

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CONSUMERS POWER COMPANY'S
STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE TO BE HEARD

1. On July 26, 1976, the United States Court of Appeals issued its decision in Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976), remanding certain issues in connection with construction permits awarded to Consumers Power Company ("Consumers") for Midland Plant Units 1 and 2 ("the project" or "the plant") to the Nuclear Regulatory Commission ("Commission"). Pursuant to Commission direction, an evidentiary hearing ("the suspension hearing") was scheduled before an Atomic Safety and Licensing Board ("Licensing Board") to consider whether to suspend the Midland construction permits pending determination of the issues remanded by the Court of Appeals. Among the matters to be considered at the suspension hearing were the need for process steam by Dow Chemical

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Company's industrial facilities at Midland and the status of Dow's contract to buy steam and electricity from Consumers Power Company. Consumers Power Company (Midland Plant Units 1 and 2), LBP-77-57, 6 NRC 482 (September 23, 1977), at 482-83, 487, ¶¶ 1, 3, 15, 16.

2. As a result of the Court of Appeals decision in Aeschliman and new projected capital costs for the project of \$1,670,000,000, the Michigan Division of Dow Chemical Company, in August, 1976, initiated a review of the project and the contracts between Dow and Consumers. Tr. 220, p. 2 (Temple Direct Testimony, following Tr. 220).

3. On September 8, 1976, Mr. Joseph G. Temple, head of Dow's Michigan Division, wrote to Mr. Paul F. Oreffice, President of Dow U.S.A., expressing the opinion "that the nuclear-project will be most likely to be disadvantageous to Dow * * *" and recommending that Mr. Oreffice "call for a corporate review of the entire question" of Dow's relationship to Consumers. Board Exhibit No. 1, p. 3; "Memorandum of Licensee Consumers Power Company and its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence," dated December 30, 1976 (hereafter referred to as "Consumers Mem. 12/30/76"), Attachment A, pp. 9-10; see also Temple's Notes of September 13 meeting (at p. 3), included as Attachment G to Attachment A of Consumers Mem. 12/30/76 (hereafter

referred to as "Temple's Notes, Attach. G to "A"); Bacon Affidavit dated December 30, 1976 (hereafter "Bacon Affidavit I"), ¶2.

4. Mr. Temple had on prior occasions made public statements expressing his dissatisfaction with the Midland project and was known, both within Dow and by Consumers, to be personally opposed to Dow's participation in the project. Renfrow Affidavit dated March 28, 1979 (hereafter "Renfrow Affidavit II"), ¶¶ 4, 6; see also Consumers Mem. 12/30/76, Attachment A, p. 10; Consumers Mem. 12/30/76, Attachment D to "A".

5. On September 13, 1976, Mr. Temple formally recommended to Mr. Oreffice that a corporate review be conducted of Dow's current position on the Midland project. Board Exhibit No. 2; Temple's Notes, Attach. G to "A", p.2. This information was communicated orally to Consumers in a meeting between Consumers and Dow that same date. Consumers Mem. 12/30/76, Attachment A, pp. 9-10; Temple's Notes, Attach. G to "A", p. 2; Bacon Affidavit I, ¶ 2. In the course of that meeting, it was recognized that Dow's position would be presented to the Commission and could in no way be untrue, misleading, or incomplete. Consumers Mem. 12/30/76, Attachment A, p. 9; Temple's Notes, Attach. G to "A", p. 1.

6. Mr. Oreffice subsequently created a corporate review team, headed by Mr. Alden J. Klomprens and comprised of Dow

personnel who did not report to Mr. Temple. Tr. 2694; Consumers Mem. 12/30/76, Attachment F, Item IV.A. The review team was given seven task force assignments. Board Exhibit No. 2; Youngdahl Memorandum dated September 16, 1976, R/D Attachment L.

7. Task Force No. 2 was assigned to review the legal aspects of the decision -- past, present, and future. Consumers was to be invited to make comments and provide input for the Task Force's consideration. Youngdahl Memorandum dated September 16, 1976, R/D Attachment L. To this end, a meeting between Dow and Consumers was scheduled for September 21, 1976. Consumers Mem. 12/30/76, Attachment A, p. 10; Temple's Notes, Attach. G to "A", p. 3; Renfrow Affidavit dated December 30, 1976 (hereafter "Renfrow Affidavit I"), ¶ 2; Renfrow Affidavit II, ¶ 3; Bacon Affidavit I, ¶ 2; Falahee Affidavit dated March 28, 1979 (hereafter "Falahee Affidavit"), ¶2.

8. The September 21, 1976 meeting was attended by Messrs. Renfrow, Bacon and Falahee, representing Consumers, and Messrs. Nute, Hanes and Klomprens, representing Dow. Prior to the meeting, Messrs. Bacon and Renfrow considered whether Mr. Temple would be the best witness to use to testify about Dow's ultimate corporate position. In particular, they discussed Mr. Oreffice and Mr. Klomprens of Dow U.S.A. as potential alternative witnesses knowledgeable about the Michigan Division

interim position and the Dow corporate review; both men were less hostile in their personal attitudes about the project. Renfrow Affidavit II, ¶6; Bacon Affidavit dated March 28, 1979 (hereafter "Bacon Affidavit II"), ¶6.

9. Both Mr. Oreffice, President of Dow U.S.A., and Mr. Klomparens, head of the Dow U.S.A. corporate review team, were familiar with the interim position and recommendations of the Michigan Division and participated significantly in formulating the Dow corporate position with respect to the Midland project. Renfrow Affidavit II, ¶6.

10. During the September 21 meeting, reference was made to the need for a Dow witness to testify at the suspension proceeding. Concern was expressed about using Mr. Temple as the Dow witness, and in that connection Mr. Renfrow suggested that consideration might be given to a witness from Dow U.S.A. It was fully recognized that whoever might testify for Dow would be required to state Dow's current corporate position in order to satisfy the Court of Appeals directive in Aeschliman. Renfrow Affidavit II, ¶ 6, Bacon Affidavit II, ¶ 5, Falahee Affidavit ¶4.

11. At no time did Mr. Miller, Mr. Rosso, or Mr. Renfrow, attorneys for Consumers, discuss the possibility of tendering at the suspension hearings any Dow witness other than Mr. Temple, Mr. Oreffice, or Mr. Klomparens. Miller Affidavit

dated March 26, 1979 (hereafter "Miller Affidavit"), Rosso Affidavit dated March 28, 1979 (hereafter "Rosso Affidavit II"), ¶4; Renfrow Affidavit II, ¶6.

12. At no time did Mr. Miller or Mr. Rosso ever suggest to, or direct, Mr. Renfrow to urge Dow that a witness who had no knowledge of the interim position of Dow's Michigan Division be tendered as the Dow witness in the suspension hearing. Miller Affidavit ¶3; Rosso Affidavit II, ¶5.

13. It was the consensus of Messrs. Miller, Rosso and Renfrow that Mr. Temple was the logical witness to tender, but they would not object to tendering Mr. Oreffice or Mr. Klomparens as the Dow witness. Miller Affidavit ¶3; Rosso Affidavit II, ¶6.

14. At the September 21 meeting, Mr. Falahee made it clear that Dow could anticipate litigation from Consumers if Dow decided to abandon the project and withdraw its support from the Midland plant at the upcoming suspension hearings. Falahee Affidavit ¶5; Bacon Affidavit I, ¶¶ 3, 8; Bacon Affidavit II, ¶ 6, Renfrow Affidavit II, ¶ 5.

15. On September 24, 1976, at a subsequent meeting between Dow and Consumers, it was again pointed out that if Dow breached its contractual agreements with Consumers, Consumers would pursue its legal remedies. Bacon Affidavit I, ¶5.

16. On September 27, 1976, the Dow corporate review culminated in a determination by the Dow U.S.A. Operating Board that circumstances had not then changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers. The Operating Board emphasized that this decision would be subject to constant review and reevaluation and could change in the future if the project experienced additional delays or other difficulties. Tr. 220, pp. 2-3. This corporate position was communicated to Consumers on September 27. Bacon Affidavit I, ¶6; Bacon Affidavit II, ¶7; Consumers Power Exhibit No. 24.

17. The Dow U.S.A. decision of September 27 was contrary to the interim position of the Michigan Division and constituted the authoritative determination of Dow corporate policy. Duran Notes on Dow/Consumers meeting of 10/12/76, at p. 11, R/D Attachment H.

18. Following Dow's decision to proceed with the Midland project and support Consumers in the suspension hearing, Mr. Temple was designated as the Dow witness to testify at the hearing. Consumers Mem. 12/30/76, Attachment F, p. 1; Bacon Affidavit II, ¶ 7; Renfrow Affidavit I, ¶5. By September 29, 1976, the first proposed draft of Temple's testimony was prepared and discussed at a meeting between Dow and Consumers.

Consumers Mem. 12/30/76, Attachment C; Renfrow Affidavit I, ¶5; Bacon Affidavit I, ¶7.

19. No representative of Consumers disputed the designation of Temple as the Dow witness. Renfrow Affidavit I, ¶5; Bacon Affidavit I, ¶¶6 and 7; Bacon Affidavit II, ¶7.

20. Disclosure was made in Mr. Temple's direct testimony of the 1976 review conducted by Dow which culminated in the September 27 corporate decision to support the project while keeping the matter under continuous review with all options open. Tr. 220, pp. 2-3.

21. Mr. Temple's direct testimony did not include reference to the interim position and recommendation of the Michigan Division. Tr. 220.

22. The decision not to include the Michigan Division interim position and recommendation in Temple's direct testimony was based on the considered judgment of both Dow's and Consumer's attorneys that, in light of Dow's ultimate corporate decision, the reservation expressed by the Michigan Division was no longer material to the suspension proceeding. Renfrow Affidavit I, ¶¶ 5, 6; Rosso Affidavit dated December 30, 1976, ¶ 4; Consumers Mem. 12/30/76, pp. 11-14. See also Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 16, R/D Attachment G; Duran Notes on Dow/Consumers meeting of 10/12/76, at pp. 6-7, 10, 11, R/D Attachment H; Duran Notes on

Dow/Consumers meeting of 11/1/76, at pp. 7-8, R/D Attachment I; Nute Notes on Dow/Consumers meeting of 9/29/76, at p. 3, ¶ IV.B.3., R/D Attachment C; Nute Notes on Dow/Consumers meeting of 10/12/76, p. 2, ¶ II.B.3., R/D Attachment D.

23. At no time during preparation of Mr. Temple's direct testimony did Mr. Temple or any other Dow representative indicate to Consumers or its counsel that he desired the Michigan Division interim position to be included in the direct testimony. Renfrow Affidavit I, ¶9.

24. The NRC Staff counsel concurred in the judgment of Consumers and its counsel that "What required disclosure in Mr. Temple's direct testimony was the corporate decision of Dow and why that particular decision was made * * * . Mr. Temple disclosed all relevant information in his direct testimony." NRC Staff Memorandum In Response To The Atomic Safety and Licensing Board's Order Regarding Preparation Of Testimony of Dow Witness Temple, dated December 30, 1976, at p. 6.

25. Consumers made available to all parties in advance of the suspension hearings all the materials in its possession which formed the basis for its prepared testimony, Tr. 268, including the Temple memorandum to Mr. Oreffice of September 8, 1976, setting forth the Michigan Division's interim position in opposition to the Midland project, and the Temple request of September 13, 1976, for a full corporate review of the

question. These documents were made part of the evidentiary record. See Board Exhibit Nos. 1 and 2; Staff Mem. 12/30/76, pp. 6-7; Consumers Mem. 12/30/76, pp. 17-19, and Attachment L thereto; Renfrow Affidavit I, ¶ 9; Tr. 175-76.

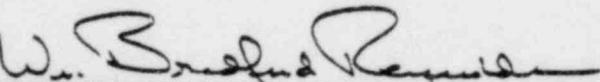
26. Both Mr. Temple and Mr. Oreffice appeared and testified fully at the suspension hearing. The Licensing Board found both men to be "highly knowledgeable." Consumers Power Company (Midland Plant Units 1 and 2). LBP-77-57 (September 23, 1977), as amended November 4, 1977, 6 N.R.C. 482, 485 ¶ 10.

27. The stated intention of Dow in 1976 to adhere to its commitment to the Midland plant remains intact. In 1978, Consumers and Dow entered into new, modified steam and electric contracts containing an explicit Dow commitment to the project in contemplation of commercial operation for steam generation by December 31, 1984. Bacon Letter to Licensing Board dated June 26, 1978.

Respectfully submitted,

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MEMORANDUM OF CONSUMERS POWER
COMPANY IN SUPPORT OF MOTION FOR
SUMMARY DISPOSITION

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Attachments

Affidavit of Judd L. Bacon

Affidavit of James B. Falahee

Affidavit of R. Rex Renfrow, III

Supplementary Affidavit of David J. Rosso

Affidavit of Michael I. Miller

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I. Preliminary Statement

On January 4, 1979, the Licensing Board in this remand proceeding ordered the parties to file certain requested information to assist the Board's review of "charges relating to alleged attempts to prevent full disclosure of facts to an NRC licensing board".¹ As matters now stand, it is the understanding of Consumers Power Company ("Consumers") that the inquiry currently being undertaken centers on the activities of Consumers, acting through its counsel, in connection with (a) the designation of Joseph Temple as a witness for Dow Chemical

¹ Consumers Power Company (Midland Plant Units 1 and 2), Docket Nos. 50-329CP and 50-330CP Remand Proceeding, "Order Concerning Remanded Issues", dated January 4, 1979, at p. 10.

U.S.A. ("Dow") in the earlier remanded proceeding concerning possible suspension of the Midland construction permits,² and (b) the preparation of Mr. Temple's direct testimony to be used in that proceeding. The fundamental question is whether, in either or both respects, an effort was made to keep from the reviewing board material information bearing upon Dow's commitment to the Midland project.³

Consumers can fully appreciate the Licensing Board's interest in pursuing this matter notwithstanding the fact that

2 The referenced suspension proceeding in question resulted in a Licensing Board decision not to suspend the Midland construction permits pending consideration of various issues remanded to the Commission by the United States District Court for the District of Columbia Circuit in Aeschliman v NRC, 547 F.2d 622 (D.C. Cir. 1976). Consumers Power Company (Midland Plant Units 1 and 2), LBP-77-57, 6 N.R.C. 482 (September 23, 1977). This decision, as subsequently amended by the Licensing Board on November 4, 1977 (6 N.R.C. at 485-86), was affirmed by the Appeal Board on February 14, 1978 (ALAB-458, 7 N.R.C. 155 (1978)), and the full Commission declined review. References herein to relevant portions of the suspension hearing will be by use of the symbol "Tr." See note 10, infra.

3 A claim by Consumers of work product privilege with respect to certain documents prepared by counsel in connection with the drafting of Mr. Temple's direct testimony resulted in an order by the Licensing Board for distribution of the referenced documents to the Board and the parties under a protective order (Tr. 502). That protective order was subsequently dissolved by the Board on February 2, 1977 (Tr. 2742). There is, therefore, no issue remaining as to what impact, if any, resolution of the present inquiry may have on a claim of work product privilege asserted with respect to documents relevant to a disposition of the instant disclosure question. See Tr. 503 and 505.

the suspension hearing is now concluded. Suggestions of possible "nondisclosure" of information by a licensee deserve serious attention, both to preserve the integrity of the administrative review process if it is demonstrated that "nondisclosure" actually occurred and to preserve the integrity of those whose conduct is questioned if the suggestions prove to be unfounded.

Following a careful evaluation of the facts and circumstances giving rise to the suggested "nondisclosure" involved here, we remain convinced that there was no impropriety in Consumers' handling of the suspension proceeding. In preparing for any evidentiary hearing, it is not only expected, but, indeed, as a matter of professional responsibility, required, that counsel for the parties involved explore thoroughly alternative approaches that might be taken in preparing and presenting their respective positions in the most effective and comprehensive manner. Suggestions as to possible witnesses are in this context invariably made, and the strong and weak points of those persons being considered are routinely discussed. Any number of factors, including, among others, an individual's demeanor, personal prejudices, comprehension of the subject matter and ability to articulate clearly, bear on the ultimate selection. Once it has been determined who the witness or witnesses will be, considerable

effort goes into the preparation of testimony, both in terms of drafting a meaningful direct statement to be filed in advance of the hearing, and in terms of readying each witness for anticipated cross-examination. Necessarily, the attorneys responsible for presenting their client's position to the licensing board play an integral and important role in this entire process, and properly so.⁴

The conduct which is under scrutiny at this time is based upon characterizations of certain remarks and judgments made by Consumers' counsel while coordinating with Dow and its representatives during the preparatory phase of the suspension proceeding. It will come as no surprise to this Board that in September, 1976 the relationship between Consumers and Dow, both of whom were committed by contract to the Midland project, had become somewhat strained.⁵ Financial considerations, along

4 See Wigmore On Evidence § 288 (1970), and cases cited therein. See also Code of Professional Responsibility, Ethical Considerations EC 7-26 and Disciplinary Rule DR 7-101; McCartney v United States, 343 F.2d 471 (9th Cir. 1965). The Supreme Court of the United States has commented directly on the distinction between the ethical considerations involved in attorneys' discussions of testimony with a witness (which is proper) and attorneys' efforts to manipulate or unduly influence such testimony (which is not). Geders v United States, 425 U.S. 80, 90 n.3, 96 S. Ct. 1330, 1336 n.3 (1976).

5 As reflected in minutes of several meetings between representatives of Dow and Consumers, the companies were engaged in serious negotiations relevant to changes in their existing contract. See Duran Notes on Dow/Consumers meeting of 9/29/76, (continued next page)

with delays in the anticipated schedule for commercial operation of the plant, had caused Dow to undertake an independent reevaluation of its Midland commitment to determine whether continued reliance upon the project for its 1984 steam requirements was justified, or whether Dow should, instead, begin to look elsewhere.⁶

One view within the company, which was strongly advocated by Joseph Temple and was communicated to management

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at pp. 3-4, 9-10, 12, 13 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 3-4, 5 (R/D Attachment I). In this connection, certain Dow representatives suggested the possibility that Dow might terminate its participation in the Midland project (see note 29, infra). Representatives of Consumers stated the obvious, that if Dow failed to live up to its existing contractual obligations, it could anticipate litigation by Consumers for breach of contract. See Bacon Affidavit of December 30, 1976, ¶¶ 3, 5 (hereafter "Bacon Affidavit I"); Renfrow Affidavit of December 30, 1976, ¶ 3 (hereafter "Renfrow Affidavit I"); Falahee Affidavit of March 28, 1979, ¶ 5. Such pronouncements between parties involved in the arduous task of renegotiating contractual arrangements are not at all surprising. Almost invariably, the competing positions that are forcefully advanced during extended contract negotiations will tend to strain both corporate and personal relationships to one degree or another. Unfortunately, this was precisely the situation in which both Dow and Consumers found themselves at the time that they had to turn their attention to preparing for the Midland suspension hearings. Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 12 (R/D Attachment G).

⁶ See Tr. 220, pp. 2-3 (Temple Direct): Renfrow Affidavit I, ¶ 2; Rosso Affidavit of December 30, 1976, ¶¶ 2, 3 (hereafter "Rosso Affidavit I"); Bacon Affidavit I, ¶ 2. See also "Memorandum of Licensee Consumers Power Company and its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence", dated December 30, 1976, at pp. 7-8 (hereafter referred to as "Consumers Mem. of 12/30/76").

by the Dow Michigan Division on September 8, 1976, was that the Midland project was no longer in Dow's best interest.⁷

Following a full assessment of the situation by a specially designated company review board, including consideration of reservations expressed by the Michigan Division, Dow decided on September 27, 1976, to adhere to its commitment to the Midland plant while attempting to negotiate certain modifications to the Consumers contract. The company further stated that it would continue to review the possibility of disassociating itself from the project and "keep all of its options open".⁸ Consumers was informed of the decision by Dow on the same day.⁹

The suggestion of impropriety relates only to the manner in which Consumers, acting through its counsel, determined to treat the Dow Michigan Division's stated reservation about continuing to support the project in the ensuing suspension hearing. The issues presented can be stated as follows:

1. Whether an effort was made by Consumers to have Dow produce a witness at the hearing other than Joseph Temple, one who was not fully knowledgeable about the Michigan Division's interim position?

7 Board Exhibit No. 1; Tr. 417-18 (Temple), and Tr. 2693-94 (Oreffice).

8 Bacon Affidavit I, ¶ 6.

9 Bacon Affidavit I, ¶ 6; Consumers Power Exhibit No. 24.

2. Whether the Michigan Division's expressed reservation about Dow's continued participation in the Midland project was of sufficient materiality to require that it be affirmatively disclosed by Consumers in written direct testimony submitted at the suspension hearing?

3. Whether in any event the manner in which Consumers determined to handle the Michigan Division's view of the project at the suspension hearing was calculated to prevent a full disclosure of the facts to the Licensing Board?

For the reasons set forth below, Consumers respectfully submits that each of these questions requires a negative response. Indeed, based upon the relevant portions of the record compiled in the suspension proceeding,¹⁰ as supplemented by the affidavits and other materials filed herewith, it is our view that an evidentiary hearing on the instant suggestion of possible "nondisclosure" is not really necessary for the Board to conclude this matter. Evaluated in the context of preparations for an extended suspension hearing, the remarks by Consumers' representatives relating to the selection of witnesses and the scope and direction of their

10 Pursuant to the Licensing Board's Order Concerning Remanded Issues, we are filing herewith a designation of all portions of the prior record which should be considered in the present proceeding. For the convenience of the Board, we have included parenthetically in the designation the short-form reference to each of those listed materials discussed herein. Attachments to the record designation will be referred to herein as "R/D Attachment ___".

testimony were neither improper nor inappropriate. Summary dismissal of this matter therefore is fully warranted.¹¹

II. Discussion

A. NO EFFORT WAS MADE BY CONSUMERS TO HAVE DOW PRODUCE AN UNKNOWLEDGEABLE WITNESS FOR THE HEARING

The initial point of inquiry concerns whether Consumers sought to prevail upon Dow to present a witness at the suspension hearing unfamiliar with opposition to the Midland plant voiced internally by the Dow Michigan Division. Cause for examination of this question is indicated in the typewritten notes of a Dow attorney, L. F. Nute, setting forth in summary fashion his later recollections of conversations that took place at a meeting of Consumers and Dow representatives on September 21, 1976.¹² The Nute Notes

11 A list of names and addresses of all witnesses or persons alleged to possess information regarding this matter is being filed herewith pursuant to the Licensing Board's direction. If, contrary to our view of the matter, the Board deems it necessary to hear testimony from any or all of these individuals, Consumers is certainly prepared to cooperate to the fullest extent. We do not want our request for summary disposition to be misconstrued by anyone as an attempt to keep any information from the Board. Rather, it is prompted solely by a genuine belief that any suggestion of possible impropriety has been conclusively demonstrated to be without substance by the extensive record materials already before the Board, thereby rendering unnecessary the expenditure of more time and energy to accumulate additional corroborating evidence.

12 The typewritten notes (hereafter referred to as the (continued next page)

contain a statement that "Rex [Renfrow, an attorney for Consumers] suggested that Dow witness might be someone from Dow Chemical U.S.A. or Corporate area who is unaware of Midland Division recommendation to Orrefice [sic] -- this person would testify as to the effects of further delay upon Dow * * *".

