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NUCLEAR REGULATORY COMMISSION
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OFFICE OF SECRETARY
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Memorandum for: James G. Keppler, Regional Administrator
Region III

From: James P. Murray
Acting Executive Legal Director

SUBJECT: CONTENTIONS IN THE MIDLAND LICENSING PROCEEDING

During the evidentiary hearing in the Midland OL/OM proceeding conducted in the last week of July 1983, Intervenor Stamiris filed a motion to litigate in the OM proceeding three contentions based on certain of the allegations contained in the complaint filed by Dow Chemical Company against Consumers Power Company in the Circuit Court for the County of Midland, Michigan on July 14, 1983. Specifically, the three contentions proposed by Ms. Stamiris were:

1. Consumers misrepresented its time schedule for completion of the Midland plants to the NRC, including the NRC staff and this Licensing Board.

2. Consumers used and relied on U.S. Testing test results to fulfill NRC regulatory requirements while knowing that these test results were invalid.

3. Consumers knowingly represented to the NRC that the single test boring taken near the diesel generator building demonstrated that unmixed cohesive fill had been used as a foundation for safety-related structures at the site even though this test boring actually indicated that random fill had been improperly used in these areas.

On May 7, 1984, long before Consumers Power Company announced suspension of construction at Midland, the Atomic Safety and Licensing Board entered an Order admitting for litigation the first two of the above contentions and rejecting the third. (A copy of this order is attached.)

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Because of the uncertainty which now exists regarding the Midland facility, it is not now clear on what time schedule, if any, these contentions will be considered by the Licensing Board. Nevertheless, since the contentions allege improper conduct on Consumers part you may wish to consider putting them in the allegation tracking system anyway.

James P. Murray
Acting Executive Legal Director

Enclosure: As stated

LBP-84-20

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. Frederick P. Cowan
Dr. Jerry Harbour

ASLBP Nos. 78-389-03 OL
80-429-02 SP

In the Matter of

CONSUMERS POWER COMPANY

(Midland Plant, Units 1 and 2)

Docket Nos. 50-329 OL
50-330 OL

Docket Nos. 50-329 OM
50-330 OM

May 7, 1984

MEMORANDUM AND ORDER
(Ruling on Motions Arising from Dow Litigation)

On July 14, 1983, Dow Chemical Co. filed suit in the Circuit Court for the County of Midland, Michigan against Consumers Power Co. (hereinafter CPC or Applicant), seeking a declaratory judgment and monetary relief arising out of a contract under which the Applicant agreed to supply Dow with steam to be produced by the Midland facility. During our first hearing session in Midland, Michigan following that filing, Ms. Barbara Stamiris and Ms. Mary Sinclair, Intervenors in this consolidated proceeding, each filed a motion based on the Dow lawsuit. Ms. Stamiris seeks to litigate in the OM proceeding three contentions based on Dow's complaint (Dow contentions). Ms. Sinclair seeks to hold open the OM/OL record pending the completion of the Dow lawsuit.

The Applicant opposes litigation of all three of the Dow contentions. The NRC Staff would have us litigate all three of them. Both the Applicant and Staff oppose Ms. Sinclair's motion.

For reasons hereinafter set forth, we admit for litigation two of the three contentions proposed by Ms. Stamiris and decline to admit the third. We also deny Ms. Sinclair's motion, but without prejudice to her moving to supplement or reopen the record should the Dow lawsuit uncover information of significance to this proceeding and not a part of the existing record or the record to be developed hereafter.

I. Stamiris Motion

A. Ms. Stamiris' motion was presented orally on July 28, 1983 (Tr. 19358-65) and was followed by a written motion dated August 8, 1983 (corrected on August 12, 1983). As set forth in the written motion, Ms. Stamiris is seeking to litigate the following three contentions derived from the Dow lawsuit:[1]

1. Consumers misrepresented its time schedule for completion of the Midland plants to the NRC, including the NRC Staff and this Licensing Board. See paragraphs 20, 37, 39-48.

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[1] The July 14, 1983 complaint was dismissed by the Court sua sponte for procedural reasons on July 15, 1983, with directions to Dow to file a complaint complying with specified procedures within 10 days. Dow filed a First Amended Complaint on July 18, 1983. Paragraph references in the proposed contentions refer to paragraphs of the initial July 14, 1983 complaint (which is considerably more detailed than the First Amended Complaint).

2. Consumers used and relied on U.S. Testing test results to fulfill NRC regulatory requirements while knowing that these test results were invalid. See par. 24, 35.

3. Consumers knowingly represented to the NRC that the single test boring taken near the diesel generator building demonstrated that unmixed cohesive fill had been used as a foundation for safety-related structures at the site even though this test boring actually indicated that random fill had been improperly used in these areas. See par. 27.[2]

Ms. Stamiris further sought discovery on these contentions, both in the form of new discovery and as a claim that certain documents referenced in the Dow complaint had not been turned over to her in response to earlier discovery requests which, she claims, called for production of such documents.

