January 20, 1983

SECY-83-28

POLICY ISSUE
(Notation Vote)

For: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: FOIA APPEAL 82-A-20

Purpose: To recommend that

Ex. 5

Discussion: On July 11, 1981, Barbara Stamiris, a participant in the Midland proceeding on soils construction (OM-OL proceeding), 1/ requested, pursuant to the Freedom of Information Act (FOIA), a copy of a Proposed Stipulation between the NRC and Consumers Power Company regarding quality assurance issues at the Midland site. [Attachment 1.] On July 6, 1981, the NRC withheld the document in its entirety contending that its release could distort the Licensing Board's ultimate decision on the soils construction matters in issue. [Attachment 2.]

1/ That proceeding was initiated in March 1980, in response to a request by the licensee for a hearing on a December 6, 1979 Order issued jointly by NRR and I&E. That Order prohibited CPCo from performing certain soil related activities pending approval of amendments to the construction permits. The Order was based on investigations regarding deficiencies in quality assurance related to soils construction activities.

CONTACT:
Gary M. Gilbert, SECY
634-1435

In October 1982, Mrs. Stamiris requested the NRC to reconsider the denial or, in the alternative, appealed the denial. [Attachment 3.] The NRC treated her request as a new FOIA request. On October 13, 1982, the NRC again denied the request, noting that since an initial decision had not been issued in the Midland proceeding, the rationale for withholding continued to be valid. [Attachment 4.] Ms. Stamiris is now appealing that decision. For the reasons discussed below, we believe that

Ex. 5

Ex. 5

The NRC staff also withheld the document under Exemption 4 on the basis that the "Proposed Stipulation is privileged information in the form of an attorney work product which reveals strategies developed by Consumers Power Company in preparing for legal action."

In her appeal, Ms. Stamiris challenged the applicability of Exemptions 7B and 4. [Attachment 5.] She asserted that the Proposed Stipulation fails to meet the criteria of Exemption 7B because it is neither an investigative record nor was it compiled for law enforcement purposes. Ms. Stamiris also asserted that Exemption 7B was inappropriate because that exemption was designed to protect individuals by preventing prejudicial pretrial publicity.

With regard to Exemption 4, Ms. Stamiris contended that the exemption applies only to trade secrets and commercial and financial information, and not to attorney work product.

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GX. 5

We believe that

2/ [Footnote 2 continues from previous page.]

Therefore, the litigative risk posed by this case

However, we believe that

Ex. 5

In view of

we recommend

Recommendation:

Sheldon L. Trubatch
Acting Assistant General
Counsel

Attachments as stated

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, February 4, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, January 28, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:
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ATTACHMENT 1

Rel.

June 11, 1981

Joseph M Felton
Director, Division Rules & Records
Nuclear Regulatory Commission

Dear Mr. Felton,

This is a Freedom of Information Act Request for a document in possession of the NRC, which came from Consumers Power Company as a part of the 50-329 50-330 OM & OL Proceeding for the Midland Plant.

I first learned of the existance of this document on May 6, 1981 from Mr. Wm. Paton. It is a proposed stipulation or document proposing terms of a compromise or agreement between the NRC and Consumers regarding Quality Assurance issues in this "soil settlement" hearing. As a pro se Intervenor, and full party to this proceeding, I believe I have every right to see this document and consider it essential to my case, despite its being stamped "confidential" and considered as such. I believe this document was receive by Mr. Paton of the NRC sometime between April 29, 1981 and May 6, 1981, although I cannot be certain of these dates.

I have waited until I was sure that the "QA Stipulation"propo and its affect on my intrests did take place. Having received the proposed stipulation today, I have been given until June 24, 1981 by Judge Bechhoefer of the ASLB, to set forth my objections to it in writing. Due to these time constraints, I would appreciate your reply as soon as possible, to this FOIA request.

Sincerely,
Barbara Stamiris

ATTACHMENT 2

Rel.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 6, 1981

Ms. Barbara Stamiris
5795 N River
Freeland, MI 48623

IN RESPONSE REFER
TO FOIA-81-227

Dear Ms. Stamiris:

This is in response to your letter dated June 11, 1981, in which you requested pursuant to the Freedom of Information Act, the document proposing terms of a compromise between the NRC and Consumers Power regarding quality assurance issues in the Midland proceeding.

The NRC is in possession of an eight page CONFIDENTIAL PROPOSED QA STIPULATION which is the subject of your request. This document is a record which is part of the NRC's ongoing enforcement proceeding involving Consumers Power Company and their Midland Plants.

As you may be aware, exemption (b)(7)(B) of the Freedom of Information Act protects from disclosure material which would "deprive a person of a right to a fair trial or an impartial adjudication." This protection extends to corporations as well as individuals. See, 5 USC section 551(2). As the Attorney General's Memorandum on the 1974 Amendments explains, the provision operates to safeguard a litigant when "the release of damaging and unevaluated information may threaten to distort an administrative judgment in a pending case." 1974 Attorney General Memorandum at 8.

The facts in the Midland case threaten such a distortion. In the present case a quality assurance stipulation, signed by the NRC and Consumers Power Company and submitted to the licensing board, still awaits approval. The stipulation the board has before it is the result of several months of negotiations between the NRC and Consumers Power Company. Exposure of previous drafts of stipulations without exposure to the process under which those drafts were developed can severely distort the perception of the board as to the merits of the present stipulation. It may prompt the board to second guess the posture of the parties and involve the board in the negotiation process. This is the type of situation exemption (b)(7)(B) was intended to prevent. Therefore, this Proposed Stipulation is being withheld pursuant to exemption (b)(7)(B) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(B)) and 10 CFR 9.5(a)(7)(ii) of the Commission's regulations.

Additionally, the Proposed Stipulation is being withheld pursuant to exemption (b)(4) of the Freedom of Information Act (5 U.S.C. 552(b)(4)) and 10 CFR 9.5(a)(4) of the Commission's regulations. Exemption (b)(4) is applicable here as the Proposed Stipulation is privileged information in the form of an attorney work product which reveals strategies developed by Consumers Power Company in preparing for legal action.

Pursuant to 10 CFR 9.15 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure and that its production or disclosure is contrary to the public interest. The person responsible for this denial is Mr. Thomas F. Engelhardt, Acting Executive Legal Director.

This denial may be appealed to the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

J. M. Felton, Director
Division of Rules and Records
Office of Administration

ATTACHMENT 3

October 1, 1982

J.M. Felton
Division Rules & Records
Office of Administration

Dear Mr. Felton,

This is an appeal to the July 6, 1981 denial of my June 11, 1981 FOIA request for the eight page CONFIDENTIAL PROPOSED CA STIPULATION (FOIA- 81-227). This appeal is filed pursuant to the FOIA Act and your letter of August 20, 1981 in which you indicated that I should " feel free to submit a request for reconsideration " at a later time.

Accordingly, I submit the appeal at this time. I look forward to hearing from you as soon as possible within the twenty days allowed by law.

