U.S. NUCLEAR REGULATORY COMMISSION

FURTHER COMMISSION GUIDANCE
FOR POWER REACTOR OPERATING LICENSES

STATEMENT OF POLICY *

I. BACKGROUND

After the March 1979 accident at Three Mile Island, Unit 2, the Commission directed its technical review resources to assuring the safety of operating power reactors rather than to the issuance of new licenses. Furthermore, the Commission decided that power reactor licensing should not continue until the assessment of the TMI accident had been substantially completed and comprehensive improvements in both the operation and regulation of nuclear power plants had been set in motion.

At a meeting on May 30, 1979, the Nuclear Regulatory Commission decided to issue policy guidance addressing general principles for reaching licensing decisions and to provide specific guidance for near-term operating license cases.[1/] In November 1979, the Nuclear Regulatory Commission issued the policy guidance in the form of an amendment to 10 CFR Part 2 of its regulations,[2/] describing the approach to be taken by the Commission regarding licensing of power reactors. In particular, the Commission noted that it would "be providing case-by-case guidance on changes in regulatory policies." The Commission has now acted on three operating licenses, has given extensive consideration to issues arising as a result of the Three Mile Island accident, and is able to provide general guidance.

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* All footnotes for this statement of policy appear at end of text.

Following the accident at Three Mile Island 2, the President established a Commission to make recommendations regarding changes necessary to improve nuclear safety. In May 1979, the Nuclear Regulatory Commission established a Lessons Learned Task Force,[3] to determine what actions were required for new operating licenses and chartered a Special Inquiry Group to examine all facets of the accident and its causes. These groups have published their reports.[4]

The Lessons Learned Task Force led to NUREG-0578, "TMI-2 Lessons Learned Task Force Status Report and Short-Term Recommendations" and NUREG-0585, "TMI-2 Lessons Learned Task Force Final Report." The Commission addressed these reports in meetings on September 6, September 14, October 14, and October 16, 1979. Following release of the report of the Presidential Commission, the Commission provided a preliminary set of responses to the recommendations in that report.[5] This response provided broad policy directions for development of an NRC Action Plan, work on which was begun in November 1979. During the development of the Action Plan, the Special Inquiry Group Report was received, which had the benefit of review by panels of outside consultants representing a cross section of technical and public views. This report provided additional recommendations.

The Action Plan[6] was developed to provide a comprehensive and integrated plan for the actions judged appropriate by the Nuclear

Regulatory Commission to correct or improve the regulation and operation of nuclear facilities based on the experience from the accident at TMI-2 and the official studies and investigations of the accident. In developing the Action Plan, the various recommendations and possible actions of all the principal investigations were assessed and either rejected, adopted or modified. A detailed summary of the development and review process for the Action Plan is provided in NUREG-0694, "TMI-Related Requirements For New Operating Licenses."

Actions to improve the safety of nuclear power plants now operating were judged to be necessary immediately after the accident and could not be delayed until the Action Plan was developed, although they were subsequently included in the Action Plan. Such actions came from the Bulletins and Orders issued immediately after the accident, the first report of the Lessons-Learned Task Force issued in July 1979, the recommendations of the Emergency Preparedness Task Force, and the NRC staff and Commission. Before these immediate actions were applied to operating plants, they were approved by the Commission. Many of the required immediate actions have already been taken by licensees and most are scheduled to be complete by the end of 1980.

On February 7, 1980, based on its review of initial drafts of the Action Plan, the Commission approved a listing of near-term operating license (NTOL) requirements, as being necessary but not necessarily sufficient TMI-related requirements, for granting new

operating licenses. Since then, the fuel load requirements on the NTOL list have been used by the Commission in granting operating licenses, with limited authorizations for fuel loading and low power testing, for Sequoyah, Salem, and North Anna.

