UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. W. Reed Johnson
Gary J. Edles

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

Mr. Myron M. Cherry, Chicago, Illinois (with whom Mr. Peter Flynn was on the brief), for intervenor Saginaw Valley Nuclear Study Group.

Mr. Gerald Charnoff, Washington, D.C. (with whom Mr. Dean D. Aulick and Ms. Deborah B. Bauser were on the brief), for licensee Consumers Power Company.

Mr. William C. Potter, Jr., Detroit, Michigan (with whom Mr. T. J. Cresswell, Midland, Michigan, was on the brief), for intervenor The Dow Chemical Company.

Messrs. Barton Z. Cowan and John R. Kenrick and Ms. Ann M. Strickland, Pittsburgh, Pennsylvania, on the brief for amicus curiae The Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc.

Mr. William J. Olmstead (Messrs. Michael N. Wilcove and William D. Paton were on the brief) for the Nuclear Regulatory Commission staff.

DECISION

September 9, 1982

(ALAB-691)

This construction permit proceeding, in its various stages, is now in its second decade. Pending before us here is the appeal of intervenor Saginaw Valley Nuclear Study

Group (Saginaw Valley) from the Licensing Board's December 22, 1981, partial initial decision in a special proceeding on remand. See LBP-81-63, 14 NRC 1768. The principal inquiry in this phase of the case is the alleged attempt by licensee Consumers Power Company to prevent full disclosure in an earlier phase of the proceeding of certain important information. The Licensing Board concluded that "the parties and their lawyers took an improperly narrow view of their duty affirmatively to disclose significant information," but found that "sanctions are neither necessary nor appropriate." Id. at 1800, 1801. Saginaw Valley agrees with the facts as found by the Board but appeals its determination not to impose sanctions against Consumers Power. Saginaw Valley Brief (February 22, 1982) at 1-2, 4.

For the reasons discussed below, we dismiss Saginaw Valley's appeal. We nonetheless review the entire decision sua sponte and affirm the Board's decision not to impose sanctions, as explained in this opinion.

I.

Before we address the merits of this most recent episode, a brief outline of the history of this proceeding is in order.

Consumers Power received its construction permits for the two Midland facilities in 1972. LBP-72-34, 5 AEC 214 (1972), aff'd, ALAB-123, 6 AEC 331 (1973). Certain parties

sought judicial review, and in 1976 the U.S. Court of Appeals for the District of Columbia Circuit remanded this case (and others) for further action on issues relating primarily to the environmental impacts of the nuclear fuel cycle. Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).[1/] Accordingly, the Commission reconvened a licensing board to determine whether the Midland construction permits should be modified or suspended and to consider the issues identified by the court. CLI-76-11, 4 NRC 65; CLI-76-14, 4 NRC 163 (1976).

This "Suspension Board" held extensive hearings. Among the issues considered, pursuant to the District of Columbia Circuit's decision, was the need for the facility -- particularly by Dow Chemical Company. See 547 F.2d at 632. Dow, an intervenor in the construction permit proceeding, had contracted with Consumers Power for the purchase of process steam from the Midland Units for use at Dow's nearby industrial plant. In declining to suspend the permits, the Board found that "Dow continues to need process steam," though the company "has continuously reviewed its situation regarding purchase of steam from the Midland plant" and "continues to . . . [keep] its options open." LBP-77-57, 6

1/ Notwithstanding the parties' pursuit of court review, construction of these facilities, which had begun earlier under an interim authorization, continued pursuant to the newly issued permits.

NRC 482, 487, 488 (1977). The Board made the following observation, however (id. at 485-486):

> There is evidence in this record that Licensee has considered conducting its share of this proceeding in such a way as to not disclose important facts to the Board. Notes taken by a Dow attorney of meetings with Consumers' attorneys indicate the desire of the latter to "finesse" the dispute with Dow if no Intervenors appeared (Intervenors Ex. 25, page 2, paragraph B). The same notes reflect the exploration by a Consumers' attorney of the possibility of using Dow witnesses unfamiliar with the facts relating to the Dow-Consumers dispute to testify at the hearing; they further disclose a proposed strategy by Consumers to "drag feet" in the hearing process because as long as construction continues, Consumers "has a lever" (page 3, paragraph 4). Assuming that the proposals set out here were made and acted upon, none were successful. Aggressive Intervenors did appear and the Dow-Consumers matter was aired; the Dow witnesses furnished were highly knowledgeable men (Mr. Temple headed the Michigan Division of Dow); and Licensee has not slowed the suspension hearing. Of course there remains the suspicion, raised by the disclosure of these instances, that there may have been similar ploys which were successful.

We affirmed the Suspension Board's decision in ALAB-458, 7 NRC 155 (1978). With respect to the need for power and the Dow-Consumers Power contract, we described the evidence as showing that

> some officials in the local Dow management view Midland as a losing proposition and would abandon it, but the senior corporate officers have decided, subject to reconsideration if circumstances change, that Dow will honor the contract to buy steam from Midland, notwithstanding that intervening events have rendered its terms far less attractive to Dow than they originally were.

Id. at 167 (footnote omitted). We viewed this as "convincing evidence that Dow's present intention is to adhere to the contract's terms." Id. at 168 (footnote omitted). Nevertheless, we expressed our concern about the Suspension Board's suspicions that Consumers Power may not have fully disclosed all the important facts relating to the Dow contract. We therefore noted our expectation that this matter would "be fully aired and resolved" at future hearings (on unrelated issues) before the Board -- "whether or not the parties are themselves otherwise interested in pursuing" it. Id. at 177 n.87.

