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IN THE MATTER OF:

ADJUDICATORY SESSION 78-9

RESPONSE TO STAY MOTION IN THE MATTER OF  
METROPOLITAN EDISON CO. (Three Mile Island Unit 2)

Place - Washington, D. C.

Date - Tuesday, 28 February 1978

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY SESSION 78-9

RESPONSE TO STAY MOTION IN THE MATTER OF  
METROPOLITAN EDISON CO. (Three Mile Island Unit 2)

Room 1130,  
1717 H Street, N.W.,  
Washington, D.C.

Tuesday, 28 February 1978

The Commission met, pursuant to notice, at 11:10 a.m.

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

VICTOR GILINSKY, Commissioner (Presiding)

PETER A. BRADFORD, Commissioner.

RICHARD T. KENNEDY, Commissioner.

# DISCLAIMER

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P R O C E E D I N G S

CHAIRMAN HENDRIE: This brings us to the second item on the agenda. And before the meeting starts on it I will point out that I have -- this concerns an Intervenor's motion for stay of Three Mile Island-2.

Now as in many of the older licensing matters that are around in the agency's business, this is one which was in the house at various times while I was a member of the ACRS, a member of the Regulatory Staff. In these cases it is my practice to ask the parties whether they would object to my sitting on the matter if indeed my own conclusion is that I don't happen to have substantial personal interest.

In the case at hand about to come up I would like to say for the record, I have not had an opportunity to circulate to the parties what remains in the files to show my previous association with it, and to obtain their opinions on whether I should participate. And I'm therefore going to turn the gavel over to Commissioner Galinsky to deal with this matter, and get out of the room.

I would just not that my withdrawal on this matter at this time should not prejudice the matter, and whether I will come back into it in later Commission meetings on this subject, if there are any, will be decided after I do have a chance to ask all the parties what they think of my



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1 participation, and then make that decision.

2 So I'm happy, I must say, to turn the gavel over  
3 to Mr. Galinsky.

4 (Whereupon a brief recess was taken.)

5 COMMISSIONER GALINSKY: (Presiding) Before we  
6 begin, Jim Kelley is going to make some comments.

7 MR. KELLEY: I would like to comment on a request.

8 We are here this morning to consider an applica-  
9 tion for a stay of a decision, by the intervenors in this  
10 Three Mile Island case. This is an adjudicatory matter and  
11 normally these matters are closed to the public and just  
12 involve the Commission and the immediate staff.

13 We did decide in this case, as we have in a few  
14 others, that we would do this in the sunshine, as it were,  
15 so it is not closed to the public. And the participants in  
16 the case did know about the meeting, and I believe all but  
17 the State of Pennsylvania are here this morning.

18 With that as background, I should explain that we  
19 don't normally -- obviously, if it is normally closed -- have  
20 oral arguments or any presentations from the parties at a  
21 meeting of this kind.

22 We have had a request from Dr. Kepford for an  
23 opportunity to address the Commission this morning. I've  
24 asked the other parties who are represented, except the  
25 State, and the NRC Staff and counsel for the utility whether

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1 they would have an objection to, in effect, our entertaining  
2 oral argument this morning. The contemplation would have  
3 been, each party would have had a few minutes to address  
4 the Commission.

5 Counsel for the Staff and the utility have objec-  
6 ted essentially because this is coming up at the last minute  
7 and they don't have papers nor are prepared to make an  
8 oral presentation.

9 In these circumstances, and since we don't nor-  
10 mally contemplate oral presentations in this kind of a  
11 meeting, the Commission will not hear oral presentation from  
12 the parties.

13 MR. SLAGGIE: I'll proceed with the background of  
14 the stay motion. This arises out of a proceedings whereby  
15 Metropolitan Edison has applied for an operating license  
16 for the Three Mile Island Unit 2 case. When there was  
17 objection to issuance of a license, hearings were held.  
18 And the Licensing Board determined that the license should  
19 issue in an initial decision handed down at the end of  
20 December.

21 The intervenors filed exceptions with the Appeal  
22 Board to this decision. Among the exceptions that they  
23 raised was the radon question which we were discussing in  
24 the session right before this. The intervenors did intro-  
25 duce testimony at the operating license hearings regarding

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1 the radon question, the amount of radon releases, and so forth.

