UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

BRIEF IN SUPPORT OF
EXCEPTIONS TO PARTIAL INITIAL DECISION DATED DECEMBER 22, 1981

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The Saginaw Valley Nuclear Study Group, one of the Intervenors Other Than Dow (hereafter "Intervenor"), respectfully submits this Brief in support of its Exceptions to the December 22, 1981 Partial Decision (Remand Proceeding) of the Atomic Safety and Licensing Board herein.

INTRODUCTION

In a nutshell: The Licensing Board here found in detail that Consumers Power Company had deliberately withheld highly material information from this Commission -- and refused to do anything about it.

This appeal is taken from that refusal. We have no quarrel with the Licensing Board's findings of fact (Decis. at 25-39). Those findings were not only correct, but virtually ineluctable, given the documentary evidence (as another Board observed of part of that evidence, "[i]t seems to us beyond doubt that [the exhibit] relates what we have said that it

relates:" see Decis. at 7) and the testimony at the suspension hearings from which this matter arose. But we do quarrel, most profoundly, with the Licensing Board's decision -- despite those findings -- to terminate its inquiry here without so much as a wrist-slap.

We show below that the "conclusions" on which the Board rested that inaction are directly contrary to the Board's own findings and to the very Commission decisions the Board cited. That requires reversal. The implications of the Board's refusal to act are grave -- and gravely damaging. The Board's inaction here directly undermines both the integrity of, and public confidence in, the Commission's regulatory process. It undercuts the entire structure on which that regulatory scheme rests.

In the complex world of nuclear power, we deal with activities costing billions of dollars and fraught with serious concerns involving the public health and safety. It is a truism that the Commission's ability adequately to regulate those activities relies heavily upon candor and accuracy on the part of licensees and applicants. As the Appeal Board said in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347, 356-57 (1976):

> "It is not open to question that those who would construct and operate a nuclear facility,...stand 'in responsible relation to a public danger.' Nor can there be serious doubt respecting the vital importance which attaches to the accuracy and completeness of the representations made to this Commission by the applicant for a nuclear license. Of necessity, those representations play a large role in the Commission's discharge of its statutory responsibility to insure that the grant of the license would not be 'inimical*** to the health and safety of the public.'"

Hence Section 186 of the Atomic Energy Act, 42 U.S.C. 2236, prohibiting "material false statements" on the part of license applicants. The

Commission has made it clear that that section is crucial to the Commission's ability to do its job. As the Commission held in North Anna, CLI-76-22, 4 NRC 480, 488-89 (1976), "...[T]he language and history of the Act make clear that the Commission's primary duty is to protect the public health and safety. Moreover, full disclosure by applicants and licensees of all relevant data is vital if the Commission is to fulfill that duty.... We think...that 'material false statement' may appropriately be read to insure that the Commission has access to true and full information so that it can perform its job."

That is hardly startling. As the Appeal Board observed in the same case, 3 NRC at 360, "the necessity that there be complete disclosure of all information pertinent to a thorough and sound Commission appraisal of the particular application under review" is "so obvious that it needs no extended discussion." Here that disclosure requirement -- fundamental in the law, in the Commission's decisions, and in common sense -- was egregiously violated. The Board's findings, and the underlying documents, leave no doubt that the violation was quite deliberate; indeed, it was planned and discussed for months. To wave such conduct aside without sanctions -- as the Board did here -- is to establish a precedent which all but encourages future violations. That cannot be tolerated.

It is by now well documented that in the nuclear industry, a number of profound and powerful "disincentives" to accurate reporting operate to discourage the kind of candor upon which the Commission must rely if it is to do its job. See, e.g., NUREG/CR-1250, Three Mile Island, A Report To The Commissioners And To The Public (1980) at 161-64. Only rigorous enforcement of the Commission's right to "true and full

information so that it can perform its job" -- only strict adherence to the Commission's "require[ment]" of "a regime in which applicants and licensees have every incentive to...be as sure as they possibly can that all submissions to this Commission are accurate", North Anna, supra, 4 NRC at 486 -- can counterweigh those "disincentives." Yet here the Licensing Board did the exact opposite. The Board's inaction was demonstrably wrong in this case. In the broader context of the Commission's regulatory responsibilities, the Board's inaction was not only wrong but dangerous. That is why we have appealed.

STATEMENT OF FACTS

The central facts pertinent to this appeal are set forth at pages 25-39 of the Licensing Board's decision. Since we accept the facts as there stated -- and since they are drawn largely from documentary evidence cited by the Licensing Board and readily available to this Board -- we need not rehearse the facts again in full. But a brief summary of the Licensing Board's crucial findings is appropriate.

