

UNITED STATES OF AMERICA DOCKETED
NUCLEAR REGULATORY COMMISSION USNRC
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

'84 JAN 26 AIO:19

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
Docket Nos. 50-329 OM & OL
50-330 OM & OL

MEMORANDUM OF CONSUMERS POWER COMPANY
IN OPPOSITION TO APPEAL OF GOVERNMENT
ACCOUNTABILITY PROJECT DEponents

David M. Stahl, Esq.
Counsel for Consumers Power

Susan D. Proctor, Esq.
Counsel for Consumers Power

December 9, 1983

8401270391 840123
PDR ADOCK 05000329
G PDR

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....11

STATEMENT OF FACTS.....1

ISSUES.....4

ARGUMENT

 I The GAP Deponents Have No First.....8
 Amendment Privilege

 II The Balance of Interests Weighs in.....12
 Favor of Disclosure of the Information
 Sought to be Withheld by the GAP
 Deponents

 IV GAP has No Common Law Privilege to.....18
 Withhold Information

TABLE OF AUTHORITIES

<u>COURT CASES</u>	<u>PAGE</u>
<u>Apicella v. McNeil Laboratories</u> , 66 F.R.D. 78 (E.D.N.Y. 1975)	8,9,16
<u>Branzburg v. Hayes</u> , 408 U.S. 665 (1972).	5,9,10,17
<u>Bruno v. Stillman & Globe Newspapers</u> , 633 F.2d 583 (1st Cir. 1980)	12
<u>United States v. Criden</u> , 633 F.2d 346 (3rd Cir. 1980) <u>cert. denied</u> 449 U.S. 1113 (1981)	15
<u>Gilbert v. Allied Chemical Corp.</u> , 411 F.Supp. 505 (E.D.Va. 1976)	15
<u>Herbert v. Lando</u> , 441 U.S. 153 (1979)	8
<u>In re Popkin</u> , 460 F.2d 328 (5th Cir. 1972) <u>cert.</u> <u>denied Popkin v. United States</u> 411 U.S. 909 (1973)	9,10
<u>In re Blier Cedar Co., Inc.</u> , 10 B.R. 993 (D. Me. 1981)	19
<u>In re International Horizons, Inc.</u> , 689 F.2d 996 (11th Cir. 1982)	18
<u>Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.</u> , 71 F.R.D. 388 (N.D.Cal. 1976)	10
<u>Roviaro v. United States</u> , 353 U.S. 53 (1957)	18
<u>Solargen Electric Motor Car Corp. v. American Motors Corp.</u> , 506 F.Supp. 546 (N.D.N.Y. 1981)	8,16
<u>Tavoulareas v. Piro</u> , 93 F.R.D. 35 (D.D.C. 1981)	16
<u>Trammel v. United States</u> , 445 U.S. 40 (1980)	18
<u>United States ex rel. Riley v. Franzen</u> , 653 F.2d 1153 (7th Cir. <u>cert. denied</u> 454 U.S. 1067 (1981)	18
<u>United States v. Cuthbertson</u> , 630 F.2d 139 (3rd Cir. 1980) <u>cert. denied</u> 449 U.S. 1126 (1981).	9

<u>COURT CASES, cont'd</u>	<u>PAGE</u>
<u>United States v. Nixon</u> , 418 U.S. 683 (1974)	5,16,20
<u>Wright v. Jeep Corp.</u> , 547 F.Supp. 871 (E.D.Mich. 1972)	10,11,18
<u>Wright v. Patrolmen's Benev. Ass'n.</u> , 72 F.R.D. 161 (S.D.N.Y. 1976)	9,14,15
 <u>NRC CASES</u>	
<u>In re Commonwealth Edison Co.</u> (Byron Nuclear Power Station, Units 1 and 2) 15 N.R.C. 1400 (1982)	6
<u>In re Consumers Power Co.</u> (Midland Plant, Units 1 and 2), 13 N.R.C. 96 (1981)	13
<u>In re Consumers Power Co.</u> (Midland Plant, Units 1 and 2), Memorandum and Order (Ruling on Motions to Quash Subpoenas), slip op. LBP-83-53, 18 NRC (August 31, 1983)	3,12
<u>In re Consumers Power Co.</u> , (Midland Plant, Units 1 and 2), Memorandum and Order (Denying Motion for Reconsideration of LBP-83-53), slip op. LBP-83-64, 18 NRC (October 6, 1983)	3,13,16,17
<u>In re Consumers Power Co.</u> (Midland Units 1 and 2), Memorandum and Order, LBP 83-63 (October 6, 1983)	15
 <u>MISCELLANEOUS</u>	
Larkin, <u>Federal Testimonial Privileges</u> §1.01 (1983).	19
Rule 1, Fed. R. Civ. P.	5
Rule 26(b)(1), Fed. R. Civ. P.	5
Rule 26(c), Fed. R. Civ. P.	5
Statement of Policy, 13 N.R.C. 452 (1981)	5
U.S. Const. amend I	passim
8 Wigmore, <u>Evidence</u> § 2286 (McNaughton rev. 1961)	19

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

84 JAN 26 AIO:20

In the Matter of:

CONSUMERS POWER COMPANY

(Midland Plant, Units 1 & 2)

)
)
)
)

Docket Nos. 50-329 OM

50-330 OM

Docket Nos. 50-329 OL

50-330 OL

MEMORANDUM OF CONSUMERS POWER COMPANY IN
OPPOSITION TO APPEAL OF GOVERNMENT
ACCOUNTABILITY PROJECT DEPONENTS

Consumers Power Company ("Consumers" or "the Applicant"), by and through its attorneys, submits its Memorandum in Opposition to the Appeal of Louis Clark, Thomas Devine, Billie Pirner Garde and Lucy Hallberg of the Government Accountability Project.

STATEMENT OF FACTS

This appeal arises from the denial by the Atomic Safety and Licensing Board ("the Licensing Board") of a motion to quash subpoenas duces tecum for the depositions of Louis Clark, Thomas Devine, Billie Pirner Garde and Lucy Hallberg of the Government Accountability Project ("the GAP deponents"), and for the production of certain documents in their possession. These subpoenas were originally issued by the Licensing Board, pursuant to Consumers' Application, on

July 8, 1982. The Application stated that the GAP deponents had submitted affidavits from anonymous sources to the Nuclear Regulatory Commission. These affidavits reportedly alleged a pattern of poor quality work at Consumers' Midland Plant. The Application further stated that these persons also gave extensive information concerning these allegations of poor quality work to the press. The Application emphasized that Consumers was not seeking the identity of the affiants but only information relevant to the licensing and operating proceedings, in particular, copies of the Affidavits themselves. A copy of the Application, with attachments, is attached as Exhibit A.

By its Order of December 30, 1982, the Licensing Board accepted revised contentions of the Intervenor Mary Sinclair. Certain of these contentions were based upon the newspaper articles containing information received from the anonymous affiants. (Tr. 8359, 19118).

Service and enforcement of the subpoenas upon the GAP deponents were delayed by agreement, in September, 1982, of the Applicant and the Staff to permit the NRC Region III opportunity to conclude its investigation of related allegations prior to discovery. In April 1983, the Applicant advised that it wished to begin discovery on these issues, so that it could prepare for anticipated operating license hearings involving these issues. The Staff indicated it did

not object. Memorandum & Order, LBP 83-53 (Aug. 31, 1983).

