UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of the Application of Public Service Company of Oklahoma, Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative (Black Fox Station, Units 1 and 2)	)	Docket Nos. STN 50-556 STN 50-557

RESPONSE OF INTERESTED STATE OF OKLAHOMA TO APPLICANTS' MOTION FOR COMMISSION ACTION

COMES NOW the State of Oklahoma (Oklahoma), participant in the above-captioned proceeding as an Interested State pursuant to 10 CFR, § 2.715(c), and makes response to the MOTION FOR COMMISSION ACTION filed by Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electrical Cooperative (hereinafter referred to collectively as Applicants).

I. COMMISSION AUTHORITY TO CONTROL ACTIONS AND POLICY OF THE AGENCY.

Oklahoma agrees with Applicants that the Commission has recognized its inherent authority, apart from 10 CFR 2.786(a), to maintain supervision over the conduct of the agency's adjudicatory proceedings through interlocutory guidance. In the Clinch River case[1], the Commission acted to correct what it perceived to be a fundamental error in

the Licensing Board's ruling. The Commission held that the ruling of the Licensing Board in that case, which the Appeal Board declined to review and which involved the appropriate scope of review by the NRC of another federal agency's Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, raised important policy issues, and, because the lower decision was found erroneous, was productive only of unwarranted delay as well as being offensive to Congressionally established allocation of authority among federal agencies. The Commission stated:

> "... While 10 CFR 2.786(a) states the ordinary practice for review, it does not--and could not--interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this Commission, including the authority to step in and rule on the admissibility of a contention before a Licensing Board. See Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), 6AEC 995 (1973), petition for review dismissed sub nom. Ecology Action v. AEC, 492 F.2d 998 (C.A. 2, 1974). See also, Consolidated Edison Co. (Indian Point Station, Units 1, 2, and 3), 2 NRC 173 (1975). A contrary view could severly dislocate the adjudicatory process within this agency and would imply a delegation of authority by the Commission difficult to justify."/2

Similarly, in the Seabrook Station decision[3], the Commission rejected a contention that the Commission should defer decision on two issues identified by the Commission until after the Licensing Board had an opportunity, with

the benefit of the parties, to frame the issues consistently with the facts. In ruling that the issues had "obvious" significance warranting Commission review[4], the Commission stated:

> "Counsel's first argument proceeds from a judicial analogy which has only partial application in our licensing proceedings. While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the Nuclear Regulatory Commission is not a court constrained to the "passive virtues" of judicial action, which can afford in every instance to wait for the better-framed issue or fully developed argumentation. We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings. Nor can we regard the proceedings of our appellate and hearing tribunals with the detachment the Supreme Court may bring to trial and intermediate appellate action; the analogy is imperfect. Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal--subject only to the constraints of action on the record and reasoned explanation of the conclusions--constraints imposed on all agencies by the Congress." (Emphasis added)/5

The Commission went on to add that:

> "... The questions are not fact-dependent, and resolution of them now could materially shorten these proceedings and guide the conduct of other pending proceedings."/6

In summary, therefore, Oklahoma submits interlocutory action has been granted by the Commission in the past concerning issues not first reviewed by the Licensing Board when (1) the issues were not fact dependent, (2) the issues involved were significant and warranted Commission revew, (3) settlement of the issues involved would result in the avoidance of unnecessary delay or excessive inquiry in a licensing proceeding and, (4) it would provide a guide to the conduct of other pending proceedings.

