

Jeff Bartlett

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)

NRC STAFF'S BRIEF IN RESPONSE TO COMMISSION'S
ORDER DATED AUGUST 5, 1983

August 30, 1983

James M. Cutchin IV
Counsel for NRC Staff

8309090113 830830
PDR ADOCK 05000289
G PDR

DESIGNATED ORIGINAL

Certified By

[Signature]
ASOZ/11

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)

NRC STAFF'S BRIEF IN RESPONSE TO COMMISSION'S
ORDER DATED AUGUST 5, 1983

August 30, 1983

James M. Cutchin IV
Counsel for NRC Staff

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)

NRC STAFF'S BRIEF IN RESPONSE TO COMMISSION'S
ORDER DATED AUGUST 5, 1983

I. INTRODUCTION

In an order dated August 5, 1983 the Commission announced its decision "to take review of that portion of ALAB-724^{1/} which addresses whether the concerns raised by BN-83-47^{2/} are outside the scope of the TMI-1 adjudicatory proceeding." The Commission also announced its intent to decide, "if these matters are within the scope of the proceeding, whether the information contained in BN-83-47 warrants reopening the record sua sponte." To assist it in its determinations the Commission requested briefs from the parties on (1) whether the concerns raised by BN-83-47 are outside the scope of the proceeding; and (2) whether, if they are within the scope of the proceeding, the information contained in BN-83-47 warrants reopening the record sua sponte. In addition,

^{1/} 17 NRC ____, slip opinion (April 20, 1983).

² Memorandum for the Commissioners from Darrell G. Eisenhut, "Board Notification Regarding the Need for Rapid Primary System Depressurization Capability in PWR's (BN-83-47)," dated April 4, 1983.

the Commission noted a request by Chairman Palladino that the parties address the points made in a preliminary discussion of why the issue of PORV safety-grade qualification, as it applies to steam generator tube ruptures (SGTR), may not be within the scope of the restart proceeding.^{3/} The Staff's views on these matters are presented below.

II. ARGUMENT

A. The Concerns Raised By BN-83-47 Are Outside the Scope of the Restart Proceeding.

In its August 9, 1979 Order and Notice of Hearing the Commission directed that the subjects to be considered at the hearing in the restart proceeding include whether certain short and long term actions recommended by the Director of Nuclear Reactor Regulation were necessary and sufficient to provide reasonable assurance that TMI-1 can be operated without endangering the health and safety of the public. CLI-79-8, 10 NRC 141, 148 (1979).

Before ruling on the admissibility of contentions to the proceeding, the Licensing Board received the views of the parties and petitioners to intervene on both the scope of the proceeding and whether

^{3/} That discussion as set forth in the order reads as follows:

The point raised in BN-83-47 is that without safety grade depressurization capability, a licensee's analysis showing that Part 100 dose limits are met is called into question. The issues relating to the operability of the PORV that were raised in connection with the TMI-2 accident were concerned with the capability to remove decay heat in the event of a LOCA. However, that is not the issue that was raised in the staff's notification. BN-83-47 raised no issues with respect to PORV qualification that might be of concern in assuring decay heat removal in the event of a SGTR or any other small break LOCA. Although decay heat removal capability is within the scope of the proceeding, capability to meet Part 100 dose limits is not.

the contentions advanced by the various petitioners were within that scope. In its First Special Prehearing Conference Order dated December 18, 1979 the Licensing Board stated that it saw little practical difference between the definition of scope proposed by the NRC Staff^{4/} and the definition advanced by UCS and several others. LBP-79-34, 10 NRC 828, 831 (1979). However, the Licensing Board also stated that it had experienced a problem in applying a scope test to some of the contentions advanced by petitioners to intervene and had resolved its doubts in favor of admitting safety-related issues. Id. Thus, it had admitted any otherwise allowable contention having a reasonable nexus to the TMI-2 accident. LBP-81-32, 14 NRC 381, 394 (1981).

