UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CONSUMERS POWER COMPANY'S REPLY BRIEF

On October 15, 1979, Consumers Power Company ("Consumers"), The Dow Chemical Company ("Dow") and the Staff of the Nuclear Regulatory Commission ("NRC Staff") submitted Post-Hearing Briefs on the issues set forth in the Licensing Board's Order of June 12, 1979. As reflected in those submissions, the parties are unanimously of the opinion that the extensive evidentiary record before the Board compels a negative response to all five issues.[1]

Consequently, there is no need to repeat here the comprehensive discussion contained in "Consumers Power Company's Post-Hearing Brief And Proposed Findings Of Fact And Conclusions Of Law".[2] Instead, the following remarks are

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1 The Midland Intervenors, who were parties to the original suspension hearing wherein the issues here under scrutiny were first raised, elected not to participate in the instant hearing or file any brief with the Licensing Board.

2 Consumers' initial brief will be referred to hereafter as
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directed to three areas of discussion in the Post-Hearing Briefs filed by the NRC Staff and Dow which require some additional perspective to be fully understood and appreciated by this Board.

1. The Nute Notes of September 21, 1976. The Licensing Board in the suspension hearing expressed concern over certain comments appearing in the Nute Notes which reportedly were made by Consumers' representatives during the September 21, 1976 legal meeting between Dow and Consumers. See LBP-77-57, 6 N.R.C. 482, 485 ¶ 10 (1977). While there remain some differences of opinion among those present at the meeting as to the precise words spoken (see CP Co. Br. at pp. 21-28, 60-62; NRC Br. at pp. 13-17; Dow Br. at pp. 11-21) -- and the other sets of meeting notes fail to corroborate Leslie Nute's account of the meeting in several of the particulars under scrutiny (CP Co. Br. at pp. 23, 25, 28) -- the general consensus is that the extended discussion on September 21 at least touched upon the subjects of Myron Cherry's possible absence from the hearing, selection of a Dow witness other than Joseph Temple, and the prospects of a delay in the larger substantive hearing on remand if suspension were ordered. CP Co. Br. at pp. 21-28; NRC Br. at pp. 13-17; Dow Br. at pp. 11-21.

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"CP Co. Br.". References to the Post-Hearing Brief of the NRC Staff will be to "NRC Br."; the Post-Hearing Brief filed by Dow will be identified hereafter as "Dow Br.".

It is agreed by all parties -- after each independently reviewed the full record -- that whatever fleeting consideration may have been given on September 21 to (a) "finess[ing] the Dow-Consumers dispute" of 1974-75 (Nute Tr. 50,744-46), (b) selecting someone other than Joseph Temple as the Dow witness, or (c) delaying any of the then anticipated proceedings, none of these possible approaches was ever seriously considered by any of the parties or their attorneys, let alone adopted as a strategy and thereafter pursued or acted upon. See CP Co. Br. at pp. 23-24, 25-26, 27-28; 60-62; NRC Br. at p. 17, 31-32; Dow Br. at pp. 14, 18, 21, 72, 84-85. As the Licensing Board in the suspension proceeding pointed out:

> Aggressive Intervenors did appear and the Dow-Consumers matter was aired; the Dow witnesses furnished were highly knowledgeable men (Mr. Temple headed the Michigan Division of Dow); and Licensee has not slowed the suspension hearing. [LBP-77-57, supra, 6 N.R.C. at 485.]

To the extent that the Nute Notes may have conveyed a contrary impression as to the manner in which Consumers intended to approach the suspension hearing, the explanation could well lie in Nute's perception at the time -- a perception which Consumers was neither aware of nor shared -- that there existed an adversarial relationship between the companies.[3] As

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3 Because of personal frustrations experienced during contract negotiations with Consumers' representatives (Nute Tr. 50,519-20, 50,532-36, 50,556), his involvement in the earlier unsuccessful (continued next page)

a comparison of the different sets of meeting notes reflects, Nute entered the September 21 meeting with more of an antagonistic attitude toward Consumers' representatives than either of the other Dow officials, Mr. Klomparens and Mr. Hanes. Compare Klomparens Tr. 53,689-90; Hanes Tr. 52,403.

