

In the Matter of <sup>83</sup> DEC -5 A10:47

Docket Nos. 50-443 OL  
50-444 OL

Massachusetts Attorney General Bellotti (hereinafter referred to as the MassAG) has filed a motion seeking to compel the Federal Emergency Management Agency (FEMA) to respond to certain interrogatories. For the reasons set forth below FEMA maintains that it cannot be compelled to respond to interrogatories.

On December 7, 1979, President Carter, in response to the recommendations of the President's Commission on the Accident at Three Mile Island (the Kemeny Commission), assigned FEMA the responsibility as lead agency in offsite emergency planning and response. To implement this assignment FEMA and the Nuclear Regulatory Commission (NRC) signed a Memorandum of Understanding (MOU) on January 4, 1980 describing each agency's responsibilities in preparing for emergencies at nuclear facilities. 45 Fed. Reg. 5847. The MOU was revised and updated on November 1, 1980. 45 Fed. Reg. 82713 (December 16, 1980).

[T]he FEMA responsibilities with respect to emergency preparedness as they relate to the NRC are:

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4. To make findings and determinations as to whether State and local emergency plans are adequate and capable of implimentation [e.g., adequacy of maintenance of procedures, training, resources, staffing

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levels and qualifications and equipment adequacy]. Notwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC through the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These finding and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC.

MOU, II. Authorities and Responsibilities, 45 Fed. Reg. 82714 (December 16, 1980).

The MOU further provides that FEMA will "provide expert witnesses before the Commission, the NRC Advisory Committee on Reactor Safeguards, the NRC hearing boards and administrative law judges, any court actions, and during any related discovery proceedings." MOU, III. Areas of Cooperation, A. NRC Licensing Reviews, 48 Fed. Reg. 82714.

There is no other mention of FEMA's role as it relates to the licensing proceeding anywhere else in the MOU.

The Commissions rules on discovery are set forth in 10 C.F.R. Part 2. More specifically 10 C.F.R. § 2.740b provides that

(a) Any party may serve upon any other party (other than the staff) written interrogatories.... (emphasis added).

FEMA is not party to these proceedings. The Memorandum of Understanding between the NRC and FEMA belies such an interpretation. While one licensing Board panel has called FEMA a "de facto" party to ASLB proceedings, Matter of Cinnicinnati Gas & Electric Co., et al, (Wm. F. Zimmer Nuclear Power Station), 15 N.R.C. 1549, 1565 (1982), another has correctly observed "that the status of FEMA in NRC licensing hearings is unclear." Matter of Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), Memorandum And Order Denying Suffolk County Motion To Compel Discovery From FEMA (September 27, 1983).

The issue of whether FEMA could be compelled to respond to interrogatories was addressed in Union Electric Company (Callaway Plant, Unit 1), where the ASLB denied a motion to compel on the grounds that FEMA was not a party. In fact Intervenor in this proceeding have recognized that FEMA has something of a "hybrid status....It does not have full party status." Letter from William S. Jordan, Counsel for NECNP to Brian P. Cassidy dated July 1, 1983.

Further, the status of a party in an NRC proceeding does not need any elaboration or authorization beyond that required in the NRC rules on intervention. In the Matter of Kansas Gas & Electric Co., et al (Wolf Creek Generating Station), the Board took pains to define the scope of FEMA's participation in the hearings process in its Prehearing Conference Order stating that,

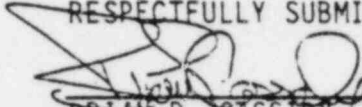
FEMA shall have an independent role in this proceeding in terms of presenting its witnesses by its attorney and by conducting redirect examination of its witnesses and cross examination of opposing witnesses.

It is clear that FEMA is not a party to the proceeding for purposes of responding to interrogatories propounded under 10 C.F.R. § 2.740b. Consequently, FEMA cannot be compelled to respond to the MassAG's interrogatories.

By denying the MassAG's motion to compel the Board will not foreclose the MassAG from conducting discovery. FEMA's Counsel advised the MassAG's Counsel that it would discuss those objections which were raised in FEMA's response and would provide a response to any comprehensible questions within the scope of the contentions. In fact, FEMA has already done this with NECNP. See, FEMA's Amended Answers To NECNP's Interrogatories. The MassAG responded with this motion. FEMA stands by its representation that it will endeavor to negotiate a amicable settlement with the MassAG.

