UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER OPPOSING UCS' PETITION FOR REVIEW OF ALAB-705 CONCERNING THE ENVIRONMENTAL EFFECTS OF "CLASS 9 ACCIDENTS"

Mary E. Wagner
Counsel for NRC Staff

Jack R. Goldberg
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January 10, 1983

DESIGNATED ORIGINAL

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In a petition filed on December 29, 1982,[1/] the Union of Concerned Scientists (UCS) requested that the Commission review, pursuant to 10 CFR § 2.786, the decision of the Atomic Safety and Licensing Appeal Board that no analysis of the environmental effects of "Class 9 accidents" is required in this proceeding.[2/] In that decision, the Appeal Board, with the Chairman dissenting, affirmed the Licensing Board's rejection of UCS Contention 20, which called for such a Class 9 accident analysis. UCS asserts that the Appeal Board's majority opinion is erroneous and that the case involves important procedural and public policy issues appropriate for Commission review. The NRC Staff hereby opposes UCS' petition for Commission review of ALAB-705.

I. SUMMARY OF DECISION BELOW

In ALAB-705, the Appeal Board upheld the Licensing Board's rejection of UCS Contention 20,[3/] which essentially contended that an

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1/ Petition for Review of ALAB-705, December 29, 1982 (UCS Petition).

2/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-705, ___ NRC ___ (December 10, 1982).

3/ LBP-81-60, 14 NRC 1724 (1981).

analysis of the environmental effects of Class 9 accidents was required for TMI-1.[4/] The Appeal Board held that the Commission's June 13, 1980 Statement of Interim Policy (Policy Statement), which abolished the former classification of accidents and henceforth required the Staff to consider a broad spectrum of accidents in its NEPA review for any plant whose Final Environmental Impact Statement (FES) had not yet been issued, did not apply to this "discretionary, special proceeding." ALAB-705, slip op. at 14. This result follows, the Appeal Board held, from the Policy Statement itself, which speaks in terms of applying the new policy in environmental impact statements prepared in ongoing and future licensing proceedings where an FES had not already issued. The Appeal Board noted that the FES for TMI-1 has long been completed and the TMI-1 restart proceeding is a "discretionary, special proceeding," and, therefore, not a licensing proceeding to which the Policy Statement applies. Moreover, the Appeal Board emphasized that the Policy Statement expressly provided that it was not to be a basis for the expansion of any previous or ongoing proceeding absent a showing of special circumstances similar to those described in the Policy Statement. The Appeal Board held no such similar special circumstances exist regarding TMI-1. ALAB-705, slip op. at 15-20.

Finally, the Appeal Board held, as have the courts, that NEPA itself does not require consideration of Class 9 accidents in the Commission's environmental reviews because the environmental impacts of such accidents are "remote and speculative." ALAB-705, slip op. at 22-24. The Appeal Board pointed out that UCS never even attempted to identify a single specific accident sequence having a nexus either to the TMI-2 accident or to questions that accident raised about whether TMI-1 could be operated safety, as required

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4/ UCS Contention 20 is quoted in full in ALAB-705, slip op. at 2, n.2.

by the Commission in this proceeding. ALAB-705, slip op. at 21-22. In fact, the Appeal Board noted that the Licensing Board was satisfied that there was an adequate basis for treating as "incredible" those Class 9 accidents with a nexus to the TMI-2 accident. ALAB-705, slip op. at 24.

Chairman Edles of the Appeal Board dissented from the majority opinion in ALAB-705. He does not believe that the Policy Statement is, by its terms, inapplicable to this case. Chairman Edles believes that the TMI-1 restart proceeding presents special circumstances within the Commission's Policy Statement and that, therefore, the Staff should be ordered to evaluate the environmental effects of serious accidents at TMI-1. ALAB-705, slip op. at 32-33.

