

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, OFFICE OF NUCLEAR REACTOR REGULATION

In the Matter of)
)
GPU NUCLEAR CORPORATION) Docket No. 50-289
) (10 C.F.R. § 2.206)
(Three Mile Island Nuclear Station,)
Unit 1))

LICENSEE'S RESPONSE TO
§ 2.206 PETITION OF ROBERT GARY

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I. Introduction

On July 10, 1992, Mr. Robert Gary wrote to the U.S. Nuclear Regulatory Commission ("NRC"), invoking section 2.206 of the Commission's regulations to request that the NRC suspend the operating license for the Three Mile Island Nuclear Station, Unit 1 ("TMI-1") based on certain alleged "discrepancies" in radiological emergency plans for Dauphin County, Pennsylvania. The Director of the Office of Nuclear Reactor Regulation acknowledged receipt of Mr. Gary's letter (the "Gary Petition") on August 5, 1992. See 57 Fed. Reg. 36415 (August 13, 1992).^{1/} GPU Nuclear Corporation ("Licensee"), the holder of Operating License

^{1/} The NRC recently advised that it expects to issue its decision on the Gary Petition in February 1993. See Letter to R. Gary from T. Murley (dated November 24, 1992). Mr. Gary responded by letter dated December 2, 1992. The NRC has acknowledged Mr. Gary's response. See Letter to R. Gary from T. Murley (dated December 23, 1992).

No. DPR-50 and the operator of TMI-1, responds herein to the Gary Petition.^{2/}

The Gary Petition raises three different issues related to transportation in the event of an evacuation due to a radiological emergency at TMI-1. First, the Gary Petition expresses concern about letters of agreement for the use of buses in an evacuation. Second, the Gary Petition challenges the accuracy of emergency plan listings of contacts and 24-hour phone numbers for bus companies. And, third, the Gary Petition questions the scope of the role of the Commonwealth of Pennsylvania in emergency response, and contends that military vehicles should be used for evacuation transportation.

The Gary Petition asserts that the Dauphin County Radiological Emergency Response Procedures to Nuclear Power Plant Incidents (the "Dauphin County Emergency Plan") is "so substandard that it is for all practical purposes non-operational" and requests that the NRC suspend the operating license for TMI-1 and "direct the power company to power down those reactors until such time as a satisfactory plan is in place and workable." Gary Petition at 3.

^{2/} Licensee's Response is supported by the Affidavit of George J. Giangli ("Giangli Affidavit") (appended hereto as Attachment A). Mr. Giangli is employed by Licensee as Corporate Manager of Emergency Preparedness.

As discussed more fully below, however, the issues raised in the Gary Petition are not well-founded in fact or law. Rather, the Gary Petition reflects a fundamental misapprehension of the emergency preparedness scheme at both the state and county levels, as well as a fundamental misunderstanding of applicable NRC regulations. Certainly the petition does not demonstrate the existence of a substantial health or safety issue. Accordingly, the Gary Petition must be denied.

II. Standards For Initiation of Show Cause Proceeding

Section 2.206 of the Commission's regulations provides a mechanism by which members of the public may request initiation of an enforcement action to modify, suspend, or revoke a license, or to take other appropriate action. In addition, section 2.206 vests authority in the director of the appropriate NRC office to decide whether to institute an enforcement action by the issuance of a show cause order. The only criterion set forth in the rule itself for judging the sufficiency of a petition is the requirement that "[t]he request . . . specify the action requested and set forth the facts that constitute the basis for the request." 10 C.F.R. § 2.206(a).

The apparent reason for the absence of a more specific standard in the regulation is that the decision to institute an enforcement action is not an adjudicative one, but rather a matter of "prosecutorial" discretion. See Consolidated Edison Co.

of New York (Indian Point Units 1, 2, and 3), CLI-75-8, 2 N.R.C. 173, 175 (1975). Nevertheless, the Commission has in previous decisions provided guidance delimiting the exercise of this discretion.

