

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos.	'84 MAY -7 AIO:34
	)	50-329	OM
	)	50-330	OM
CONSUMERS POWER COMPANY	)	Docket Nos.	50-329 OL
(Midland Plant, Units 1&2)	)	50-330	OL

MEMORANDUM OF CONSUMERS POWER COMPANY
OPPOSING GAP'S PETITION FOR REVIEW

Consumers Power Company ("Consumers" or "Applicant"), by its attorneys, hereby submits its Memorandum opposing the Petition for Review filed by Louis Clark, Thomas Devine, Billie Pirner Garde, and Lucy Hallberg of the Government Accountability Project (referred to collectively herein as "Petitioners" or "GAP") on April 17, 1984.

INTRODUCTION

Petitioners are seeking to have the Commission quash four subpoenas duces tecum that would require them to appear for depositions and disclose, in expurgated form, copies of anonymous affidavits alleging poor work quality at Consumers' Midland, Michigan plant. The information would be disclosed subject to a stringent protective order to shield identities of the anonymous affiants.

GAP has asserted a claim of privilege against disclosure of any part of the anonymous affidavits, and

against giving any testimony concerning them, based on the theory that such privilege is necessary to protect the identities of the affiants. GAP asserts this blanket claim of privilege even though it has advanced no reason for believing the protective order entered by the Licensing Board will be inadequate to protect the affiants' identities, and even though selected portions of the affidavits have already been released to the press. See Articles in Midland Daily News, June 28, 1982, Attachment A to Consumers' Application for Deposition Subpoenas (July 8, 1982). In addition, it is uncontested that certain of the revised contentions of Intervenor Mary Sinclair are based upon newspaper articles containing information from the anonymous affidavits. Prehearing conference, August 13, 1982, Transcript at 8359; Licensing Board Order Accepting Contentions (December 30, 1982).

In an order entered on August 31, 1983 the Licensing Board denied GAP's motion to quash the subpoenas in question, concluding that the motion was "premised on the false notion that the Applicant is seeking to expose the identity of the confidential informants." LBP-83-53, 18 NRC at 286. Nonetheless, the Board, with Consumers' acquiescence, entered a protective order provided that (1) the names of the affiants and any other identifying information will be deleted from subpoenaed documents and need not be disclosed in the depositions; (2) any identifying information inadvertently disclosed

during the deposition will be deleted from the transcript and not revealed by those present; (3) all of the information elicited will be restricted to Applicant's counsel, the NRC staff, Intervenors, and, if necessary, the Board itself; and (4) the parties may present to the Licensing Board any disputes over what constitutes protected information. Id., Appendix, 18 NRC at 289-90.

On October 3, 1983 GAP moved for reconsideration of the Licensing Board's decision. The Board denied the motion, addressing in more detail GAP's claim of privilege. The Board found it unnecessary to reach the question of privilege, but pointed out that it had already undertaken the balance of interests that would have been required if it had found that a privilege existed, and that even assuming the existence of a qualified privilege, "the lack of harm which we found would result from revealing the information subject to a protective order would dictate our denial of the GAP deponents' motion to quash." LBP-83-64, 18 NRC at 768-69. The Board also imposed strict limits on the scope of inquiry at the depositions. Id. at 771-72.

In their Petition for Review the Petitioners press their claims of privilege, and assert that their interests have not been given due consideration in the three decisions that already have been issued by the Licensing Board and the Appeal Board. For the reasons set forth below, the decisions below have fully accommodated the interests asserted by the Petitioners and their petition for review should accordingly be denied.

ARGUMENT

I. GAP has failed to establish the existence of privilege.

It is a fundamental tenet of the American system of justice that "the public . . . has a right to every man's evidence." Trammel v. United States, 445 U.S. 40, 50 (1980). "[E]xceptions to the demand for every man's evidence are not lightly created, for they are in derogation of the search for the truth." United States v. Nixon, 418 U.S. 683, 710 (1974). Accordingly, new privileges should be created only where there is a "compelling justification." In re Dinnan, 661 F.2d 426, 430 rehearing denied 666 F.2d 592 (5th Cir. 1981), cert. denied 457 U.S. 1106 (1982).

The Petitioners are claiming an unprecedented privilege, asserting that the qualified privilege of journalists not to reveal confidential sources should be extended to protect GAP's interest in providing information to government agencies.* Petition for Review at 4-5. GAP has simply failed to justify this novel extension of the journalist's privilege.

Courts have been reluctant to extend the privilege enjoyed by the media. See e.g. Wright v. Patrolman's Benevolent Ass'n., 72 F.R.D. 161 (S.D.N.Y 1976) (journalists' privilege not extended to bar association conducting inves-

* GAP's advocacy of the right to promote "full and free flow of information on matters pending before governmental bodies and agencies," while certainly laudable, is somewhat ironic given its actual posture in this case -- seeking to prevent the "full and free flow" of selected portions of the information it gathers.

tigation of qualifications of judge transferred from criminal to civil bench); In re Dinnan, (denying "academic privilege" asserted to protect deliberations of tenure review committee). The only authority cited by GAP in its Petition for Review to support its expansive view of privilege is a single district court decision which recognized "scholar's privilege" against disclosure of confidential research notes. In re Grand Jury Subpoena Dated January 4, 1984, No. CV-84-0336 (E.D.N.Y. April 9, 1984). Even assuming the soundness of that decision, it does not require recognition of a privilege for GAP.