For the reasons stated above, the MassAG's motion to compel should be denied.

RESPECTFULLY SUBMITTED,

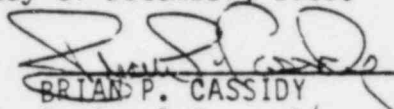


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BRIAN P. CASSIDY  
Regional Counsel  
Federal Emergency Management Agency

CERTIFICATE OF SERVICE

I, Brian P. Cassidy, state that I served a copy of FEMA's Memorandum In Opposition To Attorney General Bellotti's Motion To Compel Answers To Interrogatories, by mailing in a franked envelope upon the parties identified in the attached service list on this 1st day of December, 1983.

  
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Federal Emergency Management Agency

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OFFICE OF SECRETARY  
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BRANCH

July 1, 1983

Brian P. Cassidy  
Regional Counsel  
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& Courthouse  
Boston, Massachusetts 02109

Dear Brian:

Pursuant to our conversation of this afternoon, I am enclosing a copy of NECNP's contentions with respect to the New Hampshire State Plan. I do this as a courtesy since you expressed interest in the contentions in order to assist FEMA's review of the state plan.

I am, for the moment, withholding a decision on your request that FEMA be included on our service list for the Seabrook proceeding. Although you have previously rejected our suggestion for cooperation, I would like to pursue it further before seeking guidance from the Board.

I gather that you view your having filed an appearance in the licensing hearing as establishing a right to be on the service list. We disagree. Although it has something of a hybrid status, FEMA appears in licensing hearings primarily as a witness for the NRC Staff. It does not have full party status. Witnesses are not normally placed on the service list except as a matter of courtesy. We see no reason that FEMA should be treated differently from other witnesses.

In addition, I am sure that you are aware that NECNP is a citizen organization that depends upon donations and fundraising for its survival. Every filing and every additional expense is a heavy burden. We simply cannot afford to provide extra copies of our filings to non-parties without some substantial justification.

HARMON & WEISS

Brian P. Cassidy  
Page Two

Having said that, I emphasize that we are more than willing to cooperate. Diane suggested to you some time ago that we should be served with any correspondence between FEMA and the states and localities whose plans FEMA is reviewing. This suggestion arose from the fact that we discovered by accident that FEMA had written a somewhat negative letter concerning the New Hampshire State Plan, and we then had some difficulty obtaining a copy of the letter. When correspondence of that sort is crucial to developing and evaluating the state of emergency planning and preparedness in the area, it is unreasonable that concerned citizens should be required to stumble upon the materials by accident.

We can, of course, obtain all of the correspondence through discovery once that phase of the proceeding has arrived, and we will undoubtedly do so if we must. Surely the need to take that route is contrary to public policy and to reason. NECNP, SAPL, and other local groups are concerned about emergency planning for Seabrook. We have previously expressed our willingness to cooperate with FEMA to the extent that our resources allow in evaluating state and local plans. FEMA is a public agency, and most of its correspondence on the matters will be with other state and local public agencies. There is no reason whatsoever that this correspondence should be withheld from the public at the time it is sent since it will all be available shortly thereafter on discovery, or through the Freedom of Information Act if we are forced to make use of it.

For these reasons, we are willing to include FEMA on our service list if FEMA will reciprocate by copying us with all of its correspondence related to the emergency plans for Seabrook. Since FEMA is an independent public agency, we believe that the correspondence in question should include materials sent by FEMA to the NRC as well as to others.

Please let me know whether you will be able to cooperate in this fashion. If you will not, please explain your refusal so that we can evaluate your position and determine the appropriate future course of action.

Sincerely,



William S. Jordan, III

WSJ/cpk  
Enclosure



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

MAR 21 11:17

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

James A. Laurenson, Chairman  
Dr. George C. Anderson  
Dr. Hugh C. Paxton

SERVED MAR 21 1983

In the Matter of	)	Docket No. 50-482
KANSAS GAS & ELECTRIC CO., et al.	)	ASLBP No. 81-453-03 OL
(Wolf Creek Generating Station, Unit No. 1)	)	March 18, 1983

PREHEARING CONFERENCE ORDER

A prehearing conference was held in Burlington, Kansas on March 10, 1983. All parties were called upon to present and discuss their positions concerning each item on the prehearing conference agenda. Except for the date and place of the hearing, the parties were in agreement concerning all matters at the prehearing. The Board has considered the positions expressed by all parties on the disputed issues.

