UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF THE DOW CHEMICAL COMPANY INCORPORATING FINDINGS OF FACT AND CONCLUSIONS OF LAW

and

ADDENDUM

R. L. Davis
Senior Attorney for The Dow Chemical Company
47 Building
Midland, Michigan 48640
(517) 636-4781

Fischer, Franklin, Ford, Simon & Hogg
By: William C. Potter, Jr.
Attorneys for The Dow Chemical Company
1700 Guardian Building
Detroit, Michigan 48226
(313) 962-5210

1301 073

TABLE OF CONTENTS

		Page
INTRODUCTION	.....	1-10
DISCUSSION OF "ISSUES"		
I.	DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID EXPRESS A BELIEF THAT CERTAIN MATTERS COULD BE "FINESSED" IF NO INTERVENORS APPEARED AT THE SUSPENSION HEARING	11-14
II.	DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID SUGGEST THE POSSIBILITY OF USING A DOW WITNESS WHO WAS NOT FULLY KNOWLEDGEABLE OF THE DOW-CONSUMERS RELATIONSHIP	15-18
III.	DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID STATE THAT CONSUMERS WOULD HAVE A "LEVER" AS LONG AS CONSTRUCTION CONTINUED	19-21
IV.	DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING AND A SEPTEMBER 24, 1976 MEETING WITH DOW, CONSUMERS DID THREATEN TO SUE DOW IF THE CONSTRUCTION LICENSES WERE SUSPENDED AS A RESULT OF DOW'S FAILURE TO POSITIVELY SUPPORT CONSUMERS' POSITION IN THE SUSPENSION HEARING	21-44
V.	THE ROLE OF DOW'S ATTORNEYS IN THE PREPARATION FOR THE ASLB HEARING WAS PROPER	44-64
VI.	THE DIRECT TESTIMONY OF MR. TEMPLE WAS PROPERLY PREPARED EVEN THOUGH IT DID NOT CONTAIN A REFERENCE TO THE MICHIGAN DIVISION RECOMMENDATION	64-69

VII.	MR. TEMPLE WAS IN FACT DOW'S MOST KNOWLEDGEABLE WITNESS EVEN THOUGH HE DID NOT TAKE PART IN THE DOW CHEMICAL USA BOARD DELIBERATIONS THAT TOOK PLACE IMMEDIATELY FOLLOWING THE PRESENTATION BY THE REVIEW TEAM	69-72
VIII.	MR. TEMPLE WAS ACTIVELY INVOLVED IN THE PREPARATION OF HIS TESTIMONY AND IT WAS IN FACT HIS TESTIMONY	72-74
IX.	THERE WAS NOTHING IMPROPER IN DOW'S FAILURE TO ADVISE THE ASLB OF CONSUMERS' THREAT TO SUE DOW IF THE LICENSES WERE SUSPENDED DUE TO DOW'S FAILURE TO POSITIVELY SUPPORT CONSUMERS' POSITION IN THE SUSPENSION HEARINGS	74-82
X.	SUMMARY	82-86
XI.	DISPOSITION	87-88

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF THE DOW CHEMICAL COMPANY INCORPORATING FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

On July 2 through July 31, 1979, this Board conducted an inquiry pursuant to a Notice of Hearing dated May 3, 1979, which scheduled an evidentiary hearing on the following "issues":

"Issue No. 1

Whether there was an attempt by parties or attorneys to prevent full disclosure of, or to withhold relevant factual information from the Licensing Board in the suspension hearings.

"Issue No. 2

Whether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers.

"Issue No. 3

Whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions.

1301 076

"Issue No. 4

Whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony.

"Issue No. 5

What sanctions, if any, should be imposed as a result of affirmative finds on any of the above issues."

Prior to the hearing, extensive discovery depositions were taken during the months of May and early June 1979, in Midland, Michigan; Jackson, Michigan; Atlanta, Georgia; Washington, D. C. and Coral Gables, Florida.

The evidentiary hearing held during July 1979 was exhaustive and involved the production of testimony through fourteen witnesses. The testimony elicited at the hearing conclusively established the following:

1. In September 1976, Dow's Michigan Division, when told that it would have to provide a witness for the suspension hearing, advised Consumers that the position of the Michigan Division at that time was that the contract between the parties was valid but no longer advantageous to the Division for a number of

specified reasons. Consumers was told that the Dow U.S.A. Board was then conducting a corporate review of the Dow-Consumers contract at the recommendation of the Michigan Division and that Consumers was invited to make any input it felt necessary.

2. Thereafter, representatives of Dow and Consumers met on September 21, 1976 and on September 24, 1976 and, on both occasions, Consumers told Dow that it would sue Dow if Dow's testimony in the forthcoming suspension hearing was not "supportive" of Consumers and a suspension of the construction licenses resulted.

3. On September 27, 1976, after a review of the Michigan Division position, the Dow U.S.A. Board reached the decision that the nuclear project was still of economic benefit to Dow. In reaching this decision, the Dow U.S.A. Board considered, among other factors, the threats of litigation against Dow if the Dow position in the suspension hearing was not "supportive" of Consumers and a suspension resulted.

1301 078

4. Thereafter, counsel for Dow and counsel for Consumers began the preparation of the Temple testimony. Dow counsel attempted to meet the information demands of Consumers while at the same time trying to protect Dow from engaging in conduct that Consumers might subsequently claim was not "supportive" if the construction licenses were thereafter suspended.

Dow counsel tried to insure that the information supplied to Consumers was in fact the information that Consumers itself had requested and was not information gratuitously volunteered by Dow. Dow counsel tried to have Consumers prepare the written testimony so that it was clear that the information supplied by Dow was responsive to Consumers' demands and not volunteered by Dow.

5. Mr. Temple was directly involved in the preparation of his testimony and it in fact was his testimony that was filed with the Board. He was the most competent and knowledgeable Dow witness available to

testify concerning the intentions of The Dow Chemical Company with respect to the nuclear contract. His testimony on this issue was complete and accurate.

In summary, there was no evidence adduced at the hearing of any conduct on the part of Dow or Dow counsel that would fall within the parameters of Board Issues 1 through 5.

The "issues" set forth in the ASLB Order of May 3, 1979 are extremely vague*/ and do not set out specific factual matters relating to any conduct that the Board or other parties might feel to be within the parameters of the "issues" set out in the Order. In order to decide what specific factual matters might be considered to fall within the parameters of the ASLB general statement of "issues", Dow has reviewed the Opinion and Order of the ASLB dated September 27, 1977, as amended by Order dated November 4, 1977, and the Decision of the ASLAB dated February 14, 1978.

---

*/ The "issues", as framed by the ASLB Order of May 3, 1979, are so vague as to raise serious Constitutional questions if the Board entertains any intention of going any further than determining whether further hearings are necessary.

1301 080

It has also reviewed the discovery depositions of all witnesses and transcripts of the evidentiary hearing to determine, from the questions asked by the Board, Staff counsel and counsel for Consumers, what specific factual matters they may conceive to be arguably within the parameters of the Board's general statement of "issues". Dow's review has not included a review to determine whether the conduct of Consumers in the preparation of the Temple testimony and the conduct of Consumers and the Staff in preparation for the hearing might be viewed as arguably within the parameters of the Board's general statement of "issues". Dow leaves these subjects to the Board for decision.

Dow believes that the testimony has shown that the conduct of itself and its counsel was clearly proper and there was no conduct engaged in that falls within the scope of the Board's "issues". However, Dow believes that certain questions asked by counsel for Consumers, Staff counsel and the Board during the hearing indicate a need for further discussion and clarification. Accordingly, Dow believes the following list contains the factual or legal matters that may be considered by the Board, Consumers, Staff or Dow to be within the parameters of the Board's general statement of "issues".

1301 081

1. Did Consumers, during the course of a September 21, 1976 meeting with Dow, express a belief that certain matters could be "finessed" if no intervenors appeared at the suspension hearing?

2. Did Consumers, during the course of a September 21, 1976 meeting with Dow, suggest the possibility of using a Dow witness who was not fully knowledgeable of the Dow-Consumers relationship?

3. Did Consumers, during the course of a September 21, 1976 meeting with Dow, propose that Consumers would "drag its feet" in the hearing process because, as long as construction continues, Consumers "has a lever"?

4. Did Consumers, during the course of a September 21, 1976 meeting and a September 24, 1976 meeting with Dow, threaten to sue Dow if the construction licenses were suspended as a result of Dow's failure to positively support Consumers' position in the suspension hearing?

5. Was the role of Dow's attorneys in the preparation of the Temple testimony proper?

   (a) Was there anything improper in Dow's decision to take the legal position that it was no longer a party to the NRC proceedings after an order had been entered by the U. S. Court of Appeals for the District of Columbia Circuit, dismissing it as an intervenor in the then pending proceedings?

(b) Was there anything improper in the alleged failure of Dow counsel to advise Consumers counsel Renfrow and Rosso that Consumers had threatened Dow with litigation if the construction licenses were suspended due to the failure of Dow to positively support the Consumers position in the suspension proceedings?

(c) Was there anything improper in the alleged failure of Dow counsel to advise Consumers counsel Renfrow and Rosso that Consumers counsel Renfrow had suggested, during the course of a September 21, 1976 meeting with Dow, that a Dow witness be used who was not fully knowledgeable of the Dow-Consumers relationship?

(d) Did the conduct of Dow counsel create the impression that Consumers alone had prepared the Temple testimony? If so, was this improper?

(e) Did Dow counsel embellish upon and broaden the Dow Chemical U.S.A. decision as it was stated by Mr. Oreffice on September 27, 1976?

6. Was the direct testimony of Mr. Temple properly prepared in view of the fact that it did not contain a reference to the Michigan Division recommendation?

7. Was Mr. Temple in fact Dow's most knowledgeable witness in view of the fact he did not take part in the Dow Chemical U.S.A. Board deliberations that took place immediately following the presentation by the review team?

1301 083

8. Was Mr. Temple himself actively involved in the preparation of his testimony and was it in fact his testimony?

9. Was there anything improper in Dow's failure to advise the ASLB of Consumers' threat to sue Dow if the licenses were suspended due to Dow's failure to positively support Consumers' position in the suspension hearings?

Dow emphasizes that, in its opinion, not all of the above stated matters are viable "issues" meriting discussion and consideration. Nonetheless, Dow will hereafter discuss each "issue" enumerated above with appropriate references to the transcripts*/ and then suggest, under the heading "CONCLUSION", how the "issue" should be resolved based on the facts elicited

---

*/ Citations to the transcript will be made by identifying the particular witness testifying and the specific page referred to (i.e., Oreffice; 54,121). Footnotes containing citations to the transcript and to exhibits are set out in a separate Appendix for the Board's convenience.

1301 084

during the course of the evidentiary hearing.*/

As noted supra, Dow, in this Brief, will not discuss the conduct of Consumers in the preparation of the Temple testimony or the conduct of Consumers and the Staff in preparation for the suspension hearing. It leaves for Board determination the question of whether their respective conduct was proper or whether such conduct falls within the parameters of the Board's general statement of "issues".

---

*/ During the recent hearing, undersigned Dow counsel became aware of this Board's view of the role and duty of attorneys for parties and witnesses appearing before it. While this subject matter is unrelated to the Board's enumerated "issues", it is, in Dow's opinion, of sufficient importance to merit discussion in this Brief. A discussion of this subject matter appears at the end of this Brief in an Addendum.

DISCUSSION OF "ISSUES"

I. DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID EXPRESS A BELIEF THAT CERTAIN MATTERS COULD BE "FINESSED" IF NO INTERVENORS APPEARED AT THE SUSPENSION HEARING.

Subsequent to the September 13, 1976 negotiating meeting between Dow and Consumers at which Consumers was advised of the Michigan Division recommendation and the reasons for it,[1] a meeting was scheduled for September 21, 1976 for the purpose of explaining to Dow what would happen at the suspension hearing and the possible impact on the construction licenses of various positions Dow U.S.A. might take.[2] The Nute notes of that meeting state in part as follows:

> "B. Factors to be considered in suspension hearing (5) - Consumers assumes Cherry will not appear because of lack of funds - Consumers says suspension hearing most critical - they believe that since there is no discovery, and probably no intervenor cross-examination - will be able to finesse Dow-Consumers continuing dispute." 3/

At the hearing, Mr. Nute testified that Mr. Renfrow made this statement in the September 21, 1976 meeting.[4] During that same meeting, Mr. Nute had referred to the 1974-75 correspondence between Dow and Consumers and inquired what effect the Dow negotiating position (that it was excused from the contract if

the plant was not completed by 1984) would have on the cost-benefit analysis.[5/]

Mr. Hanes recalled a discussion during the meeting concerning whether Mr. Cherry would appear at the suspension hearing in which Dow challenged Mr. Renfrow's belief that Mr. Cherry would not appear.[6/] Mr. Hanes did not recall a discussion about a "continuing dispute" between Consumers and Dow.[7/] Mr. Klomparens testified that he could recall a discussion regarding whether Mr. Cherry would appear, could not recall the use of the word "finesse" but stated he was sure Consumers had the feeling things would be a lot easier if Mr. Cherry was not there.[8/] Mr. Klomparens also stated that Mr. Nute's notes were an accurate summary of what transpired in the meeting.[9/]

Mr. Falahee testified that he could not recall whether the word "finesse" was used.[10/] Mr. Renfrow testified that he did not recall using the exact words attributed to him in the Nute notes but "could have". He went on to state that he was simply telling Dow the "obvious" -- "if Mr. Cherry was not there, the hearing would go forward on a quicker pace with less interruption."[11/]

Mr. Bacon's testimony corroborated Mr. Nute's notes. When the relevant portion of Mr. Nute's notes of the September 21, 1976 meeting was read to Mr. Bacon and he was asked whether he

recalled such a statement, Mr. Bacon responded, "Generally, yes."[12/]

Mr. Bacon then testified as follows:

Q "And what is it that you recall being said?"

