February 9, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-289-OLA
	)	ASLBP 83-491-04-OLA
(Three Mile Island Nuclear Station, Unit No. 1)	)	(Steam Generator Repair)
	)	

LICENSEE'S OPPOSITION TO TMIA'S MOTION FOR APPOINTMENT OF SPECIAL PANEL

Licensee hereby opposes TMIA's January 25, 1984 Motion for Appointment of Special Panel. In support of its opposition, Licensee states as follows:

PRELIMINARY STATEMENT

TMIA, citing inter alia its "lack of expertise" and "difficulty in obtaining the cooperation of experts on a voluntary basis" (TMIA Motion at 2), has proposed the following mechanism to "'get at the truth'" during these proceedings:

> Each of the four parties in this proceeding appoint an expert representative. As representatives of the parties, the chosen experts constitute a panel. If the Board should order, each would sign a "proprietary agreement" and any "proprietary" information would be disclosed to them. The panel would be paid by the NRC, and would act as quasi-investigators, quasi-Special Masters, to investigate, take evidence informally in the form of oral or written presentations by other experts in this field. Each may also submit their own papers, or other form of

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> evidence. Once their investigation is complete, they each report to the Board with their recommendations. The parties would have an opportunity to comment on the recommendation of their own appointed expert. Based on these reports and the evidence examined by the experts, the Board would make its decision.

TMIA Motion at 3-4.

TMIA's suggestion is admittedly creative. It is, nonetheless, incompatible with the spirit and terms of the Administrative Procedure Act, the Atomic Energy Act, and the NRC's regulations. It is also incompatible with an intervenor's responsibilities connected with participation in licensing proceedings, contrary to the Congressional prohibition against funding intervenor's participation in such proceedings, and decidedly not necessary to "get at the truth." Licensee accordingly opposes TMIA's motion.

ARGUMENT

1. The Atomic Energy Act of 1954, as amended ("Act") and accompanying NRC regulations provide that licensing disputes are to be resolved by an Atomic Safety and Licensing Board comprised of three members. See 42 U.S.C. § 2241; 10 C.F.R. § 2.721. The Board thus has the obligation to "conduct a fair and impartial hearing according to law" (10 C.F.R. § 2.718), and the related power to "[r]ule on offers of proof, and receive evidence." Id. at § 2.718(c). The Commission has recognized only a single, narrow exception to the requirement that evidence be heard by the Board: under 10 C.F.R. § 2.722(a)(2), the Board may appoint a Special Master to hear evidentiary presentations by the parties

on specific technical matters, and to issue an advisory report to the Board.

The delegation permitted by § 2.722(a)(2) differs from that requested by TMIA in a most significant respect: a Special Master may be utilized only if the parties consent. See id. Licensee, however, does not consent to the use of a Special Master, much less to a panel of "quasi-Special Masters" (TMIA Motion at 4). Licensee submits that under the NRC's rules, this absence of consent is dispositive of the instant motion.

TMIA's suggestion that the Board has the authority to fashion new procedures not contemplated by the NRC regulations (TMIA Motion at 4)[1/] is incompatible with the narrow scope of § 2.722(a)(2) as finally promulgated by the Commission. As originally drafted, § 2.722(a)(2) would have permitted a Board to delegate its hearing obligations to a Special Master even in the absence of consent by the parties. See 45 Fed. Reg. 5308 (January 23, 1980). The commentators to the proposal, however, objected to this course inter alia on the ground that the Administative Procedure Act (which is applicable to NRC licensing

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1/ It should be noted that TMIA's reliance on Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-544 (1978) for this proposition is misplaced. The Supreme Court there held that courts are not free to impose additional procedures on an agency in excess of those contemplated by the APA and the agency's rules; it in no way suggested an agency was free to ignore its own regulations. In fact, the Court expressly stated it was not addressing the latter question. See id. at 542.

proceedings by virtue of section 191 of the Act, 42 U.S.C. § 2231) contemplates that the agency official(s) responsible for making or recommending a decision to the agency held shall preside at the taking of the evidence upon which the decision is to be based. See 5 U.S.C. § 557(a),(b). The Commission, recognizing that its proposal might violate this directive but believing nonetheless that a Special Master could be useful in some situations, added the consent requirement to the final rule. The Commission found this sufficient to overcome the rule's potential infirmity because "parties may consent to procedures which differ from those statutorily provided ...." 45 Fed. Reg. 62027 (September 18, 1980).

The Commission's concerns were well-founded. The general rule that the person who presides over the reception of evidence should make the decision is no mere technicality; rather, it is one of the "fundamental procedural requirements" designed to safeguard the fairness of the hearing process. Morgan v. United States, 298 U.S. 468, 480 (1936); see id. at 480-482. Although a party arguably can waive this right, Licensee has elected not to do so here.

2. TMIA's proposal is objectionable on other grounds as well. First, unlike § 2.722(a)(2) Special Masters, who must be part-time ASLBP members selected by the Board, the panel members under TMIA's proposal would be selected by the parties. Licensee questions whether such a panel could be deemed the type of impartial adjudicatory tribunal required by due process. See generally Johnson v. Mississippi, 403 U.S. 212, 216 (1971).

Second, in contrast to § 2.722(a)(2), which accords all parties the opportunity to comment upon the report of a Special Master, TMIA's proposal would only permit a party to comment on the recommendation of its own appointed expert. Again, fundamental fairness would seem to require more. See 5 U.S.C. § 554 (notice and opportunity to comment); id. at § 556 (d) (opportunity for cross-examination).

Third, as TMIA appears to concede in stating that a primary basis for its motion is its "difficulty in obtaining the cooperation of experts on a voluntary basis" (Motion at 2), TMIA's proposal sounds suspiciously like an attempt to obtain technical assitance on a cost-free basis. The Commission is not empowered to subsidize intervenors in this fashion. See Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717, 1718 (1982), and authorities cited therein.

Fourth, it is inappropriate to establish a special panel as a means of compensating for TMIA's admitted "lack of expertise" (TMIA Motion at 2). As the Commission recently emphasized, "Statements that [documentary] material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities connected with participation in Commission proceedings, and thus do not present cognizable arguments." Duke Power Company (Catawba Nuclear Stations, Units

1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).[2/]

Finally, to the extent that TMIA suggests that its proposal could expedite the proceeding, the opposite would be true. TMIA's proposal would add several unnecessary and time consuming steps which would have the strong likelihood of severe prejudice to Licensee.

CONCLUSION

For the foregoing reasons, TMIA's Motion for Appointment of Special Panel should be denied.

Respectfully submitted,

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Dated: February 9, 1984

2/ TMIA's related concern that it will not be able to control the dissemination of proprietary information, or that the use of proprietary information will "hinder" the preparation of its case. has been addressed in detail in Licensee's January 6, 1984 Motion for Protective Order and Answer to TMIA's Motion for an Order Compelling Discovery (at 13-14), and that discussion will not be repeated here.

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CERTIFICATE OF SERVICE

This is to certify that copies of "Licensee's Opposition to TMIA's Motion for Appointment of Special Panel" are being served to all those on the attached Service List by deposit in the United States mail, first class, postage prepaid, this 9th day of February, 1984.

Bruce W. Churchill, P.C.

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