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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1
and 2))

OFFICE OF SECRETARY
DOCKETING & SERVICE

Docket Nos. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

MOTION TO LITIGATE ISSUES RAISED BY DOW
SUIT AND TO OPEN DISCOVERY ON THE DOW ISSUES

Intervenor Barbara Stamiris, pursuant to 10 C.F.R. 2.730 and through undersigned counsel, hereby moves this Atomic Safety and Licensing Board ("Licensing Board") to allow litigation of three issues raised by the Dow suit against Consumers Power Company ("Consumers"). All three issues are probative of Mrs. Stamiris' management attitude contentions that Consumers is not and has not been honest and forthright in providing information to the Nuclear Regulatory Commission ("NRC" or "Commission"), both the NRC Staff and this Licensing Board. She requests the immediate reopening of discovery on these three issues so that their litigation will not unduly prolong these OM hearings.

A. BACKGROUND.

On July 14, 1983, the Dow Chemical Company sued Consumers for a declaratory judgment that Consumers had acted fraudulently and in derogation of contractual and fiduciary duties and for \$60 million in damages.^{1/} The Dow Chemical Company v. Consumers Power Company, File No. 83-00-2332-CK-D (Mich. Cir. Ct. filed July 14, 1983).

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On July 18, 1983 Dow filed a first amended complaint. The Dow Chemical Co. v. Consumers Power Co., File No. 83-002232-CK-D (Mich. Cir. Ct. filed July 19, 1983). All references in this motion are to the original complaint since it contains a more comprehensive statement of facts. Both the original and the first amended complaints were certified by a Dow Chemical Company official.

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Dow based its request for relief largely on three claims:

1) Consumers made fraudulent misrepresentations and failed to disclose material facts in derogation of its contractual and fiduciary obligations to Dow;

2) Consumers materially breached its contractual and fiduciary duties to Dow;

3) Dow is excused from performance under its contract with Consumers due to a "failure of fundamental assumptions."

Many of the allegations in the complaint are the same contentions intervenors have put forward in these soil settlement proceedings.

Three issues raised by the Dow Complaint, and evidently substantiated by documentation, present new evidence on intervenor's management attitude contentions:

1) Consumers misrepresented its time schedule for completion of the Midland plants to the NRC, including the NRC Staff and this Licensing Board. See paragraphs 20, 37, 39-48.

2) Consumers used and relied on U.S. Testing test results to fulfill NRC regulatory requirements while knowing that these test results were invalid. See par. 24, 35.

3) Consumers knowingly represented to the NRC that the single test boring taken near the diesel generator building demonstrated that unmixed cohesive fill had been used as a foundation for safety-related structures at the site even though this test boring actually indicated that random fill had been improperly used in these areas. See par. 27.

All of these issues are probative of Consumers' failure to give full and accurate information to the NRC and to be totally honest and forthright in all communications with the NRC.

A fair reading of the Dow complaint and other sources indicate that the following documents exist which tend to support the management attitude issues:

- 1) Par. 30: Bechtel Forecast 5, June, 1978;
Consumers' Memo reviewing Bechtel Forecast 5, June, 1978;
- 2) Par. 35: Consumers' investigation following August 23, 1978 suspension of construction which showed negligence in placement and compaction of fill site-wide;
July, 1978 Bechtel Report stating "no rational means of determining which test results are valid ..."
April, 1979 Bechtel Letter to U.S. Testing regarding test results;
October 1, 1979 U.S. Testing Response to Bechtel Letter;
April 17, 1980 Bechtel Response to October 1, 1979 U.S. Testing Letter;
- 3) Par. 37: April, 1979 Bechtel Report concerning delays for Units 1 and 2;
July, 1979 Bechtel Report on Schedule;
November, 1979 Consumers' Schedule; and
Consumers' investigation of fill which indicated remedial measures it took were inadequate.
- 4) Par. 40: Bechtel Forecast Six - January, 1980;
- 5) Par. 41: Consumers' internal studies stating that it could not complete plants until 1985 and alternatives considered.

