UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CONSUMERS POWER COMPANY'S POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter came on for hearing before an Atomic Safety and Licensing Board (the "Licensing Board") of the Nuclear Regulatory Commission ("NRC") pursuant to a remand order by the Commission directing that further consideration be given to allegations of a possible attempt in an earlier suspension proceeding "to prevent full disclosure of the facts relating to [Dow Chemical Company's] intentions with regard to its contract" with Consumers Power Company ("Consumers").[1]

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1 See Commission Memorandum and Order of November 6, 1978, in Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, at p. 6.

The allegations first surfaced in late 1976 and early 1977 during an evidentiary hearing before an NRC Licensing Board (two members of which preside over the present inquiry), convened to determine whether or not to suspend the Midland construction permits pending consideration of various issues remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit in Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).[2] In substance, the claim made by counsel for a group of intervenors (the "Midland Intervenors") was that the written direct testimony of Joseph Temple, a Dow Chemical Company ("Dow") official appearing on behalf of Consumers, failed to disclose affirmatively an interim position -- which was unfavorable to the Midland project -- advanced by a division within Dow, the Michigan Division, for the consideration of higher Dow management. The suggestion was that this interim position, although not accepted by the Dow U.S.A. Board following a full review of the matter, was nonetheless material to the Licensing Board's consideration of a possible suspension of Consumers' construction permits, and that its disclosure had

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2 See Consumers Power Company (Midland Plant, Units 1 and 2), LBP-77-57, 6 N.R.C. 482 (September 23, 1977), as amended, LBP-77-57, 6 N.R.C. 485-86 (November 4, 1977), and subsequently affirmed by the Appeal Board, ALAB-458, 7 N.R.C. 155 (February 14, 1978).

been withheld in a calculated effort to deprive the Licensing Board of material information.

Following a preliminary inquiry into the matter,[3] the Licensing Board determined to defer consideration of the allegations of possible misconduct with regard to the disclosure question until after the conclusion of the suspension hearing. During the course of the suspension hearing, documentary evidence and testimony were received by the Licensing Board concerning the Michigan Division's interim position, consideration and evaluation thereof by the Dow U.S.A. Board, the ultimate Dow decision not to accept the Michigan Division's interim position but to continue for the present to honor Dow's contractual commitment to rely on the

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3 Early in the course of the suspension hearing, Myron Cherry, counsel for the Midland Intervenors, raised the question whether all material facts relevant to Dow's contract intention had been disclosed in Temple's direct testimony (Suspension Tr. 242-44). The Board heard from both Consumers' and Dow's counsel on the matter in a series of exchanges extending over several hearing days, and also called for and received written memoranda from the parties. The Board then determined to defer full consideration on the disclosure question until after completion of the suspension proceeding (Suspension Tr. 2365-66, 2369, 2373). It was on this basis that Consumers subsequently requested the Licensing Board to amend paragraph 10 of its Initial Decision so as to accurately reflect the fact that allegations of misconduct had been raised during the course of the suspension proceeding, but were neither considered nor resolved by the Licensing Board. Paragraph 10 was then so amended, LBP-77-57, 6 N.R.C. at 485-86 (November 4, 1977), with the Licensing Board acknowledging that it had "put aside the question of attorneys conduct to be treated separately."

nuclear facility for its future steam requirements, and the reasons therefor.[4]

At the close of the hearing, the Licensing Board decided not to suspend the Midland construction permits (LBP-77-57, supra, 6 N.R.C. at 499). This decision was affirmed on February 14, 1978 by the Appeal Board, which made particular reference to the fact that "the suspension hearing yielded convincing evidence that Dow's present intention is to adhere to the contract terms." ALAB-458, supra, 7 N.R.C. at 168. The full Commission declined review. Not long thereafter, in June 1978, Dow and Consumers completed their lengthy negotiations to modify their original steam and electric contracts in several important respects and entered into new, modified contracts attesting to Dow's continuing commitment to participate in the Midland project.[5] Those 1978 contracts remain in effect today. CP Co. Ex. 1, Doc. Nos. 19, 20.

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4 See Licensing Board Order of September 23, 1977, declining to suspend construction permits, LBP-77-57, 6 N.R.C. 482, 487-88 ¶¶ 19-22.

5 Dow and Consumers first entered into a contract providing for the purchase by Dow of steam from the Midland facility in 1967. The contract was amended thereafter, including a number of amendments made in 1974. Modification of the 1974 contracts occurred after extended contract negotiations between the companies which commenced in the latter part of 1976, were suspended for short periods from time to time, and finally concluded in June 1978. CP Co. Ex. 1, Doc. Nos. 17 and 18.

THE PRESENT PROCEEDING

In its February 1978 decision, the Appeal Board, after disposing of the suspension question, identified five specific areas for consideration by the Licensing Board on the Aeschliman remand. Included among the listed matters were the allegations of a possible attempt to prevent full disclosure of material facts relating to Dow's contract intentions.[6] This issue, along with one other concerning the environmental effects of radon, promptly became the only remaining items requiring Licensing Board consideration as a result of the April 3, 1978 decision by the U.S. Supreme Court in the consolidated cases of Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Counsel and Consumers Power Co. v. Aeschliman, 435 U.S. 519, 98 S. Ct. 1197 (1978).[7] The radon question was deferred pending the outcome of an ongoing generic review by the Appeal Board of the associated environmental consequences; the question concerning a possible non-disclosure of material information is the subject of the instant proceeding.[8]

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6 See Commission Order of April 10, 1978, in Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, Slip Opinion at p. 2.

7 See Commission Memorandum and Order of November 6, 1978, in Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, Slip Opinion at p. 2.

8 See Licensing Board Order Concerning Remanded Issues (continued next page)

This, then, is the final act in what has proved to be an inordinately long proceeding to secure NRC authorization to construct the Midland nuclear facilities. It should be emphasized at the outset that the inquiry at this late stage in the process is not related in any way to the qualifications of Consumers to complete the work underway at the site. No reason has even been advanced that would warrant a halt to construction of the Midland units; nor has there been a suggestion of any behavior on the part of Consumers or its representatives that would cast doubt on the validity of prior NRC decisions in this construction proceeding.[9] The sole purpose of the present hearing is to insure that the disclosure issue is "fully aired and resolved" in accordance with the Appeal Board's directive. See ALAB-458, supra, 7 N.R.C. at 177 n.87.

To this end, the Licensing Board, by Order dated January 4, 1979, instructed all parties to submit a statement of the issues of law and fact involved in this hearing, designate relevant portions of the record in the suspension hearing to be considered, identify witnesses to be examined, and submit whatever motions were deemed appropriate. In

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(continued)
of January 4, 1979, in Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329 CP, 50-330 CP (Remand Proceeding).

9 See NRC Staff Letter to the Licensing Board dated June 1, 1979, reporting on the Staff's review of the record in the suspension proceeding.

response, Consumers filed a Motion for Summary Disposition, arguing that the allegations that had been raised could properly be dismissed on the basis of the undisputed facts of record in the prior suspension hearing, the affidavits of participating counsel filed with the Licensing Board and Consumers' supporting legal memorandum.

No opposition to the Summary Disposition Motion was filed by counsel for the Midland Intervenors, who had originally made the allegations prompting initiation of the present inquiry. Counsel for Dow, while noting some differences in their perceptions of the underlying facts, agreed with Consumers that the matter could be resolved summarily without recourse to an evidentiary hearing.[10] The NRC Staff, however, argued that Consumers' Motion for Summary Disposition was premature; it took the position that "since the facts are for the most part within the possession of Consumers and Dow personnel, the Board and the parties must first have the opportunity for discovery before summary disposition is appropriate."[11]

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10 See "Response of Intervenor The Dow Chemical Company To Licensing Board Order Dated April 9, 1979", dated April 25, 1979.

11 See "NRC Staff Response In Opposition To Consumers Motion For Summary Disposition", dated April 19, 1979, at p. 1.

Following a prehearing conference on May 1, 1979, the Licensing Board ruled that "action on the motion for summary disposition would be deferred until completion of discovery."[12] During the next six weeks, the NRC Staff proceeded to depose those officials of Consumers and Dow deemed to be knowledgeable about the subject matter of the inquiry, as well as the individual attorneys retained to represent the two companies in the prior suspension hearing.[13] At the conclusion of this round of discovery, the NRC Staff filed a further response to Consumers' Summary Disposition Motion, stating its position on that occasion in the following terms:

> This Licensing Board has repeatedly stated (most recently during today's 11 A.M. conference call) that it has not, as yet, preferred any charges. Rather, the forthcoming hearings are for the purpose of conducting an in-depth on-the-record hearing into the issues identified in the Board's May 3 and June 12 Orders. Since no charges are as yet identified and placed in issue, it is most difficult to determine whether the

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12 See Prehearing Conference Order, dated May 3, 1979, at p. 1.

13 Consumers' officials deposed were Alphonse H. Aymond, Judd L. Bacon, James B. Falahee and Russell C. Youngdahl; Consumers' retained counsel deposed were David J. Rosso and R. Rex Renfrow, III. Dow's officials deposed were David A. Duran, James F. Hanes, Alden S. Klomparens, Leslie F. Nute, Paul F. Oreffice and Joseph G. Temple; Dow's retained counsel deposed was Milton R. Wessel. All of the individuals named above also appeared and gave live testimony at the evidentiary hearing that commenced on July 2, 1979. In addition, Stephen H. Howell of Consumers testified at the hearing.

> facts, as identified by Consumers, are disputed, much less material. For this reason alone, ruling on Consumers' motion at this point would be premature.[14]

The Licensing Board agreed and scheduled the evidentiary hearing to commence on July 2, 1979. The following five issues were framed for consideration:

> 1. Whether there was an attempt by parties or attorneys to prevent full disclosure of, or withhold relevant factual information from, the Licensing Board in the suspension hearings.
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> 2. Whether there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers.
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> 3. Whether there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions.
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> 4. Whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony.
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> 5. What sanctions, if any, should be imposed as a result of affirmative findings on any of the above issues.[15]

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14 See "NRC Staff Resonse In Opposition To Consumers' Motion For Summary Disposition", dated June 15, 1979, at p. 2.

15 See Licensing Board Order of June 12, 1979.

PROPOSED FINDINGS OF FACT

The evidentiary hearing lasted approximately one month, from July 2 to July 31. Its stated purpose was to provide the Licensing Board with an opportunity to inquire generally into allegations raised during the earlier Midland suspension proceeding with regard to the inadequacy of certain affirmative disclosures made therein by the parties and their respective attorneys. Since no charges have been preferred against anyone, all fourteen witnesses who appeared were called as "Board witnesses". Based on their testimony, and the extensive documentary record compiled at the hearing, the following findings are required as to the underlying facts:

A. CONSUMERS AND DOW CONTRACT NEGOTIATIONS

1. In December 1967, Consumers and Dow entered into a General Agreement providing for the sale by Dow to Consumers of certain real property located in Midland and Saginaw Counties, Michigan, for use as a site on which to build the Midland Nuclear Power Plant. By its terms, the General Agreement committed Dow to purchase from Consumers process steam and electric energy generated by the nuclear plant for use at Dow's Midland plant pursuant to the terms of separate steam and electric contracts to be executed by the parties.

2. The two companies thereafter entered into the referenced steam and electric contracts. Dow's original contract for steam from Midland apparently contemplated the maximum purchase of 4,050,000 lbs/hr. The contract was amended in 1974 to provide for a minimum purchase of 2,000,000 and a maximum of 2,400,000 lbs/hr of 175 psig steam and 400,000 lbs/hr of 600 psig steam. The parties established March 1, 1980, as the target date for steam deliveries to begin, but no specific delivery date was fixed in the contract. See LBP-77-57, supra, 6 N.R.C. at 487, ¶18.

3. Some months after execution of the amended steam and electric contracts on January 30, 1974, Consumers began to experience difficulty obtaining sufficient financing to maintain the projected construction schedule for completion of its planned nuclear facilities. See NRC Staff Ex. 1, Doc. 13. Dow was uninterested in assisting Consumers' efforts to raise additional capital through the purchase of a special preference stock issue. NRC Staff Ex. 1, Doc. No. 15, p. 2. On September 17, 1974, Consumers alerted Dow to the possibility of a delay in completion of the Midland facility designated to provide Dow with process steam. See NRC Staff Ex. 1, Doc. No. 16, pp. 1, 3-4, and Doc. No. 17, p. 1.

4. This information prompted Joseph Temple, General Manager of Dow's Michigan Division, to write Russell Youngdahl, Senior Vice President of Consumers, on November 11, 1974, and demand

> * * * that Consumers give to Dow adequate assurance that Dow can expect due performance of the aforementioned [steam] contract obligations. Unless you comply promptly with this demand for assurance of performance, we can elect to treat your failure to furnish such assurance as a repudiation of the contract. [NRC Staff Ex. 1, Doc. No. 20, p. 2.]

5. Consumers' response, by letter dated November 25, 1974, took issue with Dow's view of the steam contract as permitting repudiation upon failure to provide the assurance demanded, and advised Dow that "Consumers Power is using its best efforts to place the units in commercial operation on or before the target commercial operation dates, and will continue to do so." NRC Staff Ex. 1, Doc. No. 25, p. 2. While noting by subsequent letter dated December 19, 1974, that "stronger assurances of on-time delivery of process steam to Dow" had been hoped for, Dow elected not to repudiate, but, instead, chose to "continue to monitor the matter while considering our options." NRC Staff Ex. 1, Doc. No. 28.

6. Throughout 1975, the two companies regularly communicated with each other regarding the matters of schedule slippage and cost overruns associated with the Midland facility. While the original completion dates of March, 1979 for Unit 2 and March, 1980 for Unit 1 were revised twice by Consumers during this period to ultimately be set at March, 1981 and March, 1982, respectively (NRC Staff Ex. 1, Doc. No. 32, p. 1, and Doc. No. 36, p. 1), it was suggested that Dow

might be able to take its steam requirements from Unit 2 until Unit 1 (the unit designated to provide Dow with process steam) was completed. NRC Staff Ex. 1, Doc. No. 30, p. 1.

7. Dow continued to express concern over the Midland construction delays and cost increases. In a speech delivered to the Saginaw Valley Press Club on November 12, 1975, Joseph Temple publicly indicated his disenchantment with the nuclear project in the following terms:

> All of the delays and the fantastic cost increases since the Midland project was conceived have changed our view of what process steam from the N - Plant will do for our Division. We once thought it would actually give us an economic advantage over some of the other Dow locations. And, up until the most recent two-year delay of the plant start-up, to 1982, and the last increase in the estimated cost of the plant of over $450 million, to $1.4 billion, our plans were still being formulated on this basis.
>
> Today, we don't feel confident that this will be the case. * * * [NRC Staff Ex. 1, Doc. No. 35, p. 1.]

He further stated: "With the possibility of this different kind of a future for our Division, we are relooking at our whole energy plan for the period up to the year 2000." Id. at p. 2.

8. In a letter to Russell Youngdahl prepared shortly thereafter and dated December 11, 1975, Temple advised: "I feel that it is a 'must' that we work out some contract modifications that reflect these changed conditions and reflect

the real world of today if we are to go forward together on this project." See NRC Staff Ex. 1, Doc. No. 36, p. 3.

9. Pursuant to this request, the companies commenced contract negotiations in January, 1976, and continued to discuss various modifications to the steam and electric contracts into the summer of that year. See generally NRC Staff Ex. 2, Doc. Nos. 1, 2, 3, 5, 6, 7, 8, 11, 12, 13. On June 30, 1976, Temple forwarded to Youngdahl a formal proposal of specific contract changes recommended by Dow. NRC Staff Ex. 2, Doc. No. 16; Temple Tr. 53,422-23.

B. MICHIGAN DIVISION REVIEW AND RECOMMENDATION

10. Shortly after this letter was sent, the U.S. Court of Appeals for the District of Columbia Circuit, on July 21, 1976, announced its decision in Aeschliman v. Nuclear Regulatory Commission, supra, 547 F.2d 622, remanding the Midland licensing proceeding to the Commission. The Court found that the Commission had failed to give proper consideration to energy conservation as an alternative to the Midland plant, faulted the report of the Advisory Committee on Reactor Safeguards, directed the Commission to inquire further into whether circumstances had changed regarding Dow's need for process steam, and noted that the Commission had not undertaken a review of the environmental impacts of the nuclear fuel cycle. Id.

