UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In The Matter Of METROPOLITAN EDISON COMPANY, et al. (Three Mile Island, Unit 1)	:	Docket No. 50-289 (Restart)

BRIEF OF CONSUMER ADVOCATE OF PENNSYLVANIA IN SUPPORT OF CONSUMER ADVOCATE'S PETITION TO SEEK NRC FUNDING FOR INTERVENOR WITNESSES

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Dated: December 3, 1979

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I. STATEMENT OF THE CASE

The immediate action is an adjudicatory proceeding before the Atomic Safety and Licensing Board (ASLB or Board), investigating various issues relating to the possible restart of the Three Mile Island Unit 1 (TMI Unit 1), which has not operated since March of 1979, due to the occurence of an accident at the adjacent twin reactor, TMI Unit 2, and Order of the Nuclear Regulatory Commission (NRC or Commission) dated July 2, 1979.

On August 9, 1979 the NRC ordered that the facility remain in a cold shutdown condition until completion of certain "short term" actions by Metropolitan Edison (Met-Ed or Company), the plant operator, and resolution of various concerns described in that Order. The NRC designated the ASLB to conduct a hearing on these issues. Numerous citizen groups filed petitions to intervene, including the Chesapeake Energy Alliance (CEA), the Environmental Coalition on Nuclear Power (ECNP) and the Anti-Nuclear Group Representing York (ANGRY), and several state agencies, including the Office of Consumer Advocate of Pennsylvania (OCA), filed petitions for leave to participate.

In its Order of August 9, 1979 this Honorable Commission stated that it would, at a future date, consider whether it could or should grant financial assistance to parties seeking to address the psychological distress which might be caused to the surrounding community by a restart of TMI Unit 1. CEA and several other intervenors, due to a severe lack of resources, requested NRC funding to assist them in presentation of their case and in order to offset the disadvantage caused by such inadequate resources. ANGRY moved that the ASLB certify to the NRC the question of financial assistance on all issues in the immediate action, not merely psychological distress.

The ASLB, by Memorandum and Order issued October 15, 1979, denied CEA's request for funding on the grounds that this Commission had preempted consideration of this issue by a previously issued policy statement[1] and by limiting consideration of possible funding to the psychological distress issue. In essence the ASLB ruled that it was not the proper authority to consider the issue. The Board, on identical grounds, also refused ANGRY's request that the intervenor funding issue be certified to this Commission, by Memorandum and Order issued October 31, 1979.

The Consumer Advocate of Pennsylvania then filed a "Petition to Seek NRC Funding for Consumer Intervenors to Finance Witness Expenses" with this Honorable Commission, and requested that the NRC hear and rule upon this Petition inasmuch as the ASLB stated that it was without discretion or authority to approve funding of intervenor witnesses on any issue other than psychological distress, or, alternatively that the NRC delegate to the ASLB the authority to grant such funding. The NRC legal staff, on November 21, 1979, filed a response in opposition to the Consumer Advocate's Petition.

This Brief is filed as an answer to the staff's response and in furtherance of the Consumer Advocate's belief that funding of intervenor witnesses is necessary in the instant proceeding and that this Honorable Commission is the proper party to adjudicate the issue.

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1 In The Matter of Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceeding), CLI-76-23, Docket No. PR-2, 4 NRC 494, November 12, 1978. (Hereinafter NRC Financial Assistance)).

II. ISSUES PRESENTED

A. WAS IT PROPER PROCEDURE FOR THE CONSUMER ADVOCATE TO FILE A PETITION REQUESTING FUNDING OF INTERVENOR WITNESSES BEFORE THE NUCLEAR REGULATORY COMMISSION?

B. MAY THE NUCLEAR REGULATORY COMMISSION PROVIDE FUNDING FOR EXPERT WITNESSES, ENABLING THEM TO PROVIDE TESTIMONY WHICH IS NECESSARY AND RELEVANT BEFORE THE NUCLEAR REGULATORY COMMISSION?

