

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

MEMORANDUM IN SUPPORT OF MOTION OF
THE WASHINGTON LEGAL FOUNDATION TO
DISQUALIFY COMMISSIONER VICTOR GILINSKY
FROM THE THREE MILE ISLAND UNIT NO. 1
RESTART PROCEEDING

I. INTRODUCTION

The Washington Legal Foundation (WLF or Foundation) is a non-profit, public interest law firm with over 85,000 members nationwide, including Pennsylvania and the Three Mile Island area, that engages in litigation and the administrative process in matters affecting the broad public interest. The Foundation commits a substantial portion of its resources to regulatory matters in which it attempts to reduce regulatory excess, increase regulatory efficiency, and insure the integrity of the administrative process.

WLF submits this Memorandum in Support of the Motion to Disqualify Commissioner Victor Gilinsky in the Three Mile Island Unit No. 1 Restart Proceeding on the grounds that his actions with regard to the proceeding conclusively demonstrate that he has:

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- (1) actually prejudged the issues in the proceeding;
- (2) given the appearance that he has prejudged the issues in the proceeding; and
- (3) assumed the role of an advocate and has a bias towards the parties that he has an emotional commitment to one side of the issues thereby destroying his impartiality.

Commissioner Gilinsky's views on the pending proceeding were made public by him on or about June 22, 1983 by his issuance of a Memorandum dated June 22, incorporating a 25-page draft of his views dated February 24, 1983 ("Memorandum"). As set forth more fully below, Commissioner Gilinsky's actions destroy any appearance of his impartiality and impeach his capacity to decide in a fair and even-handed manner the issues raised and outstanding in this case of broad public significance. Permitting Commissioner Gilinsky to remain in judgment in this proceeding is against the public interest, undermines the integrity of the administrative process, and irreversibly infects the entire proceeding to such a degree that a reviewing court would be compelled under the applicable law to order his disqualification and a de novo review of the issues raised and decided during the course of his participation in this proceeding. Hence, the Washington Legal Foundation submits that Commissioner Gilinsky must either disqualify himself or be disqualified by the Commission immediately to preserve the integrity of this lengthy and complex proceeding, as well as the integrity of the Nuclear Regulatory Commission.

II. STATUS OF THE RESTART PROCEEDINGS FOR TMI-UNIT NO. 1

While the proceedings in this case have been lengthy and complex, it is useful to describe briefly the chronology and status of this case.

Following the accident in March 28, 1979 at Three Mile Island Nuclear Station, Unit No. 2, the Commission ordered on July 2, 1979 that TMI-Unit No. 1--which was not affected by the accident--to remain nevertheless in shutdown condition until further notice. On August 9, 1979, the Commission ordered that a hearing be held before startup and prescribed procedures governing this hearing.

Since 1979, there have been a number of administrative actions taken by the Atomic Safety and Licensing Board, the Atomic Safety and Licensing Appeal Board, and the Commission itself relating to the restart proceeding of the undamaged TMI-Unit No. 1. The Atomic Safety and Licensing Appeal Board reviewing this case has now issued two of its three expected decisions on this matter. The major remaining issue yet to be resolved by the ASLAB deals with the management competence of the licensee, although the Licensing Board ruled in 1980 that the licensee met this criterion.

Despite the fact that none of the three major issues have been completely reviewed and decided by the Commission as a whole, and despite the fact that not all the evidence has been reviewed, Commissioner Gilinsky, on June 22, 1983, publicly issued a Memorandum and gave interviews to the media stating his views on the substantive and procedural

aspects of this formal adjudicatory proceeding. These actions by Commissioner Gilinsky form the basis of his disqualification from further participating in this matter.

On July 28, 1983, the Appeal Board held a hearing on a motion filed by certain intervenors to reopen the record on the issue of management competence. No decision on that motion has been made.

There is considerable doubt when TMI-Unit No. 1 will be permitted by the NRC to restart its operation. More troubling, there is considerable doubt that the issues will be resolved in a fair and impartial manner in light of the views expressed by Commissioner Gilinsky.

III. AN EXAMINATION OF THE GILINSKY
MEMORANDUM AND THE APPLICABLE
LAW DEMONSTRATES THAT MR. GILINSKY
MUST BE DISQUALIFIED FROM FURTHER
PARTICIPATION IN THE INSTANT
PROCEEDING

Commissioner Gilinsky's statements and actions in issuing his Memorandum necessitate his withdrawal from the TMI-1 Restart proceeding for three principal reasons under the appropriate legal standards. First, the Memorandum demonstrates that Mr. Gilinsky has in fact prejudged the merits of the case. Second, even assuming that he had not actually prejudged the issues, he has created the impression that he has made such a premature judgment. Third, the Memorandum clearly indicates that the Commissioner has assumed the role of an advocate in the proceeding and that his view of the case is animated by a bias towards certain individual officers of General Public Utilities such that Mr. Gilinsky has an emotional commitment to one side which is so intense as to foreclose the detachment necessary to render an impartial decision in the instant proceeding. These reasons, independently and in combination, dictate that Commissioner Gilinsky recuse himself, or be removed by order of the Commission should he fail to do so.

