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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD  
APPEAL BOARD

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

Fifth Floor Hearing Room,  
4350 East West Highway,  
Bethesda, Maryland,  
Thursday, May 13, 1982.

The above-entitled matter came on for oral  
argument, pursuant to notice, at 2:00 p.m.

BEFORE:

- CHRISTINE KOHL, Chairman
- REED JOHNSON, Member
- GARY EDLES, Member

APPEARANCES:

On behalf of Appellant, Saginaw Nuclear  
Study Group:

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On behalf of Consumers Power Company:

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On behalf of Intervenor Dow Chemical Company:

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and

THOMAS G. KRESWELL, ESQ.  
Division Counsel for the Michigan  
Division of the Dow Chemical Company.

On behalf of the Nuclear Regulatory  
Commission Staff:

WILLIAM OLMSTEAD, ESQ.  
MICHAEL N. WILCOVE, ESQ.  
WILLIAM D. PATON, ESQ.  
Nuclear Regulatory Commission  
Washington, D. C.

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1            Depending on questions from the Board, I  
2 should like probably to save twenty minutes for my  
3 rebuttal. If my affirmative takes longer than that,  
4 then I will just eat into that. I think my presentation  
5 will be relatively short, depending on questions.

6            MR. CHARNOFF: I am Gerald Charnoff of Shaw,  
7 Pittman, Potts and Trowbridge, representing Consumers  
8 Power Company. With me here today is my partner, Mr.  
9 Dean Aulick of the same law firm.

10           I think we would take one-third of fifty  
11 minutes, but I have difficulty doing that division.

12           JUDGE KOHL: So do we. How much time, then,  
13 do you plan to take?

14           MR. CHARNOFF: Well, I would like to do that,  
15 but do we have a chance to come back on rebuttal as  
16 well?

17           JUDGE KOHL: No. You are in the position of  
18 an appellee.

19           MR. CHARNOFF: Well, then, I would like to  
20 take one-third of fifty minutes.

21           (Laughter.)

22           MR. POTTER: My name is William C. Potter,  
23 Jr., of Fischer, Franklin, Ford, Simon & Hogg of  
24 Detroit, Michigan. We are appearing on behalf of the  
25 Intervenor Dow Chemical Company. With me is Thomas G.

1 Kreswell, Division Counsel for the Michigan Division of  
2 the Dow Chemical Company.

3 We will presumably take the allotted portion  
4 of our time of 15-2/3 minutes.

5 MR. OLMSTEAD: I am William Olmstead, counsel  
6 for the NRC Staff. With me at the table is Mr. Michael  
7 N. Wilcove, also counsel for the NRC Staff. In the room  
8 and also on the brief is Mr. William D. Paton, counsel  
9 for the NRC Staff.

10 JUDGE KOHL: Thank you. Mr. Cherry.

11 ORAL ARGUMENT BY MYRON CHERRY

12 ON BEHALF OF APPELLANT

13 MR. CHERRY: Thank you, Judge Kohl.

14 JUDGE KOHL: Before you begin your argument, I  
15 would like you to address yourself to the matter of  
16 whether or not we can even entertain your appeal, given  
17 the fact that you did not participate in the special  
18 proceedings below.

19 MR. CHERRY: Well, I would hope if you  
20 ultimately decide that question in the negative you  
21 would at least hear my argument.

22 JUDGE KOHL: That is what we are asking you to  
23 do now.

24 MR. CHERRY: No, I meant on the merits, but my  
25 answer to that question is really threefold:

1           Number one, we participated in the hearing.  
2 At the time that Mr. Miller scheduled his hearing, I had  
3 succeeded in developing a record before the Midland  
4 Licensing Board which was duly recorded by the Ace  
5 Federal Reporters' Staff, which contained almost all of  
6 the information that Mr. Miller and the Licensing Board  
7 relied upon. All the documents were produced as a  
8 result of my cross examination. All of the information  
9 came out as a result of my cross examination, and the  
10 only thing that remained was to have lawyers testify to  
11 come up with some rationale for why their conduct did  
12 what they did. I did not participate in that proceeding  
13 physically because I did not believe that the proceeding  
14 really had any role for me.

15           There was nothing I could do to bring out the  
16 information again. I thought it was a waste of the  
17 administrative process and my time, as well as the time  
18 of others that would be taken up by my participation to  
19 say again what I had already said.

20           JUDGE KOHL: Wouldn't you have found it  
21 interesting to hear what others say, though?

22           MR. CHERRY: I guess I would have found it  
23 interesting.

24           JUDGE KOHL: And don't you think since the  
25 Licensing Board specified as one of the five issues the

1 matter of sanctions, the very issue to which you have  
2 limited your appeal here, don't you believe that the  
3 Licensing Board could have benefitted from your views on  
4 that particular point?

5 MR. CHERRY: Judge Kohl, of course this is a  
6 hindsight view. I would like to add one other thing and  
7 then I will answer your question directly.

8 At the time of the Midland case by the Nuclear  
9 Regulatory Commission, I had been in the hole from a  
10 legal standpoint of about \$125,000 in time. I had about  
11 \$18,000 in out-of-pocket expenses that I did not get and  
12 would never get. I thought I had made my contribution  
13 to the administrative process.

14 JUDGE KOHL: Did you ever indicate that to the  
15 parties or to the Licensing Board during the course of  
16 the hearing?

17 MR. CHERRY: I think I made a motion to be  
18 either special counsel -- I think I made that motion to  
19 the Commission -- or to be paid for participation. I do  
20 not think I told them -- I may have told them that I had  
21 a \$100,000, and \$18,000 out of pocket, but--

22 JUDGE KOHL: What I am getting at is what  
23 exactly did you do to preserve any rights that you might  
24 have on appeal?

25 MR. CHERRY: Well, I gave the Licensing Board,

1 at the beginning of their presentation, almost all of  
2 the information which they ultimately relied upon. I do  
3 not, in view of Mr. Miller's opinion, believe that my  
4 presence would have made one whit of difference on  
5 sanctions.

6 JUDGE EDLES: Mr. Cherry, let me ask you this  
7 question. When you say you participated and you brought  
8 out all of the information, are you referring to the  
9 most recent round of hearings or the suspension  
10 hearings?

11 MR. CHERRY: I am talking about the suspension  
12 hearing. The record that was developed in the most  
13 recent round of hearings is probably 99 percent of the  
14 record that was developed at the earlier hearing. That  
15 is the point at which I participated. Indeed, while I  
16 did not technically write briefs or findings of facts, I  
17 did write a rather long letter to the Appeal Board  
18 summarizing what I thought of the other people's  
19 presentations.

20 It was a letter which was cited and used by  
21 the Licensing Board in its opinion. No one ever made a  
22 motion to terminate our presence before the Licensing  
23 Board, and indeed I received copies of all the  
24 transcripts and exhibits and was considered by the  
25 Licensing Board as a party.

1           My view of whether or not we are properly here  
2 is that it would be nice to conjecture on what the  
3 Licensing Board might have done if someone had made a  
4 motion to terminate my status as to the Licensing Board,  
5 but in the end when you read the opinion by Mr. Miller  
6 he lists me as an attorney representing a party. And I  
7 believe that if anyone is out of time, it is my  
8 opponents who belatedly raised this issue in the  
9 appellate court.

10           JUDGE KOHL: What do you think about the  
11 Licensing Board's order -- I believe it was November 14,  
12 1980 -- in which the Board noted that you had filed this  
13 five-page letter well out of time for filing the  
14 proposed findings of facts and conclusions of law?

15           In that November 14th order, the Licensing  
16 Board specifically invited you to file formal pleadings  
17 and you chose not to respond to that. Is that correct?  
18 Did you file anything in response to that? And how did  
19 you interpret that invitation to, as it were, reinstate  
20 your more active participation in the case?

21           MR. CHERRY: I interpreted that as an  
22 invitation by the Licensing Board to add to anything  
23 that I could add.

24           JUDGE KOHL: How could you interpret an order  
25 that said you have an opportunity to file proposed

1 findings of facts and conclusions of law in accordance  
2 with our regular procedures, how could you interpret  
3 that as do you have anything further to say?

4           Don't you think an invitation to add something  
5 further would be kind of peculiar under those  
6 circumstances?

7           MR. CHERRY: No. As a matter of fact, there  
8 is ample current precedent for the same thing. In the  
9 case I argued this morning where you were a member of  
10 the panel, the Staff took no participation in the  
11 appellate process and, while invited to file briefs by  
12 the Licensing Board below, declined to do so on the  
13 grounds they had nothing further to add.

14           I do not think --

15           JUDGE KOHL: The Staff is not appealing a  
16 decision and arguing for --

17           MR. CHERRY: That is their lack of integrity,  
18 not mine. They ought to be here appealing the decision.

19           JUDGE KOHL: I think you ought to be directing  
20 yourself to the particular question that I asked. That  
21 is, what did you think when you received the November  
22 14th order? As I understand it, you did not file  
23 anything after that point. You made no effort to comply  
24 with that order or our general regulations.

25           MR. CHERRY: Well, Judge Kohl, when you asked

1 me if I did anything after November 14th, I can answer  
2 that I think, if that is the date. When you ask me a  
3 loaded question like I made no effort to comply with  
4 your general regulations, I would like to ask you to  
5 tell me what regulations you are talking about before I  
6 deal with it. My simple response --

7 JUDGE EDLES: Did you respond to the Licensing  
8 Board's offer to have you file proposed findings of fact  
9 and conclusions of law?

10 MR. CHERRY: I did not file proposed findings  
11 of fact and conclusions of law in response to the  
12 Licensing Board's permission to have me do so, and I did  
13 not do it for the following reasons: (a) I believe that  
14 the findings of facts and the record that I had read  
15 adequately brought out what was at issue. I had no  
16 doubt from the result of that that the Licensing Board  
17 would conclude, as it did, that chicanery went on. I  
18 did not believe that I had anything to add and I was in  
19 the hole \$125,000.

20 JUDGE KOHL: Did you not think it prudent then  
21 to at least send a letter to the Board or to the other  
22 parties advising them that you had said everything you  
23 had to say and that you were relying in fact on your  
24 prior participation and that you felt you had done as  
25 much as you could, given the financial circumstances?

1           MR. CHERRY: Well, I had originally, Judge  
2 Kohl, told the Commission and I think I asked for some  
3 assistance, and I believe if I look at the Licensing  
4 Board's order it was not a directive to file. It was an  
5 "if any" and I had not "any."

6           I am trying to find it right now, where the  
7 Licensing Board says that I have until a date certain to  
8 file something if I wish to.

9           JUDGE KOHL: So then you still have no  
10 proposed findings of fact and conclusions of law.

11          MR. CHERRY: I am not arguing about the  
12 proposed findings of fact.

13          JUDGE KOHL: Isn't that a prerequisite to  
14 pursuing a matter on appeal? Maybe you should direct  
15 yourself to the other point that I raised: Don't you  
16 believe that given the matter of sanctions was one of  
17 the five issues specified by the Board, don't you  
18 believe that the Board could have benefitted from the  
19 guidance that you now suggest in the form of your brief  
20 to us?

21          MR. CHERRY: I suppose I could have written to  
22 the Licensing Board and said take a look at my closing  
23 argument in the suspension hearing where I said that  
24 Consumers is not the kind of company that belongs in the  
25 nuclear business and you ought to take the toys away

1 from them because they are a bunch of little kids. I  
2 made my position extremely clear.

3           If you wish to prevent me from making an  
4 appeal here, I cannot stop you. I have nothing further  
5 to add, Judge Kohl, on that. I can say just this. I do  
6 not believe I am in a position like the cases that are  
7 cited by my opponents, because of the peculiar  
8 circumstances where the hearing from which this appeal  
9 is taken is a duplication of the suspension hearing, had  
10 I not appeared in any of them and just waited until the  
11 end and done nothing, I think that is the position of  
12 those cases.

13           I would not ask you to approve a rule of  
14 procedural law before the Appeal Board where people  
15 simply wait back looking for some tactical advantage.  
16 That is not this record here.

17           JUDGE EDLES: Mr. Cherry, how is your case  
18 different from that situation? I am willing to applaud  
19 you for your contribution to the proceedings at the  
20 suspension level. I am willing to commiserate with you  
21 over your not being able to collect your fees and your  
22 out-of-pocket, but my concern is what rule do we  
23 establish for people who make a volitional decision not  
24 to participate in the second phase of an ongoing  
25 proceeding, and then lo and behold months later they

1 docket an appeal?

2 MR. CHERRY: I think that you have to make a  
3 judgment as to whether or not in each case the facts and  
4 circumstances amount to my abdication of involvement in  
5 the licensing process, and I do not think that is true  
6 at all. I don't think that you can look at my client's  
7 participation, as well as mine, as an abdication in the  
8 Midland process. If you believe that, then I will go  
9 home early.

10 JUDGE KOHL: Did you appear --

11 JUDGE EDLES: Excuse me. Just let me follow  
12 up for one moment. In the second phase you mentioned  
13 that the lawyers appeared, the lawyers who were counsel  
14 in the suspension proceeding.

15 MR. CHERRY: Right.

16 JUDGE EDLES: Obviously their testimony was  
17 important to what the Licensing Board found in this most  
18 recent go-around.

19 MR. CHERRY: Not really. I don't think so,  
20 but let's take that as a given.

21 JUDGE EDLES: Your brief also attempts to tie  
22 sanctions to the facts as developed by the Licensing  
23 Board.

24 MR. CHERRY: Only because I am using that  
25 record. There isn't a document that was entered that is

1 of significance in the Licensing Board's most recent  
2 hearing that was not one of my exhibits in the  
3 suspension hearing.

4 JUDGE EDLES: Let me step back to a more  
5 pristine legal position. I assume what you are saying  
6 to me at the outset is that we somehow must make the  
7 punishment fit the crime; that we have to look at the  
8 facts and somehow apply the sanctions depending upon the  
9 facts. Is that correct, or am I incorrect?

10 MR. CHERRY: You mean in terms of our coming  
11 to the Appeal Board?

12 JUDGE EDLES: In terms of what I am supposed  
13 to be doing now at this stage.

14 MR. CHERRY: I don't mean to -- I am confused  
15 as to what you are asking me.

16 JUDGE EDLES: As I understand your brief, you  
17 are saying the Licensing Board made certain findings of  
18 fact.

19 MR. CHERRY: Right.

20 JUDGE EDLES: It then refused to apply  
21 sanctions and it did not use the proper structure  
22 because what it did was it found terrible conduct and  
23 then was willing to allow it to go unpunished. In other  
24 words, you must somehow fit the sanction to the conduct  
25 that was observed.

1 MR. CHERRY: That is correct.

2 JUDGE EDLES: My second point is that the  
3 presentation of the lawyers in this second phase was an  
4 element of the facts to be considering in determining  
5 the sanctions. You were not there to help the Licensing  
6 Board out on that aspect of the case.

7 MR. CHERRY: There is nothing significant, I  
8 repeat, that came out by lawyers in the suspension  
9 hearing in the most recent hearing that was not a  
10 document that was produced by me through cross  
11 examination in the suspension hearing. We all knew that  
12 Rex Renfro said what he said. We all knew people were  
13 threatening each other. All of those facts were of  
14 record.