A "I can't recall the specific words but I think probably it was in response to a concern voiced by Mr. Nute about documents, and I think he specifically referred to exchanges of correspondence in '74 and '75 about the contract being disclosed in the proceeding."

Q "So Mr. Nute expressed some kind of concern about correspondence exchanged between the parties being exposed in the proceeding and that led to a comment to the effect of the one I just read, that since there would be no intervenors present and no discovery, that there would be an ability to finesse a continuing dispute between Dow and Consumers?"

A "I generally remember both comments. I'm not sure that one was in response to the other. I can't be positive about that."

Q "But you have a general recollection that somebody indicated that there would be an ability to finesse a dispute between Consumers --"

A "I can't tell you what words were used, but I think that was the general idea expressed, that if it was not a contested hearing, then it was likely that the contract dispute, if you want to call it, of '74 - '75 would be aired."

Q "Could you repeat that? I think you said 'likely" when you meant not likely, or vice versa."

CHAIRMAN MILLER: "Could you rephrase your answer, please?"

1301 088

MR. POTTER: "Do you remember what your answer was, Mr. Bacon?"

THE WITNESS: "Not now. I don't even remember the question."

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: "You're correct. It should be 'would not be aired.'" 13/

CONCLUSION

During the September 21, 1976 meeting, Mr. Nute inquired as to what effect Dow's negotiating position as set out in the 1974-75 Dow-Consumers correspondence would have on the cost-benefit analysis. Mr. Bacon interpreted Mr. Nute's comments to express concern over the disclosure of the correspondence in the suspension proceeding. Mr. Renfrow responded that if no intervenor appeared it was likely that the "contract dispute" would be "finessed". In fact, Mr. Cherry did appear and there was a full airing of the Dow-Consumers relationship.

1301 089

II. DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID SUGGEST THE POSSIBILITY OF USING A DOW WITNESS WHO WAS NOT FULLY KNOWLEDGEABLE OF THE DOW-CONSUMERS RELATIONSHIP.

Mr. Nute's notes of the September 21, 1976 meeting state in part as follows:

> "4. Effect of delay steam, and cost/benefit analysis tilted - Dow becomes very important because here two issues (above) can come together - Rex suggested that Dow witness might be someone from Dow Chemical U.S.A. or corporate area who is unaware of Midland Division recommendation to Oreffice - this person would testify as to effects of further delay upon Dow -" 14/

At the hearing, Mr. Nute testified that his notes accurately reported what he understood Mr. Renfrow to state regarding the selection of the Dow witness.[15/] Mr. Nute further testified that Mr. Renfrow was not merely asking for a witness who did not "have such strong personal beliefs as Mr. Temple had".[16/] Mr. Nute also testified that he did not express any concern over using Mr. Temple as a witness but did ask questions to determine what effect certain things said or done by Mr. Temple or Dow would have in the suspension hearings.[17/]

While the notes of Mr. Hanes and Mr. Klomparens of this meeting are silent on this point,[18/] both recall a discussion on

1301 090

the nature of the Dow witness. Mr. Hanes testified that during the meeting Mr. Nute raised a question as to whether Mr. Temple should be the witness because of "the announced position he had already taken". In response, Mr. Renfrow made a comment that "maybe the Dow witness should be someone not familiar with the position Mr. Temple had taken". Mr. Hanes responded emphatically that "that wouldn't be appropriate at all, that the Dow witness would be a knowledgeable person, and he would testify fully at the hearing".[19/] Mr. Hanes further testified that Mr. Renfrow "popped out with this idea". Mr. Hanes "chopped it off" and "that pretty much ended the discussion".[20/]

Mr. Klomparens understood Mr. Renfrow to be asking for a witness who was less emotionally involved than Mr. Temple and "maybe less knowledgeable about it".[21/] Mr. Klomparens recalled Mr. Hanes making a statement that Dow would supply a knowledgeable witness who would tell the truth. This statement of Mr. Hanes was made at the point in the meeting when Mr. Renfrow was discussing the type of Dow witness he wanted.[22/]

Turning to Consumers' version of this aspect of the September 21, 1976 meeting, Mr. Renfrow categorically denied making the statement attributed to him in the Nute notes.[23/] He went on to testify that, before attending the September 21, 1976

meeting, Mr. Bacon had told him that Dow was concerned over using Mr. Temple as a witness and Mr. Renfrow and Mr. Bacon then discussed possible alternative Dow witnesses. According to Mr. Renfrow, there was no discussion of alternative Dow witnesses in the September 21, 1976 meeting.[24] Mr. Renfrow further stated that Dow expressed concern over using Mr. Temple as a witness during the September 21, 1976 meeting and that "I told them that if they had a problem with Mr. Temple, they might look at providing someone else as a witness".[25] Mr. Renfrow testified that he did recall Mr. Hanes stating that the Dow witness would tell the truth but could not recall when it came up in the meeting.[6]

Mr. Bacon testified that he could not recall Mr. Renfrow making the statements attributed to him in the Nute notes.[27] He also could not recall hearing Mr. Nute express any concern over using Mr. Temple as a witness at any time before the September 21, 1976 meeting[28] or during the meeting.[29] Mr. Bacon did recall Mr. Hanes stating that the Dow witness would tell the truth.[30]

Mr. Falahee stated that he could not recall any discussion regarding the use of a less than fully knowledgeable witness.[31] He did recall Mr. Nute stating that "there may be

1301 092

a problem with Mr. Temple as a witness" because of his prior public statements regarding the nuclear plant.[32/] Mr. Falahee did not form any impression that Mr. Nute was in any way reluctant to use Mr. Temple as a witness but rather "he wanted us to be aware that that had been said".[33/]

CONCLUSION

During the course of the September 21, 1976 meeting, Mr. Nute advised Consumers that there might be a problem with using Mr. Temple as a witness because of his earlier public statements regarding the project. The statement by Mr. Nute did not reflect any reluctance over using Mr. Temple as the Dow witness but was made to be sure Consumers was aware of the statements Mr. Temple had made. Mr. Renfrow did suggest the use of a Dow witness who was not aware of Mr. Temple's views on the project and his recommendation in light of those views. Mr. Hanes immediately responded that Dow would provide a fully knowledgeable witness who would testify truthfully. The matter was terminated at that point. Ultimately, Mr. Temple was called as the Dow witness and was Dow's most knowledgeable witness on the issue of the intentions of The Dow Chemical Company regarding the nuclear project.

III. DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, CONSUMERS DID STATE THAT CONSUMERS WOULD HAVE A "LEVER" AS LONG AS CONSTRUCTION CONTINUED.

Mr. Nute's notes of the September 21, 1976 meeting state in part as follows:

> "Consumers said that as long as construction continues, Consumers has a lever and will drag its feet in hearing on merits - if construction stopped, intervenors have lever and will drag feet in hearing on the merits - " 34/

At the hearing, Mr. Nute testified that the above quoted matter was what he understood Mr. Renfrow to say. He was certain that Mr. Renfrow used the phrase "lever" 35/ but was less sure whether the phrase "drag feet" was used by Mr. Renfrow or was Mr. Nute's paraphrase of what Mr. Renfrow said. 36/ Mr. Nute was certain that the "lever" discussion referred to both Consumers and the Intervenors having a "lever" under certain circumstances. 37/

Mr. Hanes recalled some discussion on this point to the effect that if Intervenors obtained a suspension, it would be a "hard thing to overcome" and if Consumers "could keep construction going they had a project that was viable. 38/ Mr. Hanes stated that Consumers indicated that there was a large investment

1301 094

in the project and it "would be an advantage to the project if they could keep it going pending the hearings and whatever was to come".[39/]

Mr. Klomparens recalled Mr. Renfrow indicating that if construction could continue, it would be beneficial to Consumers whereas if construction was suspended, it would be advantageous to the Intervenors. Mr. Klomparens described the thrust of Mr. Renfrow's remarks as " ... I guess it's the situation that if I got the ball and I'm running, you've got to stop me. If you get the ball and you're running, I've got to stop you, type of thing."[40/]

Messrs. Renfrow, Bacon and Falahee all testified that the "lever" conversation was used only in connection with the Intervenors.[41/]

CONCLUSION

The three Dow personnel attending the September 21, 1976 meeting all heard some statements made regarding an advantage to Intervenors if a suspension of the construction licenses occurred. They also heard statements made to the effect that there would be an advantage to Consumers if it could avoid a

suspension and continue construction pending further NRC hearings. Mr. Renfrow indicated that if there was no suspension, Consumers would have a "lever". Ultimately, there was no delay in the suspension hearing and no evidence was produced of an attempt by Consumers to "drag its feet" in the hearing process.

IV. DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING AND A SEPTEMBER 24, 1976 MEETING WITH DOW, CONSUMERS DID THREATEN TO SUE DOW IF THE CONSTRUCTION LICENSES WERE SUSPENDED AS A RESULT OF DOW'S FAILURE TO POSITIVELY SUPPORT CONSUMERS' POSITION IN THE SUSPENSION HEARING.

BACKGROUND

In order to understand and properly assess this issue, some understanding of the events that preceded the September 21, 1976 and September 24, 1976 meetings is necessary. From 1970-1976, the history of the Dow-Consumers contractual relationship with respect to the completion of the nuclear power plant had been one of continual delay and constantly accelerating cost.[42/] During 1974-1975, there was an exchange of correspondence between the companies in which Dow sought changes in the contract. The correspondence expressed Dow's unhappiness with the delays in

1301 096

construction.[43] By mid-1976, Dow was clearly unhappy with the length of time it was taking to build the plant and its cost.[44] By June 1976, the relationship between the parties was, at least from Dow's point of view, "strained" but efforts to negotiate contractual changes continued.[45] On June 30, 1976, Mr. Temple wrote a letter to Mr. Youngdahl setting out the basic demands Dow was making in the contractual negotiations.[46]

After the June 30, 1976 letter was sent to Consumers and before the negotiating meeting of September 13, 1976, several significant events occurred. On July 21, 1976, the U. S. Court of Appeals for the District of Columbia Circuit remanded to the NRC for further hearing several questions regarding the granting of the construction licenses to Consumers. [Aeschliman v. U. S. Nuclear Regulatory Commission, 547 F. 2d 622 (D.C. Cir. 1976); rev'd sub nom Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U. S. 519 (1978)] This decision raised the possibility of still further delays in the project.[47] Consumers did not contact Dow at any time prior to the September 13, 1976 meeting to discuss the impact of this decision on the project.[48] On August 5, 1976, Mr. Youngdahl called Mr. Temple and advised him that the new revised cost of the plant was $1.67 billion with the possibility that it might

cost $2 billion.[49/*] Mr. Temple then asked both Mr. Nute and Mr. Burroughs to take opposing positions, review the viability of the Dow-Consumers contractual relationship and report back to him.[50/] He also discussed his developing thoughts regarding the benefit to Dow's Michigan Division of the nuclear project with Mr. Carl Gerstacker, a member of the Dow Board of Directors.[51/] At that time, Mr. Temple was concluding that "continued reliance upon Consumers Power Company for the Division's long-term future, and particularly steam, was not going to work out well for us."[52/]

Prior to September 8, 1976, Mr. Temple advised Mr. Nute of his position on the contract relationship.[53/] Mr. Nute and Mr. Wessel thereafter met with Mr. Temple and a corporate review was suggested to insure that any Dow position that became an issue in the remand proceeding would be in fact the Dow corporate position.[54/] Mr. Temple adopted the suggestion and sent a letter dated September 8, 1976 to Mr. Oreffice discussing the Dow-Consumers relationship, stating the Michigan Division conclusion regarding that relationship and recommending a corporate review of the Michigan Division conclusion.[55/] The Michigan Division position was not primarily economic. Mr. Temple did not consider the nuclear plant cost advantage ($4 million a year over the

---

*/ The estimated cost of the project at the time the contract was executed in 1967 was $267 million.

alternative fossil fuel plant) to be significant when weighed against his views of Consumers' capability of delivering on their promises both in quantity and in consistency and in time.[56/] The Michigan Division position was that the contract was no longer advantageous to Dow but that Dow was going to fulfill its contractual obligations.[57/]

On September 9, 1976, Mr. Youngdahl called Mr. Temple and, in anticipation of the upcoming negotiating meeting, discussed Consumers' position on each of the points contained in Mr. Temple's letter of June 30, 1976. While Mr. Temple stressed an urgent need to hear from Consumers regarding the effect of the Aeschliman decision on the project and expressed the view that "a significant and dramatic change in the entire situation had occurred",[58/] Mr. Youngdahl testified that he came away from the telephone call with the belief that the parties had reached tentative agreement on contract changes and final agreement would be reached at the September 13, 1976 meeting.[59/]

