LIC 11/10/81

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

LICENSEE'S MEMORANDUM IN SUPPORT OF ITS APPEAL FROM LICENSING BOARD ORDER ON CONFIDENTIALITY AND IN SUPPORT OF ITS MOTION FOR STAY

Licensee submits this memorandum in support of its appeal from the Licensing Board's November 6, 1981, Order on Confidentiality and in support of its motion for a stay of this Order pending disposition of this appeal.

STATEMENT OF FACTS

This appeal arises out of the reopened hearing to determine whether Licensee should be permitted to restart Three Mile Island Nuclear Station, Unit No. 1 ("TMI-1"). The hearing was reopened following the discovery that certain operators at TMI-1 had cheated on their operator license examinations.[1/] The discovery of the cheating led to an extensive investigation by the NRC. Many of Licensee's operators voluntarily participated in interviews

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1/ Two operators who admitted cheating are no longer employed by Licensee. These two individuals and one current employee of Licensee are represented separately in this matter.

with the NRC and otherwise cooperated with the investigation. In one case, information was apparently provided by a confidential informant. The raw results of the investigation were compiled in NRC investigative reports setting forth a wide range of rumors, accusations, hearsay and other information concerning suspected or possible cheating at TMI-1. The names of Licensee's operators appeared repeatedly throughout the investigative material.

During the discovery phase of the reopened hearing, the intervenors requested the NRC to produce its investigative reports, as well as the examination answers given by Licensee's operators and seating charts showing where operators sat during examinations. These documents were produced, but the names of individual operators were deleted and replaced by letters, with each operator having his own assigned letter designation. Only the NRC and Licensee have the "key" to the lettering system that allows translation of the letters into individuals' names.

The reopened hearing is being conducted by Special Master Gary L. Milhollin, who was appointed to that capacity by the Licensing Board pursuant to 10 C.F.R. § 2.722. On October 2, 1981, the Special Master ruled that the lettering system should be continued during discovery pending a final decision on whether the operators' names should be held confidential throughout the proceeding. Accordingly, the lettering system was used during

discovery, and with great success. The parties quickly became conversant with the letter designations, and discovery proceeded quickly and efficiently. Depositions of several of the "lettered" individuals were taken, and full examination and cross-examination was conducted successfully using the lettering system. For example, the deposition of "Mr. T" shows the facility with which a useful examination can be conducted under the lettering system. A copy of the uncorrected transcript of Mr. T's deposition is attached hereto as Exhibit "A". Indeed, the Special Master himself concluded in his October 22, 1981, Order that "the [lettering] system is working; discovery is proceeding rapidly." October 22 Order, at 3 (emphasis added).

Despite the success of the lettering system during discovery, the Special Master ruled on October 22, 1981, that there was no legal right to prevent disclosure of the individuals' names during the hearing process. A copy of the Special Master's October 22 Order is attached hereto as Exhibit "B". The ruling further provided that "[d]uring pendency of any appeal, and until further notice, confidentiality shall be maintained by use of the lettering system. . . ." October 22 Order, at 14.

Licensee, the NRC Staff, and the three separately represented individuals all appealed to the Licensing Board from the Special Master's order denying confidentiality. Licensee argued that to reveal the individuals' names in the context of the NRC investigation would subject them to personal embarrassment, humiliation and

perhaps even physical danger; that maintaining confidentiality would not interfere with a full and fair adjudication of the relevant issues in the reopened hearing; and that, in addition, disclosure of the individuals' identities would constitute a violation of the Privacy Act, 5 U.S.C. § 552a. Licensee therefore requested that the individuals' identities remain confidential and requested that the lettering system be continued in use during the hearing. In addition, Licensee requested that any testimony by "lettered" individuals be given under the lettering system and in camera so as to avoid the possibility that a member of the public might recognize a witness who otherwise would be identified only by a letter designation.

On November 6, 1981, the Licensing Board issued a "Memorandum and Order Affirming Special Master's Order on Confidentiality." A copy of the Licensing Board's November 6 Order is attached hereto as Exhibit "C". After a lengthy discussion of the issues, the Licensing Board concluded that "Judge Milhollin is authorized to disclose or not to disclose information concerning the involved persons and Licensee employees depending upon his judgment as to the needs of the hearing and the considerations set forth above." November 6 Order, at 21. The Licensing Board's Order further provides: "So that the jurisdiction of the Appeal Board is preserved, the effectiveness of this order is stayed until the close of business, November 10, 1981." Id. The reopened hearing is scheduled to begin with Licensee's witnesses at 2:00 p.m. on November 10, 1981.

Licensee brings this appeal in order to avoid the serious irreparable injury that would result to its employees if their identities were disclosed to the public during the reopened hearing. Licensee believes that an immediate appeal is proper under the principles outlined in Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 N.R.C. 693, 694-95 & n.5 (1979), and in Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 N.R.C. 469, 172-73 (1981).

ARGUMENT

I. NO GOOD REASON HAS BEEN GIVEN FOR INVASION OF THE OPERATORS' PRIVACY

No one has seriously disputed that public disclosure of the names of individuals who may have cheated on examinations, who gave the NRC information related to cheating, and who are the subject of rumors about cheating, would cause these persons and their families great embarrassment, humiliation, and even potential physical injury in the communities where they live.[2/] Licensee submits that neither the Licensing Board nor anyone else has given a good reason why the operators should be subjected to this public embarrassment.

2/ As to the individuals who admitted cheating, the Licensing Board found it "difficult to believe" that there was any danger of physical harm. The Board conceded, however, that "the damage would be real enough without actual physical danger." November 6 Order, at 13.

At the outset, it is important to note what the Licensing Board did not hold. After an analysis of the Supreme Court's opinion in Department of Air Force v. Rose, 425 U.S. 352 (1976), the Board concluded that public disclosure would not be warranted solely for the purpose of informing the public or because of the NRC's preference for public proceedings. November 6 Order, at 12-15. To the contrary, the Licensing Board concluded that public disclosure would be based only "upon the needs of the hearing in the interest of a full and accurate record." November 6 Order, at 15-16. However, the Licensing Board failed to give any sound reason why the confidentiality procedures theretofore in use would interfere significantly with the hearing or result in an incomplete or inaccurate record.

For example, the Licensing Board did not conclude that the lettering system was unworkable. Rather, the Board stated that the system "may or may not be effective in testimony." November 6 Order, at 20. As shown by the depositions already taken, the lettering system is effective and can be used to produce intelligible testimony and a record that is easily reviewable by the Licensing Board and the Commission.[3/] The lettering system will

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3/ The Board also stated that it did "not see depositions, as suggested by the Licensee, as a practical substitute." Id. The Board clearly misunderstood the position advanced by Licensee, which was that the use of the letter designation system had worked effectively not only in earlier parts of the restart proceeding, but recently, in the conduct of depositions of the unnamed individuals. Licensee in no way intended to suggest that depositions should be substituted for the live testimony of available witnesses, including the "lettered" individuals. It was simply Licensee's observation that privacy could be maintained without introducing unmanageable confusion into the litigation process.

permit all relevant information to be put into the record. It must be kept in mind that this is not a disciplinary proceeding to identify and punish operators who cheated or failed to report cheating by others. The names of the individuals involved is not relevant, as the Licensing Board conceded when it observed:

> It is not the names of the involved individuals that we need. The Board, the Special Master, and the litigating parties, in the public interest, need to know not who they are, but for example, what they were, what did they do, why did they do it, how did they do it, do they think that others did it, what did others know about their conduct, and related inquiries. If this information could be produced without sacrificing their personal privacy, we would so direct that it be protected, and we believe that Judge Milhollin would do the same.

November 6 Order, at 19. It is precisely this kind of information that has been provided through depositions and other discovery under the lettering system, without sacrificing personal privacy. The same information can be provided during the hearing process under the lettering system, again without sacrificing personal privacy. The Licensing Board agreed that privacy should be protected if this information can be obtained. Since the information can be provided under the lettering system, privacy should be protected.

