

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

Respectfully submitted,

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