Sincerely,
Barbara Stamiris
Barbara Stamiris
Intervenor OM-OL Proceeding
Midland Plant

5795 N. River
Freeland, Mich. 48623

cc: Mr. S. Kohn
Gov. Accountability Project

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

August 20, 1981

Ms. Barbara Stamiris
5795 N. River
Freeland, MI 48623

Dear Ms. Stamiris:

This is in reply to your letter dated August 12, 1981, in which you requested an extension of time for filing an appeal, if necessary, in connection with your Freedom of Information Act request for a proposed QA stipulation in the Midland proceeding. Access to this document was denied to you in my letter dated July 6, 1981 (FOIA-81-227).

I have been informed that hearings are currently being scheduled through December, 1981 in connection with this proceeding. Therefore, I must deny your request for an extension at this time due to the administrative burden it would place on this office.

If you decide to seek the denied document when a decision has been reached in the proceeding, please feel free to submit a request for reconsideration at that time.

Sincerely,

J. M. Felton, Director
Division of Rules and Records
Office of Administration

August 12, 1981

J.M. Felton, Director
Div. Rules & Records
Office of Administration
U.S. Nuclear Regulatory Commission

Dear Mr. Felton,

I received your July 6, 1981 denial of my FOIA request for a confidential proposed Q.A. Stipulation in the Midland , Michigan 50-329, 50-330 OM-OL Proceeding.

I have decided not to pursue what I believe is my right to see this confidential document, unless I am compelled to appeal the initial decision rendered in the OM-OL Proceeding. If I should decide to appeal the OM-OL Proceeding however, this confidential proposed Q.A. Stipulation would be an important part of my case.

Therefore I now seek an extension of time in which to file an FOIA appeal for this document, in the hopes that such an appeal will not be necessary.

I seek that I be allowed 20 days beyond the receipt of an initial decision in the OM-OL Proceeding in which to file the FOIA appeal for this document if necessary.

Sincerely,

Barbara Stamiris

Barbara Stamiris
5795 N. River
Freeland, Mich. 48623

Re: FOIA 82-477
(FOIA 81-227)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Dear Secretary:

This is an appeal from an initial FOIA decision, 81-227, issued July 6, 1981 and reaffirmed Oct. 8,1982 according to understandings reached between myself and Mr. Shomaker of OELD. The new FOIA denial, 82-477, will be issued on October 13,1982 for procedural clarity, although the issues and responses remain the same. according to Mr. Shomaker. At my request Mr. Shomaker read me the Oct. 13,1982 denial letter over the phone. All related correspondence is attached.

In phone conversations on Oct. 7 and 8, 1982, Mr. Shomaker and I discussed the status of the FOIA requests. Although I had originally intended to wait the outcome of the Midland CM-CL proceeding to appeal the FOIA denial (8-12-81 letter), the unexpected turn of events in this case makes the requested Confidential Proposed QA Stipulation of renewed interest to me in 1982.

Those recent events which motivate my appeal at this time include the reopening of the record on QA by the NRC so as to allow Mr. Keppler to reconsider his QA testimony of 1981 (7-7-82 ASLB memo), and the subsequent consideration by the NRC of a second stipulation or QA solution addressing the new QA problems of 1982 (7-13-82 ASLB memo).

I fear that the terms of the first QA Stipulation from 1981, in question here, will increase the likelihood of the NRC negotiating a new QA agreement with Consumers. The Confidential Proposed QA Stipulation thus has the potential to undermine the essence of the CM-CL hearings if the new NRC/CPC agreements made for confidential reasons allow the soils remedial underpinning work to proceed prior to ASLB resolution of the question of QA implementation posed in the December 6, 1979 Order regarding the soils issues.

For these ultimate public health and safety reasons, I once again seek access to the 1981 Confidential Proposed QA Stipulation as soon as possible within the twenty days from the NRC's Oct. 4, 1982 receipt of my Oct. 1, 1982 Appeal. The urgency of my request is due to the October 29, 1982 submission date for NRC QA testimony and the November 30, 1982 QA hearing dates in the CM-CL proceeding.

My responses to the cited exemptions of the 82-477 denial repeating those of the 81-227 denial will be forthcoming.

Sincerely,

Barbara Stamiris

cc: E. Shomaker, OELD
S. Kohn, GAP
Parties CM-CL Proceeding

Barbara Stamiris
5795 N. River
Freeland, Mich. 48623

ATTACHMENT 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 13, 1982

Ms. Barbara Stamiris
5795 N River
Freeland, MI 48623

IN RESPONSE REFER
TO FOIA-82-477

Dear Ms. Stamiris:

This is in response to your letter dated October 1, 1982, in which you sought reconsideration of the Nuclear Regulatory Commission's July 6, 1981 response to your initial Freedom of Information Act request of June 11, 1981. In both requests you have sought a copy of an eight page CONFIDENTIAL PROPOSED QA STIPULATION -- a document proposing terms of a compromise between the NRC and Consumers Power regarding quality assurance issues in the Midland proceeding. Since requests for reconsideration are not strictly speaking a form of request for information pursuant to the Freedom of Information Act, Mr. Edward Shomaker of the Office of the Executive Legal Director contacted you on October 7, 1982, to try and clarify the scope and form of your request. Mr. Shomaker has indicated that you agreed that this office can consider your October 1, 1982 request for reconsideration as a new FOIA request for the stipulation document and that you are making this request now because (1) you wish to query whether the basis for the NRC's withholding the subject document has modified since July 6, 1981; and (2) you believe that this document would be valuable to you in preparing to comment upon some remedial QA actions that are being proposed in relation to the Midland facility.

Acting upon your request, Mr. Shomaker contacted the NRC attorney in the Midland proceeding, William Paton, and coordinated with the attorneys who generated the subject document at Isham, Lincoln & Beale in Chicago, Illinois. Both these parties have indicated that an initial decision has not been rendered in the Midland OM-OL proceeding and that the document continues to be privileged information in the form of an attorney work product which reveals strategies developed by Consumers Power Company in preparing for legal action. Accordingly, the rationale for withholding explained in my letter of July 6, 1981 (copy attached), continues to be valid. Therefore, this proposed stipulation is being withheld pursuant to exemptions (b)(4) and (b)(7)(B) of the Freedom of Information Act [5 U.S.C. 552(b)(4) and (7)(B)] and 10 C.F.R. 9.5(a)(4) and (7)(ii) of the Commission's regulations.

Pursuant to 10 C.F.R. 9.15 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure and that its production or disclosure is contrary to the public interest. The person responsible for this denial is Mr. Guy Cunningham, the Executive Legal Director.

