UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

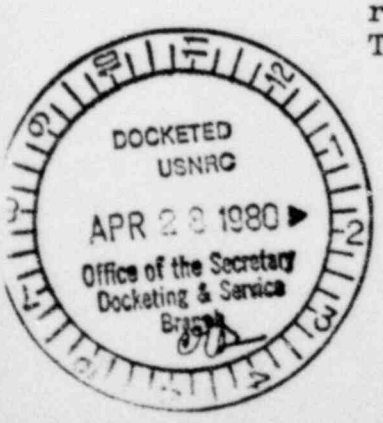
In the Matter of	)	
	)	Docket No. 50-289
METROPOLITAN EDISON COMPANY	)	(Restart)
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	

MEMORANDUM AND ORDER ON UCS MOTION FOR RECONSIDERATION OF ADMISSIBILITY OF UCS CONTENTION 15

(April 25, 1980)

By motion dated April 4, 1980, Union of Concerned Scientists, (UCS) requests the board to reconsider its ruling of December 18, 1979 rejecting UCS contention 15. UCS contention 15 states:

> The measures identified by the staff in NUREG-0578 and the Commission's Order of August 9, 1979 include many which will not be implemented until after the plant has resumed operation and some which will not even be identified until some unspecified time in the future. No justification has been provided for concluding that the plant can safely operate in the period while these corrective actions are being identified and prior to their implementation. The public health and safety demands that all safety problems identified by the accident be corrected prior to resumption of operation at TMI-1.



The matter has come to the fore again because the Commission issued an order on March 14, 1980 to make it clear that contentions in this proceeding may properly raise issues as to whether safety concerns not specifically listed as "short-term" items in its notice of hearing (August 9, 1979) should be satisfactorily resolved prior to startup. The Commission referred to Sholly contention 6 and UCS contention 15 as examples of the concern generating its clarification.

The board issued a memorandum and order on March 28 in which we reported that the standards of the Commission's clarification were in fact the standards we applied in accepting and rejecting contentions. We explained that accepting Mr. Sholly's contention 6 precisely demonstrates the application of that standard, (id., pp.3-4) but that UCS contention 15 was rejected on the grounds that:

> It was defective, in our view, on two counts: 1) without any explanation, it would substitute UCS's philosophy for the Commission's judgment (expressed in the August 9, 1979 Order) that at least some "long-term" actions could be deferred if the record establishes that certain short term actions are sufficient to protect the public health and safety, and 2) the contention totally lacks specificity and basis. It is too unbounded to be litigable. It was, by UCS's admission, "... intended to cover all the issues which are raised by the staff which have not been independently challenged by us." Tr. 332.

Our memorandum went on to explain that UCS contention 15 was rejected, not because it would require "long-term" actions to be resolved before startup, but that "the contention failed under traditional tests of litigable contentions, and still fails with the guidance provided by the Commission's March 14 Order." Although we found no basis to change any ruling, we invited the parties to move for relief consistent with the Commission's March 14 order and to argue the correctness of our interpretation of that order. UCS alone among the parties responded to the invitation, requesting that, in view of the Commission's March 14 Order, its contention 15 now be admitted.

The licensee and the staff originally had no objection to UCS contention 15. The licensee now believes that contention 15 is conceptually faulty and that UCS's present altered position is, without justification, tardy. Licensee's April 14 response to UCS motion. The NRC staff reminds the board that it has previously not objected to the contention, but staff states that since UCS has not provided any new discussion not previously available to the board, its motion should be denied. The staff has not discussed the merits of the contention or the board's problems with it. Staff's April 15 response to UCS motion.

The first argument urged by UCS in its motion is that the Commission's Order of March 14 has corrected the board's

"misunderstanding" that the August 9 notice of hearing was divided into an "unchallengeable" division of short- and long-term items. There was no such misunderstanding. UCS's argument flies directly into the face of the example presented by Sholly contention 6, where we accepted five long-term NRR recommendations as issues under the Commission's short-term standard for startup.

The next argument advanced by UCS (p.3) is that the board does not understand its contention and that we failed to appreciate counsel's explanation of it at the special prehearing conference. Counsel now states that what UCS contention 15 really means to say is that " 'the long term' (Category B) measures specified in Table B-1 of NUREG-0578 and those contained in Table A-1 of NUREG-0585 must be accomplished prior to startup of the plant...." The full explanation by counsel at the prehearing conference was:

> Contention 15, UCS contends that the various short- and long-term measures identified by the Staff ought all to be resolved prior to operation of TMI-1. I think that is a short, concise, and accurate description of the contention.
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> The Licensee has not objected. The Staff has objected. I read the Staff's objection [later withdrawn] as essentially misunderstanding the contention as being broader than it was intended to be.

> Each of our individual, technical issues, our other technical contentions we think ought to be resolved prior to the operation of TMI-1. Now this contention is intended to cover all the issues which are raised by the Staff which have not been independently challenged by us. We simply wish to extend the principle that all of those short- and long-term issues ought to be resolved prior to operation of TMI-1, and I think the Licensee has interpreted that correctly.