15 I am somewhat shocked that Mr. Miller took two  
16 years to write a decision. That is a model of  
17 administrative inefficiency. He did not need all that  
18 time. He started with a record that was replete with  
19 information. I think I know what his problem was, and I  
20 will get to it in a moment.

21 JUDGE EDLES: Let me ask you this: Would the  
22 record before us be complete had those lawyers not  
23 testified at all?

24 MR. CHERRY: Sure. You should have thrown  
25 Consumers out of the game after the Midland suspension

1 hearing. You did not need the two years of procedural,  
2 gentlemanly handling that went on. It was totally  
3 unnecessary.

4 JUDGE EDLES: Take as a hypothetical the fact  
5 that I do not agree with your assessment that I could  
6 have reviewed the record --

7 MR. CHERRY: Fair enough.

8 JUDGE EDLES: -- in the absence of the  
9 testimony of those lawyers. Where am I left at that  
10 point?

11 MR. CHERRY: You are left with I suppose,  
12 assuming from my knowledge of procedure, with a judgment  
13 as to whether or not under all of the circumstances and  
14 given the reasons why I did not participate, and given  
15 the fact that it was my client that created the need for  
16 the hearing in the first place and that I asked the NRC  
17 for assistance as a special prosecutor or something and  
18 they refused, plus the law that I think is apparent in  
19 this circuit, that you can take an appeal from a final  
20 order if you are adversely affected without even having  
21 participated in the proceeding under certain  
22 circumstances, I do not think that this case gives an  
23 Appeal Board who wishes to have some rule that they can  
24 announce to the people a great deal of difficulty.

25 I would have liked to have participated in

1 that hearing. From some of the things I heard during  
2 the course of it, I would have dearly liked to have  
3 participated. I thought that if the Regulatory Staff  
4 honestly was out to do cross examination as a party on  
5 Dow and Consumers that all the facts would come out.  
6 They did. There is nothing I could have done to Mr.  
7 Miller to change his mind on the sanctions except to  
8 convince you that that rule is a travesty.

9 JUDGE KOHL: Doesn't that go more to the  
10 matter of whether or not you were physically present at  
11 the hearing itself? That does not seem to address the  
12 matter of why you didn't file proposed findings of facts  
13 and conclusions of law.

14 MR. CHERRY: Because the proposed findings  
15 that were filed jointly by the parties had all of the  
16 information available to the Board in connection with  
17 the hearing, and the Board had incorporated the  
18 transcript of the suspension hearing either directly, if  
19 not by constant reference, and there was nothing I could  
20 have said.

21 JUDGE KOHL: But certainly the proposed  
22 findings filed by Consumers Power, for example, did not  
23 propose a finding of fact that they had deliberately  
24 failed to disclose material and relevant information and  
25 that they should be sanctioned.

1 MR. CHERRY: And it didn't fool Chairman  
2 Miller either. He saw through that transparency gook.  
3 It was pretty clear that anybody who would look at those  
4 facts would come through. I frankly thought that this  
5 was -- I'll tell you what I would have wished.

6 I would have wished that as a critic of the  
7 AEC first and then the NRC for a long time, over the  
8 years I have begun to have some grudging respect for  
9 some of their administrative processes -- not all of  
10 them, but some of their administrative processes. It  
11 would have been a delight for me as a public interest  
12 lawyer to know, and at least from my perspective to know  
13 that that proceeding went on and it didn't need me to go  
14 and call people names and encourage them.

15 That wasn't the reason I didn't go, but it  
16 seems to me Mr. Miller and his group missed a great  
17 opportunity to convince the public that all is well at  
18 the Licensing Board level, in my judgment.

19 JUDGE KOHL: Mr. Cherry, I am not clear what  
20 we have to do to earn more than your grudging respect  
21 for our administrative processes.

22 MR. CHERRY: Shut down the industry until you  
23 solve the safety problems.

24 JUDGE KOHL: We are talking about the  
25 administrative procedures, though. I do not think our

1 rules and regulations and past decisions, including one  
2 or two in this very case relating to you some eight or  
3 ten years ago in which this same matter of preserving a  
4 right to appeal was specifically addressed, and as I  
5 recall what the Board found was that you needed to  
6 observe the procedures embodied in our regulations.

7           I can't help but note, after listening to the  
8 oral argument you referred to earlier this morning, that  
9 there is a communication problem here in terms of what  
10 we need to do to get you to respond to orders and  
11 invitations to file proposed findings or to answer  
12 orders or just in general to play by the rules that the  
13 Agency has established.

14           MR. CHERRY: Let me try to answer this as  
15 clearly as I can, Judge Kohl. I felt that the  
16 information that had come out in the suspension hearing  
17 was sufficient to make any responsible agency take some  
18 action. I felt that the hearings which took place most  
19 recently were an unnecessary sham. I felt I did not  
20 want to waste my time with them and I was in the hole  
21 for \$125,000.

22           I read Mr. Miller's opinion on my honeymoon  
23 and I was shocked and I filed this brief as a  
24 responsible lawyer on behalf of Saginaw Valley after  
25 securing my client's permission. I am here to make my

1 argument. I have told you all I can. I cannot fathom  
2 through a rule that makes what you want fit or what Mr.  
3 Edles wants fit.

4 JUDGE KOHL: Is a decisional body supposed to  
5 intuit what your feelings are? You have spoken several  
6 times about you "felt" that the record was adequately  
7 developed already and it did not need your  
8 participation, and you "felt" that the Licensing Board  
9 would surely find that there had been an intentional  
10 effort to not disclose important information.

11 MR. CHERRY: And they did.

12 JUDGE KOHL: You felt sure that the Licensing  
13 Board would impose appropriate sanctions.

14 MR. CHERRY: No, I am not so sure I felt that,  
15 but I knew they could not avoid the facts.

16 JUDGE KOHL: If you are not sure that you felt  
17 that, then how could you guarantee that since that is  
18 what the goal is that you are seeking. That is the  
19 relief that you have asked, although you do not specify  
20 what sanction you want. You do want sanctions imposed.  
21 How is any decisional body, whether it is at the NRC or  
22 in a Federal or a State court or any other agency, how  
23 are those decisionmakers supposed to know what a party  
24 wants?

25 MR. CHERRY: By first evening up the odds.

1 You cannot impose upon me and my clients the burden of a  
2 hearing which I think is totally irrelevant and when you  
3 look at it you will conclude yourself it probably is,  
4 and then have the public pay for his fees from the rate  
5 base, have the public pay for his fees from the rate  
6 base --

7 JUDGE KOHL: We are not talking about who pays  
8 the fees.

9 MR. CHERRY: -- and then not pay for mine.

10 Well, you are asking why we don't have a  
11 perfect system. You are saying why shouldn't --

12 JUDGE KOHL: Excuse me. All I am asking you  
13 is how are any decisionmakers supposed to know what you  
14 want? Where is the burden in sitting down and writing a  
15 one-page letter that indicates what your problems are  
16 and doing it in a timely fashion, given that you have  
17 practiced before here for 20 years and that you are  
18 familiar with our regulations and our requirements?

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1           MR. CHERRY: Judge Kohl, I let everyone know  
2 in advance that I was not going to participate in those  
3 hearings. I believe -- and I don't want to say I am  
4 certain because I want to make sure my representations  
5 are correct -- but I believe I made a motion, at least I  
6 advised everybody, that I was not going to participate.  
7 It came as no surprise to anybody. Why didn't somebody  
8 make a motion to terminate me?

9           They didn't do that. They sent me briefs.  
10 They sent me documents. And at the very end they said,  
11 do you have anything else to add? And I didn't. I  
12 don't have anything else to say.

13           JUDGE EDLES: Can I turn for a moment to some  
14 of the substantive matters and ask you just one or two  
15 questions from your 20 years as a practitioner? I know  
16 that you embrace the factual findings of the Licensing  
17 Board, but let me ask you --

18           MR. CHERRY: I don't quarrel with them.

19           JUDGE EDLES: Let me ask you this. One of  
20 their conclusions is that when lawyers draft testimony  
21 for clients, that is something that we should be  
22 concerned about. Is it a practice that we should be  
23 concerned about when lawyers attempt to draft testimony  
24 on behalf of their clients in the first instance?

25           MR. CHERRY: I think that is a red herring

1 issue in this proceeding.

2 JUDGE EDLES: Well, we don't agree on that, so  
3 would you answer my question?

4 MR. CHERRY: I will, but I guess I am going to  
5 be a little more loquacious than I ought to be, but I  
6 will tell you why I think it is a red herring issue in  
7 this proceeding, why you do not have to reach that  
8 issue.

9 The Licensing Board, contrary to the second  
10 half of Mr. Collins' brief and contrary to the last 30  
11 pages of Mr. Charnoff's brief and contrary to the  
12 Staff's brief, I think the mid 20 pages, did not say  
13 that lawyers cannot get involved in drafting expert  
14 testimony.

15 JUDGE EDLES: I didn't say "get involved." I  
16 said "draft the briefs for their clients."

17 MR. CHERRY: I don't think that Mr. Miller  
18 below was talking about procedure. I think he was  
19 talking about substance. And the substance is whether  
20 or not lawyers have to be honest. That is the issue.  
21 It doesn't matter who drafts the testimony.

22 JUDGE EDLES: Are we to measure that testimony  
23 by whether it was honest or whether the lawyer  
24 participated in its drafting?

25 MR. CHERRY: By whether it is honest.

1 JUDGE EDLES: Okay.

2 MR. CHERRY: I do not believe that a lawyer  
3 qua lawyer as a general rule cannot participate in the  
4 drafting of testimony, and that is not what Miller held.

5 JUDGE EDLES: Let me ask you. How -- It is  
6 unclear to me from the record how you came into position  
7 of the Michigan Division recommendation. Could you just  
8 enlighten me on this?

9 MR. CHERRY: Yes. I began the  
10 cross-examination of Mr. Temple and began to ask him  
11 some questions, and I asked him whether or not the rule  
12 and standard was to provide full, free and frank candid  
13 testimony? Had he done so? And he said no. And that  
14 question and answer led me on to an inquiry where I  
15 began to move for documents and have them described, and  
16 it was in the course of that hearing where these  
17 documents came about.

18 JUDGE KOHL: You got nothing during the  
19 discovery process?

20 MR. CHERRY: No. And as a matter of fact, it  
21 was very interesting to me that as soon as the Licensing  
22 Board ordered them produced, they were like neatly  
23 there. In other words, they had been consciously put in  
24 a place, I would assume, where they could be easily  
25 gotten to. No, I didn't get anything.

1 JUDGE EDLES: This is on the day of the  
2 hearing the documents were produced?

3 MR. CHERRY: No, they were produced sometime  
4 subsequent to that question and answer to Mr. Temple,  
5 which was the opening question in the hearing.

6 JUDGE EDLES: In other words, you first became  
7 acquainted with the Michigan Division recommendation  
8 after your cross-examination of Mr. Temple?

9 MR. CHERRY: Yes. I didn't know anything  
10 about it, as did no one else. It was simply misheld. I  
11 am sometimes given credit for being a skillful  
12 cross-examiner. Let me tell you, it was not hard to get  
13 Mr. Temple to say that his testimony was not complete.  
14 I barely touched him and he exploded. So my feeling of  
15 it, someone -- I often wonder why nobody called me as a  
16 witness in this hearing that just took place, but it was  
17 my feeling from observing Mr. Temple that this was a  
18 very well thought out ploy.

19 JUDGE EDLES: Let me ask you with regard to  
20 Mr. Temple. It seems to me from my reading of the  
21 record that he was not an advocate of continuation of  
22 the project between Dow and Midland.

23 MR. CHERRY: Correct.

24 JUDGE EDLES: Although he was a subordinate  
25 and his decision it appears to me was overruled by the

1 Dow Board of Directors. Am I correct on those facts?

2 MR. CHERRY: No.

3 JUDGE EDLES: All right. Why don't you tell  
4 me the facts as you see them.

5 MR. CHERRY: The Michigan Division recommended  
6 that they not continue with Consumers Power Company.  
7 Consumers Power Company then -- the Michigan Division  
8 then made a decision to continue the contract under all  
9 the facts and circumstances then existing, which was the  
10 testimony of the gentleman with the colorful last name  
11 from Dow, who I cannot remember for the moment, when  
12 asked on cross-examination if the Dow position would  
13 have changed, i.e., adopted the Michigan Division, if  
14 there had not been threats of lawsuits, et cetera.

15 He said that was a fact and circumstance which  
16 we considered in not adopting the Michigan position. He  
17 later testified that that was blackmail and that that  
18 went into why the Dow position had not changed.

19 JUDGE EDLES: I understand that. As a result  
20 of the allegations --

21 MR. CHERRY: Oreffice was his name.

22 JUDGE EDLES: -- the Dow Board of Directors as  
23 you say under the threat of a potential lawsuit -- am I  
24 still incorrect that they overturned the Michigan  
25 Division recommendation?

1 MR. CHERRY: No, no. What I --

2 JUDGE EDLES: They may have done it under the  
3 threat of a lawsuit, but I am trying to get at the fact  
4 as to whether they in fact overruled their subordinate  
5 on this matter.

6 MR. CHERRY: Mr. Oreffice testified that they  
7 did not adopt Mr. Temple's --

8 JUDGE EDLES: -- recommendation.

9 MR. CHERRY: -- decision. But in explaining  
10 why he did so, he did so as a result of the shenanigans  
11 that went on.

12 JUDGE EDLES: The potential threat of a  
13 lawsuit.

14 MR. CHERRY: And other things, yes.

15 JUDGE KOHL: What other things?

16 MR. CHERRY: The fact that Consumers Power  
17 Company was negotiating with Dow and Dow needed to  
18 support Consumers at the rate hearing as to whether or  
19 not the steam would be considered a part of the rate  
20 base.

21 Dow had contributed the land to this facility,  
22 and it was not altogether clear, because there was a  
23 pending lawsuit going on by the county and the state, as  
24 to whether that all was appropriate. And both parties  
25 needed each other's cooperation to keep the thing going

1 on.

2 JUDGE EDLES: Mr. Cherry, much of this  
3 information that you are offering now is a little bit  
4 new, and I am actually now disappointed that you were  
5 not a participant --

6 MR. CHERRY: So am I.

7 JUDGE EDLES: -- because it suggests to me  
8 that there are lots of things that you might have been  
9 useful in presenting to us which --

10 MR. CHERRY: Not only do I think I was  
11 useful--

12 JUDGE EDLES: -- we are now going to have to  
13 flounder around trying to find.

14 MR. CHERRY: -- I think that there is no  
15 question that had I been at the hearing, a lot of people  
16 would have been quite uncomfortable about their  
17 position, but I am not here arguing my mischance. I am  
18 just trying to, I hope, soon get to the point of why you  
19 have got to do something here if you want to maintain  
20 the integrity of this Agency.