The subpoenas were served on May 10, 1983. The GAP deponents filed a Motion To Quash on June 27, 1983. The Applicant and Staff filed responses in opposition to the motion. While indicating such an order was unnecessary in view of the limited nature of the requested discovery, Applicant stated it would not object to the entry of a Protective Order securing the anonymity of the affiants who had provided information to the GAP Deponents. (Tr. 19132-35). After oral argument, the Licensing Board denied the Motion to Quash and entered a Protective Order. Memorandum and Order, LBP 83-53 (Aug. 31, 1983). The Protective Order establishes procedures to assure that the identity of the affiants remains anonymous, including protection from the release of any "identifying information" and from any inadvertent disclosures. A copy of the Protective Order is attached as Exhibit C.

On September 30, 1983, the GAP deponents filed their Motion For Reconsideration and Request For Stay. After oral argument on October 5, 1983, the Licensing Board issued an order on October 6, 1983 denying both motions but imposing certain additional procedures to be followed at the depositions.

The GAP deponents filed their appeal on October 21, 1983. Subsequently, the GAP deponents, on October 26, 1983,

moved this Board for a stay, a request which was denied on October 28, 1983. Despite their failure to obtain a stay, the GAP deponents failed to appear for a records deposition previously noticed for October 26, 1983. Further, the GAP deponents have advised the Licensing Board that they will not obey the subpoenas unless ordered to do so by a United States Court. GAP Deponents' Response to Applicant's Motion to Compel and Application for Enforcement of Subpoenas (Nov. 4, 1983).

ISSUES

1. Whether the qualified First Amendment privilege against disclosure afforded the press should be extended to the GAP deponents, members of a self-styled public-interest law firm?
2. Whether the Licensing Board abused its discretion in finding that the need for disclosure outweighed GAP's interest in withholding information concerning work quality at the Midland Plant?
3. Whether the GAP deponents have a common-law privilege against disclosure?

ARGUMENT

A fundamental tenet of the American system of

justice is that all relevant evidence must be made available for resolution of disputes unless there are substantial overriding policy considerations. The federal courts have held that "'the public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common-law or statutory privilege." Branzburg v. Hayes, 408 U.S. 665, 688 (1972). Such privileges "are not lightly created or expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974).

The Federal Rules of Civil Procedure incorporate this principle in authorizing discovery of all relevant evidence not privileged. Rule 26(b)(1), Fed. R. Civ. P. The United States District Courts are granted broad discretion in supervising the extent of discovery, Rule 26(c), Fed. R. Civ. P., and are to construe the rules liberally. Rule 1, Fed. R. Civ. P. The Commission has adopted the discovery rules of the federal courts and has indicated that the Licensing Boards also have broad discretion in overseeing the conduct of discovery. Statement of Policy, 13 N.R.C. 452 (1981).

The context of the claim of privilege made here is especially significant, because the interest in disclosure of the requested information is not that of the Applicant alone. The public has a significant interest in assuring

that the allegations of poor quality work at the Midland Plant are brought into the open and closely scrutinized. The GAP deponents' adamant refusal to respond to the subpoena, while "leaking" selected portions of the information to the press defeats that objective. This Board has, in similar situations, not tolerated such obstruction of justice:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record [footnote omitted].

Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2) 15 N.R.C. 1400, 1417 (1982).

In proceedings before the Licensing Board, Applicant and Staff both took the position that the Board need not address the issue whether GAP is entitled to claim the protection of any privilege, since Applicant made it clear that it was not seeking disclosure of that which most concerned GAP, the identity of the anonymous affiants. (Tr. 19127). Rather, Applicant's attorneys stressed that they were interested only in disclosure of the affidavits themselves and the facts surrounding the preparation of those Affidavits. (Tr. 19127-28). In light of this position, the Licensing Board concluded that it need not reach the

question whether either privilege extended to GAP.

The Licensing Board undertook, however, to balance the need for disclosure against GAP's asserted need for confidentiality, as if the privilege existed. In view of the protections imposed by the Licensing Board's orders, it found that the need for disclosure should prevail.

The position of the Applicant remains that expressed before the Licensing Board: that GAP has no privilege of any kind -- constitutional, statutory or common law -- behind which it can hide what it has always proclaimed is evidence of serious deficiencies; but that in any event the Appeal Board need not reach the issue of privilege since the Applicant does not seek to learn the identity of the anonymous affiants and the Licensing Board has, based on its balancing of interests, entered a Protective Order which ensures that Applicant can gain access to the underlying facts while protecting the anonymity of GAP's "sources." Indeed, it is difficult to determine what continuing controversy exists that needs to be resolved by the Appeal Board.

The record indicates that the Licensing Board reached a fair and just result, clearly within its discretion. The appeal should, therefore, be dismissed and the GAP deponents required to respond to the previously issued subpoenas.

I. The GAP Deponents Have No First Amendment Privilege

Privileges, since they run counter to the ideal of full discovery and truth-seeking, are not favored by the law. Consequently, the burden rests on the objecting witness to prove the existence of the privilege. Solargen Electric Motor Car Corp. v. AM Motors Corp., 506 F.Supp. 546, 549 (N.D.N.Y. 1981). Essentially, GAP contends that it enjoys the quasi-privileged status sometimes afforded the press to protect its confidential information. To date, this privilege has only applied where the objecting witness is a member of the press or similarly in the business of disseminating news and information to the public. It has not, and should not, be applied in this case where the party asserting the privilege is an entity collecting information for its own purposes.

The press enjoys a qualified privilege to withhold confidential information. Herbert v. Lando, 441 U.S. 153, 175 (1979). This right evolved in recognition of the role of the press in news gathering in order to disseminate the information. While the liberty of the press is not confined to newspapers and periodicals, nor to the organized press, the concept of the "press" does connote publication and dissemination of the information to the public. Apicella v. McNeil Laboratories, 66 F.R.D. 78, 84 (E.D.N.Y. 1975) citing

Lovell v. City of Griffin, 303 U.S. 444, 452 (1935) and Branzburg v. Hayes, 408 U.S. 665, 705 (1972). The protection of the press is, thus, founded upon the importance of preserving the flow of information to the public domain, to the "marketplace of ideas." Apicella v. McNeil Laboratories, 66 F.R.D. 78, 84 (E.D.N.Y. 1975); In Re Popkin, 460 F.2d 328, 334 (5th Cir. 1972).

This aspect of the First Amendment privilege accorded the press has never been extended beyond those truly in the business of disseminating news and information to the public. See Wright v. Patrolmen's Benev. Ass'n., 72 F.R.D. 161 (S.D.N.Y. 1976). [Bar Association not entitled to prevent deposition of its president and committee members on grounds it provided information concerning judicial qualifications to public in same manner as does press.] By contrast, GAP does not disseminate information to the public, and does not allege that it does.

GAP's release of portions of the information in its possession to certain newspapers does not transform GAP into the "press" for the First Amendment purposes. In reality, the GAP deponents are simply themselves press sources whose identity is known. It is well established that the source cannot assert the privilege. See U.S. v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980). [First Amendment privilege belongs to reporter, not his sources.]

GAP would have this Board believe that the First Amendment privilege of the press has been broadly applied to "scholars and other information-gathering organizations." Memorandum, at 5. Of the three cases cited by GAP in which this privilege was considered for academic researchers, one court explicitly held that its ruling was not based on any asserted privilege.^{1/} The other two decisions^{2/} are based upon one of the cases reversed in Branzburg v. Hayes, 408 U.S. 665 (1972) and are, therefore, no longer good authority.

