

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 15, 1980

CONSENT CALENDAR ITEM
ADJUDICATORY

SECY-A-80-54

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: REQUEST FOR COMMISSION FUNDING OF EXPERT
WITNESSES CALLED BY INTERVENORS IN TMI-1
RESTART

Discussion: The Consumer Advocate of Pennsylvania (CAP)
has filed a petition with the Commission
requesting that the Commission agree to
provide funding to intervenors who propose to
call expert witnesses on any issues relevant
to the TMI-I proceeding (Attachment A). The
NRC staff opposed this petition on the
grounds that it is improperly before the
Commission and Commission policy is presently
against funding intervenors (Attachment B).
The staff pointed out that the Licensing
Board in TMI-I ruled that it is without
authority to grant funding requests (Attach-
ment C) (ruling on motion of Chesapeake
Energy Alliance) and that it would not
certify this general funding issue to the
Commission for decision (Attachment D) (rul-
ing on motion of Anti-Nuclear Group Rep-
resenting York). CAP filed a "Petition for
Leave to File a Brief Addressing Issues
Raised by the Response of the NRC Staff to
the Consumer Advocate's Petition for NRC
Funding of Intervenor Witnesses". (Attach-
ment E), and its supporting brief (Attachment
F). The NRC staff responded to the petition
to file the brief (Attachment G).

We believe

5 that

Contact:
Harvey J. Shulman, GC
X-43288

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PDR FOIA
GILINSK92-436 PDR

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

PLS

Recommendation:

Leonard Bickwit, Jr.
General Counsel

Attachments: A-H

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, April 29, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT May 5, 1980, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of May 5, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

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ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

HS

release
all

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

PETITION TO SEEK NRC FUNDING FOR
CONSUMER INTERVENORS TO FINANCE
WITNESS EXPENSES

1. The Atomic Safety and Licensing Board (ASLB) has received several requests from intervenors for financial assistance to retain experts who will submit studies and/or testify before the ASLB on any and all issues raised in the above-captioned action. The Consumer Advocate of Pennsylvania, by this Petition, supports those requests and any similar requests which may be filed by intervenors in the future and respectfully requests that this Honorable Commission provide financial assistance to intervenors requesting such aid.

2. The Nuclear Regulatory Commission (NRC) is the proper party to hear and rule upon this petition. The ASLB, by its Memorandum and Order issued on October 15, 1979, stated that it is without authority to approve funding to intervenors on any issue other than psychological distress, inasmuch as that was the sole issue upon which the NRC gave the ASLB discretion. Id. at 7. Alternatively, the Petitioner respectfully requests that this Honorable Commission delegate to the ASLB the authority to grant funding for expert witnesses to intervenors on all issues presented by the above-captioned proceeding.

3. a. Assuming that this Honorable Commission is correct in holding that the opinions of the Comptroller General are controlling on the issue of intervenor funding; In the Matter of Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, Docket No. PR-2, 4 NRC 494, November 12, 1976, at 497-S01 (hereinafter NRC (Financial Assistance)); then the NRC must fund intervenor participation if such participation can "reasonably be expected to contribute substantially to a full and fair determination." In the Matter of Costs of Intervention - FDA B-139703, December 3, 1976, 56 Decisions of Comptroller General of the U.S. 111-115.

Although the above-cited opinion of the Comptroller General was issued with regard to proceedings before the Food and Drug Administration (FDA), the Comptroller General has made it clear that his opinions on intervenor funding apply with equal force to nine major regulatory agencies, including the NRC. Letter of Comptroller General to the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, dated May 10, 1976, cited in NRC (Financial Assistance) at 499.

b. Previously, the Comptroller General had stated that a stricter standard applied, which would require that the intervenor participation be necessary or "essential" to the proceedings. However, this ruling was subsequently overturned by the issuance of the letter containing the more liberal requirement of "substantial contribution." Cost of Intervention -FDA, Decisions of Comptroller General, supra.

4. Judge Skelly Wright, for the United States Circuit Court of Appeals, District of Columbia, the judicial tribunal charged with review of orders issued by this Honorable Commission, stated in dicta that "it

would be unrealistic to expect public interest litigants to underwrite the expense of mounting the kind of preparation and presentation of evidence that is ordinarily required in this type case [NRC licensing proceeding]." York Committee for a Safe Environment v. NRC, 527 F.2d 812, 816, footnote 13 (D.C. Cir. 1975).

5. The U.S. District Court, District of Columbia, has expressly held that the United States Department of Agriculture (USDA) may fund intervenor participation in that agency's rule making proceeding. Chamber of Commerce v. U.S. Dept. of Agr., 459 F.Supp 216 (D.C. District Court (1978)). There is no compelling reason to distinguish between the USDA and the NRC with regard to intervenor funding. The D.C. District Court held that Greene County Planning Board v. FPC, 559 F.2d 1227 (2nd Cir. 1977) (en banc), cert. den. 434 U.S. 1086 (1978), was inapplicable on the ground that in that case the FPC had denied intervenor funding, whereas in Chamber of Commerce v. USDA, the USDA had determined that such funding was necessary to ensure a complete record. The court concluded that the determination of an administrative agency that such expenditures were necessary was entitled to great deference.

In Greene v. FPC the intervenors requested attorney fees. In Chamber of Commerce v. USDA the issue was the propriety of the USDA funding an expert study. The court concluded that such disbursement of funds was within the USDA's implied authority to expend funds to fulfill its statutory mandate.

6. This Honorable Commission has recognized in its Order and Notice of Hearing issued August 9, 1979, that it is empowered to provide

financial assistance to parties seeking to raise the issue of psychological distress resulting from the accident at the Three Mile Island (TMI) Unit #2. Id. at 13. The Consumer Advocate believes that one reason this Commission ruled in this manner was because the NRC staff are not experts in psychological responses and, therefore, some outside expert assistance was necessary.

7. The Consumer Advocate submits that this same rationale applies with equal force to other health and safety issues raised in the above-entitled action. The NRC staff is in need of outside assistance and expertise in order to help it deal with the issues raised by the accident at TMI Unit #2 and the resultant effects on Unit #1. The Report of the President's Commission on the Accident at Three Mile Island issued on October 30, 1979 (hereinafter Kemeny Commission Report) is replete with indictments of faulty staff analysis, attitudes and procedures. See for example, Kemeny Commission Report Findings G.1., G.3., G.5., G.8.c., G.8.d., G.10., and G.12. The Kemeny Commission Report concludes that: "With its present organization, staff, and attitudes, the NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants." (Emphasis Added.) Id. at 56.

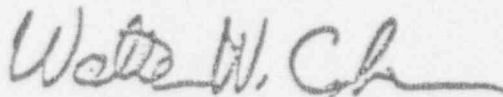
8. These conclusions of an independent Commission substantially refute the assertions contained in the NRC (Financial Assistance) Order regarding a "comprehensive, expertly staffed, well developed regulatory regime;" Id. at 502; and "the professionalism, depth and experience of our regulatory staff;" Id. at 503; upon which this Honorable Commission concluded that intervenor funding was not required.

9. Furthermore, the Kemeny Commission Report recommends the establishment of a permanent oversight committee on nuclear reactor safety "to examine, on a continuing basis, the performance of the agency and of the nuclear industry in addressing and resolving important public safety issues associated with the construction and operation of nuclear power plants..." Kemeny Commission Report at 2. Pending the possible creation of such a body through Act of Congress or Executive Order, the Consumer Advocate submits that a proper role for intervenors in this case, who have already filed expressions of interest and contentions for proof, is to provide outside review and input to the regulatory process with appropriate funding to support such efforts.

10. The Consumer Advocate maintains that the Kemeny Commission Report places into question the credibility of the regulatory scheme to produce all significant and relevant testimony on health and safety issues, which credibility can only be guaranteed through the conduct of fair and open proceedings before the Atomic Safety and Licensing Board where all intervenors have adequate resources to fully present testimony in the case.

WHEREFORE, the Consumer Advocate of Pennsylvania respectfully requests that this Honorable Commission provide financial assistance to those intervenors who have now requested or will in the future request such funding for the purpose of retaining experts to submit studies and/or testify on any and all issues raised in the above-captioned action.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Walter W. Cohen", written in a cursive style. The signature is positioned above a horizontal line.

WALTER W. COHEN

ATTACHMENT A

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

METROPOLITAN EDISON COMPANY)

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

Docket No. 50-289
(Restart)

NRC STAFF RESPONSE TO PETITION TO SEEK
NRC FUNDING FOR CONSUMER INTERVENORS

1. INTRODUCTION

In the present proceeding The Consumer Advocate of Pennsylvania (Petitioner) has filed with the Commission a "Petition To Seek NRC Funding For Consumer Intervenor To Finance Witness Expenses" (Petition) (undated). In its submittal, the Petitioner requested financial assistance on behalf of itself and those intervenors who have either requested or who may at some later date request financial assistance from the Commission for the purpose of retaining experts who will submit studies and/or testify before the Licensing Board on any issues raised in the proceeding. In the Petition, the Petitioner asserts that its request for funding is properly before the Commission since the Licensing Board had denied similar requests filed by other persons, ruling that it is without authority to approve funding to intervenors on any issue other than psychological distress.^{1/} Petition, p. 1. In support

^{1/} Although the Board has found that several petitioners have either satisfied the interest requirements for intervention in this proceeding, or that certain representatives of the Commonwealth of Pennsylvania or agencies thereof may participate pursuant to 10 CFR § 2.715(c), it has not yet ruled that anyone has been admitted as a party.

of the request, the Petitioner refers to the letter of the Comptroller General advising that agencies such as the NRC can fund intervenors under certain circumstances, as well as court decisions supporting such funding by other agencies in the past. Petition, pp. 2,3.

Notwithstanding any merit that may be contained in Petitioner's argument, the Staff nonetheless opposes the request upon the grounds that: 1) the request is improperly before the Commission, and 2) the current policy of the Commission does not sanction such intervenor funding. The Staff sets forth its response to the Petition more fully below.

