UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

LICENSEE'S MOTION WITH RESPECT TO PSYCHOLOGICAL HEALTH ISSUE

Licensee moves the Commission to complete as promptly as possible, in response to the Amended Judgment of the United States Court of Appeals for the District of Columbia, (a) the determination as to whether, since the preparation of the original environmental impact statement for Three Mile Island, Unit No. 1 (TMI-1), significant new circumstances or information have arisen with respect to the potential psychological health effects of operating TMI-1, and (b) if the Commission finds that such significant circumstances or information exist, to prepare a supplemental environmental impact statement ("SEIS") which considers the effects of TMI-1 restart on psychological health and the well-being of communities surrounding Three Mile

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Island. The Commission should take such actions without prejudice to, and with full reservation of, the rights of the Commission and of Licensee as Intervenor-Respondent to seek further appellate review of the Amended Judgment of the Court of Appeals. Licensee further moves the Commission, if it finds that such significant circumstances and information exist, itself to decide the matter of TMI-1 restart after the completion of such SEIS without further trial-type hearings. In furtherance of these motions, Licensee also moves the Commission to exercise its authority pursuant to Section 51.4 of its regulations to exempt the TMI-1 restart proceeding from any further trial-type hearing requirements which arguably may be imposed by Section 51.52 of its regulations with respect to the matters covered by the SEIS.

It is Licensee's understanding that the Commission has directed the Staff to proceed with the initial determination required by the Court in its Judgment issued more than four months ago. The Staff's efforts since that time have included the convening of a psychological stress workshop on February 4-5, 1982, attended by representatives of the authors of most of the major studies which have investigated psychological stress impacts since the TMI-2 accident, and the engagement of other expert consultants. The transcript of that workshop and a draft report of that workshop have been available since February 19, 1982. The final report, without substantive

change from the draft, was published as NUREG/CP-0026 in April. The Staff has also been in close touch with the Pennsylvania Department of Health. In addition, the Staff has already offered those parties to the TMI-1 restart proceeding with an interest in the matter an opportunity to provide input to its initial determination and have already met for this purpose with three of the groups representing residents of the TMI area who are intervenors in the TMI-1 restart proceeding. In the event that the Commission determines that significant new circumstances or information have arisen and that a SEIS is required, there will of course be further opportunity for public input and comment on a draft SEIS.

Considerations of public health and safety, as well as considerations of equity and responsible administration of the Atomic Energy Act, require that the procedures employed by the Commission in satisfying the Court's Amended Judgment not result in further delay in the authorization of resumed operation of TMI-1.

The Commission, the Licensee and officials of the Commonwealth have all expressed concern about the potential for slow degradation of TMI-2 containment integrity and equipment capability and for an unexpected release of radioactivity from TMI-2 in the absence of TMI-2 clean-up. As matters now stand, clean-up of TMI-2 is delayed because GPU does not have the funds to proceed with it. Licensee's replacement power costs continue

to run at an average of $14 million a month. The availability of funds allocated for TMI-2 clean-up purposes by the Pennsylvania Public Utility Commission (and expected to be allocated by the New Jersey Board of Public Utilities) in accordance with Governor Thornburgh's proposal is presently contingent upon the return of TMI-1 to service and the concomitant reduction in replacement power charges to customers.

In that light, Licensee urges that the Commission set a firm, early date (June 15, 1982, for example) to make the determination called for by the Amended Judgment. If the Commission determines that a SEIS is required, Licensee urges that the Commission fix a firm, early date (July 15, 1982, for example) for completion of a draft SEIS, and initiation of the circulation and comment process. The CEQ Guidelines encourage Federal agencies to establish time limits (40 C.F.R. § 1501.8) and the background against which this matter is presented and the consequences of further delay make it particularly appropriate that the Commission should do so.

Even if the Commission sets firm deadlines, additional time would be required for the receipt and review of comments on the draft SEIS and publication of a final SEIS. We urge the Commission not to compound the delay in reaching a decision on the resumption of TMI-1 operations by adding a further public trial-type hearing for resolving the psychological health issue to the already lengthy process relating to TMI-1 operations.

Instead, we ask the Commission itself to decide the impact of this issue on TMI-1 operations on the basis of (a) the results of the extensive psychological stress evaluation process relating to TMI-1 operation already underway and (b) comments on the draft SEIS.

