



November 30, 1979

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S RESPONSE TO  
NRC STAFF BRIEF ON THE EFFECT OF RULEMAKINGS  
UPON THE ISSUES OF THE TMI-1 SUSPENSION PROCEEDING

I. INTRODUCTION

In response to the Board's request that the NRC Staff report on the status and effect of rulemakings upon the issues in this proceeding, the NRC Staff has submitted a brief addressing the options and considerations of the Licensing Board when (1) the Commission has published notice of rulemaking in the Federal Register and (2) when a rulemaking that has been proposed by the NRC Staff has not been commenced by the Commission.

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Licensee concurs generally in the NRC Staff's statement of the law on the effect of proposed and pending rulemakings upon issues properly within the scope of an adjudicatory proceeding. The question which remains to be decided by the Board is which of the proposed and pending rulemakings identified by the Staff relate to matters within the scope of this proceeding. Licensee states herein its position as to the scope of the proceeding on each of the three issues which the Staff addressed in its brief.

## II. ARGUMENT

### A. "Class 9" Accident Consequences

As the Staff noted in its brief, on December 1, 1971, the AEC published notice in the Federal Register of proposed amendments to regulations, in the form of an Annex to Appendix D to 10 C.F.R. Part 50 (currently Part 51). 36 Fed. Reg. 22851-52 (December 1, 1971). The Annex includes assumptions proposed by the AEC for use by applicants in assessing the environmental risk of a spectrum of accidents, for purposes of the preparation of environmental reports. The Annex concludes that neither Class 1 or Class 9 accidents need to be considered. The consequences of Class 1 accidents were deemed too trivial to warrant discussion in environmental reports. Although the consequences of a Class 9 accident were admittedly

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potentially severe, the probability of such an accident was considered so low that the Annex provided that applicants need not discuss such events in their reports.

At the time the AEC published notice of the proposed Annex, the AEC stated that the Annex "will be useful as interim guidance until such time as the Commission takes further action on [it]." 36 Fed. Reg. 22851 (December 1, 1971). Although the Commission has never completed the rulemaking, the proposed Annex has consistently been applied to generally preclude consideration of Class 9 accidents, except where a party raises a contention alleging particularized circumstances that could result in a specific Class 9 accident at an individual reactor. See cases cited in Staff brief, pp. 6-7.

As the Staff further noted in its brief, the Commission has recently indicated that it intends to complete the "Class 9" rulemaking initiated with the publication of the Annex, and to re-examine its own policy in the area. Offshore Power Systems (Floating Nuclear Power Plants), CLI-79- \_\_\_\_\_, 10 NRC \_\_\_\_\_, \_\_\_\_\_ (September 14, 1979) (slip op. at 3). Until the Commission alters its interim policy or until the "Class 9" rulemaking has been completed, however, the guidance provided by the proposed Annex remains controlling in all licensing proceedings. See Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 209-210 (1978). The Staff concluded in its brief that the legal framework within which

specific "Class 9" accident contentions may be considered is not materially altered by the Commission's announcement of its intent to complete the "Class 9" rulemaking; that is, the Staff believes "that the consideration of accidents in this proceeding must be limited to accidents that bear a close nexus to the March 28, 1979 accident and that, in order that the Board can determine whether such nexus exists, contentions must describe the scenario of events that might be involved in such accidents." Staff brief, p. 7 n. 4.

Licensee agrees with the Staff's conclusion on the effect of the pending "Class 9" rulemaking on this proceeding, but believes that it is unnecessary for this Board to reach that issue in order to rule on the "Class 9" contentions proposed by petitioners here. Licensee objects to the proposed "Class 9" contentions primarily on the grounds that the proposed contentions are clearly beyond the limited scope of this proceeding, and urges that the proposed "Class 9" contentions be excluded from this proceeding on that basis.

The scope of this proceeding is defined and limited by the Commissions' August 9, 1979 Order and Notice of Hearing. See 10 C.F.R. §§2.703(a)(2), 2.703(a)(3). Section II of the August 9 Order refers to the recitation, in the Commission's July 2 Order, that the Commission presently lacks the requisite reasonable assurance that TMI-1 can be operated without endangering the public health and safety, and then specifically

enumerates "the bases for that conclusion" (pp.2-5). These bases fall into two categories -- those common to other P&W reactors and those concerned with the unique circumstances at TMI. The Commission's concerns in the first category are generally described in the August 9 Order (pp. 3-4) and relate both to the sensitivity of B&W designed reactors to certain off-normal transient conditions originating in the secondary system and the avoidance of errors that occurred during the TMI-2 accident. These concerns are further specified in documents referenced in the Order, i.e. a series of I&E Bulletins issued to owners of B&W reactors (I&E Bulletins, 79-05, 79-05A, 79-05B and 75-05C) and the Office of Nuclear Reactor Regulations Status Report to the Commission of April 25, 1979.

