

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter	)	
	)	
METROPOLITAN EDISON COMPANY,	)	Docket No. 50-289
<u>ET AL.</u>	)	
	)	
(Three Mile Island Nuclear	)	
Station, Unit 1)	)	

NRC STAFF RESPONSE TO BOARD  
MEMORANDUM AND ORDER DATED MARCH 25, 1980

In its Motion For Emergency Funding dated March 13, 1980, and its letter to the Licensing Board dated March 21, 1980, Three Mile Island Alert (TMIA) requested funding from the Board in order to complete the taking of depositions in this proceeding. In its March 25, 1980 Memorandum and Order (Order), the Licensing Board concluded that TMIA had not provided cause for the Board to depart from its previously stated position that it cannot authorize intervenor funding. The Licensing Board also ruled that it would not certify the question of general funding to the Commission.

The Licensing Board indicated, however, that it was concerned about the subject matter of the proposed depositions: the management and financial competence of the licensee.<sup>1/</sup> The Licensing Board further stated that it would not know how complete and balanced the Staff's evaluation of these

<sup>1/</sup> In its August 9, 1979 Order and Notice of Hearing, the Commission requested that the issues of the suspended licensee's managerial capability and financial qualifications be resolved in this hearing. Like the Commission and the Licensing Board, the Staff desires that these issues be fully aired and intends to explore these issues in depth.

two subjects would be until the final SER or its equivalent is published. Accordingly, the Licensing Board initiated a review of the depositions already taken by TMIA to determine whether there exists a need for the Licensing Board to adopt TMIA's discovery as its own with the aid of the Staff, TMIA and the licensee. The Licensing Board indicated that one possible course of action would be for it to direct the Staff to take depositions on the Licensing Board's behalf.

Prior to undertaking the referenced course of action, the Licensing Board directed the Staff to respond to the following questions:

1. Does it [the Staff] have objections concerning our claimed authority to order it to take depositions in our behalf in furtherance of TMIA's deposition plan? Discuss the Appeal Board ruling in Consumers Power Co. (Midland Plant Units 1 and 2) ALAB-382, 5 NRC 603, 607-08 (1977), (Licensing Board adopts and subpoenas indigent intervenor's witness at NRC expense).
2. Does the Staff believe the proposed action is practical? Does it present a conflict of interest problem to the staff? Does the Staff believe that TMIA's depositions to date have been skillful and potentially productive as they relate to the issues of management or financial competence?
3. Would it be duplicative or cumulative to complete TMIA's deposition program? Have other investigators, Kemeny or Rogovin for example, already developed evidence along the line of TMIA's inquiry?

The Staff's response to these questions follows.

1. The Staff Does Not Believe that the Licensing Board has the Authority to Order the Staff To Take Depositions On Behalf of the Licensing Board and TMIA
  - a. Licensing Boards are Delegates of the Commission and Thus Have Only Those Powers that the Commission Gives them.

Hearing boards are creations of the Commission and receive their authority from the Commission. Section 191(a) of Atomic Energy Act of 1954, as amended. The Commission delegates to individual boards the authority and jurisdiction to preside over specific proceedings. 10 C.F.R. § 2.721. A board thus can exercise only those powers granted by the Commission. Northern Indiana Public Services Co. (Bailly Generating Station, Nuclear 1), ALAB-249, 8 AEC 980, 987 (1974); see also Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). The scope of jurisdiction for a specific hearing board is found in the hearing notices and orders issued by the Commission in that proceeding. Marble Hill, supra at 170, 171; 10 C.F.R. § 2.717(a).

The relevant notices and orders in this proceeding are the Commission's August 9, 1979 Order and Notice of Hearing, CLI-79-8, 10 NRC 141, and its Order of March 16, 1980 (CLI-80-5). Those orders do not contain express authorization for the presiding Licensing Board to order the Staff to take depositions on behalf of itself or an intervenor in the proceeding. The August 9, 1979 Order does, however, authorize the Licensing Board to conduct the hearing in accordance with the applicable provisions of subpart G of the Commission's Rules of Practice (Rules). Therefore, an examination of the general jurisdiction of this Licensing Board under the Rules is necessary in order to determine the jurisdiction of the Licensing Board to order the taking of depositions in this proceeding.

