UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 30, 1979

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: LB Leonard Bickwit, Jr., General Counsel

SUBJECT: TMI-1 PROCEEDING

This paper continues the discussion of the Three Mile Island Unit No. 1 proceeding which the Commission last discussed on Friday, July 27, 1979. We have included a discussion of the 30-day deadline in the July 2, 1979 order and have included a draft Order extending that deadline. We have also summarized the results of Friday's discussion including, in those cases in which agreement was reached, the language approved and, in cases where agreement was not reached, the options which are still under discussion. Finally, as requested in the Friday meeting, we have included discussion and options for some of the points which were not fully discussed in our July 26, 1979 memorandum on this subject.

I. The 30-Day Deadline in the July 2 Order

On July 2, 1979 the Commission directed that TMI-1 remain shut down until after a hearing and that a further order would be issued within 30 days specifying the basis of its concerns with regard to TMI-1. Since then the Commission has met repeatedly to draft that further order which will enumerate those concerns and specify the procedures for the required hearing. At the July 27 meeting the Chairman asked OGC to draft an order extending the 30-day deadline on the assumption that the further order would not be completed by Wednesday, August 1, 1979, 30 days after July 2.

We believe there are two options for such an order. One option would be a simple order extending time for the further order until Friday, August 10. We have no legal concerns about such an order although, as you have been previously advised, at some point the further order may become so remote in time from the July 2 order as to cause problems. We recommend issuance of such an order and have attached a draft.

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The second option would be to issue a further order which does set forth the concerns which underlay the July 2, 1979 order, but that would postpone the promulgation of the procedures for the TMI-1 hearing until a third order is issued. We believe that the Commission is in substantial agreement on its concerns, and that reaching agreement on language might well be possible by Wednesday. Even if such agreement is reached, however, we believe that issuing three separate orders on TMI-1 restart would be more conducive to confusion than clarification. We believe the Commission would be well advised to continue its present course of work on the TMI-1 order and set August 10 as a realistic goal for completion of work.

II. The July 27, 1979 Meeting

A. Commission Review of the Licensing Board Decision

At the July 2 meeting the Commission agreed to adopt a two-phase process for considering the Licensing Board's decision. Adjudicatory review of the Board's decision would follow the normal course (although there would be no intermediate review by the Appeal Board). However, the Commission agreed to decide whether to remove the immediate effectiveness of its order, and thus to permit restart of TMI-1, on a separate and faster track. We believe that the following language embodies your agreement:

> If the Licensing Board should issue a decision authorizing resumption of operation upon completion of certain specific actions by the licensee, and subsequently if staff certifies that those actions have been completed to its satisfaction, the Commission will decide within 35 days after such certification whether this order shall remain immediately effective. Any motions relating to the lifting of immediate effectiveness must be received by the Secretary of the Commission within 10 days of issuance of the certification, and any responses to such motions must be received by the Secretary 7 days later. The Commission shall issue an order lifting the immediate effectiveness of this order, or any provisions of this order, if it determines that the public health, safety or interest no longer require that this order or such provisions remain immediately effective. The Commission's decision on that question shall not affect its direct appellate review of the merits of the Board's decision.

B. Cross-Examination

The Commission agreed that normal procedures for cross-examination would be employed by the Board. The following language reflects the agreement:

> In the conduct of this proceeding the Licensing Board should exercise its authority to seek to ensure that it receives all information necessary to a thorough investigation and resolution of the questions before it. However, it should use its authority under 10 CFR 2.757 to prevent any undue delay to the proceeding resulting from any cross-examination not required for the full and true disclosure of the facts or from other sources mentioned in that section.

C. Discovery

By a vote of 2-1-1 the Commission indicated a preference for the first discovery option listed below. Commissioner Ahearne indicated that he preferred the second option and Commissioner Bradford preferred the third. We have added language to the second and third options to clarify that it will be an acceptable response to a discovery request to state that the material in question is available in the public compilation of documents and to provide sufficient information to allow it to be located.

