

October 14, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

APPLICANT'S RESPONSE TO "SECOND SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF INTERVENOR BARBARA
STAMIRIS' MOTION TO LITIGATE DOW ISSUES"

On October 5, 1983 Ms. Stamiris filed a "Second Supplemental Memorandum in Support of Dow Issues" (hereinafter, "Second Supplemental Memorandum"). The two Dow issues addressed by Ms. Stamiris in her Second Supplemental Memorandum are:

1. Whether Consumers used and relied on U.S. Testing test results to fulfill Nuclear Regulatory Commission ("NRC") requirements when it knew the test results were invalid, and
2. Whether Consumers knowingly misrepresented to the NRC that a single test boring taken near the diesel generator building indicated that unmixed cohesive fill had been used, or alternatively, did not disclose to the NRC that the single test boring demonstrated the use of random, improperly compacted fill in the ¹area and constituted evidence of site-wide problems.

1/ The formulation of item 2 above in Ms. Stamiris' October 5, 1983 Second Supplemental Memorandum is somewhat broader than the way it was stated in Ms. Stamiris' original August 8, 1983 pleading.

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In Applicant's "Response to Motions of Intervenors Mary Sinclair and Barbara Stamiris with respect to Dow Lawsuit" dated August 17, 1983 (at pp. 9-17), Applicant showed that these allegations in the Dow Complaint and First Amended Complaint, to the extent they have any factual foundation, reflect Dow's misunderstanding of the record in this proceeding, and that Dow's allegations have themselves been misunderstood and distorted by Ms. Stamiris. We will not repeat those explanations. However, we do have a few general observations on Ms. Stamiris' Second Supplemental Memorandum, followed by some comments on specific mistakes in that document.^{2/}

I. MS. STAMIRIS HAS FAILED TO SHOW THAT THERE IS ANY NEW AND SIGNIFICANT INFORMATION JUSTIFYING REOPENING THE RECORD.

In its Memorandum and Order (Denying Motion to Reopen Record on Containment Cracks) dated August 17, 1983, the Licensing Board indicated that it will apply two legal criteria in determining whether to consider "motions to reopen the record" at this advanced stage of the OM proceeding, where hearings have been concluded but the proceeding has not yet been closed. The two legal criteria are that the motion

^{2/} Applicant had promised to inform the Licensing Board within 24 hours after receipt of Ms. Stamiris' Second Supplemental Memorandum whether it wished to file a response, which it anticipated would require only 5 to 7 days. Tr. 21203. Applicant received Ms. Stamiris' pleading on October 5, but due to an oversight did not inform the Licensing Board of its intention to respond until October 11. Notwithstanding this oversight and the slight delay, Applicant requests permission to file this response, which we believe will not prejudice the rights of any party or delay the proceeding.

must be timely and raise issues of substance.^{3/} Although Ms. Stamiris acknowledges that these are the legal standards, the Second Supplemental Memorandum does not directly address them.

Neither of the two Dow issues addressed in the Second Supplemental Memorandum is based on new information and therefore neither is timely. Ms. Stamiris' counsel has conceded that there are no "Dow documents" relating to the DGB single test boring issue. Tr. 20834. Likewise (with one possible exception) all of the documents cited by Ms. Stamiris in support of the other Dow issue (Applicant's alleged knowing reliance on invalid U.S. Testing results) were given by Applicant to Ms. Stamiris in 1980 and used by Ms. Stamiris in the evidentiary hearings conducted two years ago.^{4/}

3/ Because a record has already been compiled on these two Dow issues, this is not a situation in which the Allens Creek decision applies. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542 (1980). The Licensing Board is entitled to review the record to determine whether there is factual support for Ms. Stamiris' arguments as if it were ruling on a motion for summary disposition. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station) ALAB-138, 6 AEC 520, 523-524 (1973)

4/ The documents Ms. Stamiris relies on are discussed briefly at pp. 5-11, below.

