

Dow Contract

August 2, 1983

TO: James G. Keppler, Regional Administrator

FROM: R. F. Warnick, Director, Office of Special Cases

SUBJECT: REVIEW OF DOW CHEMICAL COMPANY'S TERMINATION OF CONTRACT AND COMPLAINT FOR DECLARATORY JUDGMENT - MIDLAND (Case # F-3038382)

Enclosed for you are the subject documents (attached). The documents are being reviewed to determine if they contain any new information regarding health and safety which the NRC should pursue. The documents contain information regarding allegations that (1) Conoco's failure to complete Units 1 and 2 of the Midland Refinery and take appropriate health and safety precautions, and settling. In my opinion the health and safety of the public and the NRC has already been protected by the action by RRM. Enclosed for your review.

R. F. Warnick
R. F. Warnick, Director
Office of Special Cases

- 1. Mr. Keppler
- 2. Mr. [unclear]
- 3. Mr. [unclear]
- 4. Mr. [unclear]

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and Dow executed an Initial General Agreement under which Consumers Power agreed to supply steam to Dow on completion of the Midland Nuclear Facility (the "1967 Contract").

9. Under the 1967 Contract and at all times since, Consumers Power has retained sole responsibility for the design, construction, operation and maintenance of the Midland Nuclear Facility. Dow has no right of ownership, control or direction over the plant and Consumers Power has reserved to itself the exclusive right to make changes in the concept, design, construction and operation of the plant at any time and to whatever extent it deems desirable.

10. Because of Consumers Power's complete control over and superior knowledge of the design and construction of the plant, Dow has placed its complete faith, trust and confidence in Consumers Power. Pursuant to the complete trust and confidence which Dow has placed in Consumers Power and because of the exclusive control exercised by Consumers Power over all phases of the project, Consumers Power has assumed a fiduciary relationship to Dow, in addition to its other obligations under the parties' agreements. In recognition of Consumers' fiduciary obligations, at all relevant times, Consumers has had an express contractual obligation to keep Dow fully informed of all material facts that would significantly affect the cost of steam to Dow including projected cost and scheduling information.

11. Pursuant to the 1967 Contract, Dow and Consumers Power entered into a separate contract on January 30, 1974, governing the calculation of Dow's steam cost (the "1974 Steam Contract"). Under the 1967 and 1974 agreement, relying on Consumers Power's cost estimates, the parties agreed that upon completion of the Midland Nuclear Facility, the cost of steam to Dow would be based on that portion of the total plant design

and construction costs devoted to the facilities for generating and delivering steam to Dow. This portion of costs is referred to in the contracts as the Allocated Steam Investment. Under the contract formula, increases in the cost of the plant and delays in the plant's completion increase the cost of steam to Dow.

12. In 1967, Consumers Power estimated that the Midland Nuclear Facility would be completed prior to 1975 at a cost of \$186 million. After 1967, the Midland Nuclear Facility was subject to continuing scheduling delays and cost increases such that by September 1976, Consumers Power was predicting that it would complete both units by March 1980 at a total project cost of \$1.47 billion.

D. The 1976 General Agreement

13. As a result of these credible allegations and the numerous and on-going disputes over the enforceability of the then existing contracts, Dow and Consumers Power undertook late in 1977 the negotiation of a general, new agreement. A fundamental concern to Dow during these negotiations was to obtain from Consumers Power a firm date by which Consumers Power would complete the plant. Dow's need for such a date stemmed in large part from the continuing adverse effect on Dow's Michigan Division of the uncertainty as to when and at what cost the Midland Nuclear Facility would be completed. This uncertainty had had substantial adverse effects on the Michigan Division by preventing Dow from making long-range plans regarding the products to be manufactured at Dow's Midland facilities, Michigan Division employment levels, and capital projects, causing a reduction in Michigan Division operations.

14. Because of these concerns, Dow made it known to Consumers Power from the start of the negotiations that it was of critical importance to Dow that Consumers Power make full

disclosure of accurate, reliable and up-to-date cost and schedule information. Furthermore, if Consumers Power were unable to complete the Midland Nuclear Facility by a firm date, Dow wanted the express right to terminate any obligations to purchase steam. In the course of the negotiations which began in 1977 and concluded in June of 1978, the parties therefore agreed that all prior agreements be cancelled and that a new General Agreement be executed.

15. On or about June 21, 1978, Dow and Consumers Power entered into the General Agreement, attached hereto as Exhibit A (the "General Agreement"). Under the General Agreement, Consumers Power undertook to supply up to 4,000,000 million pounds of process steam per year to Dow upon completion of the Midland Nuclear Facility. The General Agreement further provided that the cost to Dow of the steam would be based on the Allocated Steam Investment, reflecting a portion of the costs of constructing the facility, but that Dow will have no obligation to pay Consumers Power for steam until the Midland Nuclear Facility attained commercial operation for steam generation as defined in the General Agreement.

16. Recognizing the past history of the facility, the parties agreed to specific provisions intended to protect Dow from further cost increases and completion delays. For example, under Section 1(B) of the General Agreement, Consumers Power promised to "use its best efforts to place Unit 2 of the Generating Plant in commercial operation for electric service on or about February 1, 1981 and to place the entire Generating Plant in commercial operation for process steam service and electric service on or about March 1, 1982." Under Section 4(C)(4), Consumers Power further agreed to "avoid imprudent expenditures" and to "use its best efforts to optimize the capital investments includable in the Allocated Steam Investment."

17. Under Section 9(B)(1) of the General Agreement, the parties agreed that if Consumers Power became unable to declare the Midland Nuclear Facility in commercial operation for process steam by December 31, 1984, then Dow would be entitled to terminate the contract and pay Consumers a termination fee no larger than one-half of the prudently incurred Allocated Steam Investment expenditures as of the date of termination.

18. Under Section 1(C) of the General Agreement, Consumers Power undertook to keep Dow currently informed whenever practical concerning Consumers Power's construction schedules, the progress of engineering design and construction, and proposed changes in engineering design, construction and operating and maintenance practices and procedures that will significantly affect the aggregate cost of process steam returned to Dow.

F. Consumers Power's Fraudulent Misrepresentations
And Non-Disclosures in the Negotiation of the
1978 General Agreement.

19. During the contract negotiations in 1977 and 1978 leading up to execution of the 1978 General Agreement, Consumers represented to Dow that it knew of no construction problem or other circumstances that would prevent it from placing the Midland Nuclear Facility in commercial operation by March 1982. Immediately before the execution of the contract, Dow specifically requested disclosure of any information adversely reflecting on the status, cost or completion of the project. Consumers Power assured Dow that it knew of no 'surprises' or any other adverse and undisclosed information about the project. These representations were intended to and did in fact induce reliance on the part of Dow in executing the General Agreement in June 1978.

20. Consumers Power's representations concerning the absence of adverse and undisclosed information were false. Specifically, Consumers Power knew prior to the execution of the General Agreement that the Midland Nuclear Facility was being constructed on improperly placed and compacted fill and that these soils problems and other construction problems described hereafter likely would prevent Consumers Power from meeting its target schedule. Consumers Power thus misrepresented to Dow the status of the project and, in addition, concealed material information from Dow with the intent to induce Dow to enter into the General Agreement.

21. The soils problem concealed from Dow arose from Consumers Power's decision because the Midland Nuclear Facility is located on the flood plain of the Tittabawassee River to raise the level of the site by depositing and compacting more than 31 feet of fill. Rather than constructing foundations using underpinning, pilings or other established techniques to rest the weight of the plant structures on bedrock or the undisturbed and compacted glacial deposits underlying the site, Consumers Power decided to place plant structures directly on top of the fill.

22. Among the structures were vital safety installations such as the emergency diesel generator building, the auxiliary building, storage tanks for emergency cooling water, service water pump structure, and numerous underground pipes and cables carrying cooling water and vital control systems. Because these structures would rest in whole or in part on fill, proper placement and compaction was essential to prevent the fill from settling under the weight of the structures. Excessive settlement and/or differential degrees of settlement of the fill can create serious unsafe conditions in any construction project and are of particular concern in a nuclear power plant because they can cause blockage or rupture of pipes

and cables carrying cooling water and electricity essential to the plant's safe operation.

23. On the basis of an engineering study completed in 1969 by the firm of James & Moore, Consumers Power adopted detailed specifications and procedures governing the fill to be used on the site and how it would be deposited, compacted and tested. Among other things, the specifications and procedures called for:

- (a) Use of specified kinds of unripped, cohesive fill such as clay in areas containing safety-related structures;
- (b) Regular testing of fill for moisture content before and after placement on the plant site;
- (c) Control over the thickness of each layer of fill as it would be deposited on the site;
- (d) Use of qualified persons and other compaction equipment to apply the necessary amount of compaction pressure on each layer of fill to achieve proper compaction;
- (e) Testing of the compacted fill at specified intervals to ensure that the required degree of density necessary to prevent settlement had been achieved;
- (f) Full-time supervision of all fill operations by a qualified geotechnical engineer.

24. Placement of the fill on the plant site took place from 1975 through 1977. Consumers Power failed to observe any of the previously identified controls or other standards of reasonable care and prudence. Instead, Consumers Power proceeded with the placement of the fill knowing that there was not proper supervision, that improper fill was being

used, that the fill had been insufficiently compacted, and that false or misleading test results were being relied upon to certify the fill as meeting standards of the U.S. Nuclear Regulatory Commission ("NRC"). Dow was not informed of any of these problems by Consumers Power at any time prior to the execution of the General Agreement.