From the inception of Consumers' Midland facility, it was understood that the "Dow connection" -- that is, the sale to Dow of process steam to be produced by the Midland facility -- was a crucial aspect of the Midland proposal, both in terms of siting and in terms of economic feasibility. Indeed, the Final Environmental Impact Statement at the construction permit stage bluntly stated (at page XI-3) that if there were to be no sale of steam to Dow, one of the two Midland nuclear units would be cancelled and the other would probably be relocated.[1]

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1. This was very much on Consumers' mind before it began the process of suppressing Dow information described by the Licensing Board. See, e.g., Staff Ex. 3, Doc. 26 at 3, recording a Consumers' official's reference to the FES on this point and describing the Dow relationship as "one of basis [sic] for issuance of construction license."

As the construction permit proceeding wended its way through the appeal process, continued cost escalations and construction delays -- as well as other things -- produced considerable doubt on Dow's part as to whether in truth the Midland project remained beneficial from its standpoint. See Decis. at 26-27. Eventually the United States Court of Appeals for the District of Columbia, in remanding the Midland construction permit proceeding to the Commission, directed the Commission to "take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fueled generating facilities." Decis. at 5. Thereafter, the Commission convened a Licensing Board to canvass that issue, as well as others raised by the Court of Appeals, in the context of determining whether Midland construction should be suspended pending the completion of full hearings on the remanded issues. Decis. at 5.

By this time Dow's doubts about the Midland project had progressed to "deepseated unhappiness." Decis. at 27. Dow's Michigan Division had formally taken the position "that there was 'no longer the possibility or probability that the nuclear plant would be good for Dow's Midland plant,'" and the parties' disagreement had become so intense "that Dow had seriously considered bringing suit against Consumers for breach of the [steam purchase] contract and had drafted complaints for declaratory judgment." Decis. at 27. Consumers had no doubt whatever that these facts, if disclosed to the Board in the suspension hearing, would seriously impair Consumers' position. Indeed,

> "...one counsel for Consumers explained to Dow that he had not included in a draft of [the principal Dow witness'] direct testimony information that Dow was concerned about Consumers' reliability, or that Dow was seeking a date after which it would be relieved of all

> contractual obligations if steam was not forthcoming, because such information would cause Consumers to 'lose the case.'" Decis. at 28. [Emphasis added.]

Still in the process of evaluating the Michigan Division's recommendation that Dow find the entire Midland project disadvantageous, and concerned about the obvious lack of candor in the draft testimony described in the above quotation, Dow indicated reluctance to tailor its testimony to Consumers' wishes. Consumers responded by threatening Dow with a $600,000,000.00 lawsuit unless Dow did what Consumers wanted -- focusing specifically upon providing "adequate support for Consumers" at the suspension hearings. Decis. at 26, 32. Consumers suggested that absent searching cross-examination by Intervenors it might be possible to "finesse" the Dow dispute, and -- evidently in order to guard against any such cross-examination -- also suggested that Dow might present its testimony through a witness "who was not knowledgeable about the Michigan Division position." Decis. at 29-30.

Initially, at least, Consumers' tactics were successful. To be sure, the Dow witness was Joseph Temple, head of Dow's Michigan Division. But after repeated redrafting -- and despite complaints by Dow that Consumers' revisions in it were "misleading and disingenuous," Decis. at 37 -- Mr. Temple's direct testimony omitted any mention of the Michigan Division's position, omitted any reference to Consumers' threatened lawsuit, and generally painted Dow as continuing to support the Midland project (through "keep[ing] all of its options open"). Decis. at 27-28, 32, 37. However, Intervenors' cross-examination at the suspension hearing brought to light the extraordinary lack of candor and accuracy in that testimony.

Mr. Temple admitted that the testimony was "not open, not honest, and not consisting of all of the relevant information." Decis. at 33-34. Both Mr. Temple and Mr. Paul Oreffice, then head of Dow USA, further testified that the final shape of the Temple direct testimony -- and the fact that Dow had not ultimately adopted the Michigan Division recommendation -- resulted largely from Consumers' coercion and threats of litigation. Said Mr. Temple (Suspension Transcript at 2311):

> "Q. All right. Now just between you and me, Mr. Temple, isn't it true that the only reason that Midland [sic] Division's findings and conclusions was not the corporate finding and conclusion was a lawsuit. Wasn't that the only significant reason?
>
> "A. In my judgment that's true."

Said Mr. Oreffice, when asked what factors Dow USA considered significant in evaluating the Michigan Division recommendation: "Without the threat of litigation, I don't know what our conclusion would have been." Suspension Transcript at 2699. As the Licensing Board found here, "Dow conducted itself through the remaining preparation and hearing with this perceived threat in mind." Decis. at 32-33.

