

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
(Midland Plant,) 50-330CP
Units 1 and 2) (Remand Proceeding)

MEMORANDUM OF CONSUMERS POWER
COMPANY IN SUPPORT OF MOTION FOR
SUMMARY DISPOSITION

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Table of Contents

	<u>Page</u>
I. Preliminary Statement.....	1
II. Discussion	8
A. NO EFFORT WAS MADE BY CONSUMERS TO HAVE DOW PRODUCE AN UNKNOWN- LEDGEABLE WITNESS FOR THE HEARING....	8
B. THE INTERNAL VIEW EXPRESSED BY DOW'S MICHIGAN DIVISION WAS NOT OF SUFFICIENT MATERIALITY TO REQUIRE THAT IT BE INCLUDED IN TEMPLE'S DIRECT TESTIMONY FILED WITH THE LICENSING BOARD.....	20
C. THERE WAS NO ATTEMPT BY CONSUMERS TO PREVENT FULL DISCLOSURE TO THE LICENSING BOARD OF THE INTERIM VIEW EXPRESSED BY THE MICHIGAN DIVISION...	28
III. Conclusion.....	35

Attachments

Affidavit of Judd L. Bacon

Affidavit of James B. Falahee

Affidavit of R. Rex Renfrow, III

Supplementary Affidavit of David J. Rosso

Affidavit of Michael I. Miller

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I. Preliminary Statement

On January 4, 1979, the Licensing Board in this remand proceeding ordered the parties to file certain requested information to assist the Board's review of "charges relating to alleged attempts to prevent full disclosure of facts to an NRC licensing board".¹ As matters now stand, it is the understanding of Consumers Power Company ("Consumers") that the inquiry currently being undertaken centers on the activities of Consumers, acting through its counsel, in connection with (a) the designation of Joseph Temple as a witness for Dow Chemical

¹ Consumers Power Company (Midland Plant Units 1 and 2), Docket Nos. 50-329CP and 50-330CP Remand Proceeding, "Order Concerning Remanded Issues", dated January 4, 1979, at p. 10.

U.S.A. ("Dow") in the earlier remanded proceeding concerning possible suspension of the Midland construction permits,² and (b) the preparation of Mr. Temple's direct testimony to be used in that proceeding. The fundamental question is whether, in either or both respects, an effort was made to keep from the reviewing board material information bearing upon Dow's commitment to the Midland project.³

Consumers can fully appreciate the Licensing Board's interest in pursuing this matter notwithstanding the fact that

2 The referenced suspension proceeding in question resulted in a Licensing Board decision not to suspend the Midland construction permits pending consideration of various issues remanded to the Commission by the United States District Court for the District of Columbia Circuit in Aeschliman v NRC, 547 F.2d 622 (D.C. Cir. 1976). Consumers Power Company (Midland Plant Units 1 and 2), LBP-77-57, 6 N.R.C. 482 (September 23, 1977). This decision, as subsequently amended by the Licensing Board on November 4, 1977 (6 N.R.C. at 485-86), was affirmed by the Appeal Board on February 14, 1978 (ALAB-458, 7 N.R.C. 155 (1978)), and the full Commission declined review. References herein to relevant portions of the suspension hearing will be by use of the symbol "Tr." See note 10, infra.

3 A claim by Consumers of work product privilege with respect to certain documents prepared by counsel in connection with the drafting of Mr. Temple's direct testimony resulted in an order by the Licensing Board for distribution of the referenced documents to the Board and the parties under a protective order (Tr. 502). That protective order was subsequently dissolved by the Board on February 2, 1977 (Tr. 2742). There is, therefore, no issue remaining as to what impact, if any, resolution of the present inquiry may have on a claim of work product privilege asserted with respect to documents relevant to a disposition of the instant disclosure question. See Tr. 503 and 505.

the suspension hearing is now concluded. Suggestions of possible "nondisclosure" of information by a licensee deserve serious attention, both to preserve the integrity of the administrative review process if it is demonstrated that "nondisclosure" actually occurred and to preserve the integrity of those whose conduct is questioned if the suggestions prove to be unfounded.

Following a careful evaluation of the facts and circumstances giving rise to the suggested "nondisclosure" involved here, we remain convinced that there was no impropriety in Consumers' handling of the suspension proceeding. In preparing for any evidentiary hearing, it is not only expected, but, indeed, as a matter of professional responsibility, required, that counsel for the parties involved explore thoroughly alternative approaches that might be taken in preparing and presenting their respective positions in the most effective and comprehensive manner. Suggestions as to possible witnesses are in this context invariably made, and the strong and weak points of those persons being considered are routinely discussed. Any number of factors, including, among others, an individual's demeanor, personal prejudices, comprehension of the subject matter and ability to articulate clearly, bear on the ultimate selection. Once it has been determined who the witness or witnesses will be, considerable

effort goes into the preparation of testimony, both in terms of drafting a meaningful direct statement to be filed in advance of the hearing, and in terms of readying each witness for anticipated cross-examination. Necessarily, the attorneys responsible for presenting their client's position to the licensing board play an integral and important role in this entire process, and properly so.⁴

The conduct which is under scrutiny at this time is based upon characterizations of certain remarks and judgments made by Consumers' counsel while coordinating with Dow and its representatives during the preparatory phase of the suspension proceeding. It will come as no surprise to this Board that in September, 1976 the relationship between Consumers and Dow, both of whom were committed by contract to the Midland project, had become somewhat strained.⁵ Financial considerations, along

4 See Wigmore On Evidence § 288 (1970), and cases cited therein. See also Code of Professional Responsibility, Ethical Considerations EC 7-26 and Disciplinary Rule DR 7-101; McCartney v United States, 343 F.2d 471 (9th Cir. 1965). The Supreme Court of the United States has commented directly on the distinction between the ethical considerations involved in attorneys' discussions of testimony with a witness (which is proper) and attorneys' efforts to manipulate or unduly influence such testimony (which is not). Geders v United States, 425 U.S. 80, 90 n.3, 96 S. Ct. 1330, 1336 n.3 (1976).

5 As reflected in minutes of several meetings between representatives of Dow and Consumers, the companies were engaged in serious negotiations relevant to changes in their existing contract. See Duran Notes on Dow/Consumers meeting of 9/29/76, (continued next page)

with delays in the anticipated schedule for commercial operation of the plant, had caused Dow to undertake an independent reevaluation of its Midland commitment to determine whether continued reliance upon the project for its 1984 steam requirements was justified, or whether Dow should, instead, begin to look elsewhere.⁶

One view within the company, which was strongly advocated by Joseph Temple and was communicated to management

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at pp. 3-4, 9-10, 12, 13 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 3-4, 5 (R/D Attachment I). In this connection, certain Dow representatives suggested the possibility that Dow might terminate its participation in the Midland project (see note 29, *infra*). Representatives of Consumers stated the obvious, that if Dow failed to live up to its existing contractual obligations, it could anticipate litigation by Consumers for breach of contract. See Bacon Affidavit of December 30, 1976, ¶¶ 3, 5 (hereafter "Bacon Affidavit I"); Renfrow Affidavit of December 30, 1976, ¶ 3 (hereafter "Renfrow Affidavit I"); Falahee Affidavit of March 28, 1979, ¶ 5. Such pronouncements between parties involved in the arduous task of renegotiating contractual arrangements are not at all surprising. Almost invariably, the competing positions that are forcefully advanced during extended contract negotiations will tend to strain both corporate and personal relationships to one degree or another. Unfortunately, this was precisely the situation in which both Dow and Consumers found themselves at the time that they had to turn their attention to preparing for the Midland suspension hearings. Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 12 (R/D Attachment G).

6 See Tr. 220, pp. 2-3 (Temple Direct): Renfrow Affidavit I, ¶ 2; Rosso Affidavit of December 30, 1976, ¶¶ 2, 3 (hereafter "Rosso Affidavit I"); Bacon Affidavit I, ¶ 2. See also "Memorandum of Licensee Consumers Power Company and its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence", dated December 30, 1976, at pp. 7-8 (hereafter referred to as "Consumers Mem. of 12/30/76").

by the Dow Michigan Division on September 8, 1976, was that the Midland project was no longer in Dow's best interest.⁷

Following a full assessment of the situation by a specially designated company review board, including consideration of reservations expressed by the Michigan Division, Dow decided on September 27, 1976, to adhere to its commitment to the Midland plant while attempting to negotiate certain modifications to the Consumers contract. The company further stated that it would continue to review the possibility of disassociating itself from the project and "keep all of its options open".⁸ Consumers was informed of the decision by Dow on the same day.⁹

The suggestion of impropriety relates only to the manner in which Consumers, acting through its counsel, determined to treat the Dow Michigan Division's stated reservation about continuing to support the project in the ensuing suspension hearing. The issues presented can be stated as follows:

1. Whether an effort was made by Consumers to have Dow produce a witness at the hearing other than Joseph Temple, one who was not fully knowledgeable about the Michigan Division's interim position?

