166

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REPLY TO THREE MILE ISLAND ALERT'S MOTION FOR STAY OF PROSPECTIVE COMMISSION ORDER AUTHORIZING RESTART OF THREE MILE ISLAND, UNIT 1

Mary E. Wagner
Counsel for NRC Staff

May 28, 1985

D507

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REPLY TO THREE MILE ISLAND ALERT'S MOTION FOR STAY OF PROSPECTIVE COMMISSION ORDER AUTHORIZING RESTART OF THREE MILE ISLAND, UNIT 1

I. INTRODUCTION

By Motion dated May 17, 1985, intervenor Three Mile Island Alert ("TMIA") has moved for a stay of the Commission's "order of May 29, 1985, which will authorize the restart of Three Mile Island, Unit 1." 1/ TMIA also moves, in the alternative, for a two-week stay of the Commission's order to allow TMIA to seek an emergency judicial stay. Since the order for which TMIA seeks a stay has not yet been issued, TMIA's application is premature. Moreover, TMIA has not demonstrated, on the merits, that application of the stay criteria warrants issuance of a stay of any prospective Commission order which might authorize restart, and TMIA's Motion should be denied.

1/ "Three Mile Island Alert's Motion for Stay of Commission Order Authorizing Restart of Three Mile Island, Unit 1, (Motion) at 1.

II. DISCUSSION

A. TMIA's Motion is Premature

TMIA argues that "it is clear" that on May 29 the majority of the Commission will vote to lift the suspension of the TMI-1 license. Motion at 1, n.1. Based on this assumption, TMIA then proceeds to argue that it meets the standards for issuance of a stay. Its arguments, of necessity, are fashioned without specific reference to the order sought to be stayed.

While TMIA purports to bring its Motion under 10 CFR Section 2.788, that section does not apply to the situation presented here where there is as yet no decision to be staved. Section 2.788(a) provides a procedure by which a party may file an application for a stay "[w]ithin ten (10) days after service of a decision or action..." (emphasis added). There is no regulation which provides for a stay of an order before that order is issued, nor, as a practical matter, is such a provision feasible. Accordingly, TMIA's Motion is clearly premature. For these reasons, TMIA's Motion should be denied without prejudice to refiling at such time as the Commission has acted.

B. On the Merits, TMIA Has Failed to Demonstrate that a Stay of a Possible Commission Order Authorizing Restart is Warranted

While TMIA's Motion should be denied as premature, the arguments it raises in its pleading are capable of being addressed now on the merits in a general fashion, even before a restart order has issued. TMIA's arguments are, for the most part, of the sort that would not be mooted by a Commission order favorable to restart. For that reason, and because

the Staff assumes that upon issuance of any order favorable to restart TMIA would renew its application for a stay, the Staff, in the interest of expediting any Commission decision on a stay request, will address in this pleading TMIA's arguments on the merits. For the reasons set forth below, TMIA has failed to satisfy any of the four factors to be considered in deciding whether a stay should issue, and its Motion must therefore be denied on the merits.

1. The Standards Applied to Stay Applications

In Commission practice, a determination as to whether to stay an otherwise effective decision or order depends on:

(a) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(b) Whether the party will be irreparably injured unless a stay is granted;

(c) Whether the granting of a stay would harm other parties; and

(d) Where the public interest lies.

10 C.F.R. § 2.788(e).

In applying the four factors considered by the Commission in ruling on stay requests, particular emphasis is given to the showing by the moving party of irreparable injury and probability of success on the merits. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-13, 20 NRC 267 (1984). Of these, both the Commission and the Appeal Board have stated that the question as to whether irreparable injury will be incurred by the moving party in the absence of a stay is the most important. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Philadelphia Electric Company (Limerick Generating Station,

Units 1 and 2), ALAB-789, 20 NRC 1443, at 1446 (1984). 2/ TMIA's current showing on each of the four factors is insufficient to warrant a stay of a possible Commission decision favorable to restart.

2. TMIA Has Not Made the Necessary Showing Under 10 C.F.R. § 2.788(e) to Warrant Issuance of a Stay or Suspension Order Pending Judicial Review

a. TMIA Has Failed to Make a Strong Showing that It Is Likely to Prevail on the Merits

In arguing that there is a strong likelihood of TMIA's prevailing on the merits, TMIA is in many instances simply rearguing points it has briefed previously or expressing disagreement with rulings already made by the Commission. While TMIA expressed general disagreement with many rulings, it has provided no basis for believing that those rulings are erroneous or that it is likely to prevail on the merits of those rulings.

