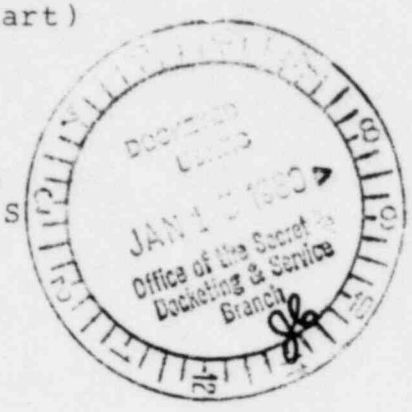
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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



UNION OF CONCERNED SCIENTISTS
REPLY TO LICENSEE'S AND STAFF'S
OBJECTION TO EMERGENCY
PLANNING CONTENTION

UCS has formulated the following contention:

> 16. The events at TMI-2 showed the inadequacy of NRC emergency planning requirements. Emergency planning beyond the LPZ is a recognition of the residual risk associated with major reactor accidents whose consequences could exceed those associated with so-called design basis events. The TMI-1 emergency plan is inadequate because it is not based on a weather-dependent worst case analysis of the potential consequences of a core melt with breach of containment. The public health and safety requires that there be in place prior to re-start of TMI-1 a feasible plan to evacuate the public in the event of such an accident and to take other emergency measures at distances beyond which evacuation is impractical.

The licensee objects to the contention on the grounds that it is inconsistent with the Board's Prehearing Conference Order and that it impermissibly challenges a Commission Policy Statement.

As to the first grounds for objection, UCS does not believe that its contention conflicts with the Board's Order.

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First, the Board did not rule out consideration of all contentions which in any way turn on the assumption of an accident beyond the current design basis. To the contrary, UCS's Contention No. 13 was admitted. In addition, the Board stated with respect to Contention No. 16 as follows:

> As part of the inquiry on emergency planning, and consistent with our introductory Class 9 discussion, evidence may have to presented on the question of whether evacuation plans adequately consider the credible consequences of an accident
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> Sl.op. at 24, emphasis added

In order to determine whether the licensee's emergency plan adequately considers the credible consequences of an accident, the Board will perforce be required as a first step to determine what accident is assumed and to pass on the reasonableness of selecting that accident as the "design bases" for emergency planning. It is clear at this point that the accident assumed for emergency planning purposes is some Class 9 accident: that is, it is beyond the current design basis for safety and environmental reviews. No party contests this point. Thus, this contention raises a different question than that raised by the other UCS "Class 9" contentions. The question here is not whether Class 9 accidents can or should be considered, the question is which Class 9 accident shall be considered as the basis for the review of the adequacy of emergency planning.

UCS's review of the licensee's emergency plan disclosed that it does not contain either a description of the accident

chosen as the basis for emergency planning nor a justification for the selection of any particular accident. It is our contention that emergency planning should be based on a weather-dependent worst case accident assumption. But even if something less than worst case is accepted, surely the intervenors have the right to challenge the appropriateness of the selection.

Given this context, much of the licensee's and the staff's objections are irrelevant or nonresponsive. If they had posited a "design basis" accident for emergency planning purposes, they might conceivably be heard to object to a contention which challenged the selection of that particular accident, but which did so in a less than specific way. But since they have provided no basis whatsoever for the limitation of emergency planning to a 10-mile radius, they can hardly be permitted to object to a contention which claims that a worst-case scenario for release of radioactivity should be assumed. The contention is more specific than the plan itself in this regard.