On August 17, 1983, the Applicant filed a response (corrected on August 18, 1983) which offered to make available to parties the documents which it had provided to Dow ("Dow documents") and to which reference was made in the Dow complaint. The Applicant urged that we defer ruling on the contentions pending examination by the Intervenors of the Dow documents, and that, if Ms. Stamiris found it appropriate,

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2 This third contention was later restated as follows:

Consumers knowingly misrepresented to the NRC that a single test boring taken near the diesel generator building indicated that unmixed cohesive fill had been used, or alternatively, did not disclose to the NRC that the single test boring demonstrated the use of random, improperly compacted fill in the area and constituted evidence of site-wide problems.

* Second Supplemental Memorandum, dated October 5, 1983.

she should thereafter supplement or resubmit her motion. On the merits, however, the Applicant set forth its grounds for opposing all three contentions.

In a telephone conference call on August 25, 1983, we heard arguments of all parties concerning the Applicant's response and we adopted the Applicant's suggestion that we defer ruling on Ms. Stamiris' proposed contentions and request for discovery until such time as all parties had had a chance to review the Dow documents. We also requested the Applicant to make available certain other documents. Memorandum and Order (Memorializing Telephone Conference Call of 8/25/83), dated August 29, 1983. On or about August 25, 1983, the Applicant made available the Dow documents; on September 14, 1983 it provided the additional documents identified by the Board.

Thereafter, on September 21, 1983, Ms. Stamiris filed a Supplemental Memorandum which, as a result of time constraints (Tr. 20792), was limited to the first of her contentions. On the same day, we held oral argument on all of her contentions, in which all parties participated (Tr. 20791-873). At that time, the Staff took the position that all three should be accepted (Tr. 20805-806). On October 5, 1983, with leave of the Board granted on September 23, 1983 (Tr. 21202), Ms. Stamiris filed a Second Supplemental Memorandum, in support of her second and third proposed contentions. The Applicant filed a written response on October 14, 1983 (corrected on October 17, 1983). We heard further argument on those contentions on October 31 (Tr. 21297-305).

During the early part of April, 1984, counsel for the Applicant and NRC Staff each telephoned the Board to advise us that each would be filing additional information bearing on the Dow contentions and to suggest that we defer our ruling on those contentions (which was then imminent) until we had received the additional information.[3] We have followed that suggested course of action.

The first communication we received was a Board Notification from the Staff (BN 84-091), dated April 27, 1984, advising that an allegation regarding misrepresentation of soils data provided to NRC had been received, that it could be material and relevant both to QA/QC issues before us and to the proposed Dow contentions, and that the allegation was being referred to the Office of Investigations (OI) for evaluation. No additional identifying information was set forth, but we presume (from the reference to "soils data") that the information would have a bearing on the second or third proposed contention.

The second communication we received was a letter from the Applicant, dated April 30, 1984, advising that CPC had become aware of discrepancies in records of several borings made during the 1977 investigation of the settlement of the administration building. This information has a potential relevance to proposed contentions 2 and 3.[4]

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3 The Applicant confirmed its telephone communication by letter dated April 17, 1984, which has been circulated to all parties.

4 Apparently this is not the information which the Applicant advised us by telephone was forthcoming.

Finally, by letter also dated April 30, 1984, the Applicant advised us that document discovery in the CPC-Dow litigation had brought to light certain Bechtel documents bearing on Bechtel Forecast 6 which, according to the Applicant, may be inconsistent with its response to Ms. Stamiris' motion. (This is the information about which the Applicant had earlier notified us.) The Applicant further advised that the Bechtel documents are subject to a protective order in the Dow litigation and cannot be released at this time. CPC suggests that we rule on the "Dow" issues without regard to the newly discovered information (although it offers to initiate the process under the protective order for disclosure of the documents, if we deem it necessary).

B. In proposing her contentions, Ms. Stamiris asserts that all three of them bear on her already-admitted management attitude contentions and that, accordingly, the record should be supplemented or reopened to incorporate the newly developed information brought out by the Dow complaint. In her written motion, she asserts that, in considering her proposals, we should act under our inherent authority to shape the course of proceedings over which we preside (citing, inter alia, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 201-08 (1978); 10 CFR § 2.718(e); and 5 U.S.C. § 556(c)).

In contrast, the Applicant regards the first contention as a new contention and thus subject to the requirements for late-filed contentions set forth in 10 CFR § 2.714(a). With respect to the second and third contentions, the Applicant would utilize the standards for

reopening a record. In asserting that we should consider all three new issues, the Staff does not definitively spell out what standards we should utilize.

