UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	(Remand Proceeding)

NRC STAFF BRIEF ON ISSUES IDENTIFIED IN BOARD'S MAY 3, 1979 ORDER

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I. INTRODUCTION

The Atomic Safety and Licensing Board identified five issues requiring further hearings in its May 3, 1979 Prehearing Conference Order. The issues involve charges that attorneys or parties may have attempted to prevent full disclosure of relevant facts or may have withheld relevant facts from the Licensing Board during the suspension hearings. These matters were fully explored during four and one-half weeks of hearings in July 1979. Pursuant to the Licensing Board's direction the NRC Staff is submitting this brief addressing the issues identified in the Board's May 3, 1979 Order.

II. BACKGROUND

In 1973, permits were issued by the Atomic Energy Commission to Consumers Power Company authorizing construction of two pressurized light-water nuclear power reactors in Midland, Michigan. The decision authorizing the permits

was reviewed in the U.S. Court of Appeals for the District of Columbia where it was remanded to the Commission for further proceedings.[1/] Although review of the Court of Appeal's decision was pending in the United States Supreme Court, the NRC was required by the Court of Appeal's mandate to institute a proceeding to consider the remanded issues.

The Court of Appeals directed the Commission to consider some specific issues not relevant here and then noted:

> As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fueled generating facilities.[2/]

Subsequently, the Commissior reconvened an Atomic Safety and Licensing Board to consider whether the construction permits should be continued, modified, or suspended as a result of the Court of Appeal's mandate. [CLI-76-14, 4 NRC 163 (1976).] Following the Commission's September 14, 1976 Memorandum and Order, the Licensing Board issued a Memorandum and Order dated September 21, 1976 calling for briefs on the remanded issues by September 29, 1976 and scheduling a hearing to commence on October 6, 1976 in Midland, Michigan. The Board indicated that it would prefer written

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1/ Aeschilman v. NRC, 547 F.2d 622 (1976); rev'd and remanded Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

2/ Id, 632 footnote omitted. The U. S. Supreme Court interpreting this language stated that this was not an independent basis for the remand and found no error in the Commission's decision on the Dow issue. 435 U.S. 519, 555 n. 22.

testimony but would not require it in view of time limitations. (Order p. 4.) As a result of a motion by Intervenors other than Dow, the Board by Order dated October 4, 1976 continued the hearing date until November 16, 1976. On October 21, 1976, the Board issued another Memorandum and Order which opened discovery, set November 5, 1976, the date for all parties to file written direct testimony, and noted that the Board intended to hold a prehearing conference at a time convenient to the parties. As a result of a conference call on November 11, 1976 during which the Board heard arguments of counsel concerning another request for continuance from Intervenors other than Dow, a Memorandum and Order rescheduling the hearing for November 30, 1976 was issued. The hearing commenced on November 30, 1976 without a prehearing conference having been held.

On the first day of hearings, Consumers represented that its witnesses on the Dow-Consumers steam contract would testify that "...to date there have not been any changes to the contract which were not before the Commission when it ruled on April 11, 1974 that there were 'no changed circumstances warranting a reopening of these proceedings.'" (Tr. 152.) Consumers also presented the testimony of Joseph G. Temple, Jr., General Manager of the Michigan Division of Dow Chemical U.S.A. (following Tr. 220). In his testimony Mr. Temple stated that

> ...at the present time circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982. Under the present circumstances as known to Dow, the nuclear alternative remains the most attractive economically. Further, the matter will be kept under continuous review and Dow will keep all of its options open.

Mr. Temple's direct testimony did not disclose the fact that the Midland Division, which he headed, had concluded that the Consumers contract was no longer advantageous to Dow (Board Ex. 1, Tr. 387) nor that Dow was influenced by Consumers objurgation that it would seek $60C,000,000 in damages if Dow failed to purchase steam from the Midland units. (Tr. 2695 et. seq.)

After the record was closed, the Licensing Board, in its findings, stated "There is evidence ... that Licensee has considered conducting its share of this proceeding in such a way as to not disclose important facts to the Board." [LBP-77-57, 6 NRC 482, 485 (1977).] It noted that there "...remains the suspicion, raised by the disclosure of these instances, that there may have been similar ploys which were successful." [6 NRC 482, 486 (1977).]

On review, the Appeal Board noted the Licensing Board's findings and directed the Licensing Board to fully air and resolve the matter at future hearings. [ALAB-458, 7 NRC 155, 177, fn. 87 (1978).] The Commission expressly left the Appeal Board's direction standing on this matter stating: "Furthermore, nothing has happened since the Appeal Board's decision in ALAB-458 which would warrant our modifying its instructions to the Licensing Board to further explore the charges at a future hearing." [Unpublished Order dated November 6, 1978, slip op. p. 6.]

In its Prehearing Conference Order dated May 3, 1979, the Licensing Board adopted the following issues to define the matters in controversy:

1. Whether there was an attempt by parties or attorneys to prevent full disclosure of, or to withhold relevant factual information from the Licensing Board in the suspension hearings?

2. Whether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers?

3. Whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions?

4. Whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony?

5. What sanctions, if any, should be imposed as a result of affirmative finds on any of the above issues.

The Board allowed discovery prior to the commencement of hearings on the above issues and hearings were held from July 2 to July 31, 1979. In addition, pursuant to the Board's request, the NRC Staff reviewed the underlying record as to all contentions, charges or allegations which had been made by the Intervenors other than Dow. The NRC Staff reported the results of its review in a letter to the Board dated June 1, 1979 which was admitted as Board Exhibit 4.

The NRC Staff has concluded that the Board should not impose sanctions for affirmative findings on any of the four substantive issues. The Board may wish, however, to specifically address the standards governing the duty of parties to NRC proceedings to disclose information bearing on issues in controversy when they have a good faith belief that such information may affect the decision to be rendered whether or not such information is technically material to the issues in controversy.

III. ISSUE 1: Whether there was an attempt by parties or attorneys to prevent full disclosure of, or to withhold relevant factual information from the Licensing Board in the suspension hearings?

This issue is the broadest of the four substative issues set forth by the Licensing Board in its May 3, 1979 Order.[3/] At the Board's request, the NRC Staff reviewed the entire record of this proceeding (particularly focusing on allegations made by Intervenors other than Dow) and concluded, on the basis of the record evidence, that there was insufficient evidence to warrant further inquiry as to whether any party or attorney had attempted to prevent full disclosure of relevant factual information on any matter other than on the issues already identified in the Licensing Board's May 3, 1979 Order. (Board Ex. 4.) As a result of the NRC Staff's review and the July hearings, the following matters, in addition to the Dow issue, were identified as encompassed by Board Issue 1:

1. Alleged failure of Consumers Power to disclose internal Bechtel cost estimates for plant completion of $2 billion. (Board Ex. 4, p. 2);

2. Conflicting testimony presented by Consumers to the Michigan Public Service Commission and the NRC. (Board Ex. 4, p. 2);

3. Alleged discrepancy between Consumers' prepared testimony and its ER submissions for the Palisades facility concerning the planned Palisades derating and outage. (Board Ex. 4, p. 3);

4. Possible misrepresentations in Dr. Timm's testimony on behalf of Intervenors other than Dow concerning his analysis of Consumers' need for power testimony. (Tr. 50,291);

3/ Of course, this issue can be read in emcompass issues 2 and 3 relating to facts relevant to Dow intentions. The NRC Staff's analysis and conclusion on issues 2 and 3 later in this brief should be considered its conclusion on issue 1 relative to the Dow matter.

5. Possible misrepresentations by Dow's counsel concerning the preparation of the Temple testimony as presented to the Licensing Board. (Tr. 50,895, 51,294).

The NRC Staff requested all parties to the proceeding to advise it if they knew of any matters related to the Board's request to identify contentions, charges or allegations concerning any of the designated issues. The Staff received a negative reply from Consumers (Board Ex. 4b.) and received no reply from Dow or Intervenors other than Dow. (See Tr. 54,337.) On June 1, the Staff in a letter to the Board concluded that it was unnecessary to expand the issues scheduled for hearing to include the allegations identified as a result of the Staff's review of the record. The Board admitted the Staff letter into evidence as Board Exhibit 4. Since no other evidence of record addresses the matters identified by the Staff, there is no basis for concluding that there was an attempt by parties or attorneys to prevent full disclosure of relevant factual information regarding the matters addressed in the Staff's June 1 letter.

Regarding the fourth matter (possible misrepresentations in Dr. Timm's testimony), the July hearings brought to light no information which was not before the Board when it rendered its decision in 1977. Consumers had pointed to the evidence it thought supported such a charge in its responsive findings of fact[4/] and the Board was aware of the facts concerning the matter. The NRC Staff has concluded that the evidence does not support a finding that

4/ "Motion of Consumers Power Company to File Responsive Findings and Brief Instanter," filed July 14, 1977.

full disclosure of relevant factual information concerning the Timm testimony did not occur.