11. By Memorandum and Order dated August 16, 1976, the Commission ordered that an Atomic Safety and Licensing Board be convened to consider whether the Midland construction permits should be continued, modified or suspended pending the promulgation of an interim fuel cycle rule. CLI-76-11, 4 N.R.C. 65.[16]

12. These new developments, when coupled with the two-year delay already contemplated and the announced cost increases, prompted Joseph Temple to undertake a reevaluation of Dow's continued participation in the Midland project. Nute Tr. 50,613-16. In this connection, he requested both Leslie Nute and James R. Burroughs of the Dow Michigan Division to prepare analyses of the "pluses" and "minuses" associated with the existing contractual relationship. NRC Staff Ex. 2, Doc. Nos. 17 and 18; Temple Tr. 53,423-25; Nute Tr. 50,616.

13. Upon returning from vacation in early September, 1976, Joseph Temple, after talking with other employees in the Dow Michigan Division, personally reached the conclusion that the Midland project was in all likelihood no longer

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16 The Commission further directed that no hearing should be held on the merits of the other remanded issues until the Court of Appeals decision became final. However, following issuance of the Court's mandate on September 14, 1976, the Commission ordered the reconvened Licensing Board to consider all of the Aeschliman issues as well as the fuel cycle issue to determine whether to continue, modify or suspend the permit. CLI-76-14, 4 N.R.C. 163.

advantageous for Dow. Temple Tr. 53,426, 53,446. This view differed from the official corporate position at the time, which was, as Dow's Associate General Counsel advised counsel for the Midland Intervenors by letter dated August 19, 1976, "that there has been no change in Dow's position on or plans relating to the Midland Nuclear Plant and no present intention to change." NRC Staff Ex. 2, Doc. No. 24.

14. Temple communicated his conclusions to Paul F. Oreffice, President of Dow Chemical U.S.A., in a memorandum dated September 8, 1976. Board Ex. No. 1.[17] The memorandum recommended that the Michigan Division's concerns be discussed with Consumers at a contract negotiating meeting scheduled for September 13, 1976, and, if Consumers' analysis of the situation failed to alleviate those concerns, that Mr. Oreffice "call for a corporate review of the entire question * * * designed to evaluate all aspects of the conclusion that we have reached here in the Division and the potential problems that arriving at such a conclusion could cause for others." Id. at p. 3; emphasis in original.

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17 Dow Chemical U.S.A. is the Operating Unit of The Dow Chemical Company responsible for all corporate activities within the United States. Its areas of responsibility are divided among several Divisions, one of which is the Dow Michigan Division. The Board of Directors of The Dow Chemical Company has delegated full authority to operate the corporation's United States business to the President of Dow Chemical U.S.A., and he, in turn, has delegated operational responsibility to the several Divisions' General Managers, subject to review and approval in appropriate circumstances by the Dow U.S.A. Operating Board. See Dow Ex. 2.

15. This recommendation was communicated to the Board of Directors of The Dow Chemical Company the same day, and that Board accepted the Division's recommendation for a full corporate review of the nuclear project contingent upon what Dow learned from Consumers at the September 13 meeting. NRC Staff Ex. 3, Doc. No. 4, p. 9, and Doc. No. 6, p. 3; Oreffice Tr. 54,123-24; Temple Tr. 53,586; Nute Tr. 50,641-42.

16. The ensuing discussion at the September 13 meeting failed to alleviate the concerns expressed by Joseph Temple on behalf of the Dow Michigan Division. NRC Staff Ex. 3, Doc. No. 4, pp. 6, 9; Nute Tr. 50,639, 50,642, 50,650. Following a break in the meeting to allow the Dow representatives to caucus, Temple advised Consumers that "the Michigan Division negotiating group had concluded that there is no longer the possibility or probability that the nuclear project would be good for Dow's Midland Plant." NRC Staff Ex. 3, Doc. No. 4, p. 9; Doc. No. 5, p. 5; Doc. No. 6, p. 2; Doc. No. 9, p. 1. He listed a number of factors influencing this new, interim Division position, including schedule uncertainties, cost increases, the Court's remand order, problems Dow was having with the Michigan Air Pollution Commission and a general sweeping antinuclear sentiment. Id; Young[illegible] Tr. 53,785.

17. Temple further advised Consumers on September 13 that "the official Dow position" had not yet been taken with respect to the question of continued participation in the

Midland project, and that, pursuant to the Michigan Division's recommendation, a full corporate review of the matter would be undertaken before the ultimate Dow position was determined. NRC Staff Ex. 3, Doc. No. 4, p. 10; Doc. No. 5, p. 5; Doc. No. 6, p. 3. In response to a question from Russell Youngdahl of Consumers, Temple advised that, in the interim, Dow continued to believe that the companies had a valid binding contract which Dow intended to honor. NRC Staff Ex. 3, Doc. No. 4, p. 11; Doc. No. 5, p. 5; Doc. No. 9, p. 2; Youngdahl Tr. 53,785-86. However, he recommended that for the present the efforts to negotiate contract modifications "should stop". NRC Staff Ex. 3, Doc. No. 4, p. 11.

C. DOW U.S.A. BOARD REVIEW AND DECISION

18. By letter dated September 15, 1976, Temple forwarded to Oreffice his recommendations as to how the corporate review of the Midland project should be conducted. Temple Tr. 53,431-32. He proposed that seven task forces be set up to consider the Michigan Division's conclusion from a number of different perspectives: (1) economic, (2) legal, (3) environmental and energy conservation, (4) safety, (5) community relations, (6) the Dow/Consumers relationship, and (7) statewide and national implications. Board Ex. 2. This suggestion was followed, and Alden Klomparens, Assistant Director of Sales of Dow U.S.A., was designated as the team

leader. Id; Oreffice Tr. 54,125-26; Klomparens Tr. 53,608. No one reporting to Joseph Temple or otherwise involved in the developmen of the Michigan Division interim position was assigned to the corporate review. Nute Tr. 50,563, 51,156-58; Temple Tr. 53,435. Input from Consumers was invited on all of the task force assignments except those dealing with economic considerations and environmental and energy conservation concerns. NRC Staff Ex. 3, Doc. Nos. 15 and 18.

19. Several different task force meetings with Consumers' representatives were held on September 21, 1976. The one dealing with "review of the legal aspects -- past, present and future outlook" (Board Ex. 2, p. 2; footnote omitted), was convened for the purpose of receiving a report from Consumers on the likely impact of the Aeschliman decision on the Midland project and on the procedural framework, issues and scheduling of the remanded proceedings. NRC Staff Ex. 3, Doc. No. 22, p. 2; Renfrow Tr. 51,412. Dow was represented by Alden Klomparens, James F. Hanes, General Counsel of Dow Chemical U.S.A., and Leslie Nute, Senior Attorney. James Falahee, General Counsel, and Judd Bacon, Senior Attorney, attended for Consumers. NRC Staff Ex. 3, Doc. No. 26. They were accompanied by R. Rex Renfrow, III, a lawyer with Isham, Lincoln & Beale, the Chicago law firm retained by Consumers after issuance of the Aeschliman decision to handle the Midland remand. Renfrow Tr. 51,403-04, 51,411.

20. Several sets of notes were prepared on the September 21 meeting. CP Co. Ex. 1, Doc. No. 7 (Hanes); NRC Staff Ex. 3, Doc. No. 24 (Bacon), Doc. No. 26 (Nute), Doc. No. 34 (Klomparens); Cf. NRC Staff Ex. 3, Doc. No. 22 (Renfrow). In addition, all six individuals in attendance testified at the hearing. Before commenting on their recorded and refreshed recollections of the matters discussed, a degree of perspective is required.

21. Undeniably, private discussions among lawyers and their clients which concern matters relevant to upcoming hearings tend to be rather free-wheeling. Positions and strategies are invariably advanced for no reason other than to satisfy those assembled that a full range of possibilities has been considered. One of the purposes of the September 21 meeting was to provide an opportunity for just such discussion. See FF ¶19, supra. Indeed, this was the very first time that the Dow and Consumers attorneys met to discuss the Midland proceeding. See NRC Staff Ex. 3, Doc. No. 22, p. 2. It is from this perspective that the remarks of counsel must be assessed. It may well be that a strategy which is seriously suggested and thereafter pursued gives rise to legitimate concerns which are simply not warranted if that same strategy is mentioned in passing, and then abruptly discarded. We have therefore been particularly careful to examine isolated comments said to have been made in the September 21 meeting in

the context of the overall discussion at the time and in the context of the actions of counsel thereafter.

22. In addition, we have been sensitive to one other factor that was underscored repeatedly throughout the hearing. Understandably, perceptions of certain statements made during the course of a lengthy meeting may vary among the participants. Honest differences of opinion over both what is said and what is intended frequently occur. This is particularly true where those in attendance come to the meeting with different perspectives and may be listening for different signals. We have no doubt that such was the case on September 21, and that this contributed in no small part to many of the variations in the multiple sets of meeting notes and to the different perceptions testified to at the hearing. In reconciling these differences, we have not allowed ourselves to be unduly influenced by the perceptions of any one individual, but rather have been guided by the notes and recollections which on this record reflect the clear consensus of those who were in attendance.

23. The obvious staring point in our examination of the September 21 meeting is with the notes of Leslie Nute ("Nute Notes"), to which the Licensing Board made specific references in its Initial Decision in the suspension hearing. LBP 77-57, supra, 6 N.R.C. at 485. The Nute Notes report that someone from Consumers, while discussing factors to be

considered in the upcoming suspension hearing, suggested that, in the absence of an appearance by Midland Intervenors' counsel, the parties would "be able to finesse Dow-Consumers continuing dispute." NRC Staff Ex. 3, Doc. No. 26, p. 2, ¶ B. In addition, it is reflected in the Nute Notes that at a later point in the meeting, Rex Renfrow "suggested that [the] Dow witness might be someone from Dow Chemical U.S.A. or Corporate area who is unaware of Midland Division recommendations to Oreffice". Id. at p. 3, ¶4. Also, a Consumers' representative is recorded in the Nute Notes as later making the observation that "as long as construction continues, Consumers has a lever and will drag feet in hearings on merits." Id.

24. Taken together, these remarks, if true, suggest the possibility that Consumers gave consideration on September 21, 1976, to perhaps not disclosing certain information to the Licensing Board, and also to attempting to "drag out" the hearing process to Consumers' advantage. Either of these strategies, if adopted and acted upon, would be cause for serious concern, and thus we felt compelled to probe extensively into this matter during the evidentiary hearing. Based on our review of all the documentary evidence relating to the September 21 legal meeting and on the live testimony given, including careful consideration of the demeanor of the witnesses, we are satisfied that the Nute Notes do not accurately portray the intentions of Consumers and its attorneys regarding their approach to the suspension hearing.

Nor do they accurately reflect the actual conduct of Consumers and its attorneys in the proceeding.

25. First, with reference to the alleged "finesse" remark, only the Nute Notes among all the sets of notes reporting on the September 21 meeting suggest that this statement was made. When we asked the meeting participants what the term "finesse" meant to them, they testified at the hearing to a variety of definitions. It is clear that at the time the word was allegedly used, Rex Renfrow was engaged in a discussion of the issues to be addressed in the upcoming hearing and of the probable extent and duration of the hearing. See NRC Staff Ex. 3, Doc. No. 22, p. 4. Renfrow testified before us that he did remark that the suspension hearing would undoubtedly be much shorter if counsel for the Midland Intervenors did not participate. Renfrow Tr. 51,417-18, 51,421-22, 51,723-24; NRC Staff Ex. 3, Doc. No. 22, p. 4. That observation is certainly an accurate one, and, whether communicated on September 21 in terms of being able to "finesse issues" or "shorten the hearing", we find no legitimate reason on the basis of such a statement to fault Consumers' conduct in preparing for the suspension hearing, or to ascribe a wrongful intent to its attorneys. That conclusion is reinfored by our findings with respect to Renfrow's subsequent efforts, during the course of preparing for the hearings, to bring out and include in Temple's direct testimony specific reference to the Dow-Consumers contract negotiations. See FF ¶ 60, infra. This

would plainly not have been his approach if Renfrow had in fact harbored notions of attempting to "finesse" that matter in the sense of keeping it from the Licensing Board.

26. Our conclusion is much the same with respect to the reported "unaware witness" statement after hearing all the testimony. Rex Renfrow denied unequivocally that he ever suggested to Dow that it produce a nonknowledgeable witness. Renfrow Tr. 51,422-23; NRC Staff Ex. 3, Doc. No. 22, pp. 4-5, and Doc. No. 33, p. 3. He testified that his remarks on this subject were made in response to earlier expressions of concern by Dow employees over using Joseph Temple as a witness in the suspension hearing because of Mr. Temple's personal dissatisfaction with the project. Renfrow Tr. 51,427-31, 51,739-41; NRC Staff Ex. 3, Doc. No. 22, pp. 4-5 and Doc. No. 33, pp. 3-4.[18] Renfrow's recollection is that he suggested that Dow consider using a witness other than Temple, one who might not have the same personal resentments against Consumers. Renfrow Tr. 51,428-31; NRC Staff Ex. 3, Doc. No. 22, p. 5. The

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18 Prior to the September 21 meeting, Dow representatives appear to have voiced some concern to Consumers about using Temple as the Dow witness in light of Temple's personal views; indeed, Temple himself raised the question with Youngdahl the day following the September 13 meeting, when Consumers was first told of the Michigan Division's recommendations to Mr. Oreffice. Youngdahl Tr. 53,873. Moreover, several of those who were present at the September 21 meeting remember Leslie Nute questioning once again whether Temple was the best witness to testify for Dow. See Renfrow Tr. 51,413-14, 51,739-40; Falahee Tr. 52,265-66; Hanes Tr. 52,349, 52,409.

individuals he had in mind as possible alternates were Paul Oreffice and Alden Klomparens, the President of Dow U.S.A. and the head of the corporate review team, respectively, both of whom had full knowledge of the Michigan Division's interim position and were directly involved in the corporate review thereof. Renfrow Tr. 51,429; see also NRC Staff Ex. 3, Doc. No. 33, ¶ 6, and Doc. No. 36, ¶ 6. In fact, although it is not reflected in the Nute Notes, it is Klomparens' recollection that these two names were actually offered for consideration at the September 21 meeting. Klomparens Tr. 53,624-25.

27. We therefore cannot accept as completely accurate the report in the Nute Notes on the "witness" conversation at the September 21 meeting. Nute readily admitted that his notes were not a verbatim account of statements made. Nute Tr. 51,189-90. In this particular instance, the Nute Notes seem to us to have lost something in transcription. No reference to the suggested use of an "unaware witness" appears in any of the other sets of notes on this meeting. Compare NRC Staff Ex. 3, Doc. Nos. 24 and 34; CP Co. Ex. 1, Doc. No. 7. Others in attendance testified at the hearing that they recalled the conversation on this subject somewhat differently from Nute, or not at all.[19] Moreover,

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19 Compare Klomparens Tr. 53,717-21; Hanes Tr. 52,349; Bacon Tr. 52,011-12, 52,161; Falahee Tr. 52,266-67; Renfrow Tr. 51,423, 51,429-30. Nute may well have misunderstood Renfrow's comment that Dow might want to consider a witness other than
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there is absolutely nothing that we have heard or been shown with respect to Consumers' behavior after September 21 that so much as suggests any resistance to the designation by Dow of Joseph Temple as the Dow witness.[20] In these circumstances, we find no attempt by Consumers to put forward a witness not fully knowledgeable about Dow's reassessment of its commitment to take process steam from Consumers, including the views on the subject expressed internally by Dow's Michigan Division.

28. Nor do we find that Consumers' attorneys approached the suspension proceeding with a view to dragging their feet. While the Nute Notes contain such a suggestion, Nute admitted that he could make little sense out of it. Nute Tr. 51,269-75. Rex Renfrow, while acknowledging that he made the observation at the meeting that the Midland Intervenors

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Temple, someone who did not share the same personal animosities for the project.

