

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



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

INTERVENOR BARBARA STAMIRIS' RESPONSE TO APPLICANT
MOTION TO REQUIRE SUBMISSION OF CROSS-EXAMINATION PLANS,
DESIGNATION OF LEAD INTERVENORS, AND ESTABLISHMENT OF TIME
LIMITS ON CROSS-EXAMINATION

Applicant moved on May 4, 1983 to limit participation by parties in these licensing hearings, by means of this Atomic Safety and Licensing Board ("Licensing Board") imposition of the following requirements:

1. Require all parties to file cross-examination plans with the Licensing Board.
2. Require intervenors to designate a Lead Intervenor.
3. Require Ms. Stamiris' counsel to conduct all cross-examination.
4. Require all parties to submit estimates of the time required for cross-examination. The Board would then allow parties to exceed these time estimates only for good cause shown.

On May 9, 1983, Applicant submitted a "Revised Motion" in which it had deleted all statements critical of the Nuclear Regulatory Commission ("NRC" or "Commission") Staff. In exchange, apparently, the NRC Staff agreed to support the Applicant's Motion.

Intervenor Barbara Stamiris opposes applicant's revised motion. It is clear that if this Board were to grant applicant's motion it would deny Ms. Stamiris and other intervenors in this proceeding basic due process rights of full participation.

It is also obvious that applicant's motion is not for the purpose of controlling the size of the record. Instead, it appears to be aimed at limiting intervenor's participation in these hearings; an obvious effect would be to hinder the full and sound development of the record.

Although applicant has stated that its sole goal is to keep the record within a manageable size, in fact, the large size of the record is due to the applicant's own mismanagement and quality assurance failures. These very OM hearings would not be necessary if it were not for the applicant's failures in the soils area. Moreover, this Licensing Board reopened the record for the OM hearings upon a motion by the NRC Staff which felt compelled to request reopening after determining that applicant's overall performance at Midland was very poor. Therefore, this entire set of hearings, extraordinary for any nuclear power plant, has been continuing for over two-and-one-half years solely because of Consumer Power Company's failure to solve the serious quality assurance and soil problems at the site.

Once the reason for these hearings is recognized, applicant's motion to limit participation in these licensing hearings must be seen simply as a legal maneuver intended to obstruct a full and sound development of the record for this Board.

I. THE RESTRAINTS REQUESTED BY APPLICANT WOULD
UNFAIRLY DENY INTERVENORS THEIR DUE PROCESS
RIGHTS TO FULL PARTICIPATION IN THESE HEARINGS.

Ms. Stamiris agrees with applicant that this Licensing Board has broad authority to ensure that those hearings which take place before it are conducted efficiently, and in a manner so as to create a sound record. The Board is expressly granted the authority to prevent argumentative, repetitious or cumulative cross_examination, 10 CFR 2.757(c), and to regulate the course of the hearing, 10 CFR 2.718(e). Moreover, it is clear that a party is entitled to conduct only such cross-examination as may be required for a full and true disclosure of the facts. Northern States Power Co. (Prairie Island Nuclear Generating Plant), ALAB-244, 8 AEC 857, 869 n.16 (1974), reconsideration denied, ALAB-252, 8 AEC 1175 (1975), affirmed, CLI-75-1, 1 NRC 1 (1975); 5 U.S.C. §556(d); Attorney General's Manual on the Administrative Procedure Act, p. 78 (1947), quoting from H.R. Rep. 1980, 79th Cong. 2nd Sess. 37 (1946).

However, a Licensing Board may not impose restraints on any party such that a party is deprived of his or her rights to procedural due process. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188 (1978). In the Marble Hill case, the Appeals Board ruled that a Licensing Board may be held to have abused its discretion in setting a hearing schedule which is fundamental unfair to any party. Ibid.

The Midland Licensing Board on two prior occasions has been reversed by an Appeals Board for making rulings to control the hearings taking place before it. In Consumers Power Co. (Midland

Plant, Units 1 and 2), ALAB-379, 5 NRC 565 (1977), the Appeals Board ruled that the Licensing Board had abused its discretion in excluding prospective NRC staff witnesses from the hearing room during the testimony of other parties' witnesses. The basis for the decision was that the Board's ruling "could hamper the staff's ability to contribute to the development of a sound record." Id. at 569.