Similarly, the Licensing Board's rationale for rejecting the in camera procedure requested by Licensee is unpersuasive at best.[4/] The Board stated that it was unable to find a secure "hearing

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4/ Only limited portions of the hearing--when "lettered" individuals were called to testify--would be held in camera under Licensee's proposal. All of the persons on Licensee's own slate of witnesses will testify in public.

place"; that in camera proceedings are "awkward" and might not "assure confidentiality"; and that proceeding in camera might "whet the appetites of the idly curious." November 6 Order, at 19-20. With respect to the first argument, Licensee would have thought that reasonable security can be provided simply by clearing the hearing room of spectators and shutting the door. On the other points, Licensee concedes that the in camera procedure may not provide perfect protection. But surely it is preferable to offer some protection rather than to guarantee publicity by opening the hearing to the public at large. In addition, the Licensing Board identified no substantial practical problems with in camera hearings. The Licensing Board offered nothing but speculation as to why such hearings might not work.[5/] Given the acknowledged hardship that disclosure would cause, Licensee submits that something more than speculation must be shown before rejecting reasonable, limited use of in camera hearings.

Finally, Licensee's employees can take no real comfort from the statement at the end of the Licensing Board's opinion that the Special Master "is authorized to disclose or not to disclose information concerning the involved persons and Licensee employees." November 6 Order, at 21. Although this statement gives the Special Master authority to grant confidentiality on a case-by-case basis,

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5/ The Special Master recognized that "a reasonable accommodation may be possible through in camera proceedings. . . ." October 22 Order, at 13.

it must be read in the context of the Special Master's own conclusion that there is no right to confidentiality in the reopened hearing. Thus there is no assurance that confidentiality will be preserved.

In summary, the Licensing Board clearly recognized the vital privacy interests in jeopardy here. The Board went on to find that the policy favoring public hearings does not outweigh these interests. Nevertheless, without good cause, the Board declined to endorse the system effectively utilized to date to maintain confidentiality, or the proposed limited use of in camera sessions during the evidentiary hearings. Licensee submits that the Board's conclusions are in error and should be reversed by the Appeal Board.

II. THE LICENSING BOARD'S ORDER IS CONTRARY TO THE PRIVACY ACT

Licensee argued before the Licensing Board that it would be a violation of the Privacy Act, 5 U.S.C. § 552a, for the NRC to disclose, or to order disclosure of, the identities of the individuals who so far have been identified only by letter designation. Licensee adheres to the position it took before the Licensing Board.

The Privacy Act expressly prohibits any agency from disclosing any "record" in a "system of records" to any person or another

agency without the prior written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b). It is beyond dispute that the NRC is an "agency" within the meaning of the Privacy Act. In addition, the investigative reports, examination results and other documents at issue here constitute "records," which are broadly defined in the Act to include "any item, collection, or grouping of information about an individual." 5 U.S.C. § 552a(a)(4). Moreover, the fact that the NRC has already disclosed expurgated versions of the documents with the names of the individuals deleted does not render the Privacy Act inapplicable, since those names in and of themselves would constitute records under the Act.[6/]

The record also must be contained in a "system of records," which is defined in the Privacy Act as follows:

> (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. . .

5 U.S.C. § 552a(a)(5). Since the pertinent documents relate to NRC-licensed reactor operators, it appears that the records would be retrievable by the name of the individual or by some other identifying particular, such as his license number or the facility for which he is licensed. In this connection, the NRC has published in the Federal Register a description of its sytems of

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6/ A "record" can be part of another "record," and it can be "as little as one descriptive item about an individual" so long as the item contains a name or other "individual identifier." OMB Circular No. A-108, 40 Fed. Reg. 28,948, 28,952 (July 9, 1975).

records, as required by the Privacy Act. 46 Fed. Reg. 46,707 (Sept. 21, 1981). This listing contains at least two records systems in which the documents at issue are likely to be found--NRC-16 (Facility Operator Licensees Record Files) and NRC-18 (Office of Inspector and Auditor Index File).

A record in a system of records may not be disclosed without the consent of the affected individuals unless the disclosure falls within one of the eleven exceptions listed in 5 U.S.C. § 552a(b). Those exceptions allow a disclosure that would be--

> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (2) required under section 552 of this title;
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (3)(4)(D) of this section;
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> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
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> (6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
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> (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
>
> (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;
>
> (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or
>
> (11) pursuant to the order of a court of competent jurisdiction.

In its brief to the Licensing Board, Licensee stated that "[n]one of those exceptions appears applicable here, and no one has suggested that they apply." Licensee's Brief In Support Of Its Appeal From Special Master's Decision On Confidentiality, dated November 4, 1981, at 11. The Licensing Board criticized Licensee's counsel for making this statement without discussing Exception No. 2--disclosure that is "required under section 552 of this title," which is the Freedom of Information Act ("FOIA"). November 6 Order, at 7-8. The Licensing Board relied on this exception in rejecting

Licensee's argument that the Privacy Act prohibits disclosure of the information at issue here.[7/]

In response to the Licensing Board's criticism, we can only say that we thought a detailed discussion of Exception No. 2 to be unnecessary. The NRC Staff, which usually decides such matters under the FOIA, had taken the position that the information at issue was exempt from mandatory disclosure under FOIA Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C), and disclosure of the information therefore would not be "required" by the FOIA within the meaning of 5 U.S.C. § 552a(b)(2). See NRC Staff Appeal and Brief Regarding Issue of Confidentiality, dated November 3, 1981. Intervenor Three Mile Island Alert ("TMIA") stated that it was willing to assume that the information fell within Exemptions 6 and 7(C), but argued that it should nevertheless be disclosed under 10 C.F.R. § 2.744, which provides for discretionary disclosure of information exempt from mandatory disclosure under the FOIA. See TMIA's Comments to Board Order Dated September 14, 1981 Concerning Confidentiality dated October 1, 1981.[8/] Most important,

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7/ The Licensing Board also noted in passing, Exception No. 7, which allow disclosure to another agency for civil or criminal law enforcement purposes. November 6 Order, at 11. Suffice it to say that no such disclosure is contemplated here. Rather, it is disclosure to the public that is threatened by the Licensing Board's Order and it is such public disclosure that prompted this appeal.

8/ The Aamodts, who are also intervenors below, did not state any position in detail on this issue. See Memorandum Opposing the Withholding of the Names of Operators Known to Have Cheated on Examinations, dated October 2, 1981. The Commonwealth of Pennsylvania also took no position on the legal issues, but argued that Licensee's lettering system should be accepted. See Commonwealth of Pennsylvania's Response to Assertions of Confidentiality, dated October 2, 1981.

the Special Master concluded with respect to Exemption 7(C) that "it is clear that the exemption applies." October 22 Order, at 7. The Special Master held, however, that the information, although exempt, should be disclosed pursuant to 10 C.F.R. § 2.744 because it is necessary to a proper decision in the proceeding.[9/] Id. at 8, 10.

Thus, until the Licensing Board's Order on November 6, 1981, it seemed to be agreed that the information was not subject to mandatory disclosure under the FOIA and that the real issue was whether the information should be disclosed as a matter of discretion under 10 C.F.R. § 2.744. By this analysis, disclosure would not be "required" by the FOIA, and Exception No. 2 to the Privacy Act would have no application.

The Licensing Board has apparently concluded, however, that public disclosure is "required" by FOIA and that the Privacy Act therefore offers no protection in the circumstances of this case. Licensee respectfully disagrees with the Licensing Board's analysis of the legal issues raised by the Privacy Act. In rejecting Licensee's Privacy Act argument, the Licensing Board stated:

> We were able to identify quickly and easily by a reading of the annotations under 5 U.S.C.A. 552a specific law contrary to the position of Licensee and the involved persons.

