

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKET #
1983-001

ATOMIC SAFETY AND LICENSING APPEAL BOARD

83 OCT 31 P2:45

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

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MEMORANDUM IN SUPPORT OF APPEAL OF
GOVERNMENT ACCOUNTABILITY PROJECT
DEPONENTS

I. Background

Appellants Louis Clark, Thomas Devine, Billie Pirner Garde and Lucy Hallberg are all employed by the Government Accountability Project (hereafter, "GAP" or "Project") of the Institute for Policy Studies, a private, non-profit organization located in Washington, D. C. Mr. Clark is GAP's Executive Director; Mr. Devine is the Project's Legal Director; Ms. Garde is Director of GAP's Citizens Clinic for Government Accountability (hereafter, "Citizens Clinic"); and Ms. Hallberg is GAP's representative in the State of Michigan.^{1/}

Among other activities, GAP offers assistance to public and private employees, private citizens and community-oriented groups who pursue illegal, wasteful, improper or negligent actions by government or corporate bodies.^{2/} In June, 1980, GAP was approached by a whistleblower who had been dismissed from his employment at the Zimmer nuclear power plant in Moscow, Ohio.^{3/} As a consequence of the

^{1/} See paras. 1 and 2, Affidavit of Louis Clark, which was attached as Exhibit A to the motion to quash subpoenas filed by appellants with the Atomic Safety and Licensing Board on June 27, 1983.

^{2/} Id., para. 4.

^{3/} Id., para. 7.

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Project's ensuing success in assisting this whistleblower and others in exposing serious safety problems at the Zimmer plant,^{4/} GAP began to receive requests for assistance with nuclear power safety problems from many other citizens groups and whistleblowers.^{5/} Among those citizens organizations were groups located in Midland, Michigan, who had been contacted by a number of whistleblowers at the Midland nuclear power plant operated by Consumers Power Co. (hereafter, "Consumers"),^{6/}

The Midland citizens groups did not know how to assist the whistleblowers; consequently, they sought advice from GAP's Citizens Clinic.^{7/} GAP asked the citizens organizations to provide the Project with as much information as possible about alleged safety problems at the Midland plant, and after it became convinced that the problems were serious, GAP agreed to assist the whistleblowers who had contacted the Midland citizens groups about plant safety problems.^{8/} Thereafter, GAP submitted six affidavits to the Nuclear Regulatory Commission (hereafter, "NRC" or "Commission") prepared by persons who believe that there are major safety problems at the Midland plant.^{9/} With only one exception, all of the Midland affiants requested that their information be supplied to the NRC on a confidential basis.^{10/} Accordingly, GAP sought and obtained a guarantee from the Commission that the agency would protect the anonymity of these affiants.^{11/}

On August 8, 1982, Consumers requested the Atomic Safety and Licensing Board (hereafter, "Licensing Board") to issue subpoenas to GAP representatives. Consumers chose not to pursue these subpoenas in August, 1982, even though it

^{4/} Id.

^{5/} Id., para. 10.

^{6/} Id.

^{7/} Id.

^{8/} Id.

^{9/} Id.

^{10/} Id., para. 12.

^{11/} Id., para. 8 and Attachment 1.

claimed the testimony and documents it sought were relevant to quality assurance and quality control questions to be the subject of the OM hearings, then scheduled for October, 1982. However, in April, 1983, near the end of the OM hearings, in which most of the testimony on quality control and quality assurance issues was presented, Consumers decided to serve the subpoenas and pursue depositions of GAP representatives.

On June 27, 1983, the GAP representatives moved the Licensing Board to quash the subpoenas. The GAP employees contended that the subpoenas were violative of the First Amendment to the Constitution of the United States ^{12/} and of common law principles of privilege, ^{13/} and that the NRC was estopped from issuing subpoenas in violation of its promise of confidentiality. ^{14/} After oral argument on the motion on July 26, 1983, the Licensing Board issued a memorandum and order on August 31, 1983, which denied the motion to quash but sua sponte imposed a protective order limiting dissemination of certain information obtained through discovery to Consumers' attorneys.

