ADJUDICATORY ISSUE

(Notation Vote)

February 2, 1983 SECY-83-49

COMMISSION LEVEL
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For: The Commission

From: Trip Rothschild
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-705 -- IN THE MATTER OF METROPOLITAN EDISON COMPANY

Facility: Three Mile Island Nuclear Station, Unit 1

Purpose: To advise the Commission of an Appeal Board decision [which, in OGC's view,

Review Time Expires: February 16, 1983

Petition for Review: UCS petitioned for review. Licensee and the NRC staff opposed review.

Discussion:

1. Background

UCS Contention 20 in the Three Mile Island, Unit 1 (TMI-1) Restart proceeding alleged that there was no technical basis for concluding that the risk of a Class 9 accident was low enough to justify operation of TMI-1, and essentially called for a NEPA analysis of "Class 9".

CONTACT:
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accidents prior to allowing TMI-1 to restart. 1/

The Licensing Board, in its First Special Prehearing Conference Order, after setting out its standards for accepting Class 9 contentions,2/ rejected UCS Contention 20 as too vague and unfounded. The Board stated, however, that it would address the need for an environmental impact statement (EIS) in a subsequent order. LBP-79-34, 10 NRC 828 (1979).

Thereafter, the NRC staff stated that although no environmental analysis was required for the

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1/ UCS Contention 20 stated:

> Neither Metropolitan Edison nor the NRC staff has presented an accurate assessment of the risks posed by operation of Three Mile Island, Unit 1, contrary to the requirements of 10 CFR 51.20(a) and 51.20(d). The decision to issue the operating license did not consider the consequences of so-called Class 9 accidents, particularly core meltdown with breach of containment. These accidents were deemed to have a low probability of occurrence. The Reactor Safety Study, WASH-1400, was an attempt to demonstrate that the actual risk from Class 9 accidents is very low. However, the Commission has stated that it "does not regard as reliable the Reactor Safety Study's numerical estimate of the overall risk of reactor accidents." (NRC Statement of Risk Assessment and the Reactor Safety Study Report (WASH-1400) in Light of the Risk Assessment Review Group Report, January 18, 1979). The withdrawal of NRC's endorsement of the Reactor Safety Study and its findings leaves no technical basis for concluding that the actual risk is low enough to justify operation of Three Mile Island, Unit 1.

2/ The Licensing Board admitted those contentions "alleging a specific Class 9 accident which is either the same as or closely related to the actual accident which took place at TMI Unit 2." 10 NRC 828, 834 (1979).

restart of TMI-1, it would nonetheless prepare an environmental impact appraisal (EIA). The Board then announced that it would not rule on the EIS issue until after staff issued its EIA. Staff issued that EIA one year later, on March 27, 1981. It did not include an analysis of Class 9 accidents.

The Licensing Board on December 15, 1981 held that the staff EIA was adequate and that an EIS was not required. The Licensing Board referred to the Commission's Interim Statement of Policy dated June 13, 1980, 45 Fed. Reg. 40101, in which the Commission stated that its new policy requiring consideration of Class 9 accidents was not, "absent a showing of similar special circumstances . . . a basis for opening, reopening or expanding any . . . ongoing proceeding." 14 NRC at 1732. The Board stated that it did not know whether the new policy applied to TMI-1 restart, but, regardless, "the EIA as supplemented by the hearing record and . . . Partial Initial Decisions, contains an adequate evaluation of Class 9 accidents."3/ Id.

3/ The Board elaborated on its analysis of Class 9 accidents as follows: "Class 9 accidents have received extensive consideration in the proceeding. We did insist that contentions based on Class 9 accidents have a reasonable nexus to the TMI-2 accident, but subject to that requirement the Board allowed contentions by UCS, Mr. Sholly and ECNP. . . . In addition, the Board, on its own initiative, pursued the subject through demands for additional information on (1) the staff's methodology for classifying accidents as credible or incredible, and (2) the basis for the Licensee's and staff's conclusions that the long- and short-term 'fixes' at TMI-1 have, in their totality, provided reasonable assurance that the public health and safety is protected. We believe it is fair to say that the Board was very persistent in its pursuit of the Class 9 question and eventually succeeded in developing a full and sound record. . . ." 14 NRC at 1731-32.

2. The Appeal Board's Decision

The Appeal Board in ALAB-705 held: (1) The Commission's June 13, 1980 Policy Statement does not require a Class 9 accident analysis in the TMI-1 Restart proceeding; and (2) NEPA does not require such an analysis. Mr. Edles dissented.

A. The Commission's Policy Statement

The Appeal Board held that an EIS was not required under the Policy Statement because (1) the Policy Statement applied only to licensing proceedings, not to discretionary, special proceedings such as TMI-1 Restart,4/ and (2) even if the Policy Statement did apply to the Restart proceeding, the EIS for TMI-1 has long been completed and there are no "special circumstances" that would now require a Class 9 accident analysis.5/ In this regard, the Appeal Board held that the occurrence of the TMI-2 accident alone was not a "similar special circumstance," that the concerns which led to the Restart proceeding do not constitute the type of special circumstances mentioned in the

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4/ The Board, in response to the dissent by Mr. Edles, noted that in the Indian Point proceeding the Commission directed that risk of serious accidents be reviewed consistent with the guidance in the policy statement. The Board found that the Commission would not have needed to issue such a directive "[h]ad the Commission viewed the policy statement as already encompassing special proceedings such as Indian Point." Slip Op. at 15.

5/ The Board noted that the examples in the policy statement suggest that "special circumstances" require "either some special or unique reactor design or a genuine difference in potential consequences of an accident." Slip Op. at 16.

Policy Statement and, regardless, that those concerns will be resolved prior to any restart. The Board also rejected psychological stress as a special circumstance, holding that if the Commission finds that there is significant new information on the subject it will then address those effects.

B. NEPA Analysis

The Appeal Board noted that UCS contention 20 was merely a legal proposition that a Class 9 accident analysis was required. The Board stated that a full EIS had been prepared for TMI-1 at the operating license stage, and that the policy at that time of excluding consideration of Class 9 accidents from an EIS had been approved by the courts because the environmental risk of such accidents was so low that it could be disregarded. Thus, the Board held, NEPA would require a supplemental EIS only if restart "would present significant new environmental effects or there have been significant changes in the environmental impacts previously addressed in the FES." Slip Op. at 23.

The Appeal Board found that the TMI-2 accident did not call into question assessments of the risk of accidents without a reasonable nexus to the TMI-2 accident, and that the Licensing Board properly delineated the scope of the required environmental review. The Appeal Board thus concluded that no environmental analysis of these unrelated accidents is required. The Appeal Board further found that "[i]f restart is to be authorized, we must be satisfied that the record contains sufficient evidence upon which to conclude that Class 9 accidents with a nexus to the TMI-2 accident are no longer credible at

TMI-1."6/ Slip Op. at 24. The Appeal Board then found that the risk of such accidents was still so remote and speculative that no Class 9 EIS was required.

C. Mr. Edles' Dissent

Mr. Edles disagreed with the Appeal Board's holding that the Commission's Policy Statement did not require consideration of Class 9 accidents at TMI-1. Mr. Edles, citing the Commission's action at Indian Point, maintained that the Commission's Policy Statement was not limited to licensing proceedings, and that the Boards must decide in each case "whether the particular circumstances at hand warrant a serious accident analysis." Slip Op. at 30. Mr. Edles believed that "whenever the Commission determines that the risks of reactor operation are sufficiently special to justify institution of a comprehensive discretionary, adjudicatory proceeding, they are, perforce, sufficiently special to warrant application of the policy statement." Mr. Edles then noted that the circumstances for Class 9 accident consideration at TMI-1 appeared to be more compelling than those at Indian Point because Indian Point was allowed to continue to operate during the hearing.

Having held that the Policy Statement applies, Mr. Edles then found that the Restart proceeding presents "special circumstances," such that the environmental phase of TMI's licensing

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6/ The Licensing Board had found that the staff had an adequate basis for treating Class 9 accidents with a nexus to the TMI-2 accident as incredible.

proceeding should be reopened.7/ Mr. Edles maintained that "'similar special circumstances' can embrace either potentially increased probabilities of an accident or potentially greater consequences," Slip Op. at 34, and that both are present here.

With regard to increased probability of an accident, Mr. Edles argued that the circumstances which caused the Commission to make the shutdown Orders immediately effective were sufficiently special to warrant invocation of the policy statement. Mr. Edles continued that the fact that the safety review has been conducted does not affect the Commission's directive that if special circumstances are found at some pre-decisional stage, serious accidents are to be examined. Mr. Edles rejected the idea that the environmental examination is wholly redundant of the safety analysis.

With regard to potentially greater consequences, Mr. Edles, citing the Commission's policy statement issued in response to PANE, stated that the "TMI area residents constitute a highly special neighboring population." Slip Op. at 36. The Commission in that policy statement distinguished the potential psychological consequences of restarting TMI-1 from those of allowing other reactors to operate. Mr. Edles reasoned that the existence "of a neighboring population potentially suffering serious mental health effects, like the presence of a geographically dense population . . ., is sufficiently special" to require the review mandated by the Policy Statement. Id. at 37. Mr. Edles concluded by finding it curious "that the very circumstances that were sufficiently special to trigger both the change in policy and

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7/ Mr. Edles assumed that the environmental phase of the licensee proceeding was closed without deciding whether the Restart proceeding is a separate licensing action.

the shutdown of TMI-1 pending a full adjudicatory hearing are now somehow insufficiently special to warrant application of the new policy." Id.8/

3. UCS' Petition for Review And The Responses

A. The Commission's Policy Statement

UCS, citing 5 U.S.C. §551(9),9/ argued that the Restart proceeding is a licensing proceeding because it "has involved at least suspension, limitation, amendment, modification and conditioning of the TMI-1 operating license." Thus, UCS maintained, the Commission's Policy Statement did apply. UCS also argued that because it had submitted its contention at the beginning of the proceeding consideration of Class 9 accidents would not reopen or significantly expand the proceeding. UCS further maintained that, assuming special circumstances have to be shown, they are present because TMI-1 was so unique that it alone was

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8/ Mr. Edles also argued that the Board erred in requiring that contentions have a nexus to the TMI-2 accident. Mr. Edles maintained that the TMI-2 accident raises doubts about the adequacy of the TMI environmental review just as it called into question, e.g., emergency preparedness for all types of accidents. Mr. Edles stated that the Board for environmental issues should have used the broader standard which it employed for management, separation and emergency planning purposes.

