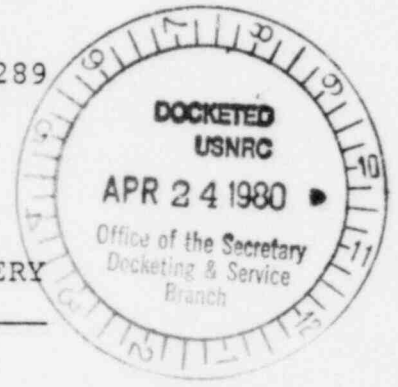


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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



LICENSEE'S SECOND MOTION TO COMPEL DISCOVERY
OF THREE MILE ISLAND ALERT

I. INTRODUCTION

On January 14, 1980, Licensee filed interrogatories to TMIA. Failing response by March 17, 1980 (the deadline set by the Board), Licensee filed a Motion to Compel on March 24, 1980. The Board granted Licensee's motion by Memorandum and Order dated April 11, 1980.

On April 14, 1980, Licensee's counsel in this proceeding received from TMIA a response to its interrogatories dated April 3, 1980.^{1/} With very limited exceptions, TMIA's responses fail to supply the information sought by Licensee. In many

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TMIA has offered no explanation for its late filing. Licensee notes that while TMIA did not manage to answer Licensee's interrogatories during the prescribed discovery period, it did find time to prepare a total of seven sets of interrogatories to Licensee (5 sets), the NRC Staff and the Commonwealth of Pennsylvania, as well as to conduct extensive depositions of Licensee's employees.

instances TMIA has responded that it does not have facts to support its allegations even as to past occurrences and that it has not yet developed information to support its allegations and predictions as to future events. Given this state of affairs there is no point in Licensee's asking the Board to compel a further response to most of the interrogatories. If TMIA does not have and has not developed information to support its contentions, a further order to compel disclosure of the information would serve no purpose.

Licensee notes, however, that the Board intends before the hearing, by requiring trial briefs or by other method, to require a full and timely disclosure of each party's position on each issue affecting that party. Memorandum and Order on UCS March 24, 1980 Motion to Compel Licensee to Answer UCS Interrogatory 179, p. 2 (April 2, 1980). The Board might well consider requiring parties advancing contentions to identify at that time the specific facts which they intend to show at the hearing, either through direct testimony or cross-examination, in support of their contentions.

There are, however, several interrogatories as to which TMIA apparently has information on which it relies in support of its allegations, but which TMIA refuses to answer. Licensee herein moves for a second time to compel TMIA's full and substantive response to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6. In the discussion which follows, Licensee first states the contention which is the subject of the listed interrogatories,

then sets forth its interrogatories (as modified at p. 2 of the Memorandum and Order dated April 11, 1980), with TMIA's answers to those interrogatories.

II. DISCUSSION

All five of the interrogatories which are the subject of this motion were designed to elicit the specific factual bases for TMIA's Contention 5. That contention alleges that:

Met-Ed has negligently, and on occasion, willfully violated NRC regulations concerning the safe operation of both Units 1 and 2, in that it has deferred necessary maintenance and repairs in order to minimize reactor downtime, to the detriment of the integrity of the nuclear facility itself. The Licensee has, in the past, allowed work orders to go undone in order to avoid shutting Unit 1 down to perform necessary maintenance. The licensee would allow work orders to pile up until refueling, at which time the licensee would attempt to do all the work required. Just to complete essential maintenance in the short time available, employees were worked to a point where they were no longer effective because of fatigue. These actions, and actions of this type, reflect negatively upon the ability of the licensee to safely operate a nuclear facility. Consequently, it is contended that Met-Ed is incapable of safely operating TMI-1 and that its operating license should be suspended permanently.

Licensee's Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6 (as modified by the Board at p. 2 of its Memorandum and Order dated April 11, 1980) are set forth below, with TMIA's answers to those interrogatories.

Interrogatory 5-1

5-1 Identify every occasion on which TMIA contends that Met-Ed "negligently . . . [or] willfully violated NRC regulations concerning the safe operation of . . . Unit #1 . . . in

that it . . . deferred necessary maintenance and repairs in order to minimize reactor downtime, to the detriment of the integrity of the nuclear facility itself."

a. Define "necessary maintenance and repairs" as that term is used in the allegation.

b. Set forth each and every fact and the source of each and every fact relating to or bearing upon the allegation.

c. Identify all documents containing any evidence or information relied upon by TMIA in support of the allegation.

d. Identify all persons having any information or knowledge relied upon by TMIA in support of the allegation.

