

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

METROPOLITAN EDISON COMPANY,
ET AL.)

(Three Mile Island Nuclear
Generating Station, Unit 2))

Docket No. 50-320

RESPONSE OF COMMONWEALTH OF PENNSYLVANIA
OPPOSING INTERVENORS' MOTION TO COMPEL
THE APPEARANCE OF THOMAS GERUSKY



1. During the licensing proceeding, Intervenor had ample opportunity to request a Bureau of Radiological Health witness. That request was made and withdrawn.

The only contention at issue in the licensing proceeding which was directed to the performance of Commonwealth of Pennsylvania personnel was Contention 8, which states:

8. The warning and evacuation plans of the Applicants and the Commonwealth of Pennsylvania are inadequate and unworkable. The plans assume that all local and state officials involved are on 24-hour notice and can be contacted immediately. They further assume that all people notified will promptly react and know how to respond and are trained in what to do. They also assume that the public which has been assured that accidents are "highly unlikely" or "highly improbable," will respond and allow themselves to be evacuated. No operating license should be granted for Unit 2 until emergency and evacuation plans are shown to be workable through live tests.

This was the only contention on which the Commonwealth presented witnesses and these two witnesses were state and county civil defense officials. During the cross-examination of these witnesses, Intervenor formally requested a Bureau of Radiological Health (hereinafter BRH) witness on the grounds that the civil defense witnesses were not familiar with

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"radiation emergencies and hazards of radiation." (Tr. 888) Counsel for the Commonwealth responded by stating that the contention was focused on evacuation, that civil defense officials were the most appropriate witnesses to discuss the issue of evacuation, and that response to the contention did not necessitate a BRH witness. (Tr. 888-889) Intervenor repeated their request for a witness who had a "real understanding of radiation or the effects of radiation." (Tr. 888) Board Chairman Luten stated that he was "inclined to agree" with the Commonwealth that "these witnesses are indeed able to talk about what the contention raises, namely the matter of evacuation." (Tr. 890) Board member Linenberger asked how the lack of expertise cited by Intervenor compromised the ability of the civil defense witnesses to carry out their jobs; and Intervenor suggested that "the fact that we are dealing with an unusual hazard and an essentially undetectable hazard" might cause volunteer workers not to appear for duty. (Tr. 890) Mr. Linenberger responded that Intervenor were referring to a different contention, namely certain psychological factors which were allegedly not being addressed with respect to the evacuation plan. (Tr. 891) Mr. Linenberger stated that he found this issue to be outside the contention before the Board. Intervenor then withdrew the request for a BRH witness (Tr. 891).

Intervenor had ample opportunity to renew this request. Indeed, in the course of testimony on Contention 8, witnesses for the Commonwealth, the Applicant and NRC all mentioned BRH. However, witnesses for these parties did not indicate that BRH's presence and participation were an essential element of any evacuation which might be necessitated by an emergency at TMI. In fact, Commonwealth civil defense witnesses clearly stated that BRH's advice, while welcome, was not essential. State Council

of Civil Defense witness Williamson testified that the responsibility for determining the area to be evacuated lay with both the Applicant and BRH (Tr. 1541), and stated that if BRH were unavailable, he would rely on the Applicant for directions as to the necessity and extent of evacuation to be carried out (Tr. 2529-32). Dauphin County Civil Defense witness Molloy also testified that a call from Applicant, without further advice from BRH or the State Civil Defense Council, would be sufficient to put his staff into action (Tr. 1720-1721). Mr. Molloy also stated his reliance upon Applicant's advice at the very point in his testimony which Intervenor's have cited in their motion. At pages 1363-1364 of the transcript the following exchange took place:

DR. JOHNSRUD: Could you then pursue the use of your term "severity of the problem"? What do you understand by the use of that phrase, "severity of the problem"?

WITNESS MOLLOY: When the experts, the people from the Bureau of Radiological Health, or the people from Three Mile Island say that we have a situation that warrants evacuation, in that respect that is what I consider a "severity," not my personal knowledge.

DR. JOHNSRUD: You are relying then, is it fair to characterize your situation, by saying you are relying entirely upon outside advice?