9/ 5 U.S.C. §551(9) defines licensing as any "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."

shut down,10/ and because of the psychological anxieties of the surrounding populace.

Both the NRC staff and the licensee argued that the Commission's Policy Statement did not apply to the Restart proceeding. Licensee maintained that the Policy Statement applied only to situations where an EIS is already required, and no EIS is required in the Restart proceeding. The staff stated that the Policy Statement is aimed at proceedings leading to the issuance of a construction permit or operating license.

Staff and licensee further agreed that even if the Policy Statement did apply to the Restart proceeding, there are no special circumstances at TMI-1. Both staff and licensee stated that the risk at TMI-1 now is no greater than at any other plant. Licensee also noted that the Commission's position before the Supreme Court is that psychological stress is not cognizable under NEPA, and there has been no determination that the psychological health of TMI residents will be significantly affected by restart.

Finally, both staff and licensee maintained that the Commission's action in directing consideration of Class 9 accidents in the Indian Point proceeding clearly showed that the Policy Statement is not by its terms applicable to special proceedings like Indian Point and TMI. Both argued that the Commission would not have had to take such direct action had the Policy

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10/ UCS refuted the Board's statement that special circumstances will no longer exist if the plant is allowed to restart by noting that no plant is licensed without the requisite safety findings, and that under the Board's logic no consideration of Class 9 accidents would ever be required.

Statement applied to special proceedings.11/

B. NEPA Analysis

UCS maintained that an EIS is required under NEPA because of the new recognition that serious nuclear accidents cannot simply be deemed incredible.

Both the staff and the licensee maintained that the risk of a Class 9 accident is remote and speculative, thus no Class 9 EIS is required. Staff argued that the record showed that accidents with a nexus to the TMI-2 accident are not credible, that the proceeding was limited to such issues, and that there has been no showing that any Class 9 accidents without a nexus to the TMI-2 accident are credible.

11/ Staff also stated that consideration of all Class 9 accidents would clearly expand the Restart proceeding, in contravention of the Commission's policy statement.

EXS

Trip Rothschild
Acting Assistant General Counsel

Attachments:
(1) ALAB-705
(2) Petition for Review
(3) NRC staff's Response
(4) Licensee's Response
(5) April 14, 1980 OGC Memo

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, February 16, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, February 9, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Attachment 1

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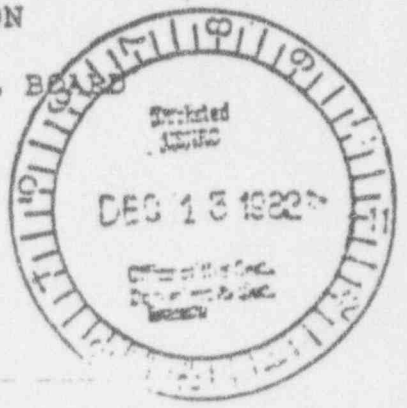
ATOMIC SAFETY AND LICENSING APPEAL BOARD



Administrative Judges:

Gary J. Edles, Chairman
Dr. John H. Buck
Dr. Reginald L. Gotchy

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

Thomas A. Baxter, Washington, D.C. (with whom George F. Trowbridge, Robert E. Zahler, and Delissa A. Ridgway were on the brief), for Metropolitan Edison Co., et al., licensees.

Ellyn R. Weiss, Washington, D.C., for the Union of Concerned Scientists, intervenor.

James M. Cutchin, IV (with whom Joseph R. Gray, Jack R. Goldberg, and Mary E. Wagner were on the brief) for the Nuclear Regulatory Commission staff.

DECISION

December 10, 1982

(ALAB-705)

Opinion of the Board by Drs. Buck and Gotchy:

Now before us is an appeal by the Union of Concerned Scientists (UCS) from the Licensing Board's partial initial decision on environmental issues in the TMI-1 restart

proceeding. LBP-81-60, 14 NRC 1724 (1981). 1/ That appeal is addressed exclusively to the Licensing Board's rejection of UCS Contention 20, which called for an analysis of the environmental effects of so-called "Class 9 accidents." 2/

1/ UCS is the only party that has appealed any aspect of the Licensing Board's separate partial initial decision on environmental issues. LBP-81-60, supra, 14 NRC 1724. UCS briefed and argued this appeal together with its appeal from the Licensing Board's partial initial decision in the design phase of this proceeding. LBP-81-59, 14 NRC 1211 (1981). Our review of that decision is currently underway. Also pending are appeals from the Board's two partial initial decisions on management competence. LBP-81-32, 14 NRC 381 (1981); LBP-82-56, 16 NRC ___ (July 27, 1982). Our decisions on emergency planning issues were announced earlier. ALAB-697, 16 NRC ___ (October 22, 1982); ALAB-698, 16 NRC ___ (October 22, 1982).

2/ UCS Contention 20 states:

> Neither Metropolitan Edison nor the NRC staff has presented an accurate assessment of the risks posed by operation of Three Mile Island, Unit 1, contrary to the requirements of 10 CFR 51.20(a) and 51.20(d). The decision to issue the operating license did not consider the consequences of so-called Class 9 accidents, particularly core meltdown with breach of containment. These accidents were deemed to have a low probability of occurrence. The Reactor Safety Study, WASH-1400, was an attempt to demonstrate that the actual risk from Class 9 accidents is very low. However, the Commission has stated that it "does not regard as reliable the Reactor Safety Study's numerical estimate of the overall risk of reactor accidents." (NRC Statement of Risk Assessment and the Reactor Safety Study Report (WASH-1400) in Light of the Risk Assessment Review Group Report, January 18, 1979). The withdrawal of NRC's endorsement of the Reactor Safety Study and its findings leaves no technical basis for concluding that the actual risk is low enough to justify operation of Three Mile Island, Unit 1.

(FOOTNOTE CONTINUED ON NEXT PAGE)

Id. at 1731. The issue presented is a narrow one that can readily be decided apart from the other questions still before us. See note 1, supra. For this reason, we reach it now in this separate decision. For the reasons discussed below, we hold that no such environmental analysis is required and thus affirm the Licensing Board's decision.

I. Background

A. The Commission has explained the origin and meaning of the "Class 9 accident" concept as follows:

> The term "Class 9 accidents" stems from a 1971 AEC [Atomic Energy Commission] proposal to place nuclear power plant accidents in nine categories to take account of such accidents in preparing environmental impact statements. The proposal was put forward for comment in a proposed "Annex" to the Commission's regulations implementing NEPA. 36 Fed. Reg. 22851-52 (December 1, 1971). The nine categories in that "Annex" were listed in increasing order of severity. "Class 9" accidents involve sequences of postulated successive failure more severe than those postulated for the design basis of protective systems and engineered safety features. The Annex concluded that, although the consequences of Class 9 accidents might be severe, the likelihood of such an accident was so small that nuclear power plants need not be designed to mitigate their consequences, and, as a result,

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

2/ Final Contentions of the Union of Concerned Scientists (October 22, 1979) at 10-11. Although the contention does not mention the National Environmental Policy Act (NEPA) or otherwise call for an Environmental Impact Statement (EIS), the Licensing Board treated it as raising such issues by implication. See LBP-79-34, 10 NRC 828, 839 (1979). This was in accordance with the interpretation expressed by counsel for UCS at the prehearing conference and in various pleadings. See, e.g., Tr. 378-79 (Weiss) and UCS Reply Brief on the Application of the National Environmental Policy Act (November 30, 1979).

> discussion of such accidents in applicants' Environmental Reports or in staff's environmental impact statements was not required. The Annex specifically referred to the "defense in depth" concept, the Commission's quality control system, its inspection program, and its general requirement of design conservatism. 36 Fed. Reg. at 22852. When the Annex was published the Commission directed that it be followed as "interim guidance" until the Commission took further action. When the Commission revised and recodified its environmental regulations in 1974, the Annex's status as a proposal and "interim guidance" was not changed, the Commission merely noting that it was "still under consideration."

Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257, 258-59 (1979) (footnotes omitted).

Although the Commission never formally adopted the Annex, its guidance was followed by the NRC staff and the adjudicatory boards [3/] and withstood challenge in the courts. [4/] Then, on September 14, 1979 the Commission approved in Offshore Power Systems the inclusion of a Class 9 accident analysis in the environmental impact statement (EIS) prepared by the staff in connection with an application for a license to manufacture floating nuclear power

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3/ See the decisions cited in Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 210 n.52 (1978). We certified a question decided in that opinion to the Commission in ALAB-500, 8 NRC 323 (1978). The Commission's decision on certification is CLI-79-9, supra.

4/ See, e.g., Porter County Chapter of the Izaak Walton League v. AEC, 533 F.2d 1011 (7th Cir.), cert. denied, 429 U.S. 858 (1976); Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1976).

plants. 5/ At the same time, the Commission announced its intention to reexamine the existing policy by completing the rulemaking begun with the proposed Annex. In the interim, the staff was to bring to the Commission's attention any individual cases in which an environmental analysis of Class 9 accidents was warranted. 6/

On June 13, 1980, the Commission published a Statement of Interim Policy on "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969." 45 Fed. Reg. 40,101 (hereinafter referred to as the June 13, 1980 policy statement). In it, the Commission announced that it was revising its policy regarding the consideration, in environmental impact statements required by NEPA, of "the more severe kinds of very low probability accidents that are physically possible" -- i.e., those "commonly referred to as Class 9 accidents." Id. The

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5/ CLI-79-9, supra, 10 NRC at 261.

6/ Id. at 262. The Commission again addressed the issue of Class 9 accidents in Black Fox, where it explained that the staff had discretion to bring individual cases to the Commission. Such discretion was not to be exercised, however, "without reference to existing staff guidance on the type of exceptional case that might warrant additional consideration; higher population density, proximity to man-made or natural hazard, unusual site configuration, unusual design features, etc., i.e., circumstances where the environmental risk from such an accident, if one occurred, would be substantially greater than that for an average plant." Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433, 434-35 (1980).

Commission explained that the TMI-2 accident "has emphasized the need for changes in NRC policies regarding the consideration to be given to serious accidents from an environmental as well as a safety point of view." It therefore withdrew the proposed Annex containing the old policy and instructed the staff to examine, in ongoing and future environmental reviews, both the probability and the environmental consequences of "accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core." Id. It defined "ongoing NEPA reviews" as those "for any proceeding at a licensing stage where a Final Environmental Impact Statement [FES] has not yet been issued." Id. at 40,103.