In Indian Point, supra, the Commission affirmed a Director's decision denying a § 2.206 petition. The Commission there observed that "a show cause order would have been required had [the Director] reached the conclusion that substantial health or safety issues had been raised. . . . [A] mere dispute over factual issues does not suffice." Indian Point, supra, 2 N.R.C. at 176 & n.2.^{3/} This standard has been acknowledged in dicta by the U.S. Courts of Appeals. See, e.g., Lorion v. NRC, 712 F.2d 1472, 1475 (D.C. Cir. 1983), rev'd on other grounds sub nom., Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1601 (1985), on remand sub nom., Lorion v. NRC, 785 F.2d 1038, 1041 (D.C. Cir. 1986); Rockford League of Women Voters v. NRC, 679 F.2d 1218, 1222 (7th Cir. 1982).

The Commission reiterated the "substantial health and safety issues" standard in Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 N.R.C. 429, 433

^{3/} The directors have adhered to the "substantial health and safety issues" test. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 N.R.C. 149, 152 (1985); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 N.R.C. 899, 923 (1984).

(1978), aff'd sub nom., Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979). In that case, the Commission also rejected a claim that the Director erred in failing to permit petitioner to comment on, respond to, or cross-examine the views of the NRC Staff:

[The Director] is not required to accord presumptive validity to every assertion of fact, irrespective of its degree of substantiation, or to convene an adjudicatory proceeding in order to determine whether an adjudicatory proceeding is warranted. Rather, his role at this preliminary stage is to obtain and access the information he believes necessary to make that determination. Provided he does not abuse his discretion, he is free to rely on a variety of sources of information, including staff analyses of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations.

Id. at 432-33.

The "substantial health and safety issues" test requires that a petitioner do more than merely state its disapproval of NRC policy or its belief that the utility may be found in violation of the Commission's regulations. Instead, a petitioner must advance evidence of violations of significance sufficient to pose a threat to public health and safety. Thus, in Limerick, supra, 22 N.R.C. at 166, the Director determined that the petitioners' showing of a trend of operator errors did not amount to a significant safety problem. Declining to issue a show cause order, the Director noted:

Isolated deficiencies in the licensee's program . . . do not necessarily undermine the program to such an extent as to give rise to a significant safety concern.

What is required, when a violation is identified, is a careful assessment as to the significance of the violation, its cause, and the corrective action taken to preclude recurrence.

Id. at 161-62 (footnote omitted). Measured against this standard, the petition here must fail. Mr. Gary has not proffered evidence of even one violation of the Commission's regulations; certainly there is no evidence of a substantial health and safety issue to warrant the initiation of an enforcement proceeding against Licensee.

III. Response to Gary's Allegations

Licensee responds below to each of the issues raised in the Gary Petition. As demonstrated in the discussion which follows, there is no basis in fact or law for the commencement of "show cause" proceedings here.

A. Availability of Letters of Agreement for Transportation Providers

The Gary Petition first contends that emergency preparedness in Dauphin County is "substandard" in the absence of letters of agreement with bus companies identified as evacuation transportation providers. Gary Petition at 1. The Gary Petition thus erroneously assumes that the availability of resources in an emergency is dependent on the existence of letters of agreement. This position reflects a basic misunderstanding of the purpose of letters of agreement under the NRC's regulatory scheme.

The historical record of response to natural and technological disasters indicates that necessary resources are made available in actual emergencies, regardless of whether or not letters of agreement have been previously executed. See, e.g., Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-85-14, 21 N.R.C. 1219, 1273-74 (1985); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), DD-87-15, 26 N.R.C. 233, 238-39 (1987).

Moreover, under the NRC's regulatory scheme, letters of agreement are not intended to be contractually-binding, legally-enforceable instruments. Instead, the purpose of written letters of agreement is simply to confirm the availability of resources and suppliers' knowledge of their commitments. Limerick, supra, 21 N.R.C. at 1273; Perry, supra, 26 N.R.C. at 238-39.