Tentatively Approved Option

> The Commission has determined that the extraordinary amount of information that is and will be made publicly available as a result of the various investigations of the Three Mile Island accident that are now underway makes it unnecessary to apply to this proceeding the discovery procedures in sections 2.740-2.742 of the Commission's regulations. This information, which is being gathered by the licensee, by NRC staff, by the Commission's Special Inquiry, by the President's Commission and by several Congressional committees will far exceed in depth and breadth the information publicly available in any normal Commission proceeding, and exceeds that which would likely be uncovered through even the most extensive use of discovery procedures. Accordingly, in several locations, including the Commission's Public Document Room and the TMI Local Public Document Room in Harrisburg, the Commission will maintain and continuously update compilations of all publicly available information on the Three Mile Island accident and related matters, and it will also permit informal access to NRC staff considerations of the

issues involved in this hearing in the manner in which such access is permitted in reactor licensing proceedings. Any party wishing to employ the discovery procedures in 10 CFR 2.740-2.742 will have to satisfy the Licensing Board that the information sought is clearly relevant to the proceeding, is not available in the data compilation and that permitting discovery will not result in undue delay or impose an undue burden on any party.

Second Option

The provisions for pre-hearing discovery set forth in sections 2.740-2.742 of the Commission's regulations shall apply to this proceeding. Furthermore, in several locations, including the Commission's Public Document Room and the TMI Local Document Room in Harrisburg, the Commission will maintain and continuously update a compilation of all publicly available information on the Three Mile Island accident and related matters, and it will also permit informal access to NRC staff considerations of the issues involved in this hearing in the manner in which such access is permitted in reactor licensing proceedings. It shall be an adequate response to any discovery request to state that the information or document requested is available in the public compilation and to provide sufficient information to locate the document or information. Moreover, as provided by 10 CFR 2.740(c) and 10 CFR 2.740(d), the licensing board may, and when appropriate, should, in the interests of justice, limit the extent or control the sequence of discovery to prevent undue delay or imposition of an undue burden on any party.

Third Option

The provisions for pre-hearing discovery set forth in sections 2.740-2.742 of the Commission's regulations shall apply to this proceeding. Furthermore, in several locations, including the Commission's Public Document Room and the TMI Local Document Room in Harrisburg, the Commission will maintain and continuously update a compilation of all publicly available information on the Three Mile Island accident and related matters, and it will also permit informal access to NRC staff considerations of the issues involved in this hearing in the manner in which such access is permitted in reactor licensing proceedings. It shall be an adequate response to any discovery request to state that the information or document requested is available in the public compilation and to provide sufficient information to locate the document or information.

D. Satisfactory Completion of Required Actions

The Commission agreed that staff certification of satisfactory completion of actions required by the Board should be governed by procedures similar to those employed in a contested operating license proceeding. We believe the following language which is modeled after and refers to the OL regulations embodies that agreement:

> Prior to issuing its decision the Board shall have authority to require staff to inform it of the detailed steps staff believes necessary to implement actions the Board may require and to approve or disapprove of the adequacy of such measures. With respect to any uncompleted items the Board shall have authority similar to that provided in 10 CFR 50.57(b) to take such actions or to impose such limitations or conditions as it believes necessary to protect the public health and safety: Provided, that, as provided elsewhere in this order, restart shall not be permitted until satisfactory completion of all uncompleted short-term actions.

E. Immediate Effectiveness of Long-Term Actions

The Commission did not agree on a resolution of this matter. Two options were discussed at the meeting: the first proposed by Commissioners Kennedy and Bradford, the second by Commissioner Ahearne. The first option would not require the licensee to begin work immediately on implementing the long-term actions and would permit the Board to set a date for their completion based on the time after restart allowed to other B&W facilities required to perform similar long-term actions. The second option would be to make immediately effective an order requiring the licensee to implement all long-term actions that are now required of other B&W facilities and would provide that when other long-term actions are required of other facilities they would be required of TMI-1. We have also added a third option which would not require the licensee to begin work on the long-term actions but would make restart conditional on a Board finding that the licensee had implemented those actions as promptly as practicable and would permit the Board to recommend that restart be delayed an appropriate amount of time if those actions had not been so implemented. As a practical matter, we believe this would likely be equivalent to immediate effectiveness, but since work would be done only if the licensee chose, it would avoid placing the Commission in the posture of ordering work done while at the same time it was deliberating on whether to permit the facility to operate again. Put another way, it would allocate risk between the licensee and the public in a manner similar to the way in which it would be allocated for the short-term actions. In each

case the licensee could choose not to implement the actions in the hope of persuading the Board or the Commission that they ought not to be required. In each case, the result of a failure to convince the Board or the Commission would be a delay in restart.

First Option

The portions of this order requiring the taking of long-term actions are not immediately effective. In its Initial Decision the Board shall set a date by which the long-term actions it requires must be completed and it shall be guided to the extent applicable by the amount of operating time other licensees were allowed to complete similar long-term actions.