The fifth matter results from a question raised during the July hearings by Rex Renfrow, a witness for Consumers. Since it is an issue integral to the Board's Issue 4 concerning the preparation or presentation of the Temple testimony, it will be addressed later in this brief.

IV. ISSUE 2: Whether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers?

The record in this proceeding is replete with assertions by counsel for both Dow and Consumers that the only material fact of consequence to the Licensing Board's ultimate decision was that which identified the Dow corporate position. (Bacon - Tr. 52,109, Nute - Tr. 50,924 and 53,161, Renfrow - Tr. 51,523, 51,573, 51,637 and 51,945-6, Rosso - Tr. 51,688, 53,166, and 53,266 and Wessel - Tr. 52,637, 52,920 and 53,161.) To assess the validity of counsel's assertions, it is necessary first to analyze the Dow issue as remanded by the Court of Appeals, second to identify the proper legal standard of materiality and finally to apply that standard to the facts as disclosed on the record.

A. The Court of Appeals Remand

The Court of Appeals assumed "...that the Commission would take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fueled generating facilities."

[547 F.2d 622, 632.] The Supreme Court later held that this language "...was not an independent basis for vacating and remanding the Commission's licensing decision." After noting that the Commission had reconsidered the changed circumstances at least three times, the Supreme Court further noted, "We see no error in the Commission's actions in this respect." [435 U.S. 519, 555.]

Unfortunately, the Supreme Court's interpretation of the Court of Appeal's language was not available to the parties at the time the suspension hearings commenced. Consequently, it is necessary to evaluate the critical language of the Court of Appeal's opinion in the context of the information available on November 30, 1976. Prior to the remand, the Atomic Energy Commission called for the newly executed contract and determined that it evidenced an intent on the part of Consumers to sell process steam to Dow and an intent on the part of Dow to purchase the steam. The AEC concluded that circumstances had not changed sufficiently to require further inquiry. The Commission had made its determination by review of the contract itself without resort to extrinsic evidence. [CLI-74-15, 7 AEC 311 (1974).]

The Commission's decision had been before the Court of Appeals prior to the remand and had included the phrase "...reaffirm our prior determination that there are no 'changed circumstances', ...warranting a reopening of these proceedings." The Court of Appeals clearly did not find an independent basis for remand on the Dow steam issue. Its "assumption" that the Commission would take into account changed circumstances regarding Dow's need is included in a paragraph discussing recalculation of costs and benefits. In

this context, the Court might well "assume" that while circumstances had not changed sufficiently to warrant reopening the record, they might have changed sufficiently to affect the decision after the recalculation of costs and benefits called for by the remand of other issues. Nowhere, however, did the Court either explicitly or implicitly criticize the Commission's acceptance and review of the contract as evidence of the corporate intent of both Dow and Consumers.

B. The Standard of Materiality

During the suspension hearings, the representation of counsel for both Consumers and Dow that there was a contract which both companies were treating as valid was clearly a material fact requiring an examination of the contract as the Commission had done. At the time, there had been no amendments since the Commission's last review.

The Licensing Board's review, however, involved consideration of subsequent events such as schedule slippages, cost increases and other factors related to restriking the cost-benefit analysis. In order to determine whether the intent of the parties as evidenced by the contract supported the continued conclusion that Dow would purchase steam from the nuclear facility it was necessary to this resort to extrinsic evidence since the contract as executed did not address the factors which had changed significantly since the date of contracting.[5/] Although counsel for both Dow and Consumers would have an

5/ Obviously counsel for both Dow and Consumers thought resort to extrinsic evidence was necessary to establish circumstances under which Dow would take steam since the Temple testimony as filed describes situations not within the literal terms of the contract.

obligation to inform the Board of amendments to the contract, particularly if such amendments affected Dow's intent to take steam, the issue here is how far counsel must go on its own motion in divulging the reasons underlying the current contractual position of the parties.

Rule 401 of the Federal Rules of Evidence defines relevant evidence as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [Emphasis added.]

The Advisory Committee's note accompanying the United States Supreme Court version of Rule 401 of the Federal Rules of Evidence states:

> The rule uses the phrase 'fact that is of consequence to the determination of the action' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material'.... The fact to be proved may be ultimate, intermediate or evidentiary; it matters not, so long as it is of consequence in the determination of the action.

Weinstein believes the advisory committee's note "[S]hows a circularity of reasoning.... 'Intermediate' or 'evidentiary' propositions are relevant and provable only if they tend to prove or disprove an 'ultimate' fact. The fact that is 'of consequence' in terms of Rule 401 must therefore be an 'ultimate fact'...."[6/] Equally important to analysis of this case is the

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6/ Weinstein's Evidence United States Rules ¶ 401[03] fn 4 (1978).

fact that broad construction of pleadings and contentions under modern rules supports a number of implicit consequential facts and theories of law.[7] The "consequential," "ultimate," or "material" facts on the Dow issue in this proceeding were those facts which proved the circumstances under which Dow would purchase steam from the Midland facility.

C. The Material Facts of Record

Using the concept that material facts are those which are "of consequence" to the determination, it is troublesome to find in this record instances where counsel considered not revealing information which it was thought would cause the Licensing Board to suspend Consumers' construction permits.[8]

The July hearings demonstrate that the problem should not be approached solely on the basis of the facts in a contract which the parties are treating as valid and enforceable. There is evidence that while Dow was treating the contract as in force and valid, one option it was seriously considering was

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7/ Id. ¶ 401[04].

8/ At p. 11 of the Duran notes (19 page version) of the September 29, 1975 meeting (Staff Ex. 4, tab 42) Mr. Wessel is reported to have responded to Consumers' request for information by saying that he had the feeling that if what is being asked for by Consumers Power is furnished, this would invite the Board to say that this is such a tenuous thing, that this project should be put to an end. See also p. 3 of the Duran notes of the November 1, 1976 meeting (Staff Ex. 5, tab 22).

At p. 4 of the Duran notes of the November 1, 1976 meeting (Staff Ex. 5, tab 22) Mr. Rosso is reported to have discussed the fact that Consumers Power did not have in the testimony that Dow was also concerned about Consumers Power's "reliableness" to deliver steam and that if it came to a certain point Dow would "walk." Mr. Rosso is reported to have said that Consumers Power didn't put this into the testimony because it would lose the case.

its right to sue Consumers for breach. Dow considered seeking a declaratory judgment against Consumers and went so . . . draft papers seeking such relief. [Tr. 52,477.] To maintain such an action, Dow believed it had to continue to perform its obligations under the contract including the common law duty to refrain from any action which might prevent Consumers from performance. [Tr. 52,494.]

There is evidence which could support an argument that Dow had no intent to take the steam pursuant to the contract but was maintaining the validity of the contract only for the purpose of seeking remedies for the perceived breach. The question thus presented is whether Dow or Consumers had an affirmative duty to make full disclosure on the record of this fact, if such a fact were an essential part of the Dow corporate position at the time of the NRC suspension hearings? It is obvious that the legal recourse available to Dow is not the material fact with which the Licensing Board is concerned. The material fact is what circumstance results in Dow taking steam from the Midland facility.

There were other matters which affected the Licensing Board's decision (viz, notes indicating a desire by Consumers' attorneys to "finesse" the Dow-Consumers dispute, to drag their feet in the suspension hearings, and to provide less than knowledgeable witnesses, and notes indicating threats of massive litigation if Dow did not support Consumers in the proceedings). These matters could also be argued to be material to the circumstances under which Dow would take steam since they tend to indicate an effort to prevent

an affirmative full disclosure of facts relating to Dow's intentions which Consumers considered adverse to its position. (September 23, 1977 Order ¶10.)

1. The Unaware Witness and the Foot Dragging Strategy

The Licensing Board's September 23, 1977 Order based its finding on disclosure of Dow intentions on notes taken by Dow attorney, Leslie F. Nute, at a meeting on September 21, 1976 between Consumers and Dow personnel. (Staff Ex. 3, Tab 26). The meeting was attended by Judd Bacon, Rex Renfrow, and James Falahee representing Consumers and Mr. Nute, James Hanes, and Al Klomparens representing Dow. In addition to Mr. Nute, Mr. Bacon (Staff Ex. 3, Tab 24), Mr. Hanes (Consumers Ex. Vol. 7, Tab 7), and Mr. Klomparens (Staff Ex. 3, Tab 34) also took notes at the meeting.

