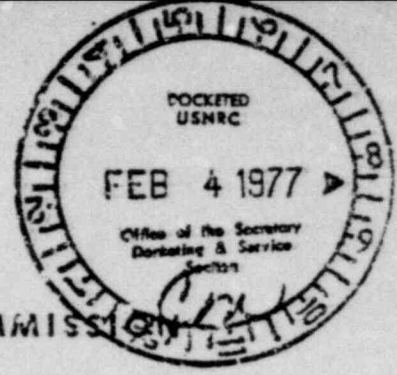


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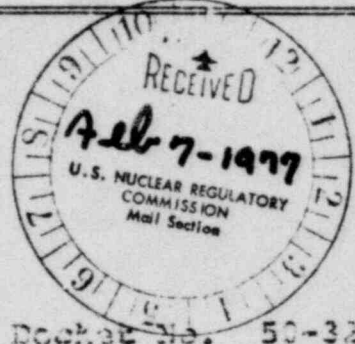


NUCLEAR REGULATORY COMMISSION

Regulatory Docket File

IN THE MATTER OF:

CONSUMERS POWER COMPANY
(Midland Units 1 and 2)



Docket No. 50-329
50-330

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES



Place - Chicago, Illinois

Date - Tuesday, 1 February 1977,

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the matter of: :

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CONSUMERS POWER COMPANY :

: Docket Nos. 50-329

(Midland Units 1 and 2) : 50-330

:

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Room 2503
Everett M. Dirksen Building
219 South Dearborn Street
Chicago, Illinois

Tuesday, 1 February 1977

Hearing in the above-entitled matter was convened
pursuant to notice at 1:30 p.m.,

BEFORE:

FREDERIC J. COUFAL, Esq., Chairman

DR. EMMETH LURBKE, Member

DR. J. VENN LEEDS, Member

APPEARANCES:

(As heretofore noted.)

C O N T E N T S

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>BOARD</u>
Joseph G. Temple (Resumed)	--	2276	--	--	--

<u>EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
Midland Intervenor's No. 25 (Mr. Nutes Notes, Meeting with Consumers Power, 9/21/76)	2395	--
Midland Intervenor's No. 26 (Comparison of Dow Alternative for Supplying Steam and Power to the Midland Plant, 1/13/77)	2403	--
Midland Intervenor's No. 27 (Meeting with Consumers Power Co., 9/24/76)	2436	--

P R O C E E D I N G S

CHAIRMAN COUFAL: On the record.

Let the record show that Mr. Cherry is here for the Intervenors; Mr. Kiefer and Mr. Hoefling for the Staff; Mr. Bacon and Mr. Renfrow for Consumers; Mr. Durand, Mr. Kaute, Mr. Pribila, Mr. Wessel and Mr. Edwards for Dow.

Mr. Wessel indicated that he had something he wanted to say about the letter with some enclosures we got, with regard to some claims of privilege.

Before you do that, though, Mr. Wessel, let's let Dr. Leeds hand back to Consumers a bunch of documents we have.

DR. LEEDS: I am going to give Mr. Renfrow those documents which had claims of privilege made, and which our rulings were made in the transcript yesterday.

(Handing documents to Mr. Renfrow.)

MR. RENFROW: Dr. Leeds, the other set which you have returned, those rulings are also in the transcript?

DR. LEEDS: I'm sorry?

MR. RENFROW: The documents that you already returned to us, those rulings are also in yesterday's transcript?

DR. LEEDS: Yes, that is correct.

MR. WESSEL: I would like to supplement yesterday's record, if the Board please, with regard to the documents

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that were considered and are being ruled on by the Board at some point, and before the Board rules, so the Board will have this information.

Mr. Pribila's January 26th letter classifies the attorneys, Dow's attorneys notes into two categories. The first relate to the meetings of September 21 and 24; and the second are the meetings that followed thereafter, essentially between the Dow-Consumers' attorneys, and on occasion with Mr. Temple.

MR. CHERRY: Mr. Wessel, before you go on, may I ask Mr. Howell be excused because there are going to be some preliminary matters that I am going to deal with that are going to deal with some of the testimony.

MR. WESSEL: No, this is strictly on documents.

MR. CHERRY: I am about to, when you finish, get into some preliminary matters and the documents that are going to deal with the testimony.

CHAIRMAN COUFAL: Okay.

When we get to those, you may be excused, Mr. Howell.

MR. RENFROW: Hear me on it before you rule.

MR. WESSEL: I do want to add with regard to the September 21 and 24 notes, those are the notes of Mr. Nute and Mr. Haines, regarding the meetings that took place on those two days, with Consumers Power personnel and attorneys.

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It was -- it should be added that Mr. Nute had been assigned the task of preparing notes for the September 21 meeting. I know the Board has received notes of other Dow-Consumers meetings in rather careful form, including one of January 12th, yesterday.

And Mr. Nute had been assigned that task for the September 21 meeting. It is the only meeting of all those he attended, which he did not maintain and keep his handwritten notes, because he saw that as his assignment. He not only prepared them from his own recollection, but he also looked at Mr. Klomparens' notes in order to be assured that his own recollection was clear and that it would be meeting notes of the Dow Chemical Company.

And I should add, of course, that Mr. Nute, in addition to being an attorney for Dow, was the member of the negotiating team.

Mr. Haines, who yesterday was referred to in a conversation with the Chairman, before yesterday's session was referred to as general counsel, is, of course, general counsel of Dow Chemical USA. But he was also and is a member of the corporate review team.

That distinguishes, I think, those two sets of notes on the September 24th and September 21st dates from the balance of the notes.

I also should add that there are two sets of notes

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which were not included, and I think they should be referred to, although I do not think properly they are included within the categories the document calls for. They are notes of Mr. Nute and Mr. Pribila, of a meeting that took place on November 15, 1976

This was after the Temple testimony had been completed and served, which I think was November 5.

This was a session in which there was some discussion, in which Consumers' attorneys were present, and then there were discussions among the Dow counsel and Mr. Temple alone. They were never transcribed.

Mr. Nutes notes are notes of an attorney talking to himself as to what he is going to say to his client and about testifying. And I think they are traditional, whether it is -- well, I would say it is attorney-client privilege as well as -- clearly it is quite different from the other notes.

Mr. Pribila's notes, this was the first meeting he had attended, are in two sets. The first two pages refer to the meeting with Consumers and just have some notes which are rather difficult to understand because he had not met the persons before, did not know all the names and the issues.

And the second are his notes of his discussions alone with Mr. Temple and other attorneys. I do not think these are of the same category as the other group, but they should be referred to.

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And I might add, finally, that Mr. Durand's stenographic notes of the November 15 meeting are in the Board's possession in one of the sets of documents, because those, I think, might properly fall within Dr. Leeds' statement of page 1001 of the transcript, of those which are ministerial acts and those of which are attorneys' acts.

MR. CHERRY: Mr. Chairman, could I just respond to what Mr. Wessel said.

I feel very strongly that the Board should release the two documents in categories 1 and 2 in Mr. Wessel's letter of January 26th, which were tendered to the Board yesterday, about which Mr. Wessel just commented in part for the following reason.

Number one, there is no absolute claim of privilege involving work products as the Board ruled earlier. The work product privilege, to the extent it exists, has to give way to an overriding public interest.

The notes which are being withheld are the only notes of the meetings of September 21 and September 24, which are available, and which bear upon the critical meetings where Consumers made the threat of the lawsuit, which is a realistic threat here in light of earlier testimony.

It seems to me that to the extent there is an attorney-work product privilege, those notes must be released particularly to me. If the Board wishes to enter an order that

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only Consumers' lawyers can look at them for some reason, that their clients can rely on another litigation, I can understand something like that.

But those are the only notes of that meeting of September 21 and 24 for Dow, which are critical meetings.

Point number two, the notes are of persons, as Mr. Wessel indicated, who are members of the negotiating team.

So, while Mr. Nute may be, in fact, an attorney and may have been delegated the responsibility of going to that meeting and taking notes, in fact he was and is a member of the negotiating team, and therefore played at least a dual role in connection with these duties, and maybe in connection with the duties of that meeting, played only a negotiating role.

These are not minutes of advice to Dow Chemical, they are recollections of what took place in a meeting with another party. And I do not think that that is protectable under any theory at all.

If these were notes of a meeting by MR. Nute among Dow personnel only, there might be a claim of attorney-work product, or attorney-client privilege, if the purpose of the meeting was to render and receive advice.

But that is not the kind of a situation. And what you are permitting Dow to do, if you don't release this document, is to pick and choose which notes it wants to release to the Board.

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For example, we have gotten notes for all of the meetings which have been typed up by Dow Chemical, and no claim of privilege or work product has been made. Yet, there is no difference in character between those kinds of notes and minutes and the ones that are in subparagraphs 1 and 2 of Mr. Wessel's letter.

So, to the extent that there is a privilege, which I don't think there is, and it isn't outweighed by the enormous public interest, of being able to see the only notes of those meetings of critical interest, it seems to me that the course and conduct of Dow has waived the privilege in connection with those documents, because they produced documents of every other single meeting.

And I repeat again that there is no claim of attorney-client privileges, or cannot be because Consumers was at the meeting, made in connection with this. There can only be a claim of work product which is not an absolute privilege.

Finally, it doesn't make any sense for me to cross-examine Mr. Temple or someone else on his recollection of what took place at that meeting, if in fact there is an actual recordation.

So you can see that in the traditional work product privilege there is no other way to get the information. Hence, granting the privilege really preserves the so-called

underlying relationship.

But here, here, even if a privilege of work product attaches, it would not prevent the information from coming out, although in a more cumbersome and detailed way.

These are critical meeting notes, they are the only notes that we don't have, and I don't have, to fill the gap as to what really happened on the 21st and 24th. And as I say, the Board has already ruled the work product privilege, which I don't think exists here because these are not mental processes of an attorney. This is a recordation of what took place with the admission by Mr. Wessel that Mr. Klomprens' notes were looked at in order to provide a firm recollection of what took place at the meeting, rather than to have an attorney's recollection.

So I think on the basis of Mr. Wessel's candid presentation those notes should be produced. And I would like to have that ruling as soon as possible, and hopefully before we begin with Mr. Temple's testimony, because those are the two critical meetings that I cannot piece together from the data I have and I need.

CHAIRMAN COUFAL: We will hear you in a second, Mr. Renfrow, but I want to clear up something with Mr. Wessel.

Can you identify for us, so that in looking through this package we can find the notes which you claimed were handwritten notes of Mr. Nute, and were distinguished from

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what you thought might be classified as ministerial notes made by --

MR. WESSEL: No, the two notes I referred to there were not included in the package at all. They were excluded from the package --

CHAIRMAN COUFAL: I see.

MR. WESSEL: -- on the belief that they were not included -- and I think that properly so, and I think that others might differ and I wanted to refer to them. They are in my hands now, I am holding them here.

DR. LEEDS: Mr. Wessel, let me ask you a question before we continue with this.

Have you had an opportunity to read the Board's order with respect to Dow's participation as a party?

MR. WESSEL: I have.

DR. LEEDS: I'm sorry?

MR. WESSEL: I have.

DR. LEEDS: Is there anything in these two packages of notes that, based on the reading of that order, that you would think that Dow ought to waive?

Are you claiming a work product privilege with respect to this?

MR. WESSEL: The answer to your last question is, we are claiming work product privilege. And the reason we are claiming work product privilege is because of great

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concern of waiver, not as to these documents, but as to documents as one gets on down the line which reflect true legal opinions, particularly of outside counsel with regard to the issues between Consumers and Dow.

The way in which you phrased your question, Dr. Leeds, forces me to say that I agree entirely with Mr. Cherry.

DR. LEEDS: That they ought to be released?

MR. WESSEL: There is no doubt in my mind about it.

DR. LEEDS: That public interest would dictate their release?

MR. WESSEL: There is no doubt in my mind that, A, they are not work products because they are the notes of the person who was performing the ministerial act you referred to on page 1001; there is no doubt in my mind that if they were, in fact, covered by some work product exemption, these two meetings are of a critical importance, and if it were not for concern about waiver, we would not have asserted the privilege.

I might add, however, that the privilege was asserted on December 3th, or December 7th, before the Consumers' affidavits were received, and these are the documents which led me to write the letter that I wrote on January -- whatever it was -- with regard to Consumers' affidavits.

MR. RENFROW: Mr. Chairman?

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CHAIRMAN COUFAL: Well the privilege was repeated in your letter of January -- of Mr. Pribila's January 26th letter.

MR. WESSEL: Yes.

DR. LEEDS: Let me understand then --

MR. WESSEL: The answer was, it was repeated because of the concern of waiver. We very carefully identified and categorized the September 21 documents as different from September -- from the ones that started on September 26th and 27th, which the Board has. They are of a different character.

I added what I added this morning because I felt that parties cannot cross-examine about these issues unless they see the documents and the Board might have ruled first.

I can only say that the September 24th and September 21 meetings are critical meetings and I must say when an attorney sits down there and is delegated the task of being a reporter, in effect, he is not performing attorney's work, which he is being paid for.

DR. LEEDS: Let me make sure I have got the right documents we are talking about. These are the two documents that were handed to the Board yesterday by Mr. Pribila?

MR. PRIBILA: Those are two packages.

DR. LEEDS: Two packages of documents.

MR. PRIBILA: Numerous documents.

DR. LEEDS: Yes, I understand that. But they were

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the two packages handed yesterday that we are talking about?

MR. WESSEL: Yes.

DR. LEEDS: And they were referred to in your letter, Mr. Pribila, of the 26th of January?

MR. PRIBILA: Those are the references 1 and 2 in my letter, yes.

CHAIRMAN COUFAL: And your comments, Mr. Wessel, go to both packages; that is the notes?

MR. WESSEL: They do not go to the documents that begin about September 26 or 27, after the September 24th meeting and when Dow counsel and Consumers' counsel began discussing the specific testimony of Mr. Temple.

These are the documents now being referred to that deal with the so-called inputs from Consumer to the Dow corporate review.

CHAIRMAN COUFAL: The items listed in paragraph 1 of Mr. Pribila's letter?

MR. CHERRY: And 2.

MR. WESSEL: You have my copy of it, if I may?

(Dr. Leeds handing to Mr. Wessel)

MR. CHERRY: I think all he is asking, Mr. Wessel, is whether or not all of the remarks today where you essentially agree with me that the documents should be released, go to subparagraphs 1 and 2.

MR. WESSEL: Subparagraph 1 was produced yesterday.

MR. CHERRY: No, it wasn't.

DR. LEEDS: No, it was not.

MR. PRIBILA: Subparagraph 1 and 2 were produced to the Board yesterday.

DR. LEEDS: Produced to the Board, but the Board did not release them.

MR. CHERRY: I think on the basis of Mr. Wessel's agreement with me, there really isn't any controversy.

MR. WESSEL: I just reread it. September -- the paragraph 1 of the January 26th letter, are the documents starting at the end of September between Dow attorneys, Consumer attorneys, and sometimes with Mr. Temple present.

That is one set of documents, not the corporate review meetings of September 21 and 24.

My specific comments this morning in response to Dr. Leeds' question, are with regard to paragraph 2 of the January 26 letter, and those are the ones which are related to the corporate review inputs which I think are properly to be used in connection with whatever testimony is elicited today and tomorrow in connection with those meetings.

MR. RENFROW: Mr. Chairman, before you rule --

MR. CHERRY: Mr. Chairman?

MR. RENFROW: Excuse me.

MR. CHERRY: Do you take a position on subparagraph 1, Mr. Wessel? Do you agree with me that those should be

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released as well?

MR. WESSEL: I find it difficult -- may I answer the question?

CHAIRMAN COUFAL: Yes.

MR. WESSEL: I find it difficult to answer that question because if the Board recalls, there was a good deal of difference between parties, specifically between Consumers and Dow, and in the briefs as well with regard to these preparation sessions that took place beginning from the end of September forward.

And briefs were submitted, and Dow in its brief said these were not work products. Consumers said they were.

The Board in substance upheld, I think, Consumers' position by at least holding one document of that character to be a work product.

And therefore I think there is clearly more of an argument to be made with regard to the second set, that is those that begin about the end of September. My own view is expressed in our brief, and I don't think it needs to be repeated. I will be glad to, but it is a very different kind of document than the September 21 and 24 document.

MR. CHERRY: Dr. Leeds, I just might point out that even if we take Mr. Wessel's statement that the Board should be more careful in connection with Item 1 in Mr. Pribila's letter, all of those items were released to me at least for

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purposes of examination. There was no document in connection with the preparation of the Dow Chemical testimony that was ever withheld from me. It was only withheld from me releasing it to others.

So that if I understand the sense of what Mr. Wessel says, he has taken the position that he does not think there was a work product claim on these documents, either subparagraph 1 or paragraph 2. That is, all the documents that are in those envelopes.

In effect, he has withdrawn his claim of privilege based upon his candidness in agreeing with me on the underlying law, and with respect to subparagraph 2 he believes that if there is a privilege it is outweighed by the public interest, and with respect to subparagraph 1, I believe he feels the same way. Although he is calling to your attention that earlier documents in connection with the Dow testimony were held proprietary for the purpose of Board and Party review. But ultimately almost all of them were released.

But I saw them all. So no matter how you read Mr. Wessel's statement, I get to see them all and use them in cross-examination.

The only question now is whether or not you want to have the press involved.

It seems to me that there cannot be any claim of work product privilege when both these parties were together

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when there is an obvious and broiling controversy going on. These documents will demonstrate beyond doubt that Consumers Power Company manipulated Dow testimony, because the way I have looked at the documents, these are the critical documents.

If you put together the Rosso, Renfrow and other affidavits and Mr. Wessel's letter earlier of the 11th where he talks about controversy, it seems to me that the Board cannot fail to look at these documents and consider them in the public interest.

I have made some very serious charges based upon admissions by the parties. The Board has seen fit earlier to look into this question. There is a serious question as to whether the parties and their representatives ought to be reprimanded here. We can't stop them at the gate. We have to go into the ark and take a look.

CHAIRMAN COUFAL: Mr. Renfrow?

MR. RENFROW: Mr. Chairman, I am not going to comment on my position on work products. That is in the briefs. If sanctions are to be imposed in this case -- I think you better look to the representations made.

Notes of Joe Temple premeeting September 4
Document No. 8, turned over by Dow; Mr. Temple's notes of September 24 meeting, Document No. 17, you can look at document by Mr. Klomprens on September 1; meeting with Consumers on 9/24, Document No. 13.

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There are a number of documents which have been set forth, given out by Dow, of notes taken by nonattorneys at those meetings, which have been available to Mr. Cherry since day one of the hearing.

But he tells this Board that there are no other documents that he can look at.

That is just not correct.

Dow turned them over, they are here, the numbers I referred to. You can pick up, they are handwritten notes and the parties can look at them, and they have been available since the first day of the hearing, which was the day Mr. Cherry requested that Dow turn them over.

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So when you go to this public interest argument about that being the only place he can get those documents, that is incorrect. And that, Mr. Chairman, is the umpteenth time that we have had statements made to this Board about what is and what is not the documents; which is flat incorrect.

CHAIRMAN COUFAL: Now, Mr. Renfrow?

MR. RENFROW: Let me get clear on your position. With regard to -- well, tell me how Consumers has any interest in the notes specified in paragraph 2 of Mr. Pribila's letter of January 26, 1977.

MR. RENFROW: I would have to look at that letter. And if you want a specific answer, then I can give it to you. My general answer is I have said that I am not going to get into the dispute between Dow and Mr. Cherry on whether or not these documents are work product or not. Dow is a party; it can assert its rights. They are not Consumer Power Company notes; they are Dow notes.

I have said to the Board: To keep this record straight, that as a matter of fact there have been documents setting forth the minutes of those meetings since the first day of the hearing. That's the point I want to make to you in response to Mr. Cherry's speech; that the public interest requires it because the only way he can get the information is through these notes. That is not correct.

Mr. Temple's notes and I believe Mr. Clomprens'

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notes of the 9/24 meetings are in here and also Mr. Klomparens' notes of 9/21.

So his statement to you that the only way he can get the information is through the notes that you have now in front of you, is incorrect. That's all I wanted to get before the Board.

(Board conferring.)

DR. LEEDS: Mr. Wessel, let me make sure that I understand -- and I hate to be repetitive and I apologize for not completely understanding your position: But referring to Mr. Pribila's letter, the notes of the meetings held on the 21st and 24th prepared by Mr. Hanes and Nute, you say in a sense they should be released because the public interest demands in it. And you are also saying Dow is not really claiming work product privilege on that; is that correct?

MR. WESSEL: I said that Dow has claimed work product privilege and is claiming work product privilege lest it not be placed in a position of having waived.

However, in response to your question as to what my opinion was, I stated that I did not regard them as being covered by work product. And if they were, they should be produced in the public interest.

DR. LEEDS: But your waiver doesn't go to these notes? Your waiver goes to other documents.

MR. WESSEL: Yes, and I would like the Board to

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understand that there will be many occasions on which we will be asserting, I assume during the testimony, various kinds of privilege. I know of nothing that has transpired between Dow and Consumers as to which there is the slightest degree of concern about production.

But unfortunately on document waiver when you allow the door be opened a little bit, you have opened it all the way. There are legal opinions in our files from many attorneys that consider the issues between Dow and Consumers. Obviously they are frank legal opinions. They are as broad as one could expect they would be. If those are produced and there is ever a contest between Dow and Consumers, obviously Consumers can pick and choose what it wishes and we do not wish to produce those.

Therefore, I am asking the Board to rule on this issue so that we have not voluntarily waived any rights. Mr. Charry has already asserted there was a waiver.

CHAIRMAN COUFAL: We are going to take two or three minutes and go back and toss a coin or something equally clever.

(Recess.)

CHAIRMAN COUFAL: In view of the arguments of counsel this morning or the lack thereof and the representations by counsel, we are releasing all the notes; that is, overruling the privilege claim with regard to all the notes

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described in Mr. Pribila's letter of January 26, 1977 and set out in paragraph 1 and 2 thereof.

MR. CHERRY: Mr. Chairman, I had a conversation with Mr. Wessell off the record and I just wanted to put in on the record. I don't think there needs to be any discussion.

There are several letters which I received from Dow Chemical, some of which are produced documents and some of which claim privilege, some of which have been subject to the Board.

I have asked Mr. Wessel and he has agreed to go through his notes to make certain that any documents for which claim of privilege has been claimed has been turned over to the Board for review.

MR. WESSEL: I hope we will do that, if there are others, right after lunch.

MR. CHERRY: Right.

MR. WESSEL: I guess we could do it now. I don't know that there are any others.

CHAIRMAN COUFAL: We are so grateful to you gentlemen, to provide us with more paper.

(Laughter.)

MR. WESSEL: This would be a very small -- you have already ruled just now on almost all of it.

MR. CHERRY: Mr. Chairman --

DR. LEEDS: We hope it is small.

CHAIRMAN COUFAL: You know, you guys can -- the combined effort of all of you is an ability to put out more printed words that this Board can read.

(Laughter.)

MR. WESSEL: Mr. Pribila will hand copies of the documents the Board has just ruled on to the parties right now.

(Counsel distributing documents.)

MR. CHERRY: Mr. Chairman, just very briefly in connection with the rulings made last evening on the interrogatories: In the answering of the interrogatories, Consumers Power Company did not follow either of the demands of the interrogatories which required a listing of relevant documents regarding each answer and a list of witnesses who had facts in connection with each answer.

Consumers Power Company did not object to that, but I called it to the Board's attention in connection my requirement that the Board order further answers. So I just want to make sure that in connection with Consumers' answers, they are now going to go to back for each answer and give a list of the documents plus the witnesses because that is what was required of them in the interrogatories.

You recall this came up earlier with respect to Mr. Wessel and he then complied in a separate amended answer to the interrogatories.

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And it is a proper requirement and I am entitled to it. You didn't specifically mention that in your ruling because it didn't come up as a point o. controversy. I just noted that Consumers had failed to do it the first round. But I expect to see it in the second round.

Next, on the interrogatories, can we set a date for answers? I would like to have interrogatories by the end of the week, the answers, or by Monday at the latest. It doesn't do me any good to have those answers to interrogatories after the end of next week. These were interrogatories which were served for answers that we had before the beginning of the hearing.

So I would ask now for the Board to order that the interrogatories' answers be in my hands by the close of business Friday but no later than Monday. But if you choose Monday, that you order Consumers Power Company to submit answers as they are prepared so I can get something subject to an affirmation when all of them are prepared.

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Secondly, with respect to the documents, do I understand now that the Board has made a decision on the record with respect to each document that they have sustained or denied privilege concerning Consumers? Because what I'm concerned about is that if there is ever an appeal in this case, and there is a document which the Board believes was privileged and then it was returned to Consumers Power Company, and there is no listing of it, that I could ever make the argument.

I think the record must contain a sealed copy of all of the documents which were tendered to the Board but as to which privilege was sustained, because there's no way at all then for the appellate court to ever rule on those withholding documents unless they're part of the record.

That is traditional and the only way that I can ever assert those documents were not privileged at some later point.

That concludes my remarks with respect to the Board's rulings last evening; and, rather than having argument about it, I ask the Board to consider it over the noon hour, and I'd like to proceed with Mr. Temple.

CHAIRMAN COUFAL: Well, Mr. Renfrow is entitled to say something at this time.

MR. RENFROW: Mr. Chairman, there is no way that we can be here in this hearing and also advance those

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interrogatories by Friday or Monday. I've not had a chance to review yet, since we started at 9:00 this morning and the transcript was not out until after 11:00 last night, the rulings on those interrogatories.

If you could withhold your questions on that, I'll go back, if we take a lunch break, over the noon hour and review your rulings and then attempt to give you an idea of how long it would take us to answer the ones that you're going to require that we answer.

Second of all, as to the documents, I have no problem with Mr. Cherry's request. We could have those documents recopied and returned to you. I will look at your rulings on those, hopefully over the noon hour, provided we're given enough time, and I'll then tell you when we'll be able to set forth our position as to which ones we disagree with you on.

The ones that we do not disagree with we would, of course, make available immediately.

DR. LEEDS: Mr. Cherry, may I make a word of explanation about the way we handled this?

Instead of reading in the transcript the number which we said granted and the number which we said released, what we did was take the indexes that Consumers had provided us, which contained within those indexes all of the documents that they were claiming a privilege or proprietary claim

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with respect to.

We then checked the indexes with respect to the document we had in hand and made our ruling with respect to those indexes.

So the indexes themselves, which we've asked the Applicant to return to us, do provide a listing of the documents, which I think is one point you brought up.

MR. CHERRY: Okay. But that in my judgment is not sufficient, because a court can't review the decision, or even the Appeal Board, without the documents themselves.

DR. LEEDS: I'm not arguing your question on that. All I'm saying is I thought you said there was no listing thereof, and I wanted to say that there was a listing, which you might not have understood.

MR. CHERRY: Then if you compare the index with your rulings, you will be able to determine which ones were the subject of ruling and which were returned, is that correct?

DR. LEEDS: Yes.

MR. CHERRY: Now, Mr. Renfrow just said a curious thing. He said documents which you've released he's going to look at, and if he agrees with you he'll turn them over. I didn't understand that this exercise was one of futility. I understood that when you released the document that it was released.

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It seems to me that I ought to have it, and not this business of Consumers Power Company having an option to determine whether they'll obey your ruling.

CHAIRMAN COUFAL: Well, it came up a week or so ago; and, to get away from arguments on the whole gamut, we said we'd issue an order indicating documents we thought would be released and Consumers could have a comment on that.

We don't want a brief, Mr. Renfrow -- you know, just one line on a page for each document will be enough.

MR. RENFROW: I think perhaps, Mr. Chairman, we could either do it orally or in writing, either one. I think it would probably be quicker to do it orally. We will only take those ones to which we objected.

I think a number of them are going to be fairly easy, since it's not clear on their face as to why the privilege was claimed but once it's stated it's going to be either clear that it is or it is not.

MR. CHERRY: I would suggest that it be in writing.

