

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Board

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

RESPONSE OF INTERVENORS OTHER
THAN DOW CHEMICAL COMPANY TO
LICENSING BOARD ORDER OF JANUARY 4, 1979

Pursuant to the Board's Order of January 4, 1979, Intervenor herein other than Dow Chemical Company ("Intervenors"), by their counsel, submit the following Response concerning the four matters specified at p. 10 of that Order.

Introduction

We must emphasize at the outset that the issue of Consumers' attempted suppression of highly material information does not come before this Board in the form of mere unsupported allegations. To the contrary, there is already substantial evidence of record developed primarily by Intervenor--and including among other things the sworn testimony of senior officials of Dow Chemical Company--concerning Consumers' deliberate attempt to hoodwink the other parties and the Commission by presenting evidence

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which had been so radically doctored as to make it highly misleading and in some instances downright false. Virtually all of the support for these charges was (and is) in the form either of documentary evidence which cannot meaningfully be disputed,* or of sworn testimony from Dow officials, which, to say the least, diverged dramatically from the prepared testimony submitted by Consumers in an attempt to show that all was well between Consumers and Dow. See, e.g., the testimony of Dow witness Joseph Temple at Tr. 414-17, 2320, 2322, 2379-82, 2399-2400, 2703, 2707.

Even if we limit ourselves solely to the documentary evidence and sworn testimony presented thus far, a damning picture is presented. In order properly to focus the issues, we summarize it briefly here. Matters began with the Board's October 21, 1976 opening of discovery concerning the Dow-Consumers relationship--a major, if not the major, issue in the suspension hearings before the Board, inasmuch as the Dow-Consumers relationship is the principal reason for the present design and location of the Midland facility. Consumers' evidentiary presentation concerning

* See, for example, Midland Intervenors' Exhibit 25, described by the Board in its September 23, 1977 Opinion as indicating an intent to "finesse" the ongoing Dow-Consumers dispute and "to not disclose important facts to the Board." Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-77-57, 6 NRC 482, 485 (1977). As the Board responded when Consumers attacked that portion of its Opinion: "[paragraph 10 of the Opinion] begins by reciting that the exhibit relates that certain suggestions were made. It seems to us beyond a doubt that it relates what we have said that it relates." Order, November 4, 1977, p. 2.

its relationship with Dow began with the written testimony of Joseph G. Temple, incorporated into the record at Tr. 220. That testimony asserts (at pp. 2-3) that "at the present time [November 1976] circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982. Under the present circumstances as known to Dow, the nuclear alternative remains the most attractive one economically."

That statement, however, is seriously misleading, and in some respects false. It omits the extremely important facts--which Consumers attempted to suppress, as we will see, but which Intervenors unearthed during discovery--that: (i) Both Mr. Temple and Dow's Michigan Division, the corporate arm chiefly responsible for the dealings between Dow and Consumers, had affirmatively concluded and repeatedly stated that the Midland nuclear project was no longer advantageous to Dow; (ii) Although the Dow corporate review of the Division recommendations resulted in a decision not to oppose the Midland project during the suspension hearings, that decision was largely if not entirely based upon Consumers' threat to sue Dow for some \$600 million if Dow did not actively support the project (a threat Dow's counsel termed "pretty damned close to blackmail," Midland Intervenors' Exhibit 25); and (iii) Dow's corporate management had become so disenchanted with

Consumers in general and the Midland project in particular that, if the Dow-Consumers contract had been tendered to Dow as of November 1976, Dow would have refused to sign it (Tr. 414-17, 2320, 2322, 2707).

Even as developed thus far, the record affirmatively shows that Consumers knew those facts, but deliberately chose to conceal them from the Board. Mr. Temple so testified (Tr. 2379-82), and the documentary evidence is very clear. At a meeting between attorneys for Consumers and attorneys for Dow on September 21, 1976, before Consumers filed its prepared Temple testimony, Consumers told Dow:

"Consumers assumes Cherry [Intervenors' counsel] will not appear because of lack of funds--Consumers says suspension hearing most critical--they believe that since there is no discovery, and probably no intervenor cross-examination--will be able to finesse Dow-Consumers' continuing dispute."
[Emphasis added.]