On May 15, 1980, after review of the last version of the Action Plan, the Commission approved a list of "Requirements For New Operating Licenses", now contained in NUREG-0694, [7/] which the staff recommended for imposition on current operating license applicants. That list was recast from the previous NTOL list and sets forth four types of TMI-related requirements and actions for new operating licenses: (1) those required to be completed by a license applicant prior to receiving a fuel-loading and low-power testing license, (2) those required to be completed by a license applicant to operate at appreciable power levels up to full power, (3) those the NRC will take prior to issuing a fuel-loading and low-power testing or full-power operating license, and (4) those required to be completed by a licensee prior to a specified date. The Commission also approved the staff's recommendation that the remaining items from the TMI reviews should be implemented or considered over time to further enhance safety.

In approving the schedules for developing and implementing changes in requirements, the Commission's primary considerations were the safety significance of the issues and the immediacy of the need

for corrective actions. As discussed above, many actions were taken to improve safety immediately or soon after the accident. These actions were generally considered to be interim improvements. In scheduling the remaining improvements, the availability of both NRC and industry resources was considered, as well as the safety significance of the actions. Thus, the Action Plan approved by the Commission presents a sequence of actions that will result in a gradually increasing improvement in safety as individual actions are completed and the initial immediate actions are replaced or supplemented by longer term improvements.

II. COMMISSION DECISION

Based upon its extensive review and consideration of the issues arising as a result of the Three Mile Island accident, the Commission has concluded that the above-mentioned list of TMI-related requirements for new operating licenses found in NUREG-0694 is necessary and sufficient for responding to the TMI-2 accident. The Commission has decided that current operating license applications should be measured against the regulations, as augmented by these requirements.[8/] In general, the remaining items of the Action Plan should be addressed through the normal process for development and adoption of new requirements rather than through immediate imposition on pending applications.

III. LITIGATION OF TMI-2 ISSUES IN OPERATING LICENSE PROCEEDINGS

In the November 1979 policy statement, the Commission provided the following guidance for the conduct of adjudicatory proceedings:

> In reaching their decisions, the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island Accident. In this regard, it should be understood that as a result of analyses still underway, the Commission may change its present regulations and regulatory policies in important aspects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application.

The Commission is now able to give the Boards more guidance.

The Commission believes the TMI-related operating license requirements list as derived from the process described above must be the principal basis for consideration of TMI-related issues in the adjudicatory process. There are several reasons for this. First, this represents a major effort by the staff and Commissioners to address an almost overwhelming number of issues in a coherent and coordinated fashion. It is extremely doubtful this process can be reproduced in individual proceedings. Second, the NRC does not have the resources to litigate the entire Action Plan in each proceeding, nor does it believe it would be a responsible decision to do so. Third, many of the decisions involve policy rather than factual or legal decisions. Most of these are more appropriately

addressed by the Commission itself on a generic basis than by an individual licensing board in a particular case. Consequently, the Commission has chosen to adopt the following policy regarding litigation of TMI-related issues in operating license proceedings.

The TMI-related "Requirements For New Operating Licenses" adopted herein can, in terms of their relationship to existing Commission regulations, be put in two categories: (1) those that interpret, refine or quantify the general language of existing regulations, and (2) those that supplement the existing regulations by imposing requirements in addition to specific ones already contained therein. Insofar as the first category -- refinement of existing regulations -- is concerned, the parties may challenge the new requirements as unnecessary on the one hand or insufficient on the other. The Atomic Safety and Licensing and Appeal Boards' present authority to raise issues sua sponte under 10 CFR 2.760a extends to this first category.