TMIA's Response

5-1. Contention 5 was based primarily on the information provided in an article published in the Philadelphia Inquirer on Monday, April 16, 1979. This information was gathered by twelve reporters of that newspaper, based on interviews with fifty past and present employees of the Licensee at Three Mile Island. That article is a matter of public record and available to the Licensee as easily as to TMIA. Based on the information contained in this article, TMIA has reviewed hundreds of work orders, and summaries of work orders, depositions and interviews conducted by the NRC and the President's Commission and has deposed twenty-one individuals. All information gathered was either in the possession of Licensee or is now in its possession. Numerous areas of concern have been identified in this process, many of which have been further identified in the depositions. TMIA, if resources permit, will attempt to continue to identify these areas of concern. Since all the information is already in Licensee's possession, it would appear to be unnecessary, burdensome and improper to require TMIA to attempt to describe in writing and in advance of hearing all of the many dozens of areas of concern where deferral of necessary or required maintenance has taken place. Since Licensee is fully aware at this point of TMIA's area of concern, since it has itself provided the documents upon which it is based, and since it knows (through the depositions) many specific work orders that have provoked concerns, Licensee can adequately prepare for trial.

Interrogatory 5-2

5-2. Identify every occasion on which TMIA contends that Met-Ed "negligently . . . [or] willfully violated NRC regulations concerning the safe operation of . . . Unit #2 . . . in

that it . . . deferred necessary maintenance and repairs in order to minimize reactor downtime, to the detriment of the integrity of the nuclear facility itself."

a. Define "necessary maintenance and repairs" as that term is used in the allegation.

b. Set forth each and every fact and the source of each and every fact relating to or bearing upon the allegation.

c. Identify all documents containing any evidence or information relied upon by TMIA in support of the allegation.

d. Identify all persons having any information or knowledge relied upon by TMIA in support of the allegation.

TMIA's Response

5-2. See answer to 5-1 above.

Interrogatory 5-3

5-3. Identify every occasion on which TMIA contends that Met-Ed "allowed work orders to go undone in order to avoid shutting Unit #1 down to perform necessary maintenance."

a. Define "necessary maintenance" as that term is used in the allegation.

b. Set forth each and every fact and the source of each and every fact upon which the allegation is based.

c. Identify all documents, including Generation Corrective Maintenance System Job Tickets (Work Requests) - Three Mile Island ["Job Tickets"], containing any evidence or information relied upon by TMIA in support of the allegation.

d. Identify all persons having any information or knowledge relied upon by TMIA in support of the allegation.

TMIA's Response

5-3. See answer to 5-1 above.

Interrogatory 5-4

5-4. Identify every occasion on which TMIA contends that Met-Ed "allow[ed] work orders to pile up until refueling, at which time the licensee would attempt to do all the work required."

a. Set forth each and every fact and the source of each and every fact upon which the allegation is based.

b. Identify all documents, including Job Tickets, containing any evidence or information relied upon by TMIA in support of the allegation.

c. Identify all persons having any information or knowledge relied upon by TMIA in support of the allegation.

TMIA's Response

5-4. See answer to 5-1 above.

Interrogatory 5-6

5-6. Identify every occasion on which TMIA contends that, "[j]ust to complete essential maintenance in the short time available, employees were worked to a point where they were no longer effective because of fatigue."

a. Define "essential maintenance" as that term is used in the allegation.

b. Set forth each and every fact and the source of each and every fact relating to or bearing upon the allegation.

c. Identify all documents, including Job Tickets, containing any evidence or information relied upon by TMIA in support of the allegation.

d. Identify all persons having any information or knowledge relied upon by TMIA in support of the allegation.

TMIA's Response

5-6. See answer to 5-1 above. "Essential maintenance" is that maintenance which was identified by the operator itself as most important or is understood in the industry to be of great importance to safe or efficient operation.

The Board has previously examined all of Licensee's interrogatories to TMIA and has compared them to TMIA's contentions. On the basis of this review, the Board has already ruled that Licensee's interrogatories "are relevant to the proceeding and

are reasonably calculated to lead to the discovery of admissible evidence." Memorandum and Order on Licensee's Motion to Compel Discovery of TMIA, p. 1 (April 11, 1980). Licensee is therefore entitled to full, substantive answers to its interrogatories.

TMIA's answer to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6 (except to define "essential maintenance") is generally non-responsive to the questions posed.^{2/} Though the citation to the Philadelphia Enquirer article is partially responsive to the interrogatories, TMIA only "primarily" based its Contention 5 on that article, and itself admits that it "has reviewed hundreds of work orders . . . depositions and interviews conducted by the NRC and the President's Commission and has deposed twenty-one individuals." Presumably, TMIA intends to rely upon some of this other material, in addition to the cited newspaper article, in support of its contention. However, the mere recitation of TMIA's research in preparation for trial does not answer Licensee's specific questions as to the bases for TMIA's contention, and does not comply with the Board's April 11 Memorandum and Order.

