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Staff 2/3/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S SUGGESTIONS ON
METHODS TO EXPEDITE COMPLETION OF RESTART PROCEEDING
AND ISSUANCE OF A RECOMMENDED DECISION TO THE COMMISSION

In a Memorandum and Order issued on January 26, 1981 referencing Chairman Ahearne's January 22, 1981 memorandum on expediting the restart proceeding, the Licensing Board solicited suggestions from the parties on how the restart hearing might be expedited. At this time, a few issues in the area of plant design modifications and all issues in the areas of management capability, onsite and offsite emergency preparedness, and financial qualifications remain to be litigated. Pursuant to the Licensing Board's request, the NRC Staff's suggestions on methods by which these remaining issues might be dealt with in an expedited fashion as well as suggested procedures that could promote the expedited issuance of a recommended decision to the Commission are set forth below.

1. Commission Authorization for Operation at Power Levels up to 5%

The Commission could modify its Orders of July 2, 1979 and August 9, 1979 to authorize operation of TMI-1 at power levels up to 5% once the Director of NRR is satisfied that the Licensee has implemented the items which the Staff

considers necessary and sufficient to provide reasonable assurance that the facility can be safely operated at power levels of up to 5%. The Staff previously concluded in "NRC Staff Response to General Public Utilities Letter dated December 1, 1980," dated January 6, 1981, that the NRC has the authority to lift the license suspension of TMI-1 without completing the restart hearing provided that the NRC sets forth an adequate basis for the decision.

The Staff considers that the consequences of an accident while operating at 5% power are sufficiently small that the Staff does not consider it necessary to require the implementation of all of its recommendations set forth to permit full power operation. The Staff has previously evaluated the consequences of severe accidents while a plant is limited to power levels not to exceed 5%. These analyses have shown that substantial reductions in risks ranging from 400 to ~~800~~ 1500 can be defined compared to operation at full power. While recognizing the differences in operating history and plant features, we would conclude that these same reductions can be applied to TMI-1 during the period of low power operation.

It is also possible that the delay of the startup of Unit 1 can have some impact on the availability of power in the area. In this regard, provided in Attachment A is a response prepared by the Division of Power Supply and Reliability, Economic and Regulatory Administration in the Department of Energy dated January 27, 1981, addressing the need for power. The DOE staff found that the regional power supply adequacy and system operations will be negatively impacted by a continuing outage of the facility.

The benefits (if any) which could be accrued by adopting this proposal cannot be quantified until the Licensee provides a schedule for meeting the proposed requirements identified in paragraph 2 of the letter by Chairman Ahearne and Commissioner Hendrie dated January 28, 1981 to the TMI-1 Restart Atomic Safety and Licensing Board and Counsel of Record.

2. Modifications to the Commission's August 9, 1979 Order on Restart

The Commission could modify its August 9, 1979 Restart Order to require that only those issues directly related to the suspension of the TMI-1 operating authority would be litigated to completion prior to restart. In the Staff's view, financial qualification issues need not be decided as a condition for restart.

The Staff has previously concluded that for operation of TMI-1, the relationship between the corporate finance and the technical departments of the licensee is such that financial considerations should not have an improper influence on technical decisions. (NUREG-0680, Supp. No. 1, p. 27) Further, as a result of arrangements with its insurers, cleanup costs for TMI-2 are expected to be covered by insurance funds for at least the next year. Finally, the Staff would not expect that the licensee's financial condition would undermine its ability to safely operate the plant for the short period that would be anticipated for litigating the financial issue. For these reasons, the Staff submits that the Commission may desire to eliminate the financial issue from those issues that must be litigated prior to reaching a decision on the restart of TMI-1.

3. Licensing Board Actions to Determine the Need for Presentation of Contentions and Witnesses

A number of contentions admitted as issues in the proceeding have been abandoned by intervenors yet the status of certain of those contentions is not clear. The Licensing Board has not indicated whether those contentions have been dismissed as issues in the proceeding or whether, instead, the Board considers such contentions to raise serious safety questions under 10 C.F.R. §2.760a which must be addressed on the record. The Licensing Board should issue a ruling identifying those abandoned contentions which the Board wishes to have addressed in testimony and dismiss the remaining abandoned contentions. With such a ruling, the time it would take the parties to prepare testimony and present witnesses at hearing on abandoned issues in which the Board has no interest could be saved. Such action would be consistent with the policy, illustrated by 10 C.F.R. §2.752, that the issues be simplified, clarified and specified and with the guidance set forth in 10 C.F.R. Part 2, Appendix A, §V that the Board use its powers to assure that the hearing is focused upon matters in controversy.

