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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman
Dr. Walker H. Jordan
Dr. Linda W. Little

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

MEMORANDUM AND ORDER REQUIRING FURTHER SPECIFICATION OF CONTENTIONS

(June 23, 1980)

On May 23, 1980 the licensee served Licensee's Motion to Require Further Specification of Contentions. Licensee seeks a board order which would require intervenors to provide specification of contentions in two categories. The first includes those contentions accepted by the board as issues with the expectation and requirement that, with the benefit of discovery, further particulars would be specified. These contentions are Aamodt Contention 5, ANGRY Contention 5(D), Newberry Contention 3(d)(9), Sholly Contentions 8(C), 8(T), 14, and 16, and UCS Contentions 9, 10, and 13.

The second category of contentions includes those which were accepted without condition, but as to which licensee states that it has received discovery responses which fail to provide sufficient specificity for litigation. These contentions are CEA Contentions 5, 6, 7, and 8, and TMIA Contentions 6 and 7.

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Licensee also seeks an order which would preclude intervenors who do not further specify contentions in accordance with the board order, from litigating any matter (other than "new information") which was not expressly included in the contention itself, or in the bases for the contentions, or identified by the intervenor in response to discovery requests. Motion, p. 26.

The Aamodt family and CEA did not respond to licensee's motion. We discuss the responses of UCS and TMIA, and Mr. Sholly's position below in connection with their respective contentions.

The NRC staff responded to the motion[1/] by opposing the request for specification except for Sholly Contention 14 and UCS Contention 13, which according to the staff are without bases. The staff argues that because of the Appeal Board's decision in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC ____, April 22, 1980, this board may not require further specificity of contentions if there was sufficient basis for their acceptance under the criteria of ALAB-590.

The staff states:

> Thus, based on this ruling, some of the contentions originally thought by the Licensing Board, the Licensee, or the Staff to have insufficient bases and to need further specificity may be admissible without a further showing. It is the Staff's view that, under the Allens Creek decision, Aamodt #5, ANGRY #5(D), Newberry #3(d)(9), Sholly #8(C), Sholly #8(T) and Sholly #16 are all presently admissible without further specificity by the parties. Each of the contentions named above

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1/ NRC Staff Response to Licensee's Motion for Further Specification, June 12, 1980.

> includes a basis for the assertions and gives all parties involved reasonable notice as to the issues to be litigated.[5/] For these reasons, that portion of Licensee's Motion which seeks further clarification of these six contentions should be denied. [Footnotes 3 and 4 omitted.]
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> 5/ Allens Creek only discussed "the acceptance of a contention for the limited purpose of determining whether to allow intervention under 10 C.F.R. 2.714." Slip op. at 16. Although denial of any of these five contentions will not deny intervention status to the parties concerned, it seems that the acceptability of all contentions should be judged by the same standard.

Staff response, p. 3.

The staff has misread ALAB-590. Its position is out of step with established procedures under NRC rules for developing issues for litigation. The staff has confused the bases requirements of 10 CFR 2.714 with the specificity standards contemplated by other rules. The Appeal Board in ALAB-590 carefully noted that it was considering the threshold admissibility criteria for contentions under Section 2.714. Slip op., pp. 9, 11, 14, and 15. In this proceeding, discovery, except for new information, has been completed and the parties are now preparing to go to hearing.

After a petitioner and his contentions have been accepted into the proceeding, a different, more demanding obligation arises. Id., p. 11. During the interval between accepting contentions and hearing them, boards have the continuing responsibility and authority to require the refinement of contentions until they are

suitable for litigation. Beginning with Section 2.751a(1) and (2), the board must provide for the identification of key issues. Then it must permit discovery under Section 2.740 for the further identification of issues. Before the matter goes to hearing, the board should (in some cases must) consider the "Simplification, clarification and specification of the issues;" and consider whether pleadings (contentions) should be amended. Section 2.752(1) and (2). Moreover, if a party is in default of the board's discovery orders or orders under Section 2.751a and 2.752, the board may, if it is just under the circumstances, find facts in favor of one party over another. Section 2.707(a).

Our rulings accepting contentions subject to later specification were entirely consistent with ALAB-590. In fact, it is the very action anticipated by, and in some cases made necessary by the reasoning of ALAB-590. We must, according to ALAB-590, accept contentions where the reasons (basis) for them has been stated. Id., p. 11. But often it is not until the board has provided some mechanism for specifying the bases can an adverse party avail itself of the provisions of 2.749 by demonstrating that there is no genuine issue to be heard, or go to hearing on the issue. The Appeal Board in ALAB-590 had no need to discuss a licensing board's authority to require the further specification of admitted contentions. Its silence on this aspect of the matter seems to have misled the staff. See also Tr. 1871-83.

