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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of)
METROPOLITAN EDISON COMPANY, ET AL.)
(Three Mile Island Nuclear Station,)
Unit No. 1)

Docket No. 50-289
(Restart)

NRC STAFF'S ANSWER TO LICENSEE'S
REQUEST FOR STAY (ALAB-772)

Jack R. Goldberg
Counsel for NRC Staff

June 22, 1984

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I. INTRODUCTION

On June 13, 1982, Licensee filed with the Commission a request that the Commission stay the remand and reopening of the TMI-1 restart management proceeding which the Appeal Board ordered in ALAB-772.^{1/} Licensee requested the stay pending Commission action on the petition for review of ALAB-772 which Licensee states it will file.^{2/} Licensee pointed out that on June 11, 1984, it had sought a stay of ALAB-772 from the Appeal Board, which the Appeal Board denied by Order of

^{1/} Licensee's Request for Stay (ALAB-772), June 13, 1984 (Licensee's Request).

^{2/} By Order dated June 14, 1984, the Commission granted to all parties an extension of time until close of business on June 22, 1984 to submit petitions for review of ALAB-772.

June 13, 1984.^{3/} Licensee's Request sets forth grounds which it believes supports a stay, with reference to the factors in 10 C.F.R. § 2.788(e). For the reasons set forth below, the Staff does not believe that Licensee has made a particularly strong showing for a stay, but in the circumstances of this case, believes that the Commission should grant Licensee's Request.

II. DISCUSSION

A. The Stay Factors

In determining whether to grant or deny an application for a stay, the Commission will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.788(e). Licensee's Request addresses each of these factors.

(1) Likelihood of Prevailing on the Merits

Licensee addresses the three matters on which the Appeal Board determined further development of the evidentiary record was required. Licensee notes that its commitments to correct weaknesses in training

^{3/} Licensee also pointed out that by Order dated June 11, 1984, the Licensing Board scheduled a prehearing conference on the issues remanded in ALAB-772 for June 28, 1984, and that on June 12, 1984, Licensee requested the Licensing Board to delay scheduling a prehearing conference until after action on its request for a stay. By Order dated June 20, 1984, the Licensing Board denied Licensee's request to delay the prehearing conference.

and information available to the Commission on the Dieckamp mailgram and TMI-1 leak rate testing support the likelihood that Licensee will prevail on these matters on the merits if the Commission reviews ALAB-772. The Staff believes that Licensee's commitments and the information which has been provided to the Commission in its immediate effectiveness review on Licensee's current training and testing program, the Dieckamp mailgram, and TMI-1 leak rate testing practices, may provide a basis for the Commission to decide either that the further hearings ordered in ALAB-772 are not necessary, or, if necessary, need not precede a restart decision by the Commission. That does not necessarily mean, however, that the Commission, in its review of ALAB-772 on the merits, will disagree with the Appeal Board that the evidentiary record needs to be supplemented for the purpose of resolving certain litigated issues on their merits. With respect to reversing ALAB-772 on the basis of the evidentiary record, therefore, Licensee has not shown that it likely will prevail. All things considered, this factor appears, at best, to be neutral insofar as a stay is concerned.

(2) Irreparable Injury

Licensee claims that further delay to allow completion of reopened hearings will result in the postponement of rate relief, delay in return on owners' investment, and delay in the schedule for defueling and clean-up of TMI-2. This argument has merit, however, only if an actual restart decision is deferred until after the further hearings ordered in ALAB-772 are completed and a supplemental decision issued. The Commission could decide that while further hearings are appropriate

as discussed in ALAB-772, they need not precede an actual restart.^{4/} Therefore the Staff does not believe that Licensee has shown irreparable injury in the event a stay is not granted unless any further hearings ordered by ALAB-772 actually delay restart. The only injury to Licensee resulting directly from the absence of a stay of ALAB-772 is its expenditure of resources in preparing for further hearings which ultimately might not be required. Mere litigation expense, however, even if substantial, does not constitute irreparable injury. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977). Thus Licensee has not made a particularly strong showing of irreparable injury.