9/ Since the Supreme Court's decision in Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979), it has been clear that an agency may disclose records that are exempt from mandatory disclosure under the FOIA, so long as the disclosure is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

In Painter v. Federal Bureau of Investigation, 615 F.2d 689, 690 n.2 (5th Cir. 1980), the Fifth Circuit noted that:

> 5 U.S.C. § 552a(b)(2) . . . provides that although many records about an individual cannot be disclosed under the Privacy Act without the individual's consent, if disclosure is called for under the FOIA, no consent need be obtained. See Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28948, 28954 (July 9, 1975). This provision, like the legislative history, indicates that the Privacy Act is not to be used to block disclosures required by the more general Freedom of Information Statute.

November 6 Order, at 9. The above quotation from the Painter case is not part of the Fifth Circuit's holding, but rather is a quotation from the District Court's opinion, which the Fifth Circuit reversed on appeal. The actual holding of the Painter case is that the Privacy Act is one of the statutes encompassed by FOIA Exemption 3.[10/] By the logic of the Painter case, if the Privacy Act applies to a record, then it falls within Exemption 3 and its disclosure is not required by the FOIA. In this connection, the Fifth Circuit found support for its conclusion in Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). See 615 F.2d

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10/ This exemption provides that the FOIA does not apply to matters that are:

> specifically exempted from disclosure by statute (other than § 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld. . . .

5 U.S.C. § 552(b)(3).

at 691 n.3. Thus, if the Painter opinion is accepted,[11] the Licensing Board's conclusion is clearly wrong. Under Painter, once it is determined that the Privacy Act applies, FOIA Exemption 3 comes into play, and disclosure of the information is not required by the FOIA.

Furthermore, the Licensing Board's decision cannot be sustained even if FOIA Exemption 3 is disregarded. The Board found both FOIA Exemptions 6 and 7(C) inapplicable because the invasion of privacy inherent in disclosure is "warranted" in order to ensure a fair adjudication and a full and accurate record.[12] Accordingly, the Licensing Board apparently concluded that the information is not exempt from disclosure under the FOIA; that disclosure is "required" by the FOIA; and that the Privacy Act therefore is inapplicable under 5 U.S.C. § 552a(b)(2). This rationale cannot withstand analysis. If the FOIA truly "required" disclosure within the meaning of the Privacy Act, then the Licensing Board could not have held, as it did, that the Special Master "is authorized to disclose or not to disclose information concerning the involved persons and Licensee employees. . . ." November 6 Order, at 21. In addition, the conclusion that invasion of privacy is warranted in order to ensure a complete record is undercut by the fact that, as discussed

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11/ The rationale of the Painter case has been criticized. See J. O'Reilly, Federal Information Disclosure § 20.13, at 20-30 to -31 (1980).

12/ Exemption 6 deals with personnel, medical and similar files disclosure of which would constitute "a clearly unwarranted invas. of personl privacy." Exemption 7(C) deals with investigatory records compiled for law enforcement purposes, disclosure of which would constitute "an unwarranted invasion of personal privacy."

above, no one has shown that the hearing process will be significantly compromised by the use of the lettering system and limited in camera sessions. In short, the invasion of privacy is unwarranted here; disclosure of individual identities is not "required" by the FOIA; and the Privacy Act prohibits any such disclosure.

CONCLUSION

For all the reasons stated above, Licensee respectfully submits that the Licensing Board's November 6 Order should be reversed; that the Special Master and the Licensing Board should be directed during the hearing to use the lettering system and in camera procedure proposed by Licensee; and that the Licensing Board's November 6 Order should be stayed pending disposition of this appeal.

DATED: November 10, 1981.

Respectfully submitted,

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EXHIBIT "A"

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

DEPOSITION OF	:	MR. T
Before	:	Karen Kauffmann
Beginning	:	Saturday, October 24, 1981, 4:15 p.m. Federal Building Third and Walnut Street, Room 700 Harrisburg, Pennsylvania

PARTIES PRESENT:

JOHN CLEWETT, Esquire
MARJORIE M. AAMODT
NORMAN AAMODT
CHARLES HOLZINGER

For - The Aamodts

LOUISE BRADFORD
JOANNE DOROSHOW

For - Three Mile Island Alert

RICHARD LLOYD, Esquire

For - Licensee

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MR. T. called as a witness, being duly sworn by Ali Smith, Notary Public, testified as follows:

DIRECT EXAMINATION

BY MR. CLEWETT:

Q T, did you take the April 1991 NRC examination?

A Yes, I took an exam at that time.

Q Who, if anyone, did you study with before you took that examination, do you recall?

A I studied with Mr. U one night.

Q He was the only person you studied with?

A Yes.

Q Did you feel well prepared for that test by the time you took it?

A I felt as prepared as for any other test.

Q Was your situation, in essentially not studying with anyone else, was that at all unique? Did a lot of people approach it as a group effort in studying, to your knowledge?

A Some people did. It depended what shift you worked on.

Q And you didn't study with your shift?

A No.

Q Do you know if any of those individuals studied with each other?

A No, I don't.

Q Who, if you recall--who was on your shift in April by letter designations?

A No, I don't really know for sure.

Q Fair enough. In your understanding, was the April examination administered by the NRC a requirement of the NRC or a

requirement of the company?

A My understanding, it was an agreement between the company and the NRC.

Q So it is a joint requirement?

A Yeah, I guess you could say that.

Q Do you know Mr. NNN socially or in a professional context or both or neither?

A Yes, I know him.

Q Do you know him socially as well as professionally?

A I don't know him professionally. I do know him socially.

Q Do you know Mr. P socially?

A Yes. Wait a minute, I'm looking at the wrong one. Yes.

Q Does your wife know their wives?

A Yes.

Q Are you aware of rumors to the effect that your wife indicated to the wives of Mr. NNN and Mr. P that cheating had been going on during the April NRC examination?

A I heard that it was said. I don't know how true it is.

Q Have you spoken with your wife about it?

A As to what extent?

Q Well, to find out whether, in fact, she said something about that and what she said?

A I told her if she is saying anything, I would like her to keep her mouth shut.

Q Do you feel it inappropriate for people to talk about cheating if, in fact, it's happening?

A No, I feel it inappropriate for people to talk about

cheating who don't know.

Q Would your wife be in a position to know if cheating were occurring?

A I don't see how.

Q Did you and your wife--did you ever tell your wife anything about cheating happening at the plant?

A Not that I recall.

Q You may have but you don't recall?

A I don't recall ever telling her specifically anything. I don't talk to her about my work at the plant.

Q Do you recall talking to anyone else about cheating during the April examination?

(Whereupon, the referred-to question was read back by the reporter.)

THE WITNESS: No. If he means that to include the NRC and Mr. Arnold, then the answer would be, yes.

BY MR. CLEWETT:

Q When did you talk with the NRC and Mr. Arnold about such matters?

A I don't know. The NRC came to my house. When that was I don't know.

Q Would that have been late this summer, roughly, or would it have been early this past summer?

A I don't know.

Q You don't know. Was the visit by the NRC individuals the first time you heard any rumor about cheating at the April test?

A (Pause.) No.

Q What times before that had you heard rumors about cheating?

A I don't know, specifically.

Q What rumors had you heard before the investigators from the NRC appeared at your house?

A I don't know, specifically.

Q Did you ever hear any rumors before that to the effect that Mr. U had brought any crib sheets or other materials into the examination with him? Had you heard a rumor to that effect before that?

A No.

Q Had you heard any rumors to the effect that he had written anything on his hand?

A No.

Q Had you heard anything to the effect that he had made a call to Mr. KK, who was in the control room at that time, to ask him any question that might have been on the examination?

A Not until I was questioned by the NRC about it.

Q But you had heard some rumors about cheating before the NRC arrived? You just don't recall what they are?

A Yes.

Q Were those rumors ones that were discussed by other operators at the plant?

A Other licensed people.

Q Did those rumors relate to other RUs or SROs or do you recall?

A I don't recall.

Q How many times would you say that you heard rumors to the effect that there was cheating during the April exam before the NRC came to your house?

A I don't know.