2 The Licensing Board determined in its initial  
3 decision that even if these numbers were correct, and if  
4 consideration of them were allowed by the S-3 rule their  
5 decision would not have been affected.

6 The intervenors asked the Appeal Board for a stay.  
7 The Appeal Board denied the stay, after first noting that  
8 the only issue in the case-- Well, let me backtrack a little  
9 bit.

10 The intervenors applied for a stay, filing their  
11 exceptions along with the motion for the stay. The Appeal  
12 Board said that this motion was deficient on its face  
13 because, in order to comply with 2.788(e) of the Com-  
14 mission's rules, you have to address the four requirements  
15 for a stay which are listed in our memorandum.

16 The intervenors came back with a supplemental  
17 memorandum that stressed as their primary concern the radon  
18 question. The Appeal Board said: We can't look at the  
19 radon question, that's precluded by the Commission's S-3  
20 rule; therefore the intervenors cannot possibly -- or,  
21 rather, have only a remote probability of prevailing on the  
22 merits.

23 The Appeal Board denied the stay. The inter-  
24 venors have now -- properly, in our view -- petitioned the  
25 Commission for a stay. And we are now considering this, not

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1 as a review of what the Appeal Board did but as a motion for  
2 a stay on its own before the Commission.

3 However the question does arise as to what issues  
4 may be raised in this motion before the Commission. The  
5 motion as the intervenors have submitted it includes the  
6 radon question. But it also includes several other issues  
7 which they did raise before the Licensing Board, at least  
8 some of them, and which were listed in their exceptions  
9 but were not stressed in their supplemental memorandum  
10 to the Appeal Board.

11 In our view these issues are not properly before  
12 the Commission now because they were not raised below  
13 in the stay motion before the Appeal Board, and, therefore,  
14 the only issue on the merits which the Commission needs to  
15 consider now is the radon question.

16 Our memorandum goes briefly -- I hope -- through  
17 the four criteria for a stay. The first criteria is whether  
18 the moving party has made a strong showing that it is likely  
19 to prevail on the merits.

20 Well here we have the occasion, as we discussed  
21 in the previous hour--

22 COMMISSIONER GILINSKY: Could I stop you?

23 MR. SLAGGIE: Yes, sir.

24 COMMISSIONER GALINSKY: Did the Licensing Board  
25 say that even had it adopted the intervenors' numbers it



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1 would have come to the same decision?

2 MR. SLAGGIE: That's what the Licensing Board  
3 said. It said that in their view the impact of radon,  
4 even adopting the intervenors' numbers, was immaterial, 'of  
5 negligible materiality,' is the way the Licensing Board  
6 put it. The intervenors have strongly challenged that.  
7 They say that the Licensing Board has not articulated its  
8 reasons for that conclusion; they barely stated them.

9 Now the Licensing Board said that the radon  
10 releases were small compared to natural background, and  
11 the intervenors have said "So what? What does natural  
12 background have to do with it?"

13 So they have challenged the Licensing Board's  
14 reasoning on this.

15 However they have not demonstrated in the stay  
16 motion before the Commission specific arguments to show that  
17 the Licensing Board was wrong. And in our view their burden  
18 is to show that they would be likely to prevail on the  
19 merits of this question if it were fully raised before the  
20 Appeal Board. We feel they have not met that.

21 On the other hand, we don't think it would be  
22 right, in view of the radon situation, merely to have the  
23 Appeal Board review this case on the merits and dismiss  
24 the radon question on the basis of the fact that the  
25 Table S-3 rule precludes consideration.

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1 So that's why recommending today that the  
2 Commission should direct the Appeal Board to give full con-  
3 sideration to the radon question when it reviews the Three  
4 Mile Island case on the merits. It's my understanding that  
5 that review on the merits should be coming around probably  
6 toward the end of March, is what Al Rosenthal told me.  
7 So we're talking about something fairly soon.

8 So that's part of our recommendation.

9 But that does not, of course, dispose of the ques-  
10 tion whether we should stay the operation of this plant  
11 between now and the time that the Appeal Board acts on the  
12 merits.

13 In order to consider that we go on to the other  
14 criteria for a stay, one of the most important ones of  
15 which is whether the party has demonstrated that they will  
16 be irreparably injured as a result of this stay. --if the  
17 stay is not granted. The question is, Would the intervenors  
18 be irreparably injured if Three Mile Island Unit 2 starts  
19 up and operates pending the Appeal Board's review on the  
20 merits. In our view they haven't made a case that they  
21 would.