Accordingly the Board should do the following:

a. Specify, at the time of setting out the schedule, whether the Board itself wishes to question any witnesses on the secheduled issues,

b. all intervenors should be immediately required to specify which contentions they intend to participate in and whether participation will be by direct testimony or cross-examination,

c. direct the other parties to file appropriate cross-examination plans at least five days before the hearing on a scheduled issue,

d. Any intervenor failing to comply with above requirements should be held in default and the relevant contentions dismissed, and

e. Pursuant to 10 C.F.R. §2.760a, the Licensing Board should issue a ruling identifying those abandoned contentions which the Board wishes to have addressed in testimony and dismiss the remaining abandoned contentions. Particular attention should be given as to whether abandoned contentions raise a serious safety question prior to their adoption by the Board. The Board should then provide specific guidance to the parties so that the Board's objectives are more precisely known.

4. Motions for Summary Disposition 10 Days Before the Date on Which an Issue is to be Considered at Hearing

The Licensing board could rule that motions for summary disposition on any issue will be accepted if filed 10 days before the date on which such issue is to be heard with opposing responses due 5 days before the hearing. 10 C.F.R. §2.749 provides that summary disposition motions are to be filed at least 45 days before commencement of the hearing but this has been interpreted by at least one Licensing Board (Portland General Electric Company, et al. (Trojan Nuclear Plant), oral ruling, Tr. 5111-12, April 16, 1978; see also unpublished Order, May 2, 1978) to mean 45 days before the commencement of the hearing session in which the issue which is the subject of the motion is to be heard. In addition, 10 C.F.R. §2.711 authorizes the presiding officer to shorten time periods specified in the Rules of Practice for good cause.

Such summary disposition motions would be most useful for those contentions abandoned by intervenors but retained as issues by the Board. If the Board were to allow such summary disposition motions, it could result in the dismissal of contentions without the need for having those contentions addressed at hearing, thus saving hearing time.

5. Extension of Hearing Sessions to Six Days Per Week and Evenings

In accordance with the presiding officer's authority under 10 C.F.R. §2.718(e) to regulate the course of the hearing to avoid delay, hearing sessions could be extended to run six days per week and evenings.

6. Use of Special Masters to Allow Parallel Hearings

10 C.F.R. §2.722(a)(1) allows the use of Special Masters to hear evidentiary presentations by the parties on specific technical matters with the consent of all parties. The Special Master would prepare a report on the presentation that would become part of the record. Such reports are advisory in nature but could provide the basis for the Licensing Board's decision on the issues heard by the Special Master in this way would allow parallel hearings with the Licensing Board taking evidence on certain issues at the same time the Special Master takes evidence on other issues. But Special Masters could also be used in this context not necessarily for parallel hearings, but to take evidence in remaining issue areas (e.g., emergency planning and financial qualifications), freeing the Licensing Board to analyze the record already made and to begin preparation of its decision on completed issue areas.

The Licensing Board should be assisted by Licensing Board Panel members, consistent with 10 CFR §2.722, in analyzing the record of the restart hearings. Such assistance could help reduce the time needed by the Licensing Board after the close of the record to prepare and issue its recommended decision to the Commission.

7. Licensing Board Action to Limit Number of Witnesses

Pursuant to 10 C.F.R. §2.757(a), the board could issue an order appropriately limiting the number of witnesses that could be presented on any given issue by a party, so as to prevent the presentation of cumulative testimony. The parties should be encouraged to limit the number of witnesses addressing specific issues and the amount of cumulative testimony. This proposal would probably affect

the Licensee more than any other party. For example, on the management capability issue alone, Licensee proposes to present over 20 witnesses (See Tr. 10,434-35 and submittals to Board of 12-22-80 and 1-19, 1-26-81). This consists of 7 individuals and a representative of a consultant, consisting of 5 different witness panels, on the subject of management organization and staffing, another 7 persons on 4 different panels on operator training alone, and several other witnesses on different specific pieces of testimony. The fact that none of the intervenors have indicated that they definitely will introduce expert testimony on management capability issues further draws into question the need for all of the testimony sought to be introduced by the Licensee on this issue. The savings of hearing time that could be achieved by limiting the number of witnesses on this issue along so as to prevent cumulative evidence would be considerable.