In order to further this "finesse," Consumers urged that the Dow witness to be tendered be someone from "Dow Chemical U.S.A. or corporate area who is unaware of Midland Division recommendation to Orefice." (See also Tr. 2399-2400, 2703.) After Dow refused to do as Consumers wished, Consumers:

"...then made naked threat that if Dow testimony not supportive of Consumers (note: no longer if we just go too far) and that results in suspension or cancellation of permit, then Consumers will file suit for breach and include as

damages cost of delay, cost of project if cancelled and all damages resulting from cancellation of project if it causes irreparable financial harm to Consumers (bankruptcy). (Note: pretty damn close to blackmail)"

Midland Intervenors' Exhibit 25.

Mr. Temple himself agreed, on cross-examination by Intervenors, that his written testimony was at best seriously misleading (Tr. 2307; see also Tr. 2379-82):

"Q...Would you agree with me that the presentation of your testimony if the goal was to tell in complete detail, everything that was going on at that point, that your testimony was, as judged by that criteria, not open, not honest, and not consisting of all the relevant information?

A. I would--I would agree to that."

The written testimony which Mr. Temple himself agreed was "not open, not honest, and not consisting of all the relevant information" was prepared primarily by Consumers. The documents presented by Dow in connection with its December 22, 1976 memorandum regarding Hearing Preparation show that--prompted largely by Consumers' threats of litigation--Dow regarded the nature and scope of the Temple testimony as a matter to be determined by Consumers rather than by Dow. Indeed, the Dow-Consumers correspondence concerning preparation of the Temple testimony reveals a continuing (albeit not particularly forthright) effort on Dow's part to

dissociate itself from Consumers' decisions concerning the precise form and scope of the Temple testimony-- apparently in order to avoid being drawn into precisely the kind of charges with which we are here concerned. See, e.g., Exhibits A1 and B to Dow's December 22, 1976 Memorandum.

Finally, the documentary evidence developed thus far sharply contradicts Consumers' post hoc rationalization that the information it attempted to cover up was irrelevant or insignificant. The documents show that at the time Consumers was engaged in preparing the Temple testimony, it knew that information concerning the Consumers-Dow dispute was extremely significant and could well determine the outcome of the suspension proceedings. At the September 21, 1976 Consumers-Dow meeting described in Midland Intervenor's Exhibit 25, Consumers' attorneys expressed the flat belief that "if Dow accepts Division recommendation and takes that position in suspension hearing, then construction license will be suspended for at least one year--no doubt about it." In a subsequent meeting on September 24, 1976, Consumers' Chairman of the Board agreed that whether Dow "officially" supported Consumers or not, disclosure of the ongoing dispute and of the Midland Division recommendation would drastically impair Consumers' prospects of success in the suspension hearings:

"If Dow gave lip service to the contract between Dow and Consumers Power, but indicated it did not like the deal anymore--the odds would be reduced to 50-50. It was added that this would be a high-risk situation."

Thus Consumers knew quite well that it was engaged in a deliberate attempt to suppress information which--whatever self-serving rationale Consumers might adopt--the Board was more than likely to consider extremely significant.*

I.

STATEMENT OF ISSUES

The Board's January 4, 1979 Order directs the parties to provide "a statement of the issues of fact or law which are involved in this hearing, including legal duties of parties to NRC regarding full disclosure." In terms solely of issues, as opposed to the position Interveners take concerning what the record presently discloses and how legal questions should be resolved, we suggest that the following are pertinent issues here:

* As the Board did. It said in paragraphs 23 and 24 of its September 23, 1977 Decision: "While Dow needs steam, Dow does not necessarily need it from Midland and whether Dow will ever buy steam from that plant is, on the record, speculative.... In the event that Dow fails to buy steam from Consumers, the circumstance will be one of a plant at a site for which only very limited alternatives were explored, designed in substantial part for a purpose which will not be fulfilled. The effect on the values that NEPA protects could be serious...."

1. Did Consumers, in fact, deliberately attempt to withhold information from the Board concerning the Consumers-Dow dispute?