In paragraph B.4. on page 3 of the Nute notes of 9/21/76 (Staff Ex. 3, Tab 26), the following statement appears:

> "Rex suggested that Dow witness might be someone from Dow Chemical USA or corporate area who is unaware of Midland Division recommendation to Oreffice -..."[9]

Mr. Nute's notes are the only notes that record an unaware witness statement. Although Mr. Nute could not remember Mr. Renfrow's exact words (Tr. 51,226), he stated that his notes were as close as he could come to

9/ Dow USA was the corporate entity of the Dow Chemical Co. which had direct control and supervisory authority over the Michigan Division operating unit which had negotiated the contract with Consumers. Dow Ex. 2

what Mr. Renfrow said. (Tr. 51,229.) Mr. Nute testified that Mr. Hanes responded to Mr. Renfrow's statement by saying that the Dow witness would tell the truth. (Tr. 50,750-51 and 51,232.) Mr. Nute stated that after September 21, 1976, there was never a suggestion by anyone that Dow produce a witness who was aware of the Midland or Michigan Division recommendations. (Tr. 51,233.)

Mr. Renfrow categorically denied that he ever said anything even close to the quotation from the Nute notes about an unaware witness. (Tr. 51,423.) He testified that at the September 21, 1976 meeting, Mr. Nute had expressed some concern about Mr. Temple as a witness because of Mr. Temple's personal opinions and that in response to these comments by Mr. Nute he (Mr. Renfrow) suggested that Dow might want to find someone other than Mr. Temple to testify. (Tr. 51,429.)

Mr. Renfrow repeatedly denied that he had ever suggested to anyone that he wanted a witness who was unaware of the Michigan Division recommendation. (Tr. 51,740.) Mr. Renfrow also expressed anger at a memo written by Mr. Wessel dated October 15, 1976 (Staff Ex. 5, Tab 12) wherein Mr. Wessel stated that he had specifically refrained from saying anything about the Consumer suggestion that Dow produce a witness who had no significant knowledge and would therefore not be in a position to advise the hearing board of the extreme sensitivity of the Dow-Consumer's relationship. (Tr. 51,936.) Mr. Renfrow did not know that anyone had gotten the idea that he made the unaware witness statement until January or February, 1977 during the course of the suspension proceeding. (Tr. 51,423.)

Mr. Bacon stated that he had no recollection whatsoever of anybody making a statement proposing that an unaware witness be offered. (Tr. 52,021.)

Mr. Falahee remembered that Mr. Nute had said something about there being a problem with Mr. Temple as a witness but did not remember any statement being made about a witness being knowledgeable of the Michigan Division position. (Tr. 52,266.) Mr. Falahee did not remember Mr. Hanes making a statement during the meeting of September 21 to the effect that Dow will put on a knowledgeable witness. (Tr. 52,328.)

Mr. Hanes remembered that Mr. Nute had expressed a question as to whether Mr. Temple should be the witness because of the announced position he had already taken. (Tr. 52,349.) He recalled that Mr. Renfrow responded that maybe the Dow witness should be somebody not familiar with the position Mr. Temple had taken. (Tr. 52,349.) He testified that he emphatically responded that Mr. Renfrow's suggestion was not appropriate and that the Dow witness would be a knowledgeable person and that that was the end of that discussion. (Tr. 52,349-351.) Mr. Hanes did state that he felt Mr. Renfrow's statement about the unaware witness was not planned - that it had come up on the spur of the moment. (Tr. 52,411.)

Mr. Klomparens' recollection was that Mr. Renfrow had raised the question about Mr. Temple as a witness because of Mr. Temple's deep involvement with the subject - that the concern was whether Mr. Temple would be a good objective witness. (Tr. 53,624; see also Tr. 53,718-21.) He stated that after

some discussion of alternative witnesses, either Mr. Nute or Mr. Hanes said that whoever the Dow witness was, he would have to tell the truth. (Tr. 53,624-25.)

The testimony of the witnesses on this issue is somewhat conflicting. At a September 29, 1976 meeting between Consumers and Dow, however, Mr. Renfrow is reported to have said that he had been "...toying with the idea of not having Joe as a witness". [Staff Ex. 4, Tab 21, p. 20 "Duran notes".] Mr. Nute, Mr. Hanes, and Mr. Klomparens all specifically recall Mr. Hanes reacting in the September 21 meeting to a statement which caused him to feel it necessary to indicate that Dow personnel would tell the truth. Drawing the most unfavorable conclusion for purposes of analysis results in a conclusion that Mr. Renfrow probably made some suggestion concerning whom Dow should provide as a witness. This could have resulted from Mr. Renfrow's perception of Dow concerns about public positions taken by Mr. Temple in the past. (Tr. 51,413.) To the extent that an attempt to prevent full disclosure of intentions was "considered" by means of a less than knowledgeable witness, the record indicates that at most it was "considered" but not acted upon.

The same notes disclose a proposed strategy to "drag feet". [Staff Ex. 3, Tab 26, p. 3.] This strategy, if indeed it was considered at all, clearly was not implemented since the record is replete with Consumers' objections to extension of time requests and scheduling requests which would have prolonged the decision-making process. (Tr. 51,433.)

2. The Threat of a Lawsuit

As with the question of the "unaware witness", the issue of the "threat of a lawsuit" begins with the Nute notes of the meeting of September 21, 1976. (Volume 3, Tab 26.) The "Nute notes" report that Consumers' threatened Dow with a massive lawsuit if Dow failed to support Consumers in the suspension hearings. (Staff Ex. 3, Tab 26, p. 3.) The "Nute notes" read as follows:

> "Consumers' threat - Falahee brought up the point that Dow has an obligation (Bacon interjects "Section 3") under the general agreement to support Consumers in the licensing proceeding. Falahee said "If Dow takes this posture, Dow and Consumers will have a helluva legal problem". (Note: strong implication that Consumers would regard us in breach if we went too far in our testimony) - Hanes replied that Dow's witness would tell the truth as he honestly believed it to be, whoever the Dow witness - Falahee then made naked threat that if Dow testimony not supportive of Consumers (Note: no longer just if we go too far), and that results in suspension or cancellation of permit, then Consumers will file suit for a breach and include as damages cost of delay, cost of project if cancelled, and all damages resulting from cancellation of project if it causes irreparable financial harm to Consumers (bankruptcy). (Note: pretty dammed close to blackmail.)"

Although the "Nute notes" have inferences that are not supported by the testimony of the other witnesses, the testimony shows that the two companies viewed "the threat" from different perspectives. Mr. Nute viewed the statement made by Mr. Falahee as a threat of a massive lawsuit. (Tr. 50,671.) He testified that this threat both angered him and shocked him. (Tr. 50,785.) Mr. Nute explained the meaning of the word "blackmail" contained in his notes. (Tr. 51,239.) He said the implication was that Dow had better be careful as to its testimony because if the testimony resulted in harm to Consumers, Dow would be faced with a massive lawsuit. His interpretation was that Mr. Falahee was saying that the testimony had to support Consumers

and if it didn't and the result was a suspension or a cancellation of the permit, then Consumers would sue Dow. Mr. Nute did testify that he did not interpret Mr. Falahee's statement as a request that Dow testify falsely. (Tr. 51,239.)

Consumers' witness Renfrow testified that the September 21 meeting was very calm; that Mr. Falahee said that if Dow breached the contract they would have a "helluva" legal problem; that Mr. Hanes and Mr. Falahee agreed that that was not the purpose of the meeting and that was the end of that discussion. (Tr. 51,447.) Mr. Renfrow's recollection was that Mr. Falahee did indicate that the legal problem would be gigantic. (Tr. 51,452.) But he was positive that nothing was said about a suit being filed. (Tr. 51,451 and 51,454.) It was Mr. Renfrow's recollection that both Dow's counsel, Hanes, and Consumers' counsel, Falahee, were satisfied that they weren't going to talk about the very difficult legal problem at the meeting of September 21. (Tr. 51,737.)

Consumers' witness Bacon recalled that Mr. Falahee mentioned a "helluva" legal problem which could result if Dow repudiated the contract. (Tr. 52,015-16.) He said that both Mr. Falahee and Mr. Hanes said that they hoped that could be avoided. (Tr. 52,015-16.) As the other Consumers' witnesses testified, Mr. Bacon stated that when Mr. Falahee made this statement the demeanor of the parties was calm, businesslike, unemotional. (Tr. 52,017.)

Mr. Bacon referred to the statement in the Aymond (Mr. Aymond was chairman of Consumers' Board of Directors) outline (Staff Ex. 4, Tab 7) which reads:

> "CP would have no alternative but to seek to recover damages from Dow for a, b and c [which Mr. Oreffice testified would total close to 600 million dollars - Tr. 54,135] if revocation were due to Dow's failure to abide by the contracts. We consider that a Dow position other than 3a or 3a(1) would be inconsistent with Dow's contract obligations."

