UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

TERA

INTERVENOR'S JOINT RESPONSE IN OPPOSITION TO LICENSEE'S MOTION FOR RECONSIDERATION OF THE COMMISSION'S ORDERS OF 7/2/79 AND 8/9/79

(18 December 1980)

Introduction

The Commission has before it a request from the Licensee to reconsider and modify its 7/2/79 and 8/9/79 Orders in this docket, orders pertaining to the restart of TMI-1. In an Order dated 12/9/80, the Commission extended the response date for this matter until 1/6/81.

The parties joining in this response note for the record that this request is most unusual. We would have expected such a request to come in the form of a motion from Licensee's counsel. The request before the Commission not only is not in the form of a motion, but comes from the President of General Public Utilities rather than from Metropolitan Edison Company, the Licensee. The letter from Mr. Dieckamp does, however, have the substance of a motion and appears to be in the

DS03
S
1/1

G

process of being considered by the Commission as a motion for reconsideration (although the letter does not invoke any Commission regulation, for instance 10 C.F.R. § 2.771).

The undersigned parties therefore file this joint response in opposition to Licensee's motion. We file this response jointly solely in the interests of efficiency and due to shared interests in this matter. Nothing in this response should be construed to represent a consolidation by the parties on any other issue or matter.

DATED: 18 December 1980

RESPECTFULLY SUBMITTED,

Jordan Cunningham, Esq., counsel
for Newberry Township TMI Steering
Committee

Steven C. Sholly, Intervenor
pro se

Mary Hartnett, President of
Three Mile Island Alert, Inc.

Gail Bradford, legal representative
for Anti-Nuclear Group Representing
York

Donald Hossler, President of
People Against Nuclear Energy

Judith Johnsrud, legal representative
for the Environmental Coalition
on Nuclear Power

1. Licensee's motion for reconsideration is untimely in the extreme and contains no facts which were not known to the Licensee at least five months prior to the date of the motion, and, in most cases, over a year prior to the date of the motion. Further, the motion utterly fails to address its untimeliness. Having therefore failed to file a timely motion, and having further failed to justify at all the untimeliness of its motion, Licensee is in no position now to complain that the outcome of the 7/2/79 and 8/9/79 Commission Orders is not to its liking.

The Commission's 7/2/79 Order invoked what has been referred to by the Executive Legal Director as an "extraordinary remedy" by ordering the continued shutdown of TMI-1 following the accident at TMI-2. The basis for that action, as stated in the Order, was a determination by the Commission that:

> "In view of the variety of issues raised by the accident at the Three Mile Island Unit No. 2 facility, the Commission presently lacks the requisite reasonable assurance that the same Licensee's Three Mile Island Unit No. 1 facility, a nuclear power reactor of similar design, can be operated without endangering the health and safety of the public." (See Commission Order, 7/2/79, page 1).

The 7/2/79 Order was made immediately effective, in effect, suspending the operating license of TMI-1 until the bases for suspension (to be spelled out in what became the Commission's Order and Notice of Hearing, dated 8/9/79) were resolved. The 7/2/79 Order further specified the Commission's determination that the public interest in the matter required a hearing prior to restart of TMI-1.

It is worth noting that on the day the Commission's Order was issued, the Commissioners received a letter from Licensee's counsel, George F. Trowbridge, Esquire, setting forth the Licensee's views on the Commission's 7/2/79 Order and suggesting a procedural framework for the hearings mentioned in the Order (See letter to Joseph Hendrie from George F. Trowbridge, Esq., dated 7/2/79, attached to this response as Appendix 1). The Licensee's views on the restart hearing were known by the Commission, therefore, well before the issuance of the 8/9/79 Order and Notice of Hearing. The 7/2/79 letter from Mr. Trowbridge to Chairman Hendrie notes:

> "The purpose of this letter is to request that GPU have an opportunity to review and comment on any proposed order with respect to the scope and conduct of the hearing and the Commission's decisional process. The Commission's determinations on these matters can make a difference of many months in the length of the proceeding." (See 7/2/79 letter from Trowbridge to Hendrie, page 1, emphasis added).

In the letter, Licensee's counsel offered to meet with the Commission staff or furnish written comments within 48 hours on any proposed order. It is quite clear that even at this early time in the restart hearing process, the Licensee was well aware of the importance of the Commission's Orders and understood the possible impact of those Orders. If Licensee disagreed with the Commission's approach, Licensee could have filed, pursuant to 10 C.F.R. § 2.771, a motion for reconsideration within ten days of the 7/2/79 Order.

Licensee filed no such motion.

Instead, a letter was sent from W. G. Kuhns (Chairman of GPU Service Corporation) to Chairman Hendrie dated 7/11/79 (See letter to Joseph Hendrie from W. G. Kuhns, dated 7/11/79, attached to this response as Appendix 2). The Kuhns' letter sets forth Licensee's concerns over the economic impact of the Commission's 7/2/79 Order and forthcoming hearing order on Licensee's financial standing. The letter notes Licensee's concern about its "more than 4 million residents of Pennsylvania and New Jersey served by the GPU companies" and noted that the replacement power for TMI-1 was costing the Licensee "on the order of $14 million a month." Again, it is very clear that Licensee understood the economic importance of the Commission's Orders prior to the issuance of the 8/9/79 Order and Notice of Hearing.

On 7/20/79 the Licensee filed a document with the Commission entitled "Licensee's Answer to Commission Order Dated July 2, 1979" (copy attached to this response as Appendix 3). Although styled as a response to the 7/2/79 Order, in reality the filing addressed a memorandum from the Executive Legal Director to the Commission dated 7/9/79 and a subsequent discussion on the record on 7/12/79 (See memorandum to the Commissioners from Howard K. Shapar, dated 7/9/79, attached to this response as Appendix 4). The Licensee's answer to the 7/2/79 Order proposed the extraordinary concept that a hearing could be held prior to restart without the opportunity for discovery or for cross-examination of witnesses. The 7/20/79 "answer" references the Kuhns letter in discussing the economic impact of the hearing

(noting, for example, that the continued shutdown of TMI-1 would cost the Licensee $168 million per year in replacement power costs, or an increase of approximately $42.50 in the annual electric bill for the average residential customer). The "answer" also extensively discusses Licensee's views on the hearing, both its scope and conduct. In an appendix to the "answer" discusses whether or not, in Licensee's view, the hearing before restart is required. Again, the Commission had before it at an early date (prior to issuance of the 8/9/79 Order and Notice of Hearing) Licensee's views on the structure of the hearing and the economic costs of the hearing process to the Licensee. Also, the Licensee, in the "answer", ackonwledges once again its knowledge of the costs to it of the hearing process and its knowledge of the procedures the Commission was considering imposing on the proposed hearing.

The NRC Staff responded to the Licensee's "answer" in a memorandum dated 7/25/79 from Howard K. Shapar to the Commissioners. The memorandum notes that the Staff feels that "many of the points made by licensees are misleading and erroneous", referring to the Licensee's "answer" to the 7/2/79 Order. The Staff's views are further set forth in the "NRC Staff Reply to Licensees' Answer to Commission Order Dated July 2, 1979" which is attached to the Shapar memorandum to the Commissioners dated 7/25/79 (See memorandum to the Commissioners from Howard K. Shapar, dated 7/25/79, with attached Staff Reply to Licensee's "answer", attached to this response as Appendix 5). The Staff's reply notes that:

> "At bottom, Licensees' argument is simply a plea to change its mind--to treat Three Mile Island Unit 1 like other B&W reactors, permitting resumption of operation upon the Director of NRR's finding that the required corrective actions had been taken. The Commission chose in its Order of July 2 not to follow this course, bit rather to have a hearing precede the restart of TMI-1. While the Commission is free to reconsider that decision, there are ample grounds that support the Commission's original views. Moreover, in several respects the Licensees' suggested format fails to comply with the law." (See, Staff Reply, pages 6 and 7, dated 7/25/79, emphasis added)

Despite the obvious invitation to the Licensee to move the Commission to reconsider its 7/2/79 Order, Licensee again filed no request for reconsideration. Instead, Licensee filed a response to the NRC Staff Memo and Reply of 7/25/79 (See "Licensees' Response to NRC Staff Memo and Reply of July 25, 1979", filed 7/26/79, attached to this response as Appendix 6). In this "response to the Staff's reply to Licensee's response to the Staff's memo concerning the Licensee's views on the Commission's 7/2/79 Order," the Licensee reiterates its economic concerns about the hearing process and reiterates its views on the conduct and process of a hearing prior to restart. By this point, though, "The Licensees have accepted and endorsed the Commission's decision to have a hearing precede restart," (See Licensee's response to Staff memo, dated 7/26/79, page 7). Again, the Licensee had forcefully stated its views on both the hearing process and the economic consequences of that process, and again the Commission had Licensee's views before

it prior to issuing the 8/9/79 Order and Notice of Hearing. Yet, despite having attended Commission meetings where these issues were discussed, and despite having presented its differing views to the Commission on several occasions, the Licensee failed to file a motion for reconsideration or seek any other type of formal or informal relief from the Commission.

