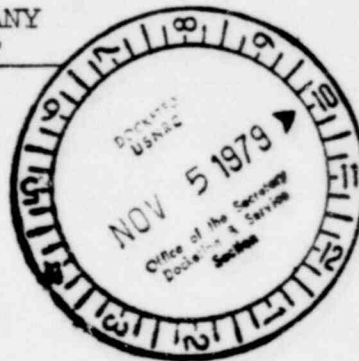


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF THE DOW CHEMICAL COMPANY
IN REPLY TO BRIEF OF NRC STAFF



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INTRODUCTION

The Dow Chemical Company ("Dow") has reviewed the Brief filed by NRC Staff ("Staff"). Unlike the Brief of Consumers Power Company, which Dow has responded to separately, the Staff Brief does not contain itemized findings of fact and conclusions of law but rather is a brief in the more traditional sense which contains some recitation of facts and legal argument. Dow disagrees with some of the statements of fact contained in the Staff Brief as well as certain legal conclusions reached by the Staff. While Dow agrees with the Staff and Consumers that there is no evidence in the record, viewed in its entirety, that would warrant any affirmative finding on any of the five issues articulated by the Board, it also believes that the Board's findings of fact and conclusions of law should be based on an accurate view of the record. The portions of the Staff Brief with which Dow disagrees are itemized below.

1354 125

COMMENTS ON STAFF BRIEF

1. In the first paragraph on page 4 of the Staff Brief, the Staff characterizes Consumers' threat of litigation against Dow as being a threat that "it would seek \$600,000,000.00 in damages if Dow failed to purchase steam from the Midland units." The threat of litigation by Consumers against Dow went far beyond the simple statement that Dow would be sued if it breached or repudiated the contract. Dow was told that it would be sued if it was not supportive of Consumers and if it adopted the Michigan Division position and that in turn resulted in a suspension of the license. (See Dow's initial Brief, pp. 26-42)

2. At pages 12-13 of the Staff Brief, the Staff states that there is evidence that Dow was "seriously considering" suing Consumers for breach of the "best efforts clause" in the Dow-Consumers contract as well as seeking a declaratory judgment against Consumers. The statements contained in the Staff Brief at this point create the inference that litigation by Dow against Consumers was imminent at that point in time for the purpose of Dow being relieved of its contractual obligations. Dow believes this to be an inaccurate characterization of the record. The testimony of Mr. Wessel indicates that he was advising Dow to consider litigation against Consumers not for the purpose of being released from the contract with Consumers but rather to prod Consumers to negotiate changes in that contract desired by

1354 126

Dow. (Wessel 52,478; 52,862-863; 52,865) The testimony of both Mr. Temple and Mr. Nute clearly establishes that litigation by Dow against Consumers was not imminent at that point in time. (Nute 50,511; 50,515; 50,545; 50,548; 50,773; 50,953; Temple 53,480-481; 53,487-488) Indeed, Dow considered the contract to be valid and binding and so advised Consumers. (See Dow Reply to Consumers Brief, pp. 12-13.)^{*/}

3. In the third paragraph on page 13 of the Staff Brief, the Staff mentions, in passing, that the Nute notes indicate "a desire by Consumers' attorneys to 'finesse' the Dow-Consumers dispute." The Staff Brief then goes on to discuss other statements contained in the Nute notes and makes proposed findings regarding those statements. However, it never again discusses the alleged "finesse" statement anywhere in its Brief or makes any proposed finding with respect to this issue. This is somewhat

^{*/} The Staff, on page 13 of its Brief, states that "there is evidence which could support an argument that Dow had no intention to take the steam pursuant to the contract but was maintaining the validity of the contract only for the purpose of seeking remedies for the perceived breach." The Staff does not identify what part of the record it thinks supports this "argument" and Dow can find none. As noted above, Dow did consider the contract to be valid and there was no intention to commence litigation against Consumers during the time the Temple testimony was being prepared.

