UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

IN THE MATTER OF CONSUMERS POWER COMPANY (Midland Plant, Units 1 & 2)	Docket Nos. 50-329 CP 50-330 CP

BRIEF OF THE DOW CHEMICAL COMPANY
IN REPLY TO BRIEF OF
CONSUMERS POWER COMPANY

INTRODUCTION

This is an appeal by Intervenor Saginaw Valley Nuclear Study group (Intervenor) from a decision of an Atomic Safety and Licensing Board dated December 22, 1981. Intervenor filed its "Brief in Support of Exceptions to Partial Initial Decision Dated December 22, 1981" on February 22, 1982. The Dow Chemical Company (Dow) filed a brief in reply to Intervenor's Brief on March 22, 1982. Consumers Power Company (Consumers) obtained an extension of time within which to file its reply

brief and thereafter filed its "Brief of Consumers Power Company in Opposition to Intervenor's Exceptions" on April 5, 1982.

Dow has reviewed the Brief filed by Consumers Power Company. Rather than simply taking issue with exceptions filed by the Intervenor, the Consumers Brief goes on to take exception to certain facts found by the Licensing Board below and also contains a recitation of "facts" on which the Licensing Board below made no finding. In several cases, Dow does not agree with Consumers that the Board made the finding that Consumers claims it did and Dow also disagrees with certain factual assertions made by Consumers regarding the testimony elicited at the hearing below and upon which the Licensing Board made no specific finding.

Dow will hereafter set out its position with respect to certain "findings of fact" which Consumers claims the Licensing Board made as well as its position with respect to certain factual assertions contained in Consumers' Brief regarding the testimony elicited at the hearing below.

COMMENTS ON CONSUMERS' BRIEF

I. THE CLAIM THAT ALL PARTICIPANTS IN THE REMAND PROCEEDING CONCLUDED THAT, WITH RESPECT TO CONSUMERS AND ITS ATTORNEYS, NO WRONGFUL CONDUCT HAD BEEN ESTABLISHED IN THE PREPARATION OF THE TESTIMONY OF JOSEPH TEMPLE

On page seven of its Brief, in Footnote 7, Consumers states "All participants in the remand proceeding concluded that with respect to Consumers and its attorneys, all four questions (relating to whether there had been any wrongful conduct engaged in in the preparation of the testimony of Mr. Temple of Dow) should be answered in the negative. In its Brief filed with the Licensing Board, Consumers devoted considerable time and effort in arguing that Mr. Wessel, outside counsel for Dow, had engaged in "improper" conduct during the period while the testimony of Mr. Temple was being prepared (Consumers' Brief dated October 15, 1979, Proposed Conclusions of Law Nos. 44-51, pp. 90-95). Dow responded to these contentions in its reply brief dated November 5, 1979 (see pp. 32-45). The Licensing Board, in its decision, correctly concluded, contrary to Consumers' position, that neither Mr. Wessel nor any other Dow attorney engaged in any wrongful conduct in the preparation of Mr. Temple's testimony.

Contrary to Consumers' statement in its brief before this Appeal Board, Dow did not conclude that Consumers' conduct during the preparation for the 1976 hearings was proper. Indeed, it expressly took no position on this question and left that question to be answered by the Licensing Board. (See Dow Brief dated October 15, 1979, p. 6.)

II. THE CLAIM THAT, DURING THE TESTIMONY PREPARATION, CONSUMERS WAS "SIMPLY TRYING TO GET FACTS" WHILE DOW COUNSEL WERE ENGAGING IN "SPORTING ACTIVITIES"

At page 17 of its Brief, Consumers claims that its hearing counsel viewed the preparation for the 1976 hearings as "simply ... a cooperative effort ..." with Dow. It then states that Dow counsel " ... based on an admittedly erroneous perception of Consumers' approach (citing Tr. 52,524-6, 52,992-7 and Staff Ex. 5, Doc. 5, No. 40) treated the Consumers Power attorneys as adversaries." Consumers goes on to state " ... [t]hus, while Consumers' hearing counsel simply were trying to gather facts, Dow attorneys were engaged in what Mr. Wessel, outside Dow counsel, called "sporting activities". This myopic view urged by Consumers both below and before this Board is at

odds with critical evidence offered in the hearing below and totally ignores the fact that Consumers, at the very outset of the joint preparation for the 1976 hearings, threatened Dow with massive litigation if its testimony was "not supportive" of Consumers in the hearings. We quote at length from Dow's Brief dated October 15, 1979:

> To properly assess the role of Dow counsel in the preparation for the ASLB suspension hearing, the Board must place themselves in the environment that existed when the Temple testimony preparation began. Mr. Nute (a Dow attorney) was a member of the Dow negotiating team and shared that team's belief that Consumers had misled Dow in 1974 by withholding information about proposed construction delays until after Dow had executed the 1974 amendments to the contract. (Tr. 50,506-508) The team also felt that Consumers (a) had consciously misled Dow regarding the sale of nuclear fuel rights, (b) was less than candid about construction delays and the reasons for them, and (c) was unprepared for negotiating meetings. (Vol. 5, Tab 9, p.8) In Mr. Nute's words, the relationship between Dow and Consumers deteriorated from "compatible" to

"arms-length" between February 1974 and December 1975 (Tr. 50,519-520) and was "pretty strained" by June 30, 1976. (Tr. 50,556) The Aeschliman decision was handed down in July 1976 and Consumers made no effort to explain to Dow its implications on the project before the September 13, 1976 meeting. (Tr. 50,601) Instead, after the Aeschliman decision was handed down, Consumers rushed to sign a new contract. (Tr. 50,629-630)

Mr. Nute attended both the September 21, 1976 and September 24, 1976 meetings with Consumers representatives. He heard the circumstances under which there would be litigation by Consumers against Dow explained as follows:

> A "Well if I said to you, Mr. Olmstead, I want you to get up on the stand and testify, but you'd better be careful what you say because if what you say results in our construction license being terminated and it causes us irreparable financial harm we're going to sue you for every penny. So that causes you, as I said in my deposition, to testify with some trepidation. It would sure be on my mind." (Tr. 50,764)

* * *

Q "So what, then, made this one so distinctive? Was it the forewarning or was it the size of the suit?"

A "Neither one. it was -- what I captured in my notes and what Mr. Hanes apparently caught in his notes -- that if your testimony doesn't -- Well, his said if your testimony doesn't support that this has an economic advantage, or whatever was in his notes, and that results in us losing the license, we're going to sue you.

"So it went to what they expected from us in the way of testimony. It wasn't just get up there and testify as to what your feelings are; it was the testimony had to be positive." (Tr. 51,144)

* * *

"The point I'm trying to make is they had asked us on at least two or three occasions if we were going to breach the contract and we said No, it's a valid contract. It's a valid contract but we don't think it is of any -- there is a probability or possibility that it's going to be of any benefit to us, we're going to live up to our contractual obligations.