A. The Gilinsky Memorandum

Commissioner Gilinsky's "Memorandum for the Parties in the Three Mile Island Unit I Proceeding" (Exhibit 1), issued June 22, 1983, opens with the claim that the TMI-1 "restart proceeding has bogged down;" notes some of the

unresolved issues of the case; and states that "[t]he Commission, as is usual in such proceedings, has been silent" about them.

Mr. Gilinsky next candidly notes that he has urged his fellow Commissioners to take interim steps on some of the unresolved issues, but that, "[u]nfortunately, I have had no success in persuading my colleagues to adopt this course." Thus, he concludes:

I have decided, in these circumstances, to make known my own tentative conclusions about Three Mile Island Unit 1 and the management of General Public Utilities in the hope that this might contribute to a satisfactory solution of this case.

Having assumed the role of an advocate attempting to improperly influence the administrative process towards a particular result, Mr. Gilinsky proceeds to attack three management officials of GPU and issues the ultimatum that:

so long as they [GPU's officers] remain in control of the Company, I am not prepared to approve the return of Three Mile Island Unit 1 to operation. In my view, the only sensible way of resolving the problems which affect GPU is to replace the top management of the Company--and by that, I mean the Chairman of the Board of GPU, the President of GPU, and the President of GPU Nuclear.

While the Commissioner adds that "[G]iven the posture of this case, my conclusions are, of course, subject to modification in light of any new information which may be introduced," the tenor of his remaining "conclusions," as well as those preceding his caveat, suggest that Mr. Gilinsky's judgment is far from "tentative." Even assuming that he had

an open mind in fact, Mr. Gilinsky's disqualification would still be mandated under existing and well-recognized principles of law and policy.

The Foundation notes that Commissioner Gilinsky's actions were promptly and properly denounced by his fellow Commissioners. Chairman Palladino, for example, complained that:

In issuing his tentative conclusions on the proposed restart of Three Mile Island, Unit 1, Commissioner Gilinsky has chosen to disregard the collegial process. I am dismayed by this action, which I believe is unprecedented, and I fear that it may generate confusion on the part of the public and the parties to the case.

Statement of Chairman Palladino, June 23, 1983 (Exhibit 2).

Furthermore, Chairman Palladino properly noted the prematurity of issuing any views on the subject by stating:

The Commission continues to review all the issues in the TMI-1 restart case. Not all the facts are in.... It would be premature for me to comment on those matters while they are still under consideration.

Id. (Emphasis added). Commissioner Asselstine agreed with Chairman Palladino stating:

The Commission does not yet have all the information needed to reach a decision in the TMI-1 restart case and that it would be premature at this point to comment on the issues in this case.

Statement of Commissioner Asselstine, June 23, 1983 (Exhibit 3).

Not content with impugning the integrity of the parties before the Commission in this proceeding and prejudging the issues, Commissioner Gilinsky also attacks the Commission

and its staff. He blames the "Commission... for the disarray which has characterized this case." Gilinsky Memorandum at 4. He criticizes NRC staff for allegedly having been "unusually accommodating" in granting extensions to GPU in making certain changes. Gilinsky Feb. 24, 1983 draft memorandum at 3. If Commissioner Gilinsky has any reason to believe that the NRC staff has acted improperly, he should present those reasons and evidence to the appropriate authorities rather than irresponsibly casting aspersions on the character of the Commission and its staff.

The Foundation finds that Commissioner Gilinsky's reckless and maverick conduct is incompatible with an orderly and collegial decision-making process. If Commissioner Gilinsky does not voluntarily recuse himself, it is imperative that the Commission as a whole remove him from these proceedings, especially in light of the views critical of Commissioner Gilinsky's conduct expressed by Chairman Palladino and Commissioners Ahearne and Asselstine. Otherwise, the public and Commissioner Gilinsky will perceive that such irresponsible conduct is to be condoned and tolerated in this and all other pending and future NRC proceedings.

B. The Applicable Law Dictates That Commissioner Gilinsky be Disqualified as a Matter of Due Process Under the Constitution and the Administrative Procedure Act.