II. WHERE THE MATTER WAS RAISED BELOW

UCS Contention 20 before the Licensing Board argued that the consequences of Class 9 accidents which might be associated with the operation of TMI-1 must be considered under NEPA. In a Memorandum and Order on NEPA-Compliance Issues dated December 15, 1981 (NEPA Order), the Licensing Board rejected UCS Contention 20. UCS raised the Class 9 issue before the Appeal Board in its brief in support of its exceptions to the Licensing Board's Partial Initial Decision of December 14, 1981.[5/] UCS claimed that the Licensing Board erred in failing to rule, as called for by UCS Contention 20, that NEPA requires the preparation of an EIS which considers the consequences for TMI-1 of Class 9 accidents. UCS Brief at 62-64. The Staff argued in its responsive

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5/ Union of Concerned Scientists' Brief on Exceptions to the Partial Initial Decision of December 14, 1981, March 12, 1982 (Part 1) and April 14, 1982 (Part 2) (UCS Brief).

brief that neither the Commission's Policy Statement nor NEPA required consideration of Class 9 accidents in this proceeding.[6/]

III. WHY THE DECISION BELOW WAS CORRECT

A. The Policy Statement, By Its Terms, Does Not Contemplate Consideration of Class 9 Accidents in This Proceeding

1. This is not a licensing proceeding of the type encompassed by the policy statement

The Policy Statement makes clear that its new approach of considering a broad spectrum of accidents in "ongoing and future NEPA reviews" was to be employed in ongoing licensing proceedings only if a Final Environmental Impact Statement for the facility has not been issued, unless special circumstances exist similar to the examples given in the Policy Statement. The Policy Statement, which defines "ongoing...NEPA reviews" as those "for any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued," speaks only in terms of environmental impact statements prepared in connection with licensing proceedings. 45 Fed. Reg. at 40,103 (emphasis added). The Commission emphasized that its "change in policy [was] not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements nor, absent a showing of similar special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding." Id. (footnote omitted). The TMI-1 restart proceeding is not a proceeding leading to the issuance of a construction permit or

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6/ NRC Staff's Brief in Response to the Exceptions of Others to the Atomic Safety and Licensing Board's Partial Initial Decision on Plant Design and Procedures, Separation, and Emergency Planning Issues, May 20, 1982, at 94-104 (NRC Staff Brief).

operating license, in connection with which an FES is issued, and at which the Policy Statement is squarely aimed. Rather, this is a proceeding to determine whether a suspended operating license (the original issuance of which was considered extensively in an FES issued at the time of the initial licensing) should be reinstated. The Appeal Board decision correctly recognized this as a "discretionary, special proceeding" to which the Policy Statement simply has no application. Id.

By its terms the Policy Statement applies where an FES "has not yet been issued." An FES for TMI-1 had already been issued when the Policy Statement was published. Therefore, even if the TMI-1 proceeding is a "licensing proceeding" or is at a "licensing stage" (an assumption even the dissent does not make), no Class 9 analysis is contemplated by the Policy Statement because the FES already had been issued.

The dissent, in concluding that the TMI-1 restart proceeding comes within the terms of the Policy Statement, relies in part on the Commission's decision in Indian Point. See Consolidated Edison Co. of New York (Indian Point Unit 2), CLI-81-23, 14 NRC 610 (1981). In that discretionary, special proceeding, the Commission concluded that even though no EIS was required a review of the risk of serious accidents at those units nevertheless should be conducted. The Indian Point case, however, provides further support for the Appeal Board's majority holding. In that special proceeding the Commission considered it necessary to direct explicitly that a Class 9 analysis be performed. If such special proceedings were already encompassed by the Policy Statement, the majority correctly reasoned, there would have been no need for such a Commission directive in Indian Point.

2. No "similar special circumstances" exist which would justify a reopening or expanding of any TMI-1 proceeding

In its decision the Appeal Board found that there are no "special circumstances" similar to those described in the Policy Statement that would require an analysis of serious accidents in this case. Those cases identified by the Commission in the Policy Statement are: (1) the Clinch River Breeder Reactor (a novel reactor design); (2) the early site review for Baltimore Gas and Electric Company's Perryman reactor (involving a high population density); and (3) the Offshore Power Systems' proceeding (involving floating nuclear plants with the potentially serious consequences associated with liquid pathways).7/ UCS has never suggested that this case involves any of the special circumstances identified by the Commission in its Policy Statement or in the Black Fox case, supra n.7, as warranting Class 9 accident analysis considerations. The Staff submits, and the majority of the Appeal Board has agreed, that no "similar special circumstances" exist in this case. ALAB-705, slip op. at 16.

