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NUCLEAR REGULATORY COMMISSION

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SERVED SEP 11 1984

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

ORDER

CLI-84-17

This order addresses licensee's June 13, 1984 request that the Commission stay the reopened management hearings in the Three Mile Island, Unit 1 (TMI-1) restart proceeding (ALAB-772), and Three Mile Island Alert's (TMIA) June 25, 1984 request that the Commission lift the stay of the reopened hearings on the so-called Hartman allegations (ALAB-738).[1] As explained below, the Commission has decided to deny licensee's request and grant TMIA's request.

[1]By separate order issued today, the Commission has taken review of three issues in ALAB-772 and of several related matters, in order to decide whether or not further hearings are required in this restart proceeding and, if so, what their scope should be. CLI-84-18 (September 11, 1984)

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I. Licensee's Request to Stay ALAB-772

On May 25, 1984 the Appeal Board issued its decision on the management issues in the TMI-1 restart proceeding. The Appeal Board in that decision remanded three issues to the Licensing Board for further hearings. Those issues involved (1) the adequacy of licensee's training program, (2) the May 9, 1979 mailgram from Herman Dieckamp to Congressman Udall concerning the "pressure spike" during the TMI-2 accident, and (3) pre-accident leak rate practices at TMI-1.

On June 13, 1984 licensee requested the Commission to stay the remanded hearings pending action on the petition for review it intended to file.[2] Licensee addressed the four factors to be considered in deciding whether to grant a stay as follows.[3] Licensee argued first that it is likely to prevail on the merits on all three remanded issues. Licensee stated the difference in judgments between the Boards on training are

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[2]Licensee requested prompt Commission action on its motion because the Licensing Board had scheduled a pre-hearing conference on the remanded issues for June 28, 1984. The Commission issued an order on June 26, 1984 (unpublished) stating that it would not act on licensee's motion prior to June 28.

[3]The four factors to be considered in deciding whether to grant a stay request are set forth in 10 CFR 2.788:

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.

likely "to be resolved in favor of the Licensing Board's decision," that it would be "fruitless and inconsistent" to devote additional resources to the mailgram issue, and that the evidence does not justify reopening on leak rate testing practices at TMI-1. Licensee then argued that it will be irreparably injured if a decision on restart must await completion of further hearings, and that it will suffer irreparable injury from the effort and expense of preparing for and conducting further hearings if the Commission should eventually reverse the Appeal Board. Finally, licensee stated no other party will be harmed by a stay, and the public interest will best be served by avoiding a commitment of resources to the reopened hearings prior to a Commission decision on whether those hearings are necessary.

The NRC staff, the Union of Concerned Scientists (UCS), and Three Mile Island Alert (TMIA) responded to licensee's motion.

The NRC staff supported licensee's request. Staff argued that licensee had failed to show that it was likely to prevail on the merits and did not make a particularly strong showing of irreparable injury. However, staff agreed with the licensee that no other party would be harmed by a stay and that the public interest would best be served by avoiding any commitment of resources to a hearing which may not be necessary. Staff, balancing these four factors, concluded that they weighed "slightly in favor" of granting licensee's request "until the Commission has acted on licensee's petition for review of ALAB-772."

UCS opposed licensee's request. UCS first argued that the application for a stay is inconsistent with the procedures adopted by the Commission in the resta[illegible] ceeding. UCS, noting that the Commission removed stay

authority from the Appeal Board in this special proceeding, argued that there is no reason for a stay because the question of restart is independent of the merits process.

UCS next argued that licensee's request does not meet the standards required for the granting of a stay. UCS stated that licensee has not established that it will suffer irreparable injury because the grant or denial of a stay would have no effect whatever on restart, and because the effort and expense of conducting hearings do not constitute irreparable harm. UCS argued that licensee's pleading on its face was insufficient to show that it is likely to prevail on the merits. UCS maintained that the other parties would be harmed by a stay because it would again delay the time when intervenors can participate in a on-the-record adjudication of licensee's competence and integrity. Finally, UCS argued that the public interest favors denying the stay because the questions here go to the heart of management and operator competence and hence should be resolved now.

TMIA opposed licensee's request for the reasons outlined in the UCS opposition.