The courts have repeatedly found that the test for disqualifying an official of a regulatory agency from an administrative proceeding is whether "he or she has given a

reasonable appearance of having prejudged it." Kennecott Copper Corp. v. Federal Trade Commission, 467 F.2d 67, 80 (Cir. 1972). See also, Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. Federal Trade Commission, 363 F.2d 757 (6th Cir. 1966); Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754 (D.C. Cir. 1964), vacated and rem'd on other grounds, 381 U.S. 739 (1965); Gilligan, Will & Co. v. Securities & Exchange Commission, 267 F.2d 461 (2d Cir. 1959), cert denied, 361 U.S. 896 (1959). An examination of the leading cases which are similar in fact and principle to the one at bar underscores the necessity of disqualifying Commissioner Gilinsky.

In Texaco v. FTC, supra, then Federal Trade Commission Chairman Paul Dixon made a speech before the National Congress of Petroleum Retailers while a case against Texaco was pending before a hearing examiner on remand. During his speech, Chairman Dixon discussed the very type of practices at issue in the Texaco administrative proceeding and noted that the FTC was aware of the practices and had challenged their legality in previous cases. 336 F.2d at 759.

Texaco subsequently filed a motion asking that Mr. Dixon withdraw from participation or that the Commission determine him to be disqualified. Both Dixon and the FTC refused. Id. On appeal, the United States Court of Appeals for the District of Columbia Circuit restated the test for disqualification and stated that:

[A] disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.

336 F.2d at 760. The court added that "[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness, but with the very appearance of complete fairness." Id., citing, Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 267 (D.C. Cir. 1960). Hence, the court concluded that Chairman Dixon's participation in the hearing amounted under the circumstances to a denial of due process invalidating the order under review.

Cinderella, supra, also involved a speech given by then FTC Chairman Dixon. In that case, deceptive advertising charges brought against Cinderella Career & Finishing School had been dismissed by an FTC hearing examiner and a notice of appeal had been filed by the Commission staff. While the appeal was pending before him, Chairman Dixon spoke to the National Newspaper Association and referred to a generic type of advertising as deceptive and admonished his listeners that they should be "savvy enough to smell deception when the odor is strong enough." 425 F.2d at 590.

Since Chairman Dixon's generic reference included the type of advertising in which Cinderella had engaged (although no specific reference was made to the company), the Court of Appeals stated that:

It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in the public statements of government officers, but we are charged with the responsibility of making certain that the image of the administrative process is not transformed from a Rubens to a Modigliani.

425 F.2d at 590 (emphasis added). As it did in Texaco, the court in Cinderella found that Chairman Dixon's further participation in the administrative proceedings violated due process guarantees. The court reasoned that while the agency had the authority to take certain preliminary actions in the public interest, such authority...

does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record. There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has "reason to believe" that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.

Id. (Emphasis added) (footnote omitted):

The reasoning of these cases applies with special force to the facts and circumstances of the instant case. Unlike Texaco and Cinderella in which an administrator made a general statement about an issue pending before him which

called his impartiality into question, Commissioner Gilinsky has made case-specific statements which indicate that he has actually prejudged the issues of this proceeding. While NRC Chairman Palladino and the other Commissioners note that "[t]he Commission continues to review all the issues in the TMI-1 restart case, not all the facts are in," (See Statements of Chairman Palladino and Commissioners Asselstine and Ahearns), Mr. Gilinsky has indicated that he has made up his mind about permitting the restart of TMI-1 unless certain conditions (such as the removal of three individuals in GPU's management) are met. His prejudgment in fact of these issues compels his disqualification.

Even if one were to accept as true Mr. Gilinsky's statement that his views are subject to modification "in light of new information which may be introduced," he cannot be permitted to sit in judgment in this proceeding. */ The

*/ Whether Commissioner Gilinsky considers himself able to rule fairly upon the case is immaterial. Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977). Accord, e.g., SCA Servs., Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977); Smith v. Pepsico, Inc., 434 F.Supp. 524, 525-26 (S.D. Fla. 1977). As the United States Court of Appeals for the Fourth Circuit has stated in a case involving judicial disqualification: "

"The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all of the circumstances...."

Rice v. McKenzie, 581 F.2d 1114, 1116-17 (4th Cir. 1978) (footnotes omitted).

cases discussed above all make clear that actual prejudgment is not necessary for disqualification--the appearance of prejudgment is sufficient. As one court declared:

It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be a reasonable suspicion of unfairness it is best to disqualify.

American Cyanamid v. Federal Trade Commission, 363 F.2d 757, 764 (6th Cir. 1966); see also, National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 226-7 (1947); Dorais-Wamy v. Secretary of Labor, 555 F.2d 832, 843 (D.C. Cir. 1976).