CHAIRMAN COUFAL: That's the Board's inclination so as to not take time with an oral argument, because we seem to get involved with oral argument

The second thing is there are a bunch of things claimed proprietary on fuel cycle costs. I don't know whether it's relevant to this thing. I don't know whether or not Mr. Cherry is interested in it.

MR. CHERRY: Yes, I am.

CHAIRMAN COUFAL: There's been a proprietary claim with regard to fuel cycle or fuel costs. As far as I know, that's the only bunch of documents that were claimed to be proprietary.

Am I right, Mr. Renfrow?

MR. RENFROW: To the best of my recollection, you're correct. They are fuel cost documents. Certain sets of the fuel cost documents Mr. Cherry has asked that we provide him and has informed me that he intends to get into the fuel cost.

CHAIRMAN COUFAL: I don't know why fuel costs are proprietary, so you'll have to come up with something on that.

MR. RENFROW: Fine.

CHAIRMAN COUFAL: Some written document.

MR. RENFROW: Fine. I understood that from your previous ruling on the B&W contract, which we're getting affidavits prepared for.

CHAIRMAN COUFAL: Okay.

Are you ready to go with Mr. Temple?

MR. RENFROW: No, sir, I'm not. I'd like to look at these documents, which I have never seen, prior to beginning with Mr. Temple, Mr. Chairman.

MR. CHERRY: That can be done over the noon hour.

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I haven't looked at them, either. I want to start my cross-examination. You don't take a break just when documents are prepared normally. It can be done over the noon hour.

I'm cross-examining; he can read them while my cross-examination is going on or read them over the noon hour. I have the same debilitation.

MR. HOEFLING: Mr. Chairman, with regard to Mr. Temple's testimony today, the Staff indicated at the last session that it's going to move the Board to reopen cross-examination of Mr. Temple.

In the interim since Mr. Temple testified in Midland, we've had some extensive document discovery and additional events regarding the EPA, the Michigan Air Pollution Commission, and additional negotiations with Dow and Consumers. The Staff has an interest in pursuing certain lines of questioning with Mr. Temple.

We can do it either following Mr. Cherry's cross-examination or prior to it.

The Staff also has an interest in looking at these notes prior to finishing its cross-examination of Mr. Temple if the Board grants the Staff's motion.

CHAIRMAN COUFAL: If the Board grants the Staff's motion for further cross-examination?

MR. HOEFLING: Right.

CHAIRMAN COUFAL: How much time are you talking

about, Mr. Renfrow?

MR. RENFROW: I've not even had a chance to look at it. I don't think it would take us very long to look at them. I would like to look at them. I think I need to look at them in order to protect my client's interests, since Mr. Wessel has represented to us that they are important documents which bear on the issue, Dow's position. Therefore, I believe we should have the opportunity to read them prior to the time we start cross-examination.

I will take as short a time as I could.

CHAIRMAN COUFAL: All right. Let's take 10 minutes.

MR. WESSEL: I was going to say there are two categories of documents. The larger, bulky category relates to the preparation of the Temple testimony. I doubt it's going to be the subject of cross-examination. I may be wrong.

MR. CHERRY: You are.

MR. WESSEL: The September 21 and 24 minutes are the critical ones, and those are quite short.

MR. CHERRY: Mr. Chairman, I would really oppose a break. It's 10:15 now, and I would really like to get started.

There's no reason why Mr. Renfrow can't look at these at noon. Insofar as the cross-examination of the Staff is concerned, it should take place after my cross-examination, which will be exceedingly thorough, and I'm sure that Mr. Hoefling won't have any questions.

If he does, we can take his motion up at that point.

(The Board conferring.)

CHAIRMAN COUFAL: I've just been overruled. Go ahead, Mr. Cherry.

MR. RENFROW: Excuse me, Mr. Chairman. Can I take care of the preliminary matters that I have? You asked me to do a number of things.

CHAIRMAN COUFAL: Okay. What else is there?

MR. RENFROW: You asked yesterday for copies of Consumers meeting notes for the January 12 meeting. I'll now distribute copies of those. They have no numbers on them. I have not had a chance to index them.

(Documents distributed.)

Second of all, Mr. Chairman, shortly, the memorandum order which you issued yesterday in response to our motion of December 13 and January 13, we would like to note our exception to that order. We believe that order does not meet, with all due respect, with the Board's responsibilities in this matter in setting forth the issue; therefore, for the record we'd like to state our exception to it.

The last point that I have is a question to the Board. Has the Board responded to the Appeal Board's request on sequestration yet, to respond to them by letter with reasons?

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CHAIRMAN COUFAL: When we respond you'll get a copy, Mr. Renfrow. If you haven't got a copy, you can safely assume that we haven't responded.

MR. RENFROW: With the mail, I'm not always sure I can make that assumption.

CHAIRMAN COUFAL: We have not responded.

MR. RENFROW: Thank you, Mr. Chairman.

You will note my exception that we continue prior to the time we've had a chance to review the documents?

CHAIRMAN COUFAL: Yes, sir.

MR. RENFROW: Thank you.

MR. CHERRY: May Mr. Howell be excused now?

CHAIRMAN COUFAL: You can't be your expert on this one, Mr. Howell.

MR. RENFROW: Mr. Chairman, we had a request as to that representative. Without going through that again, we're entitled to have such a representative.

MR. CHERRY: Mr. Chairman, I object. You've ruled. Let's go on.

MR. RENFROW: You have not ruled. You told us you'd address that matter when we got there.

CHAIRMAN COUFAL: We are addressing it. Mr. Howell cannot be your representative since he has not finished testifying, Mr. Renfrow.

(Mr. Howell leaving room.)

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MR. RENFROW: I'd like to note my exception to that ruling, please.

CHAIRMAN COUFAL: I'll be happy to, Mr. Renfrow.

MR. RENFROW: Thank you, sir.

CHAIRMAN COUFAL: We'll note that Mr. Bacon is in the room.

MR. CHERRY: Can we try the heat with the doors closed? It's getting kind of noisy.

I take it that Mr. Renfrow will accept my statement about the interrogatories, that we will get a list of the witnesses and documents.

MR. RENFROW: You'll get a proper answer to the interrogatories, Mr. Cherry.

MR. WESSEL: Mr. Sinclair, who is with the Dow Public Information Department, is here. May he remain?

CHAIRMAN COUFAL: Well, we excluded him yesterday. I expect in the interest of perhaps foolish consistency we will exclude him again today.

(Mr. Sinclair leaving room.)

All right, who was cross-examining when the recess came?

MR. CHERRY: I was.

Whereupon,

JOSEPH G. TEMPLE
was recalled as a witness on behalf of Dow Chemical Company and, having been previously duly sworn, was examined and testified further as follows:

FURTHER CROSS-EXAMINATION

BY MR. CHERRY:

Q Mr. Temple, would you describe for me what involvement you had other than reading and approving the correctness of your testimony that Consumers Power Company submitted in this proceeding?

MR. RENFROW: Mr. Chairman, if that is all the question I'll object to it. Let's get it done now.

The question as to whether or not Mr. Temple believes that is his true testimony, he's sworn to it. The questions that go to the preparation of that, with regard to the questions that this Board has asked about, are not proper during cross-examination.

Dr. Leeds and I discussed this last week on the procedures that go to that issue. I'll ask the Board for a ruling on that now so that we can go forward without continually arguing.

MR. WESSEL: Let me, if I may, address that.

Yesterday I read part of the transcript. There were some comments as to the scope of cross-examination. It is our position now that the witnesses here from Dow are here for whatever purpose anyone wishes. We would far prefer the Board to allow any questions that are relevant material to be asked and not to say something should be done at some later point when called by some other party.

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It would be difficult; it would be confusing, I think. It would certainly not expedite the proceeding.

So if the question is what the scope of the cross ought to be the scope of the direct and so forth, I urge the Board to allow the witnesses to be asked whatever questions are relevant and material and proper.

CHAIRMAN COUFAL: One problem is he is Consumers' witness and not a Dow witness, Mr. Wessel. I understand your position.

MR. WEGSEL: Something has changed now, I think, if the Board please. Dow does not have any direct, it's true, but at the time he was tendered Dow did not regard itself to be a party. It turned out to be wrong, but that was the position at that time. That's been very clearly stated to the contrary now, and he is a Dow witness and has been tendered by Dow, as far as that's concerned, without any direct examination for Dow, so there's no limitation on the cross so long as it's relevant and proper.

MR. CHERRY: If the Board wants to abide by the cross and direct, which has no business in an administrative hearing at all, the limitation, then I will have no cross-examination of any of the Dow witnesses in this proceeding. I'll call them all in my own case.

I asked for these people to be here for purposes of bringing out relevant information on this record. I now

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agree wholeheartedly with Mr. Wessel. It doesn't make any sense for me to take Mr. Temple in sixteen bites.

MR. REMFROW: I'm not objecting to that, Mr. Chairman. It's my understanding that Mr. Cherry called these people and we would take them out of order to accommodate Mr. Wessel.

The only point I'm making to you is the differentiation between the proper process by which we're going to cross Mr. Temple on his position on what Dow did and separate that out from questions that were raised on the December 30th brief. That's the question I'm raising before the Board now.

I have no objection to what Mr. Wessel said about relevancy. I don't object to Mr. Cherry -- he's called these people. We'll take them out of order. We can cross-examine them on what's relevant material.

I do not believe, though, he should be allowed to cross-examine on the items that go to the questions raised on the December 30th brief. That's not the proper procedure by which that should be done.

MR. CHERRY: The preparation of testimony is part of the testimony. I'm entitled to ask this.

CHAIRMAN COUFAL: I think that's right. I think this argument has all been for naught. I think the question he asked was proper under any theory of the case. It was a proper question on cross-examination to ask him who prepared

1.4 his testimony or if he had any part in it.

BY MR. CHERRY:

Q Do you understand the question, Mr. Temple?

A Why don't you repeat it, Mr. Cherry?

Q What I want for you to do is to describe for me what role you yourself played in the testimony that Consumers Power Company filed on its behalf.

A Okay.

As I recall, I had participated in one meeting, which I would call sort of an introductory meeting. I believe it was the first time the Consumers attorneys came to Midland and met with the Dow attorneys.

My participation was only a small part of that meeting. I can also remember --

Q Let's take that meeting. What occurred at that meeting that you can recollect? This is the first meeting you attended?

A With the attorneys, yes.

Q Did you attend a meeting about your testimony or have any conversations prior to this one you've just related?

A With regard to my testimony and its preparation?

Q Yes.

A Not that I can recall, Mr. Cherry.

Q Okay. So at this first meeting, where did it take place?

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A It was in Midland.

MR. WESSEL: I don't think the witness understands. Mr. Temple and I did have conversations before the Consumers attorneys came in, and I don't think the witness is considering that preparation.

BY MR. CHERRY:

Q I'm not for the moment going to ask you about any conversations with Mr. Wessel. I think we would agree those are privileged since you are a Consumers witness. Let's accept that for a moment, and let's start with the first time you discussed your testimony or the Dow position to be given at the hearing, which ultimately you were selected to discuss, other than your conversations with anyone who is employed by Dow and acts as a lawyer.

With that exception, let's take the first communication.

A I was interpreting your question as some direct involvement by me, and that was with the Consumers people or something they had submitted.

I really can't recall that there was anything of much substance in the I would guess 30 or 40 minutes that I was present in that meeting, other than to have an introduction of me to Mr. Renfrow -- Mr. Renfrow was there -- and general discussions about the relationship. I can't recall if there was anything really specific.

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Q. What was the date of that?

A. I'm sorry, Mr. Cherry, I can't recall that date.

Q. Was it before September 21?

A. No, it was after the corporate review, after Dow had reached the decision with regard to our support of the nuclear project.

Q. Now, what was the next time that you recall having discussions at which you were present?

A. Where other than Dow people were present?

Q. No, no, no. The only meetings I'm excluding at the moment are where only Dow lawyers and you were present. If there was a meeting with Consumers and Dow people, I am not excepting that meeting, okay?

A. To the best of my recollection, from the standpoint of an actual meeting where I was present, Consumers attorneys were present, and Dow attorneys were present, that was after the testimony had been finalized, and it was a witness preparation type session.

Q. Who wrote the testimony, Mr. Temple?

A. The final testimony which was submitted, which was our answers to specific questions that the attorneys had agreed were to be answered, was written by the attorneys and then edited and stylized by me to make sure that I did agree with the way those questions were answered and that the information was accurate and truthful.

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Q Who selected the questions?

A It's my understanding that Consumers selected the questions, but there were meetings between the lawyers when that was decided. I was not present.

Q Now, Mr. Temple, you have read the Aeschliman decision, the Court of Appeals decision, have you not?

A You'll have to refresh my memory.

Q That's the decision by Judge Bazelon which prompts these hearings.

A I haven't read it, but I've been told the essence.

Q You understand essentially what it provides?
I'm not going to ask you in detail about it.

A I think so.

Q And you understand that part of these hearings were remanded to consider a revised cost-benefit analysis? Has anyone ever told you that?

A Yes, sir.

Q I see.

Now, was there any discussion prior to the preparation of your testimony in which you participated where the question of a revised cost-benefit analysis came up between Dow and Consumers?

A Between Dow and Consumers?

Q In a discussion.

A I believe that that probably came up during the

meeting on the 24th.

Q It also came up in the meeting on the 13th, did it not?

A Yes, I think that's true.

Q Didn't in fact Mr. Burroughs, who wrote those notes, report that Consumers' position on the cost-benefit analysis as stated to the Board in a formal paper filed and signed by its attorneys was contrary to what Consumers had in fact told you and others at the meeting?

A I'm sorry. I'm not sure I understand the question.

Q Let me make it very clear.

Do you recall that there were some issues which were the subject of briefs by the parties? Consumers had submitted a brief on what kind of a cost-benefit analysis had to be struck in the suspension and remanded hearings. Do you recall that brief?

I think Mr. Burroughs commented that it was kind of amusing that vice presidents took five days to get the brief.

A Yes, but I don't know that I ever read that brief. I recall it.

Q Do you recall the minutes of the 13th of September 1976 meeting, where Dow recorded that Consumers Power Company's position with Dow was directly contrary to the position which Consumers attorneys had represented to the Board?

MR. RENFROW: Can I have that question back, please?

MR. CHERRY: I'm trying to make it clear that the question really is whether or not the Board received a brief which was a lie by its lawyers, a knowing lie, that was contrary to the admission made to the contrary by Consumers Power Company.

The purpose of this cross-examination is, so that there will be no doubt, is not only to show that the Temple testimony was prepared in a way to contrive the truth, but that every step that Consumers has taken since July 26, 1976, has been characterized to support their application by any means rather than give this Board the facts.

Later on we're going to show through the Dow witnesses that conversations were set forth in order to contrive an electric demand for Dow Chemical for the sole purpose and for the only purpose of having this Board be influenced by the Dow Chemical need for power, which is totally non-existent, and that Mr. Russell Youngdahl solicited and received from Dow Chemical a statement that Russell Youngdahl could not afford now, in light of the suspension hearing, to relook at the need for power issues because it would erode the cost-benefit analysis and begged, demanded, cajoled and got Dow Chemical to agree to that plan.

That's the purpose of this. I now ask to have

Mr. Temple take a look at the September 13, 1976 --

MR. RENFROW: I'd like to respond, Mr. Chairman. This is about the fourteenth time we've done this.

We've been through the notes in Midland; the brief is attached to the 9/13 minutes; the Board has that brief. Consumers' position in that brief was that you could not take sunk costs into account.

If you look at the statement made of people at that meeting -- these were engineers from Consumers -- they said that sunk costs could be taken into account, in answer to the question quite frankly, if you look at Davis-Besse. You can't take them into account one way, but, as Aeschliman said, you're required to take them into account another way. That's my characterization of it. You've heard Mr. Cherry's characterization.

My request to you is that as we go through this, rather than make speeches about what he's going to prove, we rely on the documents and what the documents say and the witnesses, and not what Mr. Cherry tells you he thinks he's going to be able to do.

BY MR. CHERRY:

Q Mr. Temple, to refresh your recollection, I'm referring to page 5 of the September 13th meeting, under the paragraph entitled "Court Cost-Benefits Order."

I'm asking you, based on that, if you will agree

with me that your recollection of what took place at that meeting at least in part was that Consumers' negotiating team, including Keeley, Youngdahl and Howell, two of which have already testified in this proceeding, indicated their belief that it was required to do a cost-benefit analysis updated and based upon the most current facts.

A. I'm sorry, Mr. Cherry. You're going to have to ask the question again. This isn't exactly my area of expertise.

Q. I appreciate it.

Was there a discussion at the September 13th meeting in which Consumers Power Company stated that they believed the court order required an up-to-date revised cost-benefit analysis on all of its parameters?

A. I believe that's the case.

Q. Now, that is your recollection, Mr. Temple?

A. Yes, sir.

Q. Now, with that framework in mind, what were you asked to supply to Consumers Power Company in connection with your testimony on costs, benefits and alternatives so that this information could be affirmatively placed into the record by Consumers Power Company?

A. Well, we were asked what our electric demand was going to be and what our electric consumption was going to be and what our steam take would be.

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Q And were you asked to supply Consumers Power Company with alternative cost studies that Dow had prepared, i.e., alternative to purchase of steam or electricity from the proposed Midland units?

A You mean Dow alternatives to taking steam from Consumers? Is that the alternatives you mean?

Q Yes. Or electricity.

A I don't believe that at this session we were asked to provide those studies which we had done which identified our internal alternatives.

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Q Were you ever asked to provide that information at any time in connection with Consumers tendering of your testimony?

A Yes, we were.

Q And did you tender that information?

A I believe that we did.

Q Did it find its way into your testimony as finally drafted by Consumers' lawyers?

MR. RENFROW: I am going to object to that characterization, Mr. Chairman.

CHAIRMAN COUFAL: Overruled.

BY MR. CHERRY:

Q Go ahead, Mr. Temple.

A The alternatives that were studied by Dow were identified in my testimony but none of the data, the specific data, as I recall, was provided.

Q By the time of your testifying in Midland, you had already told Consumers Power Company, either in writing or orally, that you believed that the cost-benefit analysis in favor of nuclear steam, was about to be lost if it wasn't lost already.

Isn't that correct?

A I would like to rephrase it.

I said that as far as Dow was concerned, we had concluded that it was not likely to be advantageous for us,

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the division.

Q And you meant not likely economically?

A Economically.

Q And that is still your position, isn't it?

A Yes, it is.

Although there is today, still based on the \$1.67 billion cost and the March 1982 startup, some economic advantage to the nuclear steam versus our own internal alternative, strictly on the economic basis.

Q When you say versus your own internal alternative, you are talking about facilities that are quite old?

A No, I am talking about a new facility.

Q Well, would you please explain your answer which I don't understand completely.

When you say that you still believe that it would most likely be disadvantageous economically for Dow on the nuclear steam issue, but there are some advantages based on alternatives, there seems to be an inconsistency in those two statements.

A I'm sorry.

What I said is there is still some economic advantage if Consumers builds the plant for \$1.67 billion and if it comes on line in March of 1982.

There are other noneconomic factors that cause me and others on the negotiating team to feel that as the

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future unfolds and events took place, that that economic advantage would disappear and probably become a disadvantage.

Q Now, has Dow done any analysis as to whether or not the economic advantage would be true if the plants came on line for steam and electricity in 1985?

A Well we have done no specific analysis of that, Mr. Cherry. We have taken the position that our own power houses, even with additional capital spent on them, cannot run beyond 1985.

The economic advantage that nuclear has over our proposed new power house, if we were to build one in the division, is about \$4 million per year in cost of steam and electricity. And there are several factors not terribly large, that would cause that advantage to evaporate if they all went against the nuclear case.

Q Tell me what those factors are.

A Well, if the cost of the plant indeed was higher than \$1.67 billion, that advantage would disappear.

If the relationship between the costs of nuclear fuel and the costs of coal were to change significantly, that would affect it.

Almost any combination of cost factors and capital that worked to the disadvantage to the nuclear case, such that \$4 million disappears out of the total cost of, I think in the range of \$100 million --

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Q So we are talking about an advantage of about 4 percent a year, which is eroded by any increased capital costs, is that correct, on an annual basis?

A Well, for instance, I looked at the number that Bechtel has given to Consumers as a potential increase in costs of \$90 million, and if nothing else changed, that would evaporate the advantage of the nuclear project versus the current coal-fired facilities that we would anticipate we might build now. Although as you know, there is other technology we are considering.

Q I appreciate that.

But just so I understand it, if Bechtel in its cost estimate is correct, there no longer is, in your judgment, an economic advantage to Dow Chemical for nuclear steam.

Is that correct?

A And if nothing else changes.

Q You mean, for example, if the price of the plant goes up, that uranium goes to a nickel a pound, that might help it out?

A Or, if instead of our facility costing \$300 million, it cost \$350 million.

Q I appreciate that.

Now, what has been the tendency of the differentiation between coal prices and nuclear fuel prices over the

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period of time you have been involved with these guys, Consumers?

A I would like to answer that kind of question in a different way.

I haven't really specifically followed -- nuclear fuel costs have gone up significantly, and I think the last move up was a much greater increase than the coal alternative.

But whereas we have looked at the nuclear project, we have looked at the total difference in cost of steam and power from the nuclear project versus our own internal alternative.

And at the end of 1973, if you assume we had to earn a 15 percent return on our investment, the advantage of the nuclear project versus our alternative in 1973, was approximately \$40 million a year.

Q When was this?

A In 1973.

Let me say \$20- to \$40 million. I am not quite that sure because I am not sure what the cost of our alternative was.

Q Right. I appreciate that.

But that 20-to 40 million in 1973 advantage is the same 4 million advantage that exists at the 1.67 billion and evaporates, all other things being equal, with an increase

of \$90 million as suggested by Bechtel.

A It is reasonable to compare those two cases.

Q Right.

Did there come a time when Consumers and Dow Chemical had a dispute over what the value of coal, the price of coal would be in connection with assessing alternatives such that Consumers' attorneys wanted to have a meeting with Dow to make sure that there was no dispute when the hearings came about?

A There is a difference of opinion on coal and its escalation, between the two companies.

Q Could you describe that difference of opinion, please?

A Yes.

Before Dow did their analysis of the Dow alternative to compare to the nuclear project, we compared data with Consumers on coal value. At that time Consumers confirmed that our values were appropriate, but also added that they were relooking into the coal situation.

After we had completed the study, and I don't know whether Consumers had seen the results by that time or not, Consumers came forward with different coal values and the main difference was in the rate at which the cost of coal was going to escalate in the future.

Our coal projection was based on our actual cost

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for 1976 probably at that point in the year where we were, and we escalated those costs 3 percent per year through '82, and then 6 percent per year on through the life of the project. Those were the same numbers that Consumers saw before we started the study.

Q And agreed were a reasonable figure?

A But also said that they were doing current work with regard to coal.

After our study was completed, the Consumers' projection had changed and the value they used as a base point was slightly higher than our actual coal prices. But they projected, as I recall, that it would escalate 12 percent per year for the first two years, 10 percent per year for the next three years, and then 9 percent per year for the balance of the, I guess, 20-year life of the project.

Q Now, did Consumers' relook at coal prices cause Dow to change its position as to future values of coal?

A No, sir, it didn't. It caused us to communicate with our people whose responsibility it is to acquire fuels for Dow, to ask whether this caused them to reconsider.

They came back and told us that they felt their numbers were correct.

Q Whose numbers?

A Our numbers, the numbers that we had used in this study that this coal purchasing group had provided us, our own

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coal purchasers.

Q And Consumers' figures were inflated?

A They were different from ours, on the high side.

Q Did you communicate that to Consumers?

A Yes. They knew the difference between what we used and the fact that we did not agree with their values. It is not an exact science projecting inflation rates on anything.

Q I appreciate that.

A And we felt that our judgment was at least as good as theirs.

Q Do you know if Consumers Power Company predicted the coal price increase through their rather unique process called probability encoding?

A No, sir, I don't have any idea as to the internal working.

Q Did they show you any work papers in connection with their increased coal prices?

A I don't recall personally seeing any.

Q Did they submit any to Dow Chemical?

A I guess not that I am aware of.

Q Is it fair to say then, Mr. Temple, that in connection with this exchange of coal prices, Consumers Power Company first generally agreed with your data, although they said they would take another look at it. And Dow's data was based upon its actual experience in the everyday buying of coal.

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Is that correct?

A Yes.

I am not sure what their starting point was based on.

Q I appreciate that.

But Dow's was?

A Yes, sir.

Q And Consumers Power then came back and had these increased figures, but they didn't tender you any underlying support to the extent that you recall it?

A I can't say that I have seen it.

Q Do you think that if on a critical issue as coal prices, that if Consumers Power Company had, in fact, tendered some backup for their projections, it would have crossed your desk and you would have sent it on to your people to analyze?

A I don't know whether it would have or it wouldn't have, because our relationship then was mostly in a lawyer-to-lawyer basis.

Q Antagonistic, you would describe it?

A No, not necessarily.

Q But less than two people who trust each other completely?

A I wasn't involved in the lawyer-to-lawyer discussions.

Q But there did come a point, did there not, Mr. Temple, when the relationships between Consumers and Dow had

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deteriorated so much that you had to write Mr. Youngdahl and tell him that many Dow employees feel that Consumers is intentionally hurting the future of Dow and Midland, or is doing things which had the effect of hurting the future of Dow and Midland?

A Yes.

But that predates the discussion on coal prices.

Q I appreciate that, but that discussion was approximately when?

Late 1975? That letter?

A I can't -- I can look that up, I have it here. But there was an exchange of letters between Mr. Youngdahl and myself which started late 1974. I don't remember when that particular quotation -- it is a relatively accurate quotation.

Q And isn't it also true that rather than improving since the date of that letter, which is somewhere in the early -- late '75, earlier, the relationships between Consumers and Dow, and Dow's viewpoint of Consumers has consistently eroded or they have consistently eroded?

A I would say that is true.

Q To the point where on January 12, 1977 it was your position, echoed by Mr. Youngdahl, that the two parties were further apart than they ever had been on the issue of the nuclear power plant?

mm11

A The specific comment was directed towards a renegotiated contract, not to the project as a whole.

Q I appreciate that.

But the contract deals with the parties' interest in the project, does it not?

A Yes, sir.

Q And you would agree with me that one of the ways in which to assess someone's interest is to determine what they want and what they will give up in negotiations?

A That is a way to determine one's interest.

Q Well, would you say that the relationship between Consumers Power and Dow has strained to the point where the relationship and the negotiations on the proposed amendments to the contract are now further apart than they ever have been concerning the project?

A I would say that is true, covering the period that I have been involved.

Q That is since 1974?

A Really since early 1973, but essentially since '74.

Q And I take it that one of the major matters that has contributed to this erosion is Dow's lack of confidence in Consumers and being able to meet a proposed schedule of the power plant, Midland power plant.

Is that correct?

A That has been a major issue between the companies.

mm12

Q In other words, every time Consumers has made a promise, they have never been able to keep it?

I mean, isn't that the history, Mr. Temple?

A With regard to startup dates?

Q Yes.

A I couldn't say they have never kept a promise.

Q No, I'm talking about in connection with their projections as to when the plant was going to be on line and commercially available. Those promises made in a multitude of events since 1967 have been just a series of broken promises.

A I guess I would agree with that characterization.

Q Do you have confidence, Mr. Temple, that Consumers' current projection of having the plant on line by 1981 for electricity and 1982 for steam is one in which you would have confidence in?

A You are asking for my personal --

Q Yes.

You have been negotiating on behalf of Dow, you are head of the negotiating team.

A Yes, sir.

Q You have commented since 1973. I am asking for your opinion, but I am asking for your opinion as the head of the Dow negotiating team and if there is -- if what you are telling me is that what you are about to tell me is disputed by people

rml3

at Dow, I want to know who they are, when they disputed it.

Otherwise, I will assume you are speaking for Dow Chemical.

Okay, Mr. Temple. Do we understand the distinction I made?

A Yes, would you ask the question?

MR. CHERRY: Mr. Reporter, will you read it?

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

THE WITNESS: No, I do not have confidence in that date.

BY MR. CHERRY:

Q Do you know anyone on the Dow negotiating team who disagrees with you on that issue?