Once the 8/9/79 Order and Notice of Hearing was issued, there could have been no reasonable doubt about Licensee's awareness of the implications of the items in the Order. The 8/9/79 Order provided that the Licensee could respond by 9/4/79 (presumably this was extended when the filing deadline for petitions to intervene was extended), and Licensee submitted its response on 9/14/79 (See "Licensee's Answer to the Commission Order and Notice of Hearing Dated August 9, 1979", dated 9/14/79, attached to this response as Appendix 7). Licensee's "Answer" to the 8/9/79 Order again restates the Licensee's financial concerns about the hearing process. The "Answer", however accedes to the Order:

> "Licensee will appear at the hearing and will address the necessity for and sufficiency of the recommended actions." (See Licensee's "Answer" at page 2)

The "Answer" notes the Commission's rejection of Licensee's hearing-related suggestions:

> "From the outset of the Commission's deliberations which resulted in the August 9 Order, the TMI-1 owners have recognized the desirability of providing a forum for public participation in the decision on restart of TMI-1. However, in

> several communications to the Commission prior to the issuance of the Commission's August 9 Order and Notice of Hearing the TMI-1 owners argued strongly that, in establishing procedures to be employed for a public hearing, the Commission should adopt those procedures which would allow the earliest possible decision on restart of TMI-1. . .The Commission elected to apply to the hearing essentially the same procedures which accompany the initial issuance of construction permits and operating licenses, but at the same time indicated its expectation that consistent with a fair and thorough hearing and decision the Board would conduct the proceeding expeditiously." (See Licensee's "Answer" to 8/9/79 Order at pages 3 and 4)

Despite arguing that the Staff had misrepresented its position regarding the Commission's treatment of TMI-1 vs. other B&W reactors (in Licensee's filing of 7/26/79, the Licensee accepted and endorsed the Commission's intent to hold a hearing prior to TMI-1 restart), Licensee turned around its position in its answer to the 8/9/79 Order and noted:

> "The Commission has singled out TMI-1 among all B&W operating reactors in requiring a lengthy public hearing on all of the NRC Staff's recommended requirements and in suspending operation of TMI-1 until both an Atomic Safety and Licensing Board and the Commission itself have passed on the adequacy of those requirements. In contrast other B&W owners had their licenses suspended only for the brief period necessary to accomplish those few plant modifications and other measures considered urgent by the Commission in the light of the TMI-2 accident and their licenses were promptly reinstated upon completion of those measures. Other less urgent requirements will still have to be met by other B&W reactors but they will be permitted in the meantime to continue in operation. The costly delays mandated by the Commission's

> decision, resulting from the suspension of operation pending further definition and accomplishment of a long list of Staff requirements and their consideration in public hearings structured along the lines of a conventional NRC licensing proceeding, will unfairly burden Licensee's consumers and investors." (See Licensee's "Answer" to 8/9/79 Order, pages 4 and 5)

Despite these statements, Licensee appears to accede to the Commission Order, noting in the next sentence following those quoted above:

> "This burden must not be aggravated by allowing the scope of the hearing to expand beyond those issues mandated by the Commission's Order and Notice of Hearing. . . We urge the Board to confine this proceeding strictly to the issues directly related to the TMI-2 accident and to the question of what measures need be taken in the light of that accident to assure the continued safe operation of TMI-1." (See Licensee's "Answer" to 8/9/79 Order, page 5)

Despite Licensee's statements of "unfairly" burdening Licensee's customers and investors and despite a final realization that the Commission had adopted an approach to the hearings which the Licensee had previously argued was not necessary or required, the Licensee failed to file motions to request the Commission to reconsider either the 7/2/79 or 8/9/79 Orders.

It is quite clear that the Licensee could and should have filed motions for reconsideration on both the 7/2/79 and 8/9/79

Orders. Yet, in the end, Licensee explicitly and implicitly acceded to those Orders and failed to make an reconsideration motions to the Board or the Commission. If Licensee disagreed with the Commission's Orders, such motions were necessary to protect the Licensee's interests. By failing to file such motions in a timely manner, especially considering that the Licensee had known and quite vividly expressed its knowledge of the Orders and their economic consequences for the Licensee, the Licensee failed utterly to protect its interests in this matter. Licensee, knowing the content of the Orders, and having stated the consequences of those Orders to the Commission itself, was in an excellent position as of 9/14/79 (the date of its response to the 8/9/79 Order) to file a motion for reconsideration, having essentially all the information it required for such a filing. Licensee could have made essentially the same points as it made in the 12/1/80 motion on the 14th of September, 1979, over a year earlier than its current motion. Licensee failed to do so.

Even granting grossly inappropriate discretionary leeway to the Licensee and assuming that the Licensee did not appreciate the full impact of the Commission's Orders, it becomes clear upon reflection that the Licensee has continued to fail to protect its own interests in this matter. Assuming that the Licensee had decided to go along with the schedule as laid out by the Commission in the 8/9/79 Order, it is useful to examine "checkpoints" throughout the process at which the Licensee could have become aware that the schedule was slipping, and that the Licensee could then request relief from the Commission or the Board. Similarly, it is useful to examine instances where decisions by the Board could have alerted the Licensee that its understanding of the 8/9/79

Order was being altered by Board rulings. and again this could have alerted the Licensee to file requests for relief with the Board or the Commission.

The first instance involves both examples cited above. The First Special Prehearing Conference was held beginning on 11/8/79. The 8/9/79 Order set this date as 75 days following the publication of the 8/9/79 Order, or approximately 10/24/79. Therefore, the First Special Prehearing Conference took place approximately 15 days late. The Licensee made no motions regarding this schedule, nor did it make any request for relief from the delay imposed thereby. In addition, the 8/9/79 Order anticipated the publication of the First Special Prehearing Conference Order five days after the conference was over. In fact, publication of the First Special Prehearing Conference Order did not take place until 12/18/79, about a month after the conference and some six-to-seven weeks behind the schedule in the 8/9/79 Order. Again, Licensee made no request for relief.

The subject matter of the First Special Prehearing Conference dealt with, inter alia, the scope of the proceeding. Arguments were advanced by all parties at the conference, including the Licensee. When the First Special Prehearing Conference Order was published on 12/18/79, it was clear that the Licensee's views on the scope of the hearing had been rejected by the Board, and that the scope of the hearing would be broader than Licensee had anticipated. In commenting on the scope issue, the Board stated:

> "In sum, we view licensee's position to be that this board may consider only those individual factual issues which are expressly stated in the Commission's August 9 order, or in the documents referenced in that order. For the reasons stated below we do not accept that argument. . . We believe the charge to consider the sufficiency of the recommended short and long term actions clearly draws the scope of this hearing beyond the limits urged by the licensee. . . We see an additional fallacy in licensee's position. To accept its view, we would have to conclude that as of the August 9 order and notice of hearing, the Commission already had in mind all possible factual issues to be considered in the hearing, and that the Lessons Learned report was the final word on the subject. This is not the case, of course. . . We have resolved doubts in favor of including safety-related issues." (See First Special Prehearing Conference Order, pages 5 through 8)

In addition, the Board deferred ruling on issues of combustible gas control, psychological stress, and emergency planning. This should also have alerted the Licensee to potential for delays in the proceeding. The combustible gas issue has been the subject of numerous orders, rulings and reconsiderations. The psychological stress issue was not certified to the Commission until February 22, 1980, and was not voted upon by the Commission until very recently. Emergency planning contentions have finally been ruled upon at two different times following two substantive revisions of Licensee and state and county emergency plans.

Licensee neither brought these delays to the attention of the Board, nor filed for relief from the delays inherent in the above matters. Licensee failed to protect its interests.

There are other "checkpoints" at which the Licensee should have been well aware of the delay in the proceeding, at which point this should have prompted Licensee to seek relief from these delays. In summary, these key times are:

a. Completion of general discovery in March 1980, some two months behind schedule.

b. Issuance of Staff's SER (NUREG-0680) in June 1980, some six months after its projected release date.

c. The filing of direct testimony on 9/15/80, some eight months behind schedule.

d. The beginning of the hearings on 10/15/80, some eight months behind the Commission's proposed schedule as set forth in the 8/9/79 Order.

At none of these key times did Licensee acknowledge the delays and file requests for relief from the Board and/or the Commission. Licensee has consistently and totally failed to protect its interests in this matter.

Another test of the Licensee's motion and its timeliness is the examination of the dates of the documents relied upon by the Licensee in support of its motion, to determine the Licensee's diligence in making its motion for reconsideration. The following examples are illuminating:

a. Licensee's motion cites the Transcript of the restart proceeding at page 2436. Licensee fails to mention that this transcript was for the August 1980 Prehearing Conference, some 3-4 months prior to the Licensee's motion. The Prehearing Conference was itself some seven to eight months behind the Commission's schedule as published in the 8/9/79 Order.

b. Licensee references a 9/17/80 Memorandum and Order without mentioning that the 9/17 Memorandum and Order was issued in 1980, and not 1979 as may have been implied.

c. Licensee relies upon the report of the Senate Subcommittee on Nuclear Regulation without citing specific language from the report supporting its position or referencing the language in its motion (making Licensee's reliance upon the report impossible to address). The report was published in June 1980, six months before Licensee's motion for reconsideration was served.

d. Licensee's motion also cites the GAO report, "Three Mile Mile Island: The Financial Fallout," without mentioning its date of publication--7/7/80. This is five months before Licensee's motion for reconsideration.

e. Licensee cites the SER (NUREG-0680). NUREG-0680 was issued in June 1980, six months before Licensee's motion was served.

It is easily seen that Licensee relies on support for its motion which is all at least five months old. In some cases, as will shortly be obvious, Licensee notes arguments in its 12/1/80 motion which are nearly identical to statements and arguments made before the 8/9/79 Order was even issued.