On September 13, 1976, the Dow and Consumers negotiating teams met. Mr. Bacon, a regular member of the Consumers negotiating team and the most knowledgeable person on the Consumers team with respect to the impact of Aeschliman, was not present. Messrs. Howell and Youngdahl testified that they entered the meeting believing a new contract would be agreed to with little time or effort.[60/] Dow entered the meeting with an

agenda that called for the discussion of three issues in the following order -- (1) the Aeschliman decision and its implications on the project, (2) the status of the project, and (3) contract renegotiations.[61] After discussion of the first two issues and after repeated statements by Mr. Youngdahl that Mr. Temple would have to testify at the upcoming hearings, Dow caucused and then advised Consumers of the Michigan Division position and the reasons for it.[62] Consumers was told that Dow considered the contract between the parties to be valid and that Dow intended to honor it, but the contract was no longer in the best interests of Dow's Michigan Division.[63] Consumers was advised that Mr. Temple had called for a corporate review to which Consumers would be invited to make an input.[64] Apart from stating the view, at the September 13, 1976 meeting, that the contract was valid and Dow intended to honor it, Dow again reiterated this view in a telephone call between Mr. Youngdahl and Mr. Temple on September 14, 1976[65] and in a telephone call between Mr. Nute and Mr. Bacon on September 17, 1976.[66] Mr. Bacon reported this fact to other Consumers personnel on September 17, 1976[67] at a meeting where there was some discussion concerning whether Dow was taking the position that the contract was valid but no longer advantageous to frustrate the purposes of the contract.[68]

1301 100

THE SEPTEMBER 21, 1976 MEETING

As noted at page 11, supra, the purpose of the September 21, 1976 meeting was to explain to Dow the issues involved in the suspension hearing and what effect various Dow Chemical U.S.A. positions might have on the construction licenses. Mr. Nute's notes of the September 21, 1976 meeting state, in part, as follows:

> "4. Effect of delay steam, and cost/benefit analysis tilted - Dow becomes very important because here two issues (above) can come together - Rex suggested that Dow witness might be someone from Dow Chemical U.S.A. or Corporate area who is unaware of Midland Division recommendation to Oreffice - this person would testify as to effects of further delay upon Dow - if Dow accepts division recommendation and takes that position in suspension hearing, then construction license will be suspended for at least one year - no doubt about it - Falahee added that Consumers may lose its construction permit entirely - Consumers said that as long as construction continues, Consumers has a lever and will drag feet in hearing on merits - if construction stopped, intervenors have lever and will drag feet in hearing on merits - Consumers further pointed out that final FES (environmental statement?) states that if construction permit for Midland is cancelled, Consumers will cancel one Unit and transfer the other to Palisades - this was one of basis for issuance of construction license - Consumers threat - Falahee brought up the point that Dow has an obligation (Bacon interjects 'Section 3') under the General Agreement to support Consumers in the licensing proceeding. Falahee said 'If Dow takes this posture, Consumers and Dow will have a helluva legal problem.'

1301 101

(Note: strong implication that Consumers would regard us in breach if we went too far in our testimony) - Hanes replied that Dow's witness would tell the truth as he honestly believed it to be, whoever the Dow witness - Falahee then made naked threat that if Dow testimony not supportive of Consumers (Note: no longer just if we go too far) and that results in suspension or cancellation of permit, then Consumers will file suit for breach and include as damages cost of delay, cost of project if cancelled and all damages resulting from cancellation of project if it causes irreparable financial harm to Consumers. (bankruptcy)
(Note: pretty damn close to blackmail)" 69/
(emphasis supplied)

At the hearing, Mr. Nute testified that Mr. Falahee's comments at the September 21, 1976 meeting were to the effect that:

" ... I want you to get up on the stand and testify, but you'd better be careful what you say because if what you say results in our construction license being terminated and it causes us irreparable financial harm, we're going to sue you for every penny."70/

Mr. Nute continued:

* * *

"The point I'm trying to make is they had asked us on at least two or three occasions if we were going to breach the contract and we said No, it's a valid contract. It's a valid contract but we don't think it is of any -- there is a probability or possibility that it's going to be of any benefit to us, we're going to live up to our contractual obligations.

1301 102

"And they said to us if you get up there and say that and that results in the license being suspended, we're going to sue you. And to me that's going to have a -- well at that time I thought that's going to have an attempt to influence what you're going to say, and that's why I wrote, 'pretty damn close to blackmail'." 71/

Mr. Nute also testified that Dow was told that if its testimony did not support the position that the project had an economic advantage and that resulted in a suspension of the license, Dow would be sued. 72/

Mr. Hanes' notes of the September 21, 1976 meeting state, in part, as follows:

"Need Dow to avoid suspension + if suspended would ultimately lose license. Can't consider sunk costs in evaluation.

"If live up to K but no longer economically viable. Will sue Dow for K violation - shutdown costs, investment, bankruptcy." 73/

At the hearing, Mr. Hanes testified that Mr. Falahee told Dow that "if Dow took the position that Joe Temple had enunciated, that we'd be having a lawsuit." 74/ Mr. Hanes stated that there was quite a bit of talk about what was "support" for Consumers under the contract and that Mr. Falahee indicated that Dow had an obligation to support Consumers as Consumers interpreted the word "support" and if Dow did not do it and a suspension resulted,

1301 103

Dow would be subjected to a lawsuit.[75] Mr. Falahee also itemized Consumers' losses in the event of suspension to include sunk costs, purchase of power from other sources, loss of a possible sale of an interest in the plant and possible bankruptcy.[76] Mr. Hanes also stated that Consumers took the position that Dow had the obligation to advocate the project and try to "sell it".[77]

Mr. Klomparens' notes of the September 21, 1976 meeting state, in part, as follows:

> "Jim - If Dow takes this posture, Cons. and Dow will have a hell of a legal problem." [78]

At the hearing, Mr. Klomparens stated that this note referred to a statement made by Mr. Falahee and the phrase "this posture" referred to the Michigan Division position.[79]

Although Dow's Michigan Division had repeatedly advised Consumers that it considered the contract valid and intended to honor its obligations although the contract was no longer advantageous in its opinion, Mr. Renfrow entered the September 21, 1976 meeting thinking that the Michigan Division position meant that Dow would repudiate the contract.[80] Mr. Renfrow testified that, while Mr. Renfrow was outlining the possible impacts of various positions that Dow Chemical USA might take, Mr. Falahee interrupted and said that " ... if Dow breached the contract

they'd have a hell of a legal problem." [81] Mr. Renfrow said he did not recall Mr. Falahee stating that " ... if Dow takes this posture, etc." [82] Mr. Renfrow testified that Mr. Falahee did not threaten Dow with litigation at any time during the meeting and never told Dow that a lawsuit would result if Dow wasn't supportive of Consumers in the suspension hearing.[83]

Mr. Falahee testified that he made no statements during the meeting until Mr. Renfrow had completed going through the various alternative positions.[84] Concerning what he communicated to Dow during that meeting, Mr. Falahee testified as follows:

> "I was merely, frankly, trying to tell their lawyers that if what they did, regardless of what it was, if it turned out to be a breach there would be consequences."
>
> CHAIRMAN MILLER: "Serious consequences?"
>
> THE WITNESS: "Yes, Sir." [85]
>
> (emphasis supplied)
>
> * * *
>
> "The point I was getting across or trying to get across to Dow was that we felt we did have a valid contract; if indeed they did take action that constituted a breach that it would result in litigation." [86]
>
> * * *

1301 105

"What we were trying to tell Dow is if you disagree with us and think you have a legitimate reason, then you can take that position, but act carefully, because it is a serious proposition and it may result in serious litigation." 87/ (emphasis supplied)

* * *

"I don't recall saying if Dow's testimony is not supportive of Consumers -- that wasn't the thrust that I was trying to get across. What I was trying to get across is if, indeed, the Dow testimony was such that it breached the contract, that there would be resultant effects." 88/ (emphasis supplied)

* * *

"In other words, we weren't telling Dow damn it support this contract, that wasn't our position at all. We said if you're going to go with the Temple situation and the way you go with it and the [illegible] you go with it results in breach, [illegible] going to be some consequences. [illegible] we [illegible], and I don't think that [illegible] understood, that we were going any [illegible] further [illegible] frankly." 89/ (emphasis supplied)

Mr. Falahee also testified that if Dow had testified that they considered the contract uneconomic but still intended to take the steam and if a suspension resulted, Consumers would have sued Dow because he did not think Dow could take such a position in good faith. 90/ Mr. Falahee stated that there was some discussion regarding Dow's duty to support Consumers during the meeting. 91/

1301 106

Regarding the question of whether the magnitude of damages in such litigation was discussed, Mr. Falahee stated:

> "I did say, I'm sure, that if, indeed, they did breach that we would have a lawsuit -- a hell of a lawsuit, I guess I might have said, and I may have tried to put some flesh on those bones by telling what kind of damages I was considering.
>
> "But as I sit here this morning, I don't recall that. But I do know that a similar note to this with that kind of language in it appears I believe in Mr. Hanes' notes. And since it's in both, I suspect I may have said that." 92/ (emphasis supplied)

Mr. Bacon testified that the question of possible liability between Dow and Consumers came up in the meeting but was not a part of the prepared portion of the meeting.[93/] Mr. Falahee made a statement to the effect that if Dow repudiated the contract and walked away and that resulted in suspension, there would be a "hell of a legal problem" between the two companies.[94/] Mr. Bacon stated that he could not recall any statement to the effect that there would be a legal problem between the companies if Dow took the position that the contract was valid but no longer economically advantageous.[95/] He did recall some discussion during the meeting regarding Dow's obligation to support Consumers.[96/] Mr. Bacon stated that if there was a good faith disagreement between Dow and Consumers over whether the contract was advantageous to Dow and Dow testified that it was disadvantageous, Consumers would sue if a suspension resulted.[97/] If Dow took the position that the contract was valid but no longer advantageous and a suspension resulted, Mr. Bacon stated that it would be for the courts to resolve.[98/]

THE SEPTEMBER 24, 1976 MEETING

Prior to the September 24, 1976 meeting, Mr. Aymond requested Mr. Bacon to prepare a written outline for his use.[99] The first page of the outline contained four possible alternative positions [3a, 3a(1), 3b and 3c] that Dow Chemical U.S.A. might take and an estimate of the impact of each alternative on the construction licenses.[100] On the fourth page of the outline, Mr. Aymond caused to be inserted a statement reciting:

> "We (Consumers) consider that a Dow position other than 3a or 3a(1) would be inconsistent with Dow's contract obligations." [101]

Mr. Aymond could not recall inserting the statement and felt that it overstated the case.[102] Mr. Aymond could not recall receiving any report back from either Mr. Bacon, Mr. Falahee or Mr. Renfrow after the September 21, 1976 meeting to the effect that statements were made to Dow concerning the circumstances under which there would be litigation between the companies.[103] Prior to entering the September 24, 1976 meeting, Mr. Aymond felt that the Michigan Division position was closest to 3b on his outline,[104] Mr. Youngdahl thought it was closest to 3a(1),[105] Mr. Falahee couldn't estimate[106] and Messrs. Bacon and Howell expressed no opinion. Messrs. Temple, Nute and Hanes thought it was closest to 3b,[107] while Mr. Klomparens thought it was closest to 3c.[108]

With respect to the September 24, 1976 meeting itself, Mr. Nute's notes state, in part, as follows:

> "Mr. Aymond said if project shut down for 18 months would severely impact value of project to Dow in terms of cost and delay - would probably cause license revocation - currently have $350,000,000 in sunk costs less salvage - cost of dismantling and restoring site - $50 million in recoverables from Dow - commitments outstanding $123 million in cancellation costs in addition to $350,000,000 - wouldn't be able to finance for quite some time - would cancel coal-fired unit at Campbell + pollution control devices massive deterioration in earnings overnight while conducting no new construction - would lose $200-300 million on the project - 22 to 33% of common equity - would assert every claim they could to avoid it - seek damages from Dow to extent revocation attributable to breach of contract by Dow - if Dow repudiated it would be breach - if Dow frustrated ability to keep going without being obvious, still would leave it to courts - feel that Consumers, under the contract, deserves Dow's support - if reduced to a permit for only one unit as a result of Dow not participating - numbers could be less - (such as costs, cancellation charges, etc.)" 109/

At the hearing, Mr. Nute testified that he interpreted Mr. Aymond's statements at the September 24, 1976 meeting to mean that if Dow volunteered too much, it might face a lawsuit.110/

Mr. Temple testified that he was not surprised when Consumers indicated that Dow would be sued if they backed out of

the project. He then went on to state:

> "But they also described an intermediate case where we said we think it's a lousy contract but we've got it and we're going to continue. And that was very close to where the Division was sitting at the time the September 24th meeting took place, and at that point in time there was no other decision. And knowing that I was going to be, probably, the witness, and having been told that if they lose their license because they were frustrated by Dow that they would seek whatever means were available to them to sue Dow to get their money back, I was very concerned about that because that's where we were." 111/ (emphasis supplied)

Mr. Temple stated that Mr. Aymond was not suggesting that Dow adopt an untrue position or else risk a lawsuit but that:

> "He indicated that if there was any belief on their part that Dow, in any way, conducted themselves in the hearing in such a way as to -- well, in any way in the hearing or outside the hearing, to frustrate their efforts to maintain the construction license, that they'd sue Dow for whatever they could, based on whatever they thought the causes or the reasons for concluding that Dow was at fault.
>
> "And, as I said earlier, the Michigan Division conclusion was essentially that third situation." 112/

