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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DEPOSITION OF LESLIE F. NUTE

Place - Midland, Michigan

Date - Tuesday, 15 May 1979

Pages 1-204

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3

4 DEPOSITION OF LESLIE F. NUTE
5

6 Dow Center
7 Patrick Road and Abbot Street
8 Building 2030
9 Executive Wing
10 Midland, Michigan
11 Tuesday, 15 May 1979
12

13 Deposition of LESLIE F. NUTE, called for examination
14 at 10:25 a.m., pursuant to prehearing conference order of
15 the Atomic Safety and Licensing Board, before Helen M. Rabbage,
16 a notary public in and for the County of Midland, State of
17 Michigan, when were present on behalf of the respective
18 parties:
19

20 WILLIAM J. OLMSTEAD, Esq., Office of Executive Legal
21 Director, U. S. Nuclear Regulatory Commission,
22 Washington, D. C., on behalf of the NRC Regulatory
23 Staff.

24 WILLIAM C. POTTER, Jr., Esq., Fischer, Franklin, Ford,
25 Simon & Hogg, 1700 Guardian Building, Detroit,
Michigan; and

R. L. DAVIS, Esq., Michigan Division, Legal Department,
47 Building, Midland, Michigan, 48640, on behalf of
Dow Chemical Company.

GERALD CHARNOFF, Esq., ALLEN WEISBARD, Esq., and
WILLIAM BRADFORD REYNOLDS, Esq., Shaw, Pittman,
Potts & Trowbridge, 1800 M Street, N.W., Washington,
D. C. 20036, on behalf of Consumers Power Company.

RONALD G. ZAMARIN, Esq., Isham, Lincoln & Beale,
One First National Plaza, Chicago, Illinois 60603,
on behalf of Consumers Power Company.

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C O N T E N T SWITNESS:DIRECT CROSS REDIRECT RECROSS

Leslie F. Nute

3

EXHIBITS:

(None.)

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P R O C E E D I N G S

MR. OLMSTEAD: On the record.

Whereupon,

LESLIE F. NUTE

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. OLMSTEAD:

Q Would you state your full name, address and
occupation?

A My name is Leslie F. Nute. My address is 4212
Partridge Lane, Midland, Michigan, and I'm Director of
Environmental Quality for Dow Chemical, USA.

Q Are you currently employed in the same position
you held during the period June 30, 1976 to May 15, 1977?

A No.

Q What position did you hold at that time?

A I was senior attorney, Michigan Division.

Q For the entire period? Through May of 1977?

A Yes.

Q The purpose of this deposition is to inquire
into the issues set forth in the Board's May 3 prehearing
conference order. Have you read that order?

A Yes, I have.

Q And you're aware of the issues of what your

1 testimony is?

2 A As nearly as I can recollect.

3 Q Would you like me to read the issues?

4 A Yes, please.

5 Q Issue number one is whether there was an attempt
6 by the parties or attorneys to prevent full disclosure of
7 or to withhold relevant factual information from the
8 Licensing Board in the suspension hearings.

9 Issue number two is whether there was a failure
10 to make affirmative full disclosure on the record of the
11 material facts relating to Dow's intentions concerning
12 performance of its contract with Consumers.

13 Issue number three is whether there was an
14 attempt to present misleading testimony to the Licensing
15 Board concerning Dow's intentions.

16 Issue number four, whether any of the parties
17 or attorneys attempted to mislead the Licensing Board
18 concerning the preparation or presentation of the Temple
19 testimony.

20 Issue number five, what sanctions, if any, should
21 be imposed as a result of affirmative findings on any of
22 the above issues.

23 How long have you been employed by Dow Chemical
24 Company?

25 A Since 1971.

1 Q What was your first position with Dow Chemical?

2 A Attorney in Dow Chemical, USA.

3 MR. CHARNOFF: What was that year?

4 THE WITNESS: 1971.

5 BY MR. OLMSTEAD:

6 Q Were you assigned to the Michigan Midland Division
7 at that time?

8 A No, I was here. It was in the corporate legal
9 department, in this building.

10 Q In 1971?

11 A 1971.

12 Q When did you join the Midland Division?

13 A January, 1974. End of January.

14 Q And you became senior attorney for the Midland
15 Division at that time?

16 A No, I was just an attorney. I was later promoted
17 to senior attorney.

18 Q When did that occur?

19 A I would say late 1974, early 1975.

20 Q But well before the remand from the Court of
21 Appeals which was July 1976?

22 A I guess I'd have to go back and look. I can't
23 recall when it was, when I was promoted. I can't recall.

24 Q But you were the senior, lead attorney at the
25 time?

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1 A Yes. I'll explain that. Senior attorney is just
2 a title of salary range. It doesn't connote any particular
3 power or responsibility. I was the lead attorney in the
4 Michigan Division, regardless of what my title was.

5 Q Okay. The other attorneys of record in this
6 proceeding are Mr. Pribila -- he is junior to you as I
7 understand it?

8 A He was at that time, yes, sir.

9 Q And in regard to the issues with which we are
10 concerned, namely the Dow-Consumers contract and the remand
11 proceeding and the presentation of testimony, you would have
12 been senior to Mr. Pribila at the time?

13 A Yes.

14 Q And you would have been senior to Mr. Durand?

15 A Yes.

16 Q And your relationship to Mr. Hanes was what?

17 A I reported to Mr. Hanes.

18 Q Directly?

19 A Yes.

20 Q So there were no other lawyers besides Mr. Hanes
21 for Dow Chemical Company who were a member of the corporate
22 office, legal office, who were senior to you, with regard
23 to these matters?

24 A No, that's not correct. Mr. Edwards was involved
25 at one point. He is and was then the head of the litigation

1 section.

2 Q For Dow corporate?

3 A Yes.

4 Q And what was his role?

5 A He entered an appearance on the record, and if
6 I recall, was present at some of the hearings in Chicago
7 when Mr. Orefice testified. And I believe he signed some
8 of the documents that were filed, some of the briefs. I'd
9 have to check back. But I seem to recall he signed some
10 of them.

11 MR. POTTER: Let me just interject to clarify
12 for the record, when you refer to either Mr. Hanes or Mr.
13 Edwards as corporate Dow attorneys, are they Dow USA or
14 the Dow Chemical Company?

15 THE WITNESS: They were Dow Chemical, USA at
16 that time. They are now corporate, because the legal
17 department has been combined. There were two separate legal
18 departments at that time.

19 BY MR. OLMSTEAD:

20 Q One for the Dow Chemical Company and one for
21 Dow USA?

22 A Right. One for the Dow Chemical Company was
23 primarily concerned with financing, stocks and bonds and
24 antitrust issues.

25 Q But one would not conclude from that that the

1 attorneys assigned to Dow Chemical Company were senior to
2 the attorneys assigned to Dow, USA, necessarily?

3 A That's right. You wouldn't make that assumption,
4 that's correct.

5 Q Okay.

6 What was your relationship to Mr. Wessel?

7 A Mr. Wessel, at that time -- I'm trying to
8 recollect -- he was at that time, I think his title was
9 Special Litigation Counsel to the Dow Chemical Company. He
10 was outside counsel, but with a little bit different
11 relationship than many of the outside counsel had with Dow.

12 Q If there were a disagreement between you and he
13 concerning strictly a legal matter, would he be considered
14 senior to you, or would you be considered senior to he,
15 or would there be a contract relationship?

16 Who would make the ultimate decision as between
17 the two of you?

18 A Well, normally it would be me, but if there was
19 a violent disagreement it would probably go to Mr. Hanes.

20 Q Okay.

21 Now, just for background purposes, I would like
22 to go back to the earliest involvement that you might have
23 had with the Dow-Consumers steam contract.

24 If you could generally tell me what the first
25 involvement you had with Consumers Power Company --

1 A You mean strictly with regard to the steam
2 contract? I had a great deal of contact with Consumers over
3 the years.

4 Q Let's take both. What was your first involvement
5 with Consumers Power Company generally?

6 A First involvement with Consumers Power Company
7 was in January of 1974 when I first came to the Division.
8 There was at that time a hearing going on before the Michigan
9 Public Service Commission that had to do with the proposed
10 rule on natural gas curtailment that had been proposed by
11 Consumers Power. And my predecessor had intervened, and I
12 substituted for him as counsel.

13 That was a rather long, protracted proceeding in
14 which I represented Dow, and Consumers was involved as well
15 as a lot of other companies. Both in electric rate cases and
16 gas rate cases filed down there, as well as cases before
17 the FEA involving natural gas curtailment or feed stocks
18 to Marysville -- all those things I was involved with
19 Consumers.

20 Q Okay. Now, with your first contact with Consumers
21 Power in that proceeding, what counsel represented Consumers
22 Power?

23 A Alan Bass.

24 Q And was he a member of their corporate counsel
25 structure?

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1 A Yes.

2 Q They didn't have an outside counsel?

3 A Not at that time.

4 Q Okay. What was your first involvement with
5 Consumers specifically relating to the nuclear steam
6 contract at Midland?

7 A There were a couple different agreements involved.
8 There were some real estate transactions involved in the
9 general agreement, but putting those aside and just dealing
10 with the steam contract, I think it was - - I'd be guessing,
11 but around October of 1974.

12 Q And who was the Consumers counsel that you
13 interfaced with?

14 A Oh. Okay. I misunderstood your question. I
15 thought you meant when did I first become involved of a
16 general nature.

17 Q That's what I meant.

18 A Oh, I'm sorry. No. Let me go back. I'm sorry.
19 I misled you.

20 When I first arrived in the Division in 1974
21 they were wrapping up their final negotiations of the 1974
22 amendments, and I think I met Judd Bacon at that time. I
23 know I met him at that time.

24 Q So you did have some involvement with the 1974
25 modifications to the steam contract?

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1 A Yes, I did.

2 Q But you didn't start those negotiations?

3 A No, I didn't start them, and I wasn't involved.

4 Q And you weren't involved in the original contract,
5 which was signed before?

6 A No.

7 Q So exactly what did you do with regard to the
8 1974 modifications?

9 A Well, I arrived in the Division the end of
10 January, just about a week prior, I guess, to when they
11 signed the agreement. And there may have been one or two
12 sessions where there were some questions about language
13 involved in the amendments, which I discussed with Judd
14 Bacon, I think, about completing the language. And I can
15 remember retyping some documents, but there was very
16 limited involvement at that point.

17 Q Were there other attorneys for Consumers involved
18 that you --

19 A Not that I recall. They were here, and I met
20 Judd here, in Midland.

21 Q And who was the primary Dow attorney involved at
22 that time?

23 A There had not been.

24 Q You mean they were negotiating the 1974 modifica-
25 tions without the assistance of counsel?

- 1 A Yes.
- 2 Q And Judd Bacon was involved for Consumers Power?
- 3 A (Nodding affirmatively.)
- 4 Q Did you have any opinion as to that situation?
- 5 A Opinion when, then?
- 6 Q Yes.
- 7 A It was -- let me go back a step. Mr. O'Conner
- 8 had been involved in the --
- 9 Q Who is Mr. O'Conner?
- 10 A He's an attorney for Dow Chemical, and was of
- 11 record in this proceeding, and the original construction
- 12 license. He had about the same -- well, just prior to my
- 13 coming to the Division he had been transferred to Texas,
- 14 and my predecessor in the Michigan Division had left the
- 15 Company.
- 16 So the two attorneys who would have been
- 17 involved were no longer there, and then I was moved over
- 18 and came in just at the end of that.
- 19 Q Did you feel you were at a disadvantage vis-a-vis
- 20 Consumers, because of that?
- 21 A Yes.
- 22 Q And when were the 1974 agreements culminated?
- 23 A I believe they were signed at the end of
- 24 January or February 2, is the date.
- 25 Q Now, at that particular time in the nuclear

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1 licensing proceeding I believe the intervenors other than
2 Dow had appealed the NRC decision to the U. S. Circuit Court
3 of Appeals in the District of Columbia. Were you aware --
4 did you follow that appeal?

5 A No. Mr. Wessel was involved in that, and
6 sometime during that period of, I believe it was 1974 --
7 I'll get to why I can't recall -- I remember I got -- Milt
8 thought that we should withdraw, and submitted a petition to
9 withdraw before the Court of Appeals, which was subsequently
10 granted.

11 Q Why did he feel you should withdraw?

12 A I think he felt at that time that whatever the
13 initial reasons were for intervening, whatever our purposes
14 were for intervening, had been served.

15 Q Okay. At that time --

16 MR. POTTER: Excuse me. I wonder if we could fix
17 a date on that? You say at that time.

18 MR. OLMSTEAD: We're talking about 1974.

19 MR. POTTER: But when?

20 MR. OLMSTEAD: I don't think you have --

21 THE WITNESS: There was a strike going on in the
22 Michigan Division at that time, which was a very long,
23 violent strike. It had quite an impact on the community,
24 and I was Dow's attorney then. So what was going on in the
25 nuclear process at that time is rather fuzzy to me, because

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1 I had other things that I was responsible for.

2 Q Okay. But Mr. Wessel had been involved in
3 monitoring some aspects of that?

4 A Yes.

5 Q Had he been involved in the 1974 negotiations?

6 A Not to my knowledge.

7 Q -- the modifications of the contract?

8 A No.

9 Q But his involvement was in monitoring what was
10 going on in the NRC proceedings and the appeal?

11 A That's right.

12 Q Do you recall any information being supplied to
13 Consumers, to the Court or to other parties involved in that
14 appeal concerning changed circumstances with regard to Dow's
15 intention to take steam from the Midland facility?

16 A Could you rephrase that? I'm not sure I under-
17 stood.

18 Q Okay. In the oral argument in that case, and in
19 some of the papers filed in that case, -- and I don't have
20 them here, but I think it's general knowledge -- intervenors
21 other than Dow argued that there had been changed circum-
22 stances with regard to Dow's intent to take the steam. In
23 particular, they referred a great deal to the modifications
24 of agreement in 1974.

25 My question to you is: Were you aware of what

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1 the relationship between Dow and Consumers was and how it
2 was changing?

3 A I don't think at that time there was any whatever
4 you mean by change . . . well, I'll answer your question in
5 two parts:

6 Number one, did I have any contact? Yes, with
7 a gentleman by the name of Kelly from the NRC Staff, who
8 I believe was arguing the case on appeal.

9 Q Right.

10 A And he called me a couple of times asking for
11 information -- I've forgotten what it was, but he asked me
12 some questions and so forth. I do recall there were some
13 questions about whether the 1974 amendments should be made
14 available to Mr. Cherry or not, but I wasn't involved in
15 making that decision, and just deferred to Consumers Power.

16 Q Okay. Now, during the time period that we're
17 talking about, which is the 1974 modifications and the
18 pending case before the D. C. Circuit Court of Appeals,
19 was Mr. Temple the head of the Michigan Division?

20 A Yes, he was.

21 Q And was he -- if you had to designate a Dow
22 employee as your primary client, would he be the person you
23 designated as your primary client?

24 A Yes.

25 Q So you had regular interfaces with Mr. Temple?

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1 A Yes, I did.

2 Q On a number of issues?

3 A Yes.

4 Q Including the nuclear steam contract, when
5 necessary?

6 A Yes. You'll have to define that to a certain
7 period, but yes, I did.

8 Q Well, explain.

9 A The strike started in March of 1974, and ended
10 in September 1974, and I recall very little discussion of
11 the nuclear plant at that time, the nuclear steam contract
12 at that time, until the end of that period.

13 Q Okay. So let's go to that period, when you
14 started to have discussions with Mr. Temple, I assume,
15 about the nuclear steam contract.

16 A Yes, sir.

17 Q What was the purpose of those discussions?

18 A As I recall, the purpose was he came to me and
19 told me that Consumers had approached him, I believe for the
20 second or third time-- I'm not sure which it was -- and told
21 him about the first of a series of construction delays in
22 unit 1 and unit 2, and he discussed that with me, and the
23 ramifications of it, and so forth.

24 Q And what was his concern with the construction
25 delays?

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1 A Well, his concerns were at that time we had
2 recently entered into an agreement with the Michigan Air
3 Pollution Control Commission, which fit in with the 1974
4 amendments, in other words, what we were going to do until
5 1980 when the nuclear plant came on.

6 Now, there was obviously going to be a gap of
7 at least one year, and so that was a concern.

8 A A further concern was the picture was apparently
9 being painted by Consumers as to what he told me about
10 their position and not being able to finance the plant. It
11 was deteriorating, and they had a lot of concerns about
12 further construction of the plant.

13 Q Did he feel Consumers had the capability to
14 continue construction of the plant? Did he express any
15 opinion about that at that time?

16 A I don't recall him expressing any opinion.

17 Q Was he aware that Consumers was rejuggling, for
18 lack of a better word, its construction schedule and Midland
19 was one that was slipping, and that it was going ahead
20 with some other projects?

21 A It's hard for me to recall at this point, whether
22 he told me that or I became aware of it because of documents
23 that I later saw, memorandums of meetings, and so forth.

24 Q But it would be fair to say that over the course
25 of perhaps the next year, from September 1974 to September

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1 1975, Dow became aware of the way that Consumers was
2 managing its construction?

3 A In the general nature, yes, I think. They came
4 up with a series of plans and so forth. My recollection
5 from looking at notes was that they told us in the general
6 nature of what those plans were.

7 Q And did Dow have any reaction to those plans?

8 A I don't know what you mean by reaction.

9 Q I mean did they suggest to Consumers that
10 because of the contract they had for nuclear steam for
11 Midland that Consumers ought to give a higher priority to
12 the Midland construction schedule, or at that time were
13 you just taking a more neutral role of monitoring it and
14 being concerned about it in general, but not giving any
15 feedback to Consumers?

16 A I wasn't involved in any of those meetings, so
17 I really don't know.

18 Q But there were meetings between Mr. Temple and
19 Consumers?

20 A Yes, there were.

21 Q And did Mr. Temple provide you any feedback from
22 those meetings, or ask you any questions?

23 A Only of a very general nature. None that I can
24 recall. I knew there were some meetings between Consumers
25 and other senior Dow executives. I think Mr. Gerstaker, and

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1 so forth.

2 Q In your conversations of 1974 or thereabout with
3 Mr. Temple concerning the contract, did he ask you to examine
4 Dow's position under that contract in any way?

5 A Yes, he did.

6 Q What did he request?

7 A Well, I think he just requested an analysis of
8 what kind of rights we had under the contract, in light
9 of the delay announced by Consumers, and just what were some
10 of the options he had, as I recall.

11 Q In your opinion, what was he concerned about?
12 At that particular point. Was he seeing a substantial delay,
13 a minor delay? I mean I know you explained why he was
14 concerned, but I'm trying to examine whether you have any
15 opinion as to how deep that concern was at that time?

16 A I think two things: The consent decree we had
17 with the Michigan Air Pollution Control Commission, and the
18 second thing was that Consumers had announced one delay,
19 but had indicated there may be further delay and it may
20 even be worse than that. And I think he was just saying,
21 well, you know, if it's worse than that, whatever it is,
22 what are our rights under the contract, what are our
23 obligations, and so forth.

24 Q And what analysis did you provide him at that
25 time?

1 A I think we discussed the contract and the
2 provisions in it, and so forth.

3 Q Did he ask you if they could get out of the
4 contract?

5 A No.

6 Q Did he ask you if they had to complete the
7 contract by a date certain?

8 MR. POTTER: Excuse me. Let me interrupt,
9 because I think the context is -- you say, did he ask if --

10 MR. OLMSTEAD: If Consumers must complete their
11 contract obligations to provide steam by a date certain.

12 MR. POTTER: Okay. Before he answers that, I
13 want to go to the preceding one. I want to make sure I
14 understood. When you say can they get out of the contract,
15 could --

16 MR. OLMSTEAD: Could Dow?

17 MR. POTTER: That's what I wanted to know.

18 THE WITNESS: I can't recall whether that came
19 up at that point, or a little later.

20 BY MR. OLMSTEAD:

21 Q By "a little later," what would we be talking
22 about?

23 A Well, from then on.

24 Q Spring, '75?

25 A Through Fall -- from Spring '75, from then on I

1 began concentrating more and more on the nuclear plant and
2 the issue of delay. So I really can't separate it out in
3 my mind.

4 Q Okay. Let's move ahead to late 1975, then. By
5 this time the extent of Consumers delays were known by Dow?

6 A Yes.

7 Q And Mr. Temple's concern had increased?

8 A Yes.

9 Q And by this time had he asked you whether Dow
10 could force Consumers to complete their contract by a date
11 certain?

12 A I don't recall.

13 Q Had you undertaken, of your own initiative, to
14 determine whether they were required to complete the
15 contract? Basically . . . let me clarify that.

16 At some point Dow and Consumers got into an
17 argument over this point in the contract.

18 A (Nodding affirmatively.)

19 Q And before there was any interface with Consumers'
20 counsel and Dow's counsel, I'm trying to ascertain whether
21 you had an evaluation of that contract in your own mind as
22 to what Dow's position might be if they had to force Consumers
23 to the contract. I mean what did you deem to be a reasonable
24 completion date under that contract?

25 A I didn't approach it that way. The first step

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1 we took was to write a letter to Consumers asking for
2 assurances under the Uniform Commercial Code.

3 Q And when was that?

4 A Well, I'd like to see the document. I think it
5 was November 1974. But later on . . . I think that's when
6 it was.

7 Q And I assume they responded?

8 A Yes, they did.

9 Q And generally what was their response at that
10 time?

11 A Well, it's written out in the letter. If I
12 remember, it's about a 2 or 3 page letter. So --

13 Q I really just want your impressions.

14 A My impression was they said that they didn't
15 believe that the Uniform Commercial Code applied, and said
16 the steam was not a sale of goods, and that they were only
17 required to use their best efforts, which they had done.

18 There's more to it than that, but that's
19 basically it.

20 Q And that was the best-efforts clause of the
21 original contract, as modified by the '74 agreement?

22 A That they were referring to?

23 Q Right.

24 A I understood it as that, yes.

25 Q Now, under that best-efforts clause, did Dow

1 think that they were using their best efforts at that time?

2 A At that time?

3 Q Yes.

4 A At that time I don't think we had an opinion.

5 Q At what point do you think Dow had an opinion?

6 A I would say, well, it was a developing thing up
7 until 1976.

8 Q Just an aside here, I'm going to jump ahead a
9 couple of years. But that best-efforts clause, does that
10 clause comprehend the provision of the contract which Dow
11 felt compelled them to support Consumers before the Nuclear
12 Regulatory Commission proceeding, or is that a separate
13 provision?

14 A I guess I'd have to look at the contract. I
15 think they are two different provisions. I may be wrong.

16 Q Okay.

17 Moving into 1975, did your contacts with Consumers
18 Power increase?

19 A Yes. I saw a number of their attorneys for a
20 variety of reasons, from real estate transactions to rate
21 cases to --

22 Q Focus on the nuclear steam contract. Your
23 contacts increased with Consumers?

24 A It's difficult to recall what I did in 1975.
25 I remember one contact in specific that occurred in 1975.

1 Q What was that?

2 A That was the telephone call that was placed by
3 Consumers' General Counsel to --

4 Q Who was?

5 A I think his name was Graves at that time. And
6 this related to the letter we had sent asking for assurances.
7 It was a late night conversation in Joe Temple's office.
8 He was rather upset, I think, because they were going out
9 with a financing of some kind, and they had to --

10 MR. CHARNOFF: Who was going out?

11 THE WITNESS: Consumers was going out for a
12 financing.

13 BY MR. OLMSTEAD:

14 Q And Temple was upset, or Graves was upset?

15 A Graves was upset.

16 MR. CHARNOFF: Go ahead.

17 THE WITNESS: And he was concerned over the
18 letter we had sent them in November asking for assurances,
19 and the general tenor of the conversation was that they had
20 to put something in the prospectus about that letter, and
21 they wanted a letter from us saying that we had given
22 adequate assurances, and so he wouldn't have to put it in
23 the prospectus. And we refused to give that to him.

24 BY MR. OLMSTEAD:

25 Q And what did they put in the prospectus?

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1 A I'd have to see the prospectus. I know there
2 was something in there, and there continues to be something
3 in all the prospectuses when they went out for financing
4 thereafter.

5 Q And I assume that that prospectus indicated that
6 Dow was supportive of the contract?

7 A No, it dealt with a letter we had sent asking
8 for assurances, and I think it dealt . . . I guess I can't
9 recall. I'd have to see. I recall there was a statement
10 in the prospectus dealing with our request for assurances
11 and the response.

12 Q Do you recall whether you thought the statement
13 was accurate?

14 A Yes, I think it was an accurate summation of
15 their side of the situation.

16 Q Was it an accurate summation of Dow's side?

17 A Well, yes, that we'd asked for assurances.

18 Let me go back. We also, after they responded,
19 we sent back another letter saying we disagree with your
20 legal posture. And that's sort of where the matter stood.

21 Q But -- well, the prospectus is the best evidence,
22 so I won't ask you that question. But in the succeeding
23 prospectuses that they sent out through July of 1976
24 relating to the request for assurances did you have any
25 problem with what was stated in those prospectuses

1 concerning Dow?

2 A My recollection is it was the same statement on
3 each prospectus.

4 Q All right.

5 Now, this telephone conversation that you had
6 with Graves in the evening, was Mr. Temple present?

7 A Yes, he was.

8 Q Was it on a speaker phone?

9 A No, he had just gotten the call.

10 Q So Mr. Temple talked to him and you were in the
11 room?

12 A No. Mr. Temple knew the call was coming. Mr.
13 Graves had called earlier, and had asked me to be there.
14 I think I'd been away somewhere. When the call came in he
15 talked to Mr. Graves briefly, and then I talked with him.

16 Q Okay. Did either you or Mr. Temple make a
17 record of that phone conversation?

18 A I can't recall. I don't remember ever seeing
19 one.

20 Q Who were the other Consumers lawyers that you
21 had contact with at this time?

22 A But [redacted] was in charge of the real estate
23 work.

24 Q With regard to the steam contract.

25 A Well, with regard to the general agreement, the

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1 nuclear general agreement, there was a transfer of real
2 estate and rights of way, and these kinds of things going on
3 that had to do with the nuclear plant.

4 Q Okay. Who else?

5 A With regard to the steam contract?

6 Q Yes.

7 A No one else.

8 Q So even though you had met Judd Bacon at this
9 time, he was not involved in your conversations with regard
10 to the steam contract?

11 A Which conversations?

12 Q During this period of the Temple call with Graves.

13 A Not that one. I recall meeting with Consumers
14 sometime in the fall, November, in which one of the subjects
15 may have been real estate transactions. I'm not sure.