22 As far as the radon question goes -- and this is  
23 the main issue on which their stay motion relies, once we  
24 dismiss the other issues that were not raised below -- the  
25 operation of this plant, at least for this interim period,

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1 will not add to the radon releases. The plant would be  
2 operated on fuel that has long since been mined, milled, and  
3 fabricated, and the mill tailings are already there; no new  
4 mill tailings will be created by this operation.

5 COMMISSIONER GILINSKY: But it's a further com-  
6 mitment to the use of uranium?

7 MR. SLAGGIE: It's not a further commitment to the  
8 mining of more uranium. If the Appeal Board approves an  
9 operating license for a long term, for forty years, that's  
10 certainly a commitment. But all we're considering now is  
11 whether the applicant should be stayed from running for a  
12 month or so until the Appeal Board makes its decision. In  
13 our view that does not represent an injury. If there is an  
14 injury in there it is one that has already occurred when the  
15 fuel was originally mined and milled.

16 The intervenors say that starting up the plant  
17 is an injury: this will cause contamination, and it will be  
18 expensive to decontaminate the plant; there's a significant  
19 difference between a plant that has never run and a plant  
20 that has run, so that decommissioning expenses would be  
21 involved. -- And I think we have to concede that this is  
22 correct.

23 The applicant objects to raising this issue at  
24 all as a basis of irreparable injury, stating that the  
25 intervenors didn't raise decommissioning questions below.

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1 I don't think we have to dispose of it that way.

2 I think we can say that to the extent that there is contamina-  
3 tion this is not an irreparable injury; that there are  
4 methods for decontaminating and decommissioning plants and  
5 restoring sites, and the costs of doing that would not fall  
6 on the intervenors.

7 So, though this may be an injury, it is not  
8 irreparable, and it is not an injury -- irreparable or  
9 otherwise -- to the intervenors.

10 The question of whether granting a stay would harm  
11 other parties seems to be relatively easily answered. This  
12 is a plant that presumably will be ready to go: I'm told  
13 that it should be ready to begin operations on about the  
14 10th of March. And to have a plant that is ready to operate  
15 and has otherwise been licensed in accordance with the  
16 safety and environmental conditions, not allowed to operate  
17 incurrs expenses. Good equipment standing idle, additional  
18 fuel expenses to provide power in an alternative way: these  
19 burdens would fall both on the applicant, the utility, and  
20 on the general public, the ratepayers.

21 So we feel that granting this stay would harm  
22 other parties, and that the public interest would not be  
23 served by so doing.

24 Taking all these factors together, it seems to us  
25 that the intervenors fail on all four of them, and that

wb10 1 certainly on balance they haven't made a strong showing that  
2 generally is considered necessary before the Commission  
3 would issue a stay. Hence our recommendation that the  
4 Commission deny the stay, but direct the Appeal Board to  
5 consider the radon question in their review on the merits.

6 MR. KELLEY: One question or comment, how this  
7 recommendation relates to the meeting we just had:--

8 It's consistent with the recommendation that the  
9 Staff is supporting and that we agreed with; namely, that in  
10 this case where the intervenors seek to litigate this ques-  
11 tion, the Appeal Board would be told, since it's before  
12 them, to hear the question.

13 COMMISSIONER GILINSKY: Are we, in effect, making  
14 the decision in the larger sense?

15 MR. KELLEY: I don't think so.

16 My next point would be: This particular case  
17 has come before us in an adjudicatory framework.)  
18 We can look at our draft order again, but it seems to me  
19 we can say in the order, without prejudice to any decision  
20 we might make on the broader issue, in this particular case  
21 look at radon.

22 MR. SLAGGIE: As we have drafted the order, the  
23 legal analysis behind what we're advocating that you do here  
24 is that the Commission would be waiving a rule. Under  
25 10 CFR 2.758(b) people can petition the Commission to waive

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1 a rule when the application of the rule in a special case  
2 would not serve the rule's purposes.

3 We feel here that this case is special in the  
4 sense that the radon question on the problem in Table S-3  
5 has now initially been drawn to the Commission's attention in  
6 the context of a Staff recommendation that this rule be  
7 altered. The Commission is considering that. And this is a  
8 sufficiently special circumstance that it would certainly  
9 not serve the purpose of the rule, which is, of course, to  
10 provide adequate consideration of environmental impacts,  
11 to apply them rigidly in this case, and preclude considera-  
12 tion of the impacts that we think the Appeal Board ought  
13 to look at.