20 We note that the reported "suggestion" by Renfrow with respect to an "unaware witness" occurred at the first meeting between the Consumers and Dow lawyers. Thereafter, despite numerous telephone conversations and meetings involving the attorneys in an effort to prepare for the suspension hearing, no mention was made of the possible use of a nonknowledgeable witness at the hearings. Nute acknowledged to us in the instant hearings that he never heard anything more on the matter. Nute Tr. 51,233. In fact, there was complete unanimity that Consumers from the outset readily accepted Dow's designation of Temple as the appropriate Dow witness to testify about Dow's corporate position regarding the steam contract. Nute Tr. 51,185-86; Wessel Tr. 52,625-27, 52,632-33; Renfrow Tr. 51,502-03, 51,778, 51,795-96; Bacon Tr. 52,105-06. And the documents support this testimony. NRC Staff Ex. 4, Doc. No. 18, p. 3.

would have little interest in expediting the then-anticipated subsequent hearing on the merits if construction were suspended, denied ever making the statement that Consumers "will drag feet in hearing on merits" as long as construction continues. Renfrow Tr. 51,433-34, 51,767-68; NRC Ex. 3, Doc. No. 26, p. 3, ¶ 4. He was equally at a loss to explain what possible advantage might be served by Consumers employing the tactic of "foot dragging". Renfrow Tr. 51,433-34; NRC Staff Ex. 3, Doc. No. 22, pp. 6-8.

29. In addressing this point at the hearing, Renfrow testified convincingly that Consumers could ill-afford to permit the uncertainty of a possible suspension order to last for any extended period of time. Renfrow Tr. at 51,434, 51,767-68. Not only would delay impact adversely on Consumers insofar as its financial commitments and supply contracts were concerned (id. at 51,767), but so Dow had made it abundantly clear to Consumers that it could tolerate no further delays of any sort, including any possible delays in the remand proceeding. Id. at 51,433; Bacon Tr. 52,082, 52,128. Certainly, at the time when Dow had under active consideration whether or not to continue its participation in the nuclear plant, it would have been impolitic, at the very least, for Consumers to have suggested on September 21 that it was prepared to engage in delay tactics. Nor can we understand how it would accrue to Consumers' benefit to "drag feet" at any

subsequent point in the hearing process, given Dow's sense of urgency that the project be completed and the fact that any licensing delay would only prolong the period during which Consumers' considerable investment was at risk pending final agency action.

30. We are, therefore, of the view that this is also a point on which the Nute Notes are unreliable. The reference to "foot dragging" by Consumers appears nowhere in the other sets of notes on the September 21 meeting. It was recalled by none of the other participants. Renfrow Tr. 51,433; Falahee Tr. 52,268-69; Bacon Tr. 52,013; Klomparens Tr. 53,722-24; Hanes Tr. 52,467. Moreover, the conduct of Consumers throughout the suspension hearings -- which was observed by two members of this Board -- dispels entirely any thought that a strategy of delay was being pursued.

31. We cannot leave the September 21 meeting without commenting on one further area of discussion. The Nute Notes report that the following statements were made at some point near the end of the meeting:

> Falahee brought up the point that Dow has an obligation (Bacon interjects 'Section 3') under the General Agreement to support Consumers in the licensing proceeding. Falahee said 'If Dow takes this posture, Consumers and Dow will have a helluva legal problem' * * * - Hanes replied that Dow's witness would tell the truth as he honestly believed it to be, whoever the Dow witness - Falahee then made naked threat that if Dow testimony not supportive of

> Consumers * * * and that results in suspension or cancellation of permit, then Consumers will file suit for breach and include as damages cost of delay, cost of project if cancelled and all damages resulting from cancellation of project if it causes irreparable financial harm to Consumers * * *. [NRC Staff Ex. 3, Doc. No. 26, p. 3 ¶4.]

32. There appears to be no real disagreement among those at the meeting that Falahee made pointed reference to the potential for "a helluva legal problem" between Dow and Consumers in the event of suspension or cancellation of the Midland permits due to Dow's nonsupport of the project. See Falahee Tr. 52,251-52; Bacon Tr. 52,015-16; Renfrow Tr. 51,447, 51,744; Hanes Tr. 52,351; Klomparens Tr. 53,626-27; Nute Tr. 51,234-36. However, individual perceptions of Mr. Falahee's remarks varied.

33. The comments came close to the end of Rex Renfrow's discussion of the likely impacts on the outcome of the suspension hearing if Dow's corporate review reached one of three possible conclusions: (a) to adhere to the steam contract and continue to support the project -- probably no suspension; (b) to honor its contractual commitments but make clear that it views the arrangement as no longer advantageous to Dow -- 50-50 chance of suspension; or (c) to withdraw its support entirely from the project -- probable suspension. See Renfrow Tr. 51,447-48; Falahee Tr. 52,250-51; Bacon Tr. 52,024-26, 52,166; Klomparens Tr. 53,626, 53,725; NRC Staff Ex. 3, Doc. No. 34, pp. 3-4.

34. Mr. Falahee testified that he interjected his observation concerning the potential for "a helluva legal problem" to alert his counterpart at Dow, Mr. Hanes, and the other Dow representatives that the administrative ramifications discussed by Rex Renfrow were not without possible legal consequences in the event that a decision was made by Dow to walk away from the contract. Falahee Tr. 52,265. His recollection was that the comment was made matter-of-factly, in a calm tone (id. at 52,260, 52,263, 52,270), and with the added observation that he sincerely hoped this (i.e., a helluva legal problem) could be avoided -- to which Mr. Hanes eagerly agreed. Id. at 52,269-70. The other Consumers' representatives at the meeting testified that they detected no particular reaction by Dow to the statement. Renfrow Tr. 51,449; Bacon Tr. 52,016-17.

35. Leslie Nute, however, apparently was exceedingly disturbed by Falahee's remarks. The editorial parentheticals he incorporated in his meeting notes reflect that he viewed the references to possible litigation between Dow and Consumers as a "naked threat" which came "pretty damn close to blackmail". NRC Staff Ex. 3, Doc. No. 26, p. 3; Nute Tr. 50,790, 51,238-39. In Nute's mind, the Falahee statements may have contained an underlying suggestion that Dow's testimony at the suspension hearing had better be supportive of the project, irrespective of Dow's actual views about the nuclear plant, or Consumers would sue for breach of contract. Nute Tr. 50,761, 50,765, 50,790, 51,260.

36. Since none of the other participants in the meeting understood the statements by Falahee in quite the same way, and all were unequivocal in rejecting any suggestion that Consumers was seeking to influence Dow to falsify its position or to present false testimony (Hanes Tr. 52,423-24; Klomparens Tr. 53,696-97; Renfrow Tr. 51,449-52, 51,456; Bacon Tr. 52,016-17, 52,036-37; Falahee Tr. 52,274-75),[21] we are inclined to believe that Nute's editorializing reflects an overreaction on his part to what he actually heard. Nothing in the other sets of meeting notes, or in subsequent events, suggests to us any attempt by Consumers to use threats, coercion or intimidation as a means of forcing Dow to give less than truthful testimony at the suspension hearing. See Temple Tr. 53,497-98, 53,506-09; Wessel Tr. 52,970.

37. At the same time, we are mindful of the fact that the prospect of contract litigation with Consumers weighed significantly on the ultimate decision by the Dow U.S.A. Board to continue its support of the Midland project. Oreffice Tr. 54,141, 54,224-26.[22] The subject was discussed at a meeting

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21 See also the Affidavits filed with the Licensing Board by Messrs. Falahee, Renfrow and Bacon in support of Consumers' Motion for Summary Disposition, dated March 30, 1979. NRC Staff Ex. 3, Doc. Nos. 33, 36 and 37. Mr. Hanes testified that he was shocked by Falahee's reference to litigation; however, he did not view it as an effort to coerce Dow into testifying untruthfully at the hearing. Hanes Tr. 52,352, 52,362; but see id. 52,419-24; see also p. 61, infra.

22 Paul Oreffice testified at the suspension hearing that (continued next page)

attended by the chief executives of both companies (Paul Oreffice of Dow Chemical U.S.A. and A. H. Aymond of Consumers) that occurred on September 24, 1976. The meeting was arranged for the specific purpose of allowing Consumers to provide input into Task Force No. 6 of the Dow corporate review -- the task force assigned to "consider the impact of the [Michigan] Division position and a similar Dow corporate position on Consumers Power." NRC Staff Ex. 3, Doc. No. 15.

38. Aymond spoke from a previously prepared outline at the meeting (NRC Staff Ex. 4, Doc. No. 9), but he neither distributed nor read it (Aymond Tr. 54,054; Bacon Tr. 52,096). See note 24, infra. He first reviewed the anticipated results in the suspension hearing if Dow took various positions at the conclusion of its corporate review, ranging from the one extreme of enthusiastic support of the project to the other extreme of a complete abrogation of its existing contract obligations. Aymond Tr. 54,074-75.[23] There followed a rather

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the possibility of a lawsuit by Consumers if the permits were suspended was a significant factor in his decision to continue with the project (Suspension Tr. 2699, 2713). Temple, during his cross-examination by counsel for the Midland Intervenors at the suspension hearing, speculated (he was not present when the Dow U.S.A. Board decided the Dow position) that the litigation prospect was the determinative factor in the decision of the Dow U.S.A. Board to reject the Michigan Division's interim position. Suspension Tr. 2310-12, 2611-12.

23 There are six separate sets of notes on the September 24, 1976 meeting, all of which give a similar account of the matters discussed. See NRC Staff Ex. 4, Doc. No. 6 (continued next page)

detailed discussion of the different costs associated with project delays due to suspension, as well as of the costs Consumers would incur in the event of a cancellation of the Midland permits. See NRC Staff Ex. 4, Doc. No. 7, Exhibits 1, 2 and 3. Mr. Aymond then advised Dow that if Consumers should suffer such losses as a result of a decision by Dow "to repudiate" the contract, Consumers would sue to recover damages for breach; he further advised that if Dow undertook "to frustrate" completion of the project "without being obvious", that, too, might be a matter for the courts to resolve. NRC Staff Ex. 4, Doc. No. 6, p. 3.[24]

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(Nute), Doc. No. 10 (Temple), Doc. No. 11 (Bacon), Doc. No. 14 (Howell), Doc. No. 17 (Klomparens); CP Co. Ex. 1, Doc. No. 8 (Hanes).

24 See also Aymond Tr. 54,055, 54,089-90; Bacon Tr. 52,089, 52,099-100; Howell Tr. 53,997; Falahee Tr. 52,289-91; Youngdahl Tr. 53,820. At the hearings, considerable attention was devoted to Mr. Aymond's precise formulation of his comments regarding the prospect of a Consumers' lawsuit against Dow in the event of a suspension order. The Aymond outline prepared by Consumers in advance of the meeting, and from which he spoke, contains a final sentence in paragraph 5 which suggests that Consumers would consider as "inconsistent with Dow's contract obligations" a position by the company which amounts to outright repudiation of the steam and electric contracts, or, alternatively, a position by the company which affirms its intention to adhere to the existing contract obligations but expresses disenchantment with the arrangement on the ground that "an alternative [power] source or sources would be more advantageous to Dow * * *." NRC Staff Ex. 4, Doc. No. 9, ¶5. This raised a question whether Mr. Aymond's actual oral presentation at the meeting had tracked the outline.

After hearing the testimony and reviewing the meeting
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39. We find nothing inappropriate about these remarks. The September 24 meeting was explicitly arranged for the purpose of receiving from Consumers, for consideration as part of Dow's corporate review, what Consumers viewed as the likely impact on it of a decision by the Dow U.S.A. Board similar to the interim position expressed by the Michigan Division. We cannot imagine that a company having the size, experience and business acumen of Dow could have been too surprised to hear that a decision to repudiate or frustrate its contracts with Consumers would likely result in substantial litigation. That is often the consequence when one or the other party to a contract elects not to honor its contractual

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notes, it is clear to us that Mr. Aymond's remarks in this area departed in one material respect from the prepared outline. He did indeed advise Dow that a repudiation of the contract would result in litigation if the Midland permits were suspended. Aymond Tr. 54,055, 54,058; see also Youngdahl Tr. 53,900, 53,909. However, there was no representation that a lawsuit could be expected if Dow agreed (albeit without enthusiasm) to abide by its contract obligations. Bacon Tr. 52,094; Falahee Tr. 52,290; CP Co. Ex. 1, Doc. No. 8, p. 3. Rather, as the testimony and all the meeting notes indicate, Dow was advised that an effort by Dow "to frustrate" completion of the project might well lead to court action. Aymond Tr. 54,092-93; NRC Staff Ex. 4, Doc. Nos. 6, 10, 11, 14; CP Co. Ex. 1, Doc. No. 8. Aymond explained that the decision by Consumers regarding litigation in the event of a perceived attempt by Dow to frustrate the contract would depend largely on Dow's intent -- i.e., whether it acted in good or bad faith -- and that might well be an issue for the courts to resolve. Aymond Tr. 54,026-28, 54,050, 54,089-90; see also Bacon Tr. 52,094-96; Howell Tr. 53,997; Falahee Tr. 52,288-91; Youngdahl Tr. 53,818, 53,900-01, 53,909.

obligations; we cannot fault Consumers for making clear its resolve in this respect.

40. Notably, Mr. Aymond did not advise Dow to support the Midland project at the suspension hearing even if it determined that the project was no longer good for Dow. Indeed, when Paul Oreffice suggested that Dow might ultimately have to testify that "Dow can't go beyond 1985 or it walks away", Mr. Aymond, while acknowledging that such testimony might be troublesome to Consumers, responded: "you have to tell the truth under oath or you will go to jail". NRC Staff Ex. 4, Doc. No. 6, p. 4; see also NRC Staff Ex. 4, Doc. No. 10; CP Co. Ex. 1, Doc. No. 8. In these circumstances, we see nothing wrong with alerting Dow to the potential for court litigation with Consumers if the decision of the Dow U.S.A. Board was, on a reassessment of all factors considered in the corporate review, to abandon the project.

41. As it turned out, that was not the decision. On September 27, 1976, the review team presented to the Dow U.S.A. Board a full report on the various task force assignments. At the conclusion of the presentation, Al Klomparens advised the Dow U.S.A. Board that the corporate review team had reached the following conclusions:

> 1. Nuclear continues to be attractive to the Michigan Division based upon Consumers' projections -- but

(a) the attractiveness has diminished significantly in the last 5 years;

(b) coal gasification may be better;

(c) there are many uncertainties with significant adverse impacts.

2. Considering all factors -- Dow should positively support the Midland nuclear project. [NRC Staff Ex. 4, Doc. No. 16, p. 14; Doc. No. 17, pp. 10-11; Klomparens Tr. 53,682-83; Nute Tr. 50,887; Temple Tr. 53,597-99; Oreffice Tr. 54,139-40.]

42. The members of the Dow U.S.A. Board then adjourned to another room to consider the matter. After approximately 15-20 minutes (Oreffice Tr. 54,224; Temple Tr. 53,595; Nute Tr. 50,911; Klomparens Tr. 53,687) they returned to announce that the Dow U.S.A. Board had concluded that "circumstances have not changed sufficiently to call for any modification of [Dow's] commitment to nuclear produced steam and electricity." NRC Staff Ex. 4, Doc. No. 18, p. 1. Paul Oreffice added that Dow intended to keep all of "its options open" in the event that there should occur "any significant changes of any kind" in the future. NRC Staff Ex. 5, Doc. No. 17 DD, ¶IV.C., p. 4; see also NRC Staff Ex. 4, Doc. No. 18, p. 1. He directed the Michigan Division "to support Consumers Power, as requested, in the forthcoming hearings, and to make available to Consumers and the Licensing Board, as witnesses, Dow personnel who were fully informed on the Dow position and

who could testify to all the relevant facts concerning the Dow position." NRC Staff Ex. 5, Doc. No. 17 DD, ¶IV.C., p. 4.

D. PREPARATION OF TEMPLE'S DIRECT TESTIMONY

43. The Dow corporate position was immediately communicated by telephone to Judd Bacon of Consumers by Dow's outside counsel, Milton Wessel. NRC Staff Ex. 4, Doc. No. 18. The two discussed areas to be covered by the Dow witness designated to testify at the suspension hearings; four individuals, including Joseph Temple, were mentioned as the likely candidates. Id. In a second phone conversation with Bacon the following day, September 28, 1976, Wessel and Nute identified Temple as the Dow witness. NRC Staff Ex. 3, Doc. No. 30, p. 6. A meeting among counsel to prepare for the upcoming hearings was scheduled for September 29. NRC Staff Ex. 4, Doc. No. 20, p. 2.