It is for this reason that the Nute Notes cannot be read in vacuo. Rather, they must be considered in conjunction with the other meeting notes, the testimony of those in attendance, and the actions and behavior of Consumers and its counsel following September 21. In this context, it is clear -- as all parties stated in their initial briefs -- that no attempt was made by Consumers to withhold relevant or material factual information from, or prevent the disclosure of such information to, the Licensing Board; nor was any effort made to delay the proceedings. CP Co. Br. at pp. 22-28, 47-48, 49, 53-55, 60-66; NRC Br. at pp. 8-31; Dow Br. at pp. 14, 18, 21, 72.[4] An exhaustive review of the record of the suspension

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demand by Dow in 1974 for "reasonable assurances" from Consumers (Nute Tr. 50,508-12, 51,163-64), his misunderstanding of Consumers' position at the time it entered into the 1974 contract amendments (compare Nute Tr. 50,506-08 with Renfrow Tr. 51,462-65), and his participation in Temple's formulation of the Michigan Division interim position (Nute Tr. 50,558-59, 50,562, 50,565-66), Nute admittedly viewed Consumers as Dow's adversary at the time of the September 21 meeting (Nute Tr. 51,129). Wessel pointed out in testimony before the Board that this perception -- which he shared (Wessel Tr. 52,492, 52,524) -- ultimately proved to be erroneous (Wessel Tr. 52,524-26).

4 The NRC Staff made marginal reference to the Duran notes
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hearing undertaken by the NRC Staff at the request of this

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of November 1, 1976, as perhaps reflecting an instance where Consumers' counsel "considered not revealing information which it was thought would cause the Licensing Board to suspend Consumers' construction permits". NRC Staff Br. at p. 12 & n.8. Those Duran notes report David Rosso as telling Milton Wessel that Rosso's October 22 draft of testimony failed to indicate Dow's intention to "walk" away from its contract with Consumers if steam was not delivered on schedule because such information "would lose the case". See NRC Staff Ex. 5, Doc. No. 22, p. 4.

We are somewhat surprised at the Staff's reference to this portion of the Duran notes, since sufficient question was raised as to the accuracy of the reported Rosso statement during deposition testimony (Rosso Dep. at pp. 148-50) that the Staff saw fit not to revisit the matter at the hearing. The essential difficulty with the Duran account of the November 1 conversation is that the October 22 draft did in fact include statements of Dow's concern over any further delays in the project (NRC Staff Ex. 5, Doc. No. 17EE, at pp. 3, 4, 6, 9), emphasized that Dow needed steam from the Midland plant by no later than the first part of 1982 when operation was then scheduled to commence (id. at pp. 4-5, 6, 8, 9), and advised that Dow would consider making "other arrangements for its needed power and steam supplies" if it became clear that the existing schedule could not be met (id. at 4, 6).

In light of these statements in the October 22 draft, the Duran notes simply do not ring true as to this particular matter. Moreover, the subsequent draft of testimony, prepared by all counsel (including Rosso) at the November 1 meeting, fully disclosed the same information regarding Dow's intentions to continually review the current situation, keeping all its options open, and to pursue "other arrangements for a reliable supply of steam" in the event of further slippages in the 1982 scheduled operation date. NRC Staff Ex. 5, Doc. NO. 17EE, pp. 3, 6. The final Temple testimony filed with the Licensing Board is to the same effect. Temple Test. at pp. 3-6, following p. 220 of Suspension Transcript.

Accordingly, none of the drafts of testimony prepared by or in consultation with David Rosso failed to disclose the information which Duran's November 1 notes suggest caused Rosso concern. Even assuming arguendo that Rosso expressed the view to Wessel at the November 1 meeting that such information "would lose the case" (which we seriously doubt), it is obvious that Rosso at no time considered not
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Licensing Board removed all conceivable doubts in this regard.[5]

2. The alleged "threat" of litigation. There is no real disagreement among the parties that statements were made by Mr. Falahee at the meeting of September 21, 1976 (NRC Staff Ex. 3, Doc. No. 26, p. 3 ¶ 4), and by Mr. Aymond at the meeting of September 24, 1976 (NRC Staff Ex. 4, Doc. Nos. 6, 10, 11, 14, 17; CP Co. Ex. 1, Doc. No. 8), to the effect that substantial litigation between Consumers and Dow could be expected if Dow chose to repudiate its contracts with Consumers -- or, alternatively, if it undertook to frustrate the performance thereof "without being obvious" (NRC Staff Ex. 4, Doc. No. 6, p. 3) -- and suspension of the Midland construction permits followed as a consequence. See CP Co. Br. at pp. 28-29, 32-33; NRC Staff Br. at pp. 18-20, 22-23; Dow Br. at pp. 21-44.

Mr. Nute testified at the hearing that he "interpreted" these remarks to be threats, although he acknowledged that he may have been "reacting too strongly". Nute Tr. 50,799. Others who heard and observed Mr. Falahee and Mr. Aymond at the time the statements were made did not have the impression that they were talking in either a threatening tone or a threatening manner.[6] Both speakers testified that their

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revealing that information to the Licensing Board.