Shortly after our decision in ALAB-458, the Supreme Court reversed Aeschliman and remanded it to the District of Columbia Circuit. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Consequently, the Commission noted that "the only issue [among those originally identified for further action as a result of Aeschliman] which remains . . . for consideration by the Licensing Board is the airing and resolution of the charges relating to Consumers' conduct." Memorandum and Order of November 6, 1978 (unpublished) at 2. 2/

2/ In the same order (at 2), the Commission also directed the Licensing Board to "address the issue of the environmental effects of radon as required by subsequent Commission actions."

The Board thus held hearings during July 1979 at which the following issues were explored:

> Issue No. 1
> Whether there was an attempt by parties or attorneys to prevent full disclosure of, or to withhold relevant factual information from the Licensing Board in the suspension hearings (ALAB-458, 7 NRC 155, 172 fn. 64[,] 177, fn. 87).
>
> Issue No. 2
> Whether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers.
>
> Issue No. 3
> Whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions.
>
> Issue No. 4
> Whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony.
>
> Issue No. 5
> What sanctions, if any, should be imposed as a result of affirmative finds on any of the above issues.

44 Fed. Reg. 35061 (June 18, 1979). Fourteen persons testified, all as Board witnesses. Although Consumers Power, Dow, and the NRC staff participated in the hearing, neither Saginaw Valley nor any of the other intervenors with which it was aligned participated or filed a post-hearing

brief or proposed findings. [3] The Licensing Board fully explored both the incident in question arising from the Suspension Board hearing and the duty of affirmative disclosure imposed on applicants and licensees in NRC proceedings. As noted above, the Board concluded that "in developing testimony on the issue of Dow's intentions concerning the purchase of steam, the parties and their lawyers took an improperly narrow view of their duty affirmatively to disclose significant information to the Board." 14 NRC at 1800. In particular, the Board found that certain prefiled direct testimony on behalf of Consumers Power should have included "a fair and candid description of the true relations between Dow and Consumers." Ibid. The Board nonetheless chose not to impose sanctions against any party or its counsel because (1) it found no deliberate intent to engage in fraud or unethical conduct; (2) it believed the standards by which it measured the involved conduct were new; and (3) all the significant information was ultimately included (through

---

3/ Counsel for all of these intervenors, however, was promptly served with copies of all transcripts, exhibits, pleadings, and other papers. 14 NRC at 1777. As discussed below, intervenors' counsel submitted a letter to the Board, three months after post-trial briefs and proposed findings were due, containing his views on the issues. The Board later solicited from intervenors a formal filing with analysis and citations to the record, but none was ever filed.

cross-examination) in the record of the suspension proceeding. Id. at 1801. It is the Board's determination not to impose sanctions that Saginaw Valley alone appeals. 4/

II.

As a threshold matter, Consumers Power, Dow, and the staff each contend that we should dismiss Saginaw Valley's appeal. They argue that intervenor has waived its right to appeal by failing to participate below.

Saginaw Valley has nominally been an intervenor throughout the various stages of the Midland construction permit proceeding. Although instrumental in provoking the particular phase at hand, Saginaw Valley elected not to participate in the hearing itself, primarily for financial reasons. As noted above, however, its counsel was served with all transcripts, exhibits, pleadings, orders, and the like. See note 3, supra. Further, staff counsel advised Saginaw Valley's counsel the day after the hearing terminated that that party (like the other parties) was permitted to file a post-hearing brief or proposed findings

---

4/ The Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc., requested and received permission to participate as amicus curiae with respect to two legal issues in this case: the standard for the preparation of direct testimony (the duty of affirmative disclosure), and the standard of conduct for counsel who assist expert witnesses in the preparation of direct testimony. See note 9, infra.

by October 1979. Letter of William D. Paton to Myron M. Cherry (August 1, 1979). Nevertheless, Saginaw Valley submitted nothing until January 11, 1980, when it apprised the Licensing Board in a five-page letter of its views on this special proceeding and Consumers Power in general. This letter was self-described (at 4) as "in the nature of [a] post-trial memorandum" and purported (at 2) to preserve a right to appeal. It stated without elaboration (at 4) intervenor's belief that "Consumers has attempted to distort the proceedings by persistently focusing on a fictitious issue." The letter contained no references to the record or any other material on which the Licensing Board could rely in reaching its decision. Nor did it address the matter of sanctions.

In an unpublished order issued November 14, 1980, the Licensing Board noted (at 3) its desire "to be fully advised as to the facts and law by all parties," as well as the unfairness in allowing Saginaw Valley and its counsel "to make unverified statements and arguments without record citations, or any effort to participate directly in the instant inquiry." 5/ But because of the unusual nature of

---

5/ The Board regrettably offered no explanation for the ten-month delay between its receipt of counsel's January 1980 letter and the issuance of its order. It does not appear, however, that any party was prejudiced by this time lapse.

this case and intervenor's role in the earlier suspension hearing, the Board concluded that "the public interest would be served by requiring [Saginaw Valley] to take the responsibility of analyzing the record, including the exhibits and transcripts of testimony." Ibid. (emphasis added). The Board thus gave intervenor over six weeks to file a brief and proposed findings with appropriate citations to the record. Saginaw Valley made no response whatsoever to the Board's order and offer of a last chance to participate.

