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POLICY ISSUE
(Information)

January 9, 1984

SECY-83-474B

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For: The Commissioners

From: Herzel H. E. Plaine
General Counsel

Subject: ADDITIONAL COMMENTS ON SECY-83-474, CONCERNED WITH NO SIGNIFICANT HAZARDS CONSIDERATION IN STEAM GENERATOR REPAIR AT THREE MILE ISLAND, UNIT 1

Discussion: By memorandum dated January 4, 1984, staff has presented you with a legal analysis of its no significant hazards consideration determination in the TMI-1 steam generator repair. Our brief commentary on this analysis is attached.

However, we believe that some caution should be exercised by the Commission in reaching a conclusion.

First, both our commentary and the staff analysis contain an element of advocacy. We and staff are now so close to the issue that the "distance" required for an absolutely neutral analysis may not be achievable.

Second, the staff analysis and our commentary produce a very complicated legal argument. Hence, any legal brief that we may file will try to be simple and straightforward.

Third, we have no difficulty with adoption of

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"significant, new and unreviewed safety issue" as the definition of significant hazards consideration. Using this definition, the resolution of this particular matter before the Commission turns on the answer to two questions:

-- Does operation of TMI-1 with the repaired steam generators present significant safety issues which NRC has not previously reviewed and are new?

-- Has a convincing documented case been made that none of the technical issues put forward by the parties are significant, new, and unreviewed safety issues?

However one answers these questions, we strongly endorse the staff suggestion that "the Commission may wish to have the documentation of the final no significant hazards consideration determination expanded and clarified by the staff should it decide to approve the recommendations in SECY-83-474."

Finally, as we indicated at the prior Commission meeting, this particular matter has important implications for the NRC regulatory program. It appears to us that under the staff approach nearly all operating license amendments issued by the Commission would qualify as involving no significant hazards consideration and therefore could be issued without a prior hearing. This is so because staff's arguments reflect an underlying conclusion that a license amendment which the staff has determined will not significantly increase the risk to the public of operating the nuclear plant can for that reason be found to involve no significant hazards consideration. The staff issues few, if any, license amendments that in their view will significantly increase risks to the public. Accordingly, under the staff approach an operating license amendment for which a no significant hazard consideration finding could not be made will be truly exceptional.

Under the OGC approach, by contrast, no significant hazards consideration determinations will be less common. On amendments involving equipment or practices important to safety, such determinations may even be the exception rather than the rule.

From the viewpoint of Commission flexibility, the staff approach is more attractive, and the Commission might prefer it, trusting its lawyers to untangle the complicated legal arguments, if the Commission believes this is what Congress intended. In short, if the Commission is prepared to assert that by the "Sholly" amendment Congress sought to create or ratify a situation in which almost all reactor license amendments will be issued without a prior hearing, then the Commission should accept the staff's positions on the meaning of no significant hazards consideration.

I believe that a non-frivolous legal argument can be made to support staff's position, and we would make the strongest possible argument to support that position in court should the Commission choose to adopt it. While it is my view that the legislative history does not support the staff position, to develop that point further is to drop back into complicated argument, which I have reserved for the attachment.

Herzel H. E. Plaine
General Counsel

Attachment: OGC analysis

OGC COMMENTARY ON STAFF ANALYSIS
OF NO SIGNIFICANT HAZARDS CONSIDERATION

1. Staff takes the view that a significant hazards consideration presumes the existence of some "safety issue which is new and unreviewed." Staff Memo at 8. We agree. We also believe that the word "significant" should be added as a qualifier, since the statute itself refers to "significant" hazards consideration. The resulting formulation, "significant safety issue which is new and unreviewed" is about what we had in mind when we suggested the formulation "significant safety concern." We believe that either definition of significant hazards consideration is reasonably consistent with the statute and legislative history. Staff's definition does have the added advantage of ruling out "old" or previously reviewed safety issues. Our analysis did not take this qualification into account only because it did not seem relevant to the pending TMI-1 amendment. Our review of the relevant documents had not suggested that any of the arguably significant safety issues were "old" or had been previously reviewed.

2. We don't disagree with staff's additional step of using the NRC's regulations to state (Staff Memo at 8) that for an amendment to present a "safety issue which is new and unreviewed" it must involve a significant increase in the probability or consequences of an accident previously analyzed, create the possibility of some new accident, or involve a significant reduction in a margin of safety. This is because we agree that a strong argument can be made that Congress intended to codify NRC practice prior to the Sholly case when it enacted the Sholly amendment, and NRC's regulations had been put before the Congress as an embodiment of the prior NRC practice.