No party in its contentions sought to raise any issue related to a SGTR accident. The subject of SGTR accidents first came up in the proceeding on December 10, 1980 during Mr. Pollard's cross-examination for UCS of the Licensee's witnesses on their prefiled testimony on UCS Contention 3. See Tr. 7930. In its Contention 3, UCS had asserted that, because they are necessary to maintain natural circulation at hot-standby conditions, the pressurizer heaters must be safety-grade. LBP-81-59, 14 NRC 1211, 1267 (1981). In connection with the cross-examination by UCS of Licensee's witnesses there was considerable discussion as to whether questions on a SGTR accident were within the scope of either UCS Contention 3 or the restart proceeding. Without ruling on whether litigation of a SGTR accident

^{4/} The NRC Staff had expressed the view that for a contention to be admissible there must be some reasonable nexus between the TMI-2 accident and the issue sought to be raised by the contention. Tr. 152. In an unpublished Order dated March 14, 1980 the Commission itself endorsed this "reasonable nexus" requirement.

is within the scope of the proceeding the Licensing Board ruled that, because a SGTR accident for purposes of UCS Contention 3 could be viewed as just another small break LOCA, litigation of a SGTR accident was outside the scope of UCS Contention 3. Tr. 7989; Tr. 8267; Tr. 8271; Tr. 8272; Tr. 8273.

The question as to whether evidence related to a SGTR accident should have been admitted also arose when UCS filed its Exception 31 to the Licensing Board's evidentiary rulings. In dealing with UCS's arguments on this matter in ALAB-729 the Appeal Board referred both to ALAB-724 in which it had concluded that a SGTR accident is outside the scope of the restart proceeding and to BN-83-47 in which the NRC Staff states its view that to limit primary to secondary leakage to amounts predicted in licensing analyses of a SGTR accident PWRs must have a rapid primary system depressurization capability and that this function is presently performed by non-safety grade equipment. ALAB-729, 17 NRC ____, slip opinion, 82 at n. 169 and 111 (May 26, 1982).^{5/}

^{5/} The Appeal Board also noted its belief that by indicating in BN-83-47 its intent to require that plants not yet licensed have safety-grade PORVs the Staff had changed its position as to whether a safety-grade PORV is necessary to mitigate the consequences of any design basis accident. ALAB-729, slip opinion, 111 at n. 238; ALAB-724, slip opinion, 3. In BN-83-47 the Division of Systems Integration of the Office of Nuclear Reactor Regulation expresses its view that the means of rapid depressurization should be a safety-grade PORV. The NRC Staff has not yet concluded that only a PORV can perform the rapid depressurization function and thus that a safety-grade PORV is necessary, i.e., that a safety-grade PORV is a component without which a finding of reasonable assurance of adequate safety cannot be made. See ALAB-729, slip opinion, 14-16. Moreover, in a follow-up to BN-83-47 the Staff made clear that the need for safety-grade PORVs on operating reactors will be evaluated generically and consistent with established backfitting criteria and procedures. See Memorandum for the Commissioners from Darrell G. Eisenhut, "Status of PORV Issues for Westinghouse, B&W and CE Plants (Board Notification 83-110)," dated August 26, 1983.

In the Staff's view a correct application of the scope test endorsed by the Commission itself leads to the conclusion that was reached by the Appeal Board in ALAB-724 and ALAB-729. In other words, the concerns raised by BN-83-47 are outside the scope of the TMI-1 restart proceeding. As the preliminary discussion on which Chairman Palladino requested comments suggests, the concern which is the subject of BN-83-47 is, at bottom, a concern about potential offsite doses that may result from failure to terminate primary to secondary leakage rapidly enough, rather than a concern about failure to adequately cool the core, during a SGTR accident. There is no reasonable nexus between the TMI-2 accident and issues of offsite doses from failure to terminate primary to secondary leakage during a SGTR accident, which is the subject of BN-83-47. Only issues related to the capability to adequately cool the core following a small break LOCA and/or main feedwater transient (not an issue raised by BN-83-47) are within the scope of the design issues litigable in the restart proceeding. Thus, the Staff believes the Appeal Board correctly concluded that the concerns raised by BN-83-47 are outside the scope of the TMI-1 restart proceeding.

B. The Information Contained in BN-83-47 Does Not Warrant Sua Sponte Reopening of The Record

The standards for deciding whether the evidentiary record on safety issues should be reopened are relatively well defined in NRC case law for the situation where reopening is sought by a party. The standards for deciding whether the record should be reopened, not on motion of a party but, rather, sua sponte by an NRC appeal tribunal in a proceeding, are less well defined in NRC case law.