25. In 1977, the administration building was constructed on the defective fill and excessive settlement occurred immediately. By August 1977, portions of the foundation of the administration building had settled up to 3-1/2 inches in one month. An informal investigation conducted by Consumers Power later in 1977 and concealed from Dow confirmed that there were serious deficiencies in the fill underlying the entire site, including the fill on which vital safety-related structures were about to be constructed. The results of this investigation, as well as all other facts known to Consumers Power concerning the placement and method of fill placement, were concealed from Dow.

26. The 1977 Consumers Power investigation was limited to an examination of the fill in the vicinity of the administration building and a perfunctory test of two other portions of the site. Even this inadequate review revealed that there had been systematic errors in the placement and compaction of the fill. Among other things, the investigation at the administration building site found "voids" or pockets of air in the fill and unbroken lumps of clay up to 3 feet in diameter, demonstrating that the fill had not been compacted contrary to Safety Analysis Reports certified by Consumers Power to the NRC.

27. To examine the entire safety-related portion of the site, Consumers Power conducted only one test boring. As a matter of prudent engineering practice, a single boring was

insufficient to determine the safety of fill over the complete site. Contrary to representations in the Safety Analysis Reports submitted to the NRC that unmixed cohesive fill had been used in safety-related areas, this single test demonstrated that Consumers Power had improperly used random fill consisting of mixed clay, sand and other materials with varying properties. Consumers Power's representations that unmixed cohesive fill had been used in the safety area were later determined by NRC officials to be material false statements.

21. Both before and after execution of the General Agreement, Consumers Power's reports documented that random fill was improperly used throughout the safety area and that the fill had not been adequately compacted to NRC safety standards. More than 400 separate tests taken during the fill work had shown that the fill was insufficiently compacted but were overruled or disregarded. While numerous instances of 'passing' tests contained results which upon further examination revealed degrees of compaction physically impossible to achieve. At least three 'audits' conducted by Consumers Power during the period 1974 to 1977 also verified numerous instances of failure to meet proper procedures or specifications, but no disclosure was made to Dow or to the NRC.

22. By at least the end of December 1977, the senior management of Consumers Power knew or should have known that the fill on which the Midland Nuclear Facility was being constructed was patently inadequate for construction of a nuclear power plant and potentially unsafe. Notwithstanding this information, Consumers Power made the conscious decision not to disclose this material information to the NRC. Consumers Power also made no disclosure to Dow during the negotiation of the General Agreement. Instead, Consumers Power decided to proceed with construction of the diesel generator building and

other safety-related structures on the fill, thereby creating the false and misleading appearance during the negotiations that construction was proceeding normally.

30. At the time the General Agreement was executed, Consumers Power was also aware, but did not disclose to Dow, that non-soils construction problems would affect its ability to fulfill its obligations under the General Agreement. Construction delays caused by engineering changes, work stoppages, and continuing failures to follow proper procedures and specifications were of such magnitude that Consumers Power decided in June 1978 to forego its usual practice of adopting a new schedule. Such a forecast, if properly prepared and disclosed, would have revealed Consumers Power's inability to meet the March 1981 and March 1982 completion dates represented to Dow in the General Agreement.

31. In reliance on Consumers Power's misrepresentations and non-disclosures during the 1977-78 negotiations regarding the status of the project, Dow executed the General Agreement. Had Dow known the true situation, it would not have signed the General Agreement.

G. Consumers Power's Misrepresentations And
Failures To Disclose
Since Execution Of The General Agreement

32. Since June 1978, Consumers Power has engaged in an ongoing pattern of misrepresentation and concealment from Dow of the true impact on cost and schedule caused by Consumers Power's negligence and willful misconduct in designing and constructing the plant. Specifically, this ongoing fraud constitutes a material breach of Consumers Power's contractual and fiduciary obligations and justifies cancellation of Dow's obligations to perform under the General Agreement. In addition, Consumers Power's concealment from Dow of the true cost and schedule was intended to prevent Dow from exercising its

right to terminate the General Agreement as described here-
after. Moreover, as the direct and proximate result of
Consumers Power's concealment of the true status and schedule
of the project, Dow has incurred millions of dollars in expenses,
including more than \$60 million expended to construct its
facilities to receive steam from Consumers Power. Dow has done
so in reliance on the misrepresentations of Consumers Power
regarding the status of the project. Had Dow been informed of
the continuing delays and construction problems at the project,
or Consumers Power's inability to meet the December 31, 1984
deadline, Dow would not have incurred these costs.

33. Prior to execution of the General Agreement,
Consumers Power began construction of the diesel generator
building and other safety-related structures. By July 21,
1978, shortly a month after the execution of the General
Agreement, settlement of the diesel generator building already
exceeded 1-1/2 inches as compared to a total safety allowance
of three inches over the 40-year projected lifetime of the
Midland Nuclear Facility. Nevertheless, Consumers Power decided
to continue construction and to conceal this information from
Dow, despite the General Agreement provisions requiring Dow to
be advised of such significant events.

34. By August 13, 1978, settlement of portions of
the diesel generator building had reached four inches, exceed-
ing the safety limit, even though the building was still only
approximately half complete. On August 23, 1978, Consumers
Power suspended construction of the diesel generator building
and other safety structures and notified the NRC. At the same
time, recognizing that its previous schedule estimates were no
longer valid, Consumers Power decided again to delay prepara-
tion of a cost and schedule forecast for the project because
soils problems and other uncertainties prevented any realistic
forecast from being made. Despite its duty to disclose this

significant development to Dow, Consumers Power failed to do so.

35. Following the August 23, 1978 suspension of construction, Consumers Power conducted another investigation which confirmed that there had been systematic and gross negligence in the placement and compaction of fill underlying the entire site. The investigation concluded that essentially all moisture and density tests conducted during the placement and compaction of the fill had been improperly performed. As later summarized in a July 1979 report prepared by Bechtel, "there is no rational means of determining which test results are valid and which are not."

36. Despite the overwhelming evidence that the fill underlying the Site was inadequate and potentially unsafe, Consumers Power elected on or about December 1978 to resume construction of the Midland Nuclear Facility. Consumers Power did so in the face of express warnings from NRC officials that Consumers Power was proceeding at its own risk. Consumers Power also decided not to remove and replace the unsafe fill but instead temporarily piled sand on portions of the site in an attempt to compact the defective fill. Consumers Power was specifically warned by NRC officials that they had not approved this procedure or the resumption of construction.

37. In December 1978, Consumers Power requested Bechtel to assess the impact on plant completion of still remedial work. In April 1979, Bechtel informed Consumers Power that there would be at least an eight-month delay in the fuel load date for Unit 2 and a five-month delay for Unit 1. Subsequent schedule changes showed that the target dates Consumers Power had held out to Dow were no longer valid. These included a July 1979 Bechtel report and a November 1979 Consumers Power schedule, both of which identified further slippage in the schedule. Still further slippage became inevitable when Consumers

Power's investigation of the fill confirmed that the remedial soils measures it had taken were inadequate and that years of additional delay would be necessary to devise and implement further remedial measures.

38. On December 6, 1979, the Nuclear Regulatory Commission issued an order finding that there had been a "breakdown in quality assurance related to soil construction activities under and around safety-related structures and systems." The NRC also found that Consumers Power had made material false statements in certifying its compliance with fill procedures outlined in the Final Safety Analysis Report. The NRC determined that there remained an unresolved safety issue concerning the adequacy of the remedial action to correct the deficiencies in the soil construction under and around safety-related structures and systems. Consumers Power was therefore ordered to terminate all further soils related work.

39. It was abundantly clear by at least the end of December 1979, in light of the NRC order, that Consumers Power could not meet the General Agreement's target completion dates. Furthermore, Consumers Power also knew or should have known that it was unable to meet the December 31, 1984 deadline for commercial steam operation in view of the fact that the major structures of the facility were resting on thirty feet of inadequate and unsafe fill and the NRC had rejected the remedial measures which Consumers Power had taken.

40. Consumers Power's inability to meet the 1984 deadline was confirmed in January 1981 when Bechtel provided Consumers Power with an updated cost and schedule forecast, known as Forecast 6, which declared that Consumers Power would be unable to complete the Midland Nuclear Facility until 1985. The Bechtel forecast also projected that total plant costs would be \$3.1 billion rather than the \$1.67 billion previously estimated.

41. Despite its knowledge that it could not complete the project by 1984, Consumers Power decided to conceal from Dow its inability in order to prevent Dow from terminating the General Agreement under Section 9(B)(1). Thus, Consumers Power publicly stated that it refused to accept Bechtel's estimates for plant completion. At the same time, however, Consumers Power performed internal studies disclosing that its principal alternatives were (1) either to complete the nuclear facility in May 1985 and assume the risk that Dow would terminate the General Agreement; or (2) to terminate construction and either write-off the project or convert it to coal-fired power. Consumers Power recognized that if Dow were to exercise its right to terminate under Section 9(B)(1), Dow's termination payment based on costs incurred as of April 1, 1980 would be a maximum of \$185 million. Had Consumers Power disclosed to Dow that it could not meet the 1984 deadline, Dow would have terminated the contract.

42. On or about March 5, 1980, Consumers Power decided to continue construction of the Midland Nuclear Facility, and fabricate an artificial schedule purporting to show that it could complete the project before December 1984, thereby depriving Dow of its right to terminate. Pursuant to its March 1980 plan, Consumers Power thereafter took the public position that it intended to find ways of shortening the schedule. At the time it took this public position, Consumers Power concluded internally on May 5, 1980, that "we generally agree with Bechtel both on schedule and cost."