There is another aspect of ALAB-590 which appears to occupy the staff's attention as it relates to the specification of issues. That is the availability of summary disposition procedures under 2.749. Staff response, p. 5, Tr. 1873-74. Taken out of context, ALAB-590 could be read to say that the obligation to establish some factual support for contentions can be addressed only under a motion for summary disposition or at the evidentiary hearing.[2/] The staff's view is that, without summary disposition procedures, the licensee has no proper recourse in the face of contentions lacking in specificity. Staff response, p. 5. Here again, we believe that the staff has failed to appreciate the distinction between the procedural requirement for specifying contentions so that they can be litigated and the substantive demonstration required in motions for summary disposition and in evidentiary hearings.

Be that as it may, the staff has a point to be considered. The Commission, in its August 9, 1979 Order and Notice of Hearing, suggested a schedule which did not provide for motions for summary disposition. The staff subsequently proposed a schedule which would provide for such motions (Tr. 1526), but the licensee proposed to eliminate summary disposition motions. Tr. 1536. It was the board's impression that there was no great demand for the opportunity to file summary disposition motions (Tr. 1537), so, in our February 29, 1980 Fourth Special Prehearing Conference Order (p. 26),

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2/ "Rather, the obligation [to establish support] arises solely (1) in response to a subsequent motion of another party seeking to dispose summarily of the contention under 10 CFR 2.749 for want of a genuine issue of material fact; or (2) in the absence of such a motion, at the evidentiary hearing itself." ALAB-590, Slip op., p. 16.

we indicated that, in the tentative schedule then under consideration, there would be no opportunity for summary disposition motions.

Subsequently at the May 13, 1980 prehearing conference, the staff again made a general recommendation for summary disposition opportunities, but did no specific proposal. Tr. 1873-74. Now, in its response to licensee's motion, the staff raises the point again and correctly points out that the Commission's Order of March 14, 1980 referred to the availability of summary disposition procedures in this proceeding.

We continue to believe that in this particular proceeding there is little demand for nor utility in motions for summary disposition. Tr. 1536. Further, even motions for summary disposition may not solve the problem expressed in licensee's motion to specify contentions because, as we note above, some specificity may be desirable to determine whether there remains a genuine issue of fact to be heard. Nevertheless, in view of staff's persistence on the subject, we wish to make it clear that our ruling on February 29 that there would be no opportunity for motions for summary disposition was intended to mean only that there would not be a special 45-day interval set aside for summary dispositions. See also Tr. 1874. Parties may file motions for summary disposition. Such motions must be in the board's hands no later than August 5, 1980. Responses to such motions will be by special order of the board.

Aamodt Contention 5 would require that evacuation plans provide for the care or relocation of livestock in emergencies. The Aamodts cite as bases for the contention their personal but unspecified experiences during the March 1979 evacuations, and the problem of mastitis or "going dry" in dairy cattle. The board accepted the contention, but noted that it wasn't sufficiently specific for litigation. We stated that we would expect it to be revised after discovery. Licensee now requests the board to enforce this expectation, but makes no particular requests.

In our order of June 19, 1980, we suspended activities on emergency planning issues, so there is no need for the Aamodts to respond until the suspension is lifted. In the meantime, some observations on the contention might be helpful. A part of the contention is an expression of a value judgment, i.e., livestock should be cared for or relocated during evacuations. It might be difficult to provide factual specifics as to an individual's judgment, but the Aamodts may wish to elaborate upon their experiences and the practical problems brought about by the abandonment of livestock. The other aspect, whether or not licensee's revised emergency plan actually does provide for the care or relocation of livestock, and if so, whether the provision is realistic, is a discrete factual consideration which the Aamodt family should thoroughly address when called upon to do so when procedures on emergency plans are resumed. The Aamodt family is required to

specify their Contention 5 within 20 days (plus five days for service) following the date of the order lifting the suspension of emergency planning matters.

ANGRY's Contention 5(D) demands the installation in effluent pathways of systems for the rapid filtration of large volumes of contaminated gases and fluids. We accepted the contention with the understanding that ANGRY would specify the particulars in the course of discovery. ANGRY has provided what appears to be adequate specificity in response to licensee's Interrogatory 5-2 to ANGRY. ANGRY may, if it so elects, formally specify its Contention 5(D) in accordance with the order below, but it also may choose to remain silent and by its silence indicate that the contention is specified by the response to the interrogatory.