We recognize that Ms. Stamiris has raised a number of management-attitude issues in this proceeding and that her first issue here bears ultimately on that subject. Nonetheless, the subject matter of her other management-attitude contentions--i.e., "providing information [to NRC] relevant to health and safety standards with respect to resolving the soil settlement problems" (OM Contention 1), and implementation of the QA program with respect to soil settlement issues (OM Contention 3)--is far removed from the scheduling representations on which the first proposed contention is founded. In admitting Ms. Stamiris' earlier management-attitude contentions, we explicitly limited their managerial-attitude aspects "to factors which could be said to bear upon the Applicant's managerial attitude in resolving [soil settlement] issues." Prehearing Conference Order, dated October 24, 1980, at 4 (unpublished). The management attitude alleged in the first proposed contention (as well as in the material false statement alleged in the Modification Order) may be analogous to (and hence have some bearing on) the attitude alleged in OM Contentions 1 and 3, but the technical subject matter is disparate enough that the first proposed contention must properly be deemed a new contention.

That being so, we seriously doubt whether we could employ our general authority to shape the course of a proceeding as the foundation for accepting such a new contention, particularly since the Commission

has in place explicit standards for dealing with new "late-filed" contentions. 10 CFR § 2.714(a).[5] We thus will apply the standards for late-filed contentions in determining whether the first proposed contention should be accepted.

As for the second and third contentions, both raise allegedly new information bearing on issues already litigated. Ms. Stamiris' motion for us to consider this information is in substance a motion to reopen the record on such issues. Because the Commission has explicit standards governing the reopening of the record of a proceeding to consider new information on issues already litigated, we decline to use our general authority to shape the course of a proceeding as the foundation for considering what in essence is a motion to reopen the record. We will instead consider the second and third contentions under standards for reopening the record.[6]

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5 A "late filed" contention is any contention filed after 15 days prior to the first special prehearing conference which (in the OM proceeding) was held in September, 1980. 10 CFR § 2.714(b); see Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576 (1982).

6 The Applicant would also have us apply the standards for reopening a record to the first contention (response, pp. 6-7, 28-29). If we regarded the contention as adding new information to matters already litigated, we would have done so (but would not apply standards for late-filed contentions). Since we regard the first proposed contention as a new contention, and since (as Ms. Stamiris points out, Tr. 20838) the OM record was not closed at the time it was filed, we decline to apply the standards for reopening a record to that contention.

The allegedly new information in these contentions was proffered prior to the close of the record on the segment of the proceeding in which the matters were litigated. For that reason, we will evaluate these contentions on the basis of the same standards we spelled out in ruling on motions of Ms. Stamiris and the Applicant earlier in this proceeding--i.e., whether the motion was timely and whether it presents important information regarding a significant issue. See Memorandum and Order (Denying Motion to Reopen Record on Containment Cracks), LBP-83-50, 18 NRC 242, 246-48 (1983); Applicant's Motion to Reopen and Supplement the Record on Sinclair Contention 14, dated October 28, 1983, at 1-3 (ruled upon favorably by Licensing Board at Tr. 22655-56).[7] See also p. 18, infra.

C. We now turn to each of Ms. Stamiris' proposed contentions.

1. Inasmuch as we are considering Ms. Stamiris' first contention--which alleges that Consumers misrepresented to the NRC the time schedule for completion of the facility--as a late-filed contention, we must initially consider whether the contention meets

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7 The circumstance that our ruling here follows the closing of the record of a major segment of the OM/OL proceeding does not alter the governing standards, which are based on the status of the record at the time the proposed contentions were first offered. Cf. Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC ___, ___ n.43 (March 14, 1983) (slip op. p. 89, n.43).

normal contention requirements. If so, we must additionally consider the factors for late-filed contentions set forth in 10 CFR § 2.714(a)--i.e.:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In applying these factors, we must determine whether application of all of the five factors, on balance, favors admission of the contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); see also Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 576-78 (1982). In balancing the factors, however, we are not necessarily required to give the same weight to each one of them. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 22 (1977) (cited approvingly by the Commission in Catawba, CLI-83-19, supra, 17 NRC at 1046); Midland, LBP-82-63, supra, 16 NRC at 577. Where a proponent demonstrates "good cause" for late filing, the showing required on the other factors is decreased. St. Lucie, ALAB-420, supra, 6 NRC at 22; Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83

(1978); cf. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

Turning first to whether the normal contention requirements have been satisfied, the Commission's rules require that there be filed "contentions which petitioner seeks to have litigated * * *, and the bases for each contention set forth with reasonable specificity." 10 CFR § 2.714(b). The Applicant claims that Ms. Stamiris has not satisfied the basis and specificity requirements (response p. 28).