This sordid tale having emerged through cross-examination at the Midland suspension hearings, further inquiry into the preparation and presentation of Mr. Temple's "not open [and] not honest" direct testimony was ordered. Decis. at 6-8. The Board below conducted that investigation. The Board made three major findings. First, it found that the preparation and presentation of the Temple direct testimony resulted in giving seriously inaccurate information to the Suspension Hearing Board (Decis. at 26-28):

"Events occurred in the preparation of written testimony concerning Dow's intention to buy process steam which demonstrate an incorrect view of a party's duty of affirmative disclosure to the Licensing Board. As the Appeal Board stated, the Licensing Board had to probe 'to determine what [Dow's] intention truly is' with respect to purchasing steam from Consumers...."

"Failure to include the recommendation of the Michigan Division of Dow in Temple's direct testimony could have created an unwarranted impression on the part of the Licensing Board that there was very substantial, perhaps even unanimous, satisfaction within Dow with the purchase agreement. In fact, the Michigan Division recommendation that there was 'no longer the possibility or probability that the nuclear plant would be good for Dow's Midland plant' would have disclosed deepseated unhappiness with the arrangement. Evidence that Dow had seriously considered bringing suit against Consumers for breach of the contract and had drafted complaints for declaratory judgment emphasized the extent of this unhappiness. The strength of Dow's commitment to buy steam under its contract with Consumers could be accurately evaluated only with knowledge of this substantial internal disagreement."

Second, the Licensing Board found that Consumers and Dow knew perfectly well that they were withholding highly material information. Indeed, the facts we have summarized above -- and which were found by the Licensing Board -- leave no doubt that the withholding of material information was precisely the purpose of the repeated redrafting of Mr. Temple's direct testimony, principally at Consumers' behest. The Board here found that "Dow and Consumers contemplated as little disclosure as possible." Decis. at 29. For example (Decis. at 28):

"Consumers and Dow recognized the potential impact that knowledge of the disagreement [i.e., the ongoing Consumers-Dow dispute] might have on the Licensing Board, but they carefully constructed rationalizations for not including it. Specifically, one counsel for Consumers explained to Dow that he had not included in a draft of Temple's direct testimony information that Dow was concerned about Consumers' reliability, or that Dow was seeking a date after which it would be relieved of all contractual obligations if steam was not forthcoming, because such information would cause Consumers to 'lose the case.'" [Emphasis added.]

In other words, Consumers regarded the information which it wanted to suppress as not only material, but potentially dispositive. Yet it deliberately suppressed that information, coercing Dow into abetting its scheme. And "even in the face of disclosures raising serious questions about the [Temple] testimony's preparation," Consumers' counsel sought to avoid presenting the facts, on grounds the Board here found as fabricated as the original testimony itself: "This Board does not understand how Consumers could genuinely believe the materials were privileged." Decis. at 30, 32.

Third, the Licensing Board found that -- as Mr. Temple had himself conceded -- the upshot of this protracted scheme was the submission of materially incomplete and misleading testimony (Decis. at 38):

> "After counsels' repeated redrafting of the testimony, the Licensing Board was not provided with complete or candid direct written testimony concerning Dow's intent to enable it to achieve 'sufficient probing to determine what that intention truly is,' as contemplated by the Appeal Board."

In view of the testimony of Mr. Temple and Mr. Oreffice after matters were brought into the open at the suspension hearing, and in view of Dow's own complaint to Consumers that Consumers' draft of the Temple testimony was "misleading and disingenuous" (Decis. at 37), that finding can hardly be questioned.

Thus, the Licensing Board here found that Consumers and (largely as a result of Consumers' coercion) Dow prepared materially misleading testimony, in Mr. Temple's words "not open, not honest, and not consisting of all the relevant information;" that Consumers and Dow fully recognized

the materiality and importance of the information they deliberately suppressed; and that the result was the presentation of materially incomplete, misleading, and uncandid testimony to the Suspension Hearing Board. Yet the Licensing Board here chose to take no action. We show below that its reasons for refusing to take action cannot withstand even cursory scrutiny.

ARGUMENT

I.

