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October 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION OF EDWIN ZEBROSKI
TO QUASH SUBPOENA AND SUBPOENA DUCES TECUM
OR, IN THE ALTERNATIVE, TO MODIFY SAME

Dr. Edwin Zebroski hereby moves to quash a subpoena and a subpoena duces tecum issued to him by the Licensing Board on October 12, 1984. In the alternative, Dr. Zebroski moves to modify those subpoenas.

Background

The background of this matter is set forth correctly in "Licensee's Motion to Quash Subpoena and Subpoena Duces Tecum to Edwin Zebrowski [sic]", dated October 17, 1984. Dr. Zebroski adds only that the description of the telephone call between him and Ms. Bernabei in Licensee's Motion is correct.

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The Relevant Legal Standard

The Commission's Rules of Practice provide, in 10 C.F.R. § 2.720(f) (1984), that:

> On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may: (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms.

Dr. Zebroski contends that the subpoenas issued to him are unreasonable and require evidence not relevant to any matter in issue, and for that reason should be quashed.[1/]

1/ Dr. Zebroski does not contend that his testimonial subpoena is technically deficient. Dr. Zebroski was given his witness and mileage fees by counsel for TMIA. See 10 C.F.R. § 2.720(d) (1984). However, the subpoena duces tecum purportedly would require Dr. Zebroski to appear at Ms. Bernabei's office on November 1, 1984 with all documents responsive to the subpoena. The subpoena is technically deficient for failure to provide Dr. Zebroski with any witness and mileage fees for that appearance. In addition, as discussed infra, the Commission lacks the legal authority to compel Dr. Zebroski to travel to Washington, D.C. from California for any purpose. Thus, Dr. Zebroski agrees with Licensee that his subpoena duces tecum is technically deficient. Compare Licensee Motion at 5.

The Testimonial Subpoena is Unreasonable

Dr. Zebroski joins Licensee in contending that TMIA's counsel's conduct in telephoning him directly was unreasonable. While the undersigned did not represent Dr. Zebroski at the time of the telephone call between him and Ms. Bernabei,[2/] the spirit of the Code of Professional Responsibility supports Licensee's position that it was inappropriate to call Dr. Zebroski directly. See D.C. Bar "Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Committee" at 35 (Disciplinary Rule 7-104). While Dr. Zebroski was not represented by Mr. Blake or Shaw, Pittman, Potts & Towbridge, the fact that Licensee was sponsoring his testimony should have caused Ms. Bernabei to deal with Dr. Zebroski only through Mr. Blake or other attorneys in his firm.

In any event, during Dr. Zebroski's stay in Washington, D.C., he is available only on the evening of November 13. Licensee has demonstrated that holding the

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2/ The undersigned were asked to represent Dr. Zebroski on October 22, 1984.

deposition that evening--the night before the hearings are to begin--is inappropriate. Dr. Zebroski joins in that position, not because of his own schedule, but because he believes that Licensee counsel should be present for his deposition. No other date during his stay in Washington, D.C. is convenient for Dr. Zebroski. TMIA should not, in any event, be entitled to profit based on its knowledge of his schedule because of the inappropriate behavior of its counsel in contacting Dr. Zebroski directly.

Dr. Zebroski therefore suggests that the deposition be conducted between October 24, 1984 and October 29, 1984, or between November 5, 1984 and November 10, 1984, in Palo Alto, California, at his place of business. He does not plan to be in the East before November 11, 1984, but would make himself available in Palo Alto during either of those two periods. Conducting the depositions in Palo Alto would also be convenient for Dr. Zebroski, because of the enormous number of documents that have been subpoenaed (see infra). In any event, unless he will in fact be present in the place set for a deposition (which is true only during November 11-15), Dr. Zebroski cannot be made to travel outside of the county where he lives or works, or 40 miles from the place he is served, to appear at a civil deposition. See Rule 45(d)(2) of the Federal Rules of Civil Procedure; see also Illinois Power

Company (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 N.R.C. 27, 33 (1976) (parallel between NRC discovery rules and those contained in the Federal Rules of Civil Procedure).

Dr. Zebroski does not believe that TMIA's anticipated argument[3/] that it should not have to bear the expense of travelling to California is entitled to any weight. Counsel is unaware of any authority to compel a witness to travel (a) beyond 40 miles from the place of service, or (b) within the county where the witness lives or works, for purposes of a civil deposition.[4/] It is simply a function of the American legal system that each party must bear its own litigation expenses. Neither Dr. Zebroski nor his employer are willing to pay for Dr. Zebroski's travel to accomodate TMIA.[5/]

Other discovery procedures are available to TMIA without the necessity of incurring the expense of travel to California. As Licensee suggested, depositions by written

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3/ Mr. McBride has discussed this matter with Ms. Bernabei and she has indicated that she does not believe TMIA should have to travel to California to conduct Dr. Zebroski's deposition, due to the expense of travel.