It is claimed that the prospective Commission order possibly authorizing restart necessarily must be based on less than a full adjudicatory record, since the Licensing Board has not yet issued favorable decisions on two issues: the adequacy of the operator training program and the "Dieckamp Mailgram". In so arguing, TMIA is rearguing an issue which all parties have briefed and which is before the Commission for determination -- whether the reopened proceedings must be completed prior to a decision whether to lift the immediate effectiveness of the

---

2/ See also, United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543-44 (1983) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).

1979 shutdown orders. See CLI-85-2, at 5-6. The remanded training decision, which the Commission thought of some importance, has been issued based on a full adjudicatory record and TMIA has no basis to complain in that regard. 3/ Further, the Staff believes, and the Commission can appropriately find, that the Dieckamp mailgram issue need not be decided for the Commission to be able to find that its concerns which caused it to issue the immediately effective shutdown order have been resolved.

TMIA also claims that its right to a hearing on all license amendments would be violated by an order authorizing restart, since restart cannot be authorized without granting GPUN certain license amendments. Motion at 4-5. TMIA is ignoring the fact that the license amendments to which it refers are the results of, and implement

---

3/ TMIA points out that the Licensing Board in its May 3, 1985 training decision ordered that GPUN provide it with an implementation plan for evaluation of trained operators in the job setting, and retained jurisdiction to approve the plan. Motion at 3, n.2. The Licensing Board has determined that this license condition is a "long-term" action. TMIA argues that the Licensing Board will not have the comments of the parties on the plan by May 29 and will not be able to make a "reasonable progress" finding by that date, and that the Licensing Board will not have rendered a "favorable decision to licensee on the training issue" by the time of a May 29 Commission vote possibly authorizing restart. This argument fails, in that the Licensing Board's May 3, 1985 decision specifically found 1) that the "licensed-operator training program for TMI-1 is adequate to train reactor operators and senior reactor operators to operate the unit safely," provided that Licensee institutes a procedure for evaluating the on-the-job performance of operators, and 2) that Licensee will demonstrate reasonable progress toward completion of this requirement "if it begins immediately to satisfy this requirement" as provided in the order for the submission of a plan. Slip op. 214-16 (emphasis added). Thus, actual submittal and approval of a plan is not necessary to a finding of "reasonable progress." Following the issuance of the PID, Licensee has undertaken the program planning necessitated by the Licensing Board and thus has made "reasonable progress" toward completion of the Licensing Board's requirement. See letter R. L. Long, GPUN to J. F. Stolz, NRC, May 24, 1985 (attached).

requirements coming from, the hearings in which TMIA and other intervenors fully participated. In fact, a hearing -- in which TMIA participated -- has been held on the license amendments which TMIA now argues should be the subject of a (second) hearing. TMIA's argument on license amendments is without merit.

TMIA also states that, because of the participation of Judge Ivan W. Smith, the proceedings have been infected with such judicial bias that they must be invalidated. Motion at 5. TMIA raises no new arguments in this area and casts no doubt on the correctness of the Commission's decision that Judge Smith was not biased and that the proceeding has not been adversely affected by virtue of his participation. See CLI-85-05.

Finally, TMIA contends generally that the conduct of the hearings, including evidentiary rulings, and the restart decision "based on other than record evidence" has violated TMIA's rights. In point of fact, TMIA and all other parties to the restart proceeding have had continuing and ample opportunities to comment and be heard on all issues and all items of information on which the Commission might base a restart decision. TMIA's generalized assertion that it has somehow been deprived of its right to be heard is not supported by specific reference and on its face presents nothing that would suggest that TMIA would prevail on appeal.

In sum, TMIA has not satisfied the first factor of 10 C.F.R. § 2.788(e).

b. TMIA Has Not Shown Irreparable Injury

TMIA next argues, with respect to the second and most crucial factor, Farley, supra, that the health and safety of residents of central Pennsylvania will be jeopardized by the restart of TMI-1 before a

full resolution of both technical and licensee management integrity concerns. TMIA asserts that, because of concerns about the integrity of GPUN's current management, there is "no assurance that GPUN can be entrusted with [TMI-1's] operation." Motion at 7. TMIA does not state how this asserted lack of assurance translates into irreparable injury. It presents no more than speculation, implying that deficiencies could result in a nuclear accident. 4/ Such speculation is inadequate to support the issuance of a stay:

> It is well established that speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a license decision.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, at 964 (1984). Given only TMIA's unsupported speculations, TMIA has failed to show the likelihood of irreparable harm.

