

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station)	)	Docket No. 50-271
PUBLIC SERVICE ELECTRIC & GAS COMPANY (Salem Nuclear Generating Station, Units 1 & 2)	)	Docket Nos. 50-272 50-311
PHILADELPHIA ELECTRIC COMPANY (Peach Bottom Atomic Power Station, Units 2 & 3)	)	Docket Nos. 50-277 50-278
METROPOLITAN EDISON COMPANY, <u>ET AL.</u> (Three Mile Island Nuclear Station, Units 1 & 2)	)	Docket Nos. <u>50-289</u> 50-320
CONSUMERS POWER COMPANY (Midland Plant, Units 1 & 2)	)	Docket Nos. 50-329 50-330
DUQUESNE LIGHT COMPANY, <u>ET AL.</u> (Beaver Valley Power Station, Units 1 & 2)	)	Docket Nos. 50-334 50-412
PHILADELPHIA ELECTRIC COMPANY (Limerick Generating Station, Units 1 & 2)	)	Docket Nos. 50-352 50-353
PUBLIC SERVICE ELECTRIC AND GAS COMPANY and ATLANTIC CITY ELECTRIC COMPANY (Hope Creek Generating Station, Units 1 & 2)	)	Docket Nos. 50-354 50-355
PENNSYLVANIA POWER AND LIGHT COMPANY (Susquehanna Steam Electric Station, Units 1 & 2)	)	Docket Nos. 50-387 50-388
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, <u>ET AL.</u> (Seabrook Station, Units 1 & 2)	)	Docket Nos. 50-443 50-444
UNION ELECTRIC COMPANY (Callaway Plant, Units 1 & 2)	)	Docket Nos. STN 50-483 STN 50-486

STAFF RESPONSE TO COMMISSION
DIRECTIVE OF OCTOBER 13, 1976

October 22, 1976

Thomas F. Engelhardt
Deputy Executive Legal
Director

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On October 13, 1976 the Commission noted that it was considering suspending further actions in the above-referenced dockets in light of certain recent events and circumstances which will be referred to in the discussion following. ^{1/} The parties in these dockets were then directed to respond to a pending motion to the effect that such actions be taken. ^{2/}

Background

A rather complex series of events and circumstances has led to the present question of whether to suspend further proceedings in these dockets. First of all, on July 21, 1976 the U.S. Court of Appeals for the District of Columbia Circuit handed down a decision in the case of Natural Resources Defense Council v. NRC. ^{3/} This decision declared the Commission's rule ^{4/} for treating two aspects of the fuel cycle - reprocessing and waste management - inadequately supported by the rulemaking record. In a General Statement of Policy ^{5/} (GSP) responding to the court's action, the Commission

^{1/} Letter from Secretary of the Commission to all parties in these dockets, dated October 13, 1976.

^{2/} Motion of Vermont Yankee Nuclear Power Corporation dated September 27, 1976 and docketed (in Docket No. 50-271) on October 1, 1976.

^{3/} CADC Nos. 74-1385 and 74-1586 (July 21, 1976).

^{4/} Table S-3 included in 10 CFR Part 51.

^{5/} 41 Fed. Reg. 34707 (August 16, 1976).

said it was going to reopen the proceedings directly affected by the decision. ^{6/} The Commission said, further, that it would resolve the question of how to deal with other licensing proceedings that might be impacted by the court's decision on the basis of its evaluation of established equitable factors. These dockets are the cases which have either already been reopened or in which reopening is being sought on Table S-3 grounds. ^{7/}

Subsequent to the GSP, Supreme Court review was sought by one of the affected licensees (Vermont Yankee) of the Court of Appeals holding and motions were filed with the Court of Appeals seeking a stay of its mandate. The Court of Appeals granted a stay of its mandate on October 8, 1976, thus effectively postponing its issuance until the Supreme Court acts on the pending petition for a writ of certiorari.

Five days later, on October 13, 1976, the same day it issued the directive to which this pleading responds, the Commission issued a notice of proposed

6/ The Vermont Yankee and Midland proceedings.