In fact, attempts to apply the broad First Amendment protections in press cases to situations involving scholars have been resisted. In a case quite analogous to the instant one, the court ordered a non-party researcher's deposition testimony and production of his research data. Wright v. Jeep Corporation, 547 F.Supp. 871 (E.D.Mich. 1972). To the researcher's objections that such testimony and production would have a chilling effect on his and other researcher's activities, the court replied:

[T]he court does not believe that compelling Professor Snyder to testify violates any first amendment rights. The protection of the first amendment is designed to afford the right to write and to speak. It does not give a right to

^{1/} Richards of Rockford, Inc. v. Pac. Gas & Elec. Co., 71 F.R.D. 388; 389 at n. 2 (N.D.Cal. 1976).

^{2/} In Re Popkin, 460 F.2d 328 (5th Cir. 1972). In Re Falk, 382 F.Supp. 938 (D.Mass. 1971).

withdraw material written and published from public scrutiny, nor does it give a right to refuse to disclose facts discovered as a result of observations that are relevant in making a judgment as to the correctness of the researcher's published conclusions. 547 F.Supp. at 875.

GAP is attempting to withhold affidavits it has previously released to both the NRC and the press. GAP also is refusing to permit examination of those allegations and to disclose any facts relevant to ascertaining the correctness of the allegations.

The fact that GAP persists in describing itself as a public-interest law firm does not endow GAP with any particular privileged status under the Constitution. Extending such a preferred position, which has historically been restricted to "the press", to GAP would be a dangerous precedent which would at best complicate and at worst totally frustrate the efforts of this Commission as well as other administrative and judicial bodies to develop factual records upon which to make a decision. Under GAP's position, any person who possessed relevant knowledge could withhold that information from a tribunal simply by asserting that it was a "public interest" entity engaged in the collection and dissemination of information. The absurdity of such a result is obvious, yet that is precisely the position taken by GAP. It should be soundly rejected.

II. The Balance Of Interests Weighs In Favor Of Disclosure Of The Information Sought To Be Withheld By The GAP Deponents

Even if the First Amendment privilege of the press were extended to GAP, the privilege, as the GAP deponents admit, is a qualified one. Courts, when considering an asserted First Amendment privilege of non-disclosure, have traditionally balanced the need for confidentiality against the need for disclosure. The party seeking such information must bear the burden of showing relevance and need; the party opposing discovery bears the burden of showing the need for confidentiality. Bruno v. Stillman & Globe Newspapers, 633 F.2d 583, 597-98 (1st Cir. 1980).

Here, the balancing of conflicting needs required by a First Amendment analysis has already been performed. Although the Licensing Board found that the GAP deponents had no viable First Amendment or common-law privilege, it did evaluate the GAP motion to quash as if these privileges were applicable. The Board found that "[Consumers] did have a need to discover information relevant to the contentions and that it has been unable to obtain the information elsewhere." Order LBP 83-53 (August 31, 1983), at 10. The Board further found that under its protective order there was no risk to GAP's "institutional integrity." Id. at p. 9. Since the Licensing Board's findings do not constitute

an abuse of discretion, its ruling must stand. Consumers Power Company (Midland Plant, Units 1 and 2), 13 N.R.C. 96, 100 (1981).

The need for disclosure of the affidavits is clear. The Licensing Board noted that "the contentions which question the QA practices of the Applicant or its contractors . . . were based in part on newspaper accounts." Memorandum and Order, LPP-83-64 (October 6, 1983). The information sought is obviously relevant, in fact central, to the proceedings. At the time that the Licensing Board accepted the revised contentions, it stated that "we will not rely on anything that is in those affidavits without having a chance to cross-examine the persons who made those affidavits and having the parties cross-examine them." (Tr. 1957-60). Thus, the very basis for accepting the contentions was the Licensing Board's understanding that there would be full disclosure of the information, with appropriate procedures for protecting the identity of the affiants. (Tr. 9859).

The Applicant has been unable to obtain copies of these affidavits. Application for Deposition Subpoenas, ¶2. As GAP concedes, these materials cannot now be sought from the NRC Staff. Memorandum, at 8. Obviously, the anonymous affiants themselves cannot be approached. There are contradictions in the record whether Ms. Sinclair or her repre-

sentatives have been provided copies of these affidavits. Ms. Bernabei, in oral argument to the Licensing Board, represented that neither Ms. Sinclair or her attorneys had any of the affidavits or the information contained in them. (Tr. 19118). Yet, by Memorandum dated January 25, 1983, Judge Bechhoefer transmitted certain materials sent by Ms. Sinclair but not served on the parties. Included in those materials was a copy of one of the "confidential" affidavits. A copy is attached as Exhibit B. The responses of Intervenor Sinclair to Applicant's discovery requests indicate that all documents supporting her contentions have already been produced, and no additional affidavits have appeared.

To be weighed against the interests of the Applicant and the public in having access to any information concerning the quality of work at the Midland plant, is GAP's purported interest in maintaining confidentiality. GAP has the burden of establishing that there is a need for such confidentiality, including the fact that the communications were made and maintained in confidence. See Wright v. Policemen's Benv. Assoc., 72. F.R.D. 162, 163 (S.D.N.Y. 1976). Again, there is conflicting evidence in the record whether this material has, in fact, been maintained as confidential. While the GAP deponents contend that the information was gathered for delivery to the NRC, as the

Licensing Board notes, the affidavits or the information were made available to the press (Memorandum and Order, LPP 83-63 (Oct. 6, 1983) at 7-8). Further, Intervenor Mary Sinclair has at least one affidavit.

GAP, however, attempts to circumvent this problem, contending that even non-confidential materials warrant protection. (Memorandum at 6-7). However, the two cases it relies upon for that proposition are totally inapposite to the situation at hand. Those cases both involved reporters. The holdings were based, in part, on the reluctance to intrude on the press and, in part, on a literal interpretation of state shield laws. Moreover, the materials sought were the reporter's unpublished notes. More on point are those decisions which have held that the First Amendment privilege does not protect non-confidential materials unless those materials directly lead to the disclosure of confidential sources. Gilbert v. Allied Chemical Corp., 411 F.Supp. 505, 511 (E.D.Va. 1976).

At the very least, the lack of confidentiality weighs heavily in the balancing process. See Criden v. U.S., 633 F.2d 346, 358 (3rd Cir. 1980). Previous disclosure, even partial disclosure, can totally defeat the claimed need for confidentiality. See Wright v. Policemen's Benev. Ass'n, 72 F.R.D. 162, 163 (S.D.N.Y. 1976). In a celebrated case, the Supreme Court has rejected the argument

that anyone, even the President, can prevail on a claim of generalized need for confidentiality. See United States v. Nixon, 418 U.S. 683, 706 (1974).

All other aspects of the need for confidentiality asserted by GAP as essential to its effectiveness as an organization have been scrupulously addressed by the Licensing Board in its orders. The Applicant never sought the identity of the affiants and requested that all references to identity or identifying information be deleted. (Application for Deposition Subpoenas). The protective order embodies these protections, and limits disclosure of all information to Applicant's counsel. The Licensing Board established additional procedures permitting the deponents to refuse to answer those questions which might compromise the anonymity of the affiants. (See Order LBP 83-64).

