R.9. Files

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Michael C. Farrar, Chairman
Dr. Lawrence R. Quarles
Richard S. Salzman

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

Messrs. Milton J. Grossman and James Lieberman for the Nuclear Regulatory Commission staff.

Mr. Myron M. Cherry, Chicago, Illinois, for the intervenors, Saginaw Valley Nuclear Study Group, et al.

MEMORANDUM AND ORDER

March 4, 1977

(ALAB-379)

The staff has renewed its request that we step into this post-construction permit proceeding[1] in the midst of trial and disapprove the Licensing Board's practice of excluding prospective staff witnesses from the hearing room while other parties' witnesses testify.[2] We have an

1/ The proceeding was convened by the Commission in the wake of Aeschliman v. NRC, ___ F.2d ___ (D.C. Cir., Nos. 73-1776 and 73-1867, July 21, 1976) certiorari granted, ___ U.S. ___, February 22, 1977.

2/ The request comes to us by way of a motion for directed certification (a procedure first held permissible in Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-271, 1 NRC 478 (1975)).

aversion to interfering with a trial board's conduct of a hearing. Here, however, there appears to be no warrant for the Board's sequestration of staff witnesses; more importantly, its continuing series of rulings threatens to impede rather than to assist the search for truth. We reluctantly conclude that the Board below has abused its discretion and that the public interest requires corrective action now; accordingly, we instruct the Board to abandon the course it has thus far followed with respect to the exclusion of staff witnesses.[3/]

1. When this matter first came before us[4/] we surmised that the Board was sequestering all parties' prospective witnesses for the customary purpose of "insur[ing] 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."[5/] Because other considerations -- e.g., the Board's failure

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3/ The Board has excluded other parties' prospective witnesses as well. Those parties, however, have not pursued the matter before us (see fn. 9, infra).

4/ The staff's original motion was filed on December 17, 1976, after less than a week of hearings had taken place.

5/ ALAB-365, 5 NRC ____ (January 18, 1977) (slip opinion, p. 2).

to impose the usual restraints against the witnesses' reading the transcript of prior testimony -- left us unsure that this traditional reasoning underlay the Board's action, we remanded the matter to the Board so that it could inform us of the "precise rationale for the unusual rulings objected to."[6/] In that connection, we suggested that, in light of the particular circumstances of the case, there might be a distinction drawn between the witnesses for the staff and the witnesses for other parties.[7/]

On February 7th, after another two weeks of hearing had been held, the Board responded by declaring that it was continuing to exclude witnesses for all parties because in its view "the spontaneity of the person testifying is encouraged by the absence of those who may be known by the witness to agree or disagree with his position."[8/] It

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6/ Id. at ___ (slip opinion, pp. 2-3).

7/ Consumers Power had filed a short statement joining in the staff's motion and asking that relief be extended to its witnesses as well.

8/ In some instances, the Board below seems to be taking a more traditional approach to sequestration, i.e., using it for what the commentators say is the purpose of "preventing one prospective witness from being taught by hearing another's testimony." See VI Wigmore (3rd ed.) §1838, p. 352. Specifically, it has informed us that "when the witnesses closest to the Dow-Consumers relationship have testified, we have imposed a more stringent rule; [in addition to excluding them from the hearing room] we have barred discussions among themselves and reading of the transcript." Nothing said in this decision should be taken as being in any way critical of that practice in those circumstances.

thought that a "more revealing account" of the past and future course of the "Dow-Consumers relationship" (which is at the heart of one aspect of the present proceeding) might thereby be obtained. The Board added that it perceived "no distinction between the presence of Staff witnesses" and "those of other parties."

In renewing its motion with us, the staff attacks the Board's rulings both in the abstract and as applied to its witnesses. The utility company, which initially joined in the staff's motion and asked that we grant relief to its witnesses also, has not renewed its motion.[9/] We therefore consider the impact of the Board's rulings only insofar as they affect the staff.

2. We stress at the outset that if the only adverse impact of those rulings was that they were inconveniencing the staff witnesses we would not be inclined here either (1) to exercise our authority to intercede in Licensing Board proceedings on an interlocutory basis or (2) to reverse

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9/ On February 11th, we told the parties that the requests for certification would be deemed denied unless renewed by February 18th. ALAB-373, 5 NRC ___. The staff, but not Consumers Power, renewed its motion. Before it did, several more days of trial had taken place. The hearings have since been in recess and are scheduled to resume on March 7th.

the rulings of the Board below. As to the first point, the need to conserve our own time and resources, as well as our respect for the need of the trial boards to be free from undue interference in the conduct of their proceedings, call for us to exercise our authority only in extraordinary situations. Secondly, even a large degree of disaccommodation of the parties and their witnesses is a tolerable price to pay for a measure which a Board has reason to believe might aid it in ferreting out the truth; that the measure causes inconvenience does not of itself justify our inquiring into whether it is necessary or even useful.