WHEREFORE, IT IS ORDERED that

1. Intervenors Mary Ellen Salava and Wanda Christy shall file on or before April 7, 1983, updated answers to interrogatories and specific objections to the emergency plan in the form of a proposed stipulation of contentions.

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2. The hearing of this matter will commence at 10:00 a.m. on Tuesday, September 20, 1983 in Burlington, Kansas and continue at that location through Saturday, September 24, 1983. The hearing will reconvene on Monday, September 26, 1983 in Emporia, Kansas and continue at that location through Thursday, September 29, 1983. No hearings will be held during the weeks commencing October 3 or October 10. The hearing will resume in Emporia, Kansas on Tuesday, October 18 and continue through Saturday, October 22, 1983. The hearing will resume on Monday, October 24, 1983 and continue through Thursday, October 27, 1983. The precise location of the hearings will be specified in a subsequent notice.

3. The parties will offer and the Board will receive in evidence, without objection, exhibits as follows:

- By Applicant:
  - a. The Kansas State Plan
  - b. The Coffey County Plan
  - c. The Evacuation Time Estimate Study
  - d. Public Notification Study
- By NRC Staff:
  - a. Safety Evaluation Report and Supplements
  - b. Final Environmental Impact Statement
- By FEMA: Interim Findings
- By Intervenors: None

4. The parties expect to call witnesses as follows:

By Applicant:

- a. Ray Lewis.
- b. Phoenix Consulting Organization employees regarding Evacuation Time Estimate Study.
- c. Wyle Laboratories employees who prepared Public Notification Study.
- d. Coffey County Emergency Preparedness employees including: Carroll Wilcox, Director of Emergency

Preparedness; Sheriff Earl Freeman; Jack Scott, County Clerk; and one or more County Commissioners.

- e. Leon Mannell, Radiological Systems Administrator for the State of Kansas.
- f. An expert on psychological reactions if Intervenors present such a witness.

By NRC Staff: None.

By FEMA:

- a. Steve Ferris - Region VII, Chairman of Radiological Assistance Committee.
- b. Other members of the Radiological Assistance Committee.

By Intervenors:

- a. The following Coffey County employees:

- 1. Health officer
- 2. Sheriff's dispatcher
- 3. Undersheriff
- 4. Shelter manager
- 5. Shelter leader
- 6. Radiological defense officer
- 7. County engineer
- 8. County nurse
- 9. School superintendent(s)
- 10. County Commissioners not called by Applicant.

- b. Other government employees as follows:

- 1. Fire chiefs
- 2. Manager of John Redmond Reservoir
- 3. Employees of U.S. Fish and Wildlife Service
- 4. Employees of Kansas Fish and Game Commission
- 5. City of Burlington Police Chief
- 6. Other police chiefs in Coffey County
- 7. Employees of Kansas Department of Health
- 8. Employees of Kansas Department of Social and Rehabilitation Services.

- c. Other witnesses as follows:

- 1. Hospital Administrator for area hospitals
- 2. Head of Coffey County Ambulance Service
- 3. Administrators of Nursing Homes in Coffey County
- 4. Expert witnesses to testify concerning the following: (a) time necessary for evacuation; (b) radiological injuries; (c) weather and climatic

conditions; (d) psychological reactions of emergency workers; and (e) response of the general public to an emergency.

5. Dr. Jacob Frenkel.

5. The parties shall file (by mailing or other proper procedure specified in 10 CFR §2.701) the direct testimony of each witness in written form at least 21 days in advance of the session of the hearing at which such testimony is to be presented.

6. After Intervenor submit their updated answers to interrogatories, there shall be no further discovery.

7. No party intends to file a motion for summary disposition or any other prehearing motion and, accordingly, no such motions will be entertained.

8. FEMA shall have an independent role in this proceeding in terms of presenting its witnesses by its attorney and by conducting redirect examination of its witnesses and cross-examination of opposing witnesses.

9. The order of proceeding at the hearing will be as follows: Applicant will proceed first; Intervenor shall be second; and the NRC Staff and FEMA will be third.