21 JUDGE EDLES: My concern is that all of these new  
22 materials are coming out, and the other parties to the  
23 case and the Licensing Board have as a result not really  
24 had an opportunity to address all of the things that you  
25 are now telling me. They will get a few minutes here on

1 oral argument, but they did not have the opportunity to  
2 put on rebuttal witnesses to, for example, suggest that  
3 you are not right on what went on in the rate  
4 proceeding, or that you are right.

5 MR. CHERRY: But I am not telling you anything  
6 that was not of record in the suspension hearing, Judge  
7 Edles. I am not making this up. This is information  
8 that comes from the suspension hearing, my  
9 participation. Ace reporter recorded it in living  
10 color. It is all there.

11 JUDGE KOHL: But isn't that -- again I hate to  
12 beat a dead horse -- but isn't that the function of a  
13 well-drafted proposed findings of fact and conclusions  
14 of law? That is the sort of thing that should be  
15 pointed out? Even if you are not physically present at  
16 the taking of that testimony, that later pleading serves  
17 to bring out the relevant points to the parties and the  
18 decision-maker.

19 MR. CHERRY: Let me for a moment with all due  
20 respect put the shoe on the other foot by first agreeing  
21 with you that yes, it would be nice to have proposed  
22 findings of fact. But let me ask you why Consumers  
23 Power is still in the licensing business with quality  
24 assurance problems after Mr. Rosenthal's opinion of some  
25 months ago.

1 JUDGE KOHL: Mr. Cherry, that is not in  
2 issue.

3 MR. CHERRY: Oh, but wait a minute. You are  
4 saying: Why don't people participate in light of past  
5 effects? I am saying to you, if that is true then you  
6 ought to consider the conduct of the utility over many  
7 years in an agency. Fair is fair. The reason that I am  
8 still involved in the nuclear field is for those  
9 reasons.

10 JUDGE KOHL: Well, I would think that would  
11 spur you on to even greater participation and efforts to  
12 secure your rights at every stage of the proceeding.

13 MR. CHERRY: If I had a million dollars I  
14 would camp out on your doorstep, but I don't have it.

15 JUDGE KOHL: Notwithstanding limited  
16 resources, you would not have to be reminded of filing  
17 dates and invited to file pleadings.

18 MR. CHERRY: Well, see, I don't review -- it  
19 just may be a difference in approach. We shared a  
20 discussion this morning. I did not view my procedures  
21 there as having violated any rule, and I don't think I  
22 have violated any rule in this procedure. I was asked  
23 by the Licensing Board to file findings of fact, if  
24 any -- I think I have found the language -- and I didn't  
25 have any, so I didn't file them. I was not ordered to

1 file anything. I am not in contempt of anything the  
2 Board said.

3 JUDGE KOHL: We are not suggesting that you  
4 are, but what we are trying to discern is what your  
5 arguments are now and why weren't they before the  
6 Licensing Board in the first instance--

7 MR. CHERRY: They were before the Licensing  
8 Board.

9 JUDGE KOHL: - so that the Board could have  
10 the benefit of what you would have wanted the facts to  
11 be found and what conclusions of law you would have  
12 liked and what sanctions you feel are appropriate.

13 MR. CHERRY: Judge Kohl, I do not quarrel with  
14 Mr. Miller's findings. The Board had no difficulty in  
15 making findings. I quarrel with his ipsi dixit  
16 reasoning in the last two pages of his decision.

17 JUDGE EDLES: If you quarrelled with his facts,  
18 would you be here before us arguing that he had found  
19 the facts wrong?

20 MR. CHERRY: Probably not. The reason for  
21 that is that would have probably involved too much of a  
22 contribution to my friends at Consumers Power when there  
23 are some other utilities that are requiring my attention  
24 these days. I probably would not have taken three  
25 months to take this appeal and would have hoped that the

1 Licensing Board's opinion would have been reviewed sua  
2 sponte by the Appeal Board.

3 JUDGE EDLES: Let me ask you another  
4 question: One of the Licensing Board's findings as I  
5 recall is that when lawyers hold meetings to determine  
6 whether or not matters are material and should go into  
7 the testimony, that in and of itself is an admission  
8 that all of the material discussed at the meeting ought  
9 to be presented to the Licensing Board. Would you share  
10 in that analysis?

11 MR. CHERRY: That is nonsense.

12 JUDGE EDLES: What about the filing of drafts  
13 of proposed testimony when those drafts ultimately  
14 eventuated in some final testimony?

15 MR. CHERRY: You see, that is a decent issue,  
16 and it reminds me of Mr. Cowan's brief. Mr. Cowan's  
17 brief spends a great portion in the Lawyer's Committee  
18 arguing by arguing in these academic principles about  
19 these gang members, that this is tantamount to saying  
20 that the Licensing Board ordered all draft testimony be  
21 produced. No.

22 What the Licensing Board found was that when  
23 you looked at the draft testimony, it was an indication  
24 of what was trying to be withheld. The Licensing Board  
25 found that that information should have been in the

1 final testimony, and it is just Mr. Miller's inartful  
2 writing. He doesn't mean that the draft testimony  
3 should have been produced; he means that the information  
4 in the draft should have been in the final testimony.  
5 He just didn't write it well. That is what it means.

6 JUDGE JOHNSON: Mr. Cherry, may I ask a  
7 question of you?

8 MR. CHERRY: Surely, sir.

9 JUDGE JOHNSON: You indicated in response to a  
10 question by Judge Edles that the first knowledge anyone  
11 had of the Michigan Division's position vis-a-vis the  
12 Midland Plant was subsequent to your cross-examination  
13 of Mr. Temple.

14 MR. CHERRY: That is the first knowledge I  
15 had. Certainly not everyone's knowledge. Dow knew about  
16 it; Consumers knew about it; and maybe the Staff knew  
17 about it; but it was the first time I knew about it.

18 JUDGE JOHNSON: How about a footnote in the  
19 applicant's brief in response to your appeal on page  
20 19? I assume you would say that this footnote was not  
21 entirely factual? "It is uncontested that the Dow  
22 Michigan Division position was in fact disclosed in  
23 documents which Consumers had voluntarily made available  
24 to the NRC Staff and Intervenor prior to and at the  
25 hearing?"

1           MR. CHERRY: If Dow or Consumers made those  
2 documents available prior to the hearings of the Staff,  
3 then that is correct. They were not made available to  
4 me. The day that Mr. Temple testified, there were some  
5 documents given to me, oh, I would say by Mr. Wessel, I  
6 remember that, giving me a stack of additional documents  
7 maybe an hour or so before I examined Mr. Temple. I  
8 can't tell you whether those documents had them, but I  
9 can tell you that when I asked Mr. Temple that question  
10 and the following mouth dropped, people scurried around  
11 and I got lots of documents, and those were the ones in  
12 the suspension hearing.

13           I don't know -- Mr. Charnoff is a careful  
14 lawyer, but I would sure like to see some, if it is  
15 important, documentary proof of that footnote. I did  
16 not know, and I carefully prepared that case, of Mr.  
17 Temple's position except there was a lawyer who  
18 mentioned to me that I would do well to cross-examine  
19 Mr. Temple about a day before the thing started to get  
20 my juices flowing.

21           JUDGE JOHNSON: All right. Was Mr. Temple's  
22 position relevant to the question or material to the  
23 question at issue, the question at issue being the  
24 status of the Dow-Consumers contract?

25           MR. CHERRY: It was the central focus of the

1 hearing. I mean, if Dow and Consumers --

2 JUDGE JOHNSON: Excuse me. I don't know what  
3 "it" you refer to. I asked: Was the Temple testimony  
4 material to the question of what is the status of the  
5 contract?

6 MR. CHERRY: Do you mean the Temple prepared  
7 testimony or the Temple testimony on cross-examination?

8 JUDGE JOHNSON: The Temple prepared  
9 testimony. Well, any of his testimony. I ask you what  
10 his feelings were. Were they relevant to the issue?

11 MR. CHERRY: Both what Mr. Temple stated in  
12 part in his written testimony and what was secured from  
13 him by cross-examination was the guts of the hearing, so  
14 yes, it was not only --

15 JUDGE JOHNSON: How are they the guts of  
16 what -- I thought the guts of the hearing was, and this  
17 was what the Appeal Board said in the ALAB responding to  
18 the suspension hearing, the bottom line was the contract  
19 was in effect. How could what Mr. Temple feel be the  
20 guts of the hearing?

21 MR. CHERRY: Well, that is not the issue. The  
22 issue that the Appeal Board sent back was to determine  
23 whether or not Dow still was wedded to the contract.  
24 And if Dow had testified bottom line, that the reason  
25 the contract--

1 JUDGE JOHNSON: Wait a minute. Wait a  
2 minute. I can't accept that statement because that is  
3 not -- if you are talking about the Appeal Board  
4 decision --

5 MR. CHERRY: I am talking about the Court of  
6 Appeals mandate which ordered -- which the Commission in  
7 turn seized upon to order the hearing.

8 JUDGE EDLES: Let me pick up on your  
9 question.

10 JUDGE JOHNSON: Excuse me. You said "Appeal  
11 Board." You meant "Court of Appeals"?

12 MR. CHERRY: I meant the process by which the  
13 suspension hearings started, which started with the  
14 Court of Appeals --

15 JUDGE JOHNSON: Okay. Fine. Go ahead.

16 MR. CHERRY: -- and ultimately the order by  
17 the Commission to air those views.

18 I would like to finish the answer to the  
19 question in this sense. If I get up and I am Dow and I  
20 say I am wedded to this contract, and I say that but the  
21 real reason I am wedded to the contract is because I  
22 want to get the hell out of that hearing because  
23 tomorrow once that hearing is over I am going to change  
24 my mind, I am no longer presently wedded tomorrow but I  
25 am today and so I can get through this hearing, and the

1 reason I am doing that is because I am getting a  
2 \$600 million lawsuit and I have got all that, then that  
3 decision, that statement that I am presently wedded to  
4 the contract is not meaningful.

5           Take the circumstances of a man whose child  
6 continuously cracks up the car on Saturday night. Every  
7 Sunday after he cracks up the car and the kid is found  
8 drunk, the father says, "You are never going to drive  
9 again," and next Saturday he gives him the car. If this  
10 happens continuously, pretty soon you begin to realize  
11 that even though the father says "I do not want you to  
12 drive," he doesn't mean it. So a trial involves what  
13 words mean, not necessarily what words are said.

14           JUDGE JOHNSON: All right.

15           If after having made the statement that the  
16 contract was in effect, qualifying it with some rather  
17 pertinent adjectives, did the next day Dow renege on the  
18 contract? Is the contract still in effect? Did Dow do  
19 what you just said they were going to do?

20           MR. CHERRY: What Dow does is the wisdom of  
21 something-- I do not know what Dow did.

22           JUDGE JOHNSON: Well, what you implied was the  
23 demeanor of Dow when it gave its testimony. You said  
24 that Dow gave the testimony one way but they were going  
25 to walk out and do something else the next day, but it

1 turns out, I think, that they didn't do that.

2 MR. CHERRY: There were amendments to the  
3 contract subsequent --

4 JUDGE KOHL: Is the contract still in  
5 existence, to the best of your knowledge?

6 MR. CHERRY: I am not privy to twhat  
7 happened. I do know that Dow --

8 JUDGE EDLES: Let us assume for purposes of  
9 argument that the contract is currently in existence.  
10 Are we allowed to use that fact in order to interpret  
11 their statement back at the hearing that they were  
12 presently wedded to the contract?

13 MR. CHERRY: Well, I can't see how because I  
14 don't think the issue before you is whether or not Dow  
15 is wedded to the contract. The issue is whether or not  
16 people got together to withhold information.

17 JUDGE EDLES: You said a moment ago, and I  
18 wrote it down because I thought you had precisely stated  
19 the issues, you said the issue before the Board was: Is  
20 Dow wedded to the contract?

21 MR. CHERRY: That is what the issue was at the  
22 suspension hearing. That is why the information that  
23 was withheld was relevant. But the issue here is not  
24 whether Dow was wedded to the contract but whether the  
25 Licensing Board conclusion below is appropriate.

1 JUDGE EDLES: We are here determining whether  
2 Dow misrepresented or withheld material information at  
3 the time of the suspension hearing. I am asking whether  
4 or not the fact that that contract did indeed eventually  
5 is not some evidence that they were not telling a lie in  
6 the suspension hearing.

7 MR. CHERRY: I suppose, with all due respect,  
8 I don't think --

9 JUDGE EDLES: It is an inference from the  
10 evidence. There may be others, but is it an  
11 unreasonable one for me to draw from the evidence?

12 MR. CHERRY: Worse than unreasonable, it is a  
13 non sequitur. It is like saying that you can prove that  
14 a man didn't have intent to commit murder if the person  
15 lives, because had he really had intend to commit  
16 murder, he would have killed the man. I don't think it  
17 follows at all. At all.

18 JUDGE KOHL: Mr. Cherry, I think you have used  
19 up about 40 minutes of your time. Do you want to  
20 continue now and reserve the rest for rebuttal?

21 MR. CHERRY: I do have a few things that I  
22 want to say, and if I use up my time for rebuttal, so be  
23 it.

24 As we indicated in our brief, we do not  
25 quarrel with the findings of fact. Now the culprits are

1 pretty evident here, too. I am not very kindly in my  
2 characterizations of them, and I hope you will  
3 understand that they are made in the spirit of an  
4 advocate trying to make a point. We had the  
5 Jackson-Michigan gang, Consumers, the Michigan marauder  
6 gang, Dow Chemical, and the lawyer gang.

7           Now while I think the whole affair below is  
8 pretty sordid as well as the delay in decision-making by  
9 Mr. Miller, there is no mistake about what happened.  
10 The participants put it in writing. I personally  
11 cross-examined many of them. I saw it happen. That  
12 record was available and it was duly recorded.

13           The chairman after two years, Chairman Miller,  
14 reconfirmed, and three references will suffice. Page 29  
15 of his decision: "Incidents reinforce our finding that  
16 DOW and CPC contemplated as little disclosure as  
17 possible." If you look up the word "contemplated" in  
18 the dictionary, it means "conscious."

19           Page 30: "The attorneys sought not to  
20 disclose these materials because," at page 28, "such  
21 information could cause Consumers to lose the case."

22           JUDGE EDLES: Excuse me. When you say  
23 "contemplate," you mean that they thought about this--

24           MR. CHERRY: Yes.

25           JUDGE EDLES: -- as a potential?

1 MR. CHERRY: No. They thought about and  
2 figured about it and did it, and what I am saying is  
3 this wasn't negligence.

4 JUDGE EDLES: Must I conclude -- you told me  
5 that Mr. Miller does not draft artfully. Must I  
6 conclude that when he says "contemplate," that that  
7 means they indeed acted upon that contemplation?

8 MR. CHERRY: Sure they did. He found they  
9 did.

10 I think the reason the sanctions' motion came  
11 out like it did is the following reason, and I am going  
12 to try to prevent that from cluttering up the Appeal  
13 Board process. Lawyers were involved. If you call a  
14 lawyer a crook, you take into jeopardy his ability to  
15 practice law. Okay?

