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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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COMMONWEALTH OF PENNSYLVANIA'S RESPONSE TO
INTERVENOR STEVEN C. SHOLLY'S
MOTION TO REJECT THE NRC STAFF ENVIRONMENTAL APPRAISAL
ON TMI-1 RESTART

Introduction

On March 30, 1981, Counsel for the NRC Staff served on the Board and the parties copies of the NRC Staff's Environmental Impact Appraisal (EIA) relating to the proposed restart of Three Mile Island, Unit 1. The intent to prepare this document had been announced by NRC Staff Counsel at the November 9, 1979 Special Prehearing Conference. Tr. 373.

On April 9, 1981, intervenor Steven C. Sholly moved the Board to reject the Staff's EIA or to grant permission to raise new contentions. The Commonwealth herein responds to Mr. Sholly's motion and addresses the adequacy of the EIA.

Jurisdiction

The Board's first consideration should be whether it has jurisdiction over NEPA questions in this proceeding. In its March 12, 1980 "Memorandum on the Need for Preparing a Final Environmental Statement Prior to Restart of TMI-1" [hereinafter "March 12, 1980 memorandum"],

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the Board expressed strong doubt egarding its jurisdiction to consider the NEPA issue, noting that the Board's authority was limited by the Commission's August 9, 1979 Order and Notice of Hearing. If this Board finds that it has no jurisdiction over the NEPA question, the Commonwealth presumes that the Commission will publish a notice of a negative declaration in the Federal Register in accordance with 10 C.F.R. §§ 51.7, 51.50(d), and the intervenors will then be entitled to seek judicial relief. For the reasons stated below, however, the Commonwealth believes that this is not the appropriate course of action.

In its July 31, 1980 Position Report, at 6, the Commonwealth urged the Board "to decide the question of whether an EIS is required as early as possible in this proceeding to avoid potential further delay in final resolution of the restart petition." The Commonwealth still believes that an exercise of jurisdiction by this Board over NEPA questions, along with the subsequent automatic certification to the Commission, would ultimately produce the most efficient and orderly disposition of the issues.

The Board's decision on the question of NEPA jurisdiction should be governed by two general principles. First, it is well settled that licensing boards have an "independent obligation to assure that the important policies of [NEPA] have been protected by the agreed course of action." Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit No. 3), 2 Nuc. Reg. Rep.(CCH) ¶30,027.03, (1976) (Commission Memorandum and Order). See also,

Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear 1) ALAB-303, 2 Nuc. Reg. Rep.(CCH) ¶30,031.06, (1975). The restart of TMI-1, over which this Board has jurisdiction, is not exempt from the Agency's responsibilities under NEPA. This does not imply that the Board has unlimited jurisdiction over all possible NEPA issues involving TMI-1. Rather, an analogy should be drawn to the Board's standard for exercising jurisdiction over safety-related issues in this proceeding. The Board accepted contentions on all safety issues having a reasonable nexus to the TMI-2 accident, regardless of whether the issue was set forth explicitly in the Commission's Order and Notice of Hearing. First Special Prehearing Conference Order, at 14. Similarly, the Board should assume its responsibility to ensure compliance with NEPA with respect to all environmental issues that have a reasonable nexus to the TMI-2 accident. Thus, the Board has jurisdiction over all environmental issues that have changed as a result of the TMI-2 accident, or new environmental issues resulting from the TMI-2 accident.

Second, it is a general principle of NEPA law that, in making a negative declaration, federal agencies are obligated to produce an administrative record facilitating judicial review. In Hanly v. Mitchell, the Court ruled that NEPA requires "federal agencies to affirmatively develop a reviewable environmental record ... perfunctory and conclusory language simply does not suffice, even for purposes of a threshold Section 102(2)(c) determination." 460 F.2d 640, 647 (2d Cir. 1972). Accord Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1973); Arizona Public Service Co. v. Federal Power Comm., 483 F.2d 1275 (D.C. Cir. 1973). NRC case law also accepts this concept. Northern Indiana Public Service Co., supra, ¶30,031.06.