C. IS FUNDING OF OUTSIDE EXPERTS NECESSARY WHERE THE NUCLEAR REGULATORY COMMISSION STAFF EXPERTS MAY BE UNABLE TO CREDIBLY AND COMPETENTLY ADDRESS THE ISSUES PRESENTED, WHERE THE PUBLIC PERCEPTION OF THE NUCLEAR REGULATORY COMMISSION IS LARGELY NEGATIVE, AND WHERE THE CITIZEN VIEWPOINT MAY NOT OTHERWISE BE PRESENTED?

III. DISCUSSION

A. IT WAS PROPER PROCEDURE FOR THE CONSUMER ADVOCATE TO FILE A PETITION REQUESTING FUNDING OF INTERVENOR WITNESSES BEFORE THE NUCLEAR REGULATORY COMMISSION.

1. It Is Erroneous For the Nuclear Regulatory Commission Legal Staff To Claim That the Consumer Advocate of Pennsylvania, Who Has A Statutory Duty To Protect and Represent the Interests of Consumers, May Not Support the Rights of Other Consumer Intervenors In This Case.

The Office of Consumer Advocate (OCA) is an agency of the State of Pennsylvania and is participating in the above-captioned action under 10 CFR §2.715(c). The OCA was created by the Pennsylvania General Assembly in 1976 as an independent state agency authorized to represent the "interest of consumers" before the state and federal regulatory commissions. The Consumer Advocate, by statute, has broad discretion to define and interpret that phrase.[2] The Consumer Advocate has determined, in the particular instance of the recent events at Three

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2 71 Pa. C.S.A. §309-4.

Mile Island, that the interest of consumers as represented by the Consumer Advocate may extend to health and safety issues as well as economic issues, and, further, that the health and safety issues presented by the immediate action are inextricably tied to the economic condition of Met-Ed.3

The intervenor groups, which have requested or may request funding for witness expenses, are consumers and it is completely proper for the Consumer Advocate to support their rights in the matter of funding. Further, the Consumer Advocate believes that all Pennsylvania consumers will benefit by NRC funding of intervenors witnesses. The Consumer Advocate is supporting the rights of his client and, thereby, fulfilling his statutory duty. The situation is completely different from that of a private party acting in the interest of another. The General Assembly of Pennsylvania has created the OCA to represent consumers and it would be inappropriate for this Honorable Commission to deny the Consumer Advocate authority to fulfill his statutory mandate.

Further, the precedent cited by the NRC staff as support for its theory, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1977), is irrelevant to the proposition for which the staff claims it stands. The issue in that case was standing to intervene only.

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3 See: "General Statement of Pennsylvania Office of Consumer Advocate Regarding Petition For Leave to Participate As An Interested State Agency", October 22, 1979, filed with the ASLB in the instant proceeding.

2. It Is Erroneous For The Nuclear Regulatory Staff to Claim That the Consumer Advocate of Pennsylvania May Not Appeal the Board's Denial of Intervenor Funding To This Commission.

The NRC legal staff correctly states that 10 CFR §2.730(f) precludes interlocutory appeals from rulings of the presiding officer (the ASLB in this instance), unless the presiding officer determines that prompt decision by this Commission is "necessary to prevent detriment to the public interest or unusual delay or expense" and further determines that the ruling should be referred or certified the to the full NRC. However, the staff incorrectly applies 10 CFR §2.730(f) in this instance.

The first sentence in 10 CFR §2.730(f) states the general rule: "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." (Emphasis added.) The ASLB did not rule that funding was not necessary. The Commission, properly asserting its authority as principle and primary agency, refused to delegate authority to the Board to rule on requests for intervenor funding, except on the issue of psychological distress by its Order of August 9, 1979. The ASLB expressly recognized that : "By expressly considering that possible exception [for the isue of psychological distress to the general rule of no intervenor funding] the inference must be drawn that the Commission had considered the possibility of general intervenor funding and decided to limit its consideration to funding on psychological issues." (Emphasis added). The Staff agrees with this inference by the Board. Consideration by the Board of the intervenor funding issue was also preempted by issuance of this Commission's decision in NRC (Financial Assistance).