Insofar as the second category -- supplementation of existing regulations -- is concerned, boards are to apply the new requirements unless they are challenged, but they may be litigated only to a limited extent. Specifically, the boards may entertain contentions asserting that the supplementation is unnecessary (in full or in part) and they may entertain contentions that one or more of the supplementary requirements are not being complied

with; they may not entertain contentions asserting that additional supplementation is required. The boards' authority to raise issues sua sponte shall be subject to the same limitations. Past adjudicatory decisions of the Commission have been clear that generally a finding of compliance with the regulations entitles one to the requested permit or license insofar as the requirements of the Atomic Energy Act are concerned.[9/] Accordingly, absent some special showing,[10/] no party has in the past been entitled to litigate matters going beyond NRC regulations before boards. The Commission guidance on litigation of this second category of requirements will thus serve to expand the scope of permissible contentions to include issues as to the necessity for or compliance with certain TMI-related requirements that are supplementary to existing regulations.

In order to focus litigation of TMI-related issues, the Commission instructs its staff to utilize, to the maximum extent practicable, the Commission's existing summary disposition procedures in responding to TMI-related contentions.

The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects strict adherence to its regulations in this regard.

Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision.

Separate and dissenting views of Commissioners Gilinsky and Bradford are attached.*

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
the 16th day of June, 1980.

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* Section 201 of the Energy Reorganization Act, 42 U.S.C. § 5841 provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Bradford was not present at this Affirmation session, but had previously indicated his intention to dissent. Had Commissioner Bradford been present at the meeting he would have dissented. Accordingly, the formal vote of the Commission was 3-1 in favor of the decision.

FOOTNOTES

1/ "Staff Requirements - Discussion of Options Regarding Deferral of Licenses," memorandum from Samuel J. Chilk, Secretary to Lee V. Gossick, Executive Director for Operations, May 31, 1979.

2/ "Suspension of 10 CFR 2.764 and Statement of Policy on Conduct of Adjudicatory Proceedings," 44 FR 65050 (November 9, 1979).

3/ "Lessons Learned from TMI-2 Accident," Roger Mattson to NRR staff, May 31, 1979.

4/ Report of the President's Commission on The Accident at Three Mile Island, "The Need for Change: The Legacy of TMI," October 1979;

U.S. Nuclear Regulatory Commission, "TMI-2 Lessons Learned Task Force Status Report and Short-Term Recommendations," NUREG-0578, July 1979;

U.S. Nuclear Regulatory Commission, "TMI-2 Lessons Learned Task Force Status Report," NUREG-0585, August 1979;

U.S. Nuclear Regulatory Commission Special Inquiry Group, "Three Mile Island: A Report to the Commissioners and to the Public," January 1980.

5/ U.S. Nuclear Regulatory Commission, "NRC Views and Analysis of the Recommendations of the President's Commission on the Accident at Three Mile Island," NUREG-0632, November 1979.

6/ U.S. Nuclear Regulatory Commission, "NRC Action Plans Developed as a Result of the TMI-2 Accident," NUREG-0660.

7/ U.S. Nuclear Regulatory Commission, "TMI-Related Requirements for New Operating Licenses," NUREG-0694, June 1980.

8/ Consideration of applications for an operating license should include the entire list of requirements unless an applicant specifically requests an operating license with limited authorization (e.g., fuel loading and low-power testing).

9/ Maine Yankee Atomic Power Company (Maine Yankee Nuclear Power Plant, Unit 2), ALAB-161, 6 AEC 1003 (1973), affirmed, CLI-74-2, 7 AEC 2 (1974), affirmed, Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975).

10/ See 10 CFR § 2.758.

COMMISSIONER GILINSKY'S SEPARATE VIEWS
REGARDING THE COMMISSION'S POLICY STATEMENT --
COMMISSION GUIDANCE FOR POWER REACTOR OPERATING LICENSES

I regard the Action Plan as a directive to the staff from the Commission acting in its supervisory capacity and expect that it will be given appropriate deference by the adjudicatory boards. However, in view of the fact that the Action Plan and the NTOL list are not regulations, and are not the result of a public proceeding, they cannot be given the weight of rules. Nor does the fact that the Commission spent a great deal of time developing the Action Plan change the situation. There were many items to deal with and the Commission did not spend much time on each of them and very little on some. Moreover, as Commissioner Bradford has pointed out, the industry has had extensive opportunities to comment on the Action Plan and to obtain changes, which in almost all cases have resulted in a reduction of the requirements initially proposed by the staff. To now limit litigation to the issues of whether these requirements have been satisfied or are excessive, and to exclude discussion of whether they go far enough, is a manifestly unfair and unwise policy.

