

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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Docket Nos. 50-329  
50-330

STAFF MEMORANDUM IN SUPPORT OF ITS RENEWED  
MOTION FOR CERTIFICATION OF THE LICENSING BOARD RULINGS  
EXCLUDING STAFF'S WITNESSES FROM THE HEARING

The Staff submits this Memorandum in support of its renewed motion for certification of the Licensing Board's ruling in this proceeding excluding Staff witnesses from the hearing room.

I.

The issue of witness exclusion first arose in this proceeding on November 30 when counsel for the Intervenors moved for a general rule excluding prospective witnesses during testimony (Tr. 129). The Licensing Board ruled that the motion be made at the time each witness was called. (Tr. 130). When the first applicant witness was called, the Licensing Board granted counsel for Intervenors' motion to exclude prospective witnesses, other than one expert advisor for each party, from the hearing room during oral testimony. (Tr. 198-200). The motion did not prevent the prospective witnesses from discussing the transcripts. (Tr. 202).

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Since the time of the Staff's initial motion for certification, the Licensing Board has entered a number of other witness exclusion orders in response to motions of Intervenor's counsel. Thus, with respect to the testimony of Mr. Keeley a licensee witness on the effects of delay (Tr. 594-601), Mr. Heins, a licensee witness on the need for electrical power (Tr. 1649) and Mr. Bickel, another licensee witness on the need for electrical power (Tr. 1966), exclusion orders were granted which were essentially similar in terms and in effect to the previous orders described above. With respect to the testimony of Mr. Howell, of the licensee and Messrs. Temple and Orifice of Dow Chemical, regarding the Dow-Consumers relationship, a more comprehensive sequestration order was entered (Tr. 1553). In addition to the exclusion of other prospective witnesses, the witness on the stand was directed not to discuss his testimony or the transcript with anyone other than his counsel, and Dow and Consumers' counsel were advised that other Dow and Consumers prospective witnesses were not to be informed about the witnesses' testimony. The Staff witnesses, however, were free to discuss the testimony among themselves and the issues and topic addressed in the testimony with others. (Tr. 1635).

Intervenor's counsel made a witness exclusion motion with respect to the testimony of Mr. Crocker, a staff witness with respect to the revised ACRS letter, but the motion was denied by the Board

(Tr. 4130). No other motions were made by Intervenor's counsel and thus witness exclusion orders were not in effect during the testimony of any of the Staff witnesses.

The Staff submits that the Licensing Board has failed to supply a reasoned explanation as to what purpose its exclusion rule is designed to serve; why those rules can be appropriately applied to the Staff witnesses, in light of the unique role performed by the Staff in the licensing process; and why the exclusion of witnesses makes any sense in the absence of restrictions upon their conduct outside the hearing room.

## II.

In ALAB-365, the Appeal Board made the "surmise" that the purpose of the Licensing Board's exclusion rules had been "to insure the credibility of subsequent witnesses by preventing them from deliberately fashioning their testimony in such a way as to support the testimony of those who preceded them" (p. 2). This understanding of the possible purpose of the exclusion rule was entirely consistent with the purpose which emerges from an examination of the case law and treatises with respect to witness exclusion in judicial proceedings. Thus, for example, Wigmore suggests that the exclusion rule is an instrument "to detect falsehood in testimony by exposing inconsistency."<sup>1/</sup> It is explained further that the rule in essence prevents "one prospective

<sup>1/</sup> Wigmore on Evidence, §1837, 1976 ed.

witness from being taught by hearing another's testimony."<sup>2/</sup>

In response to the Appeal Board's request for a statement of rationale, the Licensing Board has now made quite a different statement of purpose from the traditional one. The Licensing Board has now explained that "the rationale for the exclusion is that the spontaneity of the persons testifying is encouraged by the absence of those who may be known by the witness to agree or disagree with his position." Thus, the Licensing Board is suggesting that the exclusion rule is useful not in assuring the truthfulness and spontaneity of the testimony by prospective witnesses who will follow the witness on the stand, but rather that it is useful in assuring the spontaneity of the witness on the stand. While this is an explanation which at least conceivably could justify witnesses' exclusion without accompanying restrictions on the reading of transcripts and subsequent discussion among the witnesses (we discuss that question more fully below), the explanation raises other serious questions as to whether there has been a reasoned exercise of the Licensing Board's discretion.

The Licensing Board's rationale appears to rest upon amateur psychologizing which has no visible support in case law or legal writing. On its face the theory seems subject to some serious questions. It should be noted first of all that in the main, we are dealing with the

<sup>2/</sup> Wigmore on Evidence, §1834, 1976 ed.

testimony of professional people with considerable experience in their fields and at least a passing familiarity of the manner in which this Commission's licensing and hearing process works, rather than with the testimony of naive or uninformed lay witnesses. As a general matter, it simply does not seem credible that the testimony of such witnesses is likely to be significantly inhibited by the knowledge that there are present in the hearing room persons who agree or disagree with their testimony.

