

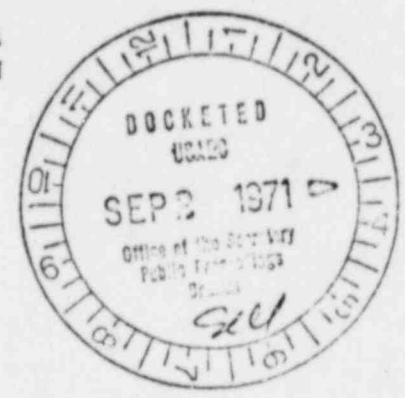
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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD:

Algie A. Wells, Chairman  
Dr. John H. Buck  
Dr. Lawrence R. Quarles



IN THE MATTER OF  
CONSUMERS POWER COMPANY  
(Midland Plant, Units 1 and 2)

DOCKET NOS. 50-329  
50-330

MEMORANDUM

The Atomic Safety and Licensing Board in this proceeding <sup>1/</sup> has, under date of June 22, 1971, certified to the Appeal Board the following questions arising out of a request for production of Atomic Energy Commission records and documents filed by the Saginaw Valley Nuclear Study Group, intervenors in the proceeding before the Licensing Board:

- I. Do the regulations preclude the disclosure of documents which are found to be privileged?
- II. Would the disclosure of the documents, in accordance with the Board's order, be contrary to the public interest?
- III. Does the Freedom of Information Act require the production of those documents as to which the Board denied disclosure? (The Licensing Board commented that if the answer to this question is in the affirmative, then the same question would have to be answered as to the documents covered in question II.)

<sup>1/</sup> The proceeding before the Licensing Board is to consider whether a permit should be issued to the applicant, Consumers Power Company, to construct Units 1 and 2 of a nuclear generating plant at Midland, Michigan.

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Before responding to these questions, we summarize the background.

Following the request for documents by the intervenors, the regulatory staff made available to the intervenors a substantial number of documents which it did not regard as privileged. These included documents upon which the staff relied in preparing its Safety Evaluation, and copies of AEC Division of Compliance inspection reports for the Midland Plant.<sup>2/</sup> In addition, a large number of documents were already available to the public in the Public Document Room. By letter dated April 29, 1971, the staff transmitted to the Licensing Board for in camera inspection the remaining documents which had been requested. Some of these documents had been withheld in toto from intervenors on the basis of a claim of privilege; the others had been furnished with deletions claimed to be authorized by the Commission's regulations.

By order dated May 19, 1971, the Licensing Board found, with respect to the documents withheld in toto, that documents falling within the following categories need not be disclosed: (1) documents pertaining to the Advisory Committee on Reactor Safeguards (ACRS), including reports, draft reports, memoranda of meetings, etc.; (2) communications between the staff and the Commission; and (3) certain miscellaneous documents involving confidential communications between staff members. The Board held that the remainder of the documents identified by the staff as being exempt from disclosure should be produced. In doing so, it acknowledged that most of those documents were "internal working papers" and, hence, privileged.

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<sup>2/</sup> See Answer of AEC Regulatory Staff to Motion of Intervenors, dated January 19, 1971. See also letter from AEC staff counsel to intervenors' counsel, dated April 9, 1971.

(The Licensing Board felt that certain letters and reports to and from Commission consultants should be disclosed whether privileged or not, and consequently did not reach the question of whether those documents were in fact privileged.) The Board, in general, took the position that access to documents should not be denied "except for good reason" and concluded that the staff had not made such a showing with respect to those documents. As to the documents which were forwarded to the intervenors with deletions, the Licensing Board followed a similar policy and ruled that, with certain designated exceptions (relating to material not relevant to the proceeding, or to confidential communications between staff members), portions of records deleted by the staff should be restored and produced.