44. The record clearly reflects that the outside attorneys retained by Consumers and Dow to handle the suspension proceeding approached the meetings on hearing preparation from different perspectives and with different objectives in mind. Rex Renfrow and David Rosso, Consumers' counsel, had not represented Consumers in the original licensing proceeding or in the judicial appeal resulting in the remand order. Renfrow Tr. 51,403-04; Rosso Tr. 53,097. They were neither involved in, nor particularly familiar with, the

extended negotiations between the two companies with respect to contract modifications. Renfrow Tr. 51,403; Rosso Tr. 53,098. As such, Consumers' outside counsel did not, at least initially, fully appreciate the personal animosities that the Dow negotiators felt toward certain of their Consumers' counterparts. Renfrow Tr. 51,405, 51,462-63; Rosso Tr. 53,097-99.[25] They entered the referenced meetings in a spirit of cooperation, and fully anticipated receiving from Dow whatever information was needed to prepare adequately for the hearings. Rosso Tr. 53,209. At no time during this period did Renfrow or Rosso perceive Dow as an adversary of Consumers. Renfrow Tr. 51,501; Rosso Tr. 53,240.

45. Milton Wessel, outside counsel for Dow, was not nearly so trusting. He had been involved in Dow's unsuccessful effort in late 1974 to obtain a "reasonable assurance" letter from Consumers (see FF ¶¶ 3-5, supra; Wessel Tr. 52,522), and, since then, had actively promoted the idea of initiating a lawsuit against Consumers to secure release from the steam and electric contracts on the ground that Consumers had failed to comply with the "best efforts" clause. Wessel Tr. 52,475-79,

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25 On several occasions in late 1975 and early 1976, Temple, the leader of Dow's negotiating team, advised his counterpart at Consumers of strained feelings he perceived to exist among employees of the respective companies. See NRC Staff Ex. 1, Doc. No. 36, p. 4; NRC Staff Ex. 2, Doc. No. 4, pp. 7-11; Doc. No. 16, p. 3. He particularly objected to Judd Bacon's active participation in the negotiating sessions. NRC Staff Ex. 2, Doc. No. 4, pp. 7-11.

52,503, 52,510, 52,985; Nute Tr. 51,163-64; and see NRC Staff Ex. 3, Doc. No. 12; NRC Staff Ex. 4, Doc. No. 41. Wessel knew full well from conversations with Nute of the frustrations felt by Temple and the other members of Dow's negotiating team. Wessel Tr. 52,834-37; Nute Tr. 50,562-65. He also was aware of Consumers' statements in the September 21 and 24 meetings concerning a possible damages action against Dow for breach of contract if Dow's repudiation or frustration of the existing contracts caused suspension of the Midland permits. Wessel Tr. 52,872, 52,877, 52,987-88, 53,056; Nute Tr. 50,798. Accordingly, Mr. Wessel testified that he had no intention of being cooperative with Consumers' lawyers in the meetings prior to the hearing. Wessel Tr. 52,492, 52,549. Rather, he had as his twofold objective doing everything possible to protect Dow against a later lawsuit by Consumers, while at the same time putting Dow in the best possible litigating posture in the event that such a lawsuit should ultimately be brought. Wessel Tr. 52,504-05, 52,510. In his view, the relationship at the time between the two companies was definitely an adversarial one, and Renfrow and Rosso were regarded by Wessel as his adversaries. Wessel Tr. 52,492, 52,523-26.

46. In this setting, the tensions that surfaced at the ensuing meetings were inevitable. Requests by Rex Renfrow and Judd Bacon for information from Dow (including internal documents) relevant to the status of contract negotiations and

to the Michigan Division's interim position -- which were considered important to familiarize Consumers' attorneys with background facts helpful to their overall knowledge of the corporate review and the Dow U.S.A. Board decision (NRC Staff Ex. 4, Doc. No. 21, pp. 12, 18) -- were resisted by Wessel on grounds that the information and materials were particularly sensitive and, in any event, were not really germane to the issues involved. Wessel Tr. 52,739, 52,923; NRC Staff Ex. 4, Doc. No. 21, pp. 5, 6, 7, 12-13; NRC Staff Ex. 5, Doc. No. 9, pp. 4-5. Finally, agreement was reached on October 15, 1976, whereby Dow allowed Messrs. Renfrow and Rosso, for purposes of hearing preparation only, to review internal Dow documents considered by Dow to be "confidential" on the condition that Consumers' outside attorneys (and their law firm) agreed not to represent or advise Consumers in any subsequent contract negotiations with Dow. NRC Staff Ex. 4, Doc. No. 28. As for disclosure of this "confidential" material to other parties, Wessel's position up to commencement of the hearing was that it was privileged and would not be turned over unless compelled by subpoena. Renfrow Tr. 51,604; NRC Staff Ex. 4, Doc. No. 21, p. 7; NRC Staff Ex. 5, Doc. No. 9, p. 10.[26]

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26 It appears that Mr. Wessel abruptly changed his position on this point at the start of the hearing without any advance notice to Consumers' counsel, agreeing to produce all Dow documents requested by counsel for the Midland Intervenors. Renfrow Tr. 51,680, 51,893; Rosso Tr. 53,212-13; Suspension Tr. 206-212.

47. In this latter connection, the record shows that Wessel took the position prior to the hearing that Dow was not a party to the suspension proceeding. NRC Staff Ex. 4, Doc. No. 26; NRC Staff Ex. 5, Doc. No. 9, p. 3; Doc. No. 32.[27] From this perspective, he proceeded throughout the preparation of the Temple testimony to try to maneuver Consumers' counsel into a position of explicitly directing all aspects of Dow's participation, as opposed to offering Dow's assistance voluntarily. Wessel Tr. 52,548-49, 52,868-71. As Milton Wessel stated in one of the early meetings among the attorneys, held on October 12, 1976:

> * * * he wanted to emphasize once again that Dow did not consider themselves a party and that Mr. Temple's testimony was a Consumers Power document and Consumers Power would decide what would actually be put in. * * * He then emphasized that Consumers Power would be the authoring party, and Dow was only the supplying party. [NRC Staff Ex. 5, Doc. No. 9, p. 3; emphasis in original.]

48. Such a strategy was designed essentially to protect Dow against a later claim by Consumers, in the event of an adverse ruling in the suspension proceeding, that some affirmative action by Dow at the evidentiary hearing had caused suspension or revocation of the Midland permits. Wessel Tr. 52,546, 52,548, 52,607, 52,714, 52,870-71; Renfrow Tr.

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27 Consumers did not agree with Wessel's position that Dow was not a party to the suspension proceeding. Renfrow Tr. 51,841; NRC Staff Ex. 5, Doc. No. 11.

51,607-08. To remove the prospect of such an allegation, Wessel testified that he took steps to insure that Consumers' counsel alone would appear ultimately responsible for the preparation of the direct written testimony of Joseph Temple. Wessel Tr. 52,536-37, 52,691-92; see NRC Staff Ex. 5, Doc. No. 22, p. 3.

49. Thus, when asked to prepare an initial draft of testimony (NRC Staff Ex. 4, Doc. No. 18, p. 4), Wessel said he intentionally submitted "a lousy draft" so that it would be unacceptable to Renfrow and Rosso. Wessel Tr. 52,911-13, 52,699; see NRC Staff Ex. 5, Doc. No. 17AA. In addition, he resisted attempts by Consumers' attorneys to meet with Temple early in the drafting process to discuss the nature and substance of his prepared testimony, suggesting that, instead, such a discussion follow the preparation of a proposed text which could be reviewed for accuracy by Temple. Rosso Tr. 53,211-12.

50. In response to a request on September 29, 1976 from Rex Renfrow for information from Dow on a number of points outlined by Renfrow as possible areas to be covered in the Temple testimony (NRC Staff Ex. 5, Doc. No. 17BB), Nute prepared a narrative discussion for review by Consumers' attorneys. NRC Staff Ex. 5, Doc. No. 17DD. While this material was characterized by Nute as "an outline of testimony" in the cover letter transmitting the document to Judd Bacon on

October 6, 1976 (NRC Staff Ex. 4, Doc. No. 25), Nute testified at the hearing that his writeup was not supposed to be an actual draft of testimony, but only a working document for use by Consumers' attorneys. Nute Tr. 50,964-65, 51,043-44; and see Dow Ex. 1.[28]

51. At a meeting of counsel held on October 12, 1976, the information contained in the Nute memorandum was discussed. NRC Staff Ex. 5, Doc. No. 9, pp. 5-13. There were essentially two areas of disagreement between the Dow and Consumers attorneys with respect to what information should be included in the Temple testimony. These differences involved the matter of the Michigan Division review and recommendations, and the matter of the then unresolved contract negotiations between Dow and Consumers.

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28 At the hearing, Wessel and Nute testified that Temple contributed to the preparation of both the initial statement prepared by Wessel for discussion at the September 29 meeting and the October 6 Nute memorandum. Wessel Tr. 52,696, 52,699, 52,910; Nute Tr. 51,044, 51,285. However, during discussions of the Temple testimony with Consumers' counsel, Wessel made a point of emphasizing that these documents had been prepared by counsel only. Wessel Tr. 52,694-95, 52,910-11; NRC Staff Ex. 5, Doc. No. 9, p. 2. This was contrary to a specific request made by Renfrow on September 29, 1976, that he wanted "Joe Temple to give him an outline of what he, Joe, wants to say." NRC Staff Ex. 4, Doc. No. 21, pp. 15, 23. Rosso testified at the hearing that one of his frustrations throughout in undertaking to prepare the direct written testimony was being denied access to Temple or to anything written by Temple. Rosso Tr. 53,210-12.

52. Milton Wessel was adamant that there was no need to go into the Michigan Division's interim position with regard to the nuclear project, or the reasons therefor. Wessel Tr. 52,923-24; Nute Tr. 50,924, 51,112-13; Renfrow Tr. 51,513, 51,522-23, 51,786-87; Rosso Tr. 53,161, 53,220. His position was that the only "relevant" concern in the suspension hearing was the ultimate, official Dow position announced at the conclusion of the full corporate review. Wessel Tr. 52,943, 53,022; Renfrow Tr. 51,575.[29] He expressed the concern that any reference in Temple's direct testimony to the Michigan Division review would invite cross-examination on Temple's personal views about Consumers and the nuclear project, which, if made public, could have an adverse impact on efforts to conclude contract negotiations. Wessel Tr. 52,755-56; Renfrow Tr. 51,786-87; NRC Staff Ex. 4, Doc. No. 21, p. 7; NRC Staff Ex. 5, Doc. No. 9, p. 7.

53. Messrs. Renfrow and Rosso did not agree with Wessel that the Michigan Division interim position was irrelevant to the suspension hearing. Renfrow Tr. 51,513, 51,549-50, 51,788-89; Rosso Tr. 53,162-64, 53,170-71. However, they fully agreed that the interim conclusion of the Michigan

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29 This had been Wessel's position from the outset. See Wessel's initial draft of testimony. NRC Staff Ex. 5, Doc. No. 17AA; see also NRC Staff Ex. 4, Doc. No. 21, pp. 4, 13-15; NRC Staff Ex. 5, Doc. No. 9, pp. 6-7; Wessel Tr. 52,642, 53,022, 52,923-24.

Division was not "material" to the inquiry in light of the subsequent decision to the contrary of the Dow U.S.A. Board. See FF ¶ 42, supra; Renfrow Tr. 51,575, 51,787; Rosso Tr. 53,164-67; NRC Staff Ex. 3, Doc. No. 32, p. 5.

54. Initially, there appears to have been a difference of opinion between the two Consumers' lawyers as to the treatment to be accorded this matter in the direct testimony. Rex Renfrow, guided largely by his past experience in NRC licensing proceedings as an NRC Staff member in prior years and then as a private practitioner (Renfrow Tr. 51,401-02), took the position that the Michigan Division review and recommendations, including Joseph Temple's personal views about the nuclear project, would inevitably be brought out at the hearing (Renfrow Tr. 51,513, 51,549-50; and see NRC Staff Ex. 6). Accordingly, simply as a matter of "trial tactics", he urged that the matter be covered in the direct testimony, even though he deemed it not to be material, so as to present the Michigan Division's interim position, and the reasons therefor, in their best light. Renfrow Tr. 51,549-50, 51,788; Rosso Tr. 53,161-62; NRC Staff Ex. 4, Doc. No. 21, pp. 14, 19-20. David Rosso's first reaction on this subject was to not include any reference to the Michigan Division interim position in Temple's direct testimony since it was no longer a material fact once it had been rejected by the Dow U.S.A. Board. Rosso Tr. 53,166, 53,169-70; NRC Staff Ex. 5, Doc. No. 9, p. 7. By the October

12 meeting, however, Rosso was, for tactical reasons, leaning more toward Renfrow's view, observing: "when Consumers Power considers what to put into Temple's direct testimony, they will try and anticipate what Mr. Cherry [counsel for the Midland Intervenors] is going to ask on cross-exam." NRC Staff Ex. 5, Doc. No. 9, p. 7; see Rosso Tr. 53,220.

55. Following further consultation on the matter with another partner in their law firm, Messrs. Renfrow and Rosso ultimately decided, on or about October 17, 1976, not to include the Michigan Division position in the Temple direct testimony. Renfrow Tr. 51,597-98; Rosso Tr. 53,169-70. NRC Staff Ex. 3, Doc. No. 32, p. 7. It was their considered judgment that whatever dissatisfaction with the nuclear project had been expressed by a division of Dow, that interim position was not a material fact once the Dow U.S.A. Board determined, on the basis of a full corporate review, to reject it. Renfrow Tr. 51,550, 51,574-75; Rosso Tr. 53,164. They thus saw no compelling reason to include it in Temple's written testimony. Indeed, Rosso expressed some concern that mention of the Michigan Division viewpoint on the direct case might perhaps even mislead the Licensing Board into thinking it was still of some importance -- when in reality it was not. Rosso Tr. 53,169-77. This consideration, when combined with Dow's resistance to making any reference in the direct testimony to the Michigan Division review and with the need to get on with

the task of preparing testimony, overrode the strategic advantages of inclusion and resulted in the decision to address only the material fact of Dow's official position in Temple's direct testimony. Renfrow Tr. 51,549-50, 51,597.

56. At the same time, Consumers' counsel determined to make available to the NRC Staff and the Midland Intervenors all documents they had in their possession, and had received from Dow, discussing or having reference to the Michigan Division's interim position, as well as to the other matters covered in the Temple direct testimony. Renfrow Tr. 51,550; Rosso Tr. 53,167, 53,170; NRC Staff Ex. 3, Doc. No. 32, pp. 7-8. Included among these materials was the official set of Dow notes taken at the September 13, 1976 meeting, which fully set forth the Michigan Division's conclusions and recommendations. NRC Staff Ex. 3, Doc. No. 32, p. 8; see NRC Staff Ex. 3, Doc. No. 20, pp. 8-10. Production of these documents in Jackson, Michigan, for review and copying was done voluntarily by Consumers; no document request was served on the company. See CP Co. Ex. 1, Doc. No. 16. Rex Renfrow testified that Consumers took such action because it viewed the produced materials to be potentially "relevant" to the suspension hearing, and therefore properly subject to review by the other parties in the proceeding even though not "material" to the issues in question. Renfrow Tr. 51,530-31; see also Rosso Tr. 53,167, 53,170; NRC Staff Ex. 6.

57. We find that the decision of Consumers' counsel to address in Temple's direct testimony only the official Dow position regarding its nuclear steam contract intentions -- but to voluntarily make available to the NRC Staff and the Midland Intervenors the documents in its possession alerting the other parties to the Michigan Division's interim position and the reasons therefor -- was based on a good faith assessment that the Michigan Division's view, once rejected by the Dow U.S.A. Board, was not material to the Licensing Board's review on any reasonable evaluation of the issues involved in the suspension hearing, notwithstanding its general relevance to the inquiry at hand. Rather, the material fact for the Board's consideration was Dow's present intention, as determined by Dow's senior corporate officials. See ALAB-458, supra, 7 NRC at 167 & n.45. Thus, the judgment exercised by Messrs. Renfrow and Rosso in this regard was entirely reasonable and proper.

58. With regard to the other area of disagreement between the Consumers and Dow attorneys in connection with Temple's direct testimony -- i.e., the treatment of the status of contract negotiations -- the resolution was to include a discussion of this matter in the prepared text. See Temple Test., at pp. 6-8, following p. 220 of Suspension Transcript.