We would emphasize again the opportunity already afforded by the Staff for contribution by interested parties to the initial determination directed by the Amended Judgment. Further opportunity for input and comment will be provided if the Commission decides to issue a draft SEIS and final SEIS. Even if the Commission decides that these are unnecessary, it can in its discretion, as it did in connection with the venting of TMI-2 containment, afford an opportunity for comment on its initial determination.

Formal trial-type public hearings would add nothing of value to the Commission's decision-making process commensurate with the impact of delay. Moreover, if, and to the extent that, the Commission determines that significant new circumstances have arisen with respect to potential psychological health effects, Licensee believes that the Commission should conclude that the potential psychological health effects associated with potential delay of TMI-2 clean-up greatly outweigh the potential psychological health effects of restart of TMI-1 after the Commission has made a determination based on an exhaustive record, months of public hearings, detailed findings

by the Licensing Board and the Commission's own review that TMI-1 can be safely operated.

The Commission should also take into account the delays already occasioned by the public trial-type hearings previously mandated by the Commission. It is now over three years since the TMI-2 accident and over 33 months since the Commission issued a notice of hearing on the restart of TMI-1. Resolution of the issue of the NEPA aspects, if any, of psychological health has now been added to the process by the Court of Appeals decision. The Commission should bear in mind that it took the Commission almost ten months after certification of the issue to the Commission by the Licensing Board to announce a 2-2 split on the question of whether psychological stress was cognizable under NEPA or the Atomic Energy Act. The result was a corresponding delay in commencement of the appellate process and a Court of Appeals Judgment which tacked additional requirements onto a restart proceeding that was otherwise essentially complete.

The delays during the appellate process have compounded these problems. PANE took the full 60-day period allowed by the Court's rules before filing its appeal to the Court of Appeals on February 3, 1981. Licensee moved that the Court of Appeals expedite its consideration of that appeal. PANE opposed this motion which was denied by the Court of Appeals. The Court's initial Judgment was not issued until January 7, 1982,

its Amended Judgment on April 2, 1982, and its Opinions on May 14, 1982. Consequently, the appellate process has taken more than 15 months.

Neither NEPA nor the Atomic Energy Act require any hearings - let alone trial-type hearings - on environmental issues. Both leave the Commission, as does the Court's Amended Judgment and Opinions, free to decide for itself the question of further procedures in the TMI-1 restart proceeding. Indeed, as has been made clear, the decision by the Commission to hold trial-type hearings prior to authorizing TMI-1 restart was one not required by either NEPA or the Atomic Energy Act. Notwithstanding PANE's request to the Court of Appeals that it order the Commission to admit PANE's contentions in the TMI-1 restart proceeding, the Court did not do so. NEPA requirements will be fully met if the Commission itself takes into account the results of any supplementary environmental review it determines to be necessary and factors these into its restart decision along with the Licensing Board's recommendations on safety issues. Because of the importance of this legal point we enclose as Attachment A a detailed analysis of NEPA requirements and pertinent case law.

The fundamental purpose of NEPA is met if the decision-maker fully considers significant environmental impacts along with other issues in its decision. Licensee recommends that (assuming the Court of Appeals' decision shall not have been

set aside in the interim) the Commission take no action on the restart until it has determined whether significant new circumstances or information have arisen with respect to the psychological health effects of operating TMI-1 and, if it determines that such new circumstances or information exist, until a draft SEIS has been prepared and comments thereon have been received. At that time, the Commission will be in a position to make a final restart determination accompanied by a final SEIS.

Licensee is concerned, however, that it may be urged that the Commission's present environmental regulations go beyond the requirements of NEPA and require that the psychological health issue be addressed by trial-type hearings in the restart hearing. Thus, it is not unlikely that it will be contended that Section 51.52 of the Commission's regulations requires that, because the Commission has called for a public hearing on the restart of TMI-1, controversies concerning any negative determination or SEIS prepared in connection with the restart proceeding must be adjudicated as a result of trial-type hearings before the Licensing Board. While this result may not have been intended by the Commission, and while the Licensing Board itself has expressed serious doubt as to whether the Commission ever intended NEPA issues to be considered in the restart hearing,[1/] we request the Commission as a matter of

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1/ See ASLB Memorandum on the Need for Preparing a Final Environmental Statement Prior to Restart of TMI-1, March 12, 1980. Licensee doubts that Section 51.52 was intended by (continued)

legal prudence pursuant to Section 51.4 of its regulations to exempt the restart hearing from any trial-type hearing requirement on environmental issues which arguably may be imposed by Section 51.52

In Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005 (C.A. 5, 1981), the Court was at some pains to stress that when a court has found a party to be in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible consistent with the broader public interest. It also stated that:

> "Another purpose is to provide the agency with the incentive to comply with NEPA in as rapid and thorough manner as is reasonably possible. The court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction."