43. On June 25, 1980, to further the concealment of its inability to meet the 1984 deadline, Consumers Power directed Bechtel to prepare a new construction schedule under which the Midland Nuclear Facility would be in operation by July 1984. This date, which shortened the Bechtel estimate by one year, was announced for the specific purpose of, among other things,

preventing Dow from exercising its right to terminate the General Agreement.

44. In order to effect the continuing concealment, Consumers Power and its agent, Bechtel, agreed on July 10, 1982 that in all statements and documents prepared "for public consumption," they would refer to Consumers Power's "current project schedule" dates purporting to show that the 1984 commercial steam operation deadline could be met. At the same time, it was agreed for internal purposes to use the true schedule which recognized that the 1984 deadline would not be met.

45. Dow was not informed of the true schedule. Instead, at all times between July 10, 1982 and April 10, 1983 Consumers Power assured Dow that the plant would be in commercial operation by December 31, 1984. Throughout this period of deception, Consumers Power and/or should have known, with each passing day, that the 1984 deadline was ever more unattainable, but refused publicly to acknowledge these facts.

46. For example, on November 4, 1982, Consumers Power called a press conference to discuss the plant's status at which a Consumers Power official specifically denied that the schedule contrived for public consumption would not be met. Following the press conference, on November 15, 1982, Consumers Power informed Dow that no new completion dates would be available to Dow until early February 1983.

47. In early February, Consumers Power again concealed from Dow the existence of its right to terminate. Instead of admitting its inability to meet the deadline, Consumers Power notified Dow that a new schedule would not be released until April. On February 18, 1983, Dow requested Consumers Power to provide "meaningful written assurance" that the 1984 deadline would be met. On March 7, 1983, Consumers Power once again refused to admit its inability to meet the

1984 deadline and instead responded that "April will be the earliest time we can give you the benefit of our considered judgment on cost and schedule."

48. Not until April 11, 1985 did Consumers Power finally admit to Dow that Unit 2 would not go into commercial operation before February 1986 and that completion of Unit 1 would be delayed until August 1985. Consumers Power further estimated that the total cost of the project would be \$4.43 billion, an increase of more than \$1 billion over its previous estimates. By virtue of the April 11 announcement, for the first time Dow possessed the unqualified right to terminate under Article 9 E)(1) of the General Agreement.

B. Consumers Power's Other Material Breaches
And Delays in The Performance
Of the 1974 General Agreement

49. The misstatements and non-disclosures alleged above constitute material breaches of Dow's contractual and fiduciary duties. In addition, Consumers Power has since June 1976 committed other material breaches of its duty to use its best efforts to complete the plant and by failing to avoid imprudent expenditures in the design and construction of the Midland Nuclear Facility. Consumers Power has also negligently and willfully failed to exercise due care in the construction of the Midland Nuclear Facility.

50. Since 1976, Consumers Power's mismanagement of the Nuclear Facility project has resulted in repeated schedule delays and inordinate cost increases. Among other things, as a result of the negligence of Consumers Power in the placement and compaction of the fill on the Midland Nuclear Facility site and its imprudent choice of remedial measures unacceptable to the NRC, Consumers Power placed itself in a position whereby removal and replacement of the deficient fill could not be accomplished without demolishing the nuclear facility. Consumers

Power then adopted a costly and untested underpinning program involving tunneling under existing structures and installing new foundations, further adding to the delay and expense of the project.

51. NRC officials have described the magnitude and complexity of the underpinning program as equivalent to building a third nuclear reactor on the site. Under present construction schedules released by Consumers Power, the earliest the underpinning program can be completed is in 1985. As a consequence, more than eight years of delay in the Midland Nuclear Facility will have elapsed from the August 1977 detection of settlement at the administration building. During this same period, Consumers Power's estimates of the cost of the nuclear facility have increased by nearly \$5 billion.

52. Continuing quality assurance problems at the Midland Nuclear Facility have resulted in the NRC's concluding that there is no reasonable assurance that Consumers Power will construct a nuclear facility that meets NRC requirements for licensing for commercial operation. For example, since the underpinning program began, the NRC has ordered the work to be halted at least twice because of negligence and lack of supervision by Consumers Power. On January 7, 1981, the NRC fined Consumers Power \$35,000 for quality assurance infractions related to the negligent installation of heating, ventilating and air-conditioning equipment. Two years later, on February 8, 1983, the NRC imposed a civil penalty of \$125,000 on Consumers Power for yet another breakdown of its quality assurance program.

53. On December 2, 1982, in the face of mounting pressure from the NRC, Consumers Power halted all non-soils, safety-related construction because of its continuing inability to manage construction in a competent and licensable manner. Jurisdiction over the project has been assigned to the NRC Office of Special Cases, an office specially created to review

the most troubled nuclear projects. Because of its non-negligence and mismanagement, Consumers Power has been subject to increased scrutiny and investigation by the NRC, leading to further increases in the plant's cost and unreasonably delaying its completion.

54. In light of the continuing history of Consumers Power's negligence, quality assurance breakdowns and other failures, there is no reasonable prospect that Consumers Power will complete the Midland Nuclear Facility at a reasonable cost and within a reasonable time if indeed the plant will ever be finished. It now appears likely that the NRC will order a reinspection of virtually all plant systems and will require an independent third-party verification of design and construction. Such actions will require at least a year of further delay and additional substantial cost increases by themselves. Because of the history of serious safety and other problems disclosed to date, it is reasonable to expect further delays and cost increases, if not permanent termination of construction, to result from any additional inspection of the Midland Nuclear Facility and the discovery of additional material defects concealed thus far from us.

55. Based on the present status of the Midland nuclear facility and its past history, Consumers Power's April 11, 1984 cost and schedule forecast was itself a continuation of Consumers Power's pattern of concealment and misrepresentation. Because of the continuing negligence and recklessness of Consumers Power and the numerous unresolved licensing and safety questions that have resulted, the Midland Nuclear Facility may never be completed and in any event it certainly will not come into commercial operation before 1986 at the earliest and at a cost of less than \$6.0 billion. The Midland Nuclear Facility, if completed, would produce energy at a commercially unreasonable

cost contrary to the assumptions on which the General Agreement was premised.

I. Dow's Termination Of The General Agreement

56. Following Consumers Power's April 11, 1983 announcement, Dow undertook to determine the reasons for Consumers Power's failure to complete the Midland Nuclear Facility. Dow demanded a review of a large number of Consumers Power documents never before provided to Dow, a portion of which have not been produced. The documents confirm that a continuous and systematic practice of misrepresentation and non-disclosure has been perpetuated by Consumers Power in derogation of its obligation to keep Dow fully and accurately informed of all material facts concerning the project's cost and schedule.

57. Accordingly, for all of the reasons described in this Complaint, Dow notified Consumers Power that it was terminating the General Agreement pursuant to Section 9.13.11 and reserving its rights to pursue its legal remedies under this Complaint.

COUNT I Fraudulent Misrepresentations and Non-Disclosures

58. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

59. At all relevant times Consumers Power owed Dow a duty to refrain from making material misrepresentations. Under the General Agreement, Consumers Power also owed the duty affirmatively to disclose on a current basis all material information which could significantly affect Dow's rights and obligations under the General Agreement. Because of the fiduciary relationship owed by Consumers Power to Dow, Consumers Power was required to adhere to an even higher standard of full and fair disclosure than would ordinarily be applicable.

60. As previously alleged, Consumers Power has engaged in an ongoing series of material misrepresentations and non-disclosures, in disregard of its common law, fiduciary and contractual duties, beginning as early as 1977 and continuing until at least the date of this action. Said misrepresentations and non-disclosures were intended by Consumers to be relied upon, and were relied upon, in inducing Dow to enter into the 1978 General Agreement. Thereafter, Consumers Power's misrepresentations and non-disclosures were calculated to prevent or delay Dow from exercising its legal right to terminate the contract and were also designed to conceal Consumers Power's negligence and incompetence in meeting its obligations to construct a nuclear generating plant in a safe, efficient, workmanlike manner while avoiding all imprudent expenditures. Dow did in fact justifiably rely to its detriment on these misrepresentations and non-disclosures which were false and misleading by, among other things, expending over \$40,000,000 as a direct and proximate result.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That during the negotiations leading up to the execution of the 1978 General Agreement, Consumers Power engaged in material misrepresentations and non-disclosures which induced Dow to enter into the 1978 General Agreement.

B. That after the execution of the 1978 General Agreement, Consumers Power engaged in ongoing misrepresentations and non-disclosures for the purpose of concealing from Dow material information concerning the cost and scheduling of the project.

C. That the foregoing material misrepresentations and non-disclosures were relied upon by Dow to its detriment.

D. That by reason of Consumers Power's wrongful conduct, the General Agreement should be and is legally cancelled and any and all obligations of Dow under said General Agreement are discharged.

E. That Dow is entitled to such further and additional relief as this Court shall deem just and proper including actual damages in excess of \$60,000,000 as well as punitive and exemplary damages and reasonable attorneys' fees.