It is no answer to Licensee's proper interrogatories to assert that the information sought "is a matter of public record

^{2/}

Though TMIA's definition of "essential maintenance" is of little help to Licensee, Licensee does not here seek to compel a further response to Interrogatory 5-6(a). Instead, Licensee seeks further specification, through its other interrogatories, of the specific items of maintenance to which TMIA refers.

and available to the Licensee as easily as to TMIA" and "is already in Licensee's possession." Though it may be true that Licensee has in its possession much of the information on which TMIA bases its Contention 5, Licensee cannot verify that assertion until TMIA specifically identifies that information for Licensee. Moreover, the mere attendance of Licensee's representatives at some of the many interviews and depositions conducted by the various TMI investigative groups and by TMIA is not sufficient to put Licensee on notice of the specific facts, documents and persons relied upon by TMIA in support of its allegations. Only TMIA itself can provide the specific bases for its contention. This it has refused to do.

TMIA's responses to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6 (to the extent that answer refers to the answer to 5-1) may be viewed not as answers to those interrogatories, but rather as legal objections. However, such objections are without merit. See, e.g., Stonybrook Tenants Association v. Alpert, 29 F.R.D. 165, 167 (D. Conn. 1961) (permissible to inquire into matters within interrogating party's knowledge); Erone Corporation v. Skouras Theatres Corporation, 22 F.R.D. 494, 500 (S.D.N.Y. 1958) (mere fact that matters are within knowledge of examining party or are matters of public record not valid objection to interrogatories); and Wolf v. Dickinson, 16 F.R.D. 250, 252 (E.D. Pa. 1953) (objection to interrogatory on ground that information is equally available to parties ordinarily not sustained).

Further, TMIA's responses to Licensee's interrogatories are dated April 3, 1980, more than five weeks after objections to

Licensee's interrogatories were due. TMIA sought no extension of time for the filing of objections. The applicable Commission discovery rules generally parallel the analogous provisions of the Federal Rules of Civil Procedure. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974). A failure to file objections to interrogatories within the time prescribed by the rules waives those objections. Mengle v. Tucker, 21 F.R.D. 187 (E.D. Pa. 1957); Bohlin v. Brass Rail, 20 F.R.D. 224, 225 (S.D. N.Y. 1957). TMIA has thus waived any objections it might have to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6, including the legal arguments it included in its response to those interrogatories dated April 3.

Finally, TMIA complains that "it would appear to be unnecessary, burdensome and improper to require TMIA to attempt to describe in writing and in advance of hearing all of the many dozens of areas of concern where deferral of necessary or required maintenance has taken place." However, Licensee is at a loss to understand how it is to prepare to litigate "all of . . . [TMIA's] many dozens of areas of concern" if TMIA will not specify those areas. At page two of its April 11 Memorandum and Order on Licensee's Motion to Compel Discovery of TMIA, the Board noted:

If licensee is to prepare carefully to litigate the allegations contained in TMIA's contentions, responses to the interrogatories are very desirable, perhaps essential.

Moreover, if TMIA truly finds responding to interrogatories on its contention to be intolerable, TMIA may avail itself of the remedy which the Board pointed out to UCS in its April 1, 1980 Memorandum and Order Compelling UCS to Answer Licensee's Interrogatory No. 8-1; TMIA can narrow its Contention 5. Licensee's interrogatories are exactly as broad as the contention which gives rise to them. If the interrogatories are too burdensome for discovery, TMIA's contention is too broad for litigation.

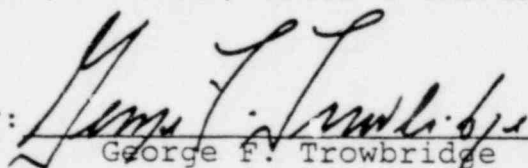
III. CONCLUSION

TMIA's answers to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6 (except its definition of "essential maintenance") are non-responsive, incomplete, and an untimely objection which lacks merit. TMIA's answers therefore do not comply with the Board's April 11 Memorandum and Order. Accordingly, pursuant to 10 C.F.R. § 2.740(f), Licensee moves the Licensing Board for a second order compelling TMIA to respond fully and substantively to Interrogatories 5-1, 5-2, 5-3, 5-4 and 5-6 (except 5-6(a)).

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:


George F. Trowbridge

Dated: April 22, 1980

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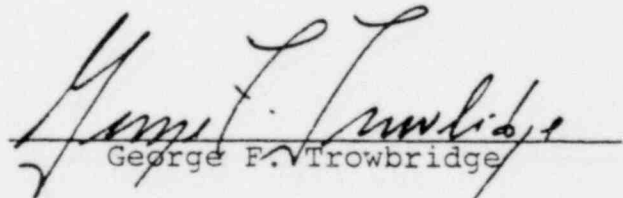
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Second Motion to Compel Discovery of Three Mile Island Alert", were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 22nd day of April, 1980.


George F. Trowbridge

Dated: April 22, 1980

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