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August 10, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

LICENSEE REPLY TO UCS
COMMENTS ON TMI-1 RESTART

The comments of the Union of Concerned Scientists (UCS) on restart of TMI-1 offered on July 26, 1984,1/ reflect deep misunderstandings of the procedural posture of the TMI-1 proceedings and applicable law. UCS contends that allowing restart now would:

1. Violate the Commission's own mandated procedures, since the Commission has allegedly provided that any restart decision will wait until after a favorable decision by the Licensing Board is completed, and the Appeal Board has remanded certain management issues for examination of further evidence;

1/ UCS Comments on TMI-1 Restart Immediate Effectiveness, July 26, 1984, (hereinafter "UCS Comments").

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2. Violate statutory procedural requirements, since the restart necessarily involves amending the TMI-1 operating license, which can be done only through formal, adjudicatory proceedings, and with the Appeal Board remand such proceedings have not yet been completed;

3. Also violate statutory procedural requirements, because lifting the suspension is allegedly itself a license amendment which must be adopted solely through a formal proceeding, and the Commission has indicated it would base its decision in part on evidence outside the formal hearing record;

4. Violate the Commission's own procedural regulations; and

5. Violate the requirements of Due Process of Law, if the Commission relies on material outside the formal hearing record.

As explained below, none of these contentions are valid.

BACKGROUND

In response to the accident at Three Mile Island, Unit 2 (TMI-2) in March, 1979, the Commission issued an immediately effective order on July 2, 1979 suspending the operating license for Unit 1 (TMI-1) pending a public hearing and further order of the Commission. In the Matter of Metropolitan Edison Company, Docket No. 50-289, July 2, 1979 ("July 2nd Order"). Because this suspension was immediately effective, the licensee

lost its usual rights to advance notice and hearing before such suspension. 10 C.F.R. 2.201-2.202; 42 U.S.C. § 2239; 5 U.S.C. § 558(c). The Commission had the legal authority to bypass such rights only because it found that the public health, interest or safety required the suspension to be immediately effective. July 2nd Order; In the Matter of Metropolitan Edison Company, CLI-79-8, 10 NRC 141 at 146, 149, (August 9, 1979); 10 C.F.R. 2.201(c), 2.202(f); 5 U.S.C. 558(c).

Since that time, the Commission has clearly and consistently reserved to itself the decision as to whether and when to lift the immediately effective suspension of TMI-1 operations. In the very same August 9, 1979 Order which established the formal, on-the-record, Licensing Board proceedings, the Commission said:

> The Commission shall issue an order lifting immediate effectiveness [of the license suspension] if it determines that the public health, safety or interest no longer require immediate effectiveness. The Commission's decision on that question shall not affect its direct appellate review of the merits of the Board's decision. 10 NRC at 149.

Later, when the Commission established a separate Appeal Board for the Licensing Board proceedings, it again emphasized that it reserved the right to lift the suspension itself without waiting for any final Appeal Board decision. In the Matter of Metropolitan Edision Company, CLI-81-19, 14 NRC 304, 305-306 (August 20, 1981). A later Order stated: "The Commission is the exclusive administrative body with the power to determine

whether Unit 1 may restart during the pendency of any possible appeals of a Board decision before the Atomic Safety and Licensing Appeal Board." In the Matter of Metropolitan Edison Company, CLI-81-34 14, NRC 1097, 1098 (December 23, 1981). The Order ruled that the Appeal Board did not have authority to stay a Commission ruling on lifting the suspension and allowing restart, explaining in effect that the decision as to lifting the suspension was separate from the formal proceeding before the Licensing and Appeal Boards. The Order stated:

> 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. 14 NRC at 1098.

Consequently, the decision as to whether and when to lift the immediately effective suspension is being made in a proceeding before the Commission itself separate and distinct from the formal proceeding before the Licensing and Appeal Boards. The court in Philadelphia Newspapers, Inc. v. Nuclear Regulatory Commission, 727 F. 2d 1195 (D.C. Cir. 1984)

recognized the distinction between these two proceedings, in fact holding that they were separate and distinct. The need to maintain two separate proceedings was created when the TMI-1 license suspension was imposed on an immediately effective basis. The licensee, as discussed above, could be deprived of its prior right to notice and hearing only because the Commission found the public health, safety or interest so required. When the basis for these public concerns dissolved, the Commission's authority to maintain the license suspension without prior notice and hearing would also dissolve. The Commission, therefore, had to maintain its own inquiry to monitor whether such special conditions continued and whether the suspension could legally remain in force, without waiting for any Licensing or Appeal Board proceedings to conclude.

