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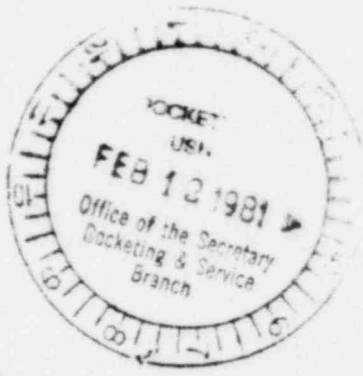

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

SERVED FEB 13 1981

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

February 12, 1981

MEMORANDUM AND ORDER
(Concerning Depositions of NRC Staff Members)

A. Consumers Power Co. (Applicant) has filed three motions to compel the depositions of named NRC Staff members: (1) a motion dated January 15, 1981, to depose Kamalaker Naidu (Office of Inspection and Enforcement, Region III); (2) a motion dated January 23, 1981 to compel the deposition of Harold Thornburg (Office of Nuclear Reactor Regulation, Bethesda); and (3) a motion, also dated January 23, 1981, to compel the deposition of Gaston Fiorelli (I&E, Region III). In each case the Applicant sought not only to take the requested deposition but also the assessment of certain costs against the NRC Staff. The NRC Staff opposed all three motions: it filed a written response dated January 27, 1981 with respect to Mr. Naidu, and it addressed all three motions at the prehearing conference commencing on January 28, 1981.

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On December 4, 1980, the NRC Staff filed a motion for a protective order to prevent the further deposition of Joseph Kane (Office of Nuclear Reactor Regulation, Bethesda). The Applicant opposed this motion by reply dated January 9, 1981. With our permission, the Staff on January 27, 1981 filed a response to the Applicant's reply.

The Board heard oral argument on all four motions at the prehearing conference on January 28-29, 1981.[1/]

With respect to Messrs. Naidu, Fiorelli, and Thornburg, the Staff generally took the position that, under NRC rules, the Staff could select any of its members to be deposed and that another party could not second-guess the Staff as to the choice of a witness. 10 CFR §2.720(h)(2). Although recognizing an exception for "exceptional circumstances," the Staff asserted that those circumstances had not been demonstrated. On the other hand, the Applicant pointed to specific areas of inquiry which Staff-designated witnesses were unable to address, as well as information tending to indicate that the named Staff witnesses had knowledge in such areas. As for Mr. Kane, the Staff claimed that his deposition to date had been unduly lengthy and repetitive, to the extent that further questioning would amount to harrassment. The Applicant claimed that Mr. Kane had been evasive or non-responsive during much of his deposition and that there were particular areas in which Mr. Kane had knowledge which the deposition had not yet reached.

1/ See Tr. 422-479, 631-634 (Naidu deposition); Tr. 485-525 (Fiorelli deposition); Tr. 537-546 (Thornburg deposition); Tr. 551-611 (Kane deposition). The Applicant's requests for fees were considered at Tr. 612-630, 634-647.

At the January 29, 1981 session of the prehearing conference, the Board rendered the following ruling on these motions from the bench (Tr. 699-704):[2/]

> The Board has decided to grant the motions of the Applicant to compel the depositions of Messrs. Naidu, Fiorelli, and Thornburg. We have also decided to deny the Staff's request for a protective order with respect to Mr. Kane, subject to certain requirements. We find that in each case the Applicant has demonstrated exceptional circumstances, within the meaning of 10 CFR §2.720(h)(2), to warrant the deposition or further deposition of the named individuals. Specifically, the Applicant has demonstrated, as contemplated by the foregoing regulation, that the named NRC employees have direct personal knowledge of material facts not known to the deponents heretofore made available by the Staff. In particular:
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> (1) The Board agrees that the Applicant should be able to question Mr. Naidu about the adequacy of the current QA program. Mr. Keppler, made available by the Staff, expressed no detailed knowledge of this subject (see, e.g., Tr. 462-465) but identified Mr. Gallagher and Mr. Naidu as having knowledge of different aspects of this area. Mr. Gallagher was apparently unable to address certain matters about which he was questioned. The deposition of Mr. Naidu may include (a) whether the QA program has been adequately modified, and will be adequately implemented, to prevent QA deficiencies of the type which have heretofore occurred, and (b) whether the particular QA deficiencies which have arisen with respect to the soils settlement problem have been adequately resolved.
>
> (2) Mr. Keppler also identified Mr. Fiorelli as the individual having knowledge of other QA matters. The Applicant should be able to question Mr. Fiorelli about (a) the SALP board meeting concerning the appraisal of the Consumers Power Company QA program for the Midland facility; (b) the Region III I&E review of non-conformance reports submitted in accordance with ALAB-106 (including the extent to which the NCR's reflect upon the Staff's QA questions which are at issue here); (c) Mr. Fiorelli's discussions or communications with Mr. Keppler on these matters; and (d) matters arising out of Exhibit ? of the Gallagher deposition.