Newberry's Contention 3(d)(9) asserts, inter alia, that most local municipalities are not aware of their responsibility to develop a separate emergency plan. We accepted the contention with this allegation but directed Newberry to specify the basis for it. Newberry did not specify but is directed to do so within 20 days (plus five days for service) following the lifting of the suspension on emergency planning matters.

Mr. Sholly did not file a response to licensee's motion to specify contentions but he filed Intervenor Steven B. Sholly Reconsideration of Contentions on June 5, 1980 which either

promises to specify or undertakes to specify each of the contentions covered in licensee's motion, except for Sholly Contention 16, which he has since withdrawn. On June 18, the chairman conferred with Mr. Sholly and counsel for the licensee requesting that licensee address the adequacy of Mr. Sholly's June 5 filing. After the proposals in Mr. Sholly's June 5 filing realize final form, the licensee will report to the board whether it continues to seek relief.

UCS Contentions 9, 10, and 13 were accepted with the expectation that further specification would be appropriate.[3/] UCS, itself, has no problem with the concept of specifying its Contentions 9, 10, and 13. In its June 5 answer to licensee's motion, UCS stated:

> UCS notes at the outset that we recognize our obligation to meet the directives of the Board with respect to contentions 9, 10 and 13 after the close of discovery. We will need some reasonable period of time thereafter in which to do so. There is no justification, however, for requiring this showing to be made before discovery is completed, as the licensee has requested. We also note that we have not yet received the staff's filing on Class 9 accidents, nor do we have the SER. Nor, indeed, have we received full answers to all of our interrogatories.

Union of Concerned Scientists Opposition to Licensee's Motion to Require Further Specification of Contentions, June 5, 1980, pp. 1-2.

3/ Contrary to the implication of the staff's June 12 response to the motion, the board in adopting UCS Contentions 9 and 10, included them in the category of example-type contentions which should be refined in the discovery process. First Special Prehearing Conference Order, December 18, 1979, LBP-79-34, 10 NRC 828, at 831-32.

Since UCS filed its answer to licensee's motion, the SER, NUREC-0680, and the staff report of TMI-1 Potential Core Damage Accident Sequences and Preventive and Mitigative Measures (referred to by UCS as the "filing on Class 9 accidents") has been published and served. Although UCS suggests that it may have been prevented from specifying its contentions because it has not received full answers to interrogatories, it has not provided details nor are we aware of any outstanding discovery disputes involving UCS. Therefore, we believe that the time for specifying the UCS contentions will be ripe within the time period provided below, and UCS is directed to provide the requested specification. Any other intervenor who has been permitted to adopt any of UCS Contentions 9, 10, or 13, such as ANGRY, is also included in the board's order to specify the respective UCS contentions.[4/]

CEA Contentions 5, 6, 7, and 8 are also included in licensee's motion. These contentions were accepted by the board without any conditions as to later specificity. The licensee's motion is founded on CEA's responses to licensee's interrogatories which, licensee asserts, were inadequate to inform it of the specifics of CEA's allegations.

The board has been heavily involved in licensee's efforts to discover the particulars of CEA's contentions. The licensee served

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4/ ECNP had been granted the right to adopt UCS Contentions 10 and 13, but because of default that opportunity was revoked. June 12, 1980 Memorandum and Order On Licensee's Motion for Sanctions Against Environmental Coalition on Nuclear Power, (Slip op., p. 23), LBP-80-17, 11 NRC ____ (1980).

its "first" set of interrogatories upon CEA on January 18, 1980. On March 17, CEA filed its "response" to the interrogatories. On March 31, licensee served its first motion to compel CEA answers to certain of licensee's interrogatories. CEA did not answer the motion to compel.

Licensee's first motion to compel identified three categories of asserted answer failures, the "toss of the ball back" answer, the non-responsive or incomplete answer, and no answer whatever.

The board agreed with licensee and, in its April 16 memorandum and order, CEA was directed to provide responses to the licensee's interrogatories, including important interrogatories on CEA Contentions 5 through 8. In response to the board's order, CEA on April 26 filed its "Further Response" to licensee interrogatories. In response to the interrogatories relating to CEA's Contentions 5, 7, and 8, CEA's answer to most of them (twenty in all) was that "CEA is not presently able to identify [the requested information]."

Also, CEA failed to provide a complete response to Interrogatory 5-5, the board had overlooked compelling CEA to respond to Interrogatory 6-2, and CEA had overlooked the board's order to respond to Interrogatories 6-3(b) and 6-3(c). Therefore on May 12, licensee filed its second motion to compel discovery of CEA seeking responses to the Interrogatory 5-5 and the overlooked interrogatory under Contention 6. CEA agreed to respond to these interrogatories at the prehearing conference of May 13. Tr. 1951-53.