Therefore, 10 CFR §2.730(f) is inapplicable in this instance because the holding by the ASLB that funding was unavilable was not a ruling at all, but rather an application of a ruling made by this Honorable Commission. It was the action of an agent following the directive of its principal.

The Staff's logic, by which it concludes that the Consumer Advocate followed improper procedure, would foreclose all avenues of appeal of this issue to the NRC, despite the fact that immediate consideration by this Commission is absolutely necessary to permit meaningful participation by intervenors during the course of the above-captioned proceeding. Failure to extend funding will result in irreparable prejudice. The Staff claims that consideration by the NRC is foreclosed unless the Board agrees to certify the issue to the Commission. The Board however, refused the request for certification filed by ANGRY, on the ground that no purpose would be served thereby because this Commission would refuse to make funding available. Therefore, according to the NRC Staff, consideration of this matter by the Commission may not be had.

The issues presented by the recent events at Three Mile Island are unique and of first impression. This Honorable Commission should not allow itself to be foreclosed from openly and publicly considering the various arguments favoring funding of intervenor witnesses on issues other than psychological distress, and intervenors should not be denied the opportunity to know the specific grounds for this Commission's ultimate ruling on this issue.

B. THE NUCLEAR REGULATORY COMMISSION MAY, BY ITS DISCRETIONARY POWERS, MAKE AVAILABLE FINANCING FOR INTERVENOR WITNESSES TO TESTIFY BEFORE THE NUCLEAR REGULATORY COMMISSION.

1. Congress Has Stated That the Nuclear Regulatory Commission Has the Authority to Reimburse Parties Where It Deems Necessary.

In its consideration of the Energy Reorganization Act of 1974 (P.L. 93-438) the Senate included numerous amendments which would have provided this Honorable Commission with express statutory authority to fund intervenors.[4] Although these bills were deleted in conference, the conference committee expressly stated that the Nuclear Regulatory Commission, under the current statutory schema, has authority to provide intervenor funding:

> The deletion of Title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs incurred in the licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to Title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems necessary. (Emphasis added). 5

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4 These amendments were contained in Title V of the Senate version of that legislation. Senator Kennedy introduced S.1791 which provided for direct cost and fee reimbursement to intervenors. Senator Netcalf proposed S.2787 which would require the Nuclear Safety and Licensing Board to provide information and technical assistance to parties and an ability to pay basis. S.2788, also proposed by Senator Metcalf, would have required the disclosure of information relating to safety systems previously protected from the Freedom of Information Act as "propriety".

5 120 Congressional Record at S.18722 (October 10, 1974).

Inasmuch as Congress considered the Atomic Energy Act a sufficient mechanism for the provision of intervenor funding, it determined that it would await the outcome of administrative consideration[6] of the issue and would defer any action until that time.

Subsequently, Senator Kennedy introduced into the Senate a bill entitled "Public Participation in Government Proceeding Act of 1977"[7] (S.270) which will, if enacted, specifically authorize administrative agencies, including the NRC, to dispense public funds to reimburse eligible parties to an agency proceeding for expert witness expenses, attorney's fees and other costs of participation. This proposed legislation is currently pending before the Senate.

In an article recently published by the American Bar Association, Martin Body, Assistant Director for the National Capital Planning Commission, has concluded that passage of S.270 is imminent. "Based on the momentum now represented in Congress it appears that federal agencies will be pushed into a new era of participatory democracy."[8] (Emphasis in original).

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6 The Commission was considering the issue of intervenor funding generically at NRC (Financial Assistance), Docket No. PR-2 and a final order was issued on November 12, 1976, denying intervenor funding.

7 Public Participation in Federal Agency Proceedings Act of 1977, S.270, 95th Congress, 1st Session, 123 Congressional Record 676 (1977). (Hereinafter S.270).

8 Rody, "Governmental Financing of Citizen Participation in Federal Agency Proceedings: A Practitioner's Outline," 31 Administrative Law Review 81, 96.

Therefore, Congress has clearly stated that under the Atomic Energy Act the NRC may, in its discretion, fund intervenor participation, and failing such exercise of discretion by the NRC, Congress may soon provide a statutory mechanism to ensure the availability of such funding.

