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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
	)	(Restart)
(Three Mile Island Nuclear Station, Unit No. 1)	)	

MEMORANDUM
(April 24, 1980)

In the Memorandum and Order dated March 25, 1980, the board expressed its concern that the record might not develop fully on certain issues pertaining to the licensee's management and financial competence. We invited the parties to comment on the perceived problem. In particular we requested extensive advice from the staff on a course of action we had then only begun to consider, i.e., examine the discovery program of intervenor Three Mile Island Alert, Inc. (TMIA) to determine whether the board should adopt TMIA's inquiry as its own. We would do this only if our examination should indicate that TMIA's inquiry appeared "reasonably calculated to lead to the discovery of evidence necessary to a proper decision in the proceeding ...." As we stated, our concern was generated by the importance of the issues involved, an indication that TMIA on its own may not be able to develop a complete record,

and the fact that no other party was known by us to be gathering evidence on the issues.

In its response of April 3, 1980, the staff advised the board that, in its view, the referenced course of action (specifically: directing the taking of depositions) would be contrary to NRC regulations, impractical, an infringement upon the staff's case preparation, and unnecessary.

We need not dwell on the substance of the staff's response. We recognize that important procedural problems might arise if the staff were to be directed so precisely as to require in particular the taking of depositions under 10 CFR 2.718(d). Whether or not we have the authority to order the staff to take depositions, such an approach is unappealing as a practical matter.[1/] The staff has indicated that it is unwilling to take depositions and, in view of its general disinterest in the proposal, it does

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1/ The presiding officer, under 10 CFR 2.718(d), has the power to order depositions to be taken. Even if the staff is correct in its conclusion that we do not have the authority to direct the staff or any party in the taking of specific depositions, its reasoning in arriving at this conclusion is incomplete. The staff states that Section 2.718(d) refers only to the presiding officer's authority to compel proposed deponents to be deposed under Sections 2.740 and 2.740a. If this is so, why then is the authority to grant motions to compel depositions restated under Section 2.740(f) where the authority to order discovery in response to interrogatories and requests for the production of documents is also provided? Section 2.718 makes no reference to interrogatories and document requests. In other words, if staff's analysis is correct, Section 2.718(d) is either superfluous or incomplete.

not appear practical for the board to seek specific assistance from the staff in the subject matter of concern to us. Moreover, we have since learned that TMIA has, for now, resumed its deposition program.

The subject matter of TMIA's inquiry which we partially discerned by a summary review of some of its depositions, has now been explained by TMIA in its April 2 response to the board's memorandum and order:

> The primary objective of TMIA's discovery and deposition program, as it relates to management, is to continue some of the work the Kemeny staff had begun but had neither the time nor resources to continue,[1] and to develop those areas which had not been investigated at all. These latter areas include: (1) deferred and temporary maintenance on safety-related components, (2) lack of objective and uniform priorities for maintenance work orders, (3) sufficiency of competent manpower in all areas, (4) the competency of contractors and suppliers, (5) quality control, and (6) health physics.

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[1] See Report of the Office of Chief Counsel on The Role of the Managing Utility and Its Suppliers, pp. 2 (Paragraphs 2-4), 198.

Items (1) through (3) are of particular interest to the board.

The staff also declined to honor the board's request to inform it as to whether TMIA's deposition program would be duplicative or cumulative to similar Kemeny or Rogovin inquiries. Staff response, p. 10-11. The staff, pointing to the availability

of this information in local public document rooms, would leave this task to TMIA, or presumably to the board to inform itself if TMIA fails to do so.

The licensee is "disturbed" at the board's review of TMIA's depositions, making the fundamental and unnecessary observation that the depositions are not yet in evidence. We are sensitive to licensee's concern. The division between examining a potential source of evidence for procedural purposes (e.g., discovery disputes, rulings under 10 CFR 2.752, motions to reopen the record and the preliminary examination of proposed evidence for admissibility) and the examination of information not in evidence for its substantive merit is sometimes a fine, but nonetheless important line. We will take the licensee's concerns to heart.

