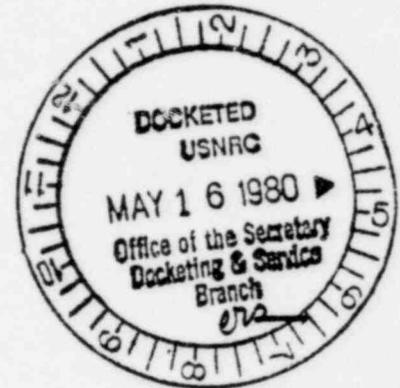


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford



In the Matter of
METROPOLITAN EDISON COMPANY
(Three Mile Island Nuclear
Station, Unit No. 1)

Docket No. 50-289
(Restart)

MEMORANDUM AND ORDER
CLI-80-19

The Consumer Advocate of Pennsylvania, participating in this proceeding as a representative of an interested governmental agency pursuant to 10 CFR § 2.715(c), has petitioned the Commission to provide financial assistance to intervenors for retaining experts who will submit studies and/or testify before the Atomic Safety and Licensing Board. Alternatively, the petitioner asked the Commission to delegate to the Licensing Board the authority to grant funding for expert witnesses to be called by intervenors. The petition was directed to the Commission because, on October 15, 1979, the Licensing Board rejected requests by other intervenors for such funding on the ground that it was "without authority to grant any funding".^{1/}

On November 21, 1979, the NRC staff filed a response to the petition. The staff's view is that the request for funding is improperly before the Commission and that current Commission policy does not sanction such funding.

^{1/} Memorandum and Order at 7 (October 15, 1979).

8005280289

G

On December 3, 1979, the petitioner requested leave to file a brief addressing the issues raised in the NRC staff's response. A copy of the brief accompanied that request. We will grant the request and accept the brief for our consideration.^{2/}

The petition sets forth for Commission consideration the policy question of intervenor funding in the proceeding. We have chosen to address the petition on its merits in the exercise of our inherent supervisory authority over agency adjudications.^{3/} At the outset, we do not think that it is necessary to resolve the question of whether the petitioner, charged with representing the interests of Pennsylvania consumers under state law, may properly assert claims raised by other persons -- including Pennsylvania consumers -- before the Licensing Board. The Commission treatment of the funding issue will affect the petitioner, as well as other parties to or formal participants in the proceeding. Thus we believe that it is reasonable to read the petition, as the NRC staff has read it, as one in which "petitioner requested financial assistance on behalf of itself and those intervenors who

^{2/} On December 21, 1979, the NRC staff submitted a pleading in which it argued that the petitioner had not shown sufficient justification to waive 10 C.F.R. §2.730(c), which prohibits a moving party from replying to an answer to its motion unless permitted to do so by the Secretary. The NRC staff has requested that it be allowed to respond to arguments in the petitioner's reply brief if the Commission chooses to accept that reply brief. In light of the disposition of petitioner's request for funding, we see no need to have the staff submit any additional pleading.

^{3/} For this reason, we do not believe that it is relevant that the Licensing Board refused to certify the question of intervenor funding to the Commission. See "Memorandum and Order Denying Motions by TMIA and ANGRY" (October 31, 1979). Although there is an express certification method whereby a party may seek to have the Commission consider waiving the application of any of its rules or regulations which affect licensing standards, 10 C.F.R. § 2.758, there is no specific route set forth for dealing with the type of request presented by the petitioner.

have either requested or who may at some later date request financial assistance . . ." (NRC staff Response at 1). For this reason, there is no basis to object to petitioner's standing to raise the funding arguments.

As the parties and the Licensing Board have recognized, the Commission has previously declined to proceed with a program for intervenor funding, Financial Assistance to Participants in Commission Proceedings. 4 NRC 494 (1976). The Commission's August 9, 1979 order in this case, holding open the possibility of funding on the issue of psychological distress, was a departure from that general policy. Furthermore, a majority of the Commission has expressed an intention of proceeding with a pilot program for intervenor funding in fiscal year 1981 if Congress approves such a program.

The Commission notes in passing that apparently the staff has not recognized that the current Commission does favor funding intervenors, contrary to the implication of Section III of the staff's response to the petition. The Commission notes that the Congress has precluded such funding, and therefore, the Commission will not fund intervenors. However, as clearly indicated by the FY 81 budget submission and subsequent Congressional testimony, the Commission is in the favor of such funding.