A No, sir.

Q Do you know anyone at the Dow Board of Directors who disagrees with you on that issue?

A No, sir.

Q Do you know anybody at Dow who disagrees with you on that issue?

A That's too big a place for me to answer that question.

Q Well, how about somebody with responsibility for making decisions with which we are dealing now?

A I know of no one that fits that description that

mm14

would disagree with me.

Q So at least confidence in the schedule of 1981 and 1982 isn't one of the reasons why the Dow Corporate Review concluded to go on with the project, correct?

A I believe that is true.

Q Okay.

Do you have confidence, Mr. Temple, that the plant would cost no more than \$1.67 billion whenever it is built?

A No, sir.

Q Do you know anyone with management responsibility at Dow Chemical who disagrees with you?

A No, sir.

Q In fact, Dow has mistrusted Consumers' and Bechtel's figures so much that it went out and hired Black & Veatch to do its own study of what a nuclear power plant would build, is that right?

A I understand that to apply. I have never seen that study.

Q And you have never seen the results of the study which say this plant should only cost \$1.4 billion?

A No, sir.

Q I'll show it to you.

Did you have anything to do with the Black and Veatch study?

mm15

A No, sir.

Q Who did, Mr. Burroughs?

A Are you talking about the one with regard to nuclear plants being able to be built?

Q Well, there was a Black and Veatch study concerning coal costs and alternatives, and then there was a Black and Veatch study which estimated the amount of an alternative nuclear power plant cost.

A Well, let me try to answer it this way.

I feel responsible for any studies which were requested by Mr. Burroughs. Anybody else in Dow who asked for studies did not do so at either my suggestion or my urging. And I believe the nuclear study falls in that category.

Q In which category?

A I don't believe that was requested by Mr. Burroughs.

Q Why did Black and Veatch do it?

A I think it was requested by somebody else at Dow. I haven't seen the study.

Q I see.

Would Mr. Decker ring a bell?

A Yes, I would suspect that was requested by Mr. Decker.

Q Did Mr. Decker have confidence in Consumers Power Company's ability to build a plant by 1981, 1982 for \$1.67 billion?

mm16

A I've never talked to Mr. Decker about that specific question.

(Mr. Cherry handing document to witness.)

Q I will show you a document which I will mark in a moment and ask if you have ever seen what I have shown you? Then I will put it on the record.

A No, I have not seen that.

MR. CHERRY: Is Mr. Decker coming, Mr. Wessel?

MR. WESSEL: I assume that is going to be a matter that is discussed as soon as you have finished your examination.

MR. CHERRY: I am just wondering if Mr. Burroughs will be here.

BY MR. CHERRY:

Q Did Consumers Power Company know about the Black and Veatch report on your alternative studies; that is alternatives for Dow buying steam and electricity prior to the date you testified in Midland?

A Yes, sir.

They knew about the study we had done, and I assume that they knew we had relied on Black and Veatch data.

Q Did that information find its way into your testimony in detail, or at all?

A I would have to look at that testimony.

I don't believe so.

unl.7

Q Do you want to confirm that, Mr. Temple.

I mean, I am willing to rely on your recollection, but I don't want to leave -- because when we finally prevail here on Consumers' appeals, I want to be able to sustain the Board's ruling.

(Witness reading testimony.)

A I don't see any reference to Black and Veatch.

Q But Dow commissioned that Black and Veatch study on alternatives because it thought it was relevant to making a decision on the various options that could be available.

Isn't that correct?

A I would say that we have used Black and Veatch over the years as we have continually evaluated the merits of the nuclear project versus an internal alternative. And we certainly -- I think that study was updated, so it could specifically be used, late in the summer of '76 as we were attempting to determine what, indeed, Dow's position was with regard to the nuclear project in anticipation of these hearings, plus -- plus the significant increase in cost that we were advised of on, I think it was August 5th.

Q Right, it was August 6th.

But, in fact -- you may be right it was August 5th, but I believe it was the 6th. In fact, the reason you commissioned the Black and Veatch study was because sometime in August 1976, Consumers had told you that Bechtel had an

mm18

informal price increase to \$1.67 billion, which was not formalized and given to the parties here until sometime in December of 1976.

Isn't that correct?

A I'm not sure.

We were told on August the 5th, I believe it was, that the new definitive estimate, I think is the word they used, for the Midland Nuclear Plants, is \$1.67 billion and that that was both the result of input from Bechtel and Consumers doing whatever work they did with that other data.

Q But, Mr. Temple, had you been free in preparing your testimony in order to place forward the sufficient facts to understand in detail what were the various options, alternatives, and what was facing Dow at about the time of December 1, 1976, would your testimony have been different than the one that Consumers submitted on your behalf?

MR. RENNOR: Objection, Mr. Chairman.

I am not sure he can answer that question.

MR. CHERRY: If he can't, he will tell me he can't.

CHAIRMAN JOUFAL: Overruled.

THE WITNESS: My nature is one of being open and candid in attempting to tell all of the information I think might be relevant.

So, I would say yes, I think there probably would

have been that kind of information included in the testimony.

BY MR. CHERRY:

Q Now I don't want you, Mr. Temple, to feel that I am trying to get you to engage in a namecalling contest, or put you on the spot. But for my purposes, the preparation of your testimony, probably more serious than whether you go out of business or Consumers goes out of business, because I can't be at every nuclear power plant hearing, nor can the public participate in every major business decision, so we really have to rely on honesty, particularly in connection with nuclear power, because if a licensee isn't candid, the whole process will fall apart.

So it is with that background that I am about to ask you the following question:

Is it your position or belief, based upon what you now know, and given the thrust of your statement that you like to be open, candid and put in relevant information, that your testimony insofar as telling the story about Dow was not open, not candid and not complete insofar as relevant information?

A I would say that all of the questions to which we were asked to answer, were open and relevant and I guess I would have to look at them as to whether they contained everything one might imagine could follow in there.

But I didn't feel that anything that we said was anything other than a full answer to the question that was asked.

mm20

Q I know.

But I am not talking about a limitation based upon questions, Mr. Temple. I am talking about a real, practical answer that if you want to tell the whole story and you don't want to limit it to certain questions which don't get you into trouble -- because I am not suggesting that your answers to questions were not as you described them -- but with the clarification I have just made, and given the surrounding circumstances as to what Dow knew and what were the important issues of the day, would you agree with me that the presentation of your testimony if the goal was to tell in complete detail, or reasonably complete detail, everything that was going on at that point, that your testimony was, as judged by that criteria, not open, not honest, and not consisting of all the relevant information?

A I would -- I would agree to that.

end #4

MR. CHERRY: I hope the Board takes note of that now.

CHAIRMAN COUFAL: We take note of everything, Mr. Cherry.

MR. CHERRY: I don't mean to suggest it but I just want to make it absolutely clear; that admission.

BY MR. CHERRY:

Q Mr. Temple, I want to just ask a question that I think I asked a little bit on cross-examination and that is this:

You made a decision on behalf of the Midland Division that was encompassed in letters which were earlier marked as Board Exhibits 1 and 2 and which were the subject of the meeting of September 13, 1976 with Consumers Power Company and were part of the documents that prompted you and Mr. Creffice and others to agree that there was a Dow Corporate Review; is that correct? Do you remember those letters?

A Yes, I do.

Q Now at some point there was a Dow Corporate Review which came out with the conclusion that said that Dow still supports the project, or something to that effect?

A Correct.

Q I am going to get into that conclusion and what it means in a moment.

But what I want to know is: Did anyone in

b2
connection that Corporate Review express an opinion that the findings you had made about disadvantageous, et cetera, all the ones that are listed in your letter, that any of those findings were not true?

A To the best of my recollection; no, sir.

Q So that it is at least clear that the Corporate Review's decision to move forward, whatever that means, was not based upon a rejection of the Midland Division view that the plant was most likely to be disadvantageous to Dow, to Midland, et cetera; correct?

A Well, there were none of the specific things that we had used to base our decision on that I recall anybody disagreeing with.

Q Is that the sort of thing, Mr. Temple, that is someone had disagreed with the Midland Division's conclusion, that it would have come up expressly in the Dow Corporate Review?

A I believe it would have.

Q Yes.

So it is safe to say, based on your involvement in both the Midland Division decision and the Dow Corporate decision that it is Dow's position regardless of what their decision is to move forward, that the Midland plant will most likely be disadvantageous to Dow and the Midland community; is that correct? That is the Corporate finding?

rb3

What we do with that is a different question, but you will agree with me about that?

A Well, I am not sure that I can, Mr. Cherry, because part of the Corporate Review involved the discussion of the threatened lawsuit which had taken place between the time we concluded that the project would most likely -- to be disadvantageous to the Midland and the time the Corporate Review took place. That was a new piece of data which the Corporate Review team had and I think influenced their position which was a recommendation which Mr. Orefice later adopted, that the condition had not changed significantly enough for us to alter our position as being one in support of the nuclear project, but we were to continue to keep all of our options open.

Q So let me ask the question this way, Mr. Temple:

Is it not a fact that the only significant reason why the Dow Corporate Review was not identical in findings and conclusions with the Midland Division's view, the only reason that didn't take place was the threat of a lawsuit?

A I think you are asking me to look into the minds of 7 or 8 people who deliberated for a couple or three weeks when I deliberately kept myself out of it after assisting Mr. Orefice in making the charge that -- to make sure that we -- if we made any erroneous conclusions or decision in the Division we wanted to find out inside of Dow instead of

rb4
outside of Dow. I wasn't privilege to any of those meetings.

Q No; no, but you participated in the Dow Corporate Review. You were there when it was made.

A Yes, sir.

Q And you had participated in conversations and communications with Mr. Oreffice; is that correct?

A Yes.

Q And you are here as a Dow witness and you know what the Dow position is; don't you?

A Yes, sir.

Q All right.

Now just between you and me, Mr. Temple, isn't it true that the only reason that Midland Division's findings and conclusions was not the Corporate finding and conclusion was a lawsuit. Wasn't that the only significant reason?

A In my judgment that's true.

Q So that it would be fair to say that the Dow Corporate position is that they believe the Midland nuclear plant most likely to be disadvantageous to Midland and to Dow.

Point number two, that they have no confidence in Consumers being able to meet its proposed schedule -- that is a Dow Corporate position.

Point number three, that they -- that Dow Corporate has no confidence that Consumers will be able to build the plant for \$1.67 billion.

rb5
Point number four, that Dow has no real confidence that a nuclear advantage will convincingly be maintained.

And point number five, you are afraid to be sued for \$600 million; ergo, you support the project.

Without adopting all of my characterizations, have I correctly summed up the Dow Corporation position?

A. You have to remember, Mr. Cherry, that that conclusion was reached by Mr. Oraffice with consultation with other members of the Dow Operating Board who were present, and I was not present.

Q. I appreciate that, but I am only talking about whether or not you will agree with me that is the Dow Corporate position essentially as I have stated it on your involvement, your knowledge and your understanding of what went on?

You are not a flunky at Dow. As a matter of fact, after you wrote the letter saying it was a bad, bum deal, you were promoted.

So what I want to know, Mr. Temple, is whether or not based on your knowledge, your standing in the Dow Chemical Company, you would agree with my characterization of what the Dow Corporate position is.

A. Yes, I guess with that description, I guess I would agree with that.

Q. Now if your testimony had been candid about the Dow Corporate position we would have all learned this some

time in November or December, if Consumers had permitted your testimony to be candid; let me phrase the question that way.

MR. PENFROW: I am going to object to that question, Mr. Chairman, on the basis that Consumers -- of the record that Consumers knew all the things that Mr. Cherry characterized was his position prior to the time he filed his testimony.

MR. WESSEL: I really think we are on summation at this time and not examination. These are conclusions and the witness has stated -- we really are drawing conclusions which the Board is going to draw.

MR. CHERRY: I withdraw the question.

I would like to know if we can take -- and if you say no I will go on -- from now until 11:30 which is approximately 16 minutes. I will go through those documents and I might be able to conclude Mr. Temple a lot quicker than I had anticipated.

CHAIRMAN COUFAL: Wait.

Mr. Wessel, you have a comment?

MR. WESSEL: I want to know about other witnesses are in Midland. Mr. Oreffice can't make it today. Maybe you want Mr. Howell.

But it will take some time to bring them all over here. There is a plane that will get here at about 2:00; we could get the witnesses here by about 2:00 o'clock.

MR. CHERRY: Let me ask this question: Mr. Hoefling, how much examination do you have of Mr. Temple?

MR. HOEFLING: About a half hour.

MR. CHERRY: So that will be about an hour.

And Mr. Renfrow, do you have any recollection of your witness?

MR. RENFROW: I'm not sure he is my witness any more, but yes; we have some questions.

MR. WESSEL: I don't want to see any time wasted; I'm sure you don't either. If it is -- I don't know when Mr. Temple will finish. If Mr. Howell could go on after Mr. Onofice first thing tomorrow morning and give us some indication at that point, who if anybody else, is required we will have them here.

MR. CHERRY: I would agree to do whatever is necessary to fill the time if we don't conclude Mr. Temple today including the putting in of the Staff testimony as it read. We ought to get it in the record, anyway. We could do that.

But we might need the rest of the day with Mr. Temple. I think we probably will.

If the Board agrees, I think it will expedite --

CHAIRMAN COUFAL: We are agreeable to a 15-minute break, if that will expedite anything.

MR. CHERRY: Terrific.

(Recess.)

CHAIRMAN COUFAL: Proceed, Mr. Cherry.

BY MR. CHERRY

Q Mr. Temple, I want to talk a bit about the contract itself. You are familiar with the contract; are you not?

A Yes, sir.

Q Did you participate in any of the negotiations that led up to the changes in 1974 on the steam contract?

A Yes, sir.

Q And you are familiar with the relative rights and obligations of the Consumers and Dow prior to '74 as well as subsequent to '74; is that correct?

A To a certain extent.

Q I mean in terms of what you are obligated to buy and not obligated to buy and what you have to pay and what costs are figured out; correct?

A Generally, yes.

Q I appreciate that, but Dow wouldn't go into a contract without knowing how much it is going to cost for steam.

By the way, Consumers has taken a position, particularly in the January 12, 1977 meeting that was given to the Board and the parties yesterday -- or the Board got it earlier -- and before that, that there was no upset date in the contract.

Are you familiar with that position of Consumers?

A I am not sure whether I know what upset date; you mean final date?

Q Yes. What I mean by upset date, or what you mean by final date is that Dow Chemical has to buy steam and electricity from the Midland nuclear units no matter what, whenever the plant is built for whatever cost. That is essentially their position?

A Yes, sir; as I understand it.

Q Do you agree with that position, based on your understanding of the contract, Mr. Temple?

A I agree that to my knowledge we don't have specific language in the contract that allows us to walk away at any given date.

Q Is that your complete answer?

A If I understood the question right.

Q Well, you may not have understood the question.

Is it Dow's understanding that if the nuclear power plant isn't built until 1990 and you move forward and build your own facilities, that when that plant comes on line, you have to buy steam and electricity from it, pursuant to the contracts that are still in effect?

A It is our understanding that that is Consumers' position.

Q Does Dow's understanding agree with that position?

10
A. No. We feel that if we wait until December 13, 1984 at which our own power houses are no longer capable of operating economically and sustaining the operation of the Division, that we have fulfilled our obligations and at that time can turn our backs and walk away. Consumers has not agreed that that is a valid position.

Q. They have asked you for \$400 million in order to agree with you?

A. Well, at the last negotiating session with regard to what we call final date, Consumers, I feel, agreed that the date in question was the right date; December 31, 1984.

Consumers date at that meeting was that they would agree to that kind of a date and that we could turn our backs and walk away. But that date could slide if for one of any number of reasons that they covered in force majeure language that was the cause for the date to slip.

Q. And I think you characterized that force majeure language as covering so many things it didn't leave anything out -- anything else out?

A. That is precisely my characterizations, although Consumers did say that they were going to look again at that language. But is -- it is very all inclusive in my judgment. And so as a part of the final date language Dow was upon signing of any new contract to pay Consumers front-end money, as I call it, of \$100 million and then over the life of the

b11

construction of the plant, assuming the cost didn't go up from the current \$1.67 billion estimate, we would owe them progress payments which would end up with our having paid them \$400 million.

And they indicated that we would owe nothing at that point in time, if --

Q Mr. Temple, would you agree with me that the contracts, as you understand them and the negotiations that both led up to and were ongoing, had infused in them certain commercial reality; i.e., that there was a particular purpose why the plant was being built, a particular objective and a particular reason why Dow got involved?

A Yes, sir.

Q Would you describe that purpose, reason or objective?

A Well, the plant was built and we became a customer of that plant by contract because I think both Consumers and Dow felt that the concept of supply steam, exhaust steam if you will, to chemical processes rather than merely condensing and recycling it had some significant advantages. And we were interested in those advantages because Michigan is a high cost energy area.

That was the concept. It was a good concept. And if the plant had been built on schedule, we would probably be recipients of some very low-cost steam.

12 Q If the plant had been built and hadn't run into any operating problems?

A Yes, sir.

Q Okay; go ahead.

A It was also known to all of the parties that our old facilities had some kind of a definable life to them and that we needed to have that steam available to us at the time that we took -- could no longer rely on those facilities.

We also had a consent agreement based on their projected completion dates as projected in 1974, early '74, that they would be on-line in such a way that we could shut our power houses down in July of 1980.

We felt those were meaningful dates. It was when Consumers' financial difficulties caused them to be unable to progress the job on what up to that point in time was a reasonable construction schedule that the gap between Consumers and Dow began to open and that got progressively wider.

Q Would it be fair to state that the original advantages perceived in the 1967, '68, '69 period continued to evaporate at about the same rate that Dow and Consumers grew apart?

A I didn't hear the first part of your question, Mr. Cherry.

Q Would it be fair to say that while Dow and Consumers

b13

were beginning to grow apart, during the period from '67 on to the present, that the original perceived advantages of the nuclear power plant began to be eroded to the point where there may not longer be an advantage today?

A I think I said earlier that up through the end of 1973, the advantage to the nuclear project, to Dow for steam and electricity off the grid was still a significant economic advantage. The deterioration was rapid from late 1973 to the present.

Q Well, I mean if we put ourselves back in 1967, with what ever perceived advantages were discussed then and we know what we knew today, Dow would not have entered into that contract; isn't that correct?

A Well, I wasn't there in 1967, but if I knew everything I knew today, I think your statement is true.

Q That Dow would not have entered into the contract?

A That's my judgment, sir.

Q But the point I am trying to make is that this kind of partnership between the nuclear utility, such as it is, and Dow Chemical Company which was going to herald the joint cooperation because of low-cost steam and et cetera, et cetera; all of those advantages have eroded now; haven't they?

A In our judgment; for Dow, yes.

Q So that if we looked at the relationship today from Dow's position and from a cost-benefit standpoint, leaving

b14
aside the contract for the moment, this project, insofar as
Dow is concerned, should not continue?

A. Again, I have to restate the position that I have
taken with regard to the Midland plant --

Q. Mr. Temple, I don't mean to interrupt you but what
I would like you to do is try to answer my question, since it
was phrased with some care:

That from a cost-benefit analysis kind of thing,
which a businessman has been used to doing for a long time --
Congress decided it would have the government do it beginning
around 1970 -- but from that kind of an economic-looking at
alternatives and looking at the issue today from Dow's stand-
point, would you agree with me that the project, nuclear pro-
ject, should not go forward from a cost-benefit standpoint?

A. From Dow's point of view --

MR. REMFORD: I will object. I want the question
clear as to whether he is asking for Mr. Temple's own judg-
ment or whether he is having Mr. Temple testify as to the Dow
Corporate judgment.

MR. CERRIE: I am having Mr. Temple testify as a
senior official of Dow. If he wants to, he can tell me if
other people at Dow disagree with him. We earlier told him
when I think you were out of the room, that he could do that.
But every question that Mr. Temple is answering is on behalf
of Dow as an entity unless he says to me: Now wait a minute:

b15

there are three guys who sign the checks and they don't agree with that. So all of these questions are to solicit Dow's position.

BY MR. CHERRY:

Q If your position and Dow's position are inconsistent, then tell me both. Now with that background, let me state the question again:

From Dow's standpoint, would you agree with me today that from a cost-benefit standpoint, knowing all you know including the prospect of an increased price and everything we know, that we have discussed, that the project should not be continue?

A From Dow's point of view?

Q Yes.

A I would agree with that.

Q You would agree with that.

A Yes.

Q Now if the project were not continue, Mr. Temple, would Dow be able to, if left to its own devices, move forward with an alternative that would satisfy Dow's needs for steam and electricity? Or would you just be out in the cold and you would have to shut down Midland and whatever?

A No; I think given the existing life of the current power houses and the money that we are putting into sustaining them into the period when we think the nuclear plant will be

b16

on-line, that would allow us time to put new facilities in; then I have to ask where that fits in our overall capital program,--

Q I appreciate that.

A But from the point of view of being able to physically do that, yes; I think we could do that.

Q And not only from the point of being able to physically do that; from the point of being able to do it on a reasonable time frame -- and you have sufficient funds to do it -- I mean, it is a realistic option and alternative, if we are just looking at the cost and benefits.

And now that we have established that Dow doesn't believe the project should continue from that standpoint, that Dow has realistic alternatives which are not going to place Dow in any difficult position, competitively, economically; you are not going to lose jobs, et cetera. That is the kind of sense of my question.

Do you agree with me?

A Yes, I do. But we will also need to complete the new consent agreement which is being discussed with the Air Pollution Control Commission, because we can't do it before July of 1980.

Q But you could comply with one of your alternatives that are available to you now if you started some time this year, pretty close to the July 1980 date; couldn't you?

b17

A. If we had unlimited capital funds.

Q. What do you mean; unlimited capital funds? You mean to say that you could not get sufficient funds to implement one of the your alternatives between now and, say, mid-1981?

A. I am saying it would be difficult.

Q. Difficult?

A. Given the other projects that we have underway and between now and 1985, which we are anticipating we are going to have to gear up to operate between now and that time; I think that we could do that. We would also look at the products we make to see whether Michigan is the appropriate place to make them or not which may change our steam and power --

Q. But if you decided not to make changes -- to make changes which would diminish products in Michigan, it would increase it somewhere else; wouldn't it?

A. Yes; assuming the product is a profitable one; that's correct.

Q. From the standpoint of the overall economy, we are not living in just one state. From the standpoint of the United State's economy, you are not talking about just taking something out of the economy; you are talking about moving it some place else, essentially; correct?

A. I think that is a fair statement.

Q. And under no situation would you ever shut down

Midland to the extent so that your work force would be all on the welfare doles?

A I don't believe that would ever be the case.

Q So that we are -- what we are talking about is in the sense of alternatives that if you made a decision to move a product somewhere else, that wouldn't dislocate the Midland plant as it now is; it just might inhibit growth on some exaggerated level; correct?

A I think that's a fair statement.

Q But the people who now rely upon Dow for a job, they don't have to be worried; they will still have their job if this project isn't continued?

A I think our attrition rate is adequate to handle anything of the nature that we would envision as being practical under those circumstances.

Q Just to be clear: If a guy wants to work in Midland who is working for you now, he will still be able to work whether or not this nuclear plant is built or not?

A Yes, sir.

Q And you would still pay the same taxes to the Midland community that you are paying now unless they raise them or lower them?

A Well, we will pay whatever we have to pay.

Q Right. Okay.

That's a good answer.

b19

How can you conceive of any significant dislocation to the Midland economy if the nuclear power plant is not built and you move forward with one of the varied options that are practically available to you?

A. Well, I think there would be a short term -- well, there would be some dislocation based on the construction work force that's on the job in the nuclear plant today. And I don't think our program would mesh too well with instantly picking up very many of the building trades people who are on the job in Midland, building the nuclear plant. I think there would be that in -- disruption.

Q For a short time?

A. Well, they have quite a few over there, but they move around generally to where the work is.

Q Sure; and then they would go to another plant, wouldn't they?

A. That would be a disruption.

Q Any others you can think of?

A. The tax base in Midland may change if the plant isn't built in which case we would pay more taxes, I guess.

Q It's a pretty wealthy community right now; though, isn't it?

A. Yes, I think that is a fair statement.

Q You don't have any problem with raising money for schools or public projects or anything else? I mean, if you

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need money for something, it is there; isn't it, essentially?

A Well, I wouldn't quite characterize it as that. The voters don't like millage elections either, time after time. So it is not a cake walk.

Q I appreciate it, but the mean income is pretty high in Midland compared to other cities?

A That is true.

Q The top ten percent in the United States?

A I don't know, Mr. Cherry.

Q Now wasn't there a time in your meetings with Mr. Youngdahl where he said that one of the reasons that Consumers didn't want Dow to begin one of these alternatives while the nuclear power plant was being built -- which is of course an option Dow has; isn't that right? I mean, you could start out today and still build the facility while the project is being built? It might give you some economic problems but you could do it; correct?

A Yes, but then when the nuclear plant comes on-line, we have to shut it down in order to accommodate the quantities of steam and power.

Q It is my position that you are a little too concerned about that eventuality, but I don't want to get into that just now.

A Let me add one thing, which I am not sure of but I think I need to add.

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Q Sure.

A In 1974 when we had some contract changes that did allow us to continue to run our existing power houses and to make improvements in them -- but I am not sure that I have -- I have to ask some of the people at the table -- I am not sure that really allows us to go out and build a power house. And during the course of the negotiations that had taken place throughout 1975, I had felt that we had reached agreement in principle on a number of changes that would not cause that to be a problem. But I would have to look at the contract again to know whether we really have the right today under the existing contract to do that.

Q But you are not suggesting to me, Mr. Temple, that you and Dow and Consumers can enter into a contract which violates the law?

A I don't think I am qualified -- I would not enter into a contract which violates the law; that's right.

Q But generally as a Businessman, in your sophistication, you would agree with me that the law governs a contract rather than private parties being able to sign something and it is controlling, no matter what the law says? I mean, would you agree with me that that's generally how you operate?

A We operate within the law at all times.

Q So we have got the National Environmental Policy Act that has got to be satisfied, no matter what the contract

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says.

Now, Mr. Temple, I want to go back:

At some point, Dow had a discussion with Consumers Power Company about building a boiler for 1 million pounds per hour.

A Yes, sir.

Q And didn't Russ Youngdahl take the position that Consumers wasn't very anxious about that because if you were building while Consumers was building, there might be a competition for trades and Consumers might not be able to get all the people it needed for the nuclear plant?

A Well, what we had discussed was one of the approaches we had considered with regard to addressing our Air Pollution Control Commission problem which involves the installation of some hardware.

Q I know and --

A And --

Q I am sorry; go ahead.

A And in that context, I don't know who made the comment from Consumers, whether it was Mr. Youngdahl or Mr. Sowall, but at the time we had also discussed an alternative proposal which was the one we ultimately went with, which was to convert gradually from our current coal power to 100 percent oil.

We asked Consumers whether they had any preference

with regard to which alternative we pursued. They then said it would be more logical for -- from their point of view, to assume that if we made the conversion to oil that we would have a lesser demand on the crafts in the area. Therefore, that would have a lesser impact on their construction schedule.

Q So at least Consumers admitted that there was, if not the potentiality, the actual cross-over. So that getting back to your original dislocation problem based on at least the admission by Consumers Power Company; at least they believed that there could be a cross-over between construction of that alternative by Dow and construction of the nuclear power plant?

A A cross-over of people on that job onto our job?

Q Sure.

A Yes.

Q So that it is safe to say that the only dislocation you can think of might not even be a reality; i. e., the people who are working on the project now more or less might be employed either in another nuclear project or at a facility Dow might build; correct?

A No; not entirely. I don't think our demand would -- the kind of project that I would envision. I don't think would take the same number of people that are currently employed at the nuclear plant. I don't know what that number is but I think it is a lot.

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Q You don't think it is a lot?

A I think it is quite a few.

Q What ever that number is, would that be a sufficient benefit to have these people employed in the short-term, to go forward with the project with all of the other things we know?

A At Dow?

Q Yes.

A Not to Dow.

Q Right.