We agree with appellees' arguments that the appeal should be dismissed. Our decisions have

> emphasized the importance of the submission of proposed findings and put litigants on notice that a default in the performance of this obligation would be taken into account in any challenge on appeal to the findings of the Licensing Board. . . . Failing either to raise satisfactorily a particular issue or (once the record has been closed) to express [it]self in the prescribed manner regarding how that issue should be resolved, [an intervenor] is scarcely in a position, legally or equitably, to protest the determinations made by the Board in connection with it.

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864, reconsideration denied, ALAB-252, 8 AEC 1175 (1974), aff'd, CLI-75-1, 1 NRC 1 (1975). Requiring the submission to a licensing board of proposed findings or a comparable document is not a mere formality: it gives that board the benefit of a party's arguments and permits it to resolve

them in the first instance -- possibly in the party's favor, obviating later appeal. Thus, unless there is "a serious substantive issue as to which a genuine problem has been demonstrated, we ordinarily will not entertain an issue raised for the first time on appeal." Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). See also Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981).

Though purporting to preserve a right to appeal, Saginaw Valley's January 1980 letter to the Licensing Board did not. Apart from its untimeliness, it contained no references to the record in this proceeding and no relevant argument. It also made no mention at all of sanctions, which had been clearly identified as an issue for pursuit at the hearing (see 44 Fed. Reg. 35061, supra) and is the only matter that Saginaw Valley seeks to raise here on appeal. Instead, the letter amounted to an unfocused attack on licensee generally. But most significant is the fact that, after the Licensing Board specifically solicited a brief and proposed findings from it, Saginaw Valley totally failed to respond. See Wright v. Hartford Accident & Indemnity Co.,

580 F.2d 809, 810 (5th Cir. 1978). [6]

Saginaw Valley's counsel argues before us that he did not respond to the Licensing Board's November 1980 order because he (1) believed that the record and the findings of fact filed by others "adequately brought out what was at issue," (2) had nothing to add, and (3) was "in the hole $125,000" for expenses and legal fees already incurred in this proceeding. App. Tr. 11. See also App. Tr. 5-23. But a party that makes such litigation judgments assumes the risk that its reliance on the proposed findings of others is misplaced, and it must be prepared to live with the consequence that its further appeal rights will be waived. Cf. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-645 (1977). [7]

---

[6] Indeed, this is at least the third occasion on which Saginaw Valley, represented by the same counsel as here, has failed to fulfill its responsibilities as an AEC/NRC litigant and has been chastised for it. See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 474-476 (1975); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-334 (1973). Thus, we should not have to repeat here our discussion in those cases concerning a party's obligations.

[7] At a minimum, we believe Saginaw Valley was obliged to respond to the order by informing the Board of its decision not to file formal findings or a brief.

Parties may not dart in and out of proceedings on their own terms and at their convenience and still expect to enjoy the benefits of full participation without the responsibilities.

This is not a case involving "a serious substantive issue as to which a genuine problem has been demonstrated," requiring our consideration despite intervenor's waiver of its appeal rights. Hartsville, supra, 7 NRC at 348. In any event, as discussed below in Part III, we have reviewed sua sponte the entirety of the Licensing Board's decision, and our disposition upon that review makes reaching the sanctions issue unnecessary. In these circumstances, we find no basis for entertaining Saginaw Valley's arguments and therefore dismiss its appeal. 8/

8/ Pending before us are two motions by Saginaw Valley to strike the reply briefs of Consumers Power and Dow. Saginaw Valley argues that these briefs do not respond directly to its challenge to the Board's conclusions of law regarding sanctions, but rather attack the Board's underlying findings of fact. Saginaw Valley contends that because neither it nor appellees took exception to any of these factual findings, appellees are thereby precluded from disagreeing with or attacking them.

In view of the dismissal of Saginaw Valley's appeal we deny both of its motions as moot. Even if its appeal were not dismissed, however, we would still deny the motions. Although parties not adversely affected by the ultimate outcome of a licensing board decision may not appeal that decision, they may "defend a result in their favor on any ground presented in the record, including one rejected below." Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979), and cases cited.

III.

Regardless of whether there is an appeal, "[i]t is our practice . . . to review sua sponte 'any final disposition of a licensing proceeding that either was or had to be founded upon substantive determinations of significant safety or environmental issues.'" Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 803 (1981), quoting from Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979) (emphasis in original). On the other hand, we do not ordinarily scrutinize licensing board rulings on economic issues, intervention requests, or procedural matters in the absence of a properly perfected appeal. Louisiana Power and Light Co. (Waterford Steam Generating Station, Unit No. 3), ALAB-258, 1 NRC 45, 48 n.6 (1975); Washington Public Power Supply System (Nuclear Projects No. 1 and No. 4), ALAB-265, 1 NRC 374, 375 n.1 (1975); Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633-634 (1974). The Licensing Board decision before us does not fit within either category. It does, however, involve the integrity of the hearing process and was the result of our expressed concern in ALAB-458, 7 NRC at 177 n.87, that the Consumers Power-Dow relationship "be fully aired and resolved." In such circumstances, we believe that a sua sponte review of the

Board's decision is warranted. 9/

By so doing, we do not intend to resolve every factual dispute or discrepancy noted by the parties (in particular, Consumers Power and Dow). No one has excepted to the Licensing Board's statement of the facts, and it is not our function in this limited type of review to undertake a detailed scrutiny of the entire record. Rather, we address only those portions of the Board's opinion that we believe deserve clarification or correction. And our absence of comment on a particular Board statement should not be construed as either agreement or disagreement with