THE LICENSING BOARD'S REASONS FOR REFUSING TO IMPOSE SANCTIONS IN THIS CASE CONTRADICT BOTH ITS OWN FINDINGS AND SETTLED LAW

Following its detailed, documented, and damning findings of fact, summarized above, the Licensing Board turned its attention to "the question of what sanctions, if any, should be imposed as a result of our findings." Decis. at 40. The Board advanced three terse reasons for concluding that sanctions would be "neither necessary nor appropriate." Decis. at 40-41. Unfortunately, each of the reasons given by the Board is flatly contrary to its own findings, to settled law, or to both. In itself, and even without regard to the larger (and compellingly important) policy issues present in this case, that requires reversal. It is elementary that the Board's conclusions -- like those of any other tribunal -- must follow from its findings, and equally elementary that the Board's inaction must be justified -- if at all -- on the basis of "its own findings and determinations, and not on subsequent legal arguments of counsel." See, e.g., Hess & Clark, Division of Rhodia, Inc. v. FDA, 495 F.2d 975, 987-88 (D.C. Cir. 1974). Here the result below cannot survive those tests.

First.[2] The Board's first reason for refusing to impose sanctions was as follows (Decis. at 40):

> "In the first place, most of the deficiencies in disclosure identified above resulted from counsels' excessive preoccupation with the supposed interests of their respective clients, and insufficient sensitivity to the high level of voluntary disclosure required in NRC cases. However, there was no conspiracy to countenance perjury or to commit fraud upon the Board. There is no evidence that any attorney deliberately intended to engage in unethical conduct, or to wilfully deceive the Board."

That conclusion cannot possibly be squared with the Board's own detailed findings of fact -- let alone the documentary evidence in this matter and the testimony ultimately elicited at the suspension hearings. The Board's own findings in this case reveal precisely a deliberate and knowing attempt -- spanning a period of months -- to commit fraud upon the Board by suppressing information known to be material. The Board's own findings, and the documentary evidence and testimony, establish beyond cavil that this scheme was engineered by both Consumers and its counsel.

Indeed, it is difficult to see how those facts can be doubted, on the basis of the documentary evidence alone. We discover from the documentary evidence that in September 1976 Dow's Mr. Temple emphasized to Consumers that testimony concerning Dow's position "can in no way be untrue, misleading or incomplete." Mr. Temple then went on to explain the Michigan Division's recommendation, his intent to reaffirm that recommendation to Dow USA, and his intent to push for early adoption of that recommendation by Dow USA. Staff Ex. 3., Doc. 12. One of Dow's

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2. We deal here with Intervenor's Exceptions 1, 2, 3, 10, and 11.

counsel wrote to another of Dow's counsel two days later (Staff Ex. 3, Doc. 26, at 2) that:

> "Whether or not Dow technically continues to be a party, the rule of reason mandates that any significant change in [Dow's] position be set forth, clearly, frankly and fully, especially in view of the Court of Appeals reference to the importance of the Dow position to the project as a whole, and [Consumers'] and the NRC's inquiries in that regard."

Consumers' reaction was expressed at a meeting with Dow a week later, at which both a Consumers official and counsel for Consumers were present: "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." Consumers' counsel then "suggested that Dow witness might be someone... who is unaware of Midland Division recommendation...." And the Consumer official present (Mr. Falahee) made it quite clear what would happen if Dow insisted on testifying frankly:

> "Falahee then made naked threat that if Dow testimony not supportive of Consumers (Note: no longer just if we go too far) and that results in suspension or cancellation of permit, then Consumers will file suit for breach and include as damages cost of delay, cost of project if cancelled...(Note: pretty damn close to blackmail)." [Emphasis added.]

Staff Ex. 5, Doc. 26, at 3.

Three days later, at still another meeting, the threat was reaffirmed by Consumers' Chairman, Mr. Aymond. Consumers Ex. 1, Doc. 8, at 3. Consumers then prepared a draft of the Temple testimony. One of

Dow's counsel complained that Consumers' draft testimony "seems to be disingenuous" and that it "leaves out all of our concerns about Consumers as a supplier and a company." Staff Ex. 20. Consumers' counsel responded three days later by saying that the information had been deliberately omitted "because such information would cause Consumers to 'lose the case.'" Decis. at 28. And so matters proceeded until the final, misleading draft of Mr. Temple's testimony. Decis. at 35-38.

These facts, drawn from the documents and found by the Board, simply do not admit of any doubt that both Consumers' senior officials and its counsel knew perfectly well what they were doing. They were bludgeoning Dow into agreeing to suppress information, because Consumers -- both its officials and its counsel -- regarded the information as so material and damaging that, were it to emerge, Consumers might well "lose the case." Unfortunately, the matter is that simple. If that deliberate doctoring of Mr. Temple's testimony, overcoming Dow's objections by threats of multimillion dollar litigation, does not constitute a knowing attempt "to commit fraud upon the Board," then we do not know what would. From beginning to end, it was a deliberate attempt to "finesse" -- in other words, to cover up -- facts which Consumers itself perceived to be not only "material" but crucial, concerning the Michigan Division's recommendations, Dow's disenchantment with the Midland project, and Dow's dispute with Consumers.

