

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

CONSUMERS POWER COMPANY

(Midland Units 1 and 2)

Docket Nos. 50-329
50-330

Place - Bethesda, Maryland

Date - 16 July 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Docket Nos. 50-329
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Commission Hearing Room, Fifth Floor,
East-West Towers,
4350 East-West Highway,
Bethesda, Maryland.

Monday, 16 July 1979.

The hearing in the above-e. titled matter was
reconvened, pursuant to adjournment, at 9:00 a.m.

BEFORE:

MARSHALL E. MILLER, Esq., Chairman,
Atomic Safety and Licensing Board.

DR. J VENN LEEDS, JR., Member.

DR. EMMETH A. LUEBKE, Member.

APPEARANCES:

On behalf of Consumers Power Company:

GERALD CHARNOFF, Esq.,
W. BRADFORD REYNOLDS, Esq.,
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On behalf of Dow Chemical Company:

WILLIAM C. POTTER, JR., Esq.,
Fischer, Franklin, Ford, Simon and Hogg,
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R. L. DAVIS, Esq.,
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47 Building,
Midland, Michigan 48640.

On behalf of the NRC Regulatory Staff:

WILLIAM J. OLMSTEAD, Esq.,
DENNIS DAMBLY, Esq.,
RICHARD K. HOEFLING, Esq.,
WILLIAM D. PATON, Esq.,
Office of the Executive Legal Director,
United States Nuclear Regulatory Commission,
Washington, D. C. 20555.

C O N T E N T S

					Exam.by	Cross on
	<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Board</u> <u>Board</u>
1						
2						
3	James B. Falahee	52,230	52,308			
4	James H. Hanes	52,342	52,388			
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P R O C E E D I N G S

CHAIRMAN MILLER: We'll be on the record.

MR. OLMSTEAD: I have a couple of preliminary matters I would like to raise.

For the record, last week I requested from Dow the meeting minutes of the Dow corporate board for October, 1976. And in reviewing many responses to interrogatories over the weekend I discovered in January of 1977, Dow had indicated that in addition to the Kay, Scher firm, they had sought legal advice on the steam contract in the period 1976 - 1977, from Fischer, Franklin and Ford and Lane, McDonald and Wilshire.

I would request that any documents of the type that we received from the Kaye, Scholer firm that might exist in those two firms be produced for the Board's inspection.

CHAIRMAN MILLER: Have you made the request of Counsel?

MR. OLMSTEAD: I have not. I just found this and I wanted it for the record.

CHAIRMAN MILLER: All right, the record will reflect your request.

Mr. Potter, have you had a chance to consider the matter?

MR. POTTER: Since I just found out about it, no, I haven't, Mr. Chairman. I'll have to see what I can locate.

CHAIRMAN MILLER: Very well. Advise the Board

eb2

1 after you gentlemen have had a chance to confer.

2 Anything further?

3 MR. OLMSTEAD: No, sir.

4 Mr. Paton will be handling this morning's witness.

5 Whereupon,

6 JAMES B. FALAHEE

7 was called as a witness and, having been first duly sworn,

8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. PATON:

11 Q Mr. Falahee, will you state your name and address?

12 A James B. Falahee, 212 West Michigan Avenue, Jackson,
13 Michigan.

14 Q And what is your present employment?

15 A I'm employed by Consumers Power Company as senior
16 vice president in charge of legal accounting rates and regula-
17 tion.

18 Q What was your position in September 1976?

19 A In September 1976 I was general counsel for
20 Consumers Power Company.

21 Q Mr. Falahee, we've been using these volumes of
22 material that you see on the desk in front of you here. Will
23 you see if you can find Volume 3?

24 A I have it.

25 Q Tab 2. You will see there are two pages there. The

1 first page is the front of the prospectus.

2 A Yes.

3 Q All right.

4 Would you turn to the second page, the second piece
5 of paper there. Is that page 22 of that prospectus?

6 A Yes.

7 Q Will you look at eight lines from the bottom of
8 that page, and in the middle of that line, do you find the
9 words, "In connection with construction delays"?

10 A I find that, yes.

11 Q Would you read-- Let me read that sentence to you
12 and you can follow me along.

13 "In connection with construction delays
14 at the Midland Plant, the Dow Chemical Company
15 alleged in correspondence with the company that such
16 delays reflect an inability on the part of the com-
17 pany to perform its obligations under the parties'
18 contract in which the company has agreed to supply
19 process steam to Dow from the Midland Plant. The
20 company believes it is not in default of its obli-
21 gation...."

22 CHAIRMAN MILLER: A little slower for the Reporter,
23 please.

24 MR. PATON: Pardon me, Mr. Chairman.

25 BY MR. PATON:

eb4

1 Q (Continuing) The last sentence is:

2 "The company believes it is not in
3 default of its obligations under the steam service
4 contract."

5 What was your knowledge of the situation that
6 existed between Dow and Consumers with respect to the contract
7 that is mentioned there at that time, sir?

8 A My knowledge was that we had a contract with Dow
9 and we were proceeding as best we could with the construction
10 but we had problems with financing and so forth which had
11 delayed the project.

12 Q You say you had trouble with financing. Was that
13 a problem between Dow and Consumers?

14 A Oh, no. This was a problem between-- I guess you
15 could characterize it as between us and the Michigan Public
16 Service Commission in obtaining adequate earnings which
17 would support bond issues, e cetera.

18 Q What problems existed, if any, between Dow and
19 Consumers?

20 A I really don't recall any. This is early on. This
21 is '74, isn't it, or '75?

22 Q '76, sir. The front page is dated September 9,
23 '76.

24 A Oh, I thought this was an earlier prospectus
25 because this note had been in the prospecti of the company for

1 several years prior to this.

2 Okay, now that I'm in focus with the time period
3 that we're talking about here:

4 Of course the September 1976 period, this was the
5 period where Dow had advised us that the project was no longer
6 in the best interests of Dow.

7 Q This is dated September 9, '76. We'll talk about
8 that statement that you just mentioned but before that state-
9 ment, -- that's what I'm trying to get at -- were there any
10 difficulties between the parties before that statement?

11 A I don't know whether you would characterize it as
12 difficulties. I guess that would be a fair characterization
13 in that there was contract negotiations going on at that time.
14 It had been for some time, where Dow wanted some changes and
15 we wanted some changes.

16 Q Let me ask you about the specific words:

17 "....such delays reflect an inability
18 on the part of the company to perform its obliga-
19 tions...."

20 Now did Dow make a statement like that.

21 A I think Dow had made a statement like that long ago,
22 on other words not in September of '76 but prior thereto.

23 Q All right.

24 That tends to go toward whether or not Consumers
25 is breaching the contract, doesn't it? Doesn't it tend in

eb6

1 that direction?

2 A I think one could draw that conclusion.

3 Q Let me ask you this question, sir:

4 At this point in time had either company discussed
5 suing the other company under this contract?

6 A I don't believe so.

7 Q Now there came a time in September 1976 when you
8 became aware of what has been called the Michigan Division
9 position. Do you know what I'm referring to?

10 A Yes.

11 Q All right.

12 Would you tell us first of all how you heard about
13 it?

14 A Yes. And I didn't have an independent recollection
15 of this when I had my deposition but I was refreshed when I
16 saw the memorandum that Mr. Youngdahl prepared wherein he
17 recited that at a negotiating meeting he was advised by
18 Mr. Temple that Dow no longer thought it was in the best in-
19 terest of Dow to -- that the project was. And he wanted to
20 break off negotiations.

21 And Mr. Youngdahl called me that evening at home
22 and told me about it. That was the first I had heard about
23 it.

24 Q Did you have a meeting that night?

25 A No, sir.

eb7

1 Q Did you have a meeting the next day?

2 A Yes, we met in Mr. Aymond's conference room, I
3 believe, and discussed the situation.

4 Q Sir, would you find in Volume 3-- Take a look at
5 Tab 9.

6 A I have it.

7 Q On the second page, the very last paragraph, would
8 you read the first sentence, "Reviewed the Dow position...."

9 A "Reviewed the Dow position with
10 AHAYmond and JBFalahee last night."

11 Q Wouldn't that indicate to you that you had met with
12 Mr. Youngdahl?

13 A You can draw that conclusion but actually he made
14 two phone calls, I think.

15 Q Oh. All right.

16 So you learned of it that night but you didn't
17 met with him?

18 A That's right.

19 Q All right, you're correct.

20 Now you said that-- I believe you said, and please
21 correct me if I'm wrong, that Mr. Youngdahl was advised that
22 Mr. Temple was going to break off negotiations. Is that what
23 you said?

24 A I think I said that. Actually what-- I don't know
25 if he said that. All I knew was, as I recall, that the

eb8

1 project was no longer in the best interest of Midland Division.

2 Q All right.

3 A I will amend that prior testimony.

4 MR. POTTER: In what regard, Mr. Falahee, that you
5 don't recall --

6 THE WITNESS: The breaking off of negotiations.

7 MR. POTTER: Thank you.

8 BY MR. PATON:

9 Q Now please tell us if you can recall anything more
10 you remember about the Dow position, other than the fact that
11 Mr. Temple indicated that it was the Michigan Division position
12 that the contract was no longer advantageous to Dow.

13 MR. REYNOLDS: Excuse me. Can I just ask at what
14 point in time you're asking him to answer this?

15 CHAIRMAN MILLER: Yes.

16 MR. REYNOLDS: It may make a difference if you're
17 talking about the 14th of September as opposed to the 21st.

18 MR. PATON: All right.

19 BY MR. PATON:

20 Q Prior to the meeting of September 21st, what was
21 your understanding on September 13th and September 14th?

22 A As I sit here today I don't have an independent
23 recollection of that. Now my recollection has been refreshed
24 by, obviously, looking at this memo of 9/14 where they list
25 the seven items there. But we, I or the company, never knew

ebj

1 precisely what triggered the Dow position.

2 In other words, these items here influenced their
3 decision but we were never able to know, on the 14th, 15th
4 or subsequently, what was the item that really triggered
5 Mr. Temple to take the position that he did.

6 Q All right, sir.

7 Tell us what you understood the Michigan Division
8 position to be. And you can draw on your knowledge at any
9 time, acquired at any time, with respect to their intent to
10 perform under the contract.

11 A We didn't know what their position would be, and
12 that was part of the problem, with the position was no longer
13 in the best interest of Dow. It was an uncertainty whether
14 they were going to continue to perform under the contract or
15 not, and we really didn't know the answer to that until the
16 27th of September after the corporate review.

17 Q Now during the period of time prior to November
18 27th -- excuse me -- September 27th, and let's agree on
19 September 27th -- that was the date the Dow US Area board met
20 and made a decision. Is that correct?

21 A As I sit here I can't remember whether that was the
22 date or not. I know it is the date that the Dow Counsel
23 called Mr. Bacon and advised him of the board decision. I
24 assume that they met that day also, but as I sit here, I can't
25 recall that.

eb10

1 Q Prior to the Dow USA board decision, which I will
2 indicate to you the record shows was on September 27th, but
3 in any event, prior to that date, describe whether you thought
4 this problem or this situation with the Dow Michigan Division
5 was a serious problem.

6 A Well, it was a serious problem in that they were
7 reviewing the whole situation but I myself, as I said in my
8 deposition, perhaps I was optimistically naive, but as I
9 understood the situation, namely, that the project was the
10 most economic alternative for Dow to obtain the energy that
11 they will need, I really was confident myself that they ulti-
12 mately would reach the position that they did.

13 Q Now you say it was "most economic." That was in
14 the opinion of Consumers Power; is that correct?

15 A Yes.

16 Q Now you were optimistic about arriving at a solu-
17 tion but despite that optimism, isn't it a fact that Consumers
18 Power considered to be the Michigan Division a very signifi-
19 cant and a very serious problem?

20 A Excuse me, sir. I didn't hear the latter part of
21 that.

22 Q Isn't it true that you considered that the Michigan
23 Division position to be a serious problem for Consumers Power?

24 A We considered the fact that it was no longer in
25 the best interest of Dow, that they had reached that

eb11

1 conclusion, obviously that was a serious problem, yes. We
2 didn't know why they had reached it, and we held that upon
3 mature reflection and looking at all the facts that that deci-
4 sion would be reversed.

5 But yes, it was serious that the situation arose
6 in the first instance.

7 Q All right.

8 A I would have much preferred that we worked out the
9 contract and I wouldn't be down here today.

10 Q Now with respect to the seriousness of the problem
11 prior to the decision of the Dow US Area board, there was
12 discussion within Consumers Power of the possible effects of
13 this decision if it ultimately resulted in breaking off the
14 contract. Isn't that correct?

15 A Yes. The discussion was prompted by a request from
16 Dow that we provide them input as to what the impact of such
17 a decision might have on Consumers Power.

18 Q One of the most adverse possible impacts that you
19 could envision was-- Well, let me ask you:

20 Did you ever discuss bankruptcy of Consumers Power?

21 A That appears in the notes of Mr. Nute and Mr. Hanes,
22 having to do with the September 21st meeting of the lawyers
23 and it's attributed to me. As I sit here today I don't recall
24 saying that bankruptcy was threatened or might have been a
25 possibility, but I could have said that. But it would have

eb12

1 been -- it would have led to serious consequences, obviously
2 large damages.

3 Q All right, sir.

4 I really wasn't addressing what in fact you said.
5 My question was whether or not there was any discussion of
6 bankruptcy within Consumers Power. Was that part of your
7 deliberations?

8 A I don't have any independent recollection that that
9 was a subject discussed.

10 Q Now you attended the meeting of September 24th?

11 A Yes, sir.

12 Q Do you recall a statement by Mr. Aymond that one
13 of the possible effects of this decision if it resulted in
14 lengthy suspension of your permit would be a massive deteriora-
15 tion in earnings?

16 A Yes.

17 Q All right.

18 You would agree it was a very serious problem?

19 A The possible effects of Low action would have very
20 serious consequences, yes.

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23

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25

1B wrb/agbl 1

2 I was hopeful throughout that when they looked
3 at all the facts they would reach the decision they ultimately
4 did.

5 Q But as a good corporate planner, you couldn't
6 just simply count on that, you had to evaluate all contingencies,
7 is that right?

8 A Well we had to be as responsive as we could to
9 what Dow was asking us to do, yes.

10 Q Now you did attend the meeting on September 21

11 A Yes.

12 Q And did you attend some Consumers Power meeting
13 prior to the 21st?

14 A Yes, my memory is rather fuzzy, but I know --
15 I think there was a meeting on September 20, and there was
16 a meeting following Mr. Youngdahl's telephone conversations
17 of the 14th. I think there was a meeting on the 15. And my
18 memory isn't all that -- I don't independently remember but
19 I think, what I read in the notes, apparently there was
20 another meeting. In other words, there was a meeting on the
21 15th, one subsequent to that, and one on the 20th. But as I
22 sit here, I don't remember -- they all sort of merge in my
23 memory.

24 Q All right, sir. Would you see if you can find
25 Volume 7 on the desk?

A I have it.

1.175

b/egb2

1 Q Is your volume tabbed? For example, near the end
2 do you have tab 22?

3 A No, I don't have any tabs on here.

4 MR. CHARNOFF: What document do you want?

5 MR. PATON: The meeting of 9/17.

6 MR. CHARNOFF: The Howell notes?

7 MR. PATON: Yes.

8 It's four pages from the back of the document.

9 THE WITNESS: I have it.

10 BY MR. PATON:

11 Q Now let's make sure we have the same document.
12 Do you have a document, at the top in the center it says:
13 "CP Co. Meeting on Dow, 9/17/76 at 11:00 a.m.?"

14 A Yes, sir.

15 Q All right.

16 Now I see the initials in the upper right-hand
17 corner JBF.

18 As a matter of fact, look those notes over, sir,
19 and see if they refresh your recollection as to whether or not
20 you attended that meeting. The notes are three pages long.

21 (The witness reading.)

22 Let me ask you, Mr. Falahee, have you ever seen
23 those notes before?

24 A I saw them for the first time, I believe, Saturday.

25 Q All right. Take your time, sir, and look them over.

1 Unless you can answer my question now. Do you know if you
2 attended that meeting?

3 A Well I don't independently remember the meeting,
4 except that looking at the last page it says:

5 "JBF - Legal issue on contract.

6 - Haven't gone outside yet. - Dykema, Gossett -
7 Detroit."

8 That suggests I was there.

9 Q Do the words you just read refresh your recollection
10 as to what discussion took place at that meeting?

11 A No, sir, it does not.

12 . I know what that means, I think. As I sit here
13 today I know what it means. I probably told the meeting that
14 we hadn't gone to outside counsel as yet for advice on the
15 situation and that we would address outside counsel, namely,
16 Dykema, Gossett on that point.

17 Q Right below that on page three of the notes
18 it says, "Case Description," Case I and Case II, is that
19 also something that you discussed?

20 A No, sir, not as I recall.

21 Q Would you turn back to page one of those notes?

22 A I'm sorry my memory isn't better than it is,
23 but these notes are pretty darn cold.

24 Q Right, that's three years ago.

25 On page one, do you see AHA in the left

wrb/agb4

1 column there?

2 A Yes.

3 Q "What is Dow's position."

4 Do you see those words?

5 A Yes.

6 Q Do you recall anything about that discussion?

7 A I think -- I guess to be honest with you I can't
8 recall that precise discussion. I think, based on my overall
9 knowledge of what went on and also what went on in the
10 September 24 meeting, that we were struggling from the very
11 beginning as to what was the Dow's position, what did it mean
12 when they said it's no longer in their best interest. Were
13 they going to walk away from the contract? We didn't know.
14 We also didn't know what was the triggering mechanism that
15 caused Mr. Temple to, in effect, ask Mr. Orrefice for the
16 corporate review.

17 I think that's the genesis or what is implied
18 by this. But I don't have any independent recollection of
19 what went on at this meeting on September 17.

20 Q Let me ask you a question about something you
21 just said, because I think you said it twice.

22 Mr. Temple met with Mr. Youngdahl on September 14,
23 I believe, or the 13th possibly. His notes maybe were of the
24 14th.

25 A All right.

wrb/agb5

1 Q And didn't he at that meeting tell Mr. Youngdahl
2 his reasons --

3 MR. REYNOLDS: Excuse me, are you asking him --
4 I'll object that the witness wasn't at the meeting. I have
5 no problem with him asking a question as to what was reported
6 to him on the meeting but I think we have to rephrase the question

7 CHAIRMAN MILLER: Rephrase the question.

8 BY MR. PATON.

9 Q Let me ask you this. Did you ever see Mr.
10 Youngdahl's memorandum of September 14th concerning the 9/13
11 meeting?

12 A It shows that I was copied on that memo. Frankly,
13 in preparing for the deposition, I hadn't reviewed it. It
14 was shown to me during my deposition, and that was the first
15 time I had really seen it, except obviously I received it at
16 the time but I didn't have any memory of it. I'm familiar
17 with it now.

18 Q All right.

19 You are familiar with it now?

20 A I'm familiar with what it says.

21 Q Does it state in there what Mr. Temple told
22 Mr. Youngdahl as the reasons for --

23 A I think it listed those seven things as having
24 an influence on his decision, but it doesn't identify what
25 indeed did trigger him taking the step that he did. Was it a

b/agb6

1 single event, was it cost, was it something else, that's what
2 we really didn't have a handle on.

3 Q All right, sir.

4 In that same volume that you have there, Volume 7,
5 turn back if you will one page back from the notes you were
6 just looking at.

7 A I have it.

8 Q And do you have a page there --

9 A It looks like transcript

10 Q Well it's very similar -- oh, no, you should have
11 a page there that says 9/20.

12 A Oh, I went back instead of forward, excuse me.

13 CHAIRMAN MILLER: What tab are we referring to?

14 MR. PATON: Tab 23.

15 THE WITNESS: 9/20/76.

16 MR. PATON: All right.

17 BY MR. PATON:

18 Q Does that note begin at the top left corner with
19 "RCY - Talked with Temple."

20 A Yes, sir.

21 Q All right.

22 Now in the middle of the page in the left column
23 there, the capital letters JBF.

24 A Yes.

25 Q ARE those your initials.

rb/agb/

1 A Yes.

2 Q Does that refresh your recollection as to what --
3 well excuse me, let me ask you this question.

4 Do you remember attending this meeting on
5 9/20?

6 A I remember attending meetings prior to the
7 meeting of September 21 with the Dow legal group. I don't
8 have as I sit here today an independent recollection that I
9 attended this meeting. I'm not denying it would be logical
10 that I did because we were here reviewing what we were going
11 to do in preparation for the meeting that ensued on the 21st.

12 Q All right, sir.

13 Would you read all of the statements that are
14 under the initials JBF and tell us your recollection, drawing
15 on your knowledge from any source, as to what those -- as
16 to what the discussion was?

17 (Witness reading document.)

18 A All right.

19 To put this in context I believe at the earlier
20 meetings, namely, the two that had preceded this by a few
21 days, I think it became clear that Dow Chemical had established,
22 I think, seven task forces to review the question and that they
23 were asking input from us on two of the task force, one the
24 legal one and one on economics, I believe. And I had called,
25 I believe, Jim Hanes, who was General Counsel, to establish

wrb/agb8

1 when we would get together to meet with them on the legal
2 meeting that ensued on the 21st.

3 I don't have -- I read what is here, I can give
4 you my best impression of what they mean. Like the:

5 "Only reason looking at is to prepare
6 for upcoming hearings."

7 Jim Hanes may have told me that, I don't remember
8 that as I sit here today.

9 And we did agree to get together at 2:00 on the
10 following day and that Judd Bacon was going along with us.

11 "Asked whether or not CP Co. had to
12 worry about whether contract is to be broken."

13 I don't recall now whether asked that or not.
14 I must have or it wouldn't be here, and I don't recall what
15 response I got.

16 Q Thank you, that was my next question.

17 A "Trying to reach Dykema - representative
18 in this AM."

19 I think that's self-explanatory, that's the
20 follow-on on seeking outside counsel's opinion as to the Dow
21 situation.

22 And:

23 "CP Co. Wayne Kirkby worked over
24 week."

25 I imagine that was over the weekend or something,

wrb/agb9

1 Mr. Kirkby is a lawyer on the staff of Consumers Power Company's
2 legal department.

3 Q All right, sir.

4 Now would you turn back for just a moment to the
5 first page of the notes of 9/17. I believe it's the next
6 page.

7 A Yes, the last page of those notes, is that what
8 you mean?

9 Q No, let me go slow now.

10 I want you to turn to the notes of 9/17.

11 A I have them.

12 Q Page one.

13 A Yes.

14 Q Okay.

15 Now near the bottom there under "AHA," do you see
16 where it says: "2. Break contract."

17 A Yes.

18 Q And then there is the statement:

19 "If Midland Plant goes under, CP Co.
20 can't continue."

21 Do you remember that statement?

22 A No, I do not as I sit here.

23 Q All right, sir.

24 Now I think we're finished with those volumes.
25 You did attend the meeting on September 21st?

b/agbl0

1 A Yes.

2 Q Tell us your purpose in attending that meeting.

3 A My recollection is that that meeting was part of
4 this task force examination of this whole question and that
5 meeting was the legal -- the lawyer part of the meeting looking
6 at the legal aspects of the situation. And they had asked
7 us, Dow, that is, had asked us to attend the meeting and to
8 provide them with what we understood the legal situation to
9 be.

10 Q Did you plan, prior to attending that meeting,
11 to indicate to Dow what your reaction would be if they did
12 not support the contract?

13 A I think I would rather phrase it this way, that
14 we did plan to tell them at that meeting that we felt, Consumers
15 Power Company felt that we had a valid enforceable contract
16 and that if Dow, as a result of their action, breached the
17 contract, we wanted to acquaint them with the fact--in the
18 context of telling them what the legal situation was--acquaint
19 them with the fact that there were, may be consequences flowing
20 therefrom.

21 The other part of the meeting, of course, was to
22 explain to Dow -- because the Aeschliman had just come
23 down, they didn't have a good understanding of what it meant
24 in terms of the issues and it was to explain to Dow, particularly
25 the suspension hearing and what impact that might have, the

wrb/gabli

1 length of time and that sort of thing, what the issues therein
2 were.

3 Q Now you have stated, and you stated in your
4 deposition, that you said there would be legal consequences.

5 Have you intentionally not stated that it was your
6 intent to indicate that there would be a suit, that there would
7 be litigation. I mean, did you intentionally limit your
8 statement to legal consequences?

9 A No, I don't believe I meant to do that consciously.
10 What I meant to do at that September 21 meeting was to tell
11 Dow -- because we didn't know where they stood, but we wanted
12 to be sure to acquaint them with the fact that we thought we
13 still had a valid enforceable contract, and if they would
14 happen to take action that was in violation or in breach of
15 that contract that -- well I think Mr. Nute's notes said,
16 Mr. Nute's notes said I said there would be a hell of a
17 lawsuit or something like that.

18 Q There are other notes that say there would be
19 a hell of a lawsuit, is that your knowledge?

20 A There may well be. I don't recall as I sit here.

21 Q Did you say that?

22 A I could have. I don't remember saying it. It
23 would be logical that I might have said that, because it was
24 consistent with my thinking, namely, that it would be a
25 serious lawsuit and contra, I guess, to the impression that

1 might be gained from the Nute notes. I said that in the
2 sense that there would be a hell of a lawsuit for both of us
3 and I, as General Counsel, frankly was thinking of the
4 complexity of the suit: the tremendous amount of discovery,
5 the horrendous damages--it would be a tremendous undertaking
6 for both of us and I volunteered, as my deposition, I think,
7 stated that I hoped we could avoid it and I sincerely d'd hope
8 we could avoid it.

9 Q Are you aware of what Mr. -- Have you ever read
10 or are you aware of what Mr. Haines said that you said at
11 that meeting?

12 A He said something about I had mentioned the fact
13 that if they breached the contract it could result in very
14 serious litigation or something to that effect, I don't
15 remember very clearly.

16 Q You don't have any recollection that he put any
17 numbers on that, that he indicated what the size of the --

18 A I don't think so, because I don't think at that
19 September 21 meeting that we had numbers.

20 Q Okay. You had numbers at the 9/24 meeting?

21 A Yes, right. But not at the lawyers meeting.

22 All I was stating at the lawyers meeting is that
23 if a breach ensued, there would be a substantial lawsuit.

24 And I don't think we translated that into numbers.

25 Q All right, sir.

/agbl3

1 Have you read your deposition?

2 A Yes, sir.

3 Q And do you recall that in two instances you
4 indicated that there would be litigation repercussions?

5 A I could have said that.

6 Q Yes.

7 A Meaning if they breached the contract and it
8 resulted in damages and so forth, there would be litigation
9 repercussions, yes. I also said in the deposition, I think,
10 if you enter into a contract you assume certain obligations,
11 and if you don't live up to those obligations, obviously,
12 there's going to be some resultant effects.

13 Q My question, sir, was whether you recall that
14 in your deposition you on two occasions mentioned litigation,
15 one one occasion litigation repercussions, and on another
16 occasion you said it could lead to litigation. Now if you
17 don't remember that, I'll be glad to show you.

18 A I think you had better show it to me so I can
19 see the context in which I used that, please.

1Cflws

1C WRB/wb11

MR. PATON: I'm showing the witness page 92 of
his deposition.

BY MR. PATON:

Q I would ask you to read the question starting on
line 2 through the answer on line 14.

(Handing document to the witness)

A Do you want me to read it orally?

Q As a matter of fact, sir, if you don't mind, I
think that would be helpful.

CHAIRMAN MILLER: We want to have it in the record,
so one of you is going to have to read it aloud.

MR. PATON: Don't make the mistake I did and read
it too fast for the Reporter.

THE WITNESS: I'm reading from page 92 of my
deposition beginning at line 2.

"QUESTION: Now was there any mention
during the September 21st meeting during Mr. Renfrow's
presentation as to what would follow if Dow took
any of these particular positions in terms of any
subsequent litigation between Consumers and Dow?

"ANSWER: I don't think Mr. Renfrow
articulated anything on that subject. The whole
point was that what he was doing was being respon-
sive to what we thought Dow wanted, namely, our
judgment as to what impact the various Dow positions

WRB/wb2

1 might have, and that Dow was free to take any one
2 of them. And it was at that juncture that I spoke
3 up and said, 'But we do feel we have a valid con-
4 tract with you. And obviously if you take positions
5 that are a breach of that contract there will be
6 some litigation repercussions.'"

7 And I confirm that I said that.

8 Q Now turning to page 94, or, rather, 93, would
9 you read the question beginning on line 19 through your answer
10 on line 7 of the next page?

11 MR. REYNOLDS: I'm sorry; what was that again?

12 Line, what?

13 BY MR. PATON:

14 Q On page 93, the question begins on line 19. And
15 I would ask you to read through line 7 on page 94, which is
16 the next page.

17 A "QUESTION: Okay. In your own mind, during
18 that meeting, Mr. Falahee, when Mr. Renfrow was
19 outlining the last two of the four alternatives
20 did you form a judgment in your own mind at that
21 point as to whether either one of those was con-
22 sistent or inconsistent with what you thought Dow's
23 obligations were?

24 "ANSWER: Clearly it was a given in
25 the fourth one that it was a violation.

550 031

WRB/wb3

1 "QUESTION: Okay.

2 "ANSWER: I don't think at that meeting

3 I formed any conclusions as to where No. 3 feel.

4 I was just making an assertion that if indeed what

5 Dow did, regardless of what it was that was ulti-

6 mately construed to be by us a violation of the con-

7 tract, it could lead to litigation."

8 I think the record might-- Maybe from what has
9 gone on before it may be clear what 3 and 4 are, and so forth.

10 CHAIRMAN MILLER: Do you recall what they are
11 now?

12 THE WITNESS: Yes, I do.

13 CHAIRMAN MILLER: You may describe them, if you
14 will.

15 THE WITNESS: The last one which was a given it
16 was a violation was that they would repudiate the contract.
17 The third one was we have a valid contract but it's no longer
18 economically advantageous for us to continue. --something to
19 that effect. It was what was described in the 9/24 meeting as
20 the position that was described by Mr. Raymond as giving lip
21 service to the contract. It's the same category.

22 CHAIRMAN MILLER: And what was your judgment, if
23 you had one at that time, as to the breach or non-breach if
24 Dow took Position No. 3 as you described it?

25 THE WITNESS: I don't think at that time, sir, I

WRB/wb4

1 had any judgment on that; I was merely, frankly, trying to
2 tell their lawyers that if what they did, regardless of what it
3 was, if it turned out to be a breach there would be consequences.

4 CHAIRMAN MILLER: Serious consequences?

5 THE WITNESS: Yes, sir.

6 CHAIRMAN MILLER: Thank you.

7 BY MR. PATON:

8 Q So would you agree, sir, that you did on two
9 occasions mention the possibility of litigation at the meeting
10 of the 21st?

