1/7/83



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

LICENSEE'S RESPONSE TO UCS PETITION FOR REVIEW OF ALAB-705

By its Petition for Review of ALAB-705, dated December 28, 1982, UCS seeks review of the Appeal Board's determination that an EIS covering the consequences of all Class 9 accidents is not required in the TMI-1 restart proceeding. Licensee opposes UCS' petition.

UCS argues that an EIS covering all Class 9 accidents is required both by the Commission's Statement of Interim Policy on Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969[1/] ("Policy Statement") and, as a matter of law, under NEPA. We address these arguments in the same order as UCS.

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1/ 45 F.R. 40101 (1980).



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## Policy Statement

The Commission's Policy Statement provides in pertinent part as follows (emphasis added):

> "It is the position of the Commission that its Environmental Impact Statements, pursuant to Section 102(c)(i) of the National Environmental Policy Act of 1969, shall include a reasoned consideration of the environmental risks [impacts] attributable to accidents at the particular facility or facilities within the scope of each such statement.
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> * * * * * * * * * * * * * *
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> "Events or accident sequences that lead to releases shall include but not be limited to those that can reasonably be expected to occur. In-plant accident sequences that can lead to a spectrum of releases shall be discussed and shall include sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.
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> * * * * * * * * * * * * * *
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> "It is the intent of the Commission in issuing this Statement of Interim Policy that the staff will initiate treatments of accident considerations, in accordance with the foregoing guidance, in its ongoing NEPA reviews, i.e., for any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued. These new treatments, which will take into account significant site- and plant-specific features, will result in more detailed discussions of accident risks than in previous environmental statements, particularly for those related to conventional light water plants at land-based sites. It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices, particularly for cases involving special circumstances where Class 9 risks have been considered by the staff, as described above. Thus, this change in policy is not to be construed as any lack of confidence in conclusions

regarding the environmental risks of accidents expressed in any previously issued Statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding."[2/]

UCS first argues that the TMI-1 restart hearing is in its own right a licensing proceeding within the meaning of the Policy Statement, that no EIS has previously been prepared in that proceeding, and that therefore under the Policy Statement an EIS must be prepared covering all Class 9 accidents. It bases its argument on the broad definition of licensing in the Administrative Procedure Act.

The initial fallacy in UCS' argument (and in Judge Edles' dissent in ALAB-705) is its failure to recognize that the Policy Statement itself prescribes the Commission actions and proceedings to which it applies. It is not necessary to resort to legal definitions of a licensing proceeding in contexts wholly unrelated to the Policy Statement.

The Policy Statement, by its own terms, applies only to environmental impact statements which are required by NEPA. Thus in the Summary accompanying the Policy Statement the Commission explained that it was revising its policy with respect to "environmental impact assessments required by the National Environmental Policy Act." The Policy Statement itself deals expressly only with "Environmental Impact Statements pursuant to Section 102(c)(i) of the National Environmental Policy Act

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2/ Commissioners Gilinsky and Bradford disagreed with the inclusion of the preceding two sentences.

of 1969," i.e. with environmental impact statements which are mandated by NEPA. Contrary to the premise implicit in both UCS' and Judge Edles' positions, the Commission's Policy Statement does not contain new requirements as to when an EIS must be prepared. It deals solely with the content of Class 9 accident analyses where an EIS is already required by NEPA. As discussed in the next section of this response, NEPA does not require an EIS in the TMI-1 restart proceeding, and the Policy Statement is therefore not applicable to that proceeding.

Even assuming arguendo that the TMI-1 restart proceeding falls within the general scope of the Policy Statement, the new requirements imposed by the statement are expressly limited to any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued. There is no dispute over the fact that an FES was prepared in connection with the operation of TMI-1 or that it treated Class 9 accidents properly under the Commission's policy in effect at that time. UCS would have the Commission read the Policy Statement, however, to ignore the prior FES and to treat the TMI-1 restart hearing as a separate proceeding to which new requirements must be applied. Licensee submits that this interpretation is inconsistent with the provisions of the Policy Statement, quoted above, that the Commission's change in policy is not to be construed as a basis for, inter alia, reopening any previous proceeding absent a showing of "special circumstances" similar to those enumerated in the preamble to the Commission's Policy Statement.

UCS maintains, however, that the Commission's suspension of TMI-1's operating license and the circumstances which prompted that suspension constitute "special circumstances." The question before the Licensing Board for consideration, however, was not whether TMI-1 should be allowed to restart under the same circumstances as those under which the TMI-2 accident occurred, but whether the plant could be safely operated with the design modifications and other changes recognized or mandated by its decision. As observed by the Appeal Board majority, the effect of the licensing proceeding and of the improvements made by Licensee will be to make the likelihood of a Class 9 accident at TMI-1 no greater than for other operating plants. There is simply no logical purpose to be served in Judge Edles' conclusion that special circumstances must be judged by the circumstances existing at some "pre-decisional" stage which will be very different at the time of restart.

Both UCS and Judge Edles find special circumstances in the Commission's "recognition" that the "potential" psychological consequences of restarting TMI-1 may be different from the consequences of operating other reactors, citing a Commission Statement of Policy dated July 16, 1982. The Commission has, of course, made no determination that the psychological health of TMI residents will be significantly affected and, as pointed out by the Appeal Board, a finding of special circumstances on the basis of psychological considerations would be premature. Further, the Commission's policy statement dealt with the consequences of restart, not with accident consequences, and provides no support for the proposition

that the consequences of a Class 9 accident would be different (i.e. constitute "special circumstances") than at other reactors. In any event, the Commission has previously decided that psychological stress due to fears of restart are not cognizable under NEPA and is presently defending its decision before the Supreme Court. It would be a strange result for the Commission to conclude that potential psychological stress is not cognizable under NEPA but that it should be the basis for conducting a NEPA Class 9 accident analysis.

