

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

DOCKETED
 USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the matter of)
)
 CONSUMERS POWER COMPANY) Docket No. 50-155-OLA
) (Spent Fuel Pool
) Modification)
 (Big Rock Point Nuclear Power Plant))

CONSUMERS POWER COMPANY
 REPLY TO INTERVENORS' LETTER
 OF FEBRUARY 24, 1983

On February 24, 1983, Intervenors Christa-Maria, et al., ("Intervenors") wrote the Atomic Safety and Licensing Appeal Board ("Appeal Board") complaining that Consumers Power Company's ("Licensee") filing of certain depositions with the Appeal Board and the Atomic Safety and Licensing Board ("Licensing Board") was improper. Intervenors concluded their February 24 letter by stating:

"The presentation of the deposition to the Appeals Board has prejudiced this appeal. Intervenors submit that the only recourse is to remand to the case to the Licensing Board which can then entertain a motion by Licensee to reopen. Intervenors request this letter be considered a motion to that effect, or if the Board desires, Intervenor will file a formal motion."

Licensee submits this reply in opposition to Intervenor's request.

1. As Licensee's letter of February 18, 1983 stated, the Brooks and Fieno depositions were taken as a

result of newly-discovered information contained in a memorandum from Mr. Harold R. Denton to B. Paul Cotter, Jr., Esquire. The subject matter of these depositions is pertinent to O'Neill Contention II E-3, an issue decided by the Licensing Board and a matter on appeal before this Board. Therefore, it was appropriate to submit the Brooks and Fieno depositions to the Licensing Board and Appeal Board for their information, especially in view of the fact that NRC appellate reviews are de novo. Indeed, such action is mandated by the McGuire ^{*/} decision. In that case, the Appeal Board stated:

[P]arties must inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated. . . . Any uncertainty regarding the relevancy and materiality of new information should be decided by the presiding board.

McGuire, supra at 625 and fn. 15. Intervenors' suggestion that the depositions were submitted in support of Licensee's appeal or were an attempt to reopen the evidentiary record is erroneous. The submission of the depositions was made solely to satisfy the McGuire doctrine.

2. Intervenors' suggestion that the pending appeal has been biased by the filing of the depositions

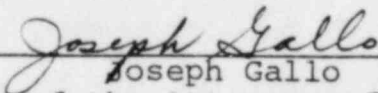
^{*/} Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623 (1973).

is also erroneous. Intervenors do not flesh out their assertion of bias. But apparently Intervenors believe that the Appeal Board will be influenced by the depositions in a manner contrary to their interest. Licensee is unable to speculate which aspect or aspects of the depositions might cause such a result. However, Licensee is able to state that Intervenors have misapplied a rule of law that, if appropriate, would apply to jury trials but certainly not to bench trials. While jury laymen may not be able to draw distinctions between record evidence and non-record information, jurists can and do so routinely. Administrative judges are also routinely called upon to draw such distinctions. No bias accrues to any party's interest in these circumstances. Moreover, Intervenors are hardly in a position to assert such a claim since the Intervenors are the only party that has attempted to inject the substance of the Brooks and Fieno depositions in the pending appeal. (See "Brief of Intervenors In Support of Licensing Board's Decision Concerning O'Neill Contention II E-3," dated January 28, 1983, pp. 7-8.)

For the foregoing reasons, Intervenors' requests

contained in their February 24 letter should be rejected.

Respectfully submitted,



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Dated: March 11, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of CONSUMERS POWER
COMPANY'S REPLY TO INTERVENORS' LETTER OF FEBRUARY 24,
1983 were served on all persons listed below by deposit
in the United States mail this 11th day of March, 1983.

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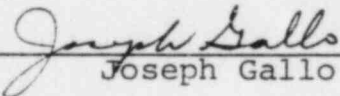
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