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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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USNRC

'85 MAY 28 P4:52

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

Union of Concerned Scientists
Motion for a Stay

In anticipation that the Commission will, on or about May 29, 1985, issue an order lifting the "immediate effectiveness" of the shutdown of Three Mile Island, Unit 1 ("TMI-1") and authorizing operation of the plant, the Union of Concerned Scientists move the Commission to stay its order so as to preserve the status quo and prevent irreparable harm pending review on the merits in the United States Court of Appeals. In the alternative, UCS seeks a two-week stay so that it may prepare and present arguments to the court on an application for stay pending review.

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ARGUMENT

Pursuant to 10 CFR 2.788, the factors to be considered in ruling on a stay request are as follows:

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

A. UCS Has a Strong Likelihood of Prevailing on the Merits

1. Restart Requires at Least a Finding of Reasonable Progress by GPU Towards Correcting the Deficiency Found by the Licensing Board In its Training Program

On May 3, 1985, the Atomic Safety and Licensing Board ("ASLB") issued a partial initial decision on the remanded issue of licensed operator training at TMI-1. ASLBP 79-429-09-SP. The ASLB ruled, inter alia, that "UCS has prevailed" (Sl.op. at 144) in proving that GPU's training program is deficient in that it does not provide for "periodic, formal on-the-job operator performance evaluations for training revision or for any other purpose after initial on-the-job training." (Id. at 143). The Board determined that the license condition "correcting the void in Licensee's training program" (Id. at 144) must be prepared and approved by the Board, which retained jurisdiction for this purpose. (Id. at 155). The ASLB further directed GPU to submit its proposed plan to the parties within 30 days of May 3rd, and to seek the agreement of particularly UCS and the Staff. The

plan with the parties' agreement or disapproving comments are to be given to the ASLB within 15 additional days Id. at 216-217.

Without any explanation of its reasons, the ASLB further determined that implementation of a program to evaluate the job performance of operators "need not precede restart" (Id. at 156); i.e., could be treated as a so-called "long-term" item.

UCS believes that this determination by the ASLB was clearly in error, indeed, that it has essentially repeated the error that led to reversal in ALAB-772, 19 NRC 1193 (1984). "[Q]uestions about the management capabilities and technical resources of Metropolitan Edison" were one of four "unique circumstances" at TMI-1 which the Commission identified from the first as requiring resolution "prior to restart," CLI-79-8, 10 NRC 141, 144, 143 (1979). In addition, two of the specific short-term (immediate) actions ordered by the NRC in 1981 included augmented training and retesting of all TMI operators (item 1.(e)) and a demonstration of the "management and technical capability and training of operations staff" (item 6). See ALAB-772, 19 NRC at 1202-1203.

When the post-cheating hearings demonstrated deficiencies in operator testing and training, the ASLB chose to treat the matter as a "quality assurance problem - one that could be remedied by future audits of various aspects of the training program." ALAB-772, 19 NRC at 1232. The basis of UCS's successful appeal was a straightforward premise: "future audits do not assure safe operation of the facility now." Id. The Appeal Board ruled:

> In sum, proper training is essential to the safe operation of the plant and requires the closest scruting. This is especially so here, where because of the role of operator error in the TMI-2 accident, training has been of key importance in this proceeding from the outset. Id. at 1239.

There is no rational basis, nor has the ASLB suggested one, for allowing TMI-1 to operate in the face of a crucial known and identified deficiency in operator training - failure to meet one of the five basic INPO training elements endorsed by the Commission. ASLBP-79-492-09-SP, Sl.op at 165-166 and n.40. The ASLB has made the same mistake made previously: while recognizing that GPU's training program is deficient, it would permit operation based on the hope that, at some time in the future, it will be corrected. This is not enough. Safety must be assured before the plant goes into operation.

