

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY  
CONSENT CALENDAR ITEM

June 12, 1979

SECY-A-79-51

MEMORANDUM FOR: The Commissioners

FROM: *LB* Leonard Bickwit, Jr., General Counsel

SUBJECT: REQUESTS FOR HEARING PURSUANT TO THE COMMISSION'S  
ORDER OF MAY 7, 1979, IN THE MATTER OF SACRAMENTO  
MUNICIPAL UTILITY DISTRICT (RANCHO SECO  
FACILITY)

By a confirmatory Order dated May 7, 1979, the Commission directed that the Rancho Seco facility (a B&W design) should remain shut down until certain short-term actions were completed to the satisfaction of DNRR. The Order also directed the licensee to accomplish "as promptly as practicable" certain long-term modifications set out in the Order. The Order stated further:

Within twenty (20) days of the date of this Order, the licensee or any person whose interest may be affected by this Order may request a hearing with respect to this Order. Any such request shall not stay the immediate effectiveness of this Order.

During the twenty-day period requests for a hearing were received from Friends of the Earth and from two members of the Board of Directors of Sacramento Municipal Utility District.

On June 1, 1979 the staff filed with the Commission a response to the hearing requests, making certain procedural recommendations and offering a proposed scope for the hearing, if one is held. See Attachment A. The initial point made by the staff is that resumed operation of Rancho Seco need not be stayed pending the completion of any required hearing. The staff's legal analysis gives adequate support for this conclusion, with which we agree. We note that the case for immediate startup is legally strongest

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if the hearing has not yet begun at the time the plant is ready to resume operation. This will probably be the situation for Rancho Seco. Whatever the situation, however, it may be safely assumed that Rancho Seco will not be precluded from resuming operations once the conditions of the May 7 Order have been met. This conclusion applies to all of the options for Commission action which we discuss below.

### I. Delegation to a Licensing Board

At the outset the Commission must decide who shall rule on the hearing requests. The regulations provide that "[i]f a request for a hearing ... is filed within the time prescribed in the notice, the Commission or an atomic safety and licensing board designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel will rule on the request ...." 10 CFR 2.105(e). The threshold determination is whether the requester has the requisite personal interest. Although under the rule the Commission itself could make this determination, requests for hearings are usually reviewed by a Board selected by the Chairman of the ASLBP. Such a review is a routine matter requiring no special guidance. Accordingly, we agree with the staff's recommendation that the Commission should instruct the Chairman of the ASLBP to select a board to review the Rancho Seco hearing requests.

### II. Scope of the Hearing

If the board finds that one or more of the persons requesting a hearing meet the interest test, the board must then determine what contentions these persons wish to raise and whether they fall within the proper scope of the hearing. On this point we believe Commission guidance is needed, since the Order itself did not specify the subject matter of the hearing. We see three basic options:

#### 1. Narrow Scope.

The Commission could legally limit the hearing to two questions: first, whether the Rancho Seco facility should remain shut down until actions (a) through (e) specified in Section III of the Order are completed, and second, whether completion of the long-term modifications set forth in Section II of the Order should be

required.<sup>1/</sup> Contentions relating to the need for additional restrictions on operation of Rancho Seco other than those set forth in the Order would be excluded. Such contentions would of course be proper subjects for show cause petitions filed pursuant to 10 CFR 2.206.

2. Intermediate Scope.

Under this option, the Commission as a matter of discretion would permit parties to contest, in addition to the issues in Option 1, the sufficiency of the actions required by the May 7 Order, and also to raise other matters relevant to the safe operation of Rancho Seco, insofar as those matters reasonably relate to the sensitivity of B&W reactors to off-normal feedwater transients.<sup>2/</sup>

3. Unlimited Scope.

Under this option, interested persons could raise in the hearing any issue bearing on safety at Rancho Seco, whether or not related to the off-normal feedwater transients involved in the Commission's May 7 Order.

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<sup>1/</sup> If by the time a hearing has begun actions (a) through (e) have been completed to the satisfaction of DNRR, the only subject remaining for a hearing under this narrow approach would be the necessity for the long-term modifications. As the staff suggests in its June 1, 1979 response, the Commission could permit consideration of the question whether the short-term modifications had been satisfactorily completed. We think that in a strict sense this consideration would not be legally required. A challenge to the adequacy of the licensee's performance in accomplishing the short-term actions could be raised in a petition under 10 CFR 2.206.