7 Board Exhibit No. 1; Tr. 417-18 (Temple), and Tr. 2693-94 (Oreffice).

8 Bacon Affidavit I, ¶ 6.

9 Bacon Affidavit I, ¶ 6; Consumers Power Exhibit No. 24.

2. Whether the Michigan Division's expressed reservation about Dow's continued participation in the Midland project was of sufficient materiality to require that it be affirmatively disclosed by Consumers in written direct testimony submitted at the suspension hearing?

3. Whether in any event the manner in which Consumers determined to handle the Michigan Division's view of the project at the suspension hearing was calculated to prevent a full disclosure of the facts to the Licensing Board?

For the reasons set forth below, Consumers respectfully submits that each of these questions requires a negative response. Indeed, based upon the relevant portions of the record compiled in the suspension proceeding,¹⁰ as supplemented by the affidavits and other materials filed herewith, it is our view that an evidentiary hearing on the instant suggestion of possible "nondisclosure" is not really necessary for the Board to conclude this matter. Evaluated in the context of preparations for an extended suspension hearing, the remarks by Consumers' representatives relating to the selection of witnesses and the scope and direction of their

10 Pursuant to the Licensing Board's Order Concerning Remanded Issues, we are filing herewith a designation of all portions of the prior record which should be considered in the present proceeding. For the convenience of the Board, we have included parenthetically in the designation the short-form reference to each of those listed materials discussed herein. Attachments to the record designation will be referred to herein as "R/D Attachment ___".

testimony were neither improper nor inappropriate. Summary dismissal of this matter therefore is fully warranted.¹¹

II. Discussion

A. NO EFFORT WAS MADE BY CONSUMERS TO HAVE DOW PRODUCE AN UNKNOW- LEDGEABLE WITNESS FOR THE HEARING

The initial point of inquiry concerns whether Consumers sought to prevail upon Dow to present a witness at the suspension hearing unfamiliar with opposition to the Midland plant voiced internally by the Dow Michigan Division. Cause for examination of this question is indicated in the typewritten notes of a Dow attorney, L. F. Nute, setting forth in summary fashion his later recollections of conversations that took place at a meeting of Consumers and Dow representatives on September 21, 1976.¹² The Nute Notes

11 A list of names and addresses of all witnesses or persons alleged to possess information regarding this matter is being filed herewith pursuant to the Licensing Board's direction. If, contrary to our view of the matter, the Board deems it necessary to hear testimony from any or all of these individuals, Consumers is certainly prepared to cooperate to the fullest extent. We do not want our request for summary disposition to be misconstrued by anyone as an attempt to keep any information from the Board. Rather, it is prompted solely by a genuine belief that any suggestion of possible impropriety has been conclusively demonstrated to be without substance by the extensive record materials already before the Board, thereby rendering unnecessary the expenditure of more time and energy to accumulate additional corroborating evidence.

12 The typewritten notes (hereafter referred to as the (continued next page)

contain a statement that "Rex [Renfrow, an attorney for Consumers] suggested that Dow witness might be someone from Dow Chemical U.S.A. or Corporate area who is unaware of Midland Division recommendation to Orrefice [sic] -- this person would testify as to the effects of further delay upon Dow * * *".

This subsequently prepared shorthand account of what was said at the September 21 meeting concerning possible Dow witnesses is unfortunately too abbreviated and disjointed to relate fairly and accurately either the context or substance of the actual remarks made. A fuller description of the meeting, and the events immediately preceding it, will help clarify the Nute Notes and remove whatever implication of impropriety may arguably be suggested therein.

Approximately two weeks before the meeting in question, the Michigan Division of Dow determined that continued participation in the Midland project was no longer "good" for the company, and Mr. Temple, head of the Michigan Division, so advised Mr. Paul F. Oreffice, President of Dow

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"Nute Notes") were filed with the Licensing Board in the suspension hearing, and received into evidence as Midland Intervenor's Exhibit No. 25. It is undisputed that Nute prepared these notes sometime after the meeting based on his own recollections and on his review of handwritten notes taken by Mr. Klomprens of Dow who was also in attendance. Tr. 2245. Nute's handwritten notes of the meeting were apparently discarded and no longer exist. Id.

U.S.A. (the corporate division of Dow Chemical Company with responsibility for domestic operations, including those of the Michigan Division).¹³ On September 13, 1976, Mr. Temple formally recommended to Mr. Oreffice that the company "call for a corporate review of the entire question, 'What is Dow's current position with regard to the Midland Nuclear Project?'"¹⁴ This information was communicated orally to Consumers in a meeting with Dow representatives on September 13, 1976.¹⁵ Prior thereto, Mr. Temple had already made known in public statements his personal opposition to Dow's continued participation in the Midland plant; it was common knowledge, both within Dow and Consumers, that he was openly hostile to the project.¹⁶

Upon receipt of the Michigan Division recommendation, Mr. Oreffice, on authorization by the Dow Chemical Company

13 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 I, ¶ 2. The Michigan Division's stated reservations about the Midland project are set forth in Board Exhibit No. 1.

14 Temple's Notes, Attach. G to "A", p. 2; Board Exhibit No. 2.

15 Consumers Mem. 12/30/76, Attachment A, pp. 9-10; Temple's Notes, Attach. G to "A", p. 2; Bacon Affidavit I, ¶ 2; Renfrow Affidavit dated March 28, 1979, ¶ 3 (hereafter referred to as "Renfrow Affidavit II").

16 Consumers Mem. 12/30/76, Attachment A, p. 10; id., Attachment D to "A"; Renfrow Affidavit II, ¶¶ 4, 6.

Board of Directors (Tr. 419-24), ordered a corporate level review of the Midland project, to be headed by Mr. Alden J. Klomparens (Tr. 2694). The review team was composed of Dow personnel who did not report to Mr. Temple; it was directed to undertake an evaluation of Dow's continued participation in the nuclear plant from seven separate vantage points, each to be examined by a separate task force coordinated under Klomparens.¹⁷ Input from Consumers was invited on some, but not all, of the task force assignments. One of the areas in which Consumers' input was sought concerned the possible "legal aspects" of Dow's ultimate decision -- "past, present and future" -- and a meeting between Dow and Consumers to discuss this matter, as it bore upon the upcoming suspension and remand proceedings, was scheduled for September 21.¹⁸

Prior to that meeting, Consumers attorneys discussed among themselves what they perceived to be Dow's concerns about the project, and the possible impact on the scheduled suspension hearing if Dow's corporate review team concluded

17 Consumers Mem. 12/30/76, Attachment F, "Outline Supplied by Consumers Power on 9/29/76", Item IV.A.; Board Exhibit No. 2; Youngdahl Memo of 9/16/76 (R/D Attachment L).

18 Id. See also Consumers Mem. 12/30/76, Attachment A, at p. 10; Temple's Notes, Attach. G to "A", p. 3; Renfrow Affidavit I, ¶ 2; Renfrow Affidavit II, ¶¶ 5, 7; Bacon Affidavit I, ¶ 2; Falahee Affidavit, ¶ 2.

that continued participation in the Midland plant was no longer advisable. Renfrow affidavit I, ¶ 2; Renfrow affidavit II, ¶ 3; Bacon Affidavit I, ¶ 2. One of the items covered was whether Mr. Temple was the best witness to use to testify about Dow's ultimate corporate decision in light of his open hostility to the project. Renfrow Affidavit II, ¶ 6; Bacon Affidavit II, ¶ 6. In this regard, the Consumers lawyers were of the view that a witness from Dow Chemical, U.S.A., rather than Mr. Temple, would be able to give more objective testimony about the Dow position. Both Mr. Oreffice and Mr. Klomprens were considered to be likely alternatives. They were fully familiar with the attitude of the Michigan Division and its "corporate review" recommendation to Dow, and the Consumers lawyers felt that either man could be expected to present Dow's ultimate position fully and accurately. Renfrow Affidavit II, ¶ 6; Bacon Affidavit II, ¶ 6. No suggestion was ever made during this preliminary discussion, or thereafter, that Consumers offer a Dow witness who was not aware of the Michigan Division matter.¹⁹ Indeed, it was fully recognized by both Dow and Consumers at the September 13 meeting that the testimony to