This subsequently prepared shorthand account of what was said at the September 21 meeting concerning possible Dow witnesses is unfortunately too abbreviated and disjointed to relate fairly and accurately either the context or substance of the actual remarks made. A fuller description of the meeting, and the events immediately preceding it, will help clarify the Nute Notes and remove whatever implication of impropriety may arguably be suggested therein.

Approximately two weeks before the meeting in question, the Michigan Division of Dow determined that continued participation in the Midland project was no longer "good" for the company, and Mr. Temple, head of the Michigan Division, so advised Mr. Paul F. Oreffice, President of Dow

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"Nute Notes") were filed with the Licensing Board in the suspension hearing, and received into evidence as Midland Intervenors Exhibit No. 25. It is undisputed that Nute prepared these notes sometime after the meeting based on his own recollections and on his review of handwritten notes taken by Mr. Klomprens of Dow who was also in attendance. Tr. 2245. Nute's handwritten notes of the meeting were apparently discarded and no longer exist. Id.

U.S.A. (the corporate division of Dow Chemical Company with responsibility for domestic operations, including those of the Michigan Division).¹³ On September 13, 1976, Mr. Temple formally recommended to Mr. Oreffice that the company "call for a corporate review of the entire question, 'What is Dow's current position with regard to the Midland Nuclear Project?'"¹⁴ This information was communicated orally to Consumers in a meeting with Dow representatives on September 13, 1976.¹⁵ Prior thereto, Mr. Temple had already made known in public statements his personal opposition to Dow's continued participation in the Midland plant; it was common knowledge, both within Dow and Consumers, that he was openly hostile to the project.¹⁶

Upon receipt of the Michigan Division recommendation, Mr. Oreffice, on authorization by the Dow Chemical Company

13 Consumers Mem. 12/30/76, Attachment A, pp. 9-10; see also Temple's Notes of September 13 meeting (at p. 3), included as Attachment G to Attachment A of Consumers Mem. 12/30/76 (hereafter referred to as "Temple's Notes, Attach. G to "A"); Bacon Affidavit I, ¶ 2. The Michigan Division's stated reservations about the Midland project are set forth in Board Exhibit No. 1.

14 Temple's Notes, Attach. G to "A", p. 2; Board Exhibit No. 2.

15 Consumers Mem. 12/30/76, Attachment A, pp. 9-10; Temple's Notes, Attach. G to "A", p. 2; Bacon Affidavit I, ¶ 2; Renfrow Affidavit dated March 28, 1979, ¶ 3 (hereafter referred to as "Renfrow Affidavit II").

16 Consumers Mem. 12/30/76, Attachment A, p. 10; id., Attachment D to "A"; Renfrow Affidavit II, ¶¶ 4, 6.

Board of Directors (Tr. 419-24), ordered a corporate level review of the Midland project, to be headed by Mr. Alden J. Klomparens (Tr. 2694). The review team was composed of Dow personnel who did not report to Mr. Temple; it was directed to undertake an evaluation of Dow's continued participation in the nuclear plant from seven separate vantage points, each to be examined by a separate task force coordinated under Klomparens.¹⁷ Input from Consumers was invited on some, but not all, of the task force assignments. One of the areas in which Consumers' input was sought concerned the possible "legal aspects" of Dow's ultimate decision -- "past, present and future" -- and a meeting between Dow and Consumers to discuss this matter, as it bore upon the upcoming suspension and remand proceedings, was scheduled for September 21.¹⁸

Prior to that meeting, Consumers attorneys discussed among themselves what they perceived to be Dow's concerns about the project, and the possible impact on the scheduled suspension hearing if Dow's corporate review team concluded

17 Consumers Mem. 12/30/76, Attachment F, "Outline Supplied by Consumers Power on 9/29/76", Item IV.A.; Board Exhibit No. 2; Youngdahl Memo of 9/16/76 (R/D Attachment L).

18 Id. See also Consumers Mem. 12/30/76, Attachment A, at p. 10; Temple's Notes, Attachn. G to "A", p. 3; Renfrow Affidavit I, ¶ 2; Renfrow Affidavit II, ¶¶ 5, 7; Bacon Affidavit I, ¶ 2; Falahee Affidavit, ¶ 2.

that continued participation in the Midland plant was no longer advisable. Renfrow affidavit I, ¶ 2; Renfrow affidavit II, ¶ 3; Bacon Affidavit I, ¶ 2. One of the items covered was whether Mr. Temple was the best witness to use to testify about Dow's ultimate corporate decision in light of his open hostility to the project. Renfrow Affidavit II, ¶ 6; Bacon Affidavit II, ¶ 6. In this regard, the Consumers lawyers were of the view that a witness from Dow Chemical, U.S.A., rather than Mr. Temple, would be able to give more objective testimony about the Dow position. Both Mr. Oreffice and Mr. Klomprens were considered to be likely alternatives. They were fully familiar with the attitude of the Michigan Division and its "corporate review" recommendation to Dow, and the Consumers lawyers felt that either man could be expected to present Dow's ultimate position fully and accurately. Renfrow Affidavit II, ¶ 6; Bacon Affidavit II, ¶ 6. No suggestion was ever made during this preliminary discussion, or thereafter, that Consumers offer a Dow witness who was not aware of the Michigan Division matter.¹⁹ Indeed, it was fully recognized by both Dow and Consumers at the September 13 meeting that the testimony to

¹⁹ Renfrow Affidavit II, ¶ 6; Rosso Supplementary Affidavit of March 28, 1979, ¶¶ 4, 5 and 6 (hereafter referred to as "Rosso Affidavit II"); Miller Affidavit of March 26, 1979, ¶¶ 3, 4; Bacon Affidavit II, ¶ 6.

be presented must state Dow's "complete position" and be in no way "misleading".²⁰

The September 21 meeting between Dow and Consumers lasted two to three hours and covered a variety of topics. Renfrow Affidavit II, ¶ 5. During that meeting, Dow expressed its concern regarding discovery in the suspension proceeding insofar as it might seek to invade the sensitive contract negotiations under way between Dow and Consumers. In that context, Dow expressed its own misgivings regarding Mr. Temple's personal views of the Midland project (Renfrow Affidavit II, ¶ 6); Mr. Falahee's recollection is that Mr. Nite indicated he would have a problem using Mr. Temple as the Dow witness because of Temple's public statements to the effect that he believed the nuclear project was no longer beneficial to Dow. Falahee Affidavit ¶ 4. At that point, Mr. Renfrow suggested to the Dow representatives that, in light of these concerns, consideration might be given to providing Consumers with another witness from Dow, U.S.A. Renfrow Affidavit II, ¶ 6.

Renfrow believes he did not then name anyone as a possible alternative to Temple, and this recollection is

20 Consumers Mem. 12/30/76, Attachment A, p. 9; Temple's Notes, Attach. G to "A", p. 1.

consistent with the reports on the meeting by others in attendance.²¹ This is perfectly understandable in the context of the September 21 meeting, since the central focus of discussion at that time was not on the identity of particular hearing witnesses, but, more importantly, on what Dow's position would be vis-a-vis continuing to participate in the Midland project, and how that position might impact on the suspension question.²² Regardless of who might be testifying from Dow, it was fully recognized that he would be required to state the current corporate position in order to satisfy the directive given by the Court of Appeals in Aeschliman. Falahee Affidavit ¶ 4; Bacon Affidavit ¶ 5.

Renfrow categorically denies that he ever suggested that Dow present a witness who was unaware of the Michigan Division attitude and its recommendation to Dow management to review Dow's commitment to the project (Renfrow Affidavit II, ¶ 6); neither Mr. Falahee (Falahee Affidavit ¶ 4) nor Mr. Bacon (Bacon Affidavit ¶ 5) has any recollection that Rex Renfrow or

21 Renfrow Affidavit II, ¶ 6. None of the individuals reporting on the September 21 meeting -- Lee Nute, Al Klomprens and Jim Hanes from Dow and Rex Renfrow, Judd Bacon and James Falahee from Consumers -- identified other Dow officials as possible witnesses. See note 23, infra

22 Renfrow Affidavit I, ¶ 3; Bacon Affidavit I, ¶ 3; Falahee Affidavit ¶ 2; Renfrow Affidavit II, ¶ 5. See also Nute Notes, pp. 1-2.

anyone else representing Consumers suggested then, or at any other time, that Dow produce a witness who was unaware of the Michigan Division position or recommendation (see note 19, supra); and no such indication appears in the handwritten notes taken by Al Klomprens and Jim Hanes of Dow at the September 21 meeting.²³

The contrary inference conveyed in the Nute Notes is, we suspect, largely attributable to the imprecise manner in which Nute undertook at a later date to paraphrase the September 21 discussions. The shorthand characterization of an individual "unaware of the Michigan Division recommendation" covers in a single phrase the entire conversation at the meeting, in which Nute participated, relevant to the expressed concern of both companies with using Mr. Temple as a witness in light of his outspoken role in opposition to the Midland project, his preparation and presentation to Orefice of the Michigan Division's view that continued participation in the plant was no longer in Dow's best interest, and his recommendation for a corporate review of the entire question of Dow's adherence to its contractual commitments to Consumers.²⁴

23 Klomprens' notes (R/D Attachment B) are silent on the point. Hanes' notes (R/D Attachment A) state only, "will have to have a Dow witness state Dow's position" (p. 1). This is essentially what Renfrow recalls saying -- i.e., that a witness from Dow, U.S.A. should be considered, in lieu of Mr. Temple, to testify on the Dow position (Renfrow Affidavit II, ¶ 6). And see Bacon Affidavit II, ¶ 5.

24 Both in terms of the format used and the substantive com-
(continued next page)

If Renfrow's "suggestion" at the meeting that Dow may want to give consideration to using a witness other than Temple was misunderstood by Nute as conveying indirectly a message that Dow produce a witness "unaware of the Michigan Division recommendation" -- and we do not entirely discount this possibility²⁵ -- such a communications breakdown is admittedly regrettable.²⁶ However, as explained above and in Renfrow's Affidavit II, no such message was intended by Renfrow; nor was it ever contemplated by Consumers or its counsel that an "unaware" Dow witness would be used at the hearing (see note 19, supra). To the contrary, the individuals considered by Consumers and its lawyers as likely alternatives to Temple were

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ments made, it is clear that the Nute Notes only paraphrase the subjects of discussion rather than attempt to set forth in narrative form actual conversations that took place or endeavor to report with any degree of precision particular statements made by any of the individuals at the meeting. Midland Intervenors Exhibit No. 25.

25 See Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 6-7 (R/D Attachment I).

26 With the benefit of hindsight, it now appears that any confusion in this area would have been immediately dispelled at the September 21 meeting if Mr. Renfrow had named both Mr. Oreffice and Mr. Klomparens as the two individuals whom Consumers considered to be likely alternatives. This obviously would have satisfied Mr. Oreffice that Consumers and its counsel did not want an "unknowledgeable" Dow witness, and thus avoided the subsequent misunderstanding apparently based on the Nute Notes that surfaced during the suspension hearings. Tr. 2703-04 (Oreffice); see also Tr. 2399-2400 (Temple); Bacon Affidavit II, ¶ 4.

Mr. Oreffice and Mr. Klomprens, both of whom had a full knowledge of the reservations expressed by the Michigan Division as well as the corporate review that it recommended. See p. 12, supra.

In any event, we are hard pressed to find any impropriety in the discussions that took place at the September 21 meeting. The suggestion made by Mr. Renfrow -- whether understood by Dow in the manner intended (consider producing a Dow witness other than Mr. Temple) or in the manner reflected in the Nute Notes (consider producing an "unaware" witness) -- was neither pursued nor accepted.²⁷ No pressure was brought to bear on Dow with respect to its selection of witnesses.²⁸

27 No such suggestion was made by counsel for Consumers at the subsequent meetings with Dow representatives on September 24 and September 29, 1976. Consumers Mem. 12/30/76, Attachments B and F. Nor were there any other conversations between Dow and Consumers in which a replacement for Temple as the Dow witness was discussed. See Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 2-3, 7, 9, 11, 14, 16 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, pp. 3-4, 6-7, 8-9 (R/D Attachment H); Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 6-7 (R/D Attachment I). Duran Notes on Dow/Consumers meeting of 11/8/76, at p. 4 (R/D Attachment J).

28 As already noted, the September 21 meeting was convened by Dow in part to allow Consumers to provide input to the task force assignment studying the legal implications of Dow's ultimate decision with respect to the Midland project (see p. 11, supra). There was discussion at the meeting and thereafter of possible consequences that might be expected if Dow's corporate position should ultimately reflect the negative attitude of the Michigan Division. Consumers made it clear (continued next page)

Directly following Dow's decision on September 27, 1976, to proceed with the Midland project and support Consumers in the suspension hearing,²⁹ Mr. Temple was designated as the Dow witnesses to testify at the hearing.³⁰ No representative of Consumers disputed or sought to alter that determination.³¹

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that Dow could anticipate litigation from Consumers if it decided to abandon the project and withdraw its support from the Midland plant at the upcoming suspension hearing. See Nute Notes, p. 3; Bacon Affidavit I, ¶¶ 3, 8; Bacon Affidavit II, ¶ 6; Renfrow Affidavit II, ¶ 5; Consumers Mem. 12/30/76, Attachment B, p. 1. The references to litigation throughout the period in question stated the company's position in unmistakable terms in the event that Dow chose not to adhere to its contractual commitments. There was nothing either improper or inappropriate about alerting Dow to this prospect. Indeed, it is difficult to believe that Dow could reasonably have expected any other response from Consumers if it decided to abrogate its contract commitments.

However, at no time did anyone from Consumers link the company's position regarding a possible lawsuit for breach of contract with the separate consideration being given to which individuals from Dow should appear to testify at the suspension hearings. Although the Nute Notes of the September 21 meeting juxtapose in the same paragraph statements relating to the selection of the Dow witness and Mr. Falahee's remarks alerting Dow to the likelihood of a lawsuit by Consumers if Dow decided to abandon the project and withdraw its support at the suspension hearing, neither the Nute Notes nor any other evidentiary material indicates or alleges that the threat of litigation was employed to pressure Dow to produce an unknowledgeable or untruthful witness. Falahee Affidavit ¶ 5; Bacon Affidavit II, ¶ 5; Renfrow Affidavit II, ¶ 5.

29 See Consumers Mem. 12/30/76, Attachment F, Item IV.D.; Duran Notes on Dow/Consumers Meeting of 10/12/76, at p. 11 (R/D Attachment H; Consumers Exhibit No. 24.

30 Consumers Mem. 12/30/76, Attachment F, p. 1; Bacon Affidavit II, ¶ 7; Renfrow Affidavit I, ¶ 5; Renfrow Affidavit II, ¶ 6.

31 Renfrow Affidavit I, ¶ 5; Bacon Affidavit I, ¶¶ 6, 7; (continued next page)

Accordingly, there exists no legitimate basis for suggesting that Consumers acted improperly insofar as the designation of a Dow witness is concerned. Consideration was indeed given, for very legitimate reasons, to producing someone other than Mr. Temple to testify about Dow's corporate decision on continued participation in the Midland project. However, at no time did Consumers have in mind to request Dow to furnish a witness who was not knowledgeable about the view expressed by the Michigan Division and its recommended corporate review. Events both before and after the September 21 meeting belie any suggestion in the Nute Notes to the contrary. Both Mr. Temple and Mr. Oreffice in fact testified at the suspension hearing, with the full support and cooperation of Consumers and its counsel (see p. 28, infra), and the Licensing Board found both men to be "highly knowledgeable".³²

In short, production of a Dow witness "unaware of the Michigan Division recommendation" (Nute Notes, p. 3) was neither contemplated, attempted, suggested nor accomplished by Consumers, and in fairness to those whose conduct has been

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Bacon Affidavit II, ¶ 8. And see note 27, supra; Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 3-4 (R/D Attachment G).

³² Order of Licensing Board declining to suspend construction permits, LBP-77-57, 6 N.R.C. 482, 485 ¶ 10.

questioned any suggestions to the contrary should, we submit, be summarily dispelled by this Board as without basis in fact.

B. THE INTERNAL VIEW EXPRESSED BY
DOW'S MICHIGAN DIVISION WAS NOT
OF SUFFICIENT MATERIALITY TO
REQUIRE THAT IT BE INCLUDED IN
TEMPLE'S DIRECT TESTIMONY FILED
WITH THE LICENSING BOARD

The manner in which Consumers and Dow chose to treat the Michigan Division viewpoint, and its recommendation to management, at the suspension hearing also suggests no impropriety. The question raised in this area concerns the determination not to include any discussion in Joseph Temple's direct testimony about the dissatisfaction within Dow relating to the company's participation in the Midland project. This decision was made on the basis of discussions between attorneys for Consumers and Dow that took place after the Dow U.S.A. Operating Board had decided, following an evaluation of the Michigan Division's interim position, to continue to adhere to Dow's contractual commitments with Consumers -- subject to constant review of the situation and possible reevaluation of Dow's position in the future if the project experienced further delays or other difficulties. See note 29, supra.

In the considered judgment of both Dow's and Consumers' attorneys, the suggestion by the Michigan Division not to continue with the project was no longer material to the

suspension hearing once Dow had internally decided to the contrary. Rather, the material facts to be disclosed were those describing management's ultimate decision, after a full corporate review, to adhere to its contract with Consumers and continue the company's commitment to participate in the Midland facility.³³ Accordingly, disclosure was made in Mr. Temple's direct testimony of the 1976 review conducted by Dow which culminated in the September 27 corporate decision to support the project (Tr. 220, p. 2-3), while "keeping all * * * options open" to reevaluate the company's position on a regular basis in terms of future schedule delays (Tr. p. 517), action taken by the Michigan Air Pollution Control Commission (Tr. 220, p. 4), financial considerations (Tr. 220, p. 5), and the development of alternative steam generation sources (Tr. 220, pp. 5-6).

Even without the benefit of hindsight -- which amply demonstrates that the September 27, 1976 corporate decision to support the project was an accurate forecast of Dow's

33 Renfrow Affidavit I, ¶¶ 5, 6; Rosso Affidavit ¶ 4; Consumers Mem. 12/30/76, pp. 11-14. See also Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 16 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at pp. 6-7, 10, 11 (R/D Attachment H); Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 7-8 (R/D Attachment H); Nute Notes on Dow/Consumers meeting of 9/29/76, at p. 3, ¶ IV.B.3. (R/D Attachment C); Nute Notes on Dow/Consumers meeting of 10/12/76, p. 2 ¶ II.B.3 (R/D Attachment D).

continuing commitment to the plant for the future (see note 42, infra) -- it is difficult to fault the perimeters set by counsel for Temple's direct testimony. Invariably, one will find within a company the size of Dow diverse opinions among responsible employees on policy matters of considerable importance. In the final analysis, these competing philosophies must be resolved by those charged with the ultimate responsibility for shaping the direction of company policy. The material disclosure with regard to such matters is the corporate position ultimately adopted by the responsible "decisionmakers" after a careful evaluation of the recommendations for and against a particular course of action to be followed. Those suggestions advanced internally but rejected in the given circumstances are no longer of material consequence.

The internal expression of dissatisfaction heard from Dow's Michigan Division offers a classic case in point. It contained the implicit suggestion by one faction within Dow conversant with the Midland project to abandon the company's commitment to participate in the plant. See note 13, supra. The Dow U.S.A. Operating Board, however, decided not to follow this suggestion, finding sufficient reason to adhere to Dow's steam and electric contracts with Consumers. See note 29, supra. It is, of course, the Operating Board that sets Dow's

corporate policy, not the Michigan Division. What was material to the Licensing Board looking into possible suspension of the Midland construction permits was whether Dow intended to honor its contractual commitments with Consumers and continue to participate in the project. A full disclosure of the company's position in that regard, as announced by its Operating Board following a corporate review of the matter, was made in Joseph Temple's direct testimony.³⁴

We fully recognize that in undertaking an assessment of "materiality" there are no absolutes. As the Commission observed in Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480, 491 (1976), "determinations of materiality require careful, commonsense judgments of the context in which information appears and the stage of the licensing process involved". From this perspective, the Commission held in that case "that materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job" (id. at 486).

Applying that standard to the present situation confirms the soundness of the judgment by Dow and Consumers

34 Tr. 220, pp. 1-3, 8. No one disputed that Temple's direct testimony fairly and accurately described the corporate position of Dow with respect to continued participation in Midland -- but with all options left open. See discussion of the NRC Staff's position at p. 24, infra.

that the Michigan Division recommendation was not of sufficient materiality to be included in Temple's direct testimony. Staff counsel in the suspension hearing, responding to questions from the Licensing Board, spoke directly to this matter; he advised that, in Staff's view, no information "was excluded from the Temple testimony which would rise to the level of non-disclosure of relevant information".³⁵ The assessment by Staff counsel of the materiality question bears repeating:

Questioning and dissent are attributes of any viable decision-making process. What required disclosure in Mr. Temple's direct testimony was the corporate decision of Dow and why that particular decision was made, and not a detailed discussion of how that decision was made. The nature of the decision-making process is a proper area of cross-examination and, indeed, that area (Tr. 385-462) was and presumably will continue to be probed by Intervenor's cross-examination. Mr. Temple disclosed all relevant information in his direct testimony. [Emphasis added.]

On hindsight, it is abundantly clear that the Staff's appraisal of the situation is beyond criticism. As discussed

35 NRC Staff Memorandum In Response To The Atomic Safety and Licensing Board's Order Regarding Preparation Of Testimony of Dow Witness Temple, dated December 30, 1976, at p. 5 (hereafter referred to as "Staff Mem. 12/30/76").

36 Id. at 6.

more fully in the next section (pp. 28-34, infra), there was no effort made by Consumers to keep from the Licensing Board information relevant to the reservation expressed by the Michigan Division (see also pp. 8-20, supra). The decision not to include a reference to this matter in the direct testimony of Joseph Temple was made in order to concentrate Consumers' affirmative case on what was reasonably believed to be the only material disclosure for purposes of the hearing. Renfrow Affidavit I, ¶ 6; Rosso Affidavit I, ¶¶ 3, 4, 5; note 33, supra. At the same time, it was clearly recognized that the interim view of the Michigan Division would be a likely subject of discussion on Temple's cross-examination.³⁷ And, as pointed out by the Staff, this in fact occurred.³⁸ Moreover, Consumers, of its own volition, made available to all parties in advance of the suspension hearings the documents in its possession showing "that the Dow Michigan Division was unfavorable to the Midland Nuclear Plant", and these documents were made part of the evidentiary record.³⁹

37 See Renfrow Affidavit I, ¶ 15; Rosso Affidavit I, ¶ 9; Consumers Mem. 12/30/76, p. 22. And see Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 11 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at p. 7 (R/D Attachment H); Duran Notes on Dow/Consumer meeting of 11/8/76, at pp. 1, 3 (R/D Attachment J).