Now let's lift out of Dow for just a moment, Mr. Temple, and I am now going to ask you a question personally:

Based upon what you know do you believe that moving forward with this project is a good objective, business venture, for anybody? I would just like your opinion as a senior businessman in the Midland community and aside from Dow and looking at it from all of the angles. If you had to -- the decision to make with all of its ramifications, do you think objectively, this proposal as you now know it, with its prospects is a good business venture?

A Well, I think that is very hard for me to answer for a lot of reasons:

Number one, I would not consider as an individual or as a senior manager at Dow in getting into any business which was as regulated from the standpoint of either rates or

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from the standpoint of -- I beg your pardon -- from the standpoint of the kind of hearings we are having now with the NRC. We were involved as a contractor with the AEC at one time and we elected not to continue to seek that contract.

So I don't think being in the utility business is very good business anyway. Well, it is fine for people who are in the utility business perhaps, but I am not in the utility business. I have never been in the utility business. I would not consider getting into the utility business. And I certainly wouldn't consider taking over this project at its current stage if I were going to be in the utility business.

I don't know whether I have answered your question.

Q I think what you have told me is that from a business standpoint, you don't think this makes sense primarily -- partly because you don't like the utility business, but if you were in the utility business you still don't think this project made sense, based upon what you currently know: correct?

A If I were a utility executive, I don't think I would try to move in and buy Consumers out and continue the plant myself based on all of the unknowns which exist that we have talked about so often.

Q Does Dow have a high confidence level in the managerial ability of Consumers Power Company to handle big

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deals like this?

A I guess I can't speak for Dow.

Q What about you?

A No, sir; I don't.

Q Do you know anyone at Dow that disagrees with you?

A No, sir; I don't.

Q Now is it an important quality, managerial quality to have that, in meeting schedule and projections and costs, et cetera; is that an important quality?

A Yes, sir.

Q Would you agree with me, Mr. Temple, that if we all went home right now and ev everybody including myself, did what we could to help them out, that is, Consumers Power Company, that it would be more likely than not that Consumers still couldn't build the plant at the price of \$1.67 billion and meet the 1981-'82 schedule?

A I don't know what kind of help you would envision.

Q Let's say I stop the hearing; I walk away and I issue a public apology and I say that Marcus Rowden hasn't been ripping off the public since he has been chairman. And I apologize for the remarks I have made about the general counsel and I state that the Regulatory Staff has been a boondoggle and I get my payoff and I go home.

What I want to know is if this hearing ends do you have any confidence that Consumers if left to their own

business will be able to meet either the schedule or projected costs?

A No, sir.

Q Do you know anyone at Dow who disagrees with you?

A If I really understand that part of the question, as to how much of an impact -- no insult meant -- your walking away would have on this thing, I don't think it would have enough of an impact and therefore, I don't think there is any Dow executive that I know of that would disagree with me.

Q Now let me say -- no insult intended, no insult taken -- I didn't stop the Midland plant. They stopped it. So I get credit for it and I take it because it helps a little. If you don't get paid, you like to see your name in the newspapers. But it was really Consumers who stopped the project, not me.

Now, Mr. Temple, we started out this line of examination, and I might add the underlying facts, with your understanding of the contract, et cetera. Does Dow take the position as a legal matter, if you know, -- and if Mr. Nassal doesn't consider this a frivolous statement, that Consumers Power Company was obligated as a matter of the commercial reality and the understanding, et cetera, to have this plant on-line prior to '81 and '82; that was the understanding of the partner?

A Yes; I believe that that is our position.

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Q So that if you are in fact sued by Consumers Power Company, one of your defenses, as you understand it, was that Consumers Power Company did not use its best efforts to get the plant on-line by 1980 and given the commercial reality, Dow is really off the hook?

A Our position is that if they don't get it on before 1985, we are off the hook.

That's an argument -- I am not a lawyer, but about commercial reality and frustration and that sort of thing, that is what I was referring to.

Q But I had asked about 1980 and you also agreed with me that it was Dow's position that given the commercial reality and the frustration, that Consumers had an obligation realistically to have the plant on-line by 1980 as well?

A Yes.

Q That is how Dow has operated with that understanding from the beginning, more or less?

A I think, if I understand your question -- I will put it this way:

I think we felt that the dates that were in the contract that they said were dates we could rely on, or we interpreted as dates we could rely on, and weren't dates upon which we based our planning.

Q That is the '79 date?

A '79-'80 dates; correct.

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Q And Consumers made representations that they would do everything to have the plant on-line by then?

A Yes, sir.

Q List the things that Dow Chemical did in reliance upon those representations? You can do it in a general way and then I will ask you to put a dollar figure on it.

A Well, originally, the plant was to be on-line in '75, and we initiated some air pollution control measures which were effective in mid-July '75 which involved supplemental control systems to where we switch from coal to oil, to control both the emissions to some extent but primarily the ambient air quality with regard to SO₂.

We are now in conversations with the air pollution control commission with regard to what we need to do to operate our facilities from July of 1980, which was the next date we relied upon until some date in the future.

And our plans are based on the fact that we are treating the contract as in effect, and we are expecting to buy the nuclear steam and to a certain extent it gets into the confidence factor.

Our programs are designed to try to get our plants to reliably perform up until 19 -- the end of 1984. I used some numbers and they were admittedly rough, and maybe they will suffice to give you a feel for what you are looking for. And I said if we had assumed from the beginning not to go with

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Consumers project and we had indeed built a conventional power house with extraction steam and had it on-line in mid-1975 which was when we had to implement the supplemental control system and that power house burned the fuel mix of 90 percent coal, 10 percent oil or gas, and assuming that we had to wait until the end of 1984 for nuclear steam, that we will have spent somewhere in the range of \$250 to \$300 million. Most of it is in fuel premiums; the cost of oil per million btus versus the cost of coal; some of it in capital but most of it in fuel premiums.

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Q In reliance on Consumers' representation that the plant would be on line by '79-'80.

A No, some of that would have been spent in order to get to '79-'80. But we concluded that the program that we're now taking to the Air Pollution Control Commission, if we have to go until the end of 1984, the capital cost and fuel premiums would be in the range of \$200 million. A hundred million of that was already committed, \$75- to \$100 million. That would bring the \$200 million up to the total I gave you before we're already committed to, even if they were going to make the 1980 date.

Q I know that, but it's fair to state that you spent in excess of \$100 million of money you would not have spent in reliance on the 1980 date, at least that amount?

A I think that's correct.

Q Now, tell me, Mr. Temple, just prior to the 1974 steam contract revision what the obligations were as you understand them for Dow to purchase steam.

Well, let's back up, because I think there was another interim change. What I want you to do is trace for me the changes, if any, in the relationship on steam and the cost from the beginning through the change in 1974; and then I'll ask you to take it on up to what your negotiating position is, if there is one; and then I want to do the same thing with the electric contract, that is, originally and

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any changes that have occurred up to today, including the negotiating position, if any, on the electrical contract.

And then I want to talk about the water business just a little for just another indication of the sloppiness in the way this has moved forward. I just want to talk about that a bit.

CHAIRMAN COUFAL: We'll strike the last comment, Mr. Cherry.

MR. CHERRY: Oh, I'm sorry.

I want to talk about the water contract, because I think it's an indication of the character of this arrangement.

MR. ROSSO: Mr. Chairman, Mr. Cherry has indicated he has quite a bit more cross-examination in these areas. I was wondering if you could give us a schedule for lunch.

I think we could use an hour-and-a-half.

MR. CHERRY: I was thinking we would go until 12:30 so I could conclude this line of examination, and then we would break for an hour.

MR. ROSSO: Mr. Renfrow indicates we would need two hours to look at some things over the lunch hour. I was not here all morning, so I was not knowledgeable of those.

I wonder if we could break now and come back at 2:00 o'clock.

MR. CHERRY: I would object to that. We don't

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need two hours.

They've got three lawyers plus a firm of lawyers. You know, I've got the same problems. I've got thirty-six cases on my docket, and I do it all alone.

I'd like to get this over with. Two hours is outrageous.

MR. RENFROW: Mr. Chairman, I want to report on the documents.

MR. CHERRY: Do it tomorrow morning and review it tonight. I mean, if that's a problem have them do it tonight and report on the documents first thing in the morning.

MR. RENFROW: In view of the documents we've gotten from Dow, I would at least like some time, between an hour-and-a-half and two hours, so that we can go forward; any time between that I think we can handle the problem.

(The Board conferring.)

CHAIRMAN COOPER: Can you finish whatever line of inquiry you're on now by half past, Mr. Cherry?

MR. CHERRY: Do you think you can do what I just asked you in 20 minutes, Mr. Temple?

THE WITNESS: I'll try.

MR. CHERRY: I think you could.

THE WITNESS: I'm not sure how deep I'll get in some of these things.

MR. CHERRY: I appreciate that. I'll help you out.

I think I have a better understanding than Mr. Howell did, but you go ahead.

BY MR. CHERBY:

Q Let's start with the steam first, how it was originally, and then just take it through as best you can remember approximate facts. I don't necessarily need amendment numbers or things like that. Tell me how it stands today and what position, if any, DCV has about whether to change that steam contract.

A Do you want to start at the end of 1973?

Q No, I want to start as it was, because I think there was -- as it was in the very beginning, whenever the first steam arrangement was made.

What I want is the development of the steam arrangement after the signing of the General Agreement. Do you understand my question?

A I think that was done in 1974, the signing of the General Agreement.

Q No, the General Agreement was signed in '67.

A I wasn't even involved before 1973.

Q Okay. Then why don't you tell me where the steam stood just before and then after the 1974 agreement, okay?

A With regard to quantities?

Q Quantities, price and obligation.

A Okay.

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To the best of my recollection, there was not a minimum quantity of steam required of Dow in the contract before the change in 1974. It became economically prohibitive for us not to take a certain minimum, as I recall it.

I believe that in 1974 we agreed to take a minimum of 2 million pounds per hour of 175 psig steam. We may take more, but we would always agree that we would take no less than that.

We were also required, I think, to have a 6-year projection of what we anticipated our take would be, and that would be called toward reserve capacity.

Q How was the steam to be paid for prior to 1974?

A Pardon me?

Q Prior to 1974, you didn't have any obligation to take the minimum amount of steam, as you recollect.

A I think that's correct.

Q Well, if you didn't take any, did you still pay something for it?

A Yes, sir.

Q Okay. Tell me what you paid, if anything, what you were obligated to pay.

A Well, it's my understanding that we were obligated to pay the fixed charges, which I understand amounts to about 70 or 75 percent of the total cost of steam, even if we don't take any.

Q That's figured on Unit 2 alone?

A I can't tell you how that's figured.

Q In other words, the sense of the agreement prior to '74 is that, since this was kind of a partnership, Dow's rate should reflect the cost of the original investment.

A I think that's always been the philosophy.

Q That's a little cheaper than what the average guy on the street pays for his power, isn't it?

A We are talking about steam.

Q I know that. But what I am suggesting is that if I'm going to get some power from a factory for my house I don't pay over a period of time the capital cost. I pay the capital cost plus a lot of other things added on. Is that correct?

MR. ROSSO: Mr. Chairman, I object. I don't think the witness testified that all that Dow was going to pay was the capital cost on this if they acquired steam. I think that's a mischaracterization of the prior testimony.

CHAIRMAN COOPER: What did you testify to, Mr. Temple?

THE WITNESS: Well, I think what I tried to say was even if we took no steam we were obligated for the fixed costs. If we took steam we paid the fixed costs plus the operating, the variable costs of operation -- fuel, maintenance, insurance, taxes, and that sort of thing.

BY MR. CHERRY:

Q Yes, but all that still did not reflect what -- how, for example, a residential user of electricity pays, because he pays a return on investment; he pays for the mid-day clubs and for all the fancy lawyers. All of that would not go into Dow's computation.

A Yes, there was a return to Consumers.

Q What was the return to Consumers, do you know?

A I can't tell you what it was, but there was an intensive effort on the part of both Consumers and Dow to make sure that the steam cost reflected the total cost of steam and an adequate return for Consumers so it was not being subsidized by the electric ratepayers, because that's an unreal world to expect that to prevail.

We worked very hard, both companies, to try to make sure that that didn't take place.

Q But you're not sure whether or not in fact there is a subsidy? And when I say you're not sure, you haven't run the gurnit of the NPSC yet, correct?

A We have not gone to the NPSC, but I have lots of confidence in the people who have established the principles upon which the steam would be priced to Dow; and I think the principles have been fulfilled.

Q But you did remark in one of these meetings that when Dow, if it ever did get what far, to the NPSC to have

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the steam rate approved, that Dow wouldn't have any friends; they'd have everybody saying that that's too good a rate, the public and everybody else.

So it was a concern and still is a concern to Dow, isn't it?

A It doesn't mean that -- that remark did not mean that the steam, in my judgment, was not bearing its total cost, because I think it is. But in the political area, I'm not sure that we alone could win that point.

Q Okay.

Let's go on now. Have you now told me everything that involved the purchase and sale of steam prior to the '74 revision?

You've told me about the capital cost, the purchase of steam, whether there was a minimum or not, and how the cost was roughly computed.

A I've told you everything I know about it.

Q Okay.

What changes besides the minimum purchase were made in 1974?

A With regard to steam?

Q That's right.

A I can't recall any of significance.

Q Was there any permission given to Dow to operate its own facilities in 1974?

A Yes.

Q What was that permission, to your understanding?

A Well, I've referred to that earlier. We were given permission to operate our steam facilities with reasonable maintenance, perhaps all capital projects, to sustain their reliability if we wanted to beyond the startup of the Unit No. 1 of the nuclear project.

Q Was that a Consumers-suggested amendment or a Dow-suggested amendment?

A No, we asked for that.

Q Why did you ask for that?

A Well, there were several reasons, and one goes to reliability. But the specific one that we were principally reacting to then was that signing of the contract, it was right at or around the time of the OPEC oil embargo. There was lots of concern about energy availability, and our position was that we didn't feel we wanted to be obligated contractually to Consumers Power to shut down our power houses when indeed somebody like the Public Service Commission could come along and say, "You can't give power and maybe even more steam to Dow to operate their plants, because it's needed elsewhere in the population."

Q How long, at least in 1974, did Dow contemplate it wanted to have this continued backup ability on steam?

A Not very long, because it would have meant we would

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also have had to come into compliance with the air pollution control regulations, which we felt, if there were a state of emergency, that we would probably be allowed to continue to operate the facilities if the nation was short of electricity. It didn't make much sense to us that we should be ordered to shut down those units by contract.

Q But then it was contemplated that essentially through the life of the contract you'd have this backup steam availability in one form or another?

A Yes, but we never envisioned using the power houses for that. We envisioned installing at that point in time package boilers which could be brought on and off line reasonably rapidly when we needed them, as opposed to a power house, which you can't just bring up and down willy-nilly and have it perform.

Q Is that right?

A An old one.

Q You might be interested to know that the Regulatory Staff -- and don't be too chary, Mr. Chairman, about this -- it's sort of relevant. The Regulatory Staff in the Koshkonong proceedings took the position that at times of low flow of the Koshkonong River, which was in the summer, which were coincident with peak loads of the power plant, when there was a demand for power for the plant and then drinking water, that the alternative would be to shut down the power

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plant, an 800-megawatt facility.

MR. ROSSO: Mr. Chairman, I object and move that be stricken. He's not showing us what kind of power plant, what kind of conditions. It's not relevant.

MR. CHERRY: I'll withdraw it if that suits your purpose, Mr. Rosso. It wasn't meant for the record. It was just meant to suggest that maybe Mr. Tample made a good deal when he said goodbye to the AEC.

BY MR. CHERRY:

Q Mr. Tample, the cost of the backup steam system that was contemplated by the 1974 contract had a cost involved, didn't it, and it has a continuing cost involved of some sort, some magnitude?

A Yes.

Q And that cost was not contemplated prior to 1974?

A To the best of my recollection, it was always contemplated that either we or Consumers would have some backup steam capability, and we elected, my recollection is we decided we'd rather have it and run it as a backup facility than pay in the cost of the areas for them to run it.

Q How was Consumers to have a backup facility prior to 1974 under the original contemplation?

A Well, they weren't to have the facility on in 1974.

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Q No, I mean what was the contemplation of the parties prior to 1974 as to how Consumers might supply backup steam capability once the system became commercially operational?

A Well, there is an automatic backup, which is not the one that we're talking about, in that Unit 2 can, if Unit 1 is down, feed the steam service to Dow.

My understanding is that they would have put in package boilers on their side of the river.

Q Do you know whether or not that was ever assessed in the original cost-benefit analysis that was done in this proceeding or for this proceeding?

A No, sir.

Q You do not know.

But at least the concept of how the backup steam was to be provided changed in 1974 so that some options were foreclosed?

A Or it was sometime thereafter, anyway, we elected the option of putting in the backup facilities ourselves.

I'm not trying to be vague. I'm just not sure what happened.

Q All I'm really trying to point out is that in 1974 there was a change in how the backup steam was to be done between the parties from what it was prior to '73, correct?

A. That's my understanding.

Q. It's only trying to suggest that when we get to a remanded hearing, once the plant is suspended, as I hope it will be, that is one factor of cost that we'll have to look at that hasn't been looked at as all.

Now, Mr. Sample, we talked a bit about the Bechtel forecast, and you said that Consumers -- and I think you said this at some earlier point -- was going to take some time -- I think it's reflected in your memorandum -- and give you Consumers' views on that sometime in March, is that right?

A. We discussed that, and Mr. Howell made the point, when we talked about early March, he said that would be difficult to do.

Q. Because of the hearings, among other things?

A. Yes, among other things. But yes, they are going to do that, and when it's ready I'm sure Consumers will tell us what they believe the new definitive estimate and timetable is, assuming it's the same as it is or different.

Q. Based upon Mr. Howell's representations to you, Consumers will not be in a position to comment on Bechtel's costs until essentially after the completion of these hearings?

A. I don't know how long the hearings are going to run.

Q. Let's say they end next week.

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A Well, that's before March 1, and he thought that date was timely.

Q Okay.

Do you remember Bechtel's forecast in 1974-5, when it went up to 1.4 billion?

A No, sir, I don't know -- I don't think I ever saw a Bechtel forecast per se. What we were usually, I think, dealing with was the Bechtel input as assessed by Consumers.

There are things which affect the total cost of the plant that I think are outside of Bechtel's area of activity. What we were interested in is what the whole thing is going to cost and what's the steam supply system going to cost.

Q Do you recollect that when Bechtel made a previous forecast that Consumers upped it by about \$200 million after review?

MR. ROSSO: Just to be clear -- excuse me. I object to the question because it's vague.

Does he mean that the Bechtel estimate as to the construction cost, fuel construction cost, was upped by including Consumers' costs?

MR. CHERBY: That's correct.

MR. ROSSO: And that that added up to the \$1.4 million?

MR. CHERBY: All I'm trying to point out, Mr.

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Rosso, is that based on history, which we'll get into when we get Mr. Youngdahl here, that all of the Bechtel estimates have been consistently raised by a substantial amount by Consumers after review, so to lead the Board to conclude that \$1.67 billion will also be raised at the March Review of Consumers if they tell the truth.

MR. ROSSO: Then I object to the question, because the Bechtel estimate does not include all costs for the plant. If it was raised, it was raised to the \$1.4 billion by including Consumers' costs.

I don't think there's anything in the testimony which indicates that Consumers raised the Bechtel portion of the estimated costs.

MR. CHERRY: Okay.

Mr. Chairman, you begin to see the breadth of the misrepresentation. You see, Mr. Rosso wrote a letter to the Board in December of 1976 --

CHAIRMAN COUFAL: Why don't you save your argument, Mr. Cherry, until an appropriate time for it? We're hard on 11:30.

MR. CHERRY: You're right.

BY MR. CHERRY:

Q Mr. Temple, Mr. Rosso has helped me with his admission a bit. You will now agree with me that the \$1.67 billion estimate received from Bechtel is not the total cost

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of the plant?

A. I'm sorry.

MR. ROSSO: I object. That isn't what I said at all.

MR. CHERRY: I'm asking this witness a question, and I don't want you to make any other than an objection, Mr. Rosso, without -- well, I don't really care. Mr. Temple will tell it like it is, anyway.

CHAIRMAN COWPAL: Mr. Cherry, why don't you just ask the question that you want answered by Mr. Temple without referring to whatever Mr. Rosso said.

MR. CHERRY: All right.

BY MR. CHERY:

Q. You will agree with me that the \$1.67 billion estimate by Bechtel that was related to you in August and which is the subject of the Bechtel forecast does not comprise all of the costs of the plant?

MR. ROSSO: Objection. Vague. Which forecast? There are two forecasts involved. And which total costs of the plant?

CHAIRMAN COWPAL: Overruled. Go ahead.

MR. ROSSO: Moreover, Your Honor, none of the Bechtel forecasts contain the figure \$1.67 billion.

CHAIRMAN COWPAL: Can you answer the question, Mr. Temple?

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THE WITNESS: I think I can clarify what we have always worked with, and that is the Consumers estimate. The \$1.67 billion, as I understand it, is Consumers' estimate with Bechtel's input.

MR. CHERRY: Okay.

THE WITNESS: That's the number we've worked with, and that's the number we've worked with in all our internal evaluations, was their number, and at times in discussions they would discuss some of the Bechtel input.

BY MR. CHERRY:

Q What I want to know is if you can tell me how much of that \$1.67 billion, either percentage-wise or dollar-wise, represents an estimate by Consumers?

A I can't tell you that.

Q You can't tell me that.

MR. CHERRY: We'll get into this later, Mr. Chairman. I just want the Board to know that within the \$1.67 billion is the self-serving estimate of the Licensee, which has to be looked at in terms of the Licensee's interest in this proceeding.

BY MR. CHERRY:

Q Now, Mr. Temple, can you scratch in just a minute or so whether Dow has a negotiating position on the steam contract today or whether they're satisfied with the rights and obligations of the steam contract?

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And when I say "satisfied," I want to exclude for the moment a final date. I just want to talk about price, amount, et cetera.

A. Our position with regard to steam is that the contract as it reads should stay unchanged, including the million to two million pounds minimum, but that Dow should be given the flexibility to make their own steam, to sell Consumers steam once we buy it, or to do anything we want with the steam that we get.

I think that's our position.

Q. Why do you want that flexibility, Mr. Temple?

Let me withdraw that question and suggest an answer.

Do you want that flexibility because of Dow's lack of confidence in Consumers' ability to supply steam even if a plant is built?

A. Well, I'd say we want that flexibility because we're looking at a period of time which will start presumably five years from now and go for twenty years; and there are some severe restrictions in that contract with regard to our ability to do whatever we want to do in the steam area, whether it's with the steam we buy from them or making our own steam, and we want the flexibility to act in our own best interests during this 25-year period of time and still have a contract that we feel is realistic and that we can

comply with.

Q Is reliability and confidence in reliability of the nuclear power plant one of the reasons why you'd like your own flexibility?

A Yes, sir.

Q And confidence in Consumers Power Company's ability to do a good job, that is, lack of confidence is another reason why you want your own capability?

A I think that all relates to reliability.

Q Okay.

Now, is it fair to say, then, in that sense that in terms of the steam contract as it's now written it may inhibit Dow from expanding at Midland over the long-term rather than increase their shipment?

A Yes, that's possible. It would certainly take place if they were not a reliable supplier, because we simply can't operate without steam and there's no place else we could get it.

Q And if you're restricted from having any more steam than is available from Consumers and you need more, the contract presently would prohibit you from having any more?

A No, I don't think that's true. If they're unable to supply, then I think there's some language in the contract that says we can go ahead and put in some facilities.

20 Q Under what circumstances would Dow want to resell the steam it purchased from the proposed Midland Plant, and to whom?

A Well, I would envision two circumstances. One could be if our energy conservation efforts and product mix changes made it difficult for us to meet the minimum. Then we'd want all the flexibility we could get to do something that made sense with the extra steam.

The contract is based such that once we pay most of the fixed charges that the more steam we take the lower the cost of the steam. It's the incremental aspect to it. So it could also be advantageous for us to sell steam to somebody else so that our total take from Consumers could be higher and result in a lower cost.

Q Okay.

I think that we probably should break now. Let me just tell you a couple of subjects I'm going to get into right after the break.

I'm going to get into the electricity aspect. I want to get into the current dispute over the rates when electricity and steam were to be purchased by Dow, with the obvious implication that if we buy Consumers' argument on the contracts we result in inefficient operation of the steam units of Dow. And then I'm going to get into some more stuff with the preparation of your testimony, and I'm going to

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conclude with some of the studies of alternatives in that exhibit that was prepared pursuant to my request.

MR. CHAFFY: But before I do that, Mr. Chairman, there is a proprietary order which prevents Mr. Temple, among others, to read the affidavits that were submitted by Rosso, Rentrow and Bacon.

Now, a proprietary order cannot prohibit me from cross-examining, and I intend to cross-examine Mr. Temple on his recollection of those events as set forth in those affidavits.

I don't quite understand the propriety of an order which prevents the only person who can comment on the truth of the statements from not being able to read it, but in any event it is absolutely clear that a protective order cannot prevent cross-examination.

You might want to seal the room, et cetera, and for that purpose I would like your permission to tender these three affidavits to Mr. Temple so he can read them over the noon hour -- they're very short -- so I can ask my questions when we return.

CHAIRMAN COCHRAN: As I recall, the problem with letting Dow people read the affidavits was that it was a violation of the exclusion rule, and that was one of the reasons that the order was not then removed, so that they could do that.

MR. ROSSO: There's another problem, Mr. Chairman.

MR. CHERRY: That's obviated now, since Mr.

Temple is here and obviously knows what his own testimony is. He can be instructed as the Board wishes. I'm only concerned with getting his views on these affidavits, in light of his testimony this morning, about the candor and openness of the testimony.

MR. ROSSO: There is another problem, Mr. Chairman, and that is that that material was initially put under protective order because it contained within the order of work product privilege and attorney-client privilege, and that to allow non-attorneys in the suit to view that would very likely break or waive those two privileges.

So we do not consent to that.

MR. CHERRY: That's ridiculous. He's suggesting that when he takes a position in a brief he can all of a sudden say, "You can't read my brief, but you can rely on it nonetheless." That's insane.

But, assuming Mr. Rosso has a valid point -- and I haven't heard it yet -- we can solve that problem by telling Mr. Temple appropriately whatever you want to tell him.

All I want to do is expedite the cross-examination and have him read it over the noon hour, unless his counsel objects, so that I don't have him read them first thing. I'm entitled to ask questions on the preparation of the

testimony. These affidavits are critical to that point.

Mr. Wessel has already told you that that's the reason why he wrote the January 11th letter, and there is a very serious motion pending before this Board. When we get back from lunch you're going to see more information produced this morning that really critically goes to the heart of the representations of Consumers.

Mr. Renfrow said he didn't want me to get into that until after lunch so he can read that. I accorded him that courtesy, but I do want to get into that this afternoon.

MR. ROSSO: Mr. Chairman, you've heard my objection, and I stand by it.

CHAIRMAN CONYAL: Mr. Wessel?

MR. WESSEL: I find it difficult to know what to say. The Board will recall there was a stipulation executed by all parties which permitted Dow to show these affidavits and the memorandum which puts them together to its witnesses. That later was withdrawn in the course of the day because of, I think, the argument that it would be unfair to allow the Dow witnesses to see it if the Consumers witnesses hadn't seen it.

I don't know that I can address myself to that last comment. I referred to it as "bit for eat" at the time.

MR. ROSSO: Mr. Chairman, my concern is true.

CHAIRMAN CONYAL: Yes, I'm aware of that, Mr.

Rosso.

MR. RENFROW: We've been through that this morning, about waiving privilege and what that does to you, Mr. Chairman, to lawyers representing their clients.

MR. CHERRY: I will permit Consumers to continue to assert whatever privilege they want and will agree that my showing it to Mr. Temple does not in itself waive the privilege, that if it is waived or is not applicable it is for reasons other than my cross-examination of Mr. Temple.

Therefore, Consumers' concern is neutralized.

MR. RENFROW: No, it's not, because his agreement still does not affect the waiver, Mr. Chairman.

