

2 NRC 6 (1975). In the present proceeding Consumers' motions to compel have been granted against three individuals, Mr. Naidu, Mr. Thornburg, and Mr. Fiorelli. These motions were granted pursuant to 10 C.F.R. 2.720(h). That provision provides that the only Staff witnesses who need be made available for depositions are those designated by the Executive Director for Operations. The one exception is when there are "exceptional circumstances", in which case the presiding officer may order NRC personnel to be made available for depositions. The regulation also provides an example of such exceptional circumstances.

"...the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director of Operations" 10 C.F.R. 2.720(h)(2).

In Appendix A to 10 C.F.R. Part 2 the regulations set out a statement of general policy and procedure for the conduct of construction permit and licensing proceedings. Part IV of the Appendix addresses discovery. The provision notes that in no event are "fishing expeditions" to be allowed. The Appendix continues that with the comprehensive body of information available through documents there should be a minimum need to resort to time consuming discovery procedures against the Staff. The Appendix also notes that interrogatories against

the Staff are available for information not obtainable elsewhere and depositions of Staff members are available on a showing of exceptional circumstances. It is, therefore, clear that, under the regulations, Consumers first line of discovery is intended to be documents; interrogatories a second method based on a showing of need, and depositions a final method available on the more restricted basis of exceptional circumstances. It is evident that it is difficult, if not impossible, to show exceptional circumstances unless it is first clearly shown that both documents and interrogatories fail to provide the information desired by the party seeking discovery against the Staff. Further, under the example provided in 10 C.F.R. 2.720(h) it must be shown that no other individual which has been made available could provide the desired information and that the information is material.

The relatively heavy burden which Appendix A and 10 C.F.R. 2.720(h) indicate for requiring depositions of the Staff has not been met by Consumers. Turning to Consumers' claim that they can't get the information from any other source, it is evident that such a showing has not been made. Although Consumers has alleged that a few named individuals from the Staff did not have the requested information, they have not established that none of the numerous witnesses made available to them had the desired information. Further, although Consumers may prefer depositions to interrogatories, the deciding factor is not preference. As Appendix A and 10 C.F.R. 2.720(h) demonstrated, Board

ordering of the deposition of a Staff witness is expected to be an exceptional occurrence.

The second part of the showing of exceptional circumstances in 10 C.F.R. 2.720 is that the information sought must be "material fact(s)." In defining the term "material" with respect to NRC regulations the Appeal Board has stated that to be material the fact must have the ability to influence the decision maker's disposition of an issue. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2) ALAB-324, 3 NRC 347 (1976). It is apparent that material facts do not constitute all facts which would come under the general relevancy requirements discussed in 10 C.F.R. 2.740(a)(1). The facts desired must have direct impact on the decisionmaker. They should not be insignificant or simply facts which could lead to the discovery of admissible information, as would be the case for discovery in general.

The information which Consumers seeks to obtain from Mr. Thornburg does not meet this materiality requirement. In the present proceeding the two basic issues are (1) were the facts on which the Staff based the December 6, 1979 order true and (2) are the proposed remedial actions adequate. To be material the information must be such as would affect the decisionmaker's resolution of those issues. Consumers wishes to depose Mr. Thornburg because he attended several meetings just prior to December 6, 1979 during which, they allege, there was a change in the Staff's position. Consumers has not established, either in their motion to compel or at the prehearing conference, how the information sought is

material to the truth or falsity of the facts in the December 9, 1979 order or is material to the adequacy of the proposed remedial work. It is difficult to imagine how the information requested by Consumers of Mr. Thornburg could be material to the issues which are a part of this proceeding. They have not identified any facts or even a general category of facts which would be known to Mr. Thornburg, which were not discoverable through other witnesses, documents, or interrogatories. In fact, it would appear that the only "category" in which they wish to question Mr. Thornburg is with respect to what he said to Mr. Case and Mr. Stello in two meetings held just prior to issuance of the December 6, 1979 Order. This would amount to interrogation directly concerning the deliberative processes of the NRC Staff and is privileged from discovery under the executive privilege. Consumers Power Company (Palisades Nuclear Power Facility) ALJ-80-1 (1980).^{1/}

It should be particularly noted that Darl Hood, NRC project manager for Midland, was in attendance at both of the subject meetings with Mr. Case and Mr. Stello. Mr. Hood was deposed by Consumers for 19 1/2 hours. If Consumers failed to ask Mr. Hood what meetings he had with the decisionmakers, that is an error in their deposition questioning, but

^{1/} The Staff notes that the motion to compel the deposition of Mr. Thornburg was received just prior to counsel leaving for the prehearing conference and there was no time for researching these issues to provide thorough response to the motion. While the Staff believes none of Consumers' requests for deposition should have been granted, the Staff reserves its exceptions as to Mr. Naidu and Mr. Fiorelli for later appeal since the deliberative process issue is not involved with respect to them.

should not be considered "exceptional circumstances" such as would override the deliberative process privilege and allow a compelled deposition against Mr. Thornburg.

The ruling as it now stands would render 10 C.F.R. 2.720(h) ineffective in limiting discovery if attendance at a meeting with a decisionmaker amounts to exceptional circumstances allowing compelled discovery against NRC personnel. Many NRC personnel, perhaps hundreds, have knowledge of such meetings and would be subject to discovery under such an interpretation of "exceptional circumstances" as appears in the Board's ruling. This interpretation makes 10 C.F.R. 2.720(h) ineffectual for preventing the "fishing expedition" Appendix A to 10 C.F.R. Part 2 indicates is to be avoided.

For the reasons stated above the Staff respectfully requests the Board reconsider its granting of Consumers Motion to Compel Harold Thornburg and deny that motion.

REQUEST FOR REFERRAL

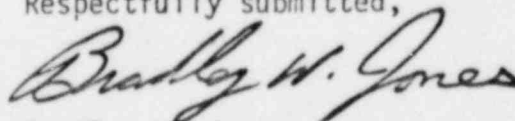
In the event that this Board denies the Staff's request for reconsideration, the Staff respectfully requests that the Licensing Board refer the question of compelling the deposition of Mr. Thornburg to the Atomic Safety and Licensing Appeal Board.

Under 10 C.F.R. 2.730(f) the Licensing Board may refer an interlocutory ruling to the Appeal Board when prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. In Public Service Company of Indiana, Inc. (Marble Hill Nuclear

Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 (1977) the Appeal Board held that discretionary review was appropriate when the ruling threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal. This is exactly the situation in the present case with respect to Mr. Thornburg. If the deposition of Mr. Thornburg is allowed, later appeal can not undo that deposition. The situation is particularly appropriate for immediate appeal as it involves allowing discovery into a privileged area as discussed above. Under such circumstances later review, as a practical matter, can offer no adequate remedy for the anticipated harm. Indeed, later review of such a situation as this may always be precluded due to mootness. Such a precedent could allow the weakening of the deliberative process privilege without hope of challenging the ruling through the appellate process.

For the above reasons the present ruling is particularly appropriate for referral to the Appeal Board under 10 C.F.R. 2.720(h). The Staff respectfully requests the Licensing Board, if it does not reconsider its January 29, 1981 ruling on the Motion to Compel the Deposition of Harold Thornburg, to refer the issue to the Appeal Board for immediate resolution.

Respectfully submitted,



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