UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commissioners

In the Matter of	)	
	)	'82 DEC 28 P2:46
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart)
(Three Mile Island Nuclear Station, Unit No. 1)	)	
	)	

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.

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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. <u>Properly applied, the policy statement requires analysis of Class 9 Accidents in this proceeding</u>.

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 delayed 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 shutdown, 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.

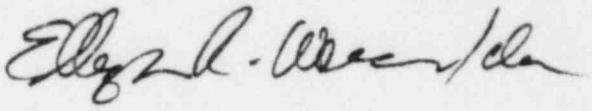
A supplemental EIS is required whenever "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. "40 CFR §1502.9(c)(1)(ii), PANE v NRC, 678 F.2d 222,233 (D.C. Cir. 1982). The applicability of this standard was not 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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NUCLEAR REGULATORY COMMISSION

'82 DEC 28 P2:47

OFFICE OF SECRETARY
DOCKETING & SERVICE

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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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