UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

1/16/80

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC RESPONSE TO MOTIONS BY INTERVENORS TO CORRECT FIRST SPECIAL PREHEARING CONFERENCE ORDER OF DECEMBER 18, 1979

I. Motion by People Against Nuclear Energy (PANE) to Clarify or Correct First Special Prehearing Conference Order (Motion), dated December 28, 1979.

In its Motion, PANE notes that the ruling of the Board in its Order of December 18, 1979 that general discovery must be completed not later than 60 days after the service of its Order (see Order at 66), may preclude discovery on psychological distress contentions. PANE therefore moved the Board to permit discovery on psychological distress and related contentions for at least 60 days from service of the Commission's ruling requiring adjudication of such contentions in this proceeding.

In its response to PANE's motion, Licensee has proposed one of two methods to compute the discovery period on the psychological distress issue. First, if the Board decides to certify the psychological distress issue to the Commission either without recommendation or with a recommendation against hearing that issue in this proceeding, Licensee would not object to postponing a 30-day discovery period until after the Commission has handed down its decision. See Licensee's Response

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to PANE Motion to Clarify or Correct First Special Prehearing Conference Order at 2 (January 4, 1980). Second, if the Board recommends the inclusion of psychological distress issues in this proceeding, then Licensee would view that recommendation as a sufficient basis for requiring discovery to begin immediately and to be completed within 60 days of service of the Board's recommendation. See id.

On January 11, 1980, the Board refused to grant PANE's motion for a 60-day discovery period following service of the Commission's ruling that psychological issues may be litigated. See Second Special Prehearing Conference Order at 12-13 (January 11, 1980). The Board did, however, adopt Licensee's second suggestion of an immediate 60-day discovery period if the Board recommends to the Commission that psychological stress issues be litigated. In a pleading entitled "PANE Response to Licensee Counter-Motion Concerning Psychological Distress Discovery," dated January 9, 1980, PANE, as well, accepted Licensee's second suggestion but rejected the first on the ground that a 30-day period for discovery after the Commission has admitted psychological distress contentions would be insufficient to conduct discovery and to respond to discovery on an issue that is "new and unique to this forum." Id. at 2. In its Order of January 11, 1980, the Board also adopted Licensee's first suggestion but refused to decide now whether the discovery period will indeed encompass a 30-day span.

The Staff agrees with the Board, PANE and Licensee that consistent with fairness, this hearing, although expedited, can allow for a flexible discovery period for the psychological distress issue. For this reason, the Staff does not oppose

the compromise effectuated by PANE and Licensee in the event that the Board certifies a recommendation to the Commission to consider the issue. If, however, the Board certifies the psychological distress issue to the Commission absent a recommendation or with a recommendation against consideration and the Commission decides nonetheless to admit the issue for adjudication in this proceeding, then the Staff believes that the manner in which the Commission decides to fashion this issue should be determinative of the amount of time necessary for discovery. Therefore, the Staff agrees with the Board that the Board should wait until the Commission renders an order before the Board decides upon an appropriate length of time for discovery. Furthermore, in the interim the Staff has no objection to cooperating informally by complying with reasonable requests for information on psychological distress issues. The Staff is, however, awaiting an action by the Board or the Commission in order to decide how to proceed on this issue.

II. Union of Concerned Scientists (UCS) Request for Reconsideration or, in the Alternative, for Certification, dated January 7, 1980.

UCS has requested the Board to reconsider its rulings disallowing UCS contentions 17, 18 and 20. In the alternative, UCS asks that the Board certify UCS's request to the Commission for consideration. In contention 17, UCS alleged that the accident at TMI-2 was caused or aggravated by factors labeled "generic unresolved safety issues." See Final Contentions of the Union of Concerned Scientists at 8 (October 22,

1979). UCS offered two examples of its contention: (1) the failure of the pressurizer power operated relief valve and the condensate system as a failure of non-safety systems that contributed to the TMI-2 accident and (2) failure of previously qualified pressurizer-level instruments that should have functioned in the TMI-2 accident environment. The Board, remarking that the issues stated in this contention are adequately covered in other UCS contentions, rejected contention 17 on the ground that it lacked specificity. See Order at 25.

