UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

UNION OF CONCERNED SCIENTISTS
OBJECTION TO EX PARTE COMMUNICATIONS

On October 6, 1982, the Commission held a meeting with the NRC Staff to discuss what the Staff characterized as a briefing on "TMI-1 Status." During the course of this meeting, a great deal of information and technical opinion dealing directly with substantive issues which are in controversy in the TMI-1 Restart proceeding was communicated from the NRC Staff, which is a party to that proceeding, to the Commissioners, who will make the final determination of the issues. In the course of this meeting, it was revealed publicly for the first time, to our knowledge, that the Staff has been routinely engaging in ex parte communications with the Licensing Board, Appeal Board and Commissioners by sending them lengthy discussions of technical issues related to TMI-1 without serving those on the parties. We refer here specifically to: 1) SECY-82-384, September 16, 1982, "Three Mile Island, Unit 1 (TMI-1) NUREG-0737 Items Status," which in reality is not a status report, but proposes and purports to present justification for delay of implementation of required safety improvements until after restart of TMI-1; and 2) SECY-82-111, March 11, 1982, "Requirements for Emergency Response Capability" which

requests Commission approval of emergency planning requirements.*/ There are also follow-up documents to SECY-82-111 (i.e., SECY-82-111A, 111B, etc.) which UCS has still not been able to obtain because they are not in the PDR and our request to NRC Staff Counsel for their production has been fruitless -- so UCS is unable to comment on their content. There may well be other SECY documents which have been served on the Boards and the Commission, but not the parties. We have no reason to conclude that the two which happened to be referenced and discussed on October 6 are the only ones that exist.

The Commission meeting and the SECY documents dealt directly with contested issues in the TMI-1 Restart proceeding. Moreover, the Staff discussed facts and presented opinion, in an effort to convince the Commission that the plant is safe for restart, which go far beyond what was presented on the record and are in important ways inconsistent with the record.

The law is clear that off the record briefings by one party to a decision-maker in an adjudicatory proceeding concerning matters in issue at that proceeding constitute improper ex parte contacts, forbidden by the Administrative Procedure Act and NRC regulations. The APA states flatly that decision-makers in adjudicatory proceedings "may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." 5 U.S.C. Section 554(d)(1). Moreover, the staff "may not, in that or a factually related case,...advise in the decision...except as witness or counsel in public proceedings." Id. In addition, in the section reciting the rules governing adjudicatory proceedings, the APA repeats its prohibition against parties and decision-makers engaging in ex parte contacts concerning the merits of an ongoing proceeding. 5 U.S.C. Section 557(d)(1)(A), (B). The

---

*/ While UCS has not raised emergency planning contentions in the Restart hearings, many other parties did.

section goes on to require that any ex parte contacts be placed in the public record, and initiate a further proceeding on the remedy to mitigate, if possible, prejudice to other parties. 5 U.S.C. Section 557(d)(1)(C), (D). NRC regulations restate these prohibitions and remedies at 10 C.F.R. Section 2.780.

In U. S. Lines v. Federal Maritime Commission (FMC), 584 F.2d 519, 539 (D.C. Cir. 1978), the court noted the numerous cases holding that ex parte contacts were inconsistent with the "notion of a fair hearing and with the principles of fairness implicit in due process." Furthermore, the court held that ex parte contacts "foreclose effective judicial review of an agency's final decision." Id. at 541. Citing from the same court's decision in Home Box Office v. FCC, 567 F.2d 9 (D. C. Cir. 1977), cert. den. 434 U.S. 829, the court explained:

> [H]ere agency secrecy stands between us and fulfillment of our obligation. As a practical matter, Overton Park's mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. 567 F.2d at 54.
> Id. at 541, citing 567 F.2d at 54.

In U.S. Lines, the FMC staff communicating to the Commission an analysis of issues before it. The court found these communications to be improper ex parte contacts, in that they "introduced new arguments and positions and responded to and rebutted the arguments which protestant USL made in its public findings." Id. at 538. The court therefore set aside the agency decision and remanded the case to the Commission for new proceedings. Id. at 543. Similarly, see National Small Shipments Traffic Conference v. ICC, 590 F.2d 345 (D.C. Cir. 1978).

In this case, the Staff has labeled its communications to the Commission "status" reports, in an attempt to fall under the exception for such reports under 5 U.S.C. Section 551(14) and 10 C.F.R. Section 2.780(d)(3). However, the content of the Staff's briefing goes far beyond permissible status reports, and encompasses positions and arguments on controverted issues involved in the proceedings before the Commission and the Appeal Board.

For example, the Staff briefed the Commission on the plant shielding modifications required to ensure that vital plant systems and equipment will not be unduly degraded by the high levels of radiation that will result during a TMI-2 type accident. This was item 2.1.6.b of NUREG-0578 required by the Commission to be completed by January 1, 1981 and recodified as item II.B.2 of NUREG-0737 with the deadline extended to January 1, 1982. This issue was litigated as part of UCS Contention 2 and Board Question/UCS Contention 12 and was addressed in the Initial Decision of December 14, 1981 at, for example, paragraph 628. The Board resolved the UCS Contention by relying on the Staff's assertion that the plant shielding modifications would be completed by January 1, 1982, to meet the requirements of Item II.B.2 of NUREG-0737. PID, at Paragraph 628, n. 72. The matter is also the subject of pleadings before the Appeal Board. See "Union of Concerned Scientists' Reply to Staff and Licensee Responses to Appeal Board Order of July 14, 1982" (August 25, 1982) at 4-5.

