

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In The Matter Of :
METROPOLITAN EDISON COMPANY : Docket No. 50-289 (Restart)
(Three Mile Island Nuclear :
Station, Unit No. 1) :

PETITION FOR RECONSIDERATION

The Consumer Advocate of Pennsylvania (Consumer Advocate), participating in the above-captioned proceeding as a representative of an interested governmental agency pursuant to 10 CFR §2.715(c), hereby petitions your Honorable Commission in accordance with 10 CFR §2.771 to reconsider your decision set forth at CLI-80-19 to deny the Consumer Advocate's petition for financial assistance to intervenors who are participating in the TMI Unit 1 restart proceeding. In support of this petition the Consumer Advocate states the following:

The Decision In CLI-80-19 Is Erroneous

1. Absent a clear and detailed explanation, there is no basis for determining why this Honorable Commission in its Memorandum and Order at CLI-80-19 has failed to adopt a legal opinion by the Comptroller General of the United States which was specifically requested by this Honorable Commission's General Counsel in an effort to resolve the intervenor funding controversy. Without such explanation, it appears that this Commission has either misunderstood the Comptroller's opinion or has indiscriminately chosen to ignore it. As a result, the decision in CLI-80-19 is erroneous.

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The Comptroller's opinion, Financial Assistance to Intervenors in Proceedings of Nuclear Regulatory Commission, B-92288, January 25, 1980, was issued in response to a letter dated November 2, 1980 from the NRC's General Counsel which sought answers to two narrow questions regarding intervenor funding:

- (1) Whether it is legal to use appropriated funds to provide financial assistance to intervenors in adjudicatory and/or rulemaking proceedings when Congress has neither expressly prohibited nor approved such funding.
- (2) Whether there are, in fact, circumstances under which the Commission may legally use public funds, as appropriated in fiscal year 1980, to provide financial assistance to intervenors.^{1/}

The Comptroller General's response to these questions was unequivocal:

- (1) Nuclear Regulatory Commission may use appropriated funds to provide financial assistance to its intervenors in its proceedings.
- (2) Nuclear Regulatory Commission may use fiscal year 1980 funds to provide financial assistance to intervenors in its proceedings despite appropriation committee statement that no funds are being provided for that purpose.

Financial Assistance to Intervenors, supra at 1. The Comptroller went on to state that its decision was limited to the legality of NRC

^{1/} A majority of the Commissioners have already voted to request funds for a pilot intervenor funding program for fiscal year 1981. In his inquiry to the Comptroller, the General Counsel asks whether Congressionally-appropriated funds for FY 1980 can be used for a pilot intervenor funding program where the FY 1980 appropriations legislation neither authorizes nor forbids such spending. The Commission was apparently concerned about the legal effect of language in the House Appropriation Committee reports for FY 1979 and FY 1980 that expressly prohibited intervenor funding by the Commission.

funding of intervenors and that should the NRC proceed with a "pilot intervenor's program," the Comptroller "would not be required to object."

The extent to which the Comptroller qualified his opinion is de minimis. By way of dictum, the Comptroller suggests that the NRC:

may be well advised to postpone further implementation of the pilot intervenor's program... in the light of the 1980 House Appropriations Committee report.

(Emphasis supplied.) Financial Assistance to Intervenors, supra at 6. Quoted in CLI-80-19 at 5. This gratuitous advice, 2/ which appears from the structure of the Comptroller's decision to have been added only as an afterthought, together with the Commission's "clear reading of the legislative history associated with the fiscal year 1980 appropriations legislation" is offered as the only basis for the CLI-80-19 Memorandum and Order denying intervenor funding. Absolutely no rationale or authority is cited by this Honorable Commission for its giving more weight to the Comptroller's unsolicited dictum and its own assessment of the legislative history of the appropriations legislation than to the substantive aspect of the Comptroller's opinion, i.e. that intervenor funding is legal

2/ It is worth reiterating that the letter from the NRC General Counsel sought only the Comptroller's opinion on two narrow legal questions. The General Counsel did not ask for the Comptroller's views as to a preferred course of action for the NRC. Nevertheless, the Comptroller's advice was given, ostensibly to warn the NRC of the possibility of "strained relations with the Congress" if the Commission decided to fund intervenors.