Mr. Temple went on to state that, in his opinion, Mr. Aymond wanted to make it perfectly clear what the financial risks were if Dow was careless. 113/

1301 110

Mr. Hanes' notes of the September 24, 1976 meeting provide, in part, as follows:

> "Mr. Aymond continued that Consumers Power has $350 million in such costs, of which $40 million is allocated to the steam plant. There would be a huge cost to return the site to its original condition. There would be some offsetting savings like the lowering of taxes. He said there are commitments on orders placed for $123 million and cancellation charges would be involved. Losses of the above magnitudes would affect Consumers Power's financing ability for a long period of time. There could be no expansion.
>
> "Mr. Aymond said that if these things happened they would sue Dow for losses, alleging a breach of contract by Dow, on theory that repudiation is a breach. He said if Dow acts to frustrate Consumers Power it is less clear. Consumers Power is entitled to Dow's support for the project."
>
> * * *
>
> "Mr. Aymond said it was all right for Dow to say they view the situation with concern. Dow can still support the project and say Dow cannot stand any more delays. Dow would still be behind the project.
>
> "Mr. Aymond recognizes that the present schedule is vital and that we can't avoid the question of Air Quality Board problems. He said there is a need to say the project is good for Dow even if close to the neutral point.
>
> "Mr. Aymond said Consumers Power is committed to the project if they can get licenses. If Dow would withdraw support, it would impair the ability to get licenses." 114/

1301 111

Mr. Hanes stated that Mr. Aymond did not precisely state that "only 3a or 3a(1)" would be acceptable but that was how he interpreted the combination of what Mr. Aymond and Mr. Falahee had said. 115/ Mr. Hanes testified that he understood the word "frustration" as it was used in the September 24, 1976 meeting to refer to a position that Dow Chemical U.S.A. might take that the contract was valid but that "it did not like the deal anymore". 116/ Mr. Hanes also testified that Mr. Aymond was saying:

> " . . . we'll see you in court if there's a repudiation or if Dow takes the position that it still intends to take electricity and steam from Consumers Power in accordance with the contracts but that an alternative source or sources would be more advantageous to Dow." 117/

Mr. Klomparens' notes of the September 24, 1976 meeting state, in part, as follows:

> "Would certainly seek to recover damages from Dow
>
> - If Dow were to repudiate the contract that would be a breach
>
> - If Dow were to just make things hard for Cons. then it's less clear & courts would have to decide." 118/

1301 112

At the hearing, Mr. Klomparens testified that Mr. Aymond made it clear that if Dow took the Michigan Division position and construction was suspended or the plant was delayed, Consumers was certainly going to seek damages from Dow.[119] When asked what type of position the phrase "if Dow were to just make things hard for Consumers" refers to, Mr. Klomparens stated that it referred to a position where Dow said the contract was valid but no longer advantageous to Dow.[120]

Mr. Aymond used the September 24, 1976 outline as a speaking aid but did not hand it out.[121] He does not recall reading the sentence on the outline to the effect that only 3a and 3a(1) were positions consistent with Dow's obligations during the meeting.[122] Mr. Aymond testified that earlier at his deposition he had said that Dow was told at the September 24, 1976 meeting that if it took the position that the contract was valid but there were alternative sources that were more advantageous and a suspension resulted, it would be sued. However, he then testified that he was not certain he actually said this at the meeting itself.[123] Mr. Aymond stated that a 3b position was not an entirely black or white position. It was a gray area where Consumers would have to know Dow's state of mind to determine whether it was a frustration of the purpose of the contract or not.[124] He went on to state that if Dow had testified that the nuclear

option was no longer economically attractive to it, he would have viewed that as a deliberate breach because all of Consumers' studies showed the project to still retain a significant cost advantage over the alternatives and Dow couldn't reach a contrary conclusion in good faith.[125/] Mr. Aymond testified that Dow's contractual duty to support Consumers went beyond simply providing technical data, information and witnesses and required Dow to support Consumers' efforts to complete the project.[126/] When asked what would have happened if Dow had taken a 3b position and a suspension resulted, Mr. Aymond responded that Consumers would go to court if its counsel advised it that there was a reasonable probability of success.[127/] He defined "frustration" as

> "a state of mind in which although ostensibly proceeding in accordance with the contract, they might actually attempt to shoot the project down." [128/]

When asked what "message" he was giving Dow if they took a position that the contract was valid but no longer advantageous, Mr. Aymond said:

> "I think we indicated that it was possible that that could result in a suspension and possible that it could not. I think we gave the percentages as 50-50, and I think I did indicate that if it did result in a suspension and if their actions were taken in

frustration of our contractual commitment for them to support the project, that we would let the courts decide what the liabilities were." 129/ (emphasis supplied)

Finally, when asked whether he viewed a Dow position that the contract was valid but no longer advantageous as a breach, Mr. Aymond said:

"Well, this was something that Mr. Potter and I got into at great length during my deposition. And I think that the question Mr. Olmstead asked me this morning was a little different than the one Mr. Potter did when I gave my deposition in May. I think an awful lot depends upon the good faith of the parties involved. And my view is that the economic evaluation is so clear that nuclear is more attractive from an economic standpoint that any position that was taken to the contrary would not be in good faith. (emphasis supplied)

"On the other hand, Mr. Olmstead today raised other issues in addition to the economics: the uncertainties, the delays, the future potential escalations, that do, I think, raise a question which, if that were the position that had been taken, I don't know what the answer would be. It could or could not be one that was in violation of the contract." 130/

Mr. Youngdahl succinctly stated the "message" given Dow at the September 24, 1976 meeting, as follows:

Q "Now was it also stated in that meeting that if Dow took any actions which frustrated Consumers' ability to finish the project, that Consumers would sue?"

1301 115

A "Well I think the reference was that if Dow overtly or inadvertently in some manner frustrated the contract, that it could well go to the courts." 131/
(emphasis supplied)

Mr. Falahee testified that Mr. Aymond did not read to Dow the position of his outline relating to the alleged inconsistency of 3b and 3c positions with Dow's contractual obligations. Rather, Mr. Aymond started talking about acts that would be giving "lip service" to the contract and that it would be necessary to leave the question up to the courts in this circumstance.132/ In Mr. Falahee's judgment, a 3b position would have been regarded by Consumers as giving "lip service" to the contract.133/

Mr. Bacon testified that Mr. Aymond told Dow that if Dow repudiated the contract, Consumers would regard it as a breach. If Dow did something less than repudiation but it amounted to a frustration of the purpose of the contract, then it would be for the courts to resolve.134/ Mr. Bacon defined "frustration" to mean:

"If Dow took any action which made it impossible for us to perform, for example." 135/

When asked what would have occurred if Dow took the position that the contract was valid but no longer economically viable, Mr. Bacon stated:

"I suspect it would be a litigable issue if reasonable men could differ." 136/

Finally, Mr. Bacon stated that the net effect of what Mr. Aymond said was:

> " . . . Look, if you repudiate the contract or if you frustrate its purpose and we can attribute damages to a breach by Dow, then we're going to seek all possible legal remedies to recover damages." 137/

CONCLUSION

The statements made to Dow at the September 21, 1976 and September 24, 1976 meetings by Messrs. Falahee and Aymond clearly went beyond simply stating that if Dow breached or repudiated the contract, Dow would be sued. Dow was clearly told that if it took any position that was not supportive of the contract and a suspension occurred, Dow would be sued by Consumers on the ground it could not in good faith reach any conclusion other than to support the project.

As noted above, Mr. Falahee testified that he delivered the following message to Dow on September 21, 1976:

> " ... [I]f you disagree with us and think you have a legitimate reason, then you can take that position, but act carefully, because it is a serious proposition and it may result in serious litigation." (emphasis supplied)

1301 117

That message was received as testified to by Mr. Nute:

> "I want you to get up on the stand and testify, but you'd better be careful what you say because if what you say results in our construction license being terminated and it causes us irreparable financial harm, we're going to sue you for every penny."
> (emphasis supplied)

The message delivered to Dow by Mr. Aymond on September 24, 1976, as testified to by Mr. Youngdahl, was:

> "If Dow overtly or inadvertently in some manner frustrated the contract, that it could well go to the courts."
> (emphasis supplied)

Dow properly interpreted the remarks of Messrs. Falahee and Aymond as a threat that litigation would ensue if its testimony was not supportive of Consumers and a suspension resulted. Consumers clearly indicated to Dow that the Michigan Division position was not "supportive" of the Consumers position and, if adopted by Dow U.S.A. and suspension resulted, there would be litigation between the companies.

The meetings of September 21, 1976 and September 24, 1976 focused Dow's attention on the fact that litigation with Consumers was a certainty if there was a suspension or revocation of the construction licenses -- regardless of whether or not there was any actual fault on the part of Dow. The strength of these messages

that Consumers intended to convey and did convey to Dow at these meetings forced the parties into adversarial positions.

V. THE ROLE OF DOW'S ATTORNEYS IN THE PREPARATION FOR THE ASLB HEARING WAS PROPER.

BACKGROUND

To properly assess the role of Dow counsel in the preparation for the ASLB suspension hearing, the Board must place themselves in the environment that existed when the Temple testimony preparation began. Mr. Nute was a member of the Dow negotiating team and shared that team's belief that Consumers had misled Dow in 1974 by withholding information about proposed construction delays until after Dow had executed the 1974 amendments to the contract.[138/] The team also felt that Consumers (a) had consciously misled Dow regarding the sale of nuclear fuel rights, (b) was less than candid about construction delays and the reasons for them, and (c) was unprepared for negotiating meetings.[139/] In Mr. Nute's words, the relationship between Dow and Consumers deteriorated from "compatible" to "arms-length" between February 1974 and December 1975[140/] and was "pretty strained" by June 30, 1976.[141/] The Aeschliman decision was handed down in July 1976 and Consumers made no effort to explain to Dow its implications on the project before the September 13, 1976 meeting.[142/] Instead, after the Aeschliman decision was handed down, Consumers rushed to sign a new contract.[143/]

1301 119

Mr. Nute attended both the September 21, 1976 and September 24, 1976 meetings with Consumers representatives. He heard the circumstances under which there would be litigation by Consumers against Dow explained as follows:

> A "Well if I said to you, Mr. Olmstead, I want you to get up on the stand and testify, but you'd better be careful what you say because if what you say results in our construction license being terminated and it causes us irreparable financial harm, we're going to sue you for every penny. So that causes you, as I said in my deposition, to testify with some trepidation. It would sure be on my mind." 144/
>
> * * *
>
> Q "So what, then, made this one so distinctive? Was it the forewarning or was it the size of the suit?"
>
> A "Neither one. It was -- what I captured in my notes and what Mr. Hanes apparently caught in his notes -- that if your testimony doesn't -- Well, his said if your testimony doesn't support that this has an economic advantage, or whatever was in his notes, and that results in us losing the license, we're going to sue you.
>
> "So it went to what they expected from us in the way of testimony. It wasn't just get up there and testify as to what your feelings are; it was the testimony had to be positive." 145/
>
> * * *
>
> "The point I'm trying to make is they had asked us on at least two or three occasions if we were going to breach the contract and we said No, it's a valid contract. It's a valid contract but we don't think it is of any --

there is a probability or possibility that it's going to be of any benefit to us, we're going to live up to our contractual obligations.

"And they said to us if you get up there and say that and that results in the license being suspended, we're going to sue you. And to me that's going to have a -- well at that time I thought that's going to have an attempt to influence what you're going to say, and that's why I wrote, 'pretty damn close to blackmail'." 146/

Mr. Nute became greatly concerned after Consumers explained to Dow the circumstances under which Consumers would sue Dow and sought legal advice concerning the strength of Consumers' position from outside counsel. He testified as follows:

Q "Did Mr. Friedman tell you that he had a concern?"

A "Yes."

Q "What was that concern?"

A "Well, it was more I guess along the lines of what I indicated yesterday, that there were cases, lines of cases, that dealt with the problem of somebody being involved in a contractual situation with another party and through testimony or through some action trying to sabotage a license that was needed to perform that contract.

"And if I recall correctly, some of those cases went to what was the intent of the party in his action or his testimony.

1301 121

Q "Did you have occasion to ask Mr. Friedman, or did Mr. Hanes address the Board concerning whether the provision of Mr. Temple as a witness in the proceeding which might result in a suspension of the license if he testified truthfully would fall into that category of cases where liability might attach?"

A "Well, number one, I don't know whether Mr. Hanes did. Number two, we may have discussed that. I think the concern was more along the lines of then you're getting into what was the intent of the party when he testified, and that was a concern, not so much with liability -- well, yeah, it was concerned with liability; it's a question of when you have that kind of an issue, quite obviously you're not going to -- if you want to defend it, you're not going to win on a summary judgment argument, you're going to go through a lengthy prolonged litigation with a lot of discovery and what was in somebody's mind and what was written down. And if I can put it in the vernacular, it's a crap shoot, and that's what we're worried about." 147/ *
(emphasis supplied)

---

*Mr. Nute's concerns were well-founded. Consumers itself had received legal advice on September 23, 1976 to the effect that "anything that Dow says or does that has the foreseeable result of a denial of Consumers' permit would be subject to scrutiny as a breach of this implied promise". (Tr. 52,189)

1301 122

Faced with the possibility of massive litigation if Dow did not "act very carefully", Dow adopted the following approach in the preparation of the Temple testimony:

> Q "Did Mr. Wessel suggest a way that you could build a record to protect yourself against such a contingency?"
>
> A "I think in our discussions after this point we decided we would make very sure that everything that was in the testimony was something that Consumers wanted in there and understood the implications of before they put it in there to make sure that they really understood what they were saying, so they couldn't come back later and say we sandbagged them or held out or something like that." 148/ (emphasis supplied)
>
> * * *
>
> Q "But under the 'duty to support' clause of the contract, Dow didn't want to volunteer anything. Is that correct?"
>
> A "We didn't want to volunteer anything because we'd been threatened by Mr. Aymond that if we volunteered too much we might be facing a lawsuit. So we wanted to make sure that it was very, very clear in our notes and to Consumers that everything they asked us for, they understood the significance of it and that they wanted it." 149/
>
> * * *
>
> Q "Is this the reason that you drafted that testimony in the third person?"
>
> A "It could have been, yeah. I know it was at the request of Milt."
>
> Q "And can you think of any other reason you would have drafted it in the third person?"