2/ The transcript language has been modified slightly for clarity.

(3) Mr. Shewmaker, who was made available by the Staff, identified Mr. Thornburg as having particular knowledge in certain areas which Mr. Shewmaker did not possess. Mr. Thornburg should be made available to address (a) a meeting he attended on November 28, 1979, which the parties referred to in their oral argument before this Board, and (b) information he provided to, or discussions he had with, Mr. Stello and/or Mr. Case during the period between that meeting and the issuance of the December 6, 1979 modification order. Specifically, Mr. Thornburg may be questioned about whether, and if so in what respects, the Staff changed its position concerning remedial actions proposed by the Applicant to ameliorate the soils settlement problem.

(4) Although the deposition of Mr. Kane has been lengthy, we find no evidence of harrassment by the Applicant or bad faith by the Staff or Mr. Kane. Mr. Kane plays a significant part in this proceeding, concerning some very technical and complex areas. Mr. Kane should be made available for further questioning concerning (a) cracks in the concrete ring foundation for the borated water storage tanks; (b) the underground piping matter; (c) amendment 85 to the FSAR (at such time as Mr. Kane is prepared to address this subject); and (d) the line of questions which the Applicant attempted to commence at the conclusion of the deposition on December 4, 1980 (Volume VI, p. 403). In addition, Mr. Kane may be asked (for the record) sufficient questions to determine whether he has significant knowledge of the other subjects mentioned by the Applicant at the prehearing conference. If he does not, he need not attempt to answer questions on those subjects. (He also should then not be used as a Staff witness on those subjects.) With respect to the change of position reflected in the letter from R. L. Tedesco to the Applicant dated January 8, 1981, Mr. Kane may be asked whether he merely participated in that matter as a conduit or whether he had any substantive input. If the latter situation is the case, he may be questioned concerning that input.

The Board has decided to disallow the claim of the Applicant for costs and expenses. Although we are essentially rejecting the position of the Staff on the various motions, we find no bad faith in the Staff's asserting these positions. In addition, we find that the filing of motions to compel is the usual way contemplated by the Rules of Practice to obtain the testimony of particular Staff witnesses, and nothing in our telephone conference call changed that for this case. (We had hoped, however, to avoid this procedure if possible.) Moreover, the Applicant had indicated that it will take the deposition of Mr. Gilray in Bethesda during the next two or three weeks; to take two other depositions at that time would not seem to inconvenience it unduly. For that reason, we direct the Staff to make available Messrs. Kane and Thornburg at that time in Bethesda (if sought by the Applicant). Otherwise,

the depositions of Messrs. Kane and Thornburg shall be taken in Bethesda at a time mutually agreed by the Staff and Applicant. The depositions of Messrs. Naidu and Fiorelli shall be taken in Glen Ellyn, Illinois at a time mutually agreed by the Applicant and Staff.

The depositions shall be limited to the subjects indicated. We urge the parties to attempt to work out any differences of opinion amicably; if they cannot do so, they can ask us to resolve disputes. In doing so, we will be guided by our desire to permit parties to obtain all material information which they may need to develop their cases. We add, however, that we will not countenance open-ended interrogation of Staff witnesses.

B. On February 5, 1981, the Applicant initiated a telephone conference call to resolve a dispute which had arisen between it and the NRC Staff concerning the scheduling of the depositions which we had ordered. Participating were Mr. Ronald Zamarin for the Applicant and Mr. William Paton for the Staff. The Chairman was the sole Board member who was involved, since the other members were unavailable at the time. (See 10 CFR §721(d).)

The Applicant asserted that the NRC Staff was refusing to agree upon definite schedules for the depositions and had offered no explanation. The Applicant sought a definite schedule so that it could arrange its own schedule and make travel plans as necessary. The Staff explained (although it apparently had not previously informed the Applicant) that it was planning to file a motion for reconsideration of the earlier Board order.

The Board Chairman ruled that the Staff should schedule the depositions in question but that no depositions were to be taken until the Board had ruled on the reconsideration motion. The Board Chairman also stated that the Applicant need not respond to the Staff motion

unless asked by the Board to do so, and that any response requested would be through the medium of a telephone conference call (given the expedited discovery schedule which had been contemplated by the Board's discovery order).[3/]

C. On February 9, 1981, the Staff filed its "Motion for Reconsideration or Referral of Licensing Board's Rulings of January 29, 1981." In that document, the Staff sought reconsideration only of our ruling with respect to Mr. Thornburg. By limiting its motion in that respect, the Staff is leaving in effect our rulings compelling the depositions of Messrs. Naidu and Fiorelli and the further deposition of Mr. Kane. (The Staff has reserved the right to contest these rulings later on appeal, a course of action which will provide appellate review only after the depositions have taken place.) The Staff also asked us to refer our ruling to the Appeal Board should we determine to deny its reconsideration motion.

