September 20, 1983 SECY-83-385 7 m

COMMISSION INTERNAL DISTRIBUTION ONLY

ADJUDICATORY ISSUE

(Commission Meeting)

For: The Commissioners

From: Herzel H. E. Plaine, General Counsel

Subject: MOTION TO QUASH SUBPOENAS IN HARTMAN INVESTIGATION

Discussion: On Septembe , 1983, the NRC Regional Administrato. Region I, issued subpoenas to forty-seven individuals who had been working at Three Mile Island, Unit 2 (TMI-2), prior to the accident at that facility. These subpoenas were issued at the request of OI, which believes that it is necessary to interview these individuals in order to pursue its investigation into the Hartman allegations of leak rate falsification.[1] Those subpoenaed include the shift supervisors, senior reactor operators, reactor operators and others working at TMI-2 prior to the accident who might have knowledge of leak rate test practices. The first of these subpoenas was

[1] By way of background, in early 1980 Mr. Harold Hartman, a TMI-2 control room operator at the time of the accident, alleged that prior to the TMI-2 accident it was common practice for control room personnel at TMI-2 to falsify the results of reactor coolant surveillance leak rate tests. The NRC halted its investigation into these allegations at the request of the Department of Justice in May 1980. On May 27, 1983 the Commission requested OI to resume this investigation.

When OI resumed the investigation, these forty-seven individuals indicated through counsel that they would not voluntarily talk to the NRC about the Hartman allegations because of the ongoing grand jury investigation into the matter.

CONTACT:
Rick Levi, OGC
4-1465

SECY NOTE: This paper is identical to the one advanced to the Commissioners' offices on the evening of September 19. It is to be considered at the Commission meeting scheduled for 9:30 a.m., Wednesday, September 21, 1983.

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returnable on September 19, 1983; the last on October 4, 1983. All were returnable in the Middle District of Pennsylvania in Harrisburg, Pennsylvania.

On September 15, 1983, counsel for the subpoenaed individuals moved to quash forty-five of the subpoenas,[2] arguing that (1) the NRC cannot pursue its own investigation because it has referred this matter to the Department of Justice for possible criminal proceedings, and (2) some of the subpoenas are unreasonable in that they require individuals residing outside of the Middle District of Pennsylvaria to appear in that District.

The attached draft Memorandum and Order denies the Motion to Quash. As explained more fully in that Memorandum, the mere referral of a matter to the Department of Justice for criminal proceedings does not bar a parallel NRC investigation, and in our view there are no special circumstances here which would warrant further postponement of the NRC's investigation.[3] However, we believe the subpoenas of those residing outside Harrisburg

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[2]In the motion to quash, counsel stated that two of the individuals will comply with the subpoenas.

[3]We note the similarity of this matter to the challenge to the subpoenas issued in 1980 in the investigation into information flow on the day of the TMI-2 accident. Counsel in that case also argued that the NRC could not pursue a civil investigation while the grand jury was conducting an investigation. The Commission denied that motion to quash because the civil and criminal investigation involved different matters. CLI-80-22, 11 NRC 724 (1980). The court granted the NRC's request for enforcement of the subpoenas in that case. United States v. McGovern, 87 F.R.D. 590 (M.D. Pa. 1980).

The present case presents a somewhat closer question because

[Footnote Continued]

should be made returnable in the district where each individual resides.[4] The attached order accordingly directs the Regional Administrator to modify the subpoenas for those individuals residing outside the Middle District of Pennsylvania to make them returnable in the district where each such individual resides.

We recommend that the Commission adopt the attached Memorandum and Order. If the Commission does so and the subpoenaed individuals do not comply with the subpoenas, we will request

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[Footnote Continued]

the civil and criminal investigations both involve the same allegations. However, as explained in the attached draft Memorandum and Order we believe the Commission can legally issue the subpoenas in this case as well, and that the Commission should deny the motion to quash.

[4]The NRC's subpoena power under Section 161(c) of the Atomic Energy Act is nationwide. However, Section 233 of the Atomic Energy Act requires the agency to seek enforcement of a subpoena in "any district in which [the] person is found or resides or transacts business." Therefore, since we will have to obtain enforcement of the subpoenas in the district where each individual resides, we believe the subpoenas should also be made returnable in the district where the individual resides. Since only approximately fifteen of the individuals reside outside the Middle District of Pennsylvania, we do not believe this will be unduly burdensome.

the Department of Justice to bring a subpoena enforcement action on our behalf.