- b. The Commission Rules of Practice, In Particular § 2.718(d),<sup>2/</sup> Do Not Authorize the Licensing Board to Order the Staff to Take Depositions.

As evidenced by its Order, the Licensing Board appears to interpret the Rules as permitting the Board to adopt TMIA's inquiry as its own in the interest of developing a full record. The Board also reads section 2.718(d), which states that a presiding officer has all powers necessary to ". . . [o]rder depositions to be taken," as perhaps giving the Licensing Board the authority to direct the Staff to take the noticed depositions in order to complete TMIA's deposition program. It cites Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977), as support for this possible interpretation of the regulations. See Order at 3. For the reasons set forth below, the Staff believes that section 2.718(d) does not empower the Licensing Board to order the Staff to take depositions.

It is the principal duty of a licensing board to determine the matters in controversy among the parties as well as matters that are deemed necessary in order to resolve a serious question of safety, environmental protection, common defense or security. See 10 C.F.R. § 2.760a. Pursuant to 10 C.F.R. § 2.718, a licensing board must both develop an adequate decisional record and seek to avoid delay in the conduct of the hearing. The powers in section 2.718, many of which are expanded upon in detail in other sections of Part II, Subpart G, are procedural, designed only to aid presiding officers to conduct a fair and impartial hearing and to take appropriate action to

<sup>2/</sup> This section in the Rules is similar to that in the Administrative Procedures Act, 5 U.S.C. § 556(c)(4).

avoid delay and to maintain order. See generally Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 1 NRC 1, 4-5 (1977); Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-2, 1 NRC 39, 41 n.1 (1975); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 544 (1975).

Section 2.718(d), read in this procedural context, gives a presiding officer the power to enforce the provisions of section 2.740, which governs discovery in general, and section 2.740a, which governs depositions upon oral examination and upon written interrogatories. Pursuant to these sections, parties may request to take depositions of other parties. In the event that a prospective deponent refuses or fails to appear upon notice of the taking of a deposition, section 2.718(d) gives the presiding officer the power to compel a response to the deposition. However, this power may only be exercised upon a motion by a party when necessary to aid that party who wishes to develop its case by means of taking depositions. Nothing in sections 2.740, 2.740a or 2.718(d) provides that a licensing board may order one party to depose another party when it does not wish to do so. In addition, the broad authority to regulate the course of a hearing under section 2.718 has also been read in light of other procedural sections in Subpart G, for example, sections 2.714 and 2.757(c). These sections allow the presiding officer to rule on requests for intervention and to prevent argumentative, repetitious

or cumulative cross-examination.<sup>3/</sup> Finally, a survey of decisions under the Federal Rules of Civil Procedure, upon which the NRC Rules are patterned,<sup>4/</sup> discloses no instance where a court, on its own initiative, has ordered a party to take depositions.

Although licensing boards do have the power to inquire into issues that they deem to be important, 10 C.F.R. § 2.760a, they do not have the power to infringe upon the case preparation of a party by ordering the Staff or other parties to take depositions. Indeed, even the "broad authority" of a presiding officer to regulate the course of a hearing by issuing what appears on the surface to be strictly a procedural mandate has been curtailed when that order also would have had an impact upon the substance of the Staff's case preparation. In Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978), the Appeal Board held that the licensing board may direct the Staff to publish its environmental documents by specific dates if it finds that no further delay is justified. Id. at 208. In so holding, the Appeal Board cautioned that . . . did not mean to imply that a

<sup>3/</sup> See, e.g., Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 868 (1974) (general power to regulate the course of a hearing is read in light of § 2.757(c), the power to "[t]ake necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination"); Consumers Power Company (Midland Plant, Unit 1 and 2), ALAB-47, 4 AEC 794, 795 (1972) (broad authority to regulate course of hearing is delegated in § 2.718; specific authority to rule on requests for intervention is found in § 2.714).