This denial may be appealed to the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

(Signed) J. M. Felton

J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosure:
7/6/81 letter

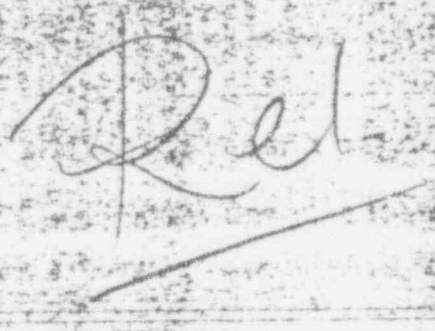
Distribution:
DRR Rdg
DRR Subj
EShomaker
PGNorry
WPaton
Reed
Carr
JMFelton
PDR

w/h: Ex. 5

In Lewiston concerns also

OELD	OELD	ADM
EShomaker:noj	HBRagan	JMFelton
10/ /82	10/ /82	10/13/82

ATTACHMENT 5



Barbara Stamiris
Intervenor 50-329,
50-330 OM-OL Proceeding
5795 N. River
Freeland, Mich. 48623
October 27, 1982

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washingtin D.C. 20555

re: FOIA Appeal 81-227
and 82-477

Dear Secretary:

Please regard this letter as a supplement to my appeal of the Nuclear Regulatory Commission's denial of my Freedom of Information Act request of 6/11/81 (FOIA 81-227); to the reaffirmation of this request dated 10/13/82 (FOIA 82-477); and to my appeals of these requests dated 8/12/81, 10/1/82, and 10/13/82.

The original FOIA request and all subsequent correspondence concern the release of a 1981 Confidential Proposed QA Stipulation submitted to the NRC by Consumers Power Company regarding Quality Assurance adequacy in the Midland nuclear plant "soil settlement" proceeding (hereinafter Stipulation).

The requested document contains the confidential terms of the NRC/Consumers Power Company agreement upon which the 6/5/81 public QA Stipulation is based (attached). Consumers Power Company agreed to this Stipulation upon receiving the NRC's "reasonable assurance" judgement for quality assurance adequacy contained in James Keppler's OM-OL testimony (p. 1464).

My 6/11/81 FOIA request was denied in a 7/6/81 letter from J.M.Felton of the NRC. This FOIA denial and the reasons justifying the denial were reaffirmed in a 10/13/82 letter from Mr. Felton.

Mr. Felton cited two exemptions justifying his denial of the FOIA request. He also asserted that the release of the Stipulation was not in the public interest, and therefore not disclosable under Nuclear Regulatory Commission (NRC) guidelines. The two FOIA exemptions cited were 5 U.S.C. 552(b)(4), which concerns "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and 5 U.S.C. 552(b)(7)(B) which exempts certain "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would... deprive a person of a right to a fair trial or an impartial adjudication." Mr. Felton also denied release of the Stipulation under 10 CFR 9.9(a) which allows for the release of otherwise exempted information if disclosure is "not contrary to the public interest and will not adversely affect the rights of any person..."

This appeal letter will show that both exemptions to the FOIA have been missapplied, and have no bearing on the Stipulation given the facts of this case. The use of these exemptions has contravened public policy, public interests, and the congressional intent of the FOIA. Furthermore, release of the Stipulation will further the public interest in the construction a safe nuclear power plant , and further the public interests of the citizen s surrounding the Midland nuclear plant. No

person's rights or interests would be "adversely affected" through the release of the Stipulation. Thus the disclosure of the Stipulation is not only required under law, it is also required under NRC policy.

I. Exemption (b)(7)(B) is not Applicable or Relevant to the Stipulation. The Exemption was Misappled and can not be used to Withhold Release of the Stipulation under the FOIA.

In order for a record or file to be exempted under 5 U.S.C. 552(b)(7)(B), it must meet a three part test. If it fails to meet any part of this test the record cannot be withheld. The records must be both "investigatory" and "compiled for a law enforcement purpose," to be covered under any of the subsections of Exemption (b)(7). In order to be covered by subsection (B) of Exemption (b)(7) the record must further "deprive a person of a right to a fair trial or an impartial adjudication." Irons v. Bell, 596 F.2d 468 (1979); Gregory v. Federal Deposit Insurance Corp., Civ. No. 78-1702 (D.D.C. March 29, 1979); 120 Cong. Rec. S 9336 (daily ed., May 30, 1974); Education/ Instruccion, Inc. v. HUD, 471 F. Supp. 1074 (1979), Church of Scientology v. Department of the Army, 611 F.2d 738 (1979).

In his July 6, 1981 letter Mr. Felton fails to even allege that the requested Stipulation was either an "investigatory" record, or "compiled for law enforcementpurposes." Felton's failure to make the allegation is not suprising. Clearly the

Stipulation is not an "investigatory record." It is a document submitted by a private corporation in anticipation of a valuable benefit. As the Stipulation is not an investigatory record, it can not be exempted under (b)(7)(B).

Furthermore, the record was not "compiled for law enforcement purposes." The standard for such purposes has been well defined - it applies only to information compiled for a demonstrated law enforcement purpose, Scientology v. Army, 611 F.2d 738,748 (1979); Irons v. Bell, 596 F.2d 468 (1979). The courts have consistantly held that investigatory documents with no law enforcement component are not exempted, such as civil rights monitoring reports, see Sears, Roebuch and Co. v. GSA, 509 F.2d 527 (1974); law enforcement manuels, Cox v. Dept. of Justice, 576 F2d 1302 (1978); union authorization cards, Committee on Masonic Homes v. NLRB, 566 F.2d 214 (1977).

As the Stipulation was neither an "investigatory" record or a record "compiled for law enforcement purposes," Exemption (b)(7)(B) is not applicable. Even assuming the Stipulation was an investigatory record compiled for law enforcement purposes, the Stipulation still fails to overcome the third burden - "depriving a person of a right to a fair trial or an impartial adjudication."

Mr. Felton claims that subsection (b)(7)(B) is relevant because the FOIA applies to "corporations as well as individuals," thereby implying that corporation s have similar privacy interests as individuals and (b)(7)(B) is designed to protect these interests. Felton also aserts that this exemption applies to administrative hearings as well as to jury trials, and the release of the Stipulation might "distort the perception of the board" and "prompt the board to second guess the posture of the parties and involve the board in the negotiation process."

Felton's application of (b)(7)(B) is completely erroneous. His implied assumption that corporation s and individual s have similar privacy interests protected under the exemption is wrong. Equating the standard used to protects a person's interests before a criminal trial and before an administrative proceeding as in any way similar, is wrong. His fear that the release of the Stipulation might "distort" the board's perceptions is unfounded, and runs counter to the NRC's rules of evidence.

Although the case law on subsection (b)(7)(B) is scarce, the type of interest protected by this subsection can be analogized to the privacy interests protected in (b)(7)(C) which denies disclosure of information which would "constitute an unwarranted invasion of personal privacy." As the case law under this exemption clearly points out, the types of privacy or secrecy interests protected are dissimilar in cases

of people and cases of corporations. It is wrong to analogize information which may hurt the reputation of an individual and thereby prejudice him or her at a trial, and similar information dealing with a corporation. The courts have consistantly held that the standard for protection of a corporation is much lower than the standard for an individual. In fact, a corporation is not even extended any of the privacy interests protected by (b)(7)(C). The courts have held that this exemption has no application to corporations, see e.g. Public Citizen v. HEW, 477 F.Supp. 595 (1979); Robertson v. Dept. of Defense, 402 F.Supp. 1342 (1975); Ferguson v. Kelly, 455 F.Supp. 324 (1978).