The Commission also mentioned several completed environmental reviews in which the staff had already considered Class 9 accidents because of the "special circumstances" present in those cases: namely, the special risks to the public health and safety posed by the Clinch River Breeder Reactor (unique design), the Perryman facility (high population density surrounding the proposed facility), and Offshore Power Systems (water pathways from floating nuclear plants leading to potential radiological impact on water biota and humans). Id. at 40,102. 7/ It stated

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7/ Significantly, all three examples involved environmental reviews that were conducted prior to the grant of a construction permit or manufacturing license.

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. at 40,103 (footnote omitted).

B. Early in this proceeding, UCS urged that an EIS on the effects of Class 9 accidents was required prior to restart. At the November 9, 1979 prehearing conference, the staff reiterated its position that no environmental analysis was required for the restart of TMI-1 [8/] but announced its intention to prepare, as a matter of discretion, an

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8/ See Brief of NRC Staff on Psychological Distress Issues (October 31, 1979) at 8-9. Basically, the staff's position at that time was that no further environmental analysis was required for TMI-1 restart because (1) as an enforcement proceeding, it was exempt from NEPA; (2) restart did not constitute a major federal action significantly affecting the environment; and (3) a legally sufficient EIS had already been prepared in 1972 and there were no newly discovered environmental impacts sufficient to trigger the need for a supplemental EIS. The U.S. Court of Appeals for the District of Columbia Circuit rejected the first of these justifications in People Against Nuclear Energy v. NRC, 678 F.2d 222, 231 n.14 (D.C. Cir. 1982), but it remanded the record to the Commission for a "study of potential psychological health effects and for a decision whether a supplemental EIS is necessary." Id. at 249. The Supreme Court recently granted the petitions for a writ of certiorari in that case. See Metro Ed. v. PANE, 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982) (No. 81-2399).

environmental impact appraisal (EIA). Tr. 373-74. 9/ The staff also indicated at that time that it expected to receive some guidance on the subject of Class 9 accidents as a result of the Commission's then ongoing rulemaking. Tr. 384-85.

In a prehearing conference order issued on December 18, 1979, the Licensing Board ruled that those "contentions which use the actual events at TMI as a base and then add or change a credible specific occurrence or circumstance, [do] set forth sufficiently specific accidents which have a close nexus to the TMI accident." LBP-79-34, 10 NRC 828, 834 (1979). The Board rejected UCS Contention 20 as "too vague and unfounded," but specifically reserved for later resolution the issue of the need for an EIS. Id. at 839. Then, on March 12, 1980, the Board announced that it would defer ruling on contentions calling for an EIS until after the staff had issued its EIA. The evidentiary hearing in the TMI-1 restart proceeding began on October 15, 1980, but the staff did not issue its EIA until March 27, 1981.

9/ Under the Commission's NEPA regulations, an EIA is prepared in connection with any declaration by the agency (i.e., a negative declaration) that a particular licensing or regulatory action need not be accompanied by an environmental impact statement. The EIA is required to include a summary description of the probable impacts of the proposed action on the environment and the basis for the conclusion that no environmental impact statement need be prepared. The EIA is available to the public. 10 CFR 51.7(b).

Soon thereafter, several intervenors filed comments on the adequacy of the EIA. In response, the staff issued a supplemental EIA on May 11, 1981. UCS, however, filed no comments on either document. Finding "that the only NEPA matters in controversy [were] legal contentions that there has been a failure to comply with NEPA and [the Commission's environmental regulations]," the Licensing Board approved the adequacy of the EIA and rejected all contentions calling for an EIS. 10/

In that decision, the Licensing Board expressed doubt that the Commission had intended to include the authority to consider the need for and content of an EIS as part of its delegation to the adjudicatory boards. But because the parties had recommended that it rule on the NEPA issues, and because 10 CFR 51.52 at least arguably authorized it to do so, the Board proceeded to rule on the NEPA contentions. The Licensing Board rejected UCS Contention 20 because, insofar as it called for an evaluation of all Class 9 accidents, it lacked the requisite nexus to the TMI-2 accident. With regard to the June 13, 1980 policy statement, the Board also noted that it was uncertain whether the new policy, calling for consideration of Class 9 accidents in certain circumstances, applied to TMI-1

10/ LBP-81-60, supra, 14 NRC at 1728.

restart. It held, however, that "if the new policy does not apply, the EIA as supplemented by the hearing record and [its] Partial Initial Decision, contains an adequate evaluation of Class 9 accidents." 11/

UCS maintains on appeal that the Licensing Board erred in its approach. First, UCS argues that NEPA requires the Commission "to prepare, circulate and consider an EIS" on the environmental impacts of Class 9 accidents prior to restart. UCS points out that the statutory obligation to comply with NEPA does not depend on "any explicit delegation from the Commission" and that the applicability of NEPA to the restart proceeding has been "implicitly decided" in the affirmative in PANE v. NRC, note 8, supra. UCS then argues that the TMI-2 accident "demonstrated that Class 9 accidents are a credible event and therefore 'reasonably foreseeable' at TMI-1." According to UCS, NEPA therefore requires consideration of such accidents in a supplemental EIS. 12/

With regard to the Commission's policy statement, UCS maintains that the Licensing Board misapplied the

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11/ Id. at 1732.

12/ Union of Concerned Scientists' Brief on Exceptions to the Partial Initial Decision of December 14, 1981 (March 12, 1982) at 63.

Commission's instructions in this proceeding. 13/ UCS argues that its Contention 20 was timely raised at the beginning of the proceeding, before the staff began preparation of its EIA. UCS concludes that TMI-1 restart is not a case involving the reopening of a prior proceeding or environmental review. 14/

In contrast, the licensee's position is that "Class 9 accidents had been considered [i.e., properly disregarded] in the initial operating license proceeding for TMI-1 under the guidance then provided by the Commission, and that under present guidance from the Commission no further EIS need be prepared on the subject." 15/ The licensee recognizes, however, that the Licensing Board declined to base its ruling on that ground. Accordingly, the licensee supports the Board's decision by making the following three arguments. First, "UCS made no attempt to bring its contention within the ambit of accidents having a nexus to

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13/ Id. at 63-64. UCS also maintains that the policy statement is an incorrect statement of NEPA law. We need not reach that question in this case and, in any event, would be bound by the Commission's statement of policy.

14/ Id. at 64.

15/ Licensee's Brief in Opposition to the Exceptions of Other Parties to the Atomic Safety and Licensing Board's Partial Initial Decision on Plant Design and Procedures, Separation, and Emergency Planning Issues (May 10, 1982) at 122.

the TMI-2 accident." Second, "no party presented any factual basis for assessing the impact of a Class 9 accident having a nexus to the TMI-2 accident." Third, "the staff had an adequate basis for treating as 'incredible' those Class 9 accidents with a nexus to the TMI-2 accident"; the EIA as supplemented by the hearing record and the Board's decision therefore contain an adequate evaluation of Class 9 accidents. In short, there is, in the licensee's view, "ample evidence on which to conclude that the impacts of Class 9 accidents having a nexus to the TMI-2 accident need not be considered." 16/

Similarly, the staff agrees that NEPA does not require consideration of Class 9 accidents in this proceeding. The staff argues that, even assuming that the restart proceeding comes within the scope of the Commission's policy statement, an analysis of Class 9 accidents nevertheless is not required here. In the staff's view, the new policy on its face covers only those "proceedings at a licensing stage where a Final Environmental Impact Statement has not yet been issued," unless special circumstances can be shown. Because (1) TMI-1 restart is not a licensing proceeding, (2) the FES for Unit 1 has already been issued, and (3) the case presents no special circumstances of the type mentioned in

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16/ Id. at 124.

the policy statement, the staff concludes that no Class 9 analysis is required. 17/

In the alternative, the staff supports the Licensing Board's ruling that, in any event, the EIA as supplemented by the hearing record and the Board's decision contains an adequate evaluation of Class 9 accidents. The staff points out that Class 9 accidents need not be considered under NEPA, citing those court cases in which the Commission's previous policy was upheld. See note 4, supra. It then argues that the record clearly demonstrates that Class 9 accidents with a nexus to the TMI-2 accident are no longer credible and, accordingly, a NEPA review is not required. 18/ Finally, the staff urges that UCS Contention 20 lacks the necessary specificity and was properly rejected on that ground. 19/

II. Analycis

As we explain more fully below, we believe the Licensing Board correctly ruled that, contrary to UCS Contention 20, no further analysis of Class 9 accidents is

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17/ See 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 95, 97-99.

18/ Id. at 99-103.

19/ Id. at 103.

required prior to restart. Assuming for the sake of argument--that the Commission's June 13, 1980 policy statement is applicable to this proceeding, under the terms of that statement no Class 9 accident analysis need be performed here. Moreover, NEPA does not require such an analysis.

A. The Commission's Policy Statement

As discussed above (pp. 5-7, supra), the Commission's June 13, 1980 policy statement withdrew the proposed Annex containing the prior policy, abolished the former accident classification scheme, and directed that, henceforth, a broad spectrum of accidents be considered in ongoing and future NEPA reviews. The statement makes clear that the new approach is to be employed in ongoing licensing proceedings only if an FES for the facility has not yet been issued, unless special circumstances similar to the examples given are shown. The FES for TMI-1 has long been completed. Moreover, the policy statement speaks only in terms of environmental impact statements prepared in connection with licensing proceedings. See p. 6, supra. This is a discretionary, special proceeding to which the policy statement simply does not apply.

Our dissenting colleague nevertheless concludes that the TMI-1 restart proceeding comes within the terms of the policy statement, relying in part on the Commission's

decision in Indian Point. [20] That discretionary, special proceeding is now under way to consider whether the risk presented by operation of Indian Point Units 2 and 3 is acceptable in view of the very high population density surrounding the site, taking into account various safety and emergency preparedness improvements. [21] In that decision, the Commission concluded that, although no EIS was required, a review of the risk of serious accidents at those units should be conducted consistent with the guidance provided in the policy statement. [22] We find it significant that the Commission apparently considered it necessary to direct that such an analysis be performed. Had the Commission viewed the policy statement as already encompassing special proceedings such as Indian Point, there manifestly would have been no need for that directive.