"...despite appropriation committee statement that no funds are being provided for that purpose." Absent such an explanation, it must be presumed that this Honorable Commission has either misinterpreted the thrust of the Comptroller's opinion or has unaccountably chosen to disregard his expert views on the issue. As a result, it is difficult to see how this Honorable Commission has:

chosen to address the [Consumer Advocate's] petition on its merits in the exercise of [the Commission's] inherent supervisory authority over agency adjudications.

CLI-80-19 at 2.

2. The Memorandum and Order at CLI-80-19 is inconsistent on its face and is therefore erroneous. As discussed below, two inconsistencies can be found in the text of CLI-80-19. Petitioner respectfully submits that these discrepancies require this Honorable Commission to provide further explanation and clarification of the Memorandum and Order or, as requested here, to undertake its reconsideration.

CLI-80-19 is remarkably forthright as to this Honorable Commission's position on intervenor funding:

The Commission notes in passing... that the current Commission does favor funding intervenors...

(Emphasis in original.) CLI-80-19 at 3. This unqualified statement of the Commission's views is inconsistent with the Commission's decision to deny the Consumer Advocate's petition requesting funding for other intervenor groups. More importantly, this statement further begs the question as to why the Commission has chosen to disregard the substance of the legal opinion that the Commission solicited from the Comptroller General. The Comptroller's opinion unequivocally states that disbursing of funds appropriated for FY 1980 to intervenors in NRC proceedings is within this Commission's discretion and is legal. CLI-80-19 can therefore be reduced to the following non sequitur: the Commission enthusiastically

declares its total support for intervenor funding;^{3/} before proceeding to fund intervenors, the Commission seeks a legal determination to support such action; a favorable determination is made by the appropriate authority; and, in response, the Commission declines to fund intervenors.

A second internal inconsistency in CLI-80-19 is revealed when the Commission states:

The Commission notes that Congress has precluded such funding, and therefore, the Commission will not fund intervenors.

(Emphasis supplied.) CLI-80-19 at 3. The Commission's conclusion that Congress has precluded intervenor funding contradicts subsequent recognition of, and citation from, the Comptroller's opinion at B-92288 that is found in CLI-80-19. Moreover, this conclusion subverts well-established principles of statutory construction.

The above-cited statement in CLI-80-19 presumably reflects this Commission's view that prohibitory language in a House Appropriations Committee report to which a conference committee fails to object

^{3/} This enthusiasm is further demonstrated in the Commission's FY 81 budget submission and in testimony before Congress. CLI-80-19 at 3.

represents affirmative Congressional action and thus constitutes positive law. This view is expressly rejected by the Comptroller General as the Memorandum and Order at CLI-80-19 clearly recognizes when it quotes from B-92288 as follows:

On January 25, 1980, the Comptroller General issued his decision... in which he concluded, that the restriction "indicated in the [Congressional committee] report was not a legal limit on the agency's spending because it was not expressly stated in the appropriation act,"

CLI-80-19 at 4-5, citing B-92288 at 6. The Commission's statement that Congress has precluded intervenor funding (CLI-80-19 at 3) overtly contradicts the Comptroller General's conclusion in B-92288 later referenced by the Commission's Memorandum and Order at CLI-80-19, thus making the latter inconsistent on its face.