Addressing Licensee's arguments made in the 12/1/80 motion, and comparing them with prior statements, it becomes clear that the 12/1/80 motion is based on information which Licensee has had at its disposal for five to eighteen months:

ARGUMENTS IN 12/1/80 MOTION	PREVIOUS ARGUMENTS MADE
1. "The consequence of those orders has been to severely penalize the four million residents of our service areas and our hundreds of thousands of investors."	1. "We urge that, in establishing those procedures /the hearing procedures/, consideration be given to the economic interest of the more than 4 million residents of Pennsylvania and New Jersey served by the GPU companies in permitting restart of TMI-2 as soon as that is consistent with the Commission's obtaining reasonable assurance that TMI-1 can be operated without endangering the health and safety of the public." (Letter from Kuhns to Hendrie, 7/11/79, page 1) "If the restoration of TMI-1 to service is delayed, the Licensees will have no choice but to seek increases in their charges to customers to cover the $14 million per month additional cost of purchasing such replacement power." (Licensee's Answer to 7/2/79 Order, page 14, dated 7/20/79) "We particularly emphasized the heavy burden which will be borne by the four million residents of the service areas served by the TMI-1 owners and the investors in the securities of those companies..." (Licensee's Answer to 8/9/79 Order, page 3, dated 9/14/79)
2. "There is no legal requirement that the Commission employ the formal procedures which it has ordered prior to authorizing TMI-1 restart."	2. ". . . we disagree with the assumption by the Executive Legal Director in his memorandum to the Commission dated July 9, 1979, that if a hearing is to be held prior to the lifting of the suspension order, it must be an 'adjudicatory-type hearing.'" (Licensee's Answer to 7/2/79 Order, dated 7/20/79, page 2)

3. "Instead the Commission chose to treat TMI-1 differently than all other affected plants and ordered a full adjudicatory hearing with a further requirement for specific approval by the Commission itself prior to restart."	3. "The Commission has singled out TMI-1 among all B&W operating reactors in requiring a lengthy public hearing on all of the NRC Staff's recommended requirements and in suspending operation of TMI-1 until both an Atomic Safety and Licensing Board and the Commission itself have passed on the adequacy of those requirements." (Licensee's Answer to 8/9/79 Order, dated 9/14/79, page 4)

All of these arguments were made no later than 9/14/79, nearly fifteen months prior to the service of Licensee's motion for reconsideration.

Licensee has been aware of its precarious financial position for many months as a result of its involvement in a continuing series of rate hike requests before both the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utilities. TMI-2 was removed from the Licensee's rate base on 4/19/79 and TMI-1 was removed from the rate base on 5/9/80. Licensee has filed several rate hike requests, the most recent being in excess of $75 million. Licensee cannot by any reasonable stretch of the imagination claim that it is not aware and, in fact, has been aware for nearly a year of the conditions which it claims led to the filing of its motion for reconsideration.

Licensee has failed to address the lateness of its motion. In fact, the motion appears to presume that Licensee has the right to file motions for reconsideration of Commission Orders at any time it chooses, without any consideration of the prejudice this may bring upon the other parties to the proceeding. In fact no such right exists absent permission from the Commission to late-file such a motion. No such permission has been

sought by the Licensee, and, in our view, it would be an abuse of discretion for the Commission to grant such permission in view of the facts set forth in this response.

Licensee has demonstrated no good cause for the Commission to accept its late-filed motion for reconsideration. Moreover, a considerable body of evidence demonstrates that the Licensee could have filed a nearly identical motion in September 1979, nearly fifteen months ago, but failed to do so for unexplained reasons. We speculate that this had more to do with the prevailing climate of political and public opinion in that time period, but note that the Commission's regulations do not recognize these exigencies--Licensee has failed to protect its interests in this matter for fifteen months and has presented no arguments which should compel the Commission to overlook the Licensee's lack of diligence in protecting its interests. Licensee's motion for reconsideration should be denied on lateness grounds alone, but there are other significant reasons why the motion should be denied.

2. Licensee has been aware of provisions in the 8/9/79 Order which govern conditions under which TMI-1 can restart prior to the completion of litigation on the long-term items. Licensee has failed, through acts of commission and omission, to assure that these conditions were met, and has therefore failed again to protect its interests. Licensee's own proposed schedule of hearing issues, adopted in large measure by the Board, resulted in the sequence of issues at the hearing.

The Commission's 8/9/79 Order and Notice of Hearing, pages 9-10 and 14-15, details a process by which Licensee can ensure the earliest possible restart date for TMI-1. Licensee was aware of these provisions when the 8/9/79 Order was issued, and if it objected to these provisions, Licensee could have timely filed a motion for reconsideration to attempt to change

those provisions. In fact, Licensee engaged in extensive efforts to change these provisions before the Commission adopted them (See Licensee's filings dated 7/20/79, 7/26/79, and 9/14/79, all attached as appendices to this response). Licensee failed, however, to challenge these provisions once the Commission adopted them in the 8/9/79 Order and Notice of Hearing. Licensee's response to the 8/9/79 Order indicates, in fact, Licensee's acceptance of these provisions, stating that Licensee would appear at the hearing and address the necessity and sufficiency of the actions proposed in the Commission's Order.

The Atomic Safety and Licensing Board has set schedules in several instances in this proceeding which clearly were indicative of the delay which was occurring, yet the Licensee failed to pose objections to these schedules, and failed to move the Board to reconsider them. It is the Licensee itself, however, which is largely responsible for the sequence of issues being considered at the restart hearing. Despite the fact that Licensee was aware of the considerable delay in the proceeding by the time testimony was to be filed, Licensee proposed a schedule of issues which resulted in the issues which could have resulted in an early restart of TMI-1 being placed at the end of the litigation process. Licensee has no one to blame but itself for this situation. A memorandum from Licensee's counsel, dated 7/18/80, sets forth Licensee's proposed sequence of issues, and also includes an earlier proposed grouping of issues by subject. Licensee's 7/18/80 memorandum (copy attached to this response as Appendix 8 to this response) resulted, for instance, in the management capability and financial qualifications issues, two issues identified as "short-term" by the 8/9/79 Order (issues which would have

been required to be resolved in order to permit restart of TMI-1 before the long-term issues were considered at the hearing), were not scheduled to be litigated until the end of the hearing. Since it was the Licensee who proposed this sequence of issues, and since the Licensee was well aware as a result of the number of issues, the results of discovery, and past experience in ASLB proceedings of the time which would be needed to reach the management and financial issues, it can hardly be claimed now by the Licensee that the Licensee has been somehow wronged by the NRC Staff or the Commission.

Licensee's proposed sequence of issues has resulted in, as of the date of this response, testimony having been heard only from the Intervenor group Three Mile Island Alert on management capability, and not on a single other identified short-term issue. If this sequence of events has placed the Licensee at a disadvantage, Licensee can blame no one but itself since the Licensee proposed this sequence. Licensee is not in a position to request relief from the Commission from the Licensee's own errors. In fact, since filing the motion for reconsideration, Licensee has not moved the Board to alter the sequence of issues (in order to protect itself should the Commission deny its motion). What Licensee is doing, in effect, is saying to the Commission, "Please Commissioners, we have been foolish, but this is costing us a lot of cash, so please rescue us." Licensee has no one to blame but itself for this situation and should suffer the consequences of its own actions in this regard.

Licensee has had the opportunity throughout the restart proceeding to move the Board to certify questions to the Commission if the Licensee was confused by the 8/9/79 Order. Other than participating in certifications

on hydrogen gas control and psychological stress, Licensee has filed no such motions with the Board. Licensee has also had the opportunity to request the Board to explain the 8/9/79 Order; Licensee made no such requests.

Licensee could have objected or moved the Board to reconsider its orders and rulings on scheduling, but failed to do so. Licensee could even, having realized its mistake in its proposed sequence of issues moved the Board to alter the sequence of issues. Licensee did nothing.

Licensee has had the opportunity throughout the proceeding to move the Board to pursue the path suggested by the 8/9/79 Order which would permit, through a partial initial decision, restart of TMI-1 prior to the end of the hearings. Licensee did nothing.

In summary, the Licensee has failed to protect its interests in this matter. Licensee seeks to have the Commission remedy the Licensee's past failings over the last fifteen months by moving the Commission to reconsider and modify its 7/2/79 and 8/9/79 Orders. Under the circumstances, no such relief is appropriate.

3. Licensee's motion is rooted in the economic consequences to the Licensee, its customers, and its investors, from the 7/2/79 and 8/9/79 Commission Orders. Such consequences do not result from the Commission's Orders, but rather from rulings by the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utilities on Licensee's rate base, and from Licensee's own actions regarding payment of dividends on its stock. Further, such issues are not cognizable under the Atomic Energy Act, and cannot, therefore, serve as a basis for the Commission to modify in any way the 7/2/79 and 8/9/79 Orders.

The Licensee's motion for reconsideration is based solely on the economic consequences of the 7/2/79 and 8/9/79 Orders (as perceived by the Licensee) for its customers and investors. Such issues, by a long history of precedent and the language of the Act, are not cognizable before the Commission. The Commission's concern in the matter of TMI-1 restart is and must remain the assurance of public health and safety. Such concerns cannot be modified by economic consequences of the Orders; public health and safety matters stand on their own merit. Since the financial issues are not cognizable beofre the Commission, the Commission cannot use them as a basis for modifying the 7/2/79 and 8/9/79 Orders.

The actions which are directly to blame for Licensee's precarious financial position stem from the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utilities, and, ironically, from the Licensee itself. The PaPUC and NJBPU have removed TMI-1 and TMI-2 from the rate bases of the three corporate owners of TMI--namely, Metropolitan Edison Company, Pennsylvania Electric Company, and Jersey Central Power and Light Company. The Nuclear Regulatory Commission has no authority in these matters.

The economic consequences to Licensee's stockholders stem directly from Licensee's own actions in eliminating dividends on Licensee's stock. Again, the NRC was not involved in this decision by the Licensee, and NRC certainly has no power to determine Licensee's stock dividends.

Even if these financial matters were cognizable before the Commission as a basis for the Commission to modify its Orders (which we believe they are not), the Licensee's motion for reconsideration goes no further than

merely alleging financial consequences. Licensee's motion is devoid of an specification of these financial consequences. There are no dollar amounts given on financial consequences thus far, financial consequences of continued shutdown of TMI-1, or financial benefits of immediate restart. There is no information presented which would even allow the Commission to judge whether, even with TMI-1 back on line and providing revenue to the Licensee, the Licensee would remain able to survive financially. It is not inconceivable that even with near-term restart of TMI-1 that Licensee's financial position is such that bankruptcy may be inevitable. Even if such financial issues were cognizable before the Commission, Licensee's motion for reconsideration lacks the specificity needed by the Commission to make a determination of whether the relief the Licensee requests is merited.

