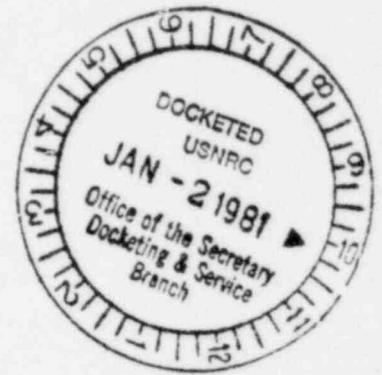


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Charles Bechhoefer, Chairman
Dr. Frederick P. Cowan
Gustave A. Linenberger



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JAN 2 1981

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

Docket Nos. 50-329 OM
50-330 OM
Docket Nos. 50-329 OL
50-330 OL

December 31, 1980

MEMORANDUM
(Concerning Telephone Conference Call)

On December 29, 1980, beginning at about 4:40 p.m. EST, the NRC Staff initiated a telephone conference call to discuss certain questions which had arisen with respect to discovery being undertaken by the NRC Staff and Consumers Power Co. (Applicant or CPC). The need for a call of this sort was dictated by the proposed scheduling of some of this discovery during the week of January 5-9, 1981, and the desirability of resolving the outstanding questions prior to that time. In addition to the three Board members, the following persons participated in the conference:

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Mr. Michael I. Miller, for the Applicant
Mr. Ronald G. Zamarin, for the Applicant
Mr. William J. Olmstead, for the NRC Staff
Mr. William D. Paton, for the NRC Staff
Mr. Myron M. Cherry, for Ms. Mary P. Sinclair, Intervenor
Ms. Barbara Stamiris, Intervenor
Ms. Sharon K. Warren, Intervenor
Mr. Wendell H. Marshall, for the Mapleton Intervenor

The Staff opened the conference by requesting the Board to require the Applicant to make available for deposition upon oral examination certain named individuals employed by contractors being utilized by the Applicant in the preparation of its case on the soil settlement questions. The Staff claimed (1) that the Applicant was insisting that subpoenas be issued to each of the contractor employees and (2) that witness fees be tendered to those employees. The Staff acknowledged that the Applicant previously had made available or agreed to make available various individuals for deposition (including contractor employees) but claimed that, after the Staff had filed its December 4, 1980, Motion for Protective Order, the Applicant had changed its position. The Staff also asserted that the NRC Rules of Practice permit the taking of depositions of third-party contractor employees.

The Applicant claimed that NRC regulations provide a different mode for discovery of parties and non-parties (including employees of a party's contractors) and that, in the latter case, subpoenas must be utilized. It acknowledged

that it heretofore had not insisted upon the issuance of subpoenas and that it favored voluntary and informal cooperation between the parties in carrying out discovery. It declared itself to be reluctant to continue the voluntary cooperation in light of what it asserted was the Staff's position that the Staff must determine for itself the particular witnesses who would be made available for deposition. One particular example referenced by the Applicant was the Staff's motion for a protective order, in which the Staff was seeking to limit the deposition of Mr. Joseph D. Kane. The Applicant also referred to its previously unsuccessful attempt to take the deposition of Mr. Gaston Fiorelli. (But it acknowledged that it never contacted the Board concerning Mr. Fiorelli and now no longer sought his deposition.)

The Applicant recognized that, technically, the regulations required it to seek Board permission to depose particular Staff witnesses (10 CFR § 2.720(h)(2)(i)). But it added that, if the Staff were to rely on such technicalities, the Applicant would also do so (by seeking subpoenas for the testimony of contractor representatives and by seeking the tendering of witness fees).

Mr. Cherry acknowledged that he was not a direct party to the discovery dispute between the Applicant and Staff; but he expressed the view that, in view of the safety significance of

the soils settlement questions, the technicalities of the discovery rules should not be utilized to circumscribe discovery in any way and that the Board should encourage, if not order, the fullest scope of discovery. Mr. Cherry urged us to deny the Staff's motion for a protective order and to order the Applicant and Staff to complete the discovery to which they informally had agreed. No other intervenor expressed a view with respect to the dispute between the Applicant and Staff.

At the outset, we noted that we would make no determination during the call concerning the Staff's motion for a protective order. The Applicant's response to that motion is not due to be filed until January 9, 1981.