The most significant factor in deciding whether to grant a stay request is "whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted."[4] Westinghouse Electric Corp. (Export to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). The

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[4]The Commission disagrees with the UCS argument that a stay is necessarily improper in this special proceeding. The Commission removed stay authority from the Appeal Board because the Commission intended to make the decision on restart. That does not mean that a stay by the Commission in the present circumstances would be improper.

only injury in the present case would be the commitment of resources to a hearing before the Commission has decided whether that hearing should be held. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1979), quoting Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 24 (1974).[5]

With regard to the second factor, establishing a strong likelihood of prevailing on the merits, licensee has not made a convincing argument. On the first issue, training, licensee offers only a conclusionary argument that the Commission is likely to resolve the differences in judgment between the boards in favor of the Appeal Board. This argument is insufficient for purposes of its stay motion to establish a strong likelihood of prevailing on the merits.[6]

Concerning the third factor, the Commission finds that the other parties would not be harmed by a stay. The only harm alleged by UCS and TMIA is a delay in the hearings and some unspecified relationship between that delay and a restart decision. The Commission will not authorize restart unless the concerns which led to making the 1979 shutdown order immediately effective are satisfied. A short delay in any hearings while

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[5]Licensee's argument that it will be irreparably injured through a delay in restart is irrelevant to the present question. The issue of restart is separate from the issue of whether the reopened hearings should be stayed until the Commission decides whether to review ALAB-772.

[6]The Commission notes that in view of licensee's failure to make the requisite showing on the training issue it is unnecessary to address the other two issues. Even if licensee made the requisite showing on the other issues, the prospect of some reopened hearings would remain real.

the Commission determines whether those hearings should be held would not affect the Commission's decision.

The Commission finds that the fourth factor, the public interest, is neutral here. While there is some public interest in not pursuing those hearings before the Commission has considered if they are necessary, there is also a public interest in avoiding delay in hearings.

The Commission after considering these four factors has decided to deny licensee's motion. The necessity of participating in a hearing does not constitute sufficient harm to justify a stay, and licensee has failed to demonstrate that any of the other factors are significant enough in the present case to warrant a stay.

II. TMIA's Request to Lift Stay of ALAB-738

The Appeal Board in ALAB-738 directed the Licensing Board to reopen the TMI-1 restart record to examine allegations made by Harold Hartman, a former TMI-2 operator, that leak rate data at TMI-2 had been falsified. On October 7, 1983 the Commission took review of whether the hearings should be deferred until after the Commission's Office of Investigations (OI) had completed an investigation it had instituted on the Hartman allegations. To preserve the status quo, the Commission stayed the Licensing Board hearings until it had received and considered the parties' views.

Shortly after issuance of the October 7 order, the Department of Justice requested the Commission to stay further administrative proceedings related to the operation of TMI-2 until the then-pending criminal trial,

United States v. Metropolitan Edison Company, had been completed. The Commission agreed to cooperate with the Department of Justice and suspended the OI investigation of the Hartman allegations.

TMIA in response to licensee's request for a stay of ALAB-772 moved the Commission to lift the stay of the reopened hearings on the Hartman allegations. TMIA argued that there was no longer any basis for staying that decision. TMIA maintained that OI had substantially completed its investigation, that the company had already commissioned a new investigation, and that it was grossly unfair to deny the parties to the proceeding any opportunity to pursue this matter.

The staff opposed TMIA's motion. Staff argued that the stay should continue until OI has completed its investigation of the Hartman allegations and issued its resulting report, especially in view of the previous Commission decision that the Hartman allegations do not have to be resolved before restart. Staff also argued that the stay should continue until the Commission decides whether further hearings are required under ALAB-772.

Licensee also opposed the TMIA motion. Licensee argued there was no urgency to pursuing the matter and the original basis for the stay remained valid. Licensee also noted that the Commission could still take review of whether further hearings were required.

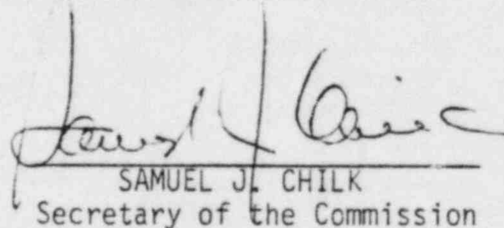
The Commission has decided to grant TMIA's motion and lift the stay of the hearings ordered by the Appeal Board in ALAB-738. The Commission has not yet decided whether a full investigation of the Hartman allegations is still warranted, and, accordingly, the Commission has determined that its original concerns about conserving agency resources and avoiding duplication of effort are not now sufficient to warrant a stay. The Commission

also notes in this regard that the Li.ensing Board in the prehearing conference on the issues remanded by ALAB-772 deferred proceeding on the TMI-1 leak rate matter pending further guidance by the Appeal Board or Commission because the Appeal Board expected the TMI-1 leak rate matter to be considered in conjunction with the Hartman remand. For purposes of a stay of hearings, the Commission sees no reason to treat the leak rate practices issues differently from the other remanded issues.

In sum, the Commission finds no reason to stay the remanded hearings. Licensee's motion to stay the remand directed in ALAB-772 is therefore denied, and TMIA's motion to lift the stay of the remand directed in ALAB-738 is granted. The Commission in this decision is expressing no view on the merits of either Appeal Board decision.

It is so ORDERED.

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 11th day of September, 1984.