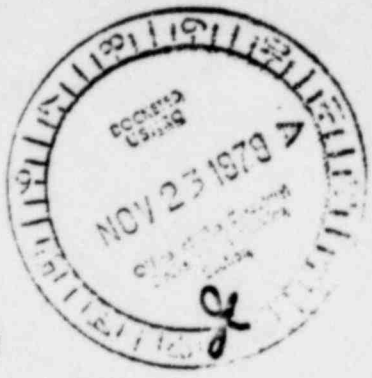


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

INTERVENOR THREE MILE ISLAND ALERT, INC.'S BRIEF ON ISSUE OF PREPARING AN EIS PRIOR TO TMI-1 RESTART

I. Introduction.

By briefs dated October 31, 1979, and received by Petitioner on November 2 and November 5, respectively, the Licensee and the NRC Staff responded to the contention of several Petitioners, including that of Three Mile Island Alert (TMIA), that a new or revised final Environmental Impact Statement (EIS) must be completed by the NRC concerning all aspects of the restart of TMI-1. On November 9, 1979, Joseph Hendrie, Chairman of the Nuclear Regulatory Commission, announced that a comprehensive EIS concerning the cleanup for restart of TMI No. 2 would be done by the NRC. The existence of this new EIS and the further reasons set forth herein must propel this Board to a finding that a final environmental impact statement on the restart of Unit No. 1 must be completed and complied with prior to any decision which allows the Unit's return to commercial service.

WIDOFF, REAGER, SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3552 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

II. The Restart Of Unit I Involves Environmental Factors Not Previously A Part Of An EIS.

The brief of the Licensee relies on the existing environmental reviews of TMI-1 and the minimal operational and technical changes made to the plant as a result of the accident as support for the position that no new EIS is required. It generously provides citations to the regulations of the Council on Environmental Quality (CEQ) (40 CFR Section 1502.9(c)(1) which detail the circumstances under which a supplemental EIS must be done, then proceeds to "explain" why the restart falls outside those requirements. The explanation provided fails entirely to address the reasons why a new or supplemental EIS must now be undertaken. For clarity of review, those requirements are as follows:

> Agencies shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

As to point (i), TMIA concurs that no such changes are implied by the restart. The unit to be restarted is the same in all important technical aspects as it was before. As to paragraph (ii), the Licensee has missed the point entirely.

The Licensee contends that the existing EIS for the plant already covers a potential accident of the type experienced at TMI-2 and, therefore, such a study need not be repeated. Assuming, arguendo, that the Licensee is correct on this point, it is not the impact of such an accident that must now be reviewed. It is the

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3582 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
717) 763-1383

restart and attendant normal or abnormal operation in light of new and significantly changed circumstances which were never previously assessed that must now be studied. These new factors include:

1. The safety and praticality of operating a nuclear power station adjacent to a five-year cleanup of a damaged station involving levels and volumes of radioactivity never before experienced in the history of commercial nuclear power.*

2. The safe operation of Unit I when a significant portion of its tankage is required by an Order of the NRC to be kept available for use in conjunction with the cleanup of Unit II (see attached Exhibit "A", Order of October 16, 1979).*

3. Cumulative effects of normal operating levels of radiation (assuming it runs normally) on a population which has received excessive doses as a result of the accident at Unit II and the related cleanup.*

4. The potential thermal pollution impact of the operation of Unit I as related to the levels of thermal pollution generated from the unprecedented volumes of water discharged by the Unit II cleanup.

In the language of the CEQ regulations, these and other factors are "significant new circumstances . . . relevant to environmental concerns and bearing on the proposed action or its impacts," which give rise to a supplemental environmental impact statement.

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3883 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

*Such interrelationships are further evidence of the need to delay the decision to restart Unit I until final plans are approved for the total cleanup of Unit II.

III. The Restart Of Unit I Is A Major Federal Action Significantly Affecting The Human Environment Within The Meaning Of NEPA.

The NRC Staff contends, beginning at page 14 of its brief, that this restart proceeding, as an enforcement action, need not be the subject of an EIS, as it is not a major action significantly affecting the human environment. Its first argument is that the NRC regulations of 10 CFR Section 51.5(d) do not require a NEPA statement for every enforcement action. That may be so. However, it is NEPA which controls when a particular situation requires an EIS, not the NRC regulations. See Isaak Walton League of America vs. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971).