The federal courts, in attempting to balance these competing needs for information and for confidentiality, have, like the Licensing Board, tailored procedures to the specific circumstances. E.g., Tavouldreas v. Piro, 93 F.R.D. 35, 40 (D.D.C. 1981); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 86 (E.D.N.Y. 1975). By their total refusal to honor the subpoenas, the GAP deponents place this Board in the untenable position of considering abstract rather than concrete objections. As the court points out in Solargen Electric Motor Car Corp. v. AM Motors Corp., 506

. . . the Court is greatly bothered by the unreasonable refusal of the journalists to even appear at their designated depositions, particularly from people who belong to a profession that continually espouses the people's right to know. These reporters cannot refuse to appear, and must instead respond to the subpoenas and assert whatever privilege they may properly invoke in response to particular questions. See Silkwood v. The Kerr McGee Corporation, 563 F.2d at 436-37. Rosario v. The New York Times Company, 84 F.R.D. 626, 631 (S.D.N.Y. 1979). To maintain otherwise would go against the duty "which the citizen owes his government . . . to support the administration of justice by . . . giving his testimony whenever he is properly summoned." Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375 (1932), quoted in In Re Consumer's Union of United States, Inc., 27 F.R.D. 251, 253 (S.D.N.Y. 1963). See Branzberg v. Hayes, 408 U.S. at 682, 690-91, 92 S.Ct. 2657, 2661. Id. at 552.

Even if the Board decides that the qualified First Amendment privilege should be extended in this case, GAP has failed to meet its burden of establishing that its need for confidentiality outweighs the need for disclosure of this information. The Licensing Board imposed stringent procedures to protect any legitimate interest that GAP might have. In the words of the Licensing Board:

. . . GAP's desire to shield its operations from scrutiny while nevertheless permitting allegations against the applicant made to it to be revealed anonymously to newspapers is grossly unfair to the applicant and to the adjudicatory system itself.

Board Order LBP 83-64, October 6, 1983 at p. 8. The depositions should be allowed to proceed in accordance

with the procedures established by the Licensing Board.

III. GAP Has No Common Law Privilege To Withhold Information

As an alternative to their First Amendment argument, GAP claims a privilege based on common law. A common law privilege for whistleblowers or similar organizations has never been recognized.^{3/} This fact alone will often result in a court's refusal to recognize "new" privileges. See Matter of International Horizons, Inc., 689 F.2d 996, 1004 (11th Cir. 1982) [accountant-client privilege]; U.S. ex rel. Riley v. Franzen, 653 F.2d 1153, 1160 (7th Cir. 1981) [father-child privilege]; Wright v. Jeep Corp., 547 F.Supp. 871, 875 (E.D.Mich. 1982) [academic privilege]. Common-law privileges, either evidentiary or testimonial, are to be strictly construed and accepted only to the very limited extent that they serve a good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. Trammel v. United States, 445 U.S. 40, 50 (1980).

GAP contends that it can assert a common-law

^{3/} The most closely analogous privilege is the so-called informer privilege, a misnomer since the privilege is held by the government and its subdivisions alone. Roviaro v. United States, 353 U.S. 53, 59 (1957).

privilege because it satisfies some of the four criteria outlined by Professor Wigmore in his treatise on Evidence. A court should not find a privilege to exist unless all four conditions are met. Larkin, Federal Testimonial Privileges §1.01 (1983). While confidentiality is the hallmark of any common-law privilege, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relationship, does not create a privilege. 8 Wigmore, Evidence §2286.

In this case, GAP fails to meet three of Wigmore's four conditions. First, there is no evidence that, other than the affiant's identity, the information communicated to GAP was intended to be confidential. On the contrary, the express purpose for obtaining the information was to transmit it to the NRC.^{4/} Further, by revealing portions of this information to the press, GAP has destroyed whatever confidentiality may have previously attached. In Re Blier Cedar Co., Inc., 10 B.R. 993, 1001 (1981) [confidentiality may be destroyed by: waiver, public use, disclosure to third persons, and by contemplation ab initio that information would be disclosed].

Second, there has been no showing that confi-


^{4/} Prior to presenting this information to the NRC, GAP only requested that its affiants' identity remain anonymous. At no time did the NRC agree to keep all other information confidential.

dentiaity as to any information other than the identity of the affiants is essential to the relationship between GAP and its affiants. As noted earlier, a generalized claim of the need to keep all communications confidential does not satisfy this condition. See United States v. Nixon, 418 U.S. 683, 706 (1974). GAP consistently claims that the affiants would not have contacted GAP without the assurance of confidentiality. This need for confidentiality arises from the affiant's alleged fears of retaliation. Where, as in this case, the anonymity of the affiants is preserved, the confidentiality essential to the relationship is maintained.

Finally, it is clear from the analysis performed by the Licensing Board, that any imagined injury to GAP's organizational effectiveness does not outweigh the benefit of allowing the Licensing Board and Applicant to test the veracity and credibility of the anonymous affiants.

WHEREFORE, Consumers Power Company submits that the rulings of the Licensing Board do not constitute an abuse of discretion and should be sustained. The appeal should be dismissed and the GAP deponents should be ordered to appear for deposition pursuant to the subpoenas.

Respectfully submitted,
CONSUMERS POWER COMPANY

By 
One of its Attorneys

David M. Stahl, Esq.
Susan D. Proctor, Esq.
ISHAM, LINCOLN & BEALE
Three First National Plaza
Suite 5200
Chicago, Illinois 60602

DATED: December 9, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CONSUMERS POWER COMPANY'S
APPLICATION FOR DEPOSITION SUBPOENAS

Pursuant to 10 C.F.R. §§ 2.720(a) and 2.740a(a), Consumers Power Company ("Applicant") hereby applies to the Atomic Safety and Licensing Board ("Licensing Board") to issue the attached deposition subpoenas to Billie P. Garde, Thomas Devine, Lewis Clark and Lucy Hallberg, commanding them to appear to give their depositions at the time and place indicated on the attached subpoenas. In support of this Application, Applicant states:

1. Billie P. Garde, Thomas Devine, Lewis Clark and Lucy Hallberg are associated with the Government Accountability Project ("GAP"). Acting under the auspices of GAP, these persons submitted affidavits to the Nuclear Regulatory Commission alleging a pattern of poor work quality at Applicant's Midland plant. These persons have also given extensive information to the press regarding the allegations contained in the GAP affidavits. (See Attachment No. 1, articles from the June 28, 1982 edition of the Midland Daily News).

Exhibit A

2. Applicant has been unable to obtain information regarding the allegations contained in the GAP affidavits or copies of the affidavits themselves from the NRC Staff or from GAP.

3. The allegations contained in the GAP affidavits and the information upon which the allegations are based are relevant to the proceedings now before the Licensing Board. In her "Response to Board's Request For Reasons For Late Filing of New Contentions", Intervenor Mary Sinclair expressed her intention to file another set of new contentions based on the "extensive documentation" of quality control and safety problems which has allegedly been supplied to GAP by workers at the Midland plant. Applicant will be unable to evaluate or respond to such new contentions unless it is given access to the documentation supplied to GAP by the Midland workers.

4. The allegations contained in the GAP affidavits are also relevant to the proceedings before the Licensing Board because the Licensing Board itself stated, in the conference call of July 2, 1982, that these allegations would be among the issues raised in the hearings on the Midland facility scheduled for October, 1982. Without access to the GAP affidavits and the information on which they are based, Applicant can neither prepare for the October hearings nor determine whether the GAP allegations are a proper subject for litigation.

5. Applicant is not attempting to discover the identities of the GAP affiants. The "Schedule of Documents

Requested" attached to the deposition subpoenas requests copies of the GAP affidavits with the identities of affiants and identifying information regarding them deleted. Moreover, Applicant will not ask for the names of the affiants during the requested depositions. There is no need, therefore, to issue a protective order protecting against disclosure of the GAP affiants' identities.

