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RELATED CORRESPONDENCE

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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 Remand on
(Three Mile Island Nuclear	)	Management)
Station, Unit No. 1)	)	

LICENSEE'S MOTION TO COMPEL RESPONSES  
TO LICENSEE'S SECOND SET OF INTERROGATORIES

On August 17, 1984, Licensee filed Licensee's Second Set of Interrogatories and Request for Production of Documents to Intervenor Three Mile Island Alert, Inc. Three Mile Island Alert (TMIA) filed its response to Licensee's Second Set of Interrogatories on September 5, 1984.

TMIA's answers to a number of the interrogatories are incomplete and inadequate. Accordingly, as further discussed below, Licensee moves the Board to issue an order compelling complete answers.

Interrogatory No. 1

Licensee's Interrogatory No. 1 asks TMIA to identify its witnesses. TMIA responds that it is not yet "prepared" to identify its witnesses and will not do so until after its discovery is complete.

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While a response that TMIA has not selected any of its witnesses, if truthful, would be an acceptable answer, TMIA's response implies that it already knows or anticipates who some of its witnesses will be. If so, TMIA should identify these witnesses now, so that Licensee may conduct depositions if necessary. For TMIA to wait until after discovery is completed to respond will unfairly deprive Licensee of this opportunity. TMIA must answer this interrogatory to the extent it is now able. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-9, 17 N.R.C. 403, 406-407 (1983). It must supplement its response when able. See 10 C.F.R. § 2.714(e)(1).

Accordingly, Licensee moves that the Board compel TMIA to answer Interrogatory No. 1 to the extent it is now able, and to supplement its answer by identifying additional witnesses at the time they are selected.

#### Interrogatory No. 2

In Interrogatory No. 2, Licensee asked TMIA to identify relevant documents in its possession. TMIA responds by referring Licensee to the NRC Public Document Room. TMIA argues that the burden of deriving the information requested in this interrogatory is substantially the same for Licensee as it is for TMIA. TMIA cites Fed. R. Civ. P. 33(c).

TMIA's argument is frivolous and its citation is non-supporting. It is not a ground for objection that

information is equally available to the interrogator; and it is not a ground for objection that the information is a matter of public record. Petruska v. Johns-Manville, 83 F.R.D. 32, 35 (E.D.Pa. 1979), citing C. Wright & Miller, 8 Federal Practice and Procedure, § 2014 at 111 (1970). Nor does Fed. R. Civ. P. 33(c), miscited by TMIA as support, hold to the contrary. Rule 33(c) merely states that one may provide information requested in an interrogatory by 1) "specify[ing] the records" that contain the information and 2) "afford[ing] to the party serving the interrogatory reasonable opportunity to inspect" such records. TMIA has not made available the documents whose identification is requested, nor does its referral to all documents in the NRC public document room permit Licensee to ascertain this information.

TMIA also argues, "To the extent the interrogatory seeks information as to TMIA's counsel's investigation into the facts surrounding the Dieckamp mailgram issue, this information is privileged from disclosure under the work product doctrine." Licensee's Interrogatory No. 2, however, does not seek information as to TMIA's counsel's investigation, but seeks the identity of documents in TMIA's possession. Interrogatory No. 2 is a mundane interrogatory that does not invoke the work product privilege. "The work product concept furnishes no shield against discovery, by interrogatories or deposition, of . . . the existence or nonexistence of documents. . . ." C. Wright & Miller, 8 Federal Practice and Procedure, § 2023 at

194 (1970). The Commission's Rules of Practice, 10 C.F.R. § 2.740(b)(1), "specifically allow questions concerning such things as the existence, description, nature, custody, condition and location of any books, documents or other tangible things." Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 333-34 (1980).

Accordingly, TMIA's answer to this interrogatory is non-responsive and Licensee moves for an order compelling TMIA to identify the relevant documents it has in its possession or to make such documents immediately available for Licensee's inspection.

Interrogatory No. 3

In Interrogatory No. 3, Licensee asks for the identification of documents which TMIA intends to offer as exhibits or use during cross-examination. TMIA responds that it is not yet prepared to respond. Licensee moves that TMIA be compelled to provide this information now to the extent it is presently able, and to supplement its response at the time additional information becomes available. See discussion of Interrogatory No. 1, above.