38 See Staff Mem. 12/30/76, p. 6; Tr. 385-462.

39 See Board Exhibit Nos. 1 and 2; Staff Mem. 12/30/76, (continued next page)

Thus, this is not a case of nondisclosure of information, or even of attempted nondisclosure. The Licensing Board was fully apprised of the Michigan Division recommendation for a corporate review based on its expressed dissatisfaction with the Midland project. Implicit in the Licensing Board's decision was its own conclusion that the central concern for purposes of the suspension proceeding was Dow's corporate position; the differing viewpoint advanced internally by the Michigan Division, though thoroughly aired before the Board, was of no material consequence to the outcome of the hearing.⁴⁰ The Appeal Board agreed.⁴¹ And subsequent events underscore the soundness of this conclusion. Thus, the stated intention of the company in 1976 to adhere to its contractual commitments with Consumers has been tested over time and remains intact. In 1978, Consumers and Dow entered into new, modified steam and electric contracts which contained an explicit Dow commitment to the Midland project in contemplation of commercial operation for steam generation by December 31, 1984.⁴²

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pp. 6-7; Consumers Mem. 12/30/76, pp. 17-19, and Attachment L thereto; Renfrow Affidavit I, ¶ 9; Tr. 175-76.

40 Licensing Board Order declining to suspend construction permits, LBP-77-57, 6 N.R.C. 482, 487-88, 494-96, 498 ¶¶ 15-22, 52-59, 71-72.

41 ALAB 458, 7 N.R.C. 155, 167 (1977).

42 Copies of these new modified steam and electric contracts (continued next page)

Accordingly, the judgment exercised by Dow and Consumers in their handling of the Michigan Division matter contains no suggestion of impropriety. This differing view of a corporate division within Dow was recognized by the lawyers responsible for preparing for the suspension hearing to be of general relevance to the issues presented. Renfrow Affidavit I, ¶ 5. However, it was not considered to be of sufficient materiality that a "reasonable staff member" would or should expect it to be included in the direct testimony of a Dow witness whose purpose was to advise the Licensing Board of the ultimate corporate position with regard to support for the Midland project. See Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, supra, 4 N.R.C. at 484, 486. That determination was subsequently concurred in explicitly by Staff counsel. Nothing has occurred since to suggest any infirmity in counsel's "materiality" assessment (see note 42, supra), or to question the reasonableness of the judgment exercised with regard to this matter.

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were submitted to the Licensing Board immediately after Dow and Consumers had reached agreement, under cover letter dated June 26, 1978.

C. THERE WAS NO ATTEMPT BY CONSUMERS
TO PREVENT FULL DISCLOSURE TO THE
LICENSING BOARD OF THE INTERIM VIEW
EXPRESSED BY THE MICHIGAN DIVISION

There is, moreover, no factual basis for the suggestion of an "alleged attempt by Consumers to prevent full disclosure of the facts relating to Dow's intentions with regard to this contract".⁴³ A fair review of the evidentiary record bearing on this issue leaves no room for a finding of impropriety. "Dow's intentions with regard to its contract" were openly discussed in Mr. Temple's direct testimony and were explored by the Board and all parties on cross-examination of this and other witnesses. Tr. 220, pp. 2-3, 5-6, 8; Tr. 385-462, 2687-2741. Those intentions, as described to and understood by the Licensing and Appeal Boards in the suspension proceeding, remain uncompromised today, and are in fact even more firmly fixed. By the explicit terms of the new Dow-Consumers contracts, Dow is still committed to participation in the Midland plant to satisfy its steam generation requirements (see note 42, supra), notwithstanding the earlier expressed view of the Dow Michigan Division that continued involvement in the project was not in Dow's best interest.

43 ALAB-458, 7 N.R.C. 155, 177, at n.87.

While there appears to be some question whether disclosure of the Michigan Division's interim position was fully intended by Consumers in light of the fact that no discussion of this matter was contained in Mr. Temple's direct testimony, such speculation misperceives the judgments made and is belied by the actions taken. We have heretofore explained the determination by counsel for Consumers and Dow as to the "immateriality" of the Michigan Division attitude with respect to the Midland Nuclear Plant (see pp. 20-27, supra). Though Consumers counsel was initially of the view that there might be some advantage to including a reference to this matter in Mr. Temple's direct testimony -- since counsel for Intervenor had already asked for this witness to be produced for cross-examination and it was anticipated that the subject would come up in any event at the hearing⁴⁴ -- the narrower focus on only Dow's ultimate corporate position was decided upon after further discussion with Dow's attorneys.⁴⁵

Counsel for both companies agreed that the material fact was Dow's corporate position regarding continued

44 Renfrow Affidavit I, ¶¶ 5, 15; Rosso Affidavit I, ¶¶ 3, 4, 6, 8, 10; Bacon Affidavit I, ¶ 7. And see Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 14, 15-16 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at p. 7 (R/D Attachment H).

45 Renfrow Affidavit I, ¶¶ 5, 7; Rosso Affidavit I, ¶¶ 2, 4; Consumers Mem. 12/30/76, Attachment F, Item IV.D. See also note 33, supra; Duran Notes on Dow/Consumers meeting of 11/1/76, at p. 7 (R/D Attachment I).

participation in the Midland facility; it was concluded that this central fact should not be obscured by reference to other positions within the company that were advanced and considered by the Operating Board, but ultimately rejected.⁴⁶ Dow's attorneys accurately observed that the inclusion of such a discussion in the direct testimony would only serve to invite extended cross-examination in an area of little or no relevance to the essential inquiry at the suspension hearing. Concern was expressed that, due to Mr. Temple's personal differences with certain employees of Consumers who interfaced directly with personnel at the Dow Michigan Division, his testimony, if allowed to wander, could well impact adversely on the ongoing contract negotiations between the two companies.⁴⁷

As drafts of Temple's direct testimony were prepared and exchanged between the Dow and Consumers lawyers for review and comment, the question as to how to treat the Michigan Division recommendation was left open. Rosso Affidavit ¶ 4. Consumers lawyers actually submitted to Dow on October 24, 1976, a proposed narrative of possible testimony separately

46 Renfrow Affidavit I, ¶ 6; Rosso Affidavit I, ¶¶ 4, 8; note 33, supra.

47 Rosso Affidavit I, ¶ 4; Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 9-12, 13 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at pp. 5, 6-7, 8-9, 10-11 (R/D Attachment H).

addressing the Michigan Division's interim position.⁴⁸

However, it was ultimately decided that this narrative should not be included in Temple's submitted testimony.

The efforts that went into arriving at a final draft acceptable to Mr. Temple and to the Dow and Consumers lawyers have been exhaustively covered in earlier filings with the Licensing Board, and there is thus no need to repeat those discussions here.⁴⁹ As they clearly reflect, the intent of all involved in the drafting process was to present a clear and accurate statement of Dow's corporate position with respect to continued participation in the Midland project -- based on the considered judgment that it alone was material to the suspension hearing (see pp. 20-27, supra) -- leaving such collateral matters as the Michigan Division's interim position and the ongoing contract negotiations between Dow and Consumers to be explored on cross-examination to the extent that the Licensing Board deemed it appropriate to allow a probing of these subjects. Renfrow Affidavit I ¶ 15; Rosso Affidavit I, ¶

48 Rosso Affidavit I, ¶ 6; and see Consumers Mem. 12/30/76, Attachment G, following p. 10.

49 See Consumers Mem. 12/30/76, pp. 9-17, 21-23, and Renfrow Affidavit I, Rosso Affidavit I and Bacon Affidavit I attached thereto, all of which are incorporated herein by reference. See also Tr. 474-516, discussing the manner in which Mr. Temple's direct testimony was prepared.

10. Mr. Temple fully concurred in this approach (id.; see also Tr. 220); the attorneys for Dow strongly urged it (see note 33, supra); Consumers' counsel agreed that the direct testimony should be so framed (see note 45, supra); and counsel for the NRC Staff supported that judgment as a responsible disclosure of "all relevant information".⁵⁰

To suggest in these circumstances that an effort was made to "hide" facts relevant to Dow's corporate position from the Licensing Board, or to prevent disclosure of information, is, we submit, unfair.⁵¹ In point of fact, it was Consumers'

50 Staff Mem. 12/30/76, p. 6.

51 The Nute cover letter to Rosso of November 4, 1976, accompanying the final version of Mr. Temple's testimony, states that [u]sing * * * [the question and answer] format obviates our concern that your initial draft of Mr. Temple's testimony could be said to be misleading, or even disingenuous, by the intervenors or the NRC". Consumers Mem. 12/30/76, Attachment K. It should be clear from the text of the letter itself that Nute's remarks hardly require the inference that Consumers had proposed "misleading" or "disingenuous" testimony on Dow's current corporate position with respect to the Midland plant. Rather, Nute's alleged "concern" with Rosso's earlier draft centered on two points: (1) that it was in narrative form and thus might give the erroneous impression that Temple was "attempting to tell an all-inclusive story" about the Dow decision, and (2) that it failed to highlight that Temple was testifying in response to Consumers' questions, not in response to any questions Dow may have asked. Id.; see also Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 3, 6-7 (R/D Attachment I); Nute Notes on Dow/Consumers meeting of 11/1/76, p. II.B.2 (R/D Attachment E). While Consumers' counsel did not share Nute's misgivings as to either point (Rosso Affidavit I, ¶ 8), it was recognized that the question and answer format removed whatever ambiguities might have been perceived. Nute's letter clearly reflects Dow's approval of the change.

counsel who took the initiative to bring the Michigan Division matter to the attention of the other parties in the suspension hearing in the first place. Despite the fact that Intervenors had made no request of Consumers for documents in advance of the hearings (Tr. 93, 111-12, 180), Consumers nonetheless, on November 3, 1976, made available for inspection and copying in Jackson, Michigan, all the materials which formed the basis for its prepared testimony (Tr. 268), including the Temple memorandum to Mr. Orefice of September 8, 1976 setting forth the Michigan Division's interim position in opposition to the Midland Plant, and the Temple request of September 13, 1976 for a full corporate review of the question.⁵² Also made available at that time were the minutes of the September 13 meeting containing a discussion of this entire matter. Renfrow Affidavit I, ¶ 9.

Intervenors' counsel made no effort to examine these documents prior to the hearing, but instead made a request for them as the hearing commenced (Tr. 175-76). They were promptly turned over by Consumers at that time. Also, certain Dow documents which disclosed the Michigan Division's interim position were produced to counsel for Intervenors (Tr. 209). Obviously, such documentation had sufficient tangential

52 Consumers Mem. 12/30/76, Attachments L, O and P.

relationship to the preparation efforts undertaken for the suspension hearing to require production under normal relevancy standards that apply in the discovery process. Such a judgment by Consumers does not, however, suggest any inconsistency with its determination as to the materiality of this information. Routinely, counsel turn over in discovery numerous documents which are viewed as relevant for production purposes albeit entirely immaterial to the issues under consideration.

It is, of course, the function of responsible advocacy to focus the presentation of a client's position on those facts which are deemed material to a resolution of the controversy. While opposing counsel may well differ in their assessment of "materiality" because of their conflicting views on the merits of the case, neither can be faulted for not highlighting certain information in his direct testimony which the other might conceivably consider to be relevant if, as happened here, that information was made available to opposing counsel on discovery for inspection and copying.

Consumers responsibly fulfilled its disclosure obligations by producing the materials pertinent to the Michigan Division's interim position with regard to the Midland Plant and its recommendation for a full corporate review. As a result, this matter was thoroughly probed at the suspension hearing on the cross-examination of Mr. Temple, notwithstanding

the judgment of both Dow's and Consumers' lawyers that it was of no materiality. Both as a matter of law and as a matter of professional responsibility, Dow's corporate position relating to its commitment to the Midland plant was made known to the Licensing Board in a proper and forthright manner. The present inquiry should therefore be summarily dismissed.

III. Conclusion

For all of the foregoing reasons, Consumers submits that the suggestions of possible impropriety with respect to its role in the selection of Mr. Temple as a Dow witness at the Midland suspension hearing, and in the preparation and presentation of his testimony, are not well taken. While reservations were understandably expressed by both Dow and Consumers counsel over using Mr. Temple as the witness to describe Dow's corporate position, no effort was made to keep him from testifying. Nor was there any attempt made to deny the Licensing Board access to documents or testimony relevant to the Michigan Division recommendation. The direct testimony of Mr. Temple did not address this subject because it was considered to be immaterial to the issues in question; the reservations about continuing with the Midland project voiced by the Michigan Division had undergone a full corporate review and not been accepted. Dow's corporate position was to honor its contractual commitment to Consumers and continue to

participate in the Midland facility, while regularly reassessing alternative options. A full and accurate disclosure of that position was made in Mr. Temple's direct testimony. It continues to be the Dow position to this day.

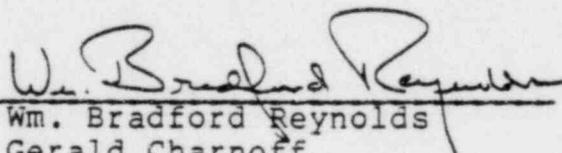
Consumers acted at all times and in all respects in a proper, professional and responsible manner throughout the course of the suspension hearings. The present inquiry should therefore be summarily dismissed in such manner as to remove any hint of impropriety.

Dated: March 30, 1979

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:



Wm. Bradford Reynolds
Gerald Charnoff
Alan J. Weisbard
1800 M Street, N.W.
Washington, D.C. 20036
Tel.: (202) 331-4100

Counsel for Consumers Power Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF JUDD L. BACON

Judd L. Bacon, being first duly affirmed, states as follows:

1. I am employed by Consumers Power Company ("Applicant") as a Managing Attorney in its Legal Department. My business address is 212 West Michigan Avenue, Jackson, Michigan. My responsibilities include supervision of legal matters relating to the licensing of the Midland Nuclear Plant. More specifically, I have actively participated in preparations for presentation of Applicant's case in this proceeding, working with attorneys from Isham, Lincoln & Beale who have been retained to represent Applicant in the NRC licensing proceedings on remand from the U. S. Court of Appeals for the District of Columbia Circuit.

2. This affidavit supplements paragraphs 3 and 6 of my affidavit in this proceeding dated December 30, 1976, filed with the "Memorandum of Licensee, Consumers Power and Its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence", on the subject of the identity of a Dow witness for the proceeding.

3. In January 1977, Dow produced on discovery a set of typed notes of the September 21, 1976 meeting which was described in paragraph 3 of my December 30, 1976 affidavit. These notes (Midland Intervenors' Exhibit 25)

were said to be authored by Leslie F. Nute, a Dow attorney who attended the meeting, sometime after the meeting, based on his recollection (as he did not keep his handwritten notes) and his review of Mr. Klomparens' notes of the meeting (Document No. 14 of "Dow Priority 2 Documents") (Tr. 2244, 2245).

4. Nute's post meeting notes raise an issue which was not addressed in Applicant's December 30, 1976 filing, namely whether Applicant had suggested to Dow that it produce a witness to testify to the Dow position on need for steam and intentions concerning its fossil-fired facilities who would not be knowledgeable of the Dow Michigan Division interim position that the Midland Nuclear Plant project was "no longer good for the Michigan Division". In particular, lines 3-5 of paragraph II.B.4 of Nute's notes state that "Rex (i.e., Rex Renfrow) suggested that Dow witness might be someone from Dow Chemical USA or Corporate area who is unaware of Midland Division recommendation to Oreffice". Mr. Nute or someone else evidently passed this misconception along to Dow management, for it was repeated in the testimony of Paul Oreffice (Tr. 2703, 2704).

5. I was present at the September 21, 1976 meeting. To the best of my recollection, neither Rex Renfrow nor anyone else representing Applicant suggested then or at any other time that Dow produce a witness who was unaware of the Michigan Division's interim position or recommendation. The Dow representatives were advised at that meeting that we would need a Dow witness to testify in the proceeding with respect to the Dow corporate (i.e., Dow USA) position on the issues remanded by the U. S. Court of Appeals for the District of Columbia Circuit relating specifically to Dow's intentions. While Mr. Falahee did make a statement at that meeting that if Dow breached its contract to buy electricity and steam from Applicant, there would be a sizeable legal problem between the companies, that statement was not coupled

with a suggestion that Dow produce a non-knowledgeable witness, since no such suggestion was made.

6. At or about the time of the September 21, 1976 meeting with Dow, I recall discussing with Mr. Renfrow alternative Dow witnesses who might be appropriate. In those discussions, it was never suggested that we offer a Dow witness who was not aware of the Dow Michigan Division interim position. In our view, the only likely candidates other than Mr. Temple were Mr. Paul Oreffice, President of Dow USA, and Mr. Alden J. Klomparens, who had been placed in charge of the Dow task forces involved in the Dow USA corporate review initiated at Mr. Temple's request. Both of these men were fully familiar with the Dow Michigan Division view. I do not recall whether these alternatives were suggested to Dow at the September 21 meeting.

7. As stated in paragraph 6 of my December 30, 1976 affidavit, I received a call from Mr. Milton Wessel, special litigation counsel for Dow, early in the afternoon of September 27, 1976. Mr. Wessel advised me of the results of the Dow USA corporate review, and the matter of providing a Dow witness for the suspension hearing was also discussed. I have no independent recollection of what was said with respect to the Dow witness. However, Mr. Wessel's September 27, 1976 memorandum to Mr. Nute concerning that telephone call (Consumers Power Exhibit 24) discloses on page 2 that I said we wished to meet with "whoever Dow wants to testify". Page 3 of the memorandum reflects a discussion of various Dow employees who would be knowledgeable about the matters I believed the Dow testimony should cover. It also reports that I said we would prefer as a witness to Joe Temple, "someone who was 'enthusiastic' about the nuclear plant". Despite that preference I never suggested that the witness or witnesses be "unaware" in addition to being "enthusiastic". In any event, Mr. Wessel's memorandum states that he and I

agreed that it was the Dow corporate position, not Joe Temple's personal views, that were really involved in the case. As reflected in paragraph 7 of my December 30, 1976 affidavit, it was soon clear that Mr. Temple was going to be the Dow witness. Not only was that choice not disputed by Applicant or its counsel, but, as that paragraph indicates, Mr. Renfrow and I at that time argued for inclusion of the Dow Michigan Division position in the written direct testimony of Mr. Temple, a draft of which was discussed with Dow counsel in Midland on September 29, 1976.

Judd L. Bacon
Judd L. Bacon

Subscribed and affirmed before me, a Notary Public, this 28th day of March, 1979.

Quinn L. [unclear]
Notary Public, Washtenaw County, MI
My Commission Expires 1-12-82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF JAMES B. FALAHEE

James B. Falahee, being first duly sworn, states as follows:

1. I am employed by Consumers Power Company ("Applicant") as Senior Vice President in general charge of legal, accounting and computer services, and regulation. My business address is 212 West Michigan Avenue, Jackson, Michigan. My responsibilities include general supervision of Applicant's Legal Department. In September 1976, I held the position of General Counsel of Applicant, and I participated in discussions with Dow representatives and counsel for Applicant in this proceeding, as well as with other officers and employees of Applicant, concerning Dow's commitments and participation in Applicant's Midland Nuclear Power Plant.

2. On September 21, 1976, I participated in a meeting at Dow's offices in Midland, Michigan. Also present were Judd Bacon and Rex Renfrow, representing Applicant, and Leslie F. Nute, James H. Hanes and Alden J. Klomprens, representing Dow. The purpose of the meeting was to assist Dow in arriving at its corporate position concerning continued participation in the Midland Nuclear Plant project by providing the Dow representatives with our views on the likely impact of various possible Dow positions upon pending legal proceedings, primarily the suspension proceeding to be held by the ASLB in connection with the

issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit in the Aeschliman case. The content of the meeting has been described in the affidavits of Messrs Renfrow and Bacon filed with the ASLB on December 30, 1976. This meeting was one of several held to enable Consumers Power to comment and provide information on matters assigned to the Dow "task forces" that had been formed to review various aspects of possible Dow positions concerning Dow's continued participation in the project.

3. The affidavits and other material filed by Applicant on December 30, 1976 do not address one allegation contained in later testimony of Dow witnesses and appearing in paragraph II.B.4 of Mr. Nute's typewritten notes of the meeting as follows: "Rex suggested that Dow witness might be someone from Dow Chemical USA or Corporate area who is unaware of Midland Division recommendation to Orefice"

4. I do not recall Rex Renfrow or anyone else suggesting to the Dow representatives at this or any other time that the Dow witness should be someone unaware of the Midland Division recommendation. As I recall, the issue of the identity of the witness was raised in the meeting by Mr. Nute after we said that it was important to the cost benefit analysis to know what Dow's position was on the nuclear project. Nute said he had a problem in using Mr. Temple as the witness because of the latter's recent public statement to the effect that he believed the nuclear project was no longer beneficial to Dow. The essence of my response to that concern was that it was not what Temple had said that was important, but what the current Dow position is. Regardless of who the witness might be, he would be required to state the current corporate position in order to satisfy the direction given by the Court of Appeals.

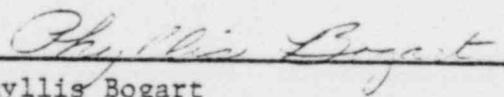
5. Mr. Nute's notes (Item II.B.4) also state that I threatened to sue Dow if Dow's testimony in the hearings was "not supportive of Consumers" and suspension or cancellation of the construction permits resulted. I do not

believe I made the statement as attributed to me by Mr. Nute. I did remind the Dow representatives that Dow had a contractual obligation to provide licensing support to Consumers Power. I also made a statement to the effect that Consumers Power believed it had a valid contract with Dow, and that if Dow did not perform the contract then Consumers Power would regard it as having been breached, which would result in a considerable legal problem between our companies that I hoped could be avoided. My recollection is that Jim Hanes said that he hoped it could be avoided, too. My statement related only to the question of whether or not Dow would continue to live up to its contract to purchase steam and electricity from Consumers Power. It was definitely not coupled with any suggestion that Dow either furnish a witness unfamiliar with its Michigan Division position on the matter or furnish a witness who would not testify fully and truthfully.



James B. Falahee

Subscribed and sworn to before me, a Notary Public this 28th day of March, 1979.



Phyllis Bogart
 Notary Public, Jackson County, Michigan
 My Commission Expires July 24, 1982

Commission of our position in a brief we had been ordered to file on September 29, 1976, Later that week I was informed that a meeting would take place with Dow's attorneys and with the head of the Dow corporate review, Mr. Klomprens, on September 21, 1976. The purpose of the meeting was to discuss the impact of the Aeschliman decision on the Midland project. I was requested to discuss the procedural framework, issues and scheduling of the hearings called for by the Commission.