Moreover, even if it were to be concluded that the inadequacy in training could properly be treated as a "long-term" item - despite the fact that the adequacy of training was included by the Commission in 1979 as a short-term action the Commission has ruled that the ASLB must find that the licensee has demonstrated "reasonable progress toward completion" of all long-term items as a condition of restart. CLI-79-8 10 NRC 141,146, 149 (1979). In this regard, the licensing Board said the following:

> To provide assurance in the long term that TMI-1 can be operated without endangering the health and safety of the public, it is necessary that Licensee implement a plan to evaluate the performance of trained reactor operators and senior reactor operators in the job setting for revision of its TMI-1 licensed-operator training program. Licensee will have demonstrated reasonable progress toward the completion of this requirement if it begins immediately to satisfy this

requirement as provided in the order below. See CLI-79-8, 10 NRC 141, 148-49.

The Board did not and could not have made a finding of reasonable progress since there has yet been no demonstrable progress. No plan has been submitted by GPU. There is no basis whatever for a reasonable progress finding by the ASLB or the Commission. Indeed, as the ASLB noted, there has been staunch opposition by GPU to instituting on-the-job evaluations because of fear of antagonizing the union. This was characterized by the Board as "an unfortunate state of affairs." Id. at 150, n.24.

Absent a finding of reasonable progress based on some evidence, restart may not be authorized.

2. UCS Is Entitled to an Opportunity to Comment on the Staff's Certification Regarding Environmental Qualification

In CLI-84-11, the Commission narrowed the scope of the issues concerning environmental qualification of TMI-1 safety equipment to one question: the qualification of certain electrical equipment (that needed to respond to small break LOCA and loss of main feedwater accidents) to the radiation levels for a large break LOCA specified by the DOR guidelines. The staff was directed to certify this information to the Commission by mid-August 1984. Ten months later, the certification has not yet been made. However, on April 26, 1985, UCS received a copy of a letter dated April 9, 1985 from John Stolz, Chief, Operating Reactors Branch #4, to Henry D. Hukill, Vice President and Director - TMI-1. This letter contains the staff's conclusion that all pertinent equipment has been identified and

is environmentally qualified for the radiation levels associated with a large break loss-of-coolant accident (LOCA). The staff's letter encloses a Safety Evaluation Report. While these documents are not denoted as the certification to the Commission required by CLI-84-11, we assume that the certification will contain the same material.

UCS is at this point entitled to review and comment on the data and analysis used by the staff. The ability of this safety equipment to survive an accident was a UCS contention properly raised and pursued within the scope of the restart proceeding. It may not legally be resolved on the basis of one party's extra-record submissions to the Commission, even if that party is the NRC staff.

As the Appeal Board recognized in this proceeding, if a matter goes beyond the implementation of a Board decision and involves the resolution of disputed matters, "such determinations must be made by an adjudicatory body, not the staff." ALAB-729, 17 NRC 814, 888 (1983). An adjudicatory tribunal may not delegate its fundamental decision-making functions, particularly not to a party in the case. Nor may agency employees engaged in investigative or prosecuting functions "participate or advise in the decision." 5 U.S.C. 554(d). See Trans World Airlines v. C.A.B., 254 F.2d 90 (D.C. Cir. 1958); F.T.C. v. Atlantic Richfield Co., 567 F.2d 96, 102 (D.C. Cir. 1977); King v. Caesar Rodney School District, 380 F. Supp. 1112, 1118 (D. Del. 1974).

Nor can the Commission resolve a factual issue in the proceeding by fiat, without allowing participation. See Minnesota v. N.R.C., 602 F.2d 412 (D.C. Cir. 1979). The law requires at least a basic opportunity to review the data and respond, putting aside for the time being the separate question of whether the law also requires an adjudication.

UCS has read the Staff's April 9 letter and the attached SER. As to the two fundamental questions here, those documents are singularly uniformative. First, we are not told what equipment was determined to be within the scope of the Order (i.e., required for a small break LOCA or loss of main feedwater) and the criteria used for this determination. Second, there is not indication of how it was determined that this equipment was qualified for the appropriate radiation levels. Reference is repeatedly made to letters, oral discussions and repeated audits which are not provided.

Therefore, as a first necessary step, the Commission must direct the staff to provide UCS immediately with the underlying data and documentation concerning the SER conclusions, including but not limited to all documentation, analyses, letters, submittals, notes of oral discussions and test results. This request was made to you in a letter from UCS dated May 16, 1985. Until UCS has had an opportunity to review and comment on the Staff certification, restart may not be permitted.