The basis asserted by Ms. Stamiris is primarily the first Dow complaint. The Applicant asserts that Ms. Stamiris should back up her accusations "with something more substantial than allegations made in a complaint" (id.). Back of this claim is its view that a complaint represents no more than unproved allegations--i.e., what a party hopes to prove--and may not be regarded as "new evidence" (id. at 14). At oral argument, the Applicant portrayed the complaint as "a lawyer's document * * * an advocate's piece" (Tr. 20841). The Applicant also emphasizes that it has denied the allegations of the complaint (response, p. 17). In short, the Applicant appears to be asserting that a complaint in a judicial action cannot serve as a basis for a contention, at least where its allegations have been denied.

We disagree. Under a long line of NRC holdings, we should not attempt to ascertain, prior to admitting a contention, the validity or merit of its bases, only whether the bases have been set forth with adequate specificity. Houston Lighting & Power Co. (Allens

Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 215, reversed on other grounds, CLI-74-12, 7 AEC 203 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244-45 (1973). Ms. Stamiris has not only identified the basis (the Dow complaint, which is a sworn document) but has identified the particular paragraphs of the Dow complaint which she asserts support her contention. She thus has set forth her basis with reasonable specificity.[8]

Moreover, in her first supplemental memorandum, Ms. Stamiris has pointed to several of the Dow documents which, she claims, support her contention. She discussed these documents during oral argument, pointing to how, in her opinion, they demonstrated that Consumers was not telling the full truth to NRC (Tr. 20792-98). By doing so, she has supplied additional bases for her contention. Moreover, although we cannot rule now on the sufficiency of those documents, we do note that they include information which, in our view,

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8 In an earlier proceeding involving CPC, a Licensing Board considered allegations from a complaint in a suit filed in a U.S. District Court in determining whether to reopen the record. In denying the motion to reopen the record, the Board considered the allegations in the complaint in the light most favorable to the petitioner, without raising any question as to the propriety of relying on such allegations. CPC apparently did not raise any objections to consideration of the substance of the allegations of the complaint. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-75-6, 1 NRC 227, 229, aff'd., ALAB-283, 2 NRC 11 (1975), clarified, ALAB-315, 3 NRC 101 (1976).

at least represents a "showing * * * sufficient to require reasonable minds to inquire further" (cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978)).

In particular, we note that Bechtel Forecast 6, presented to CPC in January, 1980, calculated the fuel load date for Unit 2 (scheduled as the first to be completed) to be April 1984.[9] A review of the Bechtel Forecast by a CPC staff team, dated May 5, 1980 ("Review Report"), analyzes several completion possibilities and concludes that, "even though we take minor exception to various sections of the estimate as presented, we generally agree with Bechtel both on schedule and cost, and are recommending a total project estimate based on the premise" (document 0014312, at 2). The document includes the statement (page 1 of transmittal letter) that "No distribution of the CPCo F/C #6 Review Report is being made outside of the Company."

Notwithstanding the recommendation of its staff, CPC management decided to retain July, 1983 as the target fuel load date for Unit 2 (document 0013524, also attachment 8 to Applicant's response). CPC also attempted to convince the NRC to structure its OL review on the basis of that target (document 00358). Whether the justifications advanced for that target date (e.g., documents 00234 and 00237) were reasonable is an appropriate topic for litigation. In addition, as Ms. Stamiris points out, some documents suggest that CPC may have maintained two schedules--one for internal use and another for

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[9] The Licensing Board and then-parties were first informed of Bechtel Forecast 6 by letter dated February 8, 1980.

others, including NRC (e.g., document 009546). Further, whether the Staff was aware of CPC's Review Report when it made its scheduling determinations in 1980, and whether (assuming it not to have had access to the report at that time) information in the report could have altered its scheduling determinations, are also appropriate subjects for litigation. The Bechtel documents about which CPC recently advised us also may be pertinent to this contention.

We recognize that, as the Applicant readily admits, the various documents may be subject to more than one interpretation. That being so, however, the proper way to resolve such interpretive uncertainties is through litigation of the contention. In short, we find that Ms. Stamiris' proposed Contention 1 sets forth appropriate bases with adequate specificity and hence satisfies the contention requirement of 10 CFR § 2.714(b).

Since we regard this contention as "late-filed," we turn to the factors for late-filed contentions which we must consider (see p. 10, supra). No party explicitly discussed these factors in its written submissions--Ms. Stamiris was relying on a different theory to support litigation of the contention and the Applicant believed it to be Ms. Stamiris' obligation to provide information in support of her contention (Tr. 20820, 20835). Nonetheless, through oral argument at

which all parties asserted their positions, we were able to develop sufficient information in order for us to balance the five factors.[10]

First, Ms. Stamiris has demonstrated "good cause" for her delay in filing the contention. The contention is based primarily on the Dow complaint, and it was submitted initially only two weeks after the Dow complaint was filed. It is noteworthy that CPC's Review Report, which in our view represents important information concerning CPC's truthfulness, was first made known to the Intervenors and Board (and, as far as we know, the Staff as well) after the filing of the Dow complaint in July, 1983.[11] This factor balances in favor of admission of the contention.

