UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

Order with Respect to Documents as to
Which Privilege Is Claimed by AEC Staff.

The first question to be decided is whether the privilege is properly claimed. If not, the documents must be furnished.* If, however, the privilege is properly claimed, the Board must decide whether the person requesting the documents has established his need for the documents and their relevancy to the issues, and if so, whether the production would be contrary to the public interest or adversely affect the rights of any person.

The procedure followed by the staff in this case was to send all documents as to which privilege was claimed to the Board and to give to intervenors only a description of the documents by category. The Board notes that this procedure, although it does seem to comply with the regulations, puts the initial burden on the Board of deciding need and relevance, and makes it difficult for the

* Subject to the provision of 10 CFR 2.744(e).

person seeking the documents to make a showing of need. The Board does not feel that intervenors have been prejudiced in this case but does note that the procedure followed creates what may be unnecessary complications.

I. As to documents withheld in toto.

The Board has examined the documents and finds that with a few possible exceptions they are "internal working papers" within the meaning of 10 CFR 2.4 (o), and, therefore, exempt from disclosure except in accordance with 10 CFR 2.744 (d). The only possible exceptions are letters and reports to and from Commission consultants; it is not clear to the Board that the reasons which support the withholding of intra-agency or inter-agency reports also support the withholding of communications with consultants. However, since the Board feels that these documents should be disclosed in any event, it does not reach that question.

Turning to the question of whether the documents, although within the class of internal working papers, should be disclosed, the Board has found the decision difficult. "Need" and "relevance" and "public interest" are elastic concepts. In balancing the various considerations, the Board has been mindful that the proliferation of interventions in licensing proceedings is a reflection of frustration on the part of many members of the public that the public voice is being inadequately considered. However ill-founded that

feeling may be, it seems clear that denial of access to documents, except for good reason, will only enhance the frustration. Accordingly, the Board should not, in our view, construe the requirement of need or relevance too narrowly. For example, many of the documents withheld relate to the effects on Dow products of the use of process steam under the earlier proposal for a "secondary" steam-supply system. The substitution of a tertiary system makes much of the earlier consideration moot and perhaps "unnecessary." Nevertheless, the Board feels that these documents should be disclosed.

Accordingly, the Board is of the view that all of the documents withheld are relevant and needed; and, further, that the production of these documents would not be contrary to the public interest, except in the following cases:

A. AEC -- ACRS documents.

These include reports by the staff to the ACRS, drafts of reports, memoranda of ACRS conferences and agenda of ACRS meetings. The Board is of the view that the ACRS review is uniquely dependent on informal communication of views and that its functioning would be materially impaired -- with serious injury to the public interest -- if documents of this kind were made available. The substance of the ACRS position on these reactors is contained in their reports which are public records, and questions which are not specifically raised

in their reports are reflected in the questions raised by the staff. In the circumstances the public interest clearly outweighs the need of the intervenors. Documents in this group include the following:

1] Letters dated November 12, 1970; September 11, 1970; August 10, 1970; June 5, 1970; May 6, 1970; March 6, 1970, from Peter Morris to Joseph Hendrie with the attached Reports to ACRS.

2] Letters dated January 24, 1969; January 8, 1969 from Morris to Stephen Hanauer, with attached Reports to ACRS.

3] Memo dated February 12, 1970 from Moore to Muller and attached material for inclusion in ACRS report.

4] Memo dated February 12, 1970 from Dromerick to Muller and attached material for inclusion in ACRS report.

5] Memo dated February 10, 1970 from DeYoung to Muller and attached material for inclusion in ACRS report.

6] Memo dated February 4, 1970 from Dromerick to Muller, and attached material for inclusion in ACRS report.

7] Memo dated February 2, 1970, from Rosen to Muller and attached material for inclusion in ACRS report.

8] Memo dated February 18, 1970, from Allenspac to Murphy, and attached material for inclusion in ACRS report.

9] Agenda for ACRS meeting dated April 15, 1970.

10] Memo dated April 27, 1970 from DeYoung to Morris, being a report on the ACRS subcommittee meeting.

11] Memo dated May 15, 1970, Case to Morris and attached list of questions.

12] Memo dated April 25, 1969 from Morris to several people re Review Plan.

13] Memo dated October 21, 1969 from Boyd to Morris (but not the attached memo from Muller).

14] Memo dated October 23, 1969 from Morris to Beck.

15] The second and third paragraphs of the memo of December 2, 1968 from Muller to DeYoung.

B. Communication between the staff and the Commission.

These communications do not contain information not available elsewhere, and in view of the need to preserve open communications by the staff to the Commission, the claim will be sustained.

Documents in this group include the following:

1] Memo dated November 21, 1968, Beck to Commissioners, and attached memo of telephone conversation.

2] Memo to files dated November 6, 1968, September 17, 1968 and September 19, 1968, by W.B. McCool Secretary of the Commission.

3] Memo dated October 31, 1968 from Price to Commissioners with attached memo to files.

4] Memo dated October 10, 1968 from Beck to Commissioners.

5] Memo dated September 16, 1968 from Price to Commissioners

6] Draft memo dated September 11, 1968 by Western of Price memo to Commissioners.

7] Memo dated July 23, 1968, Price to Commissioners.

8] Memo dated July 27, 1970, Price to Commissioners.

9] Memo dated February 25, 1970, Price to Commissioners.

C. Miscellaneous.

Consistency with the decisions on questions involving confidential communications in part II, below require sustaining the claim of privilege with respect to the following documents:

1] The second paragraph of item "1" in the memo dated January 30, 1970 from Cardone to Howe.

2] Memo to files dated November 15, 1968 from Forrest Western.

D. Documents produced but with some of the contents deleted.

Consistently with the policy set forth in Section A above, the Board believes that the entire document should be produced in all cases except the following:

1] Memo dated January 19, 1969 from Dromerick to Morris. The material deleted pertains to other facilities and is not relevant to this proceeding.

2] Memo to Files from Cunningham dated May 12, 1970. The material in the first deleted paragraph on p. 1 of the memorandum was appropriately deleted as based upon confidential communication.

3] Memo dated December 9, 1968 from Hale to Boyd. The material in the second and third deleted paragraphs on p. 2 was appropriately delcted as based on confidential communications.

Before this order becomes final, the Director of Regulation may object to the production of any documents on the grounds specified in 10 CFR 2.744(e). If he does object, his objection will be certified to the Atomic Safety and Licensing Appeal Board for decision. In view of the time schedule for this proceeding, it is hoped that a prompt determination will be made, and that any documents as to which no objection is to be made will be promptly released.

For the Atomic Safety & Licensing Board

May 19, 1971

Arthur W. Murphy, Chairman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Order with Respect to Documents as to Which Privilege Is Claimed by AEC Staff dated May 19, 1971 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of May 1971:

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