The Gilinsky Memorandum and its impact speak eloquently to the point of appearances. That an objective reader of the Gilinsky Memorandum would reasonably conclude that the Commissioner has in some measure adjudged the case is, WLF submits, beyond peradventure. It is particularly telling that the media, to whom Mr. Gilinsky widely distributed his "tentative conclusions," heralded the Memorandum as a denunciation of GPU and an announcement of unalterable opposition to restarting TMI-1. For example, the Washington Post article under the headline "NRC MEMBER DENOUNCES OWNER OF TMI," began:

Nuclear Regulatory Commissioner Victor Gilinsky issued a blistering indictment yesterday of the owners of the Three Mile Island atomic power plant, saying it was "simply unacceptable that the company responsible" for the nation's worst nuclear accident should be allowed to restart a reactor there.

Gilinsky, in a unilateral declaration opposing the bid by General Public Utilities to put the undamaged Three Mile Island Unit 1 back into operation, said the company has been slower than most to comply with safety standards set since the 1979 accident at TMI Unit 2.

"The conditions that led to the accident at Three Mile Island Unit 2 have not been cured," Gilinsky said.

(See Exhibit 4). Both Mr. Gilinsky and the NRC must face the fact that anyone reading the newspaper reports or hearing broadcast reports about Mr. Gilinsky's action could conclude nothing other than that he had made up his mind about the merits of this proceeding. His conduct has the practical effect of "making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." Cinderella, supra, at 590. Hence, his disqualification is mandated by the appearance of prejudgment alone.

Furthermore, the Memorandum and Commissioner Gilinsky's subsequent public statements to the media demonstrate that he has assumed the role of an advocate and is animated by personal bias towards the parties. As a result, his emotional commitment to one side of this proceeding is so intense as to foreclose the detachment necessary for impartial judgment.

Commissioner Gilinsky openly states in the Memorandum that his purpose in taking this unprecedented action is that it "might contribute to a satisfactory conclusion of this case;" satisfactory, that is, to Mr. Gilinsky. As he stated in an interview with the New York Times:

"I don't think we should be sitting here like five buddhas twiddling our thumbs. That's not my idea of how you do the public's business."

Mr. Gilinsky charged the commission's full-time staff with being "inordinately lenient with G.P.U.," an attitude, he said, that had "undermined the public's confidence in this agency."

(See Exhibit 5). If anything has undermined the public's confidence in the agency, it is Commissioner Gilinsky's bias, arrogance, and reckless conduct which apparently represents his warped concept of "how you do the public's business." See also Exhibit 6.

These and other statements by Commissioner Gilinsky go far beyond "tentative" statements of attitude. Rather, they are characterized by conclusory statements of fact; a use of derogatory references to terms and characterizations of both GPU officials and Commission members and staff; and affirmative efforts to propagate his settled views underscoring an emotional commitment so strong to one side of this proceeding that his further participation in this case is improper. See Reserve Mining Co. v. Ford, 529 F.2d 181 (8th Cir. 1976); Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979).

While Reserve Mining and Nicodemus involved recusals of judges, the decisions are directly applicable to the instant request to disqualify Commissioner Gilinsky. In both cases, the sitting district court judge appeared to be so emotionally involved with one side or the other of a dispute as to foreclose the detachment necessary for an

impartial decision. The case involved judicial conduct which was characterized by intemperance of expression towards one side and emotionality beyond simple disbelief, as well as circumstances which required the judge to deal with the parties and assess their good faith. In both cases, it was found that once the judge is drawn to question the good faith of a party, he has, of necessity, failed to remain "detached from the conflict...." Reserve Mining, 529 F.2d at 156; Nicodemus, 596 F.2d at 154-55.

Here, Commissioner Gilinsky's conduct is the epitomy of intemperance. He has acted prematurely in disregard of the NRC's collegial decision-making process and disparaged one of the parties as well as the Commission and its staff. */ Moreover, he has freely called into question the good faith of GPU's management in his Memorandum and before the press. Commissioner Gilinsky's animosity toward the GPU officials is doubly offensive to the administrative process since the character of the GPU management is itself a substantive issue in this proceeding. Whether motivated by "mere righteous indignation," Nicodemus, 596 F.2d at 154, or a simple "cloak of self-righteousness," Cinderella, 425 F.2d at 590, Commissioner Gilinsky's role as both advocate and judge in this case must be tolerated no longer.