UCS argues in effect that the occurrence of the TMI-2 accident, in and of itself, constitutes a "similar special circumstance" within the meaning of the Policy Statement. UCS Petition at 5-7. However, unlike cases involving novel designs or high population densities, the fact of the TMI-2 accident in no way suggests the possibility of greater risk at TMI-1. See Black Fox, supra n.7, 11 NRC at 434-35. To the contrary, the risk of accidents has been significantly reduced by the numerous new requirements imposed on all licensees, including TMI-1, in the wake of the accident at TMI-2. The Appeal Board correctly found that the occurrence of the TMI-2 accident, without more, should not be considered a "similar special circum-

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7/ A fourth type of special circumstance was identified by the Commission, prior to its Statement of Interim Policy, as "proximity to man-made or natural hazard." Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433, 434 (1980).

stance" so as to make prior or ongoing proceedings subject to reopening or expansion. ALAB-705, slip op. at 14.[8/]

B. NEPA Does Not Require Consideration of Class 9 Accidents

The law clearly does not require the consideration under NEPA of Class 9 accidents. Prior to the Policy Statement, the Commission's policy and consistent practice was not to consider Class 9 accidents under NEPA except for certain cases where special circumstances warranted it. That practice was upheld in Porter County Chapter of the Izaak Walton League v. AEC, 533 F.2d 1011 (7th Cir.), cert. denied, 429 U.S. 945 (1976), and Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

C. The Record Supports the Decision Below That Class 9 Accidents With a Nexus to TMI-2 Are Not Credible and That Accordingly No NEPA Review Is Necessary

1. By Commission orders, the only issues to be heard in this proceeding were issues with a nexus either to the TMI-2 accident or to questions which that accident raised about safe operation of TMI-1

The scope of the discretionary, special restart proceeding was limited to those issues with "a reasonable nexus between the issue and the TMI-2 accident." Commission Order, March 14, 1980, at 2 (unpublished). That determination was

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8/ UCS argues that consideration of Class 9 accidents in this proceeding should not be considered an "expansion" of the proceeding because UCS raised the Class 9 issue at the same time all other issues were raised. UCS Petition at 5. This argument ignores the fact that this proceeding was not instituted to hear any and all issues parties may wish to raise concerning the restart at TMI-1. Rather, it was a special proceeding instituted pursuant to Commission orders which defined the limited scope of the proceeding by setting forth specific issues to be litigated and a nexus requirement for contentions. Since consideration of all Class 9 accidents falls outside the scope of the Commission orders, such consideration, as advocated by UCS, clearly would expand this proceeding. As to the probability of a Class 9 accident at TMI-1, as shown below (Section III C), Class 9 accidents with a nexus to the TMI-2 accident have been demonstrated to be incredible. Consequently, there is nothing as a result of the TMI-2 accident that would make the risk of a Class 9 accident at TMI-1 any different from that for other operating reactors.

based on the fact that operation of TMI-1 was reviewed and approved at the operating license stage, a review which included not only a safety evaluation but also a NEPA environmental review and issuance of an FES. The Licensing Board correctly concluded that this reasoning is equally applicable to the consideration of NEPA environmental contentions. See NEPA Order, at 9-10. In addition, the Appeal Board noted that the nexus requirement was mandated by the Commission's August 9, 1979 Order and Notice of Hearing, in which the only issues identified for hearing had a nexus either to the specific TMI-2 accident scenario or to questions which that accident raised about whether TMI-1 could be operated safely. See CLI-79-8, 10 NRC 141 (1979); ALAB-705, slip op. at 21-22. Unidentified Class 9 accidents have no reasonable nexus to the TMI-2 accident.

2. The fact that a particular Class 9 accident is credible does not mean that other Class 9 accidents are credible

The position presented by UCS in proposed Contention 20 is that the occurrence of the TMI-2 accident leads to the conclusion that a whole range of Class 9 accidents are credible events and therefore reasonably foreseeable at TMI-1, and that, accordingly, the environmental impact of Class 9 accidents in general must be assessed. The Appeal Board correctly concluded that, under proposed UCS Contention 20, there were no factual issues in controversy to be litigated. ALAB-705, slip op. at 22.

