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UNCLASSIFIED CORRESPONDENCE

May 13, 1986



U.S. NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of : Docket No. 50-289 OLA-1  
GPU Nuclear Corporation, : 50-289 OLA-2  
(Three Mile Island Nuclear Station, : (Steam Generator Plugging  
Unit No. 1) : Criteria)

COMMONWEALTH OF PENNSYLVANIA'S MEMORANDUM  
ON LICENSING BOARD QUESTION

At a conference called by the Atomic Safety and Licensing Board, held on May 7, 1986, in Bethesda, MD, the Board heard comments on the NRC Staff's response to the Three Mile Island Alert, Inc.'s ("TMIA") request for a six month extension of time to complete discovery in these two consolidated proceedings.

The NRC Staff's response of April 30, 1986, prompted the discussion of further scheduling for this proceeding. The NRC Staff stated that it does not intend to issue its Safety Evaluation Report until the end of July, 1986, and that it intended to issue a Supplemental Safety Evaluation Report at the end of January, 1987, after the Staff had completed analysis of laboratory tests on certain steam generator tubes. The Staff further stated that it had requested GPU Nuclear to remove three tubes from the steam generator during the next fuel outage for these tests. The nature of the tests are more fully described in the Staff's letter dated May 2, 1986 (distributed

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at the conference).

The problem presented by the Staff's statement on the timing of the issuance of the Safety Evaluation Report and the Supplemental Safety Evaluation Report is whether discovery should be restarted, and a hearing scheduled and conducted, before the Staff position (as expressed in the SER and the Supplemental SER) is available. If a hearing were to be conducted and completed prior to the issuance of the Supplemental SER, the Staff has suggested that intervenor TMIA would be required to petition to reopen the proceeding in order to litigate any matter related to the tests on the pulled tubes.

At the conclusion of the conference, the Board requested the parties to the proceeding to address the following question:

"Whether a Board may issue an initial decision resolving various matters, but deciding therein, as to certain other matters, the Staff is delegated to make its analysis and determination."

Upon evaluation of this new information, the Commonwealth of Pennsylvania believes that the Board cannot schedule this matter for hearing at this time because the litigants do not know the final Staff position and do not have available the Staff's analysis in the SER and Supplemental SER. The Commonwealth believes that adoption of an expedited hearing schedule at this time would severely curtail the parties' right to submit and challenge evidence on material issues, and would unfairly compromise the hearing process.

This issue has been raised previously in other cases before the

Commission. As the Staff notes, in Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861 (1973), the ASLB imposed certain conditions on the grant of the license, specifically directing the Staff to determine the limitation of the first core residence times for each unit. On appeal, the Licensing Board's resolution of this open issue was affirmed in part by the Appeal Board. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226 8 AEC 381, 408 (1974). Although the Appeal Board was troubled by the broad grant of discretion to the Staff, and framed a narrower grant of discretion to the Staff, it decided that under the circumstances, the Board could leave the particular specification to the decision of the Staff. The Appeal Board noted, however, that "as a general proposition, contested issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution," citing Consolidated Edison Co. (Indian Point Station, Unit No. 2) CLI-74-23, 7 AEC 947, 951 (1974).

In Consolidated Edison Co. (Indian Point Station, Unit No. 2) CLI-74-23, 7 AEC 947, 951 (1974), the Commission provided general guidance on the handling open issues. The Commission recognized that in some instances involving unresolved matters, the ASLB may be able to make the requisite findings. However, the Commission cautioned that "the mechanism of post hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license -- including reasonable assurance" and that the post hearing approach should be employed sparingly and only in clear cases. 7 AEC at 951.

More recent cases have also elaborated on this guidance. In Commonwealth Edison Co. (Bryon Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210 (1984), the ASLB addressed the issue in light of contested quality assurance issues before the Board. The Board stated: "When governing statutes or regulations require a licensing board to make particular findings before granting an applicant's request, a board may not delegate its obligations to the staff," citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 737 (1975). The Board went on to state: "The Staff appears to think the Board can delegate to it the responsibility of deciding the essence of the issues raised by the contention on quality assurance. We, however, do not think so." Id. The Licensing Board's opinion on this issue was affirmed by the Appeal Board, which remanded the matter to same Licensing Board to complete its adjudication. Commonwealth Edison Co. (Bryon Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984).