2. Was the information attempted to be withheld relevant to and/or probative of some disputed issue, pertaining either to the findings the Commission must make under the Atomic Energy Act or to the findings the Commission must make under the National Environmental Policy Act?

3. Did Dow Chemical Company knowingly participate or acquiesce in the attempted withholding of information from the Board?

4. Did the Commission Staff knowingly participate or acquiesce in the attempted withholding of information?*

5. Has the Commission legal authority to impose sanctions in the event it is found that information has been withheld?

6. What sanctions (a) may, and (b) should, be imposed in the event it is found that information was withheld? In this connection we wish to call attention to the Board's comment in its September 23, 1977 Opinion, which it declined to alter or withdraw in its Order of November 4, 1977, that "of course there remains the suspicion, raised by the

* We hasten to add that we do not here accuse the Staff of having done so. However, from an analytical standpoint it appears to us that the question must be raised in view of the position taken by the Department of Justice following the Commission's decision in Virginia Electric & Power Co. (North Anna Units 1 & 2), CLI-76-22, NRCI-76/11, 480 (1976).

disclosure of these instances, that there may have been similar ploys which were successful."*

7. Finally, we believe that an unavoidable issue before this Board concerns the point, made by the Board in its September 23, 1977 Decision, that "of course, there remains the suspicion, raised by the disclosure of these instances, that there may have been similar ploys which were successful." Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-77-57, 6 NRC 482, 485-86 (1977). Intervenors are obviously in no position presently to state what additional misrepresentations or omissions Consumers may have put before the Commission. However, we believe that a full factual investigation is essential, both in order to determine whether Consumers' conduct thus far disclosed is part of a broad pattern and because it is essential both to public confidence and to the integrity of the Commission's regulatory process that the "suspicion" harbored by the Board be resolved one way or the other. Indeed, it is particularly important to address and resolve those suspicions in light of the recently voiced Congressional disquiet over utility candor arising from the nuclear

* Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-77-57, 6 NRC 482, 485-86 (1977). The Board reaffirmed its language in its Order of November 4, 1977: "The final sentence [of paragraph 10] is to the effect that the disclosures of Exhibit 25 raise a suspicion of 'similar ploys.' Of course, they do."

accidents of March 28, 1979 at the Three Mile Island plant. Nor can it be overlooked that Consumers has a long history of grudging compliance with Commission regulations and slipshod reporting of violations. See, e.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-106, 6 AEC 182, 184-85 (1973); Appeal Board letter to Director of Regulation, November 26, 1973; IE Inspection Reports Nos. 050-329/76-05, 050-330/76-05 (August 10, 1976), 050-329/76-04, 050-330/76-04 (July 2, 1976), 50-329/78-03, 50-330/78-03 (May 4, 1978), 50-329/78-06, 50-330/78-06 (July 21, 1978), 50-329/78-07, 50-330/78-07 (August 17, 1978).

II

DESIGNATIONS OF PORTIONS OF PRIOR RECORD

The Board's Order of January 4, 1979 also requests the parties to submit a "designation of all portions of the prior record which should be considered, including transcript references, affidavits, exhibits, documents, briefs and other writings." Intervenors believe that at least the following portions of the prior record should be considered in connection with this proceeding:

1. Pages 119-22, 217-471, 656-791, 939-50, 980, 2241-2485, and 2486-2741 of the Transcript, as well

as complete transcripts of the in camera proceedings held on February 1, 1977 and February 3, 1977.