Second, the regulation cited at page 18 of the Staff brief indicates on its face that some enforcement proceedings may require an EIS. Thus the language, "unless otherwise determined by the Commission."

Next the Staff argues that enforcement actions are exempt from CEQ guidelines. However, in a lapse into candor, the Staff admits that the rule, as interpreted by the courts, applies only to filing an EIS before commencing an enforcement action. See Gifford-Hill & Co. v. FTC, 523 F.2d 730 (D.C. Cir. 1975); Mobil Oil Corp. v. FTC, 562 F.2d 170 (2d Cir. 1977). These cases both address the question of NEPA at the end of the enforcement proceeding, and both indicate that NEPA considerations are relevant at that time. Here, it is not the enforcement action which is the cause for NEPA review. It is the possible restart, with its attendant environmental impacts, which must be the subject on EIS. Thus, the argument on pages 17 through 24 of the Staff brief, in the present context, is meaningless.

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3552 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1382

Finally, on page 25, the Staff begins to address the real question, calling it an "additional analytical problem", i.e., the "extent to which the renewal of operation of the facility can or should be separately identified as a federal action . . . ." More precisely, is the renewal of operation of Unit I, under present circumstances, a major federal action significantly affecting the human environment? The Staff predictably says "no." TMIA disagrees.

A. Analysis of NEPA.

After identifying the issue at page 25 of its brief, as noted above, the NRC Staff takes off on another tangent, carefully analyzing whether an ongoing federal action requires an EIS in the middle of the program. That is also not the issue. Finally, the Staff brief admits, on page 29, that "where environmentally significant changes in the project are contemplated . . . or where significant new environmental impacts are discovered, there may be some responsibility of the agency to determine whether a new or supplemental EIS should issue." That is the issue here. Once again, the Staff dismisses the need under this test by addressing and discounting the psychological stress claim, ignoring all other potential environmental factors such as those enumerated in Section II above.

The Board cannot accept the argument that it should look only to operation of Unit I with some sort of blinders, ignoring the proximity of Unit II. The Commission Order establishing this proceeding charges the Board to address this relationship.*

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3552 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

*See Order of July 2, 1979, Pages 4-5.

Furthermore, that the restart of Unit I is itself a major federal action significantly affecting the environment is clear from the relevant cases.

As summarized by the courts in Sierra Club v. Bergland, 451 F.Supp. 120 (N.D. Miss. 1978), quoting City of Rochester v. U.S. Postal System, 541 F.2d 967, 972 (2d Cir. 1976):

> In ascertaining the significance of a major federal action, the project must be assessed with a view to the overall cumulative impact of the action proposed, related federal action and the projects in the area and further actions contemplated.
>
> As the Court reasoned in Bergland, id:
>
> . . . such a statement (EIS), however, is absolutely required where the proposed action may further be said to have a potentially significant adverse effect. (emphasis added)

The Court concluded its reasoning as to the need for an EIS in the Rochester case by stating that:

> Considerations of environmental factors "to the fullest extent possible" and "beginning at the earliest possible point" are necessary. 38 F.Reg. 19856, 19865 (1973). As recognized by the Second Circuit in Conservation Society of Southern Vermont v. Sec. of Transportation, 508 F.2d 927, 936 (2d Cir. 1974), Congress was quite aware that incremental effects of small, but repetitive, projects could have major long-term effects.

As the Senate report accompanying NEPA expressly warns, one function of the Act is to prevent decision making that affects the environment from taking place "in small but steady increments which perpetuate rather than avoid the recognized mistake of previous decades." S.Rep. No. 91, 296, 91st Cong., 1st Sess. 5 (1969). Thus, the federal courts have had no difficulty in requiring impact statements for

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3882 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

"major federal actions" which were no more than the cumulative effect of related minor federal actions. See, e.g., NRDC v. Grant, 341 F.Supp. 356 (1972); People of Enewetak v. Laird, 353 F.Supp. 811 (1973); Minnesota PIRG v. Butz, 358 F.Supp. 584 (1973).

