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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Linda W. Little

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289 SP
	)	(Restart)
(Three Mile Island Nuclear Station, Unit No. 1)	)	

MEMORANDUM AND ORDER ON TMIA'S MOTION FOR ORDER TO COMPEL DISCOVERY OF LICENSEE

(June 25, 1980)

On May 13, 1980 intervenor Three Mile Island Alert, Inc. (TMIA) served TMIA's Follow-up Interrogatories to Licensee. On May 15 licensee objected to the interrogatories on the grounds of untimeliness and irrelevancy. TMIA filed its motion to compel on May 29. The licensee, in its June 4 response to TMIA's motion to compel, opposed the motion on the previously stated grounds and added an objection based upon the untimeliness of TMIA's motion to compel. The board believed that the issues raised by licensee's June 4 response to the motion to compel should be addressed by TMIA. Therefore we issued a memorandum and order on June 6 stating that these issues should be addressed by TMIA. We granted TMIA an opportunity to reply.

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Pursuant to the board's order, TMIA filed a brief response to the licensee's response to the motion to compel.[1/] TMIA's response is not helpful. It provides no information which was not already before the board.

Timeliness

The timeliness of TMIA's motion to compel discovery must be considered in light of the board's May 5 Memorandum and Order (p. 2) in which we adopted a schedule for remaining discovery. Objections to discovery requests are due within five days of the service of the requests, and motions to compel such discovery must be filed within five days after a failure to respond, or, as in this case, after service of objections to the discovery request.

Licensee timely filed the objections to TMIA's May 13 discovery request on May 15. TMIA's motion to compel would have been due on May 25 (five days plus five days for service). May 25 was Sunday, so the motion to compel was due May 26, 1980. 10 CFR 2.710. TMIA's motion to compel was served May 29, 1980.

Although TMIA acknowledges in its June 18 response that it received on May 9 the board's order shortening the time for motions to compel discovery, TMIA does not refer to this change from the rules. TMIA depends instead upon the provision of 10 CFR 2.740(f) for the timing of its motion to compel, i.e., ten days

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1/ TMIA's Response to Licensee's Response to TMIA's Motion to Compel Follow-On Discovery of Licensee, June 18, 1980.

plus five days for service. TMIA's motion to compel was out of time, but we assume that TMIA simply overlooked the board's order changing the time.

TMIA's interrogatories which are the sub[illegible] of the motion to compel are in the "follow-on" category of discovery requests. In accordance with our February 29, 1980 Fourth Special Prehearing Conference Order (p. 23), follow-on discovery requests must be made not later than ten days from the date of service of the discovery response which occasions the follow-on discovery request.

TMIA deposed Ms. Gee, licensee's employee, on March 31, 1980 but Ms. Gee declined to waive her right to examine and to sign the deposition under 10 CFR 2.740a(e). Counsel for TMIA acknowledged receipt of the unsigned and uncorrected copy of the deposition from its own reporting service early in April 1980 but did not receive the version signed and corrected by Ms. Gee until May 6. The corrected version contained four minor typographic corrections which did not change the information already known to TMIA. Deposition, pp. 13, 16, 18, and 26.

The dispute between TMIA's counsel and licensee's counsel is over when TMIA was required to serve its follow-on discovery demands; whether it was at the time TMIA's reporting service finally mailed the copy with Ms. Gee's signature (signed April 18), or whether it was at the time the information became available to TMIA's counsel

shortly after the deposition. We reluctantly give the nod to TMIA's counsel who wins on a technicality. The board failed to anticipate that TMIA's counsel would depend upon the fact that the NRC discovery rules do not provide for the service of depositions when we ordered follow-on discovery requests to "be served not later than ten days from the date of the service of a discovery response which occasions the need for follow-on discovery."[2/] By this ruling we do not wish to imply that we applaud TMIA's approach to complying with the board's discovery rulings. It was, after all, TMIA's own discovery efforts. TMIA was the only party using depositions. It could have relieved the board of the tedious and digressive task of resolving this dispute simply by recognizing our oversight and complying with the spirit of the discovery ruling, or counsel could have requested guidance from the board. However, we rule that the follow-on interrogatories were, because of the board's oversight, filed timely.

Relevance

TMIA declined to accept the board's invitation to discuss the relevancy of its interrogatories other than to state that the interrogatories are "crucial in developing a complete record on the management issue." Response, p. 2. Therefore the board must depend upon TMIA's argument as to relevancy contained in its motion to compel:

2/ Fourth Special Prehearing Conference Order, February 29, 1980, p. 23.

> The thrust of TMIA's interrogatories is that Licensee neglected critical quality assurance staffing and subsequent reorganizations after the accident occurred. Furthermore, despite Licensee's assertion that the cracking of pipes at TMI-1 is a "post-TMI-2 accident matter," Ms. Gee's deposition indicates that the problems were identified "before the accident. . . ."[2]

[2]See page 9 of Ms. Gee's deposition.

With this sparse guidance from TMIA, we reviewed the follow-on interrogatories and the deposition, which is asserted by TMIA to occasion the need for the interrogatories, to determine whether the information sought is relevant to the proceeding, and if it is reasonably calculated to lead to the discovery of admissible evidence. 10 CFR 2.740(a) and (b)(1).

The follow-on interrogatories inquire about the cracking of pipes in the borated water system, some unclear references to licensee's former employee, Mr. Mackey, and a reorganization at TMI-1. The deponent, Ms. Gee had, among other clerical jobs, the non-technical, non-supervisory position of administrative assistant in the Quality Control Department.

With some imagination, speculation and conjecture, we can envision how the line of questioning and the follow-on interrogatories could lead to the discovery of admissible evidence.[3] But

[3] By failing to explain clearly the direction of its inquiry, TMIA left it to the board to ponder the relevancy of such matters as the dialogue on page 30 of the deposition where counsel inquires about Mr. Mackey's marital status, the custody and place of residence of his daughters, and his former wife's name. We do not cite this exchange to make light of TMIA's discovery efforts, but to demonstrate that TMIA, immersed in the subject matter of its discovery, realistically should not have expected the board to discern so easily why the requested information is relevant to the proceeding.

the discovery rules do not anticipate that the board will enforce discovery demands on that basis. The rule clearly calls for discovery "reasonably calculated" to lead to the discovery of admissible evidence. Section 2.740(b)(1). The rule provides further that under Section 2.740(f), the moving party shall set forth "arguments in support of the motion" to compel discovery. TMIA has failed to support its motion with argument and a demonstration of relevancy. The board has not been able to make such a determination by its own review of TMIA's di covery materials.

TMIA's Motion to Compel Discovery of Licensee, dated May 29, 1980 is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland
June 25, 1980