In this case, without regard to letters of agreement, there can be no doubt that transportation providers have been in the past and remain today committed to emergency operations in Dauphin County. Giangi Affidavit ¶¶ 5-10. The Dauphin County Emergency Management Agency has identified three bus companies in the county which would be available to provide transportation for persons in the county requiring transportation assistance in the event of a radiological emergency evacuation -- the Capital Area Transit Bus Company ("CAT"), the Capitol Bus Company ("Capitol Trailways") and Hegins Valley Lines, Inc. Bus Company

("Schlegel"). Giangi Affidavit ¶ 5. All three of these transportation providers have regularly demonstrated their commitment to supporting emergency operations in Dauphin County through the process of the biennial radiological emergency preparedness exercises conducted for TMI in accordance with the NRC's emergency preparedness regulations. Giangi Affidavit ¶ 6.

During each biennial exercise, the Federal Emergency Management Agency ("FEMA") specifically evaluates Dauphin County's implementation of its transportation procedures, to verify the County's ability to provide evacuation transportation for those in need. FEMA has consistently approved the County's performance in this area. Giangi Affidavit ¶¶ 7-10.

FEMA's final report on the 1991 exercise (dated October 1, 1992) states at page 56:

The ability and resources necessary to implement appropriate protective actions for the impacted permanent and transient plume EPZ population (including transit-dependent persons, special needs populations, handicapped persons and institutionalized persons) was adequately demonstrated.

No corrective actions of any type were required. Giangi Affidavit ¶ 8. Similarly, FEMA's August 29, 1990 report on the 1989 exercise provided, at page 46:

[T]he ability and resources necessary to implement appropriate protective actions for the impacted permanent and transient plume EPZ population (including transit-dependent persons, special needs populations, handicapped persons and institutionalized persons) was adequately demonstrated.

The report continued:

The County EOC Transportation Coordinator confirmed the transport needs of the municipalities and verified the availability of buses . . . by actual phone contacts with the various bus companies

Again, no corrective actions whatsoever were required. *Giangi Affidavit ¶ 9.*

Dauphin County has consistently demonstrated this same capability in other biennial exercises. For example, FEMA's November 4, 1988 report on the 1987 exercise confirmed (at page 9) that "[a]ctual calls were placed to transportation resource companies" to verify the availability of resources. And, at page 38 of its March 14, 1986 report, FEMA verified that "[t]he transportation coordinator contacted bus and ambulance companies as listed on available resource inventories" during the course of the 1985 exercise. In short, the history of biennial exercises leaves room for absolutely no doubt that the identified bus companies were and are aware of their commitments to supply transportation resources for Dauphin County in the event of an evacuation and were and are prepared to meet those commitments. *Giangi Affidavit ¶ 10.*

This information belies the implication of the Gary Petition that resources would not be made available to Dauphin County in an emergency in the absence of letters of agreement. Taken together, (a) historical experience in thousands of real-life

emergencies around the world (demonstrating that resources are made available in actual emergencies, without regard to the existence of letters of agreement), and (b) the consistent record of the bus companies' cooperation and participation in the biennial emergency preparedness exercises for TMI conclusively lay to rest Mr. Gary's concern that Dauphin County emergency preparedness would be "substandard" absent letters of agreement with transportation providers.

In any event, Dauphin County has recently memorialized in letters of agreement the commitments of the three bus companies on which it relies. Specifically, a 1985 letter of agreement with the Capitol Bus Company^{4/} has been updated by a Statement of Understanding with the Board of Dauphin County Commissioners, dated September 16, 1992 (attached to the Giangli Affidavit as Exhibit A). Similar Statements of Understanding have been obtained from Capital Area Transit Bus Company and Hegins Valley Lines, Inc. Bus Company (attached to the Giangli Affidavit as Exhibits B and C). Giangli Affidavit ¶ 11. In short, Mr. Gary's concern about the availability of letters of agreement with bus companies in Dauphin County provides no basis for enforcement action under 10 C.F.R. § 2.206.

^{4/} Mr. Gary mistakenly identifies the 1985 letter of agreement as one with Capital Area Transit Company. See Gary Petition at 1. In fact, that letter of agreement was with the Capitol Bus Company. Giangli Affidavit ¶ 11 n.1.

