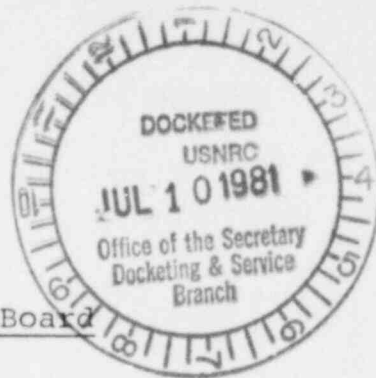




UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board



In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))

Docket Nos. 50-329-OM
50-330-OM
50-329-OL
50-330-OL

6/7/81

CONSUMERS POWER COMPANY RESPONSE IN OPPOSITION TO
INTERVENOR REQUESTS "FOR RULING ON APPROPRIATE TIME
FOR APPEALS ON DISCOVERY RULINGS & CONFERENCE CALL
RULINGS WHICH DENY EQUAL RIGHTS TO ONE PARTY IN THE
PROCEEDING" AND "APPELLATE REVIEW CERTIFIED ON
DIRECTION OF THE COMMISSION"

Pursuant to 10 C.F.R. §2.730(c) Consumers Power
Company ("Consumers Power") hereby submits its response in
opposition to (1) Intervenor's Request for Ruling on Appro-
priate Time for Appeals on Discovery Rulings & Conference
Call Rulings Which Deny Equal Rights to One Party in the
Proceeding ("Discovery Ruling Request"), and (2) Request for
Appellate Review Certified on Direction of the Commission
("Summary Disposition Appeal").

I. Discovery Ruling Request

Ms. Stamiris has requested the Appeal Board to
answer certain "questions in the abstract," viz would the
Appeal Board "entertain an interlocutory appeal on any or all
of the following issues?" According to Ms. Stamiris' scheme,

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if the Appeal Board answers any of her abstract questions affirmatively she "will provide the appropriate supporting evidence" at the Board's request. None of the abstract questions referenced in Ms. Stamiris' Discovery Ruling Request warrant interlocutory review.

Ms. Stamiris is seeking an advisory opinion as to whether the Appeal Board would entertain an interlocutory appeal on certain abstract discovery questions. The Appeal Board is "not in the business of deciding abstract questions." See, Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977). Advisory opinions are not favored by the Appeal Board and will not be rendered in the absence of the most compelling cause. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978), remanded other grounds, State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

Further, Section 2.730(f) grants Appeal Boards discretionary authority to review interlocutory orders only when "prompt decision is necessary to prevent detriment to the public interest or unusual delay." 10 C.F.R. §2.730(f). This authority is reserved for exceptional and important issues: discovery rulings, such as the ones referenced in Ms. Stamiris' motion, are generally not candidates for its exercise. See, Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-439, 6 NRC 638 (1977).

The Appeal Board clarified the criteria governing referral in Public Service Company of Indiana (Marble Hill

Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). There, in declining to accept appellate review of a Licensing Board's Order, it held:

Almost without an exception in recent times, we [the Appeal Board] have undertaken discretionary interlocutory review only where the ruling below (1) threatened the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted).

Applying these criteria to the circumstances of this case, it is clear that interlocutory appeal of the discovery "issues" raised in Ms. Stamiris' Discovery Ruling Request must be denied. The Licensing Board's discovery rulings neither affect the basic structure nor jeopardize the conduct of the proceeding below.

Most importantly, however, the Licensing Board's rulings do not threaten Ms. Stamiris "with immediate and serious irreparable harm which, as a practicable matter, could not be alleviated by a later appeal." Marble Hill at 1192. Extensive discovery has been engaged in by all parties to this proceeding, including Intervenor. Discovery must be terminated sometime prior to hearing. The decision to terminate discovery, as all questions about the proper scope of discovery, is firmly within the discretionary authority of the Licensing Board and appellate review of such rulings is best conducted at the end of the proceeding.

