Bd 7/22/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

SERVED JUL 22 1980

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

MEMORANDUM AND ORDER ON TMIA's
MOTION TO COMPEL DISCOVERY OF LICENSEE
(July 22, 1980)

On June 18, 1980, Three Mile Island Alert (TMIA) filed four "follow-up" interrogatories. Licensee objects that they are untimely, and that, in addition, interrogatory 2 does not appear to be relevant "... [w]ithout a greater specification of relevance from TMIA ...." Licensee's Objections, June 27, 1980. This dispute is further amplified by TMIA's Motion to Compel (July 7, 1980), and by licensee's response thereto (July 14, 1980).

TMIA's interrogatories 1 and 3 are in the category of "follow-on" discovery requests based on discovery responses served by the licensee on March 17, 1980. Under the clear terms of our February 29, 1980 Fourth Special Prehearing Conference Order (p. 23), the permitted one round of such follow-on requests should have been

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made within ten days of the date of service (ten days plus five days for mailing) of the response upon which it is based.

TMIA argues that the responses involved here are a 904-page computer summary of corrective maintenance and a 1137-page computer summary of hours worked by employees. We agree that it would have been a difficult task for TMIA to review these and formulate "follow-on" discovery requests within ten days. However, TMIA should have made a timely request for relief upon receipt of such extensive information back in March. Furthermore, we cannot attribute diligence to TMIA's follow-on discovery when it is over two months late.

TMIA is incorrect in its understanding of our May 5, 1980 order, which permitted discovery no later than ten days after the availability of new information. The word "availability" was used because the situation being addressed was not follow-on discovery to discovery responses,[1/] and therefore the method by which the information would become available would not necessarily be by service. In any event, even if we assume arguendo that the May 5 order applies to "follow-on" discovery and therefore information is in fact obtained by service upon a party, it is such service which is the ascertainable time of availability. We agree with licensee that TMIA's

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1/ Only one such round of follow-on discovery requests to discovery responses was permitted in our February 29, 1980 order and was governed by the schedule in that order as discussed above.

proposed test -- that the date of availability is when the discovering party gains knowledge of the content -- cannot be applied to a situation like this one where the "new information" is a response to a discovery request. Licensee is correct that as a general proposition: "... TMIA's position would allow a party to indefinitely extend discovery by reviewing available material at its leisure." We leave open the question of possible broader determinations of "availability" in other situations -- e.g., where a document is publicly available but its existence or content would not have been apparent even to a party exercising due diligence.

Notwithstanding the above, in this instance the board is interested in the responses to interrogatories 1 and 3, because they probe an important area within our concern as well as within TMIA Contention 5.[2/] Licensee is directed to answer interrogatories 1 and 3 within fifteen days of the date of service of this order.

Interrogatory 2 seeks: (a) accident reports, (b) documentation of instances where an employee has "called off" sick, and (c) infirmary records for the period October 1977 to March 1979. We find that the further explication provided by TMIA's motion to compel shows the general relevance of the requested information

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2/ Contention 5 deals with Metropolitan Edison's management competence and technical qualifications based on allegations of deferral of maintenance and having employees work to the point where they were no longer effective due to fatigue.

under the discovery standard of information that appears reasonably calculated to lead to the discovery of admissible evidence. 10 CFR § 2.740(b)(1). The information is relevant to TMIA's allegation of employees being worked to the point of fatigue. However, we do not see how this interrogatory is tied to previous discovery responses as even a very late "follow-on" discovery request. TMIA attempts to tie this interrogatory to the computer summary of hours worked. But interrogatory 2 does not depend upon that summary; in actuality, as disclosed on page 3 of TMIA's motion to compel, TMIA got the idea to ask this question late when it was suggested by a consultant. The interrogatory could have and should have been asked as part of initial discovery, and certainly not two months beyond the deadline for even follow-on discovery. Licensee need not answer interrogatory 2.

Interrogatory 4 is a request for an update of the computer summary of work requests completed since January 1980 to date, which summary was previously provided in response to TMIA interrogatory 6 (5th set, or "5-6"). Although licensee was not under an obligation on its own to update this response (see 10 CFR § 2.740(e)), we find that a request to provide an update since the last response is reasonable and should be answered, if in fact licensee has such an update of the computer summary. If not, TMIA

and the licensee should arrive at another method of providing the requested update of information on completed work requests. This interrogatory should also be answered within fifteen days of the date of service of this order.[3/]

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland

July 22, 1980

3/ Subsequent to the preparation of this order the board received licensee's July 16, 1980 motion for sanctions against TMIA requesting the dismissal of TMIA Contention 5. We will defer ruling upon the motion until TMIA serves its response. Perhaps the matter will be discussed at the August 12 prehearing conference. Our order compelling discovery responses on Contention 5 discovery requests should not be taken as an indication of our views on licensee's motion. We are directing licensee to respond to discovery in the interest of saving time in the event we decline to dismiss the contention and because of the board's interest in the subject matter. Licensee may request a delay in complying with today's order until the issue set forth in its motion for sanctions is resolved, but of course, any delay will ultimately be at licensee's expense.