16 Now I was very careful in my brief. I am not  
17 here today, even though I don't applaud the conduct  
18 below, to criticize lawyers. I am not even here to  
19 criticize Dow. They are not building nuclear power  
20 plants. I am only interested in Consumers, who owns and  
21 runs a nuclear power plant and is trying for some  
22 decades to build another one. And I would ask that you  
23 focus, given the Dow and the attorney representatives, I  
24 would ask in terms of the sanctions that you focus on  
25 Consumers.

1           I think that is the key of the whole matter  
2 for this agency's responsibility, for the following  
3 reason, and I think that had Chairman Miller had not  
4 gotten concerned about lawyers' ethics and all that, the  
5 case would have come out in a different way.

6           JUDGE EDLES: In other words, Chairman Miller  
7 has not done his duty as a government official is what  
8 you are saying.

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1           MR. CHERRY: I do not believe that Chairman  
2 Miller has done his duty not only as a government  
3 official but as a judicial officer.

4           JUDGE EDLES: And he has done that, you say,  
5 because he is a member of the fellowship of lawyers?

6           MR. CHERRY: Maybe he didn't do it  
7 intentionally. I am saying that the question--

8           JUDGE EDLES: He offers three reasons for not  
9 putting on sanctions. You tell me he doesn't draft  
10 artfully; you are now telling me that those really  
11 weren't his reasons?

12          MR. CHERRY: Sure. I think when you read  
13 this, they got that if I had to have an underlying  
14 reason for what Chairman Miller did, he felt that if he  
15 called everybody a bum it would suffice, but it didn't  
16 suffice with me. I think that he was by his very nature  
17 concerned with what happens with lawyers, because if you  
18 look at his conclusion, he focuses on the lawyers as  
19 opposed to Consumers.

20          What I am concerned about is, you know there  
21 has been a lot of talk in all of these briefs about the  
22 D.C. Bar ethics and all that kind of stuff. Well, when  
23 we go over to the criminal court system and we represent  
24 a client, we do what all good Harvard professors tell us  
25 to do: We fight like mad. But when we come before an

1 agency which has the responsibility to protect the  
2 public health and safety and writes regulations which  
3 rely on these guys for information, the standard is  
4 somewhat different: This is a privilege, not a right.  
5 And to have a license to -- as a matter of fact, take  
6 the Staff's brief and the standards they approve below  
7 of Consumers' conduct.

8           Could they operate in regulatory hearings if  
9 those kinds of standards were applied? Are you going to  
10 let the world know that Consumers, which has  
11 consistently been called upon by Region III compliance  
12 and by all of these things, is going to get away with  
13 this attitude? It is the attitude which is infectious.  
14 You know, in other utilities you have made them, I think  
15 out on the West Coast, come up with some plan why their  
16 executives should not be --

17           JUDGE EDLES: Mr. Cherry, I am as concerned as  
18 you about the attitude of counsel practicing before this  
19 agency. My problem is that I went to law school, not  
20 medical school, and I am a lawyer, not a psychiatrist.  
21 And as a result, it is difficult for me sometimes to get  
22 to the attitude of lawyers in their corporate rooms or  
23 when they meet with each other to sit and discuss the  
24 strategy, the tactics of a case.

25           I am, I think, bound to look at the record and

1 see what it is that they produce in that hearing. I  
2 feel comfortable in making a judgment as to whether what  
3 they produced was all the material information that I  
4 think was needed, but I do have some degree of  
5 difficulty in going back into their psyches and trying  
6 to figure out what it was they had in their mind.

7           Really, If you can help me on that as to what  
8 guidelines I can lay down here for the psyche in order  
9 to make sure that the practicing bar achieves the  
10 highest ethical standards, I am interested in doing that.

11           MR. CHERRY: I do not think this is the case  
12 to announce that decision because you have not seen in  
13 this case good ethical standards. You have only seen  
14 bad ethical standards.

15           What you want to do is have a rulemaking  
16 proceeding, which is why I have suggested to you: Avoid  
17 the lawyers. That is not the issue here. You want to  
18 get the lawyers in line? Sock Consumers Power with a  
19 condition in their license that if they lie one more  
20 time they're out of the nuclear business. You will get  
21 lawyers in line. Do what they did out in LA last week  
22 to Gibson, Dunn & Kretcher.

23           Julian Von Okalanowski, one of the greatest  
24 antitrust lawyers, a hero of mine, just got socked with  
25 his firm for \$400,000 for destroying documents in a

1 hearing.

2 JUDGE EDLES: Am I correct, though, that I am  
3 permitted, and I hope encouraged by you, to go back and  
4 look as carefully as I can at the record in order to  
5 draw my own determination as to what conduct actually  
6 was manifested by the lawyers?

7 MR. CHERRY: I do not believe that the way I  
8 framed my appeal that that is appropriate. I stand  
9 corrected by Mr. Charnoff's case. I encourage you to  
10 read all you want, because I do not know how any  
11 fair-minded individual could come to any less of a  
12 conclusion on the facts than Mr. Miller.

13 JUDGE EDLES: I will read it all, sir.

14 MR. CHERRY: I am concerned about Consumers  
15 Power Company as an indication. I am concerned by the  
16 briefs in this case which raise things to the level of  
17 materiality and probity when what really went on down  
18 here was a cheap and dirty trick.

19 I am concerned that Consumers Power Company  
20 will have a feeling -- you know, you've got really two  
21 options when you finally look down at what has happened  
22 here. The first option you have is to focus on  
23 Consumers Power Company and have a hearing below.

24 The reason I suggested a hearing is I  
25 think -- and I will participate in that one -- I think

1 that Consumers' entire conduct before this agency ought  
2 to be put before that hearing board: How they hire high  
3 school children to lay concrete; how they violate  
4 quality assurance and quality control; all of those  
5 things.

6 JUDGE EDLES: I think you are straying from  
7 the issues in this case.

8 MR. CHERRY: No. I am only telling you what  
9 relief I want. What relief I want is a hearing to be  
10 held by a competent Licensing Board which will issue  
11 prompt decisions, examining the character of Consumers  
12 Power Company before this agency since its inception to  
13 determine what sanctions are appropriate.

14 JUDGE JOHNSON: Mr. Cherry, will you answer  
15 one question for me?

16 MR. CHERRY: If I can.

17 JUDGE JOHNSON: You've shaken my entire fabric  
18 of life. As a high school student I was hired to lay  
19 concrete, and I felt I was pretty damn lucky to have the  
20 job, and I enjoyed it and I think it did me a lot of  
21 good.

22 Would you please tell me what the crime is  
23 that you're talking about, hiring high school students  
24 to lay concrete? Would you just tell me what the hell  
25 you are talking about?

1 (Laughter.)

2 MR. CHERRY: It's not something I found, but  
3 apparently Region III compliance some time ago found  
4 that Consumers was late in the job in laying concrete.  
5 They went out and had high school students who did not  
6 know what they are doing.

7 Don't forget, Dr. Johnson, you are in the  
8 upper crust of society.

9 JUDGE KOHL: He wasn't --

10 JUDGE JOHNSON: I wasn't when I was laying  
11 concrete.

12 (Laughter.)

13 MR. CHERRY: You were as bright then as you  
14 are now.

15 But what I am saying is that Consumers Power  
16 Company in its effort to get a job done did something  
17 which Region III found to be improper, and then there  
18 was the problem with the cement. They had hearings on  
19 that, too. Perhaps I inartfully said they hired high  
20 school kids to lay concrete but that is what the--

21 JUDGE JOHNSON: You were phrasing that as a  
22 sin. You categorized it as a sin.

23 MR. CHERRY: Had I known of your illustrious  
24 background, I would have phrased it somewhat  
25 differently.

1 (Laughter.)

2 JUDGE KOHL: Mr. Cherry, you have one minute  
3 left.

4 MR. CHERRY: Thank you.

5 In this hearing I think that Consumers Power  
6 Company should be asked to show cause a lot of things:  
7 Why their management shouldn't change and why a lot of  
8 things should be done.

9 Now your other option: Affirm below, have the  
10 utilities factor in whatever findings you give them to  
11 the rate base so that the cost of lying is now the cost  
12 of doing business, and wait for the next Jackson gang  
13 maneuver and hope it doesn't kill somebody.

14 JUDGE EDLES: One question on the rate base.  
15 Doesn't he then pass it along to the ratepayers?

16 MR. CHERRY: Well, sure. That's what they do  
17 with all the fines. That is why this Agency is  
18 absolutely ludicrous in imposing fines. Put a condition  
19 in the license that says if you do it again, you are out  
20 of the nuke business and then you will have better  
21 utilities.

22 Thank you.

23 JUDGE KOHL: Mr. Charnoff.

24 ORAL ARGUMENT BY GERALD CHARNOFF ON BEHALF OF  
25 THE APPLICANT, CONSUMERS POWER

1 MR. CHARNOFF: Good afternoon.

2 I was delighted --

3 JUDGE JOHNSON: Mr. Charnoff, I would like to  
4 get something straight very quickly.

5 MR. CHARNOFF: I never laid pipe when I was in  
6 high school, Dr. Johnson.

7 (Laughter.)

8 JUDGE JOHNSON: On page 19 of your brief, I  
9 asked Mr. Cherry about that. The implication of his  
10 argument was that that footnote was not strictly true.

11 MR. CHARNOFF: It is my understanding as  
12 follows, sir: (a) that the Consumers Power Company did  
13 make documents available in Jackson voluntarily for  
14 discovery which included the documents in question  
15 here. The parties to the hearing were advised of that.  
16 It was my understanding that the parties, neither the  
17 staff nor Mr. Cherry took advantage of that.

18 It is also my understanding that at the  
19 beginning of the hearing the documentation was moved  
20 from Jackson to wherever the site of that particular  
21 hearing was, and that prior, perhaps the evening prior  
22 to his examination of Mr. Temple, Mr. Cherry did go  
23 through those documents.

24 I would also refer you, sir, to pages 35 and  
25 36 of our brief which cited for that general proposition

1 a staff memo of the NRC issued on December 30, 1976  
2 which supports the proposition at the bottom of 35 about  
3 the voluntary -- about the documents being made  
4 voluntarily weeks before the suspension hearing with  
5 regard to the documentation. I was not present at that  
6 hearing, but it is my understanding from counsel --

7 JUDGE EDLES: Maybe the staff could clear that  
8 up when they make their presentation.

9 MR. CHARNOFF: It's my understanding from  
10 counsel who represented Consumers in that hearing that  
11 that statement that is at the bottom of the footnote is  
12 correct.

13 JUDGE JOHNSON: Thank you.

14 MR. CHARNOFF: I would like to use a few  
15 minutes of my time to make just a few general  
16 observations and then use a few of those minutes that  
17 remain to reply to some of the statements that were made  
18 by Mr. Cherry a little while ago. I think that whole  
19 discussion will not take more than ten minutes, and then  
20 I'll be available for questioning.

21 I won't repeat our brief. In our view it sets  
22 out our main points at length, I'm sorry to say, but it  
23 took a lot of pages simply to summarize the nature of  
24 the testimony in this rather complex setting.

25 In our view simply the Licensing Board

1 decision of no sanctions was clearly correct, whether  
2 the facts found by the Board were correctly found or  
3 whether the facts found by the Board were incorrectly  
4 found and should have been found as we suggested.

5           Secondly, it is our contention that sanctions  
6 and the imposition of sanctions is clearly a  
7 discretionary matter with the Licensing Board, and  
8 unless that discretion is clearly abused, it is not  
9 really to be upset. In light of the findings made by  
10 the Board with regard to the good faith of the parties  
11 and the newness of the novelty, if you will, of the  
12 standards that applied, that discretion clearly was  
13 exercised correctly.

14           Third, they complained about omissions from  
15 the direct testimony whereas we set out were either not  
16 material, not omitted or factually non-existent.

17           Fourth, we think that the Licensing Board  
18 mischaracterized the approach of Consumers and its  
19 attorneys and that that should be corrected.

20           Finally, the Licensing Board articulated and  
21 applied, as we were able to understand the Board's  
22 opinion, three new and three wrong standards related to  
23 disclosure in affirmative testimony, which if  
24 uncorrected, in our view, would intolerably burden  
25 future NRC licensing procedures. And I hope we can

1 discuss that somewhat later today.

2           There is some discussion with regard to the  
3 question of the Consumers Power Company threat of  
4 litigation that should be covered.

5           First, the Licensing Board did not say that  
6 that should be in the direct testimony.

7           Second, the Board found that it was clearly  
8 intended and did influence Dow, but the Board also  
9 accepted the general agreement among those present at  
10 those meetings that the Consumers Power Company  
11 statement with regard to litigation was not intended to  
12 require anybody to give any false testimony.

13           Third, the Board found that Dow conducted  
14 itself with that threat in mind, and certainly counsel  
15 for Dow wants that to be brought to your attention  
16 apparently.

17           Fourth, in our view that was not a threat at  
18 all. It was basically a response to a Dow request for  
19 input on legal ramifications of the Dow-Michigan  
20 position which if adopted might have become a Dow-USA  
21 position.

22           Mr. Comparence, the head of the Dow-USA review  
23 team, clearly said in testimony in our case that Mr.  
24 Cherry didn't attend, one of the substantive matters  
25 that occurred during the course of that hearing was that

1 what he received from Mr. Anen in the context of the  
2 discussion of the possibility of litigation was  
3 precisely what he was asked to look for on the issue  
4 that he was looking at.

5 JUDGE JOHNSON: May I ask you a question?

6 MR. CHARNOFF: Yes, sir.

7 JUDGE JOHNSON: Was there a contract provision  
8 in the contract between Dow and Consumers that Dow would  
9 support Consumers in licensing action?

10 MR. CHARNOFF: I don't know that I can answer  
11 that, sir. I don't remember the contract. I don't  
12 honestly know that. I could let you know. I don't  
13 think that it was anything articulated quite that way.

14 JUDGE KOHL: Perhaps counsel for Dow could  
15 elaborate on that.

16 JUDGE JOHNSON: Fine. Go ahead.

17 MR. CHARNOFF: Finally, it is my view that so  
18 long as Dow's position was genuine -- and clearly the  
19 events since that position have clearly demonstrated  
20 that it must be genuine -- it doesn't matter whether  
21 that decision was reached as a result of a threat of  
22 litigation which it took into account in deciding  
23 whether it should continue with the project, whether it  
24 comes from some economic calculus, or indeed whether it  
25 comes from some love affair that the chairman of the

1 Board or the president of Dow Chemical thought was  
2 appropriate with regard to nuclear power.

3 I think the appeal board has previously said  
4 as much in this particular case in an order predating  
5 the remand hearing.

6 Sixth with regard to this matter I think it  
7 should be clear that Consumers is not suggesting that  
8 Dow acted improperly. What we are -- and indeed I must  
9 say that the issue before the Board all along even  
10 before the suspension hearing was whether the alleged  
11 attempt by Consumers to prevent full disclosure was in  
12 any way improper.