The difficulty is that, as our earlier memo explains, NRC's own regulations can be read two ways. One possible way is to read the regulations to state that an amendment will "involve" a significant increase in the probability or consequences of an accident, "create the possibility of" some new accident, or "involve" a significant reduction in a safety margin only if it presents a significant additional safety risk. This is how staff would read them. Another possible way is to read the regulations to state that an amendment will "involve" a significant increase in the probability or consequences of an accident, "create" the

possibility of some new accident, or "involve" a significant reduction in safety margin if a significant issue or question was presented during the staff's review whether such results could occur. The critical question then is what Congress understood NRC regulations and prior practice to be when it enacted Sholly. It makes no difference, from the standpoint of legislative history, what NRC practice in fact was. A court will focus on what Congress thought NRC practice was when it agreed with it.

It is here that the principal legal difficulty arises. NRC itself, presumably the principal authority to the Congress on the meaning of its prior practice, described it in a way that is consistent only with the latter reading. Hearings Before the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, 97th Cong., 1st Sess., March 25 and 31, 1981, at 138, 139, 149.[1] The former reading also appears inconsistent with legislative history in the House Report, H.Rep. No. 97-22, Part 2, 97th Cong., 1st Sess., June 9, 1981 at 29; in the Senate Report, S.Rep. No. 97-113, 97th Cong., 1st Sess., May 13, 1981, at 15; and in House floor remarks on passage, 128 Cong. Rec. H8156 (daily ed. November 5, 1981).

Staff does offer a plausible interpretation of other segments of the legislative history (referring to the need to avoid prejudging the merits) that makes these particular segments consistent with both readings of the regulations and prior practice (Staff Memo at 9). This is useful but not dispositive, since it cannot be squared with the other elements of the legislative history cited above.

3. We agree with the staff view that NRC regulations can reasonably be read to say that a repair which returns the plant to prior condition is not a change, test or experiment within the

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[1]Commissioner Gilinsky's comment at the Senate Subcommittee hearing, quoted by staff (staff memo at 6) does offer some support for the staff argument. However, Commissioner Gilinsky's "bottom line" was that "we have got to go back and deal with that definition so it really says there is not an important safety question." The Senate Report seems to have adopted this "bottom line." This "bottom line" is not in accord with the staff position.

meaning of 10 CFR 50.59 (Staff Memo at 11-13). However, our memo did not suggest the need for additional license amendments, and this is all that a different reading of 10 CFR 50.59 would entail. 10 CFR 50.59 and its regulatory history (the Vallecitos case and its aftermath, discussed by staff) do not address license amendments, such as the TMI-1 amendment before that Commission, that do not involve a change, test or experiment but are required for other reasons. One cannot eliminate certain issues from consideration as new and unreviewed safety questions, such as the nature of the corrosion mechanism, the potential for the corrosion to attack other parts of the primary system, and whether the repair was properly conducted, on the ground that they do not involve a change, test or experiment. No one has suggested that they do. The fact that they do not is not relevant to the critical question, which is whether these safety issues have a sufficient nexus to the pending TMI-1 license amendment to be included in the review whether the amendment invokes significant "new and unreviewed safety questions."

4. The staff analysis includes a discussion and explanation of staff's previous finding that the steam generator repair involved an apparent unreviewed safety question (Staff Memo at 12-16). The Commission should also be aware of some additional Congressional materials which complicate this same matter. Thus Darrell Eisenhut told a congressional subcommittee:

> It is, and always has been our position that prior to restart of that unit an amendment will be required .... [T]he degradation problems at [TMI] are clearly unique, and we have taken the position that prior to restart on that facility an amendment is required ... it is an unreviewed safety question.

Subcommittee on Oversight and Investigation, Committee on Interior and Insular Affairs, Hearing Transcript of December 13, 1982, at 39, 42.

5. The staff memo suggests (Staff Memo at 14-15) that the TMI-1 amendment request cannot involve any significant hazards consideration unless staff identifies some new and unreviewed safety question. The implication is that a staff failure to discover such an issue properly leads to a no significant hazards consideration determination. This confuses the burden of proof here. On judicial review, the burden will be on NRC to convince the

court that the safety issues put forward by the parties are not new and unreviewed safety issues.

/Martin G Malsch/mrs

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Deputy General Counsel

January 6, 1984

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REMARKS

Pursuant to your request, please find attached our comments on the proposed Sholly Rule.

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