1301 123

A "No. Well, this reflects the concern we always had that Consumers would later come back and say we volunteered something and that was the basis for the license being lost and they were going to sue us. That was our concern throughout, my concern particularly." 150/

Q "So that it was not in Dow's strategy to say 'Here is some additional information we think will make the testimony clearer'?"

A "No, because I thought they had pretty much everything they needed after the October 5th draft and the October 12th. If they wanted more and asked for it, they would have gotten it. But it had to be clear that they asked for it, and we weren't trying to stick something in there that could later come back to haunt us in a lawsuit.

"In other words, if they could have later said 'Well, we wouldn't have put that in there, but you insisted and you knew what would happen if that was in there, we'd lose the license.' That was the kind of thing that we were concerned about." 151/

* * *

Q "Now, have you previously testified here that it was in effect a Dow tactic to have Consumers Power Company draft the testimony for you so that Dow wouldn't appear to be volunteering anything that Consumers didn't want?"

A "No, somebody may have asked me that but I didn't say that's what it was, I said my purpose was to make sure the notes reflected that they understood everything they got from us and wanted it and wanted it in the testimony so they wouldn't later go back against us and say, you know, we pushed to have that in there knowing that the result would be suspension of the license." 152/

Mr. Wessel came to the testimony preparation period with prior experience in the Dow-Consumers relationship although he was not intimately involved in the contract negotiations.[153/] He saw frustration, unhappiness, dissatisfaction and even distrust grow between the parties as time progressed from 1973 to 1976.[154/] Mr. Wessel saw the possibility of litigation by Consumers against Dow long before the threat was made explicit in the September 21, 1976 and September 24, 1976 meetings.[155/] When Mr. Wessel heard from Mr. Nute what had transpired at the September 21, 1976 and September 24, 1976 meetings, he became concerned because the implicit threat had become explicit and the nature of the threat had changed from a threat of a lawsuit if there was an outright breach of the contract by Dow to:

> " ... that if Dow didn't act in the proceeding in a way which supported Consumers, not just if Dow didn't [sic] breach the contract but if Dow didn't act in a way which supported Consumers, there was at least a $600 million lawsuit, and that didn't seem to be the limit of what they might sue for." [156/]

Mr. Wessel viewed Mr. Bacon and Mr. Renfrow (and later Mr. Rosso) as adversaries who were attempting to conduct "free discovery" of Dow's negotiating positions and of information to buttress Consumers' position in subsequent litigation against Dow.[157/]

Mr. Wessel, who worked with Mr. Nute in the preparation for the ASLB hearing, was more concerned with Dow's offensive posture vis-a-vis Consumers (i.e., a possible "best efforts" claim

against Consumers) than was Mr. Nute, who was primarily concerned over possible Dow liability to Consumers for events that occurred in the ASLB hearing.[158/] However, Mr. Wessel also shared Mr. Nute's concerns over possible liability to Consumers. Mr. Wessel's concerns, as the preparation for the hearing began, included:

> Q "And in that regard what was your primary concern?"
>
> A "I wanted to avoid doing anything which would prejudice Dow's suit, if it ever brought one, against Consumers. I wanted to avoid doing anything which would give Consumers some opportunity for saying: Dow, you have violated your rights, and either sue us first, or counterclaim, or do something of the same character." [159/]
>
> * * *
>
> Q "You did not want to put a Dow witness on as your own witness?"
>
> A "That's correct."
>
> Q "And this is consistent with the same strategy that you had with the Dow non-party position?"
>
> A "Yes, it's the same strategy of not being in a position where we could be charged with having taken action which might have a negative effect upon the license." [160/]
>
> * * *
>
> Q "Did that concern that you indicate in your answer to the questions I posed on page 57 of your deposition, did that concern affect your decision as to whether to be a party or not to be a party in the -- ?"

1301 126

A "I'm sure that was one of the reasons that I came to the conclusion that that position was by far the best one to take, but it was by no means the only reason for it."

Q "Okay. What other reasons were there for Dow's non-party status?"

A "Their relationship with Consumers. By not being a volunteer and having Consumers call the shots we would not be in a position where Consumers could say that what we did had hurt them." 161/

It is against this backdrop of events and circumstances, which by September 29, 1976 had polarized the parties into adversarial positions, that the role of Dow counsel in the ASLB suspension hearing preparation must be viewed. We will now separately analyze the "issues" raised regarding the conduct of Dow counsel.

A. THERE WAS NOTHING IMPROPER IN DOW'S DECISION TO TAKE THE LEGAL POSITION THAT IT WAS NO LONGER A PARTY TO THE NRC PROCEEDINGS AFTER AN ORDER HAD BEEN ENTERED BY THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DISMISSING IT AS AN INTERVENOR IN THE THEN PENDING PROCEEDINGS.

Concerning the decision by Dow to take the position that it was no longer a party to the NRC proceedings, Mr. Wessel stated as follows:

1301 127

Q "To the best of your recollection, how did Dow determine not to participate as a party in the NRC proceeding following the Court of Appeals remand?

"Maybe I should preface it. Was that a deliberate choice?"

A "Yes."

Q "And when was that choice made?"

A "Some time following the Court of Appeals remand. Probably in September, when the clear inconsistency between the positions of Consumers and Dow in so many respects became apparent and the danger of Dow taking action in the litigation as a party which might somehow give Consumers a claim against Dow. I think I was the person to first suggest that we ought not to in any way act as a party but rather act as a witness." 162/

Mr. Wessel went on to explain that, by taking the position that Dow was no longer a party, Dow could require Consumers to "call the shots" 163/ and avoid "a position where Consumers could say that what we did had hurt them". 164/ Mr. Wessel testified that he recommended that Dow take the position that it was not a party to the NRC proceedings before the meetings with Consumers of September 21, 1976 and September 24, 1976 because he recognized the general legal obligation not to frustrate a contract's performance and wanted to avoid Dow being placed in a position where Consumers could make such a claim. 165/ This position became even more important when Consumers told Dow that litigation would follow if Dow's testimony was not supportive of Consumers and a suspension followed. 166/

1301 128

The Code of Professional Responsibility provides, in part, as follows:

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATIONS

* * *

Duty of the Lawyer to a Client

"EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by law or is supportable by a good faith argument for an extension, modification or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous."

* * *

"EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law."

(emphasis supplied)

1301 129

The position advocated by Mr. Wessel that Dow was not a party was clearly "a permissible construction of the law" in view of Dow's earlier dismissal as an Intervenor by the U. S. Court of Appeals for the District of Columbia Circuit. The position was taken for compelling reasons to protect Dow and reduce its exposure to threatened litigation. The position was openly taken*/ and advocated with no intent to obstruct the flow of any information to the Board. As stated by Mr. Wessel:

> Q "So that, in essence, by taking the position that you were a non-party, you relieved yourself of obligations to the Hearing Board, is that correct?"
>
> A "Well I say the answer to that is yes, but that was not the purpose of taking that position and we specifically made it clear when we said we were not a party in the beginning of the hearing that we would do whatever the Board wanted without any subpoena or direction or what have you. So that position back in September and through December, or through November, of not being a party had nothing to do with the Board." 167/
>
> (emphasis supplied)

---

*/ Indeed, Mr. Wessel sent a letter dated November 22, 1976 to the Board advising them of Dow's position. (Vol. V, Tab 37)

1301 130

CONCLUSION

There clearly was no impropriety in Dow counsel's decision to take the position that Dow was not a party. Dow was told that it would be sued if its testimony was not supportive of Consumers and a suspension resulted. Mr. Wessel was Dow's counsel and, as such, sought a way to protect it from the threatened litigation or to minimize the exposure to that threat. Mr. Wessel was trying to avoid a claim charging Dow "... with having taken action which might have a negative effect upon the license".[168/] The Dow position that it was not a party was openly taken with no intent to interdict the flow of any information to the Board.

B. DOW HAD NO DUTY TO ADVISE CONSUMERS COUNSEL MESSRS. RENFROW AND ROSSO THAT CONSUMERS HAD THREATENED DOW WITH LITIGATION IF THE CONSTRUCTION LICENSES WERE SUSPENDED DUE TO THE FAILURE OF DOW TO POSITIVELY SUPPORT CONSUMERS' POSITION IN THE SUSPENSION PROCEEDING.

Questioning of Dow counsel Messrs. Nute, Hanes and Wessel during the most recent hearing implies that it may be contended that Dow counsel had some "duty" to advise Consumers counsel that their own client, Consumers, had threatened Dow with litigation. There clearly was no such "duty". Messrs. Nute, Hanes and Wessel were representing Dow, not Consumers. Moreover, as Mr. Nute testified at the hearing, he assumed that Mr. Renfrow and Mr. Bacon advised Mr. Rosso of what was said during

the September 21, 1976 meeting by Mr. Falahee and that Mr. Bacon told Mr. Renfrow and Mr. Rosso what was said during the September 24, 1976 meeting by Mr. Aymond.[169/]

Even though there was no duty to advise Consumers counsel of what their client had said to Dow (particularly when one of the counsel attended the same meeting), the evidence adduced at the hearing clearly discloses that either Mr. Renfrow or Mr. Renfrow and Mr. Rosso were told by Dow that it had been threatened with litigation by Consumers. Thus, Mr. Nute's notes of the September 21, 1976 meeting disclose that Mr. Nute told Mr. Renfrow that Consumers was being inconsistent by "threatening a massive lawsuit on one hand if Dow takes a hasty position, yet demanding immediate statement of position on the other hand".[170/] Mr. Nute so testified at the hearing.[171/] He also testified that the slide or "overhead" used during the corporate review presentation to the U.S.A. Board relating to the threat of the $600 million lawsuit by Consumers was shown to Mr. Renfrow during the Temple testimony preparation period.[172/] Finally, Mr. Rosso testified that Mr. Wessel was continually expressing concern that Consumers would come back and sue Dow if there was some misstep by Dow that caused a suspension.[173/]

CONCLUSION

There was no "duty" requiring Dow counsel to advise Consumers counsel that their own client had threatened Dow with

litigation, particularly in view of the fact that Mr. Renfrow was in attendance at the September 21, 1976 meeting. Although no such "duty" existed, it is clear that both Mr. Renfrow and Mr. Rosso or Mr. Renfrow alone were told on more than one occasion that Dow had been threatened with litigation by Consumers.

C. DOW HAD NO DUTY TO ADVISE CONSUMERS COUNSEL RENFROW AND ROSSO THAT CONSUMERS COUNSEL RENFROW HAD SUGGESTED, DURING THE COURSE OF A SEPTEMBER 21, 1976 MEETING WITH DOW, THAT A DOW WITNESS BE USED WHO WAS NOT FULLY KNOWLEDGEABLE OF THE DOW-CONSUMERS RELATIONSHIP.

As noted in Argument 5 B, supra, Consumers counsel in the most recent hearing pursued a line of questioning with Dow counsel Messrs. Nute, Hanes and Wessel that causes Dow to believe that it may be contended that Dow owed some "duty" to Consumers counsel Messrs. Renfrow and Rosso to advise them that Consumers had suggested the use of a Dow witness who was not fully knowledgeable of the Dow-Consumers relationship. Such an argument is even more untenable than the possible contention that there was a "duty" to disclose the threat of litigation to Consumers counsel. Here, it was Consumers counsel, Mr. Renfrow himself, who made the statement regarding the Dow witness. Moreover, even if a "duty" existed to advise Mr. Renfrow and Mr. Rosso that Mr. Renfrow made a suggestion that a less than fully knowledgeable witness be used, both

Mr. Renfrow and Mr. Rosso were told this fact during the November 1, 1976 meeting when Mr. Wessel told them that "... the Dow Board got the impression that Consumers Power wanted Dow to produce a witness that didn't know what had gone on."[174/]

CONCLUSION

There was no "duty" to advise Mr. Renfrow and Mr. Rosso that Consumers counsel had suggested the use of a witness who was not fully knowledgeable of the Dow-Consumers relationship. Even though no such "duty" existed, both Mr. Renfrow and Mr. Rosso were told that Dow had the impression that Consumers wanted a Dow witness who was not fully knowledgeable.