The second and fourth factors also balance in favor of admission of the contention. No other means are available for Ms. Stamiris to obtain the relief which we could grant if we were to find that Consumers did in fact knowingly misrepresent information to, or conceal information from, the NRC--i.e., license denial or conditions such as the replacement of particular personnel. Moreover, Ms. Stamiris

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10 Ms. Stamiris offered to submit information in support of a "late-filed" contention, if we were to reject her theory that we could admit the issue through our authority to shape the course of a proceeding (motion at p. 7, n.2). Although we have rejected Ms. Stamiris' theory (pp. 7-8, supra), we have a sufficient record to perform the requisite balance of factors.

11 We commend the Applicant's counsel for voluntarily providing this potentially damaging document to the Board and parties, through the Applicant's response to Ms. Stamiris' motion.

probably would not have standing to intervene in the Dow-Consumers lawsuit (Tr. 20856). Ms. Stamiris' interest will not be represented by existing parties since, absent our acceptance of the contention, there would be no issue in this proceeding raising the question of scheduling misrepresentations. Finally, although NRC's Office of Investigations could investigate alleged false statements, such an investigation (if it determined certain statements to be false) might in effect only postpone litigation of such statements. Both the Applicant and Ms. Stamiris oppose that method of resolving this issue (Tr. 20870-72).

In our view, Ms. Stamiris' participation may reasonably be expected to assist in developing a sound record on the question of management attitude. The basic issue will be the credibility of CPC's witnesses. In the past, Ms. Stamiris' cross-examination (and that of counsel who is to represent her on this issue) has been effective on questions of this type. She has also brought to our attention many pertinent documents bearing on such issues. We expect she would do so on this contention. Indeed, she has already identified a considerable quantity of particularized information regarding the substance of this contention. The third factor accordingly balances in favor of admission of the contention.

As all parties recognize, the litigation of this contention could consume considerable time and effort. The issues in the consolidated proceeding accordingly will be somewhat broadened. (The proponent of the contention views it as somewhat narrower than does the Applicant. See Tr. 20811-13.) Inasmuch as the fuel load date for

Unit 2 is now estimated by the Applicant to be July, 1986 (see letter to Board from the Applicant, dated April 12, 1984), we agree with Ms. Stamiris (Tr. 20851) that there should be no delay in concluding the proceeding prior to the fuel load date, whether or not we admit this contention. Reflecting the broadening of the proceeding, however, this factor balances slightly--but only slightly--against admission of the contention.

Given that the first four factors balance strongly in favor of admission of the contention and the last factor balances only slightly to the contrary, we believe that the balance of the five factors favors admission of the contention. Since the requirements for a litigatable contention have also been satisfied, we are accordingly admitting the contention. As we discussed with the parties (Tr. 20861-63, 22666), the period of time covered by the contention is to extend from the release of Bechtel's Forecast 6 in January, 1980, through November, 1983.

The parties discussed extensively whether the proposed contentions should be regarded as OM or OL contentions. In our view, the first could be regarded as a part of either proceeding, but the second and third are clearly OM contentions. Given consolidation, the allocation of contentions to a particular proceeding does not make too much difference. For convenience, we are numbering the contentions we are accepting as OM contentions. The first proposed contention will become OM Contention 6. Nevertheless, we expect to render decisions covering some OM issues prior to the completion of litigation of these

new contentions. Any decisions we make which could be influenced by the outcome of the new contentions will be expressly subject to change in light of that outcome. Moreover, the designation for convenience of the first contention as an OM issue is not to be taken as limiting the relief we could grant to that appropriate in the OM proceeding; relief in the OL proceeding may also be considered, to the extent appropriate (e.g., to the consideration of corporate character).

2. The second proposed contention alleges that the Applicant used and relied on test results provided by U.S. Testing Company to fulfill NRC requirements while knowing that these test results were invalid. That CPC used and relied on such test results is no secret: evidence to that effect has long been a part of the record of this proceeding (e.g., Stamiris Exh. 3, Attachments 9, 11 and 14; NRC Inspection Reports 78-20 and 80-32/33 (Attachments 2 and 3 to testimony of Gallagher, ff. Tr. 1754); Tr. 2438-39 (Gallagher)). The new allegation in this contention is that CPC knew that the U.S. Testing test results were invalid at the time it relied on these results before the NRC.

