

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO ANGRY'S REQUEST
 FOR SUBPOENA OF RANDY L. CURRY

I. Introduction

On August 19, 1980, Intervenor ANGRY, acting through its attorney, filed a notice of deposition directed to Randy L. Curry, Director of the York County Emergency Management Agency. Subsequently, Mr. Curry allegedly notified ANGRY that he would not appear to give his deposition pursuant to such notice without compulsory process, presumably in the form of a subpoena commanding his appearance. Accordingly, on September 3, 1980, ANGRY filed an application for a subpoena which would require Mr. Curry to appear for deposition on emergency planning and preparedness for York County and to bring with him a log of a test exercise in which York County participated in July 1980. ANGRY's request for subpoena raises questions on whether persons not parties may be subpoenaed in NRC proceedings, whether the request is made in accordance with the regulations, and whether this request for additional discovery is timely. The NRC Staff's position on these questions and on ANGRY's request for a subpoena is set forth below.

II. NRC Staff's Position on ANGRY's Application for Subpoena

ANGRY's original notice of deposition and its pending request for a subpoena are directed to Randy L. Curry, a person who is not a party to the TMI-1

restart proceeding. Thus, an initial question that is raised is whether a person not a party is subject to deposition and to subpoenas requiring deposition and the production of documents.

In this regard, 10 CFR § 2.740a(a) provides, in part, that

[a]ny party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing (emphasis added).

Similarly, 10 CFR § 2.740(f)(3) provides, in part, that

[t]his section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things. (emphasis added).

The quoted regulations thus appear to allow a party to depose a person not a party and to seek a subpoena compelling such person to produce requested documents. The Appeal Board itself has tacitly, although not explicitly, acknowledged the right of a party to seek a subpoena requiring the deposition of a person not a party and the production documents by such person. See, e.g. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973). In view of this, it appears that ANGRY is within its rights in the instant proceeding in seeking to depose Mr. Curry and in requesting a subpoena compelling deposition and the production of documents. Thus, ANGRY's application for subpoena is not objectionable simply because it is directed to a person not a party.

Under the NRC's rules of practice, a party desiring to take a deposition of a party or other person is to give reasonable notice, in writing, to the presiding officer, to the other party and to the person to be deposed, of

the time and place for the deposition, of the name and address of the person to be deposed, of the matters upon which the person is to be examined, and of the name or descriptive title and the address of the officer before whom the deposition is to be taken. 10 CFR § 2.740a(a). For the most part, ANGRY's August 19, 1980 notice of deposition to Mr. Curry complies with the substance of these requirements.^{1/} As to the application for subpoena, ANGRY has indicated that Mr. Curry will be deposed on matters related to York County's Emergency Plan and its inter-relationship with the plans of the State, the Licensee and local municipalities. Such matters are clearly relevant to certain of ANGRY's contentions and to emergency planning issues in the restart proceeding and, thus, ANGRY has, in its application for subpoena, made the showing of general relevance of the testimony sought, as referenced in 10 CFR § 2.720(a). Consequently, ANGRY has, to this point, substantially complied with the requirements for a subpoena under Section 2.720(a).^{2/}

^{1/} ANGRY represents that the notice of deposition was served on Mr. Curry, the Licensing Board, the Licensee and the Staff. The other parties to the restart proceeding apparently were not served. In addition, the name/title and address of the officer before whom the deposition was to be taken were not supplied in the notice of deposition. Thus, the notice of deposition did not comply with all aspects of 10 CFR § 2.740(a). However, Mr. Curry, to whom the notice of deposition was principally directed, apparently did not object to being deposed on the ground that the notice of deposition did not comply with each and every one of the technical requirements of Section 2.740a(a). In any event, should ANGRY's request for a subpoena be granted, it is the Staff's view that ANGRY should be required to give timely advance notice to all parties of the time and place of the deposition so that each party may attend the deposition if it so desires and so that this requirement of 2.740a(a) will be satisfied.

^{2/} ANGRY requests that the subpoena require Mr. Curry to appear for deposition on September 17, 1980. Since the application for subpoena was served by deposit in the mails on September 3, 1980 (the Staff did not receive a copy until September 8), issuance of a subpoena requiring deposition by September 17 would allow little time for other parties to the proceeding to have received the application for subpoena, expressed any objec-

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A final question raised by ANGRY's application for subpoena is whether, in fact, this request for discovery is timely. Under the Licensing Board's July 15, 1980 "Memorandum and Order Resuming Schedule for Discovery and Contentions on Emergency Planning," discovery on new information in revision 2 to the Licensee's emergency plan was to be filed within 10 days of the date of service of the Board's Order or by approximately July 30, 1980 (10 CFR § 2.710). ANGRY did not file its notice of deposition until August 19, 1980, nearly three weeks after the deadline for the submission of additional discovery requests. Thus, ANGRY's discovery request is untimely.

Intervenor justifies its untimely request for discovery by asserting that York County's emergency plan would not be finalized until September 1, 1980 or later and thus constitutes "new information". Insofar as a new and finalized York County Plan contains information and approved procedures which were previously unavailable, it would constitute new information and good cause for a late request for discovery. Moreover, deposing Mr. Curry now should not result in a delay in this proceeding. As to Mr. Curry's log of the July test exercise, this was presumably available for discovery on or very shortly after July 16, 1980. ANGRY has not indicated why it chose to wait until August 19, 1980 to seek access to that log. Nevertheless, ANGRY's request for access to the log should not result in delay in this proceeding. Accord-

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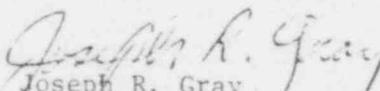
tions they might have to it, and made preparations to attend the deposition. Also, given the short period of time remaining before September 17, a subpoena requiring deposition on that date would provide little time for Mr. Curry or others to file a motion to quash the subpoena pursuant to 10 CFR § 2.720(f). In view of this, the Staff recommends that any subpoena issued by the Board provide for a reasonable date later than September 17, 1980 for Mr. Curry's deposition.

ingly, the Staff supports ANGRY's request for subpoena, provided that a more reasonable date for the deposition is set and that all parties are given notice of the time and place for the deposition.

III. Conclusion

Based on the foregoing, it is the Staff's position that ANGRY's request for subpoena of Mr. Curry should be granted but that the date for the requested deposition should be a reasonable time after September 17, 1980 and ANGRY should be required to give timely advance notice to all parties of the time and place for the deposition.

Respectfully submitted,


Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of September, 1980

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Unit 1))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ANGRY'S REQUEST FOR SUBPOENA OF RANDY L. CURRY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of September, 1980:

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A copy has also been served on Ivan W. Smith, Esq. by hand delivery to his office this 15th day of September, 1980.

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