"And they said to us if you get up there and say that and that results in the lisence being suspended, we're going to sue you. And to me that's going to have a -- well at that time I thought that's going to have an attempt to influence what you're going to say, and that's why I wrote, 'pretty damn close to blackmail'." (Tr. 50,765)

Mr. Nute became greatly concerned after Consumers explained to Dow the circumstances under which Consumers would sue Dow and sought legal advice concerning the strength of Consumers' position from outside counsel. He testified as follows:

Q "Did Mr. Friedman (outside counsel for Dow) tell you that he had a concern?"

A "Yes."

Q "What was that concern?"

A "Well, it was more I guess along the lines of what I indicated yesterday, that there were cases, lines of cases, that dealt with the problem of somebody being involved in a contractual situation with another party and through testimony or through some action trying to sabotage a license that was needed to perform that contract.

"And if I recall correctly, some of those cases went to what was the intent of the party in his action or his testimony."

Q "Did you have occasion to ask Mr. Friedman, or did Mr. Hanes address the Board concerning whether the provision of Mr. Temple as a witness in the proceeding which might result in a suspension of the license if he testified truthfully would fall into that category of cases where liability might attach?"

A "Well, number one, I don't know whether Mr. Hanes did. Number two, we may have discussed that. I think the concern was more along the lines of then you're getting into what was the intent of the party when he testified, and that was a concern, not so much with liability -- well, yeah, it was concerned with liability; it's a question of when you have that kind of an issue, quite obviously you're not going to -- if you want to defend it, you're not going to win on a summary judgment argument, you're going to go through a lengthy prolonged litigation with a lot of discovery and what was in somebody's mind and what was written down. And if I can put it in the vernacular, it's a crap shoot, and that's what we're worried about." */

(Tr. 50,899-900)(emphasis supplied)

---

*/ Mr. Nute's concerns were well-founded. Consumers itself had received legal advice on September 23, 1976 to the effect that "anything that Dow says or does that has the foreseeable result of a denial of Consumers' permit would be subject to scrutiny as a breach of this implied promise". (Tr. 52,189)

Faced with the possibility of massive litigation if Dow did not "act very carefully", Dow adopted the following approach in the preparation of the Temple testimony:

Q "Did Mr. Wessel suggest a way that you could build a record to protect yourself against such a contingency?"

A "I think in our discussions after this point we decided we would make very sure that everything that was in the testimony was something that Consumers wanted in there and understood the implications of before they put it in there to make sure that they really understood what they were saying, so they couldn't come back later and say we sandbagged them or held out or something like that." (Tr. 50,900-901) (emphasis supplied)

* * *

Q "But under the 'duty to support' clause of the contract, Dow didn't want to volunteer anything. Is that correct?

A "We didn't want to volunteer anything because we'd been threatened by Mr. Aymond that if we volunteered too much we might be facing a lawsuit. So we wanted to make sure that it was very, very clear in our notes and to Consumers that everything they asked us for, they understood the significance of it and that they wanted it." (Tr. 51,069)

* * *

Q "Is this the reason that you drafted that testimony in the third person?"

A "It could have been, yeah. I know it was at the request of Milt."

Q "And can you think of any other reason you would have drafted it in the third person?"

A "No. Well, this reflects the concern we always had that Consumers would later come back and say we volunteered something and that was the basis for the license being lost and they were going to sue us. That was our concern throughout, my concern particularly." (Tr. 51,081-082)

Q "So that it was not in Dow's strategy to say 'Here is some additional information we think will make the testimony clearer'?"

A "No, because I thought they had pretty much everything they needed after the October 5th draft and the October 12th. If they wanted more and asked for it, they would have gotten it. But it had to be clear that they asked for it, and we weren't trying to stick something in there that could later come back to haunt us in a lawsuit.

"In other words, if they could have later said 'Well, we wouldn't have put that in there, but you insisted and you knew what would happen if that was in there, we'd lose the license.' That was the kind of thing that we were concerned about." (Tr. 51,090-091)

* * *

Q "Now, have you previously testified here that it was in effect a Dow tactic to have Consumers Power Company draft the testimony for you so that Dow wouldn't appear to be volunteering anything that Consumers didn't want?"

A "No, somebody may have asked me that but I didn't say that's what it was, I said my purpose was to make sure the notes reflected that they understood everything they got from us and wanted it and wanted it in the testimony so they wouldn't later go back against us and say, you know, we pushed to have that in there knowing that the result would be suspension of the license." (Tr. 51,353)

Mr. Wessel (outside counsel to Dow) came to the testimony preparation period with prior experience in the Dow-Consumers relationship although he was not intimately involved in the contract negotiations. (Tr. 52,983) He saw frustration, unhappiness, dissatisfaction and even distrust grow between the parties as time progressed from 1973 to 1976. (Tr. 52,985-986) Mr. Wessel saw the possibility of litigation by Consumers against Dow long before the threat was made explicit in the September 21, 1976

and September 24, 1976 meetings. (Tr. 52,986) When Mr. Wessel heard from Mr. Nute what had transpired at the September 21, 1976 and September 24, 1976 meetings, he became concerned because the implicit threat had become explicit and the nature of the threat had changed from a threat of a lawsuit if there was an outright breach of the contract by Dow to:

> " ... that if Dow didn't act in the proceeding in a way which supported Consumers, not just if Dow didn't [sic] breach the contract but if Dow didn't act in a way which supported Consumers, there was at least a $600 million lawsuit, and that didn't seem to be the limit of what they might sue for." (Tr. 52,988)

Mr. Wessel viewed Mr. Bacon and Mr. Renfrow (Consumers counsel) and later Mr. Rosso (Consumers' counsel) as adversaries who were attempting to conduct "free discovery" of Dow's negotiating positions and of information to buttress Consumers' position in subsequent litigation against Dow. (Tr. 52,990-991)

Mr. Wessel, who worked with Mr. Nute in the preparation for the ASLB hearing, was more concerned with Dow's offensive posture vis-a-vis Consumers (i.e., a possible "best efforts" claim against Consumers) than was Mr. Nute, who was primarily concerned over possible Dow liability to Consumers for events that occurred in the ASLB hearing. (Tr. 52,504) Mr. Wessel also shared Mr. Nute's concerns over possible liability to Consumers. Mr. Wessel's concerns, as the preparation for the hearing began, included:

Q "And in that regard what was your primary concern."