11 A Yes, sir.

12 CHAIRMAN MILLER: Your question has been asked and
13 answered twice, Counsel.

14 MR. REYNOLDS: Excuse me, Mr. Chairman; I'd like
15 to clarify something in light of that last exchange.

16 My understanding is that what we just went through
17 confirmed that he mentioned litigation at least twice in his
18 deposition. The question that he was just asked was whether he
19 mentioned the possibility of litigation twice in the September
20 21st meeting. I'd like to make it clear--

21 CHAIRMAN MILLER: Hasn't he already testified as
22 to that?

23 THE WITNESS: I didn't have that understanding,
24 Mr. Chairman.

25 MR. REYNOLDS: My understanding is that was not his

eb1
ls wb4

1 testimony, and I'm just not sure whether the question tracks
2 what we have just been through.

3 CHAIRMAN MILLER: Rephrase it and then we'll be
4 clear.

5 BY MR. PATON:

6 Q Mr. Falahee, I want to clarify that last statement
7 by Counsel.

8 In your deposition on two occasions you used the
9 word "litigation." Do we agree on that?

10 A Yes.

11 Q Is it fair to say that in the deposition when you
12 used the word "litigation" you were indicating that you had
13 discussions involving litigation at the meeting, that you
14 mentioned litigation in the meeting of 9/21?

15 A Oh, I think that's fair.

16 Q All right.

17 A But I didn't mention it twice. The way that came
18 up was Rex had gone through the various alternative positions
19 that Dow might take in the suspension hearing, the impact
20 that might have, and then I said, however, as is clear in my
21 deposition, that I didn't want it understood that Dow was
22 free with impunity to take all of those positions. If indeed
23 any of those positions did result in a breach, it obviously
24 would have legal implications. I only said that once.

25 Q Okay. I'm going to ask you about that.

eb2

1 You just said it would have legal implications.

2 A Well, you can't hold me that tight. I may have
3 said "breach" and it would result in litigation. I can't
4 recall.

5 The point I was getting across or trying to get
6 across to Dow was that we felt we did have a valid contract;
7 if indeed they did take action that constituted a breach that
8 it would result in litigation.

9 Q Now was it your intent, prior to attending the
10 meeting of 9/21, to mention litigation?

11 A I think it was in this sense, that I wanted to be
12 sure at this meeting with the lawyers that I conveyed the
13 thought that we felt we had a valid existing contract with Dow
14 and if they violated it, obviously they couldn't do that with-
15 out having some consequence.

16 Now I don't know whether in my mind I said litiga-
17 tion or that, if that's precisely what you're asking.

18 Q That is exactly what I'm asking you.

19 Let me try this:

20 Prior to attending the meeting on 9/21, did you
21 think at all about whether you were going to use the words
22 "legal consequences" or "litigation"?

23 A I don't think I got that finite.

24 Q All right.

25 Now in your deposition you testified that you were

eb3

1 not trying to influence Dow one way or the other. Do you
2 recall that?

3 A I think the context of that question was were we
4 trying to pressure them or threaten them, or something to that
5 effect. Really, the way I looked at that meeting, and it
6 was a very matter of fact, professionally run meeting with
7 very little emotion, and what I was trying to was agitate
8 them to the fact that we felt, Consumers Power Company felt,
9 that we did have a valid contract with Dow, and that Dow
10 could not breach that contract with impunity.

11 Q Sir, let me read you from the deposition and see
12 if it refreshes your recollection. I'm reading from page 60.

13 MR. CHARNOFF: Do you want him to have a copy of
14 that before him?

15 CHAIRMAN MILLER: Yes, the witness should have a
16 copy of the deposition before him.

17 (Document handed to the witness.)

18 BY MR. PATON:

19 Q Sir, could I ask you to read into the record from
20 your deposition at page 60 near the bottom, at line 22?

21 You were being interrogated by Mr. Dambly, I be-
22 lieve. Would you read that, through line 21 of page 61? And
23 if you want to read any more, if you think any more is relevant,
24 please do, sir.

25 A You want me to begin at line 21?

eb4

1 Q Line 22, with the question.

2 A Reading from page 60 of my deposition, line 22:

3 "QUESTION: Was it Consumers' intention,
4 to the best of your knowledge, at the September 24th
5 meeting to 'push' is a word I don't like, but I'll
6 use it because -- "influence," there's a good one,
7 to influence Dow to, by presentation of these alter-
8 natives and the statement that if you didn't pick a
9 3-A or 3-A(1) it was going to be a sizable legal
10 suit?

11 "ANSWER: No. I think more the text of
12 the -- or the tenor of the meeting and the thrust
13 of the meeting was a continuation of the task force,
14 namely information input into Dow to help them reach
15 their decision.

16 "QUESTION: Well, you certainly hoped
17 that by presenting this you would influence Dow to
18 come out with a position that was either 3-A or
19 3-A(1)?

20 "ANSWER: Well, certainly we were hope-
21 ful that Dow would come out with a position that we
22 felt was rational, namely, to continue to support
23 the contract.

24 "QUESTION: I understand. You hoped it
25 would come out of that.

eb5 1 "ANSWER: Yes, that was our hope.

2 "QUESTION: And would it be fair to say
3 you were trying to influence or push them into coming
4 out to that conclusion?

5 "ANSWER: I don't like the connotation
6 of the words 'influence' or 'push' because really
7 what we were trying to do is to inform them so that
8 they could in their judgment make an educated guess
9 as to what their position should be. 'Educate' I
10 would accept."

11 MR. REYNOLDS: I would like if he could also con-
12 tinue and read the next question and answer which goes over--
13 Actually it's a couple of -- the next question and answer which
14 go down through page 62, line 12.

15 CHAIRMAN MILLER: All right. Read it and then we
16 will have it all in one place, Mr. Falahee.

17 THE WITNESS: "QUESTION: In your personal
18 opinion would you say at any time during the inputs in-
19 to what ultimately became the Dow corporate position
20 as of the September, I guess, 27th -- prior to the
21 September 27th, did you or anyone else at Consumers
22 try to push Dow into coming out with a position that
23 was favorable to Consumers by means of a threatened
24 lawsuit?

25 "ANSWER: No, I don't want to accept

eb6

1 that connotation. We were responding to their cor-
2 porate review, giving the only input that they wanted
3 from us, and leave it to them to decide the issue.
4 Frankly, we felt if they understood the facts they
5 would reach the right decision.

6 "I might say that the tenor of the meet-
7 ing on the 21st and also the meeting of the 24th was
8 not tense. It was a relaxed factual presentation.
9 It wasn't, as I think I said earlier, an adversary
10 type thing and I wasn't certainly looking at Dow
11 Chemical at that time as an adversary."

12 MR. PATON: Thank you, sir.

13 BY MR. PATON:

14 Q Would you turn to page 38 of the deposition, line
15 20, and read through the end of that page, five or six lines,
16 through line 10 of the next page. And take your time, if you
17 want to refresh your recollection on the deposition and see
18 if there is any other portion you or your Counsel think is
19 relevant.

20 A Reading from line 20 on page 38:

21 "QUESTION: At what time did you indi-
22 cate-- At the September 21st meeting did you indi-
23 cate to Dow which, if any, of these alternatives
24 would be acceptable performance of Dow's responsi-
25 bilities as you saw them under the contract?

eb7

1 "ANSWER: I think on that score that was
2 gone into-- On that score I think we definitely said
3 if they walked away from the contract it would be a
4 breach and there would be consequences flowing. But
5 again I don't want to get this out of context. We
6 weren't telling them not to take that position. What
7 we were trying to do is say 'If you take a position
8 that was ultimately construed to be a breach of the
9 contract, there would be damages flowing. And that
10 was a price that you, in your management decision,
11 might want to pay.'

12 "Now this was not articulated but this
13 was the sense in which it was given and I think
14 understood."

15 Q Thank you, sir.

16 A Just a moment, if you please. Let me see if there
17 is anything further I feel I should read.

18 (Pause.)

19 Okay.

20 Q Thank you, sir.

21 Sir, you attended a meeting on 9/21 between Dow
22 and Consumers?

23 A That's the meeting of the lawyers. Yes.

24 Q Yes, that's right, September 21st.

25 Did you attend that meeting?

eb8

1 A Yes.

2 Q Will you tell us what you recall of that meeting?

3 A Yes.

4 It was attended by myself, Mr. Bacon, Mr. Renfrow
5 for the company, Mr. Klomprens, Mr. Hanes, Mr. Nute. And
6 I think that was it.

7 At the meeting, Rex Renfrow spoke most of the time
8 and the reason for that is that Rex was our Counsel in the
9 nuclear licensing proceeding and he proceeded to go through
10 and explain the issues in the suspension hearing, the issues--
11 As he characterized it then, it was a hearing on the merits,
12 the big hearing, and then the impact that various Dow posi-
13 tions could have on the suspension proceeding.

14 As I have already indicated here this morning,
15 following that I didn't want Dow to have the impression that
16 they could take any of those positions without some conse-
17 quence, and it was at that juncture that I spoke up and re-
18 cited that we had the valid contract in the conversations we
19 have previously examined here this morn:

20 Also as my recollection is now, early on in the
21 meeting Mr. Nute, who I had known previously as Counsel for
22 Dow Chemical in Michigan Public Service Commission proceedings,
23 rate proceedings, and I felt we were on a friendly acquaintance-
24 ship basis, had alluded or said to me something to the effect
25 that there may be a problem with Mr. Temple as a witness,

eb9

1 or he was concerned about using Mr. Temple. I'm groping for
2 what he did say.

3 But the gist of it was he was concerned because
4 of Mr. Temple's prior public statements that he had made con-
5 cerning his disillusionment with the Dow project.

6 I think that is a pretty good summary of what went
7 on in that meeting.

8 Q All right, sir.

9 Now you say Mr. Nute's statement about Mr. Temple
10 as a witness related to the fact that Mr. Temple had made
11 some public statements. Is that what you said?

12 A Yes.

13 I recall at the time in my deposition I thought he
14 had made a speech in a park or something. Since the time of
15 the deposition I've read some more, and apparently my recol-
16 lection wasn't completely clear. I guess he made a statement
17 at the Press Club or something, where he indicated that all
18 was not well with the project.

19 Q Was there any discussion of the witness being
20 knowledgeable of the Michigan Division position of Dow?

21 A I know the reference I assume you're making is to
22 the comment in the Nute notes, and I don't recall that any
23 such statement was made.

24 Q You don't recall that that subject was discussed
25 by anybody? Is that correct?

550 042

eb10

1 A Other than what I said earlier concerning what
2 Mr. Nute said to me. and I spoke up and said that really what
3 Mr. Temple had said already to my mind didn't count, what
4 really counted was what the corporate position of Dow was.
5 I had no reluctance, even at that early-- well, I didn't
6 think it was an issue, frankly. I was amazed when we got into
7 the horrendous controversy that we have in this proceeding
8 concerning Mr. Temple, because I thought it's all right for
9 a Division head to have a different idea but when the cor-
10 porate organization has spoken, then he rallies behind it
11 and that would be the end of it. And that really didn't
12 bother me very much.

13 Q Okay.

14 Now I'm asking you about something a little dif-
15 ferent I think.

16 A All right.

17 Q It may be very close but it's a little different
18 that I want to address.

19 The Michigan Division position. Was there any
20 discussion about the witness knowing or not knowing about that?

21 A I don't recall that there was.

22 Q Do you recall the word "finesse" being used at any
23 time?

24 A No.

25 Q Do you recall that you indicated that under certain

eb11

1 circumstances Consumers could lose its construction permit
2 entirely?

3 A I think during Mr. Renfrow's description of what
4 the suspension hearing could do and what various Dow positions
5 might do I may have spoken up and said that, because I am
6 under the impression, and I think I am still right, that the
7 construction license was granted on sort of a site-specific
8 thing and if Dow was no longer interested or walked away,
9 I thought in my judgment, although I'm not a nuclear license
10 lawyer by any means, but I thought that might well put into
11 jeopardy the validity of the construction permit.

12 Q Do you recall any discussion by anyone of either
13 Consumers or the Intervenors having a lever as long as con-
14 struction continued?

15 A Yes. I don't recall specifically Consumers having
16 a lever. I recall, as I recited in my deposition, that this
17 situation here was a little bit -- well, was exactly opposite
18 to what our normal situation is in hearings before this
19 agency in that usually we're down here trying to get a license
20 or a permit to do something, and here -- and therefore,
21 Mr. Cherry or others have a lever in delaying the matter
22 whereas here that was not true.

23 So the word may have come up in that context but
24 I don't recall it in the context of we have a lever, but it
25 was a different situation than in a normal proceeding.

1 In fact, sir, if I could add, as far as I was
2 concerned I wanted to get the proceeding finished and behind
3 us and remove this cloud.

4 Q Did you consider that economically advantageous to
5 Consumers Power?

6 A I did, indeed.

7 Q All right.

8 Let me ask you this:

9 As long as construction continued, you did not think --
10 do you understand the theory about Consumers Power would drag
11 its feet as long as construction continued, because that would
12 give you a lever? Do you understand that?

13 A I understand what is said in those notes, and I
14 guess I get the gist of it, but it doesn't make sense to me
15 because I, for one -- and I'm sure some others in management
16 were extremely nervous that we had this question and were
17 continuing to spend millions of dollars on the project.

18 So I wanted to remove the cloud, if you will.

19 Q All right.

20 Do you recall anything said by Mr. Hanes at this
21 meeting?

22 A Yes, sir, I do. It was in answer -- when I made
23 my answer about the contract and the possibility of resulting
24 litigation which I hoped we could avoid, and Mr. Hanes spoke up
25 and said, "I hope we can avoid it too." And as I said during

wel 2

1 my deposition, I think that epitomized the tone of this
2 meeting, in contrast to the tone that is evident from a reading
3 of the Nute notes. It was not a belligerent meeting. It was
4 not a pound-the-table meeting. It was, I thought, a good
5 exchange between professionals, frankly.

6 Q All right, sir. And at a time when you mentioned
7 at this meeting the legal consequences or litigation or any-
8 thing, your testimony is that you were very calm and not at
9 all excited?

10 A Yes, sir. Not in a threatening, pound-the-table
11 mood. That's right.

12 Q Was that statement intended to influence Dow?

13 A Which one, now, sir?

14 Q The statement about litigation.

15 A It was meant to influence them as to what we
16 considered the legal position to be as Consumers Power Company
17 saw it. Namely, we had a valid contract. If they breached
18 the contract there would be litigation ensuing.

19 Q Okay. Let me ask you this:

20 In the situation in which you found yourself at the
21 September 21st meeting, wouldn't you have considered it very
22 natural that you would want to have influenced Dow to support
23 the contract?

24 A Oh, I think I said in my deposition that obviously
25 we would hope that they would reach the right conclusion, yes.

wei 3

1 Namely, to continue with the project.

2 We wanted to influence Dow in the manner by giving
3 them, to the extent they would let us, all the factual input
4 that we had from our judgment and our point of view that they
5 could then coalesce with what they had and come up with an
6 ultimate corporate position.

7 So to the extent that we were providing facts, yes,
8 we were providing facts which we hoped would influence and
9 allow Dow to make an informed judgment, yes, sir.

10 Q Let me just try it very simply:

11 Were you trying to influence Dow to support the
12 contract?

13 MR. REYNOLDS: I think that's been asked and
14 answered.

15 CHAIRMAN MILLER: No, that's a little different.
16 You may answer. Be sure you understand the question, in case
17 there are some nuances in it.

18 THE WITNESS: All right, sir. Thank you.

19 I guess I'd have to say no, we were not trying to
20 influence Dow to support the contract. What we were trying to
21 do is advise Dow of the fact that we thought there was a
22 contract, and that if they breached it some legal liabilities
23 might ensue.

24 In other words, I don't like the connotation in
25 your question, counsel, that we wanted them, come hell or high

1 water, to support that contract. That is not what our position
2 was.

3 BY MR. PATON:

4 Q That was not my question.

5 A No, but I did not want that implied, either.

6 Q Allright, let's take that implication out of it.

7 Let me just try it one more time, and then we'll move on.

8 Let me ask you if you can answer yes or no to the
9 question:

10 At the 9-29 meeting were you trying to influence
11 Dow to support the contract? Is it possible to answer that
12 question yes or no?

13 MR. REYNOLDS: Again, I believe that's been asked
14 and answered.

15 MR. PATON: All right, I'll accept that. I believe
16 he did answer.

17 CHAIRMAN MILLER: Well, can you answer yes or no?

18 THE WITNESS: Well, in the connotation of what I
19 said already. I guess I would rather answer it this way:

20 What we were trying to tell Dow is if you disagree
21 with us and think you have a legitimate reason, then you can
22 take that position, but act carefully, because it is a serious
23 proposition and it may result in serious litigation.

24 CHAIRMAN MILLER: I think that's about as close as
25 we're going to come to it.

wei 5

1 MR. PATON: Yes. Thank you, Mr. Chairman.

2 BY MR. PATON:

3 Q Mr. Falahee, I may have covered this, frankly I've
4 forgotten:

5 Do you remember whether or not -- strike that.

6 It is correct that you do not remember in any
7 discussion of litigation mentioning any dollar figure, is that
8 correct?

9 A That's correct.

10 Q All right. I'll let it go at that.

11 Now, sir, let me ask you to take a look at Volume III
12 Tab 26. Those are the Nute notes of September 21. Do you have
13 that, sir?

14 A Yes, sir, I do.

15 Q All right. Now, page 3. Do you see that paragraph,
16 the long paragraph numbered 4?

17 A Yes, I do.

18 Q Would you go about six lines from the bottom of that
19 paragraph, the second word in -- there are some words there,
20 "Falahee then made a naked threat..." Do you see those words?

21 A Yes.

22 Q Read those into the record, those next six or seven
23 lines.

24 A "Falahee then made a naked threat that if Dow
25 testimony not supportive of Consumers (Note: No longer just

1 if we go too far) and that results in suspension or
2 cancellation of permit, then Consumers will file suit
3 for breach and include as damages cost of delay and cost
4 of project if cancelled, and all damages resulting from
5 cancellation of project if it causes irreparable
6 financial harm to Consumers. (bankruptcy). (Note: Pretty
7 damn close to blackmail.)"

8 Q Mr. Falanee, do you remember saying any of those
9 things?

10 A Let me say at the outset that I don't think that
11 this accurately portrays the emotion of this meeting. When
12 you say do I remember saying any of those things, I can't
13 accept the characterization of, for example, "naked threat," or
14 "pretty damn close to blackmail."

15 Q All right.

16 Let's eliminate both of those.

17 A All right. I don't recall saying if Dow's testimony
18 is not supportive of Consumers -- that wasn't the thrust that
19 I was trying to get across. What I was trying to get across
20 is if, indeed, the Dow testimony was such that it breached the
21 contract, that there would be resultant effects.

22 Q How about the rest of those words?

23 A I don't recall as I sit here, sir, that I went into
24 all that detail as to what the damages might be, and so forth.
25 I clearly -- I'll reiterate what I said earlier on here this

1 morning. I did say, I'm sure, that if, indeed, they did breach
2 that we would have a lawsuit -- a hell of a lawsuit, I guess I
3 might have said, and I may have tried to put some flesh on
4 those bones by telling what kind of damages I was considering.

5 But as I sit here this morning, I don't recall
6 that. But I do know that a similar note to this with that
7 kind of language in it appears I believe in Mr. Hanes' notes.
8 And since it's in both, I suspect I may have said that.

9 Q Thank you, sir.

10 A What I take particular umbrage about with that
11 particular section of Mr. Nute's notes is that I don't think
12 that it in any way accurately portrayed the emotion of that
13 meeting. I really don't.

14 Q Thank you.

15 Mr. Falahee, I believe you indicated in your
16 deposition that you did not participate in the preparation of
17 the witness testimony, is that correct?

18 A That's correct. You mean Mr. Temple's?

19 Q Yes.

20 A Well, I didn't prepare any of it. So the answer is
21 yes.

22 Q Were you asked concerning the advisability of
23 including discussion of the Michigan Division position in the
24 Temple testimony? Were you asked about that?

25 A No, I was not.

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1 Q All right, that shortens the questioning.

2 A That's not why I gave that answer, though.

3 (Laughter.)

4 Q That's all right. It works both ways.

5 Did you attend the meeting on September 24th?

6 A Yes.

7 Q Tell us what you remember about that meeting.

8 A That was the meeting with the top executives of
9 the two companies. On the Dow side, it was attended by, as
10 my memory serves me, Mr. Orefice, Mr. Whiting, who was a member
11 of the Board of Dow, Mr. Temple, Mr. Hanes, Mr. Nute. As I
12 said during my deposition, I think Mr. Klomparens, because it
13 would have been logical he was there. But it's kind of fuzzy
14 as to whether he was or wasn't.

15 On Consumers side there was ~~myself~~, Mr. Aymond, Mr.
16 Bacon, Mr. Howell, Mr. Youngdahl. I think that's all.

17 Q Okay. Would you tell us your recollection of what
18 happened at that meeting?

19 A Yes. After Mr. Temple made a sort of a summary
20 opening statement as to how we got to where we were, then Mr.
21 Aymond said that he wanted -- first of all, he wanted to know
22 what prompted the Dow decision and what did it really mean.
23 That did not produce any answer. I think the answer it did
24 produce was to the effect, by Mr. Temple, that, well, the Dow
25 position and everyth ing else would be determined at the

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1 corporate review of the board, or something like that. Then
2 Mr. Aymond proceeded then to go through, using as a talking
3 tool the outline that I assume has been the subject of some
4 discussion here.

5 Q Yes, sir, and will be.

6 A And he proceeded to talk from that as to the impact
7 which a Dow decision would have on Consumers Power Company.
8 This is in -- it was a broader context than the meeting with
9 the lawyers, where we were going into what the suspension
10 issues were and what the various positions of Dow might be.
11 But here Al was addressing -- Al Aymond was addressing what
12 the total impact on Consumers Power Company might be in terms
13 of dollars, and there was a lot of figures in the outline and
14 in the exhibits.

15 That's a pretty good summary, I think.

16 After Mr. Aymond got finished, Mr. Oreffice stated
17 he thought he had heard enough and they had sufficient for
18 their decision, and thanked us for coming, and the meeting
19 broke up.

20 But, again, it was, I felt, a very calm meeting,
21 very factual, very straightforward, no accusations back and
22 forth, and the tone was good, I would say.

23 Q All right, sir, thank you.

24 Would you find Volume IV, Tab 7, and would you look
25 at that and tell me whether that is a copy of what we have been

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1 calling here the Aymond outline?

2 A Yes, sir, it appears to be.

3 Q Now, we've had pretty extensive discussion here,
4 sir, of the position stated on page 3(a), 3(a)1, 3(b) and 3(c).
5 Do you see those?

6 A Yes.

7 Q Would you take a minute -- perhaps you recall them,
8 but would you take a minute and look those over yourself and
9 just refresh your recollection -- unless you don't need to.

10 (Pause.)

11 A Yes, sir.

12 Q Do you have an opinion about where in that breakdown
13 the Michigan Division position would fall?

14 A I don't think it fits precisely any of them, frankly,
15 because that was one of our problems with the Michigan position.
16 We didn't know, were they going to walk away or what were they
17 going to do? It was never articulated. That's why Mr. Aymond
18 at the outset of this meeting asked that question, essentially.
19 Not "Are you going to walk away," but "What is the Dow position,
20 what does it mean?"

21 Q Okay.

22 Now, I want to jump forward for a minute to the
23 decision of the Dow, USA Board on September 27th. Do you
24 recall that decision?

25 A Yes.

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1 Q All right, would you tell us what that decision was?

2 A My recollection of that decision was that the Dow
3 Company had determined that at this time it still was advan-
4 tageous to proceed with the contract, or proceed with the
5 project and be supportive. That is, advantageous to Dow.

6 Q Okay. And possibly to keep its options open?

7 A I think that was in it too, yes.

8 Q Do you see that falling in any one of the four
9 positions?

10 A Not precisely, but I think it comes pretty close to,
11 in this outline -- it's not full support, but it's support with
12 some reservations, however you characterize that here, 3(a)1,
13 maybe, or something.

14 Q Okay. Between 3(a) and 3(a)1?

15 A I'd say it's in that neighborhood, yes, sir.

16 Q All right, sir.

17 Sir, do you have an opinion -- and you may not, but
18 let me ask you this -- do you have an opinion as to whether or
19 not the Dow, USA Board decision overruled the Michigan Division
20 position?

21 A I guess, as I sit here, if you say that the Dow,
22 Michigan decision as articulated by Mr. Temple was that it's
23 no longer in the best interests of Dow -- that the project is
24 no longer in the best interests of Dow -- that I would have to
25 say, then, that the Corporate position, since they had in effect

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1 concluded that it was still at this time, reserving all their
2 options, that it was at least a partial reversal, yes, if not
3 a complete reversal.

4 Q Okay.

5 Did the Michigan Division position indicate that
6 they would not take steam from Consumers Power?

7 A I don't recall that they defined it. That was part
8 of the problem. We asked Mr. Temple to define it at the
9 September 24th meeting, and he didn't do so.

10 What we are trying to do -- if they would have
11 articulated, you know, if there was some particular thing
12 bothering him, then we could address it at that meeting.

13 Q All right, sir.

14 Now I want to ask you a couple of questions specific-
15 ally with regard to 3(b).

16 Under 3(b) if Dow had testified that they considered
17 the contract to be uneconomic but they intended to take steam,
18 you would have sued Dow, is that correct?

19 A Well, I think the answer to your question is yes, but
20 let me add this: That we considered, obviously, the 3(c)
21 position of repudiation as clearly a breach and lawsuit would
22 have ensued. The 3(b) situation, as Mr. Aymond said at the
23 9-24 meeting, giving lip service to the contract, probably we
24 would have sued if they would have said it was no longer economic,
25 because our information was to the contrary. So I don't think

1 that would have been a good-faith position. It would have been
2 up to the courts to determine. It wasn't as clear, obviously,
3 as 3(c) in terms of breach.

4 Q I assume, then, that if Dow had testified that it
5 was economic but they wanted to get out of the contract for
6 non-economic reasons, you would have also placed it under 3(b),
7 which would be lip service?

8 A That's a little more difficult for me to opine on,
9 because I'm able to very definitely say on the economic-unecon-
10 omic, because from our point of view we thought it was
11 economic, and their cheapest alternative. So I would question
12 the bona fides of that position in that context.

13 But when you go to something other than economic,
14 I would have to see what Dow was basing its position on to
15 know whether or not we would sue them. It would depend on
16 were they acting in good faith, did they have good bona-fide
17 reasons, or did we have reasons countervailing those reasons
18 which would lead us to conclude that Dow was not acting in
19 good faith?

20 I mean I can't answer that in the abstract.

21 Q Okay.

22 I believe you testified in your deposition that if
23 Dow had testified that they support the contract only because
24 of the possibility of getting sued, that that was unacceptable
25 to Consumers, and you would have sued them if they had testified

1 to that.

2 CHAIRMAN MILLER: Unless you recall it, you'd better
3 refer to the deposition.

4 THE WITNESS: Yes, I'd like to see it. I don't
5 recall it being quite that naked.

6 CHAIRMAN MILLER: You'd better look at the deposi-
7 tion, then, and read it.

8 (Document handed to the witness.)

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BY MR. PATON:

Q Mr. Falahee, would you read, starting on page 44 of your deposition, line two -- Let me change that. You can take your time and read 44 if you want to and 45, but I would ask you to read page 45, line 13 through line 22 and in fact, I think through line 14 on page 46.

(Witness reading document.)

A All right. Reading from page 45 beginning at line 13:

"Question:" -- this is by Mr. Olmstead:

"Under the 'duty to support' clause of the contract had Mr. Temple testified that Dow viewed the Midland Nuclear Station economically unattractive but for their potential damage liability for breach of contract, would you have viewed that as a breach of the duty to support clause of the contract?"

"Answer: My response is that we would have treated that -- it probably would have resulted in litigation between us and Dow because we would have said that Dow's conclusion that the contract was uneconomic was not supportable."

I think that's essentially what I've already said here.

Q All right. Have you had a chance to look at --

1/agb2

1 CHAIRMAN MILLER: Have you finished reading that?

2 THE WITNESS: No.

3 CHAIRMAN MILLER: Finish first.

4 THE WITNESS: Very good.

5 Picking up then from the transcript of the
6 deposition:

7 "Question: I'm not really sure --
8 I'm totally confused here at the moment. Do you
9 think you could have sued Dow because they came
10 to a different economic conclusion than you
11 did?

12 "Answer: You see what you're asking me
13 to do is speculate as to what result that testimony
14 would have on the suspension hearing.

15 "Now if that testimony had the effect on
16 the suspension hearing resulting in delay and
17 horrendous additional cost and that sort of thing,
18 maybe even -- well, at least extensive delay, we
19 might have considered a lawsuit against Dow Chemical
20 for that resultant damage if we felt that their
21 basic position was unjustified, the premise upon
22 which he was proceeding was unjustified, namely,
23 that it was no longer economic for Dow.

24 "In other words, a contract party, the way
25 I looked at it can't decide unilaterally that

1/agb3

1 something is uneconomic and then walk away from
2 the contract."

3 And I might say, sir, that I don't think that
4 what I just read comports with the question you asked me
5 early on there before you read that.

6 BY MR. PATON:

7 Q Let me ask you this way. If Dow had testified
8 that your statement concerning a possible lawsuit was a
9 significant consideration for them in continuing with the
10 contract, would you have sued Dow?

11 A Well what else did they do. That they did continue
12 with the contract and no suspension resulted or what?

13 Q That's the testimony that they would put on at
14 the hearing, that they were continuing with the contract and --

15 A What I was trying to suggest to you is what
16 would be the result of that position by Dow. In other words,
17 before we would bring suit, we would like to know what the
18 consequences were. In other words, if, as a result of that
19 testimony, no suspension ensued and that sort of thing.

20 Q All right. I think that's right. Your statements
21 about litigation were all predicated on the fact that there
22 was some serious adverse impact in the hearing proceeding,
23 is that correct?

24 A That's right, yes.

25 Q All right.

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1 If Dow had testified that they had intended to --
2 at the hearing, if they testified that they intended to continue
3 with the contract but that your statement about a lawsuit was
4 a major consideration, and subsequently there was a lengthy
5 suspension, would you have sued Dow?

6 A Well it sort of gets to this point of giving
7 lip service to the contract. In other words, was that the
8 only reason, could Dow legitimately take that position.
9 And as I recall the record, I don't believe they did take
10 that position.

11 Q Or your position was that the contract was economic.

12 A Yes, sir.

13 Q And if Dow had gotten on the witness and indicated
14 anything contrary to that to the Board, you -- and there had
15 been adverse results, you intended to sue them?

16 A No, I don't think I would go that far, sir. We
17 would only sue Dow if what we thought Dow was doing didn't
18 have any justification. In other words, wasn't bona fide,
19 was not in good faith. In other words, that they were taking
20 a posture in the proceeding which would result in frustration
21 of the contract leading to a possible out for Dow. That was
22 the way my mind was running.

