UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 15, 1980

MEMORANDUM FOR: Chairman Ahearne

FROM: LB Leonard Bickwit, Jr., General Counsel

SUBJECT: SECY-79-617, FINANCIAL PROTECTION FOR THREE MILE ISLAND UNITS 1 AND 2

In your note of December 3, 1979, you requested an analysis of the issues presented in the referenced SECY paper and our opinion regarding the alternatives presented in this paper. We will take up this matter in two parts: A. legal and policy considerations, and B. recommended course of action.

A. Legal and Policy Considerations

1. Insurance Coverage for TMI-2

Legal Considerations

This problem is outlined in detail at pp. 2-6 of the staff paper. The relevant portion of the Price-Anderson Act is subsection 170b. which provides that:

> The amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (1) the cost and terms of private insurance, (2) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (3) the nature and purpose of the licensed activity: Provided, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of financial protection required shall be the maximum amount available at reasonable cost and on

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> reasonable terms from private sources. Such financial protection may include private insurance, private contractual indemnities, self insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe.

The applicable provision of NRC regulations is 10 CFR 140.11(a)(4), which reflects the view that the "maximum amount" referred to in the statute is the amount offered by the nuclear liability pools (ANI and MAELU) at any given time. At the time of the TMI accident, the amount was $140 million; on May 1, 1979, the amount increased to $160 million. The insurance pools, however, declined to give this increased amount to TMI-2, thus placing the licensee, Metropolitan Edison, in at least technical violation of the regulations as to this unit. The legal question presented i whether subsection 170b. empowers the Commission to require Me' Ed to obtain an additional $20 million in coverage for TMI-2 from sources other than the established pools.

Prior to the accident at TMI, the nuclear liability insurance pools provided the same level of coverage for all large power reactors. This system supported the use of 10 CFR 140.11, which simply required all licensees to buy the coverage currently made available by the pools. As noted, the regulation contained an implicit finding that this amount was the maximum available at reasonable cost. In the circumstances presented by the pools' refusal to increase TMI-2 coverage, the regulation becomes less useful, since its "implicit finding" of the maximum amount available is called into question. Indeed, the regulation pegging the amount at $160 million was agreed to by the Commission before the TMI-2 accident and, therefore, without the knowledge that any utility would encounter difficulty in getting the full $20 million of additional coverage.

The statute itself is unclear whether all licensees can be compelled to obtain the same coverage. The statute requires that the financial protection be provided in an amount equal to "the maximum amount of liability insurance available from private sources" "at reasonable cost and in reasonable terms". On the one hand, it can be argued in support of differing levels of coverage that if Metropolitan Edison can only obtain $140 million in liability insurance from private sources, then this is the "maximum amount of liability insurance available" within the plain meaning of the statute, and NRC may not compel the licensee to obtain additional protection by private indemnity, self insurance, or other means.

On the other hand, it is possible to read "maximum amount" as a maximum amount generally available. In effect, this interpretation would vest the Commission with authority to fix a uniform amount by rule. The Commission's approach over the past years lends some support to this view. Also, if Metropolitan Edison is allowed to maintain only $140 million of primary layer financial protection, then the secondary retrospective premium layer of financial protection -- requiring contributions by all licensees -- would be drawn upon for an accident at TMI-2 when damages exceeded $140 million, while for an accident at any other plant this layer would not be called upon until damages exceeded $160 million. It is possible that a licensee could refuse to begin contributions to the secondary layer until damages (for an accident at a plant other than its own) exceeded its own level of primary insurance, rather than the possibly lesser level carried by the licensee suffering the accident. The secondary retrospective premium layer was probably enacted into law under the assumption that the primary layer would be the same for all commercial power reactor licensees. This would form the basis for a legal argument supporting a uniform level of coverage. However, there is no legislative history in point; the opinion that Congress had a uniform level of primary financial protection in mind is based upon the belief that there would have been some discussion of possible inequities associated with differing triggering amounts for the secondary financial protection layer if Congress had in mind that differing primary levels were legally possible.