WITNESS MOLLOY: Yes, ma'am.

DR. JOHNSRUD: Before you make any decisions yourself?

WITNESS MOLLOY: Yes, ma'am.

DR. JOHNSRUD: Now, to whom would you turn for that advice?

WITNESS MOLLOY: The Bureau of Radiological Health.

DR. JOHNSRUD: Yes.

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WITNESS MOLLOY: And also Three Mile Island personnel. They would be involved in giving us information that they thought we should have.

Far from "emphasizing the importance of his reliance upon Mr. Gerusky's organization for information and advice" as Intervenor's claim, this portion of the record clearly shows that witness Molloy is just as willing to rely on Applicant's personnel for advice as he is to rely on BRH. During all these days of testimony on Contention 8 Intervenor's had the opportunity to renew their request for a BRH witness, but chose not to do so.

At another point in the licensing proceeding, NRC witnesses were asked by the Board to answer certain questions with respect to the dose assessment which would be carried out after a radiological event. NRC witness Stohr testified that even if a state agency were to attempt to measure thyroid doses or inhalation exposures, the state "may have to rely on some federal resources." (Tr. 1750) NRC witness Stohr also testified that any significant reduction in BRH capacity to carry out dose assessment would become known to NRC before it occurred and could be responded to in a number of ways, including the possibility that the Applicant perform such assessment and the possibility that a "multi-agency cadre" be formed to perform the assessments. (Tr. 1743-1751, 1780-1782) Again, Intervenor's had ample opportunity to request a BRH witness to testify as to expertise and manpower capabilities but chose not to do so.

2. Intervenor's have failed to show the relevance of Mr. Gerusky's testimony to any of the contentions or NRC regulatory standards at issue in this proceeding.

In order to carry the heavy burden which must be borne by anyone seeking to reopen a licensing proceeding at this late date, Intervenor's

must at least point to some newly discovered evidence which is relevant to an issue properly before the Board. In their motion Intervenorors have given no indication that Mr. Gerusky's testimony could possibly be relevant to any contention or regulatory standard at issue in the licensing proceeding. As Mr. Gerusky has stated in his affidavit and as is clear from the context of his recorded statement, Mr. Gerusky was discussing the laboratory testing of milk samples following a radiation event when he spoke at the EPA workshop. As NRC witness Van Niel stated, evacuation and other protective measures would have to be underway before environmental monitoring teams could make measurements and report back (Tr. 1756). Certainly, laboratory testing of milk would not be the kind of quickly obtainable information which would form the basis of decisions to evacuate. The statement contained in the EPA document cannot, then, be relevant to Contention 8, which concerned the ability of the Commonwealth to evacuate people on short notice. Contention 6 concerned monitoring, but it concerned the ability of the Applicant to monitor accurately, not the ability of the Commonwealth to monitor. We cannot find, and Intervenorors do not mention, any contention or NRC licensing standard to which Mr. Gerusky's statement on laboratory milk sampling would be relevant. The allegation that the EPA document was "fraudulently withheld" is, of course, baseless if the document is deemed to be irrelevant in the first place. The Commonwealth has already maintained that BRH testimony is irrelevant to any contention at issue in this proceeding, and also maintains that Mr. Gerusky's statements in the course of his duties are irrelevant. The EPA document is apparently not even in final published form. Since it was an EPA draft publication,

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Commonwealth certainly had no responsibility to publicize or circulate although such documents are always available for public scrutiny our BRH office in Harrisburg.

As for Intervenor's allegation that Mr. Gerusky has stated that he is not on 24-hour call, Mr. Gerusky in his affidavit denies making statement and affirms that BRH is indeed on 24 hour call. Since intervenors have not described this alleged statement any more specifically than to say that it was "a recent public statement," it is impossible for the Commonwealth to know which of Mr. Gerusky's public statements has given rise to misinterpretation given to it by Intervenor to respond with a careful analysis of that misinterpretation. In case, the issue of whether BRH is on 24-hour call is irrelevant Contention 8 because, as discussed above, the record contains a great deal of testimony indicating that BRH's participation and advice, if welcome, are not necessary to evacuation efforts. Again, Intervenor has not connected or attempted to connect the question of whether BRH is on 24-hour duty with any contention or NRC regulatory standard which would affect the issuance of an NRC license to TMI.

