UNITED STATES
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY ITEM
POLICY SESSION

February 24, 1978 SECY-A-78-10

For: The Commission

From: James L. Kelley, Deputy General Counsel

Subject: Response to Stay Motion in the Matter of Metropolitan Edison Co. (Three Mile Island, Unit 2), Docket No. 50-320

Summary: Intervenors have moved the Commission to stay the Licensing Board's decision authorizing the operating license for Three Mile Island, Unit 2. The intervenors assert among other things that the Licensing Board failed to take adequate account of fuel cycle environmental impacts associated with long-term radon releases from uranium mining and milling tailings piles, which the intervenors claim are much larger than the radon release number in Table S-3. In OGC's view, the available evidence supports the claim that Table S-3 greatly under-represents radon releases. The NRC staff agrees, although the staff argues that the increased releases are not significant in the overall cost-benefit balance. See SECY-78-99. OGC believes that in the Three Mile Island proceeding the Commission should remove any bar to full consideration of the radon question imposed by the S-3 fuel cycle rule and direct the Appeal Board to consider the merits of this question in its review of the merits of the Licensing Board's initial decision. However, OGC does not believe the intervenors have successfully demonstrated that they are entitled to a stay of the OL pending this review. Therefore the Commission should deny the request for a stay.

Contacts:
E. Leo Slaggie, OGC (634-3217)
Mark E. Chopko, OGC (634-1468)

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Discussion:

1. Background of the Present Motion.

Construction of Three Mile Island Nuclear Station, Unit 2 ("TMI-2"), was authorized in 1969. In December 1977, following contested hearings, the Licensing Board authorized issuance of a full term operating license. Intervenors filed a motion to stay the decision on December 29, 1977 and on the following day filed with the Appeal Board some forty exceptions to the initial decision. In a supplemental memorandum filed January 13, 1978 the Intervenors addressed the four criteria for a stay set out in the Commission's rules.[1] With regard to the likelihood that they would prevail on the merits, the Intervenors stressed that "the central issue in question .... is the quantity of radon-222 released from the abandoned uranium mill-tailings produced to support the operation of TMI-2. . .." The Intervenors cited testimony at the hearing to the effect that these releases would exceed by many orders of magnitude the value of 74.5 curies given in Table S-3 as the radon-222 effluent to be associated with the LWR annual fuel requirement. The Intervenors cited as corroboration of this testimony the September 21, 1977 memorandum by Dr. Walter Jordan, a technical member of the Licensing Board Panel, to the Chairman of the Panel.[2]

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[1] As stated in 10 CFR 2.788(e), the criteria are:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

[2] This memorandum was transmitted to Chairman Hendrie, who acknowledged receipt on October 5, 1977 and noted that the memorandum was being made publicly available and that copies are being furnished to the NRC staff.

The Appeal Board denied the stay without reaching the merits of the Intervenors' claim. ALAB-456 (January 27, 1978). Noting that the stay motion relied exclusively on the release question, the Appeal Board held that argument "barred as a matter of law for the reason that it constitutes an impermissible attack upon a generic regulation of the Commission." The Appeal Board observed that the Commission had given no indication that the Jordan memorandum called for any modification of the S-3 rule that "the contribution of the environmental effects of uranium mining and milling *** be as set forth in Table S-3" and that "[n]o further discussion of such environmental effects shall be required." 10 CFR 51.20(e). The Appeal Board concluded that "in the absence of contrary instructions from the Commission, the Licensing Board was obliged to give effect to the values in the revised Table S-3 in this proceeding."[3] ALAB-456, Slip Op. at 7.

Following denial of the stay by the Appeal Board, the Intervenors brought

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[3] Unlike the Appeal Board, the Licensing Board did not reach a decision whether the testimony and arguments of the Intervenors with regard to radon emissions from mill tailings constituted an impermissible challenge to the S-3 fuel cycle rule. The Board allowed extensive testimony on the radon question under the rationalization that testimony itself was not a challenge to a generic rule although the testimony could not be used for a barred purpose. Ultimately the Board found that even if the Intervenors' analysis of the radon question were correct, the impact of radon releases nevertheless was of "negligible materiality" in the cost-benefit balance. Initial Decision ¶ 125.

the present motion before the Commission.[4] The present status of TMI-2 is that the OL has been issued and fuel loading begun. The licensee estimates that the reactor will be ready to go critical on March 5, 1978.

2. Alternatives for Responding to the Motion

The Intervenors' motion addresses the four criteria of 10 CFR 2.788(e). With regard to the first criterion -- a strong showing that the movant is likely to prevail on the merits -- in addition to the radon issue the Intervenors raise issues before the Commission which were not argued in the stay motion to the Appeal Board.[5] The thrust of the Commission's regulations regarding stays is that questions raised in a stay motion to the Commission must first have been presented to the Appeal Board.[6] Therefore the Commission need consider only the radon release issue in addressing the first stay criterion.

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4 The motion is properly before the Commission. The Commission has directed that under the certiorari and stay rules, 10 CFR 2.786 and 2.788, a party aggrieved by an Appeal Board decision denying a stay should file stay papers with the Commission pursuant to 10 CFR 2.788(a) rather than seeking review of the Board decision under 2.786(b). In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), Memorandum and Order of January 6, 1978, Slip Op. at 44, fn 44.

5 The additional plant-related issues include the ability of TMI-2 safety-related structures to withstand aircraft crashes and protection of the public outside the Low Population Zone. These issues were noted in the exceptions to the Initial Decision filed with the Appeal Board by the Intervenors but were not relied on in the Supplemental Memorandum supporting the stay motion before the Appeal Board.

6 10 CFR 2.788(f) states that the Commission will deny an application for a stay if the stay was not, but could have been, sought before the Appeal Board. Even though in the present case a stay was sought earlier from the Appeal Board, the introduction of entirely new grounds in the motion before the Commission represents the bypassing of established review processes which 10 CFR 2.788(f) was intended to prevent.