59. Again, Milton Wessel's position was to remain silent about the negotiations on the ground that they were irrelevant to the suspension hearing, although perhaps germane

to the later hearings on the merits of the remanded issues. Wessel Tr. 52,920-21, 52,923; Renfrow Tr. 51,522-24; Rosso Tr. 53,174-76; NRC Staff Ex. 3, Doc. No. 31, p. 2; Doc. No. 32, pp. 3, 5; NRC Staff Ex. 4, Doc. No. 21, pp. 5, 7, 15; NRC Staff Ex. 5, Doc. No. 17CC (prepared by Wessel). He was concerned that any reference in the direct testimony to ongoing contract negotiations would inevitably lead to examination into the sensitive area of Dow's internal negotiating positions, thereby not only jeopardizing the efforts to reach agreement with Consumers on contract modifications but also perhaps giving the Licensing Board the incorrect impression that the relationship between the companies was a tenuous one. Wessel Tr. 52,711-12; Renfrow Tr. 51,525, 51,554; Rosso Tr. 53,159-60; NRC Staff Ex. 4, Doc. No. 21, pp. 5, 6, 7, 12-13, 15, 16; NRC Staff Ex. 5, Doc. No. 9, p. 7, 11.

60. Renfrow and Rosso disagreed. Renfrow Tr. 51,525; Rosso Tr. 53,188-89. NRC Staff Ex. 3, Doc. No. 31, pp. 2-3; Doc. No. 32, p. 4. While appreciating Mr. Wessel's legitimate concerns about disclosure of internal bargaining positions during the course of intricate negotiations (Renfrow Tr. 51,554), Consumers' attorneys determined that the status of contract negotiations had to be discussed in Consumers' direct case in light of the Aeschliman remand order. Renfrow Tr. 51,544; Rosso Tr. 53,188-89; NRC Staff Ex. 3, Doc. No. 31, p. 5; Doc. No. 32, p. 4. We find this decision to have been a reasonable and proper exercise of judgment.

61. On October 22, 1976, Consumers forwarded to Dow "a draft of testimony for Joe Temple", with a request that Dow "have a redraft in our hands by about October 27". NRC Staff Ex. 5, Doc. No. 18. The Consumers draft, prepared by Rosso largely on the basis of the Nute memorandum of October 6 (NRC Staff Ex. 5, Doc. No. 17DD) and the discussion with Messrs. Wessel and Nute on October 12 (Rosso Tr. 53,352), was in two parts. NRC Staff Ex. 5, Doc. No. 17EE.

62. The first part, headed "Outline of Proposed Temple Testimony", was in the form of a first-person narrative; it discussed the corporate review of the nuclear project in 1976, the September 27 decision made by the Dow U.S.A. Board to continue for the present its participation in the plant (but with all its options left open to reexamine the situation in the event of changed circumstances), and the companies' respective positions on proposed contract modifications under negotiation. NRC Staff Ex. 5, Doc. No. 17EE, pp. 1-10. The second part, headed "Outline of Detail of Last Review Conducted (not currently planned as part of Direct Testimony)", also in first-person narrative form, dealt exclusively with the review undertaken by the Michigan Division, its interim position and recommendation for a corporate review, Paul Oreffice's response thereto with the seven task force assignments, and the ultimate decision reached by the Dow U.S.A. Board. NRC Staff Ex. 5, Doc. No. 17EE (following p. 10).

63. Nute and Wessel, focusing only on the first part of Rosso's two-part draft, found it to be unacceptable. See NRC Staff Ex. 5, Doc. No. 19. They prepared for discussion at a meeting of counsel scheduled for November 1, 1976, a redraft of the Temple testimony, dated October 29, 1976, which contained some substantive changes (Nute Tr. 51,343) and set forth the narrative in the third-person. NRC Staff Ex. 5, Doc. No. 17GG.

64. The November 1 meeting was devoted to a discussion of the two October drafts, and a joint effort to put together a final version of the direct testimony. NRC Staff Ex. 5, Doc. No. 22. Wessel advised Renfrow and Rosso that the October 22 draft prepared by Consumers was objectionable primarily because it was, in Wessel's opinion, susceptible to being misread by someone unfamiliar with the events and circumstances as a "complete story", when it was in fact a narrative covering only those facts considered to be material to the issues in the suspension hearing. Wessel Tr. 52,759, 52,787; Nute Tr. 51,332-34; Rosso Tr. 53,242, 53,251; Renfrow 51,614-15; NRC Staff Ex. 5, Doc. No. 24, p. 1, Doc. No. 25; NRC Staff Ex. 20. While Wessel registered this objection at the meeting by describing the Rosso draft as "misleading, or disingenuous" (NRC Staff Ex. 5, Doc. No. 22, p. 3; and see NRC Staff Ex. 5, Doc. No. 26), he testified at the hearing that his use of these terms was intended more for effect than for the

purpose of suggesting any actual impropriety on Mr. Rosso's part. Wessel Tr. 52,767-68. Wessel readily admitted that the Rosso draft was not, in his view, substantively inaccurate or intentionally dishonest. Wessel Tr. 52,798-800, 52,945, 53,010. His real concern was that it might be misread "because of the way it was put together." NRC Staff Ex. 5, Doc. No. 22, p. 3.

65. The Dow redraft of October 29 apparently sought to cure this alleged problem by using the third-person. Nute Tr. 51,021-23, 51,080-82; Wessel Tr. 52,768, 52,775-78. The Dow attorneys also perceived that this "third-person format" would give the appearance they desired, i.e., that "the testimony was Consumers Power's doing and not Dow's", thereby precluding the possibility of "Consumers Power coming back at a later date and saying that Dow shot the 'thing' down". NRC Staff Ex. 5, Doc. No. 22, p. 3; Doc. No. 25.

66. David Rosso asked whether Dow's apparent problems with his draft might be better resolved "if the testimony was put in 'question and answer' format". NRC Staff Ex. 5, Doc. No. 22, p. 3. This suggestion appealed to Wessel since "this would at least show that the testimony was being brought out in response to Consumers Power's questions and not a product solely of Dow". Id.; see also Nute Tr. 51,079, 51,082, 51,091; NRC Ex. 5 Doc. Nos. 25 and 26. Following a discussion regarding how to word the direct testimony in

several particulars (NRC Staff Ex. 5, Doc. No. 22, pp. 4-6), counsel turned their collective attention to preparing yet another draft of testimony, using the question and answer format and relying primarily on the Dow draft of October 29. Duran Tr. 50,324; Renfrow Tr. 51,616; Nute Tr. 51,079, 51,082; NRC Staff Ex. 5, Doc. No. 22, p. 6.

67. This November 1 draft (NRC Staff Ex. 5, Doc. No. 17HH) was then given to Joseph Temple for his review, comments and approval. Nute Tr. 51,095; Temple Tr. 53,548; Rosso Tr. 53,380; Dow Ex. 1. After Temple made such changes as he deemed appropriate "to reflect his style, or his understanding of the facts", the testimony was put in final form and transmitted to Rosso for filing with the Licensing Board on November 4, 1976. NRC Staff Ex. 5, Doc. No. 26.

68. In its final form, Temple's direct testimony addressed generally the continuing review process at Dow relating to the nuclear steam contracts, but made no specific reference to the Michigan Division's stated disenchantment with the Midland project in September 1976. It set forth the official Dow position to continue its participation in the nuclear plant but keep all its options open to reevaluate that position if circumstances should change. Specific reference was made to alternative sources of steam considered by Dow, and to the fact that its own fossil-fuel units were antiquated and could not realistically be relied upon as a safe and reliable

source of steam beyond 1984 at the outside. In this latter connection, mention was made of Dow's concern over its ability to obtain from the Michigan Air Pollution Control Commission continued permission to operate its existing fossil-fueled units in 1980.

69. The Temple direct testimony then "emphasized that the timetable of the Midland nuclear plants is the critical factor in all of this, and that in the near-term this timetable is Dow's most critical problem." It pointed out that any further delays in construction, which would necessarily result in cost increases in nuclear steam, "would free Dow management to evaluate whether the situation had not then been altered to such an extent that Dow must make other arrangements for a reliable supply of steam". However, the Temple testimony advised that "Dow's latest analyses show that the nuclear alternative still retains some cost advantages" over the other alternatives considered.

70. With regard to the existing steam and electric contracts, the Temple direct testimony noted that Dow and Consumers had been engaged since 1975 in negotiations directed toward modifying those contracts in certain particulars. Principal matters under negotiation were summarized. The direct testimony then concluded with a statement of Dow's current intentions with regard to its agreement with Consumers, stating "Dow intends to purchase process steam from Consumers

during the first year of operation (1982)" in amounts ranging between specified maximum and minimum contractual requirements.[30]

71. We find that the aforesaid testimony, while not purporting to include all matters that might be thought "relevant" in some broad sense to the suspension proceeding, was presented in a forthright manner, and fully and accurately disclosed the material facts relating to Dow's present intentions concerning its performance of its contract with Consumers, both in terms of its immediate intent to take nuclear steam in 1982 and in terms of its long-term intent constantly to review its position, fully sensitive to any further schedule delays and cost increases, and perhaps pursue alternative sources of steam in the future in light of changed circumstances.

E. The Temple Testimony On Cross-Examination

72. Following the filing of Temple's direct testimony, the Dow and Consumers lawyers met with Temple on November 8 and 15 to prepare him for cross-examination. NRC Staff Ex. 5, Doc. Nos. 23, 27, 30, 31, 35. During these sessions, Messrs. Renfrow and Rosso interrogated Temple in

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30 The Temple direct testimony follows p. 220 of the Suspension Transcript.

areas which they anticipated would be covered by counsel for the NRC Staff and the Midland Interventors. Considerable attention was devoted to the corporate review of the Michigan Division interim position, and a probing of the underlying reasons for the ultimate decision of the Dow U.S.A. Board. NRC Staff Ex. 5, Doc. No. 30, pp. 5-8, 12.

73. We find it curious that neither Mr. Temple, nor the Dow lawyers, undertook to advise Messrs. Renfrow and Rosso on these occasions that Temple viewed as the most significant factor in the Dow U.S.A. Board decision Consumers' statements at the September 21 and 24 meetings regarding the likelihood of a substantial lawsuit against Dow if the electric and steam contracts were abrogated or frustrated. Compare Suspension Tr. 2618-19; and see In Camera Tr. of Feb. 1, 1977, at p. 3. Notably absent in the many conversations between the Dow and Consumers lawyers while preparing for the suspension hearing is an indication that this factor played any role, let alone one of significance, in the formulation of the official Dow position regarding its contract intentions. Indeed, Messrs. Wessel, Nute and Temple appear to have purposely chosen not to share this information with Consumers' counsel.[31]

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31 During preparation of the Temple testimony, Wessel and Nute repeatedly avoided responding fully to the question of what reasons prompted the Dow U.S.A. Board to decide as it did, using more often than not the excuse that this was an area which might well involve privileged information. See NRC Staff Ex. 4, Doc. No. 21, pp. 14, 18, 20; NRC Staff Ex. 5, (continued next page)

74. In short, the record makes it abundantly clear, and we so find, that it was not until Temple testified on cross-examination in the suspension hearing (Suspension Tr. 2311) that Messrs. Renfrow and Rosso first learned that the Dow U.S.A. Board's decision to support the project was prompted, in substantial part, by the spectre of a substantial Consumers' lawsuit in the event of contract repudiation or frustration. See FF ¶¶ 37-40, supra; Renfrow Tr. 51,893; Rosso Tr. 53,274, 53,318.

75. Also early in the suspension hearing counsel for the Midland Intervenors apprised the Licensing Board of the Michigan Division's interim conclusions with respect to the Midland project and its recommendation for corporate review (Suspension Tr. 244, 262-63). This information came to Mr.

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Doc. No. 9, pp. 5, 7-8; NRC Staff Ex. 5, Doc. No. 30, pp. 6-7, 12. The Nute memorandum of October 6, which contained a detailed discussion of the Dow corporate review or the Michigan Division's interim position, made no reference to the prospect of civil litigation with Consumers as bearing on the analysis. See NRC Staff Ex. 5, Doc. No. 17DD, Pt. IV. While Consumers' lawyers were shown a number of the slides used by the corporate review team in its presentation to the Dow U.S.A. Board (Rosso Tr. 53,392-93; Renfrow Tr. 51,963-66), the one slide showing "Consumers has threatened Dow with a lawsuit in the order of magnitude of $600 M" (NRC Staff Ex. 4, Doc. No. 16, p. 15) was left out of the package. Renfrow Tr. 51,961; Rosso Tr. 53,392-93. Perhaps most striking, Temple remained silent about the matter when pointedly asked about the factors influencing the Dow U.S.A. Board decision during the practice cross-examination with Consumers' lawyers (NRC Staff Ex. 5, Doc. No. 30, pp. 6-7, 12; Temple Tr. 53,527-29) -- a fact which did not escape the attention of Dow's lawyers, but was never communicated to Rosso and Renfrow. Nute Tr. 51,392-95; Renfrow Tr. 51,894; NRC Staff Ex. 5, Doc. No. 29.

Cherry's attention upon a review of the non-privileged documents which had been produced by Consumers voluntarily in Jackson, Michigan prior to the hearing; they were not actually examined until after they had been moved to Midland, Michigan, for the hearings. Renfrow Tr. 51,563; and see Suspension Tr. 93,111-12, 180, 267-72.

76. It was this disclosure which led to initiation of the instant inquiry into whether an attempt had been made in the suspension proceeding to prevent material information from reaching the Licensing Board. Consideration of this matter had earlier been deferred pending final resolution of the suspension issues (Suspension Tr. 2373). On September 23, 1977, the Licensing Board issued its Order declining to modify or suspend the Midland permits pending the outcome of the remand proceeding issues. LBP-77-57, 6 N.R.C. 482. The Appeal Board affirmed on February 14, 1978. ALAB-458, 7 NRC 155.

77. Thereafter, in June, 1978, Consumers and Dow concluded their extended negotiations relating to contract modifications and entered into new steam and electric contracts which contained an explicit Dow commitment to the Midland project in contemplation of commercial operation for steam generation by December 31, 1984. CP Co. Ex. 1, Doc. Nos. 17, 18, 19, 20. Those contracts remain in effect today (Howell Tr. 54,000).

PROPOSED CONCLUSIONS OF LAW

Any suggestion of a possible attempt by parties or counsel to an NRC proceeding to be less than candid or forthright with the presiding Board demands the closest scrutiny. Full inquiry is not only compelled to protect and preserve the integrity of the administrative review process; it is also required to afford those accused of misconduct with a meaningful opportunity to respond. We are entirely satisfied that the evidentiary hearing before this Licensing Board served these essential purposes.

Our investigation into the allegations raised at the outset of the Midland suspension hearing has revealed no legitimate basis for preferring charges against any of the parties or their counsel. As the foregoing findings of fact properly reflect, there was no attempt by Consumers or its attorneys to prevent full disclosure to the Licensing Board of any material information concerning Dow's intentions under its steam and electric contracts with Consumers. We set forth below in some detail our conclusions of law on each of the issues raised because of the novelty of the proceeding and the need for Licensing Board comment in this relatively untrod area as guidance to others appearing before us in the future.

A. Issue No. 1

1. There was no attempt by parties or attorneys to prevent full disclosure of, or withhold relevant factual information from, the Licensing Board in the suspension hearing.

2. We have heretofore discussed the statements attributed to Consumers' attorneys in the Nute Notes of the September 21 meeting. See FF ¶¶ 23-30, supra. But for those few remarks -- which may not have been reported entirely accurately in that set of meeting notes (id.) -- there is no evidence whatsoever of an effort on the part of Consumers to withhold or hide relevant information from the Licensing Board. Indeed, even if we were of the view that Rex Renfrow had, during the course of that lengthy meeting, employed the term "finesse" in the sense reported in the Nute Notes, or raised the possibilities of "foot dragging" and using a non-knowledgeable witness, his actions and behavior thereafter, and those of David Rosso and the other involved Consumers' officials, make it perfectly clear that Consumers and its counsel gave no thought to such tactics in the preparation or presentation of their case in the suspension proceeding, nor made any attempt to put them into effect.