Herzel H. E. Plaine
General Counsel

Attachment:
(1) Memorandum and Order
(2) Motion to Quash

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[5] We do not know whether the subpoenaed individuals will comply with the subpoenas if the motion to quash is denied. If they do not, we will have to enforce the subpoenas by bringing actions in the district courts. Since the NRC does not have the authority to enforce its subpoenas in court, we must request the Department of Justice to do so.

We note that it is conceivable that the Grand Jury will complete its investigation before the judicial process of enforcing the subpoenas is complete. Depending upon the nature of the action of the Grand Jury the need for these subpoenas might be mooted. However, we recommend proceeding with the subpoenas because of our lack of information on the status, or inability to predict the action, of the grand jury.

The individuals may comply with the subpoenas if the motion to quash is denied, but may, in appropriate circumstances, take the Fifth Amendment rather than answering the questions. In that case it would be necessary to obtain use immunity from the Justice Department in order to compel answers to the questions.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of GENERAL PUBLIC UTILITIES CORP. (Three Mile Island Nuclear Station, Unit No. 2)	Docket No. 50-320

MEMORANDUM AND ORDER

On September 1, 1983, the NRC Regional Administrator, Region I, at the request of the NRC Office of Investigations, issued subpoenas to forty-seven individuals who had been working at the Three Mile Island, Unit 2 (TMI-2) nuclear facility prior to the accident at that facility on March 28, 1979. The subpoenas called upon each individual to appear and give testimony on specific dates from September 19 through October 4, 1983, concerning his/her knowledge of the facts surrounding the alleged falsification of reactor coolant system leak rate test data at TMI-2.

As explained in more detail below, the Commission has determined that the public health and safety require it to complete its investigation into those allegations without further delay. Since these

individuals indicated through counsel that they would not voluntarily talk to NRC investigators concerning this matter, it was necessary to issue the subpoenas in order to determine the validity of those allegations, whether utility management is implicated by those allegations and whether further action is warranted.

The Commission now has before it a motion to quash the subpoenas on two grounds:[1] (1) that the Commission's referral of this matter to the Department of Justice in 1980 for possible criminal proceedings precludes the Commission from pursuing its own civil investigation during the pendency of the Grand Jury investigation currently under way in the Middle District of Pennsylvania; and (2) that some of the subpoenas are unreasonable in that they require persons residing outside of the Middle District of Pennsylvania to appear in that District. For the reasons discussed below, the Commission has decided to deny the motion to quash, but directs the Regional Administrator to make the subpoenas returnable in the federal judicial district where each individual resides.

I. Background

In May 1979, Mr. Harold Hartman, a TMI-2 control room operator at the time of the accident at TMI-2 in March 1979, alleged that prior to the accident it was common practice for control room personnel to

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[1]Movant in the motion to quash indicated that two of the forty-seven individuals would comply with their subpoenas.

falsify the results of reactor coolant surveillance leak rate tests.[2] The NRC initiated an investigation into this matter in March, 1980. Because of possible criminal implications of these allegations, the NRC initiated discussions with the Department of Justice about this matter while the NRC's investigation was still in progress. At the request of the Department of Justice, the NRC halted its investigation in May, 1980. Since that time the Department of Justice has been investigating this matter via Federal Grand Jury proceedings in Harrisburg, Pennsylvania.

By letter of April 11, 1983, the Commission wrote the Attorney General to inquire about the status of the criminal investigation into Mr. Hartman's allegations. The Department of Justice responded that there was no bar to the NRC pursuing its own investigation, and by

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[2]Mr. Hartman's allegations on leak rate tests can be briefly summarized. The technical specifications in the operating license for TMI-2 establish a maximum rate of one gpm for unidentified leakage from the reactor coolant system. Tests to measure leakage must be taken at least once every 72 hours during operation, and the plant must be shutdown if the leakage rate is exceeded and cannot be limited within four hours. Mr. Hartman alleges that for several months prior to the accident it was difficult to get a leak rate test within the allowable limits, and pursuant to direction from a shift supervisor and a shift foreman he and at least one other operator redid leakage tests until they obtained an acceptable leakage rate. This involved the addition of hydrogen or water to the system in small increments and without recoridng this action in the control room logs. Mr. Hartman also stated that he threw out bad test results, with the knowledge of supervisory personnel, and that he believed that personnel on other shifts and management were aware of his concerns.