7/ These dockets have been referred to loosely as involving show cause proceedings. In reality they are in various procedural postures. However, since the particular procedural status of each docket is of no importance to the basic question raised by the Commission's October 13 directive, the Staff's response is generic and directed to all the dockets.

rulemaking^{8/} which proposed interim revisions to Table S-3 on the basis of a completed Staff survey^{9/} also issued that day. In proposing an interim rule on the basis of the values in the Staff supplemental survey, the Commission expressed the view that the supplemental survey "represents a full and candid discussion of spent fuel reprocessing and waste management impacts" and that it "can serve as an adequate foundation" for an interim rule. The Commission also stated its present judgment that the impact values in the survey were unlikely to prove to be dramatically in error.

The foregoing events and circumstances essentially comprise the factual matrix giving rise to the issue of whether to suspend the pending show cause type proceedings. For the reasons which follow, it is the Staff's view that the Commission should as a matter of sound policy require such suspensions pending an effective interim rule.

FOUR FACTORS WARRANT DECISION TO
SUSPEND FURTHER PROCEEDINGS

1. Suspension of further proceedings makes sense in light of the court's stay of its mandate.

The Court's order of October 8, 1976, staying the mandate for its decision on the waste management and reprocessing aspects of Table S-3, is undeniably

^{8/} "Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management," 41 F.R. 45849 (October 18, 1976).

^{9/} "Environmental Survey of the Reprocessing and Waste Management Portion of the LWR Fuel Cycle" NUREG-0116 (Supplement to WASH-248).

Delphic in tone. We can say with some assurance, however, that the court's action removed any doubt on the question whether licenses could in fact be legally issued subsequent to July 21, 1976, the date of its decision. Licenses can be issued if they are made subject to the outcome of "the proceedings herein."^{10/} Since appropriately qualified licenses clearly can now be issued - where it wasn't clear before - it would inconsistent with the court's action to call existing licenses into question on Table S-3 grounds. Therefore, the proceedings in these dockets to do just that^{11/} should be suspended.

Since the mandate has not issued, the decision issued on July 21, 1976, does not, of itself, legally compel Commission action in Vermont Yankee or any other case. The question of the appropriate action to take in this period is thus a policy one, to be decided in light of the best information available and all the relevant circumstances. A similar question was presented to the Commission when the GSP was issued, and the chain of events leading to initiation of these proceedings begun. At that time, the Commission decided that requests to suspend existing license permits, and LWA's would be entertained on their merits. The facts and circumstances are now changed and, we submit, sound policy considerations now dictate that these proceedings be suspended.

^{10/} By the quoted phrase the court presumably means the proceedings in the cases before the court.

^{11/} In the Midland proceeding, the remanded issues include the consideration of energy conservation alternatives and clarification of the ACRS report as well as the fuel cycle issues. Only the fuel cycle should be suspended. The other issues should be allowed to proceed to resolution.

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2. Suspension of further proceedings makes sense from a timing standpoint.

The Commission's August 13 GSP noted that if a supplemental survey of adequate quality and breadth could be developed by the end of September, 1976, an interim rule "might be promulgated as early as December, 1976." This schedule has slipped approximately two weeks. Nevertheless, on the present schedule, an interim rule could be in place by mid-January. Such a rule would obviate the pending Table S-3 issues because it would remove uncertainties regarding the values to be used for spent fuel reprocessing and waste management impacts in individual cost-benefit analyses. Moreover, the practical likelihood that these show cause type actions could be brought to completion before mid-January is negligible. Finally, if the matters were allowed to continue there would be a substantial expenditure of time and effort which would be wasted as a result of an effective interim rule's preemption of the issues.

3. Suspension of further proceedings makes sense in light of the quality of the survey.

The Commission should act upon the best available information. The supplemental environmental survey of reprocessing and waste management impacts is the best available information. It is described in the notice of proposed rulemaking of October 13, 1976, as "full," "candid," "thorough," and as "an adequate foundation" for a revised Table S-3. The Commission said in that notice that its present judgment was that the values in the survey would not likely be found to be dramatically wrong. Since show cause proceedings should be based on the interim rule as adopted if they

can be justified in light of revisions to Table S-3, ad hoc proceedings which get under way only to be foreclosed by the adoption of the interim rule are ill-advised.^{12/} Suspension of outstanding licenses should await and be based upon the ultimately adopted Table S-3. This result is dictated by a need to efficiently use Commission resources.