In Long Island Lighting Co. (Shoreham Nuclear Station, Unit 1), ALAB-788, 20 NRC 1102 (1984), the Licensing Board had left unresolved two safety issues. With respect to one (a generic issue on current safety criteria), the Licensing Board determined that the issue was not directly related to the plant's safety, and could be left open for future resolution. The Appeal Board affirmed this conclusion. With respect to the other (the possibility of control system failures at the plant), the Appeal Board reversed the Licensing Board's proposed

deference to the Staff and remanded to the issue to the Licensing Board for further proceeding. The Appeal Board noted that in depth studies had not been performed to verify the staff's expectation in connection with the issue and that the intervenor (Suffolk County) was entitled to test the basis of any conclusion regarding the issue. 20 NRC at 1137.

When the question of post hearing resolution of material issues was presented in a court case, the Court of Appeals took a different look at the issue. In Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985), the Court of Appeals struck down the Commission amendment to its rule on emergency preparedness, which amendment would have allowed emergency exercises to be conducted in the "post-adjudicatory phase of licensing." The Court's opinion was based on the literal language of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a), which provides that in a proceeding for the granting, suspending, revoking, or amending of a license, the Commission must grant a hearing upon the request of any affected person. In rejecting the Commission's position that emergency exercises could be handled through post hearing procedures (via a motion to reopen the proceeding, if a significant safety defect were identified), the Court noted that the Commission's power to grant this discretionary proceeding could not be squared with the fullfledged hearing requirement of Section 189(a). 735 F.2d at 1444. In construing Section 189(a), the Court held that Commission's hearing process could not be limited so as to eliminate

from the hearing any material issues. 735 F.2d at 1447-48. The Court's decision therefore appears to foreclose the suggestion that the hearing in this proceeding be held before the Supplemental SER is completed, with the proviso that TMIA may file a petition for reopening the record after the Supplemental SER has been completed.\*

The Commonwealth of Pennsylvania believes it premature for this Board to decide whether to engage in the post hearing resolution of any issue at this time. The Union of Concerned Scientists decision certainly does not prohibit all post hearing activity. However, at this stage of the proceeding, the Staff has not issued its Safety Evaluation Report, and the parties do not know what it will state or not state. Although the Staff has attempted to assure the parties that the SER will not support any of the intervenor's contentions, the parties have no concrete evidence of the formal and final position of the Staff. Furthermore it cannot be determined at this time to what extent the SER or Supplemental SER will address the admitted contentions.

The Commonwealth also believes that it is premature to conduct discovery before the issuance of the SER. Until the parties have a clear statement by the Staff on how it has analyzed the safety issues, it would be wasteful of the parties' efforts to engage in speculation

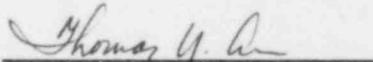
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\* The Court's decision does not preclude the Board from holding a supplementary hearing on the matters raised by the Supplemental SER. See 735 F.2d at 1447, 1448 n.19.

on the safety analysis.

The Commonwealth recognizes that truly minor matters may be left to post hearing resolution. At this stage of the proceeding, the parties do not know whether the tests required by the NRC Staff are truly insignificant, as characterized by the Staff's "confirmatory" labelling, or are an indication of a material safety issue. Common sense dictates that the Board should not prejudge a matter which may affect the ultimate outcome of this proceeding at this early stage. It is imperative to give all the parties sufficient time to examine the Staff's SER to determine whether the Staff conclusions and assumptions, as stated in the SER, are supportable. For this reason the Commonwealth supports TMIA's motion for an extension of time to complete discovery.

Respectfully submitted,



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of

METROPOLITAN EDISON COMPANY, : Docket No. 50-289 OLA  
et al. : (Steam Generator  
 : Plugging Criteria)  
(Three Mile Island Nuclear :  
Station, Unit No. 1) : ASLBP No. 86-520-01 OLA

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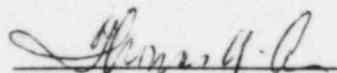
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