Mr. Hartman also alleged that emergency feedwater pump test criteria were altered, and that the estimated control rod positions for attainment of criticality were re-calculated in order to meet procedural requirements. The NRC's current investigation does not involve these two allegations.

letter of May 27, 1983, the Commission notified the Department of Justice that it intended to pursue its own investigation.[3]

The Commission has determined that the public health and safety require that it pursue and complete its own investigation into this matter without waiting further for the Justice Department to complete the criminal investigation. The Commission believes these allegations are sufficiently serious that it must investigate them before they simply become too old to pursue in order to determine whether utility management is implicated by the allegations and whether further civil enforcement action is warranted. The Commission notes in this regard that the allegations relate to the ongoing enforcement proceeding involving Three Mile Island, Unit 1, which has kept that unit shut down since the accident at TMI-2. The Commission believes that relevant portions of the Hartman allegations must be resolved before that proceeding can be completed and a final decision made on whether Unit 1 should be restarted.[4]

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[3]It appears that a misunderstanding may have emanated from the oral communications between the NRC and the Department of Justice concerning whether the Commission was advised at an earlier date that it could proceed with its investigation of the Hartman allegations. As a result, the Department of Justice believed that the NRC understood in October 1981 that there was no objection to its proceeding with its civil investigation. In contrast, the Commission believed that the Department of Justice wished the NRC to continue to delay proceeding with its civil investigation, and the Commission was aware through inquiries from late 1981 through early 1983 that the Department of Justice was continuing its investigation.

[4]The Commission notes that the Appeal Board has reopened that proceeding because of the Hartman allegations. ALAB-738, 17 NRC ___ (August 31, 1983).

Based on the Hartman allegations themselves and the NRC's earlier inquiry into this matter, the Commission has determined that all the individuals subpoenaed may have relevant information bearing on the validity of the Hartman allegations and can therefore contribute to establishing the relevance of these allegations to the proceeding underway and to whether further enforcement action is appropriate. These individuals were familiar with or responsible for conducting the leak rate tests prior to the accident, and would know or have information leading to a determination on whether or not the allegations are true. The NRC cannot conclude its inquiry into this matter without interviewing each of them.

II. Legal Analysis

A. NRC's Authority To Conduct Investigation While Grand Jury Investigation Is Underway

The subpoenas were issued pursuant to Section 161(c) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(c).[5] Movant, citing United States v. LaSalle National Bank, 437 U.S. 298 (1978), argues that "[o]nce an agency has referred a matter to the Department of Justice, thus triggering the criminal process, the agency must cease use of its own investigative authority into the same matter." Motion to Quash at

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[5]Section 161(c) provides that the Commission may "make such investigations ... as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act ... the Commission is authorized by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place."

4.[6] The Supreme Court in LaSalle held that the Internal Revenue Service (IRS) could not use a civil tax-investigation summons once the IRS had recommended the case to the Department of Justice for criminal prosecution. The Court adopted this rule as a "prophylactic restraint" to prevent the broadening of the Justice Department's right of criminal litigation discovery and to prevent infringement on the role of the grand jury as a principal tool of criminal accusation.

The Court in LaSalle based its holding on the specific statutory scheme for the IRS. Under that scheme the IRS' civil authority in essence ceases upon referral of a case to the Justice Department.[7] Thus as a practical matter the IRS would have no authorized purpose for a civil summons after a criminal referral. See SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1378-79 (D.C. Cir. en banc), cert. denied 101 S.Ct. 529 (1980). The NRC's authority to conduct an investigation under the Atomic Energy Act does not cease upon referral of a matter to the Department of Justice, and the Commission therefore does not believe that the rationale of LaSalle applies to the statutory scheme for the NRC.

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[6] Movant maintains that the Commission's awareness of this limit was apparent in CLI-80-22, 11 NRC 724 (1980). The Commission in that case denied a motion to quash because the NRC's investigation involved a different matter than that before the grand jury. The Commission did not address the situation where the parallel investigations involved the same matter.

[7] For instance, upon referral the IRS no longer has the authority to compromise even the civil aspects of a fraud case.

Movant argues, however, that both policy interests relied on by the Supreme Court in LaSalle apply here. Movant maintains that a resumption by the NRC of its investigation would hamper the role of the grand jury as a principal tool of criminal accusation, and that it would improperly broaden the Government's opportunities for criminal discovery.[8]

The Commission disagrees. The NRC's pursuit of its own civil investigation for civil enforcement purposes will not hamper the role of the grand jury. Nor will the NRC's civil investigation broaden the Government's opportunities for criminal discovery, because the grand jury's subpoena powers are as great as, if not greater than, those of the NRC.

