UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

METROPOLITAN EDISON COMPANY,	:	'85 MAY 31 P4:26
	:	Docket No. 50-289
(Three Mile Island Nuclear Station, Unit No. 1)	:	
	:	

COMMONWEALTH OF PENNSYLVANIA'S
MOTION FOR EMERGENCY STAY OF
NUCLEAR REGULATORY COMMISSION DECISION
AUTHORIZING RESTART

On May 29, 1985, the United States Nuclear Regulatory Commission (hereinafter "Commission") ruled that Three Mile Island Nuclear Station, Unit No. 1 (hereinafter "TMI-1") could restart (hereinafter the "May 29, 1985 Order"). The May 29, 1985 Order provides that restart of TMI-1 will be immediately effective in the absence of a request for a judicial stay of this proceeding by June 3 at 5:00 p.m. If a judicial stay is sought by June 3, then the effectiveness of the May 29, 1985 Order is postponed until June 11, 1985.

The Commonwealth of Pennsylvania hereby moves for a stay of the May 29, 1985 Order until such time as the Court of Appeals for the Third Circuit has ruled on the merits of the appeal filed by the Commonwealth. If the Commonwealth receives no decision on this Motion by 12:00 noon on June 3 or

if the Commission denies this Motion by that time, the Commonwealth will then seek a judicial stay of this Order with the Third Circuit.

The May 29, 1985 Order rescinds the Order of the Commission on August 9, 1979 (hereinafter the "August 9, 1979 Order"), requiring TMI-1 to remain in a cold shutdown condition pending the resolution of questions about the management capabilities and technical resources of the operator of TMI-1. In the August 9, 1979 Order, the Commission stated that it would not authorize restart of TMI-1 until the satisfactory completion of "short term" actions required to provide adequate protection of public health and safety. August 9, 1979 Order at 12-14.

The requisite grounds for a stay under 10 C.F.R. §2.788 are clearly met in this case. The factors in deciding whether to stay an administrative agency order are set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958):

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in

> the proceedings? . . . (4) Where lies the public interest? . . . Id. at 925.

In Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977), the United States Court of Appeals for the District of Columbia Circuit held that an applicant for a stay need not show a strict mathematical probability of success on the merits; a showing of a substantial possibility of success on the merits is enough, particularly where, as here, the tribunal whose order is stayed has ruled on an "admittedly difficult legal question" and when "the equities of the case suggest that the status quo should be maintained". Id. at 844-45.

I. THERE IS A SUBSTANTIAL POSSIBILITY THAT THE COMMONWEALTH OF PENNSYLVANIA WILL PREVAIL ON THE MERITS OF ITS APPEAL.

On May 29, 1985, immediately following the Commission's Order, the Commonwealth of Pennsylvania (hereinafter the "Commonwealth") filed a Petition for Review of the May 29, 1985 Order with the United States Court of Appeals for the Third Circuit. The Commonwealth is likely to succeed on the merits of its appeal; the Third Circuit is likely to rule that the Commission's decision authorizing restart must be vacated, and to direct the Commission to hold further hearings on the subject of management integrity.

In this case, the Commission on February 25, 1985 specifically refused to hold hearings before restart on two separate management integrity issues of vital importance to the Commonwealth: (1) whether any member of current management or operating personnel at TMI-1 directed or condoned the intentional and systematic falsification of leak rate results at Three Mile Island Nuclear Station, Unit No. 2 (hereinafter "TMI-2"), or was responsible for possible irregularities in leak rate testing at TMI-1; and (2) whether anyone in current General Public Utilities Corporation (hereinafter "GPU") management was involved in manipulation of an internal GPU report (hereinafter the "Keaten Report") on the accident at TMI-2 in order to avoid an adverse result in litigation, or acted to avoid statutory liability in response to an NRC Notice of Violation on the accident issued October 25, 1979.

The leak rate falsification at TMI-2 led to a criminal indictment and conviction of Metropolitan Edison Company. The extent of leak rate falsification, and the presence in TMI-1 management of those who falsified test data, have never been resolved in an adjudicatory hearing by the Commission. The material false statements and concealments in response to the Commission's Notice of Violation, which paralleled the alteration of the Keaten Report to shift the responsibility for the TMI-2 accident away from the licensee, also raise issues that need to be heard by the Commission; the Commission's refusal to hear these issues is surprising since

the Commission's February 25, 1985 Order repeatedly states that the licensee deviated from proper procedures in handling this issue.