Q If, in fact, your wife had mentioned something to these other women about the possibility of cheating in the April exam, do you have any idea where she would have gotten that information?

A No.

BY MRS. AAMODT:

Q Have you ever asked her where she got that information?

A Yes.

Q Did she tell you?

A She didn't know herself.

Q Did you communicate these concerns of your wife to anyone at the plant?

A No, because I wasn't aware of it.

Q After she told you?

A She didn't tell me until after Mr. Arnold told me. That was the first I was aware of it.

Q How much before that had she first been aware of rumors of cheating at the plant?

A I don't know.

Q You never asked her? You didn't ask her where she got her information?

A Yes, I did. I told you she didn't know.

Q And she still repeated these rumors to other wives?

A I don't know if she did or not.

Q Were you concerned at all about these rumors?

A I was upset that she was spreading them.

Q Were you upset that they might have some basis in truth?

A I don't know.

Q Did you feel it was your responsibility to tell someone in the plant about them so they could either be investigated or set aside?

A As I stated before, people in the plant knew about it before I did.

Q Well, how does your wife explain that she didn't tell you about it?

MR. LLOYD: I would object to that question. Perhaps you could rephrase it.

BY MRS. AAMODT:

Q Did you ask your wife for an explanation as to why she didn't tell you about it?

A I don't ask her what she does.

BY MR. CLEWETT:

Q Did you know Mr. O and Mr. W, the individuals who were recently terminated?

A Yes.

Q Do you have any opinion as to whether they were good operators or not?

A I don't know Mr. W well enough to opinionate. Mr. O, in my opinion, was a good operator.

Q Did it seem unreasonable to you that they were terminated because of this cheating incident, in your opinion?

A I was upset with the decision.

Q Was that opinion shared by most of the operators?

A I can't speak for them. In my opinion it was--I don't know.

Q Would it also be fair to say that it came as a surprise that these people were terminated?

A For me personally, yes.

Q So would it be fair to say that before this incident came out in the press, the operators would not have had an understanding that behavior like this would have led to termination? Would it be fair to say that?

A I don't know.

Q Would you have thought that if you had done something like they apparently did, that you would have been terminated for it?

A I would never do anything like that.

Q Did you have to sign a pledge on the test that you just took just a couple days ago?

A I signed something, I don't know what.

Q Did you read it before you signed it?

A Yes.

Q But you don't recall what it said?

A No.

Q Do you feel that the issue of the cheating on the April NRC examination has been adequately resolved?

A As far as what?

Q Well in terms of, for example, tracking down the cause

of why O and W felt compelled to cheat.

A I don't know.

Q Do you have an opinion as to what would have led them to cheat, whether it would have been their own lack of ability or whether it would have been bad training or any sort of atmosphere of pressure where they felt they had to pass the test under any circumstances or what?

A I don't know. That would be their personal views, not mine.

Q Are you acquainted with Mr. X?

A I knew him.

Q Do you know why he recently left the employment of Metropolitan Edison?

A No, I don't know him that well.

Q Do you have any idea why Mr. SS recently left Met Ed?

A No, I don't know him that well either.

Q Do you know Mr. NN?

A I knew his name.

Q Do you have any idea why he left Met Ed?

A I don't really know him well.

Q Do you know Mr. HH?

A Yes.

Q Do you have any idea why he left Met Ed?

A No.

Q How do you feel about the fact that there continues to be question about the training and the testing that has gone on at Three Mile Island? Do you feel resentment about that or what?

A Would you repeat the question?

Q I'm asking how you feel about the fact that there continues to be public focus on the training and the testing that's going on at Metropolitan Edison. Do you feel resentment about that, or do you feel that it is appropriate for that to be examined?

A I don't know. It is not my decision. I have nothing to do with it.

MR. CLEWETT: I don't think we have any more questions. Thank you for coming in.

(Whereupon, the deposition was concluded at 4:30 o'clock p.m.)

I, MR. T, the deponent in the aforementioned case, do hereby affix my signature on this document thereby indicating that I have read the transcript of the proceedings in this matter and do hereby agree to the contents as herein contained.

_____ _____

Date Mr. T

_____

Witness

I, Karen Kauffmann, do hereby certify that the witness, MR. T, was first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the above deposition was recorded in Stenotype by me and was reduced to typewriting by me or under my supervision.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel or financially interested directly or indirectly in this action.

I further certify that the said deposition constitutes a true record of the testimony given by said witness.

Karen Kauffmann

Karen Kauffmann, Court Reporter

EXHIBIT "B"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge Gary L. Milhollin
as Special Master

In the Matter of

METROPOLITAN EDISON COMPANY

(Three Mile Island Nuclear Station,
Unit 1)

Docket No. 50-289-SP

(Restart)
(Reopened Proceeding)

October 22, 1981

MEMORANDUM AND ORDER ON CONFIDENTIALITY

I. Background

On July 31, 1981, the Office of Inspector and Auditor of the United States Nuclear Regulatory Commission reported that candidates for the positions of reactor operator and senior reactor operator at the nuclear power reactor at Three Mile Island, Unit 1, cheated on their NRC licensing examinations. It also reported that the NRC had failed to proctor the examination properly and had failed to detect the cheating when grading the examination papers. On August 1, 1981, the NRC's Office of Inspection and Enforcement filed a similar report, in which two candidates admitted in signed statements facts which constitute an admission of cheating. As a result of these investigations, the Atomic Safety and Licensing Board on September 14, 1981, ordered that the above-entitled proceeding be reopened to evaluate the effect this cheating might have on the conclusions the Board reached

in its Partial Initial Decision of August 27, 1981. The Board also appointed me Special Master under 10 CFR § 2.722 (1981) for the purpose of conducting the reopened proceeding.

The purpose of this Memorandum and Order is to decide to what extent individuals who may have cheated on examinations, or who have been or may in the future be accused of cheating, are entitled to have their identities held confidential. The parties to the reopened proceeding have taken the following positions on this question: the NRC Staff urges that confidentiality is required by the NRC's Rules of Practice and by the regulations which implement the Freedom of Information Act; the Intervenors, Mr. and Mrs. Aamodt and Three Mile Island Alert (TMIA), urge that confidentiality is inconsistent with the need to examine and to refer to those who cheated in order to discover whether management condoned or encouraged cheating and to discover how much cheating there was; attorneys for the individuals who were involved in cheating oppose public disclosure on the ground that intense feeling in the community may result in threats or other harm to the individuals and their families; the Licensee, GPU Nuclear Corporation, takes the position that it has no legal right to refuse to identify these individuals by name through the normal process of discovery, but suggests a lettering system which, if adopted by the Special Master through exercise of his discretion, could preserve anonymity at least until individuals are called to testify; the Commonwealth of

Pennsylvania takes no position on the legality of disclosure, but recommends discretionary use of the Licensee's lettering system. The parties were given an opportunity to make these arguments orally and in writing at a conference among the parties held in Harrisburg, Pennsylvania on October 2, 1981. At that time the Special Master ruled from the bench that the Licensee's lettering system should be used to facilitate discovery until such time as a final ruling on confidentiality could be made. (Tr. 23,228.)

II. The timing of this decision

As stated above, the parties are now using the lettering system proposed by the Licensee. That system consists of replacing, by letters, the names of individual candidates in investigatory reports, examination papers, and seating diagrams. The system is working; discovery is proceeding rapidly. However, when the evidentiary hearing begins on November 10 it will then be necessary to decide whether confidentiality will be maintained. Individual operator candidates will be called to testify; they will be asked about their own conduct, their knowledge of the conduct of other operators, and the conduct of management. That decision will be appealable, first to the Atomic Safety and Licensing Board (Tr. 23,119-120) and then, perhaps, to the Atomic Safety and Licensing Appeal Board, and to the Commission. The time required to decide such an appeal would probably amount to three

or four weeks, at a minimum. Unfortunately, the schedule for this reopened proceeding cannot accommodate such a delay.

