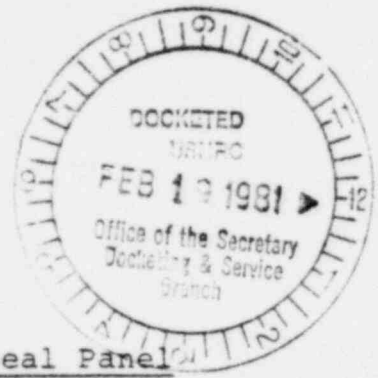


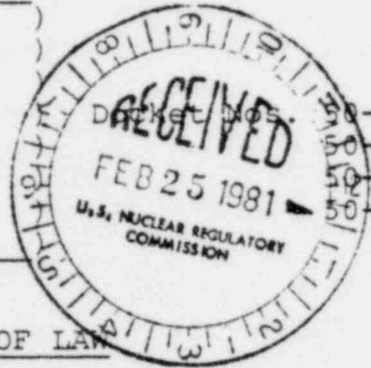
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Panel

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



50-329-OM
50-330-OM
50-329-OL
50-330-OL

MEMORANDUM OF LAW

Pursuant to the Atomic Safety and Licensing Appeal Board's "Order," dated February 12, 1981, Consumers Power Company ("Licensee"), by its attorneys, hereby responds to (1) whether the Atomic Safety and Licensing Board's ("Licensing Board") ruling in its "Memorandum and Order (Concerning Depositions of NRC Staff Members)," dated February 12, 1981 ("Memorandum and Order"), satisfies the criteria for referral set forth in 10 C.F.R. §2.730(f), and (2) whether a stay of the Licensing Board's ruling is warranted.

Background

The procedural history of Licensee's attempts to depose Mr. Thornburg has been concisely presented in the Licensing Board's Memorandum and Order. As noted in this order, Licensee filed a motion to compel the deposition of NRC Staff member Mr. Thornburg on January 23, 1981. The

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Licensing Board heard oral argument on this motion at the prehearing conference held on January 23-29, 1981 in Midland, Michigan.^{1/} On January 29, 1981 the Licensing Board ruled that Licensee had demonstrated exceptional circumstances, within the meaning of 10 C.F.R. §2.720(h)(2), to warrant the deposition of Mr. Thornburg.^{2/}

On February 9, 1981, counsel for the Nuclear Regulatory Commission Staff ("Staff") filed its "Motion for Reconsideration or Referral of Licensing Board's Rulings of January 29, 1981" challenging the Licensing Board's ruling on two grounds. First, the Staff argued that Licensee had not shown the exceptional circumstances necessary to depose Mr. Thornburg in that other witnesses were present at the meetings of interest to Licensee and that the information sought is not "material." Second, the Staff argued that questions going to the Staff's internal deliberative process would delve into privileged material and should therefore not be permitted.

In its Memorandum and Order the Licensing Board modified its earlier ruling ordering the NRC Staff to produce Mr. Thornburg for his deposition in two important respects. First, it ordered that Mr. Thornburg need be produced only if two NRC witnesses yet to be deposed were unable to properly respond to Licensee's questions. Second, the Licensing

1/ Tr. 537-546.

2/ Tr. 700-702.

Board limited the scope of Mr. Thornburg's deposition to factual information only, specifically removing from the scope of the deposition any inquiries into the Staff's deliberative process.

ARGUMENT

The Licensing Board's ruling does not warrant the Appeal Board's acceptance of the Licensing Board's referral or the granting of the stay. The Order and Memorandum eliminates all threat of irreparable harm resulting to the Staff from Mr. Thornburg's deposition. In light of the modifications to the Licensing Board's initial ruling, all of the Staff's objections to Mr. Thornburg's deposition have been accommodated.

1. The Licensing Board's Ruling Does Not Satisfy the Criteria for Referral.

Section 2.730(f) grants Appeal Boards discretionary authority to review interlocutory orders when "prompt decision is necessary to prevent detriment to the public interest or unusual delay." 10 C.F.R. §2.730(f). This authority is reserved for exceptional and important issues: discovery rulings, such as the one now before this Appeal Board, are generally not candidates for its exercise. See, Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977).