We pause at this point to consider an argument advanced by Judge Edles (but not by UCS) that the Commission's action in the Indian Point special proceeding somehow supports his conclusion that the Commission's Policy Statement on Class 9 accidents was meant to encompass proceedings such as the TMI-1 restart hearing. Indian Point, like the TMI-1 restart hearing, involved a special proceeding where an EIS was not required by law. The Commission nevertheless instructed the licensing board in that proceeding to conduct a previously ordered review of serious accidents consistent with the guidance afforded by the Policy Statement. The Commission's precise instructions were:

> "...Although not requiring the preparation of an Environmental Impact Statement, the Commission intends that the review with respect to this question be conducted consistent with the guidance provided the staff in the Statement of Interim Policy on "Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969." 14 NRC 612 (1981)

The clear conclusion to be drawn from the Commission's instructions is that the Commission recognized that an EIS was not

required in the Indian Point proceeding, that the Policy Statement was therefore not applicable to that proceeding, and that special instructions were necessary to have the licensing board's review of serious accidents conducted in a manner consistent with that statement. If the Commission had regarded its Policy Statement as applicable to the Indian Point proceeding, it need have issued no instructions at all or at most called the attention of the licensing board to the applicability of existing instructions.

NEPA Requirements

UCS maintains that even if not required by the Commission's Policy Statement, an EIS covering all Class 9 accidents is required by NEPA. UCS does not question the Appeal Board's finding that a full-scale EIS was prepared in connection with the TMI-1 operating license, that the FES treated Class 9 accidents in accordance with Commission policy at that time, and that the Commission's policy was upheld in court litigation. It argues, however, that restart authorization constitutes a new major federal action, that new circumstances or information, stemming directly from the TMI-2 accident and leading to the subsequent Commission Policy Statement, have arisen since the initial FES for TMI-1 in the form of a "recognition" that "serious nuclear accidents can no longer be deemed incredible," and that because of these new circumstances a supplemental EIS is required.

Neither the Policy Statement nor its history justify UCS' claim that they constitute a recognition by the Commission

that all Class 9 accidents can no longer be deemed incredible or even that there has been a material change in the Commission's assessment of the probability of serious accidents having severe environmental consequences. The Commission simply announced a new policy, to be applied prospectively, on how to treat "very low probability accidents" in environmental statements. In fact, the Policy Statement clearly states with respect to its new treatment of accidents: "It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of present practices." To this the Policy Statement added: "Thus, this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements."

UCS also claims that the TMI-2 accident in itself constitutes a new circumstance requiring the issuance of an EIS covering all Class 9 accidents. Both the Licensing Board and the Appeal Board rejected this position and UCS Contention 20 primarily because UCS sought to include all accidents and did not confine its contention to those having a reasonable nexus to the TMI-2 accident. The Appeal Board properly ruled that the TMI-2 accident did not affect the risk of all other serious accidents that have no logical connection to the TMI-2 sequence of events. ALAB-705, slip op. at 22-23.[3/]

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3/ The Appeal Board also properly ruled (1) that the Licensing Board afforded UCS and others full opportunity to litigate the (continued)

Both UCS and Judge Edles[4/] challenge the application of the nexus requirement to environmental issues. They point out that the nexus requirement was applied to design issues but not to management, separation and emergency planning issues. The explanation is very simple. The Licensing Board, of course, addressed all of the issues specified by the Commission's August 9, 1979 Order and virtually all of the issues raised by intervenors on management, separation and emergency planning fell within that Order. Therefore the Licensing Board had no need to consider nexus requirements as to these issues. The nexus requirement was applied only to issues sought to be raised which were not expressly covered by the Order.

Further, UCS and Judge Edles are simply wrong in suggesting that the nexus requirement was applied only to design issues. It was applied in other areas where the issue sought to be raised was not covered by the August 9, 1979 Order, e.g. in the rejection of TMIA's contention seeking to litigate the adequacy of TMI's security plan against external threats[5/] and

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(Footnote continued)
impact of accidents having a nexus to the TMI-2 accident (including accidents exceeding design basis accidents), (2) that UCS failed to pursue that opportunity and (3) that the Licensing Board on its own initiative fully explored the consequences of such accidents.

4/ Judge Edles discussed the nexus requirement only in connection with the Policy Statement and the question as to whether "special circumstances" existed within the meaning of that statement. He made no ruling on UCS' claim that because of "new circumstances" a Class 9 accident is required by NEPA independent of the Policy Statement.

5/ Second Special Prehearing Conference Order, January 11, 1980, at 9-10.

the Aamodt's contention relating to operator fatigue.[6/]

## Conclusion

The decision of the majority of the Appeal Board in ALAB-705 is so clearly correct as not to warrant further briefing or Commission review.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By George F. Trowbridge

George F. Trowbridge, P.C.

Dated: January 7, 1983

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6/ Licensing Board Confirmatory Memorandum and Order on Aamodt Motions, April 6, 1981; Tr. 17,256 (Chairman Smith).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to UCS Petition for Review of ALAB-705," dated January 7, 1983, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 7th day of January, 1983.

George F. Trowbridge, P.C.

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