Following these principles, assuming that the Commission determines that TMI-1 can be operated safely, the Commission should not address the psychological health and community well-being matters referred to in the Amended Judgment through

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(Footnote continued)

the Commission to apply to hearings designed to develop the conditions under which the Commission would consider restart authorization where the Licensing Board had authority only to make recommendations and where the Commission reserved to itself all decision-making authority. Certainly it cannot be argued that a hearing is required by the Commission's regulations in general or Part 51 in particular. Part 51 deals only with NEPA procedures when a hearing is otherwise required. In any event, out of an excess of caution Licensee has included in this motion a request under Section 51.4 for an exemption from any hearing requirement that any party may attempt to read into Part 51. See attachment A to this motion.

procedures which unnecessarily prolong the shutdown of TMI-1. These matters must be weighed against the larger interests of society discussed above. Licensee's motion seeks, therefore, to have the Commission employ the procedures and establish the time schedule which will promptly carry out the cost-benefit and balancing analysis required by NEPA if this proves necessary by reason of the Amended Judgment.

In considering this request, it is surely pertinent for the Commission to take into consideration that its July 2, 1979 and August 9, 1979 Orders were recognized by it to be "extraordinary" and that the Commission has recognized that it is obligated to lift the suspension of TMI-1's operating authority as soon as the factors that gave rise to such suspension no longer exist.

In making the foregoing request Licensee is acutely aware that the time required to complete a SEIS, if required by the Commission, could make resolution of the psychological stress issue the controlling critical path item in the restart of TMI-1. Other issues in the restart hearing are now ripe or close to ripe for a Commission decision on restart authorization. The only other important matter critical to the schedule for restart is the repair of the TMI-1 steam generator tubes and Licensee has proposed to the Commission a repair

program which, assuming no major licensing delays, would permit restart of TMI-1 before the end of 1982. Under these circumstances it is imperative that the Commission and its Staff accord the highest priority to the further proceedings on psychological stress, including preparation of the Staff's draft SEIS if the Commission determines that it is necessary. We hope the Commission will urge its Staff and others providing input to the assessment to intensify their efforts toward its completion.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

George F. Trowbridge, P.C.

Dated: May 24, 1982.

Analysis of NEPA Requirements

The decision presently facing the Commission is whether to lift the immediately effective suspension of Licensee's operating authority for TMI-1 imposed by the Commission's Orders of July 2, 1979, and August 9, 1979. The Court of Appeals has directed that, if the Commission finds that significant new circumstances or information have arisen with respect to the potential psychological health effects of operating TMI-1, the Commission shall prepare a supplemental environmental impact statement ("SEIS") which considers not only effects on psychological health but also effects on the well-being of the communities surrounding TMI.

The legal question addressed in this attachment is whether the TMI-1 restart hearing before the Atomic Safety and Licensing Board must be reopened to consider such impacts or whether the Commission may itself decide the issue without further trial-type hearings on the basis of the initial environmental assessment or the SEIS required by the Court of Appeals if it is determined that significant new circumstances or information have arisen.

The question is one of the legal requirements under NEPA, not the Atomic Energy Act. The Court of Appeals has affirmed the Commission's determination that psychological health is not a health or safety issue cognizable under the Atomic Energy Act. Therefore, the hearing requirements of that Act are not in issue. With respect to NEPA, the opinion and Amended Judgment

of the Court of Appeals do not require any form of hearing and expressly leave the Commission with "discretion to choose its procedures for studying the significance of the alleged psychological health impacts arising from the proposed restart of TMI-1." Slip opinion, at 8.[1/] The Court further stated that "[we] remand the record in this case to the Commission to determine what procedures NEPA requires in light of its evaluation of alleged psychological health effects." Id at 19 n.12. It is significant that the Court did not "order the Commission to admit [PANE's] contentions in the TMI-1 restart proceeding," as PANE specifically requested in its Petition For Review at page 7. See also PANE's Brief to Court of Appeals, at 69; PANE's Reply Brief, at 35.