23 Q You were convinced that the contract was economic?

24 A Yes, sir.

25 Q So doesn't it follow that if Dow had gotten on

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1 the witness stand and said that we're going to support this
2 contract but only because they threatened to sue us, wouldn't
3 you have said that was giving lip service?'

4 A If they said that was the only reason we're sup-
5 porting this contract?

6 Q No, that's not what I said. That it was one of
7 the major considerations.

8 A We might well have sued them under those cir-
9 cumstances, yes, because it would be only giving lip service.

10 Q All right, sir.

11 A But if I can carry on with that answer, but on
12 the other hand if Dow had taken
13 that was in effect bona fide and based on -- in good faith
14 that we would take a look at it and say well they've got a
15 point here, uneconomic reasons or what have you. We'd have
16 to evaluate well can we counter that or can't we, and we
17 may not have sued them.

18 In other words, we weren't telling Dow Damn it
19 support this contract, that wasn't our position at all. We
20 said if you're going to go with the Temple situation and
21 the way you go with it and the reasons you go with it results
22 in breach, there's going to be some consequences. But we
23 didn't, and I don't think that they understood, that we
24 were going any further than than frankly.

25 Q All right, sir.

1/1/agb6

1 Would you turn to page four of the Aymond outline.
2 The Aymond outline, I think you have it in front of you,
3 Volume 4, tab seven, page four of that memo.

4 A Does that start with "Possible need to" --

5 Q Yes. Down near the bottom of the page, paragraph
6 number six. Do you see that paragraph number six?

7 A Yes.

8 Q All right. Would you read the sentence that just
9 precedes that which begins with the words, "We consider."

10 A Yes.

11 Q Would you read that into the record, that
12 sentence?

13 A All right. I'll read the whole paragraph, or
14 just that sentence?

15 Q Read the whole thing, I don't care.

16 A "Consumers Power would have no alternative
17 but to seek to recover damages from Dow for A, B
18 and C if revocation was due to Dow's failure to
19 abide by the contract. We consider that a Dow
20 position other than 3A or 3A1 would be inconsistent
21 with Dow's contract obligations."

22 Q All right. Now I want to ask you about that last
23 sentence. Was that your position?

24 A No, that was not. It was articulated, I think,
25 more specifically -- this statement was not stated by

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1 Mr. Aymond, what was stated is clearly if you had the four
2 situation of a repudiation of a contract, that that's a breach.
3 If you have the lip service situation, which would be the 3A2
4 or -- 3B -- that that would be up to the courts.

5 In other words, he did not state, "

6 "We consider that a Dow position other
7 than or 3A1 would be inconsistent with Dow's
8 contract obligations."

9 Q You say he didn't say it?

10 A No, sir. He went through -- as I recall, the
11 meeting went from the worst situation and went up to the --
12 and he may have said the first sentence, he clearly said the
13 first sentence, but I don't think he said the second.

14 The way he characterized the second was when he
15 made the statements concerning giving lip service to the
16 contract. And that would be up to the courts to decide, it
17 was a more difficult question.

18 Q All right. Let's go back to page one, if you
19 will, sir.

20 3A and 3A1 were acceptable, is that correct?

21 A That's right.

22 Q But you described 3B as lip service.

23 A That's right.

24 Q And for lip service, Mr. Aymond said we'd leave
25 it up to the courts.

1 A That's right.

2 Q And obviously 3C you'd leave up to the courts.

3 A Well, yes.

4 Q Okay. Then aren't we in a position where only
5 3A and 3A1 were acceptable?

6 A No, because that has a connotation to it that I
7 can't accept and it wasn't the intent that we were conveying
8 and I don't think -- or intended to convey and I don't think
9 we did, namely that lawsuits would ensue if you didn't take
10 3A or 3A1. That would eliminate any possibility of 3B that
11 was legitimate. And we weren't trying to foreclose legitimate
12 positions by Dow Chemical Company.

13 Q All right. But you had described 3B in your
14 testimony, I think, as giving lip service only. Is that
15 inaccurate, is that not correct?

16 A Giving lip service only, well yes, but I've also
17 said in my testimony here this morning that it's lip service
18 if, in fact, they said it was uneconomic. Then you asked me
19 a further question, and we would have sued under that
20 situation. And you asked me the further question well
21 suppose they didn't say anything about the economics but they
22 said other reasons, and I said I couldn't say what we would
23 do under 3B in those circumstances. So I think I'm being
24 consistent here, sir.

25 Q So what you're saying is that 3B sometimes could

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1 be lip service, other times could be accepted.

2 A Depending on the circumstances, yes, sir.

3 CHAIRMAN MILLER: All right. You have said
4 that if it were based on economic considerations only from
5 the information available to you and Consumers e- utives
6 you would feel that in and of itself constituted bad faith
7 and hence the result would flow.

8 THE WITNESS: Based upon the information base
9 we had.

10 CHAIRMAN MILLER: Now if there were other
11 considerations besides economic, they would be evaluated to
12 determine the question of good faith or lack of good faith?

13 THE WITNESS: That's precisely what I'm trying
14 to say, sir.

15 CHAIRMAN MILLER: All right.

16 I think we'll recess at this time and pick up
17 after the recess. About 10 minutes.

18 (Recess.)

19 CHAIRMAN MILLER: All right. You may proceed.

20 BY MR. PATON:

21 Q Mr. Falahee, would you take a look at tab seven,
22 still the Aymond outline, page one, just below the middle:
23 3Alb, "It would be in our best interest...", would you read
24 that sentence?

25 A "It would be in our best interest if Dow would

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1 preserve some flexibility without being too precise
2 about the effect upon Dow of further delays and
3 increases."

4 Q Was that stated at the meeting?

5 A I think there was some discussion. I don't know
6 whether this was precisely stated or not.

7 Q Do you understand the statement?

8 A I don't really, as I sit here this morning.

9 Q Let me just ask you -- I think that would close
10 off.

11 A Mr. Aymond might, but as I sit here I can't.

12 Q All right.

13 Now still in Volume 4, tab six, see if you don't
14 find there some meeting notes dated September 24th.

15 A Yes, sir.

16 Q All right. I suggest to you those are the Nute
17 notes.

18 Would you turn to the third page? There's a long
19 paragraph in the middle of that page that begins, "Mr. Aymond
20 asked....," let me direct your attention to five lines from
21 the bottom of that paragraph, "Mr Aymond is confident....,"
22 would you read those five lines?

23 A "Mr. Aymond is confident that if they
24 couldn't make 1985, would let Dow walk away
25 without cost."

/agbl1

1 Is that what you meant?

2 Q Yes. And the next sentence.

3 A "Mr. Bacon indicated this would create a
4 licensing problem."

5 Q Do you recall that discussion?

6 A I recall Mr. Aymond saying something about letting
7 Dow walk away by 1985. As I sit here, I can't recall
8 Mr. Bacon saying that this would create a licensing problem
9 but he could have said it, I just don't recall.

10 Q Have you discussed that with anybody since then?

11 A I recall early on some conversations with
12 Mr. Bacon because this walk-away issue in 1985 was a matter
13 I guess that was trying to be negotiated in the contracts.

14 But I guess Judd had mentioned to me at one time
15 or another, not at the time of this meeting but earlier on,
16 that a walk-away option for Dow might complicate the licensing
17 proceeding.

18 So what is here is consistent with that, but I
19 don't recall -- my memory fails me to know whether Mr. Bacon
20 said it or not, I just don't have that recollection. It's
21 not inconsistent with what he had said earlier.

22 Q Sir, directing your attention to the last three
23 lines on page three, "Mr. Falahee is very...", et cetera,
24 the same page, page three, at the bottom, the last three lines,
25 you see that?

/agbl2

1 A Yes.

2 Q Would you read those three lines?

3 A "Mr. Falahee is very seriously concerned that
4 if Dow's only in the project because of the contract,
5 less than 50/50 chance of keeping the construction
6 license."

7 Q Now if Dow had testified to the effect that
8 what you're saying right there --

9 A Oh, now this is saying what Mr. Nute said I said
10 right here.

11 Q Okay. That's good. What did you say?

12 A Well what I was doing here, I don't recall this
13 at all. And I think the reason is -- I'm not saying I didn't
14 say something like this but it was a reiteration of what
15 Mr. Aymond had already said, namely that if they only give
16 lip service to the contract and not in good faith, that it
17 would result in litigation. That was the reference -- and
18 that's possibly why I don't recall it as I sit here this
19 morning.

20 In other words, it was reiterating something
21 that had already been said. Mr. Whiting, as Mr. Aymond was
22 going through those possibilities, I think he asked Mr. Aymond
23 to assign percentages to what adverse impact or favorable
24 impact it might have on the suspension proceeding and he put
25 50/50 on it as the 3B position.

/agbl3

1 Q All right, sir. I'm through with Volume 4 for
2 a while. I want to ask you about the testimony that we dis-
3 cussed a while ago about trying to influence Dow.

4 Is it correct that you thought it to be in
5 Consumers Power's best interests if Dow supported the contract?

6 A Yes, sir.

7 Q Is it correct that you thought it was in Dow's
8 best interests?

9 A Yes. We thought it was the cheapest and quickest
10 way to get the energy that they needed.

11 Q And you had considered the possibility of the
12 position taken by the Michigan Division -- you considered the
13 possibility that that could have pretty disastrous results for
14 Consumers Power?

15 A Well I have one problem with that. We didn't
16 know what they meant by that position exactly.

17 Q That's not exactly my question.

18 A I'm sorry.

19 Q My question is you considered that as a result
20 of the Michigan Division position it would be possible that
21 Consumers Power could have a tremendous financial problem.

22 A If they carried it out, in the sense that what
23 they meant by that, it was supported by the corporate Board
24 where they walked away from the contract or something like
25 that, yes, that could have very serious results on Consumers

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1 Power.

2 Q And you told them that if they took certain
3 positions and that this resulted in a long suspension there
4 would be a lawsuit?

5 A No, we didn't tell them that. We told them that
6 if they took positions that were construed to be violations
7 of the contract, a breach of the contract, that this would
8 result in a lawsuit.

9 Q Right.

10 Now in light of the facts that we have just
11 discussed, is it still your position that you went to the
12 meetings of 9/21 and 9/24 and did not try to enforce Dow to
13 support the contract?

14 A Well I think I've already responded to that
15 question at least once or twice here this morning in that
16 we went to those meetings to influence Dow, if you will, in
17 the context to give them the facts as we saw it to influence
18 them to come out with the answers that namely is in their
19 best interest after they look at all the facts, to go along
20 with us and support the contract.

21 But I don't like the connotation -- because it
22 has the connotation to influence Dow standing naked and
23 hitting them over the head or something. That isn't what we
24 were doing, sir.

25 Q No, sir, I'm not really going that far. And I'm

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1 having a little difficulty because it seems like -- I just am
2 simply asking you whether or not you intended to influence
3 Dow to support the contract.

4 Now, I suggest to you that in your deposition
5 you said three times specifically we were not trying to
6 influence them, we were trying to educate them, we were trying
7 to help them. Now do you remember that?

8 A Yes, sir. And that comports with the way I feel
9 here this morning.

10 Q It is correct then that you were not trying to
11 influence them to support the contract?

12 MR. REYNOLDS: I believe that's been answered
13 now, any number of ways.

14 MR. PATON: Mr. Chairman, I'm not getting an
15 answer.

16 CHAIRMAN MILLER: You're not getting an answer
17 you want, but the witness has his own explanation and you're
18 going to have to accept that. He said it and he's explained
19 it at least three different times.

20 BY MR. PATON:

21 Q All right. I interpret your answer as no, that
22 you were not trying to influence Dow to support the contract.

23 A I don't think that's fair either, counsel.

24 Q What is fair?

25 A Well I've tried it now several times, namely, we --

1/agbl6

1 we were delighted frankly that Dow had given us an opportunity
2 to put input into two of their seven task force, we would have
3 liked it if we could have had all seven task force and had
4 input into all of them, whether it was all relevant, I don't
5 know.

6 But we were delighted to have that opportunity
7 so that they could have what we considered our best judgment
8 of the situation and reflect that in their corporate decision.

9 Now if that's influencing, then the answer to
10 your question is yes, we were influencing. But it doesn't
11 go any further than that.

12 Q That's fine. . I don't want to go any further
13 than the question.

14 Did you consider that the situation demanded
15 that Consumers Power do everything that they could to influence
16 Dow to support the contract?

17 A No. Everything they could connotes even having
18 Dow take some positions that they didn't believe in, and
19 we didn't want them to do that.

20 Q Let me amend the question. I guess I'd better
21 be more careful.

22 Didn't the situation demand that you do every
23 legitimate thing in your power to influence Dow to support
24 the contract?

25 MR. REYNOLDS: I'll object to that. I think we've

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1 gone over this now just about every way you can and the
2 questions have been answered as to where Mr. Falahee was in
3 terms of the matter of possible influence or persuasion or
4 what have you on the -- on this matter. And I think that
5 what we're doing is getting the same question asked over and
6 over.

7 CHAIRMAN MILLER: We think that matter has been
8 covered. Whatever inferences you wish to draw you will be
9 doing in your argument to the Board and the Board will consider
10 it. But we believe you've established now sufficiently the
11 witness' interpretation of the various positions and that
12 now you're getting to the ultimate question which is a little
13 bit different.

14 MR. PATON: All right, Mr. Chairman. I'm going
15 to move on to an area that may seem similar but it's not --
16 I'm moving on.

17 (Laughter.)

18 CHAIRMAN MILLER: Well watch carefully.

19 (Laughter.)

20 BY MR. PATON:

21 Q Mr. Falahee, let me ask you, if you gave any
22 consideration to this problem that I will pose to you. I will
23 suggest to you the possibility that Consumers Power wanted
24 very badly to have Dow support the contract. And I will
25 suggest to you that Consumers Power wanted very badly that Dow

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not get on the witness stand and say we're supporting this contract because they are threatening to sue us.

Now, my question is did you consider that as a problem?

MR. REYNOLDS: As a problem?

BY MR. PATON:

Q Let me ask you if you understand the question.

A No, I'd like to have it repeated

Q All right. I'm suggesting you to, I'm asking you whether you considered, number one, that there was a problem involved with your trying to influence Dow to support the contract on one hand, and on the other hand, not wanting them to get on the witness stand and say that they were influenced by your threat of a lawsuit.

A I'm having a problem with the latter, not wanting them to get on the witness stand and say they're influenced by our threat of a lawsuit.

Q Did you give that any thought at all? Did you care whether they said that?

MR. REYNOLDS: Wait a minute now, that's two questions. Is the question whether you gave that any thought or is the question whether you cared whether they said it?

CHAIRMAN MILLER: Yes, it is a double question. Rephrase it.

BY MR. PATON:

WEL/agbl9

Q Did you care?

MR. REYNOLDS: I'll object. I think the other question comes first.

MR. PATON: I think I can put my questions in the order in which I choose.

CHAIRMAN MILLER: Do you understand the single question now before you?

THE WITNESS: I think I understand what the counsel is getting at, I'll try it anyway.

That didn't enter my mind at the time. My mind was focused on tell the lawyers what we thought the situation was, and I thought we were obligated to do that, both in fulfilling what they asked us to do and -- first of all, we weren't threatening. I was trying to set forth what I understood the legal situation to be, and I really hadn't envisioned that they were going to get on the stand and say that the only reason we're supporting this contract is your threatening us with a lawsuit, that didn't enter my mind because I was coming from a fact base that we thought, one, there was a valid contract and, two, we thought it was a contract that remained good for both Dow and Consumers Power Company. So I guess the answer to your question is it was not a concern.

BY MR. PATON:

Q Mr. Falahee, are you familiar with a meeting that took place on January 11, 1977 between Dow and Consumers

1/agb20

1 having to do with a contract?

2 A Not as I sit here, unless that was -- was that
3 the resumption of negotiations? I just don't know.

4 Q I just want to get your recollection, sir.

5 A I know we resumed negotiation with new teams and
6 worked out amendments to the contract.

7 Q All right.

8 A But I don't know the date.

9 Q Are you at all familiar with a request that
10 Consumers Power made made of Dow for \$400 million to obtain
11 a walk-away date of 1985? Does that refresh your recollection
12 at all?

13 A Are you tying that to that January '77 meeting
14 now, too?

15 Q Yes.

16 A I don't recall the connection. I recall that
17 there was great consternation about that request.

18 Q All right. Tell us about that request.

19 A I'm sorry, but I'm not going to be able to tell
20 you very much about it because my recollection of it as I sit
21 here is that I don't know we made that demand. It was mis-
22 construed and thought we had made that demand, but I don't
23 think that was the position of Consumers Power Company.

24 Q Do you know what your position was?

25 A I can't say, sir, no.

al/agb21

1 Q But you know it wasn't that you --

2 A You see, the reason I can't, I wasn't in the
3 contract negotiations.

4 Q All right.

5 Are you aware of the fact that a New York law firm
6 by the name of Kaye-Scholer, Sherman, Hays and Handler --
7 Have you ever heard that name?

8 A It doesn't mean anything to me.

9 Is that the anti-trust handler?

10 Okay, yes, I've heard of him.

11 Q Maybe Kaye-Scholer.

12 Do you know, did they come to Jackson, Michigan
13 in March of 1977?

14 A I don't recall as I sit here that they did, I
15 don't know. I'm not saying yes or no, I don't know, I don't
16 remember.

endwel/2

b1

1 MR. PATON: Mr. Chairman, I'm just about through.
2 I need a couple of minutes.

3 (Pause.)

4 BY MR. PATON:

5 Q Mr. Falahee, have you heard any statements from
6 Mr. Aymond concerning his reaction to the testimony in the
7 suspension proceeding?

8 Let me say something else that may possibly refresh
9 your recollection.

10 Do you recall an article in The Wall Street Journal
11 in March of 1977 which reported some statements made by
12 Mr. Aymond concerning the testimony in the suspension pro-
13 ceeding?

14 A No, sir, I do not.

15 Q From any source, are you familiar with any state-
16 ments that Mr. Aymond made concerning the testimony of Dow
17 in the suspension proceeding?

18 A I'm sorry but as I sit here this morning I don't.

19 Q All right.

20 Was any consideration given by Consumers Power
21 to suing Dow because of the testimony in the suspension pro-
22 ceeding?

23 A I don't believe so.

24 Q All right, sir.

25 Would you find Volume 5?

eb2

1 A Yes, sir.

2 Q The very last page of the entire volume.

3 A The fine print there?

4 Q The very fine print, yes.

5 MR. REYNOLDS: For the record --

6 CHAIRMAN MILLER: Just one at a time now. Do you

7 have an objection?

8 MR. REYNOLDS: No, but for the record it's Staff

9 45. I think that's a better way to indicate the last page

10 in the volume.

11 MR. PATON: Yes, that's fine.

12 CHAIRMAN MILLER: All right.

13 Did you find that?

14 THE WITNESS: I have it.

15 BY MR. PATON:

16 Q That purports to be an article from The Wall Street

17 Journal. Let me direct your attention to the second page, the

18 right column. There's a paragraph slight below the middle

19 there that begins "Mr. Aymond calls that comment...." Do you

20 see that?

21 A Yes, I found that paragraph.

22 Q Would you read that paragraph, sir, and see if

23 that refreshes your recollection?

24 A Silently you mean?

25 Q Yes.

eb3

1 (Witness reading.)

2 A I have to read a little bit above that to see what
3 he's talking about.

4 Q Yes, yes. Take your time.

5 (Witness reading.)

6 A Okay. I'm down to "Dow has done some sword
7 rattling, too."

8 Q All right.

9 Does that refresh your recollection at all about
10 the question that I asked you?

11 A Yes, it does, partly. I do recall that during
12 the suspension hearings there was some tension between us and
13 Dow Counsel and that was causing some unhappiness.

14 But the problem I'm having with this is that the
15 Dow position as articulated at the board and ultimately testi-
16 fied to by Mr. Temple we viewed as supportive and so there-
17 fore I myself personally am having a little problem with were
18 we contemplating a lawsuit at this time, although I read what
19 allegedly Mr. Aymond said.

20 Q Sir, can you attach any facts that you were aware
21 of to the statement in there by Mr. Aymond? Do you have any
22 recollection at all?

23 A No, I don't. I think those quotes probably came
24 in an interview between Mr. Aymond and The Wall Street Journal
25 reporter. I wasn't present at that meeting.

eb4

1 Q All right, sir.

2 Sir, in this proceeding there are five issues
3 before the Board -- four of them. I want to read them to you
4 and ask you what your conclusion is with respect to these
5 issues.

6 The first issue is this, whether there was an
7 attempt by the parties or attorneys to prevent full disclosure
8 of, or to withhold relevant factual information from the
9 Licensing Board in the suspension hearings.

10 A It's my understanding that there was none.

11 Q Thank you.

12 Number two, whether there was a failure to make
13 affirmative full disclosure on the record of the material facts
14 relating to Dow's intentions concerning performance of its
15 contract with Consumers.

16 A No, sir.

17 Q The third issue, whether there was an attempt to
18 present misleading testimony to the Licensing Board concerning
19 Dow's intentions.

20 A No, sir.

21 Q The last issue, whether any of the parties or
22 attorneys attempted to mislead the Licensing Board concerning
23 the preparation or presentation of the Temple testimony.

24 A No, sir.

25 Q Thank you, Mr. Falahee.

eb5

1 A Thank you, Counselor.

2 CROSS-EXAMINATION

3 BY MR. POTTER:

4 Q Mr. Falahee, do I understand correctly that your
5 only involvement in the Dow-Consumers contract prior to July
6 1976 would have been whatever periodic reports you might have
7 received on negotiations from Mr. Bacon?

8 A And possibly Mr. Youngdahl may have said something
9 to me at the time. I was not on the negotiating team; that's
10 correct.

11 Q Now you mentioned earlier this morning that you
12 apparently had some involvement regarding the preparation of
13 a statement that appeared in a number of prospectuses that
14 were issued by Consumers Power Company.

15 A Yes, sir. At that time-- The first time that
16 occurred I believe I was general attorney in the Legal
17 Department. That was the second in command, if you will. And
18 one of my responsibilities at that time was to work and pre-
19 pare that part of the registration statement that had to do
20 with regulation and this Dow note that was referred to earlier
21 today was part of that.

22 Q Okay.

23 Could I ask you to take a look at Volume 3, Tab 2?
24 Just to confuse the matter, if you'll take Volume 7, the tenth
25 page in from the front, it's Tab 2.

eb6 1 A Thank you. I have both of those documents.

2 Q Okay.

3 Now if we look at Tab 2, which is the prospectus
4 dated May 22nd, 1975, and look at the description of the Dow-
5 Consumers situation at that point --

6 A That's on the second page?

7 Q Yes, sir.

8 -- that reads as follows. Correct me if I make
9 any errors as I'm reading along here.

10 A Mr. Potter, excuse me. I can't find where you are.
11 My book is not tabbed.

12 Q. It's ten pages in from the front.

13 Reading now from the prospectus of May 1975, it
14 reads:

15 "1. Connection with construction delays
16 at the Midland Plant, the Dow Chemical Company has
17 alleged in correspondence with the company that such
18 delays reflect an inability on the part of the com-
19 pany to perform its obligations under the parties'
20 contract in which the company has agreed to supply
21 process steam to Dow from the Midland Plant. Dow has
22 demanded that the company give adequate assurance
23 that Dow can expect due performance of the com-
24 pany's obligation to deliver steam from the Midland
25 units on the schedule contemplated in the contract.

eb7

1 "In reply, the company has asserted that
2 it is not in default of the contract obligation. If
3 the company were to be found in default of its obli-
4 gations with respect to the timely completion of the
5 Midland Plant and if Dow were to successfully liti-
6 gate the matter, it is possible that the company
7 could be found liable to Dow for damages in an amount
8 which the company is unable to determine at this time.

9 "In addition, the amount heretofore in-
10 vested by the company in equipment at the Midland
11 Plant allocable to the service of process steam to
12 Dow which amount may not be salvageable in the event
13 Dow is entitled to terminate the contract, is presently
14 estimated to amount to approximately \$22,500,000."

15 The last sentence says:

16 "The company does not believe it is in
17 default of its obligations under the steam service
18 contract as alleged by Dow."

19 Now if we go from that statement to the statement
20 that appears in the September 9, 1976 prospectus, would you
21 take a moment and compare the two?

22 What I want to ask you is that it seems to me that
23 there's a number of sentences that appear in the May 1975
24 statement which do not appear in the September 1976 statement,
25 specifically the reference to the adequate assurance demanded

1 by Dow and whether or not Dow might successfully litigate the
2 matter.

3 And I'm curious, why was that language change made?

4 A As I sit here this morning I can't answer your
5 question.

6 Q Would you have been the one responsible at the
7 company at that time, though, for the language changes and that
8 type of thing?

9 A I was the ultimate-- What happens is this particu-
10 lar note-- Anything having to do with the Midland project
11 was prepared initially by Judd Bacon and then I would just
12 read it, see if it comported with my understanding, and then
13 it would appear in the registration statement. That was my
14 function.

15 Q So you just don't know today?

16 A That's correct. I'm sorry, Counsel, I can't respond.

17 Q Now did you have an opportunity to reac the
18 Aeschliman decision when it came down in July of 1976?

19 A Yes, sir.

20 Q After reading that were you concerned at all about
21 the possibility of still further delays in the construction
22 of the plant in view of the fact there were suspension hearings?

23 A Obviously if we were going to have to go back and
24 relitigate some of the issues we'd already litigated, yes, we
25 were concerned.

eb9

1 Q Okay.

2 Now had you had any direct involvement or, rather,
3 direct contact with people at Dow, either Jim Hanes, Joe
4 Temple or any of that group at that time?

5 A No. I think the liaison at that time was through
6 the negotiating committee largely, which would have been --
7 well, two of them, obviously, Mr. Temple and Mr. Youngdahl.

8 Q Had you heard at that time -- and by "that time"
9 I mean around July and August of 1976, that Dow itself was
10 concerned over the possibility of further delays in view of
11 the decision in the Aeschliman case?

12 A I don't know that I'd heard that, no.

13 Q I take it it's your recollection that the first
14 information you received as to what transpired at the September
15 13th, 1976 negotiating meeting came in a telephone call you
16 received that evening from Mr. Youngdahl?

17 A That's correct. And I didn't have that recollection
18 during my deposition. It had gone from my memory, but then
19 I saw Mr. Youngdahl's notes that said he did call, and I
20 remembered, yes, he did call.

21 Q Okay.

22 Could I ask you to take a look at the September
23 14th, 1976 Youngdahl memorandum?

24 A What volume and so forth?

25 Q I believe it's Volume 5. Just a moment.

eb10

1 It's Volume 3.

2 A I have it in front of me, Counselor.

3 Q What is your recollection, Mr. Falahee, as to when
4 you first would have been that memorandum?

5 A My recollection was I didn't remember seeing it at
6 all until it was shown to me during my deposition, but I'm
7 not testifying that I had not seen it prior thereto, but my
8 recollection was completely gone.

9 Q Okay.

10 In this telephone call that you had with
11 Mr. Youngdahl the evening of the 13th, did he tell you about
12 the seven reasons that appear in Paragraph 1, the first page
13 of that memorandum?

14 A No, as I recall the phone call, it was rather brief,
15 namely that Mr. Temple had stated that it was the Midland
16 Division's position that it was no longer in the best interests
17 and that we really ought to get together tomorrow morning and
18 talk about it with interested people.

19 Q Okay.

20 Now did Mr. Youngdahl mention to you in the course
21 of that telephone conversation that Temple had in turn indi-
22 cated to him that he recognized that Dow had a valid signed
23 contract and that apparently in his opinion provisions of the
24 contract had been violated by Consumers?

25 A I don't recall whether he did or did not. I was
pleased to read this in the memo.

WRBloom/wbl
WELandon

1 Q Do you recall attending any meetings within
2 Consumers about the situation with Dow between the 14th --
3 between the 13th, the evening of the 13th and the meeting of
4 September 17, 1976?

5 A Well as I stated earlier on here this morning, and
6 as I said during my deposition, there obviously were meetings
7 held. My memory at the time of the deposition was that I
8 couldn't remember precisely how many or exactly when. But
9 I knew we had meetings because we ultimately ended up in a
10 meeting on the 21st, as you know, of the legal committee.

11 My memory has been refreshed since by the fact
12 that I've read some notes and things that demonstrated there
13 was a meeting on the morning after the phone call on the 15th
14 and another one -- two more, I guess, before the meeting on the
15 21st with the Dow people.

16 Q You say you believe there was a meeting on
17 September 15th, 1976?

18 A I think that was the morning after the phone call.
19 I think we all gathered and talked about it.

20 Q All right.

21 Now could I ask you to take a look at the notes
22 apparently prepared by Mr. Howell of the September 17th meeting
23 which appear in Volume 7 at Tab 22.

24 A Yes, sir, I have it.

25 Q Now I'm a little unclear from your testimony

WRB/wb2

1 earlier today. Is it your recollection that you did attend
2 this meeting?

3 A I said I had no current recollection that I did.
4 But looking at the minutes leads me to believe that I did.
5 Because there's a reference to me on the last page.

6 Q Okay.

7 A But as I sit here I can't remember it.

8 Q Now on the front page of that memorandum under
9 the section where it says "AHA?", I take it that's Mr. Aymond;
10 is that right?

11 A That's right.

12 Q And is it your recollection that some time during
13 that meeting--

14 A There may have been some doubt in Mr. Howell's
15 mind as, Did Mr. Aymond actually ask these questions or not:
16 therefore the question mark.

17 Q Okay.

18 A But I can't answer that. I don't know.

19 Q Well regardless of who the source of the question
20 might have been do you recall a question being raised during
21 the course of that meeting to the effect of, What is Dow's
22 position? and Why was the change in attitude?

23 A I don't recall, as I said, what went on at that
24 meeting. The fact that such a question came up would not have
25 surprised me, however, because that was one of our concerns,

WRB/wb3

1 Well, what really is the Dow position? As I said here earlier
2 on, did it mean they were going to repudiate the contract?
3 Did they want to abandon the project? What is the situation?

4 Q Okay.

5 Do you recall Mr. Youngdahl making a presentation
6 at that meeting wherein he explained the reasons that he had
7 received which are reflected in the memorandum of September 14th
8 1976?

9 A I don't recall, as I said, what went on at that
10 meeting.

11 Q Okay.

12 A But the memo that you refer to says that they
13 influenced the Dow position. It doesn't say that necessarily
14 it triggered the action taken by Mr. Temple at the meeting on
15 the 13th.

16 Q I appreciate that. But I'm just simply trying
17 to find out whether at any time Mr. Youngdahl told Mr. Aymond
18 in your presence what the reasons were that he had received
19 in that--

20 A I don't say he didn't, I just don't remember.

21 Q I appreciate that.

22 Do you have any idea, Mr. Falahee, how the-- If you
23 look down at the second "AHA" that appears on page 1, do you
24 have any recollection of how this statement came up at the
25 meeting, to the effect that -- quote.... The quotes are mine, not

WRB/wb4

1 in the text of the memorandum: Not economically advantageous,
2 but live up to the contract? Do you have any idea?