B. Currency of Contact Names and Availability of 24-Hour Phone Numbers in Emergency Plan

The Gary Petition also professes concern about the currency of contact names and the availability of 24-hour phone numbers in the listing of transportation provided in the Dauphin County Emergency Plan. Gary Petition at 2. However, the Gary Petition erroneously assumes that the Emergency Plan itself "is the book that the staff on hand at the EOC would refer to in a radiological emergency." Gary Petition at 2. Mr. Gary's concern thus reflects a basic misunderstanding of the role of an emergency plan versus the role of implementing procedures in an actual emergency.

Under the NRC's regulatory scheme, emergency plans are to be relatively short -- of "such a length as to permit the whole planning scheme to be grasped in one view." Carolina Power & Light Company (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 N.R.C. 207, 220 (1985). Emergency plans are, in turn, supplemented with implementing procedures, which provide "all the details that will be necessary in the event of an actual emergency." Louisiana Power & Light Company (Waterford Steam Electric Station), ALAB-732, 17 N.R.C. 1076, 1107 (1983). Generally, "lists of names and [phone] numbers and the like" belong in implementing procedures, not in emergency plans themselves. See Shearon Harris, supra, 22 N.R.C. at 220.

In the instant case, Mr. Gary does not claim either that the phone numbers listed for bus companies in the Dauphin County Emergency Plan were outdated or that any of the persons he contacted at those bus companies indicated to him that they would not respond to an actual emergency. Nor could he honestly so claim. Instead, he complains that certain individuals whose names are listed in the plan itself are no longer employed with the respective companies and, further, that 24-hour phone numbers are not specified in the plan. Gary Petition at 2. But such discrepancies simply do not raise a substantial health and safety issue -- especially where, as here, biennial exercises have proven Dauphin County's ability to contact the transportation providers at all times throughout the period using applicable implementing procedures. See Giangi Affidavit ¶¶ 6-10.

The Dauphin County Emergency Plan provides for the quarterly updating of contact names and phone numbers in implementing procedures. Thus -- without regard to what the County Emergency Plan says -- The County Transportation Coordinator's TMI Implementing Procedure reflects the correct contacts and 24-hour phone numbers for Capital Area Transit Bus Company, Capitol Bus Company and Hegins Valley Lines, Inc. Bus Company. Moreover, the Dauphin County Emergency Plan is presently being revised to delete from the plan itself the names and phone numbers of contact persons at transportation providers. In the future, consistent with industry practice, this information will be included only in the

Transportation Coordinator's Implementing Procedure. It is this type of Implementing Procedure -- and not the Emergency Plan itself -- to which emergency response personnel refer in the event of an actual emergency. Giangi Affidavit ¶ 12.

Accordingly -- in light of (a) Dauphin County's repeated demonstrations of its ability to contact transportation providers in exercises over the years, and (b) the provisions for maintaining the currency of the information in the Implementing Procedure which would be used in an actual emergency -- Mr. Gary's concern about the accuracy of contact names and the availability of 24-hour phone numbers in the Dauphin County Emergency Plan provides no basis for the enforcement action requested here.

C. Use of Military Vehicles and the Commonwealth's Role in Emergency Response

The third and final issue advanced in the Gary Petition is Mr. Gary's complaint that existing emergency plans do not contemplate the use of military vehicles for evacuation transportation in the event of a radiological emergency at TMI-1. Gary Petition at 2. Mr. Gary notes that the County Plan does not provide for the use of military vehicles, emphasizing that the county has no authority to request such vehicles but would refer any unmet transportation needs to the Commonwealth. But, according to Mr. Gary, the Commonwealth "has no plan to call for the use of military vehicles because they feel that [the Pennsylvania

Emergency Management Agency's] responsibility is in the area of communications and coordination." Id. Mr. Gary's criticisms are premised on a fundamental misunderstanding of the Commonwealth's concept of emergency operations.