16 Q This is '75 or '74?

17 A '75.

18 Q Okay.

19 A And -- well, I remember it was cold, and we went
20 down to Jackson. It would have been the fall. One of the
21 subjects was -- well, Judd was there, we went to lunch
22 together, and I think we discussed -- they were trying to
23 sell off their place in line for nuclear fuel. I think we
24 had some discussion about that at lunch.

25 MR. CHARNOFF: They were trying to what?

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1 THE WITNESS: Sell their place in line for nuclear
2 fuel, as a financing means. They were, again, having
3 financing problems and they were doing a number of things
4 to try to, I guess, get capital. And that was one of the
5 things I think they were discussing during that time.

6 BY MR. OLMSTEAD:

7 Q And did that cause you some concern?

8 A Yes, sir.

9 Q Because of the financial liability that would be
10 passed through to Dow?

11 A No, because of -- I didn't really understand what
12 it meant to sell your place in line, what that phrase meant.
13 I guess I was concerned as to whether that would mean more
14 delay, or could they get back in line when the plant was
15 completed. It was just a reaction.

16 MR. CHARNOFF: Was that a place in line for
17 uranium enrichment from the government, or a place in line
18 for uranium supply from uranium suppliers? What -- was it
19 the nuclear fuel arrangement you were concerned about?

20 THE WITNESS: My understanding was that at this
21 time it was for yellowcake. I really don't know what that
22 means. As I understood, it was a financial arrangement of
23 some kind that other utilities were doing also.

24 BY MR. OLMSTEAD:

25 Q And did Mr. Temple share your concern with regard

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1 to this?

2 A I think I informed him of that, and he wanted to
3 know what it meant. He didn't really understand what it
4 meant. We tried to find out.

5 Q And at that time you personally had never
6 participated in any NRC proceeding?

7 A No, I had not.

8 Q Okay. Moving, then, through the '75 period into
9 the early '76, through the spring of '76 was there any
10 change in relationships between Dow and Consumers of
11 significance?

12 A It depends on whose perspective. I'll tell you
13 what happened.

14 The end of '75 we sent a letter to Consumers
15 which essentially said we spent a whole year evaluating what
16 this delay means to us, and so forth, and basically saying
17 before we take any step that's commercially irreversible or
18 something we'd like to sit down and negotiate some changes
19 in the contract.

20 Q Okay. You said you spent a year evaluating. Was
21 there a task force or a group that had been doing this
22 evaluating, or had it been less formal?

23 A Less formal.

24 Q So Mr. Temple had been evaluating it?

25 A Well, I had, too.

1 Q You had been evaluating it. Were there any other
2 Dow people who had any primary responsibility in looking at
3 this issue up to that time?

4 A Mr. Burroughs was involved.

5 Q Anyone else? Mr. Whiting?

6 A No, I don't believe so.

7 Q Jumping ahead to the Midland review group, I
8 think at one point four people were identified as being
9 involved with that reevaluation.

10 A Which Midland review?

11 Q The Midland Division review that Joe Temple headed.
12 There was Jim Burroughs, yourself, Joe Temple and I think
13 Whiting was involved.

14 A Okay. No, that's the negotiating committee.

15 Q Okay. The negotiating committee. Take that.
16 Take the negotiating committee, and we'll move back to late
17 1975 when you said you'd been evaluating for a year. Had
18 the people who later were to be members of the negotiating
19 committee, I assume, been involved in that evaluation at
20 all?

21 A Some of them had, yes.

22 Q Who?

23 A Mr. Burroughs, Mr. Brown was briefly involved --
24 let me clear up what I mean by evaluate the situation. The
25 situation was not only our position vis-a-vis Consumers

1 Power's, but it was also at this point what we were going
2 to do with the Michigan Air Pollution Control Commission.
3 They were now aware of the delay of the nuclear plant, and
4 they were saying that there was a gap of two years, what
5 are your plans?

6 So, a lot of the evaluation had to do with --
7 the two were kind of tied together, in the sense of where
8 are we going to be in 1980, 1982?

9 Q Okay. Now, you sent a letter asking to negotiate
10 some changes in the contract.

11 Yesterday you were sitting in on Mr. Orefice's
12 deposition when he stated that he always liked to negotiate
13 rather than litigate, which I understand. Did this position
14 of Dow which was being officially communicated to Consumers
15 require any concurrence of approval above Joe Temple?

16 A I don't know.

17 Q When major positions were going to be taken by
18 the Midland Division did they have to seek approval outside
19 of the Division?

20 A I guess that would depend on whatever the issue
21 was. They operate fairly autonomously, general managers do.
22 It would be no more, perhaps, that notification to his boss
23 about what his plans were. There may have been more than
24 that, but I wasn't involved.

25 Q And you wouldn't have known whether in this case

1 Joe Temple notified anybody that he was going to make this
2 request?

3 A I don't recall. He could have, but I don't
4 recall.

5 Q Okay.

6 A He may have written a memorandum to his boss,
7 just saying, you know, here's what we're doing.

8 Q And what was Consumers' response?

9 A I think they indicated they wanted to sit down
10 and negotiate. We had a formal response back in a letter.

11 Q So they had some things in the contract they
12 wanted to negotiate, and were willing to negotiate, or were
13 they just being helpful?

14 A I'd have to look at the letter to say whatever
15 they said in the letter. Later during negotiations, yes,
16 they did have some things that they wanted to change.

17 But --

18 Q Whether they did at that time, you don't recall?

19 A I don't recall what was in the letter. I assume
20 that there were some things they wanted, but whatever is
21 in the letter is what they said. I don't recall what that
22 was.

23 Q There was a meeting, and we have some notes of
24 it that I'm going to look for here, in early 1976. Do you
25 recall meetings with Consumers following the agreement to sit

1 down and negotiate?

2 A The first one was in January, I believe.

3 Q Okay. And essentially what was that meeting about?

4 A Well, there are notes. We took notes on that
5 meeting, and I'd have to refer to those. Basically we
6 indicated what were the changes we would like to see in the
7 contract that would ease our position as we found it.

8 Q You took notes of each meeting you went to with
9 Consumers Power?

10 A Yes, I did. We all took notes and combined them
11 for official meeting notes.

12 Q Now, in this latest round of negotiations that
13 were just concluded in the discovery process, after every-
14 body had agreed on the notes that were sent out to all the
15 parties, is that the same procedure that you used from the
16 beginning?

17 A Well, I wasn't involved in the second round of
18 negotiations, so I don't know. But basically we would write
19 up some meeting notes and have one form, basically, for our
20 own records so we would know what had been discussed and
21 what work had to be done, and then we would send a copy to
22 Consumers Power.

23 Q And what would they do with it?

24 A I think it was more only for their information,
25 and I recall after one copy of notes was sent to them, we

1 got a letter back saying, thank you very much, we don't
2 agree with everything that's in the notes, basically.

3 Q Did they send you a copy of notes that they took
4 at the meeting?

5 A I don't recall. I don't think that they did.

6 Q So normally what would happen is Dow kept notes
7 and sent them to Consumers, and Consumers, if they kept
8 notes, didn't send any back to Dow?

9 A That's my recollection. This is from January,
10 the meetings from January on I'm talking about.

11 Q Right. Okay, was the relationship between
12 Consumers and Dow at that point starting to get less
13 cordial?

14 A No. Just -- we walked out of the January 9
15 meeting, and we were all pleased. You know, it seemed to
16 have gone very well. We'd been able to negotiate some
17 changes, and we felt the meeting had gone very well.

18 Q And those negotiations continued through the
19 spring?

20 A Yes.

21 Q Did Dow continue to believe they were going
22 well?

23 A No.

24 Q At what point did Dow feel that the negotiations
25 were breaking down?

1 A I think it was a gradual process during the
2 course of the meetings that that happened.

3 Q Did Joe Temple at some point during that period
4 of time indicate to you that there was going to be any
5 significant change with respect to Dow's position vis-a-vis
6 Consumers'?

7 A No, just the opposite. He was increasingly
8 frustrated that we couldn't negotiate some changes.

9 Q At what point did he decide to undertake a
10 review of the whole Dow position vis-a-vis Consumers?

11 A Which review?

12 Q The Midland Division position.

13 A That would be in August of 1976.

14 Q Following the Court of Appeals decision?

15 A Yes.

16 Q Did that decision have some effect on his
17 decision?

18 A His decision to order a review?

19 Q Right.

20 A Yes, it did.

21 Q Why was that?

22 A Well, for a variety of reasons. There were two
23 things that, to my understanding, he was told on the phone.
24 That summer by Consumers there was just one contact, and
25 that talked about or informed Joe of the remand by the Court

1 of Appeals, and it also informed him of the new estimated
2 cost of the Midland plant. Both of those together had an
3 impact.

4 Q Okay.

5 MR. OLMSTEAD: Off the record.

6 (Discussion off the record.)

7 MR. OLMSTEAD: Back on the record.

8 BY MR. OLMSTEAD:

9 Q I'm going to hand you a file memorandum dated
10 March 4, 1976 concerning a meeting with Consumers Power and
11 Dow, and ask you to review it.

12 (Document handed to the witness.)

13 (Witness reviewing document.)

14 (Counsel Potter, Reynolds and Charnoff reviewing
15 document handed to the witness.)

16 I've kind of forgotten where I was when I had
17 you review this document, but let's go back to the March
18 4, 1976 meeting.

19 MR. POTTER: Is that a meeting or a memo?

20 MR. OLMSTEAD: Meeting.

21 MR. POTTER: No, I think it refers to an earlier
22 meeting.

23 MR. OLMSTEAD: Oh, January 9, 1976 meeting. I'm
24 sorry.

25 Okay.

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1 BY MR. OLMSTEAD:

2 Q (continuing) -- where a meeting was held to
3 discuss the Dow contract, and it indicates, the memo that
4 I handed to you, which is Exhibit 7 in the underlying
5 Midland proceeding, from Keeley to files, indicates you
6 were in attendance at that meeting.

7 A Yes.

8 Q Do you recall that meeting?

9 A I recall being present at the meeting and the
10 general context of it, yes.

11 Q Okay. Having looked at this memorandum now,
12 do you feel that it accurately reflects the mood between
13 Consumers and Dow at that time?

14 A The mood?

15 Q The mood, right.

16 A I guess I don't understand what you mean by
17 that.

18 Q Well, for instance--I'll just read this to you,
19 because you didn't write the memo, and I don't expect you
20 to agree with it, but I'm trying to get a sense for the
21 relationship between Consumers and Dow.

22 This statement is attributed to Youngdahl of
23 Consumers Power Company:

24 "Dow can take their views (Joe's letter)..." --
25 which I assume is the letter that Mr. Temple wrote the

1 second time to Consumers?

2 A I don't know whether he means the first letter
3 or the bunch of letters. I'm not sure which one he's
4 referring to.

5 Q But I assume that the views referred to there
6 are Dow's views, that under the Uniform Commercial Code
7 there are some obligations on Consumers Power to go ahead
8 with construction?

9 MR. POTTER: I think Mr. Nute's response is he
10 can't make that judgment based on this statement.

11 MR. OLMSTEAD: I'm not asking him to based on
12 this memo. I'm asking him based on his recall of the
13 meeting of January 9, as to whether Youngdahl might have
14 said Dow can take their views, but Consumers Power doesn't
15 have to agree.

16 THE WITNESS: I'm not sure which letter he was
17 referring to. As I said, there were at least three letters
18 that I can recall right now which talked -- or four letters--
19 from Dow. I don't know which one he was talking about,
20 whether he's talking about our legal views, or the views
21 that were expressed in the letter that preceded this
22 negotiation, on what Consumers' business obligations were.

23 I don't know which he's referring to.

24 BY MR. OLMSTEAD:

25 Okay. But the tone of that statement is that

1 Consumers Power and Dow aren't necessarily agreeing in
2 these negotiations that are going on, at least at this
3 period of time?

4 A Well, no. The general context of that meeting,
5 you know, was, in my opinion -- and we discussed it after-
6 wards -- that it went very well, and in that context, if
7 I remember, it was, you have your views, we have ours, and
8 let's get on with it.

9 Q We'll negotiate?

10 A We'll negotiate it.

11 Q There's also a concern expressed in this memoran-
12 dum about the Youngdahl and Temple letters or exchange of
13 correspondence becoming public. Do you recall that concern?

14 A I think that deals with, again, the demand for
15 assurances and their response.

16 Q And he indicates that that will be in the regis-
17 tration statement, and I believe you testified something to
18 that effect was in the registration statement?

19 A Yes. I thought it was earlier than that date.
20 I thought it already had been.

21 Q Now, Joe Temple says he agrees that they can
22 resolve the matters in a business like fashion, which I
23 assume was an accurate reflection of what his views might
24 have been?

25 A Yes.

1 Q But he's concerned that the public feels that
2 Dow and Consumers are at odds?

3 A Yes.

4 Q Was that a concern at that time?

5 A He must have felt it was. At that point in
6 time I can't . . .

7 Q Going back a year previously an article that
8 appeared in the Wall Street Journal on May 2, 1975 quoting
9 Dow as saying that the prospectus summary, which I assume
10 that referred to the first letter --

11 A Yes.

12 Q -- says, it's factually accurate that Dow's
13 position remains unchanged. "However a Dow spokesman
14 declined to say what guarantees the Company is seeking or
15 how it is pursuing the matter."

16 So I guess it's fair to say that as of this
17 meeting, January, 1976, Dow hadn't gotten the guarantees
18 that it was looking for and it was still pursuing the
19 matter?

20 A Yes.

21 Q There's another statement in this memorandum
22 attributed to Youngdahl, saying that Consumers had some
23 matters they wished to negotiate in the contract, but that
24 their proposals were not as radical as Dow's.

25 Did you have a sense at that meeting that

1 Consumers viewed your proposals or Dow Chemical Company's
2 proposals as radical?

3 A No.

4 Q So you really thought that the meeting went well,
5 and that Consumers thought everything you were asking for
6 was reasonable?

7 A No. I don't know what Consumers thought. We
8 walked out of the meeting and --

9 Q But your assessment of the meeting was that --

10 A -- it went well, and that negotiations would
11 proceed and we were going to come up with amendments to
12 the contract that both sides could live with. We were
13 quite pleased with the tone of the meeting.

14 Q Okay. Now, Judd Bacon was present at that
15 meeting?

16 A Yes.

17 Q Was he serving for purposes of these negotiations
18 as Consumers' counsel from that time forward?

19 A Yes, he was.

20 Q And your contacts from that time forward were
21 with Mr. Bacon?

22 A Yes.

23 Q Essentially?

24 A (Nodding affirmatively.)

25 Q Were your contacts with Mr. Bacon satisfactory?

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1 Did you get along well together?

2 A Initially I think we did.

3 Q At what point did you feel you were not getting
4 along?

5 A I wouldn't say "getting along." I think there
6 was -- when you get into these kinds of negotiations, and
7 towards the end we were dealing with language and positions
8 and everything, you know, I think there was the normal kind
9 of conflict. There were a series of negotiating meetings,
10 and at some point we started talking about language and --

11 Q Approximately when was that?

12 A (Pause.)

13 Q Before or after the Court of Appeals decision?

14 A Before.

15 Q Before. So you thought you were near the end
16 before the Court of Appeals decision?

17 A No, I meant at the end of the meetings that took
18 place, not near the end of the negotiations. There were
19 three meetings that took place before September, I think.

20 Q To the best that you can recall it, where did
21 Consumers and Dow stand as of July 1, 1976?

22 A I'm not sure --

23 MR. POTTER: On the status of the negotiations?

24 MR. OLMSTEAD: Yes, on the status of the
25 negotiations.

1 THE WITNESS: Joe Temple had sent a letter on
2 June 30 in which he had conceded on some things and given
3 Consumers their choice of some others to pick from, and
4 asked for their response.

5 BY MR. OLMSTEAD:

6 Q And did they respond?

7 A We never got a response until sometime in August
8 or September, I believe.

9 Q And what was the response at that time?

10 A The first response was a telephone call from
11 Youngdahl to Temple, and Temple wasn't there and his
12 secretary jotted down what Russ said, and it was, We'll take
13 A, we'll take B, or that kind of thing. Just a notation.
14 That's the only response I'm aware of.

15 Q And was Dow satisfied with that response?

16 A Well, you know, he just left the message over the
17 phone.

18 Q Well, I assume you followed up on it, and there
19 was some --

20 A Well, that eventually led to the September 13
21 meeting, negotiating meeting.

22 Q That response?

23 A That response.

24 MR. POTTER: You may have picked it up and I
25 missed it, but did we fix the date of the telephone call

1 from Mr. Youngdahl?

2 MR. OLMSTEAD: It was August of 1976.

3 THE WITNESS: Yes.

4 BY MR. OLMSTEAD:

5 Q By this time Mr. Temple's views had been affected
6 by the remand decision in July, is that right?

7 A Yes.

8 Q What was your first contact, if you can recall,
9 with Mr. Temple following the Court of Appeals remand
10 decision?

11 A Okay. When the Court of Appeals remand decision
12 came down, I was on vacation and I came back and I got
13 some phone calls that something had happened. When I came
14 back he was leaving on vacation, and . . . you know, we
15 just knew something had happened.

16 As I said, our motion to withdraw had been
17 granted by the Court of Appeals sometime before. We were
18 not on the service list, and we hadn't gotten any documents.
19 We hadn't received any communication from Consumers Power
20 since we met with them in May, other than the one telephone
21 call in which they told us about the remand decision and
22 the new price of the plant.

23 I came back in a situation where everyone wanted
24 to know what was going on. The first thing I did was sent
25 for a copy of the opinion right away.

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1 Q Including Mr. Temple wanting to know what was
2 going on?

3 A Yes.

4 Q And you got the opinion --

5 A -- sometime in August, yes.

6 Q -- before you had any meetings with Mr. Temple
7 as to what was going on?

8 A As I said, I think he went on vacation shortly
9 after I was back, or he went away, or something. It's
10 unclear to me at what point I read the opinion and talked
11 to him, but at some point I did and he left on another
12 vacation in the last two or three weeks of August -- last
13 couple weeks of August.

14 Q So would it be fair for me to assume, then, that
15 you had Mr. Youngdahl's response to your suggested revisions,
16 and negotiating position, you had the Court of Appeals
17 decision at the time you and Mr. Temple sat down for the
18 first time to talk about what Dow's position was in light
19 of those events?

20 A No. I don't know if I had that telephone
21 response. As I said, when I came back we may have just
22 sat down initially. He wanted to know what was going on,
23 and I think he went away. And then he came back and he
24 asked for that material which I think I gave him, and then
25 he went away on vacation again. Then when he came back we

1 sat down and discussed them.

2 Q And when would that have been?

3 A The end of August.

4 Q The last week?

5 A I believe that was it, roughly.

6 Q And what was his reaction at that point?

7 A His reaction was that he had evaluated the
8 whole situation while he was away on vacation. He had
9 re-read all the documents, and considered everything,
10 especially the impact that the new price was going to have
11 on the plant, and that --

12 Q The new price? When did you get the new price?

13 A August 5. That same telephone call, I believe, that
14 talked about the Court of Appeals Decision also was when
15 Mr. Youngdahl communicated to Joe that there --

16 Q -- that there was a new price?

17 A -- that the price was \$1.67 billion, possibly
18 as high as \$2 billion.

19 Q But in that August 5 phone call he did not
20 communicate Consumers' position on Dow's changes?

21 A No.

22 Q Okay.

23 Go ahead.

24 A Well, we sat down and discussed it, and he said
25 he had come to a management decision. He had some serious

1 reservations about the Midland nuclear plant and whether or
2 not it was going to be something that was going to be
3 beneficial to the Division.

4 Q And if you could summarize those reservations,
5 what were they?

6 A Well, they are summarized, I think, in his letter
7 to Paul Orefice on the 8th. It was all the unknowns, all
8 the things we didn't know.

9 Q The 8th of September?

10 A Yes. I think that's when it was dated.

11 Q Now, did Mr. Temple have anybody else assist him
12 at that period of time between that time when you and he
13 sat down, and the letter to Orefice of September 8, in
14 determining whether or not his instincts or management
15 prerogatives were correct? I mean did he have any formal
16 review team working on it?

17 A No. He may have asked for -- you know, talked
18 to people on the negotiating team, like myself, or Mr.
19 Burroughs.

20 Q At that point did he ask you to give him any
21 advice with regard to Dow's options under the contract?

22 A I'm trying to recall. It was more from the
23 point of view of still not knowing enough of what was going
24 on. We were reading newspaper stories, and reporters were
25 calling about the Court of Appeals remand, and a lot of

1 legal activity that was going on.

2 He had a number of questions about what does this
3 all mean; it's so up in the air; can you find out more in-
4 formation before we meet with Consumers?

5 Q Did you have occasion to advise him as to the
6 possibilities of suspension of construction?

7 A Well, sometime during that period, yes. I had
8 read the decision, and what could come out of it.

9 There was also a phone call from Myron Cherry
10 I think sometime in August -- not to me, but to another
11 attorney in Dow, in which he said a number of things. But
12 one of which stuck in my mind was that the NRC has already
13 taken the position that the construction license is invalid.

14 So that raised some questions in my mind that
15 I wanted to pursue.

16 Q He called another attorney in Dow?

17 A Yes, he did.

18 Q Who was that?

19 A R. W. Barker.

20 Q So you investigated that, and what did you
21 conclude?

22 A Investigated which?

23 Q The impact of the remand proceeding and the
24 position that Cherry had represented to you that the
25 construction permit was invalid.

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1 A Well, I was unable to conclude anything. One of
2 the steps that I took was to call the NRC to try to set up
3 a meeting with them, and that meeting never occurred. I
4 wanted to find out whether that assessment was correct or
5 not, among other things.

6 Q And who did you talk to at the NRC?

7 A I talked to Mr. Kelly at first, and then I had
8 two or three conversations with Mr. Brown, who I believe
9 was an attorney that was supposed to be involved at that
10 time.

11 Q Okay. So what did you then advise Mr. Temple
12 prior to September 9?

13 A September 9?

14 Q Right, or when he wrote his letter to Mr. Orefice.

15 A Advised him on what?

16 Q I mean he didn't push you to say what are the
17 odds of a suspension?

18 A He asked if there was a possibility, and I said
19 there was.

20 Q And then did he say, is it a strong possibility,
21 likely, unlikely?

22 A If he did, I would have said I didn't know. I
23 didn't have any information at that point.

24 Q Right. I understand. But I also understand
25 clients, and I would assume they want a better answer than

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1 you can give them.

2 A Well, we had a lot of discussion on this fact
3 that we didn't have any information from Consumers, and
4 that it was limiting us in trying to make a decision.

5 Q Okay. And what was his -- did he suggest to you
6 that by taking a hard line at this point that you might be
7 able to force Consumers to provide more information than
8 you'd been able to get up to that date?

9 A A hard line?

10 Q Yes. By some change, shift in Dow position, or--

11 A No.

12 Q Did he feel that a shift in Dow policy would
13 have any effect on the relationship with Consumers?

14 A Yes, he did.

15 Q Did he express an opinion as to what that effect
16 might be?

17 A Well, yes, I think he thought it would cause
18 some consternation, and from the fact that it was -- I think
19 I had said that apparently someone from Dow was going to
20 have to testify in this hearing, and they're going to get
21 into these issues, all the issues we were talking about,
22 negotiations, cost, the price of steam, and all these things.

23 As I read the opinion, the cost-benefit analysis
24 would have to be redone, and when you redo that -- it had
25 been done in the early 1970s, and when you redo that, with

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1 a \$1.67 billion price tag, or the \$2 billion price tag, or
2 whatever it was--we had some concerns whether that \$2 billion
3 was in fact correct.

4 Q Now, the record is replete with references to
5 public statements by Mr. Temple, and I may be wrong -- and
6 correct me if I am -- but it seems to me that somebody at
7 one point suggested that he made a statement in June of '76
8 expressing his own opinion that the plant, if delayed too
9 long, was not to Dow's best interest.

10 Did he make any such statement to your knowledge
11 that early, or did those all follow the Youngdahl call in
12 August?

13 MR. POTTER: Excuse me. I'm going to have to
14 object.

15 It's probably my own ignorance of the record
16 in this case, but I object to the characterization that the
17 record was replete with what I understood you to say public
18 statements by Mr. Temple regarding the project.

19 MR. OLMSTEAD: References to public statements
20 by Mr. Temple.

21 MR. POTTER: Not to statements actually made,
22 but references to statements allegedly made?

23 MR. OLMSTEAD: Right.

24 MR. POTTER: All right.

25 BY MR. OLMSTEAD:

1 Q The record is full of references by various
2 parties at different times for different purposes to
3 statements made by Joe Temple concerning his own views, his
4 personal views, of the Dow-Consumers steam contract. And
5 what I'm trying to fix on is when did those statements start
6 to be public?

7 A The only statement that I can recall is one that
8 he made in which he talked about the Michigan Division --
9 the Michigan Division was traditionally at a cost disad-
10 vantage in production with the Gulf Coast units of Dow,
11 because the cost of steam down there was much cheaper.
12 They had natural gas, and long-term contracts at a low
13 price. And that has resulted in a lot of capital invest-
14 ment going to the Gulf Coast area as opposed to the
15 Michigan Division.

16 And one of the reasons for the nuclear plant
17 contract, as I understand it, was that when the original
18 agreement was signed the price of steam to Dow as estimated
19 then was going to be quite cheap, so it would restore the
20 competitive advantages of the two areas, at least as far
21 as the price of steam was concerned, perhaps not as far as
22 cost of transportation and other things, but at least as
23 far as the price of steam was concerned.

24 He made a statement which was carried in the
25 press at some time during this period, 75-76, that the

1 escalated cost of the nuclear plant had gotten to such a
2 point that we were no longer counting on, you know, that
3 kind of cheap steam in our capital planning.

4 Q Okay. Now, to the best of your recollection,
5 when was that statement made?

6 A I can't recall. I know it was carried in the
7 press.

8 Q Was that before September of 76?

9 A Yes, it was.

10 Q Was that before August of 76?

11 A I think it was, yes.

12 Q So there at least was a public statement
13 heightening the dispute between Dow and Consumers as carried
14 in the 1975 Wall Street Journal article?

15 A No, I wouldn't say that.

16 Q You wouldn't say that that statement heightened
17 the concern? That it was the same concern that it had
18 always been?