<sup>4/</sup> See Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (1975).

licensing board may force the Staff to file the final environmental statement on a particular day, if, upon that date the statement is incomplete or the Staff is dissatisfied with its content. Id. at 206. In the latter situation, a licensing board would be infringing upon the Staff's obligation and right to decide how it wishes to prepare its case. See id. Similarly, two licensing boards have refused to exercise what they called "supervisory" authority over the part of the licensing process that has been entrusted to the Staff. New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978); Northeast Nuclear Energy Company (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436, 437 (1975). In the Montague case,<sup>5/</sup> the licensing board stated that although the Commission's regulations require the Staff to review applications for licenses, they do not permit licensing boards to direct the Staff in the methods it should use in preparing its case on the issues. In like manner, the licensing board in the NEP proceeding<sup>6/</sup> described the independent responsibilities entrusted to the Staff as studies and analyses that result in Staff reports to the licensing board.

<sup>5/</sup> In the Montague case, an interested state, among others, requested the licensing board to order the Staff and the applicant either to hold discussions concerning the issues raised in the state's petition to intervene in Massachusetts or to provide verbatim transcripts or detailed summaries of the meeting. The licensing board held that 10 C.F.R. § 2.102(a), which provides that the Staff may request any party to a proceeding to confer informally with the Staff, permits the Staff to confer privately with any party.

<sup>6/</sup> This ruling arose as a result of an intervenor motion requesting the Board to "direct the . . . Staff to suspend its review of the [applicant's] application, preparation of the draft environmental impact statement, [etc.]" until resolution of the issue of site ownership. New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 277-78 (1978).

The licensing board concluded that section 2.718 ". . . is not an all-purpose delegation of power [to licensing boards] to control or direct the work of the Staff in carrying out its primary responsibilities." Id. at 279-80.

Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977), which was cited by the Licensing Board as possible authority for the Licensing Board to order the Staff to take depositions, did not expand upon the power of licensing boards as defined in Offshore Power Systems, New England Power Company and Northeast Nuclear Energy Company, supra. The Consumers Power Appeal Board held that a licensing board, where it has a genuine need, may obtain the benefit of important testimony to be given by an indigent intervenor's witness by subpoenaing that witness as a board witness. Id. at 607. The Appeal Board did not, however, deal with the issue of the power of licensing boards to direct the methods of pretrial preparation.

For its part, the Staff intends to fulfill its duty to complete an exhaustive review of all the issues in this proceeding, including these of management competence and financial capability. At present, however, the Staff is still in the process of independently evaluating these two issues. Upon the completion of its own study, the Staff will then be able to determine whether there exist certain aspects of these issues that remain to be further investigated.

In any event, it is only upon completion of the Staff's review, coupled with a finding of genuine need for additional testimony, that the power discussed in Consumers Power Company, ALAB-382, supra, to subpoena an indigent intervenor's witnesses comes into play. In such an event, the Licensing Board could call and examine the necessary witnesses and all of the parties to the proceeding would be permitted to cross-examine those witnesses. Id. at 607-08. The Licensing Board also might require the Staff and other parties to present further evidence in order to ensure a complete record upon which to decide the issues. See, e.g., Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245, 249 (1978); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-275, 1 NRC 523, 531-32 (1975); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 362 (1973). However, as noted above, the Licensing Board is precluded both under the Rules and by virtue of Commission precedent from reading section 2.718(d) so broadly as to authorize it to order the Staff to conduct depositions.

## 2. The Licensing Board's Proposed Action Is Impractical

The Staff submits that the proposed action would be impractical. Although the proposed action would not present a conflict of interest to the Staff in the classical sense of that term, certain portions of the proposed discovery plan would constitute an inefficient use of the Staff's time and money.

Since TMIA has listed several Staff members on its proposed deposition list

(Notice of Taking Deposition dated February 5 and 22, 1980), adoption of the Licensing Board's proposed action would require the Staff to take depositions of some of its own members. Such action would serve no useful purpose, especially in light of the fact that the Staff has not yet completed its review of the licensee's management and financial competence.