The Board concluded that it saw "no evidence" of any deliberate intent to deceive. Decis. at 40. But what was the "finesse" of the Consumers-Dow dispute, if not an attempt to deceive? How can Consumers' suggestion that Dow present a non-knowledgeable witness (so that he could

be shielded from cross-examination) possibly be squared with candor? How can Consumers' reaction to Mr. Temple's desire to tell the whole truth with the "naked threat" of a lawsuit be considered a mere inadvertent lapse? The documents from which we have quoted, a small sampling of those before the Board, leave no doubt that Consumers' officials as well as its counsel regarded the full truth as extraordinarily material and damaging, and were prepared to go to almost any lengths to prevent it from emerging. We need only look to the Board's own findings. As the Board itself found (Decis. at 28-29), "Dow and Consumers contemplated as little disclosure as possible." Even though they "recognized the potential impact that knowlecge of the disagreement might have on the Licensing Board," they "carefully constructed rationalizations for not including it." Again: if that is not on its face a wilful attempt to hoodwink the Board, then we do not know what is.

Nor, from a legal standpoint, would the presentation of what Mr. Temple conceded (and the Board found) was "not open and not honest" testimony be excused even if it had been inadvertent -- a claim which cannot conceivably be made on the record here. As the Licensing Board here itself noted (Decis. at 16-17), the Commission has repeatedly "stressed that prompt disclosures to Boards of changing circumstances are mandatory." The Appeal Board has long since held that this disclosure requirement "is not the product of any overly procedural formalism on [the Commission's part -- it goes to the very heart of the adjudicatory process. Its sacrifice for the sake of expediency cannot be justified and will not be tolerated." Duke Power Co. (William B. McGuire Nuclear Plant, Units 1 & 2), ALAB-143, 6 AEC 623, 262 (1973) (emphasis added). "In Commission proceedings as in

judicial ones, the tribunal must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome' [citation omitted]." Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 406 n. 26 (1976). Even a lack of scienter, or the absence of any wilfull intent to deceive, does not excuse a violation of that well-established requirement. As the Commission held in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, (1976), any scienter requirement would be:

> "...inconsistent with the Commission's obligation to protect the public health and safety.... 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." [Emphasis added.]

Thus, the Board's first conclusory reason for refusing to impose sanctions -- the asserted lack of any "deliberate" or "wilful intent to deceive" -- is not only directly contrary to the Board's own detailed findings, as we have shown, but legally beside the point as well. Even were wilfulness absent here (plainly it is not), that would not excuse the conduct set out in the Board's own findings. In North Anna, supra, for example, the Commission affirmed the imposition of sanctions for "material omissions" even though "it was stipulated that, at the time the alleged material false statements were made, VEPCO thought each of them was true." 4 NRC at 483, 492-93. The Board's refusal to act here would be contrary to that holding even if the conduct at issue had in fact been inadvertent. Where (as we have shown) the conduct was quite deliberate,

The Board's refusal to act is not only erroneous but an intolerable affront to the proper functioning of the Commission's regulatory scheme.

Second.[3] The Board's second excuse for inaction was as follows (Decis. at 40-41):

> "Next, the high standards of testimony preparation and other conduct which the Board has described herein, have not previously been specifically addressed by the NRC Appeal Board or the Commission. Such standards of conduct may not necessarily have been recognized or followed in other administrative proceedings. Fairness to the parties and counsel would require some advance notice to them of the standards of conduct to be required in NRC proceedings."[4]

Bluntly, the Board's reasoning here strains credulity. It can hardly be argued that either Consumers Power Company or its experienced counsel were unaware of the obligation to tell the truth in formal adjudicatory proceedings. Nor do we understand why "fairness" would require even parties -- let alone members of the Bar -- to be excused from misrepresentation unless they have been warned in advance that the deliberate suppression of material facts is not permissible. Since the earliest days of the Republic, witnesses have been sworn "to tell the whole truth." Surely if, as in North Anna, supra, a licensee may be subjected

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3. We deal here with Intervenor's Exceptions 4, 5, and 6; and, of course, we deal further with Exceptions 1, 10, and 11.