- 6) Par. 42: March 5, 1980 Consumers' Report and/or Plan to fabricate schedule;
Consumers' May 5, 1980 Memo and/or Position Paper on Schedule(s).
- 7) Par. 43: June 28, 1980 Meeting Minutes or other documents concerning Consumers-Bechtel meeting regarding new construction schedule;
- 8) Par. 44: July 10, 1980 Meeting Minutes and/or other documents concerning Consumers-Bechtel agreement to maintain dual schedules.

Intervenor also understands that the following "generic" corporate documents exist which support the allegations in the Dow Complaint:

- 1) Documents Consumers submitted in the 1980 and 1981 time period to the Michigan Public Service Commission indicating Consumers knew that it could not complete the project by 1984 as it stated to the NRC;
- 2) Monthly Bechtel to Consumers Status Reports;
- 3) Monthly Cost Trend Reports; and
- 4) Bechtel Schedule Forecasts, issued every six months and reviewed by Consumers.

Paragraph 56 of the Dow Complaint indicates that Dow demanded and received a "large number of Consumers' documents which demonstrate a "continuous and systematic practice of misrepresentation and nondisclosure" Apparently these documents form the basis for a portion of the factual allegations of the complaint, especially those having to do with whether Consumers falsely represented the project's schedule to Dow and to the NRC.

NRC Project Manager Darl Hood, in response to questions from Judge Bechhoefer, stated that Consumers transmitted information to the NRC on the scheduled completion of the two plants for the Yellow Book and for the Case Load Forecast Panel. Tr. at

19353-55. Intervenor's review of the schedule information Consumers transmitted to the NRC indicates that Consumers told the NRC the same completion dates as it communicated to Dow, according to the Dow Complaint, that is, the "public consumption" schedule.

None of the three issues listed above has been litigated up to this point in these OM hearings. The evidence presented on the "soil boring" issue in these hearings did not indicate that soil boring D-4, taken near the diesel generator building showed site-wide problems. Gilbert Keeley, Consumers Project Manager, testified in prefiled testimony, July 7, 1981, following Tr. at 1163, that the test boring taken in September, 1977, in the diesel generator building area indicated no site-wide problems. The intervenors did not challenge this evaluation in any way. The NRC staff, pursuant to a stipulation entered into with Consumers, presented no evidence for the time period preceding 1979.

Similarly, no party presented evidence in these proceedings that Consumers knowingly used false test results of U.S. Testing. Eugene Gallagher testified that given the involvement of U.S. Testing in soils testing at both the Administration Building and the Diesel Generator Building areas, Consumers should have been aware of potential problems with U.S. Testing results and that a site-wide problem existed. Neither Mr. Gallagher nor any other witness testified, however, that Consumers had actual knowledge of the invalidity of U.S. Testing test results at the time it used them. Tr. at 2573.

NRC Staff Counsel supports litigation of the issue of whether or not Consumers misrepresented the scheduled completion dates for the Midland plants to the NRC. Tr. at 19351-52, 19366, 19379. NRC Staff Counsel also supports re-opened discovery on issues raised by the Dow Complaint. Tr. at 19369-71, 19380, 19385.

B. THIS LICENSING BOARD HAS BROAD INHERENT AUTHORITY TO SHAPE THE COURSE OF THESE PROCEEDINGS TO PERMIT LITIGATION OF THE DOW ISSUES.

Licensing Boards have broad inherent authority to shape the course of the proceedings over which they preside. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 2-1-08 (1978); 10 C.F.R. 2.718(e); 5 U.S.C. 556(c), Administrative Procedure Act.

This authority includes the power to schedule the receipt of evidence into the hearing record to create a sound record for decisionmaking. Offshore Power Systems, supra, 8 NRC at 205, n. 36.

It is not the convenience of litigants but the "broader public interest" which a Licensing Board or presiding officer must maintain as paramount in all decisions as to the course of licensing hearings. Id. at 208; Potomac Electric Power Co. (Douglas Point, Units 1 and 2), ALAB-277, 1 NRC 539, 552 (1975).