The brief of the Staff acknowledges the line of cases which hold that the subsequent discovery of new factors involving an ongoing project for which an EIS had already been prepared required the filing of a supplemental EIS. See Aluli v. Brown, 437 F.Supp. 602 (D.Hawaii 1977) cited at page 28 of NRC brief. The Aluli decision does not stand alone, as the tone of the Staff brief would have one infer. A further case is very instructive on this point. In Essex City Preservation Ass'n. v. Campbell, 536 F.2d 956 (1976), the Circuit Court of Appeals for the First Circuit affirmed the District Court ruling (399 F.Supp. 208) that a supplemental EIS was required because of changed circumstances. In this case, the Governor of Massachusetts declared a moratorium on the further construction of a portion of a federal interstate highway after the EIS for that construction and related construction farther north had already been filed. The Court's opinion, discussing the District Court requirement of a new EIS based on the moratorium, is as follows:

> While declining to decide whether the Sargent moratorium actually would have such an environmental impact, the court held that a supplemental EIS had to be prepared in order to effectuate the basic aims of NEPA which favor disclosure of all relevant factors affecting agency decisions. See Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). We are inclined to agree with this judgment. While we cannot determine with certainty what the

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3883 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

> ultimate environmental effects of the moratorium will be, it would seem to constitute the type of "significant new information . . . concerning (an) action's environmental aspects" that makes a supplemental EIS necessary. 23 C.F.R. Section 771.15. Such a supplemental statement, which receives the same type of public comment and exposure as an original EIS, is likely to facilitate the "complete awareness on the part of the actor of the environmental consequences of his action . . .," National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971), mandated by NEPA. It is this type of outside review that can mitigate against errors or possible bias. See I-291 Why? Association v. Burns, 372 F.Supp, 223, 245-46 (D.Conn.1974), aff'd, 517 F.2d 1077 (2d Cir. 1975). In view of the fact that the reconstruction project at issue here is not yet completed and that certain agency decisions may "remain open to revision," see Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973), we cannot say it was improper for the district court to require appellees to prepare and circulate a supplemental EIS directed to the impact of the Sargent moratorium.

Surely, if a postponement in a construction project of a related stretch of highway can trigger a supplemental EIS, then the accident at TMI-2, its proximity to Unit I, the synergistic impact of radiation exposures, the need to share facilities with and the unknown plans for the Unit II cleanup must compel a supplemental EIS on the restart of Unit I.

The Board must keep in mind that NEPA requirements are stringent, and that the issue is not resolved merely because the Licensee and Staff conclude that an EIS is not needed.

The National Environmental Policy A. . of 1969, 42 U.S.C. Section 4321, et seq., has been litigated now for almost a decade. Courts in every circuit have recognized its strict requirements. Section 102(2)(c) of NEPA requires that "to the fullest extent possible" all federal agencies must include a detailed environ-

WIDOFF REAGER, SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3883 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

mental impact statement "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment"; this environmental impact statement is to "accompany the proposal through the existing agency review processes . . ." Jones v. District of Columbia Redevelopment Land Agcy., 499 F.2d 502 (D.C. Cir. 1974) Cert. den. 96 S.Ct. 299 (Bazelon, C.J.)

In Calvert Cliffs Coordinating Committee vs. Atomic Energy Commission, 449 F.2d 1109 (1971), a landmark case under NEPA, the Court, per Judge Wright, discussed how NEPA is to apply. Judge Wright stated that NEPA required the Federal Government to "use all practical means and measures" to protect environmental values. He further went on to say that the "greatest importance of NEPA is the requirement that agencies consider environmental issues just as they consider other matters within their mandates."

In his opinion, Judge Wright states that the procedural requirements of NEPA "are not highly flexible . . . they establish a strict standard of compliance." 449 F.2d at 1112; adding that Section 102's mandate that agencies prepare environmental impact statements:

> . . . must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay, or economic cost will not suffice to strip the section of its fundamental importance." Calvert Cliffs, supra, at 1115.
>
> NEPA mandates a case by case balancing judgment on the part of federal agencies . . . the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be con-

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3892 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
[illegible] 763-1383

> sidered which would effect the balance of values . . . . The point of the individualized balancing analysis is to insure that the optimally beneficial action is finally taken. supra at 1123.

The Court, in Calvert Cliffs, pointed out that impact statements should be prepared at a time when it is still possible to consider alternatives and possible approaches to a particular project. In most cases, it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with public interest, be enjoined until such compliance is forthcoming. Jones vs. D.C. Land Development Agency, 499 F.2d 502, 513 (D.C. Cir. 1974). In fact, the courts have stated that there is a presumption in favor of injunctive relief in cases of NEPA non-compliance. This presumption is necessary in order that the courts may preserve the status quo to allow decision makers the opportunity to choose, with the benefit of advice and counsel, from all affected parties, among the options available to it. NORMAL vs. United States, 11 E.R.C. 1841 (D.C. Cir. 1978).

