

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'84 SEP 12 A10:59

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

Docket No. 50-289 SP
(Restart - Management Phase)

TMIA'S MOTION TO COMPEL RESPONSES TO TMIA'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION; MOTION FOR REASONABLE ATTORNEYS FEES AND COSTS INCURRED IN BRINGING THIS MOTION; AND MOTION FOR THREE WEEK EXTENSION OF DISCOVERY PERIOD

Three Mile Island Alert ("TMIA") moves to compel General Public Utilities ("GPU") to respond to TMIA's First Set of Interrogatories and First Request for Production. After an extension of time of over two weeks GPU has failed to answer over one-third of the interrogatories which it acknowledges it has a duty to answer. GPU has also answered over one-quarter of TMIA's interrogatories by referring TMIA to documents which are maintained only in a document room in Harrisburg, Pennsylvania and not in Washington, D.C. Finally, GPU has produced documents in response to TMIA's request for production only in Harrisburg, and not in Washington, D.C.

TMIA therefore moves this Atomic Safety and Licensing Board ("Licensing Board") to compel GPU to respond to its discovery requests and further to grant TMIA the reasonable attorneys fees and costs incurred in bringing this motion to compel.

Finally, TMIA requests a three week extension of the discovery period currently scheduled to end September 30, 1984 to and including October 22, 1984.

I BACKGROUND

On July 31, 1984 TMIA filed its First Set of Interrogatories and First Request for Production to GPU concerning the issue of the Dieckamp mailgram and its reflection on GPU management integrity. Under the rules governing proceedings before this Licensing Board GPU's response to TMIA's First Set of Interrogatories was due on July 19, 1984, and its response to TMIA's First Request for Production was due on September 4, 1984. Discovery is scheduled to be completed by September 30, 1984 according to the Prehearing Conference Order of this Licensing Board.¹

On August 13, 1984, at the offices of GPU's counsel, GPU and TMIA counsel negotiated for over four hours concerning TMIA's First Set of Interrogatories and First Request for Production in an attempt to reach agreement on the scope and timing of answering these discovery requests.

¹TMIA has proceeded expeditiously with discovery in this reopened phase of the management hearing on the assumption that all parties, including GPU, will respond to discovery requests within the time allowed under the rules. Judge Smith indicated during a conference call on August 30, 1984 that he was not inclined to grant TMIA an extension of the discovery period because TMIA's discovery requests were broad. TMIA is aware of no authority for the position that the narrowness or breadth of discovery requests permits any party special privileges under the rules as to time for response to another party's discovery requests. In fact all authority TMIA has found indicates that all parties have the right to expect that all other parties will comply with the rules, including the rules as to response time, which govern the forum in which they are litigants.

TMIA also notes that TMIA and the NRC Staff have successfully negotiated concerning TMIA's First Set of Interrogatories and First Request for Production to the NRC Staff to resolve their differences without the need for the Licensing Board's intervention. TMIA, as described below, has attempted unsuccessfully to negotiate a similar resolution of its discovery disputes with GPU.

TMIA and GPU counsel agreed during these negotiations that GPU would not pose an objection to certain interrogatories and document requests on the ground of overbreadth or burdensomeness if TMIA, in return, agreed to narrow these discovery requests. Counsel for both parties reached agreement on the narrowing of a number of discovery requests, including interrogatories 2, 3, 4, 5, 6, 7, 9, and 42; and document request 7.

However, GPU counsel later, through a letter of August 21, 1984, disclaimed GPU's promise to withdraw objections of overbreadth or burdensomeness.² TMIA counsel therefore informed GPU counsel by letter that TMIA would not be able to comply with its stipulation to a narrowing of the above-cited discovery requests.³

As of August 29, 1984, therefore, all TMIA discovery requests to GPU were to be answered in the precise form they were served on GPU. The only modifications were the ones ordered by the Licensing Board on August 30, 1984.

During these negotiations TMIA counsel also agreed to an extension of time to August 27, 1984 within which GPU could answer TMIA's First Set of Interrogatories.

On August 15, 1984 GPU filed a Motion for Protective Order, arguing that a large number of TMIA's interrogatories and requests for production should be severely limited. GPU stated it was willing only to produce information concerning "the generation and combustion of hydrogen, the pressure spike, and the initiation of containment spray." GPU also requested an extension of time to September 4, 1984,

²See D. Lewis Letter, GPU Counsel to L. Bernabei, TMIA Counsel, August 21, 1984

³See L. Bernabei, TMIA counsel, Letter to D. Lewis, GPU counsel, August 29, 1984.

to respond to TMIA's interrogatories. TMIA opposed both GPU's motion for protective order and its motion for extension of time past August 27, 1984. TMIA alternatively requested that if the Board were to grant GPU's motion for extension of time that the Board similarly extend the period for discovery.

In a conference call on August 30, 1984 the Licensing Board granted GPU's motion for a protective order in part, and denied it in part. The Licensing Board also granted GPU's motion for an extension of time to September 4, 1984.