¹⁹ Renfrow Affidavit II, ¶ 6; Rosso Supplementary Affidavit of March 28, 1979, ¶¶ 4, 5 and 6 (hereafter referred to as "Rosso Affidavit II"); Miller Affidavit of March 26, 1979, ¶¶ 3, 4; Bacon Affidavit II, ¶ 6.

be presented must state Dow's "complete position" and be in no way "misleading".²⁰

The September 21 meeting between Dow and Consumers lasted two to three hours and covered a variety of topics. Renfrow Affidavit II, ¶ 5. During that meeting, Dow expressed its concern regarding discovery in the suspension proceeding insofar as it might seek to invade the sensitive contract negotiations under way between Dow and Consumers. In that context, Dow expressed its own misgivings regarding Mr. Temple's personal views of the Midland project (Renfrow Affidavit II, ¶ 6); Mr. Falahee's recollection is that Mr. Nute indicated he would have a problem using Mr. Temple as the Dow witness because of Temple's public statements to the effect that he believed the nuclear project was no longer beneficial to Dow. Falahee Affidavit ¶ 4. At that point, Mr. Renfrow suggested to the Dow representatives that, in light of these concerns, consideration might be given to providing Consumers with another witness from Dow, U.S.A. Renfrow Affidavit II, ¶ 6.

Renfrow believes he did not then name anyone as a possible alternative to Temple, and this recollection is

²⁰ Consumers Mem. 12/30/76, Attachment A, p. 9; Temple's Notes, Attach. G to "A", p. 1.

consistent with the reports on the meeting by others in attendance.²¹ This is perfectly understandable in the context of the September 21 meeting, since the central focus of discussion at that time was not on the identity of particular hearing witnesses, but, more importantly, on what Dow's position would be vis-a-vis continuing to participate in the Midland project, and how that position might impact on the suspension question.²² Regardless of who might be testifying from Dow, it was fully recognized that he would be required to state the current corporate position in order to satisfy the directive given by the Court of Appeals in Aeschliman. Falahee Affidavit ¶ 4; Bacon Affidavit ¶ 5.

Renfrow categorically denies that he ever suggested that Dow present a witness who was unaware of the Michigan Division attitude and its recommendation to Dow management to review Dow's commitment to the project (Renfrow Affidavit II, ¶ 6); neither Mr. Falahee (Falahee Affidavit ¶ 4) nor Mr. Bacon (Bacon Affidavit ¶ 5) has any recollection that Rex Renfrow or

21 Renfrow Affidavit II, ¶ 6. None of the individuals reporting on the September 21 meeting -- Lee Nute, Al Klomprens and Jim Hanes from Dow and Rex Renfrow, Judd Bacon and James Falahee from Consumers -- identified other Dow officials as possible witnesses. See note 23, infra

22 Renfrow Affidavit I, ¶ 3; Bacon Affidavit I, ¶ 3; Falahee Affidavit ¶ 2; Renfrow Affidavit II, ¶ 5. See also Nute Notes, pp. 1-2.

anyone else representing Consumers suggested then, or at any other time, that Dow produce a witness who was unaware of the Michigan Division position or recommendation (see note 19, supra); and no such indication appears in the handwritten notes taken by Al Klomparens and Jim Hanes of Dow at the September 21 meeting.²³

The contrary inference conveyed in the Nute Notes is, we suspect, largely attributable to the imprecise manner in which Nute undertook at a later date to paraphrase the September 21 discussions. The shorthand characterization of an individual "unaware of the Michigan Division recommendation" covers in a single phrase the entire conversation at the meeting, in which Nute participated, relevant to the expressed concern of both companies with using Mr. Temple as a witness in light of his outspoken role in opposition to the Midland project, his preparation and presentation to Orefifice of the Michigan Division's view that continued participation in the plant was no longer in Dow's best interest, and his recommendation for a corporate review of the entire question of Dow's adherence to its contractual commitments to Consumers.²⁴

23 Klomparens' notes (R/D Attachment B) are silent on the point. Hanes' notes (R/D Attachment A) state only, "will have to have a Dow witness state Dow's position" (p. 1). This is essentially what Renfrow recalls saying -- i.e., that a witness from Dow, U.S.A. should be considered, in lieu of Mr. Temple, to testify on the Dow position (Renfrow Affidavit II, ¶ 6). And see Bacon Affidavit II, ¶ 5.

24 Both in terms of the format used and the substantive com-
(continued next page)

If Renfrow's "suggestion" at the meeting that Dow may want to give consideration to using a witness other than Temple was misunderstood by Nute as conveying indirectly a message that Dow produce a witness "unaware of the Michigan Division recommendation" -- and we do not entirely discount this possibility²⁵ -- such a communications breakdown is admittedly regrettable.²⁶ However, as explained above and in Renfrow's Affidavit II, no such message was intended by Renfrow; nor was it ever contemplated by Consumers or its counsel that an "unaware" Dow witness would be used at the hearing (see note 19, supra). To the contrary, the individuals considered by Consumers and its lawyers as likely alternatives to Temple were

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ments made, it is clear that the Nute Notes only paraphrase the subjects of discussion rather than attempt to set forth in narrative form actual conversations that took place or endeavor to report with any degree of precision particular statements made by any of the individuals at the meeting. Midland Interveners Exhibit No. 25.

25 See Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 6-7 (R/D Attachment I).

26 With the benefit of hindsight, it now appears that any confusion in this area would have been immediately dispelled at the September 21 meeting if Mr. Renfrow had named both Mr. Oreffice and Mr. Klomparens as the two individuals whom Consumers considered to be likely alternatives. This obviously would have satisfied Mr. Oreffice that Consumers and its counsel did not want an "unknowledgeable" Dow witness, and thus avoided the subsequent misunderstanding apparently based on the Nute Notes that surfaced during the suspension hearings. Tr. 2703-04 (Oreffice); see also Tr. 2399-2400 (Temple); Bacon Affidavit II, ¶ 4.

Mr. Oreffice and Mr. Klomparens, both of whom had a full knowledge of the reservations expressed by the Michigan Division as well as the corporate review that it recommended. See p. 12, supra.

In any event, we are hard pressed to find any impropriety in the discussions that took place at the September 21 meeting. The suggestion made by Mr. Renfrow -- whether understood by Dow in the manner intended (consider producing a Dow witness other than Mr. Temple) or in the manner reflected in the Nute Notes (consider producing an "unaware" witness) -- was neither pursued nor accepted.²⁷ No pressure was brought to bear on Dow with respect to its selection of witnesses.²⁸

27 No such suggestion was made by counsel for Consumers at the subsequent meetings with Dow representatives on September 24 and September 29, 1976. Consumers Mem. 12/30/76, Attachments B and F. Nor were there any other conversations between Dow and Consumers in which a replacement for Temple as the Dow witness was discussed. See Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 2-3, 7, 9, 11, 14, 16 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, pp. 3-4, 6-7, 8-9 (R/D Attachment H); Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 6-7 (R/D Attachment I). Duran Notes on Dow/Consumers meeting of 11/8/76, at p. 4 (R/D Attachment J).

28 As already noted, the September 21 meeting was convened by Dow in part to allow Consumers to provide input to the task force assignment studying the legal implications of Dow's ultimate decision with respect to the Midland project (see p. 11, supra). There was discussion at the meeting and thereafter of possible consequences that might be expected if Dow's corporate position should ultimately reflect the negative attitude of the Michigan Division. Consumers made it clear (continued next page)

Directly following Dow's decision on September 27, 1976, to proceed with the Midland project and support Consumers in the suspension hearing,²⁹ Mr. Temple was designated as the Dow witnesses to testify at the hearing.³⁰ No representative of Consumers disputed or sought to alter that determination.³¹

(continued)

that Dow could anticipate litigation from Consumers if it decided to abandon the project and withdraw its support from the Midland plant at the upcoming suspension hearing. See Nute Notes, p. 3; Bacon Affidavit I, ¶¶ 3, 8; Bacon Affidavit II, ¶ 6; Renfrow Affidavit II, ¶ 5; Consumers Mem. 12/30/76, Attachment B, p. 1. The references to litigation throughout the period in question stated the company's position in unmistakable terms in the event that Dow chose not to adhere to its contractual commitments. There was nothing either improper or inappropriate about alerting Dow to this prospect. Indeed, it is difficult to believe that Dow could reasonably have expected any other response from Consumers if it decided to abrogate its contract commitments.