Both the NRC staff and the applicant in their responses urge the Commission to deny the stay. They propose two grounds for finding that the Intervenors are not likely to prevail on the merits. The first proposed ground is the one relied on by the Appeal Board, that consideration of the radon release issue is barred by the Commission's fuel cycle rule. As an alternative ground the staff and the applicant cite the Licensing Board's determination that, even if the significantly larger figures proposed by the Intervenors are used, the radon released to the atmosphere would be small compared to radon in natural background and that the related TMI-2 health effects would increase the mortality rate by only one additional death per billion other deaths over the billions of years required for th decay of the parents of radon-222. Initial Decision, Paragraph 125.

Although the Appeal Board was certainly correct in holding that the Intervenors' claim was technically barred as an attack on a generic regulation, OGC recommends that the Commission not rely on the S-3 rule in disposing of the stay motion. The staff has submitted a recommendation that the Commission amend the fuel cycle rule to remove the radon release value from Table S-3 and to allow discussion of radon releases and associated health effects in individual cases. SECY 78-99. Should the Commission decide to issue this amendment, OGC believes it would be inappropriate not to apply it to the TMI-2 proceeding, which remains open pending the Appeal Board's review on the merits now tentatively scheduled for late in March. Because the Licensing Board took and

considered testimony on the radon question,[7] there would probably be no need to reopen the evidentiary hearings. The Appeal Board could review the adequacy of the Licensing Board's consideration of radon impacts based on the existing record.[8] This approach is more desirable than having the Appeal Board, following ALAB-456, dispose of the Intervenors' principal exception by reliance on a rule which appears to be seriously misleading.

Assuming the Commission decides to permit consideration of radon impacts in the TMI-2 proceeding before the Appeal Board, the question remains whether it can be said that they are likely to prevail. Although the testimony taken on the question was fairly extensive, the Licensing Board in its Initial Decision discussed the significance of radon impacts with a perfunctory analysis that in OGC's view passes over important questions.[9]

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7 See note 3 above.

8 There are several other cases in which review of an Initial Decision is pending before the Appeal Board. OGC has been informed that the staff intends to submit a supplement to SECY 78-99 giving its recommendation regarding whether the proposed suspension of the S-3 rule should apply to these cases. Although OGC believes that the suspension should apply, following the reasoning offered in this paper for TMI-2, OGC recognizes that unlike TMI-2 evidentiary hearings may have to be reopened in some or all of these cases. This would not mean that the effectiveness of licenses authorized by the initial decisions would need to be suspended, but it would of course impose burdens on the staff, the applicants and the Licensing Boards.

9 These questions include whether it is self-evident that radiation increments small compared to natural background are for that reason of no significance, even though they may persist for many thousands of years.

In the stay motion the Intervenors have challenged the Licensing Board's asserted failure to "articulate the relevance" of its arguments, but they have not offered much themselves in the way of argument to support a conclusion that fuel cycle radon releases would tilt the environmental balance against operation of TMI-2. In this circumstance, if the Commmission directs the Appeal Board to consider the merits, the possibility remains open that the Intervenors might prevail, but it cannot be said that they have made a strong showing of likelihood.

With regard to whether the Intervenors will be irreparably injured if the TMI-2 OL is not stayed pending the Appeal Board's review, both the applicant and the staff give persuasive arguments that there will be no irreparable injury. The fuel for this period of operation has been fabricated and the associated tailings piles already created, so the radon release impact on which the stay motion is based will not be increased if a stay is denied.[10] Granting the stay would impose on the applicant and the persons served by TMI-2 the evident costs of requiring an operational facility to stand idle. The Intervenors argue that because in their view, the TMI-2 OL has been issued in violation of NEPA, the public interest in legality of agency procedure requires that a stay be granted despite the above costs. However, case law and the Commission's practice hold that even if NEPA violations have occurred that fact would not

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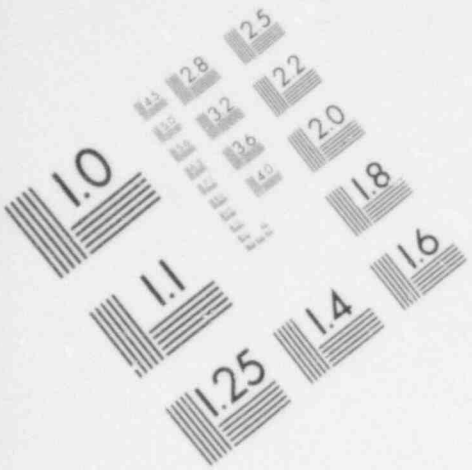
10 The Intervenors' arguments that the fuel could be transferred to an already-licensed reactor and that allowing the reactor to start up will involve decommissioning expenses if the Intervenors ultimately prevail do not establish irreparable injury. Transfer of irradiated fuel and decommissioning could be accomplished, if necessary, and the cost of these operations would not fall on the Intervenors, contrary to their assertion in the stay motion.