5 See NRC Staff letter of June 1, 1979, identified as Board Exhibit No. 4. And see NRC Br. at pp. 6-8.

6 See Falahee Tr. 52,260-63, 52,270, 52,277; Bacon Tr.
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comments were not intended or delivered as "threats". Falahee Tr. 52,272-74, 52,277, 52,287; Aymond Tr. 54,055.[7] Whatever honest differences of perception there might have been in this regard, the significant fact is that everyone who heard the "litigation" comments agreed that they were neither aimed at nor understood as intimidating Dow into testifying untruthfully at the suspension hearing. See CP Co. Br. at pp. 31, 35; NRC Br. at pp. 19; Dow Br. at p. 35.

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52,016-17; Youngdahl Tr. 53,815-17, 53,959; Renfrow Tr. 51,449-51; Aymond Tr. 54,055; Klomparens Tr. 53,654-55; Temple Tr. 53,509-11.

7 Dow states in its Post-Hearing Brief that "Consumers now denies making any threats to Dow" (Dow Br. at 81, ft*). In point of fact, Consumers has never denied that Mr. Falahee and Mr. Aymond made specific reference in meetings with Dow representatives to possible legal action in the event that Dow breached its Midland contracts (or frustrated their purpose) and suspension of the Midland permits followed as a result thereof. What has been disputed by Consumers is that such remarks were either intended or can properly be characterized as "threats." As Consumers officials and attorneys testified, it was their considered judgment that Dow was sufficiently sophisticated in business matters that the prospect of litigation with Consumers under such circumstances would hardly come as a surprise. Renfrow Tr. 51,453; Falahee Tr. 52,253; Aymond Tr. 54,055-56; Bacon Tr. 52,169-70. Dow had invited Consumers' views on the possible legal consequences of adopting an official corporate position similar to the interim position announced by the Michigan Division. NRC Ex. 3, Doc. No. 15. In response, Consumers did indeed indicate that a repudiation or frustration of the Midland contracts could certainly precipitate legal action. See pp. 19-23, infra. This has never been denied.

In its Post-Hearing Brief, Dow points to the Falahee and Aymond remarks as largely responsible for Dow's resistence to being totally cooperative with Consumers' attorneys during preparation of Temple's direct testimony. Dow Br. at pp. 43-44, 52. Both Wessel and Nute testified that, because of the potential for substantial litigation between the companies, they treated Rosso and Renfrow as their adversaries. Wessel Tr. 52,492, 52,524; Nute Tr. 51,129. Mr. Wessel has since acknowledged that Dow regrettably misperceived the attitude and objectives of Consumers' counsel during the hearing preparations. Wessel Tr. 52,524-26; NRC Staff Ex. 5, Doc. No. 40.

At the time in question, however, Dow maintains that Nute and Wessel were justified in not advising Rosso and Renfrow of Dow's understanding of the referenced statements made at the September 21 and 24 meetings -- i.e., as "threats of litigation" -- since it could legitimately be assumed that Consumers' lawyers knew "what their client had said to Dow (particularly when one of the counsel attended the same meeting)". Dow Br. at p. 57. Even accepting this observation for the moment -- and passing the question whether Consumers' representatives could reasonably have been expected in the circumstances to fully appreciate Leslie Nute's unexpressed overreaction to the comments (Nute Tr. 50,799; and see Renfrow Tr. 51,447-49, 51,456; Bacon Tr. 52,016-17) -- Dow's argument misses the point. What was not known by Consumers' lawyers,

and was never communicated to them by anyone from Dow despite Rosso's direct questioning of Temple on the precise point (NRC Staff Ex. 5, Doc. No. 30, pp. 6-7, 12), was that the potential lawsuit by Consumers, if Dow chose to repudiate or frustrate the Midland contracts, had a substantial influence on the Dow U.S.A. Board decision. See CP Co. Br. at pp. 56-57.[8]

On hindsight, it would undoubtedly have been better judgment on the part of Dow's attorneys -- once they were advised that the corporate decision was to continue for the present to adhere to the contracts with Consumers (not to repudiate or undertake to frustrate those contracts) -- to have candidly discussed with Consumers' counsel the influence which Falahee's and Aymond's "litigation" remarks had on the Dow U.S.A. Board decision. Yet, the first time that Consumers'

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8 Dow asserts in its Post-Hearing Brief that Nute "testified that the slide or 'overhead' used during the corporate review presentation to the U.S.A. Board relating to the threat of a $600 million lawsuit by Consumers was shown to Mr. Renfrow during the Temple testimony preparation period." Dow Br. at p. 57. What is left unsaid, however, is that this testimony was given by Leslie Nute on the basis of his assumption that the referenced slide was in the package of documents transmitted to Consumers with Nute's October 6 outline of testimony. Nute Tr. 51,050-51, 51,325, 51,382. It was subsequently demonstrated to Nute at the hearing that this assumption was wrong, that the slide was not among those documents. Nute Tr. 51,318, 51,326, 51,371; and see NRC Staff Ex. 5, Doc. No. 17DD, Exhibits following Pt. IV, p.4. Moreover, both Renfrow and Rosso testified that they never saw the "$600 million lawsuit" slide prior to commencement of the suspension hearing. Renfrow Tr. 51,961; Rosso Tr. 53,392-93. These additional facts place in a more accurate perspective the isolated reference to the initial Nute testimony cited in the Dow Post-Hearing Brief.

