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March 13, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
GENERAL PUBLIC UTILITIES NUCLEAR	)	Docket No. 50-289(CH)
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	

MR. HUSTED'S ANSWER TO
TMIA's MOTION TO DISMISS AND FOR STAY

TMIA requests that the Commission dismiss this proceeding and, pending the Commission's decision on its request, stay all proceedings, including discovery, before the Administrative Law Judge. Mr. Husted's position is that TMIA's Motion to Dismiss and for Stay should be denied.

I.

Background

On February 25, 1986, in the TMI-1 restart proceeding, the Commission held that Mr. Husted should have an opportunity to request a hearing on whether an Appeal Board order barring him certain supervisory responsibilities should be vacated. Metropolitan Edison Co. (Three Mile

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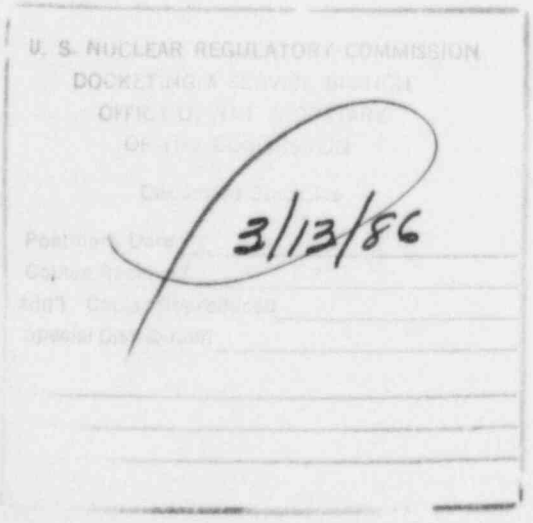
U. S. NUCLEAR REGULATORY COMMISSION
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Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 317 (1985). The Commission gave Mr. Husted "20 days after the service of this Order" to make the request. Id. On March 25, 1985, Mr. Husted filed his request for hearing with the Commission and sought to enlarge the scope of the proceeding to include the issue of whether he should be barred by concerns about his attitude or integrity from serving as an NRC-licensed operator or a licensed operator instructor or training supervisor. See Letter from Deborah B. Bauser, Esquire to the Commissioners, dated March 25, 1985.

On September 5, 1985, the Commission granted Mr. Husted's request for a hearing and his request that the scope of the proceeding be enlarged. See Notice of Hearing, Dkt. No. 50-289(CH), 3 (September 5, 1985). In its decision, the Commission explicitly rejected TMIA's argument that the hearing offered Mr. Husted was merely an effort to relitigate issues already decided in the TMI restart proceeding. The Commission said:

> TMIA's claims are without merit. The Commission is instituting this proceeding, to be held separate from the restart proceeding, in fairness to Mr. Husted, who was not given notice and an opportunity to intervene in the restart proceeding. TMIA's claims of an attempt to relitigate issues in the restart proceeding are unfounded. Those issues have been resolved for the purposes of that proceeding. Moreover, TMIA, if it meets the standards

> for intervention, may intervene in this separate proceeding. This will provide TMIA the opportunity to protect any interests it may have in this matter.

Id. at 2, n.1.

The proceeding launched by the Commission's Notice of Hearing is now well along. Petitions for leave to intervene have been filed and ruled upon by the presiding Administrative Law Judge (ALJ), and TMIA has been admitted as a party. A prehearing conference was held by the parties in Harrisburg, Pennsylvania on February 19, 1986, and a Report and Order on Initial Prehearing Conference (the Report) was issued by the ALJ on February 27, 1986. The Report, among other things, established a schedule for the proceeding; pursuant to that schedule, the discovery period began March 1, 1986.[1]

At the prehearing conference, TMIA argued that factual issues involving Mr. Husted's forthrightness in his testimony before the Special Master, his attitude toward that hearing and his cooperation with the NRC investigation into TMI cheating may not be relitigated in this proceeding. The ALJ rejected the argument, holding that relitigation of

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[1] On March 9, TMIA filed with the ALJ a request for delay of discovery; the request has not been acted upon.

those issues is a specific purpose of this proceeding. Report at 10-11. TMIA has now filed its Motion to Dismiss and for Stay.

Mr. Husted's position here is that (a) the Commission does have jurisdiction to grant Mr. Husted a hearing, (b) Mr. Husted's request for this hearing was timely, (c) TMIA's argument that factual issues affecting Mr. Husted cannot be litigated further has already been rejected by the Commission and the ALJ and should be rejected again, and (d) there is no basis whatever for staying this proceeding. Thus, TMIA's Motion to Dismiss and for Stay should be denied.

