DD-80-16

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
HAROLD R. DENTON, DIRECTOR

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-320
(Three Mile Island Nuclear	)	(10 CFR 2.206)
Station, Unit 2)	)	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

By petition dated April 27, 1979, Dr. Chauncey Kepford requested on behalf of the Environmental Coalition on Nuclear Power (ECNP) that the Director of Nuclear Reactor Regulation institute public hearings prior to any alteration of the "experimental and operational status" of the Three Mile Island Unit 2 (TMI-2) reactor. Dr. Kepford filed a supplemental petition dated May 16, 1979, which expanded the scope of ECNP's original request for relief. Notice was published in the Federal Register, 44 FR 40986 (1979), that ECNP's petitions were being considered under 10 CFR 2.206.

The bases for ECNP's petitions concern the status of the damaged Unit 2 reactor in the aftermath of the accident of March 28, 1979, at Three Mile Island. ECNP's April 27th petition was directed primarily at the conversion to natural convective circulation cooling of the damaged reactor core, although ECNP apparently intended its petition to extend to all future actions of the Commission concerning TMI-2. The May 16th petition cited additional concerns regarding radiation monitoring and waste disposal.

ECNP's petitions were styled as requests for "emergency action". To the extent that the petitions requested could be said to require "emergency action", (e.g., to prevent the unassessed release of contaminated water) the staff believes

that the Commission has taken action essentially along the course ECNP requested. This decision addresses the requests for relief found in ECNP's two petitions. For the reasons stated in this decision, ECNP's petitions have been granted in part and are denied in part.

THE APRIL 27th PETITION

The main thrust of the April 27th petition is ECNP's request that "a public hearing be held prior to any further experimentation at TMI-2" (Petition at 4). While "experimentation" is not explicitly defined in the petition, ECNP was concerned at the time about the transition to natural circulation to cool the damaged reactor core. On April 27, 1979, the same day ECNP submitted its petition, the transition to natural circulation was safely performed. See "Abnormal Occurrence Event; Nuclear Accident at Three Mile Island," 44 FR 45803, 45807 (1979). Prior to the initiation of the transition, the staff had evaluated the proposal to cool the damaged reactor core by natural convective circulation and had concluded that the transition could be accomplished with minimal risk to public health and safety. The staff's evaluation was reported in NUREG-0557, "Evaluation of Long-Term Post-Accident Core Cooling of Three Mile Island Unit 2." In the proceeding - to which ECNP is a party - being held on the restart of Three Mile Island Unit 1, the Board has admitted contentions regarding the adequacy of natural convective circulation cooling. First Special Prehearing Conference Order at 20. (Docket No. 50-289, Dec. 8, 1979) (UCS contentions 1 and 2).

ECNP apparently intended its demand for public hearings prior to further "experimentation" at TMI-2 to extend beyond the transition to natural convective circulation cooling of the core. In assessing this request, the staff can only assume that, by the term "experimentation", ECNP means those actions requiring the

Commission's formal approval, i.e., license amendments and orders of the Commission. 1/ Of course, the Atomic Energy Act of 1954, as amended, requires the Commission to grant a hearing upon the request of any person whose interest may be affected in any proceeding "for the granting, suspending, revoking or amending of any license". Section 189a., 42 U.S.C. 2239(a). Although the Commission must grant a hearing upon the demand of any person who has an interest affected by a proceeding to grant, suspend, revoke or amend a license, every such proposed action does not require notice and hearing prior to the effectiveness of the proposed action. 2/ In taking action at its own initiative, the Commission has the authority - indeed, the responsibility - to order the modification, suspension or revocation of a license when public health, safety, and interest so requires. 10 CFR 2.202(f), 2.204. See Nuclear Engineering Company, Inc., CLI-79-6, 9 NRC 673 (1979). Although administrative procedure normally contemplates the holding of required hearings prior to the effectiveness of proposed actions, it is inappropriate, in view of the potential need for the Commission to take emergency action, to promise unequivocally in response to ECNP's petition that

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1/ The Commission's regulations contemplate that certain changes in a facility or in procedures and certain tests or experiments may be conducted by the licensee without the Commission's prior approval. Such changes, tests, or experiments may not involve an unreviewed safety question or a change in technical specifications. 10 CFR 50.59(a)(1).