Assuming arguendo that the policy statement can be interpreted to apply to discretionary, special proceedings, it does not require that an analysis of serious accidents be performed in this particular case. The policy statement lists several examples in which Class 9 accident analyses

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20/ See Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-81-23, 14 NRC 610 (1981).

21/ See Consolidated Edison Co. of New York, Inc. (Indian Point, Unit 2), CLI-81-1, 13 NRC 1 (1981).

22/ CLI-81-23, supra, 14 NRC at 612.

were performed and directs such reviews where "similar special circumstances" are shown. Those examples suggest that there must be either some special or unique reactor design or a genuine difference in potential consequences of an accident. Contrary to the views expressed by our dissenting colleague, neither circumstance is present here.

Both UCS and our dissenting colleague presumably would have us conclude that the occurrence of the TMI-2 accident in and of itself constitutes a similar special circumstance. We do not think that the occurrence of the TMI-2 accident can properly be viewed in this manner. While the Commission expressly mentioned the TMI-2 accident as one of the reasons for its change in policy, at the same time it cautioned that its change in policy was not to be construed as indicating any lack of confidence in its earlier environmental reviews. From this, we conclude that the Commission did not intend the occurrence of the TMI-2 accident, without more, to be considered a "similar special circumstance" so as to make prior or ongoing proceedings subject to reopening or expansion.

An implicit premise of our dissenting colleague's argument is that the TMI-2 accident was a Class 9 occurrence. The Licensing Board found that the TMI-2 sequence of events could be considered a Class 9 accident in the sense that it exceeded the design basis for the facility. It should be noted, however, that the offsite

radiological consequences of that accident were not significant. 23/ In contrast, the consequences of accidents formerly referred to as Class 9 were described as "severe" in the proposed Annex.

Of course, as our dissenting colleague correctly emphasizes, the TMI-2 accident raised a number of questions concerning whether TMI-1 could safely resume operation without undue risk to the public health and safety. Accordingly, the Commission determined that a hearing must be held to determine whether and under what conditions TMI-1 would be permitted to restart. The issues considered throughout this proceeding have been matters of the licensee's management capability and technical resources, the adequacy of plant design and procedures, the separation of units, and emergency preparedness. But these concerns do not constitute the type of special circumstances mentioned in the policy statement.

Furthermore, TMI-1 will not be allowed to restart unless all of these concerns are adequately resolved. Thus, any uncertainties that may have resulted from the occurrence of the TMI-2 accident either must be or have been resolved

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23/ In the emergency planning phase of this case, we rejected intervenors' assertions that certain health effects could be attributed to the TMI-2 accident. See ALAB-697, 16 NRC ___, ___ (October 22, 1982) (slip opinion at 36-49). See generally Report of the President's Commission on the Accident at Three Mile Island (October 1979) at 34-35.

by the evidence and decisions in this case. The Licensing Board has already completed its extensive review and has issued partial initial decisions on all phases of the restart proceeding. Our review is now under way, and a final review will be performed by the Commission. Such extensive scrutiny of TMI-1, together with any improvements and conditions that are required as a result, serve to make the likelihood of a Class 9 accident at TMI-1 no greater than that for other operating plants. Thus, whatever concerns may have existed at the beginning of this proceeding, they are (or, prior to restart, will be) no longer present.

Our dissenting colleague would also find special circumstances in the Commission's recent statement that TMI-area residents may be suffering from "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." "Consideration of Psychological Stress Issues; Policy Statement," 47 Fed. Reg. 31,762 (July 22, 1982). In his view, the presence of a psychologically more sensitive population is a special circumstance, much like high population density, that would serve to create special or different environmental consequences -- presumably, of either routine operation or of a serious accident.

We do not believe the Commission intended to have its policy statement employed in this manner. Because the

Commission is bound to follow PANE unless it is overturned, the statement was issued in furtherance of the circuit court's directive in that case. See note 8, supra. It also represents the Commission's effort to determine the applicability of that case for other proceedings. We do not believe that statement was intended to enlarge the scope of the Commission's June 13, 1980 policy statement. If the Commission finds that "significant new circumstances or information have arisen with respect to the potential psychological health effects of operating the TMI-1 facility," it will address those effects. Id. The Commission has not yet made that determination. Thus, even assuming that psychological stress may properly be considered a special circumstance, any Class 9 accident inquiry based on that factor is, at present, premature.

In short, there is nothing unusual about the TMI-1 reactor, site, or neighboring population, as a result of the TMI-2 accident, that would make the risk of a Class 9 accident any different from that for other operating reactors. Thus, within the meaning of the Commission's policy statement, there are no special circumstances in this case. 24/

24/ In concluding otherwise, our dissenting colleague construes the policy statement as applying to any ongoing proceeding in which the circumstances surrounding the proposed action are "special." See pp.

(FOOTNOTE CONTINUED ON NEXT PAGE)

B. NEPA and the Nexus Requirement

In its first special prehearing conference order, the Licensing Board ruled that issues to be litigated in the restart proceeding must have a reasonable nexus to the TMI-2 accident. LBP-79-34, 10 NRC 828, 830-31 (1979). UCS was in general agreement with that approach. Tr. 133. The Board

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24/ 30-38, infra. By the specific terms of the policy statement, however, the special circumstances must be "similar" to those identified in the statement. 45 Fed. Reg. at 40,103. Thus, it is not enough that the circumstances giving rise to this restart proceeding may be "unique" to trigger application of the policy. The special circumstances must also be similar to those in which the environmental effects of Class 9 accidents were assessed under the earlier policy. See p. 6, supra.

Apart from our dissenting colleague's disregard of "similar," he apparently finds some support for his position on perceived procedural irregularities in connection with the staff's preparation of the EIA. He stresses, for example, that the staff reversed the usual procedure for issuing an EIA -- that here, the staff proceeded to prepare an EIA only after it decided first that no EIS would be issued. See note 1, infra. The point is irrelevant. What is significant is that no party found the EIA, as supplemented, to be inadequate, as evidenced by the absence of any challenge to it.

Our dissenting colleague also apparently finds it worth highlighting that the Licensing Board did not reexamine its earlier ruling regarding the admission of Class 9 accidents following issuance of the Commission's June 13, 1980 policy statement. See pp. 27-28, infra. Its failure to do so, however, is not crucial. We have the power to make that examination (Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-73, 5 AEC 297, 298 (1972); Wisc. Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972)) and our decision today does so.

concluded that it would be "too broad and non-specific and inconsistent with still viable Commission precedent to open up this proceeding to the extent of embracing generally the litigation of unspecified Class 9 accidents." LBP-79-34, supra, 10 NRC at 832. As mentioned previously (p. 8, supra), the Board ruled that "contentions which use the actual events at TMI as a base and then add or change a credible specific occurrence or circumstance, [do] set forth sufficiently specific accidents which have a close nexus to the TMI-2 accident." Id. at 834. The Board rejected UCS Contention 20, which called for an analysis of the environmental impacts of all Class 9 accidents, as "too vague and unfounded," but reserved for a later order the question of the need for an EIS. Id. at 839.

UCS never attempted to identify any specific accident sequences requiring an environmental review, as the Board's ruling required. Had it done so, we believe the Board would have admitted the contention for litigation. 25/ In our view, the nexus requirement was mandated by the Commission's August 9, 1979 order and notice of hearing, in which the

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25/ Other contentions alleging certain environmental impacts were initially admitted, although they were later withdrawn or dismissed. See, e.g., LBP-81-60, supra, 14 NRC at 1729 n.5 and LBP-81-59, supra, 14 NRC at 1424-25. In addition, the monitoring of effluents from TMI-1 and measures taken to ensure against groundwater contamination at the site, clearly environmental issues, were both addressed at the hearing. As explained below, however, we conclude that NEPA does not require further analysis in any event.

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). Indeed, the Commission effectively ratified the nexus requirement as applied to contentions contesting the sufficiency of the short term actions to resolve various safety concerns raised as a result of the TMI-2 accident. See the Commission's order of March 14, 1980 (unpublished).

UCS contention 20 was nothing more than a legal proposition that a Class 9 accident analysis was required. Under that contention, there were no factual issues in controversy to be litigated. A full EIS covering the environmental impacts of operating TMI-1 was prepared in connection with the Unit 1 operating license proceeding. And, as noted above, the Commission's prior policy of excluding consideration of Class 9 accidents from its environmental impact statements, which governed the preparation of the FES for TMI-1, was approved by the courts. 26/ This is because the environmental risk of such accidents was found to be extremely low and could, therefore, be disregarded. NEPA would require a supplemental EIS in this case only if the proposed federal action (here, the authorization of the restart of TMI-1)

26/ See the cases cited in note 4, supra.

would present significant new environmental effects or there have been significant changes in the environmental impacts previously addressed in the FES. 27/

As we have indicated, the TMI-2 accident raised a number of questions concerning whether TMI-1 could be operated without undue risk to the public health and safety. It called into question the adequacy of earlier accident assessments to account for the risk of new scenarios involving a small break loss of coolant or a loss of main feedwater -- i.e., those accidents with a reasonable nexus to the TMI-2 incident. The accident did not affect the risk of all other serious accidents that have no logical connection to the TMI-2 sequence of events. Thus, we find that the nexus requirement was properly imposed for environmental purposes. Clearly, no environmental analysis of these unrelated accidents is now required.

Accidents having the requisite nexus received a great deal of attention in the design phase of the restart hearing. 28/ In response to UCS Contention 13 and Board Question 2, licensee and staff witnesses presented testimony

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27/ See PANE v. NRC, supra, 678 F.2d at 245-47, and cases cited.

28/ The record contains a wide range of possible accident scenarios. See, e.g., Jones and Broughton, fol. Tr. 5038; Tr. 5039-105 (Jones and Broughton); Lic. Exs. 3-13.

that satisfied the Licensing Board that (1) the staff's method of determining which accidents fall within the design basis is reasonable, and (2) the short and long term actions to be taken at TMI-1 are sufficient to provide reasonable assurance that the public health and safety will be protected. LBP-81-59, supra, 14 NRC at 1395-96. 29/ After the "extensive consideration" given to Class 9 accidents in the restart proceeding, the Board "eventually was satisfied that the staff had an adequate basis for treating as 'incredible' those Class 9 accidents with a nexus to the TMI-2 accident." LBP-81-60, supra, 14 NRC at 1731-32. No party has appealed that determination. It is well settled that NEPA does not require an evaluation of environmental impacts that are "deemed only remote and speculative possibilities." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978) quoting NRDC v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972). Our review of the record on plant design and procedures is not yet complete. If restart is to be authorized, we must be satisfied that the record contains sufficient evidence upon which to conclude that Class 9 accidents with a nexus to the TMI-2 accident are no longer credible at TMI-1. Thus, NEPA does not require a supplemental EIS for such accidents in this case.