As we previously stated (p. 9, supra), in determining whether to reopen the record as of the time the motion was submitted, we must inquire whether the motion was timely and whether it presents important information regarding a significant issue. The Applicant claims that the motion with respect to this contention is "not timely" (response, p. 17) but provides no elaboration of its statement. It

founds its opposition largely on its argument that no "new evidence" justifying reopening of the record has been presented.

We disagree on both counts. In the first place, although the Applicant's truthfulness has been the subject of some earlier testimony, the allegation of CPC's knowledge of invalidity of the tests represents significant new information stemming from the filing of the first Dow complaint. The initial submission of Ms. Stamiris' contention two weeks later clearly satisfied the timeliness requirement.

More important, for reasons we have spelled out earlier (pp. 11-12, supra), we regard the Dow complaints, which are sworn documents, as valid bases for the contention. We need not determine the validity of the positions contained therein in order to rely on the complaints to reopen the record. Both complaints allege that Consumers knowingly relied on inaccurate information before the NRC. This information has a direct bearing on the management capability and attitude which we are evaluating in this proceeding, and it appears to differ from the information previously entered into the record.

Indeed, even though Ms. Stamiris is not required to satisfy the standard because of the time she filed her motion, we believe that, if proved, the alleged misstatements of information could significantly change the end result which we might otherwise reach. Thus, not only could such false statements, if proved, warrant severe sanctions but, in addition, they could signify a lack of management character sufficient to preclude an award of operating licenses, at least as long as the responsible individuals retained any

responsibilities for the project. South Texas, LBP-84-13, supra, 19 NRC at ___ (slip op., pp. 16-18), and cases cited, particularly Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70 (1983).

The Applicant directs our attention to the circumstance that the amended complaint (¶12) presents this claim only on "information and belief"; it also characterizes the claim as "absurd" in postulating that it would act contrary to its own interest by relying on test results known to be inaccurate (response, p. 14). We decline to resolve these positions at this time, since they go to the merits of the contention. We note, however, that "information and belief" pleadings are accorded considerable judicial stature (Wright & Miller, Federal Practice and Procedure: Civil § 1224). "[A] corporation [such as Dow] may find pleading on information and belief a useful form of allegation when its information has been received from subordinate employees within the firm" (id.). Further, we might also observe that what may be "absurd" from a corporate viewpoint may not necessarily be absurd from the individual viewpoint of a particular corporate official or agent.

Other information stemming from the documents provided to the parties and Board also supplies bases for this contention. For example, it appears that both CPC and Bechtel (CPC's agent) had knowledge of infirmities in certain U.S. Testing results some time around February, 1978. See letter from J. F. Newgen (Bechtel) to D. Edley (U.S. Testing), dated February 1, 1978 (copy received by Consumers on February 10, 1978) (Attachment 3 to Ms. Stamiris' Second Supplemental

Memorandum dated October 5, 1983). Although the document relates to tests performed for the administration building, it includes statements which could be construed as indicating Bechtel's awareness of a more pervasive failure of U.S. Testing to conform to testing specifications (Tr. 2573-74 (Gallagher)).

Nonetheless, the Applicant's testimony presented in July, 1981 indicated that, on the basis of borings taken from September 27-30, 1977, the Company determined that the grade beam failure of the administration building was localized. Keeley, ff. Tr. 1163, at 5. U.S. Testing was also said to have used similar procedures for a number of its tests throughout the site (Tr. 1263 (Keeley)). But CPC, in discussions with the NRC Staff as late as the summer of 1979, appears to have continued to portray the cause of the U.S. Testing inaccuracies with respect to the administration building borings as "administrative problems" (document 7908170390), despite knowledge of more severe problems as early as the fall of 1977 (Audit Report F-77-32, Board Exh. 3; Bechtel "Administration Building" Report dated December, 1977, document SB 13752). Indeed, the Staff was not even informed of the grade beam failure until December, 1978, pite the fact that the NRC's investigation into the diesel generator building settlement began in October, 1978 and the administration building settlement was considered

by some Staff members as indicative of soils compaction deficiencies in the area of the nearby DGB (Tr. 2336, 2341, 2412, 2345-47 (Gallagher)).[12]

The Staff also testified that it had no basis for concluding that information regarding the administration building (a non-safety structure) had been intentionally withheld from NRC (Tr. 2342, 2357 (Gallagher)). This proposed contention, if proved, could alter the record in this regard. For that reason, the information appears to be important to an issue which is also significant.[13] Moreover, Ms. Stamiris initially filed her motion in a timely fashion, two weeks from the filing of the first Dow lawsuit. The standards for reopening the record have thus been clearly satisfied for this contention. We will admit this contention as OM Contention 7.

3. Ms. Stamiris' third proposed contention concerns a test boring taken near the DGB and analyzed by U.S. Testing Company. The analysis of this boring by U.S. Testing Company involves one or more of the tests alleged in the previous contention to have been falsified. The third contention is very close to the second in alleging that the Applicant knowingly misrepresented the results of the boring to the NRC.