Petitioner would also submit that the Commission's statement in CLI-80-19 at 3, accepting as having the force of law a statement contained in the report of a Congressional committee, is contradictory to well-established principles of statutory construction. Committee reports and other secondary sources are used to construct a statute only when the text of the statute can support two or more equally plausible but irreconcilable or inconsistent interpretations. Such ambiguity can hardly be said to exist when Congress is silent on as topical an issue as intervenor funding. As the Comptroller General stated:

if the Congress desires to restrict that [financial] flexibility [of Federal departments] with respect to a specific item, it may do so by inserting a limitation in the text of the appropriation act or in some other enactment.

In other instances in which the Congress desired to prohibit funding of intervenors, it has specifically indicated this intent in the appropriation act itself.

B-92288 at 5 and 6.

In concluding that Congress has precluded intervenor funding, this Commission, without explanation or justification, reverses settled rules of statutory construction and rejects the well-reasoned analysis of a Comptroller General decision that this Commission itself requested. As the quoted statement also contradicts later reliance in CLI-80-19 on the Comptroller General decision, CLI-80-19 is internally inconsistent and therefore erroneous.

Grounds Of This Petition For Reconsideration

3. The Office of Consumer Advocate (OCA) is an agency of the State of Pennsylvania and is participating in the above-captioned action under 10 CFR §2.715(c). The OCA was created by the Pennsylvania General Assembly in 1976 as an independent state agency authorized to represent the "interest of consumers" before state and federal regulatory commissions. The Consumer Advocate, by statute, has broad discretion to define and interpret the words "interest of consumers."^{4/} The Consumer Advocate has determined, in the particular instance of the recent events at Three Mile Island, that the interest of consumers as represented by the Consumer Advocate extends to health and safety issues attending the restart of TMI Unit 1 as well as the financial and managerial capability of the licensee. Thus, the interests represented by the Consumer Advocate will be affected by the outcome of the instant restart proceeding. The Consumer Advocate believes that denial of intervenor funding will severely limit the record on which that outcome is based.

4. The intervenor groups, which have requested or may request funding for witness expenses, are consumers whose rights in the matter of funding are supported by the Consumer Advocate. Further, the Consumer Advocate believes that all Pennsylvania consumers will benefit by NRC

^{4/} 71 Pa. C.S.A. §309-4.

funding of intervenors' witnesses. As this Commission has already noted, its decision in CLI-80-19 affects both the Consumer Advocate as well as other parties and formal participants in the proceeding. In submitting this Petition For Reconsideration the Consumer Advocate is supporting the rights of his client and, thereby, fulfilling his statutory duty.

5. As discussed above, the Consumer Advocate believes this Commission's decision in CLI-80-19 to be erroneous because: (1) the decision rejects the conclusions of the legal opinion provided by the Comptroller General at this Commission's request and provides no explanation for this rejection, and (2) the decision is internally inconsistent. As a result, the Consumer Advocate believes that its Petition To Seek NRC Funding For Consumer Intervenors To Finance Witness Expenses was not addressed "on its merits" in CLI-80-19, was erroneously rejected, and should be reconsidered by this Commission.

Relief Sought By Petitioner Consumer Advocate

6. For the reasons set out above, Petitioner, the Consumer Advocate of Pennsylvania, respectfully requests that your Honorable Commission:

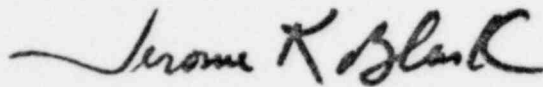
a. reconsider its decision in CLI-80-19 to deny Consumer Advocate's Petition To Seek NRC Funding For Consumer Intervenors To Finance Witness Expenses,

b. schedule oral argument on the issues raised by this Petition For Reconsideration,

c. allow submission of briefs on the issues raised by this
Petition For Reconsideration, if it so desires, and

d. revise its Memorandum and Order at CLI-80-19 to provide for
intervenor funding in NRC proceedings.

Respectfully Submitted,



Jerome K. Blask
Assistant Consumer Advocate

WALTER W. COHEN
Consumer Advocate

Pennsylvania Department of Justice
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

DATED: May 30, 1980