2 The Nuclear Regulatory Commission Has Broad Discretion To Interpret and Implement The Atomic Energy Act and Possesses Both Express and Implied Authority To Fund Intervenor Experts.

As was established in the proceeding section the NRC has express authority under the Atomic Energy Act of 1954 to fund intervenor witnesses. If this Honorable Commission nonetheless finds, despite substantial reason to do so, that express funding authority has not been granted by Congress, then the Consumer Advocate asserts that such authority may be implied.

Reviewing Courts have consistently held that determinations by administrative agencies are entitled to great deference. This is equally true of an agency's interpretation of its own statute and its powers thereunder.[9]

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9 Volkswagenwerk Aktiengellschaft v. Federal Maritime Commission, 390 U.S. 262, 272, 88 S. Ct. 929, 19 L.Ed.2d 1090 (1968); Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965); Greene County v. FPC, (en banc) supra Footnote 2 at 1239; Chamber of Commerce v. USDA, 457 F. Supp. 216, 221 (D.C. 1978).

In Greene County v. FPC, the Second Circuit declined to require that the Federal Power Commission (FPC) award legal fees to a successful intervenor where that agency had previously refused to do so. Although that court appeared to state that agency authority to fund intervenors must come from Congress, it "placed great weight on the FPC's construction of its statute and on the FPC's explicit distaste for funding intervenors. Id. at 1239 n.2."[10] However, the Second Circuit's refusal to reverse the FPC on the ground that any mandate to disburse funds must come from Congress begs the essential question - may the authority to fund intervenors be implied by an agency which has determined that such participation would be of assistance in fulfilling its enabling act?

In Chamber of Commerce v. USDA the District Court for the District of Columbia held that such authority could be implied by an agency. Federal agencies have "implied power voluntarily to fund the views of parties whose position might otherwise go unrepresented."[11] In

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10 Chamber of Commerce v. USDA, supra footnote 9 at 220-21. The court in Chamber of Commerce v. USDA agreed with the holding in Greene County v. FPC on the ground that compelling an agency to reimburse fees when it believes that it lacks the power of that an intervening party does not deserve reimbursement might be stifle the agency's willingness to allow intervention or to lead to unnecessary intervention by parties more interested in fees than advancing a meritorious viewpoint." Chamber of Commerce v. USDA, supra footnote 9 at 221.

11 Chamber of Commerce v. USDA, supra footnote 9 at 221. The court in Chamber of Commerce v. USDA stated that a finding of implied authority was not contrary to the finding of the Second Circuit in Greene County Planning Board v. FPC, 559 F.2d 1227 (2nd Cir. 1977) that "[t]he authority of a Commission to disburse funds must come from Congress."

that case, the United States Department of Agriculture (USDA) entered into a contract with the Consumer Federation of America (CFA), a consumer advocacy organization, whereby the USDA would finance a CFA study stating the consumers' viewpoint on a proposed regulation. The plaintiffs, various industrial associations, sought to enjoin the USDA from funding or considering the study. Plaintiff's motion for a preliminary injunction was denied.

The court was greatly persuaded by the USDA's finding that consumer testimony was essential to a fair and balanced record and necessary for that agency to carry out its enabling statute. It was upon this fact that Greene County v. FPC was distinguished. "The court gives deference to the agency interpretation of its own statute and cannot say that the interpretation is wrong as a matter of law."[12]

Therefore, the NRC may within its administrative discretion determine that its powers under the Atomic Energy Act of 1954 impliedly include the authority to expend funds to obtain information and testimony not otherwise available.

3 President Carter, By Executive Order, Has Stated That Public Funds Should Be Made Available To Citizen Intervenors By the Nuclear Regulatory Commission.

By Memorandum (herein attached as "Appendix A" and incorporated into and made a part of this Memorandum of Law) dated May 16, 1979 President Carter has directed all Federal Agency heads,

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12 Chamber of Commerce v. USDA, supra footnote 9 at 222; see also: footnote 9 generally.

including this Honorable Commission, to determine their authority, express or implied, to establish a public participation funding program and to assess the need for such a program. President Carter vigorously supports intervenor financing and has appointed a Special Assistant for Consumer Affairs to coordinate a government-wide program of funding.