Accordingly, the Commission may elect to consider psychological impacts without a hearing so long as no statute or regulation requires otherwise. As discussed below, there are three distinct reasons why no hearing is required in the circumstances of this case, each of which by itself would be a sufficient basis for granting this motion.

1/ Although we believe that the opinion of the majority of the Court of Appeals is in other respects inconsistent with that of the Supreme Court in Vermont Yankee, we note that in this respect, the Court of Appeals' decision is consistent with the Supreme Court's mandate that an agency is free to choose its own procedures for compliance with NEPA. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 548 (1978).

I. No Hearing Is Required In A Proceeding To Lift A Suspension Of Operating Authority

Any analysis of the hearing requirements under NEPA must begin with the text of the statute itself. Section 102(c) of NEPA, 42 U.S.C. § 4332 (2)(C), requires federal agencies to include an environmental impact statement ("EIS") in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." In addition, the impact statement msut "accompany the proposal through the existing agency review processes." The statute on its face does not provide for any sort of hearing procedure, and the cases have consistently held that no hearing is required by NEPA. See, e.g., Como-Falcon Community Coalition, Inc. v. United States Department of Labor, 609 F.2d 342, 345 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980); Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1284-87 (9th Cir. 1973). There is no reason to depart from the general rule in this case.

It may be argued that where an agency holds a hearing on other issues, the hearing is part of the "existing agency review processes," and that the EIS must therefore be included in the hearing procedure. This was the result reached in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), in which the court held that an environmental impact statement should have been prepared and considered in an

FPC hearing on a utility's application for authorization to construct a high-voltage transmission line. The Second Circuit remanded for preparation of an EIS and consideration of the statement in an adjudicatory hearing. The Second Circuit later reached the same conclusion in Harlem Valley Transportation Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974), involving an ICC proceeding for the abandonment of rail service.

Greene County and Harlem Valley were both specifically disapproved by the Supreme Court to the extent they were inconsistent with its holding in Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 321 n.20 (1975) ("SCRAP II").[2/] The SCRAP II decision is discussed in the next section of this attachment. Greene County and Harlem Valley were further undermined by the Second Circuit's more recent decision in Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725 (2d Cir. 1978), which concerned an ICC hearing on an application for a certificate of public convenience and necessity. There, the court rejected an argument that the ICC was required to include consideration of an EIS in the non-mandatory public hearing:

> There is no procedural requirement under the Act or its implementing regulations that public hearings be held in every case. See 42 U.S.C. § 4321 et seq.; 40 C.F.R. §§ 1500.7(d), 1500.9(d), 1500.10; 49 C.F.R. §§ 1108.15, 1108.16(b), 1108.17(a). NEPA requires only

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2/ In the same footnote the Supreme Court also disapproved Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 D.C. Cir. 1971), to the same extent as Green County and Harlem Valley.

> that an EIS "accompany [a] proposal through the existing agency review process." [Emphasis added by the Court] 42 U.S.C. § 4332 (2)(C). Unless hearings are required by statute or as a matter of due process, they are discretionary with the federal agency. See 5 U.S.C. § 554.
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> In the case of grants of certificates of public convenience by the ICC, neither statute nor Commission regulations requires an oral hearing. 49 U.S.C. § 909(c); 49 C.F.R. §§ 1100.247(e)(1), (3). It follows that NEPA does not itself require hearings in this context.

573 F.2d 732 n.4. The Court went on to point out that Greene County and Harlem Valley, "even if still valid" after SCRAP II, were not on point because in those cases hearings were required under the agencies' respective organic statutes or regulations. Id. The thrust of the Cross-Sound case is clear: A public hearing is not an "existing agency review process" through which an EIS must be considered under NEPA unless the hearing is otherwise required by statute or regulation.

In the present case, the Commission was not required to conduct a hearing before deciding whether to lift the suspension of operating authority for TMI-1. This point was discussed at some length in a document filed with the Commission by the Staff on January 6, 1981, entitled "NRC Staff Response to General Public Utilities Letter Dated December 1, 1980." In that brief (pp. 3-8), the Staff cited a number of cases supporting the proposition that the TMI-1 restart hearing was discretionary and was not a prerequisite to a decision lifting the suspension of operating authority for TMI-1. Consumers Power Co. (Midland

Plant, Units 1 and 2), CLI-73-38, 6 A.E.C. 1082 (1973); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-79-7, 9 N.R.C. 680 (1979), stay denied, Friends of the Earth, Inc. v. United States, 600 F.2d 753 (9th Cir. 1979); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), Docket No. 50-346, Order of July 6, 1979.