3 A No, I don't. I can see the parallelism of this
4 to what we discussed subsequently at the legal meeting and
5 also at the September 24th meeting of the top executives.
6 But I don't recall what went on at this meeting.

7 Q Okay.

8 Now if we go down to the point under the same
9 section there, under "AHA," where it says, "Dow's responsibil-
10 ity," and then there's a number of subparts, and the third
11 part is "liability for shooting project down," and yet another
12 subpart, "frustrate purpose of the project."

13 Do you have any recollection of any discussion
14 going on in the September 17th, 1976 meeting to that effect?

15 A No, sir.

16 Q Okay.

17 A I'm not saying it did not take place.

18 Q I understand.

19 If I could ask you to take a look at page 2 of
20 that same memorandum of September 17th, 1976.

21 Do you recall Mr. Bacon making a report on a
22 conversation he had with Mr. Nute, apparently prior to the
23 meeting, in which he advised the parties present at the
24 September 17th meeting that Dow did intend to live up to the
25 contract?

WRB/wb5

1 A No, I don't recall that.

2 Q Okay.

3 Finally, under the part of the paragraph on
4 page 2 where it says, "SHH," which I take it to be Mr. Howell,
5 Item 4, the subpart there that says, "Evaluate the seven reasons
6 Dow gave." Do you recall Mr. Howell making any statements to
7 that effect?

8 A No, I do not.

9 Q Okay.

10 Now you testified at some point in your testimony
11 this morning to the effect that it was your understanding that
12 Consumers only put in input on two of the seven areas of the
13 corporate review; is that correct?

14 A That's my best recollection; yes, sir.

15 Q Could you take a look at the September 16th, 1976
16 memorandum of Mr. Youngdahl, apparently to file, which appears--
17 It's Volume 3, Tab 15.

18 A I have it.

19 Q Now that appears to be a memorandum from
20 Mr. Youngdahl as a result of a conversation he had with
21 Mr. Temple on September 16th; am I correct?

22 A That's what it appears to be, yes.

23 Q Could I ask you to take a moment to just read
24 that memorandum and see whether it refreshes your recollection
25 as to whether Consumers was invited to have input into more than

WRB/wb6

1 two areas of the corporate review?

2 A Very well.

3 (The witness reading)

4 Yes, it does refresh my recollection. I obviously
5 was in error on the two of the seven. It's faulty recollection
6 on my part.

7 Q I appreciate that.

8 A I knew that I functioned, I knew Russ functioned,
9 and I didn't realize until just this moment that included in
10 the seven was the top executive meeting, which obviously we
11 had in put in.

12 Q Okay.

13 A Yes, sir.

14 Q Now in preparing for the September 21st, 1976
15 meeting did you meet with Mr. Bacon and Mr. Renfrow to discuss
16 what it is that was going to be done, or said at that meeting,
17 by Consumers' representatives?

18 A As I sit here I don't recall. But it would be
19 logical that I probably did. But I really don't remember
20 meeting with them.

21 Obviously maybe Judd and Mr. Renfrow got together,
22 and they must have met with me, but I just don't remember it.

23 Q Okay.

24 Do you recall, Mr. Falahee, perhaps on the plane
25 trip up, if you went by plane--

WRB/wb7

1 A We did.

2 Q --was there any discussion before you actually
3 went into the meeting to the effect that: Rex, you make your
4 presentation regarding the NRC areas, and then I'm going to
5 make a presentation myself? --that is, I, Jim Falahee, will?

6 A I could have said that. But as I sit here today
7 I don't remember that.

8 Q Would it be your recollection today that whatever
9 comments you made at the September 21st meeting really were
10 extemporaneous and not planned beforehand?

11 A Oh, I won't go that far; because I think at the
12 September 21th meeting there was some discussion to the effect
13 that we clearly should make clear to Dow that we felt we had
14 a valid contract, and if they did breach the same there would
15 be litigation.

16 Q Do you recall at that pre-meeting meeting on
17 September 20th discussing not only that Dow would be advis-
18 ed that there was a valid contract and if they breached it
19 there was likely to be litigation, but also the attention of
20 Dow would be brought to the fact that they had a duty to support
21 Consumers under that contract?

22 A I don't recall that as I sit here.

23 Q Okay.

24 Can I ask you to take a look at page 27 of your
25 deposition, please?

WRB/wb8

1 A I don't have a copy. I'm blame that on counsel;
2 he told me not to bring anything this morning.

3 (Document handed to the witness)

4 I have page 27.

5 Q Okay.

6 A On line 13 the question was asked of you,

7 "To the best of your recollection was
8 there any discussion of your alleged statement on
9 September 21st to the effect that if Dow breached
10 the contract there would be a sizeable legal prob-
11 lem? Was that kind of a statement at all discussed
12 at the September 20th meeting?"

13 And your answer was,

14 "I think it was discussed in this con-
15 text; that we should make clear to Dow that we
16 felt we had an enforceable contract and if Dow
17 didn't support it there would be legal consequences.
18 That would be part of the input that we saw they
19 were seeking from us. 'they' being Dow."

20 Is that an accurate reading of the question and
21 answer that appear there?

22 A Yes, and that's essentially the same answer I just
23 gave you. If you're drawing a distinction between "legal con-
24 sequences" and "litigation," I wasn't thinking that precisely.

25 Q I wasn't talking about that; I was talking about the

WRB/wb9

1 idea of using the term "duty to support," whether there was
2 any discussion prior to going into the September 21st meeting
3 of bringing it up in that meeting, not simply: Dow, if you
4 breach the contract there's likely to be a lawsuit, but, Dow,
5 you've a duty to support us under this contract.

6 A I don't remember at the September meeting whether
7 it was or it wasn't. It wouldn't have surprised me if it had
8 come up, though.

9 Q Okay.

10 Now, I'd like to get a better feel for what
11 actually happened in the September 21st meeting when the subject
12 of litigation came up.

13 First of all, do I understand that Rex Renfrow
14 did most of the talking at that meeting?

15 A That's correct.

16 Q And I think his remarks were apparently limited to
17 what the impact might be on the suspension hearing of various
18 positions that the Dow USA board might ultimately decide to
19 follow?

20 A That's too restrictive. He started in first of all--
21 Frankly, it was kind of edifying for me, too, because I wasn't
22 that much on top of all the issues. But he went into what the
23 issues would in the substantive hearing, the hearing on the
24 merits: the ACRS question; the conservation question; the
25 fuel cycle question, etc. And then he went through what the

WRB/wb10

1 issues would be on suspension: elimination of alternatives;
2 cost-benefit effects, and that sort of thing. And then finally
3 he got to what you've suggested; namely, if Dow took this
4 position it might have this impact, and from the very best to
5 the worst, yes.

6 Q All right.

7 Now where in the course of that presentation did
8 you begin to speak?

9 A Well when he finished, that is when I spoke up
10 and said: Now these are all the various positions and the impact
11 they might have. Rex has given that-- I didn't use these
12 words, but the thought I was trying to convey was that it was
13 in a generic sense, and I didn't mean to imply that under the
14 contract Dow was free to take any of those positions without
15 some reverberations or legal impact.

16 Q Did you feel that they would come away from
17 Rex's presentation with the feeling they could do that?

18 A I guess I really didn't think that they were that
19 unknowledgeable. After all, Dow Chemical has very competent
20 legal counsel. But what I wanted to do, and as I saw our
21 mission there, it was to tell them what we thought. And that's
22 what I was doing.

23 Q Okay.

24 So despite the fact you felt they might have been
25 intelligent enough to figure out what might happen if they took

WRB/wb11

1 certain steps, you still wanted to underscore it so that they
2 knew what Consumers meant?

3 A Well that makes it kind of unilateral. Really
4 I thought it was being responsive to what they wanted.

5 Q Okay.

6 A They were seeking information to make an ultimate
7 decision and asked for our viewpoint, and we gave it to them.

8 Q Okay.

9 A That was the sense in which it was given.

10 Q Is it, then, your recollection that you did not
11 interrupt Mr. Renfrow during the course of his presentation?

12 A Well there's a reference in the notes which leads
13 me to believe, although I don't really remember it now, that I
14 may have interrupted him once. Because I think I interjected
15 something to the effect that whatever he had said could result
16 even in the loss of our license because it was site specific.
17 And that was an interjection, I think.

18 Q But so far as whatever presentation you made re-
19 garding possible legal liability of Dow to Consumers, it's
20 your testimony that you did not interrupt Rex's presentation?

21 A That's the best of my recollection, yes, sir.

22 Q Did you speak more than once during the course of
23 the meeting on this question of possible legal liability
24 between Dow and Consumers?

25 A My memory is I did not. Because after I made that

WRB/wbl2

1 point I then said: And I hope we can avoid it. And Mr. Hanes,
2 to the best of my memory said he hoped we could avoid it, too.
3 And I don't think I spoke of it again.

4 Q Okay.

5 And I take it -- and you correct me if I'm
6 wrong -- but your recollection of what you said was to the
7 effect that: Dow, if you repudiate the contract there'll be
8 a hell of a legal problem?

9 A I think I said: Dow, if what you do is a breach
10 of the contract there would be a hell of a legal situation,
11 or litigation, or something. --or a lawsuit.

12 Q And in your own mind at that time who would have
13 been the one who would have determined whether there had been
14 a breach of that contract?

15 A Ultimately the court.

16 Q Okay.

17 Now do you recall at any time during that
18 September 21st meeting using any words to the effect of: Dow,
19 you've got a duty to support the contract; or, You have to be
20 supportive; with the word "support" being used in any context?

21 A Let me think for a moment.

22 Q Sure.

23 (Pause)

24 A I think there was a reference to -- what is it? --
25 Section 3, which is Dow would be supportive of the licensing

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1 proceeding. I think that that was mentioned during the
2 course of the meeting.

3 Q Now was that by you or by Mr. Bacon?

4 A I don't recall.

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1 Q Now I think you indicated that during the course
2 of the September 21st meeting it was your recollection that
3 Mr. Nute made some statements to the effect of "Are you aware
4 that Joe Temple has taken certain positions publicly on this
5 plant?"

6 A Yes, that there may be a problem with Temple be-
7 cause of some public statements he has already made concern-
8 ing this disillusionment with the project, yes.

9 Q Now from the statements you say Mr. Nute made in
10 the meeting regarding that, did you form any impression that
11 Mr. Nute was reluctant in any way to have Mr. Temple used as
12 a witness?

13 A No, I don't think so. But he wanted us to be aware
14 that that had been said.

15 Q Okay.

16 A And I-- To follow that up if I could, I at that
17 time told him that I really didn't -- and I don't know whether
18 I said this this morning or not, if I have forgive me. But
19 I told him I didn't think what Mr. Temple had said already
20 was really the important issue, the important issue was what
21 the corporate board decides.

22 Q Okay.

23 Do you have any recollection of Mr. Hanes making
24 a statement during the course of the September 21st meeting
25 to the effect that Dow will put on a knowledgeable witness

200

eb2

1 who will tell the truth?

2 A No, I don't have any memory of that, but that doesn't
3 surprise me because that's what I was thinking, too, namely,
4 that whatever came out would be the truth, so it wouldn't have
5 registered in my mind.

6 Q Now to the extent that you were aware of what the
7 Michigan Division recommendation was when you attended the
8 September 21st, 1976 meeting, had you formed a judgment in
9 your own mind that if that particular recommendation in fact
10 became the Dow USA board decision, whether that would have
11 been supportive or not supportive of the contract?

12 A Well, no. The answer to your question is no, be-
13 cause I didn't understand the Dow Midland position with
14 sufficient understanding to reach that conclusion. It re-
15 quired greater explanation.

16 Q Okay.

17 Now after the September 21st meeting at Dow, you had
18 at least one meeting with Mr. Aymond during which this outline
19 was discussed that he ultimately used at this September 24th
20 meeting. Is that not correct?

21 A That's right.

22 Q Okay.

23 Now let me also ask you something else. Had you
24 at this point, that is, September 21st, 1976, had you gone
25 outside in the sense of retaining an outside lawyer to take a

eb3

1 look at the contractual rights between Dow and Consumers?

2 A I think-- Yes, I think we had at that time. We
3 had not, according to -- well, the note you referred to
4 earlier which was September 16th or 17th, but I think between
5 the 17th and the 20th we may well have contacted Dykema.

6 My memory is, though, that we had had Dykema pre-
7 pare a memorandum way back I think earlier on; at the time
8 that the note appeared in the prospectus that you referred me
9 to we may have had them examine it at that time, too.

10 Q Okay.

11 Now do you recall whether-- First of all, do you
12 recall reading any of the Dykema briefs when they came in?

13 A I think I looked at them, yes.

14 Q Do you recall whether you had seen the first brief
15 before you attended the September 24th, 1976 meeting?

16 A Now what do you characterize as the first brief?

17 Q I'll show you. It's a memorandum brief dated
18 September 23rd, 1976.

19 A Oh, I don't think we would have seen that before
20 the 24th. I think that was delivered subsequent to that meet-
21 ing.

22 Q Now can I ask you to take a look at the Aymond
23 outline, please?

24 A Yes, if you'll give me the tab and volume.

25 Q Volume 4, Tab 7, I am told.

eb4

1 A Yes, sir.

2 Q Was it your understanding before you attended that
3 meeting in which this outline was discussed that Mr. Bacon
4 was to prepare a draft outline?

5 A He was given the task of preparing a draft, yes.

6 Q Okay.

7 I ask you to take a look, in conjunction with the
8 outline you have before you, at Volume 7, Tab 9, which we
9 believe to be the Bacon draft for the outline.

10 A Yes, I'm looking.

11 Q Do you have them both?

12 A I have them, yes.

13 Q Okay.

14 A Tab 9 and Tab 7.

15 Q Yes.

16 Now could I ask you to take a look at the last page
17 of the Bacon draft, --

18 A Yes.

19 Q -- the last sentence that appears on Item Number 5.

20 A Yes.

21 MR. REYNOLDS: Excuse me, if I can interrupt just
22 for a second, I'm not sure that you're both looking at the
23 same document. Can you refer him to the tab number that you
24 have in mind?

25 MR. POTTER: Okay.

eb5

1 BY MR. POTTER:

2 Q On Volume 7, Tab 9, I'd like to be on page 6 of that
3 outline.

4 MR. REYNOLDS: Mr. Falahee, there are two different
5 volumes we're working with and I believe you're looking at only
6 one volume.

7 THE WITNESS: That's right.

8 MR. REYNOLDS: Volume 7, Tab 9, and Volume 4, Tab 7
9 are the two documents we're addressing.

10 THE WITNESS: Okay. I have Volume 7, Tab 9, and
11 Volume 4, Tab 7.

12 MR. REYNOLDS: All right.

13 MR. POTTER: Thank you.

14 THE WITNESS: The reason I was confused was-- Well,
15 never mind.

16 BY MR. POTTER:

17 Q If you'll take a look at the last sentence in
18 paragraph 5 of the Bacon draft thich appears in Volume 7, --

19 A Yes.

20 Q -- and compare that with the sentence that appears
21 in the Aymond outline as used in the meeting, which is in
22 Volume 4, page 4, --

23 A Yes.

24 Q -- am I correct that there's an additional sentence
25 that's been added and that reads as follows:

eb6

1 "We consider that a Dow position other
2 than 3-A or 3-A(1) would be inconsistent with Dow's
3 contract obligations."

4 A Yes.

5 Q Do you know how that sentence was added and why it
6 was added?

7 A I have no recollection.

8 Q Were you consulted in any way, to your recollection?

9 A I don't recall that I was. I just don't remember
10 whether I was or was not.

11 Q Now let me ask you to turn to the first page of the
12 outline that appears in Volume 4, the one that apparently was
13 used by Mr. Aymond at the meeting.

14 A I have it.

15 Q If we take that last paragraph on 5 where it says:

16 "We consider that a Dow position other
17 than 3-A or 3-A(1) would be inconsistent with Dow's
18 contract obligations."

19 And I ask you to read on page 1, 3-B, I'm trying
20 to find out from your state of mind whether 3-B is necessarily
21 inconsistent with the contract obligations as you understood
22 them?

23 A I think that Counsel for Staff covered this with me
24 earlier on, and my answer at that time was that 3-B could or
25 could not be, depending on what Dow did --

eb7

1 Q And you don't recall --

2 A -- and why they did it.

3 Q And you don't recall being consulted by Mr. Aymond
4 regarding the insertion of that last sentence in paragraph 5?

5 A I have no memory of that, no.

6 Q Now during the course of the September 24th, 1976
7 meeting do you recall Mr. Temple making a statement to the
8 effect that Dow regarded the contract with Consumers to be a
9 valid and binding one?

10 MR. REYNOLDS: I believe that's been asked and
11 answered.

12 MR. POTTER: I don't believe it has on the September
13 24th meeting.

14 CHAIRMAN MILLER: You may answer.

15 THE WITNESS: I seem to remember he did say some-
16 thing like that.

17 BY MR. POTTER:

18 Q Were you at all surprised by that statement?

19 A I was pleased.

20 Q Okay.

21 Now was the --

22 A I think that's why I remember it, too, because that
23 was one of the questions in our mind, and it was interesting
24 to have a statement come like that.

25 Q Okay.

eb8

1 Would it be a fair summary of what occurred at the
2 September 24th meeting to say that it was a more detailed
3 presentation regarding the possible circumstances under which
4 there might be legal problems between Dow and Consumers over
5 what you had presented to Dow at the September 21st meeting?

6 A I think that's a good start on it, but I think that
7 the September 24th meeting-- You'll recall, if I can go this
8 way, at the September 21st meeting we pretty well went into
9 what the various effects would be if they took this position
10 and that position in the suspension hearing, but we didn't --
11 we weren't at that time in a position to articulate what
12 effect this might have on Consumers Power Company whereas
13 with the passage of a few more days we were able to compile
14 some numbers and so forth, prepare exhibits, and that's what
15 took place then at the September 24th, in addition to what
16 was covered at the September 21st meeting.

17 The September 24th meeting I have to say was maybe
18 broader based.

19 Q Okay.

20 Now did you have any involvement in the actual
21 preparation for the suspension hearing, that is, gathering
22 information within Consumers and becoming aware of what the
23 issues would be, and that type of thing?

24 A No, sir, I was very happy to turn that back to
25 Judd.

eb9

1 Q Okay.

2 Could I ask you to take a look at page 62 of your
3 deposition a minute, Mr. Falahee?

4 (Document handed to the witness.)

5 A I have it.

6 Q During that deposition, I'm not quite sure at this
7 point who the questioner was, I guess it was Mr. Dambly. Line
8 13:

9 "QUESTION: Do you have any reasons to
10 believe now that Dow might have been looking at
11 Consumers as an adversary during that meeting?"

12 And it was referring to the meeting of the 24th.

13 "ANSWER: Not necessarily as an adver-
14 sary. I guess my impression from what went on at
15 the suspension hearing and Dow's Counsel, Mr. Wessel,
16 that Dow was being extremely careful to avoid any
17 action that might result in an accusation on the part
18 of Consumers Power Company that would lead to litiga-
19 tion and so forth.

20 "For that reason, there was some tension
21 subsequently in the suspension hearings."

22 My question is: To the best of your recollection
23 today, when did you first form that judgment?

24 A This was during the course of the suspension hear-
25 ings.

eb10

1 Q And what did you see that caused you to form that?

2 A Well, it was reports back from our Counsel, and
3 I'm sorry, I can't particularize because I just don't remember,
4 but my impression as I sit here this morning is that the
5 relationship between us and Dow Counsel were not as coopera-
6 tive or as friendly as they might have been.

7 Q Okay.

8 Now is that the first time, to the best of your
9 recollection, that you gave any thought to the possibility
10 that Dow might be concerned about something said or done during
11 the course of the suspension hearing which might conceivably
12 be relied upon by Consumers as a basis for a lawsuit, that
13 that was a legitimate concern by Dow?

14 A I'm sorry, I lost your question.

15 Q I'm sorry.

16 I'm trying to get a feel. Was it during the sus-
17 pension hearing, was that the first time that you became
18 aware that Dow might fear that if it did something during the --

19 A I guess it's the first time I became aware. I
20 think perhaps there was some inkling of that during the
21 preparation of the testimony, but I wasn't aware of any of
22 that at that time.

23 Q Okay.

24 A In other words, the exchange of drafts of Mr. Temple
25 and that sort of thing may have led some to that conclusion,

eb11

1 but I wasn't privy to that.

2 Q Okay.

3 So you're not aware at any time of having been told
4 by Mr. Bacon or Mr. Renfrow or anybody else that something --
5 of anything that might have happened during the testimony
6 preparation meetings that indicated that Dow might be enter-
7 taining some concern that if something happened at the hearing
8 that Consumers might go back and sue it?

9 A I don't recall any, no.

10 Q Okay.

11 Could I ask you to take a look at pages 93 and 94
12 of your deposition? There you're being examined regarding
13 the September 21st meeting. And the question is asked of you
14 on line 19 on page 93:

15 "Okay. In your mind during that meeting,
16 Mr. Falahee, when Mr. Renfrow was outlining the last
17 two of the four alternatives...."

18 And let me hold there a minute.

19 Did you understand Mr. Renfrow to present four
20 alternatives at the September 21st meeting?

21 A I don't know as I sit here. I know there were four
22 as it ultimately developed at the 24th meeting. At the 21st
23 meeting it may have been full support, support "Yeah, we have
24 a contract but we don't think it's economically feasible,"
25 and re-radiation. There may have been three.

eb12

1 Q Okay.

2 It goes on and says:

3 "....did you form a judgment in your own
4 mind at that point as to whether either of those was
5 consistent or inconsistent with what you thought
6 Dow's obligations were?"

7 And your answer is:

8 "Clearly it was a given in the fourth
9 one...."

10 which I take it refers to the repudiation --

11 A Yes.

12 Q "....that it was a violation."

13 And then the answer goes on:

14 "I don't think that at that meeting I
15 formed any conclusion as to where the other three
16 fell. I was just making an assertion that if in-
17 deed what Dow did, regardless of what it was, was
18 ultimately construed by us a violation of the con-
19 tract, it could lead to litigation."

20 And from that particular answer I am unclear. Was
21 this your state of mind, or is this what you are saying you
22 actually told Dow during the course of the meeting?

23 A Oh, I didn't tell-- I didn't articulate this;
24 all I articulated was that whatever you do, Dow, you have a
25 valid contract. We think if you breach that contract there's

eb13

1 going to be some responsibility, and that's all.

2 And I didn't assign-- I didn't try to differentiate
3 between the last position, repudiation, or the lip service, as
4 it has come to be known, at that juncture.

5 Q I just have two last questions.

6 If you'll take a look at the September 17th, 1976
7 notes again, and that's in Volume 7, Tab I believe it is 22
8 or 23, --

2a

9 A I have it.

10 Q Bear with me just a minute.

11 (Pause.)

12 I'm sorry, I want you to take a look at the notes
13 of the September 20th meeting, Tab 23.

14 Midway down are the initials JBF which would tend
15 to indicate that this was a presentation by you at the September
16 20th, 1976 meeting. There's a statement which says:-- You're
17 talking to Jim Hanes, and it says:

18 "Agreed to get together 2:00 p.m.,
19 Tuesday, September 21 at Midland."

20 Whose idea was it to set up that meeting, do you
21 recall?

22 A I think it was the Dow Chemical Company.

23 You referred me earlier on here to the seven task
24 force and Russ Youngdahl reported they would like input, and
25 this was carrying that out.

eb14

1 Q Okay.

2 But you apparently-- The note here says: "Talked
3 to Jim Hanes." Do you have any indication of whether you
4 called him or he called you?

5 A I don't.

6 Q Okay.

7 A I do remember a little bit about that, and the
8 reason. That's why I'm confused.

9 There was a problem. I don't know who initiated
10 it. Either I wasn't in or he wasn't in. And then there was
11 a follow back. I don't know who started it.

12 I wish he had had notes that said I was friendly,
13 too, but apparently he didn't.

14 (Laughter.)

15 Q One final question: Apart from the fact that you
16 said you don't believe you received the September 23rd, 1976
17 opinion from Dykema before you entered the September 24th
18 meeting, did you have any telephone conversations with indi-
19 viduals at Dykema in which they might have told you what they
20 were coming up with in terms of an opinion?

21 A I don't recall any that I had.

22 Q Okay.

23 MR. POTTER: I don't have any more questions.

24 Thanks very much, Mr. Falahee.

25 CHAIRMAN MILLER: Consumers?

550 116

eb15

1 MR. REYNOLDS: I don't have any questions.

2 CHAIRMAN MILLER: Very well. I guess that's all
3 then.

4 MR. OLMSTEAD: I think that's a record.

5 CHAIRMAN MILLER: It is a record indeed.

6 Thank you, Mr. FALAhee, for coming. You're ex-
7 cused. We appreciate your cooperation, sir.

8 (Witness excused.)

9 We'll take our lunch recess and come back at 1:30.

10 (Whereupon, at 12:00 noon, the hearing in the
11 above-entitled matter was recessed to reconvene at
12 1:30 p.m. the same day.)

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A F T E R N O O N S E S S I O N

(1.00 p.m.)

CHAIRMAN MILLER: Are we ready to proceed?

Whereupon,

JAMES H. HANES

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

DIRECT EXAMINATION

BY MR. PATON:

Q Mr. Hanes, would you state your full name and your business address?

A James H. Hanes, 2030 Dow Center, Midland, Michigan.

Q What is your present position and your occupation?

A I'm Associate General Counsel of the Dow Chemical Company, and also a Vice President of Dow Chemical, USA.

Q What was your position in September, 1976?

A I was at that time General Counsel of Dow Chemical, USA, and also a Vice President of Dow Chemical, USA, which is not a separate corporation. It's an operating unit of the Dow Chemical Corporation.

Q All right, sir.

Did it come to your attention in September of 1976 that Mr. Temple of the Michigan Division had taken a position with respect to the contract between Dow and Consumers Power?

A Yes, it did.

1 Q All right. Tell us how you first learned of that?

2 A I don't remember my first knowledge of it. My first
3 involvement was when Mr. Orefrice asked me to serve on a review
4 team or task force to review the decision that Mr. Temple had
5 tentatively arrived at.

6 Q All right. Would you tell us what your understanding
7 of that position was?

8 A My understanding is that Joe Temple felt that in
9 view of the long delays and the problems they had had with
10 completing nuclear plants and the urgent need that he had for
11 getting substitute steam sources and power sources when his old
12 generating capacity became totally unusable, that a decision
13 had to be made. And looking at the facts he felt that at that
14 time it was probably not to the best advantage of Dow to
15 continue with that process.

16 Q All right, sir.

17 Now, let me ask you: Toward the end of that you
18 indicated it was his opinion that it was not in the best
19 interests of Dow to continue with that process. Now, did his
20 position incorporate what Dow should do if the ultimate
21 corporate decision agreed with his opinion that the contract
22 was no longer in the best interests of Dow?

23 A No, he hadn't arrived at any conclusions. There
24 were several possibilities that were discussed, building plants
25 of our own, various kinds of plants, some talk about temporary

wel 3

1 steam generating capacity, even -- a variety of possibilities
2 they were looking at. But as far as I know, there was no firm
3 plan of action.

4 Q All right, sir.

5 During the month of September, after you learned of
6 the Michigan Division position, approximately what percentage
7 of your time did you spend on this problem or this situation?

8 MR. CHARNOFF: What period of time is this?

9 MR. PATON: During the month of September.

10 THE WITNESS: I'd say from the time I got involved
11 with that, I spent at least half of my time for roughly the
12 balance of the month of September.

13 BY MR. PATON:

14 Q All right, sir. Did you get involved in the
15 preparation of the testimony that was to be the testimony of
16 a Dow witness in the suspension proceeding?

17 A No, I did not.

18 Q Now, I'm fishing a little bit here, but is there a
19 Mr. Edwards that is an attorney for Dow?

20 A Yes, there is.

21 Q There is? Do you know whether he ever gave any
22 legal advice with respect to the responsibility of the Dow
23 witness in the suspension proceeding?

24 A I'm not aware of any participation by Mr. Edwards.

25 Q All right, you don't know that he ever offered any

wel 4

1 advice or wrote an opinion in that respect, is that correct?

2 A I'm not aware of any.

3 Q All right. Did you have any personal contact with
4 any people from Consumers Power with respect to the Michigan
5 Division position prior to the meeting of September 21?

6 A I believe there was just a phone conversation which
7 was making arrangements for that meeting.

8 Q Do you know who you spoke to?

9 A Mr. Falahee.

10 Q All right. Who set up the meeting of 9-21? At
11 whose request was it set up?

12 A I believe Lee Nute initiated that request. When
13 the task force was established, we then broke down the tasks
14 into various parts and, of course, the legal part was my area
15 of responsibility. I believe Mr. Nute contacted the Consumers
16 people, and I'm not sure who -- probably Mr. Bacon, and tried
17 to find a time when we could get together to get Consumers'
18 input.

19 Q It's your testimony, then, that the meeting was
20 set up at the request of Dow?

21 A Yes.

22 Q And you wanted to obtain some information from
23 Consumers Power?

24 A Yes.

25 Q What was that information that you wanted to obtain

wel 5

1 with respect to the task force that you were assigned to?

2 A Well, at the time we got into this I really hadn't
3 been involved before, as I mentioned. I felt that I needed
4 some background on what the hearings were that were coming up,
5 the framework in which these would be handled, the nature of
6 our participation. And we really had been left out of the
7 chain of communications for some time.

8 As I mentioned, at that time we didn't even
9 consider ourselves a party. We were just working in coopera-
10 tion with Consumers. So I really wanted to evaluate this
11 position that Mr. Temple had taken, and I felt I needed to
12 know where we were going, what the implications were, and get
13 a chance to evaluate the whole picture. The only way we knew
14 of doing that very effectively was to get together with
15 Consumers.

16 Q Now, in that meeting on the 21st, there was
17 ultimately some discussion of litigation, is that correct?

18 A Yes.

19 Q When you asked Consumers Power to have this meeting
20 did you ask them to discuss the circumstances under which
21 there would be litigation?

22 A No, we didn't.

23 Q Would you tell us your recollection of what
24 happened at the meeting of the 21st?

25 A Well, I think we started out with probably Mr.

wel 6

1 Falahee opening the meeting to give us some background -- I
2 probably opened the meeting, since I was the host, and outlined
3 what the task force assignment was, and my part of it, and Mr.
4 Falahee talked for a few minutes on the general aspects, and
5 then Mr. Renfrow went into quite a lot of detail on, first, the
6 suspension hearings -- I guess it's the other way around. We
7 were talking about a suspension hearing that was supposed to
8 just last, I think, a few days. Then a big hearing, as they
9 called it, which was to go into the license matter. And that
10 was supposed to happen shortly after the first of the year.