6. Appropriate fees will be paid to the deponents, in accordance with the 10 C.F.R. § 2.740a(h). Once the requested subpoenas are issued, Isham, Lincoln & Beale will pick up the subpoenas from Licensing Board's offices in Bethesda and serve the subpoenas to the deponents residing in Washington, D.C. Ms. Hallberg will be served in Michigan by a non-party, pursuant to 10 C.F.R. § 270(c).

WHEREFORE, Applicant respectfully requests that its "Application for Deposition Subpoenas" be granted and the the Board issue the attached deposition subpoenas to Billie P. Garde, Lewis Clark, Thomas Devine and Lucy Hallberg.

Respectfully submitted,

Phillip P. Steptoe / JLS
One of the Attorneys for
Consumers Power Company

ISHAM, LINCOLN & BEALE
Three First National Plaza
Suite 5200
Chicago, Illinois 60602

DATED:

GAP wants plant to be a test case



By PAUL EAD

Construction of the Midland market plant should be under way shortly, according to a source who said the plant should be under way by the end of the year. The plant is being built for the Midland Paper Company, a subsidiary of the Office of Paper Products, a unit of the Midland Paper Company.

The construction of the plant is being supervised by the Midland Paper Company, which is a subsidiary of the Midland Paper Company. The plant is being built on a site in Memphis, Tenn.

The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn.

The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn.

The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn.

The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn. The plant is being built on a site in Memphis, Tenn.

Midland Paper Co. plant under construction. (Daily News photo by Terry L. Tanner.)

Should a municipality...

Should a municipality... (The text is very faint and partially obscured by the image and other text.)

Should a municipality... (The text is very faint and partially obscured by the image and other text.)

Phoenix fails to rise

Phoenix fails to rise... (The text is very faint and partially obscured by the image and other text.)

Nuclear plant problems alleged

Related story, page 3.

By PAUL RAU
Daily News staff writer

Cables intended to carry important information to operators of the Midland nuclear plant may not function properly because unauthorized substitutions were made by the plant's cable shop, a former plant worker has said in an affidavit given to the Government Accountability Project.

In another affidavit collected by GAP, another former worker said defective welds can be found throughout the plant because welders were inexperienced and because poorly trained Quality Control (QC) inspectors approved bad welds for years.

A third former nuclear plant worker said shipments of defective ductwork were installed despite objections because management was in a hurry to finish building the plant.

Asked to comment on these and other allegations which will be formally made public Tuesday, Consumers Power Co. plant spokesman Norman Saari said the utility cannot respond until GAP provides details on the charges. "All we know is what they are channeling to the media. Our communication with GAP has not been successful, and it's not because we haven't tried," Saari said this morning.

He said the plant's prime contractor, Bechtel Power Corp., the focus of many of GAP's charges, also will not comment and is deferring all response to Consumers.

GAP INTENDS to present the workers' allegations to the Nuclear Regulatory Commission Tuesday, and to press the NRC to take action. GAP is a non-government, Washington, D.C. based group established to protect workers who expose waste, fraud and corruption.

The Daily News read and took excerpts from three of seven affidavits GAP plans to give to the NRC after a three month investigation. GAP is not revealing the identity of the former and current plant workers it talked to, and the NRC has agreed to do likewise unless the information leads to hearings by Congressional committees.

IN THE AFFIDAVITS, plant workers

detailed:
• The "powerhouse shuffle" technique used by workers to look busy without doing anything. Prime contractor Bechtel encourages the "powerhouse shuffle" because the longer workers take to do their jobs and the more material they use, the more profit Bechtel will make under its cost plus contract with Consumers, one worker alleged.

• How workers once cut up \$250,000 worth of good cable and threw it away because the paperwork had gotten lost and Bechtel feared an inspector would notice.

• How workers learned techniques to deceive QC inspectors, such as shortening bolts when there wasn't room to install them properly.

• Widespread drug and alcohol abuse, sleeping on the job and an underground operation in which workers crafted belt buckles from stainless steel and ditched plant materials and offered them for sale on the site.

TWO OF THE affidavits read by the Daily News were written by persons who claimed they were fired for being too aggressive in reporting and trying to correct quality defects at the plant. Management was not interested in such zeal, they charged, despite pointers on the site claiming otherwise.

The third quit for the same reason. "I left Midland because it was like a zoo. I could not live with myself knowing that I was participating in filling that 'bucket of worms,' a term used on site by workers," one former worker said in an affidavit.

A former electrician who left the Midland project this spring said the cable shop routinely substituted control cables when the correct type was unavailable, and expressed fear the substituted cable will not give future plant operators correct information.

For example, the electrician said a cable design may have called for three shielded pairs of 18 gauge wire, but the cable shop in which he worked would use six-stranded 18 gauge wire with the shielding around the entire bundle.

This person told GAP, "Whether one conductor may induce a current in another conductor within the shield and

whether this would be significant are unknown factors which should be investigated by technical experts.

"I believe there is a very real possibility that the operator may have to deal with stray, random or erroneous signals telling him something is happening when it isn't, or that something is not happening when it is.

"If the operator should grow accustomed to false alarms or inaccurate signals, it could lead to ignoring a real problem should one occur," the electrician wrote.

THE SAME PERSON described the "powerhouse shuffle," and said he once spent two days measuring things for no reason and was praised for his industriousness.

"It didn't matter what I measured, nor was there any need for the measurements. That's an example of the 'powerhouse shuffle.'" The electrician said he did it because there was no work to do on those days.

The person said Bechtel has "an arsenal of ways" to impose a slow pace on all Midland plant workers, including pairing fast workers with slow ones, rewarding competence with increasingly heavier and more difficult work and placing a worker where he is least competent.

The electrician wrote, "There is the temptation to dismiss such incidents as just an oversight, a mistake or somehow not deliberate. But such incidents are a way of life at the plant and far too common to be dismissed. On many occasions, I had been told in advance that my assignment would be torn out when I was done."

He said crews sometimes would be put to work at cross purposes. In a cable spreader room, the electrician said, "we tore out what the day shift installed and they tore out what we installed. After a month of this I asked for and received a transfer because it was so demoralizing."

ANOTHER FORMER worker, a nuclear engineer with 17 years experience at six nuclear plants (including Consumers' Palisades plant), called the Midland plant "the worst nuclear facility I have ever seen."

plant, he said he was "astonished" to find Bechtel had established standards that were far below those set by national societies of professional engineers.

That person said in an affidavit, "The new specifications are inadequate to the needs of a nuclear facility. Specifications for ordinary office buildings are stricter than those tolerated by Bechtel in the construction of the nuclear plant."

"is person — who had top-level responsibility for welding — said other inspectors admitted to him they had approved bad welds for years before the engineer showed them proper welding techniques.

He said internal corrosion of small-bore piping, which Bechtel QC inspectors "never took the time" to look for, "is in my opinion inexcusable, and certainly very dangerous to the successful operation of the plant."

THE ENGINEER faulted Bechtel for hiring inexperienced welders and inspectors and not training them properly.

He claimed 90 percent of all piping in the plant has been torn out and replaced at one time or another, and said "Bechtel's indifference to quality will cost the ratepayers a bundle, if they are allowed to pile on their costs to the public."

When the engineer was terminated earlier this year, he said he was told he had been unable to "adjust to the way things were done at Midland."

The engineer said in his affidavit, "After nearly 20 years of work as an engineer, I know a deficient weld when I see one, and I know how many of these welds and other problems went undetected or ignored by the men responsible for inspecting them. Bechtel has shown by its attitude that it cannot be trusted to perform work of the high quality necessary in a nuclear plant."

He said a full investigation of Bechtel would conclude that "much work will have to be redone before Midland can go into operation. The cost of this will be enormous, if it can be done at all. Despite the cost, I cannot stand by and watch the plant go on-line in its present state of safety."