MR. CHERRY: Let me be flat out. I think these affidavits are lies, okay? I want to prove it. That to me is a heavy responsibility in this proceeding. I now have told you it. It seems to me you've got to take that into consideration as well.

MR. ROSSO: Mr. Chairman, if Mr. Cherry believes that the affidavits are lies it seems to me that there are appropriate bodies to which he can bring them and that problem can be addressed or that this Board can address them in a later hearing with regard to sanctions that could be directed against the lawyers for lying in affidavits, which they did not do.

But it seems to me it would be totally inappropriate

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to handle these things as part and parcel, first of all, in this proceeding. Second of all, against whom will this privilege be maintained if it's shown to everybody in the world and everybody in court?

The point of the matter is that many of these matters deal with attorney-client privileges between Consumers and its attorneys, work product privilege of the attorneys, and if everyone at Dow is going to be allowed to see them, then it seems to me that the privilege becomes rather ineffective if they've all seen them.

DR. LEEDS: Let me ask a question, Mr. Rosso, for my edification.

If he does not show them to Mr. Temple but uses them for his information to cross-examine Mr. Temple, does that make a difference?

MR. ROSSO: I don't think so, Mr. Chairman.

DR. LEEDS: I'm not Mr. Chairman. Thanks for the promotion.

MR. ROSSO: The fact is it's impossible for me to see how he can cross-examine on the basis of the affidavits without revealing the contents of the affidavits.

MR. CHESTER: So he's telling you I have a document I can't use. That's ridiculous.

MR. ROSSO: I think, Mr. Chairman, that this question of conduct of attorneys is something that should be

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separated out from the rest of this hearing, and there are procedures before this Board which can be called into play with regard to sanctions against attorneys if Mr. Cherry wishes to do so.

We stand by those affidavits. We didn't put anything in there -- you know, I heard a man say not long ago that there wasn't anything in this world that was important enough to him so that he would lie under oath, and that goes for me, too, and that goes for Mr. Bacon and Mr. Renfrow. We stand by those affidavits, and we have no fear of anything in them and no fear of incurring any sanctions for our conduct in these proceedings.

We laid out our position in the December 30th memorandum and in those affidavits, and we stand by that. We did not do anything wrong in this proceeding.

Now, if the problem of what we did is one that the Board wishes to address and Mr. Cherry wishes the Board to address it, I suggest there are proper ways of doing that under the rules and not as part of this proceeding.

MR. CHERRY: Mr. Chairman, the Board has already ordered that the question be addressed. It's already been briefed, and it doesn't go just to the attorneys' conduct. It goes to the licensee's conduct. It is not limited just to Mr. Rosso, Mr. Renfrow, and Mr. Bacon. It is -- it goes to the very question of the preparation of the Temple testimony,

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which is an issue in this proceeding, which is an issue in my cross-examination. It was the very first question I asked and was overruled. This is just more of the complete story. You can't stop me from getting at the whole story.

(The Board conferring.)

CHAIRMAN COWLEY: We're not going to permit you to show those to the witness, Mr. Cherry. We'll conceivably get into that, probably will get into that, at another day and another time; but for the purpose of this examination on the suspension hearing today we're not going to lift the protection we put on those affidavits.

MR. CHERRY: Okay. I just want you to know that in my judgment the board cannot make any decision exonerating Consumers on my issue, which says it should be suspended because they lied to the Board.

I want to also state for the record that I believe the information I want to place before the Board will show beyond doubt that there has been manipulation. I believe that the Board's responsibility goes that far, because it goes to my motion.

I want to further state that I believe I am now prohibited from bringing to the Board's attention conclusive information with respect to my motion to dismiss for intentional misrepresentations to the Board.

And, finally, I've read the affidavits, and there's

no way that I can cross-examine Mr. Temple without my referring to them, at least in my head. So I assume that you're not ordering me, then, in the context of my cross-examination -- I am barred from referring to these, because I've got them almost committed to memory. I don't know where they came from, anyway.

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MR. WESSEL: Let me, if I may, say with the Board's order yesterday we have already discussed it, and it is my intention and I assume that Dow comes last on any redirect that there may be, but to the extent that either Mr. Cherry or the Staff or counsel for Consumers do not question Mr. Temple with regard to the areas that are covered in this subject matter, I intend to cover them on redirect or whatever the examination is.

And they are wholly without regard to any affidavit because obviously I have the knowledge for this. So the record will not be incomplete so far as Mr. Temple's participation is involved, if I am capable.

MR. CHERRY: Sure.

But at that point it doesn't make any sense not to use the very affidavits because Mr. Wessel now feels it is his obligation as a party to put this information in the record, and I feel that it is my obligation during cross-examination to do it.

And there is no reason in the world why they should be proprietary.

If you believe these contain work products and it makes sense to submit an affidavit to this Board and then hide it, make the hard decision, decide whether or not these affidavits are protected under work product, and then make the tough decision.

But don't, please, foreclose my cross.

MR. WESSEL: If the Board please, I would like these two issues separated.

A good part of those affidavits do not relate to information where Mr. Temple was present. It is strictly between counsel and it is a different subject matter. And to that extent, I think it can be separated into that area, and one that can be isolated and dealt with in a secret hearing or some other way.

DR. LEEDS: Mr. Cherry, let me ask you a question for my information, sir.

Those affidavits were prepared by three attorneys for the licensee.

MR. CHERRY: Yes, sir.

DR. LEEDS: And it contains their views of the preparation of this testimony.

The Board has those affidavits and at a later time could read them if necessary in some other proceeding, some other operation.

Given that statement and the material that you have today from our release of the first two items in Mr. Pribile's letter of the 26th of January discussing, if I remember correctly, those meetings, don't you have sufficient material to do cross-examination on without discussing the affidavits per se?

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MR. CHERRY: I suppose the answer to that question is yes, and no.

The yes part is obvious from your statement.

The no part is what I have had pending now, at the invitation of this Board since December of 1976, a motion which I think is of extreme seriousness, and I don't want it delayed any further because if I am correct in my view of the law, this proceeding should be suspended immediately. And I want -- and the license. And I want to meet that issue.

I do not believe that a licensee which creates a series of maneuvers which consciously omit true testimony and other matters -- let me say this, Dr. Leeds:

I am a little bit of a bombastic guy and a hard-nosed guy and a tough guy, and I like to try my lawsuits that way. But I said I would destroy Heinz and I did. We may quibble about it. I am now telling you that there has been a lot of junk going on here.

I said I would prove that the Dow corporate position was only because they were sued. You heard it this morning.

I said I told you that the Consumers-Dow testimony was not open and honest, and you heard it here this morning.

I am telling you those affidavits aren't true and I think I want to deal with it now.

MR. PENFROW: And I think, Mr. Chairman, I have had

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about all I can take.

We have got two issues here. One issue is on my conduct and I want it addressed, and I put it forward.

Now the other issues goes to affect my client. And when my representation begins to interfere with my client, then you have posed a different problem for me and it may well be that we have to get into it.

I listened to this bombastic material. I have not heard one word from Dow Chemical Company as to that their position is different from that in the testimony.

Certainly I could file 5000 words of testimony all about economic advantages and studies from '73 and studies from '74. We didn't do that, nor were we required to do that.

Now perhaps -- I will take a little time after lunch -- but perhaps what we ought to do is break now and perhaps what this Board should do is decide the first issue first, which is the conduct of counsel. We can get through that and we can set up the procedures.

I will read the little book, since nobody else seems to do it, and then we will go back to the hearing.

Or, you have to make the other choice, and that is to put the conduct of counsel back and go ahead with the conduct of the hearing. That is going to be a little difficult because we seem to continually get intertwined.

So, let's just take our ... We will

go back -- I haven't seen these documents. I think we may have some difference of opinion between counsel for Dow and counsel for Consumers.

That is a little different question. But I would like to review them before I have the opportunity to address them head on.

MR. ROSSO: Yes.

I would like to add one thing more, Mr. Chairman.

You know we have not skirted from this question of misconduct of counsel. We put forth what we thought had happened and we have asked in every communication to this Board that the issue be addressed and we be exonerated.

We have even asked for an apology on that matter. So I have no objection to going forward in a proceeding on that now and getting that issue settled. I have no objection to that at all.

MR. NESEB: I should say I have a great deal of objection, Mr. Chairman, as interfering with this date that the Board has set up. Our witnesses are waiting to come over here by plane, this has been planned for a good long time and I urge the Board to proceed with the testimony on the subject matter that is before the Board and not the peripheral issue.

There are some areas where they are together, and those can be dealt with in the witnesses' testimony.

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CHAIRMAN COUFAL: All right, we are going to continue as we said. That is without permitting Mr. Cherry to do what he wants to do with the affidavits and get through with the suspension hearing, understanding that this is going to come up again and again I suspect in other contexts. And we are just going to have to decide then where to go, and that is all.

MR. CHERRY: Very well.

May I suggest an hour and ten minutes, sir, we come back at 2 o'clock?

MR. ROSSO: Mr. Chairman, we need more. We absolutely need more. The last time we didn't get what we said we needed, we came in and ate lunch here.

It is ten to one and we need until about 2:30, sir.

MR. CHERRY: I would oppose that.

There are a lot of people here who -- you know, any work that has to be done over the noon hour other than reading these documents, should be done this evening. And believe me an hour and ten minutes is not an unreasonable recess, even in a complicated trial. There are multiple lawyers. They can work this evening.

Mr. Kenfrew doesn't have to address the documents this afternoon, because this Board said that they preferred it in writing in any event. And I don't think it is fair not to conclude Mr. Temple's testimony today. And I think if we

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take the additional half an hour we stand the risk of not doing that.

MR. RENFROW: We will get Mr. Cherry his time. You give me the 20 minutes that I sat over here this morning waiting for him before he got here. Then we will have it worked out and I will have the time.

MR. ROSSO: We need the time that I requested, Mr. Chairman.

CHAIRMAN CORTAL: All right. Take your hour and a half, we will go until 6 or so this evening.

MR. ROSSO: Thank you, Mr. Chairman.

MR. CHERRY: So we will be back here at 2:20?

CHAIRMAN CORTAL: 2:22 and a fraction.

(Whereupon, at 12:52, the hearing was recessed to resume at 2:22 p.m. this same day.)

AFTERNOON SESSION

2:30 p.m.

CHAIRMAN COWAL: On the record.

MR. ROSSO: Mr. Chairman, we request permission to approach the Bench and have a Bench conference with all counsel.

MR. CHERNO: I have no objection, so long as it is on the record.

MR. ROSSO: We have no problem with it being on the record.

MR. CHERNO: Let's do it right here.

MR. ROSSO: However, I do believe it ought to be in camera.

MR. CHERNO: I would object to that unless we know why on the record it should be in camera. I don't particularly think that in this proceeding anything ought not to be in the public record, and I finally do not want to be bound by any more restrictions than I have to. There are a lot of them in this proceeding and I don't think are fair, but I have lived with them and I don't want to be bound by anything else.

MR. ROSSO: Mr. Chairman, after the in camera session, you could if you felt that it was important to have this available to the public, let them have it.

But we would ask permission to approach the Bench for an in camera session at this point in time.

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MR. CHERRY: Mr. Chairman, I have no objection to Mr. Rosso approaching the Bench and telling you the subject matter of it. Then you make a determination.

But I don't want to participate in an in camera conversation unless the Board has made a judgment that this is the kind of thing that ought to be shielded from the public.

CHAIRMAN COUNSEL: Is that procedure agreeable with you, Mr. Hoefling, Mr. Wessel?

MR. WESSEL: It is with me.

MR. HOEFLING: Yes, Mr. Chairman.

CHAIRMAN COUNSEL: All right, come forward Mr. Rosso if you will.

(Bench conference.)

CHAIRMAN COUNSEL: All right.

The Board doesn't see any alternative but to talk to counsel about this problem, the problem that has arisen and we would like you to come forward, please.

We will get it on the record.

MR. CHERRY: You want it in camera?

CHAIRMAN COUNSEL: Yes, sir.

MR. CHERRY: I would like to register my objections but I will participate.

CHAIRMAN COUNSEL: Ladies and gentlemen, we have come to a problem that is going to have to be discussed by the lawyers with the Board, and a resolution come before

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we can proceed further with this hearing.

Rather than have all the lawyers and the Board hide out in some other room, we are asking you to leave for a little while so that we can hash this out and then we will notify you when the hearing gets underway again.

There are some chairs down by the elevators that you may wish to avail yourselves of.

MR. WESSEL: Does it involve Mr. Temple?

I just wonder whether it involved Mr. Temple or not.

CHAIRMAN COUPLER: Yes.

Mr. Temple, I guess you had better step out, too.

(Whereupon, at 2:45 p.m., the hearing was recessed for an in camera session, to follow immediately.)

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CHAIRMAN COUFAL: For the benefit of the audience, there was no testimony taken during this period of time during which you were excluded from the room. That is not to say that there was nothing said.

(Laughter.)

MR. CHERRY: We are now out of the in camera portion.

CHAIRMAN COUFAL: We are now back on the record, the public portion.

MR. CHERRY: Mr. Chairman, I would like to make a motion that we release the in camera portion at this point on the grounds that after having participated in the in camera session, it does not seem to me that it warrants nondisclosure to the public.

And I ask that you now release the in camera portion.

CHAIRMAN COUFAL: All right.

We will consider that, Mr. Cherry.

Whereupon,

JOSEPH G. TEMPLE

resumed the stand on behalf of Dow Chemical Company and, having been previously duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. CHERRY:

Q Mr. Temple, would it be fair to state, that in the process of the negotiations that went on concerning Dow's position ultimately your testimony sponsored by Consumers Power Company, that Dow and its representatives had informed Consumers representatives that Dow believed that the testimony as cast was too narrow to really tell the whole truth of the underlying circumstances?

Well, first of all, did Consumers have the final say as to what the testimony would have in it in terms of scope?

A Yes; that's my understanding.

Q Okay.

And you have already told us about -- that you believe that the scope of the testimony was too narrow in order to tell openly and candidly and honestly all of the relevant facts; do you recall that testimony this morning?

A Yes, sir; I do.

Q What I want to know is do you know whether during this process of negotiation before your testimony that the viewpoint of Dow, as you expressed in this morning, that the testimony was not as open and candid and complete as it ought to have been, that this was communicated to Consumers prior to the time that you first came on the stand?

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A. I think I would have to say that the position of the Dow attorneys as I understand it, was that Consumers would determine what was in the testimony and that we would provide that information or any other information that they wanted provided. I don't know what they had concluded, the lawyers, but my conversations with them --

MR. WESSEL: If the Board please, the witness may have been about to communicate attorney client information. If these are conversations that he had with Mr. Nute or with myself or counsel strictly for Dow, before the witness discloses them, I would like to see what it is that he is going to talk about to know whether it is privileged or not.

MR. CHERNY: Maybe I can satisfy the statement if Mr. Wessel will make a representation that during the negotiating process as well as by letter, he communicated to Consumers' lawyers that the testimony did not portray all of the underlying facts. And in many instances, it might be misleading.

If he will make that representation, I will go on. I think he wrote it in a letter. I don't want to --

MR. WESSEL: If the Board wishes me to respond, I think it would be unfortunate for me to try to characterize; I would be in the position of a witness testifying.

There are letters which I have in front of me and they can be marked and offered in evidence. There are also

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notes of the meetings. And I think what was said is clearly what was said, and for me to characterize it under these circumstances I think would be not acting as an attorney but as a witness.

BY MR. CHERRY:

Q Mr. Temple, did anyone ever tell you that a Dow representative, whether an attorney or not, had informed Consumers Power Company that the scope of the testimony of Consumers Power -- that Consumers Power wanted to portray was not the complete story.

Now I am not asking for an attorney client communication. I am asking for a kind of reporting function, whether it occurred by a lawyer or not. I am asking whether or not a representative of Dow ever told you that that representative or some other representative, whether or not a lawyer, had informed in words or substance to Consumers Power, what I have just said?

A Had informed Consumers of that?

Q Yes.

A I don't have first-hand knowledge of that.

Q I appreciate that, but I am asking for hearsay.

I am asking whether you were ever told by anyone that Consumers was so informed by a Dow representative?

A I am trying to make sure that I can answer the question correctly. I would believe that that was said -- I

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believe that part of the reason that we came down to the question and answer form of testimony was a result of those kinds of conversations which took place between attorneys.

I generally was not present for them except for that one exception.

Q And reported to you?

A Yes; I think that that was reported to me. I am not terribly certain.

Q So the answer to my question is yes; you were informed by a Dow representative that one or more Dow representatives made it clear to Consumers in that period prior to your coming on the stand that the scope of the testimony as set up by Consumers did not reflect all of the underlying facts concerning the "Dow Corporate position?"

A I think that's true.

Q Now, Mr. Temple, I think when we broke before lunch, I wanted to go through the electricity part of the obligations in the contract.

Can you tell me what the electricity contract provided in its original form prior to any amendments?

A Again, are you going to 1974, as a break point, or are you --

Q Unless you can go further back. I think that was the break point.

A Okay.

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Q We are talking about pre-1974.

A Well, I think pre-1974 the only difference that I can recall was I think the demand rate was set at 400 megawatts. And I think it is in the -- in that transition that it got reduced to 300 megawatts.

Other than in the contract negotiations which ended in -- at the end of '73 or early '74, I believe that is all I can remember about it. Well, no; I can remember one other thing:

I think in the contracts before 1974 the demand level was 400 megawatts. We were to purchase that off Consumers system at rate F. And in the original electric contract, Consumers, I believe, also had an obligation to attempt to negotiate with the Public Service Commission two additional rate steps depending on the volume of electric purchases from Dow.

That was eliminated in the process of going from a pre-1974 version to the January 1974 version.

Q Now you mentioned the pre-1974 version. There was a demand of 400 megawatts. What do you mean; it was just created by contract? You were obligated to buy that without regard to what you needed, or just what do you mean by there was a demand for 400 megawatts?

A Well, as I understand it, that was the peak demand which is set and Consumers and Dow determined what that number

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should be before I got on the scene; determined it should be 400 megawatts. We are then obligated to pay for, I think 60 percent of that number whether we need it or not.

In the course of the negotiations at the end of '73, we recognized we weren't going to need that much electricity, and I think that's when it got reduced to 300 megawatts, of which we are still obligated to pay 60 percent of that, whether we need it or not -- use it or not. That's my understanding of it.

Q And how long do you have to buy electricity?

A The current contract calls for us to buy all of our electric requirements from Consumers Power Company for five years with again the exception of any we may generate as we operate our existing power houses, as I just described earlier.

Q Now the amendment for you; that is Dow, to be able to generate its existing electricity came also in 1974 at the same time that you were given permission to generate steam as backup; is that correct?

A Well, there was always the context that there would be about 1 million pounds an hour of steam backup. The question was who would put it in; Dow or Consumers. I am not sure precisely when it was determined. I think it was late in '74 that we would put it in and not Consumers. Our ability to generate electricity only related to the continued

operation of the existing power houses if we deemed it desirable and could comply with the existing air quality standards to do that.

Q Isn't it a fact, Mr. Temple, that prior to 1973, you were required by contract to shut down your facilities when the nuclear power plant when operational and could not generate electricity, but by the 1974 amendment you got the ability to continue to at least have those facilities to generate backup electricity or additional, if you wanted to?

A That's my understanding.

Q And that was a change from the arrangement which was analyzed in the earlier hearings, because it came after the conclusion of those hearings? Is that correct?

A Yes; I believe that's true.

Q Now, can you tell me why Dow Chemical originally or at any time in partnership with Consumers Power Company would only sign a contract to generate electricity for five years as opposed to for the life of the plant?

A You mean why did we sign the contract to buy electricity?

Q Why did you limit it to five years? Why didn't you buy it for the life of the plant? That is, the life of the Midland plant.

Let me put my question into a little better context and maybe you can understand it: The useful life of the

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plant I think in accordance with financial projections is around 32 years, although Mr. Howell, I believe testified that it might be 30 to 40 years and there is a lot of talk that maybe they will renew licences in the nuclear field for 40 and plus. So no one really believes that 32 years. They just get their money quicker from the ratepayers.

But let's assume that it is at least 35 years. Why is it that Consumers did not require and Dow did not agree to take electricity for that full period of time and to take steam for that full period of time? Can you speak to that question?

A I really can't because I wasn't involved in the negotiations back in the mid-1960s. I think that from all that's been said, you can assume that today we are glad that it is not longer than five years. But I don't know what the rationale was at that particular point. But I assume it was along the same lines as trying to keep some our options open.

Q But it is clear that in the sixth year of operation of the Milland nuclear plant, whether it is built or not, assuming it is; Dow is completely free to generate its own electricity?

A That's correct.

Q Okay.

Do you have any judgment right now as to whether or not this day Dow Chemical is planning on at the sixth year,

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generating its own electricity or is seeking to expand with Consumers Power its electric contract?

A I think you know, Mr. Cherry, we are trying to shorten our electric contract. That's one of the items of negotiation.

Q Down to what period of time?

A One year.

Q So much for electrical benefits.

Now, Mr. Temple, and I take it whether you are successful with the one or five years, you will begin to build whatever facilities it needs to generate its own electricity in the sixth year, if you go forward on this contract, or in the second year if you get your amendment, or in the first year if the plant isn't built?

A I think it is fair to say that we would seriously consider that option. We have developed ways of doing it. And if the circumstances were such at the time, we would probably implement such a plan.

One of the things that continues to concern us is the trend of the regulators to a flat rate, inverted rate, other things of that nature which would -- puts us less in control of our own destiny.

Q In other words, you might not exercise the option to buy from Consumers right off its grid because you might be paying a much higher price than if you generated the

electricity yourself; is that correct?

A. That's correct; particularly if we went to a different rate structure.

Q. Right.

And that is why you had some concern in your communication with Mr. Youngdahl and told him that you were concerned about the prospect of an inverted rate structure?

A. Yes, sir.

Q. And what Mr. Youngdahl say to you in reply; do you remember?

A. I think he said that Consumers Power Company strongly supported the rates being charged on the basis of the cost of service.

Q. Did he say anything else as to why he thought -- felt that way?

A. Yes, but I can't remember precisely what it was.

Q. He said that he didn't think that there was any reason why Consumers Power Company ought to create any rates that had a welfare or social purpose in mind; isn't that what he said?

MR. BENFROW: I am going to object to that characterization, Mr. Chairman.

MR. CHERIE: I am asking the witness if that is his recollection.

MR. BENFROW: Ask what his recollection is.

MR. CHERRY: No, I am asking if he agrees with me that what I said is his recollection. It is appropriate.

CHAIRMAN COWLEY: Yes; this is on cross-examination.

THE WITNESS: That is essentially what was in one of the letters from Mr. Tompkins in response to a letter that I wrote.

BY MR. CHERRY:

Q So it is fair to state that some of the costs that Dow might have to spend in terms of alternative way of generating nuclear steam and electricity, that is, electricity or steam from a nuclear power plant, will be spent by Dow in any event, more likely than not, based upon what you know today, because your tendency in what you know is to build a facility to generate at least your own electricity in the sixth year, at a minimum; is that correct?

A Assuming conditions don't change and our concerns about rates are valid, that is our current thinking.

Q Do you know how many states over the last two or three years began peak load pricing or inverted rate structures that didn't have it before?

A No, sir; not really.

Q Wisconsin has it; do you know?

Did you know that?

A I am sure there is more of this but I don't -- you

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asked me if I knew how many. I don't know how many.

Q Would you agree with me that there are at least 15 states?

A No; I would agree that there are more and more of them, but I don't -- can't put a precise number on it.

Q And you would agree with me that the Michigan Public Service Commission is about to initiate proceedings concerning inverted rate structures?

A I guess I am not really aware of that.

Q You don't know that.

Now, Mr. Temple, let's talk a bit about why you didn't buy steam for the full life of the plant but only 20 years. How come? You don't know?

A No.

Q So is it fair to state that based upon what you know now, whether or not the plant operates, you will begin the plan to produce your own steam at a minimum, the 21st year.

A I don't really think we contemplated that at all.

Q But at least you have that option?

A Yes; we have that option.

Q Have you ever been in a lawsuit before, Mr. Temple, as a witness?

A No, sir.

Q Never have.

Have you ever been in a meeting where Consumers Power Company threatened to sue if your testimony did not shape up as to what the general counsel of Consumers Power Company wanted?

A I was in the meeting that Mr. Raymond was present at, but I wouldn't describe it -- his remarks quite the way that you have given it.

The message was that if we frustrated their efforts to sustain their construction license or if we repudiated the contract, that they would seek what ever recourse they had to recover all damages. That is not different, but it is a nicer way of saying it.

Q Didn't Mr. Raymond say that if Dow told it like it was and Consumers Power Company didn't get a license that even if it wasn't because of what Dow said, they would sue you anyway, so you better not take the risk; wasn't that the import of Mr. Raymond's statement?

MR. RENFROW: I am going to object to that question, Mr. Chairman. There are documents that have been provided to this Board. He knows what the Raymond statements are and he can ask from that document.

You continue to tell us when I make this objection that it is cross-examination. He can misstate facts and he cannot state them correctly.

I am going to refer you now to Section 780, Wigmore,

in which Wigmore states that that is not correct. Counsel has not right even in order to detect or catch a witness in a falsity, falsely to assume or to pretend that the witness has previously sworn or stated differently to the facts, or that a matter had previously been proved when it had not.

Wigmore goes on to say for a number of pages that that is one of the responsibilities of a judge, and a panel. He states it pretty frankly.

Mr. Cherry stated he believes he has that ability. I don't believe he does. Wigmore doesn't. And the cases, other cases, I have found, do not. Wigmore says, and I quote now:

"The remedy for such an abuse is in the hand of the judges. The disgrace of these occurrences is even more there than defending counsel... Their duty to interfere is easier than counsel's duty to refrain."

I do not object to Mr. Cherry taking the documents, taking Mr. Temple's statement and asking him from that. I do object and I continue to object to Mr. Cherry's mischaracterization of those documents and what he believes they say.

I believe that is beyond the pale, Mr. Chairman. I would ask you to rule that he cannot and is not allowed to do that and to require him to conduct his cross-examination properly.

MR. CHERRY: Mr. Chairman, Wigmore may say what he says, but that ain't the situation. Wigmore and what he is

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 saying -- I am really getting tired of this. I did not say this to Mr. Temple. Isn't it true -- in an effort to trick him. I asked him if Mr. Raymond said a particular thing at a meeting. I am entitled to ask that question.

MR. REMFROW: He is not entitled to misstate a fact, one, which is not in the record, or two, which is not true. He can go get those documents.

MR. CHERRY: How do you know it is not true. Because Mr. Raymond wrote it in a document? Do you think I believe him any more on paper --

CHAIRMAN COWLEY: Never mind. Never mind. I have heard enough about it.

Read the question back, will you, Ms. Reporter? Whereupon, the reporter read the pending question as requested.

MR. REMFROW: Mr. Chairman, what I am objecting to is for him to answer that question and assume the fact that Mr. Raymond stated that. That is not in this case. It is not a fact that has been shown in this case. In addition, the documents turned show that that was not the case.

Mr. Cherry is allowed to take a transcript and ask the question from that or from the document itself. I would refer you to that. I will state a continuing objection to it. Perhaps you can look at it tonight because that type of a question is exactly what Mr. Wigmore is speaking of.

CHAIRMAN COOPER: Overruled.

MR. CHERBY: You are permitted to answer the question.

THE WITNESS: I thought I characterized my understanding of what Mr. Raymond said earlier. Let me try to repeat it.

At the meeting of September 24th which is the only meeting that I was at where Mr. Raymond was present, on this subject he indicated that under certain circumstances Consumers either had about a 50-50 chance of retaining their construction permit, or if Dow repudiated the contract, he felt the odds of their retaining their construction permit were even less than that.

Mr. Raymond by what he said made it clear to me and to others who were at the meeting whose notes I have seen that if the project was cancelled that the cancellation cost and cost delay and any irreparable damages to Consumers and so forth would be costs that they would seek to recover from Dow by what ever means were open to them. That's my understanding of what Mr. Raymond said when he and I were in the same meeting and he was speaking in a manner which would cause me to feel that he was threatening to sue us under certain circumstances.