3. CLI-85-2 Unlawfully Reversed The Appeal Board Decision Regarding Leak Rate Falsification.

In ALAB-738, 18 NRC 177 (1983), the Appeal Board remanded the record in this proceeding for hearings on the issues surrounding leak rate falsification at Unit 2. The Appeal Board noted that this issue was squarely within the scope of the hearing on management integrity. Id. at 189. Moreover, it held that since the ASLB's decision was explicitly rendered "subject to" the resolution of this matter, "[t]he record on this point has never closed." Id.

The Appeal Board ruled:

> Moreover, we cannot make an final judgment on appeal as to licensee's management competence and integrity without an adequate record. The Hartman allegations fell within the scope of the issues the Commission has directed be resolved through the hearing process. See pp. 188-89, supra. The absence of a materially complete record precludes us from reaching any conclusion on those issues, one way or the other. The Commission's primary committment ... to a fair and thorough hearing and decision; in this case required no less than an exploration of Hartman's charges at hearing. CLI 79-8 10 NRC 141, 147 (1979).
> Id. at 190 footnotes omitted, emphasis added.

Thus, ALAB-738 constitutes a ruling that the record as it stands does not support an affirmative finding that GPU possesses the requisite competence and integrity to operate TMI-1. Under the clear terms of CLI-79-8, GPU has not prevailed on the basis of the record and is not entitled to operate TMI-1. No party appealed ALAB-738, nor did the Commission ever take review pursuant to its own rule, 10 CFR 2.786(a). The Commission simply issued a sue sponte stay of ALAB-738. It states tht it did so because of concern over duplication of effort by concurrent NRC and Department of Justice Investigations. CLI-85-2, Sl.op at 13.

Yet, the Commission purports in CLI-85-2 to "reverse" ALAB-738. It has no legal authority to do so. ALAB-738 is a final merits decision. Contrary to the Commission's apparent views, it is bound by the provisions of its own rules and may not simply ignore them at will. See UCS v. NRC, 711 F.2d. 370, 381 (D.C. Cir. 1983); U.S. v. Nixon, 418 U.S. 683, 695-6, 94 S.Ct. 3090, 3101 (1974); Vitarelli v. Seaton, 359 U.S. 535, 539-40, 79 S. Ct. 968, 972-973 (1959).

Thus, ALAB-738 is the controlling final merits decision on management integrity and it does not support restart. Nor may the Commission under the mantle of lifting "immediate effectiveness" reverse the decision of the adjudicatory panel. CLI-79-8 unequivocally provides that a favorable underlying adjudicatory decision on all issues is a predicate to restart - it is those favorable decisions the the Commission would make immediately effective pursuant to Section VI of the 1979 order. CLI-79-8, 10 NRC at 149. Here there is no favorable underlying decision since in ALAB-739, the Appeal Board refused to conclude that GPU possesses the requisite competence and integrity.

B. The Intervenors will Suffer Irreparable Harm if TMI-1 is Permitted to Operate

If TMI-1 is permitted to operate, the people who reside in the area adjacent to the plant will suffer irreparable harm in that they will be subject to the risk of great harm from an accident at the plant.

It should first be noted that this is not like the case of issuance of an initial operating license, where testing and power ascension to the point above low power is a months-long process and explicit Staff approval is required to go beyond low power. Here, GPU proposes to ascend to 3% power in 7 days and then directly to 15% power after three more days.[1] The plant will be at 40% power at the 15th day after it receives permission to restart. There is no staff hold-point at all until 48% power. Thus, TMI-1 will be above low power in 10 days and no staff approval is required at all until the step from 48% to 75% power. This is an exceedingly fast power ascension and thus arguments relating to lowered risk at low power are not relevant.

Moreover, as GPU appears to admit there are unique risks posed by a plant which has been shut down for 6 1/2 years, as to which many physical and procedural modifications have been made and for which there are virtually no experienced operators. See Hukill Affidavit attached to "Licensee's Opposition to TMIA Stay Request." May 24, 1985, para. 4. A Board Notification of May 14, 1985 (received on May 23, 1985) confirms that in recent operator examination, "generic weaknesses in understanding normal plant equipment responses are believed to result from the extended period (5 1/2 years) of plant shutdown." BN-85-054, TMI Restart Hearing Operator Licensing Examinations, attachment, Examination Report No. 50-289/84-32, p.1.