19 A No. Let me discuss a little more of that. There
20 were some other statements that Joe was making at that
21 time about the business climate in Michigan, and I think
22 he gave some speeches on that, and that was, at least I
23 think in Dow's view, deteriorating at the time for a number
24 of reasons. Workmen's Compensation, and a whole list of
25 things. And I think it was in that context that, you know,

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1 here's another thing that is contributing to the failure
2 for the Michigan Division to get more capital investment
3 and grow, as we're not projecting any cost advantage or
4 any great cheap steam that's going to allow us to compete
5 for that capital.

6 Q We'll get into it in greater detail later when
7 we get to the meetings, but those views that were expressed
8 prior to August of 1976 are some of the personal views of
9 Joe Temple that Consumers' retained counsel, Rex Renfrow
10 and Dave Rosso were concerned about, were they not?

11 A I think so, yes.

12 Q Okay.

13 MR. CHARNOFF: Did you say August of 1976?

14 MR. OLMSTEAD: The views were expressed prior
15 to August of 1976, and I was asking whether those were some
16 of the personal views of Joe Temple which concerned Dave
17 Rosso and Rex Renfrow.

18 THE WITNESS: We talked about that. I think
19 later on we talked about it with Mr. Aymond at the
20 September 24 meeting.

21 BY MR. OLMSTEAD:

22 Q Now, we're down into the last week of August,
23 and by September 9 Mr. Temple's recommendation to Dow USA
24 and the request for a corporate review is made.

25 So, it's within a week to two week time frame,

1 essentially, that we're talking about.

2 Prior to the letter to Mr. Oreffice that Mr.
3 Oreffice testified yesterday I believe was hand carried to
4 him on that date, did Mr. Temple communicate to your
5 knowledge with Consumers Power in any informal or formal
6 fashion regarding his concern?

7 A I don't know. I know he and Russ Youngdahl
8 talked on the telephone prior to the September 13 meeting,
9 and I think there were some notes taken, but --

10 Q Having sat in those meetings and knowing that
11 Mr. Temple's concerns were running in that direction, did
12 you have any conversations with anybody from Consumers
13 Power in which you may have indicated any concern?

14 A No. That was part of the problem, was there was
15 no communication. I didn't know what was going on. I
16 hadn't talked to anybody.

17 Q Did you make attempts to find out from Consumers
18 what was going on?

19 A No, I didn't.

20 Q Okay, I'm going to be talking about the
21 September 13 meeting a little bit.

22 You have some notes of that meeting, I believe?

23 A You mean my own personal notes?

24 Q Yes. I'm not sure whether you did or not.
25 Off the record.

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(Discussion off the record.)

MR. OLMSTEAD: Back on the record.

BY MR. OLMSTEAD:

Q Mr. Hanes had some notes of that meeting, is that not correct?

A Which meeting?

Q The September 13 meeting with Consumers Power.

A He wasn't there.

Q Oh, that's right. Mr. Temple, Mr. Nute, Mr. Burroughs, Mr. Gaska, and Mr. Whiting. Were these the members of the Dow negotiating --

A The membership of that team changed in there. It had been a Mr. Brown and Mr. Gaska replaced Mr. Brown, in the job Mr. Brown had. But the other three people, Mr. Burroughs, Mr. Whiting and Mr. Temple and myself, had been involved and had been at all the meetings, from January on.

Q So they were all knowledgeable of the Consumers-Dow contract negotiations?

A Yes, they were.

Q Okay. I'm referring to Midland Intervenors Exhibit Number 29, which is a file memorandum from R. C. Youngdahl. You are free to refer to your own best recollection and any other notes of that meeting that you want to.

MR. CHARNOFF: What's the date?

1 MR. OLMSTEAD: September 14 is the date that
2 refers to the September 13 meeting.

3 MR. CHARNOFF: Youngdahl's file?

4 MR. OLMSTEAD: Yes.

5 MR. POTTER: Let the record indicate at this
6 point the witness does have a copy of the September 14,
7 1976 Consumers Power memorandum before him. Go ahead.

8 BY MR. OLMSTEAD:

9 Q I don't want you to testify on that memo. I'm
10 referring to it because it's one of the lengthier memos
11 on the meetings, but you can use anybody else's meeting
12 notes or your own recollection for purposes of the questions.

13 Mr. Youngdahl says that Dow insisted that we
14 follow the attached agenda. Was this meeting like the other
15 meetings, or was there a change in the way you approached
16 this meeting?

17 A The way I interpret that, if he's talking about
18 the attached agenda, which is ours -- I believe that's our
19 agenda -- as I said, there'd been a phone conversation
20 between Mr. Temple and Mr. Youngdahl prior to this meeting,
21 and if I recall the general tenor of that conversation as
22 it was relayed to me was that Mr. Youngdahl wanted to
23 finish the renegotiation of the contract, and he wanted to
24 come up -- he wanted it to be done that day, prior to the
25 hearing. Mr. Temple had expressed some concern about all

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1 the things that had been going on all summer, and particular-
2 ly in the legal arena, and the emphasis by Mr. Youngdahl,
3 as Mr. Temple told me, was, well, you know, we'll spend a
4 few minutes on that and we'll get on with the negotiating
5 of the contract and -- you know. I don't know. Mr.
6 Temple's response was whatever it was, but our concern was,
7 wait a minute, we don't want to renegotiate a contract here
8 in one day that we've been working on for a year, when we
9 don't know what's going on, whether the license is even
10 suspended or not. We want a detailed discussion of
11 everything that's been going on this summer. We don't
12 know. We've tried to find out. We haven't been able to find
13 out. And before we even talk about negotiations, we want
14 to know what's going on in the legal arena.

15 Q Okay. Now, that was Mr. Temple's position as
16 related to Consumers Power Company?

17 A Well, that was our position going into the
18 September 13 meeting, and it's my impression of what he
19 said to Russ on the phone.

20 MR. POTTER: Let me just interrupt, because
21 we're going to lose it by the time we get to it.

22 Could I just interrupt just a second?

23 Mr. Nute, will you take a look at the September
24 14, 1976 memo, and I think you referred to the agenda
25 attached as possibly being a Dow agenda. Would you take a

1 moment to please look at that document and tell me whether
2 it is a Dow agenda or a CP agenda?

3 THE WITNESS: I could tell if I looked at our
4 meeting notes of the September 13 meeting. It would have
5 our agenda and their agenda. From looking at it, it looks
6 like our agenda, but I can only tell for sure by looking
7 at our copy of the notes.

8 MR. POTTER: Off the record.

9 (Discussion off the record.)

10 MR. OLMSTEAD: Back on the record.

11 MR. POTTER: Mr. Nute, I asked you to take a
12 look at the copy of the agenda that's attached to the
13 Consumers Power Company memo of September 14, 1976, which
14 apparently describes, in their terms, what occurred at the
15 September 13, 1976 negotiating meeting with Dow.

16 I ask you again: Is the outline that's attached
17 to that memorandum in fact a Consumers Power Company
18 outline, or is it a Dow Chemical Company outline?

19 THE WITNESS: I believe it's our outline.

20 MR. POTTER: Thank you.

21 BY MR. OLMSTEAD:

22 Q Okay. You were in the process of explaining to
23 me the statement in here that Dow insisted we follow the
24 attached agenda, and I got the impression that Consumers
25 wanted to hurry up and end the negotiations and get a revised

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1 contract, and Dow was saying, wait a minute, there are a
2 lot of new things here we don't fully understand what's
3 going on, and we're not prepared to go forward, although
4 that had not been stated explicitly at that point in the
5 meeting, is that correct?

6 A Yes. It hadn't been stated in the meeting.

7 Q Okay. But prior to this meeting, Mr. Temple's
8 recommendation to Mr. Oreffice and the request for a Dow
9 USA corporate review had been made?

10 A Yes. Well, I don't know whether the request for
11 a corporate review, the September 8 letter, had gone to
12 Mr. Temple. That contains the request for a corporate
13 review. (Pause.)

14 It nad, yes.

15 Q That was the letter Mr. Temple hand-carried to
16 Mr. Oreffice that Mr. Oreffice testified to yesterday, is
17 that correct?

18 A I don't know. I'm a little confused as to which
19 letter --

20 Q There were two letters to Mr. Oreffice?

21 A There was a later one in September, which
22 established the corporate review team and what their tasks
23 were and so forth.

24 Q That was the letter from Mr. Oreffice, though.

25 A No.

1 MR. CHARNOFF: Off the record.

2 (Discussion off the record.)

3 MR. OLMSTEAD: Back on the record.

4 BY MR. OLMSTEAD:

5 Q You have reviewed now Board Exhibit 1 and Board
6 Exhibit 2, which are the two letters from Mr. Temple to
7 Mr. Oreffice, is that correct?

8 A Yes, I have.

9 Q And I think my previous question was when did
10 Mr. Temple ask Mr. Oreffice for the corporate review?

11 A Yes. It's contained in the September 8 letter,
12 in the last part, on the third page.

13 Q So Mr. Temple's position with regard to the
14 Dow-Consumers contract was fixed at that point in time, is
15 that correct?

16 A His position, as described in this letter, yes.

17 Q And nothing occurred at this September 13
18 meeting that changed his position, is that correct?

19 A That's correct.

20 Q Okay. So would you say that the relationships
21 or the tenor of the meeting -- the September 13 meeting
22 was different than those which you had attended previously?

23 A Yes, sir.

24 Q In what way?

25 A Much more tense.

1 Q Was Consumers more tense at the outset, before
2 the recess? There's an indication that you had a temporary
3 adjournment -- this is the September 13 meeting.

4 A Yes, they were. It was a very odd meeting that
5 Consumers had.

6 Q Would you explain that?

7 A Well, if my recollection is correct, Mr. Temple
8 had indicated to Mr. Youngdahl prior to the meeting that
9 one of our concerns was what was happening in the legal
10 arena, specifically on the question of whether the
11 construction license was going to be suspended as a result
12 of the Court of Appeals case. And he had, as he communicated
13 to me, said, we had a need to know what had been going
14 on.

15 Consumers arrived, and their attorney wasn't
16 with them. And that struck us as very strange, since that
17 was one of the things we -- we wanted a briefing, and he
18 wasn't there.

19 Q Did you mention that?

20 A I think we asked where he was.

21 Q Do you recall what the response was?

22 A I think they said he was working on a brief, or
23 something.

24 Q At that time he, I assume, referred to Judd Bacon?

25 A Judd Bacon, yes. I'm sorry.

1 Q And did you have any conversations with Judd
2 Bacon prior to this meeting?

3 A I don't recall that I did.

4 Q Okay.

5 Mr. Youngdahl note indicates that after review-
6 ing items 1 and 2, which essentially was the Court of
7 Appeals decision, and I assume -- correct me if I'm wrong --
8 that you didn't get much information since there was no
9 attorney there --

10 A What we got is in our notes. But I didn't have
11 the opportunity to ask the kinds of questions that I wanted
12 to ask. I tried to explore the whole question of the
13 redoing of the cost-benefit analysis, and I think they said
14 they couldn't comment on that.

15 Q So you led the discussion for Dow on item 1?

16 A No, I think I just had that question at some
17 point. As they talked about I think I just -- when they
18 talked about the cost-benefit analysis, I just said, have
19 you done that in light of the new figure, and so forth.

20 Q So Mr. Temple took the lead in the discussion
21 at this meeting?

22 A Yes. He was the chairman of the negotiating
23 committee.

24 Q Okay. Then Dow requested a temporary adjournment?

25 A Yes. At some point in the meeting, we did. There

1 was a lot of discussion before that.

2 Q So did you go to another room?

3 A Yes, we did.

4 Q And had a caucus?

5 A Yes.

6 Q And what occurred in that caucus?

7 A Basically, if I recall, Joe said, has anybody
8 heard anything that changes anything? And we expressed
9 concern that we still didn't have the information that we
10 wished we had that they weren't communicating with us.

11 Q "We?"

12 A The negotiating team.

13 Q Each member of the team had the same reaction?

14 A (Nodding affirmatively.) Yes, I believe we did.
15 Because of the tenor of Mr. Youngdahl's conversation we
16 were frustrated.

17 Q Okay. Then what happened?

18 A Well, I guess I'd have to go back to what
19 happened before.

20 Q Okay.

21 A A number of things:

22 First of all, Mr. Temple said -- I mean Mr.
23 Youngdahl -- excuse me -- said, at least on three or four
24 occasions, well, Joe, you're going to have to testify,
25 you're going to have to tell them what you think, you're

1 going to have to testify, Joe. And he kept saying that,
2 without ever asking Joe what his feelings were.

3 Q So it was obviously Mr. Youngdahl's impression
4 that if Dow supplied a witness, it would be Mr. Temple at
5 that --

6 A He repeated it 3 or 4 times.

7 Q Okay. And did you have any position on who a
8 witness might be?

9 A No, we just --

10 Q Had you even discussed the matter before that
11 meeting?

12 A Oh, I think we may have discussed it only from
13 the point of view that, you know, Joe was the chairman of
14 the negotiating team and he was the head, general manager
15 of the Division. I guess we assumed he'd be the witness
16 at some point, if, in fact, there was going to be a Dow
17 witness, which was unclear to us at that time, you know,
18 whether we had to testify or not.

19 We'd read the footnote, and it indicated that
20 they'd want to know what Dow's position was, but how they
21 were going to arrive at that we didn't have any idea.

22 Q And did you, as of this time, or had you as of
23 this time, had any contacts with Mr. Wessel, or had Mr.
24 Wessel entered the picture?

25 A Yes.

1 Q How did he come to become involved?

2 A Well, he had always been involved in the back-
3 ground in this thing, since, well, since its inception back
4 in the seventies. And at some point he had left his law
5 firm and gone out and practiced on his own, and I continued
6 to talk to him about the whole nuclear process and what
7 had gone on before, because I hadn't been involved and I
8 used his recollection.

9 So all during this whole period I had discussed
10 this problem with Milt.

11 Q Had you had any meetings with him prior to this
12 time specifically as a result of the Court of Appeals
13 remand?

14 A Prior to when?

15 Q The September 13 meeting?

16 A Yes, I did.

17 Q All right. And you'd been on leave, and then
18 Mr. Temple had been on leave, so approximately what was the
19 first time you and Mr. Wessel got together?

20 A We got together over the telephone the end of
21 August. That was when I was attempting to meet with the
22 NRC, and I wanted Milt to go with me and talk. So I checked
23 with him, it was available on his schedule, and we had a
24 number of conversations about that.

25 Q And did you anticipate at that time that you

1 would have to provide a witness in the NRC proceedings,
2 or did you discuss it?

3 A I can't recall whether I did or not. It was
4 apparent to me from reading the Court of Appeals decision
5 that there were going to be some questions asked of Dow.
6 In what form, I didn't know, or how.

7 Q Okay. And did you have any other meetings with
8 Mr. Wessel prior to this time? Prior to the September 13
9 meeting was Mr. Wessel aware of the change in Mr. Temple's
10 position?

11 A Yes, he was.

12 Q Was he aware of the September 9 -- is it? Board
13 Exhibit 1?

14 A I'd be speculating. I'd say yes, I think he
15 was, but I can't say for sure.

16 Q And had you discussed this September 13 meeting
17 with him prior to the September 13 meeting?

18 A Yes.

19 Q And did you tell him that Dow was going to tell
20 Consumers what Mr. Temple subsequently told them on
21 September 13?

22 A I can't recall. It may have been part of the
23 conversation, but I can't specifically recall telling him
24 that.

25 Q Okay. Well, let's go back to the caucus. Mr.

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1 Mr. Temple must have announced to the caucus that he was
2 going to go back in and lay it on the table, so to speak?

3 A No, it wasn't like that. We sat around and
4 talked about what Consumers had presented in the first
5 part of the meeting, the continual references to the fact
6 that Joe would have to testify. And I think I said, you've
7 got to tell them, Joe, what your feelings are as you've
8 expressed them to me. You have that obligation, since they
9 think you're going to be the witness.

10 Q Did the other members of the negotiating team
11 share his feelings?

12 A Well -- which feelings?

13 Q The feelings you just mentioned.

14 A (Pause.)

15 Q You said, Joe, you've got to tell them what
16 your feelings are. I assume you had some feelings in mind?

17 A I didn't disagree with the position he reached,
18 as set forth in the September 8 memorandum to Mr. Orefice.

19 Q And to your knowledge, neither did Mr. Burroughs?

20 A I never asked him. I don't know. I had never
21 asked him, do you agree or do you disagree.

22 Q But he didn't express any disagreement?

23 A No.

24 Q Is the climate in Dow Chemical such that one
25 would express disagreement with Mr. Temple?

1 A With Mr. Burroughs it was, yes.

2 Q How about with Mr. Whiting?

3 A Yes. Mr. Whiting was senior to Mr. Temple.

4 Q Okay. Mr. Gaska?

5 A This was his first meeting, and he didn't know
6 what was going on.

7 (Laughter.)

8 In that context, I mean, it was all new to him.

9 Q Okay. Go ahead. We were in the caucus. You
10 told Mr. Temple that he was going to have to express his
11 personal feelings.

12 A I said -- I think I indicated in my opinion we
13 shouldn't try and negotiate any further, absent a fairly
14 comprehensive discussion of what was going on in the legal
15 arena. Mr. Youngdahl kept expressing a need to rush through
16 that part. You know, all right, let's rush through it,
17 let's spend a couple minutes and renegotiate. And we
18 kept saying, listen there's an awful lot that's gone on,
19 and you've got to tell us what's gone on. We don't know,
20 and we can't negotiate unless we know.

21 Q And that would probably explain why he reports
22 that Dow insisted that we follow the attached agenda?

23 A That's right.

24 Q And Youngdahl wants to finish the items listed
25 in Joe Temple's letter of July 9, 1976?

1 A No, it says in the letter received July 9, 1976.

2 Q Oh. That was the June letter that Mr. Temple
3 sent?

4 A I assume so.

5 Q Okay.

6 Let's jump back to the caucus now. So what
7 essentially came out of that caucus? What was the decision
8 that Mr. Temple announced, or the course of action?

9 A He said he wanted to go back in and express his
10 decision, what he would say if he were asked to testify,
11 and he felt he ought to let them know at this point.

12 Q Now, Mr. Youngdahl's notes indicate that when he
13 came back he suggested that the matter was highly
14 confidential and that Consumers Power Company participation
15 should be restricted.

16 Was that discussed in the caucus?

17 A I notice the name in Mr. Youngdahl's memo of
18 Carl Geisel, who was a member -- as I recall his position,
19 he had something to do with steam rates, or something. He
20 hadn't been involved in these discussions. And I think
21 my impression, Mr. Temple went off to talk with Mr.
22 Youngdahl, and I think the impression was just not to have
23 that person from Consumers Power in the room when he
24 communicated with the negotiating team to negotiate.

25 Q Oh, because he was not a member of the

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1 negotiating committee?

2 A That's right.

3 Q Now, you say that Mr. Temple went off to talk
4 to Mr. Youngdahl?

5 A Yes.

6 Q Did he have a conversation with Mr. Youngdahl
7 before they met with Hal Keeley and Youngdahl?

8 A It was just saying, you know, let's meet again.
9 And my impression was it lasted just about a minute.

10 Q Okay. I'd like you to read the fourth paragraph
11 again in the September 13 memo.

12 A Starting with --

13 Q "Temple then proceeded to identify..."

14 MR. CHARNOFF: It's the September 14 memo of the
15 September 13 meeting?

16 MR. OLMSTEAD: Yes, the memo is dated September
17 14.

18 MR. CHARNOFF: You just called it the September
19 13 memo. That's all I was --

20 MR. OLMSTEAD: Oh, I'm sorry.

21 (Witness reviewing document.)

22 BY MR. OLMSTEAD:

23 Q Is that, in your opinion, an accurate summary
24 of what Mr. Temple told Consumers Power?

25 A No.

1 Q Would you explain what it is that you feel is
2 not accurate?

3 A The sentence starting, "They felt certain, and
4 we agree, that Dow would be forced to testify in the
5 upcoming public hearings."

6 The whole conversation was from Mr. Youngdahl
7 to Mr. Temple, you're going to have to testify, Joe. And
8 I don't recall us discussing that one way or the other.
9 But they kept saying to him.

10 The part about Joe Temple would be asked about
11 Dow's position regarding the facility by either the NRC
12 or the intervenors, that's accurate. And Mr. Youngdahl,
13 as I think is reflected in our notes, said a number of
14 things. One of which stuck in my mind was what are you
15 going to say, Joe, when they ask you how do you like doing
16 business with an incompetent utility?

17 It was that kind of thing.

18 So then it goes on to talk about, in light of
19 this, the Midland Division management have spent the
20 last several days or weeks formulating a position. And
21 then he lists a number of items. And Joe had some prepared
22 notes that he spoke from in telling Mr. Youngdahl what
23 our position was, and why we reached it. And I guess --
24 I recall he stuck to those notes. I don't know whether
25 this is an accurate rendition of what he said.

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1 Q But it could be?

2 A It could be.

3 Q Okay. You mentioned that your reaction was to
4 ask Temple the question: What are you going to respond
5 when they ask you how do you like dealing with an incompetent
6 utility? The words, "incompetent utility," did Mr. Temple
7 feel that they were incompetent?

8 A Those were Mr. Youngdahl's words to Mr. Temple.

9 Q Oh, those are Mr. Youngdahl's words?

10 A Those were Mr. Youngdahl's words to Mr. Temple.

11 MR. CHARNOFF: Let's go off the record.

12 (Discussion off the record.)

13 MR. OLMSTEAD: Back on the record.

14 BY MR. OLMSTEAD:

15 Q I'll paraphrase what I understood you to tell
16 me, and you tell me whether that's correct:

17 I asked you who said to Joe Temple, "What are
18 you going to say when someone asks you in the hearings, how
19 do you like dealing with an incompetent utility?"

20 And you told me that Mr. Youngdahl had asked
21 that as a hypothetical question to Mr. Temple.

22 A That's correct.

23 MR. CHARNOFF: Thank you.

24 THE WITNESS: Along with some others that I
25 think are in our September 13 notes.

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1 BY MR. OLMSTEAD:

2 Q In your opinion did Mr. Temple have concerns with
3 Consumers management?

4 A In what regard?

5 Q In terms of their economic, financial competence
6 to manage the project.

7 A You want my impression of what Mr. Temple was
8 thinking?

9 Q Right. I want you to just give me an impression
10 of what you felt his attitudes were.

11 MR. POTTER: In those two areas, economic and
12 financial?

13 MR. OLMSTEAD: Well, let's back up.

14 BY MR. OLMSTEAD:

15 Q I assume that Dow's primary concern with the
16 whole Midland project was essentially not a health and
17 safety matter, and not an environmental matter, as far as
18 the nuclear plant went; but, rather, an economic matter:

19 (1) where are you going to get steam at a
20 reasonable price across the river, and

21 (2) was Consumers going to get the facility built
22 at a reasonable price across the river.

23 Is that fairly accurate?

24 A No, that's just one of the concerns There
25 were others.

1 Q Well, what would you say were the primary
2 concerns?

3 A The primary concerns were the reliability of
4 Consumers Power as a supplier.

5 Q In other words, the constant flow of steam
6 across the river?

7 A (Nodding affirmatively.)

8 Q That was the paramount concern?

9 A Well, I don't know. Are you asking my impression
10 or --

11 Q Right.

12 A -- Mr. Temple's, or --

13 Q Your impression of the Dow Midland Division
14 position, to the extent that it's expressed through Mr.
15 Temple.

16 A I think they all had some weight. Again, if
17 I could go back to that September 8 document, that's the
18 best expression I can recall of our concerns at that time.

19 Q Okay. Well, looking at the Youngdahl memo,
20 there are several concerns there which may be all or may
21 not be all of the concerns, and may not be exactly as Mr.
22 Temple expressed them. But number 5 is "Sweeping in a
23 nuclear sentiment."

24 You wouldn't suggest, would you, that that
25 concern was as important as 1 and 2, which is increased

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1 capital costs and lengthy delays, would you?

2 A No, I wouldn't.

3 Q So there were some of those concerns that were
4 more important, one of which was the economic ability of
5 Consumers Power to fulfill their contract obligations?

6 A Yes. And others.

7 Q Okay. With regard to that particular issue,
8 would you have an opinion as to how Mr. Temple felt about
9 it?

10 A Their economic ability?

11 Q Yes.

12 A I think he had some questions as to whether they
13 could continue on with the pace of capital construction if
14 we went into double digit inflation again as we had in
15 1974 or 5, whenever Consumers first had their financial
16 problems.

17 Q Okay. Now, in the last paragraph of the September
18 14 Youngdahl memorandum, there is a discussion of the
19 fact that Mr. Temple had asked Paul Orefice to review the
20 Midland Division position from a corporate standpoint, and
21 there's a sentence in there that says, "This was done at
22 Dow's board meeting on Thursday, September 9." And then
23 a discussion about the Board apparently spent time, and that
24 they suggested the review. Now, is this just an inaccurate
25 reflection of what happened, or was there a mention of the

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1 Dow board having met?

2 A Well, I can answer that, but I want to condition
3 that by saying since I was a counsel in this thing there's
4 been testimony, and the rest of that I can't distinguish
5 out.

6 There's a normal board meeting on the first or
7 second Thursday -- I think it's the first Thursday -- of
8 the month, and my recollection is that Mr. Oreffice
9 discussed something at that meeting. I don't know what it
10 was.

11 Q Now, the date of Board Exhibit 1 is what?
12 September 8, I believe.

13 A Yes.

14 Q And I believe Mr. Oreffice testified that Mr.
15 Temple hand-delivered that letter to him on the evening of
16 September 8.

17 MR. POTTER: I don't recall that there was any
18 time specified. Hand-delivered I recall.

19 MR. CHARNOFF: Yes, the hand delivery I think
20 was right, but I don't recall the statement that it was in
21 the evening.

22 MR. OLMSTEAD: But at any rate, Mr. Oreffice
23 had it in time for a Thursday board meeting on September
24 9, and could have reviewed it with the board at that time?

25 THE WITNESS: I don't know when he got it. The

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1 memorandum is dated September 8, and I don't know if he
2 had it on the --

3 BY MR. OLMSTEAD:

4 Q Okay, but it is possible that he could have
5 reviewed it at the board meeting?

6 A It's possible.

7 Q And it is possible that Mr. Temple could have
8 told Consumers Power that the board had knowledge of his
9 position?

10 A I think there's a telephone call, a memorandum
11 of a telephone call, in which that's stated, between Mr.
12 Temple and Mr. Youngdahl.

13 Q But that would have occurred after this meeting?

14 A It was a telephone conversation on the 14th,
15 I believe.

16 Q But that telephone conversation relates to what
17 the new corporate position is, isn't that correct?

18 A (Pause.)

19 Q We'll, let's back up. I'm concerned about
20 September 9, not September 14, and whether the Dow corporate
21 board was informed of Temple's position, to the best of
22 your knowledge.