14 So that's the analysis here.

15 If you subsequently adopt the Staff's recommenda-  
16 tions and similar cases come up, then you would dispose of  
17 them in accordance with a rule rather than in accordance  
18 with the waiver of an existing rule that you have not yet  
19 amended but you are considering this amendment.

20 MR. KELLEY: Although you're reaching a different  
21 result than the Appeal Board did, you are looking at a sig-  
22 nificantly different universe, it seems to me.

23 The Appeal Board said, and I think quite properly,  
24 on the record before them, "The S-3 rule says such-and-such.  
25 That's it. You can't attack a rule." And they were aware



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1 of the memorandum from the member of the Licensing Board  
2 panel that raised the question about radon. But the opinion  
3 says, well if there were really anything wrong with radon  
4 we surely would have heard by now.

5 But now you've got a Staff recommendation before  
6 the Commission saying, Yes, the radon number is wrong.

7 The Appeal Board wasn't looking at that universe.  
8 I think, given the one you've got, it's a different world,  
9 and the result you reach is not inconsistent with what the  
10 Appeal Board did; it's just a different record.

11 MR. SLAGGIE: You're not reversing the Appeal  
12 Board.

13 COMMISSIONER GALINSKY: What was the date of the  
14 decision?

15 MR. SLAGGIE: January 27th.

16 COMMISSIONER GALINSKY: And what was the date of  
17 the memorandum?

18 MR. KELLEY: The Staff memorandum? -- Oh, the  
19 Licensing Board memorandum. Last September, I believe.

20 MR. SLAGGIE: The Jordan memorandum. That was  
21 given to the Chairman in October 1977, I believe.

22 MR. KELLEY: It was dated the 21st of September.

23 COMMISSIONER BRADFORD: Leo, what posture does  
24 that put the Commission in when you go into court -- assuming  
25 there were some request for a stay filed with the court after

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1 this -- with....

2 MR. KELLEY: I believe there has been, by the  
3 way.

4 MR. SLAGGIE: It is now before the D.C.Circuit.  
5 We just got a petition for review which was filed, I guess,  
6 yesterday, or this morning, asking the D.C. Circuit to stay  
7 this operating license.

8 COMMISSIONER BRADFORD: Presumably the D.C.  
9 Circuit won't be terribly interested until after the Com-  
10 mission has acted.

11 MR. SLAGGIE: That's certainly what we would argue.  
12 We would say the Commission has not yet acted: it's not  
13 appropriate for the D.C. Circuit to consider it.

14 COMMISSIONER BRADFORD: Suppose we follow your  
15 recommendation and the plant starts operation, or is on the  
16 verge of starting operation. You'll be in court saying it's  
17 okay for this plant to operate, even though there's an  
18 acknowledged hole in the S-3 table, because a month's opera-  
19 tion won't really do anybody any harm?

20 MR. SLAGGIE: No irreparable injury. It's certain-  
21 ly an occasion for Commission for action on Table S-3. But  
22 it's not an occasion to stay a license that was granted,  
23 and properly, in accordance with the Commission's rules,  
24 and the applicant has a license that is presently valid.

25 This can be challenged, and indeed it will be, I'm

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1 sure.

2 But the question before the Commission now is  
3 staying that license.

4 COMMISSIONER BRADFORD: Were you in this same  
5 position when you went into court on Vermont Yankee? Or  
6 was it a previous S-3 challenge, and though the Commission  
7 was at that point defending the S-3 table the Court said  
8 No, it has a hole in it. Now what did they do at that  
9 point? They didn't suspend issuance of further permits?

10 MR. KELLEY: They looked at all three or four  
11 categories: outstanding OL's, outstanding CP's, and treated  
12 them somewhat differently.

13 There was a request, as I recall, to yank the OL,  
14 which was not done, on the basis of the Commission's per-  
15 ception of the extent of the defect.

16 MR. EILPERIN: There the Commission --at least  
17 at the outset it's different from this. Because there the  
18 Commission was saying that the values were correct. And then  
19 the D.C. Circuit stayed the effect of its order in any event  
20 in the Vermont Yankee case.