In sum, TMIA's argument that its appeal rights will be abridged by plant operation is based on the erroneous premise that the very operation of TMI-1 constitutes irreparable injury. Such a standard would not only impugn the validity of all NRC decisions on public health and safety of power plants, but effectively preclude plant operation prior to the completion of judicial appeals in all cases. This basis for a claim of irreparable injury must be rejected.

4/ Moreover, as TMIA itself points out (Motion at 8), ascension to full power is a gradual process. The public health and safety risks of low levels of power are far less than the theoretical risks of full-power operation. See Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 476 (1985).

c. TMIA Has Not Shown that Other Parties Will Suffer No Harm if a Prospective Commission Decision Authorizing Restart Were Stayed

TMIA argues that the grant of a stay during the early stages of power ascension will not harm other parties, particularly Licensee, "since the power ascension will be very gradual." Motion at 8. In arguing that TMI-1 will have to operate at low power levels for several months, during which an expedited decision on the merits of this case could be expected, TMIA demonstrates a lack of knowledge of the effect of the relief it is seeking. If the Commission were to grant TMIA's stay request, TMI-1 would not be permitted to operate, even at low power levels, pending a decision on the merits. Thus, TMIA's rationale as to why GPUN would not be harmed is based on a false premise -- that TMI-1 could operate at low power during judicial review. It is apparent that GPUN would suffer continuing economic harm if commercial operation of the plant were to be delayed by a period of several months pending judicial review. Since TMIA's only argument as to why no party would suffer harm is based on a false premise, TMIA has not presented a valid reason as to why no party would suffer harm. Indeed, it appears that if TMI-1 were to continue to be shut down pending judicial review, it would result in economic harm to GPUN and its customers.

d. The Public Interest Lies in Denial of a Stay

The fourth factor, where the public interest lies, similarly does not favor the issuance of a stay. As the Commission itself has recognized, its immediate suspension of the TMI-1 license without affording the Licensee an opportunity for a prior hearing is an extraordinary action which is justified only so long as the concerns which prompted such action remain:

> 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 . . . to lift that suspension immediately. CLI-81-34, 14 NRC 1097-1098 (1981).

TMIA has presented no arguments which would undermine a prospective Commission determination that TMI-1 can operate without endangering the health and safety of the public. In such circumstances, the public interest lies in giving effect to a Commission decision lifting the suspension of the license held by GPUN to operate TMI-1. See Southern California Edison Company et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 692 (1982).

In sum, the standards for a stay of a prospective Commission decision authorizing restart are not satisfied. TMIA's motion for a stay pending judicial appeal should be denied.

3. TMIA Has Not Made the Necessary Showing for Issuance of a Two-Week Stay

TMIA has also moved, in the alternative, for a two-week stay of any prospective Commission order authorizing restart, to allow TMIA to seek an emergency judicial stay of such order. Motion at 2. For the reasons which follow, the Commission also should deny this request.

As demonstrated above, TMIA has not made a showing on any of the four factors to be considered in determining whether a stay should issue. Thus, it has not demonstrated that a stay of any duration is justified. Moreover, as illustrated by the fact that TMIA itself does not deem it necessary to await a Commission order on restart before applying for a stay of such an order, the rationale and bases for any prospective Commission decision authorizing restart should not be new or unanticipated and any party who may seek a judicial stay of such an order should

be in a position to do so promptly upon issuance of a Commission order. This proceeding has been ongoing for nearly six years. The issues before the Commission have not only been fully litigated and briefed but have been explored in public meetings with the parties. Indeed, most recently, the Commission has set forth its own reasoning on the issues which must be resolved prior to lifting its suspension of GPUN's license. CLI-85-2. The parties should be well apprised by this stage in the proceeding as to the position likely to be taken by the Commission in any order lifting the license suspension. TMIA does not claim otherwise.

It is thus apparent that the instant case is not one where the Commission need stay the effectiveness of its decision so that the parties might review its order, analyze its rationale and marshal the arguments for presentation to a court. To the contrary, even before a Commission order has issued, TMIA has felt able to argue its case for a stay. TMIA has not put forth any argument as to why it would need a two-week stay in order to seek judicial review, and its request for such a stay should be denied.