The balance of the Licensing Board's initial decision will be issued in late November (unpublished Licensing Board Order of September 3, 1981). If that decision is favorable to restart, the Commission will decide by early January whether to make the decision immediately effective. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-81-19, 14 NRC ____, slip op. at 3 (August 20, 1981). At that point, however, the Commission will not have a complete record before it because the Licensing Board rendered its first Partial Initial Decision (P.I.D.) subject to the outcome of this special proceeding. P.I.D., August 27, 1981 at 27. Therefore, in order to provide the Commission with a timely opportunity to rule on a complete record, this proceeding must go forward (and will go forward) on an extraordinarily rapid schedule. As things now stand the evidentiary hearing in this proceeding should be completed in November of 1981. Under this schedule the Special Master could, if necessary, make a preliminary report in December or early January regarding the content of the record. A delay to decide appeals on confidentiality would preclude such a report. Under the present schedule the Special Master's final report is due in early January, and the Licensing Board's decision on the final report on the first of February, 1982.

For the reasons stated above, a ruling on confidentiality will now be made so that an appeal can be decided before the evidentiary hearing begins.

III. Confidentiality as a matter of right

A. With respect to the Licensee.

The Licensee now stands ready to disclose to any party in this case the identity of any present or former employee whose name may be linked to cheating on operator examinations. The Licensee points out that neither the Privacy Act nor the Freedom of Information Act (both of which are discussed below) applies to the Licensee's records. Thus, the Licensee does not assert any legal basis for refusing a properly-drawn discovery request which seeks these identities. The Licensee also states that, in its opinion, there are no solid grounds upon which individual employees would be legally entitled to prevent disclosure by the Licensee. From this it follows that the only way in which the Licensee could refuse to supply the identities would be if the Licensee were ordered not to supply them by the Special Master. As stated above, the Licensee recommends that the Special Master make such an order through the use of his discretion. The Special Master's decision on discretion is set out below.

With respect to the law applicable to the Licensee, there is little doubt about the soundness of the Licensee's position. Both the Privacy Act, 5 U.S.C. § 552a (1974) and the Freedom of Information Act, 5 U.S.C. § 552 (1977), apply to government agencies only, not to the Licensee. Nor does either of these Acts give a private individual the right to prevent disclosure. Chrysler Corporation v. Brown, 441 U.S. 281, 60 L.Ed. 2d 208, 99 S.Ct. 1705 (1979) (no private right of action where a government agency elects to disclose). The result is that the litigants to this case are fully entitled under the law to obtain the information they seek. In the absence of the Special Master's discretion, mentioned above, there is no barrier to discovery from the Licensee.

B. With respect to the NRC Staff.

The Staff urges that the identities of the individuals accused of cheating are not discoverable from the Staff because they fall within two exceptions to 10 CFR § 2.790, the rule which makes final NRC documents generally available to the public. These exceptions are contained in §§ 2.790(a)(6) and 2.790(a)(7). The first, in § 2.790(a)(6), exempts "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This language is the same as that in 10 CFR § 9.5(a)(b), which implements the Freedom of Information Act

(5 U.S.C. § 552 (1977)). The second, in § 2.790(a)(7), exempts "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would... constitute an unwarranted invasion of personal privacy...". There is, again, a parallel provision in 10 CFR § 9.5(a)(7), implementing the Freedom of Information Act. With respect to § 2.790(a)(6), there is considerable doubt whether that exemption is intended to shield the type of information sought here. The concern of the exemption, as the Staff points out, is with the "personal quality of the information in the file," Wine Hobby U.S.A. v. I.R.S., 502 F.2d 133, 135 (3d Cir. 1974), and with "intimate details of a highly personal nature," Getman v. N.L.R.B., 450 F.2d 670, 675 (D.C. Cir. 1971). The qualifications of an individual reactor operator for his job are rather different from that. They are not "intimate details of a personal nature," they are objective facts necessary to resolve an issue of central relevance to the restart proceeding. Those qualifications include, of course, the fact of whether the operator cheated on a licensing examination.

With respect to § 2.790(a)(7), however, which deals with investigatory reports, it is clear that the exemption applies. The names of the operators involved in cheating first appear in NRC investigative reports, so the policy of protecting the privacy interests of individuals named in these reports is brought squarely into play. In order to decide whether to implement that policy in a particular case,

a balancing test is required. 10 CFR § 2.744 provides that the presiding officer may order production of an NRC record exempt under § 2.790 if its "disclosure is necessary to a proper decision in the proceeding and the document, or the information therein is not reasonably obtainable from another source...". This balancing test in § 2.744, which weighs the need for a proper decision against the interest in privacy, is similar to that used by the courts in cases under the Freedom of Information Act where this same language is at issue. See Columbia Packing Co., Inc. v. Department of Agriculture, 563 F.2d 495, 498 (1st Cir. 1977); Wine Hobby, supra, at 136; Getman v. N.L.R.B., supra, at 674. However, this balancing test is apparently not required under § 2.744 if the "information... is... reasonably obtainable from another source...". Here, of course, it is "reasonably obtainable" from the Licensee. This would appear to make the above inquiry moot unless the Special Master exercises his discretion so as to block the Licensee's disclosure. As indicated below, this discretion will not be so exercised, at least at this time. The result with respect to the Staff, therefore, is that it is unnecessary to decide which way the balance under § 2.744 should tip with respect to information which is also obtainable from the Licensee.

Such a result might not be reached if it were decided that the protection enjoyed by the Staff's reports should be extended, as a matter of policy, to the Licensee. It could be argued that the policy

underlying the exemption for investigatory reports is principally one of preserving the government's power to investigate effectively. If identities of persons mentioned in raw investigatory data are released, persons could be inhibited from speaking candidly to investigators. This power might well be undermined if the same information contained in the government's reports could be obtained directly from the Licensee through routine discovery. However, the fact that Congress did not choose to make the Freedom of Information Act or its exemptions applicable to private entities weakens such an argument considerably. Further, the NRC Staff in this case has not requested that the exemption be extended to the Licensee. Finally, the language of § 2.744, quoted above, appears to view disclosure of information by the Licensee as clear alternative to disclosure by the NRC Staff. The result is that no basis appears in law for extending any of the concepts peculiar to the Freedom of Information Act to the Licensee. The only basis could lie in the Special Master's discretion as discussed below.

There remains the question of information which may be available only from the Staff's investigatory records. In this case, those records contain the identities of persons who have provided information relative to cheating. These persons will be called as witnesses. They may give testimony which describes acts or words which amount to cheating by others, or which reflects upon management's possible

implication in the cheating. Such testimony is very likely to be contradicted by other testimony. It is obvious that whatever facts emerge from this conflicting testimony will be important to the question of operator competence at TMI-1, and of great interest to the community surrounding the reactor. The policy in favor of public hearings is designed to avoid having testimony such as this received in camera. Absent a far stronger showing in favor of confidentiality than the Staff has made so far, the community's right to have these matters aired publicly means that the balance under 10 CFR § 2.744 must be struck in favor of public disclosure. It follows that there is no legal right on the part of the Staff to hold these identities confidential.

C. With respect to rights asserted by private individuals.

Counsel for three persons who have been involved in cheating incidents entered appearances. They argued that their clients' names should be held confidential. However, they cited no persuasive authority for the proposition that their clients had any individual rights against either the Staff or the Licensee. Instead, they cited evidence that the intense feeling in the community, where all the individuals still reside, may result in harm to the individuals and their families if identities are disclosed. They indicated that

this fact should be taken into account by the Special Master in the exercise of his discretion.

In the recent decision of Chrysler Corporation v. Brown, supra, the Supreme Court of the United States decided that individuals have no private right of action under the Freedom of Information Act to enjoin disclosure of documents by a governmental agency. This decision would be relevant to a decision to disclose by the NRC Staff. However, in this case the Licensee stands ready to disclose, and no authority whatever has been cited for the proposition that private individuals have a right against the Licensee.