Second Option

Those portions of this order which require the licensee to take long-term actions as to which the Commission had issued immediately effective orders against other licensees are hereby made immediately effective. If the Commission issues immediately effective orders against other licensees imposing requirements with respect to other long-term actions, it will, to the extent appropriate in the circumstances, issue immediately effective orders against the licensee in this proceeding.

Third Option

Those long-term actions as to which the Commission had issued immediately effective orders against other licensees must, effective immediately, be performed as promptly as practicable as a condition to restart. If the orders against other licensees imposing requirements with respect to other long-term actions, it will, to the extent appropriate in the circumstances, issue orders, effective immediately, to require that such other actions be performed as promptly as practicable as a condition to restart. If the Board determines that operation can be resumed upon completion of certain specific short-term actions by the licensee, it shall consider the extent to which the licensee has acted to implement the long-term actions described above. If it finds that the licensee has moved to implement those actions as promptly as practicable, it shall recommend resumption of operation upon completion of the short-term actions. If it cannot make such a finding, it shall recommend that operation be resumed at a date that it believes appropriately reflects the importance of the action involved, the time lost

because the licensee did not implement the long-term actions as promptly as practicable, and the overriding need to provide adequate protection of the public health and safety.

III. Remaining Issues

A. Specificity of Issues Enumerated, Atribution to Commission or Staff and Treatment of Generic Issues

1. Acknowledgement of Actions as Tentative

As the title above indicates, this subject contains a number of topics. The options discussed here are not necessarily mutually exclusive since they address various areas of potential concern. The first option would be to leave the substantive list of concerns and required actions essentially as it was proposed by staff and to include in the order language such as:

> The above list of actions required is provisional and has been based on recommendations given to the Commission by NRC staff. It may be supplemented or modified by the Board as a result of the evidence presented at the hearing, and it does not represent the fixed or final views of the Commission.

Other conforming language would replace existing draft language elsewhere in the draft.

2. Removal of Specific Mention of Remedial Actions

Alternately all discussion of specific actions, either long- or short-term, would be removed from the order. The concerns alone could be listed and it could be stated that these had led the Commission to order operation not to resume until a hearing at which the Board could pass on the necessity and sufficiency of remedial actions proposed by staff and other parties. We believe such an order would be legally defensible since the Commission is obligated only to explicate and defend the concerns which have led it to prohibit operation. At least until after a hearing the Commission is not itself required, even on a tentative basis, to set out what actions would be sufficient to alleviate those concerns. This option could be implemented by deleting all discussion of actions from the order (pages 5-8 of the July 25 draft order circulated by OGC) and by adding such language as:

> Based on the above, the Commission has determined that operation not be resumed at TMI-1 unless and until the Commission has determined that those concerns have been resolved. A hearing shall be held by an Atomic Safety and Licensing Board which shall be on the necessity and sufficiency of specific remedial actions proposed by staff and other parties to resolve those concerns. On the basis of that hearing, it will be determined whether operation will be permitted. If so, it will be further determined what actions will be required as a condition to restart and what additional actions, if any, will be required after restart is permitted.

It should be noted that, under this option, no long-term requirements can be made immediately effective.

3. Removal of all Generic Actions

A third option would be to cull the lists of concerns and short- and long-term actions to extract those which are essentially generic from those which are wholly or largely singular to TMI. The order would provide that a hearing would be held on the TMI-specific issues and that TMI would be treated in the same fashion as similar facilities with respect to generic issues. Perhaps the easiest way to proceed would be to list in the order all contemplated actions for TMI-1 and provide that those later handled generically would be deleted by subsequent order. In that case, the issue of "sufficiency of required actions" would have to exclude those questions which are handled generically.

The major advantage of this proceeding is that this would permit generic issues to be resolved on a truly generic basis free of the delays and difficulties inherent in adjudication. Furthermore, this would remove the possibility that inconsistent results would be reached by different licensing boards in different proceedings. The two disadvantages are that it would require the generic actions to be implemented by rulemaking rather than by more informal means as staff would prefer and also that it would mean the removal of issues from adjudication to what may be perceived as the less rigorous process of rulemaking. This option could be implemented by including in the order language such as:

The Commission is considering imposing generic requirements as a result of the Three Mile Island accident. If any such generic action is taken and the Commission determines that such action impinges upon any of the matters in controversy in this proceeding, the Commission shall issue a separate order removing such matter from the hearing or taking other appropriate action.