4. At that time, I had never met with or talked to any one from Dow nor had I any knowledge of the relationship between Dow and Consumers. I did learn, prior to the 21st, the general background and what Consumers perceived to be Dow's problems with the nuclear project. Three factors seemed to be of paramount concern: (1) Dow was worried that the suspension hearing might result in Consumers slipping the construction schedule and increasing the cost of Midland; (2) Dow was concerned that they had no direct control over the project cost or schedule; and (3) Dow personnel, especially those employed by the Michigan Division, were concerned about Joe Temple testifying because of his personal views about Consumers and the project and the documents in the files which set forth these views. Since I did not know at this time what the ultimate Dow corporate position would be, I set forth my presentation in such a way as to cover these general concerns.
5. On September 21, 1976 I accompanied Messrs. Judd L. Bacon and James B. Falahee to Midland, Michigan for a meeting with Messrs. Hanes, Nute, and Klomprens of Dow. Mr. Bacon is a Managing Attorney and Mr. Falahee was General Counsel of Consumers Power

Company. Mr Hanes was introduced as counsel for Dow, USA, Mr. Nute as counsel for the Michigan Division of Dow and Mr. Klomprens as the head of Dow, USA team assigned to review Dow's continued participation in the Midland nuclear project. The meeting lasted two to three hours and I spoke approximately 75% of the time. I explained the issues which had been remanded by the appellate court in Aeschiliman and the relationship of the suspension hearing to the full hearing on the remanded issues. I also discussed with Dow the time period within which decisions in the suspension hearing and the remanded hearing could be expected. Finally, I discussed the impact of various positions which Dow could take with regard to the ultimate outcome of the hearings. Following the discussion of the impact of the various Dow positions, Mr. Falahee stated that he wanted it clear that this discussion related only to the impact on the hearings and that it was not intended to address the tremendous legal problems that would face Dow and Consumers if Dow breached the contract. At no time did Mr. Fallahee suggest in any way that legal action by Consumers was dependent on the witness to be presented by Dow. While there were additional meetings between Dow and Consumers, I did not participate in another meeting with Dow until September 29, 1976.

6. I categorically deny that I ever recommended that Dow present anyone who was unaware of the Midland Division recommendation to Dow U.S.A. In fact, as stated above, I had become aware that Dow was concerned about presenting Joe Temple as a witness because of his personal opinions. In discussing this with Judd Bacon prior to the meeting, we discussed whether or not there might be other Dow witnesses who were acceptable to us. We

concluded that a witness from Dow U.S.A. might be advantageous because of Temple's personal opinions and previous statements, and concluded that the only two possibilities were either Mr Oreffice, the President of Dow, U.S.A. or Mr Klomprens, who was head of the review team. Since we did not believe that we could obtain Mr. Oreffice as a witness, we concluded that if Dow was extremely wary about presenting Mr. Temple that we would recommend and accept Mr. Klomprens as the witness. Of course, the reason for this position was that Mr. Klomprens was currently conducting a review of the entire Dow-Consumers relationship, including the Midland Division recommendation. At the meeting, Dow did express its concern regarding discovery and Mr. Temple's personal views. It was at that time that I suggested that if this really bothered Dow, they might want to consider providing us with another witness from Dow, U.S.A. I did not offer Mr. Klomprens name at that time and the matter became moot by September 29 when both Dow and Consumers agreed to present Mr. Temple. At no time did anyone at Dow or Consumers suggest to me that Dow believed we wanted to have a witness who was unaware of the Midland Division position. Indeed, the first time in which I knew that this was Dow's belief was during the testimony of Temple, and when we received the "Nute" notes. Had anyone discussed this with me prior to that time, I would have certainly corrected Dow's view.

7. With regard to my participation in this proceeding after the meeting of September 21, 1976, please see my affidavit dated December 30, 1976 which was previously filed in this proceeding.



R. Rex Renfrow III

Subscribed and affirmed before me, a Notary Public, this 23th day of March,, 1979.

Pattie J. D. d
Notary Public

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)

CONSUMERS POWER COMPANY)

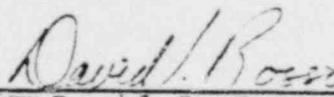
(Midland Plant, Units 1 and 2))
)

Docket Nos. 50-329
50-330

SUPPLEMENTARY AFFIDAVIT OF
DAVID J. ROSSO

State of Illinois
County of Cook

I, DAVID J. ROSSO, being first duly sworn, upon my oath certify that the statements contained in the attached pages are true and correct to the best of my knowledge and belief.



David J. Rosso

Subscribed and sworn to before
me this 28th day of March, 1979.



Notary Public

My commission expires: September 24, 1980

1. I am a partner in the firm of Isham, Lincoln & Beale. On September 3, 1976, I was assigned by the firm as the partner in charge of representation of Consumers Power Company ("Consumers") in the suspension and remand proceedings in the above-captioned matter. Mr. Michael I. Miller is the partner in general charge of the firm's representation of Consumers. Mr. R. Rex Renfrow III was an associate of our firm working with me on this matter.

2. I did not attend the meeting of September 21, 1976, between representatives of Consumers and Dow Chemical Company ("Dow") which is the subject matter of the memorandum of Mr. Nute, who was at that time counsel for Dow's Michigan Division.

3. At no time, either prior or subsequent to the meeting of September 21, 1976, did I discuss with any representative of Consumers the tendering at the remand suspension hearings of a Dow witness who had no knowledge of the interim position of Dow's Michigan Division. At no time did any representative of Consumers suggest that I should urge that Dow tender a witness who had no knowledge of the interim position of Dow's Michigan Division. To my knowledge, no representative of Consumers ever made any such suggestion to any other lawyer in our firm.

4. At no time did I, Mr. Miller or Mr. Renfrow discuss the possibility of tendering at the remand suspension hearings any Dow witness other than Mr. Temple, Mr.

Orefice (who was then President of Dow, U.S.A. and the senior Dow corporate official encharged with reviewing the Michigan Division's interim position and formulating the Dow corporate position), or Mr. Klomprens (the Dow official encharged with supervising the review of the Michigan Division's interim position), all of whom were completely familiar with the Michigan Division's interim position. At no time did I even consider tendering any Dow witness, other than those named above, nor to my knowledge did Mr. Miller or Mr. Renfrow consider any other witness.

5. At no time did I or, to my knowledge, Mr. Miller ever suggest to, or direct, Mr. Renfrow to urge Dow that a witness who had no knowledge of the interim position of Dow's Michigan Division be tendered as the Dow witness in the remand suspension proceedings.

6. It was the conclusion of myself, Mr. Miller and Mr. Renfrow, independent of any position which may or may not have been taken by Dow, that Mr. Temple was the Dow representative most directly involved in this matter and that he would be the logical witness to tender, but that if Dow had any objections to tendering Mr. Temple as the Dow witness, we would not object to tendering Mr. Orefice or Mr. Klomprens as the Dow witness.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

_____))
In the Matter of))
))

CONSUMERS POWER COMPANY))

(Midland Plant, Units 1 and 2)))
_____))

Docket Nos. 50-329
50-330

AFFIDAVIT OF MICHAEL I. MILLER

State of Illinois
County of Cook

I, MICHAEL I. MILLER, being first duly sworn, upon my oath certify that the statements contained in the attached pages are true and correct to the best of my knowledge and belief.

Michael I. Miller
Michael I. Miller

Subscribed and sworn to before
me this 26th day of March, 1979.

Marilyn Menke
Notary Public

My commission expires: August 31, 1980

AFFIDAVIT

1. I am a partner in the law firm of Isham, Lincoln & Beale, Chicago, Illinois. I have general supervisory responsibility for the representation by our firm of Consumers Power Company in connection with the construction permit proceedings for the Midland Plant which followed the remand of those proceedings by the Court of Appeals in 1976. Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).

2. Although I was not directly involved in the day to day preparation of Consumers Power Company's position in those proceedings, I was consulted from time to time by David J. Rosso and R. Rex Renfrow III, the attorneys in this office who had primary responsibility for these matters, in the late summer and fall of 1976. In general these consultations concerned matters of overall policy and strategy rather than the details of preparing for the then scheduled hearings.

3. The issue of which person from Dow Chemical Company should be presented by Consumers Power Company was discussed by me with Messrs. Rosso and Renfrow on one occasion in late September or early October, 1976. In this discussion there was no consideration of any witness from Dow Chemical Company other than Joseph G. Temple, Jr., Paul F. Oreffice or Alden J. Klomparens. These three witnesses

were identified by Mr. Renfrow as the three employees of Dow Chemical Company who were familiar with the manner in which the Dow Chemical Company had reached its decision with respect to continued participation in the Midland Plant. It was the consensus of Messrs. Rosso, Renfrow and myself that Mr. Temple was the preferred witness of the three since he had been most closely involved in the decision-making process at both the Dow-Michigan Division and Dow Chemical Company level. However, we agreed that if it was Dow Chemical Company's preference that Mr. Temple not testify, either of the other two Dow employees named above would be satisfactory. At no time did we consider a direction or suggestion to Dow that it supply any other person as a witness nor was there ever any discussion concerning presentation of a Dow employee who lacked knowledge of the Dow decision-making process with respect to the Midland Plant.

4. At no time was there any discussion by me with any representative of Consumers Power Company regarding use of any other employee of Dow Chemical Company as a witness other than Mr. Temple. At no time did any employee of Consumers Power Company suggest that an employee of Dow Chemical Company who did not have knowledge of the decision-making process regarding Dow's continued participation in the Midland Plant be presented as a witness.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))
_____)

) Docket Nos. 50-329
) 50-330

PROPOSED DESIGNATION
OF RECORD OF
CONSUMERS POWER COMPANY

In accordance with the terms of the January 4, 1979 Order Concerning Remanded Issues, Consumers Power Company submits the following "designation of all portions of the prior record which should be considered, including transcript references, affidavits, exhibits, documents, briefs and other writings". (Order at p. 10) Items on this list marked with an asterisk were not admitted into evidence at the suspension proceeding; copies of these documents are attached.

DESIGNATION OF RECORD

I. Transcript References

11/30/76	following Tr. 220	(Temple written testimony)
11/30/76	Tr. 218- 232	(Temple testimony)
12/ 1/76	Tr. 288- 462	(Temple testimony)
2/ 1/77	Tr. 2275-2482	(Temple testimony)

2/ 2/77	Tr. 2492-2672	(Temple testimony)
2/ 2/77	Tr. 2687-2741	(Oreffice testimony)
12/ 1/76	Tr. 235- 287	(Board discussion)
12/ 2/76	Tr. 474- 516	(Board discussion)
1/18/77	Tr. 1003-1004	(Board discussion)
1/20/77	Tr. 1507	(Board discussion)
2/ 1/77	Tr. 2241- 74	(Board discussion)
2/ 1/77	Tr. 2262- 63	(Board ruling)
2/ 1/77	<u>In Camera</u> Tr. 1-36	(Board discussion)
2/ 2/77	Tr. 2742	(Board ruling)
2/ 3/77	<u>In Camera</u> Tr. 1-9	(Board discussion)
12/ 3/76	Tr. 661- 680	(Wessel statement)

II. Pleadings

12/22/76 Dow Memorandum Regarding Hearing Preparation

12/30/76 Memorandum of Licensee, Consumers Power Company and its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence (Consumers Mem. of 12/30/76)

Attachment A - Report of Dow-Consumers Nuclear Project Meeting, September 13, 1976

Attachment A - Dow-Consumers Power Co. Meeting Agenda, September 13, 1976

Attachment B - Brief of Consumers Power Company dated September 7, 1976

Attachment C - Chronology Midland and Uranium Fuel Cycle Appeals, September 15, 1976

Attachment D - Statement by J. G. Temple, Jr., Before the Saginaw Valley Press Club, November 12, 1975

Attachment E - Aeschliman v. Nuclear Regulatory Commission, D.C.Cir., July 12, 1976 (Slip opinion. unnumbered page)

- Attachment F - Important Progress Dates,
Midland Nuclear Plant
 - Attachment G - Joseph G. Temple's Notes
of September 13, 1976 Meeting with
Consumers Power Company
 - Attachment B - Outline for 9/24/76 Meeting
at Dow
 - Attachment C - Draft of Joseph G. Temple, Jr.,
Testimony Prepared by Milton R. Wessel
 - Attachment D - Outline for Joseph G. Temple,
Jr., Testimony Prepared by R. Rex Renfrow III
and Judd L. Bacon
 - Attachment E - Draft of Statement to be Read
by Joseph G. Temple, Jr. Prepared by Milton
R. Wessel
 - Attachment F - Draft of Joseph G. Temple, Jr.
Testimony Prepared by Leslie F. Nute
 - Attachment G - Draft of Joseph G. Temple, Jr.
Testimony Prepared by David R. Rosso
 - Attachment H - Draft of Affidavit of Joseph
G. Temple, Jr. Prepared by R. Rex Renfrow III
and Copy of Affidavit of Joseph G. Temple, Jr.
as Executed
 - Attachment I - Draft of Joseph G. Temple, Jr.
Testimony Prepared by Leslie F. Nute
 - Attachment J - Draft of Joseph G. Temple, Jr.
Testimony Prepared by R. Rex Renfrow III,
David J. Rosso, Milton R. Wesel, Leslie F.
Nute and David A. Duran
 - Attachment K - Testimony of Joseph G. Temple,
Jr. as Filed
 - Attachment L - Notice of Availability of
Documents for Inspection of Consumers Power
Company, filed October 29, 1976
 - Attachment M - Non-Disclosure Agreement Between
The Dow Chemical Company and Isham, Lincoln &
Beale
 - Attachment N - Letter from Myron M. Cherry to
Milton R. Wessel and James N. O'Connor, dated
September 27, 1976
 - Attachment O - Letter from Milton R. Wessel to
Myron M. Cherry, dated October 12, 1976
 - Attachment P - Letter from Peter A. Flynn to
Milton R. Wessel, dated October 27, 1976
- Affidavit of R. Rex Renfrow III
(Renfrow Affidavit I)
- Affidavit of David J. Rosso
(Rosso Affidavit I)
- Affidavit of Judd L. Bacon
(Bacon Affidavit I)

- 12/30/76 NRC Staff Memorandum in Response to the Atomic Safety and Licensing Board's Order Regarding Preparation of Testimony of Dow Witness Temple (Staff Mem. 12/30/76)
- 12/31/76 Memorandum of Intervenors Other Than Dow Chemical Company Concerning Pending Issues
- 10/ 3/77 Consumers Power Company's Petition for Reconsideration of Portions of Board's September 23, 1977 Orders
- 4/24/78 NRC Staff Reply to Commission's April 10, 1978 order
- 4/24/78 Statement of Consumers Power Company with Regard to What Issues Remain for Commission Consideration
- 4/24/78 Intervenors' Response to Commission Order of April 10, 1978

III. Exhibits

- Board Exhibits 1 and 2
- Consumers Power Exhibit 24 (Wessel memo)
- Midland Intervenors' Exhibit 25 (Nute Notes)
- *Midland Intervenors' Exhibit 71 (Hanes' Notes)
[Attachment A]

IV. Documents

- *Document #14 of "Dow Priority 2" documents, submitted to the parties on December 8, 1976 (Klomprens' Notes) [Attachment B]
- *Documents #8, 11, 17, 19, 31, 33, 35 and 36 (Nute Notes and Duran Notes) of "Dow Priority 1 and 2" documents which Dow initially claimed were privileged

by memorandum of December 7, 1976. These documents were released on February 1, 1977, when the Licensing Board overruled the claim of privilege, Tr. 2262-63. [Attachments C-K, respectively]

*Youngdahl Memorandum dated September 16, 1976.
[Attachment L]



Wm. Bradford Reynolds
Gerald Charnoff
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D. C. 20036
Tel.: 202/331-4100

Counsel for Consumers Power Company

Dated: March 30, 1979.

ATTACHMENT A

9/21/76

Jim Fallshaw
Rex Bonfina
Judd Larson

October 6, 1976, 11:30 hearing on suspension of construction permits.

Profess criticized testimony.

Reserve October 6, 7 & 8.

Review legal aspects of "Decision."

Report to CP before 22nd. No surprises. Your witness is essential!

Rex

What issue? What is Dow's role?

Suspension hearing from Big Hearing.

Issues in Big Hearing

#1. ACRS Issues

'72 generic issues resolved.

Develop other things.

'72 generic letters. 16 items.

[J] spray valves - resolved.

4/16/76 letter: to Chairman of Commission

All issues

They stay about 3 years ahead. All handled before.

#2. (Electricity) Energy Conservation - Another Rate Cap.

Substitute plant for conservation.

Just electric side - 10 yr. growth, 5%/yr.

Diablo Canyon.

Niagara Mohawk.

CP - feel loaded for bear on energy conservation.

Conservation has been factored in.

#3. Changed circumstances of Dow K.

Ct. referring to items Cherry used to ask et. to reopen--can't limit to 1974. Must talk about today. Original Plant Exp. State put. See (11/1/76) p. 11.

How supply when X unit down? (fossil)
Does Dow need steam now?
Dow factories include end product? "At Ever Cons."
Dow intent- electricity, steam.
End use.
EPC - under development.
So likely desirable to supply Dow?
Trade secrets.
Delivery schedule.

#4. Cost/Benefit Analysis.

Fossil or Solar? "Fossil" does not show.

#5. Other unaddressed fuel cycle issues.

Transportation of radioactive waste--S-3 sets forth.
Midland to change spent fuel pool--more rods.
This plant goes on line in 1981--know where waste go.
Commission working on wastes.

Box (cont'd)

Suspension Hearings. Oct. 6

Significant adverse impact

- Coalition v. Safe Nuclear Power vs. AEC
- 2 studies on delays.

Reasonable alternatives foreclosed.

Effect of delay.

Tilt cost/benefit analysis.

General Public Policy Concerns.

Go back.

#1. NRC will come out with interim fuel cycle rules by 1
Final Rules in a year.

2 cases - 4 mo. period--interim rule
12 mo. period--final rule

Impact for continued construction is small.
Suspension worse than going ahead.

#2. Will alternatives be prejudiced by cont'd. construction?

Don't see a big problem.

If foreclose an alternative--can you redress it?

Steen - may foreclose generation from another source.
(May prejudice Dow's alt. steam plans.)

Old FES base is gone. Whole new case. Have to re-do.

Can you suspend construction.

300000 to get off the grid.

Increased Costs tied to delays.

Increased charges 2

\$700 if decisions to spend

Delay of 1 year raises costs \$1000 + also cost of purchase to supply Dow.

Have had 2 letters by end of Sept.

Need figures out by Nov what a delay will cost Dow -
1 year delay in construction throws us 10 mos. behind
before on stream.

(chart in handwritten notes)

Need Dow to avoid suspension + if suspended would ultimate
lose license. Can't consider sunk costs in evaluation.

If live up to K but no longer economically viable. Will
Dow for K violation--shutdown costs, investment, 'backlog'

G. Decker - contractual fight.

General Public Policy Concerns - last item.

Jobs. Midland site.

Mr. Stan Arnold will testify as to unemployment.

Midland costs v. Gulf Coast expansion of jobs.

Sacramento Municipal Utility System - Calif.

5 B&W units operating.

- Judd Brown
 - Jim Falter
 - Rep. Leifer - Chicago testimony
 - Jim Hanes
 - John Hute
 - A. Thompson

Big hearing: -

1. Safety - ^{WTS - letter (report)} Crews will have to defend ^{has to be read for all items} several ~~items~~ ^{issues}
2. Energy Conservation
 - Crew feels they have good data on this & will not be major issue
3. Changed circumstances in Row Contract
 - Going to have to talk about it in today's situation -
 - will have to have a Row witness state Row's position.
 - Do you Row really need this steam
 - May even get into argument on end use (footnote).
 - May be helpful for Row to show how we have saved electricity through conservation
4. Cost Benefit Analysis
 - A Row witness will be needed - (what is our position now?) ^{steam?} ^{gas?}

growth - near term - $< 5\% / yr$ (2 yrs)

Meeting with Cons (cont)

9/21/76

4. — What are we going to do today

5. Any other fuel related issues
(transportation)

- This issue may come up - what
do you do with the fuel

What do you have to do to suspend a
license?

1. Will there be a sig. adverse impact
on environment? (if best is suspended)
- 2 cases will get prevented - 12 mo period
stopped 4 mo period

2. Whether reasonable alts will
be closed by continuing?
- Whether continuing construction would
affect whether flow can do something
with its alternate source of steel.

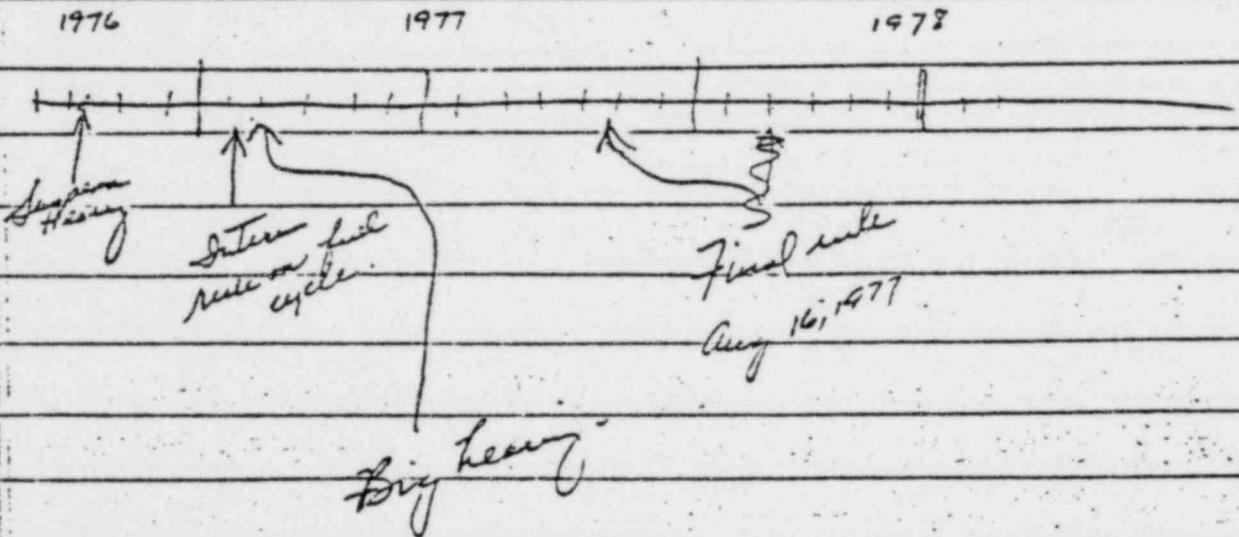
3. Effects of delay?
~~that~~ If flow does not want power
then Cons would have +300 MW extra
- ~~that~~ ∴ what flow intends to do is
important.

4. Whether cost benefit anal will
be better tilted by continuing investment

4 mo delay { \$70m to continue
\$130m to start & stop
- low risk... P.P. ... - In BS

4. (cont) - Steam portion important
* What would impact on flow
if 1 year delay or 4 mo delay
were required.

(1 year delay now would result
in 18 mo delay of when the
plant will come on stream)
(4 mo might be 1 yr. - Cons will delay)



Cons. said (Rex) that if flow takes
its position, the NRC will suspend
the construction of the plant and
(Jim) may ultimately lose its entire
construction license.

If flow said they were out of the
contract because it is ----- then
there may be a 50/50 chance that the
construction will be suspended.

If Dow supports the plant —
then Rex & Cons feel they can beat
the current Ct of appeals issues and
continue construction.

Jim { "If Dow takes this posture, Dow &
Rex will have a hellava legal
problem."

If Rex feels that Dow will
if construction is stopped, then goes
back thru all the approp^{ts} to
procure again, it will delay
plant 9-12 mo.