Moreover, a Licensing Board's authority to shape the course of a proceeding or determine the type, amount and schedule of presentation of evidence on contentions is distinct from its limited authority under 10 C.F.R. 2.760 to determine the issues or contentions to be litigated. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111 (1981).

In this motion intervenor invokes the inherent authority of this Board to shape these OM proceedings and not its authority to determine the contentions to be admitted for litigation.^{2/}

Clearly, the three issues outlined above are relevant and important to this Board's decision on the "management attitude" contentions. The issues of whether Consumers misrepresented the schedule for completion of the two Midland plants to the NRC Staff and to this Licensing Board and whether it misrepresented the validity of U.S. Testing test results and its own evaluation of an important test boring are crucial to this Board's decision. In fact, an applicant's honesty and integrity are important to every Licensing Board's determination of whether the utility can be trusted to protect the public health and safety since the NRC system is largely self-regulatory. The Commission and the courts have always stringently interpreted the Atomic Energy Act's requirement that applicants and licensees fully disclose all potentially relevant information to the Commission. Virginia Electric and Power Company 'North Anna Power Station, Units 1 and 2, 4 NRC 480, 491-92, n. 11 (1976), aff'd, Virginia Electric Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978). Matter of Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964).

^{2/} If this Board denies intervenor's motion to reopen discovery and litigate the Dow issues under the "management attitude" contentions, Mrs. Stamiris will move to reopen the record and to establish these issues as contentions in the OM hearings. Certainly litigation of these issues as "management attitude" issues, analogous to the Boos' investigation issues, will expedite these proceedings.

Consumers' past and continuing failures to communicate accurate and honest information to the NRC is probably the single most probative evidence as to whether or not Consumers should be allowed to proceed with the soils work at Midland. Region III has stated that it cannot itself construct the Midland plants. Given that the NRC inspection staff is strained to its limits, this Licensing Board's basic decision is to determine whether Consumers can be trusted to carry out the complex soils remedial work needed at Midland. Certainly the allegations of the Dow Complaint, if substantiated, cast doubt on Consumers' ability and willingness under any NRC-imposed conditions to complete the soils work and other construction of the Midland plants in a manner which guarantees the public health and safety.

C. DISCOVERY SHOULD BE REOPENED
ON THE THREE DOW ISSUES.

Intervenor requests that discovery be reopened on the three Dow issues listed above. It is obvious from the face of the Dow Complaint that Dow is relying on specific documents to demonstrate that Consumers submitted false information on the schedule for completion of the Midland plants to Dow and to the NRC. It is also clear that Dow is quoting from specific documents in stating that Consumers had knowledge that the U.S. Testing test results on which it was relying were false. See par. 35. Intervenor believes, therefore, that documents substantiating Dow's claims are readily available and have been supplied to Dow by Consumers, as stated in paragraph 56 of the complaint.

Therefore, intervenor requests that discovery be reopened on those issues listed above.

Intervenor agrees with NRC Staff counsel that the issues dealing with Consumer's material misrepresentations on the schedule may be difficult to litigate. Thus, litigation of this issue would be best scheduled three to four months after the opening of discovery. Nevertheless, if this Board determines it cannot keep the record open in the OM proceedings through December, 1983, intervenor respectfully requests that discovery be opened immediately and shortened response times be established for all parties. A shortened discovery period would permit litigation of the Dow issues in the October hearings.

On July 31, 1983, intervenors reviewed with Consumers those specific documents described in the Dow complaint or of whose existence intervenor knew from other sources. Many of these documents Mrs. Stamiris believes were included within the scope of her earlier discovery requests. Consumers has not stated whether or not it will now produce any of these documents on the basis that they should have been produced at an earlier time in response to Mrs. Stamiris' discovery requests. In fact, Mr. Brunner indicated that he was not hopeful that Consumers would voluntarily produce any of the documents. Therefore, intervenor requests at this time that this Board determine whether or not any of the documents listed in Part I, supra, were in fact subject to her original discovery requests and should now be immediately produced.