"To do so would be to betray my responsibilities as a professional, as an

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

CONSUMERS POWER COMPANY
(Midland plant, Units 1 and 2)

DOCKET NO. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

TO

Thomas Devine
Government Accountability Project
1901 Q Street, NW
Washington, D.C. 20009

YOU ARE HEREBY COMMANDED to appear at the office of Isham,
Lincoln & Beale, 1120 Connecticut Ave., N.W., Suite 840
in the city of Washington, D.C.
on the 19th day of July 19 82 at 1:00 O'clock P.M.
to ~~appear~~ on behalf of Government Accountability Project
be deposed

in the above entitled action and bring with you the document(s) or object(s) described
in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

ATTORNEY FOR CONSUMERS
POWER COMPANY
Philip P. Steptoe, Esq.
Isham, Lincoln & Beale
TELEPHONE (312) 558-7500

.....19.....

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

presiding officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

RETURN ON SERVICE

Received this subpoena at.....on
.....and on.....at.....
served it on the within named.....
by delivering a copy to h..... and tendering to h..... the fee for one day's
attendance and the mileage allowed by law.¹

Dated.....19..... BY.....

Service Fees

Travel..... \$
Services..... \$

Total..... \$

Subscribed and sworn to before me, athis.....
day of.....19.....

NOTE - Affidavit required only if service is made by a person other than a United States
Marshal or his deputy.

¹ Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

TO

Lewis Clark
Government Accountability Project
1901 Q Street, NW
Washington, D.C. 20009

DOCKET NO. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

YOU ARE HEREBY COMMANDED to appear at the office of Isham,
Lincoln & Beale, 1220 Connecticut Ave., NW, Suite 840
in the city of Washington, D.C.
on the 20th day of July 19 82 at 9:00 o'clock A.M.
to testify on behalf of Government Accountability Project
be deposed
in the above entitled action and bring with you the document(s) or object(s) described
in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

ATTORNEY FOR CONSUMERS
POWER COMPANY
Philip P. Steptoe, Esq.
Isham, Lincoln & Beale
TELEPHONE (312) 558-7500

.....19.....

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

pending officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

RETURN ON SERVICE

Received this subpoena at.....on
.....and on.....at.....
served it on the within named.....
by delivering a copy to h..... and tendering to h..... the fee for one day's
attendance and the mileage allowed by law.¹

Dated.....19..... BY.....

Service Fees

Travel..... \$
Services..... \$

Total..... \$

Subscribed and sworn to before me. athis.....
day of.....19.....

NOTE - Affidavit required only if service is made by a person other than a United States
Marshal or his deputy.

¹ Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

TO Lucy Hallberg
3819 Chestnut Hill
Midland, Michigan 48640

DOCKET NO. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

YOU ARE HEREBY COMMANDED to appear At the Consumers Power
Company Midland Service Center
in the city of Midland, Michigan
on the 21st day of July 19 82 at 1:00 o'clock P.M.
to testify on behalf of Government Accountability Project
be deposed
in the above entitled action and bring with you the document(s) or object(s) described
in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

ATTORNEY FOR CONSUMERS
POWER COMPANY
Philip P. Steptoe, Esq.
Isham, Lincoln & Beale
TELEPHONE (312) 558-7500

.....19.....

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

pending officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

RETURN ON SERVICE

Received this subpoena at.....on
.....and on.....at.....
served it on the within named.....
by delivering a copy to h..... and tendering to h..... the fee for one day's
attendance and the mileage allowed by law.¹

Dated.....19..... BY.....

Service Fees

Travel..... \$
Services..... \$

.....
Total..... \$

Subscribed and sworn to before me, athis.....
day of.....19.....

NOTE - Affidavit required only if service is made by a person other than a United States
Marshal or his deputy.

¹ Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

TO Billie P. Garde
Government Accountability Project
1901 Q Street, NW
Washington, D.C. 20009

DOCKET NO. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

YOU ARE HEREBY COMMANDED to appearat the office of Isham, Lincoln
and Beale, 1120 Connecticut Ave., NW, Suite 840
in the city of Washington, D.C.
on the 19th day of July 19 82 at 9:00 O'clock A. M.
to ~~appear~~ on behalf of Government Accountability Project.
be deposed

in the above entitled action and bring with you the document(s) or object(s) described
in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

ATTORNEY FOR CONSUMERS
POWER COMPANY
Philip P. Steptoe, Esq.
Isham, Lincoln & Beale
TELEPHONE (312) 558-7500

.....19.....

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

presiding officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

RETURN ON SERVICE

Received this subpoena at.....on
.....and on.....at.....
served it on the within named.....
by delivering a copy to h..... and tendering to h..... the fee for one day's
attendance and the mileage allowed by law.¹

Dated.....19..... BY.....

Service Fees

Travel..... S
Services..... S

.....
Total..... S

Subscribed and sworn to before me, athis.....
day of.....19.....

NOTE - Affidavit required only if service is made by a person other than a United States
Marshal or his deputy.

¹ Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the

SCHEDULE OF DOCUMENTS REQUESTED

I. Definitions

1. "Communication" means and includes, but is not limited to, all discussions, conversations (personal, telephonic or by any other medium), inquiries, negotiations, meetings, understandings, notes, drafts, agreements, letters, telegrams, "telex", or other forms of oral or written interchange.
2. "Document" means the original, any copies when an original is unavailable and any non-identical copies (whether different from the original because of notes made on such copies or otherwise), regardless of origin or location, of any handwritten, typewritten, printed, recorded, transcribed, punched, taped, photocopied, photostatic, "telexed", filmed, microfilmed or otherwise prepared matter, however produced or reproduced, including, but not limited to, all papers, letters, correspondence, telegrams, telexes, cables, memoranda or minutes of meetings or conversations (personal or telephonic), desk pads, calendars, diaries, telephone pads, travel and expense records, reports, summaries, surveys, analyses, ledgers, journals, and other formal or informal books of records or accounts, bulletins, instructions, agreements, legal documents, billing records, drafts, notebooks, worksheets, time records, vouchers, and writing of every description, including drawings, charts, photographs, films, recordings, computer tapes and printouts and other

data or compilations from which information can be obtained and translated, if necessary, by deponent into reasonable usable form.

II. Documents Requested

1. All statements and affidavits supplied to the Nuclear Regulatory Commission by the Government Accountability Project ("GAP"), relating to work or conditions at Consumers Power Company's Midland plant, with the affiant's name and any information which would disclose the affiant's identity deleted.

2. All documents relating to GAP's investigation of the Midland project, including but not limited to all documents provided to GAP by affiants, all statements of present or former employees of Consumers Power Company at the Midland plant taken by GAP which were not supplied to the NRC and all drafts of statements given to GAP by present or former employees of Consumers Power Company at the Midland Plant.

3. All communications between Barbara Stamiris or Mary Sinclair on one hand and GAP, representatives of GAP, Billie P. Garde, Lewis Clark, Lucy Hallberg or Thomas Devine on the other.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of CONSUMERS POWER COMPANY'S APPLICATION FOR DEPOSITION SUBPOENAS were hand delivered to Charles Bechhoeffer, Jerry Harbour, and William D. Patton were served on the other person's listed below by deposit in the United States Mail, First Class Postage Pre-Paid, this 8th day of July 1982.