Both the Board Chairman and the Applicant received the Staff's motion the afternoon of February 9, 1981. Because the Board determined that the arguments of the Staff raised questions concerning certain aspects of our earlier order, we requested the Staff to arrange a telephone conference call on February 10, 1981 to discuss these questions. The Staff did so.

Judges Bechhoefer and Cowan participated in this call. Representing various parties were Messrs. Michael I. Miller and Ronald Zamarin for the Applicant, Mr. William Olmstead for the NRC Staff, Ms.

3/ Dr. Cowan concurs with this ruling.

Sharon Warren, pro se, and Mr. Wendell Marshall, for the Mapleton Intervenors.

In its reconsideration motion, the Staff challenged our earlier finding of "exceptional circumstances" with respect to Mr. Thornburg; it characterized the Applicant's attempt to depose Mr. Thornburg as a "fishing expedition" barred by 10 CFR Part 2, Appendix A, Part IV. The Staff also claimed that, under the regulations, the Applicant must first attempt to obtain information from the Staff through documents, next through interrogatories, and only if those attempts fail through depositions. The Staff would require a showing that "no other individual" made available by the Staff could provide the desired information "and that the information is material" (emphasis in original). In that connection, the Staff took the position that the only information possessed by Mr. Thornburg which might be material was subject to executive privilege and hence should not be discovered. The Staff also observed that the information as to which we found "exceptional circumstances" was known to other witnesses made available by the Staff; put another way, it asserted that "Consumers * * * [has] not established that none of the numerous witnesses made available to [it] had the desired information."

We will not at this point treat whether the Staff's understanding of the Rules of Practice accords with our own. For, subject to its undertaking to ascertain whether two other witnesses already designated by the Staff possess knowledge of the matters concerning which the Applicant wishes to inquire, the Applicant, in our

view, has demonstrated "exceptional circumstances," in the context of the discovery arrangements being followed in this proceeding, to warrant the deposition of Mr. Thornburg.

With its motion to compel Mr. Thornburg's deposition, the Applicant supplied documents which indicated, it claimed, that during the period between November 28, 1979 and November 30, 1979 the Staff may have changed its opinion with respect to whether the modification order should be issued. Notes of a meeting on November 28, 1979 involving several ranking NRC employees who were engaged in resolving the soils settlement question indicate, according to the Applicant, a general consensus that CPC's "proposed fixes are such that, if they are implemented properly they should be adequate" (Shewmaker dep., exhibit 13, attached to Applicant's motion to compel). Among the persons who apparently attended that meeting were Messrs. Shewmaker, Hood, Keppler, and Rinaldi, all of whom had been made available for deposition, and Messrs. Fiorelli and Thornburg, whose depositions we have ordered. Notwithstanding the alleged consensus, however, drafts of a proposed modification order circulated two days later (with the order itself issuing eight days after the meeting). The Applicant also produced a meeting log which indicated that Mr. Thornburg had met on November 28 and 29, respectively, with Mr. Case and Mr. Stello, the officials who signed the modification order. The Applicant wishes to discover any factual information communicated to Mr. Case or Mr. Stello which may have led to the modification order and which may indicate a shift in position of Staff members.

This information in our view is material--indeed essential--to a proper evaluation of the soils settlement question. As all parties seem to

agree, the surfacing of differing professional opinions within the Staff (if any) will assist us in reaching an informed decision on this question. Mr. Thornburg appears to have information not possessed by others made available by the Staff. In order to confine the deposition to information demonstrated by the Applicant to be not otherwise available, we limited the subjects of the deposition. See p. 4 infra, and Tr. 701-702.

We also find that the Applicant has made sufficient attempts (except as described below) to obtain the information from other sources to warrant our finding of "exceptional circumstances" with respect to Mr. Thornburg (subject to procedural requirements hereinafter outlined). There is a public interest reason for completing discovery, as well as the entire proceeding, as expeditiously as possible--if only because the Applicant is free to continue plant construction in areas impacted by the soils settlement condition despite questions by the Staff as to whether the soils settlement questions have been adequately resolved. For that reason, the Applicant and Staff have informally agreed to utilize depositions as the primary discovery methodology. We agree that the use of depositions in this context is desirable and, hence, we decline to require that the Applicant first attempt to obtain the information through documents or interrogatories.[4/]

The Applicant did attempt to obtain the requested information from witnesses produced by the Staff who had attended the November 28, 1979 meeting and who might have had knowledge of facts later communicated to

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[4/] It appears, however, that the Applicant has sought to obtain certain documents from the Staff; we express no opinion whether its requests were specific enough to have obtained documents (if any) containing the information sought from Mr. Thornburg.