TMIA also asserts that identification of documents to be used during cross examination is privileged under the work product doctrine. The work product privilege, however, applies only to the discovery of 1) documents or other tangible things,

2) prepared in anticipation of litigation or for trial, 3) by or for the objecting party or that party's representative. See C.F.R. § 2.740(b)(2); Fed. R. Civ. P. 26(b). See generally Hickman v. Taylor, 329 U.S. 495 (1947). TMIA does not indicate that any of the documents to which it is referring were prepared in anticipation of litigation.<sup>1/</sup> Irrespective, the identity of documents is always discoverable; and the identity of documents to be used during TMIA's cross examination is necessary to prevent surprise at trial and to permit Licensee to prepare adequately. These are fundamental purposes of discovery. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 888 (1981); See Seabrook, supra, LBP-83-9, 17 N.R.C. at 405, and references cited therein. Licensee therefore moves that TMIA also be compelled to identify the documents it intends to use during cross-examination.

Interrogatory No. 4(c)

Interrogatory No. 4(c) asks TMIA to identify certain documents. TMIA identifies some documents, but then states:

Numerous other interviews conducted in the course of compiling NUREG-0760 contain relevant information. TMIA refers GPU to all such interviews conducted during the course of that investigation, since the burden of deriving the

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<sup>1/</sup> TMIA, as the party asserting the privilege has the burden to establish the existence of the privilege. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 N.R.C. 490, 495 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit No. 1), LBP-82-82, 16 N.R.C. 1144, 1153 (1982).



information sought by this interrogatory is substantially the same for GPU as it is for TMIA. Rule 33(c), Fed.R.Civ.P.

TMIA's Response at 7.

As discussed with respect to Interrogatory No. 2 above, that information is equally available to Licensee is not ground for objection. Similarly, reference to "numerous other interviews" and citation to Fed. R. Civ. P. 33(c) is not an adequate response. Accordingly, Licensee moves the Board to compel TMIA to identify these other interviews, or to make the interview transcripts immediately available.

#### Interrogatory No. 13

Interrogatory No. 13 asks TMIA to identify individuals who prepared or provided information used in preparing TMIA's First Set of Interrogatories to General Public Utilities. TMIA states that "this information relates to the mental processes of TMIA attorney and requests information on statements of potential TMIA witnesses." TMIA asserts the work product privilege.

TMIA's response and objection are again frivolous. The work product privilege applies to discovery of documents. See discussion of Interrogatory No. 3 above. It provides "no shield against discovery by interrogatories or deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts. . . ." C. Wright & A. Miller, 8 Federal Practice and Procedure, § 2023 at 194

(1970). 10 C.F.R. §2.740(b)(1) specifically permits discovery of the "identity and location of persons having knowledge of discoverable matter." The names of such persons are never privileged. Harrison v. Prather, 404 F.2d 267, 273-74 (5th Cir. 1968); Edgar v. Finley, 312 F.2d 533, 535-36 (8th Cir. 1963).

Accordingly, Licensee moves the Board to compel TMIA to respond fully to Licensee's Interrogatory No. 13.

#### Interrogatory No. 19

In Interrogatory No. 19, Licensee asked TMIA to identify individuals who provided TMIA with any of the documents identified in response to Licensee's previous interrogatories. Although this is a routine general interrogatory, TMIA objects on the grounds of irrelevance and work product privilege.

With respect to relevance, this interrogatory asks for the identity of persons who have or had discoverable documents or knowledge thereof. Such an interrogatory is expressly countenanced under the Commission's Rules of Practice. 10 C.F.R. § 2.740(b)(1). It is unequivocally information that is reasonably calculated to lead to the discovery of admissible evidence. See Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 A.E.C. 457, 462 (1974).

With respect to TMIA's assertion of the work product privilege, see Licensee's discussion of Interrogatory No. 13 above. The work product privilege simply does not apply to an interrogatory requesting the names of persons who may have knowledge

of discoverable matter. Moreover, such information certainly does not reveal "TMIA's counsel's trial preparation and trial strategy;" and TMIA's bald and incredible assertion to the contrary does not satisfy TMIA's burden to establish the existence of the privilege. Seabrook, supra, LBP-83-17, 17 N.R.C. at 495, and cases cited therein.

Accordingly, Licensee moves the Board to compel TMIA to respond fully to Licensee's Interrogatory No. 19.

Respectfully submitted,

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Counsel for Licensee

Dated: September 13, 1984



RELATED CORRESPONDENCE

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion to Compel Responses to Licensee's Second Set of Interrogatories" were served this 13th day of September, 1984, by hand delivery to the parties identified with an asterisk and by deposit in the U.S. mail, first class, postage prepaid, to the other parties on the attached Service List.

*Ernest L. Blake, Jr.*  
Ernest L. Blake, Jr., P.C.

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