A "I wanted to avoid doing anything which would prejudice Dow's suit, if it ever brought one, against Consumers. I wanted to avoid doing anything which would give Consumers some opportunity for saying: Dow, you have violated your rights, and either sue us first, or counterclaim, or do something of the same character." (Tr. 52,504-505)

* * *

Q "You did not want to put a Dow witness on as your own witness?"

A "That's correct."

Q "And this is consistent with the same strategy that you had with the Dow non-party position?"

A "Yes, it's the same strategy of not being in a position where we could be charged with having taken action which might have a negative effect upon the license." (Tr. 52,600)

* * *

Q "Did that concern that you indicate in your answer to the questions I posed on page 57 of your deposition, did that concern affect your decision as to whether to be a party or not to be a party in the -- ?"

A "I'm sure that was one of the reasons that I came to the conclusion that that position was by far the best one to take, but it was by no means the only reason for it."

Q "Okay. What other reasons were there for Dow's non-party status?"

A "Their relationship with Consumers. By not being a volunteer and having Consumers call the shots we would not be in a position where Consumers could say that what we did had hurt them." (Tr. 52,548)

It is against this backdrop of events and circumstances, which by September 29, 1976 had polarized the parties into adversarial positions,

that the role of Dow counsel in the ASLB suspension hearing preparation must be viewed.

(Dow Brief dated October 15, 1979, pp. 44-51)

From the above, it is clear that there is no support for Consumers' contention at page 17 of its Brief that, as preparation for the 1976 hearings began, it correctly viewed its relationship with Dow as non-adversarial in nature and that Dow counsel "erroneously" perceived the relationship as adversarial and acted accordingly. The Licensing Board, in its decision, correctly found as follows:

> "Apparently in an effort to discourage Dow from making negative statements about the project in the suspension hearing, Consumers informed Dow several times that it had a contractual duty to support Consumers in the hearing, and further threatened that if it believed that that duty was arguably breached, Consumers would bring suit. A figure of $600 million was suggested as the magnitude of the suit. Although there was general agreement among those present that the statement was not intended to require perjury, it nevertheless was clearly intended to and did influence Dow.

Dow representatives felt threatened by it, although they were not certain what Consumers expected from them in the event Dow honestly concluded that the contract was not advantageous to it. */

"Dow conducted itself through the remaining preparation and hearing with this perceived threat in mind. By forcing Consumers to decide what evidence would be presented, Dow sought to avoid charges that it had been the cause of a license suspension or revocation." (Decision, p. 33) (emphasis supplied)

---

*/ In a footnote, the Licensing Board stated:

"Consumers' witnesses testified it was not intended as a threat. Tr. 53,816 and 54,055. The detail Consumers went into concerning the extent of Dow's liability and the conditions which would cause Consumers to bring suit did, however, go beyond the usual bounds for asserting that contractual rights will be pursued."

Thus, contrary to Consumers' assertions at page 17 of its Brief, Dow's perception of its relationship with Consumers as adversarial and the conduct of Dow counsel in their relationship with Consumers' counsel was not based on some " ... admittedly erroneous perception of Consumers' approach" */ but rather on the hard reality of threatened massive litigation by Consumers if Dow did not "support" Consumers in the hearings. **/

---

*/ Contrary to Consumers' position that Mr. Wessel later stated that he misperceived the relationship between Dow and Consumers during the preparation of Mr. Temple's testimony as adversarial, Mr. Wessel never altered his perception of the adversarial environment that existed between Dow and Consumers during the Temple testimony preparation period and which was caused by threats of litigation made by Consumers against Dow if Dow was not supportive of Consumers in the forthcoming hearings. (Tr. 52,598; 52,600; 52,821) What did change, in Mr. Wessel's mind, was his perception that Mr. Rosso and Mr. Renfrow were aware of certain conduct by Consumers that antedated the Court of Appeals remand and the suspension hearing. (Tr. 52,992-993)

**/ The adversarial relationship which existed between Dow and Consumers, engendered as it was by Consumers' threat of litigation, precluded Dow from permitting Consumers to meet and correspond with Mr. Temple without the presence of Dow counsel.

III. THE CLAIM THAT DOW COUNSEL IMPROPERLY PREPARED "LOUSY" DRAFTS OF TESTIMONY AND TRIED TO BAR CONSUMERS FROM ACCESS TO NEEDED INFORMATION

At page 17 of its Brief, Consumers argues that Dow counsel engaged in improper "sporting activities" by preparing "intentionally lousy" drafts of testimony and by trying to prevent Consumers from gaining access to information it was "seeking to get". Such conduct, Consumers argues, was not only improper but placed "practical constraints" on Consumers in testimony preparation.

Had the relationship between Dow and Consumers been one of harmony and close cooperation as their respective counsel began preparation for the 1976 hearings, the conduct of Dow attorneys alluded to by Consumers would indeed seem strange. However, as noted above, Consumers again conveniently fails to include as an essential underlying fact the threat of massive litigation against Dow by Consumers if it did not "support" Consumers in the 1976 hearings - a threat which was made time and again to Dow before the testimony preparation began. As noted in Dow's

Reply Brief dated November 5, 1979:

In fact, the record clearly demonstrates that it was Mr. Wessel's intention throughout to actually get Consumers to make the major decisions and draft the testimony so that Dow would not be subsequently accused of volunteering information which Consumers might have felt was detrimental to its interests. (Tr. 52,538; 52,548; 52,718; 52,980) The record demonstrates that Mr. Wessel, in an effort to get Consumers to assume the drafting role, took the position that Dow was not a party to the proceeding and prepared an incomplete testimony outline in the September 29, 1976 draft. As noted in Dow's initial Brief at pages 52-56, there was nothing improper in Dow's taking the position that it was not a party to the suspension proceeding. Neither was there anything improper in the preparation of an incomplete response to the factual requests received from Mr. Bacon (Consumers' counsel) during the September 27, 1976 telephone call between Messrs.

Bacon and Wessel. Mr. Wessel testified that the September 29, 1976 informational response was prepared in an incomplete manner to cause Consumers to assume the role of drafting the testimony. (Tr. 52,911) He viewed the Consumers request to be a ruse under which Consumers was proceeding to obtain "free discovery" to be used either in the contract negotiations with Dow or "against us if anything went wrong, or whatever". (Tr. 52,708) At the time the September 29, 1976 informational response was prepared, it was never Mr. Wessel's intention that the document be filed with the ASLB. (Tr. 52,699; 52,977) The document was designed "to try to elicit from Consumers a revised draft". (Tr. 52,699; 52,977) There was no intention on the part of Dow or Consumers that the September 29, 1976 informational response be filed as the written testimony of the Dow witness. (Tr. 52,699; 51,517-518; 53,327) It was Mr. Wessel's intention to prepare an informational response that was obviously incomplete and Consumers recognized it as such (Tr. 51,518-519; 52,105;

52,107-108) -- shortly thereafter assuming the drafting duties. (Tr. 53,224-225) In view of the circumstances that existed at the time the September 29, 1976 information response was prepared, it was understandable and proper for Mr. Wessel to attempt to shift the Temple testimony drafting duties to Consumers. There was no impropriety in preparing an obviously incomplete response which was recognized as such by Consumers. (Dow Reply Brief dated November 5, 1979, pp. 35-36)

* * *

In Proposed Conclusion of Law 47, Consumers asks the Board, by inference, to conclude that Mr. Wessel was engaged in improper conduct when he did not disclose to Messrs. Renfrow and Rosso that he considered them to be adversaries, that he did not disclose any more information to them than was absolutely necessary and kept memoranda of conversations had with Consumers' counsel.