<sup>2/</sup> Under this option, if the suspension of Rancho Seco operation has been lifted before the hearing is completed, a party wishing to challenge DNRR's finding that the required actions had been satisfactorily completed could raise this contention as a matter reasonably related to the subject of the Order. If on considering such a contention the Board concluded, contrary to DNRR's finding, that the ordered remedial actions had not been satisfactorily completed, the Board would not be able to order the plant back down (unless the Commission specifically delegated such authority, which we do not recommend; see note 3 below). However, such a finding by the Board would obviously stimulate a prompt response by the staff, which could reconsider its previous findings in the light of the Board's views and act appropriately. The Commission would of course be able to direct what action the circumstances required.

### III. Comments on the Options.

Since the affirmative effect of the May 7 Order is simply to direct the licensee to meet certain new requirements, the only mandatory subject for a hearing is whether those requirements should be imposed. Thus a hearing restricted to the narrow scope of Option 1 would satisfy the Commission's legal obligation under the Administrative Procedure Act and Section 189 of the Atomic Energy Act. As a matter of policy, however, the Commission may wish to broaden the scope of the hearing beyond the legal minimum. In a hearing addressed to actions imposed by the Commission to deal with a specific technical problem it may appear unreasonable to exclude discussion of additional actions related to that same technical problem. Furthermore, the effect of choosing the narrow scope in Option 1 would probably be to prevent a hearing on Rancho Seco, since both hearing requests have focused on the sufficiency rather than the necessity of the actions required by the Order. Rather than have the offer of hearing turn out to be illusory, the Commission might reasonably choose a scope beyond the legal minimum sufficient to allow a hearing to go forward on topics of obvious concern to persons affected by operation at Rancho Seco.<sup>3/</sup>

Option 3, however, by allowing an essentially unlimited scope for the hearing, could result in needless reexamination of matters explored previously and might well distract from thorough consideration of the feedwater transient issues which are the present focus of concern.

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<sup>3/</sup> The effect of including sufficiency issues in the scope of the hearing rather than requiring that such questions be raised by a 2.206 petition would be that the Board would make a finding at the close of the hearing regarding any contentions that further actions should be ordered. The Board itself could not order these actions or issue a shut-down order, unless of course the Commission specifically delegated this authority. We do not think such a delegation is necessary. If evidence appeared during a hearing to indicate that new restrictions on Rancho Seco's operation were needed promptly, the staff through its participation in the hearing would know of this information and could take prompt action pursuant to 10 CFR 2.206. Also it may be expected that both the staff and the Board would inform the Commission of any apparent need for emergency action.

Thus we recommend Option 2, the intermediate scope.<sup>4/</sup> Since it seems likely that both Friends of the Earth and the two SMUD directors will meet the interest test, choice of this option would probably assure there will be a hearing. We see this as an advantage rather than a disadvantage of Option 2, given our position that startup of the plant need not await completion of the hearing. A hearing on the issues we have set out in Option 2 would seem to be a useful and appropriate response to public concern regarding possible vulnerability of Rancho Seco to TMI-2-type accidents.

We have attached a draft Order delegating review of the hearing requests to a licensing board and establishing the scope of the hearing in accordance with Option 2. Attachment B.

Recommendation: Issue the draft Order.

Scheduling:

Attachments:

- A. Staff Response 6/1/79
- B. Draft Order

cc: SECY (2)  
PE (2)

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As we read the staff's response, the staff's views are in accord with our recommendation. In Section II of the staff responses, "Issues to be Heard," the staff recommends that the Commission make clear that the hearing "will be related to the enforcement actions ordered by the May 7 Order and will not encompass requests for additional enforcement action." In terms of the options we have set out, this would appear, without further clarification, to support Option 1. But the staff goes on to define the "appropriate issues to be heard" in terms consistent with Option 2. Most significantly, they are defined as including the question whether the actions required by the May 7 Order "provide reasonable assurance that the reactor system will respond safely to feedwater transients ..." It would seem reasonable that a hearing participant who contended that these actions do not provide reasonable assurance would be permitted to discuss additional actions related to feedwater transients which the participant believes are necessary. The principal difference between Options 1 and 2 as we have defined them is that under Option 2 a participant could question the sufficiency of the enforcement actions already ordered and contend that additional modifications to the Rancho Seco facility are needed. Thus, we view the staff's "appropriate issues" as consistent with Option 2, which we recommend.