Since no restart hearing was required by statute or regulation,[3/] under the Second Circuit's analysis in Cross-Sound a hearing is not part of the existing agency review process, and therefore no hearing is required on any SEIS prepared in response to the Court of Appeals' Amended Judgment.

II. No Hearing Is Required In The Absence Of A "Proposal" Within The Meaning Of NEPA

As noted above, NEPA only requires that an EIS be included in recommendations or reports on "proposals" for legislation and other major federal actions, and that the EIS accompany the "proposal" through the existing agency review process. In SCRAP-II, the Supreme Court held that the requirement for an EIS does not arise until there has been an agency proposal and

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3/ Certainly it cannot be argued that a hearing is required by the Commission's regulations in general or Part 51 in particular. Part 51 deals only with NEPA procedures when a hearing is otherwise required. In any event, out of an excess of caution Licensee has included in this motion a request under section 51.4 for an exemption from any hearing requirement that any party may attempt to read into Part 51.

that preparation and consideration of the EIS is timely if done in the course of the agency review of that proposal and before a final agency decision, even where public hearings have preceded and resulted in the proposal. 422 U.S. at 320-21.

In that case, involving ICC approval of rate increases proposed by the railroads, the Supreme Court held that there was no agency proposal until after the ICC, after previously holding hearings on the rate increase, had issued a report on October 4, 1972, declining in the main to disturb the proposed rate increases. The ICC's draft final environmental statement was not prepared and circulated until March, 1973--several months after the October 4, 1972, report. Comments on the March, 1973 draft environmental impact statement were thereafter received by the ICC from several government agencies and intervenors. On May 1, 1973, the ICC issued a final impact statement without further hearings as the basis for the ICC's final determination in the case. The Supreme Court held that the earliest time at which NEPA required an environmental impact statement was the time of the ICC's report of October 4, 1972--some time after the oral hearing. Other cases since SCRAP II have reinforced the Supreme Court's strict reading of the "proposal" requirement in NEPA. See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 405-06 (1976); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980); New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 (1st Cir. 1978); Mobil Oil Corp. v. FTC, 562 F.2d 170, 173 (2d Cir. 1977).

In the context of the TMI-1 proceeding, we assume that to the extent there is a "proposal" at all, it is a proposal to allow restart of TMI-1. Accordingly, the legal question is whether the Commission's August 9, 1979 Order constituted an agency proposal and the Licensing Board hearing constituted an agency review thereof within the meaning of NEPA. If not, under SCRAP II there was no legal requirement that the environmental issue of psychological distress be addressed in the hearing. To the extent the August 9 Order may be read as contemplating that the issue of psychological health, if determined to be cognizable under NEPA, would be addressed by the Licensing Board, that result was not required by NEPA and the Commission is free to adjust its procedures by deciding itself to consider possible psychological health impacts in its restart decision.

To begin with, the Commission's August 9 Order did not represent a Commission proposal. It recited instead a series of actions that had been recommended by the Staff as a condition for restart and it called for a hearing to consider whether the Staff recommendations were necessary and sufficient as a basis for restart. NRC Staff recommendations do not constitute an agency proposal within the meaning of NEPA and the Supreme Court's SCRAP II decision. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 94 & n.12 (1st Cir. 1978).

In any event, the Staff recommendations recited in the Commission's August 9 Order do not add up to the kind of definitive proposal that triggers the need for an environmental

statement. Many of the Staff recommendations were general in character and amounted only to a framework within which a restart proposal could be generated as an outcome of the hearing. For example, the Staff recommendations called upon Licensee, with little definition of specific requirements, to upgrade its emergency plans and assess their relationship to State/Local plans, to demonstrate measures for the physical separation of TMI-1 and TMI-2, and to demonstrate its managerial capability and resources to operate Unit 1.

