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THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

UNION OF CONCERNED SCIENTISTS' OPPOSITION
TO GPU REQUEST FOR STAY (ALAB-772)

1. The Application for a Stay is Inconsistent With the Procedures Adopted by the Commission for This Proceeding.

The procedures adopted by the Commission for this "unique" proceeding do not contemplate and are inconsistent with the consideration of an application for a stay.

In August, 1981, the Commission changed the original procedures for this case, which had called for bypass of the Appeal Board and, in its place, review by the Commission of the record as a condition of restart. Instead, the Commission directed the Appeal Board to undertake a merits review of the record but reserved for itself the determination of whether to lift the "immediate effectiveness" of the 1979 license suspension. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-81-19, 14 NRC 304 (1981).

Subsequently the Commission elaborated further on the division of responsibility when it removed from the Appeal Board the authority to grant a stay of any Licensing Board decision:

> The Commission is the exclusive administrative body with the power to determine whether Unit One may restart

during the pendency of any possible appeals of a Board decision before the Atomic Safety and Licensing Appeal Board. Parties may not file papers with the Appeal Board either supporting or opposing a stay of any such decision during the pendency of any such appeals. Therefore, any party which has a position on whether, in light of the Licensing Board's decision, Unit One should be allowed to restart during the pendency of any such appeals should so argue in its comments submitted to the Commission.

The Commission has decided against Appeal Board stay authority because this case differs significantly from normal initial operating license cases. Here, a decision by the Commission rather than granting effectiveness to a Licensing Board decision, would be determining, based on that decision and other factors, whether the concerns which prompted its original immediate suspension order of August, 1979, justify a continuation of that suspension. If they do not, and the Commission therefore can no longer find that the "public health, safety and interest" mandates the suspension, then the Commission is required by law -- whatever the nature of the Licensing Board's decision -- to lift that suspension immediately. This is a matter peculiarly within the Commission's knowledge and involving the most discretionary aspects of its enforcement authority.

CLI-81-34, 14 NRC 1097, 1098 (1981) (emphasis added).

As the Commission's language quoted above makes quite clear, the reason for removing stay authority from the Appeal Board was that the restart decision would not hinge on granting effectiveness to any particular Licensing Board decision but rather on removing the immediate effectiveness of the 1979 suspension order, a decision which requires the Commission to find that the concerns which prompted the suspension order no longer justify its continuation. A stay, by contrast, is indisputably a decision concerning the merits of the on-the-record adjudicatory proceeding, which requires the Commission not only to accept review of ALAB-772 but also to find, inter alia, that GPU has made a strong showing that it is likely to prevail on that merits review. 10 CFR § 2.788(e)(1). Since the Commission's withdrawal of stay

authority from the Appeal Board was premised on the determination that the restart decision would be ma· by the C·mmission separately from the merits review, indeed "whatever the nature of the Licensing Board's decision," (Id.) the granting of a stay would be anomalous, inconsistent with the procedure established for this case, and ultimately meaningless.

2. GPU's Request Does Not Meet The Standards Required For The Granting Of A Stay

a. GPU has failed to establish that it will suffer irreparable injury in the absence of a stay

We begin with this factor because it is well established as the "most crucial factor" in deciding on a stay request. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977); ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC 341, 342, n.1 (1983). In this case, it could not be more clear that denial of a stay will have no operative effect on restart and thus no potential to cause injury, much less irreparable injury, to GPU.

Whether or not ALAB-772 is stayed, TMI-1 cannot operate without a separate decision by the Commission lifting the 1979 license suspension and addressing whether the concerns which mandated that suspension has been satisfied. The Commission stated this unequivocally in CLI-81-34, 14 NRC 1097, 1098 (1981) quoted above. This is unlike the normal licensing case where, absent a stay, a favorable Licensing or Appeal Board

decision becomes immediately effective and triggers authorization to the Staff to immediately issue a construction permit or operating license. 10 CFR § 2.764(a) and (b). In that case, denial of a stay is equivalent to authorizing construction or operation, and granting of a stay would likewise, without any further action, constitute withholding of permission to build or operate. In this case, by contrast, the granting or denial of a stay would have no effect whatever on restart -- a Commission decision is necessary to effect that -- and it therefore follows ineluctably that denial of the stay request cannot cause irreparable injury to GPU.[1/]

Moreover, even if the Commission were to disregard the above, GPU has not presented grounds for finding irreparable injury. Such grounds must be well documented; conclusory allegations are insufficient. United States Dept. of Energy et al. (Clinch River Breeder Reactor Plant) ALAB-721, 17 NRC 539, 544-5 (1982); In Re: Fire Protection for Operating Nuclear Plants (10 CFR 50.48), CLI-81-11, 13 NRC 778 (1981).