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, June 15, 1979.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 14, 1979, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of June 18, 1979. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

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Commission Staff Offices  
Secretariat



ATTACHMENT A

520 060

June 1, 1979

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )

SACRAMENTO MUNICIPAL UTILITY )  
DISTRICT )

Docket No. 50-312

Rancho Seco Nuclear Generating )  
Station )

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NRC STAFF RESPONSE TO REQUESTS FOR HEARING  
FILED BY FRIENDS OF THE EARTH, ET AL. AND BY  
RICHARD D. CASTRO AND GARY HURSH, MEMBERS,  
SMUD BOARD OF DIRECTORS

On May 7, 1979 the Commission issued an immediately effective Order confirming the undertaking of the Sacramento Municipal Utility District (SMUD) to maintain its Rancho Seco Nuclear Generating Station in a shut-down condition until a number of short term modifications were performed to the satisfaction of the Director of Nuclear Reactor Regulation, and to thereafter accomplish a series of long-term modifications to further enhance the capability and reliability of the reactor to respond to various transient events. The Order further provided that the licensee or any person whose interest might be affected by the Order could request a hearing with respect to it, though any such request would not stay its immediate effectiveness. By letter dated May 15, 1979, Friends of the Earth, the Environmental Council of Sacramento, and the Original SMUD Ratepayers Association requested "formal hearings regarding the shutdown, modification, and reopening of Rancho Seco Nuclear Generating Station," to be held before resumption of operation of the plant." By telegram of May 25, 1979, Richard D. Castro and Gary Hursh, two members of the SMUD Board of Directors requested a hearing on three enumerated issues.

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The NRC Staff believes that some or all of the requesters may be entitled to a hearing upon satisfactory elaboration of how their interests may be affected by the Order, but that the holding of such a hearing before resumed operation of the facility (now projected for approximately June 6, 1979), is not legally required and is contrary to the intent of the Commission as reflected in its Order. The Staff also believes that many of the matters raised in the requests for hearing are beyond the scope of the Order and should be considered as requests for additional enforcement action pursuant to 10 CFR 2.206. As more fully explained below, the Staff recommends that the Commission issue an order (1) confirming that Rancho Seco will be permitted to resume operating as permitted by the Order upon satisfaction of the requirements of the Order prior to the completion of any required hearing, (2) identifying the scope of the issues to be heard in any hearing on the Order, and (3) delegating to an Atomic Safety and Licensing Board the authority to ascertain whether the requesters are "person(s) whose interests may be affected by the Order" and to conduct any required hearing.

I. Whether any required hearing must be held prior to resumption of operation.

The Commission's Order of May 7, 1979 contained two elements: (1) a suspension of operating authority for the short period of time required to effect modifications deemed necessary to provide adequate assurance of protection for the public health, safety and interest, and (2) a requirement that additional modifications be accomplished following the brief suspension. Section 189a of the Atomic Energy Act explicitly provides for a hearing upon the request of any person whose interest

may be affected by a proceeding for the . . . suspending . . . of any license. There is, of course, no question here of a hearing prior to suspension, because suspension has been accomplished. (The law is clear that while the norm is an opportunity for hearing prior to suspension, the Commission is empowered to dispense with a prior hearing when the public health, safety or interest requires that a suspension be made effective immediately. Consumers Power Co. (Midland Plant, Units 1 and 2), 6 AEC 1082 (1973).)

The Staff believes that just as the Commission can take summary action in imposing an immediate suspension, so it may take summary action without prior hearing to lift an immediate suspension. Principally this is so because suspension prior to hearing (or opportunity for hearing) is an extraordinary remedy,<sup>1/</sup> justified only so long as the facts supporting that action exist (in this case, the absence of the protective measures encompassed in items (a) through (e) of paragraph (1) of Section IV of the Order). When that situation changes the agency may (and arguably must) summarily lift the suspension and restore the original status quo. See, Northwest Airlines v. CAB, 539 F.2d 748 (D.C. Cir., 1978); See also, ICC v. Oregon Pacific Industries, Inc., 420 U.S. 184 (1975) (concurring opinion); Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

Sound policy requires that the flexibility of immediately effective, but modifiable suspensions be available: if immediate suspensions could not be changed without

<sup>1/</sup> See Section 9(b), Administrative Procedure Act, 5 U.S.C. 558(c); 10 CFR §§2.202(f) and 2.204. It should be noted that the suspension action was taken here pursuant to agreement with the licensee. That agreement went only to shutdown pending the satisfactory completion of the short term modifications.