The Appeal Board clarified the criteria governing

referral in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). There, in declining to accept the Licensing Board's referral of an order, it held:

Almost without exception in recent times, we [the Appeal Board] have undertaken discretionary interlocutory review only where the ruling below (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted).

Applying these criteria to the circumstances of this case, it is clear that referral must be similarly denied. The Licensing Board's ruling ordering Mr. Thornburg's deposition neither affects the basic structure nor jeopardizes the conduct of the proceeding below. Depositions are a routine matter. Including an additional deponent in a series cannot be characterized as unusual.

More importantly, however, the Licensing Board's ruling does not threaten the NRC Staff "with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal." Marble Hill at p.1192. The Licensing Board fashioned its order in a manner which eliminates all threat of irreparable harm.

First, Mr. Thornburg's availability for deposition is contingent upon other witness' inability to supply the material information Licensee seeks from Mr. Thornburg. Memorandum and Order, at p.10. In this manner, the Licensing

Board conditioned Thornburg's deposition upon the presence of the same "exceptional circumstances" incorporated into the NRC regulations.^{3/}

Second, the Licensing Board has limited the scope of Mr. Thornburg's deposition to "facts." The thrust of the Staff's opposition to the deposition during oral argument at the prehearing conference and in its "Motion for Reconsideration," was a concern with protecting information about the NRC's "deliberative process."^{4/} By narrowing the scope of Mr. Thornburg's deposition to factual information, the Licensing Board precluded inquiry into material the Staff alleges is privileged.

Mr. Thornburg's deposition will only involve inquiry into factual information, such as differing professional judgments, which the Staff has acknowledged as matters the Board should be made aware of.^{5/} Such inquiry falls clearly outside any credible claim of executive privilege.

Even if Licensee were to ask questions requiring answers which the Staff believes to be privileged, the Staff

3/ 10 C.F.R. §2.720(h)(2)(i) provides, in pertinent part, "That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel."

4/ Tr. 543-544; "Motion for Reconsideration or Referral of Licensing Board's Ruling of January 29, 1981," at 5-6.

5/ Tr. 546.

may object and instruct Mr. Thornburg to refuse to answer pending a ruling by the Licensing Board. A privilege must be exercised through objections raised to specific questions, instructions not to answer objectionable questions, and rulings thereon by the Licensing Board. In the past, the Appeal Board has explicitly refused to review, on an interlocutory basis, various privilege decisions made during discovery,^{6/} holding:

The rule in the federal courts is that discovery orders involving the scope of an attorney's work product--even in the so-called "big case"--are not appealable, and the contention that a denial of a claim of privilege (much less its grant) enjoys a special status deserving of interlocutory review has been expressly rejected by the Supreme Court. We think it wisest to continue our own adherence to that same practice.... Aside from the obvious fact that to do so would stall the proceeding below until we acted, the simple truth is that we are no better equipped to rule on such matters than the Licensing Board. The Toledo Edison Company (Davis - Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 768-69 (1975).

The instant case does not present circumstances where the order involved "must be reviewed now or not at all." See, e.g., Kansas Gas and Electric Co. (Wolf Creek, Unit 1), ALAB-327, 3 NRC 408, 413 (1976). In Wolf Creek an applicant had been ordered to disclose specific pricing information. Once this information was disclosed there was

^{6/} In Davis - Besse The Appeal Board refused to review privilege determinations for various documents requested to be produced during discovery. 2 NRC 758-59, 76-70. This stage has not even been reached in the proceeding at hand. The Staff has not attempted to assert a privilege, much less obtained a privilege ruling from the Licensing Board.

no effective remedy on final appeal. In contrast, here the NRC does not oppose disclosure of any particular facts. Rather, the NRC is apparently concerned with maintaining the integrity of the NRC's deliberative process.^{7/} There is no need for an interlocutory review to accomplish this purpose in that the opportunity to instruct Mr. Thornburg not to answer objectionable questions affords the Staff with an adequate remedy.