What is involved here, however, is not merely inconvenience. On the contrary, the Board's rulings threaten to impede rather than aid the full development of the record. There is, then, justification both to review these rulings now and, as it turns out, to reverse them.[10/]

10/ The intervenors, at whose behest the sequestration rulings have been issued, suggest that we should not become involved at this interlocutory stage because "the issue here is not novel nor unique." We disagree. Sequestration for the reason given and under the conditions established by the Board is, to our knowledge, unique in the annals of nuclear licensing and perhaps in other forums as well. Neither the Board below nor the intervenors have cited to us any other instance in which witnesses have been excluded from a hearing room for the reason stated by the Board and without any limitations being placed upon their conversing among themselves or reviewing the transcripts.

a. We begin by analyzing the differences between the practices usually followed at our hearings and those familiarly employed in adjudication elsewhere. The Board below apparently did not attach great significance to any such differences, for it said indiscriminately that sequestration orders are "commonplace in other forums." That they may be. Indeed, as the Board noted, such orders may even have to be granted now as a matter of right, not just of discretion, in the federal courts.[11] But this overlooks that even in the courts parties are free to argue that expert assistants should be permitted to remain.[12] Moreover, in any event it misses the point -- judicial procedures should not be imported into the administrative arena uncritically,[13] and the sequestration rule is one that has to be

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11/ Rule 615, Federal Rules of Evidence, and the accompanying Advisory Committee's Note.

12/ See 3 Weinstein's Evidence ¶ 615[01], p. 615-8, commenting on who may be exempted from the exclusionary rule: "Experts needed to advise counsel on technical matters, as for instance in tax or patent litigation, might also qualify * * *" under the exemption for "a person whose presence is shown by a party to be essential to the presentation of his cause." This exemption appears to place no limit on the number of persons who might qualify under it.

13/ Of course, we have ourselves often been guided by the rules and practices followed by federal courts. See, e.g., Public Service Co. of Indiana (Marble Hill Units 1 and 2), ALAB-374, 5 NRC ___, ___ (February 11, 1977) (additional views of Mr. Farrar, joined in by the entire Board, slip opinion, p. 4). But before guidance can be taken from judicial proceedings, there must be inquiry into whether the situations are truly similar. See, e.g., Duke Power Co. (Catawba Units 1 and 2), ALAB-355, NRCI-76/10 397, 402-05.

applied with a sensitive concern for the special nature of our proceedings.

In this connection, the direct testimony of witnesses in nuclear licensing hearings is usually prefiled in written form so that all the other parties -- as well as all potential witnesses -- know in advance the basic position to be taken by each witness. In many instances the direct testimony is prepared and presented not by just one person but by a panel of witnesses, no one of whom possesses the variety of skills and experience necessary to permit him to endorse and to explain the entire testimony. For similar reasons, counsel conducting the cross-examination of a witness or a panel of witnesses often needs the assistance of his own battery of experts. As all concerned recognize, under long-standing federal court practice one representative of a party that is not a natural person is routinely exempt from sequestration even in the simplest of cases in order that he may assist counsel.[14/] The Board below accordingly exempted one such person here. But in our proceedings --

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14/ See Weinstein (fn. 12, supra) at pp. 615-1 - 615-2, quoting the Senate Judiciary Committee's clarifying statement on the purpose of the exemption, granted by both past practice and the Rule, to "an officer or employee of a party which is not a natural person designated as its representative by its attorney."

as well as in complex litigation elsewhere -- it is not usually the presence of any one person which counsel needs; rather, he needs the assistance of several experts, collectively skilled in all the topics under discussion.

It is for precisely this reason that the staff is challenging the Board's rulings. The staff claims that it is not sufficient for it to have just one expert available during the cross-examination of the other parties' witnesses. Nor does the staff believe it remedies the situation for the Board to permit (as it has done) the staff's other experts to read the transcript of the proceedings after each day's session, for at that point it may be too late to suggest alternate lines of inquiry that might expose deficiencies in the testimony.

We agree with all the staff says in this regard. The highly technical and complex nature of our proceedings will in many instances demand that counsel have a number of expert assistants ready to aid him during cross-examination of other parties' witnesses. Counsel is entitled to this aid unless there is serious reason justifying the denial of it.