2. Board Exhibits 1 and 2, Intervenors Exhibits 6, 7, 9, 18, 23, 24, 25, 27, 28, 29, 30, 3, 46R, Group 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77 (including in camera portions), and 78; Dow Chemical Company Memorandum regarding hearing preparation dated December 22, 1976; Dow document entitled "History Of The Preparation Of Mr. Temple's Testimony As Disclosed In Documents Produced Pursuant To The Protective Order," dated December 22, 1976; Dow Exhibits A through KK inclusive (submitted in connection with December 22, 1976 documents); Memorandum Of Intervenors, Other Than Dow Chemical Company, Concerning Pending Issues, submitted on or about December 31, 1976; Proposed Findings of Fact and Conclusions of Law of Intervenors Other Than Dow Chemical Company, dated June 30, 1977, and exhibits and other documents referred to therein; all documents listed in Appendix A to February 10, 1978 letter from J. M. Felton to Myron M. Cherry (FOIA-78-10) and all documents described in Memorandum dated July 12, 1977 from K. L. Saifer to William E. Ryan, which Memorandum is attached to the Felton-Cherry letter previously described; all documents located in the NRC files (listed and described in

Memorandum from K. Saifer to Thomas J. McTiernan dated September 21, 1977) identified as "Dow Air Quality Materials," "Temple Testimony Materials," "Dow Documents Made Available At November 30-December 3, 1976 Hearings," "Dow Documents Available At Jackson," "Dow Documents Supplied December 6 and 8, 1976, December 16 and 17, 1976, December 22, 1976, January 7, 1977," "Consumers' Affidavits-October 1976," "Additional Dow Documents," "Midland-Dow Documents, December 22, 1967-December 11, 1975, Volume 1 of 2," "Midland-Dow Documents, January 9, 1976-January 7, 1977, Volume 2 of 2," "Consumers' Documents Released," and "Additional Dow Documents Received At February Hearing Session;" and all documents described in Attachment A to Memorandum of Joseph R. Gray (undated), which Memorandum is attached to the Felton-Cherry letter previously described.

III

LIST OF WITNESSES

The Board's Order of January 4, 1979 also requests the parties to provide a "list of the names and addresses of all witnesses or persons alleged to possess information regarding this matter." Since Intervenor's are not privy to the internal workings of either Dow Chemical Company or Consumers Power Company (or, for that matter, the NRC Staff), Intervenor's cannot supply a complete witness list. At this time,

Intervenors do not know of any persons other than employees of Consumers or Dow or members of the Commission Staff who possess first hand information regarding the pending issues. Similarly, Intervenors are not in a position to provide addresses for these people. However, Intervenors believe that persons possessing knowledge of the issues herein include at the very least Messrs. Aymond, Youngdahl, Falahee, Bacon, and Howell from Consumers; Messrs. Rosso and Renfrow, of the law firm of Isham, Lincoln & Beale in Chicago (Consumers' counsel during the time period which included preparation of the Temple testimony); Messrs. Klomprens, Temple, Nute, Hanes, Oreffice, and Whiting of Dow Chemical Company; and Messrs. Hoefling and Brenner of the NRC Staff.

IV

POINTS OF LAW

The Board's Order of January 4, 1979 requests the parties to provide the Board with "motions, points and authorities, briefs or memoranda of law." Intervenors are not entirely sure what the Board wishes in this regard, and obviously cannot prepare a memorandum or brief responding to any legal arguments which may be made by other parties without having seen those arguments. However, Intervenors' position concerning the applicable legal issues is set forth in their Memorandum Concerning Pending

480, 484 (1976). As we have previously pointed out, Consumers itself regarded the statements in issue here as having precisely that tendency. Furthermore, it is established that an omission, as opposed to a positive misrepresentation, may be a "material false statement." As the Commission has explained, "'material false statement' may appropriately be read to ensure that the Commission has access to true and full information so that it can perform its job." Virginia Electric & Power Co., supra, at 489. Thus we need not engage in logic-chopping here as to whether the extraordinary distortions in the prepared testimony of Mr. Temple consisted of "misrepresentations" as opposed to "omissions;" both are equally unlawful. Finally, the Commission has also held that the duty of full disclosure is uncompromising, and that even an innocent falsehood or omission may properly be the subject of sanctions:

"The requirement urged by VEPCO that liability attach only if a statement is known to be false is inconsistent with the Commission's obligation to protect the public health and safety. If an applicant were liable only for statements it knew to be false, that applicant would have a reduced incentive to ensure that its consultants, contractors, and employees were meeting the highest standards in their work. The less the applicant knew, the less its vulnerability to civil proceedings. In short, forgiving innocent mistakes puts a premium on innocence. We require instead a regime in which applicants and licensees have every incentive to scrutinize their internal procedures to be as sure as they possibly can be that all submissions to this Commission are accurate." Virginia Electric & Power Co., supra, at 486.