B. Procedures for Determining Whether to Consider "Psychological Distress" in the TMI-1 Proceeding

The Commission has tentatively agreed that the question of whether to consider psychological distress (and resulting physical consequences) in the TMI-1 proceeding will not be resolved in this order, but will be decided after interested parties have had an opportunity to brief the implications of the Atomic Energy Act and NEPA. There are several options for such a process. The three major matters that must be addressed are the stage of the TMI-1 hearing at which this question will be resolved, who will resolve it, and whether the proceeding will continue while it is unresolved.

1. When Will the Issue Be Resolved?

The issue could be addressed by providing in this order for the filing of expedited briefs and directing a prompt decision. This would permit a decision within 30-45 days after the order was issued. The second option would be for the psychological distress issue to be addressed at the time the acceptability of other contentions is ruled upon. The last practical stage would be the initial decision after the hearing is completed.

We recommend the second option. It would not be practical to try to resolve this issue before the proceeding is underway. Parties will not have been admitted or consolidated, and some time should be allowed to them to focus on the whole case before requiring them to address one issue. Conversely we believe postponing the decision whether to accept this contention until the initial decision stage is unwise. To keep open the option to accept it, it would be necessary to admit a considerable volume of evidence on this point. If the contention ultimately is not accepted, considerable hearing time will have been wasted. By resolving the psychological distress issue at the contention stage, parties will be able to deal with it at the stage at which they are engaged in similar activities for the other contentions being raised.

2. Who Will Resolve It?

The three options are the Licensing Board with normal Commission review, the Board with provision for expedited Commission review, and the Commission itself directly. We believe that the first option would make the consequences of an error too great since an erroneous decision could either vitiate the usefulness of the record or lead to substantial unnecessary prolongation of the hearing. The choice between the second and the third options is more difficult and requires consideration of several factors not now known. For example, if evidence or testimony is offered on this matter, it would be preferable for the Board to take it and make an initial decision. However, if the issue is presented solely as a legal and policy matter, it would be more appropriate for the Commission itself to address the matter. We recommend that you defer the choice between the second and third options by leaving the issue to the Board. The Board would be given instructions to certify the question, and the briefs and record on point, to the Commission for interlocutory decision either before or after making a recommended decision on the matter, as it deems appropriate. As a general matter, certification can be appropriate whether or not the Board has recommended or ruled on the issue.

3. Should the Proceeding Continue While the Psychological Issue is Unresolved?

A case can be made that resolution of the psychological distress issue will affect how other issues will be presented, and thus that the proceeding should be delayed to await resolution of the issue. However, we believe that the activities necessary in the initial stages of the proceeding do not require resolution of the psychological distress issue any more than they require other possible contentions to have been resolved.

4. Draft Language

The options we have recommended could be embodied in the order by inclusion of language such as:

While the issue of psychological distress and physical consequences resulting solely from such distress is a matter of real and substantial concern, the Commission has not determined whether it is an appropriate matter to be raised in this proceeding. Any party wishing to raise this subject as a contention, or as an aspect of a separate contention, should brief the Atomic Energy Act and National Environmental Policy Act issues he believes appropriate to the Board as part of the contention acceptance process set out in the Commission's regulations. The Board should then certify that issue to the Commission for final decision prior to the issuance of its prehearing conference order pursuant to 10 CFR 2.752(c), either with or without its recommendation on that issue, as it deems appropriate under the circumstances.

C. Financial Qualifications

In view of the substantial concern that the licensee and others have expressed publicly about its financial well-being in the aftermath of the accident, and since there have been unproven allegations that financial considerations may have led the licensee to put TMI-2 into service before it otherwise would have, we believe the Commission should accept staff's recommendation to make financial qualifications a short-term issue in the hearing. If it does so, there are two options for proceeding further. First, it could be provided that financial qualifications will be judged by the "reasonable assurance" standards set forth in 10 CFR 50.33(f) for approving operating license applications. This is presumably the level of qualifications that a licensee must meet during the entire time he holds a license, and so it logically could be applied to this licensee now. However, use of this standard and use by staff of the procedures currently used to apply that standard will mean that financial qualifications will be a major issue in discovery and will require more than a few hearing days to be devoted to it.

The second option would be to direct the Board to employ the OL financial qualifications criteria, but also to attempt to develop and employ new procedures that will reduce the time and paperwork burden that would otherwise be created. In SECY 79-299 the staff has proposed substantial revisions to current procedures for determining financial qualifications and in that paper staff suggests that substantial time and resources could be saved in this area. Accordingly, there may be considerable room for improvement in present financial qualifications procedures. A direction to the Board that it is free to develop new procedures, perhaps similar to those proposed in SECY 79-299, that will effectively and expeditiously address the financial

issue will permit the Board to consult with staff and other parties as to the portions of normal OL procedures that may be dropped as unnecessary. It is at least a possibility that this may result in elimination of unnecessary delay.