4. Licensee's motion takes issue with the Commission's treatment of TMI-1 versus other B&W reactors. The 8/9/79 Order is quite specific and clear on the reasons for this difference--the issues raised by the TMI-2 accident with regards to TMI-1 and this particular Licensee are unique compared to other B&W reactors. The discrimination alleged by the Licensee is well-explained in the 8/9/79 Order, and Licensee has been aware of this discrimination and the reasons therefore since the Order was issued.

Licensee's own motion for reconsideration at pages 4 and 5 (copy attached to this response as Appendix 9) cites the very language from the 8/9/79 Order which clearly demonstrates why the Commission has treated the Licensee differently from other B&W licensees. The Commission's 8/9/79 Order states in part (emphasis added):

> "In addition to the items identified for the other B&W reactors, the unique circumstances at TMI require that additional safety concerns identified by the NRC Staff be resolved prior to restart."

It was quite evident when the 8/9/79 Order was issued that the Commission had determined, after 4½ months of investigations on the TMI-2 accident, that there were serious, additional concerns about TMI-1, concerns which went far beyond those identified generically for all B&W reactors. Licensee was quite aware of these concerns and the Commission's reasoning at the time the 8/9/79 Order was issued. If Licensee disagreed as violently as the motion for reconsideration would have the parties believe, then the Licensee should have promptly filed for reconsideration. To wait fifteen months, as the licensee did, and then allege "discriminatory action" shows an extreme lack of diligence on the part of the Licensee i- attempting to protect its interests. There is nothing in the motion which addresses why it took the Licensee fiftenn months to figure out that it disagreed with the Commission's Order.

The specific issues raised by the Commission in the context of TMI-1 restart included the management capability and financial qualifications of the Licensee. In no other case were such issues raised, largely because it is this particular Licensee which experienced the TMI-2 accident, an accident which revealed serious flaws in the management structure of the Licensee and which raised questions about the financial ability of the Licensee to safely operate TMI-1 for the

future.

Largely through Licensee's own suggested sequence of issues, as of the date of this response, testimony has been heard on only one of the mandated, site-specific issues from the Commission Order, and in that case it was the direct case of the intervenor--the NRC Staff and the Licensee have yet to even file their written testimony on the management issue.

Other issues (beyond those mandated by the Order as short-term and long-term issues) were accepted for litigation by the ASLB. These issues were accepted in the First Special Prehearing Conference Order of 12/18/79, and were accepted based on the charge of the Commission to consider the necessity and sufficiency of the items proposed in the Order. The tests applied by the Board to determine the acceptability of these issues went well beyond traditional tests of litigability. All such issues were required to be related to the question of whether TMI-1 could be operated without posing an undue risk to public health and safety, and were further required to have a reasonable nexus to the TMI-2 accident.

Licensee clearly knew about these issues by the date of the Board's First Special Prehearing Conference Order. If Licensee was in such violent disagreement with their inclusion in the hearing, the question must be asked why the Licensee did not move the Commission to reconsider its Orders, why the Licensee did not move the Board to reconsider its rulings on the contentions, and why the Licensee, in its proposed sequence of issues for the hearing, proposed to litigate these issues ahead of Commission-mandated issues. There are no answers to these questions provided by the Licensee--it is clear that Licensee did nothing for fifteen months, thus failing to protect its interests.

5. Licensee's motion asserts that there are "National and regional interests" being sacrificed by the TMI-1 restart proceeding. No supportive argument or factual materials are found in Licensee's motion to back up this argument. It is without merit and is meaningless to the Commission's determination regarding this motion for reconsideration.

Licensee's motion depends, in part, upon Licensee's assertions that there are certain, unspecified "National and regional interests" being sacrificed by the delay in the restart proceeding. Such assertions were made by the Licensee in its 7/20/79 and 7/26/79 filings nearly seventeen months ago; there is nothing new about such assertions.

Licensee's motion fails utterly to go beyond mere assertion in this regard. Licensee has not cited a single law, resolution, Executive Order, or Commission statement of position which supports its claim. Licensee's unsupported assertions were known to the Commission weeks before the 8/9/79 Order was issued, and the Commission's knowledge of these assertions had no perceivable impact on the Order. Having repeated these assertions seventeen months later, with no more (in fact, even less) specificity now than in July of 1979, Licensee expects the Commission to modify its Orders. This simply is unreasonable, and provides no basis for Commission action.

If Licensee is referring to its earlier alledged oil import savings if TMI-1 were on line, Licensee should have addressed in some detail precisely where the replacement power for TMI-1 is coming from. In fact, a significant portion of that replacement power is coming from coal-fired power plants, from hydroelectric sources, and from other nuclear plants. The parties joining in this response are not

privy to the exact figures, but are certain that, should the Commission for some unexplained reason require these figures, the PaPUC could provide most of this information as could the Consumer Advocate's Office (Pennsylvania Department of Justice).

Licensee's unsupported assertions of national and regional interests must be balanced against the very specific and very real interests in the public health and safety, the interest which must be paramount in the Commission's deliberations. The Commission took extraordinary action in suspending TMI-1's operating license on 7/2/79 because it lacked the requisite reasonable assurance that the plant could be operated without endangering the public health and safety. Absent some equally extraordinary determination by the Commission that this is no longer the case (and this decision has been assigned to the ASLB hearings for deliberation), the protection of the public health and safety must remain the paramount concern of the Commission. Licensee has identified no national or regional interests of any type which are as important as the health and safety the two million people living within 50 miles of Three Mile Island. Licensee's unsupported assertions are without merit.

6. Licensee's assertions in its motion for reconsideration that the delays in the proceeding have resulted from delaying tactics by the intervenors, from "overgeneralized" wording of the 8/9/79 Order, and from NRC Staff actions, are gratuitious and at best disingenuous. The Licensee has contributed significantly to the delays in this proceeding, and must therefore shoulder a significant part of the burden of the delay. This perspective greatly weakens Licensee's argument that it is entitled to Commission relief from these delays.

Licensee strongly implies in its motion that the intervenors in this proceeding have sought to use the adjudicatory process to delay the restart of TMI-1. Licensee provides no support for this assertion, and, in fact, the record shows many instances where the large number of intervenors in this proceeding have voluntarily cooperated with the ASLB and the Licensee to reduce the opportunity for delays in the proceeding. Such instances include voluntary consolidation on the basis of issues (without intervention by the Board), dropping of duplicative contentions, simplifying of issues following discovery, and voluntary attendance at many meetings outside the hearing process to resolve disputes which have arisen. The intervenors have also been amenable to curtailed schedules for submittals and discovery on matters such as the SER (NUREG-0680). Licensee's blame of the intervenors for delaying the proceeding is mere rhetoric, unsupported by any documentation, and contradicted by the facts.

Licensee lays most of the blame for the delays on the Commission and the Staff. If Licensee was confused by the 8/9/79 Order, or disagreed with the language of the Order as being "overgeneralized", Licensee had a number of remedies--motions for reconsideration, certified questions of clarification, and other motions to the Board. Licenses took advantage of none of these remedies. Licensee complains that it did not know what standards would be applied to it in determining the acceptability of Licensee's responses to the order items. Licensee had the same discovery opportunities as other parties, yet failed to pose a single interrogatory to the Staff on this matter. Licensee's complaints about the Order language, coming at this late date following fifteen months of inaction by the Licensee, amounts to "sour grapes." Licensee is in no position to complain.

Regarding the Staff's role in delays, the parties joining in this response agree to some extent that the Staff's prioritization of this proceeding appears to have slipped since the beginning of the proceeding. The parties feel that there are numerous causes for this, however, among them being the multitude of investigations following the TMI-2 accident, and the necessary reviews of TMI-2 cleanup-related processes. The parties are also in agreement, however, that much of the delay the Licensee would lay upon the Staff (in terms of issuing the SER and providing testimony) are in fact due to the Licensee's delays in providing the Staff with materials which the Staff requested, and to the habit of the Licensee to repeatedly and significantly revise such information months after it is submitted. Examplary of such delay on the part of the Licensee in timely filing of information requested by the Staff is a letter from Mr. Robert Reid to the Licensee, dated 9/4/80 (copy attached to this response as Appendix 10). The letter states, in part (emphasis added):

> "In NUREG-0680 ussued in June 1980, we identified open items in our review of your compliance with the NRC Order of August 9, 1979. This review covered your Restart Report through Amendment No. 18, and letters and other documentation through late May 1980. Since that time we have received Amendments Nos. 19 and 20 to the Restart Report, dealing with the revised Emergency Plan and management capability, as well as your current financial plan and some plant procedures. These items are in review."
>
> "However, we have received no amendments or other information on the bulk of open items in the SER since issuance of NUREG-0680. Your letter of May 28, 1980 (TLL 254) identified scheduled intermediate and completion dates for many open items, at least half of which have already passed. Verbal information from your staff

> in July indicated significant submittals were to have been made by August 1, and after this date had passed, this was estimated to be accomplished by the end of August. Present estimates, we understand, are now mid-September."

It is the view of the parties joining in this response that a careful review of information in Dockets 50-289 and 50-320 will demonstrate that such delays in submitting requested information are characteristic of this Licensee, and will further demonstrate that such delays have had a significant impact on the ability of the Staff to meet its deadlines for filing reports and testimony.