Thus, not only is an EIS required, but also it is in the interest of efficiency and fairness to all, including the Licensee, that it be done now, rather than at the end of a court proceeding after the Commission entered a final order which did not include a new EIS.

B. The restart hearings should be delayed pending resolution of environmental issues at Unit II.

Directly related to the problems which give rise to the need for an EIS for Unit I is a resolution of the issues surrounding II. As noted above, the Commission has decided to do a comprehensive EIS on the cleanup of that unit. However, the

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3883 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
717 763-1383

scope of that EIS has not yet been determined nor is there a timetable for completion. Without a final decision as to the methods of decontamination, the disposal of water, wastes and resins, for intermediate and high-level radioactivity and related concerns, one cannot understand, nor assess, the potential environmental impact of restarting and operating Unit I. Thus, even if a new EIS is undertaken for Unit I, it will be premature unless the final decisions and assessments of the Unit II operation have been made. Such a premature statement will then have to be supplemented and revised when the Unit II plan is finalized, making it an interim statement at best, on which no restart could properly be allowed. See Environmental Defense Fund v. Armstrong, 352 F.Supp 50 (1950), affirmed 487 F.2d 814, cert. denied 94 S.Ct. 2002, 416 U.S. 974.

IV. Harm To The Human Environment From Psychological Stress Is Recognizable Under NEPA.

TMIA and other intervenors have requested that the harm to the people of the Susquehanna Valley arising from the stress engendered by the restart of Unit I be part of the subject of an EIS. Both the Licensee and the NRC Staff contend otherwise. The NRC Staff allows that certain non-direct "sociological" factors can be considered if there are also direct ecological impacts. As we have shown above, there are direct ecological impacts to consider in a supplemental EIS, thus we can consider non-direct "sociological" ones. However, TMIA asserts that the medically demonstrable harm to the public is a direct injury to the human environment. Further, if found not to be direct, it is certainly one of the indirect effects of the restart to be studied in the EIS that otherwise must be done.

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3892 OLD GETTYSBURG ROAD
CAMP HILL PENNSYLVANIA 17011
(717) 763-1383

As the affidavit of Dr. Barnoski attests (Exhibit "B" hereto), the stresses related to the continuing operation of TMI are having substantive, real, medical consequences. Reducing this real harm to a psycho-sociological metaphor, as the Licensee and Staff would have us do by calling it "distress", elevates semantics beyond a reasonable bound.

The Hanly* line of cases so aptly cited by the Commonwealth of Pennsylvania and others on this topic make it clear that protecting the quality of the human environment under NEPA requires a review of the effects of the federal action on such diverse factors as health care delivery systems, sewerage treatment, community mental health capabilities and the like.

The stress related medical consequences of TMI-1 returning to operation are more directly evident than some of the considerations required by Hanly and its progeny. Although such factors may be somewhat more difficult to measure than conventional environmental woes, such inconvenience is not a sufficient basis to deny their inclusion in an EIS. Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1115 (1971). To decide now, before an EIS is done, that such measurements will prove so difficult as to be of no value to the decision makers surely puts the cart before the horse. At this stage, it is only to be decided whether such a review will be done at all, not to determine or predict what the review will tell us. Let the record first be made, then the proper decisions

WIDOFF REAGER, SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3993 OLD GETTYSBURG ROAD
CAMP HILL, PENNSYLVANIA 17011
(717) 763-1383

*Hanly v. Mitchell, 460 F.2d 640, cert. denied 409 U.S. 990 (1972); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) cert. denied 412 U.S. 908 (1973).

gleaned therefrom, rather than foreclosing agency consideration of important public topics by pre-determining that it will be too difficult to do.

V. Conclusion.

The public policy of this country as codified in NEPA is clear; environmental concerns must be made a part of the Federal Government's decision making process. As demonstrated above, and by the other intervenors, the restart of TMI-1 has the potential for adversely affecting the quality of the human environment. Thus, an environmental impact statement concerning this federal action must be issued, after full public contact, discussion and participation.