---

9/ See also our unpublished order of April 8, 1982, at 2-3, granting the AIF Lawyers Committee permission to file an amicus curiae brief and declaring our intent to review sua sponte the Board's decision as a whole.

it. 10/

We expressly defer, however, our sua sponte review of the Licensing Board's disposition of the radon issue. 11/ As pointed out in note 2, supra, the Commission in November 1978 directed the Board to address the environmental effects of radon at the same time it was to inquire into the matter of Consumers Power's conduct during the earlier suspension

---

10/ During the briefing of Saginaw Valley's appeal, Dow moved for leave to file a second brief in response to the brief of fellow appellee Consumers Power. In an unpublished order (April 13, 1982) we denied the motion, finding no sufficient cause for departing from the traditional scheme of briefing, in which co-appellees do not have the opportunity to respond to one another. Dow then moved for reconsideration, tendering a brief in reply to Consumers Power. It argued that, as to the matter of Dow's involvement in any allegedly improper activity during the preparation of testimony for the suspension hearings, Dow and Consumers Power are not "on the same side" and have differing interests; thus, Dow argued it should be permitted to respond to Consumers Power in a separate brief.

The dismissal of Saginaw Valley's appeal technically moots Dow's motion, just as it moots Saginaw Valley's motions to strike. See note 8, supra. But given our decision to review the matter sua sponte and the obvious effort expended by all parties to brief the case, we strike no brief and consider all seven as essentially amici briefs.

11/ Specifically, the Board found "no reason to disagree with the conclusion [of Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-78-25, 8 NRC 87, 100 (1978)] that the radon effects from uranium fuel supply to nuclear plants are negligibly small compared to the effects of natural radon emissions, and are therefore not significant." 14 NRC at 1789.

hearing. Consumers Power and the staff contended that the record in Perkins, note 11, supra, provided adequate evidence concerning the effects of radon on which the Board could rely in this case. Consequently, they did not request additional hearings, nor did any of the intervenors. 14 NRC at 1772-1773, 1786, 1789.

The radon issue has been actively litigated in several consolidated cases. In Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-640, 13 NRC 487 (1981), we reviewed the Perkins record and quantified the radon emissions attributable to the mining and milling of uranium fuel. Still being litigated and under consideration is the question of the health effects of those emissions. See id. at 543-545. It would not be fair to the parties in Peach Bottom for us to review, in the context of this proceeding, the very radon issue that they are now actively litigating. Further, there would be the potential for our reaching prejudicial or inconsistent conclusions, were we to review the Midland Licensing Board's radon findings. For these reasons, we believe it preferable to await the issuance of the Peach Bottom health effects decision before undertaking our sua sponte review of radon here. Accordingly, we retain jurisdiction over this portion of the Board's Midland decision. See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 304, 309 (1980).

IV.

Turning to the alleged attempt by Consumers Power to prevent the full disclosure of certain information about its contractual relationship with Dow, we are satisfied that this matter has been "fully aired and resolved." ALAB-458, supra, 7 NRC at 177 n.87. The Licensing Board has done a thorough and commendable job of investigating these charges, setting forth the facts, and reporting its conclusions. We see no basis for suspecting that "there may have been similar ploys [i.e., attempts to withhold material information] which were successful." LBP-77-57, supra, 6 NRC at 486. Nonetheless, we are troubled by certain aspects of the Licensing Board's opinion, particularly insofar as they have implications for future cases. It is these matters that we address in our sua sponte review.

A.

An applicant or licensee has an obligation in NRC proceedings to provide "accurate and timely information." Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978). See also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC ___ (June 10, 1982). The source of this obligation is the Atomic Energy Act itself. Section 186a, 42 U.S.C.

2236a, provides, as pertinent (emphasis added):

> Any license may be revoked for any material false statement in the application or any statement of fact required under section 182 [which authorizes the Commission to determine the information necessary for a license application], or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application. . . .

In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978), the Commission expounded on the phrase "material false statement." First, it concluded that knowledge of falsity is not necessary for liability under Section 186. Otherwise, the Commission reasoned, an "applicant would have a reduced incentive to insure that its consultants, contractors, and employees were meeting the highest standards in their work." Id. at 486. Second, the Commission found that materiality depends on whether the information is capable of influencing the decisionmaker -- not on whether the decisionmaker would, in fact, have relied on it. Id. at 487, 491. Recognizing the often fine line between material and nonmaterial information, the Commission emphasized that such "determinations . . . require careful, common-sense judgments of the context in which information appears and the stage of the licensing process involved."

Id. at 491. See also id. at 487-488. Third, the Commission concluded that "material false statement" encompasses omissions as well as affirmative statements. 12/ Observing that it must have "access to true and full information so that it can perform its job," the Commission pointed out that "[s]ilence can be remarkably expressive." Id. at 489 (emphasis in original). 13/

The charge here was that Consumers Power had not fully disclosed, during the suspension hearing, assertedly important facts concerning its contract for the sale of process steam to Dow. See pp. 4-8, supra. The focus of the Board's inquiry below was thus necessarily on whether Consumers Power's actions constituted a material false

---

12/ In so concluding, the Commission overruled our contrary holding in the same case. See ALAB-324, 3 NRC 347, 360-363 (1976).