3. In this regard, the record reveals no Consumers opposition to Dow's designation of Joseph Temple as the witness to testify about Dow's intentions under its nuclear steam

contracts. See FF ¶ 27 & n.20, supra.[32] The Licensing Board in the Midland suspension hearing specially noted that "the Dow witnesses furnished were highly knowledgeable men (Mr. Temple headed the Michigan Division of Dow)." LBP-77-57, supra, 6 N.R.C. at 485.[33]

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32 Consumers' attorneys did indicate on more than one occasion that Temple was not an optimal witness from Consumers' standpoint because of his personal disenchantment with the Midland project. See NRC Staff Ex. 9, Doc. No. 18, p. 3; NRC Staff Ex. 5, Doc. No. 23, p. 4; and see Rosso Tr. 53,270; Renfrow Tr. 51,497-500. However, certain Dow officials, including Leslie Nute, expressed similar reservations about using Temple as a witness. Renfrow Tr. 51,428-29, 51,739-40; Youngdahl Tr. 53,873. Notwithstanding these comments, the record shows no resistance by Consumers to Dow's selection of Joseph Temple as the Dow witness. See Oreffice Tr. 54,143.

33 It was pointed out to us at the hearing that Joseph Temple, having not participated in the private discussion that took place among members of the Dow U.S.A. Board during their caucus following presentation of the report and recommendations of the corporate review team on September 27, 1976, had no direct knowledge of that discussion. See FF ¶ 42, supra; Temple Tr. 53,450-51; Wessel Tr. 52,634, 52,646-47. In this regard, Temple's earlier testimony at the suspension hearing concerning the likely impact on the Dow U.S.A. Board of the potential for substantial litigation with Consumers (Suspension Tr. 2310-12, 2612) was admittedly not based on firsthand knowledge. Temple Tr. 53,431-32. While this suggests that Temple was perhaps not fully knowledgeable in this one discrete area, it does not lead to the conclusion that he was a witness "unknowledgeable" about the subject matter of his testimony -- i.e., Dow's present intentions under the nuclear steam contracts. In fact, even with respect to the Dow U.S.A. Board's private deliberations on September 27, 1976, we cannot help but observe how closely Temple's testimony in this area paralleled that of Mr. Oreffice, a participant in the Dow U.S.A. Board caucus (Suspension Tr. 2699). Accordingly, we can find no fault with the selection of Temple as the Dow witness. Indeed, the suggestion at this late date that Temple may have been a less than knowledgeable witness strikes us as particularly ironic in light of the allegations prompting this inquiry.

4. Moreover, contrary to the purported import of the alleged "finesse" statement, it was Messrs. Renfrow and Rosso who, for tactical reasons if no other, argued during the early stages of the preparation effort for inclusion in Temple's direct testimony of information that Wessel wanted excluded. See FF ¶¶ 53-54 supra. Consumers' attorneys in fact prevailed on their position to include information relating to the ongoing contractual negotiations between the companies. See FF ¶¶ 58-61, supra. With respect to the ultimate decision not to address the Michigan Division review in the direct testimony, but rather to have Temple testify affirmatively only as to the official Dow position (see FF ¶ 55, supra), it was Consumers' attorneys who, even though no discovery request had been made, undertook voluntarily to make available in advance to the NRC Staff and the Midland Intervenors in Jackson, Michigan, all documents in their possession relevant to the matters covered in Temple's prepared statement, including materials disclosing the Michigan Division interim position and the recommendation for a full corporate review. See FF ¶ 56, supra. In our opinion, this was both appropriate and commendable, and certainly belies any suggestion that Consumers was engaged in an attempt to "finesse" issues presented in the suspension proceeding.[34]

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34 We note in passing that the decision by Consumers' counsel to make the documents available for inspection
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5. To the contrary, notwithstanding the absence of a specific discovery request to Consumers, Renfrow and Rosso explained at the hearing that Consumers' voluntary production was based on counsels' judgment that the documents were of sufficient relevance to the suspension inquiry that they should be made available prior to the hearing for review by the other parties. Renfrow Tr. 51,550; Rosso Tr. 53,167, 53,170. This was to permit the NRC Staff and the Midland Intervenors to bring to the attention of the Licensing Board any information contained in the produced materials which they may have deemed to be of sufficient importance to warrant disclosure. Renfrow Tr. 51,547-50.

6. Of course, if neither the Staff nor the intervening parties pursue discovery, the file information made available to them for inspection will, if determined by the producing party to have no material bearing on the issues, not

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at Consumers' home offices in Jackson, Michigan, was perfectly proper. It would be an unresaonble burden indeed to impose on applicants to an NRC proceeding the tedious responsibility and considerable expense of copying and delivering separate sets of all potentially relevant file materials to the NRC Staff and each intervening party, however far away they may be located, in the absence of a properly framed document request. Accordingly, we find no imperfection in the practice of making relevant documentation available to other parties for inspection and copying at the home office of the producing party in the present circumstances. See, e.g., Lundberg v Welles, 93 F. Supp. 359 (S.D.N.Y. 1950); Niagara Duplicator Co. v Shackleford, 160 F.2d 25 (D.C. Cir. 1947).

always come to the attention of the Licensing Board. That prospect, however, does not suggest that the producer of the documents is being derelict in his disclosure responsibilities -- so long as his decision on the materiality question is sound and was based on a reasoned, good faith exercise of judgment.[35]

7. There certainly is no obligation upon utility counsel to include in his affirmative presentation to a Licensing Board all information considered to be relevant or potentially relevant to the licensing proceeding. If that were the rule, hearings before this agency would not only become so protracted that their usefulness could be seriously questioned, but also they would become so unfocussed that it is doubtful whether meaningful review could be undertaken. The Commission's Rules of Practice, instead, provide a comprehensive discovery procedure to allow the Staff and intervenors to review such non-material, but relevant or potentially relevant, information on request in advance of the hearing. See 10 C.F.R. §§ 2.740 and 2.741.

8. Once such information is turned over by a utility pursuant to a discovery request, it is incumbent on the Staff and the intervenors to review it and bring to the Licensing Board's attention whatever they might deem to be of importance to the issues under consideration. Should they fail to do so,

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35 See discussion at pp. 70-78, infra.

plainly the utility and its attorneys cannot thereafter be faulted for non-disclosure of relevant or potentially relevant information produced on discovery.

9. There is no need to extend our discussion on this point in the circumstances of the present proceeding, however. The materials produced by Consumers in Jackson, Michigan, were brought to Midland and placed before the Licensing Board at the outset of the suspension hearing. Renfrow Tr. 51,563. Insofar as those documents addressed the Michigan Division situation (see, e.g., NRC Staff Ex. 3; Doc. No. 4 pp. 9-10; FF ¶ 56, supra), it was the considered judgment of the NRC Staff,[36] and ultimately of the Licensing Board and the Appeal Board,[37] that the disclosure of an internal disagreement within Dow concerning the company's commitment to the nuclear project made no material difference to the outcome of the suspension proceeding. In short, the Michigan Division's interim position, once rejected by the Dow U.S.A. Board, was of no real consequence to the determination of Dow's current contract intentions. Accordingly, we cannot criticize the reasoned decision of Consumers' attorneys to make this information

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36 See NRC Staff Memorandum In Response To The Atomic Safety and Licensing Board's Order Regarding Preparation Of Testimony Of Dow Witness Temple, dated December 30, 1976, at p. 5 (hereafter "Staff Mem. 12/30/76").

37 See LBP-77-57, supra, 6 N.R.C. at 488; ALAB-458, supra, 7 N.R.C. at 167-68.

available to the other parties on discovery, but not include it as part of their affirmative case.[38] Such a course of action suggests to us no attempt by Consumers or its attorneys to withhold or prevent disclosure of material or relevant information in the suspension hearing.

B. Issue No. 2

10. Nor do we think there was a failure to make affirmative full disclosure on the record of the material facts relating to Dow's intentions concerning performance of its contract with Consumers.

11. In this connection, we have heretofore observed that Temple's direct testimony accurately reported the official Dow position as announced by Paul Oreffice on September 27, 1976, following a full corporate review of the several factors bearing on Dow's continued participation in the Midland project. See FF ¶¶ 42, 68-71, supra. The Appeal Board, in affirming the decision of the Licensing Board not to suspend the nuclear permits, emphasized that "extensive probing on this point at the suspension hearing yielded convincing evidence that Dow's present intention is to adhere to the contract's terms". ALAB-458, supra, 7 N.R.C. at 168 (footnote omitted).

12. Joseph Temple's direct testimony so stated.[39] It further disclosed Dow's need for a reliable source of

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38 See discussion at 69-78, infra.

39 See F ¶ 68, supra. The Licensing Board in the sus- (continued next page)

electric power and process steam by 1982.[40] It pointed out that the nuclear project continued to retain a cost advantage over the alternative of a Dow-owned coal-fired plant, albeit an advantage that had narrowed appreciably. And it emphasized that Dow intended to review the project continuously, keeping all its options open to make other arrangements for a reliable supply of steam and electricity should future schedule delays and cost increases alter the existing situation.[41] Finally, Temple's direct testimony made reference to the ongoing contract negotiations between Dow and Consumers, specifically identifying Dow's position on certain of the principal issues. See FF ¶ 70, supra.

13. We agree with the considered judgment of counsel for Consumers and Dow that the aforesaid testimony fully set forth the material facts relating to Dow's present intentions under its Midland electric and steam contracts. The fact that the interim position of the Michigan Division was not disclosed in Temple's prepared text does not alter this conclusion. We

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(continued)
pension proceeding understood Temple's direct testimony as reflecting a commitment on Dow's part to adhere for the present to its contract obligations. LBP-77-57, supra, 6 N.R.C. at 488.

40 See FF ¶ 70, supra; and see LBP-77-57, supra, 6 N.R.C. at 487, 491.

41 See FF ¶ 69, supra; compare LBP-77-57, supra, 6 N.R.C. at 488.

are satisfied that the Dow U.S.A. Board disagreed with the Division's view that the Midland project was no longer good for Dow (see FF ¶¶ 41-42, supra). Its subsequent decision, that "circumstances have not changed sufficiently to call for modification of Dow's commitment to nuclear produced steam * * *",[42] superseded and supplanted the tentative conclusions of the Division which were, at the Division's request, subjected to a full corporate review. See FF ¶¶ 14-15, supra.

14. This is not to suggest that the Michigan Division's interim position and recommendations had no conceivable relevance to the suspension inquiry. Rule 401 of the Federal Rules of Evidence defines relevance in terms of "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added). In the present context, of course, the "fact that is of consequence to the determination of the action" is the official Dow position with regard to its intended performance under the contracts.[43] However, the fact that there existed within Dow diverse views at different levels

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42 See Temple Test. at p. 2, following p. 220 of Suspension Transcript; and see Temple Tr. 53,441-42, 53,446.

43 The Appeal Board made this abundantly clear in its affirmance of the Licensing Board's decision not to suspend, emphasizing that the "controlling" fact with regard to the inquiry on remand of the "current status of the contractual relationship between Dow and [Consumers]" was "Dow's present intention" to honor the contract to buy electric power and process steam. ALAB-458, supra, 7 N.R.C. at 167.

of management as to what that official corporate position arguably should be could well be regarded as having a "tendency" to bear on Dow's decision to adhere to the electric and steam contracts.[44] On these terms, we fully agree with the assessment of Messrs. Renfrow and Rosso (Renfrow Tr. 51,511, 51,513, 51,523, 51,549-50, 51,788; Rosso Tr. 53,162-64, 53,170-71) -- not shared by Mr. Wessel (Wessel Tr. 52,923; NRC Ex. 5 Doc. No. 9, p. 7) -- that the Michigan Division interim position was potentially relevant evidence.

15. Insofar as the discovery rules compel production on request of all non-privilege matter "which is relevant to the subject matter involved in the pending action", whether itself admissible or "reasonably calculated to lead to the discovery of admissible evidence" (Rule 26(b)(1), Fed. R. Civ. P.), we have no doubt that the parties were under an obligation

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44 It could conceivably be argued that the fact that Dow's corporate position was reached after a full review of the views expressed by the Michigan Division made its announced present intention to adhere to its contracts "more probable" than if the decision had been reached in the absence of such a comprehensive review. On the other hand, the contention could perhaps also be made that the existence of internal dissatisfaction at a management level indicates that Dow's stated intention presently to support the Midland project is "less probable" than if that position had been arrived at without any expression of dissatisfaction within Dow. Under either hypothesis, the Michigan Division interim position could be regarded as "relevant" under Rule 401, but certainly not "material". The material fact "of consequence to the determination of the action" is Dow's official corporate position with regard to its present intentions under the contracts. See note 43, supra.

on request to make information relating to the Michigan Division's interim position available to the NRC Staff and the Midland Intervenors. Consumers in fact went beyond this obligation, making such information available voluntarily and in advance of the suspension hearing, even in the absence of a discovery request addressed to the company. See CP Co. Ex. 1, Doc. No. 16.

16. However, the fact that certain information is recognized as potentially "relevant" to a consequential fact in the evidentiary sense -- and therefore producible on discovery and admissible if introduced in an adversary proceeding (Rule 402, Federal Rules of Evidence) -- does not compel its affirmative disclosure by counsel in direct written testimony. While there is little that has been written in this area directly on point, we are comfortable in our conclusion that, in an adjudicatory context, the obligation of affirmative disclosure on the direct case rests in the final analysis on the concept of materiality.

17. We do not for this purpose define materiality in overly restrictive terms. Rather, we are guided by the sensible discussion of the United States Court of Appeals for the District of Columbia Circuit in Weinstock v United States, 231 F.2d 699 (D.C. Cir. 1956), a decision cited approvingly by both the Appeal Board and the Commission in Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2),

ALAB-324, 3 N.R.C. 347, 358 (1976), and CLI 76-22, 4 N.R.C. 480 (1976). Weinstock involved the review on appeal of a criminal conviction under 18 U.S.C. § 1001 for the assertion by defendant of a false statement as to "a material fact". In overturning the conviction, the court had this to say with regard to materiality:

> "Material" when used in respect to evidence is often confused with "relevant", but the two terms have wholly different meanings. To be "relevant" means to relate to the issue. To be "material" means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. [231 F.2d at 701.][45]

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45 While this statement preceded the enactment of the Federal Rules of Evidence on January 2, 1975, we see nothing in Rules 401 and 402 thereof which alters Weinstock. Indeed, while the term "material" is not contained in Rule 401, the essential concept is preserved by use of the phrase "any fact that is of consequence". See Wright and Graham, 22 Federal Practice and Procedure, Evidence § 5164 (1978 ed.). Significantly, new Rule 401 by its very terms draws much the same distinction between a "relevant" fact for evidentiary purposes, on the one hand, and a "consequential" (or material) fact for substantive law purposes, on the other hand, as the court did in Weinstock. If this had not been the case, both the Appeal Board and the Commission would most assuredly have so indicated when discussing Weinstock in their 1976 VEPCO decisions, both of which followed the effective date of the new Federal Rules of Evidence (July 1, 1975) by many months. However, there was plainly no need in the circumstances for them to do so.

18. Weinstock is particularly instructive in that it articulated a test for determining materiality which has not only been followed in other contexts by this agency, but seems also to have gained wide acceptance in many fields of law. As there stated, the test is whether the statement or information in question "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made". 231 F.2d at 701-02.[46] It hardly needs to be added that no single resolution fits every situation. Thus, as the Commission emphasized in its VEPCO decision, "[w]hether a particular bit of information is material in a given context must * * * 'be judged by the facts and circumstances in the particular case'". CLI-76-22, supra, 4 N.R.C. at 487 (quoting Weinstock, 231 F.2d at 702).

19. In this connection, regard must be given to the fact that licensing proceedings before this Commission -- similar to adversary proceedings in many other agencies -- generally involve "public interest" issues that transcend the particular interests of the individual participants. This adds a dimension in the present administrative context which is not

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46 See also Blake v United States, 323 F.2d 245, 246 (8th Cir. 1963); Gonzales v United States, 286 F.2d 118, 122 (10th Cir. 1960); United States v Krause, 507 F.2d 113, 118 (5th Cir. 1975); Securities and Exchange Comm'n v Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), certiorari denied, 394 U.S. 976 (1969). And see cases collected in Weinstock v United States, supra, 231 F.2d at 702 n.6.

always present in the judicial arena when private litigants are disputing personal claims. It is important that the assessment of materiality for disclosure purposes is fully sensitive to this situation.

