

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



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

SUPPLEMENTAL MEMORANDUM OF
CONSUMERS POWER COMPANY

1. By Prehearing Conference Order of the Licensing Board dated May 3, 1979, responses to the March 30 Motion For Summary Disposition filed by Consumers Power Company ("Consumers") were due on June 15, 1979. The only response filed was that of the NRC Staff, taking the position that:

Since no charges are yet identified and placed in issue, it is most difficult to determine whether the facts, as identified by Consumers, are disputed, much less material. For this reason alone, ruling on Consumers' motion at this point would be premature. [Staff Response, p. 2.]

2. The Staff is clearly correct that no charges have been preferred against Consumers, Dow or their respective counsel with regard to their involvement and participation in the earlier suspension hearing -- as the Board itself has carefully noted (Staff Response, p. 2). After listening to the extensive deposition testimony that has been given by 13 witnesses over the past six weeks, and reviewing all the documents deemed to have any relevancy to the present inquiry, it remains clear to us

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that no charges of any kind are warranted. The hearing scheduled to commence on July 2, 1979 will appropriately serve to underscore this conclusion.

3. We are submitting the present supplementary memorandum simply to clarify a few factual points prior to commencement of the hearing. As matters now stand, there appears to be general agreement among the parties with regard to the facts set forth in paragraphs 1-10, 13-15, 18, 20-22 and 26-27 of Consumers Power Company's Statement Of Material Facts As to Which There Is No Genuine Issue To Be Heard ("Consumers Fact Statement"). See Staff Response, p. 2.^{1/}

4. As to paragraph 25 of Consumers Fact Statement, we wish to bring to the attention of the Board and the parties a correction that should be made therein. That paragraph indicates that Board Exhibit Nos. 1 and 2 were among the discovery documents which Consumers voluntarily made available in Jackson, Michigan, for inspection and copying by the parties in advance of the hearing.^{2/} Those documents -- which are the two Temple memoranda to Mr. Orefice setting forth the Michigan Division interim position and recommending a full corporate review by the Dow USA Board -- were actually not provided to Consumers by Dow

^{1/} We would note in passing that there is a typographical error in paragraph 5 with respect to the date of Board Exhibit No. 2. That memorandum is dated September 15, 1976, not September 13, 1976.

^{2/} The same statement is contained in the "Memorandum of Consumers Power Company In Support Of Motion For Summary Disposition", at p. 33.

prior to the commencement of the hearing and thus were not among the discovery materials which Consumers produced in Jackson, Michigan. In fact, they were not even shown to Consumers or its lawyers until Dow produced the referenced Temple-to-Oreffice memoranda on the first day of the suspension hearing (November 30, 1976) at the request of counsel for the Midland Intervenors. See Consumers Power's Memorandum Regarding the Preparation of Testimony and the Presentation of Evidence dated December 30, 1976, at p. 8.

5. With this modification, the remaining portion of paragraph 25 of Consumers Fact Statement is correct. Thus, Consumers did in fact "make available to all parties in advance of the suspension hearings all the materials in its possession which formed the basis for its prepared testimony". See Tr. 268. Included among the produced documents were notes on the meeting among Consumers and Dow representatives held on September 13, 1976. Those notes set forth the view at that time of Mr. Temple, as head of the Michigan Division negotiating group, to the effect that the project was no longer good for Dow's Midland plant, explained that this view was "not yet Dow's official position but rather a Division recommendation", and further stated that Mr. Temple had requested Paul Oreffice to conduct "a Corporate review of the nuclear project and of the Division's position and how the Division's negotiating team arrived at their con-

clusions".^{3/} This is in substance the same information that was contained in Board Exhibit Nos. 1 and 2.

6. We note with some puzzlement that the NRC Staff has made reference to paragraphs 11, 12 and 19 of Consumers Fact Statement as containing information with which the Staff "does take issue" (Staff Response, p. 2). Paragraphs 11 and 12 deal only with discussions among Messrs. Miller, Rosso and Renfrow, as is clear from a reading of their affidavits. The recent deposition testimony confirms the accuracy of those paragraphs. See Rosso Dep. Tr. 40-42, 52-54. While the NRC Staff states that certain deposition testimony of Lee Nute (Nute Dep. Tr. 132) and Jim Hanes (Hanes Dep. Tr. 15, 44, 64) put in issue the fact statements in those paragraphs, significantly neither Lee Nute nor Jim Hanes was present at the discussions in question; their deposition testimony does not even address, let alone "place in issue", the fact assertions set forth in paragraphs 11 and 12.