8. Filing of Proposed Findings upon Completion of a Major Issue Area

Although the Staff and licensee have proposed the filing of proposed findings upon the completion of a major issue area, the Licensing Board has not ruled on the suggestion.

The Licensing Board should require all parties to file proposed findings on a major issue area (such as plant design modifications) shortly after completion of the hearing on that issue area rather than after the completion of the entire hearing. The early filing of such issue-related proposed findings could reduce the length of time needed by the Licensing Board after the record

is finally closed to produce its initial decision. Such action by the Board could be taken pursuant to the presiding officer's authority under 10 C.F.R. §2.718(e) to regulate the course of the hearing, his authority under 10 C.F.R. §2.711 to reduce time limits for taking required actions, and his authority under 10 C.F.R. §2.754(a) to alter the schedule for the filing of proposed findings.

9. Proposed Findings be Submitted in the Form of Oral Closing Arguments

The Licensing Board could, with the agreement of all parties (since 10 C.F.R. §2.754(a) gives parties the right to file proposed findings) dispense with the filing of proposed findings and, instead, permit one to two weeks of closing arguments during which time each party would be given an appropriate amount of time for closing arguments in which to cite as necessary those portions of the record supportive of the party's position - in effect, oral proposed findings. This would reduce the 50 days provided by 10 C.F.R. §2.754 for the filing of written proposed findings to about 7 to 14 days.

10. Further Limitations Could be Placed on Cross-Examination

While the Commission's Rules of Practice give parties the right to cross-examine witnesses (10 C.F.R. s2.743(a)) they also give a Licensing Board broad discretion to regulate the course of a hearing (10 C.F.R. §2.718(e)) and to take necessary steps "to prevent argumentative repetitious, or cumulative cross examination...." (10 C.F.R. §2.757(c)). Although the Licensing Board in this proceeding has taken some measures to ensure that cross-examination is done expeditiously, further measures could be taken consistent with NRC and other case law.

its presentation. The court found that it had an obligation to the proper administration of justice to curtail the length of the trial and cited as support for this proposition the Federal Rules of Civil Procedure (Fed. R. Civ. P. 1) and Federal Rules of Evidence (Fed. R. Evid. 403). Id. at 13. Under these decisions, it seems clear that the Licensing Board could set appropriate limits on the cross-examination conducted by all the parties.

Respectfully submitted,

James R. Tourtellotte
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 3rd day of February, 1981

In Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857 (1974), the Appeal Board ruled that:

> There is nothing to preclude a [licensing] board from insisting upon an advance indication respecting what the intervenor will attempt to demonstrate or ascertain by his interrogation. If it then appears that, in whole or in part, the cross-examination would be irrelevant, repetitous or otherwise of no value to the development of a full record on the issue at hand, the board can preclude it or limit it accordingly.

Id at 869. (footnote omitted). Thus, under the Prairie Island decision, the Licensing Board can, as it has, require detailed cross-examination plans from all the parties to be filed with the Board well ahead of the time the testimony to be cross-examined is presented. Further, should the Board decide that cross-examination, as detailed in the prefiled cross-examination plans, would not contribute to the record as a whole, such cross-examination could be properly limited or excluded by the Board.

In addition to limiting or precluding the cross-examination, Licensing Board could set a reasonable time limit on cross-examination. Although such a situation has not arisen in AEC or NRC cases, the United States District Court in MCI Communications Corp. v. AT&T, 85 F.R.D. 28 (N.D. Ill. 1979), held that it had the authority to impose reasonable time limits upon an antitrust case (which, similar to the TMI-1 Restart proceeding, involves complex litigation). Similarly, the court in SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977), imposed an absolute limit on the number of trial days available to the plaintiff to complete

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S SUGGESTIONS ON METHODS TO EXPEDITE COMPLETION OF RESTART PROCEEDING AND ISSUANCE OF A RECOMMENDED DECISION TO THE COMMISSION", dated February 3, 1981, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 3rd day of February, 1981:

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