29/ See generally Levy, fol. Tr. 11,049; Rosenthal and Check, fol. Tr. 11,158.

For the foregoing reasons, the Licensing Board's rejection of UCS Contention 20 is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The dissent of Mr. Edles follows, p. 26 et seq.

Dissenting Opinion of Mr. Edles:

I am unable to concur in my colleagues' conclusion that the restart of TMI-1 presents no special circumstances within the meaning of the Commission's 1980 policy statement and that TMI-1 should, instead, be treated as an ordinary operating reactor.

A. Background

The majority opinion summarizes the Commission's traditional approach to so-called Class 9 accidents, the changes brought about by the 1980 policy statement, the evolution of the notion of "special circumstances," and the background of this case. With regard to that summary, there are a few points that warrant further discussion.

First, the staff made its determination that no environmental analysis was required for the TMI-1 restart proceeding on procedural grounds. The usual approach, however, is to base such a decision on the potential environmental effects of the proposed federal action. 1/

1/ The National Environmental Policy Act (NEPA) requires that Federal agencies analyze the potential effects of a proposed action in order to determine whether such effects are likely to be significant. In practice, this analysis takes the form of an environmental impact appraisal (EIA). If, after completing the analysis, the agency determines that its proposed action will have no significant effects on the environment, it simply issues a negative declaration. If, on the other hand, the analysis reveals that the environment could

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Second, the Licensing Board's tentative rejection of UCS Contention 20 in the December 18, 1979 prehearing conference order was based on what it described as "still viable Commission precedent . . . ." 10 NRC at 832-35. The Licensing Board believed that such precedent prohibited the litigation of Class 9 accidents in individual licensing cases involving land-based reactors, absent a showing that a particular accident was sufficiently probable to form the basis of an admissible contention. It reasoned that the occurrence of the accident at TMI-2 constituted a prima facie showing of such probability of the specific TMI-2 type accident. Id. at 833. Although the Board recognized that it might have to reexamine its ruling regarding the admission of Class 9 contentions in light of any subsequent

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1/ be significantly affected, a full-scale EIS is required. In some situations it is so clear that the environment could be significantly affected that the agency automatically invokes the full-blown EIS process. See 10 CFR 51.5 and 10 CFR 51.7. See generally, Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982). In the instant case the procedure was reversed: the staff decided first that no EIS would be issued, but then proceeded to prepare an EIA. See Brief of NRC Staff on Psychological Distress Issues (October 31, 1979) at 14-29; NRC Staff Brief in Response to Contentions (October 31, 1979) at 13-14; Tr. 373-74.

policy that the Commission might announce, the record does not indicate that the Board ever did so. 2/

2/ The most important discussion of the issue at the time of the Board's ruling was contained in Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978), and CLI-79-9, 10 NRC 257 (1979). In that case, the staff urged the inclusion of a Class 9 accident analysis in connection with a floating nuclear power plant. The staff argued that, despite the Commission's then-prevailing general policy against such analysis in individual cases, an evaluation of environmental risks was permissible where (i) the probability of an accident was greater than at the ordinary reactor, (ii) the consequences of an accident could be greater, or (iii) the risks were "of a different kind" than those associated with the typical reactor. 8 NRC at 210-11, and 218. The Appeal Board permitted the analysis but found it necessary to adopt only the staff's third argument. The Board nonetheless observed, by way of dictum, that it was the higher probability of an accident, not the potential for greater consequences, that was ordinarily the "triggering factor" in determining whether to examine Class 9 accidents. Id. at 214-18. The Board certified to the Commission the issue of whether a Class 9 analysis should be conducted with respect to the floating reactor. ALAB-500, 8 NRC 323 (1978). The Commission answered the question in the affirmative but explicitly limited its decision to offshore reactors. It expressly declined to address the issue of whether the Appeal Board correctly concluded that special circumstances must be based solely on probability. 10 NRC at 259 n.3 (1979). It also chose not to resolve the more general question of the standards to be employed in determining whether a consideration of Class 9 accidents was appropriate at land-based reactors. That issue would be, and indeed was, taken up in the June 13, 1980 policy statement. Id. at 262.

Third, there seems to have been some delay in connection with the review of environmental issues in this proceeding. The staff took nearly one and one-half years to complete its EIA. When it was finally issued, the restart hearing was still some four months from completion. Thus, in terms of the Commission's administrative concerns regarding the reopening or expansion of ongoing proceedings, an accident evaluation of the type called for in the policy statement could have been accommodated within the established procedural framework without much additional time, effort, or delay. But the staff adhered to its position that no environmental analysis of any kind was required and, for that reason, it declared that it did not intend to introduce the EIA into evidence. 3/ And the Licensing Board took no action on UCS' environmental contention until December 15, 1981, a day after it issued its decision in the design and emergency planning phases of the case, and some five months after the close of the evidentiary hearing on all matters except the reopened cheating inquiry. In that decision, the Board expressly declined to reach the key question we address here -- i.e., whether the restart proceeding comes within the June 13, 1980 policy statement. LBP-81-60, 14 NRC at 1732.

3/ See NRC Staff Response to the Commonwealth of Pennsylvania's Response to Intervenor Sholly's Motion to Reject the Staff's EIA (May 11, 1981) at 6 n.3.

B. Analysis

1. -- Applicability of the Policy Statement

The staff and the licensee argue, and my colleagues agree, that this is not a licensing proceeding, that the FES originally prepared in connection with TMI-1 is adequate, and that, as a consequence, the policy statement is by its terms inapplicable to this case. I disagree.

The policy statement gives guidance regarding the conduct of serious accident analyses in ongoing and future NEPA reviews. Such reviews are most often undertaken in connection with construction permit or operating license proceedings. The Commission's NEPA responsibilities are not limited to those situations, however, and NEPA reviews are sometimes undertaken in other contexts. Contrary to my colleagues' assertion, the Commission did not expressly limit application of the new policy approach to licensing proceedings. I conclude, therefore, that it is up to the adjudicatory boards to construe the policy statement and to determine whether the particular circumstances at hand warrant a serious accident analysis. 4/

The Commission recently stated its intent that the new policy approach be applied in the special proceeding involving Units 2 and 3 of the Indian Point facility.

4/ See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443 (1981).

Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-81-23, 14 NRC 610, 612 (1981). Unlike my colleagues, I view the Commission's action as confirming that the new policy approach, although ordinarily intended for environmental impact statements prepared in connection with construction permit or operating license cases, is not limited to them. In my judgment, it is reasonable to conclude that whenever the Commission determines that the risks of reactor operation are sufficiently special to justify institution of a comprehensive discretionary, adjudicatory proceeding, they are, perforce, sufficiently special to warrant application of the policy statement. The circumstances at TMI, in fact, appear to be even more compelling than at Indian Point: in contrast to TMI, the Commission had sufficient confidence in the circumstances affecting Indian Point to allow the reactor to continue to operate during the pendency of the adjudicatory hearing. See Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-81-1, 13 NRC 1 (1981).

Unlike the majority, I attribute no significance to the Commission's failure to invoke the policy statement affirmatively in this case. The policy statement was issued almost a year after the Commission's notice of hearing in this case, while the proceeding was pending before the Licensing Board. This case was thus in a totally different procedural posture than Indian Point. I am not willing to

attribute the Commission's failure to intervene affirmatively in the middle of the prehearing phase to a deliberate determination that the policy statement was inapplicable to TMI-1.

2. Special Circumstances

The Commission's policy statement now mandates consideration of site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling and eventual melting of the reactor core, for all new proceedings and selected ongoing proceedings. The environmental record in pending cases is to be reopened for such consideration, however, only where certain "special circumstances" are found. 5/ I think the restart proceeding clearly presents such special circumstances and thus comes within the Commission's policy

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5/ I assume, for present purposes, that the environmental phase of TMI's license proceeding is closed because an FES was once prepared. I need not decide -- but do not necessarily reject -- UCS' contention that, within the meaning of the policy statement, the restart proceeding is a separate licensing action in which the staff's environmental evaluation was plainly not completed (indeed, appears to have hardly even begun) at the time the Commission issued its policy statement. I also note that the Administrative Procedure Act defines licensing broadly to include "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. 551(9).

directive. As a result, I would order the staff to evaluate the environmental effects of serious accidents at TMI-1 as it now does routinely.

The policy statement does not define the term "special circumstances." The "special circumstances" notion originated in Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 209 (1978), and CLI-79-9, 10 NRC 257 (1979), where the staff argued that a discussion of Class 9 accidents was proper where circumstances indicated that Class 9 accident risks might be unusually high or of a different character than for a typical nuclear power plant. See note 2, supra. In the policy statement, the Commission recapitulates certain examples that the staff or the Commission previously considered sufficiently unique to warrant a more careful analysis of serious accidents. It leaves the inclusion of ongoing proceedings to case-by-case consideration, but requires that such proceedings be reopened only if they present special circumstances similar to those historically relied on.

The evolution of the "special circumstances" concept, taken together with the Commission's statement that "approximately equal attention shall be given" to the issues of probability and consequences in future cases, 45 Fed. Reg. at 40,103, indicates that "similar special circumstances" can embrace either potentially increased probabilities of an accident or potentially greater

consequences. My colleagues implicitly accept this notion of "special circumstances" but believe that neither is present in this case. In my view, both are present and I believe Commission determinations lend support to that conclusion.

a. Increased Probability of an Accident.

The TMI-2 accident, the most serious of its kind in U.S. commercial reactor operating history, prompted the Commission to conclude that it lacked the requisite assurance that TMI-1 could be operated without undue risk to the public health and safety. It therefore ordered a special, discretionary hearing to determine whether TMI-1 could safely resume operation. Presumably, the Commission was concerned that there was some increased risk of an accident or it would not have ordered either the indefinite shutdown of the reactor or the special hearing. The Commission, in fact, explicitly termed the circumstances at TMI-1 "unique" because of (1) potential interaction between Units 1 and 2, (2) questions regarding the licensee's management capability and technical resources, (3) the potential effect of Unit 2 decontamination efforts, and (4) deficiencies in emergency planning and station operating procedures. 10 NRC at 143-44. These circumstances were sufficiently special to justify treating TMI-1 differently from other Babcock & Wilcox designed reactors. I cannot

agree that they are suddenly insufficiently special to warrant invocation of the policy statement.

