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STAFF  
AUGUST 27, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

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In the Matter of )  
METROPOLITAN EDISON COMPANY, ET AL. )  
(Three Mile Island Nuclear Station, )  
Unit No. 1) )

Docket No. 50-289 *SP*  
(Restart Remand on  
Management)

NRC STAFF'S ANSWER TO LICENSEE'S MOTION  
TO PARTIALLY EXCLUDE UCS FROM  
PARTICIPATION IN THE MANAGEMENT REMAND

I. INTRODUCTION

On July 31, 1984, Licensee filed a motion to partially exclude UCS from participating in the management remand proceeding.<sup>1/</sup> Licensee requests the Licensing Board to exclude UCS from participating in the remanded proceeding on the issues of the Dieckamp mailgram and leak rate test practices at TMI-1. Licensee's Motion at 14. Although Licensee believes that the legal basis which it asserts for the exclusion of UCS from participation on these two issues also supports the exclusion of UCS from participation on the only other remanded issue -- training -- Licensee has chosen not to move to exclude UCS from participation on the training issue. Id. at 22, n.11. On August 17, 1984, UCS filed a

<sup>1/</sup> Licensee's Comments on July 13, 1984 Memorandum and Order on Lead Intervenors and Motion to Partially Exclude UCS from Participation in the Management Remand, July 31, 1984 (Licensee's Motion).

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response opposing Licensee's Motion.<sup>2/</sup> For the reasons set forth below, the Staff opposes Licensee's motion.

## II. DISCUSSION

Licensee argues that UCS is not entitled to participate as a matter of right in the remanded proceeding on the issues of the Dieckamp mailgram and TMI-1 leak rates because UCS deliberately chose not to participate on management issues originally, and consequently UCS has defaulted. Licensee's Motion at 14-20. Licensee recognizes, however, that the Licensing Board has discretion to permit UCS to participate in the litigation of those issues. Id. at 20. Licensee argues, though, that the Board should decide not to allow UCS to participate on these issues because the five factors for evaluation of late intervention (see 10 C.F.R. § 2.714(a)(1))<sup>3/</sup>, in Licensee's view, all weigh against UCS' participation. Licensee's Motion at 20-26.

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<sup>2/</sup> Union of Concerned Scientists' Response to GPU Comments on July 13, 1983 (sic) Memorandum and Order on Lead Intervenors and Motion to Partially Exclude UCS from Participation in the Management Remand, August 17, 1984 (UCS' Response to Licensee's Motion).

<sup>3/</sup> The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1).

The Staff does not disagree with Licensee's legal argument that UCS does not have a right to participate in the remanded issues of the Dieckamp mailgram and TMI-1 leak rates. In fact, in response to a request by UCS to participate in a presentation to the Commission by the parties to the management phase of the proceeding regarding Licensee's June 10, 1983 management organization proposal, the Commission ruled that UCS "has forfeited its right to participate as a party on management issues." Order (unpublished), December 2, 1983.<sup>4/</sup> However, the Commission, in its discretion, allowed UCS to participate in the meeting as an amicus. Id. Consequently, the only remaining issue presented by Licensee's Motion is whether the Licensing Board should allow UCS to participate in the Dieckamp mailgram and TMI-1 leak rate issues as a matter of discretion. The Staff believes that the Board should permit UCS to participate.

Licensee concedes the Board's authority to permit UCS to participate as a matter of discretion (Licensee's Motion at 20), but argues that each of the five late intervention factors weigh against UCS participation.<sup>5/</sup> The Staff disagrees with Licensee's analysis and

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<sup>4/</sup> See also Order, August 6, 1984, where the Commission repeated this ruling and as a matter of discretion again allowed UCS to participate in an oral presentation to the Commission on management issues. UCS filed an undated "Proposed Correction to the Commission's Order of August 6, 1984" disagreeing with that ruling and arguing that it was participating as a matter of right, not Commission discretion.

<sup>5/</sup> The late intervention factors of 10 C.F.R. § 2.714(a)(1) are not strictly applicable to the issue raised by Licensee's Motion since UCS has not petitioned to intervene late, but rather seeks to participate in the litigation of issues in a proceeding (TMI-1 restart) to which UCS unarguably already is a party but on which UCS, according to Licensee, has not previously participated. Nevertheless, assuming arguendo that UCS has not participated at all on the two issues involved, the Staff believes that the late intervention factors provide useful guidance in the Board's determination of whether to allow UCS to participate as a matter of discretion.

believes that a Licensing Board decision allowing UCS to participate, as a matter of discretion, on the two issues involved can be amply supported by a balancing of the five factors. For example, Licensee argues that UCS has not shown good cause for its failure to participate in the management phase earlier. Until UCS' Response to Licensee's Motion, however, UCS had not attempted to show good cause because it never had been asked to do so. In fact, UCS has been participating on management issues since at least August, 1982. See "Union of Concerned Scientists Exceptions to Partial Initial Decision (Reopened Proceeding), July 27, 1982," August 20, 1982. Furthermore, some of UCS' submissions since that time have addressed the Dieckamp Mailgram issue (Union of Concerned Scientist's Comments on List of Integrity Issues in Restart Proceeding, February 21, 1984 at 8) and the TMI-1 leak rate issue (Union of Concerned Scientists' Support of Aamodt Motion to Reopen Record on Unit 1 Leak Rate Falsification, February 9, 1984).

Also, based on UCS' active participation on other issues in this restart proceeding, UCS reasonably can be expected to assist in developing a sound record on the two issues involved. While UCS will not have lead intervenor status on those two issues, its experience in NRC proceedings can be expected to assist the other, much less experienced and largely pro se intervenors.

In addition, UCS participation on the two issues involved will not broaden the issues, since their scope already has been determined by the Board's July 9, 1984 Prehearing Conference Order. Neither will UCS' participation likely delay the proceeding on the two issues since, as noted above, UCS does not have lead intervenor status on those issues.

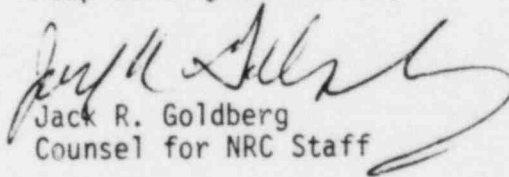
Consequently, UCS would have to obtain leave of the Board to proceed separately on those issues. Memorandum and Order on Lead Intervenors, July 13, 1984, at 1-2. Furthermore, UCS' assistance to the other less experienced intervenors may actually focus and shorten the intervenors' presentation and cross-examination on those issues.

In summary, Licensee's argument that each of the late intervention factors weighs against UCS participation is not correct, and the Licensing Board can allow UCS to participate based on an analysis of the late intervention factors.

### III. CONCLUSION

The Commission has ruled that UCS has forfeited its right to participate as a party on management issues, but the Licensing Board has discretion to permit UCS to participate in the management remand. The Staff believes that the Licensing Board should allow UCS to participate on the issues involving the Dieckamp mailgram and TMI-1 leak rate testing. Licensee's motion to partially exclude UCS should be denied.

Respectfully submitted,

  
Jack R. Goldberg  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 27th day of August, 1984.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO LICENSEE'S MOTION TO PARTIALLY EXCLUDE UCS FROM PARTICIPATION IN THE MANAGEMENT REMAND" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 27th day of August, 1984:

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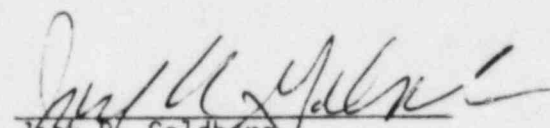
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