Where reopening is sought by a party, the record should be reopened only if the safety issue on which reopening is sought is both timely presented and of major significance. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). On the other hand, reopening on a matter of sufficient gravity may be warranted even if the matter is not timely presented. Id. However, even though a matter is timely raised and involves a significant safety consideration, the evidentiary record should not be reopened unless the papers supporting and opposing reopening demonstrate the existence of a genuine unresolved issue of fact. Id. The questions of whether the matter sought to be raised is significant and whether a triable issue of fact is presented may often be intertwined. Id. at 524. Moreover, where, as in the restart proceeding, the evidentiary record on safety issues has been closed, the Commission itself has stated that the record should not be reopened absent a showing by the moving party of significant new evidence not included in the record that materially affects the decision. Pacific Gas and Electric Company, (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981).

Although the standards to be used by an NRC adjudicatory tribunal in deciding whether it should reopen a record sua sponte are less well set forth in NRC case law, the Staff believes that guidance in the form of general principles is available. It appears to be clear that regardless of how or when the information comes to its attention (whether by a party's motion to reopen, by a party's board notification, or otherwise), any NRC adjudicatory tribunal having jurisdiction over the matter addressed by the information should reopen the evidentiary record to consider a problem

coming to its attention that in its view presents a sufficiently grave threat to public safety. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 at n.10 (1973).

However, as the Commission itself has stated, before an NRC tribunal exercises its sua sponte authority to shape the safety issues in a proceeding such as by broadening previously admitted contentions or injecting totally new issues, it has an obligation to make an affirmative finding that a serious safety problem exists. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981). Also, where factual information coming to its attention causes it to believe that the information must be considered by it in reaching its decision on a contested issue in the proceeding (i.e., causes it to believe that without the information the evidentiary record on a contested issue is materially inaccurate or incomplete), an NRC tribunal should reopen the evidentiary record, because it cannot base its decisions on contested issues admitted to NRC proceedings on factual information coming to its attention that has not been received in evidence.^{6/} Moreover, where the factual disclosures to an NRC appellate tribunal create serious doubts about the correctness of a decision below on a

^{6/} An adjudicatory tribunal which bases its decision on factual information that has not been received in evidence deprives parties opposing the factual information of their opportunity to impeach such information by cross-examination or rebut it with other evidence. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, ⁷ NRC 341, 352 (1978).

contested issue admitted to a proceeding the tribunal may order the record to be reopened for the taking of supplementary evidence to resolve those doubts. Hartsville, ALAB-463, 7 NRC at 352.

In circumstances such as exist in this proceeding, where both the Licensing Board's decision and the Appeal Board's decision on the appeals of the Licensing Board's decision on design issues have been issued, and where no party has sought a reopening of the record on the concerns raised in BN-83-47, the Commission should not reopen the evidentiary record sua sponte to consider the concerns raised in BN-83-47, even if it were to decide that the concerns are within the scope of the proceeding, unless (1) it can make an affirmative finding that the information in BN-83-47 demonstrates the existence of a problem that presents a grave threat to public safety, or (2) it believes that omission of the information in BN-83-47 from the evidentiary record would leave that record materially inaccurate or incomplete on a contested issue admitted to the restart proceeding, or (3) the information in BN-83-47 has created serious doubts about the correctness of a decision below on a contested issue admitted to the restart proceeding and the Commission believes the taking of supplementary evidence is required to resolve those doubts.^{7/}

The information in BN-83-47 indicates that the Division of Systems Integration (DSI) of the Office of Nuclear Reactor Regulation has

^{7/} However, in a situation where a safety concern coming to its attention is not within the scope of an ongoing proceeding, the Commission in appropriate circumstances could broaden the scope of the ongoing proceeding or initiate a new proceeding to consider the concern.

concluded, that to effectively mitigate a design basis SGTR accident, pressurized water reactor plants should include a safety-grade means for rapidly depressurizing the primary system. In addition, it indicates that DSI does not believe that the potential for prolonged primary to secondary leakage and the resulting increased offsite radiological doses has been considered in SGTR accident analyses (except for the Midland analyses) for steam generators designed by Babcock and Wilcox. The information also indicates the Staff's intent to require that plants not yet licensed (except those with reactors supplied by Combustion Engineering) have safety-grade PORVs. The information does not indicate that a safety-grade PORV is the only acceptable means for rapidly depressurizing the primary system. According to BN-83-47, in some plants with reactors designed by Combustion Engineering the depressurization function would be accomplished by a safety-grade spray system. Moreover, the information does not support a conclusion that, without a safety-grade rapid depressurization capability, offsite doses resulting from a SGTR accident would exceed 10 CFR Part 100 guideline values at the TMI-1 site or that any operating reactor without such a capability should be shutdown until DSI's concerns are resolved. To the contrary, the information indicates that DSI is currently evaluating the actions that may need to be taken on operating reactors to resolve its concerns.^{8/} Clearly,