counsel learned this information was when it was volunteered by Temple on cross-examination at the suspension hearing. Renfrow Tr. 51,893; Rosso Tr. 53,274, 53,318. As pointed out by the NRC Staff, there was in this area simply "a failure of communication". NRC Br. at p. 25; and see CP Co. Br. at pp. 56-57, 78.[9] Thus, Renfrow and Rosso certainly were in no position to suggest inclusion of this particular fact in

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9 Dow argues in its Post-Hearing Brief that it was justified in remaining silent about the extent to which a potential Consumers' lawsuit influenced the Dow U.S.A. Board decision "in view of the probability that Consumers would charge Dow with deliberately sabotaging the project by advising the Board of the alleged threats". Dow Br. at p. 81 (footnote omitted). We would simply make two observations in response. First, if Messrs. Wessel, Nute or Temple had disclosed to Consumers' attorneys in advance of the hearing that the Dow U.S.A. Board focussed on the alleged "threat of litigation" in its September 27 deliberations, they could have easily ascertained whether or not Consumers would have regarded the disclosure of this information to the Board as an effort to "deliberately sabotag[e] the project" (id.). Unfortunately, the "failure of communication" (NRC Br. at p. 25) needlessly created for Dow the illusory spectre of a lawsuit by Consumers.

This brings us to the second point. Dow asserts that it was concerned about a possible claim from Consumers of "sabotage" if the Licensing Board was advised that the decision of the Dow U.S.A. Board was largely influenced by Falahee's and Aymond's "litigation" comments. Yet, Joseph Temple, while admitting that he had no firsthand knowledge on the subject, voluntarily offered this precise information at the first opportunity he had in the suspension hearing. See Suspension Tr. 2311. It is not without interest that the concern over possible later litigation with Consumers -- which Dow's Post-Hearing Brief now argues prompted Dow to remain silent about this matter during its dealings with Rosso and Renfrow in preparing Temple's direct testimony, and in discussing Temple's cross-examination with Consumers' counsel (see CP Co. Br. at pp. 56-57, 78) -- disappeared so suddenly in the suspension hearing, at the very time when the theory on which Dow claims it proceeded would have required even greater circumspection about volunteering information. Wessel Tr. 52,504-05, 52,548; Nute Tr. 51,083-86.

Temple's earlier filed direct testimony. See CP Co. Br. at pp. 56-57, 78.

Whether or not that testimony should have made reference to the consideration given by the Dow U.S.A. Board to the "potential litigation" factor is a question we have already addressed in our earlier brief. As there stated, the underlying reasons for Dow's ultimate decision to adhere to its contracts with Consumers were not material facts required to be disclosed affirmatively. See CP Co. Br. at pp. 79-81. Pursuant to the Aeschliman remand order, the inquiry in the suspension hearing to which Temple's prepared testimony was properly directed concerned only Dow's then current contract intentions. See Aeschliman v Nuclear Regulatory Commission, 547 F.2d 622, 632 (D.C. Cir. 1976).

Following a full corporate review, Dow determined on September 27, 1976, to continue its participation in the Midland project for the present, but to keep all of its options open in the event that subsequent reviews demonstrated a change in the existing circumstances sufficient to warrant active consideration of alternative fuel supply sources. See CP Co. Br. at p. 36. As noted by the Midland Appeal Board in its affirmance of the denial of suspension, this was the material fact. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 N.R.C. 155, 167 n.45 (1978). It was fully disclosed in Temple's direct testimony. See CP Co. Br. at pp. 53-55.

The NRC Staff agrees that "the Dow corporate position was the material fact with which the Licensing Board was concerned * * *". NRC Br. at p. 27. As stated elsewhere in the Staff's Post-Hearing Brief, "the material consideration is Dow's present intention * * *". Id. at p. 30 (emphasis in original) and p. 43. Insofar as the underlying reasons for the Dow decision are concerned, the NRC Staff suggests that they "are probative of the circumstances under which Dow intends to take the steam and therefore relate directly to the material issue". Id. at 27; emphasis added.