The role of the Pennsylvania Emergency Management Agency ("PEMA") in response to a radiological emergency extends well beyond responsibility for communications and coordination, to include overall oversight and command of emergency operations. Under the Commonwealth's concept of operations, any resource needs which could not be met within Dauphin County would be referred to PEMA, which would supply the necessary resources from its network of contacts throughout the state. The time required to mobilize the military is relatively great. Therefore, because resources from other sources could be made available more quickly, PEMA does not presently contemplate the need to rely on military vehicles for evacuation transportation. However, PEMA has both the authority and the ability to use military vehicles should the need arise. Giangi Affidavit ¶¶ 13-14.

In sum, contrary to the implication of the Gary Petition, the absence of plans for the use of military vehicles for evacuation transportation in the event of an emergency at TMI-1 is not due to some sort of confusion concerning the Commonwealth's role in emergency response. Rather, the county and the state do not plan to use military vehicles for evacuation transportation

because it would not be time-efficient to do so when transportation resources can be obtained from other sources much more quickly. Mr. Gary's complaint that existing emergency plans do not rely on military vehicles for evacuation transportation therefore cannot support his request for enforcement action in this case.

IV. Conclusion

Emergency planning is a continuing process, and it is continuing at TMI. Indeed, the process will continue throughout the life of the plant.^{5/} Potential enhancements to preparedness -- whether they are initially proposed by the Commonwealth, the counties, FEMA, NRC, GPU Nuclear or members of the public -- are evaluated and, if appropriate, implemented on an ongoing basis.

^{5/} Measures have been taken to ensure that up-to-date letters of agreement are maintained with emergency support organizations that might be called upon to provide transportation in the event of an evacuation due to a radiological emergency. By letter dated July 23, 1992 (Exhibit D to the Giangli Affidavit), PEMA emphasized to all risk and support counties in the Commonwealth the need to maintain current letters of agreement with emergency support organizations. And, more specifically, Dauphin County's most recent agreements with its three bus providers expressly provide for updating on an annual basis. Moreover, Dauphin County has reinforced the importance of quarterly verification of contacts and phone numbers of emergency resource providers as listed in emergency plan Implementing Procedures. Giangli Affidavit ¶ 15.

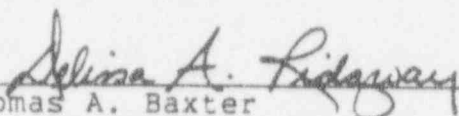
Giangi Affidavit ¶ 16. It does not follow, however, that TMI-1 must sit idle.^{6/}

In the words of the Commission, the relevant issue "is not whether continued improvements are a useful goal, but whether there is reasonable assurance that adequate protective steps can and will be taken in the event of a radiological emergency." Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 N.R.C. 685, 693-94 (1986). In the instant case, comprehensive plans and procedures are in place for response to a radiological emergency at TMI-1. The necessary facilities and equipment have been identified. State and local personnel have been trained and exercised in implementing the plans and procedures, and have proven their proficiency. In short, there is reasonable assurance that adequate protective measures can and will be taken to protect public health and safety in the event of a radiological emergency at TMI-1. Giangi Affidavit ¶ 16.

^{6/} Indeed, under 10 C.F.R. § 50.54(s)(2)(ii), enforcement action (including the shutdown of a reactor) as a result of emergency planning deficiencies occurs only after (1) the Commission finds that there is no reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency and (2) the deficiencies have not been corrected within four months of that finding. Here, the Commission has not even made the requisite finding (and, as shown above, there are no grounds for it to do so) which would trigger the four-month period for corrective action. Thus, even if the Gary Petition had identified significant emergency planning shortcomings (which it has not), the conditions precedent to enforcement action, set forth in the NRC regulations, have not been met.

The Gary Petition has failed to advance evidence of even a single violation of the Commission's emergency preparedness regulations. Certainly there is no evidence of a "substantial health and safety issue" to warrant the initiation of enforcement action here. Accordingly, the Gary 5 2.206 Petition must be denied.

Respectfully submitted,



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