> I have supported, and will continue to support, legislation to create, standardize, and adequately finance public participation funding programs government-wide. Independent of these legislative efforts, there is a current need for public participation funding and I strongly encourage each department and agency with the requisite authority to institute a public participation funding program.[13]

Therefore, the President of the United States has unequivocally stated that under his executive powers he encourages and will support any effort by this Honorable Commission to provide intervenor funding and will support any legislation designed to require this same end.

4 The Comptroller General of the United States Has Stated That the Nuclear Regulatory Commission May Fund Intervenor Participation.

The Comptroller General has stated that the NRC may fund intervenor participation where such participation can "reasonably be expected to contribute substantially to a full and fair

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13 Memorandum of President James E. Carter For the Heads of Executive Departments and Agencies, May 16, 1979, at page two. "Appendix A".

determination."[14] Thus, this Honorable Commission is assured that the General Accounting Office will not impede any disbursement of funds to intervenors for such a legitimate purpose as to aid in the development of an adequate record in the instant proceeding.

5 Other Federal Regulatory Agencies Have Concluded That, Despite the Lack of Express Congressional Authority, They Are Authorized to Fund Intervenor Participation.

Several federal agencies have concluded that intervenor funding is permissible and even desirable. The Civil Aeronautics Board (CAB) has adopted formal regulations by which individuals or groups representing the interests of the public may be compensated.[15] CAB concluded that such a program of funding was necessary "to assist the Board in making full and fair resolutions of issues presented in its public proceeding..."[16] Similarly, the Consumer Product Safety Commission has promulgated regulations designed to compensate participants in proceedings before it.[17] The Food and Drug

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14 In the Matter of Costs of Intervention-FDA, B-139703, 56 Decisions of Comptroller General of the U.S. 111-115, December 3, 1976. Although this decision was addressed to intervention before the FDA, it is directly applicable to the NRC. Letter of Comptroller General to the Oversight and Investigative Subcommittee of the House Committee on Interstate and Foreign Commerce, May 10, 1976, cited in NRC (Financial Assistance) at 4 NRC 494.

15 14 CFR §304.

16 14 CFR §304.2.

17 43 Fed. Reg. 23562 (1978).

Administration published a proposed rulemaking to provide for payment of attorneys fees and other assistance to hearing participants.[18] The National Highway Safety Administration recently issued a final rule establishing a one year demonstration program of financial assistance, and has issued a proposed rulemaking notice providing for a permanent program of financial assistance.[19]

C. FUNDING OF INTERVENOR WITNESSES IS NECESSARY IN THE IMMEDIATE PROCEEDINGS TO ENSURE A FULL AND COMPLETE RECORD AND TO RESTORE THE PUBLIC CONFIDENCE IN THE NUCLEAR REGULATORY COMMISSION.

Funding of intervenor witnesses in the immediate proceedings would provide this Honorable Commission with information and data regarding TMI Unit 1 which might be otherwise unavailable to it. Presentation of this evidence is essential to ensure a full and complete record, which will represent the viewpoints of all persons affected by operations at Three Mile Island, not merely the opinions of Metropolitan Edison and its parent, General Public Utilities.

All expenditures made by the Company in this case will most probably be paid dollar for dollar by Met-Ed consumers. But consumers themselves and other intervenors have little or no resources for presentation of their case. Without funding, intervenors will be denied an opportunity to meaningfully participate, the evidence presented will be one-sided, and the hearings will be dominated by advocates for the Company. This gross imbalance should be remedied. The Consumer

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18 41 Fed. Regl. 35855 (1976).

19 42 Fed. Regl. 2863 (1977).

Advocate takes no position on which groups and viewpoints should be funded, but rather believes funds should be dispensed to parties who can make a contribution to resolving the issue of whether TMI Unit 1 should be allowed to restart.

