of the other pressures that were beyond the managerial division, is that right?

A I would say that is correct. And I think as a matter of fact Joe Temple suggested this review himself, recognizing these very factors.

Q In fact, he had recommended -- I think it's reflected in Board Exhibit Number 1 in this case, that was a letter to Mr. Oreffice where he recommended the establishment of the review group on a corporate basis, is that right?

A I can't quote exhibit numbers and so on, but I'm sure that's right.

Q What was the purpose of the September 24 meeting?

A Well, I didn't call that meeting. It was, I guess, a higher-level version of the September 21 meeting. The review panel, Dow management, needed to have a direct

first-hand, unfiltered view of the Consumers Power posture of the status of the hearings, and they needed that direct input from Consumers Power. So it was called to give Consumers that direct chance to input to Dow.

Q One of the inputs was to discuss at a higher level the nature of the forthcoming hearings?

A Yes.

Q Another input was, in light of the September 21 meeting, to acquaint Mr. Oreffice and other senior management with the possibility of a lawsuit if the contract was terminated?

A Give them a chance -- well, give Consumers a chance to do whatever they wanted to do. We had already told them about the September 21 meeting, so that was known at the time.

Q Was the statement -- there were statements made again about the possibility of a lawsuit by Consumers Power, weren't there?

A Yes, there were.

Q And that was made by Mr. Aymond, I think you said?

A Yes.

Q -- rather than Mr. Falahee at that point?

A I think Mr. Aymond did most of the talking. Mr. Falahee may have joined in sometimes.

Q And was that stated by Mr. Aymond as almost a natural consequence of what would happen if the contract were terminated, or was it stated in some sort of threatening way, or what?

A I don't know how you'd state a $600 million lawsuit in a non-threatening way.

We felt threatened, yes.

Q Well, you've been engaged with Dow for some time, and Dow has had a lot of lawsuits, I take it, over your 20-year period?

A It's had a few.

Q And I take it in the course of those situations, there were events where you met with parties before a lawsuit was started, is that correct?

A That's correct.

Q And you would want to know from a corporate position whether that lawsuit potential was real or fancied, wouldn't you?

A Yes.

Q So, as a source of information from -- I mean as a matter of information, Dow would want to know in connection with any potential action it would take, wouldn't it?

A Correct.

Q So it would seek out that information as a

matter of information, wouldn't it?

A I would say so, yes.

Q Okay. And if, in fact, whether it's a Consumers case or some other potential situation, if in fact the contracting party or the person with whom you had a contractual relationship wouldn't tell you that the potential consequences of some Dow action might lead to some litigation, you would feel that you were missing some information at that point, wouldn't you?

A That was the purpose of that meeting, is to get direct information from Consumers and a chance to ask questions.

Q About the potential for a lawsuit, as well as anything else, is that right?

A Right.

Q At that meeting did Mr. Aymond or anyone else from Consumers Power Company urge Dow to present any testimony that would be less than truthful?

A No.

Q Incidentally, at the September 21 meeting was there any indication from Mr. Bacon, Mr. Aymond, Mr. Falahee that the people should present any information that was less than truthful?

A No.

Q Was there any discussion at the September 24

meeting about the choice of a Dow witness, whether it should be Mr. Temple or someone else?

A I don't recall that that was resolved at that time. I think it was later.

Q I thought you said earlier --

A Well, earlier than that Mr. Oreffice had said in his opinion it should be Joe Temple, but I don't know that that was finally agreed upon until sometime later.

Q You might wish to consult your notes. I don't see any reference in those notes to discussion of witnesses, do you?

A If you'll see in those notes, they obviously weren't complete, because -- I don't even know where they are, but - -

Q I'm talking about the September 24 meeting, where you had indicated --

A The meeting started out with a presentation. I think Joe Temple had some fairly formal opening remarks, and Mr. Aymond had a fairly formal opening remarks, background. And my notes sort of picked up after all those formal remarks had been made.

Is there anything in my notes that suggest who the witness would be? I don't recall that being discussed.

Q All right. But this was -- as compared with the September 21 meeting, these were more complete notes?

A Right.

Q So it's not your recollection that there was any discussion at all about the Dow witness at the September 24 meeting?

A I don't think there was any discussion.

Q Was there any discussion at that meeting of withholding from the Licensing Board any information with regard to the Consumers Power Company-Dow contract?

A Not that I recall.