The Commission stated, in its August 9, 1979 Order, that it would not authorize restart until hearings on the "short term" conditions established by the Commission, including management capability issues, were completed. Management integrity is an important element of managerial capability; the unresolved issues of responsibility for leak rate falsification and concealment of information about the accident at TMI-2 are essential to any assessment of management integrity. These are issues that go to the heart of a licensee's character and ability to operate a nuclear power plant. Houston Lighting and Power Company (South Texas Units 1 and 2), ASLBP 79-421-07 OL (1984), Slip Opinion at 8; RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981); FCC v. WOKO, 329 U.S. 223 (1946).

This action by the Commission is contrary to proper administrative procedure articulated in the case of Minneapolis Gas Co. v. Federal Power Commission, 294 F.2d 212 (D.C. Cir. 1961). In that case, the Court of Appeals held that the Federal Power Commission could not initiate a discretionary hearing to determine the appropriateness of a rate, and then terminate the proceeding without issuing a decision on the merits. The Minneapolis Gas case is directly

applicable here because the Commission in 1979 ordered that hearings be held on managerial capability of the TMI-1 operator, and has now issued a decision on restart, which terminated its investigation on the TMI-1 operator's capability to operate TMI, without having issued a complete decision on management integrity.

II. THE COMMONWEALTH WILL SUFFER IRREPARABLE INJURY IF THE STAY IS DENIED.

The Commission's denial of hearings has deprived the Commonwealth of a right to a hearing recognized in the Atomic Energy Act. See 42 U.S.C. §2289(b). This denial of due process constitutes irreparable harm per se. United Church of the Medical Center v. Medical Center Commission, 689 F.2d 693 (7th Cir. 1982); Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971); Henry v. Greenville Airport Comm., 284 F.2d 631 (4th Cir. 1960); O'Conner v. Mowbray, 504 F. Supp. 139 (D. Nev. 1980). No further showing of harm is required to support an immediate stay. On an issue that affects the health and safety of the citizens of central Pennsylvania, and the integrity of their environment, it is essential that required hearings take place before the anticipated restart of TMI-1. An immediate stay is important to preserve the status quo. If not stayed, the Commission's Order will change the status quo and authorize restart as early as June 3, 1985.

III. THE GRANT OF A STAY WILL NOT HARM THE LICENSEE OR THE COMMISSION.

The requested stay of restart will take place until the Court of Appeals for the Third Circuit can issue a decision on the Commonwealth's and other parties' petitions for review of the Commission's order. This stay contrasts with the six-year suspension of operations at TMI-1, much of which has resulted from the lengthy Commission review of the restart issue. A stay will not be particularly harmful, in contrast to a decision authorizing restart without resolving management integrity issues. Additionally, if the May 29, 1985 Order is overturned by the Court of Appeals, without a stay having been granted, it is likely that the licensee will be harmed in having to shut down its operation of TMI-1 after having restarted TMI-1.

The Commission should hold no stake either in restart or in continuing the shutdown condition of TMI-1, and therefore will not be harmed by the issuance of a stay.

IV. THE PUBLIC INTEREST FAVORS THE ISSUANCE OF A STAY.

In this case, the public interest mandates the issuance of a stay. First, the public interest cannot possibly favor a change in the status quo of the past six years, particularly before all management integrity issues have been resolved. Second, the Commonwealth has a recognized vital

interest in nuclear power issues. The Commission should give great weight to the views of chief elected representatives of the Commonwealth of Pennsylvania that a rush to restart would not be in the public interest and that the Commission should resolve crucial management integrity issues within the foreseeable future through Commission hearings.

Although granting the stay would harm no one, denying the stay will have a direct impact upon the Commonwealth. The Commonwealth and its citizens have a particularly strong interest in attaining the resolution of crucial questions concerning their safety in the light of public hearings, and an additional interest in having the Commission's decision stayed because it authorizes restart of TMI-1 without these hearings.

V. CONCLUSION

The Commonwealth has met the four standards for a stay. The Commonwealth has proven that it is likely to prevail on the merits of its appeal, that it will suffer irreparable injury if the stay is denied, that the grant of a stay will not harm the licensee or the Commission, and that the public interest favors the issuance of a stay. Therefore, the Commonwealth requests that the Commission grant to the Commonwealth an emergency stay of the May 29, 1985 Order authorizing restart until such time as the United States

Court of Appeals for the Third Circuit has issued a decision on the merits of the Commonwealth's pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Commonwealth of Pennsylvania's Motion for Stay have been served on the persons listed on the attached Service List by First Class U.S. Mail* ** this 31st day of May, 1985.

Maxine Woelfling

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* Addresses indicated by "*" are being hand delivered.

** Addresses indicated by "**" are being delivered by Federal Express.

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