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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-320
	)	
(Three Mile Island Nuclear Station, Unit 2)	)	

NRC STAFF'S ANSWER TO JOINT INTERVENORS' APPEAL TO THE COMMISSIONERS FOR REVIEW OF AN APPEAL BOARD DECISION

On August 5, 1978, Joint Intervenors York Committee for a Safe Environment and Citizens for a Safe Environment ("Intervenors"), filed Intervenors' Appeal to the Commissioners for Review of an Appeal Board Decision ("Appeal") pursuant to 10 CFR § 2.786. Therein, Intervenors seek reversal, in part, of the presiding Atomic Safety and Licensing Appeal Board's ("Appeal Board") decision in the instant proceeding, ALAB-486, issued on July 19, 1978. Intervenors specify those issues addressed in ALAB-486 on which they seek Commission review: (1) the aircraft crash issue, (2) the evacuation preparedness - emergency planning issue, and (3) denial of funding for Intervenors in this proceeding (Appeal, p.2).[1/] With respect to the aircraft crash issue, Intervenors are appealing the Appeal Board's decision only insofar as it permits continued operation of the Three Mile Island Nuclear Station, Unit 2 during the pendency of the reopened evidentiary hearing on this issue before the Appeal Board (Appeal, pp.2, 3). In addition, they request Commission consideration of the Appeal Board's resolution of the

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1/ On June 13, 1978, Intervenors filed a request for Commission review of ALAB-480, which addresses the Table S-3/radon issue, and is currently pending before the Commission.

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issue raised by Intervenors on the Price-Anderson Act (Appeal, p.8).[2/]

For the following reasons, the NRC Staff ("Staff") opposes Intervenors' Appeal and urges that it be denied.

I. BACKGROUND

On December 19, 1977, the presiding Atomic Safety and Licensing Board ("Licensing Board") issued an Initial Decision[3/] resolving matters in controversy in connection with the application for an operating license for the Three Mile Island Nuclear Station, Unit 2 ("TMI-2"), and determining all matters appropriately considered in connection with the construction permit for that facility pursuant to 10 CFR Part 50, Appendix D, Section C (which, by virtue of the timing of this facility, was applicable). Among those issues resolved by the Licensing Board were (1) the need to consider in facility design the crash of a Boeing 747 or Lockheed C-5A aircraft into the facility, and (2) the adequacy of the emergency plans pursuant to 10 CFR Part 50, Appendix E. Both of these issues, among others, were appealed to the Appeal Board. On July 19, 1978, that Board issued an opinion which: (1) affirmed the Initial Decision on the issue of emergency planning as well as on certain other issues; (2) reopened the record for a further evidentiary hearing, before the Appeal Board, on the aircraft crash issue; and (3) deferred

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[2/] Intervenors apparently raise the Price-Anderson issue in conjunction with emergency planning.

[3/] LBP-77-70, 6 NRC 1185 (1977).

decision on the radon issue pending the outcome of the procedures outlined in ALAB-480, 7 NRC ____ (May 30, 1978) (ALAB-486).

Intervenors' contention with respect to the aircraft crash issue is that the facility has not been adequately designed against the crash of a heavy aircraft (one weighing more than 200,000 lbs), such as the Boeing 747 or Lockheed C-5A, which use the nearby Harrisburg International Airport. Based on calculations provided by the Applicant and the Staff, the Licensing Board found the probability of such a crash so low as to not require consideration in the TMI-2 design.[4/] The Appeal Board examined in detail the analyses performed by the Applicant and Staff[5/] and concluded that all the analyses point to a crash probability value within the guideline value of 10^{-7},[6/] assuming the current level of heavy aircraft traffic. Thus, with respect to present use of the airport by heavy aircraft, the Appeal Board supported the Licensing Board's finding. However, the Appeal Board went on to find that the amount of additional traffic that can be tolerated before the guideline limit is reached could not be satisfactorily determined based on the analyses in the record.[7/] It identified certain inadequacies, inconsistencies and

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4/ Id., pp.21-26.

5/ ALAB-486, pp.31-70. In addition, the Appeal Board calculated its own crash probability using the Standard Review Plan (NUREG-75/087), § 3.5.1.6. See p.66.

6/ The Standard Review Plan provides that if the probability of a plane crash can be shown to be less than about 1×10^{-7} per year, such events will be deemed by the Staff to be of sufficiently low likelihood that their effects need not be considered in the design of the facility.