Here, too, the Licensing Board's imposition of limits on parties' participation would hamper their ability to contribute to the development of a full and sound record. In fact, given the frequent and oftentimes frivolous objections of applicant's counsel, such restrictions would allow nothing more than a one-sided presentation of evidence in the hearings.^{1/}

Applicant has stated that the limited time and resources of the Licensing Board, of the Appeals Board and of the Commission itself are proper factors to be taken into consideration in

^{1/} If the Licensing Board grants applicant's motion in its entirety, intervenor Barbara Stamiris requests that this Board certify the issue to the Appeals Board pursuant to 10 CFR §2.730(f). This issue certainly is one that is "certifiable" under the standard set out in Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533 (1980). The standard is that discretionary interlocutory review will be granted when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal; or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. Id. at 536. Certainly this Board's imposition of drastic restrictions on intervenors' participation in these hearings would be such an immediate and serious irreparable harm, and could not be remedied in a later appeal of the decision of the Board. Similarly, these restrictions would affect the basic structure of the proceedings in a pervasive manner. Thus, there is no doubt that if this Board were to grant applicant's motion, it would have no choice but to grant intervenor's request for certification to the Appeals Board.

determining whether or not limits should be placed on parties' participation. There exists no legal support for this assertion. In fact, all decisions and the Commission Statement of Policy on the Conduct of Licensing Hearings state clearly that no action can be taken which would be inconsistent with the fairness owed all parties. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981). Moreover, Licensing Boards must make rulings which on balance enhance the development of a sound record and full disclosure of all relevant evidence. Consumers Power Co. (Midland Plant, Units 1 and 2), supra, 5 NRC at 569. It is the rights of the parties which are of utmost importance and the creation of a sound record which must guide this Licensing Board in shaping these OM hearings.

Applicant's withdrawal of its original May 9, 1983 motion and filing of a "Revised Motion" appear to demonstrate the bad faith of applicant's counsel. No counsel should file a pleading for which he does not have a sound basis in fact. If applicant's counsel in fact believed that he had a sound basis in fact and law to file his original motion, in which he criticized NRC Staff counsel's cross-examination, he should not have withdrawn that criticism at a later time. If he had no basis in fact to criticize Staff counsel but merely wished to pressure Staff counsel to agree to applicant's motion, applicant's counsel should be reprimanded by this Board. Neither on the record of May 6, 1983 nor in its revised motion has applicant's counsel stated any reason for withdrawal of the original motion. Tr. at 16321 to 16324.

II. NO RESTRICTIONS SHOULD BE IMPOSED ON INTERVENORS
WITHOUT PLACING SIMILAR RESTRICTIONS ON APPLICANT'S
COUNSEL'S OBSTRUCTIVE AND FRIVOLOUS OBJECTIONS.

Applicant cites a number of examples of cross-examination which it characterizes as repetitive, discursive, and even abusive. Applicant's Motion at 6. Clearly in all the examples cited, the cross-examination, as it continued, elicited new and useful information. In fact, it could be stated that in some of the examples cited, if the applicant's witnesses had been more forthright and honest, the cross-examination of those witnesses could have been significantly shortened.

Certainly the examples cited by applicant from the most recent two weeks of hearings held from April 27 through May 5, 1983 demonstrate that cross-examination is aiding to develop a sound record. A cursory examination of the examples cited by applicant as "repetitive" cross-examination, Motion at 9 n.8, illustrate applicant's all too frequent mischaracterization of the record. On pages 14921-22, it is clear that Ms. Stamiris is attempting to establish the reason the NRC Staff decided to conduct the diesel generator building inspection. Her point is established a few pages later in the transcript. On page 14923 Judge Bechhoefer states that he believes he understands what Ms. Stamiris is aiming for. On page 14961 applicant's counsel makes an objection to Ms. Stamiris' question regarding the purpose of the inspection. This objection is overruled. Similarly, on page 14970 the Board allows a question as to whether Consumer Power Company's stated position that its problems are only in the soils area is different than its position in a draft letter of

September 7, 1982.

On page 15057, Ms. Stamiris, over the objection of applicant's counsel, succeeds in asking the NRC panel what the root cause is for the problems at Midland. Dr. Landsman, in some of the most illuminating testimony offered during the most recent two weeks of the hearing, stated that he ebelieved the Midland Team had soul-searched for the last six months for the answer to that question, Tr. at 15056, and that he believed it was a combination of inability and unwillingness of the applicant to change the situation. Ibid.

Over the objection of applicant's counsel Ms. Stamiris also elicited the response from Dr. Landsman that further evidence of the technical inability of Consumers Power Company could be seen in three obvious design deficiencies found in the Midland plants. Tr. at 15059-60.