13 But it is our view that what came out at that  
14 hearing that Mr. Cherry did not attend and that did not  
15 come out in the earlier suspension hearing were the  
16 perceptions of Dow's attorneys and their admitted  
17 sporting conduct. I leave it to you to judge whether  
18 that is appropriate or it is not appropriate. That is  
19 not the matter of importance here. They admitted  
20 sporting conduct toward Consumers and its attorneys was  
21 a reality that was not given any cognizance by the  
22 Licensing Board.

23 In my view that directly explains the  
24 extensive involvement of the lawyers in the evolution of  
25 the testimony by Mr. Temple, which was also not

1 inappropriate and also certainly explains the  
2 ambiguities in a number of the meeting notes. But it  
3 really makes clear that neither Dow nor Consumers were  
4 acting in any bad faith toward the Licensing Board  
5 whatever the differences were between them.

6 JUDGE JOHNSON: Are you suggesting perhaps  
7 they were acting in bad faith towards each other,  
8 though?

9 MR. CHARNOFF: I think Mr. Wessel basically  
10 admitted that when he was on the stand. I think that  
11 there was, as Mr. Wessel said, a good deal of sparring  
12 and sporting. There was, for example, to the extent  
13 that Mr. Wessel concocted the strategy of causing  
14 Consumers Power Company to decide what was in the Dow  
15 witness's testimony, but did not explicitly or candidly  
16 say that, it seems to me that is an interference with  
17 communications. Call it sporting, call it what you  
18 will, it came about from perhaps a legitimate motive on  
19 his part. He was concerned about a threat of  
20 litigation.

21 But the fact that he conducted himself in such  
22 a way without any explicit statement that, look, what  
23 I'm trying to do is to get you fellows to decide what  
24 goes in here, rather than what he did which was to  
25 develop a bad draft, an intentionally lousy draft I

1 think were his words, those were the kinds of thing, the  
2 reality of that situation. That doesn't go to bad faith  
3 towards the NRC or towards the Licensing Board.

4           In my judgment communications would have been  
5 substantially better between the parties, even though  
6 they might have been adversaries, had the game not been  
7 played that way. But whether that is good or bad faith  
8 between them, I think that is one of the kind of  
9 communications I don't embrace. I don't think it helps  
10 anybody. And I don't know that calling it good or bad  
11 faith particularly helps it one way or the other.

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1 JUDGE KOHL: Does that reflect the kind of  
2 attitude that the NRC should condone?

3 MR. CHARNOFF: I don't think the NRC should  
4 necessarily judge that, so long as the NRC gets full  
5 truthful facts that are material to the issues before  
6 it. I think when it interferes with the NRC getting  
7 those material facts before it, then I think the NRC  
8 could say what it wishes about whatever the motivation  
9 was.

10 The NRC's concern should be focused on what's  
11 important to it and not on some prurient interest in  
12 what goes on between private parties if it doesn't  
13 affect the ultimate testimony that gets presented to  
14 it.

15 JUDGE KOHL: But if the NRC doesn't comment  
16 unfavorably in some fashion on that kind of activity,  
17 even if in a given case it didn't result in any actual  
18 distortions of the record or the testimony, might not  
19 others in the future also engage in such sporting  
20 activity, with perhaps the result that there would be an  
21 effect on the actual testimony?

22 How can we know, and what should we say about  
23 guidance for the future?

24 MR. CHARNOFF: I am sorry, Judge Kohl. I  
25 think what I would do if I were at the NRC, I would

1 clearly insist on what the minimum requirements are for  
2 disclosure to this agency. And if sporting conduct  
3 between two or more private parties appearing before it  
4 nevertheless results in meeting those minimum  
5 requirements, then I have to submit to you that the NRC  
6 doesn't have to do anything other than say, fine, thank  
7 you for what you got.

8           But if the NRC determines that you do not get  
9 the information you are entitled to get as a matter of  
10 good policy and law, then of course you should condemn  
11 that or anything else that interferes with it. But I  
12 think you first have to cross that first bridge.

13           JUDGE JOHNSON: Well, doesn't the fact, as the  
14 Licensing Board at the suspension hearing indeed said,  
15 the fact that there is evidence of "sporting conduct"  
16 raise the specter of, well, as a result of this conduct  
17 what is it that we have not heard, that may not be  
18 disclosed? In other words, this playing fast and loose  
19 with each other in doing that, the two contracting  
20 parties may, even inadvertently, obscure information  
21 that might be of interest, of critical interest.

22           I would make a distinction, too, between  
23 whether we are dealing with safety matters or purely  
24 economic matters, but --

25           MR. CHARNOFF: I think that's an important

1 distinction, but I don't necessarily think it applies  
2 here. I think it applies to the basic thrust of where  
3 this case was going in the Licensing Board's mind.

4           But let me say that I don't have any trouble  
5 with the -- as a matter of fact, I've said before I  
6 think the Licensing Board should have taken cognizance  
7 of that kind of communication-block problems, call it  
8 what you will. Whether the NRC should condemn it or  
9 sanction anybody for it, I think I feel very strongly  
10 that it should not, in the absence of it actually  
11 interfering with production before the NRC of the kind  
12 of candid testimony you are entitled to get.

13           I think if we begin to judge the behavior of  
14 some people and how and in which ways material gets  
15 generated for your consideration, we are wandering into  
16 a thicket that it seems to me goes beyond the question  
17 of what this agency's function is. That doesn't mean  
18 that you should be silent on it, but it also doesn't  
19 mean you have to apply a bunch of adjectives to it,  
20 whether it'll be good or bad.

21           That may be the reality in a lot of situations  
22 where parties have difficult contractual relationships  
23 between them that are really of no concern to this  
24 agency so long as it does not impact the information you  
25 get. It's a fine line, but I think it's an important

1 one.

2           Let me just pass briefly to Mr. Cherry's  
3 exceptions. I think that it is clear and understandable  
4 that they do not reflect the hearing record below,  
5 probably because Mr. Cherry wasn't there. And I don't  
6 know whether he's read the transcript in that case or  
7 not. I suggest he may not have, because the pleading  
8 doesn't suggest anywhere an awareness of that record.

9           But for example, the fact that there was the  
10 omission of the Michigan Division position from the  
11 final testimony clearly comes out as being basically a  
12 Dow-requested view for the view that Mr. Wessel thought  
13 that if it were in, somebody later on might in  
14 litigation between the two parties, contend Dow did  
15 something improper. As I say, I don't think we have to  
16 judge that.

17           JUDGE EDLES: But Mr. Charnoff, I assume that  
18 if Consumers' counsel -- and I realize you were not  
19 Consumers' counsel at that time -- I assume that if  
20 Consumers counsel had concluded that the Michigan  
21 Division recommendation was in fact material, it would  
22 have had an obligation to put it forward even though Dow  
23 resisted.

24           MR. CHARNOFF: Absolutely. I couldn't agree  
25 more. And I suspect, from all the discussions in the

1 record, that Consumers' counsel would agree with you on  
2 that.

3           Secondly, if one examines Mr. Cherry's brief  
4 closely, he really confuses, because he's unaware of the  
5 facts below, a number of things. He would have you take  
6 the Board's findings that the Dowe Michigan Division  
7 position should have been in and that litigation threats  
8 should have been in the direct testimony, and then  
9 confuses them, hopefully not deliberately, with the  
10 reference by the Licensing Board to the "lose the case"  
11 statement.

12           I think you will recall in our brief that we  
13 have indicated, first of all, that "lose the case"  
14 statement was apparently a major error that the Board  
15 made in accepting, but a major error by the transcriber,  
16 because the transcriber of the notes, Mr. Duran, was  
17 referring to a document by Mr. Roso, the Consumers  
18 attorney, which had in it precisely the things that,  
19 according to Mr. Duran's notes, Mr. Roso was saying  
20 would lose the case if it were in.

21           In any event, my point here is simply that Mr.  
22 Cherry's statement of the facts do not really match with  
23 what the Board found or with what the record shows.

24           Finally, if I can, I would like to -- well,  
25 next to finally, if I can, I would like to touch on a

1 few things that Mr. Cherry said with you and then get  
2 back to the Licensing Board decision.

3           First, fines imposed on utilities are not  
4 passed through to ratepayers. No regulatory commission  
5 that I know of anywhere in the United States allows that  
6 to be done, nor am I aware of any utility that has  
7 requested a commission to allow it to do so.

8           Secondly, when Mr. Cherry says he does not  
9 quarrel with the findings of fact of the Licensing  
10 Board, that is only true if you allow Mr. Cherry to  
11 characterize the third paragraph on page 40 of the  
12 typewritten decision as something other than findings of  
13 fact. I'm referring to the findings by the Licensing  
14 Board that there was no intention to deceive and no  
15 conspiracy and so on.

16           With regard to some of the substantive matters  
17 that were considered in the hearing below, we have  
18 talked about Mr. Wessel's testimony and the perception  
19 of the adversarial relationship that clearly did not  
20 come out in the suspension hearing below.

21           There was, in response to one of your  
22 questions, Judge Edles, a question with regard to the  
23 Michigan Division recommendation. One of the  
24 evidentiary documents below, a meeting held September  
25 13th, attended by both Consumers and Dow executives, but

1 not lawyers, where Mr. Temple told Consumers of the Dow  
2 Michigan Division recommendation, he said, and these  
3 were in the Dow notes, there would be a corporate  
4 decision in 30 days, acknowledging specifically that  
5 that was nothing more than a Michigan Division  
6 recommendation.

7           If I can, I would like to turn to something  
8 that concerns me perhaps a little bit more than the  
9 sorry tale that got us into this case.

10           JUDGE KOHL: Mr. Charnoff, your time is just  
11 about up.

12           MR. CHARNOFF: Fine. Let me just briefly pass  
13 through this. A number of people are actively engaged  
14 with the Commission in attempting to streamline that  
15 licensing process.

16           I must say, the schedule followed by the  
17 Licensing Board in this case is a horror in terms of the  
18 post-hearing schedule. To have allowed Mr. Cherry at  
19 all to file anything late was in itself an act of  
20 discretion that is questionable. But beyond that, to  
21 get a letter from Mr. Cherry in January of '80, after  
22 all of the findings have been filed by the other parties  
23 in November, and then to wait ten more months before  
24 inviting Mr. Cherry to file some other findings in this  
25 case, and then to wait 12 more months to write a

1 decision, is a little frightening in terms of  
2 expedition.

3 JUDGE KOHL: Mr. Charnoff, did you do  
4 anything, though, to object to Mr. Cherry's filing, the  
5 January letter? And did you make any effort --

6 MR. CHARNOFF: I had no objection to the  
7 letter, Judge Kohl. I had a lot of objection to the  
8 Board in November 1980 having extended that offer. But  
9 having done that, I was not about to quarrel with that  
10 and get this matter further delayed.

11 And we waited and waited for the Cherry  
12 submittal, which didn't come, and then waited almost  
13 another 12 months until the decision came.

14 There is one thing that does bother me in that  
15 decision that I hope the Board will look at carefully.  
16 That is, the discussion by the Board insofar as it fails  
17 to consider the D.C. Bar opinion which was filed with  
18 it. It could agree or disagree with it, but to fail to  
19 make any awareness of that in the decision was a little  
20 bit scary to me.

21 JUDGE JOHNSON: Was that filed as an exhibit  
22 or evidence or something in that case?

23 MR. CHARNOFF: It was filed in the January  
24 1980 letter by us with the Board.

25 JUDGE JOHNSON: Subsequent to the hearing?

1 MR. CHARNOFF: Yes. We had asked for it  
2 during the hearing, but I'm afraid the D.C. Ethics Board  
3 takes almost as long as the Licensing Board to give  
4 their opinion.

5 JUDGE EDLES: But the letter was before the  
6 Licensing Board at the time it wrote its decision?

7 MR. CHARNOFF: Absolutely, sir.

8 JUDGE KOHL: It got it, then, about the same  
9 time it got Mr. Cherry's letter?

10 MR. CHARNOFF: That's right, about a week  
11 before.

12 The Board takes Consumers Power attorneys to  
13 task for claiming the privilege with respect to the  
14 draft of the testimony. I am not going to get into the  
15 question at the moment now as to whether the work  
16 product privilege applies to that or whether it  
17 doesn't. Mr. Cowan's brief takes care of that quite  
18 adequately.

19 Most egregious to me is that for the Licensing  
20 Board in this case to take Consumers' attorneys to task  
21 for filing -- for requesting that privilege below,  
22 without mentioning that in the suspension hearing below  
23 the REC staff supported the Consumers Power Company  
24 position and the Chairman of the Licensing Board  
25 decision below said, and I quote -- it's on page 1,000,

1 I believe, of the transcript -- "It's a tossup." He  
2 really went both ways before he finally decided.

3 Now, it could be that the Licensing Board in  
4 the remand proceeding is correct that privilege should  
5 not apply. But to take Consumers and its attorneys to  
6 task for requesting the application of that privilege,  
7 in the light of what went on below, and not to mention  
8 that, is to me an egregious non-disclosure of its own.

9 And unbelievably, the Board then got carried  
10 away and said that all of the drafts should have been  
11 voluntarily produced, whether or not discovery was  
12 requested. I don't know what that heralds if that's  
13 allowed to stand and I hope you won't allow it to stand,  
14 but it borders on absolute nonsense in terms of rules  
15 for conduct of these proceedings.

16 It is for that reason that I was delighted  
17 when I had read that you were going to take sua sponte  
18 review of this case, because those standards that were  
19 enunciated by the Board, together with this particular  
20 matter, just require a restatement by you as to what the  
21 rules are going to be in future cases.

22 JUDGE EDLES: Mr. Charnoff, I am as concerned  
23 as you are about the delays involved generally in this  
24 proceeding, but this sporting conduct that you talk  
25 about does call into question by Licensing Boards and

1 perhaps Appeal Boards whether or not they really did get  
2 all the information. This is the matter Judge Johnson  
3 was discussing earlier on.

4           What can we do about that as an Appeal Board?  
5 How can we lay down guidelines and rules, you know,  
6 beyond the canons of ethics, so that we will not get  
7 that sporting conduct, so that we will not have to have  
8 yet another hearing to determine whether the first  
9 hearing really brought out all the other information and  
10 we can shorten these procedures by a goodly amount?

11           MR. CHARNOFF: Let me try to answer that in  
12 two ways. First of all, I do not advocate the sporting  
13 conduct and I'm not suggesting you bless it in any way.  
14 I'm suggesting there are limits to what you can do or  
15 even might do. I believe you have an unqualified  
16 responsibility to do what you can do to make sure you  
17 get everything you want. I think if the sporting  
18 conduct comes before you and that turns out to be a  
19 communication block you ought to recognize it for what  
20 it is.

21           You might even quote Mr. Wessel, who as I  
22 recall it, when he testified, he said he wrote a book on  
23 behavior which was critical of sporting conduct. You  
24 might quote him and say that.

25           But I don't know whether you can really change

1 the human psyche. You said you went to law school and  
2 not medical school. I'm sorry, I have the same  
3 limitation, although my mother had her doctor. The  
4 other guy in the family is a doctor, so I couldn't go to  
5 medical school. So I can't answer that.

