SEP 27 1977

MEMORANDUM FOR: Howard Shapar, Executive Legal Director

FROM: Thomas J. McTiernan, Director
Office of Inspector and Auditor

Original Signed by
Thomas J. McTiernan

SUBJECT: REVIEW OF THE MIDLAND MATTER

As you requested, we have completed our preliminary consideration of the Midland matter and, based upon our review of the materials furnished by your office, both initially and in response to other requests, as well as consulting with you and members of your staff, we are of the view that there is no criminal or other misconduct in this matter warranting further action by this office. Our consideration of possible non-criminal misconduct was confined to the activities of NRC employees. Also, while not passing upon the adequacy of the hearing process from an audit or management standpoint, we found no glaring deficiencies in the hearing process that, if corrected, would guard against the unique problems that arose in this case. However, just as outside observers, we were struck with the impression that the "looseness" of those aspects of the hearing that we reviewed, mostly the Temple-related transcripts, contributed considerably to the confusion that developed.

While I am sure this observation comes as no surprise to you, there seems little doubt that a prehearing discovery proceeding might have avoided the arguments, charges and counter-charges that opened the hearing and threw things into a turmoil. Also, the sweeping discussions that accompanied objections to questions, the lengthy speeches made in the form of questions, the wide-ranging nature of matters raised and discussed almost at will by counsel (with a witness on the stand) and the frequent exchanges between counsel left an impression with us that there may be a need for "tightening up" hearing rules and procedures for the benefit of all parties and in the interests of assuring a fair and equitable hearing. The hearing in this matter has been described to us as "chaotic," probably an apt description.

Also, we noted that the background material you furnished us to assist in our review included a memo prepared by Mr. Hoefling of your staff dated February 6, 1977, which raises certain questions concerning this matter. We have been advised that, while your office has not addressed

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this memo on the record, it has been discussed with Mr. Hoefling by supervisory personnel and the memo does not reflect the views of ELD in the items discussed. Our review of the Hoefling memo in the light of OIA's responsibilities is discussed hereafter.

The basic questionable conduct involved is the failure of Consumers to include in the direct testimony of the witness Temple the fact that Dow-Michigan, after the Court of Appeals decision and in view of "continuing circumstances," concluded that the project was "disadvantageous" to Dow. The conclusion was subject to corporate review and decision. The information involved did come out on cross-examination. Also it was available to all parties before the hearing and was furnished at the commencement of the hearing.

The failure to incorporate the Dow-Michigan concerns in the direct testimony is being questioned particularly in the light of the so-called Nute notes. A further concern about the conduct is expressed in the Hoefling February 6, 1977, memo, in which he states Consumers and Dow failed to advise the staff of the continuing differences.

The Nuta notes (Nute is a Dow attorney) cover September 1976 conferences with Consumers attorneys in which the Consumers people reportedly stated, among other things, that (1) the suspension hearing is most critical, (2) there will be no discovery in the hearing and probably no intervenor cross-examination so they will be able to "finesse" the Dow-Consumers continuing dispute, and (3) if the Dow testimony is not supportive of Consumers and suspension results, Dow will be sued for breach of contract and all damages. Other alleged Consumer comments were that (1) if Dow USA were to accept the Dow-Michigan recommendation and says so at the hearing the CP would be suspended and (2) Consumers has the "lever" if construction is continued and the intervenors have the "lever" if construction is suspended. It should be noted, of course, that these notes were made by a Dow attorney and, while Dow and Consumers were forced to cooperate to present evidence at the hearing (Consumers needed a Dow witness), they were at arms length on contract negotiations. Eventually they even disagreed over who decided to exclude the contract dispute information from Temple's direct testimony (see briefs filed in response to the Board's question and item 35 furnished by you).

According full credibility to the Nute notes for purpose of this discussion, they clearly indicate an early state of mind on the part of Consumers to "downplay" the contract dispute in the hearing. There then ensued a series of discussions and conferences on preparing a Dow witness to testify for Consumers. It is these continuing preparations which provide the best basis for evaluating the implications of Consumers' conduct, that is, whether they were corruptly motivated and thus obstructing justice, the only possible criminal theory we can see. (We saw no allegation or indication of perjury, subordination of perjury, defrauding of the Government, or other possible violations.)

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Whether there was a corrupt endeaver must be determined by the facts. Consumers take the position that the failure to present the Dow-Consumers contractual problems in their direct testimony was based upon a legal determination that it was legally immaterial in view of the Dow-USA decision to honor the contract subject to a later change of mind. From Consumers standpoint, such an argument is legally consistent with the related Consumer position that the Board cannot look behind Dow's position at the time of the hearing to abide by the contract and use the steam. Unless such arguments are knowingly frivolous and lacking in foundation, there is no reasonable basis to conclude that Consumers' attorneys were corruptly motivated and that their conduct went beyond their duty to protect their clients' interest and their role as advocates. While one might wonder how these attorneys, in the loose atmosphere of these Board proceedings, ever thought they could "downplay" their contract problems by relying on such legal niceties as materiality and limiting the scope of cross-examination, their failure to prevail in such strategy does not constitute criminal conduct. Criminal conduct in these circumstances more likely would involve making the key witness in the contract problem, Temple, unavailable for the hearing or tampering with his testimony or knowingly and falsely denying the existence of a contract dispute. In fact, the record reflects a willingness to place Temple on the stand to express his views on the contract, although there is an indication that early in the Dow-Consumers conferences there was a view that an official closer to the corporate position should be the witness. There was a tendency to call Temple's views "personal," but there is little doubt they were also the views of Dow-Michigan. There is ample indication that Consumers expected the Dow-Consumers contract differences to come out in Temple's testimony. Temple's witness preparation anticipated this information being developed on cross. He was instructed to be truthful and the transcript indicates he spoke openly and freely. Further, there is basis for an argument that no one could really claim surprise when the information on the contract problems did come out on cross-examination in the hearing. For example:

1. In May 1975, the Wall Street Journal published an article indicating contract differences existed;

2. Temple made a press release on November 12, 1975, before the Saginaw Valley Press Club expressing concern about the contract delays;

3. The Court of Appeals on July 21, 1976, specifically noted in its remand that an issue to be considered was Dow's need for steam;

4. Mr. Cherry before the hearing began, made it clear Temple was a necessary witness, thus indicating some prior knowledge of his potential testimony; the staff took the position that a Dow witness had to be produced or he would be subpoenaed;

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5. Exhibits were made available at Jackson a month before the hearings which disclosed details on the contract problems, a fact acknowledged by the staff.