(Under 3a and 3a(1), Dow would have testified that it still intended to take electricity and steam in accordance with the contracts.) Mr. Bacon testified that that statement was in the Aymond outline at the specific request of Mr. Aymond. (Tr. 52,046.) Mr. Bacon later testified, however, that the position ultimately taken by Mr. Aymond at the meeting of September 24 was not quite as strong as indicated in the Aymond outline. (Tr. 52,047, 52,051 and 52,089.)

Consumers' witness Falahee did not specifically remember saying anything about a "helluva" lawsuit but he did intend to tell Dow that Consumers thought they still had a valid enforceable contract and that if Dow took action that was in violation or breach of the contract that there would be something like a "helluva" lawsuit. (Tr. 52,251.) Mr. Falahee testified he was trying to convince Dow that they could not breach the contract with impunity. (Tr. 52,260.)

Mr. Falahee said that the Nute notes do not accurately portray the emotion of the meeting. He did not recall specifically whether he got into the details of the damages that Consumers was considering. (Tr. 52,274-5.)

With respect to the meeting of September 24, Mr. Falahee stated that Mr. Aymond went through the Aymond outline to show the impacts which a Dow decision would have on Consumers in terms of dollars, but that the meeting was very calm, very factual, and very straightforward. (Tr. 52,277.)

Dow witness Hanes remembered that a suggestion or statement was made at the meeting of September 21 that if Dow took the Temple position that there would be a lawsuit. (Tr. 52,347.) Mr. Hanes was not certain whether the 600 million dollar figure was developed at the meeting of the 21st or the 24th, but it was clear to him that Consumers had a large lawsuit in mind because they discussed the value of what they had in the plant, having to buy power from other sources, the loss of possible sale of an interest in the plant, and even the possibility of bankruptcy of Consumers Power. (Tr. 52,351.)

Mr. Hanes interpreted statements made by Mr. Aymond and Mr. Falahee as being consistent with the statement in the Aymond outline that only positions 3a and 3a(1) were acceptable to Consumers. (Tr. 52,358.)

Mr. Hanes testified that the Dow USA Board did see the slide that reads "Consumers has threatened Dow with this lawsuit on the order of magnitude of 600 million dollars". (Tr. 52,370.) He stated that the Dow USA corporate review team considered the 600 million dollar threat a significant factor. (Tr. 52,370.)

Mr. Temple testified that he had stated in the remand proceedings in February 1977, that in his opinion the Dow USA Board reached its decision because of the threat of a 600 million dollar lawsuit. He stated that he based this on his own feeling as to the impact that had on him and what he felt it probably had on others. (Tr. 53,451.) It is still Mr. Temple's opinion that the threat of a lawsuit was the only difference between the Dow USA position and the Michigan Division position. (Tr. 53,469 and 53,528.) With respect to the apparent inconsistency between his opinion on the impact of the threat of the lawsuit and the fact that the review team found nuclear to be economically advantageous, Mr. Temple stated that the Dow management would consider more than a "set of numbers" and would consider various other factors such as a lawsuit. (Tr. 53,520.)

Mr. Klomparens, the Dow review team leader, also testified that Mr. Falahee said that if construction were suspended or cancelled that Consumers and Dow would have a "helluva" legal problem. He said this would result if Dow took the Temple position. (Tr. 53,636.) Mr. Klomparens said that the risk presented by the threat of litigation was a factor considered by the review team but it was not quantified. (Tr. 53,654.)

Mr. Youngdahl, head of Consumers' negotiating team, emphasized that at the meeting of September 24, there was no threat. (Tr. 53,815, 53,817, 53,902 through 924.) He stated that the purpose of the meeting was to show possible consequences of actions that Dow might take and that the meeting was business-like. (Tr. 53,815, 53,817, 53,959.) He did agree that Mr. Aymond indicated the damages that Consumers might incur. (Tr. 53,908.)

Consumers' Chairman Aymond stated that at the meeting of September 24, he was careful not to ever use the word "sue". He was very careful not to threaten in any way. (Tr. 54,055.) He stated that the purpose of attending the meeting of September 24 was to respond to Dow's invitation to provide Dow with the impact on Consumers Power Company of various possible courses of action that Dow might take. (Tr. 54,029.)

Dow Chairman Oreffice was very clear that he had been informed of a Consumers' threat of a $600 million lawsuit prior to attending the meeting of September 24, 1976. (Tr. 54,132-3-4.) Mr. Oreffice added up the dollar figures in the Aymond outline and said that this would correspond to the $600 million figure. (Tr. 54,135.) Mr. Oreffice interpreted Mr. Aymond's presentation of alternatives as confirming what he had previously heard about the threat of a lawsuit. (Tr. 54,194-5.)

While there was a conflict in the testimony concerning the Aymond outline used at the September 24, 1976 meeting between Consumers and Dow, the Michigan Division position apparently was most nearly represented by the statement on the outline identified as 3.b.:

> If Dow takes the position that it still intends to take electricity and steam from Consumers power in accordance with the contracts, but that an alternative source or sources would be more advantageous to Dow, then the chances for suspension and ultimate modification or revocation of the construction permits would be greatly enhanced (50-50).

Page 4 of the Aymond outline reveals Consumers' position if that Dow position was expressed to the NRC and permits were suspended. Item 5 concludes:

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

It involves no great logical analysis to draw a reasonable inference from the latter statement to the effect that if the Michigan Division position as perceived by Consumers were to have been adopted by the Dow corporation and the licensing board suspended the permit as a result, Consumers probably would have sought damages from Dow in ensuing litigation. Mr. Oreffice testified that the financial numbers in the Consumers presentation added up to approximately $600 million. (Tr. 54,135.) He further indicated that this potential for litigation ("threat") was inseparable in his mind from the remainder of the reasons for the Dow corporate decision to continue with the contract. (Tr. 2699.)

3. The Facts "Of Consequences" to the Board's Decision

While allegations of misconduct related to the "consideration" of actions rather than the actual presentation of misleading evidence, i.e., foot-dragging, unknowledgeable witness, or suing Consumers, can be dismissed as not having a impact on the integrity of the Commission's process, Consumers successful effort to influence Dow's decision with a blunt discussion of Dow's liability in the event Dow breached the contract requires further analysis.

The Licensing Board found Dow's potential liability to be one of the two most important factors influencing Dow's decision (6 NRC 488).

A review of the Temple direct testimony reveals no mention of Dow's consideration of its financial liability to Consumers in the event of litigation between the two companies. Further, there is no evidence of record to indicate that Consumers or Dow had produced any document during discovery prior to the presentation of Mr. Temple as a witness which would reveal the discussion of litigation between the two companies.

The reason for this failure appears to be due to a failure of communication between Dow counsel and Consumers counsel. None of the notes taken of meetings between Dow and Consumers reveal a discussion of the possibility of including the litigation threat in the Dow testimony. Mr. Renfrow felt it was obvious to anyone that when two large corporations have a contract and one seeks to abandon the contract, the other will seek redress. (Tr. 51,453.) Mr. Renfrow saw the question as whether the Michigan division position should be revealed in direct testimony as a tactical matter.

Mr. Rosso may not have known of the threat since his first direct involvement was at the meeting of October 12, several weeks after the last known mention of the threat. (Tr. 53,098 et seq. and 53,154 et seq.)

Mr. Nute and Mr. Wessel viewed the threat as going beyond the bounds of simply asserting one's legitimate contract rights and thought that Consumers was no longer merely suggesting that Dow had a contract obligation but was suggesting that whatever Dow testimony was provided had to be supportive or Consumers would sue. (Staff Ex. 3, Tab 26, p. 3, Tr. 52,915.) Mr. Wessel

did not believe he needed to mention the threat as an important reason for Dow's corporate decision because Consumers knew it had made a threat. (Tr. 52,914-52,917.)

D. Standard of Disclosure

While the NRC Staff is unable to conclude that attorneys for Dow or Consumers consciously or deliberately failed to produce evidence of litigation threats by Consumers against Dow, there does appear to be sufficient evidence of nonproduction[10/] to consider what consequences flow from a failure to produce.

Parties to NRC proceedings have an affirmative duty to keep boards advised of significant changes and developments relevant to the proceeding.[11/] By disclosing information in accordance with their affirmative duty, parties do not admit relevancy or materiality.[12/] The Appeal Board has also been critical of practices which effectively conceal pertinent matter which cuts against a party's position.[13/]

10/ Supra p. 12 n. 6.