Respectfully submitted,

Larry B. Selkowitz

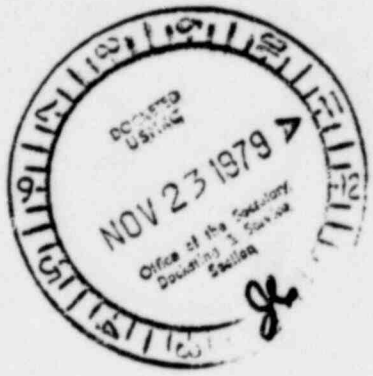
Theodore A. Adler
Counsel for TMIA, Inc.

Widoff, Reager, Selkowitz & Adler, P.C.
P. O. Box 1547
Harrisburg, PA 17105
(717) 763-1383

WIDOFF REAGER
SELKOWITZ &
ADLER P.C.
ATTORNEYS AT LAW
3892 OLD
GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
(717) 763-1383

Dated: November 21, 1979

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, et al. (Three Mile Island Nuclear Station, Unit 2)	Docket No. 50-320

MEMORANDUM AND ORDER

Because of the March 28, 1979 accident at the Three Mile Island Unit 2 nuclear power plant (TMI-2), substantial amounts of radioactively contaminated waste water have been collected in tanks at the facility. As the initial step in a program to deal with this accumulation, the Commission's technical staff has recommended that Metropolitan Edison Company, the licensee for Three Mile Island, be permitted to operate an EPICOR-II filtration and ion exchange decontamination system to decontaminate intermediate-level radioactive waste water now held in tanks in the TMI-2 auxiliary and fuel handling building. This recommendation is accompanied by the staff's environmental assessment of the impact of using EPICOR-II and an analysis of comments on the assessment by the public. The staff has concluded, based on this assessment and analysis, that the proposed use of EPICOR-II will not significantly affect the e
mental impact statement need be prepar
operate EPICOR-II. The Commission is

EXH

COMMONWEALTH OF PENNSYLVANIA)
: SS:
COUNTY OF DAUPHIN)

John F. Barnoski, being duly sworn, says the following:

I am a medical doctor who has maintained a family medical practice in Middletown, Pennsylvania, since 1976. Immediately following the accident at Three Mile Island, I treated, and continue to treat, a substantial number of patients who, along with their physical symptoms, expressed a heightened awareness of and anxiety concerning any other medical involvements they were experiencing or would experience in the future because of their exposures to the radiation emitted by TMI during and after the accident. In addition, these and other patients continue to consult me regarding the harm they and their children will experience from any additional exposures to radiation resulting from present and future activity at TMI. These concerns and fears of the residents of Middletown and near-by communities have also been expressed to me by other citizens who are not my patients.

The past and continuing psychological effects on the population around Three Mile Island are having negative consequences on the patients I have seen, ranging from the mild to the severe, and will continue to have such effects so long as the NRC and GPU continue to release radioactivity into the environment or announce that such is imminent or contemplated.

WIDOFF REAGER SELKOWITZ & ADLER P.C.
ATTORNEYS AT LAW
3968 OLD GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011
717) 763-1383

EXHIBIT "B"

Any programs to treat or discharge any radioactive substances at TMI will, because of these psychological effects, have a negative impact on the human environment near TMI, which must be considered before such actions are taken.

John Barnoski, M.D.

Sworn to and subscribed before me
this [illegible] day of November, 1979.

Notary Public

My Commission Expires:

AUDREY C. KEHLER, NOTARY PUBLIC
HARRISBURG, DAUPHIN COUNTY
MY COMMISSION EXPIRES JAN. 18, 1982
Member, Pennsylvania Association of Notaries

1577 329

WIDOFF REAGER
SELKOWITZ &
ADLER P.C.
ATTORNEYS AT LAW
3883 OLD
GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011

(717) 763-1383

CERTIFICATE OF SERVICE

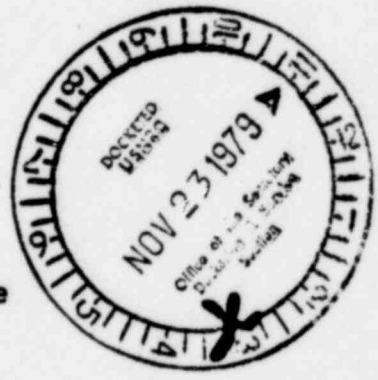
I do hereby certify that I served a true and correct copy of the attached document, Intervenor Three Mile Island Alert, Inc.'s Brief On Issue Of Preparing An EIS Prior To TMI-1 Restart, on the below listed parties, by hand delivering a copy to the TMI Observation Center in Middletown, Pennsylvania, directed to the attention of John Wilson, on November 21, 1979, for reproduction and first-class mailing, in accordance with Licensee's memo dated November 13, 1979.