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12 Apparently the Staff did not become aware of the February 1, 1978 letter to U.S. Testing until some time after December, 1978 (Tr. 2572-73 (Gallagher)).

13 The information about which the Staff informed us on April 27, 1984, and that concerning which the Applicant advised us in the April 30, 1984 communication which we discuss first (p. 5, supra) could also be relevant to this contention. We express no opinion on this matter at this time.

To the extent that this contention is based on information in the Dow complaint, it was submitted in a timely fashion. But unlike the previous contention, there is no significant allegation here that has not been previously addressed in this proceeding. The Applicant was already charged with making a material false statement that incorrectly indicated the placement of random fill rather than controlled compacted cohesive fill and has agreed not to contest that issue. For its part, the NRC Staff agreed that the material false statement was not made intentionally. Joint Exh. 6; Hood, et al., ff. Tr. 1560, at pp. 4-6.

Even more important, the boring log in question has been introduced into evidence and was the subject of extensive testimony. See Stamiris Exh. 19; Tr. 3437-41 (Peck) and 3589-3636 (Kane). Although the soil in question is different from what the FSAR represented, it nevertheless is competent soil (Tr. 3618-19 (Kane)).[14] Either type would have been acceptable if it had been compacted correctly (Tr. 4426-27 (Kane, Hood)).

In short, all of the information in the bases relied upon by Ms. Stamiris appears to have already been considered in this proceeding. The Staff asserts that we should litigate this contention

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14 We assume that, in giving this testimony, Mr. Kane took account of the hammer weight and fall in relying on the blow counts shown on Stamiris Exh. 19 and discussed by CPC in its letter to us of April 30, 1984. If not, we call upon the Staff to advise us promptly (with an appropriate affidavit, if necessary).

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because of the allegation that, at the time of the boring in 1977, CPC knew the problem was site-wide and provided the NRC with incorrect information (Tr. 20806). An affirmative intent by the Applicant to mislead the NRC on a significant matter would, of course, be a serious indictment of the Applicant's managerial attitude. We read the contention (either in its initial or revised forms, see n.2, supra) as based on alleged misinformation about the soil type used for plant fill. Nothing in the bases relied upon by Ms. Stamiris in both versions of this contention would indicate that the types of materials utilized for plant fill was a site-wide problem. Indeed, we do not view the log itself as indicating any problem with the soil type, as alleged in both forms of this contention. For that reason, we do not perceive that Ms. Stamiris has brought to our attention with respect to this contention any significant new information of the type which would warrant a reopening of the record.[15] Since standards for reopening the record on this contention have not been satisfied, we decline to reopen on this matter.

We note that the question of the Applicant's knowledge or lack of knowledge of the site-wide nature of any soils deficiencies is a

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15 Unlike with respect to a new timely-filed contention, on a motion to reopen the record, we can give some consideration to the substance of the information sought to be added to the record. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523-24 (1973); cf. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

part of Ms. Stamiris' second contention which we are accepting. The question stressed by the Staff in supporting the third contention will thus likely be considered to some extent in our resolution of the second contention.

We also note that our ruling rejecting the third proposed contention does not take into account the information provided to us by the Applicant on April 30, 1984 (the first CPC communication of that date discussed on p. 5, supra), except with respect to the matter described in n. 14, supra. Nor does it consider the information provided to us by the Staff on April 27, 1984. Insofar as we can ascertain, we regard this new information as possibly relevant to the third proposed contention but more likely relevant either to matters heretofore litigated or, alternatively, to a potential contention comparable to the third proposed contention (i.e., knowledge of site-wide deficiencies) but premised not on whether information on soil type was withheld but rather on whether information was withheld as to the degree of compaction. We trust that the Applicant and/or Staff will keep us and the parties advised of any new information of this type which may develop.

4. Ms. Stamiris has asked for discovery on her proposed contentions, both in the form of documents allegedly not turned over to her previously and new discovery. We will not determine whether any documents should have been, but were not, turned over to Ms. Stamiris earlier. We note that, upon further checking, Ms. Stamiris discovered

that she had received certain of the documents she initially thought had not been turned over to her.

CPC has already voluntarily supplied many documents to the parties and Board. We believe that further discovery on the two admitted contentions is warranted, but only to the extent it seeks information or documents relevant to those contentions beyond what CPC has already supplied. The discovery we are permitting will be so limited.