23 A I have no personal knowledge.

24 Q No personal knowledge of that. Okay.

25 A If I could, I'd like to go back to that paragraph

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1 where you asked me whether I agreed with everything in
2 there or not. One thing I didn't comment on, and that's
3 the sentence that, "They have concluded that the Midland
4 project is no longer in Dow's best interest." I don't
5 regard that as an accurate statement of what they were told.

6 Q Okay. How would you characterize what they were
7 told?

8 A I would characterize that by both referring to
9 the notes from which Mr. Temple spoke, from our meeting
10 notes, and by this one paragraph in the September 8 letter.

11 But I guess basically what our meeting notes
12 reflect is what they were told, which I don't believe was
13 that.

14 Q Okay.

15 Now, getting back to the board meeting, over
16 on page 2 at the top of the page, it says:

17 "In Temple's opinion there was no reason to
18 change their position."

19 Now, do you recall that at all? Does that really
20 mean that Temple's position at that time was that there
21 would be no reason for the Dow corporate board to change
22 the position, or is that -- what did Mr. Temple indicate
23 in that regard?

24 A My understanding of what he's referring to is
25 when Mr. Temple came back and said, we've caucused, we've

1 listened to what you had to say, and there's no reason why
2 we would change the opinion that we've communicated to you
3 today based on what you've told us. Our opinion, the
4 Michigan Division opinion.

5 Q As a result of the caucus?

6 A The initial part of the meeting.

7 Q Okay.

8 MR. POTTER: Off the record.

9 (Discussion off the record.)

10 MR. OLMSTEAD: Back on the record.

11 All right, let's break for lunch.

12 (Whereupon, at 12:20 p.m., the taking of the
13 deposition was recessed, to be continued at 1:30 p.m., this
14 same day.)
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AFTERNOON SESSION

(1:00 p.m.)

MR. OLMSTEAD: Back on the record.

DIRECT EXAMINATION (Continued)

BY MR. OLMSTEAD:

Q We were discussing the September 13 meeting between Consumers and Dow before lunch, and I note that in the September 14 memorandum from Youngdahl to the files that he indicates that Dow had represented that they were going to review the Midland Division position over the next 30 days.

Was that the time frame that they had anticipated for the review?

A As I recall it was, yes. That Dow had anticipated.

Q Now, subsequently Dow finished that review up in less than a week, as near as I can tell. What precipitated the new . .

A If I recall, was what Mr. Renfrow told us at the 21st meeting as to his needs to have a position by a certain date, because the hearings were going to start I think the 5th, 6th or 7th of October.

Q Okay. Then the Youngdahl memorandum goes on to suggest that Consumers asked several questions, and one of those was whether Dow wanted Consumers to suspend expenditures to Dow's account, I assume is what they mean.

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1 A During the next 30-day period.

2 Q And then it says, "Joe replied that it was
3 entirely up to Consumers."

4 Do you recall that exchange?

5 A I recall an exchange. I don't recall it as
6 being that way.

7 As background, either in something that Mr.
8 Temple told me after talking to Mr. Youngdahl on the phone
9 before this meeting, or during this meeting -- and I'd
10 have to refer to the notes -- but at some point, Mr.
11 Youngdahl said to Joe, or said to us, that the decision
12 to continue construction was a day-to-day kind of a
13 situation, and at some point -- I can't remember where --
14 I had the opinion that the engineering and construction
15 side of Consumers was arguing for continued construction,
16 and they indicated the lawyers were arguing it a different
17 way.

18 But at any rate, it was in the context of --
19 I'd have to look at the 13th meeting notes to recall
20 whether we had discussions about what's the construction
21 schedule, are you guys --

22 Q Do you have the 13th notes?

23 (Document handed to the witness.)

24 I guess we'd better identify those for the
25 record, what he's looking at.

1 MR. POTTER: Mr. Nute, in attempting to answer
2 the pending question, is now referring to a copy of the
3 September 13 meeting notes that were prepared by Dow
4 Chemical Company, and he is now at page 6.

5 MR. CHARNOFF: Could I see that document for a
6 moment?

7 (Document handed to Mr. Charnoff.)

8 MR. POTTER: Do you still remember the pending
9 question?

10 THE WITNESS: Yes. On page 6 there is some
11 preliminary discussion, and then at the middle of the page
12 it refers to conversations by Consumers, which I can read,
13 or . . .

14 BY MR. OLMSTEAD:

15 Q Whatever you feel.

16 A It says:

17 "Consumers said they were not trying to give
18 Dow a level of confidence and are not suggesting
19 there are no problems. Consumers has only said that
20 Consumers plans to continue with the project. The
21 recommendations of Consumers management to their
22 board of directors to continue with the project haven't
23 changed yet. However, this could change if the
24 information changes upon which the decision to
25 continue construction was made. Consumers concluded

1 that it's a scary world."

2 I think perhaps there was a telephone conversa-
3 tion that preceded this 13th meeting that Youngdahl commun-
4 icated that it was a day-to-day decision or something.
5 Maybe I got that from reading the notes, or from some
6 conversation I had with Mr. Temple. But this was along
7 the same lines.

8 Q But did they ask you whether you wanted to
9 suspend -- whether Dow wanted to suspend expenditures to
10 their account?

11 A It wasn't to our account. They said, you know,
12 what shall we do? Should we keep on building? And we
13 said, that's basically your decision.

14 Q Okay. Then it indicates that you were asked,
15 for example, did you intend to break the contract. Was
16 that asked?

17 A That's right, it was.

18 Q And it indicates that you at that point said
19 that there was a valid signed contract.

20 A That's right. It appears in our notes, that
21 conversation.

22 Q Was that your legal opinion?

23 A Our opinion was there was an existing contract
24 that Consumers may have breached. We were treating the
25 contract as in effect until we decided what we were going

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1 to do about it.

2 Q That was your opinion?

3 A That was my opinion.

4 Q And that was also the Dow Division's opinion?

5 A Yes.

6 Q And that was Mr. Hanes' opinion? Had he reviewed
7 the contract at this point?

8 A I don't think he had.

9 Q Was that Mr. Wessel's opinion?

10 A Yes, I think -- you know, we may have felt
11 differently about whether there was a breach or not, and
12 how severe the breach was by Consumers, and in that context.
13 But with what I just stated, I think he would agree with
14 that.

15 Q "We" referring to --

16 A Mr. Wessel and I.

17 Q Which one of you felt more strongly that there
18 was a breach?

19 A Well, I think we felt differently. There were
20 different reasons for believing that there was a breach.
21 And he felt strongly about one theory, and I felt strongly
22 about another theory. Let's put it that way.

23 Q Well, what was your theory?

24 A There were a number of things, but I guess I
25 was more concerned about the misrepresentation aspect of

1 some of the things that had gone on.

2 Q In the prospectuses?

3 A No, in the 1974 contract negotiations.

4 Q Specifically what misrepresentations were going
5 on?

6 A There'd been a lot of discussion or some
7 discussion in the 1974 renegotiation contracts about when
8 Consumers estimated they would have their units on line,
9 and 79 and 80 were the dates that they were talking about.

10 Q Were these negotiations that you earlier told
11 me that you got in on the tailend of?

12 A Yes, only reading this from the notes and from
13 my conversations with people that were involved. I don't
14 have any first-hand knowledge, but it's my impression from
15 talking to the people investigating this thing, that that
16 was of concern because the contract was signed the end
17 of January, first part of February, and I think in March or
18 April we signed a new consent order with the Michigan Air
19 Pollution Control Commission that was based on those dates,
20 and we were going to do certain things by the dates,
21 because we'd just signed that contract with Consumers.

22 Q And you felt that at the time Consumers knew
23 those dates were not good?

24 A Yes.

25 Q At the time they signed the contract?

1 A Yes.

2 Q Do you have any documentation on which to base
3 that belief?

4 A Yes.

5 Q What might that be?

6 A We conducted cross-examination on a rate case,
7 a separate case, where Consumers had put up a Mr. Mosely
8 who had been involved in some of the financial dealings, and
9 who was retired at that time, or about to retire, and we
10 cross-examined him, or the attorney representing Dow
11 cross-examined him, on the basis of when did they start
12 planning for the construction cutback that occurred in the
13 74-75 period. And he testified they started their planning
14 in November of 1973, and I think also in discovery there
15 are some Consumers notes of a meeting of the Consumers
16 Power Company board in January of 1974 where there was an
17 indication, to my mind, that some of that planning was
18 going on prior to signing that contract.

19 Q Okay.

20 Now, what was Mr. Wessel's theory?

21 A I think his theory was on the so-called best-
22 efforts clause.

23 Q Now, in asking to go into renegotiation of the
24 contract subsequent to the 74 amendments, and particularly
25 in meetings in the early part of 1976, as part of the

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1 negotiating posture of Consumers Power, were you using the
2 possibility of litigation as a bargaining position to get
3 concessions from Consumers?

4 A Well, let me go back.

5 We wrote the letter that started negotiations,
6 talking about taking a commercially irreversible step
7 through this litigation. I think our preference was much
8 more towards negotiation.

9 A couple of times in connection with this problem--
10 the statement has to be placed in perspective -- I think
11 perhaps the first was in a conversation with Mr. Graves,
12 where he said, well, you guys have said you're going to
13 sue us. And we said, no, we haven't said that at all, and
14 we referred him back to the letter saying we didn't like
15 your assurances, but, you know, we're going to continue to
16 monitor the situation.

17 And a couple of times that came up, and we said,
18 no, we've never said we're going to sue. We just said we
19 don't think you gave us adequate assurances, and we're
20 going to monitor the situation.

21 And then we went into these negotiations, and
22 one of the things that Consumers wanted was a so-called
23 legal clean bill of health, which my understanding was was
24 to get this statement out of all their prospectuses. They
25 seemed to feel that it was hindering their ability to raise

1 capital. I didn't -- you know, after the first one was out,
2 it didn't seem to. So I don't know if -- they never told
3 me what the problems were. But that was my impression of
4 it.

5 As far as litigation was concerned, that was
6 the only discussion, is they wanted to get that out of
7 their prospectus.

8 Q Did your feelings that Consumers was misrepresent-
9 ing the construction completion dates in the 74 negotiations
10 affect your attitude in these negotiations?

11 A Yes.

12 Q Did that lead to some acrimony between you and
13 Judd Bacon?

14 A I don't think acrimony. I think it just caused
15 me to have a healthy skepticism of any data they gave us,
16 or any information.

17 Q Did Judd Bacon ever comment about that?

18 A About?

19 Q That he thought you were being too skeptical,
20 or --

21 A Not to my knowledge. I think that was just an
22 internal skepticism.

23 Q Okay. Following the Court of Appeals remand
24 in 1976 did you feel that your position as to the breach
25 of contract by Consumers, or did you feel that your position

1 for any other reason in the renegotiations would be
2 stronger, your bargaining position?

3 A We had discussion about that, that they would
4 probably want to have a negotiated contract before they
5 went into the hearing.

6 Q And with whom was this discussion?

7 A It could have been the negotiating team. It
8 was just not an extended discussion. It was in talking
9 about the impact of this thing. Somebody might have said,
10 well, I think they'll be -- you know, more desiring to
11 negotiate with us finally than they have been. We had
12 a lot of frustration in this, of trying to negotiate and
13 not getting anywhere, and it was from the point of view
14 that they now have a reason to negotiate.

15 Q So you felt your position was stronger in terms
16 of those negotiations, should you choose to go forward with
17 those negotiations?

18 A Yes..

19 Q Did you have any discussions about taking the
20 optimum advantage of that new development in negotiations?

21 A Not at that point. I think my position was at
22 that point that, you know, that doesn't make any difference
23 to me. There's so much we don't know about the suspension
24 hearing. And one of the other problems was that the final
25 cost of the plant, we had had a number of discussions

1 at the negotiating meetings about what we called retrofit
2 items. Consumers had told us that there were a number of
3 items that they had before the NRC that the NRC had to rule
4 on, things that had to be built into the plant or didn't
5 have to be built into the plant, and that a change in any
6 one of those, without specifying what it is, could markedly
7 increase the cost of the plant.

8 So -- and they indicated the NRC was about to
9 rule on those fairly soon, in the summer or fall of that
10 year. So even though we had gotten a cost estimate, we
11 didn't know how reliable that was. It was just -- we
12 really were just isolated, and didn't know what was going
13 on.

14 So it didn't make any difference, in my mind.
15 If Consumers wanted to give us everything that we wanted
16 at that point, we would have been very skeptical as to why,
17 maybe they knew something we didn't know about the future
18 of the plant.

19 Q Now, we'll go into transactions between you and
20 Consumers in greater detail, but as you moved along toward
21 the suspension hearings, and things began to clarify
22 themselves, did you then feel that you could use the Dow
23 position to advantage in these or the suspension hearings,
24 to advantage in negotiations between Dow and Consumers,
25 once the corporate review had determined to go ahead with

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1 the project?

2 A I think that you could make that assumption from
3 the way Consumers reacted on the 13th, the way they wanted
4 to negotiate everything and sign everything. We sat down
5 and calculated that we would negotiate and get what we
6 wanted? No, there were still too many things up in the air.
7 There were a lot of emotions. Once we had been through this
8 corporate review, and so forth, a lot of other things had
9 happened.

10 So it was my feeling at that time that as long
11 as the hearings were going on, that we were not going to
12 negotiate anything, for a variety of reasons.

13 Number one, all the documents had to be turned
14 over. People were testifying.

15 So I never sat down and said, hey, this is really
16 great, and now we're going to get what we want in the next
17 two months. Because --

18 Q By the spring of 1977, though, you were
19 negotiating again, is that correct?

20 A Yes. There'd been a meeting in January, and I
21 don't know when the next one was after that.

22 Q And the suspension hearings were still going on?

23 A Well, there was a meeting in January, but it
24 was just a complete breakdown between the two parties. I
25 mean it just was a bad meeting, and I don't recall when the

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1 next one was after that. I think it was sometime after
2 that.

3 Q The breakdown in January, would you attribute
4 that to the row over the Temple testimony in the suspension
5 proceedings which you had just completed?

6 A On our side, I would attribute it to getting one
7 of the things -- one of the things that was discussed was
8 can Dow get out of this at a certain date, either walk away
9 or pay its share, or for whatever reason, but can we choose
10 another alternative. And that's the meeting where Mr.
11 Youngdahl said, well, for \$400 million you can.

12 And that was regarded on our side as just no
13 meaningful offer at all, and things just broke down.

14 Q Okay.

15 MR. REYNOLDS: What was the date of that?

16 MR. OLMSTEAD: That's after January '77.

17 THE WITNESS: I'd have to go to the notes for
18 the exact date.

19 BY MR. OLMSTEAD:

20 Q But then you had further meetings before the
21 hearings concluded in May of '77?

22 A I can't recall, offhand. At some point in this,
23 Mr. Miller replaced me on the negotiating team, so I don't
24 know.

25 Q Okay. Going back to the September 14 memo to

1 files of Youngdahl, there is on the second page at the
2 bottom a notation that says:

3 "September 14, 1976. He reports that he reviewed
4 the Dow position with other officials of Consumers Power,
5 and that Judd Bacon is to draft contractual language to
6 permit third party sales, which I will send to Dow, and Jim
7 Falahee is going to do a legal review."

8 And then it says: "Judd Bacon to contact Nute,
9 and I will contact Temple, to see what additional information
10 we can gain."

11 Did Judd Bacon contact you?

12 A Yes, he did.

13 Q And what information did he ask for?

14 A I have a long memorandum of that telephone
15 conversation. I'd have to refer to that.

16 Number 1, he was talking about the language that
17 he was sending to allow third parties to buy --

18 Q Which Dow had no objection to, as I understand?

19 A Not in the context of negotiating. It was
20 something he gave up to get something else.

21 He asked me again if Dow intended to breach the
22 contract, and I told him we did not. And he asked me
23 exactly what had Temple said at the meeting of the 13th, and
24 I think I read the language to him.

25 It's in my draft of the notes. He talked a lot

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1 about some of the proceedings that were going on. I'd
2 have to refer to the notes.

3 MR. CHARNOFF: Excuse me. Is there a copy of --
4 has there been a copy of that memorandum made available?

5 MR. OLMSTEAD: I have some memorandums. I don't
6 know exactly . . .

7 THE WITNESS: It's been given up in discovery.

8 MR. OLMSTEAD: I'm sure it has.

9 MR. CHARNOFF: What was the date?

10 THE WITNESS: September 17.

11 MR. OLMSTEAD: I have a memorandum of a phone
12 conversation here. Let me see if that's it.

13 Is this it?

14 THE WITNESS: Yes, that's a page from it.

15 MR. OLMSTEAD: Well, the other page is behind it
16 there, I think.

17 THE WITNESS: Oh, okay. Yes, that's it.

18 MR. CHARNOFF: Could I ask you, Mr. Potter, to
19 supply us with a copy of that?

20 MR. POTTER: Sure.

21 Mr. Nute, just to clarify for the record, is it
22 correct that's a 4-page memorandum which is undated?

23 MR. OLMSTEAD: I think that once upon a time
24 there was a date up here.

25 MR. CHARNOFF: Oh, we have that.

1 MR. OLMSTEAD: Was this the date?

2 THE WITNESS: Yes, it was.

3 MR. OLMSTEAD: The date at the top in handwritten
4 notation is 9-17, I believe.

5 MR. CHARNOFF: It says, "Notes of the Conversation
6 between Judd Bacon and Lee Nute," on the first line?

7 THE WITNESS: Yes. It's five pages.

8 MR. CHARNOFF: And it's what date?

9 MR. OLMSTEAD: I believe it's 9-17. Is that
10 your recollection?

11 THE WITNESS: I think that's right.

12 MR. CHARNOFF: I see something here, but I can't
13 read it. Thank you. I do have a copy of that.

14 BY MR. OLMSTEAD:

15 Q As long as we're on this memorandum, you might
16 look at the bottom of page 3, there. At this point there
17 is clearly a discussion between you and Mr. Bacon as to
18 Mr. Temple being a witness.

19 I gather at this time nobody had suggested that
20 Mr. Temple was not the appropriate person to be a witness?

21 A I think this relates to Mr. Youngdahl's comments
22 on the meeting of the 13th, that Joe would have to testify.

23 Q And Mr. Bacon felt that Mr. Temple was going to
24 have to testify?

25 A I don't know where you . . .

1 Q I was asking for your --

2 A No. Mr. Bacon was a little unclear as to Mr.
3 Temple's comments at the meeting.

4 It says, "Mr. Nute explained that Dow was aware
5 that someone would probably be called as a witness,
6 most likely Joe Temple, and if he were that based on
7 the knowledge of the facts that he presently has,
8 this..."

9 and then I read what he said at the meeting as to what I,
10 Joe Temple, would say. So I said that.

11 Then when Mr. Bacon indicated the witness would
12 not be asked, and so on and so forth.

13 Q Okay. And, to follow on where you were reading,
14 he said, "Here are your contracts that are still in effect.
15 Are you going to take two million pounds of steam from the
16 plant?"

17 Later on in the meeting minutes it becomes a
18 matter of some discussion between you and Consumers and
19 Mr. Wessel, as to what's relevant and what's irrelevant.

20 MR. POTTER: Within the framework of this
21 memorandum?

22 MR. OLMSTEAD: Within the framework of what the
23 witness is going to testify to at the hearing. Mr. Bacon,
24 in this memorandum, says that he's more than likely going to
25 testify, here are your contracts, they're still in effect,

1 are you going to take two million pounds of steam. Namely,
2 the legal theory that if there is a valid contract between
3 Dow and Consumers, that's all that the Licensing Board
4 needs to know that's relevant on the issue of need for steam.

5 BY MR. OLMSTEAD:

6 Q Was that a view that you came to share with
7 Mr. Bacon with regard to the issue which was appropriately
8 before the Licensing Board?

9 A At what point?

10 Q Before the November 30 testimony of Joe Temple?

11 A Well, with respect to --

12 Q We'll go through each meeting, meeting by
13 meeting, later. But I'm just asking you in terms of your
14 own legal theory of what was relevant for the Licensing
15 Board. This is the first statement I've found of Consumers'
16 theory, and I'm asking if that was a theory that you
17 subsequently came to agree with?

18 A The theory was that Joe Temple's . . .

19 Q -- personal views were irrelevant, that the
20 central concern for the Licensing Board, the relevant issue,
21 was is there a valid contract to take the steam from
22 Consumers' nuclear plant.

23 A Well, I don't know about the last part of that,
24 as to what the central concern of the Licensing Board was.
25 But it was my opinion after the Division was overruled by

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1 the board that the Dow position was that put forth by the
2 U. S. Area board. And that was what the relevant position
3 was, not -- you talked about Joe Temple's personal --

4 Q So let's take this particular position, then,
5 because over on the top of page 4 you said that you viewed
6 the contract as disadvantageous to the Midland plant
7 because -- the current contract is disadvantageous to the
8 Midland plant because of the uncertainties, and the Air
9 Pollution Control Commission, and those types of things.

10 A No, that's not what I said. It says:

11 "Explaining Mr. Temple's feelings, Mr. Nute
12 felt he viewed..." -- meaning Mr. Temple. I'm
13 explaining again --

14 Q Okay.

15 A -- why Mr. Temple reached the conclusion that he
16 did.

17 Q Okay. Now, had this same conversation with Mr.
18 Bacon taken place after the Dow corporate board met and
19 overrode the Michigan Division, what would your reaction
20 have been to that statement?

21 A Now, which --

22 Q The one on the bottom of page 3.

23 A I think it would have gone more than that. I
24 think that what was relevant was what the U. S. Area board
25 decided and directed us to do, which was more than that as

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1 contained in that statement.

2 Q Subsequent to the September 14 meeting, there
3 was another meeting the next week, September 21. That was
4 the first time that any Dow personnel, to your knowledge,
5 had another meeting with any Consumers personnel relative
6 to this matter?

7 A No, the review team was meeting with Consumers
8 people all during this period. I knew that. I don't know
9 on what days they were meeting, whether it was before this
10 or right after this. But there were a number of meetings
11 going on.

12 Q Okay. What was the next meeting that you
13 attended with Consumers?

14 A That was the 21st.

15 Q Now, you have some notes of that meeting, do
16 you not? Mr. Klomparens took notes at that meeting. Mr.
17 Hanes took notes at that meeting. And you've reviewed those
18 notes in preparation for these depositions?

19 A I've reviewed my notes, obviously.

20 Q Well, but one of the arguments we had yesterday
21 about whether you were going to be in attendance was that
22 you were going to assist Mr. Potter, so I assume you
23 reviewed things which --

24 A I mean I know what's in the notes, yes, but I
25 thought you were talking about just before I came in here.

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1 Q No, I mean in preparation for whatever it is that
2 we're going to be doing here.

3 A Yes.

4 Q In this proceeding.

5 A (Nodding affirmatively.)

6 MR. POTTER: Off the record.

7 (Discussion off the record.)

8 MR. OLMSTEAD: Back on the record.

9 BY MR. OLMSTEAD:

10 Q In Mr. Klomparens' notes, there is a statement
11 to the effect that if Dow takes its position, the NRC
12 will suspend construction of the plant and, as a consequence,
13 Consumers might ultimately lose its construction permit.
14 Those statements are attributed to Consumers representatives?

15 A (Nodding affirmatively.)

16 Q Was it the opinion of you or anyone else, but
17 primarily you, did you at that date have any opinion as to
18 whether that was a truthful statement or not, or if that
19 was a reasonable conclusion or not?

20 (Pause.)

21 In other words, up to this time -- let me back
22 up -- up to this time, you had told me that you were pretty
23 much in the dark as to what this remand proceeding meant,
24 and I guess what I need to know is: Is this the first time
25 you really got any information from Consumers as to the

1 meaning of the remand proceeding and its effect on Dow-
2 Consumers contract?

3 A This is the first time they sat down and
4 explained what the remand hearing was all about, other than
5 what Judd had talked about in the conversation we'd had
6 on the telephone.

7 Q As a result of that meeting, did you have an
8 opinion on whether Consumers might ultimately lose its
9 license, or had your opinion changed?

10 A I guess my opinion going in was more from the
11 cost-benefit analysis, and what's going to be the effect of
12 doing the cost-benefit analysis, given all the costs and
13 given some of the things that we had asked for in the
14 negotiations, whether there would be changes in the contract,
15 that if they'd been given, would it affect the cost-benefit
16 analysis.

17 And I was looking at it primarily from that point
18 of view.

19 Then they came out and said what's reflected
20 in my notes, and it was just looking at it in a different
21 way.

22 Q Okay. Klomparens' notes also indicate that Jim
23 Falahee of Consumers Power, may have said that Dow would
24 have a hell of a legal problem. Was this the first time
25 that you had had any -- in the course of negotiations -- any

1 feedback from Consumers' side of the negotiating table, that
2 they might sue?

3 A Yes.

4 Q This is the first time?

5 A To the best of my recollection.

6 Q But Dow had made such statements earlier than
7 that?

8 A That we might sue them for breach of contract?
9 Yes. I may have misspoke myself. Sue them for breach of
10 contract. There'd been this whole discussion since 1975
11 as to, you know, pursuing other options, or negotiate rather
12 than do something else. And that we viewed the fact that
13 they -- we had some reservations as to whether they had
14 breached the contract or not.

15 I don't think we'd ever said we were going to
16 sue you. I can't recall that.

17 Q Well, I suppose one wouldn't necessarily have to
18 say, "I'm going to sue you," but one could say, "If you
19 don't negotiate in good faith with me, we'll have to have
20 recourse to whatever legal actions are available to us."

21 A I never said that.

22 Q I show you Intervenor's Exhibit Number 7, which
23 is the Keeley memorandum of March 4, 1976, and ask you to
24 look at page 2, item G.

25 A That, again, is referring to that statement they

1 have in their proxy, starting with the conversation with
2 Mr. Graves, and then mention thereafter that you guys are
3 going to sue us, and we kept saying, no, that's not what
4 we said at all.

5 And it's very, very clear that we had never
6 threatened them in that sense.

7 Q Well, if you made it so clear, why did they
8 keep bringing it up?

9 A I don't know. They didn't like it in their
10 prospectus, and however they framed it in their prospectus
11 is how they framed it. Whether they talked about a threat
12 of litigation in that comment in there, I don't know.

13 But that had been brought up on more than one
14 occasion, and we told them no, it's not our present
15 intention to bring the contract into litigation.

16 Q Even though it wasn't your present intention,
17 if they failed to negotiate with you you might have had
18 to have recourse to that?