The court in SEC v. Dresser Industries, supra, directly addressed these same arguments. In Dresser, the court upheld parallel civil and criminal investigations by the Securities & Exchange Commission (SEC) and Department of Justice, respectively, into the same matter. The Dresser court stated that the reasoning of LaSalle could not be extended to an agency with a wide-ranging mandate to make investigations as

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[8] Movant provides no support for these arguments beyond his assertion that the NRC has already provided the Justice Department with the information it developed during its earlier investigation into this matter. There is no bar to the NRC sharing information with the Justice Department, and doing so does not of itself amount to an improper influence on the grand jury. See SEC v. Dresser, supra at 1383-87. For the NRC to brief the Department of Justice on the information in its possession is "in accordance with the Atomic Energy Act. 42 U.S.C. 2271." CLI-80-22, 11 NRC 724, 728 (1980). See also United States v. Kordel, 397 U.S. 1, 11-12 (1970) (rejecting argument that use of civil discovery to compel answers to interrogatories that could be used to build government's case in a parallel criminal proceeding required reversal of criminal convictions).

necessary to protect the public from violations of the security laws.[9] The court explained that there is no call for a "prophylactic rule" in the case of an SEC investigation. Unlike the IRS, the SEC's authority to issue subpoenas remains undiminished after commencement of grand jury proceedings, and neither of the policy interests discussed in LaSalle were relevant to the SEC investigation at issue in that case: (1) there was no chance of broadening the Justice Department's right to criminal discovery because until an indictment was returned the grand jury had subpoena powers at least as broad as those of the SEC; and (2) any potential infringement upon the role of the grand jury was too speculative and remote "to justify so extreme an action as denying enforcement of this subpoena."[10] Id. at 1384. This discussion in Dresser applies equally well here.

The court in Dresser further explained why fulfillment of the SEC's responsibilities required that the SEC be able to pursue its investigation even if a criminal proceeding were underway:

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[9]The court stated that "the language of the securities laws and the nature of the SEC's civil enforcement responsibilities require that the SEC retain full powers of investigation and civil enforcement action, even after Justice has begun a criminal investigation into the same alleged violations." 628 F.2d at 1379.

[10]Dresser argued in this connection that enforcement of the SEC subpoena would undermine the secrecy of the grand jury, and that the SEC could infringe on the role of the grand jury by interpreting and selectively disclosing part of the subpoenaed information to the grand jury through the Justice Department. The court rejected both of these arguments, noting that the fact that a grand jury has subpoenaed documents does not insulate those documents from other investigations and that it would be inappropriate to presume that the SEC would try to prejudice the grand jury. The court also rejected the suggestion that

[Footnote Continued]

> "Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously.... If the SEC suspects that a company has violated the securities laws, it must be able to respond quickly: it must be able to obtain relevant information concerning the alleged violation and to seek prompt judicial redress if necessary. Similarly, Justice must act quickly if it suspects that the laws have been broken. Grand jury investigations take time, as do criminal prosecutions. If Justice moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted....
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> * * * *
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> Unlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose."

Id. at 1377, 1380.

This rationale clearly applies to NRC investigations. To carry out its public health and safety mandate the NRC must be able to investigate matters expeditiously, regardless of whether there is a parallel criminal investigation into the same matter underway. The United States District Court for the Middle District of Pennsylvania, the only court explicitly to consider LaSalle as it relates to NRC subpoenas, in a series of three opinions upheld the authority of the NRC to conduct an

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[Footnote Continued]

the SEC be barred from providing the Justice Department with information it developed after criminal proceedings began.

investigation even though there was also a Grand Jury investigation underway at the same time.[11]

The court in its first opinion found that the parallel investigations by the NRC and the Grand Jury were not impermissible, observing that there was "no inherent intertwining of functions between the Grand Jury and NRC as one finds with investigations with the Internal Revenue Service and the Department of Justice." 87 F.R.D. at 584. The court concluded that "[w]here an investigation is being conducted for a lawful purpose and the information sought is relevant to the investigation, to stop such investigation at the threshold of inquiry would render substantially impossible an agency's effective discharge of the duties of investigation." Id.

The court in its second opinion, citing NLRB v. Interstate Dress Carriers, 610 F.2d 99 (3rd Cir. 1979), reiterated that there was nothing inherently improper about parallel civil and criminal proceedings. The court, quoting LaSalle, 437 U.S. at 316, found no evidence that the NRC was not "honestly pursuing the goals of [its statute]." 87 F.R.D. at 588. The court also noted that the NRC and the grand jury in that case were investigating different matters, but even if they were "conducting investigations concerning the same matters ... it would be of little or no consequence...." Id at 588.

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[11] United States v. McGovern, 87 F.R.D. 582 (1980); United States v. McGovern, 87 F.R.D. 584 (1980); United States v. McGovern, 87 F.R.D. 590 (1980).

In its third decision, the district court held that there had been no showing that the subpoenas were intended "solely to serve improper purposes." 87 F.R.D. at 591. The court upheld issuance of the subpoenas and commented as follows:

> Petitioner is burdened with the responsibility of establishing sound policy and procedures for the nuclear power industry and for the enforcement of those policies and procedures.... To deny petitioner the opportunity to gather relevant information for these undeniably proper purposes would be to thwart its effort to better execute its responsibilities.... In addition, there is a large and very real public interest in having an expeditious and comprehensive investigation of the Three Mile Island incident, with the expectation that precautions may be taken to prevent a reoccurrence or diminish its seriousness. To allow respondents to unjustifiably delay the NRC investigation works a cognizable prejudice on that public interest.

87 F.R.D. at 593.

The Commission agrees with the rationale of Dresser and the McGovern cases. If the Commission's Congressionally mandated authority to investigate matters touching the public health and safety is to be effectively blocked every time a Grand Jury is convened on the same matter, the Commission will be unduly hampered in carrying out its mandate to protect the public health and safety. As stated by the Supreme Court, "[i]t would stultify enforcement of federal law to require a governmental agency ... invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." United States v. Kordell, 397 U.S. 1, 11 (1970) (footnote omitted). The Commission therefore concludes that the existence of a criminal investigation does not preclude the NRC from conducting its own civil investigation into the matter.

B. Whether There Are Special Circumstances In This Case Which Justify Quashing The Subpoenas

The Commission believes that it is clear from the above discussion that the NRC has the legal authority to conduct a civil investigation at the same time that a grand jury is conducting a criminal investigation. This does not end the inquiry, however. The Commission must also address whether there are any special circumstances in this particular case such that proceeding with parallel investigations would demonstrably prejudice substantial rights of the investigated parties.

The court in SEC v. Dresser Industries, Inc., supra, explained that while ordinarily civil and criminal actions can proceed simultaneously, a court may in its discretion stay civil proceedings, postpone civil discovery or impose protective orders or conditions when required in the interests of justice. The court noted that the strongest case for taking such action, "[o]ther than where there is specific evidence of agency bad faith or malicious governmental tactics ... is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." 628 F.2d at 1375-76. The court explained that in that type of case "[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." Id. at 1376 (footnote omitted). The court, noting that it might defer noncriminal proceedings in such circumstances if such delay "would not seriously injure the

public interest," found the case before it to be "a far weaker one for staying the administrative investigation." Id. The court noted that no indictment had been returned, no Fifth Amendment privilege was threatened, Rule 16(b) had not come into effect, and the SEC subpoena did not require any revelation of the basis for any defense. The court therefore declined to stay the civil proceedings.

The Commission believes that the present case, like Dresser, presents a weak case for staying the administrative investigation. No indictment has been returned, no Fifth Amendment privilege is threatened, Rule 16(b) has not come into effect, and the NRC subpoenas do not require the revelation of the basis for any defense.

Regardless of these conditions, moreover, the Commission believes that its public health and safety mandate under the Atomic Energy Act requires that it pursue its own civil investigation into this matter without further delay. It is now well over four years since Mr. Hartman first made these allegations, and over three years since the NRC stopped its own investigation in deference to the grand jury's inquiry. The Commission believes that these allegations are serious enough that it must determine their validity, whether utility management is implicated by the allegations and whether they warrant further enforcement action. The Commission notes in this regard that Three Mile Island, Unit 1 has been shut down since the accident at Unit 2 while the NRC conducted a full adjudicatory proceeding on whether Unit 1 could be operated safely and should be allowed to resume operation. The Licensing Board in that proceeding found in favor of restart, but noted that its decision was subject to the Hartman allegations. LBD-81-32, 14 NRC 381, 557. The

Appeal Board has recently reopened the proceeding on the Hartman allegations, noting as follows:

> "One Grand Jury has expired without action, and another is still sitting, with no prospect of imminent decision. In short, by next year we may be exactly where we are today -- 'square one."... [T]oo much valuable time has been wasted. Evidence and witnesses' memories are getting stale.... It simply is time to move forward on the Hartman allegations, as our independent responsibility to protect the public health and safety under the Atomic Energy Act requires."

ALAB-738, 17 NRC ___, Slip Op. at 23-25 (August 31, 1983) (footnote omitted).

The recollections of the individuals may be fading with the passage of time, and delaying the NRC's investigation any longer could seriously prejudice the NRC's ability to resolve this matter. The Commission believes that it must act now to resolve this matter, and that the only way to resolve it is to interview all those who may have knowledge concerning Mr. Hartman's allegations. The individuals subpoenaed include the shift supervisors, senior reactor operators, reactor operators and others who might be familiar with leak rate testing at TMI-2 prior to the accident. Unless and until the NRC interviews each of these individuals, it will be unable to resolve this matter.[12] The Commission has therefore decided to deny the motions to quash.

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[12] The Commission notes that even interviewing the forty-seven individuals will not conclude the investigation into this matter. There are other individuals, including those in management, who will also have to be interviewed. It is necessary to interview these forty-seven individuals first in order to lay the groundwork for the later interviews.

III. Reasonableness Of Subpoenas For Those Residing Outside Of The Middle District of Pennsylvania

The Commission agrees with movant under the particular circumstances of this case that it would be more reasonable to have the subpoenas for individuals residing outside the Middle District of Pennsylvania made returnable for the federal district in which each individual resides.

The Commission therefore directs the Regional Administrator, Region I, to revise the subpoenas for those individuals residing outside the Middle District of Pennsylvania to make them returnable jn the District where each individual resides. The Regional Administrator is also directed to set forth new times for the return of those subpoenas whose date has expired while the motion to quash was pending.

It is so ORDERED.

For the Commission

SAMUEL J.CHILK
Secretary of the Commission

Dated at Washington, D.C.
this _____ day of September, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Dkt. No. 50-289
(Three Mile Island Nuclear Station, Units 1 and 2)	)	Dkt. No. 50-320
	)	

MOTION TO QUASH SUBPOENAS
AND FOR EXPEDITED CONSIDERATION

Introduction

On or about September 1, 1983, the Regional Administrator, Region I, at the request of the Office of Investigations, issued subpoenas to a number of employees and former employees at the Three Mile Island Nuclear Station. These subpoenas, all of which were made returnable at a motel room near Harrisburg, Pennsylvania, were issued for the purpose of investigating the alleged falsification of reactor coolant system leak rate test data at TMI-2. The same allegations were referred to the Department of Justice by the Nuclear Regulatory Commission ("the Commission") in 1980 and are at present the subject of inquiry by a Grand Jury of the United States District Court for the Middle District of Pennsylvania.

Under §2.720(f) of the Commission's Rules of Practice, 10 C.F.R. §2.720(f) (1983), the Commission may quash a subpoena that is unreasonable. For the reasons stated in this Motion, the subpoenas issued to Movants (listed in Appendix A) are improper and unreasonable and should be quashed.[1/]

Argument

I.

THE COMMISSION MAY NOT INVESTIGATE THE HARTMAN ALLEGATIONS AFTER THEIR REFERRAL TO THE DEPARTMENT OF JUSTICE.

The subpoenas demand testimony and documents for an investigation of statements made to Commission inspectors by Harold Hartman, a former control room operator at TMI-2, in interviews following the March 1979 accident at that facility. Mr. Hartman alleged that certain control room operators may have falsified the results of reactor coolant system leak rate tests at TMI-2, in violation of technical specifications and operating procedures.

1/ The Commission is advised that Ivan Porter and Jack Garrison, whom we represent, will comply with the subpoenas issued to them. Because the undersigned are not aware of every subpoena issued by the Commission in this investigation, we have listed all present or former employees at TMI whom we represent. Only those persons listed in Appendix A who have been subpoenaed are Movants.

The Commission pursued the Hartman allegations through examination of documents and records and interviewed a number of Hartman's former co-workers. In March 1980, it informed the Department of Justice of the possibility of a referral for criminal prosecution. That referral was made the following month, and the Commission properly brought its own investigation to a halt.

The Department of Justice has been responsible for investigation of the Hartman allegations since April 1980. A Grand Jury convened in May 1980 by the United States District Court for the Middle District of Pennsylvania interrogated a number of the Movants to determine whether Mr. Hartman's charges were true. Although that Grand Jury was discharged in October 1981, before it had completed investigation of the Hartman allegations, the Department of Justice never relinquished control of the matter. Instead, another Grand Jury was convened in November 1981, and given at least some preliminary information concerning the work of the May 1980 Grand Jury. Among other things, the November 1981 Grand Jury was subjected to voir dire examination concerning the veiremen's potential bias or prejudice because of the TMI accident. In March 1983, yet another Grand Jury was empaneled in the Middle District of Pennsylvania for the

primary purpose of probing further into the Hartman allegations and other matters involving reactor coolant system leakage at TMI-1 and TMI-2.

The March 1983 Grand Jury investigation, still pursuant to the Commission's referral, continues. The Grand Jury has heard testimony on the matter from virtually all of the Movants here as well as other individuals. We have been advised that at least certain Movants may be recalled before the March 1983 Grand Jury.

In the circumstances, the subpoenas issued by the Regional Administrator must be quashed. Once an agency has referred a matter to the Department of Justice, thus triggering the criminal process, the agency must cease use of its own investigative authority into the same matter. United States v. LaSalle National Bank, 437 U.S. 298, 312 (1978); see also Garden State National Bank v. United States, 607 F.2d 61 (3d Cir. 1979). This "prophylactic restraint" serves two important policy interests: it safeguards the role of the grand jury as a "principal tool of criminal accusation", and it prevents improper broadening of the Government's opportunities for criminal discovery. LaSalle, 437 U.S. at 312-13.

Both interests are at stake here. The March 1983 Grand Jury is in the midst of an active investigation of

the Hartman allegations and other aspects of reactor coolant system leakage determinations at TMI-1 and TMI-1, the same allegations that the Office of Investigations would now pursue. The grand jury "has always occupied a high place as an instrument of justice in our system of criminal law . . . ." United States v. Sells Engineering, Inc., 103 S. Ct. 3133, 3137 (1983). Its process must remain unhampered by the reintrusion of an agency that has relinquished investigatory control of a matter, as the Commission did here over three years ago.

Furthermore, resumption of the Commission's inquiry into allegations with respect to reactor coolant system leakage risks circumvention of the limits on criminal discovery required by fundamental fairness and respect for individual rights. As the LaSalle Court observed, effective use of information obtained in an agency's civil investigation "would inevitably result in criminal discovery." United States v. LaSalle National Bank, 437 U.S. at 312 (emphasis added); see also United States v. Sells Engineering, Inc., 103 S. Ct. at 3138. Virtually all Movants here have been questioned at least once and remain subject to further interrogation about the Hartman allegations by the March 1983 Grand Jury. The Government's criminal discovery should not be impermissibly expanded, and Movants'

rights should not be put at risk, by renewed Commission inquiry on precisely the same subject.

The communication between members of the Commission's Staff and the Department of Justice that has occurred since the Commission's referral of the Hartman allegations demonstrates the wisdom of the LaSalle prophylactic rule. According to a list received in response to a Freedom of Information Act request by Movants' attorneys, staff representatives met with personnel of the Middle District of Pennsylvania United States Attorney's Office on June 28, 1983.[2/] A letter from R.K. Christopher to James West, the First Assistant United States Attorney responsible for the March 1983 Grand Jury investigation, followed on July 5 and enclosed a "cataloged version of material received from T.T. Martin concerning Hartman." A subsequent memorandum from Mr. Christopher to Mr. Martin discussed "material developed for DOJ [the Department of Justice] in support of Hartman investigation." Further exchanges of information will "inevitably result", contrary

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2/ A copy of the list of some of documents responsive to the request is attached as Appendix B. The Commission's failure to produce the listed documents themselves and deletion of information on the list prevent detailed discussion here.

to the instruction of LaSalle, if the subpoenas are not quashed.

In recognition of this danger, the Commission properly terminated its investigation of the Hartman allegations in 1980. The Commission's awareness of the limits on its investigative powers after referral of a matter to the Department of Justice was apparent in its 1980 decision. In re Metropolitan Edison Company, 11 N.R.C. 724 (1980). There the Commission refused to quash subpoenas issued to some of the Movants here only because the Commission then sought to investigate matters "wholly separate and distinct" from those before the 1980 Grand Jury. Id. at 728. The current resurrection of the Hartman allegation investigation, through the Office of Investigations, apparently arises from a letter to Chairman Palladino from Lowell D. Jensen, Assistant Attorney General in charge of the Criminal Division, stating Mr. Jensen's belief that the Commission was free to proceed with its inquiry.3/

3/ The Commission has failed to respond in a timely fashion to a Freedom of Information Act request for a copy of this letter. Movants learned of the letter through an account in a newspaper to which the letter was apparently available. Movants are confident that the correspondence demonstrates that the Office of Investigation intends to inquire into the same matters being investigated by the Grand Jury, and that Chairman Palladino requested advice from Mr. Jensen as to whether that was appropriate.

Based on press reports of Mr. Jensen's letter, the position taken by the Criminal Division flatly contradicts the Supreme Court's prophylactic standard defined in LaSalle. Having set the criminal process in motion by its referral to the Department of Justice, the Commission must quash the subpoenas issued to Movants. The Commission need only delay its investigation until the March 1983 Grand Jury completes its inquiry and any further related activity by the Department of Justice has ceased. Deference to the criminal process will protect both the Grand Jury and Movants here, and confine the Government's investigation to its proper sphere.