Absent the preparation of an EIS, the parties must be given some forum to develop an administrative record regarding potential deficiencies in the NEPA process. This requirement is also expressly recognized in the NRC Rules of Practice:

> In any proceeding in which a hearing is held for the issuance of a permit, license, or order, or amendment thereto or renewal thereof, where the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards or their designee, as appropriate has determined that no environmental impact statement need be prepared for the particular action in question, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action covered by NEPA and this part in accordance with the provisions of Subpart G of Part 2 of this chapter. In such proceedings, the presiding officer will decide any such matters in controversy among the parties.

10 C.F.R. § 51.52(d) (emphasis added).[1] This provision grants the Board jurisdiction over NEPA questions that are within the scope of this proceeding. It may be argued that the Staff's EIA constitutes an adequate administrative record on which to base a judicial appeal of compliance with NEPA for this agency action. The EIA is limited, however, to the environmental issues defined by the Staff. Mr. Sholly's motion asserts that there are additional areas, not considered by the Staff, that warrant evaluation. Agencies are required to take into account all relevant factors on determinations to issue negative declarations. Hanly v. Mitchell, 460 F.2d 640, 648 (2d. Cir. 1972). Thus, the agency "is called upon to review in a general fashion the same factors that would be studied in depth for preparation of a detailed environmental impact statement." Hanly v. Kleindienst,

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[1] Proceedings in which environmental impact statements are clearly required, such as construction permit or operating license proceedings, are covered by 10 C.F.R. § 51.52(a)-(c). Proceedings in which a negative declaration is issued, such as this case, are encompassed by 10 C.F.R. § 51.52(d).

471 F.2d 823, 835 (2d. Cir. 1972). Only the depth of analysis differs between an EIA and an EIS; the scope of issues considered is the same. Therefore, absent an order by the Board that the Staff consider these areas in a supplement to the EIA, or an opportunity to present evidence on these issues pursuant to 10 C.F.R. § 51.52(d), or an adjudicative ruling that the issues cited by Mr. Sholly are not cognizable in an NRC NEPA review, there will be a complete void in the administrative record justifying the agency's decision not to consider these issues. Such a void is likely to produce a remand by a reviewing court, and consequently, additional delay in the final resolution of the TMI-1 restart issue.

Finally, the Commonwealth notes that both the Board and the Commission have, by implication, recognized the potential applicability of NEPA to this proceeding. In the Order and Notice of Hearingzthe Commission wrote:

> While real and substantial concern attaches to issues such as psychological distress and others arising from the continuing impact of aspects of the Three Mile Island accident unrelated directly to exposure to radiation on the part of citizens living near the plant, the Commission has not determined whether such issues can legally be relevant to this proceeding. Any party wishing to raise such subjects as contentions, or as aspects of separate contentions, should brief the Atomic Energy Act and National Environmental Policy Act issues he believes appropriate to the Board as part of the contention acceptance process set out in the Commission's regulations. The Board should then certify such issues to the Commission for final decision prior to the issuance of its pre-hearing conference order pursuant to 10 C.F.R. 2.752(c), either with or without its recommendation on such issues, as it deems appropriate under the circumstances. At the time the Commission reaches a decision on these issues, it will also consider whether it can and should grant financial assistance to parties seeking to raise these issues in this case.

Slip op. at 13. (emphasis added). A close reading of this language suggests certification to the Commission as an alternative to hearing evidence on potential areas of deficiency in the Staff's NEPA analysis for environmental issues not related to radiological hazards, such as socioeconomic impacts. Only the narrow issue of psychological stress has been certified to the Commission pursuant to this language. Although other contentions raised socioeconomic impacts in general in the NEPA context, e.g., TMIA 8, rulings on these contentions were deferred by the Board pending staff preparation of the EIA. [2] More importantly, the Commission expressed doubts only over the relevance of considering nonradiological environmental factors in this proceeding under NEPA. This implies that radiological environmental issues, such as Class 9 accidents and plant separation (both raised in Mr. Sholly's motion), are clearly cognizable in this proceeding under NEPA.