POINT II
Material Breach of Contract and of Fiduciary Duties

61. The allegations of paragraphs 1-57 are hereby recited and incorporated by reference.

62. Consumers Power owes the following duties under the General Agreement and by reason of the fiduciary relationship between the parties:

a. Consumers Power was required under Article 1(B) of the General Agreement to use its best efforts to obtain commercial operation of Unit 2 for electric service by March 1, 1981 and to place the entire generating plant in commercial operation by March 1, 1982. This contract obligation, as well as its fiduciary obligation, required Consumers Power at minimum to proceed with all phases of construction and licensing with due diligence and in a non-negligent, workmanlike manner so as to achieve these dates;

b. Consumers Power was required under Article 4(C) of the General Agreement, as well as under its fiduciary obligations, to avoid imprudent expenditures so as to minimize the aggregate cost of the price of steam to Dow;

c. Consumers Power was further required under Article 1(C) of the General Agreement, as well as under its fiduciary obligations, to keep Dow

currently informed of all material facts which would significantly affect the cost or timing of Dow obligations under the General Agreement.

d. Consumers Power was further subject to an implied obligation under the General Agreement to exercise good faith, due care and reasonable diligence in the performance of its contractual obligations.

63. As previously alleged, Consumers Power has repeatedly violated each of the foregoing legal obligations. Individually and collectively these actions constitute material breaches of the General Agreement, entitling Dow to cancel all remaining contract obligations. As the direct and proximate result of Consumers Power's material breaches, Dow has suffered substantial financial injury including the loss of over \$40,000,000 expended in reliance on the General Agreement.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That Consumers Power has materially breached the General Agreement.

B. That Consumers Power has materially breached its fiduciary duties owed Dow.

C. That by reason of the foregoing breaches of Consumers Power's contractual and fiduciary duties to Dow, the General Agreement should be and is cancelled and all remaining obligations of Dow under the General Agreement are discharged.

D. That Dow is entitled to such further and additional relief as that court should deem just and proper, including but not limited to recovery of damages resulting from Consumers Power's wrongful conduct including more than \$40,000,000 expended by Dow in direct reliance on Consumers Power's faithful adherence to its legal obligations.

COUNT III
Excuse by Reason of Failure
of Fundamental Assumptions

64. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

65. All remaining contract obligations of Dow should be excused by reason of the failure of fundamental assumptions upon which contract performance was based, including Consumers Power's inability to complete the Midland Nuclear Facility. As a result, Dow's performance to purchase steam has become commercially impracticable because of the occurrence of supervening contingencies which were not within the contemplation of the parties at the time the General Agreement was executed in June 1974, including:

A. The assumption that the fill upon which the plant structures were to be erected was adequately supported and suitable for construction of the Midland Nuclear Facility;

B. The assumption that the plant was capable of being constructed so as to meet the target dates of 1981 and 1982 for Unit 2 and the entire generating plant respectively;

C. The assumption that the plant would be constructed within a reasonable time at a commercially reasonable cost.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. Dow's contract obligations to purchase steam have been frustrated or rendered commercially impractical by the failure of fundamental assumptions upon which the General Agreement was based.

B. The failure of these fundamental assumptions were not caused by any actions of Dow.

C. Dow is entitled to a declaration that all of its remaining obligations under the General Agreement are expired.

COUNT IV
Calculation of Termination Payment
Under Article Nine of the 1978 General Agreement

66. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

67. To the extent that its obligations under the General Agreement are not legally discharged on one or more of the grounds set forth in Counts I-III, Dow notified Consumers Power that it has exercised its unqualified right to terminate in accordance with the provisions of Article 9(B)(1) of the General Agreement.

68. Although Consumers Power acknowledged for the first time on April 22, 1983 that commercial operation for process steam would not occur prior to December 31, 1984, it knew or had reason to know of its inability to meet this deadline at least as early as December 1979.

69. Consumers Power's false representations and nondisclosures concerning its ability to meet the December 31, 1984 commercial operation date were designed to prevent, and in fact did prevent, Dow from exercising its termination rights under the General Agreement. Consumers Power thereby sought to increase by many hundreds of millions of dollars the eventual termination charge which Consumers Power would claim that Dow was required to pay.

70. The foregoing actions of Consumers Power are in breach of the fiduciary obligations owed Dow as well as the General Agreement and further constitute fraudulent misrepresentation and non-disclosures in violation of Dow's common law rights. As the direct and proximate result of Consumers Power's failure timely to disclose its inability to complete the plant for commercial steam operation prior to December 31, 1984, Dow

has incurred substantial expenses which would not have been incurred had Consumers Power timely disclosed this inability.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That to the extent the General Agreement is not otherwise legally discharged, Dow has properly exercised its right to terminate under Article 9(B)(1).

B. That Consumers Power's communications to Dow concerning the commercial operation date for process steam were fraudulent, misleading, and in violation of Consumers Power's contractual and fiduciary obligations to Dow.

C. That in computing the termination charge, to the extent that payment is not otherwise excused, said termination charge shall be computed on the basis of a termination date at least as early as December 1978 when Consumers Power became unable to complete the plant for commercial steam operation prior to December 31, 1984.

D. That in computing the termination charge, to the extent that payment is not otherwise excused, said termination charge shall be reduced by that amount of expenses incurred by Dow since at least as early as December 1978 which would not have been incurred had Consumers Power timely disclosed its inability to complete the plant for commercial steam operation prior to December 31, 1984.

CONCLUSION
AND PRAYER

71. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

72. Consumers Power further owed to Dow at all relevant times a duty to exercise due care and to proceed in a competent, workmanlike manner on its part or on the part of its agents in the planning, supervision and construction of the Midland Nuclear Facility.

73. Consumers Power has breached its duty by failing to exercise due care in a competent, workmanlike manner in the planning, supervision and construction of the Midland Nuclear Facility. Consumers Power's actions have instead reflected a willful disregard for the rights of Dow and constituted recklessness or at minimum negligence. Dow has suffered serious financial injury as the direct and proximate result of Consumers Power's failure to exercise due care including the loss of over \$60,000,000.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That Consumers Power owed a duty to Dow to proceed in a competent workmanlike manner and with due care in the planning, supervision and construction of the Midland Nuclear Facility.

B. That Consumers Power has willfully disregarded and violated the aforementioned duties and through negligent conduct has caused Dow to suffer serious financial damages in excess of \$60,000,000.

C. That Dow is entitled to recover its damages as the result of Consumers Power's reckless and negligent conduct together with such further and additional relief as this Court shall deem just and proper including punitive and exemplary damages together with reasonable attorneys' fees.

Penelope A. Gaska
Manager, Specialty Products Manufacturing,
Energy and Utilities
Michigan Division
The Dow Chemical Company

*Cancellation of Dow. File
Midland contract*



**Consumers
Power
Company**

James B. Falahes
Vice Chairman of the Board

General Offices: 212 West Michigan Avenue, Jackson, Michigan 49201 • (517) 788-0600

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+10*

July 15, 1983

PRINCIPAL STAFF	
✓ AA	✓ ENF
D/RA	✓ ECS
A/RA	PAO
DR/RA	SLO
DR/MA	RC
DR/MSPI	
✓ DE	✓
ML	
OL	FILE

Mr. James G. Keppler
Regional Director
Nuclear Regulatory Commission
Region III
799 Roosevelt Road
Glen Ellyn, IL 60137

Dear Mr. Keppler:

As I advised you late yesterday afternoon by telephone, the Dow Chemical Company notified Consumers Power Company that it was exercising "its right of termination, effective immediately, by reason of Consumers Power's inability to meet the commercial steam operation date as defined in Section 9(B)1 of the General Agreement." I first learned of this action by Dow Chemical as a result of a telephone call at approximately 4:30 PM yesterday from Mr. Wayne M. Hancock, General Counsel of Dow Chemical Company. Mr. Hancock advised me that Dow's written notice of termination and a copy of the complaint filed against Consumers Power Company in the Midland Circuit Court had been hand-delivered to Mr. James W. Cook's office in Jackson at 4:00 PM yesterday. Mr. Cook was at the Midland Plant site.

I am enclosing copies of the notice of termination and the Complaint for Declaratory Judgment. In summary, the Complaint for Declaratory Judgment asked that the General Agreement be cancelled and all remaining obligations of Dow under the General Agreement be discharged. In addition, Dow is seeking damages from Consumers Power Company in the amount of \$60,000,000.

Obviously in the short time which has been available, Consumers Power Company has not fully evaluated the impact of the Dow Chemical Company's notice of termination and declaratory judgment action. We do not agree with the allegations contained in the declaratory judgment complaint and will deny the same. As to construction of the Plant, we are continuing on the schedule we have previously announced.

I would be pleased to respond to any further questions you may have regarding this situation.

Yours very truly,

JBF:im
Enc.

CC: Harold R. Denton
JDSelby
JWCook

JUL 18 1983

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DOW CHEMICAL U.S.A.

MIDLAND, MICHIGAN 48640

July 14, 1983

Mr. James W. Cook
Vice President
Projects, Engineering and Construction
Consumers Power Company
1945 West Parnell Road
Jackson, Michigan 49201

Dear Mr. Cook:

Pursuant to Section 9(E) of the June 21, 1978, General Agreement between Consumers Power and The Dow Chemical Company, notice is hereby given that Dow exercises its right of termination, effective immediately, by reason of Consumers Power's inability to meet the commercial steam operation date as defined in Section 9(B)1 of the General Agreement. This notice of termination is given with full reservation of Dow's legal rights, including the attached Complaint for Declaratory Judgment And Other Relief which Dow will be filing today in the Circuit Court for the County of Midland, Michigan. Should Consumers Power wish to discuss this notice or the matters raised in Dow's Complaint, Dow stands willing to do so.