IV. Confidentiality as a matter of discretion

Under 10 CFR § 2.718, a presiding officer has all powers necessary to conduct a fair and impartial hearing. Under 10 CFR § 2.722, a Special Master must be assumed to have these same powers with respect to those matters wich the Master has been appointed to hear. From this it follows that a Special Master has the power to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. In this case, it appears that confidentiality would have that effect to the extent that it increases the likelihood of compiling a full and accurate evidentiary record. If such a record were made more likely, for example, because witnesses

accused of wrongdoing would be more cooperative under confidentiality, then it might be proper to exercise discretion to facilitate such cooperation. Also, granting confidentiality might advance the policy underlying the exemption for investigatory reports, as explained above. However, these benefits of confidentiality may be possible only at the cost of placing practical burdens on other parties, and at the cost of subordinating the general policy, contained in 10 CFR § 2.751, of having NRC hearings be public. A weighing of these considerations determines whether discretion should be exercised, and to what extent.

The information sought from the Staff's investigatory reports can be divided into two types. First is the identity of those who cheated. Second is the manner in which they cheated, the extent to which they cheated, their knowledge of cheating by others, their knowledge of management's attitude toward cheating, and their knowledge of the extent to which the integrity of the examination process could have been or was in fact compromised by other devices, such as coaching, or knowledge of questions in advance, which would permit an unqualified candidate to become licensed. It is possible that the second type of information could be explored without going into the first. It is also possible that it could not be. The persons involved in cheating will be called as witnesses. Other persons called as witnesses will be asked about the persons involved in

cheating. Both TMIA and Mr. and Mrs. Aamodt assert that disclosure is necessary. TMIA contends that it would be confusing, and perhaps impossible, to develop a factual record on the cheating without referring to specific individuals by name during questioning of the witnesses. There is also the public interest in open hearings. At this time it is difficult to predict what, if any, arrangements for confidentiality will be feasible. It is, however, clear now that testimony by those involved in cheating, and about those involved in cheating, will be of vital importance to issues in the reopened proceeding, and it is clear that all litigants have the right to participate effectively in exploring this testimony. Any claim of confidentiality which conflicts with this right must give way. Since it is not possible now to say with confidence whether it will eventually be feasible to reconcile confidentiality with litigants' rights and the public interest in open hearings, it is imprudent to exercise discretion to prevent disclosure. This is true even though it still appears that a reasonable accommodation may be possible through in camera proceedings and protective orders.

V. Ruling

It is the ruling of the Special Master that there is no right, on behalf of the individuals involved in cheating incidents, the

Licensee, or the NRC Staff, to prevent the disclosure of the identities of these individuals during the hearng process.

VI. Effectiveness of this ruling

This Order refusing to grant confidentiality is immediately appealable to the Atomic Safety and Licensing Board (Tr. 23,120). A party may appeal this Order within seven (7) days after its service by filing a notice of appeal and a supporting brief. Any other party may file a brief in support of or in opposition to the appeal within seven (7) days after the appeal. During pendency of any appeal, and until further notice, confidentiality shall be maintained by use of the lettering system, referred to above, or by such other order of the Special Master as shall become necessary.

IT IS SO ORDERED.

Gary L. Milhollin
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 22nd day of October, 1981.

EXHIBIT "C"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Linda W. Little

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

November 6, 1981

MEMORANDUM AND ORDER AFFIRMING SPECIAL MASTER'S ORDER ON CONFIDENTIALITY

Three individuals, by their counsel, sought confidential treatment of their identities in relation to the reopened proceeding concerning allegations of cheating on NRC and Licensee-administered examinations. Two of them have acknowledged cheating. The other, perhaps unwittingly, provided information used in cheating.[1/] They were granted standing to seek a confidentiality order from the Special Master by our order of September 28, 1981 and on that date counsel for the "involved persons" filed a memorandum in support of protecting the identities of their clients. They assert the need for anonymity to avoid embarrassment and threats to themselves and their families.

1/ This information has not been produced on an evidentiary record. Our comments reflect only the threshold consideration needed to rule upon the matter.

The NRC Staff had previously taken the position that there was a need for a protective order with respect to the identities of the involved persons[2/] and the Licensee initially stated that confidentiality should be afforded to facilitate the reopened proceeding and for fairness to some employees, although it identified no legal grounds upon which confidentiality must be afforded.[3/] Intervenors TMIA (on October 1) and the Aamodts (on October 2) filed memoranda asserting the need to disclose, to them at least, the identities of the involved persons. The Commonwealth, in its memorandum of October 2, noted its position not opposing the request for confidentiality but reserving the right to reconsider if the confidential information is later needed. The parties argued the confidentiality issue before the Special Master on October 2. Tr. 23,190-222.

We ruled on October 14 that if the Special Master denied the request we would entertain an immediate appeal and perhaps facilitate an immediate review by the Appeal Board if we affirm the Special Master.

On October 22, Judge Gary Milhollin as the Special Master issued his Memorandum and Order on Confidentiality denying the requests. His order sets out the complete background of the reopened proceeding and the particular matter of confidentiality. Counsel for the involved persons filed

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2/ NRC Staff Brief On Need For Protective Order, September 24, 1981.

3/ Licensee Response to Board Order Dated September 14, 1981 in the Matter of Confidentiality, September 25, 1981.

their exceptions, notice of appeal and supporting briefs together with affidavits of two of the involved persons on November 2.

The NRC Staff filed its appeal and supporting brief on November 3. Licensee filed a brief supporting its appeal on November 4. Neither the the Commonwealth nor any intervenor filed an appeal from the Special Master's ruling. In our scheduling order of October 30 we informed the parties that if we are not persuaded by the appellants' briefs, we might rule without waiting for answering briefs. As we said we would, we accept the appeal from the Special Master. The matter must be considered now or never. We have not been persuaded by the appellants and we affirm without delay the Special Master's order.

We approach the issue with the observation that NRC business, particularly its adjudications, is public business, which should be conducted in public. Section 181 of the Atomic Energy Act, 5 U.S.C. 2231, and the Commission's regulation 10 CFR 2.751 provide that our hearings be public unless an affirmative justification for non-disclosure is made. The national policy for disclosure of public business is set out in the Freedom of Information Act (FOIA), 5 U.S.C. Section 552. The Commission has implemented this policy in its regulations, 10 CFR 2.790(a) and in 10 CFR Part 9. To assure that this policy is implemented, the Commission requires its presiding officers to conduct hearings at a time and place which will consider the public's interest. 10 CFR 2.703(b); Part 2, Appendix A, V(b)(5). Emphasizing that this particular proceeding must be wide open to the interested public, the Commission directed this Board to hold its hearings in the vicinity of the facility and to attempt to hold evening and weekend

sessions to "permit the maximum public attendance." Notice and Order of Hearing, 10 NRC 141, 147.[4/] The proponent of an order contrary to this fundamental policy of government has a heavy burden. 10 CFR 2.732.

The broad issue before us is whether the exemptions to the FOIA, 5 U.S.C. Section 552(b)(1) - (9), or the Commission regulations implementing the FOIA, 10 CFR 2.790(a)(1) - (9), require the non-disclosure sought by the involved persons, the NRC Staff, and the Licensee; whether disclosure is prohibited by the Privacy Act, 5 U.S.C. Section 552a; and whether the informer's privilege provided by 10 CFR 21.2, or its equivalent, may apply.

Judge Milhollin organized his discussion on confidentiality in part by considering whether either Licensee (at pp. 5-6), the NRC Staff (at pp. 6-7), or the involved persons (at pp. 10-11) has a right to the non-disclosure of the identities of the involved persons. In considering the standing of each party he found that none has a claim to non-disclosure as a matter of right.

The involved persons mount their appeal from Judge Milhollin's order principally upon factual arguments as to need for the non-disclosure and upon injury, they add no new legal discussion except an argument concerning

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4/ In its September 24, 1981 brief in support of a protective order, at p. 6, the NRC Staff has cited a series of court decisions for the general proposition, inter alia, that the public has a right to be informed. We agree of course. The cases are legion. The point is fundamental in a democracy.