21 MR. SLAGGIE: Another legal point that might be  
22 worth pointing out is that the nature of the intervenors'  
23 argument on the review of the merits would be that the  
24 environmental analysis was deficient because it didn't take  
25 proper account of the radon question.

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Now I believe in the Midland case, where concededly the environmental analysis was found to be invalid by the Court of Appeals, this was not necessarily found to be an occasion for a stay.

Even if someone conceded -- as need not be conceded at this point -- that the environmental analysis is faulty, the question amounts to how faulty, and severe a flaw is this. It doesn't necessarily follow that a license will be stayed because there is a question, even a decided question, that the environmental analysis was faulty.

COMMISSIONER GILINSKY: I don't follow that. Don't we agree that the numbers are wrong?

MR. SLAGGIE: Do we agree the numbers.... I'm sorry.

COMMISSIONER GILINSKY: The radon numbers.

MR. SLAGGIE: Yes, we agree they're wrong.

COMMISSIONER GILINSKY: We agree they're wrong?

MR. SLAGGIE: Right.

COMMISSIONER GILINSKY: In the case when we're dealing with the back end of the fuel cycle, as I recall the Court really found problems with the way the numbers were arrived at, rather than problems with the numbers. The Court was not saying the numbers are wrong; the Court was saying, Go about this in a different way.

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1 MR. EILPERIN: One difference is, as I understand  
2 it, is that the Licensing Board has in fact utilized the  
3 intervenors' numbers, which are different from the numbers  
4 in the rule, and has come to the conclusion that even using  
5 those larger numbers an operating license should still issue.

6 So that, to my mind, is a rather large difference.

7 MR. KELLEY: I think Leo's analysis is right, too.  
8 You're saying here the number is wrong. Well, in the Midland  
9 case referred to, the Court said there was an inadequate  
10 exploration of energy conservation, and that's a substantive  
11 flaw in the NEPA analysis. Again, as we speak today, that  
12 plant is being built. It has never been stayed.

13 You have to have some assessment of how serious  
14 a problem is.

15 COMMISSIONER KENNEDY: I read the order, noting  
16 the fact that it will require the Appeal Board to take note  
17 of this issue and rule on it.

18 It seems to me that that's a reasonable course.

19 MR. SLAGGIE: The plant will probably start up  
20 before the Appeal Board reaches its decision.

21 COMMISSIONER KENNEDY: I understand that.

22 MR. SLAGGIE: That goes back to the question of  
23 whether that involves any irreparable injury. The applicant  
24 and the Staff both contend that it doesn't; and quite  
25 persuasively.

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1 COMMISSIONER BRADFORD: NEPA, in the normal course  
2 of events, would require that we arrive at a complete  
3 balancing before the construction permit, never mind the  
4 operating license. We're all agreed we haven't done that?

5 MR. SLAGGIE: That's the issue. They're telling  
6 the Appeal Board the Licensing Board did not do a complete  
7 and adequate --

8 COMMISSIONER KENNEDY: It's not my impression that  
9 we're agreed on that. That is the contention.

10 COMMISSIONER BRADFORD: The Licensing Board has  
11 said even if you use the appellant's number we have still--

12 MR. SLAGGIE: That's right; their reasoning has  
13 been challenged. It certainly will be challenged. But....

14 COMMISSIONER GILINSKY: Let me ask you this:  
15 What will the Appeal Board do? Suppose it  
16 examines the question of radon releases and arrives at some  
17 new number?

18 MR. SLAGGIE: I will not tell you what the Appeal  
19 Board will do. The Appeal Board will have to consider the  
20 question, they will have to look at the evidence that was  
21 taken, and decide whether sufficient evidence went into the  
22 record to make a reasoned decision. And if they so decide,  
23 they will then consider whether the Licensing Board's  
24 analysis was adequate based on that evidence.

25 COMMISSIONER GILINSKY: So they will re-examine



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1 and balance it?

2 MR. KELLEY: They certainly have the power to do  
3 it.

4 MR. EILPERIN: They would have to, under the pro-  
5 posed Commission order. The Commission is directing them to  
6 look into this radon issue.

7 MR. SLAGGIE: You could direct them to do it very  
8 specifically.

9 COMMISSIONER GILINSKY: To look at the number and  
10 see what impact that has on the decision?

11 MR. EILPERIN: That's right.

12 MR. SLAGGIE: Basically what we're telling them  
13 is, Don't let your investigation be impeded any more by the  
14 idea that Table S-3 restricts it. Go out and do what you  
15 think is best. And the rule no longer restricts you.