D. THE CONDUCT OF DOW COUNSEL DID NOT CREATE THE IMPRESSION THAT CONSUMERS ALONE HAD PREPARED THE TEMPLE TESTIMONY.

Mr. Renfrow testified that he felt that the effect of the testimony of Mr. Temple as delivered and some comments to the Board by Mr. Wessel concerning how the testimony was prepared may have misled the Board into believing that Consumers alone had prepared the testimony and had "manipulated" Dow into complying

with its desires regarding the content of that testimony.[175] Mr. Renfrow stated that all the information relevant to the Dow corporate position was given to the ASLB[176] but the Board may have been misled as to how the Temple testimony was in fact prepared.[177] However, when asked to point out the specific points testified to by Mr. Temple or the comments made by Mr. Wessel that Mr. Renfrow was relying on, he was unable to do so.[178]

On this point, Mr. Rosso testified as follows:

BY MR. DAMBLY:

Q "Mr. Renfrow has testified that he thought the statements by Mr. Wessel made at the hearings and Mr. Temple's testimony created the impression that Dow had wanted initially the Michigan Division position and I guess Mr. Temple's personal views to go into the testimony and Consumers Power had wanted to keep them out and it fought to keep them out. Does that comply with your impression of what Mr. Wessel's statements and Mr. Temple's testimony conveyed to the Board during the suspension hearing?"

A "Oh, I don't know what they conveyed to the Board. My impression is somewhat different than -- if that's what Rex said, my impression is somewhat different."

CHAIRMAN MILLER: "Without commenting upon what Rex or any other witness said, what is your best recollection?"

1301 135

THE WITNESS: "My best recollection is that Milton washed his hands of the whole thing and made some vague statements about Rosso and Renfrow acted in this great way, which was supposed to refer, I guess, to some -- to the canons of ethics or something like that but he really didn't help us any, he just sort of washed his hands of the whole thing.

"And I don't think that they -- I don't know that they misled the Board in any way, I just -- "

CHAIRMAN MILLER: "Don't worry about the Board being misled, tell us what you observed and what your best recollection is."

THE WITNESS: "That's it. They just sort of washed their hands and said go talk to them, not us. 179/

(emphasis supplied)

Thus, the only Consumers witness to testify that the Board may have been misled by Dow counsel concerning Dow's involvement in the preparation of the Temple testimony was Mr. Renfrow and he was unable to identify the statements by either Mr. Temple or Mr. Wessel that he was relying on. Mr. Rosso did not agree with Mr. Renfrow's judgment and did not think Dow had misled the Board in any way.

1301 136

All parties agreed that the Temple testimony as filed with the Board was properly prepared and was complete in its exposition of the Dow corporate position. Since the testimony was properly prepared, the relative degree of involvement of Dow and Consumers in the preparation of that testimony should be of little importance.*/ The record amply demonstrates that Dow feared it would be sued if the license was suspended and the suspension could somehow be claimed to be due to a failure of Dow to be supportive of Consumers in the hearings. For this reason, Dow time and again took steps to insure that the testimony as given by Mr. Temple was what Consumers wanted and was responsive to their questions.

CONCLUSION

The conduct of Dow counsel was not improper in any respect in insuring that the testimony of Mr. Temple was accurate and was what Consumers wanted. They did not create the impression that Consumers alone was involved in preparing Mr. Temple's testimony.

---

*/ In any event, Dow's involvement in the preparation of Mr. Temple's testimony was fully explained to the Board at the time of the suspension hearing. (Tr. 478-502; 661-680)

1301 137

E. DOW COUNSEL DID NOT EMBELLISH UPON AND BROADEN THE DOW CHEMICAL USA DECISION AS IT WAS STATED BY MR. OREFFICE ON SEPTEMBER 27, 1976.

During the testimony of Mr. Temple, the Board asked a question indicating a concern that the Dow USA Board decision may have been "expanded a little" in the course of the preparation of the draft testimony outlines.[180/] Dow believes that the record amply demonstrates that the precise content of the Dow USA Board decision was accurately communicated to the ASLB in the Temple testimony.

Mr. Oreffice testified that the elements of the Dow USA Board decision were (a) based on a cost of $1.67 billion and a March 1982 completion date, the project was still the best economic alternative, (2) any further delays or cost increases could make a difference, (3) Dow should keep its options open.[181/]

The Dow USA Board decision as reported in the written direct Temple testimony was as follows:

> "A further review of the project and the contracts between the parties was commenced in August 1976, as a direct result of the Court of Appeals decision on July 21, 1976, and the new projected capital cost of the project of $1,670,000,000 given to me by telephone on August 5, 1976. This last review, which was concluded in September of 1976, resulted in a conclusion that at the present time circumstances

1301 138

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

CONCLUSION

The Dow USA Board decision as made by the Dow USA Board on September 27, 1976 was fully and accurately reported in the Temple direct testimony without expansion or embellishment by Dow counsel.

VI. THE DIRECT TESTIMONY OF MR. TEMPLE WAS PROPERLY PREPARED EVEN THOUGH IT DID NOT CONTAIN A REFERENCE TO THE MICHIGAN DIVISION RECOMMENDATION.

The testimony at the hearing disclosed that counsel for Consumers were initially inclined to include a discussion of the Michigan Division position and the reasons for it in the direct testimony of Mr. Temple. While both Mr. Renfrow and Mr. Rosso were convinced that the Michigan Division position was immaterial in view of the corporate review and the Dow USA Board decision, Mr. Renfrow thought that it should be included in the direct testimony for tactical reasons.[182/] Both Mr. Nute and Mr. Wessel were convinced that the Michigan Division position was both irrelevant and immaterial.[183/] They argued that it should not be

1301 139

included in the direct testimony for reasons best stated by Mr. Wessel:

> CHAIRMAN MILLER: "So it's really very difficult to say anything is absolutely immaterial, including subsequent repairs because of certain exceptions which have developed. Isn't that true, under the law of evidence?"
>
> THE WITNESS: "It is true, and it is an argument and I don't know the extent to which I had any confidence that the argument would be successful, although I thought it was a valid argument to make, and I wrote up a two-page statement arguing that it wasn't material. But it was at least a responsible, credible argument to be made which might be successful and if it was not successful, then it would have been forced out of Dow and we wouldn't have volunteered it and we wouldn't be in trouble."
>
> CHAIRMAN MILLER: "So far as the Board was concerned, isn't it fair for us to infer that respectable legal argument could be made both ways on that question?"
>
> THE WITNESS: "Yes, clearly."
>
> CHAIRMAN MILLER: "All right. Thank you."
>
> THE WITNESS: "And I think I was always aware of the strong possibility that Mr. Cherry, the moment he heard such a statement, would fight like heck to get to the information.
>
> "But remember that a very substantial part of my concern was that it not be

1301 140

produced by Dow in a way which Consumers could then say, 'You did this deliberately to get us,' or 'You sandbagged us,' or something like that." 184/
(emphasis supplied)

Dow counsel urged that the Michigan Division position not be included in the direct testimony at the September 29, 1976 meeting with Messrs. Bacon and Renfrow.185/ However, their view did not then prevail and Messrs. Bacon and Renfrow continued to insist that it be included for tactical reasons, giving Dow a revised outline which included a demand for information on the Michigan Division position and the reasons for it.186/* Subsequently, between October 13, 1976 and October 17, 1976, Messrs. Miller, Rosso and Renfrow discussed the matter further and decided to preserve the argument on materiality by not including the Michigan

---

*/ Mr. Wessel's memorandum of December 4, 1976 states, in part:

> "He (Rosso) then said what his position had been (that the underlying Dow reasoning was irrelevant to the final action decision) and that this had been the Dow position. I said it indeed had been the original Dow position, but that it had been overruled by Mr. Renfrow and Mr. Bacon at the first conference I attended with them."

Thus, Mr. Wessel's memorandum accurately stated the status of the matter at the conclusion of the September 29, 1976 meeting. The decision not to include the Michigan Division position in the October 22, 1976 draft of testimony prepared by Consumers was made by Consumers before the draft was mailed to Dow. 187/

Division position in the direct Temple testimony. 188/*

---

*/ Mr. Nute's memorandum of December 2, 1976 states in part:

> "Dave said he believed that Dow had requested that the Corporate Review Michigan Division decision discussion be left out of Temple's testimony. He said he thought that it was not Consumers that had decided to leave the Michigan Division decision out of Temple's testimony."
>
> * * *
>
> "I further told Dave that in my opinion, the decision to leave out testimony on the Division Review was Consumers' idea."
>
> (emphasis supplied)

Mr. Nute's memorandum is correct. The testimony showed that the idea of leaving out the Michigan Division position originated with Dow. The final decision to leave it out was made by Consumers sometime before it delivered the October 22, 1976 draft to Dow. Mr. Rosso's comment to Mr. Nute speaks to the "decision" to leave the Michigan Division position out of the Temple testimony. Mr. Nute's comment correctly responds that the "decision" was Consumers'.

The decision not to include a discussion of the Michigan Division position in the direct testimony of Mr. Temple due to its immateriality was clearly proper. Not one attorney who appeared before the Board in this hearing made any claim that the Michigan Division position was in fact material. Viewed against the definition of materiality set out in North Anna Power Station, Units 1 and 2, NRC Decisions # 30,121) (i.e., "whether a reasonable staff member would, or should, consider it in reaching a conclusion or in determining a course of action"), there clearly was no need to disclose a division position that was not adopted by the Dow USA Board. The ASLAB, in its decision of February 14, 1978, did not deem the Michigan Division position to be material. There, it said:

> "The evidence adduced thus far, which appears to be unusually comprehensive, can be fairly summarized as follows: some officials in the local Dow management view Midland as a losing proposition and would abandon it, but the senior corporate officers have decided, subject to reconsideration if circumstances change, that Dow will honor the contract to buy steam from Midland, notwithstanding that intervening events have rendered its terms far less attractive to Dow than they originally were.
>
> "For our purposes, then, that portion of the demand for Midland power attributable to Dow is a given." 189/
> (emphasis supplied)

1301 143

Notwithstanding the above, the Michigan Division position was clearly set out in the Dow notes of the September 13, 1976 negotiating meeting. These notes were made available by Dow to Consumers on October 18, 1976 and were subsequently made available to both the Intervenors and the Staff by Consumers on November 3, 1976 in Jackson, Michigan. Neither the Intervenors nor the Staff chose to avail themselves of this documentary disclosure.

CONCLUSION

There clearly was no impropriety in not discussing the Michigan Division position in the direct testimony of Mr. Temple.

VII. MR. TEMPLE WAS IN FACT DOW'S MOST KNOWLEDGEABLE WITNESS EVEN THOUGH HE DID NOT TAKE PART IN THE DOW CHEMICAL USA BOARD DELIBERATIONS THAT TOOK PLACE IMMEDIATELY FOLLOWING THE PRESENTATION BY THE REVIEW TEAM.

During the course of the hearing, counsel for the Staff raised the question of whether Mr. Temple was in fact Dow's most knowledgeable witness in view of the fact that he did not participate in the Dow USA Board deliberations following the review team's presentation. Dow believes that Mr. Temple was, indeed, its most knowledgeable witness.

1301 144

In order to resolve this question, it must be determined why a Dow witness was to be called at all. The Aeschliman decision called for testimony on "the changed circumstances regarding Dow's need for process steam and the intended continued operation of Dow's fossil-fueled generating facilities".[190] On this question, Mr. Temple was clearly the most knowledgeable Dow witness. He was the General Manager of the Dow Division that would ultimately receive the steam from the nuclear plant[191] and had been involved in the negotiations with Consumers over contract changes since 1973.[192] When he took the stand, he was Dow's most knowledgeable witness regarding what the Michigan Division's position had been and the factors that led up to it.[193] While he had not participated in the review team's work[194] or the deliberations of the Dow USA Board,[195] he was present throughout the review team's presentation to the Dow USA Board on September 27, 1976 and was familiar with the same facts presented to the Dow USA Board.[196] The Dow USA Board then deliberated as follows:

(BY MR. CHARNOFF)

Q "Mr. Oreffice, going back to the meeting of the Dow USA Board on September 27th, could you review with me, with us, exactly what took place in the private meeting that the Dow USA Board had after the presentation by the review group?"

A "Oh, as I recall, it was a very short meeting, probably -- my guess is ten minutes, fifteen minutes, because

essentially we had all heard the conclusions of the review group and there was unanimous agreement that the conclusions were correct, that given the same capital and timing that the proper thing was to go on with the Consumers' contract and continue to negotiate a better contract, but that the nuclear alternative was still the best alternative."

Q "Was there any particular focus on any particular element of that presentation by the review group?"

A "I don't recall any, no."

Q "It was basically a review of the relative economics of the nuclear alternative?"

A "Well, I remember walking out of there, walking out of the meeting with the whole review board with the feeling on my part that the conclusion would be what we reached, and essentially as I gathered the guys -- I said essentially, 'Does anybody disagree with this? What thoughts does anybody have?'

"And that's why it was such a short meeting, because everybody had heard the same data and everybody essentially agreed." 197/
(emphasis supplied)

Thus, the deliberations of the Dow USA Board consisted simply in determining whether there was unanimity of opinion in favor of the review team recommendation. No new subject matter was discussed that had not been raised in the review team presentation to the Dow USA Board -- all of which Mr. Temple had heard.

1301 146

CONCLUSION

Mr. Temple was Dow's most knowledgeable witness on the issue outlined by the Aeschliman decision, for which a Dow witness had to be called. While he did not take part in the Dow USA Board deliberations, nothing occurred in those deliberations other than determining whether there was agreement on the recommendation made by the review team. Mr. Temple, like the Dow USA Board, had heard the review team presentation and its recommendation. He heard the Dow USA Board decision. No other Dow witness was more knowledgeable. No review team member or Dow USA Board member was as close to the project as Mr. Temple or possessed his detailed knowledge of it.