4/ In contrast, grand juries and courts in criminal cases can compel witnesses to travel to the grand jury or courtroom from anywhere in the Nation.

5/ Dr. Zebroski's employer is also unwilling to have him travel to the East Coast for this deposition because of the loss of his valuable services during the travel time.

interrogatories are an economical alternative to the oral deposition procedure that TMIA has sought. However, based on the limited nature of Dr. Zebroski's direct testimony, Dr. Zebroski seriously questions the necessity of taking his deposition in any fashion.

For the foregoing reasons, and those stated by Licensee, Dr. Zebroski believes that his testimonial subpoena should be quashed, or modified to provide that the deposition can only be taken between October 24-29 or between November 5-10 in Palo Alto, California. However, if the Licensing Board does not quash or modify the subpoena in that fashion, Dr. Zebroski does not wish to be the cause of any delay in the remanded hearings. Therefore, he opposes TMIA's suggestion that his deposition be the cause of any delay in the hearings. See TMIA's "Response to Licensee's Motion to Quash Subpoena and Subpoena Duces Tecum to Edwin Zebrowski [sic]", filed October 22, 1984, at 1-2.

The Subpoena Duces Tecum Is Unreasonable

The subpoena duces tecum is plainly unreasonable. It asks for "all" documents in three categories, which counsel for Dr. Zebroski are informed amounts to approximately 50,000-100,000 pages or more of material. See Illinois Power Co. (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4

N.R.C. 27, 34 (1976) (blanket request for production of all documents which are relevant and relate to the subject matter of an examination is obviously without merit, citing 4A Moore's Federal Practice, 2d ed., ¶34.07). The requests apply to the entire period between March 28, 1979 and today, and do not purport to be limited to the subject matter of Dr. Zebroski's direct testimony.

Almost all of the documents sought in the subpoena are irrelevant to Dr. Zebroski's testimony. Furthermore, virtually all of them came from GPU, and should have been sought from GPU.

Dr. Zebroski suggests that a reasonable document request would be confined to documents pertaining to the period between March 28, 1979 and April 3, 1979, to cover the period of time conceivably relevant to the Dieckamp mailgram issue. Dr. Zebroski would be willing to produce those documents.[6/] Alternatively, TMIA could await Dr. Zebroski's prepared testimony and Dr. Zebroski will voluntarily produce any

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6/ We understand that TMIA subpoenaed these documents before it knew what Dr. Zebroski's direct testimony would involve, and that, now that it has some idea of that testimony, it would agree to reduce the scope of the documents sought in the subpoena substantially.

documents in EPRI's possession or control that he will rely on in his testimony.[7/]

Conclusion

The Licensing Board should quash the testimonial subpoena issued to Dr. Zebroski as unreasonable. If the Licensing Board does not quash the subpoena, it should modify it to provide that the deposition may take place only in Palo Alto, California on a work day between October 24-29, 1984, or on a work day between November 5-10, 1984. If the subpoena is not quashed or so modified, however, Dr. Zebroski will obey it rather than be the cause of any delay in the remanded hearings.

The subpoena duces tecum is plainly unreasonable and should be quashed or modified to provide either (1) that documents that came into existence during the relevant time period (March 28, 1979 to approximately April 3, 1979) must be produced, or (2) that only documents that Dr. Zebroski will rely on in his direct testimony must be produced. If for any reason the subpoena duces tecum is not quashed or modified to

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7/ We note that by letter dated October 22, 1984, Mr. Lewis, counsel for Licensee, has informed Ms. Bernabei that the documents used by Dr. Zebroski in preparing his testimony have been placed in Licensee's Discovery Room.

drastically reduce the number of documents that must be produced, Dr. Zebroski hereby respectfully requests a stay of the Licensing Board's ruling to permit an emergency appeal to the Appeal Board, because of the impossibility of compliance.[8/]

Respectfully submitted,

Harry H. Voigt

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8/ A Licensing Board order granting discovery against a third party is a final order and may be appealed. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-122, 6 A.E.C. 322 (1973). To preserve the right to appeal from such an adverse ruling, counsel are entering a special appearance for Dr. Zebroski. See Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 N.R.C. 85 (1976).

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NOTICE OF SPECIAL APPEARANCE
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Basis of Eligibility: Admitted to District of Columbia Court of Appeals

Michael F. McBride
MICHAEL F. McBRIDE

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CERTIFICATE OF SERVICE

I hereby certify that I have served, this 24th day of October 1984, a copy of the foregoing Motion and Notices by hand delivery on those persons whose names are marked with an asterisk and on all others by first-class mail, postage prepaid, and properly addressed to the following:

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