In addition, to the extent we must evaluate discovery requests, we will consider, as within the proper scope of discovery, information tending to demonstrate, or leading to information that could demonstrate, whether CPC knowingly made false statements to the NRC (either the Staff or a Licensing Board). By "knowingly," we are including intentional falsehoods, intentional incomplete statements, intentional omissions, and statements made "with disregard for the truth." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 n.4 (1980); id., LBP-84-13, 19 NRC ___, ___ (March 14, 1984) (slip op., pp. 16-18). But whether CPC should have known that a statement was inaccurate or incomplete is not in itself a part of these contentions (although it may bear substantially on issues already admitted to this proceeding).

We are presently authorizing a four-month period for formal discovery, commencing on the date when the Applicant's reply findings on QA/management attitude issues are to be submitted (currently June 8, 1984). We direct that parties engaged in discovery on these two

contentions send us monthly reports (either individually or collectively) on the progress of discovery. (These reports should be filed on the first Monday-workday of each month, beginning in August, 1984.) Ms. Stamiris has requested four to six months for discovery (Tr. 20813, 20864); we will utilize these reports to determine whether additional discovery is warranted.

Bearing in mind the fact that these contentions are limited to knowing misrepresentations (as defined above), we would hope that the parties could agree (prior to trial of the issues) to a limitation of scope to matters clearly tending to demonstrate or suggest such knowing misrepresentations. We would also trust that the parties will attempt to develop methods for pre-trial settlement or dismissal of at least portions of these issues, to the extent appropriate. Such a course of action appears consistent with that favored by several parties at oral argument (Tr. 20806, 20814-15, 20865-68).

II. Sinclair Motion

Ms. Sinclair's motion was made orally (Tr. 19341-46, 19382-83) and followed by an almost identical written motion dated July 28, 1983. It seeks to have the record of this consolidated proceeding held open until the completion of the Dow lawsuit, on the ground that information may be obtained through discovery in that litigation "which will be pertinent to the issues of the OM and OL proceedings" and that it is important that "all available facts" relative to those issues be considered by us.

Ms. Sinclair spells out eight areas of inquiry where, she claims, "more information can be expected."

The Applicant opposed Ms. Sinclair's motion, both through an oral response (Tr. 19346-47) and in a written response dated August 17, 1983. The Staff also generally opposed Ms. Sinclair's motion, although it recognized one allegation of the Dow litigation (the scheduling matter) which should be litigated before us (Tr. 19350-52, 19356-57, 19397). Mr. Wendell H. Marshall, another Intervenor, supported Ms. Sinclair's motion by mailgram dated July 29, 1983.

We do not believe that the relief sought by Ms. Sinclair's motion is warranted. In the first place, Ms. Sinclair is only speculating at this time that the Dow lawsuit will lead to the discovery of significant information pertinent to the OM or OL proceeding which would not otherwise be incorporated into this record. Many of the issues in the Dow lawsuit are not particularly pertinent to matters before us. In that connection, the two new Stamiris contentions which we are accepting incorporate in our view the allegations of the Dow lawsuit most closely related to the matters at issue in the OM/OL proceeding. One of those contentions will litigate the scheduling allegation which the Staff, in commenting upon Ms. Sinclair's motion, found appropriate to consider in this proceeding.

Furthermore, if the Dow lawsuit should produce truly significant information not previously included in the record here and pertinent to the OM/OL proceeding, Ms. Sinclair could (depending on the status of this proceeding) move to supplement the record and incorporate it into

this proceeding, or to reopen the record of this proceeding, or (if, all levels of review within NRC have been completed) seek consideration of the matter under 10 CFR § 2.206.

Finally, the length of the Dow lawsuit, and hence the scope of relief being sought by Ms. Sinclair, is presently indeterminate. All proceedings, of course, even this one, must at some point come to an end. See United States v. Interstate Commerce Commission, 396 U.S. 491, 521 (1970). In our view, it would be "productive of little more than untoward delay" for us to freight the possible conclusion of the OM/OL proceeding with the uncertainties of the Dow lawsuit. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 747-48 (1977).

For these reasons, we are denying Ms. Sinclair's motion. This denial is without prejudice to Ms. Sinclair's seeking (to the extent appropriate) the other forms of relief which we have outlined, particularly to supplement or reopen the record before us.

III. ORDER

In light of the foregoing discussion and the entire record on the motions before us, it is, this 7th day of May, 1984

ORDERED

1. That Ms. Stamiris' motion to admit three new contentions is granted in part and denied in part. Proposed contentions 1 and 2, renumbered as OM Contentions 6 and 7, are admitted; proposed contention 3 is denied.

2. That discovery on new OM Contentions 6 and 7 is authorized to the extent indicated in part I.C.4 of this Memorandum and Order. Parties are directed to file reports as set forth therein (pp. 26-27, supra).

3. That Ms. Sinclair's motion to hold open the record of this proceeding pending completion of the Dow lawsuit is denied, without prejudice to Ms. Sinclair's later seeking (to the extent appropriate) to supplement or reopen the record before us.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE