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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
HOUSTON LIGHTING & POWER	)	
COMPANY, et al.	)	Docket Nos. 50-498 OL
(South Texas Project,	)	50-499 OL
Units 1 and 2)	)	

APPLICANTS' OPPOSITION TO
CCANP MOTION TO SEQUESTER WITNESSES

On July 5, 1985, Citizens Concerned About Nuclear Power (CCANP) filed and served a Motion to Sequester eleven (11) specified witnesses, including Applicants' lead counsel, and an as yet to be determined number of "Baker and Botts attorneys." (Motion at 1-2). That motion was received by Applicants' counsel on July 8, 1985, just three days before the hearing in Phase II of this proceeding is scheduled to begin. 1/

CCANP's motion, which is devoid of any authority and wholly unsupported by the facts, asks this Board to deprive Applicants of the assistance of counsel and its witnesses during substantial portions of this licensing proceeding.

As demonstrated below, CCANP has made no showing to justify the exclusion of any witness or prospective witness from the hearing room during these proceedings. This is true with respect to both the lay witnesses and the attorneys. As to the attorneys, in particular,

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1/ CCANP received copies of the prefiled testimony June 26, 1985, and yet waited until the eve of the hearing to file its sequestration motion.

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serious constitutional and statutory questions would be presented if they were to be excluded from the hearing room. For the reasons set forth below, CCANP's motion must be denied in its entirety.

I. Sequestration of Applicants' Witnesses Should Not Be Ordered

As the proponent of a sequestration motion, CCANP bears a heavy burden. CCANP points to no facts and directs this Board to no law which would support its request for sequestration of witnesses. Indeed, given the facts and circumstances present here, there is no law to support CCANP's motion.

In NRC proceedings, sequestration orders are not granted as a matter of right, "and the sequestration rule is one that has to be applied with a sensitive concern for the special nature of NRC proceedings." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568-69 (1977). 2/ Such motions may be granted, in the discretion of the Board, if the party seeking sequestration can demonstrate that the witnesses' credibility is in issue, and sequestration is necessary to enhance full disclosure of all relevant evidence. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-374 5 NRC 415, 416 (1977). Boards are not inclined, however, to sequester witnesses on the basis of unsupported assertions. See id., at 571 n.19. In considering whether to sequester witnesses, NRC caselaw recognizes the need for counsel to receive the full and complete

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2/ The Appeal Board had previously noted that sequestration orders are not common in NRC proceedings, citing the special nature of NRC proceedings as a probable reason why sequestration was not more widely utilized. Consumers Power Company (Midland Plant, Unit 1 and 2), ALAB-365, 5 NRC 37, 38 (1977).

assistance of all of its witnesses in ensuring that the Board receives a full and complete record. Id. at 569. It is equally important that an applicant not be handicapped in presenting its case to the Board. In any sequestration decision the Board must balance these factors.

In an apparent effort to color its motion as one involving the credibility of witnesses, CCANP alleges that all the witnesses identified in its motion are "co-conspirators" engaged in a conspiracy to mislead the NRC about the seriousness of the findings in the Quadrex Report, and further (again without any legal authority) that it is "entitled" to a "presumption" that there "might have been a conspiracy." For this reason alone, CCANP argues that it is entitled to have its sequestration motion granted. (Motion at 2-3).

Unsupported allegations are not sufficient to support issuance of a sequestration order. See Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 571 n. 19 (1977), (Board disinclined to credit unsupported assertions of lack of candor). Beyond its bald assertion, CCANP offers not one fact to suggest the existence of a conspiracy. The NRC Staff has already investigated CCANP's allegations that Applicants deliberately withheld the Quadrex Report from the NRC and that such withholding constituted a conspiracy to obstruct the NRC from performing its duties. The NRC staff interviewed many of the persons sought to be sequestered here--Messrs. Oprea, Goldberg, Sumpter, Robertson, Frazar, and Stanley. The Staff's report of its investigation concluded that CCANP's allegations were unsubstantiated. NRC I&E Report No. 82-02.

In these circumstances, and in the absence of any proferred support, the Board should reject the "conspiracy theory" in considering CCANP's sequestration motion.

CCANP next contends that given these witnesses' participation in "common decision making" on whether to give the entire Quadrex Report to the NRC Staff or the ASLB, they must be sequestered in order to "minimize their obvious incentive to tell the same innocuous story." (Motion at 3). CCANP, however, points to no facts to support its suggestion that, under oath, these witnesses will tailor their testimony. CCANP has not made even the preliminary showing that each of the witnesses it seeks to sequester actually participated in some form of "common decision making." 3/ Again, without specifying a single fact, CCANP would have the Board presume that these persons were part of some common decision-making process and that their veracity is therefore in question.