II. THE PETITION IS IMPROPERLY BEFORE THE COMMISSION

The Staff perceives at least two fundamental obstacles to the Commission's acceptance of jurisdiction to consider the present Petition. The first obstacle is that the Petitioner in filing the request is not seeking to assert its own claim, but rather, is improperly seeking to assert the claims of other persons in the proceeding. Second, even if the Petitioner were appealing the denial of a motion that it had made before the Board, such an appeal would be barred by the Commission's Rules of Practice.

A. A Person may not Represent the Rights of Other Petitioners

In the present action certain persons who have petitioned to intervene have requested financial assistance to retain experts to assist their case and to appear as witnesses in this proceeding. By Memorandum and Order dated October 15, 1979, the Board denied the requests for intervenor

funding, citing the Commission's November 12, 1976 Statement of Considerations Terminating Rulemaking, in which the Commission determined that intervenor funding is, in general, not appropriate at this time. In a subsequent order of October 31, 1979, the Licensing Board denied a request by Petitioner ANGRY^{2/} to certify the question of intervenor funding to the Commission. In its order, the Board decided that the Commission had exercised its discretion to carve out an exception to its policy against intervenor funding for the limited purpose of considering the possibility of funding for intervenors on the issue of psychological distress. ANGRY Order at 2. Accordingly, the Board concluded that it would be improper to certify the question of general intervenor funding to the Commission.

The present Petitioner did not file or join in any of the motions for intervenor funding considered by the Licensing Board, and thus, it has no decision by the Board from which to appeal. Instead, the Petitioner is now seeking to assert the claims raised by other persons and to appeal the denial of their motions.

The Commission has declared in the past that a person may not assert the rights of anyone other than itself in NRC proceedings. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610,613 (1977), citing Warth v. Seldin, 422 U.S. 490, 499 (1975). In this present action, no other person has sought to appeal the question

^{2/} "Memorandum and Order Denying Motions by TMIA and ANGRY" dated October 31, 1979 (ANGRY Order).

of intervenor funding directly to the Commission, and Petitioner may not do so on their behalf. Moreover, as will be discussed below, it would be improper for even those other persons to appeal this question directly to the Commission.^{3/}

B. Petitioner may not Appeal the Board's Denial of Funding to the Commission

Even if the Petitioner were appealing a denial of a motion that it had made before the Board for funding, it would be barred from taking an appeal of that denial to the Commission by virtue of 10 CFR § 2.730(f). That regulation specifically prohibits persons from taking interlocutory appeals to the Commission from rulings of the presiding officer. The only exception to that prohibition is contained in 10 CFR § 2.714a. That regulation permits a person who has petitioned to intervene in a proceeding to appeal from an order concerning his petition only if the order denied the petition outright. As indicated above, Petitioner's petition for leave to participate as an interested state agency was granted by the Board. An interlocutory appeal utilizing § 2.714a is therefore not available to Petitioner.

Although interlocutory appeals are not generally permitted, interlocutory review of licensing board rulings can be sought pursuant to 10 CFR § 2.730(f). Under this section, a presiding officer may refer a ruling

^{3/} The Staff notes that neither the requests made by other persons for funding nor the instant Petition would assist Petitioner even if they were granted, since all such requests seek funding for intervenors. Petitioner is not an intervenor in this proceeding, nor has it requested to be admitted under this status. Petitioner requested leave to participate as an interested state agency pursuant to 10 CFR § 2.715(c), and was admitted in this capacity. Transcript of November 8, 1979 special prehearing conference, p. 45.

directly to the Commission when, in his or her judgment, a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. Thus, although Petitioners have raised several arguments in support of intervenor funding which may or may not meet the test set forth in § 2.730(f), that regulation requires a person to petition the licensing board to certify the question to the Commission, and precludes the person from appealing the question directly to the Commission. The fact that Petitioner is not a party but rather a non-party interested state agency does not excuse it from complying with the requirements of 10 CFR § 2.730(f), for a participant admitted under 10 CFR § 2.715(c) must comply with all the procedural rules and is subject to the same requirements as other parties appearing before a board. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).

For the reasons set forth above, the Staff concludes that Petitioner has improperly submitted its request for funding to the Commission.

III. THE CURRENT COMMISSION POLICY DOES NOT FAVOR FUNDING INTERVENORS

As discussed above, the Commission in its November 12, 1976 Statement of Considerations determined that intervenor funding is generally not appropriate at this time. The rationale provided by the Commission for that decision was that the possibility of substantive contributions to the correct resolution of safety and environmental issues is not substantially greater in the case of funded versus unfunded intervenors. Id., 4 NRC at 504.

As the Licensing Board indicated in its October 15, 1979 Memorandum and Order, the Commission exercised its discretion to consider an exception to its bar to intervenor funding on the issue of psychological distress in this proceeding. However, the Board concluded in its order that: "[b]y expressly considering that possible exception the inference must be drawn that the Commission had considered the possibility of general intervenor funding and decided to limit its consideration to funding on psychological issues." ANGRY Order, p. 2. The Board applied this same reasoning to ANGRY's request for certification of the funding issue to the Commission, ruling that no purpose would be served by certifying an issue which the Commission had already expressly considered in this proceeding. Id. at 2.

The Staff submits that the Board correctly applied the Commission's ban on intervenor funding in this case.

In conclusion, the Staff submits that the case against general intervenor funding in NRC proceedings is well-established by Commission decisions. Accordingly, the issue is not one which would warrant the Board's certification of the matter to the Commission. Nor is it an "exceptional issue" which would justify having the Appeal Board or the Commission direct certification of the issue to the Commission. See, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977).

IV. CONCLUSION

For the reasons set forth in this Response, the Staff concludes that the Commission should deny the Petition.

Respectfully submitted,

Daniel T. Swanson

Daniel T. Swanson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of November, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITION TO SEEK NRC FUNDING FOR CONSUMER INTERVENORS" 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 21st day of November, 1979:

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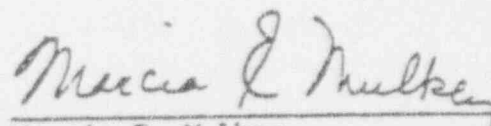
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Marcia E. Mulkey
Counsel for NRC Staff

ATTACHMENT C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

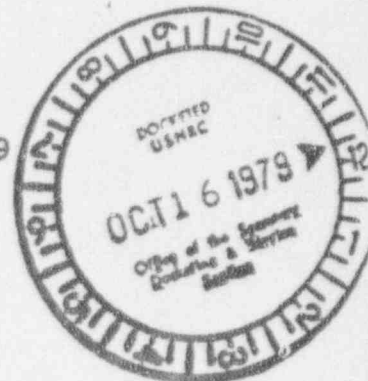
October 15, 1979

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

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

Docket No. 50-289
(Restart)



MEMORANDUM AND ORDER

By motion dated September 27, 1979 and supplements dated September 28 and 29, Chesapeake Energy Alliance (CEA) moves that the board's memorandum and order of September 21 setting the special prehearing conference be modified in several respects. The NRC staff and the licensee oppose the motion.

CEA's principal request is that the schedule in the board's order of September 21 be set back approximately two months to provide more time for petitioners to prepare contentions and to become informed on the procedural and technical aspects of this proceeding. CEA also requests that certain activities not contemplated by the board's order be added to the schedule.

CEA's request to delay the prehearing schedule is denied for the general reasons that the schedule in the board's order

closely parallels the schedule recommended by the Commission in its Order and Notice of Hearing of August 9. No major circumstance is identified by CEA which was not known to the Commission when it issued its order. Additionally, this board, independent of the Commission's recommendations, believes that the schedule is reasonable. Nevertheless, the board is sympathetic to many of CEA's concerns, and we have considered each of its points.

We recognize, as CEA's representative states, that the alliance may not be familiar with NRC procedures, it may be limited in the time available to prepare for the proceeding and it may be limited in resources. Other petitioners doubtless have similar problems. To the extent permissible under the Commission's rules, and consistent with due process to all parties, the board will take these disadvantages into account as the proceeding moves along.

CEA may be unaware that, although the intervention rules and the board's order requires contentions to be filed before the special prehearing conference, NRC practice and other provisions of the rules provide that, for good cause, contentions can be later modified and new contentions may be added. The board will continue to hear arguments concerning the issues during the special prehearing conference now scheduled and during the prehearing conference following

discovery. 10 CFR §2.751a and §2.752(c). Typically good cause may be found for adding or modifying contentions where information not previously available, but important to the proper resolution of the proceeding, later becomes available.

The fact that the Presidential Commission (Kemeny Commission) to Study the Three Mile Island Accident is due to report in October was considered by the board and known to the Commission when the schedules were established. If the Kemeny Commission report requires added contentions or other changes, the board will entertain appropriate motions and will itself consider the effect of the report upon this proceeding. In the meantime, anticipating that the Kemeny Commission report will contain information bearing upon this proceeding the board requests the NRC staff to give a high priority to providing petitioners and participating Commonwealth agencies with copies of the report promptly. If the full report is not timely available for distribution, the staff should consider providing copies of any executive summary.

CEA complains that copies of NUREG-0578, TMI-2 Lessons Learned Task Force Status Report, was not mailed to it by the staff with other materials intended to aid petitioners. We now understand that copies have since become available and sent to petitioners. But, in any event, NUREG-0578 was referred to in the Commission's Order and Notice of Hearing of

August 9 which was published August 15. Interested persons were notified that copies of the document were available for inspection in document rooms in Harrisburg and Washington, D.C., the latter location being within 45 miles of CEA's Baltimore headquarters. It may not have been convenient for any member of CEA to examine NUREG-0578 in a public document room, but we may not delay the proceeding on that account. Intervenor's assume a responsibility to be productive parties to the proceeding. A strong effort to become informed on the issues as to which they seek to intervene may be a part of that responsibility.