We are in general agreement with the Staff's analysis to this point. The "potential litigation" factor as an element of the Dow U.S.A. Board's corporate review is certainly a relevant fact. As such, its disclosure to the Licensing Board on the affirmative case is optional, not mandatory. This is because, as explained by the NRC Staff, the "potential litigation" reason supporting Dow's decision does not, upon examination, alter in any way the Licensing Board's conclusion as to Dow's present contract intentions. NRC Br. at p. 30.[10]

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10 In the context of this case, the "potential litigation" factor merely reinforces the other objective economic factors on which the Dow U.S.A. Board decision was based. As pointed out by the NRC Staff, the prospect of litigation "was a strong incentive to Dow to continue to support the contract" (NRC Br. at p. 28); it thus was but cumulative of the other supportive factors, having no tendency on its own to influence the ultimate decision concerning Dow's true contract intentions. See Dow Br. at pp. 81-82. There may be circumstances in which a "threat of litigation", standing alone, could tend to influence the

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Stating the same thing in terms of the applicable "materiality" standard announced by the Appeal Board in Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-324, 3 N.R.C. 347, 359 (1976), the information in question does not have a "natural tendency" or capability of influencing the ultimate decision. See CP Co. Br. at pp. 74-76, 78-81.[11]

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decisionmaker -- if, for example, it is designed to and does in fact intimidate the threatened party to assert an artificial position which cannot be justified by other objective factors. Here, however, it is undisputed that Consumers at no time sought to elicit untruthful testimony from Dow, or have Dow testify at the suspension hearing to an artificial position. See p. 7, supra. Moreover, Dow's stated intent to adhere to the Midland contracts has been fully borne out by subsequent events. See CP Co. Br. at p. 58; NRC Br. at p. 48.

11 The NRC Staff states at the outset of its Post-Hearing Brief that the obligation on parties and counsel to make an affirmative disclosure of facts to the Licensing Board should turn on "a good faith belief that such information may affect the decision whether or not such information is technically material to the issues in controversy". NRC Br. at p. 5. In our view, this formulation of a standard tends to confuse, rather than clarify, the analysis. As the Staff's own discussion of the "standard of disclosure" demonstrates (NRC Br. at pp. 25-30), a fact which may legitimately be regarded as "affecting" the decision is, by definition, a material fact, i.e., one which has a natural tendency or capability of influencing the ultimate decision. VEPCO, ALAB-324, supra, 3 N.R.C. at 359.

As we pointed out in our initial brief (CP Co. Br. at pp. 73-76), if the fact in question reflects a significant new development or a changed circumstance with regard to safety or environmental issues being adjudicated or already determined, its "materiality" is readily identifiable, and disclosure is required so as to "accurately reflect existing facts". See Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 A.E.C. 623, 626 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-167, 6 A.E.C. 1151 (1973). This case, however, presents
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Indeed, this was fully recognized by the Appeal Board on review of the denial of suspension in the following terms:

> For our purposes, then, that portion of the demand for Midland power attributable to Dow is a given. To be sure, financial and other considerations might result in Dow's being unwilling to enter into a similar arrangement if the choice were before it today. But that is true of many contracts viewed in the perspective hindsight affords. Whether or not it is in Dow's financial interests to honor its contract is not for us but for Dow to determine. And, to repeat, extensive probing on this point in the suspension hearing yielding convincing evidence that Dow's present intention is to adhere to its contract terms. [ALAB-458, supra, 7 N.R.C. at 168; footnotes omitted and emphasis added.]

3. The Michigan Division interim position. It is agreed that Consumers and Dow were under no obligation to include the Michigan Division interim position in Temple's direct testimony. As pointed out in all the Post-Hearing Briefs, once the Dow U.S.A. Board officially determined on September 27, 1976 to abide by its contracts with Consumers, the contrary views expressed internally by officials within a

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the "materiality" question in a different context, one where the facts in question present neither a significant new development nor a change of circumstances insofar as the status of Dow's contractual relationship with Consumers is concerned. The proper analysis in such circumstances is the one set forth in our earlier brief. See CP Co. Br. at pp. 76-81.

Division of Dow were not material to the fundamental issue of Dow's present corporate position regarding the procurement of process steam from the Midland plant. CP Co. Br. at pp. 67-78; NRC Br. at pp. 27, 36, 43-44; Dow Br. at pp. 64-69.

Notwithstanding unanimity on this point, we cannot help but note the continuing confusion regarding what the Michigan Division's interim position actually was. In some respects that confusion is not surprising. The carefully couched statement that the Michigan Division no longer regarded the nuclear project as "good for Dow's Midland plant" (NRC Staff Ex. 3, Doc. No. 4, p. 9), and had recommended a complete higher level corporate review by Dow management, was certainly susceptible to more than one good faith interpretation. Examination of the record demonstrates that the context, bases and implications of the Michigan Division interim position were in fact understood differently both within Consumers and within Dow. Indeed, the Division's position was even understood differently at different times by one of Dow's key employees, Leslie Nute, who was closely associated with its formulation. See n.13, infra.