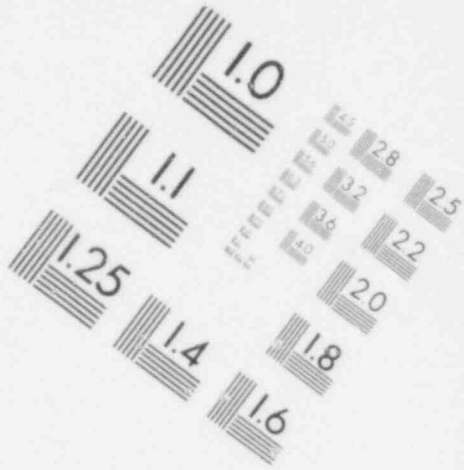
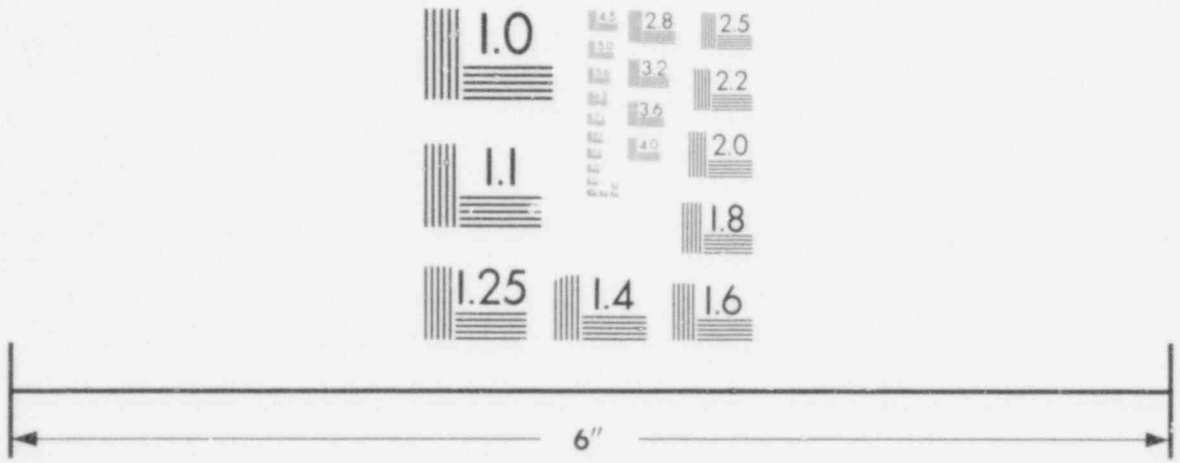
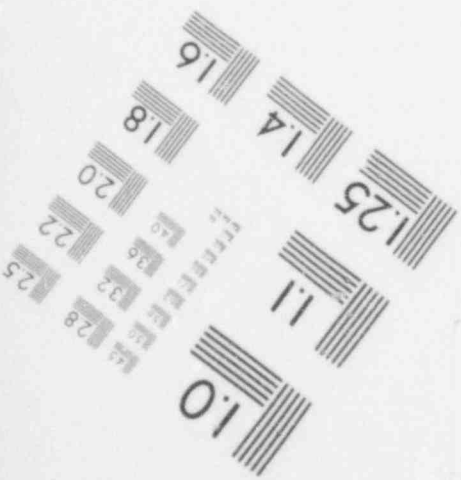
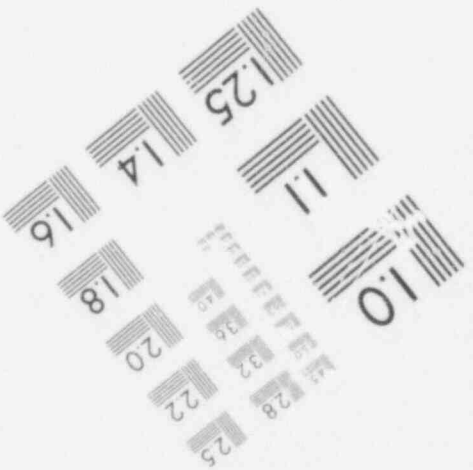
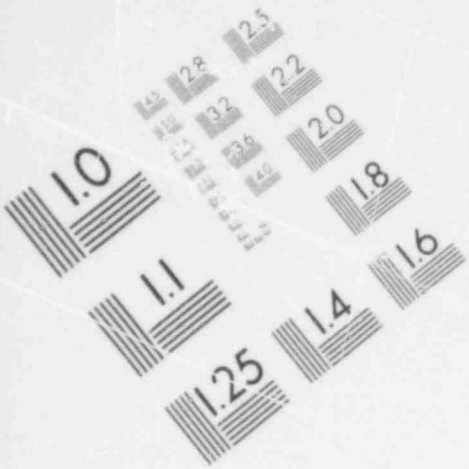


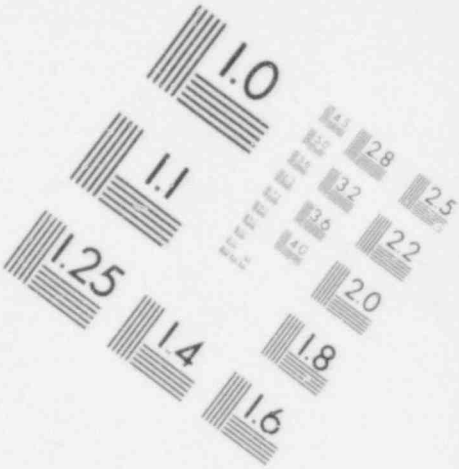
IMAGE EVALUATION TEST TARGET (MT-3)











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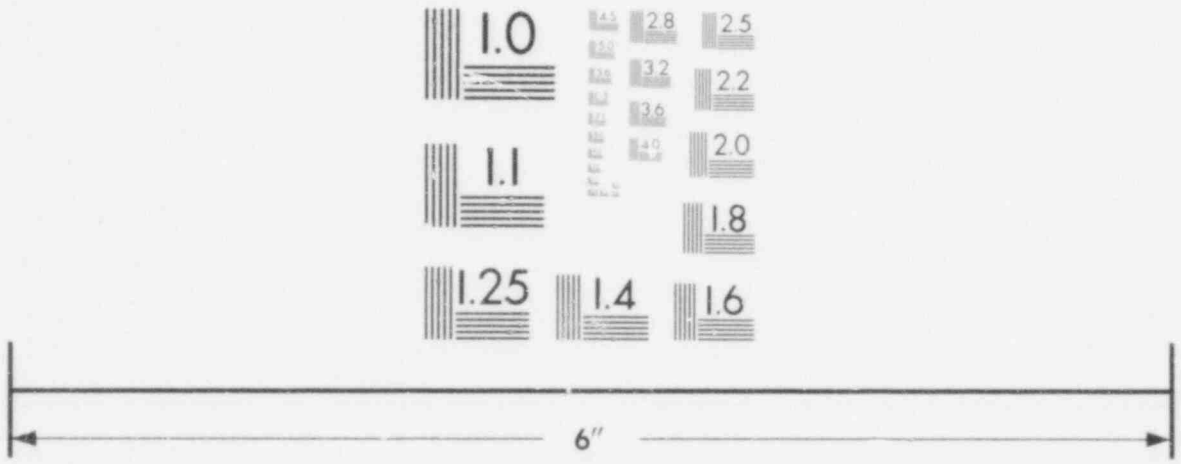

