October 31, 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
	)	(Restart)
(Three Mile Island Nuclear Station, Unit No. 1)	)	
	)	

LICENSEE'S BRIEF ON THE ISSUE OF PREPARING AN FES PRIOR TO TMI-1 RESTART

Some of the petitioning parties in the above-captioned proceeding have raised contentions requesting the preparation of a Final Environmental Statement ("FES") prior to the restart of TMI-1.[1/] Because the restart of TMI-1, as distinct from the initial licensing of the facility, does not involve a "major Federal action significantly affecting the quality of the human environment" (National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976)), Licensee finds no need for preparation of an FES, and requests the Licensing Board to so rule.

A. Existing Environmental Reviews of TMI-1

To appreciate the context in which this restart proceeding is taking place, it is necessary to briefly retrace the

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1/ See Chesapeake Energy Alliance, Inc., Amended Contention No. 1; Steven C. Sholly, Final Contention No. 12; Three Mile Island Alert, Inc., Revised Contention No. 8.

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initial licensing of TMI-1.[2/] The application for a contruction permit for Unit 1 (Docket No. 50-289) was filed on May 3, 1967. A public hearing before the Atomic Safety and Licensing Board was held on April 10 and 11, 1968; the hearings were uncontested, and a construction permit was granted on May 18, 1968 (CPPR-40). Since the construction permit antedates the National Environmental Policy Act of 1969 ("NEPA"), no environmental impact statement was prepared in connection with the construction permit proceedings.

The operating license application for Unit 1 was filed with the AEC on March 2, 1970. By letter dated July 15, 1970, the AEC informed Licensee of the recent enactment of NEPA, and requested that environmental information related to the operation of TMI be submitted. In response, Licensee filed its Environmental Report Operating License Stage on October 1, 1970. This environmental report was transmitted for comment by the AEC to other federal and state agencies on October 26, 1970. Notice of availability of the environmental report was subsequently published in the Federal Register (see 35 Fed. Reg. 17138 (November 6, 1970)). On June 14, 1971, Licensee replied to the comments made by the federal and state agencies.

On September 9, 1971, the AEC, in response to the decision in Calvert Cliffs' Coordinating Committee, Inc. v.

2/ Much of the following discussion is taken from the Final Environmental Statement Related to Operation of Three Mile Island Nuclear Station, Units 1 and 2 (December 1972) and Final Supplement to the Final Environmental Statement Related to Operation of Three Mile Island Nuclear Station, Unit 2 (December 1976) (NUREG-0112).

AEC, 449 F.2d 1109 (D.C. Cir. 1971), published in the Federal Register a revised Appendix D to 10 C.F.R. Part 50 (36 Fed. Reg. 18071). Paragraph C(1) of revised Appendix D required holders of construction permits issued prior to January 1, 1970, but for which neither an operating license nor an opportunity for a public hearing on the operating license had been issued before October 31, 1971, to furnish to the AEC a supplemental environmental report covering certain environmental material not previously submitted to the AEC.[3/] On December 10, 1971, Licensee submitted a revised environmental report, superseding in its entirety the October 1, 1970 report. Notice of the availability of this revised environmental report was published in the Federal Register (see 37 Fed. Reg. 3661 (February 18, 1972)). In March 1972 Amendment No. 1 to the revised environmental re-

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3/ Paragraph E(3) of the revised Appendix D also required Licensee to submit a written statement of reasons why, with respect to the criteria in Paragraph E(2), its construction permits for TMI should not be suspended, in whole or in part, pending completion of the NEPA review. On October 19, 1971, Licensee submitted a written statement pursuant to Paragraph E; additional information was transmitted on November 4, 1971.

By an order to show cause dated November 29, 1971, the AEC's Director of Regulation determined that construction activities involving the off-site portion of transmission lines for Unit 2 should be suspended pending completion of the NEPA review, but none of the other construction activities for either Units 1 or 2 need be suspended (see 36 Fed. Reg. 23264 (December 7, 1971)). On December 28, 1971, Licensee filed an answer requesting that the order to show cause be reconsidered. Subsequently, on February 7, 1972, the show cause order was modified so as to provide for the suspension of construction activities involving the off-site portion of only one of the TMI-2 transmission lines. Notice of this determination and an opportunity to request a hearing on the matter was published in the Federal Register (see 37 Fed. Reg. 3376 (February 15, 1972)). No hearing was requested by any person.

port was submitted and Supplement No. 1 was filed in August 1972.