In allowing restart now, the Commission would be taking two, separate, distinct actions relating to the two different proceedings:

(1) Lifting the immediately effective suspension of the TMI-1 operating license, in the informal proceeding before the Commission itself; and

(2) Amending the TMI-1 operating license, on the basis of the formal, on-the-record, Licensing Board proceedings in which all parties have participated and which, despite the Appeal Board remand, still provide all support necessary for the amendments.

ARGUMENT

I. THE COMMISSION HAS COMPLIED WITH ALL PROCEDURE REQUIRED TO DECIDE NOW TO LIFT THE IMMEDIATELY EFFECTIVE SUSPENSION OF THE TMI-1 OPERATING LICENSE.

A. The Commission Would Not Violate the Procedure It Established for the TMI-1 Proceedings By Lifting the Suspension Now.

Despite the contentions of UCS, the Commission, as discussed above, has always reserved to itself the decision as to whether and when to lift the immediately effective suspension of the TMI-1 operating license, with such decision to be made in a proceeding before the Commission itself separate and distinct from the Licensing and Appeal Board proceedings. This has been recognized and affirmed by the D.C. Circuit in Philadelphia Newspapers, supra. It has also always been recognized by the parties, or should have been. UCS offers no citations to any fact or occurrence indicating any party reliance to the contrary. Lifting the TMI-1 immediately effective suspension now would be perfectly consistent with this established Commission procedure.

UCS contends that the Commission in its August 9, 1979 Order committed itself to consideration of the lifting of the suspension only after a favorable Licensing Board decision (allegedly not now in effect due to the Appeal Board remand). UCS bases this contention on the following language in the August 9, 1979 Order:

> If the Licensing Board should issue a decision authorizing resumption of operation upon completion of certain short-term actions by the licensee . . ., and subsequently if staff certifies that those short-term actions have been completed to its satisfaction, the Commission will issue an order . . . deciding whether the provision of this order requiring the licensee to remain shut down shall remain immediately effective . . . .

UCS Comments at 3-4.

But this language merely sets out one way the suspension may be lifted, it does not foreclose other procedural possibilities. This language was in fact a minimum guarantee by the Commission to the licensee that consideration of lifting the suspension would at least occur upon these events. Contrary to the UCS contention, the Commission has stated elsewhere that it may lift the suspension "whatever the nature of the Licensing Board's decision." 14 NRC 1097, at 1098 (relevant language quoted, supra, at 4). Indeed, the Commission had no legal authority to make the commitment UCS contends it did, because authority to maintain the immediately effective suspension dissolves as soon as the special public concerns justifying immediate effectiveness dissolve, and the Commission cannot then continue to maintain such a suspension while awaiting a Licensing Board decision. Moreover, in any event, the Licensing Board did issue a decision favorable to restart and the Appeal Board did not reach any conclusions contrary to the Licensing Board decision. The Appeal Board merely asked the Licensing Board to examine further evidence.

B. In Deciding to Lift the TMI-1 Suspension, the Commission is not Confined to the Record of the Formal Licensing Board Proceedings.

The UCS contention that the Commission must base its decision on whether to lift the TMI-1 suspension solely on the record of the formal, Licensing Board hearings completely fails to recognize that, as discussed above, the decision on lifting the suspension is being made in a separate proceeding before the Commission itself. Naturally, the Commission in this separate proceeding may accept evidence and base its decision on it.

Even if we assume arguendo that Due Process requires that UCS be informed of all such evidence and be allowed to comment on it, such requirement has been fully satisfied. The O.I. reports and all other evidence provided to the Commission in public meetings relating to the TMI-1 suspension have been made available to UCS and all other parties, and all have been allowed to comment on such evidence. The Commission's Order of June 1, 1984 specifically invited the parties to comment on other relevant information. Of course, all evidence in the Licensing Board proceeding has been provided to UCS and the other parties with opportunity to comment and more. These materials constitute the identified record for the Commission proceeding to decide whether and when to lift the TMI-1 suspension.