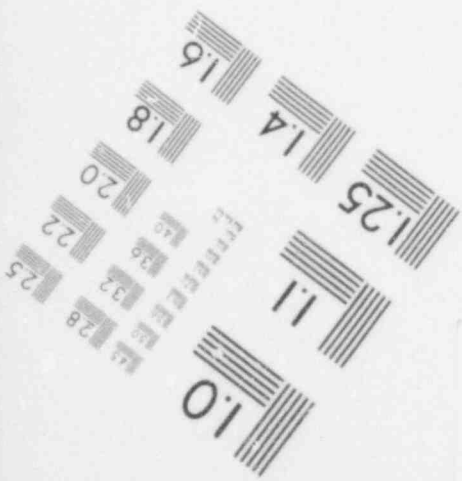

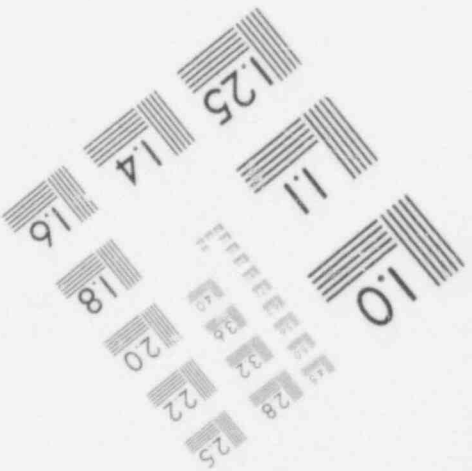

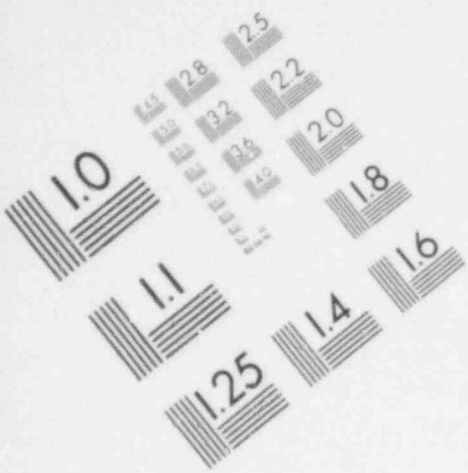

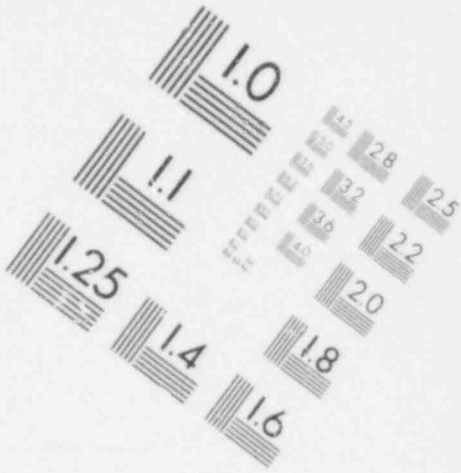

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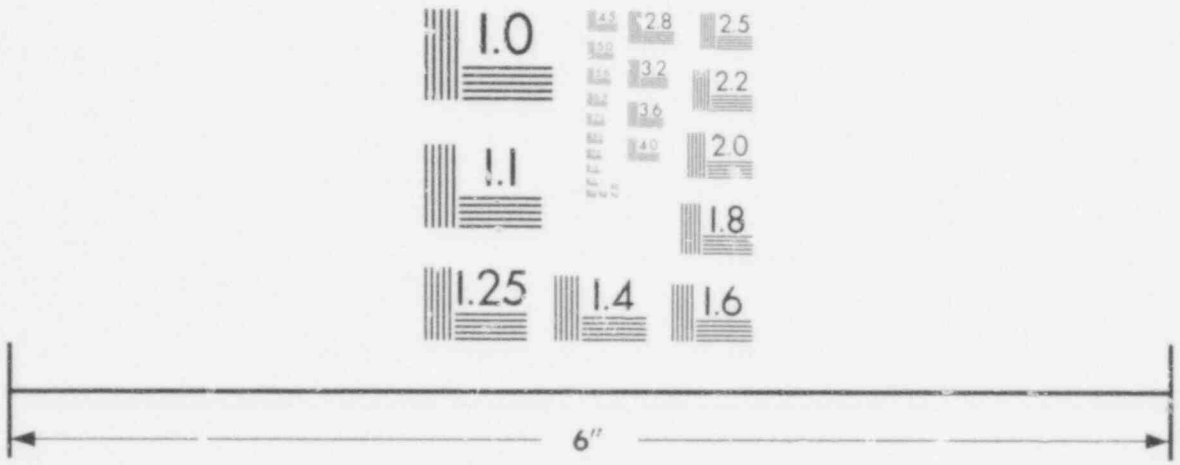

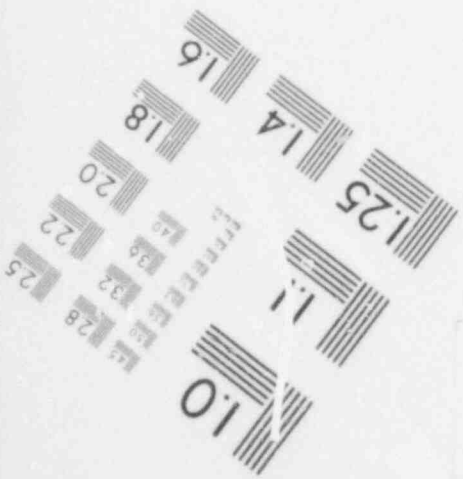

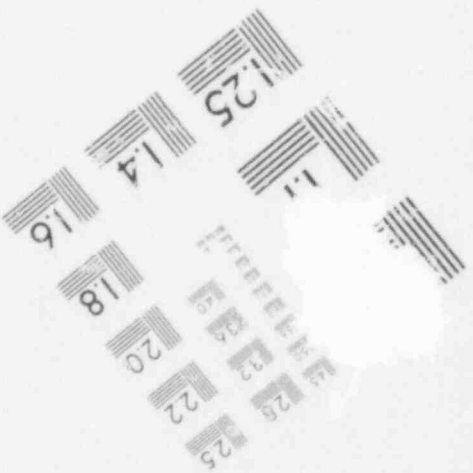

of itself constitute irreparable harm requiring preliminary relief. State of New York v. NRC, 550 F. 2d 745, 753 (2d Cir. 1977).