The AEC issued a Draft Environmental Statement ("DES") for operation of TMI Units 1 and 2 in June 1972 (see 37 Fed. Reg. 12513 (June 24, 1972)). Following circulation of the DES for comments, the AEC issued a Final Environmental Statement ("FES") in December 1972 (see 37 Fed. Reg. 26144 (December 8, 1972)). The FES, reflecting the Staff's review of the NEPA environmental issues, recommended the continuation of construction permit CPPR-40 and the issuance of a full-term operating license. A notice of hearing on the TMI-1 operating license was issued on July 7, 1972 (see 37 Fed. Reg. 13360). Operating license DPR-50 was issued for TMI-1 on April 19, 1974 (see 39 Fed. Reg. 14623 (April 25, 1974)).[4/]

There is no question but that, at the time the TMI-1 operating license issued, the AEC had completed a full and adequate FES with respect to the issuance of the operating license. This FES considered the need for the facility, including a cost-benefit analysis of various alternatives to the proposed licensing of TMI-1. It also evaluated the environmental impacts from normal plant operation and from postulated accident conditions for the full 40-year term of the license -- i.e., until May 18,

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4/ On April 4, 1974, Licensee filed an application for an operating license for TMI-2. As part of that application, Licensee also filed Supplement No. 2 to its revised environmental report. In view of these circumstances, the NRC Staff determined that the FES previously issued in December 1972 should be updated by issuing a supplemental FES and circulating it for comment. The Final Supplement to the FES (NUREG-0112), which issued in December 1976, thus brings the Staff's environmental reviews of TMI up to date as of December 1976.

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2008. In the normal course of events, it would not be expected that the Commission would update or revise this FES during the 40-year period. The question posed here is whether circumstances related to the restart of TMI-1 require a supplemental FES. Licensee believes not for the reasons stated below.

B. No Changed Circumstances Require Supplementation of the TMI-1 FES

On July 2, 1979, the Commission suspended Licensee's authority to operate TMI-1. The bases for that immediately effective suspension were detailed in a subsequent Order and Notice of Hearing dated August 9, 1979. Pursuant to that order, this Licensing Board was convened for the purpose of taking evidence on, and issuing a recommended decision with respect to, the necessity and sufficiency of the Staff's recommendations to resolve the concerns identified by the Commission as the bases for suspension of TMI-1 operations. In these circumstances, resolution of the concerns identified by the Commission as its bases for suspension does not constitute a major federal action significantly affecting the quality of the human environment, and a supplemental FES therefore need not be prepared.

The test for determining whether a proposed agency action is one that will trigger a NEPA review is set forth in the leading case of Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). The court there held

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(471 F.2d at 830-31; emphasis added):[5/]

> [I]n deciding whether a major federal action will "significantly" affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change.

The recently promulgated regulations by the Council on Environmental Quality ("CEQ") implementing the provisions of NEPA (see 43 Fed. Reg. 55978-6007 (November 29, 1978)) provide explicit guidance on how to apply this standard when an agency

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5/ Accord: Mont Vernon Preservation Society v. Clements, 415 F. Supp. 141, 147 (D.N.H. 1976); Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650, 653-54 (E.D. Mich. 1976); McDowell v. Schlessinger, 404 F. Supp. 221, 250 (W.D. Mo. 1975); Simmons v. Grant, 370 F. Supp. 5, 15 (S.D. Tex. 1974).

Application of the Hanly test in a setting that is no longer a virgin environment requires an assessment to be made in terms of those adverse environmental effects, if any, that are "in excess" of those presently resulting from existing uses. The approach taken in Julis v. City of Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972), illustrates the importance of analyzing the environmental impact in terms of those impacts that are "in excess" of existing uses. In that case, the court concluded that a proposed widening of a highway from two to four lanes was not a major action significantly affecting the quality of the human environment. Central to this holding was the court's finding that the construction would not create a new highway location nor represent a change in the functional characteristics of the highway. Id. at 90. A similar analysis is appropriate here.