~~Comparison with ~~the~~ to Dow~~

— w —

(ATTACHMENT C)

MEETING BETWEEN CONSUMERS POWER COUNSEL (J. BACON, R. RENFROW) AND DOW COUNSEL (L. NUTE, M. WESSEL, D. DURAN), 9/29/76

I. Consumers & NRC Staff.

A. Larry Brenner - main trial counsel for NRC - had 1 day notice.

1. Staff going to have independent position - hadn't gotten it yet.
 - a. Didn't know what NRC position will be on suspension issue.
 - b. 10 months before staff will be ready to go to trial on substantive issues.
 - c. Staff will file brief today stating all of the above.
 - d. If hearings go on the Oct. 6, NRC will not put in an affirmative case - Consumers will have to go forward.
2. Cherry has filed affidavit - sets out his litigation schedule - Cherry really is booked until the 18th of Nov. - it is a legitimate request for delay.

B. Consumers strategy.

1. Will have to supplement environment report and recirculate it through NRC, take at least 90 days - puts it in March - wants to hold to the March date - Consumers doesn't want the substantive hearings to be moved out too far.
2. Consumers has filed new schedule (copy given) - what has been done (hopefully) is that November has been freed up for the suspension hearings - but still have to proceed forward on assumption that hearing will commence on Oct. 6 (suspension hearing).
3. Consumers concerns.
 - a. Joe Temple's personal feelings on the matter - problem of witness.
 - b. Question of what is going on in the negotiations which are now in abeyance - want to set up ground rules on what documents are discoverable in the big hearing - Milt said very reluctant to give up any Dow internal memos or notes on the negotiations - outside counsel for Consumers bluntly suggesting Dow and Consumers get together and renegotiate before hearings - have until 1/21/76 until discovery - Rex pushing Judd, and obliquely me, to get a renegotiated contract - Rex wants both sides to state ultimate negotiating position on stand and write environmental report based on those positions.

II. Discussion of written testimony draft.

A. Original contracts - 1967.

1. Intent of Dow at time - what it called for Dow to take - Dow's commitments in return - (letter notice of what our intent to take) - may need someone just to brief Joe and be able to be backup for Joe.
2. Dow's intention as to its own fossil units at that time.

B. 1974 modifications.

1. Changes in contract and their meaning - also reasons for changes.

C. Continuing Mich. Division of contract.

1. Basic business judgments as to why this is constantly reviewed.
2. 1976 review by the Division - what were the reasons for Joe saying what he said - objective and subjective - Consumers insists that this be brought out - Milt kept saying are you sure that want Joe to testify to this - Consumers insists that it does - Consumers wants to know what is there, but may not want to use it.
3. Action taken after review by Division - Consumers assumes that the decision was to refer to Dow Chemical U.S.A. for review - what were the alternatives in review - Milt said that may include filing suit - Consumers said no, only considering alternative sources of steam and electricity - corporate review considered what alternatives and how to meet problem of Air Pollution Control.

D. Present intent of Dow vis-a-vis steam and electric sources - that will get us into the 1976 contract renegotiations - Milt says he is concerned that if Consumers pushes too far, the Board will terminate the construction license - "cautions" Consumers that if you put on too much information, the Board may draw the conclusion that this is a very tenuous deal at best and license should be suspended - Consumers reply that they want to get it all out and try to explain it away.

III. Caucus.

A. Rex - no problem to general policy problems of Judd being involved, however, on sensitive issues, Judd will be excused (leaves Rex privileged as Joe Consumers' witness).

1. Dow witness will have to be provided.

2. Got to talk not only about 1974 modifications, but those of current discussion.
3. Best way to do that is to put it out in best light you can and then prepare for cross.

IV. Discussion of testimony of Temple with Consumers' lawyer.

A. Temple - is there any way you can keep them from digging into my personal feelings on the reasons for the 1976 decision?
Consumers - no, may not be material but Board will probably force you to testify as to those feelings, regardless. Milt - what about if Joe reads the following statement (reads)?
Consumers response is that don't want him to speak such a piece starting off, perhaps reserve it until later - then, Consumers said that they don't want him to read it at all - Temple says he would like to get through the hearing without having to answer any questions as to his personal feelings - Rex brought this up again in connection with the comments made in the Sept. 13 meeting, that he will be asked to give his personal feelings as to his reasons for reaching such a decision - Rex said you will probably be required to answer that kind of question.

B. Instructions by Rex to Joe.

1. Who is giving you the information should be available for backup if requested.
2. Information and data used to answer questions - kept in one file so that it can be brought out if necessary.
3. Milt - inquiry into reasons for decision is irrelevant, what Dow feels is the decision is important - Rex doesn't feel that way, feels that Dow economic analysis is proper area of discussion and can be brought by Board or Cherry - Again, a discussion by Milt & Rex over whether it is really necessary for Dow to have to supply all this information, Milt saying it wasn't really called for, Rex saying he thought it was really necessary - Rex didn't think the issue of nuclear v. non-nuclear steam would be raised at this hearing, but certainly would be covered at the big figure.
4. Start on Monday @ 8 AM and continuing over on Tuesday - have all backup witnesses present, particularly on first round.
5. Documents needed.
 - a. Those related to Air Pollution Control Problems.
 - b. Press releases from 1976 back to 1967.
 - c. Notices as to estimated take that may have been sent.
 - d. Backup documents for data given to Temple - place in separate files.

MEETING - CONSUMERS POWER - 10/12/76

Opening Discussion

- 1. Seabrook case.
- 2. Current status of Midland case.
- 3. M. Sinclair paper.
- 4. Limited appearances by labor organizations.

I. Seabrook case.

- A. Consumers to file amicus brief before Commission on legal issues, particularly need for power.
- B. Roisman has gone before 1st Circuit to get Commission order granting stay lifted.

II. Discussion of testimony due from Dow.

A. Section IV - Dow Chemical U.S.A. Review.

- 1. Discussion of graphs.
 - a. Black & Veatch - does Consumers have a copy of the study.
 - b. Apparently a difference in numbers between Dow and Consumers.
 - c. Gave them copies of Joe's graphs - liked them - if they use graphs, will use Joe's - haven't decided whether to go into this in detail, or just say what the decision was and let it go at that for cross.

B. Discussion of testimony from beginning.

- 1. Original Contracts.
 - a. Electricity off the grid - don't emphasize that electricity.
 - b. 3rd paragraph - where did 20,000,000 figure come from - measured at what point.
 - c. Leave this section out and only go with the next section (1974 modifications) and refer back - may be the way they (Consumers) will put in the case. Milt agains brings up that Dow should testify as little as possible - Consumers should use their people the most (Milt).

2. 1974 Modifications.
 - a. Documents stating money sunk in power plants to keep them going through 1980 - capital requests? Less than certain amount requests?
3. Continuing Review of the Contract by Division.
 - a. Milt doesn't want to make it an affirmative presentation, all the decision making process - stresses again that Consumers shouldn't get into this area on direct testimony - discussion with Rosso as to whether it should be presented on direct, as Cherry seems to know, or wait and face it on cross - again Milt suggests Consumers should prepare direct and give to Dow to review - Milt again suggests that Consumers shouldn't delve into Temple's reasons for his decision on Sept. 13, or that they shouldn't ask if he agrees with U.S.A. Board decision.
 - b. Judd left room and Milt informed Consumers some of Joe's reasons for his Sept. 13 decision.
4. Requirements.
 - a. List of "Dow Confidential" documents that we won't turn over - Black & Veatch study given to Bacon just before they left.
5. Dow Chemical U.S.A. Review of Division position.
 - a. Want to strike sentence "Other factors."
6. Present Intent
 - a. Electric demand projected for 1982 - less than 300,000 - what will it be under existing
 - b. Emissions from 1,000,000 lbs./hr. backup - will be no greater than the law allows.

backup documents for corporate review
negotiating documents for 1974
2 sets of notes for 1976

L. F. Nute

PURCHASED STEAM AND POWER FROM CONSUMERS POWER CO.

VS

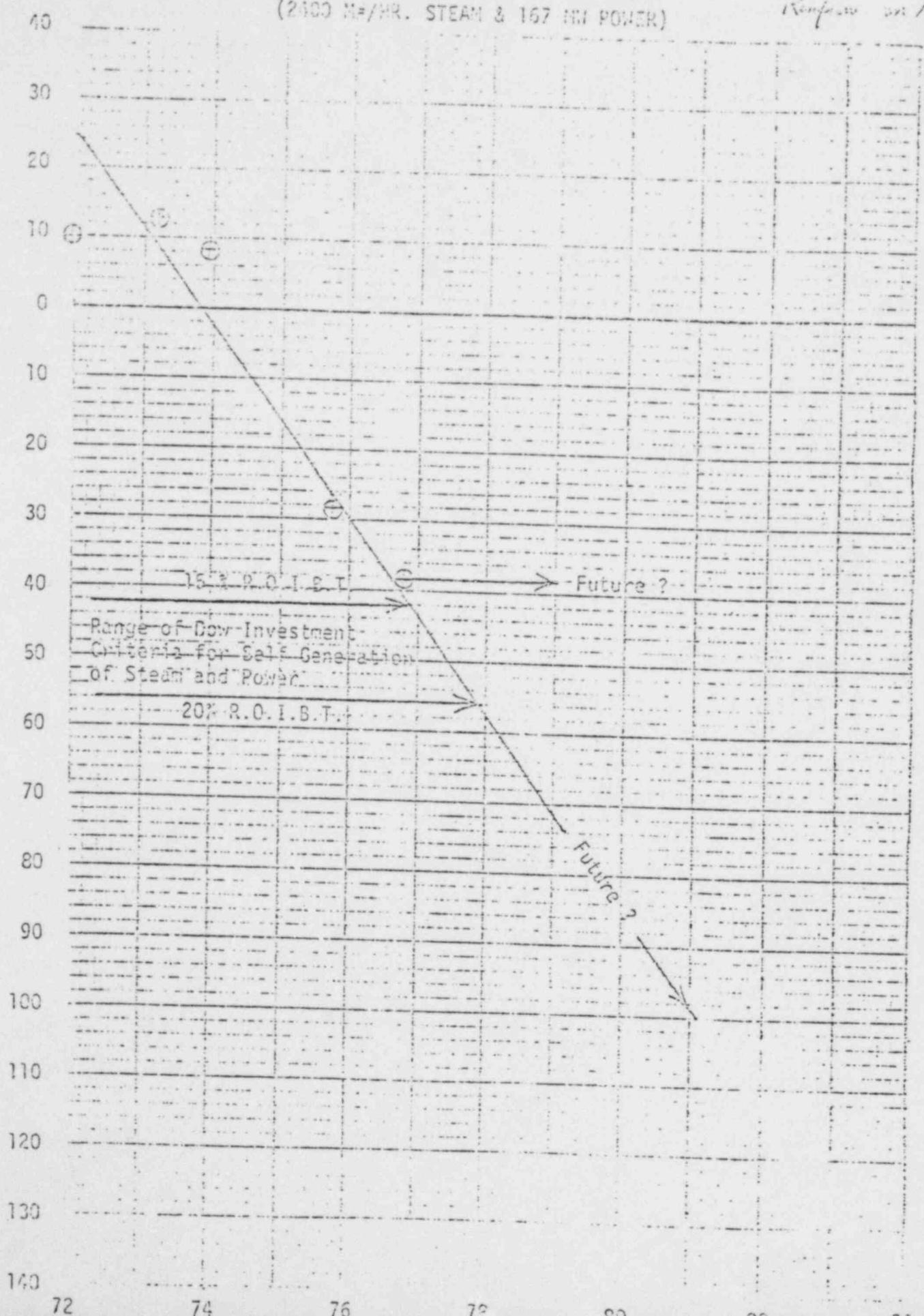
SELF GENERATION BY DOW @ ZERO % R.O.I.B.T.

(2400 MW/HR. STEAM & 167 MW POWER)

forward to:
Process
Process
Ranfman on 1/11/77

MILLIONS OF DOLLARS/YEAR
Cost Advantage of
Purchasing Steam &
Power from Consumers

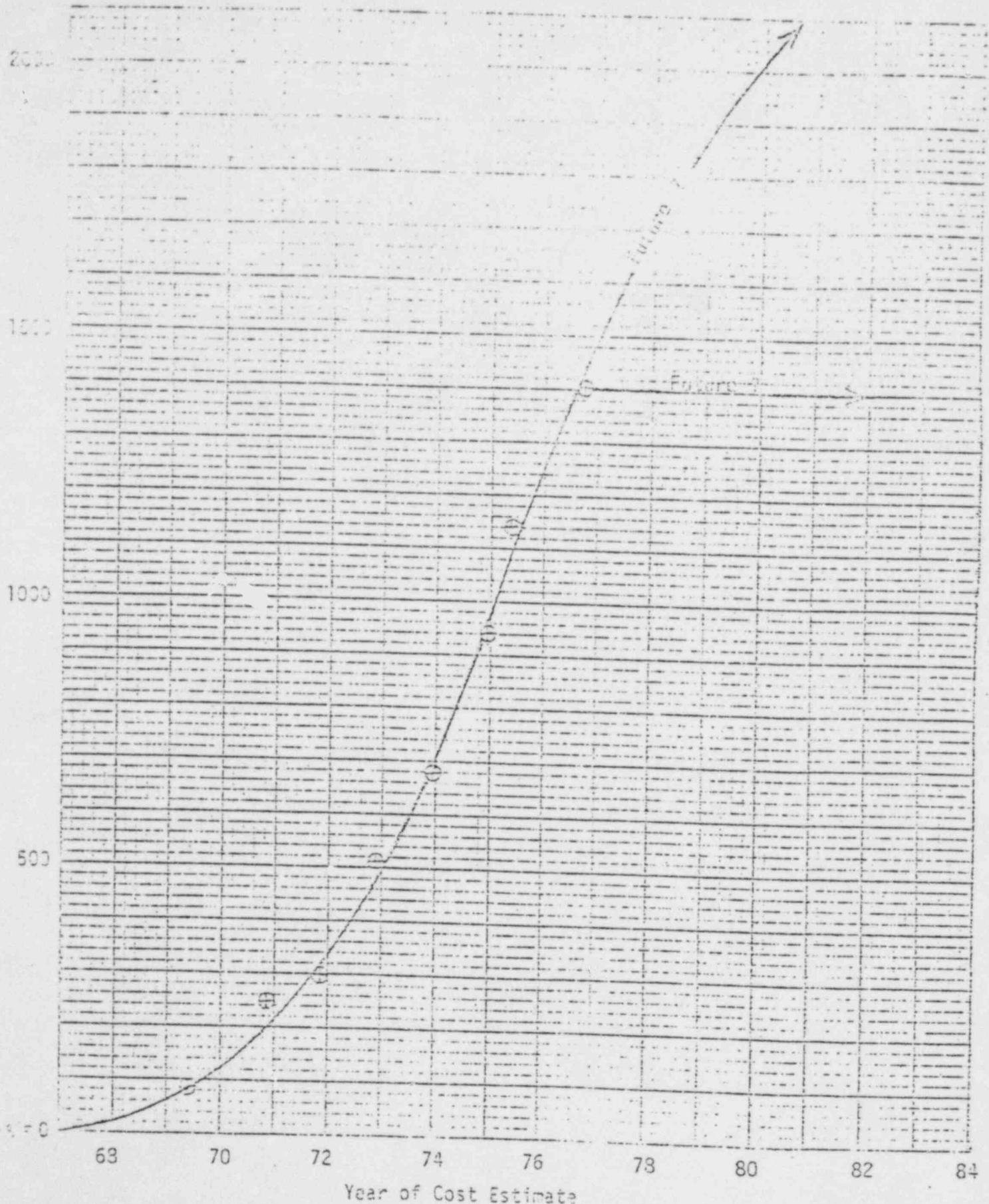
MILLIONS OF DOLLARS/YEAR
Cost Advantage of Dow Generation
@ Zero % Return on Investment



MIDLAND NUCLEAR PLANT CAPITAL COSTS INCREASES VS TIME

INITIAL PLANT COST = \$1.5,000,000

Cost Increase in Midland Nuclear Plant - Millions of Dollars



Note: Capital Costs of Dow Alternatives Are Also Up Significantly Over Same Period

J.G.T., Jr.
10/4/75

ATTACHMENT E

November 1, 1976 - Renfrow, Rosso, Wessel, et al

- I. Discussion of documents on view in Jackson
 - A. Two sets of documents that will be on view
 1. Those notes already passed will be on view
 2. Those notes seen under authority of the letter - wants it sealed envelope - take back and show to Cherry only under protective order - Milt again saying that Dow has no problem showing those documents to the world - just don't want Consumers to see them without seeing Consumers'.
- II. Discussion of their draft outline of testimony and Nute draft revision
 - A. Rosso on what he attempted to do - 2 things
 1. Tried to have a flow from Howell to Temple about discussion of contracts and past modifications - revision looks more like affidavit and less like testimony
 2. Tried to flavor the testimony a little, and that was taken out - wanted to know why this was taken out
 - B. Milt answer
 1. Changes were not inadvertent - good reasons and a lot of thought went into changes - we are concerned about cross-examination of Joe if your version were used - we want to make very clear that if plant sunk as a result of Joe's response on cross, that Consumers will turn around and sue Dow for breach by intentionally trying to sink the project
 2. Milt also afraid that Rosso draft would appear disingenuous and misleading - appears to be the complete story, but in reality is not - once you make decision to get into negotiations, then you have to be complete
- III. Discussion of Nute draft of 10/29
 - A. Howell language will be left out and covered on direct - have Joe read affidavit
 - B. Paragraph 1 - Rex wanted a qualifying letter rather than to put it in direct testimony - Milt gracefully conceded that Dow could do that since Consumers felt strongly - Consumers finally decided to put Joe's testimony in question and answer form.
 - C. Paragraph 1 - place in first person (follows from going question and answer route)

- D. Paragraph 2 - "Since 1967, when the General Agreement was executed, the Michigan Division periodically has reviewed the situation with regard to the economics of nuclear steam . . ."
 - 1. Last paragraph - add the complete conclusion of the Board.
 - 2. Give Joe letter containing information that was sent to Green on capacity, emissions, etc.
- E. Paragraph 3 - (copy . . .) will be changed to direct question and refer to it as an exhibit.
 - 1. second parenthetical statement (or for that . . . it [change to Dow]).
- F. Paragraph 4, discussion of conclusion of Board - line 3 - rewrite according to Milt's notes.
- G. Paragraph 5 - more complete explanation of why Dow wants an ROI - add a question discussing need for ROI.
- H. Paragraph 6 - explained about the resale restriction and its elimination.
- I. Paragraph 8 - the last phase - some explanation of how they could minimize costs, yet the nuclear alternative is better.

L. F. Nute

ATTACHMENT F

MEETING - NOVEMBER 18, 1976 - Consumers - Russo & Renfrow

CROSS EXAMINATION OF TEMPLE

- I. Initial discussion - areas to cover
 - A. Russo brought up prior references to shutting down in 1975 - Milt took exception, saying he didn't think that anything like that had been said, and, further, that there was a great deal of difference to Dow between 1975 and 1984.
 - B. Also cover how Dow figures its alternative costs, especially compared to Consumers.
 - C. Discussion of current negotiations.
- II.
 - A. Asked about reviews - Gaska, Burroughs
 - B. Economic review - Rex wants to get our coal price people together with their coal price people this week "to see what the differences are and whether they can be worked out".
 1. Rex also wants Joe to spend some time on economic study, Black and Veatch - and basis Burroughs used - want Joe to be more comfortable, not necessarily completely knowledgeable.
 - C. Other factors in the review.
 1. Joe refuses to mention that "we have a contract" and that one of the factors considered was the legal liability of breaching the contract.
 - D. More stress on how long can they run - what have we done - what studies run - what is past history of reliability?
 - E. 1,000,000 lbs./hr. backup - can we give any hard data on emission on how much it will be run on auxilliary?

L. F. Nute

ATTACHMENT G

MEMORANDUM TO FILES

D. A. DURAN

RE: DOW/CONSUMERS POWER MEETING OF 9/29/76

The following memo is an accurate summary of what was said during the meeting; however, it should not be regarded as being verbatim in any sense.

Messrs. Nute, Wessel and I met with Judd Bacon and Rex Renfrow on September 29, 1976 in Building 47 of Dow's Midland Plant.

Rex stated the meeting with the statement that Larry Bremmer has been chosen to try the case. Rex stated that this assignment came from staff meeting with Consumers Power. Rex also stated that he doesn't know what the answer will be on the expansion question. He said it will take them ten months to get to the hearing on the substantive issues from the date the necessary information is received. He said the ER will still be filed on 10/22/76. He stated that he has told Consumers Power that this ten-month delay is too long for us. He stated that he intends to file their brief.

Lee asked what the source of the screw-up was.

Judd stated that they just handed the assignment to someone else.

Rex stated that Marty is now on his way to Europe. He stated that Dick Brown was preparing to hear this. Rex pointed out that Dick has now come over to take some of his job and is not ready to handle the job of the hearing. This is why Bremmer is going to do it. Rex stated that, on the bottom line, we can get them ready to go to the hearing. Rex stated that he has given Consumers Power Roy Wells and Dick Kiely's names. Rex stated that if we have to go on the 6th, they will not be able to put forward a substantive case at all. Rex pointed out that if no one meets the burden of going forward, they should cancel the hearings.

Judd stated that they are very close to getting ready for the interim hearing.

Rex stated that they have word that Myron Cherry has his trial schedule filled up to date and a check of Judge Cavelo's calendar confirms that Myron is tied up until November 18, 1976. Rex stated that they think the Board will give or grant this delay of the hearing. Rex stated that his main concern is that it will move the substantive hearing so far out that there may be a delay in the interim hearing. Rex stated that he thinks the supplement will have to be recirculated. He said this is going to take 90 days minimum. He observed that one will then have to work these 90 days into the schedule. He stated that this gets into March, 1977. Rex then handed out a Proposed Schedule for Remand Hearings, copy attached. He then stated that he has a revised schedule that will be attached to their motion.

Rex stated that the hearing would then be on ACRS and the environmental matters. He stated that both sets of discussion would be going on at the same time. He then observed that this schedule change frees up November for the hearing on suspensions. Rex pointed out that the parties will have to go forward for October 6 like the hearings are going to be held.

Milt stated that we should go forward today with what we have worked on.

Rex handed out copies of a proposed schedule for the 10/6/76 hearings, copy attached. He stated that he has tried to provide time for working with witnesses. Rex stated that the schedule will give one an idea when he intends to work with the witnesses and get them ready. Rex then said he needed to see a basic outline of what Dow will give him to work on.

Milt stated that he didn't feel there needed to be agreement on what was going to go on. Milt pointed out that, as far as what was going to be said, Dow will not say anything unless Consumers Power wants us to say it. Milt reiterated that he didn't feel that an agreement was needed.

Rex stated that by agreement, he meant agreement on the facts. Milt stated that if there is a question of privilege or trade secrets, he would surely object. If it is otherwise, he said that Dow would not get in Consumers Power's hair. Rex responded that this was "beautiful."

Rex referred to the 10/6/76 schedule and stated that the four main issues form a coalition case. He pointed out that he would not necessarily put the witnesses on in the order shown. He then stated that underneath the main issues he put the subissues. He pointed out that the witnesses are in all caps out at the side. Rex then stated that he would be glad to answer any questions anyone had on the four issues.

Rex observed to Lee that he and Lee had talked on this. He said that the only problem he had with Temple was that of the original position had on this and he didn't want a witness to get up there and tell other than the truth.