The GAP deponents subsequently moved the Licensing Board to reconsider its August 31 order, and at the same time moved the Atomic Safety and Licensing Appeal Board for an order staying the depositions. The Appeal Board denied the request for a stay on October 4, 1983, and on October 6, 1983, the Appeal Board issued a memorandum which explained the basis of its October 4 order. ^{15/}

^{12/} Motion to Quash Subpoenas, pp. 4-8.

^{13/} Id., pp. 9-10.

^{14/} Id., p. 11.

^{15/} According to the October 6 memorandum at pp. 2-3, appellants' motion for a stay "affirmatively misled [the Appeal Board] into believing [appellants] had already sought and been denied a stay by the Licensing Board...." Appellants (footnote continued on p. 4)

On the same day, the Licensing Board issued a memorandum and order denying the motion for reconsideration.

This appeal followed.^{16/}

II. GAP Has A First Amendment Privilege To Protect Its Information-Gathering Processes From Disclosure In Proceedings To Which It Is Not A Party.

The primary basis on which GAP seeks to quash Consumers' subpoenas against it is its First Amendment right freely to collect information from confidential sources about the safety problems at the Midland nuclear plants. GAP, after gathering affidavits from confidential sources, passes this information to the Nuclear

(continued from p. 3)

respond that if any confusion surrounded the question whether the motion for a stay of depositions was ripe for consideration by the Appeal Board as of the date of its filing, the confusion was not caused by any "affirmatively misleading" representations to the Appeal Board by appellants, but rather was directly and solely attributable to the Licensing Board's unambiguous statement at p. 2 of its order of September 26, 1983, that "we wish to make it clear that we are not staying our order of August 31, 1983." Appellants thought, reasonably enough, that the Licensing Board had thereby indeed made it crystal clear that the Licensing Board would not stay the depositions pending appellants' efforts to obtain further review of the legality vel non of the subpoenas. Appellants therefore concluded that an application to this Board for a stay was ripe as of September 26. Appellants, of course, do not quarrel with the Appeal Board's observation at p. 3 of its October 6 memorandum that "misleading statements in [a] motion...do not contribute meaningfully to the hearing process;" however, appellants for their part are constrained to say that the integrity of the hearing process is likewise compromised when an administrative tribunal is too quick to infer bad faith motives on the part of litigants and their counsel.

^{16/} A nonparty is entitled to take a direct appeal from an order of a Licensing Board granting discovery against it since such a ruling has all the attributes of finality insofar as that nonparty is concerned. In the Matter of Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683 (1979); In the Matter of Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973); In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322 (1973). The GAP deponents are not, of course, parties to the current soils settlement and licensing hearings ongoing before the Licensing Board.

Regulatory Commission Staff so that an appropriate investigation may be conducted of these sources' allegations. In almost all cases the sources are former or current Consumers' or Bechtel Power Company employees who give this information to GAP only under strict guarantees of confidentiality. In some cases the sources have already suffered retaliation for their outspokenness about safety problems at the plants.^{17/} Moreover, the NRC has given written promises of confidentiality to these individuals in order to obtain their affidavits from GAP.^{18/}

The growing line of cases which protects journalists and news editors in their newsgathering and editorial functions clearly protects GAP's information-gathering which serves the public interest.^{19/}

Journalists, scholars and other information-gathering organizations have a qualified privilege not to disclose news sources and other work materials unless disclosure is essential to protect the public interest in the orderly administration of justice and the information whose disclosure is sought is at the heart of the moving party's case. Baker v. F&F Investment, 470 F. 2d 778 (2nd Cir. 1972); cert. denied, 411 U. S. 966 (1973) (journalist would not be compelled to disclose confidential sources in case of alleged racial discrimination in sale of houses where party had not shown information relevant or critical to their civil rights action);

^{17/} See Affidavit of Billie Pirner Garde, attached as Exhibit B to the motion for reconsideration of the August 31, 1983, order of the Licensing Board.