My colleagues suggest, however, that now that a thorough review of safety and related matters has been conducted and will shortly be completed, it can be concluded that TMI-1 is no different from the scores of other plants around the nation. Hence, they appear to argue that special circumstances no longer exist. I cannot agree that this is a reasonable implementation of the Commission's policy directive. I believe the Commission meant that if, at some pre-decisional stage of a case, special circumstances are found, the record is to be reopened or expanded and serious accidents are to be examined from an environmental perspective in accordance with the requirements of the policy statement.

Furthermore, I am not prepared to join in the majority's implicit conclusion that the environmental examination of serious accidents is wholly redundant of the safety analysis. The Commission has explicitly observed that the environmental evaluation of serious accidents under the new policy is to proceed "in coordination with other ongoing safety-related activities. . . ." 45 Fed. Reg. 40,101. I must conclude that the Commission finds valuable the discrete, although perhaps related environmental examination that it now conducts routinely along with its safety review.

In the instant case, moreover, as the Licensing Board concedes, the record contains no evidence of environmental consequences even as to those accident scenarios actually litigated, despite the Commission's 1980 pronouncement that probabilities and consequences are to receive roughly equal analytical treatment. The record also contains no probability estimates or other quantification of risk of the type contemplated by the policy statement. The Licensing Board's decision, moreover, continues to rely on the pre-1980 accident classification scheme even though the Commission abandoned it in its policy statement well before the date of the Licensing Board's decision. It is not at all surprising that the Licensing Board itself described the staff's method for determining accident design bases as "not ideal." 14 NRC at 1383.

b. Potentially Greater Consequences.

The Commission has also acknowledged that the TMI-area residents constitute a highly special neighboring population. In the policy statement issued in response to the PANE case, [6/] the Commission noted the court's characterization of the neighboring population as one that is potentially suffering some "post-traumatic anxieties,

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6/ PANE v. NRC, 678 F.2d 222 (D.C. Cir.), cert. granted sub. nom. Metro. Ed. v. PANE, 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982) (No. 81-2399).

accompanied by physical effects and caused by fears of recurring catastrophe." See the Commission's policy statement, 47 Fed. Reg. 31,762 (July 22, 1982). There may well be a greater fear of serious accident than at the ordinary plant. The Commission observed that the fear resulting from the occurrence of the accident at TMI-2 serves to distinguish the potential psychological consequences of restarting TMI-1 from the consequences likely to result if other reactors are authorized to continue operations. The presence of a neighboring population potentially suffering serious mental health effects, like the presence of a geographically dense population cited in the policy statement, is sufficiently special in my view to warrant invocation of the policy statement. Unless the PANE case is overruled and the Commission withdraws its July 22, 1982 policy statement, I see no way to disregard the Commission's recognition that the potential consequences of restarting TMI-1 may be different from those that obtain when other plants are authorized to continue or resume operations.

c. Summary

My colleagues claim that the Commission did not intend the occurrence of the TMI-2 accident, without more, to be considered a special circumstance so as to make prior or ongoing proceedings subject to reopening or expansion. I

have no quarrel with that observation if what they mean is that the fact that an accident occurred does not mandate the routine reopening or expansion of all cases involving B&W reactors. That is quite different, in my view, from reopening the very case that led to the change in policy.7/

In sum, I cannot accept the position that TMI-1 should be treated no differently than all the currently operating reactors for which new environmental concerns either have not arisen or have been resolved. The Commission observed that the TMI-2 accident was, at least in part, a catalyst for the change in policy regarding serious accidents. I find it curious, in such circumstances, that the staff argues, and my colleagues agree, that the very circumstances that were sufficiently special to trigger both the change in policy and the shutdown of TMI-1 pending a full adjudicatory hearing are now somehow insufficiently special to warrant application of the new policy.

7/ Somewhat similarly, the Director of Nuclear Reactor Regulation, in a series of decisions which the Commission has declined to review, has concluded that the mere change in Commission policy to allow broader consideration of accidents in the future in light of the newly acquired knowledge gained as a result of the TMI-2 accident does not warrant a reopening of all license proceedings involving operating reactors. See, for example, Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3) et al., DD-80-22, 11 NRC 919, 931 (1980). These decisions are not binding on the adjudicatory boards and the majority, quite properly, has not relied on them. It is worth noting, however, that there is also no inconsistency between my conclusion in the instant case and the Director's conclusion in those cases.

2. The Nexus Requirement

The Licensing Board rejected UCS Contention 20 only because, to the extent that it sought an evaluation of a broader range of Class 9 accidents, it had no nexus to the TMI-2 accident. 14 NRC at 1731. I disagree with the Board's approach. In my view, the Board should have applied the Commission's policy statement, which does not impose any requirement that there be a nexus between the special circumstances found and the type of accidents that are to be considered. Once it is determined that special circumstances are present, the staff is required to evaluate a broad range of serious accidents, including those beyond the design basis, not just those that are in some way related to the special circumstances.

In any event, I disagree with the Licensing Board that the narrow definition of "nexus" used in connection with design issues must inevitably be applied to all aspects of the restart proceeding. In the design phase of the proceeding, the Board permitted the parties to litigate the adequacy of plant design to withstand or mitigate possible Class 9 accidents with a "nexus" to the TMI-2 accident; for this purpose, the Board defined the nexus requirement narrowly to include only those accident scenarios stemming from a loss of main feedwater or a small break loss of coolant. Based on that record, the Board further concluded that Class 9 accidents with a nexus to the TMI-2 accident

were no longer credible at TMI-1. Although such definition of nexus was unchallenged when applied to design matters (indeed, the Commission approved its application for such matters), the Board employed a broader definition in connection with other issues and, in my view, should have employed a broader definition in examining environmental issues once the Commission issued its policy statement.

In my judgment, the Board improperly limited the nexus to matters of probability and further to the probability of accidents stemming solely from a TMI-2 type accident. For management, separation, and emergency planning purposes, the Board employed a broader view of the lessons learned and improvements required as a result of the TMI-2 accident. It was the occurrence of the accident itself that gave rise to far-reaching concerns about the licensee's management capability and technical resources for a broad range of operational and accident situations, not just the likelihood that another accident identical to the one at TMI-2 might occur. The TMI-2 accident called into question the licensee's emergency preparedness for all types of potential accidents. Similarly, the Board considered whether training was adequate to cope with unforeseen types of accidents. In much the same way, the accident raises doubts about the adequacy of the staff's and the licensee's environmental review for the TMI facility. In my judgment, the TMI-2 related considerations that brought about the change in

Commission policy concerning Class 9 accidents, together with the special circumstances which the Commission enumerated in ordering a suspension of the TMI-1 operating license pending completion of a discretionary, adjudicatory hearing, provide a sufficient nexus to justify the type of accident analysis that the staff now undertakes as a matter of course.

3. Further Procedures

I am extremely sensitive to the possible delay that may now result because the analysis I believe is required by Commission policy was not undertaken in a timely fashion. Because I believe the Licensing Board erred, however, I am compelled to recommend corrective action. Given the Commission's special concerns regarding TMI-1, neither the Licensing Board nor the staff explains to my satisfaction why, for the purposes of the policy statement, we should now treat TMI-1 as if it were simply a typical operating reactor.

I express no view as to whether the restart of TMI-1 constitutes a major Federal action significantly affecting the environment or whether circumstances have changed since the last environmental examination so that NEPA would

require a supplemental environmental review. [8/] These are matters to be decided by the Commission in light of the PANE litigation. The Commission may, nevertheless, as a matter of discretion, undertake analyses not mandated by statute, as it has explicitly done in the Indian Point case. As discussed above, I believe this is also what the Commission's policy directive contemplates in this case.

Because I am unable to persuade my colleagues that an environmental analysis of serious accidents should now be conducted, I cannot direct what procedures should be employed to integrate the serious accident analysis called for in the policy statement into the final decision in this case. I note, however, that the court in the PANE case expressly left the Commission with discretion to choose the procedures for studying the significance of the psychological health impacts arising from the restart of TMI-1. (The licensee has requested a waiver of the formal hearing requirement if the Commission should conclude that its regulations would ordinarily mandate a hearing, and the matter of procedures is now before the Commission for

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8/ See PANE v. NRC, supra note 6, at 233, and WATCH v. Harris, 603 F.2d 310 (2d Cir.), cert. denied sub. nom. Waterburg Urban Renewal Agency v. WATCH, 444 U.S. 995 (1979).

disposition.) [9] I believe that similar discretion is available with regard to a consideration of serious accidents. This is a special proceeding, not mandated by statute; [10] moreover, the Commission's policy toward evaluating serious accidents changed during the course of the case. The Commission thus may not necessarily be required to start from scratch and employ full trial-type procedures at this juncture. It is the undertaking of the substantive analysis that is important. Perhaps the prompt preparation of a serious accident analysis by the staff along the lines it now undertakes routinely, with an opportunity for comment by the parties as part of the Commission's ultimate decision in this case, will be sufficient. [11]

9/ See CLI-82-13, 16 NRC ___ (1982).

10/ See generally, Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-81-1, 13 NRC 1, 5 n.4 (1981).

11/ Cf. Aberdeen & Rockfish RR Co. v. SCRAP, 422 U.S. 289, 319 (1975); Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1071 (8th Cir. 1977); Ely v. Velde, 471 F.2d 823, 834 (2d Cir. 1972).

Attachment 2

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commissioners

DOCKETED
'82 DEC 28 P2:47

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

PETITION FOR REVIEW
OF ALAB-705

Pursuant to 10 CFR 2.786(b), the Union of Concerned Scientists ("UCS") petitions the Commission for review of ALAB-705, decided on December 13, 1982.