Sincerely,

R. A. Gaska, Manager
Specialty Products Manufacturing,
Energy & Utilities
47 Building

Attachment

caj



STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 CONSUMERS POWER COMPANY,) COMPLAINT FOR DECLARATORY
) JUDGMENT AND OTHER RELIEF
)
 Defendant.) File No. 83-00- -CK-

Herbert H. Edwards (P13112)
and Kirkland & Ellis
Attorneys for Plaintiff

A. Introduction

1. By this Complaint and based upon the facts alleged herein and based upon its information and belief, plaintiff, The Dow Chemical Company, seeks a declaratory judgment declaring its legal rights and obligations with respect to the June 21, 1978 General Agreement for the sale of steam to Dow by defendant, Consumers Power Company, from its Midland Nuclear Facility currently under construction. Specifically, Dow seeks a declaration that all obligations of Dow under the General Agreement are cancelled and discharged because of Consumers Power's fraudulent misrepresentations and non-disclosures, Consumers Power's material breaches of its contractual and fiduciary obligations to Dow, and Consumers Power's inability to complete the Midland Nuclear Facility within any reasonable time or cost. Alternatively, if Dow's obligations are not deemed to be completely cancelled and discharged, Dow seeks a declaration that any termination payment required under the 1978 General Agreement must be substantially reduced by virtue of Consumers Power's wrongful conduct. Dow

further seeks a declaration that it is owed damages arising from Dow's expenditures of more than \$60 million in reliance on Consumers Power's fraudulent misrepresentations and non-disclosures as well as such further and additional relief as the Court deems just and proper.

B. The Parties

2. The Dow Chemical Company ("Dow") is a Delaware corporation headquartered at 2030 Dow Center in Midland, Michigan. Dow is a diversified international manufacturer of a wide range of chemicals and other products, including industrial chemicals and raw materials, specialty and agricultural chemicals, and consumer products. Since Dow's founding in 1897, one of its principal manufacturing complexes, currently referred to as the Michigan Division, has also been located in Midland. Dow currently manufactures approximately 100 major products at its Midland facilities and employs approximately 7,800 people in the Midland, Michigan area.

3. Consumers Power Company ("Consumers Power") is a Michigan corporation whose principal business is the sale of electricity and natural gas to a service area comprising most of the State of Michigan, including Midland. Consumers Power is the largest utility in Michigan and its revenues in 1982 exceeded \$2.7 billion.

C. Jurisdiction and Venue

4. Personal and subject matter jurisdiction of this Court is founded on Sections 600.601, 600.605, and 600.711 of the Michigan Compiled Laws and the Michigan General Court Rules of 1963. An actual controversy exists between Dow and Consumers Power and Consumers Power is a Michigan corporation carrying on a continuous and systematic part of its general business in Michigan.

5. Venue properly lies in the Circuit Court for the County of Midland under Section 600.1621(a) of the Michigan Compiled Laws because Consumers Power conducts business and maintains a place of business in Midland County.

D. The Prior Contracts Between Dow And Consumers Power

6. In the operation of its Midland, Michigan manufacturing facilities, Dow requires a continuous, reliable and economical supply of process steam. At all relevant times, Dow's Michigan Division has owned and operated its own powerhouses to supply its steam needs.

7. Beginning in 1966, Dow and Consumers Power engaged in discussions about the possibility of Consumers Power supplying steam to Dow from a nuclear plant it was planning to construct. As proposed, the Midland Nuclear Facility would consist of two nuclear steam supply systems, one of which (Unit 1) was designated to supply steam to Dow. As an inducement to Dow to discontinue its own production of steam and to rely in the future on steam from Consumers Power, Consumers Power indicated to Dow that the Midland Nuclear Facility would be capable of producing 4,050,000 pounds of steam per hour on a continuous, economical, and reliable basis as required by Dow.

8. At all relevant times, Consumers Power held itself out to Dow as capable of constructing the Midland Nuclear Facility in a workmanlike, safe and licensable manner, that such construction would proceed without undue delay, and that Consumers Power would undertake the project without incurring unreasonable or imprudent expenditures. Consumers Power also advised Dow that Bechtel Power Corporation ("Bechtel") would be the architect-engineer and construction manager for the project. On or about December 13, 1967, Consumers Power

and Dow executed an initial General Agreement under which Consumers Power agreed to supply steam to Dow on completion of the Midland Nuclear Facility (the "1967 Contract").

9. Under the 1967 Contract and at all times since, Consumers Power has retained sole responsibility for the design, construction, operation and maintenance of the Midland Nuclear Facility. Dow has no right of ownership, control or direction over the plant and Consumers Power has reserved to itself the exclusive right to make changes in the concept, design, construction and operation of the plant at any time and to whatever extent it deems desirable.

10. Because of Consumers Power's complete control over and superior knowledge of the design and construction of the plant, Dow has placed its complete faith, trust and confidence in Consumers Power. Because of the complete trust and confidence which Dow has placed in Consumers Power and because of the exclusive control exercised by Consumers Power over all phases of the project, Consumers Power has occupied a fiduciary relationship to Dow, in addition to its other obligations under the parties' agreements. In recognition of Consumers' fiduciary obligations, at all relevant times, Consumers has had an express contractual obligation to keep Dow fully informed of all material facts that would significantly affect the cost of steam to Dow, including projected cost and scheduling information.

11. Pursuant to the 1967 Contract, Dow and Consumers Power entered into a separate contract on January 30, 1974, governing the calculation of Dow's steam cost (the "1974 Steam Contract"). Under the 1967 and 1974 agreement, relying on Consumers Power's cost estimates, the parties agreed that upon completion of the Midland Nuclear Facility, the cost of steam to Dow would be based on that portion of the total plant design

and construction costs devoted to the facilities for generating and delivering steam to Dow. This portion of costs is referred to in the contracts as the Allocated Steam Investment. Under the contract formula, increases in the cost of the plant and delays in the plant's completion increase the cost of steam to Dow.

12. In 1967, Consumers Power estimated that the Midland Nuclear Facility would be completed prior to 1975 at a cost of \$256 million. After 1967, the Midland Nuclear Facility was subject to continuing scheduling delays and cost increases such that by September 1976, Consumers Power was predicting that it would complete both units by March 1982 at a total project cost of \$1.67 billion.

E. The 1978 General Agreement

13. As a result of these schedule slippages and cost increases and of disputes over the continued validity of the then existing contracts, Dow and Consumers Power undertook late in 1977 the negotiation of an entirely new agreement. A fundamental concern to Dow during these negotiations was to obtain from Consumers Power a firm date by which Consumers Power would complete the plant. Dow's need for such a date stemmed in large part from the continuing adverse effect on Dow's Michigan Division of the uncertainty as to when and at what cost the Midland Nuclear Facility would be completed. This uncertainty had had substantial adverse effects on the Michigan Division by preventing Dow from making long-range plans regarding the products to be manufactured at Dow's Midland facilities, Michigan Division employment levels, and capital projects, causing a reduction in Michigan Division operations.

14. Because of these concerns, Dow made it known to Consumers Power from the start of the negotiations that it was of critical importance to Dow that Consumers Power make full

disclosure of accurate, reliable and up-to-date cost and schedule information. Furthermore, if Consumers Power were unable to complete the Midland Nuclear Facility by a firm date, Dow wanted the express right to terminate any obligations to purchase steam. In the course of the negotiations which began in 1977 and concluded in June of 1978, the parties therefore agreed that all prior agreements be cancelled and that a new General Agreement be executed.

15. On or about June 21, 1978, Dow and Consumers Power entered into the General Agreement, attached hereto as Exhibit A (the "General Agreement"). Under the General Agreement, Consumers Power undertook to supply up to 4,050,000 million pounds of process steam per hour to Dow upon completion of the Midland Nuclear Facility. The General Agreement further provided that the cost to Dow of the steam would be based on the Allocated Steam Investment, reflecting a portion of the costs of constructing the facility, but that Dow would have no obligation to pay Consumers Power for steam until the Midland Nuclear Facility attained commercial operation for steam generation as defined in the General Agreement.

16. Recognizing the past history of the facility, the parties agreed to specific provisions intended to protect Dow from further cost increases and completion delays. For example, under Section 1(B) of the General Agreement, Consumers Power promised to "use its best efforts to place Unit 2 of the Generating Plant in commercial operation for electric service on or about March 1, 1981 and to place the entire Generating Plant in commercial operation for process steam service and electric service on or about March 1, 1982." Under Section 4(C)(4), Consumers Power further agreed to "avoid imprudent expenditures" and to "use its best efforts to optimize the capital investments includable in the Allocated Steam Investment."

17. Under Section 9(B)(1) of the General Agreement, the parties agreed that if Consumers Power became unable to declare the Midland Nuclear Facility in commercial operation for process steam by December 31, 1984, then Dow would be entitled to terminate the contract and pay Consumers a termination fee no larger than one-half of the prudently incurred Allocated Steam Investment expenditures as of the date of termination.

18. Under Section 1(C) of the General Agreement, Consumers Power undertook to keep "Dow currently informed whenever practical concerning Consumers Power's construction schedules, the progress of engineering design and construction, and proposed changes in engineering design, construction and operating and maintenance practices and procedures that will significantly affect the aggregate cost of process steam service to Dow."

F. Consumers Power's Fraudulent Misrepresentations
And Non-Disclosures in the Negotiation of the
1978 General Agreement

19. During the contract negotiations in 1977 and 1978 leading up to execution of the 1978 General Agreement, Consumers represented to Dow that it knew of no construction problem or other circumstances that would prevent it from placing the Midland Nuclear Facility in commercial operation by March 1982. Immediately before the execution of the contract, Dow specifically requested disclosure of any information adversely reflecting on the status, cost or completion of the project. Consumers Power assured Dow that it knew of no "surprises" or any other adverse and undisclosed information about the project. These representations were intended to and did in fact induce reliance on the part of Dow in executing the General Agreement in June 1978.