If this resource imbalance, which has historically existed in licensing proceedings before the ASLB, is perpetuated in the instant proceedings, the final decision of the Board could be based upon inadequate and untested data and assumptions. It has been suggested that a large but indeterminate extent, the events at TMI Unit 2 in March of 1979 were a function of this imbalance of advocacy. Perhaps, if funding is provided and the various intervenors are, thereby placed in positions approaching, or at least simulating, parity with the Company, there is a greater chance that the Board will be able to render a balanced, fully informed and rational decision, which will be in the public interest.

It is questionable whether the NRC technical staff standing alone will be able to provide a counterbalance to the Company's presentation and assure that the public interest is adequately represented.

> The flaw in "traditional conception of the administrative process" so widely perceived by today's commentators is its assumption that the public interest can be fully served by "disinterested experts" operating independently of interested parties. It is now generally agreed that broadened public participation is needed to add perspectives to the decisional process that may not be available either from an industry respondent or applicant or from an agency staff.[20]

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20 Murphy and Hoffman, "Current Models for Improving Representation in the Administrative Process", 28 Administrative Law Review 391, 393 (1976).

In the case of the NRC staff, this "flaw" is well documented. The Report of the President's Commission on the Accident at Three Mile Island (Kemeny Commission Report), issued on October 30, 1979, is replete with indictments of faulty staff analysis, attitudes and procedures.[21] For example, the Kemeny Commission found that: "insufficient attention has been paid to the ongoing process of assuring nuclear safety"[22] "the huge bureaucracy under the commissioners is highly compartmentalized with insufficient communication among the major offices"[23]; and key management personnel with NRC posses "the old AEC promotional philosophy"[24]. The Kemeny Commission, an independent, objective and disinterested body, concluded: "With its present organization, staff, and attitudes the NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants."[25] (Emphasis added).

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21 See for example: Kemeny Commission Report Findings G.1, G.3, G.5, G.8.c, G.8d., G.10., and G.12.

22 Kemeny Commission Report, supra at 20.

23 Id. at 21.

24 Id. at 21.

25 Id. at 56, Finding G.12.

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Further, the general public perception of the NRC is overwhelmingly negative. Citizens, especially those residing in and around Three Mile Island, resent the impositions of a distant bureaucracy, whom they perceive as uncaring as to their safety and well-being. To a large degree, this disenfranchisement is attributable to the lack of meaningful participation by citizens before the NRC and the ASLB, and could be cured if an attempt was made to solicite technical information and data which represented, in a positive fashion, citizen concerns over plant safety. True, general public testimony has been gathered by various NRC committees and study groups visiting the areas surrounding Three Mile Island, but this information is non-evidentiary and not of a type which will be helpful to the ASLB and this Honorable Commission in adjudicating the difficult and complex technical issues which must be resolved prior to any restart of TMI Unit 1. This Commission should solicit technical information, as presented on behalf of intervenors, which will serve this purpose.

Therefore, it is absolutely necessary for this Honorable Commision to actively search beyond the traditional sources of information, the licensee and the NRC technical staff, and secure expert testimony, by directly funding such experts on the technical issues facing this Commission and the ASLB in order to ensure that the final order issued in this case is the most comprehensive, balanced and fair decision possible. Failure to seek all of the facts available in this case would condemn us to the mistakes of the past.

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D. THE UNDERLYING FACTS AND LAW EMPLOYED BY THIS HONORABLE COMMISSION IN DEVELOPING ITS GENERAL POLICY THAT INTERVENOR FUNDING IS NOT NECESSARY ARE OUTMODED AND NO LONGER VIABLE.

In reaching its conclusion that funding for intervenors was not appropriate in NRC (Financial Assistance), this Honorable Commission placed primary reliance on the opinion of the Comptroller General that intervenors should be funded only where the NRC "determines that it cannot make the required determination" unless such financial assistance is provided to intervenors "whose participation is essential to dispose of the matter before it..."[26] The NRC concluded that: "[g]iven th[e] advanced state of the art in reactor safety the professionalism, depth and experience of our regulatory staff, and the further screening provided by expert committee and board review, we simply are unable to make the determinations set forth in the Comptroller General's standard."[27] This determination is erroneous for several reasons.