Felton completely misinterprets the correct standards to be used in determining the application of the exemption at an administrative hearing as opposed to at a jury trial. An administrative hearing is not a jury trial, and the standards used to protect a person from prejudice in these two radically different forums is likewise different.

An administrative hearing is comprised of a pannel of experts, not lay jurors often completely unfamilar with the subject matter, the case law, and the traditions of the judical process. What may be highly prejudcial to a lay jury is often dismissed as irrelevant to a pannel of experts. The courts have recognized the ability of administrative judges to insulate themselves from otherwise prejudical remarks. In Education/Instruction, Inc., v. U.S., 471 F.Supp. 1074 (1979), the court held that exemption

(b)(7)(B) was primarily a protection against prejudical publicity in criminal proceedings and has little significance in civil court or administrative hearings: "...prejudical publicity has little significance in administrative proceedings..."

Felton's letter demonstrates a clear misunderstanding of basic rules of evidence and NRC administrative procedure. Felton claimed that the Stipulation would violate Consumers Power's right to a fair ajudication because: "Exposure of previous drafts of stipulations without exposure to the process under which those drafts were develped can serverely distort the perception of the board as to the merits of the present stipulation..." This statement rests on two incorrect assumptions - first, that the Stipulation will be accepted into evidence, and second, that if it is accepted into evidence, the witness at the proceeding will not be able to explain any possible unfair prejudice contained in the Stipulation.

The NRC's regulations regarding submission of documents into evidence are clearly spelled out in 10 C.F.R. 2.743. The acceptance of evidence is predicated on a three part test. The document must be "relevant," "material" and "reliable." If the document fails any part of this test, it cannot be admitted into evidence at the proceedings.

First, no unreliable information can be admitted into evidence. If the evidence is not sufficiently self-explanatory, it can only be admitted into evidence by a witness who is qualified to

explain the document. If the document standing by itself is not self-explanatory, the only witness who would be able to explain the document at a hearing would be representatives from either Consumers Power or the NRC who are familar with its history, development , and meaning. The ability to have witnesses on the stand, either called up for direct testimony or examined under cross, will insure that any of the "distortions" contained in the Stipulation standing by itself can be rendered harmless.

In order to be admitted into evidence the Stipulation must also be both relevant and material, see 10 C .R. 2.743. In order to meet this burden, the document must be both addressed to an issue being litigated and influential as to the outcome of the proceedings. If the Stipulation is not relevant and material it cannot be submitted into evidence, and therefore exemption (b)(7)(B) is irrelevant. If the Stipulation is relevant and material, then the intervenors have a compelling reason for its release, and if the Stipulation is not released, the intervenors' rights to a fair and impartial hearing will be abridged. (As an intervenor in this matter, I find this situation particularly aggrievous. This arguement will be further developed in the third section of this letter, which covers the release of information which serves the public interest.) See 10 C.F.R. 9.9(a)

Felton also alludes to the fact that a hearing is presently pending, and the final stipulation is still "awaiting approval" as a factor in applying the (b)(7)(B) exemption. Felton cites no case law or no portions of congressional debate to support this misleading assertion. There are no cases which support Felton's position, and the history of the exemption completely negates his assertion. Subsection (B) was added to exemption (b)(7) in 1974 as a means of narrowing the exemption. Prior to 1974 a number of courts allowed a broad reading to the definition of "investigatory records". Exemption 7 was explicity narrowed in order to restrict withholdings under this exemption, 120 Cong, Rec. S 9336 (daily ed., May 30, 1974). Only information contained in six very explicit subsections of exemption 7, (b)(7)(B) being one of the subsections, could be withheld from public view. The Supreme Court has recognized that this narrowing process was the primary intent of the 1974 amendment to the exemption: "...the thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file," NLRB v. Robbins, 437 U.S. 214,230 (1978). There is no specific category or subsection in exemption 7 relating to the withholding of open investigatory files or investigatory files relating

to pending litigation. The very existance of subsection (b)(4)(B) presuposes that material relating to a pending hearing or trial can be released, and only exempts a small portion of these files which are (a) investigatory; (b) compiled for a law enforcement purpose; (c) and would "deprive a person of a right to a fair trial or an impartial adjudication," none of which apply in this case.

In fact, in ruling upon the public QA Stipulation, the ASLB accepted only Parts I and 2 of the Stipulation, declining to rule upon Part 3 concerning QA adequacy until hearing testimony and receiving evidence on that subject. (See attached Ruling) The Board's request for relevant and material evidence on the NRC's position concerning "reasonable assurance" of QA adequacy makes disclosure of the requested document necessary to a complete public record. In summary, Felton's use of Exemption (b)(7)(B) is erroneous.

(1) The exemption only covers "investigatory" records compiled for "law enforcement purposes." As such, the Stipulation, which was not compiled as part of an investigation, or for law enforcement, is not covered by (b)(7)(B). The Stipulation was a document voluntarily submitted to the NRC from a private corporation with the anticipation of receiving a valuable benefit

(2) The standards under (b)(7)(B) for corporations and individuals are not identical.

(3) The Stipulation will not prejudice an administrative hearing.

(4) The standards for prejudicing an administrative hearing are not identical to that of a trial by jury.

(5) The NRC rules of evidence will protect the NRC or Consumers Power from any prejudice resulting from release of the Stipulation.

(6) If the Stipulation is not reliable, relevant, and material, it cannot come into evidence.

(7) If the Stipulation is relevant and material, it must be released to protect the interests of the public, and the rights of the intervenors to a fair and impartial hearing.

(8) The fact that hearings are presently pending is not relevant given the facts of this case.

II. Exemption (b)(4) is not Applicable or Relevant to the Stipulation. The Exemption was Misapplied and can not be used to Withhold the Release of the Stipulation.

The second exemption cited by Mr. Felton in his July 6, 1981 letter as justifying the NRC's refusal to disclose the Stipulation is (b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential," from disclosure, 5 U.S.C. 552(b)(4). This exemption has been completely misapplied, and is not relevant to the facts of the present case.

Felton states that the Stipulation is "privileged information in the form of attorney work product," and thereby exempted through (b)(4). But attorney work product is not covered by this exemption. This exemption applies only to "trade secrets" and "commercial or financial" information. Attorney work product is explicitly excluded from its scope.

Felton has made no attempt to portary the Stipulation as either a "trade secret" or as "commercial or financial" information. In fact, the Stipulation is nothing of the kind. It is a document concerning important soils issues and quality assurance issues and problems suffered at the Midland site. Because the Stipulation is neither a "trade secret" nor "commercial or financial" information, the exemption has been misapplied.

The courts have been very clear that only trade secrets and commercial or financial information are covered by this exemption It does not apply to other types of information, see e.g. Board of trade v. Commidity Futures Trade Committee, 627 F.2d 392,405 where the court stated that the "plain language" of Exemption 4 restricted its use to trade secrets and commercial or financial information. In County of Madison v. Department of Justice, 641 F.2d 1036,1042 (1981) attorney work product was explicitly excluded from exemption (b)(4).