C. The Separate Proceeding Before the Commission Itself Regarding the Lifting of the Suspension Is No More Than Informal Adjudication, and the Commission Has Complied with All Procedural Requirements of such Adjudication.

There is no requirement that the Commission hold any hearing at all in its own proceeding to lift the TMI-1 suspension. Section 189(a) of the Atomic Energy Act (42 U.S.C. § 2239) requires hearings before a suspension is imposed, though such requirement is superceded when the public health, safety or interest requires immediate effectiveness, as noted above. There is nothing in the language of § 189(a), however, which requires hearings before an already imposed suspension is lifted.

Under long-standing Commission practice, affirmed by the courts, license suspensions have been routinely lifted without a hearing. In the Matter of Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-79-7, 9 NRC 680 (1979), aff'd Friends of the Earth, Inc. v. United States, 600 F.2d 753 (9th Cir. 1979); In the Matter of Public Service Company of Indiana (Marble Hill Nuclear Generating Station), CLI-80-10, 11 NRC 438 (1980); Nuclear Regulatory Commission, respondent, (6th Cir. 1983) (slip opinion); In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant), CLI-83-27, 18 NRC 1146 (1983); In the Matter of Consumers Power Company (Midland Plant), CLI-73-38, 6 AEC 1082 (1973).2/ While UCS argues that these cases did not involve

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2/ A hearing before lifting a suspension should especially not be required where, as here, the suspension was imposed in

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license amendments as well as suspension removal, as this case does, the Commission here has also complied with the separate procedural requirements relating to license amendments, as discussed, infra, at 12-15.

Even if § 189(a) could be read to require a hearing before lifting a suspension, there is no requirement that this be a formal hearing. The courts have held that even where a hearing is required, there must be some clear indication that Congress intended the formal APA procedures to apply before they will be required. City of West Chicago v. United States Nuclear Regulatory Commission, 701 F.2d 632, 641 (7th Cir. 1983); United States Lines v. FMC, 584 F.2d 519,536 (D.C. Cir. 1978); Nofelco Realty Corp. v. United States, 521 F. Supp. 458 (S.D.N.Y. 1981). Nothing in § 189(a) indicates any intent to require a formal hearing before lifting an immediately effective suspension imposed on a licensee without a prior hearing. Indeed, in City of West Chicago, the court held that even though § 189(a) required a hearing for a materials license amendment, there was no requirement that the hearing must be

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the first place without a hearing due to special concerns regarding the public health, interest or safety. To require hearings in these circumstances would be ironic and unfair to the licensee, which suffers suspension itself (in this case over 5 years) without prior opportunity for a hearing. It would also seriously hamstring the Commission's practical ability to utilize its summary suspension powers, since the Commission will often not want to impose a summary suspension on a licensee if it cannot lift such suspension until after an extended hearing procedure.

formal. In so holding, the court was interpreting the same hearing requirement language in the first sentence of § 189(a) that would be the source of any hearing requirement for lifting suspensions, if such a requirement existed.

This analysis is thoroughly consistent with the decision in Philadelphia Newspapers, supra. In regard to the very same TMI-1 proceedings at issue here, the court in Philadelphia Newspapers recognized not only that the Commission proceeding for lifting the suspension was separate from the formal Licensing Board proceeding, but also that the Commission proceeding involved only informal adjudication, 727 F.2d at 1197-1199.

Nothing in the Commission's regulations changes this conclusion either. Lifting a license suspension is not one of the licensing actions which call for formal hearings under the Commission's regulations. The Commission has made the formal adjudicatory procedures under its regulations applicable to the Licensing and Appeal Board proceedings, as UCS notes, but not to the separate, informal proceeding on lifting the license suspension before the Commission itself.

Since this separate, Commission proceeding involves only informal adjudication, the parties, including UCS, have only limited procedural rights in regard to such proceeding. The parties, including UCS, have no right to cross-examination or any of the other formal procedures of the APA in such an informal proceeding, as opposed to the formal Licensing and Appeal Board proceedings. In the informal Commission proceeding, it

is appropriate for the Commission merely to accept evidence in a publicly available record, as well as comments by all parties on such evidence. The Commission has taken no actions inconsistent with the simple requirements of informal adjudication.