In addition to the above, it should be noted that Temple, who was technically a Consumers' witness, in his direct testimony, which was circulated prior to the the hearing, certainly pulled no punches when it stated Dow will keep the matter under "continuous review" and "keep all of its options open." He stated further "it must be emphasized that the timetable of the Midland nuclear plant is the critical factor in all of this and that in the near term this timetable is Dow's most critical problem." Also, he testified that "there must be a specifically stated deadline for the commencement of a steam supply for Dow-Michigan by Consumer Power."

With language like this, furnished in advance of the hearing, it is difficult for anyone to say the Board was being deceived. From Consumers' standpoint, about the only favorable thing that can be said for Temple's direct testimony is that it did conform to their legal theory that the legal issue before the Board was Dow's present position to abide by the contract, not Consumer's future ability to deliver steam or Dow's possible change of mind at a later date.

It should be noted, too, that the Board is at least partially responsible for the confusion that resulted. As we understand, initially the hearing was scheduled on very short notice and only oral testimony was planned with no discovery. The lack of adequate discovery is the key. It should not be overlooked that Consumers voluntarily made available before the hearing discovery-type information covering the Dow-Michigan concerns and also produced it at the commencement of the hearing at the request of Mr. Cherry.

We have reviewed Mr. Hoefling's memo of February 6, 1977, from the standpoint of the responsibilities of this office. The principal points of the memo are:

1. "It would appear" that the need for steam issue should be evaluated in the time frame that the power plant will be operational. This requires the Board to make a "predictive determination" as to whether Dow "intends" to take the steam. The memo terms Dow's intent "tenuous" and says it is a "close question." The memo acknowledges that in the hearing Consumers legal position on the "intent" question is that "if Dow indicates a present intent to take the steam, that is adequate to support a finding of need for steam..."

2. The staff appears to be under an obligation to provide the Board with its views on the need for steam and the factual basis to permit the

Board to possibly suspend the steam-producing unit without suspending construction on the all electric unit;

3. Full disclosure of information is basic to the regulation of nuclear power. The memo observes that the licensee may not appreciate the significance of the need for candor. The memo states that a viable theory of the case is that in September Dow was contemplating repudiation of the contract but was swayed by Consumers under the threat of a lawsuit. The memo states that at no time was staff advised of the depth of the contract dispute or that Dow-Michigan was unfavorable. The staff took the position that the Dow-Consumers relationship was "firm." The memo observes that the licensee has acted improperly but adds that "this is probably not the case." The memo suggests a special proceeding to explore all issues and the findings be taken into consideration on suspension.

Since we could not find any material in the file reflecting ELD's position on the Hoefling memo, we accorded its contents special consideration in our review and discussions with staff. While we recognize that the issues raised in the Hoefling memo cover such complex areas as (1) staff's responsibilities to the Board, (2) ELD's role as counsel to NRR, (3) the obligations for candor on the part of parties to license proceedings and (4) the legal problems involved in the "predictive determination" and "intent" issues discussed in the memo, we concluded that the implications of the memo that staff was not properly fulfilling its obligations to the Board raised a question for OIA to consider. On the basis of our review, we have concluded that the position adopted by staff before the Board is based upon a valid legal determination in the light of the circumstances and cannot be deemed to be improper, misleading or lacking in foundation. We understand that the legal issues involved have been fully discussed with Mr. Hoefling. Further, as Mr. Hoefling noted, the requirement to make a "predictive determination" at this time is a difficult legal question. ELD believes the better view is that Dow's corporate present position on the need for steam should be more controlling than speculation on its future or present "intent," particularly in view of the fact that such speculation could have the effect of stopping construction after millions of dollars had been spent. As we understand it, a "predictive determination" test might be applicable if the record clearly showed that Dow's present position on the need for steam was not supported by the facts, which is not now the case. As was pointed out to us, a ruling to continue construction does not foreclose the issue. Circumstances can change. The remand hearing must still be held. Dow may ultimately change its mind, which could compel a reopening of the matter under an order to show cause.

We also were advised that there is no special rule or regulation that Consumers violated in not making the contract differences a part of its direct testimony. For the reasons expressed above, we do not find

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Consumers conduct a matter that compels action to initiate a special proceeding or warrants suspension. If there is confusion about the obligations of parties to disclose all relevant facts openly, up front and in direct testimony, without regard to such legal niceties as materiality and scope of cross, then the ASLB should clarify what is required. Further, we have no difficulty with the fact that Dow had to consider its possible vulnerability to a lawsuit in adopting its position. Parties breach contracts at their peril. As a general proposition, we find nothing wrong with letting someone know he is risking a lawsuit. This is particularly true where, as in this case, the hearing was to be held on very short notice. Dow needed far more time than what was allowed to consider all the implications of a possible breach of contract.

As you know, the Board has now ruled in this matter. Our review in response to your request and our reply to you were substantially completed before the Board decision was announced. We have reviewed the Board's opinion and find nothing therein to alter the views expressed herein.

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