4. Suspension of further proceedings makes sense because the cost-benefit balance is not likely to be tilted.

The fuel cycle impacts attributable to an individual reactor's cost-benefit assessment--particularly those which would occur over the next few months--are relatively small.

The waste management and reprocessing portions of the fuel cycle are a fraction of the total impacts of the fuel cycle. Thus, any differences, even large differences, in values for these impacts between existing Table S-3 and proposed Table S-3, (including any appropriate revisions thereto as a result of the rule-making process) will not likely show up as large differences in the overall cost-benefit analysis for an individual reactor. Since any overall perturbation

^{12/} However, it is noted that a decision on the interim rule will be based on the surveys as modified by those public comments which the Commission finds to be persuasive. During the period of notice and comment, the parties can direct their attention to the rulemaking proceeding. After the airing of these issues, it may be appropriate for the Commission to review these dockets on its own motion at the conclusion of the interim rulemaking process. In the event the Commission is persuaded that the comments show a need to reactivate show cause type proceedings on S-3 issues, it could do so at that time.

for Table S-3 reasons can as a practical matter only be minor, it could only tilt an individual cost-benefit balance in a different direction if that balance were in virtual equipoise. None of the balances that have been struck in the cases in these dockets have been found to be in such a state.

Suspension is a Matter of Discretion, Not of Law

In view of the Staff's conclusion that the Commission should suspend further show cause type actions in these dockets, we did not find it necessary to reach the point raised in the motion of Vermont Yankee Nuclear Power Corporation to the effect that it would be contrary to law not to do so. Generally, the Commission has broad discretion in the exercise of its regulatory authority. Siegel v. Atomic Energy Commission, 400 F.2d 778 (CA-2; 1968), see also, FCC v. Pottsville Broadcasting Company, 309 U.S. 134 (1940). Also, it is true, generally, that while a specific agency action is undergoing judicial scrutiny the agency is powerless to act with respect to that specific action. Jaffe, Judicial Review of Administrative Action, 711 (1965). These general principles make clear, however, that an agency is legally free to exercise its regulatory authority in matters related - even closely related - to the specific agency action undergoing judicial scrutiny. Thus, to take a hypothetical example, general Commission concern based on new information

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over the numerical values for the reprocessing or waste management impacts could properly trigger an exercise of regulatory authority by the Commission resulting in license suspensions. If broad-scale license suspensions were dictated by such information^{13/} the suspensions could properly be imposed, even with respect to Vermont Yankee. For regardless of whether the Supreme Court might ultimately find that the old Table S-3 values were adequately supported at the time they were developed that would not have been the issue triggering suspension; new information would have been the basis. It, therefore, seems clear that as a matter of law the Commission retains the discretion to permit the show cause type proceedings to continue based upon the new information developed in the supplemental survey. For the sound policy reasons enumerated above it should not do so.

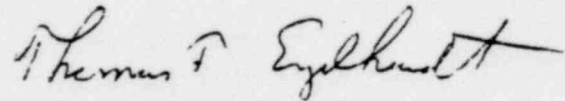
Conclusion

In view of the court's action staying its mandate, the issuance of the notice of proposed rulemaking, the publication of the supplement to the environmental survey, and the Commission's stated expectation that an interim rule will be

^{13/} Of course, as noted elsewhere herein, there is no reasonably conceivable way as a practical matter that the relatively minor effects which the numerical values for these impacts represent in individual impact statements could actually change so as to warrant broad-scale license suspensions.

in place in the near future, the Commission should suspend all show cause type proceedings requested or initiated on the basis of the Commission's policy statement or the Court of Appeals decision in NRDC v. NRC. Orderly conduct of licensing proceedings and effective public interest regulation can best be accomplished by deferring action on these matters pending the adoption or rejection of an interim rule.

Respectfully submitted,



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Deputy Executive Legal Director

Dated at Bethesda, Maryland
this 22nd day of October, 1976.

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