We recommend the second option discussed above. To accomplish such a result the order should include language such as:

> In deciding the financial qualifications issue the Board shall employ the financial qualifications criteria for operating license applicants set forth in 10 CFR 50.33(f) and 50.57(a)(4). The Board is free to attempt to develop, in consultation with NRC staff and the parties, appropriate procedures different from those employed in operating license proceedings to aid it in resolution of that issue as it is presented in this proceeding. Any such procedures should assure that all necessary and relevant information will be thoroughly considered without any undue delay to the proceeding and without imposing an undue burden on any party.

D. Commission Funding of Intervention

Commissioner Bradford has suggested that the Commission consider providing intervenor funding in the TMI-1 restart proceeding on issues related to psychological impacts. This raises several issues, which are discussed below. 1/ Although the Commission has tentatively agreed that the question of whether to consider psychological impacts will not be resolved in this order, we have recommended that that question be resolved when the acceptability of contentions is ruled on. If funding is to be available for preparation of arguments on the acceptability of psychological impacts as a contention, rather than only for preparation for hearing if the contention is accepted, then the funding question may have to be decided in this order, or soon thereafter.

1. Legal Authority

The Commission's legal authority to fund intervention was discussed in Section XII of a January 5, 1979 memo from this office to the Commission on the licensing reform bill. That memo, Section XII of which is attached, concluded that the Commission would be on reasonably firm legal ground funding intervenors without an express Congressional appropriation.

1/ Portions of this discussion are drawn from a paper by Joan Aron, OPE, entitled "Citizen Participation at Government Expense," to be published soon in the Public Administration Review.

Since January, President Carter has directed executive agencies with the requisite authority to institute public participation funding programs. We know of no new cases or other major developments concerning agency funding authority since January. We conclude that the Commission's authority to fund intervenors remains reasonably firm.

2. Should Funding Be Provided?

There is perhaps more need to ensure full public participation on the issue of psychological impacts than on other issues before the hearing board. Neither staff nor the licensee has any particular expertise in the matter. If, as a practical matter, the burden is on intervenors to demonstrate significant psychological impact, rather than on the applicant to show no significant impact, adequate preparation by intervenors will be particularly important, and cross-examination will be less adequate as a substitute. Moreover, since the issue is one of how the surrounding community will react to restart, interested members of the community may be better qualified to present such a matter than staff or applicant.

On the other hand, delays that may be caused by implementing a funding program may be troublesome here, where the Commission is concerned with reaching a decision rapidly. The decision made here on funding will inevitably tend to set a precedent for other future decisions the Commission may make concerning a non-statutory funding program, and there may be too little time here to reach a consensus on how the many details of a funding program should be handled, without unduly delaying the proceeding.

3. Who Receives Funding? 2/

There are several possible sets of criteria.

a. The licensing reform bill criteria, which resemble those in the FTC's statute. Those criteria are:

i. the intervenor's interest in the matter;
ii. that the intervention would not occur or its effectiveness would be significantly limited in the absence of funding;

2/ In this and subsequent funding-related issues, the section on intervenor funding in the Commission's licensing reform bill may be helpful, particularly in suggesting resolution of issues which are not discussed here.

iii. that the intervenor's participation is likely to lead presentation of arguments and/or views that would not otherwise have been presented; and
iv. that presentation of such views is likely to be necessary in order that a fair determination be made.

b. The criteria from Senator Kennedy's bills on intervenor funding and the pending bills on the regulatory reform. To qualify a party must:

i. represent an interest which could contribute substantially to a fiar determination, considerating the nature of the issue and the need to represent balanced interests; and
ii. show that its economic interest in the outcome is small or that it lacks sufficient resources to participate effectively without a subsidy.

c. The GESMO criteria: that a party (i) show that it could make substantial contribution to the proceeding, and (ii) show that it would be unable to participate effectively without assistance.

d. The Commission could dispense with criteria and determine that it will make some amount available to community or public interest groups for a study of psychological impacts. The hearing board would require participants avocating that significant impacts will occur to make a single consolidated proposal for a study. A study of the other side of the issue might also be funded. This would be similar to the Department of Agriculture's decision to contract with the Consumer Federation of America to present consumer views of certain proposed USDA regulations. See Chamber of Commerce v. USDA, D.D.C. Civil No. 78-1515 (October 10, 1978) (upholding contract).

e. Discussion

We think that the Commission's experience with the GESMO criteria has shown that they do not work well, as the two components tend

to be mutually exclusive. As between the first two sets of criteria above, those in the proposed licensing bill have the advantage that the Commission has carefully considered them and agreed on them. The second set would be easier to meet and perhaps easier to administer.