Summary of the Decision

By a 2-1 vote, with the sole lawyer and Chairman of the Board dissenting, the Appeal Board in ALAB-705 upheld LBP-81-60, 14 NRC 1724 (1981), in which the Licensing Board rejected UCS Contention 20 calling, pursuant to the National Environmental Policy Act ("NEPA"), for public assessment of the risk, including potential consequences of serious accidents (so-called "Class 9 accidents"), at TMI-1.*/

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*/The full contention is reproduced at ALAB-705, Sl. op. at p.2, n.2. Counsel for UCS made it clear that this was a NEPA contention. Tr.368, Nov. 9. 1979.

The majority of the Appeal Board held that the Commission's Statement of Interim Policy, Nuclear Power Plant Accident Consideration Under the National Environmental Policy Act of 1969, 45 FR 40101, June 13, 1980, does not apply to this case because it is not a "licensing proceeding." ALAB-705, Sl.op.at 14. They further held that, if the statement of interim policy does apply it justifies the NRC in refusing to disclose and assess the potential consequences to the public of serious accidents at TMI-1 because this cases presents no "special circumstances". ALAB-705 Sl.op. at 15-19.

The majority held finally that NEPA does not require such an assessment because the only accidents to be considered in the restart proceeding are those with a "nexus" to the TMI-2 accident, that all such accidents are incredible and therefore their consequence need not be disclosed. Id. at 20-25.

In dissent, Judge Edles argued first that the Policy Statement does apply here because the Commission's NEPA responsibilities are not limited to construction permits and operating licenses. He then argued that "special circumstances" are presented here and that the majority misapplied the "nexus" requirement in the NEPA context.

The Appeal Board Decision Is Erroneous

Both TMI-2 and TMI-1 were licensed at a time when NRC "deemed" accidents involving any significant core damage to

be incredible and based on that belief held that the impacts, including most importantly the potential consequences of such accidents, should not be disclosed in the Environmental Impact Statements prepared for nuclear plants. Public assessment of these potential consequences has never been prepared for either plant.

On March 28, 1979, TMI-2 experienced the most serious accident to date in the civilian nuclear power program. The accident was not catastrophic in the sense that large releases of radiation to the public did not take place. However, a series of multiple failures previously considered incredible took place, compounded by inappropriate operator action, leading to substantial core damage.

As a direct result of the TMI-2 accident, the NRC took two actions most pertinent to the issues at hand. First, finding that the Commission lacked the requisite assurance of the safety of TMI-1, it ordered the plant shut down pending a hearing to determine whether and under what conditions the plant could safely resume operation. Order and Notice of Hearing, 10 NRC 141, 142 (1979). As to no other operating plant did the Commission find that it lacked reasonable assurance of safety; TMI-1 was characterized as "unique" because of technical issues and doubts concerning the management capability and technical resources of the utility in question. Id. at 143-144.

Second, some 10 months later the Commission reversed its pre-TMI policy on the consideration of serious nuclear accidents under NEPA. This action was based explicitly on

the occurence of the TMI-2 accident, which was stated to have "emphasized the need for changes in NRC policies regarding the consideration to be given to serious accidents from an environmental as well as a safety point of view." Statement of Interim Policy, 45 FR 40101, June 13, 1980. Noting that "our experience with past NEPA reviews of accidents and the TMI accident clearly leads us to believe that a change is needed," the Commission directed that EIS's should consider both the probability and consequences of a broad range of possible accidents not limited"to those that can reasonably be expected to occur." The Commission also stated that such assessments should be done "for any proceeding at a licensing stage where a final Environmental Impact Statement has not yet been issued." Special circumstances were to be required to open, reopen or expand any previous or ongoing preceeding.

Against this backdrop, the majority's ruling is both profoundly ironic and legally erroneous. The Appeal Board adopts the policy statement insofar as it imposes restrictions on accident consideration, while at the same time rejecting the fundamental finding of the policy statement (i.e. the consequences of serious accidents shall no longer be disregarded on the grounds of alleged "incredibility") by ruling that the consequences of serious accidents at TMI-1 can be disregarded precisley because they are, or will be "incredible." ALAB-705, Sl.op. at 24.

1. Properly applied, the policy statement requires analysis of Class 9 Accidents in this proceeding.

The Commission limited application of the policy statement to proceedings "at a licensing stage" where an FES has not been prepared. The Appeal Board is in error in ruling that this is not such "a licensing state". ALAB-705 at 14. The APA defines licensing as any "agency process respecting the grant, renewal, denial, revokation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. §551(9). This process has involved at least suspension, limitation, amendment, modification and conditioning of the TMI-1 operating license. It is clearly a "licensing state" and no FES had been prepared.

Moreover, UCS submitted its contention at the earliest possible time; preparation of an EIS on this subject would not have de ayed completion of this proceeding at all. The facts that 1) the staff took an unconscionable year and a half to prepare a brief, pro forma EIA (ALAB-705 at 29), which failed to consider the consequences of accidents and 2) that the Board delayed ruling on this issue until the day after it issued its decision on the merits of UCS's other contentions, cannot be used to bootstrap a finding that assessment of the consequences of serious accidents would reopen or significantly expand this proceeding.*/

2. Special Circumstances are presented

Even assuming that special circumstances, have to be shown, they are presented here. The Commission found

*/Clearly no "expansion" can be involved when this issue was raised at the same time that all other issues were raised.

TMI-1 to be "unique" when it withdrew its previous conclusion of reasonable assurance of safety and ordered the plant shut down pending hearings. ALAB-705, Sl.op. at 34-36. This amounted logically to a finding that the probability of an accident was greater at TMI-1 than at any other plant. The majority argues, in essence, that such circumstances wil no longer exist after restart is authorized, since that authorization must be based on a finding that the plant is as safe as others. ALAB-705 at 17-18. Such circular logic confuses the roles of the safety and environmental reviews. It would, of course, preclude consideration of consequences in all cases, since no plant is licensed without the requisite safety findings, and thus it runs directly counter to the core finding of the post-TMI Policy Statement: the potential consequences of accidents shall be publicly disclosed and weighed even if the NRC considers their probability to be very low.

In addition, the consequences of a serious accident at TMI-1 would be greater than for the average plant and probably unique considering that the neighboring population is potentially suffering "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." Policy Statement, 47 FR 31762, July 22, 1982. See ALAB-705 at 36-27.

Simple common sense dictates that if TMI-1 presented questions unique enough to require an unprecedented shut-down, these are sufficiently special circumstances to mandate forthright consideration of potential future accident

consequences before it is allowed to operate again-consideration which never took place before it was licensed. Considering the heightened sensitivity of the surrounding population, the Appeal Board's tortuous ruling is clearly erroneous.

3. NEPA calls for assessment of the consequences of accidents in this case.

The majority's sole basis for ruling that NEPA, as distinguished from the policy statement, does not require assessment of serious accidents in this case was its holding that serious accidents with a nexus to TMI-2 are now or will be incredible and thus are remote and speculative, citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519,551 (1978) and NRDC v Morton, 458 F.2d 827, 837-838 (D.C. Cir. 1972). ALAB-705 at 24. This is nothing more than a reversion to the discredited position which was expressly repudiated by the post TMI Policy Statement. Morever, the narrow "nexus" requirement was applied in a cramped way to hold that only credible TMI-2 type accidents could be considered. Even if the nexus requirement was appropriate for questions of plant design, NEPA has no such requirement restriction, nor was the restriction applied so narrowly to other issues. See ALAB-705 at 39-41.

Neither the Licensing nor the Appeal Board held either that the restart proceeding was not a major federal action or that it had no significant impact on the human environment. As to the former, even Judge Wilkey, who dissented from the ruling in PANE v NRC, 678 F.2d 222 (D.C.Cir. 1982) cert.

accepted, does not contest that the restart decision is a major federal action. Id. at 245.

As to the latter, the potential impact on the human environment is precisely the same as in all operating license cases; the operation of TMI-1 creates the risk of harm to public health and safety resulting from accidents. NRC has never disputed that this is a significant impact.

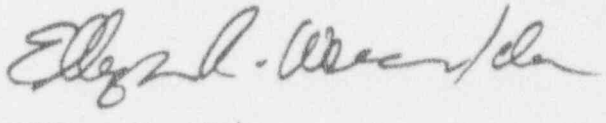
A supplemental EIS is required whenever "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. "40 CFR §1502.9(c)(1)(ii), PANE v NRC, 678 F.2d 222,233 (D.C. Cir. 1982). The applicability of this standard was not disputed by Judge Wilkey, who complained instead of the breadth of the majority's "continuing activity" language when restart itself is a proposed action. Id. at 244-245. Here, the new circumstances or information consist of the recognition, stemming directly from the TMI accident (itself a "new circumstance"), and leading directly to the June, 1980, Policy Statement, that serious nuclear accidents can no longer simply be deemed incredible. Supplemental EIS's have been ordered in analytically similar situations. E.g. WATCH v Harris, 603 F.2d 310,317-318 (2d Cir.) cert. denied, 444 U.S. 995 (1979). See PANE v NRC, supra, at 232-235 and cases cited therein.

This Case Is Appropriate for Commission Review

This case involves important procedural issues and important questions of public policy. The Commission has

been directly involved in this proceeding to an almost unprecedented degree, from the initial decisions announcing its lack of assurance of TMI's safety to its current consideration of whether the ASLB's decision should be made immediately effective. More public scrutiny and attention has attached to this proceeding than any other. Moreover, the Commission personally determined its scope and authorized the policy statement, the meaning of which is in dispute. The question of whether the NRC will disclose and consider in a forthright manner the potential consequences to the public safety of serious accidents at this plant is a major policy decision which must be decided at the Commission level.

Respectfully submitted,



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Dated: December 28, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of PETITION FOR REVIEW OF ALAB-705, were served this 28th day of December, 1982 upon the following people by first-class mail, postage prepaid, and by hand where indicated by an asterisk.

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Attachment 3

Release

DOCKETED
USNRC

'83 JAN 11 A9:11

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
Counsel for NRC Staff

January 10, 1983

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-289
	)	(Restart)
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January 10, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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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"

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,

Mary E. Wagner
Counsel for NRC Staff

Jack R. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of January, 1983

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)	)	

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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Mary E. Wagner
Counsel for NRC Staff

Attachment 4

1/7/83

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

LICENSEE'S RESPONSE TO UCS PETITION FOR REVIEW OF ALAB-705

By its Petition for Review of ALAB-705, dated December 28, 1982, UCS seeks review of the Appeal Board's determination that an EIS covering the consequences of all Class 9 accidents is not required in the TMI-1 restart proceeding. Licensee opposes UCS' petition.

