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NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

METROPOLITAN EDISON COMPANY,  
ET AL.

(Three Mile Island, Unit 1)

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Docket No. 50-289

NRC STAFF RESPONSE TO MOTIONS FILED  
BY CEA TO AMEND MEMORANDUM AND ORDER

On September 27, 1979, Chesapeake Energy Alliance, Inc. (CEA) submitted a "Motion to Modify Memorandum and Order Setting Special Prehearing Conference" (Motion), in which CEA requests the Board to make certain modifications to the Memorandum and Order which the Board issued on September 21, 1979 (Order). CEA amended its Motion via its "Supplement to Motion to Modify Memorandum and Order Setting Special Prehearing Conference" dated September 28, 1979 (Supplement) and its "Second Supplement to Motion to Modify Memorandum and Order Setting Special Prehearing Conference" also dated September 28, 1979 (Second Supplement). In these submittals, CEA moves the Board to modify its Order in the following manner:

1. require delivery of all petitions to intervene and related motions to the intervenors in the proceeding; (Motion, pp. 2, 3)
2. require a special conference among those intervenors challenging the reopening of TMI-1 to provide for discussion as well as identification and consolidation of contentions; (Motion, p. 3)

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3. modify the schedule reflected in the Order so that the deadline for submitting draft contentions to the Staff and Licensee would be postponed almost a month and a half; (Motion, pp. 4, 5)
4. allow parties to have access to consultation with the Staff or others to understand the Staff's documents prepared thus far, with seminars for briefing purposes; (Supplement, p. 4)
5. require the Staff to evaluate the potential impact on intervenors from the lack of access of parties to resources adequate to ensure that their interests can be properly presented before the Commission; (Supplement, p. 6)
6. permit parties to move for further modification of the Order for a showing of cause where such modification would be essential to preserve the public's interest in the fairness of the hearings; (Supplement, p. 7) and
7. permit parties to have reasonable extensions of time limits for filing documents when inability to comply with the time limits results from a lack of adequate resources (Second Supplement, p. 2).

The Staff's Answer in opposition to each of the requests is set forth below.

Request No. 1. The Staff is unsure exactly what CEA is seeking in its first request. If CEA is requesting the Board to issue an Order requiring each party to serve documents that it files on every other party, then the Motion is not necessary. Section 2.730 of the Commission's regulations already require a party to serve all motions on all other parties to the proceeding. The regulations do not, however, specifically require petitioners to serve their pleadings on other petitioners. The Staff has in the past sent copies of petitions to intervene filed in this case to petitioners who have requested them, and is willing to do so for CEA. However, the Staff does not believe that it is necessary or appropriate to send copies of the petitions to petitioners who have not requested them, in light of the costs involved in reproducing and mailing the large number of documents and the availability of local public document rooms near the plant site where such documents may be studied and copied.

Request No. 2. CEA moves the Board to provide for a special conference among the intervenors opposed to the reopening of TMI-1 to permit discussion, identification of, and consolidation of contentions. However, the Order already provides for a special prehearing conference starting on November 8. As indicated in the Order, at page 26, the "purpose of the special prehearing conference is to permit identification of the key issues in the proceeding and to take steps necessary for the further identification of issues..."

To the extent that CEA is requesting a conference prior to the one provided for in the Order, CEA is of course free to meet with any other petitioners in the proceeding to discuss issues. In addition, as indicated in the Order (p. 25), the Staff and, to a lesser extent, the Licensee, are directed to negotiate with the other petitioners concerning the suitability and form of contentions and issues to be litigated prior to the November 8 prehearing conference. The Staff expects to meet soon with petitioners to discuss draft contentions.