The fourth arrangement would dispense with criteria and definitely provide for one or perhaps two studies. It dispenses with one major delaying factor - selecting and implementing eligibility criteria. This may be justified by the rather unusual nature of the issue involved. We cannot say whether this arrangement would work for other proceedings, but we do not think the Commission needs to choose a set of general criteria, designed to be workable in all cases, in order to fund intervenors in this case.

4. Timing Of Payments

Payments may be made either before or after the hearing. Payment after the hearing allows the Board (or the Commission) to assess the party's contribution before payment is made. This tends to assure that funds will not be wasted.

Payment before the hearing would have to be based on a proposal for study and expected expenses, which would be more difficult to evaluate than an actual contribution. However, it may be necessary if truly impoverished groups are to make a substantial affirmative case. The difficulties of assessing beforehand whether a valuable contribution can be made might be alleviated somewhat by making progress payments based on preliminary results.

5. Who Decides?

Several decisions will have to be made if funding is provided, such as whether funding criteria are met, whether payment should be before the hearing, and the amount of payment. These may be made by the Hearing Board, by the Commission after recommendation of the Board, or by the Commission directly. Since the program will surely be controversial, the Commission may prefer to make the initial decision itself. This may be cumbersome, however, and the Board can more readily take evidence or call for submissions. To the extent that the Commission can provide sufficient guidance,

it can request a recommended decision or an initial decision from the Board. Like the decision on whether to accept psychological distress as an issue, the Commission may wish to avoid the normal decision and appeal process and have funding decisions certified to it with or without a recommended decision.

Attachments:
1. Draft Order
2. Section XII of OGC Memorandum of January 5, 1979.

cc: SECY
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Richard T. Kennedy
Peter A. Bradford
John F. Ahearne

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

ORDER

On July 2, 1979 the Commission issued an Order directing that this facility remain in a shutdown condition pending further order. It provided that it would also issue a further order within thirty (30) days specifying in detail the basis for its concerns, and the procedures to govern further proceedings in this matter. The Commission has made substantial progress toward issuing that further order, but has not yet completed resolution of all of the legal and technical issues involved. Accordingly, the Commission has found it necessary to extend the period of time in which to issue that order until Friday, August 10, 1979.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this day of 1979.

XII. FUNDING OF INTERVENORS

A. Background

The general question of the desirability of intervenor funding in NRC proceedings has been thoroughly discussed in the Commission's 1976 decision terminating its rulemaking on funding [1/] and elsewhere.[2/] A section on funding was included in the draft licensing bill developed by the Commission in September of 1977 (§ 194).

To provide a context for this controversial issue, it may be useful to review some of the legal history concerning intervenor funding, as it has affected NRC and other federal agencies.

In response to a request from NRC, the Comptroller General ruled in February 1976 that, under the Commission's appropriations for "necessary expenses," it

> has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on the matter, and (2) when it finds that the intervenor is indigent or otherwise unable

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1/ Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), Dkt. No. PR-2, CLI-76-23, 4 NRC 494 (November 12, 1976).

2/ Letter from Chairman Hendrie to Representative Seiberling, May 11, 1978.

to bear the financial costs of participation in the proceedings.3/

The opinion noted, however, that legislation would be desirable.4/

The Commission relied substantially on the quoted language in its 1976 funding decision.

In a later opinion, the Comptroller General clarified this and other decisions on funding intervenors:5/

> While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent.6/

3/ Comptroller General, Costs of Intervention -- Nuclear Regulatory Commission, file B-92288 at 7 (February 19, 1976).

4/ Id. at 8.

5/ The Comptroller General had previously found that his ruling for NRC was equally applicable to FCC, FTC, FPC, ICC, CPSC, SEC, FDA, EPA, and NHTSA. Letter to Congressman John E. Moss, file B-180224 (May 10, 1976). See also letter to Congresswoman Yvonne Brathwaite Burke, file B-139703 (September 22, 1976) (concerning FCC).