Milt stated that Dow will tell the truth as Dow sees it. Milt pointed out that it is probably better to have a person there who has direct knowledge of the situation and Joe Temple knows more about this situation than most people. Milt stated that Joe knows about the effect of delay. Milt pointed out that, on the question of his lack of enthusiasam, Joe will testify to the truth. Milt did point out, however, that Joe is one member of a board on these decisions. Milt stated that Company policy is different from Joe's view and we will give Dow's position on this. Milt stated that he knows Joe Temple will state that he agrees with the Company's policy. Rex stated that he would be satisfied with Joe's position if he in fact does just that. Milt stated that at some point the parties will have a full hearing on the matter. Judd stated that all these things should be brought out at the suspension hearings.

Milt stated that at this point Dow is not prepared to give anyone information on what went on during any proceedings. Milt stated that, he felt, any correspondence that has gone on between Dow people, internally, has not been given to Consumers Power yet. Milt stated that, while Joe Temple

does have knowledge on all these internal things, we don't feel it is proper to give you this info because of the delicate nature of the relationship now between Dow and Consumers Power regarding on-going negotiations. Rex stated that, provided Joe Temple's position is how Dow has related it this morning, he would be more than happy to go with Joe as a witness.

Rex stated that he didn't know what the pure economics were on whether there was an alternative way to get steam to Dow.

Milt stated that he thought Consumers Power would see that in what Dow would give them today. Milt stated that this position of Dow depends on when one reviews it. He pointed out that if one looks at it right now, the answer is that nuclear power comes out best. However, he further observed that if you look at it in 1983 or 1984, this could undoubtedly change.

Lee talked about the program Mary Sinclair is going to be on. He pointed out that she may talk about the November 1974 press release of Joe Temple. Milt cautioned that one must be aware that this was done in 1974 and a lot of things have happened since then and it will be shown that Joe Temple has changed his view now to get in line with the Dow Board decision.

Milt mentioned all of the factors considered with all the legal implications that are present in this situation. Milt stated that he was very reluctant to get into these areas. He pointed out that some of this information is privileged and some of it is not.

Rex stated that the third big thing on his list was the current negotiations that are going on now. Judd stated that those current negotiations are in abeyance now. He pointed out that he wasn't quite sure where the parties are right now. Rex stated that the negotiations gave him a problem, not so much from the suspension hearing part but from the big hearing. He stated that he would like to get them out in the open in the suspension hearing. He pointed out that when the big hearing is held, he would like to work out something between Dow and Consumers Power.

Something in the nature of general guidelines as to where the parties are going. He further stated that if he had to put a person on the stand, he would like to know what that person is going to say. He stated that this may come right in the middle of negotiations and this may cause a problem from this viewpoint.

Milt stated that this is exactly what he had in mind when he was saying that this type of thing would cause a problem because Dow is not going to turn over voluntarily what is going on inhouse or internally. Milt pointed out that the answer to all of this is that it is obvious from today's position that the parties have both asserted rights and interests and they don't really know what to do about this information. He stated that the parties should try to resolve these differences before the suspension hearings.

Rex stated that the parties today could go forward with the environmental stuff. He felt that the parties should set down some reasons for their positions. Rex stated that what he was saying was that the parties were going to have to do the ER on all of this. Judd stated that if this 11/15 continuance is granted, the parties would be able to sit down and iron their differences out.

Milt stated that in answer to Consumers Power's question concerning attorney-client privilege, he didn't think work product applies to the negotiations going on between Dow and Consumers Power. He further pointed out that another thing to consider was the relationship among the parties. Milt reiterated that Dow would not give up the information generated in-house until compelled to do so. Milt stated that Consumers Power would probably agree with him when he pointed out that Dow would be very reluctant to expose Dow's internal processes until there have been some final agreement made in the negotiations.

Rex stated that it didn't bother him to have to tell the Hearing Board that the documents asked for were internal to Dow and could possibly cause a business relationship problem, and that they would be subpoenaed before

they are given to Myron Cherry. Rex further stated that the other point was the parties could get by this problem if Lee and Judd could resolve the negotiations before we get to the suspension hearing. Judd observed that neither he nor Lee could do this alone. He pointed out that they would need a lot of other people getting together before some agreement could be reached. Milt pointed out that Dow would have to be ready to turn these notes over to the parties if they are requested by the Board.

Rex stated that he felt the parties could work out a position that could be taken on the witness stand which could limit the problem to a great extent. This could be accomplished by stating what your ultimate position was vs. what you may be able to go back to. Rex stated that he didn't want to put Youngdahl on the stand. He pointed out that what he was going to try to do was to get people to state their ultimate positions on the ER instead of their fall-back positions. Milt suggested that something be done about getting these positions refined.

Judd stated that the issues we want to cover today are: will Dow take steam and what will Dow do about present fossil-fuel facilities?

Milt handed Judd and Rex a copy of the draft of Joe Temple's testimony, copy attached. He told them to look it over and get back to Dow when they want to discuss it. This was at 9:18 a.m.

The parties adjourned at 9:20 a.m.

The meeting commenced at 10:15 a.m.

Rex handed Milt a copy of an outline of items he would like to have answered for the hearings, copy attached.

Milt stated that Dow has given Consumers Power at least an outline of the questions Judd asked of Milt on the phone. Milt pointed out that if Dow was requested to go further, they could run into problems. Milt stated

that Consumers Power should give Dow what they need further and Dow would see what they could do about supplying the information.

Rex stated that most of the stuff we need is somewhere in the draft and when he puts Joe Temple on the stand, he would like to see Joe testify in the order as outlined on the list. Rex went to the list and stated that, on the subject of original contracts, what Consumers Power needs here is the original thing Dow stated about requirements and commitments in the contract. Milt stated that Dow may have included intentions in the original contract, but he doubted if Joe Temple could remember what the intentions were. Milt didn't feel Joe could answer the question.

Rex stated that if one was going to explain the 1974 modifications, he could just put the entire contract into evidence and state that the document speaks for itself. However, Rex then pointed out that he would rather put Joe Temple on the stand and actually get into the situation from the beginning. Rex stated that he would like to know, generally, what the contract called for on Dow's part and also what their commitments were under the contract. Rex pointed out that, when he said Dow's commitments, he meant what Dow had committed in return. Rex stated that he thought the water thing came into play here, but that he would get to that later. Milt stated that neither he nor Lee were there when this was agreed to.

Rex stated that he didn't care on this one where Lee or Milt have stated that since this contract was entered into, that Dow's requirements were such and such. Milt stated that if Consumers Power wants something beyond the document as to what Dow's requirements were, Dow would probably have to go get the information. Rex stated that he felt he really had to have the extra information. Rex stated that what he was really looking for was a person to feed this information to Joe Temple in a general fashion. Rex stated that he thought the Commission asked Dow's people some questions and Dow had come back with some answers. Judd stated that he would like whatever the Commission had asked Dow for and also Dow's answers. He stated that the contract would have something in respect to Dow's opinions of its own facilities.

Rex pointed out that Dow probably also stated that they were not going to run their present equipment and not have air pollution problems. Rex stated that in the 1974 negotiations he wants the changes for requirements and commitments made by Dow. Milt pointed out that there are differences as to what these things mean. He stated that there have been differences in the parties' discussions as to whether costs are non-recoverable under any circumstances or just in the event of some environmental action. Judd stated that he didn't feel the parties have to get into the meaning of these clauses, but rather they should get into the meaning of change and what Dow wants to do in the matter.

Rex stated that he was not going to ask Joe Temple what some of these responses in the draft mean.

Judd stated that Consumers Power is going to need further detail of those 1974 changes. He pointed out that Dow has stated that they are going to be taking 2,000,000 lbs/hr because this is what it states in the contract.

Rex stated that what he had tried to do was state this matter out logically and in a fashion of what really happened from 1967 to 1976. Judd stated that if the Board can still conclude that the reasons for the original contract are valid, then they may see it Consumers Power's way. Judd referred to the third item and asked if Dow committed to building the sewage building changes in the original contract. Lee stated that the sewage item was a separate agreement between Dow and Consumers Power. Rex stated that he would like to fit this sewage thing into Joe's testimony. He said this is why he needs the information. Rex pointed out that one of Consumers Power's problems was that they have port-a-johns on site and as soon as Dow can get the sewage thing completed, Consumers Power will be able to remove them. On item number III on the outline, Continuing Michigan Division Review, Rex said that he wanted Joe to state why he reviews the contract from time to time. Rex pointed out that this is separate from the Dow USA Review.

Rex asked Milt why Joe Temple had made certain statements regarding Joe's opinion on this entire matter. Milt wanted to know why Rex and Judd wanted Joe's opinion on some of the items. Milt asked if they wanted Joe's views on the Court of Appeals findings. Milt pointed out that he hoped Rex would let Joe say just what Joe had said in the Michigan Division Review position. Rex stated that he hoped Milt and Joe would sit down and put down some basic business decisions on this matter. Milt pointed out that this is what Dow had tried to do in the draft they prepared of Joe's testimony.

Rex stated that Mary Sinclair has all of the press releases of Joe's and Joe is going to be confronted with them at the hearings. Milt pointed out that Rex and Judd were asking for all the things Joe Temple has ever said or thought about the matter. Rex stated that he wanted all of it -- everything that Joe has ever said or thought about the matter. Rex pointed out that they may not use it all, but they would like to see it all. Judd stated that he felt the parties were better off in the long run if the information is revealed now.

Milt cautioned that Dow and Consumers Power have to be very careful about what they are doing in this hearing and what they may be doing otherwise in the negotiations between themselves. Milt stated that he didn't know how much of the information Rex wanted was privileged information. Milt pointed out that Rex was asking for a lot of information and this request really presented Dow with a problem. Milt stated that the ideal thing to do would be for Dow and Consumers Power to reach some agreement on the negotiations before they get to the hearings. Judd pointed out that Consumers Power wants to know what the picture is before we get to the hearings so we won't be surprised by the other side. Rex stated that he didn't want this problem concerning the negotiations between the parties to come out and interfere with what goes on in the hearings.

Judd pointed out that for Consumers Power's purpose, initially, Consumers Power would like to see everything there is on this entire matter. Rex

stated that he needed the action Joe Temple took based on the Michigan Division Review. He then pointed out that he needed the same kind of information on the Michigan Division Review. Milt stated that if Consumers Power pushed farther on this information, then the parties may get into a situation where Dow immediately files suit against Consumers Power. Rex pointed out that all of this is aimed at the requirements for steam and electricity. Rex stated that he was not interested in the legal implications of breaking the contract. He pointed out that he wanted to know what Dow viewed their requirements at initially and why they have changed.

Milt asked Rex if it would solve the problem if he put a clause in Joe's draft that stated that there are a number of elements involved in a corporate decision and necessarily does include many things. Rex stated that this would invite a question and he wanted to stay away from this. Rex stated that the requirements under the original contract is what he is after. He said that he would then like to get into the 1974 modifications and why they were arrived at. Rex then said he would like to get into the Michigan and Dow USA reviews and why these decisions were reached. Rex continued that after the reviews, he would like to know what Dow's present intent of what their needs are. He stated that this is what he was aiming for in all the items outlined in his request for information. Rex pointed out that, in item II, Joe will tell Consumers Power what things he used for consideration and these same things or considerations will be used again in item V. Rex once again pointed out that he was only interested in items related to Dow's requirements for steam and electricity supply. Rex pointed to item 4 in Joe's draft and stated that he would like Dow to be a little more specific if the Board is expected to make a decision under NEPA.

Milt pointed out that this is what happens when Consumers Power wants Dow to be a little more specific. He stated that a source of concern will be Dow's problem of what to do with Consumers Power's request. Rex stated that he didn't think any lawyer would let Dow get away with their statement in a courtroom. Rex observed that Dow should say they are entirely dependent upon Consumers Power to supply them steam; that Dow has no backup for this steam; and, if the units do go down, Dow will be without

this backup but with the need still existing. Milt pointed out that Joe's draft already says just that. Milt stated that he is hopeful that when the witness gets on the stand and is pushed to these other irrelevant issues, that Consumers Power's lawyers will stop the line of questioning.

Rex stated that he wanted Joe Temple to give him an outline of what he, Joe, wants to say. Milt pointed out that Joe has a great reluctance to say anything. Milt asked if it was possible for Dow to send Consumers Power a letter on this. Rex stated that the Court of Appeals wants to know what Dow's intent is. He stated that this has to be brought out now. Milt stated that Rex's observation may be true in relation to the big hearing, but surely not true for the suspension hearing. Rex stated that he thought they wanted to know this. Rex pointed out that, if Dow's intentions were to run their fossil fuel operations until 1990, the Board would want to know this. He pointed out that Consumers Power has already stated that if Dow doesn't need the steam, then Consumers Power would cancel one unit and move the other to Palisades.

Milt pointed out that Judd had told Lee that if Dow wanted out of the situation, then that would be the end of the project. Milt stated that he had the feeling that if what is being asked for by Consumers Power is furnished, this would invite the Board to say that this is such a tenuous thing, that this project should be put to an end. Judd re emphasized that he still wanted to hear this information from Joe Temple. Milt pointed out that once Judd hears this information from Joe Temple, then Dow has a lot of other problems. Milt stated that it was his intent to do whatever needs to be done to cooperate with Consumers Power. He did point out, however, that one may come up with the conclusion that this is, indeed, a very tenuous thing.

Rex said that if Joe gets before the Board and states that it is Dow's intent to take an amount of steam and an amount of electricity, then this will suffice. Milt stated that he had no problem with that as long as that is all you ask Joe.

Rex stated that he wanted to know what Dow was really going to do. He stated that he wanted to know why Dow was doing this and why they are there. He pointed out that there has been a stormy relationship between the parties. Rex stated that he would like to put this out in the best light possible -- which is business judgment. Rex pointed out that when this has been talked about, the parties were talking about mixing in items 2 and 3. These items seemed to relate back to what was said on day one. Rex stated that he didn't know enough about this contract to know what the restrictions were all about. Judd pointed out that the restrictions only went to how to use the steam that Dow gets from Consumers Power. He stated that the question was, "Can Dow sell this steam to other people?" Rex stated that every time he got back into this situation, everything from day one seems to flow from the question of reliability of getting steam.

Lee pointed out that there are two things to consider here. One is that once the steam comes on, how reliable will it be; and, secondly, when will we get the steam?

Rex pointed out that he was going to have to put Consumers Power on the stand to talk about what they want to do in selling a portion of their output. Rex stated that he thought there was a distinction between why Dow wanted the contract and why they wanted it changed from what is going on now in negotiations. Milt stated that the June 30 letter to Youngdahl lists several reasons for these negotiations. Milt pointed out that Rex wanted more specifics about the technical aspects concerning the amount of steam and electricity, the alternatives for steam and electricity and what the present fossil fuel operations can do. He pointed out that it seems Rex did not want any more statements concerning the problem areas underlying these factors. Judd pointed out that while Consumers Power may not need them for testimony, they would like all of this information at this time.

Rex stated that he didn't want any more from Dow than what they put in Joe's draft. He did point out, however, that he wanted it in a more direct fashion. Milt stated that he thought he finally saw what Rex

meant. Rex stated that he wanted the information from the scope of what Dow needs in steam and electricity. Milt told Judd that Dow would like to give Consumers Power details for their purposes here as long as this request didn't get into other considerations. Milt asked why did Dow have to talk about the best efforts clause and things of that nature.

Judd stated that he didn't want to hear this information from a legal side, but he did want to know what was troubling Joe Temple from a personal side. Judd pointed out that he wanted to know why Joe had made the statements he made to the Press Club.

Milt pointed out that one cannot avoid getting into the details as long as one is going to get into the reasons for our decisions. Milt wanted to know why Consumers Power wanted to get into the reasons at all. Milt stated that this gets the parties into other areas of consideration. Milt stated that he didn't know if what corporate attorneys say is privileged or not. Milt stated what he was struggling for was of what importance is Joe Temple's opinion to this situation? Milt pointed out that Joe Temple is prepared to answer in response to such questions concerning reasons. Milt did point out though that what is bothering Joe Temple is that he is concerned about Consumers Power's inability to supply steam and electricity and to share data in the area of money decisions, etc. Milt stated that these reasons from Joe are his personally and not necessarily the views of the Board of Directors. Milt wanted to know why Consumers Power wanted to get into this at all.

Rex stated that what he thought the best thing would be to be aware of a-1 the information in the case and then shape the facts the best way they could to Dow and Consumers Power's best advantage. Milt once again stressed that he thought a lot of the things Joe Temple would say would have the effect of prejudicing the on-going negotiations. Judd stated that he wanted to know what some of the other things were that Joe Temple may state if he is asked. Milt stated that he had already listed a couple of things previously.

Rex stated that Bremmer told him that if Dow doesn't have a witness there, then he, Bremmer, would subpoena Dow's witness. Milt asked if it wouldn't be better if Dow let Bremmer subpoena Joe Temple. Rex stated that he didn't think this was the best thing to do.

The meeting was adjourned at 11:20 a.m.

The meeting commenced at 11:40 a.m.

Rex stated that he had a proposal to make. When the parties share general and policy stuff, Rex said that he could see no harm in having all of the people in the meeting present. He stated that, on the sensitive stuff Milt has been concerned about, he would ask Judd to leave the room when he, Rex, is preparing Joe as a witness.

Rex then summarized what he wanted from Dow. He said he needed three things -- a Dow witness will have to be provided by Consumers Power or be subpoenaed by the other party; how to go about deciding what information to put in (1974 negotiations, current intent; corporate review); when Rex has to include those items, the best way would be to do this in the most direct manner and then prepare the witness so that the answers one gets are the best one can come up with.

Rex stated that he had been toying with the idea of not having Joe as a witness; but someone will probably subpoena him so we may as well just use him and go from there.

Milt asked why the parties just didn't go in and talk to Joe right away? Rex stated that the parties could just go in and talk to him about the general outline. Rex stated that Judd could stay with the parties on this. Milt said that Judd may be present on the general stuff, but on cross-exam stuff, he should not be present. Rex stated that what he would like to accomplish with Joe was to talk to him about what he, Rex, was going to need from him. Rex stated he would then give him a couple of days for him to put the stuff together and then give him, Rex, an outline of this. Rex stated he would like this information to be delivered to him by this Saturday in Jackson.

The parties then adjourned to meet with Joe Temple.

Meeting continued with Joe Temple now present.

Milt told Joe that Rex was going to go into those alternatives concerning Dow's needs and requirements for steam and electricity and Dow's intentions in those areas, but not the legal aspect of what happens if we have to sue Consumers Power or anything in that area. Milt then went over the general outline prepared by Rex.

Rex stated to Joe that, in the outline, he is really looking for the steam and electricity part of the subject between the parties. Rex stated that this is what he wanted to focus on. Rex stated that he knows that any corporation that signs a contract that was to be completed in 1974 but is now scheduled to be completed in 1981 must review their options from time to time. Rex pointed out that in this review, there are reasons why the corporation comes to the conclusions of going forward with the project or not. Rex stated that one must look at the availability, reliability, and safety of it. Rex stated that what he was looking for in this outline was to go through the hassle Dow has been through to ensure themselves that this steam will be there in 1981. Rex stated that if the steam is not going to be there, then the corporation is going to continue to review the situation. Rex stated that he wanted more detail than was provided in Joe's draft.

Joe stated that he thought Dow would be willing to proclaim that it was a very good idea to get nuclear steam in the beginning and if the project was to go on stream today, it would still be a good idea.

Rex stated that he would like to limit the information to Dow's intent today during the hearing. He did point out that there was no way this could be limited because of the other parties' interests. Joe asked if the Hearing Board will let the other parties get into his, Joe's, personal views regardless of its relevance. Milt then read the prefacing statement

that he had prepared for Joe's use and recital before the Board, copy attached.

Rex stated that he didn't want Joe to start off making this kind of statement initially even though he may have to say something like it in the hearing process. Rex said that Joe should become sensitive to the fact that he, Joe, should state it's his personal opinion rather than Dow's position. Rex stated that he will make the statement that Consumers Power has requested that Dow provide Consumers Power with a witness. Rex then pointed out that when it gets down to the 1976 decision date, the parties should get down to what Dow's position was and their reasons for it. Rex reminded the parties once again that he was talking about steam and electricity, and not about other things. Rex stated that he was really looking for Dow's alternatives in these two areas. Rex observed that Joe made the decisions on these items and passed them up through the system. He then pointed out that Dow USA then made a decision on the matter. Rex stated that, as soon as this fact is brought out, the other side is going to ask Joe what his personal opinion is and our side will object -- but to no avail. Rex stated that what we are going to do today is cover some of Joe's reasons as to why he arrived at his decisions in a personal sense. Rex stated that he needed to do this for cross-exam purposes and this information gathering would be done without Judd being present. Rex stated that, on the negotiations, he would like to get into Dow's intent just a little bit further. Rex told Joe that he may be asked about what Consumers Power's intent was in the negotiations so Consumers Power will get Joe a copy of what Consumers Power will want him to say on this. Rex told Joe that he would probably go on the stand on 10/6/76 or 10/7/76 and his statements would be as of that date. Rex stated that the questioning was going to be by oral means. Rex pointed out that what becomes important is not the idea he may want to convey, but the words he may use to convey it.

Joe wanted to know why one couldn't just write it down if one's words are what one is. Rex told Joe that he really wasn't interested in Joe's

words. Rex pointed out that Joe talks differently than he writes. Rex stated that this is why he would like Joe to prepare an outline from his, Joe's, own words in response to the outline Rex had given Joe. Rex said that he would like Joe's outline by Saturday of this week (10/2/76) and that he would get back to Joe and discuss it with him on Monday (10/4/76). Milt asked Rex if it was possible to delay the discussion between Rex and Joe until Tuesday. Rex stated that he would probably still be talking to Joe on Tuesday and he felt he needed two days to do this. Therefore, Rex emphasized that he would still like to get together with Joe on Monday.

Milt pointed out that Rex would like as many more specifics as Dow can give him on what Dow's requirements are. Milt stated that the information doesn't have to be written in formal fashion but rather in a raw data form and then put into Joe's own words. Rex stated that what he really wants is information to show that Dow was really reviewing a business decision. Rex stated that, under the circumstances, this review was the proper thing for Dow to do and to continue doing it. Rex pointed out that he would rather Dow err on the side of too much on their outline rather than not enough. Rex observed that he had to get into a lot about Joe and his feelings on the matter.

Joe stated that he hoped he didn't have to get into an area that a Jim Burroughs or an economic evaluator could answer when he takes the stand. Rex stated that the data Joe gets from other people should be put in a file and kept. Rex observed that this will allow the parties to get that person on as a back-up witness because he didn't contemplate putting Joe on the stand as an expert in any of the areas. Judd stated that one of Cherry's tactics was to take a person out of his particular area of expertise and allow him to answer questions in order to trap him.

Milt talked about Dow's plans on coal gasification. Rex stated that if Joe is asked to talk about best cost/benefit alternatives, he should not bring up the coal gasification item because Dow has stated that the nuclear power steam is the most economical alternative. Milt pointed

out that no one went into Dow's operations to see if there are other ways to generate steam. Rex pointed out that if Dow would have stated that the best alternative was not nuclear steam, then the parties would be in a position to discuss other alternatives at this point. Milt observed that the parties have to be very careful that this coal gasification item does not get into the trade secret area.