Further, even where Staff recommendations were more specific, as in the case of certain plant modifications, the August 9 Order allowed other parties to the hearing to propose other measures which they considered necessary for the public health and safety and left it open to the Staff itself to recommend additional modifications, which the Staff in fact did during the course of the hearing. Unlike other NRC licensing proceedings, the actions proposed by Licensee to address the concerns expressed by the Commission in its August 9 Order were developed in the form of Licensee's Restart Report and testimony only after the notice of hearing. Staff requirements were developed through the preparation and issuance of a Safety Evaluation Report and in a report and testimony following promulgation by the Commission of new emergency planning regulations. Proposals for further requirements were presented in contentions and testimony by intervenors in the proceeding. The Commission's August 9 Order made clear

that the Commission would consider lifting the suspension of TMI-1's operating authority only after the Licensing Board had both established the conditions for restart and had recommended favorably on restart based on those conditions. Public hearings held for the purpose of developing an agency proposal are not part of the agency review process to which the environmental statement requirements of NEPA apply. Kleppe v. Sierra Club, supra; Mobil Oil Corp. v. FTC, supra.

Licensee recognizes that it is customary practice in NRC construction permit and contested operating license proceedings for an environmental statement to be prepared and considered in hearings before a licensing board and that Part 51 of the Commission's regulations so requires. In the Commission's scheme of regulation the requirement makes sense in order to avoid licensing delays after the Licensing Board is ready to issue its decision on safety issues. In contrast, in the TMI-1 proceeding, the Licensing Board's initial decision is only a recommendation having no legal force and effect. The Commission itself is the only decision-maker.

Accordingly, there will be a "proposal" in the NEPA sense, at the earliest, when the Commission is considering its own decision on restart. It is then that the obligation to prepare an environmental statement will arise. The existing agency review process through which that statement must therefore accompany the restart proposal will be the Commission's review

of the Licensing Board's recommendations, and comments on those recommendations, in shaping the Commission's ultimate decision on restart. Thus under SCRAP II it is sufficient if the Commission itself considers the environmental statement on psychological impacts while it is in the process of making the restart decision. At the time of the restart hearings previously held by the Licensing Board, there was no NEPA "proposal," no need to prepare an environmental statement, and no need to include such a statement in those hearings.

III. Even If Psychological Impacts Should Have Been Considered In The Restart Hearings, There Is No Need To Reopen Those Hearings Now

Even if legal hindsight were now to tell the Commission that, contrary to Licensee's arguments, psychological health issues should have been considered in the restart hearing before the Licensing Board, there is no need to embark on a new hearing. In SCRAP II the Supreme Court concluded, even assuming that the ICC's decision on the timing of the preparation of an EIS had been in error, that there was no need to "start over again" with a new hearing and that the ICC was in "as good a position to correct a statutory error by integrating environmental factors" into its final determination as it would have been at the time of its report following a hearing on the proposed rate increases. 422 U.S. at 321-22. The

District of Columbia Circuit followed SCRAP II in City of Wilcox v. FPC, 567 F.2d 394 (D.C. Cir. 1977), cert. denied, 434 U.S. 1012 (1978), where it held that the FPC need not start over again with proceedings to develop a gas curtailment plan after preparation of an EIS.[4/] In the present case there is likewise no need to force the Licensing Board to start over again with the trial-type hearings for the purpose of considering an environmental statement on psychological stress. The Commission is in a position to consider such a statement itself and to integrate environmental factors into its restart decision.

It is to be sure a reasonable reading of the Commission's August 9, 1979 Order that the Commission contemplated at that time that if the issue of psychological distress was later determined to be cognizable under the Atomic Energy Act or NEPA, that issue and related contentions would be addressed initially in the hearings before the Licensing Board.[5/] The August 9 Order certainly did not contemplate, however, that it would be some 15 months before the Commission ruled on the question of

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4/ It is also established that considerable flexibility is to be afforded in fashioning remedies for violations of NEPA so as to balance the objectives of the statute against the broader public interest. See Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir. 1981).

5/ The Licensing Board did in fact consider the question of possible psychological distress impacts on the effectiveness of emergency plans, having previously concluded that the possible relationship of psychological impacts to a safety issue clearly before the Board was within the scope of its charter from the Commission. The issue of psychological distress has no bearing on other safety issues before the Board.

cognizability and that the hearing would be closed before the Court of Appeals, another 14 months later, reversed the Commission's determination. It is now too late to ask the Licensing Board to consider possible psychological health impacts simultaneously with safety issues and it makes no sense to insist that the Licensing Board rather than the Commission now address the matter. The time and effort heretofore spent by the parties on this matter should make it possible for them to respond promptly to the Commission's invitation for comments on the Commission's draft SEIS.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion With Respect To Psychological Health Issue," dated May 24, 1982, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, or as indicated by asterisk, by personal service this 24th day of May, 1982.

George F. Trowbridge

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