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John Ahearne, Chairman
Victor Gilinksy, Commissioner
Richard Kennedy, Commissioner
Joseph Hendrie, Commissioner
Peter Bradford, Commissioner
Nuclear Regulatory Commission
11th Floor
Washington, D.C. 20555

RE: Policy Statement for Operating License Requirements

Gentlemen:

The Commission voted today to approve in principle a policy that would permit utilities in individual licensing cases to challenge the need for any new TMI-related safety requirements but would prohibit intervenors from even raising the possibility that these requirements are not adequate to address the safety problems revealed by the TMI accident. Neither the so-called "Action Plan" which defines these new requirements, nor this remarkable policy was ever noticed for public comment. I am in the hope that there is some chance of deflecting the Commission from this course of action. I am convinced that, in addition to being unlawful, it is grossly unfair and insensitive to the pleas for increased openness and public participation in NRC proceedings included in every major post-TMI investigation of the NRC.

For some time the staff and the Commission, in consultation with the nuclear industry, have been engaged in determining how to solve the safety problems raised by TMI. The Action Plan is the result of these efforts. The public has at no time been invited to comment. The Action Plan addresses a great number of issues. For some of the most crucial safety areas, problems and uncertainties are identified but no solution suggested except studies which may offer the hope of solutions at some unspecified time in the future. The section on core degradation and fuel melting is a prime example (II. B. 5). In other cases, the schedules for implementing solutions are exceedingly long. In yet others, the Action Plan mandates a course of action, the efficacy of which is certainly disputable. It should come as no surprise to you

that the contents of the Action Plan are open to considerable scientific and technical debate. Despite this, your action today would totally foreclose intervenors in licensing cases from attempting to prove that actions different from or in addition to those in the Action Plan are necessary to ensure safe operation of the plant in question.

Contrary to the observations of some today, the law not only attempts to define fundamental fairness; it requires it. No arcane parsing of legal precedent is required to conclude that the policy statement voted on today offends fairness and due process. It is self-evident that the Commission has given the industry two bites at the apple and the public none. The industry not only participated in the formulation of the Action Plan, but it will be free in each licensing case to try to prove that the safety measures included therein are not necessary. No argument as to their sufficiency will be heard. The law treats all parties to NRC proceedings equally; it does not countenance the unilateral abridgement of the rights of one side.

Less than a year ago, the U.S. Court of Appeals reminded the Commission that it cannot resolve issues of factual dispute by edict, State of Minnesota v. N.R.C., 602 F. 2d 412 (D.C. Cir., 1979). There are two ways in which this agency can develop precedent: by rulemaking or by adjudication. Each affords the public some right to be heard. This policy statement is neither, and it cannot lawfully be used to cut off the rights of intervenors. This is clear from the following statement of the court in Pacific Gas and Electric Co. v. F.P.C., 506 F. 2d 33, 38 (D.C. Cir., 1974):

> The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only answers what the agency seeks to establish as policy . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy. (Id. at 38 - 39, Emphasis added)

This issue goes beyond legalisms; it goes to the heart of this Commission's attitude towards the role of those outside

the nuclear establishment, whose participation has too often been treated as an annoying obstacle to be evaded when possible and tolerated when necessary. I had thought that the Indian Point proceedings marked a change in that attitude, but this policy statement represents a major retrenchment to pre-TMI complacency.

I hope that you will reconsider.

Very truly yours,

Ellyn R. Weiss /dmw

Ellyn R. Weiss
Counsel for the Union of Concerned Scientists

ERW/lc

cc: Leonard Bickwit
General Counsel