20. Consumers Power's representations concerning the absence of adverse and undisclosed information were false. Specifically, Consumers Power knew prior to the execution of the General Agreement that the Midland Nuclear Facility was being constructed on improperly placed and compacted fill and that these soils problems and other construction problems described hereafter likely would prevent Consumers Power from meeting its target schedule. Consumers Power thus misrepresented to Dow the status of the project and, in addition, concealed material information from Dow with the intent to induce Dow to enter into the General Agreement.

21. The soils problems concealed from Dow arose from Consumers Power's decision, because the Midland Nuclear Facility is located on the flood plain of the Tittabawassee River, to raise the level of the site by depositing and compacting more than 30 feet of fill. Rather than constructing foundations using underpinnings, pilings or other established techniques to rest the weight of the plant structures on bedrock or the undisturbed and compacted glacial deposits underlying the site, Consumers Power decided to place plant structures directly on top of the fill.

22. Among the structures were vital safety installations such as the emergency diesel generator building, the auxiliary building, storage tanks for emergency cooling water, service water pump structure, and numerous underground pipes and cables carrying cooling water and vital control systems. Because these structures would rest in whole or in part on fill, proper placement and compaction was essential to prevent the fill from settling under the weight of the structures. Excessive settlement and/or differential degrees of settlement of the fill can create serious unsafe conditions in any construction project and are of particular concern in a nuclear power plant because they can cause blockage or rupture of pipes

and cables carrying cooling water and electricity essential to the plant's safe operation.

23. On the basis of an engineering study completed in 1969 by the firm of Dames & Moore, Consumers Power adopted detailed specifications and procedures governing the fill to be used on the site and how it would be deposited, compacted and tested. Among other things, the specifications and procedures called for:

- (a) Use of specified kinds of unmixed, cohesive fill such as clay in areas containing safety-related structures;
- (b) Regular testing of fill for moisture content before and after placement on the plant site;
- (c) Control over the thickness of each layer of fill as it would be deposited on the site;
- (d) Use of qualified rollers and other compaction equipment to apply the necessary amount of compaction pressure on each layer of fill to achieve proper compaction;
- (e) Testing of the compacted fill at specified intervals to ensure that the required degree of density necessary to prevent settlement had been achieved;
- (f) Full-time supervision of all fill operations by a qualified geotechnical engineer.

24. Placement of the fill on the plant site took place from 1976 through 1977. Consumers Power failed to observe any of the previously identified controls or other standards of reasonable care and prudence. Instead, Consumers Power proceeded with the placement of the fill knowing that there was not proper supervision, that improper fill was being

used, that the fill had been insufficiently compacted, and that false or misleading test results were being relied upon to certify the fill as meeting standards of the U.S. Nuclear Regulatory Commission ("NRC"). Dow was not informed of any of these problems by Consumers Power at any time prior to the execution of the General Agreement.

25. In 1977, the administration building was constructed on the defective fill and excessive settlement occurred immediately. By August 1977, portions of the foundation of the administration building had settled up to 3-1/2 inches in one month. An informal investigation conducted by Consumers Power later in 1977 and concealed from Dow confirmed that there were serious deficiencies in the fill underlying the entire site, including the fill on which vital safety-related structures were about to be constructed. The results of this investigation, as well as all other facts known to Consumers Power concerning the negligent and improper fill placement, were concealed from Dow.

26. The 1977 Consumers Power investigation was limited to an examination of the fill in the vicinity of the administration building and a perfunctory test of two other portions of the site. Even this inadequate review revealed that there had been systematic errors in the placement and compaction of the fill. Among other things, the investigation at the administration building site found "voids" or pockets of air in the fill and unbroken lumps of clay up to 3 feet in diameter, demonstrating that the fill had not been compacted, contrary to Safety Analysis Reports certified by Consumers Power to the NRC.

27. To examine the entire safety-related portion of the site, Consumers Power conducted only one test boring. As a matter of prudent engineering practice, a single boring was

insufficient to determine the safety of fill over the complete site. Contrary to representations in the Safety Analysis Reports submitted to the NRC that unmixed cohesive fill had been used in safety-related areas, this single test demonstrated that Consumers Power had improperly used random fill consisting of mixed clay, sand and other materials with varying properties. Consumers Power's representations that unmixed cohesive fill had been used in the safety area were later determined by NRC officials to be material false statements.

28. Both before and after execution of the General Agreement, Consumers Power's reports documented that random fill was improperly used throughout the safety area and that the fill had not been adequately compacted to NRC safety standards. More than 600 separate tests taken during the fill work had shown that the fill was insufficiently compacted but were overruled or disregarded, while numerous instances of "passing" tests contained results which upon further examination revealed degrees of compaction physically impossible to achieve. At least three "audits" conducted by Consumers Power during the period 1974 to 1977 also verified numerous instances of failure to meet proper procedures or specifications, but no disclosure was made to Dow or to the NRC.

29. By at least the end of December 1977, the senior management of Consumers Power knew or should have known that the fill on which the Midland Nuclear Facility was being constructed was patently inadequate for construction of a nuclear power plant and potentially unsafe. Notwithstanding this information, Consumers Power made the conscious decision not to disclose this material information to the NRC. Consumers Power also made no disclosure to Dow during the negotiation of the General Agreement. Instead, Consumers Power decided to proceed with construction of the diesel generator building and

other safety-related structures on the fill, thereby creating the false and misleading appearance during the negotiations that construction was proceeding normally.

30. At the time the General Agreement was executed, Consumers Power was also aware, but did not disclose to Dow, that non-soils construction problems would affect its ability to fulfill its obligations under the General Agreement. Construction delays caused by engineering changes, work stoppages, and continuing failures to follow proper procedures and specifications were of such magnitude that Consumers Power decided in June 1978 to forego its usual practice of adopting a new schedule. Such a forecast, if properly prepared and disclosed, would have revealed Consumers Power's inability to meet the March 1981 and March 1982 completion dates represented to Dow in the General Agreement.

31. In reliance on Consumers Power's misrepresentations and non-disclosures during the 1977-78 negotiations regarding the status of the project, Dow executed the General Agreement. Had Dow known the true situation, it would not have signed the General Agreement.

G. Consumers Power's Misrepresentations And
Failures To Disclose
Since Execution Of The General Agreement

32. Since June 1978, Consumers Power has engaged in an ongoing pattern of misrepresentation and concealment from Dow of the true impact on cost and schedule caused by Consumers Power's negligence and willful misconduct in designing and constructing the plant. Specifically, this ongoing fraud constitutes a material breach of Consumers Power's contractual and fiduciary obligations and justifies cancellation of Dow's obligations to perform under the General Agreement. In addition, Consumers Power's concealment from Dow of the true cost and schedule was intended to prevent Dow from exercising its

right to terminate the General Agreement as described hereafter. Moreover, as the direct and proximate result of Consumers Power's concealment of the true status and schedule of the project, Dow has incurred millions of dollars in expenses, including more than \$60 million expended to construct its facilities to receive steam from Consumers Power. Dow has done so in reliance on the misrepresentations of Consumers Power regarding the status of the project. Had Dow been informed of the continuing delays and construction problems at the project, or Consumers Power's inability to meet the December 31, 1984 deadline, Dow would not have incurred these costs.

33. Prior to execution of the General Agreement, Consumers Power began construction of the diesel generator building and other safety-related structures. By July 22, 1978, scarcely a month after the execution of the General Agreement, settlement of the diesel generator building already exceeded 1-1/2 inches as compared to a total safety allowance of three inches over the 40-year projected lifetime of the Midland Nuclear Facility. Nevertheless, Consumers Power decided to continue construction and to conceal this information from Dow, despite the General Agreement provisions requiring Dow to be advised of such significant events.

34. By August 18, 1978, settlement of portions of the diesel generator building had reached four inches, exceeding the safety limit, even though the building was still only approximately half complete. On August 23, 1978, Consumers Power suspended construction of the diesel generator building and other safety structures and notified the NRC. At the same time, recognizing that its previous schedule estimates were no longer valid, Consumers Power decided again to delay preparation of a cost and schedule forecast for the project because soils problems and other uncertainties prevented any realistic forecast from being made. Despite its duty to disclose this

significant development to Dow, Consumers Power failed to do so.

35. Following the August 23, 1978 suspension of construction, Consumers Power conducted another investigation which confirmed that there had been systematic and gross negligence in the placement and compaction of fill underlying the entire site. The investigation concluded that essentially all moisture and density tests conducted during the placement and compaction of the fill had been improperly performed. As later summarized in a July 1979 report prepared by Bechtel, "there is no rational means of determining which test results are valid and which are not."

36. Despite the overwhelming evidence that the fill underlying the site was inadequate and potentially unsafe, Consumers Power elected on or about December 1978 to resume construction of the Midland Nuclear Facility. Consumers Power did so in the face of express warnings from NRC officials that Consumers Power was proceeding at its own risk. Consumers Power also decided not to remove and replace the unsafe fill but instead temporarily piled sand on portions of the site in an attempt to compact the defective fill. Consumers Power was specifically warned by NRC officials that they had not approved this procedure or the resumption of construction.