Licensee has contributed to delay in other ways. For example, Licensee has had three substantively different site emergency plans before the parties in this proceeding. The Commonwealth of Pennsylvania and the counties of Dauphin, Cumberland, York, Lancaster, and Lebanon (upon whom the Licensee relies for emergency planning) have also had two distinctly different sets of emergency plans before the parties. Such continuing revisions inevitably causes delay. Licensee has revised its management structure at least three different times, and has submitted numerous sets of financial information, each substantively different from the previous submittal. All such revisions inevatably take time from the Staff, the Board, and the intervenors and introduce delays into the proceeding.

Licensee's continuing habit of revising its so-called "Restart Report" has also caused delay. The parties have been submitted 22 sets of revisions, the most recent having been served upon the parties on 10/17/80, two days after the hearings began. Revision 22 included

substantive revisions of, among others:

a. Emergency power supply requirements and design basis for Pressurizer heaters, PORV, PORV-block valve, and Pressurizer Level Indication.
b. Instrumentation to detect inadequate core cooling (saturation meter design).
c. Auxiliary feedwater power supply modifications.
d. A major review of in-plant shielding.
e. Revisions to management structure.
f. Major submittals on small-break operating procedures and auxiliary feedwater accident analyses.

Such revisions cannot help but cause delays in the proceeding, particularly for the Staff.

Licensee's attempts to place responsibility for delaying the proceeding on all parties but itself is clearly self-serving and misleading. Licensee must be held responsible for such delays as well, particularly considering that the Licensee is the only source, in many cases, of the information required by the Staff for its review purposes. When the delays for the proceeding are placed into this perspective, with the Licensee clearly being responsible for much of the delay, this greatly weakens the Licensee's case that it is entitled to some type of relief from the Commission. This is especially true when the Licensee has had identical opportunities for filing the same motion for reconsideration (with the same arguments and facts) for the last fifteen months.

7. There are due process considerations which Licensee's motion totally fails to address regarding the timing and substance of the motion for reconsideration. The intervenors (and possibly other parties, such as Commonwealth representatives) would be substantially prejudiced by the granting of Licensee's motion due to the investments in the adjudicatory proceeding of time, money, and legal and technical expertise. Granting Licensee's motion would greatly prejudice intervenors' efforts to obtain relief by other means. Licensee has substantially contributed to this prejudice by its filing of the motion fifteen months late.

The intervenors entered into the restart proceeding in good faith, under the belief that the Commission was properly exercising its statutory authority in ordering this proceeding to be held prior to restart. Other remedies could have been pursued (such as a "show cause" order, for instance), but were not pursued due to the existence of the hearing process set in motion by the 8/9/79 Order and Notice of Hearing.

The intervenors have invested a substantial amount of effort in this proceeding. Many thousands of dollars have been spent on attorneys, researchers, and expert assistance in preparing for these hearings. Untold thousands of hours of personal time and other in-kind efforts have been donated by hundreds of individuals. By committing their legal, technical, financial, and personal efforts to the adjudicatory proceeding on TMI-1 restart, the intervenors have forgone other remedies which were available to the intervenors. The 8/9/79 Order significantly affected the choice of remedies for the intervenors. For the Commission to now grant this extremely late-filed motion would be very prejudicial to the intervenors and manifestly unfair. Furthermore, it would be prejudicial to other members of the

public who, save for the participation of the intervenors in this adjudicatory proceeding, would also have sought relief from the situation by seeking alternative remedies.

By its late-filing of its motion for reconsideration, Licensee shall have substantially contributed to this prejudice if its motion is granted. Given the lack of authority for such a filing, and the utter failure of the Licensee to protect its interests until this late date in the proceeding, for the Commission to grant the Licensee's motion would be manifestly unfair and would constitute a very obvious and bold abuse of discretion. Licensee's motion should be denied.

8. TMI-1 is not ready to be restarted now, and will not be prepared for restart for some time. Modifications to the plant must be completed and the entire facility and staff must be inspected by the NRC Staff prior to restart. The operators of the reactor must all be requalified and relicensed. By the time all of these things can be accomplished, the adjudicatory proceedings will be nearly or totally completed.

It is clear that TMI-1 is not prepared for operation at this juncture. Consultation with the NRC Staff will readily confirm this fact. Many changes in both hardware and procedures remain to be accomplished. In addition, the NRC Staff must complete its inspection of the facility. Only a "rush job" could result in restart significantly before the end of the adjudicatory hearings.

Such a "rush job" is not desirable from either the NRC Staff or the Licensee's personnel. The risks inherent in such an approach are very high, and unreasonably risk the public health and safety. Even if the Commission were to grant Licensee's motion, which the parties joining

in this response believe that the Commission lacks the authority to do, there is little practical relief that this would grant to the Licensee. The only possible benefit would be the placement of TMI-1 back into the rate base of the Licensee, and even this possible benefit is contingent upon action by the PaPUC and the NJBPU. Furthermore, such potential benefit is not cognizable before the Commission as a basis for granting relief which the Licensee has requested.

There would be precious little merit in permitting restart of TMI-1 only a few weeks shy of the completion of the proceedings, as would granting the Licensee's motion so result. In essence, even if the Commission could grant the motion, there would be little practical benefit to the Licensee in doing so. Such questionnable benefit must be weighed against the overriding interest by the NRC in protecting the public health and safety. Again, the parties joining in this response respectfully suggest that the benefits which might accrue to the Licensee are far outweighed by the consideration of public health and safety.

9. Licensee's position regarding the Staff in its motion is internally inconsistent, and poses a paradox in terms of the Staff's role in the restart of TMI-1. It is also paradoxical that the Licensee is prepared to accept the safety findings of the very agency which it has sued for $4 billion, alleging incompetance in regulating nuclear power plants.

The parties joining in this response note here, for the record, a paradox posed by Licensee's motion. Licensee harshly criticizes the Staff, and then proposes to have this same Staff act in the role of final arbiter in determining whether or not the bases for suspension of the operating license have been satisfactorily resolved, and whether the Licensee has satisfactorily completed all required modifications

to the facility and to plant procedures. This is illogical.

Further, Licensee has recently filed suit against the Commission alleging $4 billion in damages. This suit alleges negligent performance by the NRC of its operational functions. It is paradoxical that the Licensee sues the NRC on one hand, and requests that same agency to expedite a safety review of its nuclear facility.

10. Despite continued attention to the management capability issue which Licensee claims to be making, there have been and continue to be occurrences which raise serious questions about the ability of the Licensee to safely operate TMI-1. Even the NRC Staff concluded recently in its Supplement to NUREG-0680, issued in November 1980, that the Licensee is still not in compliance with Order Item 6. Until the management capability issue is resolved, the Commission cannot make the finding required to permit TMI-1 to restart.

Licensee claims to have solved its management problems. Contrary to this position, the parties joining in this response note a continuing series of management-related problems which raise serious questions about the ability of the Licensee to safely operate TMI-1, especially when consideration is given to the fact that this same Licensee is attempting to decomtaminate TMI-2. Such a task, involving a cleanup of unprecedented proportions, must be attracting the attention of Licensee's most qualified personnel and management. This cannot help but detract from the operation of TMI-1.

The most recent instances of questions about management being raised arise from a recent special health physics inspection and a letter to the Licensee regarding the Licensee's operator training program. Both of these areas were highlighted by the TMI-2 accident as being deficient.

In a letter dated 12/1/80, Mr. Paul F. Collins of NRC submitted comments to the Licensee on its Revised Licensed Operator Qualification and Requalification Training Program (the letter and comments are attached to this response as Appendix 11). The letter noted that the Staff found Licensee's training program for licensed personnel to be "unacceptable." Among the reasons listed were that the program relies on open book quizzes for periodic evaluation of an operators knowledge of the subject matter of the training program, and provision that licensed personnel not directly related to unit operations had to participate actively in control room operation only one shift every three months. Certainly this is not the picture of a Licensee which has "learned its lesson" and "cleaned up its act."

The health physics problem noted relates to a special inspection of the Licensee's health physics program conducted during the period of 28 July to 8 August 1980. Inspection and Enforcement Report 50-289/80-22 (copy attached as Appendix 12, including cover letter, notice of violations, and cover sheet of Inspection Report itself) reveals numerous violations, including failure to implement a satisfactory extremity TLD monitoring program, and a variety of procedural violations. It is worth noting that this inspection and list of violations comes within a year of a Special Panel report on TMI-2's health physics program. That report found that the Licensee's Unit 2 health physics staff was unprepared for the major recovery actions which would be necessary following the TMI-2 accident. The parties joining in this response would have expected that the Report of the Special Panel would have prompted the Licensee to greatly improve its health physics programs at both TMI-1 and TMI-2. Apparently, this did not happen, and additional violations were uncovered in the recent special

inspection of Licensee's TMI-1 health physics program.

It is also worth noting the protracted periods of time required by the Licensee to resolve violations arising from the NUREG-0600 investigation. The recent NUREG-0680 Supplement notes that some items were not successfully resolved until as late as November 1980 (See NUREG-0680, Supplement No. 1, Appendix A, page 7). The Notice of Violation arising from the NUREG-0600 investigation was dated 10/25/79.

Taken together with other instances too numerous to detail in this response, these management-related problems indicate that there remain substantial problems and that Licensee's management capability must remain suspect until proven otherwise. Licensee's motion for reconsideration provides no information upon which the Commission or the NRC Staff could make a finding that Licensee's management is now adequate. Inasmuch as management capability is one of the Order-mandated issues identified as part of the basis for the suspension of the TMI-1 operating license, Licensee's motion cannot be granted. The management issue is central to the restart proceeding, and the restart proceeding represents the most expeditious and most thorough forum for resolving this issue.

11. Licensee's arguments regarding the legal acceptability of restart while the restart proceeding continues to consider short-term items identified as part of the basis for suspension of the TMI-1 operating license are flawed. Since the TMI-1 license has been suspended, the bases for that suspension must, under the law, be resolved prior to restart. The Commission must be able to make a finding that operation of TMI-1 will not endanger the public health and safety, before TMI-1 restart can be authorized. The Commission has determined, within the scope of its authority under the Atomic Energy Act and the Administrative Procedure Act, to hold an adjudicatory hearing prior to restart. That hearing is the means by which the bases for suspension of TMI-1's operating license are to be resolved, and that hearing must continue until these bases are resolved.