For the foregoing reasons, the Commonwealth urges the Board to pass on the merits of NEPA issues related to the restart of TMI-1. Such jurisdiction could take a number of possible forms. First, the Board could order the staff to supplement its EIA to consider the additional environmental issues posed by Mr. Sholly and other parties

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2 The Commonwealth is somewhat puzzled over the status of existing NEPA contentions. Although some of these contentions have been withdrawn voluntarily, e.g., Sholly 12, others are apparently still open pending preparation of the new EIA. These, along with the three new contentions posed by Mr. Sholly based on new information contained in the EIA, are still before the Board for ruling.

in the current round of filings, [3] as an exercise of its independent obligation to ensure compliance with NEPA and the formulation of an adequate administrative record. Alternatively, the Board could admit contentions and hear evidence pursuant to 10 C.F.R. §51.52(d). Third, if the Board doubts whether some of the issues suggested by the parties are legally cognizable under NEPA, it should ask the parties to brief these issues. Although the Board can pass on the legality of considering radiological issues, nonradiological issues, such as socioeconomic factors, arguably should be certified to the Commission.

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[3] The Commonwealth suggests additional deficiencies in the Staff's EIA in the substantive comments that follow.

Substantive Comments

In general, the Commonwealth shares Mr. Sholly's concerns regarding the adequacy of the Staff's EIA, and consequently, the basis for recommending issuance of a negative declaration. Adequate compliance with the Commission's NEPA regulations (10 C.F.R. Part 51) is a necessary prerequisite to TMI-1 restart, as is compliance with other NRC regulations.

NEPA case law varies on the substantive standard applicable to the issuance of a negative declaration. But it is clear that the Agency must demonstrate that it took a " 'hard look' at the problem, identified the relevant areas of environmental concern, and made a 'convincing case' that the impact is insignificant." Northern Indiana Public Service Co., supra (quoting Maryland National Cap. Pk. & Pl. Comm. v. U.S. Postal Service, 487 F.2d 1029, 1039-40 (D.C. Cir. (1973)). The Board should assure itself that these standards have been met before ruling that the EIA submitted by the Staff is adequate.

A brief examination of the approach taken to the preparation of the EIA, as defined by the Staff, is indicative of the deficiencies in the Staff's analysis:

> In determining the potential effects of the proposed restart, the Staff re-examined the environmental impact of operation of the TMI station as discussed in the FES for Units 1 and 2. This re-examination included an evaluation of whether previously identified environmental impacts would be changed in any way should restart be authorized. The impacts reported in the 1972 FES are restated below and are followed by the present staff evaluation of the impacts associated with the proposed restart.

EIA, at 3. (emphasis added). Essentially, the staff simply restates the environmental impacts identified in the summary and conclusion section of the December 1976 FES (NUREG-0112, at B-1), and determines that operation of TMI-1 in itself after restart would not

have significantly different environmental impacts than did operation of TMI-1 prior to the accident. Since the safety-related physical modifications to TMI-1 required after the accident are relatively minor and primarily interior, this point is almost self-evident. The critical area of analysis overlooked in many cases by the staff was whether estimates of previously identified environmental impacts have changed as a result of the TMI-2 accident, or more importantly, whether there are potential new environmental impacts of TMI-1 operation as a result of the TMI-2 accident. The three areas identified by Mr. Sholly, as well as the additional areas of concern noted below, fall into these categories.

Class 9 Accidents - The Commonwealth concurs in Mr. Sholly's interpretation of the Commission's statement of Interim Policy on Class 9 Accidents. 45 Fed. Reg. 40101 (1980). It is also notable that the two sentences relied upon by the Staff in excluding TMI-1 from the scope of this Policy Statement were objected to by two of the four current NRC Commissioners. 45 Fed. Reg. 40103, fn. 5.

Plant Separation - The Commonwealth raised a number of issues during the litigation of plant separation that demonstrate the need to evaluate the environmental impacts of concurrent Unit 1 operation and Unit 2 decontamination.

1. No analysis has been performed of potential fuel drop accidents in the joint Unit 1-Unit 2 fuel handling building. Tr. 10,057-59; 10,205.
2. No analysis has been performed of the projected total radiation dose from Unit 2 cleanup and Unit 1 restart.

Counsel for the NRC Staff indicated that this analysis would be performed and provided to both the Commonwealth and the Board. Tr. 10,185-191. No such report has been disseminated thus far.