^{18/} See para. 12 and Attachment 1 to Affidavit of Louis Clark, supra n.1.

^{19/} The NRC suspended safety-related construction at the Zimmer nuclear power plant in November, 1982, largely in response to GAP's petition to suspend construction, which was supported by affidavits and documentary evidence too voluminous to describe. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-33, 16 NRC (Nov. 12, 1982).

Similarly, at Midland, GAP affidavits and documentary evidence has led the NRC Staff to open both Region III and Office of Investigation investigations of alleged construction and quality assurance problems at the Midland site. No party can deny that GAP's information gathering serves the public interest.

Silkwood v. Kerr-McGee Corp., 563 F. 2d 433 (10th Cir. 1977) (trial court must weigh whether the party seeking information has made independent attempt to obtain information elsewhere, information goes to the heart of the matter, the information is relevant and the type of controversy); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (D. Va. 1976); United States v. Cuthbertson, 630 F. 2d 130 (3rd Cir. 1980) (CBS was not compelled to produce transcripts and audiotapes related to "60 Minutes" programs where defendant failed to prove that only practical access to information was through media source); Maughan v. NL Industries, 524 F. Supp. 93 (D.D.C. 1981); Solargen Electric Motor v. American Motors Corp., 506 F. Supp. 546 (N.D.N.Y. 1981) (motion to quash subpoenas of television reporters granted insofar as plaintiffs failed to explore alternative sources of obtaining information).

This qualified First Amendment privilege clearly protects more than simply the identity of confidential sources. It protects all materials which the news or public interest organizations gather in performing their public service. Thus, in United States v. Cuthbertson, *supra*, the court stated that the privilege prohibits the compelled production of unpublished materials in CBS' possession since such disclosure would "constitute a significant intrusion into the newsgathering and editorial processes." 630 F. 2d at 147. See also Herbert v. Lando, 441 U. S. 153 (1979) (recognizing an editorial privilege); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Calif. 1976); In re Popkin, 460 F. 2d 328 (1st Cir. 1972), cert. denied, 411 U. S. 909 (1973); and In re Falk, 332 F. Supp. 938 (D. Mass. 1971), in which courts recognize a "scholar's privilege" or a free speech, First Amendment interest in maintaining the free flow of information to scholarly researchers from confidential sources.

In fact, GAP's sources and materials need not even be confidential to claim this First Amendment privilege. See Altemose Construction Co. v. Building and Construction Trades Council, 443 F. Supp. 489 (D. Pa. 1977)

(motion to quash granted even though confidentiality had potentially been waived by disclosure of affidavits to third parties and by numerous references to these affidavits in course of broadcast by reporter and affiant); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975). The Appeal Board's focus must be on whether the compelled production of the appellants' testimony and investigative materials would intrude on GAP's protected information-gathering activities and the flow of information to the NRC on safety problems at the Midland site. If so, this Board must then consider (1) that GAP is not a party to these proceedings; (2) the information sought does not go to the heart of Consumer's case; (3) that Consumers has made no effort to obtain this information from other sources; and (4) that even if GAP were to be found to be the only practical source of information, GAP's interest and the public's interest in protecting the flow of information about safety problems to GAP and to the NRC outweighs Consumers' interest in obtaining information relevant to issues in the licensing hearings. Baker v. F & F Investment, supra; Richards of Rockford v. Pacific Gas & Electric Co., supra, 71 F.R.D. at 390.

In In re Application of Consumers' Union, 32 F.R. Serv. 2d 1373, 1374 (S.D.N.Y. 1981), the court found this balance was in Consumer's Union ("CU") favor since the public interest lay in CU's unfettered factfinding and publication of a magazine providing a forum for "impartial discussion of safety, fitness for use and reliability of products offered to the consuming public." See also, Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975). In this case as in In re Consumers' Union, supra, this Board's balancing of these factors must lead to a decision to quash the GAP subpoenas.