However, at no time did anyone from Consumers link the company's position regarding a possible lawsuit for breach of contract with the separate consideration being given to which individuals from Dow should appear to testify at the suspension hearings. Although the Nute Notes of the September 21 meeting juxtapose in the same paragraph statements relating to the selection of the Dow witness and Mr. Falahee's remarks alerting Dow to the likelihood of a lawsuit by Consumers if Dow decided to abandon the project and withdraw its support at the suspension hearing, neither the Nute Notes nor any other evidentiary material indicates or alleges that the threat of litigation was employed to pressure Dow to produce an unknowledgeable or untruthful witness. Falahee Affidavit ¶ 5; Bacon Affidavit II, ¶ 5; Renfrow Affidavit II, ¶ 5.

29 See Consumers Mem. 12/30/76, Attachment F, Item IV.D.; Duran Notes on Dow/Consumers Meeting of 10/12/76, at p. 11 (R/D Attachment H; Consumers Exhibit No. 24).

30 Consumers Mem. 12/30/76, Attachment F, p. 1; Bacon Affidavit II, ¶ 7; Renfrow Affidavit I, ¶ 5; Renfrow Affidavit II, ¶ 6.

31 Renfrow Affidavit I, ¶ 5; Bacon Affidavit I, ¶¶ 6, 7; (continued next page)

Accordingly, there exists no legitimate basis for suggesting that Consumers acted improperly insofar as the designation of a Dow witness is concerned. Consideration was indeed given, for very legitimate reasons, to producing someone other than Mr. Temple to testify about Dow's corporate decision on continued participation in the Midland project. However, at no time did Consumers have in mind to request Dow to furnish a witness who was not knowledgeable about the view expressed by the Michigan Division and its recommended corporate review. Events both before and after the September 21 meeting belie any suggestion in the Nute Notes to the contrary. Both Mr. Temple and Mr. Orefice in fact testified at the suspension hearing, with the full support and cooperation of Consumers and its counsel (see p. 28, infra), and the Licensing Board found both men to be "highly knowledgeable".³²

In short, production of a Dow witness "unaware of the Michigan Division recommendation" (Nute Notes, p. 3) was neither contemplated, attempted, suggested nor accomplished by Consumers, and in fairness to those whose conduct has been

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Bacon Affidavit II, ¶ 8. And see note 27, supra; Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 3-4 (R/D Attachment G).

32 Order of Licensing Board declining to suspend construction permits, LBP-77-57, 6 N.R.C. 482, 485 ¶ 10.

questioned any suggestions to the contrary should, we submit, be summarily dispelled by this Board as without basis in fact.

B. THE INTERNAL VIEW EXPRESSED BY
DOW'S MICHIGAN DIVISION WAS NOT
OF SUFFICIENT MATERIALITY TO
REQUIRE THAT IT BE INCLUDED IN
TEMPLE'S DIRECT TESTIMONY FILED
WITH THE LICENSING BOARD

The manner in which Consumers and Dow chose to treat the Michigan Division viewpoint, and its recommendation to management, at the suspension hearing also suggests no impropriety. The question raised in this area concerns the determination not to include any discussion in Joseph Temple's direct testimony about the dissatisfaction within Dow relating to the company's participation in the Midland project. This decision was made on the basis of discussions between attorneys for Consumers and Dow that took place after the Dow U.S.A. Operating Board had decided, following an evaluation of the Michigan Division's interim position, to continue to adhere to Dow's contractual commitments with Consumers -- subject to constant review of the situation and possible reevaluation of Dow's position in the future if the project experienced further delays or other difficulties. See note 29, supra.

In the considered judgment of both Dow's and Consumers' attorneys, the suggestion by the Michigan Division not to continue with the project was no longer material to the

suspension hearing once Dow had internally decided to the contrary. Rather, the material facts to be disclosed were those describing management's ultimate decision, after a full corporate review, to adhere to its contract with Consumers and continue the company's commitment to participate in the Midland facility.³³ Accordingly, 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 project (Tr. 220, p. 2-3), while "keeping all * * * options open" to reevaluate the company's position on a regular basis in terms of future schedule delays (Tr. p. 517), action taken by the Michigan Air Pollution Control Commission (Tr. 220, p. 4), financial considerations (Tr. 220, p. 5), and the development of alternative steam generation sources (Tr. 220, pp. 5-6).

Even without the benefit of hindsight -- which amply demonstrates that the September 27, 1976 corporate decision to support the project was an accurate forecast of Dow's

33 Renfrow Affidavit I, ¶¶ 5, 6; Rosso Affidavit ¶ 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 H); 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).

continuing commitment to the plant for the future (see note 42, infra) -- it is difficult to fault the perimeters set by counsel for Temple's direct testimony. Invariably, one will find within a company the size of Dow diverse opinions among responsible employees on policy matters of considerable importance. In the final analysis, these competing philosophies must be resolved by those charged with the ultimate responsibility for shaping the direction of company policy. The material disclosure with regard to such matters is the corporate position ultimately adopted by the responsible "decisionmakers" after a careful evaluation of the recommendations for and against a particular course of action to be followed. Those suggestions advanced internally but rejected in the given circumstances are no longer of material consequence.

The internal expression of dissatisfaction heard from Dow's Michigan Division offers a classic case in point. It contained the implicit suggestion by one faction within Dow conversant with the Midland project to abandon the company's commitment to participate in the plant. See note 13, supra. The Dow U.S.A. Operating Board, however, decided not to follow this suggestion, finding sufficient reason to adhere to Dow's steam and electric contracts with Consumers. See note 29, supra. It is, of course, the Operating Board that sets Dow's

corporate policy, not the Michigan Division. What was material to the Licensing Board looking into possible suspension of the Midland construction permits was whether Dow intended to honor its contractual commitments with Consumers and continue to participate in the project. A full disclosure of the company's position in that regard, as announced by its Operating Board following a corporate review of the matter, was made in Joseph Temple's direct testimony.³⁴

We fully recognize that in undertaking an assessment of "materiality" there are no absolutes. As the Commission observed in Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480, 491 (1976), "determinations of materiality require careful, commonsense judgments of the context in which information appears and the stage of the licensing process involved". From this perspective, the Commission held in that case "that materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job" (id. at 486).

Applying that standard to the present situation confirms the soundness of the judgment by Dow and Consumers

34 Tr. 220, pp. 1-3, 8. No one disputed that Temple's direct testimony fairly and accurately described the corporate position of Dow with respect to continued participation in Midland -- but with all options left open. See discussion of the NRC Staff's position at p. 24, infra.

that the Michigan Division recommendation was not of sufficient materiality to be included in Temple's direct testimony. Staff counsel in the suspension hearing, responding to questions from the Licensing Board, spoke directly to this matter; he advised that, in Staff's view, no information "was excluded from the Temple testimony which would rise to the level of non-disclosure of relevant information".³⁵ The assessment by Staff counsel of the materiality question bears repeating:

Questioning and dissent are attributes of any viable decision-making process. What required disclosure in Mr. Temple's direct testimony was the corporate decision of Dow and why that particular decision was made, and not a detailed discussion of how that decision was made. The nature of the decision-making process is a proper area of cross-examination and, indeed, that area (Tr. 385-462) was and presumably will continue to be probed by Intervenor's cross-examination. Mr. Temple disclosed all relevant information in his direct testimony. [Emphasis added.]³⁶

On hindsight, it is abundantly clear that the Staff's appraisal of the situation is beyond criticism. As discussed

³⁵ 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. 5 (hereafter referred to as "Staff Mem. 12/30/76").

³⁶ Id. at 6.

more fully in the next section (pp. 28-34, infra), there was no effort made by Consumers to keep from the Licensing Board information relevant to the reservation expressed by the Michigan Division (see also pp. 8-20, supra). The decision not to include a reference to this matter in the direct testimony of Joseph Temple was made in order to concentrate Consumers' affirmative case on what was reasonably believed to be the only material disclosure for purposes of the hearing. Renfrow Affidavit I, ¶ 6; Rosso Affidavit I, ¶¶ 3, 4, 5; note 33, supra. At the same time, it was clearly recognized that the interim view of the Michigan Division would be a likely subject of discussion on Temple's cross-examination.³⁷ And, as pointed out by the Staff, this in fact occurred.³⁸ Moreover, Consumers, of its own volition, made available to all parties in advance of the suspension hearings the documents in its possession showing "that the Dow Michigan Division was unfavorable to the Midland Nuclear Plant", and these documents were made part of the evidentiary record.³⁹

37 See Renfrow Affidavit I, ¶ 15; Rosso Affidavit I, ¶ 9; Consumers Mem. 12/30/76, p. 22. And see Duran Notes on Dow/Consumers meeting of 9/29/76, at p. 11 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at p. 7 (R/D Attachment H); Duran Notes on Dow/Consumer meeting of 11/8/76, at pp. 1, 3 (R/D Attachment J).