Concerns in the second category were specifically enumerated as (1) potential interaction between Unit 1 and the damaged Unit 2, (2) questions about the management capabilities and technical resources of Metropolitan Edison, including the impact of the Unit 2 accident on these, (3) the potential effect of operations necessary to decontaminate the Unit 2 facility on Unit 1, and (4) recognized deficiencies in emergency plans and station operating procedures (pp. 4-5).

By its own terms, the August 9 Order "establishes procedures for a hearing and decision on the particular issues identified in Section V of the Order" (p. 2). The issues

listed in Section V (p. 12) in turn relate solely to the necessity and sufficiency of certain "short term" and "long term" actions recommended by the Director of Nuclear Reactor Regulation. As explained in the Order both the short term and long term recommendations were made by the Director "to resolve the concerns" stated in the Order and to "permit a finding of reasonable assurance that the facility can safely resume operation" (pp. 5 and 7). The only reasonable reading of the August 9 Order, therefore, is that the issues to be considered in this hearing related only to the necessity and sufficiency of the Director's recommendations to resolve the concerns identified by the Commission as the bases for suspension of operation of TMI-1.

The proposed "Class 9" contentions by their very terms thus exceed the scope of this proceeding, as it is defined by the Commission's August 9 Order. None of the petitioners here has attempted to identify an accident or sequence of events, with particular reference to TMI-1, which he or she desires to litigate. Rather, the petitioners here have implicitly premised their contentions on the general argument that the occurrence of the TMI-2 accident (which has been characterized as a "Class 9" accident in terms of its initiating events, but not its consequences), belies the assumption of the Annex as to the low probability of a "Class 9" accident. Their challenge is thus a generic concern as that Annex applies to all power

reactors, not a particularized concern as to TMI-1. This interpretation of the breadth of the petitioners' "Class 9" contentions is supported by the petitioners' uniform failure to identify any specific accident or sequent of events which they desire to litigate as to TMI-1. The petitioners thus seek to here litigate the consequences of all "Class 9" accidents. The Commission's August 9 Order cannot be read to mean that, because the Staff in one unrelated proceeding concluded that the TMI-2 accident was a "Class 9" accident in terms of the initiating events, this Board is now to consider, in this special proceeding of narrow, well-defined scope, every conceivable accident more severe than a design basis accident.

Moreover, though the proposed "Class 9" contentions would be beyond the scope of this proceeding even if a rulemaking on the subject matter were not pending, the exclusion from this proceeding of the "Class 9" contentions proposed by petitioners here will neither leave the petitioners without a remedy nor their contentions without a forum. The very breadth of the proposed "Class 9" contentions illustrates their suitability for determination in the pending rulemaking<sup>1</sup>. Any rules or

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1 There are numerous advantages to the resolution of such generic issues in rulemaking proceedings. Broad participation by industry and public groups (as may be anticipated in the pending "Class 9" rulemaking) and the consequent airing of a wide range of opinions and factual assertions test the premises that support a proposed rule or regulation and increase the probability that (continued next page)

regulations which the Commission may adopt as a result of the pending rulemaking may be made applicable, as appropriate, to this proceeding. See Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, AEC 53,57 n. 19 (1973).

B. Emergency Preparedness

Licensee agrees with the Staff's conclusion that the Board should consider the issue of emergency preparedness in this proceeding. The Commission's express identification, at pages 6 and 8 of its August 9 Order, of emergency preparedness as an issue to be addressed in this proceeding is a clear indication of the Commission's intent that the issue is to be addressed in the restart hearings notwithstanding the pending rulemaking in the area identified by the Staff in its brief. See Staff brief at pp. 7-9. Licensee recognizes the right of petitioners to raise contentions in this area, and therefore has not objected

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(continued)

the decision-maker will be apprised accurately of the relevant facts. Further, rulemaking allows more people to participate in the decision-making process, since public participation in a rulemaking proceeding is not limited by any standing barriers that may preclude the participation of prospective licensing intervenors who contribute substantially to the proceeding. Moreover, rulemaking allows participants to influence those decisions which have a broad impact. This opportunity is available only indirectly and less effectively in adjudication, which considers such decisions in the context of a single proposed plant. Finally, rulemaking allows concentration of presentation in a single forum, which is especially important for thinly-financed individuals and environmental groups.

to such proposed contentions unless they are objectionable on other grounds. See Licensee's Response to Petitioners' Amended Petitions and attachments (October 31, 1979).