7. Paragraph 19 of Consumers Fact Statement states simply: "No representative of Consumers disputed the designation of Temple as the Dow witness". Not only did Lee Nute indicate his agreement with this statement during the course of his deposition (Nute Dep. Tr. 151-52, 157-58, 402-03, 512), but so, too, did Milton Wessel (Wessel Dep. Tr. 111-14, 118). While Jim Hanes

^{3/} See Burroughs Notes on Dow-Consumers Project Meeting of September 13, 1976. Attachment "A" to Consumers Memorandum of December 30, 1976, at pp. 9-10 (Midland Intervenor's Exhibit 67); Renfrow Affidavit I, ¶ 9.

did not testify directly on the point, his testimony plainly indicates that at no time did he perceive that Consumers seriously objected to the use of Joe Temple as a witness (Hanes Dep. Tr. 47-50).

8. The Staff's stated reservation with respect to paragraphs 2⁷ and 24 of Consumers Fact Statement is also curious. It apparently rests on the assertion that "Mr. Wessel's deposition, among others [unspecified], raises factual matters which may be construed to dispute * * *" these paragraphs (Staff Response, p. 3; emphasis added). Without attempting to argue the matter at this time, we cannot help but observe that Mr. Wessel, of all the witnesses deposed, was perhaps the most emphatic in insisting that the Dow position from the outset was that the Michigan Division interim position not be included in Temple's direct testimony (Wessel Dep. Tr. 128-29, 268-69, 326-27). Neither he, Lee Nute (Nute Dep. Tr. 527), nor Joe Temple (Temple Dep. Tr. 110-12) suggested that anyone at Dow had ever advised Consumers to the contrary during the preparation of Mr. Temple's direct testimony.^{4/} That is, of course, precisely the statement set forth in paragraph 23 of Consumers Fact Statement.

^{4/} See also Renfrow Dep. Tr. 112-16; Rosso Dep. Tr. 310-13. There was discussion during the meeting between Consumers and Dow counsel on November 1, 1976, regarding the format of the prepared testimony to be filed by Joe Temple. At that time, Milton Wessel questioned draft testimony prepared by Dave Rosso of Consumers and forwarded to Dow on October 22, 1976, on the ground that the narrative discussion used in that draft might give the "misleading" impression that the testimony was intended to be an exhaustive account of Dow's reevaluation of its com-
(Continued next page)

9. As to paragraph 24, it simply quotes the conclusion announced by NRC Staff counsel on December 30, 1976, to the effect that the Dow corporate position was the material decision for disclosure in Temple's direct testimony. The referenced NRC Staff Memorandum, at p. 6, confirms that the quotation is accurate.

10. To the extent that there remain the suggestion of a possible disagreement as to factual matters involved in the present inquiry, the differences of opinion or interpretation will obviously be resolved at the hearing. After the Board has had an opportunity to hear firsthand the testimony of designated witnesses, we continue to believe that it will conclude

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mitment to the Midland project. See Duran Notes of Nov. 1, 1976, at pp. 2-4; Wessel Dep. Tr. 203, 217, 294; Nute Dep. Tr. 372-73, 376. In order to remove this possible misimpression, Lee Nute had prepared an alternative draft of testimony dated October 29, 1976, as a suggested solution. This October 29 alternative draft continued to present the Dow position in the manner that had consistently been urged by Milton Wessel from the outset -- i.e., without reference to the Michigan Division interim position.

The Nute draft was delivered to Consumers attorneys just prior to the November 1 meeting, and it was used as the final working document from which the Dow and Consumers lawyers jointly prepared the Temple testimony that was actually filed (Rosso Dep. Tr. 287). Wessel, Temple and all testified that they were satisfied that the final draft of the direct testimony set forth all material facts relating to the Dow position accurately and in a straightforward manner; there was no suggestion, as paragraph 23 of Consumers Fact Statement asserts, that any of the Dow representatives "desired the Michigan Division interim position to be included in the direct testimony". See Wessel Dep. Tr. 204, 209, 217; Nute Dep. Tr. 333; Temple Dep. Tr. 109-12.

that the pending motion for summary disposition is well taken and should be granted.

Dated: June 26, 1979.

Respectfully submitted,

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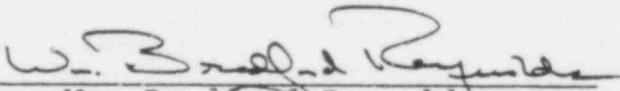
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Supplemental Memorandum Of Consumers Power Company" were served on this 26th day of June, 1979, upon each of the persons named on the attached Service List, by hand delivering copies to those persons in the Washington, D. C. area, and by mailing copies, first class, postage prepaid, to all others.



Wm. Bradford Reynolds

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