II. IDENTIFICATION OF ISSUES BEFORE THE COMMISSION.

Applicants request by Motion that the Commission grant them three things through issuance of an Order:

> "which (i) rejects the demand of the President's Commission on the accident at Three Mile Island (hereinafter referred to as the "Kemeny Commission") to call a nuclear licensing moratorium, (ii) adopts the NRC Staff's recommendation to resume licensing based on the implementation of the Three Mile Island-related licensing requirements set forth in Mr. Denton's memorandun of August 20, 1979, and (iii) directs the Atomic Safety and Licensing Board ("Licensing Board") to grant Applicants' motion to reopen the hearing record to consider Three Mile Island ("TMI") issues pertinent to the Black Fox application on the basis of a reasonable schedule."/7

Oklahoma respectfully submits that Applicants' Motion fundamentally raises but two issues:

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(1) Should all pending applications for Construction Permits be required to address relevant safety and environmental issues raised as the result of the accident at Three Mile Island, Unit 2 (TMI-2)?

(2) If so, what is the proper scope for review at the Construction Permit stage for said relevant safety and environmental issues raised by the accident at TMI-2?

Applicants' brief provides an adequate discussion of the procedural back-ground of the instant case.[8] As reflected in said recital of the procedural background, the applicant filed a request on August 11, 1979, to re-open the record and made at the same time a motion to establish a hearing schedule. Oklahoma responded to said request/motion that it, too, believed it was in the public interest that the record in the Construction Permit phase of the licensing process should be re-opened to supplement the record on issues raised by the TMI-2 accident.[9] Before Staff had an opportunity to respond to the Applicant's motion, the Kemeny Commission incident occurred and the Staff has requested continuances for making said response since that time.

Therefore, the first question before the Commission is identical to the one placed before the Licensing Board: should the pending application for a Construction Permit be required to address relevant safety and environmental issues raised as a consequence of the TMI-2 accident? As

of this date, Applicants, Intervenors and Oklahoma have agreed before the Licensing Board that it is in the Public Interest that the instant application should address such issues. It is submitted that this preliminary issue is of the type the Commission has granted interlocutory advice upon in the past. Whether the public interest requires discussion of relevant TMI-2-raised safety and environmental issues before a Construction Permit is issued is not a question of fact but of policy. Said issue is significant because it involves the adequacy of safety and environmental review of the instant application. Settlement of the issue would indicate whether delay was necessary in order to promote an adequate inquiry of safety and environmental issues in the instant application. Finally, the importance of the issue transcends the instant case and would provide guidance to all proceedings currently pending involving applications for Construction Permits.

Oklahoma would submit that the Public Interest requires discussion of relevant safety and environmental issues at the Construction Permit phase of issues raised as a consequence of the TMI-2 accident. The accident has been characterized by NRC Staff reviewers as "the most severe accident in U.S. commercial nuclear power plant operating history."[10] The accident precipitated the existing, unprecedented moritorium on issuing new operating and construction licenses.

The Lessons Learned Task Force has characterized the accident "Class 9,"[11] a fact significant in itself due to the Commission's present policy concerning siting and design requirements. Certain short-term tasks have been identified by NRC Staff as appropriate construction permit and operating license standards.[12] Oklahoma would submit that these facts suggest relevant safety and environmental issues have been and will be identified in the course of the investigation of the TMI-2 accident and should be addressed in all applications for new Construction Permits.

The second issue placed before the Commission by Applicants is the proper scope of additional Construction Permit review that is required before the permit can be issued. Applicants apparently assert that sufficient investigation has been conducted as of August 11, 1979, to justify re-opening of the hearing record. They state that each day of delay past July 2, 1979, increases the ultimate cost of Black Fox Station by $251,000, assuming that a Construction Permit would have been authorized to them by the Licensing Board by that date had the TMI-2 accident not intervened. It was concerning the scope of required further hearings that Applicants and Oklahoma disagreed in reference to Applicants' motion before the Licensing Board of August 11, 1979. Applicants contended below that issues were identified, commitments by the Companies had been made, and, therefore,

hearings should be scheduled without further delay. Oklahoma responded that the scheduling criteria set forth by the Appeal Board in the Douglas Point case[13] had not been satisfied. As that opinion stated:

> "... the absence of any rigid scheduling criteria established by statute or regulation suggests that the adjudicatory boards were to decide for themselves in such circumstances when hearings should be held on specific issues. It seems to us that a variety of factors appropriately should be taken into account in reaching that decision. Principal among them are: (1) the degree of likelihood that any early findings on the issue(s) would retain their validity; (2) the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issue(s); and (3) the extent to which the hearing of the issue(s) at an early stage would, particularly if the issue(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants."/14

We noted that Lessons Learned Task Force's Introduction to NUREG-0578 stated the possibility existed that the recommendations made therein could be displaced as the result of more comprehensive long-term changes in nuclear regulation.[15] The Task Force went on to say in the same document that issues to be examined in their Long Term Recommendations Study were "inextricably tied" to fundamental policy questions.[16] They stated the fundamental policy decisions should be made in conjunction with the Kemeny and

Rogovin studies.[17] We reasoned that because the studies were expected to discuss issues of a more long-term significance, and because all the reports were expected within a relatively short time, scheduling of hearings should await the issuance of the Long Term Recommendations of the Lessons Learned Task Force[18], the Kemeny Report[19] and the Rogovin Special Inquiry Report[20]. We argued that there was little advantage to be gained by having early inconclusive hearings. Should the longer-term studies show that the short-term recommendations were not sufficient to meet future regulatory requirements, all parties would suffer the monetary and procedural burden of re-trying issues; a burden made more pernicious by the fact that re-litigation can be avoided by awaiting the long-term studies.

Applicants indicate that the cost of Black Fox Station increases $251,000 each day the construction is delayed past July 2, 1979. Hearings within the near-term on short-term TMI-2 issues would not provide relief from the daily increase in cost unless they constitute the only barrier to the issuance of the Construction Permit. It is submitted that Applicants have not made a showing that the Construction Permit will be, or should be, issued on the strength of the commitments to short-term recommendations alone.[21]

Oklahoma respectfully submits that it is not in the public interest to confine the safety and environmental

issues raised as a consequence of the TMI-2 accident and required to be addressed before the issuance of a Construction Permit to only the short-term recommendations identified by Mr. Denton in his August 20, 1979, memorandum to the Commission concerning licensing. Such action, although it would pave the way for decision on the Construction Permit, would certainly have to be amended at some future point in time in order for Applicants to be subject to the same regulatory criteria as other new construction applicants who presently have their permits pending. Oklahoma does not believe that such action, limiting the eventual necessary issues, was recommended by Mr. Denton's memorandum.

Oklahoma considers significant the fact that the Lessons Learned Task Force considers TMI-2 to have been a Class 9 accident[22] and expects the Task Force to report in their long-term study relative to the significance of this fact on siting considerations.[23] Also significant are the statements by both the Lessons Learned Task Force[24] and the I & E investigators[25] that full assessment of all the causes of the TMI-2 accident should await completion of the Kemeny and Rogovin studies. Oklahoma respectfully requests the Commission to deny the relief requested by Applicants for the reason that the Public Interest requires an adequate resolution of TMI-2 accident issues before the Construction Permit can be issued, and that the short-term recommendations,

presently identified, are not in and of themselves sufficient for this purpose.

III. HEARINGS SCHEDULE.

Oklahoma respectfully submits to the Commission that Applicants' request for the Commission to schedule hearings does not conform with the past practices of the agency. As the portion of the Douglas Point decision quoted above clearly states:

> "the absence of any strict scheduling criteria established by statute or regulation suggests that the adjudicatory boards were to decide for themselves in such circumstances when hearings should be held on specific issues. . . ."/26

Such a policy recognizes that settling dates for scheduling is a problem not only for the various parties, but for the Licensing Board itself. Furthermore, specific scheduling of hearings is not an action the Commission normally settles by way of interlocutory relief.[27]