16 MR. KELLEY: As to radon.

17 COMMISSIONER KENNEDY: In other words, this is  
18 being put in precisely the posture proposed in the previous  
19 meeting.

20 MR. KELLEY: In this particular case, that's right.

21 COMMISSIONER KENNEDY: We're saying in this case  
22 that the rule is no longer effective for this purpose, and  
23 you must actually litigate that question. And we're not  
24 certain at this point-- Well at least it is contended that  
25 the examination was not complete in this regard, and you

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1 should look into this allegation.

2 MR. KELLEY: Yes.

3 COMMISSIONER BRADFORD: If you were sitting on  
4 the Appeals Board and this plant had been in operation for  
5 about a month and you concluded that in fact the Licensing  
6 Board had been wrong, its balancing was incorrect, would  
7 you feel at that point that you had to stay it; in effect  
8 lift the operating license?

9 MR. SLAGGIE: That would then be really a  
10 separate question. There would probably be a motion to stay  
11 the operating license in view of the Appeal Board's  
12 decision. The Appeal Board would probably decide that as  
13 part of their decision. They might, for example, say, We  
14 think that the Licensing Board gave an inadequate analysis.  
15 We remand to the Licensing Board for adequate analysis,  
16 but -- and just for an example -- but, for example, we find  
17 no need for a stay for the reasons we've given here: no  
18 irreparable injury. That would be one of many possible  
19 dispositions.

20 On the other hand they might say, We think this  
21 is an appalling problem and we stay the effect of the operat-  
22 ing license and remand to the Licensing Board.

23 COMMISSIONER BRADFORD: I guess what I'm after  
24 would be, Leaving aside irreparable injury, because I think  
25 that's really going to be hard to show in this context -- at

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1 least if one accepts the rationale that the uranium has  
2 already been milled and, therefore, no new radon, and that  
3 plant would operate for quite a while before you would mill  
4 any more uranium for it. But are you saying, in effect, that  
5 it would be possible to have a -- if the Appeal Board found  
6 that balancing could no longer stand, given the defect in  
7 the S-3 table, that it would be possible to have a violation  
8 of NEPA if it were to go on in continuing effect, because  
9 there was not irreparable injury shown? Does NEPA have  
10 that little operative value?

11 MR. SLAGGIE: No. Not an indefinite continuation.

12 This argument, that a violation of NEPA doesn't  
13 compel a stay, refers only to temporary situations. Once  
14 the issue is finally resolved, if the Appeal Board says  
15 we have finally concluded that the environmental analysis  
16 was no good, then that would be it; they would order the  
17 operating license to be rescinded.

18 The applicant would, in all probability, come in  
19 and complain about that.

20 MR. EILPERIN: I think I disagree partly with  
21 Leo on that. I think in a sense the burden then switches.  
22 If in fact the Appeal Board said, Look, the Licensing  
23 Board's analysis was lousy and we think it was wrong, and  
24 there has to be further evidence taken on the issue, then  
25 that is a decision on the merits. So that at that point

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1 the intervenors have prevailed on the merits. They don't  
2 have to show a substantial likelihood of prevailing on the  
3 merits, they have prevailed on the merits.

4 And the burden then switches to the applicant to  
5 show why, despite the fact that there's a defective NEPA  
6 analysis, why this plant should be allowed to run.

7 It's not an automatic stay of the operating license,  
8 but the burden is really upon the applicant to show strongly  
9 why he should be allowed to operate until that defect is  
10 picked up.

11 MR. KELLEY: On the assumption that it can be  
12 picked up; right? --which is usually the case. You get a  
13 remand and look into something further. But in a case where  
14 you concluded the cost-benefit balance is against this  
15 plant, then it's all over.

16 MR. SLAGGIE: It's over. It's just the Commission  
17 making the final decision that this operating license should  
18 not issue.

19 COMMISSIONER GILINSKY: That presumably has pretty  
20 far-reaching consequences.

21 MR. KELLEY: I'm not suggesting this is the likely  
22 outcome.

23 COMMISSIONER GILINSKY: What I'm saying is, in  
24 effect are we running this generic proceeding by having the--

25 MR. SLAGGIE: The Appeal Board will certainly be

wb22

1 making generic inquiries when it considers this individual  
2 licensing case. But that's how it goes when you consider  
3 generic questions in individual licensing. That's what the  
4 Staff is advocating for the whole Table S-3 business.