13/ These North Anna principles are in accord with the Commission's "General Policy and Procedure for NRC Enforcement Actions," issued after the Licensing Board's decision. See 10 CFR Part 2, Appendix C, 47 Fed. Reg. 9987 (March 9, 1982), as corrected, 47 Fed. Reg. 16005 (April 14, 1982). "Material false statement" is defined there as "a statement that is false by omission or commission and is relevant to the regulatory process." 47 Fed. Reg. at 9995 n.16.

statement in violation of Section 186. 14/ The Licensing Board, however, did not expressly find or identify any such violation by Consumers Power. 15/ Instead, it found that "the parties and their lawyers took an improperly narrow view of their duty affirmatively to disclose significant information to the Board." 14 NRC at 1800. See also id. at 1790, 1794.

This "improperly narrow view" was manifested in several ways. According to the Board, the prefiled direct testimony in support of Consumers Power should have included a more candid description of the Consumers Power-Dow relationship. 16/ Specifically, Consumers Power should have

---

14/ The Board identified the second issue for hearing as "[w]hether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers." 14 NRC at 1776.

15/ With the exception of the fifth issue dealing with sanctions, the Board never directly answered any of the issues it identified for hearing.

16/ The Board noted, however, that all of the information it considered important "was ultimately included in the record of the suspension proceedings." 14 NRC at 1801. Moreover, much of this information apparently was made available to intervenors and the staff shortly before the hearing. Consumers Power Brief (April 5, 1982) at 19 n.14, 35-36; App. Tr. 51, 88-92, 95-96, 100. Compare App. Tr. 34-35.

voluntarily revealed at the outset that (1) the Michigan Division of Dow -- which reports to Dow USA, the corporate entity responsible for entering into the process steam contract -- no longer found the contract with Consumers Power advantageous; (2) some Dow officials were influenced by Consumers Power's threat of a breach of contract suit and considered bringing suit themselves against the utility; and (3) the principal witness on the contract, Joseph G. Temple, General Manager of the Michigan Division, was personally dissatisfied with it. Id. at 1790-1791, 1794-1799, 1800. The Board found that the parties had a duty to disclose this information. In its view, "[i]f counsel have any doubts whether disclosure of particular material is required, . . . that information should be disclosed." Id. at 1796. For instance, the fact that Consumers Power's counsel held a meeting to discuss whether to include in the Temple testimony the Michigan Division position on the contract "sufficiently demonstrate[d] . . . such doubts" to the Board. Ibid. See also id. at 1792. The Board also found that the parties had an "attitude favoring limited disclosure" as reflected primarily in various internal corporate memoranda and notes. Id. at 1795. 17/

17/ For example, the Board discussed notes relating to a Consumers Power suggestion to "finesse" its contract dispute with Dow. Id. at 1790, 1792-1793.

The principal problem with the Licensing Board's analysis is that it fails to explain how the parties' "improperly narrow view" of their duty of affirmative disclosure constitutes a "material false statement" under Section 186, as interpreted and applied by the Commission in North Anna. To be sure, the Board describes the information that was omitted from the prefiled direct testimony on behalf of Consumers Power and indicates that this omission "could have created an unwarranted impression on the part of the Licensing Board." Id. at 1791. It neglects to elaborate, however, on why this is material -- i.e., how it was capable of influencing the decisionmaker. 18/

For example, the Board implies, but does not explain, that the Suspension Board could have somehow been influenced by the fact that the Michigan Division of Dow was no longer enthusiastic about the contract with Consumers Power. But we fail to see the materiality of this type of internal corporate dispute to the issue there at hand -- Dow's need for the power to be generated by the Midland facility. The Licensing Board has given undue emphasis to differences of opinion that are inevitable within any organization. The

---

18/ The Commission emphasized in North Anna, supra, 4 NRC at 488 n.6, that "an omission must be material to be punishable." See also id. at 491.

only material and relevant consideration here is the testimony sponsored by the entity ultimately responsible for contracting with Consumers Power, Dow USA: that "Dow intends to purchase process steam from Consumers beginning the first year of operation (1982)." Temple Testimony, fol. Tr. 220 (suspension hearing), at 8.

The failure to disclose an internal corporate disagreement of the type found here is clearly distinguishable from the failure to disclose seismic information, which was found to constitute a material false statement in North Anna, supra. The former involves matters of business or commercial prerogative with which we are not ordinarily concerned. That certain persons or entities within a corporate structure disagree with the senior company officials who have the decisionmaking responsibility in such matters is of no consequence, absent fraud, misrepresentation, or the like. 19/ The information

---

19/ The Licensing Board, while finding "no conspiracy to countenance perjury or to commit fraud," suggested that Dow's expressed intent to abide by its contract was disingenuous and improperly motivated by Consumers Power's assertion of its contractual rights. 14 NRC at 1801, 1794-1795. The Board also questioned Dow's intent because Dow considered the option of suing Consumers Power. Id. at 1791. We do not regard these events with as great a concern as did the Licensing Board. Each side may well have been influenced by the legal posturing of the other. But many entirely appropriate business judgments are made on such a basis -- i.e., avoidance of a breach of contract suit. Further, as explained at pp. 25-27, infra, we see no convincing evidence that undercuts Dow's expressed intent to go ahead with the contract.

withheld in North Anna, on the other hand, consisted of scientific data and the existence of seismic studies undertaken by the licensee. See 4 NRC at 482-483, 491-492. As the Commission pointed out, id. at 492, this is clearly the kind of information that agency experts must evaluate. See generally Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-82-1, 15 NRC 225 (1982) (in statement directing the issuance of a Notice of Violation, Commission found reason to believe that applicant's statements at public meeting with NRC staff concerning applicant's assertedly independent relationship with its consultant on seismic reverification program constituted "material false statements").