19 A That was a possibility.

20 Q So that had to be one of the reasons, I think
21 you agreed earlier, that one of the reasons that they might
22 well be negotiating, is that they didn't want to be sued?

23 MR. POTTER: I think that calls for speculation
24 on the part of the witness. I object on that ground.

25 THE WITNESS: I don't know what was in their

1 questions they may have, as was Mr. Burroughs on the
2 technical side. I was on the economics side.

3 So I was in and out of a number of meetings,
4 depending on what they wanted to talk about.

5 Q Were you aware of any feedback from the Dow USA
6 board concerning the Midland Division recommendations before
7 the review was ordered, or during the period of the review,
8 before it made any recommendations?

9 Was there anything coming back down through
10 channels to indicate what the board's position might be?

11 A I don't think there was. I wasn't aware of it.

12 Q Okay. Let's go to the September 21 meeting.

13 What was your impression of Consumers' reaction
14 after that meeting, or during that meeting?

15 MR. POTTER: Reaction to what? There were a
16 number of subjects discussed.

17 MR. OLMSTEAD: I just want a feel for the
18 relationships between Dow and Consumers. Were they getting
19 worse?

20 THE WITNESS: They sure were, after that meeting.

21 BY MR. OLMSTEAD:

22 Q Okay. That's even worse than they were after
23 the September 13 meeting?

24 A Yes.

25 MR. CHARNOFF: After which meeting did they get

1 worse?

2 MR. OLMSTEAD: They got worse after the September
3 13 meeting. That's the meeting where Mr. Temple -- Mr. Wute
4 is nodding yes. Then they got worse after the September
5 21 meeting, which was the second meeting.

6 THE WITNESS: That's correct.

7 BY MR. OLMSTEAD:

8 Q Then we go to the September 24 meeting.

9 Now, these two meetings, was it your recollection
10 that both of these meetings were requested by Consumers
11 Power, the September 21 and the September 24 meetings?

12 A I don't know how the September 21 meeting was
13 set up. I was told -- it may have been Mr. Hanes, but I
14 can't recall -- that they wanted me to attend that one, but
15 I don't know who contacted who to set it up.

16 Q Who requested you to attend?

17 A I can't remember whether it was Mr. Hanes or Mr.
18 Temple indicated Mr. Hanes wanted me to. I was supposed to
19 attend and also be the official note taker.

20 Q Okay.

21 Who set up the September 24 meeting?

22 A There's a telephone conversation between Mr.
23 Temple and Mr. Youngdahl that speaks to that. So I can
24 only repeat what I remember reading from that, from his
25 notes of that telephone call. It was kind of that Consumer's

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1 asked to, and I think Joe said yes, we expected that you'd
2 want to. And so apparently they set the meeting up.

3 Q You were the official note taker at the September
4 21 meeting?

5 A Yes, I was.

6 Q So those notes are the official Dow notes?

7 A That's my impression of what I was supposed to do.

8 Q What about the September 24 meeting?

9 A I seem to recall that somebody said to Jim Hanes,
10 you take the notes in this meeting. I took some too. But
11 I don't know. That was my impression at that time, was that
12 he was supposed to do that. And I took my own.

13 Q Okay.

14 I believe at the September 24 meeting, the
15 observation was made by Mr. Falahee that Consumers was
16 concerned that Dow was only in the contract because they
17 felt they couldn't get out of it, that Consumers chance of
18 keeping the license was less than 50-50. Do you --

19 MR. POTTER: Can I inquire? You're saying the
20 9-24 meeting now?

21 MR. OLMSTEAD: Right.

22 THE WITNESS: I guess I'd have to look at my
23 notes. I think there was some conversation about that, but
24 I'd --

25 MR. POTTER: Are you through with the 9-21

1 meeting?

2 MR. OLMSTEAD: Well, we're on and off at this
3 point.

4 (Witness reviewing document.)

5 BY MR. OLMSTEAD:

6 Q I think in the Hanes notes of that meeting, if
7 that's what you have, --

8 A I have my notes.

9 Q Okay.

10 (Witness reviewing document.)

11 MR. CHARNOFF: What was the question?

12 MR. OLMSTEAD: I was asking about the options
13 that Jim Falahee discussed at the September 24 meeting, one
14 of which was if Dow was only in the contract because they
15 had a contract, and for no other reason, then they only had
16 a 50-50 chance of -- Consumers only had a 50-50 chance of
17 keeping the license.

18 THE WITNESS: I have a notation on page 4 of my
19 notes about a 50-50 chance, feel that they'll get a
20 suspension. But it's unclear from my notes who said that.

21 BY MR. OLMSTEAD:

22 Q Okay. Now, --

23 A Oh, I'm sorry. At the bottom of page 3, "Mr.
24 Falahee is seriously concerned that if Dow is only in the
25 project because of the contract, less than a 50-50 chance

1 of keeping the construction permit."

2 Q Page 3?

3 A Yes, bottom of page 3.

4 Q Okay. As of that date, September 24, the Dow
5 corporate review was not yet complete, right?

6 A That's right.

7 Q And if you had to summarize your opinion as to
8 why Dow was in the contract as of that date, what would it
9 be?

10 A I think, number one, the history of the project.
11 This was quite a big project for Midland, and it had an
12 awful lot of community support and support within the
13 Company.

14 I think that just a strict dependence on Consumers
15 Power being available at a certain time, and sort of just
16 having faith in that, that had gone by the board in this
17 particular instance.

18 I thought in my own mind there were a number
19 of other options in light of Temple's opinion we could
20 pursue that still might result in our buying steam from
21 Consumers Power Company, but in order to do that you might
22 need revisions of the contract, or what else.

23 I mean I still thought it was at that point a
24 viable project, but, you know, there were a number of ways
25 you could go.

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1 MR. REYNOLDS: Excuse me. Are you through?

2 THE WITNESS: Yes.

3 MR. REYNOLDS: Could we get that question back so
4 he can answer it again?

5 MR. OLMSTEAD: Well, I think we're getting there.

6 MR. REYNOLDS: I thought he said he was through.

7 MR. OLMSTEAD: Well, let me summarize what I
8 heard you say:

9 I asked you why Dow was in the contract as of that
10 date, in your opinion, and you suggested to me a reason that
11 they were in the contract which would go beyond just being
12 in because of the contract. And that was the concern about
13 Midland, the community.

14 THE WITNESS: Let me try again.

15 It was my impression that there was a lot of
16 support within the Company for the Midland nuclear project,
17 with its dual purpose of generating electricity and use for
18 steam.

19 My impression of the decision that we had reached
20 in the Michigan Division was that it was no longer the great
21 deal that it initially had been thought, been touted, with
22 the cheap steam and everything else.

23 That meant, to my mind, that it was time to look
24 at other alternatives in conjunction with buying steam some
25 day from the nuclear plant. We had a contract that we were

1 treating in effect. I thought it was time to reassess what
2 we were going to do now so that we would have a reliable
3 source of steam in 1980.

4 BY MR. OLMSTEAD:

5 Q Okay. Let me try my question a different way:

6 If your counsel would provide you with the Hanes
7 notes of September 24 . . .

8 (Document handed to the witness.)

9 And maybe the Midland Intervenors Exhibit Number 9, which
10 is the outline for the 9-24 meeting --

11 MR. POTTER: The Aymond outline?

12 MR. OLMSTEAD: Right.

13 (Document handed to the witness.)

14 BY MR. OLMSTEAD:

15 Q Okay. If you'd look at item 3(a) on the outline--
16 and I think in the Hanes notes there are notes of that
17 outline . . . here (indicating to the witness.)

18 Well, it may be better just to use the Aymond
19 outline, unless you feel that one of those alternatives
20 wasn't presented, in which case use your own notes or Mr.
21 Hanes notes.

22 A No, I think as I remember, they'd all been.

23 Q They'd all been presented?

24 A Yes.

25 Q In your opinion, as of September 24, 1976, which

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1 one of those alternatives best described Dow's position at
2 that time?

3 A You mean the Michigan Division's position, or the
4 position of Dow Chemical?

5 Q Well, the Dow corporate review had not been
6 completed.

7 A That's right.

8 Q So let's take the Michigan Division position.

9 A I think 3(b) would be more, I believe -- as much
10 as they can characterize where we were, I think that's the
11 best.

12 Q 3(b), which reads?

13 A "If Dow takes the position that it still intends
14 to take electricity and steam from Consumers Power in
15 accordance with the contracts, but that an alternate
16 source or sources would be more advantageous to Dow."

17 Q Okay. And continuing?

18 A Well, then it talks about what the chances of
19 suspension would be. And that's their opinion that --

20 Q That it would be 50-50?

21 A Well, that's their speculation.

22 Q Yes, that's what it says on that outline. And
23 that's the position that you think is closest to the Dow --

24 A Well, but --

25 Q And they've --

1 MR. POTTER: Let him finish?

2 THE WITNESS: I want to emphasize that when you
3 start from the comma, "then the chances of suspension and
4 ultimate modification or revocation of the construction
5 permits would be greatly enhanced 50-50" that's their
6 statement. We hadn't arrived at any assessment like that.

7 BY MR. OLMSTEAD:

8 Q No, I believe you testified that the September 21
9 meeting was the first time that you got any indication from
10 Consumers about the implications or reading of the remand,
11 and now on September 24, three days later, you're getting
12 very specific statements from an attorney of Dow Chemical,
13 because some of these notes attribute that statement to Jim
14 Falahee and --

15 MR. POTTER: He's not an attorney for Dow Chemical.

16 MR. OLMSTEAD: Okay. I'm sorry.

17 BY MR. OLMSTEAD:

18 Q -- getting a very specific statement of the
19 legal implications of the Dow position from Consumers Power
20 on September 24.

21 A These were made by Mr. Aymond.

22 Q Okay. As a consequence of those two meetings,
23 did the Dow Midland Division position, as reflected by Joe
24 Temple, change in any way?

25 MR. POTTER: Was that before the board ruled?

1 MR. OLMSTEAD: Before the board ruled.

2 THE WITNESS: We didn't sit down and discuss it.

3 BY MR. OLMSTEAD:

4 Q You had no conversations with him?

5 A After the 24th meeting?

6 Q Yes. Or the 21st meeting. Sometime before the
7 ruling of the Dow corporate board.

8 A I had conversations with him, but do you mean
9 that he and I and Mac Whiting and Jim Burroughs sit down
10 and change our position, no. We didn't go through any kind
11 of formal process.

12 Q Did your opinion change?

13 A No. I recognized what they were saying, which
14 was that we faced -- if we kept that position, and if the
15 license were suspended based on that position, we faced
16 significant litigation.

17 Now, whether they'd be successful or not was
18 another question. But I was facing a \$600 million lawsuit.
19 Yes, that had an impact on me.

20 Q Now, the next meeting of significance, I think --

21 MR. REYNOLDS: Excuse me. Were you going to go
22 back and pick up the question he still hasn't answered, or...

23 MR. OLMSTEAD: Well, I don't want to beat a
24 dead horse. Do you want to ask another question, or . . .

25 MR. REYNOLDS: Well, the unanswered question we

1 had and then we kind of diverted from was why Dow was still
2 in the project on 9-24, and Mr. Nute started to answer and
3 then I think we got diverted into the Michigan Division
4 assessment and the Aymond alternatives. And I don't think
5 we got back to a response to that question that you started
6 to answer, as to why Dow was still in the project on 9-24.

7 BY MR. OLMSTEAD:

8 Q You had finished your answer, hadn't you?

9 A You've kept me thoroughly confused. I'll try
10 again to answer that question if you want me to, but I guess
11 you're confusing me by what Dow thought and what I thought
12 and what the Division thought.

13 Q Well, I'd like to have the answer to all three
14 of those questions, what Dow thought, what you thought and
15 what the Division thought. But I had concluded in my own
16 mind that evidently I wasn't going to get a very clear
17 picture because I had assumed there wasn't one.

18 A Okay. Dow as a corporation:

19 Apparently the last the project had been discussed
20 in detail I assume was when the 1974 amendments were
21 discussed with the board of directors. So as far as direction
22 from the board, that was the final direction.

23 As far as direction from Dow Chemical USA, they
24 were waiting for the corporate review.

25 As far as the Michigan Division decision, we had

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1 a contract that we felt was in effect, we were treating it
2 as in effect, we had obligations under that contract, we
3 felt that there were other things that we now had to think
4 about if our position was correct, and that is, we shouldn't
5 assume that that project is going to be any good for us any
6 more, however you want to phrase it, that we ought to start
7 making some plans. And those plans involve capital expendi-
8 tures, alternate sources of power, capital that may be
9 put into chemical plants or may not be put into chemical
10 plants in the Division.

11 So, to go back, we had a contract, we were
12 treating it as in effect. We had been asked on three
13 occasions that I'm aware of in that period as to whether
14 we were going to breach the contract, and had said no each
15 time.

16 Q And then I asked you, based on the outline
17 provided by Consumers Power, what the best characterization
18 of Dow's position was at that time, and you said --

19 MR. POTTER: No, wait a minute. Dow Michigan.

20 THE WITNESS: Dow Michigan, yes.

21 BY MR. OLMSTEAD:

22 Q Dow Michigan. And if you had had to answer that
23 personally as to yourself, you would have also said 3(b),
24 I would assume?

25 A Yes.

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1 Q The next meeting, I believe, was the September
2 29, 1976 meeting, after the Dow corporate USA board decided
3 to go forward, right?

4 A The next meeting between --

5 Q Consumers Power and --

6 A Yes.

7 Q And this is the meeting where the Durand notes
8 surfaced?

9 A (Nodding affirmatively.)

10 MR. CHARNOFF: What do you mean, "surfaced?"

11 MR. POTTER: That's an unfortunate choice of
12 terms.

13 MR. OLMSTEAD: Well, this is the first set of
14 Durand notes we have, this is the first time Dave Durand
15 was at a meeting.

16 THE WITNESS: The first time he was involved,
17 yes.

18 BY MR. OLMSTEAD:

19 Q I guess the question that I have is why was
20 Dave Durand at that meeting?

21 A Two reasons that I can recall offhand.

22 Number one, Milt and I had had some discussions
23 about just pure workload, where this thing was possibly
24 heading, and the amount of time and involvement, and he
25 suggested that one of the other attorneys wh. was over there

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1 with me should get involved in this.

2 I think about that time the other attorney who
3 was there was Jim Hanson, and he was leaving to take
4 another job, or had left to take another job over here in
5 Corporate, and the second reason was that I was greatly
6 concerned about the threat that had been made by Consumers,
7 as I understood it, to the extent that if Dow testifies and
8 the testimony goes too far, and that going too far --
9 whatever that meant -- resulted in the license being
10 suspended, we faced a huge litigation.

11 And I knew Dave took shorthand notes, that he
12 had started out his career as a male secretary, and taking
13 shorthand notes in labor negotiations, and I wanted him
14 present so that there would be a fairly accurate record of
15 some of the things that were said, because I knew I'd be
16 involved and wouldn't be able to take notes.

17 So there were two reasons in my mind why he
18 was there.

19 Number one, to bring him into it and, number two,
20 because of his note taking ability.

21 Q So you discussed this with Mr. Wessel?

22 A I discussed getting another person involved. I
23 don't recall if I ever discussed with him -- at some point
24 I know I discussed with Milt Dave's shorthand ability.

25 Q Okay. Now, if Dow had decided that negotiations

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1 had totally broken down, they were irretrievable, and that
2 they were stuck, with the contract as amended in 1974 and
3 the Dow corporate board decided that they were getting into
4 a position that was intolerable, and you were forced into
5 litigation on the contract, either under your theory or
6 Milt Wessel's theory, what damages would Dow have accrued
7 in economic terms?

8 A Do you want to run through those hypotheticals
9 again?

10 Q Well, basically it just amounts to the fact that
11 Dow needs the steam, for whatever reason, they've got to
12 have it, it's not there, and Consumers isn't going to make
13 it. The contract is breached. Consumers won't renegotiate.
14 Dow has to sue. Under either your theory or Mr. Wessel's
15 theory, what kind of damages would we be talking about,
16 economic damages?

17 A You're making an assumption there which I don't
18 think is necessarily correct, that there would be economic
19 damages.

20 Q Well, I assume if you would sue them, you would
21 sue them for a specific performance. If you'd conclude that
22 that's not possible, then you'd have to sue them for some
23 other reason.

24 A Well, there are any number of possibilities.
25 You could go for declaratory judgment, to ask whether or

1 not you still had any obligations under the contract, or
2 the contract had been breached and you had no further
3 obligations and you could go out and make alternative plans.

4 Q Was that essentially what you thought you would
5 get if you sued them?

6 A I guess.-- you know, when you frame a lawsuit,
7 you frame it from a variety of purposes. And I guess I at
8 that point hadn't sat down and . . . I think if I were to
9 weigh them, I'd be much more interested in a declaratory
10 judgment than the --

11 Q Okay, let's take the declaratory judgment, and
12 assuming you did get a declaratory judgment in September of
13 1976, that Dow had no further obligations under the
14 contract, what would have been the impact as you understand
15 it on Consumers?

16 A They probably would have lost their construction
17 license, based on the cost-benefit analysis that was then
18 in effect.

19 Q Okay and what impact would that have had on
20 Consumers?

21 A Well, I imagine the impact that Mr. Aymond set
22 out when he mentioned all the things that would happen if
23 they lost their license.

24 Q Which was in the hundreds of millions of dollars?

25 A Yes.

1 Q So would it be fair for me to assume that if
2 Consumers sues you for hundreds of millions of dollars for
3 breach of contract, that that wouldn't have been any greater
4 shock to Dow than it would have been to Consumers? In
5 other words, the amount of money we're talking about, which-
6 ever party was liable, was essentially in the same neighbor-
7 hood?

8 A No, we weren't talking about damages of that --
9 if we were to have sued for damages, we wouldn't be talking
10 about damages of that magnitude. If we were seeking
11 damages from Consumers?

12 Q No, but if Consumers was unable to recover
13 damages from you because of a declaratory judgment, the
14 impact, the financial impact on them would have been in the
15 same ball park in terms of total financial cost, as the
16 impact would have been on you had they sued you and
17 recovered \$400 million.

18 A They stated a whole range of things that could
19 happen. Number one, there were damages, and number two,
20 I think they even implied that bankruptcy would result.

21 Q That bankruptcy would be a result?

22 A Yes. Bankruptcy of Consumers Power.

23 Q So even though \$600 million or \$400 million
24 would have caught Dow's attention, I assume we weren't
25 talking about bankruptcy.

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- 1 A Consumers was talking about their bankruptcy.
- 2 Q But Dow wasn't talking about bankruptcy?
- 3 A Oh, no, we never said anything --
- 4 Q I mean a \$600 million lawsuit would not bankrupt
- 5 Dow Chemical?
- 6 A I don't know. I don't think so.
- 7 Q But I wanted to get that on the record, because
- 8 there's a lot of discussion about who threatened who, and
- 9 whether \$600 million is a threat. But you would agree,
- 10 I assume, that bankruptcy is a threat?
- 11 A Let me see if I can rephrase. \$600 million was
- 12 the number that was thrown out. They also talked about
- 13 being forced into bankruptcy.
- 14 So I assume that if that happened, the number
- 15 might even be bigger. And that's the way I interpreted
- 16 what they were saying.
- 17 Q Okay. But to your knowledge they didn't,
- 18 because of the severe financial consequences they might
- 19 suffer due to Dow's position if it was not favorable to
- 20 Consumers, choose to get a stenographer to take down
- 21 verbatim the notes of the meetings that they had with you?
- 22 A They didn't have one there, no.
- 23 Q And did you tell them that you were having
- 24 somebody take down notes verbatim?
- 25 A I introduced Dave on his coming into the meeting,

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1 that he was going to get involved. At some point, whether
2 it was the first meeting or the second meeting or something,
3 Rex Renfrow commented on the fact that Dave was taking down
4 shorthand and said, "That must be a useful skill," or
5 something. I mean he was aware that Dave was taking notes.

6 Q But he never asked to see any notes, or --

7 A Not to my knowledge.

8 Q You didn't distribute those notes to Consumers
9 after any of those meetings?

10 A No. One set, I believe, was transcribed and
11 typed up, and I don't think the other ones were transcribed
12 and typed up until much later when the hearing was going
13 on, when it became apparent that they might be asked for in
14 discovery, and so on.

15 Q Did Dave Durand, after he made up his minutes,
16 circulate them to you for comment?

17 A Yes, he did. He sent them to me and he sent
18 them to Milt Wessel.

19 Q Did you make any changes or corrections in them?

20 A I can't remember. I know Milt sent him a letter
21 saying that he thought there'd been some omissions and so
22 forth. I can't remember if I corrected them. I don't
23 think I made any comments.

24 Q Are you referring to all of them, or just the
25 first set?

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1 A Just the first set. The other two sets I don't
2 think I read until the hearings were pretty much over,
3 because they were transcribed towards the end, if I recall.

4 MR. CHARNOFF: Towards the end of what?

5 THE WITNESS: Well, just prior to when they
6 were produced in the hearing. My recollection is I told
7 him, you'd better get those notes transcribed, because
8 there's a possibility they might be discovered. And I
9 don't think I ever read them before they were turned in.

10 BY MR. CHARNOFF:

11 Q So he transcribed those notes some weeks after
12 the meetings?

13 A Yes. Not the 29th notes, or the first notes,
14 but the other ones.

15 Q The 29th notes were transcribed almost immediately?

16 A I don't know. I don't recall when they were.
17 But they were sometime after then.

18 Q Do you remember receiving any copy of a letter
19 to Dave Durand from Milt Wessel dated October 5?

20 A Yes, that's the letter I was referring to.

21 MR. OLMSTEAD: Off the record.

22 (Discussion off the record.)

23 MR. OLMSTEAD: Back on the record.

24 Let's have a short recess.

25 (Recess.)

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1 MR. OLMSTEAD: Back on the record.

2 BY MR. OLMSTEAD:

3 Q Do you have a copy of the letter to Dave Durand
4 from Milt Wessel dated October 5 and the attached memorandum
5 to files?

6 MR. POTTER: I think you're going to have to use
7 your copy. I've got it, but I don't know where it's filed.

8 MR. OLMSTEAD: Okay. I kind of need to look at
9 it myself.

10 (Document handed to the witness.)

11 BY MR. OLMSTEAD:

12 Q Up at the top in the first paragraph, Mr. Wessel
13 refers to Dave Durand's 26 pages of minutes and says he
14 fears that there's no way in which they can be modified.
15 The set of minutes that were produced at that meeting are,
16 I believe it was 19 pages long, and I was wondering if you
17 received a copy of that set of minutes that Mr. Wessel
18 refers to there?

19 A Yes, I have a copy in my files.

20 Q What was your response to that set of minutes?

21 A I think Milt called me when he got Dave's notes,
22 and was concerned, if I remember, that they portrayed
23 almost a word-for-word record, as a court reporter would
24 take. And he didn't feel that that had been the case, that
25 things had been missed and people had been in and out of

1 the meeting, and there had been conversations that weren't
2 reflected. And so he was -- as I recall, he was concerned
3 that it purported to be a transcript or a true record, where
4 it really wasn't.

5 I don't know whether I talked to Dave about that
6 or not. I know Milt sent the letter. But I honestly -- I
7 can't recall whether I said anything to Dave or not. I
8 just can't recall.

9 Q So following receipt of that letter Dave Durand
10 wrote this memorandum to files of September 29, 1976, which
11 has been discussed here previously. Do you have that?

12 A Yes.

13 Q Did you make any suggestions to Dave as to how
14 he might record the minutes following receipt of Mr.
15 Wessel's letter?

16 A I honestly don't remember. I could have, but I
17 honestly don't recall whether I talked to him or not. I
18 would assume, since Milt called and sent the letter I said
19 something. But I can't recall.

20 Q Now, the 26-page version, you said you still had
21 a copy in your files of that?

22 A I have a copy of the notes of the 29th. I think
23 it's this set.

24 Q You don't still have a copy of the 26-page version
25 that's referred to in Wessel's letter?

1 A I didn't realize until you mentioned it right
2 now that the letter said 26 and this is 19. I think this
3 is the copy I have. I could check, but . . .you know, I
4 think this is it.

5 Q When Milt called you and was concerned about the
6 verbatim transcript, he was referring to a different
7 document than that?

8 A It would appear so. I don't know. I mean this
9 has 19 and he talks about 26. So I guess it's different.

10 Q But when he called you, did you know what he
11 was referring to when he said it appeared to be a verbatim
12 transcript?

13 A Yes. I guess he was referring to Dave's
14 transcription of his shorthand notes.

15 Q Which would have been, if I were to look at the
16 record of proceedings, I would have said -- or it would
17 have said, "REX:..." or it would have said, "MILT:..." out
18 at the side?

19 A I don't remember. I honestly don't remember.

20 Q Mr. Wessel indicates in that cover letter of
21 October 6 that Dave had failed to catch all the references.
22 What do you think he means by the word "references?"

23 A Where? Where are you in the letter?

24 Q It says: "You had been so recently introduced
25 to the matter, and accordingly couldn't catch all the

1 references."

2 A I guess I can just give you a reaction that Dave
3 was new to the matter and didn't know all the things we
4 were talking about, the corporate review and all these other
5 things that had gone on in these other meetings, and I
6 don't think Dave knew that much about what had preceded
7 this. I don't think I had kept him informed.

8 So from that point of view, you know, to be
9 new to the matter you don't know all that's happened, and
10 all the people.

11 Q Was it your intention at the time that he was
12 selected to come to these meetings and take notes that he
13 have any substantive role in these interactions between
14 Consumers and Dow with regard to the steam contract?

15 A Well, this is kind of an evolving thing. The
16 first meeting we had was over the testimony we had roughed
17 out, or the outline of testimony that we had roughed out,
18 pursuant to a telephone call between Judd and Milt Wessel
19 where Judd outlined what he wanted in the testimony. And
20 I think at that time we still thought the hearing was
21 going on the 5th, 6th and 7th of October.

22 So there wasn't much time, and they were just
23 going to put a witness on the stand without filing the
24 written.

25 Q Without filing the written?

1 A Yes. That was my understanding, when the hearing
2 was going to take place on the 5th, 6th and 7th, that the
3 Dow witness was just going to be put on the stand. There
4 was going to be no filing of written testimony. And I
5 think something Rex said indicated that to me, that the
6 Board didn't want written testimony.

7 Q Okay. But there's discussion in these minutes
8 about the big hearing, implying that there's going to be a
9 littler hearing. Was it anticipated by Dow or Consumers, or
10 anybody involved, that they were going to have witnesses
11 at the little mini-hearing?