To begin with, it is beyond serious dispute that GAP's effectiveness will be substantially impaired by involuntary disclosures of confidential information. As is made plain by the supplemental affidavits of deponents Clark and Garde, which

were attached as Exhibits A and B, respectively, to the motion for reconsideration filed with the Licensing Board, GAP has entered into a covenant of confidentiality with persons who have come to it with information concerning nuclear power plants, exactly because such persons simply will not come forward with their information absent a clearly articulated and enforceable policy of confidentiality on GAP's part. The injury resulting from forced disclosure of the information sought by Consumers from GAP would substantially undermine GAP's organizational effectiveness, and would intrude into the special and confidential relationship that exists between GAP and those who come to it with information which they wish to put into the public domain. Compare Machin v. Zuckert, 316 F. 2d 336 (D. C. Cir. 1963).

By contrast, Consumers has made no showing at all of any particularized need to depose and subpoena documents from GAP representatives at this juncture of the proceedings. In truth, Consumers is simply attempting to discover the substance of an NRC investigation into allegations of construction deficiencies at the Midland Plant while the investigation remains ongoing. According to NRC practice and procedure, discovery of this sort would not be permitted against the NRC staff until the conclusion of the investigation; consequently, by pursuing discovery against GAP while the NRC investigation is pending, Consumers is merely attempting to circumvent normal NRC procedures. Consumers will not be prejudiced in any way by adhering to the course normally followed in NRC proceedings.

In short, Consumers has shown no particularized need for this discovery, while GAP has demonstrated a compelling interest in maintaining the confidentiality of its records, operations, and communications. Clearly, the subpoenas at issue must be quashed under the First Amendment principles discussed above.

III. The Subpoenas Are In
Violation Of The Common
Law Of Privilege.

Furthermore, quite independently of appellants' constitutional claim, Consumers' subpoenas must be quashed as a matter of common law.

There are four conditions necessary to the recognition of an evidentiary privilege at common law: (1) the communications must originate in a confidence that they will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relationship must be one in which the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. 8 WIGMORE, EVIDENCE Sec. 2285. In the present proceeding, all four factors strongly militate in favor of recognition of a privilege.

First, the communications from the Midland whistleblower to GAP and thence to the NRC indisputably originated in the confidence that they would not be disclosed.^{20/}

Second, without such an assurance of confidentiality, the Midland whistleblowers would not have executed affidavits for submission to the NRC;^{21/} thus, the element of confidentiality is essential to the relationship between GAP and the whistleblowers, and to the full and free flow of information to the NRC and to the public.

^{20/} Affidavit of Louis Clark, supra n. 1, paras. 8, 12 and Attachment 1.

^{21/} Id., paras. 8, 9 and 12.

Third, the public interest clearly favors encouragement of relationships between whistleblowers, who may have knowledge of unsafe conditions in nuclear power plants, and GAP, which has the resources and expertise essential for effective transmission of whistleblowers' information to the NRC and to the public.

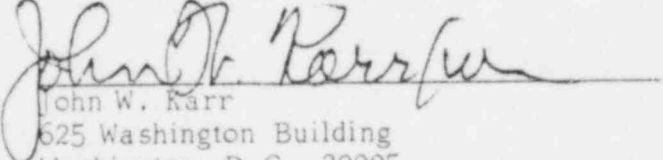
Fourth, compelled disclosure of the communications between the whistleblowers and GAP would not only destroy the relationship between GAP and these particular whistleblowers, it would also make it impossible for GAP to establish such relationships with future whistleblowers;^{22/} by contrast, Consumers has made no particularized showing of need for the information.

Clearly, then, all of the elements traditionally implicated in the recognition of common law evidentiary privileges point toward recognition of a privilege on the present facts. For that reason alone, Consumers' subpoenas should be quashed.

IV. Conclusion

For all of the foregoing reasons, the orders of the Licensing Board appealed from herein should be vacated, and the matter remanded to the Licensing Board with directions to enter an order to quash Consumers' subpoenas to GAP representatives.

Respectfully submitted,


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CERTIFICATE OF SERVICE

DOCKETED
1983

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