^{8/} The Commission previously has stated its belief that TMI-1 should be dealt with as an operating reactor unless information already in the evidentiary record dictates otherwise and that no action should be taken to reopen the record or otherwise delay the proceeding in any way in order to decide whether TMI-1 should be treated as other than an operating reactor. CLI-81-3, 13 NRC 291, 295-296 (1981).

the information in BN-83-47 does not raise a problem that presents a grave threat to public safety. Furthermore, it does not create serious doubts about the correctness of a decision below on a contested issue admitted to the proceeding that requires the taking of supplementary evidence to resolve and its omission from the evidentiary record would not leave that record materially inaccurate or incomplete on a contested issue admitted to the proceeding. Thus, based on an application of the standards indicated above, the information contained in BN-83-47 would not warrant a sua sponte reopening of the record in the TMI-1 restart proceeding by the Commission, even if consideration of the dose consequences of a SGTR accident were to be viewed as within the scope of the restart proceeding.

III. CONCLUSION

For the reasons stated above, the concerns raised by BN-83-47 are not within the scope of the TMI-1 restart proceeding and the information in BN-83-47 does not warrant a sua sponte reopening of the evidentiary record by the Commission, even if those concerns were within the scope of the proceeding.

Respectfully submitted,



James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of August, 1983

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)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO COMMISSION'S ORDER DATED AUGUST 5, 1983" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of August, 1983:

*Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Herzel H. E. Plaine, General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Ivan W. Smith
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, Tennessee 37830

Dr. Linda W. Little
Administrative Judge
5000 Hermitage Drive
Raleigh, North Carolina 27612

*Gary J. Edles, Chairman
Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Christine N. Kohl
Administrative Judge
Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*John H. Buck
Administrative Judge
Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George F. Trowbridge, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, NW
Washington, DC 20036

Douglas R. Blazey, Esq.
Chief Counsel
Department of Environmental Resources
514 Executive House, P.O. Box 2357
Harrisburg, PA 17120

Mr. Thomas Gerusky
Bureau of Radiation Protection
Dept. of Environmental Resources
P. O. Box 2063
Harrisburg, PA 17120

Gary L. Milhollin, Esq.
4412 Greenwich Parkway, NW
Washington, DC 20007

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

Mr. C. W. Smyth, Supervisor
Licensing TMI-1
Three Mile Island Nuclear Station
P. O. Box 480
Middletown, PA 17057

Ms. Marjorie Aamodt
R.D. #5
Coatesville, PA 19320

Gail Phelps
ANGRY/TMI PIRC
1037 Maciay Street
Harrisburg, PA 17103

Allen R. Carter, Chairman
Joint Legislative Committee on Energy
Post Office Box 142
Suite 513
Senate Gressette Building
Columbia, South Carolina 29202

Chauncey Kepford
Judith Johnsrud
Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, PA 16801

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

Mr. Henry D. Hukill
Vice President
GPU Nuclear Corporation
Post Office Box 480
Middletown, PA 17057

Michael McBride, Esq.
LeBoeuf, Lamb, Leiby & McRae
Suite 1100
1333 New Hampshire Avenue, NW
Washington, DC 20036

Honorable Mark Cohen
512 D-3 Main Capital Building
Harrisburg, PA 17120

William S. Jordan, III, Esq.
Harmon & Weiss
1725 I Street, NW
Suite 506
Washington, DC 20006

John Levin, Esq.
Pennsylvania Public Utilities Comm.
Box 3265
Harrisburg, PA 17120

Jordan D. Cunningham, Esq.
Fox, Farr and Cunningham
2320 North 2nd Street
Harrisburg, PA 17110

Louise Bradford
Three Mile Island Alert
1011 Green Street
Harrisburg, PA 17102

Ms. Ellyn R. Weiss
Harmon & Weiss
1725 I Street, NW
Suite 506
Washington, DC 20006

Mr. Steven C. Sholly
Union of Concerned Scientists
1346 Connecticut Avenue, NW
Dupont Circle Building, Suite 1101
Washington, DC 20036

*Dr. Lawrence R. Quarles
Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Judge Reginald L. Gotchy
Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

David E. Cole
Smith & Smith, P.L.
Riverside Law Center
2931 N. Front Street
Harrisburg, PA 17110

Michael W. Maupin, Esquire
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212

*Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety & Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555



James M. Cutchin IV
Counsel for NRC Staff