Q Was there any discussion at that meeting of withholding from the Licensing Board any discussion of the Dow Michigan recommendation?

A Not that I recall.

The whole world knew by then, anyway.

Q Of the Dow Michigan recommendation?

A I think so.

Q Tell me about that, how --

A It was in the newspaper. And there had been phone discussions, and Consumers had talked about it. And I think it was generally pretty well publicized, what Joe Temple had said.

Q Are we talking -- as I recall, and correct me if I'm wrong -- there was a 1975 statement by Mr. Temple that I've seen, but are you saying that there was a Mr. Temple's statement in the period of September 1976 which

reflected the Dow Michigan recommendation?

A I can't give you dates, but I think it was in the newspapers that Joe Temple had been quoted as saying that this was no longer a good situation for Dow.

MR. CHARNOFF: Off the record for a minute.

(Discussion off the record.)

MR. CHARNOFF: Back on the record.

BY MR. CHARNOFF:

Q At the September 21 meeting Mr. Falahee, you said, discussed the Consumers contract and what he felt at least the contract required in terms of Dow support of Consumers at the Licensing hearing.

Could you summarize what the nature of that support was that Mr. Falahee thought that contract ought to require?

A Well, he felt that that support requirement probably went beyond the Dow position that we felt support meant, that we would provide engineering type witnesses who would come up with factual information, and that that satisfied our requirements under that part of the contract.

Mr. Falahee felt that that required further action on Dow, that we should actively come in and support their position in all ways, to try and help the licensing.

Q Did it mean that you had to take a corporate position with regard to the ongoing project that was

consistent with theirs?

MR. POTTER: Consistent with whose?

MR. CHARNOFF: Consumers.

THE WITNESS: No, I don't recall him putting it in quite those terms. He put it in the posture that if we came out and took a position that resulted in their loss of the license because we were no longer supportive of the project, and so on, that that, certainly he thought, would be in violation of the contract.

BY MR. CHARNOFF:

Q And that was the basis, among others, for his statement that if the contract were terminated there might be a lawsuit?

A Might be? He said there would be. There wasn't any question about that whatsoever.

MR. CHARNOFF: I think that's all the questions we have.

MR. POTTER: I'd like to have just about two minutes to talk with Mr. Davis.

(Recess.)

BY MR. POTTER:

#2 Q Mr. Hanes, I just have a few questions.

Earlier in your testimony when you were responding to questions from Mr. Olmstead you were talking about a period of time apparently after these meetings of 9-21-76

and 9-24-76 when the Temple testimony was being prepared for submission to the Nuclear Regulatory Commission Board.

I believe you said at some point that they reported back to you. Can you tell me who the "they" you were referring to was?

A That would be Lee Nute and Milt Wessel.

Q Okay. Now, as Mr. Charnoff pointed out in his examination of you, you took minutes -- not minutes, but rather notes, at both the 9-21-76 meeting and the 9-24-76 meeting, is that correct?

A Yes.

Q And it's your practice, I believe you testified, to note down in notes that you take at meetings those subjects that you regard as significant, is that correct?

A That's correct.

Q Would you take a moment and review your 9-21-76 meeting notes and tell me whether there's any reference to the Renfrow statement in there?

A Which Renfrow statement?

Q The one that you testified to earlier, both to Mr. Olmstead's examination and also during Mr. Charnoff's examination, relating to the witness, the Dow witness.

MR. CHARNOFF: The witness who would be unaware of Mr. Temple's position?

MR. POTTER: I'm talking about whatever statement

Mr. Renfrow made during the course of the 9-21-76 meeting regarding the use of the Dow witness. I will subsequently ask the question, what's his best recollection as to --

THE WITNESS: No, there's no reference to that.

BY MR. POTTER:

Q Is there any particular reason why that doesn't appear in your notes?

A Yes. Because when that conversation started down that line, I was starting to prepare mentally my other speech that the Dow witness was going to be open and knowledgeable, and candid. I guess candid may not be a fair word, because nothing was suggested that they not be candid, but that the Dow witness would be knowledgeable and he would tell the whole story.

Q Now, as Mr. Charnoff brought out, before Mr. Renfrow said whatever he said there apparently was what I might call an antecedent discussion in which there was some discussion made by a number of people regarding the use of Mr. Temple as a witness, is that correct?

A Yes.