In addition to NUREG-0578, the staff provided to petitioners copies of the I&E report of its TMI investigation (NUREG-0600), the NRC Staff Practice and Procedure Digest (NUREG-0386) and Parts 2, 20, 50 and 51 of the NRC regulations. Apparently the licensee sent petitioners a 100 page document referring to recommended requirements for the restart of TMI-1. CEA points to the length and complexity of these documents in its request for more time. CEA also requests an order requiring ready access to consultation with NRC staff members or other qualified persons, and requests that seminars be held to brief the parties on the staff documents.

We have not seen the licensee's document, but as to those sent by the staff we agree that some are lengthy. Much

of the material is technical, and it may be difficult for an inexperienced intervenor to master it all. The staff was not literally required to provide this material, nor was the licensee, although in a larger sense it can be said that to do so is a part of their overall responsibilities.

We have no easy answer to CEA's complaint. Much of the material yet to be produced in this proceeding will also be very technical. If each effort by the staff or the licensee to provide information to intervenors and to assure a complete public record is met by an order delaying the proceeding to meet the particular needs of an individual intervenor, the result may be to constrict the flow of information or unduly to prolong the proceeding. The public interest lies in encouraging a full disclosure of the underlying facts in a reasonably expeditious proceeding. Therefore we will not order a delay as a result of the staff's efforts to assist and the licensee's efforts to inform.

As the petitioners are now aware, the NRC staff, pursuant to its traditional practice and the board's order, is conducting negotiating and clarifying sessions with petitioners. The staff has committed itself to comply with the Commission's order to assure participants informal access to NRC staff considerations of the issues and to honor all reasonable requests for information on the Staff's position.^{1/} The staff has not

^{1/} Staff response to CEA's motion, p. 7.

expressly agreed to provide counseling on NRC adjudicative procedures, but this may be an oversight. In other proceedings we have observed that legal counsel for the staff has provided information concerning NRC practice in response to specific questions. We urge the staff to continue this practice.^{2/}

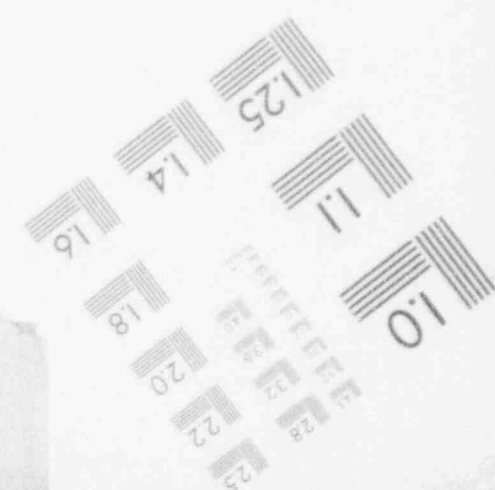
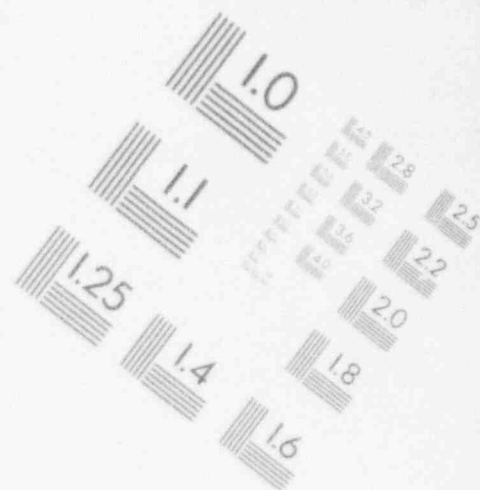
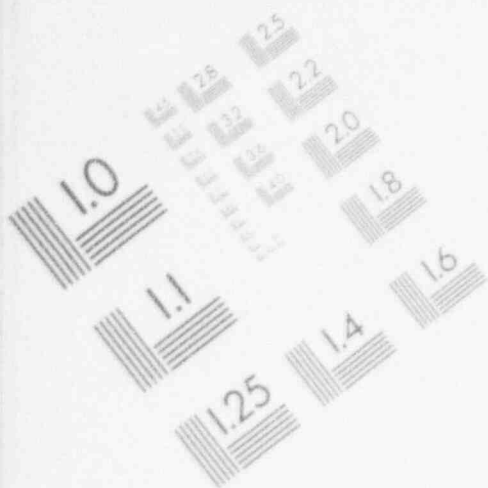
The board denies CEA's motion to order general instructional seminars as impractical and unnecessary. After it has reviewed materials available to it in light of its own special interest and contentions, CEA may make specific requests for advice from the staff, and at the special prehearing conference the board will also attempt to assist all petitioners concerning the procedures in this hearing.

In a rather complex paragraph, (Motion, p. 6) CEA moves for an order which, as we understand it, would require the NRC staff to evaluate the lack of intervenor resources as it affects their respective abilities to present their interests in the proceeding. If the proceedings are found to be adversely affected and if the intervenor's effectiveness is deemed diminished as a result of inadequate resources, CEA would require

^{2/} In fact we have observed the staff assist intervenors in drafting contentions in appropriate language even when the staff disagrees with the merits and suitability of the contentions. In the order of September 21 the staff was assigned the primary responsibility for negotiating both the suitability and the form of contentions.

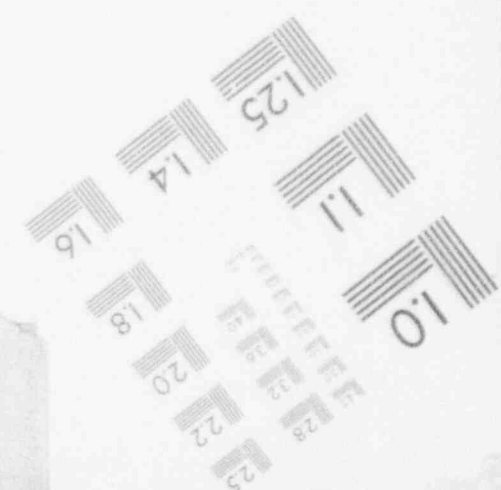
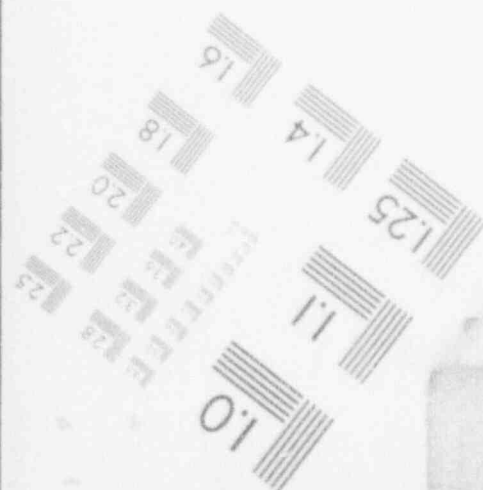
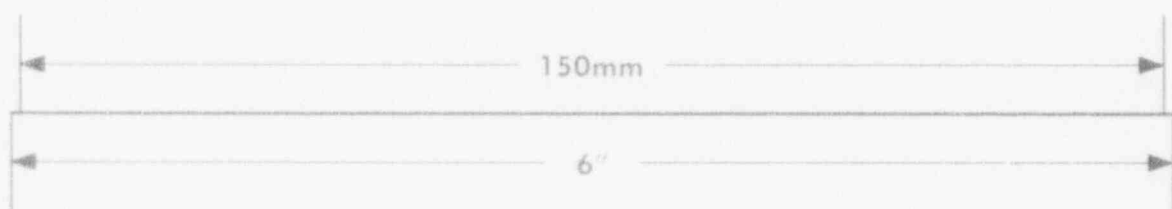
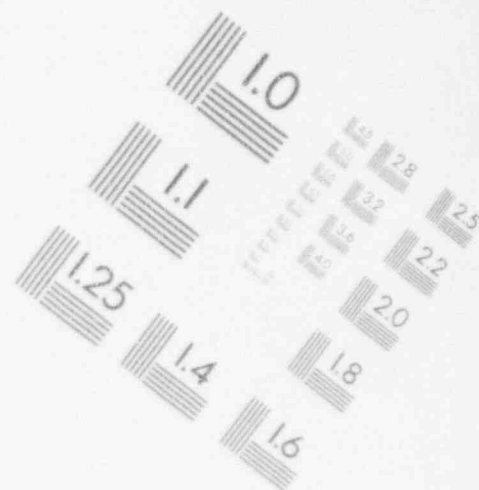
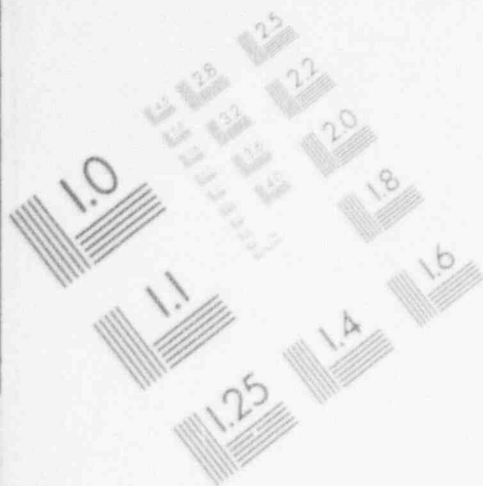
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IMAGE EVALUATION TEST TARGET (MT-3)



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IMAGE EVALUATION TEST TARGET (MT-3)



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IMAGE EVALUATION
TEST TARGET (MT-3)

