February 4, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

LICENSEE'S ANSWER TO THE UCS
MOTION FOR AN ORDER DIRECTING
DISCOVERY AGAINST THE STAFF AND LICENSEE

On February 2, 1983 -- five weeks after the Appeal Board ordered this proceeding reopened, and only two weeks before direct testimony must be filed -- intervenor Union of Concerned Scientists filed a "Motion for an Order Directing Discovery Against the Staff and Licensee." On February 3, 1983, at the request of the Appeal Board, UCS supplemented its motion. Letter from UCS counsel (Weiss) to Appeal Board (February 3, 1983).

Licensee opposes the UCS motion. UCS has not demonstrated a need for discovery at this point in the proceeding, and the instant motion simply requests the same relief, albeit by a different mechanism procedurally, earlier sought by UCS and denied by the Appeal Board.

Only two weeks ago, UCS sought, inter alia, a modification of the schedule for this reopened proceeding to provide UCS the opportunity to file direct testimony one month after receipt of the direct testimony by Licensee and the NRC Staff. The

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basis for that request was that UCS purportedly could not present its direct testimony without knowing what the positions of Licensee and the Staff will be regarding the B&W and RELAP5 computer codes used to evaluate small-break loss of coolant accidents. See Union of Concerned Scientists' Response to ALAB-708 and Request for Modification of Schedule, January 19, 1983.

Denying this UCS request, the Appeal Board stated:

> We note, however, that UCS had the opportunity to review the information on both the B&W code and the RELAP5 code at an earlier stage. In addition, the earlier filings by the staff and the licensee spell out in some detail the positions and arguments likely to be developed on the record at the reopened hearing. In such circumstances, we are unpersuaded that UCS' ability to formulate its position and necessary supporting testimony, including anticipatory rebuttal, will be compromised by having to file on the same date as the staff and the licensee. If UCS can establish a need for the submission of written rebuttal testimony despite the opportunity for cross-examination at the hearing, it may seek leave to do so at the hearing.

Order (January 26, 1983), at 4-5 (footnote omitted).

Persistence alone should not be rewarded. In the instant motion UCS seeks to achieve the same relief and for the same reasons. UCS simply wants to assess the Licensee and Staff testimony in advance of the deadline for filing any direct testimony of its own. The only difference here is that UCS presumably would ask each witness to provide a preview of the direct testimony by oral deposition. We must assume that this is the UCS plan since the motion and its supplement are devoid of particularity as to the intended

purpose and scope of the discovery sought. Licensee submits that this is a classical example of a proposed fishing expedition. UCS admits that it has no independent affirmative evidence to present through direct testimony on the specific issues posed by the Appeal Board for this reopened proceeding, and that UCS seeks merely to rebut the testimony of Licensee and the Staff in any direct testimony UCS files.[1/] UCS fails, however, to demonstrate that the opportunity for cross-examination at the hearing itself will not be adequate for UCS to build its record in response to Licensee and the Staff.

This is a proceeding reopened, on a limited basis, to address specific concerns of the Appeal Board with respect to its review of the evidentiary record.[2/] The reopening is not prompted by new developments of which UCS is unaware. The only new development cited by the Appeal Board is the Semiscale testing, which is fully reported in the relevant Board Notifications. Licensee's witnesses have no other information on those tests, and our views on their significance are fully set forth in Licensee's November 22, 1982 filing with the Appeal Board.

1/ Licensee does not criticize any UCS failure to file direct testimony. UCS is not required to do so. The UCS motion and supplement, however, make it clear that UCS has no purpose for the depositions other than a general hope that it will uncover something worthy of written rebuttal. This utterly fails as a basis for discovery in the circumstances of this expedited and limited reopened proceeding.

2/ UCS repeatedly crowns itself the prevailing party in this case. Licensee both disagrees with the assertion and fails to see its relevance to the request for discovery.

While we understand that UCS seeks to depose witnesses well in advance of February 16, Licensee also objects to discovery, whether before or after that date, for the avowed purpose of assisting UCS in its preparation of cross-examination. There are 19 days between the filing of the direct testimony and the commencement of the hearing. This is more than the Commission's regulations require. See 10 C.F.R. § 2.743(b). UCS has not shown that discovery is necessary for the preparation of cross-examination.

Finally, Licensee records its disagreement with the UCS observations that depositions are the most productive and least time-consuming of discovery methods for all concerned, UCS Motion at 2, and that they are "greatly beneficial to the parties and ultimately to the Board." Letter from UCS counsel at 2. The benefit here, and the convenience apparently contemplated, would inure solely to UCS. Discovery at this juncture, however, would be disruptive to Licensee's preparation for hearing.[3/]

The standard here should be that without an opportunity to discover the testimony of other parties in advance of hearing, UCS would be prejudiced to a degree which denies due process (e.g., that otherwise UCS would be unable to ferret out for the record critical relevant information). The Appeal Board essentially has already decided that

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3/ Referring to a one-day deposition, UCS Motion at 2, UCS apparently contemplates that Licensee's witnesses are to be assembled at one time and in one place for the convenience of counsel for UCS. None of our witnesses, however, are in the metropolitan Washington area. Rather, they are in Parsippany, New Jersey, and Lynchburg, Virginia.

UCS has not made such a showing, and the instant motion presents no basis for a modification of that holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Licensee's Answer to the UCS Motion for an Order Directing Discovery Against the Staff and Licensee" were served this 4th day of February, 1983, by hand delivery upon the parties identified by an asterisk and by deposit in the U.S. mail, first class, postage prepaid, to the other parties on the attached Service List.

Thomas A. Baxter

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