Licensee's motion for reconsideration argues explicitly that there is no legal requirement that the Commission hold a formal adjudicatory hearing prior to restart of TMI-1. Licensee cites a memorandum from the Commission's General Counsel, dated 7/26/79 (copy attached as Appendix 13), as authority for its position.

The parties note here that the record of the meetings of the Commission covering the period 7/2/79 through 8/9/79, taking note of the restrictions imposed by the disclaimer resulting from the rules at 10 C.F.R. § 9.103, are not entirely clear what arguments the Commission eventually accepted as controlling in this matter. For instance, the Executive Legal Director addressed this matter in two separate memoranda to the Commission, dated 7/9/79 and 7/25/79. The ELD noted in the 7/9/79 memo (emphasis added):

> "This memorandum explores the alternatives available to the Commission and presents our recommendations in the three areas. It assumes that an adjudicatory-type hearing will be held and that the Commission itself intends to complete its review of the issues relating directly to the restart of the facility prior to lifting the suspension of operation. We further consider the hearing as one 'required by statute' to which the adjudicatory provisions of the Administrative Procedure Act apply; i.e., we treat the hearing contemplated by the Commission's Order as the hearing which would be required by § 189a of the Atomic Energy Act if any person whose interest may be affected by this suspension proceeding should request a hearing." (See Shapar memorandum, dated 7/9/79, at pages 1 and 2)

This memorandum appears to be in conflict with the quoted language from the General Counsel's memoradum dated 7/26/79, wherein the General Counsel stated, as mentioned in the Licensee's motion:

> "No statutory requirements are applicable to any such hearing." (See Bickwit memorandum, page 2)

The General Counsel appears to disagree with the Executive Legal Director on whether the restart hearing is required prior to restart. Regardless of who is correct on this point, however, both Mr. Bickwit and Mr. Shapar agree that it is within the Commission's authority to determine that the hearing will occur prior to restart, and Mr. Shapar points out the even the Licensee concedes that this is so (See Shapar memorandum, dated 7/25/79, pages 1 and 2 of the Staff reply attached to this memoradum). This, in fact, is what has occurred; i.e., the Commission has determined that a full adjudicatory proceeding will precede restart of TMI-1. Neither the General Counsel nor the Executive Legal Director (or the Licensee for that matter) address what happens after the Commission exercises its discretion and orders the hearing prior to making a decision on restart.

As Mr. Shapar's 7/9/79 memorandum noted:

> "The suspension of operation ordered by the Commission prior to hearing (or opportunity for hearing) invokes an extraordinary remedy. . . It is justified only so long as the bases supporting the action exist. The Commission has elected to determine through adjudicatory proceedings whether those bases are satisfactorily resolved. When and if, however, completed adjudication reveals that the bases are favorably resolved, the suspension must be lifted to restore the status quo prior to the extraordinary action." (See Shapar memorandum, 7/9/79, pages 7 and 8)

In fact, the Commission's 8/9/79 Order takes this matter into

account in providing, as previously described, a means by which TMI-1 could restart prior to the end of the hearings if the Board issues a Partial Initial Decision concerning the suspension-related issues (i.e., the "short-term actions").

Since the Commission has determined that the adjudicatory hearing is necessary to its deliberations on this matter, it is inappropriate for the Licensee, at this late date, to request the Commission to change its course in mid-stream. As we have stated, this would be extremely prejudicial to the intervenors' interests.

Once started into the adjudicatory process, we question whether the Commission has the authority to change the nature of the hearing in mid-stream. Licensee's motion cites no authority for so doing, rather it deals only with whether the hearing was required. Having been started within the scope of the Commission's discretion, Licensee fails to address whether the Commission can alter the process.

Given this extraordinary situation, the parties joining in this response were not surprised to find that there is precious little in the way of precedents dealing with this situation or anything remotely like it. We can only suggest, however, that after beginning this process (which apparently all parties are agree was within the Commission's authority to do so), the Commission is bound by due process and fairness to complete it. Licensee has failed to take advantage of the provisions of the 8/9/79 Order which could conceivably have resulted in restart of TMI-1 by now or in the near future. Having utterly failed to protect its interests, Licensee now seeks the Commission's rescue from Licensee's own self-inflicted position. The Commission owes the Licensee nothing in

in this regard.

The Commission has set forth the restart hearings as the means by which the bases for the suspension of the TMI-1 operating license are to be resolved. Licensee presents no convincing arguments that at this late date, after having totally failed to take advantage of the provisions of the 8/9/79 Order, and after neglecting to file an appropriate motion for reconsideration for fifteen months, the Commission should grant it some relief. Under the circumstances set forth in this response, no such relief is merited. The Licensee's motion should be denied without further ado.

APPENDICES:

1. Letter from George F. Trowbridge, counsel for the Licensee, to Chairman Joseph Hendrie, NRC, dated 7/2/79, 3 pages.

2. Letter from W. G. Kuhns, Chairman of GPU Service Corporation, to Chairman Joseph Hendrie, NRC, dated 7/11/79, 2 pages.

3. Filing entitled, "Licensees' Answer to Commission Order Dated July 2, 1979, docketed 7/20/79, signed by George F. Trowbridge, counsel for Licensee, 15 pages with Appendix A, 5 pages.

4. Memoradum from Howard K. Shapar, ELD, through Lee V. Gossick, EDO, to the Commissioners, dated 7/9/79, subject: Discussion of Proposed Provisions Relating to Hearing to be Contained in Commission's Further Order in the Three Mile Island Unit 1 Suspension Proceeding, 9 pages.

5. Memorandum from Howard K. Shapar, ELD, through Lee V. Gossick, EDO, to the Commissioners, dated 7/25/79, subject: Proceedings on Start-Up of Three Mile Island Unit 1, 2 pages, with accompanying "NRC Staff Reply to Licensees' Answer to Commission Order Dated July 2, 1979," 7 pages.

6. Filing entitled, "Licensees' Response to NRC Staff Memo and Reply of July 25, 1979," docketed 7/27/79, dated 7/26/79, signed by George F. Trowbridge, counsel for Licensee, 7 pages.

7. Filing entitled, "Licensee's Answer to Commission Order and Notice of Hearing Dated August 9, 1979," dated 9/14/79, signed by George F. Trowbridge, counsel for Licensee, 5 pages.

8. Memorandum from George F. Trowbridge, counsel for Licensee, to parties in TMI-1 Restart Proceeding, dated 7/18/80, with Attachment A, "Sequence of Subject Matter Groups," and copy of "Grouping of Staff Recommendations and Intervenor Contentions (dated 4/14/80)," 9 pages total.

9. Letter from Herman Dieckamp, President of GPU, to Chairman John F. Ahearne, NRC, dated 12/1/80, 11 pages (with first page as revised on 12/5/80).

10. Letter from Robert W. Reid, Chief, Operating Reactors Branch #4, Division of Licensing, NRC, to R. C. Arnold, Senior Vice President, Metropolitan Edison Company, dated 9/4/80, 1 page.

11. Letter from Paul F. Collins, Chief, Operator Licensing Branch, Division of Human Factors Safety, NRC, to Henry D. Hukill, Vice President and Director, Metropolitan Edison Company, dated 12/1/80, with "Comments on Three Mile Island Operator Requalification Program (Unit 1 Administrative Procedure 1006)", 3 pages total.

12. Letter from Boyce H. Grier, Director, Region I Office of Inspection and Enforcement, NRC, to R. C. Arnold, Senior Vice President, Metropolitan Edison Company, dated 11/26/80, with accompanying Appendix A, "Notice of Violation", and cover sheet for I&E Report 50-289/80-22, 9 pages total.

13. Memorandum from Leonard Bickwit, Jr., General Counsel, to the Commissioners, dated 7/26/79, subject: TMI-1 Proceeding, 10 pages.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify, by my signature which appears below, that I served upon those persons on this service list single copies of the document captioned: "JOINT RESPONSE IN OPPOSITION TO LICENSEE'S MOTION FOR RECONSIDERATION OF THE COMMISSION'S ORDERS OF 2 JULY 1979 and 9 AUGUST 1979", dated 18 December 1980, by deposit in the United States mail, first class postage prepaid, this 18th day of December 1980, or by hand delivery as noted by (*) on the same date.

