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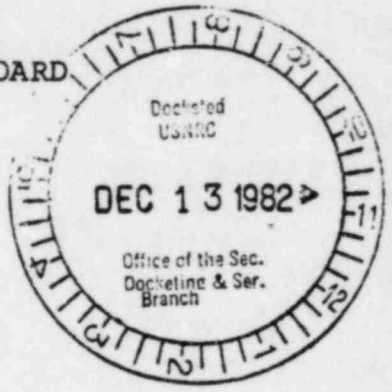
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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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. Analysis

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-[illegible] 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 known. 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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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

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

(FOOTNOTE CONTINUED ON NEXT PAGE)

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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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

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); Hanly v. Kleindienst, 471 F.2d 823, 834 (2d Cir. 1972).