Q How did Mr. Raymond tell you directly or with words to the effect that if Dow Chemical took the situation

and stated affirmatively that they were only bound to this project because of the contract; in other words, they wanted to get out and Consumers lost the license, they would sue you because you told that position, which I take it happens to be the true position? Did Aymond say that?

A Mr. Aymond described the condition like you described and that was included in cases which I felt would cause him to conclude that they should sue Dow for damages.

Q Was there any doubt in your mind, Mr. Tonyle, that Mr. Aymond was telling Dow Chemical that unless you came to this hearing and stated that you 100 percent supported the nuclear project, both as to its underlying assumptions and everything else, Dow stood the risk of being sued if the license was suspended?

A I think that is stating it a little strongly, Mr. Cherry. I described the circumstances. He described four cases; the two that I described would -- in my recollection, be the basis upon which Mr. Aymond would sue Dow.

MR. CHERRY: I would like to have this marked as Midland Intervenor's Exhibit 25.

CHAIRMAN COOPER: It will be so marked.

(Whereupon, the above-mentioned document was marked Midland Intervenor's Exhibit 25 for identification.)

MR. CHERRY: I have had marked as Midland Inter-
vener's Exhibit 25 a copy of what are marked at the upper
right-hand corner in hand, Nute's notes, on a meeting with
Consumers Power, September 21, 1976 at 1:30 p.m.

BY MR. CHERRY:

Q I will ask if you can identify those notes as
notes properly prepared -- notes prepared by Mr. Nute at a
meeting on September 21, 1976?

A Yes, sir; I have seen this. But this is different.
Mr. Aymond was not at this meeting.

Q There were two meetings.

A I was not at that meeting.

Q There were two meetings that day?

A No; there were two meetings that week.

Q You were at the meeting on the 24th?

A Yes, sir. And that is when Mr. Aymond was there.

These are the conditions that I tried to describe earlier
in answer to the question I thought you were asking.

Q Yes.

Let me ask a question here now, Mr. Temple --

MR. CHERRY: Mr. Chairman, we are going to run
into a problem with the Dow witnesses about identification
of documents. And I would just like to know if I can get
a stipulation from the Staff, from Dow Chemical and from
Consumers Power Company that with respect to documents

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produced, pursuant to a request that were released by the Board order, that foundation is in effect waived. I am not talking about relevancy or privilege or anything else. But I will have an awful lot of documents that I want to mark. And a lot of them are authored by Mr. Temple although they have a lot of carbon copies for a lot of people, to go around.

But I just want to know if we can operate under the assumption that it is not necessary for a witness from Dow to say: yes, that is a true and correct copy of what it purports to be as a foundation for it to be admitted in evidence, if it in fact was produced by Dow and Dow's counsel will vouch for it.

And I would agree to the same thing insofar as Consumers is concerned, the other way. In other words, if Consumers' lawyers say that this is a document which was produced on discovery and in fact it was, I won't require any foundation. And that will solve a whole lot of problems.

Would you agree, Mr. Wessel?

MR. WESSEL: Of course, if this is a stipulation of authenticity.

I should say in response to Dr. Leeds' request, some of the typing was done from notes, and that was done by secretaries and I hope they are correct. That is not true of exhibit 25. We can identify those as they appear. I would hope that there would be a stipulation of the authenticity

of documents produced by us.

MR. CHERRY: By anyone.

Would you agree to that?

MR. ECKFLING: Yes.

MR. RENFROW: Just as the authenticity.

MR. CHERRY: Yes, just authenticity.

So if I want to introduce a letter signed by Mr. Temple and I have it marked when Mr. Temple is not here, I won't need him to identify the letter. And I can offer it in evidence; is that agreed?

MR. RENFROW: Yes.

MR. CHERRY: Okay.

BY MR. CHERRY:

Q Now we have in effect a stipulation that this is an authentic document. And I would ask you if you would take a look at paragraph four of this document on page three, and ask if you anyone ever informed you of the Falahee threat that is contained on that page?

MR. CHERRY: Does the Board have a copy of these documents?

CHAIRMAN COUFAL: Yes.

THE WITNESS: May I answer the question?

CHAIRMAN COUFAL: There is no objection.

THE WITNESS: I have been informed of the existence of this and have indeed seen this.

BY MR. CHERRY:

Q Now, that Falahee threat goes a bit further than what you've said Mr. Raymond characterized it as, and that Falahee threat really is what I earlier stated, that "If you don't come out and support us 100 percent and we lose, we'll sue you." Is that correct?

A I can agree with you that Mr. Falahee's statement reads more like that.

Q Okay.

Mr. Temple, at any time did you or others at Dow Chemical, as a result of the Raymond and Falahee threats, feel that Consumers Power Company was making an attempt to prevent evidence from coming into this case through you or any other Dow witness?

A Yes, it was suggested, I believe, in the same meeting that it might be possible for Dow to furnish a witness from the U. S. area or corporate area who was not aware of the Division's conclusion with regard to the Midland Nuclear Plant.

MR. ROSSO: Mr. Chairman --

MR. CHERRY: Let the witness finish. He's making

an incredible statement.

is clear.

MR. WINTER: Mr. Lyndon was also suggesting that they would certainly rather have someone from Dow who was more enthusiastic about the project than Joe Temple.

BY MR. CHASE:

Q And how knowledgeable?

A I don't know what I could attribute that to Mr. Lyndon.

Q I see.

MR. WINTER: Lyndon went so far as to suggest that Dow put up a witness who didn't necessarily reflect the Dow position, isn't that correct?

A That suggestion was made in that meeting. I was not in attendance, but I've read the reports.

MR. WINTER: Now that he's finished, Mr. Chairman, I think there's a objection since I thought it was clear on the record that he was not at this meeting to that one testimony that's given in his subject to that understanding.

MR. WINTER: Would the Reporter ask that section of Mr. Temple's testimony previous to that?

MR. CHASE: If the Board would permit the Reporter to ask that what Mr. Temple said to him, I'd like to have him hear it.

MR. WINTER: What Mr. Sanford said?

MR. WESSEL: What Mr. Temple just testified to in response to Mr. Cherry's question. I'd like to have Mr. Temple hear it, if he could.'

CHAIRMAN COWAL: Read it back, please.

(Whereupon the Reporter read from the record as requested.)

THE WITNESS: I thought I said a witness who was not aware of the Michigan Division's conclusion with regard to the Midland Nuclear Project, but at that point in time there was no Dow position.

MR. CHERRY: I see.

BY MR. CHERRY:

Q But ultimately was Michigan Division position in substance become the Dow corporate position, aside from the lawsuit threat, is that right?

A Well, that's a big aside, but that's my view.

Q Well, you know, you guys are big enough to stand up to bullies. You assume you'll have to fight these guys on those terms.

A I don't think you asked a question, did you?

Q No, I just offered some friendly advice.

CHAIRMAN COWAL: Are you sure this is the first time you've testified, Mr. Temple?

(Laughter.)

THE WITNESS: In a lawsuit, yes.

CHIEFMAN CONFAL: Well, you're learning fast.

THE WITNESS: Thank you.

MR. WESSEL: One has little choice.

MR. CHERRY: I would now like to mark as Exhibit 26 a document dated January 13, 1977, which I received pursuant to a discovery request from Mr. Nute and is entitled "Comparison of Bow Alternatives for Supplying Steam and Power to the Midland Plant."

It has three attachments. One is Attachment 1, with various cases analyzed, and then Attachment 2 and Attachment 3, which are forms entitled "Capital Summary" and "Production Cost Estimates" respectively, which are blank, because I think there is some claim as to proprietary data, although I think Mr. Temple has brought a copy with him.

Mr. Wessel, do you object to marking a copy that has the information in it -- I'll tell you what. My feeling is that I will have to submit the information with it that is proprietary, you so assert, subject to being worked out. I'll agree to maintain it's proprietary. If you prefer the exhibit being marked without the information, that's all right with me, provided you also make a copy available to Defendant Power's counsel, because I want them to be in position to ask on redirect.

If you will provide the original, I'll mark one with all the information in it.

MR. WESSEL: We do not maintain it is proprietary, so you mark it.

MR. CHERRY: You do not? Well, I have a blank set, so if you'll give me a filled-in set I'll mark one of those.

THE WITNESS: I have a filled-in set.

MR. CHERRY: Would you mark now a substitute copy which I've been given by Mr. Nute which has the backup to the figures and other than that as described.

This document does not have the blank forms, but has the actual backup as to each of the cases were arrived at. It contains in total twelve pages.

Please mark it as Midland Intervenor's Exhibit No. 26.

(The document referred to was marked Midland Intervenor's Exhibit No. 26 for identification.)

MR. CHERRY: Is there one more copy perchance so the Board can use it?

MR. WESSEL: Here is a copy.

MR. CHERRY: I'll get some more, but here is a copy with the backup.

(Document handed to the Board.)

CHAIRMAN COOPER: You owe us a number of copies, Mr. Cherry.

MR. CHERRY: Right.

Here's a copy without the backup, so the Board should be able to follow with that, although you have already received somewhere along the line that document without the backup.

BY MR. CHERRY:

Q. Can you identify Midland Intervenor's Exhibit No. 26?

A. Yes.

Q. Would you describe it, please?

A. Well, it's a summary of a number of --it's really a summary of a base case, which is Case A, purchase of nuclear steam and the purchase of power from Consumers, and then a number of alternatives which were evaluated by Dow as potential alternates to taking steam and power from the nuclear plant.

Q. Including a partial alternate, that is, buy steam and not electricity, and a complete alternate, produce yourself under a variety of generating alternates?

A. Three complete alternates, one combination.

Q. You didn't have an alternate, realistic, of producing steam but buying electricity since you're not going to buy electricity from Consumers for very long no matter what happens? I take it that's why you didn't consider that as a realistic alternative.

b1: 7
A Well, as long as we're going to make steam in our particular business, it makes sense to make electricity, too; so that would not be a practical case.

Q That's what I thought. I've learned a lot in this case. I'll be really dynamite next time around.

Now, some of these estimates, Mr. Temple, were made at various times, like Case A on Attachment 1, which is the purchase of nuclear steam and nuclear electricity, which I take it comes from the Midland Plant, was September '76. Is that correct?

A That's correct.

Q And Case B, which was purchase nuclear steam but produce power through coal gasification, was the same date, September '76.

Case C is identified as September '76.

Case D is October '76.

Case E was January '77.

Now, is it safe to assume that we can conclude -- I'm going to get into the details of the figures and how firm they are, but can we conclude that this data, even though they are estimates back in September 1976, that if the same estimates were made today they'd more or less be the same? Or would there be some substantial variations in some of the cases, all of the cases, or none of the cases?

Give me a little clue as to which one I should

b1+8
start first with.

A Well, I think they would be essentially the same. The data that went into the nuclear case, both A and portions of B, is Consumers data which we have used.

Q That's the data you got from Consumers as of August?

A \$1.67 billion, right.

Case C, which was a conventional powerhouse, is based on the Black and Veatch data and probably has, of the Dow alternatives, the least number of unknowns in it.

Coal gasification is new technology. I don't think we've changed the numbers, but the numbers are -- have a greater plus or minus to them because the technology is new.

Q Case E?

A I think Case E is known technology, which is burning oil in a conventional powerhouse, I believe.

Q So would it be fair to say that Cases C and E represent pretty hard information in terms of realistic projections?

A Yes, sir.

Q Case D, because it's a new technology, may have some problems, but Case A and B rely entirely on Consumers' and Bechtel's projections?

A For the nuclear portion -- for all of A and the

hit 9
nuclear portion of B.

The electric portion of B, again, is coal gasification, which is a new technology.

Q Can you tell me what would happen in Case A as compared to Case B, C, D, and E, i.e., would it be more or less attractive than it currently is, if Consumers' estimate really now has to be increased by 90 more million dollars?

A Well, Case A would change the most in the direction of becoming more costly, if that's the only thing that changes.

Q Well, that's all they've told us so far. When we get Mr. Aymond and Mr. Youngdahl here, we'll press them a bit. Maybe we'll get a little more information.

So Case A would become less attractive comparatively to the rest of the cases based on what we now know? In other words, this is already outdated if we add that \$90 million more into it?

A Yes.

Q Would it be fair to state, then, that nuclear power would have no advantage either in the 15 percent return on investment or 30 percent return on investment column if you added the additional \$90 million?

A I think it would have no advantage at the 15 percent level. I think if we required 30 percent return on our investment the powerhouse-nuclear stand would still be

10
advantageous.

Q Would you say that realistically the 15 percent return on investment makes more sense based on what you know?

A Mr. Orefice has said that 15 to 20 percent is Dow's investment range for electric generating facilities of steam manufacturing.

Q So that realistically, in terms of how Dow is evaluating its alternatives, and hence how we ought to look at the full picture, we ought to look at the 15 percent return on investment column for the comparative costs?

A As the minimum that we would require. Thirty percent is unrealistic.

Q That's all I wanted. Thank you.

Now, the \$143 million figure that's under total cost, 15 percent return on investment, would it be difficult for you to tell me how much that figure would go up if you added \$90 million in the cost? Would your chart give you some idea, that's attached, this Case A chart? Or would it be very difficult to do?

A I could explain it in a different way. Really, we're looking at total cost, first year of operation. Our conventional way of looking at these things, which is what we've done throughout the years we've been involved in the nuclear project, is to look at them over a 20-year period.

If we do that, there is actually a \$4.3 million

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per year advantage to the nuclear over the Dow powerhouse for the extraction of steam generation.

If the capital costs increase \$90 million, it would make them even on the basis of a 20-year levelized load.

I think you have to quantify -- qualify numbers that you're projecting out 10 to 25 years into the future. I don't think they're all that accurate to begin with, but essentially the numbers say it's a push between A and C if you add \$90 million of cost to the nuclear plant.

DR. LEEDS: It's a what? A push?

THE WITNESS: A push -- no advantage either way.

DR. LEEDS: Thank you.

BY MR. CUSRAY:

Q Now, is it that close, though, so that at least from a numbers game if it were \$90 million and 1, the advantage would be Case C? Is \$90 million the push point?

A It just happened to be. I calculated that out when I heard the \$90 million. I told Mr. Youngdahl essentially what I've told you.

Q So that if Consumers has as little as a 5 percent error band in its projected increase of \$90 million, or Bechtel's, then there is the beginning of a decided advantage against the nuclear alternative economically?

A I wouldn't use the word "decided." I don't think

lit 12
the numbers are all that accurate. It begins to slide in favor of the Dow alternative within the context of the accuracy of the numbers.

Q Do you think it makes sense to know whether or not Bechtel's estimates are sound before making a judgment on whether to proceed on the basis of them?

A Well, let me go back to the decision, the conclusion that we reached in the Michigan Division, which was that the nuclear project in our view would prove to be disadvantageous to Dow.

We were looking at this \$4.3 million and didn't consider it all that significant. What we did consider significant was all of the what I'd call non-economic factors, the unknowns or the imponderables that still surround the project and whether it will, for instance -- construction will be stopped by this Board is one of the main items, not necessarily the only one. I think a lot of those things are more significant than whether it's a million dollars a year, give or take one way or the other. I don't think the numbers are that valid.

So I guess I'm saying I don't know whether it's all that important or not if we were making the judgment.

Q What I'm saying now is even now, if the \$1.67 billion stays, it ain't enough of a difference to make a decision in favor of nuclear, knowing all the other things

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you know?

A. Not for me.

Q. And not for Dow?

A. If you set the potential lawsuit aside.

Q. Of course. We'll get rid of that.

A. If we walk away free and all that, yes.

Q. They can't let you be sued because they enforce NEPA. Don't worry about it. Just relax.

A. I'm not worried about it.

Q. No, I know you're worried about it. I told Milton not to worry about it. Just relax, will you?

People will be outraged as soon as the Journal and Midland Daily News writes a few stories. The Governor is going to talk; the Attorney General. They won't let you get in a fix; don't worry.

What I want to know, Mr. Temple, is whether or not you've looked at the Bechtel forecast that was produced?

A. No, sir.

Q. You have not.

DR. LEEDS: Excuse me. Which Bechtel forecast?

MR. CHERRY: The forecast that was produced.

That's Forecast No. 2 as of December 1976 that Consumers Power Company said it needed at least until March 1 to analyze and maybe a little bit longer, okay?

DR. LEEDS: Thank you.

BY MR. CHERRY:

Q You haven't looked at that?

A No, sir.

Q Did Mr. Aymond or Mr. Youngdahl, or anyone else at Consumers Power Company, explain to you or express to you after you were aware of that figure whether that figure had a lot of fat in it in terms of delay and increased costs or whether it was a pretty tight figure, right up against the wall?

A You mean about the \$90 million?

Q No, the \$1.67 billion.

A Yes. When Mr. Youngdahl told me that that was the new definitive estimate in the budget upon which the construction work was going to be based, he indicated to me that they had opted to select a figure which was more on the lean side than on the fat side from the standpoint of cost control and motivating productivity and so forth on the job.

Q So that the \$1.67 billion is characterized by one of its creators as at the low end of a realistic projection?

A I guess that's a fair interpretation of what I understood Mr. Youngdahl was saying.

Q Did Mr. Youngdahl also tell you that he wanted to keep that figure pretty thin or as low as possible because

of these particular hearings?

MR. RUNFROW: I object to that question, Mr. Chairman.

CHAIRMAN COUTAL: Overruled.

THE WITNESS: I don't recall him saying that with regard to these hearings.

BY MR. CHERRY:

Q Didn't Mr. Youngdahl tell you that he didn't want to sit down and negotiate on the 5- or the 1-year electricity contract because, even though they weren't interested in Dow being an electric customer anymore, if they gave you that it would hurt them in the suspension hearing?

A Well, Mr. Youngdahl, when we talked about an agreement which I felt we had reached in principle earlier in the negotiations to go from the 5 to the 1, told us at the January meeting that he didn't want to go in that direction because he more clearly saw in his view in the long-term the fact that we would not be an electric customer of Consumers and in the short-term it would have a significant adverse impact on the cost-benefit.

Q In the suspension hearing?

A In these hearings.

Q So Mr. Youngdahl and Consumers Power Company went back on an agreement you had reached in principle in an effort to preserve some kind of semblance of a cost-benefit

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advantage at these hearings, is that correct?

A. That was one of the reasons he cited for changing his position.

Q. Boy, when they try to fix a case they really go.

MR. CHERRY: Mr. Chairman, can we have 5 or 6 minutes, and I'll see if I can wind up?

By the way, let me ask a question before we go.

Do you have some redirect, Mr. Renfrow?

MR. RENFROW: I don't think it's redirect anymore, from what I understood this morning.

Mr. Hoeftling said he had some questions. I do have some questions, yes.

MR. CHERRY: I'm just wondering now in terms of my own schedule, if we go to 6:00 or 6:30 or even 7:00, I'm willing to push if we're all going to finish in order to accommodate Mr. Temple; but if he's coming back tomorrow, then maybe I won't shave some of the things that I want.

So during the recess could I ask Renfrow and Hoeftling to give us some estimate about how long they'll be, and I'll try, and Mr. Wessel as well? Can we have 10 minutes?

CHAIRMAN COUFAL: Let's take 10 minutes.

(Recess.)

CHAIRMAN COUFAL: What conclusion were you able to come to over the break?

MR. CHERRY: Mr. Hoeftling, on the basis of what

b1: 17
he told me, I would suspect has somewhere between 20 and 30 minutes of cross-examination. I mean, that's my estimate. I think it might even be shorter.

Mr. Renfrow said he's got a lot. I don't know what that means. I would ask if he would put some meat on that.

MR. RENFROW: I've got a number of questions, Mr. Chairman.

CHAIRMAN COUFAL: Are you through, Mr. Cherry?

MR. CHERRY: No, I'm not.

MR. RENFROW: I really can't put a time period on most of the information questions that I'd like to ask.

DR. LEEDS: Mr. Cherry, when do you think you'll be finished tonight?

MR. CHERRY: I can see the end. I would think an hour to an hour-and-a-half maybe I could be done, maybe shorter. I'm basing this on some understanding that someone will be here to testify if I want them on the Black and Veatch documents, but that may not be necessary now that we have Exhibit 36.

I'm seriously considering waiving any cross-examination of any more Dow witnesses, Consumers witnesses, and I may say that at 6:00 o'clock tonight I would like to go on with the Staff, because I think I may have done what I want. If somebody else wants to call somebody, let them

18 do it. But I have not made a final determination of that yet.

CHAIRMAN COUFAL: I guess the only thing we can do is to keep arguing on now and see what happens.

MR. CHERRY: I just want to alert the parties that I may be done today.

I want to tell the Board, however, that if I do take that position -- Dr. Timm is putting together direct testimony which is going to recast all of the exhibits prepared by Mr. Keeley and Mr. Helms and show what we believe they truly reflect based solely on information produced by Consumers Power Company. I think I've concluded that it's going to be more difficult for me to cross-examine Consumers Power Company on some of these technical matters, and since we're using Consumers' figures and there can be no dispute about it I may just put in direct testimony and move along a little earlier than that. I may try to do that on Friday and maybe try to get the hearing over this week.

But maybe I can't do that. That's kind of my thinking. I want to reflect on it a little bit.

BY MR. CHERRY:

Q Mr. Temple, you mentioned that the nuclear case, Case A, had more unknowns and probables than any other case. Could you tick those off for me?

A I don't know that it has more than Case B, which also involves the nuclear plant.

b1:19

Q Okay. But the nuclear proposal, whether in Case A or B, has more unknowns than any of the others, even including the gasification one, which is Case D, and is a relatively unknown technology, is that correct in your judgment?

A That's true in our judgment. It may be partially because we know a lot more about coal gasification than we know about nuclear power plants.

Q Well, you know enough about nuclear power now to stay away from it, I would think, but that's your judgment.

Tell me some of the -- well, certainly as compared to Case C, which is the coal study, would it be fair to state that the unknowns and imponderables in Case A and Case B as compared to Case C in Midland Intervenor's Exhibit 26 are orders of magnitude greater?

A As we look at it, yes.

Q Okay.

Tell me what those unknowns and imponderables are that I take it would increase the nuclear option, the cost of the nuclear option.

A I think I've gone over some of them, but I'll try to recall a complete list, as complete as I can.

I guess the entire history of the Midland Nuclear Project with the series of increases in cost and the changed startup date caused us to find it difficult in our judgment

that the future will be drastically difficult from the past.

In the past Consumers has had problems in continuing to finance the construction program that they deemed to be appropriate. That particular shortcoming on funds resulted in a significant increase in cost to the plant and a 2-year delay.

I don't know whether they will be able to finance the job in accordance with the current project schedule or not.

The ability of Consumers to operate the plant in light of some of the operating experiences that we're aware of at Palisades and perhaps more recently at Kern give us cause to be concerned about the reliability of Consumers from the standpoint of having to have steam in the quantities that we needed in order to operate a plant that employs about 7500 or 8000 people.

The regulatory environment I've talked about, the purchasing of electricity from a public utility, is obviously subject to the jurisdiction of the Public Service Commission. And, although there seems to be some difference in the view between Dow and Consumers with regard to jurisdiction of the Public Service Commission on the steam contract, we believe that they will also have jurisdiction over that. So we have a contract to purchase a quantity of steam, but the price is subject to judgment of the politically

b1: 21
appointed Public Service Commission.

The cost and availability of nuclear fuel, particularly perhaps as the whole recycle question gets thrashed out through the hearings that take place as a result of the Court of Appeals decision, it seems to us can only cause nuclear fuel to increase in cost.

I guess these are the sorts of things that I would list as concerns that we have and/or unknowns.

Q I want to go back to some of those and ask you to explain them in a little more detail. Let's start with the last one you talked about, fuel cycle cost. Is that what you said?

A I said the fuel cost as the result of whatever answers may be forthcoming with regard to the fuel cycle question that I understand is part of what's been remanded to the hearings.

Q Would you be a little bit more specific about what you mean?

A I don't know whether I can, but it's my impression that the final answers to that will probably result in a more expensive nuclear fuel.

Q The final answer to the fuel cycle question?

A Yes.

Q So you're saying that one of the issues which was barred from this hearing is an issue which presents an

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imponderable, and it's your judgment based on what you know that if that issue were heard here it would increase the cost of the nuclear option? Is that a fair statement?

A. Well, I understand that's an issue to be heard pertaining to all nuclear plants, not just this one.

Q. That's because of the contrivance of the Commission. The court ordered it done, and they decided to lift it out for a little bit of respite before Carter makes some appointments.

What I want to know is whether or not -- if in your judgment, based on what we know, if we did discuss that issue here would it be your conclusion that it would increase the amount of the nuclear option?

A. I guess I can't -- I don't think I'm qualified to answer that, except in the discussions we've had in the Division we've concluded that the cost will go up when all these answers are found.

Q. Could you be provided with a set of answers to interrogatories which you submitted in this proceeding?

A. Which ones are they, Mr. Cherry?

Q. I think your counsel will give it to you.

(Document handed to the witness.)

MR. WESSEL: He has it, Mr. Cherry.

BY MR. CHERRY:

Q. Those are the interrogatories which were first

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tendered to me unsigned, and then I received, as well as everyone else, received a signed copy with your signature dated -- I don't have the signed copy here.

MR. WESSEL: January 25.

MR. CHERRY: Yes.

BY MR. CHERRY:

Q In your judgment, Mr. Temple -- and I'm talking realistically, from a business standpoint -- is it really possible to finalize a cost-benefit analysis for the nuclear option without considering the fuel cycle costs that are barred from this proceeding?

MR. ROSSO: I'm going to object to that for the reason stated in the question, Mr. Chairman.

MR. CHERRY: It goes to the question of Dow's alternatives and is the foundation for my next question. I'm just asking whether it's possible to do from a business standpoint. I'm entitled to ask that question.

CHAIRMAN COUFAL: Do you mean is it possible for Dow in their judgment of what to do with the contract with Consumers, whether they have to consider the fuel cycle costs?

MR. CHERRY: That's right.

CHAIRMAN COUFAL: All right, you may answer that.

MR. CHERRY: From the cost-benefit standpoint.

THE WITNESS: If the impact was significant, I

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don't think we could make the proper economic evaluation, which we would want to do, to assess the alternatives without having all the significant aspects of it.

BY MR. CHERRY:

Q Would you agree with me that without knowing it would not be prudent from a business standpoint to move forward?

A Frankly, I'd want to talk to some people who knew more about this issue than I did and really clarify to what extent they really feel that's going to be a significant change.

I guess I have not done that.

Q Would you say on the basis of what you know that it would be reasonable to just exclude it from any consideration on the grounds that it surely will be insignificant?

A No, sir, I would not say that.

Q And in fact, in answer to Interrogatory No. 7, when Dow was asked about the cost-benefits -- that's on page 17 of your answers -- when Dow was asked about the cost-benefit analysis, did you not conclude that fuel cycle cost was one of the things that ought to be analyzed in your answer?

A I think we said there that we felt all significant cost factors had to be taken into consideration.

MR. CHERRY: I'd like Dow's responses to

interrogatories marked as Midland Intervenor's Exhibit 27, unless I have a stipulation from the parties that answers to interrogatories can be used as part of the evidence in the proceeding without them being offered in evidence.

Would you agree to that so we don't have to reproduce?

MR. WESSEL: Speaking for Dow, I don't have any objection at all to that.

MR. CHERRY: Would the Regulatory Staff, without the formality of marking them and offering them in evidence, agree that they can be relied on as part of the record?

MR. RENFROW: Before he answers, Mr. Cherry, I would rather have you put them in the record so that we will have them in the Public Document Room.

MR. CHERRY: They are in the Public Document Room now.

MR. RENFROW: They're in as part of the interrogatories. You and I both have difficulty finding documents in the PDR. We'd have better luck if they're in as an exhibit to the case. I would rather have them done that way.

MR. BOEFLING: The Staff would be of the same view. Mechanically it would be sounder if they were an exhibit.

MR. WESSEL: Will you include the 1-page

supplement containing the typos?

