UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289 SP
	)	(Restart - Management Phase)
(Three Mile Island Nuclear Station, Unit No. 1)	)	
	)	

THREE MILE ISLAND ALERT'S MOTION FOR RECONSIDERATION OF BOARD'S ORDER GRANTING LICENSEE'S PROTECTIVE ORDER, OR, IN THE ALTERNATIVE, MOTION FOR DIRECTED CERTIFICATION

Three Mile Island Alert ("TMIA"), pursuant to 10 C.F.R. 2.771, petitions this Atomic Safety and Licensing Board ("Licensing Board") to reconsider its oral order of August 30, 1984, granting in large part licensee General Public Utilities' ("GPU") Motion for Protective Order, and to deny the protective order insofar as it forecloses TMIA's discovery on GPU employees', operators', and management's knowledge of the conditions of the reactor and events occurring on the first day of the accident. If the Licensing Board denies TMIA's motion for reconsideration, TMIA respectfully requests that the issue be certified to the Atomic Safety and Licensing Appeal Board ("Appeal Board") for decision.

I. BACKGROUND.

On July 31, 1984, TMIA filed its First Set of Interrogatories and First Request for Production to GPU concerning the remanded issue of the Dieckamp mailgram, and its reflection on GPU management integrity. TMIA requested information about GPU (Met-Ed) and B&W personnel's knowledge of the conditions of the reactor and events occurring on the first day of the Accident, March 28, 1979. GPU's

response to TMIA's First Set of Interrogatories was due on August 19, 1984, and its response to TMIA's First Request for Production was due on September 4, 1984.

GPU moved for a broad protective order which essentially bars TMIA's inquiry into any conditions of the reactor on March 29, 1979, other than "the generation and subsequent combustion of hydrogen, the pressure spike and the initiation of containment spray."

GPU moved for an extension of time up to and including September 4, 1984, to respond to TMIA's First Set of Interrogatories.

On August 20, 1984, TMIA filed its Opposition to GPU's Motion for Protective Order and GPU's motion for extension of two weeks within which to answer TMIA's interrogatories. In the alternative, TMIA requested that if GPU were permitted an additional two weeks to respond that the discovery time period, currently scheduled to end on September 30, 1984, be similarly lengthened.

On August 27, 1984, the Licensing Board granted GPU's motion for extension of time. On August 30, 1984, the Licensing Board granted, in large part, GPU's motion for protective order.

Judge Ivan Smith, in a conference call among the parties, indicated that the basic "acceptance standard" according to which the Board ruled on GPU's motion was that TMIA had the right to discovery only as to Mr. Dieckamp's knowledge about plant conditions, and not to other individuals' knowledge about plant conditions on March 28, 1979. Judge Smith also stated that he believed that all the information to which TMIA was entitled "would be captured" at the point of Mr. Dieckamp.[1/]

1/ Judge Smith also stated that he expected the formal Board order to be issued in written form by September 4, 1984.

The parties held some discussion on the exact wording of the protective order. TMIA requested that the wording of the protective order, if it were to be granted, be broadened to include the following: information relating in any way to the generation of hydrogen or other combustible gas; the combustion of hydrogen or other combustible gas; the pressure spike; the initiation of containment spray; any noise caused by the hydrogen or gas combustion; any chemical reaction which was indicated by the rapid rise in pressure; any orders or direction not to activate equipment in the reactor building because it might cause a spark and/or hydrogen explosion.

Judge Smith stated that he assumed that GPU, in responding to TMIA's discovery requests, would not make a mechanical search for the words "pressure spike" and "hydrogen combustion" and would not read TMIA's discovery requests in an "excessively narrow" manner.

A short time after the conference call, GPU counsel Ernie Blake informed TMIA counsel that GPU would not be able by September 4, 1984, to fully respond to all those interrogatories which Judge Smith indicated should be answered and for which the Licensing Board did not issue a protective order. Mr. Blake gave no indication of the date by which GPU will be able to respond to those TMIA discovery requests for which the Board denied GPU's Motion for Protective Order.

II. DISCOVERY AS TO GPU AND B&W PERSONNEL'S KNOWLEDGE OF THE CONDITIONS OF THE REACTOR AND EVENTS OCCURRING ON THE DAY OF THE ACCIDENT IS RELEVANT TO TMIA'S THEORY THAT MR. DIECKAMP KNEW, OR SHOULD HAVE KNOWN, THAT SOME GPU EMPLOYEES BELIEVED THE PRESSURE SPIKE INDICATED CORE DAMAGE, AND FURTHER IS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

Intervenor TMIA is entitled, under the discovery rules for

adjudicatory proceedings before this Licensing Board, to any information relating to any party's claims or de[f]nses, and information which even though inadmissible at the time of hearing, appears reasonably calculated to lead to the discovery of admissible evidence. 10 C.F.R. 2.740(b)(1).