While we do not believe that the record, even as developed so far, leaves any room for doubt that Consumers knew exactly what it was doing when it suppressed the facts concerning the Consumers-Dow dispute, we think it important to emphasize the Commission language quoted above. For if (as the Commission held) the demands of the NRC's regulatory mission are so uncompromising as to require the punishment even of an innocent misstatement, it follows that the sanctions imposed for deliberate misstatements of the kind in issue here must be doubly severe.

Under the circumstances, it seems premature for Intervenors to suggest precisely what sanctions should be imposed in connection with Consumers' conduct. The statute provides for sanctions as severe as license revocation. Under the circumstances--including the Board's "suspicion" that other violations by Consumers may exist,

* It is worth noting that the Commission's own inspectors have repeatedly suggested that Consumers is seriously lacking in the "incentive to scrutinize [its] internal procedures" regarded as so important by the Commission. Under date of April 29, 1977, the Commission's Region III Office wrote to Consumers, warning that its continuing violations and past history "...indicate further evaluation of your QA-QC program may be needed to assure safety related work is accomplished in accordance with your commitments and design specifications." As recently as July 21, 1978, IE Inspection Reports Nos. 50-329/78-06 and 50-330/78-08 noted that ten Consumers Power, and 17 Bechtel Corporation, nonconformance reports had to be reviewed and that "in most cases the response to these reports consists of a request for relief from requirements and a rationale for not performing them rather than sound engineering judgment."

and the obvious questions that raises concerning the integrity and accuracy of the NEPA and safety findings made to date-- we believe that revocation, or at least suspension pending a full investigation into the accuracy of the information Consumers has submitted, cannot be ruled out. Compare the Commission's language in Matter Of Hamlin Testing Laboratories Inc., 2 AEC 423, 428 (1964):

"We find in this licensee's past performance inadequate reason to believe that it would in the future meet the high standards of compliance which we must require, and respond to proper inquiries with the simple candor on which we must insist, in order to discharge our own responsibility for public health and safety. Nothing less than candor is sufficient." [Emphasis added.]

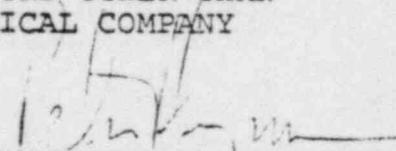
See also Virginia Electric & Power Co., supra, at 492 n. 12, holding license revocation inappropriate principally because "intention to deceive was not shown." Here, by contrast, the record as developed thus far discloses far more than a prima facie case of deliberate deception.

CONCLUSION

As both the Appeal Board and the Commission itself have recognized, the issues in this proceeding are serious and important. The public which will be (and is being) affected by the Midland project deserves nothing less than a full and thorough investigation of the charges against Consumers--charges cogently, if not indeed conclusively, supported by the documentary and testimonial

evidence already of record. That the Commission treat Consumers' violations with the seriousness they deserve, and that it undertake a full and impartial investigation in order to resolve the suspicion of other violations directly raised and adhered to by the Board, is essential, both to public confidence--severely shaken by the recent events at the Three Mile Island Nuclear Plant and the increasing fear that public statements concerning those events were less than candid--and to the integrity of the Commission's regulatory mission. As the Commission itself has recognized in the decisions cited herein, its job cannot adequately be performed unless there is real assurance that applicants such as Consumers are completely open, honest, and candid in their submissions. That assurance cannot be given, but rather will be affirmatively undercut, unless Consumers' conduct is thoroughly examined and severely dealt with.

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Certificate of Service

I hereby certify that the foregoing Response of Intervenor other than Dow Chemical Company to Licensing Board Order of January 4, 1979 in Docket Nos. 50-329CP and 50-330 (Remand Proceeding) was served upon all persons appearing on the attached Service List by mailing a copy thereof to each at the addresses shown, first class mail, postage prepaid, this 30th day of March, 1979.



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