2/ See Sections 186b. and 189a. of the Atomic Energy Act, 42 U.S.C. 2236(b) and 2239(a); 10 CFR 2.202(f) and 2.204.

hearings will be held before any action is taken at TMI-2. 3/

The Commission has offered in fact the opportunity to request a hearing in connection with various orders related to the Three Mile Island reactors. 4/ To the extent that ECNP believes it has an interest affected by various Commission proceedings, it is incumbent upon ECNP to request a hearing under applicable orders or other notices.

In connection with any further "experimentation" at TMI-2, ECNP requested that a "Safety Evaluation report" be made available prior to such further "experimentation". Of course, the Commission must establish a technical basis for issuing an order or for issuing a license amendment requested by a licensee. See e.g., 10 CFR 2.105(b), 2.106(b), 2.202(a)(1). The Commission has in fact made available safety evaluation reports and environmental evaluations which have accompanied major proposed actions. All future safety evaluation reports

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3/ Under Section 189a. of the Atomic Energy Act the holding of hearings is mandatory only on applications for a construction permit under Section 103, 104b. or 104c. Of course, persons who demand a hearing as a matter of right in proceedings must establish that they are adversely affected by the proposed action. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), Commission Memorandum and Order (Docket Nos. 50-546 & 50-547, March 13, 1980); Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976); Nuclear Engineering Company (Sheffield Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978).

4/ See Order (Feb. 11, 1980), published in 45 F.R. 11282 (1980); Order for Modification of License (Oct. 18, 1979), published in 44 F.R. 61277 (1979); Order and Notice of Hearing, CLI-79-8, 10 NRC 141 (1979) (TMI-1 Restart Proceeding). ECNP has intervened in the Unit 1 restart proceeding, and in a request dated March 15, 1980, has asked for a hearing on the Order of February 11, 1980.

or other documents which establish the technical bases for proposed actions will be publicly available.

ECNP also requests that it "be informed prior to any further experimentation or change of licensed procedures or otner alteration of the facility which may affect the health and safety of the public". Dr. Kepford, who filed the petition on behalf of ECNP, has been on the distribution list for orders and other formal actions of the Commission with respect to TMI-2. Orders or other relevant notices have also been published in the Federal Register. To the extent that the public health, safety or interest requires Commission Orders to be immediately effective, ECNP would of course not receive notice prior to the effectiveness of such actions, nor is ECNP entitled to such notice as a matter of law.

Prior to further "experimentation" at TMI-2, ECNP asks that the public be evacuated from areas that would be affected "should the experiment fail and control of the reactor be lost". In the first instance, it should be noted that the Commission does not have the authority to order evacuation of the population surrounding a reactor site. This authority rests with responsib.e State and local officials. The Commission advises these officials as appropriate in emergency circumstances. In all events, ECNP simply presents no basis for this request. The TMI-2 reactor is in a stable state, and the authorized activities at the site do not involve risks to the public that warrant evacuation.

In its fifth request for relief in the April 27th petition, ECNP asks that the Commission deploy "live, real-time" radiation detectors in a 40 mile radius around the Three Mile Island site. ECNP provides no reasons for instituting such a program. Radiological environmental monitoring conducted by the licensee and by State and federal agencies in the area surrounding the Three

Mile Island site is described in the "Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere" (NUREG-0662, March 1980). To the extent that additional or different capabilities are required in the future, particularly for future decontamination operations, the Commission will ensure that appropriate capabilities are provided.

Finally, ECNP requested that the Commission require public announcement of future planned releases of radioactive materials from Unit 2. In view of its Statements of May 25, 1979, and November 21, 1979 (published in 44 F.R. 67738) and the Order of February 11, 1980 (45 F.R. 11282), the Commission has essentially granted this request. The Commission has prohibited various decontamination activities that might result in planned releases of radioactive materials until such activities have been approved by the Commission. Any such authorization would be by its very nature a matter of public record and as such would be "publicly announced" as ECNP requests.