11 He went into quite a lot of detail on the issues
12 that would come up in the big hearing first. After that, he
13 went into the suspension hearing, and what the issues would
14 be there, what Dow -- the part we needed to play in that, to
15 participate in the hearings. And it was after that, I think,
16 that we got into the question of what constitutes Dow's
17 support of Consumers Power.

18 Out of that discussion came the suggestion, or
19 the statement, that if Dow took the position that Joe Temple
20 had enunciated that we'd be having a lawsuit.

21 Q All right, sir. Have you finished with your
22 recollection of what happened at the meeting?

23 A I guess I could go on for awhile longer if you want
24 me to.

25 Q Go ahead, please do.

1 A All right. Where would you like me to start? I
2 took some notes of that meeting, which I'm sure are on the
3 record, on the issues that they talked about in the big hearing.
4 One was the general safety aspects of the plant.

5 Mr. Renfrow said that Consumers had this all under
6 control, and he went through what some of these issues are and
7 seemed very confident that they didn't need any Dow participa-
8 tion in any of that part of it.

9 I think then after the safety part of it, he got
10 into the need for electricity and the projections they had,
11 and he made a statement that this was just another rate case
12 as far as the need to prove the necessity of having the power.

13 They talked about what Dow's current needs were
14 going to be, and we'd have to update our economic evaluation of
15 the need for power evaluation, and those things.

16 There were a couple of other things he covered on
17 the big hearing.

18 Q All right.

19 I'll ask you specific questions, but if you have
20 anything else you want to say, go ahead.

21 A Why don't you go ahead and ask questions. I think
22 it would be more productive.

23 Q Okay.

24 Was there discussion about the Dow witness and what
25 the Dow witness would say?

1 A Yes, there was.

2 Q Was there discussion about whether that Dow witness
3 would testify as to the Michigan Division position?

4 A We really didn't get into a discussion of that. I
5 think in this meeting there was some question came up about
6 Joe Temple as a witness, and I believe it was Lee Nute who
7 was expressing a question as to whether Joe Temple should be
8 the witness, because of the announced position he had already
9 taken.

10 In response to that, or growing out of that, there
11 was a comment by Mr. Renfrow maybe the Dow witness should be
12 somebody not familiar with the position Mr. Temple had taken.
13 At that point in time, I emphatically stated -- and I think
14 mainly because I knew that any Dow witness who was knowledgeable
15 of the facts would be aware of Mr. Temple's position -- that
16 that wouldn't be appropriate at all, that the Dow witness
17 would be a knowledgeable person, and he would testify fully at
18 the hearing.

19 And that was the end of that discussion.

20 Q Did anybody argue with your position on that?

21 A No, they did not.

22 Q Did Mr. Falahee discuss what he considered to be
23 support?

24 A Well, yes, we did talk quite a bit about what was
25 support, and Mr. Falahee's position of Dow's support would be

1 that this is a good contract, that Dow supported the contract,
2 that we were interested in having the plant built and operated.

3 Q Well, do you mean that Mr. Falahee -- that his
4 interpretation of support was that that was the only position
5 you could take?

6 A Well, it wasn't just limited to that statement. We
7 obviously had done our own economic evaluation as to the
8 appropriateness of the plant, and that sort of thing. But he
9 did take the position that support of Consumers meant that
10 we'd be actively supporting them in the hearing to avoid having
11 a suspension and avoid the possibility of losing the license.

12 Q Did you disagree with his position on the meaning
13 of support?

14 A I thought his position was much broader than it
15 should have been. We had envisioned Dow -- at that time, we
16 didn't think we were a party, and we envisioned Dow's support
17 being coming in with technical data, engineering data, and
18 evaluation from that standpoint, and giving them that kind of
19 factual information.

20 Q In your deposition, sir, I believe you stated that
21 you remembered specifically reacting strongly twice during the
22 meeting of September 21st. Do you recall that?

23 A Yes.

24 Q Can you tell us -- describe those two circumstances.

25 A Well, in chronological order, the first was when

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1 the suggestion was made that a witness who was not familiar with
2 Joe Temple's position be Dow's witness. And I didn't know where
3 that question was leading, but I wanted to clear the air right
4 there, that the nature of the testimony that a Dow witness
5 would have, that he'd be fully knowledgeable.

6 The second time was when we were faced with the
7 possibility of a suit, when Mr. Falahee indicated that if we
8 did not support them as he interpreted the word "support," and
9 they had problems with suspension or license, that Dow would
10 certainly be subjected to a lawsuit.

11 Q Did he mention any numbers?

12 A There was a number of \$600 million that came out,
13 and I'm not sure whether it was in this meeting, or between
14 this meeting and the meeting of the 24th. But at some point
15 in time it was obvious that he had in mind a large suit,
16 because he talked about the value of what they had in the
17 plant, he talked about having to buy power from other sources,
18 the loss of the possible sale of an interest in the plant, and
19 even the possibly bankruptcy of Consumers.

20 So it was very obvious there was a large amount of
21 money involved. I don't know whether we came up with the
22 \$600 million figure, or whether he mentioned it. But that was
23 the figure that got adopted someplace.

24 Q Is it your recollection that Mr. Falahee mentioned
25 the possibility of bankruptcy of Consumers?

1 A Yes.

2 Q After the meeting did you meet with Mr. Nute and
3 Mr. Klomparens?

4 A Yes, I did.

5 Q What was the discussion -- did you have some dis-
6 cussion about the meeting?

7 A Yes, we did.

8 We reviewed the whole meeting, I think, in some
9 detail, and exchanged views on it.

10 Q Was there any discussion between you about Mr.
11 Falahee's discussion of a suit?

12 A Yes.

13 Q Do you recall what that discussion was?

14 A Well, we were all in shock at that stage, because
15 we hadn't considered that Dow had done anything to breach the
16 contract. We hadn't interpreted the term support Consumers in
17 the broad vein that he looked at it in, and we were really
18 surprised and in shock at that.

19 Q When Mr. Falahee made the statement about the suit,
20 was he calm, or did he exhibit anything to you to indicate that
21 he was excited in any way?

22 A Well, he was pretty intense. He didn't jump out
23 of his chair, or anything like that, but . . .

24 Q Can you tell us anything that led you to believe that
25 he was intense?

1 A It was just a general impression. He was leaning
2 across the table and looking at us, and he obviously meant
3 everything he said.

4 Q When you reacted to the statement about the witness
5 not being knowledgeable of the Michigan Division position, did
6 you state that calmly or were you in any way excited?

7 A I was excited.

8 Q Did you do anything that would indicate to anybody
9 else that you were excited?

10 A Not that I'm aware of.

11 Q I believe you may have answered this, sir, but when
12 Mr. Falahee indicated the possibility of a lawsuit did he tell
13 you what they would sue for, what damages? Did he in any way
14 indicate what the damages would be?

15 A Well, he talked about the investment in the plant.
16 I think I did mention two or three things -- purchase of power,
17 the loss of possible sale of interest, and ultimately bankruptcy
18 or possible bankruptcy.

19 Q After this meeting . . . did you report to Mr.
20 Oreffice?

21 A Yes.

22 Q Tell us -- now, I think you said you met with him
23 alone, was your recollection, you didn't meet with anybody
24 else?

25 A As best I can recall, I went by his office.

eb1
s wel 12

1 Q Tell us exactly what you told him.

2 A Well, I think the highlights of the meeting were --
3 that I told him at least were the threat of a suit, and then
4 I mentioned the suggestion of a possible witness that wasn't
5 aware of Joe Temple's position that he had taken.

6 Q Did you tell him your reaction to those two?

7 A Yes.

8 Q And was that reaction consistent with your testi-
9 mony here today?

10 A Yes, it was.

11 Q Did he have any reaction to what you told me?

12 A Yes, he's a pretty volatile person. He reacted
13 the same way I did.

14 Q Well, could you be a little bit more specific than
15 that, sir, and tell us exactly what he did say?

16 A I don't remember exactly what he said. I think
17 with reference to the lawsuit, I hadn't really had time to do
18 any in-depth exploring but he expressed concern about that.

19 With respect to the witness, he agreed with my
20 statement that we would provide a knowledgeable witness.

21 Q Did you attend a meeting on September 24th?

22 A Yes, I did.

23 Q Have you ever seen an outline of that meeting,
24 the Aymond outline, that was used by Mr. Aymond?

25 A No.

eb2
1 Q In that meeting did Mr. Aymond indicate the various
2 positions that could be taken by Dow and what the result of
3 those positions would be?

4 A Yes, he did.

5 Q Would you tell us what they were?

6 A Well, I made some notes on this. I'll try to --

7 Q Would you like to see your notes?

End WEL 4 8 A I think that would be helpful.

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ebl

(Document handed to the witness.)

MR. PATON: I'm showing the witness Volume 7, Tab 8.

Take your time, sir.

(Witness reading document.)

BY MR. PATON:

Q Does that refresh your recollection, sir?

A Yes, it does.

Q What were the positions that were stated by
Mr. Aymond?

A Well, the first one was that:

"Dow supports the project actively and
wants to buy steam and electricity from the plant.

He said:

"This would have little impact on the
licensing."

And that:

"....he estimated 100 percent chance
of success"
in the hearings.

If Dow said that:

"....the attractiveness of the project
has been impaired and further delays could tip
the balance on the project from positive to negative. He felt this may increase the risks of suspending construction but the odds are still good."

WEL/eb2

1 And later on in answer to a question he said 90 per-
2 cent probability of success.

3 "He suggested it would be better not to
4 be too specific and try to reta in a flexible posi-
5 tion."

6 He said in the third one:

7 "If Dow gave lip service to the con-
8 tract between Dow and Consumers Power, but indi-
9 cated it did not like the deal any more -- the odds
10 would be reduced to 50-50. It was added that this
11 would be a high risk situation.

12 The fourth one:

13 "If Dow takes a position that the con-
14 tract is no longer in force, it is not advantageous
15 to Dow. He felt that construction would almost
16 certainly be suspended and there was danger of los-
17 ing the whole project."

18 Q All right, sir.

19 Now you may need your notes again, but would you
20 take a look at Volume 4? See if one of those other books
21 up there is Volume 4.

22 A I have it.

23 Q Tab 7

24 Do you have that, sir?

25 A Yes.

WEL/eb3

1 Q All right.

2 Would you look at page 4? Do you see near the
3 bottom of the page there a paragraph numbered 6?

4 A Right.

5 Q Now I want to read to you the sentence immediately
6 preceding that. It says:

7 "We consider that a Dow position other
8 than 3a or 3a(1) would be inconsistent with Dow's
9 contract obligations."

10 Now go back and look at page 1, if you will, of
11 Tab 7, and look at 3a and 3a(1). I think you have already
12 described those two positions.

13 A It sounds like it.

14 Q All right.

15 Now did Mr. Aymond make that statement that only
16 3a and 3a(1) were acceptable?

17 A I don't recall that exact statement, but that was
18 how I would have interpreted the combination of what he said
19 and what Mr. Falahee had said.

20 Q All right.

21 Correct this statement if it is wrong then: I'm
22 suggesting that what you've testified is that Consumers Power
23 was telling you that 3a and 3a(1) were acceptable and the
24 last two positions that you described were unacceptable. Is
25 that correct or not correct?

WEL/eb4

1 A That is my understanding, yes.

2 Q All right.

3 Look at page 1 of the 9/24 -- what is called the
4 Aymond outline. That's Tab 7, and look at 3b.

5 Now is that your recollection of what was said at
6 the meeting?

7 A Yes, it is. In fact, I think I tacked that in at
8 the end of my second point, where:

9 "He suggested it would be better not to
10 be too specific and try to retain a flexible posi-
11 tion."

12 I would assume that these were the same statements.

13 Q Sir, I'm sorry, I believe you're referring to
14 3a(1)(b). I want you to look at 3b(1) that reads: "If Dow
15 takes the position...." Do you see that?

16 A Yes.

17 Q Okay.

18 Look at that for just a minute, sir.

19 A Okay.

20 Q Now is that the one you've described that was
21 talked about at the meeting as giving lip service to the con-
22 tract?

23 A Yes.

24 Q Was there any discussion that you recall about
25 what would happen if Dow had indicated that they were supporting

WEL/eb5

1 the contract because they had been threatened with a lawsuit?

2 A I don't believe that was discussed.

3 Q Now referring to page 1 of the same volume here,
4 the Aymond outline, Tab 7, do you have any opinion as to where
5 the Michigan Division position would fall among these four
6 positions?

7 A Well, I guess it would be closer to 3b, although
8 I don't think Mr. Temple said anything about intending to take
9 electricity and steam. I don't think he touched on that in
10 the statement I understand he made anyway. But it would be
11 the closest to that.

12 Q All right.

13 Now did you ultimately learn of the decision--
14 You did learn of the decision of the Dow USA Area board on
15 September 27th?

16 A Yes.

17 Q Tell us what that decision was.

18 A The Dow US Area board, after our presentation, our
19 task force presentation, they recessed for a time, came back
20 in, and said that their position was more in line with the
21 second one I have here, that the attractiveness of the pro-
22 ject had been impaired and that further delays could tip the
23 balance. And I think they said that they were going to keep
24 their options open, but that they still found the contract
25 attractive and were going to live with it and keep their

WEL/eb6

1 options open in the future.

2 Q All right, sir.

3 At the meeting of the 24th, do you recall any
4 discussion by Mr. Aymond indicating that if Consumers could
5 not make a 1985 date that they would let Dow walk away without
6 cost?

7 A Yes, he did make a statement along those lines,
8 but his attorney stepped in at that point and suggested that
9 he shouldn't be making that statement, so he backed away from
10 it. We were ready to accept, just about, but his attorney
11 cautioned him.

12 CHAIRMAN MILLER: Which attorney was that?

13 THE WITNESS: I think it was Mr. Bacon, either
14 Mr. Bacon or Mr. Falahee, and I think it was Mr. Bacon.

15 CHAIRMAN MILLER: Thank you.

16 BY MR. PATON:

17 Q At this meeting of the 24th, there was more exten-
18 sive discussion of the damages that might result in the event
19 -- or damages that Consumers Power would sue for in the event
20 of a breach. Is that correct? . . .

21 A Yes, sir. They elaborated quite a good deal on
22 that.

23 Q All right.

24 And do you remember any of that discussion? Do
25 you remember -- and you can refer to your notes if you want

WEL/eb7

1 to -- for example, the worst case in the event that the con-
2 struction permit was revoked?

3 A Well, on the bottom of page 2 of my notes it talks
4 about Consumers having \$350 million in such costs, of which
5 \$40 million was allocated to the steam plant.

6 "There would be a huge cost to return
7 the site to its original condition. There might be
8 some offsetting savings...."
9 on taxes.

10 But he also talked about, again, the loss of sales,
11 the loss of financing opportunities, and possible bankruptcy.

12 Q All right, sir.

13 Let me go back for just one minute to the meeting
14 of the 21st when Mr. Falahee made the statement about the law-
15 suit. From that, did you feel intimidated by that statement?

16 A I would say yes.

17 Q Mr. Hanes, I want to ask you now about just before
18 the meeting of September 27th. Did you at that time believe
19 that the contract between Dow and Consumers was enforceable?

20 A Well, I thought there was a question but on balance
21 I thought our opportunity to prevail was not good so-- There
22 could have been a close question. I was not willing to
23 challenge it, so I guess that's a negative way of saying that
24 I thought it was enforceable.

25 Q Did you have advise-- No, let me ask you this:

WEL/eb8

1 Did you report that to the Dow USA board on the
2 27th?

3 A I don't remember that coming up on the 27th.

4 Q Well, let me ask you this:

5 You made a report to the Dow USA board on the 27th, --

6 A Yes.

7 Q -- and your responsibility was the legal aspects.

8 A Yes.

9 Q I'm just a little puzzled as to why you wouldn't
10 tell them whether or not you felt the contract was enforceable.

11 A Well, I probably did. I talked generally about
12 the hearing, our participation in it. We hadn't really talked
13 with our management very much about the question of enforce-
14 ability of the contract.

15 Q Let me ask you this:

16 The Dow USA board on the 27th was considering the
17 Michigan Division position, weren't they?

18 A Yes, that was one of the factors.

19 Q And was it reported to them that from Dow's point
20 of view the contract was economically advantageous?

21 A On the 27th?

22 Q Yes.

23 A Yes, we still felt it was.

24 Q Did the question of the enforceability of the con-
25 tract come up at all?

WEL/eb9

1 A If it came up I would have just included it as part
2 of the discussion of the threat of a lawsuit and the question
3 of the contract, but in my own mind-- I didn't have a written
4 presentation but I had notes that I spoke from, and if I
5 touched on that, nobody questioned it. We didn't dwell on it
6 enough to really fix anything in my mind about any discussion.

7 Q The board did decide to continue with the contract.

8 A That's true.

9 DR. LEEDS: Excuse me, Mr. Paton.

10 Mr. Hanes, do you have those notes still?

11 THE WITNESS: No. I just had some handwritten
12 notes. I was the only one who didn't have a formal presenta-
13 tion with visuals and so on. I just had an outline and I
14 threw it away after the meeting.

15 DR. LEEDS: Thank you.

16 Thank you, Mr. Paton.

17 BY MR. PATON:

18 Q Mr. Hanes, did you tell the board about Mr. Falahee's
19 statement about the lawsuit?

20 A Yes.

21 Q Okay.

22 What did you tell the board about that?

23 A I think most of the board was aware of it by then,
24 but I -- well, I combined it with these statements that
25 Mr. Aymond had made where he had really refined the positions

WEL/eb10

1 that, in effect, as you stated earlier, that if we took one
2 of the first two positions we did not stand in danger of a
3 lawsuit; if we took one of the latter two positions, we would.

4 Q How long did your presentation to the board last?

5 A Oh, not more than ten minutes.

6 Q In your presentation to the board was the dis-
7 cussion -- some people have called it a "threat," but the
8 discussion of the lawsuit, was that a consideration that went
9 into your thinking in your remarks to the board?

10 A Yes.

11 Q What was your bottom line to the board? I mean you
12 apparently didn't discuss the enforceability of the contract.
13 What was the thrust of what you told the board?

14 A Well, I guess when you talk about the enforceability
15 of the contract, I obviously took the position that I felt
16 we should stay with the contract, observe it, that in view of
17 all of the presentations, it still looked like a favorable
18 arrangement for Dow.

19 The safety, the economics, each of the presenta-
20 tions indicated that it still could be attractive because
21 other costs were increasing, too. So when you talk about the
22 enforceability of the contract, my position was we still had
23 a valid contract.

24 Now we didn't go into the question of legal
25 niceties, if you will, about the various theories.

28 wrb/agbl

1 Q Is it correct to say that you intended to present
2 to the Board more that the contract was desirable than to
3 concentrate on whether it was technically enforceable or not?

4 A Yes.

5 Q Is that correct?

6 A I would say that's correct.

7 Q Now correct means -- I want this to be as precise
8 as we can, but you told the Board that the contract was
9 desirable, is that correct, or what did you say in that line?
10 Was it economically desirable?

11 A Well I didn't get into the economics, we had
12 another group that looked at the economics. I was looking at
13 the legal aspects of it, and I didn't go into the details --
14 when you asked me the question was it enforceable, I didn't
15 go into all the legal theories. But I felt that the contract
16 was still binding on us, and I talked about the possibility
17 of a lawsuit and, in evaluating it, my recommendation was
18 in we observe the contract and participate in the hearing --
19 with that in mind.

20 Q You say you didn't evaluate whether the contract
21 was economically advantageous or not.

22 A I was on the task force, and I was in meetings
23 where this was discussed, so I had a participation but that
24 was not my specific assignment.

25 Q Okay.

550 142

wrb/agb2

1 In making your recommendation to the Board did
2 you rely on the conclusion of other people that the contract
3 was economically desirable?

4 A Yes.

5 Q All right.

6 Now, did you also take into account the threat
7 of a lawsuit?

8 A Yes.

9 Q Now I want to ask you about prior to the meeting
10 of September 27.

11 Did you receive legal advice from any counsel in
12 or out -- inside or outside with respect to the validity or
13 the enforceability of the contract?

14 A Yes.

15 Q Who? First of all, tell us who you received that
16 advice from.

17 A Are we still in the position where we're talking
18 about -- well, Milton Wessel was an attorney who was involved
19 in this from the very first. Milton felt that there was a
20 good chance that the contract could be cancelled by Dow,
21 either on a frustration theory or a theory that Consumers had
22 not used its best efforts.

23 We also had the Kaye-Scholer firm do some research
24 for us on the question as to whether Dow had a good position
25 to challenge the contract, and they came back and, on balance,

b/agb3

1 they felt we did not.

2 Q I'm sorry, sir, I missed that.

3 A That we did not have a basis for cancelling the
4 contract. And I was already leaning in that direction, my
5 conclusion was we should not challenge the contract.

6 Q Did you receive advice on that subject from any
7 of the counsel inside or outside?

8 A I'm sure Lee Nute got involved in it to some
9 extent. I don't think anyone else did.

10 Q All right. Let me suggest a name: Fisher,
11 Franklin and Ford.

12 A I don't remember them being in it at that time.

13 Q All right, sir.

14 Lane, McDonald?

15 A I didn't have any contact with them. I don't
16 remember seeing any opinions from them.

17 Q Did you later?

18 A I think they got involved in a later period.

19 Q All right.

20 Bear with me just a minute, sir.

21 (Pause.)

22 Now in the meeting of the 27th you made a pre-
23 sentation, I think you testified, that last 10 minutes. Did
24 Mr. Wessel talk to the Board?

25 A No, I don't believe so.

wrb/agb4

1 Q Not at all?

2 A No.

3 Q Okay.

4 I believe the record will indicate there has been
5 a suggestion that he answered a question. Does that refresh
6 your --

7 A It still doesn't. He may have, but I don't
8 remember it.

9 Q Did anyone else, did any other lawyer speak to the
10 Board?

11 A I don't believe so. Mr. Nute, I think, was there
12 but I don't think he participated.

13 Q Was Mr. Friedman there?

14 A He may have been. I don't recall.

15 Q Your recollection is that he didn't speak to the
16 Board?

17 A I don't recall him speaking. I don't even recall
18 him being there.

19 Q And the review team recommendation to the Board
20 was unanimous?

21 A Yes, I would say so.

22 Q Was a slide presented to the Board, or was anything
23 presented to the Board to the effect that Consumers has
24 threatened Dow with a lawsuit on the order of magnitude of
25 \$600 million?

1 A I think Mr. Klomprens had a slide as part of his
2 summary presentation.

3 Q Let me show you, sir -- or rather you can turn
4 to Volume 4, tab 16, it's the fifth piece of paper from the
5 end, the fifth from the end of that group of papers under
6 tab 16. It's a document that reads:

7 "Consumers has threatened Dow with a
8 lawsuit on the order of magnitude of \$600 million."

9 Do you see it, sir?

10 Let me show you mine, sir.

11 A Oh, here it is.

12 Q All right.

13 To your recollection, was a slide presented to the
14 Board that had those words on it?

15 A Yes.

16 Q That would seem to me to have been more in your
17 area, but I guess that was presented by Mr. Klomprens because
18 he was -- why was it presented by him, sir?

19 A He was the chairman, and he summarized the
20 presentation.

21 Q Could I infer from that that the review team
22 considered that to be, since it was presented by Mr. Klomprens,
23 to be a significant factor?

24 A Yes.

25 Q After the meeting of the Board on the 27th, are

b/agb6

1 you aware of any conversations by any member of that Board
2 that would indicate to what extent they were affected by the
3 threat of a lawsuit?

4 A No, I don't recall any.

5 Q Okay.

6 Mr. Hanes, I want to move on to January 1977,
7 and I want to ask you about negotiations between Dow and
8 Consumers concerning the contract.

9 Do you remember that there was a meeting in
10 January, possibly January 11th, at which there was some dis-
11 cussion of a request for \$400 million by Consumers Power?

12 A I don't remember the time frame. I know there
13 were some suggestions that Dow should help finance.

14 Q Tell us what you know about that, sir.

15 A I don't recall very much about it. I don't
16 remember that date.

17 Q I'm not concerned about the date, just what you
18 remember.

19 A I remember sitting in in the meeting at one time
20 where this was discussed as to whether or not Dow should
21 participate in helping to finance the plant, and that was
22 rejected. I'm not even sure who was in the meeting, I thought
23 it was just a Dow group that I was in. I don't remember being
24 in such a meeting with Consumers, maybe I was.

25 Q Do you remember the figure \$400 million as a

b/agb7

1 request from Consumers?

2 A It sounds familiar.

3 Q Do you know what it was for?

4 A It was helping to finance the plant.

5 I was not involved in the negotiations that led
6 up to the modification of the contract. I was only indirectly
7 aware of what was going on.

8 Q All right.

9 Were you aware that some time in early 1977 -- did
10 contract negotiations break off?

11 A I think they started and broke off, as I recall,
12 two, or three times. These went over a number of years to try
13 and modify the contract.

14 Q Did Dow seek advice at about, let's say, during
15 the first six months of 1977, did you seek further advice on
16 a possible lawsuit between Consumers and Dow?

17 A We had, as the hearing went on, we had some
18 follow-up evaluations, I think again by the Kaye-Scholer firm,
19 on the conduct of the negotiations and how Dow stood with
20 respect to possible lawsuits, either as a defendant or as a
21 plaintiff.

22 Q Did you have any opinions in that respect from
23 Fisher, Franklin and Ford?

24 A I think we did in that time frame.

25 Q Were they written?

wrb/agb8

1 A I don't remember.

2 Q You could get us that information, is that correct?

3 A I'm sure I could.

4 Q How about Lane, McDonald -- I don't have the third
5 name, that's the name of a law firm, Lane, McDonald and someone
6 else.

7 A That doesn't ring any bells.

8 Q None at all?

9 A You see, most of this activity took place over in
10 the Michigan Division and Lee Nute and Milt Wessel and others
11 were handling the day-to-day things. I was across town in
12 another building and I just was updated periodically on the
13 general status, I really wasn't involved in the detail.

14 Q All right, sir.

15 But it is your recollection that during this
16 period -- your best recollection right now is that you did
17 receive, Dow did receive a written opinion with respect to
18 a possible lawsuit between Consumers and Dow from Fisher,
19 Franklin and Ford?

20 A I don't remember whether it was in writing or not.

21 Q You think you consulted with them in that regard?

22 A I'm sure we consulted with them.

23 Q Do you know what advice you received?

24 A As I recall, that advice was that we were in
25 pretty good shape. But further than that, I.....

wrb agb9

1 Q Could you tell me a little bit more what you mean
2 by that, sir, that you were in pretty good shape?

3 A That we weren't in violation of the contract if
4 Consumers brought a suit.

5 Q All right.

6 Just a minute, sir.

7 (Pause.)

8 MR. PATON: Mr. Chairman, I may be nearing the
9 end.

10 CHAIRMAN MILLER: All right.

11 (Pause.)

12 CHAIRMAN MILLER: Mr. Hanes, do you have a copy
13 of your notes there?

14 THE WITNESS: Yes, sir.

15 CHAIRMAN MILLER: Are you able to read those?
16 My copy is so poor --

17 THE WITNESS: These are the notes of the 21st?

18 CHAIRMAN MILLER: No, the notes taken by you on --
19 yes, the 21st, 9/21.

20 THE WITNESS: With great difficulty.

21 CHAIRMAN MILLER: Yours are no better than mine?

22 THE WITNESS: I can make most of them out.

23 CHAIRMAN MILLER: Well read me the first paragraph,
24 will you, and then we'll go over to the next page while they're
25 conferring.

rb/agbl0

1 THE WITNESS: The first paragraph?

2 CHAIRMAN MILLER: Yes, right at the very beginning,
3 the first sets of asterisks.

4 THE WITNESS: Well:

5 "October 6, Midland, Michigan Hearing on
6 Suspension of Construction Permits."

7 I think is the first one.

8 MR. PATON: Could I interrupt, Mr. Chairman, I
9 was tied up and I didn't hear your question. Could I just
10 see what paper you're referring to?

11 CHAIRMAN MILLER: I'm having him read me his
12 obscure notes.

13 MR. PATON: All right.

14 THE WITNESS: I don't know where they got that
15 typewriter. It must have been in an antique shop. I've
16 asked that same question a number of times.

17 Then the next one, I think, says:

18 "Prefers written testimony."

19 And then it says:

20 "Reserve October 6, 7 and 8."

21 CHAIRMAN MILLER: All right. And then the next
22 paragraph?

23 THE WITNESS: "Review legal aspects of decision,"
24 I believe it says. And then: "Report to CI" -- which would
25 be Consumers Power -- "before the 29th."

wrb/agbll

"No surprises. Dow witnesses essential."

CHAIRMAN MILLER: Now will you go down to the very bottom of the page where is the number three, "changed circumstances." Will you read the next three lines?

"Court referring...."

THE WITNESS: "Court referring to items Cherry used to ask court to re-open. Can't limit to 1974. Must talk about today."

And the copy apparently didn't pick up the last....

CHAIRMAN MILLER: Okay. Thank you.

THE WITNESS: I gather that meant we had to update all of our economic data and circumstances.

CHAIRMAN MILLER: You were making these notes, I take it, as Rex -- as noted in the margin, who would be Rex Renfrow, was talking?

THE WITNESS: Yes, sir.

CHAIRMAN MILLER: Do you have a better copy?

MR. POTTER: Not any better.

CHAIRMAN MILLER: Will you read us the last line?

MR. POTTER: The last line apparently was cropped off of this copy here.

THE WITNESS: It says:

"Original Final Environmenal Env.

Statement....," and then I can't read the last two words.

rb/agbl2

CHAIRMAN MILLER: Okay. We'll stop there.

I must say, though, that this is awfully difficult
to decipher.

2Cflws

You may proceed.

2C
WRB/wb1

1 MR. PATON: Mr. Chairman, I have four or five
2 more questions. If I could have five minutes I think I could
3 probably cut the time way down. I just think it would be very--
4 I'd appreciate a five-minute break.

5 CHAIRMAN MILLER: All right. We'll take a five-
6 or ten-minute break.

7 (Recess)

8 CHAIRMAN MILLER: Okay. You may proceed.

C9 9 BY MR. PATON:

10 Q Mr. Hanes, will you take a look at a document
11 there in the gray cover, I think it is called Board Exhibits.
12 Board Exhibit 1 is the first document, and it's a letter
13 dated September 8th, 1976 from Mr. Temple to Mr. Oreffice.

14 Have you seen that before?

15 A I believe I have.

16 Q Does that letter set forth what in your opinion
17 was the Michigan Division position?

18 A Yes, I believe it does. I think that what you
19 usually see is -- the last of the second paragraph and the
20 top of page 3 -- is generally what is deemed to be the
21 Michigan Division position.

22 Q Would you explain-- Was there an explanation of
23 the Michigan Division position at the meeting of 9/21?

24 MR. POTTER: You mean using this letter?

25 MR. PATON: No; just as stated.

WRB/wb2

1 MR. CHARNOFF: I'm sorry; I missed the question.

2 MR. PATON: Let me repeat the question.

3 BY MR. PATON:

4 Q At the meeting of September 21st was there any
5 discussion or explanation by Dow of the Michigan Division
6 position?