By memorandum dated May 28, 1971, the intervenors objected to the withholding of the documents and information within the categories which the Licensing Board permitted to be withheld. Their ground for this contention was that the Freedom of Information Act required such disclosure and that the Commission's regulations must be interpreted in a manner not inconsistent with the Freedom of Information Act.<sup>3/</sup>

The staff, by letter dated June 18, 1971, advised the Licensing Board that, pursuant to the provisions of 10 CFR §2.744(e), the Director of Regulation objected to the production of records and documents ordered to be produced by the Licensing Board, on the ~~st~~ grounds that:

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<sup>3/</sup> The relationship of the Freedom of Information Act to §2.744 of the Commission's regulations is discussed in Part III of this Memorandum.

1. The records and documents are, in fact, internal working papers or records or documents of the type specified in 10 CFR §9.5 and thus privileged under 10 CFR §2.744(c); and
2. As privileged records and documents, their production would be contrary to the public interest.

The staff also advised the Licensing Board that pursuant to 10 CFR §2.744(b), the Director of Regulation objected to the release of information which had been deleted from various documents, on the ground that such deletions are authorized pursuant to 10 CFR §2.744(b)(1) through (5).

Since the Licensing Board believed that the documents should be disclosed and the deletions restored, as indicated in its May 19, 1971 order, it certified the above three questions to the Appeal Board.

Following such referral, the staff, on July 7, 1971, transmitted copies of the documents which were the subject of the certification to the Appeal Board. By letter dated August 25, 1971, to the Appeal Board, the staff stated that it "elected to waive its claim of privilege" with respect to six of the documents, <sup>4/</sup> and with regard to the other documents described the considerations underlying the Director of Regulation's determination that their production would be contrary to the public interest.

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4/ These six documents were copies of Commission letters requesting the services of consultants in connection with the staff's review of the application for licenses for the Midland Plant. Five were addressed to other Government agencies, and the sixth was directed to a private consulting firm. In waiving its claim of privilege, the staff commented that, in its view, none of the documents was needed by the intervenors or relevant to an issue in the proceeding.

I. Do the regulations preclude the disclosure of documents which  
are found to be privileged?

For reasons set forth below, we conclude that Commission regulations do not preclude the disclosure of documents or parts of documents which are found to be privileged.

In Licensing Board proceedings, the production of AFC records and documents is governed by the rules appearing in §2.744 of the Commission's Rules and Regulations. (The provisions of 10 CFR §2.744 are reproduced as Appendix A to this Memorandum.) These rules, as applied to a licensing proceeding, permit the Licensing Board to require that relevant documents, as a general rule, be produced upon request by the moving party. Two categories of documents, however, are subject to production only in accordance with specified conditions. The first of the categories includes documents falling within the purview of 10 CFR §2.744(b) -- i.e., inspection reports or other records the basic purpose of which is to record matters of fact relating to license applications or licensed activities. These documents must be produced upon a showing of need and relevancy, if the information is not otherwise available, but certain specific information may be deleted. By contrast, documents of the type described in §2.744(c), which comprise the second special category -- i.e., internal working papers and other documents exempt from public disclosure under the provisions of 10 CFR §9.5 -- are required to be produced only in accordance with the procedures appearing in 10 CFR §2.744(d) and (e).

When a document falls within a category privileged under the provisions of 10 CFR §2.744(c), a party, under §2.744(d) may apply for production of such a privileged document by setting forth his need for such document and its relevancy to the issues in the proceeding. The documents are then produced for the in camera inspection of the Board, so that it may determine (1) need for and relevancy of the records and documents; (2) whether the records and documents are, in fact, privileged; and (3) whether the production of such records or documents would not be contrary to the public interest and would not adversely affect the rights of any person. If a Licensing Board determines under this section that documents should be released, the Director of Regulation may, under §2.744(e), object to the Licensing Board's determination on the ground that (1) need for and relevancy of the records and documents has not been shown; or (2) the records and documents are, in fact, privileged; or (3) that, if so, the production of the records and documents would be contrary to the public interest or would adversely affect the rights of a person or persons. Upon such objection, the Licensing Board must certify the matter to the Appeal Board for determination.

It is our opinion that, with respect to privileged documents, considerations of need, relevancy and the public interest must be taken into account in reaching a decision as to whether the documents should be produced. The fact that documents or records are in fact privileged does not necessarily establish that their production would be contrary to the public interest. We note, however, that §2.744(e) requires that the Licensing Board, the Appeal Board and the Commission accord great weight to any objection to production

by the Director of Regulation, in view of his knowledge of the adverse effects of production on the effective performance of AEC programs and his responsibility for the effective performance of those programs.