In any event, we believe that the Dow testimony accurately reflected the Dow position and did not create any "unwarranted impression" about that firm's satisfaction with the contract. 20/ In the first place, the prepared testimony did not, in fact, constitute an unqualified commitment to continue the contractual relationship with Consumers Power. Indeed, after noting the "continuous review since May of 1974" of the contracts, Mr. Temple

---

20/ As observed earlier, the proponent of that testimony was Mr. Temple, who, as General Manager of the Michigan Division, was less satisfied with the contract than Dow USA, the corporate superior of his division.

stated that

> at the present time circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982. Under the present circumstances as known to Dow, the nuclear alternative remains the most attractive one economically. Further, the matter will be kept under continuous review and Dow will keep all of its options open.

Temple Testimony, supra, at 2-3 (emphasis added). Mr. Temple went on to state that there were "active negotiations" between the two parties "concerning possible modifications" of the contracts, noting that time and cost factors were critical to Dow. Id. at 6-8. See also id. at 4-6. Further, Mr. Temple stated that "Dow cannot be expected to wait beyond a reasonable time for the completion of the nuclear power plant and commencement of the reliable delivery of contract quantities of process steam," and emphasized that "there can be no contractual restrictions on Dow's right to make, purchase and utilize process steam and electric power at any time at [Dow's] Midland Plant." Id. at 7 (emphasis in original). See also App. Tr. 79-80; Tr. 2281, 2306-2307 (suspension hearing); Tr. 53,468, 53,548-53,570.21/

21/ It must also be kept in mind that this prefiled direct testimony and other documents made available before and at the suspension hearing were revealing enough to trigger the cross-examination by intervenors that revealed the Michigan Division's dissatisfaction with the contract. See note 16, supra.

We recognized in ALAB-458, supra, 7 NRC at 168, that "financial and other considerations might result in Dow's being unwilling to enter into a similar arrangement if the choice were before it today." But we nevertheless found "convincing evidence that Dow's present intention is to adhere to the contract's terms." Ibid. (footnote omitted). The Licensing Board's further inquiry into this matter gives us no reason to conclude otherwise now. Dow's testimony accurately reflected the corporate position on the Consumers Power contract at the time of the suspension hearing. Compare United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-22, 16 NRC __ (August 12, 1982). 22/

In general, we agree with the Licensing Board's view that, if a party has doubts about whether to disclose information, it should do so. See 14 NRC at 1792, 1796. This is because the ultimate decision with regard to materiality is for the decisionmaker, not the parties. We part company with the Board, however, to the extent it suggests that the mere existence of a question or discussion about the possible materiality of information necessarily

---

22/ We think it noteworthy that in June 1978 Consumers Power and Dow signed new contracts containing an explicit Dow commitment to the Midland project in contemplation of commercial operations by the end of 1984. See Consumers Power Exhibit 1, Documents 17, 18, 19, 20; Tr. 53,999-54,000.

makes the information material. See id. at 1796. We also disagree with the Board's notion that drafts of prepared testimony are ordinarily material and should be disclosed. See id. at 1794. In each instance, such information may or may not be material, depending on the circumstances and proper application of the test for materiality.

The standard for materiality commonly invoked by the courts and adopted by the Commission in North Anna, supra, is whether the information involved is capable of influencing a decisionmaker. 4 NRC at 487-488, 491. See also our discussion of materiality in ALAB-324, note 12, supra, 3 NRC at 358-360. Recognizing that application of this test may not always be simple, the Commission provided further guidance: use common sense and consider the context and stage of the licensing process in which the materiality issue arises. 4 NRC at 487-488, 491. The Licensing Board's rule, in our view, conflicts with this "common sense and context" approach. 23/ A well-prepared lawyer or party will review and evaluate for materiality enormous amounts of factual and legal information in the course of engaging in virtually any type of NRC proceeding. Strict adherence to the Board's standards would greatly overburden already

---

23/ At oral argument before us, counsel for Saginaw Valley agreed that the Licensing Board's standard was erroneous. App. Tr. 33.

voluminous records with largely extraneous matter, possibly distracting the licensing boards and the parties from the more serious issues. Thus, rather than endorsing this broader and more inflexible standard for materiality, we prefer to emphasize the Commission's call in North Anna for the exercise of simple good judgment when determining whether to disclose possibly material information.

The Licensing Board, in our view, also gave too much weight to the attitudes and asserted intentions of the parties and their representatives to deceive the Suspension Board and other parties. See, e.g., 14 NRC at 1795. Intent, however, is not a prerequisite for a material false statement. This logically follows from the Commission's holding in North Anna that knowledge of the falsity of a material statement is not a necessary element of a Section 186 violation. 4 NRC at 486-487. See pp. 18-20, supra. If one's knowledge of falsity is irrelevant, a fortiori one's intention to deceive (which is necessarily a function of knowledge) is likewise irrelevant in determining whether a violation has been committed. In other words, a material false statement may be found, irrespective of whether an applicant or a licensee intended to make such a statement.