VIII. MR. TEMPLE WAS ACTIVELY INVOLVED IN THE PREPARATION OF HIS TESTIMONY AND IT WAS IN FACT HIS TESTIMONY.

During the hearing, the Board raised the question why Mr. Temple did not himself prepare his own testimony without the aid of counsel.[198/] Mr. Nute testified that, based on his experience before administrative agencies, it was accepted practice for lawyers to work with the witness in preparing question and answer format written testimony.[199/] Mr. Rosso concurred in Mr. Nute's understanding of this practice.[200/]

1301 147

The testimony at the hearing clearly showed that Mr. Temple was actively involved in the preparation of his testimony and that it was in fact his testimony. Mr. Nute testified that Mr. Temple was involved in the preparation of both the October 6, 1976 draft outline and the October 29, 1976 draft of testimony.[201] He was also involved in the preparation of the final written testimony that was submitted to the Board.[202]

Mr. Temple testified that he reviewed the October 6, 1976 draft outline and made changes to it before it was sent to Consumers.[203] He reviewed the October 22, 1976 draft of testimony prepared by Consumers and noted those sections he objected to as erroneous.[204] Concerning his overall involvement in the preparation of the testimony, Mr. Temple said:

> Q "I believe you told us in your deposition that the form your testimony took was decided by attorneys. Is that correct?"
>
> A "That's my understanding."
>
> Q "And that you had minor involvement in that?"
>
> A "By the form, I'm talking about the question-and-answer form. That's my recollection."
>
> Q "Okay."
>
> "Did you feel you had a major involvement concerning the scope of the testimony?"

1301 148

A "In its final form, I felt I had the final say or I wouldn't sign it."

Q "On the scope of the testimony?"

A "Yes."

Q "So that they asked the questions that you wanted asked?"

A "No, I approved of the questions that they had put together as being the basis for the testimony. I didn't feel that, with regard to the Dow corporate position, that I had, as I recall it anyway, any need to incorporate, other than what the attorneys had worked up for weeks to put together." 205/ (emphasis supplied)

CONCLUSION

Mr. Temple was actively involved in the preparation of his own testimony and it was in fact his testimony.

IX. THERE WAS NOTHING IMPROPER IN DOW'S FAILURE TO ADVISE THE ASLB OF CONSUMERS' THREAT TO SUE DOW IF THE LICENSES WERE SUSPENDED DUE TO DOW'S FAILURE TO POSITIVELY SUPPORT CONSUMERS' POSITION IN THE SUSPENSION HEARINGS.

During the hearing, the Staff raised the question why Dow did not advise the ASLB of Consumers' threat to sue Dow if the Dow testimony was not supportive of Consumers' position in

the suspension hearing.[206] Mr. Nute responded:

A "I felt the first thing I should do is get an accurate legal analysis of whether Consumers had a basis to state what they did, whether they were on firm legal ground when they said that or not. And I viewed that as the first thing that I had to do, and I went about doing that."

Q "And what did you find out?"

A "I found out that there are cases from which you could imply that we have an obligation not to sabotage their attempts to get a license; that there was enough there that they could get past a summary judgment test and we'd be involved in major litigation." (emphasis supplied)

Q "That's not quite what I asked you about, sabotage. I'm taking your own analysis here, the naked threat that if the testimony was not supportive, not just if you went too far and not if you sabotaged, but if it was not supportive, and I'm asking you in the context of what I understood to be your conception of some contractual clause which imposed certain obligations upon Dow, what about that?"

A "I didn't view it in terms of the contractual clause which imposed those obligations on Dow, but I looked at just plain contract law, and there are cases dealing with this question of what is required by 'support,' and some of those cases go to the intent of the party in their testimony, and testifying that where they didn't support.

"In other words if the intent behind that testimony was to purposely sabotage the project, then the party who was losing its license could sue and successfully litigate. So it got down to a question of intent, and that's the legal conclusion that I came to." 207/ (emphasis supplied)

Q "Well, now, what if the facts as you analyzed the law were both accurate and matters which could be significant to a trier of fact such as the Licensing Board? What does your analysis indicate as to potential duties of Dow or any other party?"

A "I didn't reach that point of analysis, what our duties were to the Board at that point because I didn't know how this whole thing was going to come before the Board or what shape the hearing was going to be at this point."

Q "Well, you had a clue, didn't you, that there was going to be some effort possibly to finesse certain matters? Didn't that give you some kind of a guide as to what was at least contemplated?"

A "I'm sorry, I didn't -- I didn't know how the hearing was going to take place, what our function was going to be in it, what kind of contacts we would have with the Staff before that. I hadn't reached all those questions yet." 208/

* * *

"I interpreted it one way. I didn't know if I was right. That was it. There was further discussion after that. I mean, I was just notifying everybody.

"I guess it was an impression. I couldn't quite believe what I heard. And then,

again, I didn't know whether I was reacting too strongly to it or not, and I wanted to find that out by talking to other people." 209/

Shortly after the threats were made to Dow, the Dow USA Board met on September 27, 1976 and heard the review team presentation which included the information that Dow had been threatened by Consumers. 210/ As Mr. Oreffice testified:

" ... essentially we had all heard the conclusions of the review group and there was unanimous agreement that the conclusions were correct, that given the same capital and timing that the proper thing was to go on with the Consumers' contract and continue to negotiate a better contract, but that the nuclear alternative was still the best alternative."

Q "Was there any particular focus on any particular element of that presentation by the review group?"

A "I don't recall any, no."

Q "It was basically a review of the relative economics of the nuclear alternative?"

A "Well, I remember walking out of there, walking out of the meeting with the whole review board with the feeling on my part that the conclusion would be what we reached, and essentially as I gathered the guys -- I said essentially, 'Does anybody disagree with this? What thoughts does anybody have?'

"And that's why it was such a short meeting, because everybody had heard the same data and everybody essentially agreed." 211/

1301 152

Thus, while the threat of litigation was a "very important" factor in the Board's decision, the USA Board concluded that the nuclear project retained an economic advantage over other alternatives at that point in time.

Faced with a Dow USA Board decision that found the nuclear project still economically viable, Dow continued to entertain the fear that if it volunteered any other information adverse to the Consumers' position, including the threat of litigation itself, massive protracted litigation would result. As Mr. Nute stated:

> Q "Well, assume for the moment that Consumers Power was not in the posture of providing Dow's testimony and that instead of later, Dow had to have by this time been ordered to be a party by the Board and to provide its own testimony. Would it have provided different testimony?"
>
> A "Assuming that we'd still be threatened with the lawsuit?"
>
> Q "Right."
>
> A "I think we would have asked the Board for guidance probably."
>
> CHAIRMAN MILLER: "In what context? Explain that, please."
>
> THE WITNESS: "Well, what it was that the Board wanted us to testify about. We were concerned about volunteering something or having been said to volunteer something so that in later litigation if it got back to the question of the intent behind volunteering that,

1301 153

whether there was some intent to cause Consumers to lose its license, so maybe one of the things -- I'm just speculating, we might have gone to the Board and asked for direction. I don't know." (emphasis supplied)

CHAIRMAN MILLER: "Well, would you have revealed -- Would Dow have revealed to the Board that it was operating under what it considered to be threats of litigation which might have some impact upon the extent of its proffered testimony?"

THE WITNESS: "I think it would have been more in the nature that we had this obligation to support under Paragraph 3 yet we're supposed to put in testimony, what does the Board want? And if they asked, as they later did, why are you concerned about that, it probably would have come out. The question again was about volunteering something."

CHAIRMAN MILLER: "What I'm asking you is in your initial -- Dow's initial contact with the Board on that question, whether or not it would have affirmatively revealed to the Board that there was some question as to what Dow considered to be threats of litigation."

THE WITNESS: "I don't know."

CHAIRMAN MILLER: "Who would know?"

THE WITNESS: "You're asking me to speculate on what would have happened if, and -- "

CHAIRMAN MILLER: "NO, I'm asking your best judgment as to whether Dow would have or would not have affirmatively revealed certain things to the Board. Those certain things would rotate about this question of your interpretation of a threat as to consequences."

THE WITNESS: "I think yes, if the Board had asked we would have told them."

CHAIRMAN MILLER: "Pardon me?"

THE WITNESS: "If the Board had asked a question along that line that we would have told them." (emphasis supplied)

CHAIRMAN MILLER: "But it would have been necessary for the Board to ask the right question to get that information?" (emphasis supplied)

THE WITNESS: "I think it would be necessary that we didn't appear to be volunteering anything." (emphasis supplied)

CHAIRMAN MILLER: "Explain that to me. I'm not sure what you're saying, whether that would have been necessary for the Board to ask the right question to get that information from Dow or not."

THE WITNESS: "I don't think we would have come and said we need guidance because we've been threatened with a lawsuit. I think we would have said we need some guidance from the Board. If the Board would have asked, why do you need that guidance, we probably would have told them."

1301 155

CHAIRMAN MILLER: "Would have told them what?"

THE WITNESS: "That we had this threat of a lawsuit if we appeared to frustrate the license without being obvious about it, and we wanted direction from the Board on how we should proceed." 212/

CONCLUSION

In view of the fact that the Dow USA Board had independently concluded that the nuclear project continued to maintain an economic advantage over other alternatives and did not conclude that the threats of litigation were the only reason why Dow should remain committed to the project, Dow was justified in not advising the Board of the threats by Consumers. The Dow USA Board decision was supported by an independent basis, i.e., economics. Moreover, in view of the probability that Consumers would charge Dow with deliberately sabotaging the project by advising the Board of the "alleged" threats,*/ Dow was justified in not disclosing the threats to the Board. Dow recognized that

---

*/ Since Consumers now denies making any threats to Dow, it is clear that Consumers would have denied such conduct had Dow disclosed the threats to the Board when made.

1301 156

it was the only legally vulnerable party if the construction licenses were suspended or revoked. It, not the ASLB, the Staff or Intervenors, would have been left to face Consumers in a protracted legal battle if suspension or revocation of the construction licenses occurred. Finally, the threats made by Consumers against Dow were disclosed during the course of the suspension hearing during cross-examination of Mr. Temple and the production of the Nute notes. With this information before it, the Board nonetheless concluded that no action should be taken. Thus, the Board apparently did not view the threats as material to its decision.

X. SUMMARY

The hearing held during July 1979 was an outgrowth of a statement which appeared in the ASLB Opinion and Order dated September 23, 1977, as amended by Order dated November 4, 1977. That statement provided as follows:

> "10. There is evidence in this record that Licensee has considered conducting its share of this proceeding in such a way as to not disclose important facts to the Board. Notes taken by a Dow attorney of meetings with Consumers' attorneys indicate the desire of the latter to 'finesse' the dispute with Dow if no Intervenors appeared (Intervenors Ex. 25, page 2, paragraph B). The same notes reflect the exploration by a Consumers' attorney of the possibility of using Dow witnesses unfamiliar with the facts relating to the Dow-Consumers dispute to testify at the hearing; they further disclose a pro-

> posed strategy by Consumers to 'drag feet' in the hearing process because as long as construction continues, Consumers 'has a lever' (page 3, paragraph 4). Assuming that the proposals set out here were made and acted upon, none were successful. Aggressive Intervenors did appear and the Dow-Consumers matter was aired; the Dow witnesses furnished were highly knowledgeable men (Mr. Temple headed the Michigan Division of Dow); and Licensee has not slowed the suspension hearing. Of course there remains the suspicion, raised by the disclosure of these instances, that there may have been similar ploys which were successful."

Subsequently, on February 14, 1978, the Atomic Safety and Licensing Appeals Board filed its decision which affirmed the decision of the ASLB not to suspend the construction licenses. The ASLAB decision in a footnote, noted as follows:

> "87/ We have eschewed any comment on the significance of the events which led the Board below to include in paragraphs 9-11 of its decision (6 NRC at 485-86, as amended by order of November 4, 1977) comments relating to an alleged, albeit unsuccessful, attempt by the applicant to prevent full disclosure of the facts relating to Dow's intentions with regard to its contract. That matter was not put to rest by the November 4th order. Nor was it dealt with -- indeed it was specifically excluded from consideration -- in another order the Board issued that same day, referring certain attorney misconduct charges to a special licensing board pursuant to 10 C.F.R. §2.713(c). That Board has since been told by the Commission to attempt to settle those charges, failing which it will be dissolved (January 30, 1978 letter from the Chairman of the Commission to the Chairman of the Special Licensing Board).

> The reasons the Commission gave for dissolving the special board do not apply to the entirely different type of charges involved here. And it is important that they be fully aired and resolved. Consequently, we fully expect both that matter and the merits of the ACRS's 'unresolved safety issues' to be explored further at future hearings before the Licensing Board. This must be done whether or not the parties are themselves otherwise interested in pursuing these matters."

The July 1979 hearing was preceded by the taking of depositions of virtually all the witnesses who subsequently testified at the hearing. The hearing itself was exhaustive, lasting five weeks and producing over 4,000 pages of transcript as well as hundreds of exhibits. The issues set out in the Board's Order of May 3, 1979 were fully explored. Dow believes that the record establishes the following:

1. During the course of a September 21, 1976 meeting with Dow, Consumers did express a belief that certain matters could be "finessed" if no Intervenors appeared at the suspension hearing. However, Intervenors did appear at the hearing and all relevant issues were fully explored.