DATED: 18 December 1980

Steven C. Sholly, Intervenor
pro se

Mr. John F. Ahearne
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Peter Bradford
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Victor Gilinsky
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Joseph Hendrie
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Leonard Bickwit, Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Stephen Eilperin, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. George F. Trowbridge, Esq.
Counsel for Metropolitan Edison Company
Shaw, Pittman, Potts, & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Mr. James Tourtellotte, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Herman Dieckamp
President
General Public Utilities Corporation
100 Interpace Parkway
Parsippany, N.J. 07054

Hon. Richard Thornburgh
Governor of the Commonwealth of
Pennsylvania
Room 225 Main Capitol Building
Harrisburg, PA 17120

Mr. Ivan W. Smith, Esq.
Chairman, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Linda W. Little
Atomic Safety and Licensing Board
Panel
5000 Hermitage Drive
Raleigh, NC 27612

Dr. Walter H. Jordan
Atomic Safety and Licensing Board
Panel
881 West Outer Drive
Oak Ridge, TN 37830

Mr. Thomas J. Germine, Esq.
Deputy Attorney General
State of New Jersey
Division of Law--Room 316
1100 Raymond Boulevard
Newark, NJ 07102

Mr. John A. Levin, Esq.
Assistant Counsel
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Mr. Walter W. Cohen, Esq.
Consumer Advocate
Office of the Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17127

Ms. Karin W. Carter, Esq.
Assistant Attorney General
505 Executive House
P.O. Box 2357
Harrisburg, PA 17120

Mr. Robert W. Adler, Esq.
Assistant Attorney General
Commonwealth of Pennsylvania
505 Executive House
P.O. Box 2357
Harrisburg, PA 17120

Mr. John E. Minnich
Chairman, Dauphin County Board
of Commissioners
Dauphin County Courthouse
Front and Market Streets
Harrisburg, PA 17101

Mr. Samuel Chilk
Secretary of the Commission
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Section

Mrs. Marjorie M. Aamodt
Intervenor pro se
R.D. #5
Coatesville, PA 19320

Mr. Jordan D. Cunningham, Esq.
Counsel for Newberry Township
Three Mile Island Steering Committee
Fox, Farr & Cunningham
2320 North Second Street
Harrisburg, PA 17110

Ms. Ellyn R. Weiss, Esq.
Counsel for Union of Concerned
Scientists
Harmon and Weiss
1725 I Street, N.W., Suite 506
Washington, D.C. 20006

Ms. Gail Bradford
Legal Representative
Anti-Nuclear Group Representing
York (ANGRY)
245 West Philadelphia Street
York, PA 17404

Mr. William S. Jordan, III, Esq.
Counsel for People Against Nuclear
Energy (PANE)
Harmon and Weiss
1725 I Street, N.W., Suite 506
Washington, D.C. 20006

Mr. Robert Q. Pollard
Representative for Chesapeake Energy
Alliance (CEA)
609 Montpelier Street
Baltimore, MD 21218

Dr. Judith H. Johnsrud
Legal Representative
Environmental Coalition on Nuclear
Power (ECNP)
433 Orlando Avenue
State College, PA 16801

Mr. Marvin I. Lewis
Intervenor pro se
6504 Bradford Terrace
Philadelphia, PA 19149

Mr. Theodore A. Adler, Esq.
Counsel for Three Mile Island
Alert, Inc. (TMIA)
Widoff Reager Selkowitz & Adler
P.O. Box 1547
Harrisburg, PA 17105

Ms. Judith A. Dorsey, Esq.
Counsel for Susquehanna Valley
Alliance (SVA)
Public Interest Law Center of
Philadelphia (PILCOP)
1315 Walnut Street, Suite 1600
Philadelphia, PA 19107

Ms. Jean Kohr, Esq.
Counsel for Susquehanna Valley
Alliance (SVA)
Minney, Mecum & Kohr
150 East Chestnut Street
Lancaster, PA 17602

Mr. Daniel P. Sheehan, Esq.
Christic Institute
1324 North Capitol Street
Washington, D.C. 20002

Ms. Frieda Berryhill
Chairman, Coalition for Nuclear
Power Plant Postponement
2610 Grendon Drive
Wilmington, DE 19808

Ms. Jane Lee
R.D. #3
Box 3521
Etters, PA 17319

General Counsel
Federal Emergency Management Agency
ATTN: Docket Clerk
1725 I Street, N.W.
Washington, D.C. 20472

Mr. Donald Konkle
President
Three Mile Island Legal Fund
Board of Directors
1037 Maclay Street
Harrisburg, PA 17103

Ms. Beverly M. Hess
President
Three Mile Island Public Interest
Resource Center Board of Directors
1037 Maclay Street
Harrisburg, PA 17103

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M STREET, N. W.
WASHINGTON, D. C. 20036

RAMSAY D. POTTS
STEUART L. PITTMAN
GEORGE F. TROWBRIDGE
STEPHEN D. POTTS
GERALD CHARNOFF
PHILLIP D. BOSTWICK
R. TIMOTHY HANLON
GEORGE M. ROGERS, JR.
JOHN S. RHINELANDER
BRUCE W. CHURCHILL
LESLIE A. NICHOLSON, JR.
MARTIN D. HALL
RICHARD A. KENDALL
JAY E. SILBERG
BARBARA M. ROSSOTTI
GEORGE V. ALLEN, JR.
WM. BRADFORD REYNOLDS
FRED A. LITTLE
FRED DRASHER
NATHANIEL P. BREED, JR.
MARK AUGENBLICK
ERNEST L. BLAKE, JR.
CARLETON S. JONES
THOMAS A. BAXTER
JAMES M. BURGER
SHELDON J. WEISEL
JOHN A. MCCULLOUGH
JAMES THOMAS LENHART

STEVEN L. MELTZER
DEAN O. AULICK
JOHN ENGEL
STEPHEN B. HUTTLER
WINTHROP M. BROWN
JAMES B. HAMLIN
ROBERT E. ZAHLER
RICHARD C. GALEN
ROBERT B. ROBBINS
LAURA A. FARRAND
MATIAS F. TRAVIESO-DIAZ
VICTORIA J. PERKINS
JOHN H. O'NEILL, JR.
JAY A. ERSTIEN
FRANKLIN D. CHU
GEORGE D. CROWLEY, JR.
MICHAEL D. HAYS
THOMAS H. MCCORMICK
SUSAN D. FALKSON
STEVEN W. LUCAS
RAND L. ALLEN
ALAN J. WESBARD
WILLIAM P. BARR
ALAN R. FUSPECK
JOHN W. CARR, JR.
PHILIP J. HARVEY
KAY L. RICHMAN

(202) 331-4100
TELECOPIER
(202) 296-0684 & 296-1760
TELEX
89-2683 (SHAWLAW WSH)
CABLE "SHAWLAW"
JOHN H. SHARON
EDWARD B. CROSLAND
COUNSEL

July 2, 1979

The Honorable Joseph Hendrie
Chairman
U.S. Nuclear Regulatorn Commission
Washington, D.C. 20555

Dear Mr. Chairman:

On Friday evening, June 29, 1979, Commissioner Gilinsky announced in Middletown, Pa., that the Commission had decided to issue a formal order with respect to TMI-1. While GPU has had no official notice of the Commission's action, it is our understanding based on Commissioner Gilinsky's announcement that the order will require TMI-1 to remain shut down until further order of the Commission and that an opportunity for public hearing will be provided prior to final Commission action.

The purpose of this letter is to request that GPU have an opportunity to review and comment on any proposed order with respect to the scope and conduct of the hearing and the Commission's decisional process. The Commission's determinations on these matters can make a difference of many months in the length of the proceeding.

We would be prepared to meet with the Commission's staff or in the alternative to furnish our comments within 48 hours of receipt of a proposed order. Meanwhile, we have the following suggestions:

1. The scope of the hearing should be limited to issues which arise out of the TMI-2 accident

and to whether the measures proposed by Metropolitan Edison Company to be accomplished prior to the start-up of TMI-1 represent an adequate short-term response to that accident and a basis for restart of TMI-1. These measures are listed in a letter from Mr. Herbein to Mr. Denton, dated June 27, 1979 (copy attached).

2. Since the Commission has decided that TMI-1 should not restart until further decision and order of the Commission itself, the normal process of hearing and decision by an Atomic Safety and Licensing Board followed by appeals to the Appeal Board and then to the Commission should not be followed. One alternative would be to adopt instead the procedure followed in the Appendix I and ECCS rulemaking proceedings, i.e. an adjudicatory hearing before a specially appointed hearing board which would then certify the record to the Commission for decision.

3. The hearing board should be instructed, as permitted by present regulations, to consolidate to the maximum extent possible multiple interventions by private individuals or groups.

4. The order should make clear that pending the outcome of the hearing Metropolitan Edison Company may proceed to make modifications in the TMI-1 plant and plant procedures in accordance with existing Commission regulations, including modifications already required by the Commission for other B&W reactor plants.

The above suggestions are consistent both with an opportunity for citizens living in the vicinity of the plant fully to participate in a public hearing and with the interest of the customers of Metropolitan Edison Company in the earliest practicable decision on the restart of TMI-1.

Mr. Herman Dieckamp and I plan to be present at the Commission's meeting today and we would be pleased to answer any questions with respect to this request.

Sincerely,

George F. Trowbridge
Counsel for GPU

Enclosure

cc w/enclosure:

Commissioner Victor Gilinsky
Commissioner Richard Kennedy
Commissioner Peter Bradford
Commissioner John Ahearne
Samuel J. Chilk, Secretary
Leonard Bickwit, General Counsel

GPU Service

GPU Service Corporation
260 Cherry Hill Road
Parsippany New Jersey 07054
201 263-4900
TELEX 136-482

July 11, 1979

Hon. Joseph Hendrie, Chairman
United States Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Chairman:

It is my understanding that the Commission intends to consider at its meeting tomorrow procedures for the further proceedings relating to restart of Three Mile Island Unit No. 1, as contemplated by the Commission's Order, dated July 2, 1979, which will largely govern the schedule on which such proceedings can be completed. We urge that, in establishing those procedures, consideration be given to the economic interest of the more than 4 million residents of Pennsylvania and New Jersey served by the GPU companies in permitting restart of TMI-1 as soon as that is consistent with the Commission's obtaining reasonable assurance that TMI-1 can be operated without endangering the health and safety of the public.

We are fully in accord with the view that the governing criteria for resumption of TMI-1 operations must be those of public health and safety. The proposals we submitted to the Commission on July 2 for changes in equipment, training and operating procedures were based on those criteria. Those modifications could be completed by about September 1, 1979. We submit that it would be a disservice to all concerned if the procedures established for the further proceedings resulted in a long delay after that date before the Unit could be restored to service.