GPU asked for no further extension of time during the conference call or at any time subsequent to the conference call. After the conference call, GPU counsel called TMIA counsel to inform her that GPU would be unable to answer by September 4, all TMIA interrogatories and requests for production in light of the Licensing Board's denial of a portion of GPU's motion for protective order. TMIA counsel informed GPU counsel that she would not stipulate to any further extension of time and expected all discovery requests permitted by the Board to be answered in full by September 4, 1984.

During the afternoon of September 4, 1984, TMIA counsel telephoned GPU counsel to inquire about the status of GPU's discovery responses. GPU counsel did not return the telephone call.

On September 5, 1984, TMIA counsel received by mail a copy of GPU's response to TMIA's First Set of Interrogatories and First Request for Production. From that response TMIA counsel learned the following:

- (1) GPU had failed to answer seven interrogatories in part and 14 interrogatories in full on the ground it could not respond to the interrogatories in accordance with the Board's order of

August 30, 1984.⁴ (In other words, GPU had assumed that the Licensing Board would grant its motion for protective order in total, and had made no attempt to obtain the information needed to respond to the discovery requests in the event the Board denied the protective order or any portion of the protective order.)

(2) GPU answered 16 interrogatories in part or in whole by production of documents in a document room in Harrisburg, Pennsylvania to which TMIA counsel handling the discovery portion of this issue has no reasonable access;⁵

(3) GPU has produced documents responsive to TMIA's First Request for Production only in a document room in Harrisburg, Pennsylvania.

On September 5, 1984, TMIA counsel inquired of GPU counsel Ernest Blake the reason the documents responsive to TMIA's First Request for Production and First Set of Interrogatories were placed only in a document room in Harrisburg given the fact that both TMIA counsel handling the discovery portion of the case up to this point are located in Washington, D.C., and he knew that. Mr. Blake said it had been done this way in the past. TMIA also inquired of GPU counsel the date when these documents would be produced in Washington. Mr. Blake informed her that he did not know if the documents would be produced in Washington, D.C.

⁴ See GPU's responses to TMIA's interrogatories 1, 3, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 34, 37, 38, 39, 49, 50, 51, and 58.

⁵ See GPU's responses to TMIA's interrogatories 3, 4, 6, 8, 10, 12, 13, 14, 23-24, 25, 26, 32, 33, 35, and 51.

By a letter delivered on September 6, 1984, Mr. Blake informed TMIA counsel that the documents would be produced in Washington if she were to request by letter that the documents be placed in Washington.⁶

It has been the practice throughout these hearings that GPU has produced documents responsive to intervenors' requests at the business address of intervenors' counsel. In the past GPU has produced documents in Washington, D.C. for the Union of Concerned Scientists, whose counsel is located in Washington. Similarly, GPU has served all other discovery pleadings by hand on TMIA's Washington counsel and not on TMIA members themselves. Service by hand on either TMIA or GPU's Washington counsel has been considered by the parties to be service by hand on TMIA and GPU respectively. TMIA has never chosen to serve GPU by serving pleadings on corporate officers in Parsippany.

II GPU'S FAILURE TO PRODUCE DOCUMENTS RESPONSIVE TO TMIA'S DISCOVERY REQUEST AT A LOCATION REASONABLY ACCESSIBLE TO TMIA COUNSEL IS AN EFFECTIVE REFUSAL TO RESPOND TO DISCOVERY REQUESTS WITHIN THE PERMITTED TIME.

GPU has responded to 16 of TMIA's First Set of Interrogatories and all of TMIA's Document Requests by referring TMIA to documents contained in a document room in Harrisburg. TMIA assumes that GPU is invoking, with respect to the interrogatory responses, a procedure established by Rule 33(c), Fed.R.Civ.P., which gives a party under an obligation to answer interrogatories the option of producing business records when the burden of ascertaining or deriving the information from such records is substantially the same for the party

⁶See E. Blake, GPU counsel, Letter to L. Bernabei, TMIA counsel, September 6, 1984.

requesting the information as the party under an obligation to produce it. Certainly under no stretch of the imagination can it be argued that information contained in documents maintained in a document room two to three hours from the offices of TMIA's counsel is as easily ascertained or derived by TMIA as by GPU.

GPU has also produced documents in response to TMIA's First Request for Production by producing a number of as of yet unidentified, and apparently unindexed, documents in a document room in Harrisburg, Pennsylvania. GPU is under an obligation to produce the documents in a form and a place where they can easily be reviewed by TMIA counsel.

Although TMIA did not state in its Request for Production a location for production of responsive documents, it assumed that the documents would be produced at a reasonable time, place, and manner, as is required under both the Federal Rules of Civil Procedure and 10 CFR 2.741(c).

Courts have long held that district courts have broad discretion to determine the conditions under which inspection of documents will be ordered but that such discretion should be guided by considerations of policy, necessity, propriety and expediency in the particular case. Vaughn v. Chrysler Corp., 16 FRD 6,8 (D.Okl. 1969); United States v. Kuhler, 9 FRD 289, 291 (D.Pa. 1949).

Similarly, the Licensing Board here must use its discretion to ensure that GPU answers those discovery requests propounded to it by producing documents in a reasonable time, place and manner. TMIA believes that if the Board fails to ensure that each party adheres to such a procedure, it would be abusing its discretion in

overseeing the discovery process.