Finally, CCANP argues that the Board itself has raised the issue of "apparent inconsistencies in [the] previous testimony" of Messrs. Jordan, Goldberg, Frazar, and Oprea, thereby creating a separate issue of their credibility. (Motion at 3-4). As support for this statement, CCANP refers to the Board's February 26, 1985 Memorandum and Order (Phase II Hearings on Quadrex-Report Issues) at 19. CCANP states "[i]n this instance, all four witnesses are testifying about the same topics with their credibility being the issue." Its argument, however, is addressed to only three of the witnesses it seeks to have sequestered, Messrs. Goldberg, Oprea, and Frazar. Even as to these three witnesses

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3/ CCANP does not identify the witnesses involved in the "common decision-making nor even the "decision" it has in mind.

the argument is unfounded. The Board's February 26, 1985 Memorandum and Order stated that the Board would expect HL&P to address the Phase I testimony of these three witnesses. Each of these witnesses has been asked to testify about his own prior testimony. The Board's request that the witnesses explain their previous testimony does not mean that their credibility has been placed in issue, and in these circumstances, there is nothing to suggest that sequestration is necessary to ensure full disclosure of relevant evidence.

In short, CCANP has failed to give this Board any reason, much less the necessary showing, for taking the extremely prejudicial action of sequestering any of the witnesses identified in CCANP's motion.

In exercising its discretion as to whether to sequester witnesses, the Board must weigh the movant's showing of a need for sequestration against the likelihood that such an order would hinder the ability of the party whose witnesses are sought to be sequestered to contribute to the full and complete development of the record. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 569 (1977). In weighing these considerations, licensing boards must take into account the special nature of NRC proceedings, where testimony has been prefiled and all of the parties and witnesses know in advance the basic position to be taken by the witnesses. See id. at 568-69. As demonstrated above, CCANP has made no showing of its need for sequestration. On the other hand, Applicants will be severely handicapped in developing a full and complete record before the Board without the assistance of their witnesses. 4/ Moreover, Applicants'

4/ For the reasons set forth in this pleading, Applicants maintain that none of their lay witnesses should be sequestered. [Continued on next page]

ability to participate in the hearing will be totally frustrated by barring from the hearing room counsel who have represented them for over 10 years, including Phase I of this proceeding and preparation of Phase II.

Finally, CCANP has completely failed to meet its burden of identifying a sequestration order tailored reasonably to the particular circumstances of this case. In the few NRC cases in which sequestration has been ordered, licensing boards have been careful to limit the scope of their orders to the specific aspects of the witnesses' testimony that addressed the subject matter which were the justification for sequestration. Eg., Consumers Power Company (Big Rock Point Plant), LBP-82-97, 16 NRC 1439, 1448, rev'd on other grounds, ALAB-725, 17 NRC 562 (1983); Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units, 1 & 2), LBP-84-55, 20 NRC 1646, 1653 (1984).

CCANP has failed to identify what it seeks to have the Board delineate in a sequestration order. Its request for "clear and comprehensive instructions" (Motion at 5) without further explanation is meaningless, and cannot either be meaningfully observed by the parties or implemented by the Board.

[Continued from previous page] If the Board were to rule otherwise however, any sequestration order issued by the Board should not include Mr. Goldberg. Even under the Federal Rules of Evidence an exception from sequestration is provided for "an officer or employee of a party which is not a natural person designated as its representative by its attorney," Fed. R. Evid. 615(2), and NRC caselaw recognizes that "under longstanding Federal court practice one representative of a party that is not a natural person is routinely exempt from sequestration even in the simplest of cases in order that he may assist counsel. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC at 569 (1977). An applicant should not be forced to participate in a proceeding without the assistance of its designated representative, and Mr. Goldberg is the officer who will perform this essential function for Applicants.

Moreover, if the Board were to issue a gross sequestration order of the type sought by CCANP, Applicants would be prejudiced in the presentation of their case, and the overriding interest of this Board and the Commission in having a full and complete record would be impaired.

For example, while both Mr. Powell and Mr. Stanley could conceivably be asked about some of the matters addressed in Mr. Goldberg's testimony, there is no apparent subject that they might address in common. Thus there would be no reason to exclude them from hearing each other's testimony. In the case of Mr. Goldberg's testimony, large portions involve complex questions of nuclear plant design, and do not involve any credibility issue. Several of the listed witnesses are expected to assist counsel in the conduct of the hearing on such matters. It is CCANP's burden to propose an order that addresses these concerns, and it has not even attempted to do so.