7 A As I recall, at that meeting everyone was already
8 familiar with it when the meeting started. I think Joe Temple
9 had previously told the Consumers people, and they were well
10 aware of it. So I don't recall us going into that.

11 Q I believe you said that at the 9/21 meeting there
12 was a statement that if Dow adopted Joe Temple's position there
13 would be a suit. Do you recall that?

14 A Yes.

15 Q Now, was it clear at that time what you meant --
16 what was meant by Joe Temple's position? For example, was it
17 clear that it was the Michigan Division position?

18 A Yes.

19 Q --as opposed to Mr. Temple's personal views?

20 A Well, we went into that on deposition. I can't
21 separate the two. Mr. Temple was the General Manager of the
22 Michigan Division, and when he announced the position I guess
23 I wasn't sure: I don't see how you can distinguish between the
24 two, really.

25 Q You're unable to make any distinction between those

rb/agbl
rb/wb2

1 two?

2 A Between Mr. Temple's position and the Michigan
3 Divisions? I can't.

4 Q I take it there was no discussion of that
5 distinction, if any, at the 9/21 meeting?

6 A I don't believe so.

7 Q Now I may have asked you this, Mr. Hanes, but
8 bear with me.

9 Your interpretation of the Michigan Division
10 position was generally that the contract was disadvantageous
11 to Dow, and then what, was there anything that followed that?
12 For example, did the Michigan Division position say what
13 happened after that, what happened after the decision that it
14 was not advantageous to Dow?

15 A I don't believe so. I haven't read this letter
16 in detail, there may be something in there. But my understanding
17 was that Joe Temple felt that we were at a critical juncture,
18 that we needed to re-evaluate everything, that we were running
19 out of time and that if, in fact, we were going to abandon
20 the Consumers project in some way, we needed to be getting
21 on with other plans. I don't think those other plans were
22 finalized. This is what he was driving at.

23 Q All right, sir.

24 You indicated I think that, at the meeting of 9/21,
25 Mr. Nute raised some kind of a question about using Mr. Temple

wrb/agb2

1 as a witness, do you recall that?

2 A Yes.

3 Q And what was it about Mr. Temple, or his views,
4 that Mr. Nute raised, what was the subject that he thought
5 was some kind of a problem?

6 A Well as I recall, the only question he had was
7 that Mr. Temple had already taken a position, and that the
8 U.S. Area--our team recommendation and the U.S. Area position
9 might well be contrary to the position Mr. Temple had taken,
10 that was his only thing that he questioned.

11 Q All right.

12 You say Mr. Temple had taken a position. When
13 you said that, did you mean the Michigan Division position?

14 A Yes.

15 Q All right.

16 Do you have an opinion as to whether or not the
17 Michigan Division position and the position ultimately taken
18 by the Dow-U.S. Area Board are different?

19 A Yes.

20 Q What is your opinion?

21 A I think they're quite different. I think that the
22 Dow-U.S. position, U.S. Area position was that there were
23 still some advantages to the Consumers arrangement and that
24 we would like to see the plants completed and continue with
25 our previous arrangement.

b/agb3

1 DR. LEEDS: Excuse me, Mr. Paton, let me get a
2 clarification of this point.

3 When you say there are still some advantages,
4 I'm having trouble trying to crank in the lawsuit problem.
5 I'm going to call it a problem, I don't know how else to
6 describe it -- but the lawsuit that would incur if certain
7 things had happened.

8 And when you said there were still some advantages,
9 does that mean net advantages because the lawsuit was there,
10 or does it mean advantages if you didn't have the lawsuit
11 sitting there as a possible lawsuit? Is my question clear?

12 THE WITNESS: Yes, Dr. Leeds, I think I under-
13 stand.

14 The various groups in this task force came up
15 with the conclusion there were still some economic advantages,
16 that the safety considerations were still positive. So
17 in evaluating the different pieces of it, each one came out
18 positive.

19 Now the lawsuit was a factor, but even if you
20 disregard the lawsuit, there were still some advantages in
21 the nuclear plant compared to any of the alternatives.

22 DR. LEEDS: And they disagreed, then, with
23 Mr. Temple's concern about the non-economic factors: timing,
24 financing and so forth and so on?

25 THE WITNESS: I think they are economic factors,

rb/agb4
1 but they disagreed with Mr. Temple conclusions.

2 We were also concerned about the endless delays
3 and the increased costs, and we recognized the same things
4 Mr. Temple had, but in reviewing the costs of alternative
5 sources of power and steam, they too had had escalations in
6 cost, so it still, depending upon fuel prices and a few
7 things, it still looked like it could be a good deal.

8 DR. LEEDS: So did the review committee, then,
9 disagree with Mr. Temple's economics?

10 THE WITNESS: Yes, we didn't agree with all of
11 them. But we did do our own study on economics and we came
12 up with a conclusion that it still could be attractive if we
13 could proceed on schedule.

14 DR. LEEDS: Okay. I'm still not clear on that one.
15 Did the review committee's economics show different
16 results than Mr. Temple's studies?

17 THE WITNESS: This wasn't my area, but it was my
18 understanding, yes, that we came up with slightly different
19 economics and they looked better than the ones Mr. Temple had
20 looked at.

21 DR. LEEDS: Mr. Klomparens would know?

22 THE WITNESS: I think so, yes.

23 DR. LEEDS: Okay.

24 Thank you, Mr. Paton.

25 BY MR. PATON:

wrb/agb5

1 Q Mr. Hanes, do you know to what extent the threat
2 of a \$600 million lawsuit was taken into account in determining
3 the economics -- the recommendation made by the review team
4 to the Board?

5 A I don't believe that was looked at as an economic
6 factor, I don't think we ever put a price tag on that, but
7 I don't know what part that was in the ultimate decision. I'm
8 sure it was a factor but it was one of many factors.

9 Q You mentioned that you had received some advice
10 from outside counsel, I think, some time in the first six
11 months of 1977 concerning the enforceability of the contract.
12 Was that different from the advice that you received in
13 September 1976?

14 A Could you clarify the question a little bit?
15 You mean enforceability against Dow or our ability to take
16 an action against Consumers? We were looking at both sides
17 of this. And as I recall the '77 decision, it was more Dow,
18 you're in a good posture to resist a suit by Consumers. So
19 that was my understanding.

20 I don't recall that going into a question of what
21 was our chances of succeeding on a best efforts or frustration
22 theory against Consumers.

23 Did I answer your question or did I understand
24 your question?

25 Q Yes, sir.

b/agb6

1 Before May of 1977, did you change your opinion
2 concerning the feasibility of a successful suit against
3 Consumers on the best efforts clause?

4 A Would you repeat that first --

5 Q Let me try it another way.

6 Did you change your thinking substantially in any
7 respect with regard to the legal situation between Consumers
8 Power and Dow in March, April, along in that period of 1977?

9 A No.

10 MR. POTTER: I'm going to object to that question.
11 It's so broad, are you talking now in terms of a possible
12 suit by Dow against Consumers, Consumers against Dow?

13 MR. PATON: Mr. Chairman, he's answered the
14 question.

15 CHAIRMAN MILLER: One at a time.

16 Have you answered the question?

17 THE WITNESS: Well as I understood the question,
18 did I change my opinion, and I guess no, I had not on either
19 side. We were in better shape, if anything, in resisting
20 a Consumers suit, and I hadn't really seen any change on our
21 possibility of a suit against them.

22 BY MR. PATON:

23 Q Did you do anything in the first six months of
24 1977 to prepare for a suit against Consumers?

25 A Not that I recall.

b/agb7

1 MR. PATON: Mr. Chairman, I just have the four
2 last questions.

3 MR. CHARNOFF: Is that the same four that --

4 MR. PATON: No, no, it's a new four.

5 CHAIRMAN MILLER: You're not going to start with
6 a fifth one, are you?

7 (Laughter.)

8 BY MR. PATON:

9 Q Mr. Hanes, there are five issues in this proceeding
10 before the Board, and I want to read you the first four and
11 ask you what your conclusion is with respect to those issues.

12 The first issue is this:

13 Whether there was an attempt by the parties or
14 attorneys to prevent full disclosure of or to withhold
15 relevant factual information from the Licensing Board in the
16 suspension hearings.

17 A In my opinion, there was not.

18 Q All right, sir.

19 Issue number two: whether there was a failure to
20 make affirmative full disclosure on the record of the material
21 facts relating to Dow's intentions concerning performance of
22 its contract with Consumers.

23 A In my opinion, there was not.

24 Q All right, sir.

25 Number three, whether there was an attempt to

b/agb8

1 present misleading testimony to the Licensing Board concerning
2 Dow's intentions.

3 A I don't believe there was.

4 Q The last question, whether any of the parties or
5 attorneys intended to mislead the Licensing Board concerning
6 the preparation or presentation of the Temple testimony.

7 A I don't believe so.

8 Q All right.

9 MR. PATON: That's all I have, Mr. Chairman.

10 CHAIRMAN MILLER: Thank you.

11 Mr. Charnoff?

2Dflws

2d ebl

CROSS-EXAMINATION

BY MR. CHARNOFF:

Q Mr. Hanes, as I understand it, you were responsible for task number two of the seven tasks into which the review group activities were broken down. Is that correct?

A Would you tell me what task number two was?

Q Review of the legal aspects, past, present and future outlook.

A Yes.

Q I think you have the Board exhibit document right there in front of you, Board Exhibit Number 1 being the September 8th letter, and Board Exhibit Number 2 follows that. It's the September 15th letter from Mr. Temple to Mr. Oreffice. --

A Right.

Q -- to which are attached two attachments, the first of which is the recommendations by Mr. Temple for the corporate review project.

I take it you've seen that document before?

A Yes, some time ago. I haven't seen it recently.

Q And Mr. Temple apparently recommended to Mr. Oreffice that you be responsible for task number two, according to that particular memorandum.

A Yes, he has my name on it.

Q Now who told you about your responsibilities?

A Mr. Oreffice.

eb2

1 Q And did he give you this particular assignment in
2 terms of the wording that appears next to item two there,
3 "Reivew of the Legal Aspects, Past, Present and Future Out-
4 look," with the asterisked item that refers to a 1975 deci-
5 sion?

6 A I presume so. He probably gave me a copy of this
7 letter.

8 Q Okay.

9 Did anyone else serve with you in performing this
10 particular task?

11 A Well, I worked with Lee Nute quite closely, and
12 in our meeting with Consumers Power, Al Klomparens sat in on
13 it. But I had access to others. I may have talked with others
14 but I don't recall at the moment.

15 Q Okay.

16 So primarily Lee Nute was staffing this review?

17 A Yes.

18 Q Now how did you function in connection with this
19 time period with Mr. Nute? Do you remember? Did you ask him
20 to develop any memoranda for you, or to sit down and talk with
21 you about certain things, or what?

22 A Well, as I said earlier, I had not been closely
23 involved with what went on.

24 The first thing I did was to get the Consumers'
25 contract out and read it, and then I asked Lee for some

eb3

1 background on it. I may have talked with others. We did not
2 have a formal agenda or a formal memorandum that we gathered
3 together.

4 Q Under the terms past, present, and future, what
5 kind of questions did you ask yourself?

6 A Well, I started out looking at the contract as to
7 what is the history of the contract. There had been some
8 amendments made previously. The background of some of the
9 negotiations with Consumers surrounding those amendments, trying
10 to get a feel for what had happened that had made this tre-
11 mendous looking deal go sour over the years.

12 Q Did you want to know what would happen if the con-
13 tract were terminated?

14 A We did explore that, yes.

15 Q Okay.

16 When you say "we," it was you and Mr. Nute?

17 A Right. Mr. Wessel and I talked some about that, too.
18 And as I mentioned, we did get an opinion from the Kaye,
19 Scholer firm.

20 Q Now the discussions with Mr. Nute took place during
21 the time period from the time you got this assignment until
22 September 27th?

23 A Yes.

24 Q How about the discussions with Mr. Wessel? Do you
25 remember them?

eb4

1 A Well, he was in and out during that period of time
2 and I probably met with him two or three times, not very often
3 but occasionally.

4 Q Do you remember any particular discussion with
5 Mr. Wessel immediately before the September 27th meeting with
6 the Dow USA board?

7 A No, I don't recall any specifics.

8 Q Do you remember any sense that-- I think you testi-
9 fied in response to a question by Mr. Paton that Mr. Wessel
10 took a much stronger position than you were taking with regard
11 to the susceptibility of a successful termination of the suit
12 by Dow or a suit against -- the termination of the contract by
13 Dow or a suit against Consumers.

14 A Yes, we did that. And I think I had probably a
15 couple of law clerks do some research along that line. But
16 Mr. Wessel felt the probabilities were better than I did all
17 along.

18 Q When you say "all along" do you mean during this
19 period of the 10 or 12 days you were looking at this?

20 A Yes.

21 Q So you might have talked with him in the early
22 stages of the 10- or 12-day period and then again at the end?

23 A I think I did.

24 Q Do you remember at any time toward the end modify-
25 ing your position in any significant way because of Mr. Wessel's

eb5

1 observations to you?

2 A I think my position became stronger, if anything,
3 rather than weaker.

4 Q I see.

5 Did you have any involvement in the formulation of
6 this particular document that's known as Board Exhibit 2,
7 that is, in the formulation of the seven tasks, or was the
8 first time you were acquainted with it only after Mr. Orefice
9 told you your assignment?

10 A No, that was my first awareness. I didn't help
11 divide this up.

12 Q Do you recognize the name R. W. Barker?

13 A Yes.

14 Q Was he an associate general counsel of the Dow
15 Chemical Company?

16 A Yes, he is.

17 Q What is your title now, sir?

18 A I'm also associate general counsel. We have the
19 same title.

20 Q You have the same title?

21 A Yes.

22 Q Is he still with the company today?

23 A Yes.

24 Q So you are in effect on the same level at this
25 point in the corporation?

eb6

1 A Yes, I'd say so, except I'm a vice president of
2 Dow US and he's not. He has worked for me two or three times --

3 Q Okay.

4 A -- in the course of his career.

5 Q In 1976, the summer of 1976, what was your relation-
6 ship to Mr. Barker at that time?

7 A Mr. Barker at that time was in what we called the
8 corporate legal department. I was running the US Area legal
9 department, so he was not reporting to me. He was reporting
10 to the general counsel of the corporation which was Mr. Greening
11 at that time.

12 Q Do you remember Mr. Barker ever telling you that
13 in the summer of 1976 he had a telephone conversation with
14 Mr. Cherry and he was writing some letters to Mr. Cherry, or
15 a letter to Mr. Cherry?

16 A Yes, I do recall, now that you mention it, that he
17 had been in contact with Mr. Cherry, but I think it was only
18 because when the call came in he was the only one around. It
19 was that kind of a thing; it wasn't part of his responsibility.

20 Q Do you recall his clearing any letter that he was
21 writing to Mr. Cherry?

22 A I don't recall.

23 Q Volume 2, Number 24. If you will locate that,
24 please?

25 Do you have that, sir?

eb7

1 A I have it.

2 Q At that tab number is there a letter addressed to
3 Mr. Cherry dated August 19, 1976?

4 A Yes, there is. And I got a copy of it.

5 Q Could you take a moment just to review that letter?

6 (The witness reading.)

7 That letter shows that a carbon copy of that letter
8 went to you. Is that right?

9 A That's correct.

10 Q Do you remember seeing that letter?

11 A I'm sure I did.

12 Q Do you remember discussing it with Mr. Barker before
13 it went out?

14 A No.

15 Q When you saw it, did you have any occasion to
16 agree or disagree with the statement that appears in the first
17 sentence of the second paragraph which says:

18 "I understand that there has been no
19 change in Dow's position on or plans related to the
20 Midland Nuclear Plant, and no present intention to
21 change."

22 A No, I had no reason to disagree with that at that
23 time.

24 Q Okay.

25 And you don't have any recollection that Mr. Barker

eb8

1 might have cleared that statement with you at the time?

2 A No. I may have been out of the city or something;
3 I don't know. I see Mr. Barker didn't even send it, his
4 secretary did.

5 Q He was out of the city, too. Apparently that's a
6 habit.

7 A Right.

8 Q Then returning to your role in the review group,
9 one of the things you did you said was to arrange for the
10 September 21st meeting. Is that right?

11 A Yes.

12 Q And were you seeking information from Consumers at
13 that meeting with respect to both the past, present, and future
14 outlook of the legal aspects of the Consumers contract?

15 A Yes, we wanted any input that Consumers might have
16 to help us reach a recommendation.

17 Q Okay.

18 So while you didn't-- As Mr. Paton asked you, you
19 did not ask them under what circumstances they might sue you,
20 you did ask them or invite their comments on the past, present
21 and future outlook of the legal relationship between Consumers
22 and Dow. Is that right?

23 A We didn't get into specifics, like we didn't really
24 delve into contract modification negotiations and all that sort
25 of thing. And I think Lee Nute and Judd Bacon had spent many,

eb9

1 many hours working on this kind of thing.

2 We didn't dig into that. We were mainly looking at--
3 The present and future, really, was our main emphasis.

4 Q Present and future in terms of what would happen if
5 the contract were left undisturbed and what would happen if
6 the contract were disturbed?

7 A Well, our main thrust was the hearings that were
8 coming up in the immediate future, and what was Dow's role,
9 what was our participation. We had an immediate problem that
10 we were focusing on, and this was not just a broad, general
11 discussion. It was pretty specific about these hearings.

12 Q But you didn't understand your assignment to be
13 just to get an understanding of the NRC hearings outlook, did
14 you, or did you think it also embraced the contractual rela-
15 tionship, not from a negotiation standpoint but the basic
16 contractual relationship?

17 A Yes, but we weren't-- I didn't feel that I was
18 charged with negotiating further contractual changes at that
19 moment.

20 We did talk about modification of the contract as
21 being one way to help resolve some of the issues to make us
22 work better jointly in the hearings, but the immediate problem
23 was the hearings.

24 Q Okay.

25 I think you said to Mr. Paton that while the Dow

eb10

1 Michigan position was as articulated in that September 8th
2 letter to Mr. Orefice, that Mr. Temple nor the Dow Michigan
3 position had identified what it might do if the nuclear pro-
4 ject were abandoned. Do you remember saying that to Mr. Paton--

5 A Yes, I think there were a lot of possibilities
6 discussed, but I don't know of any firm plans of what Dow was
7 going to do.

8 Q -- if the project were abandoned?

9 A Yes.

10 Q But one of the possibilities perhaps was abandon-
11 ment?

12 A Right.

13 Q Did you understand from the Dow Michigan position
14 that one of the possibilities was abandonment of the nuclear
15 project?

16 A Yes.

17 Q And under such circumstances did you want to know
18 what the legal consequences would be of such an abandonment?

19 A Yes.

20 Q And so one of the purposes of the -- or a number
21 of the purposes of the September 21st meeting were, one, to
22 find out more about the NRC process and what was going to be
23 taking place and to understand perhaps what the consequences
24 would be if the project were abandoned?

25 A Right.

eb11

1 Q Now if I could ask you to turn to your notes of the
2 September 21st meeting, which appears in Volume 7, Tab 7, --

3 A All right, I have it.

4 Q I take it you took these notes sequentially as
5 events transpired or as comments were made during the course
6 of the meeting. Is that right?

7 A Yes, I think so.

8 Q Okay.

9 And right at the outset of the meeting, as I under-
10 stand it, you have an indication there on the second or third
11 line that says: "Prefers written testimony."

12 Is that a statement that was made by Mr. Renfrow
13 or somebody from Dow or what?

14 A That would have been Consumers' request. Whether
15 Mr. Renfrow made it or somebody else I'm not sure.

16 Q Okay.

17 And then three or four lines below that it says:
18 "Report to CP before the 29th."

19 What does that have reference to, do you know?

20 A They wanted to know our responseto the position that
21 Dow was taking, whether we were supporting Mr. Temple's posi-
22 tion or whatever Dow's position was. They said they needed
23 to know by the 29th, before the hearing started, so they could
24 get ready for the hearing, the preparation of testimony and
25 so on.

eb12

1 Q Okay.

2 And then the statement, "No surprises." Does that
3 mean they didn't want to be surprised?

4 A They did not want to be surprised. They wanted to
5 know in advance.

6 Q Okay.

7 But they specifically did ask for the decision of
8 Dow before the 29th of September?

9 A Yes.

10 Q Did they relate that to some brief they were filing
11 at the time, do you remember?

12 A Well, it was the timetable they were working on.
13 I think-- If you look at the first line, I think October 6th
14 was the setting of the time for the hearings to commence so
15 they felt that just as a working timetable they they had to
16 know where we stood and had to be in a position to move for-
17 ward by that time.

18 Q Okay.

19 A There may have been some other reason; I don't
20 recall.

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1 Q And then the next sentence says:

2 "Dow witnesses essential," with an exclamation
3 point.

4 A Right.

5 Q This again was a statement by somebody from
6 Consumers, perhaps Mr. Renfrow?

7 A Yes.

8 Q Now was there any statement, then, as to what the
9 Dow witness would testify to?

10 A Well part of the remand, as I recall, was that
11 there was a need to update the situation as to did Dow still
12 need the steam, did Dow still need the electricity, was it
13 still a viable project as far as Dow was concerned because
14 we were probably the major user of the products of these
15 two plants. So they said there really was no way that
16 Consumers could put on that testimony on behalf of Dow, that
17 we had to put on a witness to do this.

18 Q Okay.

19 Was there a discussion, then, as to who the
20 witness might be?

21 A I think that came along a little later in the
22 meeting. There was some discussion, but I think that was
23 later in the meeting.

24 Would you want me to go into that? I think I
25 covered most of it with Mr. Paton.

9.450

wrb/agb2

1 Q I understand. I just want to know when that
2 discussion took place, whether it took place at this point --
3 as I recall your testimony, Mr. Nute raised some questions
4 about Mr. Temple being a witness, good, bad or otherwise
5 because of certain statements he made, and Mr. Renfrow made
6 the statement that he allegedly made and then you had your
7 reaction. Did that take place here at the early part of the
8 meeting?

9 A I think it was later in the meeting.

10 Q Okay.

11 Do you remember any discussion at this point as
12 to who the witness might be?

13 A I don't believe there was any discussion at that
14 point, just the kind of things that Dow would have to testify
15 to.

16 Q Okay.

17 And there was no statement, then, by Mr. Renfrow,
18 at least at this point, as to who the witness might be or
19 might not be?

20 A My notes don't indicate when that was, and my
21 recollection is that it was later. I may be wrong, but....

22 Q Then after the asterisks, there's a line that
23 appears:

24 "What issue, what is Dow's role?"

25 What does that pertain to?

wrb/agb3

1 A Well this was just to outline what the issues are
2 in the hearings, what the background is and what is Dow's
3 participation from Consumers' standpoint. It was part of the
4 general background that Mr. Renfrow was giving us.

5 Q Okay.

6 And what happened, did Mr. Renfrow in effect say
7 this is what I'm going to talk about, or did you people say
8 or ask these questions at this point, do you have any idea?

9 A It could have been either way. I don't recall
10 whether we asked the question or whether he volunteered.

11 Q Okay.

12 Was there any discussion --

13 A The fact that his name is there would indicate
14 to me that he probably said -- he was making a presentation
15 to us, really, that he probably led off the presentation with
16 that statement, what are the issues and what is Dow's role.

17 Q Does that mean that the information appearing
18 above that on page one of your notes were statements made by
19 other than Rex Renfrow?

20 A They could have been. I think Mr. Falahee made
21 some of those statements. Judd Bacon may have participated.
22 Mr. Renfrow -- when Rex started his formal presentation, I
23 wrote his name.

24 Q Now do you recall any discussion of the Dow-
25 Consumers continuing dispute, do you remember language like

wrb/agb4

1 that being used at the meeting?

2 A I guess I'm trying to get the framework of what
3 you mean by continuing dispute. I don't know that there was
4 a continuing dispute. We had a lot of differences, we were
5 working things out all the time.

6 Q Okay. So at that time, if you heard the words
7 "Dow-Consumers continuing dispute," you really wouldn't have
8 known what that relates to, other than the fact that there were
9 on-going negotiations?

10 A It doesn't ring any bells.

11 Q Okay.

12 Do you recall any discussion of whether Mr. Cherry
13 would or would not be present at the hearing?

14 A Yes, very distinctly.

15 Q What was that discussion all about?

16 A Mr. Renfrow said that Mr. Cherry -- he very
17 positively said Mr. Cherry would not be at the hearing, he
18 was having economic problems and he had other things to do
19 and that he just knew that Mr. Cherry wasn't going to be
20 there.

21 Q Did you feel otherwise?

22 A Very strongly. We challenged him on that, and he
23 still was so positive that Mr. Cherry was not going to be
24 there that we dropped it. But I remember after the meeting
25 commenting to Lee and Al Klomparens that I didn't know

wrb/agb5

1 Mr. Cherry, but in view of what I heard about him, he probably
2 would get out of his deathbed and hitchhike to Midland rather
3 than miss that. And it turned out he did show up.

4 Q But at the meeting itself you also remember
5 challenging him on that or asserting that you thought that
6 Mr. Cherry would --

7 A We disagreed with his conclusion, and he was
8 very positive.

9 Q Okay.

10 Now if I can ask you to turn to page three of
11 your notes of September 21, there's a reference there to
12 "G. Decker - Contractual fight," in the middle of the page.

13 A Yes.

14 Q What does that have reference to?

15 A Well in the course of the meeting, one of the
16 Consumers people -- and I believe it was probably Jim Falahee
17 -- had mentioned that Gerry Decker had been in Jackson and
18 that he had made some kind of a comment like We shouldn't
19 be getting into a big contractual fight, and I made that note
20 because I knew that Gerry Decker was in contact with the
21 Consumers people, but his area of expertise was fuel, cost
22 of fuel and alternate kinds of fuel. I think he was looking
23 into coal costs and other things for comparison purposes.
24 And I was upset that Gerry was meddling in the legal things
25 that he shouldn't have been meddling in as far as I was concerned.

wrb/agb6

1 Q So the note does not mean that there was an on-going
2 contractual fight?

3 A No, not at all. He's saying we shouldn't get
4 into a contractual fight, really. I didn't disagree with him,
5 but I just felt it wasn't what he was down there for.

6 Q Going back to your notes a little bit, in terms
7 of what we were talking about a minute ago, in terms of
8 Mr. Cherry, there is no indication in your notes that there
9 was discussion at the meeting of September 21 about whether
10 Mr. Cherry would be present or not. Does that mean that
11 you were talking at that time?

12 A No, I guess I didn't feel it was that significant.
13 I had the clear thought that I just was surprised at counsel
14 going ahead in preparation for hearing on the basis that
15 some opposition wouldn't show up, I thought that was rather
16 strange, but I didn't include it in my notes.

17 Q Was the scope of the presentation such that it
18 appeared like even if they believed that Mr. Cherry would not
19 appear, that they were preparing on the assumption that he
20 would not appear?

21 A I had that feeling. The fact that he felt the
22 hearing would only last three days, this would be very short,
23 to the point, we'd be in and out, was largely based on the
24 fact that he didn't expect Mr. Cherry to be there.

25 Q And he was assuming that there wouldn't be an

wrb/agb7

1 extended hearing, is that what you're saying?

2 A Yes.

3 Q And the way or the manner in which Rex expressed
4 that, if he did, was not such that it was a significant enough
5 a point for you to mark down in your notes?

6 A I didn't make any notes of it.

7 Q Now there is no discussion elsewhere in your notes,
8 other than on page one, about a Dow witness, is that correct?

9 A I think when you get over on the bottom of the
10 second or the top of the third page they start getting into
11 the specific kinds of things that would have to be gone into
12 in the suspension hearings. And I think at that time we got
13 into a little more detail. I didn't use the term Dow
14 witness.

15 Q It's a little bit blurred.

16 A It sure is.

17 Q -- on my copy, and I assume on the Board's
18 as well.

19 But I take it what appears at the bottom of
20 page two and the top of page three are the issues that would
21 be considered in the suspension hearing?

22 A Yes.

23 Q Some of which would pertain to Dow matters and
24 some of which would not?

25 A Right. Like talking about reasonable alternatives,

wrb/agb8

1 the effects of delay, tilt cost-benefit analysis, these are
2 the kind of things that they wanted Dow to testify to and then
3 Consumers would also have to testify to these kind of things.

4 Q But again there's no discussion in here, there's
5 no part of your notes where one could tell of who the Dow
6 witness might be or what his qualities would be?

7 A Right.

8 Q Now you testified --

9 A You've got changed circumstances, the Dow contract
10 at the bottom of the first page. We talked about how we'd
11 have to update some data, but that was for the big hearing,
12 which presumably was going to happen later.

13 Q And again in the context of the issues that would
14 have to be addressed, as distinguished from what kind of a
15 Dow witness?

16 A The kind of a Dow witness would have to be capable
17 of discussing these things, so it could have come in either
18 place.

19 Q Okay.

20 Now you testified before in talking to Mr. Paton
21 about the fact that when Mr. Nute suggested that there may be
22 a problem with Mr. Temple being the witness because of his
23 past statement, Mr. Renfrow suggested that perhaps it might
24 be a witness unfamiliar or unaware of Mr. Temple's position
25 and you said very firmly that you'd have to have a knowledgeable

wrb/agb9

1 witness and one of the thoughts in your mind was that anybody
2 who's knowledgeable, presumably knowledgeable about any of
3 these issues that Mr. Renfrow talked about, is that what
4 you meant by knowledgeable?

5 A Yes.

6 Q Any such knowledgeable person would also have to
7 be knowledgeable of Mr. Temple's position, is that correct?

8 A That's correct.

9 Q Do you remember saying that at the meeting?

10 A No, I didn't say that. I didn't know what
11 Mr. Renfrow was driving at. And when he popped out with this
12 idea Well maybe we ought to have a witness who's not familiar
13 with Joe's position, my immediate response was I want to clear
14 the air that any Dow witness is going to be very knowledgeable
15 and he's going to have all the facts and he's going to disclose
16 all the facts.

17 So rather than let that conversation go down that
18 path, I chopped it off with a little speech along that line.
19 And really that pretty much ended that discussion.

20 So I don't know exactly what he had in mind.
21 But one of the thoughts that went through my mind was just
22 what you said.

23 Q Do you have a copy of your deposition?

24 A No, I guess I don't.

25 MR. CHARNOFF: Mr. Potter, could you furnish

wrb/agbl0

1 Mr. Hanes with a copy of his deposition?

2 (Document handed to the witness.)

3 BY MR. CHARNOFF:

4 Q Could I ask you to turn to pages 45 and 46 and
5 review those briefly?

6 You may want to read on through page 47.

7 (Witness reading document.)

8 Q Now as I understand it on these pages in the
9 deposition, you do indicate that Mr. Nute expressed some
10 concern along the lines of Joe Temple being the witness because
11 of his previously announced posture, and you said you personally
12 felt that Mr. Temple was emotionally involved as well as
13 logically involved, is that right?