38 See Staff Mem. 12/30/76, p. 6; Tr. 385-462.

39 See Board Exhibit Nos. 1 and 2; Staff Mem. 12/30/76, (continued next page)

Thus, this is not a case of nondisclosure of information, or even of attempted nondisclosure. The Licensing Board was fully apprised of the Michigan Division recommendation for a corporate review based on its expressed dissatisfaction with the Midland project. Implicit in the Licensing Board's decision was its own conclusion that the central concern for purposes of the suspension proceeding was Dow's corporate position; the differing viewpoint advanced internally by the Michigan Division, though thoroughly aired before the Board, was of no material consequence to the outcome of the hearing.⁴⁰ The Appeal Board agreed.⁴¹ And subsequent events underscore the soundness of this conclusion. Thus, the stated intention of the company in 1976 to adhere to its contractual commitments with Consumers has been tested over time and remains intact. In 1978, Consumers and Dow entered into new, modified steam and electric contracts which contained an explicit Dow commitment to the Midland project in contemplation of commercial operation for steam generation by December 31, 1984.⁴²

(continued)

pp. 6-7; Consumers Mem. 12/30/76, pp. 17-19, and Attachment L thereto; Renfrow Affidavit I, ¶ 9; Tr. 175-76.

40 Licensing Board Order declining to suspend construction permits, LBP-77-57, 6 N.R.C. 482, 487-88, 494-96, 498 ¶¶ 15-22, 52-59, 71-72.

41 ALAB 458, 7 N.R.C. 155, 167 (1977).

42 Copies of these new modified steam and electric contracts (continued next page)

Accordingly, the judgment exercised by Dow and Consumers in their handling of the Michigan Division matter contains no suggestion of impropriety. This differing view of a corporate division within Dow was recognized by the lawyers responsible for preparing for the suspension hearing to be of general relevance to the issues presented. Renfrow Affidavit I, ¶ 5. However, it was not considered to be of sufficient materiality that a "reasonable staff member" would or should expect it to be included in the direct testimony of a Dow witness whose purpose was to advise the Licensing Board of the ultimate corporate position with regard to support for the Midland project. See Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, supra, 4 N.R.C. at 484, 486. That determination was subsequently concurred in explicitly by Staff counsel. Nothing has occurred since to suggest any infirmity in counsel's "materiality" assessment (see note 42, supra), or to question the reasonableness of the judgment exercised with regard to this matter.

(continued)
were submitted to the Licensing Board immediately after Dow and Consumers had reached agreement, under cover letter dated June 26, 1978.

C. THERE WAS NO ATTEMPT BY CONSUMERS
TO PREVENT FULL DISCLOSURE TO THE
LICENSING BOARD OF THE INTERIM VIEW
EXPRESSED BY THE MICHIGAN DIVISION

There is, moreover, no factual basis for the suggestion of an "alleged attempt by Consumers to prevent full disclosure of the facts relating to Dow's intentions with regard to this contract".⁴³ A fair review of the evidentiary record bearing on this issue leaves no room for a finding of impropriety. "Dow's intentions with regard to its contract" were openly discussed in Mr. Temple's direct testimony and were explored by the Board and all parties on cross-examination of this and other witnesses. Tr. 220, pp. 2-3, 5-6, 8; Tr. 385-462, 2687-2741. Those intentions, as described to and understood by the Licensing and Appeal Boards in the suspension proceeding, remain uncompromised today, and are in fact even more firmly fixed. By the explicit terms of the new Dow-Consumers contracts, Dow is still committed to participation in the Midland plant to satisfy its steam generation requirements (see note 42, supra), notwithstanding the earlier expressed view of the Dow Michigan Division that continued involvement in the project was not in Dow's best interest.

43 ALAB-458, 7 N.R.C. 155, 177, at n.87.

While there appears to be some question whether disclosure of the Michigan Division's interim position was fully intended by Consumers in light of the fact that no discussion of this matter was contained in Mr. Temple's direct testimony, such speculation misperceives the judgments made and is belied by the actions taken. We have heretofore explained the determination by counsel for Consumers and Dow as to the "immateriality" of the Michigan Division attitude with respect to the Midland Nuclear Plant (see pp. 20-27, supra). Though Consumers counsel was initially of the view that there might be some advantage to including a reference to this matter in Mr. Temple's direct testimony -- since counsel for Intervenor had already asked for this witness to be produced for cross-examination and it was anticipated that the subject would come up in any event at the hearing⁴⁴ -- the narrower focus on only Dow's ultimate corporate position was decided upon after further discussion with Dow's attorneys.⁴⁵

Counsel for both companies agreed that the material fact was Dow's corporate position regarding continued

44 Renfrow Affidavit I, ¶¶ 5, 15; Rosso Affidavit I, ¶¶ 3, 4, 6, 8, 10; Bacon Affidavit I, ¶ 7. And see Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 14, 15-16 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at p. 7 (R/D Attachment H).

45 Renfrow Affidavit I, ¶¶ 5, 7; Rosso Affidavit I, ¶¶ 2, 4; Consumers Mem. 12/30/76, Attachment F, Item IV.D. See also note 33, supra; Duran Notes on Dow/Consumers meeting of 11/1/76, at p. 7 (R/D Attachment I).

participation in the Midland facility; it was concluded that this central fact should not be obscured by reference to other positions within the company that were advanced and considered by the Operating Board, but ultimately rejected.⁴⁶ Dow's attorneys accurately observed that the inclusion of such a discussion in the direct testimony would only serve to invite extended cross-examination in an area of little or no relevance to the essential inquiry at the suspension hearing. Concern was expressed that, due to Mr. Temple's personal differences with certain employees of Consumers who interfaced directly with personnel at the Dow Michigan Division, his testimony, if allowed to wander, could well impact adversely on the ongoing contract negotiations between the two companies.⁴⁷

As drafts of Temple's direct testimony were prepared and exchanged between the Dow and Consumers lawyers for review and comment, the question as to how to treat the Michigan Division recommendation was left open. Rosso Affidavit ¶ 4. Consumers lawyers actually submitted to Dow on October 24, 1976, a proposed narrative of possible testimony separately

46 Renfrow Affidavit I, ¶ 6; Rosso Affidavit I, ¶¶ 4, 8; note 33, supra.

47 Rosso Affidavit I, ¶ 4; Duran Notes on Dow/Consumers meeting of 9/29/76, at pp. 9-12, 13 (R/D Attachment G); Duran Notes on Dow/Consumers meeting of 10/12/76, at pp. 5, 6-7, 8-9, 10-11 (R/D Attachment H).

addressing the Michigan Division's interim position.⁴⁸

However, it was ultimately decided that this narrative should not be included in Temple's submitted testimony.

The efforts that went into arriving at a final draft acceptable to Mr. Temple and to the Dow and Consumers lawyers have been exhaustively covered in earlier filings with the Licensing Board, and there is thus no need to repeat those discussions here.⁴⁹ As they clearly reflect, the intent of all involved in the drafting process was to present a clear and accurate statement of Dow's corporate position with respect to continued participation in the Midland project -- based on the considered judgment that it alone was material to the suspension hearing (see pp. 20-27, supra) -- leaving such collateral matters as the Michigan Division's interim position and the ongoing contract negotiations between Dow and Consumers to be explored on cross-examination to the extent that the Licensing Board deemed it appropriate to allow a probing of these subjects. Renfrow Affidavit I ¶ 15; Rosso Affidavit I, ¶

48 Rosso Affidavit I, ¶ 6; and see Consumers Mem. 12/30/76, Attachment G, following p. 10.

49 See Consumers Mem. 12/30/76, pp. 9-17, 21-23, and Renfrow Affidavit I, Rosso Affidavit I and Bacon Affidavit I attached thereto, all of which are incorporated herein by reference. See also Tr. 474-516, discussing the manner in which Mr. Temple's direct testimony was prepared.