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offering a prior hearing, then the agency might well be reluctant to issue them. such a situation would be contrary to the public interest.

Section 2.202(f) of the Commission's regulations supports the view that the immediate suspension can be lifted without prior hearing. It provides that the proposed action may be made "temporarily effective pending further order." (Emphasis supplied.) This provision seems to contemplate that the Director has discretion to modify the temporary suspension prior to the hearing and the Commission has so interpreted it in an analogous situation.

In Midland,<sup>2/</sup> after a construction permit was granted, staff reviews revealed significant deficiencies in implementation of the licensee's quality assurance program, particularly with regard to cadwelding. The Director of NRR issued a show cause order which included an immediately effective suspension of all cadwelding activities "pending further order" of the Director of NRR. An opportunity for hearing was provided but before the twenty days during which a hearing could be requested had expired, the Director of NRR issued an order lifting the suspension of cadwelding activities. Petitioners in that case argued that the Director of NRR was not permitted to lift the suspension prior to the hearing. The Commission upheld the Director's action. It said:

In view of the potentially serious consequences of summary suspension orders contemplating a later hearing, the Director of Regulation has discretion to modify such orders on the

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<sup>2/</sup> Consumers Power Co. (Midland Plant, Units 1 and 2), 6 AEC 1082 (1973).

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basis of subsequent developments warranting such action, prior to the hearing. If the rule were otherwise, the Director might well be reluctant to issue summary orders, knowing that (under petitioners' theory) they must remain unchanged and in effect for substantial periods of time, regardless of changed circumstances. Such a rule would be inimical to the public interest.

The foregoing discussion sets forth the bases for the Staff's belief that a hearing on the suspension accomplished by the Commission's May 7 Order is not required prior to termination of that suspension. That is not to say that the Commission may not hold such a hearing in its discretion, should it choose to do so. The record of this proceeding, however, seems to indicate that a different course was contemplated by the Commission.

The explicit offer of an opportunity for hearing in the Order indicates clearly that the Commission expected that a hearing would be held at some time, if one was requested by a person whose interest was affected by the Order. The Order was equally clear, however, that the suspension of operating authority would be in effect only until the required short term modifications were accomplished, and that a request for hearing would "not stay the immediate effectiveness of this Order."

If the Commission agrees that the suspension may end upon satisfactory completion of the short term modifications, the Staff respectfully suggests that the Commission now provide guidance as to the course it wishes the Staff to follow after making a determination that the requirements of the Order have been satisfied. Because the requests for hearing have triggered the applicability of the ex parte communication

rule (10 CFR 2.780) the Staff cannot follow its practice of discussing such significant actions with the Commission in a relatively informal open meeting. Accordingly, the Commission should decide whether it wishes to schedule consideration of any proposed restart formally as part of this proceeding, or whether it wishes the Director of NRR to exercise the authority spelled out in the May 7 Order without further consultation with the Commission.

## II. The Issues to be Heard

Unlike many enforcement proceedings, the Order in this matter does not precisely identify the issues to be heard in the event of a hearing.<sup>3/</sup> The Staff believes that the Commission should now identify those issues, making it clear that any hearing will be related to the enforcement actions ordered by the May 7 Order, and will not encompass requests for additional enforcement action.<sup>4/</sup> In the view of the Staff, the following are the appropriate issues to be heard in a hearing after the suspension has been terminated:<sup>5/</sup>

1. Whether the "short term modifications" required by subparagraphs (a) through (e) of paragraph (1) of Section IV of the Order have been satisfactorily completed.

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<sup>3/</sup> Compare 10 CFR 2.202(a)(4) which provides that a show cause order will "specify the issues."

<sup>4/</sup> Any such requests for additional action should be referred to the Director, NRR, pursuant to 10 CFR 2.206.

<sup>5/</sup> In the event that there is a hearing, it would be open to the Board and the parties to more specifically ascertain the precise aspects of these relatively broad issues which are in controversy and need to be litigated. The full range of procedural devices in the Commission's regulations such as discovery, stipulations, prehearing conferences and summary disposition are available for this purpose.