3. Licensee's draft contingency plan provides for onsite storage of radioactive wastes from Unit 1 and Unit 2 in the same facility. This storage is necessitated in part by limitations on storage in existing licensed burial facilities. Tr. 10,025-031. The EIA included no analysis of the environmental effects of additional onsite interim waste storage, or of the adequacy of long-term offsite disposal facilities for the combined wastes from Unit 1 operation and Unit 2 cleanup.

This is not intended to constitute a comprehensive list of plant separation-related environmental impacts. A complete analysis of this issue needs to be performed by the NRC Staff.

Socioeconomic Impacts - As noted earlier, only the narrow consideration of psychological stress was certified to the Commission. There are, however, a wide range of other socioeconomic impacts that resulted from the TMI-2 accident and that have a bearing on the proposed TMI-1 restart. These include the costs to state and local governments for increased emergency preparedness, the environmental effects of licensee's alert-notification system, potential adverse effects of evacuation and other protective actions (e.g., business dislocation, depreciated property values, loss of pay, decreased tourism, community disruption, etc.).

Again, this is not intended as a complete list. A thorough analysis should be performed by the Staff to identify all such impacts and to determine whether an EIS is warranted. Surely one of the lessons learned from the TMI-2 accident is that these impacts are no longer too remote to consider as potential costs of nuclear power generation.[4] Moreover, such socioeconomic impacts are clearly part of the "human environment" encompassed by NEPA analysis. See, e.g., Maryland National Cap. Pk. & Pl. Comm. v. U.S. Postal Service, supra, 487 F.2d. at 1038-39. Hanly v. Mitchell, 460 F.2d 640, 647 (2d. Cir.) cert. den. 409 U.S. 990 (1972); Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB 321, 2 Nuc. Reg. Rep. (CCH) ¶30,061.06 (1976).

Construction and Site Development - The Staff concludes summarily in this portion of its analysis that "All construction relating to Unit 1 which would cause disturbance of land onsite and of adjacent waters is complete. No additional construction or site development relating to Unit 1 restart is occurring or will occur." EIA at 4. This statement is blatantly incorrect on its face. For example, Licensee is constructing an interim staging facility for purposes of storage of wastes from both Unit 1 and Unit 2. Tr. 10,028-029. The Staff did not analyze the effects of this construction or other construction that may be required to achieve adequate plant separation.

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[4] Notably, the "Final Supplement to the Final Environmental Statement" for TMI-2 concluded that "there will be no significant economic costs imposed on surrounding communities due to operation of TMI-2." NUREG-0112, at 10-1.

Procedural Comments

In addition to the substantive comments listed above, the preparation of the Staff's EIA was notably deficient in terms of the lack of input from the public and other government entities. The council on Environmental Quality's NEPA implementing regulations require the agency to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments ... " 40 C.F.R. §1501.4(b). Similar requirements have been imposed on agencies by the Courts in highly controversial cases. In Hanly v. Kleindienst, the Court required the agency, before issuing a negative determination, to "give notice to the public and opportunity to submit relevant facts which might bear upon the agency's threshold decision." 471 F.2d. 823, 836 (2d. Cir. 1972). Of particular interest to TMI-1 case, the Court commented that:

> particularly where emotions are likely to be aroused by fears, or rumors of misinformation, a public hearing serves the dual purpose of enabling the agency to obtain all relevant data and to satisfy the community that its views have been considered.

471 F. 2d at 835. No such effort was made by the Staff to solicit the views either of the public or of other interested government entities.

Conclusion

The Commonwealth is extremely concerned that deficiencies in the Staff's NEPA review of TMI-1 restart will result in additional delay of the final resolution of the restart question. Therefore, the

Commonwealth urges the Board to accept jurisdiction over the open NEPA issues, in order to ensure NRC compliance with the goals of NEPA within the context of the restart proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Commonwealth of Pennsylvania's Response to Intervenor Steven C. Sholly's Motion to Reject the NRC Staff Environmental Appraisal on TMI-1 Restart were served on the persons on the attached service list this 22nd day of April, 1981. Parties denoted by an asterisk were served by hand. All other parties were served by deposit in the U.S. Mail, first class postage prepaid.

Robert W. Adler

ROBERT W. ADLER
Attorney for the Commonwealth

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