Here, GPU alleges first that "promised rate relief" to its customers will be delayed. Even if true, this does not

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1/See Long Island Lighting Co. et al (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-521, 9 NRC 51 (1979) where a stay request was denied because, although the applicants had a construction permit, they could not go forward with construction until they obtained approval from the State of New York:

> The Jamesport project is not proceeding and it will not proceed without authorization from the appropriate State authority. The County has not only failed to show irreparable injury; it has failed to show any injury at all from the absence of a stay.

Id. at 53. The case is directly on point.

constitute irreparable injury to GPU. Moreover, as noted above, the only action which could even arguably trigger rate relief would be restart, and a stay of the Appeal Board decision cannot by itself affect restart.

N , GPU claims that it will have to "wait" for return on its investment. Again, GPU confuses the restart decision with a stay of the Appeal Board decision. In addition, monetary injuries of this nature are not "irreparable". American Hospital Association v. Harris, 625 F.2d 1328, 1331 (7th cir. 1980); Toledo Edison Co. et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 627-8 (1977).

Third, GPU alleges that a delay in clean-up of TMI-2 will "almost certainly" occur. This is the sheerest speculation. The TMI-2 clean-up is stalled because the nuclear industry has thus far failed to contribute promised funds to the effort. Staying the Appeal Board decision will not affect this; indeed even restart is unlikely to substantially affect it, given the magnitude of the sums involved.

Lastly, GPU claims harm in the effort and expense of conducting hearings. It is black letter law that this is not irreparable harm, no macter how substantial. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1979)

B. GPU has not established a strong likelihood of prevailing on the merits

Without a showing of irreparable injury, the party requesting a stay is required to establish an "especially

compelling showing" on the other three factors -- prime among these, a strong likelihood of prevailing on the merits. Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2) ALAB-415, 5 NRC 1435, 1437 (1977). Moreover, mere allegations are not enough when relying on facts in dispute. The Commission's rules require reference to the record or affidavits. 10 CFR § 2.788(b)(4). See Consolidated Edison Co. of N.Y. (Indian Point Station, Unit No. 2) ALAB-414, 5 NRC 1425, 1432 (1977). GPU's pleading makes no references to the record nor contains any affidavits.

Measured against this stiff burden, GPU's pleading is all but perfunctory. The central issue addressed by the Appeal Board was: "is the instruction [of operators] adequate to prepare the operators to operate the plant safely?" ALAB-772, Sl. op. at 63. The Appeal Board held here that it "disagreed" with the Licensing Board's affirmative answer to that crucial question. Id. In light of this ruling, it is astonishing that GPU could assert that "[t]he decisions of the Appeal Board and Licensing Board do not differ on any finding of fact or law..." Licensee's to Request for Stay (ALAB-772) at 2. The Appeal Bord held further:

> ...in several important areas, we agree with intervenors that the record does not support the Licensing Board's favorable findings concerning licensee's management of TMI-1....

* * *

> The most significant issue requiring further hearing is training. Because the safe operation of the plant is so heavily dependent upon the operators' skill, the importance of training cannot be overstated. The cheating and related incidents called into question the adequacy and integrity of licensee's entire training and testing program.
> Id. at 155, emphasis added

* * *

> ...the present state of the record in several areas does not permit us to make an ultimate judgment on the licensee's competence.
> Id. at 2-3, emphasis added.

Thus, on at least two factual issues central to this case: the adequacy of GPU's training program to meet the mandatory requirements [2/] of the Commission's Order of August, 1979 (CLI-79-8, 10 NRC 141, 143) and 2) the competence of GPU and the TMI-1 operators, the Appeal Board rulings are directly contrary to those of the Licensing Board.