While applicant may not have wished the above testimony to be added to the record, it must be acknowledged as useful information which will aid this Board in making its decision.

Moreover, the frequent and oftentimes frivolous objections of applicant's counsel make expeditious questioning of witnesses difficult, if not impossible. Among the frivolous objections, not based in law, made by applicant's counsel in the last set of hearings were the following:

- 1) Applicant's counsel objected, without offering any basis in law for the objection, to an NRC Staff witness consulting his handwritten notes during his testimony. Tr. at 14455-61.

- 2) Applicant's counsel objected to intervenor's counsel

questioning a witness one one portion of a document and not the entire document. Tr. at 15076. Again, Mr. Miller gave no legal basis for his objection.

3) Mr. Miller objected to intervenor's counsel's hypothetical question to an NRC Staff witness when it was clear a basis for the question would be p-ovided in future testimony. This objection was overruled. Tr. at 14685.

4) Applicant's counsel objected twice to a question of the NRC panel about whether or not a particular memorandum indicated that Consumer Power Company's employees were instructed not to talk to the NRC about the Construction Completion Program ("CCP"). When these objections were overruled, Mr. Miller himself testified as to the substance of the memorandum. Finally, the witnesses were permitted to answer the question. Tr. at 14710-13.

5) Mr. Miller interjected himself into cross-examination by intervenor's counsel to suggest to an NRC Staff witness that he had incorrectly answered a question about the quality assurance performance of applicant since SALP 2. Despite the lack of any legal basis for his interjection, Mr. Miller obstructed the ongoing line of cross-examination.

In addition, Mr. Miller throughout the last two weeks of hearings objected to preliminary questions intended to lay the foundation for a line of cross-examination, even though he himself often asked preliminary questions.^{2/}

Moreover, an examination of his early cross-examination of the Midland section demonstrates a long and rambling probing of the

^{2/} The numerous examples can be seen in the following pages: Tr. at 14454, 14562, 14563, 14566, 14585, 14589, 14590, 14623, 14662, 14681, 14706, 14707, 14710

team's communications with intervenors. Tr. at 16160-16197.

These questions are inappropriate in an administrative hearing and should not have been permitted by this Board. In addition, it is clear from the answers elicited from the panel that Mr. Miller had no good faith basis to expect that he would elicit relevant or useful information from the panel.

This Board cannot limit intervenors' participation in this licensing hearing or place any limits on cross-examination without similarly restraining applicant's obstructive and time-consuming objections throughout intervenors cross-examination. Any such one-sided imposition of restrictions would be a violation of intervenors' due process rights to full participation in these hearings and hurt development of sound record for decisionmaking.

III. CONCLUSION

For the foregoing reasons, intervenor Barbara Stamiris respectfully requests that this Licensing Board deny applicant's motion in its entirety.^{2/}

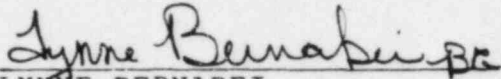
^{2/}

It is anticipated that Ms. Stamiris' counsel will undertake the bulk of the cross-examination in the hearings currently scheduled for June, 1983. Moreover, it has always been agreed that Ms. Stamiris and her counsel will not cross-examine the same panel of witnesses on the same subjects. Given Ms. Stamiris' counsel late entry into this case it certainly appears more appropriate and expeditious to allow both the intervenor and her counsel to conduct cross-examination.

Moreover, there is absolutely no basis for excluding Mrs. Sinclair and Mr. Marshall from their own cross-examination of witnesses. As it is clear from the last set of hearings, Mrs. Sinclair and Mr. Marshall's cross-examination did not overlap to any degree with the questioning by Mrs. Stamiris and her counsel.

The Commission has held that an intervenor can and should be afforded the opportunity to cross examine on those portions of a witness' testimony which relate to matters which had been placed into controversy by at least one of the parties to the proceeding, so long as that intervenor has a discernible interest in the resolution of the particular matter. Northern States Power Co., supra.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INTERVENOR STAMIRIS
RESPONSE TO APPLICANT MOTION TO REQUIRE SUBMISSION OF CROSS-EXAMINATION
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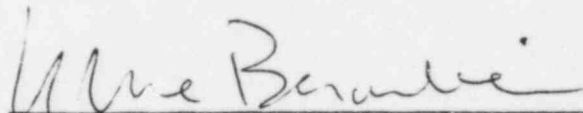
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