> Consumers, for understandable reasons, again fails to state that this conduct took place after Dow had been threatened with substantial litigation if Dow's conduct in the suspension hearing was not supportive of Consumers' position. Against this background, Mr. Wessel's conduct was entirely proper in view of his professional obligation as an attorney to protect Dow against the threatened litigation. (Dow Reply Brief dated November 5, 1979, p. 37)

Thus, it is clear that the conduct of Dow's counsel was not improper under the circumstances that existed when the testimony was being prepared. Whatever "practical constraints" were placed on Consumers by Dow were the direct result of Consumers' conduct in threatening Dow with massive litigation if Dow did not "support" it in the 1976 hearings.

IV. THE CLAIM THAT CONSUMERS WAS UNAWARE OF THE IMPACT OF ITS "THREAT" OF LITIGATION ON DOW'S DECISION-MAKING PROCESS PRIOR TO THE 1976 HEARING

At page 19 of its Brief, Consumers states that:

(a) The "threat" conveyed to Dow was that Consumers would sue Dow if Dow arguably breached its contract with Consumers; */ and

(b) Consumers was totally unaware that this "threat" had any impact on the Dow decision-making process until the 1976 hearing.

At the outset, the record below clearly demonstrates that the "threat" conveyed by Consumers to Dow was not simply that Consumers would sue Dow if Dow breached or "arguably breached" the contract with Consumers. The statements made to Dow at the September 21, 1976 and September 24, 1976 meetings by Messrs. Falahee and Aymond of Consumers clearly went beyond simply stating that if Dow breached or repudiated the contract, Dow would be sued. (See Dow Brief dated October 15, 1979, pp. 26-44) Dow was clearly told that if it took any position that was not supportive of the contract and a suspension

---

*/ This contention is also discussed in a footnote at page 47 of the Consumers' Brief.

occurred, Dow would be sued by Consumers on the ground that Dow could not in good faith reach any conclusion other than to support the project. (Ibid)

As noted above, Mr. Falahee testified that he delivered the following message to Dow on September 21, 1976:

> " ... [I]f you disagree with us and think you have a legitimate reason, then you can take that position, but act carefully, because it is a serious proposition and it may result in serious litigation."
> (Tr. 52,274)(emphasis supplied)

That message was received as testified to by Mr. Nute:

> "I want you to get up on the stand and testify, but you'd better be careful what you say because if what you say results in our construction license being terminated and it causes us irreparable financial harm, we're going to sue you for every penny."
> (Tr. 50,764)(emphasis supplied)

The message delivered to Dow by Mr. Aymond of Consumers on September 24, 1976, as testified to by Mr. Youngdahl of Consurers, was:

> "If Dow overtly or inadvertently in some manner frustrated the contract, that it could well go to the courts."
> (Tr. 53,820)(emphasis supplied)

Dow properly interpreted the remarks of Messrs. Falahee and Aymond as a threat that litigation would ensue if its testimony was not supportive of Consumers and a suspension resulted. Consumers clearly indicated to Dow that the Michigan Division position was not "supportive" of the Consumers position and, if adopted by Dow U.S.A. and suspension resulted, there would be litigation between the companies. */ (Tr. 52,046; 52,287; 52,458)

Consumers' claim that it was totally unaware that the "threat" had any impact on Dow's decision-making process until the 1976 hearing is hard to accept in view of the fact that the "threat" was conveyed once by Consumers' general counsel at a September 21, 1976 meeting between the parties (Vol. 3, Tab 26, p. 3; Tr. 50,764-65; 52,272-74) and again by its Chairman of the Board at a September 24, 1976 meeting between the parties (Vol. 4, Tab 6; Tr. 51,069-70; 54,050-051; 54,085-88; 54,107-109). Both meetings

---

*/ As noted supra, the Licensing Board described the "threat" as follows:

> "Apparently in an effort to discourage Dow from making negative statements about the project in the suspension hearing, Consumers informed Dow several times that it had a contractual duty to support Consumers in the hearing, and further threatened that if it believed that that duty was arguably breached, Consumers would bring suit." (Decision, p. 32)

had been scheduled to obtain Consumers' "input" for Dow's decision-making process. Consumers "threat" was made expressly for the purpose of influencing Dow's decision-making process. (Tr. 54,029) If Consumers did not intend to influence Dow's decision-making process by making the "threat", then why was the "threat" made at all?

Dow submits that the Licensing Board correctly concluded as follows:

> "Although there was general agreement among those present that the statement was not intended to require perjury, it nevertheless was clearly intended to and did influence Dow. Dow representatives felt threatened by it, although they were not certain what Consumers expected from them in the event Dow honestly concluded that the contract was not advantageous to it." */
> (Decision, pp. 32-33)

---

*/ The Licensing Board also correctly noted that Consumers' detailed explanation of the circumstances under which it would sue Dow went " ... beyond the usual bounds for asserting that contractual rights will be pursued." (Decision, p. 32)

Since Consumers intended its threat to affect Dow's decision-making process, it is absurd to contend that Dow was somehow remiss in failing to explain to Consumers the precise impact the threat had on Dow's decision-making process.

V. THE CLAIM THAT THE "MICHIGAN DIVISION POSITION" ON THE DOW/CONSUMERS RELATIONSHIP WAS "CONFUSING" AND MISUNDERSTOOD EVEN BY DOW

At pages 21-22 of its Brief, Consumers states that the Michigan Division position was so "confusing" that officials of both companies disagreed which, of four possible alternative positions prepared by Mr. Aymond of Consumers to describe positions Dow U.S.A. might finally reach on the contractual relationship, best described the Michigan Division position. While Consumers predictably faults Dow's articulation of the Michigan Division position rather than Mr. Aymond's "four alternatives" outline, Dow notes that the Michigan Division position was set out in Mr. Temple's own words in a letter he sent to Mr. Oreffice, then President of Dow U.S.A. dated September 8, 1976. (Tr. 53,428; Board Ex. 1) A copy of this letter was given to Consumers during the preparation for the 1976 hearing.