*/ For example, Commissioner Gilinsky concludes that just because the NRC staff is not as antagonistic to licensees such as GPU as Commissioner Gilinsky would prefer, the "NRC staff should no longer be a full party in NRC licensing proceedings." Feb. 24 Mem. at 24. He further remarks that with regard to the GPU management issue, "the [Licensing] Board has no particular competence in matters of management and was out of its depth in making fundamental judgments on the future of GPU." Id. Because of Commissioner Gilinsky's deep-seated bias and strong hostility and distrust of his own agency, WLF submits that not only should he be disqualified in this case, the public interest would be better served by his resignation from the Commission.

C. Commissioner Gilinsky Has Violated
NRC Regulations Regarding Improper
Conduct.

Not only does Commissioner Gilinsky's actions compel his disqualification under applicable case law, WLF submits that his actions violate the NRC's own regulations, 10 C.F.R. Section 0.735-49a, regarding ethical conduct. Specifically, Commissioner Gilinsky's conduct as described above violates 10 C.F.R. Sections 0.735-49a(d), (f) which states:

Section 0.735-49a Other proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this Part O, which might result in, or create the appearance of:

* * *

(d) Losing complete independence or impartiality; [or]

* * *

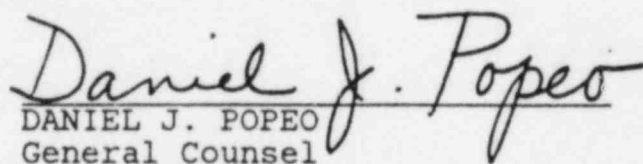
(f) Affecting adversely the confidence of the public in the integrity of the Government.

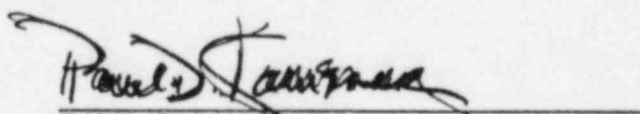
We submit that Commissioner Gilinsky's conduct described above clearly demonstrates that he might have or created the appearance of losing complete independence or impartiality and engaged in conduct that adversely affects the public's confidence in the integrity of the Government. The code of conduct applicable to employees of the NRC should be especially observed in a scrupulous manner by the Commissioners since they occupy positions of power and set an example for other NRC employees. Further, his conduct appears to violate the NRC's procedural requirements of adjudicatory proceedings. See 10 C.F.R. Sections 2.760; 2.770.

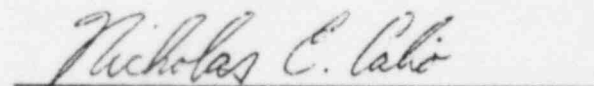
IV. CONCLUSION

For all the foregoing reasons, the Washington Legal Foundation submits that Commissioner Gilinsky must be disqualified from any further participation in this proceeding.

Respectfully submitted,


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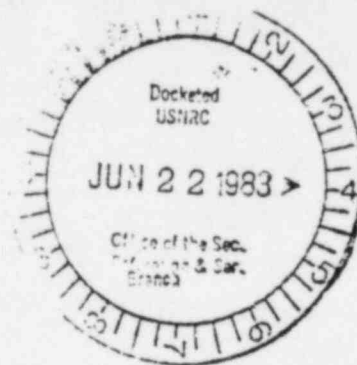
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OFFICE OF THE
COMMISSIONER

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

June 22, 1983



MEMORANDUM FOR THE PARTIES IN THE THREE MILE ISLAND
UNIT 1 PROCEEDING

The Three Mile Island Unit 1 restart proceeding has bogged down. This is to no one's ultimate benefit. On the one hand, the plant does not operate, on the other, opportunities to make needed major changes are being lost. In an effort to obtain a decision favorable to restart, the NRC Staff and General Public Utilities have tried to disentangle themselves from the nagging questions about the Company management's integrity and competence by proposing changes in the personnel to be assigned to the power plant. The Governor of Pennsylvania has urged the Commission not to permit the restart of Unit 1 until a number of pending issues have been resolved. The Commission, as is usual in such proceedings, has been silent.

While the Commission's role in licensing proceedings is in some ways similar to that of a court, its adjudicatory role is less well defined in this extraordinary case. The overlap between issues which are in contention and those which are not, and the sheer length of the proceeding -- it is more than four years since the accident -- have blurred the distinctions between the adjudicative and the administrative processes. And the end is not yet in sight.

I have suggested to the Commission that it should at least provide interim guidance on what it expects the Company to do about the difficult question of management. If the Commission waits until the very end of its review, little time will be left to make significant managerial changes, and the Commission will have a limited range of choices between accepting things as they are and further postponing authorization for the reactor to operate. Unfortunately, I have had no success in persuading my colleagues to adopt this course.