CEA further suggests in its proposed schedule that the prehearing conference should precede the submittal of draft contentions by the intervenors. However, the Staff perceives no benefit from reversing the normal order of events as CEA suggests. Indeed, there would be little that the Board could accomplish at a prehearing conference in the absence of even draft contentions submitted by the parties. 10 CFR § 2.752(a) specifically contemplates that a prehearing conference in a proceeding will accomplish such things as simplification, clarification, and specification of issues, and obtaining stipulations and admissions of fact. Such matters could not even be discussed without some prior indication by petitioners as to the issues that they want litigated in the proceeding. Moreover, the benefit inherent in the Board's schedule, that of having the petitioners and the Staff negotiate and rework contentions prior to holding the prehearing conference, would be lost under CEA's proposal. In this context, it is the Staff's opinion that much more can be accomplished in the informal setting of negotiation among the parties

than can be gained in the formal setting of a prehearing conference. Consequently, the Staff submits that the current schedule should be followed, and that petitioners should have the opportunity to negotiate with the Staff on draft contentions prior to the first prehearing conference.

Request Nos. 3., 4. and 6. CEA also requests the Board to modify the schedule set forth in the Order so as to postpone the date for filing draft contentions and to formally modify the Order to incorporate a provision for further modifications to the Order or to the schedule attached to the Order for cause. Since the requests all involve a possible change in the schedule for the proceeding, the Staff considers them together here.

The Commission emphasized the importance of conducting the proceeding expeditiously. Order and Notice of Hearing, August 9, 1979, p. 10 (44 Fed. Reg. 47824, August 13, 1979). To accomplish this, the Commission instructed the Board to consolidate parties to the extent practicable, to shorten time limits where feasible, and to use its authority to prevent any undue delay in the hearing. Id. It was in response to this Commission Order and proposed schedule that the Board adopted the schedule incorporated into its September 21, 1979 Order.

The first excuse offered by CEA for delaying the schedule is that the official report of the Presidential Commission to study the TMI-2 accident is expected to be released around October 25, or three days after the deadline for submitting final contentions and the bases for them. Motion, pp. 1-2,

4-6. CEA alleges that lack of access to the information contained in the Presidential Commission's report may prevent them from including related contentions in this proceeding. However, CEA fails to recognize that the Commission's Rules of Practice specifically provide for modification of the contentions to be considered in a proceeding for good cause. 10 CFR § 2.752(c). Accordingly, CEA will be able to amend its contentions or add new ones if the report contains significant new information such as would constitute good cause pursuant to § 2.752(c). In the interim, much progress can be made if draft contentions are submitted on October 5 pursuant to the Board's schedule, for negotiations can commence and refinements of the contentions and/or stipulations can be accomplished in the next month. Then if significant new information is subsequently disclosed in the report to the President, CEA's rights will not have been prejudiced since it would then be free to modify its list of contentions. The timing of the release of the Presidential Commission's report, thus, does not constitute good cause for altering the schedule set forth in the Board's Order.

The second argument raised by CEA for altering the schedule is that the NRC Staff or other "suitably qualified persons" should be required to consult with CEA and other parties to interpret various documents, that seminars should be established to accomplish this purpose, and that such assistance should be made available prior to the final date for filing draft contentions, which under CEA's proposed schedule, would be November 19, 1979. Supplement, p. 4. Without reaching the question of whether it would be proper for the Licensing Board to order the Staff to comply with the CEA

request, we see no need for the Board to mandate such procedures at this time.

The Commission's Order assures that participants in the proceeding will have informal access to NRC Staff consideration of the issues involved in this hearing in the manner in which access is permitted in reactor licensing proceedings.<sup>1/</sup> The Staff has in the past and will continue to honor all reasonable requests from petitioners for information on the Staff's position. Moreover, we have contacted all petitioners and hopefully made it clear that we will meet with them at a time and place convenient for them for the purpose of finalizing their contentions. While perhaps this approach does not meet the format suggested by CEA, it does accomplish the same purpose and does not require further action by this board.

A third related concern raised by CEA is that it wants the Order to include provisions that permit further modifications of the Order upon a showing of good cause. Supplement, p. 7. This request also is not necessary in light of the specific inclusion in the Commission's Rules of Practice referred to above. Section 2.752(c) of 10 CFR, as noted, permits modification for good cause of an order issued by a licensing board which limits issues or defines the matters in controversy, or which recites action taken with respect to the setting of a hearing schedule. Accordingly, this part of CEA's request is unnecessary, and should be denied.

<sup>1/</sup> See Commission's Order and Notice of Hearing, supra, at 11.