Policy Considerations

The levels of primary insurance do not affect the funds available to pay claims, but do affect the level of government indemnity made available to licensees. In order to reach the $560 million limitation -- with a fixed sum assumed for the secondary layer -- government indemnity must "drop down" to assume any slack in the primary layer. Hence, for TMI-2, the government has assumed an additional $20 million liability compared to other licensees or TMI-1. This varying level of government indemnity would be the rule rather than the exception if licensees were permitted to maintain varying levels of primary insurance coverage.

This argues in favor of the view that the "maximum amount" should be a uniform amount for all licensees if one makes the reasonable assumption that it is good policy to minimize the Federal Government's financial liability. As noted above, a variable first layer also results in unequal burdens among licensees, and this also argues in favor of a uniform amount applicable to all licensees.

On the other hand, if all licensees are required to maintain the same fixed amount of primary protection, then Metropolitan Edison must be required to furnish an additional $20 million coverage for Unit 2. If the licensee is unwilling to do so, then it is not at all clear what can be done by way of the usual administrative enforcement action. The Unit 2 operating license has already been suspended and the further step of revocation may not add substantially to the case that the licensee will be required to make before being allowed to operate TMI-2. A civil penalty will not serve the purpose of making additional insurance funds available to pay claims. It is possible, however, that NRC could order the licensee to obtain additional protection by private indemnities or other means besides liability insurance, and enforce this order by court action. The law is clear that financial protection requirements can be met by a variety of means besides liability insurance.

2. Replenishment of Funds Paid for TMI-2 Losses

Legal and Policy Considerations

This issue is outlined in the staff paper at pp. 6-8. In legal and policy terms, the considerations outlined above apply to this issue as well. At present Met Ed actually carries less than $140 million coverage for TMI-2 because of the non-reinstatement of its policy by the nuclear insurance pools. The staff paper indicates that Met Ed and its insurance brokers are now seeking to replace this insurance elsewhere in the insurance market.

The requirement that Met Ed seek to replenish the $1.29+ million is contained in 10 CFR 140.92, the Commission's standard indemnity agreement with power reactor licensees. This agreement requires that, when primary insurance funds have been used to compensate claims for public liability, the licensee must apply to the insurers for reinstatement of the policy to its full value. (Note that government indemnity is increased so long as the policy has not been reinstated in order to maintain public protection at a constant $560 million.) If the licensee is unable to gain reinstatement within 90 days, the Commission may require that it furnish the necessary additional protection in another form absent good cause shown to the contrary (Article II, Section 2).

Met Ed has complied with the requirement that it seek reinstatement, and the insurance pools have refused to reinstate the policy for TMI-2. As the staff paper notes, it is unclear when the 90-day period should be considered ended, since payments continue to be made for TMI-2 claims. In light of the pools' refusal, however, it would seem to make little difference. The question is, as before, whether the Commission may require Met Ed to obtain additional insurance to replace these losses, and whether, if this does not appear possible, Met Ed may be required to furnish additional financial protection in another form so that a uniform level of primary financial protection will be maintained.

B. Recommended Course of Action

The Staff recommends that the licensee be notified that it must provide $160 million in primary financial protection from both TMI units through liability insurance, or some combination of liability insurance, letters of credit, etc. We agree with this recommendation.

We believe that there are overriding policy advantages associated with a uniform level. Moreover, the Staff indicates in its paper (page 4) that "the licensee is presently pursuing an insurance approach for obtaining the additional $20 million for Unit 2 and is guardedly optimistic of success ...". It is therefore at least possible that Met Ed may be able to obtain additional liability insurance coverage for Unit 2 at reasonable cost.

It would be useful to know whether other utilities are willing to assume a retrospective premium responsibility for this unit beginning at $140 million, when for their own plants it would not be activated until the $160 million level. It is true that in either event, an additional $20 million in Federal indemnity must make up the shortfall in insurance coverage, but the question would be whether that $20 million was inserted between the primary and secondary layers or following the secondary layer.

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