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May 24, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

LICENSEE'S OPPOSITION TO
TMIA STAY REQUEST

On May 17, 1985, intervenor Three Mile Island Alert ("TMIA") filed with the Commission a request to stay an anticipated order authorizing restart of Three Mile Island, Unit No. 1 ("TMI-1").1/ TMIA seeks a stay pending full resolution of all court of appeals reviews, or, in the alternative, for two weeks to seek an emergency stay from the reviewing court (TMIA Request at 2). For the reasons described below, and in the attached affidavits of Henry D. Hukill, Jr. and John G. Graham, Licensee opposes the TMIA request as unnecessary and without adequate support in law or fact.2/

1/ The TMIA stay request is anticipatory, since the Commission has not yet issued any order authorizing restart of TMI-1. Nonetheless, Licensee does not oppose the request as premature. Licensee urges the Commission to resolve the stay issue as part of its decision on restart authorization. This will permit an orderly appeal process and will provide the reviewing court with the Commission's considered opinion on the merits of any stay request that may later be presented to the court.

2/ TMIA cites the stay granted by the Commission to the San Luis Obispo Mothers for Peace in the Diablo Canyon proceeding as

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TMIA Has Failed To Make The Necessary Strong Showing That It Is Likely To Prevail On The Merits

TMIA puts forth four reasons why it is likely to succeed on the merits of an appeal: (1) that the hearing on management issues is not complete; (2) that full Section 189(a) hearings must be held on all issues since the restart order necessarily involves the issuance of license amendments; (3) that Chairman Ivan Smith's alleged bias invalidates the six years of adjudicatory hearings held in this case; and (4) that in various unspecified ways, TMIA's hearing rights under the Atomic Energy Act, Administrative Procedure Act and Constitution have been violated (TMIA Request at 2-6). This laundry list of procedural complaints, none of which is fully specified or explained, raises issues with which the Commission has previously dealt on numerous occasions. Such complaints fall far short of the required strong showing necessary to justify issuance of a stay.

1. TMIA's claim that the management hearings are incomplete (TMIA Request at 2-4) is based on a substantial distortion of three

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precedent for the requested stay (TMIA Request at 1-2, n.1). However, in Diablo Canyon the utility applicant did not oppose the intervenor's stay application. Here, by contrast, Licensee believes that neither the equities of this case nor the procedural posture of the proceeding necessitates issuing a stay. More relevant to the present stay request, and providing more appropriate precedent, are the Commission decisions in both the Waterford and Catawba proceedings to deny intervenor requests for stays pending judicial review.

key points. First, TMIA ignores the extensive adjudicatory record compiled, including lengthy decisions by the Licensing and Appeal Boards, which deal exclusively with management issues. Second, TMIA simply misreads the Licensing Board's May 3, 1985 decision on licensed operator training (TMIA Request at 3, n.2). The Licensing Board held that, for Licensee to demonstrate "reasonable progress" in this area, Licensee needed to begin immediately to develop a plan for on-the-job evaluations. This ruling is consistent with the Commission's original delegation to the Licensing Board to establish the standards for measuring "reasonable progress," while leaving to the Staff the responsibility to determine whether the standards have been satisfied. Licensee has begun the work to develop the required plan (see Public Hearing Tr. at 109 (May 22, 1985)), and expects a favorable NRC Staff certification. Third, TMIA's claim that a favorable finding must be made on the "Dieckamp Mailgram" issue prior to restart ignores the Commission's earlier ruling that the hearing on this issue was held merely as a matter of discretion, based primarily on public policy considerations. See CLI-85-2, at pp. 8-9 (February 25, 1985). Thus, there is no requirement that a decision on the mailgram be issued prior to restart.

2. TMIA's argument that, since license amendments will be part of the restart decision, hearings on those amendments must first be held (TMIA Request at 4-5), also is premised on misconceptions about the restart hearing process. The license amendments imposed on Licensee resulted from the hearing process. Apparently,

TMIA's argument is that, notwithstanding the past six years of proceedings, which form the basis for the license amendments, TMIA is entitled now to still further hearings on the license amendments which have resulted to date. This envisions a continuum of infinite proceedings. We know of no judicial support for this novel theory, and certainly the cases cited by TMIA do not support such a "Catch-22" approach to the Commission's hearing obligations.