37. In December 1978, Consumers Power requested Bechtel to assess the impact on plant completion of soils remedial work. In April 1979, Bechtel informed Consumers Power that there would be at least an eight-month delay in the fuel load date for Unit 2 and a five-month delay for Unit 1. Subsequent schedule changes showed that the target dates Consumers Power had held out to Dow were no longer valid. These included a July 1979 Bechtel report and a November 1979 Consumers Power schedule, both of which identified further slippage in the schedule. Still further slippage became inevitable when Consumers

Power's investigation of the fill confirmed that the remedial soils measures it had taken were inadequate and that years of additional delay would be necessary to devise and implement further remedial measures.

38. On December 6, 1979, the Nuclear Regulatory Commission issued an order finding that there had been a "breakdown in quality assurance related to soil construction activities under and around safety-related structures and systems." The NRC also found that Consumers Power had made material false statements in certifying its compliance with fill procedures outlined in the Final Safety Analysis Report. The NRC determined that there remained an "unresolved safety issue concerning the adequacy of the remedial action to correct the deficiencies in the soil construction under and around safety-related structures and systems". Consumers Power was therefore ordered to terminate all further soils related work.

39. It was abundantly clear by at least the end of December 1979, in light of the NRC order, that Consumers Power could not meet the General Agreement's target completion dates. Furthermore, Consumers Power also knew or should have known that it was unable to meet the December 31, 1984 deadline for commercial steam operation in view of the fact that the major structures of the facility were resting on thirty feet of inadequate and unsafe fill and the NRC had rejected the remedial measures which Consumers Power had taken.

40. Consumers Power's inability to meet the 1984 deadline was confirmed in January 1980 when Bechtel provided Consumers Power with an updated cost and schedule forecast, known as Forecast 6, which declared that Consumers Power would be unable to complete the Midland Nuclear Facility until 1985. The Bechtel forecast also projected that total plant costs would be \$3.1 billion rather than the \$1.67 billion previously estimated.

41. Despite its knowledge that it could not complete the project by 1984, Consumers Power decided to conceal from Dow its inability in order to prevent Dow from terminating the General Agreement under Section 9(B)(1). Thus, Consumers Power publicly stated that it refused to accept Bechtel's estimates for plant completion. At the same time, however, Consumers Power performed internal studies disclosing that its principal alternatives were (i) either to complete the nuclear facility in May 1985 and assume the risk that Dow would terminate the General Agreement; or (ii) to terminate construction and either write-off the project or convert it to coal-fired power. Consumers Power recognized that if Dow were to exercise its right to terminate under Section 9(B)(1), Dow's termination payment based on costs incurred as of April 1, 1980 would be a maximum of \$185 million. Had Consumers Power disclosed to Dow that it could not meet the 1984 deadline, Dow would have terminated the contract.

42. On or about March 5, 1980, Consumers Power decided to continue construction of the Midland Nuclear Facility and fabricate an artificial schedule purporting to show that it could complete the project before December 1984, thereby depriving Dow of its right to terminate. Pursuant to its March 1980 plan, Consumers Power thereafter took the public position that it intended to find ways of shortening the schedule. At the time it took this public position, Consumers Power concluded internally on May 5, 1980, that "we generally agree with Bechtel both on schedule and cost."

43. On June 25, 1980, to further the concealment of its inability to meet the 1984 deadline, Consumers Power directed Bechtel to prepare a new construction schedule under which the Midland Nuclear Facility would be in operation by July 1984. This date, which shortened the Bechtel estimate by one year, was announced for the specific purpose of, among other things,

preventing Dow from exercising its right to terminate the General Agreement.

44. In order to effect the continuing concealment, Consumers Power and its agent, Bechtel, agreed on July 10, 1980 that in all statements and documents prepared "for public consumption," they would refer to Consumers Power's "current project schedule" dates purporting to show that the 1984 commercial steam operation deadline could be met. At the same time, it was agreed for internal purposes to use the true schedule which recognized that the 1984 deadline would not be met.

45. Dow was not informed of the true schedule. Instead, at all times between July 10, 1980 and April 11, 1983, Consumers Power assured Dow that the plant would be in commercial operation by December 31, 1984. Throughout this period of deception, Consumers Power knew or should have known with each passing day that the 1984 deadline was ever more unattainable, but refused publicly to acknowledge these facts.

46. For example, on November 9, 1982, Consumers Power called a press conference to discuss the plant's schedule at which a Consumers Power official specifically denied that the schedule contrived for public consumption would not be met. Following the press conference, on November 15, 1982, Consumers Power informed Dow that no new completion dates would be made available to Dow until early February 1983.

47. In early February, Consumers Power again concealed from Dow the existence of its right to terminate. Instead of admitting its inability to meet the deadline, Consumers Power notified Dow that a new schedule would not be released until April. On February 18, 1983, Dow requested Consumers Power to provide "meaningful written assurance" that the 1984 deadline would be met. On March 7, 1983, Consumers Power once again refused to admit its inability to meet the

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1984 deadline and instead responded that "April will be the earliest time we can give you the benefit of our considered judgment on cost and schedule."

48. Not until April 11, 1983 did Consumers Power finally admit to Dow that Unit 2 would not go into commercial operation before February 1985 and that completion of Unit 1 would be delayed until August 1985. Consumers Power further estimated that the total cost of the project would be \$4.43 billion, an increase of more than \$1 billion over its previous estimates. By virtue of the April 11 announcement, for the first time Dow possessed the unqualified right to terminate under Article 9(B)(1) of the General Agreement.

H. Consumers Power's Other Material Breaches
And Negligence In The Performance
Of the 1978 General Agreement

49. The misrepresentations and non-disclosures alleged above constitute material breaches of Consumers Power's contractual and fiduciary duties. In addition, Consumers Power has since June 1978 committed other material breaches by failing to use its best efforts to complete the plant and by failing to avoid imprudent expenditures in the design and construction of the Midland Nuclear Facility. Consumers Power has also negligently and willfully failed to exercise due care in the construction of the Midland Nuclear Facility.

50. Since 1978, Consumers Power's mismanagement of the Nuclear Facility project has resulted in repeated schedule delays and inordinate cost increases. Among other things, as a result of the negligence of Consumers Power in the placement and compaction of the fill on the Midland Nuclear Facility site and its imprudent choice of remedial measures unacceptable to the NRC, Consumers Power placed itself in a position whereby removal and replacement of the deficient fill could not be accomplished without demolishing the nuclear facility. Consumers

Power then adopted a costly and untested underpinning program involving tunneling under existing structures and installing new foundations, further adding to the delay and expense of the project.

51. NRC officials have described the magnitude and complexity of the underpinning program as equivalent to building a third nuclear reactor on the site. Under present construction schedules released by Consumers Power, the earliest the underpinning program can be completed is in 1985. As a consequence, more than eight years of delay in the Midland Nuclear Facility will have elapsed from the August 1977 detection of settlement at the administration building. During this same period, Consumers Power's estimates of the cost of the nuclear facility have increased by nearly \$3 billion.

52. Continuing quality assurance problems at the Midland Nuclear Facility have resulted in the NRC's concluding that there is no reasonable assurance that Consumers Power will construct a nuclear facility that meets NRC requirements for licensing for commercial operation. For example, since the underpinning program began, the NRC has ordered the work to be halted at least twice because of negligence and lack of supervision by Consumers Power. On January 7, 1981, the NRC fined Consumers Power \$38,000 for quality assurance infractions related to the negligent installation of heating, ventilating and air-conditioning equipment. Two years later, on February 8, 1983, the NRC imposed a civil penalty of \$120,000 on Consumers Power for yet another breakdown of its quality assurance program.

53. On December 2, 1982, in the face of mounting pressure from the NRC, Consumers Power halted all non-soils, safety-related construction because of its continuing inability to manage construction in a competent and licensable manner. Jurisdiction over the project has been assigned to the NRC Office of Special Cases, an office specially created to review

the most troubled nuclear projects. Because of its own negligence and mismanagement, Consumers Power has been subject to increased scrutiny and investigation by the NRC, leading to further increases in the plant's cost and unreasonably delaying its completion.

54. In light of the continuing history of Consumers Power's negligence, quality assurance breakdowns and other failures, there is no reasonable prospect that Consumers Power will complete the Midland Nuclear Facility at a reasonable cost and within a reasonable time, if indeed the plant will ever be finished. It now appears likely that the NRC will order a reinspection of virtually all plant systems and will require an independent third-party verification of design and construction. Such actions will require at least a year of further delay and additional substantial cost increases by themselves. Because of the history of serious safety and other problems discovered to date, it is reasonable to expect further delays and cost increases, if not permanent termination of construction, to result from any additional inspection of the Midland Nuclear Facility and the discovery of additional material defects concealed thus far from Dow.

55. Based on the present status of the Midland nuclear facility and its past history, Consumers Power's April 11, 1983 cost and schedule forecast was itself a continuation of Consumers Power's pattern of concealment and misrepresentation. Because of the continuing negligence and recklessness of Consumers Power and the numerous unresolved licensing and safety questions that have resulted, the Midland Nuclear Facility may never be completed and in any event it certainly will not come into commercial operation before 1986 at the earliest and at a cost of less than \$6.0 billion. The Midland Nuclear Facility, if completed, would produce energy at a commercially unreasonable

cost contrary to the assumptions on which the General Agreement was premised.

I. Dow's Termination Of The General Agreement

56. Following Consumers Power's April 11, 1983 announcement, Dow undertook to determine the reasons for Consumers Power's failure to complete the Midland Nuclear Facility. Dow demanded a review of a large number of Consumers Power documents never before provided to Dow, a portion of which have now been produced. The documents confirm that a continuous and systematic practice of misrepresentation and nondisclosure has been perpetuated by Consumers Power in derogation of its obligation to keep Dow fully and accurately informed of all material facts concerning the project's cost and schedules.