Even if the theory may have some validity in particular situations which arise in NRC hearings, the Licensing Board appears to be applying it here indiscriminately. Thus, while one might possibly imagine that the testimony of one Dow witness might be inhibited by the presence of other Dow witnesses, it does not seem credible to suggest that the testimony of a Dow witness may be inhibited by the presence of prospective Staff witnesses. Even among witnesses representing the same party, a reasoned application of the theory seems to call for some discrimination as to relationships among witnesses. Thus, for example, if the testimony of an inferior official might conceivably be inhibited by the presence of his superiors, the converse seems much less credible. Furthermore, the Licensing Board's rationale seems inconsistent with its application of the rule since no account has been taken in practice of the subject matter of testimony by the prospective witnesses. Thus, we cannot conceive how the testimony of witness A on issue A could be inhibited by the presence in the hearing room of prospective witness B on issue B.

Finally, if there is any reason at all to the Licensing Board's stated rationale, it would appear to have been applied much too narrowly. On that premise, the Board should have been concerned with the presence in the hearing room not only of prospective witnesses but also with non-witnesses whose presence might be calculated to inhibit the spontaneity of the witnesses' testimony. Thus, for example, during the testimony of Dow witnesses, there might well have been present in the hearing room other Dow officials, not scheduled as witnesses, to whom the witnesses had a more significant relationship than that which he had with the prospective Dow witnesses.

In short, we submit that it must be concluded that the Licensing Board's state of rationale is not well founded in the law, is not supported by any well recognized concept of human behavior, and in any event, has been applied in an unreasoned and indiscriminating manner.

### III.

Even if it were to appear that the Licensing Board's state of rationale for excluding witnesses had a germ of validity, its application to exclude the Staff's proposed witnesses from the hearing room must be regarded as arbitrary and unreasonable because it fails to take account of the countervailing policy favoring the presence of Staff witnesses. In our initial motion for certification we pointed out (pp. 5-8) that the

Board's exclusion rules had significantly restricted Staff's counsel access to technical advice and had impaired the effective performance of the Staff's role as an arm of the Commission. We noted that the Staff has continuing responsibility even after its evaluation of an application is completed to assemble and evaluate material new information which might bear upon conclusions previously reached. We noted that hearings before the Licensing Board are one of the principal means whereby material information is gathered and that "the exclusion of Staff witnesses from the hearing room necessarily impair their immediate and direct access to sources of information which they may need to fulfill their continuing responsibilities to the Commission." (P. 7).

In its response to this Board's request for clarification, the Licensing Board has merely stated without elaboration that "we see no distinction between the presence of Staff witnesses or of those of other parties." Thus, the Licensing Board totally failed to address itself to the important policy considerations outlined in the Staff's motion for certification and, so far as it appears, made no balancing of the perceived advantage of a witness exclusion rule in promoting spontaneity against the very real harm which the exclusion of Staff witnesses would do to the Staff's effective performance of its assigned role.

The Staff's experiences under the witness exclusion rule since the time of its initial motion for certification has confirmed that the exclusion rule as applied by the Board does in fact impair the Staff's effective performance of its role. For example, during the testimony of one Applicant witness, Mr. Keeley, Staff counsel brought to the attention of the Licensing Board that there were two additional prospective Staff witnesses just "down the corridor" which would assist the Staff in reviewing Mr. Kelley's testimony but could not because of the sequestration order. (Tr. 3672). The sequestration order during Mr. Kelley's testimony was eventually lifted. (Tr. 3677, 3681). In addition, Staff counsel had to reserve an objection as to certain documentary evidence since the Staff expert was not available to review the material due to the sequestration order.<sup>3/</sup>

We submit that whatever conceivable advantage the exclusion of prospective Staff witnesses could have in encouraging the spontaneity of the witness testifying must be far outweighed on a reasonable balance by the detriment it does to the effective performance of the Staff's role as an arm of the Commission.

<sup>3/</sup> Tr. 3655. A policy of sequestration may create needless delay if Staff provides advice to counsel for additional cross-examination after reading transcripts, thereby causing witnesses to be recalled and risking the loss of the spontaneity sequestration was designed to obtain.

IV.

On its face, the rationale which the Licensing Board stated appears not inconsistent with the limited nature of the restrictions imposed--that is, restrictions which exclude other prospective witnesses from the hearing room while a witnesses' testimony is ongoing but do not restrict other prospective witnesses from reading the transcript or discussing the testimony among themselves. If one pursues the matter somewhat further, however, very real questions arise as to whether the Licensing Board's exclusion orders are rationally related to its stated purpose.