II.

The Motion to Dismiss Should be Denied

A. Jurisdiction. -- Section 161c of the Atomic Energy Act of 1954, 42 U.S.C.A. § 2201(c) (1973) provides:

> In the performance of its functions the Commission is authorized to -- . . . hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. . . .

There may well be, as the Commission acknowledged in CLI-85-2, a question about whether Mr. Husted has a right

to a hearing under § 189a of the Act. But there can be no doubt that the Commission has the authority to provide him with a hearing, as it has done in this case.

B. Timeliness of the Husted request. -- The Commission's decision in CLI-85-2, though dated February 25, 1985, was served by mail on February 26, 1985. Thus, in addition to the twenty-day request period specified by the Commission, Mr. Husted was entitled under 10 C.F.R. § 2.710 to five more days in which to file his request. Adding these twenty-five days to the February 26 service date would normally have made the Husted request due on March 23, 1985. But March 23, 1985 was a Saturday, and so under 10 C.F.R. § 2.710, the deadline for filing became the following Monday, March 25, 1985. March 25, 1985, of course, is the date on which the request was filed. In short, a complete answer to this part of TMIA's waiver argument is that Mr. Husted's hearing request was timely.[2]

TMIA also argues that Husted should have sought to intervene under 10 C.F.R. § 2.714. Quite aside from the fact that he was not given notice of a right to intervene,

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[2]Ironically, it is TMIA that has slept on its rights. It filed its response to Mr. Husted's hearing request almost a year ago, but it made no mention of his alleged failure to file the request on time.

it is important to remember that no sanction was imposed on Mr. Husted until the restart proceeding had reached the Appeal Board, a time long after the hearing of evidence had been completed. TMIA also argues that Mr. Husted should have invoked 10 C.F.R. § 2.715(a) (limited appearances) or § 2.715(d) (amicus briefs). Neither of those devices, however, provides an affected person with an opportunity to cross-examine witnesses and to produce evidence, and it was the absence of an opportunity to do those things, among others, that made the restart proceeding unfair insofar as Mr. Husted was concerned.

C. Relitigation of issues. -- TMIA persists in arguing that factual matters addressed in the restart proceeding may not be relitigated in this case, that Mr. Husted has offered no new evidence, and that the findings in the restart proceeding are res judicata. As we pointed out above, the ALJ has rejected the argument that certain issues litigated in the restart proceeding may not be relitigated here. The Commission, in its Notice of Hearing, has too.

As for the argument that Mr. Husted has produced no new evidence, the answer is: he has requested this hearing so he can do precisely that.

As for TMIA's res judicata argument, the answer is that the doctrine precludes only parties or their successors in interest from raising issues already resolved on the merits in earlier proceedings. Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982). Mr. Husted, of course, was not a party to the restart proceeding, and so the doctrine simply does not apply. In any event, res judicata rules need not be applied by administrative agencies in cases where public policy interests favor relitigation. Id. This is such a case, involving as it does the fundamental fairness of the Commission's hearing process.

III.

The Motion for Stay Should be Denied

None of the Commission's regulations applies in terms to a motion such as TMIA's Motion for Stay, but the familiar criteria in 10 C.F.R. § 2.788(e) ought to guide the Commission's decision. The criteria are:

(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.

These can be dealt with quickly. First, the foregoing discussion of TMIA's Motion to Dismiss indicates that TMIA is unlikely to prevail on the merits. Second, TMIA's sole basis for alleging irreparable harm is that it must proceed with discovery. TMIA does not attempt to explain why complying with a process required of all NRC litigants -- a responsibility TMIA assumed when it petitioned to intervene -- will damage it irreparably. We confess serious doubt that it will. Third, entry of a stay will harm Mr. Husted. He cannot hope to resume his work as a licensed operator or trainer of licensed operators or licensed training supervisor, if ever, until this proceeding has run its course; delaying discovery, of course, will delay a decision. Finally, the public interest lies on the side of proceeding swiftly to judgment in a manner consistent with fairness to all participants and thus requires that the stay be denied.

IV.

Conclusion

For the reasons set out above, TMIA's Motion to Dismiss and for Stay should be denied.

Respectfully submitted,

CHARLES HUSTED

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Dated: March 13, 1986

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CERTIFICATE OF SERVICE

I certify that copies of Mr. Husted's Answer to TMIA's Motion to Dismiss and for Stay, dated March 13, 1986, were served upon the following persons today by deposit in the U.S. Mail, first class, postage prepaid, addressed to them at the following addresses:

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Dated: March 13, 1986