7/ ALAB-486, p.70.

ambiguities in those analyses which it believes requir' resolution before a decision can be made on future heavy aircraft crash probabilities. Thus, the Appeal Board has directed the Applicant and the Staff to present additional information and data with respect to heavy aircraft crash probabilities at the Harrisburg Airport.[8/] The Appeal Board will conduct a hearing to receive the additional information and data and allow the parties "to test this new evidence".[9/]

Intervenors do not appeal the Appeal Board's decision to conduct a further hearing on this issue, but they question how the present record can be used to justify continued operation of TMI-2 while awaiting the further hearing (Appeal, pp.3-4). As noted by Intervenors, the Appeal Board decision was divided on the question of whether to suspend the operating license pending its decision on the reopened issue.

II. SUSPENSION OF THE OPERATING LICENSE

Intervenors' request that the operating license for TMI-2 be revoked "to protect the health and safety of the public" (Appeal, p.4). This is predicated upon Intervenors' interpretation of the Appeal Board's resolution and reopening of the aircraft crash issue. In fact, however, Intervenors have misconstrued the Appeal Board's decision on this issue and revocation is not an appropriate remedy.

As described above, it is abundantly clear that the Appeal Board majority was satisfied from its examination of the record that for the present

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8/ ALAB-486, pp.72-76.

9/ ALAB-486, pp.70-71. Pursuant to a conference call between the parties on August 15, 1978, the hearing is presently scheduled to commence in Harrisburg, Pennsylvania on November 27, 1978.

level of aircraft operation, the probability of a heavy aircraft crash is lower than the 10^{-7} guideline. The defects in the record which it identified affect only the calculation of probability at the level of traffic to be expected over the life of the unit. This being the case, the Appeal Board then properly resolved the question of whether to suspend the operating license on the basis of finding that the identified deficiencies do not change the very fundamental conclusion that must under all circumstances be made -- namely, that the public health and safety will be adequately protected if the unit continues to operate during the remand proceeding. In so finding, the Appeal Board majority determined that:

> the evidentiary deficiencies which have led us to order the reopening of the record relate essentially to the matter of long-term aircraft crash probability assessment. Specifically, what still is unclear -- and must be explored anew at an evidentiary hearing -- is by how much the current level of aircraft traffic would have to increase for the 10^{-7} guideline value to be exceeded. Insofar as the current traffic level is concerned, none of the appraisals of heavy aircraft crash probability produces a result which exceeds that value. Nor have we been given -- either by a party or on our independent evaluation of the existing record -- any cause to believe that, given the current traffic level, there is a greater than 10^{-7} probability that a heavy airplane will crash into TMI-2.[70/] (ALAB-486, slip op. at 78)

70/ As we have noted earlier, the most recent crash data, used in the applicants' primary probability assessment, strongly suggests that the likelihood of a crash at an off-runway-line site such as TMI-2 would be far less than 10^{-7} per year (see p.62, supra). Using the probability model of the staff, as presented in NUREG-75/087, the 10^{-7} limit would not be reached unless the traffic of heavy planes were to double.

Thus, while the Appeal Board decision does indeed provide for reopening the record on a safety issue, the Appeal Board has properly concluded

that in the likely short period in which the matter will be resolved, no undue risk to the public health and safety is presented. See Commonwealth Edison Co. (Zion Station, Units 2 and 2', ALAB-185, 7 AEC 240 (1970). The majority's position is fortified further by its apt observation of the many conservatisms factored into the analyses contained in the record and the extremely small possibility of occurrence of the event itself (ALAB-486, slip op. at 80-81).

In his dissent, Mr. Sharfman disagrees with the majority that the record supports the conclusion that safety from heavy aircraft crashes at present levels of traffic is assured.[10/] Mr. Sharfman argues that all of the analyses performed, including one performed by the Appeal Board using the Standard Review Plan, are deficient in some respect so as to disqualify them as a basis on which to allow operation pending the further evidentiary hearing. In the Staff's view, this disagreement between Mr. Sharfman and the majority does not justify Commission review. The evidence presented by the Staff and the Applicant was examined by the Appeal Board majority in great detail, recognizing the limitations in which probability assessments must be conducted, but bringing a common sense approach to the application of the data presented. The Staff believes that the majority decision is an entirely reasonable one and is based on a sufficient factual record to fully support the conclusion that there is no threat to the public health and safety pending the reopened hearing.

10/ ALAB-486, pp.85-124.