6/ Comptroller General, Costs of Intervention -- Food and Drug Administration file B-139703 at 5 (December 3, 1976).

On June 30, 1977, the Second Circuit in Greene County IV rejected the Comptroller General's rationale and ruled that the FPC had no statutory authority to pay the expenses of intervenors in its proceedings.[7] It concluded, with little discussion:

> In light of the Supreme Court's very broad language in Alyeska Pipeline Service Co. v. Wilderness Society [421 U.S. 240, 257 (1975)], that "absent statute or enforceable contract, litigants pay their own attorneys' fees", a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action.[8]

Later that year, the Commission determined, based largely on this case, that it would not fund participants in the Uranium Fuel Cycle (Table S-3) rulemaking.[9]

On March 1, 1978, the Office of Legal Counsel of the Department of Justice informed both CAB and DOT that Greene County did not preclude them from determining whether they had explicit or implicit statutory authority to pay expenses

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7/ Greene County Planning Board v. FPC, 559 F.2d 1237, (2d Cir. 1977) (en banc), reversing in part 559 F.2d 1227 (Greene County III), cert. denied, 46 U.S.L.W. 3514 (February 21, 1978).

8/ Id. at 1239.

9/ Letter from Samuel J. Chilk to Helene Linker, NRDC September 26, 1977, regarding NRDC's Petition for Reconsideration of the Commission's Ruling Reopening the Hearing on the Uranium Fuel Cycle; see SECY-77-455 at 3 (August 23, 1977); Transnuclear, Inc. (Low-Enriched Uranium Exports to EURATOM Member Nations), 6 NRC 849, 852-853 (1976).

of intervenors in their proceedings.[10/] The Justice Department reasoned that Greene County construed only the Federal Power Act and thus bound no other agency (except possibly FERC, as legal successor to FPC). It also concluded that the court's opinion was not so broad as to preclude other agencies from funding participants, in part because the opinion gave great weight to the FPC's views that it lacked statutory authority.

On October 10, 1978, in a carefully researched opinion, the District Court for the District of Columbia found that the Department of Agriculture possesses implied authority to fund, by contract, a consumer group's participation in its rulemaking. Chamber of Commerce of the United States v. Department of Agriculture, Civil No. 78-1515 (October 10, 1978). It found that the Greene County court based its decision largely on FPC's views and in essence refused to require FPC to fund participants because of FPC's distaste for doing so and its view that it lacked authority.

A number of agencies have instituted, proposed, or considered programs to reimburse participants' expenses. FTC and EPA have statutorily-based programs for agency

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10/ Letters from John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Phillip J. Bakes, Jr., General Counsel, CAB, and to Linda Heller Hamm, General Counsel, DOT (March 1, 1978).

rulemaking proceedings. No other agencies have explicit statutory authority to fund participants. However, the National Highway Traffic Safety Administration (NHTSA) has had an active program since January 1977 and the National Oceanic and Atmospheric Administration (NOAA) promulgated final rules for such a program in April 1978. The Consumer Product Safety Commission (CPSC) has promulgated interim rules for financial compensation; the CAB has published proposed rules; and FDA and FCC have published advance notice of proposed rulemakings.[11/] The Department of Agriculture has directed its agencies to consider funding as one means of encouraging and increasing public participation in their proceedings.[12/]

The question of implicit statutory authority for agencies to fund intervenors has not been finally settled. The most authoritative judicial decision on the subject -- Greene County -- is against such authority. However, we believe that Greene County is properly construed narrowly, as the Office of Legal Counsel and D.C. District Court in

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11/ Brief histories of and statutory and Federal Register citations for these programs are given in a Congressional Research Service report available from OGC.

12/ 43 Fed. Reg. 50988 (November 1, 1978).

the Chamber of Commerce case have done. The best legal arguments, and the positions taken by several other federal agencies, favor implicit authority to fund. The Commission would be on relatively, if not entirely, firm legal ground if it decided to institute a funding program without explicit statutory authorization.

B. Need for Legislation

Since the Commission can properly interpret the Atomic Energy Act to confer implicit statutory authority to fund intervenors, further legislation would not be necessary to authorize a funding program (leaving aside, of course, the need to obtain funds for such an initiative through the routine budget process). However, even though the Commission has implicit authority, funding legislation may be desirable. This issue is discussed in the Commission's decision terminating its rulemaking on funding cited in note 1, above. The Commission there thought that a decision to fund the presentation of private views should be made by Congress. The Comptroller General also suggested that legislation "would be advisable [to set forth] the parameters of such financial assistance and the scope and limitations on the use of appropriated funds ...."[13/]

13/ Controller General, Costs of Intervention -- Nuclear Regulatory Commission, supra n. 3, at 8.