Mr. Felton apparantly misread this exemption in precisely the fashion the courts have warned against. In Brockway v. Department of Air Force, 518 F.2d 1184,1189 (1974), the court

explained the origins of this misreading:

> "The tendency has been to grant little weight to these passages from reports (i.e. congressional history) on the theory that the passages (which support a broad reading of exemption 4) were taken from previous congressional reports on an earlier draft of the Freedom of Information bill which in fact exempted confidential, non-commercial and non-financial matters." (emphasis added)

Thus attorney work product has been explicity excluded from coverage under exemption (b)(4). The misapplication of the exemption has been explicity warned against in numerous cases, see e.g. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (1974); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (1969); County of Madison, supra, at 1189 (1981).

Significantly, even if the material requested was commercial or financial, and was given to the NRC on a strictly confidential basis, the Stipulation still would not be included within exemption (b)(4).

It is well-settled law that information given to a federal agency under a promise of strict confidentiality is not automatically exempted from the public under the FOIA. In Petkas v. Staats, 501 F.2d 887 (1974) the court held that a "promise" of confidentiality cannot itself defeat the right of disclsoure. Even before the 1974 amendments to the FOIA, the

courts were clear that information given to the government, even if confidential and related to commercial or financial matters, is not automatically exempt under exemption (b)(4): "The Board, citing the Attorney General's memorandum of 1967, maintains that Exemption 4 applies to any information given the government in confidence. But this interpretation tortures the plain meaning of Exemption 4..." Getman v. NLRB, 450 F.2d 670 (1971) at 673. Also see Dept. of Air Force v. Rose, 425 U.S. 352,371 (1976).

Information given to the government in order to satisfy a statute or regulation, or to obtain a valuable economic benefit, are not exempted from disclosure by exemption (b)(4). The exception to this general rule is information which would hurt a corporation's competitive standing or reveal a trade secret. In National Parks v. Morton, 498 F.2d 756 (1974), the court held that information given to the government in order to obtain an economic benefit was not covered by exemption (b)(4), despite the fact that it was given in confidence and contained financial information: "...since the concessioners are required to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future," 498 F 2d at 770.

Consumers Power Company must give the NRC certain information in order to comply with the law and obtain a valuable financial

benefit - the operation of a nuclear power plant. Consumers Power gave the NRC the Stipulation in anticipation of a valuable benefit. These reasons clearly place the Stipulation outside of even the type of commercial or financial information the exemption was designed to protect.

As stated above, exemption (b)(4) does not apply to attorny work product. The FOIA exemption which does apply to attorny work product is completely inapplicable. Although Mr. Felton correctly did not use this exemption [5 U.S.C.552 (b)(5)], it is important to distinguish it in order to avoid confusion.

Exemption (b)(5), which covers attorney work product, exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption only covers "inter-agency" or "intra-agency" material, and does not cover attorney work product submitted to the government by a private corporation or law firm, see e.g. NLRB v. Sears, 421 U.S. 132 (1975); Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979); County of Madison v. Dept. of Justice, 641 F.2d 1036 (1981). The exemption was designed to protect "the exchange of ideas among agency personel," H.R. Rep. No. 1497, 89th Cong. 2d Sess. 10 (1966), Ryan v. Dept. of Justice, 617 F.2d 781 (1980).

Because the Stipulation was the product of a Consumers Power attorney, it is outside of the statutory languge and outside the scope of the exemption.

The courts have also been clear that exemptions (b)(4) and (b)(5) are not inter-changeable. If a private attorney's work product is not covered by (b)(5), it also is not covered by (b)(4):

> "The government's plea that it should be able to guarantee confidentiality for its dealings with special nongovernment parties would be more properly courched in argument that the relevant provision here instead is exemption four (as opposed to exemtion 5), which excepts from disclosure 'information obtained from a person and privileged or confidential.' This position would be countered, however, by exemption four's limitation to 'commercial or financial information." County of Madison, supra at 1042.

The County of Madison case is right on point. The United States attorney had confidential dealings with the attorney for the Oneida Indian Tribe. Information obtained from these confidential meetings were held outside of both exemption (b)(4) and (b)(5). In the case at bar, the Stipulation is outside of the (b)(4) exemption because the material is not "financial or commercial," and it is outside the (b)(5) exemption because it is not an "inter-agency or intra-agency" memorandum.

The courts have held that even if the government stood to benefit from the conducting of confidential negotiations, still the material(s) from these attorney negotiations would not be covered by exemption (b)(4) or (b)(5):

> "...the Oneidas approached the governnment with their own interest in mind. While they came to parley, they were past and potential adversaries, not coopted colleagues. We recognize that the government also stood to benefit from a successful settlement, but we believe that expanding exemption five to include self-seeking petioners 'within' agencies would do more violence to statutory language than congress' direction permits." County of Madison, supra. at 1040,1041.

Again, the facts of the two cases are nearly identical. Consumers Power and the NRC were "past and potential adversaries," consumers Power approached the NRC for their own interest, and the NRC was seeking to recognize a "benefit from a successful settlement." But as County of Madison plainly holds, neither exemption (b)(4) or (b)(5) is applicable.

III. The Release of the Stipulation will Serve the Public Interest and must be Released According to NRC Regulations, Even if the Stipulation was properly Withheld via (b)(7)(3) and (b)(4)

According to 10 C.F.R. 9.9(a), the NRC must release documents requested under the FOIA, even if these documents are properly covered by the various exemptions, if the release of the material "is not contrary to the public interst and will not adversely affect the rights of any persons..." The section of the Code of Federal Regulations which covers the NRC is written in complete accordance with Supreme Court decisons and interpretations of the congressional intent behind the FOIA. The Supreme Court has ruled that all of the exemptions to the FOIA are discretionary, and there are no mandatory rules for disclosure, Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Furthermore, all of the exemption's to the FOIA must be narrowly construed: ""...the exemptions set forth in the FOIA are be be narrowly construed so as to implement the overall legislative policy of disclosure, NLRB v. Robbins, 437 U.S. 214 (1978), see also Kissinger v. Reporters Committee, 445 U.S. 136,152 (1980).

Mr. Felton, in an unsupported assertion, states that disclosure of the Stipulation would be "contrary to the public policy" and dismisses arguments for disclosure based on 10 C.F.R. 9.9(a). Not only was no evidence presented to explain

how this FOIA request would contravene public policy, the NRC , in a 10/8/82 telephone conversation and in the 10/13/82 letter, stated that their refusal to release the Stipulation was based upon consultation with Consumer's law firm. The NRC decision to withhold the document thus did not reflect any regard for public policy as asserted.

In fact, public health and safety interests which rest in the full and fair consideration of all relevant soil settlement and quality assurance issues in the OM-OL proceeding established to resolve these issues, can only be met by release of the Stipulation in question.