14 A Right.

15 Q Do you remember saying anything to that effect
16 at the meeting?

17 A No, I didn't say anything.

18 Q So the only one from Dow who might have said
19 anything or did say anything was Mr. Nute, about the concern
20 about Mr. Temple being a witness?

21 A Right.

22 Q Okay.

23 Then if you look at the bottom of page 45,
24 you say:

25 "One of the basic questions was who was

wrb/agbl1

1 Dow's witness going to be?"

2 And Temple was the only name mentioned.

3 And the concern was raised:

4 "Okay, with Joe already having been
5 quoted the way he had, how effective a witness
6 is he going to be?"

7 That basically what was Mr. Nute was expressing
8 concern about?

9 A Yes, I think so.

10 Q And then earlier in talking to me you said that
11 Mr. Renfrow popped out with -- and I think the word "popped"
12 was your word -- with whatever statement he allegedly made
13 and then you responded to that. Is that correct?

14 A That's correct.

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1 Q When you said "popped out," did you have the sense
2 that that was not a planned, deliberate proposal by Mr. Renfrow?

3 A Yes. I didn't believe it was planned. I think it
4 just came up on the spur of the moment.

5 Q It was, in effect, a reaction to the statement of
6 concern about Mr. Temple's prior position?

7 A Possibly.

8 Q And then, in turn, you just said simply, "Look, we
9 have to have a knowledgeable witness?"

10 A Right.

11 Q And that was basically the end of the discussion, I
12 take it?

13 A Yes.

14 Q Mr. Renfrow didn't quarrel with that, is that right?

15 A That's correct.

16 Q Nor did Mr. Bacon?

17 A Correct.

18 Q Nor did Mr. Falahee?

19 A That's correct.

20 Q Nor did Mr. Nute, I take it?

21 A That's correct.

22 Q So what we have, in effect, is a spontaneous
23 response to a question or statement of concern about Mr. Temple,
24 which was said once and then the issue died and nobody raised
25 the question of somebody being a witness that was either not

1 knowledgeable or not aware of Mr. Temple's position?

2 A Yes.

3 Q Now, you talked about the \$600 million figure with
4 Mr. Paton, and I believe your testimony was that that was a
5 number that you don't know where it came from, you don't know
6 whether you came up with it, was your wording this afternoon,
7 or whether Consumers Power Company did, is that right?

8 A That's right. I tried to add up the number, and it
9 isn't in my notes, so I don't know whether it was their number,
10 or we added up pieces and got it, or what?

11 Q So, if the number didn't come up from Dow at the
12 September 21 meeting, or from Consumers, rather, at the
13 September 21 meeting, then it came up either from Dow or
14 Consumers after that, is that correct?

15 A That would be right.

16 Q Is there anything in your notes that suggested that
17 the number came up at the September 21 meeting?

18 A Well, there were some numbers used in the September
19 21 meeting.

20 Q Were those numbers that --

21 A -- on suspension, and that sort of thing. But I
22 didn't put in my notes any actual numbers as the result of a
23 lawsuit.

24 Q Okay. So the numbers that were discussed at the
25 September 21 meeting were the financial impacts of various kinds

1 of suspensions?

2 A Right.

3 Q But they were not numbers relating to the damages
4 that Consumers might suffer which it might try to reclaim from
5 Dow?

6 A That's right.

7 Q All right.

8 Now, so that whereas earlier you testified -- and
9 I think even on your deposition you said -- there were two
10 things that struck you as being important on September 21. One
11 was the question of the possibility for an unaware witness, and
12 the other was a claim for \$600 million as a lawsuit, isn't that
13 right?

14 A That's right.

15 Q All right. Now, addressing the \$600 million lawsuit
16 that aroused your concern on September 21, if there was no
17 number of that sort that came up then, then what you were
18 impressed with, I take it, was just that we were going to have,
19 in the words of at least one possible participant in that
20 meeting, we were going to have a hell of a big lawsuit?

21 A That's right. There were some -- I mean we knew
22 what the investment was. I think Consumers had \$340 million in
23 the thing, and when you talk about Consumers Power going
24 bankrupt, it was obvious it was going to be a huge lawsuit.

25 But I do not know where the \$600 million came from.

1 Q So it was the concept of a huge lawsuit that aroused
2 your concern at the September 21st meeting?

3 A Right.

4 Q Now, at that September 21st meeting, in response to
5 the first issue, you did -- that is, the question of the unaware
6 witness -- you did make a response then that quieted that
7 particular issue?

8 A Yes.

9 Q As to the large lawsuit question, do you remember
10 responding to that, feeling so strongly that you had to say
11 something?

12 A We talked about that to some extent, but more along
13 the lines of what is the requirement of Dow's support. We
14 explored that to some extent.

15 Q When you say "we" are you talking about you and --

16 A Consumers and the Dow people. There were only six
17 of us in the room, so it was kind of a free for all.

18 Q Let me get this:

19 Your personal involvement at the meeting in terms
20 of your personal articulation and responses, is there any
21 specific one that you made because you felt so strongly about
22 it?

23 A Well, I disagreed with Mr. Falahee's interpretation
24 of the requirement that Dow support Consumers. Yes, I expressed
25 that disagreement.

1 Q Is that reflected in your notes anywhere, do you
2 know?

3 A I don't recall.

4 Q Is there anything in your notes relating to the
5 issue of support?

6 A I think there is.

7 (Witness reading documents.)

8 I don't see it, but we certainly discussed it.

9 Q Did you or Mr. Nute do most of the talking for Dow
10 at this meeting? Or Mr. Klomparens?

11 A Well, Consumers' people did most of the talking. I
12 guess Mr. Nute and I probably participated about equally. Mr.
13 Klomparens didn't participate very much.

14 Q When you talked about support under the contract,
15 did you talk about it in terms of: If one of the possibilities
16 that would flow from the Dow Michigan position as we established
17 earlier was possibly abandonment of the nuclear project, that
18 that would not be supportive?

19 A I think that was rather clear, yes.

20 Q Was there a lot of discussion on that?

21 A Well, they took the position that would be clearly
22 in violation of the contract, and I think that was a clear-cut
23 case where if we took that position we had a lawsuit on our
24 hands. There wasn't any question about that.

25 Q Is that where the basic thrust of the discussion of

1 the lawsuit potential or support obligations focused, or was it
2 on something else?

3 A No, I think it was on the Temple announced position,
4 that if we took that position that that would be not supportive.
5 When we talked about supporting Consumers, we did talk specifics.
6 We took the position that if we came up with the fact, that
7 would be supporting Consumers, and they said that wasn't
8 enough, that the whole project had to be good, and we had to
9 be supportive of it.

10 Q And when you said if you came up with the facts,
11 even if the facts led to abandonment, is that what you're
12 saying?

13 A I don't . . .

14 Q One of the possibilities that you said Mr. Temple's
15 position could result in is abandonment, which would be a
16 breach situation, and --

17 A Well, the facts would speak for themselves. I guess
18 you lose me a little bit on your question. I'm not sure what
19 you want.

20 Q All right. Let me start back again:

21 You said there was discussion with the Consumers
22 representatives with regard to the need to support the contract,
23 or to support the project, and that coming up with the facts
24 alone might not be sufficient in their view?

25 A Right.

Q If coming up with the facts alone resulted in the possibility of abandonment by Dow -- that is, the Joe Temple-Michigan position -- would that be --

MR. POTTER: Excuse me. I object. If I understood you correctly, you characterized Joe Temple's position as being abandonment.

MR. CHARNOFF: I said one of the possibilities of that position. I think that's the witness' own terminology.

BY MR. CHARNOFF:

Q If one of the possibilities that flowed from the Temple-Dow Michigan position was abandonment of the nuclear project, as you testified, that wouldn't be supportive of the contract or the project, would it?

A I'm still not sure I follow your question.

Q If you testified to the facts which lead to the possibility of abandonment --

A If the facts showed that economically it was not viable, are you saying? Are you assuming that?

Q No, I'm assuming the facts that Joe Temple considered in presenting his position which allowed for -- one route allowed for abandonment of the project. Would that be supportive of the project?

A Well, assuming his position was that it wasn't --

CHAIRMAN MILLER: Excuse me. I want to find out about this abandonment. I'm not hearing you too well, your

1 voices are very low. I'm not sure whether the witness himself
2 has testified that one of Joe Temple's positions would lead to
3 abandonment, if I understand the question.

4 MR. CHAPNOFF: What he testified to, sir, is that
5 there were a number of possibilities that flowed from the
6 Joe Temple position, one of which was to look at alternate
7 steam supplies, he testified in answer to Mr. Paton, and
8 another was abandonment of the nuclear project, and that could
9 be a real possibility in effect, isn't that right?

10 CHAIRMAN MILLER: Have you so testified? I must
11 have missed it.

12 THE WITNESS: Well, he was asking me what the
13 alternatives were, and I was spelling out some of the possible
14 alternatives.

15 I don't know that abandonment was ever spelled out
16 as an alternative. I was giving you what I saw as possible
17 alternatives.

18 MR. CHARNOFF: Okay, that's all we were looking for.

19 BY MR. CHARNOFF:

20 Q We agreed that Mr. Temple never spelled out what
21 the alternatives were, but you saw, in understanding the Dow
22 Michigan position, that one of the possible alternatives flowing
23 from that is abandonment of the nuclear project?

24 A That could, in my opinion, that could have been an
25 alternative.

1 Q I take it that anybody else reading the statement
2 of the Dow Michigan position could come up with the same
3 reading?

4 MR. POTTER: Objection. Whether it was a lawyer or
5 not a lawyer would have a bearing on it.

6 CHAIRMAN MILLER: Sustained.

7 (Pause.)

8 MR. CHARNOFF: I'm sorry. Are you through, Mr.
9 Miller?

10 CHAIRMAN MILLER: I just said, "Sustained."

11 MR. CHARNOFF: I understand. But you were asking
12 him some other questions, and --

13 CHAIRMAN MILLER: Oh. No, I just wanted to under-
14 stand what the witness' response was, and I think you have
15 cleared that up, yes.

16 THE WITNESS: Consumers would have sued, I think,
17 had we come up with anything that they considered not to be
18 supportive of the project at that point.

19 BY MR. CHARNOFF:

20 Q Yes. And when you talked about non-support, did
21 you talk in terms of what the ultimate future of the project
22 would be with Consumers? I'm trying to get an understanding of
23 that discussion that you say you had with Mr. Falahee in which
24 you participated and Mr. Nute participated.

25 A He referred to a specific clause in the contract

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1 which says that Dow would support Consumers in hearings, and
2 that is what the contract said.

3 So then we got into a discussion of what is support
4 of Consumers in hearings, and that's where our disagreement was.
5 I don't think we ever resolved that disagreement.

6 Q I see. And the nature of the disagreement was that
7 you felt that all you had to do was what?

8 A We thought that our responsibility was to run cost
9 analyses, economic studies, environmental studies -- this
10 kind of thing that Dow had peculiar knowledge for, and present
11 that in support of Consumers in hearings.

12 But they took the position, no, we had to go
13 further. We had to, in effect, be an advocate and sell the
14 project, is the way I understood it.

15 CHAIRMAN MILLER: Who took that position?

16 THE WITNESS: That was my understanding of Mr.
17 Falahee's position.

18 CHAIRMAN MILLER: Did he express it in those terms
19 or similar terms at this particular meeting on the 21st of
20 September?

21 THE WITNESS: He didn't use those terms, but he
22 clearly said that my concept of support was not adequate, it
23 had to be something more than that.

24 BY MR. CHARNOFF:

25 Q Was he looking for an ultimate Dow position beyond

1 the analysis of the facts?

2 A I don't know.

3 Q You don't know. And you didn't understand that
4 that's what he was looking for, beyond the statement or an
5 analysis of the facts?

6 MR. POTTER: Well, I'm going to object, if the
7 question is meaning to suggest what Mr. Falahee's state of
8 mind was.

9 MR. CHARNOFF: I'm trying to understand --

10 CHAIRMAN MILLER: Sustained, unless the question and
11 the answer are restricted to what the witness knows of his
12 own knowledge.

13 MR. CHARNOFF: Well, that's all I'm looking for, is
14 his understanding of the scope of the disagreement.

15 CHAIRMAN MILLER: As expressed at this meeting.

16 MR. CHARNOFF: As he understood it at that meeting,
17 and as expressed would be even more helpful, yes.

18 THE WITNESS: My understanding was that Consumers'
19 interpretation of the words "support Consumers" meant more than
20 a presentation of facts, that we had to come in and say that
21 from these facts we conclude this is a good project, and it
22 should be continued, and we should be supportive of it in that
23 regard, over and above the factual presentation.

24 BY MR. CHARNOFF:

25 Q And your position was that it stopped short of that?

1 A Yes.

2 DR. LEEDS: Let me ask you: At that point, suppose
3 that Dow had concluded that it was not advantageous to Dow, is
4 your understanding that the support that was asked for would
5 be to say that it was advantageous to Dow?

6 THE WITNESS: That was my understanding, yes.

7 DR. LEEDS: Not, let me make sure I understand what
8 you just said: That if you concluded -- by "you" I mean Dow --
9 concluded that it was not advantageous to Dow, that you were
10 then required to say that it was advantageous?

11 THE WITNESS: On the basis of our contractual
12 arrangement, they were looking for us to live up to that
13 contract.

14 Now, the fact that changing circumstances no longer
15 made that advantageous, they were saying we still -- you
16 signed the contract voluntarily, and you've got to live up to
17 the contract.

18 DR. LEEDS: And that required you to say it was
19 advantageous?

20 THE WITNESS: I'm saying . . . yes, that was our
21 contract, and we're going to live up to it.

22 MR. CHARNOFF: Mr. Hanes, let me get something --

23 THE WITNESS: I'm not quite --

24 MR. CHARNOFF: This is very important, because the
25 charge you're making here is quite serious. Are you saying that

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1 they were saying to you that Dow should, in effect, lie as to
2 its conclusions that it drew from the facts?

3 THE WITNESS: No. I did not intend to say that.
4 I'm saying that they asked us to be an advocate and try to sell
5 the project, over and above giving them specific data. I was
6 not implying that Consumers asked us to lie.

7 DR. LEEDS: Maybe you didn't understand my question,
8 because I said suppose Dow had concluded it was not advantageous
9 to Dow -- and that Dow includes Dow, USA, Dow Michigan Division,
10 Dow Corporate, the Dow Company -- then your understanding of
11 what Consumers was asking you to do was to say that it was
12 advantageous to Dow?

13 THE WITNESS: No. I did not understand that. But
14 the question was how much should we get in and be an advocate
15 of the presentation.

16 This was very fuzzy, because this was a question of
17 what is our contractual liability. No, I was never -- it was
18 never suggested, nor did I feel that they were asking us to
19 lie. But they wanted us to get in and actively participate
20 and sell the project.

21 DR. LEEDS: But even if you had concluded that it --

22 THE WITNESS: That it was bad?

23 DR. LEEDS: -- was not to Dow's advantage -- and
24 by Dow, I mean Midland, USA and The Dow Company -- then did you
25 understand that Consumers' position was that you, by contract,

wel 14

1 were required to support that plant?

2 THE WITNESS: No. They never asked us to change the
3 facts or to do anything of that nature. It was a fuzzy area
4 that we were in, and, as I say, we never did reach any agreement
5 on it. But they were not asking us to falsify anything.

6 DR. LEEDS: But if you had concluded it was not
7 to your advantage, then how could you support it?

8 THE WITNESS: We would have had to say that it was
9 not to our advantage, and that was the reason I gave that little
10 speech earlier when Mr. Renfrow suggested we put in a person
11 that was not knowledgeable, because I wanted to make it clear.
12 And that was never pursued.

13 I never really did understand, and I certainly
14 never agreed with what Mr. Falahee was driving at, but I was
15 never under the impression that he was asking us to lie or to
16 juggle the figures, or anything of that nature.

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1 DR. LEEDS: Okay, I want to think about it a little
2 more.

3 Maybe you can help me on this, Mr. Charnoff. I'm
4 still not clear in my mind.

5 BY MR. CHARNOFF:

6 Q What I think I hear you saying, Mr. Hanes, is that
7 Consumers was looking for Dow's enthusiasm for the project
8 as well as just a submittal of some data. Is that what you're
9 saying?

10 A I think that ties into the alternatives that
11 Mr. Aymond came forth with in the 24th meeting, if we
12 enthusiastically support it or if we just give lip service to
13 the contract but really felt that it wasn't a good deal.

14 Q Let's be very clear: They did not ask you to lie
15 about your ultimate position.

16 A That is correct.

17 Q They did not ask you to misrepresent any facts?

18 A That is correct.

19 Q They did not ask you to misrepresent your ultimate
20 position?

21 A That is correct.

22 Q They wanted your data and they wanted you to be in
23 that hearing telling the NRC you want the project.

24 A They wanted our enthusiastic support.

25 Q But they were not asking you to lie, hence they

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1 were in effect assuming that your data would support, con-
2 tinue support for the project?

3 MR. POTTER: I object to what Mr. Hanes' knowledge
4 of what Consumers Power was assuming.

5 CHAIRMAN MILLER: Sustained.

6 MR. CHARNOFF: What was his understanding.

7 THE WITNESS: My understanding was that they did
8 not ask us to do anything unethical or wrong.

9 CHAIRMAN MILLER: Well, what did they ask? I'm a
10 little puzzled, too.

11 THE WITNESS: Well, I was a little puzzled, too,
12 sir, and we never did agree on this. And I guess in trying
13 to --

14 CHAIRMAN MILLER: Explain the nature of the dis-
15 agreement. Maybe that will add a little light on that.

16 THE WITNESS: Well, the disagreement started with
17 Mr. Temple's position and Mr. Falahee said that if that became
18 the Dow position, that we were going to have a lawsuit.

19 So in going into what is the basis for that, he
20 refers to this contractual requirement that we support Consumers
21 Power.

22 So we got into a discussion of what does "support
23 Consumers Power" mean. My view was that we just come up with
24 studies, data, present that with a witness at the hearing,
25 and that was the end of it.

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1 He wanted something more, and I never did know quite
2 what that "something more" was. But he certainly did not
3 suggest that we come in and lie or distort the truth.

4 CHAIRMAN MILLER: You're telling us what it wasn't,
5 but I'd like to know what it was. What was the "something
6 more"?

7 THE WITNESS: I don't know.

8 DR. LEEDS: Did he say you had to conclude, no
9 matter what, that you were enthusiastic about the project?

10 THE WITNESS: No, he never got that far.

11 DR. LEEDS: Was that your interpretation of what
12 he was saying?

13 THE WITNESS: No. I don't really know what he was
14 driving at because as I say, our interpretations were different.

15 DR. LEEDS: But it was clear that if you weren't
16 enthusiastic about the project you had a lawsuit on your
17 hands? Is that right?

18 THE WITNESS: Well, if we violated the contract.
19 He wanted us to enthusiastically support it. I think the
20 lawsuit was tied to contractual obligations.

21 DR. LEEDS: But in his view is it correct that --
22 as you interpreted his view, that if you weren't enthusiastic
23 about that project you were in effect violating the contract
24 or breaching the contract? Is that correct?

25 THE WITNESS: Well, Dr. Leeds, I guess I'd go back

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1 to the same thing that Mr. Aymond presented. It was these
2 alternatives, the question of degrees of Dow's position and
3 in effect he was saying that thing, only it wasn't as re-
4 fined in our 21st meeting. It was much fuzzier than it was
5 at the 24th meeting where they had had a chance to come in
6 and refine it.

7 The 21st meeting was our first meeting and there
8 wasn't an agenda other than Rex Renfrow's presentation. It
9 was pretty informal discussion.

10 DR. LEEDS: Let me ask you this. Maybe a histori-
11 cal perspective might clear this up somewhat.

12 If I stop time prior to September 21st and consider
13 what has gone on prior to that with respect to Dow, had there
14 ever been a question of support being more than just providing
15 Consumers Power with data? In other words, were you all
16 asked, for example, to intervene in the original proceeding,
17 or was that something you just sort of walked in on your own?

18 THE WITNESS: I wasn't involved then, but I think
19 we walked in on our own. I think that we were for this
20 project and we were enthusiastic on this project.

21 DR. LEEDS: Okay. Then up until the September 21st
22 meeting had you ever heard of support being more than just
23 providing data?

24 THE WITNESS: No, sir.

25 DR. LEEDS: So this was a new element then, in the

1 relationship between Dow and Consumers?

2 THE WITNESS: It may have been part of the
3 negotiations, I don't know. I never did understand exactly
4 what it was, either. But I clearly did not have the feeling
5 he was asking me to do anything wrong.

6 It was just a question of how much did we do, what
7 extra did we put into it.

8 BY MR. CHARNOFF:

9 Q Did you personally entertain the idea that at that
10 time Dow Chemical was or was not a party to the NRC proceeding?

11 A I thought we were not a party. We were not on the
12 mailing list, we didn't get copies of notices. The only way
13 we could find out what was going on was to call Consumers or
14 the NRC Staff.

15 Q Do you know whether Consumers Power Company thought
16 you were a party?

17 A I don't know. I'm sure they knew we thought we were
18 not a party.

19 Q Do you recall that at the September 24th meeting
20 Mr. Aymond made it very clear that Dow should tell the truth
21 at the proceeding?

22 A I don't know that that was discussed, but I don't
23 think there was ever any question about it. I never felt any
24 question about it.

25 Q All right. We'll come back to that.

wel 2

1 When . . . what does the term, "lip service" mean
2 to you?

3 A Just mouth the words, but not mean it, I guess.

4 Q It means something that is not genuine?

5 A Probably.

6 CHAIRMAN MILLER: What did you say? What was the
7 answer?

8 THE WITNESS: Probably.

9 CHAIRMAN MILLER: Probably something not genuine?

10 THE WITNESS: Well, something . . . I said, just to
11 mouth the words, but not meaning it. And he said is that not
12 genuine, and I said probably.

13 CHAIRMAN MILLER: You're agreeing, then. Is that
14 the definition now you're giving the Board as you used the
15 term or understood it to be used?

16 THE WITNESS: Well, I guess there's an element there.
17 Lip service, to me, means, yes, we will abide by the contract.

18 BY MR. CHARNOFF:

19 Q But you understand the term lip service to be
20 something less than genuine, then, is that right?

21 A I guess everybody understands it differently.

22 Q How do you understand it?

23 A I guess I would think that you're at least not
24 enthusiastic, which is kind of not genuine.

25 Q Well, apart from degrees of enthusiasm, do you

1 understand, and did you understand in 1976, the term lip
2 service to be something less than the genuine article?

3 A Well, that's going back quite a ways. I guess I
4 feel that . . . I guess I'm not sure. I don't think they were
5 my words. I think they were somebody else's words.

6 Q Well, that's what I'm curious about. The words
7 "lip service" appear in your notes of the September 24th
8 meeting.

9 CHAIRMAN MILLER: What page is that?

10 MR. CHARNOFF: I'm looking for that, sir.

11 CHAIRMAN MILLER: That would be Volume VII, Tab 7,
12 I believe. Mr. Hanes, can you find that and identify it for
13 us, please?

14 MR. OLMSTEAD: That's Tab 8.

15 CHAIRMAN MILLER: All right.

WRB fls

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WELandon

1 BY MR. CHARNOFF:

2 Q On page 1 of the notes of September 24th-- Do
3 you have that?

4 A Yes.

5 Q Under item Roman II, which is the third of the
6 possible Dow positions that were discussed that day, the term
7 appears there "If Dow gave lip service to the contract."

8 A "....but indicating they did not like the deal."

9 Q Right.

10 A So we're saying, Yes, we'll abide by the contract
11 but we don't like it.

12 Q Now whose term was the term "lip service?" Did
13 Mr. Aymond, in presenting this use the term "lip service," or
14 was this your understanding of what he was trying to convey
15 to you as the third possibility?

16 A I don't know.

17 Q Could you turn to page 26 of your deposition, sir?
18 On page 26 you refer to the possible Dow positions
19 that were discussed, again, on the 24th, and speaking orally
20 you again refer, in the paragraph beginning on line 11 to--

21 CHAIRMAN MILLER: Let's have it read. Paraphrasing
22 is not quite accurate.

23 Will you indicate the lines which you wish to have
24 the witness refer to?

25 MR. CHARNOFF: Yes, Mr. Chairman.

Cl1

WRB/wb2

BY MR. CHARNOFF:

Q I'm referring you to the top of page 26, and there's a question asked of you by Mr. Olmstead where he asks you, "And what were those positions?" and then you read in three positions, and you were beginning the fourth one and you were interrupted.

Can you read what the third position was?

A "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 fifty-fifty, and this would be a high risk situation."

Q And you were now speaking, and you again characterized it as lip service?

A I was reading out of this other.

CHAIRMAN MILLER: Pardon me. Are you reading from the deposition?

THE WITNESS: I was reading from the deposition, yes, sir.

CHAIRMAN MILLER: All right. Read the question and read the answer and continue until you have covered it so you have it exactly as you testified in your deposition; which was taken on what date, now? What's the date of the deposition?

MR. POTTER: May 14, 1979.

CHAIRMAN MILLER: And you're reading from page 26,

WRB/wb3

1 are you?

2 THE WITNESS: Yes, sir.

3 CHAIRMAN MILLER: What line?

4 THE WITNESS: Line 1.

5 CHAIRMAN MILLER: All right. Read the question
6 and read the answer.

7 THE WITNESS: "QUESTION: And what were those
8 positions?

9 "ANSWER: Well, one was that if Dow
10 supported the project actively, wants to buy
11 steam and electricity from the plant, they felt that
12 that would be very positive and they were very con-
13 fident of their ability to get a license.

14 "If Dow took the position that the
15 attractiveness of the project has been impaired,
16 further delays could tip the balance on the project
17 from positive to negative. They felt that this
18 could increase the risks of suspending construc-
19 tion. But the odds would still be very good.

20 "If Dow gave lip service to the contract
21 between Dow and Consumers but indicated it did not
22 like the deal any more, the odds would be reduced
23 to fifty-fifty, and this would be a high risk situa-
24 tion.

25 "If Dow-- "

WRB/wb4

1 And then I was cut off.

2 MR. POTTER: I think what the witness was trying
3 to point out, the witness was referring to the September 24th
4 notes.

5 THE WITNESS: I was reading out of my September
6 24th notes.

7 CHAIRMAN MILLER: Does it appear in his deposition?

8 MR. POTTER: Yes.

9 MR. CHARNOFF: He had the notes before him,
10 according to the deposition.

11 CHAIRMAN MILLER: Is that the end of the passage
12 you were referring to?

13 MR. CHARNOFF: Yes.

14 BY MR. CHARNOFF:

15 Q You characterized this in your notes, and then in
16 referring to your notes you characterized it still as a lip
17 service commitment to the contract, as being what you under-
18 stood Alternate 3 to be; is that correct? --or the third
19 alternate?

20 A Right.

21 Q --which you labeled as Item Roman II. And I think
22 you told Mr. Paton earlier this morning, or early this after-
23 noon, was the same as Item 3B in the outline that Mr. Paton
24 referenced you to of Mr. Aymond's outline; is that correct?

25 A I don't know. I would have to look at Mr. Aymond's

WRB/wb5

1 outline.

2 Q Okay. Let's get that reference.

3 MR. PATON: Volume 4, Tab 7.

4 BY MR. CHARNOFF:

5 Q Does 3B in that outline correspond to Roman II in
6 your notes of September 24th?7 A It's similar. The words "lip service" are not in
8 it.9 Q The words "lip service" do not appear in
10 Mr. Aymond's outline; is that correct?

11 A That's correct.

12 Q But, nevertheless, either someone characterized it
13 at that meeting as a lip service commitment to the contract, or
14 you understood what he was saying to be the equivalent of a
15 lip service commitment; is that correct?

16 A One or the other.

17 Q Okay.

18 Incidentally, while we're on your notes of
19 September 24th, just before Roman I there's a parenthetical
20 that says,21 "The numbering of these alternatives, or
22 alternates, was added later."23 Do I take it you took your notes and then organized
24 them in some way for your secretary to type them?

25 A Yes. I at least added the lettering, or the

WRB/wb6

1 numbering.

2 Q And so what Mr. Aymond was characterizing in his
3 notes as 3B and in yours as Roman II that might have only a
4 fifty-fifty possibility was a situation under which Dow would
5 only give lip service to its commitment, but it would also
6 indicate that it does not like the deal any more: that's how
7 you understood that?

8 A That's how I wrote it down.

9 Q And that's how you wrote it down.

10 A That may or may not have been my wording.

11 CHAIRMAN MILLER: Well, whose wording would it
12 have been?

13 THE WITNESS: It could have been Mr. Aymond's,
14 it could have been somebody else's in the meeting. Because
15 actually they explored these a couple of different times.
16 They went back a second time and put in the probabilities,
17 Mr. Whiting came back, and so it didn't just go through and
18 flow the way the notes are written.

19 CHAIRMAN MILLER: Well the term "lip service," if
20 Dow gave lip service, appears, then, in the notes you took of
21 this meeting of September 24th, 1976, does it, Mr. Hanes?

22 THE WITNESS: Yes, sir.

23 CHAIRMAN MILLER: I'm still trying to find out
24 whether your understanding of the way the term "lip service to
25 the contract" was used at that time referred to something not

WRB/wb7

1 genuine, or not, as you appeared to testify a while ago. But
2 then you sort of changed that. And I'm not certain what your
3 understanding was, or is.

4 THE WITNESS: Well, my understanding is that it's
5 supposed to read the same, or means the same as Mr. Aymond's
6 presentation where it was not used. So it was really a question
7 of enthusiasm more than genuineness.

8 I didn't mean to imply that there was wrongdoing
9 or that Consumers was asking Dow to do something wrong, or lie,
10 or take a position we did not believe in.

11 CHAIRMAN MILLER: Yes; but what was the contractual
12 obligation under the clause that you've described with reference
13 the support thing?

14 THE WITNESS: I'm not sure I follow the question,
15 sir.

16 CHAIRMAN MILLER: Well, why would the giving of
17 lip service to the contract and an expressed willingness to
18 abide by it not be a sufficient performance of that aspect, or
19 any aspect of the contract, by Dow?

20 THE WITNESS: I guess I'm not sure of that.

21 DR. LEEDS: Well, Mr. Hanes, let me ask you some-
22 thing here.

23 The term "lip service" is not an unusual pair of
24 words, is it?

25 THE WITNESS: No. I've seen it used quite a lot.

1.090

WRB/wb8

1 DR. LEEDS: Do you use it quite a lot?

2 THE WITNESS: No. I have used it, I'm sure. But
3 I don't use it a lot.

4 DR. LEEDS: Okay.

5 Now why is the reason you don't use it a lot?

6 THE WITNESS: I guess because I don't know what it
7 means.

8 DR. LEEDS: I see.

9 Do you know what "finesse" means?

10 THE WITNESS: Yes.

11 DR. LEEDS: What does "finesse" mean?

12 THE WITNESS: That's where you try to slide some-
13 thing through-- At least my meaning of it is trying to slide
14 something through that-- Well, I play bridge some. To try to
15 slide something through and make it work. It doesn't mean it's
16 wrong but it doesn't always work.