C. Issues

(1) Scope

Should a funding program be a pilot program with a definite expiration date, a permanent NRC program, or a Government-wide program?[14/] In its draft licensing bill the Commission settled on a pilot program as did the Administration. The Udall draft resolution also proposed a pilot program. Chairman Hendrie and Commissioner Kennedy have indicated their view that funding in Commission proceedings could best be accomplished through a general funding bill applicable to all agencies, such as Senator Kennedy's bill, S. 270.[15/]

(2) State proceedings

Should a funding provision require or merely permit states conducting NEPA or other delegated licensing proceedings to provide intervenor funding in those proceedings using federal grant money? Alternatively, should a funding provision be limited to NRC proceedings, with no mention of state proceedings and no provision for federal-state grants for intervenor funding?[16/] The NRC draft bill (§ 193 and

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14/ See Memo from Chairman Udall to members of the House Subcommittee on Energy and the Environment entitled "Issues Paper for August 14 Meeting," dated August 11, 1978, at 21.

15/ Letter to Seiberling, supra n. 2, at 2.

16/ Udall Issues Paper, supra n. 14, at 23-24.

alternate) and the Administration bill (§ 195) provided for NRC grants to states for intervenor funding, but did not require them. Chairman Hendrie has indicated his view that since the proposed federal program is a trial or pilot program, it seems reasonable to permit but not require states to fund intervenors.[17] Commissioner Bradford has indicated that "intervenor funding should be a possibility for NEPA proceedings delegated to the States."[18]

(3) Commission proceedings

In what types of Commission proceedings should funding be available?[19] The Commission's draft bill appears to have provided for funding in all licensing proceedings and in all rulemaking proceedings in which an oral hearing is held (§ 194(a)(1)). The DOE draft bill excluded export licensing proceedings and gave the Commission sole discretion to extend the funding program to rulemakings (§ 197(a)(1)).

Rulemakings, as compared to licensing proceedings, generally cover more generic, policy-oriented issues and

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17/ Letter from Chairman Hendrie to Congressman Dingell, July 19, 1978, question 22(A) (forwarding responses to questions in Congressman Dingell's letter of June 29, 1978).

18/ Letter from Commissioner Bradford to Congressman Dingell, October 18, 1978, at 4, question 22(A) (forwarding additional responses to Congressman Dingell's questions).

19/ Udall Issues Paper, supra n. 14, at 24-25.

attract better financed intervenor groups which are better able to make an affirmative case, rather than relying on cross-examination. Clear distinctions can be drawn between rulemaking and licensing for funding purposes, but they do not all suggest that rulemakings are less appropriate for funding. Indeed, GESMO -- a rulemaking -- is the only concrete proceeding the Commission has proposed for funding to date.

Finally, the legislative hearings the Commission may hold in export proceedings [20/] would not seem sufficiently lengthy or burdensome to require funding to achieve adequate public participation.

(4) Criteria

Who qualifies for funding? There are great and subtle variations among the funding criteria in the NRC draft bill, the Administration bill (H.R. 11704 and S. 2775), the Kennedy Government-wide funding bill (S. 270) and the now-defeated amendment to the NRC Authorization Act.[21/] The major

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20/ Nuclear Non-Proliferation Act of 1978 §304(c), 42 U.S.C. 2155a.

21/ See Letter from Representative Seiberling to Acting Chairman Gilinsky, April 3, 1978.

differences pertain to financial need tests. They include

a) Whether a petitioner for funding must show that it "does not have reasonable access to alternative sources of funds."[22/]

b) Whether the main need criterion should be that "effectiveness [of intervention] would be significantly limited in the absence of funding" (DOE and NRC drafts) or that the petitioner does not have sufficient resources to "participate effectively" without funding (Kennedy bill and authorization amendment).

c) Whether, in lieu of (b) above, it is sufficient to show that the petitioner's economic interest in the outcome of the proceeding is small compared to the cost of effective participation (Kennedy bill and authorization amendment).

The other criteria in the NRC draft bill do not seem to be substantially more rigorous than the criteria for admission as an intervening party.[23/]

22/ DOE draft § 197(b)(2) only. See discussion in letter from Hendrie to Dingell, supra n. 17, question 23A.

23/ Letter from Hendrie to Dingell, supra n. 17, question 24B.