Q And then, however that particular subject was resolved, Mr. Renfrow then made a statement to you regarding the use of a witness from the Dow Chemical Company, is that correct?

A To the whole group, not just to me.

Q All right. What is your best recollection of what Mr. Renfrow said?

A It was along the lines of maybe we could have a witness who was unaware of Mr. Temple's recommendation. I guess that's about all I recall. But when he was suggesting this, I took it seriously enough that I felt I had to respond and straighten the record out at that moment, that the Dow witness was going to be knowledgeable and that he was going to testify fully, and that's how I responded.

Q Does that mean that you interpreted whatever was said by Mr. Renfrow then to mean somebody who knew less than Mr. Temple did was to be called as a witness? Or what did you understand him to mean?

A Well, I understood that his suggestion -- as I say, the way it came out, it was sort of spontaneous. The way it came out, I took it seriously enough that he was suggesting maybe that Dow should provide a witness that was not knowledgeable, and that I wanted to clear the air right then that any witness that Dow supplied would be knowledgeable and that he would testify fully and accurately as to the facts.

And I intended that to cut off that conversation along those lines, and it did in fact cut off the conversation along those lines. As I recall there wasn't any more

discussion about it.

Q Now, when you say you interpreted whatever was said to mean that a Dow witness who was not knowledgeable was to be tendered as a witness, according to your understanding, now, was he not to be knowledgeable on any specific area, or on the subject matter generally, or what? What did you understand the meaning to imply?

A Well, Mr. Potter, I didn't know quite where the line of inquiry or suggestion was headed, and it was my intention to chop it off, whichever direction it was headed down. And I, in fact, did do that, by my statement as to the nature of who -- not who, but the qualifications of the Dow witness and the nature of his testimony.

Q I'm going to refer you to page 3 of your notes of the 9-21-76 meeting and again I'm going to call your attention to the line in the middle of the page, just above the reference to Mr. Decker, where it says -- I'm quoting from the notes:

"If live up to K..." which I take it is your abbreviation for contract?

A Right.

Q "...but no longer economically viable." And there's a period there.

A Right.

Q Then the second sentence follows, "Will sue Dow..."

A "...will sue Dow for contract violation."

Q Are those two sentences connected, or are they independent thoughts?

A I think they're independent thoughts. The first one is one sentence, if we live up to the contract but it's no longer -- but if we testify that a nuclear power plant here is no longer economically viable, then the following is that they would then sue Dow for a contract violation.

Q Now, that's in the conjunctive then. Am I correct in understanding that the statement that was made that you wrote down is that if Dow lives up to the contract but then states that it's no longer economically viable --

A Well, if we testify along that line.

Q That a lawsuit would follow?

A Yes.

Q And who did that statement come from?

A Mr. Falahee. Again, that's not verbatim. That was my interpretation of what he was saying.

Q I understand.

MR. POTTER: I haven't anything else. Thank you.

MR. OLMSTEAD: I would like to have a couple of redirect questions, if I might.

REDIRECT EXAMINATION

BY MR. OLMSTEAD:

Q I want to follow up on the discussion that your

counsel, Mr. Potter, and I had on the privilege question, in that I asked you questions as to whether there had been legal advice on Dow's position relative to the contract and whether they could sue for breach or delay, and the objection was tendered that you could answer as to Mr. Wessel and in-house counsel, but there was an objection interposed as to any counsel from outside, other than Mr. Wessel.

The question I'd like to ask you is if there were any instances where other counsel besides in-house counsel and Mr. Wessel communicated with you or with any other Dow officials, to your knowledge, concerning Dow's legal liabilities, rights or responsibilities under the contract?

MR. POTTER: Excuse me. Before the witness answers, I have no objection to him responding as to the fact of yea or nay, whether there was communication. But you're --

MR. OLMSTEAD: That's why I'm asking the question.

MR. POTTER: All right.

THE WITNESS: The answer is yes, we did retain outside counsel to write some legal opinions for our guidance, and we did meet in person and explore these questions in detail with them.

BY MR. OLMSTEAD:

Q On the Dow-Consumers steam contract?

A Yes.

Q Subsequent to the Court of Appeals remand?

A Yes.

Q Subsequent to the Dow corporate review?

A I guess before and subsequent to that time.

Q Are you, on behalf of Dow Chemical Corporation, asserting attorney-client privilege with regard to those communications?

A Yes.

Q How many conversations took place with regard to this subject or communications are there to which you assert a privilege?