This is not to say that intent plays no role whatsoever in cases involving allegations of Section 186 violations. Certainly a party's deliberate effort to mislead the agency is relevant to the matter of sanctions, once a material

false statement has been found. See the Commission's "General Policy and Procedure for NRC Enforcement Actions," note 13, supra, 10 CFR Part 2, Appendix C, 47 Fed. Reg. at 9990, 9991, 9995 & n.15. 24/ But here, where no material false statement has been shown, there is no justification for the Board's substantial attention to and apparent reliance on the parties' attitudes and intentions. 25/

At the conclusion of its decision, the Licensing Board acknowledged that "the high standards of affirmative disclosure and other conduct . . . described herein[ ] have not previously been specifically addressed by the NRC Appeal Board or the Commission." 14 NRC at 1801. We agree that the Board's opinion, as discussed above, does plow new ground. But we see no warrant -- at least on the facts of this case -- for departing from or embellishing the existing statutory and case law (specifically, North Anna) concerning a licensee's or an applicant's obligation to provide

---

24/ Of course, determining one's intent is often a formidable task.

25/ Information concerning a licensee's or an applicant's intent may also call into question its "character" -- a matter the Commission is authorized to consider under Section 182a of the Atomic Energy Act, 42 U.S.C. 2232a -- or its ability and willingness to comply with agency regulations, as Section 103b, 42 U.S.C. 2133b, requires. We do not find (nor did the Licensing Board) the evidence in this particular proceeding sufficient to cast serious doubt on the licensee's overall character or ability to abide by agency requirements. But see pp. 38-40, infra.

"accurate and timely information." CLI-78-6, supra, 7 NRC at 418. We therefore reject any notion that it was necessary to develop new standards for party conduct.

B.

Our comments in the previous section dealt primarily with a licensee's or an applicant's responsibility of full and accurate disclosure of all material information. The Board below, however, also addressed to a lesser degree the obligations of counsel. In this area as well, we believe that the Board has formulated some new standards that are neither necessary nor desirable.

Two aspects of the Licensing Board's decision in this regard cause us concern. First, the Board criticized Consumers Power's counsel for asserting a claim of work product privilege against disclosure of the drafts of the Temple testimony. According to the Board, there was "no basis for claiming that testimony, ostensibly the work of a witness rather than an attorney, is privileged." 14 NRC at 1793. It found "[n]o credible argument" could be made on this point and expressed surprise that Consumers Power "could genuinely believe that the materials were privileged." Id. at 1793, 1794. Second, the Board expressed its dissatisfaction with the role played by counsel for both Consumers Power and Dow in the preparation of the Temple testimony. Characterizing this testimony as "prepared and massaged primarily by the lawyers," the Board

found this to be "the reverse of the proper procedure for preparing written testimony." Id. at 1799 (footnote omitted). In its view, the words used must be those of the witness; attorneys may only suggest clarification of vague or confusing portions of the statement, suggest omission of totally irrelevant material, and select questions to be answered as if on examination at oral hearing. Ibid.

In neither instance did the Licensing Board explicitly find that counsel had violated any agency or other rules of conduct. It did, however, suggest that there may have been unintentional "unethical conduct" on their part. Id. at 1801. But we see no basis for criticizing counsel for either their assertion of privilege or their role in preparation of testimony. We also perceive no need to alter the existing standards for lawyer conduct before the NRC.

The Commission's Rules of Practice require "parties and their representatives . . . to conduct themselves with honor, dignity, and decorum as they should before a court of law." 10 CFR 2.713(a). The majority of courts in this country have adopted the American Bar Association's Code of Professional Responsibility. That code is comprised of nine Canons of Ethics, each accompanied by Ethical Considerations and Disciplinary Rules, which further flesh out the Canons. The Commission thus generally follows the ABA Code in judging lawyer conduct in NRC proceedings. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 838 (1974). See

also 45 Fed. Reg. 69877, 69878 (October 22, 1980). 26/

Applying the ABA Code to this case, we believe the Licensing Board's condemnation of Consumers Power's counsel for asserting the work product privilege as to the drafts of the Temple testimony was unjustified. Canon 7 requires a lawyer to represent his or her client "zealously within the bounds of the law." These bounds are not always easy to ascertain. Ethical Consideration 7-2. They include, however, "urg[ing] any permissible construction of the law favorable to [a lawyer's] client, without regard to his [or her] professional opinion as to the likelihood that the construction will ultimately prevail." Ethical Consideration 7-4 (footnote omitted). A "permissible" argument is any nonfrivolous position supported by the law or by a good faith argument for extension, modification, or reversal of existing law. Ibid. The very cases cited by the Licensing Board in its discussion of this point, in our view, make arguing for the extension of the work product privilege to the drafts of Mr. Temple's testimony just such a permissible position.

Most pertinent is Hickman v. Taylor, 329 U.S. 495 (1947). There the Court pointed out that "[p]roper

---

26/ By the same token, the ABA Code itself applies to lawyers appearing before administrative agencies. See, e.g., Ethical Consideration 7-15.

preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Id. at 511. This lawyer work product is encompassed in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" and is generally considered privileged information. Id. at 511-512 (emphasis added). We have been unable to locate any federal or state decision that specifically extends or declines to extend the Court's definition of lawyer work product to drafts of witness testimony. Thus, given the broad language of Hickman, we believe counsel for Consumers Power was sufficiently justified in raising the claim of privilege and did not deserve the Licensing Board's implicit

censure. 27/

Similarly, we disagree with the Licensing Board's narrow view of the proper role of the lawyer in testimony preparation. Again, Canon 7's exhortation to lawyers to represent their clients "zealously within the bounds of the law" is our starting point. Related Ethical Consideration 7-26 provides (footnotes omitted):

27/ This is particularly so, given that the Suspension Board considered the question to be a "toss up." Tr. 1000 (suspension hearing).