The Staff recognizes that the Licensing Board's ruling ordering Mr. Thornburg's deposition is not unusual. Staff is providing Mr. Naidu and Mr. Fiorelli for deposition while reserving the right to contest the Board's rulings ordering these individuals' depositions on final appeal. Naturally this course of action will provide appellate review only after the depositions have taken place. This is the proper procedure for reviewing interlocutory orders.^{8/} Staff has not attempted to differentiate between the depositions of these two witnesses and Mr. Thornburg.

2. Stay of the Licensing Board's Ruling is not Warranted.

In passing upon the merits of a stay, this Appeal Board must evaluate the four factors set forth in 10 C.F.R.

^{7/} Tr. 543-544.

^{8/} In light of the foregoing, the Licensing Board's cryptic comment that "our ruling might have public interest implications" seems inexplicable. Memorandum and Order, at p.12. The Licensing Board gave no explanation for this statement. The circumstances of this deposition do not warrant interlocutory review.

§2.788(e). Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 60 (1979). Section 2.788(e) provides:

In determining whether to grant or deny an application for a stay, ...the Atomic Safety and Licensing Board...will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies. 10 C.F.R. §2.788(e).

The NRC Staff is not likely to prevail on the merits. First, the Licensing Board ordered Mr. Thornburg's deposition because it concluded that Licensee had shown the "exceptional circumstances" required to obtain the deposition of specific NRC staff members under 10 C.F.R. §2.720(h)(2)(ii). Memorandum and Order, at p.7-8. While the NRC Staff recognized this exception, it challenged the Licensing Board's application of this regulation to the circumstances of this proceeding. In other words, the NRC Staff challenged a factual determination explicitly within the scope of the Licensing Board's responsibilities. This Appeal Board is not likely to overrule this factual decision. As most factual determinations, discovery questions "are particularly within a trial board's competence and appellate review of such ruling is usually best conducted at the end of the case."

Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

Second, it is premature to challenge the Licensing Board's order until after the depositions of the witnesses upon whose testimony Mr. Thornburg's deposition is conditioned. Only after these witnesses have been questioned will it be known whether the exceptional circumstances necessary to warrant Mr. Thornburg's deposition exist. If these witnesses disclose the factual information for which Mr. Thornburg has been sought, Mr. Thornburg's deposition will be unnecessary and review of the Licensing Board's decision becomes moot. On the other hand, if these witnesses do not yield the desired factual information, the grounds for the NRC's opposition to the Licensing Board determination of "exceptional circumstances" fails. In either event, the Licensing Board has complied with 10 C.F.R. §2.720(h) and its order will not be subject to successful challenge.

The most important factor to be evaluated is the possibility of irreparable harm resulting from the absence of a stay. See, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527 (1978).

As noted above, the NRC will not be harmed by Mr. Thornburg's deposition. Mr. Thornburg's availability for deposing is conditioned on the inability to obtain material information from other sources. Moreover, the Licensing

Board has explicitly protected the NRC "deliberative processes" by limiting the scope of Mr. Thornburg's deposition to factual information.^{9/} Memorandum and Order, at p.11.

Several members of the public have intervened in this proceeding. The material facts for which Mr. Thornburg's deposition is sought are relevant to issues with potential safety ramifications. This information is uniquely within the Staff's control. It is in the overriding public interest to have full ventilation of all facts, if any, underlying the December 6, 1979 order. Accordingly, the public interest lies against staying Mr. Thornburg's deposition.

Respectfully submitted,


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^{9/} With respect to the third factor, granting the stay will not have a serious impact on the parties to this proceeding other than depriving Licensee of material information it is entitled to as well as causing undue additional delay.

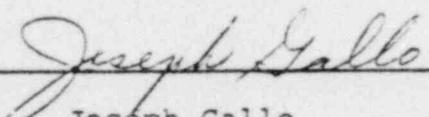
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(Midland Plant, Units 1 and 2))	50-330-OM
_____)	50-329-OL
	50-330-OL

CERTIFICATE OF SERVICE

I, Joseph Gallo, hereby certify that copies of Consumers Power Company's MEMORANDUM OF LAW was served upon Richard S. Salzman, John H. Buck, Christine Kohl, William J. Olmstead and William D. Paton by hand on February 18, 1981 and upon all other persons shown in the attached service list by deposit in the United States mail, first class, on February 17, 1981.


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