After considerable discussion, we directed that discovery should continue on the informal basis upon which it had commenced. We expressed our view that the fullest scope of discovery was beneficial and that it should be carried on and completed expeditiously. We noted that the Commission's rule governing depositions upon oral examination permitted the deposition of "any party or other person" (10 CFR § 2.740a(a), emphasis supplied) and, accordingly, that there was no bar to the Staff's taking the depositions of employees of the

the Applicant's contractors.^{1/} We also pointed out that there were substantially similar payment provisions governing both subpoenas and depositions (cf. 10 CFR § 2.720(d) and § 2.740a(h)). In any event, the tendering of fees by the Government is not required. See 28 U.S.C. § 1825.

We agreed with the Staff that, technically, it could require Board approval as a precondition to the depositions of particular employees or consultants. 10 CFR § 2.720(h)(i). See also Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980). We noted, however, the obligation of the Staff to make available witnesses knowledgeable on the issues involved in the proceeding. Where it appears that the witnesses selected by the Staff do not have the requisite knowledge but that other named employees or consultants do, the Board urged the Staff to honor requests by the Applicant to depose such persons. The Applicant expressed some reluctance to be bound by the determination of the Staff in matters of this sort, but we indicated that we would take up any

^{1/} In that connection, we referred the parties to the Appeal Board's Stanislaus decision which, in our view, blurs any distinction which might have existed in discovery by oral deposition of parties and nonparties. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686-94 (1979).

differences between them at the prehearing conference scheduled for January 28-29, 1980. Our view of the Staff's obligations to make available knowledgeable witnesses would, of course, have a bearing upon our resolution of any such differences. We also stated that we expected the Staff to make a good faith effort to produce witnesses knowledgeable on all aspects of the matters at issue in this proceeding.

We reserved the right of the Applicant to raise the question of witness fees at a later time (most logically, at the prehearing conference); but we stated that the question would have to be considered in the context of all the witnesses who have been or will be deposed, not merely with respect to all or some of the witnesses who are yet to be deposed.

We approved the following depositions of Applicant and Staff witnesses (subject to the aforementioned understandings and reservations, and subject to alteration of the schedule to the extent agreed upon by the Applicant and Staff):

<u>Date</u>	<u>Name/Organization</u>	<u>Place of Deposition</u>
1/6/81	Mr. Rinaldi, NRC Mr. Keppler, NRC	Bethesda, MD Chicago, IL
1/7/81	Mr. Huang, NRC-Navy	Bethesda, MD
1/8/81	Mr. C. Gould, CPC	Flemington, NJ
1/13-14/81	Dr. Ralph Peck, CPC	Albuquerque, NM
1/14-15/81	Mr. M. T. Davisson, CPC	Champaign, IL

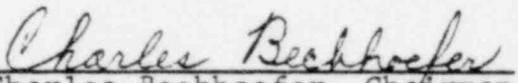
<u>Date</u>	<u>Name/Organization</u>	<u>Place of Deposition</u>
1/19-20/81	Mr. Otto, NRC-- Corps of Engineers	Detroit, MI
	Mr. Erickson, NRC - Corps of Engineers	Detroit, MI
	Mr. Gilray, NRC	Bethesda, MD
	Mr. Shumaker, NRC	Bethesda, MD
1/21-23/81	Dr. Chen, ITEK	Bethesda, MD
	Mr. Brammer, ITEK	Bethesda, MD
	Mr. Capucci, ITEK	Bethesda, MD
1/27/81	Mr. Hendron, CPC	Urbana, IL
no dates set	Mr. Wanzeck, NRC - Corps of Engineers	Ann Arbor, MI
	Mr. Lo, NRC - Corps of Engineers	Ann Arbor, MI
	Mr. Singh, NRC - Corps of Engineers (continua- tion of deposition under way)	Detroit, MI

At the conclusion of the conference, Ms. Stamiris, Ms. Warren and Mr. Marshall expressed concern about the recent Comptroller General decision which has resulted in suspension of the Commission's intervenor-assistance program. Ms. Stamiris mentioned that she had filed a motion on that question, and Mr. Marshall stated that he was preparing to do so. We indicated that we would consider those motions but our authority to provide intervenor assistance had been severely limited. We also indicated that the Commission was studying the question and perhaps would provide further guidance in this area.

The conference terminated at approximately 6:10 p.m. EST.

Any party who wishes to have us reconsider or correct any portion of this Memorandum may file a request within 5 days of service of this Memorandum (except that the Staff may file such a request within 10 days of service of this Memorandum) (cf 10 CFR § 2.752(c)).

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Charles Bechhoefer, Chairman
Administrative Judge

Dated at Bethesda, Maryland
this 31st day of December 1980.