Nevertheless, on October 6, 1982, the Staff discussed the substance of this issue and indicated that the Commission should consider further delay in the deadline until after restart. In so doing, the Staff presented a very different picture from that presented to the ASLB on the record. In particular, before the ASLB, the Staff testified that all plant shielding modifications necessary to resolve NUREG-0737 Item II.B.2 must be completed by

January 1, 1982, and that reasonable progress had been made to ensure meeting that deadline. Staff Exhibit 14 at 36. Now it is revealed that valves which must be replaced had not even been ordered until September and October, 1982 and that the control panel for these valves has not yet been ordered. SECY-82-384, Enclosure 2 at 2. This means either that the scope of the task was misunderstood during the hearing or that the Staff's "reasonable progress" conclusion was based on nothing. Id. at 1-2.

In addition, it may well be that the scope of modifications necessary to implement the requirements of NUREG-0737 Item II.B.2 is substantially greater than "only one concern" involving two motor control centers. Partial Initial Decision, Dec. 14, 1981, para. 628. The vagueness of the Staff SER makes this impossible to discern but it is an area which UCS believes requires probing and which we would explore if given the opportunity, as we request herein.

These matters are not simply questions of "scheduling." The condition of the plant at restart is fundamental to a determination of whether it is safe enough to operate -- the central issue which was presented to the ASLB. On this score, Intervenors and the ASLB had no choice but to accept the Staff's characterization of its own "requirements." Moreover, parties accepted as the starting point of this litigation that the "requirements" would be enforced. If the requirements are changed after litigation, it undermines the basis for the ASLB decision and deprives Intervenors of any opportunity to challenge the sufficiency of the new, less strict requirements or whether reasonable progress has been made.

In this regard, we further find it inconceivable that as excuses for failing to complete the plant shielding modifications, you are told by your Staff that GPU has "financial constraints," SECY-382, Enclosure 2 at 2, and that it has been delayed by diversion of manpower and resources to the steam

generator repair. Id. If GPU has financial constraints which hinder it from ordering 6 valves and a control panel, it has no business operating nuclear facilities. In addition, we find it exceedingly difficult to believe that the disciplines involved in addressing the steam generator problem have substantial overlap with those required to complete the plant shielding modifications. These are weak excuses, indeed, and hardly provide a basis for further delaying implementation of a basic safety requirement that has already been delayed for almost two years.

The Commission is now in the process of determining whether the ASLB decision should be made immediately effective. The ASLB decision was, in turn, based in this area upon a finding that the plant shielding modifications necessary to protect plant personnel and vital equipment from high radiation would be complete by January 1, 1982. The information conveyed to you by the Staff is so at odds with what it presented to the ASLB that the ASLB decision is no longer valid on this point. Therefore, the Commission must either itself hold an evidentiary session on this point, allowing all parties to participate, or remand the matter to the Licensing or Appeal Board. UCS so moves the Commission. The Commission may not rely only on the untested assertions of one party to this case (which are, in large part based on Licensee's equally untested assertions) to resolve matters in controversy or to alter the deadlines for plant modifications.

Finally, UCS objects to this pattern of ex parte communication between the Staff and the Commission. We assert our right to present evidence and to cross-examine Staff witnesses on issues concerning the safety of TMI-1. We move that any future consideration by the Commission of such questions be done in accordance with the procedural rules set out in 10 CFR Part 2, Subpart G.

Respectfully submitted,

---

Ellyn R. Weiss
Counsel for UCS

Harmon & Weiss
1725 I Street, N.w.
Suite 506
Washington, D.C. 20006

(202) 833-9070

Dated: November 4, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY 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 the foregoing UNION OF CONCERNED SCIENTISTS OBJECTION TO EX PARTE COMMUNICATIONS, have been delivered this 5th day of November, 1982, first-class, postage paid, to the following:

Ivan W. Smith, Chairman
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Walter H. Jordan
Atomic Safety and Licensing
Board Panel
881 West Outer Drive
Oak Ridge, Tennessee 37830

Dr. Linda W. Little
Atomic Safety and Licensing
Board Panel
5000 Hermitage Drive
Raleigh, North Carolina 27612

Professor Gary L. Milhollin
1815 Jefferson Street
Madison, Wisconsin 53711

Judge Gary J. Edles, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Judge John H. Buck
Atomic Safety and Licens
Appeal Board Panel
U. S. Nuclear Regulatory
Commission
Washington D.C. 20555

Judge Christine N. Kohl
Atomic Safety and Licens
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Thomas Roberts, Commissi
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Nunzio Palladino, Chairm
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mrs. Marjorie Aamodt
R.D. #5
Coalsville, Pennsylvania

Robert Adler, Esq.
Assistant Attorney General
505 Executive House
P.O. Box 2357
Harrisburg, Pennsylvania 17120

Louis Bradford
Three Mile Island Alert
325 Peffer Street
Harrisburg, PA 17102

David E. Cole, Esq.
Smith & Smith, P.C.
2931 North Front Street
Harrisburg, PA 17110

Jordan D. Cunningham, Esq.
Fox, Farr & Cunningham
2320 North Second Street
Harrisburg, PA 17110

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

Judge Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

John A. Levin, Esq.
Assistant Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17120

* John Ahearne, Commissioner
U.S. NRC
Washington, D.C. 20555

Ms. Gail B. Phelps
245 West Philadelphia Street
York, Pennsylvania 17404

Counsel for NRC Staff
Office of Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

George F. Trowbridge, Esq.
Shaw, Pittman, Potts &
Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Victor Gilinsky, Commissioner
U.S. NRC
Washington, D.C. 20555

* James Asselstine, Commissioner
U. S. NRC
Washington, D.C. 20555

Mr. Steve Brooks
Public Information and
Resource Center
1037 Maclay Street
Harrisburg, PA 17103

Michael F. McBride, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1333 New Hampshire Avenue, N.W.
Suite 1100
Washington, D.C. 20036

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

Ellyn R. Weiss

*Hand-delivered