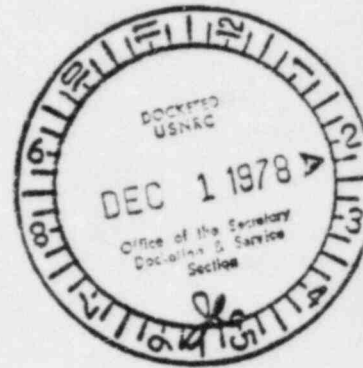




UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



November 29, 1978

MEMORANDUM FOR: James R. Yore, Chairman
Atomic Safety and Licensing Board Panel

FROM: *JLK* James L. Kelley, Acting General Counsel

SUBJECT: SUBPOENAS TO ACRS CONSULTANTS

Attached is an interpretative Commission statement on the question whether ACRS consultants can be subpoenaed to testify in licensing hearings. All Commissioners have concurred in this statement, except Commissioner Bradford who I believe may render separate views at a later date. I propose to present this statement for a formal vote of approval at the next Commission Affirmation Session. However, the Boards before which the question is presently pending may proceed now on the assumption that this statement represents the Commission's views.

Attachment: Interpretative Commission Statement

cc: Howard K. Shapar, ELD
Alan S. Rosenthal, ASLAP
Raymond F. Fraley, ACRS

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INTERPRETATIVE COMMISSION STATEMENT
ON AMENABILITY TO SUBPOENA OF CONSULTANTS TO
THE ADVISORY COMMITTEE ON REACTOR SAFEGUARDS
UNDER 10 CFR 2.720

The question has arisen in cases pending before Atomic Safety and Licensing Boards whether consultants to the Advisory Committee on Reactor Safeguards ("ACRS") are amenable to subpoena to appear and be subjected to cross-examination. Subpoena procedure generally is governed by 10 CFR 2.720, subsection (h) of which provides for a showing of "exceptional circumstances" when a party asks to subpoena specifically named NRC personnel. The phrase "NRC personnel" is, in turn, defined by 10 CFR 2.4(p) to include, for the purpose of subpoenas under section 2.720, (among others) "consultants to the Commission" and "members of advisory boards." Although this language does not cover consultants to advisory boards like the ACRS in so many words, it may be fairly read to include them.

The question presented in the pending cases has generic implications for other proceedings and for the practical availability of consultants to the ACRS. In these circumstances, and in the exercise of its supervisory authority over pending proceedings,* the Commission sought the views of the ACRS, the regulatory staff, and the parties to the

* See U.S. Energy Research and Development Administration (Clinch River Breeder Reactor Plant), 4 NRC 67, 75 (1976).

cases in which the question has arisen, on the generic aspects of the question. It subsequently considered the question in an open Commission meeting.

Upon consideration the Commission believes that the exceptional circumstances test of section 2.720(h) is properly applicable to consultants to the ACRS in cases in which they have served as consultants. On the one hand, ACRS consultants may make desirable witnesses in some proceedings. On the other hand, the ACRS advises us that their efforts to obtain the best qualified persons as consultants might be seriously compromised if consultants are to be vulnerable to subpoena without any restriction. The alternative of allowing ACRS consultants the limited protection of 2.720(h) for cases in which they have served as consultants seems an appropriate balance between these possibly conflicting considerations.

A generally-worded "exceptional circumstances" test must be administered by the boards case-by-case in the exercise of their sound discretion. For their future guidance, however, the Commission notes the following generally-applicable considerations. By the terms of the rule, "exceptional circumstances" are not limited to situations in which the particular individual has unique knowledge of facts. Furthermore, the mere fact that a particular person

may have been an ACRS consultant in a particular case does not mean that "exceptional circumstances" must be shown as a predicate for a subpoena to that person in another case. That limitation applies only in cases in which he has served as a consultant. Finally, parties may not seek to probe the reasoning process underlying the collegial ACRS report through the device of a subpoena to a consultant.