UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER IN OPPOSITION TO UNION OF CONCERNED SCIENTISTS' MOTION FOR RECONSIDERATION OF CLI-80-16

June 25, 1980

James M. Cutchin, IV
Counsel for NRC Staff

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I.
Introduction

On June 4, 1980, Intervenor Union of Concerned Scientists (UCS), assuming that the time limits of 10 CFR 2.771 apply and consequently that its filing was late, filed with the Commission both a request for authorization to file late a motion for reconsideration of CLI-80-16 and a motion for reconsideration.[1/] On June 10th the Staff filed a motion for an extension of time to submit a response.[2/] In that filing the Staff stated that it did not oppose the UCS request to file late but asked that, if the Commission granted the UCS request for authorization to file late, all parties be allowed until June 25th to respond to the motion for reconsideration. In an Order dated June 13th the Commission granted the UCS request for authorization to file late and extended to June 25th the time for all parties to respond to the UCS motion for reconsideration.

For the reasons set forth below, the Staff opposes the UCS motion for reconsideration of CLI-80-16.

1/ "Union of Concerned Scientists' Request to Late File Motion for Reconsideration of CLI-80-16" and "Union of Concerned Scientists' Motion for Reconsideration of CLI-80-16."

2/ "NRC Staff Request for Exten[s]ion of Time to Respond to UCS Motion Seeking Reconsideration of CLI-80-16."

On November 13, 1979, Intervenor Sholly, in accordance with 10 CFR 2.758, filed with the Licensing Board a "Petition for Exception to 10 CFR 50.44." Both the Staff and the Licensee filed responses to Mr. Sholly's petition.[3/] The Staff supported certification of the matter to the Commission for determination. The Licensee opposed certification to the Commission on the ground that the hydrogen gas control issue is beyond the scope of this restart proceeding. In addition, the Licensee requested that, if the "waiver question" were to be certified, the Licensing Board also certify the Licensee's "scope question" -- whether hydrogen gas control is a subject intended by the Commission to be litigated in this proceeding. UCS did not file a response to Mr. Sholly's petition.

On January 4, 1980, finding that Mr. Sholly had made the prima facie showing necessary for certification of the "waiver question" under 10 CFR 2.758(d) and that the Licensee's "scope question" warranted certification under 10 CFR 2.718(i), the Licensing Board certified both matters to the Commission for determination.[4/]

The two questions certified by the Licensing Board to the Commission were:

1. Whether the provisions of 10 CFR 50.44 should be waived or exceptions made thereto in this proceeding where a prima facie showing has been made under 10 CFR 2.758 that hydrogen gas generation during the TMI-2 accident was well in excess of the amount required under 10 CFR 50.44 as a design basis for the post-accident combustion gas control system for TMI-1.

2. Whether post-accident hydrogen gas control should be an issue in this proceeding where post-accident hydrogen gas control was perceived to be a serious problem and was in fact a problem during the TMI-2 accident.[5/]

3/ "NRC Staff Response... to Steven Sholly's Petition for Exception to 10 CFR 50.44" dated December 3, 1979 and "Licensee's Opposition to Petition of Steven C. Sholly for an Exception to 10 CFR 50.44" dated November 30, 1979.

4/ "Certifications to the Commission," LBP-80-1, 11 NRC 37.

5/ Id. at 43.

On May 16, 1980, the Commission issued CLI-80-16. Finding that this case, the TMI-1 restart proceeding, presents no "special circumstances", the Commission answered the first certified question in the negative and declined to waive 10 CFR 50.44. Order at 2. Stating that it had not intended to exclude the hydrogen gas control issue from consideration by the Licensing Board in the TMI-1 restart proceeding, the Commission answered the second certified question in the affirmative and indicated how and why it believes that in the circumstances of this proceeding the hydrogen gas control issue could more appropriately be litigated under 10 CFR 100. Order at 1-4.

The Commission said, "[u]nder Part 100, hydrogen control measures beyond those required by 10 CFR 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen concentration, containment breach or leaking, and offsite radiation doses in excess of Part 100 guideline values." Order at 2. The Commission noted that:

> "Under Part 100 the likelihood of an accident entailing generation of substantial (in excess of 10 CFR 50.44 design bases) quantities of hydrogen, the likelihood and extent of hydrogen combustion, and the ability of the reactor containment to withstand any hydrogen combustion at pressures below or above containment design pressure would all be at issue. A critical issue here would be the likelihood of an operator interfering with ECCS operation." Order at 3.

Moreover, it observed that the hydrogen gas control issue is a safety issue that is not peculiar to TMI-1 but common to all light water power reactors and stated its intention to conduct a broad rulemaking proceeding that, among other matters related to degraded core conditions, will deal with the hydrogen gas control issue. Order at 2-3.

On June 4, 1980, UCS filed its motion for reconsideration of CLI-80-16. UCS requests that the Commission reconsider the certified questions and reanswer the first question in the affirmative rather than in the negative, thus waiving 10 CFR 50.44. In support of its request UCS alleges that the Commission in its determination of the certified questions erred in that:

1. It did not invite the comments of the parties. Motion at 2.

2. It erected a barrier that must be surmounted before the hydrogen gas control issue can be litigated -- to get to the question of whether hydrogen control measures planned for TMI-1 are adequate Intervenors must show that there is "a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guideline values." Motion at 2.