10. Each party who intends to conduct cross-examination of any witness shall file with the Board, but shall not be required to serve upon other parties until after such cross-examination, a cross-examination plan for each such witness. Such cross-examination plan shall be filed so that it is received by the Board at least four

days before such witness is called to testify. Such plan shall specify the objectives of the cross-examination, the evidence the cross-examiner intends to produce by the cross-examination, and the aspects of the direct testimony which the cross-examiner intends to discredit.

James A. Laurensen  
JAMES A. LAURENSEN, Chairman  
Administrative Law Judge

Bethesda, Maryland.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

KANSAS GAS AND ELECTRIC COMPANY, ET AL.

(Wolf Creek Generating Station,  
Unit No. 1)

Docket No. (S) 50-482 OL

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this

31<sup>st</sup> day of March 1983.

Leahy F. Dwyer  
Office of the Secretary of the Commission

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

KANSAS GAS AND ELECTRIC COMPANY, ET AL.

(Wolf Creek Generating Station,  
Unit No. 1)

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) Docket No.(s) 50-482 OL  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

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*Repka*  
*McDonald*  
*FF*

In the Matter of  
LONG ISLAND LIGHTING COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

Docket No. 50-322-OL-3  
(Emergency Planning Proceeding)  
September 27, 1983

MEMORANDUM AND ORDER DENYING SUFFOLK COUNTY  
MOTION TO COMPEL DISCOVERY FROM FEMA

On September 7, 1983, Suffolk County ("the County") filed a motion to compel discovery. The motion asserted that the County had filed notices of deposition for three named FEMA employees. FEMA notified the County that it would not voluntarily produce these employees for deposition because of the following: (1) FEMA employees are entitled to the same protection as NRC employees pursuant to 10 CFR § 2.720 (h)(2)(i); (2) FEMA already designated three other persons to testify at hearing and deposition; and (3) the County has not attempted to establish "exceptional circumstances" to justify the taking of these objections. At the first Discovery Conference on September 26, 1983, the County and FEMA announced that they had resolved their differences over two of the three requested depositions. However, they were unable to settle their dispute concerning the County's request for the

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deposition of Jeffrey Bragg. The County asserts that FEMA is an independent agency, not part of the NRC, or a consultant to the NRC, and, hence, FEMA employees are not entitled to the protection of § 2.720(h)(2)(i). We disagree with the County. We find, pursuant to the relevant regulations, that FEMA is acting as a consultant to the NRC in emergency planning matters and that its employees are entitled to the protection of § 2.720 (h)(2)(i). Since the County has not established any "exceptional circumstances," the motion is DENIED. The dissenting view of Judge Frederick J. 'hon is attached. We do not here rule upon the "Suffolk County Motion to Compel Discovery from FEMA," filed on September 19, 1983, concerning documents and answers to deposition questions. That motion will be ruled upon at a later date.

FEMA has designated the following to be its witnesses at hearing and deposition: Edward Tanzman, Roger B. Kowieski, and Fred Sharrocks. The County wants to take the deposition of Jeffrey Bragg, Executive Deputy Director of FEMA. The County has conducted discovery which identified Jeffrey Bragg as someone who personally participated in the FEMA review of the LILCO Emergency Preparedness Transition Plan.

At the outset we observe that the status of FEMA in NRC licensing hearings is unclear. There have been no changes in the NRC Rules of Practice, 10 CFR Part 2, dealing with the status of FEMA since the Memorandum of Understanding between FEMA and NRC, 45 Fed. Reg. 82,713 (Dec. 16, 1980). That Memorandum set forth certain responsibilities for FEMA including that fact that "to support its findings and determinations, FEMA will make expert witnesses available before . . . NRC hearing boards . . . and during any related discovery proceeding."

45 Fed. Reg. at 82,714. The promulgation of the emergency planning rule, 10 CFR § 50.47, placed FEMA in a unique position by declaring that "In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability." 10 CFR § 50.47(a)(2). Various licensing boards have dealt with FEMA's status in differing ways. Often, FEMA and NRC have been combined in emergency planning matters and FEMA has been represented by its own counsel. NRC's failure to clarify FEMA's role in a hearing brings us to the present controversy under the Rules of Practice.

Section 2.720(h)(2)(i) provides as follows:

In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: Provided, that the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

(Emphasis in original.)