Joseph Gallo / cr
Joseph Gallo

SERVICE LIST

Frank J. Kelley, Esq.
Attorney General of the
State of Michigan
Carole Steinberg, Esq.
Assistant Attorney General
Environmental Protection Div.
720 Law Building
Lansing, Michigan 48913

Myron M. Cherry, Esq.
One IBM Plaza
Suite 4501
Chicago, Illinois 60611

Mr. Wendell H. Marsahl
RFD 10
Midland, Michigan 48640

Charles Bechhoefer, Esq.
Atomic Safety & Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Dr. Frederick P. Cowan
6152 N. Verde Trail
Apt. B-125
Boca Raton, Florida 33433

Admin. Judge Ralph S. Decker
Route No. 4, Box 190D
Cambridge, Maryland 21613

Carroll E. Mahaney
Babcock & Wilcox
P.O. Box 1260
Lynchburg, Virginia 24505

James E. Brunner, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Steve Gadler, Esq.
2120 Carter Avenue
St. Paul, Minnesota 55108

Atomic Safety & Licensing
Appeal Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Mr. C. R. Stephens
Chief, Docketing & Services
U.S. Nuclear Regulatory Comm.
Office of the Secretary
Washington, D.C. 20555

Ms. Mary Sinclair
5711 Summerset Street
Midland, Michigan 48640

William D. Paton, Esq.
Counsel for the NRC Staff
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

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

Barbara Stamiris
5795 North River Road
Route 3
Freeland, Michigan 48623

Jerry Harbour
Atomic Safety & Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

AFFIDAVIT

My name is _____ I am submitting this affidavit freely and voluntarily, without any promise of reward and in spite of indirect and implied threats and warnings, not with malice, but out of a devotion to my country and community and a genuine concern over the threat posed by the Midland Nuclear Plant.

I was born and raised in _____ Michigan. I completed high school there in _____ and attended the University of _____ where I was graduated in _____ with a B.A. in _____. I worked as a _____

I was indentured as an apprentice with the IBEW local _____. I completed this apprenticeship in _____. I am now a State Licensed Journeyman Electrician. It was in this capacity that I was employed by Bechtel Power Corporation at the Midland Nuclear Plant.

I went to work there in _____ and from the first, found it difficult to adjust to the working conditions and the pace. I had always taken pride in my workmanship and was accustomed to working hard. I had always worked for small contractors whose success depended on the man working quickly and efficiently. It was hard getting used to waiting around for or tracking down someone to sign a requisition for tools or material; and then possibly waiting another day or two for the item to be delivered if the request was for material stored elsewhere on site; or not getting the item at all if the request was for a tool the superintendent or crib foreman was holding for his friends. But this was all a part of Bechtel's

Exhibit B

philosophy; and you can adjust, get ulcers or quit.

It really isn't hard to understand their philosophy. The contract pays for time and material--the more material used and the longer it takes to install it the more money they make. As long as they can convince the customer they are making progress and the delays and overruns are not their fault, they can just ride the gravy train, as it were. The same philosophy permeates all the way down the ranks but with an added corollary: The less work done, the further behind you get. The further behind, the more likely you are to get overtime. It can be plainly seen that this positive financial reinforcement encourages the "Powerhouse Shuffle".

The "Powerhouse Shuffle" is a name the workmen have applied to the pace at which you are required to work. A little like walking in place: you must look busy without actually doing anything. I recall one instance during which I worked two days without a job to do and was praised for my industriousness. I spent the two days measuring things---walls, ceilings, floors, cabinets. It didn't matter what I measured. Everyone who saw me assumed I was working and that I knew what I was doing. That's the "Powerhouse Shuffle".

They have an arsenal of ways to impose the pace on everyone. I was frequently criticized by my peers for working too quickly. With the prospective reward of overtime for dawdling---peer pressure is a tremendous force.

Additionally, there is the "material-tool bottleneck". Although material is routinely cast aside and thrown away if something is changed or revamped; when first issued, strict controls are used to

account for each item. These controls and procedures do much to slow the overall progress.

Some subtler methods of retarding the pace are also available. Generally one works with a partner. By pairing a faster worker with a slower worker, they can slow the faster one down. I've never seen a case in which the slower man was sped up.

Another method is to reward competence with increasingly heavier and more difficult work. With one foreman I worked for, I started running 1" conduit and each new assignment was larger conduit in a more difficult or more awkward location. There is little incentive to work fast facing a harder job each time. I was running 6" conduit when I was transferred.

The transfer is another method of controlling speed by finding the area in which a man is least competent. On two occasions I was transferred for excessive competence. The tactical use of discouragement has also been successfully employed. By assigning a difficult job which upon completion is torn out and thrown away, a man is discouraged from doing his best. This method works well by example. In one instance I recall, several men spent months installing 3" and 4" conduit along the south corridor of the auxiliary building -- elevation 634'. When completed, it was a very good example of fine workmanship. When they were told to tear it out, I have been told that the men quit. But the work was so visible, the lesson was evident to all the men.

There is the temptation to dismiss such an incident as just an oversight, a mistake, or somehow not deliberate. But such incidents

are a way of life there and far too common to be dismissed. Often times, I had been told in advance that my assignment would be torn out when I was done. Once I was in a crew that worked 3 months installing wireway in the lower spreader room. When we moved to a different area, another crew came into the spreader room and spent a month tearing it all out and throwing it away. Meanwhile, we went to 640' elevation of the Auxillary building and for that month, we tore out what day shift installed and ran conduit to valves which were not yet in place. The dayshift would tear out what we installed and would redo it their way. After a month of this I asked for and received a transfer.

There are a few less specific issues that I have about the safety of the Midland Nuclear Plant. As I recall, when we installed the switchgear in the battery rooms on 614' elevation, we were unable to obtain minimum anchor bolt imbedment because of reinforcement rod interference. We followed a standard procedure to deceive quality control. We added threads to an anchor bolt, cut it off and dressed it up with a grinder and once installed it was practically indistinguishable from an untampered with bolt. This was not a unique situation; it was part of the game. Back then there was no code stamped on the end of the bolt but it would not be difficult to add a code letter to the procedure. My point is that while the anchor bolts we installed with no code will be given an ultrasound test, bolts with a code on them even if counterfeit will be accepted if they pass a torque test.

Another problem I think perhaps has not been recognized is the presence of debris in the small bore stainless steel lines. Some of

CONFIDENTIAL

these lines will carry contaminated coolant and waste products. I cannot begin to count the times I have seen someone throw peanut shells, orange peels, banana peels or waxed paper into 2" and smaller pipes. Supervision was always good for that. Perhaps it was just another way of demeaning the men. These lines are by no means straight nor even limited to a 360 degree bend. I find it difficult to believe that flushing these lines can blow the banana peels out the end.

After having worked in the control room of the Midland Plant, one can see the control room simulator at the Training Facility, the single greatest impression made is that the simulator is so vastly more spacious than the real thing. I think this demonstrates Consumers Power's own conviction that the control room in the plant is grossly undersized. My concern is not for the operator and the restrictions placed on his movements and the accessibility to his instruments and controls. My concern is more for the heat buildup and the fact that the control room itself is surrounded by heat generating electrical conductors in the upper and lower spreader rooms. Couple this with the fact that in the cable cut shop we were free to substitute a similar type of cable for a type that was unavailable or out of stock, and I feel there is a very real possibility that the operator may have to deal with stray, random or erroneous signals telling him something is happening when it isn't or that something is not happening when it is. His reactions based on this false input could vary from serious to slight in consequence. Should he grow accustomed to these false alarms it could lead to his ignoring a real problem should one occur.