2. Whether the "short term modifications" required by subparagraph (a) through (e) of paragraph (1) of Section IV of the Order provide reasonable assurance that the reactor system will respond safely to feedwater transients during the period required to accomplish the required "long-term modifications."
3. Whether the licensee should be required to accomplish the "long term modifications specified by the Order. If so, on what schedule.
4. Whether accomplishment of the long term modifications required by the Order provides continued reasonable assurance that the reactor system will respond safely to feedwater transients.

### III. Procedural Course

As outlined in Part I above, the Staff believes that it is legally permissible, and consistent with the Commission's intent, to permit the temporary suspension to end, and to hold a hearing on the Order thereafter. We have identified in Part II the issues which we believe should be the subject of such a hearing. The information necessary to rule on these matters is already before the Commission.

Whether the requesters are persons whose interests are affected by the Order, however, is a matter which requires further elaboration. The very general assertions in the two requests for hearing do not provide a sufficient basis for finding that the requesters are such interested persons. In particular, it

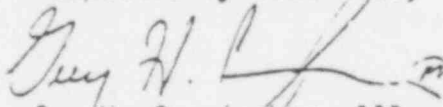


appears that Messrs. Castro and Hursh have made their request as individual members of the SMUD Board rather than as authorized representatives of SMUD. Accordingly, a showing of how their interests as individuals are affected by the Order will be required if their joint request for a hearing is to be granted. Accordingly, the Staff recommends that all requesters be given an opportunity to make a satisfactory showing on this point, and that an Atomic Safety and Licensing Board be established to rule on this matter. Such a Board should also be delegated the authority to conduct any required hearing.

CONCLUSION

For the foregoing reasons, the Staff recommends that the Commission issue an order (1) confirming that Rancho Seco will be permitted to resume operating as permitted by the Order upon satisfaction of the requirements of the Order prior to the completion of any required hearing, (2) identifying the scope of the issues to be heard in any hearing on the Order, and (3) delegating to an Atomic Safety and Licensing Board the authority to ascertain whether the requesters are "person(s) whose interests may be affected by the Order" and to conduct any required hearing.

Respectfully submitted,



Guy H. Cunningham, III  
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 1st day of June, 1979.

520-068



ATTACHMENT B

520 070

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of  
SACRAMENTO MUNICIPAL UTILITY DISTRICT  
Rancho Seco Nuclear Generating Station

Docket No. 50-312

ORDER

By a confirmatory Order dated May 7, 1979 the Commission directed that the rancho Seco facility, then in a shutdown condition, should remain shut down until certain actions specified in the Order were satisfactorily completed, as confirmed by the Director, Office of Nuclear Reactor Regulation. The Order also directed the licensee to accomplish as promptly as practicable the long-term modifications set forth in Section II of the Order. The Order stated further:

Within twenty (20) days of the date of this Order, the licensee or any person whose interest may be affected by this Order may request a hearing with respect to this Order. Any such request shall not stay the immediate effectiveness of this Order.

Requests for a hearing have been received from Friends of the Earth and from members of the Board of Directors of the Sacramento Municipal Utility District.

The Commission hereby directs that the Chairman of the Atomic Safety and Licensing Board Panel shall, pursuant to 10 CFR 105(e), select a board to determine whether the requesters meet the requisite personal interest test and to conduct any hearing which may be required.

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ATTACHMENT B

The subjects to be considered at the hearing shall include:

1. Whether the actions required by subparagraphs (a) through (e) of Section IV of the Order are necessary and sufficient to provide reasonable assurance that the facility will respond safely to feedwater transients, pending completion of the long-term modifications set forth in Section II.
2. Whether the licensee should be required to accomplish, as promptly as practicable, the long-term modifications set forth in Section II of the Order.
3. Whether these long-term modifications will provide continued reasonable assurance that the facility will respond safely to feedwater transients.

In addition to these specific subjects, the board may consider contentions relevant to the safety of operating the Rancho Seco facility, provided that these contentions are stated with specificity and are reasonably related to the sensitivity of the reactor to feedwater transients as discussed in the Order of May 7, 1979.

Resumed operation of the Rancho Seco facility on terms consistent with the Order of May 7, 1979 is not stayed by the pendency of these proceedings.

It is so ORDERED.

For the Commission

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SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, DC,  
this        day of June, 1979.

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