Request Nos. 5. and 7. CEA further makes two requests that involve the issue of the ability of intervenors to adequately represent themselves in the absence of public funding. CEA's first related request is for the Board to order the Staff to evaluate the potential impact of the lack of access of parties to adequate resources. Supplement, p. 6. The Staff submits that it would be improper for the Board to probe into this issue in light of the Commission's position on intervenor funding.

The Commission has ruled that it will not give financial assistance to intervenors in licensing proceedings. Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 484 (1976). As the Commission indicated in that decision, the possibility of substantive contributions to the correct resolution of safety and environmental issues is not substantially greater in the case of funded versus unfunded intervenors. Id. at 504. These findings of the Commission are in direct conflict with the allegations of CEA that the fairness, thoroughness and impartiality with which the proceeding can address safety and health issues is unrelated somehow to the lack of resources of CEA.<sup>2/</sup>

Accordingly, the Staff urges the Board to deny CEA's request for a study of the impacts of its lack of resources on the ability of the proceeding to address health and safety issues.

<sup>2/</sup> To the extent that CEA is claiming to represent the concerns of other intervenors and potential intervenors in this proceeding, the Staff submits that it is improper for CEA to represent the rights of anyone other than its members. See, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1977), citing Warth v. Seldin, 422 U.S. 490, 499 (1975).

The second portion of CEA's request, that it should somehow be compensated if the Staff should determine that CEA's lack of resources precludes the ability of the record to reflect a full consideration of the health and safety issues in the proceeding, is related to its request in the Second Supplement. In the Second Supplement, CEA moves for the inclusion in the Order of provisions for extensions of time limits for filing documents when it is unable to comply because of inadequate resources. These requests also are inappropriate and should be denied.

CEA's proposal to grant parties some kind of assistance to compensate for limited resources in the form of unilateral right to delay submitting pleadings and testimony by reason of those alleged limited resources, would preclude the conduct of an orderly hearing and would run counter to the express instructions of the Commission as discussed above. Further, such freedom to delay the process is contrary to the Commission's regulations, which specifically urge a board to use its power to assure that the hearing is conducted as expeditiously as possible, consistent with the development of an adequate decisional record. 10 CFR Part 2, App. A, V.

The claim of inadequate resources is certainly not a novel complaint. Intervenors have been raising this concern in numerous NRC hearings, requesting financial assistance to pay for legal counsel or technical advisors or witnesses, and claiming an inability to effectively present a case in the absence of such assistance. However, such requests have been consistently denied. See, Consumers Power Co. (Midland Plant, Units 1 and

2), ALAB-382, 5 NRC 603 (1977) and Detroit Edison Co. (Greenwood Energy Center, Units 1 and 2), ALAB-376, 5 NRC 426 (1977). Intervenors have participated in AEC and NRC hearings in the past without financial assistance, and without having an automatic time limit extension granted them for filing documents simply because of alleged limited resources. CEA has indicated no extraordinary circumstances regarding it or any other intervenors in this proceeding that would warrant the grant of such unusual and potentially disruptive relief.

CEA is always free to request an extension of time for meeting any specific deadline that the Board sets, and can argue the merits of granting that particular extension. The Board can determine whether good cause has been shown for granting such an extension of time on a case-by-case basis. However, the Staff submits that a valid reason for granting general relief to intervenors from meeting deadlines has not been offered by CEA, and the consequence of granting such relief would produce a potentially serious disruption of an orderly proceeding.

CONCLUSION

The Staff urges the Board to deny the requests sought by CEA in its Motion, Supplement and Second Supplement in that they are either unnecessary or without merit.

Respectfully submitted,

*Daniel T. Swanson*

Daniel T. Swanson  
Counsel for NRC Staff

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2,713(a), 10 CFR Part 2, the following information is provided:

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*Daniel T. Swanson*

Daniel T. Swanson  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 9th day of October, 1979

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Docket No. 50-289

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTIONS FILED BY CEA TO AMEND MEMORANDUM AND ORDER" and "NOTICE OF APPEARANCE OF DANIEL T. SWANSON" dated October 9, 1979, 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 10th day of October, 1979.

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