In short, what Ms. Stamiris wants to do is relitigate the same factual circumstances litigated in 1981, armed with new counsel and a new legal theory (willful misconduct and deception rather than poor management attitude towards implementing quality assurance requirements) and the hope that new evidence will turn up to support that new theory.

Ms. Stamiris' Second Supplemental Memorandum fails to supply new facts raising any issues of substance. Instead, Ms. Stamiris repeats her earlier claim that the allegations of the "certified" Dow complaints, standing alone, are sufficient to warrant reopening the record. Second Supplemental Memorandum at p. 2. But Dow's counsel has informed the NRC Staff that Mr. Gaska, who verified Dow's Complaint and First Amended Complaint, is not knowledgeable about Dow's allegations. Tr. 20610. Ms. Bernabei admits she no longer considers it worthwhile to depose him. Tr. 20867-20868. It is obvious that Mr. Gaska's verification of the Dow allegations is worthless.

Apparently undismayed by this inconvenient fact, Ms. Stamiris invents new characters who can support the allegations in the Dow complaints. She assumes that Dow has technical experts who participated in the drafting of Dow's Complaint and First Amended Complaint. There is absolutely no evidence that such experts exist, much less that they have played the role and hold the opinions Ms. Stamiris attributes to them.

This is an amazing substitution of creative imagination for fact. Ms. Stamiris' invocation of these phantom boffins on her side is entitled to no weight in determining whether the record should be reopened.^{5/}

II SPECIFIC COMMENTS

Second Supplemental Memorandum, p. 3, first paragraph:

Audit Report F-77-32 has already been introduced into evidence in this proceeding. See Bd. Ex. 3. The reasons why it failed to alert Applicant to the existence of site-wide soils problems were discussed at length in the testimony of Messrs. Horn, Marguglio, and Gallagher. See Applicant's Proposed Supplemental Findings of Fact and Law on Quality Assurance and Management Attitude Issues, dated March 15, 1982, at ¶s 319-329.

Second Supplemental Memorandum, p. 3, second paragraph:

This December 1977 Bechtel Report on the Administration Building Foundation Settlement was provided to Ms. Stamiris in 1980 and she admits having used it in the 1981 hearings. Tr. 20833-20834. The extent and adequacy of the 1977 soils investigations following the Administration Building Grade Beam failure were exhaustively explored in those hearings. See e.g. Applicant's Proposed Findings of Fact and Conclusions of Law on Quality Assurance and Management Attitude Issues dated October 28, 1981 at ¶s 124-135, 288-294. Moreover, contrary to Ms. Stamiris' assertion, the 1977 Bechtel Report does not conclude that the backfilled soil above the elevation of the footings is adequate; it

^{5/} At some point in the Dow-CPCo lawsuit, Dow may well retain geotechnical and other experts. If and when they materialize and if and when they provide expert opinions under oath which are inconsistent with the testimony in this proceeding, a motion to reopen the record on that basis could be considered, although Applicant does not of course concede that any such motion should be granted.

concludes that the backfilled soil other than the soil in question (i.e., other than the soil beneath the grade beams which was removed and replaced) below elevation 618 is adequate. And it is obvious that Ms. Stamiris does not understand Table 2.^{6/} Of course, even if there were errors or inconsistencies in the 1977 Bechtel Report on Administration Building Foundation Settlements, this would not prove that Applicant knowingly relied on invalid U.S. Testing test results. If anything, it would prove the opposite.

Second Supplemental Memorandum, p. 4, first paragraph:

This February 1, 1978 Bechtel letter to U.S. Testing was turned over to Ms. Stamiris in 1980. It is not one of the "Dow documents" turned over in 1983. It does not support the conclusions that Bechtel knowingly relied on invalid test results, or that Applicant knew there was a site-wide soils problem at that time.