4. The Board went on to observe that in its own inquiry, the witnesses testified "fairly and fully." We do not understand what that fact, pertaining to testimony given under compulsion in 1979, at a point after most of the facts had already been ferreted out through Intervenors' cross-examination at the suspension hearings, has to do with the violations in issue here. That one tells the truth in court would not, for example, excuse him from previously lying to a grand jury.

to sanctions even for inadvertent material omissions, one cannot escape punishment for deliberate suppression of the truth on the ground that one was not specifically warned beforehand.

Nor is the Board's apparent view that its decision here created some "new" standard defensible. As is obvious from the Board's own discussion, Decis. at 11-19, the basic legal duties to which Consumers and its counsel were subject in this case are in no sense new creations. It has long been established that "in order to find misrepresentation, it is not necessary that an affirmative falsehood be shown. Misrepresentation includes the intentional omission of a material fact." Minish v. Huey, 482 F.2d 500, 505-06 (6th Cir. 1973), citing inter alia Dennis v. Thomson, 240 Ky. 727, 739, 43 S.W.2d 18, 23 (1931), and Strong v. Repide, 213 U.S. 419, 430 (1909). At least three years before Consumers began to doctor the Temple testimony in this case, this Commission's Appeal Board had ruled that "parties must inform the presiding Board and other parties of new information which is relevant and material to the matters being adjudicated," adding that this requirement "is not the product of any overly procedural formalism on our part -- it goes to the very heart of the adjudicatory process. Its sacrifice for the sake of expediency cannot be justified and will not be tolerated." Duke Power Co. (William B. McGuire Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-26 (1973) (emphasis added). And as the Commission pointed out in the protracted North Anna litigation, the fundamental requirements of "candor" and "full disclosure" -- blatantly violated here, as the Board's own findings tell us -- were articulated by the Commission itself as long ago as 1964:

"...[A] decade ago, the AEC noted the need for full disclosure if the public safety is to be protected:

> '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 discharg our own responsibility for public health and safety. Nothing less than candor is sufficient.'

"Matter of Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964). (Emphasis supplied [by the Commission])."

Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 490-91 (1976).

Indeed, the North Anna litigation -- widely reported, and finally decided by the Commission before Consumers caused the submission of the doctored Temple testimony in this proceeding -- yielded numerous forceful and unequivocal reaffirmations of a licensee's duty to tell the whole truth in Commission proceedings. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), LBP-75-74, NRCI-75/9, 498 (1975); Id., ALAB-324, 3 NRC 347 (1976); Id., CLI-76-22, 4 NRC 480 (1976). And as the Board's own decision here points out (Decis. at 13-15), North Anna did little more than to reconfirm for the Commission the same principles of what constitutes "materiality," "falsity," and culpable omissions which have long guided the Courts. Surely it is too late in the day to claim that those principles are rei novae, which might take parties or counsel by surprise. Even on the technical question of whether an omission might be a "statement" for purposes of the disclosure statute, 42 U.S.C. 2236, the Appeal Board had no doubt as to the basic principle (3 NRC at 360):

> "One can scarcely take issue with the [Licensing] Board's observation respecting the necessity that there be complete disclosure of all information pertinent to a thorough and sound Commission appraisal of the particular application under review. Indeed, the point is so obvious that it needs no extended discussion." [Emphasis added.][5]

Even limiting ourselves to the Commission's own jurisprudence, then -- let alone the fundamental standards of fraud which have prevailed at common law for centuries -- there can be no doubt that both Consumers and its counsel were well aware that their doctoring of the Temple testimony was wrongful. The Board's attempt to justify its inaction here on the premise that the "high standard" it invoked "had not previously been specifically addressed" (Decis. at 40) is simply inaccurate; and its attempt to prescribe some form of "advance notice" of wrongdoing as necessary to "fairness" (Decis. at 41) will not do. Consumers had that notice. The very decisions the Board itself cites so demonstrate, as we have discussed.

But there is another point to be made. Here as with the Board's first excuse (pages 11-16, supra), the Board's justification for its refusal to act

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5. Similarly, the North Anna Appeal Board agreed with the Licensing Board in that case that "an omission of a material fact in the course of making an affirmative statement might well" -- as undeniably it did in our case: see Decis. at 27-28, 33-34 -- "result in the conveyance of a totally false impression respecting the import of the statement." 3 NRC at 361. And the North Anna Appeal Board also agreed that such omissions are culpable. 3 NRC at 362. The Commission, of course, agreed on both points. 4 NRC at 488-89. The only question related to the technical propriety of proving "omissions" in support of a charge of "false statements" (see 3 NRC at 361, 362-63); and the Commission settled that narrow question by holding VEPCP liable for both forms of impropriety.