The central issue before this Licensing Board is whether Mr. Dieckamp knew or should have known that there was evidence that some GPU employees interpreted the pressure spike which occurred on March 28, 1979, to indicate core damage. Although no party has at this point explained its claims or defenses on this issue, it is certain that GPU's theory of the case will differ radically from TMIA's theory of the case. GPU's theory, if it remains consistent with explanations provided to the NRC and other investigators after the accident, will be that Mr. Dieckamp was never informed that any GPU employee interpreted the pressure spike as a real increase in pressure, as an indication that a hydrogen explosion had occurred, or as an indicator of core damage. In fact, it is likely that GPU will argue that no GPU employee or operator interpreted the pressure spike on March 28, 1979, to indicate a hydrogen explosion or core damage.

TMIA's theory on this issue is substantially at variance with GPU's theory. TMIA will argue that some operators, including Mr. Mehler and Mr. Chwastyk, believed that the pressure spike indicated an explosion or chemical reaction of some sort which, in turn, resulted in core damage. TMIA believes that both these supervisors communicated this information to Mr. Miller, who is likely to have communicated this information to upper management, including Mr. Dieckamp.

TMIA believes that Mr. Dieckamp, if he made a misstatement or inaccurate statement in his mailgram to Congressman Udall, will

deny any knowledge of or communications concerning the pressure spike, hydrogen explosion, core damage, or other accompanying conditions of the reactor. In fact, if Mr. Dieckamp deliberately or with reckless disregard of the facts known to him made a false statement in the mailgram, one would not expect him at this point to admit his misstatement. Therefore, the Board's denial of discovery to TMIA on GPU's knowledge of the conditions of the reactor effectively forecloses TMIA from proving its theory of the case.

The question of relevancy is to be more loosely construed at the discovery stage of a case than at the hearing or trial stage. See generally, 8 Wright & Miller, Federal Practice and Procedure, ¶2008 at 41 (1970). It is hornbook law that a court cannot prejudge a case to permit discovery only on the theory it believes will prevail on a trial on the merits. U.S. v. 216 Bottles, More or Less, 36 F.R.D. 695,700-701 (S.D.N.Y. 1965); New York City Transit Authority v. Exxon Corp., 70 F.R.D. 574,576 (S.D.N.Y. 1976) (plaintiff could not be denied discovery on its defense that defendant was able to provide certain oil supplies despite an agency regulation since this was a material issue of fact in dispute between the parties); Rembold Motors, Inc. v. Bonfield, 293 N.E. 2d 210,220, 155 Ind.App. 422 (libelant entitled to inquire and examine upon its theory of facts and law of case and was not limited to claimant's theory).

Further, courts have long granted parties the right to information in discovery which the parties intend to use for purposes other than their case in chief, including the cross-examination of adverse witnesses. Kerr v. U.S. District Court for N. Dist. of California, 511 F.2d 192,196 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976); United

States v. Meyer, 398 F.2d 66,72 (9th Cir. 1968).

In this case, TMIA is seeking discovery on GPU operators' and management's knowledge of conditions of the reactor and events occurring on March 28, 1979, in order to determine what information was passed up the management chain, and what information in the normal course of business would have reached Mr. Dieckamp. If, as TMIA assumes is the case, a number of operators and employees knew of the pressure spike and the explosion, and suspected core damage, it is likely they passed that information up the management chain through Gary Miller. It is also likely that Mr. Dieckamp had knowledge of these events, or alternatively, suspected these events and shielded himself from actual knowledge. In either event, TMIA needs information about GPU operators' and management's knowledge in order to prove its theory of the case. It also needs the information in order to cross-examine GPU witnesses whose testimony TMIA believes will be contradictory. TMIA has a right to the discovery it has requested under the Commission's rules governing adjudicatory proceedings which parallel in large part the Federal Rules of Civil Procedure.

III. IF THIS BOARD DENIES TMIA'S MOTION FOR RECONSIDERATION, TMIA REQUESTS THAT THIS ISSUE BE CERTIFIED FOR DECISION TO THE APPEAL BOARD.