By way of example, suppose a cable was required with 3 twisted shielded pair of 16-gauge wire. At the cable cut shop, we may have substituted 6 conductor 16-gauge with a shield. Such substitutions are routinely made without consultation and without regard to the purpose, location or operation in which the cable is used. Whether one conductor may induce a current in another conductor within the shield and whether this would be significant are unknown factors which should be investigated.

It was in my final assignment that I began to seriously consider the possibility that this power plant might actually fuel up and try to run. My last assignment was to assist Q.C. in their inspection of electrical conduits and supports. In this position, I had to take seriously all shortcomings, mistakes and violations both accidental and deliberate. It was no longer a joke, trying to see how much we could get away with--how much we could sneak by undetected. All these flaws, deviations, errors had to be paid for now or with more severe consequences later.

I was assigned to work with the quality control inspection sub-contractor, Comstock Engineering, in My job duties included the marking and identification of Q-conduit supports. The Q-conduit supports were all required to be inspected by quality control because they all involved conduit necessary in an emergency shutdown of the plant. My job duties, in part, required the completion of a form showing the type of conduit support and the weight it was carrying. I found that many conduit supports had been in place and were supporting

many of the faulty conduit supports to my immediate foreman, but failed to get any kind of adequate response. Bechtel has a quality improvement program which permits employees to go from immediate foreman to their general foreman and finally to the superintendent if the employee believes that there has not been adequate attention to the quality control complaint. I did not get adequate support from either my foreman, general foreman or the superintendent. My electrical superintendent,

observed me speaking to one of the Comstock Engineering inspectors and pointing out some of the weight problems in the conduit supports. The electrical superintendent instructed me to no longer fill in the weight portion of the forms which I was completing. I was also instructed, through the general foreman, that I was not to point out potential violations in the conduit support system to the Comstock Engineering people, as it was their job to find the violations; and it was my job to fix and repair those conduit supports after the violation had been discovered. My foreman, Bob Essex, told me that they would wait and see if the violations were caught before taking any steps to make repairs.

I finally decided to write a letter to the NRC regarding the quality control mistakes which I had been observing. This letter was generated because of a story which I saw in the Midland Daily News in which a former Comstock Engineering employee had written to complain of the lax attitude of QC and the unqualified inspectors. I welcomed this news because I knew how valid his complaint was. Out of the 12 inspectors I worked with, only one could be considered even marginally competent or qualified. A

CONFIDENTIAL

few days after that story appeared, there was an article indicating that the NRC had dismissed the complaint of the Comstock employee because of lack of specific information. In response to that article, I wrote the NRC a letter specifying two kinds of violations which I had observed. First was the numerous violations of weight standards and the lack of inspection for compliance with weight specifications and second, the improper installation and use of the type 30 conduit supports which are attached to the flanges of steel I-beams. I wrote the letter to the NRC in February, 1982; and shortly thereafter I was instructed to go back and fill in the weight portions of the forms for each of the conduit supports. There was also some action to correct some of the conduit supports which were not in compliance with specifications. I have attached a copy of this list setting forth each conduit support and the problem which I observed to be not in compliance with specifications. The two (2) that are crossed out on the attached list were subsequently corrected. However, to the best of my knowledge, the remainder have not been corrected. I brought notice of each of these conduit support violations to both my foreman and general foreman, although a copy of this list has not been given to anyone connected with the power plant or to the NRC.

I was terminated as an employee of the Bechtel Power Corporation at the Midland Nuclear Power Plant on March 31, 1982. It is my belief that my termination was a direct result of my communication to the NRC.

I wish to reserve the right to expand this affidavit at a

CONFIDENTIAL

later date.

I have read the above nine (9) page affidavit and it is true and accurate to the best of my knowledge and belief.

ORIGINAL OF THIS AFFIDAVIT NOTARIZED
AND FILED WITH NUCLEAR REGULATORY COMMISSION
ON June 29, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. Frederick P. Cowan
Dr. Jerry Harbour

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

ASLBP Nos. 78-389-03 OL
80-429-02 SP

Docket Nos. 50-329 OL
50-330 OL

Docket Nos. 50-329 OM
50-330 OM

August 31, 1983

PROTECTIVE ORDER

It is ordered that the depositions and document requests encompassed by the Licensing Board's Memorandum and Order (Ruling on Motions to Quash Subpoenas) dated August 31, 1983, shall be subject to the following terms and conditions:

(1) At their respective depositions the GAP deponents who have been subpoenaed (Louis Clark, Thomas Devine, Billie Garde and Lucy Hallberg) (the "GAP Deponents") need not respond to any question which (a) seeks to learn the name of any individuals who have submitted affidavits to GAP pursuant to a promise of confidentiality ("the anonymous affiants") or (b) may reasonably be expected to result in the disclosure of the names of the anonymous affiants, or any of them ("identifying information").

Exhibit C

(2) The GAP Deponents may delete, or cause to be deleted, from the documents requested in the Schedule of Documents attached to their respective Subpoenas, the names of the anonymous affiants and other identifying information.

(3) The Applicant, Staff and Deponents will attempt to resolve any differences they may have as to whether a particular question, if answered, or a portion of a document, if not deleted, would result in the disclosure of identifying information, and in the absence of such resolution the matter may be presented to the Board for resolution by motion, upon which the Board may enter such relief as it seems appropriate including, but not limited to, ordering the resumption of a deposition.

(4) All information elicited from the depositions and document requests shall be restricted to Applicant's counsel, NRC Staff and Intervenors, except that information necessary to obtaining a ruling on the propriety of any disclosure may be revealed to this Board.¹

(5) In the event, through error or inadvertence, the name of an anonymous affiant, or identifying information, is disclosed during the course of a deposition of the GAP Deponents, upon request made on the record, by the GAP Deponent or counsel for the GAP Deponent, such name

¹ Applicant's counsel may come back before this Board and request permission to disclose information to Applicant if the counsel determines that the Applicant has a need to know it. See discussion at Tr. 19135-36.

or identifying information shall be deleted from the transcript, and counsel for Applicant, the NRC Staff and Intervenors shall not disclose such name or identifying information to any other person except to this Board as may be necessary to obtain a ruling on the propriety of any disclosure. In no event, in the absence of a subsequent order by this Board shall counsel for Applicant disclose such name or identifying information to Applicant or to any employee of Applicant.

(6) This Order does not in any way determine whether the anonymous affiants have any right to non-disclosure of their identities, or any other question of fact or law in connection therewith, and is without prejudice to the rights of any party to this proceeding to obtain a ruling on such questions of fact and/or law from this Board. This Order shall not in any way affect the burdens of proceeding or proof on such questions which would exist in the absence of this Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer
Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated August 31, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

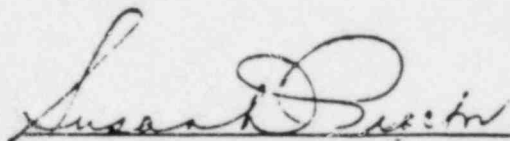
DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I, Susan D. Proctor, one of the attorneys for Consumers Power Company, hereby certify that a copy of Consumers Power Company's Memorandum In Opposition To Appeal Of Government Accountability Project Deponents was served upon all persons shown on the attached service list by deposit in the United States mail, first class. An original and two copies were Federal Expressed to Christine Kohl, Esq., Atomic Safety & Licensing Appeal Board, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555, and a copy of the same was Federal Expressed to John W. Karr, Esq., Karr & Lyons, 625 Washington Building, 15th Street & New York Avenue, N.W., Washington, D.C., 20005 this 9th day of December, 1983.



ISHAM, LINCOLN & BEALE
Three First National Plaza
Suite 5200
Chicago, Illinois 60602
(312) 558-7500