17 DR. LEEDS: Could I use "finesse" in place of
18 your term "lip service" here?

19 THE WITNESS: I don't think so.

20 DR. LEEDS: Well, "lip service" is what, a noun.
21 And "finesse" normally is considered maybe a verb, although it
22 is a noun, is it not, at times? "He tried a finesse." "He
23 finessed the queen."

24 THE WITNESS: Right.

25 DR. LEEDS: So it is both a verb and a noun.

WRB/wb9

1 "Lip service" here I gather is a noun; is that
2 right, in your notes?

3 THE WITNESS: It's been a long time since I've
4 taken English.

5 DR. LEEDS: Well tell me what a noun is, then, if
6 we're going to have that flap. What is a noun and what is a
7 verb?

8 THE WITNESS: A noun is a name or a subject or
9 a thing. A verb is an action.

10 DR. LEEDS: All right.

11 Look at that sentence there where the first clause
12 starts, "If Dow..." something or other, and tell me what the
13 verb is.

14 THE WITNESS: "Gave."

15 DR. LEEDS: Is "lip service" a verb?

16 THE WITNESS: No.

17 DR. LEEDS: What is it?

18 THE WITNESS: Apparently it's a noun.

19 DR. LEEDS: Okay.

20 Now let's go back to "finesse." Could I sub-
21 stitute the concept of "finesse" in that sentence and get the
22 same meaning?

23 THE WITNESS: No, sir, I don't think so.

24 DR. LEEDS: Okay. That's fine. That's all I
25 wanted to know. I wasn't trying to be tricky; I was just trying

WRB/wb10

1 to get at it.

2 My problem is that all of a sudden it seems like
3 to me that some very, very simple words lose their definitions.
4 And I don't really understand what happened there.

5 I mean, if you used "lip service" in your write-
6 up here, and "lip service" is a word that you use not often
7 but at least you do use it, then--

8 THE WITNESS: I think it means the same as
9 Mr. Aymond's version, which is much more artfully and care-
10 fully done apparently:

11 "If Dow takes the position it still
12 intends to take electricity and steam from
13 Consumers in accordance with the contracts, but
14 that an alternative source or sources would be
15 more advantageous to Dow. . ."

16 I think I was trying to say that same thing.

17 Now whether they used, whether somebody else in
18 the meeting used "lip service" or whether that was my choice
19 of words, I don't remember. I honestly don't remember.

20 DR. LEEDS: Well suppose it read,

21 "If Dow tried to finesse its allegiance
22 to the contract between Dow and Consumers...."
23 would that have the same meaning as "If Dow gave lip service
24 to the contract?"

25 THE WITNESS: Not to me.

WRB/wb11

1 DR. LEEDS: Okay. Fine.

2 Thank you, sir.

3 BY MR. CHARNOFF:

4 Q Now you said, Mr. Hanes, that your concept of
5 "lip service" is not very different in understanding than what
6 you understand to be in Item 3B in the Aymond outline; is that
7 right?

8 A That's my understanding of the position, yes.

9 Q Okay.

10 Now can I ask you, without losing this page,
11 can I ask you to refer back to the notes of September 21st
12 which appear-- Do you have that? Your notes of the September
13 21st meeting?

14 A Yes, sir.

15 Q And looking at page 3, there's a statement in the
16 middle of the page that says,

17 "If live up to contract but no longer
18 economically viable will..."
19 There's the beginning of a word there. It looks like "sue."
20 "...will sue Dow for K violation - shutdown costs,
21 investment and bankruptcy."

22 Do you see that?

23 A Yes, sir.

24 Q Did I read it correctly?

25 A Yes.

WRB/wb12

1 Q Now do I understand this was a statement perhaps
2 that Mr. Falahee made at the meeting?

3 A Yes.

4 Q Okay.

5 And do you understand this hypothetical posture
6 to be equivalent to 3B in the Aymond outline and Roman II in
7 your notes of September 24th?

8 A Yes, I do.

9 Q Okay.

10 So that it's fair to say that if you understood
11 the Aymond posture of 3B -- well, not the Aymond posture, but
12 the posture identified as 3B, as one of a series of possible
13 Dow postures to be a lip service commitment to the contract,
14 and you also understand that what Mr. Falahee was addressing
15 on September 21st to be similar or identical to that also,
16 if you gave lip service to the contract, and you also said
17 "but it is no longer economically viable," then Mr. Falahee
18 said Consumers would sue; is that right?

19 A Yes. I think those three are all essentially
20 the same.

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1 Q As I understand your notes of September 24th, and
2 let me refer you to page 3 of your notes of September 24th,
3 the first place that I see any reference to any possible
4 Consumers lawsuit or attempt to recover damages from Dow
5 appears on page 3 of your notes of September 24th. Is that
6 correct?

7 A Yes. I believe it's correct.

8 Q And there, as I understand it, you wrote that
9 Mr. Aymond said that:

10 "If these things happen they would sue
11 Dow for losses alleging a breach of contract by Dow
12 on theory that repudiation is a breach."

13 . Is that correct? .

14 A Yes, that's what it says.

15 Q And that I take it was a reference to the possi-
16 bility that Dow would take the position identified as III on
17 the top of page 2 of your notes. Is that correct? That would
18 be the repudiation case?

19 A Well, the reason I'm hesitating is my feeling was
20 that we may also be sued similarly if it was II at the bottom
21 of page 1. Clearly if it was III, the answer would be --

22 Q That would be repudiation.

23 A Right.

24 Q Now in that same paragraph on page 3 that we were
25 looking at, the second paragraph, you have he, referring to

eb2

1 Mr. Aymond.

2 "He said if Dow acts to frustrate

3 Consumers Power it is less clear. Consumers Power

4 is entitled to Dow's support for the project."

5 What do you understand the concept of frustration
6 to address, the situation in III or the situation in II of
7 your notes?

8 A Repudiation would probably be III on page 2, and
9 frustration would probably be II on the bottom of page 1.

10 DR. LEEDS: Mr. Hanes, is "frustration" a term of
11 art, or is it a normal word?

12 THE WITNESS: Well, I think it has both uses.

13 DR. LEEDS: What did you mean here?

14 THE WITNESS: Well, it was Mr. Aymond's term. I
15 imagine it's a term of art, if we do something to -- that they
16 felt was frustration.

17 DR. LEEDS: Well, what is frustration?

18 THE WITNESS: Something that defeats the purpose of
19 the contract. It's something less strong than repudiation.

20 DR. LEEDS: Thank you.

21 BY MR. CHARNOFF:

22 Q Just to close the loop on some of this, could I ask
23 you to look at Mr. Nute's notes of September 24 which appear
24 in Volume 4, Tab 6, according to my notes.

25 Do you have that, sir?

eb3

1 A Yes.

2 Q Now at Volume 4, Tab 6, if you would look at page
3 3, the top paragraph, and it runs over from page 2 -- you
4 might want to look at that --

5 (The witness reading.)

6 A Okay.

7 Q I'm focusing in on the top ten lines, roughly, of
8 page 3 of Mr. Nute's notes.

9 Do I understand there that Mr. Nute reports that
10 Mr. Aymond again said that Consumers would seek damages from
11 Dow -- reading in the third line:

12 "To extent revocation attributable to
13 breach of contract by Dow - if Dow repudiated - it
14 would be breach - if Dow frustrated ability to keep
15 going without obvious still would leave it to the
16 courts - feel that Consumers under the contract
17 deserves Dow's support."

18 Did I read that correctly?

19 A Yes.

20 Q And I take it that corresponds to the same notes
21 that appear in the second paragraph on page 3 of the September
22 24th notes of yours.

23 A I would assume so.

24 Q So again Mr. Aymond apparently used the term of
25 lawsuit in event of repudiation and leave it to the courts in

eb4

1 the event of frustration. Is that right? He was talking about
2 two separate cases?

3 A Yes.

4 Q And you now understand or your understood repudia-
5 tion to apply to case III on page 2 of your notes which is
6 3c in the Aymond outline, and frustration applied to case
7 II, which is 3b in the Aymond outline. Is that right?

8 A Yes.

9 Q And I refer you to Mr. Klomprens' notes of the
10 same meeting which appear in Volume 4, Tab 17. Do you have
11 that, sir?

12 A Yes.

13 Q And can I refer you to page -- it says number 2 in
14 the top right-hand corner, and if you'll look at the bottom
15 half of that page, the bottom nine lines, does it say there,
16 and I'm quoting:

17 "Would certainly seek to recover damages
18 from Dow - if Dow were to repudiate the contract that
19 would be breach - if Dow were to just make things
20 hard for Consumers then it's less clear and courts
21 would have to decide."

22 A Correct.

23 Q Mr. Klomprens, Mr. Nute and yourself all picked up
24 the same statements of repudiation in one case and frustration
25 or "make things hard" in the second case. Is that right?

eb5

1 A Yes.

2 Q And "to make things hard" or the frustration case
3 was addressed to the possible position of Dow under which it
4 might just give lip service to the contract? Is that right?

5 A Yes, alternate II.

6 Q You're referring to II in your notes of September
7 24th?

8 A Right.

9 Q Now if we can refer again to Mr. Aymond's notes or
10 the outline that Mr. Paton referred you to-- Do you have
11 that?

12 A What tab was that?

13 MR. PATON: Volume 4, Tab 7.

14 BY MR. CHARNOFF:

15 Q Volume 4, Tab 7.

16 And whether or not Mr. Aymond used these particular
17 words, if I can refer you to that last paragraph that appears
18 under number 5, preceding number 6, this is on page 4 I be-
19 lieve of the outline.

20 Do you remember Mr. Paton referred you to that para-
21 graph that just preceded paragraph number 6?

22 Do you have paragraph numbers 5 and 6 on that page?

23 A Yes.

24 Q Okay.

25 And does the last sentence just before paragraph

550 224
~~550 222~~

eb6

1 number 6 read:

2 "We consider that a Dow position other
3 than 3a or 3a(1) would be inconsistent with Dow's
4 contract obligations."

5 A Yes.

6 Q So do we understand then that what Mr. Aymond was
7 saying to you at the meeting on the 24th was that it would
8 be inconsistent with the contract obligations for Dow to only
9 give lip service to the contract or if it were to repudiate
10 the contract?

11 A That's my understanding, yes.

12 Q And it's under those circumstances that Mr. Aymond
13 said we'll see you in court?

14 A Yes.

15 CHAIRMAN MILLER: Will you look at the last page of
16 your notes, Mr. Hanes, of the meeting of September 24th, 1976.
17 That's Tab 8 of Volume 7.

18 Do you find that?

19 THE WITNESS: Yes, sir.

20 CHAIRMAN MILLER: You see the third last paragraph?

21 THE WITNESS: Yes, sir.

22 CHAIRMAN MILLER: Your notes state:

23 "Mr. Aymond recognizes that the present
24 schedule is vital and that we can't avoid the ques-
25 tion of Air Quality Board problems. He said there

eb7

1 is a need to say the project is good for Dow even if
2 close to the neutral point."

3 Now what was your understanding of Dow saying that
4 the contract or the project was good for it ever if it was
5 close to the neutral point? What was your understanding of
6 the meaning of that?

7 THE WITNESS: He said that if it was at all positive
8 we should say it was positive.

9 CHAIRMAN MILLER: Even though it was close to
10 neutral, which is neither positive nor negative?

11 THE WITNESS: Well, he didn't say it was neutral,
12 he said close to neutral.

13 CHAIRMAN MILLER: I see.

14 THE WITNESS: And I would again not assume that
15 Mr. Aymond was asking us to do anything wrong.

16 CHAIRMAN MILLER: Do you think that is full candid
17 disclosure then if it is close to the neutral point but Dow
18 nevertheless come on and affirmatively says and testifies
19 that the project is good for Dow? Is that your understanding?

20 THE WITNESS: I think that if it's clearly on the
21 positive side we ought to say it's on the positive side.

22 CHAIRMAN MILLER: Well, what if it's close to the
23 neutral point?

24 THE WITNESS: I guess we'd present the facts.

25 CHAIRMAN MILLER: Well, would the facts get you sued?

eb8

1 THE WITNESS: I don't know. Fortunately we didn't
2 face that.

3 DR. LEEDS: Well, let me explore that a little bit
4 more with you also.

5 Suppose the calculations and so forth showed that
6 it was good for Dow, whatever that means, but that within those
7 projections there are bands of estimates that would show it
8 to be somewhat better for Dow and, say, show it below the
9 neutral point, negative for Dow, bad for Dow. That's the
10 other side of the neutral point.

11 What does that mean then, that you are supposed to
12 come in with the fact that it's good and ignore the fact that
13 there are estimates which could kick it on the other side of
14 the neutral point? Is that what your understanding of support
15 meant?

16 THE WITNESS: Dr. Leeds, I think that we did come
17 in and we found that it was positive for Dow. I think history
18 maybe speaks better for itself than my supposing, because Joe
19 Temple did testify. He testified fully and completely. He
20 testified as to his own reservations. Everything totally came
21 out in the hearing.

22 I'll be glad to speculate here, but I don't think
23 Consumers was asking us to do anything wrong. Joe Temple's
24 testimony was very critical of Consumers in a lot of areas
25 and Consumers has never said anything that we did wrong in

eb9

1 testifying that way.

2 DR. LEEDS: Of course part of the problem here is
3 that there is a question involving whether or not it should
4 have been in the affirmative presentation of testimony and
5 not brought out in the cross-examination.

6 THE WITNESS: But the fact is that the corporate
7 decision was positive and that to me is a material fact. A
8 lot of times in a large organization you go through question
9 bands as you say, and some are positive and some are negative
10 but on balance, at some point somebody has to make a determina-
11 tion and Dow made a determination that this was positive for
12 Dow. And we went ahead and testified and there was no attempt
13 to hide anything in the testimony.

14 DR. LEEDS: Well, could you have understood as a
15 person walking in hearing it for the first time the words
16 "Circumstances have not changed sufficiently" and really
17 understood what those meant?

18 THE WITNESS: Not those vague, general words. They
19 wouldn't be very meaningful. I don't know even now in what
20 context you say them.

21 DR. LEEDS: Well, I was trying to remember back to
22 what the conclusion of the Dow USA board was, and it seemed
23 to me I remember it containing such words like that, did it
24 not? "Circumstances have not change sufficiently."

25 THE WITNESS: Well, if they were, I'm sure it meant

eb10

1 economic, the whole study, that it was still positive. They
2 obviously had changed from the time we started out.

3 DR. LEEDS: Well, can you tell me one more time,
4 while we've tried to explore this three or four times with
5 you, just what does it mean? You said it several times in your
6 notes. The second paragraph on that same page says:

7 "He said if Dow acts to frustrate
8 Consumers Power it's less clear. Consumers Power
9 is entitled to Dow's support for the project."

10 And then in the sentence the Chairman referred you
11 to, there is this neutral point statement, and the paragraph
12 just above that:

13 "Mr. Aymond said it was all right for
14 Dow to say they viewed the situation with concern.
15 Dow can still support the project and say Dow cannot
16 stand any more delay. Dow would still be behind the
17 project."

18 Does that mean positive, enthusiastic support?

19 THE WITNESS: I think it ties in more with this
20 even if it approaches the neutral, as was pointed out a minute
21 ago, that we should come in positively, not doctor up the
22 facts but come in and say this is a positive decision.

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1 DR. LEEDS: Do you, as an attorney, expect to be
2 sued if you either frustrate a contract or repudiate one?

3 THE WITNESS: Yes, sir.

4 DR. LEEDS: So what kind of information did he
5 transfer to you that you didn't know already when you went
6 into that meeting?

7 THE WITNESS: Well I think we got a better feeling
8 for what he considered frustration was. I think we knew what
9 repudiation was. I think we learned a lot in the interchange
10 and we learned, of course, about the whole program of the
11 hearings.

12 DR. LEEDS: If you repudiate a contract, how is
13 that inconsistent with the contract? I'm not even sure I get
14 those words connected, and I think you used that earlier.

15 THE WITNESS: To repudiate a contract?

16 DR. LEEDS: Yes.

17 THE WITNESS: You just disclaim it. Say that
18 we're not going to live up to it.

19 DR. LEEDS: Okay. Well how is that inconsistent
20 with the contract?

21 THE WITNESS: Well you have breached it. You're
22 not going to comply with it.

23 DR. LEEDS: Well I understand what you do when you
24 repudiate a contract, you just do not comply with some of the
25 terms or all of them.

wrb/agb2

1 THE WITNESS: Right.

2 DR. LEEDS: Okay. So that's repudiation of the
3 contract, you just write a letter and say It's all off, boys.
4 Okay.

5 But how is that inconsistent with the contract?

6 THE WITNESS: If you're inconsistent, you're
7 totally tearing up the contract, the contract doesn't exist
8 anymore. Anything where you're not complying with the contract
9 to me seems inconsistent.

10 DR. LEEDS: Okay. That's how you were using the
11 word "inconsistent," then.

12 THE WITNESS: I think so.

13 DR. LEEDS: Okay. It's not inconsistent with a
14 term of the contract or anything like that, it's not inconsistent
15 internally in the contract, it's inconsistent with the concept
16 of the contract itself?

17 THE WITNESS: Yes, sir.

18 DR. LEEDS: Okay. I've got that. That was
19 confusing me. I appreciate your straightening me out on that.

20 Thank you.

21 BY MR. CHARNOFF:

22 Q So Mr. Hanes, if lip service means something a
23 little bit less than genuine, then what Mr. Aymond was saying
24 on t he 24th and what Mr. Falahee was saying on the 21st
25 that you said is equivalent to this Roman II situation, they

wrb/agb3
1 were saying they didn't want Dow giving less than genuine
2 commitment to the contract, is that right?

3 A Mr. Charnoff, I guess I backed away from that
4 "less than genuine" terminology about five times.

5 I think that what I was trying to say there was
6 the same thing that Mr. Aymond said in his 3B on his outline.

7 Q A mere mouthing of --

8 A I'm not sure that lip service was my terminology
9 to start with.

10 Q Well if it wasn't --

11 A If you want to rephrase the question -- or do you
12 want to stay with the lip service?

13 Q Well it's your wording. I don't see it anywhere
14 else, that's why I puzzled by it.

15 MR. PATON: I object to the statement that it was
16 his wording.

17 CHAIRMAN MILLER: Sustained.

18 MR. CHARNOFF: It's his words in his notes.

19 CHAIRMAN MILLER: It's his notes but he testified
20 he's not sure where it came from. He presumes they may
21 have been used in the course of it but --

22 MR. CHARNOFF: I'll withdraw the question.

23 BY MR. CHARNOFF:

24 Q As you took the words down, whether they were
25 your words or your understanding of somebody else's words,

wp/agb4
1 what you're saying here is that a mere mouthing -- if that's
2 a translation or an equivalent to lip service -- a mere mouthing
3 of the commitment was not what Mr. Aymond or Mr. Falahee were
4 looking for, is that right?

5 MR. PATON: I object Mr. Chairman.

6 CHAIRMAN MILLER: On what grounds?

7 MR. PATON: I think for this witness to interpret
8 what they were looking for using the term "mouthing" and et
9 cetera is just going too far. I mean, if they gave some
10 positive statement as to what they were looking for, fine,
11 but his interpretation under the use of the word "mouthing,"
12 I think it just goes too far.

13 CHAIRMAN MILLER: This witness is a lawyer who
14 was present at the meetings in question. If he chooses to
15 reject the term "mouthing" or any other term, I'm sure he'll
16 say so and he won't accept the terminology of counsel unless
17 he desires to accept it. So with that view, we will overrule
18 the objection.

19 The witness will listen carefully to the question --
20 we will have it rephrased if he wants it rephrased -- and then
21 he'll tell us his own understanding.

22 THE WITNESS: Would you reword the question?

23 BY MR. CHARNOFF:

24 Q Let me give you a synonym for lip service, that is,
25 mere mouthing of a commitment.

wrb/agb5

1 Do I understand correctly that what all these
2 notes -- not what the notes say, but your understanding of the
3 kinds of situations under which Mr. Aymond was saying we'll
4 see you in court, were those circumstances where either there
5 was a repudiation of the contract or a mere mouthing, an oral
6 statement which might not have any substance behind it of a
7 commitment to the contract?

8 A I would say that Mr. Aymond said we'll see you in
9 court if there's a repudiation or if Dow takes the position
10 that it still intends to take electricity and steam from
11 Consumers Power in accordance with the contracts but that
12 an alternative source or sources would be more advantageous
13 to Dow.

14 Q And he said that because that might result in
15 frustration of the contract, is that right?

16 A That's correct.

17 Q Okay.

18 Let's go on to the meeting on September -- well,
19 before we do that:

20 Did Mr. Aymond or anyone else from Consumers
21 Power Company at the meeting of September 24 urge Dow to
22 present any testimony that would be less than truthful?

23 A No.

24 Q Did anybody at the September 21 meeting, Mr. Bacon,
25 Mr. Aymond or Mr. -- I'm sorry, Mr. Aymond was not there --

wrb/agb6

1 Mr. Bacon, Mr. Renfrow, Mr. Falahee state that Dow should
2 present any information that was less than truthful?

3 A No.

4 Q If I can refer you to Mr. Nute's notes of
5 September 24, which is at Volume 4, tab six --

6 CHAIRMAN MILLER: Mr. Charnoff, I think we're
7 going to recess.

8 MR. CHARNOFF: I think we have about three
9 questions. If you'll give me until 5:00, I'll finish with
10 Mr. Hanes tonight.

11 CHAIRMAN MILLER: You can finish with him by then?

12 MR. CHARNOFF: Yes.

13 CHAIRMAN MILLER: Okay, go ahead then.

14 BY MR. CHARNOFF:

15 Q If I can refer you to page four of Mr. Nute's
16 notes of September 24, the first full paragraph, Mr. Hanes.

17 Does it appear in there that Mr. Aymond said
18 "you have to tell the truth under oath or you will go to jail?"

19 A Which page are you on?

20 Q I'm sorry, page four of Mr. Nute's notes of
21 September 24, the first full paragraph under the listing of
22 the four items.

23 A Will you repeat the question?

24 Q Does the statement appear in there that Mr. Aymond
25 said "You have to tell the truth under oath or you will go

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1 to jail?"

2 A Yes, it does.

3 Q Now could I refer you to Volume 4, tab 10.

4 A I found it.

5 MR. CHARNOFF: We'll identify that, Mr. Chairman,
6 as Mr. Temple's notes when he appears here next week on the
7 23rd.

8 CHAIRMAN MILLER: Very well.

9 MR. CHARNOFF: -- of the meeting of 9/24.

10 BY MR. CHARNOFF:

11 Q Indeed, do you see the name Temple -- this is not
12 fair to ask you Mr. Hanes, but nevertheless I will. Do you
13 see way up at the top --

14 A I'd be disappointed if you didn't.

15 Q -- In the top right-hand corner, do you see, way
16 up in the upper right-hand corner, do you see the name Temple?

17 A I do not see it.

18 MR. OLMSTEAD: I think that did get bound
19 upside-down, Mr. Charnoff. The secretary couldn't tell which
20 way it went.

21 BY MR. CHARNOFF:

22 Q Let me show you mine, it's easier to read.
23 Does it show here 9/24?

24 A Is that a nine or a seven? It looks like it
25 could be either.

urb/agb8

1 Q Does it say in the upper left-hand corner,
2 "Meeting Note from 9/24 CP Co-Dow meeting?"

3 A There's a lot of abbreviations, but I assume so.

4 Q Okay.

5 And let me point to the spot on page one of these
6 notes. Does it say inhere,

7 "Aymond made long speech re telling
8 the truth, tell conclusion as they really are."

9 A Yes, it does.

10 Q Okay.

11 Now do you remember Mr. Aymond making that affirma-
12 tive statement at the 9/24 meeting as reported in Mr. Nute's
13 notes and Mr. Temple's notes? Mr. Temple is obviously a
14 businessman and not a lawyer.

15 A No, I don't recall that.

16 Q You don't recall it.

17 Let me just move on to the September 27 meeting,
18 and I think we can finish this up today.

19 I think you said to Mr. Paton that your presenta-
20 tion to the Dow-USA Board was not made in writing.

21 A That's correct.

22 Q I'd like you to refer in your deposition to pages
23 27 and 28.

24 MR. CHARNOFF: Mr. Potter, would you hand that,
25 please, to the witness?

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(Document handed to the witness.)

BY MR. CHARNOFF:

Q Now you might want to refer back to page 26, which we had looked at before, and you might want to read all three of those pages.

MR. OLMSTEAD: I gather, Mr. Charnoff, you're waiving the objection you made at that point in the deposition, is that correct?

MR. CHARNOFF: Sure.

BY MR. CHARNOFF:

Q What I want you to read, and read it into the record, if you don't mind, Mr. Hanes, is the question that appears on page 27 and the answer that follows that through the middle of page 28 which, as I take it, reflects the Dow review group's position.

CHAIRMAN MILLER: Would you read the question aloud, please?

BY MR. CHARNOFF:

Q Would you read the question in, please.

A Question by Mr. Olmstead:

"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

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1 the review group was generally leaning to one of
2 those positions as set forth in the September 24
3 meeting at that time.

4 "Answer: I guess as I recall the
5 situation the review board -- first of all, we did
6 not feel bound in any way by Joe Temple's earlier
7 comments and feelings. We recognized Joe's postures
8 and the pressures he was under because of delays
9 and other problems in connection with the future
10 of the Midland Plant. So we felt that we could
11 take a more objective view, and it didn't ever
12 enter any of our minds that we weren't fully
13 authorized and felt free to come in with some kind
14 of a recommendation different than Joe Temple's.

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

20 "The different parts of the review board --
21 we came in and the economic review indicated that
22 it was still attractive economically. The safety
23 people came in and felt that safety-wise it was
24 still attractive.

25 "I felt that the contract was binding

wrb/agbl1

1 on us and, if we were going to rewrite it, we would
2 certainly insist on some different provisions,
3 because nobody had foreseen all the intervening
4 things that had happened. There wasn't any question
5 I think that our board felt that if, indeed, we
6 could make Consumers aware and devoted to keeping
7 the current schedule, that this was the best way to
8 go."

9 Q Now that was the answer you gave to Mr. Olmstead's
10 question that you just read in at your deposition, is that
11 right?

12 A That's correct.

13 Q Okay.

14 And then if I could ask you to turn to page 29,
15 just to refresh your recollection, if I could ask you to look
16 at the first set of lines on that page.

17 A Yes, sir.

18 Q Does that, in effect, say that it was your feeling
19 that the review group's position was that the second option
20 namely, 3A1 in Mr. Hanes' outline and Roman I -- Mr. Aymond's
21 outline and Roman IB in your notes of the September 24
22 reflected the position of the review group?

23 A Yes, Roman IB I'm familiar with, and I put the
24 other one away but I'm sure they say the same thing essentially.

25 Q Okay.

wrb/agbl2

1 And I think you said on page 30 that the recommenda-
2 tions of the review panel to the Dow-USA Board, you said you
3 do not recall any dissent on page 30.

4 A Correct.

5 Q And I think you told Mr. Paton it was your
6 recollection that you thought it was unanimous, is that right?

7 A Yes.

8 Q When the Dow-USA Board emerged from its meeting,
9 did it present its position to the whole group in the manner
10 in which it was formulated in the testimony, or was that then
11 left -- or was its position then left to Mr. Wessel and
12 Mr. Nute to develop an articulation of what its position was?

13 A Well the conclusion was presented orally. I
14 don't know what appears in the testimony, and I'm not aware
15 of them leaving anything for Mr. Wessel or Mr. Nute to do.

16 Q Do you recall the outlines or the essence of what
17 was said orally and who said it?

18 A I'm sure Mr. Orrefice said it, and he came in and
19 in effect said he felt it in the best interest of Dow to
20 continue with the contract but that we would keep our options
21 open, or something along that line.

22 MR. CHARNOFF: I don't have anything else.

23 I thank you.

24 MR. POTTER: I have a couple of questions.

25 CHAIRMAN MILLER: Mr. Potter?

wrb/agbl3

BY MR. POTTER:

Q Mr. Hanes, of the Dow participants in the
September 21st, 1976 meeting, was Mr. Klomprens the o nly
non-lawyer present?

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A Yes.

3B

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1 Q All right.

2 Now during that meeting, do you remember whether
3 there was any discussion at any time about whether it might
4 be advantageous for the Intervenor's if they could obtain a
5 suspension of the license, and also whether it would be ad-
6 vantageous to Consumers if there was no suspension? Do you
7 remember any conversation about that?

8 A Yes, there was a discussion about that.

9 Q Could you relate that to the Board?

10 A Well, Consumers and I don't know whether it was
11 Mr. Renfrow, but their position was if they could keep the
12 construction going, that it would definitely be advantageous
13 to the project, that if there were a suspension that it would
14 be difficult and expensive to get it started again. The
15 initiative would be on the side of the Intervenor's and it
16 would be a hard thing to overcome.

17 If they could keep construction going, they had
18 a project that was viable. There was a large investment
19 in the project, that the public or somebody was ultimately
20 going to have to pay for it, so that this would be an advan-
21 tage to the project if they could keep it going pending the
22 hearings and whatever was to come.

23 Q Okay.

24 Now you were present during the review team's
25 presentation to the Dow USA board. Is that correct?

eb2

1 A Yes.

2 Q And I take it that the presentation included oral
3 presentations by different members that were responsible for
4 different areas?

5 A Yes.

6 Q And they included overhead displays that were
7 used and shown to the board?

8 A Yes.

9 Q And among the-- And at the end of all this, a
10 conclusion was given to the board -- pardon me, the review
11 team's conclusion?

12 A Yes, there was a summary.

13 Q So at the end of that presentation there had been
14 a discussion of the problem, if we can call it that, and then
15 the conclusion that the board had reached and the reasons
16 for that -- pardon me, the review team conclusion and the
17 reasons they had reached their conclusion. Is that correct?

18 A Yes.

19 Q And then when all that was done the board stepped
20 out and returned shortly and gave its decision. Is that
21 correct?

22 A That's correct.

23 Q Okay.

24 MR. POTTER: I don't believe I have anything else.

25 CHAIRMAN MILLER: Anything further by the Staff?

eb3

1 MR. PATON: The Staff has no questions, Mr.
2 Chairman.

3 CHAIRMAN MILLER: Very well. We think that con-
4 cludes the testimony of Mr. Hanes.

5 Thank you for coming, Mr. Hanes. You're excused.

6 (Witness excused.)

7 We'll resume at nine o'clock in the morning.

8 (Whereupon, at 5:00 p.m., the hearing in the
9 above-entitled matter was recessed to reconvene at
10 9:00 a.m. the following day.)
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