VI. THE CLAIM THAT DOW "ADAMANTLY OBJECTED" TO INCLUDING THE MICHIGAN DIVISION POSITION IN MR. TEMPLE'S DIRECT TESTIMONY

At pages 35 and 38 of its Brief, Consumers states that Dow alone "adamantly objected" and "adamantly resisted" attempts to discuss the Michigan Division position, leaving the impression any failure to "volunteer" this information was due solely to Dow's actions and not those of Consumers.

At the outset, Dow believed then and continues to believe now that the Michigan Division position was rendered immaterial by the subsequent decision of the Dow U.S.A. Operating Board and therefore there was no requirement to include discussion of it in Mr. Temple's direct testimony. */ The reason why it did not

---

*/ The Michigan Division position was set forth in Mr. Temple's September 8, 1976 letter to Mr. Oreffice, a copy of which was made available to Consumers prior to the 1976 hearing.

want the position discussed in Mr. Temple's direct testimony was best stated by Mr. Wessel at the July 1979 hearing:

> CHAIRMAN MILLER: "So it's really very difficult to say anything is absolutely immaterial, including subsequent repairs because of certain exceptions which have developed. Isn't that true, under the law of evidence?"
>
> THE WITNESS: (Mr. Wessel) "It is true, and it is an argument and I don't know the extent to which I had any confidence that the argument would be successful, although I thought it was a valid argument to make, and I wrote up a two-page statement arguing that it wasn't material. But it was at least a responsible, credible argument to be made which might be successful and if it was not successful, then it would have been forced out of Dow and we wouldn't have volunteered it and we wouldn't be in trouble."
>
> CHAIRMAN MILLER: "So far as the Board was concerned, isn't it fair for us to infer that respectable legal argument could be made both ways on that question?
>
> THE WITNESS: "Yes, clearly."
>
> CHAIRMAN MILLER: "All right. Thank you."
>
> THE WITNESS: "And I think I was always aware of the strong possibility that Mr. Cherry, the moment he heard such a statement, would fight like heck to get to the information.

"But remember that a very substantial part of my concern was that it not be produced by Dow in a way which Consumers could then say, 'You did this deliberately to get us,' or 'You sandbagged us,' or something like that." (Tr. 52,713-714) (emphasis supplied)

Thus, whether or not Consumers has correctly described Dow's position that the Michigan Division position should not be "volunteered" in Mr. Temple's testimony as "adamant", it is clear that the Dow position was in part dictated by its fear that Consumers would treat such action as a breach of Dow's duty to support Consumers in the 1976 hearings.

VII. THE CLAIM THAT THE "THREAT" AS FOUND BY THE LICENSING BOARD CONSISTED " ... ONLY OF REPRESENTATIONS TO DOW THAT IF DOW 'ARGUABLY BREACHED' THE DOW/CONSUMERS CONTRACT, IT COULD EXPECT TO BE SUED."

At page 36 of its Brief, Consumers claims that Consumers "threat of litigation" was found by the Licensing Board to consist " ... 'only' of representations to Dow that if Dow arguably breached the Dow/Consumers contract, it could expect to be sued. Dow does not agree.

As noted supra, at page 24, Consumers took the position before the Licensing Board that the "threat" by Consumers to Dow was simply that if Dow breached its contract with Consumers, it would be sued. As noted supra, at pages 24-26, Dow disagreed and took the position that the "threat" imparted to Dow was that Dow would be sued if its conduct was not "supportive" of Consumers in the 1976 hearings and Consumers' construction license was lost because of Dow's failure to support Consumers in the hearings. Based on this disagreement between Dow and Consumers below, the Licensing Board heard the witnesses, read the exhibits and concluded as follows:

> "Apparently in an effort to discourage Dow from making negative statements about the project in the suspension hearing, Consumers informed Dow several times that it had a contractual duty to support Consumers in the hearing, and further threatened that if it believed that that duty was arguably breached, Consumers would bring suit. A figure of $600 million was suggested as the magnitude of the suit. Although there was general agreement among those present that the statement was not intended to require perjury, it nevertheless was clearly intended to and did influence Dow. Dow representatives felt threatened by it, although they were not certain what Consumers expected from them in the event Dow honestly concluded that the contract was not advantageous to it."
> (Decision, pp. 32-33)(emphasis supplied)

In a footnote, the Licensing Board found that the detailed manner of Consumers' presentation of the "threat" went " ... beyond the usual bounds for asserting that contractual rights will be pursued." (Decision, p. 32, Footnote 68)

From the above finding of the Licensing Board, it is clear that it found the threat to be more than simply " ... representations ... that if Dow arguably breached the Dow/Consumers contract, it could expect to be sued." The Licensing Board's findings clearly adopt Dow's version of the nature and thrust of the "threat" made, not that proffered by Consumers.

VIII. THE CLAIM THAT CONSUMERS' ATTORNEYS DID NOT KNOW OF THE THREAT MADE TO DOW NOR ITS IMPACT ON DOW

At page 36 of its Brief, Consumers next claims that:

(a) its hearing counsel did not know of the "threat" until Mr. Temple "volunteered" this information during the 1976 hearing and Dow counsel deliberately avoided communicating this information to Consumers' hearing counsel.

(b) its hearing counsel did not know what impact the threat had on Dow's final decision-making process.

Regarding the claim that Consumers' hearing counsel were unaware of Consumers' threat to Dow until the 1976 hearing, Dow believes the claim is without support in the record. As noted supra, at pages 24-26, Consumers communicated the threat to Dow during meetings dated September 21, 1976 and September 24, 1976. As Mr. Nute testified at the hearing, he assumed that Mr. Renfrow (counsel for Consumers) and Mr. Bacon (counsel for Consumers) advised Mr. Rosso (counsel for Consumers) of what was said during the September 21, 1976 meeting by Mr. Falahee (another Consumers' counsel) and that Mr. Bacon told Mr. Renfrow and Mr. Rosso what was said during the September 24, 1976 meeting by Mr. Aymond. (Tr. 51,325-326)

Even though there was no duty to advise Consumers' counsel of what their own client had said to Dow (particularly when one of the counsel attended the same meeting), the evidence adduced at the hearing clearly discloses that either Mr. Renfrow or Mr. Renfrow and Mr. Rosso were told by Dow that it had been threatened with litigation by Consumers. Thus, Mr. Nute's

notes of the September 21, 1976 meeting disclose that Mr. Nute told Mr. Renfrow that Consumers was being inconsistent by "threatening a massive lawsuit on one hand if Dow takes a hasty position, yet demanding immediate statement of position on the other hand." (Vol. 3, Tab 26, p. 3) Mr. Nute so testified at the hearing. (Tr. 51,328) He also testified that a slide or "overhead" used during the corporate review presentation to the U.S.A. Board which specifically referred to the threat of a $600 million lawsuit by Consumers was shown to Mr. Renfrow during the Temple testimony preparation period. (Tr. 51,325) Finally, Mr. Rosso testified that Mr. Wessel was continually expressing concern that Consumers would come back and sue Dow if there was some misstep by Dow that caused a suspension. (Tr. 53,359-360) It is therefore clear that both Mr. Renfrow and Mr. Rosso or Mr. Renfrow alone were told on more than one occasion that Dow had been threatened with litigation by Consumers. */

---

*/ With respect to Consumers' claim that Mr. Temple "volunteered" information concerning the threat during cross examination by Intervenor, a review of the relevant portions of the 1976 hearing transcript discloses that the information was not "volunteered" but rather was responsive to a question from Intervenor's counsel to which Consumers did not object.