The Staff, in its Response to Contentions, stated that the Commission's August 9, 1979 Order did not identify any generic unresolved safety issues as a basis for suspension of the operation of this facility. Moreover, the Staff noted that operation of no other facility had been suspended pending resolution of such issues. NRC Staff Brief in Response to Contentions at 6 (October 31, 1979). Nevertheless, the Staff found a sufficient link between the two unresolved safety issues claimed by UCS to be related to the TMI-2 accident and the bases upon which operation was suspended. In view of the fact that the Board found that these two

unresolved safety issues are covered by UCS contentions 7 and 14, the Staff accepts the Board's ruling on contention 17.

UCS contention 18 claims that the accident at TMI-2 was caused or aggravated by factors that are the subject of Regulatory Guides that were not used in the design of TMI. UCS provides an example of its contention, yet generally states that the public health and safety requires a demonstration of conformance with each Regulatory Guide presently applicable to plants of the same design as TMI-1 or an equivalent level of protection.

The Staff replied that UCS has not identified either specific recommendations in Regulatory Guides or the nexus that links those recommendations to the bases for suspension of operation of this facility. For that reason the Staff objected to contention 18. The Board noted that the example given to support this contention is the subject of another UCS contention and rejected contention 18 as being too broad. See Order at 25-26.

For the reasons stated in its Response to Contentions, the Staff continues to oppose contention 18.

In contention 20, UCS claims that neither Licensee nor the Staff has accurately assessed the risks posed by t operation of TMI-1 and that the Staff has withdrawn

its earlier endorsement of Reactor Safety Study, WASH-1400, leaving no technical basis for concluding that the actual risk is low enough to justify operation of TMI-1. UCS thus claims that NRC's National Environmental Policy Act (NEPA) regulations require consideration of the consequences of "Class 9" accidents that may occur at TMI-1.

The Board found this contention "too vague and unfounded" and rejected it until such time as the Board addresses the issue of whether an environmental impact statement will be necessary in this proceeding. See Order at 26.

The Staff's position on whether this contention should be allowed remains the same as stated in its Response to Contentions at 7 and in its Brief on Psychological Distress Issues. The Staff believes that it is important not to lose sight of the NEPA posture. A full final environmental impact statement, which addressed whether the construction permit of TMI-1 should be continued, modified, terminated or appropriately conditioned to protect environmental values and the environmental impacts of the operation of TMI-1, was prepared in good faith. NEPA contentions should be considered in this context. Moreover, whether the analysis of accident consequences is a matter requiring consideration in connection with the present action depends partly upon how the legal issues in the Staff's Brief on Psychological Distress Issues are decided. In addition, at the present time, the Staff is undertaking preparation of an Environmental Impact Appraisal that will take accident consequences into account to the extent that the Staff deems appropriate.

Finally, as an alternative to a Board ruling in its favor, UCS asks the Board to certify the issue of the admissibility of its contentions to the Commission. The Staff contends, however, that the general prohibitions against interlocutory review should apply. See 10 C.F.R. §2.730(f); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20, 23 (1976). In its ruling on contentions 17 and 18, the Board stated that the specific issues raised are adequately covered by other UCS contentions. In reference to contention 20, the Staff has noted above that the Commission's response to the briefs filed on the NEPA issues and the Board's determination to address the issue of whether an environmental impact statement is necessary will determine in part whether the subject matter of contention 20 is litigable. Furthermore, a grant of discretionary interlocutory review would be inappropriate. Discretionary interlocutory review has been granted only where the ruling (1) threatened the party adversely affected by it with immediate and serious irreparable harm that could not be rectified by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. C.f. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Neither of these two conditions exists with reference to UCS contentions 17, 18 and 20.

Respectfully submitted,

Lisa N. Singer

Lisa N. Singer
Counsel for NRC Staff

Dated at Bethesda, Maryland,
this 16th day of January, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC RESPONSE TO MOTIONS BY INTERVENORS TO CORRECT FIRST SPECIAL PREHEARING CONFERENCE ORDER OF DECEMBER 18, 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 by deposit in the Nuclear Regulatory Commission internal mail system, this 16th day of January, 1980:

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