20. It is in this light that we understand the Appeal Board's decisions in McGuire and Vermont Yankee to require full disclosure of significant new information bearing on safety and environmental issues which are under adjudication or have been recently resolved. See Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 A.E.C. 623 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-167, 6 A.E.C. 1151 (1973).[47] Congress has entrusted the Commission with primary responsibility for insuring that licensed activities will be fully protective of the public health and safety. See Power Reactor Development Company v Electrical Union, 367 U.S. 396, 402 (1961). To the extent that information at any point in time comes to the attention of an applicant which can

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47 See also Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 N.R.C. 404, 408-09 (1975). The admonition repeated there -- which the Appeal Board indicates has equal application for determining whether to reopen the record on a safety-related issue or on an environmental issue (2 N.R.C. at 409 n.6) -- is that parties and counsel have a continuing obligation to inform the presiding board and other parties of any "new information which is relevant and material" that tends to alter the "existing facts". Id. at 408 (emphasis added).

reasonably be said to alter the environmental or safety aspects of constructing or operating a particular nuclear reactor, the public interest demands a full disclosure to the adjudicatory board so as to "accurately reflect existing facts". McGuire, ALAB-143, supra, 6 A.E.C. at 626. If the new disclosures give rise to a "significant safety-related issue" (or a significant environmental issue) there is ample justification to reopen the record to receive additional evidence. Vermont Yankee, ALAB-167, supra, 6 A.E.C. at 1151; Vogtle ALAB-291, supra, 2 N.R.C. at 408-09 (1975).

20. The earlier referenced VEPCO decisions of the Appeal Board and the Commission reinforce the validity of this approach. There, the question presented was whether certain statements bearing directly on already adjudicated safety-related issues were "materially false" within the meaning of Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236. In that context, the Commission made special note of the unanimous view that "full disclosure of safety information protects the public". CLI-76-22, supra, 4 N.R.C. at 488. It then admonished, " * * * if it is material to the licensing decision and therefore to the public health and safety it must be passed on to the Commission if we are to perform our task". Id. at 489 (emphasis added).

21. The Appeal Board's decision in VEPCO provides helpful guidance in assessing "materiality". As there stated,

"the test is whether the statement has a 'natural tendency' or capability to influence -- not whether it does in fact". ALAB-324, supra, 3 N.R.C. at 359. In making the determination, the decision is not to be entirely subjective, but rather is to be based on a careful exercise of judgment as to what a reasonable member of the NRC Staff could be expected to conclude if confronted with the information under consideration. Id.

22. The Appeal Board's focus on the NRC Staff in its definition of materiality is not without significance. It is fundamental that the Commission's regulatory process looks to the NRC Staff as the litigant in the licensing proceeding primarily responsible for insuring that the public interest is fully protected. See, e.g., Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Stations), 4 A.E.C. 429, 431-32 (1970). From this perspective, we have no difficulty concluding that the other parties to a licensing proceeding have, at a minimum, a responsibility to make available on request to the Staff all discoverable information in their possession which is relevant or material to the "public interest" issues. See pp. 68-70, supra. This insures that the Staff will have the opportunity to bring to the Licensing Board's attention that which it deems important to the issues involved. See discussion at pp. 63-66, supra.

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23. Beyond this, it is clear that there exists an affirmative obligation on parties appearing before the NRC to apprise not only the Staff, but also Board members, of a significant new development, or, any changed circumstance, with respect to matters bearing on safety-related or environmental issues which are in adjudication or have already been determined. See pp. 73-74, supra. Where -- as is the situation presented in the instant inquiry -- the question of affirmative disclosure is raised in a different context, one which does not involve a significant new development or a changed condition, the proper test to apply is the one announced in VEPCO, i.e. does the information have a "natural tendency" or capability of influencing the ultimate decision.

24. On the record before us, we are satisfied that this "materiality" standard does not demand affirmative disclosure of the referenced information. The Michigan Division's interim position was certainly not required to "accurately reflect existing facts". McGuire, ALAB-143, supra, 6 A.E.C. at 626 (emphasis added). The Division's stated conclusions and recommendations were, at best, a bit of history that had, at the time of preparing Temple's direct testimony, become totally insignificant as a result of the Dow U.S.A. Board's decision to the contrary to adhere to the contracts. See FF ¶ 42, supra.

25. In this regard, it is particularly instructive that the judgment of Messrs. Renfrow and Rosso not to include

the Michigan Division's interim position in the direct testimony -- which we are satisfied was based on a good faith, reasoned evaluation of the materiality question (Renfrow Tr. 51,529-33, 51,544-45; Rosso Tr. 53,164-68) -- was subsequently endorsed by the NRC Staff following its examination of the information in question.[48] Certainly, there is no room to fault Consumers' counsel in the face of written confirmation that, as anticipated, the same conclusion was, on careful review, reached by "a reasonable staff member". VEPCO, ALAB-324, supra, 3 N.R.C. at 359. In fact, with the benefit of hindsight, we even have the assurance that the materiality decision in this instance was sound from the perspective "of the person or body to whom the * * * [information] is submitted * * *" Id. Neither the Licensing Board nor the Appeal Board viewed the Michigan Division's review and recommendations as an influential factor in its determination not to suspend the Midland permits. See n.37, supra.

26. To them, and indeed to us, the material facts which deserved full disclosure by the applicant in its direct case were those describing the official corporate position of Dow as to its current intentions under the contracts. See

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48 See n.36, supra. Indeed, the NRC Staff was satisfied not only that everything material to Dow's official position had been disclosed, but, at least in its view, that "Mr. Temple disclosed all relevant information in his direct testimony". Staff Mem. 12/30/76, at p. 5.

n.43, supra. We find no failure on the part of Consumers, Dow and their attorneys to make known this information in Temple's prepared testimony.

27. We should add one final observation in this regard. No mention was made in the filed testimony of Mr. Temple of the fact that the Dow U.S.A. Board's decision to adhere to its Midland contract obligations was apparently influenced in large part by the prospect of substantial litigation with Consumers if Dow elected to repudiate or frustrate the electric and steam contracts. See FF ¶ 73, supra. The record shows that this fact was never communicated to Consumers or its attorneys by Dow prior to the suspension hearing. Id. Rather, our study of the record indicates that Dow's attorneys and Mr. Temple carefully avoided apprising Messrs. Renfrow and Rosso of this fact during the preparation of the direct testimony, and during the practice cross-examination sessions thereafter, when Mr. Rosso asked Mr. Temple directly to articulate all the reasons for the Dow U.S.A. Board decision. See FF ¶ 74, and n.31, supra.

28. We thus certainly cannot in such circumstances criticize Consumers and its attorneys for failure to make affirmative disclosure of the Dow U.S.A. Board's reasoning insofar as the prospect of substantial litigation with Consumers played a role in the ultimate decision. There is, however, no reason in our judgment to pursue the matter

further, since the underlying reasons for the official Dow position were plainly not facts having a natural tendency or capability of influencing the suspension determination. As the Appeal Board pointed out in affirming the denial of suspension: "Whether or not it is in Dow's best financial interest to honor its contract is not for us but for Dow to determine." ALAB-458, supra, 7 N.R.C. at 168. The same can be said with respect to whether Dow viewed it to be in its best interest to honor the contract from the perspective of potential litigation with Consumers.

29. We therefore do not consider it to be a material fact that the official Dow position was influenced by the prospect of litigation with Consumers in the event of a contract breach. We cannot help but observe that such a prospect can probably be assumed to exist any time a party elects to walk away from its obligations under an agreement. We thus find no compelling reason why mention should have been made of this fact in Mr. Temple's direct testimony. Compare Public Service Company of New Hampshire (Seabrook, Units 1 and 2), ALAB-422, 6 N.R.C. 33, 80 (1977), affirmed, CLI-78-1, 7 N.R.C. 1, 22-23 (1978).[49]

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49 In dissent, Mr. Farrar argued that it was not unheard of for a party able to honor its contract commitments to nevertheless decide that it is not in its interests to do so, and that in any event changed circumstances could affect even a willing party's ability to fulfill its contractual obligations. He was thus of the view that the record should (continued next page)

30. The Licensing Board in the suspension hearing was charged with determining, inter alia, what Dow's current intentions were concerning performance of its contracts with Consumers.[50] To the extent it was satisfied that Dow was still committed to the project, whatever the reasons for that decision, suspension was unwarranted.[51] Dow's affirmative determination to continue its participation in the nuclear project was a "material fact". In addition, its intention to continue to review the situation, keeping all its options open to abandon the project and pursue other supply alternatives in the future in the event of further delays or cost increases was

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be reopened to explore whether two of the participants in the Seabrook plant who had expressed a desire to withdraw or reduce the level of their participation in the project, would breach their obligations to continue financial participation until substitute participants were identified and approved by the Commission. ALAB-422, supra, 6 N.R.C. at 110-11. Here, by contrast, Dow made full affirmative disclosure of its intention to adhere for the present to its contract commitments, albeit without the same enthusiasm as when Dow first agreed to participate in the nuclear project. Such a showing satisfies even the dissenting view in Seabrook.

50 The Appeal Board explained the Aeschliman remand order in this area as follows: "The current status of the contractual relationship between Dow and the applicant was examined at great length at the suspension hearing. Although this is as it should be, we should repeat that no NEPA violation occurred here; rather, the court suggested that the record be brought up-to-date on this count only because the case was remanded on other grounds." ALAB-458, supra, 7 N.R.C. at 167 (footnote omitted).

51 See ALAB-458, supra 7 N.R.C. at 167 n.45, 168.

a "material fact". Full disclosure of this information was made affirmatively on the record. See FF ¶¶ 68-71, supra.

C. Issue No. 3

31. This brings us to the question whether, nonetheless, there was an attempt to present misleading testimony to the Licensing Board concerning Dow's intentions. We think not.

32. The suggestion of such a possibility was contained in Leslie Nute's cover letter of November 4, 1976, returning the final draft of Mr. Temple's written testimony to David Rosso. NRC Ex. 4, Doc. No. 26. In addition, certain remarks of Milton Wessel at the meeting with Consumers' attorneys held on November 1, 1976, characterize Mr. Rosso's October 22 draft of testimony as "being of a misleading, or disingenuous, nature because of the way it was put together". NRC Ex. 4, Doc. No. 22, p. 3; and see FF ¶ 64, supra.

33. We have heard the explanations of both Mr. Nute and Mr. Wessel as to why they chose to label the Rosso draft "misleading", and we are, quite frankly, no better informed now than we were before. Leslie Nute pointed to certain alleged misstatements of fact in the October 22 draft which, he claimed, were the principal cause for his objection. (Nute Tr. 51,003-15. However, on further exploration of this assertion at the hearing, it became apparent that the specific points

raised were the result of an honest misunderstanding by Mr. Rosso of certain information, some of which was rather sketchy, provided earlier to him by Dow in the Nute memorandum of October 6 and during the October 12 meeting. Nute Tr. 51,051. It is abundantly clear to us that in none of these particulars was Rosso attempting to set forth "misleading" testimony. In point of fact, Mr. Rosso advised Dow's attorneys at the time he transmitted his October 22 draft of testimony to them that his effort was not to be regarded as the final product, but rather was to be taken by them as essentially a working paper from which they and Mr. Temple could formulate a "redraft". NRC Staff Ex. 4, Doc. No. 18. Indeed, this had been the clear understanding of all counsel at the time Mr. Rosso had initially undertaken to prepare a draft of testimony at the conclusion of the October 12 meeting. NRC Staff Ex. 4, Doc. No. 9, p. 12-13; and see Rosso Tr. 53,141-42, 53,223-25.

34. The legitimacy of Mr. Wessel's use of the terms "misleading" and "disingenuous" is even more tenuous. His concern with the Rosso draft went to form, not to substance. Because the draft was written in the first person as an uninterrupted narrative, Mr. Wessel maintained that it was perhaps susceptible to being misread as telling a "complete story", when in fact it contained only that part of the story material to the issue of Dow's current intentions under the contract. Wessel Tr. 52,759, 52,767, 52,787. His complaint

was not so much with what was put into or left out of the Rosso draft -- although his stated preference would have been to say less on certain points[52] -- but rather with the possible impression one might have on reading it that it was intended as an exhaustive narrative on the subject. Wessel Tr. 52,765-66; Nute Tr. 51,332-34. In addition, Wessel observed that use of the first-person narrative tended to give the erroneous impression, in his view, that the testimony was being offered by Dow, not by Consumers. To remove any such misunderstanding, the Dow redraft of Rosso's effort was put into a third-person format "to make it very clear that the testimony was Consumers Power's doing, not Dow's". NRC Staff Ex. 4, Doc. No. 22, p. 3.

35. Whatever the validity of Mr. Wessel's several criticisms, we have no difficulty in concluding that David Rosso did not at any time perceive his draft to be misleading,

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52 Wessel had no objection to the fact that Rosso's draft did not discuss the Michigan Division interim position. Wessel Tr. 52,787, 52,802-03. He did object, however, to the October 22 draft insofar as it expressed Temple's agreement with that portion of the filed testimony of Mr. Howell of Consumers which listed principal contract modifications since the initial proposal and also included a discussion of Dow's position on principal issues currently involved in the ongoing contract negotiations. NRC Staff Ex. 4, Doc. No. 22, pp. 3-5. His stated preference was to simply state that "the contract speaks for itself" and not get into the area of contract negotiations. Id. at pp. 4, 5. Ultimately, the decision was to retain the discussion of Dow's position on principal issues involved in the contract negotiations in the Temple direct testimony (Temple Testimony, pp. 6-8, following Suspension Tr. p. 220).

or attempt in any way to prepare proposed testimony which, in either form or content, was calculated to mislead the Licensing Board or the parties. Rosso Tr. 53,242, 53,293-94. Moreover, when apprised of Wessel's concerns in this regard, it was Mr. Rosso who suggested the "question and answer" format that was ultimately used in order to remove any possibility of misleading the reader. NRC Staff Ex. 4, Doc. No. 22, p. 6. It was also Messrs. Rosso and Renfrow who insisted (over Milton Wessel's objections) upon including in the final draft of the Temple testimony specific reference to Dow's intention to continue to review the project and "keep all its options open". NRC Staff Ex. 4, Doc. No. 22, pp. 6, 7-8; see also Temple Test., p. 2, following Suspension Tr., p. 220. Rex Renfrow stated Consumers' position with unmistakable clarity: "he didn't want anything in the draft that would allow Mr. Cherry to say that Joe Temple had misled him". NRC Staff Ex. 4, Doc. No. 22, p. 7.

36. As finally submitted, the Temple testimony neither attempted to, nor did in fact, mislead. Joseph Temple testified at the suspension hearing that his prepared statement was true and accurate (Suspension Tr. 2306).[53] Having reviewed

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53 On cross-examination during the suspension hearing, Temple agreed with counsel for the Midland Intervenors that his direct testimony did not set forth the circumstances surrounding the Dow corporate review and ultimate decision in exhaustive detail. (Suspension Tr. 2307). However, as Temple explained in his deposition testimony and reaffirmed (continued next page)

the record of the suspension proceeding, and heard all the testimony here, we are satisfied that Temple's direct testimony described Dow's contract intentions as of that time in a candid and forthright manner. No more was required or should reasonably have been expected.

37. In so concluding, we have been particularly sensitive to the Appeal Board's admonition in VEPCO "that an omission of a material fact in the course of making an affirmative statement might well result in the conveyance of a totally false impression respecting the import of the statement". ALAB-324, supra, 8 N.R.C. at 361. As pointed out in that decision with specific reference to In re Caesars Palace Securities Litigation, 360 F. Supp. 366, 386 n.19 (S.D.N.Y. 1973), "[c]learly, the failure of a person to include material information in a necessary document can just as surely result in a false and misleading statement as would the inclusion of incorrect information". ALAB-324, supra, 3 N.R.C. at 362.

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before us, this acknowledgement was not an indication that his direct testimony was inaccurate or misleading. Temple Tr. 53,558-61. His direct testimony did not purport to cover all the particulars and details of the Dow corporate review and decision; it addressed only what Temple perceived to be the material information concerning Dow's present intentions under the contracts. Temple Tr. 53,548, 53,559-61. On these terms, Temple reiterated his opinion that the direct testimony was true and accurate. Temple Tr. 53,561, 53,569-70.

38. In the instant case, as we have heretofore discussed (see pp. 70-81, supra), there was no exclusion of material information. Even if we inquire further, however, it cannot reasonably be maintained that the omissions involved here resulted "in the conveyance of a * * * [false or misleading] impression respecting the import of Temple's direct testimony". ALAB-324, supra, 3 N.R.C. at 361. The official Dow position, as set forth in Joseph Temple's prepared statement, was to adhere to its contract commitments for the present, albeit with growing misgivings in view of schedule delays and escalating costs, and to keep all its options open in the event of changed circumstances in the future. See FF ¶¶ 68-69, supra. Certainly, the impression conveyed was less than wholehearted endorsement of the nuclear project. In a word, Dow was presently sticking with the contracts, according to Temple's direct testimony, but not without recognition that the project was less attractive than had originally been contemplated.