In short, the Board's rulings could hamper the staff's ability to contribute to the development of a sound record. Those rulings can remain standing, then, only if there is some countervailing purpose which they serve, i.e., if in some other way they might enhance full disclosure of all relevant evidence.

b. We frankly do not perceive any such useful purpose here. To be sure, one might envision situations in which a witness could be deterred from testifying fully by the presence in the courtroom of those able and likely to take physical or economic reprisals against him. But we fail to see how the staff could be placed in this category. And in any event the Board's rulings were not carefully drawn to eliminate the presence of persons who might fit into it. Instead, the rulings were both too broad and too narrow to be suitable for that purpose.

Specifically, they were overbroad because they were addressed to all prospective witnesses, without regard to what their relationship to the witness testifying might have been. Thus, while the rulings might have hit some potential targets (e.g., the supervisors of Dow or Consumers

employee-witnesses[15]), they also bore heavily -- and unnecessarily -- upon staff witnesses who have in no way been shown to be in a position to exert a chilling effect upon any other witnesses.[16] At the same time, the rulings were too limited, for they might have missed other persons who, although (at least theoretically) in a position to apply an undue influence on a witness, would not be excluded because they were not themselves scheduled to appear as witnesses.

15/ We refer to people in such positions for illustrative purposes only, i.e., to exemplify the type of relationship that could conceivably give rise to the danger the Board was attempting to avoid. In no way do we wish to be understood as expressing an opinion as to whether any sinister influence has resulted from the involvement in this case of any particular individuals.

16/ The Board has not attempted to justify the exclusion of staff witnesses under the traditional type of sequestration order. Compare fn. 8, supra. For all that appears, the crucial matter now in controversy before the Board -- i.e., the course of the Dow-Consumers relationship -- involves testimony as to past events as to which the staff was not a participant. Thus, the traditional purpose to be served by a sequestration rule would not appear to be furthered by exclusion of staff witnesses in this case. But we do not place any prospective limits on the exercise of the Board's discretion in this respect, other than to say that, of course, any invocation of the rule against the staff witnesses must be justifiable under -- and carefully explained in light of -- the appropriate governing principles, including those discussed in this opinion.

In sum, insofar as the staff's prospective witnesses are concerned, we discern no basis upon which it could fairly have been concluded that their removal from the hearing room during other witnesses' testimony might in any measure encourage spontaneity. Nor will it otherwise lead to the development of a better record.[17/] Rather, as we have seen, there is serious reason to believe that their absence could have precisely the opposite effect.[18/] Accordingly,

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17/ In seeking the orders now being challenged, intervenors argued that credibility is important here. It may well be that the credibility of witnesses on essentially factual matters (as contrasted with the validity of their expert opinions on technical subjects) takes on more significance here than in the ordinary case. But if that is true, and if there is a danger of improper collaboration on testimony, the measures challenged by the staff are not the ones to employ to avert that danger (see fn. 8, supra).

18/ We have in the past repeatedly made the point that its particular status does not entitle the staff to be treated any differently from the other parties to these proceedings. See Consolidated Edison Co. of New York (Indian Point Units 1, 2 and 3), ALAB-304, NRCI-76/1 1, 6 (text accompanying fns. 13-15) and cases there cited. (But cf. Public Service Co. of New Hampshire (Seabrook Units 1 and 2), CLI-76-17, NRCI-76/11 451, 462, dealing with the Commission's consideration, in connection with a motion to suspend construction permits, of a "revised environmental survey" of the fuel cycle carried out by the staff -- independent of its participation in any particular licensing proceeding -- "at the explicit direction of the Commission, * * * focused along lines set forth by the Commission, and * * * subject to ongoing Commission guidance during its preparation.") In this instance, however, their witnesses are in a different position with respect to the issue being tried than are the witnesses of Consumers and Dow. This justifies their being given disparate treatment for the limited purpose under discussion.

we must instruct the Board to abandon the course it has followed when it has excluded staff witnesses.19/

The staff's motion for certification is granted; further proceedings before the Licensing Board shall conform to the views expressed herein.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD .

Margaret E. Du Flo
Secretary to the
Appeal Board

19/ Intervenors, who had little to say about why we should not interfere at this stage (see fn. 10, supra), have furnished us with virtually no defense of the merits of the Board's rulings. While they do assert that "the record below discloses multiple events of a lack of candor on behalf of" the staff, they made no effort to point us to even one of those events. We are disinclined to credit an unsupported assertion of this nature; in any event, even if true it would not support the Board's rationale.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
7th day of Mar 1977.

P. A. Dawkins
Office of the Secretary of the Commission

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