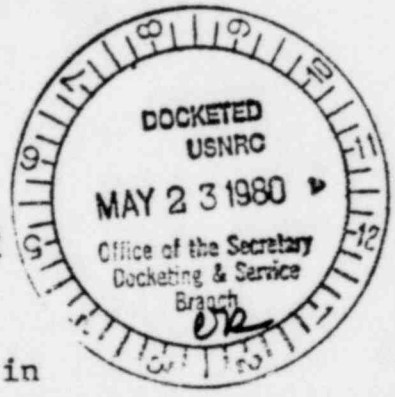
UNITED STATES OF AMERICA

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 SP
METROPOLITAN EDISON COMPANY	)	(Restart)
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	



MEMORANDUM AND ORDER ON
PREHEARING CONFERENCE OF MAY 13, 1980

(May 22, 1980)

The board conducted a prehearing conference in Harrisburg, Pennsylvania on May 13, 1980.[1/] All parties and Commonwealth Agencies except Dauphin County appeared. The board and parties discussed a schedule for prehearing events following the service of the NRC staff's Safety Evaluation Report (SER), appropriate timing for the amendment and specification of contentions based upon new information, pending discovery matters, and other items.

Schedule for Prehearing Events
Following the SER

The schedule adopted by the board below provides for a time span of 115 days from the service of the SER to the start of the evidentiary hearing, compared to 90 days in

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1/ Pursuant to notice published 45 Fed.Reg. 29147, May 1, 1980.

the proposed schedule in our May 5 Memorandum and Order. The intervenors, in a joint position, recommend a schedule with a 135-day span. Tr. 1839. The licensee urges a 75-day period. Tr. 1859. The NRC staff believes that, although the intervenors and the licensee both have realistic schedules, the intervenors' schedule is longer than is required. Tr. 1870.

The substantial delays in the issuance of the staff's SER and the preparation of the licensee's Startup Report apparently indicate that careful and deliberate attention is being paid to those important documents. The licensee's proposed schedule of 75 days from SER to hearing would not, in our view, permit a commensurately careful evaluation by the intervenors. On the other hand, with assurances by the staff that only, or primarily, the items set forth in the Commission's August 9, 1979 hearing order, not contentions, will be addressed by the SER, (Tr. 1826) the lengthy post-SER discovery period embraced by the intervenors' proposed prehearing schedule should not be required.

We have, however, added 25 days to the May 5 proposed schedule because we now believe that it was not realistic to have eliminated mail delays as we did in the May 5 proposed schedule and because, on balance, we believed that some additional time for evaluation of the SER would be

appropriate. If either of these assumptions prove wrong, or other events so warrant, we will modify the schedule accordingly. For example, the board may reduce the time between the final prehearing conference and our order on that conference, and, if the licensee wishes, we may consider proposals for the hand delivery of key documents, for instance, direct testimony and proposed exhibits. For now the schedule set out below will serve to guide the parties.

The SER is due to issue on June 15, 1980. Tr. 1809. Shortly thereafter the board will issue an order implementing the schedule. Further scheduling adjustments will be required because it is now definite that the SER issuing on June 15 will include only Items 1 through 5 of the Commission's hearing order, and that later rulings on hearing remaining Items 6 through 8[2/] will be needed. Tr. 1809-15.

Considerable attention was paid at the prehearing conference to what is meant by requiring the intervenors to "reconsider" their contentions at the 70-day milestone (60 days in May 5 proposed schedule). E.g. Tr. 1848, 1859, 1861-65, 1914-15. First, in the May 5 proposed schedule, the board erred in stating that contentions should be considered for expansion. Tr. 1848. The filing of new contentions, and expanding or specifying preexisting contentions is a separate subject. By "reconsideration of contentions"

2/ Item 6, Management Capability; Item 7, Financial Qualifications; Item 8, Lessons Learned Category "A" Items.

at the 70-day milestone, the board does not require any intervenor to narrow or drop any contention. We require only that each intervenor consider, in the intervenor's judgment, whether its contentions should be dropped, narrowed, or remain unchanged for litigation.

The purpose is to assure efficiency in the hearing. Contentions which are no longer thought by their sponsor to be valid or important because of information developed in many months since the contention was drafted should not by oversight or lack of thoughtful consideration, go automatically to hearing. In the schedule below the parties are not required to report reconsideration of contentions which have been consolidated with other intervenors' contentions, because the consolidation itself is a form of reconsideration.

The parties extensively debated the need for trial memoranda. E.g., Tr. 1860, 1878-95, 1905-1908. There was general agreement that the purposes to be served by trial memoranda were worthwhile but the exact mechanisms to be used remained in dispute. Id. In the schedule adopted today separate trial memoranda have been eliminated as a requirement because their functional equivalents will have been realized by other means. To explain: With the affirmative evidence (written direct testimony and proposed exhibits) due on the 30-day milestone, parties are required

to outline each item of evidence and to explain its purposes and objectives. Therefore most of the purposes of trial memoranda will be achieved with the filing of the affirmative evidence.