1354 127

surprising in view of the fact that one of Consumers' own witnesses, Judd L. Bacon, corroborated Mr. Nute's notes on this point. (See Dow's initial Brief, pp. 11-14) Thus, while the Staff does not take a position on the matter, the record clearly demonstrates that Mr. Renfrow did make a statement to the effect that the Dow-Consumers contractual dispute could be "finessed" if Intervenor did not appear at the suspension hearing.

4. At page 24 of the Staff Brief, the Staff again characterizes the threat of litigation by Consumers against Dow as stating that Dow would be sued if it breached the contract.^{*/} As noted supra, and in Dow's initial Brief, the threat of litigation by Consumers against Dow went further than the simple characterization contained in the Staff Brief.

5. At page 25 of the Staff Brief, the Staff states that "there is no evidence of record to indicate that Consumers or Dow had produced any document during discovery prior to the presentation of Mr. Temple as a witness which would reveal the discussion

^{*/} Curiously, the Staff Brief seems to take the position that there really was no threat of litigation made by Consumers against Dow and that Dow was simply told that it would be sued if it breached the contract. Yet, the Staff elsewhere argues in its Brief that there was a duty to disclose the threat of litigation to the Board. Either there was a threat, and the Staff is free to argue that Dow had a duty to disclose it, or there was no threat and hence no duty to disclose.

of litigation between the two companies." At the outset, it is clear that there was no discovery prior to the presentation of Mr. Temple as a witness. Certainly the Staff did not engage in any. Consumers did assemble certain documents and made them available in Jackson prior to the suspension hearing. Before making these documents available, Mr. Renfrow came to Dow and was shown documents relating to the Michigan Division position and the Dow corporate review. He then selected certain documents to take back with him to Jackson. Among the documents made available to Mr. Renfrow for his review was the so-called "litigation slide". (Nute 51,325) That document was apparently not taken to Jackson by Mr. Renfrow.

6. At page 34 of the Staff Brief, the Staff states that Mr. Wessel placed his initials on the September 29, 1976 information response "despite the fact that he did not prepare the document." Again, Dow believes this to be an inaccurate characterization of the record. While Mr. Wessel did in fact place his initials on the September 29, 1976 informational response, he also had a role in preparing that document. (Nute 54,300-302) Moreover, such conduct by Mr. Wessel was not improper. Neither Dow nor Consumers considered the draft to be a definitive statement of Mr. Temple's testimony. (Renfrow 51,517-518; Nute 50,946-947; Wessel 52,699; 52,977) Mr. Wessel was admittedly one of the authors of the draft outline. (Nute 54,300-302)

1354 129

Moreover, Mr. Bacon and Mr. Renfrow were told at the time the draft outline was handed to them at the September 29, 1976 meeting that it had not been proofed and had not been finally reviewed by Mr. Temple or anyone else. (Wessel 52,692-695; Renfrow 51,517-518) No one from Consumers was misled in any way. Simply stated, the informational response given to Consumers on September 29, 1976 bore the initials of one of its authors and Consumers was told that the material contained in the outline had not been finally reviewed by Mr. Temple. Mr. Wessel placed his initials on the draft to preclude any statements contained in the draft from being used as admissions against Dow in any subsequent litigation by Consumers against Dow. (Wessel 52,694; Nute 50,950-951) In view of the threats of litigation made by Consumers against Dow in the September 21, 1976 meeting and the September 24, 1976 meeting, such conduct by Mr. Wessel was not improper in view of Mr. Wessel's obligations as counsel for Dow to protect it from threatened litigation.

7. At page 34 of the Staff Brief, the Staff discusses the "intentionally 'lousy draft' prepared by Mr. Wessel." Dow does not believe that there was anything improper in the preparation of the September 29, 1976 informational response in view of the circumstances that existed at the time the informational response was prepared. Mr. Wessel testified that the September