As to the claim that Consumers was never advised, prior to the 1976 hearing, as to what impact the threat of litigation had on Dow's decision-making process, Dow believes that it is curious that Consumers should expect Dow to come back and advise Consumers' attorneys that the threats that had been made by Consumers had affected Dow's decision-making process, especially when Consumers made the threats with the express purpose of influencing that decision. (Tr. 54,029) During the corporate review, Consumers was invited to comment on the possible legal impact on Consumers of the Michigan Division position if adopted by Dow U.S.A. Consumers chose to make its input through its Chairman of the Board whose appearance at Dow came only three days after its General Counsel had come to Dow and advised Dow of the circumstances under which Dow would face litigation from Consumers. It borders on the riduculous for Consumers to contend now that Dow should have advised it of what impact the threats of litigation had on the Dow U.S.A. decision. The Consumers' input into the corporate review focused on the "legal aspects" of the Michigan Division position and was intended to influence the ultimate Dow U.S.A. decision. Consumers intended it to have the effect that it did. */

---

*/ The Licensing Board correctly concluded that "[a]lthough there was general agreement among those present that the statement was not intended to require perjury, it nevertheless was clearly intended to and did influence Dow." (Decision, p. 32) (emphasis supplied)

IX. THE CLAIM THAT MR. WESSEL ENGAGED IN "SPORTING TACTICS" WITH CONSUMERS

On page 39 of its Brief, Consumers claims that Mr. Wessel " ... was the leading practitioner of the 'sporting tactics' used against Consumers" and continues a line of argument first raised below that Consumers' conduct was above reproach and Dow counsel were totally at fault for whatever the Licensing Board might ultimately conclude "went wrong" during the 1976 hearing. In so doing, Consumers again chooses to ignore that the conduct of Dow counsel in their relationship with Consumers counsel during the testimony preparation period was directly affected by Consumers threat to sue Dow if Dow failed to "support" Consumers in the 1976 hearings and a suspension of the construction license resulted. (See supra, pp. 5-15) What Consumers views as "sporting tactics" were efforts by Dow to protect the company and its employees from later claims by Consumers that something Dow or one of its employees did caused Consumers to lose its construction license. As the Licensing Board noted in its decision:

> "Dow conducted itself through the remaining preparation and hearing with this perceived threat in mind. By forcing Consumers to decide what evidence would be presented, Dow sought to avoid charges that it had been the cause of a license suspension or revocation." (Decision, p. 33)

Thus, contrary to Consumers' assertion that whatever problems occurred during the 1976 hearings were caused by Dow's "sporting tactics", the cause lay at Consumers' doorstep.

X. THE CLAIM THAT THE LICENSING BOARD ERRED IN FINDING THAT A CONSUMERS ATTORNEY SUGGESTED THE USE OF AN UNKNOWLEDGEABLE WITNESS

At page 42 of its Brief, Consumers claims that the Licensing Board erred in finding that a Consumers attorney suggested the use of a less than fully knowledgeable witness at the 1976 hearing. The notes of Mr. Nute (a Dow attorney) of the September 21, 1976 meeting state in part as follows:

> "4. Effect of delay steam, and cost/benefit analysis tilted - Dow becomes very important because here two issues (above) can come together - Rex suggested that Dow witness might be someone from Dow Chemical U.S.A. or corporate area who is unaware of Midland Division recommendation to Oreffice - this person would testify as to effects of further delay upon Dow -" (Vol. 3, Tab 26, p. 3)

At the hearing, Mr. Nute testified that his notes accurately reported what he understood Mr. Renfrow to state regarding the selection of the Dow witness. (Tr. 50,731-732; 50,747) Mr. Nute

further testified that Mr. Renfrow was not merely asking for a witness who did not "have such strong personal beliefs as Mr. Temple had". (Tr. 50,748) Mr. Nute also testified that he did not express any concern over using Mr. Temple as a witness but did ask questions to determine what effect certain things said or done by Mr. Temple or Dow would have in the suspension hearings. (Tr. 50,858)

While the notes of Mr. Hanes (of Dow) and Mr. Klomparens (of Dow) of this meeting are silent on this point, (Vol. 7, Tab 7; Vol. 3, Tab 34) both recall a discussion on the nature of the Dow witness. Mr. Hanes testified that during the meeting Mr. Nute raised a question as to whether Mr. Temple should be the witness because of "the announced position he had already taken". In response, Mr. Renfrow made a comment that "maybe the Dow witness should be someone not familiar with the position Mr. Temple had taken". Mr. Hanes responded emphatically that "that wouldn't be appropriate at all, that the Dow witness would be a knowledgeable person, and he would testify fully at the hearing". (Tr. 52,349) Mr. Hanes further testified that Mr. Renfrow "popped out with this idea". Mr. Hanes "chopped it off" and "that pretty much ended the discussion". (Tr. 52,408)

Mr. Klomparens understood Mr. Renfrow to be asking for a witness who was less emotionally involved than Mr. Temple and "maybe less knowledgeable about it". (Tr. 53,720-721) Mr. Klomparens recalled Mr. Hanes making a statement that Dow would supply a knowledgeable witness who would tell the truth. This statement of Mr. Hanes was made at the point in the meeting when Mr. Renfrow was discussing the type of Dow witness he wanted. (Tr. 53,721-722)