MR. CHERRY: Okay, let me withdraw the marking of that since I may only want part of the answers to the interrogatories and he's already identified those as a document produced by Dow.

BY MR. CHERRY:

Q One of the points or imponderables, Mr. Temple, that you mentioned was the reliability, and you mentioned the incident at Kern and at Palisades.

Would you be more specific as to what you have reference to -- or as to what you had reference, period.

A Well, I think the performance record at Palisades during its early years is widely known but not very successful. The plant goes up; it goes down. On a number of occasions it was out of service for extended periods of time.

That performance can't help but be considered by us as we consider ourselves as relying on Consumers at the Midland Plant. Now, there are a lot of reasons why that ought to be more reliable, two units and so forth.

I'd respond to your question with regard to Palisades in that way.

Q Does Palisades and Midland have anything in common besides the same utility licensee that you know of?

A The same construction; the same contractor, I believe, is building both. There may be other similarities. The reactor units are not the same.

Q Do you know that they never color coded the wires in Palisades?

Do you believe that?

A Yes.

MR. RENFROW: Objection, Mr. Chairman.

MR. CHERRY: I will withdraw that.

They have worse problems without this reference in the site log with the guy crawling underneath the plant where the transformer blew up to find the wires. That is Consumers and Bechtel.

MR. RENFROW: I move to strike that, Mr. Chairman.

CHAIRMAN COUFAL: Yes, strike that.

BY MR. CHERRY:

Q Mr. Temple, what about the Karns?

A Well, I guess I would say it couldn't have come at a worse time. They had a severe problem, as I understand it in the Karn unit No. 4 where, I believe they are checking out some big exhaust fans.

All I know is what I read in the newspapers, some water in the economizer tubes. The water froze and the tubes broke. And the result is reported to be a \$2 million loss and a year's delay in the startup of the unit which I think is about 600 megawatts.

Q Why, as part of the imponderables, do you feel it is justified, as I think you do, to charge Consumers with

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both the Palisades' and the Kern's incidents as a reason why you will then say, why I am concerned about Midland reliability?

I mean, why don't you just chalk that up to, well, you know, that is the way things are?

Why do you say, we are concerned about the reliability because Consumers is building a third plant and we have seen evidence in two other plants that what, they don't know what they are doing?

Or, could you explain to me why you make that jump in logic?

A Well, I guess I would say that I think the management of a company is responsible for the record of that company whether it is their financial results, or their operations, or whatever.

And if the environment is difficult, which it obviously is, then a good management must cope with that. And the record will show whether they have or they haven't.

And as we look at the record, we conclude that it hasn't been terribly inspiring.

Q That is the Aymond-Youngdahl management?

A The management of the last four, five years.

Q Would that include Aymond and Youngdahl?

A Mr. Aymond and Mr. Youngdahl have been in the top management job since I have been involved with Consumers Power -- Bow.

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Q Yes.

You mentioned that one of the imponderables was as to whether Consumers Power Company would have the money to finance the plant either on the 1982-81 schedule or on the '85 schedule.

Is that one of your concerns?

A Well, I didn't really refine it to one of the two, but what I said is, they have been unable to finance the job in the past; they have on several occasions asked Dow to help by putting money into Consumers in one way or another, and at the January meeting they asked us for \$100 million for the change -- for the final date, as they described it.

There have been continuing references to the need for financing. They are talking about selling a piece of the plant to other parties, the purpose of which is to help to finance.

On the other hand, Consumers, with the proper hedges I would guess, would say, feels that they can sustain the construction schedule as it is currently laid out, they can get the financing.

I don't happen to be a financial man, I never have been one. I just -- they didn't do it once, I think it is possible that they could stub their toe again.

Q The last time that they asked you for money, how much did they ask you for?

A You mean besides the \$100 million?

Q Yes, before the January time.

A I think the last time they brought up a way in which Dow could help in the financing was with regard to our taking over the responsibility for a particular piece of equipment. I think it was the tertiary heat exchanger, which -- I am not sure what, but I would think it was in the range of \$50 million.

Q 60 million comes to mind. It was in that \$50-60 million range, and that request by Consumers came at a time when it was clearly suffering a problem of raising money from the commercial marketplace?

A I think that one was earlier this year in the course of resumed negotiations where they may have been having problems.

The major thrust was --

Q How about before that?

A -- mid to late 1974 when they wanted Dow to either lend them money or buy Consumers' preference stock.

Q And how much did they ask you to pay?

A Well, initially it was in the range of \$50 million. I am not sure that at one time more money wasn't talked about.

Q Was that about the same time that Mr. Aymond made his innovative suggestion that the Federal government ought to buy some of Consumers' preference stock to help them out?

A I am not familiar with that remark.

Q So that when they were really in trouble for money they asked you for somewhere between \$50-and \$60 million and that was in approximately '74, '75, is that correct?

A That was the first time they asked us -- they asked us on numerous occasions to invest money in Consumers, either in the plant or in some piece of equipment.

I think we made it fairly clear we had no interest whatsoever in investing in any of those opportunities.

Q Did Dow Chemical understand the request for 100 million sliding up to 400 million that was made at the January 1977 meeting as at least in part a request by Consumers to get Dow to help them out with financing because they project difficulty in financing?

A I can't say that there was any more emphasis on the financing need in January than there had been on some of the other occasions.

Q So there had been -- I'm sorry, go ahead.

A One of the specific things that was said was that Consumers would like to get Dow more committed to the project and that a \$100 million front end investment would be a way of getting that true commitment accomplished.

Q Dow has refused to make that true commitment?

A Dow has not changed their position that we are not

interested in investing in a plant or in Consumers Power.

Q Do you see any reason that that might change?

A No, sir, I don't.

Q If they gave you a final date you still wouldn't give them the money, is that right?

A Not that final date.

Q I see.

If they gave you a --

A I will retract that. I don't see any way in which we would put money into it.

Q Into Consumers.

A We would advance money for those purposes.

Q Do you have any understanding or experience in the raising of funds, capital funds?

The reason I ask the question is, you mentioned earlier that Dow might have some problem in raising some funds. They could do it, but they would have to do some rearranging.

And I was wondering if you speak from some experience, your background?

A No, sir.

I didn't mean to imply that we had trouble raising funds. But it was setting the priorities within the funds that we think are appropriate for Dow expanding.

Q There is no question that if one of your priorities

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was to build Case C, the coal plant, you could get the money quite easily if that was your first priority?

A I think the financial people could get out and get the money at reasonable rates.

Whether we would do that and invest in a more heavy rate in our plant at this particular point in time, I'm not sure.

Q No, I appreciate that.

Mr. Temple, this is a kind of possibility question, but I want to ask it.

Does it exist as a real possibility today, leaving aside whatever happens tomorrow, because we can deal, you know, we can make the permutations and commutations about that -- that one of the options available to Dow as contemplated by the Consumers' version of the truth that found its way in the form of your testimony, is repudiating the contract on the grounds that Consumers Power Company has, in fact, breached it, and going your own way and taking the risk of that lawsuit.

Is that an option to Dow today?

MR. RENFROW: I object to the characterization of the testimony, Mr. Chairman. Other than that I have no objection.

CHAIRMAN COUTAL: I didn't hear the last part of that.

MR. RENFROW: Other than the characterization, I

have no objection.

I move that it be stricken.

CHAIRMAN COUFAL: The characterization regarding the truth?

MR. RENFROW: Yes, sir.

CHAIRMAN COUFAL: Okay, we will strike that part.

BY MR. CHERRY:

Q And as amended will you now answer the question?

A Can you reask that part of the question?

Q Sure.

In your testimony you said Dow was keeping its options open.

I am asking you as of today, January 31st, 1977, is one of those options to walk away from the contract, go your own way on the assumption or charge or allegation or position that it is Consumers who has breached the contract, and then take your chances in a lawsuit?

Is that an option?

A I would say that is an option.

MR. WESSEL: Except it is February 1st, Mr. Cherry.

MR. CHERRY: February 1st.

BY MR. CHERRY:

Q If I asked you the same question but inserted that it is February 1st, would the answer be the same, Mr. Temple?

MR. WESSEL: I'm sorry, I'm sorry.

THE WITNESS: I assumed we were talking about today.

MR. WESSEL: I have got to learn to shut up.

MR. CHERRY: That is all right.

BY MR. CHERRY:

Q So that one of the things that we ought to consider in connection with the suspension proceeding, is the possibility that Dow may rightfully assert that that contract is no longer in existence because of breaches by Dow and walk away from the contract no matter what this Board does?

A You said breaches by Dow.

Q Breaches by Consumers, I beg your pardon.

That Dow may walk away because of breaches by Consumers between -- that have occurred. That you might assert them between now and 1980 no matter what this Board does.

A I think I said that was an option.

Q Right.

I may have asked you this before, but turning to Midland Intervenor's Exhibit 26, and the attachment 1, the 143 figure and the 155 figure.

Now the nuclear -- as I read those figures, maybe I don't understand the chart, but 143 is more costly than Case C right now without the addition of the \$90 million?

A In the first year of operation, those numbers depend.

Q I see.

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So what would happen in the second year of operation?

We looked at that curve on --

A I gave you that 20-year levelized look where over that period it is \$4.3 million difference --

Q I see.

A -- favoring nuclear, which the '90 million would essentially wipe out.

Q I want to show you a couple of tables that come from the Black and Veatch study and ask you if those were the tables that were used in connection with the preparation of the study for Case C on coal, just so that I can inform Dr. Timm that those are the figures.

(Mr. Cherry handing document to witness.)

A I'm sorry, I can't really answer that question. I have never seen this study.

I have seen the same summary that you have. I know that Black and Veatch, that a Black and Veatch study was the basis for the numbers we put in there. But I am not sure which Black and Veatch study.

That one was requested by Decker. Decker did not do this work for the division.

Q Mr. Nute, I have a couple of questions I would like confirmed by tomorrow morning.

In Mr. Kintyre's Black and Veatch letter to Mr. Decker of October 7, 1976, which you produced, there are

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some nuclear costs and then there are a couple of tables that are coal costs, et cetera.

Are these the costs that were used in Midland Intervenor's Exhibit 26?

MR. NUTE: I don't know.

There is more than one of those studies.

MR. CHERRY: And I guess my next question is, you also produced for me a two-volume report by Black and Veatch.

MR. NUTE: That is true.

MR. CHERRY: Do the tables that are attached to Mr. Kintyre's letter to Mr. Decker come from that Black and Veatch two-volume report, and whether or not they do, does the Black and Veatch two-volume report form the basis for the figures in Midland Intervenor's Exhibit 26?

In other words, if you could help me out a little bit with that?

MR. NUTE: I think the two-volume report you are speaking to is a Black and Veatch study of reconditioning of the Southside power, which is not associated with the letter to Mr. Decker at all.

MR. CHERRY: Correct.

MR. NUTE: Two different items.

MR. CHERRY: So then I would like you to pin down a little bit more whether or not the figures in there came from Black and Veatch specifically in connection with this, or

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whether or not somewhere else?

If I could have that information, I would appreciate it.

MR. RENFROW: While we finish this, Mr. Nute, can you give us a copy of this?

(Indicating.)

MR. CHERRY: Did you want a copy?

Please mark this Midland Intervenor's Exhibit 27, please.

(Whereupon, the document entitled "Meeting with Consumers Power Company," dated 9/24/76, was marked Midland Intervenor's Exhibit No. 27 for identification.)

MR. CHERRY: I have marked as Midland Intervenor's Exhibit 27, a document produced by Dow Chemical Company and released by the Board this morning entitled "Meeting with Consumers Power Company," September 24, 1976, and it appears to be the notes of Mr. Nute in connection with the meeting, which you, Mr. Temple, appear to be listed as in attendance.

MR. RENFROW: May I see what that is, please.

MR. CHERRY: Sure.

(Mr. Cherry handing document to Mr. Renfrow.)

MR. CHERRY: It is this document. Do you have it?

(Mr. Cherry showing document to the Board.)

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BY MR. CHERRY:

Q Since I have already got a stipulation that these are authentic, are those notes of a meeting at which you were in attendance?

(Mr. Cherry handing document to the witness.)

A Yes, sir.

Q Okay.

I am curious, and it really isn't an ego question, it goes to something else -- about the page 4, when there was discussion among Orredica, Raymond and perhaps yourself concerning whether or not I would show up, that is Myron Cherry on behalf of the Intervenor at the hearing.

Do you recall such a discussion?

A I recall Consumers making comments on that. We may have asked the question.

But there were various occasions where Consumers or their attorneys expressed the view that you would not attend, and I don't know whether this was the first time or whether we had heard -- in fact, this meeting was after the meeting of the lawyers on the 21st, so I suspect maybe that might have been asked then. I don't know.

Q Why did Consumers believe that I would not represent my client at these proceedings?

Did they ever express any reason?

A Oh, I think the financial aspect may have

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been mentioned. I don't know of any other reason.

Q Might not be able to afford to do so?

A Well, they indicated you might feel you should be paid for that and there may be nobody to pay you, is my interpretation.

Q I understand.

Maybe someone in Congress will hear what you are saying, then it will be helpful.

But my next question is, why were they even concerned enough to even raise the issue as to whether I would be here, with or without pay?

A I think they and we both recognized the fact that if you were here, the digging for facts would be more aggressively pursued.

Q Than if just the Regulatory Staff pursued the digging of fact?

A I don't know if there was anything other than that inference to you.

Q Well, they were right.

MR. WESSEL: Mr. Temple made your day, Mr. Cherry.

MR. CHERRY: No, no, he didn't make my day.

I just want to point out that I think -- not me, necessarily, but I would just hope that the Board in its consultations either on this case or some other, will recognize the real problem of a lawyer like myself or Mr. Roisman or

Irving Like, or Mr. Butzel, or anyone else who comes to one of these hearings with forewarned respect that he is going to do a good job and make a good presentation. He doesn't necessarily have the funds, he can't make -- can't get the request from the Regulatory Board, but the participants of the hearings are more concerned about that person than they are about the regulatory system itself digging for facts.

That seems to me to lead to two conclusions:

Something is wrong with the regulatory system so that licensees aren't concerned about going to these hearings without an intervenor; and something ought to be done to provide intervenors like my clients, with some mechanism to be repaid for valuable efforts.

If they just go out and make a lot of noise and all that, sure, they ought to be tossed out on their ear.

I think that is important, that Consumers' Power Company didn't say it was concerned that the Regulatory Staff was going to show up; with all due respect that the Board was going to make a searching inquiry, and I don't mean any disrespect, that is the way it is.

That is why I said that honesty in this proceeding was really critically important.

MR. RENFROW: Is that a summation of the question?

MR. CHERRY: No, it is not a summation. I think it is a point that ought to be taken, and I made it.

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BY MR. CHERRY:

Q Mr. Wemple, there has been some suggestion by a Consumers' witness, who will remain unidentified for the moment, that Dow Chemical has agreed already to give -- I beg your pardon -- that's right, that Dow Chemical has agreed to give Consumers Power Company a sort of clean bill of health letter, and that all that remains is to kind of work out the language.

Is that true?

MR. RANDROW: I am going to object to that question, Mr. Chairman.

The transcript is there, where is testimony on it, it is stated there. Objection, sir.

CHAIRMAN JOYAL: That is not my recollection, Mr. Cherry, of what was said.

Can you approach it asking the questions rather than providing the answer?

MR. CHERRY: Yes.

BY MR. CHERRY:

Q Has there been a discussion with respect to -- I will withdraw the question since I don't agree with Mr. Randrow's objection, and I will just ask it another way for the sake of convenience.

Has the subject of a so-called legal clean bill of health between Consumers and Dow been discussed by the

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negotiating teams?

A Yes, sir.

Q Whose idea was it for Consumers to get from Dow a legal clean bill of health?

A Well that was an item which Consumers suggested early on in the negotiations, that if we were to reach agreement on all of the important items with regard to a new contract between Dow and Consumers, that that should be part of that final package.

Q Mr. Howell said it was Dow's idea.

Is that true?

As a matter of fact, I think the way it came up is that he said we don't know why they wanted to do it, but we figured if they didn't mind giving it, we would take it.

That is kind of how it came up.

MR. FENFROW: Objection, Mr. Chairman.

There is the transcript. That is objectionable.

CHAIRMAN COUFAL: What did you say about the transcript?

MR. FENFROW: There is a transcript available. If he wants to use the transcript in the proper way that is all right. His characterization of it is incorrect, and I would object to it.

CHAIRMAN COUFAL: Overruled.

BY MR. CHERRY:

Q You may answer, Mr. Temple.

A My recollection is that my first hearing about that came from Mr. Youngdahl. It may not have been in the course of a negotiating session, and we may indeed have said that if we can get these changes in the contract, that we would be willing to do this.

Q I have never been able to get a clear handle or understanding of just what the Dow generating facilities are that would be the subject of a complete -- I mean, let me put it this way:

There is this proposal to do something with the Southside generator -- generating boiler, correct?

A A study was made on that.

Q Yes. All right.

Is that the same as to build a boiler for a million pounds of steam per hour, is that the same study?

A No, sir.

Q Okay.

Now what I would like for you to describe for me in as simple terms as you can, is what is the system of Dow. I mean, how can you describe it, that -- maybe if I give you a piece of blank paper you can draw a little sketch with A, B, C and D, and we can make an exhibit. But what I would like to do is get an idea of what you really are talking about when

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you are talking about option C on Midland Intervenor's Exhibit 26, and how that relates to the Black and Veatch proposal, the one billion pounds per hour proposal, and the proposal that you made to the Michigan Air Pollution Commission, or Air Pollution Authorities about oil in 1982.

A Well, let me back off.

Case C, which is the main case that we have used to compare Dow's alternative with the nuclear project, is a conventional brand new freestanding coal-fired powerhouse, with I think, three boilers and three turbines, or something like that. I am not sure of that.

But anyway, capable of delivering 2.4 million pounds an hour of steam and 167 megawatts of electricity.

It is a conventional powerhouse with extraction steam turbines.

Q Okay.

Now next describe for me your existing facilities from which you generate steam and electricity currently.

A They are very old versions of the same thing.

Q Freestanding powerhouse capable of generating about the same thing?

A We have two powerhouses and they aren't capable of generating that much electricity, but they have large boilers which are generally coal fired, although sometimes oil fired.

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They are equipped with extraction steam turbines, which generate electricity and send steam to the processors.

They are smaller and older and there is two of them instead of one.

Q But both of them together generate steam and electricity at lesser outputs than the new one?

A Yes.

Q Okay.

How is one called the Southside boiler?

A Yes, sir.

Q And what is the other one called?

A It is called the Southside powerhouse, and the other one is called the Westside powerhouse. And the Southside is somewhat newer than the Westside. And any one could be modified so that it could continue to operate.

Some of the guys thought South could, but upon seeing the study that is not an alternative which we think is one that we would entertain very much.

Q Okay.

Now the Black and Veatch proposal to do something to the Southside boiler, was that to replace it or to upgrade it or to do what with it?

A I haven't seen the study, but my impression of it is to gradually rebuild the South powerhouse as opposed to an entirely new grassroots facility somewhere else. And that

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is not the basis for the Dow alternative.

Q But that is an alternative that is apparently available?

A Yes, but we don't think much of it.

Q It is very expensive?

A Yes, sir.

Q And then there is a study to do something with the boiler to produce a million pounds per hour.

Is that the Westside boiler now?

A Now again, this would be one boiler and one steam turbine would produce a certain amount of electricity. I think it is around 40 megawatts and a million pounds an hour of steam.

So you might envision it as the first unit of something that could ultimately become a fullblown powerhouse, although we didn't really talk about it in those terms.

Q Now, describe now your current generating facilities, that is now, the Southside and the Westside powerhouses, what you were going to do to them in connection with the 1982 proposal that you made to the MAPCC?

A Okay.

I guess I can't describe precisely, but we have people that run the powerhouses, have gone through them extensively on the basis of what would we have to do to them to have reasonable reliability up until 1985, January 1st, 1985.

There are a whole magnitude of things that have to be done, including major replacements of boiler bottoms, for instance, some of which are already on order.

The capital required to put those facilities in condition so they could be run reliably and safely for hopefully as long as until the end of 1984 is approximately \$31 million capital plus expense.

That money will be spent heavily in '77 and '78 and it will all be spent by -- well, certainly the last bit of it will be spent in '80.

Q 1984?

A 1980.

There will be maintenance kinds of activities beyond that, but this particular \$31 million will be spent in that period of time.

Q I am really sorry, I tuned out for just a minute and didn't hear that last answer, could we have it repeated please?

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

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Q Was this in response to my question as to what your plan to the MAPCC entailed?

A Well, that's a partial answer to that.

Q Please go on.

A In addition to that, if we are to gradually change from what today is approximately a 50 percent coal, 50 percent oil-gas burn, starting in July of 1980 and getting 100 percent in oil two years later at which time we would open up -- the plant would be on, we would also have to invest in about \$17 million or \$18 million in oil storage, heated storage to store this, and I believe there is also a pipeline contemplated between Midland and Day City because of the tremendous volumes of oil which would be required if we ran the power houses completely on oil instead of on 50 percent coal. That's what has to be invested by Dow to get from here to the end of 1985 -- 1984.

Q Away from the nuclear option?

A Yes, sir.

Q I think in your interrogatories you put the figure at about \$60 million and here I think you put it at 50, or am I wrong?

But the investment is about \$60 million?

A Well, I know there is the \$18 for the oil storage and the pipeline and the \$31 million for the renovation of the power houses. And I am not sure that there is not some

other projects in there to further convert this system in the meantime so that more boilers can be operated on the supplementary control system.

Q If you moved forward on Case C and -- in Midland Intervenor's 26, the total capital cost as you have estimated it and said those were pretty hard figures, is about \$316 million; correct?

A Yes, sir.

Q If you proceeded with that alternative, would you also have to make the same \$31 million to \$60 million expenditures which you have just described?

A We would have to spend the \$31 million on the existing power houses to get us to 1981, which is about the earliest we could bring that kind of facility on-line, assuming we got started last month.

But we would have to spend that \$31 million and if we were going to commit to building a new power house to be on-line in 1981, I think we would go back to the Air Pollution Control Commission and ask them if they would extend the existing consent order until that unit came on-line rather than making us bring all the oil and make the capital investment to enable us to do so.

Q So depending on just how you cut it, somewhere between five and 10 percent of the capital cost of a new plant would be in effect spent in nursing along these old ones, is

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you waited for the nuclear option?

A Well, I said we had to spend the \$31 million, anyway.

Q Now, you have got another \$17 million?

A And that if we brought this plant on-line or if their plant had come on schedule, as scheduled, we would not have to spend -- so we have to spend it in order to get to 1982. And our figuring is we better be ready to go a little beyond 1982.

Q Now if you went the Case C option, there would be other costs which you would save; isn't that correct, other than these capital costs that you wouldn't have to put in? For example, you would save administrative costs in connection with dealing with air pollution authorities?

A I don't think that they are of that much consequence in terms of the \$316 million.

Q But hasn't EPA advised you that they think that your proposal to the the MAPCC is, to be generous, not something they will buy?

A I am not aware of that. I think they are --

Q They told me that yesterday. I thought that I would just give you a little appetizer of what you will get on February 14th and you might want to inquire into that.

Do you know what the penalties are to accompany who refused -- refuses to obey the Clean Air Act immediately,

with a plan? Do you know what they --

A I don't know, but I think we are obeying.

Q No; no -- well, we will wait until Mr. McKee -- what ever -- comes down and testifies, but he said that there is no way that EPA will wait until 1982. This isn't testimony or anything, but I thought -- but they thought your oil proposal was a lot of bunk because they didn't think you would get it in the first place. They were very insistent upon a resolution by Dow Chemical that was within their control; that is, within Dow Chemical's control. They didn't care whether you went nuclear or garbage but they wanted you to have the control of it and not someone else.

And I just thought I would tell you that, since they have already committed to that position. They told me it wasn't secret and they were going to come tell everybody about it. So I thought I would give you a little advanced warning of what you would get in Lansing on the 14th.

MR. RENFROW: I am going to object. It is gratuitous. If he wants to bring somebody in here and testify on it, he can. Otherwise, strike the entire thing.

CHAIRMAN COUPAL: We will strike that, Mr. Cherry.

MR. CHERRY: Why strike it? It is not evidentiary.

CHAIRMAN COUPAL: Well --

MR. CHERRY: This isn't a jury proceeding. What I have just said is not slanderous, scurrilous or something

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else. There is no reason in the world to strike it just because Mr. Renfrow doesn't like it.

CHAIRMAN COUFAL: It is stricken, Mr. Cherry.

MR. CHERRY: I guess you have got to give him something.

CHAIRMAN COUFAL: That is stricken.

MR. CHERRY: Okay.

I figured you would say that.

CHAIRMAN COUFAL: That is stricken.

BY MR. CHERRY:

Q Mr. Temple, would you please have before you the notes of the January 12, 1977?

A Yes, sir.

Q I want to ask you a few questions. See if you can use those notes to refresh your recollection.

DR. LEEDS: Excuse me, Mr. Cherry; are these the Dow notes?

MR. CHERRY: Yes. These are the Dow notes. The Board has a copy; January 12, 1977. This is what I have.

(Handing document to Board.)

These are the big thick ones that were distributed yesterday. And there is one set that the Board has. I think it is right here.

BY MR. CHERRY:

Q At the bottom of the introductory page, there is a

reference to the fact that Dow Chemical's June 30, 1976 letter to Consumers Power Company, actually your letter, had six things that Dow wanted. And the first four were firm and that you wanted either five or six; i.e., a final date on the contract which Consumers would agree you could walk away from or the complete ability to generate your own steam in any amounts and do what ever you wanted. Is that essentially correct?

A That is the gist of the June 30th letter.

Q And then for some reason, Dow Chemical decided that it needed to have both five and six in the negotiating position and made to -- those demands. And the notes say that part of the reason you wanted both of those was the Aeschliman decision of the U.S. Court of Appeals and the nuclear plant estimate cost.

And I would ask if you could explain that a little more in detail for me, with reference to five and six, so we see what the practical implications are.

A Well, the increase in the cost of the project to \$1.67 billion made the economic advantages of nuclear versus Dow alternative much, much smaller.

The Court of Appeals decision, in our view, was very significant and caused us much greater concern with regard to Consumers' ability to complete the project on time and/or on budget. And this just made a position that we had all

along, but which we compromised to some extent in June, a position we felt even stronger about, that if we had waited until December 31, 1984, that that was long enough and we fulfilled our obligations.

We had also concluded that if the construction was stopped, then I think there was talk of a 12-month -- if there had been a 12-month suspension, there might be an 13-month period between the job going down and getting started up. This would push the thing pretty tight against the 1984 date.

So we were more concerned than we had ever been.

Q Now at page 3 of the meeting notes, there was discussion between you and Consumers as to whether or not the forecast 2, as adjusted by Consumers, that is, Bechtel's December '76 forecast which was kind of, to create a word, "forschepted" to you in August of 1976 -- that is a Yiddish word which means appetizer; I thought I would interject that in there -- would be added to the \$1.67 billion and Consumers says that that would be the cost of the plant, if nothing else changes.

And then who ever prepared these meeting notes, I take it Mr. Burroughs, underscored, "if nothing else changes."

Did Consumers representatives and negotiating team indicate that they were not too secure in their belief

that nothing else might change? Or can you tell me that -- why that was underlined?

A Well, I don't think at least Mr. Hall who was talking about -- at the meeting, really felt he had enough time to dig into the Bechtel numbers to be comfortable with having a full understanding of what they meant. There is some discussion in this report about other reports that are kept and dated that is plotted, which Consumers uses to assess other costs which have to go into the job in addition to Bechtel's costs, that there had been no decision within Consumers as to what their position was going to be with regard to these other indicators that they keep track of.

I think it just says they had \$99, but there is the possibility that there are, you know, they need to know what Bechtel is saying and they need to look at all of the other things that impact the job. That's my recollection of what that underlining meant.

Q I might suggest, Mr. Temple, that you might at some point read the Bechtel forecast because it starts out with a whole lot of assumptions by Bechtel like, no delays, no strikes, no stoppages, no delay in equipment, no regulatory delay, blah, blah, blah, and it is a little bit like Consumers' force majeure clause. But you might want to take a look at it and make your own judgment as to whether or not that \$1.67 billion figure is realistic in light of all

those assumptions.