Ivan W. Smith, Esquire
Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, TN 37830

Dr. Linda W. Little
5000 Hermitage Drive
Raleigh, NC 27612

George F. Trowbridge, Esquire
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, DC 20006



Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Theodore A. Adler

WIDOFF REAGER
SELKOWITZ &
ADLER P.C.
ATTORNEYS AT LAW
3552 OLD
GETTYSBURG ROAD
CAMP HILL
PENNSYLVANIA 17011

(717) 763-1383

Dated: November 21, 1979

Date: November 21, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

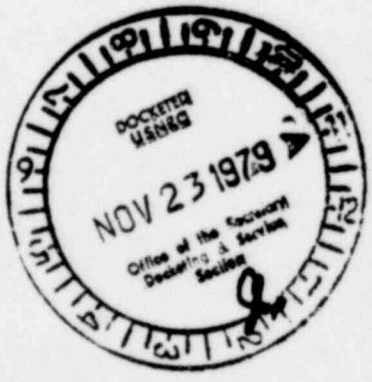
In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart)
(Three Mile Island Nuclear Station, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Intervenor Three Mile Island Alert, Inc.'s Brief On Issue Of Preparing An EIS Prior To TMI-1 Restart dated November 21, 1979, which was hand delivered to Licensee at Three Mile Island Observation Center, Middletown, Pennsylvania, on November 21, 1979 were served upon those persons on the attached Service List by deposit in the United States mail, postage paid, this 21st day of November, 1979.

John F. Wilson

Dated: November 21, 1979



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	

SERVICE LIST

Ivan W. Smith, Esquire
Chairman
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Walter H. Jordan
Atomic Safety and Licensing Board Panel
881 West Outer Drive
Oak Ridge, Tennessee 37830

Dr. Linda W. Little
Atomic Safety and Licensing Board Panel
5000 Hermitage Drive
Raleigh, North Carolina 27612

James A. Tourtellotte, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John A. Levin, Esquire
Assistant Counsel
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17120

Karin W. Carter, Esquire
Assistant Attorney General
Commonwealth of Pennsylvania
505 Executive House
P. O. Box 2357
Harrisburg, Pennsylvania 17120

Robert L. Knupp, Esquire
Assistant Solicitor
County of Dauphin
P. O. Box P
407 North Front Street
Harrisburg, PA 17108

John E. Minnich
Chairman, Dauphin County Board of Commissioners
Dauphin County Courthouse
Front and Market Streets
Harrisburg, Pennsylvania 17101

Walter W. Cohen, Esquire
Consumer Advocate
Department of Justice
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17127

Jordan D. Cunningham, Esquire
Attorney for Newberry Township
T.M.I. Steering Committee
2320 North Second Street
Harrisburg, Pennsylvania 17110

*Theodore A. Adler, Esquire
Widoff Reager Selkowitz & Adler
P. O. Box 1547
Harrisburg, Pennsylvania 17105

*Person on whose behalf service is being made. Only Certificate of Service is enclosed.

Ellyn Weiss, Esquire
Sheldon, Harmon & Weiss
Suite 506
1725 Eye Street, N.W.
Washington, D.C. 20006

Steven C. Sholly
304 South Market Street
Mechanicsburg, Pennsylvania 17055

Frieda Berryhill
Chairman, Coalition for Nuclear
Power Plant Postponement
2610 Glendon Drive
Wilmington, Delaware 19808

Holly S. Keck
Legislation Chairman
Anti-Nuclear Group Representing
York
245 West Philadelphia Street
York, Pennsylvania 17404

Karen Sheldon, Esquire
Sheldon, Harmon & Weiss
Suite 506
1725 Eye Street, N.W.
Washington, D.C. 20006

Robert Q. Pollard
Chesapeake Energy Alliance
609 Montpelier Street
Baltimore, Maryland 21218

Chauncey Kepford
Judith H. Johnsrud
Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, Pennsylvania 16801

Marvin I. Lewis
6504 Bradford Terrace
Philadelphia, Pennsylvania 19149

Marjorie M. Aamodt
R. D. 3
Coatesville, Pennsylvania 19320

Jane Lee
R. D. 3 Box 3521
Etters, Pennsylvania 17319

George F. Trowbridge, Esquire
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

*Person on whose behalf service is being made. Only Certificate of Service is enclosed.