However the Commission's present policy on funding may be characterized, petitioner's request will be denied at this time. The House Appropriations Committee, referring to appropriations for fiscal year 1980, stated that the NRC "budget request and the committee recommendation do not include funds for intervenors". H.R. Rep. No. 96-243, 96th Cong., 1st Sess. 136 (June 7, 1979). The Senate Report for fiscal year 1980 was silent on this point, but the Conference Report adopted all language in the House Report not specifically

objected to. H.R. Rep. No. 96-388, 96th Cong., 1st Sess. 1 (July 25, 1979).^{4/}
 There was no objection to the House Report language on "funds for intervenors".

Assuming that the Commission has implied authority in its enabling legislation to fund intervenors, a prohibition in an appropriations bill itself on the use of NRC "funds for intervenors" would have suspended that authority for moneys covered by that bill. See National Labor Relations Board v. Thompson Products, 141 F.2d 749 (9th Cir. 1944). But there has been some uncertainty over whether a restriction contained merely in the legislative history of an appropriations bill similarly affects an agency. Compare Winston Bros. Co. v. United States, 130 F. Supp. 374 (Ct. Cl. 1955) with McKay v. Central Electric Power Cooperative, 223 F.2d 623 (D.C. Cir. 1955) (dictum).

In order to resolve these and other uncertainties, on November 2, 1979 the General Counsel of the NRC wrote to the Comptroller General of the United States with an inquiry as to "whether there are, in fact, circumstances under which the Commission may legally use public funds, as appropriate in fiscal year 1980, to provide financial assistance to intervenors." On January 25, 1980, the Comptroller General issued his decision, Financial Assistance to Intervenors in Proceedings of Nuclear Regulatory Commission, B-92288, in which he concluded that the Commission has authority in its organic legislation to use appropriated funds to assist an intervenor, that the restriction "indicated in the [Congressional committee] reports was not a legal limit on the agency's spending because it was not expressly stated in the appropriation

^{4/} The appropriations legislation to which these reports relate was enacted after the Commission adopted its August 9, 1979 "Order and Notice of Hearing" which mentioned the possibility of funding on the issue of psychological distress.

act," but that the Commission "may be well advised to postpone further implementation of the pilot intervenor's program ... in light of the 1980 House Appropriations Committee report."

We do not expressly reject or otherwise reach a position on the representations made by the Consumer Advocate of Pennsylvania that there are compelling reasons for agreeing to fund intervenors in this case. Rather we decline to consider such funding in light of the advice of the Comptroller General and our clear reading of the legislative history associated with the fiscal year 1980 appropriations legislation. Accordingly, for the fiscal year 1980 we are hereby also reversing our earlier position, set forth in our August 9, 1979 "Order and Notice of Hearing," that we would consider providing financial assistance to parties seeking to raise issues such as psychological distress and others arising from the continuing impact of aspects of the accident unrelated directly to exposure to radiation, assuming we determine those issues to be relevant.*

It is so ORDERED.

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.,

this **16th** day of May, 1980.

*Section 201 of the Energy Reorganization Act, 42 U.S.C. 5841, provides that action of the Commission shall be determined by "majority vote of the members present." Commissioners Gilinsky and Kennedy were not present at the meeting at which this Order was approved. Had they been present, both Commissioner Gilinsky and Commissioner Kennedy would have voted with the majority on this Order. Accordingly, the formal vote of the Commission is 3-0.

CONCURRING OPINION OF COMMISSIONER BRADFORD:

I should note at this time that I will not vote to approve a reopening of TMI Unit 1 if I am persuaded that issues of significance to the public health and safety were not adequately explored for no other reason than that one or more parties lacked necessary funding.

I intend this particularly as an admonition to the NRC staff involved in this case to be certain that we have a complete and an even-handed record. In view of the constraints imposed on the Commission's ability to fund intervenors, the responsibility seems to me to fall squarely on the staff to fill out the record in areas of consequence in which the intervenors are unable to do so.

Commissioner Gilinsky has authorized me to state that he agrees with the substance of these views.