THE MAY 16th PETITION

Dr. Kepford expanded on ECNP's April 27th request for relief in a supplemental petition dated May 16, 1979. ECNP primarily requests in the May 16th petition that the Commission prohibit further releases of radioactive materials from TMI-2 pending the conclusion of a hearing on the issues raised in ECNP's two petitions. In the first instance, ECNP is not legally entitled to a hearing on its petitions. 5/ Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1363

5/ Similarly, a final decision on ECNP's petition is not required prior to issuing an authorization to undertake decontamination operations. See Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), DD-80-2, Decision at 2 n.4 (Docket No. 50-346, Jan. 17, 1980); cf. Sacramento Mun. Utility Dist. (Rancho Seco Nuclear Generating Station), CLI-79-7, 9 NRC 680, 681 (1979).

(D.C. Cir. 1979); Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979). As to some of of the issues, e.g., whether the Commission was "negligent" in licensing TMI-2 and whether the operating license should be permanently revoked, ECNP establishes no basis for prohibiting planned releases pending conclusion of a hearing on these issues. ECNP bears the burden of showing why consideration of such issues is necessary prior to the commencement of controlled releases as part of a decontamination program. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), DD-79-17, 10 NRC 613 (1979).

Moreover, ECNP presents no convincing rationale for instituting a special hearing to consider the issues in its petitions, regardless of the timing of any such hearing. A number of these issues (2, 3, 7 and 8 in the May 16th petition) relate directly to the need to evaluate the environmental consequences of proposals to decontaminate the TMI-2 facility and to dispose of various gaseous, liquid or solid wastes. The Commission has already expressed its intent to prepare an environmental impact statement. "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement", 44 FR 67738 (Nov. 27, 1979). In its "Statement" the Commission noted that:

> In the Commission's judgment an overall study of the decontamination and disposal process will assist the Commission in carrying out its regulatory responsibilities under the Atomic Energy Act to protect the public health and safety as decontamination processes. It will also be in keeping with the purposes of the National Environmental Policy Act to engage the public on the Commission's decision-making process, and to focus on environmental issues and alternatives before commitments to specific clean-up choices are made.

The Commission cautioned, however, that:

> The development of a programmatic impact statement will not preclude prompt Commission action when needed. The

> Commission does recognize, however, that as with its Epicor-II approval action, any action taken in the absence of an overall impact statement will lead to arguments that there has been an inadequate environmental analysis, even where the Commission's action itself is supported by an environmental assessment. As in settling upon the scope of the programmatic impact statement, CEQ can lend assistance here. For example should the Commission before completing its programmatic statement decide that it is in the best interest of the public health and safety to decontaminate the high level waste water now in the containment building, or to purge that building of its radioactive gases, the Commission will consider CEQ's advice as to the Commission's NEPA responsibilities. Moreover, as stated in the Commission's May 25 statement, any action of this kind will not be taken until it has undergone an environmental review, and furthermore with opportunity for public comment provided.
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> However, consistent with our May 25 Statement, we recognize that there may be emergency situations, not now foreseen, which should they occur would require rapid action. To the extent practicable the Commission will consult with CEQ in these situations as well.

The staff believes, therefore, that the Commission is already embarked on a course that will satisfy the petitioner's concerns, i.e., that waste disposal is carefully assessed and that the Commission provide a mechanism for public participation in the decision-making process. To the extent that such releases require further order, ECNP may have a right to demand a hearing, if one of its members has an interest affected by such order within the meaning of section 189a. of the Atomic Energy Act.

Several other issues (1, 6(c), and (d)) proposed for hearing in the May 16th petition concern the validity of population exposure estimates and the "intent" of the Commission to ensure that adequate radiation monitoring capabilities will be provided. The staff does not perceive a need to hold a hearing to explore the conclusions reached in the Ad Hoc Population Dose Assessment Group's report, "Population Dose and Health Impact of the Accident

at the Three Mile Island Nuclear Station" (NUREG-0558, May 1979), nor does ECNP provide particular reasons, other than its dissatisfaction with the report, why such a hearing should be held. ECNP's concern with the adequacy of radiation monitoring appears to be directed primarily at assurance of adequate capabilities during decontamination operations. Of course, the Commission intends to assure that adequate monitoring is conducted during all phases of decontamination. In this regard, the staff described the program for radiological environmental monitoring that will be provided if decontamination of the reactor building atmosphere through containment venting is approved. See "Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", Ch. 7 (NUREG-0662, March 1980). To the extent that additional or different capabilities are required for future operations, the Commission will assure that appropriate capabilities are provided. If monitoring issues are relevant to future proceedings in which ECNP has intervened, ECNP may of course raise such issues. The staff sees no need to institute a special hearing on radiation monitoring.