2. During the course of a September 21, 1976 meeting with Dow, Consumers did suggest the possibility of using a Dow witness who was not fully knowledgeable of the Dow-Consumers relationship. Ultimately, Mr. Temple was called as the Dow witness and was Dow's most knowledgeable witness on the issue of the intentions of The Dow Chemical Company regarding the nuclear project.

3. During the course of a September 21, 1976 meeting with Dow, Consumers did state that Consumers would have a "lever" as long as construction continued. However, there was no evidence offered to show that Consumers attempted to delay the suspension hearing or the hearing on the merits.

4. During the course of a September 21, 1976 meeting and a September 24, 1976 meeting with Dow, Consumers did threaten to sue Dow if the construction licenses were suspended as a result of Dow's failure to positively support Consumers' position in the suspension hearing. The threats affected Dow and its counsel in their involvement in the preparation of the Temple testimony, causing them to avoid volunteering information that Consumers might thereafter claim was not "supportive" as well as causing them to try to have Consumers draft the testimony.

5. The role of Dow's attorneys in the preparation for the ASLB hearing was proper in all respects.

6. The direct testimony of Mr. Temple was properly prepared even though it did not contain a reference to the Michigan Division recommendation. That recommendation had been superseded by the decision of the Dow USA Board, which decision expressed the intention of The Dow Chemical Company with respect to taking electricity and steam from the nuclear plant.

7. Mr. Temple was in fact Dow's most knowledgeable witness even though he did not take part in the Dow Chemical USA Board deliberations that took place immediately following the presentation by the review team. He testified fully and knowledgeably at the suspension hearing.

8. Mr. Temple was actively involved in the preparation of his testimony and it was in fact his testimony that was filed with the Board.

9. There was nothing improper in Dow's failure to advise the ASLB of Consumers' threat to sue Dow if the licenses were suspended due to Dow's failure to positively support Consumers' position in the suspension hearings. After the threats were made, the Dow USA Board considered them in a corporate review that also found the project to be economically advantageous to Dow. While the threats were considered in reaching the Dow USA Board decision, other factors favorable to the project were considered as well. The threats, while a factor considered by the Dow USA Board, were not the sole basis for the Dow USA Board decision. Dow rightly feared that disclosure of this information to the Board might be viewed by Consumers, in the event of a subsequent suspension for any reason, as not being "supportive" of Consumers -- with the result of a multi-million dollar lawsuit being brought against Dow.

The evidence thus clearly shows no wrongdoing on the part of Dow or any of its counsel in the preparation of the Temple testimony or in the preparation for the hearing or the conduct of the hearing itself.

1301 161

XI. DISPOSITION

Based on the facts as elicited at the hearing of this matter and as discussed above, Dow believes that the Board must conclude that, with respect to Dow and its counsel:

1. There was no attempt by Dow or its attorneys to prevent full disclosure of, or to withhold, relevant, factual information from the Licensing Board at the suspension hearings.

2. There was no failure by Dow or its attorneys to make affirmative, full disclosure on the record of the material facts relating to Dow's intention concerning performance of its contract with Consumers.

3. There was no attempt by Dow or its attorneys to present misleading testimony to the Licensing Board concerning Dow's intentions.

1301 162

4. There was no attempt by Dow or its attorneys to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony.

DATED: October 15, 1979

Respectfully submitted,

R. L. Davis

R. L. Davis
Senior Attorney
for The Dow Chemical Company
47 Building
Midland, Michigan 48640
(517) 636-4781

FISCHER, FRANKLIN, FORD, SIMON & HOGG

By: William C. Potter, Jr.
William C. Potter, Jr.
Attorneys
for The Dow Chemical Company
1700 Guardian Building
Detroit, Michigan 48226
(313) 962-5210

1301 163

ADDENDUM

COUNSEL FOR A PARTY OR WITNESS HAS NO OBLIGATION TO PRODUCE INFORMATION TO OTHER PARTIES OR TO THE ASLB IF NO REQUEST IS MADE FOR THAT INFORMATION.

During the course of the hearing, documents were periodically produced by Consumers and Dow when request was made for such production. Periodically, comments were made by Board members that have caused Dow to conclude that this Board may believe that there is a duty on all counsel who come before it to voluntarily produce to the Board and others all information "relevant" to the matter before the Board whether specifically requested by the Board, Staff counsel or counsel for other parties or not. Dow counsel can find no written authority to support the existence of such a "duty".*/ Dow counsel believes that such a "duty" is so at odds with the rules traditionally governing the conduct of litigation that the Board should consider formal rule-making before imposing such a "duty" on counsel for parties and witnesses.

---

*/ A discussion arguing in favor of a greater duty of disclosure by counsel appearing in non-adversarial administrative proceedings can be found in "An Appraisal of Attorneys' Responsibilities Before Administrative Agencies", 26 Case Western Reserve Law Review 285 (1976).

1301 164

The question of what information counsel for a party or witness before an ASLB must voluntarily disclose raises a conflict between a lawyer's duty to preserve his client's confidences and secrets and the possible adverse effect that non-disclosure of information may have on the interest of the public in having full disclosure of all the pertinent facts. The Code of Professional Responsibility clearly sets out a lawyer's duty to his client with respect to information the client imparts to the lawyer. DR 4-101 imposes a strict ethical obligation on an attorney to preserve the "confidences and secrets" of his clients. A "confidence" is defined as information protected by the attorney-client privilege. A "secret" is other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or detrimental to the client. Since the attorney's duty of confidentiality under DR 4-101 extends to "secrets", which by definition include information beyond the scope of the attorney-client privilege, the ethical duty of silence mandated by DR 4-101 is much broader than the attorney-client privilege. Thus, the ethical duty of confidentiality exists regardless of the "nature or source of the information or the fact that others share the information." Ethical Consideration 4-4.

Despite the breadth of the ethical duty of confidentiality, it is not without qualification. Thus, an attorney must reveal "confidences or secrets when permitted under Disciplinary Rules or required by law or court order." [DR 4-101(C)(2)]

Although not directed towards the disclosure of confidential attorney-client communications, DR 7-102(A) sets forth relevant considerations concerning the introduction and non-disclosure of evidence and provides, in pertinent part, as follows:

> "(A) In his representation of a client, a lawyer shall not:
>
> * * *
>
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statement of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."

Moreover, Ethical Consideration 7-27 provides that "a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." (emphasis supplied)

The only Disciplinary Rule that requires the disclosure of attorney-client communications is DR 7-102(B)(1), which provides:

> "(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."

In sum, the applicable Disciplinary Rules and Ethical Considerations of the Code of Professional Responsibility impose no duty upon an attorney to reveal all relevant information to the Board, any other party, or anyone else. If anything, these considerations hold that an attorney's primary duty is to preserve the confidences and secrets of his client unless disclosure is (a) permitted under the Disciplinary Rules or (b) required by law or court order.*

Relevant ABA Opinions further demonstrate that an attorney's primary duty is to protect the confidences and secrets of his client. In ABA Opinion 341, the Committee on Ethics and Professional Responsibility had occasion to construe DR 7-102(B) which concerns the duty of an attorney to disclose his client's fraud. In interpreting DR 7-102(B) so as not to require an attorney to disclose a client's confidences or secrets, the Committee stated:

"The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information

---

*/ The primacy of this duty appears to be conceded by commentators although they question the wisdom of such an approach in certain situations. See "An Appraisal of Attorneys' Responsibilities Before Administrative Agencies", supra; "The Role of Counsel In The Suppression of Truth", 1978 Duke Law Journal 921; "Where The Bodies Are Buried", "The Adversary System" and "The Obligation of Confidentiality", 10 Crim. L. Bull. 979 (1974).

> (whether a confidence or secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B). The many annotations to DR 4-101 reflect this policy."

The Committee further noted it believed "that it is inconsistent with the lawyer's confidential relationship with his client to impose at the same time a duty to evaluate the client's confidences to determine whether the level of fraud has been reached that would require disclosure of such confidences."

ABA Opinion 287 deals with the question of whether an attorney has a duty to advise the court of information which is contrary to his client's testimony in court. The Committee resolved the dilemma in favor of the sanctity of the attorney-client confidences. The Committee held that former Canon 37 (requiring the lawyer to preserve his client's confidences) superseded former Canons 22 (requiring the lawyer to treat the court with candor and fairness, 29 (demanding that counsel upon the trial of a cause in which perjury has been committed bring the matter to the authorities) and 41 (requiring the lawyer to inform the injured party or his counsel upon learning of some fraud). Thus, the Committee implicitly decided that, in the case under consideration, the lawyer's duty to preserve his client's confidences took precedence over his duty to the court.

Finally, in ABA Opinion 314, the Committee considered the duty of disclosure owed the Internal Revenue Service by lawyers practicing before it. Although the Committee recognized that the IRS had no machinery or procedure for adversary proceedings involving the weighing of conflicting testimony and cross-examination (such as this Board does), it determined that the absolute duty not to make false statements did not "require the disclosure of weaknesses in the client's case and in no event does it require disclosure of confidences. ..." The Committee further noted that "[i]n all cases, with regard both to preparation of returns and negotiating administrative settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately and affirmatively, either by misstatements or by silence or by permitting his client to mislead."

From the foregoing, it is clear that an attorney's obligation to his client requires that he not voluntarily disclose any information received from the client unless required to do so by some legal obligation. In the absence of any discovery requests made under the applicable rules of the NRC, an attorney is under no obligation to disgorge information to the Board or anyone else.

The Code of Professional Responsibility provides:

> "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." (Ethical Consideration 7-15)

1301 169

* * *

"The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." (Ethical Consideration 7-19)

* * *

"The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client." (Ethical Consideration 7-23) (emphasis supplied)

While in the abstract, such a modus operandi may sound harsh and increase the risk that all needed information may not reach the Board, the system will and does in fact work so long as counsel for all parties perform their assigned functions. This means that Staff counsel must also take an active role as representative of the public and conduct discovery under the Commission's rules when necessary to prepare their case rather than simply rely on a possible adversary relationship between an applicant and an intervenor to force out all information deemed necessary to a Board decision. As an example, during discovery in preparation for the most recent hearing and in the hearing itself, Staff counsel appeared to believe that the Michigan Division position was in fact material and should have been

disclosed in the direct testimony of Mr. Temple. Dow does not agree. However, if Staff had taken an active role in discovery in the earlier proceeding, this matter would never have become an issue in this proceeding. Staff would have seen the September 13, 1976 Dow negotiating meeting notes when they were made available for review by all parties on October 18, 1976 in Jackson, Michigan. Those notes clearly set out the fact of the Michigan Division position and the reasons for it. Staff could then have offered the information to the Board if it in fact thought it material to the Board's decision.

CONCLUSION

At present, there is no legally recognized obligation of counsel for a party or witness to voluntarily produce and disclose to the Board and other parties all information "relevant" to a matter before the Board in the absence of a discovery request. If the Board intends to impose an obligation on counsel for parties and witnesses to voluntarily disclose all "relevant" information, a rule-making proceeding should be followed so as to apprize counsel of the "duty" to which they will be required to adhere when appearing before

the Board, allow them an opportunity to comment on the wisdom of adopting a rule imposing such a "duty" and then advise their clients of the "rule".

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

The undersigned, an employee in the offices of Fischer, Franklin, Ford, Simon & Hogg, attorneys for The Dow Chemical Company in the above Remand Proceeding, hereby certifies that on the 15th day of October, 1979, he personally served the individuals listed below with the indicated number of copies of the foregoing Brief of The Dow Chemical Company Incorporating Findings of Fact and Conclusions of Law and Addendum, along with Appendix of The Dow Chemical Company Containing Footnote Citations to Transcript and Exhibits, to-wit:

Marshall E. Miller, Esq. (one copy)
Chairman, Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Emmeth A. Luebke (one copy)
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

William J. Olmstead, Esq. (three copies)
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

1301 173

Gerald Charnoff, Esq. (three copies)
Wm. Bradford Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D. C. 20036

DATED: October 15, 1979

Philip E. Chaffee

1301 174

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

The undersigned, an employee in the offices of Fischer, Franklin, Ford, Simon & Hogg, attorneys for The Dow Chemical Company in the above Remand Proceeding, hereby certifies that on the 15th day of October, 1979, each of the individuals listed below were separately served with a copy of the foregoing Brief of The Dow Chemical Company Incorporating Findings of Fact and Conclusions of Law and Addendum, along with Appendix of The Dow Chemical Company Containing Footnote Citations to Transcript and Exhibits, by first class mail, postage fully prepaid, to-wit:

Dr. J. Venn Leeds, Jr., Esq.
Atomic Safety and Licensing Board
10807 Atwell
Houston, Texas 77096

Michael I. Miller, Esq.
Ronald G. Zamarin, Esq.
Isham, Lincoln & Beale
One First National Plaza - Suite 4200
Chicago, Illinois 60603

Myron M. Cherry, Esq.
One IMB Plaza - Suite 4501
Chicago, Illinois 60611

1301 175

Ms. Mary Sinclair
5711 Summerset Street
Midland, Michigan 48640

Mr. Steve Gadler
2120 Carter Avenue
St. Paul, Minnesota 55108

Norton Hatlie, Esq.
P. O. Box 103
Navarre, Minnesota 55392

Judd L. Bacon, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

DATED: October 15, 1979

Antoinette Petrille

Antoinette Petrille

1301 176