Other than baldly asserting that the Commission is "likely," in GPU's view, to ultimately resolve these issues in GPU's favor (Licensee's Request at 3) GPU presents no facts nor anything approaching a reasoned basis for concluding that it has a strong likelihood of prevailing on the merits, much less a "compelling showing." On this score, the stay request is on its face insufficient. Far more substantial stay requests have been denied. E.g., United States Department of Energy et al. (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544, 545 (1982); Toledo Edison Co. et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621 (1977).

2/ These requirements are set out at ALAB-772, Sl. op. at 4.

On the matter of the Dieckamp mailgram and the question of whether Met Ed covered up the seriousness of the accident, GPU wishes the Commisions to rely on the IE report. The recently-released transcript of closed Commission meetings disclose that the Commissioners themselves recognized that IE's absurd treatment of this issue raised more questions than it resolved. Commissioner Ahearne called Mr. Stello's circumlocutions "specious,"[3/] Commissioner Gilinsky termed it a "joke."[4/] The most generous characterization was made by Chairman Palladino, who judged it "confusing."[5/]

Furthermore, while quoting the Appeal Board to the effect that it does not "suggest any wrong doing by Dieckamp," GPU omits the following critical phrase: "The record as only partially developed does not permit a determination one way or the other." ALAB-772, Sl. op. at 133.

GPU's position on the Unit 1 leak rate question is difficult to understand. GPU never appealed ALAB-738, which establishes that the Unit 2 leak rate falsification is material to the question of management competence and integrity, has the potential to change the result and has not been considered heretofore. GPU further asserted in later pleadings that it considers the Unit 1 leak rate issues subsumed in the issues already reopened by ALAB-738. The Commission does not have the merits of ALAB-738 before it; no party petitioned for review.

3/ Transcript of Closed Commission Meeting, 11/6/81, p. 54.

4/ Transcript of Closed Commission Meeting, 6/21/83, p. 20.

5/ Supra n. 3.

Its "stay" of the reopened hearings has simply delayed resolution of these questios for nine months.

The most GPU says here is that it "plans" to introduce evidence on its behalf in the reopened hearings. No elaboration, citation or affidavits are provided. It also states in a wholly conclusory fashion, again without citations, that a recent OI investigation report is "favorable in its overall conclusions to licensee." Licensee's Request at 5. Where the OI investigation did not find sufficient evidence to pursue criminal charges (a conclusion UCS disputes), its conclusions were scarcely "favorable." Indeed, the report and the accompanying interviews demonstrate that TMI-1 operators systematically destroyed "bad" leak tests in contravention of NRC requirements and routinely accepted as valid test results showing negative leak rates less than 1 gpm, even though the operators knew full well that such test results could not reflect actual leak rates in the plant, since a negative leak rate is impossible. E.g. Investigation No. 1-83-028, Possible Falsification of Leak Rate Data, Ex. 38 at 9. At best, the OI investigation supports a conclusion of incompetence; it is hardly vindication.

C. Other parties will be harmed by a stay

The effect of a stay would be to delay again the time when intervenors can participate in a fair on-the-record adjudication of GPU's competence and integrity, with witnesses testifying under oath subject to cross-examination, and hence to virtually ensure that the Commission will vote on restart without the benefit of a reliable record or meaningful public

participation[6/] in an issue which has been central to this case since 1979, GPU's competence and integrity.

D. The public interest ors denial

As the Appeal Board has recognized, the questions here go to the heart of management and operator competence, undeniably matters of grave safety concern.[7/] Public safety is the paramount public interest factor and that interest weighs heavily against delaying resolution of these issues and/or allowing restart now and later determining whether GPU has the competence to operate TMI-1.

Conclusion

GPU has failed to meet the standards for a stay. Its request must be denied.

Respectfully submitted,

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6/ UCS does not consider the opportunity to comment on all on and off-the-record material offered by the Commission as a substitute for a rational adjudication of these issues. On the contrary we see it as simply affording GPU the opportunity to create a new "record" through submission of untested, self-serving assessments and promises.

7/ The Commission seems to have decided that management integrity can be separated from restart. That conclusion surely cannot be extended, however, to management competence, which directly implicates public safety. See, e.g. ALAB-772, Sl.op. at 155.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the UNION OF CONCERNED SCIENTISTS' OPPOSITION TO GPU REQUEST FOR STAY (ALAB-772) have been served on the following by first class mail, postage prepaid this 25th day of June, 1984, or as otherwise indicated.

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