The impact of the TMI-2 accident and of the shut-down of TMI-1 on our ability to serve our customers and on the cost of such service were the subject of extensive proceedings before the Pennsylvania Public Utility Commission

("PaPUC") and the New Jersey Board of Public Utilities ("NJBPU"). In recognition of the importance of these matters, both the PaPUC and NJBPU held extensive and expedited hearings, sitting en banc, with full public participation. Both agencies established and maintained rigorous schedules for completion of the hearings and for decision. All procedural and substantive due process rights were fully observed, but the administrative procedure was not permitted to defeat the objective of a timely determination. In both States, the rate actions taken by the Commissions were predicated upon the expectation that restart of TMI-1 by January 1, 1980 would be authorized.

While economic consequences cannot and should not shape the nature of the action to be taken by your Commission, they clearly are relevant to the timing of that action. The cost of obtaining the power to replace that which would be provided by TMI-1 is on the order of $14 million a month and constitutes a burden to which our customers should not be subjected any longer than is necessary to provide reasonable assurance of safe operation. Similarly, the necessity to import more than 7 million barrels of oil per year to replace TMI-1 generation should be ended as soon as such assurance can be obtained.

In establishing the procedures for the further proceedings, we urge both that the foregoing factors receive adequate consideration and that your Commission consult with the PaPUC and NJBPU to obtain the views of those agencies.

Sincerely,

W. G. Kuhns

W. G. Kuhns
Chairman

cc: Hon. W. Wilson Goode, Chairman
Pennsylvania Public Utility Commission

Hon. George H. Barbour, President
Board of Public Utilities of the
State of New Jersey

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

TO BE FILED IN Hearing File

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

7-20-79

JUL [illegible] 1979

LICENSEES' ANSWER TO COMMISSION ORDER DATED JULY 2, 1979

This answer to the Commission's order dated July 2, 1979, is filed on behalf of Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company (Licensees) as co-owners of Three Mile Island Nuclear Station, Unit No. 1 (TMI-1).

The Commission's July 2 order requires that TMI-1 remain in a shutdown condition until further order of the Commission, provides for a hearing to precede restart of the facility, and states that a further order specifying the procedures to govern further proceedings in this matter will be issued within 30 days.

On July 12, 1979, the Commission received a presentation by its Executive Legal Director with respect to procedures for such further proceedings. While a number of procedural alternatives were presented to the Commission, all of [illegible]tly stated "assumption" that the [illegible] be an "adjudicatory-type hearing".

As more fully set forth in Appendix A, we disagree with the assumption by the Executive Legal Director in his memorandum to the Commission dated July 9, 1979, that if a hearing is to be held prior to the lifting of the suspension order, it must be an "adjudicatory-type hearing." However, even utilizing the assumption that an adjudicatory-type hearing is required, the pre-hearing and hearing procedures and time schedule involved in the presentation by the Executive Legal Director are both unnecessary and contrary to the National and public interest.

The basic deficiency in the July 9 memorandum of the Executive Legal Director lies in its preoccupation with existing procedures designed primarily for initial licensing proceedings. We question whether the hearing procedures in subpart G of Part 2 are indeed applicable to a hearing after a suspension for the purpose of establishing the requirements for resumption of operation. But in any event, the Executive Legal Director has already advised the Commission of its authority to change procedural regulations by rulemaking without prior notice and comment under Section 4(a) of the Administrative Procedure Act. The July 9 memorandum, however, gives the Commission no notion of the range of options available under that Act even for adjudicatory hearings. Nor does it mention or discuss any of the factors in this case which in the National and public interest dictate a departure from the procedures in a typical NRC initial licensing proceeding.

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

JUL 9 1979

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: Howard K. Shapar
Executive Legal Director

THRU: Lee V. Gossick
Executive Director for Operations

SUBJECT: DISCUSSION OF PROPOSED PROVISIONS RELATING TO HEARING TO BE CONTAINED IN COMMISSION'S FURTHER ORDER IN THE THREE MILE ISLAND UNIT 1 SUSPENSION PROCEEDING

Introduction

On July 2, 1979, the Commission ordered that the Three Mile Island Unit 1 reactor remain in cold shutdown condition until further order of the Commission itself. The Order also provided that the Commission would issue a further Order within thirty days specifying in detail the bases for its concerns, and the procedures to govern the hearing which the Commission directed be held prior to restart of the facility. The Staff was asked to provide (1) a listing of areas of technical concern to be resolved in connection with any restart of Three Mile Island Unit 1, and (2) a discussion of the Staff's views on the procedures to govern further proceedings in this matter. This memorandum addresses the matter of procedures; Staff views on the technical areas of concern will be provided by NRR on or before July 20, 1979.

The Commission's further Order should address at least the following matters relating to the hearing: (1) jurisdictional structure, i.e., designation of presiding officer, appellate jurisdiction, and decision form; (2) procedural framework; and (3) designation of issues to be heard. This memorandum explores the alternatives available to the Commission and presents our recommendation in the three areas. It assumes that an adjudicatory-type hearing will be held and that the Commission itself intends to complete its review of the issues relating directly to restart of the facility prior to lifting the suspension of operation.

Contact:
G. Cunningham, ELD
X27676

dupe. of 7909050275
9 pp

We further consider the hearing as one "required by statute" to which the adjudicatory provisions of the Administrative Procedure Act apply; i.e., we treat the hearing contemplated by the Commission's Order as the hearing which would be required by §189a of the Atomic Energy Act if any person whose interest may be affected by this suspension proceeding should request a hearing. If there should be no petition for leave to intervene from an interested person, the hearing would have been granted purely as a discretionary matter and the Commission would have broad discretion to tailor procedures for such a hearing. Since that eventuality seems very unlikely, we do not include a discussion of procedures for conduct of a purely discretionary hearing.

Jurisdictional Structure

Under the Administrative Procedure Act, the Atomic Energy Act, and the Commission's regulations, the Commission can conduct the hearing itself or designate one of its adjudicatory boards to preside.

The Administrative Procedure Act requires that the presiding officer (or board) in an adjudication render an initial decision or a recommended decision, 1/ except in cases involving initial licensing, past reasonableness of rates, or, possibly, when one or more of the Commissioners themselves preside. Administrative Procedure Act, 5 U.S.C. §§554(d) and 557(b). This proceeding involves suspension of a license and clearly cannot be construed as initial licensing. Chotin v. FPC, 250 F.2d 394 (D.C. Cir. 1957). See also U.S. Senate, 79th Cong., 2d Sess., Legislative History of the Administrative Procedure Act (Senate Document #248) at pp. 216, 226, 262 (1946). The suggestion of licensee's counsel that there be an adjudicatory hearing board which would then certify the record to the Commission for decision as was done in the Appendix I and ECCS rulemaking proceedings (where no initial or recommended decision was rendered) is, therefore, inconsistent with the Administrative Procedure Act. 2/ (See letter from G. F. Trowbridge to Chairman Hendrie dated July 2, 1979.)

The major options available to the Commission on this question are set forth below, along with a discussion of each option and our recommendation for provisions of the Commission's anticipated Order.

1/ The difference between the two in this instance is not great since the Commission has already determined that it will review the record established in the hearing and render its own final decision. A recommended decision is nothing more than that and requires agency review of the entire record and issuance by the agency of its own decision, while review of an initial decision may be confined to the exceptions taken by an appealing party.

2/ There is an exception which permits an agency to omit the initial or recommended decision in cases "in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." 5 U.S.C. §557(b)(2).

LPUK file c

RELATED CORRESPONDENCE

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

DOCKET NUMBER
PROD. & UTIL. FAC. 50-289

JUL 25 1979

TO BE FILED IN Hearing File

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: Howard K. Shapar
Executive Legal Director

Lee V. Gossick
Executive Director
for Operations

THRU: Lee V. Gossick
Executive Director for Operations

SUBJECT: PROCEEDINGS ON START-UP OF THREE MILE ISLAND UNIT 1

On July 20, 1979, Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company (licensees) filed an answer to the Commission's Order of July 2, 1979, which directed Licensees' Three Mile Island Unit No. 1 facility to remain shut down until further order of the Commission itself. The Order recited the Commission's determination that it is in the public interest that a hearing precede the restart of the facility, and indicated that the Commission will issue a further Order within 30 days specifying the procedures to govern further proceedings in this matter.

The Licensees' Answer takes issue with much of the advice concerning procedural options which the Executive Legal Director (ELD) has provided the Commission on this matter, and recommends that the Commission adopt procedures far more streamlined than those provided for in its rules of practice.

Contact:
G. Cunningham
492-7676

July 26, 1979

Hearing File

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

LICENSEES' RESPONSE TO NRC STAFF MEMO AND REPLY OF JULY 25, 1979

Were it not for the importance to the National and public interest of the question presented, we would not burden the Commission with another submittal relating to the procedures to be employed in connection with the resolution of the issues relating to restart of TMI-1.

But this is not a $64 or $64,000 question. It is a question involving:

(a) the National interest in reducing fuel imports by as much as 14 million barrels of oil;

(b) the National interest in reducing foreign balance of trade deficits by as much as $350 million;

(c) the public interest of the four million residents in hal
of New Jersey and Pennsy

subjected to unnecessary costs of electric service by as much as $350 million.

Clearly, stakes of this magnitude justify a further effort to determine whether the joint objectives of the Commission and the Licensees can be achieved, but within a time frame that does not impair these National and public interests.

Let us first examine the areas in which there is no disagreement.

1. The Commission cannot permit restart of TMI-1 unless and until it is satisfied that the public health and safety no longer require suspension; indeed, the Licensees do not wish the Commission to lift the suspension unless and until it is so satisfied;

2. The Commission determined, in its July 2, 1979, order, that it wished to have public hearings before reaching a determination as to whether it is so satisfied; the Licensees do not object to such a public hearing and, under the circumstances, believe that such a public hearing is desirable;

3. The proceeding relating to restart is not governed by Section 189a of the Atomic Energy Act or the Administrative Procedure Act. The July 25, 1979, reply of the NRC staff points out (at page 3) that the proceeding to be held prior to restart does not necessarily entail a formal hearing, even when one has been requested.