The confusion arose at the inception. Consumers personnel who testified at the hearing stressed their inability to discern exactly what Joseph Temple meant at the September 13, 1976 meeting when he first announced that the Michigan Division no longer regarded the nuclear project as "good for

Dow's Midland Plant" (NRC Staff Ex. 3, Doc. No. 4, p. 9). See Youngdahl Tr. 53,786; Aymond Tr. 54,011, 54,030; Bacon Tr. 52,183-84; Falahee Tr. 52,237, 52,244, 52,280. While Temple at that time listed a number of factors which he said "influenced" the conclusion reached by the Michigan Division (NRC Staff Ex. 3, Doc. No. 9; Youngdahl Tr. 53,785), he specifically declined to explain then or later the basis or precise implications for Consumers of the Michigan Division's conclusions.[12]

Adding to the confusion were Temple's repeated assertions that he still considered the contracts with Consumers to be valid. NRC Staff Ex. 3, Doc. No. 4, p. 11; Doc. No. 5, p. 5; Doc. No. 9, p. 2; Doc. No. 10, pp. 3-4. In terms of Dow's corporate position at the time, these remarks were undoubtedly true. As Temple advised Consumers on September 13, the Michigan Division's viewpoint had not been adopted by Dow management, and a full corporate review of the situation was to be undertaken prior to any official decision

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12 Mr. Youngdahl testified that Temple declined to elaborate on his September 13 statement when questioned by Youngdahl. Youngdahl Tr. 53,785-87. The notes of two internal meetings among Consumers officials held on September 17 and 21, 1976, indicate that efforts after the September 13 meeting to elicit a more meaningful explanation of the Michigan Division interim position were to no avail. CP Co. Ex. 1, Doc. No. 22; Doc. No. 23. Similarly, several sets of meeting notes reporting on the Dow-Consumers meeting of September 24, 1976, show that Temple refused to clarify the Michigan Division interim position when Mr. Aymond asked him for a more meaningful explanation. See NRC Staff Ex. 4, Doc. No. 6, p. 3; Doc. No. 11, p. 3; Doc. No. 14, p. 3; Doc. No. 17, p. 3.

by the Dow U.S.A. Board. NRC Staff Ex. 3, Doc. No. 4, p. 10. Thus, at least pending the outcome of the review process, Dow's corporate position continued to be -- as Temple had stated -- that the contracts remained in full force and effect. See NRC Staff Ex. 2, Doc. No. 24.

The question that went unanswered, however, was whether Mr. Temple, as spokesman for the Michigan Division, was of the view that Dow should continue to treat its contracts with Consumers as being valid. Rex Renfrow's understanding of the Michigan Division's interim position was that it contemplated a repudiation of the existing contracts. Renfrow Tr. 51,436-38. Mr. Falahee also considered Temple's "no longer good for" statement as a possible signal that the Michigan Division thought Dow should no longer honor its contracts with Consumers. Falahee Tr. 52,272-74, 52,287; see also Bacon Tr. 52,171-72. Interestingly, Mr. Klomparens, who headed the Dow review team, and (until recently) Mr. Nute, shared this view. Klomparens Tr. 53,641; Nute Tr. 50,912-13, 50,917-18.[13]

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13 Nute acknowledged at the hearing that his original understanding of the Dow U.S.A. Board's decision on September 27 -- i.e., to adhere for the present to the Midland contracts -- was that it "overruled" the recommendation of the Michigan Division (Nute Tr. 50,912-13, 50,917-18, 50,924-25). And cf. Renfrow Tr. 51,595. He further testified, however, that sometime between his deposition on June 15, 1979, and his appearance at the hearing some six weeks later, on July 6, 1979, he arrived at a different understanding of the situation as a result of being "forced to think about it" in preparation for his hearing testimony (Nute Tr. 50,925). This new understanding of the Michigan Division
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Others at both Consumers and Dow read Temple's statement of the Michigan Division's interim position differently. Mr. Temple testified that the intended message he sought to convey was essentially that the Michigan Division no longer viewed the Midland project as advantageous to Dow, but that the Division still felt compelled to honor its existing contract obligations. Temple Tr. 53,452-53, 53,510. This also seemed to be Mr. Hanes' understanding of the matter. Hanes Tr. 52,343, 52,360. Leslie Nute testified that he, too, ultimately interpreted Temple's remarks in this way, although not until much later and after considerable reflection on the subject. See n.13, supra.

