

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission



IN THE MATTER OF )  
 )  
METROPOLITAN EDISON COMPANY, )  
JERSEY CENTRAL POWER & LIGHT COMPANY, )  
and )  
PENNSYLVANIA ELECTRIC COMPANY )  
 )  
(Three Mile Island Nuclear Station, )  
Unit 1) )

Docket No. 50-289

LICENSEES' RESPONSE TO MOTION OF  
VERMONT YANKEE NUCLEAR POWER CORPORATION  
DATED SEPTEMBER 27, 1976

In a document dated October 13, 1976, the Secretary of the Commission invited the parties involved in all pending show cause proceedings on fuel cycle issues to respond to a motion filed on September 27, 1976, by the Vermont Yankee Nuclear Power Corporation in Docket No. 50-271. This motion sought the recall of those portions of the General Statement of Policy - Environmental Effects of the Uranium Fuel Cycle, 41 Fed. Reg. 34707 (August 16, 1976) which directed Atomic Safety and Licensing Boards, Atomic Safety and Licensing Appeal Boards, and the NRC Staff (in show cause proceedings) to consider the suspension or modification of any nuclear power plant license on fuel cycle grounds.

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The October 13, 1976, document also stated that the Commission was considering the suspension of all pending show cause proceedings on fuel cycle issues in light of the October 8, 1976, order of the U. S. Court of Appeals for the D. C. Circuit staying the issuance of the mandate in Natural Resources Defense Council, Inc. v. NRC and in light of the publication by the Commission of a supplement to its Environmental Survey of the Nuclear Fuel Cycle and a notice of proposed rulemaking looking towards the adoption of an interim fuel cycle rule.

Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, as holders of the operating license for Three Mile Island Nuclear Station, Unit 1, (hereinafter collectively "Licensees") submit the following comments on the Vermont Yankee motion. Licensees have previously responded to a request filed by the Environmental Coalition on Nuclear Power seeking the suspension of construction and operation of Three Mile Island, Unit 1. See letters by the President of General Public Utilities Corporation and by counsel for Licensees to the Director of Nuclear Reactor Regulation, both dated September 20, 1976.

As the Commission recognized in its August 13, 1976, General Statement of Policy, the Court of Appeals in NRDC,

1583 298

notwithstanding the defects which it found in the fuel cycle rule, did not suspend the operating license of the Vermont Yankee facility involved in that case. Nor did the court in the companion case of Aeschliman v. NRC suspend the Midland Plant construction permits notwithstanding the same perceived defect. As the Commission noted, "the court refused an explicit request to set aside these licenses." 41 Fed. Reg. 34707. The NRC did, however, view the Court's ruling as calling for the Commission to resolve the question of suspending or modifying existing licenses pending the issuance of new fuel cycle regulations on a case-by-case basis where such a suspension or modification was requested. This case-by-case determination was to be based on the equitable factors outlined in the General Statement of Policy. 34 Fed. Reg. at 34709. Absent such a request, the Commission announced that it would sua sponte determine whether to initiate show cause proceedings for all outstanding licenses based upon information in the revised environmental survey. Id.

The October 8, 1976, order of the NRDC Court, we believe, indicates that the Commission erred in its view that the Court expected the NRC to consider suspending existing operating licenses and construction permits. That order stayed the issuance of the mandate of the NRDC decision.

1583 299

The operative language of the order is as follows:

[I]t is . . . FURTHER ORDERED, by the Court, that the foregoing motions for stay of mandate are granted, and the Clerk is directed not to issue the mandate herein prior to October 31, 1976, on condition that the United States Nuclear Regulatory Commission shall make any licenses granted between July 21, 1976, and such time when the mandate is issued subject to the outcome of the proceedings herein.<sup>1/</sup>

The clear import of this language is that new licenses can be issued notwithstanding the NRDC decision so long as those licenses are "subject to the outcome of the proceedings herein."<sup>2/</sup> If the NRDC decision permits the Commission to issue new licenses pending the outcome of the remanded fuel cycle rulemaking proceeding, it logically follows that the Commission is neither obligated nor ought to consider suspension of existing licenses pending the completion of the remanded rulemaking proceedings. It would certainly defy reason for the Court of Appeals to permit NRC to issue new licenses after NRDC (subject to condition) and at the same time to intend the NRDC decision to be the possible

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<sup>1/</sup> Since a petition for certiorari of the NRDC decision has been filed by Vermont Yankee Nuclear Power Corporation and docketed in the Supreme Court, the mandate cannot now issue pending further order of the Supreme Court. Rule 41, Fed. R. App. P.