As an intervenor acting solely in the public interest to promote safety at the Midland nuclear plant, I am denied my rights as a full party to the proceeding andthe public is denied their rights to a full and fair consideration of all relevant issues by being denied access to a document which concerns the resolution of the key issue of this proceeding - the question of QA adequacy - by the agency acting in their behalf, the NRC.

According to NRC policy, resolution of the ultimate issues in a proceeding are to be left to the ASLB hearing the case, not the NRC Staff. Public Service of Indiana, Marble Hill 182, ALAB 461, 7 NRC, 313-318 (1978). Yet resolution of the ultimate issue in this case, the judgement on QA "reasonable assurance", has been used as a bargaining tool in the NRC/Consumers Power Company QA Stipulation. Such agreements which make use of public-safety QA decisions as

elements of negotiation, based on confidential terms, violate ASLB directives (see attached Ruling); NRC regulations limiting stipulations to "any relevant fact or the contents or authenticity of any document" 10CFR 2.753; and the public trust in the agency upon which they must depend. The NRC's denial of this FOIA request can only be viewed as an effort to protect themselves or Consumers Power Company, which places these interests ahead of the public health and safety interests they are charged with protecting.

The soil settlement issues which are the subject of the Stipulation are without question the most critical public health and safety issues at the Midland plant. Every major safety system at the plant is affected by the soil settlement problems, and their integrity depends on the adequate resolution of the related technical and quality assurance questions at issue here. The affected safety Category I structures which have settled, cracked, and are subject to extensive remedial support, surcharge, or underpinning measures include: the Auxilliary Building (electrical penetration and feedwater isolation valvepit areas controlling the reactor core); the Diesel Generator Building (emergency power supply); the Service Water Intake Structure (supply of cooling water); the Borated Water Storage Tanks (emergency borated water supply); and the Underground Safety Piping and Conduit (the electrical and cooling water lifelines of the plant).*

* of these, the DGB, the SWS (portion on fill), and the BWST were begun after Consumers was aware of the sitewide soils problems see CPC Proposed Findings 3/15/82, p. 221 final sentence and 1978-1979 commencement dates

The extent and seriousness of these soil settlement problems and their remediation is unprecedented in the nuclear industry. Director Keppler of Region III has likened the soils remedial work to the equivalent of building a third reactor onsite. And the ASLB Judges have warned of the potential for "irreversible damage in safety class structures" from the delicate remedial work. Yet renewed QA problems in this soils remedial work have caused the NRC to reopen the QA hearing record in the OM-OL proceeding.

In the face of the disproven QA adequacy assessment contained in the 6/5/81 public QA Stipulation, and the numerous previously misjudged signs of QA improvement (LBP 74-71, ALAB 106, ALAB 147) in Midland's public record, the time has come for the NRC to lay all the facts out to the public and to the Board regarding the QA and soils issues at Midland.

Given the history of QA failure at Midland, the importance of the soils QA issues, and the manner in which the NRC QA judgements were used in stipulation agreements, the public has a compelling interest in the release of the requested Stipulation. No persons rights will be adversely affected if the Stipulation is released. According to 10 CFR 9.9(a), such release is mandated in the public interest, even if the Stipulation was otherwise exempt. In fact, the public's rights will be seriously compromised if this important document remains secret.

In conclusion, the two exemptions cited by Mr. Felton as justifying his refusal to release the requested document are badly misapplied, misleading, and have no bearing whatsoever on the case at bar. There are no other exemptions to the FOIA which would allow the NRC to refuse to disclose the requested documents. NRC policy requires the Stipulation be released even if the exemptions did apply.

As an intervenor in nuclear power plant proceedings before the NRC, I have extraordinary needs and interests, protected by the FOIA, NRC policy, and sound and rational public policy. The Supreme Court of the United States has recognized interests such as those articulated in this request, as representing the very essence of the FOIA: "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins, 437 U.S. 214,242 (1978).

I hereby request that the Stipulation requested under the FOIA be disclosed to me without delay, pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(6) and 10 C.F.R. 9.9(a).

If any or all parts of this appeal is denied, I plan to take this matter to court.

Sincerely,

Barbara Stamiris

Barbara Stamiris

CC
Government Accountability Project

ATTACHMENT 6

w/h:
exs. 4 #2

CO..FIDENTIAL -- DO NOT DISC..OSE

Send to Mr. Fiche
SECY

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June 22, 1981

Ms. Ellen Brown
Nuclear Regulatory Commission
Washington, D.C.

Re: FOIA Request for Documents in Consumers Power Co. (Midland Plant, Units 1 and 2) Docket Nos. 50-324-OM, 50-330-OM, 50-329-OL, 50-330-OL

Dear Ms. Brown:

On June 16, 1981 you informed Consumers Power Company ("CPCo") that you received a request, pursuant to the Freedom of Information Act ("FOIA"), from Barbara Stamiris for information relating to the still ongoing settlement negotiations between CPCo and the Nuclear Regulatory Commission ("NRC") Staff in the above-captioned proceeding ("Midland proceeding"). Ms. Stamiris, an intervenor in that proceeding, stated she needed the material in order to prepare her case for hearing.

Specifically, Ms. Stamiris requested that the NRC disclose a draft of a stipulation pertaining to the quality assurance aspects of the case prepared by CPCo and used in settlement negotiations between CPCo and the NRC Staff. CPCo has always considered that document and any information relating to the negotiations in the Midland proceeding between itself and the NRC Staff highly confidential. This is to inform you that CPCo opposes any disclosure of that document or related documents at this time.

[redacted]. The specific draft stipulation was given to the NRC Staff under the express condition that it be maintained in confidence and each sheet of the document was clearly marked to indicate its confidential nature.

CPCo submits that the FOIA exempts such negotiation material as a "record compiled for law enforcement purposes"

under 5 U.S.C. §552(b) [redacted] ("exemption (b)(7)(A)") and 552 (b) [redacted] ("exemption (b)(7)(B)"). Disclosure of the document while the Midland proceeding is pending will interfere with the orderly conduct of the hearing and will seriously threaten CPCo's right to a fair adjudication in the matter.

Exemption (b)(7) Protects the Premature Disclosure of Information in Pending Administrative Proceedings.

CPCo's opposition to the disclosure of the draft quality assurance stipulation is based upon the FOIA exemption §552(b)(7). Exemption (b)(7) protects from the disclosure any

> "investigatory record compiled for law enforcement purposes...to the extent that production of such records would (i) interfere with enforcement proceedings, [and] (ii) deprive a person of a right to a fair trial or an impartial adjudication...."