MR. POTTER: I'm going to object to any further examination. Mr. Hanes can make the decision, but --

MR. OLMSTEAD: I'm not asking him for the substance of the --

MR. POTTER: I understand. But I want this record to be clear we're not waiving the privilege at this point, and I think the fact of the contact has been made, and I think that's enough. And I think that any further comment runs the risk that privilege may well be waived, and I don't -- we'll let Mr. Hanes make that decision.

THE WITNESS: I decline to answer.

BY MR. OLMSTEAD:

Q What are the names of the attorneys who provided such information?

MR. POTTER: Same objection.

MR. OLMSTEAD: Privilege does not cover the names of the attorneys.

MR. POTTER: That's arguable.

MR. OLMSTEAD: Well, I think it's fairly clear under the Federal Rules that privilege does not attach to the names of the counsel who provide --

MR. POTTER: If I'm wrong in my interpretation, then we'll subsequently have to supply the names of counsel, but I object.

THE WITNESS: I will follow my lawyer's advice.

MR. OLMSTEAD: Well, I could give you a number of case cites of federal courts that --

MR. POTTER: Well, Mr. Olmstead, I haven't had a chance to research this question in depth, and I'm not going to waive the point now. If I'm wrong, you'll certainly be supplied with the information later.

BY MR. OLMSTEAD:

Q Was this information which you assert was privileged communicated to anyone else in the Dow corporation?

A Not that I'm aware of, other than legal staff.

Q Have you discussed the matters with anyone besides your counsel?

MR. POTTER: "These matters" refers to what, now?

MR. OLMSTEAD: The matters that you assert are privileged.

THE WITNESS: The general subject matter, of course, has been discussed all over. But the legal advice and interpretation, and so on . . .

BY MR. OLMSTEAD:

Q Okay.

The second question I'd like to ask is:

With regard to these conversations which you attribute to Mr. Renfrow concerning the lack of a knowledgeable witness being a possibility, what was your impression of Mr. Renfrow?

Let me back up. Had you met Mr. Renfrow previous to this meeting?

A No.

Q Were you familiar with the law firm that he was a member of?

A No.

Q Did you have an impression as to which attorney for Consumers Power was the lead attorney?

MR. POTTER: At what point in time?

MR. OLMSTEAD: At that meeting.

MR. POTTER: The 9-21-76 meeting?

MR. OLMSTEAD: Yes.

THE WITNESS: Well, Mr. Renfrow did most of the talking in that meeting. But I guess if I had really wanted a discussion, I would have asked Mr. Falahee.

Mr. Renfrow really was following the details of the hearing. He was very knowledgeable in that area. He was educating us in that regard.

I guess I felt that if a lead attorney is the guy who makes the final decision, I thought Mr. Falahee would.

MR. OLMSTEAD: That's all I have.

MR. CHARNOFF: I have a couple of questions.

RECROSS-EXAMINATION

BY MR. CHARNOFF:

Q Did Mr. Falahee express any opinions about having a witness unaware of Mr. Temple's prior statements or positions?

A No.

Q Did you understand Mr. Renfrow's response to the discussion of Mr. Temple's suitability as a witness to be any kind of effort to present somebody who would not be knowledgeable about the Dow corporate position?

MR. POTTER: Excuse me. At the point of the 9-21-76 meeting, as I understand, there wasn't a Dow

corporate position.

BY MR. CHARNOFF:

Q Whatever the Dow corporate position would be at the time of the hearing.

A No.

Q So you're saying that there was no effort, or there was not a suggestion that there be somebody not knowledgeable about the Dow corporate position whenever that hearing would be held, is that correct?

A There was no Dow corporate position, so the answer is we didn't get into that.

Q But it was assumed that there'd be a Dow corporate position to be articulated at the hearing whenever it took place, is that correct?

A Right.

Q Was Mr. Renfrow's statement, as you understood it, addressed to the suggestion that there be somebody who would not be knowledgeable about that Dow position to be presented at the hearing?

A No.

Q Now, if I could ask you to turn to Exhibit 64, which are your notes of the September 24 meeting, I believe this was at page 3 -- do you have a copy of that, sir? I'm not sure it's in that package --

A I handed it back to somebody.

MR. POTTER: I have it.

(Document handed to the witness.)

MR. POTTER: The witness has been handed a copy of the September 24, 1976 notes.