The court of appeals in Bellotti v. NRC, 725 F.2d 1380, 1383 (D.C. Cir. 1983), held that where the Commission imposes additional license conditions to make a plant's operation safer, as is clearly the case here, there is no automatic right to participate or demand hearings under Section 189(a). Rather, only if the Commission proposes to amend a license to remove a restriction upon the licensee does Section 189(a) require public participation. Id. Cf. 10 C.F.R. §§ 50.90-.92 (1985) (Sholly Amendment regulations applicable only when a licensee applies for a license amendment).

3. TMIA's argument regarding the bias of Chairman Smith (TMIA Request at 5) merits little comment. Suffice it to say that, in carefully reasoned opinions issued by Chairman Smith (see Memorandum and Order Denying Motions to Disqualify (February 20, 1985)) and the Commission (see Memorandum and Order, CLI-85-05 (April 5, 1985)), the matter was fully considered and no basis for bias or disqualification was found. TMIA in its stay request adds nothing to the issue, merely referring the Commission to its earlier filings. In such circumstances there is little likelihood that TMIA will prevail in the courts on this issue.

4. TMIA's last claim, consisting of a single sentence alleging unidentified and unspecified procedural violations (TMIA Request at 5-6), is similarly unconvincing. The claim assumes, without further analysis, that TMIA is entitled to an on-the-record adjudication before the Commission lifts its immediately effective shutdown order. This is untrue. In San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), the court held:

> Because none of the actions specified in section 189(a) may be said to include the lifting of a license suspension, we conclude that such action does not give rise to the right to a hearing.

See also Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1197-99 (D.C. Cir. 1984) (lifting of immediate effective shutdown order is "informal" agency action).

In short, it is highly unlikely that TMIA will prevail in court on any of its procedural claims, and certainly no strong showing of success meriting a stay pending appeal has been demonstrated.

TMIA Has Made No Showing Of Injury, Let Alone Irreparable Injury

TMIA's claim of irreparable injury includes no allegation of unsafe equipment or design, no allegation of inadequate operational procedures or practices, and no allegation of untrained operators. Instead, TMIA strings together a list of allegations which, in its view, establish a "shocking history" of character failings (TMIA Request at 6-7), and, on the basis of this list, speculates that the Commission's failure to order full-scale adjudicatory hearings

on these issues provides "no assurance that GPUN can be entrusted with [TMI-1] operation" (id. at 7).3/

This claim ignores the careful consideration that the Commission already has given to the specific issues raised by TMIA.4/ In the face of this extensive review, the claim that irreparable injury results from the failure to grant a full adjudicatory hearing on such allegations is mere speculation. There is no basis to assume that a hearing on these matters would disclose significant factual material contradicting both the Staff's and Commission's

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3/ Almost as an afterthought, TMIA claims that the Commission's violation of important, but totally unidentified, procedural and constitutional rights constitute irreparable injury per se (TMIA Request at 7 & n.8). None of the cited cases involves claims that the mere denial of hearings on certain particular issues by a lawfully constituted administrative agency warrants the issuance of a stay order. If that were the rule, then all Commission action might be stayed in the face of an intervenor's claim that it had been denied a Section 189(a) hearing. The cases cited by TMIA involve district court resolution of civil rights claims, allegations of unconstitutional statutes, and the like. Certainly, TMIA's unstated "important" procedural and constitutional rights do not rise to a similar level of significance.

4/ In each case the NRC Staff carefully investigated the identified allegations, either confirmed or refuted the claim, and evaluated the impact of the claim on GPUN's ability to safely and reliably operate TMI-1. See, e.g., NUREG-0680, Supplement No. 5, "An Evaluation of the Licensee's Management Integrity as it Affects Restart of Three Mile Island Nuclear Station Unit 1, Docket 50-289" (July 1984). In no case did the NRC Staff find any basis for concluding that the allegation did, in fact, impair GPUN's ability to operate TMI-1. In its February 25, 1985 Memorandum and Order, the Commission exhaustively reviewed the NRC Staff investigations and analysis, considered the positions of the parties on the issues (including TMIA), and determined for itself that none of the identified issues raised concerns about GPUN's ability to operate TMI-1 which required an adjudicatory hearing prior to restart. See CLI-85-2.

conclusions. In such circumstances, no showing of irreparable injury is made and a stay should not issue.5/

Equally significant, TMIA overstates the immediate impacts from a Commission order authorizing restart. As the attached Hukill Affidavit makes clear, it will be a minimum of 99 days after the Commission order before TMI-1 will begin sustained full power operation (Hukill Aff. at ¶¶ 6-7). Indeed, not until the sixth day after a Commission restart order does Licensee intend to take TMI-1 critical (id. at ¶ 7(a)). A full 10 days will elapse before the plant even reaches and passes through the 5% power level (id. at ¶ 7(a)-(c)). If TMIA is concerned about having sufficient time to petition and persuade an appellate court that a stay is warranted, Licensee's carefully controlled and deliberate startup program provides an adequate opportunity -- either during the five-day final non-nuclear heatup and surveillance testing period or the ten days before ascension above 3% power.