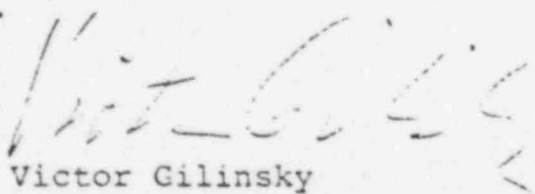
I have decided, in these circumstances, to make known my own tentative conclusions about Three Mile Island Unit 1 and the management of General Public Utilities in the hope that this might contribute to a satisfactory solution of this case. I have therefore asked the Secretary of the Commission to serve upon each of the parties to the Three Mile Island Unit 1 proceeding a copy of the draft separate views which I circulated to the Commission on February 24, 1983.

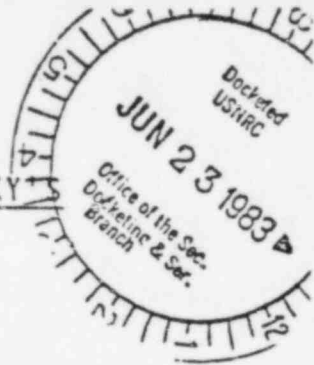
In those views, I said that the continued shortcomings in GPU's performance make it apparent that the conditions that led to the accident at Three Mile Island Unit 2 have not been cured. I attributed this in large part to the fact that GPU continues to be run by the same few individuals who ran the Company before the accident and said that, so long as they remain in control of the Company, I am not prepared to approve the return of Three Mile Island Unit 1 to operation. In my view, the only sensible way of resolving the problems which affect GPU is to replace the top management of the company -- and by that, I mean the Chairman of the Board of GPU, the President of GPU, and the President of GPU Nuclear.

Given the posture of this case, my conclusions are, of course, subject to modification in light of any new information which may be introduced. I should add that these views have not been redrafted to take into account the changes which have occurred since February, 1983. My overall conclusions on GPU's performance on the hardware issues remain the same, although the details of the hardware situation have, of course, changed since February. A short paragraph on page 3, which referred to the views of another Commissioner, has been deleted. The portions of the opinion dealing with the management issues, however, are as valid today as when they were written.

As I mentioned in my opinion, the Commission must bear the ultimate responsibility for the disarray which has characterized this case. At the outset of the Three Mile Island restart inquiry, I suggested to the Commission that it take up the issue of GPU's integrity and competence and itself decide what should be done about the management of this Company. The Commission, for reasons of its own, demurred and, instead, directed the Licensing Board to conduct a hearing on GPU's integrity and ability to safely operate Unit 1.

This was unfortunate. Had the Commission itself taken up the issue of management this hearing could have been significantly simplified and shortened. Had the Commission acted firmly by conditioning the return to operation of Three Mile Island Unit 1 on changes in the top management of GPU, the public around Three Mile Island would be better protected; and even holders of equity in GPU -- and the nuclear industry at large -- would have fared better. As it is, only GPU's top management have benefited from the course the Commission has taken.


Victor Gilinsky
Commissioner



CHAIRMAN PALLADINO'S STATEMENT ON COMMISSIONER GILINSKY'S
TENTATIVE CONCLUSIONS ON TMI-1

In issuing his tentative conclusions on the proposed restart of Three Mile Island, Unit 1, Commissioner Gilinsky has chosen to disregard the collegial process. I am dismayed by this action, which I believe is unprecedented, and I fear that it may generate confusion on the part of the public and the parties to the case.

One of the great strengths of a Commission form of regulatory agency is that the collegial views of all members can be focused on important issues at the same time regardless of their views. I believe that Commissioners should speak to an issue in a licensing case all at one time so that the public and the regulated industry have the benefit of the opinions of all the Commissioners.

The Commission continues to review all the issues in the TMI-1 restart case. Not all the facts are in. It now appears to me that we may not be able to decide the key issue of management for at least a couple of months, although we may be able to get to some of the other issues before that time. It would be premature for me to comment on those matters while they are still under consideration.

I will take whatever time is necessary to reach an objective decision on whether or not to restart TMI-1 and, if it is restarted, under what conditions.

COMMISSIONER ASSELSTINE'S STATEMENT ON COMMISSIONER GILINSKY'S

TENTATIVE CONCLUSIONS ON TMI-1

Commissioner Asselstine agrees with Chairman Palladino that the Commission does not yet have all the information needed to reach a decision in the TMI-1 restart case and that it would be premature at this point to comment on the issues in the case.

COMMISSIONER AHEARNE'S STATEMENT ON COMMISSIONER GILINSKY'S TENTATIVE CONCLUSIONS ON TMI-1

I agree with Chairman Palladino's statement (including the last sentence, were I to have remained on the Commission).