Privacy Act which we address below. They incorporate by reference their memorandum opposing disclosure of September 28, and the Staff's memorandum of September 24. Brief In Support of Exceptions, at 3. Nowhere in the involved persons filings, either directly or by reference is there a discussion of the Special Master's analysis (at pp. 6 and 11) centered on Chrysler Corporation v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed. 2d 208 (1979). Judge Milhollin has correctly relied upon Chrysler v. Brown for the proposition that a private party has no standing to prevent disclosure under the FOIA. Licensee concedes this point. Licensee Appeal Brief, p. 5. Justice Rehnquist stated this clearly for the unanimous Supreme Court:

> But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information. [Emphasis in original]

441 U.S. at 292-93.

We take the involved persons' silence on Chrysler v. Brown as agreement with Judge Milhollin's findings; their silence is at least a default.

Counsel for the involved persons makes the additional argument (Appeal Brief, p. 7) not presented to the Special Master:

> The Privacy Act, 5 U.S.C. § 552a (1976), provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior

> written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b) (1976). That subsection goes on to provide for eleven exceptions to the requirement of non-disclosure quoted above. None of the exceptions applies here. [Emphasis added]

In its November 4 appeal brief, for the first time in this reopened proceeding, the Licensee, on behalf of some employees, very strongly asserts that the Privacy Act requires that their identities be protected. To underscore its strenuous objection to disclosure of information concerning its employees, Licensee warns that employees of the NRC, including the members of this Board, would be subject to civil and criminal penalties for violating the provisions of the Privacy Act to the injury of Licensee's employees. Appeal Brief, pp. 8-12.

As was the case with the counsel for the involved persons, counsel for Licensee represents to the Board: "None of those [eleven Section 552a(b)] exceptions appears applicable here, and no one has suggested that they apply." Id., p. 11.

As did counsel for the involved persons, Licensee argues that the information at issue in the confidentiality debate, presumably including the IE investigation reports, are records in a "system of records" protected by the Privacy Act. E.g., pp. 9-10. We are not convinced. But to dwell on that subissue would be diverting and unnecessary. We assume, arguendo,

that the investigation reports are records in a "system of records" subject to the Privacy Act. The issue should turn on whether any of the Privacy Act exemptions apply.

One exemption clearly applies to this proceeding, Section 552a(b)(2) which provides:

> (b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--
>
> * * * * *
>
> (2) required under section 552 of this title;
>
> * * * * *

Section 552 of Title 5 is, of course, the Freedom of Information Act. Obviously Exemption (2) of the Privacy Act requires that the policies of the FOIA, including FOIA exemptions, prevail over the Privacy Act.

We do not understand why counsel for the involved persons and for the Licensee represented to the Board that the exemptions do not apply (or appear not to apply) without at least an identification of Exemption (2). The standards of practice before the NRC require at least this much disclosure to its judicial officers, but this failure to disclose is not characteristic of the counsel involved. We assume that there are grounds for

counsel's position on the Privacy Act exemptions but we ourselves can identify very little if any substantive grounds.

Licensee relies upon a portion of a footnote in Chrysler v. Brown, supra, 441 U.S. at 293 n.14, for the premise that the Privacy Act absolutely requires non-disclosure unless permission is granted by the person to be protected. The entire discussion, as it relates to the Privacy Act, including the footnote, is:

> Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.[14]

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14. It is informative in this regard to compare the FOIA with the Privacy Act of 1974, 5 USC § 552a [5 USCS § 552a]. In the latter Act, Congress explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission. [Balance of footnote omitted]

As can be seen, the discussion in the body of the court's opinion relates to the need for balancing under the FOIA. The cited footnote discusses not at all the eleven exemptions to the Privacy Act and cannot be cited to us as a repeal of those exemptions.

We were able to identify quickly and easily by a reading of the annotations under 5 U.S.C.A. 552a specific law contrary to the position of Licensee and the involved persons.

In Painter v. Federal Bureau of Investigation, 615 F.2d 689, 690 n.2 (5th Cir. 1980), the Fifth Circuit noted that:

> 5 U.S.C. § 552a(b)(2) . . . provides that although many records about an individual cannot be disclosed under the Privacy Act without the individual's consent, if disclosure is called for under the FOIA, no consent need be obtained. See Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28948, 28954 (July 9, 1975). This provision, like the legislative history, indicates that the Privacy Act is not to be used to block disclosures required by the more general Freedom of Information Statute.

HEW records disclosing the amounts of reimbursements paid to medicare providers were withheld from a physician under the Privacy Act where Exemption (6) of the FOIA was found applicable. Florida Medical Association v. Department of Health, Education and Welfare, 479 F. Supp. 1291 (M.D. Fla. 1979). The district court held, however, that the Privacy Act itself would not have prevented disclosure if no FOIA exemption had

applied. The court concluded that

> . . . since the Privacy Act expressly defers to the mandatory disclosure provisions of the FOIA, 5 U.S.C. § 552a(b)(2), information which is not exempt under Exemption (6) from disclosure would receive no Privacy Act protection.

Id. at 1306. The court ruled that the test to be used in determining whether disclosure should be allowed was the balancing test of Exemption 6 of the FOIA and that the Privacy Act itself added no new considerations to this test.

> The Privacy Act does not affect the initial, second-step balancing analysis used in determining the applicability of Exemption 6 of the FOIA to particular information in question. If the tilt in favor of disclosure is tipped contrariwise by the interests of personal privacy, the shift in the scales should occur independently of, and without any impact from, the Privacy Act.

Id. at 1305.

Counsel for the involved individuals aggravate their failure to identify and discuss Exemption (2) to the Privacy Act by asserting that there are no exceptions or exemptions whatever to the NRC's regulatory version of the Privacy Act, 10 CFR 9.80. Brief at p. 8. The regulation, at Section 9.80(a)(2), repeats almost identically the language of the Privacy Act Exemption (2), i.e., the Commission shall not disclose ". . . unless disclosure of the record is: . . .; (2) Required under 5 U.S.C. 552."

Another exemption to the Privacy Act is worthy of note. Exemption (7) permits disclosure (upon request) to another agency for a civil or criminal law enforcement activity. It would be an anomalous circumstance if the Privacy Act were to permit this agency to supply to another agency a record for that agency's civil or criminal law enforcement, yet bar this agency from using those very records, compiled for law enforcement purposes, in its own enforcement proceedings.

We have at this point established that there is no private right to protection under the FOIA inuring to the involved individuals, to the Licensee, or to the employees represented by the Licensee. The Privacy Act does not automatically bar disclosure of the disputed information; rather the determination must be made as to whether the FOIA and its exemptions require, permit or forbid disclosure. As to the FOIA, the non-disclosure claim of the involved persons and Licensee's employees will, to a large degree, stand or fall upon the NRC Staff's right to non-disclosure under the FOIA.[5/]

As we have noted, the underlying principles of the FOIA, and the exemptions to it, are set out in the statute itself and are reflected in the Commission's regulation, 10 CFR Section 2.790, where they form a portion of our rules of practice in adjudicative proceedings. They are also reflected in 10 CFR Sections 9.4 and 9.5 where the exemptions are restated and amplified for general NRC purposes. Unless there is a relevant

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5/ But see our following general discussion on the limits of permissible disclosure.

distinction, we shall, for efficiency, discuss the exemption by reference only to the statute, 5 U.S.C. 552(b).

The NRC Staff asserts its right to non-disclosure, both in its initial memorandum of September 23, and in its appeal brief of November 3, as being founded upon Exemption (6) and a portion of Exemption (7)(C) to the FOIA:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy, ...

It is noteworthy that the Staff depends solely upon the "unwarranted invasion of personal privacy" aspects of the exemptions although other provisions of Exemption (7) would seem to invite consideration of protecting the NRC's investigating abilities. The Staff does, however, mention in passing (Appeal Brief, pp. 21-22) its own interest in non-disclosure as compared to the consideration of compassion inuring to the involved persons. We discuss this problem and the issue of the informer's privilege later.

