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OFFICE OF SECRETARY  
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January 19, 1984

In the Matter of )  
 )  
CONSUMERS POWER COMPANY )  
 )  
(Midland Plant, Units 1 )  
and 2) )

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

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Atomic Safety & Licensing  
Board Panel  
U.S. Nuclear Regulatory Com-  
mission  
Washington, D. C. 20555

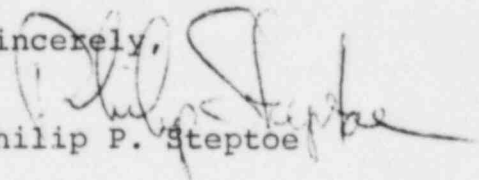
Dr. Jerry Harbour  
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Board Panel  
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Dear Administrative Judges:

Pursuant to our obligation to keep the Board and parties informed of developments relevant to this proceeding, enclosed is a pleading in the Dow-Consumers lawsuit entitled "Preliminary Pre-Trial Statement of Defendant and Counter-Plaintiff, Consumers Power Company". It provides a reasonably concise status report on the lawsuit, especially the status of document production.

Sincerely,

  
Philip P. Steptoe

PPS:es

enc.

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STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,  
Plaintiff,

Case No. 83-002232-CX-D

Honorable David Scott DeWitt

-VS-

CONSUMERS POWER COMPANY,  
Defendant.

\_\_\_\_\_  
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\_\_\_\_\_  
PRELIMINARY PRE-TRIAL STATEMENT OF  
DEFENDANT AND COUNTER-PLAINTIFF,  
CONSUMERS POWER COMPANY<sup>1/</sup>

\_\_\_\_\_  
<sup>1/</sup> In accordance with the discussion among the Court and counsel on December 27, 1983, Consumers Power Company is submitting this as a preliminary Pre-Trial Statement, which will be supplemented and modified during the course of pre-trial proceedings and in accordance with the Court's future pre-trial orders. Nothing herein shall be deemed a waiver of any of the claims or defenses contained in the pleadings previously filed by Consumers, nor be deemed a waiver of any other right to which Consumers is entitled.

1. Factual statement of claim:

Consumers Power Company ("Consumers") seeks a money judgment against Dow Chemical Company ("Dow") for the amount Dow is required to pay Consumers under their contract of June 21, 1978 (the "1978 Contract"), together with interest, costs and attorneys' fees. Consumers also seeks a declaratory judgment that Dow's purported termination of the 1978 Contract is ineffective.

In 1966 Dow approached Consumers with a suggestion that Consumers build a nuclear power plant in Midland to produce both electricity and steam. The steam would be purchased by Dow for use in its chemical manufacturing plant. After a joint study, Consumers and Dow entered into a contract by which Consumers would build such a plant (the "Midland Nuclear Plant") and Dow would purchase the steam thus produced.

For a variety of reasons, including Consumers' difficulty in obtaining the necessary construction permit from the Nuclear Regulatory Commission, construction was delayed. These delays and other factors, such as design changes, increased the estimated cost of the Midland Nuclear Plant well beyond its initial level.

In 1977, Consumers and Dow, each believing that modifications to the 1967 Contract were appropriate, entered into negotiations toward that end. The negotiations were carried on by a high-level team from each company and involved numerous meetings over a period of some nine months. On June 21, 1978, a new agreement (the "1978 Contract") was executed, superseding the 1967 Contract. The 1978 Contract provided that Consumers was to use its best efforts to place Unit 2 (the electrical generating unit) in operation on or about March 1, 1981, and to place the entire Midland Nuclear Plant (including Unit 1, the steam generating unit) in operation on or about March 1, 1982. It further provided that, so long as Consumers used its best efforts, it would have no liability to Dow if "for any reason" the plant was not put into operation. The contract provided that if Consumers became unable to produce steam for Dow by December 31, 1984, Dow could cancel the contract, provided it simultaneously paid to Consumers one-half of the Allocated Steam Investment ("ASI"). ASI is the dollar amount of Consumers' investment in the steam generating unit.

The 1978 Contract contains a Force Majeure section. It states that, notwithstanding any other contract provision, any delay or failure in performance by either party (other than in the payment of money) shall be excused if due to any of various specified causes -- such as labor disputes or governmental action -- or "any other cause or causes beyond the reasonable control of the non-performing party."

Dow has invested no monies in the Midland Nuclear Plant, the entire cost having been borne by Consumers. The current cost of the Midland Nuclear Plant is estimated to exceed \$4 billion. Consumers has calculated that the Allocated Steam Investment as of July 14, 1963 is \$919,452,000; one-half ASI is \$459,726,000.

In April, 1983, Consumers concluded that the Midland Nuclear Plant could not produce steam by the target date of December 31, 1984. It so advised Dow and the public. That announcement entitled Dow to cancel the 1978 Contract, provided it paid Consumers the amount called for under the contract. On July 14, 1983, Dow purported to cancel the 1978 Contract, while simultaneously repudiating its contractual obligations to make the required termination payment. Dow then commenced this suit seeking to be entirely relieved of its contractual obligation to make the termination payment to Consumers.

