

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 50-329-OM
	)	50-330-OM
CONSUMERS POWER COMPANY	)	50-329-OL
	)	50-330-OL
(Midland Plant, Units 1	)	
and 2)	)	

MOTION FOR ADMISSION INTO EVIDENCE  
OF TRANSCRIPT OF DEPOSITION OF JOHN L. DONNELL

Introduction

On Saturday, October 15, Consumers Power Company ("Consumers"), by counsel, took the deposition of John L. Donnell in Las Vegas, Nevada. This deposition was noticed on September 29, 1983 subsequent to Mr. Donnell's oral agreement to appear for his deposition. The Licensing Board issued a subpoena on October 3, 1983, and Mr. Donnell voluntarily accepted service. Both the notice and the application for subpoena were duly served on all parties. The NRC Staff appeared, by counsel, at the deposition and conducted cross examination, but other parties did not avail themselves of this opportunity.

Consumers requests the Licensing Board to accept the transcript of the deposition (a copy of which is attached to this Motion) into evidence for three fundamental reasons: (1) the applicable Federal Rule of Civil Procedure, which should be followed by analogy by the Board, provides for the

admission of depositions as evidence at trial under circumstances applicable to the instant case; (2) Consumers does not wish to adopt Mr. Donnell as its witness and bear the costs and adverse inferences of bringing him to the hearing and sponsoring his testimony, and (3) requiring Mr. Donnell to attend the hearings would create great inconvenience to him.

#### Argument

The rules of procedure of the Commission allow for the use of deposition transcripts as evidence but do not provide criteria as to when introduction of depositions may occur. Under such circumstances, Licensing Boards may look to relevant portions of the Federal Rules of Civil Procedure for guidance.

Section 2.740a(g) of 10 C.F.R. Part 2 provides that "A deposition will not become part of the record in the hearing unless received in evidence." (Emphasis added.) This section clearly indicates the existence of authority to receive depositions in evidence, but no specific guidance is to be found anywhere in the Commission's Rules as to the conditions or criteria under which depositions may be admitted.<sup>1/</sup>

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<sup>1/</sup> The Commission's Statement of Consideration at the time it promulgated § 2-740a sheds no light on this matter. 37 Fed. Reg. 15127 (July 28, 1972).

The Commission's basic rule governing the admissibility of evidence is set forth in 10 C.F.R. § 2.743(c), which provides, in pertinent part:

Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.

There is no requirement that evidence be presented in all cases by live testimony. Indeed, the Supplemental Report produced by the Office of Investigation, which will undoubtedly be received in evidence as the Staff's testimony, consists in large part of second and third hand reports not subject to any form of effective cross examination, in contrast to deposition testimony.

It appears to Consumers that there could be no objection to the relevance or materiality of Mr. Donnell's deposition testimony, given the information which has been put forward in the Supplemental Investigation Report issued by the Office of Investigation regarding the alleged violation of this Board's Order. Nor should the reliability of the deposition be seriously in question. The deposition consisted of sworn testimony accurately recorded by a certified stenographic reporter. Counsel for the NRC Staff was present throughout. Moreover, Mr. Donnell will review the transcript, note corrections or changes, and sign the transcript before a notary public, who will attest the signature. The original will be filed with the Secretary of the Commission and a certified copy provided to the Board. Under these circumstances the reliability of this evidence could hardly be doubted.

NRC Licensing Boards have on a number of occasions admitted depositions or portions thereof into evidence.

E.g., Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923 (1982) ("Shoreham II"); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1667 (1982) ("Shoreham I"); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-81-12, 13 NRC 557, 614-15 (1981); Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-79-13, 9 NRC 489, 536-7, 549 (1979); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), LBP-78-41, 8 NRC 750, 753 (1978). Indeed, in the Shoreham I case, supra, the Board explicitly held that it was not violative of the Administrative Procedure Act to litigate an entire subject matter area (emergency planning) on depositions. These instances appear to have been cases in which the Board concluded without need for explanation or rationale that deposition transcripts were admissible as evidence. No firm criteria for the admissibility of deposition transcripts have been given in any reported case which Consumers has been able to unearth.

The Commission's Statement of General Policy on the conduct of hearings, 10 C.F.R. Part 2, Appendix A, contains a hint of how this question is to be resolved in § IV(c), where the Commission indicates that discovery is generally to be conducted "in line with the Federal Rules of Civil Procedure." The scanty case law on the interpretation of NRC's discovery rules also indicates that the Federal Rules of Civil Procedure

are to be used as a guide in interpreting related NRC discovery rules. For example, in Consolidated Edison Company of New York (Indian Point Unit No. 2), LBP-83-29, Docket Nos. 50-247 SP, 50-286 SP, ASLBP 81-466-03 SP, slip opinion (June 8, 1983), the Board indicated that the Federal Rules of Civil Procedure provide "guidance" to Licensing Boards in applying the NRC's rules. The Board here relied on Rule 32(a)(2) of the Fed. R. Civ. P. to deny the admissibility of a specific deposition because the factual circumstances of the deposition did not meet the requirements of that subsection of Rule 32. See Public Service Company of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671, 673 (1977).<sup>2/</sup>

Rule 32 of the Fed. R. Civ. P. permits the use of deposition transcripts as evidence in trials in Federal District Courts under certain circumstances. As the basic provision allowing for use of depositions as evidence, Rule 32 is analogous to the portion of 10 C.F.R. § 2.740a(g) quoted supra at p.2. However, it also contains explicit criteria for admissibility of depositions at trial. Subsection (a)(3) provides, in pertinent part, as follows:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or

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<sup>2/</sup> Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575 (1978) is not to the contrary, because in that situation and in another case cited therein, there was no rule "even remotely similar" to the ones Applicants were there attempting to read into 10 C.F.R. Part 2.

is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

In the case of John L. Donnell, the witness lives in Las Vegas, Nevada, approximately 1500 miles from the place of hearing. This distance is a fact of a type of which the Board may take official notice. Moreover, Mr. Donnell indicated in conversations in the margins of his deposition that it would impose a significant hardship upon him to be subpoenaed for the hearing in Midland because of the pace of his work on a contract which his present employer has with the Department of Energy. If necessary Mr. Donnell could provide an affidavit attesting to that hardship.

Consumers also does not wish to sponsor Mr. Donnell as a witness at the hearing. The expense would be significant, but more important, Consumers wishes to maintain an arms length relationship with Mr. Donnell. If Consumers were to sponsor Mr. Donnell's testimony and underwrite his expenses for travel to Midland and lost wages, other parties or the Board might infer that Consumers had exercised undue influence over Mr. Donnell. Thus far Consumers has paid Mr. Donnell only the statutory witness fee for attendance at a deposition plus exact mileage for his travel to and from the deposition as required by statute.

#### Conclusion

For all of the foregoing reasons, Consumers respectfully requests that this Board admit the transcript of

the October 15 deposition of John L. Donnell into evidence. Consumers further asks the Board to request other parties to accelerate their responses to this Motion and to make an initial ruling orally on this motion so that Mr. Donnell may be subpoenaed by some party for the next session of hearings should the Board's ruling be adverse.

Respectfully submitted

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I, Frederick C. Williams, one of the attorneys for Consumers Power Company, hereby certify that I served copies of Consumers Power Company's Motion For Admission Into Evidence Of Transcript Of Deposition Of John L. Donnell upon all persons shown in the attached service list, either by hand delivery, Federal express, or deposit in the United States Mail, first class, postage prepaid, the 25th day of October, 1983.

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