Similarly, the question of BRH's manpower capability has no apparent relevance to any contention or regulatory standard in this proceeding. Intervenor states that Mr. Gerusky's assessment of his manpower capabilities is "necessary and critical to this proceeding" but they fail to support this statement with any reference to any contention or regulatory standard which would affect the issuance of an NRC license to TMI. In any case, Mr. Gerusky has stated in his affidavit that BRH is experiencing a normal staff turnover rate, not a "manpower loss" as intervenors allege. As Mr. Gerusky also states in his affidavit, two current staff vacancies are not directly related to radiation

emergency planning, and Intervenorors have not alleged that they are so related.

Perhaps one of the reasons why Intervenorors have been unable to establish the relevance of Mr. Gerusky's possible testimony to this NRC licensing proceeding is that Mr. Gerusky is a state official, not an employee of the NRC or the Applicant. His duties, powers and responsibilities are derived from the Constitution, statutes and regulations of the Commonwealth of Pennsylvania and his bureau's resources are appropriated by the state legislature. The standards by which he must assess the adequacy of his bureau's performance and manpower are not Federal standards; they are state standards. It is perfectly proper for Intervenorors, as Pennsylvania citizens, to question whether Mr. Gerusky and his bureau are measuring up to the standards set by the Pennsylvania Constitution, statutes and regulations for protection of their health and welfare; but it is not proper for them to do it in this Federal forum. NRC witness Stohr testified to the NRC's awareness that it is not the role of the NRC to assess the overall capability of the state, particularly beyond the LPZ (Tr. 1812), although the "interface arrangements" between the applicant and a state and other supporting agencies were considered an appropriate subject of review (Tr. 1812). Unfortunately, Intervenorors have not been as sensitive to the complex and crucial distinction between state and Federal jurisdiction which pervades our system of government and are mistakenly trying to use a Federal licensing forum to measure the performance of a state official by state standards.

3. If Intervenorors are not linking the testimony of Mr. Gerusky to a contention or NRC requirement at issue in this licensing proceeding, then they are attempting to introduce a new contention which is so vague that it should not and cannot be addressed by Mr. Gerusky.

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Another reason why the Intervenor's have been unable to show the relevance of Mr. Gerusky's testimony to this proceeding is that they have not discussed the allegedly relevant BRH functions precisely enough. In their motion, they have spoken of the ability of BRH to "respond to an emergency which may occur at a nuclear power plant." They have referred to "emergency response", capability of BRH "to respond in a nuclear emergency," and "manpower capabilities and responsibilities." They have characterized BRH as "the organization upon which the public must depend for its safety and information in the event of a radiological emergency." However, Intervenor's have not indicated what specific activities they are encompassing within these broad general terms. The only admitted contention relating specifically to emergency plans was Contention 8, which clearly deals with evacuation. In Contention 6, Intervenor's suggested that Applicants install certain radiation detection devices around the TMI site for use under both normal and accident conditions, but monitoring under any circumstances by the Commonwealth was not part of this contention.

Whatever this new "emergency response" contention may be, it is so vague that it is unintelligible. In the Commonwealth's view, this flaw of vagueness is no mere technicality. If Intervenor's motion is granted, the Commonwealth would not be able to advise Mr. Gerusky what sort of direct testimony he should prepare. Moreover, the Licensing Board would be forced to make Mr. Gerusky available for cross-examination without any ground rules, without any limitations in scope and without any precise definition of issues to be addressed. This process could be extremely time consuming. We trust that this Board will not allow a vague phrase such as "emergency response capability" to be used

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to take a state official away from his work for a substantial period of time and subject him to unlimited cross examination about his administrative activities.

CONCLUSION

The Commonwealth of Pennsylvania respectfully urges that this Board deny Intervenor's motion. If, however, the Board chooses to grant Intervenor's motion, we request that the issues be defined with sufficient precision to enable Mr. Gerusky to prepare relevant testimony and to enable the parties to know the allowable scope of cross-examination.