This leaves open, however, the non-disclosure problem which exists where a party depends entirely or principally upon cross-examination of witnesses. See discussion Tr. 1880-82, 1905-09. This is most likely to arise with intervenors who seek to support contentions by cross-examination instead of, or in addition to, affirmative evidence. In that event the licensee, for example, may infer that an intervenor who files no affirmative evidence on a given contention depends upon cross-examination. The licensee will also know that the cross-examination will be limited to the scope of the direct testimony, and it will have had the benefit of responses to discovery and perhaps other briefings to forewarn it of the intervenor's approach to the contention.

Moreover, the parties themselves unanimously elected to keep their cross-examination plans confidential from their adversaries. Tr. 1892. Therefore it is apparent that there is little need to state cross-examination objectives in a trial memorandum. Whatever benefit there may be from forwarning adversaries of cross-examination objectives is believed by the parties to be outweighed by the benefit

of keeping cross-examination plans confidential. We do not see this as unreasonable. Moreover the board will have the benefit of advance notice of cross-examination plans. See 10-day milestone.

There are other matters reflected in the prehearing schedule. Mr. Sholly agreed to serve as intervenors' representative in reporting on consolidations and the designation of lead counsel (or lead intervenor) and his assignment as such was accepted by all intervenors. Tr. 1868-69. See 70-day milestone. The Commonwealth agencies agreed that they would be bound to the same prehearing requirements as are the parties with respect to the filing of affirmative evidence and plans for cross-examination. They agree that, where Commonwealth agencies have adopted a position on a particular issue, that position should be stated timely. Tr. 1931-33. See 70-day milestone.

Accordingly, the parties are advised that the board intends to proceed toward hearing in this proceeding according to the following schedule:

Days Before Hearing	Event
115	SER is served.
100	Discovery requests based upon new information in SER is served.

Days Before Hearing	Event
80	Discovery on SER closes except for motions to compel. Responses to discovery on SER must be in the hands of the discovering party.
70	Except where contentions have been consolidated by intervenors, each intervenor is required to reconsider each of its surviving contentions and to state specifically whether the contention is still valid in light of information developed since the contention was accepted, i.e., whether the contention should be dropped, narrowed or litigated in its present form. Any contention not specifically discussed by its sponsor may be deemed by the board to have been abandoned.
	Mr. Sholly as the representative for intervenors shall serve his report on consolidation of parties, the designation of lead counsel or lead intervenor on particular issues, and the voluntary consolidation of contentions. Other intervenors may serve reports on consolidation or the designations of a lead intervenor on issues not covered by Mr. Sholly's report.

Days Before Hearing	Event
70 (contd)	Where Commonwealth agencies have formulated positions on issues, a report of those positions must be served. This is the time by which Commonwealth agencies should exercise their right to take a position on issues based upon information then available.
60	Final prehearing conference under 10 CFR §2.752 to consider all matters required under that section.
50	Final prehearing conference order. Ruling on simplification or clarification of issues, consolidations, designations of lead intervenors (or counsel) on particular issues. Implement schedule for remaining prehearing events.
30	Written direct testimony and proposed exhibits must be served. Written testimony shall be accompanied by the professional qualifications of expert witnesses. Where testimony is sponsored by a panel of witnesses, the testimony shall indicate which parts are supported by which witnesses. Where proposed exhibits have already been served in the proceeding they need not be served again.

Days Before Hearing	Event
30 (contd)	Each item of proposed evidence should be accompanied by an outline stating what it contains and what its purposes and objectives are. The outline should summarize the factual or legal conclusions to be drawn. The board also recommends that any item of evidence of, say more than ten pages, be indexed. This will greatly assist and benefit the sponsor of the item by bringing salient points to the board's attention easily and timely.
10	Plans for the cross-examination of witnesses must be mailed to the chairman within 10 days or be delivered to his office within 8 days prior to the beginning of the hearing.[3/] The cross-examination plans will not be revealed by the board to other persons except board panel employees under direct board supervision until after the cross-examination.[4/]

3/ If necessary a single copy will be accepted but four copies for the board's use would be preferred.

4/ This does not preclude a party from choosing to serve notice on another party at the same time that it intends to cross-examine in specified aspects within the scope of the direct testimony. (See Tr. 1892-93).