NRC Member Denounces Owner of TMI

By Milton R. Benjamin
Washington Post Staff Writer

Nuclear Regulatory Commissioner Victor Gilinsky issued a blistering indictment yesterday of the owners of the Three Mile Island atomic power plant, saying it was "simply unacceptable that the company responsible" for the nation's worst nuclear accident should be allowed to restart a reactor there.

Gilinsky, in a unilateral declaration opposing the bid by General Public Utilities to put the undamaged Three Mile Island Unit 1 back into operation, said the company has been slower than most to comply with safety standards set since the 1979 accident at TMI Unit 2.

"The conditions that led to the accident at Three Mile Island Unit 2 have not been cured," Gilinsky said.

He said that unless the top management of GPU, including the chairman and president, are replaced, "I am not prepared to approve the return of Three Mile Island Unit 1 to operation."

In a separate statement yesterday, NRC Chairman Nunzio Palladino said that he was dismayed by Gilinsky's declaration and that the commission would not be able to decide the key issue of whether the GPU management is competent to operate Unit 1 "for at least a couple of months.")

NRC commissioners James Asselstine and John Ahearne also issued brief statements agreeing with Palladino that the commission does not yet have all the information needed to decide whether to permit restarting the Unit 1 reactor. There was no

immediate reaction from NRC Commissioner Thomas Roberts.

Gilinsky, in a 25-page statement, accused the GPU management of:

- Taking a "narrow and grudging conception of its public responsibilities," and trying to "get by with the minimum, be it in terms of plant equipment, or of staff discipline and training, or of forthrightness with public authorities."

- Withholding "information about the severity of the accident" at TMI Unit 2 from the state of Pennsylvania and the NRC early on the day of the accident, "when public protection was most critical."

- Being "astonishingly tolerant of cheating by its employees, most particularly by senior members of its operating staff," on examinations for reactor operator licenses.

- Being "extraordinarily slow ... in making the changes to plant equipment and procedures required at all plants by the NRC Action Plan as a consequence of the experience of the Three Mile Island accident."

- Trying to "scrape by in complying with the new emergency preparedness requirements resulting from its own accident."

Gilinsky also expressed concern about the NRC's "own performance in this case."

"Throughout this inquiry, the NRC staff has been inordinately lenient with GPU," Gilinsky said. "The staff's habitual alignment with GPU has been particularly unfortunate as it has undermined the public's confidence in this agency."

Official Urges Dismissal Of 3 at Three Mile Island

By JANE PELLEZ

Special to The New York Times

WASHINGTON, June 23 — A member of the Nuclear Regulatory Commission, chastising his own agency for inept handling of the Three Mile Island case, said today that the three senior executives of the nuclear plant should be dismissed before an undamaged unit of the reactor was allowed to operate.

Victor Gilinsky, the commissioner, harshly criticized the performance of General Public Utilities, the operator of the plant. He said the company continued to show "shortcomings" that allowed conditions leading to the accident at Unit 2, four years ago, to remain unchanged.

He attributed this "in large part to the fact that G.P.U. continues to be run by the same few individuals who ran the company before the accident."

In an unusual step, Mr. Gilinsky made his views known before the five commissioners voted on the start-up of Unit 1. That unit was not working in March 1979, when an evacuation of the Harrisburg, Pa., area followed Unit 2's accident, the industry's worst. Unit 1 is a twin of Unit 2.

'Disarray' in Case Cited

He said the commission "must bear the ultimate responsibility for the disarray which has characterized this case" and that he had spoken out in the hope that a resolution might be more quickly achieved.

In an interview, he said: "I don't think we should be sitting here like five buddhas twiddling our thumbs. That's not my idea of how you do the public's business."

Mr. Gilinsky charged the commission's full-time staff with being "inordinately lenient with G.P.U.," an attitude, he said, that had "undermined the public's confidence in this agency."

The chairman of the commission, Nunzio J. Palladino, said he was "dismayed" by Mr. Gilinsky's early finding, calling it "unprecedented" and likely to "generate confusion on the part of the public and the parties in the case."

Mr. Palladino said he would take whatever time "is necessary to reach an objective decision on whether or not to restart T.M.I.-1 and, if it is restarted, under what conditions."

James K. Asselstine and John H. Ahearne, two other commissioners, said today to that they agreed with the chairman that insufficient information was available to draw a conclusion on the restarting Unit 1. The fifth commissioner, Thomas M. Roberts, did not make his views known.

The three executives Mr. Gilinsky referred to are William G. Kuhns, the chairman of the board of General Public Utilities; Herman Dieckamp, president of the company, and Robert C. Arnold, president of GPU Nuclear Corporation. Both Mr. Kuhns and Mr. Dieckamp were with the company before the accident at Unit 2, said a company spokesman, John Fidler.