Mr. Case or Mr. Stello (Tr. 540-41). The Applicant and Staff disagree on whether Mr. Darl Hood, the Project Manager, was asked the proper questions on his deposition. And Mr. Fiorelli has not yet been deposed.[5/] As a condition for the deposition of Mr. Thornburg, and consistent with the scheme in the NRC Rules of Practice, we have modified our earlier order to require the Applicant first to question Messrs. Fiorelli and Hood about the matters on which it seeks to question Mr. Thornburg; only if they cannot respond properly to the Applicant's questions is Mr. Thornburg to be made available.

With respectto the Staff's substantive objections, the potentially privileged nature of the information sought by the Applicant (i.e., deliberations leading to the modification order) was the primary reason we called for responses (by telephone) to the Staff's reconsideration motion. The Staff cites Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980) as authority for the proposition that interrogation concerning the deliberative processes of the NRC Staff is privileged from discovery, under the executive privilege. However, we understand that decision as holding only that, in that proceeding, the party seeking discovery had not demonstrated "exceptional circumstances" and could not obtain the requested information absent a showing that it had done so. In particular, that party had not demonstrated the safety significance of the data sought. 12 NRC at 126. The ruling also left open the possibility that the data might eventually have to be revealed. Id. at 128.

5/ His deposition is currently scheduled for February 17, 1981. See Notice of Deposition dated February 3, 1981. We were advised in the February 10, 1981 conference call that Mr. Thornburg's deposition is currently scheduled for February 20, 1981.

More pertinent, in our view, is the decision of the Commission in Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974). There, the Licensing Board ordered production of portions of documents which included information bearing upon the deliberative and policy making functions of Advisory Committee on Reactor Safeguards (ACRS), on the basis that disclosure of the information was "necessary to a proper decision in this particular proceeding" and "the information is not reasonably obtainable from another source, in view of the need to expedite the proceeding and the stipulated tight schedule for discovery." Id. at 314, emphasis supplied. The Commission approved this release of information, citing in addition the following factors:

> This proceeding involves a safety issue * * * not discovered until after issuance of the construction permits * * *. This potential problem required issuance of an Order to Show Cause. Moreover, there were allegations--sufficient to warrant an investigation--that the licensee had intentionally withheld [pertinent] information * * * from the agency for several years. Under these circumstances, we [believe] it imperative that all information concerning [the question at issue] be made public. The policy considerations underlying the Committee's decision to delete deliberative passages from its records should not be permitted to prevent disclosure of the safety-related information contained in the records here in issue.

Id. at 315 (fns. omitted).

We note that the Applicant has disclaimed any intent of inquiring into deliberative information (Tr. 544-545; also, telephone conference on February 10, 1981). To clarify our earlier ruling, we have limited the scope of Mr. Thornburg's deposition (insofar as communications with Messrs. Case or Stello are involved) to facts; recommendations are excluded.

Taking that limitation into account, and given the similarity of circumstances between this proceeding and the situation described in North Anna, we hold that the Applicant has demonstrated sufficient "exceptional circumstances" to warrant the deposition of Mr. Thornburg (subject to the preliminary procedural requirements we have imposed).

D. The Staff asked us to refer this ruling to the Appeal Board, on the basis that later appeal would not correct the injury it would sustain if deliberative material were revealed. We agreed to do so. Cf. Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413 (1976).[6/] Although we strongly support the conclusion we have reached with respect to Mr. Thornburg, we also recognize that, should the Staff's assessment of the situation be accepted, our ruling might have public interest implications, within the contemplation of 10 CFR 2.730(f). We denied the request to delay the deposition of Mr. Thornburg until after the Appeal Board ruling; the Appeal Board can, of course, stay our order if it believes that course of action is appropriate.

We note that the only ruling we are referring to the Appeal Board is that with respect to Mr. Thornburg. We perceive no persuasive reasons for early review of the other rulings included herein.

For the reasons stated, and subject to the limitations which we have described, the Applicant's motions to compel the depositions of Messrs. Naidu, Fiorelli, and Thornburg are granted. The Staff's motion for a

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6/ See, generally, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

protective order with respect to Mr. Kane is denied (subject to the limitations on questioning which we have described). The Staff's motion for reconsideration of our ruling concerning Mr. Thornburg is denied, subject to the Applicant's taking the additional procedural steps outlined in this opinion. The Staff's motion to refer our ruling with respect to Mr. Thornburg to the Appeal Board is granted.

It is so ordered this 12th day of February, 1981.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Judge Linenburger took no part in the consideration or disposition of the matters dealt with in Sections B, C and D of this opinion.