1354 130

29, 1976 informational response prepared by Dow was, from his point of view, prepared in such a manner as to cause Consumers to assume the role of drafting the testimony. (Wessel 52,911) He viewed the Consumers' request for information to be a ruse under which Consumers was proceeding to obtain "free discovery" to be used either in the contract negotiations with Dow or "against us if anything went wrong, or whatever." (Wessel 52,708) He therefore suggested that the informational response be deliberately prepared so as not to be complete. (Wessel 52,731-732; 52,977) At the time the September 29, 1976 informational response was prepared, it was never Mr. Wessel's intention that the document be filed with the ASLB. (Wessel 52,699; 52,977) The document was designed "to try to elicit from Consumers a revised draft." (Wessel 52,699; 52,977) There was no intention on the part of Dow or Consumers that the September 29, 1976 informational response be filed as the written testimony of the Dow witness. (Wessel 52,699; Renfrow 52,517-518) It was Mr. Wessel's intention to prepare a draft outline that was obviously incomplete (Wessel 52,699-700; 52,977) and Consumers recognized it as such (Renfrow 51,518-519; Bacon 52,105; 52,107-108) -- shortly thereafter assuming the drafting duties. (Rosso 53,224-225)

In view of the circumstances that existed at the time the September 29, 1976 informational response was prepared, it was understandable and proper for Mr. Wessel to attempt to

1354 131

shift the testimony drafting duties to Consumers. There was no impropriety in preparing an obviously incomplete informational response which was recognized as such by Consumers.

8. At page 35 of the Staff Brief, the Staff states that there is nothing in the record to suggest that Consumers' attorneys shared Mr. Wessel's view of the adversary relationship of the parties. Dow agrees that neither Mr. Rosso nor Mr. Renfrow testified at the hearing that they shared Mr. Wessel's feeling that there was an adversary relationship between the parties. Dow, however, does not agree with the inference created by the Staff that there was no reason for Mr. Renfrow and Mr. Rosso to appreciate that there was an adversary relationship between the parties. As noted in Dow's Reply to Consumers' Brief, Mr. Renfrow attended the September 21, 1976 meeting and heard Mr. Falahee's explication of the circumstances under which Consumers would sue Dow. Mr. Renfrow was also shown the litigation slide during his review of certain Dow documents in Midland prior to the suspension hearing. (Nute 51,325; see also Dow's initial Brief, p. 57) Moreover, Mr. Rosso was told, time and again, of Dow's fears that Consumers would come back and sue it if there was any misstep by Dow in the suspension hearing. Under these circumstances, Dow believes that it was unreasonable for Mr. Renfrow and Mr. Rosso not to appreciate the fact that an adversary relationship existed between Dow and Consumers at the time the Temple testimony was being prepared.

1354 132

9. At page 36 of its Brief, the Staff also states that Mr. Renfrow "had no idea that the Dow attorneys were not playing it straight," (citing Renfrow 51,373) thereby inferring that the effect of Mr. Renfrow's testimony was that Dow was not "playing it straight" in the September 29, 1976 meeting. However, when one looks at Mr. Renfrow's testimony on this point (Renfrow 51,573), we find no support for such an inference. There, Mr. Dambly (counsel for Staff) asked the following question and received the following answer:

Q "Did you ever get the impression during the September 29th meeting that Mr. Wessel or Mr. Nute were not playing it straight with you in that meeting?"

A "No."

Thus, Mr. Renfrow was not testifying that Mr. Wessel and Mr. Nute were not "playing it straight" during the meeting but rather that he had no mental impression that they were not "playing it straight".

10. At pages 38 and 39 of the Staff Brief, the Staff discusses Mr. Nute's reaction to the October 22, 1976 draft of testimony. Since only Mr. Nute's reaction is discussed, Dow believes that the inference is created that Mr. Nute alone had a "strong reaction" to the October 22, 1976 draft. The testimony, however, discloses that Mr. Temple, as well as Mr. Nute, reacted "strongly" to the October 22, 1976 draft because, in his judgment, it contained factual inaccuracies. (Nute 51,003-015; Temple 53,460-462) Thus, Mr. Nute was not the only Dow

1354 133

representative who reacted "strongly" to the October 22, 1976 draft.

