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October 10, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S OPPOSITION TO MOTION BY PANE
TO MODIFY MEMORANDUM AND ORDER
RULING ON PETITIONS AND SETTING
SPECIAL PREHEARING CONFERENCE

In its August 9, 1979 Order and Notice of Hearing, the Nuclear Regulatory Commission, stating that it had not determined whether psychological distress issues could legally be relevant to this proceeding, called for "[a]ny party wishing to raise such subjects as contentions" to "brief the Atomic Energy Act and National Environmental Policy Act issues he believes appropriate to the [Atomic Safety and Licensing] Board as part of the contention acceptance process set out in the Commission's regulations. The Board should then certify such issues to the Commission for final decision prior to the issuance of its prehearing conference order pursuant to 10 CFR 2.752(c), either with or without its recommendation on such issues, as it deems appropriate under the circumstances." 44 Fed. Reg. 47821, 47824 (August 15, 1979)(emphasis added). Implementing this Commission directive, the Licensing Board, in

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its September 21, 1979 Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference, directed that the briefs required by the Commission's Order should accompany the final contentions called for by October 22, 1979. The Licensing Board requested, "so that we may make appropriate recommendations to the Commission", Memorandum and Order at 24, that "any party or petitioner seeking to litigate psychological issues * * * submit a preliminary plan for the presentation of psychological distress evidence." The Board noted that "a discussion of the state of the art of stress psychology and whether it can produce reliable evidence on the subject at hand" would be of "particular value." Id.

Petitioner People Against Nuclear Energy [PANE] has moved the Board to modify its order and "delete its demand for the discussion of the state of the art of stress psychology and a plan for presentation of psychological distress evidence." People Against Nuclear Energy Motion to Modify Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference, dated October 1, 1979, at 2. PANE asserts that neither the plan for presentation of psychological distress evidence nor the state of the art of stress psychology "is relevant to the legal issue of whether psychological distress evidence may be considered in this proceeding" and argues that the "Licensing Board's requirement that they be provided as a condition of being granted standing to intervene is beyond the

scope of the Commission's Order and the NRC's regulations governing intervention." Id. at 2-3 (emphasis added). In the view of PANE, "the real question here is whether PANE's interest in protecting the psychological health of its members and their community is within the zone of interests protected by the AEA or NEPA." Id.

Licensee opposes PANE's motion for modification. That motion is founded on a misapprehension of the nature of the issue before the Licensing Board and a misunderstanding of the Commission's rules governing intervention. In our view, the Licensing Board's request for briefing on the designated issues is eminently sensible, properly implements the Commission's directive to the Licensing Board, and is in full compliance with Commission regulations. Accordingly, PANE's motion for modification should be denied.

The issue here, contrary to PANE's apparent impression, is not "standing" in the "zone of interests" sense. The Licensing Board has held, and Licensee agrees, that PANE satisfies the "interest" and "aspects" requirements of § 2.714(a)(2). Rather, the question to be determined is whether a "psychological distress" contention is cognizable in this proceeding.

The Commission's Order clearly indicates that the Commission has not yet determined whether psychological distress issues are cognizable in this proceeding and that it desires to make such a determination at an early stage. In

directing that the Licensing Board call for briefing "as part of the contention acceptance process" and certify the record "either with or without its recommendation on such issues, as it deems appropriate," the Commission confided discretion in the Licensing Board to request information it deemed reasonably relevant to the issues and to the Licensing Board's possible recommendation on those issues.

Licensee simply cannot agree with PANE's unsupported assertion that the information requested by the Licensing Board is irrelevant to the task explicitly assigned to the Licensing Board by the Commission. Even the most cursory examination of the NEPA case law reveals that the courts have refused to require agencies to consider factors which "do not seem to lend themselves to the detailed analysis required under NEPA for a § 102(C) impact statement," i.e., those factors which "are not readily translatable into concrete measuring rods."

Maryland-National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029, 1038 (D.C. Cir. 1973)(Leventhal, J.), quoting Hanly v. Kleindienst, 471 F.2d 823, 833 n.10 (2d Cir. 1972), cert. denied, 426 U.S. 936 (1974). Indeed, the leading case in this area arose specifically in the context of alleged psychological effects:

It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement.

Hanly v. Kleindienst, supra, 471 F.2d at 833 (note omitted).

As the Second Circuit further explained,

Unlike factors such as noise, which can be related to decibels and units which measure duration, or crime, in which crime statistics are available, psychological factors are not readily translatable into concrete measuring rods.

Id. at 833 n.10. See also First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1380 n.13 (7th Cir. 1973).

Given these clear indications by the U.S. Courts of Appeal for the District of Columbia, Second, and Seventh Circuits that psychological factors are not cognizable under NEPA, at least in part because such factors are not susceptible to measurement or objective proof, the Licensing Board can hardly be faulted for requesting that petitioners seeking to raise psychological distress issues in this proceeding address the fundamental questions of whether and how psychological distress can be measured and proved in an adjudicatory setting. Contrary to petitioner's assertion, the answers to such questions are not only relevant to the legal issues now before this Board, but the failure of petitioners to establish affirmatively that psychological distress is susceptible to legally satisfactory measurement and proof should, under governing legal precedents, terminate the Board's inquiry into the cognizability of psychological distress issues.

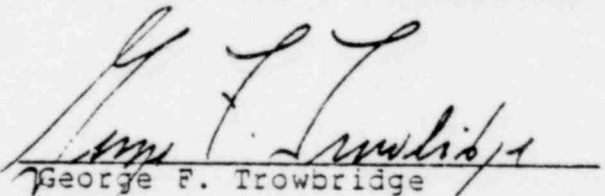
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The Licensing Board has made abundantly clear that it is seeking neither to require PANE to prove its case as a condition of being allowed to intervene nor to bind any party to a final approach to litigating the issue. Rather, the Board is requesting briefing on matters potentially dispositive of the legal decision before it: whether psychological issues are cognizable in this proceeding. In requesting briefing on the designated issues, the Board is simply applying the regulatory requirements of § 2.714(b) and implementing, with commendable foresight, the mandate clearly assigned to it by the Commission. The Board's Memorandum and Order is thus appropriate and proper. PANE's Motion to Modify should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:


George F. Trowbridge

Dated: October 10, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

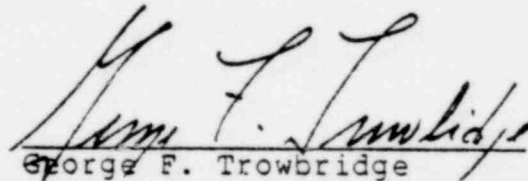
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of
"Licensee's Opposition to Motion by PANE to Modify Memorandum
and Order Ruling on Petitions and Setting Special Prehearing
Conference," dated October 10, 1979, has been served upon each
of the persons listed on the attached Service List by deposit
in the United States mail, postage prepaid, this 10th day of
October, 1979.


George F. Trowbridge

Dated: October 10, 1979

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Three Mile Island Nuclear Station,)
Unit No. 1))

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