

Reg. 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))
_____))
(Midland Plant, Units 1 & 2)))
_____))

Docket Nos. 50-329 ✓
50-330

MEMORANDUM AND ORDER

February 11, 1977
(ALAB-373)

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

We have before us the staff's request that we invoke our extraordinary power to review now a series of interlocutory Licensing Board orders excluding certain prospective witnesses from the hearing room while other witnesses testify. Because, when the matter first came to our attention, we could not ascertain "the Board's precise rationale for the unusual rulings objected to," we held the matter in abeyance and asked the Licensing Board to tell us whether it intended to continue invoking the sequestration rule and, if so, its reasons for doing so. ALAB-365, 5 NRC ____ (January 18, 1977).

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On February 7th, the Board furnished us its response. It gave as its reason for continuing to exclude witnesses the statement that "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." With respect to our question as to whether there was reason to treat the staff witnesses differently than those of other parties (ALAB-365, fn. 2), the Board explained why it sees "no distinction between the presence of staff witnesses or those of other parties."

The Board also opined -- probably in response to our statement that "sequestering prospective witnesses in Commission hearings is not common" -- that it "had not thought an exclusion order so unique," for such orders are "commonplace in other forums." Almost invariably, however, the reason given in those forums for sequestering witnesses where credibility is in issue^{1/} is to insure that subsequent witnesses do not, subconsciously or otherwise, shape their testimony -- whether on direct

^{1/} In this proceeding, counsel for the intervenors supported his request for sequestration by arguing, inter alia, that the matters in issue here were such that the credibility of witnesses loomed large. See, e.g., Tr. 198, 595.

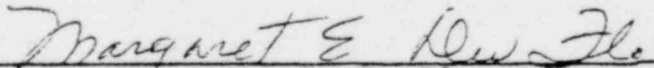
or cross-examination -- to conform to that of witnesses who have preceded them. Had that reason been given here, we would have been inclined, in light of the circumstances of this case, to reject the requests that we review the Board's rulings, particularly if that Board had decided to impose in all instances what it has characterized as the "more stringent rule" of barring the witnesses from "discussions among themselves and reading of the transcript."

Be that as it may, the question before us is not whether we would have acted just as the Licensing Board did had we been sitting in its place. That Board is much closer than we are to the problems involved in management of its hearings and must be given broad discretion to conduct the day-to-day proceedings before it in the manner it perceives as best calculated to elicit the truth. Accordingly, if we do not have in our hands by February 18, 1977, a renewal of the pending requests that we intercede, the petition for directed certification will be deemed denied. Any party renewing its request shall furnish us at the same time with a memorandum explaining why, in that party's view, it was an abuse of discretion for the Board below to conclude that the steps it has been taking, including exclusion of that

party's witnesses, will encourage "the spontaneity of the person testifying" and therefore afford greater assurance that the whole truth is being brought out.^{2/} Responses to any renewed requests are to be mailed by March 1, 1977.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD


Margaret E. Du Flo
Secretary to the
Appeal Board

^{2/} Of course, the memoranda may address such other topics as the parties deem appropriate to bring to our attention. We remind them that we still have their earlier papers; of course, the Board's rulings at those sessions of the hearing conducted subsequent to the issuance of our order, as well as the Board's written response to our order, may require that their arguments be cast in somewhat different terms.

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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
14th day of Feb 1977.

Pa Sawring
Office of the Secretary of the Commission

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