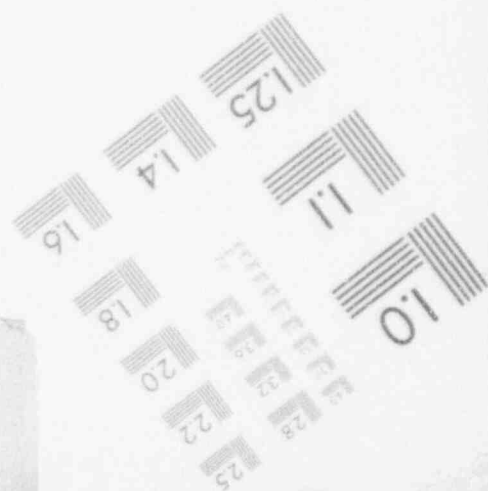
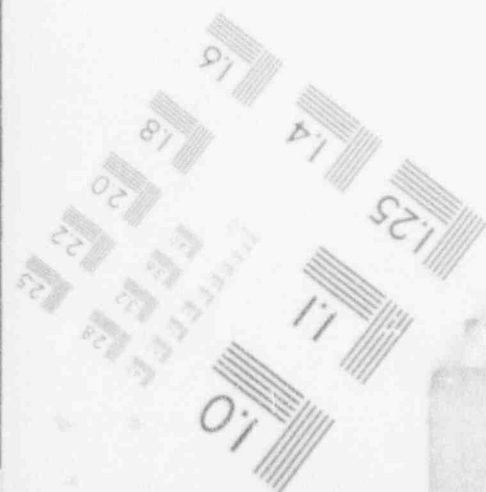
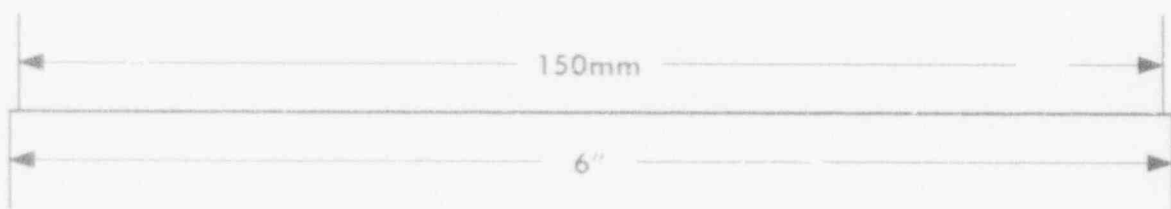
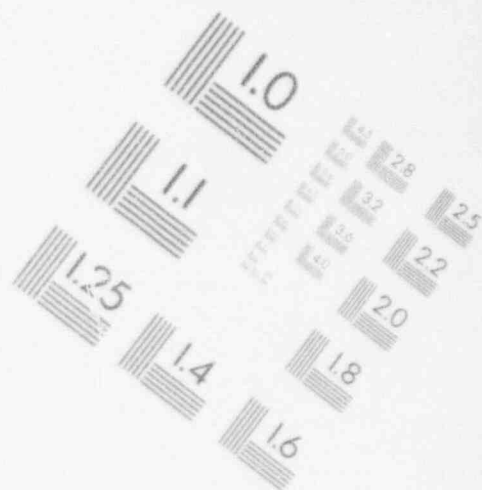
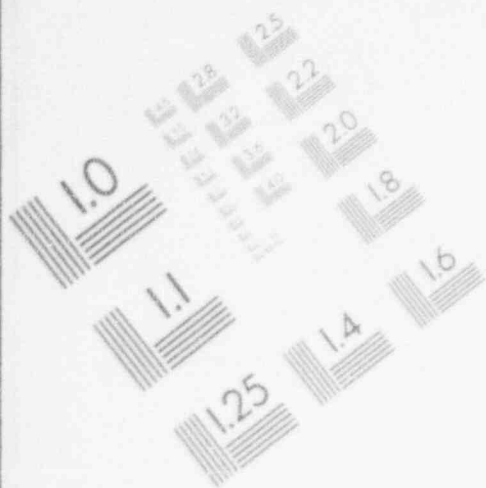
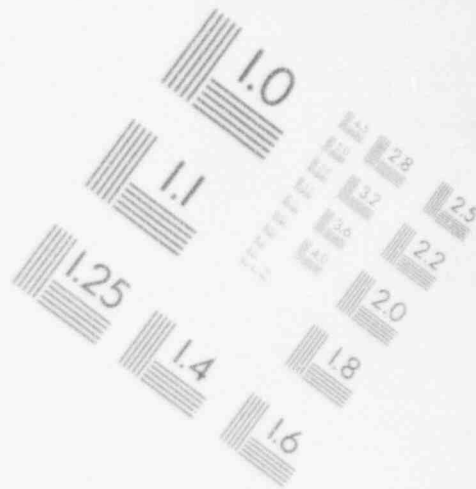
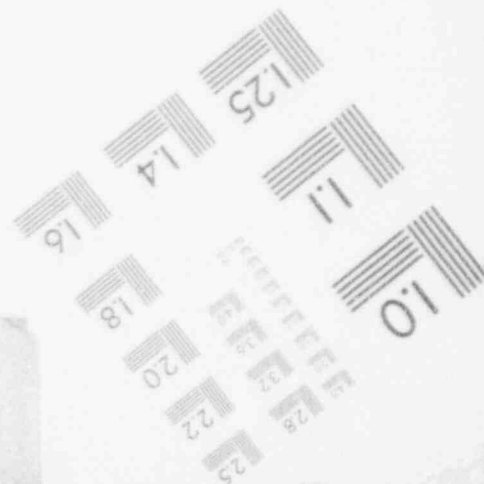


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a mechanism to offset this effect and disadvantage. CEA alludes to its lack of full-time staff, qualified legal counsel, technical expertise, clerical staff, and adequate photocopying equipment.

The board views this portion of CEA's motion to be an indirect request for intervenor funding. This is also the view of the NRC staff and licensee who oppose financial assistance to intervenors on the basis that it is contrary to expressed Commission policy. Staff and licensee are correct. The Commission on November 12, 1976 issued a "Statement of Considerations Terminating Rulemaking" on the possibility of financial assistance to participants in Commission proceedings. CLI-76-23; 4 NRC 494, 504-06. The Commission determined that a funding program is, in general, not appropriate at this time.

In holding open the possibility of funding on issues of psychological distress, the Commission exercised its discretion to consider an exception on that issue. By that exception, the Commission indicated that it had considered general financial assistance to intervenors but decided not to consider funding on all issues. Therefore the board denies CEA's request for a study of the need for funding because we are without authority to grant any funding.^{3/}

^{3/} Several other petitioners including Mr. Sholly, Mr. Lewis and ECNP have requested intervenor funding. This order is dispositive of their requests. By motion dated October 5, 1979 Anti-Nuclear Group Representing York (ANGRY) moves the board to certify to the Commission the question of financial assistance to all intervenors regardless of issue. We will rule on ANGRY's motion in due course.

Despite the fact that the board must decline requests for intervenor funding, we believe that some authority remains to provide for certain assistance to intervenors where the purpose and effect is to avoid delay and to contribute to the efficient and orderly conduct of the proceeding.

Even though the regulations require that parties follow certain procedures and file a stated number of copies of documents when serving motions and other papers, it is rare, if ever, that intervenors lose on important issues or are dismissed from proceedings solely because of a technical failure to comply with the filing rules. What happens is that the board, staff counsel, or counsel for the utility somehow belatedly learns that a paper has been filed but not correctly served. The result is confusion, delay and wasted resources. Sometimes orders are issued in the mistaken belief that a party has no position on the matter and that error must then be corrected.

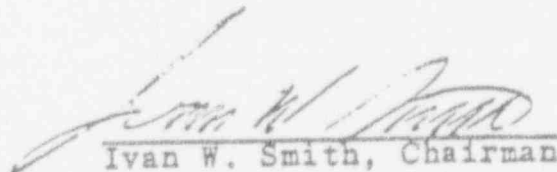
Therefore this board will explore means by which a reliable and affordable system of duplication of papers, filing, and other communication methods can be established. Under the assumption that the licensee has the greatest interest in avoiding delay in the proceeding the board will call upon counsel for licensee to address the problem and to propose solutions at the special prehearing conference. The board will also request counsel for NRC staff to comment upon whether it

is practical and appropriate to make available a disinterested member of the staff of the Office of the Executive Legal Director to intervenors to answer procedural questions. This assistance would not be for the purpose of helping intervenors to prevail on issues in controversy but to assist the board in exercising its responsibilities under 10 CFR §2.718 and §2.756, and to respond to the Commission's expectation that the board will conduct the proceeding expeditiously. Order and Notice of Hearing, p. 10.

CEA requests that all petitioners be provided copies of all other petitioners' petitions and draft contentions so that they may discuss consolidation. On October 11 the board clerk mailed these filings to all petitioners and Commonwealth agencies.

CEA moves for an order permitting further modification of the board's order of September 21 if required in the public interest. Such an order is unnecessary and would be ineffective. Motions should be made for a specific purpose in the context of the asserted need for the relief sought. By the same reasoning we deny CEA's motion to provide now for later extensions of time.

THE ATOMIC SAFETY AND
LICENSING BOARD

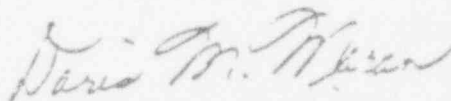

Ivan W. Smith, Chairman

Dated at Bethesda, Maryland
this 15th day of October, 1979.

COURTESY NOTIFICATION

This is intended solely as a courtesy and convenience to provide extra time to those notified. Official service will be separate from the courtesy notification and will be made by the Office of the Secretary of the Commission.

I hereby certify that I have today mailed copies of the Board's MEMORANDUM AND ORDER, dated this date, to the persons designated on the attached Courtesy Notification List.



Doris M. Moran
Clerk to the Board

Dated:
October 15, 1979

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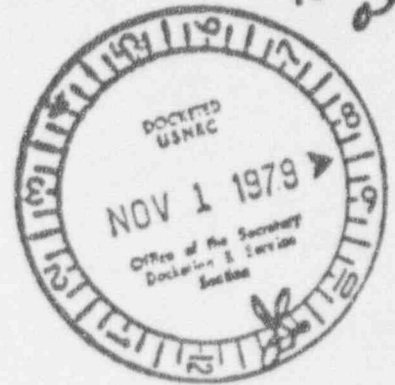
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ATTACHMENT D

245
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
(Three Mile Island Nuclear
Station, Unit No. 1)

Docket No. 50-289
(Restart)

MEMORANDUM AND ORDER DENYING
MOTIONS BY TMIA AND ANGRY

(October 31, 1979)

TMIA's Motion of October 10, 1979

In its motion of October 10, 1979, Three Mile Island Alert (TMIA) requests an order changing the schedule set forth in the board's memorandum and order of September 21. Chesapeake Energy Alliance (CEA) moved for the same schedule changes for essentially the same reasons in its motion of September 27. In our memorandum and order of October 15 we denied CEA's motion and explained why. We deny TMIA's motion for the same reasons.