The Licensing Board evidentially has assumed that at least some witnesses may have such fragile wills that the mere silent presence of persons who may agree or disagree with their testimony will have an adverse effect upon its spontaneity. If there is any basis for such a concern, it would seem to argue in favor of the sequestering of a witness during his testimony equivalent to the kind of isolation which a jury enjoys throughout a trial. That is, it would seem necessary to isolate the witnesses on the stand from any contact with other prospective witnesses (and indeed from any representative of any party in interest) during the entire period that he is on the stand. It does not seem rational to be concerned about the intimidating effect which may result from the silent presence of some persons in the hearing room but to be entirely unconcerned about whether those persons meet with the witnesses during

the lunch break and discuss his ongoing testimony with him. In short, we submit that even assuming the validity of the Licensing Board's novel rationale, the value of the exclusion orders is still "at best problematic and at worst a nuisance." (ALAB-365, p. 3).

V.

We emphasize that the foregoing arguments are discussed solely at demonstrating the complete lack of justification for excluding prospective staff witnesses during the course of the hearing. We do not intent to suggest that the Licensing Board could not have reasonably exercised its discretion to impose a sequestration rule, based upon the traditional rationale suggested in ALAB-365, with respect to certain fact-type witnesses. We have particular reference to the testimony of a factual nature by Dow Chemical and Consumers' witnesses as to the nature of the Dow-Consumers contract relationship. A Licensing Board could reasonably have concluded that some measures to assume the spontaneity of factual testimony on the subject were justified.

To the extent that they are not reflected in documents produced during discovery and available to all parties, the facts concerning the Dow-Consumers relationship are possessed only by Dow and Consumers' officials. While the Staff experts have had the responsibility of looking into the nature of that relationship, they have no independent direct knowledge of the facts. Rather, their function is to make an expert analysis of the facts assembled from the first-hand sources. Thus, the exclusion of

the Staff witness during the testimony of Dow and Consumers officials has served no legitimate purpose of preserving spontaneity of testimony. On the contrary, that exclusion has impaired the effective operation of the regulatory staff.

If there was ever a time when it was necessary for Staff witnesses to be present during this hearing, it was during the testimony relating to the Dow-Consumers relationship.<sup>4/</sup> Serious allegations<sup>5/</sup> involving impropriety in the preparation of testimony relating to the Dow-Consumers relationship have been made by the Intervenor. Mr. Temple, himself, implied that his testimony neither provided all relevant information nor was "open" or "honest".<sup>6/</sup> Staff presence was needed to obtain immediate and direct access to the information concerning the Dow-Consumers relationship. Exclusion of Staff proposed witnesses hindered the Staff in necessary information gathering and should not have been permitted absent some clear demonstration that an overriding purpose would be served.

## VI. CONCLUSION

Accordingly, the Staff submits that the issuance of exclusion orders applicable to the Staff was an abuse of discretion because the Board's

<sup>4/</sup> The Dow-Consumer relationship is material to the issues of changed circumstances concerning the need of the Dow Chemical Company for processed steam and the impact of the continued operation of the Dow's fossil fuel generating facilities remanded for further consideration by Aeschliman v. NRC, (D.C. Cir., July 21, 1976).

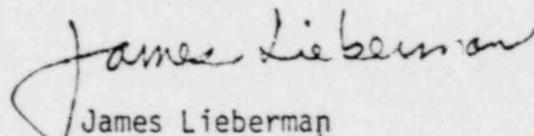
<sup>5/</sup> Memorandum of Intervenors, other than Dow Chemical Company, concerning pending issues (December 31, 1976).

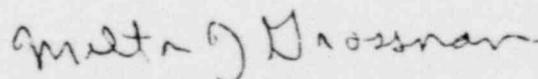
<sup>6/</sup> Tr. 2307.

rationale is inapposite to the Staff in this case and because the rulings needlessly hindered the Staff in the performance of its assigned regulatory responsibilities.

Since the Suspension and Remanded proceedings are not yet completed and the Licensing Board continues to view with favor sequestration orders, the issues raised herein are matters of continuing importance which warrant this Board's immediate review. A prompt and final decision on the appropriateness of the Licensing Board rulings is important for the protection of the public interest and to avoid serious prejudice to the interests of the Staff. We urge this Appeal Board to establish guidelines regarding the sequestering of witnesses so that the Staff will not be hindered in the absence of a compelling need, from carrying out its regulatory responsibilities.

Respectfully submitted,

  
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Counsel for the Staff

  
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Chief Hearing Counsel

Dated at Bethesda, Maryland,  
this 18th day of February, 1977.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RENEWAL OF NRC STAFF'S MOTION AND MEMORANDUM FOR DIRECTED CERTIFICATION OF LICENSING BOARD'S RULINGS EXCLUDING STAFF'S WITNESSES FROM HEARING ROOM," in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class or air mail, this 18th day of February, 1977:

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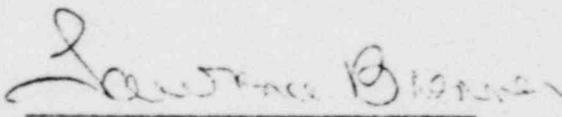
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