However, in this case we have been charged by the Commission with the duty and responsibility to determine whether the licensee possesses the requisite management, technical and financial qualifications. See Order and Notice of Hearing, CLI-79-8, 10 NRC 121, 143, 145 (August 9, 1979), and Order, CLI-80-5 (March 6, 1980). The March 6, 1980 Commission Order directed this board to examine a listing of specific issues on this subject, and "such other specific issues as the Board deems relevant to the resolution of the issues set forth in this order." Slip op. at 4. The order further stated:

> The Board should apply its own judgment in developing the record and forming its conclusions on these questions. With the record developed and the Board's conclusions in hand, the Commission will be greatly aided in reaching a final decision on the restart issue. [Slip op. at 4]

We acted in the interest of allowing the development of the record on this important mandatory issue as early as possible. We examined some of the depositions solely with this in mind. We have formed no prejudgment of the merits and recognize we have very limited information at this time. This is not dissimilar from the expectation and practice that boards will become familiar with material such as ER's, FSAR's, FES's, and SER's as far in advance of hearing as possible to be prepared for the evidence and to determine if there are uncontested, non-mandatory issues which the board wished to inquiry into sua sponte because of a perception that a "serious safety, environmental, or common defense and security matter exists". Cf. 10 CFR §§ 2.104(c) and 2.760a. Our duty and responsibility to assure development of a full record can per force be no less on a mandatory issue of great concern to the Commission and to this board. It is licensee who would suffer from the delay created by the board failing to express its strong interest in a very complete record on this subject until the hearing or after the hearing.

In sum, our efforts to apprise the parties that there are particular areas of concern to the board concerning the Commission's mandate to thoroughly consider management and financial

competence has met with the advice from staff and licensee that our involvement in the prehearing development of evidence is neither appropriate, necessary nor wanted. For now we intend to take no further action on the substance of the issue. We assume that the staff and licensee will be prepared to endure the consequences of delay if, at the close of the hearing, we remain dissatisfied with the state of the record on these issues.

The staff's response has raised another issue sufficiently important to explore further. In its response the staff states:

> 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.

Response, n. 7, p. 10.

The staff's apparent belief that the board seeks to circumvent the Commission's policies and rules to favor a party by funding is important. The NRC staff, no less than any other party, is entitled to have its case adjudicated by an impartial board.

The short response to the staff's statement is that the staff is mistaken. We seek neither to fund intervenors nor to

favor TMIA. Indeed, the board, in the first instance, directed the staff's attention to our need to be obedient to the requirement of the law as stated in Consumers Power Company (Midland Plants, Units 1 and 2), ALAB-382, 5 NRC 603, 607-08 (1977). Moreover, we told the staff and the parties that we would adopt the TMIA issues and inquiry as our own only if necessary to a proper decision in the case. Memorandum and Order, p. 3. We stated that we had "... not yet decided whether this course of action will be productive or desirable" (Ibid.) and that we needed to be fully informed as to whether it would be a lawful, appropriate, practical and necessary procedure. Id., pp. 3, 4. We cannot envision how we could have better communicated to the parties that the board would not directly or indirectly fund an intervenor, and that it would be only after a very careful and open examination of the legality and propriety of the proposal that we would even consider adopting the issues raised by TMIA as our own.

The memorandum was quite short -- four pages -- devoted mostly to our concern that we must proceed lawfully and appropriately. Certainly the staff could not have overlooked our stated intention. Yet the staff believed it was necessary, not even as an essential part of its substantive position, but as an observation in the margin, to attribute to the board the act (not merely the

intent) of adopting "TMIA's entire deposition program". This, the staff proclaims, was done "without questioning TMIA's specific goals or making an independent determination for each deposition as to need and relevancy ... as a sanction of intervenor funding." Staff response quoted p. 6, supra.

As we stated above, the staff is factually in error. Yet we are comfortable in the belief that the counsel for the staff would not make such a statement without perceived bases. Not only is the staff, as are all parties, entitled to have an impartial board presiding in accordance with the rule of law, but it is entitled to have the board preside without even the appearance of impropriety. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 63-64 (1973). American Bar Association, Code of Judicial Responsibility, Canon 2. Therefore, if the staff's doubts persist after this discussion, we invite it to come forward with the basis for its belief that we have proceeded in the manner it has referred to. If appropriate, the board will then address the staff's concerns.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland

April 24, 1980