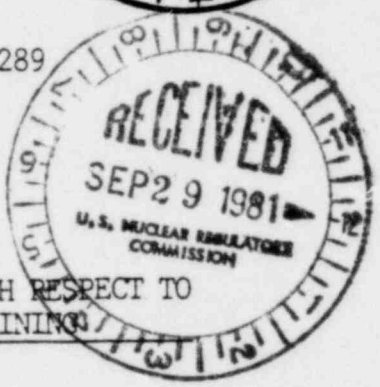
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart)
(Three Mile Island	)	
Station, Unit 1)	)	



TMIA'S RESPONSE TO NRC COMMENTS ON IMMEDIATE EFFECTIVENESS WITH RESPECT TO LICENSING BOARD DECISION ON MANAGEMENT COMPETENCE/OPERATOR TRAINING

In its September 11, 1981 comments on the immediate effectiveness issues, the Staff assumes that the Commission wants the parties views on whether the Commission should consider lifting the immediate effectiveness provisions of its July 2, 1979 Order and its August 9, 1979 Order, 10 NRC 141, regarding license suspension. Page 5. This is despite language in the Commission's August 20, 1981 Order, CLI-81-19, specifically requesting parties to file comments with the Commission on whether the partial initial decision on management competence should be made immediately effective. Comments submitted by other parties to the proceeding seem to indicate that no one else is acting under the Staff's assumptions. However, TMIA recognizes a possible ambiguity and would appreciate some guidance from the Commission as to whether the immediate effectiveness issue before it concerns the August 9, 1979 Order, or the partial initial decision on management competence.

In any event, TMIA believes this is a distinction without a difference. The reasons outlined in its request for stay and supporting memorandum are relevant in either case. Under the August 9, 1981 Order, the Commission may lift

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the immediate effectiveness of the license suspension only if the public health safety or interest no longer require it. Similarly, under 10 CFR §2.764, the Commission must stay the effectiveness of a decision if it determines that it is in the public interest to do so. It is this criteria which TMIA considered in its initial comments on immediate effectiveness and concluded that the public interest would not be served by restart or, as the Staff may wish to characterize it, by lifting the license suspension, on the basis of the partial initial decision. Since the two criteria are practically identical, TMIA submits that its comments are just as relevant if analyzed under the Staff's assumptions. The Commission must conclude that its original concerns on management capabilities as specified in its August 9, 1979 and March 6, 1980 Order, CLI-80-5, have not been satisfied.

The Staff also argues that the license suspension prescribed under the July 2, 1979 and August 9, 1979 Orders was so extraordinary a remedy that the agency should or must summarily lift the suspension and restore the original rights under the license when the situation changes. First, TMIA submits that the circumstances warranting the suspension have not changed and that the inadequate partial initial decision on which TMIA has already commented can not validly support a conclusion that it has. Second, however, TMIA believes that the Staff's argument is inapplicable under the facts of this case. The two cases cited in footnote 9 of the Staff's comments are not on point. Northwest Airlines Inc. v. CAB, 539 F.2d 748(D.C. Cir. 1976) concerned the FAA's imposition of a temporary route change under unusual circumstances without granting opposing parties the opportunity to present their objections at an evidentiary hearing as was the normal required procedure. The Court concluded that because the agency's action was taken without a hearing, the temporary suspension could be implemented only until a hearing could be held. Similarly, in ICC v. Oregon Pacific Industries, Inc., 420 US 134(1975), Justice Powell's concurring opinion

specifically noted that the agency in that case disregarded normal procedure by taking action without notice and hearing. In other words, both cases concerned extraordinary agency actions taken without opportunity for the parties to raise objections at a hearing and because of clear due process problems, the Courts held that such actionswere to be extremently limited. In contrast, however, Licensee in this case was afforded a full evidentiary hearing. Further, it is well established that due process does not require a hearing before an administrative determination becomes effective, particularly where the public's health and safety is involved, as long as an opportunity to be heard is eventually afforded. Bowles v. Willingham, 321 US 503, 520 (1944), Anderson National Bank v. Luckett, 321 US 233, 247 (1944), Moore Ice Cream Co. v. Rose, 289 US 373 (1933), Phillips v. Commissioner of Internal Revenue, 283 US 589, 597 (1931). Thus, the Staff can not properly argue that the license suspension was an extraordinary remedy merely because the Commission's action was taken prior to the hearing. Therefore, the Staff is incorrect to imply that the Commission should impose less of a burden on the Licensee to satisfy the Commission's management concern, or greater presumption in favor of the validity of the partial initial decision, on the basis that Licensee's rights have been violated by virtue of this license suspension and hearing process.

The Staff also argues that 10 CFR §2.764 does not apply to this proceeding, although recognizes that the Commission may wish to use the criteria as an aid in determining immediate effectiveness. TMIA submits that while this particular proceeding may not fall within the Staff's definition of operating license proceedings, 10 CFR §2.764(f), where an ambiguity exists, it should be resolved to effect the spirit, purpose, and intent of the Commission. In this case, the Commission has consistently used the public health, safety, and interest as a crucial standard in evaluating actions taken in this case. Therefore, since the Commission has expressed no intent to the contrary, we believe the

the public interest criteria set out in 10 CFR §2.764 should be considered by the Commission in also evaluating the immediate effectiveness issue in this case.

Finally, the Staff argues that the Board's partial initial decision is without substantive effect since the Board can not authorize an action to be taken. (This is despite language in the August 9, 1979 Order and August 20, 1981 Order referring to the Board's possible authorization of restart). The Staff concludes that the Board's decision should be made immediately effective since it is merely a recommendation. We fail to see the significance of this distinction since clearly the partial initial decision will provide the bases for any restart decision. TMIA submits that the Commission should consider the partial initial decision as having the force and effect of authorizing restart and that it should attach more importance to its potential implications than the Staff seems to.

In sum, the Staff's comments raise no new isssues of substance which TMIA must address. For the reasons stated in its September 11, 1981 request for stay and memorandum in support, TMIA maintains that the Commission must find it in the public interest to stay the immediate effectiveness of the partial initial decision.

Respectfully submitted,

Louise Bradford
TMIA

September 24, 1981