Rex stated that he didn't intend to raise the issue of nuclear steam versus non-nuclear steam in the suspension part of the proceedings. He observed that there is a greater probability that when the cost/benefit analysis is redone, the Board will get into this area. This will occur in the big hearing.

Joe pointed out that the data Dow has on the nuclear thing is what they have received from Consumers Power and then Dow looked at it for their purposes. He stated that the base set of facts is one set of numbers but Dow looks at it from different viewpoints. He further stated that the alternative review does not spring from information Dow got from Consumers Power but rather from information that is generated internally.

Milt told Rex that what Dow will try and get for Rex by Saturday is a response to the one through six items (including attached documents, if necessary) to the best of Dow's ability. Milt asked Rex for an approximate time he would like to get together on Monday. Rex stated that 8 a.m. in the morning would be fine with the possibility of going through Tuesday until finished. Rex stated that he would like to start with the back-up people and go from there.

Milt asked Rex if, in his planning for the suspension hearing, was he, Rex, going to use Joe as the second witness. Rex stated that he had to go with Keeley first because Keeley will go into the Consumers Power area. Rex then said that he would have to go with someone from Dow next. After Dow, Rex said he would go with the environmental impact guy. Joe asked Rex when Steve would come in. Rex said that he could play with Steve and Joe.

Judd pointed out that the discovery file has already been talked about and he stressed that Dow should make sure that this file is made up. Rex said that Dow should separate out the privileged information from the other material in the file. Judd stated that the file should include the proposal from the air pollution people, press releases concerning Joe's remarks, and notices under the contract regarding estimated take and reserve capacity. Rex stated that he didn't have much time to comply with the discovery request on the big hearing. Rex asked Lee to make sure that he, Lee, put together a file of documents to back up Dow's position. Rex asked Joe to make sure, when a back-up person is going to be used, that that person have the back-up material he worked from.

The meeting adjourned.

ATTACHMENT 4

MEMORANDUM TO FILES

D. A. DURAN

RE: DOW/CONSUMERS POWER MEETING OF 10/12/76

The following memo is an accurate summary of what was said during the meeting; however, it should not be regarded as being verbatim in any sense.

Messrs. Nute, Wessel and I met with Judd Bacon, Rex Renfrow and Dave Rosso from 10:45 a.m. to 4:25 p.m. on Tuesday, October 12, 1976 in Building 47 of Dow's Midland Plant.

Mr. Wessel talked about a letter he had received from Myron Cherry asking for discovery and then read a draft of a letter he was considering sending to Mr. Cherry on the discovery matter. Mr. Bacon stated that he had some deletions to suggest be made on Mr. Nute's 10/6/76 draft of Mr. Temple's testimony.

Mr. Nute talked about the MCS meeting where Mary Sinclair was scheduled to present a paper regarding nuclear power. Mr. Renfrow stated that he had received a phone call from a Mr. Arnold, labor representative, who was upset about the effect the proposed shutdown would have on the labor force in the area. Mr. Nute stated that he has received about ten requests from people who want to make their feelings known to the Hearing Board. Mr. Renfrow felt, to a limited extent, that appearances before the Board would be the best way to handle their concerns.

Mr. Bacon mentioned what the possible effect such a shutdown would have on the community. Mr. Renfrow cited the recent Seabrook case regarding the impact on the community from a shutdown. He stated that this type of information could be given to the community to give them an idea of what impact a shutdown would have on the area.

Mr. Nute asked Mr. Renfrow for the current status on the Seabrook case. Mr. Renfrow commented that the NRC was going to review the case. He said that Consumers Power was going to file an amicus curie brief in the matter. Mr. Bacon pointed out that briefs were due on 10/18/76 and oral argument was going to be set for 10/24/76. Mr. Renfrow talked about the intricacies of the Seabrook case. He then handed out a copy of the revised Midland Hearing Schedule, copy attached.

Mr. Wessel asked Consumers Power what was wrong with the 10/6/76 draft of Mr. Temple's testimony that Dow gave to them. Mr. Bacon responded that he felt the 10/6/76 document was just an outline of testimony rather than an actual draft. Mr. Nute asked if Consumers Power was going to do the testimony in question and answer form. Mr. Renfrow stated that he didn't want it done in question and answer form.

Mr. Wessel stated that he wanted to tell Consumers Power where he felt things were today. He stated that the first draft of Mr. Temple's testimony was his work and his words. He then stated that the second draft was Mr. Nute's work and words. Mr. Wessel did point out that the form of the testimony was not really important. He then stated to Consumers that what Dow has given Consumers Power to date is final in terms of what Mr. Temple has to say on the matter. Mr. Bacon stated that Dow has done a good job on what they have done, but there are some holes in the work that need to be filled. Mr. Wessel stated that he needed to know what information Consumers Power wanted in the first and second drafts. He said that he felt Dow had done everything that needs to be done in responding to requests from Consumers Power regarding Mr. Temple's testimony. Mr. Rosso stated that he wanted to go down through the material Dow has given Consumers Power and ask some questions concerning the material. Mr. Wessel stated that he and Mr. Nute would agree to do that.

Mr. Renfrow stated that he would like to see more information end up in Mr. Temple's testimony than what he (Rex) has asked for to date. He pointed out that Consumers Power has not really decided what to put in

in terms of cross and direct. Mr. Rosso stated that he and Mr. Renfrow and Consumers Power viewed the information Dow has supplied as representing that which Dow has to say about the matter. He then pointed out that they would then go back and review the information.

Mr. Wessel stated that he wanted to emphasize once again that Dow did not consider themselves a party and that Mr. Temple's testimony was a Consumers Power document and Consumers Power would decide what would actually be put in. He stated that Mr. Temple just wanted to make sure that whatever went into the document was accurate and complete. Mr. Wessel stated that, apart from questions of trade secrets and privilege, Dow would share any information that Consumers Power felt was important. He then emphasized that Consumers Power would be the authoring party, and Dow was only the supplying party.

Mr. Rosso stated that Consumers Power shared the same understanding. He then said that the parties should start with the material on the alternatives. He said that the area dealing with the graphs is where Consumers Power has the most questions. A discussion followed between Messrs. Rosso, Bacon, Renfrow and Nute on this matter, copy attached. Mr. Nute stated that the charts or graphs were the ones used in the Dow U.S. Area Review. He pointed out that he felt the information on coal costs was given to Dow by Consumers Power. Mr. Renfrow stated that the information shown was based on old costs. Mr. Nute stated that he felt the information was based on new coal costs. A discussion followed and was centered on what the charts meant and where the information came from. The ROIBT concept was discussed. Mr. Bacon observed that if this subject came up on cross-exam, then Mr. Temple should answer questions according to what was actually done in this area.

Mr. Renfrow stated that the strongest reason as to why Consumers Power cannot stand a delay in construction is because of Dow's needs. He pointed out that this is why Mr. Temple has to come up with the type of reasoning which will support this point. Mr. Renfrow pointed out that the charts were of Mr. Temple's work and could be put to use. Mr. Rosso observed that there may be no need to use any charts.

Mr. Renfrow stated that Consumers Power would not argue with Dow on the coal costs being too low as the truth probably lies somewhere in between. Mr. Bacon stated that the only thing that is relevant is--does Dow still want steam and what are they going to do about their present fossil fuel facilities.

Mr. Rosso stated that Consumers Power has not made the technical decision as to how much of the material Dow has given them will actually be put in Mr. Temple's testimony. He did point out that Mr. Temple's position should be as told to Consumers Power. He then mentioned that Mr. Temple should state that Dow is reviewing the situation all the time and they have come up with the conclusion to take the steam and power from Consumers Power. Mr. Rosso told Dow that Consumers Power would have to look at all the information Dow has given Consumers Power and then discuss it with Dow.

Mr. Renfrow stated that he would like to sit down with Mr. Nute next week and run through Dow's documents. He pointed out that this may give him a better feel for what is in those documents dealing with the cost/benefit analysis. Mr. Wessel stated that he didn't see any reason for Mr. Renfrow to have to do this. He pointed out that Dow has done what Consumers Power has requested. He further stated that Consumers Power should now sit down and review what they have from Dow and then let Dow know what more they need. Mr. Wessel stated that Consumers Power should let Dow know at this point in time what documents they are interested in seeing. Mr. Bacon stated that Consumers Power needs to review all documents because of the request for cross-exam. Mr. Wessel asked Mr. Bacon to be more specific on what documents he was talking about. Mr. Renfrow stated that he didn't want current negotiating documents right now. He stated that he hoped Mr. Bacon and Mr. Nute could get together and continue with current negotiations. Mr. Renfrow then stated that Consumers Power needed the back-up documents of what had taken place in the past.

Mr. Nute stated that there have been four meetings on current negotiations. He stated that there are minutes from Dow's notes of those meetings. He pointed out that Consumers Power has copies of the minutes of the first two meetings. Mr. Wessel pointed out that Dow gave Consumers Power copies

of those minutes and Consumers Power had responded that they were not satisfied with the content.

Mr. Rosso stated that Consumers Power needed the information requested for cross-exam preparation. He pointed out that another reason Consumers Power wanted the information was because Mr. Myron Cherry may want to get into what Dow's position will be six months from now and what information Dow would use to base their position on.

Mr. Renfrow pointed out that, since Consumers Power is going to state that they cannot stand another delay because of Dow's problem of needing a reliable supply of steam, Mr. Cherry will probably want to get into Dow's decision and position.

Mr. Rosso pointed out that everything Consumers Power has from Dow to date is strongly slanted towards the economic side. He suggested that it may be a good idea to look into all the other things that were considered. He stated that he would like to see a list of what Dow had considered.

Mr. Wessel made the observation that once Consumers Power gets into this area, then one gets into an area of how much Dow has relied on Consumers Power and Mr. Cherry would have a field day with the subject. Mr. Rosso pointed out that Consumers Power views the information Dow has given them as a step towards Consumers Power making a decision on what to put into Mr. Temple's testimony. He suggested that the parties go through the 10/6/76 draft of Mr. Temple's testimony as prepared by Mr. Nute.

A discussion followed among those present regarding the need to put into evidence all the contracts associated with the matter. Mr. Wessel suggested that the original contracts plus the negotiated changes be put into the record via Consumers Power witnesses.

A complete review of each item on Mr. Temple's drafted testimony followed with all parties present participating.

I. ORIGINAL CONTRACT(S)

Mr. Renfrow pointed out that the Court of Appeals has ruled that the entire cost/benefit analysis is up for grabs. He did point out, however, that if an item had not changed from its original position, then Consumers Power does not have to worry about it. He then suggested that it may make sense to take out the information in the draft on the original contracts and start with the 1974 modifications to the contracts. He stated that this may be the way Consumers Power may want to proceed or approach the matter but a decision will be made later. Mr. Renfrow did state that he would still like the information on all areas though.

A question arose on who could calculate the cost of steam. Even though Mr. Jim Burroughs was mentioned in this regard, Mr. Nute suggested that someone from Consumers Power should testify on this subject.

II. 1974 MODIFICATIONS TO CONTRACT(S)

A discussion took place between Messrs. Renfrow, Nute, and Bacon on Dow's intentions on running its present fossil fuel plants and what type of plant would they install for back-up purposes. Mr. Renfrow wanted to know if Dow was far enough along in their plans to tell the Board or Staff what Dow was going to do in this area and what effect this may have on air pollution. Mr. Nute stated that Dow was not really sure where they were going to be in this area in terms of what alternative to go with. Mr. Rosso asked if the plants were going to be new and Mr. Nute responded that they were. Mr. Nute also pointed out that whatever type Dow would put in, it would meet new air quality source standards.

Mr. Renfrow then expressed a fear that Consumers Power may be caught using two different sets of costs in the area of delivery of 1,000,000 pph of steam -- Black and Veatch Study vs. Consumers Power estimate of costs.

III. CONTINUING MICHIGAN DIVISION REVIEW

In the area of a continuing Michigan Division review, Mr. Rosso stated that it was important to emphasize that the Dow Board's decision is the

thing the parties should be looking at. Mr. Wessel stated that that was his point exactly and also why he felt so reluctant to answer questions from Consumers Power pertaining to the Michigan Division review. Mr. Wessel did state that, in relation to Item III, C, on decisions and reasons, Dow was concerned with putting down Mr. Temple's reasons because this gets Dow into a very sensitive area. He pointed out that if this area is mentioned in cross-exam, he would object on the basis of privilege, irrelevance, etc. Mr. Rosso then wanted to know what Mr. Temple's reasons were for coming up with the decisions he did on Item III, C. Milt pointed out, once again, that this was a sensitive area that the parties have talked about at length and he questioned what effect, if any, this information could have on the entire case.

Mr. Rosso stated that when Consumers Power considers what to put into Temple's direct testimony, they will have to try and anticipate what Mr. Cherry is going to ask on cross-exam. He stated that Consumers Power may either put the information into the record during their direct case or be ready to meet it, should it come out during cross-exam. He pointed out that these are Consumers Power's alternatives. He further pointed out that his original stand was not to get into the Division review and the reasons for that review being reversed by the Dow Board. He then made the observation that he is now becoming concerned because he has heard that Mr. Cherry may already have this information.

Milt Wessel pointed out that it might be a good idea to have Joe Temple testify that, because of the on-going negotiations, Dow would be reluctant to get into this area because of its sensitive nature. Milt further pointed out to Mr. Rosso that Consumers Power should make a decision as to whether they want to take this position or not.

Rex Renfrow stated that one of the reasons he asked for the economic stuff was because of the possibility that the Dow Board relied on it to make their decision. Milt pointed out that Joe Temple's concern has to do with the reliability of Consumers Power as a continuing supplier even after the plant comes on stream. He did state, however, that this feeling may not have been instrumental in the Dow Board making its decision. Milt observed that the Dow Board probably made their decision on the economics

of the case and this is why Renfrow wants this economic information. Dave Rosso stated that he didn't want to second guess Rex, but he has heard what Rex has said about Joe's position and would like to form his own opinion on the matter.

Lee Nute discussed how the decision was made by the Dow U.S. Area Board.

Dave Rosso wanted to know if there was anything further to discuss on Item III, C. Rex stated that he likes to know what a witness will say when he asks the witness for his opinion on a particular subject. Rex pointed out that this is why Consumers Power needs to know if there are any documents in existence that have a bearing on the matter. He further stated that it would be helpful to get a five or six page thing on Joe's opinions on this area.

Lee asked Judd Bacon to leave the room.

Milt Wessel proceeded to relate to Dave and Rex how Joe felt about certain things, and why Joe had these particular feelings. Milt stated that Joe has a credibility problem with Consumers Power because of Consumers Power's actions over the years. He discussed several items.

- Consumers Power entered into a new contract agreement in 1974 and then could not continue the plant because of money problems;
- Mr. Youngdahl's entire demeanor in the matter;
- Consumers Power's sale of its position regarding future nuclear fuel purchases;
- financing by Consumers Power and disclosure by Consumers Power to Dow;
- Consumers Power not prepared to discuss coal requirements for future needs;
- Consumers Power's failure to tell Dow about delays and why the delay came up;
- track record of Consumers Power was not one which would lead a person to have much confidence in Consumers Power's ability in the utility area;
- a lot of what Myron Cherry states about Consumers Power is really true.

Rex asked Milt if the things Milt had just related about Joe's position found their way into the request from Joe to the Dow Board when Joe asked for a review on the matter. Milt stated that most of what Joe sent to the Board did not contain many of the things he had just talked about.

Lee Nute talked about his own experiences with Judd Bacon at a meeting with Dow and Consumers Power on this issue. Lee stated that Consumers Power told Joe Temple to be sure that he was ready to go on the witness stand, but they didn't ask Joe what he was going to say once he got up there. Lee further stated that Joe finally told Consumers Power at this particular meeting what his personal feelings were regarding Consumers Power.

Milt pointed out that one consideration Joe Temple may not be swayed by is that crude petro is the lifeline of Dow and Dow needs nuclear fuel development to protect this and free up oil for their other uses. Milt then talked about Consumers Power's attitude in negotiations and their refusal to really address the problem and make decisions about what Dow is asking for in regard to changes in the contract.

Rex asked if he and Dave Rosso should go back to Consumers Power and tell them that Consumers Power should try and conclude the on-going negotiations because it would remove a great number of items of concern when the parties get to the hearing? Rex also asked how many of the items of concern would be taken care of if the negotiations were finalized? Milt stated that if Joe Temple could get all the changes he has asked for regarding a definite date of "liability," he would be happy and the various problems would not exist. Dave Rosso stated that if Consumers Power were to put in an "out date" now, this would be very harmful to their position in the suspension hearing.

Milt pointed out that Mr. Youngdahl is of the opinion that Dow has the right to just walk away from the project but Judd Bacon keeps saying Dow does not have that right. Lee Nute talked about other examples of Consumers

Power thinking Dow can get out by 1985. Milt stated that, if Consumers Power would say that 1985 is when the plant is going on-stream, most of the Dow Board would probably say that Dow will "walk" on this.

Dave Rosso stated that Consumers Power's position on this is -- Consumers Power cannot stand any more delays and there is a possibility that Dow will "walk" because of another delay.

Milt pointed out that the cost/benefit analysis is affected dramatically by a two-year delay in construction and this has to be considered.

Rex Renfrow stated that, on the substantive issues -- Consumers Power has a winner; on the suspension hearing -- Consumers Power has a problem because the appeal board may not realize that Dow does not have until 1985 before they are forced to act on the decision of whether to start on new plants or not.

Rex made an observation on the issue of documents regarding negotiations. He stated that some of the documents have been turned over to Consumers Power and some of them have not. Rex then asked Lee if Dow had a file of documents that Dow has sent to Consumers Power and, if so, Rex said that he would like to sit down with these documents and go through them. Lee stated that Rex's request could be complied with. Rex stated that he would not look at the documents regarding negotiations that Dow has not already given to Consumers Power.

Dave Rosso asked what the nature of the documents were that Consumers has not seen regarding negotiations. Lee stated that there were a lot of privileged information plus a lot of information that is "confidential in-house," but may be discoverable. Dave pointed out that it may give Consumers Power a problem if it is discoverable.

Milt stated that if Myron Cherry asked Consumers Power to get this information from Dow, Dow may refuse to do this and run the risk of having it subpoenaed. Milt stated that Dow would hope not to have to deal with this at all because they would hope the entire area could be regarded as irrelevant!

Rex made an observation relating to how to handle the sensitive documents. He stated that Dow could turn over all the documents they used to support Joe's testimony. He did point out that this would depend on which direction Consumers Power took on direct.

Milt stated that this case is Consumers Power's responsibility and Dow will try to make sure that they help Consumers Power in their endeavor. Milt once again stated that the sensitivity of the documents regarding current negotiations causes a problem.

Dave Rosso stated that Consumers Power's concern about this hearing is that the Board is running scared with intervenors, in general, and the applicant will probably lose in the long run. Dave Rosso then asked that if Rex came up to see Dow, would Dow be willing to let Rex review all those documents that Dow does not consider confidential or privileged? He asked if Dow could give Consumers Power a list of those documents they consider to be confidential. Milt stated that this would be no problem as long as Consumers Power does not need the confidential material that relates to on-going negotiations between Dow and Consumers Power.

Dave Rosso stated that a document that was integral to the decision-making process with Dow should be included, excluding those documents that are confidential from an "in-house" stand in relation to the on-going negotiations. Dave Rosso asked Dow if Dow could supply Consumers Power with this type of list? Lee stated that, as Dave Rosso had outlined it, Dow would have no problem supplying this list to Consumers Power.

IV. 1976 DOW U.S.A. REVIEW

Dave Rosso asked what decision the negotiating team came up with. Lee Nute stated that the negotiating team position was -- there is no longer a probability or a possibility that the nuclear plant would be good for Dow's Midland Plant. Lee pointed out that this decision was stated by Joe Temple to Russ Youngdahl at a 9/13/76 meeting. Lee stated that this is the decision that the Dow Board reversed.

The various charts listed under Item IV, B were discussed. Judd Bacon asked for a copy of the Black and Veatch Study and was given one by Lee Nute.

In referring to factors (uncertainties) that were neither discussed nor resolved, Dave Rosso pointed out that he preferred that this statement not be included in any testimony.

V. PRESENT INTENT OF DOW

Dave Rosso asked if Dow had any information that shows steam needs beyond 1982? Lee Nute stated that Dow did not have this information. Rex Renfrow asked Dow for energy conservation information within Dow. Lee pointed out that Dow has had an energy conservation program for many years.

A discussion among those present took place regarding Item V, B on electrical take. Dave Rosso pointed out that Consumers Power needs to know the following -- Dow will need "X" number of KW for their process: "Y" number of KW being taken from Consumers Power and "Z" number of KW to be generated by Dow's own facilities. Lee pointed out that if Consumers Power's steam facilities come on and give steam to Dow economically enough, Dow would not have to generate their own steam.

This concluded the discussion by those present on the draft of Joe Temple's testimony.

A discussion ensued about setting up a schedule for preparation of Joe Temple as a witness. Rex stated that either he or Dave Rosso would talk to and prepare Joe.

Dave Rosso stated that Consumers Power will go back and come to a decision on what approach they want to take. He stated that this should be made in the next two days or after Consumers Power takes a look at the documents they have requested from Dow. He then stated that either he or Rex would have to sit down and do some writing on the matter. Dave Rosso stated that Consumers Power would then like to be able to check their draft against what

the people who have worked on the matter have done. Dave said Consumers Power would then like to sit down with Joe Temple and a copy of the draft.

A discussion took place on scheduling of time and place for review of documents and preparation of Joe Temple. The tentative schedule agreed upon was -- Consumers Power will make approach decision by 10/13; Rex will review Dow documents on 10/18; Dave Rosso will start writing on 10/14; Consumers Power will send Dow their draft on Joe's testimony on 10/19 and then come up and review it with Joe on 10/20; Rex stated that after the 10/20 meeting, Consumers Power will give Joe nine days to write up his testimony; witness preparation of Joe by Consumers Power will be on 11/8.

Witness lineup was discussed.

Lee Nute then went over the list of documents Rex was going to want to review when he came up on 10/18/76. This list included the following:

- money sunk into power plants to keep them going;
- list of ts Dow regards as confidential vis-a-vis Consumers Power;
- Black and Veatch Study;
- back-up documents: all documents relating to what Dow and Consumers Power have discussed regarding Joe's testimony, excluding confidential documents;
- documents regarding 1974 negotiations;
- sets of meeting notes from two 1976 negotiation meetings that Dow has given Consumers Power.

The meeting adjourned at 4:25 p.m.

ATTACHMENT I

MEMORANDUM TO FILES

D. A. DURAN

RE: DOW/CONSUMERS POWER MEETING OF 11/1/76

The following memo is an accurate summary of what was said during the meeting; however, it should not be regarded as being verbatim in any sense.

Messrs. Nute, Wessel and I met with Dave Rosso and Rex Renfrow on November 1, 1976 in Building 47 of Dow's Midland Plant.

Dave Rosso opened the meeting by stating that he and Rex would like to talk about Joe Temple's testimony.

Rex asked Milt about the documents he wanted to take back to Chicago with him. Milt asked Rex if he was talking about the sealed package of documents. Rex discussed the documents that he was going to let Myron Cherry see in Jackson. He stated that Mr. Cherry would be asked to sign a protective order regarding documents of meetings held between Dow and Consumers Power.