11/ Duke Power Co. (McGuire Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973); Georgia Power Co. (Vogtle Units 1 and 2), ALAB-291, 2 NRC 404 (1975); Duke Power Co. (Catawba Units 1 and 2), ALAB-355, 4 NRC 397, 406 at n. 26 (1976). It should also be noted that the Appeal Board cites Fusari V. Steinberg, 419 U.S. 379, 391 (1974), J. Burger concurring for the proper standard of disclosure: "[C]ounsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome."

12/ Carolina Power & Light Co. (Shearon Harris Units 1-4), LBP-78-2, 7 NRC 83, 88 (1978).

13/ Tennessee Valley Authority (Hartsville Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391, 1395 (1977).

While these general rules are well known by persons practicing before the Commission (and presumably in federal courts generally), they are sometimes difficult to apply in the particular circumstances of an ongoing proceeding.

The duty of parties to keep boards advised has been referred to in NRC proceedings in situations where discovery has been completed and both direct testimony and cross examination have been concluded. In this proceeding the parties were notified that discovery documents were available for review in Jackson but no party attempted to peruse those documents before the hearings commenced. In addition, full disclosure was made by both Dow and Consumers during cross-examination and documents were made available promptly on request without the need to resort to enforcement procedures.

Consumers and Dow argue they had no duty to produce the Michigan Division position or the threat of a lawsuit in direct testimony if they were immaterial. This seems to the NRC Staff to be an overly technical application of the materiality concept. While it is true that the Dow corporate position was the material fact with which the Licensing Board was concerned, the reasons for the Dow USA decision are probative of the circumstances under which Dow intends to take the steam and therefore relate directly to the material issue. While the Michigan Division position is probably not material in light of the Dow USA decision, the threat of a lawsuit was material in so far as it demonstrated the ultimate fact in issue, i.e., Dow's intention.

Consumers' analysis of the effect of introduction of certain evidence in the proceeding tends to show that it thought the litigation potential could be of consequence to the Licensing Board's decision. In the Aymond outline, Consumers assumes that if the Dow "intent" is expressed merely by reference to its contract liability rather than by reference to the economic advantages of nuclear produced steam then the chances of suspension are greater. On cross-examination, the Consumers' lawyers indicated that their concern was not that it was inappropriate to hold a party to the bargain contracted for, but that the Board would decide that since the contract was no longer economically attractive for Dow, the project should be suspended. (Tr. 51,434-5 and 51,441-2.)

This negative analysis does not withstand scrutiny for two reasons. First, it is not at all clear why the Licensing Board should be interested in protecting Dow's financial interests. Second, as the Board clearly found, the avoidance of exposure to litigation involving $600 million was a strong incentive to Dow to continue to support the contract. Since the fundamental issue was what circumstance results in Dow's taking steam from the nuclear facility, it follows that avoiding financial exposure in a breach of contract action is strong evidence of Dow's intent to proceed with the project. However, whether a party correctly determines what the effect of material evidence may be is not important. What is important is whether the party in sole possession of material evidence comes foward with it.

Assuming, arguendo, that the "threat of litigation" if revealed would be adverse to Consumers, then it might be inferred that Dow was not legally required to adhere to the contract.[14/] Evidence of Dow's intent would then be based on an analysis of facts which Dow believed were important excluding any consideration Dow may have given to its contract liability. The best evidence of Dow's position in such circumstances would appear to be the question posed to Mr. Oreffice during the hearings:

> Question: "Mr. Oreffice, would it be fair to state that, if there had been no threat of a lawsuit, the corporate review decision would, in fact, have supported Mr. Temple's conclusion at the Division level?
>
> Answer: "I'd be speculating if I answered that in the affirmative because, as I said before, I think in making a decision you get certain data input and it's very difficult when you have that data available to you that day to say, 'How would I have decided if I didn't have that particular data available?'" (Tr. 2713.)

Assuming that The Michigan Division position would have been adopted by Dow USA, absent the threat of a lawsuit (thus assuming an adverse inference for purpose of analysis) the Dow position, as perceived at the time by Consumers, probably would have been accurately summarized as reflected on the Aymond outline in item 3.b. Mr. Nute indicated that his subsequent consideration of the difference between the Michigan Division position and the Dow USA board decision had led him to believe that while the Michigan Division position represented a change in Dow thinking it did not change Dow's intent to take steam on the schedule and at the cost projected at that time. (Tr. 50,886 et seq.)

14/ cf. International Union (UAW) v. NCRB, 459 F.2d 1329 (D. C. Cir. 1972); 2 J. Wigmore, Evidence § 291 (3d ed. 1940) for a discussion of the adverse inference rule which can be applied where a party fails to produce documents within its control which have a vital bearing on the proceedings.

In this case, the material fact is date dependent. Dow's General Manager, Joseph Temple, Jr., testified in direct testimony that Dow intended to take nuclear produced steam supplied in March of 1982. [Following Tr. 220 at p. 2.] He further indicated that Dow will be continuously reviewing the situation to see whether 1984 isn't too far. [Id. p. 3.] No sophisticated analysis is necessary to conclude that if plant completion is projected beyond 1984, Dow certainly would be considering some recourse to relieve itself from whatever contractual commitments it had with Consumers.

Thus, the relevant and material evidence would have been that if the plant is completed by 1982, Dow "...still intends to take electricity and steam from Consumers Power in accordance with the contract...." Since the material consideration is Dow's present intention, (ALAB-458, 7 NRC 155, 168), the absence of the threat of ligitation by Consumers probably would not have resulted in a change in the decision rendered by the Licensing Board, although Consumers believed the contrary at the time. Since the evidence which Consumers did not produce or include in its direct testimony was apparently cumulative, albeit material as a fact which tended to prove the ultimate fact, justified on Issue 2 as a matter of fact. This is because the ultimate fact, i.e., Dow's intention, was not made less likely by the nondisclosure of the threat.[15/]

15/ See Annot. 5 A.L.R. 2d 893, 949 (1949); Annot. 135 A.L.R. 1375, 1386 (1941); 29 Am. Jur. Evidence § 180 and § 186 (1967).

V. ISSUE 3: Whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow intentions?

At the outset of the hearings into this issue, the NRC Staff indicated that it was concerned that the Licensing Board had not been given evidence concerning the reasons for the Dow USA Board decision in view of the fact that attorneys for both Dow and Consumers had consistently argued that the Michigan Division position was immaterial. (Tr. 50,193.) Their position would seem to dictate that whatever witness Consumers provided should be knowledgeable of the corporate decision and the reasons therefore.

A. Selection of the Witness

The testimony of record shows that Mr. Temple was not in the room when the corporate decision was made on September 27, 1976 (Tr. 50,910, 51,504 and 54,224). Mr. Temple was not a part of the corporate review headed by Al Klomparens nor did Mr. Temple participate in formulating the review team's recommendations. Thus, it can be concluded that if Consumers and Dow believed that the only relevant and material evidence was that showing the corporate position of Dow, then Joe Temple might not have been the most knowledgeable witness. Dow and Consumers, however, agreed that Mr. Temple was the most knowledgeable person concerning the history of Dow and Consumers relationship.[16/] Intervenors other than Dow and the NRC Staff had both

16/ Mr. Renfrow testified that before the September 29, 1976 meeting the choice of Temple was 90 to 95% closed. He said it was made in a telephone conference between Mr. Bacon and Mr. Wessel on September 27, 1976. See discussion in Wessel memorandum to Nute (Staff Ex. 4, tab 18) especially pages 2 and 3.

indicated their intention to call Joe Temple on the Dow issue.[17/] In the circumstances it seems reasonable for Consumers to have concluded that Joe Temple was the appropriate witness to testify on behalf of Dow. Consequently, the failure to provide either Mr. Klomparens or Mr. Oreffice as part of Consumers' case-in-chief cannot be deemed an attempt to present misleading testimony concerning Dow's intentions.

B. Drafting of Testimony on Dow Intentions

The second matter relevant to a determination of whether there was an attempt to present misleading testimony concerning Dow's intentions is the drafting and submission of the written direct testimony of Mr. Temple. An analysis of this matter must focus on the meetings which occurred between Dow's counsel and Consumers' counsel for the purpose of drafting the Temple testimony.

The Temple testimony was discussed at meetings between Consumers and Dow on September 29, 1976, October 12, 1976, and November 1, 8, and 15, 1976. There were a number of drafts (sometimes called outlines):

1. The draft prepared by Dow presented at the meeting of September 29, 1976 (Staff Ex. 5, tab 17 AA);
2. Another draft prepared by Dow dated October 5, 1976 (Staff Ex. 5, tab 17 DD);

17/ Mr. Renfrow stated that Staff counsel Brenner had told him that if Dow didn't have a witness at the hearing, the Staff would subpoena Dow's witness. See p. 14 of the Duran notes (19 page version) of the September 29, 1976 meeting. (Staff Ex. 4, tab 42). Mr. Cherry wrote Mr. Wessel on September 27, 2976 requesting that Dow have Mr. Temple available at the hearings for questioning on the status of Dow's contractual relationships with Consumers (Staff Ex. 4, tab 19).