UCS argues that an EIS covering all Class 9 accidents is required both by the Commission's Statement of Interim Policy on Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969[1/] ("Policy Statement") and, as a matter of law, under NEPA. We address these arguments in the same order as UCS.

1/ 45 F.R. 40101 (1980).

Policy Statement

The Commission's Policy Statement provides in pertinent part as follows (emphasis added):

> "It is the position of the Commission that its Environmental Impact Statements, pursuant to Section 102(c)(i) of the National Environmental Policy Act of 1969, shall include a reasoned consideration of the environmental risks [impacts] attributable to accidents at the particular facility or facilities within the scope of each such statement.
>
> * * * * * * * * * * * * * * *
>
> "Events or accident sequences that lead to releases shall include but not be limited to those that can reasonably be expected to occur. In-plant accident sequences that can lead to a spectrum of releases shall be discussed and shall include sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.
>
> * * * * * * * * * * * * * * *
>
> "It is the intent of the Commission in issuing this Statement of Interim Policy that the staff will initiate treatments of accident considerations, in accordance with the foregoing guidance, in its ongoing NEPA reviews, i.e., for any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued. These new treatments, which will take into account significant site- and plant-specific features, will result in more detailed discussions of accident risks than in previous environmental statements, particularly for those related to conventional light water plants at land-based sites. It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices, particularly for cases involving special circumstances where Class 9 risks have been considered by the staff, as described above. Thus, this change in policy is 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."[2/]

UCS first argues that the TMI-1 restart hearing is in its own right a licensing proceeding within the meaning of the Policy Statement, that no EIS has previously been prepared in that proceeding, and that therefore under the Policy Statement an EIS must be prepared covering all Class 9 accidents. It bases its argument on the broad definition of licensing in the Administrative Procedure Act.

The initial fallacy in UCS' argument (and in Judge Edles' dissent in ALAB-705) is its failure to recognize that the Policy Statement itself prescribes the Commission actions and proceedings to which it applies. It is not necessary to resort to legal definitions of a licensing proceeding in contexts wholly unrelated to the Policy Statement.

The Policy Statement, by its own terms, applies only to environmental impact statements which are required by NEPA. Thus in the Summary accompanying the Policy Statement the Commission explained that it was revising its policy with respect to "environmental impact assessments required by the National Environmental Policy Act." The Policy Statement itself deals expressly only with "Environmental Impact Statements pursuant to Section 102(c)(i) of the National Environmental Policy Act

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2/ Commissioners Gilinsky and Bradford disagreed with the inclusion of the preceding two sentences.

of 1969," i.e. with environmental impact statements which are mandated by NEPA. Contrary to the premise implicit in both UCS' and Judge Edles' positions, the Commission's Policy Statement does not contain new requirements as to when an EIS must be prepared. It deals solely with the content of Class 9 accident analyses where an EIS is already required by NEPA. As discussed in the next section of this response, NEPA does not require an EIS in the TMI-1 restart proceeding, and the Policy Statement is therefore not applicable to that proceeding.

Even assuming arguendo that the TMI-1 restart proceeding falls within the general scope of the Policy Statement, the new requirements imposed by the statement are expressly limited to any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued. There is no dispute over the fact that an FES was prepared in connection with the operation of TMI-1 or that it treated Class 9 accidents properly under the Commission's policy in effect at that time. UCS would have the Commission read the Policy Statement, however, to ignore the prior FES and to treat the TMI-1 restart hearing as a separate proceeding to which new requirements must be applied. Licensee submits that this interpretation is inconsistent with the provisions of the Policy Statement, quoted above, that the Commission's change in policy is not to be construed as a basis for, inter alia, reopening any previous proceeding absent a showing of "special circumstances" similar to those enumerated in the preamble to the Commission's Policy Statement.

UCS maintains, however, that the Commission's suspension of TMI-1's operating license and the circumstances which prompted that suspension constitute "special circumstances." The question before the Licensing Board for consideration, however, was not whether TMI-1 should be allowed to restart under the same circumstances as those under which the TMI-2 accident occurred, but whether the plant could be safely operated with the design modifications and other changes recognized or mandated by its decision. As observed by the Appeal Board majority, the effect of the licensing proceeding and of the improvements made by Licensee will be to make the likelihood of a Class 9 accident at TMI-1 no greater than for other operating plants. There is simply no logical purpose to be served in Judge Edles' conclusion that special circumstances must be judged by the circumstances existing at some "pre-decisional" stage which will be very different at the time of restart.

Both UCS and Judge Edles find special circumstances in the Commission's "recognition" that the "potential" psychological consequences of restarting TMI-1 may be different from the consequences of operating other reactors, citing a Commission Statement of Policy dated July 16, 1982. The Commission has, of course, made no determination that the psychological health of TMI residents will be significantly affected and, as pointed out by the Appeal Board, a finding of special circumstances on the basis of psychological considerations would be premature. Further, the Commission's policy statement dealt with the consequences of restart, not with accident consequences, and provides no support for the proposition

that the consequences of a Class 9 accident would be different (i.e. constitute "special circumstances") than at other reactors. In any event, the Commission has previously decided that psychological stress due to fears of restart are not cognizable under NEPA and is presently defending its decision before the Supreme Court. It would be a strange result for the Commission to conclude that potential psychological stress is not cognizable under NEPA but that it should be the basis for conducting a NEPA Class 9 accident analysis.

We pause at this point to consider an argument advanced by Judge Edles (but not by UCS) that the Commission's action in the Indian Point special proceeding somehow supports his conclusion that the Commission's Policy Statement on Class 9 accidents was meant to encompass proceedings such as the TMI-1 restart hearing. Indian Point, like the TMI-1 restart hearing, involved a special proceeding where an EIS was not required by law. The Commission nevertheless instructed the licensing board in that proceeding to conduct a previously ordered review of serious accidents consistent with the guidance afforded by the Policy Statement. The Commission's precise instructions were:

> "...Although not requiring the preparation of an Environmental Impact Statement, the Commission intends that the review with respect to this question be conducted consistent with the guidance provided the staff in the Statement of Interim Policy on "Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969." 14 NRC 612 (1981)

The clear conclusion to be drawn from the Commission's instructions is that the Commission recognized that an EIS was not

required in the Indian Point proceeding, that the Policy Statement was therefore not applicable to that proceeding, and that special instructions were necessary to have the licensing board's review of serious accidents conducted in a manner consistent with that statement. If the Commission had regarded its Policy Statement as applicable to the Indian Point proceeding, it need have issued no instructions at all or at most called the attention of the licensing board to the applicability of existing instructions.

NEPA Requirements

UCS maintains that even if not required by the Commission's Policy Statement, an EIS covering all Class 9 accidents is required by NEPA. UCS does not question the Appeal Board's finding that a full-scale EIS was prepared in connection with the TMI-1 operating license, that the FES treated Class 9 accidents in accordance with Commission policy at that time, and that the Commission's policy was upheld in court litigation. It argues, however, that restart authorization constitutes a new major federal action, that new circumstances or information, stemming directly from the TMI-2 accident and leading to the subsequent Commission Policy Statement, have arisen since the initial FES for TMI-1 in the form of a "recognition" that "serious nuclear accidents can no longer be deemed incredible," and that because of these new circumstances a supplemental EIS is required.

Neither the Policy Statement nor its history justify UCS' claim that they constitute a recognition by the Commission

that all Class 9 accidents can no longer be deemed incredible or even that there has been a material change in the Commission's assessment of the probability of serious accidents having severe environmental consequences. The Commission simply announced a new policy, to be applied prospectively, on how to treat "very low probability accidents" in environmental statements. In fact, the Policy Statement clearly states with respect to its new treatment of accidents: "It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of present practices." To this the Policy Statement added: "Thus, this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements."

UCS also claims that the TMI-2 accident in itself constitutes a new circumstance requiring the issuance of an EIS covering all Class 9 accidents. Both the Licensing Board and the Appeal Board rejected this position and UCS Contention 20 primarily because UCS sought to include all accidents and did not confine its contention to those having a reasonable nexus to the TMI-2 accident. The Appeal Board properly ruled that the TMI-2 accident did not affect the risk of all other serious accidents that have no logical connection to the TMI-2 sequence of events. ALAB-705, slip op. at 22-23.[3/]

3/ The Appeal Board also properly ruled (1) that the Licensing Board afforded UCS and others full opportunity to litigate the (continued)

Both UCS and Judge Edles[4/] challenge the application of the nexus requirement to environmental issues. They point out that the nexus requirement was applied to design issues but not to management, separation and emergency planning issues. The explanation is very simple. The Licensing Board, of course, addressed all of the issues specified by the Commission's August 9, 1979 Order and virtually all of the issues raised by intervenors on management, separation and emergency planning fell within that Order. Therefore the Licensing Board had no need to consider nexus requirements as to these issues. The nexus requirement was applied only to issues sought to be raised which were not expressly covered by the Order.

Further, UCS and Judge Edles are simply wrong in suggesting that the nexus requirement was applied only to design issues. It was applied in other areas where the issue sought to be raised was not covered by the August 9, 1979 Order, e.g. in the rejection of TMIA's contention seeking to litigate the adequacy of TMI's security plan against external threats[5/] and

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(Footnote continued)
impact of accidents having a nexus to the TMI-2 accident (including accidents exceeding design basis accidents), (2) that UCS failed to pursue that opportunity and (3) that the Licensing Board on its own initiative fully explored the consequences of such accidents.

4/ Judge Edles discussed the nexus requirement only in connection with the Policy Statement and the question as to whether "special circumstances" existed within the meaning of that statement. He made no ruling on UCS' claim that because of "new circumstances" a Class 9 accident is required by NEPA independent of the Policy Statement.

5/ Second Special Prehearing Conference Order, January 11, 1980, at 9-10.

the Aamodt's contention relating to operator fatigue.[6/]

Conclusion

The decision of the majority of the Appeal Board in ALAB-705 is so clearly correct as not to warrant further briefing or Commission review.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By George F. Trowbridge

George F. Trowbridge, P.C.

Dated: January 7, 1983

6/ Licensing Board Confirmatory Memorandum and Order on Aamodt Motions, April 6, 1981; Tr. 17,256 (Chairman Smith).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to UCS Petition for Review of ALAB-705," dated January 7, 1983, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 7th day of January, 1983.

George F. Trowbridge, P.C.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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