We have interpreted UCS's current motion to mean that UCS limits the contention to only those short- and long-term recommendations specifically listed in NUREG-0578 (TMI lessons learned status report) and NUREG-0585 (final report) and that UCS intends the contention to be viewed as if each of these recommendations were written out in the contention, comparable to the manner in which Mr. Sholly restated five specific long-term actions in his contention 6.

We have doubts about whether this explanation is consistent with the original meaning of the contention because inter alia it does not explain the phrase "all safety problems identified by the accident..." nor does it explain how NUREG-0585 recommendations could have been specified by reference in the original contention when that document was then not yet published. UCS's Motion does not explain why, knowing that we had rejected its contention, it did not move to file specific new contentions based upon the newly discovered information contained in NUREG-0585. Nor does it explain why UCS did not move the board to correct what it regarded as a mistaken understanding of the

contention (compared to a difference of opinion) as provided under 10 CFR §2.751a (d) and the First Special Prehearing Conference Order. We had, after all, referred to the contention as a "catch all" contention lacking specificity, and we had accepted Mr. Sholly's contention. If UCS had meant it to be a contention specifically placing into issue each and every short and long-term recommendation in NUREG-0578 and NUREG-0585 it could easily have requested reconsideration of our "mistake" in the time provided by the order rejecting the contention. Indeed, UCS did file objections to the denial of three of its contentions (17, 18 and 20), in our First Special Prehearing Conference Order. It is significant that it did not also object to the denial of contention 15 at that time in view of our explanation for rejecting it.

Whether or not UCS had intended such a meaning, the board reasonably concluded that the contention was an unspecified catch-all contention, not amenable to specific litigation.[1/] UCS was fairly on notice that this was our view. The Commission's order of March 14 does not provide any new basis to justify UCS's

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1/ We do not question UCS's candor in presenting its current argument. As we read the motion, UCS may be explaining what its contention means today, not what it meant when it was filed and discussed at the special prehearing conference. Motion, p.3. As we noted, NUREG-0585 was not even served until later.

current position. UCS is simply too late to come in now seeking to litigate separately each of the NUREG-0578 and NUREG-0585 recommendations. In this regard we note that UCS depends upon its theory of the board's "misunderstanding" of the scope of the contention, and not upon a justification for accepting contentions late.

Although there is no basis whatever upon which the board then could have accepted UCS's reference to the implementation of unspecified, future measures, we could have, on our own, narrowed the contention to include only the measures identified by the staff in NUREG-0578. This seemed to be the core of the contention. When limited to the specific long-term actions set out in the notice of hearing and NUREG-0578, the contention, or its subcontentions, had bases. We have narrowed other contentions to reasonable bounds rather than allow excessive breadth to be fatal. We would have done as much for UCS, and in fact, we considered this course. But there was no indication until UCS filed its motion on April 4, that it wished to litigate separately and specifically each of the NUREG-0578 long-term recommendations under short-term requirements. Where UCS did intend to litigate other issues specifically it spelled them out in 15 other contentions.

There are a total of 13 major long-term considerations in the Commission's August 9, 1979 order and in the group of Category B items in NUREG-0578.[2/] UCS could have restated or referred to each of them as individual contentions, or it could have stated in definite language that contention 15 was meant to bring into issue each and every long-term action referred to in the notice of hearing and in NUREG-0578.

There is nothing conceptually wrong with the subject matter of UCS contention 15. The contention is a virtual restatement of one of the two ultimate issues we are directed to decide:

2/ This count includes the recommendation under Section 2.1.9, Analysis of Design and Off-Normal Transients and Accidents. This recommendation was not identified as a "Category B" item in NUREG-0578 (it was marked by a double asterisk) but licensee and staff agreed that it should be so considered. Tr. 756-66. The board ruled that Section 2.1.9 should be deemed a long-term action to be included inferentially as such in the notice of hearing. First Special Prehearing Conference Order, December 18, 1979, p.10. UCS does not even mention Section 2.1.9. We cannot determine from UCS's sparse filings whether or not it wishes to litigate Section 2.1.9 as a specific contention. This demonstrates one reason why the board cannot accept casual and sweeping references to entire categories of major contentions. Whether or not Section 2.1.9, for example, is included as a specific contention would have a very large effect upon case preparation. Many of the long-term Category B items would raise very complex technical issues. If UCS intended a commensurately complex litigation of each of these issues, it should have produced more than the weak effort reflected by contention 15.

(1) Whether the "short term actions" recommended by the Director of Nuclear Reactor Regulation (set forth in Section II of this Order) are necessary and sufficient to provide reasonable assurance that the Three Mile Island Unit 1 facility can be operated without endangering the health and safety of the public, and should be required before resumption of operation should be permitted.

Order and Notice of Hearing, August 9, 1979, p.12, 10 NRC 148.

Here is where the trouble lies. UCS contention 15 is not purely a contention; it is an ultimate issue. UCS is and has been free to litigate the ultimate issue. We require only that the parties so contending state timely with specificity and bases why the short-term actions recommended by the Director of Nuclear Reactor Regulation are not sufficient to protect the health and safety of the public. This opportunity has been present. UCS and other intervenors have appropriately addressed the ultimate issue by submitting other specific contentions challenging the sufficiency of the short-term recommendations. We cannot envision how else the ultimate issue can be addressed in orderly litigation.

UCS motion to reconsider the admissibility of contention 15 is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland

April 25, 1980