3. The October 22, 1976 "misleading and disingenuous" draft prepared by Consumers Power (Staff Ex. 5, tab 17 EE);
4. A draft dated October 29, 1976 by Dow (in third person) (Staff Ex. 5, tab 17 GG); and
5. A draft in question and answer form developed at the meeting of November 1, 1976 (Staff Ex. 5, tab 17 HH).

A critical part of the analysis of the facts relating to the preparation of the Temple testimony is Milton R. Wessel's (a Dow attorney) perception of the Dow-Consumers relationship.

As of September 29, 1976, Mr. Wessel testified that he regarded Consumers as a group (including the Consumers' attorneys) as adversaries (Tr. 52,524). He thought Consumers' position was "very, very, very adversarial" (Tr. 52,524). In fact, at this and subsequent meetings he viewed Consumers' personnel as "blackmailers" (Tr. 53,067-8). Mr. Wessel viewed his role in the five meetings to include an effort to get Consumers to provide testimony for the Dow witness so that Dow could defeat any charge made by Consumers in subsequent litigation (Tr. 52,536-8). During these meetings, he was trying to frustrate Consumers' efforts to obtain information from Dow (Tr. 52,549). Consumers repeated requests for documents and information was viewed by Mr. Wessel as part of their scheme to "get" Dow (Tr. 52,524-5). He did not really think it was Consumers' purpose to get the information to prepare the Temple testimony, but for some other purpose (Tr. 52,735).

The first draft prepared by Dow and given to Consumers at the meeting of September 29, 1976 was affected by Mr. Wessel's perception of the relationship of the parties. Despite the fact that he did not prepare the document, he marked each page "DRAFT - MRW" (Staff Ex. 5-17 AA). His purpose in doing that was to prevent the document from being used as an admission against Dow in the event of subsequent litigation between the parties (Tr. 52,694-6).

Dow's September 29 draft was an intentionally "lousy" draft (Tr. 52,912). It was not intended to be something that could be used in any significant way (Tr. 52,911). The document was designed by Mr. Wessel to try to elicit a revised draft from Consumers (Tr. 52,699 and 52, 717). Mr. Wessel stated that he knew what Consumers wanted and ". . . this certainly was not what he [Mr. Bacon] wanted" (Tr. 52,700). Mr. Wessel testified that the document had to be more than "token" to avoid Consumers claiming that Dow was not cooperating (Tr. 52,701 and 52,717).

Also discussed at the meeting of September 29, 1976 was an opening statement for Mr. Temple prepared by Mr. Wessel (Staff Ex. 5, tab 17 CC). Mr. Renfrow explained the nature of the document was that Mr. Temple would say it was difficult for him to testify on the subject and that he hoped the Board would understand how difficult it was for him to talk about the contact with Consumers in the ongoing negotiations (Tr. 51,570). Mr. Renfrow thought Mr. Temple should never read such a statement; it set up the witness for unwanted questions and that it didn't serve anybody's purpose (Tr. 51,570). Mr. Wessel said that the opening statement was drafted by him primarily to stop Consumers from getting information. (Tr. 52,731).

Mr. Wessel testified that both the draft testimony and the opening statement he presented at the meeting of September 29 were not prepared primarily with the Licensing Board in mind but were prepared primarily with the Dow-Consumer adversarial relationship in mind. (Tr. 52,731)

There is nothing in the record to suggest that the Consumers attorneys shared Mr. Wessel's view of the adversarial relationship of the parties nor that they were even aware of Mr. Wessel's approach until after the testimony had been prepared. Mr. Renfrow acknowledged that as a result of the meeting of September 29 he knew that he and Mr. Wessel did not do business in the same way, but he had no idea that the Dow attorneys were not playing it straight. (Tr. 51,573). Mr. Renfrow testified that he did not get the impression that Dow was posturing until the first week in December. (Tr. 51,589). Mr. Rosso testified that he had no knowledge of an adversarial relationship until after the Board raised the questions about the Temple testimony on November 30 or December 1 or 2. (Tr. 53,240).

At the meeting of September 29, Mr. Renfrow wrote out an outline of what he wanted Mr. Temple to use in preparing his testimony. (Staff Exhibit 5-17 BB). Mr. Renfrow wanted Mr. Temple to write down what he wanted to say (Tr. 51,018 and 53,178). This outline was later typed and shown as the cover to the draft testimony prepared by Mr. Nute dated October 5, 1976. (Staff Exhibit 5-17 DD) (Tr. 50,963).

1. The Michigan Division Position

The principal item of controversy during the preparation of the Temple testimony was whether to include the Michigan Division position. Starting with the first meeting on September 29, the Consumers attorneys believed that the Michigan Division position should be included in the Temple testimony, not because they thought it was material , but because they thought it would be developed on the record in any event and that by putting it in the direct testimony it could be presented in a better light. (Tr. 51,511, 51,519, 51,522-3, and 51,574).

The Dow attorneys never waivered from their position that it should not be included in the testimony. (Tr. 51,519, 52,522-3). They ultimately prevailed even though Mr. Renfrow referred to the decision to leave it out as a joint decision. (Tr. 51,908).

None of the lawyers involved in the preparation of the Temple testimony thought that the Michigan Division position was material evidence. (Bacon - Tr. 52,109, Nute - Tr. 50,924 and 53,161, Renfrow - Tr. 51,523, 51,573, 51,637 and 51,945-6, Rosso - Tr. 51,688, 53,166 and 53,226 and Wessel - Tr. 52,637, 52,920 and 53,161.)

2. Dow's October 5 Draft

Mr. Wessel testified that Mr. Nute prepared the draft dated October 5, 1976 because the Dow Attorneys had not yet been successful in persuading Consumers to prepare a draft. (Tr. 52,978). In preparing this draft, Mr. Nute

did not attempt to put everything in that he felt was material and relevant to the issues before the Licensing Board. He tried to follow the outline that had been given to him by Mr. Renfrow. (Tr. 50,964). Mr. Nute testified that in the limited time allowed, he tried to do the best job he could with this draft. (Tr. 50,965-8, and 51,308). Mr. Renfrow testified that he felt he wasn't getting anywhere with the Dow attorneys because the October 5 draft did not have the reasons for the Michigan Division review in it and it was not in the format that Mr. Renfrow wanted. (Tr. 51,582). Mr. Nute's October 5 draft left Mr. Renfrow frustrated. (Tr. 51,583). Despite Mr. Renfrow's unhappiness, Mr. Wessel indicated in the meeting of October 12 that what Dow had given Consumers to date was final in terms of what Mr. Temple had to say. (Tr. 51,586). Mr. Wessel also testified that Mr. Nute's October 5 draft continued Dow's effort not to give Consumers information. (Tr. 52,734).

Mr. Bacon testified that Mr. Nute's October 5, draft omitted several items that were in the the outline, including the Michigan Division review. (Tr. 52,117). Another thing Mr. Bacon did not like about the October 5 draft was the portion that said that the contract negotiations were very sensitive so please don't ask us about them. (Tr. 52,120).

Mr. Rosso also testified as to the problems he had with Mr. Nute's October 5 draft. (Tr. 53,178 through 53,189).

3. Meeting of October 12

At the meeting on October 12, the attorneys went though the October 5 draft testimony supplied by Mr. Nute. Because Consumers was still insisting on being knowledgeable with respect to Mr. Temple's views, Mr. Wessel related those views to Mr. Renfrow and Mr. Rosso after Mr. Bacon had left the room. (Tr. 50,976). A "laundry list" of Temple concerns is set forth on page 8 of the Duran notes of the meeting of October 12, 1976. (Staff Exhibit 5, tab 9). Mr. Wessel specifically refrained from mentioning Consumers conduct in suggesting a witness unknowledgeable about the Michigan Division position and the threat of a lawsuit since he felt Consumers' attorneys knew these things. (Tr. 52,794; 52,914-17).

After the meeting of October 12, Mr. Rosso attempted a draft of the Temple testimony. (Tr. 50,982).

4. October 22 Draft by Mr. Rosso

On October 22, 1976, Mr. Bacon mailed to Mr. Nute copies of the then most current draft which had been prepared by Mr. Rosso. (The letter is Staff Ex. 5-17 FF, the draft testimony is Staff Ex. 5-17 EE).