(3) Harm to Other Parties

The Staff agrees with Licensee that no other party will be harmed by staying the reopened hearings until the Commission can act on Licensee's petition for review of ALAB-772. This factor weighs in favor of a stay.

(4) Public Interest

The Licensee states that the public interest will best be served by avoiding the parties' commitments of resources to a hearing which may not be necessary. In the circumstances of this case, the Staff agrees. As a practical matter, it makes sense to defer the hearing ordered by the

^{4/} The Staff notes that although the Appeal Board reopened the record on the Hartman allegations of leak rate falsification at TMI-2 (ALAB-738, 18 NRC 177 (1983)), the Commission stayed that reopening indefinitely in its Order dated October 7, 1983, and decided that the Hartman allegations did not have to be resolved before restart (Tentative Commission Views and Plan for Resolution of Management Integrity Issues Prior to Restart, January 27, 1984).

Appeal Board until the Commission can determine whether it wishes to review the Appeal Board decision on which the hearing would be based. The Commission has available to it a great deal of information developed after the evidentiary record was closed. This information, presented to the Commission in the course of its immediate effectiveness review, provides the Commission a basis on which to decide, in light of such recent information, whether any further hearings are appropriate, and if so, the proper scope of such hearings, and whether they must precede an actual restart decision. A stay of proceedings on the remand ordered in ALAB-772 pending Commission action on Licensee's petition for review of ALAB-772 would provide an interim conservation of agency resources and those of the other parties which, in the Staff's view, is generally in the public interest. Therefore, the Staff believes that in this case, the public interest weighs in favor of a stay for the limited time necessary for the Commission to act on Licensee's petition for review of ALAB-772.

B. Balancing the Stay Factors

With respect to factor (1), Licensee has not shown that it likely will prevail on the Commission's review of ALAB-772 on the merits. Licensee has shown, however, that there is a basis for the Commission to decide that if further hearings are appropriate in accordance with ALAB-772, they need not precede a restart decision. This factor appears to be neutral.

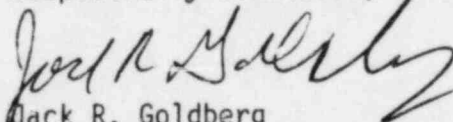
Licensee has not made a particularly strong showing of irreparable injury, factor (2). Factor (3), harm to the other parties, weighs in favor of granting a stay. The public interest, factor (4), also weighs in favor of a stay, as do practical considerations in the circumstances of this case.

The Commission has held that the "weightiest" stay factor is "whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted." Westinghouse Electric Corp. (Export to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). Licensee has not made a particularly strong showing of irreparable injury. Neither has Licensee made a strong showing of likelihood of prevailing on the merits. The other two factors, however, harm to other parties and the public interest, favor a stay. Furthermore, in the circumstances of this case where a stay is requested for a relatively short period of time necessary for the Commission to act on Licensee's petition for review of ALAB-772, practical considerations lead to the conclusion that it makes sense to defer all parties' commitments of resources to further hearings until the Commission can decide whether and to what extent further hearings should be held. On balance, therefore, the factors weigh slightly in favor of granting Licensee's request for a stay of the hearings ordered in ALAB-772 until the Commission has acted on Licensee's petition for review of ALAB-772.

III. CONCLUSION

For the above reasons, the Commission should grant Licensee's request for a stay of the hearings ordered by ALAB-772 until the Commission has acted on Licensee's petition to review ALAB-772.

Respectfully submitted,


Jack R. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of June, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO LICENSEE'S REQUEST FOR STAY (ALAB-772)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 22nd day of June, 1984:

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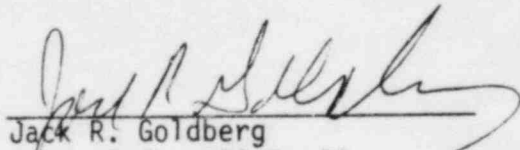
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