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May 24, 1985 (202) 822-1090

Chairman Nunzio J. Palladino
Commissioner Thomas M. Roberts
Commissioner James K. Asselstine
Commissioner Frederick Bernthal
Commissioner Lando W. Zech, Jr.
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

In the Matter of
Metropolitan Edison Company
(Three Mile Island Nuclear Station, Unit No. 1)
Docket No. 50-289 (Restart) (SP)

Gentlemen:

By letter to the Commission of May 16, 1985, UCS objects to the Staff's certification of compliance with a Commission-imposed requirement as an improperly delegated resolution of a contested issue, and requests that the Commission direct the Staff to produce essentially all written information on which the certification is based. For the reasons discussed below, Licensee opposes the UCS objection/request, which is based on factual errors and misinterpretations of the law.

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Background

In its July 26, 1984 decision on review of the plant design and procedures issues in the Restart proceeding, the Commission concluded ". . . that electrical equipment at TMI-1 needed to respond to a TMI-2-type small-break LOCA or loss-of-main-feedwater accident must be qualified to the radiation levels associated with DOR Guidelines for large-break LOCAs." CLI-84-11, 20 N.R.C. 1, 7 (1984). The Commission directed the Staff

> . . . to certify the status of environmental qualification of equipment as discussed above for radiation levels associated with large-break LOCAs in accordance with the DOR Guidelines. If any equipment within this ambit will not be properly qualified for radiation prior to restart, licensee is to provide a specific justification for interim operation. The staff is to review that justification and present its recommendation to the Commission. If any such justifications are required and challenged by a party, the Commission will determine at that time what further action is required.

Id.

By letter of April 9, 1985, the Staff transmitted to GPU Nuclear an 18-page "Safety Evaluation Report, Environmental Qualification of Electrical Equipment, Response to Commission Decision CLI-84-11." The Staff reached the following conclusions:

1. The electrical equipment located in containment and the auxiliary building, including replacement equipment to be installed prior to restart and equipment to be modified prior to restart, whose operation is necessary to mitigate small break LOCAs and loss of main feedwater transients, that is located in a harsh radiation environment and required to be qualified, has been properly identified.

2. All such equipment has been demonstrated to be environmentally qualified for the radiation levels associated with the DOR Guidelines for a large break LOCA.

SER at 17-18. Thus, the Staff concluded that the requirement of CLI-84-11 is met and no justifications for interim operation are required.

In its letter to the Commission, UCS asserts that it is entitled to review and comment on the data and analysis used by the Staff, and that this issue 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. Before addressing this untimely and erroneous legal argument, Licensee will respond to the factual underpinning for this UCS letter.

The Facts

UCS claims that as to the two fundamental questions, the Staff's April 9 letter and SER are uninformative. The two questions, according to UCS, are: (1) what equipment was determined to be within the scope of the Commission's Order and what criteria were used for this determination; and, (2) how it was determined that this equipment was qualified for the appropriate radiation levels.

As indicated in the Staff's SER, GPU Nuclear provided its list of the electrical equipment covered by the Commission's Order by letters to the Staff dated August 23, August 27 and November 9, 1984, and February 15, 1985. These documents should be available for UCS to review in the NRC's Public Document Room. If UCS has not reviewed them, it is only because it has not taken the time and trouble to do so. If this is a matter of importance to UCS, it need not wait for the Commission to direct the Staff to package up these letters and mail them to UCS -- an action which under the law is uncalled for in any event.

During the September, 1984 audit by the Staff, GPU Nuclear provided a copy of TDR-598, a report which sets forth the methodology used to determine what equipment required radiation qualification for small-break LOCA/main feedwater transient mitigation. By memorandum to the files dated September 7, 1984, Mr. Van Vliet of the NRC Staff transmitted to the TMI Service List and the Public Document Room a copy of TDR-598.

Consequently, we assume UCS received in the mail a copy of GPU Nuclear's report on the methodology used to determine which equipment is within the scope of the Commission's Order. We also assume that the report is available at the Public Document Room.