In our May 22 memorandum and order (p. 12), CEA was directed to supply the information that it had agreed to supply. CEA has not complied with the board's order nor its own promise.

The board had previously ruled that the responses to licensee's interrogatories were appropriate under 10 CFR 2.740. April 16 memorandum and order, pp. 1-2. It is only with respect to Interrogatories 5-5, 6-2, 6-3(b) and 6-3(c) that CEA is in default of a board order. The other answers, to the effect that CEA does not have the requested information, are appropriate responses under the discovery rules, if true. We assume that CEA would have supplemented its "not-presently-able-to-identify" answers with the requested information as required by 10 CFR 2.740(e)(2) if it later came into possession of information responsive to those interrogatories. Even where CEA has defaulted in responding to the board's May 22 order to honor its agreement to respond, we believe that the problem rests with CEA's lack of information and its inability to come to grips with discovery procedures rather than a willful disobedience of our order.

Having closely followed licensee's discovery demands and CEA's efforts to respond to them, it appears to the board that, even after discovery, CEA does not know much about the subject matter of its Contentions 5, 6, 7, and 8. Licensee is entitled either to the information on the particulars of CEA's contentions or to some other relief. While we have our doubts that an order

to CEA to add specification to its contentions will be productive, we do not want to foreclose the possibility that CEA has since developed the information supporting its contentions and is prepared to produce it. Therefore, we direct CEA to amend its Contentions 5, 6, 7, and 8 by providing specificity within the time provided below, or, in the alternative, to respond to the interrogatories within ten days (plus five days for service) following service of this order.

If CEA fails to do either, licensee must adjust. We are, however, disinclined to grant to licensee the ultimate relief in the exact form requested in its May 23 motion (p. 26), i.e., to limit intervenor's litigation. While we agree as a general principle that intervenors should not be permitted to litigate their own contention beyond the specificity contained in the contention, the bases for them, or the related responses to interrogatories (except for "new" information), we hesitate to apply the principle out of context of the circumstance prevailing when the problem arises. If licensee wishes to request more specific relief consistent with this principle, it may do so, but in the meantime, licensee should proceed to prepare its case giving due regard to the importance of the contentions, the extent to which the issue is also embodied in mandatory issues and other contentions, and the information made available to it by the intervenor.

TMIA's Contentions 6 and 7 were accepted unconditionally, and, as is the case with CEA, licensee seeks greater specificity of these contentions because it is not satisfied with discovery responses. Also, as with CEA, the board has been required to monitor closely the discovery disputes between licensee and TMIA. On April 11, we granted licensee's motion to compel discovery of TMIA. With respect to interrogatories covering TMIA's Contentions 6 and 7, the responses have generally been that the information requested has not yet been developed, but that it will be supplied when it becomes available. However, TMIA has never supplemented its responses on Contentions 6 and 7 with additional information as far as we are aware.

TMIA answered licensee's motion to require further specificity (June 6 Response) but it ignored completely licensee's discussion (pp. 18-24) of the previous deficiencies in TMIA's discovery responses, and it ignored its own promises (and the regulatory requirement) that it will supplement responses to interrogatories when the information becomes available to it. TMIA, implicitly at least, acknowledges the need to develop further its contentions, but states that the SER is essential for this purpose.

TMIA's Response requires the inference that it still has no information concerning Contentions 6 and 7 interrogatories which it has previously been unable to answer for want of information. The inference must also be drawn that, if this be so, TMIA will

depend entirely on the SER in support of its Contentions 6 and 7. If we are wrong about this, TMIA has a duty, without any delay whatever, to answer licensee's interrogatories with information which has come to its possession since it reported that it had no information. We are not referring to information in the SER which, in the meantime on June 16 has been served. Based upon all information, SER and otherwise, TMIA shall within the time provided below, specify its contention. In the event of TMIA's failure, licensee will be entitled to the relief discussed above (p. 13, supra) with respect to limiting litigation to the specifics of contentions. If it should become evident that TMIA has been willfully in default of the board's discovery orders, licensee, by this order is not precluded from moving for relief under 10 CFR 2.707.

Unless otherwise provided above in this order, the respective contentions shall be made specific by service on or before July 31, 1980. This date has been selected because it follows the close of discovery on the SER. However, where intervenors are able to specify contentions without relying upon information in the SER, such specification should be made earlier and as soon as possible.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland

June 23, 1980