Thus, in OGC's view the Intervenors fall short on each of the four criteria for a stay, and we therefore recommend that the stay be denied. However, for the reasons discussed earlier we believe that the Intervenors are entitled to have the Licensing Board's disposition of their radon release argument reviewed by the Appeal Board. Attached is a draft order implementing this recommendation.

James L. Kelley
Deputy General Counsel

Attachments:

1. Intervenors' Motion
2. NRC Staff Response
3. Applicant's Response
4. Draft Order

SECY Note:

This paper is currently scheduled for consideration at an Open Meeting on Tuesday, February 28, 1978.

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ATTACHMENT 1

Intervenors' Motion

Attachment 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

In the Matter of	)	
METROPOLITAN EDISON COMPANY, et al.	)	Docket No. 50-320
(Three Mile Island Nuclear Generating Station, Unit 2)	)	

INTERVENORS' APPEAL TO THE COMMISSION OF A STAY OF THE INITIAL DECISION

Under the authority of Part 2.788 of the Commission's Rules, the Intervenors' request that the Commission issue a stay of the Initial Decision (ID) of Dec. 19, 1977, in this proceeding. This action is requested because the ID issued by the Licensing Board contains numerous flagrant violations of the Administrative Procedure Act of 1946 (APA), the Atomic Energy Act of 1954, as amended, (AEA), the National Environmental Policy Act of 1969, (NEPA), the Energy Reorganization Act of 1974 (ERA), and the Commission's Rules. This action is requested of the Commission because an appeal for a stay made to the Atomic Safety and Licensing Appeal Board (AB)(Dec. 29, 1977, and Supplemental Memorandum, Jan. 13, 1978) was rejected with little indication that the AB either read or understood the filings or was aware of the requirements of the APA, 5 U.S.C. 557(c) or its other statutory responsibilities reaching its decision of Jan. 27, 1978, (ALAB-456). This appeal will by the limitations of space be a very condensed version of the Intervenors' Brief of Jan. 30, 1978, and will discuss the criteria of 10 CFR 2.788(e) in order.

1. The analysis upon which the Licensing Board and the Staff relied fraudulently concealed vital information and required that the Board and Staff turn their backs on the laws of both physics and man, as shown below. The Staff additionally must disregard the statements of the Staff's own Witness, Dr. Gotchy, who wholly and completely corroborated the basic thrust of the testimony of Intervenors' Witness Kepford. The subject here was the quantity of radon-222 released to the environment from abandoned mill tailings piles of one year's operation of TMI-2. Kepford had sh
or radon-222, each producing enormo
Table 2). The thorium-230 initiall
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-320
	)	
	)	
(Three Mile Island Nuclear Station, Unit 2)	)	

NRC STAFF ANSWER OPPOSING
JOINT INTERVENORS' MOTION FOR STAY

Pursuant to § 2.788 of 10 CFR Part 2, the Joint Intervenors, Citizens for a Safe Environment and the York Committee for a Safe Environment, have petitioned the Commission to stay the Atomic Safety and Licensing Board's ("Licensing Board") Initial Decision in this proceeding (LBP-77-70, 6 NRC ____ (December 19, 1977)). Joint Intervenors' earlier request for a stay directed to the Atomic Safety and Licensing Appeal Board ("Appeal Board") was denied by that Board (ALAB-456, January 27, 1978, slip op.) The Staff believes that the showing contained in Joint Intervenors' filing falls far short of what is required to warrant granting the requested stay and the resulting foreclosure of reactor operation pending the outcome of the appeal of the initial decision, that the Appeal Board's decision (ALAB-456) denying the stay was correct with respect to all questions of law and policy and that for these reasons, more fully discussed infra, the Commission should deny the application for a stay.

I. Summary of the Decision Sought to be Stayed

The proceeding below involve
before a Licensing Board wh

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February 21, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-320
	)	
	)	
(Three Mile Island Nuclear Generating Station, Unit 2)	)	

APPLICANTS' RESPONSE OPPOSING
INTERVENORS' REQUEST FOR STAY

On February), 1978, York Committee for a Safe Environment and Citizens for a Safe Environment ("Intervenors") filed with the Commission a document entitled "Intervenors' Appeal to the Commission of a Stay of the Initial Decision," ("Appeal") in which Intervenors request, pending the outcome of their appeals in this proceeding, that the Commission stay the effectiveness of the Licensing Board's Initial Decision [1/] which authorized issuance of an operating license for the Three Mile Island Nuclear Station, Unit No. 2 ("TMI-2"). Applicants oppose Intervenors' request for stay.

The Licensing Board's Initial Decision was issued on December 19, 1977. Intervenors on December 29, 1977, filed with the Appeal Board a Motion for Stay of Initial Decision pending the outcome of appeals. [2/] By Order of January 3, 1978, the

1/ LBP-77-70, 6 NRC ____ (December 19, 1977). The operating license for TMI-2 was issued on February 8, 1978. 43 Fed. Reg. 7073 (1978).

2/ On December 30, 1977, Intervenors also filed with the Appeal Board exceptions to the Initial Decision. No other party filed exceptions. By Order of January 3, 1978, the Appeal Board granted
(Con't on next page)

Attachment 3

Appeal Board provided Intervenors an additional opportunity until January 13, 1978, to supplement their motion for stay. On January 13, 1978, Intervenors filed a Supplemental Memorandum in Support of Motion for Stay of Initial Decision. Applicants in a reply dated January 23, 1978, and the NRC Staff in a response dated January 25, 1978, opposed Intervenors' request for a stay. On January 27, 1978, the Appeal Board denied Intervenors' request for stay. [3] It is from this denial which Intervenors now take this appeal to the Commission pursuant to 10 CFR § 2.788. [4]

The Commission's regulations (10 CFR § 2.788) specify four factors to be considered in determining whether to grant or to deny an application for a stay.

1. Whether the moving party has made a strong showing that it is likely to prevail on the merits.

In the section of their Appeal devoted to this first factor, Intervenors provide what they describe as "a very condensed version" of the Intervenors' Brief of January 30, 1978, filed in

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2/ (Con't) Intervenors' request for an extension of time until January 30, 1978, to brief their exceptions. Intervenors' brief was filed on January 30, 1978, and Applicants' reply brief on February 17, 1978.