II.

THE COMMISSION MAY NOT COMPEL THE PRESENCE OF MOVANTS RESIDING BEYOND THE JURISDICTION OF THE HARRISBURG COURT.

The Commission has statutory authority to issue subpoenas returnable at any place in the United States and to make nationwide service of process. 42 U.S.C. § 2201(c) (1976). However, its authority does not give it power to compel the presence of a witness whose subpoena is made returnable beyond the limits of the federal judicial district in which the witness is found, resides, or transacts business. 42 U.S.C. § 2281 (1976).

All of the subpoenas issued by the Office of Investigations purport to be returnable in Harrisburg, Pennsylvania. Movants here reside in several different states and several different judicial districts. A number of the Movants reside beyond the jurisdiction of the United States District Court for the Middle District of Pennsylvania. Since the Commission cannot compel their presence in Harrisburg as demanded in the subpoenas through enforcement actions in the Middle District of Pennsylvania, the Commission should quash these subpoenas on grounds of unreasonableness.

In any event, it is plainly unreasonable to require Movants who do not live in the vicinity of Harrisburg to travel there. Many of these Movants are licensed operators at other commercial nuclear facilities or are employed in other, equally important industries. No group of employees in the history of this Nation has been subjected to the necessity to give testimony on as many occasions as have Movants. Some have appeared four times or more to give testimony before various Grand Juries and have testified on numerous other occasions in judicial, legislative, and administrative hearings since the accident. In the circumstancs, the Commission, with Regional Offices in several part of the country, should take testimony (if

at all) in reasonable proximity to the place of Movants' residence or employment. The Commission followed this practice during its "information transfer" investigation in 1980, sending its representatives to Florida and Pittsburgh to interview persons then residing in those places. After the number of times these Movants have been required to appear to give testimony, it would be plainly unreasonable to require them to travel for the convenience of the Office of Investigations.

For example, certain Movants are employed at commercial nuclear power plants in California. If required to testify in Harrisburg, each such Movant will be away from his place of employment for at least three days (including one day for travel in each direction). It would be far more appropriate to interview such persons in California, with minimal disruption of their present employment and the safety of the plants where they now work.

Conclusion

For the foregoing reasons, the subpoenas should be quashed. Because the subpoenas are returnable in the near future, expedited consideration of this Motion is requested.

Respectfully submitted,

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September 15, 1983

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Bernard G. Smith
George J. Troffer
Ronald Phillip Warren, Sr.
Lynn O. Wright
William H. Zewe

Material re: I-83-010

APPENDIX B

August 23, 1983 memo to Ben B. Hayes Subject: Request for Subpoenas - Investigati I-83-010 (Three-Mile Island Unit 2/Alleged Falsification of Reactor Coolant System Leak Rate Tests)

August 5, 1983 memo to R. K. Christopher from T. T. Martin Subject: Material developed for DOJ in support of Hartman Investigation

July 13, 1983 memo to William J. Dircks from Nunzio J. Palladino Subject: B&W Assessment of EDS Nuclear Analysis

July 11, 1983 memo to file from R. K. Christopher Subject: Status of Interviews Concerning the falsification of leak rate test data at Three Mile Island Unit 2

July 7, 1983 memo to file from Ben B. Hayes Subject: TMI-Hartman

July 5, 1983 note to Pete Baci - Attaching conversation record (w/ Henry Myers on July 5, 1983 at 2:00 PM)

July 5, 1983 letter to James West from R. K. Christopher Subject: Enclosing cataloged version of material received from T. T. Martin concerning Hartman.

June 3, 1983 memo to James J. Cummings from Victor Stello, Jr. Subject: Hartman Allegations

Conversation Record dated July 6, 1983 3:00 PM [ ] Subject: Hartman Investigation

Conversation Record dated June 28, 1983 at 11:00 AM [ ] Subject: Meeting with U.S. Attorney's office

July 7, 1983 letter to Ben B. Hayes from [ ] Subject: Requesting copies of statements

Draft outline of procedures in conducting investigation

August 19, 1983 memo to Fred Combs from R. K. Christopher Subject: Hartman Investigation Tapes (Numbers 254 and 255)

June 24, 1983 memo to R. K. Christopher from T. T. Martin Subject: Material developed for DOJ in support of Hartman Investigation

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Dkt. No. 50-289
(Three Mile Island Nuclear Station, Units 1 and 2)	)	Dkt. No. 50-320

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 15th day of September, 1983, a copy of the "Motion To Quash Subpoenas And For Expedited Consideration" by first-class mail, postage prepaid and properly addressed to the following persons:

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