11. At page 44 of the Staff Brief, the Staff refers to Mr. Renfrow's allegation that Mr. Wessel may have misled the Board by something he said at the suspension hearing. The Staff goes on to say that Mr. Renfrow "apparently was referring to the statement made by Mr. Wessel to the Licensing Board on December 3, 1976," citing page 661 of the transcript. There is, however, no evidentiary support in the record for this statement. After Mr. Renfrow made his allegation, he was shown various portions of the 1976 hearing transcript and could not locate the portions of the transcript he was referring to. (Renfrow 51,928-932) Since Mr. Renfrow could not locate the portions of the transcript he was referring to, there is nothing in the record to support the Staff's assertion that page 661 of the hearing transcript of December 3, 1976 is the portion of the record relied upon by Mr. Renfrow to support his allegation. Moreover, the Staff fails to note that Mr. Rosso did not believe that Dow misled the Board in any way. (Rosso 53,277; see also 53,293-294)

12. At page 47 of the Staff Brief, the Staff states that Dow used the phrase "misleading and disingenuous" to force Consumers to delete the reference to the Michigan Division position. Dow again believes that this is an inaccurate

1354 134

characterization of the record. Mr. Wessel testified that he thought the October 22, 1976 draft might be viewed by others unfamiliar with the events as misleading and disingenuous because it appeared, with all its detail, to tell the "whole story" about the Dow-Consumers relationship (and painted a rather rosy picture of that relationship) when in fact it did not. (Wessel 52,759; 52,766; 52,957; 52,980-981) Messrs. Nute and Temple thought the draft was misleading because it contained factual misstatements, including statements that Dow had concluded that Consumers could be relied upon to deliver steam on time and in quantities contracted for. (Nute 51,003-015; Temple 53,460-462) During the course of the October 12, 1976 meeting, Messrs. Renfrow and Rosso were told of Mr. Temple's lack of confidence in Consumers. Mr. Rosso then prepared a draft of testimony which described a harmonious relationship between the companies and a belief by Dow that Consumers could be relied upon to fulfill its contractual obligations in a timely manner. The draft included some "flavoring" added by Mr. Rosso, as well as some "conclusions" not contained in the Nute informational response dated October 6, 1976. (Rosso 53,248-250) Dow was properly concerned that others not familiar with the full details might be misled by the draft. This genuine concern on the part of Dow caused Mr. Wessel to tell Mr. Rosso that he felt the draft might be viewed by others as "misleading and disingenuous". He did not use the

1354 135

phrase with the intent of causing Consumers to remove from the testimony any discussion of the Michigan Division position as alleged by the Staff. As Mr. Rosso himself testified, there was no intention on the part of Consumers to include a discussion of the Michigan Division position in the Temple direct testimony at the time the October 22, 1976 draft was sent to Dow. (Rosso 53,366) Mr. Wessel was not trying to get Consumers to remove any reference to the Michigan Division position from the Temple testimony. Consumers had already made that decision. In short, Mr. Wessel used the phrase "misleading or disingenuous" because he was genuinely concerned that the draft might mislead the Board and he wanted changes made to prevent that. (Wessel 52,767; 52,980-981)

13. At pages 48 through 50 of the Staff Brief, the Staff alleges that the Dow Brief dated December 22, 1976 misled the Board concerning the preparation and presentation of the Temple testimony and that it was not as forthright and candid as it should have been. Dow does not believe that the record supports these allegations made by the Staff.

At the outset, there was a colloquy on December 2, 1976 during which Messrs. Renfrow, Nute and Rosso explained to the Board how the various drafts of testimony had been prepared. (See Tr. 447-502) That explanation clearly set forth the involvement