3/ ALAB-456, 7 NRC _____ (January 27, 1978).

4/ Intervenors' appeal is filed out of time. Section 2.788 requires that stay requests be filed within seven days after service of a decision or action sought to be stayed. We read that regulation as requiring the same period for appeals from stay determinations. ALAB-456 was served on January 27. Allowing three days for mailing (10 CFR § 2.710), Intervenors' appeal to the Commission should have been filed on February 6, 1978.

support of the exceptions on the merits now pending before the Appeal Board. The January 30 Brief includes discussion of a variety of subjects which Intervenors are arguing before the Appeal Board, but which the Appeal Board has yet to consider. This is in contrast to their arguments to the Appeal Board in support of the stay request which addressed only one of the subject areas involved in their appeal, i.e., Radon-222 emanations from uranium mill tailings. See ALAB-458 (slip opinion, at 3). Despite the limited scope of their argument to the Appeal Board, Intervenors in this Appeal would have the Commission initially review and decide the likelihood that Intervenors will prevail on the merits of their appeal on all subjects addressed in their appeal. Applicants view Intervenors' attempt to expand their argument before the Commission from the more limited scope argued before the Appeal Board as inconsistent with section 2.788(f) [5] and as contrary to a number of prior decisions within this agency which prohibit raising issues for the first time on appeal. [6] We submit the Commission should limit its consideration on the likelihood that Intervenors may ultimately prevail on the merits to the single issue addressed below and decided by the Appeal Board, i.e., Radon-222 emanations from uranium mill tailings. Applicants'

5/ A stay request filed initially with the Commission would be denied outright pursuant to this section. The logical extension of this explicit requirement prohibits raising for the first time before the Commission arguments on the likelihood of success on appeal which were not advanced and decided before the Appeal Board.

6/ See, for example, Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B) ALAB-409, 5 NRC 1391, 1396 (1977) and decisions cited therein.

Response as to this factor is confined to that one subject area.[7]

As to Radon-222 emanations from mill tailings, there are two reasons why it is not likely that Intervenors will prevail on the merits of their appeal. First, their assertion that radon emissions additional to those specified in Table S-3 should be considered is a challenge to this Commission's regulations. The Licensing Board in this proceeding has in any event considered such additional releases and has properly factored such releases into its cost-benefit determination.

Intervenors' quarrel with Table S-3 constitutes an impermissible attack in an individual licensing proceeding upon a generic regulation of the Commission.[8] 10 CFR § 2.758. The figures in Table S-3 were developed in public rulemaking proceedings convened by the Commission specifically to consider such matters (37 Fed. Reg. 24919 (1972)). Table S-3 expressly includes the environmental effects of "uranium mining and milling." 10 CFR § 51.20(e); 10 CFR Part 50, App. D, § A.15(a). As the Commission noted in its statement of considerations accompanying Table

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7/ Applicants in their brief on the merits, submitted to the Appeal Board on February 17, 1978, have addressed all the subject areas of Intervenors' appeal. Were it not for the limitations on attachments in section 2.788, we would attach to this Response a copy of our February 17 brief for the Commission's information.

8/ Any reexaminations that were suggested on this subject should be conducted generically. The Commission has already indicated the possibility of a rulemaking proceeding to consider generally updates in the values set out in Table S-3 (in addition to the ongoing proceeding related to reprocessing and waste management). See 42 Fed. Reg. 26987, 26989. The NRC Staff has suggested the subject of radon emissions from mill tailings as one example of material appropriate for such a rulemaking. See ALAB-456, supra, at fn. 5.

S-3 when it was promulgated, "The Summary Table S-3, to be used as a basis for evaluating the environmental effects in a cost-benefit analysis for a reactor quantifies all releases . . ." (39 Fed. Reg. 14190 (1974) (emphasis added)). No further discussion of such environmental effects is required. 10 CFR § 51.20(e). Indeed, at the time the Commission issued its March, 1977, Interim Rule on Table S-3, it directed that "any operating license . . . hereafter issued must take into account the revised values contained in this rule." 42 Fed. Reg. 13803, 13806 (March 14, 1977) (emphasis added). To challenge the values in Table S-3 or the basis on which they rest is in effect a challenge to the regulation itself. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2) ALAB-218, 8 AEC 79, 89 (1974).

The crux of Intervenors' dispute with the values for Radon-222 in Table S-3 is the length of time into the future for which predictions of radon emissions and their possible effects should be made and taken into account. Intervenors contend that period should be tens of billions of years. In order to reject Intervenors' position the Commission need not overlook the basic "laws of physics" relating to radioactive decay, as Intervenors would have it believe. Rather, the Commission need only question the worth of projecting over billions of years the resultant impact of that decay, i.e., emissions, transport, health effects, etc., and such projections must be regarded as purely speculative.[9/]

9/ See, e.g., Carolina Environmental Study Group v. United States, 510 F.2d 796, 800 (D.C. Cir. 1975); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1093 (D.C. Cir.

(Con't on next page)

Even were there room in this individual licensing proceeding for consideration of curie values for Radon-222 different from Table S-3, still the record here is not deficient. Granting for the sake of argument the correctness of Dr. Kepford's approach and utilizing Dr. Kepford's own testimony, the Licensing Board determined "the relative impact of the Rn-222 consideration to be of negligible materiality." LBP-77-70, supra, ¶ 125. It based this determination on two grounds. The first ground is the uncontroverted fact that the Radon-222 emanations referred to by Dr. Kepford are small compared with the natural background. Id. The second ground was that the "TMI-2 related health effect would amount to an increased mortality rate of one additional death per billion deaths from other causes over the time span of several billion years required (by Dr. Kepford's reckoning) to account for the decay of the parents of Rn-222." Id.