Turning to Consumers' version of this aspect of the September 21, 1976 meeting, Mr. Renfrow categorically denied making the statement attributed to him in the Nute notes. (Tr. 51,422-423) He went on to testify that, before attending the September 21, 1976 meeting, Mr. Bacon had told him that Dow was concerned over using Mr. Temple as a witness and Mr. Renfrow and Mr. Bacon then discussed possible alternative Dow witnesses. According to Mr. Renfrow, there was no discussion of alternative Dow witnesses in the September 21, 1976 meeting. (Tr. 51,430-431) Mr. Renfrow further stated that Dow expressed concern over using Mr. Temple as a witness during the September 21, 1976 meeting and that "I told them that if they had a problem with Mr. Temple, they might look at providing someone else as a witness". (Tr. 51,431) Mr. Renfrow testified that he did recall Mr. Hanes stating that

the Dow witness would tell the truth but could not recall when it came up in the meeting. (Tr. 51,751-752)

Mr. Bacon testified that he could not recall Mr. Renfrow making the statements attributed to him in the Nute notes. (Tr. 52,011-012) He also could not recall hearing Mr. Nute express any concern over using Mr. Temple as a witness at any time before the September 21, 1976 meeting (Tr. 52,008; 52,159-160) or during the meeting. (Tr. 52,012) Mr. Bacon did recall Mr. Hanes stating that the Dow witness would tell the truth. (Tr. 52,161-162)

Mr. Falahee stated that he could not recall any discussion regarding the use of a less than fully knowledgeable witness. (Tr. 52,266) He did recall Mr. Nute stating that "there may be a problem with Mr. Temple as a witness" because of his prior public statements regarding the nuclear plant. (Tr. 52,265-266) Mr. Falahee did not form any impression that Mr. Nute was in any way reluctant to use Mr. Temple as a witness but rather "he wanted us to be aware that that had been said". (Tr. 52,327)

In summary, during the course of the September 21, 1976 meeting, Mr. Nute advised Consumers that there might be a problem with using Mr. Temple as a witness because of his

earlier public statements regarding the project. The statement by Mr. Nute did not reflect any reluctance over using Mr. Temple as the Dow witness but was made to be sure Consumers was aware of the statements Mr. Temple had made. Mr. Renfrow did suggest the use of a Dow witness who was not aware of Mr. Temple's views on the project and his recommendation in light of those views. Mr. Hanes immediately responded that Dow would provide a fully knowledgeable witness who would testify truthfully. The matter was terminated at that point. Ultimately, Mr. Temple was called as the Dow witness and was Dow's most knowledgeable witness on the issue of the intentions of The Dow Chemical Company regarding the nuclear project. Dow submits that the Licensing Board properly concluded that a Consumers attorney had suggested the use of a less than fully knowledgeable witness at the 1976 hearings.

XI. THE CLAIM THAT THE LICENSING BOARD ERRED IN FINDING THAT A CONSUMERS ATTORNEY SUGGESTED THAT CERTAIN ASPECTS OF THE DOW/CONSUMERS CONTINUING DISPUTE COULD BE "FINESSED" IF INTERVENORS DID NOT APPEAR AT THE HEARING

At page 43 of its Brief, Consumers claims that the Licensing Board erred in concluding that a Consumers attorney " ... suggested that if Intervenors did not appear in the suspension hearing, it might be possible "to finesse Dow-Consumers continuing

dispute." Dow does not agree.

Subsequent to a September 13, 1976 negotiating meeting between Dow and Consumers at which Consumers was advised of the Michigan Division position and the reasons for it, a meeting was scheduled for September 21, 1976 for the purpose of explaining to Dow what would happen at the suspension hearing and the possible impact on the construction licenses of various positions Dow U.S.A. might take. (Tr. 50,726; 51,720; 52,006; 52,024; 52,345-346) The Nute notes of that meeting state in part as follows:

> "B. Factors to be considered in suspension hearing (5) - Consumers assumes Cherry will not appear because of lack of funds - Consumers says suspension hearing most critical - they believe that since there is no discovery, and probably no intervenor cross-examination - will be able to finesse Dow-Consumers continuing dispute."
> (Vol. 3, Tab 26, p. 2)

At the hearing, Mr. Nute testified that Mr. Renfrow made this statement in the September 21, 1976 meeting. (Tr. 50,757) During that same meeting, Mr. Nute had referred to the 1974-75 correspondence between Dow and Consumers and inquired what effect the Dow negotiating position (that it was excused from the contract if the plant was not completed by 1984) would have on the cost-benefit analysis. (Tr. 50,744-746)

Mr. Hanes recalled a discussion during the meeting concerning whether Mr. Cherry would appear at the suspension hearing in which Dow challenged Mr. Renfrow's belief that Mr. Cherry would not appear. (Tr. 52,403-404) Mr. Hanes did not recall a discussion about a "continuing dispute" between Consumers and Dow. (Tr. 52,402-403) Mr. Klomparens testified that he could recall a discussion regarding whether Mr. Cherry would appear, could not recall the use of the word "finesse" but stated he was sure Consumers had the feeling things would be a lot easier if Mr. Cherry was not there. (Tr. 53,741-742) Mr. Klomparens also stated that Mr. Nute's notes were an accurate summary of what transpired in the meeting. (Tr. 53,740-747)

Mr. Falahee testified that he could not recall whether the word "finesse" was used. (Tr. 52,267) Mr. Renfrow testified that he did not recall using the exact words attributed to him in the Nute notes but "could have". He went on to state that he was simply telling Dow the "obvious" -- "if Mr. Cherry was not there, the hearing would go forward on a quicker pace with less interruption." (Tr. 51,418-419)

Mr. Bacon's testimony corroborated Mr. Nute's notes. When the relevant portion of Mr. Nute's notes of the September 21, 1976 meeting was read to Mr. Bacon and he was asked whether he

recalled such a statement, Mr. Bacon responded, "Generally, yes." (Tr. 52,009) Mr. Bacon then testified as follows:

Q "And what is it that you recall being said?"

A "I can't recall the specific words but I think probably it was in response to a concern voiced by Mr. Nute about documents, and I think he specifically referred to exchanges of correspondence in '74 and '75 about the contract being disclosed in the proceeding."

Q "So Mr. Nute expressed some kind of concern about correspondence exchanged between the parties being exposed in the proceeding and that led to a comment to the effect of the one I just read, that since there would be no intervenors present and no discovery, that there would be an ability to finesse a continuing dispute between Dow and Consumers?"

A "I generally remember both comments. I'm not sure that one was in response to the other. I can't be positive about that."

Q "But you have a general recollection that somebody indicated that there would be an ability to finesse a dispute between Consumers --"

A "I can't tell you what words were used, but I think that was the general idea expressed, that if it was not a contested hearing, then it was likely that the contract dispute, if you want to call it, of '74 - '75 would be aired."

Q "Could you repeat that? I think you said 'likely' when you meant not likely, or vice versa."

CHAIRMAN MILLER: "Could you rephrase your answer, please?"

MR. POTTER: "Do you remember what your answer was, Mr. Bacon?"

THE WITNESS: "Not now. I don't even remember the question."