10. Mr. Temple fully concurred in this approach (id.; see also Tr. 220); the attorneys for Dow strongly urged it (see note 33, supra); Consumers' counsel agreed that a direct testimony should be so framed (see note 45, supra); and counsel for the NRC Staff supported that judgment as a responsible disclosure of "all relevant information".⁵⁰

To suggest in these circumstances that an effort was made to "hide" facts relevant to Dow's corporate position from the Licensing Board, or to prevent disclosure of information, is, we submit, unfair.⁵¹ In point of fact, it was Consumers'

50 Staff Mem. 12/30/76, p. 6.

51 The Nute cover letter to Rosso of November 4, 1976, accompanying the final version of Mr. Temple's testimony, states that [u]sing * * * [the question and answer] format obviates our concern that your initial draft of Mr. Temple's testimony could be said to be misleading, or even disingenuous, by the intervenors or the NRC". Consumers Mem. 12/30/76, Attachment K. It should be clear from the text of the letter itself that Nute's remarks hardly require the inference that Consumers had proposed "misleading" or "disingenuous" testimony on Dow's current corporate position with respect to the Midland plant. Rather, Nute's alleged "concern" with Rosso's earlier draft centered on two points: (1) that it was in narrative form and thus might give the erroneous impression that Temple was "attempting to tell an all-inclusive story" about the Dow decision, and (2) that it failed to highlight that Temple was testifying in response to Consumers' questions, not in response to any questions Dow may have asked. Id.; see also Duran Notes on Dow/Consumers meeting of 11/1/76, at pp. 3, 6-7 (R/D Attachment I); Nute Notes on Dow/Consumers meeting of 11/1/76, p. II.B.2 (R/D Attachment E). While Consumers' counsel did not share Nute's misgivings as to either point (Rosso Affidavit I, ¶ 8), it was recognized that the question and answer format removed whatever ambiguities might have been perceived. Nute's letter clearly reflects Dow's approval of the change.

counsel who took the initiative to bring the Michigan Division matter to the attention of the other parties in the suspension hearing in the first place. Despite the fact that Intervenors had made no request of Consumers for documents in advance of the hearings (Tr. 93, 111-12, 180), Consumers nonetheless, on November 3, 1976, made available for inspection and copying in Jackson, Michigan, all the materials which formed the basis for its prepared testimony (Tr. 268), including the Temple memorandum to Mr. Orefice of September 8, 1976 setting forth the Michigan Division's interim position in opposition to the Midland Plant, and the Temple request of September 13, 1976 for a full corporate review of the question.⁵² Also made available at that time were the minutes of the September 13 meeting containing a discussion of this entire matter. Renfrow Affidavit I, ¶ 9.

Intervenors' counsel made no effort to examine these documents prior to the hearing, but instead made a request for them as the hearing commenced (Tr. 175-76). They were promptly turned over by Consumers at that time. Also, certain Dow documents which disclosed the Michigan Division's interim position were produced to counsel for Intervenors (Tr. 209). Obviously, such documentation had sufficient tangential

52 Consumers Mem. 12/30/76, Attachments L, O and P.

relationship to the preparation efforts undertaken for the suspension hearing to require production under normal relevancy standards that apply in the discovery process. Such a judgment by Consumers does not, however, suggest any inconsistency with its determination as to the materiality of this information. Routinely, counsel turn over in discovery numerous documents which are viewed as relevant for production purposes albeit entirely immaterial to the issues under consideration.

It is, of course, the function of responsible advocacy to focus the presentation of a client's position on those facts which are deemed material to a resolution of the controversy. While opposing counsel may well differ in their assessment of "materiality" because of their conflicting views on the merits of the case, neither can be faulted for not highlighting certain information in his direct testimony which the other might conceivably consider to be relevant if, as happened here, that information was made available to opposing counsel on discovery for inspection and copying.

Consumers responsibly fulfilled its disclosure obligations by producing the materials pertinent to the Michigan Division's interim position with regard to the Midland Plant and its recommendation for a full corporate review. As a result, this matter was thoroughly probed at the suspension hearing on the cross-examination of Mr. Temple, notwithstanding

the judgment of both Dow's and Consumers' lawyers that it was of no materiality. Both as a matter of law and as a matter of professional responsibility, Dow's corporate position relating to its commitment to the Midland plant was made known to the Licensing Board in a proper and forthright manner. The present inquiry should therefore be summarily dismissed.

III. Conclusion

For all of the foregoing reasons, Consumers submits that the suggestions of possible impropriety with respect to its role in the selection of Mr. Temple as a Dow witness at the Midland suspension hearing, and in the preparation and presentation of his testimony, are not well taken. While reservations were understandably expressed by both Dow and Consumers counsel over using Mr. Temple as the witness to describe Dow's corporate position, no effort was made to keep him from testifying. Nor was there any attempt made to deny the Licensing Board access to documents or testimony relevant to the Michigan Division recommendation. The direct testimony of Mr. Temple did not address this subject because it was considered to be immaterial to the issues in question; the reservations about continuing with the Midland project voiced by the Michigan Division had undergone a full corporate review and not been accepted. Dow's corporate position was to honor its contractual commitment to Consumers and continue to

participate in the Midland facility, while regularly reassessing alternative options. A full and accurate disclosure of that position was made in Mr. Temple's direct testimony. It continues to be the Dow position to this day.

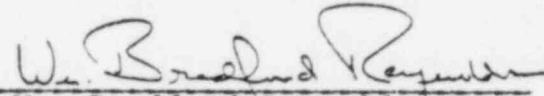
Consumers acted at all times and in all respects in a proper, professional and responsible manner throughout the course of the suspension hearings. The present inquiry should therefore be summarily dismissed in such manner as to remove any hint of impropriety.

Dated: March 30, 1979

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:



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Counsel for Consumers Power Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF JUDD L. BACON

Judd L. Bacon, being first duly affirmed, states as follows:

1. I am employed by Consumers Power Company ("Applicant") as a Managing Attorney in its Legal Department. My business address is 212 West Michigan Avenue, Jackson, Michigan. My responsibilities include supervision of legal matters relating to the licensing of the Midland Nuclear Plant. More specifically, I have actively participated in preparations for presentation of Applicant's case in this proceeding, working with attorneys from Isham, Lincoln & Beale who have been retained to represent Applicant in the NRC licensing proceedings on remand from the U. S. Court of Appeals for the District of Columbia Circuit.

2. This affidavit supplements paragraphs 3 and 6 of my affidavit in this proceeding dated December 30, 1976, filed with the "Memorandum of Licensee, Consumers Power and Its Counsel Regarding the Preparation of Testimony and the Presentation of Evidence", on the subject of the identity of a Dow witness for the proceeding.

3. In January 1977, Dow produced on discovery a set of typed notes of the September 21, 1976 meeting which was described in paragraph 3 of my December 30, 1976 affidavit. These notes (Midland Intervenors' Exhibit 25)

were said to be authored by Leslie F. Nute, a Dow attorney who attended the meeting, sometime after the meeting, based on his recollection (as he did not keep his handwritten notes) and his review of Mr. Klomparens' notes of the meeting (Document No. 14 of "Dow Priority 2 Documents") (Tr. 2244, 2245).

4. Nute's post meeting notes raise an issue which was not addressed in Applicant's December 30, 1976 filing, namely whether Applicant had suggested to Dow that it produce a witness to testify to the Dow position on need for steam and intentions concerning its fossil-fired facilities who would not be knowledgeable of the Dow Michigan Division interim position that the Midland Nuclear Plant project was "no longer good for the Michigan Division". In particular, lines 3-5 of paragraph II.B.4 of Nute's notes state that "Rex (i.e., Rex Renfrow) suggested that Dow witness might be someone from Dow Chemical USA or Corporate area who is unaware of Midland Division recommendation to Oreffice". Mr. Nute or someone else evidently passed this misconception along to Dow management, for it was repeated in the testimony of Paul Oreffice (Tr. 2703, 2704).


5. I was present at the September 21, 1976 meeting. To the best of my recollection, neither Rex Renfrow nor anyone else representing Applicant suggested then or at any other time that Dow produce a witness who was unaware of the Michigan Division's interim position or recommendation. The Dow representatives were advised at that meeting that we would need a Dow witness to testify in the proceeding with respect to the Dow corporate (i.e., Dow USA) position on the issues remanded by the U. S. Court of Appeals for the District of Columbia Circuit relating specifically to Dow's intentions. While Mr. Falahee did make a statement at that meeting that if Dow breached its contract to buy electricity and steam from Applicant, there would be a sizeable legal problem between the companies, that statement was not coupled

with a suggestion that Dow produce a non-knowledgeable witness, since no such suggestion was made.