Moreover, a federal case decided after the submission of post-hearing briefs at this stage of the proceeding but before issuance of the Licensing Board's opinion lends further support to the work product privilege claim. In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933 (6th Cir. 1980), extended the privilege to drafts of "submissions" by a chemical company to the Food and Drug Administration. The Board duly noted this decision but distinguished it on the basis that testimony is "the sworn statement of the witness, not the attorney," whereas most agency "submissions" are "briefs or argument." 14 NRC at 1794 & n.59.

Although we need not, and therefore do not, decide the correctness of this ruling, we are compelled to express our considerable doubt that the Sixth Circuit intended that its use of "submissions" be construed so narrowly. The grand jury's questions suggest that these "documents" were not briefs or similar pleadings, but rather factual statements jointly prepared by counsel and employees of its client, not unlike the Temple testimony here. 622 F.2d at 934 n.1. It is also noteworthy that the grand jury asked questions about these documents pursuant to its investigation of whether any attorney or employee of the chemical company "had made false, fictitious or fraudulent statements to the FDA during its prior investigation." Id. at 935.

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

Ethical Consideration 7-27 proscribes as well the suppression of evidence that a lawyer or his or her client is obliged to reveal. The pertinent Disciplinary Rule (7-102) states (footnotes omitted):

> (A) In his representation of a client, a lawyer shall not: * * *
>
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statement of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
>
> (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
>
> (B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

> (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

See also Ethical Consideration 8-5.

We believe that these considerations and rules provide adequate standards by which an attorney should abide in the preparation of testimony for NRC proceedings. The key factor is not who originated the words that comprise the testimony, but rather whether the witness can truthfully attest that the statement is complete and accurate to the best of his or her knowledge. 28/ Thus, we have no quarrel with the Licensing Board's general statement that "the situation should never arise . . . where one could question

---

28/ In response to the request of counsel for Consumers Power, the Legal Ethics Committee of the District of Columbia Bar issued an opinion on the subject of a lawyer's participation in preparing the testimony of witnesses. The Committee concluded:

> [A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may -- indeed, should -- do whatever is feasible to prepare his or her witnesses for examination.

Opinion No. 79 (December 18, 1979). This opinion was issued after the closing of the record and filing of post-hearing briefs. Counsel provided the Licensing Board and parties with a copy on January 7, 1980, but the Board chose not to mention it in its decision. Although not bound by the opinion, we agree fully with its reasoning and application of Ethical Consideration 7-26 and Disciplinary Rule 7-102 to the question posed.

whether in fact the testimony is uttered by the witness or negotiated by the attorneys." 14 NRC at 1799 (footnote omitted). We do, however, dispute the Board's assertion that that was the case here. As discussed above, there is no evidence on this record that the Temple testimony did not accurately and fully reflect the then-corporate position of Dow on its contract with Consumers Power. See pp. 25-27, supra.

C.

Having expressed our disagreement with these various aspects of the Licensing Board's decision, we are equally compelled to identify one significant area of agreement: "[t]he [Suspension] Board should not have been subjected to gamesmanship between or among lawyers." 14 NRC at 1800. Our opinion thus should not be read as condoning or encouraging what the parties themselves have characterized

as "sporting conduct." See, e.g., App. Tr. 56, 57, 60, 81. 29/

Initially, we emphasize that we can judge a party only on the basis of its actual conduct -- not on the misguided musings of its lawyers. Accordingly, we have found no punishable conduct here. We are obliged to reach that decision on the basis of the record and the prevailing law. And as discussed throughout this opinion, we agree with all the parties that the record is complete, and we see no warrant for changing the existing legal standards against which the facts must be measured.

Nevertheless, some of the pre-suspension hearing activity described by the Licensing Board has the strong potential for compromising the licensing process to the public detriment. See generally 14 NRC at 1790-1793. Counsel and parties who engage in such conduct risk violating the statute and other Commission authority. Where

---

29/ The District of Columbia Circuit observed in a recent case involving the Federal Communications Commission equivalent of a material false statement:

> As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," . . . and license applicants may not indulge in common-law pleading strategies of their own devise.

RKO General, Inc. v. Federal Communications Commission, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1974, 2931 (1982).

that threshold is crossed, we will have no hesitation in imposing appropriate sanctions and taking whatever other measures are necessary to ensure no recurrences. What we said at an earlier stage of this proceeding bears repeating:

> Insofar as the integrity of the proceedings or the good faith of the parties is concerned, there is no parallel between zealous advocacy in support of an arguable legal position and, e.g., the withholding of relevant factual information. We note that in the latter regard we fully expect both clients and lawyers to adhere to the highest standards.

ALAB-458, supra, 7 NRC at 172 n.64.

For the reasons set forth above, (1) Saginaw Valley's appeal is dismissed; (2) Saginaw Valley's two motions to strike the reply briefs of Consumers Power and Dow are denied as moot; (3) Dow's motion for reconsideration of our order denying it leave to file a brief in response to Consumers Power is denied as moot; (4) pursuant to sua sponte review, the Licensing Board's decision not to impose sanctions is affirmed; and (5) sua sponte review of the radon issue is deferred.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
C. Jean Shoemaker
Secretary to the
Appeal Board