CONCLUSION

Oklahoma submits that two fundamental issues have been placed before the Commission by the instant Motion of the Applicants. Oklahoma further submits that the first issue, whether Construction Permit applications should address safety and environmental issues raised by the accident at TMI-2, should be answered in the affirmative. Similarly, Oklahoma

submits that the Commission should find that proper resolution of TMI-2 issues in the Construction Permit phase, requires more than merely the examination of the short-term recommendations before a Construction Permit should issue, but should in addition incorporate recommendations that will result from longer-term studies such as the Long Term Lessons Learned Recommendations of the Lessons Learned Task Force, the report of the NRC Special Inquiry and the Kemeny Commission report. Finally, Oklahoma would submit the Commission should not entertain Applicants' request for an order scheduling further hearings but should defer hearings scheduling matters to the Licensing Board consistant with past practices of the agency.

Respectfully submitted,

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ENDNOTES

[1]United States Energy Research and Development Administration Project Management Corporation (Clinch River Breeder Reacter Plant), CLI-76-13, 4 NRC 67 (1976).

[2]Id., at 75-76.

[3]Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503 (1977).

[4]Id., at 515.

[5]Id., at 516.

[6]Id., at 517.

[7]Motion For Commission Action, (September 5, 1979), p. 1.

[8]Id., pp. 2-7.

[9]Oklahoma at the same time opposed scheduling hearings on the basis that issues were not yet identified. (See discussion at pp. 7, 8, 9, infra.

[10]NUREG-0600 Forward

[11]"NRC Staff Response to Board Question No. 4 Regarding the Occurrence of a Class 9 Accident at Three Mile Island," Attachment, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit No. 1) Docket No. 50-272.

[12]Memorandum From H. Denton to Commissioners, August 20, 1979, "RESUMPTION OF LICENSING REVIEWS FOR NUCLEAR POWER PLANTS."

[13]Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2) ALAB-277, 1 NRC 539 (1975).

[14]Id., at 547.

[15]NUREG-0578, at 3.

> "The decision-making process followed by the Task Force in determining which safety issues required short-term licensing action versus those that could be deferred for further evaluation by the Task Force or others, was based

upon engineering evaluation and qualitative professional judgment of the safety significance of the various issues. In this regard, the Task Force has selected items for "short-term action" if their implementation would provide substantial, additional protection required for the public health and safety. Our recommendations for short-term action are prompt, specific, and safety significant in their character and are not likely to be overturned or contradicted by continuing studies or investigations. Some of them may eventually be displaced, however, by more comprehensive long term changes in nuclear power plant regulation. In some cases, an immediate action may not be amenable to precise description on the basis of information or analyses developed to date; however, the item has been judged by the Task Force to be of sufficient safety significance to require an immediate commitment to get studies or testing underway. In this case the recommended action is to obtain a 'short-term commitment' for a longer term modification, study, or test by affected licensees." (Emphasis added)

[16]Id., at 4.

[17]Ibid.

[18]The Task Force apparently believed the report would be available by September 1, 1979. NUREG-0578, p. 4. Events have shown that estimate to have been ambitious.

[19]According to the Executive Order establishing the Commission, the final report is legally due not later than six months from the date of its first meeting. 44 Fed. Reg. 22027, 22028. The due date has been calculated to be October 25, 1979.

[20]When the Special Inquiry was established, it was contemplated that six months would be necessary for conducting the inquiry. 44 Fed.Reg. 35065.

[21] It is, of course, Applicants' burden, as movant, to prove that the actions requested are in the public interest and should be granted. 10 CFR, § 2.731.

[22] See note 11 above.

[23] MEMORANDUM FOR: All Licensing and Appeal Boards, Post Three Mile Island Task Force. June 6, 1979.

[24] Status Report and Short Term Recommendations, NUREG-0578, p. 4.

[25] Investigation Into the March 28, 1979, Three Mile Island Accident BY Office of Inspection and Enforcement, Forward, NUREG-0600.

[26] 1 NRC, at 547.

[27] See discussion, Part I, supra.