ANGRY's Motion of October 5, 1979

The Anti-Nuclear Group Representing York (ANGRY) filed a three-part motion dated October 5, 1979. In the first part ANGRY requests the board to certify to the Commission the question of the appropriateness of financial assistance to all

intervenors regardless of the issues they seek to raise. CEA's motion of September 27 included an indirect request for intervenor funding on all issues. In our memorandum and order of October 15 denying CEA's request we observed that the Commission has expressed a policy against general intervenor funding. CLI-76-23; 4 NRC 494, 504-506. The board also noted that, in this proceeding, the Commission exercised its discretion to make an exception to that policy by holding open the possibility of intervenor funding on the issue of psychological distress. 44 Federal Register 47824. By expressly considering that possible exception the inference must be drawn that the Commission had considered the possibility of general intervenor funding and decided to limit its consideration to funding on psychological issues. For these reasons we believe that no purpose would be served by certifying the issue. ANGRY's motion to certify is denied.

ANGRY's second request is for additional clarification as to the precise scope of the board's decisional authority in regard to the status of the TMI-1 operating license. It would be very difficult and it is unnecessary to address that very broad issue without a particular context. ANGRY suggests further that the board may have the authority to revoke the licensee's operating license and seeks guidance as to how it may address that issue. In its Order and Notice

of Hearing, the Commission stated what the issues are in this proceeding. 44 Federal Register 47824. The board has no jurisdiction beyond that bestowed in the Commission's order. We can find no part of the Commission's order which states that this board has jurisdiction to revoke the TMI-1 operating permit. We note that the Commission authorized the board to consider "... the need for continued suspension of operating authority." Id. From this it seems plain that our jurisdiction pertains to the present suspension. Additional analyses of our jurisdiction could be made, but we see no practical purpose in that. ANGRY has not explained how its plans for litigating this case depend upon the ruling it requests. If we have not sufficiently assisted ANGRY in this discussion, ANGRY may address the matter again by taking a position and making appropriate motions.

ANGRY also requests that it be exempted from the numerical filing requirement of 10 CFR §2.708(d) (20 copies). This problem will be discussed at the special prehearing conference.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Dated at Bethesda, Maryland
this 31st day of October, 1979.

ATTACHMENT E

release all

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In The Matter of METROPOLITAN :
EDISON COMPANY, et al. : Docket No. 50-289
(Three Mile Island Unit 1) : (Restart)

PETITION FOR LEAVE TO FILE A BRIEF
ADDRESSING ISSUES RAISED BY THE RESPONSE
OF NRC STAFF TO THE CONSUMER ADVOCATE'S
PETITION FOR NRC FUNDING OF INTERVENOR WITNESSES

The Consumer Advocate of Pennsylvania, participating in the above-captioned action as an interested state agency, hereby petitions this Honorable Commission and the Secretary thereof for leave to file a Brief of issues raised by the NRC staff in its Response to the Petition of the Consumer Advocate requesting funding for intervenor witnesses in the above-captioned action and in furtherance thereof avers as follows:

1. The Consumer Advocate of Pennsylvania has filed with this Honorable Commission a "Petition To Seek NRC Funding For Consumer Intervenors To Finance Witness Expenses."
2. On November 21, 1979 the legal staff of the NRC filed a Response to the above-described Petition of the Consumer Advocate, which raises issues which could not have been anticipated by the Consumer Advocate when he filed his original Petition.

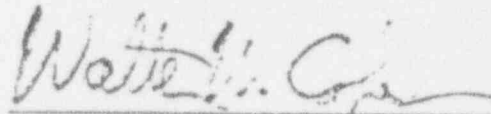
3. The issues to be adjudicated in the above-captioned action are novel and of first impression, and may necessitate a modification of this Honorable Commission's general policy against the intervenor funding. The Consumer Advocate, therefore, believes that all issues presented by his Petition should be fully briefed and brought to this Commission's attention.

4. The Consumer Advocate has prepared, for consideration by this Honorable Commission, and filed simultaneously with this Petition a Brief addressing issues raised by the Staff in its Response to the Petition of the Consumer Advocate for funding of intervenor witnesses.

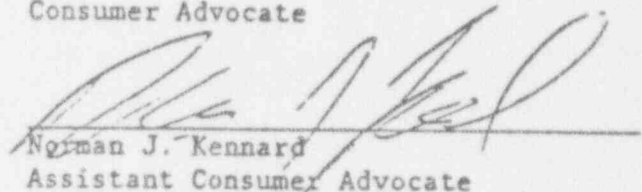
5. Section 2.730(c) of 10 CFR provides that a moving party has no right to reply to an answer to its motion, except as permitted by the Secretary or the Assistant Secretary of the NRC. The Consumer Advocate is, therefore, filing this Petition for leave to file in the belief that such Petition may be necessary to invoke the discretion of this Honorable Commission and the Secretary thereof.

WHEREFORE, the Consumer Advocate of Pennsylvania respectfully requests that he be granted leave to file a Brief of Issues raised by the staff in its Response to the Petition of the Consumer Advocate for funding of intervenor witnesses.

Respectfully submitted,



Walter W. Cohen
Consumer Advocate



Norman J. Kennard
Assistant Consumer Advocate

Date: December 3, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

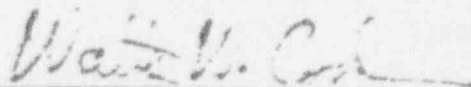
BEFORE THE ATOMIC SAFETY AND
LICENSING BOARD

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|-----------------------------|---|-----------------------------|
| In the Matter of | : | |
| METROPOLITAN EDISON | : | |
| COMPANY, et al. | : | Docket No. 50-289 (Restart) |
| (Three Mile Island, Unit 1) | : | |

CERTIFICATE OF SERVICE

I, Walter W. Cohen, hereby certify that I have this 3rd day of December, 1979 served copies of the attached statement of the Pennsylvania Office of Consumer Advocate's Petition For Leave To File A Brief Addressing Issues Raised By The Response Of NRC Staff To The Consumer Advocate's Petition For NRC Funding Of Intervenor Witnesses on each of the persons named in the attached service list by causing the same to be deposited in envelopes addressed to said persons, first class, postage prepaid, and deposited with the United States Postal Service at 813 Market Street, Harrisburg, Pennsylvania 17105.

Respectfully submitted,


Walter W. Cohen
Consumer Advocate

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND
LICENSING BOARD

In the Matter of
METROPOLITAN EDISON
COMPANY, et al.
(Three Mile Island, Unit 1)

:
:
:
:

Docket No. 50-289 (Restart)

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UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In The Matter Of METROPOLITAN :
EDISON COMPANY, et al. : Docket No. 50-289
(Three Mile Island, Unit 1) : (Restart)

BRIEF OF CONSUMER ADVOCATE OF PENNSYLVANIA
IN SUPPORT OF CONSUMER ADVOCATE'S PETITION
TO SEEK NRC FUNDING FOR INTERVENOR WITNESSES

Walter W. Cohen
Consumer Advocate

Norman J. Kennard
Assistant Consumer Advocate

Dated: December 3, 1979

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I. STATEMENT OF THE CASE

The immediate action is an adjudicatory proceeding before the Atomic Safety and Licensing Board (ASLB or Board), investigating various issues relating to the possible restart of the Three Mile Island Unit 1 (TMI Unit 1), which has not operated since March of 1979, due to the occurrence of an accident at the adjacent twin reactor, TMI Unit 2, and Order of the Nuclear Regulatory Commission (NRC or Commission) dated July 2, 1979.

On August 9, 1979 the NRC ordered that the facility remain in a cold shutdown condition until completion of certain "short term" actions by Metropolitan Edison (Met-Ed or Company), the plant operator, and resolution of various concerns described in that Order. The NRC designated the ASLB to conduct a hearing on these issues. Numerous citizen groups filed petitions to intervene, including the Chesapeake Energy Alliance (CEA), the Environmental Coalition on Nuclear Power (ECNP) and the Anti-Nuclear Group Representing York (ANGRY), and several state agencies, including the Office of Consumer Advocate of Pennsylvania (OCA), filed petitions for leave to participate.

In its Order of August 9, 1979 this Honorable Commission stated that it would, at a future date, consider whether it could or should grant financial assistance to parties seeking to address the psychological distress which might be caused to the surrounding community by a restart of TMI Unit 1. CEA and several other intervenors, due to a severe lack of resources, requested NRC funding to assist them in presentation of their case and in order to offset the disadvantage caused by such inadequate resources. ANGRY moved that the ASLB certify to the NRC the question of financial assistance on all issues in the immediate action, not merely psychological distress.

The ASLB, by Memorandum and Order issued October 15, 1979, denied CEA's request for funding on the grounds that this Commission had preempted consideration of this issue by a previously issued policy statement¹ and by limiting consideration of possible funding to the psychological distress issue. In essence the ASLB ruled that it was not the proper authority to consider the issue. The Board, on identical grounds, also refused ANGRY's request that the intervenor funding issue be certified to this Commission, by Memorandum and Order issued October 31, 1979.

The Consumer Advocate of Pennsylvania then filed a "Petition to Seek NRC Funding for Consumer Intervenors to Finance Witness Expenses" with this Honorable Commission, and requested that the NRC hear and rule upon this Petition inasmuch as the ASLB stated that it was without discretion or authority to approve funding of intervenor witnesses on any issue other than psychological distress, or, alternatively that the NRC delegate to the ASLB the authority to grant such funding. The NRC legal staff, on November 21, 1979, filed a response in opposition to the Consumer Advocate's Petition.