6           But I don't know what you can do about the  
7 human psyche and the way not only attorneys, but all  
8 people, deal with one another in adversary situations.  
9 It would be nice of people were at least candid about  
10 their adversarial relationships. You might say that.  
11 Where that goes I don't know.

12           JUDGE KOHL: Mr. Charnoff, your time has long  
13 since expired.

14           Mr. Potter?

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1           ORAL ARGUMENT BY WILLIAM POTTER ON BEHALF OF  
2                           INTERVENOR DOW CHEMICAL

3           MR. POTTER: With respect to the argument  
4 presented by Mr. Cherry, we believe the brief we have  
5 filed with the Board adequately responds and sets forth  
6 the position of Dow with regard to the position Mr.  
7 Cherry has taken. At the time of this oral argument, we  
8 still have under advisement a motion by Dow for  
9 reconsideration of your order denying us leave to file a  
10 brief in response to the brief filed by Consumers Power  
11 Company, and I would like to devote a portion of my  
12 time, if not all of it, just to bring to your attention  
13 what I conceive to be the points of disagreement between  
14 Dow and Consumers.

15           What troubled me the most, I guess, is the  
16 statement that was made by Consumers, because I am not  
17 sure where they are coming from at this point. That is,  
18 that they are not suggesting that Dow acted improperly  
19 during the testimony preparation period. I am not  
20 certain at this point whether they are drawing a  
21 distinction between Dow and its counsel and Mr. Wessel,  
22 who is an outside counsel, or whether he is treating  
23 them all the same, but the brief that Consumers filed  
24 before the Licensing Board did take the position that  
25 Mr. Wessel, Dow counsel, did act improperly and in fact

1 singled him out and suggested that the sanctions be  
2 employed against him, although not against itself.

3           The argument is continued here in their brief  
4 before this Board, which is why I wanted the opportunity  
5 to respond to it. It is exceedingly important, because  
6 the reputations of counsel are at stake, which I  
7 conceive to be very important, as certainly they do, and  
8 I presume so do Mr. Charnoff and Mr. Cherry.

9           To me when you start with the premise that  
10 Consumers does, that is that Dow erroneously conceived  
11 that there was an adversary relationship between the  
12 company, and if you start with that as a premise, then  
13 it is probably difficult to understand why it is that  
14 Dow did not voluntarily disgorge documents and provide  
15 all the information that Consumers may conceivably have  
16 wanted and done anything else that Consumers may have  
17 wanted.

18           But it is a little like -- and I realize it is  
19 an inept comparison -- but it is a little like going  
20 into a bar with a cameraman with you, picking the big  
21 guy in the house, telling the cameraman, saying, wait,  
22 do not turn the camera on yet, go on up, deck him in the  
23 face, and then say, okay, turn the camera on, and then  
24 the man comes back and starts after you.

25           I agree it is an overstatement, but the fact

1 of the matter is that what preceded the testimonial  
2 preparation period was a threat of litigation by  
3 Consumers against the Dow Chemical Company. Now, the  
4 threat took place -- it really came twice, once in a  
5 meeting during September 21st, 1976, when Consumers'  
6 general counsel, Mr. Fallahy, came to Dow. And the  
7 threat was was repeated again on September 24th, 1976,  
8 when the chairman of the board came to Dow.

9 JUDGE JOHNSON: May I ask a question?

10 MR. POTTER: Yes.

11 JUDGE JOHNSON: I believe it was a Dow  
12 attorney who characterized that threat as "blackmail."

13 MR. POTTER: That is correct, Judge Johnson.

14 JUDGE JOHNSON: In the situation where two  
15 major corporations enter into a contractual relationship  
16 and literally billions of dollars are involved, and one  
17 of the corporations perhaps for good cause is saying you  
18 all are not doing what you said you were going to do in  
19 this contract, or you were late, and we think we may  
20 just opt out of the contract. Is it not the expectation  
21 that the other side -- I think I will have to label  
22 these, because I am getting confused myself, but  
23 wouldn't Dow expect, the are saying, Consumers, you are  
24 so late in getting this power plant finished, we have  
25 got to have steam, we have got to have electricity, we

1 can't wait for you, we are going to get out of this  
2 contract.

3           Now, isn't it reasonable to expect under  
4 normal contractual behavior between parties that the  
5 Consumers says, well, you try that and we are going to  
6 sue, because we have got already \$500 million invested  
7 on the basis of your statement that you want this, or  
8 the statement that the contract is in effect, so is the  
9 suit or the threat of a suit that unusual?

10           MR. POTTER: Had that been the nature of the  
11 threat, it would not be. To accept that statement that  
12 that was what the threat was, you would accept of course  
13 the argument made by Consumers, which was basically, if  
14 you say what they said was, Dow, if you breach the  
15 contract, we are going to sue you, the threat was a  
16 little more subtle than that. I am going to refer  
17 specifically to Volume --

18           JUDGE JOHNSON: You might as well get to the  
19 question on the contractual --

20           MR. POTTER: I am. You asked earlier whether  
21 there was a contractual provision in the contract  
22 between Dow and Consumers requiring Dow to support  
23 Consumers.

24           JUDGE JOHNSON: Right.

25           MR. POTTER: The answer to that question is

1 yes, but with a qualification. The contractual  
2 obligation to support Consumers was modified, and please  
3 appreciate I don't have the contract in front of me, and  
4 it has been some time since I looked at it, but as I  
5 read it when I read it the first time, the contractual  
6 duty to support was to supply witnesses, documents,  
7 drawings, things of that nature that would be required  
8 at the various hearings, and obviously, to make the  
9 company people available to Consumers for preparation  
10 for the hearings.

11 Now the problem that developed between the  
12 companies occurred principally at the September 24th,  
13 1976, meeting when Mr. Aymond came to the meeting with  
14 an outline. That outline outlined a number of positions  
15 that Dow might take, and what the impact would be. One  
16 of the descriptions is -- and I am looking now at a  
17 document contained in Volume IV, and it is Exhibit  
18 Number 9 of the staff exhibits, first page. Paragraph  
19 3B describes one of the Dow positions as follows:

20 "If Dow takes the position that it still  
21 intends to take electricity and steam from Consumers in  
22 accordance with the contracts, but that an alternative  
23 source of power or sources would be more advantageous to  
24 Dow, then the chances for suspension and ultimate  
25 modification or revocation of the construction permits

1 would be greatly enhanced (50-50)," which is their way  
2 of saying it would be a split.

3           On Page 4 of the outline, when Mr. Aymond got  
4 around to explaining what would happen if Dow  
5 specifically took those positions independent of what  
6 the impact would be on the license, it was explained as  
7 follows:

8           "Consumers would have no alternative but to  
9 seek to recover damages from Dow for A, B, or C," which  
10 are itemized above, as to what they thought their  
11 elements of damage would be, "if revocation was due to  
12 Dow's failure to abide by the contracts. We [Consumers  
13 Power Company] consider a Dow position any other than 3A  
14 or 3A1 would be inconsistent with Dow's contract  
15 obligations."

16           In other words, 3B, which I just read to you,  
17 that is, you have got a valid contract, but it is no  
18 longer of any benefit to us any more, which was,  
19 incidentally, the recommendation of the Michigan  
20 Division. What Consumers was saying: you take that  
21 position and the license gets suspended. You have got a  
22 lawsuit on your hands.

23           JUDGE JOHNSON: The license being suspended,  
24 as I recall that discussion, for 18 months would have  
25 killed the project.

1 MR. POTTER: That is my understanding.

2 JUDGE JOHNSON: So Dow taking that position  
3 then was tantamount to causing Consumers a loss of some  
4 \$500 or \$600 million in sunk costs. Isn't that correct?

5 MR. POTTER: That's correct.

6 JUDGE JOHNSON: Would they not then normally  
7 be expected to try to recover that? Wouldn't their  
8 stockholders say --

9 MR. POTTER: What Dow was being told was,  
10 listen, if your witness gets on the stand and says,  
11 look, we have a contract with Consumers Power Company,  
12 it is a valid contract, and we are bound by it as a  
13 matter of contractual law, but if you ask us  
14 specifically, is the economic benefit there that we  
15 thought was there before, the answer is no. Now, that  
16 was a truthful statement for the Michigan Division  
17 position at that point, but what Consumers was saying,  
18 is: if you get on the stand and say that, and that  
19 results in a suspension, we are going to sue you. What  
20 concerned Dow at that point is what did Consumers mean  
21 by supporting it? Does that mean saying something  
22 beneficial when it didn't believe it was beneficial?  
23 That is where the problem developed.

24 JUDGE EDLES: There are two things, it seems  
25 to me. One, the issue was supporting them by providing

1 witnesses and documents, as you discussed, and  
2 presumably Consumers read your commitment to support as  
3 including an agreement not to undermine their license.  
4 Now there is also information in the record suggesting  
5 that at no time did they say that were you were to  
6 perjure yourself. Am I correct on that?

7 MR. POTTER: The agreement?

8 JUDGE EDLES: No, no, that the discussions  
9 among the counsel --

10 MR. POTTER: Mr. Aymond did say don't get on  
11 the stand and perjure yourself.

12 JUDGE EDLES: So in point of fact, if I  
13 brought together those two pieces of information, what  
14 they are saying is, we know you are not going to lie on  
15 the stand, but make sure you are careful in not doing  
16 anything that undermines our position. That is not to  
17 say you have to lie, but try and do the best you can to  
18 draft your testimony in a way that is not going to  
19 undercut us, and if you do not do that, we are going to  
20 litigate over whether your reading of the contract is  
21 right or whether my reading of the contract is right.  
22 Isn't that what they are saying?

23 MR. POTTER: I suppose that is one way of  
24 looking at it, but you are left with the judgment call  
25 of what do they mean, undermining. If they don't come

1 in, the problem --

2 JUDGE EDLES: I have no doubt that they had  
3 some implicit threats --

4 MR. POTTER: Judge Edles, what finally  
5 resulted from out of all this with the threat was, it  
6 colored the way Dow responded and its attorneys  
7 responded to the preparation of the testimony. What  
8 they conceived Consumers to be saying was not only do  
9 you get on and testify that the contract is valid, but  
10 don't say anything that indicates a dissatisfaction with  
11 it, because if that winds up causing a suspension, then  
12 you have got a lawsuit on your hands.

13 JUDGE EDLES: I understand your point, but let  
14 me ask you this, Mr. Potter. Was there anything in the  
15 ultimate testimony by Mr. Temple that was inaccurate,  
16 misleading, any material that was omitted that should  
17 have been included from your perspective?

18 MR. POTTER: No, sir.

19 JUDGE KOHL: Or anything that was included  
20 improperly or not included improperly as a result of  
21 this threatened lawsuit?

22 MR. POTTER: No.

23 JUDGE EDLES: Did it reflect in your judgment  
24 an accurate representation of the Dow position at the  
25 time the testimony was delivered?

1 MR. POTTER: Not only in my judgment, but Mr.  
2 Creffice, the President of Dow Chemical Company,  
3 indicated that he felt --

4 JUDGE EDELS: In other words, whatever arm  
5 twisting Consumers may have done, it only basically  
6 produced a truthful document?

7 MR. POTTER: That's correct. And I can cite--  
8 And I didn't mean to infer any other way.

9 MR. EDLES: Well, then, I don't understand the  
10 point you are making.

11 MR. POTTER: I didn't mean to infer anything  
12 other than that, but the point I am trying to bring  
13 across to you, and hopefully I will succeed before we  
14 are done, is that you cannot simply look at Consumers'  
15 version of the event, which was that there was this  
16 warm, harmonious relationship, and then their trusting  
17 lawyers came in and began to work together preparing  
18 testimony. A lot preceded that. And one of the major  
19 things that preceded it was the threat of litigation.

20 JUDGE EDLES: Let me ask you this: All of  
21 this who struck John business, is that relevant to our  
22 consideration? Or maybe I should say, is that material  
23 to our consideration?

24 MR. POTTER: Only to the extent that Mr.  
25 Charnoff has taken the position that Mr. Wessel engaged

1 in "sporting activities," without giving you the flavor  
2 of what preceded it and saying you should sanction him.  
3 Not "you" should, that is what he told the Licensing  
4 Board. And despite the fact that he now says that he is  
5 not taking that position now, it is in the record  
6 below. The Board concluded that it wasn't necessary.  
7 They looked at the entire record and correctly concluded  
8 that Dow's actions afterwards and that of its counsel  
9 were influenced by the threat.

10           If I could just add one other thing along  
11 those lines --

12           JUDGE JOHNSON: The words "sporting  
13 activities," were they Mr. Charnoff's words or Mr.  
14 Wessel's words?

15           MR. POTTER: They were Wessel's words, but  
16 they also have been used by Mr. Charnoff, and I don't  
17 know how he means them.

18           JUDGE JOHNSON: Maybe the same way Mr. Wessel  
19 meant them.

20           MR. POTTER: It could well be, but he hasn't  
21 defined them, and I don't know.

22           JUDGE JOHNSON: Go ahead. Excuse me.

23           MR. POTTER: So subsequent to the threat being  
24 made, the testimony was -- the testimony period began,  
25 the preparation period began, and Dow did do everything

1 it could to get Consumers to draft the testimony.  
2 because it did not want to be caught in the position of  
3 volunteering information that would be subsequently  
4 viewed as not supportive of the position that Consumers  
5 was taking. That is why Mr. Wessel admittedly prepared  
6 the "lousy draft".

7           The key to it, though, when you look at the  
8 record, was, that draft was never intended to go to the  
9 Licensing Board. It was strictly at a point where they  
10 were changing drafts back and forth, and Mr. Wessel was  
11 trying to get Consumers to pick up the ball and do the  
12 drafting, and they in fact did it when they saw the  
13 nature of the draft.

14           JUDGE JOHNSON: Isn't this the problem I was  
15 talking to Mr. Charnoff about? That sort of monkeying  
16 around, even if it is between two corporate entities  
17 before they get before the NRC, leads to the danger that  
18 one of these drafts that you really don't want to get to  
19 the Commission can get to the Commission?

20           In other words, if you are messing around with  
21 drafts that are not -- you know, they are only intended  
22 to preserve a litigation stance or something, and they  
23 really are not supposed to go to the Commission because  
24 they really aren't right, if you've got those in your  
25 possession, if you've got your mind working that way,

1 doesn't that heighten the chance that one of these not  
2 quite true drafts might eventually, or something out of  
3 one of these drafts might eventually end up in what is  
4 supposed to be the true and factual testimony?

5           MR. POTTER: Let me clarify something. First  
6 of all, as to the nature of the lousy draft, the nature  
7 of the lousy draft did not contain anything that was not  
8 true. What it didn't contain was a lot of information  
9 that would have had to have been contained before any  
10 testimony or draft would have been sent in to the  
11 Commission. It was incomplete, not untrue. Now I agree  
12 with you when you say this monkeying around starts,  
13 there is always a possibility that that could happen,  
14 but if I succeed in nothing else, Dr. Johnson, I want to  
15 convince you that the monkeying around did not initiate  
16 with Dow.