As to the second UCS question -- how it was determined that this equipment was qualified for the appropriate radiation levels -- Licensee does not understand what UCS seeks. The equipment is qualified pursuant to the DOR Guidelines. The Staff does not have possession of GPU Nuclear's equipment qualification files and cannot "provide" audits to UCS. See UCS May 16, 1985 letter at 2. The Staff indicates that the radiation levels postulated by Licensee to exist both inside and outside containment following a large-break LOCA were reviewed and accepted by the Staff several years ago, as documented in SERs of March 24, 1981, and December 10, 1982. See SER (April 9, 1985) at 9. The test reports and analyses demonstrating qualification to these levels are in GPU Nuclear files, which were audited by the Staff. Some of the documentation is discussed in the April 9 SER. However, the Staff does not have the files and cannot provide them to UCS.

The Law

UCS claims that it is entitled to review and comment on the data and analysis used by the Staff; and UCS suggests that the Staff's conclusion should in fact be adjudicated. UCS therefore demands the immediate provision of "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" -- in effect, discovery.

First, we note the untimeliness of UCS' assertion that the Commission improperly delegated decisional authority to the Staff. Genuine concern by UCS could have been expressed by petitioning the Commission for reconsideration of this aspect of its July 26, 1984 decision promptly after it issued, instead of waiting some ten months -- until the eve of a restart decision -- to assert a procedural error. The nature of the Staff's assignment was clear then, and it was also clear that the Commission did not contemplate further participation by the parties unless the Staff determined that one or more justifications for interim operation were required. See CLI-84-11, 20 N.R.C. at 7 (1984). A party "must make a reasonable effort to have a procedural error corrected, not hoard it for use as a ground for

reversal in the event it does not like the ultimate decision on the merits." Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179, 189 (1978). UCS has hoarded its objection, which now is untimely.

Further, UCS' claims ignore the scope of the restart proceeding. In Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 N.R.C. 141, 148 (1979), the Commission defined the scope of the restart proceeding, limiting the adjudication to the necessity and sufficiency of the long- and short-term actions which the Director of Nuclear Reactor Regulation had recommended. The Commission did not include as a matter to be adjudicated the determination whether actions found necessary had in fact been accomplished; the Commission reserved that determination for the NRC Staff. Had the Commission not done so, a bifurcated hearing would have been necessary -- one stage to determine whether those actions were necessary, and a second to determine whether those actions had been accomplished. In the six years of the Restart proceeding, no one has suggested that such a bifurcation is required.

The Commission's authority to define and structure its enforcement proceedings has been upheld in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). In Bellotti, the Court affirmed a Commission decision to limit the scope of an enforcement proceeding solely to the issue whether a license modification should be sustained. The Court found the Commission's decision to be based on a rational policy directing agency resources toward inspection rather than the adjudicatory process. Id. at 1382. Issues beyond the scope of the proceeding -- including the adequacy of the implementation of the license modification -- could be advanced in a subsequent petition for enforcement action. Id., citing 10 C.F.R. § 2.206 (1983).

The Commission's approach is supported by the Administrative Procedure Act. 5 U.S.C. § 554(a)(3) (1984) exempts from formal hearing procedures decisions that "rest solely on inspections, tests, or elections."[1/] This exemption applies where, as in the case at bar, a decision can be made on the basis of observation by members of the NRC Staff and where this decision-making process is expedient. Cf. UCS v. NRC, 735 F.2d 1437, 1449 and n.23, 1450 (D.C. Cir. 1984).

1/ 42 U.S.C. § 2231 (1984) makes the Administrative Procedure Act applicable to all agency action taken under the Atomic Energy Act.

Furthermore, even if the completion of necessary actions was a matter required to be adjudicated -- and it was not -- the Commission could still base a decision to lift the summary suspension of the TMI-1 license on the Staff's conclusion. As the D.C. Circuit has held, the lifting of a license suspension does not give rise to the right of hearing under the Atomic Energy Act. San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), reh'g granted, (D.C. Cir. May 1, 1985). As a corollary, the Court held that because the Atomic Energy Act does not provide for a hearing when a license suspension is lifted, the Administrative Procedure Act does not require that material considered by the Commission in lifting the suspension be "on the record." Id. at n.154.

Accordingly, UCS' claims are without merit. There is no issue within the scope of the restart proceeding to be adjudicated and hence no basis for granting UCS' discovery request.

Conclusion

For all of the foregoing reasons, UCS' requests to the Commission should be denied.

Respectfully submitted,

Thomas A. Baxter

Thomas A. Baxter
Counsel for Licensee

cc: TMI-1 Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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