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like the NRC is requested to supplement a preexisting FES. It is there stated (40 C.F.R. § 1502.9(c)(1); emphasis added):

> Agencies shall prepare supplements to either draft or final environmental impact statements if:
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> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
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> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Each of these two factors is discussed below.

1. Restart of TMI-1 involves no substantial change in operations relevant to environmental concerns from those already considered at the operating license stage. Implementation of the NRC Staff's proposed short-term recommendations, followed by restart of TMI-1, does not constitute a substantial change in plant operations relevant to environmental concerns from that already considered and evaluated in the TMI FES. Restart of Unit 1 will not authorize operation of that facility for a longer period of time than already considered in the FES. Nor will restart of Unit 1 result in radioactive releases from that facility greater than those already considered in the FES. To be sure, some of the safety systems and controls at Unit 1 will be modified. But none of those modifications will make plant operation less safe or increase the quantity of releases from the plant; in fact, the exact opposite is true.

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A situation similar to that presented here was raised in Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), LBP-74-57, 8 A.E.C. 176, aff'd, ALAB-231, 8 A.E.C. 633 (1974). In the Pilgrim proceeding Boston Edison sought an operating license amendment authorizing a change in core configuration from 7 x 7 fuel to a configuration utilizing a partial loading of 8 x 8 fuel. Because the licensing board in Pilgrim found that the license amendment would not materially "augment" the adverse environmental effects resulting from operation of the facility with 7 x 7 fuel, it concluded that an FES need not be prepared (see 8 A.E.C. at 184). See also Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 N.R.C. 858, 873 (1975) ("it is at best doubtful that the term 'major' can be reasonably applied to a Commission action which does no more than allow a licensee to turn to a new, and assertedly superior, construction technique in carrying out one limited aspect of the overall process of building a nuclear plant").

Thus, implementation of the Staff's short-term recommendations provides no basis for supplementing the FES.

2. There are no significant circumstances or information related to TMI-1 restart relevant to environmental concerns that were not already considered at the operating license stage. Since the licensing of TMI-1, the only material change in circumstances identified by petitioners is the TMI-2 accident. Without intending to downplay the significance of that event, the lessons

learned from the accident at TMI-2 simply do not involve significant new information relevant to environmental concerns. Petitioners contend, however, that both the environmental impacts from an accident and the psychological distress associated with operation of a nuclear power plant constitute new and relevant information not previously considered. Neither point is well taken.

With respect to the environmental impacts from an accident, the TMI FES identified, considered, and evaluated in the cost-benefit balance accident consequences worse than those associated with the TMI-2 accident. For example, at Table 20, page VI-6, of the TMI FES it was assumed that the radiological consequences at the TMI site boundary from a postulated small break loss-of-coolant accident would be a whole body dose of 80 mrem, and that the radiological consequences from a postulated large break loss-of-coolant accident would be a whole body dose of 600 mrem. By comparison the highest offsite whole body dose from the accident at TMI-2 has been set by one group at 83 mrem (see Ad Hoc Population Dose Assessment Group, Population Dose and Health Impact of the Accident at the Three Mile Island Nuclear Station at 44 (May 10, 1979)) and by another group at 70 mrem (see President's Commission on the Accident at Three Mile Island, Report - The Need for Change: The Legacy of TMI at 34 (October 30, 1979)). Obviously, accidents having offsite consequences of the same order of magnitude as the accident at TMI-2, and accidents with significantly worse consequences, were fully considered during the initial licensin of TMI-1. Thus, there is no need

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now to reevaluate the environmental consequences of such accidents; nor is there a need to restrike any cost-benefit balance.

With respect to the psychological distress associated with operation of a nuclear power plant, Licensee has this date filed a brief in support of its view that such matters are not cognizable under NEPA. See Licensee's Brief Opposing Admission of Psychological Distress Contentions. Therefore, such concerns cannot properly constitute new information which requires the preparation of a supplemental FES.

For the foregoing reasons, Licensee requests the Licensing Board to enter an order rejecting contentions suggesting that there is a need to prepare a supplemental FES prior to the restart of TMI-1.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: George F. Trowbridge
George F. Trowbridge
Robert E. Zahler

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