This exemption applies to any records which were created through an agency's inquiry into specific conditions which might have involved or violated administrative regulations, such as the now pending Midland proceeding. Riley, J., Federal Information Disclosure Act, 17-17 (1978). It applies to all aspects of the investigation: the fact that the material, as here, was prepared by attorneys at the hearing stage does not mean the loss of the "investigative" status. See, e.g., U.S. v. J.B. Williams Co., 402 F.Supp. 796 (S.D.N.Y. 1975); U.S. v. Trucking Employers, 39 Ad.L.2d 694 (D.C.D.C. 1976). It is applicable in civil administrative procedures such as this one. See, e.g., Williams v. IRS, 479 F.2d 317 (3d Cir. 1973). It protects any information in the investigatory record even if the information was generated by a private party and not the government. Congressional News Syndicate v. U.S. Department of Justice, 438 F.Supp. 538 (D.C.D.C. 1977); Forrester v. U.S. Department of Labor, 433 F.Supp. 987 (S.D.N.Y. 1977). Thus, the fact that CPCo, not the NRC Staff, generated the draft does not dilute exemption (b)(7)'s protection. Compare, County of Madison, New York v. U.S. Department of Justice, 641 F.2d 1036 (1st Cir. 1981).

Finally, unlike the earlier version of the (b)(7) exemption, the present exemption explicitly protects the interests of a party outside of the government who has submitted information to the government in confidence. Even under the prior version of (b)(7) courts have considered substantive claims under the exemption by those who supplied the government with information. Sears, Roebuck & Co. v. GSA,

509 F.2d 527 (D.C. Cir. 1974). CPCo along with the NRC has standing to assert its opposition to disclosure under exemption (b)(7).

Exemption (b)(7)(A): Release of the Draft Will Interfere with the Pending Midland Proceeding.

Exemption (b)(7)(A) protects information the disclosure of which may "interfere" with enforcement proceedings. The release of an earlier draft of a settlement stipulation -- the final version of which is yet unapproved by a licensing board -- would severely interfere with NRC enforcement proceedings in general, and the present enforcement proceeding in particular. Further, it would disrupt NRC discovery procedures.

Justice Stevens, in his concurrence in N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 243, 98 S.Ct. 2311, 2327 (1978) defined the interference envisioned by exemption (b)(7)(A) as "the act of meddling in a process." An integral part of the process in NRC proceedings, one which the Commission especially promotes, is negotiation and stipulation. In its recent "Statement of Policy on Conduct of Licensing Proceedings," ("NRC Policy") issued May 21, 1981, (CLI-81-8), the Commission stated:

> "The parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues. Negotiations should be monitored by the board through written reports, prehearing conferences and telephone conferences but the board should not become directly involved in the negotiations themselves." NRC Policy at 5.

Release of an earlier draft of a yet unapproved quality assurance stipulation between the NRC and CPCo would certainly constitute a "meddling" in the negotiation process so encouraged by the NRC Policy. Significantly, it could destroy the usefulness of the process altogether.

First, it would threaten the viability of the negotiation method for resolving problems itself. It is well recognized that disclosure of proposals of settlement would impede the negotiation process. In Branch v. Phillips Petroleum Company, the court denied the release of settlement proposals made to the government in a discrimination case. Branch held that the negotiation policy contained in Title VII of the Equal Employment Opportunity Act would be defeated by such disclosure:

> "The prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII. Therefore, disclosure of conciliation materials, even to the parties, would discourage negotiated settlement and frustrate the intention of Congress [to encourage negotiation]." 638 F.2d 873, 881 (1981).*

Similarly, the release of drafts of as yet unapproved quality assurance stipulation as Ms. Stamiris requests here would destroy the negotiation process so encouraged by the NRC Policy. The automatic release of privately generated settlement proposals would eviscerate the "give and take" of negotiations. To remain undisclosed all negotiation proposals made by those outside the government

---

* In County of Madison, New York v. U.S. Department of Justice, supra, a court also recognized the importance of confidentiality in negotiation:

> "The government engages in prodigious amount of litigation both as plaintiff and defendant. Negotiated settlement is the most efficient means to terminate such disputes. Knowledge that written settlement communications will be available to anyone, irrespective of the merit of his or her need to know, inevitably will to some extent impede this means. (Citations omitted)".

That court refused to apply exemption (b)(5) (pertaining to interagency and intraagency memoranda) to prevent the disclosure of certain settlement materials.

However, County of Madison is distinguishable from this case. Here the claim for protection is based on exemption (b)(7) not exemption (b)(5). Further, in the Midland proceeding there are still ongoing negotiations between the parties. In County of Madison, the negotiations and hearing during which the negotiations took place appeared to be ended. Finally, in this instance there is an explicit NRC Policy encouraging negotiations which would be impeded by the release of the material. In County of Madison no such policy was articulated. In addition, CPCo submits that County of Madison was wrongly decided and urges the NRC to consider exemption (b)(5) as protection against the untimely disclosure of settlement material.

would either have to be unwritten or if written their use would have to be carefully and explicitly supervised by the submitting party. The government could not retain or work with the proposal in private. The government could not protect the other side's proposal or counterproposal by writing it out itself. Even the government could not freely make confidential written proposals in negotiations since once communicated to the other side, the proposal would be beyond any "attorney-client privilege" between the NRC Staff and its attorneys. See, e.g., Mead Data Cent., Inc., v. U.S. Dept. of Air Force, 566 F.2d 242, 255 (D.C. Cir. 1977).* This situation would stifle not encourage meaningful resolution discussions.

Further, threatened release of settlement proposals could terminate negotiations completely. As recognized under the Federal Rule of Evidence 408, Advisory Committee Comments, proposals during negotiations are made for a variety of purposes -- most not commensurate at all with the idea of admissions of liability or guilt. See Federal Rule of Evidence 408, Advisory Committee's Note, Rule 408. Among other things, parties settle or propose settlement to avoid costly litigation and to promote other related interests. Release of earlier settlement proposals to the general public, without explanation of this background, would distort negotiating positions and deny a party an opportunity to explain its true position. Under such circumstances, a licensee's reluctance or outright refusal to negotiate with the NRC because of the threat of release of his bargaining position is understandable.** A grant of Ms. Stamiris' request for the earlier draft of the quality assurance stipulation would act as precedent for such premature disclosures, inhibiting future negotiations in this and all other NRC cases.

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* Mead Data, dealing with exemption (b)(5), held that once a proposal is given to the other side (b)(5) no longer protects the government's attorney-client privilege during deliberative and pre-decisional processes and the proposal can be released to the public. Unlike this case however, Mead Data concerned negotiation material from an already completed contract -- not an investigatory file from a pending administrative enforcement action.

** It is notable that the NRC carefully protects its own bargaining positions. Its regulations explicitly prohibit the disclosure of NRC bargaining positions until the action in which the positions were taken is terminated. See 10 C.F.R. §9.5(2).

Second, the release of the earlier draft of the quality assurance stipulation would threaten the viability of the negotiation process in the Midland proceeding in particular. The signed quality assurance stipulation of which the requested material is an earlier draft still awaits approval by the licensing board. The process envisioned by the NRC Policy in licensing proceedings prohibits a board from becoming involved with negotiations. Release of this document would make this licensing board directly aware of the give and take of negotiations for the quality assurance stipulation. In direct conflict with the dictates of the NRC Policy, this would involve the board in the negotiation process.