II. Summary Disposition Appeal

On April 21, 1981, Ms. Stamiris filed a motion for summary disposition in which she sought to preclude consideration in the proceeding below of "plans and promises" by Consumers Power with respect to Consumers Power's future quality assurance program. Ms. Stamiris contended that future quality assurance performance can be best predicted on the basis of past performance, and that Consumers Power's "promises, commitments, intentions, and plans for the future regarding Quality Assurance, does not constitute genuine issues to be heard in this soil settlement proceeding."

After reviewing Ms. Stamiris' motion, the Licensing Board agreed with both the NRC Staff and Consumers Power that "Ms. Stamiris' motion cannot be considered as a motion for summary disposition. It does not establish the absence of a genuine issue of material fact; indeed, on its face, it recognizes differences between her position and that of CPC. That being so, the summary disposition requirements of 10 C.F.R. §2.749 have not been satisfied." Ms. Stamiris' motion is therefore denied." (emphasis added)

There is a general proscription against interlocutory appeals. 10 C.F.R. §2.730(f). The single exception to this proscription is set forth in 10 C.F.R. §2.714a, which allows an interlocutory challenge only to the grant or the total denial of an intervention petition. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1177 (1977). "That an order declining a motion

for summary disposition (or judgment) is interlocutory cannot, of course, be disputed." Accordingly, denial of Ms. Stamiris' motion for summary disposition cannot be the subject for appeal. Louisville Power and Light company (Waterford Steam Electric Generating Station, Unit 3), ALAB-200, 6 AEC 93, 94 (1974).

Additionally, the Licensing Board's ruling refusing to exclude evidence from the proceeding below does not warrant exercise of the Appeal Board's discretionary authority to review interlocutory orders pursuant to 10 C.F.R. §2.730(f).

As noted above, Appeal Boards have taken interlocutory review only where the Licensing Board's ruling (1) threatens the party below with immediate and serious irreparable harm which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

The Licensing Board's refusal to exclude certain evidence from consideration will not affect the basic structure of this proceeding. The issues to be adjudicated remain the same, and the extent to which Ms. Stamiris may participate in this proceeding has not been altered. Indeed, contrary to Ms. Stamiris' assertions, denial of her motion to exclude certain evidence will guarantee that all relevant information will be evaluated by the Licensing Board.

More importantly, however, the Licensing Board's ruling does not threaten Ms. Stamiris "with immediate and irreparable impact which, as a practical matter, could not be alleviated" at a later stage. In fact, Ms. Stamiris' request to exclude evidence, as the Licensing Board recognized, was premature. Ms. Stamiris is provided an opportunity to submit evidentiary motions at an appropriate time in the proceeding before the Licensing Board.

Accordingly, Ms. Stamiris' request for interlocutory review of the Licensing Board's ruling denying her motion for summary disposition must be denied.

Ms. Stamiris has also sought, at page 4, "1) an appellate definition on acceptable evidence; 2) a ruling that past QA performance (prior to December 6, 1979) must be fully considered in the final 'reasonable assurance' judgment; and 3) an appellate decision on the weight accorded the evidence allowed." Each of these requests is in the nature of an advisory opinion, and, as noted above, should not be rendered in the absence of the most compelling cause. Ms. Stamiris has made no such showing. Indeed, the questions Ms. Stamiris desires to raise before the Appeal Board relate to matters appropriately within the province of the Licensing Board.

III. Conclusion

For the aforementioned reasons, Consumers Power (1) objects to both Ms. Stamiris' Discovery Ruling Request

and Summary Disposition Appeal and (2) moves for the above noted motions' denial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alan S. Farnell, hereby certify that a copy of CONSUMERS POWER COMPANY RESPONSE IN OPPOSITION TO INTERVENOR REQUESTS "FOR RULING ON APPROPRIATE TIME FOR APPEALS ON DISCOVERY RULINGS & CONFERENCE CALL RULINGS WHICH DENY EQUAL RIGHTS TO ONE PARTY IN THE PROCEEDING" AND "APPELLATE REVIEW CERTIFIED ON DIRECTION OF THE COMMISSION" was served upon all persons shown in the attached service list by deposit in the United States mail, first class, this 6th day of July, 1981. The copies to Mr. Salzman, Dr. Buck and Ms. Kohl were sent Federal Express.

Alan S. Farnell

Alan S. Farnell (by RGF:J)

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