2. Whether the moving party will be irreparably injured unless a stay is granted.

On the important second factor of irreparable injury, Intervenors' argument to the Commission (Appeal, at 8) is essen-

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9/ (Con't) 1973); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Illustrative of the speculative nature of such projections is the subject of the emissions themselves. Mill tailings and their emissions are not being ignored by the Commission. The Commission has recognized that "tailings represent the major environmental issue associated with uranium milling operations" (42 Fed. Reg. 13874 (1977)) and is considering specifically the methodology of tailings management (See 42 Fed. Reg. 13874-75, 41 Fed. Reg. 22430-31). However, the Commission has observed in this regard that the "location of uranium resources and the technology which will be used to recover uranium during time periods significantly beyond the year 2000 are highly speculative." 42 Fed. Reg. 13874.

tially the same weak argument advanced before the Appeal Board.[10]

Intervenors' first allegation of irreparable injury is based on the premise that prior to fuel loading of TMI-2 uranium ore will have been mined and milled with the attendant beginning of a billi..-year public health problem. As indicated in he attached affidavit by Walter G. Runte, Jr., the first co for TMI-2 is already on site,[11] and the processing of uranium for the first core and for at least half of the first reload batch has been completed. Intervenors are simply mistaken in their assumption that a stay of the initial decision pending appeal would affect the creation of mill tailings.[12]

10/ The Appeal Board observed as to Intervenors' argument on irreparable injury:

> [T]he Intervenors do not even endeavor to show that plant operation during the pendency of the appeal will pose a direct threat to the health and safe.. of their members, who reside in the general vicinity of t facility site. And their motion papers do not suggest that any -- let alone irreparable -- injury would be sustained during the period in question by reason of the mining and milling of additional uranium. The intervenors do make vague references to the "radioactive contamination" of the reactor and the creation of radioactive waste as a source of injury; here too, however we are left entirely in the dark regarding what the nature and extent of that injury might be. And intervenors did not complain about these consequences in the proceedings below.

11/ Mr. Runte's affidavit was prepared for submission to the Appeal Board on January 23, 1978, for its consideration of Intervenors' stay request before that body. Intervenors' argument remaining the same on appeal, no new affidavit has been prepared. Counsel are advised, however, by officials of Metropolitan Edison Company that loading of the initial fuel core has been completed and testing has begun.

12/ Intervenors' argument is not enhanced by their suggestion that TMI-2 fuel could simply be used at another reactor, thereby reducing the amount of uranium needed to be mined and milled for the other reactor. Assuming this could be done physically and contractually, only an immediate firm commitment of TMI-2 fuel to

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Applicants note that the irreparable injury alleged by Intervenors differs from the kind of immediate injury normally asserted in requests for a stay in that Intervenors have not demonstrated that the alleged irreparable injuries will be to Intervenors or their present membership in the near future. Intervenors' allegations rather are the possibility of injuries to the general public over billions of future years.

Intervenors' second allegation of irreparable injury is that the commencement of operation of TMI-2 will result in radioactive contamination of the facility and the need for decommissioning at some future time. Intervenors assert that decommissioning of nuclear reactors is "yet another subject which the Staff has given only the most superficial treatment." Appeal, at 8. Intervenors' quarrel is with the consideration given decommissioning in the Staff's Final Supplement to the Final Environmental Statement. FSFES, § 9.6. Applicants suggest that it is wholly inappropriate for Intervenors to claim irreparable injury on the basis of the impacts of decommissioning when in the proceeding to date Intervenors have advanced no contentions, presented no evidence and performed no cross-examination on the subject. Even now, Intervenors provide no definition at all of an immediate irreparable injury in this regard.

12/ (Con't) another reactor during the pendency of the appeal could possibly influence the uranium procurement plans for the other reactor. The result would be that even if Intervenors are unsuccessful on appeal, operation of TMI-2 would be delayed until the TMI-2 fuel were replaced on whatever schedule it could be mined, milled, enriched and fabricated.

3. Whether the granting of a stay would harm other parties.

Applicants' counsel has been advised by officials of Metropolitan Edison Company that loading of the initial core into TMI-2 has been completed and that initial testing leading to full power operation have begun. The harm to Applicants and their consumers which would result from a stay of the Initial Decision and consequently in operation of TMI-2 arises principally from the added operating costs (including fuel costs) of having to generate electricity from fossil fuel plants which would otherwise be generated by TMI-2. This additional cost was estimated in the Staff's Final Supplement to the Final Environmental Statement to be approximately $8 million a month (FSFES, Section 8.3.3). Applicants' counsel has been advised by General Public Utilities Corporation (the parent company of the three Applicants) officials that this additional operating cost has increased since the issuance of the FSFES. In addition, a delay in the commercial operation of TMI-2 will result in the accumulation of substantial amounts of interest during construction which will have to be added to the cost of the plant. 13/

13/ Intervenors' bald characterization of these financial costs as "fantasies" is absurd. As the Appeal Board has noted: "At the least one seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it. It is hardly a novel proposition that, like general principles, unsupported assertions do not decide concrete cases." Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-395, 5 NRC 772, 785 (1977)).

4. Where the public interest lies.

Intervenors' assertions as to where the public interest lies beg the question. They assume the premise, which Intervenors' brief does not support, that the Initial Decision fails to obey applicable laws and related judicial decisions. Applicants submit that the public interest lies in avoiding the large additional operating costs which Applicants and their consumers will occur if the Initial Decision is stayed during appeal.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By George F. Trowbridge

George F. Trowbridge

Ernest L. Blake, Jr.

Counsel for Applicants

Dated: February 21, 1978.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, et al.	)	Docket No. 50-320
	)	
	)	
(Three Mile Island Nuclear Generating Station, Unit 2)	)	

AFFIDAVIT OF Walter G. Runte, Jr.

1. My name is Walter G. Runte, Jr., and I am Nuclear Fuel Resources Manager of the General Public Utilities Service Corporation. GPU Service Corporation is responsible for fuel procurement for all of the GPU System reactors, including Three Mile Island, Unit 2. I am familiar with the status of fuel procurement for TMI, Unit 2.

2. The entire first core for TMI Unit 2 is presently on site and ready for fuel loading, and processing of the uranium for the first core has been completed.

3. Firm purchase commitments have been made by the GPU System for the procurement of sufficient uranium to support the operation of all of the GPU reactors (Oyster Creek, TMI Units 1 and 2 and Forked River) through the year 1987.

4. The GPU System has entered into a contract with ERDA for enrichment of uranium for TMI Unit 2. All of the

feed material for the first core and 50% of the feed material for the first reload for TMI Unit 2 has already been delivered to ERDA. The enrichment contract requires that the balance of the feed material for the first reload of TMI Unit 2 be delivered to ERDA not later than January 1979.