ECNP also wants the Commission to convene a hearing on the "management capability" of Metropolitan Edison (issues 4 and 5 in May 16th petition). To the extent that this issue has current relevance, that issue has been admitted in the form of various contentions in the TMI-1 restart proceeding. The Commission has provided further guidance on the scope of that issue in its Order of March 6, 1980 (CLI-80-5, Docket No. 50-289). ECNP itself has raised and had admitted such a contention in that proceeding. The staff sees no reason, therefore, to institute another proceeding to consider the issue. To the extent that such an issue may be relevant to other hearings that may be held concerning TMI-2, intervenors would have an opportunity to raise contentions concerning "management capability".

ECNP also desires a hearing on "the possible negligent role of the

Commission in licensing TMI-2". Apart from ECNP's failure to sta e the basis for or purpose of a hearing on this issue, the staff notes that the Commission's exercise of its responsibilities has been the subject of intense public scrutiny by the Congress and the President's Commission on the Accident at Three Mile Island. Such forums, particularly the Congress, are more appropriate for conducting an inquiry into the Commission's regulatory practices. In a similar vein is ENCP's request (issue 6(a) and (b) in the May 16th petition) that the Commission conduct hearings on its "capability and intent" to obey its governing statutes and its regulations. It is unreasonable to suggest that the Commission should hold hearings to determine whether it will obey the law. If ECNP believes that the Commission has not fulfilled its responsibilities or has violated its rules or federal statutes, ECNP has appropriate remedies in the federal courts.

Lastly, ECNP wishes that the Commission institute a hearing on whether the TMI-2 operating license should be "temporarily or permanently withdrawn" from Metropolitan Edison for "gross violations" of the Commission's regulations and license conditions. The Commission has already suspended the operating authority in License No. DPR-73 for the TMI-2 facility. Order for Modification of License (July 20, 1979), published in 44 FR 45271 (Aug. 1, 1979). The question whether this operating authority should be permanently revoked is a question for another day. The Commission's immediate concern is safe decontamination and disposal of wastes from Three Mile Island Unit 2.

In its final requests in the May 16th petition, ECNP asks that it be informed of all releases of radioactive materials and that it be furnished copies of all materials pertinent to "the ongoing crisis at TMI-2". Information concerning Three Mile Island is available to ECNP and other members of the public in the

Commission's public document rooms in Washington, D. C. and in Harrisburg, Pennsylvania. The Commission has made public announcements and made available information concerning radioactive releases from TMI-2. ECNP has been on the distribution list for orders and other significant documents related to TMI-2. As a participant in the TMI-1 restart proceeding, ECNP receives documents relevant to that proceeding. In effect, ECNP asks that it become another public document room for conceivably all materials related to Three Mile Island. ECNP offers no reasons why it should be accorded such a special status. To the extent that ECNP wishes to obtain information it has not received, that information is generally available to ECNP, as it is to any other member of the public, in the Commission's public document rooms.

CONCLUSION

As described in this decision, the staff believes that the Commission has essentially satisfied some of the petitioner's concerns. The staff finds no basis with respect to the petitioner's other requests to take the requested action. This decision does not bar ECNP, assuming it has an interest affected within the meaning of section 189a. of the Atomic Energy Act, from seeking intervention or hearings in future proceedings to raise similar issues.

A copy of this decision will be filed with the Secretary for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations. As provided in 10 CFR 2.206(c), this decision will constitute the final action of the Commission twenty (20) days after the date of issuance, unless the Commission on its own motion institutes a review of this decision within that time.

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 16th day of April, 1980.