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[1] Affidavit of Henry Hukill attached to "Licensee's Opposition to TMIA Stay Request," May 24, 1985.

GPU claims that the risk is lower at TMI-1 because of reduced fission product inventory. This is true only for a short period of time. Particularly for some isotopes, such as iodine, the levels will rise dramatically very quickly.

Finally, whatever the "base-line" probability of serious accident may be for a normal plant, that risk is greater for TMI-1. It is greater, as noted above, because of the long period of time the plant has been shut down and the lack of familiarity of the operators with the plant. It is also greater because of known safety problems at TMI-1. The emergency feedwater system is the only system at TMI-1 capable of mitigating a TMI-2-type accident. Yet, that system is not fully safety grade and does not meet the single failure criterion. A failure modes and effects analyses of the decay heat removal systems at TMI-1 has never been done. It is certainly true, in any case, that a greater risk is posed at TMI-1 than for comparable plants with safety-grade emergency feedwater systems.

C. GPU Will Not Suffer Irreparable Harm If a Stay is Issued

GPU claims that it will suffer monetary harm if restart is delayed. That claim must be put into proper context. The plant has been down for 6 1/2 years; a stay of two more weeks is insignificant at this point. When balanced against the harm to the residents by changing the status quo, this harm pales.

Moreover, it is not clear whether GPU's assumptions are accurate in calculating economic harm. The plant will automatically go back into the rate base after 100 hours at 35%

power. This will cause rates to rise. At some later point, if the plant is reliably producing electrical power, GPU will be able to stop purchasing some power. However, the inclusion in the rate base occurs first, is automatic and is of far-reaching consequences. Once the plant is in the rate base, ratepayers will, in essence, be charged twice during shutdowns. They will pay both for the plant and for the replacement power. The timing and duration of unplanned outages is impossible to calculate, as is the duration of planned outages, such as the first refueling outage, when a great deal of work is scheduled.

Finally, we question the appropriateness of GPU speaking for the interests of the ratepayers. The views of the ratepayers, and the residents of Pennsylvania generally, are more properly represented by their elected officials, including most particularly, the Governor. The Governor and both United State Senators have consistently opposed restart. It may fairly be concluded that the ratepayers are willing to pay the "insurance policy" for continued shutdown of TMI-1.

D. The Public Interest is Best Served By a Stay

This proceeding has been highly controversial and has aroused a level of public concern from its very outset that has seldom if ever been seen. Last week, the Governor and both Senators from Pennsylvania strongly opposed restart. This is unprecedented. There is no doubt but that the process will culminate in the courts. It is clearly in the public interest to allow all of the concerned parties the time to prepare and proceed in an orderly fashion. It will do NRC a great deal of harm and further erode

public confidence in the agency and the government if it is perceived to have effectively denied the public and their elected officials a reasonable opportunity to take their case to court.

CONCLUSION

When properly balanced, the interests favoring a stay clearly outweigh those against. We therefore urge the NRC to Stay its decision pending appeal or, in the alternative, to issue a two-week stay to permit the parties to prepare appeals to court.

Respectfully submitted,

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Date: May 28, 1985

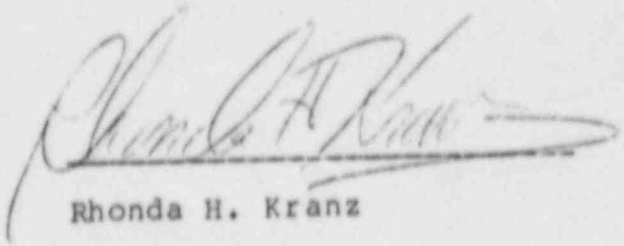
May 28, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNION OF CONCERNED SCIENTISTS' MOTION FOR A STAY, was served on those indicated on the accompanying Service List. Service was made by deposit in The United States mail, first class, postage prepaid, on May 28, 1985, except that those indicated by an asterisk were delivered by hand.



Rhonda H. Kranz

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

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