was not only inaccurate but also irrelevant. In this case there is no doubt -- there has been none since, at the latest, the Commission's decision in North Anna, supra -- that even the innocent withholding of material information constitutes a violation of a licensee's obligation to the Commission. See 3 NRC at 356-57; 4 NRC at 486-87. But even were that premise newly announced in this case (as the Board seems to suggest), it would avail Consumers nothing. For in North Anna, there was some doubt on the point, albeit limited to the technical question of whether a charge of making "material false statements" could properly encompass proof of material omissions. The doubt was genuine enough; the Appeal Board agreed with VEPCO on the point. But the Commission nevertheless did not hesitate to penalize VEPCO, in that very case, for those omissions. 4 NRC at 485, 492-93. So here: Even were there something "new" from the Commission's standpoint about the long-established standards Consumers violated here, that could not exculpate Consumers' deliberate suppression of material information. As the Licensing Board itself conceded here (Decis. at 12-15), at most the standards it applied to Consumers' conduct do no more than track settled judicial rules. The same was true in North Anna, as the Commission observed (4 NRC at 488, 490); and here as in that case, even if it were true that the Commission has not itself previously articulated the rules, the violation is culpable nonetheless.

Third.[6] The Board's final excuse for its inaction here was as follows (Decis. at 14):

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6. We deal here with Intervenor's Exceptions 7, 8 and 9, and further discuss Exceptions 1, 10 and 11.

> "Finally, we observe that all of the factual information described above was ultimately included in the record of the suspension proceedings. That fact would not serve to condone deliberate misconduct, but it is a mitigating factor since we have found no such deliberate intent in this case. Accordingly, we conclude that the questions raised as to the conduct of parties and counsel in the original suspension proceedings have now been 'fully aired and resolved,' in compliance with the Appeal Board's mandate herein."

As with the Board's first two excuses, this last excuse is neither factually nor legally supportable. The factual inaccuracy need not detain us long. We have already pointed out at some length (pages 4-9, 11-14, supra) that the Board's own specific findings in this case established beyond doubt that Consumers deliberately undertook to suppress what it knew perfectly well to be material information, and to coerce Dow into joining in that shabby exercise. By no stretch of the imagination can Consumers' explicit decision to withhold information because if it were brought forward Consumers might "lose the case" be fobbed off as a minor peccadillo. By no stretch of the imagination can the repeated doctoring of the Temple testimony, or Consumers' coercive threats of litigation if Dow declined to "play ball," or the conscious and careful "finessing" of the Dow-Consumers dispute, or Consumers' attempt to induce Dow to present a witness unaware of the real facts (so that the truth could not be elicited on cross-examination), be characterized as anything other than a protracted and wilful scheme to hide facts from this Commission. The Board here expressly found that all of those things took place. Given the documents and the testimony, it could hardly have done otherwise. In themselves those findings completely negate the Board's extraordinary conclusion that there was "no...deliberate intent

in this case." No more need be said on that score.

And the balance of the Board's third excuse -- the notion that because (despite Consumers' efforts) the Intervenors managed to unearth the truth, everything was therefore "fully aired" and no further action need be taken -- is equally unavailing. It is obviously contrary to law. For example, a perjury prosecution is by definition impossible unless the perjury has been discovered and the real truth elicited. Does that then excuse the perjurer? The Board's argument seems to be that since Consumers' efforts ultimately failed, they were not significant enough to warrant sanctions. But that flatly contradicts the Board's own definition of "materiality," rooted (as the Board itself painstakingly pointed out: Decis. at 13-17, 29) firmly in Commission decisions and long-settled law. It is well established that the "materiality" of suppressed information must be judged by what might have happened had the suppression succeeded, not by whether the ploy actually worked:

> "'The actual effect of a false statement has no bearing on its materiality, and the guilt of one who has falsely sworn does not depend upon the result of the proceedings in which it occurred. It does not lie with the perjurer to say that if he had sworn the truth, the case for other reasons would have failed;***Conversely, the fact that the case is won in spite of defendant's false testimony will not render the testimony immaterial.'"

May v. United States, 280 F.2d 555, 562 (6th Cir. 1960). In May, 290 F.2d at 563, the Court added that "'the test of materiality is whether a false statement can influence the tribunal -- not whether it does.'" Of course this Commission follows the same rule. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 487 (1976).

Even the Board here recognized the weakness of its "fully aired" excuse, conceding that it could not thus slough off "deliberate misconduct". Decis. at 41. But that does not go far enough. The "fully aired" excuse cannot even exculpate unintentional misconduct, as the Commission conclusively held in North Anna, supra, by imposing a fine on the licensee notwithstanding an express stipulation that the licensee's misstatements and omissions were inadvertent. See page 15, supra. Hence, here as with its first two excuses, even if the Board's conclusory factual premise were correct -- even if it were not (as it is) contrary to the Board's own express findings, Decis. at 25-39 -- the Board's extraordinary refusal to act still would not follow, as a matter of law.