3. It reached the unwarranted factual conclusion that operator interference with the ECCS was the "root cause" of the hydrogen problem, and in reaching this factual conclusion improperly assumed: that if the TMI-2 operators had not turned off the ECCS the core would have been adequately cooled; that the new instruction to operators (not to turn off ECCS prematurely after a LOCA) removes the cause for concern; that instructions to operators can compensate for poor design; and that the appropriate dose limits to apply to the analysis of hydrogen gas control are those contained in Part 100. Motion at 3-4.

UCS also alleges that in declining to waive 10 CFR 50.44 the Commission has explicitly or implicitly resolved, without benefit of a record and without giving the parties an opportunity to make their cases, factual issues in dispute in the TMI-1 restart proceeding and thus has denied Intervenors any forum in which to address, before the plant resumes operation, the question of whether the hydrogen generation design basis limits for TMI-1 are appropriate.

III.
Discussion

A party may petition the Commission for reconsideration of its final decisions. 10 CFR 2.771. However, such reconsideration has traditionally been limited to situations in which a petitioner presents relevant new facts or law not previously available to the tribunal.[6/] In its petition for reconsideration UCS has presented no new pertinent law or facts which, in the Staff's view, should affect the Commission's determination of the certified questions as expressed in CLI-80-16. Instead, UCS refers primarily to the discussion in the Commission's Memorandum and Order and argues that a different result should have been reached. Thus, the Staff believes that the UCS petition for reconsideration is legally deficient and should be denied.

Moreover, UCS's complaint that the Commission declined to waive 10 CFR 50.44 without inviting the parties to comment is tardy. UCS failed to respond to Mr. Sholly's petition for waiver of 10 CFR 50.44 as it is allowed to do under 10 CFR 2.758(b) and thus may be viewed as having waived its opportunity to appeal the matter. 10 CFR 2.758(d) clearly states that "[t]he Commission may, ... on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation... should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination." Having failed to participate initially in the consideration of a matter affecting its interests, UCS is in no position now to complain that the outcome is not to its liking.[7/] Thus, the UCS petition for reconsideration also should be denied on the ground that UCS shunned its opportunity seasonably to participate in the consideration of the matter.

6/ See: Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359 4 NRC 619 (1976).

7/ Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-402 5 NRC 1182 (1977).

UCS's argument that the Commission has resolved, without benefit of a record and without giving the parties an opportunity to make their case, factual issues that are in dispute in the TMI-1 restart proceeding and thus has denied Intervenors any forum in which to address, before the plant is allowed to resume operation, the question of whether hydrogen control measures for TMI-1 are adequate, is groundless. The Commission pointed out that if an Intervenor can demonstrate to the Licensing Board in the TMI-1 restart proceeding that there is a credible LOCA scenario entailing hydrogen generation and resulting in offsite radiation doses in excess of the guideline values of 10 CFR 100, it can litigate the need for hydrogen control measures beyond those presently required for TMI-1 under 10 CFR 50.44.[9/] The Commission emphasized that a critical issue in this litigation under 10 CFR Part 100 would be the likelihood of an operator interfering with the ECCS. Clearly, the Commission has not denied Intervenors a forum in which to litigate the adequacy of hydrogen control measures for TMI-1 -- the TMI-1 restart proceeding provides Intervenors such a forum.

Finally, to determine that 10 CFR 50.44 should not be waived in this proceeding the Commission only had to conclude that a prima facie showing that hydrogen gas generation during the accident at TMI-2 exceeded the design basis values

9/ An Intervenor can make its case on an already admitted contention by either direct evidence or by cross-examination of witnesses for the Licensee or the Staff. Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161 8 AEC 1003, 1019 (1973); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-505 (1973). However, to expand a contention that is inadmissible because it challenges a regulation, or to modify it to raise a new contention, an Intervenor must satisfy the "factors" of 2.714(a)(1). Also, it should be required to demonstrate that the factual information upon which an expansion or modification is based was objectively unavailable at the time its original petition was filed and that had any such information been available the scope of the contention would have been broader. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), LBP-78-31, 6 AEC 717, appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155 (1973).

specified by 10 CFR 50.44 did not constitute, by itself, a showing that hydrogen gas generation during potential accidents at TMI-1 would exceed those values. That such hydrogen gas generation occurred at TMI-2 in one set of circumstances does not demonstrate that it would occur at TMI-1 in a different set of circumstances that reasonably may be expected to obtain should restart be authorized and does not demonstrate that 10 CFR 50.44 would not serve, in this TMI-1 restart proceeding, the purposes for which it was adopted. Thus the Staff believes that the Commission correctly decided that this proceeding involving restart of TMI-1 presents no "special circumstances" warranting waiver of the regulation.

IV.
Conclusion

Accordingly, the Staff believes that the Commission properly exercised its powers in determining the certified questions and that the UCS petition for reconsideration should be denied both on procedural grounds and on the merits.

Respectfully submitted,

James M. Cutchin, IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of June, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO UNION OF CONCERNED SCIENTISTS' MOTION FOR RECONSIDERATION OF CLI-80-16", dated June 25, 1980 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 25th day of June, 1980:

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