BY MR. CHARNOFF:

Q I ask you, Mr. Hanes, to turn to page 3. Down in the second paragraph there's a statement that Mr. Aymond said that if these things happened they would sue Dow for losses alleging a breach of contract by Dow, on the theory that repudiation is a breach, and said if Dow acts to frustrate Consumers Power is less clear, Consumers Power is entitled to Dow's support for the project.

Could you elaborate a little bit on the fine point between breach or repudiation and frustration, as you understood it in that paragraph when you were quoting that?

A (Pause.)

Q This is not intended to be a test of law. I'm just curious as to . . .

A Well, I think repudiation clearly, if Dow takes the position that the contract is no longer in force, is not advantageous to Dow, -- this is back on page 2 -- to me that would be a repudiation.

Frustration gets into the other areas where we give lip service to the contract, but didn't like the deal any more, and by our actions indicate that, yes, we are

bound by the contract whether it's a bad deal or not, and that would tend to frustrate it.

I guess that would be as close as I could come at this late date, in distinguishing them.

Q And at that point what Mr. Aymond was saying was that, while it's less clear there might still be a lawsuit. Is that what you --

A Yes.

Q Now, turning back to page 3 of your notes of the September 21 meeting, Mr. Potter discussed with you -- do you have that, sir?

A Yes.

Q You were talking about some sort of conjunctive relationship between those two sentences, that "If live up to contract, but no longer economically viable. Will sue Dow for contract violation" and so on.

Is that in a sense -- I think you attributed this basic proposition in the shorthand notes to Mr. Falahee's statements at the September 21 meeting, is that correct?

A That's correct.

Q Now, do you understand your statement with regard to Mr. Falahee's statement as it is reflected in your shorthand notes there to be reflective of this concept of frustration that Mr. Aymond was talking about?

A Well, my feeling was that in the initial meeting on September 21 that Mr. Falahee came on very strong to get our attention, and they had fine-tuned their position, and that Mr. Aymond's breakdown was in more detail, with more variations, in the time between that meeting and the 24th meeting that Consumers had clarified their position somewhat over what Mr. Falahee had expressed to us.

Q You don't know that in fact that was or was not what Mr. Falahee was thinking when he said whatever he said on the 21?

A I don't know, no. This is my interpretation of what he said, and it's not verbatim as to what he said.

Q Okay.

Now, the notes are admittedly shorthand, aren't they?

A Yes.

Q -- of the September 21?

A Yes, my own version of shorthand.

Q Your own version of shorthand. Do you have any idea, as the discussion was being presented by Mr. Falahee at the time, if you were to write a complete paragraph instead of the shorthand notes that you have there, whether there would be any sentences you would insert between those two sentences there, if you had to recollect that basic discussion?

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WASHINGTON, D.C. 20001
(202) 347-3700

A We didn't explore in detail in that meeting to the extent we did in the next meeting, as to just what the meanings were. So I guess I would not insert any sentences.

Q But Mr. Falahee didn't talk -- I've met Mr. Falahee, and he doesn't talk the way these notes read, does he?

A I hope not.

Q Well, did he talk the way these notes read?

A No. He in fact did not. As I say, this is not what he said. This is my understanding of what he said.

Q So there was in effect a somewhat more elaborate oral statement?

A Yes.

MR. CHARNOFF: I don't think I nave any more questions.

MR. POTTER: Nothing further.

MR. OLMSTEAD: Off the record.

(Discussion off the record.)

MR. OLMSTEAD: All right, that concludes this witness.

We'll recess until 10:30.

(Whereupon, at 10:10 a.m., the taking of the deposition was concluded.)

CR-4810

CERTIFICATE OF NOTARY PUBLIC

I, Helen M. Rabbage a notary public, do hereby certify that the witness whose testimony appears herein, appeared before me and was duly sworn by me.

Helen M. Rabbage
Notary public in and for the
Midland County, Michigan

Mr commission expires

HELEN M. RABBAGE
Notary Public, Midland County, Michigan
My Commission Expires August 3, 1988

CERTIFICATE OF COURT REPORTER

I, William E. Landon, Court Reporter, do hereby certify that the testimony contained herein is a true record of the testimony given by said witness, and I further certify that I am neither attorney nor counsel for, related to or employed by any of the parties to the action in which this statement is taken; and, furtner, that I am not a relative or an employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

William E. Landon
Court Reporter

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