II.

SANCTIONS MUST BE IMPOSED

Plainly the Licensing Board's result here must be reversed. As we have shown in detail, its reasons for that result are at war with its own detailed findings, and with settled legal principles long since endorsed by the Commission. We might stop there. But a further word is needed concerning Intervenor's Exceptions 1, 9, 10, and 11.

Plainly the shabby scheme disclosed in painful detail by the Board's findings in this case cannot go unpunished. We are presented here not with a licensee which innocently misrepresented or omitted facts -- conduct held to warrant sanctions in Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976) -- but with the far worse picture of a licensee which deliberately undertook

to suppress information it knew was material, coerced Dow into joining in its scheme with "blackmail threats" of litigation, and (see Decis. at 30, 32) tried to prevent the full story from emerging even after its scheme was exposed. Surely if innocent misrepresentations and omissions warrant the imposition of sanctions, the conduct delineated by the Board's findings in this case requires them.

We pointed out in the opening pages of this Brief (and we need not belabor the point) that sound policy, as well as the egregious nature of the violations in question, requires the imposition of sanctions in this case. Years ago the Appeal Board held that the avoidance of a licensee's obligation of full disclosure for the sake of expediency -- exactly what Consumers did here -- "cannot be justified and will not be tolerated." Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 626 (1973). The Board's extraordinary refusal to act on its own findings in this case not only tolerates, but as a practical matter is bound to encourage, that very conduct.

What relief, however, is appropriate here? Of course a wide variety of sanctions is available, ranging from an imposition of a fine to the denial or revocation of a license and, in the case of a nonlicensee, the imposition of a bar against participation of any kind in a nuclear facility. Of these, a fine is perhaps the easiest solution. But we respectfully submit that a fine would not be adequate in the situation presented here. To begin with, in the context of a nuclear facility whose cost approaches the $2.5 billion mark, no fine which this Commission might levy is likely actually to deter Consumers from continuing to place expediency above honesty if it feels that the truth might injure

its investment. Moreover, while the imposition of a fine may adequately punish past conduct, it provides no assurance for the future -- and in the context of the deliberate, carefully-thought-out suppression of the truth disclosed by the Board's findings in this case, one cannot help but fear for the future unless strong measures are taken. Compare Matter of Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964), quoted by the Commission in North Anna, supra, and quoted at page 18 of this Brief.

No doubt the question of appropriate relief in this case ought properly to be decided by a Licensing Board after an opportunity for hearings on that issue -- an issue which, of course, the Licensing Board's decision here did not reach. But this Appeal Board can and should provide some guidelines. For the reasons already indicated, we submit that the first guideline should be that a fine is unlikely to be adequate under the circumstances of this case. We further submit that the second guideline should be consideration either of revoking Consumers' Midland license or of expressly attaching -- and enforcing -- conditions to the continued viability of that license such that any further violation of Consumers' obligation of prompt, voluntary, honest, and complete disclosure will automatically result in license termination. Only in this way can the Commission provide itself (and the public) with any assurance that Consumers will not act in the future as it has in the past -- an assurance which is vital not only to public confidence, but also to the integrity of the Commission's regulatory process, which depends heavily upon precisely the kind of licensee honesty Consumers has demonstrated it possesses only when convenient. And given the Board's findings in this

case and the egregious misconduct they document, only in that way can the Commission adequately ensure that licensees and others will realize that the decisions mean what they say in announcing that such misconduct "cannot be justified and will not be tolerated." Otherwise those pronouncements are mere hollow words -- as the Licensing Board's total refusal to act here would make of them. But if the Commission's mission is to succeed, those words cannot be hollow. They must be enforced, and enforced rigorously. For that reason, we urge the Appeal Board to adopt the guidelines for relief which we have suggested.

CONCLUSION

For the reasons set forth herein, the December 22, 1981 Partial Initial Decision of the Licensing Board herein should be reversed, and this case remanded with instructions to impose appropriate sanctions on the basis of the guidelines recommended herein.

Respectfully submitted,

ONE OF THE INTERVENORS OTHER THAN DOW

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CERTIFICATE OF SERVICE

I certify that four copies of the foregoing Brief were served upon the Atomic Safety and Licensing Appeal Board by postage pre-paid mail on February 22, 1982, and that on the same date one copy of the foregoing, postage pre-paid and properly addressed was also mailed to the Secretary of the Commission, and counsel for the parties below.