In the course of these extensive proceedings, neither UCS nor any other party was able to identify a single accident scenario which, in view of the TMI-2 accident, is now credible but was being ignored by the NRC Staff. The only Class 9 accidents within the scope of this proceeding are those with a nexus to the TMI-2 accident. All those types of accidents were considered at hearing and shown to be incredible because of the short-term fixes at TMI-1. As the Appeal Board points out, had UCS identified any specific accident sequences requiring an environmental review, those accident sequences

could have been litigated. Id. at 21. No such sequences were identified and there was nothing, therefore, to litigate.

3. The record in this case shows a careful review of the credibility of accidents with a close nexus to TMI-2

The Appeal Board duly noted that accidents having the requisite nexus received a great deal of consideration in the design phase of these proceedings. ALAB-705, slip op. at 23-24. The Licensing Board inquired extensively into (a) the Staff's methodology for classifying accidents as "credible" or "incredible" and (b) Licensee and Staff's conclusions that the "fixes" ordered adequately assure protection of the public health and safety. See LBP-81-59, 14 NRC 1211 (1981), ¶¶ 1084 to 1138.

The Staff supplied detailed information as to what specific accident sequences, not previously analyzed because they previously might have been regarded as Class 9 accidents deemed "incredible", should be analyzed in connection with the restart proceedings. In so doing, the Staff demonstrated to the Board's satisfaction that the Staff method for determining which accidents fall within the category of "design basis" accidents is reasonable. Id. at ¶ 1138.[9/]

On the basis of the extensive evidence in the record, the Appeal Board affirmed the Licensing Board's determination that the Staff had an adequate factual basis for treating as "incredible" those Class 9 accidents with a nexus to the TMI-2 accident. NEPA Order at 11. NEPA requires an environmental analysis only of "reasonably foreseeable" events. 40 C.F.R. 1508.8. It is settled that NEPA does not require an environmental analysis of con-

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9/ Class 9 accidents received extensive consideration in this proceeding. See LBP-81-59, 14 NRC 1211 (1981), Part II, Section S. Subject only to the requirement that contentions based on Class 9 accidents have a reasonable nexus to the TMI-2 accident, the Board allowed contentions advanced by UCS (Contention 13), Sholly (Contention 17), and ECNP (Contentions 4(b) and 4(c)). Other intervenors, whose Class 9 contentions had been rejected, were allowed to "adopt" UCS Contention 13. For a summary of the information provided by the Staff, see NRC Staff Brief at 101-102.

sequences which are "deemed only remote and speculative possibilities." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978). It follows that since there were no credible Class 9 accidents with a nexus to the TMI-2 accident, there was no need for a NEPA review of those accidents. Porter County, supra p. 7; Carolina Environmental Study Group, supra p. 7.

IV. WHY COMMISSION REVIEW SHOULD NOT BE UNDERTAKEN

The Appeal Board's majority decision that the environmental impacts of Class 9 accidents need not be considered in this discretionary, special restart proceeding involves a manifestly correct and straightforward reading of the Commission's June 13, 1980 Policy Statement and is consistent with the Commission's court-approved practice of not considering Class 9 accidents under NEPA. The Appeal Board's decision is unique to this discretionary, special proceeding and has no practical impact on normal licensing proceedings, either those that are ongoing or any that may be conducted in the future. In these circumstances, Commission review of ALAB-705 is neither justified nor warranted.

V. CONCLUSION

The Appeal Board's majority decision that the environmental impacts of Class 9 accidents need not be considered in this proceeding correctly follows directly from the Commission's June 13, 1980 Policy Statement. Commission review of ALAB-705 is not warranted. UCS' petition for Commission review of that decision should be denied.

Respectfully submitted,

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Jack R. Goldberg
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Dated at Bethesda, Maryland
this 10th day of January, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER OPPOSING UCS' PETITION FOR REVIEW OF ALAB-705 CONCERNING THE ENVIRONMENTAL EFFECTS OF 'CLASS 9 ACCIDENTS'" 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 10th day of January, 1983:

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