Days Before Hearing	Event
10 (contd)	The cross-examination plan shall be sufficiently detailed to inform the board of the substantive issues addressed by the cross-examination and to assist the board in regulating improper and unproductive cross-examination as we more thoroughly discussed in the May 5 Memorandum and Order (pp. 5-6). The cross-examination plan may set forth the actual line of proposed questions as suggested by staff counsel, (Tr. 1883), but, at the minimum, the cross-examination plan shall specify the objectives of the cross-examination, the affirmative evidence the cross-examiner intends to produce by the cross-examination, and the aspects of the direct testimony the cross-examiner intends to discredit. Cross-examination shall be limited to the scope of the direct testimony. Cross-examination by intervening parties shall be limited to the ambit of each intervenor's interest in the proceeding as expressly or implicitly indicated by the petition to intervene, and amendments and supplements thereto. Where intervenors

Days Before Hearing	Event
10 (contd)	seek to cross-examine on direct testimony on another intervenors' contentions or, where another (lead) intervenor has been designated for cross-examination, or where another representative of consolidated parties has been selected for that purpose, the intervenor seeking the additional cross-examination shall justify the additional cross-examination.
1	Site visit. This event will be rescheduled if the activities at the TMI site make a visit impractical.
0	Hearing begins.

General Matters

The board ruled, and the staff agreed that if a reliable prediction cannot be made soon as to when Order Items 6, 7, and 8 of the SER will be completed, a report to that effect should be made to the Commission. Tr. 1815-16.

The licensee agreed to file motions recommending how to implement the board's prior orders accepting contentions subject to later specification. Tr. 1860, 1926.

The board accepts, as it must, the withdrawal of TMIA's Contentions 1 and 2, and is considering the possibility of substituting a related but significantly differing question of its own. Tr. 1935.

Chesapeake Energy Alliance (CEA) agreed, and the board orders it, to respond to licensee's interrogatories to it Nos. 5-5, 6-2, 6-3(b) and 6-3(c). Tr. 1951.

The licensee and Mr. Sholly have agreed to consult again on Mr. Sholly's interrogatory on his Contention 16. Tr. 1968.

The licensee and counsel for TMIA have agreed to confer on their remaining discovery disputes concerning interrogatories 5-1 through 5-6. There was a strong admonition by the board to TMIA that its most recent response has not satisfied the spirit of the board's prior discovery orders. Tr. 1981-2000.

The board explained to the parties that it intends to apply the provisions of 10 CFR §2.754(a), i.e., we shall direct the parties to file proposed findings of fact, conclusions of law and a proposed form of order or decision; that any failure to do so may be considered by the board as a default according to §2.754(b). Tr. 1973-78.

Amending Contentions

Although the board's order of May 5 provided for the timing of motions for accepting new contentions based upon newly discovered information, it was recognized at the prehearing conference that there was no comparable ruling for filing motions to amend preexisting contentions. Tr. 1901-04, 1919-24, 1927-30. This is a consideration separate from the

forthcoming motion by licensee (discussed on p. 11, supra) to require intervenors to specify contentions. Here we refer to the standards for timeliness for the voluntary filing of amendments expanding preexisting contentions. The parties agree that guidance from the board is needed. Tr. 1924.

The NRC staff proposes that the standards for late filing under 10 CFR §2.714(a)(1) should be applied. Tr. 1928. Certainly the late filing criteria are relevant to the consideration. But, as to amendments based upon information which has developed until now since the acceptance of contentions, the board does not believe that an unforgiving, pro forma application of the §2.714 late filing standard is justified (nor do we read the staff to be urging such). The issue of emergency planning is a case in point, and may well be the only area where there is a problem. Tr. 1901-04, 1923-24. The emergency plans have been continuously changed and amended and are still changing. It would have been burdensome and inefficient to all concerned for intervenors to have amended emergency planning contentions continuously as new bases evolved.

The order we adopt applies relaxed standards for amended contentions based upon information developed until now. Thereafter a tighter standard prevails, and, as hearing time approaches, even stricter filing standards may be required.

As was the case with our May 5 order on new contentions, the board predicates the timing of motions to amend on the "availability" of the new information upon which the new or amended contention is based. Neither the board nor the parties have been able to define "availability" sufficiently to cover all circumstances. We will determine when information became "available" on a case-by-case basis. Tr. 1832-34. It will be the obligation of the intervenor in the first instance to demonstrate when the information first became available with particular reference to the intervenor's diligence under the circumstances.

Accordingly, intervenors must file motions for amendments which expand preexisting contentions, except for emergency planning contentions, based upon information made available through today on or before June 5, 1980. Motions for amendments to contentions based upon information becoming available after today shall be filed within ten days of the availability of the new information. As to emergency planning contentions, the licensee intends to serve a final revised emergency plan early in June. Parties may amend their emergency planning contentions within 20 days (plus 5 days for mailing) following the service of licensee's revised emergency plan. Tr. 1920-21.

THE ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland
May 22, 1980