The infirmities of the sequestration motion, including its failure to present more than unsupported assertions or to identify in any meaningful way the issues of credibility which might warrant sequestration, alone justify its summary denial. Given the countervailing considerations which boards must weigh in deciding such motions, including the need for counsel to have the assistance of all of its witnesses to ensure that the Board has a full and complete record, denial of the instant motion is mandated. As discussed below, the reasons for rejecting the motion are even more compelling in the case of counsel, where the motion is pure mischief.

II. The Sequestration of Applicants' Attorneys Would Deny Applicants Due Process of Law and Would Violate Both the Administrative Procedure Act and Applicable NRC Regulations

CCANP has asked this Board to sequester Applicants' attorneys on the pretext that they will be called as witnesses to testify about their prior recollection of "the role they played in the decisions regarding the Quadrex Report and the Brown and Root removal." (Motion at 3 - 4) In support of its argument to bar Applicants' counsel from participating during this phase of the licensing proceeding, CCANP simply states, without citation to any authority, that it is "entitled" to sequester the attorneys while Messrs. Jordan, Oprea, Goldberg, Frazar, Robertson, Powell and Poston testify. The motion is nothing more than a thinly veiled effort to disqualify counsel and should be analyzed in those terms.

As discussed at length in "Applicants' Memorandum Concerning the Permissibility of and Need for Calling Certain Attorneys for the Applicants as Witnesses" (July 2, 1985) and the "Staff Statement Regarding the Permissibility of Calling Attorneys as Witnesses" (July 3, 1985), the courts and the agencies have erected substantial barriers against the comparatively infrequent efforts to call lawyers to testify. The issue most frequently arises in the context of a lawyer seeking to disqualify opposing counsel on the ground that he is a prospective witness. Thus, the courts have recognized that such motions are often used as strategic tools. See J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., dissenting); Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1951). When confronted with such tactics, courts have generally refused to disqualify counsel, even

where it appeared that the lawyer might be called as a witness. As the court held in Foster Wheeler Corp. v. Babcock & Wilcox Co., 440 F.Supp. 897 (S.D.N.Y. 1977), it would be manifestly unfair "to deprive a litigant of the services of a trusted attorney who, by virtue of his long involvement with the subject matter in litigation, is uniquely qualified to conduct the contest on [his client's] behalf...."

The Board here has made a similar ruling, noting the importance of Applicants' counsel in this proceeding. In its Memorandum and Order (Explanation of Ruling on CCANP Motion to Reopen Phase I Record) (June 18, 1985), the Board addressed the question of whether Mr. Newman (and the members of his firm) could continue to represent Applicants in these proceedings if he were to be called as a witness. After considering the legal arguments of the parties, the Board concluded (at page 16) that

> even if Mr. Newman were to appear as a witness, his disqualification (and, per force the disqualification of other members of his firm) from continuing to represent the Applicant would amount to a substantial hardship to the Applicants.

The Board reached its conclusion based upon the "distinctive value" of Mr. Newman's services to Applicants in this proceeding, observing that he and his firm had represented HL&P in its STP licensing activity for twelve years. The Board recognized that the "ongoing nature of a nuclear licensing proceeding gives intrinsic value to an attorney (and his firm) consistently involved since the litigation began," and that Applicants "would endure substantial hardship if they were forced to seek new counsel at this point in the proceeding". Memorandum and Order (June 18, 1985) at 14. The Board's reasoning is equally compelling with

respect to CCANP's motion to sequester the attorneys which is tantamount to a motion for disqualification. Counsel for Applicants cannot properly represent their client if they are excluded from the hearing or substantial portions thereof.

Importantly, in this case, Applicants have availed themselves of their right, granted by the NRC's regulations, 10 C.F.R. 2.713(b), and the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), to have counsel represent them in this licensing proceeding. The NRC has recognized the highly complex nature of its proceedings, Consumers Power Company, (Midland Plant Units 1 and 2), ALAB-379, 5 NRC at 569 (1977), and has provided that persons appearing before the agency may be represented by counsel.

Once a party avails itself of that right, its counsel may not be excluded from the proceeding in the absence of concrete evidence that the attorney's presence will obstruct and impede the agency's proceedings. See Securities and Exchange Commission v. CSAPO, 533 F.2d 7, 11 (D.C. Cir. 1976); Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 381 (7th Cir. 1969). Absent such evidence, the exclusion of counsel of Applicants' choosing would violate Applicants' constitutionally afforded and statutorily protected right to a fair hearing. 5/ Great Lakes Screw Corp., 409 F. 2d at 380, 381. Moreover, under the circumstances here, and in light of the Board's ruling that disqualification would work a severe hardship on Applicants, the sequestration of Applicants' counsel would prevent Applicants' meaningful participation in this hearing.