In Mr. Aymond's opinion, this description of the Michigan Division's interim position was troublesome because the suggestion that the nuclear plant was no longer advantageous to Dow was contradicted by all of Consumers' own economic studies. Aymond Tr. 54,050-51, 54,088. He therefore questioned how the Division could reach such a conclusion in

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interim position was apparently that it was really no different from the decision of the Dow U.S.A. Board with respect to Dow's intention to honor its contractual commitment to take process steam from the nuclear plant. Nute Tr. 50,920-21. Dow's Post-Hearing Brief refers only to Nute's later understanding of the Michigan Division's interim position in its discussion of this matter -- i.e., the one interpreting the Division's position as expressing disenchantment with the nuclear project but intending to abide by the contracts -- and not at all to his original understanding in September, 1976. See Dow Br. at p. 33.

good faith (id.), and testified that a position which purported to "support" Consumers on any such terms would, in his view, provide only "lip service" to the contracts. Aymond Tr. 54,087-88, 54,093; see also Falahee Tr. 52,289, 52,294. Mr. Youngdahl, on the other hand, understood Joseph Temple's description of the Michigan Division's interim position to be more than mere "lip service". He thought that the Michigan Division was not urging repudiation of the contracts, but was only pointing out that the economic advantages of the nuclear plant had narrowed considerably. Youngdahl Tr. 53,812-13.

These varying interpretations of the Michigan Division's interim position were perfectly understandable in light of Mr. Temple's abbreviated remarks on September 13, and his refusal thereafter to elaborate. See n.12, supra. Precisely because Consumers' representatives were unable to ascertain whether the Division was urging Dow management to repudiate the contracts (Renfrow Tr. 51,436-38; Falahee Tr. 52,272-74, 52,287; Bacon Tr. 52,171-72), to pay only "lip service" to the contracts (Aymond Tr. 54,087-88; Falahee Tr. 52,289, 52,294), or to continue supporting the contracts (Youngdahl Tr. 53,813), Consumers' input into the Dow corporate review addressed a range of possible alternative positions that the Dow U.S.A. Board could take. Aymond Tr. 54,074-75; Bacon Tr. 52,006, 52,097-98 and see NRC Staff Ex. 4, Doc. No. 9, p. 1.[14]

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14 Consumers anticipated, correctly, that the Dow U.S.A.
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We are hard pressed to ascertain how Consumers could have responsibly taken any other approach. The September 21 meeting invited Consumers' comments on the legal implications -- past, present and future -- of a Dow corporate position similar to the announced interim position of the Michigan Division. Renfrow Tr. 51,408; Falahee Tr. 52,250; NRC Staff Ex. 3, Doc. No. 15; Board Ex. 2. As to the "past" and "present" legal ramifications, Rex Renfrow discussed the Aeschliman remand order, the upcoming suspension hearing and the then anticipated "larger" hearing on the merits. Renfrow Tr. 51,412; Bacon Tr. 52,006.

It was during this discussion (Renfrow Tr. 51,447; Bacon Tr. 52,167; Falahee Tr. 52,255-56) that Mr. Falahee advised the Dow representatives of the possibility of "future" legal implications in the event that the corporate decision was to breach the Midland contracts (Falahee Tr. 52,256). In light of Dow's expression of interest in having precisely this sort of input from Consumers at the September 21 meeting,[15] Mr.

(continued)
Board decision (unlike the Michigan Division's "conclusion" with recommendation for review) would include an explicit determination as to whether Dow's present intention was to abide by its contractual obligations. The absence of any such explicit determination in the Michigan Division's interim position helps explain the difficulty many witnesses expressed in fitting the Michigan Division position comfortably into any of the categories contained in the Aymond outline. See, e.g., Dow Br. at p. 33.

15 The September 21 legal meeting was called by Task
(continued next page)

Falahee's remarks were both appropriate and timely. See also CP Co. Br. at pp. 28-32.

The same can be said of Mr. Aymond's statements at the September 24 meeting with Dow. The purpose of this meeting, requested by Dow, was to receive input from Consumers as to "the impact of the Division position and a similar Dow corporate position on Consumers Power". NRC Staff Ex. 3, Doc. No. 15. Mr. Aymond testified that because the Michigan Division position had never been satisfactorily explained, his discussion addressed the subject once again in terms of alternative positions Dow could take. See n.14, supra; and see Aymond Tr. 54,029, 54,046. These alternatives included essentially the following four possibilities: enthusiastic support of the nuclear project (NRC Staff Ex. 4, Doc. No. 9, ¶ 3a), support of the project but with some recognition of its diminishing economic advantages (id. at ¶ 3a(1)), paying only "lip service" to the Midland contracts while claiming that the nuclear steam option was no longer the most advantageous alternative to Dow (id. at ¶ 3b), and outright repudiation of the contracts with Consumers (id. at ¶ 3c).

