

**ADVISORY COMMITTEE ON REACTOR SAFEGUARDS**  
**UNITED STATES ATOMIC ENERGY COMMISSION**  
WASHINGTON, D.C. 20545

January 5, 1968

Honorable Glenn T. Seaborg  
Chairman  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Subject: IMMUNITY FROM SUBPOENA FOR MEMBERS AND RECORDS OF ADVISORY  
COMMITTEE ON REACTOR SAFEGUARDS

Dear Dr. Seaborg:

The Committee has recently discussed with the Director of Regulation a question which has been raised with respect to subpoena of ACRS Members for AS&LB Hearings and the status of ACRS reports to the Commission on the projects being considered at these hearings. It is the opinion of the Advisory Committee on Reactor Safeguards that its members should be immune from giving testimony with respect to Committee work, records, or reports, or from producing Committee records, in administrative hearings or in courts. The Committee recommends that the Commission provide this immunity by regulation.

1. Nature And Method Of Committee Work Require This Immunity

The Committee was established as a statutory body by the Congress to provide the Commission and public with the advice of a body of non-agency experts on the safety of proposed or existing reactor facilities, the adequacy of proposed standards and criteria and such other duties as the Commission may request. This is clearly a more general assignment than the formal regulatory review of specific license applications and has been considered as an assignment to provide the Commission with the technical support of an independent advisory group in the accomplishment of its executive function.

The history indicates that the Congress regarded the Committee as, among other things, a body with independent scientific competence whose opinion would not be subject to the pressure from industry on the governing agency to whom had been committed both the promotional and licensing functions.

None of the reactor licensing authority was transferred to the Committee but remained entirely with the Commission, to be exercised in formal Administrative Procedure Act (APA) hearings on a public evidential record

reviewable by the courts. The Committee was required to make a review and report before the formal hearing process began. The Committee's report to the Commission, and only that report, was to be made public by attaching a copy to the record of the application for license.

Originally as a creation of the Commission and later as a statutory committee, the ACRS has always functioned wholly in executive non-public sessions, even in its discussion of license projects with applicants and the AEC staff, and its records have remained confidential with the Committee. This method has been followed in the interest of obtaining full exchange and expression of information and thinking among license applicants, AEC staff, and the Committee; this process might be inhibited if required to be on a public record or if it were known that any of the preliminary material short of the final report could be obtained and made public. For this reason alone, which is entirely consistent with the protection provided by the Freedom of Information Act, the members of the ACRS should be protected from compulsory disclosure of the discussions and considerations underlying its final reports. The Committee members are already prohibited by the ACRS bylaws from giving interpretations or explanations of a Committee report, or from expressing individual views on cases reviewed except as these are expressed in the final report.

## 2. Composition Of Committee Membership Requires The Immunity

Secondly, if the Committee is to function as a group which reviews and reports as a body, it cannot be permitted to deteriorate into a pool of competing expert witnesses upon whom applicants for licenses, intervenors, and hearing boards may draw at will to give individual testimony or explanations in the licensing cases on which the Committee has reported.

In this connection, the ACRS is a part-time body whose members have occupations outside the Commission that contribute to their expertise but also limit the amount of time each member can devote to ACRS work. Moreover, under the requirements of the conflict of interest statutes, the members must limit the amount of time they may devote to government activities in order to effectively discharge their non-government responsibilities. Subjecting the Committee members to subpoena for testimony in the licensing cases they have reviewed for the Commission would cripple the Committee. Indeed, mere acknowledgment by the Commission that Committee members may be subject to devoting time in hearing rooms as witnesses may have the effect of terminating some memberships and making future replacements more difficult.

## 3. There Is No Necessity For Requiring Committee Testimony

Thirdly, there is no need that overrides the foregoing considerations to subject the members of the ACRS to subpoena in the licensing process. The applicant and his witnesses and the AEC staff are subject to appearance

and to examination and cross-examination by all parties in elaboration of the exhibits and the respective positions of each, in order to establish a record for decision by the licensing bodies.

The ACRS report is automatically part of the record of the application by statute. The report proves itself and speaks for itself. It resembles the findings and recommendations of other deliberative bodies whose members would not be subject to subpoena to explain and elaborate on their findings when acted upon or used in later or other proceedings. The ACRS report can be given great weight, as a corroborative finding, by the licensing bodies, but need not be. In any event, before a decision is reached, the licensing body will have established for itself an evidential record of exhibits and testimony upon which to rest its decision.

The credit, if any, then given the ACRS report does not and cannot depend upon testimony by its members before the licensing body but rests rather upon the scientific repute of the Committee as a whole and the articulation or demonstration in the report that the Committee had full access to approximately the same material and personnel of the applicant and AEC staff that has turned up in the public licensing hearing.

4. An Immunity Rule For ACRS Has Precedent And Needs Prompt Action

It is the Committee view that the AEC, as the agency charged with interpretation of the Atomic Energy Act, should provide the necessary regulation or rule establishing the immunity from subpoena for the ACRS members and records. There is precedent for such a blanket exemption, as in the case of the exemption of personnel and records granted the Conciliation Service by regulation of the Secretary of Labor while the Service was part of the Department of Labor, and continued for the Federal Mediation and Conciliation Service when it became an independent agency, 29 CFR 1401.5.

If the Commission is contemplating a general rule applicable to all AEC officials, employees and consultants, the ACRS has no objection to being included in this rule but feels that the ACRS and the reasons for its exemption should be identified separately since the reasons for the exemption rest on the outlined grounds peculiar to the functions and composition of the ACRS.

The Committee further believes that the matter ought to be resolved in advance of an issue with respect to the subpoena of a member of Committee records becoming a litigated case. Clearly the hearing boards will be

bound by the appropriate rule, and a reviewing court is likely to give it the respect, as the considered interpretation of the agency administering the Atomic Energy Act, that a court would not as readily give to an ad hoc argument without a rule.

Sincerely yours,

C. W. Zabel  
Chairman