12 A That's what Rex, as I recall, said on the 21st,
13 was that he needed our position -- he needed the corporate
14 position very soon, because this hearing, however he
15 described it on the 21st as reflected in my notes, whether
16 it was a mini-hearing or -- anyway, it was going to be --
17 at some point he communicated to me that it was going to be
18 just put the fellow on the stand and have direct examination,
19 the way we do it with any witness.

20 At some point, and whether it was before they
21 came on the 29th -- I think it was thereafter -- that
22 changed. The hearing was delayed to November and then we
23 began to talk about written testimony and began to talk
24 about extended discovery because of the time involved.

25 So when I first had Dave sitting in, it was in

1 the context of coming up on the 29th, they want to discuss
2 the testimony, the hearing is going to be on the 5th, 6th
3 and 7th, in that area somewhere. Then that changed, and he
4 continued to sit in. And then we got into discovery, a
5 little bit of discovery, and his involvement just grew
6 from there because of his familiarity with it. At that
7 time he was the only -- until Mr. Pribila came over in
8 October or November 1976 -- it was just Dave and I among
9 the lawyers.

10 It kind of evolved.

11 Q But when Mr. Pribila came over, you assigned
12 him to this case?

13 A Yes, I did.

14 Q Rather than Dave?

15 A That's right, because Dave left soon thereafter
16 to take another job over here in the labor area.

17 Q Okay.

18 Now, prior to this meeting -- this meeting being
19 the one that Dave Durand was at the first time, and which
20 was the 29th, had there been any suggestion by Consumers
21 Power concerning who the witness was going to be? And
22 I'm particularly referring to this confusion in the record
23 about who asked for an unknowledgeable witness, or first
24 suggested an unknowledgeable witness. Had your discussions
25 with Judd Bacon, Rex Renfrow or Dave Rosso gotten to the

1 point that there was any suggestion prior to this meeting
2 on the 29th that anybody in Consumers, or at least that you
3 interpreted what they were saying, to be a request for
4 someone other than Joe Temple?

5 A If I understand your question, on September 21,
6 yes. Consumers did suggest that.

7 MR..CHARNOFF: That it be someone other than
8 Joe Temple?

9 THE WITNESS: That Dow put up a witness who was
10 not knowledgeable in the Michigan Division decision.

11 BY MR. OLMSTEAD:

12 Q But that was not one of the legal staff members?

13 A No, it was Rex Renfrow.

14 Q At the 21st meeting?

15 A Yes.

16 Q That was Rex Renfrow?

17 A Yes, sir.

18 Q And he did suggest that they use an unknowledge-
19 able witness, or that they consider someone other than
20 Joe Temple?

21 A That they put up a witness who was not knowledge-
22 able in the Michigan Division decision.

23 Q How could Dow possibly have put up such a
24 witness?

25 A The implication was that you select somebody from

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1 the corporate area, rather than somebody who works in the
2 Division --that's the way I interpreted it -- who would be
3 the Dow witness.

4 Q But he would have been knowledgeable about the
5 Midland Division position, because it was publicized.

6 A No. No, it hadn't been. The corporate review
7 team was aware of the decision, and they reviewed it. But
8 it wasn't public knowledge within the Company.

9 Q Okay. So going back to these meeting minutes,
10 and having Dave Durand there, is it fair to say that his
11 basic role in maintaining this transcript arose out of
12 your concern relating to the suggestion that you might put
13 up somebody who didn't know anything about the Midland
14 Division position?

15 A No, that's not correct.

16 Q It came solely under the contract negotiation
17 experience?

18 A It came solely because of the threat that if
19 we went too far, or, as Mr. Aymond said in his meeting,
20 if we volunteered something that resulted in the license
21 being suspended, they were going to bring a massive
22 litigation against us. And I wanted to make extremely sure
23 that there was a written record that whatever was decided
24 to be in the testimony was something that Consumers agreed
25 to.

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1 Q Okay. Was there any discussion prior to this
2 meeting of September 29, now that you really evidently had
3 a position with Consumers at arms length, so to speak, that
4 Dow might be better off if Consumers lost its construction
5 permit?

6 A At this point?

7 Q Yes.

8 A No.

9 Q I mean it hadn't occurred to anybody that in
10 terms of this massive lawsuit that they were threatening
11 that if Dow ended up in the proceeding and did what they
12 could do as they saw it under the contract, and Consumers
13 lost their construction permit, that they might be better
14 off?

15 A I -- the size of the litigation that was
16 threatened, including the possible bankruptcy of Consumers
17 Power . . . I don't know how you could reach the judgment
18 that we'd be better off facing a lawsuit of that magnitude.

19 Q Well, assuming that you were at no fault
20 whatsoever and they lost their construction permit, at
21 least financially the Dow corporate structure wouldn't
22 have been affected, is that correct?

23 A I don't understand what you mean by assuming
24 we were at no fault.

25 Q Well, let's assume that for some extraneous reason

1 to the Dow-Consumers steam contract that in re-reviewing the
2 Midland application, the Nuclear Regulatory Commission should
3 determine to suspend the construction permit, terminate it,
4 Dow would have had no liability under the contract, as I
5 understand it.

6 A That's not correct. We would have quite a bit
7 of liability.

8 Q For the cost?

9 A For the so-called non-recoverables, yes. And
10 that was \$200 million or \$400 million -- some number that
11 was fairly substantial.

12 Q Okay.

13 Was the legal staff asked to determine whether
14 Dow could take a position? By the legal staff, I mean those
15 of you involved with the exception of Mr. Hanes. If Mr.
16 Hanes asked for it, or anyone else?

17 Maybe I should put it: Were you asked, or do
18 you know whether one of your employees or Mr. Wessel was
19 asked to determine whether Dow could take a position adverse
20 to Consumers in NRC proceedings?

21 A Now, I want to be sure I understand what you mean
22 By "take a position adverse to Consumers Power."

23 Q Well, Dow, it seems to me, was afraid that it
24 was caught in a conflicting position of, (a) having a
25 contract obligation to support the Consumers advocacy, but

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1 (b) having a Midland Division recommendation which seemed
2 to be at odds with that. And the paramount consideration
3 from Mr. Hanes, as I got it, in his deposition, was that
4 we had to be truthful in any legal proceedings.

5 So that might have necessitated, it seems
6 logically to me, a position that was, in spite of the fact
7 that knowingly in breach of the contract, assuming it might
8 have been adverse to Consumers.

9 And my question is:

10 Whether the legal staff was asked to analyze
11 that position and its ramifications to Dow?

12 A We looked at it differently.

13 Number 1, what does the particular section that
14 was referred to under the contract that Consumers referred
15 to in the September 21 meeting, what do we view the
16 obligations under that clause to imply; and then,

17 Number 2, are there any other obligations, legal
18 obligations that we have?

19 To phrase it a different way, do they have a
20 cause of action against us if we take position -- let's
21 say 3(b) or whatever it was that I talked about -- if we
22 take that position, and the construction license is suspended
23 because of that, does Consumers Power have a cause of
24 action against us that gets by a summary judgment or the
25 red-face test, or whatever you want to call it.

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1 Q So, did somebody ask you to undertake a review
2 like that?

3 A I don't know if somebody asked me to, but I did.

4 Q You did undertake a --

5 A I did.

6 Q And what did you conclude?

7 A I concluded that the particular clause in the
8 contract that they referred to didn't imply the kind of
9 cooperation that they had indicated at the meeting.

10 Q And specifically what did you understand that
11 they wanted you to do?

12 A That clause implied some sort of duty to support
13 them with testimony, that our testimony had to be supportive
14 of them at a hearing in what they were trying to achieve.
15 And that's not the way I read that clause.

16 Q Okay. Can we get more specific? What did they
17 want you to do that you didn't feel you had to do under
18 that clause?

19 A My impression of what they said in the 21st
20 meeting was that that clause required our active support
21 in terms of --

22 Q Participating as a party?

23 A No, more than that. Being positive in the
24 outlook of the project, kind of position 3(a) or (b) --
25 whatever it had in Mr. Aymond's notes. I'd like to refer

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1 to them if I could.

2 (Document handed to the witness.)

3 Well, 3(a) or 3(a)(1). 3(a)(1) is slightly
4 different. I got the impression that's what -- to them that
5 clause implied that we had to take that kind of a position,
6 and my legal conclusion was that was not what that clause
7 stated.

8 Q Okay. Under your interpretation of that clause,
9 which of those positions could you have taken? You could
10 have taken 3(a) or 3(a)(1), right?

11 A Yes.

12 Q But could you have taken 3(b)?

13 A I think so.

14 Q Which was the accurate position?

15 A That's what I viewed as the Michigan Division
16 position, right.

17 Q Did you discuss this conclusion with other Dow
18 employees, or with Milt Wessel?

19 A I left you hanging. There's a second part of
20 that.

21 Q Oh, okay.

22 A The other part was, did they have a cause of
23 action? Were we facing a litigation that we'd have to
24 be involved with, facing more than a summary judgment?
25 Did we face the possibility of a protracted litigation with

1 Consumers Power based on some other theory of law?

2 And I concluded that was a definite possibility.

3 Q Okay. Did you check these conclusions, have
4 another lawyer review it independently, or request Mr.
5 Wessel's views, or --

6 A Yes, I did.

7 Q Who?

8 MR. POTTER: If the answer to that question
9 involves outside counsel other than Mr. Wessel, I would
10 advise the witness that that is protected by the attorney-
11 client privilege.

12 MR. REYNOLDS: Not identifying him.

13 MR. POTTER: We've been through all this once
14 before.

15 MR. REYNOLDS: Just identifying the individuals?

16 MR. POTTER: Your co-counsel and I have been
17 through this. I'm claiming that privilege.

18 MR. REYNOLDS: I'm asking you, is that --

19 THE WITNESS: I decline to answer on the advice
20 of counsel.

21 BY MR. OLMSTEAD:

22 Q Okay. Our ground rules yesterday when this came
23 up, subject to briefing this question, which we're going
24 to have to do, is that you can answer as to counsel employed
25 in house by Dow, Dow USA, or whatever else, and Mr. Wessel,

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1 but not as to some outside law firm which may have been
2 retained by Dow. Although I'll clarify that my position is
3 not that, that I feel the law will allow further inquiry
4 into the nature of privilege, just for the record.

5 MR. ZAMARIN: Yesterday I think it was indicated
6 that if it should come to pass that you're satisfied that
7 that is the law, that you would provide the name of that
8 counsel to us.

9 MR. OLMSTEAD: I didn't go into all the questions
10 that I feel I'm entitled to ask, because --

11 MR. CHARNOFF: I think what Bill Potter's
12 statement was that he would look it up, and he would let
13 us know if he was wrong, and that he would provide any
14 specific--

15 MR. OLMSTEAD: Okay, but as to Milt Wessel and
16 the people in the Company structure of the legal type,
17 were they asked to comment?

18 THE WITNESS: I think Milt commented.

19 BY MR. OLMSTEAD:

20 Q And what was his conclusion?

21 A He agreed with me on the conclusion that the
22 clause of the contract did not require the kind of support
23 that Consumers had indicated to us in the 21st meeting that
24 they expected. He agreed with my position on that.

25 Q I gathered from Mr. Hanes' testimony that he

1 also accepted that conclusion.

2 A Which, that the clause didn't require --

3 Q Right. That you had some liabilities that might
4 accrue, but that generally the approach you were taking
5 vis-a-vis Consumers was correct under the contract as you
6 saw it.

7 A I don't understand.

8 Q I guess my question is: Mr. Hanes had no
9 objections to the position, to the conclusion that you'd
10 arrived at and that Mr. Wessel had arrived at?

11 A On that particular paragraph in the contract?

12 Q Yes.

13 A On that particular paragraph, that point, no, I
14 think he agreed with us.

15 Q Okay. Now, did you or did anyone that you're
16 aware of have occasion to discuss this with Mr. Renfrow,
17 Mr. Rosso, Mr. Miller or Judd Bacon?

18 A Discuss which, now?

19 Q Your obligations under that support clause. And
20 I'm particularly interested in things that don't appear
21 in these minutes necessarily, the formal meetings, but did
22 you have other conversations related to it?

23 A I think that could have come up in one of the
24 meetings we had starting the 29th on. I'm not sure, because
25 I was in and out of those meetings, and, you know, we were

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1 talking in the hall, and everything else. I have a vague
2 recollection that Milt may have said something to them
3 about it, but I just can't remember. It may have come up,
4 but I'm not sure.

5 Q Did you set forth any objectives or theories or
6 any other kind of an outline position which you felt that
7 you had to maintain in order to preserve Dow's options, and
8 still fulfill the contract to support the support clause
9 of the contract? It seems to me that you're kind of in a
10 very tenuous position here, because of the uncertainty you
11 have with regard to the support clause and at the same
12 time you have the Midland Division position that you're
13 aware of, and the corporate review reversed that, and
14 feel this obligation to put Temple on the stand as a witness,
15 all of which is very understandable.

16 But did you have a legal strategy or a theory
17 or a set of objectives that you felt that you must adhere
18 to in the course of discussions with Consumers on how the
19 case was going to be prepared?

20 A You keep referring to the clause in the contract.
21 The point I'm trying to make is that I viewed that clause
22 as requiring nothing more than making available technical
23 information, drawings, or whatever else Consumers needed,
24 and I think it was then anticipated in the construction
25 hearing. Whatever they thought it meant, that was my

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1 opinion. So I didn't view what we were doing as we prepared
2 the testimony to be affected by that, or that threat to be
3 affected by that. There may have been some other legal
4 theories that may have had an impact.

5 I viewed myself as being bound by the direction
6 of the --

7 Q Other legal theories by whom?

8 A You asked me if I'd done a legal analysis, and
9 I said yes. I looked at that section of the contract and --

10 Q Okay. So that other legal theories of your
11 own?

12 A Yes.

13 Q Okay.

14 A Anyway, I viewed our direction as having come
15 from the decision of the U. S. Area board, which was the
16 decision they reached.

17 Q But this support clause of the contract, then,
18 had nothing to do with the position that Dow was taking
19 versus the question of whether to be a party, as opposed
20 to providing witnesses to Consumers?

21 A I think on that support clause we have to provide
22 witnesses, if I remember right, we have to cooperate from
23 that point of view.

24 As far as what had been expressed by Consumers,
25 I don't think the support clause required that. By "expressed

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1 by consumers," I meant on the 21st.

2 Q Okay. I'll come back to that later. I want to
3 move through the meetings that you had with Consumers'
4 counsel.

5 What I have had trouble understanding in this
6 case is why Dow was so dead set against being a party, as
7 opposed to a conduit through which witnesses passed to
8 Consumers. And let me be very candid about where I'm
9 coming from. Because you were having a lot of trouble with
10 how the testimony was going to be presented in that case
11 in your negotiations with Consumers, wouldn't it have been
12 simpler just to go ahead and say, everybody wants us to be
13 a party. We'll be a party. Here's our witness. And let
14 Consumers cross-examine the witness.

15 Or was the support clause affecting your judgment
16 in this regard?

17 A Not the support clause as much as perhaps other
18 legal considerations.

19 Q Other legal considerations?

20 A Other theories. They told me that if our
21 testimony goes too far and that results in the termination
22 of the construction license -- whatever they meant by that--
23 they're going to sue us, and their company may go bankrupt.

24 Okay. Now, maybe they referred to that section
25 in the contract, and maybe there's other contractual law or

1 something on the books. And that's what I set out to
2 determine. And then I made a judgment based on that and
3 said, yes, there's a theory under which they could proceed
4 if that happened. They may win or they may lose. But when
5 you're faced with litigation of that magnitude, you have
6 to report back, yes, there is a possibility that such a
7 suit can be entertained, and if the consequences are as Mr.
8 Aymond set out, bankruptcy and all the rest, they'll have
9 no choice but to pursue litigation, no matter how tenuous
10 the theory.

11 So it was a very, very definite threat, and
12 foremost in my mind during all these proceedings up to a
13 certain point. I wanted to make sure that there was nothing
14 there that they could hang a lawsuit on. And it was very
15 much on my mind. I was greatly concerned about it.

16 Q Okay. Now, weren't you also concerned about --
17 let's move to the hearings when they started, the 29th and
18 the 30th, when Mr. Cherry showed up and cross-examination
19 started of Temple, and the Board frequently ordered Dow
20 in as a party.

21 You had a lot of responsibilities to ensure that
22 what came out before the Nuclear Regulatory Commission
23 Licensing Board was a full and complete picture. How did
24 that affect your feelings about your original judgment?
25 Was the lawsuit still foremost in your mind, or did you start

1 to have other problems?

2 A No, it was there, but we were no longer in the
3 position of volunteering something or to be said at a later
4 date to have volunteered something. We were ordered by
5 the Board to participate, and ordered by the Board to
6 produce documents. To my mind, that's a different question
7 than volunteering something, and then somebody gets into
8 your mental state as to whether you did it on purpose to
9 try and sabotage the contract.

10 Q So from your standpoint, until the Board order
11 directing you to be a party, you did not have the same
12 level of responsibility for ensuring that whatever came out
13 in the record before the Nuclear Regulatory Commission
14 was accurate, as you had after that date?

15 A I don't think that's accurate.

16 Q Well, please, I don't want to put words in your
17 mouth. Tell me how you viewed your relationship to the
18 Licensing Board in this posture?

19 A I don't think it was so much my view towards
20 the Licensing Board. I'm sure I knew what my obligations
21 were. It was more from the point of view of representing
22 the Company, and making sure that the testimony that came
23 out was accurate, that there were accurate answers to -- as
24 it turned out to be -- questions.

25 On the one hand you're trying to make sure that

1 you're not in the position of having volunteered something,
2 and Consumers says we don't want that in there, and you
3 say it should be in there, and then later they sue you; yet
4 on the other hand, you want your witnesses' testimony to
5 be accurate.

6 And that was kind of the channel I was in.

7 Q You felt yourself in a conflict, then?

8 A Yes. Well, after the 27th or 22nd, I sure did,
9 of October.

10 Q Okay.

11 MR. CHARNOFF: After the 22nd of October?

12 THE WITNESS: Well, after I received the October
13 22nd draft of Temple's testimony by Consumers, which I
14 think we got on October 27. I may be wrong on the dates.

15 BY MR. OLMSTEAD:

16 Q Okay. Now, if you had been a party on September
17 1, 1976, what would you have viewed your obligations to have
18 been vis-a-vis the Midland Division position? Let's make
19 that September 15. If you had been a party, considered
20 yourself a party, separate and independent from Consumers
21 and anybody else in the proceeding, to an NRC licensing
22 proceeding on September 15, 1976, what would you have viewed
23 your obligation to have been concerning the litigation then
24 pending before the Licensing Board?

25 A That requires an awful lot of speculation. All

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1 right. If we got a discovery request, would we have
2 responded to it? Yes. A discovery request we got from
3 Mr. Cherry, we would have responded to it directly, rather
4 than asking Consumers Power. I mean that's one example.

5 You're asking me to speculate what we would have
6 done on the 15th, before the corporate board decision?

7 Q Well, I was going to march through the time,
8 but what day would you prefer? Say October 1, let's take
9 that. After all these meetings. You had the corporate
10 board decision, you have the Midland Division position,
11 you have an order from the Court of Appeals saying to the
12 Licensing Board, look into changed circumstances with
13 regard to Dow Chemical Company.

14 What would you have felt you had to do as a
15 party that you didn't feel you had to do if you weren't
16 a party?

17 A Well, that requires a lot of speculation. One
18 thing, there were briefs asked for by the Board, I recall,
19 sometime during that period. Now, how this was going to
20 be handled -- we'd never been asked for briefs. We'd been
21 treated not as a party. So it's hard to speculate what we
22 would have done.

23 And this is pure speculation. We would have
24 either asked for guidance from the Board what kind of
25 information they wanted, or we would have done what we did

1 with Mr. Oraffice and just placed him on the stand, make
2 him available for questioning by the Staff, or the
3 intervenors, whoever wanted to.

4 Q Okay. Let's move down to November 29, the first
5 day of the hearings. Had you considered yourself a party
6 on that day, would the Temple testimony as presented to
7 that Board on that day, the direct Temple testimony, have
8 been different in your opinion?

9 A I don't know how I can sit here now and answer
10 that then. His testimony, in my opinion, was accurate and
11 honest answers to the questions that were posed. Now, as
12 to whether we would have posed different questions, or
13 in a different form, I can't answer that.

14 We were responding to what Consumers Power
15 stated as questions, and that was what we were doing. You
16 know, I can't make that switch to what I would have done.

17 Q Well, okay. Well, I guess what I'm driving at
18 is what do you perceive your obligation -- let's start at
19 the beginning:

20 What do you perceive your obligations before
21 that Licensing Board to be now?

22 A I think, as Mr. Wessel stated on the record, that
23 we don't view it as a situation where we've been ordered
24 to be a party. We have stated that we don't feel it's
25 necessary for us to file briefs or take positions on certain

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1 issues. But if there's information within our control that
2 would be of help to the Board, or something like that, we'll
3 come forward.

4 I think that's what we've done. I'm paraphrasing
5 whatever it was he said on the record.

6 Q Okay. Let's refer to the Durand notes of the
7 September 29 meeting, page 3, the last paragraph.

8 MR. CHARNOFF: Which date are you on?

9 MR. OLMSTEAD: September 29.

10 BY MR. OLMSTEAD:

11 Q There's a comment there that "Milt stated that
12 at this point..." I guess as of September 29, 1976 "...Dow
13 is not prepared to give anyone information on what went
14 on during any proceedings."

15 What do you understand that to refer to?

16 A Where are you referring to?

17 Q On the September 29 Durand notes, page 3.

18 A Where on the page?

19 Q The last paragraph, first sentence.

20 A I think he's referring to Consumers' request in
21 the 29th meeting. Rex started to push more and more as to
22 what the internal decision-making process of Dow had been
23 during a lot of different things. This is what I recall.

24 Given the highly adversarial nature of where we
25 found ourselves, and thinking that they may be preparing for

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1 major litigation, part of this may have been legitimate
2 inquiry, part of it may have been a fishing expedition,
3 okay?

4 Q You mean part of Rex's questions?

5 A Yes, a fishing expedition.

6 Q For --

7 A For possible litigation against Dow in the
8 future.

9 Q Okay. Because that was what was foremost in
10 your mind?

11 A That's right. And I guess I interpreted that
12 that they're asking to see some documents, and we're kind of
13 saying, well, why do you want to see them? You know, just
14 the normal things that go on between lawyers in that kind
15 of a situation, kind of sparring back and forth.

16 Q Okay.

17 Now, back up on the third paragraph there it
18 says:

19 "Rex observed to Lee that he and Lee had talked
20 on this." I assume that's you?

21 A Yes.

22 Q And he said that the only problem he had with
23 Temple was that of the original position he had on this,
24 and he didn't want a witness to get up there and tell other
25 than the truth. You told me just a few minutes ago that

1 it was Rex Renfrow who said at the September 21 meeting
2 that maybe they ought to have a witness other than Temple,
3 and you said one who didn't know about the Midland Division.

4 A I didn't say that. That was my impression of
5 what --

6 Q -- of what he was saying.

7 A Yes.

8 Q Now, I've read this and re-read this set of
9 notes here, because it's about the only complete set of
10 notes where there's discussion close to that September 21
11 meeting of what Rex is saying.

12 Was it your understanding that his position on
13 the 29th was the same as it had been on the 21st, or was
14 this a change in position?

15 A My recollection is after the 21st meeting was
16 when that was suggested, and then as my notes reflect Mr.
17 Hanes said something. But I don't think that was ever
18 suggested again. I don't recall it ever being -- that kind
19 of suggestion being made again.

20 MR. CHARNOFF: "That kind of suggestion" being?

21 THE WITNESS: That Consumers suggest to Dow that
22 they put up a witness who wasn't knowledgeable of the
23 Michigan Division decision. The discussion kind of ended
24 and -- you know, I can read this, but I don't recall . . .

25 BY MR. OLMSTEAD:

1 Q Well, he says that you and he have talked on
2 this. I assume that was on this same issue.

3 A Where are you?

4 Q Page 3. It's the third paragraph. And I assume
5 what we're referring to here is the use of Temple as a
6 witness for Consumers Power, is that correct?

7 A No. I'm not sure what he's talking about, whether
8 he's referring to the paragraph before, or he's talking
9 about the -- I don't know. I don't recall any conversation
10 with Rex. I may have had some telephone conversations.
11 No, I didn't, prior to the 29th. The only time I talked
12 to him was on the 21st.

13 MR. POTTER: Off the record.

14 (Discussion off the record.)

15 MR. POTTER: The record should show that at this
16 point Mr. Nute is referring to his own notes of the 9-29-76
17 meeting.

18 THE WITNESS: My notes, on the first page, talk
19 about (b) Consumers strategy, 3, under Consumers concerns
20 is says, J.Temple's personal feelings on the matter, problem
21 of the witness.

22 So there was some discussion there, on that
23 subject, though I assume Consumers being concerned about...
24 yes, "Consumers being concerned about Joe Temple's personal
25 feelings."

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1 BY MR. OLMSTEAD:

2 Q And in your opinion, having been trial counsel
3 before in other cases, is that something that you would be
4 concerned with about witnesses that were going to be put
5 on in a case that you were trying?

6 A I hesitate in answering, because I'm not sure
7 what at that point they meant by Temple's personal feelings,
8 whether they meant the decision that Joe had arrived and
9 the reasons therefor, or his own personal feelings about
10 what had gone on in negotiations with Consumers Power.

11 I draw a distinction between those two.

12 Q When was the first time that you saw Rex Renfrow
13 in regard to any of this?

14 A September 21.

15 Q So your first impression was at that meeting?

16 A Yes.

17 Q And Dave Rosso?

18 A Not until a later meeting.

19 Q This meeting?

20 A No. This was the 29th meeting. I think it was
21 October the first.

22 Q Okay. In terms of the attorneys from Isham,
23 Lincoln & Beale, your first contact with any of them was
24 Rex Renfrow on September 21?

25 A That's correct.

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1 Q So you didn't have any reason to believe,
2 necessarily, that they had much sensitivity to the Dow-
3 Consumers steam contract negotiations, as opposed to the
4 ongoing NRC licensing proceedings?

5 A I don't know what they thought. I guess I would
6 have assumed that when they brought him into the 21st
7 meeting and we talked about negotiations, that he probably
8 knew something about it.

9 Q Did you have a personal reaction to Rex Renfrow?

10 A What do you mean?

11 Q I mean you liked him, didn't like him, that you
12 were going to have difficulty with him, that you weren't,
13 anything like that?