The purpose of this rule was set forth in the Statement of Consideration as follows:

In view of the increasing number of adjudicatory proceedings, and the demands on the time and energies of AEC policy making, supervisory and staff personnel, the Commission considers it desirable to provide a procedure and criteria for determining the appropriateness of attendance



- and testimony of such persons in AEC adjudicatory proceedings. The procedure and criteria established seek to accommodate the public interest in having participation by appropriate AEC personnel in resolving matters in issue in an adjudicatory proceeding with a parallel public interest in maintaining the efficient and expeditious conduct of this and other agency functions.

35 Fed. Rec. 19,500 (Dec. 23, 1970).

The definition of "NRC personnel" protected by the above rule is set forth in 10 CFR § 2.4(p) as follows:

'NRC personnel' means (1) NRC employees; (2) for the purpose of §§ 2.720 and 2.740 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and (3) members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings; and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

The Statement of Consideration for the above definition is, in pertinent part, as follows:

The Atomic Energy Commission has adopted an amendment to its rules of practice in 10 CFR Part 2 which refines the definition of "AEC personnel" as used in that part.

Section 2.4 of Part 2 now includes within the definition of "AEC personnel," persons who are "consultants \* \* \* of the AEC," the amendment adopted specifically includes within that definition persons who are acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons render consultant services. Thus, employees of AEC contractors are included in the definition of AEC personnel (for §§ 2.270 [sic] and 2.740 purposes only) to the extent that they act

as consultants to the Commission, even though there is no special contract for consulting services between the Commission and such employees.

The clarification of the definition in § 2.4 has the effect of making applicable to employees of AEC contractors and other persons acting as consultants to the Commission, regardless of the form of the contractual arrangements, § 2.270(h) [sic], which deals, inter alia, with attendance and testimony of "AEC personnel."

38 Fed. Reg. 1500 (Jan. 15, 1973). The fact that NRC consultants are included in the term "NRC personnel" in § 2.720(h)(2)(i) is reaffirmed in 10 CFR, Part 2, Appendix A, IV.(d). The County concedes that "Section 2.720(h)(2)(i) also protects the Staff's consultants from deposition. See 10 CFR Part 2, Appendix A, -§ IV (d)." Suffolk County Motion to Compel Discovery at 3 (footnote 1).

We next turn to the question of whether FEMA qualifies as a "consultant to the Commission." The term "consultant" is not defined in the Act or regulations. Thus, we shall look to the dictionary or ordinary usage of the term. A consultant is "a person who gives professional or expert advice." The Random House College Dictionary, Revised Edition 289 (1980). Similarly, a consultant is "one who gives professional advice or services regarding matters in the field of his special knowledge or training." Webster's Third New International Dictionary 490 (1976). This path leads back to the Memorandum of Understanding between FEMA and NRC, supra. Pursuant to that Memorandum, FEMA is to "make findings and determinations as to whether State and local emergency plans are adequate and capable of implementation

. . . . " 45 Fed. Reg. at 82,714 (Dec. 16, 1980). The Memorandum goes on to provide that, thereafter, the NRC has the responsibility

to review the FEMA findings and determinations on the adequacy and capability of implementation of State and local plans [and] to make decisions with regard to the overall state of emergency preparedness (i.e. integration of emergency preparedness onsite as determined by the NRC and offsite as determined by FEMA and reviewed by NRC) and issuance of operating licenses or shut down of operating reactors.

Ibid. Moreover, that Memorandum provides that "FEMA will provide support for NRC reactor, fuel facility and material licensing reviews, as requested with regard to the assessment of the adequacy of State and local response plans for accidental radiological releases. This will include timely submittal of an evaluation suitable for inclusion in NRC safety evaluation reports." Ibid. (Emphasis supplied.)

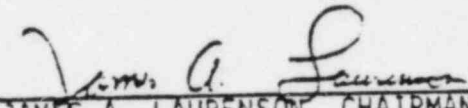
We find that the provisions of the Memorandum of Understanding between FEMA and NRC qualify FEMA as an "NRC consultant" for purposes of §§ 2.4 and 2.720(h)(2)(i). This is so because FEMA submits its professional advice concerning emergency preparedness plans and implementation of those plans, but it is NRC which must weigh and evaluate that advice in conjunction with all other probative, reliable, and substantial evidence of record. To paraphrase the Memorandum, FEMA will provide support as requested by the NRC. This clearly puts FEMA in the role of a consultant. FEMA is providing "professional advice or services" to the NRC. Since FEMA is an "NRC consultant," § 2.720 (h)(2)(i) provides that we may not require the attendance and testimony of any named FEMA employees absent a showing by the County of

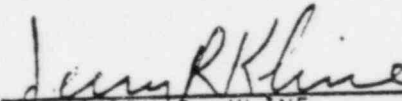
"exceptional circumstances." Since the County has not attempted to establish any "exceptional circumstances," its motion is DENIED.