5 COMMISSIONER KENNEDY: On an interim basis.

6 MR. SLAGGIE: Yes.

7 MR. EILPERIN: I'm just told that the Commission's  
8 MOD-77 Seabrook decision also had that kind of analysis.  
9 That's not an automatic injunction, but the burden does  
10 switch for a utility to explain why the plant should  
11 operate.

12 MR. SLAGGIE: If you like, you're getting a sneak  
13 preview now of how the Staff's recommendations will work.

14 COMMISSIONER BRADFORD: Then the hinge that  
15 keeps the burden from shifting to the applicant is the  
16 Licensing Board determination that, even if our conclusion  
17 wouldn't change.

18 MR. SLAGGIE: That's right.

19 COMMISSIONER BRADFORD: And the Appeal Board did  
20 not review that in any way.

21 MR. EILPERIN: That's correct. Because they  
22 considered themselves bound by the S-3 rule. And now the  
23 Commission will be saying, Don't consider yourself bound  
24 by that.

25 It's a situation which I think happens quite

wb23

1 often, where someone says the decision below is wrong for  
2 some reason, it's defective for some reason. And the  
3 traditional test which the Commission and courts have long  
4 applied is that you have to show (1) that you're going to --  
5 that you're probably right on that and (2) that you are  
6 really going to be hurt in the period before that issue on  
7 the merits can be decided.

8 And I think here what we're saying is there hasn't  
9 been a showing that you're probably right, because the  
10 Licensing Board has so far decided that even based on your  
11 numbers the radon values should not tip the balance.

12 Secondly, by the time this issue is decided,  
13 that's a matter of a couple of months, and you're not going  
14 to be irreparably injured when the issue is really one of  
15 what should be done with radon over a period of God knows  
16 how many thousands of years.



mpbl

1 MR. SLAGGIE: The criteria has to be taken all  
2 together. Even if a person in an application for a stay was  
3 able to show he was certain to prevail on the merits, the  
4 irreparable injury part, if there were no irreparable injury,  
5 the state might very well be denied. And here we feel all  
6 for the criteria the showing is it's moderate on the merits  
7 question and it's weak on irreparable injury.

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8 COMMISSIONER BRADFORD: I haven't read the  
9 licensing board opinion at all. Is there any discussion  
10 around that point that you were referring to a moment ago,  
11 or is it simply stated in one conclusory sentence?

12 MR. SLAGGIE: I could read it right now if you'd  
13 like. It's one paragraph. It's paragraph 125 of their  
14 initial decision:

15 "We need not address the questions of  
16 whether this aspect of Dr. Kepford's testimony"  
17 -- this is the error in Table S-3 -- "poses a  
18 permissible challenge to Table S-3, nor whether  
19 Dr. Gotchy's conclusions are affected by the  
20 Jordan allegation, for our decision does not  
21 require resolution of these matters. Dr. Kepford  
22 under cross-examination"-- Dr. Kepford, by the  
23 way, is a representative of the intervenors --  
24 "Dr. Kepford under cross-examination testified  
25 that even with the significantly larger releases

mpb2

1 of radon-222 that he alleges should have been used  
2 by Dr. Gotchy, one is still dealing with releases  
3 that are small compared with the natural background.  
4 The corresponding TMI-2 related health effect would  
5 amount to an increased mortality rate of one addit-  
6 ional death per billion deaths from other causes  
7 over the time span of several billion years required  
8 by Dr. Kepford's reckoning to account for the decay  
9 of the parents of radon-222. Hence, granting for the  
10 sake of argument the correctness of Dr. Kepford's  
11 analysis, we find the relative impact of the radon-222  
12 consideration to be of negligible materiality."

13 COMMISSIONER GILINSKY: They used one of several criteria.  
14 They said the relative numbers are small.

15 MR. SLAGGIE: Yes.

16 By the way, in reading this, I expressed no  
17 opinion one way or the other on how good an analysis it is.  
18 As I say, the intervenor has strongly challenged the relevance  
19 of the licensing board's arguments. But the licensing board  
20 did make a determination, and presumably the appeal board  
21 will, if you wish, and the order is repropose, the appeal  
22 board will review that and decide whether that's a reasonable  
23 determination supported by the evidence.