Mr. Nute testified that he reacted "fairly strongly" to Mr. Rosso's draft. (Tr. 50,998). He did so because he thought that some people could draw the conclusion that the draft could be said to be misleading or even disingenuous. He thought there were inaccuracies in it and the draft as a whole seemed to paint a picture that Mr. Nute did not think existed. (Tr. 50,998).

What upset Mr. Nute the most was an item on page 6 of the Rosso draft indicating that Consumers would have steam in time, which was 1982. (Tr. 51,056-7). Mr. Nute's "strong reaction" is not apparent from the two letters he sent to Consumers concerning the Rosso draft prior to the meeting of counsel on November 1, 1976. In an October 27, 1976 letter to Mr. Bacon, Mr. Nute pointed out an error in Mr. Bacon's cover letter transmitting the Rosso draft but said nothing about finding the testimony inaccurate. [Staff Ex. 4, Tab 33.] The "strong reaction" is not apparent in Mr. Nute's letter of October 29, 1976 to Mr. Renfrow in which he discusses "some changes" he has made in the Rosso draft. [Staff Ex. 4, Tab 34.]

5. October 29 Draft by Mr. Nute

On October 31, Mr. Rosso received a draft prepared by Mr. Nute in third person dated October 29. (Staff Ex. 5-17 GG) (Tr. 53,237) Mr. Rosso thought it was cohesive and organized but couldn't understand why it was a substantial departure from his October 22 draft. (Tr. 53,237). Mr. Nute's October 29, 1976 cover letter (Staff Ex. 4, tab 34) says "you will notice that your draft outline was the basis of this document." That was part of Dow's continuing effort to have the record show that the final testimony was the product of Consumers' thinking, not Dow's. Mr. Rosso also did not understand why this latest draft was in the third person. He did not think that appropriate. (Tr. 53,237). Another problem Mr. Rosso had with Mr. Nute's October 29 draft was that the opening paragraph made it appear that Mr. Temple had a lot of other things to say and he wasn't being allowed to say them. (Tr. 53,239).

6. November 1 Meeting

At the November 1 meeting, one of the Consumers attorneys suggested putting the testimony in question and answer form. This was readily agreed to by the Dow attorneys. (Tr. 51,615 and 53,239). Mr. Wessel indicated that at the November 1, 1976 meeting he became concerned for the first time that the testimony had to be drafted in a manner which would not be misleading to the Licensing Board. (Tr. 52,764.) He was concerned that the narrative form of testimony proposed by Consumers might be misleading because it appeared to be a complete description of the Dow-Consumers relationship when in fact it left out the essentials of the Dow problems with Consumers. (Tr. 52,765.) He was not concerned that such information was omitted but was concerned that the testimony as drafted might imply that the information didn't exist. (Tr. 52,766.) In Mr. Wessel's view, the question and answer format for the testimony eliminated the misleading impression. (Tr. 52,768.)

The words "misleading and disingenous" appear in the Dow meeting notes of November 1, 1976. The "Nute notes" state: "Milt also afraid that Rosso draft would appear disingenuous and misleading - appears to be the complete story, but in reality is not - once you make decision to get into negotiations, then you have to be complete." [Staff Ex. 5, Tab 21.] The Duran "Memorandum to Files" which is noted to be "an accurate summary" but not "verbatim in any sense" indicates that "Milt voiced a concern that Consumers Power's draft of Joe's testimony could be easily regarded as being of a misleading, or disingenuous, [sic] nature because of the way it was put together." (Staff Ex. 5, Tab 22.) The literal transcription of Mr. Duran's shorthand notes, however, report the conversation as follows:

Milt: It was not done inadvertently. What was done was done with a lot of thinking. The third person format was different from what you would put it is consistent with what was done in the earlier proceedings. It may be different from what you are doing now, but it is not different from what was done earlier. We are concerned with what may happen on Joe's cross exam. We are not concerned with what may happen in your direct testimony case. He stated that he would want to make it very clear on the testimony that this was Comsumers Power doing and not Dow's. This is because we are concerned with Consumers Power coming back at a later date and saying that Dow shot the thing down. He talked about this problem.

Rosso: I guess I don't follow this.

Milt: He talked about the questions that Consumers Power gave Dow to answer.

Rosso: You are concerned with Consumers Power making Dow make statements about certain things like concerning negotiations and then have this brought out by Cherry.

Milt: We are also concerned that once some of this stuff is out on the table, then people may tend to select the things that would show that the negotiations between Dow and Consumers Power are of a very tenuous nature. This could be very easily brought out on cross exam.

Rosso: Would it be better if it was of a question and answer format?

Milt: This would at least show that the testimony was being brought out in response to Consumers Power questions and not a product solely of Dow.

Rosso: Why do you feel we were being disingenous?

Milt: Dow is very interested in maintaining its rights to leave its options open. We think that Dow has a good case if [sic] for a cause of action based on the "best efforts" clause with Consumers Power. We have stated nothing about this. We do want to leave this option and others open. A lot of this depends on what is agreed upon during continuing negotiations. I thought we made this clear when we talked about Joe's views. [Dow Ex. 3, p. 2-3 11/1/76.]

Apparently, it was Mr. Wessel who first suggested that the document could be "misleading and disingenuous". (Tr. 52,762). The purpose of telling Consumers

that it was misleading and disingenuous was to get them to change the testimony. (Tr. 52,762, 52,799).

Subsequent to the November 1, 1976 meeting Mr. Nute composed and sent a letter to Mr. Rosso dated November 4, 1976 in which he said:

> "Using such a form obviates our concern that your initial draft of Mr. Temple's testimony could be said to be misleading or even disingenuous...."

Mr. Wessel's recollection was that Mr. Nute's "very, very strong feeling" stemmed primarily from Mr. Bacon's letter of October 22, 1976. (Tr. 52,771.) Mr. Wessel indicated that Mr. Nute continued to be upset even after it was determined that Mr. Bacon did not write the letter but had signed one dictated in a hurry by Mr. Rosso. (Tr. 52,772.) Mr. Wessel also noted that he didn't believe that Mr. Nute knew that he had taken the language Mr. Wessel had used at the November 1, 1976 meeting for use in his letter of November 4, 1976. (Tr. 52,772, Staff Ex. 5, tab 26.)

Mr. Rosso testified that they were upset by Mr. Nute's November 4 letter - they thought it was very strange - and they didn't know why it was written. (Tr. 53,257-8). He testified that it was the first time that the Consumers attorneys thought that maybe Dow was trying to make a record of some kind. (Tr. 53,258). Mr. Rosso and Mr. Renfrow agreed that they should write a response but they were busy and they did not get to it. (Tr. 53,258). Mr. Rosso testified that even after the receipt of the November 4 letter he still did not think that the relationship was adversarial. (Tr. 53,259).

"Cross Examination exercises" held on November 8 and 15 completed the preparation of the Temple testimony (notes of those meetings taken by Mr. Duran and Mr. Nute are found at Staff Ex. 5, tabs 23, 29, 30, 34 and 35).

C. No "Attempt" Was Made to Mislead

In examining the question presented by Issue 3 as to whether there was an "attempt" to present misleading testimony to the Licensing Board, it is important to distinguish between what may have been considered and what was done. Neither Consumers' nor Dow's positions during the discussions on testimony seem unreasonable. Consumers' desire to include a discussion of the Michigan Division position in the direct testimony accords with usual NRC practice in such circumstances. Dow's concern that a discussion of the Michigan Division recommendation without including a discussion of the concerns which resulted in that recommendation would be misleading is equally appropriate. (Tr. 52,764-66.) Although it would appear in hindsight that more candid, less guarded, conversations between the two companies would have been much more likely to prevent misleading the Board and the parties, the record does not reveal illegal conduct on the part of either company or their counsel. Certainly, subsequent decisions of the NRC and the United States Supreme Court support the position of both Dow and Consumers that the material fact as to which the testimony should be addressed was the "present intention" of the corporation.[18/] In this latter respect the record indicates

18/ Supra, p. 35.

that the Temple testimony, as filed, accurately stated Dow corporate intent. Consequently, the NRC Staff believes a negative finding should be entered on Issue 3.