6. At or about the time of the September 21, 1976 meeting with Dow, I recall discussing with Mr. Renfrow alternative Dow witnesses who might be appropriate. In those discussions, it was never suggested that we offer a Dow witness who was not aware of the Dow Michigan Division interim position. In our view, the only likely candidates other than Mr. Temple were Mr. Paul Oreffice, President of Dow USA, and Mr. Alden J. Klomprens, who had been placed in charge of the Dow task forces involved in the Dow USA corporate review initiated at Mr. Temple's request. Both of these men were fully familiar with the Dow Michigan Division view. I do not recall whether these alternatives were suggested to Dow at the September 21 meeting.

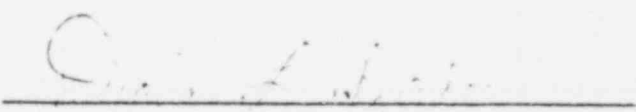
7. As stated in paragraph 6 of my December 30, 1976 affidavit, I received a call from Mr. Milton Wessel, special litigation counsel for Dow, early in the afternoon of September 27, 1976. Mr. Wessel advised me of the results of the Dow USA corporate review, and the matter of providing a Dow witness for the suspension hearing was also discussed. I have no independent recollection of what was said with respect to the Dow witness. However, Mr. Wessel's September 27, 1976 memorandum to Mr. Nute concerning that telephone call (Consumers Power Exhibit 24) discloses on page 2 that I said we wished to meet with "whoever Dow wants to testify". Page 3 of the memorandum reflects a discussion of various Dow employees who would be knowledgeable about the matters I believed the Dow testimony should cover. It also reports that I said we would prefer as a witness to Joe Temple, "someone who was 'enthusiastic' about the nuclear plant". Despite that preference I never suggested that the witness or witnesses be "unaware" in addition to being "enthusiastic". In any event, Mr. Wessel's memorandum states that he and I

agreed that it was the Dow corporate position, not Joe Temple's personal views, that were really involved in the case. As reflected in paragraph 7 of my December 30, 1976 affidavit, it was soon clear that Mr. Temple was going to be the Dow witness. Not only was that choice not disputed by Applicant or its counsel, but, as that paragraph indicates, Mr. Renfrow and I at that time argued for inclusion of the Dow Michigan Division position in the written direct testimony of Mr. Temple, a draft of which was discussed with Dow counsel in Midland on September 29, 1976.



Judd L. Bacon

Subscribed and affirmed before me, a Notary Public, this 28th day of March, 1979.



Notary Public, Washtenaw County, _____
My Commission Expires 12/31/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF JAMES B. FALAHEE

James B. Falahee, being first duly sworn, states as follows:

1. I am employed by Consumers Power Company ("Applicant") as Senior Vice President in general charge of legal, accounting and computer services, and regulation. My business address is 212 West Michigan Avenue, Jackson, Michigan. My responsibilities include general supervision of Applicant's Legal Department. In September 1976, I held the position of General Counsel of Applicant, and I participated in discussions with Dow representatives and counsel for Applicant in this proceeding, as well as with other officers and employees of Applicant, concerning Dow's commitments and participation in Applicant's Midland Nuclear Power Plant.

2. On September 21, 1976, I participated in a meeting at Dow's offices in Midland, Michigan. Also present were Judd Bacon and Rex Renfrow, representing Applicant, and Leslie F. Nute, James H. Hanes and Alden J. Klomparens, representing Dow. The purpose of the meeting was to assist Dow in arriving at its corporate position concerning continued participation in the Midland Nuclear Plant project by providing the Dow representatives with our views on the likely impact of various possible Dow positions upon pending legal proceedings, primarily the suspension proceeding to be held by the ASLB in connection with the

issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit in the Aeschliman case. The content of the meeting has been described in the affidavits of Messrs Renfrow and Bacon filed with the ASLB on December 30, 1976. This meeting was one of several held to enable Consumers Power to comment and provide information on matters assigned to the Dow "task forces" that had been formed to review various aspects of possible Dow positions concerning Dow's continued participation in the project.

3. The affidavits and other material filed by Applicant on December 30, 1976 do not address one allegation contained in later testimony of Dow witnesses and appearing in paragraph II.B.4 of Mr. Nute's typewritten notes of the meeting as follows: "Rex suggested that Dow witness might be someone from Dow Chemical USA or Corporate area who is unaware of Midland Division recommendation to Orefice"

4. I do not recall Rex Renfrow or anyone else suggesting to the Dow representatives at this or any other time that the Dow witness should be someone unaware of the Midland Division recommendation. As I recall, the issue of the identity of the witness was raised in the meeting by Mr. Nute after we said that it was important to the cost benefit analysis to know what Dow's position was on the nuclear project. Nute said he had a problem in using Mr. Temple as the witness because of the latter's recent public statement to the effect that he believed the nuclear project was no longer beneficial to Dow. The essence of my response to that concern was that it was not what Temple had said that was important, but what the current Dow position is. Regardless of who the witness might be, he would be required to state the current corporate position in order to satisfy the direction given by the Court of Appeals.

5. Mr. Nute's notes (Item II.B.4) also state that I threatened to sue Dow if Dow's testimony in the hearings was "not supportive of Consumers" and suspension or cancellation of the construction permits resulted. I do not

believe I made the statement as attributed to me by Mr. Nute. I did remind the Dow representatives that Dow had a contractual obligation to provide licensing support to Consumers Power. I also made a statement to the effect that Consumers Power believed it had a valid contract with Dow, and that if Dow did not perform the contract then Consumers Power would regard it as having been breached, which would result in a considerable legal problem between our companies that I hoped could be avoided. My recollection is that Jim Hanes said that he hoped it could be avoided, too. My statement related only to the question of whether or not Dow would continue to live up to its contract to purchase steam and electricity from Consumers Power. It was definitely not coupled with any suggestion that Dow either furnish a witness unfamiliar with its Michigan Division position on the matter or furnish a witness who would not testify fully and truthfully.

James B. Falahee

Subscribed and sworn to before me, a Notary Public this 28th day of March, 1979.

Phyllis Bogart
 Phyllis Bogart
 Notary Public, Jackson County, Michigan
 My Commission Expires 2-11-24-1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF R. REX RENFROW III

1. I am the Center Manager for est, an educational corporation in Atlanta, Georgia.
2. In September, 1976 I was an associate in the law firm of Isham, Lincoln, and Beale located in Chicago, Illinois. In early September, 1976, I was assigned along with David J. Rosso to prepare Consumers Power Company's (Consumers) presentation in the licensing proceeding for its Midland Nuclear plant. The following is my best recollection of the facts relating to my participation with regard to the presentation of Dow's U.S.A. (Dow) corporate position in that licensing proceeding.
3. During the week of September 13, 1976, I learned that the Michigan Division of Dow had informed Consumers on September 13 that it had decided that the Midland project was no longer in its "best interest" and that the Michigan Division had requested that Dow, USA review its decision with a view toward adopting a corporate position. During that week, employees of Consumers made an effort to determine exactly what the Michigan Division position meant to Consumers. My major input that week was to advise Consumers that we needed Dow's corporate position by September 27, 1976 so that we could inform the United States Atomic Energy

Commission of our position in a brief we had been ordered to file on September 29, 1976, Later that week I was informed that a meeting would take place with Dow's attorneys and with the head of the Dow corporate review, Mr. Klomprens, on September 21, 1976. The purpose of the meeting was to discuss the impact of the Aeschliman decision on the Midland project. I was requested to discuss the procedural framework, issues and scheduling of the hearings called for by the Commission.