Scholarly research, like journalism, is a well-established field of endeavor whose benefits to the public have long been recognized. Thus, assuming that the privilege should be extended to scholars, those entitled to the privilege would constitute a reasonably well-defined group. If the journalist's privilege were extended to organizations such as GAP, which claim privilege based on a generalized right to gather and disseminate information, and not as part of a long-established institution, then the privilege could just as well be extended to any member of the general public who gathers and disseminates information. See Wright v. Patrolman's Benevolent Association, 72 F.R.D. at 162 (observing that extending the journalists' privilege beyond the media would create serious problems in defining the scope of the privilege). GAP has not justified the open-ended extension of the journalist's privilege it now seeks.

II. The Licensing Board and the Appeal Board applied the balancing test that would have been required if GAP had demonstrated privilege.

As the petitioners have conceded, even where a First Amendment privilege has been recognized, the courts have balanced the need for information against the potential harm from disclosure. E.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980). See GAP Motion for Reconsideration at 4 (October 3, 1982). The Licensing Board in fact applied the "balancing test" that would have been required if GAP had established a qualified privilege. The Board found that the information sought was relevant to the issues raised in the licensing proceeding, and not obtainable elsewhere, and that its protective order would allow discovery of the information without any harm to GAP. LBP-83-53, 18 NRC at 287, 288; LBP-83-64, 18 NRC at 768-69, 771-72.

GAP suggests in its brief that the Licensing Board did not consider the issue of Applicant's need for the information. Petition for Review at 8. To the contrary, the Licensing Board's finding that the information is needed because it is relevant to contentions already accepted by the Board is apparently uncontested. LBP-83-53, 18 NRC at 288; LBP-83-64, 18 NRC at 771.*

* GAP implies that Consumers' real purpose in seeking the subpoenas is not to obtain relevant evidence but discredit GAP. Petition for Review at 7 and n. 11. The Licensing Board already has examined portions of a deposition transcript that were asserted to support this claim

GAP's suggestion that the Licensing Board failed to consider its interests is likewise without foundation. The only interest GAP has ever asserted is an interest in protecting the identities of the anonymous affiants. The protective order entered by the Licensing Board takes elaborate precautions to protect those identities. The order allows GAP to make the initial determination of what information to withhold because it may lead to disclosure of identities, and it closely restricts the persons to whom even non-confidential information about the affidavits may be disclosed. Protective Order, Appendix to LBP-83-53, 18 NRC at 289-90.

Throughout these proceedings GAP has failed to suggest any reason other than pure speculation and unsubstantiated accusations why the Licensing Board's elaborate protective order is inadequate to protect the affiants' identities. See LBP-83-64, 18 NRC at 769-80 & n. 4, 5. As the Licensing Board observed, "licensing and appeal boards have acted on the assumption that protective orders will be obeyed," and if a party has "an actual, as opposed to purely

(cont.)

- * and concluded that most of the questions contained there sought relevant information, and did "not appear to represent an attempt to discredit either GAP or the witness who sought GAP's assistance." LBP 83-64, 18 NRC at 771. Nonetheless, the Board has given the parties careful guidance about the scope of discovery and has ordered that the GAP deponents will be allowed to refuse to answer questions on grounds of relevance, subject to later consideration by the Licensing Board. Id. at 771-72. The Licensing Board not only considered GAP's concerns about overbroad discovery, it afforded generous protection against inquiry into irrelevant matters.

theoretical risk "of a breach, then it has "the obligation to document that basis," Id. at 287-88, quoting Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2) ALAB 735, 18 NRC 19, 25, 26 (1983).

GAP has suggested that any disclosure of the substance of the affidavits will necessarily lead to discovery of the affiants' identities. Hearing of Motion to Quash, July 26, 1983, Transcript at 19084. GAP's stated policy on disclosures of anonymous allegations belies any genuine fear that this is so.

An affidavit submitted by GAP to the Licensing Board states that GAP's understandings with at least three of the anonymous affiants contemplate public disclosure of the substance of their affidavits in varying degrees of detail. Affidavit of Billie Pirner Garde, Exhibit B to GAP Motion for Reconsideration, at 2, 5, 6 (October 3, 1983). As the Licensing Board observed, GAP apparently has not attempted to prevent publication of "selected information" from the affidavits. LBP-83-64, 18 NRC at 770. As the Licensing Board also observed, "GAP's desire to shield its operations from scrutiny while nevertheless permitting allegations against the Applicant to be revealed anonymously to newspapers is grossly unfair to the Applicant and to the adjudicatory process itself." LBP-83-64, 18 NRC at 770-71. See also Westmoreland v. CBS, Inc., 97 F.R.D. 703, 706

(S.D.N.Y. 1983) (denying claims of privilege for internal investigation of "60 Minutes" broadcast accusing General William Westmoreland of misrepresenting the strength of enemy forces, when report already had been "held out . . . to the public as substantiating [CBS'] accusations"). GAP's stated policy on disclosures to the press, and the selective public disclosure of portions of the affidavits, rule out any genuine claim that the substance of the affidavits was ever intended to be maintained in total confidence.

CONCLUSION

For the foregoing reasons Consumers Power Company respectfully submits that GAP's Petition for Review should be denied.

Respectfully submitted,
CONSUMERS POWER COMPANY

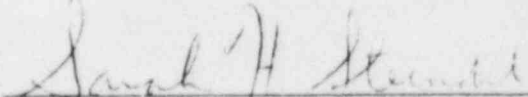
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CERTIFICATE OF SERVICE

I, Sarah H. Steindel, one of the attorneys for Consumers Power Company, hereby certify that copies of the Memorandum of Consumers Power Company Opposing GAP's Petition for Review were served upon all persons shown in the attached service list by deposit in the United States mail, first class postage prepaid, in accordance with the Commission's Rules of Practice.



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