Documents as to which some of the contents have been deleted present an additional dimension to the above discussion. These documents are inspection reports or similar documents which are specifically dealt with under §2.744(b) of the regulations. Under that section, the Commission has specifically decided that inspection reports and similar documents will be produced upon a determination of need and relevancy by the Licensing Board, if the facts recorded therein are not otherwise available to the moving party. Five categories of information<sup>5/</sup> are to be deleted from documents of this type. With such deletions these documents are specifically treated as non-privileged and not within the scope of the protective provisions applicable to privileged documents under §2.744(c).

If a claim is made for restoration of the deleted material or if the deleted material is ordered by a Licensing Board to be produced, the deleted portions which are in dispute are, in our opinion, treated the same as documents privileged under §2.744(c). The specific exclusion in paragraph (c) of documents of the type described in paragraph (b) only applies to the extent that the documents, with material deleted, are considered non-privileged.

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<sup>5/</sup> See Appendix A. Provision is made for certification to the Appeal Board of questions whether need for and relevancy of the reports, records and documents have been shown, or whether the documents are within the categories of inspection reports and similar documents covered by §2.744(b), or that certain material should be deleted.

(If this were not true, there would be no means for a party to obtain review of a decision by a Licensing Board that certain material properly has been deleted.) Therefore, with respect to the deleted information, the disclosure provisions of §2.744(d) and (e) are applicable, and production of the deleted material may be required if it is necessary and relevant to the proceeding and if its production would not be contrary to the public interest and would not adversely affect the rights of any person. The mere fact that deletions are of the type authorized by §2.744(b) is not conclusive as to whether the information should be produced under §2.744(d) and (e).

II. Would the disclosure of the documents, in accordance with  
the Board's order, be contrary to the public interest?

Disclosure of the presently withheld documents would, in our opinion, be contrary to the public interest.

Before setting forth our reasons, we wish to point out that in reaching this conclusion we have been mindful of our opinion, discussed under question I, that Commission regulations do not, under all circumstances, preclude the disclosure of privileged documents. In this case, however, we have concluded that the public interest considerations dictate that the documents in question be withheld from disclosure. There was no formal showing by the intervenor of relevancy or need. We note in this connection that the regulatory staff waived such requirement.<sup>6/</sup> We also note that there was no public interest showing before the Licensing Board, beyond the bare statement by the staff that

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<sup>6/</sup> Answer of AEC Regulatory Staff to Motion of Intervenors Saginaw Valley Nuclear Study Group, et al., dated January 19, 1971, at p. 4.



"as privileged records and documents, their production would be contrary to the public interest." Subsequently, however, the regulatory staff supplemented the record on the "public interest" question by its letter to the Appeal Board of August 25, 1971.<sup>8/</sup> As described below, we find the considerations reflected in that letter to be persuasive.

In its August 25, 1971 letter, the staff spelled out the reasons why, in the opinion of the Director of Regulation, disclosure of the documents as to which privilege had not been waived would be contrary to the public interest. The letter stated:

"The withheld documents record the development of the staff's position on the application that is the subject of this proceeding. They reflect a process in which many individuals participate, each of whom is free and indeed encouraged to contribute opinions, recommendations, advice, evaluations and analyses at any stage of the staff's review of the application. They reflect, also, a process which ultimately resolves and coordinates these various inputs through further analysis and evaluation.

"The effectiveness of this process depends in large measure on full, complete and candid communication among the participants in the process. To expose such communication in this case to public inspection would inhibit similar communication in the future, since participants in the review process would communicate with foreknowledge that their reports, memoranda and notes are subject to public disclosure."

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7/ AEC staff letter to Licensing Board, dated June 18, 1971.

8/ The note to paragraph (f) of §2.780 on ex parte communications provides that matters certified to the Atomic Safety and Licensing Appeal Board pursuant to §2.744 (b) and (e) are not deemed to involve substantive matters at issue in a proceeding. Pursuant to that provision, the Director of Regulation's attention was invited by the Appeal Board to the fact that the basis for his determination that production of the documents in question was contrary to the public interest was not clear.