C. Hydrogen Gas Control

Licensee has this day filed with the Board its Opposition to Petition of Steven C. Sholly For An Exception To 10 C.F.R. §50.44, in which Licensee sets forth fully its position on the admissability in this proceeding of the hydrogen gas control issue. Therefore, Licensee here confines itself to a summary of those arguments in comparison to the position set forth in the Staff brief, at pages 9 through 11.

Licensee concurs in the Staff's conclusion that, generally, proposed rulemakings have no effect upon the propriety of Board adjudication of issues in this proceeding. Staff brief at pp. 11, 12. Licensee further agrees with the Staff that where, as here, regulations presently govern an area (e.g., 10 C.F.R. §50.44) which is also the subject of a proposed rule-making, the Board is bound by those regulations absent a Commission determination pursuant to 10 C.F.R. §2.758 or special certification by the Board of the question of whether the purposes of a rule would be served by its application in the proceeding. Staff brief at p. 11.

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However, Licensee believes that it is unnecessary for the Board to address either the issue of the impact of any rulemaking on the hydrogen gas control issue in this proceeding or the merits of Mr. Sholly's Petition For An Exemption To 10 C.F.R. §50.44. Rather, Licensee objects to all "hydrogen control" contentions proposed by the petitioners on the grounds that the hydrogen control issue is beyond the limited scope of this proceeding, and urges that the proposed "hydrogen control" contentions be excluded from this proceeding on that basis.

As discussed above, the scope of this restart proceeding is defined and limited by the Commission's August 9, 1979 Order and Notice of Hearing. The structure and content of that Order evidence a clear intent on the part of the Commission to treat the hydrogen control issue in a generic manner, outside the scope of this particular proceeding.

In this regard, the August 9 Order directed Licensee to take action on certain identified short-term items (slip op. at 5 - 7) and other identified long-term items (slip op. at 7 - 8). The last of the short-term items was compliance with the Category A recommendations specified in Table B-1 of NUREG-0578, while the third long-term item was compliance with the Category F recommendations specified in Table B-1. With respect to the recommendations in Table B-1 relating to hydrogen gas control, this directive means that Licensee must comply with items 2.1.5.a. (dedicated hydrogen gas control

penetrations) and 2.1.5.c. (review procedures and bases for recombiner use). Significantly, however, matters dealing with the more general issues relating to hydrogen gas control are not listed as either Category A or B items, but rather are marked with an asterisk -- denoting that "[i]mplementation schedules will be established by the Commission in the course of the immediately effective rulemaking." By specifically identifying the Category A and B items, but not those marked by an asterisk for which a rulemaking proceeding would be conducted, the Commission limited the scope of this proceeding, excluding from concurrent individual adjudication matters which the Commission intends to handle through rulemaking. Accordingly, the "hydrogen control" contentions proposed by petitioners here should be excluded from this restart proceeding.

### III. CONCLUSION

Licensee concludes that it is unnecessary for the Board to address the effect of the pending "Class 9" rulemaking on this proceeding since, in any event, the "Class 9" contentions proposed by petitioners here are beyond the limited scope of this proceeding. Licensee further concludes that emergency preparedness is properly an issue in this proceeding, notwithstanding the pending rulemaking in the area, in light of the Commission's explicit identification of emergency preparedness

as an issue in this proceeding. Finally, Licensee concludes that it is unnecessary for the Board to reach the question of either (1) the effect of the proposed hydrogen control rulemaking on the litigability of that issue in this proceeding or (2) certification to the Commission of the question whether 10 C.F.R. §50.44 should be vacated in this proceeding, since the "hydrogen control" contentions proposed by petitioners here are beyond the limited scope of this proceeding and should be excluded on that basis.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Robert Zable  
for George F. Trowbridge

Dated: November 30, 1979

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November 30, 1979

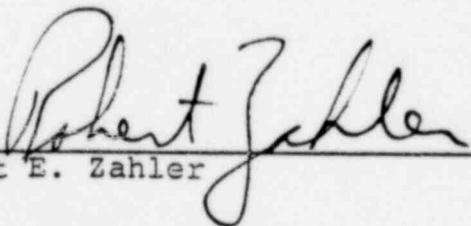
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to NRC Staff Brief On The Effect of Rulemakings Upon The Issues of The TMI-1 Suspension Proceeding," dated November 30, 1979, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 30th day of November, 1979.

  
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Robert E. Zahler

Dated: November 30, 1979

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