Nor is it pertinent that UCS has not posited a mechanistic scenario of equipment and human failures which might result in a breach of containment with massive release of radioactivity. It must be emphasized that the only arguable reason for requiring such a scenario is as a basis for complying with those agency precedents which are said to hold that, in order to challenge the failure of an Environmental Impact Statement

to consider Class 9 accidents, an intervenor must show that a particular accident is more probable than those generically regarded as being in Class 9. Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973).[1/] In the area of emergency planning, however, there is no established line between events probable enough to require consideration and those not probable enough. The staff has not said in this area that all accidents more probable than 1×10^{6} per year should be considered and all others ignored. To the contrary, emergency planning is specifically designed to account for the residual risk of accidents beyond the current design basis for safety and environmental reviews.[2/] What the staff has not specified is 1) how "probable" must an accident be in order to be considered within the context of emergency planning and 2) what is the most severe accident which falls within this level of probability? Thus, the Shoreham case and others like it are entirely inapposite. There is no established line between those accidents which should and should not not be considered. The question of the appropriate "design

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1/ We have previously provided UCS's interpretation of prior NRC precedent and present policy in connection with UCS Contentions Nos. 13 and 20. For purposes of this argument, however, it is unnecessary to dispute the continued vitality of such precedents as the cited Shoreham decision. This is because it is simply not pertinent on the issue of emergency planning.

2/ See e.g. NUREG-0396, EPA 520/1-78-016, Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans In Support of Light Water Nuclear Power Plants, December, 1978, p. I-4 - I-7.

basis" for emergency planning is an open question in this case and not only can, but will be determined by the Board, either explicitly or implicitly.

UCS is entitled to present evidence and to argue that the emergency plan is inadequate because it is not based on a weather-dependent worst case assumption of radiation release, and to present testimony on the consequences of such a release which would support a broader zone for emergency planning. The staff and licensee, in turn, will argue that some lesser accident assumption is appropriate, presumably one which justifies the limitation of emergency planning to a 10-mile zone. This is a clearly litigable issue which should not be discarded at the threshold.

The licensee argues that this Board should reject the contention on the ground that it is a challenge to a "policy statement" issued by the Commission endorsing on an interim basis the 10-mile emergency planning zone. (44 Fed. Reg. 61123, Oct. 23, 1979). There is a short and clear answer to this. There are only two ways in which an administrative agency can establish binding precedent - by rulemaking or by adjudication. Certain due process rights attach to either of these modes. 5 U.S.C. §553, 554. In contrast, a statement of policy, which may be published without any right afforded to interested parties to comment or participate, does nothing more as a matter of law than enunciate an agency's future intention to take a certain position in rulemaking or adjudica-

tion. Pacific Gas & Electric Co. v. F.P.C., 506 F.2d, 33, 38 (1974) It is established by the cours as follows:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings.
>
> A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.
>
> A general statement of policy on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.
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> Id. at 38-39. Emphasis added.

Thus, the Policy Statement cannot legally be used as if it were binding precedent, to cut off UCS's rights at the threshold.

We note finally that the licensee claims that the appropriate forum for litigating the adequacy of the emergency planning bases is an ongoing NRC rulemaking proceeding. What the licensee does not address is the question of whether, if UCS is remanded to the

rulemaking proceeding to resolve this question the authorization to restart this plant can be issued before that rulemaking is completed. We think that the answer is clearly "no." The question of whether the licensee's emergency plan is adequate to assure safety has been designated by the Commission as an issue to be resolved prior to the restart of Unit 1. If a necessary subissue of that question - the appropriateness of the accident assumed as the basis for planning - is to be taken out of the adjudication to be addressed on the rulemaking track instead, restart cannot be permitted until the subissue is resolved. Thus, even if the question is resolved in another forum it must be resolved somewhere as a condition to a favorable decision by this Board. UCS believes that there are substantial benefits both in avoiding delay and duplication of effort and in focusing the question, to having it resolved in this proceeding.

For the reasons stated above, UCS urges the Board to permit it to litigate UCS Contention No. 16. If the Board will not admit the contention, please consider this a request to certify the issue to the Commission.

Respectfully submitted,

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DATED: January 14, 1980

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CERTIFICATE OF SERVICE

I hereby certify that a copy of "Union of Concerned Scientists Reply to Licensee's and Staff's Objection to Emergency Planning Contention" were hand-delivered this 14th day of January, 1980 to the following parties:

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