Further, TMIA believes that GPU counsel has acted in bad faith, and with an apparent intent to obstruct permitted discovery by TMIA in placing those documents responsive to TMIA's discovery requests in a location inaccessible to TMIA counsel. It is clear that even if the documents are transferred to Washington by next week, TMIA counsel will have lost over a week's time in reviewing the documents and will be severely prejudiced in preparation for the depositions which are to be noticed to begin the week of September 17, 1984.

III THE LICENSING BOARD MUST COMPEL GPU TO ANSWER THOSE INTERROGATORIES WHICH THE BOARD ORDERED ON AUGUST 30, 1984 SHOULD BE ANSWERED.

GPU has failed to answer 21 interrogatories fully on the ground that it could not answer the interrogatories in accordance with the Board's August 30, 1984 order denying in part GPU's motion for protective order. GPU has failed to request any further extension of time within which to answer these interrogatories and therefore it is effectively in default.

TMIA requests that the Licensing Board compel GPU to answer these interrogatories, listed in footnote 4 below, or, in the alternative, to rule that the information requested in these interrogatories be deemed in support of TMIA's theory of the case.

GPU counsel knew on August 30, 1984 that GPU did not intend to answer the interrogatories in accordance with the Board's order by September 4, 1984, and yet asked no further extension of time. Instead it acted in direct defiance of the Board's order without explanation.

Because of GPU's cavalier attitude toward this Board's August 30, 1984 order, as demonstrated by its deliberate refusal to attempt

to answer TMIA's discovery requests in accordance with that order, or to seek a modification of that order, TMIA requests further that it be granted the reasonable attorneys' fees and costs incurred in bringing this motion to compel.

IV THIS LICENSING BOARD, IN ORDER NOT TO DENY ANY PARTY DUE PROCESS AND ADEQUATE TIME TO PREPARE ITS CASE SHOULD GRANT A THREE WEEK EXTENSION OF THE DISCOVERY PERIOD TO AND INCLUDING OCTOBER 22, 1984.

GPU's conduct during this discovery period of these reopened hearings has been obstructive and is intended, apparently, to prevent TMIA from conducting discovery into the Dieckamp mailgram issue. GPU counsel have negotiated over the scope of discovery with TMIA counsel and then reneged on promises made during the negotiation session. GPU has refused to comply with this Board's August 30, 1984 order to respond to discovery requests within the time permitted by the Board, even after being granted a two week extension. GPU has failed to request an extension of time or a modification of this Board's August 30, 1984, and instead chosen intentionally to disregard that order.

Finally, GPU has made TMIA's counsel preparation for its case impossible by locating documents which comprise the response to the majority of TMIA's discovery requests, both interrogatories and requests for production, only in a document room in Harrisburg. GPU's actions in this regard are in clear defiance of the prior practice in this case to produce documents at the location of the intervenor's counsel handling the discovery. Further, it violate the rules governing discovery before this Board and the spirit of the Board's exhortations to all parties to proceed expeditiously.

TMIA has been hindered in preparation of its case by GPU's obstructive conduct. In particular, TMIA filed its request for

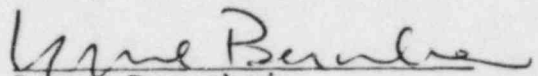
production and interrogatories a full month before it expected to notice depositions because it wished to use the information requested to prepare for depositions. Since GPU has refused to make that information available up to this point in time, TMIA counsel has been barred from adequately preparing for depositions of GPU employees.

TMIA therefore requests an extension of the discovery period to October 22, 1984 in order that it not be prejudiced by GPU's obstructive conduct. A refusal to grant TMIA, which has proceeded expeditiously and in accordance with the discovery rules, adequate time to prepare its case would be a denial of TMIA's due process right to a fair hearing.

Respectfully submitted,

Dated: September 7, 1984

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September 7, 1984

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OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION;
MOTION FOR REASONABLE ATTORNEYS FEES AND COSTS INCURRED
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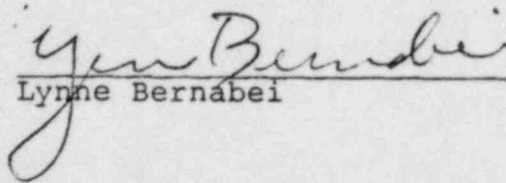
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HAND DELIVERED

September 7, 1984

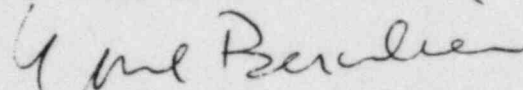
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Dear Ernie:

As must be clear from our numerous dealings during the discovery portion of these remanded proceedings I, as TMIA counsel, want the documents responsive to TMIA's discovery requests to GPU produced in Washington.

In addition I believe it is appropriate that given the bulk of documents involved ("cartons" you have stated) you make a set of documents available in Harrisburg for use during the hearings.

Sincerely yours,



Lynne Bernabei
Attorney for Three Mile
Alert

cc: Service List