1354 136

of Dow's attorneys in the actual preparation of the Temple testimony. There is no way the Board could have been misled into believing that Consumers alone was involved in the preparation of the Temple testimony. On December 3, 1976, Mr. Wessel made an oral presentation to the Board in an attempt to clarify and explain the situation that existed at the time the Temple testimony was prepared. Mr. Wessel explained to the Board that both Dow and Consumers were considering litigation against each other and were adversaries at the time that the Temple testimony was being prepared. (Tr. 664, 674) Mr. Wessel outlined to the Board the threat of litigation made by Consumers against Dow. (Tr. 664) Mr. Wessel explained that both he and Mr. Nute dealt with Mr. Renfrow and Mr. Rosso as adversaries in view of this threat of litigation. (Tr. 665) Mr. Wessel explained to the Board that every step taken by Dow counsel during the Temple testimony preparation period was taken with the view in mind that it might constitute an admission against Dow in subsequent litigation with Consumers. (Tr. 666) Mr. Wessel explained that he and Mr. Nute were involved in the preparation of the Temple testimony drafts to avoid an admission against Dow which would occur if Mr. Temple had prepared the testimony. (Tr. 666-667) Mr. Wessel also explained that he was concerned over possible litigation with Consumers influencing the document production (Tr. 669-672) and concluded by telling the Board that Dow's counsel and Consumers' counsel were working at odds with each other during the Temple testimony

1354 137

preparation. (Tr 676) When these portions of the record are read in conjunction with the Dow Brief of December 22, 1976, Dow believes that the Board was not misled in any way concerning the manner in which the Temple testimony was prepared and the role of Dow's attorneys in the preparation of that testimony.

The Staff cites Tennessee Valley Authority (Hartsville Units 1A, 2A, 1B and 2B) Alab -409, 5 NRC 1391, 1395 (1977), for the proposition that it is a party's obligation to refrain from practices directed at concealing pertinent matter which cuts against a party's position. The Staff next states, apparently relying on Tennessee Valley Authority, that there is an obvious duty to disclose information voluntarily. The Staff apparently reads Tennessee Valley Authority to mean that when a party has a duty not to conceal information, it follows that it has an affirmative duty to disclose it. Dow believes that this is an erroneous interpretation of the case and that a party who does not volunteer all information is not "concealing" that information. It is the duty of other parties, through discovery, to bring out all information that they consider relevant. If Staff's interpretation of Tennessee Valley Authority is accepted, it means that the Staff can sit back and refuse to engage in any discovery and then charge any party with "concealment" of information when they have not voluntarily disgorged all information to the Board.

1354 138

Tennessee Valley Authority clearly does not support such a proposition.*/

CONCLUSION

In this Reply Brief, Dow has attempted to correct what it conceives to be errors contained in the NRC Staff Brief. As noted in its initial Brief, it believes that the evidence from the entire record clearly shows no wrong doing 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 in the conduct of the hearing itself.

Based on the facts as elicited at the hearing of this matter and as discussed above, Dow believes that the Board must

*/ Tennessee Valley Authority discusses the duty of a party -- it does not discuss the duty of a non-party witness.

1354 139

conclude that, with respect to Dow and its counsel:

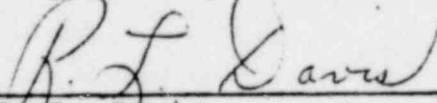
1. There was no attempt by Dow or its attorneys to prevent full disclosure of, or to withhold, relevant, factual information from the Licensing Board at the suspension hearings.
2. There was no failure by Dow or its attorneys to make affirmative, full disclosure on the record of the material facts relating 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.
4. There was no attempt by Dow or its attorneys to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony.

1354 140

5. No sanctions should be imposed against
Dow or any of its counsel.

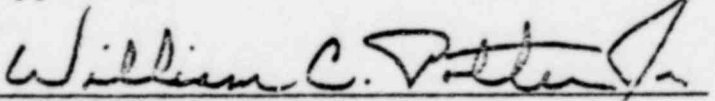
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1354 141

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)	(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 5th day of November, 1979, he personally served the individuals listed below with copies of The Dow Chemical Company Reply Brief to Consumers Power Company Brief and The Dow Chemical Company Reply Brief to NRC Staff Brief, to-wit:

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DATED: November 5, 1979

Philip E. Chaffee
Philip E. Chaffee

1354 142

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1354 143

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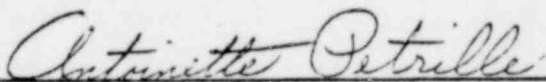
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1354 144