Milt stated that he really didn't care if Mr. Cherry sees those particular documents -- he just didn't want Consumers Power to see them without letting Dow see Consumers Power's documents of a similar nature. Milt discussed Dow's rights under the "protective order."

He stated that if Dow is forced to let the documents out under the protective order, then Dow wants to see like documents from Consumers Power.

Rex Renfrow talked about notes that Consumers Power has like Mr. Keeley's notes. Rex stated that Dow would be able to see these notes. He stated that Consumers Power doesn't have any meeting notes similar to Dow's.

Rex then talked about Mr. Youngdahl's notes. He stated he wouldn't let these notes out until he absolutely had to. Dave Rosso pointed out that both Mr. Youngdahl's notes and Dow's documents would be under the protective order.

Milt talked about the protective order again. He went over the terms of the protective order between Dow and Consumers Power. He pointed out to Rex that the documents Rex asked about initially would be protected under the same order. Rex stated that he didn't want to see the subject of "continuing negotiations" aired in public and Milt voiced his agreement with this statement.

Lee Nute asked Rex about the possibility of getting out of the hearing. Rex stated that Consumers Power hasn't anything on this.

Rex asked Lee if he had had a chance to look at the ER Rex had sent to him. Lee stated that he had given it to Jim Burroughs and Jim was looking at it.

Rex mentioned that he had a meeting set up with the Mayor to talk about the impact of delay on the community. He then talked about the one million pounds of back-up steam. Rex stated that he didn't want to get into a debate with Dow at the hearings on the economics of this item. He stated that it would be better if Dow and Consumers Power could agree on the figures beforehand. Rex stated that the price of coal was increasing at a rapid rate and expressed a desire to talk with Dow on this subject some more.

Dave Rosso suggested that they get started on Joe Temple's testimony. He stated that the main problem he had with Dow's draft is that it looks more like an affidavit than testimony. He went through why he had drafted the testimony in the manner he did in the first place. Dave Rosso stated that he had wanted the testimony to flow from Howell's testimony to Joe's testimony. He talked about why he put in certain statements to "flavor" the testimony. Dave Rosso stated that he was confused as to why Dow had cut out some of these items in their redraft

or why Dow had gone back to an affidavit format. Dave Rosso stated that he was trying to lead Dow back to working from Consumers Power's draft rather than Dow's draft.

Milt stated that the Dow draft was not done inadvertently. He stated that what was done was done with a lot of thinking. Milt pointed out that the third person format is different from what Consumers Power did, but is consistent with what was done in the earlier draft proceedings. Milt stated that Dow is concerned with what may happen on Joe's cross-exam. He stated that he did want to make it very clear that the testimony was Consumers Power's doing and not Dow's. Milt stated that Dow has this feeling because Dow is concerned with Consumers Power coming back at a later date and saying that Dow shot the "thing" down. Dave Rosso stated that he really didn't follow what Milt was saying. A discussion followed between Dave Rosso and Milt on this point.

Milt stated that Dow is concerned that once some of this stuff on continuing negotiations is out on the table, people may then tend to select things that would show that the negotiations between Dow and Consumers Power are of a very tenuous nature. He stated that this could be very easily brought out on cross-exam. Dave Rosso asked if it would be better if the testimony was put in a "question and answer" format. Milt stated that this would at least show that the testimony was being brought out in response to Consumers Power's questions and not a product solely of Dow.

Milt voiced a concern that Consumers Power's draft of Joe's testimony could be easily regarded as being of a misleading, or disingenuous, nature because of the way it was put together. Dave Rosso asked Milt why he felt Consumers Power was being disingenuous. Milt stated that Dow is very interested in maintaining its rights to leave its options open. He stated that he felt Dow has a good case for a cause of action against Consumers Power based on the "best efforts" clause in the contract between Dow and Consumers Power. Milt pointed out that Dow has not said a thing about this item. He mentioned that Dow wants to leave this option and others open. Milt stated that a lot of what happens in the future depends

on what is agreed upon during continuing negotiations. Milt stated that he thought he had made this clear when he talked to both Dave Rosso and Rex about Joe Temple's views at an earlier meeting.

Dave Rosso stated that he thought Milt was only talking about the "cost" factors and the "energy" factors. Dave Rosso stated that he thought Milt said that if these factors were not a problem, then Dow would be prepared to go forward with the matter. Milt stated that he was also concerned with the "reliability" factor. He discussed this aspect. Milt pointed out that all those things are there, and if Joe Temple is pushed, he will say them. Milt stated that Joe has two concerns -- he supports Consumers Power's efforts but he also will not jeopardize Dow's rights.

Dave Rosso talked about the fact that Consumers Power did not have in the testimony that Dow was also concerned about Consumers Power's "reliability" to deliver steam, and if it came to a certain point that Dow would "walk." Dave Rosso stated that Consumers Power didn't put this into the testimony because it would lose the case.

Milt went through Consumers Power's original draft and pointed out that one could read into the statements about supply options that there are several ways to allow Dow to meet their needs. Milt stated that Dow is concerned about Consumers Power coming back and accusing Dow of trying to mess the thing up.

Milt then talked about the problem he had with Joe Temple stating that he is familiar with Mr. Howell's testimony because Joe may or may not be familiar with it and this leaves Milt with an uncomfortable feeling. Milt then talked about whether or not Dow will agree with Consumers Power on what is "principal" among the things that were going back and forth between the two. Milt asked why Consumers Power just couldn't say that the contracts speak for themselves. Dave Rosso stated that Consumers Power thinks that Mr. Howell's testimony concerning changes made in 1974 would be directly out of the contract and Joe Temple should not have any

problem with this. Milt stated that Joe has not seen Mr. Howell's affidavit. Rex stated that Consumers Power would be willing to send this affidavit up to Joe for him to read. Milt pointed out that Joe would be "characterizing" the document and this would be done by Joe's accepting Mr. Howell's testimony. Milt wanted to know why Consumers Power wanted Joe to characterize Mr. Howell's testimony.

Dave Rosso stated that Consumers Power wants this characterization because the testimony is factually correct of what the contract is all about concerning the 1974 changes and it would be better if Joe affirms this on direct instead of on cross. Lee Nute pointed out that there is violent disagreement between the parties (Dow and Consumers Power) on what changes were "principal" and what they meant.

Dave Rosso pointed out that the above problem is covered in the last sentence of their statement on this matter. Rex pointed out that the only time this issue becomes important is in the case of abandonment. He stated that what Consumers Power has tried to do is go into the changes that affect the cost/benefit analysis for the Commission. Milt asked Rex where Consumers Power had actually said this. Rex stated that Consumers Power didn't say it per se. Milt pointed out that if Joe Temple doesn't make this clear in the hearing, it could come back to haunt Dow later on in a possible lawsuit with Consumers Power. Milt stated that this is why Dow does not want Joe to characterize Mr. Howell's testimony as being factually correct. Dave Rosso stated that he could agree with Dow that the statement "following principal changes" could create a problem.

Milt stated that the proper way to do this whole thing is to say that the contract speaks for itself.

A discussion between all present took place about various feelings and relationships between Dow and Consumers Power that have evolved over a period of time. Lee Nute stated that Dow and Consumers Power are at a point now where they do not trust each other at all. Milt pointed out that, because of this mistrust between Dow and Consumers Power, it would be better to say that the contract speaks for itself.

Rex stated that in the interest of getting on with the matter, they should start with what Lee Nute has submitted as Joe's testimony and keep in mind what we are doing this exercise for. Rex stated that if Consumers Power wants to include things that Dow has left out, they can talk about it.

Dave Rosso pointed out that if the testimony was prepared in a question and answer format, it would eliminate a lot of problems. Rex agreed with this point and stated that he wanted to go through the draft.

Rex then proceeded to suggest several changes and modifications or additions. He said that in the first paragraph he would like to add the following statement -- "This testimony was prepared under my supervision and direction and is true and accurate to the best of my knowledge." He suggested changes to wording regarding the period from 1967 to 1974. He stated that he would like to get whatever was factual about 1967-1974 in the draft. He suggested, on page two, that we may want to consider adding the statement that Dow is going to continue to review as a result of any significant changes or happenings in the matter. Lee Nute pointed out that this is already stated later on in the draft.

Dave Rosso suggested that, in paragraph 4 on page 5, we may want to change this in some manner as to what Dow will do in the event of some significant changes. Milt stated that this would present Dow with a significant problem. Milt pointed out that Consumers Power is going to pick what questions to ask and Joe will answer them. He stated that if Joe is asked a question and he doesn't come through as having answered the question, he would be criticized for this. Milt stated that he didn't want Joe to get into this type of situation. Milt stated that, in a question and answer format, this may not happen and it could be better for Joe.

Rex stated that Dow may want to respond to a question that Dow wants to reserve its options. Milt stated that the Dow Board got the impression that Consumers Power wanted Dow to produce a witness that didn't know

what had gone on. He said that the Dow Board didn't like this approach and directed that Dow's witness was to be completely aware and so testify. Dave Rosso stated that he didn't feel he was asking Dow to make a substantive change.

Milt asked Dave Rosso if Consumers Power intended to ask a question pertaining to the 1976 management review. Dave Rosso stated that they may ask Joe to only state what the conclusion of the Corporate review was.

Rex stated that they may want Joe to then conclude that Dow wants to keep its rights and options open.

Lee Nute pointed out that Dow management saw two general areas of significant misrepresentation from Consumers Power that Dow was concerned about:

- the issue that things may have been misrepresented by Consumers Power on their prospectus;
- serious misrepresentation by Consumers Power since the 1974 amendments were agreed to.

Rex stated that he knew about these issues. He then pointed out that he didn't want anything in the draft that would allow Mr. Cherry to say that Joe Temple had misled him. Lee Nute observed that this is the way Joe Temple wants it stated.

Milt pointed out that, in response to the question, "What was the conclusion," Joe may want to say that nuclear steam was the decision and not get into the area of options, etc. Lee asked Consumers Power to tell him how they wanted it phrased and he would then take it into Joe and see what Joe had to say about it. Dave Rosso stated that they were going to have to do some drafting in the afternoon and if they saw Joe then, they could explain some of these items to him.

Rex stated that he would like to have the statement "continue to review it and keep all its options open" included in the testimony. Milt

cautioned that this statement brought out the tenuousness between Dow and Consumers Power. Dave Rosso stated that he didn't know if it had that effect or not.

Rex stated that Consumers Power wanted to emphasize that, right now, it is Dow's intent to go forward with the plant while, at the same time, keep all its options open. Rex also emphasized that the Court of Appeals statement deals with the cost/benefit analysis and the continuing negotiations between Dow and Consumers Power do not affect this analysis and shouldn't be permitted to be gone into during the hearing.

A discussion followed concerning statements made on pages 7 through 10 pertaining to steam take, Rate F, minimization of Dow's costs, etc.

The parties spent the remainder of the day putting Joe Temple's testimony in a question and answer format.

MEMORANDUM TO FILE

D. A. DURAN

RE: DOW/CONSUMERS POWER MEETING OF 11/8/76

The following memo is an accurate summary of what was said during the meeting; however, it should not be regarded as being verbatim in any sense.

Messrs. Nute, Wessel, Temple and I met with Dave Rosso and Rex Renfrow on November 8, 1976 in Building 47 of Dow's Midland Plant.

Dave Rosso opened the meeting by stating that they were here to accomplish three things:

- cross-exam of Joe in preparation for next week;
- talk about other things relevant to the hearings;
- talk about pricing on coal and coal gasification.

Dave Rosso stated that he had notified Mr. Cherry of the availability of Consumers Power's documents in Jackson on Thursday, but Mr. Cherry had not shown up as yet. He then went through a variety of areas that he felt Mr. Cherry would focus on. These included the various reviews that have been conducted by Dow and also certain information on the old powerhouses.

Milt pointed out that there was a very substantial distinction between the 1984 date and whatever Dow plans to do in 1982. He stated that one is to stop the old powerhouses when Dow had another source of supply; the 1984 date has been selected at the outside if everything fails.

Dave Rosso stated that he wanted to explore what distinction Joe Temple will make in his own mind. Dave Rosso stated that he thought Mr. Cherry would be attacking this. Milt pointed out that there is an element of adversity between Dow and Consumers Power. He then asked why Mr. Cherry would want to show that these things could be run longer. Dave Rosso pointed out that this would give Mr. Cherry a chance to show that the plant should be shut down.

Dave Rosso then continued the outline of items they wanted to accomplish at this meeting:

- comparative cost studies that Dow has done;
- current contractual negotiations and how they relate to Dow's current plans (Dow will keep all its options open; firm deadline on steam supply).

Dave Rosso and Rex then proceeded to go through a "preparation" and "cross-exam" exercise with Joe Temple regarding his testimony.

The parties present discussed the coal pricing situation between Dow and Consumers Power. Rex pointed out that he didn't want to get into a debate as to whose cost estimates were right. He stated that it seems Dow's estimates are usually three months behind Consumers Power's estimates. Joe added that he didn't know if this was right or not. Rex stated that the Consumers Power people have told him that their coal prices are based on estimates they have received from quotes and that Dow's estimates may be based on the cost of getting the coal from their own mines. He pointed out that the big lag is the percent increase in 1982 and beyond.

Milt stated that the Consumers Power people may be thinking that there has been a doubling of coal prices in the last few months. Joe stated that Dow does not agree with Consumers Power coal price estimates. He pointed out that Dow's own in-house experts have been looking at this and Dow is not going to change its estimates. Milt pointed out that the figures used by Dow came from a letter from Mr. Howell dated 9/21/76. He stated that Consumers Power now is raising their estimates after this date. Rex stated this has happened because Consumers Power went out after that date and tried to buy coal. He stated that the prices Consumers Power is coming up with are those quoted to them from the people they buy coal from. Joe pointed out that Dow's prices are based on information from the people Dow buys coal from.

In response to a question from Rex, Joe stated that Dow was using high sulfur coal to base their estimates. Rex stated that this fact may be a reason for the discrepancy since he felt Consumers Power is using

low sulfur coal and there is a significant cost difference between high and low sulfur coal. Rex stated that this entire issue is a problem between Dow and Consumers Power, and he would try to get the respective coal people together and try to make some sense out of it.

The preparation and cross-exam exercise continued between Dave Rosso, Rex, and Joe.

Dave Rosso asked Joe how much of a sense did Joe have of a decision that Dow may eventually decide not to take nuclear steam power from Consumers Power. Joe reiterated his personal views on the matter. Milt stated that this was a perfect answer for Joe because he is looking at this from a personal viewpoint. Dave Rosso stated that, from a Consumers Power point of view, it would be better to have the Dow Corporate decision. He said this was because Joe feels so strongly about Consumers Power being here at all. Dave Rosso pointed out that he thought Joe felt that Dow does not have proper control over all of this. Dave Rosso stated that it was not going to be good for Consumers Power to have Joe stress the negative on this matter. He stated that Joe should stress the Dow Corporate Review position.

Rex pointed out that, generally, people see things differently from one another. He also pointed out that the review team was made up of several different people and their collective decision quite possibly could have differed from what some of the team felt from a personal level or viewpoint. Dave Rosso stated that Joe may want to state what the Dow Corporate position is and then state what his personal concerns are. Joe stated that he didn't have a problem with that approach.

Dave Rosso and Rex then proceeded to point out areas where Joe should be thoroughly familiar and comfortable with because of the high probability of attack by Mr. Cherry on cross-exam. The preparation and cross-exam exercise continued.

During the "exercise," Dave Rosso made the observation that Joe was a lousy witness in terms of Consumers Power's position in the case. Dave Rosso pointed out that Joe did not support the project in as positive a manner as they would like to have him pursue it. Dave Rosso stated that it would be better to have a witness that would look at the nuclear plant in a very positive manner.

A discussion ensued between those present pertaining to the back-up facilities Dow has or would have and how they were going to be used when the nuclear project goes on stream. The concern was how much steam Dow may be taking from this back-up system. Dave Rosso stated that it would be more effective if Joe and Jim Burroughs could quantify how much steam Dow was going to use. Milt asked if it would be proper for Dow to state that they are going to use twice as much as what Consumers Power has stated in their ER Report. Milt stated that he didn't want Dow to be blamed for what was in the ER Report. Dave Rosso stated that all he wanted Dow to state was that Dow is going to operate their back-up system X% of the time.

The preparation and cross-exam exercise continued.

After a general discussion about the "return on investment before taxes" concept between Rex and Joe, the meeting adjourned.

MEMORANDUM TO FILES

RE: DOW/CONSUMERS POWER MEETING OF 11/15/76

The following memo is an accurate summary of what was said during the meeting; however, it should not be regarded as being verbatim in any sense.

Messrs. Temple, Wessel, Nute, Pribila and I met with Dave Rosso and Rex Renfrow on 11/15/76 in Building 47 of Dow's Midland Plant.

Rex opened the meeting by stating that Joe Temple was going to testify on November 30, 1976. He made the observation that this would be before Mr. Howell's testimony and that Joe would not have to be bothered with Mr. Cherry throwing Mr. Howell's testimony back at Joe. A discussion continued concerning Joe's unavailability after 12/1/76.

Dave Rosso pointed out that no one has gone down to look at the documents as yet. Dave Rosso told Joe that he and Rex were going to go back through the same things they had covered with Joe on 11/8/76.

Dave Rosso asked a question regarding a proper foundation concerning the documents from the Michigan Air Pollution Control Commission in this area. He wanted to know who the custodian was of the business records for the Michigan Division. Lee Nute stated that he had the records in his file and would be willing to testify to that fact.

Rex proceeded to tell Joe what to expect during the hearing and how to conduct himself during his testimony and cross-examination.

A discussion ensued on whether or not Dow has initiated any legal action against Consumers Power in relation to the contract between Consumers Power and Dow. A discussion then continued on the letter

that Lee Nute sent to Judd Bacon. Lee pointed out that Consumers Power has stated in the Prospectus that there is a possibility that Dow will sue Consumers Power over Consumers Power's actions.

Dave Rosso asked Joe to stay out of the area of legal actions taken or not taken.

Rex told Joe that he (Joe) should refrain from referring to the fact that there were two separate reviews (Michigan Division and Dow Corporate).

Dave Rosso reviewed Dow's position on what would happen if there were additional delays or increased costs of construction. He stated that Joe should emphasize that, in the event of any particular significant change, Dow will review the situation in depth.

Lou Pribila discussed the alleged SO₂ violation problem Dow is having with MAPCC.

Dave Rosso stated that it is very important to realize that Dow is not really going to know what to do in the event of further delays until Consumers Power and Dow get together and resolve things via further negotiations.

Rex and Dave Rosso continued to engage in a cross-exam exercise with Joe.

A discussion followed concerning coal pricing assumptions. Dave Rosso asked Rex what the status of this situation was. Rex stated that Lee was still working on setting this meeting up to try and resolve the differences between Dow's and Consumers Power's assumptions on coal prices. Lee pointed out that there was no difference between Dow and Consumers Power on "data base" on prices but there were definite differences in the "escalation" factors. Milt pointed out that one of the dangers of Dow changing their escalation figures to match Consumers

Power's is that it may seem that Dow is buckling under to Consumers Power or that Dow really doesn't have any faith in their (Dow's) own numbers or procedures.

Dave Rosso stated that he had called for a meeting of Dow and Consumers Power coal people with the hope that they could define the difference and make Joe aware of this difference. Milt talked about several things pertaining to Dow's impeaching their own internal review. He pointed out that it would probably be sufficient to have Consumers Power just communicate to Dow that they (Consumers Power) have escalated the figures and their reasons for doing so.

Dave Rosso asked Lee if an attempt could be made to get the coal people together before the hearing. Lee stated that he thought Dow could do this once they got to the people involved with the matter.

I left the meeting at approximately 12:45 p.m. to attend a hearing in Bay City on the Echols' matter. The meeting continued.

TO FILE
FROM RYoungdahl
DATE September 16, 1976
SUBJECT DOW-CONSUMERS POWER

ATTACHMENT 1

Consumers
Power
Company

INTERNAL
CORRESPONDENCE

CC AHAYmond
JDSelby
JBFalahee

I received a telephone call from Joe Temple on September 16 at approximately 11:00 AM as a follow-on to our recent discussions. He identified that the Dow team has been formed with a series of seven task force assignments. He would not tell me who headed up each task force. All of the task forces will report back to Paul Orfice, President, Dow USA. It appears to me that the coordinator is a man named Al Klomporens (sp?) - described as a black, intelligent staff man to Orfice.

The seven task force assignments are:

- 1) to review the Dow decision from both economic and noneconomic standpoints - CPCo is invited not to provide input
- 2) review the legal aspects of the decision - past, present and future - CPCo is invited to make comments
- 3) review the environmental and energy conservation aspects of the Midland Division alternatives for both power and steam - CPCo is invited not to provide input
- 4) review the validity of the Dow position; for example, the decision is made with the full understanding that nuclear safety is not an issue. Julius Johnson is the Dow team leader and CPCo is invited to provide an input
- 5) consider the impact of the Division decision on the Midland community when made public - CPCo is invited to provide an input
- 6) consider the impact of the Division position and a similar Dow corporate position on Consumers Power. CPCo is invited to have an input and the date is September 24 at 2:00 PM. Dow members include - POrfice, MWhiting, JTemple, AKlomporens and LNute
- 7) consider the impact on (a) the national energy program (b) nuclear power in the United States (c) on the State of Michigan - CPCo is invited to provide an input.

I told Joe Temple I would get back to him with Consumers Power contacts for those task forces where we are invited to provide input.

Temple indicated that the corporate review must be complete for presentation and adoption at their Board meeting on October 7.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

<hr/>		
In the Matter of)	
)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2))	
<hr/>		

PROPOSED WITNESS LIST
OF CONSUMERS POWER COMPANY

In accordance with the terms of the January 4, 1979 Order Concerning Remanded Issues, Consumers Power Company submits the following "list of the names and addresses of all witnesses or persons alleged to possess information regarding this matter". (Order at p. 10) Inclusion on this list does not indicate that Consumers Power Company believes that the individual would be necessary as a witness in the event a hearing were held. Rather, this list is intended to represent the outside limits of persons who have information regarding this matter.

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The Dow Chemical Company
Midland, Michigan 48640

Judd L. Bacon
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

James H. Hanes
2030 Dow Center
The Dow Chemical Company
Midland, Michigan 48640

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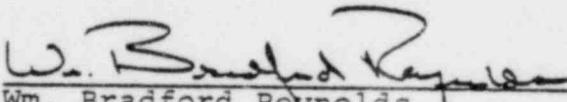
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Counsel for Consumers Power Company

Dated: March 30, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the documents listed below were served on this 30th day of March, 1979, upon the persons named on the attached Service List, by hand delivering copies to those persons in the Washington, D. C. area, and by mailing copies, first class, postage prepaid, to all others:

1. Consumers Power Company's Motion For Summary Disposition
2. Consumers Power Company's Statement Of Material Facts As To Which There Is No Genuine Issue To Be Heard
3. Memorandum Of Consumers Power Company In Support Of Motion For Summary Disposition
4. Proposed Designation Of Record Of Consumers Power Company
5. Proposed Witness List Of Consumers Power Company.


Wm. Bradford Reynolds

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

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