(continued)
Force No. 2 of the Dow corporate review team. Youngdahl Tr. 53,786-87. As Temple explained to Mr. Youngdahl, the assignment given to that task force was "to review the legal aspects of the [ultimate Dow corporate] decision -- past, present and future." NRC Staff Ex. 3, Doc. No. 15 (emphasis added).

Mr. Aymond advised Paul Oreffice and the other Dow representatives of the likely impact on the suspension hearing of each of these positions, and further provided an economic analysis of the costs that Consumers anticipated in the event of project delays due to suspension. See CP Co. Br. at p. 33. He also informed Dow that if it ultimately decided to repudiate its contracts with Consumers and suspension of construction resulted, Dow could expect a lawsuit by Consumers seeking damages for breach of contract. In addition, he stated that if Dow undertook in the suspension hearing to frustrate the performance of the Midland contracts, such action also might wind up in the courts. CP Co. Br. at p. 33 & n.24.[16] Aymond

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16 We note that the NRC Staff has discussed the Aymond remarks at the September 24 meeting concerning possible litigation in terms of the outline prepared by Consumers in advance of the meeting. NRC Br. at pp. 23-24. It is undisputed, however, that Mr. Aymond neither read from nor distributed that outline. See CP Co. Br. at p. 32. His actual comments regarding a possible lawsuit by Consumers in the event of suspension were recorded in several sets of meeting notes. They all reflect that Aymond spoke of possible litigation in terms of a "repudiation" or "frustration" of the Midland contracts by Dow. See CP Co. Br. at pp. 33-34 & n.24. Moreover, the meeting notes report that Aymond advised Dow on September 24 that there was a virtual certainty of a lawsuit if Dow breached its contracts with Consumers; however, if Consumers' claim was based on a "frustration of performance" theory, Aymond indicated that litigation was likely, but not inevitable -- i.e., that too could wind up in the courts. Id. In this latter regard, he and other Consumers representatives testified at the hearing that the decision whether to initiate litigation against Dow for "frustration" of the contracts would depend on Consumers' perception of Dow's state of mind, i.e., did Dow act in good or bad faith. CP Co. Br. at pp. 33-34 n.24. It was acknowledged that ultimately Dow's good faith might be a question which the courts would have to resolve. Aymond Tr. 54,092-93, 54,107.

testified at the hearing that a Dow position which paid "lip service" to the contract, while insisting that the nuclear option was no longer the most advantageous fuel supply alternative available, might be an example of an attempt to frustrate the contract. Aymond Tr. 54,092-93. In his view, the courts could well be called upon in such circumstances, to determine whether Dow had acted in good or bad faith (id.).

Since the Michigan Division's interim position could legitimately be interpreted by Consumers representatives either as contemplating a contract breach or as paying only "lip service" to the contracts on the basis of a questionable economic evaluation which was contradicted by Consumers' own economic studies (see pp. 17-19, supra), Aymond's remarks directed to possible litigation in the event of a Dow decision to repudiate or frustrate the contracts were perfectly understandable. Dow had asked to be advised at the September 24 meeting what the impact would be on Consumers of an adverse decision by Dow's corporate management regarding its contract intentions. Mr. Aymond's response to this inquiry was neither inappropriate nor unexpected. See CP Co. at pp. 34-35.

CONCLUSION

As discussed more fully in our initial brief, there is no basis to find that Consumers or its counsel engaged in any activities during the preparation for the Midland

suspension hearing that were improper in any respect. They did not attempt to withhold relevant factual information from the Licensing Board. They did not attempt to prevent the full disclosure of material information. They did not attempt to mislead the Licensing Board with respect to Dow's present intentions concerning performance of the Midland contracts. They did not attempt to mislead the Licensing Board regarding the preparation and presentation of the Temple testimony. And they did not attempt to delay the suspension proceedings.

A full review of the record demonstrates conclusively that Consumers and its attorneys approached the suspension hearing in a conscientious manner and with a cooperative attitude. While efforts to elicit from Dow's representatives certain background information met at first with some resistance -- for reasons unrelated to the suspension hearing -- ultimately the material facts concerning Dow's corporate position under the Midland contracts were forthcoming. These facts were fully disclosed to the Licensing Board. The preparation of Mr. Temple's direct testimony was undertaken in a careful and forthright manner, and resulted in a prepared statement that accurately portrayed Dow's present intentions.

Accordingly, there is no basis on this record to impose any sanctions against Consumers or to recommend that

charges of any kind be preferred against the lawyers and company officials who represented Consumers in the suspension hearing.

Dated: November 5, 1979.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Consumers Power Company's Reply Brief" were served upon the persons named on the attached Service List, by hand delivering copies to those in the Washington, D.C. area, and by mailing copies, first class, postage prepaid, to all others, all on this 5th day of November, 1979.

Wm. Bradford Reynolds

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