II. THE COMMISSION HAS COMPLIED WITH ALL PROCEDURE REQUIRED TO AMEND THE TMI-1 OPERATING LICENSE NOW.

A. UCS Has No Right to a Hearing in Regard to the Proposed TMI-1 License Amendments Because It Does Not Oppose Such Amendments.

UCS contends correctly that a decision to allow restart would not only involve lifting the suspension of the TMI-1 operating license, but also adopting several amendments to that license. But UCS incorrectly contends that it has a right to a formal, adjudicatory hearing regarding such amendments, and that consequently restart must wait until completion of all formal proceedings before the Licensing and Appeal Boards where such amendments have been adjudicated.

UCS has no right to any sort of hearing regarding these amendments because, while it has advocated additional license conditions, it does not oppose any of the conditions imposed by the Licensing Board which are to be reflected in license amendments. Bellotti v. United States Nuclear Regulatory Commission, 725 F.2d 1380 (D.C. Cir. 1983). In Bellotti, the Attorney General of Massachusetts was denied a hearing on a license amendment for a plant in his state, because he did not

oppose the amendment but instead wanted to address other issues. Bellotti establishes a fundamental principle of NRC procedure.

UCS argues that it does oppose restart of TMI-1 (and seeks to distinguish Bellotti on this ground since the plant in that case was never shut down). But none of the amendments themselves address restart, so UCS opposition to restart does not involve opposition to the amendments. The UCS opposition to restart is no more than its opposition to lifting the TMI-1 operating license suspension which, as discussed, supra, at 9 - 12 , also does not give UCS the right to any hearing.

UCS further attempts to argue that merely allowing restart of TMI-1 in itself involves a license amendment, since the reactor is now shut down. But this argument is illogical on its face. The mere restart of the reactor itself does not change the operating license. The Commission may have decided it does not want to allow restart without adopting license amendments. But this decision in no way turns the act of restart itself into a license amendment. Nor does it require an amendment of the basic operative provision of the license which permits reactor operation. Under the UCS position, every lifting of a license suspension would be an amendment requiring a prior, formal, adjudicatory hearing.

Sholly v. United States Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980) does not support the UCS position that restart itself is an amendment. The court in Sholly in

fact indicated that if the Commission there had simply lifted the license suspension and allowed renewed operations under the original terms of the license, there would be no amendment and consequently no right to a hearing. Restart itself, therefore, does not involve an amendment according to Sholly. A hearing was required in Sholly because the original license had been superceded by a new license and the NRC had not in fact reinstated the operable terms of the original license.

B. In Any Event, Formal, Adjudicatory Hearings Sufficient to Support the TMI-1 License Amendments Were Held in the Licensing Board Proceedings, with Full Participation by UCS and All Other Parties.

Even if UCS was entitled to a hearing on the proposed TMI-1 license amendments, full, formal, adjudicatory hearings on such amendments were held in the Licensing Board proceedings, with full participation by UCS and all other parties. The Appeal Board remand under ALAB-772 simply mandated examination of further evidence by the Licensing Board on issues unrelated to the amendments. The remand did not question or undermine the justification for any of the already proposed amendments which the Commission may now adopt in allowing restart. Consequently, a full, formal, adjudicatory record sufficient to support adoption of these amendments currently exists.

Moreover, the UCS position that the Appeal Board remand precludes the Commission from now allowing restart is

inconsistent with the Commission's prior ruling that the Appeal Board has no authority to stay Commission decision on restart. In the Matter of Metropolitan Edison Company, CLI-81-34, 14 NRC 1097 (December 23, 1981).

CONCLUSION

A Commission decision allowing restart now would involve two, separate, distinct actions:

1. Lifting the immediately effective suspension of the TMI-1 operating license; and

2. Amending such license.

The Commission has correctly observed all procedures necessary to take such actions now.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: August 10, 1984

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NUCLEAR REGULATORY COMMISSION

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(Three Mile Island Nuclear	)	(Restart)
Station, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee Reply to UCS Comments on TMI-1 Restart," dated August 10, 1984, were served on those persons on the attached Service List by deposit in the United States mail, postage prepaid, or where indicated by an asterisk (*) by hand delivery, this 10th day of August, 1984.

George F. Trowbridge, P.C.

Dated: August 10, 1984

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METROPOLITAN EDISON COMPANY	)	Docket No. 50-289 SP
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(Three Mile Island Nuclear Station, Unit No. 1)	)	(Restart - Management Phase)

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