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: "You're correct. It should be 'would not be aired.'" (Tr. 52,010-011)

In summary, during the September 21, 1976 meeting, Mr. Nute inquired as to what effect Dow's negotiating position as set out in the 1974-75 Dow-Consumers correspondence would have on the cost-benefit analysis. Mr. Bacon interpreted Mr. Nute's comments to express concern over the disclosure of the correspondence in the suspension proceeding. Mr. Renfrow responded that if no intervenor appeared it was likely that the "contract dispute" would be "finessed". In fact, Mr. Cherry did appear and there was a full airing of the Dow-Consumers relationship.

Dow submits that the Licensing Board properly found that a Consumers attorney had suggested that certain aspects of the Dow/Consumers "continuing dispute" could be "finessed" if Intervenors did not appear at the hearings.

XII. THE CLAIM THAT THE LICENSING BOARD ERRED IN FINDING THAT A CONSUMERS ATTORNEY STATED THAT CONSUMERS "MIGHT LOSE THE CASE" IF CERTAIN INFORMATION WAS INCLUDED IN MR. TEMPLE'S TESTIMONY

Consumers next claims that the Licensing Board erred in finding that a Consumers attorney had stated that certain information was not included in Mr. Temple's direct testimony because it might "lose the case."

The Licensing Board finding was as follows:

> "Consumers and Dow recognized the potential impact that knowledge of the disagreement might have on the Licensing Board, but they carefully constructed rationalizations for not including it. Specifically, one counsel for Consumers explained to Dow that he had not included in a draft of Temple's direct testimony information that Dow was concerned about Consumer's reliability, or that Dow was seeking a date after which it would be relieved of all contractual obligations if steam was not forthcoming, because such information would cause Consumers to 'lose the case.'" (Decision, p. 28)

In support of its decision, the Licensing Board cited notes of a meeting between Dow and Consumers made by Mr. Nute, a Dow attorney, and also the testimony of Mr. Nute. Consumers contends, however, that the Board should have concluded otherwise

since the statement comes " ... from the notes of a Dow attorney who had no present recollection of the event and admitted he was not taking verbatim notes and whose notes were acknowledged as not being totally accurate." (Consumers' Brief, p. 44) In making this contention, Consumers would have this Board ignore notes taken by a Dow attorney during a meeting on November 1, 1976 and rely instead on the unrecorded mental recollections of Consumers' representatives some three years after the meeting occurred. */ Dow believes that the record in the most recent hearing clearly demonstrates that the Nute notes of November 1, 1976 are an accurate summary of what occurred at that meeting.

---

*/ In Consumers' Motion for Summary Disposition, filed with the Licensing Board before the 1979 hearing began, Consumers questioned the accuracy of the "Nute notes" because it thought they were not taken contemporaneously with the meetings themselves. When the record clearly demonstrated that the notes were taken during the course of the meetings by Mr. Nute, Consumers altered course and attacked the notes because they were not "verbatim". In deciding what occurred in the November 1, 1976 meeting, it would seem that greater credibility should attach to a recorded summary of that meeting than to unrecorded recollections three years removed.

XIII. THE CLAIM THAT DOW'S CHARACTERIZATION OF A CONSUMERS DRAFT OF WRITTEN TESTIMONY AS CAPABLE OF BEING VIEWED AS MISLEADING AND DISINGENUOUS WAS BASELESS

Consumers, at page 50 of its Brief, notes that Dow counsel once criticized a Consumers draft of testimony as capable of being viewed as "misleading and disingenuous". It then goes on to claim that the criticism was baseless - one Dow counsel having made the remark simply "for effect" and the other Dow counsel having "honestly" misunderstood the "preliminary and sketchy information". This claim, like the others discussed above, finds no support in the record before the Licensing Board.

The draft of testimony in question was the October 22, 1976 draft prepared by Mr. Rosso, an attorney for Consumers. Mr. Wessel testified that he thought the draft might be viewed by others unfamiliar with the events as misleading and disingenuous because it appeared, with all its detail, to tell the "whole story" about the Dow-Consumers relationship (and painted a rather rosy picture of that relationship) when in fact it did not. (Tr. 52,759; 52,766; 52,957; 52,980-98) Messrs. Nute and Temple thought the draft was misleading because it contained factual misstatements, including statements that Dow had concluded that Consumers could be relied upon to deliver steam on time and in quantities contracted for. (Tr. 51,003-015); 53,460-462)

During the course of an October 12, 1976 meeting, Messrs. Renfrow and Rosso (of Consumers) were told of Mr. Temple's lack of confidence in Consumers. Mr. Rosso then prepared a draft of testimony which described a harmonious relationship between the companies and a belief by Dow that Consumers could be relied upon to fulfill its contractual obligations in a timely manner. The draft included some "flavoring" added by Mr. Rosso as well as some conclusions not contained in the Nute informational response dated October 6, 1976. (Tr. 53,248-250) Dow was properly concerned that others unfamiliar with the full details might be misled by the draft. Mr. Nute and Mr. Wessel acted properly to correct what they felt were misstatements of fact. Their criticism was not baseless as Consumers suggests.

CONCLUSION

In this Reply Brief, Dow has discussed some factual findings which Consumers claims were either made by the Licensing Board or should have been made based on the testimony elicited during the course of the July 1979 hearing. While there are clearly areas of disagreement between Dow and Consumers regarding the precise findings that were made by the Board or should have been made, Dow nonetheless agrees with the conclusion reached

by the Licensing Board that no sanctions are warranted against Dow or its counsel under the circumstances of this case.

DATED: April , 1982

Respectfully submitted,

T. J. Cresswell, Esq.
Division Counsel
Michigan Division
The Dow Chemical Company
47 Building
Midland, Michigan 48640
(517) 636-4781

Fischer, Franklin, Ford, Simon
& Hogg

By: _____
William C. Potter, Jr.
1700 Guardian Building
Detroit, Michigan 48226
(313) 962-5210

Attorneys representing
The Dow Chemical Company

CERTIFICATE OF SERVICE

I, WILLIAM C. POTTER, JR., hereby certify that a copy of the foregoing Motion of The Dow Chemical Company for Reconsideration of Appeal Board Order Dated April 13, 1982 Denying Leave to File Reply Brief was mailed by first class mail, postage fully prepaid, to each of the following on the 15th day of April, 1982:

Christine N. Kohl, Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles, Esq.
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gerald Charnoff, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

William J. Olmstead, Esq.
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Myron M. Cherry, Esq.
One IBM Plaza, Suite 4501
Chicago, Illinois 60671

Barton Z. Cowan, Esq.
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

DATED: April 15, 1982

William C. Potter

WILLIAM C. POTTER, JR.