Walter G. Runte, Jr.

Walter G. Runte, Jr.

ss:

Sworn to before me this 23rd day of January, 1978.

Veronica A. Gearhart

Notary Public

VERONICA A. GEARHART
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 10, 1982

25 016

February 21, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-320
	)	
	)	
(Three Mile Island Nuclear Generating Station, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response Opposing Intervenors' Request For Stay" dated February 21, 1978, has been served by mail, postage prepaid, to those persons listed on the attached service list this 21st day of February, 1978.

Ernest L. Blake, Jr.

Counsel for Applicants

Dated: February 21, 1978.

25 017

SERVICE LIST

Dr. Joseph M. Hendrie
Chairman
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Victor Gilinsky
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Richard T. Kennedy
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Peter A. Bradford
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Alan S. Rosenthal, Esq.,
Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson,
Member
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome E. Sharfman, Esq.,
Member
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward Luton, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gustave A. Linenberger
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Ernest O. Salo
Professor, Fisheries Research
Institute, WH-10
University of Washington
Seattle, WA 98195

Henry J. McGurren, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Chauncey R. Kepford
433 Orlando Avenue
State College, PA 16801

Karin W. Carter, Esq., Assistant
Attorney General
Office of Enforcement
Department of Environmental
Resources
709 Health and Welfare Building
Harrisburg, PA 17120

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTACHMENT 4

Draft Order

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Richard T. Kennedy
Peter A. Bradford

In the Matter of	
METROPOLITAN EDISON COMPANY, et al.	Docket No. 50-320
(Three Mile Island Nuclear Station, Unit No. 2)	

ORDER

On February 9, 1978, Intervenors, Citizens for a Safe Environment and York Committee for a Safe Environment, moved this Commission for a stay of the Licensing Board's Initial Decision of December 19, 1977, to authorize issuance of an operating license for Unit No. 2 of the Three Mile Island Nuclear Station (TMI-2). LBP-77-70, 6 NRC ___. On January 27, 1978, the Appeal Board denied the Intervenors' motion for a stay of the decision. ALAB-456, 7 NRC ____. The Intervenors now come to us for relief.*/ Both the applicant and the NRC staff urge the Commission to deny the stay. For the reasons which follow, we deny the Intervenors' motion for a stay but we direct the Appeal Board to consider the issue of the environmental effects of radon (Rn-222) in deciding the merits of this appeal.

*/ The instant proceeding is not, as ~~Applicant~~ contends, an appeal of this denial. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 7 NRC ____, Slip Opinion at 44, n.44 (January 6, 1978), the Commission indicated that a party aggrieved by an Appeal Board decision denying a stay should apply to the Commission for a stay under 10 CFR 2.788(a), (h) rather than petition for review under 10 CFR 2.786(b).

Our regulations require that the following four factors be addressed in consideration of a motion for a stay:

(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) whether the party will be irreparably injured unless a stay is granted;

(3) whether the granting of a stay would harm other parties; and

(4) where the public interest lies.

10 CFR 2.788(e) (1977).

In their submission to the Commission, Intervenors have introduced a variety of contentions regarding the merits of their case. Of these, only the issue of the environmental effects of Rn-222 in uranium mining and milling was presented to the Appeal Board and is therefore properly before us. 10 CFR 2.788(f) (1977).

The Intervenors claim that releases of Rn-222 associated with the production of the annual fuel requirement for a light-water reactor will be many orders of magnitude larger than the figure of 74.5 curies in Table S-3 of 10 CFR Part 51. There appears to be substantial merit in their claim. The Commission has taken under advisement a recommendation by the NRC staff that Table S-3 be amended to remove the value for radon releases and that the subject of radon releases and associated health effects be declared litigable in all individual licensing proceedings. While the Appeal Board decided correctly that the Intervenors' argument was barred by the fuel cycle rule, in these special

circumstances in which there is no apparent dispute that part of the rule is seriously inadequate, the purpose of the rule would not be served by its rigid application in this case. 10 CFR 2.758(b). Accordingly, we believe the Appeal Board should not be precluded from considering the merits of the Intervenors' argument in its review of the Licensing Board's decision.

The fact that we now direct the Appeal Board to consider the contention that the environmental effects of Rn-222 from uranium mining and milling may be more extensive than Table S-3 indicates does not necessarily mean that the Intervenors are likely to prevail. We note that the Licensing Board found the relative impact of Rn-222, even assuming the significantly larger release figures urged by the Intervenors, to be of negligible materiality. The Intervenors in their motion have challenged the Licensing Board's articulation of its reasoning, but they have not presented in this motion a persuasive showing that the Licensing Board's conclusion was wrong.

Nor are we persuaded by the Intervenors' arguments that they will suffer irreparable injury if TMI-2 is allowed to operate pending the Appeal Board's review. Because the fuel for this period of operation has already been mined and fabricated, operation of the plant will make no additional contribution to the radon releases on which the Intervenors base their argument for a stay. The Intervenors point to the costs of decommissioning as an irreparable injury resulting from contamination if operation is not stayed. This contamination is not an

irreversible harm, however, because there are methods available to decontaminate a facility and restore the site to unrestricted use. Economic costs of this decommissioning would not fall on the Intervenors.

By contrast, granting of a stay could do significant harm to other parties. Applicant's submission on this motion and the Final Supplement to the Final Environmental Statement indicate that a delay would cost the Applicant's customers some $8 million per month in added electricity costs. Intervenors contend that the Applicant had voluntarily delayed this plant and that harm to them offsets harm to the Applicant. This contention is disputed by the NRC staff and in any case is not relevant to the point at issue -- whether in the situation as it now exists the other parties would be harmed by a stay.

Unnecessary delay in operation of TMI-2 could impose the costs outlined above, and these costs and any burden of associated energy shortages will be shared by the public. This fact answers the question where the public interest lies, and supports denial of the stay.

Accordingly, the Intervenors' motion for a stay is denied. The Appeal Board is instructed to permit argument on the radon issue in its review of the Initial Decision.

It is so ORDERED.

For the Commission.

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this day of 1978.