<sup>2/</sup> This provision indicates that the Commission's General Statement of Policy went beyond the dictates of the NRDC decision when it barred the issuance of new full-power operating licenses, construction permits and limited work authorizations.

cause for the suspension of licenses issued before NRDC. Thus, the appropriate course of action for NRC at this time would be to delete from the General Statement of Policy those provisions relating to suspension of existing licenses on fuel cycle grounds and to suspend all pending show cause/suspension proceedings based on fuel cycle issues.<sup>3/</sup>

The staying of the mandate is obviously ample grounds for modification by the Commission of its suspension instructions set forth in the General Policy Statement. The Commission itself recognized that a motion to recall its decision to convene proceedings to consider suspension of existing licenses would be appropriate if the mandate were stayed. See Commission Memorandum and Order, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) and Consumers Power Company (Midland Plant, Units 1 and 2), September 14, 1976, slip op. at 7. In testimony before the Joint Committee on Atomic Energy on August 27, 1976, the Chairman of the Commission stated that, depending on the results of the revised environmental survey, the NRC might seek a stay of the mandate which if granted could serve as

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<sup>3/</sup> The October 8, 1976, order even raises the question whether the Court intended the NRDC decision to apply to existing licenses at all. By only requiring new licenses to be subject to the outcome of the remanded rulemaking, it at least implies that existing licenses are not to be subject to that outcome. If that is the case, then reconsideration of existing licenses after the rulemaking has been completed would be inappropriate and unnecessary.

the basis for additional licensing action.<sup>4/</sup> Thus, the Commission has recognized that a stay of the mandate would be cause to change its NRDC implementation policies. The staying of the mandate serves to maintain the status quo for the duration of the stay. Algonquin Gas Transmission Co. v. Township of Somerset, 112 F. Supp. 86, 90 (D. N.J. 1953). As the Supreme Court held more than sixty years ago

. . . the appeal must be regarded as pending and undisposed of until a mandate issues.

Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527, 536 (1910). If an appeal must be considered as "pending and undisposed of", it would obviously be inappropriate for an agency to take the drastic step of suspending an existing license based on such incomplete judicial action. Absent the issuance of the court's mandate, there is no official judicial action. As stated by the Eighth Circuit, "this court, as does any appellate court, acts formally and officially only through its mandate." Bailey v. Henslee, 309 F. 2d 840, 844 (8th Cir. 1962). More recently, the Ninth Circuit distinguished between the immediate effectiveness of a memorandum issued in response to a motion and the

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<sup>4/</sup> Statement of Marcus A. Rowden, Chairman, U. S. Nuclear Regulatory Commission, before the Joint Committee on Atomic Energy, August 27, 1976, p. 9.

ability of a "judgment" to be stayed through a stay of mandate. York International Building, Inc. v. Chaney, 522 F.2d 1061, 1066 (9th Cir. 1975). The Commission would not be warranted in using a judicial pronouncement not in effect as the basis for the suspension of existing licenses.

Further support for amending the General Statement and suspending pending show cause proceedings can be found in the rulemaking proceeding recently commenced by the Commission. As shown in the notice of proposed rulemaking, "Uranium Fuel Cycle Impacts from Spent Fuel Reprocessing and Radioactive Waste Management" (October 13, 1976), the environmental impacts of reprocessing and waste management as described in the revised interim table set forth in the notice are not significantly different from those in Table S-3, except for the burial of solid wastes (without their release to the environment) rather than their storage in retrievable form. As noted in the Commission's press release accompanying the notice of proposed rulemaking, the environmental impacts of fuel reprocessing and waste management as they relate to individual nuclear plants continue to be small, even when impacts which were not completely accounted for in the past are considered. The Commission has also indicated that the interim fuel cycle rule could be in place within three months.<sup>5/</sup> Given these factors and

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<sup>5/</sup> See statement by Marcus A. Rowden, Chairman, NRC, in Press Release No. 76-221, October 13, 1976.

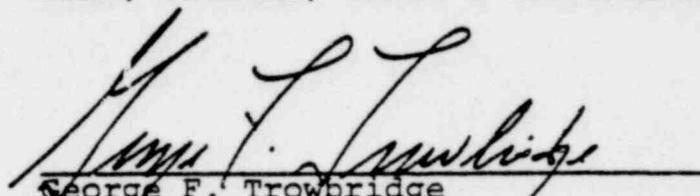
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the Commission's judgment that its present analysis of re-processing and waste management impact is unlikely to be dramatically in error, a suspension of existing licenses pending promulgation of an interim fuel cycle rule would not be sensible administrative policy.

For the reasons set forth above, Licensees respectfully request that the Commission modify its General Statement of Policy by deleting those portions relating to the suspension of existing licenses and suspending all pending show cause/suspension proceedings based on fuel cycle issues.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

  
George F. Trowbridge  
Counsel for Licensees

Dated: October 21, 1976

1583 304

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensees' Response to Motion of Vermont Yankee Nuclear Power Corporation Dated September 27, 1976," dated October 21, 1976, were served upon the following this 21st day of October, 1976:

BY HAND DELIVERY:

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

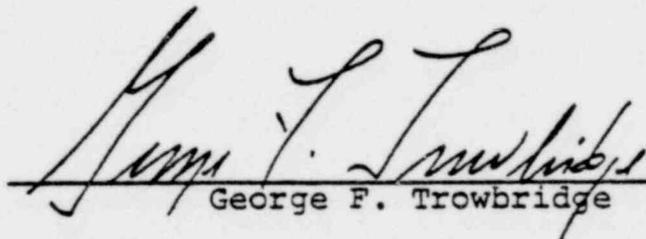
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1583 305