17           JUDGE JOHNSON: Well, my position is, I don't  
18 care where it started.

19           MR. POTTER: What Dow counsel was trying to do  
20 was to protect Dow and put the onus on Consumers.

21           JUDGE KOHL: I would like to ask you what I  
22 asked Mr. Charnoff. Regardless of who started the  
23 monkeying around, given that we have this information  
24 before us, and even if we find that no, there was no  
25 improper behavior, no failure to disclose a material bit

1 of evidence to the Licensing Board, the NRC takes note  
2 of that and says nothing more and stops short of that,  
3 aren't we impliedly condoning that sort of activity, and  
4 perhaps in another case in the future it may go one step  
5 further, and it may indeed affect what evidence is  
6 ultimately presented to a Licensing Board?

7 MR. POTTER: Perhaps the only way I can answer  
8 that is to say -- and as I am sure you are aware, I am  
9 not a regular practitioner before the NRC. I don't know  
10 whether any type of case has come up like this before  
11 before the Board, before the Appeal Board. I do know,  
12 obviously, that the Licensing Board did not look with  
13 favor on the give and take that went on in the  
14 preparation of the testimony, and perhaps a notation to  
15 the existence of that would be appropriate, and to be  
16 recognized that that type of thing should not take  
17 place, but to do it and suggest it originated alone with  
18 Dow, to me, would be so totally at odds with the record  
19 that was established before the Licensing Board, and in  
20 essence I think that is the position that Consumers  
21 argues here. They should take note of it, but blame Dow  
22 for it.

23 JUDGE KOHL: Your primary purpose on appeal is  
24 in the interest of a full and complete record on that  
25 score. Is that correct?

1           MR. POTTER: Absolutely. In closing, I just  
2 want to touch on a few other things. Let me just bring  
3 it down and capsulize it this way. In Consumers' brief  
4 they renew, as they did before the Board, the statements  
5 that there were several statements found by the Board to  
6 have been made by various counsel for Consumers.  
7 Consumers has taken the position, first of all, the way  
8 the Board concluded that the way the statements were  
9 made was, number one, notes of Dow counsel taken either  
10 at or right after the meetings where these statements  
11 were made; and secondly, through the testimony of the  
12 witnesses on the stand down below.

13           Consumers argues here that the Board concluded  
14 incorrectly in reaching the conclusions that the  
15 statements had been made by Consumers' counsel. In that  
16 connection, all we can add to that is that the notes  
17 stand for what they say. Mr. Nute, Mr. Wessel, Mr.  
18 Duran were all on the stand below and were examined and  
19 cross examined at length.

20           I believe there is a familiar rule in civil  
21 litigation, and I do know it is also a rule that is  
22 adhered to by this Board through the Duke Power  
23 decision. That is, that this Board doesn't have the  
24 witnesses before it. It does have the documents. It  
25 does have the transcript. What the Licensing Board had

1 was the live witnesses, and the ability to determine the  
2 credibility, and in that token I think that their  
3 decision should be given great weight.

4 I would close with again a request that the  
5 motion for reconsideration of your order striking my  
6 brief, not striking, but not permitting it to be filed,  
7 is still pending, and I would hope you would grant that,  
8 so we have the opportunity not only to present our  
9 testimony orally as tendered today, but to have the  
10 brief before the Board.

11 Thank you.

12 JUDGE KOHL: Thank you.

13 JUDGE EDLES: With your permission, Madam  
14 Chairman, I would just like to ask Mr. Charnoff if he  
15 would care to comment on Mr. Potter's statement that you  
16 had advocated sanctions against Dow counsel at the  
17 Licensing Board proceedings?

18 MR. CHARNOFF: I think in the briefs below we  
19 had done so not in terms of -- well, I guess in a way  
20 what we were doing was reacting to the sporting  
21 behavior, but the more I think about it in terms of the  
22 scope of the regulatory agency, and on appeal certainly  
23 we did not urge that and we do not urge that now, and  
24 the points I made before about how far this agency can  
25 go if its minimum requirements are met are really what

1 govern my position.

2 JUDGE EDLES: I appreciate your candor.

3 JUDGE KOHL: Okay. I think we will take a  
4 ten-minute recess at this point.

5 (Whereupon, a brief recess was taken.)

6 JUDGE KOHL: Mr. Olmstead.

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1           ORAL ARGUMENT OF WILLIAM OLMSTEAD ON BEHALF OF  
2           THE U.S. NUCLEAR REGULATORY COMMISSION STAFF

3           MR. OLMSTEAD: Yes. I think first I had  
4 better answer a question that has gone unanswered about  
5 the availability of documents in discovery. In Consumer  
6 Power's Exhibit at Tab 16 -- I believe this was called  
7 Volume 7 in the underlying proceeding -- they contain  
8 the notice availability of documents for inspection.  
9 You will also find it in the files dated October 29th,  
10 1976, signed by David Roso, which indicates they are  
11 placing documents at Jackson, Michigan, as of November  
12 3rd, 1976.

13           JUDGE JOHNSON: Excuse me. Was this a letter?

14           MR. OLMSTEAD: This was a filing made in the  
15 proceeding before the Licensing Board.

16           JUDGE JOHNSON: Served on all the parties?

17           MR. OLMSTEAD: Served on all the parties  
18 October 9th, 1976.

19           JUDGE JOHNSON: What was the date of the  
20 hearing?

21           MR. OLMSTEAD: The hearing commenced on  
22 October --

23           JUDGE EDLES: The documents were in Jackson  
24 and Mr. Cherry was in Chicago?

25           MR. OLMSTEAD: That's true. The documents

1 were made available. There was a sizable number of  
2 documents made available by Consumers. These documents  
3 were contained in a sealed envelope because of the  
4 dispute between Mr. Wessel and Mr. Nute and Consumers'  
5 attorney, Mr. Roso, and Mr. Renfrew. They alleged that  
6 certain documents should not be seen by Consumers  
7 Power. Ultimately, Mr. Renfrew agreed with that and he  
8 took the documents that Mr. Wessel wanted to produce,  
9 which were in a sealed envelope, and placed them in the  
10 discovery room in Jackson. No parties, including Mr.  
11 Cherry and the staff, went to Jackson and looked at  
12 those documents.

13 JUDGE EDLES: So there is nothing necessarily  
14 inconsistent between the position that they were "made  
15 available" several weeks before the hearing --

16 MR. OLMSTEAD: No.

17 JUDGE EDLES: -- and Mr. Cherry's statement  
18 that he didn't know about them until the day of the  
19 hearing.

20 MR. OLMSTEAD: Although Mr. Wessel did testify  
21 at one point that he had phoned Mr. Cherry, and I think  
22 Mr. Cherry indicated that someone had called him the  
23 night before the hearing and informed him--

24 JUDGE EDLES: I modified that. So he didn't  
25 know about them until the night before the hearing.

1           MR. OLMSTEAD: That is true. I would like to  
2 deal with that. I want to draw your attention to  
3 another document before I leave this, though, Staff  
4 Exhibit 3, which is Tab 32, which is the affidavit of  
5 Rex Renfrew, which describes this process on Page 8 of  
6 that affidavit, exactly what was done.

7           JUDGE KOHL: What is the date of that  
8 affidavit?

9           MR. OLMSTEAD: This was in -- called for by  
10 the Licensing Board during the proceeding, and it was  
11 dated December 30th 1976. This was after the disclosure  
12 of the information. The Board called for briefs at that  
13 particular time, and this was one of the papers produced  
14 by Consumers.

15          JUDGE KOHL: Why was the matter placed under  
16 seal? If Mr. Cherry or the clients he represents had  
17 gone to the public document room, would they have been  
18 permitted to see it?

19          MR. OLMSTEAD: These documents were produced  
20 in anticipation of discovery requests for documents  
21 relevant to the Dow-Consumers contract. They were  
22 placed in Jackson, Michigan, for any of the parties to  
23 the proceeding who wanted them. The staff could have  
24 seen them had they gone there. They did not. Mr.  
25 Cherry could have seen them if he had gone there, and I

1 suspect that if he had asked for specific documents,  
2 they would have been provided to him.

3           JUDGE EDLES: But he didn't know which  
4 documents were there. That's a little hard to ask.

5           MR. OLMSTEAD: My recollection of exactly what  
6 went on there is a little fuzzy, but it is one of the  
7 points that I want to make. We have spent six years  
8 looking at six weeks in 1976. If you will recall, after  
9 the Court of Appeals remand, there was a month and a  
10 half in which the Commission had not decided what to do  
11 in this case. They ultimately in late September issued  
12 an order telling the Licensing Board to assume  
13 jurisdiction of this matter and proceed to the hearing.

14           The Licensing Board spent a sizable amount of  
15 time during the month of October trying to schedule a  
16 prehearing conference, ultimately did not get any  
17 agreement as to when the parties could meet for a  
18 prehearing conference, and scheduled the hearings to  
19 begin on November 30th, 1976, with the statement that  
20 the hearings would begin with a prehearing conference on  
21 the first day of the hearings.

22           Now, that does lead to some confusion among  
23 the parties as to exactly what they are supposed to be  
24 doing, both in terms of testimony preparation and  
25 discovery, notwithstanding all the other sub-issues that

1 were involved in this proceeding, so I don't draw a  
2 whole lot of significance from the fact that Consumers  
3 didn't affirmatively mail all the documents that were in  
4 Jackson, Michigan.

5           As a matter of fact, when you get into the  
6 discovery, as I did when I was assigned to this case,  
7 for this July, 1979, proceeding, you will find that  
8 there were a tremendous number of documents that were  
9 available which would require normally, in a normal  
10 proceeding, us to go and spend a number of days going  
11 through these documents, trying to ascertain which ones  
12 were relevant for the purpose of the case the staff  
13 might want to put on.

14           JUDGE EDLES: Mr. Olmstead, who selected  
15 Jackson?

16           MR. OLMSTEAD: Jackson is the headquarters of  
17 Consumers Power Company, and that is their main office  
18 building.

19           JUDGE EDLES: But these were by and large Dow  
20 documents.

21           MR. OLMSTEAD: That is right.

22           JUDGE EDLES: In Consumers' possession?

23           MR. OLMSTEAD: Yes, because Dow was taking the  
24 position that they were not a party to the proceeding.  
25 As a matter of fact, that was another reason the Board

1 was in a somewhat difficult position at the start of  
2 these proceedings because Mr. Wessel on the part of Dow  
3 did not wish to participate. He pointed out that he had  
4 withdrawn his appearance in the proceeding. The Board  
5 then ordered him to participate, whereupon Mr. Wessel  
6 had a lot of problems, because he had been engaged in  
7 making Temple of Dow Chemical Company Consumers'  
8 witness, and suddenly he was Mr. Wessel's witness.  
9 There was a lot of, in late December, if you look at the  
10 record of the decision, there were a lot of briefs going  
11 back and forth, and there was a brief by Dow setting  
12 forth their view of the circumstances related to the  
13 Temple testimony.

14 I think if you read the record of this  
15 proceeding and all of the exhibits that we developed in  
16 July of 1979, you will find that there was a lot more  
17 going on with regard to the preparation of the Temple  
18 testimony than was adduced in the record in 1976 and  
19 1977, before the Licensing Board. It may not be the  
20 type of thing that everybody is proud to point to, but I  
21 might point out that bad cases sometimes make bad law.  
22 There were a number of factors that I think you have to  
23 consider when you are dealing with the facts adduced in  
24 this case. One is the time durations, which I alluded  
25 to. The fact that there was no prehearing conference,

1 and consequently there was no order saying these are the  
2 issues your testimony should address. The parties'  
3 relationships were not normal. There was a dispute  
4 between Dow and Consumers. There were new attorneys for  
5 Consumers who had never been involved in representing  
6 Consumers Power in this proceeding. The Board control  
7 of this proceeding was not normal.

8           The Dow counsel sought not to participate in  
9 the proceeding. That was one of the first issues that  
10 had to be dealt with at the start of the hearing. So,  
11 the responsibilities that Dow's counsel felt to the  
12 process were different than they would have been had  
13 they intended to participate in the proceeding. I think  
14 all of these factors have to be considered when one  
15 looks at the one piece of testimony that was adduced on  
16 the day of the trial.

17           JUDGE JOHNSON: Mr. Olmstead, you said that  
18 the Dow attorney did not think he was going to  
19 participate in the proceeding.

20           MR. OLMSTEAD: That is correct.

21           JUDGE JOHNSON: Does that in any way remove  
22 from him or did he feel perhaps that that removed from  
23 him any burden that someone appearing before an NRC  
24 tribunal might otherwise be expected to feel?

25           MR. OLMSTEAD: I do not want to speak for Mr.

1 Wessel. I think his testimony in the record pretty well  
2 speaks for itself. I am not sure that I would have  
3 adopted the attitude he adopted in that situation, but  
4 it is fairly clear to me that he thought the obligations  
5 that attached to an attorney toward the tribunal,  
6 namely, the NRC, were Consumers' obligations and not his  
7 if he was not representing anybody in the proceeding.

8 JUDGE JOHNSON: Okay. Thank you.

9 MR. OLMSTEAD: The next point I would like to  
10 make --

11 JUDGE JOHNSON: I have one more question.  
12 Excuse me. The letter notifying people that the  
13 discovery items were in Jackson, Michigan, how did that  
14 describe the items?

15 MR. OLMSTEAD: I would have to read it. It  
16 says: "Consumers Power Company hereby notifies all  
17 parties to the above-captioned proceeding that documents  
18 relating to the testimony which will be submitted at the  
19 hearings scheduled to begin on November 16th" -- now,  
20 that date was changed -- "on whether the construction  
21 permits for the above-referenced facility should be  
22 continued, modified, or suspended will be made available  
23 for inspection and copying by all parties beginning at  
24 9:00 a.m. Wednesday, November 3rd, at its offices  
25 located at 212 West Michigan, Jackson, Michigan. This

1 voluntary action is taken pursuant to the memorandum and  
2 order of the Atomic Safety and Licensing Board dated  
3 October 21 in which the Board stated, 'The Board hereby  
4 opens discovery with regard to the energy conservation  
5 and to the issue of Dow Chemical Company's current  
6 involvement.' Parties are requested to contact J. L.  
7 Bacon, Esquire."

8 JUDGE EDLES: Just so I am clear on it, that  
9 body of documents included the Michigan Division  
10 recommendation?

11 MR. OLMSTEAD: Yes, it did. I went out there  
12 in 1979. I was given all those documents exactly as  
13 they existed on the day in which they were produced.  
14 The sealed envelope was there and contained in it were  
15 the minutes of the September 13th meeting which you have  
16 heard alluded to, and that did reveal the Midland  
17 Division position.

18 I thought Mr. Cherry succinctly stated the  
19 issue when he said, the question is, is Dow wedded to  
20 the contract. This Commission and its predecessor, the  
21 Atomic Energy Commission, had made it abundantly clear  
22 in a number of previous rulings on the Dow-Consumers  
23 contract that their sole concern was whether there  
24 existed a valid and binding contract for Dow to take  
25 this stand. So, clearly, when the Court of Appeals

1 remanded the case and said, okay, while we are doing  
2 this, why don't you look at changed circumstances with  
3 regard to Dow's need for process steam. Most of the  
4 focus was on what the current contract said, and the  
5 thing that was material about Dow's need for process  
6 steam in that proceeding was, what did the corporation,  
7 Dow Chemical Company, intend to do?