24 COMMISSIONER BRADFORD: It's not a comfortable  
25 posture to have a case come forward in, but against that

mpb3

1 background where there's something more than a conclusory  
2 sentence but a specific discussion of testimony, it seems to  
3 me the only way that decision is going to be upset is through  
4 appellate review.

5 That is, we're not going to take it on here today  
6 that that's an erroneous conclusion.

7 MR. SLAGGIE: Even if you were to conclude that  
8 the conclusion I've just read to you was almost certain to  
9 be overthrown on appellate review, this would not decide the  
10 question of a stay again because of the irreparable injury  
11 question.

12 MR. EILPERIN: It places the burden the other way.

13 COMMISSIONER BRADFORD: As long as that conclu-  
14 sion is the one that's on the table before us, I don't see  
15 any basis for issuing a stay.

16 COMMISSIONER KENNEDY: I agree.

17 COMMISSIONER GILINSKY: Are we comfortable with  
18 the order as stated?

19 COMMISSIONER KENNEDY: I found the order in  
20 these circumstances to be wholly sufficient.

21 COMMISSIONER GILINSKY: Should we add something  
22 to the effect that this does not prejudice anything?

23 COMMISSIONER KENNEDY: I didn't think it had to  
24 say that, but I don't suppose it would hurt anything. I  
25 thought it was rather clear that --

mpb4

1 COMMISSIONER BRADFORD: I would like to go over  
2 the order in light of what is there.

3 MR. SLAGGIE: We have a few cosmetic changes.

4 We'll delete Chairman Hendrie and put in a footnote  
5 explaining that he has precluded himself. I have a footnote  
6 where the Applicant said something to the effect that it was  
7 the movant.

8 MR. KELLEY: We could recirculate a sort of final  
9 proposed order tomorrow, if that's okay.

10 COMMISSIONER GILINSKY: Fine.

11 Then we would vote on it at that time?

12 MR. KELLEY: I think we can vote on the action  
13 that we take, and then you don't have to reconvene, if you're  
14 comfortable in doing it.

15 COMMISSIONER BRADFORD: I don't have a problem  
16 with voting on the action to be taken.

17 COMMISSIONER GILINSKY: You mean one denying the  
18 stay and the other instructing the appeal board to take up  
19 the matter of radon, whatever effect that may have on the case?

20 COMMISSIONER BRADFORD: Right.

21 COMMISSIONER KENNEDY: And the language of the  
22 order subject to --

23 MR. KELLEY: The editorial change.

24 COMMISSIONER GILINSKY: Why don't we vote?

25 COMMISSIONER KENNEDY: Aye.

1 COMMISSIONER GILINSKY: Aye.

2 COMMISSIONER BRADFORD: Aye.

3 COMMISSIONER GILINSKY: We'll circulate it.

4 MR. KELLEY: We'll get it out tomorrow.

5 COMMISSIONER BRADFORD: There's also the issue --  
6 you don't have to put it in the order, but there's also the  
7 issue that we took a look at in the Seabrook case and said  
8 we wanted to look at some more, which is the interrelation-  
9 ship of our stay rules and the effective rules permanently  
10 issued, but that's not here. We said in Seabrook we'll look  
11 at that.

12 COMMISSIONER GILINSKY: It raises the same ques-  
13 tion.

14 MR. EILPERIN: This is already in the court of  
15 appeals. We'll not be making any final oral arguments, it'll  
16 just be the defense of this order.

17 (Whereupon, at 11:45 a.m., the hearing in the  
18 above-entitled matter was concluded.)

19 + + + +

20 (The record was re-opened for the following  
21 colloquy:)

22 DR. KEPFORD: I would like to offer my objection  
23 to the comments of Mr. Kelley to the Commissioners this  
24 morning. Because my request had been to address the generic  
25 issues which had gone on prior to any discussion of anything

wbl

1 directed to Three Mile Island, generic issues which were  
2 brought up earlier.

3 MR. KELLEY: I would just like to add that I  
4 regret the misunderstanding. I understood that you wanted  
5 to address the Three Mile Island stay application, which is  
6 why I asked the other counsel if they objected; and they  
7 did.

8 I'm sorry if there was a misunderstanding.

9 (Whereupon, at 11:47 a.m., the meeting was  
10 concluded.)