14 A No, not based on that meeting. And later on --
15 Rex is a personable guy, you know. All during the hearings
16 we talked and chatted. And I never sensed any problem at
17 all. We used to kid around.

18 Q Okay.

19 So It is reasonable to assume that maybe he was
20 not as appreciative of the difficulty between Dow and
21 Consumers as you were at this point in time?

22 A I don't know.

23 Q You don't know?

24 A I have no idea what was in his mind, or what he
25 would have known.

1 Q Do you know whether or not he knew whether Dow
2 had other people who had as much familiarity with the
3 Dow-Consumers contract as Mr. Temple did?

4 A I don't know whether he knew or not.

5 Q Did he seem to you to have much knowledge of the
6 internal organization of Dow Chemical?

7 A I don't recall any specific occasion. A lot of
8 people have trouble with the internal organization of Dow
9 Chemical Company.

10 Q I must admit that I do.

11 A Well, I had no feeling, one way or the other.
12 Let me put it that way.

13 Q You don't remember having to explain to him --

14 A I think probably -- you know, what the Dow U.S.
15 Area board was, what the corporate review was -- that kind
16 of discussion. There may have been some of that.

17 Q Okay.

18 In the middle of the next paragraph it says --
19 this is page 3 of the Durand notes --

20 "Milt did point out, however, that Joe, is one
21 member of a board on these decisions, and stated that
22 if Company policy is different from Joe's view, we
23 will give Dow's position on this."

24 And then he further states:

25 "Joe Temple will agree with Company policy."

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1 Was this generally a view that both you and Milt
2 shared?

3 A Yes. My impression was that Joe had come to a
4 decision, and the U. S. Area Board had arrived at a different
5 one, and in effect overruled him. And he had to live with
6 the decision of the Company.

7 Q And then following that it says:

8 "Rex stated that he would be satisfied with
9 Joe's position if he in fact does just that."

10 Did you have a feeling at that point that the
11 problem with who was going to be the witness and what he
12 was going to say was over?

13 A I guess I thought that problem was over when
14 Milt had his conversation with Judd Bacon on the 27th, after
15 the U. S. Area Board had reached this conclusion and they
16 talked about who was going to be the witness. And based on
17 that, it was my impression it was most likely going to be
18 Joe Temple.

19 And then I can't really recall whether there was
20 that much discussion, or any discussion, with anybody else
21 on the 29th. But about that same time Mr. Cherry came in
22 with his letter as to who he wanted to talk to at the
23 hearing, and it was Joe Temple.

24 So it was kind of an academic discussion after
25 that.

1 Q So as of the conclusion of the meeting on
2 September 29, did you have reason to believe that you were
3 going to have any more trouble with the Temple testimony as
4 an issue between you and Consumers Power, leading up to
5 the suspension hearings?

6 A What do you mean by the Temple testimony as an
7 issue?

8 Q What I'm trying to get a feel for is that you
9 told me just a few minutes ago that you had some problems,
10 I think, in November when you saw that draft of testimony
11 that Rex sent over to you.

12 A October.

13 Q October. But I'm trying to determine whether
14 that was a continuing thing, or whether you viewed at this
15 time that any problems associated with the questions of
16 the witness and what the witness would or would not know
17 or say, or wouldn't say, was essentially over, and that
18 was a separate problem, or whether you viewed that as a
19 continuation of acrimony, if you will, between Consumers
20 and Dow as to how the testimony should be presented?

21 A No. What happened when we received Consumers'
22 first draft of testimony in October was another event that
23 I would liken to the 21st meeting. It had an impact on us,
24 and it was unconnected with the discussions that were going
25 on here.

1 Q You would liken it to it, but you wouldn't
2 envision it as a continuous transaction, it was a separate
3 incident?

4 A Yes, in the sense that Consumers kept probing
5 for documents and wanting to know our position and the
6 reasons therefor, and we gave them the first draft of
7 testimony on the 29th. They looked at it very shortly, and
8 came out and said it was unacceptable and had a handwritten
9 outline, that had obviously been prepared at some point,
10 and said this is what we want the testimony to follow.

11 Then if you go to the second page of my notes,
12 it follows that outline that Rex gave us. He's discussing
13 what he wants on each one of those.

14 MR. POTTER: At this point the witness is
15 referring to his own notes of 9-29-76, is that correct,
16 page 2?

17 THE WITNESS: Yes, page 2.

18 BY MR. OLMSTEAD:

19 Q I hand you Exhibit BB of Midland Intervenors
20 Exhibit 60 and ask you if that's the outline?

21 A I think it is. My copy has some handwritten
22 notes on it. That's why I . . . subject to checking what
23 I have in my notes, that looks like it.

24 Q Well, you have your notes there --

25 A I have the original they gave to us, and this

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1 is a short form. So it looks like it, but I would like
2 to look at it against the original. But that looks like
3 what he was talking about.

4 Q All right. Throughout the negotiations and
5 discussions did the outline that Rex was suggesting for
6 Temple's testimony in terms of the topics that he wanted
7 covered there change in any way?

8 A The first version of the outline of testimony to
9 be drafted was in response to a telephone conversation
10 between Milt and Judd Bacon, as set out in a memorandum he
11 wrote, and that was the basis for that.

12 Then they looked at that. It was unsatisfactory
13 for some reason, and presented this outline. We talked
14 about that outline and then later I prepared another draft
15 based on that outline.

16 MR. POTTER: Referring to --

17 THE WITNESS: Referring to the outline by Rex
18 Renfrow on the 29th.

19 BY MR. OLMSTEAD:

20 Q Okay. Now, if I can summarize the flavor of
21 these meetings, as to the position that you and Milt are
22 taking, I get the impression that you continue to be
23 concerned about what you termed a few minutes ago as a
24 fishing expedition?

25 A (Nodding affirmatively.)

1 Q And that concern in some ways even continued
2 after Rex Renfrow signed an agreement not to provide this
3 information to Judd Bacon, is that correct?

4 A I'm trying to think when that was signed. I
5 think by that point we were -- I think it was in the early
6 meetings that we were wondering why he was asking the kinds
7 of questions he was.

8 For example, --

9 MR. CHARNOFF: "He" being Rex?

10 THE WITNESS: Yes. One of the things he wanted
11 to do, we had sent copies of notes to Consumers Power, of
12 our meeting notes, and he said, I want to see your meeting
13 notes of that meeting. And we said, well, we've already
14 sent those to Consumers. And he said, well, I want to see
15 yours. And we said, well, why do you want to see ours,
16 you've already got them. He said, oh, I just want to check
17 their accuracy, or something.

18 And Milt made a comment about that, reflecting
19 the adversary nature of what was going on. It was that
20 kind of thing. Why are you asking for these notes? Why
21 are you probing us?

22 BY MR. OLMSTEAD:

23 Q But in terms of someone's meeting notes of what
24 went on at the negotiations, since both parties were there
25 why was there concern about whether they wanted them or not?

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1 A They already had them. We'd already sent copies
2 to Consumers. And he wanted our copies. We said, what
3 do you want our copies for? You know, just trying to make
4 him define where he was going and why. Some of these notes
5 were from 1975. Who do you want to get into our files and
6 look at that? What's that relevant to? That kind of
7 questioning.

8 Q In other words, of your own personal knowledge
9 he already had a copy of the same thing he was requesting
10 except that now he wanted to see the copy you had in your
11 files?

12 A That's right.

13 Q And I suppose the suspicion you had was that he
14 wanted to see handwritten notes on the copy that was in
15 your files?

16 A Yes, among other things.

17 Q Okay.

18 On page 6 of the Durand notes of September 29,
19 last paragraph, page 6 --

20 MR. CHARNOFF: Excuse me. You referred to a
21 copy of Rex's outline that you had received on the 29th
22 on which you had made some notes?

23 THE WITNESS: No. I have the original copy, and
24 I think there's some blue pencil marks or notations in the
25 corner, and it's on yellow legal size. And this is a

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1 shortened version. That's why I had some trouble. As I
2 looked in the corner I didn't see the note on it. It's
3 just a -- you know, a line or something.

4 MR. CHARNOFF: Okay.

5 What page are you going to?

6 MR. OLMSTEAD: I'm going to page 6 of the meeting
7 notes of September 29.

8 MR. CHARNOFF: Of Durand?

9 MR. OLMSTEAD: Yes.

10 BY MR. OLMSTEAD:

11 Q Down at the bottom of the page, the last para-
12 graph, and turning over to the next page, Milt refers to
13 this outline of questions in his phone conversation. I
14 guess that's the one you identified just a little bit
15 earlier?

16 A Yes.

17 Q And at this point Rex has given you an outline
18 which is evidently this Exhibit BB that we were just looking
19 at. And Milt's response is that if Dow is requested to go
20 further they could run into problems.

21 Then he says, Consumers should give Dow what
22 they need further, and Dow would see what they could do
23 about supplying the information.

24 Now, I gather, in view of the answers you just
25 gave me, that Milt's concern wasn't that Consumers was going

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1 to get more information out of Temple than Dow wanted Temple
2 to give, but their concern was that Consumers was going to
3 get something that would reveal their internal discussion
4 positions, for lack of a better word, on the contract
5 negotiations.

A You mean Dow's internal things?

7 Q Right.

8 A "es, it was the negotiations. I think Milt would
9 have liked to have seen those negotiations continue on at
10 that point, or have proceeded. I think there was discussion
11 at one point between he and Rex at one of those meetings,
12 a brief discussion, that Milt was concerned about revealing
13 the negotiating positions, last-chance, fall-back positions,
14 and these kinds of things.

15 And there was another concern that we had, and
16 that is if Consumers' attorneys continued to press about
17 Joe Temple's subjective reasons for why he reached the
18 conclusion that he did, that telling those to Consumers
19 would have quite an impact on any further relations with
20 the company.

21 Q Recognizing that your approach to this was
22 affected by that consideration, but asking you to, neverthe-
23 less, attempt to look at it from the Isham, Lincoln & Beale
24 trial counsel position, given the fact that they had a
25 Joe Temple whose public positions were well known and

1 were anticipating that they might well get into that in the
2 licensing proceeding, did you consider it unreasonable that
3 they might want that information in, and in fact need that
4 information?

5 A Well, my position was they could press on and
6 get that, as long as they knew what they were getting. And
7 they asked for it, and we didn't volunteer it so that they
8 could later come back against us saying, we volunteered stuff
9 or whatever. They dragged it out of us, and once they had
10 it, they had it.

11 Q In other words, your reluctance to provide them
12 that was not only impacted -- I mean affected by the impact
13 it might have on the ongoing negotiations, but it was also
14 part of your strategy to protect your position by giving
15 them the information they wanted, but only after they had
16 requested it, so that if it did fall through and there was
17 a suit on the contract, you would be able to argue that
18 they were the ones that asked for it?

19 A To make it very clear that they wanted the
20 information, that they got what they asked for, yes. All
21 those reasons were at work.

22 Q Okay. Let's move on to the third paragraph on
23 page 9. Here again we're discussing caution by Milt
24 concerning this matter. He states that he doesn't know how
25 much of the information Rex wanted was privileged information,

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1 and Rex then concludes, down at the bottom of that para-
2 graph the he didn't want this problem concerning the
3 negotiations to come out and interfere with what goes on
4 in the hearings.

5 Now, what did you understand that to mean?

6 A I don't . . .

7 Q You don't recall that?

8 A Well, let me look at my own notes here.

9 I guess I can't square my notes with that. I
10 don't recall that being said, and I don't see any indication
11 in my notes.

12 Q Okay. Look back up at the previous paragraph,
13 the last sentence, where it says that Judd stated he felt
14 the parties were better off in the long run if the informa-
15 tion is revealed now.

16 A Where are you again?

17 Q The next paragraph back up from the one I just
18 pointed you to.

19 A Would you point it out to me?

20 Q The second paragraph, page 9, the last sentence.

21 "Judd stated..."

22 A I don't see anything in my notes on that. I
23 was in and out of that meeting, so I very well could not
24 have heard some of this.

25 Q How much of that meeting were you at?

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1 A Well, at one of those meetings -- and I think
2 it was this one -- Larry Brenner called. He may have called
3 more than once. I think it was this meeting. And he
4 talked to Rex for awhile, then he called me out on the
5 phone for awhile. Then I think in this meeting we talked
6 with Joe, and before we went in -- before the whole group
7 talked to Joe, I think I went in and talked with Joe
8 generally about what was going on and why they wanted to
9 talk to him.

10 So those two instances I don't think I was in
11 the room.

12 Q Did the phone call from Larry Brenner have
13 anything to do with the meeting that was going on?

14 A My recollection is -- whether it's this meeting
15 or another meeting -- that he had been trying to get hold
16 of Rex, and Rex had left a message that he was up in my
17 office, and he reached him there.

18 Q Did you discuss with Brenner any of this subject
19 then?

20 A This subject matter?

21 Q Yes, under the September 29 meeting, the question
22 of the witness and who it was going to be?

23 A No.

24 Q Returning to the second paragraph there, the last
25 sentence, where it says: "Judd stated that he felt the

1 parties were better off in the long run if the information
2 is revealed."

3 Now, if, in fact, that was said, and since
4 Durand at that meeting is attempting a verbatim transcript,
5 I'd assume that was said, didn't that present a problem
6 for you because you wanted him to drag this information out
7 of you, and at the same time you didn't want them getting
8 access to internal correspondence, or what Milt cautions
9 is the privileged information types of things? Didn't
10 those two considerations kind of run afoul of one another,
11 considering your review of your contract liability, because,
12 (1) you had to cooperate if they asked you for the informa-
13 tion and you had to produce it, and here is the trial
14 counsel for the case saying it's better for us, let's get
15 it all up out front, and we'll deal with it in the hearing;
16 and, at the same time, you see damage coming to your ongoing
17 negotiations on the contract on one hand versus your theory
18 of the case which is we don't volunteer anything, but if
19 we're asked we have to produce.

20 Did you feel yourself getting in a pinch?

21 A Okay. Number 1, I don't recall this, but let
22 me see if I can -- Rex stated that he wanted all of it,
23 everything that Joe has ever said or thought about the
24 matter, okay?

25 As far as what he said publicly, or the memorandums

1 that he had written, you know, I guess I wouldn't have any
2 problem with that being discovered, if that's what they're
3 talking about.

4 If he's talking about internal legal memoranda
5 or our position on the contract negotiations and everything,
6 I guess we would take a position -- and we subsequently
7 did -- that that's privileged, attorney-client privilege.
8 And we weren't going to produce it unless we were ordered
9 to do so by the Board.

10 Q And you didn't feel that was in direct conflict
11 with your theory that if they asked for it, you had to
12 product it in order to minimize your liability under the
13 support clause of the contract?

14 A I never viewed the support clause under the
15 contract as having us to come up with privileged documents.

16 Q I understand that, but you previously told me
17 that it did obligate you to cooperate when they asked you
18 to supply witnesses and information.

19 A Technical information, that's right. But I
20 didn't view it as going to our privileged information, and
21 particularly after we'd been threatened with a lawsuit.

22 Q Now, at the time these notes were being compiled,
23 and you were meeting in this meeting, was it your view
24 that these meetings were privileged?

25 A I don't think I thought about that at that point

1 as to whether the meetings were privileged.

2 I guess I hadn't even thought about it at that
3 point. I may have thought about it later, but I didn't
4 think about it at that point.

5 Q And at the time you were having these minutes
6 compiled or notes compiled, it didn't occur to you that
7 they might be subject to a discovery request or might
8 otherwise become public?

9 A Yes, it occurred to me that they'd very much
10 become public if we ever got into litigation with Consumers
11 Power. That's the reason Dave was there.

12 Q And so you had him compile these notes with the
13 idea that they might in fact become public, and you were
14 expecting to use them in such an eventuality?

15 A Everything that I did from August on I assumed
16 to be subject to discovery, in either litigation with
17 Consumers Power or with the remanded hearing. So I
18 assumed it was all subject to a request.

19 Now, whether it had to be produced or not, is
20 another question.

21 Q Now, in hindsight, having lived through this
22 whole thing, do you think that Rex Renfrow was making that
23 assumption at this time?

24 A I have no way of knowing that. I can only
25 respond that when somebody is sitting there taking a lot of

1 notes about what I'm saying, I assume it's, you know, it's
2 for a purpose.

3 Q But he never said, did he, I'd really appreciate
4 it if we had a little more informal meeting here, or do
5 we really need exhaustive notes of these discussions, or...

6 A I don't recall.

7 Q Anything of that type?

8 A No.

9 Q Had you been in a meeting with counsel and
10 somebody was sitting there taking notes like that, do you
11 think you would have made a remark of that nature?

12 A No. I think I'd just be careful of what I
13 was saying, and just say everything that I wouldn't care
14 whether it came out or not.

15 All during these negotiating meetings we'd had
16 with Consumers, Consumers had been taking notes of their
17 own. And that's the way we approached it.

18 Q Okay. On page 10, here Milt cautions that the
19 parties may get into the position where Dow immediately
20 files suit against Consumers.

21 A Where are you referring to?

22 Q On the fifth line down, where the sentence
23 starts -- well, the sentence starts on the third line --
24 and while we're at that, I'd like you to also look at page
25 15, because the subject comes up again. And also look at

1 page 3 of the November 1, 1976 Durand notes, the last
2 paragraph.

3 A I'd like to ask, on page 15, where you're looking.
4 Oh, okay, I see. Towards the top?

5 Q Right, the biggest paragraph. There are two
6 lines and then a paragraph.

7 A Okay.

8 Q Then on the November 1, 1976 Durand notes, on
9 page 1, the last paragraph --

10 A Which?

11 Q November 1. I'm sorry. That's page 3, the
12 last paragraph, from the November 1, fourth line down.

13 A Okay.

14 Q And the November 15 notes of Durand, the last
15 paragraph on the first page.

16 A All right.

17 Q All those references that I have recited to you
18 are references to recordings of conversations at meetings
19 between Dow and Consumers, at which you were present,
20 during which Milt Wessel suggests that Dow may sue Consumers.

21 Can you point me to places in those same notes,
22 throughout this period, where Consumers threatens to sue
23 Dow?

24 A Without sitting down and reading all the notes,
25 no, I don't recall where Consumers brought that up again.

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1 And if there's a mention in my notes, I'd have to go through
2 the notes page by page, and I haven't done that.

3 Q Well, I'm having a lot of difficulty here with
4 this suit, threatened suit allegation which Mr. Orefice
5 said was so important to him, and Mr. Durand said got his
6 attention, and you said was dictating a lot of how you
7 conducted this litigation, in contrast to what Consumers
8 apparent reaction was based on your notes, because it seems
9 to me that when a legal counsel of the Dow Chemical Company
10 makes that many allusions to suit for breach of contract,
11 that it would have some effect on how they were reacting
12 to your suggestions. And yet I don't see that coming out,
13 at least from Rex Renfrow and Dave Rosso. Their concern
14 seems to be primarily toward the NRC proceedings and
15 what's going to come out.

16 Do you feel, in looking at all that, that maybe
17 Dow was overly sensitive to that vis-a-vis Consumers Power?

18 A No. No, I don't. To my mind there's a great
19 difference between what's going on in these meetings where
20 one of the things -- if we were pressed at this point --
21 was, Dow, have you ever considered a legal action against
22 Consumers? And the answer is yes. And in discussing that
23 and making them aware of it, and then whatever else reason
24 Milt had had, between that kind of discussion among
25 attorneys and the general counsel of Consumers Power saying

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1 across the table to the general counsel of the Dow Chemical
2 Company that we're going to sue you, and the chairman of
3 the board of Consumers Power Company coming up with all his
4 entourage and saying across the table to the president of
5 Dow Chemical Company we're going to sue you, there's a big
6 difference in my mind.

7 Q Well, you testified earlier that you didn't
8 understand where Consumers got the idea that Dow was going
9 to sue them.

10 A No, I didn't testify -- I don't think I did.

11 Q You said, when I referred you back to the early
12 spring of 1976 and came on up through September of 1976
13 that you kept telling them, no, we're not going to sue you.

14 A That's right. No, they didn't say that. They
15 said you have threatened a lawsuit against us, and I said,
16 no, we haven't done that.

17 Q And you don't consider these references that I
18 cited to you --

19 A Later on, yes.

20 Q -- to be threatened lawsuit?

21 A I do, but you said up through September.

22 Q Okay. But you don't believe that if we'd had
23 as detailed a notes of meetings that you'd had, that I'd
24 find the same kind of allusions prior to September of '76?

25 A You might have had Consumers saying it, but I

1 can remember on at least two occasions saying, no, that's
2 not our position.

3 Q Had the legal department or Mr. Wessel, to your
4 knowledge, prepared any papers for filing suit as a
5 contingency, or legal briefs setting forth cause of action
6 as you saw it, or anything like that?

7 A At what point in time?

8 Q During this period of November 15, 1976 . . .

9 A There was a rough draft prepared.

10 Q About what time was that?

11 A It preceded, I would say, September -- August
12 of 1976. I may be wrong.

13 Q Preceded September of 1976?

14 A Yes.

15 Q Preceded August?

16 A I believe so.

17 Q Was it before or after the remand decision?

18 A Before the remand decision.

19 Q So Dow definitely had gone to the point where
20 they were strongly considering, at least within the legal
21 department, the necessity of forcing some action on behalf
22 of Consumers in the negotiations?

23 A No, based on that draft complaint I wouldn't say
24 that at all. It was just a two or three page sketch of
25 what we'd have to do if we had to do something.

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1 Q Well, who wrote that?

2 A Mr. Wessel.

3 Q In the middle paragraph, page 10 --

4 MR. CHARNOFF: Has that rough draft complaint
5 been made available to the parties in this proceeding?

6 MR. OLMSTEAD: I doubt it.

7 THE WITNESS: (Shaking head negatively.)

8 MR. CHARNOFF: Can you make it available?

9 MR. POTTER: We'll have to talk about that.

10 MR. CHARNOFF: When would you like to talk about
11 it?

12 MR. POTTER: I'm going to talk to Mr. Nute
13 about it.

14 MR. CHARNOFF: Would you let us know tomorrow?

15 MR. POTTER: Not if Mr. Nute is leaving at
16 5:00 o'clock, and you're deposing him until 5:00 o'clock.
17 I'm not going to do that kind of talking. We'll sit down
18 and take a look at it, and discuss it. If he wants to make
19 a decision, we'll do it in a timely manner, and let you
20 know. You'll either get it or you won't.

21 MR. CHARNOFF: Well, it might be helpful to have
22 it before we have the deposition of Mr. Wessel.

23 MR. POTTER: I can assure you you won't get it
24 that early. I'm not going to make a decision of that
25 magnitude that early.

1 MR. CHARNOFF: All right, would you judge the
2 magnitude?

3 While we're on this question, did you get a
4 response to your request for the documents, those five or
5 six documents that --

6 MR. OLMSTEAD: No. If I understand, you're --

7 MR. POTTER: Lee has produced them. He's got
8 them. We haven't had a chance to look at them. We've
9 located them. We've gone that far. We haven't had a
10 chance to look at them.

11 MR. OLMSTEAD: Okay. Do you want all this on
12 the record?

13 MR. POTTER: I don't care.

14 MR. CHARNOFF: It's okay.

15 BY MR. OLMSTEAD:

16 Q Getting back to the middle paragraph on page 10,
17 there's a reference to Rex -- right in the middle -- saying
18 he would like to get into the Michigan Dow USA reviews and
19 why those decisions were reached.

20 And then it describes what he would like.

21 Then, as I go through the rest of the notes --
22 and feel free to refer to your own meeting notes -- I don't
23 see any recording of a discussion of those positions.

24 Was there a discussion of that?

25 A There was not only a discussion, but later on

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1 he looked at the conclusions of the review committee.

2 Q During that meeting?

3 A No, I think it was at a later time.

4 Q But there's no further discussion of that at
5 this meeting, or document exchange, or the like?

6 A Okay. I'd like to go back to something here.
7 I found this in my notes, page 2 of my notes, talking about
8 the action taken after the review by the Division.

9 "Consumers assumed that the decision was to
10 refer to Dow Chemical USA for review."

11 Consumers was saying we assume that you referred
12 the decision -- the Division decision -- to Dow Chemical
13 USA for review. What were the alternatives in the review?
14 They were asking Milt.

15 MR. CHARNOFF: These are your notes of which
16 meeting?

17 THE WITNESS: The September 29 meeting. Second
18 page, Roman numeral II.C.3. And this was following the
19 outline that Rex gave me.

20 And they wanted to know what the alternatives
21 were in the review, and Milt said, did that include filing
22 suit? Which I judged to mean a reference to what Mr. Hanes
23 had to look at, including the footnote there, which was
24 look at the decision to negotiate instead of filing suit.
25 And Consumers said, no.

1 So my notes reflect that the discussion of a
2 lawsuit came up in that context. That's all I wanted to
3 point out there.

4 BY MR. OLMSTEAD:

5 Q Milt said that one of Dow's alternatives might
6 include filing suit?

7 A Yes, that was one of the alternatives looked at
8 in the corporate review by Mr. Hanes, and was indicated on
9 the September 15 memo, Jim Hanes' task, and a footnote
10 that said, "including the decision to negotiate instead
11 of filing suit." And they're saying, what alternatives
12 did you look at? And Milt said, we included filing suit.
13 And Consumers said no.

14 And the context that's in is, do you want that
15 in the testimony we're preparing? Is that the kind of
16 thing you want in there? And they said no.

17 Q On page 11, first full paragraph there, of the
18 Durand notes of September 29 --

19 MR. CHARNOFF: Are you back to the 29th?

20 MR. OLMSTEAD: We never left the 29th.

21 BY MR. OLMSTEAD:

22 Q -- Milt pointed out that Joe has a great reluc-
23 tance to say anything. To what was he referring?

24 A Could I look at that, please?

25 MR. OLMSTEAD: The witness is referring to

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1 Exhibit BB of Midland Intervenors Exhibit 60.

2 THE WITNESS: I'm looking at the wrong thing.
3 I'm reading the whole thing. It starts out with, "Rex
4 pointed at item 4 in Joe's draft." I don't know what he's
5 referring to. I guess . . .

6 BY MR. OLMSTEAD:

7 Q This has a lot of the drafts in it, if you'd
8 like.

9 (Document handed to the witness.)

10 A No, it doesn't have the drafts in it.

11 Q Oh, maybe that's the red book. Yes.

12 (Document handed to the witness.)

13 (Witness reviewing document.)

14 A I guess I don't know what he's referring to.
15 It says, "Rex pointing to item number 4 in Joe's draft."
16 But I don't know. . . Oh, here it is. Okay.