This Brief is filed as an answer to the staff's response and in furtherance of the Consumer Advocate's belief that funding of intervenor witnesses is necessary in the instant proceeding and that this Honorable Commission is the proper party to adjudicate the issue.

1 In The Matter of Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceeding), CLI-76-23, Docket No. PR-2, 4 NRC 494, November 12, 1978. (Hereinafter NRC Financial Assistance)).

II. ISSUES PRESENTED

- A. WAS IT PROPER PROCEDURE FOR THE CONSUMER ADVOCATE TO FILE A PETITION REQUESTING FUNDING OF INTERVENOR WITNESSES BEFORE THE NUCLEAR REGULATORY COMMISSION?
- B. MAY THE NUCLEAR REGULATORY COMMISSION PROVIDE FUNDING FOR EXPERT WITNESSES, ENABLING THEM TO PROVIDE TESTIMONY WHICH IS NECESSARY AND RELEVANT BEFORE THE NUCLEAR REGULATORY COMMISSION?
- C. IS FUNDING OF OUTSIDE EXPERTS NECESSARY WHERE THE NUCLEAR REGULATORY COMMISSION STAFF EXPERTS MAY BE UNABLE TO CREDIBLY AND COMPETENTLY ADDRESS THE ISSUES PRESENTED, WHERE THE PUBLIC PERCEPTION OF THE NUCLEAR REGULATORY COMMISSION IS LARGELY NEGATIVE, AND WHERE THE CITIZEN VIEWPOINT MAY NOT OTHERWISE BE PRESENTED?

III. DISCUSSION

- A. IT WAS PROPER PROCEDURE FOR THE CONSUMER ADVOCATE TO FILE A PETITION REQUESTING FUNDING OF INTERVENOR WITNESSES BEFORE THE NUCLEAR REGULATORY COMMISSION.

1. It Is Erroneous For the Nuclear Regulatory Commission

Legal Staff To Claim That the Consumer Advocate of Pennsylvania, Who Has A Statutory Duty To Protect and Represent the Interests of Consumers, May Not Support the Rights of Other Consumer Intervenors In This Case.

The Office of Consumer Advocate (OCA) is an agency of the State of Pennsylvania and is participating in the above-captioned action under 10 CFR §2.715(c). The OCA was created by the Pennsylvania General Assembly in 1976 as an independent state agency authorized to represent the "interest of consumers" before the state and federal regulatory commissions. The Consumer Advocate, by statute, has broad discretion to define and interpret that phrase.² The Consumer Advocate has determined, in the particular instance of the recent events at Three

2 71 Pa. C.S.A. §309-4.

Mile Island, that the interest of consumers as represented by the Consumer Advocate may extend to health and safety issues as well as economic issues, and, further, that the health and safety issues presented by the immediate action are inextricably tied to the economic condition of Met-Ed.³

The intervenor groups, which have requested or may request funding for witness expenses, are consumers and it is completely proper for the Consumer Advocate to support their rights in the matter of funding. Further, the Consumer Advocate believes that all Pennsylvania consumers will benefit by NRC funding of intervenors witnesses. The Consumer Advocate is supporting the rights of his client and, thereby, fulfilling his statutory duty. The situation is completely different from that of a private party acting in the interest of another. The General Assembly of Pennsylvania has created the OCA to represent consumers and it would be inappropriate for this Honorable Commission to deny the Consumer Advocate authority to fulfill his statutory mandate.

Further, the precedent cited by the NRC staff as support for its theory, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1977), is irrelevant to the proposition for which the staff claims it stands. The issue in that case was standing to intervene only.

3 See: "General Statement of Pennsylvania Office of Consumer Advocate Regarding Petition For Leave to Participate As An Interested State Agency", October 22, 1979, filed with the ASLB in the instant proceeding.

2. It Is Erroneous For The Nuclear Regulatory Staff to Claim That the Consumer Advocate of Pennsylvania May Not Appeal the Board's Denial of Intervenor Funding To This Commission.

The NRC legal staff correctly states that 10 CFR §2.730(f) precludes interlocutory appeals from rulings of the presiding officer (the ASLB in this instance), unless the presiding officer determines that prompt decision by this Commission is "necessary to prevent detriment to the public interest or unusual delay or expense" and further determines that the ruling should be referred or certified to the full NRC. However, the staff incorrectly applies 10 CFR §2.730(f) in this instance.

The first sentence in 10 CFR §2.730(f) states the general rule: "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." (Emphasis added.) The ASLB did not rule that funding was not necessary. The Commission, properly asserting its authority as principle and primary agency, refused to delegate authority to the Board to rule on requests for intervenor funding, except on the issue of psychological distress by its Order of August 9, 1979. The ASLB expressly recognized that : "By expressly considering that possible exception [for the issue of psychological distress to the general rule of no intervenor funding] the inference must be drawn that the Commission had considered the possibility of general intervenor funding and decided to limit its consideration to funding on psychological issues." (Emphasis added). The Staff agrees with this inference by the Board. Consideration by the Board of the intervenor funding issue was also preempted by issuance of this Commission's decision in NRC (Financial Assistance).

Therefore, 10 CFR §2.730(f) is inapplicable in this instance because the holding by the ASLB that funding was unavailable was not a ruling at all, but rather an application of a ruling made by this Honorable Commission. It was the action of an agent following the directive of its principal.

The Staff's logic, by which it concludes that the Consumer Advocate followed improper procedure, would foreclose all avenues of appeal of this issue to the NRC, despite the fact that immediate consideration by this Commission is absolutely necessary to permit meaningful participation by intervenors during the course of the above-captioned proceeding. Failure to extend funding will result in irreparable prejudice. The Staff claims that consideration by the NRC is foreclosed unless the Board agrees to certify the issue to the Commission. The Board however, refused the request for certification filed by ANGRY, on the ground that no purpose would be served thereby because this Commission would refuse to make funding available. Therefore, according to the NRC Staff, consideration of this matter by the Commission may not be had.

The issues presented by the recent events at Three Mile Island are unique and of first impression. This Honorable Commission should not allow itself to be foreclosed from openly and publicly considering the various arguments favoring funding of intervenor witnesses on issues other than psychological distress, and intervenors should not be denied the opportunity to know the specific grounds for this Commission's ultimate ruling on this issue.

B. THE NUCLEAR REGULATORY COMMISSION MAY, BY ITS DISCRETIONARY POWERS, MAKE AVAILABLE FINANCING FOR INTERVENOR WITNESSES TO TESTIFY BEFORE THE NUCLEAR REGULATORY COMMISSION.

1. Congress Has Stated That the Nuclear Regulatory Commission Has the Authority to Reimburse Parties Where It Deems Necessary.

In its consideration of the Energy Reorganization Act of 1974 (P.L. 93-438) the Senate included numerous amendments which would have provided this Honorable Commission with express statutory authority to fund intervenors.⁴ Although these bills were deleted in conference, the conference committee expressly stated that the Nuclear Regulatory Commission, under the current statutory schema, has authority to provide intervenor funding:

The deletion of Title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs incurred in the licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to Title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems necessary. (Emphasis added). 5

4 These amendments were contained in Title V of the Senate version of that legislation. Senator Kennedy introduced S.1791 which provided for direct cost and fee reimbursement to intervenors. Senator Metcalf proposed S.2787 which would require the Nuclear Safety and Licensing Board to provide information and technical assistance to parties and an ability to pay basis. S.2788, also proposed by Senator Metcalf, would have required the disclosure of information relating to safety systems previously protected from the Freedom of Information Act as "propriety".

5 120 Congressional Record at S.18722 (October 10, 1974).

Inasmuch as Congress considered the Atomic Energy Act a sufficient mechanism for the provision of intervenor funding, it determined that it would await the outcome of administrative consideration⁶ of the issue and would defer any action until that time.

Subsequently, Senator Kennedy introduced into the Senate a bill entitled "Public Participation in Government Proceeding Act of 1977"⁷ (S.270) which will, if enacted, specifically authorize administrative agencies, including the NRC, to dispense public funds to reimburse eligible parties to an agency proceeding for expert witness expenses, attorney's fees and other costs of participation. This proposed legislation is currently pending before the Senate.

In an article recently published by the American Bar Association, Martin Body, Assistant Director for the National Capital Planning Commission, has concluded that passage of S.270 is imminent. "Based on the momentum now represented in Congress it appears that federal agencies will be pushed into a new era of participatory democracy."⁸ (Emphasis in original).

6 The Commission was considering the issue of intervenor funding generically at NRC (Financial Assistance), Docket No. PR-2 and a final order was issued on November 12, 1976, denying intervenor funding.

7 Public Participation in Federal Agency Proceedings Act of 1977, S.270, 95th Congress, 1st Session, 123 Congressional Record 676 (1977). (Hereinafter S.270).

8 Rody, "Governmental Financing of Citizen Participation in Federal Agency Proceedings: A Practitioner's Outline," 31 Administrative Law Review 81, 96.

Therefore, Congress has clearly stated that under the Atomic Energy Act the NRC may, in its discretion, fund intervenor participation, and failing such exercise of discretion by the NRC, Congress may soon provide a statutory mechanism to ensure the availability of such funding.

2 The Nuclear Regulatory Commission Has Broad Discretion To Interpret and Implement The Atomic Energy Act and Possesses Both Express and Implied Authority To Fund Intervenor Experts.

As was established in the proceeding section the NRC has express authority under the Atomic Energy Act of 1954 to fund intervenor witnesses. If this Honorable Commission nonetheless finds, despite substantial reason to do so, that express funding authority has not been granted by Congress, then the Consumer Advocate asserts that such authority may be implied.

Reviewing Courts have consistently held that determinations by administrative agencies are entitled to great deference. This is equally true of an agency's interpretation of its own statute and its powers thereunder.⁹

9 Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 262, 272, 88 S. Ct. 929, 19 L.Ed.2d 1090 (1968); Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965); Greene County v. FPC, (en banc) supra Footnote 2 at 1239; Chamber of Commerce v. USDA, 457 F. Supp. 216, 221 (D.C. 1978).