The letter also notes that such facts important to the health and safety determinations to be made in this proceeding as are intertwined with the views expressed in the withheld documents are set forth in other documents which are available to the parties.

We find, after examination of the presently withheld documents, that they are internal working papers, within the meaning of 10 CFR §2.4(o), and consequently privileged. We believe that the factors cited by the staff as a basis for the Director of Regulation's public interest finding in this proceeding constitute cogent and persuasive considerations which compel a conclusion, under the facts of this case, that production of these internal working papers would be contrary to the public interest. The fact that some of these documents contain information which may be of little or no significance should not be a basis for their release, under circumstances where release might reasonably be expected to produce the adverse effects on the regulatory process cited by the staff, and where no compelling reason or need for disclosure has been presented. Accordingly, taking into account the "great weight" we are required to accord to the public interest finding of the Director of Regulation, we conclude that production of the withheld documents in this proceeding would be contrary to the public interest. With respect to documents which had been made available with deletions, we find that the deleted material, to the extent relevant to this proceeding, was properly withheld on the same basis. (Deletions based on relevancy are discussed in this Memorandum under Question III.)

III. Does the Freedom of Information Act require the production of  
those documents as to which the Board denied disclosure?

Since we have authorized the withholding of more documents than did the Licensing Board, we will answer this question with respect to all the documents, or portions of documents, as to which either the Licensing Board or the Appeal Board has denied disclosure. In doing so, we will describe what we consider to be the relationship between the Freedom of Information Act and the Commission's rules and regulations governing the availability of AEC records and documents in a quasi-judicial proceeding.

The Appeal Board is of the opinion that information which is not relevant to a matter at issue should not be involved in the discovery aspects of a quasi-judicial proceeding. We view the Licensing Board's denial of access to certain information on grounds of relevancy to be an appropriate exercise of discretion under §2.744, whether or not such information apart from this licensing proceeding might be subject to disclosure under the Freedom of Information Act.

Turning now to the question of documents which are relevant to the matters at issue in this proceeding, we read the exemptions from disclosure in §2.744 as consistent with the exemptions from disclosure included in the Freedom of Information Act and in 10 CFR Part 9 of the Commission's regulations. Indeed, Section 2.744 provides for the production of certain documents (those described in Section 2.744(b)) which might be considered as falling within a Freedom of Information Act exemption.

On the basis of the foregoing, we conclude that --

- (1) since production of documents which are not relevant should not be considered in the context of a quasi-judicial proceeding; and
- (2) since the relevant documents or portions thereof which have not been made available are validly withheld under 10 CFR §2.744 of the Commission's regulations because of persuasive public interest considerations,

--the production of these documents in this quasi-judicial proceeding is not required by the Freedom of Information Act.

ATOMIC SAFETY AND LICENSING APPEAL BOARD

BY: 

William L. Woodard  
Assistant Executive Secretary

Attachment:  
Appendix A - "Production of AEC  
Records and Documents"

Dated: September 3, 1971

**§ 2.714 Production of AEC records and documents.**

(a) AEC records and documents, except internal working papers and other records of the type which are exempt from public disclosure under § 9.5 of this chapter, will be produced upon request for inspection and copying or photographing.

(b) An application by a party to a proceeding for the production of Commission inspection reports and other records and documents, the basic purpose of which is to record matters of fact relating to license applications or licensed activities, shall be addressed to the presiding officer in writing and shall set forth the need of the party for such documents and the relevancy thereof to the issues in the proceeding. Such applications shall be processed as motions in accordance with § 2.730 (a) through (d). Inspection reports and records and documents which are the subject of such applications will be produced for the in camera inspection of the presiding officer exclusively and only to the extent necessary for the determination of need and relevancy of the reports, records, and documents, and whether the reports, records, and documents are within the categories described in this paragraph. Upon a determination of need and relevancy by the presiding officer, such inspection reports and such records and documents will be produced if the facts recorded therein are not otherwise available to the moving party. Production of such reports, records, and documents will be subject to the deletion of:

(1) Opinions, evaluations, analyses, deliberations, recommendations or advice;

(2) Information given in confidence (whether specifically given in confidence or under circumstances where it could be reasonably concluded that the information was given in confidence) and names of individuals, other than AEC personnel, providing such confidential information;

(3) References to records and documents which may be withheld from public disclosure;

(4) Information of a proprietary nature; and

(5) Other information, including classified information, privileged under § 9.5 of this chapter and/or paragraph (c) of this section.