The discovery requests which Mrs. Stamiris believes requested documents related to the Dow Complaint are the following:

December 4 1980 Discovery Request:

1. Document Request 2: "Any cost or schedule impact data or projections made since those submitted in response to 50.54f questions 21 and 22 regarding soil settlement matters.

All "schedule" documents described in Part I, supra, which were issued at any time prior to Consumers response on March 30, 1981, should have been produced. None of these documents was produced.

2. Discovery Request 5: Discussions of all options ever considered (whether formal or informal, tentative or complete) for correction of the Administration Building settlement.

Certain of the documents described in the Dow Complaint indicate that Consumers knew that its remedial measures were inadequate and that other options were considered. None of these documents was produced.

3. Interrogatory 2(a): Did your consultants ever differ in their recommendations on soil settlement matters (including tentative opinions)?

Certain documents described in the Dow Complaint indicate that Consumers knew fill problems were site-wide but did not communicate this information to the NRC. None of these opinions, whether of consultants, Bechtel or Consumers, was forwarded to Mrs. Stamiris during discovery.

January 14, 1981 Discovery Request:

1. Discovery Request 2: Were any audits conducted covering soil settlement matters (including QA QC aspects) which have not

been presented to the NRC. If so, provide these findings.

All documents demonstrating that the diesel generator building soil boring indicated site-wide problems should have been produced. In addition, all documents related to Consumers' knowledge about the invalidity of U.S. Testing test results should have been produced, including the correspondence between Bechtel and U.S. Testing described in Part I, supra. None of these documents was produced.

2. Discovery Request 5: Provide the Bechtel reports as to the cause of the Administration Building settlement and whether it was an isolated problem, or any other reports recommending procedural changes stemming from this event.

Documents described in the Dow Complaint, including Bechtel's 1979 Report should have been produced as they dealt specifically with causes of the soil settlement problems and whether or not they were site-wide problems.

March 27, 1981 Discovery Request:

1. Interrogatory 3: Were any corrective actions recommended as a result of the Administration Building settlement problems? If so, please describe.

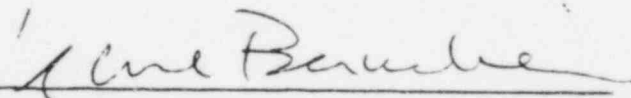
The Dow Complaint indicates that internal Consumers' or Bechtel investigations demonstrated that improper placement and compaction of fill created problems site-wide. See par.35. It is likely that these documents also recommend corrective action to these site-wide settlement problems, which would include corrective action for the Administrative Building problems as well.

Intervenor requests that this Board order Consumers to produce documents listed in Part I, supra, which are obviously included within Mrs. Stamiris' prior discovery requests and were not produced at that time.^{3/}

D. CONCLUSION.

In consideration of the above, this Licensing Board should grant intervenor's requests to litigate as management attitude issues the three Dow issues raised for the first time in the Dow Complaint filed July 14, 1983, and to reopen discovery immediately on these issues.

Respectfully submitted,


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August 8, 1983

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Intervenor has not submitted an affidavit swearing to the fact that she made the above-mentioned discovery requests and that she did not receive the documents described in the Dow Complaint. If this Board deems filing of such an affidavit necessary after review of the publicly available discovery requests and responses, she will file one.

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board
OFFICE OF SECRETARY
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)	50-330-OL
CONSUMERS POWER COMPANY)	50-329-OM
)	50-330-OM
(Midland Plant, Units 1 and 2))	
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion
To Litigate Issues Raised by Dow Suit and To Open Discovery
on the Dow Issues were mailed, proper postage prepaid, this
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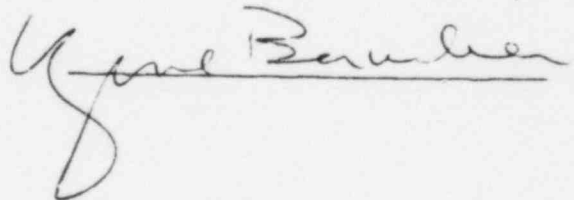
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