Mr. Fidler said that the company regretted that Mr. Gilinsky, by making his statement, had chosen to disregard the established "collegial process" of the commission. He asserted that Mr. Gilinsky's conclusions "discounted and contradicted years of official investigations" and that the company looked forward to an "orderly process" that would result in the restart of Unit 1.

The staff of the Nuclear Regulatory Commission recently suggested to the commissioners that a group of management officials at G.P.U. be assigned away from Unit 1 until investigations by the staff had been completed.

In his 28-page report, Mr. Gilinsky said that despite certain improvements since the accident, "the overall picture" is of a company with "a narrow and grudging conception of its public responsibilities, which seeks to get by with the minimum, be it in terms of plant equipment, or of staff discipline and training, or of forthrightness with public authorities."

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GPU's Top Officials Should Be Replaced Before Restart of Reactor, NRC Aide Says

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—A member of the Nuclear Regulatory Commission said the top management of General Public Utilities Corp. should be replaced before the company is allowed to restart its undamaged reactor at Three Mile Island.

That assertion by Commissioner Victor Gilinsky caused a startling blowup at the normally placid NRC Commission Chairman Nunzio Palladino said he was "dismayed" at Mr. Gilinsky's "unprecedented" voicing of an opinion before the entire five-member NRC is ready to rule on the much-delayed case. Mr. Palladino said that may take "at least a couple of months."

Commissioners John Ahearne and James Asseltine issued statements saying they agreed with the chairman. The fifth commissioner, Thomas Roberts, was out of town and didn't comment.

Famous Accident

GPU owns two reactors at Three Mile Island on the Susquehanna River in Pennsylvania. Unit 1 was closed for refueling when Unit 2 overheated and broke down in the famous 1979 accident. The NRC ordered Unit 1 to remain closed while the accident was investigated. That investigation has evolved into a NRC scrutiny of the fitness of the utility's management to run the plant if Unit 1 is restarted.

Mr. Gilinsky isn't against all nuclear power, but he's been an acerbic critic of both the industry's and the NRC's own procedures. In that vein he made public a memorandum complaining that the Three Mile Island case is "bogged down."

He continued: "On the one hand, the plant doesn't operate, on the other, opportunities to make needed major changes are being lost." He said he had urged his fellow commissioners to give GPU "interim guidelines" on what it must do to win the NRC's approval to restart Unit 1.

The other commissioners wouldn't go along with that, so Mr. Gilinsky specified the conditions for winning his own restart vote.

Gilinsky's Recommendation

"In my view," he said, "the only sensible way of resolving the problem which affects GPU is to replace the top management of the company—and by that I mean the chairman of the board of GPU, the president of GPU and the president of GPU Nuclear."

Chairman Palladino protested that NRC members should speak on a pending case "all at one time," and said Mr. Gilinsky's action would just confuse everybody.

William G. Kuhns is chairman and chief executive officer of GPU and Herman

Dieckamp is president and chief operating officer. GPU Nuclear was established as a subsidiary after the Unit 2 accident to manage the utility's nuclear operations, including the units at Three Mile Island and at Oyster Creek, in Lacey Township, N.J.

GPU said Mr. Gilinsky's conclusions contradicted "years of official investigations" and expressed confidence that "a reasonable, complete and prompt review" of the restart question would support the position that GPU Nuclear "has the competence and integrity to safely operate" Unit 1.

As reported, GPU earlier this month realigned the management of its nuclear subsidiary to assure the NRC that certain management personnel who worked for the utility when the accident occurred wouldn't work at Unit 1 until management integrity questions were resolved.

The utility also "reallocated" responsibilities of the president of GPU Nuclear, giving primary responsibility for Unit 1 to Philip R. Clark, executive vice president, who joined the company after the accident. Robert C. Arnold, president of the nuclear subsidiary, and a GPU official at the time of the accident, will devote most of his time to the cleanup of Unit 2.

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NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave of the Washington Legal Foundation to File the Motion to Disqualify Commissioner Victor Gilinsky, Motion to Disqualify Commissioner Victor Gilinsky, Memorandum in Support thereof, and Exhibits thereto were served upon the Commissioners of the NRC by hand-delivery this 17th day of August, 1983, and upon all other persons named in the attached Service List this same day, by first-class mail, postage prepaid. Commissioner Gilinsky's draft memorandum dated February 24, 1983 which was incorporated into his June 22, 1983 memorandum was not served on the parties inasmuch as they were already served with such draft memorandum by the Commission on June 23, 1983.


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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