^{6/} Ms. Stamiris appears to be referring to the last two entries in the first "Table 2" included in the 1977 Bechtel Report. Those entries, ST-4 and ST-5, give the results of unconfined compression tests of soil samples taken with Shelby tubes ("ST") at boring location LN at elevations 597.5 and 588.0. (The boring log LN itself is also included a few pages later in the 1977 Bechtel Report.) The test results in the fourth column (i.e., 3187 lbs per square ft and 2837 lbs per square ft) are used to derive the allowable bearing values in the fifth column by use of the multiplication factors given at the bottom of the table. To determine whether these allowable bearing values are adequate, one needs to compare them to the bearing pressures which the Administration Building imposes on the soil. These bearing pressures can not be determined from Table 2 and are not included anywhere else in the 1977 Bechtel Report. Therefore we are unable to guess how Ms. Stamiris comes to the conclusion that these two allowable bearing values are "insufficient." As a matter of fact, for a comparatively light structure such as the Administration Building, these two values, 2704 lbs per square ft and 2428 lbs per square ft, are adequate.

The last column in Table 2, "Percent Strain" provides information about the test procedure. The applicable ASTM-2166 [footnote continued on next page]

Second Supplemental Memorandum, p. 4, second paragraph:

As we have previously pointed out in our August 17, 1983 pleading, Ms. Stamiris introduced the 1979 Bechtel Report into evidence as Stamiris Ex. 3, Attachment 11. This is not new or significant information. Applicant has no record establishing whether the October 1, 1979 U.S. Testing response (which is one of the "Dow documents" turned over in 1983) was previously provided to Ms. Stamiris in 1980. However, the conclusion she draws from this document, that Bechtel was involved in Midland soil placement and testing activities, is hardly new or significant.

Second Supplemental Memorandum, p. 5, last two paragraphs:

This is as close as Ms. Stamiris gets to satisfying the Licensing Board's request to go into some detail about how Applicant is alleged to have misled the NRC. Tr. 21201. And because, for a change, she is specific, the charge she makes is easily disproved. Contrary to her assertion, the 50.55(e) report she is referring to is not misleading at all. Moreover, in May 1979, CPCo provided a preliminary draft of the 1979 Bechtel Report in its response to NRC 50.54(f) Questions Regarding Plant Fill, response to Question 1 at App. I, Attachment 1-8 (the last 9 pages of the response). This was later introduced into evidence by Ms. Stamiris herself as Stamiris Ex. 3,

continuation of footnote 6 from previous page:

standard requires the compression strength test to be conducted at increasing strains until failure occurs or 20% strain is reached, whichever occurs first. Accordingly, the 20% values given for samples ST-4 and ST-5 don't say anything (at least directly) about the adequacy of the soil in situ.

Attachment 9. The complete 1979 Bechtel Report was discussed in November, 1979 in Applicant's response to NRC 50.54(f) Questions Regarding Plant Fill, Question 23, pp. 23-26 to 23-31 and p. 23-81 (Action Item Number 15). This too was introduced in 1981 by Ms. Stamiris as Stamiris Ex. 3, Attachment 14. NRC Staff review of the 1979 Bechtel Report is documented in NRC Inspection Report 80-32 and 80-33 (Attachment No. 1, sheet 20 of 21, Action Item No. 1-19 (This is on the next to last page of the Inspection Report, which is attached to Eugene Gallagher's prepared testimony following Tr. 1754). In addition, of course, in 1980 Applicant gave the 1979 Bechtel Report itself to Ms. Stamiris during discovery and it was introduced by her into evidence as Stamiris Ex. 3, Attachment 11.

Ms. Stamiris' accusation that Applicant withheld from the NRC information concerning the 1979 Bechtel Report is obviously without substance.

Second Supplemental Memorandum, p. 6, last paragraph (carrying over to p. 7):

The relationship between the FSAR and the construction specifications has been explained over and over in this proceeding. The FSAR is not a design document or a construction specification but a "history" of the way the plant was built.^{7/} If one reads

^{7/} See, e.g. Lansman, Tr. 4915-4918. See also Applicant's Proposed Findings of Fact and Conclusions of Law on Quality Assurance and Management Attitude Issues, dated October 28, 1981, at ¶s 242-245.