ORDER

WHEREFORE, IT IS ORDERED that the Suffolk County Motion to Compel Discovery from FEMA is DENIED.

ATOMIC SAFETY AND  
LICENSING BOARD

  
JAMES A. LAURSEN, CHAIRMAN  
Administrative Law Judge

  
DR. JERRY R. KLINE  
Administrative Judge

Bethesda, Maryland

DISSENTING VIEW OF JUDGE FREDERICK J. SHON

I respectfully dissent from the views of my colleagues in this matter. I note that, to the extent I have been able to research it, the question is indeed a matter of first impression. We have no specific guidance from either Commission or Appeal Board, and the regulation itself seems not to have contemplated the precise situation at bar. That is not surprising in view of the fact that the special relationship between NRC and FEMA was defined a decade after the rule on NRC witnesses was adopted and seven years after the changes in definitions which brought "consultants" under the rule's aegis.

Nonetheless, I believe certain logical extrapolations can be made from the regulations as they stand. The original rule provided a special shield for "AEC personnel" in consideration of the "increasing number of adjudicatory proceedings, and the demands on the time and energies of AEC policy making supervisory and staff personnel." It seems clear to me that an agency, faced with increased demands upon its personnel, might well--purely as a matter of administrative efficiency--develop such a rule as 2.720(h)(2)(i) to apportion the effort of its people. But we have no indication that FEMA faces a dilemma of "increasing . . . adjudicatory proceedings" in its own right, or that it would adopt this particular mechanism to remedy the problem if it did.

Certainly it seems FEMA has no comparable rule of its own, since FEMA's very able counsel cites only ours. If indeed, FEMA is in need of such protection, it should pursue it through the rulemaking mechanisms available to it rather than through adjudication before this Board.



In my colleagues' view the FEMA employee whose deposition is at issue here is a "consultant" to NRC. I have reviewed the memoranda of understanding which created the present relationship: both of the Memoranda of December 16, 1980 (45 Fed. Reg. 82,713) and the Memorandum which they superseded (45 Fed. Reg. 5847 Jan. 24, 1980).

Nowhere are the words "consult" or "consultant" used. Indeed, under sections II and III of the extant Memorandum on emergency planning, the directives to FEMA include only such exhortations as "to review," "to make findings and determinations," "to take the lead," and "to assume responsibility." These scarcely smack of the notion of serving as consultant.

I note further that, in 10 CFR § 2.4 as cited by my colleagues, the Regulations make specific provision for the circumstances under which employees of other agencies come beneath the umbrella. 10 CFR § 2.4, as cited supra, specifies that, for the purposes of 10 CFR § 2.720 and § 2.740 "NRC personnel" includes

. . . officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

(Emphasis added.) No one, to my knowledge, claims that the FEMA employee whose deposition Suffolk County would take is "assigned to duty at the NRC."

It is well established that exceptions to general rules are to be construed narrowly. A fortiori, where the general rule is one which, as a matter of equity, permits a party before us to exercise discovery rights, a narrow construction of exceptions to that rule seems


well-advised. I therefore do not believe the Regulations themselves extend any protection to FEMA employees.

I turn now to the question of whether, as a matter of interagency comity, we should seek to extend the aegis of § 2.720 and § 2.740 to the employees of another agency in circumstances other than those specified by regulation. I am convinced we should not.

Two decades ago the notion of an agency's bending its rules to protect a sister agency from the prying nose of John Q. Public might have seemed a sound one indeed. But times have changed. In the enlightened era of Government in Sunshine and Freedom of Information, the Weltanschauung is reversed. Public servants must expect to live in a goldfish bowl. In this case, where comity contests with equity, equity wins hands down.

I would grant Suffolk County the relief it requests.

ATOMIC SAFETY AND  
LICENSING BOARD

  
FREDERICK J. SHON  
Administrative Judge