Respectfully submitted,

Karin W. Carter

Karin W. Carter
Assistant Attorney General
Commonwealth of Pennsylvania

Dated: April 26, 1978

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

METROPOLITAN EDISON COMPANY,)
et al.)

) Docket No. 50-520
)

(Three Mile Island Nuclear)
Generating Station, Unit 2))

AFFIDAVIT OF Thomas M. Gerusky

COMMONWEALTH OF PENNSYLVANIA :
DAUPHIN COUNTY : SS

I, Thomas M. Gerusky, being duly sworn according to law, depose and say that the facts set forth below are true and correct to the best of my knowledge, information and belief:

1. My name is Thomas M. Gerusky, and I am Director of the Bureau of Radiological Health of the Department of Environmental Resources of the Commonwealth of Pennsylvania.

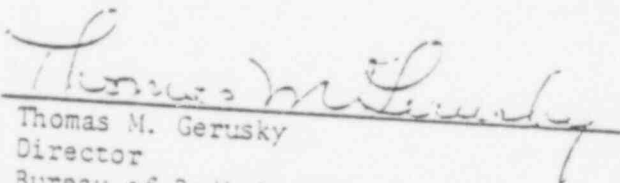
2. I made a statement at an Environmental Protection Agency workshop which took place at Philadelphia, Pennsylvania, November 30-December 1, 1976. In this statement, I discussed the capability of certain state laboratories to handle large volumes of milk for sampling for radioactive iodine content; and I indicated that since the laboratories were already overburdened during the 1976 fallout episode, an even larger milk sampling and analysis program following a major reactor accident would be even more difficult to carry out.

3. The above statement was recorded beginning on page 23 of a document entitled "PROCEEDINGS, Workshop on the October, 1976, Fallout Radiation Incident". I received this document early in 1977. The front page was stamped "Draft" and the document was accompanied by a brief message from Dr. Lee Bettenhausen, EPA Regional Health Physicist, Region III, requesting that I make any changes to the

document which I felt appropriate and communicate these changes to the EPA. I have received no further versions of this document, and I have submitted no revisions of the document to EPA.

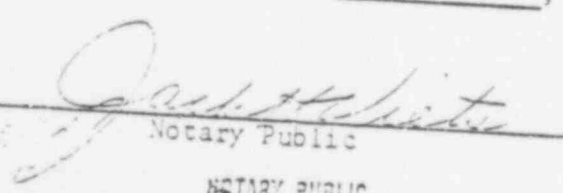
4. Staff members of the Bureau of Radiological Health are on 24-hour call through the State Council of Civil Defense. To the best of my knowledge, information and belief, I have made no statement to the contrary in the recent past.

5. Since December 1976, two of the Bureau staff members, one in the Bureau's Reading Office and the other in the Bureau's Harrisburg Office, have resigned or retired. This is a normal staff turnover rate for the Bureau and the vacancies arose for normal reasons (retirement in one case and resignation to pursue further education in the other case). Neither of these staff positions has responsibilities directly related to radiation emergency planning, and the Bureau plans to fill both vacancies.


Thomas M. Gerusky
Director

(Address) Bureau of Radiological Health
Department of Environmental Resources
Fulton Building
P. O. Box 2063
Harrisburg, Pennsylvania 17120

Sworn and subscribed before me
this 26 day of APRIL, 1978.


Notary Public

NOTARY PUBLIC

Commission Expires June 4, 1982
Harrisburg, Pa. Capital County

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of
METROPOLITAN EDISON COMPANY,
et al.

(Three Mile Island Nuclear
Generating Station, Unit 2)

Docket No. 50-320

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response of Commonwealth of Pennsylvania Opposing Intervenor's Motion to Compel the Appearance of Thomas Gerusky" dated April 26, 1978, has been served by mail, postage prepaid, to those persons listed on the attached service list this 26th day of April, 1978.

Karin W. Carter
Karin W. Carter
Assistant Attorney General
Commonwealth of Pennsylvania

Dated: April 26, 1978

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