In Greene County v. FPC, the Second Circuit declined to require that the Federal Power Commission (FPC) award legal fees to a successful intervenor where that agency had previously refused to do so. Although that court appeared to state that agency authority to fund intervenors must come from Congress, it "placed great weight on the FPC's construction of its statute and on the FPC's explicit distaste for funding intervenors. Id. at 1239 n.2."¹⁰ However, the Second Circuit's refusal to reverse the FPC on the ground that any mandate to disburse funds must come from Congress begs the essential question - may the authority to fund intervenors be implied by an agency which has determined that such participation would be of assistance in fulfilling its enabling act?

In Chamber of Commerce v. USDA the District Court for the District of Columbia held that such authority could be implied by an agency. Federal agencies have "implied power voluntarily to fund the views of parties whose position might otherwise go unrepresented."¹¹ In

10 Chamber of Commerce v. USDA, supra footnote 9 at 220-21. The court in Chamber of Commerce v. USDA agreed with the holding in Greene County v. FPC on the ground that compelling an agency to reimburse fees when it believes that it lacks the power of that an intervening party does not deserve reimbursement might be stifle the agency's willingness to allow intervention or to lead to unnecessary intervention by parties more interested in fees than advancing a meritorious viewpoint." Chamber of Commerce v. USDA, supra footnote 9 at 221.

11 Chamber of Commerce v. USDA, supra footnote 9 at 221. The court in Chamber of Commerce v. USDA stated that a finding of implied authority was not contrary to the finding of the Second Circuit in Greene County Planning Board v. FPC, 559 F.2d 1227 (2nd Cir. 1977) that "[t]he authority of a Commission to disburse funds must come from Congress."

that case, the United States Department of Agriculture (USDA) entered into a contract with the Consumer Federation of America (CFA), a consumer advocacy organization, whereby the USDA would finance a CFA study stating the consumers' viewpoint on a proposed regulation. The plaintiffs, various industrial associations, sought to enjoin the USDA from funding or considering the study. Plaintiff's motion for a preliminary injunction was denied.

The court was greatly persuaded by the USDA's finding that consumer testimony was essential to a fair and balanced record and necessary for that agency to carry out its enabling statute. It was upon this fact that Greene County v. FPC was distinguished. "The court gives deference to the agency interpretation of its own statute and cannot say that the interpretation is wrong as a matter of law."¹²

Therefore, the NRC may within its administrative discretion determine that its powers under the Atomic Energy Act of 1954 impliedly include the authority to expend funds to obtain information and testimony not otherwise available.

3 President Carter, By Executive Order, Has Stated That Public Funds Should Be Made Available To Citizen Intervenors By the Nuclear Regulatory Commission.

By Memorandum (herein attached as "Appendix A" and incorporated into and made a part of this Memorandum of Law) dated May 16, 1979 President Carter has directed all Federal Agency heads,

12 Chamber of Commerce v. USDA, supra footnote 9 at 222; see also: footnote 9 generally.

including this Honorable Commission, to determine their authority, express or implied, to establish a public participation funding program and to assess the need for such a program. President Carter vigorously supports intervenor financing and has appointed a Special Assistant for Consumer Affairs to coordinate a government-wide program of funding.

I have supported, and will continue to support, legislation to create, standardize, and adequately finance public participation funding programs government-wide. Independent of these legislative efforts, there is a current need for public participation funding and I strongly encourage each department and agency with the requisite authority to institute a public participation funding program.¹³

Therefore, the President of the United States has unequivocally stated that under his executive powers he encourages and will support any effort by this Honorable Commission to provide intervenor funding and will support any legislation designed to require this same end.

4 The Comptroller General of the United States Has Stated That the Nuclear Regulatory Commission May Fund Intervenor Participation.

The Comptroller General has stated that the NRC may fund intervenor participation where such participation can "reasonably be expected to contribute substantially to a full and fair

13 Memorandum of President James E. Carter For the Heads of Executive Departments and Agencies, May 16, 1979, at page two. "Appendix A".

determination."¹⁴ Thus, this Honorable Commission is assured that the General Accounting Office will not impede any disbursement of funds to intervenors for such a legitimate purpose as to aid in the development of an adequate record in the instant proceeding.

5 Other Federal Regulatory Agencies Have Concluded That, Despite the Lack of Express Congressional Authority, They Are Authorized to Fund Intervenor Participation.

Several federal agencies have concluded that intervenor funding is permissible and even desirable. The Civil Aeronautics Board (CAB) has adopted formal regulations by which individuals or groups representing the interests of the public may be compensated.¹⁵ CAB concluded that such a program of funding was necessary "to assist the Board in making full and fair resolutions of issues presented in its public proceeding..."¹⁶ Similarly, the Consumer Product Safety Commission has promulgated regulations designed to compensate participants in proceedings before it.¹⁷ The Food and Drug

14 In the Matter of Costs of Intervention-FDA, B-139703, 56isDens of Comptroller General of the U.S. 111-115, December 3, 1976. Although this decision was addressed to intervention before the FDA, it is directly applicable to the NRC. Letter of Comptroller General to the Oversight and Investigative Subcommittee of the House Committee on Interstate and Foreign Commerce, May 10, 1976, cited in NRC (Financial Assistance) at 4 NRC 494.

15 14 CFR §304.

16 14 CFR §304.2.

17 43 Fed. Reg. 23562 (1978).

Administration published a proposed rulemaking to provide for payment of attorneys fees and other assistance to hearing participants.¹⁸ The National Highway Safety Administration recently issued a final rule establishing a one year demonstration program of financial assistance, and has issued a proposed rulemaking notice providing for a permanent program of financial assistance.¹⁹

C. FUNDING OF INTERVENOR WITNESSES IS NECESSARY IN THE IMMEDIATE PROCEEDINGS TO ENSURE A FULL AND COMPLETE RECORD AND TO RESTORE THE PUBLIC CONFIDENCE IN THE NUCLEAR REGULATORY COMMISSION.

Funding of intervenor witnesses in the immediate proceedings would provide this Honorable Commission with information and data regarding TMI Unit 1 which might be otherwise unavailable to it. Presentation of this evidence is essential to ensure a full and complete record, which will represent the viewpoints of all persons affected by operations at Three Mile Island, not merely the opinions of Metropolitan Edison and its parent, General Public Utilities.

All expenditures made by the Company in this case will most probably be paid dollar for dollar by Met-Ed consumers. But consumers themselves and other intervenors have little or no resources for presentation of their case. Without funding, intervenors will be denied an opportunity to meaningfully participate, the evidence presented will be one-sided, and the hearings will be dominated by advocates for the Company. This gross imbalance should be remedied. The Consumer

18 41 Fed. Regl. 35855 (1976).

19 42 Fed. Regl. 2863 (1977).

Advocate takes no position on which groups and viewpoints should be funded, but rather believes funds should be dispensed to parties who can make a contribution to resolving the issue of whether TMI Unit 1 should be allowed to restart.

If this resource imbalance, which has historically existed in licensing proceedings before the ASLB, is perpetuated in the instant proceedings, the final decision of the Board could be based upon inadequate and untested data and assumptions. It has been suggested that a large but indeterminate extent, the events at TMI Unit 2 in March of 1979 were a function of this imbalance of advocacy. Perhaps, if funding is provided and the various intervenors are, thereby placed in positions approaching, or at least simulating, parity with the Company, there is a greater chance that the Board will be able to render a balanced, fully informed and rational decision, which will be in the public interest.

It is questionable whether the NRC technical staff standing alone will be able to provide a counterbalance to the Company's presentation and assure that the public interest is adequately represented.

The flaw in "traditional conception of the administrative process" so widely perceived by today's commentators is its assumption that the public interest can be fully served by "disinterested experts" operating independently of interested parties. It is now generally agreed that broadened public participation is needed to add perspectives to the decisional process that may not be available either from an industry respondent or applicant or from an agency staff.²⁰

20 Murphy and Hoffman, "Current Models for Improving Representation in the Administrative Process", 28 Administrative Law Review 391, 393 (1976).

In the case of the NRC staff, this "flaw" is well documented. The Report of the President's Commission on the Accident at Three Mile Island (Kemeny Commission Report), issued on October 30, 1979, is replete with indictments of faulty staff analysis, attitudes and procedures.²¹ For example, the Kemeny Commission found that: "insufficient attention has been paid to the ongoing process of assuring nuclear safety"²² "the huge bureaucracy under the commissioners is highly compartmentalized with insufficient communication among the major offices"²³; and key management personnel with NRC possess "the old AEC promotional philosophy"²⁴. The Kemeny Commission, an independent, objective and disinterested body, concluded: "With its present organization, staff, and attitudes the NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants."²⁵ (Emphasis added).

21 See for example: Kemeny Commission Report Findings G.1, G.3, G.5, G.8.c, G.8.d., G.10., and G.12.

22 Kemeny Commission Report, supra at 20.

23 Id. at 21.

24 Id. at 21.

25 Id. at 56, Finding G.12.

Further, the general public perception of the NRC is overwhelmingly negative. Citizens, especially those residing in and around Three Mile Island, resent the impositions of a distant bureaucracy, whom they perceive as uncaring as to their safety and well-being. To a large degree, this disenfranchisement is attributable to the lack of meaningful participation by citizens before the NRC and the ASLB, and could be cured if an attempt was made to solicit technical information and data which represented, in a positive fashion, citizen concerns over plant safety. True, general public testimony has been gathered by various NRC committees and study groups visiting the areas surrounding Three Mile Island, but this information is non-evidentiary and not of a type which will be helpful to the ASLB and this Honorable Commission in adjudicating the difficult and complex technical issues which must be resolved prior to any restart of TMI Unit 1. This Commission should solicit technical information, as presented on behalf of intervenors, which will serve this purpose.