III. CONCLUSION

TMIA's Motion is premature and could be denied on that basis. On the merits, however, TMIA has failed to demonstrate that application of the stay criteria warrants a stay of any duration of a prospective Commission order authorizing restart.

Respectfully submitted,

Mary E. Wagner

Mary E. Wagner
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of May, 1985.

GPU Nuclear

GPU Nuclear Corporation
100 Interpace Parkway
Parsippany, New Jersey 07054-1149
(201) 263-6500
TELEX 136-482
Writer's Direct Dial Number:

May 24, 1985
5211-85-2102
NA/908

Office of Nuclear Reactor Regulation
Attn: J. F. Stolz, Chief
Operating Reactor Branch No. 4
Division of Licensing
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Stolz:

Three Mile Island Nuclear Station Unit 1 (TMI-1)
Operating License No. DPR-50
Docket No. 50-289
Proposed Revision to Licensed Operator Training Program

The May 3, 1985 Partial Initial Decision (PID) on the Remanded Issue of Licensed-Operator Training at TMI-1 ordered that the TMI-1 training program be revised to include formal written on the job evaluations of licensed operator performance both during normal and abnormal operation, in accordance with the Boards license condition. Following the issuance of the PID, GPU Nuclear Corporation began immediately to satisfy this requirement and has made good progress in developing a plan for conducting on the job performance evaluations. Licensee will formally present this plan to the NRC staff and other proceeding participants within 30 days of the date of the PID.

Sincerely,

Robert L Long

R. L. Long
Director, Nuclear Assurance

RJMc:dls:1879f

cc: R. Conte
T. Murley

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO THREE MILE ISLAND ALERT'S MOTION FOR STAY OF PROSPECTIVE COMMISSION ORDER AUTHORIZING RESTART OF THREE MILE ISLAND, UNIT 1" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk, by hand delivery, this 28th day of May, 1985:

**Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Herzel H. E. Plaine, General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Ivan Smith, Chairman
Administrative Law Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Sheldon J. Wolfe
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Mr. Gustave A. Linenberger, Jr.
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas Y. Au, Esq.
Office of Chief Counsel
Department of Environmental Resources
505 Executive House
P. O. Box 2357
Harrisburg, PA 17120

Mr. Marvin I. Lewis
6504 Bradford Terrace
Philadelphia, PA 19149

Mr. C. W. Smyth, Manager
Licensing TMI-1
Three Mile Island Nuclear Station
P. O. Box 480
Middletown, PA 17057

Ms. Marjorie Aamodt
200 North Church Street
Parkesburg, PA 19365

Sen. Allen R. Carter, Chairman
Joint Legislative Committee on Energy
Post Office Box 142
Suite 513
Senate Gressette Building
Columbia, SC 29202

Chauncey Kepford
Judith Johnsrud
Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, PA 16801

Ms. Frieda Berryhill, Chairman
Coalition for Nuclear Power Plant
Postponement
2610 Grendon Drive
Wilmington, Delaware 19808

Mr. Henry D. Hukill
Vice President
GPU Nuclear Corporation
Post Office Box 480
Middletown, PA 17057

Michael McBride, Esq.
LeBoeuf, Lamb, Leiby & McRae
Suite 1100
1333 New Hampshire Avenue, NW
Washington, DC 20036

Louise Bradford
Three Mile Island Alert
1011 Green Street
Harrisburg, PA 17102

William S. Jordan, III, Esq.
Harmon, Weiss & Jordan
20001 S Street, NW
Suite 430
Washington, DC 20009

**Lynne Bernabei, Esq.
Government Accountability Project
1555 Connecticut Ave., NW
Washington, DC 20009

Jordan D. Cunningham, Esq.
Fox, Farr and Cunningham
2320 North 2nd Street
Harrisburg, PA 17110

Ms. Ellyn R. Weiss, Esq.
Harmon, Weiss & Jordan
2001 S Street, NW
Suite 430
Washington, DC 20009

Ms. Jane Lee
183 Valley Road
Etters, PA 17319

Michael W. Maupin, Esq.
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212

Mr. Thomas Gerusky
Bureau of Radiation Protection
Dept. of Environmental Resources
P. O. Box 2063
Harrisburg, PA 17120

**George F. Trowbridge, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, NW
Washington, DC 20036

*Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety and Licensing
Appeal Board Panel (8)
U.S. Nuclear Regulatory Commission
Washington, DC 20555

**Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mary E. Wagner

Mary E. Wagner
Counsel for NRC Staff