Subsequent to this Commission's order in NRC (Financial Assistance) the Comptroller General modified his opinion regarding intervenor financing. If intervenor participation can "reasonably be expected to contribute substantially to a full and fair determination"[28] then, this Commission may fund intervenors. While intervenor expert witnesses might not be absolutely necessary or "essential" to the resolution of the issues presented in under stricter standard, there can be no doubt that such expertise would "contribute

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26 NRC (Financial Assistance), supra footnote 1 at 497.

27 Id. at 503.

28 See Footnote 17.

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substantially to a full and fair determination" in the instant proceedings.

Further, as discussed in section III. B. of this brief, findings made by the Kemeny Commission place serious doubt on the ability of the NRC technical staff to ensure the safe operation of TMI Unit No. 1 and the safety and welfare of the surrounding community. The conclusions contained in the Kemeny Commission Report substantially refute the basic supporting premise of the Commission's decision in NRC (Financial Assistance) regarding the adequacy of the staff presentation to counterbalance the case presented by the licensee or applicant utility. With the failure of this premise, the validity of the ultimate conclusion that funding was not necessary is lost. If the NRC technical staff is unable to adequately perform its function, then information must be solicited from outside sources.

IV. CONCLUSION

For the foregoing reasons, the Consumer Advocate of Pennsylvania respectfully requests that this Honorable Commission approve and provide assistance to intervenors in the above-captioned proceeding who have requested or will in the future request such assistance, for the purpose of retaining experts to submit studies and/or testify on any and all issues raised in the above-captioned action.

Respectfully submitted,

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Norman James Kennard
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Appendix "A"

THE WHITE HOUSE

WASHINGTON

May 16, 1979

MEMORANDUM FOR THE HEADS OF

EXECUTIVE DEPARTMENTS AND AGENCIES

Executive Order 12044 of March 23, 1978, formalized the Administration's commitment to public participation in Federal agency proceedings. Widespread participation can improve the quality of agency decisions by assuring that they are made on the basis of more complete and balanced records.

Experience has shown, however, that citizen groups often find the cost of meaningful participation in agency proceedings to be prohibitive. Many citizen groups are unable to pay the costs of experts and attorneys' fees, clerical costs, and the costs of travel to agency proceedings. As a result, the views and interests of consumers, workers, small businesses, and others often go unrepresented, or underrepresented, in proceedings that may have substantial impacts on their health, safety, or economic well-being.

In recognition of the cost problems faced by many citizen groups, several agencies have established programs to provide financial assistance to persons (1) whose participation in a proceeding could reasonably be expected to contribute to a fair disposition of the issues and (2) who would be unable to participate effectively in the proceeding in the absence of such assistance. These programs have improved agency decisionmaking, and I believe they should be utilized in other agencies.

Accordingly, I direct each Executive Department and Agency to take the following steps:

1. Each department and agency that has not already established a public participation funding program should determine whether it has statutory authority to do so. I note in this regard that the Department of Justice has advised Federal agencies that they may determine for themselves whether they have explicit or implicit authority to fund such programs.

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In the event that an agency concludes that it does not have this authority, it should immediately apprise my Special Assistant for Consumer Affairs of that conclusion and of the grounds upon which it is based.

2. Each department and agency that finds it has authority to establish a public participation funding program should assess the extent of its need for such a program. A preliminary evaluation, as well as a tentative timetable for the development of program regulations, should be forwarded to my Special Assistant for Consumer Affairs within 60 days of the issuance of this memorandum. After appropriate consultation with other White House and Executive Office of the President officials, my Special Assistant will report to me on these evaluations.

I have supported, and will continue to support, legislation to create, standardize, and adequately finance public participation funding programs government-wide. Independent of these legislative efforts, there is a current need for public participation funding and I strongly encourage each department and agency with the requisite authority to institute a public participation funding program. Until new legislation is enacted, however, additional programs of this sort will have to rely upon agency funds already allocated. My Special Assistant for Consumer Affairs and her staff will be available to provide technical assistance and advice regarding the structure and standards of such programs.

Jimmy Carter