8           Now, there may be a lot of relevant facts that  
9 shed light on that, and the thing that the Licensing  
10 Board traditionally focused on in this case was the  
11 Midland Division position, but I would be a lot more  
12 concerned if I were the Licensing Board about the  
13 threats of litigation between the two parties, and  
14 particularly the fact that Dow had prepared its own suit  
15 on the contract, accusing Consumers of failing to use  
16 its best efforts to complete construction of the nuclear  
17 plant.

18           Now, this all came out in the July, '79,  
19 hearing. Consumers threatening a suit for breach of the  
20 contract because you failed to support Consumers in the  
21 NRC licensing hearings. On the other hand, Dow's  
22 counsel looking at suing Consumers for failure of best  
23 efforts. The fact is, the parties got together and  
24 resolved their differences on that. Consumers made some  
25 concessions, Dow made some concessions, they arrived at

1 a tentative approach to a new contract, so that by the  
2 time Mr. Temple testified, it was Dow's intention to  
3 abide by contract obligations to take the process steam.

4           So, I do not find anything in the direct  
5 testimony of Mr. Temple that should have mislead the  
6 Board. As a matter of fact, it did say that Dow was  
7 keeping its options open.

8           JUDGE EDLES: Let me pursue that for a  
9 moment. The meeting at which the Dow corporate position  
10 was articulated was at the end of September. The  
11 hearings were held two months later, the end of  
12 November, the Temple testimony prepared in the interim.  
13 He just said that during that same two-month period  
14 lawyers for Dow and Consumers had reached broad  
15 agreement on the terms of a new contract?

16           MR. OLMSTEAD: Lawyers, I am not sure, got  
17 into it at that phase. Certainly the chief executive  
18 officers between Dow and Consumers had made a couple of  
19 key concessions. One was that Consumers had agreed in  
20 one of those meetings in September, the chief executive  
21 officer of Consumers, I believe it was Chairman Aymond,  
22 what he had agreed to was very significant. He had  
23 agreed to renegotiate the contract and put in a date by  
24 which Dow would be relieved of contract obligations.  
25 That was highly significant, just as much as it was

1 significant that if Dow breached the contract, Consumers  
2 would seek \$600 million.

3           So, in reaching the corporate decision, there  
4 were really two elements that Dow considered. One was,  
5 as a result of the remand and Consumers' need for our  
6 testimony in this case, they will give us an end date,  
7 which we don't have, thus eliminating the need to follow  
8 the recommendation of their counsel to file a best  
9 efforts case against Consumers, and two, obviously, we  
10 have some contract obligations to Consumers. No court  
11 is going to let us out completely scot free with no  
12 financial involvement, so we have to add that cost into  
13 the cost of other alternatives.

14           JUDGE EDLES: Are you satisfied, Mr. Olmstead,  
15 as a public counsel wedded to neither side in this case,  
16 that by the time the Temple testimony was introduced in  
17 November, the threat of litigation had completely,  
18 evaporated?

19           MR. OLMSTEAD: No, I am not satisfied that it  
20 completely evaporated. I think it had been severely  
21 reduced. However, it was not until February or March,  
22 and I do not remember the dates precisely, that they  
23 actually completed their negotiations and got a final  
24 contract that they all agreed to, but there is another  
25 point that I think is equally significant when we are

1 talking about what duty a party has vis-a-vis our  
2 process in terms of bringing information to the Board's  
3 attention. That really has to do with the timing of the  
4 production of information. I think Consumers produced  
5 the information necessary for parties to develop a case  
6 both for and against the suspension issue in this  
7 proceeding. The parties did not go out and take  
8 advantage of the discovery, and so, to some extent, they  
9 did not do a particularly good job of preparing for the  
10 case.

11           Now, maybe they couldn't do that because they  
12 only had six weeks to do it, and normally in our process  
13 it is about three months that is used to review  
14 discovery.

15           JUDGE JOHNSON: There was no formal exchange  
16 of discovery requests? Presumably there wasn't enough  
17 time?

18           MR. OLMSTEAD: No, and in a normal case you  
19 would open discovery. There would be a round of  
20 interrogatories, certain kinds of interrogatories would  
21 be produced, there would be another round of  
22 interrogatories and that sort of thing would go on. It  
23 didn't happen here.

24           JUDGE JOHNSON: And time precluded it? Is  
25 that right?

1 MR. OLMSTEAD: I think time precluded it.  
2 They had a hearing scheduled for November 16th, and they  
3 didn't find out until September 26th that they were  
4 going to go to hearing, so you are essentially talking  
5 about less than two months.

6 JUDGE JOHNSON: Well, let me just ask you  
7 this. The parties would, if there had not been a  
8 compression of time, would have expended a great deal of  
9 effort in discovery preparation and answers to  
10 interrogatories.

11 MR. OLMSTEAD: And I certainly hope they would  
12 have gone out to Jackson and looked at the documents and  
13 determined for themselves what their positions might or  
14 might not be, but there is another point.

15 JUDGE JOHNSON: Well, wait a minute. I want  
16 to ask a few more questions.

17 MR. OLMSTEAD: All right.

18 JUDGE JOHNSON: The amount of effort required  
19 for the staff and for Mr. Cherry to go to Jackson, would  
20 that in your mind be generally comparable to the amount  
21 of effort that a party might reasonably have been  
22 expected to exert during a non-time-compressed discovery?

23 MR. OLMSTEAD: Absolutely. As a matter of  
24 fact, as a normal practice of mine, if somebody produces  
25 documents, I always make sure I look at them, but if I

1 don't have much time and you start cutting things out  
2 and changing your priorities, I can understand how you  
3 might cut that out. It depends on how significant you  
4 viewed the issue in the proceeding in the time frame  
5 that you were talking about.

6           The other point that I want to make though is,  
7 in all of our disclosure cases, and I do think that  
8 these attorneys would have had an obligation to bring  
9 this information to the Board's attention under some  
10 circumstances, but in all of our disclosure cases, they  
11 have involved facts that are remarkably different than  
12 these. They have involved indications on the record  
13 that the Licensing Board thought things were one way and  
14 the Appeal Board has consistently said, when you see  
15 that, you have an obligation to come in and correct the  
16 Board, tell them the facts are not the way they think  
17 they are.

18           Here, we are talking about the first day of  
19 hearings. The direct testimony of Temple is put in the  
20 record. It is sworn to routinely, and cross examination  
21 starts, and two questions later we are off to the  
22 races. If anybody was misled, they were misled for  
23 five minutes.

24           JUDGE KOHL: So in other words all the  
25 documents that nobody took the occasion to get prior to

1 the hearing, those documents and the information  
2 contained therein did not come to light during the '76  
3 hearing and early on in the 30 days?

4 MR. OLMSTEAD: As a matter of fact, the first  
5 day of the Temple testimony on cross examination  
6 disclosed the Midland Division position. It was not  
7 until February that they got Mr. Oreffice, now Dow board  
8 chairman, who indicated why the Midland Division  
9 position was not acceptable to him. But the Midland  
10 Division position and the business of the threat of  
11 lawsuits came out in November or December, that first  
12 week of hearings.

13 JUDGE KOHL: You stated a little while earlier  
14 that you found more significant the threats of lawsuits  
15 between Consumers and Dow. Do you find anything  
16 inherently improper in that kind of corporate behavior?

17 MR. OLMSTEAD: Well, Mr. Cherry was talking  
18 about the gang in Jackson and the gang some place else,  
19 and the staff -- maybe I shouldn't put this on the  
20 record, but I will. We intended to talk about the  
21 stormtroopers and the munchins, but Dow Chemical --

22 JUDGE KOHL: Use Dow and Consumers.

23 (General laughter.)

24 MR. OLMSTEAD: Dow Chemical was in the  
25 business to make money, and Dow Chemical had a contract,

1 and it didn't like the way Consumers was executing that  
2 contract. Namely, in 1974, they quit building the  
3 facility for two years, and they didn't think that was  
4 in Dow's best interest, so there was some unhappiness on  
5 Dow's part.

6 JUDGE KOHL: I am concerned about the staff's  
7 attitude toward the threats of lawsuits, and also  
8 towards what has been described as the sporting  
9 behavior. To what extent should the NRC be concerned  
10 about that, and try and discourage that kind of  
11 behavior, regardless of its outcome in the future?

12 MR. OLMSTEAD: I think that type of behavior  
13 in an NRC proceeding is inappropriate, but the issue  
14 before you, as has been argued today, hasn't really gone  
15 into this sporting conduct which we developed in the  
16 record, and the Licensing Board did not really deal  
17 with, as Mr. Charnoff pointed out.

18 JUDGE JOHNSON: Let me make one point. I am  
19 not pointing fingers at one side or the other. I think  
20 they were engaged in a process which was being said to  
21 be one thing and which was really something else.

22 Mr. Olmstead, let me make something very clear  
23 for myself, anyway. When the Chairman asked you about  
24 the threat of a suit, and then she asked you about  
25 sporting behavior, in your view, in the circumstances

1 that were presented here, would you characterize a  
2 threat of a suit by Consumers on Dow or vice versa as  
3 sporting behavior?

4 MR. OLMSTEAD: No. No, I am sorry. Let's  
5 keep those two things straight.

6 JUDGE JOHNSON: I don't believe anyone  
7 intentionally got into that confusion.

8 MR. OLMSTEAD: I think telling another person  
9 what you view your rights under a contract to be is  
10 perfectly permissible.

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1 I think that is true on most sides. I think  
2 Dow can say look, you didn't use your best efforts and  
3 we don't think you are abiding by your contract, and if  
4 you don't do it we are going to sue you. I think they  
5 can do that.

6 I think Consumers can likewise say if you do  
7 not abide by this contract we are going to sue you and I  
8 think Dow would want to know that. I think Consumers  
9 would want to know that, because it is a part of the  
10 business decision process.

11 When we are talking about sporting conduct, we  
12 are talking about the type of things where gee, I don't  
13 want to draft my testimony. I'd like you to draft it so  
14 that if anything comes up that causes any problems, then  
15 I can point the finger over and say you are the bum that  
16 did it. That is sporting conduct, particularly if you  
17 do not tell the fellow that that is what you are doing.

18 JUDGE KOHL: Your time has expired. If you  
19 want to take a minute to sum up.

20 MR. OLMSTEAD: The major point I want to make  
21 about disclosure is: The thing that makes the Licensing  
22 Board's decision novel is that it has found a duty of  
23 disclosure beyond discovery, and early in the process  
24 prior to any decision or record being developed in which  
25 in essence they are saying an attorney has an obligation

1 to put into his direct testimony fact that he considers  
2 not persuasive to his case, as opposed to following the  
3 McGuire doctrine or the Oconee doctrine, and without  
4 conceding relevance or materiality, and informing the  
5 Board of facts that would not help his case.

6 JUDGE KOHL: Mr. Cherry, we have been generous  
7 to appellees with respect to time. If you would like to  
8 take five minutes for rebuttal.

9 MR. CHERRY: I think I can do it in less than  
10 that. This business about the documents in Midland,  
11 Michigan, and whose obligation it was to go there  
12 focuses on, I think, really my main argument. The  
13 letter that Mr. Olmstead read said here are documents in  
14 Michigan, assuming we are talking about the same  
15 documents, that are relevant to the Temple testimony.

16 If we spit out Mr. Olmstead's theory that  
17 these documents in the sealed envelope were  
18 characterized by the lawyers as relevant yet did not  
19 find their way into direct testimony, certainly you do  
20 not want a rule that relies upon, particularly when the  
21 NRC has to in turn rely upon an agency, a utility, for  
22 candor, that relies upon the particularities of  
23 litigation as to whether or not Mr. Olmstead is going to  
24 travel to Jackson, Michigan, to look at documents or  
25 whether I, as I did, insisted that they be produced at

1 the hearing because of the short time span.

2           Finally, in my request for relief I urged the  
3 Appeal Board to have a hearing on the appropriate  
4 sanctions. I did that because I did not think that this  
5 Appeal Board would take the giant step of putting a  
6 sanction in the record that I believe is required, that  
7 is, a license limitation on Consumers which had some  
8 guts, which said that if this kind of conduct happens  
9 again you lose your license as opposed to we will have  
10 elongated proceedings.

11           I didn't mean to suggest that you have no  
12 authority to do that. I am not interested in another  
13 hearing. I frankly thought, when I discussed it with my  
14 partner, that it was more political to ask for a hearing  
15 rather than to have you impose the sanctions, and I  
16 would like to amend my request for relief to say that I  
17 think you have the power to impose that sanction on this  
18 record now and urge you to do that as well.

19           JUDGE KOHL: I thought you asked to have a  
20 hearing by the Licensing Board.

21           MR. CHERRY: Yes, I just addressed that  
22 issue. What I said is I did that because my partner,  
23 Peter Flynn, thought it would be more political to ask  
24 for that hearing rather than to expect the Appeal Board  
25 to put such a condition in the license.

1           After being here today I am suggesting I would  
2 like to amend my request for relief and ask the the  
3 Appeal Board to consider itself directly applying  
4 sanctions, and if it wishes any further information from  
5 counsel on the kind of sanctions I would prefer, I would  
6 be delighted on a prompt basis to give you some further  
7 information.

8           JUDGE EDLES: Would you argue that the conduct  
9 of the parties, Consumers in particular, was violative  
10 of the statutory requirement of section 186 that  
11 licensees not make material false representations?

12           MR. CHERRY: Yes.

13           JUDGE EDLES: So what you are asking us to do  
14 as a sanction is to impose on them a condition in their  
15 license that they obey the law?

16           MR. CHERRY: A condition in light of its past  
17 practices, that the next time Consumers does something,  
18 there is no more talking. You are out of business.

19           If you would meet the people who run Consumers  
20 Power you would seriously consider getting those people  
21 to assign their rights to someone else. They are  
22 children living in an unreal world.

23           Thank you.

24           JUDGE KOHL: Thank you, counsel. The case is  
25 submitted.

1 (Whereupon, at 4:15 o'clock p.m., the case was  
2 submitted.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

ATOMIC SAFETY AND LICENSING BOARD APPEAL BOARD

In the matter of: Consumers Power Company (Midland Plant Units 1&2)

Date of Proceeding: Bethesda, Maryland

Docket Number: 50-329 & 50-330 (Remand Proceeding)

Place of Proceeding: Bethesda, Maryland

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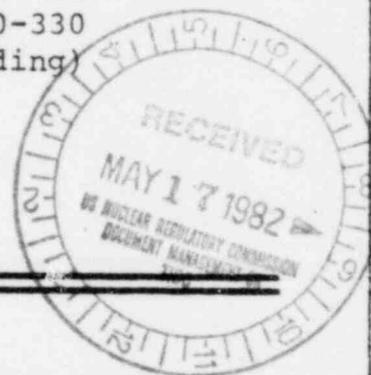
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In the Matter of: :  
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 : 50-330  
 (Midland Plant Units 1 and 2) : (Remand Proceeding)



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