Attachment 8 to Ms. Stamiris' Second Supplemental Memorandum (NRC Inspection Report 78-20), it is clear that the FSAR was still being prepared when the fill was being placed. The FSAR was not submitted until August 29, 1977 and not docketed until November 11, 1977. Hood, NRC Staff prepared testimony in response to Stamiris Contention 2 at p. 7, following Tr. 2530. The alleged material false statement (which Applicant has agreed not to contest in this proceeding) was that when submitted, the FSAR did not accurately reflect what was done. See Gallagher, Tr. 1814-1815. This issue of why soils placement failed to comply with PSAR commitments and FSAR standards has already been litigated, and Ms. Stamiris presents no new or significant information which would justify reopening the record.

Second Supplemental Memorandum, p. 8, paragraph 1:

The allegation that there may be a missing, third boring is not based on anything new in the Dow documents but on an ambiguity in testimony provided in 1981 by Don Horn.

(We note that in Mr. Horn's 1980 deposition, attachment 9 to Ms. Stamiris' Second Supplemental Memorandum, Mr. Horn states that there were only two borings). Despite Mr. Horn's confusion, the weight of the evidence in this proceeding is clear that in 1977 after the Administration Building grade beam failure, the follow up investigations included only two borings outside the

area of the Administration Building.^{8/} Indeed Ms. Stamiris agreed that there were only two borings in paragraph 78 of her proposed findings dated December 10, 1981. In any event, the question of whether there were two or three borings lacks significance since neither Don Horn nor any other witness in this proceeding has testified that the 1977 investigations showed site-wide soils problems.


Second Supplemental Memorandum, p. 9, last two sentences:

Bechtel stamped the page numbers on the 1977 Bechtel Report. We are informed by Bechtel that Bechtel has located in its files the two "missing" pages, SB 13770-71, and that they are identical (except for the stamped numbers) to the first

^{8/}See e.g. Keeley, prepared testimony at p. 5, following Tr. 1163, Gallagher, Tr. 2556, 2591-2592, and Stamiris Ex. 3, attachment 4 at p. 11, Stamiris Ex. 3, attachment 7 at p. 22. Although Ms. Stamiris doesn't mention it, Mr. Wiedner was also confused on this issue. Tr. 10850-10855. Applicant's counsel has recently asked Bechtel to confirm once again, and Bechtel has confirmed, that the follow up investigations of the grade beam failure in 1977 included only two borings outside the Administration Building area. Applicant therefore stands by Mr. Keeley's testimony and its October 28, 1981 proposed findings on quality assurance and management attitude issues. (¶s 124, 289).

two pages of Attachment 3 to Ms. Stamiris' Second Supplemental Memorandum (the February 1, 1978 letter from Mr. Newgen to Mr. Edley). This letter was turned over to Ms. Stamiris in 1980.

Respectfully submitted,


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Dated: October 14, 1983

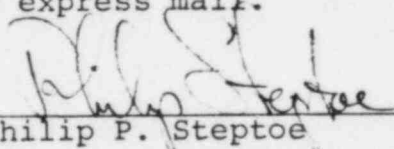
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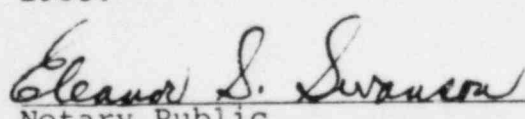
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CERTIFICATE OF SERVICE

I, Philip P. Steptoe, one of the attorneys for Consumers Power Company, hereby certify that a copy of "Applicant's Response to 'Second Supplemental Memorandum in Support of Intervenor Barbara Stamiris' Motion to Litigate Dow Issues'" was served upon all persons shown in the attached service list by deposit in the United States mail, first class, this 14th day of October, 1983. Persons marked with an asterisk were served by express mail.


Philip P. Steptoe

SUBSCRIBED AND SWORN before
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My Commission Expires January 14, 1986

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