4. At that time, I had never met with or talked to any one from Dow nor had I any knowledge of the relationship between Dow and Consumers. I did learn, prior to the 21st, the general background and what Consumers perceived to be Dow's problems with the nuclear project. Three factors seemed to be of paramount concern: (1) Dow was worried that the suspension hearing might result in Consumers slipping the construction schedule and increasing the cost of Midland; (2) Dow was concerned that they had no direct control over the project cost or schedule; and (3) Dow personnel, especially those employed by the Michigan Division, were concerned about Joe Temple testifying because of his personal views about Consumers and the project and the documents in the files which set forth these views. Since I did not know at this time what the ultimate Dow corporate position would be, I set forth my presentation in such a way as to cover these general concerns.
5. On September 21, 1976 I accompanied Messrs. Judd L. Bacon and James B. Falahee to Midland, Michigan for a meeting with Messrs. Hanes, Nute, and Klomprens of Dow. Mr. Bacon is a Managing Attorney and Mr. Falahee was General Counsel of Consumers Power

Company. Mr Hanes was introduced as counsel for Dow, USA, Mr. Nute as counsel for the Michigan Division of Dow and Mr. Klomprens as the head of Dow, USA team assigned to review Dow's continued participation in the Midland nuclear project. The meeting lasted two to three hours and I spoke approximately 75% of the time. I explained the issues which had been remanded by the appellate court in Aeschliman and the relationship of the suspension hearing to the full hearing on the remanded issues. I also discussed with Dow the time period within which decisions in the suspension hearing and the remanded hearing could be expected. Finally, I discussed the impact of various positions which Dow could take with regard to the ultimate outcome of the hearings. Following the discussion of the impact of the various Dow positions, Mr. Falahee stated that he wanted it clear that this discussion related only to the impact on the hearings and that it was not intended to address the tremendous legal problems that would face Dow and Consumers if Dow breached the contract. At no time did Mr. Falahee suggest in any way that legal action by Consumers was dependent on the witness to be presented by Dow. While there were additional meetings between Dow and Consumers, I did not participate in another meeting with Dow until September 29, 1976.

6. I categorically deny that I ever recommended that Dow present anyone who was unaware of the Midland Division recommendation to Dow U.S.A. In fact, as stated above, I had become aware that Dow was concerned about presenting Joe Temple as a witness because of his personal opinions. In discussing this with Judd Bacon prior to the meeting, we discussed whether or not there might be other Dow witnesses who were acceptable to us. We

concluded that a witness from Dow U.S.A. might be advantageous because of Temple's personal opinions and previous statements, and concluded that the only two possibilities were either Mr Oreffice, the President of Dow, U.S.A. or Mr Klomprens, who was head of the review team. Since we did not believe that we could obtain Mr. Oreffice as a witness, we concluded that if Dow was extremely wary about presenting Mr. Temple that we would recommend and accept Mr. Klomprens as the witness. Of course, the reason for this position was that Mr. Klomprens was currently conducting a review of the entire Dow-Consumers relationship, including the Midland Division recommendation. At the meeting, Dow did express its concern regarding discovery and Mr. Temple's personal views. It was at that time that I suggested that if this really bothered Dow, they might want to consider providing us with another witness from Dow, U.S.A. I did not offer Mr. Klomprens name at that time and the matter became moot by September 29 when both Dow and Consumers agreed to present Mr. Temple. At no time did anyone at Dow or Consumers suggest to me that Dow believed we wanted to have a witness who was unaware of the Midland Division position. Indeed, the first time in which I knew that this was Dow's belief was during the testimony of Temple, and when we received the "Nute" notes. Had anyone discussed this with me prior to that time, I would have certainly corrected Dow's view.

7. With regard to my participation in this proceeding after the meeting of September 21, 1976, please see my affidavit dated December 30, 1976 which was previously filed in this proceeding.



R. Rex Renfrow III

Subscribed and affirmed before me, a Notary Public, this 23th
day of March,, 1979.

Robert J. [unclear]
Notary Public

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
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CONSUMERS POWER COMPANY)

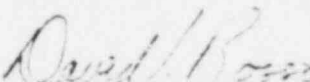
(Midland Plant, Units 1 and 2))
)

Docket Nos. 50-329
50-330

SUPPLEMENTARY AFFIDAVIT OF
DAVID J. ROSSO

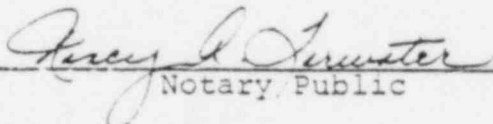
State of Illinois
County of Cook

I, DAVID J. ROSSO, being first duly sworn, upon my oath certify that the statements contained in the attached pages are true and correct to the best of my knowledge and belief.



David J. Rosso

Subscribed and sworn to before
me this 20th day of March, 1979.



Notary Public

My commission expires: September 24, 1980

1. I am a partner in the firm of Isham, Lincoln & Beale. On September 3, 1976, I was assigned by the firm as the partner in charge of representation of Consumers Power Company ("Consumers") in the suspension and remand proceedings in the above-captioned matter. Mr. Michael I. Miller is the partner in general charge of the firm's representation of Consumers. Mr. R. Rex Renfrow III was an associate of our firm working with me on this matter.

2. I did not attend the meeting of September 21, 1976, between representatives of Consumers and Dow Chemical Company ("Dow") which is the subject matter of the memorandum of Mr. Nute, who was at that time counsel for Dow's Michigan Division.

3. At no time, either prior or subsequent to the meeting of September 21, 1976, did I discuss with any representative of Consumers the tendering at the remand suspension hearings of a Dow witness who had no knowledge of the interim position of Dow's Michigan Division. At no time did any representative of Consumers suggest that I should urge that Dow tender a witness who had no knowledge of the interim position of Dow's Michigan Division. To my knowledge, no representative of Consumers ever made any such suggestion to any other lawyer in our firm.

4. At no time did I, Mr. Miller or Mr. Renfrow discuss the possibility of tendering at the remand suspension hearings any Dow witness other than Mr. Temple, Mr.

Orefice (who was then President of Dow, U.S.A. and the senior Dow corporate official encharged with reviewing the Michigan Division's interim position and formulating the Dow corporate position), or Mr. Klomprens (the Dow official encharged with supervising the review of the Michigan Division's interim position), all of whom were completely familiar with the Michigan Division's interim position. At no time did I even consider tendering any Dow witness, other than those named above, nor to my knowledge did Mr. Miller or Mr. Renfrow consider any other witness.

5. At no time did I or, to my knowledge, Mr. Miller 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 remand suspension proceedings.

6. It was the conclusion of myself, Mr. Miller and Mr. Renfrow, independent of any position which may or may not have been taken by Dow, that Mr. Temple was the Dow representative most directly involved in this matter and that he would be the logical witness to tender, but that if Dow had any objections to tendering Mr. Temple as the Dow witness, we would not object to tendering Mr. Orefice or Mr. Klomprens as the Dow witness.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))

) Docket Nos. 50-329
) 50-330
)

AFFIDAVIT OF MICHAEL I. MILLER

State of Illinois
County of Cook

I, MICHAEL I. MILLER, being first duly sworn, upon my oath certify that the statements contained in the attached pages are true and correct to the best of my knowledge and belief.

Michael I. Miller
Michael I. Miller

Subscribed and sworn to before
me this 26th day of March, 1979.

Marilyn Menke
Notary Public

My commission expires: August 31, 1980

AFFIDAVIT

1. I am a partner in the law firm of Isham, Lincoln & Beale, Chicago, Illinois. I have general supervisory responsibility for the representation by our firm of Consumers Power Company in connection with the construction permit proceedings for the Midland Plant which followed the remand of those proceedings by the Court of Appeals in 1976. Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).

2. Although I was not directly involved in the day to day preparation of Consumers Power Company's position in those proceedings, I was consulted from time to time by David J. Rosso and R. Rex Renfrow III, the attorneys in this office who had primary responsibility for these matters, in the late summer and fall of 1976. In general these consultations concerned matters of overall policy and strategy rather than the details of preparing for the then scheduled hearings.

3. The issue of which person from Dow Chemical Company should be presented by Consumers Power Company was discussed by me with Messrs. Rosso and Renfrow on one occasion in late September or early October, 1976. In this discussion there was no consideration of any witness from Dow Chemical Company other than Joseph G. Temple, Jr., Paul F. Oreffice or Alden J. Klomparens. These three witnesses

were identified by Mr. Renfrow as the three employees of Dow Chemical Company who were familiar with the manner in which the Dow Chemical Company had reached its decision with respect to continued participation in the Midland Plant. It was the consensus of Messrs. Rosso, Renfrow and myself that Mr. Temple was the preferred witness of the three since he had been most closely involved in the decision-making process at both the Dow-Michigan Division and Dow Chemical Company level. However, we agreed that if it was Dow Chemical Company's preference that Mr. Temple not testify, either of the other two Dow employees named above would be satisfactory. At no time did we consider a direction or suggestion to Dow that it supply any other person as a witness nor was there ever any discussion concerning presentation of a Dow employee who lacked knowledge of the Dow decision-making process with respect to the Midland Plant.

4. At no time was there any discussion by me with any representative of Consumers Power Company regarding use of any other employee of Dow Chemical Company as a witness other than Mr. Temple. At no time did any employee of Consumers Power Company suggest that an employee of Dow Chemical Company who did not have knowledge of the decision-making process regarding Dow's continued participation in the Midland Plant be presented as a witness.