5/ In its June 18, 1985, Memorandum and Order, the Board concluded that "absent any showing of prejudice to CCANP, we conclude that Mr. Newman (and members of his firm) should not be disqualified from continued representation of the Applicants, even if it were necessary or appropriate for Mr. Newman to appear as a witness in this proceeding." [Continued on next page]

Section 555(b) of the APA provides, in pertinent part: "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in any agency proceeding." Applicants are clearly a "party" to an agency proceeding and have elected to be represented by counsel in this proceeding. This right to counsel, provided by statute and confirmed in the NRC's regulations, is even broader than the Fifth Amendment right to advice by an attorney (Backer v. Commissioner of Internal Revenue, 275 F.2d 141, 143 (5th Cir. 1960)), and has always been construed to mean counsel of one's own choosing. Id. at 144; see Great Lakes Screw Corp. v. NLRB, 409 F.2d at 380 (7th Cir. 1969). The right to counsel must yield only to ethical considerations which run to the very integrity of the judicial process. Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975). It is incumbent on the party wishing to disrupt that relationship to prove to the court, pointing out precise grounds, where impropriety exists and how that impropriety threatens the integrity of the proceeding before it. See Church of Scientology v. McLean, 615 F.2d 691, 693 (5th Cir. 1980).

[Continued from previous page] (Memorandum and Order at 16). CCANP's suggestion that Applicants took the risk of sequestration of their attorneys when they stated that they had no problem with counsel's continued representation even if called as a witness, is without merit. Applicants took no such risk. To the contrary, CCANP admitted that it would not be prejudiced if Applicants' counsel were to testify and remain as counsel. Letter to ASLB from Mr. Sinkin dated May 7, 1985. Clearly it is CCANP which accepted the possibility that Applicants' counsel might both testify and, in the necessary performance of its duties as counsel, be present during the testimony of other witnesses. It is disingenuous for CCANP to claim now that, regardless of the Board's ruling on the initial question of disqualification, CCANP had in mind all along that it would achieve the same purpose through sequestration.

CCANP states that it seeks sequestration of the Applicants' attorneys in order to "minimize the natural inclination to harmonize testimony" with that of preceding witnesses. (Motion at 4-5). This statement is gratuitously insulting. In light of the fact that these potential witnesses are attorneys, the Board can fully rely upon their obligation and duty to act in accordance with their ethical codes. As Justice Marshall stated in his concurring opinion in Geders v. United States, 425 U.S. 83, 137-38 (1976):

> The fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and the same would hold true absent the most unusual circumstances, I take it, for an order barring consultation between a defendant and his attorney at any time before or during the trial. If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.

The NRC is bound by its regulations, and in the absence of a violation of 10 C.F.R. § 2.713(c), which is not even alleged, this Board may not exclude Applicants' counsel from these proceedings. These regulations have the force of law, and are as binding on the agency as is the APA. Service v. Dulles, 354 U.S. 363, 388 (1957). As the courts have noted, this rule "is to prevent ... [a] denial of adequate notice of procedures by the agency in violation of due process." U.S. v. Newell, 578 F.2d 827, 834 (9th Cir. 1978). That is not to say that Applicants' counsel is not bound by the Code of Professional Responsibility and its disciplinary rules regarding disqualification of counsel. However, as this Board has held, there is no basis for disqualification in this proceeding. Moreover, even given the Code's provisions discouraging the dual role of attorney as witness, DR 5-102(B) allows the attorney to continue to represent his client until it appears that his testimony may be prejudicial to the client. United States v. Reeder, 614 F.2d 1179, 1185-86 (8th Cir. 1980).

The impropriety of sequestering attorney witnesses has been recognized even under Rule 615 of the Federal Rules of Evidence which provides for exclusion of witnesses upon request, with certain exceptions, including subsection (3), "a person whose presence is shown by a party to be essential to the presentation of his cause". Fed. R. Evid. 615(3). As the court concluded in Reeder, that provision "clearly would allow [the attorney] to remain present in the courtroom as an exception to the exclusionary rule for witnesses". Id. at 1186.

CONCLUSION

WHEREFORE, for the foregoing reasons, Applicants urge the Board to deny CCANP's motion in its entirety.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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(South Texas Project, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of "Applicants' Opposition to CCANP Motion to Sequester Witnesses" has been served on the following individuals and entities by hand delivery or deposit in the United States mail, first class, postage prepaid as designated, on this 11th day of July, 1985.

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