57. Accordingly, for all of the reasons described in this Complaint, Dow served notice on Consumers Power that it was terminating the General Agreement pursuant to Section 9(B)(1) and reserving its rights to pursue its legal remedies under this Complaint.

COUNT 1
Fraudulent Misrepresentations and Non-Disclosures

58. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

59. At all relevant times Consumers Power owed Dow a duty to refrain from making material misrepresentations. Under the General Agreement, Consumers Power also owed the duty affirmatively to disclose on a current basis all material information which could significantly affect Dow's rights and obligations under the General Agreement. Because of the fiduciary relationship owed by Consumers Power to Dow, Consumers Power was required to adhere to an even higher standard of full and fair disclosure than would ordinarily be applicable.

60. As previously alleged, Consumers Power has engaged in an ongoing series of material misrepresentations and non-disclosures, in disregard of its common law, fiduciary and contractual duties, beginning as early as 1977 and continuing until at least the date of this action. Said misrepresentations and non-disclosures were intended by Consumers to be relied upon, and were relied upon, in inducing Dow to enter into the 1978 General Agreement. Thereafter, Consumers Power's misrepresentations and non-disclosures were calculated to prevent or delay Dow from exercising its legal right to terminate the contract and were also designed to conceal Consumers Power's negligence and incompetence in meeting its obligations to construct a nuclear generating plant in a safe, efficient, workmanlike manner while avoiding all imprudent expenditures. Dow did in fact justifiably rely to its detriment on these misrepresentations and non-disclosures which were false and misleading by, among other things, expending over \$60,000,000 as a direct and proximate result.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That during the negotiations leading up to the execution of the 1978 General Agreement, Consumers Power engaged in material misrepresentations and non-disclosures which induced Dow to enter into the 1978 General Agreement.

B. That after the execution of the 1978 General Agreement, Consumers Power engaged in ongoing misrepresentations and non-disclosures for the purpose of concealing from Dow material information concerning the cost and scheduling of the project.

C. That the foregoing material misrepresentations and non-disclosures were relied upon by Dow to its detriment.

D. That by reason of Consumers Power's wrongful conduct, the General Agreement should be and is legally cancelled and any and all obligations of Dow under said General Agreement are discharged.

E. That Dow is entitled to such further and additional relief as this Court shall deem just and proper including actual damages in excess of \$60,000,000 as well as punitive and exemplary damages and reasonable attorneys' fees.

COUNT II
Material Breach of Contract and of Fiduciary Duties

61. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

62. Consumers Power owed Dow the following duties under the General Agreement and by reason of the fiduciary relationship between the parties:

a. Consumers Power was required under Article 1(B) of the General Agreement to use its best efforts to attain commercial operation of Unit 2 for electric service by March 1, 1981 and to place the entire generating plant in commercial operation by March 1, 1982. This contract obligation, as well as its fiduciary obligation, required Consumers Power at minimum to proceed with all phases of construction and licensing with due diligence and in a non-negligent, workmanlike manner so as to achieve these dates;

b. Consumers Power was required under Article 4(C) of the General Agreement, as well as under its fiduciary obligations, to avoid imprudent expenditures so as to minimize the aggregate cost of the price of steam to Dow;

c. Consumers Power was further required under Article 1(C) of the General Agreement, as well as under its fiduciary obligations, to keep Dow

currently informed of all material facts which would significantly affect the cost or timing of its obligations under the General Agreement.

d. Consumers Power was further subject to an implied obligation under the General Agreement to exercise good faith, due care and reasonable diligence in the performance of its contractual obligations.

63. As previously alleged, Consumers Power has repeatedly violated each of the foregoing legal obligations. Individually and collectively these actions constitute material breaches of the General Agreement, entitling Dow to cancel all remaining contract obligations. As the direct and proximate result of Consumers Power's material breaches, Dow has suffered substantial financial injury including the loss of over \$60,000,000 expended in reliance on the General Agreement.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That Consumers Power has materially breached the General Agreement.

B. That Consumers Power has materially breached its fiduciary duties owed Dow.

C. That by reason of the foregoing breaches of Consumers Power's contractual and fiduciary duties to Dow, the General Agreement should be and is cancelled and all remaining obligations of Dow under the General Agreement are discharged.

D. That Dow is entitled to such further and additional relief as this court should deem just and proper, including but not limited to recovery of damages resulting from Consumers Power's wrongful conduct including more than \$60,000,000 expended by Dow in direct reliance on Consumers Power's faithful adherence to its legal obligations.

COUNT III
Excuse by Reason of Failure
of Fundamental Assumptions

64. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

65. All remaining contract obligations of Dow should be excused by reason of the failure of fundamental assumptions upon which contract performance was based, including Consumers Power's inability to complete the Midland Nuclear Facility. As a result, Dow's performance to purchase steam has become commercially impracticable because of the occurrence of supervening contingencies which were not within the contemplation of the parties at the time the General Agreement was executed in June 1978, including:

a. The assumption that the fill upon which the plant structures were to be erected was adequately compacted and suitable for construction of the Midland Nuclear Facility;

b. The assumption that the plant was capable of being constructed so as to meet the target dates of 1981 and 1982 for Unit 2 and the entire generating plant respectively.

c. The assumption that the plant would be constructed within a reasonable time at a commercially reasonable cost.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. Dow's contract obligations to purchase steam have been frustrated or rendered commercially impractical by the failure of fundamental assumptions upon which the General Agreement was based.

B. The failure of these fundamental assumptions were not caused by any actions of Dow.

C. Dow is entitled to a declaration that all of its remaining obligations under the General Agreement are excused.

COUNT IV
Calculation of Termination Payment
Under Article Nine of the 1978 General Agreement

66. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

67. To the extent that its obligations under the General Agreement are not legally discharged on one or more of the grounds set forth in Counts I-III, Dow notified Consumers Power that it has exercised its unqualified right to terminate in accordance with the provisions of Article 9(B)(1) of the General Agreement.

68. Although Consumers Power acknowledged for the first time on April 11, 1983 that commercial operation for process steam would not occur prior to December 31, 1984, it knew or had reason to know of its inability to meet this deadline at least as early as December 1979.

69. Consumers Power's false representations and nondisclosures concerning its ability to meet the December 31, 1984 commercial operation date were designed to prevent, and in fact did prevent, Dow from exercising its termination rights under the General Agreement. Consumers Power thereby sought to increase by many hundreds of millions of dollars the eventual termination charge which Consumers Power would claim that Dow was required to pay.

70. The foregoing actions of Consumers Power are in breach of the fiduciary obligations owed Dow as well as the General Agreement and further constitute fraudulent misrepresentation and non-disclosures in violation of Dow's common law rights. As the direct and proximate result of Consumers Power's failure timely to disclose its inability to complete the plant for commercial steam operation prior to December 31, 1984, Dow

has incurred substantial expenses which would not have been incurred had Consumers Power timely disclosed this inability.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That to the extent the General Agreement is not otherwise legally discharged, Dow has properly exercised its right to terminate under Article 9(B)(1).

B. That Consumers Power's communications to Dow concerning the commercial operation date for process steam were fraudulent, misleading, and in violation of Consumers Power's contractual and fiduciary obligations to Dow.

C. That in computing the termination charge, to the extent that payment is not otherwise excused, said termination charge shall be computed on the basis of a termination date at least as early as December 1979 when Consumers Power became unable to complete the plant for commercial steam operation prior to December 31, 1984.

D. That in computing the termination charge, to the extent that payment is not otherwise excused, said termination charge shall be reduced by that amount of expenses incurred by Dow since at least as early as December 1979 which would not have been incurred had Consumers Power timely disclosed its inability to complete the plant for commercial steam operation prior to December 31, 1984.

COUNT V
Negligence

71. The allegations of paragraphs 1-57 are hereby realleged and incorporated by reference.

72. Consumers Power further owed to Dow at all relevant times a duty to exercise due care and to proceed in a competent, workmanlike manner on its part or on the part of its agents in the planning, supervision and construction of the Midland Nuclear Facility.

73. Consumers Power has breached its duty by failing to exercise due care in a competent, workmanlike manner in the planning, supervision and construction of the Midland Nuclear Facility. Consumers Power's actions have instead reflected a willful disregard for the rights of Dow and constituted recklessness or at minimum negligence. Dow has suffered serious financial injury as the direct and proximate result of Consumers Power's failure to exercise due care including the loss of over \$60,000,000.

WHEREFORE, Dow prays that the Court adjudge the legal rights of the parties as follows:

A. That Consumers Power owed a duty to Dow to proceed in a competent workmanlike manner and with due care in the planning, supervision and construction of the Midland Nuclear Facility.

B. That Consumers Power has willfully disregarded and violated the aforementioned duties and through negligent conduct has caused Dow to suffer serious financial damages in excess of \$60,000,000.

C. That Dow is entitled to recover its damages as the result of Consumers Power's reckless and negligent conduct together with such further and additional relief as this Court shall deem just and proper including punitive and exemplary damages together with reasonable attorneys' fees.

Remigius A. Gaska
Manager, Specialty Products Manufacturing,
Energy and Utilities
Michigan Division
The Dow Chemical Company

STATE OF MICHIGAN)
) SS.
COUNTY OF MIDLAND)

On this 14th day of July, 1983, before me personally came the above-named Remigius A. Gaska and made oath that he has read the foregoing Complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge or, on information and belief, he believes it to be true.

Notary Public

My Commission expires _____

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Dated: July 14, 1983