39. We do not, on reflection, perceive that specific reference by Temple to the Michigan Division attitude and recommendations would have altered our understanding of Dow's contract intentions. What it would have told us is simply that there were officials within Dow more disenchanted with the nuclear facility than the Dow U.S.A. Board. That is, however, invariably what one can expect in large corporations. At most,

such a disclosure would perhaps have been a means of alerting us to a possible indecisiveness in Dow's stated intention to adhere for the present to its contract obligations. Yet that message was in Temple's direct testimony anyway, by explicit reference to Dow's review of the project, its concern over schedule delays and cost increases, and its stated intention to pursue other fuel supply alternatives in the event of changed circumstances and to keep all its options open. See FF ¶¶ 68-69, supra. We thus cannot say that the failure to set forth the rejected Michigan Division interim position in the direct testimony created a false or misleading impression as to the true corporate position of Dow with respect to its present intentions under the electric and steam contracts.

40. Nor, for similar reasons, do we find anything to condemn in the failure to mention affirmatively the fact that the decision of the Dow U.S.A. Board was influenced in large part by the prospect of substantial litigation with Consumers if Dow elected to repudiate or frustrate the Midland contracts. See FF ¶ 73, supra. As already mentioned (pp. 78-81, supra), since Consumers and its attorneys were not apprised of this fact until Temple so testified on cross-examination at the suspension hearing, there is simply no legitimate ground to fault them for its non-disclosure in the direct testimony.

41. The essential point here, however, is that this information does not change our basic understanding of the

official Dow corporate position in any material respect. Indeed, if anything, it tends to lend credence to Dow's official statement of continuing support for the project, rather than to suggest a reason for doubt. Certainly, the knowledge by Dow that abandonment of its contractual obligations to Consumers would be met by a forceful assertion of Consumers' contractual rights, with substantial potential liability under the contract (NRC Staff Ex. 7, Doc. No. 16, p. 15), provides ample incentive for sober deliberation by Dow before reversing itself.

42. We now know, of course, with the benefit of hindsight, that Dow's stated intention to continue its participation in the nuclear project has remained, for whatever reasons, intact since the suspension hearing. The extended negotiations with Consumers for contract modifications, to which specific reference was made in Temple's direct testimony,[54] were successfully completed with the signing of revised

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54 We have not overlooked the fact that Milton Wessel argued unsuccessfully against inclusion in Temple's direct testimony of a reference to the ongoing contract negotiations because he felt such a statement might suggest to someone that the Consumers-Dow relationship was a "tenuous" one. NRC Staff Ex. 5, Doc. 22, p. 3. A probing of this position at the hearing satisfied us that Wessel's objection in this area was not for the purpose of misleading the Licensing Board or the other parties. Rather, his concern was that discussion of the ongoing negotiations would create the erroneous impression of a tenuous relationship (see Rosso Tr. 53,174-77), when in fact such was not the case. See Nute Tr. 50,688-89; Temple Tr. 53,441-42; Rosso Tr. 53,188-89; Renfrow Tr. 51,525, 51,554; Aymond Tr. 54,108-09; Youngdahl Tr. 53,785-86; Bacon Tr. 52,072, 52,106; Howell Tr. (continued next page)

electric and steam contracts in June, 1978. Those contracts are in full force today. See FF ¶ 77, supra. This simply serves to reinforce the conclusion compelled by the record before us that there was no misleading testimony presented to the Licensing Board concerning Dow's contract intentions, nor any attempt to present such testimony.

D. Issue No. 4

43. Still left is the question whether any of the parties or attorneys attempted to mislead the Licensing Board concerning the preparation or presentation of the Temple testimony. Certainly insofar as Consumers and its attorneys are concerned, this issue also deserves a negative response. We find nothing in the record to suggest activity on the part of Renfrow, Rosso, Bacon, or any other Consumers' official of a misleading nature in this regard. Nor has it been alleged otherwise.

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53,925, 53,976, 53,994-95. Thus, Wessel's preference was simply to have Temple's direct testimony refer to the contracts and state that they speak for themselves. NRC Staff Ex. 4, Doc. No. 22, pp. 6, 7-8. Following further discussion on this point among counsel at the November 1, 1976 meeting, however, the decision was made to include a discussion of the ongoing negotiations in Temple's direct testimony. See FF ¶¶ 58-60, 70, supra. We agree with this decision, but do not regard Wessel's initial resistence to this approach as an attempt (albeit unsuccessful) to mislead.

44. We are, however, troubled by certain conduct of Dow's outside counsel in this connection, particularly the manner in which Mr. Wessel chronicled the events bearing upon witness preparation when he was asked for an explanation during the suspension hearing. The picture which Milton Wessel painted at that time gave the impression that Consumers and its attorneys had from the outset resisted Dow's attempts to include information in the direct testimony and had refused to follow Dow's advice to produce documents on discovery. See Wessel Tr. 52,825-27; NRC Staff Ex. 10.[55]

45. In advancing this position, Wessel now candidly admits that he misperceived the relationship between himself and the Consumers' attorneys during the preparation and presentation of Temple's testimony as being "adversarial" in nature. See NRC Staff Ex. 5, Doc. No. 40; NRC Staff Ex. 1, Pt. I, p. 8. Wessel Tr. 52,524-26; compare Renfrow Tr. 51,501; Rosso Tr. 53,240. Consequently, throughout this period, he (and Leslie Nute at his instruction) was engaged primarily in an effort to place Dow in the best strategic position possible in the event that litigation with Consumers should later develop. Wessel Tr. 52,504-05, 52,510, 52,536-37, 52,983-84.

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55 NRC Staff Ex. 10 is in two parts: one, which was filed in the public document room, is entitled "Dow Memorandum Regarding Hearing Preparation" (hereafter cited as "NRC Staff Ex. 10, Pt. I"); the other, which was submitted to the Licensing Board under a protective order, is entitled "History Of The Preparation Of Mr. Temple's Testimony As Disclosed In Documents Produced Pursuant To The Protective Order" (hereafter cited as "NRC Staff Ex. 10, Pt. II").

46. Part of Wessel's plan was to make it appear as though Consumers, not Dow, was making all the major decisions in the suspension hearing. See FF ¶¶ 47-48, supra. To this end, Wessel maintained throughout the hearing preparations that Dow was not a party to the suspension proceeding and thus had no affirmative obligation to come forward with evidence except as and to the extent that Consumers directed. Id.; Wessel Tr. 52,548-49, 52,868-71. In his testimony before us, Wessel acknowledged that such overt direction at times had to be drawn out of Consumers attorneys by such tactics as submitting a Dow draft that was admittedly "lousy" and unusable (Wessel Tr. 52,912-13, 52,977), or by deliberately overreacting negatively to a Consumers' draft in order to get agreement on certain suggested changes (Wessel Tr. 52,767-68).

47. In Mr. Wessel's view, these tactics were neither unlawful nor unethical, but more appropriately could be called "sporting". Wessel Tr. 52,558-59, 52,975-76. As an element of such "sporting" behavior, Wessel explained that he treated Consumers' attorneys in much the same manner as he treated any adversary (Wessel Tr. 52,492, 52,524) -- but without ever apprising them that he so perceived the relationship. See NRC Staff Ex. 5, Doc. No. 40. Thus, no more was disclosed to Messrs. Renfrow and Basso than Wessel felt was absolutely necessary, and certain information was specifically withheld. Wessel Tr. 52,549, 52,739.[56] In addition, meeting notes and

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56 Wessel testified that Consumers was erroneously advised
(continued next page)

memoranda of side conversations with Consumers' counsel were regularly prepared by Messrs. Wessel and Nute with an eye toward possibly using these documents to Dow's advantage in later litigation with Consumers. Wessel Tr. 52,653-54, 52,656-57; Nute Tr. 50,939-40.[57]

48. It is against this background that we register concern over Dow's presentation to the Licensing Board on

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that the initial draft of testimony was prepared by him alone, and that the second Dow draft was prepared only by Leslie Nute, in order to preserve an argument that the drafts were attorneys' work product and thus not discoverable. Wessel Tr. 52,694-97; NRC Staff Ex. 5, Doc. No. 9, p. 2. In point of fact, Wessel did not really prepare the initial draft of testimony (Wessel Tr. 52,696), and Leslie Nute testified that Temple and others assisted him on the October 6 draft (Nute Tr. 54,302-03).

Wessel and Nute also declined to inform Renfrow and Rosso of certain information. Thus, Wessel deliberately withheld from Consumers counsel that Dow viewed with concern Renfrow's remark in the September 21 meeting bearing on the selection of a Dow witness. See NRC Ex. 5, Doc. No. 12; Renfrow Tr. 51,936-37. Also, there was no mention of the extent to which the prospect of substantial litigation with Consumers influenced the decision of the Dow U.S.A. Board. See FF ¶¶ 73-74, supra. The underlying reasons for the Michigan Division's interim position were also never articulated in any meaningful sense. Youngdahl Tr. 53,786-87; Howell Tr. 53,926; Aymond Tr. 54,010-11, 54,039. And Wessel continously resisted discussing anything with Consumers counsel relating to the ongoing contract negotiations. Wessel Tr. 52,920-21, 52,923.

57 Compare Nute Memorandum of December 2, 1976, which gives the erroneous impression that exclusion from Temple's direct testimony of a reference to the Michigan Division review was Consumers' idea, not Dow's (NRC Staff Ex. 5, Doc. No. 39), with Rosso Tr. 53,278-79 and Renfrow Tr. 51,685-86. Compare Wessel Memorandum of January 17, 1977, indicating that Wessel had advised Rosso in a telephone conversation of Falahee's remarks at the September 21 meeting (NRC Staff Ex. 9), with Rosso Tr. 53,274, 53,318.

December 22, 1976, of its comments regarding the preparation of Temple's testimony. NRC Staff Ex. 10, Pt. II. That discussion conveys the impression that Consumers rejected every effort by Dow to draft Temple's testimony in a manner satisfactory to the witness. In point of fact, however, the initial Dow draft of testimony was, by Wessel's own account, intentionally so poorly done that Consumers could not have responsibly accepted and used it. Wessel Tr. 52,699-700. The second Dow draft, prepared largely by Leslie Nute, was by Nute's own account, never intended to be used by Consumers as the direct testimony; instead, it was calculated to provide requested information to Consumers' attorneys for their use in preparing a draft of testimony. Nute Tr. 50,964-65, 51,043-44. David Rosso's draft of October 22 followed.

49. While the impression conveyed in Dow's December 22 submission is that the Rosso draft was "misleading and disingenuous" in terms of the manner in which it discussed the official Dow position under the Midland contracts, we have since learned that Wessel's use of these terms in the November 1 meeting with Messrs. Rosso and Renfrow (NRC Staff Ex. 5, Doc. No. 22, p. 3), and similarly Nute's repetition of them in his November 4 cover letter (NRC Staff Ex. 5, Doc. No. 26), had nothing to do with the treatment therein of the Michigan Division's interim position and the corporate review thereof. See FF ¶ 64, supra. We note further that it was Rosso who

suggested the "question and answer" format as a cure for any conceivable misimpression one might have as to the intended scope of Temple's testimony, not someone from Dow as the December 22 filing would have us conclude. Compare NRC Staff Ex. 5, Doc. No. 22, p. 3 with NRC Staff Ex. 10, Pt. II, p. 6.

50. As a final observation, we find disturbing the suggestion in the December 22 submission that it was Dow, not Consumers, who favored a voluntary production of all relevant documentation. NRC Staff Ex. 10, Pt. II, pp. 8-9. In point of fact, Mr. Wessel was the individual throughout the period of hearing preparation who voiced strongest resistance to turning over any Dow documents unless compelled to do so, maintaining that many were arguably protectable under a claim of privilege. See NRC Staff Ex. 4, Doc. No. 21, pp. 7, 12-13; NRC Staff Ex. 5, Doc. No. 9, pp. 10-11; Doc. No. 22, p. 1. Indeed, one of the curiosities noted by Messrs. Renfrow and Rosso in their testimony here was Mr. Wessel's surprise abandonment of this position when the Midland Intervenors requested production of all Dow documents at the outset of the suspension hearing. See Renfrow Tr. 51,680, 51,893; Rosso Tr. 53,212-13; and see Suspension Tr. 206-12; NRC Staff Ex. 5, Doc. Nos. 41, 42, 43.

51. Mr. Wessel has testified that he was primarily responsible for preparing the December 22 filing discussed above. Wessel Tr. 52,820-21. We think a more forthright presentation could have been expected from one who has taught

legal ethics to law students, written one book dealing with the subject of responsible advocacy in an adversarial context, and is in the process of writing another. Wessel Tr. 52,569. Certainly, greater candor would have helped remove some of the confusion surrounding the allegations at the time of the suspension hearing. To his credit, Mr. Wessel has come forward here and testified openly and fully on the issues raised, and that testimony has helped immensely in our resolution of the various issues. Our regret is that he failed to display the same openness and candor earlier in his comments to the Licensing Board in the suspension hearing.

E. Issue No. 5

52. In view of the foregoing findings of fact and conclusions of law, the question of sanctions requires minimal discussion. As we noted at the outset, the present inquiry is the last vestige of an extended remand proceeding concerning possible suspension of the Midland construction permits. The record here, as well as the record of the earlier suspension hearing with which we have an intimate familiarity, suggests no reason for us to question Consumers' qualifications to continue construction work as originally authorized at the time the Midland permits issued, and as subsequently approved at the time that the decision was made by the NRC not to suspend.[58] No change in that situation has been requested or is warranted.

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58 The NRC Staff undertook a complete review of the record
(continued next page)

53. The essential purpose of the present hearing was to determine whether sanctions other than those directly affecting the current Midland licensed activity might be appropriate, and whether charges should be preferred toward that end. We are satisfied that no such action is required. The principal claim here was that Consumers and its attorneys had been less than forthright with respect to certain affirmative disclosures made to the Licensing Board in the suspension hearing. In light of various comments attributed to Consumers' lawyers and officials in documents prepared and produced by Dow, a legitimate question was raised as to whether an attempt had been made to keep certain material information out of the hearing. The record before us shows that such was not the case. Consumers and its attorneys approached the suspension hearing responsibly. The decisions made by them during the course of preparing Temple's direct testimony were based on carefully reasoned judgments that have not only withstood our careful scrutiny, but have yet to be faulted by anyone who has examined the circumstances under review. See nn.36 & 37, supra.

54. We are confident that Consumers and its attorneys kept no material information from the Licensing

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of the suspension hearing and concluded there was no cause to question the findings of the Licensing Board with regard to Consumers' qualifications to continue with construction of the nuclear facility. See n.9, supra.

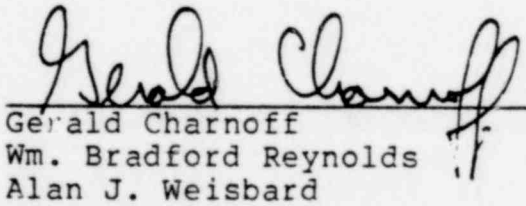
Board, nor attempted to prevent the affirmative disclosure of material information. Messrs. Renfrow and Rosso even made available voluntarily to the NRC Staff and the Midland Intervenors for inspection and copying information considered to be perhaps relevant, although not material, to the issues in the suspension hearing. We view this as entirely proper procedure in every respect; it comports fully with the Commission's Rules of Practice and satisfies the legal and ethical obligations of parties and their attorneys with respect to their disclosure responsibilities in NRC proceedings.

55. Accordingly, we find no justification in this case to impose sanctions against Consumers, nor does the record warrant a recommendation on our part that charges of any kind be preferred against the lawyers and company officials who represented Consumers in the suspension hearing.

Dated: October 15, 1979.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Consumers Power Company's Post-Hearing Brief And Proposed Findings Of Fact And Conclusions Of Law" were served this 16th day of October, 1979, upon the persons named on the attached Service List, by hand delivering copies to those persons in the Washington, D.C. area, and by mailing copies, first class, postage prepaid, to all others.

Wm. Bradford Reynolds

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