If the General Manager or the Director of Regulation, as appropriate, objects to authorizing production of the reports, records and documents on the ground that need for and relevancy of the reports, records, and documents have not been shown, or that the reports, records and documents are not within the categories described in this paragraph, or that certain material should be deleted, the matter shall, prior to any ruling ordering production, be certified to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, for determination.

(c) Internal working papers and records and documents of the type specified in § 9.5 of this chapter, including lists, digests and summaries thereof and references thereto, but not including reports, records and documents described in paragraph (b) of this section, will be treated as privileged documents and exempt from disclosure except in accordance with paragraphs (d) and (e) of this section.

(d) An application by a party to a proceeding for the production of AEC records and documents described in paragraph (c) of this section shall be addressed to the presiding officer in writing and shall set forth the need of the party for such records and documents and the relevancy thereof to the issues in the proceeding. Such applications shall be processed as motions in accordance with § 2.730 (a) through (d). Records and documents covered by such applications will be produced for the in camera inspection of the presiding officer exclusively and only to the extent necessary to determine (1) need for and relevancy of the records and documents, (2) whether the records and documents are in fact internal working papers or records or documents of the type specified in § 9.5 of this chapter and thus privileged under paragraph (c) of this section, and (3) whether the production of a record or document privileged under paragraph (c) would not be contrary to the public interest and would not adversely affect the rights of any person.

(e) Upon a determination by the presiding officer that the moving party has demonstrated need for and relevancy of the records and documents and that the production of records and documents privileged under paragraph (c) of this section would not be contrary to the public interest and would not adversely affect the rights of any person, the General Manager or the Director of Regulation, as appropriate, will either authorize production of such records and documents or state any objection to production. If the General Manager or the Director of Regulation, as appropriate, objects to authorizing production of such records and documents on the ground that (1) need for and relevancy of the records and documents have not been shown; or (2) the records and documents are in fact internal working papers or records or documents of the type specified in § 9.5 of this chapter and thus privileged under paragraph (c) of this section; or (3) that, if privileged, the production of the records and documents would be contrary to the public interest or would adversely affect the rights of a person or persons, the matter shall, prior

to any ruling ordering production thereof, be certified to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, for determination. In view of their knowledge of the adverse effects of production on the effective performance of AEC programs, and their responsibilities for the effective performance of those programs, an objection to production by the General Manager or the Director of Regulation will be accorded great weight by the presiding officer, the Atomic Safety and Licensing Appeal Board and the Commission.

(f) A ruling by the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission, for the production of AEC records and documents will specify the time, place and manner of production. The presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission may make an order which justice requires to protect against annoyance, embarrassment, oppression.

(g) Notwithstanding the provisions of §§ 2.3 and 9.10(a) of this chapter, in any conflict between these sections and any other provision of this chapter, this section governs.

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

Abm. 4  
9-3-71

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

Docket No. 50-329, 330

CERTIFICATE OF SERVICE

I hereby certify that copies of the MEMORANDUM issued by the Appeal Board dated September 3, 1971 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 3rd day of September 1971:

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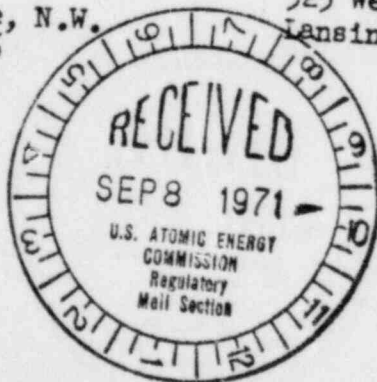
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