Further, in pending Midland proceeding there are still ongoing negotiations between the NRC Staff and CPCo. Disclosure of negotiating positions from prior stipulations would jeopardize these discussions. Indeed, without the protection of exemption (b)(7) there is no reason why a similar FOIA request could not be made -- and granted --for any material relating to these discussions. CPCo may be forced to reconsider participating in settlement negotiations altogether if their negotiating positions are exposed prior to the resolution of the hearing.

The result of the termination of the negotiating process is evident: a lengthy hearing in which each issue must be litigated completely, regardless of its settlement potential. The time required alone would disrupt and interfere with the already lengthy Midland proceeding, seriously overtaxing the licensing board and obstructing the NRC Policy encouraging the use of negotiation to resolve issues.

Third, the disclosure of the draft of the quality assurance stipulation would have the effect of interfering with the normal NRC rules of discovery. This sort of interference, as Justice Stevens noted, is the type specifically protected by the operation of exemption (b)(7)(A):

> "A statute [meaning the FOIA] that authorized discovery greater than available under the rules normally applicable to an enforcement proceeding would interfere with this proceeding in that sense."

Robbins Tire & Rubber Company, supra, 98 S.Ct. at 2327.

The legislative history of exemption (b)(7) makes clear that litigants such as Ms. Stamiris are not to obtain special discovery benefits from the FOIA. See Attorney General's Memorandum on the Public Information Section of

the Administrative Procedure Act at 38 (1967). The Supreme Court has explicitly disproved the use of the FOIA to give a party access to information beyond discovery. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 95 S.Ct. 1504 (1975).

Under the usual discovery procedures, an application of the sort made by Ms. Stamiris would be adjudicated by the licensing board. As noted in Virginia Electric and Power Company (North Anna Power Station Units 1 and 2), CLI-74-16, 7 AEC 313, (1974) a licensing board's first hand contact with and appreciation for all the circumstances surrounding a case is a necessary adjunct to discovery determinations. In discovery "maximum reliance on proper discretion of the licensing board is essential". North Anna, supra, 314. Therefore, under the usual circumstances a licensing board would determine whether the disclosure of the draft would disrupt or interfere with the present enforcement proceeding, and if necessary it could control the use of the material through a protective order. See, e.g., 10 CFR §2.740(c); see, also Kansas Gas and Electric Co., Kansas City Power and Light Co. (Wolf Creek Nuclear Generating Station, Unit 1) ALAB-327, 3 NRC 408, 413 (1976).

However, if the material is released to Ms. Stamiris under the FOIA no protective order is possible for under the FOIA, material once released "is available to any person". Hawkes v. Internal Revenue Service, 467 F.2d 787, 790 N.3 (6th Cir. 1972). The result of such lack of control would mean that the detrimental effects inherent in unevaluated draft offers to compromise could not be moderated.

Further, use of the FOIA as an unlimited discovery tool, especially for information which is generally treated confidentially, would significantly increase the delays in licensing and enforcement proceedings. As described by the Supreme Court in Robbins Tire & Rubber Co., supra, at 2325:

Unlike ordinary discovery contests, where rulings are generally not appealable until the conclusion of the proceedings, an agency's denial of a FOIA request is immediately reviewable in the district court, and the district court's decision can then be reviewed in the court of appeals. The potenti for delay and for restructuring of...adjudicatior from FOIA requests is thus not insubstantial.

Thus, at a time when the Commission is attemptin to restrict discovery in proceedings, release of heretofor confidential material under the FOIA would expand it. As noted in the NRC Policy guidelines:

> The purpose of discovery is to expedite hearing by the disclosure of information...which is relevant to...the proceeding so that issues may be narrowed, stipulated or eliminated and so that evidence to be presented...can be stipulated or otherwise limited to that which is relevant.
>
> Accordingly, the board should manage and supervise all discovery including not only the initial discovery directly following admission of contentions but also any discovery conducted thereafter. NRC Policy at 6-7, (emphasis added).

Disclosure of a private settlement material outside of the normal discovery process directly contravenes the intent of this Policy. It would lengthen not expedite proceedings, discourage stipulations and remove the control of discovery from the licensing board.

In the present case Ms. Stamiris' FOIA request would have such an effect. The licensing board has ordered all discovery closed in the Midland proceeding. Midland Proceeding Licensing Board Order (Concerning Various Pending Motions), June 15, 1981 (the "Order"). By that Order the Board acknowledge the already expanded discovery in the case and determined that no further discovery was appropriate. Order at 4-5. The board specifically denied all of Ms. Stamiris' discovery requests and granted a protective order against any future discovery requests. Ms. Stamiris' FOIA request is merely an end run around this Order. Grant of the FOIA request would expressly contravene the underlying basis for the Order, lengthen the case and lessen the board's control of it.

Exemption (b)(7)(B): Release of the Draft Will Deprive CPCo of a Fair Adjudication

The grant of Stamiris' request for the quality assurance stipulation draft should also be denied under exemption §552(b)(7)(B). Exemption (b)(7)(B) protects from disclosure material which would "deprive a person of a right to a fair trial or an impartial adjudication." This protection extends to corporations as well as individuals. See, 5 USC §551(2). As the Attorney General's Memorandum on the 1974 Amendments explains, the provision operates to safeguard a litigant when "the release of damaging and unevaluated information may threaten to distort an administrative judgment in a pending case." 1974 Attorney General Memorandum at 8.

The facts in the Midland case threaten such a distortion. In the present case a quality assurance stipu-

lation, signed by the NRC and CPCo and submitted to the licensing board, still awaits approval. The stipulation the board has before it is the result of several months of negotiations between the NRC and CPCo. Exposure of previous drafts of stipulations without exposure to the process under which those drafts were developed can severely distort the perception of the board as to the merits of the present stipulation. It may prompt the board to second guess the posture of the parties and involve the board in the negotiation process. It is this exact situation exemption (b)(7)(B) was intended to prevent.

Further, the only way in which to even minimally remedy these side effects would be to make the board aware of the purposes of the various positions taken by the parties throughout the negotiations. This would entail a complex evidentiary presentation to explain the positions. Such a hearing would lengthen an already protracted Midland proceeding and re-focus it on matters totally collateral to the main considerations. It could involve matters protected by the attorney-client privilege. To fully explain their positions to the board CPCo -- or the NRC -- would be forced to waive that privilege. Such a coerced waiver may infringe upon the constitutionally protected right to counsel.

CONCLUSION

CPCo asserts its right under the Freedom of Information Act to have its draft of the quality assurance stipulation remain undisclosed. Release of such material would hamper the enforcement proceedings and threaten CPCo's right to a fair adjudication in those proceedings. While the thrust of FOIA is toward disclosure, examination of exemption (b)(7) demonstrates that it was intended to protect parties, such as CPCo, from just those problems. With the Commission's explicit policy in favor of the negotiation process, it is difficult even to infer a public interest which could countervail this protection. CPCo submits that the NRC must deny Ms. Stamiris' request and withhold the draft stipulation.

If the NRC decides to grant Ms. Stamiris' request, CPCo requests at least 48 hours notice of the release in order to permit it to protect its rights through appropriate procedures.

Sincerely,

James C. Bloom