

February 14, 1984

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 Nuclear Station,)
Unit No. 1))

Docket No. 50-289
(Steam Generator Repair)

NRC STAFF REPLY TO TMIA MOTION FOR
APPOINTMENT OF SPECIAL PANEL

I. INTRODUCTION

By Motion dated January 25, 1984,^{1/} intervenor TMIA has proposed the appointment of a special panel to act as "quasi-investigators, quasi-Special Masters" to evaluate the safety of the TMI-1 steam generator repairs and to make recommendations to this Licensing Board regarding their conclusions. For the reasons set forth below, the NRC Staff opposes TMIA's Motion.

II. DISCUSSION

A. The TMIA Proposal

TMIA has submitted a proposal which is, by its own admission, "somewhat unusual." Motion at 1. Simply put, TMIA would have the NRC convene a panel of four experts, one appointed by, and acting as

^{1/} "TMIA Motion for Appointment of Special Panel," January 25, 1984 (Motion.)

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representative of, each party to the proceeding. The panel, which would be paid by the NRC, would investigate, take evidence "informally," submit their own evidence if they wish, and report to the Board with their recommendations. The parties could comment on the reports of their own experts. Based on the experts' reports, and the evidence examined by the experts, the Board would then make its decision. Motion at 3-4. The stated purpose of such a procedure is to "insure an (sic) competent and expeditious evaluation of the safety of these repairs, to everyone's benefit." Id.

B. Established Procedures Provide Adequate Protection of the Public Interest

TMIA's proposal is not only unprecedented, but flies in the face of established statutory and regulatory procedures which have been designed to ensure a full and fair airing of issues in controversy,^{2/} and violates an explicit Congressional prohibition against financial aid to intervenors.

Under the Atomic Energy Act of 1954, 42 U.S.C. § 2241, and Commission regulations, 10 CFR § 2.721, an Atomic Safety and Licensing Board, comprised of three members, is to preside over licensing proceedings and to perform such other adjudicatory functions as the

^{2/} The reasons given as justification for TMIA's extraordinary proposal are not compelling. Among them are TMIA's asserted lack of expertise, difficulty in obtaining experts, time constraints, financial constraints, and difficulty in travelling (some ten miles) to the room in which Licensee has compiled documents responsive to TMIA's document request. Motion at 2-3. These constraints are not atypical of those facing many parties to NRC licensing proceedings, and intervenors are not to be excused from shouldering the burdens of litigation once they decide to participate in an NRC proceeding. In any event, the appointment of a special panel has no obvious nexus to relieving TMIA of most of the burdens of which it complains.

Commission deems appropriate. The Board is empowered, inter alia, to rule on offers of proof, receive evidence and examine witnesses. 10 CFR § 2.718. In such instances where all parties consent, the Board may appoint a Special Master to hear evidentiary presentations by the parties. 10 CFR § 2.722(a)(2). TMIA has proposed that the Board impose a panel of four "quasi-special masters" to hear and evaluate the evidence in this proceeding. This proposal clearly exceeds the bounds of Section 2.722 which not only requires consent of the parties for use of a single Special Master but also requires that the Special Master be selected from the Atomic Safety and Licensing Board panel.

There are many discretionary provisions in the Commission's regulations which when used, can inure to the benefit of intervenors in the presentation of their case^{3/}. For example, Commission regulations provide for great discretion in the appointment of special assistants both to facilitate the hearing process and improve the quality of the record produced for review. Specifically, 10 CFR § 2.722 grants the Board discretion to appoint personnel, from the Atomic Safety and Licensing Board Panel, to assist it in taking evidence and preparing a suitable record for review. As set forth in the regulations, such special assistants may function as (1) technical interrogators in their

^{3/} In contrast with TMIA's proposal, however, the established procedures do not relieve an intervenor of its basic burden of going forward with its case. An intervenor has the burden of going forward with respect to issues raised by his contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 191 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 388-89 (1974). TMIA's Motion, impermissably, would shift that burden to a panel to be paid out of NRC funds.

individual fields of expertise; (2) Special Masters (upon consent of all of the parties) to hear evidentiary presentations and to prepare an advisory report; and (3) alternate Board members, in an advisory capacity, to participate in the evidentiary sessions on the particular issue for which they were designated. In addition, the Board may informally seek the assistance of members of the Atomic Safety and Licensing Board Panel, for briefings on the general technical background of subjects involving complex issues.

Provision is also made in the rules for the use of scientifically or technically trained persons to conduct direct or cross-examination on behalf of a party. See 10 CFR § 2.733. This procedure may be used to further the conduct of the hearing, and properly is limited to areas in which the "expert examiner" is shown to be qualified.^{4/} The order of presenting testimony, as well, may freely vary, and the Board may in its discretion take expert testimony from witnesses on a round table basis. See 10 CFR Part 2, Appendix A, V.(d)(4). In sum, the existing NRC hearing process provides ample assurance for a full and fair hearing on the issues in controversy, and for the use of "experts" to assist the Board in its examination of those issues. TMIA's proposal ignores these provisions and, in addition, in suggesting that the proceeding be conducted and fact-finding be done by persons who are not Atomic Safety and Licensing Board members, contravenes the requirements of the Atomic Energy Act and the regulations.

^{4/} In contrast, TMIA's motion does not contain any proposal to assure that the "representatives" picked are in fact experts in their fields.

Finally, TMIA's proposal that the party-picked "experts" (each of whom apparently would be an advocate for the position espoused by the party selecting him or her) be paid by the NRC constitutes impermissible financial assistance to intervenors. See Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Station, Unit No. 1), CLI-82-40, 16 NRC 1717, 1718 (1982), and authorities cited therein.^{5/} Accordingly, such an approach may not be undertaken.

III. CONCLUSION

For the reasons set forth above, TMIA's Motion should be denied in all respects.

Respectfully submitted,

Mary E. Wagner
Mary E. Wagner
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of February 1984

^{5/} The prohibition against financial aid to intervenors, cited in Zimmer, supra, appears as well in the current appropriations act for the Commission. See P.L. 98-50, Title V, Section 502 (97 Stat. 251 (1983)).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO TMIA MOTION FOR APPOINTMENT OF SPECIAL PANEL" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 14th of February 1984:

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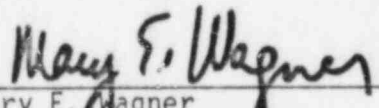
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