UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Dr. David L. Hetrick
Dr. James C. Lamb, III

In the Matter of	
	ASLBP Docket No. 83-491-04 OLA
METROPOLITAN EDISON COMPANY, ET AL.	(NRC Docket No. 50-289)
	(Steam Generator Repair)
(Three Mile Island Nuclear Station, Unit No. 1)	February 24, 1984

MEMORANDUM AND ORDER
(Denying TMIA Motion For Appointment Of Special Panel)

MEMORANDUM

On January 25, 1984, Three Mile Island Alert, Inc. (TMIA) filed a Motion For Appointment Of Special Panel.[1] Therein, in order to "get at the truth" in an expeditious, thorough and nonburdensome way, TMIA proposed that the following procedure should be adopted:

> Each of the four parties in this proceeding [Licensee, NRC Staff, Joint Intervenors and TMIA] appoint an expert representative. As representative 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

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1 The status of the proceedings is as follows: Discovery has been substantially completed; in the near future, the Board will rule on TMIA Motion For Order Compelling Discovery which was filed on January 25, 1984, and on Licensee's Motion For Protective Order which was filed on February 6, 1984. Both the Licensee and the Staff have advised that, by February 24, 1984, they intend to file motions for summary disposition of all admitted contentions.

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> 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 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.

On February 9 and February 14, 1984, the Licensee and the Staff respectively filed submissions opposing the instant motion. The Joint Intervenors did not file a response.

Noting that its motion is "somewhat unusual" and indicating that its proposed procedure is a departure from the strict due process requirements of the adjudicatory process, TMIA states that such a change in process should be possible if all parties agree (TMIA mot. at pp. 1, 4). Without proceeding further, in light of TMIA's statement, we could deny the motion because the Licensee and the Staff do not agree to such a proposed change in the adjudicatory process.[2] Further, without more discussion, we could deny the motion because (1) the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2231, 2241, provides that the Administrative Procedure Act shall apply and authorizes the Nuclear Regulatory Commission to establish atomic safety and licensing boards to conduct hearings, and because (2) in implementing that Act, the Commission's regulations provide for the establishment of atomic safety and licensing boards and state that these boards (a) have the duty to

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[2] Since the Joint Intervenors did not file a response, we do not know their position.

conduct fair and impartial hearings according to law, and (b) are authorized to administer oaths and affirmations, to rule on offers of proof and receive evidence, to regulate the course of hearing and to examine witnesses, and to take various measures to regulate hearing procedures. (See 10 C.F.R. §§ 2.721, 2.718, 2.757). As the Licensee points out, the Commission has recognized only a single narrow exception to the requirement that evidence be heard by the Board - 10 C.F.R. § 2.722 provides that, upon the consent of all parties, the Board may appoint from the Atomic Safety and Licensing Board Panel a special master to hear evidentiary presentations by the parties on specific technical matters and to render an advisory report to the Board. Obviously, TMIA's proposal is a radical departure from Congress' and the Commission's mandates. We are bound to comply with these mandates.

However, citing Vermont Yankee Nuclear Power Corporation v. NRDC, 435 U.S. 519, 543 (1978), TMIA urges that "Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" First, TMIA's reliance on Vermont Yankee is misplaced. In that case the Supreme Court was addressing the authority of this agency (or any agency) qua agency to fashion its rules of procedure and to devise methods of inquiry and was not addressing either the authority or discretion of Licensing Boards, as delegates of the Commission, to fashion the Commission's rules of procedure and to devise methods of inquiry. As delegates of the Commission we exercise only

those powers which the Commission has given to us in its regulations and orders. Second, even assuming for the sake of argument that Vermont Yankee is apposite and that this Board is free to radically depart from the Commission's Rules of Practice (10 C.F.R. Part 2), we are not persuaded by and reject the reasons advanced by TMIA in support of its proposal. TMIA argues, in substance, that it cannot meaningfully participate in the currently established hearing process because (a) it lacks expertise and has neither funds to pay experts to conduct discovery within the expedited time for discovery nor funds to pay the Licensee's copying fees, (b) the document room maintained by the Licensee is ten miles away which works a hardship upon TMIA, and especially upon its chief researcher, who cannot drive an automobile, and because (c) certain documents have been withheld by the Licensee on proprietary grounds and, if these documents are the subjects of a protective order, its ability to freely research and contribute to this case will be further hindered. With respect to TMIA's first and second arguments, the Commission has held that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation, that it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding, and that the fact that a party may possess fewer resources than others to devote to the proceeding or is not an expert in technical matters does not relieve that party of its hearing obligations. Duke Power Company, et. al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983); Statement

of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). Moreover, the Commission has held that, by virtue of language in various appropriation acts, the Commission is not empowered to expend its appropriated funds for the purpose of funding intervenors.[3] Cincinnati Gas and Electric Company, et. al. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717, 1718 (1982). Finally, we fail to see any connection between TMIA's conclusional third argument and its proposal. If perhaps TMIA is urging here that its proposal should be adopted because only its expert panel representative would be able to understand various technical documents that might be the subjects of a protective order, such an argument has been encompassed in the discussion above and is rejected.[4]

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3 The Energy And Water Development Appropriation Act, 1984, Pub. L. No. 98-50, § 502, 1983 U. S. Code Cong. & Ad. News (97 Stat.) 247, 261 (1983) states that:

> None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.

4 In support of its Motion For Order Compelling Discovery of January 25, 1984 at page 2 and thus in a different context, TMIA asserted that it had refused to sign the Licensee's informally proposed proprietary agreement because the restrictions therein would hinder its ability to perform research and would intimidate its members. As reflected in footnote 1, supra, in the near future the Board will rule on that Motion as well as on the Licensee's Motion For Protective Order.

ORDER

In light of the discussion, supra, TMIA's Motion For Appointment Of Special Panel is denied.

Judges Hetrick and Lamb join but were unavailable to sign this Memorandum and Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 24th day of February.