TMIA's depositions thus far have developed some points that may be potentially productive as sources to lead to relevant evidence on the issues of management and financial competence. The Staff may want to pursue those leads. However, the Staff cannot, in the absence of a detailed statement by TMIA concerning the objectives of its discovery program and the precise information sought to be obtained from each deponent, evaluate the skill with which TMIA has achieved these goals thus far.<sup>7/</sup>

3. The Staff Cannot State That TMIA's Deposition Program Would Not Be Duplicative or Cumulative

With respect to the question of whether the adoption of TMIA's deposition program would duplicate existing efforts, the Staff notes that the Kemeny and Rogovin Reports both indicate that their staffs have examined in depth the areas of management and financial competence of the Metropolitan Edison

<sup>7/</sup> If the Board were to order the Staff to undertake TMIA's discovery program solely on TMIA's behalf, the Board would be sanctioning indirect intervenor funding which is, of course, prohibited at this time. By construing the discovery program as its own, the Board seeks to avoid this problem. For its part, the Staff questions whether the Board's adoption of TMIA's entire deposition program, without questioning TMIA's specific goals or making an independent determination for each proposed deposition as to need and relevancy, is not also a sanction of intervenor funding.

Company. For example, Volume II, Part 3 of the Rogovin Report contains a list over 16 pages in length consisting of the names of persons who have been deposed or interviewed by the Rogovin committee. Most of these individuals are either licensee or Staff personnel (pages 0678-94). Some are individuals whom TMIA seeks to depose here. The records of these depositions and interviews are publicly available and have been sent to the local public document rooms for this proceeding. Clearly TMIA could examine these documents, if it has not already done so, and report to the Board whether the information it seeks is contained in these depositions and interviews already available. TMIA has not indicated that it has done so.

In the absence of information regarding the goals of TMIA's discovery program and the information sought to be obtained from it, the Staff cannot conclude whether, or to what extent, TMIA's program would duplicate existing lines of inquiry already developed by other investigators.

Respectfully submitted,

*Daniel T. Swanson*

Daniel T. Swanson  
Counsel for NRC Staff

*Lisa N. Singer*

Lisa N. Singer  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 3rd day of April, 1980.



Walter W. Cohen, Consumer Advocate  
Department of Justice  
Strawberry Square, 14th Floor  
Harrisburg, Pennsylvania 17127

Ms. Karen Sheldon  
Sheldon, Harmon, Roisman & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, DC 20006

Ms. Frieda Berryhill, Chairman  
Coalition for Nuclear Power  
Plant Postponement  
2610 Grendon Drive  
Wilmington, Delaware 19808

- \* Atomic Safety and Licensing Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555
- \* Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555
- \* Docketing and Service Section  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Robert O. Pollard  
609 Montpelier Street  
Baltimore, Maryland 21218

Chauncey Kepford  
Judith H. Johnsrud  
Environmental Coalition on Nuclear Power  
433 Orlando Avenue  
State College, Pennsylvania 16801

Holly S. Keck  
Anti-Nuclear Group Representing  
York  
245 W. Philadelphia Street  
York, Pennsylvania 17404

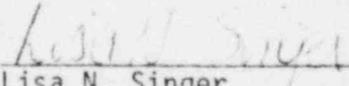
John Levin, Esq.  
Pennsylvania Public Utilities Comm.  
Box 3265  
Harrisburg, Pennsylvania 17120

Jordan D. Cunningham, Esq.  
Fox, Farr and Cunningham  
2320 North 2nd Street  
Harrisburg, Pennsylvania 17110

Ms. Kathy McCaughin  
Three Mile Island Alert, Inc.  
23 South 21st Street  
Harrisburg, Pennsylvania 17104

Ms. Marjorie M. Aamodt  
R.D. #5  
Coatesville, Pennsylvania 19320

Senator Allen R. Carter  
Chairman  
Joint Legislative Committee on Energy  
Post Office Box 142  
Suite 513 Senate Gressette Building  
Columbia, SC 29202

  
Lisa N. Singer  
Counsel for NRC Staff