III. REMAINING ISSUES RAISED BY APPEAL

Intervenors have appealed the Appeal Board's resolution of the emergency planning issue.[11] As below, Intervenors allege that lack of knowledge concerning radiation and radiation exposure to humans on the part of the responsible civil defense organization points up a defect in emergency planning, and that there has been no showing that the evacuation plans at TMI-2 are demonstrably workable. (Appeal, pp. 5-6). These are factual allegations which the Licensing Board, after hearing a great deal of testimony, rejected.[12] In its decision on Intervenors' appeal of this issue, the Appeal Board carefully reviewed the record and concluded that the Licensing Board's conclusions were correct on these issues.[13]

The Commission's regulations, 10 CFR § 2.786(b)(4)(ii), require that:

> (ii) A petition for review of matters of fact will not be granted unless it appears that the ... Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same matter by the ... Licensing Board.

With respect to emergency planning, the Appeal Board did not resolve any factual matter contrary to the Licensing Board's resolution of the matter. The Appeal Board's findings supported the decision of the Licensing Board in every respect. Thus, an appeal on this issue cannot

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11/ Intervenors' admitted contention on this issue appears in the Licensing Board's Initial Decision at 6 NRC 1203.

12/ TMI-2 Licensing Board Initial Decision, 6 NRC 1185 (1977) at pp. 1203-1208.

13/ ALAB-486, pp. 6-27.

meet the requirements of the regulation.[14/] In addition, Intervenors have presented no argument as to why this issue involves an important matter that would bring it within the purview of 10 CFR §2.786(b)(4)(i).

Intervenors have raised a question dealing with the Price-Anderson Act, viz., Sections 170 and 190 of the Atomic Energy Act. They allege that they would not be permitted to use accident reports in court, should that become necessary, following an accident at TMI-2. This issue was not raised with the Licensing Board, but it was raised with the Appeal Board, which chose to resolve it on its own.[15/] The Appeal Board found that the use limitations in Section 190 are applicable only to the particular reports submitted to the Commission and would restrict neither (1) an individual's rights informally to request or formally to discover information and data possessed by the applicants (as licensees) concerning the off-site consequences of an accident; nor (2) his use of that information and data. In other words, while the use of the report itself may be circumscribed by Section 190, the use of the information and data undergirding the report is not. Intervenors have provided no reasons why this finding is not correct. Intervenors' only support for their position is their statement that:

> "The TMI-2 record shows conclusively that there is no mechanism for an individual who believes himself, or herself, to have been injured in a nuclear accident at TMI-2 to determine the magnitude of his or her specific

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14/ See, Statement of Considerations accompanying 10 CFR §2.786, para. (6), 42 F.R. 22128.

15/ [illegible]180, pp. 28-30.

> radiation exposure or other injury, for use in a claim under Section 170 of the Atomic Energy Act of 1954, as amended." (Appeal, pp. 7-8).

However, the Staff knows of nothing in the TMI-2 record which supports such a statement. Since the Price-Anderson issue was not raised before the Licensing Board, there is no record before that Board on this issue, and the Appeal Board found no merit in Intervenors' argument. In short, there has been no showing by Intervenors that this is an "important matter", under 10 CFR §2.786(b)(4)(i), which could signiifcantly affect the public health and safety.

Finally, Intervenors allege that the Commission's policy against funding intervenors violates their rights guaranteed under 10 CFR §2.743(a) and the due process and equal protection clauses of the Constitution. Suffice it to say that the Commission has announced its position that it does not have the authority to provide intervenors with funds for their participation in individual licensing proceedings, stating:[16/]

> "... we lack not only the statutory authority to provide funding, but we also find, as a policy matter, that a non-elected regulatory Commission is not the proper institution to expend public funds in this fashion absent express congressional authorization."

The Staff, therefore, submits that none of these issues raised by Intervenors are appropriate for appeal, and the Intervenors' Appeal should be denied.

16/ "Statement of Consideration Terminating Rulemaking", In the Matter of the Nuclear Regulatory Commission (Financial Assistance), CLI-76-23, 4 NRC 494 at 500 (November 12, 1978.)

IV. CONCLUSION

For the foregoing reasons, the Staff respectfully urges that the Commission deny Intervenors' Appeal and request for revocation of the operating license.

Respectfully submitted,

Gregory Fess

Gregory Fess
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of August, 1978

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' APPEAL TO THE COMMISSIONERS FOR REVIEW OF AN APPEAL BOARD DECISION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 21st day of August, 1978:

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