This Board's ruling limiting TMIA's discovery requests is a determination that information regarding GPU operators' and management's knowledge about conditions of the reactor and events occurring on March 28, 1979, is not relevant to the issues before it and is not reasonably calculated to lead to the discovery of admissible evidence. Therefore, TMIA foresees that the Board will similarly rule at the time of hearing that TMIA may not offer evidence concern-

ing GPU's knowledge of conditions of the reactor and events occurring on March 28, to demonstrate Mr. Dieckamp knew, or should have known, that some GPU personnel interpreted the pressure spike as indicative of core damage.

TMIA objects to this narrowing of the scope of the issue in this remanded portion of the management hearings. Therefore, pursuant to 10 C.F.R. 2.718(i), TMIA requests that this Board certify for decision to the Appeal Board the question whether TMIA's discovery, and resulting offer of proof at the time of hearing, may be limited in the manner ordered by the Licensing Board in its order of August 30, 1984.

The basic rule is that the Appeal Board will undertake discretionary interlocutory review when the ruling by the Licensing Board either (1) threatens the party adversely affected by it with immediate and serious irreparable harm, which, as a practical matter, could not be alleviated by later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual matter. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 N.R.C. 1190, 1192 (1977).[2/]

Section V(f)(4) of Appendix A to 10 C.F.R. Part 2 states the standard for directed certification:

> A question may be certified to the Commission of the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when a prompt and final decision of the question is important for the protection of the public interest, or to avoid undue delay or serious prejudice to the interests of a party.

2/ See also Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693,694(1979); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533,534 (1980); Houston Lighting and Power Co. (Allens Creek Generating Station, Unit No. 1), ALAB-635, 13 NRC 309,310 (1981).

The question which TMIA requests be certified to the Appeal Board for determination is the following:

> Whether TMIA has the right to discovery, pursuant to 10 C.F.R. 2.740(b)(1), concerning GPU employees', operators', and management's knowledge of plant conditions and events occurring on March 28, 1979, the first day of the accident, other than their knowledge of the pressure spike, hydrogen explosion, activation of containment sprays, or core damage.

This Board's foreclosure of inquiry into this area during discovery, and its certain foreclosure of testimony in this area, affects TMIA's basic right to prepare and present its theory of the case, that numerous GPU operators and managers knew that the pressure spike observed on March 28, 1979, indicated core damage and Mr. Dieckamp should have known or been informed of that fact.

This order of the Licensing Board impairs TMIA's ability to prepare its case and indicates that the Board will make similar rulings at the time of the hearing. Therefore, it affects the basic structure of the hearing on the Dieckamp mailgram issue in a pervasive manner. TMIA is effectively foreclosed from proving its theory of the case on this issue, and foreclosed from discovering information to use in cross-examining GPU's adverse witnesses.

In light of the above, TMIA respectfully requests that if this Board denies its motion for reconsideration, it direct certification of the question outlined above to the Appeal Board.

IV. THE WORDING OF THE PROTECTIVE ORDER GRANTED GPU SHOULD BE MODIFIED TO ENSURE THAT GPU PROVIDES ALL INFORMATION RELATING TO THE PRESSURE SPIKE, HYDROGEN COMBUSTION, OR CORE DAMAGE.

GPU requested a protective order regarding a large number of TMIA's interrogatories and requests for production. Essentially, the protective order provides that GPU is not required to provide

information or documents other than that relating to "the generation and subsequent combustion of hydrogen, the pressure spike and the initiation of containment spray."

TMIA requested during the conference call held on August 30, that the wording of the protective order be broadened to indicate that GPU would be required to provide information or documents concerning "the generation or combustion of hydrogen or other combustible gas, the pressure spike, the initiation of containment spray, any noise caused by the hydrogen or other combustible gas, any chemical reaction which was indicated by the pressure spike or rapid rise in pressure, and any order or direction not to activate equipment in the reactor building because it might cause a spark or explosion."

TMIA believes that the broadening of the protective order to include the other events and conditions stated above, will more effectively carry out the Board's intent in limiting discovery, if it should determine not to grant TMIA's motion for reconsideration.

IV. CONCLUSION.

In consideration of the above, TMIA respectfully requests that this Board grant TMIA's Motion for Reconsideration and deny GPU's Motion for Protective Order insofar as it bars inquiry into GPU employees', operators' and management's knowledge of conditions of the reactor and events occurring on March 28, 1979.

If the Board denies TMIA's Motion for Reconsideration, TMIA requests that it certify to the Appeal Board for interlocutory review this question. Further, TMIA moves that the language of the protective order granted GPU be broadened so that TMI is ensured full discovery on the pressure spike and hydrogen combustion.

Respectfully submitted,

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