Furthermore, the extended period of TMI-1 shutdown, and the gradual escalation to full power operation, ensure that the fission

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5/ See, e.g., Massachusetts Coalition of Citizens v. Civil Defense Agency, 649 F.2d 71, 75 (1st Cir. 1981) ("merely raising the specter of a nuclear accident" is inadequate to demonstrate "immediate irreparable injury"); Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980) ("more than the risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury', or a 'presently existing actual threat'" (citations omitted)); Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254, 267-68 (E.D. La. 1967) ("injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties").

product inventory of the plant and the decay heat to be removed in the event of an accident are small fractions of the levels associated with long-term, full-power operation (Hukill Aff. at ¶ 10). Thus, in the unlikely event of an accident, potential radioactive releases from TMI-1 will be substantially less than for plants operating at full power (id.). Similarly, unanticipated events will place less stress on emergency equipment, provide plant operators with a longer period of time to respond, and generally be subject to greater safety margins than is the case for plants operating at full power (id.). All of this means that the risk to the public health and safety during the TMI-1 restart test program is substantially less than the Commission accepts when it authorizes full power operation of other nuclear power plants.6/

By every measure, the TMIA stay request fails to demonstrate irreparable injury.

Granting A Stay Will Injure And Harm Licensee

TMIA's views on the harm to Licensee from a stay are somewhat difficult to comprehend (TMIA Request at 8). Apparently, TMIA argues that Licensee would not be harmed by a stay because "TMI-1's power ascension will be very gradual" (id.). If TMIA means what it says, it is not seeking a stay which will preclude Licensee from

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6/ We also would observe that in this case there can be no claim that restart authorization will irreparably contaminate an otherwise clean plant. Thus, from a judicial perspective, an incorrect decision authorizing restart is more easily reversible and reparable than in a case where the Commission issues a new license.

initiating and completing its restart test and power ascension program. Accordingly, there is no need for a Commission stay at this time; it is possible under expedited procedures to have briefed and argued the merits of any TMIA appeal to the court within 99 days. If no decision had yet issued, TMIA could at that time petition the court for a stay.

However, if TMIA seeks to enjoin the start of Licensee's restart test program, then there assuredly will be significant harm to Licensee. The Hukill Affidavit demonstrates that Licensee is ready to begin its restart test program now (Hukill Aff. at ¶ 5), that the program consists of a controlled and detailed set of sequential steps which must be performed in order (id. at ¶¶ 6-7), and that any delay in beginning the program will result in a day-for-day delay in completing the program and starting sustained full-power operation (id. at ¶¶ 8-9).

The Graham Affidavit demonstrates that, for each month's delay in returning TMI-1 to operation, Licensee's ratepayers will incur increased costs of about $6.7 million (Graham Aff. at ¶ 6), that Licensee's nonresidential customers will continue to suffer under competitive disadvantages in both national and international markets (id. at ¶ 7), and that GPU common stockholders will be injured due to an approximately $5 million reduction in earnings (id. at ¶ 8). In addition, the TMI-1 owners' ability to fund additional, excess advances to TMI-2 cleanup activities will be impaired (id. at ¶ 9). By any measure these are direct and substantial injuries that would result from issuance of a stay.

The Public Interest Lies In An End To Administrative Proceedings That Are Complete

The TMI-1 restart proceeding has dragged on beyond the expectations of everyone, and certainly beyond the Commission's expectations in 1979. The record is voluminous; the written opinions and orders are lengthy; the issues have been analyzed in painstaking detail. Once the Commission has assured itself that the public health and safety will be protected, there is a substantial public interest in concluding the proceeding and allowing operation of TMI-1. Granting a stay at this point would only further protract the proceedings with no public benefit. This is especially true here since Licensee's gradual power ascension program provides TMIA with adequate time to seek a stay from the reviewing court. In short, there is no need for the Commission to stay its own order lifting the immediately effective shutdown order.

Respectfully submitted,

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