MR. REINFROW: That is not a question. I object and ask that it be stricken, Mr. Chairman.

MR. CHERRY: Mr. Chairman, Dow Chemical has an obligation to respond to this proceeding as a party with respect to matters that it believes are important. Obviously, one of the matters is the cost figure of Bechtel. Consumers Power Company has conveniently told us that they will be unable to give us any of their input until some time after a date when presumably these hearings will be over.

I just thought it made sense in light of the very candid responses I seem to be getting from the Dow witnesses that I suggest to them that they look at the Bechtel forecast because they might want to tell us something about that based on their knowledge and experience.

So I don't think that my suggestion was anything other than to try to assist this hearing record in becoming complete.

MR. REINFROW: If Mr. Cherry wants to assist the record, he can ask the question of the witness -- produce the document and ask the questions.

CHAIRMAN COUFAL: If we could move this along just as fast as we could, I would be grateful.

MR. CHERRY: Yes, sir.

BY MR. CHERRY:

Q Now there is currently a disagreement between Consumers and Dow as to the meaning of the contract as to the commercial operation date and specifically it is Dow's position that Dow does not have to buy electricity until the steam is on-line.

Now Consumers' position is you have to buy whatever is available when it is available; isn't that correct?

A Well, Dow's position is that we had believed that since we had agreed to change, the change is the order of startup of Units 1 and 2, that we would make electricity from Consumers at the time Unit 1 came on-line, we -- when they were capable of delivering process steam to us.

It is true, however, that the electric contract was never changed to reflect the change in the steam contract.

Q Will an operation under Consumers' version of what really took place increase costs to Dow Chemical during the period prior to operation of nuclear steam if the electricity in fact gets on line in '81? 9

A If we have to buy all our electricity from Consumers and can't generate the electricity as a by-product of the steam?

Q Yes.

A Is that what you are asking?

Q Yes.

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A. It is my understanding that it will increase the cost.

Q. Do you know by what factor?

A. Well, it is complicated by this -- we have to pay for the demand whether we take it or not. If we were to -- Consumers tells us that it is their estimate that power off the grid in 1982 will be 31 mills. If we look at our ability -- if we look at our situation where we have to make our steam and look at the generating of electricity on an incremental basis from there, we feel our own costs would be around -- in the range of 20 mills, and that is a very rough kind of number.

In order to get a feel for what it was, I asked somebody to do that.

Q. Did you explain this to Consumers?

A. I didn't have the numbers down, but I expressed dismay that they would expect us take electricity before they were prepared to give us steam.

And further, I thought that we had had enough discussion amongst various people in both companies that we both honestly recognized that an oversight had been made in not changing the electric contract.

Consumers position was that -- they didn't agree with us.

Q. A contract is a contract; was that their position?

Q These words were used once by Mr. Youngdahl, either in a telephone conversation or --

Q And in fact Mr. Youngdahl said that now they are in this suspension hearing; he is not going to change that requirement for electricity on-line for Dow in 1981 because it could hurt Consumers chances at this hearing; correct?

MR. RENNOW: I will object to that characterization.

CHAIRMAN COFFAL: Overruled.

BY MR. CHERRY:

Q Is that what he said?

You can answer.

A That is not precisely what he said. He did indicate that if he didn't stick with the contract, it would have probably an eroding effect on the cost benefit relationship.

Q But the reason that Mr. Youngdahl decided not to do it was not out of any honest evaluation of whether you really need the steam or he has really got to sell it, but it really had to do with this particular licensing proceeding; isn't that correct?

MR. RENNOW: Objection, Mr. Chairman; characterization.

THE WITNESS: I guess I really don't know what Mr. Youngdahl had in his mind. The negotiation session was a

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strange one at this point.

Q What do you mean by a strange one?

A Well, the positions changed very dramatically from what we had anticipated that they might be, on the part of Consumers on some of those items.

Q Because they think they got you over a barrel; they think that you are really afraid of them. But if you stand up and give them a shove, they fall apart like fluffy cake. Try it.

MR. REMFORD: I will object to that, Mr. Chairman.

MR. CHERRY: They are not tough at all.

BY MR. CHERRY:

Q On page 9 of the hearing notes --

MR. CHERRY: They are irrational, I grant you that. But they are not tough.

BY MR. CHERRY:

Q On page 9 of the negotiating notes, they have a reference to the impact on the hearings with a sentence that Consumers commented that Dow's steam and power generation plans coal gasification et cetera, would have a tremendous direct eroding impact on the nuclear plant's cost benefit analysis that Consumers now has before the NRC Board.

Was there a suggestion that Dow Chemical not get very involved in voluntarily submitting information on these alternatives because it would add -- adversely affect

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Consumers Power's position?

A. No, I didn't get that flavor out of the notes that were made.

Q. What was the basis of that conversation; what was said at that time, at that point?

A. Well, Mr. Youngdahl made the statement that he had now concluded on the basis of one of the proposals that we talked about with the Air Pollution Control Commission which involved that 1 million pound an hour boiler -- 1 million pound an hour steam plus -- of the boiler and the turbine, and he had concluded from that, plus the fact we talked about coal gasification unit and the turbine, that Dow was not really interested in being an electric customer of Consumers and that would have a tremendously eroding effect on the cost benefit analysis.

We didn't comment on that.

Q. On page 13 in the Dow summary, there is a suggestion that Dow pointed out that Dow's interim proposal would make Dow dependent on the Arabs for oil and on Consumers Power Company for steam.

Was the juxtaposition of the Arabs for oil and Consumers for steam an indication of the kind of reliability that Dow believed it could count on or not count on for steam or for oil?

A. That is a quotation from something I said. Yes;

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that is the general innuendo that is meant by that.

Q Now at the January 11th meeting -- January 12, 1977 meeting, did Consumers' proposal become conditioned upon asking Dow to stop making statements, either in this hearing or in the public press about the possibility of Dow's building its own facility?

A No; I don't think so. They indicated that was a concern they had in the context of the fact that they would like to get us more committed to the project, to the \$100 million.

Q Page 11 in the hearing notes under Consumers' proposal it states:

"Furthermore, Consumers wants Dow to stop talking in public about building new facilities."

Does that refresh your recollection as to whether or not that request was made by Consumers?

A That statement was made, but I thought I heard your question as: Was it a condition? I think that it was something that they would like to have take place. The statement was made.

Q Did they say why they would like Dow Chemical to stop talking about building its own facility?

A Well, I don't think they felt it was helping them in their case before the Board here.

Q At page 12 of the hearing notes, when there was a

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discussion about selling part of the plant to cooperatives, Consumers says that they will -- Consumers commented and I quote:

"To sell part of the plant to cooperatives it will have to go through the whole licensing process again."

Now Consumers has continually told Dow that the reason they don't want to give Dow a final date is because they would have to go through the whole licensing process again.

Did Consumers state what it was their belief that if they made a sale of part of the plant to the cooperatives, it would have to go through the licensing process again?

A I think you would have to know how the Dow notes are prepared. I do most of the talking; therefore, have the least amount of notes.

If they -- this came in Mr. Burroughs' or Mr. Nite's or Mr. Pribila's notes, I believe that they said it. I can't elaborate on the circumstances under which it was said.

Q I am trying to figure out the logic of coming before the Board and suggesting that one of the reasons they have to continue the schedule is because they want to make a deal with the cooperatives, but then admitting privately that that whole process is going to have a whole new licensing process which could create more of a delay.

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And I just was wondering if you could shed some light on that interesting duality of illoginess.

MR. RENFROW: I am going to ask that the question be repeated, please.

MR. CHERRY: My question was as to whether Mr. Temple could shed any light on what I believe are inconsistent positions; i.e., state that you want to sell part of the plant in order to justify moving forward with the application on the grounds that these cooperatives need it and then admitting if you do that you are going to have to go through the whole licensing process again, and then I would have -- I wouldn't have to stop this plant; you will stop it.

So I just don't understand it.

But I thought it interesting enough to call it to the Board's attention that, viewed in terms of Heins' proposals, if you implement all of that Consumers has now admitted, at least in these notes, that they have to start the whole procedure again. Clearly they couldn't move forward.

CHAIRMAN COUFAL: There is a question pending. Do you want to answer it, Mr. Temple? Can you shed any light on that?

MR. RENFROW: Mr. --

B MR. CHERRY:

Q On page 15 of the meeting notes, Consumers stated that their philosophy on nuclear steam is similar to their

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feeling about the electric contract, and they said they did not want to give you item 5 because of all restrictions on low steam and use -- and if all restrictions on low steam and use were removed, it would affect the cost benefit analysis.

Can you shed some light on that comment?

A I really didn't follow the line of logic in that. That is essentially what was said. I can only speculate about what caused Mr. Youngdahl to do that, to make that statement, unless he felt we were going to generate steam and make electricity out of it, which is conceivable.

Q I guess what I am getting a flavor of in these more recent negotiating meetings -- you told me if my characterization is correct or not -- is that the position of Consumers Power Company are not to assess a state of facts and then try to reach a conclusion based upon an analysis of those facts, but to posit a conclusion and then try to create or support the facts that support the conclusion.

Is that a fair characterization?

A I am not sure I follow the question.

Q Now suppose, instead of assessing realistically the merits of your five and one-year contracts, fairness to company and all that, they say we are not going to do that because that is going to hurt us in the area. And instead of assessing the fairness of the steam proposals under

all of -- no; we are not going to do that; that is going to hurt us in the hearing. And we have seen that elsewhere; they have picked up sales to utilities and cooperatives because it will help them in the hearing, and they won't shut down Palisades in '79 to fix it but in '82 because that will help them at the hearing.

And I am just wondering if you get the flavor that Consumers' negotiating with Dow Chemical has been kind of contrived to help as a last ditch effort to protect their license in these suspension proceedings.

MR. REMARKS: I'll object to all the characterizations, Mr. Chairman. He can ask him the question without all that.

CHAIRMAN CONWAY: I think that's a fair objection, Mr. Cherry.

BY MR. CHERRY:

Q Will you agree with me that Consumers' negotiating tactics, particularly those of January 1977, are rather than good-faith negotiations; as you believe them, they're more reflective of Consumers trying to protect its position in the suspension hearing?

A I would certainly characterize them as positions which have a strong flavor of trying to optimize their position with regard to their being able to sustain the license through these hearings.

Q Under what circumstances would you and Dow Chemical reduce steam capacity in 1982 in your reservation clause?

A I'm not sure I understand the question.

Q Page 18 of the hearing notes, there is a sentence in the second paragraph: "Consumers further consented that they received a letter from Dow saying that Dow may want to reduce their reserve steam capacity for 1982." That's what I'm referring to.

A Okay. We would reduce the reserve steam capacity

if we felt we needed less steam, and I think the current best estimate of Dow is reflected in the alternatives that we've looked at, which said it's more like 2.4 million pounds per hour in 1982 than it is 3.0 million pounds per hour.

Q Now, we've talked a bit, Mr. Temple, about the past financial difficulties that Consumers has experienced in connection with building the Midland facility and the portent of future financial problems.

I want to ask you this question: In the proposal that Consumers Power Company made to have a final date of 1985 if it came up with the \$400 million, was one of the elements in the force majeure clause that would excuse Consumers from performing by 1985 the fact that they might have financial problems and couldn't finish the plant for that reason?

A Yes, that was one of the elements in the language, but Consumers did say they were going to look at the language again and see whether they really needed to have all of these elements in there. But that is in the current language that we have.

Q It was tendered to you in January 1977 that one of the things Consumers wants to protect against as to a final date is the fact that they may not have enough money to finish by that date?

A Well, the force majeure language was written in

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May, but that was the language, I think, that Mr. Youngdahl read from at that session.

Q In January?

A In January.

Q And it includes their wanting to hedge against their being unable to raise money to complete the plant?

A Yes, sir. At that time he read that fact.

Q Mr. Temple, what is a chlorinated hydrocarbon?

A It's a hydrocarbon which has been reacted in some way to put chlorine on it.

Q Do you make that at Dow?

A Yes.

Q Are chlorinated hydrocarbons -- do they have an impact on the environment?

MR. BENEROW: I'll object to that question, Mr. Chairman. I'm not sure that I know the relevance of it to this proceeding.

CHAIRMAN COUFAL: What are you going to tie it to, Mr. Cherry?

MR. CHERRY: One of the issues under the cost-benefit analysis is whether or not giving Dow Chemical processed steam and electricity to produce products which have an adverse effect on the environment is a sensible thing for NEPA to do. That's the line of questioning I'm pursuing.

For example, would you go out and borrow money

and give it to a kid who's going to commit a murder? No. And you wouldn't analyze whether or not you're going to give him a gun without figuring out what he's going to do with it.

Now, in terms of the question of environmental impact of the use of electricity and energy conservation, one of the things that we tried to get done before the prior Board was just this; and the Board said, "It's normal residential use --" let the record show the hands over my eyes -- "-- and that's it," closing their eyes to the reality of how decisions are really made in the real world.

What I now want to demonstrate is that Dow Chemical's production of a whole host of products in the Midland area has an impact on the environment, is sometimes subject to regulation, sometimes subject to lawsuits; and, to the extent that NEPA has a say in that -- I mean, if they go ahead and build their own plants, let them -- but to the extent that NEPA has a say in that, you have to look to the cost-benefit analysis as to whether or not you want to encourage that activity.

What if we want to build a power plant to keep lights on all night in a building where no one was there? We clearly wouldn't do that. And the reason we wouldn't do that is that it does not make sense to have a building lit when no one is there.

But if we take that theory and we apply it to

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the question of impact on the environment, would you create an energy source that is going to have an adverse impact on the environment? You know, it's got to deal with the whole question of whether or not electricity should be made cheaper for General Motors to build bigger cars, right? That's why we're in Hocking now about inverted rate structures and making industrial users pay more, which is precisely why Mr. Temple wants Dow Chemical to be out under the rim of the regulators who would say, "I'm going to regulate what you do by charging you more for your product."

So that's a kind of indication as to where I want to go.

MR. HOEFLEMS: Mr. Chairman, the Staff would join in the objection to Mr. Cherry's line of questioning. This issue is not one of the issues that's been remanded to this Board for consideration.

I believe that this so-called "in use" argument was rejected by the Commission prior to its decision in this proceeding. I think Mr. Cherry did not press this issue on appeal to the Circuit Court. To that extent he's waived that argument.

MR. CHERRY: That's not true. The "in use" argument was in our brief. It was not the subject of oral argument, but Judge Bazelon thought enough of it that he singled it out in a footnote so I wouldn't forget it when I

came back down here.

MR. BENFORD: The problem with that argument, Mr. Chairman, is, as we stated before, certainly if Judge Baskler knows anything he knows how to interpret that law. By golly, you're limited to the issues he remanded to you; and what he said about "the use," we can fight all about that NEPA stuff.

MR. CHERRE: Let me know how long you'll be, because I want to make a phone call.

MR. BENFORD: As you'll make much longer. I'm much quicker than you are.

It's not an issue that's appropriate to this hearing. Let's go on to something that is.

CHAIRMAN COSTA: The objection is sustained.

MR. BENFORD: Thank you, sir.

MR. CHERRE: Mr. Chairman, let me also state for the record that it is a function not only of the costs and benefits but of energy conservation, because energy conservation has to make a determination of which uses under all terms and conditions are more beneficial to society, and I just want you to know that you have made a decision which will very clearly have this reversed if the suspension doesn't proceed.

Let me give you one other example. We are now going through a period of time in this energy crisis where

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companies and government agencies have made decisions as to what is best to do under the circumstances. Now, one of the things which is the import of the Aschliman decision, as well as the National Environmental Policy Act, is that we have to begin to make reasoned judgment and reasoned choices about our production of energy in the future, and we have to look at the "in use" impact on the environment in order to make these reasoned judgments.

I'm not going to press it any more, but I think that there is now sufficient error in the record that there is no way a license could be sustained anymore. I'm sure they're not going to give a license, anyway, when we're done. But I would just ask for you to consider this over the evening.

I know the Commission doesn't like this idea, but they don't like any idea that seems to intrude on nuclear power. They haven't issued any pronouncement yet on this issue. The Regulatory Staff has taken their traditional position of not wanting anything to get into the record that they don't think they can control; and maybe what you ought to do is permit the question to be asked, let them certify it, and let's let the Appeal Board make the decision.

Just consider that over the evening, because I think it's really an important issue.

I'm telling you that the environmental and energy

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 conservation decisions are only going to expanded. What was required yesterday is only half of what's going to be required tomorrow. It just doesn't make any sense at this point not to recognize that fact.

And there's a cost-benefit analysis. I just think we ought to get into it, and it's a mistake not to. But I'll proceed forward on the basis of your sustaining the objection. I have clearly stated my objection to that.

MR. BENTON: You don't want any response, I take it?

MR. CHERRY: What do you want? If you open your mouth you might lose. Whenever you win, be quiet, Rex.

MR. BENTON: Sometimes, Mr. Cherry, your eloquence is so great you turn people around. I don't think that one did it, but I just want to be sure the Board Chairman didn't want to hear anything further.

MR. CHERRY: I'm actually delighted with the ruling.

CHAIRMAN COTTEL: Gentlemen, can we get on with the questioning of the witness?

MR. BENTON: I'm sorry, Mr. Chairman.

MR. CHERRY: I'm just going through my notes.

BY MR. CHERRY:

Q Page 9 of the hearing notes, there is a question as to whether or not the EPA solution might be sold to Dow

management, or the interim EPA decision.

Has that been "sold" to Dow management within the meaning of how that was used on page 9 of the meeting notes?

A The meaning of it was could we get support all the way up the line, and the answer to that is yes. That was necessary before we made a formal proposal to the Michigan Air Pollution Control Commission.

Q Would it be fair to state that an alternative of Dow's under Case C, or realistically any alternative, would be cheaper the earlier it started? Is that a fair assumption?

A Once we know that there's going to be no nuclear steam?

Q Well, without regard to that.

A Well, it's hard for me to answer that, because if we build a facility and then the nuclear plant comes on in 1985 or '90 or whatever, we are required to do whatever is necessary in order to begin taking the steam. If that meant shutting down a facility, I don't think it would be cheaper in the long run.

Q You and Mr. Youngdahl once had some communications dealing with energy conservation. Do you believe, Mr. Temple, that industry is going to respond to both the Energy Conservation Act et cetera so that over the next 5 to 10 years

10 both in Michigan and elsewhere industry will find ways to be more efficient in terms of use of energy?

A Dow Chemical will.

Q And do you believe that industry will?

A Yes, I think they will.

Q Are you part of that FEA commitment to the creation of the SIC, Standard Industrial Group Commitment? Several of the major areas and segments have committed to the Federal Energy Administration to reduce energy per unit of output by a given percentage by 1980. Is Dow part of that?

A Yes.

Q Are there other companies in Michigan that you know are part of that effort?

A I'm not aware of that. The commitment that Dow is involved in is one that was made by, as I understand, a number of chemical companies through the Manufacturing Chemists Association.

There are a number of chemical companies involved in it.

Q You don't know if the transportation companies and G.M. are also part of it?

A No, I have no knowledge of that.

Q Did you ever express the concern to Mr. Youngdahl that you thought Consumers' load forecasting, or at least their projections of future energy use, were kind of optimistic

over the next 5 to 10 years?

A I don't think I personally have expressed that view. I don't recall doing it.

Q But if you wrote it in a letter then you would have expressed that view?

A Yes, if I wrote it in a letter I would have expressed that view.

Q Now, at page 15 of the meeting notes, at the bottom, there is a statement that Consumers also said they felt the water contract should not be changed at the present time. That's one of the contracts that we haven't discussed. What is the water contract, and what's that all about?

A I was sure hoping you wouldn't ask me about that.

Q I thought you didn't want to be asked about the chlorinated hydrocarbons.

A I'm not familiar enough with the water contract, except that some of our people do feel some changes should be made. They've had some discussions.

Q What is it for? Do you give them a drink out of that? What's it all about? What's the substance?

A I think under certain circumstances with regard to river levels we're responsible for seeing that they get water. I'm very vague about that.

Q Mr. Sample, let me ask a question. I have all of these notes of the Dow corporate review. In light of

your testimony -- maybe I'll ask Mr. Wessel.

MR. CHERRY: You've discussed, obviously, with Mr. Orefice his testimony, have you not?

MR. WESSEL: Yes.

MR. CHERRY: Could you state, because it would be a help to me as to whether or not I want to ask for other witnesses because I obviously don't want to ask for repetitive examination -- and, as a matter of fact, the rules of Part II suggest there should not be repetitive information.

Can you represent that if Mr. Orefice is asked the same questions about the Dow corporate position as Mr. Temple has stated on the important aspects that Mr. Orefice's position would be the same?

MR. WESSEL: Does the Board wish me to answer?

MR. CHERRY: I'd like an answer.

CHAIRMAN COUNSEL: Yes, you can.

MR. WESSEL: He doesn't normally speak directly to counsel in the courtroom.

MR. CHERRY: I'm sorry, Mr. Wessel.

CHAIRMAN COUNSEL: I understand that, Mr. Wessel.

MR. WESSEL: There have been so many characterizations that I really don't think I can answer the question.

The Dow position is stated in its responses to interrogatories: position with regard to the contract, position with regard to Consumers Power. And there are so

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many differences of perception here that I can only say that two people listening to somebody repeat what their positions are might come out with different conclusions.

I cannot represent that everybody listening to what Mr. Orefice says would say it's the same. I might say what I think, but I think that's as much as I can say.

MR. CHERRY: Let me ask the question another way. Are you convinced that as the result of your discussion with Mr. Orefice that Mr. Temple has correctly stated the Dow corporate position in his cross-examination today?

MR. WESSEL: I have no doubt that he's stated the Dow corporate position correctly, but I'm concerned with the characterization. Let me confer with my colleagues a minute.

MR. CHERRY: Yes, and maybe we can save Mr. Orefice time if he's just going to say the same in a different version.

MR. WESSEL: That's an appealing offer, Mr. Cherry, but I can't accept it if it doesn't accurately and fairly reflect what other parties, not just yourself, might conclude.

MR. CHERRY: Well, they can ask for it, but I'm just talking about -- you asked me to tell you about after Mr. Temple who I wanted, okay? I'm not trying to make that judgment.

(Dow counsel conferring.)

MR. WESSEL: I don't think I can make that representation. I don't want to have anybody infer from what I've said that it's any different. I just don't think that in the light of all that's been said it is proper for one party, with one party's own perception, to say "This is the way it is."

The Dow position, as stated in the interrogatories, is clearly and specifically stated in the fashion which I have no doubt about. When it goes beyond that, one gets into areas in which others might differ.

MR. CHERRY: Mr. Wessel, let me narrow down my question. It may help you.

All I'm really concerned about is that -- that Mr. Orefice will not -- will support or agrees with Mr. Temple's position that the corporation review did not detract any of the findings that were made by the Michigan Division and that essentially the reason why Dow now announced it's moving forward is the lawsuit. That's all I really am talking about when I say the Dow corporate position.

MR. REMFROW: Mr. Chairman, I submit we should ask Mr. Orefice that question.

MR. CHERRY: It's a question of who we ask.

Would you prefer that we have Mr. Orefice, Mr.

Wessel?

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MR. WESSEL: I do not want to see Mr. Oreffice testify. I fear he must.

MR. CHERRY: Okay. Bring him on.

BY MR. CHERRY:

Q Do you believe, Mr. Temple, that I ought to discuss with Mr. Oreffice these Dow corporate review documents as opposed to yourself?

A I guess I don't have a judgment on that. He was there; I was there.

Q Okay.

MR. CHERRY: Let me ask this: What is the Board going to do about this evening? Consumers has some questions; the Staff has some questions. Are we going to move forward or not?

Mr. Temple said the last plane he can get is 10:00 o'clock. Is he going home or ain't he?

CHAIRMAN COUFAL: I don't see how we can get through with him in order to get him out to O'Hare by 10:00 o'clock, No. 1, and, No. 2, it's late.

MR. CHERRY: I'm tired, but then so is Mr. Temple. If I can do anything to help I will.

CHAIRMAN COUFAL: Mr. Renfrow has quite a number of questions. Mr. Hoefling does. I don't know whether Mr. Wessel does or not.

MR. WESSEL: I doubt that I'm going to have very

11:16

much.

CHAIRMAN COUFAL: He's been testifying for a long time.

MR. CHERRY: What I will do is, if it goes over tomorrow, if it's meaningful to you to leave after they finish -- I mean, what I'm suggesting is I would stop now and let the others finish. If the time schedule is such that it is meaningful for me to go back on the Dow corporate review documents, which is all I have left with Mr. Temple, I'd like to reserve that option, because if I do it then I won't do it with Mr. Oreffice.

But I'll let the other parties start first thing in the morning, if that's agreeable to the Board, so long as when it's over, if it's not the end of the day and I want to go back to those, I can.

But if it's a question of tightness, I won't do it, okay?

MR. WESSEL: May I speak to the witness a minute?

(Pause.)

MR. WESSEL: Mr. Temple has stated to me that he had just as soon stay over. He's getting tired. He thinks he should go through those notes. It's his responsibility, and he's likely to have a much more specific recollection and knowledge.

MR. CHERRY: The Dow corporate review notes?

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THE WITNESS: Yes.

MR. CHERRY: That's terrific. In that case, I'll start with you on those notes first thing in the morning, before Consumers and the Regulatory Staff go on.

I appreciate very much.

There's one question that I'm dying to ask you, but I don't think I will. Maybe tomorrow I'll ask you that question.

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MR. WESSEL: It would be helpful.

I have a note from Mr. Orrefice saying that he intends to be here at 9 o'clock in the morning unless he will not be reached until late afternoon.

If the parties can give me an indication of when they expect -- if it is sometimes later in the morning -- obviously people can't be precise -- then he will be here at 9 o'clock or be available at that time.

But if the expectation is it will go until mid-afternoon, he will come later.

MR. CHERRY: I would suggest, from what I can see, we put Mr. Orrefice on in the afternoon.

MR. WESSEL: Is that satisfactory with the Board?

CHAIRMAN COVIELL: Yes.

If we start at 9 o'clock. The proposition is, if we start at 9 can you be through with your examination of Mr. Temple so we can put Mr. Orrefice on in the afternoon?

That is the question.

MR. REVEROW: I am not sure how much Mr. Cherry has. We could do it.

One of the things I want to do tonight is to go back and look at the transcript to see if I can pare down the number of questions I have to ask Mr. Temple.

Is tomorrow the only day that Mr. Orrefice is available?

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MR. WESSEL: No, he is available Thursday as well.

MR. RENFROW: I would suspect it would be
afternoon before we finish with Mr. Temple, depending upon
how long Mr. Cherry takes.

MR. CHERRY: I can't estimate.

I won't take the whole day, but you know, I could
take some time. I just don't know.

DR. LEEDS: Excuse me, Mr. Cherry.

Let me get at this this way. Let me just go
down the tables and ask:

What is your best estimate at this time?

MR. CHERRY: Two hours.

DR. LEEDS: Two hours.

MR. HOEPLING: Half hour for the Staff.

DR. LEEDS: Half hour; two and a half.

Mr. Renfrow?

MR. RENFROW: Two.

DR. LEEDS: Four and a half.

Mr. Wessel?

MR. WESSEL: Ten minutes, perhaps.

DR. LEEDS: A little over four and a half hours.

CHAIRMAN COUFAL: That gets him here in the
middle of the afternoon.

MR. WESSEL: Thank you.

CHAIRMAN COUFAL: All right.

Shall we wind it up until 9 in the morning.

MR. CHERRY: Okay.

I would like to suggest we start at 9:15, only because there is one phonecall I have to make precisely at 9:00. If I make it I can leave my office and be here at 9:15.

But, if you want, I will make it at the first break.

CHAIRMAN COFFEL: 9:15 is all right.

(Whereupon, at 6:40 p.m., the hearing in the above-entitled matter was adjourned, to resume at 9:15 a.m. on Wednesday, 2 February 1977.)