Therefore, it is absolutely necessary for this Honorable Commission to actively search beyond the traditional sources of information, the licensee and the NRC technical staff, and secure expert testimony, by directly funding such experts on the technical issues facing this Commission and the ASLB in order to ensure that the final order issued in this case is the most comprehensive, balanced and fair decision possible. Failure to seek all of the facts available in this case would condemn us to the mistakes of the past.

D: THE UNDERLYING FACTS AND LAW EMPLOYED BY THIS HONORABLE COMMISSION IN DEVELOPING ITS GENERAL POLICY THAT INTERVENOR FUNDING IS NOT NECESSARY ARE OUTMODED AND NO LONGER VIABLE.

In reaching its conclusion that funding for intervenors was not appropriate in NRC (Financial Assistance), this Honorable Commission placed primary reliance on the opinion of the Comptroller General that intervenors should be funded only where the NRC "determines that it cannot make the required determination" unless such financial assistance is provided to intervenors "whose participation is essential to dispose of the matter before it..."²⁶ The NRC concluded that: "[g]iven th[e] advanced state of the art in reactor safety, the professionalism, depth and experience of our regulatory staff, and the further screening provided by expert committee and board review, we simply are unable to make the determinations set forth in the Comptroller General's standard."²⁷ This determination is erroneous for several reasons.

Subsequent to this Commission's order in NRC (Financial Assistance) the Comptroller General modified his opinion regarding intervenor financing. If intervenor participation can "reasonably be expected to contribute substantially to a full and fair determination"²⁸ then, this Commission may fund intervenors. While intervenor expert witnesses might not be absolutely necessary or "essential" to the resolution of the issues presented in under stricter standard, there can be no doubt that such expertise would "contribute

26 NRC (Financial Assistance), supra footnote 1 at 497.

27 Id. at 503.

28 See Footnote 17.

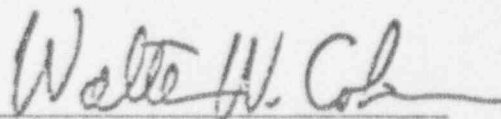
substantially to a full and fair determination" in the instant proceedings.

Further, as discussed in section III. B. of this brief, findings made by the Kemeny Commission place serious doubt on the ability of the NRC technical staff to ensure the safe operation of TMI Unit No. 1 and the safety and welfare of the surrounding community. The conclusions contained in the Kemeny Commission Report substantially refute the basic supporting premise of the Commission's decision in NRC (Financial Assistance) regarding the adequacy of the staff presentation to counterbalance the case presented by the licensee or applicant utility. With the failure of this premise, the validity of the ultimate conclusion that funding was not necessary is lost. If the NRC technical staff is unable to adequately perform its function, then information must be solicited from outside sources.

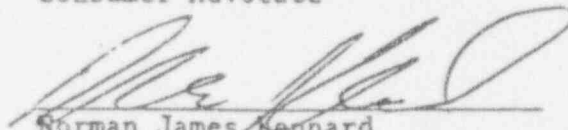
IV. CONCLUSION

For the foregoing reasons, the Consumer Advocate of Pennsylvania respectfully requests that this Honorable Commission approve and provide assistance to intervenors in the above-captioned proceeding who have requested or will in the future request such assistance, for the purpose of retaining experts to submit studies and/or testify on any and all issues raised in the above-captioned action.

Respectfully submitted,



Walter W. Cohen
Consumer Advocate



Norman James Kennard
Assistant Consumer Advocate

THE WHITE HOUSE

WASHINGTON

May 16, 1979

MEMORANDUM FOR THE HEADS OF

EXECUTIVE DEPARTMENTS AND AGENCIES

Executive Order 12044 of March 23, 1978, formalized the Administration's commitment to public participation in Federal agency proceedings. Widespread participation can improve the quality of agency decisions by assuring that they are made on the basis of more complete and balanced records.

Experience has shown, however, that citizen groups often find the cost of meaningful participation in agency proceedings to be prohibitive. Many citizen groups are unable to pay the costs of experts and attorneys' fees, clerical costs, and the costs of travel to agency proceedings. As a result, the views and interests of consumers, workers, small businesses, and others often go unrepresented, or underrepresented, in proceedings that may have substantial impacts on their health, safety, or economic well-being.

In recognition of the cost problems faced by many citizen groups, several agencies have established programs to provide financial assistance to persons (1) whose participation in a proceeding could reasonably be expected to contribute to a fair disposition of the issues and (2) who would be unable to participate effectively in the proceeding in the absence of such assistance. These programs have improved agency decisionmaking, and I believe they should be utilized in other agencies.

Accordingly, I direct each Executive Department and Agency to take the following steps:

1. Each department and agency that has not already established a public participation funding program should determine whether it has statutory authority to do so. I note in this regard that the Department of Justice has advised Federal agencies that they may determine for themselves whether they have explicit or implicit authority to fund such programs.

In the event that an agency concludes that it does not have this authority, it should immediately apprise my Special Assistant for Consumer Affairs of that conclusion and of the grounds upon which it is based.

2. Each department and agency that finds it has authority to establish a public participation funding program should assess the extent of its need for such a program. A preliminary evaluation, as well as a tentative timetable for the development of program regulations, should be forwarded to my Special Assistant for Consumer Affairs within 60 days of the issuance of this memorandum. After appropriate consultation with other White House and Executive Office of the President officials, my Special Assistant will report to me on these evaluations.

I have supported, and will continue to support, legislation to create, standardize, and adequately finance public participation funding programs government-wide. Independent of these legislative efforts, there is a current need for public participation funding and I strongly encourage each department and agency with the requisite authority to institute a public participation funding program. Until new legislation is enacted, however, additional programs of this sort will have to rely upon agency funds already allocated. My Special Assistant for Consumer Affairs and her staff will be available to provide technical assistance and advice regarding the structure and standards of such programs.

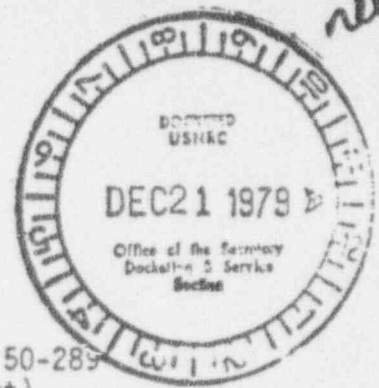
Jimmy Carter

ATTACHMENT G

release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of

METROPOLITAN EDISON COMPANY

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

}
}
}
}

Docket No. 50-289
(Restart)

NRC STAFF RESPONSE TO CONSUMER ADVOCATE
PETITION TO FILE REPLY BRIEF

Statement

In the present proceeding, the Consumer Advocate of Pennsylvania (Petitioner) filed with the Commission a "Petition to Seek NRC Funding for Consumer Intervenors to Finance Witness Expenses" (undated). In its submittal, the Petitioner requested financial assistance on behalf of itself and those intervenors who have either requested or who may at some later date request financial assistance from the Commission for the purpose of retaining experts who will submit studies and/or testify before the Licensing Board on any issues raised in the proceeding.

On November 21, 1979, the Staff replied to the petition in its "NRC Staff Response to Petition to Seek NRC Funding for Consumer Intervenors" (Response). In the Response, the Staff urged the Commission to deny the request upon the ground that it was improperly before the Commission. Specifically, the Staff argued that since the Petitioner had not raised the issue of intervenor funding before the Licensing Board, it could not now seek to appeal the

denial of such a request made by other parties in the proceeding. Moreover, the Staff asserted that even if the Petitioner were appealing a denial of a motion that it had made before the Board for funding, it would be barred from taking an appeal of that denial to the Commission by virtue of 10 CFR §2.730(f). On December 3, 1979, the Petitioner filed a further pleading entitled "Petition for Leave to File a Brief Addressing Issues Raised by the Response of NRC Staff to the Consumer Advocate's Petition for NRC Funding of Intervenor Witnesses" (Petition). In its latest submittal, the Petitioner asserts that the Staff raised issues in its Response "which could not have been anticipated by the Consumer Advocate when he filed his original Petition." Petition, p. 1. In light of this assertion and the claim that the issues in this proceeding are novel, the Petitioner now requests permission to file a supplemental brief in support of its original petition, and in answer to the Staff's Response. Petitioner attached a copy of a brief to its Petition to be considered by the Commission in the event that it grants the Petition.

Discussion

Commission regulations, 10 CFR §2.730(c), prohibit a moving party from replying to an answer to its motion unless permitted to do so by the presiding officer, the Secretary or the Assistant Secretary. In the present case, we do not believe that the Petitioner has set forth a sufficient justification to permit the granting of its request to file further pleadings in this matter.

The Staff submits that the same reasoning set forth in its Response in opposition to the filing of the original petition is equally applicable to the

present motion. For just as the original petition is improperly before the Commission, a reply brief in answer to the Staff's Response would be no less improper. As the Staff has previously stated, the Petitioner may not represent the rights of other petitioners in this proceeding (Response, pp. 2-4^{1/}), and Petitioner's appeal of the Board's denial of other petitioners' funding requests to the Commission is precluded by 10 CFR §2.730(f) (Response, pp. 4, 5). Permitting Petitioner to now file a reply brief in support of its improper appeal would only serve to compound the legal problems previously addressed. Thus, the Staff concludes that the Petitioner has failed to state good cause why it should be permitted to file a responsive brief, and urges the Commission to deny the Petition.

In the event that the Commission decides to permit consideration of the reply brief filed by the Petitioner, the Staff would request permission to have a reasonable amount of time to file a brief responding to the new arguments raised for the first time in the Petitioner's brief.

Respectfully submitted,



Daniel T. Swanson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of December, 1979.

^{1/} See also, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483 (1977): "It is a basic legal principle that one party may not represent another without express authority to do so."

BEFORE THE COMMISSION

Docket No. 50-289

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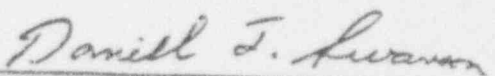
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