17 Q Could you identify that document first?

18 A I'm looking at the 9-29-76 draft outline of
19 testimony of Joseph T. Temple, Jr., which is Exhibit AA.

20 Q Of Midland Intervenors Exhibit 60. Okay.

21 (Witness reviewing document.)

22 A Okay. The item that Rex was pointing to deals
23 with negotiations between Consumers and Dow Chemical
24 Company, and it's referring to what Dow wants t of the
25 negotiations, and apparently what Joe Temple perceives

1 Consumers wants. And Rex is saying, according to Durand's
2 notes, he wants Joe to be more specific in that area. And
3 that's the context of the conversation. And I read that as
4 saying --

5 Q Well, the first sentence is that Rex wanted Joe
6 Temple to give him an outline that he wants -- that is, that
7 Joe wants -- to say.

8 A Where are you now?

9 Q On page 11.

10 A Okay.

11 Q Then it says, "Milt pointed out that Joe has
12 a great reluctance to say anything."

13 A Okay, that's referring to this previous
14 discussion about the negotiating positions of the parties,
15 what are Dow's minimum demands, and so forth, that are set
16 forth in number 4 of the draft outline of Joe Temple's
17 testimony of November 29 -- I mean September 29.

18 So I think you have to read the whole thing.
19 They're talking about -- Rex is talking about this particular
20 thing, and he wants more detail on here. And I regard
21 Milt's reaction is that Joe is going to be very reluctant
22 on going into what he wants out of the contract, what
23 his minimum demands are, fallback position, and so forth.

24 Q Okay. Now, when I read through this, I got
25 a sense that Rex was a little frustrated with the objections

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1 that he was getting on his outline, and that he was kind
2 of saying, okay, tell me what you want to say.

3 Now, of course, I recognize reading this from
4 the cold text it's impossible to get that feel, but is it
5 possible that that was what he was doing?

6 A I don't recall, and I can't speculate.

7 MR. OLMSTEAD: Do we need a break?

8 (Recess.)

9 MR. OLMSTEAD: Back on the record.

10 BY MR. OLMSTEAD:

11 Q Okay. If you will refer to Exhibit CC of
12 Midland Intervenors Exhibit 60, and if you want a reference
13 to the Durand notes it's at about page 15, and I'm not
14 sure where it would be in your notes --

15 A Page 3. IV.A. on page 3 of my notes.

16 Q -- Milt Wessel prepared a statement for Temple
17 to read, is that correct? Or did he feel that it should be
18 filed, this written direct testimony?

19 A No. He prepared this statement. Let me read
20 my notes?

21 MR. CHARNOFF: This statement is the CC?

22 THE WITNESS: Exhibit CC of -- whatever it is...
23 yes, this is the 29th meeting. My recollection isn't clear
24 on this, but I would gather from this that this is something
25 that Milt prepared for Joe to read.

1 Now, I don't know at this point whether -- I
2 think by now we must -- I don't know, I'm a little confused
3 as to whether at this point we know we're going to go to
4 written testimony instead of oral testimony, or not. I
5 guess I'm unclear.

6 If I knew at what point we realized --

7 BY MR. OLMSTEAD:

8 Q Look at the next page of the Durand notes, on
9 page 16, down at the end of that big, long paragraph.
10 There are some dates in there.

11 A Okay. Yes. Then . . . if I recall correctly,
12 this was prepared for Joe to read from the stand when they
13 put him on the stand, with no written testimony filed
14 beforehand. This was when the hearing was going to be on
15 the 5th, 6th and 7th, or sometime around there.

16 Q My understanding is that Rex objected to this,
17 reading a statement like that.

18 A That's right. My notes say:

19 "Consumers' response is that they don't want
20 him to speak such a piece starting off. Perhaps
21 reserve it until later."

22 Then I guess in a few minutes they decided they
23 didn't want him to read it at all. That's from my notes
24 of the 29th.

25 Q The Durand notes reflect that Rex seemed to feel

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1 that it would come out, but that the way for it to come out
2 was through Consumers objecting to its coming out.

3 A Where are you?

4 Q This big paragraph on page 16.

5 (Witness reviewing document.)

6 A Okay. I've read the statement on page 16 of
7 Dave Durand's notes.

8 Q Now, as I get the flavor of this meeting, Rex
9 seemed to feel that the information that had been put in
10 this draft statement that Milt Wessel had presented was
11 going to come out at the hearing. Is that the impression
12 you had?

13 A In discussing this particular thing?

14 Q Right.

15 A I can't recall. I can read what's in Dave's
16 notes, and I can read what's in mine, and . . .

17 Q Well, did Milt show you that statement before
18 you had this meeting?

19 A Before the 29th, or before we met with Mr.
20 Temple, which is . . .

21 Q Before you met with -- well, let's take it one
22 step at a time. Before you met with Mr. Temple on the
23 29th?

24 A Yes. I had seen it before that.

25 Q Had you seen it before you started meeting with

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1 Consumers Power on the 29th?

2 A I probably had, yes. I know I saw it before we
3 talked to Joe, and I assume I saw it before the meeting.

4 Q Did you and Milt discuss it?

5 A He may have shown it to before the meeting and
6 said something like, you know, I'm going to give this to
7 Rex, or something. I just don't really recall.

8 I know I saw it before the meeting, and I'm
9 not sure at what point on that day he showed it to me or
10 how much we discussed it.

11 Q Do you know why he felt it necessary to prepare
12 that?

13 A (Pause.)

14 Q Or did you ask that something similar be
15 prepared, or did you feel something like this had to be
16 prepared?

17 A No, that was Milt's idea, and I . . . I think
18 it's --

19 Q What concern of either you or Milt --

20 MR. POTTER: Excuse me. I think he's just
21 about to answer.

22 MR. OLMSTEAD: I'm sorry. I was trying to help
23 him by asking the question differently.

24 THE WITNESS: This is similar in nature to that
25 number 4 that I referred to in the first outline of Joe

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1 Temple's testimony. There's much of the same language in
2 there.

3 I don't know whether Rex is having another run
4 at Joe -- you know, we put that in the outline of testimony,
5 they looked at that outline and it wasn't acceptable, and
6 perhaps this is just Milt trying again to make this kind
7 of statement about the negotiations.

8 BY MR. OLMSTEAD:

9 Q Did you and Milt have trouble with the outline
10 that Rex presented?

11 A The October . . .

12 Q The handwritten outline that we were looking at
13 awhile ago, that's in the book there.

14 A I don't think so. I think we wanted it
15 explained, what he wanted specifically for us to put down.
16 In that context. You know, what did he mean by this, and
17 what did he mean by that. And there was discussion on
18 that. But I don't think . . .

19 Q Okay. In terms of the outline that he had, if
20 you were to place that statement that Milt provided into
21 that outline, where would it go?

22 A I don't think it was intended for that. It
23 was intended for --

24 Q Oh, I thought that was what you said.

25 A No. This language is very similar to the language

1 in the first outline that we gave to Consumers on 9-29,
2 based on the telephone conversation between Bacon and
3 Wessel.

4 If you look at number 4 of that outline that
5 you asked me some questions about earlier, that same
6 language is in there.

7 Q Okay.

8 So this wasn't an attempt to meet the objections
9 at this meeting that Rex had to that testimony?

10 A He never told us what his objections were. He
11 and Mr. Bacon arrived, I gave them a copy of it, they went
12 into our library, they were there half an hour maybe, I
13 don't know. They came out, they said, you know, that's
14 not the version we want. This is the version we want of
15 the outline.

16 And we never discussed -- I can't recall there
17 was ever much discussion about the first outline we
18 prepared.

19 Q How were relations at that meeting? Were those
20 typical, or were they more strained than normal, in terms
21 of --

22 A Well, I mean we were kind of on notice with a
23 threatened litigation. But I thought it was a good working
24 meeting. I'd been in a lot more acrimonious meetings.

25 Q Now, down at the bottom of page 16, after

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1 discussion of this bit of material that Mr. Wessel prepared,
2 the statement appears that Joe wanted to know why one
3 couldn't just write it down, if one's words are what one
4 is.

5 Had he read that document that Mr. Wessel had
6 prepared?

7 A I can't recall. Milt may have read it in his
8 presence. I think he read it. I don't know if he read
9 it in Joe's presence or -- I know at one point he read it.
10 I don't know whether Joe was present or not. I remember
11 him reading it.

12 Q Well, as best as you can remember, what was
13 Joe Temple's concern at this point?

14 A He had to testify orally. He was going to be
15 put on the stand and asked some kind of questions on direct
16 examination. And I think he wanted to write down what
17 his thoughts were, so he could just refer to them when he
18 testified.

19 Q And then it says:

20 "Rex said he wasn't really interested in Joe's
21 words."

22 So I guess what I'm trying to get at is, what --
23 was Rex wanting Joe to testify extemporaneously?

24 A Yes, that's what he told him, was you're going
25 to have to get on the stand, we're going to have direct

1 examination. I'm going to ask you questions, and then
2 there's going to be cross-examination.

3 Q And was Rex concerned about having something
4 written down?

5 A I don't know what his concern was. My impression
6 was that Joe wanted to summarize his thoughts on something
7 he could refer to, and apparently Rex didn't want it.

8 Q Okay.

9 Back on page 11, in the second paragraph, second
10 full paragraph of that page, second sentence, it's
11 reported:

12 "Milt stated that he had the feeling that if
13 what is being asked for by Consumers is furnished,
14 this would invite the Board to say that this is such
15 a tenuous thing that this project should be put to
16 an end."

17 And then it says:

18 "Judd reemphasized he still wanted to hear
19 this information from Joe Temple."

20 And Milt points out that then he has a lot of
21 other problems.

22 I assume that those lot of other problems go
23 back to this concern that both you and Milt shared over
24 this fishing expedition into Dow's internal discussions
25 concerning the ongoing contract negotiations. What I'd

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1 like to ask you about is the concern he's expressing, that
2 if the Board had this information that Consumers is asking
3 about, it was his belief -- that is, Milt's belief -- that
4 the Board would find this to be too tenuous.

5 Do you have any recall of that discussion?

6 A Yes, I do.

7 Q What was your impression of what Milt's position
8 was there, and did you share it?

9 A I guess I'd like to characterize it a little
10 differently, because I remember that part very vividly.

11 In my opinion, during the course of the
12 negotiations there was a certain amount of antipathy that
13 developed between Joe Temple and Judd Bacon. And I know
14 on one occasion Joe called Russ Youngdahl and talked about
15 Judd's conduct in the negotiations, how he felt it was
16 affecting them.

17 MR. CHARNOFF: These particular negotiations?

18 THE WITNESS: The negotiations preceding the
19 September 13 meeting. This preceded August. Sometime in
20 the spring sometime, I would guess.

21 My impression was that Judd perceived that, and
22 may have felt the same way about Joe. I don't know. But
23 there was some antagonism there.

24 This whole interchange was, to us, Judd trying
25 to find out for himself what were Joe's personal reasons for

1 reaching some of the decisions that he had.

2 I had perceived this earlier, when I talked with
3 Judd on the phone on the 17th. He was pressing, you know,
4 why did Joe decide that?

5 And we didn't want those two -- I guess I
6 shouldn't say "we" -- I didn't think there would be any
7 purpose to be served by Judd Bacon sitting there asking
8 Joe Temple what his reasons -- his personal reasons, not
9 those expressed to Paul Orefice -- but his personal reasons
10 about how he felt about Consumers and certain members of
11 the negotiating team. I didn't see any purpose to be
12 served for Judd to hear that, because it involved him.

13 And that's what that interchange -- that's
14 my recollection of that interchange. We didn't think it
15 was necessary for Judd to hear that.

16 Q Subsequently, later on in the minutes, after
17 Judd was being excluded, when Rex and Dave Rosso talked
18 to Joe Temple, was part of the reason that you pushed for
19 that due to this feeling that things would progress much
20 better if he weren't present, or was that strictly related
21 to the ongoing contract negotiations?

22 A I guess I . . .

23 Q Later on in these meetings, Judd is excluded --

24 A That's right.

25 Q -- when Dave Rosso and Rex Renfrow discuss

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1 Temple's testimony.

A That's right.

3 Q And part of the reason for that was because you
4 and Milt Wessel had pushed for such an arrangement?

5 A That's right.

6 Q And was part of the reason you were pushing for
7 such an arrangement the fact that you didn't want this
8 information concerning Joe's feelings about Judd Bacon to
9 come out and degenerate into a discussion between Judd and
10 Joe on their personal relations?

11 A Okay. When we talked about Joe's personal
12 feelings -- I think it was Rex and Dave, I'd have to look
13 at the meeting notes -- anyway, Judd was excluded when Joe
14 wasn't present. It was Milt and Dave and I and Rex --
15 Dave Durand, Rex Renfrow, Dave Rosso and I.

16 That was one of the reasons. There were some
17 other concerns that Joe had, which I think are probably
18 referenced in Dave's notes -- but there were other concerns
19 that we didn't think having Judd here would do any good
20 if we were ever going to negotiate again, or anything, in
21 the future.

22 Q Okay. Did Joe Temple ever express to you, as
23 these proceedings moved along and it was clear that he was
24 going to have to testify, any desire to be represented by
25 someone other than Judd Bacon at the hearings, or any

1 concern about whether Judd Bacon would be the lawyer
2 examining him?

3 A I think he knew from the outset that it wasn't
4 going to be Judd Bacon, it was going to be Rex Renfrow.

5 Q All right.

6 However, that leaves me with the first part of
7 my question on that language on page 11, which was that
8 if Joe Temple says what Consumers is pushing him to say,
9 that the Board would say this is a tenuous thing, and the
10 project should be put to an end.

11 Leaving aside these negotiation problems, and
12 personality problems, was there a feeling on the part of
13 you or Milt Wessel that if the Midland Division information
14 came to the fore, that the Board might find the deal too
15 tenuous?

16 A No, I don't think that's a proper characteriza-
17 tion. I think there are two separate thoughts there.

18 Go back to how that starts out:

19 "Milt pointed out that Judd had told Lee that
20 if Dow wanted out of the situation, then that would
21 be the end of the project. Milt stated that he had
22 the feeling that if what is being asked for by
23 Consumers Power is furnished, this would invite the
24 Board to say . . . "

25 Okay. It's hard to tell from these notes, but my perception---

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1 again, this goes back to - - these are listed as separate
2 paragraphs, like they're separate subjects, but I don't
3 think they are. I think this goes back to where we're
4 discussing Dow putting in another power house. Or one of
5 the other alternatives is if we just said to Consumers
6 Power, we want to buy out of this thing. Tell us what our
7 bill is, and we want to buy out.

8 In that context, if you build a new power house
9 that affects the cost-benefit analysis. If you buy out
10 of this thing and build a new power house, that affects
11 the cost-benefit analysis.

12 And if that comes out that's a tenuous kind
13 of thing. That's the way I would interpret that.

14 Q Okay. Let's take those situations as making
15 it a tenuous kind of thing.

16 Was there a concern on the part of you and Milt
17 Wessel that if these alternatives came out, the Board would
18 suspend the construction permit, or find the deal too
19 tenuous?

20 A Yes, I think it would definitely affect it.
21 My opinion was then and is now that it would have definitely
22 affected the cost-benefit analysis. If we had said we
23 can't count on Consumers Power, and we're going to go out
24 and build a new power house just in case, then what's the
25 purpose for having the nuclear power two-unit reactor there?

1 Q Yet this was something that was under fairly
2 serious consideration within the Dow Chemical Company?

3 A It was something we were thinking of. What do
4 we do if the nuclear plant is not built? Do we build a
5 conventional power house? Do we build gas turbine technol-
6 ogy, which is new? I mean there are a number of options.
7 Wheel power.

8 Q So even though at the time you weren't terribly
9 familiar with NRC proceedings, now that you are you can
10 understand, I suppose, why one would want to bring that
11 out?

12 MR. POTTER: Can I have that read back?

13 MR. OLMSTEAD: I mean Rex and Judd are pushing
14 to bring some information out that evidently concerns Milt
15 and you. But given the climate of the regulated industry
16 that the nuclear industry is, you can understand, I
17 suppose, why they would feel that ought to come out?

18 MR. POTTER: Excuse me. That presupposes that
19 we all understand that both Renfrow and Rosso were operating
20 under that state of mind, and I'm not going to accept that.

21 MR. OLMSTEAD: Okay.

22 BY MR. OLMSTEAD:

23 Q Well, assuming that you knew at that time what
24 you know now about the Nuclear Regulatory Commission,
25 is that the type of thing that you think ought to have come

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1 out?

2 A What I knew then is basically what I know now,
3 and that was I had read the cost-benefit analysis from the
4 original construction hearing, and that talked about the
5 reason for the plant being in Midland, and some language
6 in there that had to do with the transfer of a unit to
7 Palisades and cancellation of another one in a certain
8 event -- I've forgotten what it was. And I think this was
9 brought out at one of the other meetings prior to this,
10 that we had with Consumers.

11 The basis for the whole plant was the fact that
12 we're supplying you with steam, and the cost-benefit
13 analysis is based -- this was my perception -- on supplying
14 the steam to Dow, as well as supplying electricity to
15 the net.

16 Well, if we went out and said, we're going to
17 build our own power house, then in my opinion that would
18 affect the cost-benefit analysis.

19 Q But in your opinion, the alternative of building
20 your own power house should have been in the environmental
21 report, isn't that correct?

22 A I guess you've lost me there.

23 Q Well, Consumers asked you at some point to look
24 at their environmental report that they were submitting as
25 a part of this remand proceeding?

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1 A Yes.

2 Q Was the alternative of your building your own
3 power house in that report?

4 A I believe it was. I think . . . I'd want to look
5 at it, but my recollection is that they put something in.

6 Q And in your opinion did that environmental
7 report accurately reflect the Dow position on the alterna-
8 tive to building its own power house?

9 A I think, if I recall, that was the only alterna-
10 tive that you could say was available at that time. New
11 technology had not come along, and so forth.

12 I guess the point I'm trying to make is there's
13 a difference between saying that's the alternative, and
14 saying we're going to do it. You know, we've appropriated
15 the money, we have the engineering drawings, and we're
16 starting to build it. Because we don't think Consumers is
17 going to come on.

18 That's almost a self-fulfilling prophesy at that
19 point.

20 Q Okay. At that point had Dow developed engineer-
21 ing drawings for its own power house?

22 A They had some studies done by Black & Veatch
23 as to the cost, and so forth.

24 Q And they had been exploring this with other
25 regulatory agencies? They'd been asking questions about this?

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1 A No.

2 Q They subsequently were asked questions about it,
3 weren't they?

4 A Yes.

5 Q Okay. If you'd look at page 17, in the first
6 full paragraph there -- it's actually the second paragraph
7 on the page, the sentence that I'm focusing on in particular
8 is the statement, the second from the end:

9 "Rex pointed out that he would rather Dow
10 err on the side of too much on their outline rather
11 than not enough."

12 Is that an accurate recording of what you
13 understood to be what Rex was asking for?

14 A Well, I have a notation in my notes:

15 "A discussion by Milt and..." this is on page
16 3 of my notes, IV.b.3 --

17 "A discussion by Milt and Rex over whether
18 it was really necessary for Dow to have to supply
19 all this information."

20 I don't know if this is the same point. Milt
21 is saying it really wasn't called for, and Rex saying he
22 thought it was really necessary.

23 Q And this is essentially talking about alternatives
24 again, and how much information they're going to need to
25 satisfy the Board.

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1 A Economic analysis, yes.

2 Q This is an impression that I want to be very
3 careful about, because I do get this impression, which may
4 be affected by this underlying contract dispute in negotia-
5 tions with Consumers:

6 There are a number of instances in these notes
7 where I get the impression that Rex Renfrew and Dave Rosso
8 are pushing for a lot more information or economic alterna-
9 tives and criteria for decision making than Dow seems
10 willing to provide.

11 Is that an accurate capture of the sense of
12 these meetings?

13 A They pushed for it, and we may have questioned
14 their need for it. But there was no sensitivity about it.

15 I think our economic analysis showed that the
16 non-nuclear versus the nuclear -- at least from Dow's point
17 of view -- was rapidly reaching the point where the nuclear
18 was going to become more expensive to supply steam to Dow.
19 The non-nuclear alternative would be cheaper to us than
20 buying steam from the nuclear power plant.

21 That's what our data showed. That's what our
22 recent analysis in October, after we got the new numbers
23 from Consumers showed.

24 And, again, at least on my part, there was a
25 reluctance to volunteer this stuff if it would later come

1 back to haunt us in a litigation by Consumers.

2 Q Okay. Understanding that, but once they asked
3 for it, you hadn't volunteered it at that point, and my
4 concern about these discussions is that Milt seems to be
5 indicating that he does not see the relevance of this to
6 what the Board is going to be doing. Did you share that?

7 A I guess, to give you the sense of the meeting,
8 Milt was doing whatever he thought he was doing as trial
9 counsel in the meetings, and I was, you know, concerned
10 with other things. I don't know what was in Milt's mind
11 at that point.

12 Q Did you feel these materials were relevant to
13 what the Board was going to be doing?

14 A I guess I didn't even reflect on it. They
15 asked for it. There were some graphs that Joe had, and I
16 gave them to them, I think right after that meeting, which
17 had those curves on them.

18 Q Could we look at page 3 of your notes, to where
19 you referred me? It says, "Milt saying it wasn't really
20 called for, Rex saying he thought it was really necessary."

21 And then Rex said, well, maybe this is not going
22 to be raised at this hearing. I assume that was the little
23 hearing, or suspension hearing, but certainly would be
24 covered at the big, big hearing. And I suppose that's
25 the remand proceeding on the remand issues that the parties

1 thought would come subsequently?

2 A Yes, big hearing. That's what my notes here say.

3 I regard this whole conversation as, you know,
4 why do you want it kind of a thing, just not really pressing.
5 Because I think we talked about a lot of this information
6 with Consumers already, indicating where we thought we were
7 getting close to that line.

8 Q Which line?

9 A The line where non-nuclear steam became cheaper
10 to Dow than nuclear steam.

11 Q But Rex and Dave didn't seem to mind that?

12 A Mind what?

13 Q That you might be getting close to that line.
14 They wanted the information anyway.

15 A No. It later degenerated into a big fuss about
16 the price of coal, and escalation factors, and their
17 suggesting that our numbers were wrong. But at that point,
18 until they saw it, they didn't seem to have any question.
19 Later on, they did have a lot of questions about it. And
20 that's where we got into all the discussion about coal
21 prices we used, the coal prices they used, the escalation
22 factors for inflation, and all these things, which link
23 is reflected in the notes.

24 Q I don't want to belabor the point, but I'm going
25 to. The information that Rex is asking for here deals with

1 economic alternatives, and the only real relationship that
2 it has to the ongoing Consumers-Dow steam contract
3 negotiations is this support clause which you didn't want
4 to breach. But it's alternatives to nuclear steam that
5 he's talking about, and he's asking for information, and
6 there's still a reluctance to provide all that information.
7 And the sense that I got out of it is that the reason is
8 that there's a feeling, either on your part or Mr. Wessel's
9 part that that information goes beyond what they need to
10 have to try the case.

11 Is that not correct?

12 A That doesn't reflect my feeling.

13 Q Okay.

14 A My feeling, again, was that this was a fishing
15 expedition that was going on, and in this particular area
16 I wasn't all that concerned. But, you know, it was just,
17 what do you need it for?

18 Again, a large law firm from Chicago was there.
19 We'd been threatened with a lawsuit. And, you know, were
20 they conducting discovery while using that clause in the
21 contract to conduct discovery or not?

22 I don't know what was in their minds. But you
23 have to act in that manner. So, naturally, the question,
24 what do you want that for.

25 It was in that context that we were talking about

1 these items.

2 Later on, there was a lot more discussion, as I
3 indicated.

4 Q Right. We'll get there, I hope.

5 MR. CHARNOFF: Today?

6 (Laughter.)

7 MR. ZAMARIN: I was going to suggest, if you're
8 going to go on to a new area --

9 MR. CHARNOFF: Is that the end of that day?

10 MR. OLMSTEAD: No, just a couple more questions.
11 Would you like me to get to the end?

12 MR. CHARNOFF: Whatever you want. I just thought
13 if you were starting a new day, this would be a good time
14 to --

15 MR. POTTER: Well, I want to caution you again,
16 Mr. Nute has got a commitment and he has to leave at 5:00.

17 MR. OLMSTEAD: Okay.

18 BY MR. OLMSTEAD:

19 Q Following the 9-29 meeting, did you have any
20 meetings internal to Dow, or with Mr. Wessel or with other
21 Dow personnel -- Mr. Temple -- to discuss the sense of that
22 meeting, and where you saw Dow going?

23 MR. CHARNOFF: The sense of the 9-29 meeting?

24 MR. OLMSTEAD: Right.

25 THE WITNESS: Well, two things. Number one, this

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1 is the 29th, and I don't know what day that fell on, but I
2 had committed, I believe, to get back to Rex by . . . well,
3 I can refer back to my notes on page -- the third page of
4 my notes, number 4:

5 "Start on Monday, 8:00 a.m., continue over on
6 Tuesday, have all backup documents present, particu-
7 larly on first round."

8 I guess I'd want to know whether that refers to
9 what we then thought was the start of the hearing in
10 October, okay?

11 The point I'm trying to make is that at that
12 point I still think we thought we were going in October.
13 Rex had asked me to come up with a much broader draft of
14 testimony. So I would imagine the next few days I was
15 spending my time just doing that, and I don't recall any
16 meetings where we sat down and had a long discussion about
17 where we were going. I think I was really just hustling
18 trying to get that next draft together.

19 Q Okay.

20 I really am at a good stopping spot.

21 (Whereupon, at 5:00 p.m., the taking of the
22 deposition was concluded.)

23 - - -

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1 CERTIFICATE OF NOTARY PUBLIC

2
3 I, Helen M. Rabbage a notary public, do
4 hereby certify that the witness whose testimony appears
5 herein, appeared before me and was duly sworn by me.

6
7 Helen M. Rabbage
8 Notary public in and for the
9 Midland County, Mich

10 My commission expires

11 HELEN M. RABBAGE
12 Notary Public, Midland County, Michigan
13 My Commission Expires August 3, 1980

14 CERTIFICATE OF COURT REPORTER

15
16 I, William E. Landon, Court Reporter, do
17 hereby certify that the testimony contained herein is a true
18 record of the testimony given by said witness, and I further
19 certify that I am neither attorney nor counsel for, related
20 to or employed by any of the parties to the action in which
21 this statement is taken; and, further, that I am not a
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23 by the parties hereto, or financially interested in the
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