DISSENTING VIEWS OF COMMISSIONER BRADFORD

To curtail the rights of parties involved in NRC adjudicatory proceedings through the device of a policy statement is, if it is legal at all, a radical act requiring (one would have thought) urgent justification. The justifications advanced in this case amount to no more than a bored yawn toward the concerned public. Specifically, they are: 1) We have worked very hard, and what we have done is too complicated to defend; 2) We are too busy to listen to you, and despite our $400 million annual budget, we can't afford to hear you;[1/] and 3) Because the plan involves "policy" common to all cases rather than to a specific number of them, the public should not be heard on it at all. There are four reasons why the Commission should not be taking this action, even assuming that it has the power to do so.

First, the action embodies precisely the complacency that the Kemeny Commission, among others, suggested as a strong contributing factor to the accident at Three Mile Island. Rather than strengthening the role of the public in NRC proceedings as advocated by both the Kemeny Commission and the NRC's own Special Inquiry Group Report, this action lessens the public's

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1/ The statement that the Commission would have "to litigate the entire Action Plan in each proceeding (policy statement, page 6)" is of course false, and it reveals just how little the Commission understands its own proceedings. The entire Action Plan is not at issue here - only those items not within the reach of current regulations. Furthermore, it is inconceivable that each of those items (or even most of them) would be litigated in every proceeding.

ability to comment on the adequacy of many of the technical responses to Three Mile Island. This attitude that the regulatory agency and the industry between them know best ignores a series of failures in the AEC/NRC licensing history of which Three Mile Island was only the most dramatic example. It is noteworthy that the staff, which did most of the work on which the Commission now relies, did not recommend such a policy statement. It appears that they may briefly have learned more than the Commission.

Second, the action is clearly unfair. One set of prospective litigants - the industry - has been extensively involved in the development of the Action Plan. An industry panel met with the Commission, and the industry has been in constant contact with the staff and in the providing of written comments throughout the process. The plan has never been put out for public comment, and little or no public comment has taken place. However, as a result of the Commission's actions, the only group that will be permitted to contest the questions at issue here will be the industry. Thus, those who have had the greatest say in shaping the Action Plan will now be able to challenge its requirements further, while those who have had no say in shaping it will be foreclosed from challenging the very requirements that they have had no opportunity to comment on.

Third, this action is unnecessary. For one thing, legitimate processes exist through rulemaking for the Commission to develop a document of general applicability. I would not have recommended

it in this case, but such a process would at least have cured the worst of the defects in the Commission action. Furthermore, even without a rulemaking, the Action Plan could have been used to shape the staff position in NRC hearings. As a practical matter, this would have made it a document of considerable influence. In uncontested cases, it would clearly have governed. Intervenors in contested cases would have been taking on a very heavy burden in trying to go against a staff position and convince the Commission to change its mind on a document that it had already approved. However, they would have least had had a chance to prepare a record and to make the attempt.

Fourth, the Commission's action does not lend the desired certainty to the process. For one thing, it is certainly subject to challenge pursuant to Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33 (D.C. Cir., 1974). Should such a challenge prevail, the Commission will have lost far more time than it can possibly be saving through the measures taken here.

For another thing, it makes no sense for the Commission to take this action on the eve of the advent of a new Chairman, whose appointment is part of the President's response to Three Mile Island. In order that no party rely unduly on the policy statement at this time, I am hereby giving notice that I intend to seek its reconsideration and revocation upon the arrival of the President's new appointee. It may of course be that no change will occur, but at least the new appointee will have had a voice in choosing a vital policy which he or she must preside over and defend.