Dow's First Amended Complaint is in five counts. Count I alleges that Consumers made material misrepresentations and failed to disclose material facts to Dow during the course of the negotiations leading up to execution of the 1978 Contract. Dow asks that it be relieved of all obligations under the 1978 Contract.

Count II alleges that Consumers breached the 1978 Contract and its alleged fiduciary duties to Dow by failing to use its best efforts to obtain commercial steam operation by March 1, 1982. Again, Dow asks to be relieved of all obligations under the 1978 Contract.

Count III claims that Dow should be excused from performing under the 1978 Contract because of the occurrence of supervening contingencies, which were not caused by Dow, and which were not in contemplation of either Dow or Consumers at the time the 1978 Contract was executed.

In Count IV Dow asks that, to the extent its obligations under the 1978 Contract are not otherwise fully discharged or excused, Dow be required to pay to Consumers some amount less than one-half ASI.

In Count V Dow alleges that Consumers owed Dow a duty to exercise due care in the planning, supervision and construction of the Midland Nuclear Plant and that it negligently breached that duty. Dow asks for damages, including the sum of \$60 million allegedly expended by it for facilities to receive the steam from the Midland Nuclear Plant.

Consumers timely answered the First Amended Complaint. Consumers denies that it was guilty of fraud or misrepresentation, breach of contract or negligence. Consumers denies that Dow is excused from its obligations under the 1978 Contract by any claimed failure of fundamental assumptions. Consumers denies that Dows obligation to pay one-half of the calculated ASI should be reduced.

Consumers simultaneously filed a three count counterclaim against Dow.

In Count I Consumers seeks a declaratory judgment that Dow, by repudiating its obligation to make the termination payment required by the 1978 Contract, has failed to exercise its option to terminate in accordance with its terms and that its purported termination is therefore ineffective.

In Count II Consumers alleges that Dow's purported termination of the 1978 Contract was undertaken in bad faith, in breach of Dow's common law and contractual obligations to Consumers to perform its obligations under the 1978 Contract in good faith.

In Count III Consumers asks for money judgment against Dow for the amount of the termination payment which, as of July 14, 1983 is \$459,726,000.

2. Legal Issues:

At this stage of the proceedings, the legal issues have been adequately framed by the First Amended Complaint, Answer and Counter-Claim. As the parties proceed through discovery and towards trial, there will be opportunities to narrow the legal and factual issues and to provide the Court, through pre-trial motions, stipulations, requests for admissions and trial briefs, with comprehensive statements of the respective factual and legal issues.



3. Additional pleadings, motions, additional defenses or amendments desired. If pleadings are satisfactory, so state:

At this stage of the proceedings, the pleadings are satisfactory. During the course of discovery it may become necessary or appropriate to amend or supplement the pleadings. During the course or at the conclusion of discovery, it may be appropriate for one or more dispositive motions to be filed dealing with one or more of the claims or defenses of the parties.

4. What depositions or discovery is yet to be done?

Since the filing of the Complaint, the parties have proceeded expeditiously to exchange documents. Consumers has produced approximately 590,000 pages of documents to Dow and Dow has produced approximately 140,000 pages of documents to Consumers. Under Pre-Trial Order No. 1, the date for completion of first-wave document production is February 29, 1984, subject to the right of either party to move the Court for good cause for an extension of time. Consumers has agreed to produce in excess of one million additional documents to Dow as part of first-wave discovery. That production cannot physically be completed by February 29, 1984. On January 13, 1984, Consumers advised Dow that it will need an additional 90 days in which to complete document production. In the event Dow does not stipulate to grant the needed additional time, Consumers will, at the January 23rd pre-trial conference, file a motion, for hearing at a later date, requesting an appropriate extension of time.

It was initially agreed among counsel for the parties that depositions of party representatives would await completion of first-wave document production. Consumers believes that this procedure should be continued. In the interim, the parties can proceed with depositions of third parties, a number of which have already been noticed.

5. Any jury demands?

None.

6. Any consolidation, other parties to be joined or dropped, separation of issues, or additional claims?

None at this time.

7. Admissions of fact requested.

There are numerous facts which, during the course of discovery and in advance of trial, can be stipulated to by the parties. No requests for admissions have yet been filed by either party.

8. Documents you anticipate putting in evidence which you would like authenticated.

We contemplate that authentication of documents can proceed largely by stipulation in advance of trial. To the extent that questions of authenticity or admissibility may be raised, we anticipate that they can be presented to the Court in an orderly fashion in advance of trial.

9. Exhibits proposed.

There will no doubt be a great many physical exhibits at trial. It is premature to describe or list them at this time.

10. Estimated time of trial:

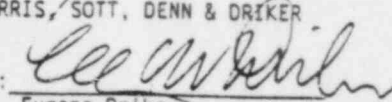
We are presently unable to estimate the time of trial.

The remaining items called for under the Pre-Trial Statement cannot be answered at this time. It is respectfully suggested that the Court conduct periodic pre-trial conferences, either on its own motion or at the request of the parties, when they deem such conferences advisable.

Prepared By:

BARRIS, SOTT, DENN & DRIKER

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DATE: January 14, 1984