VI. ISSUE 4: Whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony?

On the third day of hearings, December 2, 1976, the Licensing Board requested the parties to file written briefs addressing the preparation of the Temple testimony and the nature of its presentation to the Board. (Tr. 502.) In addition, the Board requested discussion of the issue on the record. (Tr. 503.) Dow filed a written memorandum with the Board on December 22, 1976 and Consumers filed a written memorandum with the Board on December 30, 1976.[19/]

During the course of the Board's investigation of this matter, the only witness to give an affirmative answer to the question posed by Issue 4 was Mr. Renfrow. He indicated that he thought Mr. Wessel may have misled the Board concerning the preparation and presentation of the Temple testimony. (Tr. 51,924 et seq.) Mr. Renfrow apparently was referring to the statement made by Mr. Wessel to the Licensing Board on December 3, 1976. (Tr. 661.) On December 2, 1976, the Licensing Board ordered the parties to prepare briefs concerning the preparation of the Temple testimony. (Tr. 502.) The first two of several issues to be addressed were: (1) Whether the testimony

19/ The filings of the other parties are not being addressed here since they were not privy to the facts as ultimately developed on the record as were Dow and Consumers.

itself was proper in view of the nature of its preparation and the nature of its presentation to the Board and, (2) Whether in view of the testimony by Mr. Temple and the discussions on the record regarding the draft testimony's preparation any attempt was made to avoid full disclosure of Dow's current position on the contract and of any other relevant facts relating to the suspension hearing. (Tr. 502-3.)

Mr. Wessel appeared before the Licensing Board on December 3, 1976 and asked that the Board countermand its Order of December 2, 1976. (Tr. 678.) He told the Licensing Board that the proceedings of December 2, 1976 were misleading. (Tr. 661.) He stated that the Dow perception would explain what the Board inadvertently had concluded was impropriety or misconduct. (Tr. 663.)

Mr. Wessel told the Board that it was not possible for them to come to a proper judgment on the issues regarding the preparation of the Temple testimony without having a good deal more information than it had. (Tr. 663.) He then discussed what he had viewed as an adversarial relationship between Dow and Consumers. (Tr. 664.) He stated that he dealt with Consumers' attorneys as adversaries knowing that what he said or did could well end up in subsequent litigation between the parties "...and I have no desire to be disclosing this but I feel that what has been said to this point, because I did not disclose, may to that extent have created a misleading impression to the Board". (Tr. 665.) At the conclusion of his statement he said, "I consider that I have a responsibility for having generated something that probably shouldn't be here and I would love to see it stopped". (Tr. 680.)

Because of their perception of the adversarial relationship between the parties, Mr. Wessel testified that the Dow attorneys felt it necessary to use "sporting" tactics. Mr. Wessel defines "sporting" as conduct concerning which you would be embarrassed if it were disclosed publicly. (Tr. 52,558.) He said the process he described as "sporting" was also called the "game theory". (Tr. 52,560.) He stated that "sporting" "...is probably the most common characteristic of our American litigation mechanism...it is the way it is done". (Tr. 52,560.) Mr. Wessel does not consider "sporting" to be unethical. (Tr. 53,082.)

Mr. Wessel's primary concern during the preparation of testimony was to avoid doing anything that would prejudice Dow's position in subsequent litigation with Consumers. (Tr. 50,423, 51,090, 52,036-8 and 52,504.) He did not want Consumers to know his real purpose in the preparation of the Temple testimony and, therefore, he engaged in "sporting". (Tr. 52,558.)

During the hearings investigating the preparation of testimony, Mr. Wessel testified that he was perfectly aware of the fact that the position that Dow took in the course of the discussions in the negotiations with Consumers from September to the time of his statement of December 3, 1976 "...is what led to at the minimum misunderstandings of significant consequence which, at least as of the day I was speaking, December 3, 1976, led me to believe that the Board had concluded that there had been some effort to mislead or to suppress or to do something else that was wrong which I thought was wrong and was trying to correct". (Tr. 52,593.)

Mr. Wessel's statements on December 3, 1976 are fully comprehensible only in the light of the 4,343 pages of testimony taken by this Board during the July hearings. Mr. Wessel was acknowledging that he was partly responsible for having generated the situation that led to the Board's inquiries into the preparation of the Temple testimony. Despite Mr. Wessel's statement, however, the Board did not countermand its December 2, 1976 order for briefs.

In response to that Order, however, the memo submitted by Dow on December 22, 1976 (Staff Ex. 10) did not mention the "sporting" activities which, in Mr. Wessel's opinion, contributed to the Board's thought that there may have been some misconduct in the preparation of the Temple testimony.

Nowhere in Dow's brief is it indicated that any of the Dow drafts were prepared in a deliberately unsatisfactory way. The Dow brief does not indicate that the letters to Consumers containing the language "misleading and disingenuous" were based on language used in the November 1 meeting to force changes in Consumers' drafts which would delete reference to the Michigan Division position. (Tr. 52,799-80.) To the contrary, the Dow brief cites the cover letter for the final draft of the Temple direct testimony stating that its concern about Consumers draft being misleading and disingenuous was alleviated by the question and answer format without any indication that Consumers had sought to include rather than exclude information and that it was the inclusion of too much detail which had caused Dow's concern. (Staff Ex. 10, p. 6.)

Mr. Wessel testified that he thought that the Dow brief was sufficient for the Licensing Board to draw a conclusion. (Tr. 52,821.) However, he indicated that he would avoid the conclusion that the brief was a "complete story" (the standard he had used for Consumers' drafts of testimony) because "...it was replete with references to the Dow perception." (Tr. 52,821.) He indicated that "there were all kinds of things" in the brief "which would alert anybody who wanted to get into it to the fact that there was a lot more going on than met the eye." (Tr. 52,822.) He concluded that he did consider the brief to be a fair reflection of what he then believed the true explanation to be. (Tr. 52,822.)

The Staff believes that Dow's memorandum concerning the preparation of the Temple testimony dated December 22, 1976 could have and probably did mislead the Licensing Board concerning the preparation and presentation of the Temple testimony. After thorough hearings into this matter, Mr. Wessel's oral presentation to the Licensing Board on December 3, 1976 can be seen as an accurate representation of the adversarial relationship between the parties. That statement, when followed by Dow's brief, however, was not as complete and thorough as the Board deserved in the circumstances and Dow had an obligation to set forth the circumstances surrounding the testimony preparation more fully in its written brief. Dow's task at that point was not one of advocacy. Dow did not respond as candidly as should have reasonably been expected.

There is no doubt on this record that Dow was seriously concerned about being accused by Consumers of breeching its contract obligations should the license be suspended. As Mr. Wessel pointed out, "The Board did not really understand what was involved between the parties." (Tr. 52,549.) That being the case, of course, Dow certainly had an obligation to make every attempt to clarify the Board's understanding.

The Appeal Board has noted a party's obligation to refrain from practices directed at concealing pertinent matter which cuts against a party's position. [Tennessee Valley Authority (Hartsville Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391, 1395 (1977).] This obvious duty to disclose is particularly applicable in a situation such as this where the purpose of the inquiry is to determine whether matters are fully disclosed. By citing all the materials Dow had carefully prepared to be used in a litigation against Consumers without more than passing reference to Consumers' repeated efforts to include the Michigan Division position in the direct testimony, Dow left the impression that the decision concerning what to include and not to include was solely Consumers when in fact Dow had deliberately attempted to influence that decision to the maximum extent possible consistent with its contract obligations.

The impression left by Dow's December brief is that Consumers did in fact attempt to mislead the Licensing Board even though the brief concludes that was not the case. The Staff believes, however, that Dow did believe that Consumers was guilty of misconduct of some sort. (Tr. 52,745 et seq.)

Dow's brief does not so allege. At that point in time, Dow's duty to avoid misleading the Licensing Board was far greater than its duty to protect itself from potential litigation with Consumers.

Having made the above observations, however, the NRC Staff concludes that Dow's conduct and that of any of its attorneys was in accordance with their perceptions at the time. So was Consumers. Consequently, the NRC Staff concludes there was not a deliberate "attempt" to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony insofar as "attempt" infers intent or a conscious endeavor. Whatever misleading may have occurred appears to have been based upon an honest but mistaken impression between the parties concerning the Dow-Consumers relationship. The intent was not to mislead the Board but rather to protect the client's position and options so far as possible. Once it became obvious that the Board was being confused by their positions, both Dow and Consumers made full disclosure of the facts concerning the relationship. Therefore, the NRC Staff believes the Licensing Board should enter a negative finding on Issue 4.

VII. ISSUE 5: What sanctions should be imposed, if any?

Assuming the Board enters negative findings on the first four issues, no sanctions would be appropriate nor should any be imposed. Should the Board enter affirmative findings on any of the above issues, the party or party affected should have an opportunity to be heard from prior to the consideration and imposition of sanctions.

VIII. CONCLUSION

The Licensing Board should issue a memorandum and order resolving the charges relating to the five issues discussed in this brief and should make negative findings on all five issues.

Respectfully Submitted,

William J. Olmstead

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Dated at Bethesda, Maryland
this 15th day of October 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	(Remand Proceeding)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF ON ISSUES IDENTIFIED IN BOARD'S MAY 3, 1979 ORDER" dated October 15, 1979, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of October, 1979.

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