For now, however, we address the Staff's argument that, to avoid embarrassment to the involved persons and their families and to prevent damage to their reputations, we must, in a balancing of needs, protect their identities. Staff Appeal Brief, p. 9. The two involved persons who

have admitted to cheating state in affidavits filed with their appeal brief that disclosure of their identities would cause embarrassment to themselves and their families and would be detrimental to their careers. It is difficult to believe, however, that, as one of them states, disclosure would cause any danger to the families. In any event, the damage would be real enough without actual physical danger, and we accept their statements as demonstrating that the issue is important to all concerned.

The Supreme Court decision in Department of Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed. 2d 11 (1976), has been cited by the Staff in support of its Exemption (6) argument. The case involved a demand under the FOIA by law review editors for records concerning Air Force Academy disciplinary records, including, as in our consideration, information concerning possible cheating by cadets. The Court held that the summaries containing identities of the cadets were files similar to personnel files and were protected under Exemption (6) (Id. at 380); that portions of the files, with the names excised, must be released even though the release could still expose the identities of the accused cadets (Id. at 381); and that there must be a balancing of the privacy rights of the accused candidates against the policy in favor of disclosing otherwise public information (Id., e.g., at 373-375).

Air Force v. Rose provides important guidance. Even though (under an analysis of FOIA Exemption (2)[6/]) the Court recognized the strong public ". . . stake in the operation of the [Academy Honor] Codes as they affect the training of future Air Force officers and their military careers . . . ." (id. at 368), to protect them from embarrassment, the Court would not permit the direct release of the names of the accused cadets. From this we learn and rule that, in our proceeding, even though the involved persons who have admitted cheating may be the original source of their own potential embarrassment, they still may be protected under Exemption (6) if release of their identities is a "clearly unwarranted invasion of personal privacy".

Even though the persons who cheated on the NRC examinations were engaged in a very public undertaking, their identities in connection with the cheating, under the rationale of Air Force v. Rose, are nevertheless a matter of "personal privacy".

We learn also that, even though release of Air Force case summaries with the names redacted could still create the risk of identification, such a disclosure would not constitute a "clearly unwarranted" invasion of their personal privacy. Id. at 381-82. Air Force v. Rose teaches also that the court would risk the indirect identification of the involved cadets for no other reason than that law review editors wanted the information. Finally we learn from Air Force v. Rose that the public's right to be informed concerning government activities through the inquiries of the law review

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6/ Exemption (2): "related solely to the internal personnel files and practices of an agency."

editors was not sufficient to require the disclosure of the identities of the cadets. This holding suggests that the Board must require something more than the policy of public disclosure under the FOIA to require disclosure of the identities of the involved persons and Licensee's employees. 7/

We believe, however, that there is a greater interest in public disclosure, for the sake of public disclosure, in this proceeding than there was in Air Force v. Rose. The members of the public residing near TMI-1 have a greater interest in the cheating episodes and their ramifications than did the public, through the law review editors, in the identities of the accused cadets. This concept is very hard to quantify; we see it as largely subjective. In addition, we believe that the potential harm to the youthful cadets involved in the Air Force incident is greater than the potential harm to the involved individuals here. On balance, however, we do not believe that the rationale of the Supreme Court in Air Force v. Rose would permit us to reveal the identities of the involved persons solely for the purpose of informing the public. In any event the consideration probably will not turn on that issue. Disclosure and non-disclosure will be afforded in this proceeding based upon the needs

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7/ But see, e.g., Columbia Packing Company, Inc. v. United States Department of Agriculture, 563 F.2d 485, 497 (1st Cir. 1977), where the public interest in disclosure of personnel records was held sufficient to counterbalance the privacy interests of the individuals, despite the weight of the privacy interest and an expectation of confidentiality. Id. at 498.

of the hearing in the interest of a full and accurate record, and where the principles underlying the informer's privilege apply.

The Staff asserts that under the balancing test set forth in Air Force v. Rose, supra, disclosure of the names of the involved individuals would constitute a "clearly unwarranted invasion of privacy" under Exemption (6). Staff Brief, at 10. In the cases cited by the Staff on page 7 of its brief, however, courts have held that disclosure should be withheld only where the invasion of privacy was balanced against a relatively personal interest in obtaining information. See, e.g., Campbell v. United States Civil Service Commission, 539 F.2d 58, 60 (10th Cir. 1976) (information sought by two individual employees); Wine Hobby U.S.A., Inc. v. United States Internal Revenue Service, 502 F.2d 133, 135 (3d Cir. 1974) (information desired for private advertising purposes).

In other cases relied on by the Staff, which have struck this balance, disclosure was ordered despite the invasion of personal privacy involved. See Kurzon v. Department of Health and Human Services, 649 F.2d 65, 67 (1st Cir. 1981) (names of applicants for unsuccessful research grants held not to be sufficiently private); Columbia Packing Company, Inc. v. United States Department of Agriculture, 563 F.2d 495, 497 (1st Cir. 1977) (public interest in disclosure held to outweigh privacy interests in personnel records of farmer meat inspectors convicted of taking bribes); Getman v. National Labor Relations Board, 450 F.2d 670, 671 (D.C. Cir. 1971) (names and addresses of NLRB employees eligible to vote in representation

elections held disclosable to law professors engaged in NLRB voting study).

Since the Staff invokes Exemption (7) solely for the purpose of preventing, under item (C), an "unwarranted invasion of personal privacy" and, in that we will determine whether the invasions are warranted or not solely upon the need for the invasion, there is no reason to analyze the concept of "unwarranted invasion" under Exemption (7)(C) separately from the Exemption (6) standard. Both considerations will turn on whether the need for the disclosure in the reopened proceeding outweighs the protection of personal privacy provided for in the exemptions. In our reading of the cases cited by the Staff in its Exemption (7)(C) arguments, we can see no basis for applying different standards. Appeal Brief, pp. 12-14. The Staff recognizes this (Id. at 13-14), except to note that Exemption (6) has a "clearly unwarranted invasion" standard while Exemption (7)(A) proscribes simply "unwarranted invasions" of personal privacy. Furthermore, in determining the need for the invasion we also are determining whether the information is necessary to a proper decision in this proceeding pursuant to 10 CFR 2.744. Id. at 10. Our ruling below is that the invasion is warranted, thus it is neither "clearly unwarranted" nor merely "unwarranted".

As we begin our discussion concerning the need for the disclosure of the identities of the involved individuals, we wish to emphasize that we abide by the lessons of Air Force v. Rose that the protection of personal

privacy does not depend upon the good conduct of the person whose privacy is to be protected. We admit that this was an unexpected result, in that we could envision a form of estoppel. The acts of cheating, now the subject of the dispute, have given rise to the need for the reopened proceeding, and in turn have created the need for the disclosure. Nevertheless, we may not gratuitously reveal the identities of the involved persons; we direct the disclosure, where appropriate, not out of a sense of recrimination, but for the requirements of the adjudication. Any disclosure of this particular information under FOIA beyond the minimum needed for the reopened proceeding would be inappropriate.

This result is the natural progression from the Privacy Act through the Freedom of Information Act to the exemptions to the FOIA. It is the FOIA exemptions that control; since our ruling permitting disclosure is an exemption to the exemptions, invasion of personal privacy may not exceed the needs of the litigation.

Aside from the Privacy Act, and the principles underlying the exemptions to the FOIA, simple fairness requires some consideration of the position of the employees represented by the Licensee in this appeal. Most of them, we assume, are innocent of any malfeasance and are the victims not only of those who cheated, but of anyone who may have failed to prevent the cheating. We, as components of the NRC, should not, without good cause, exacerbate their problems. Judge Milhollin shares this view. But the overriding interest is that there be a full hearing on this very important safety issue.

It is not the names of the involved individuals that we need. The Board, the Special Master, and the litigating parties, in the public interest, need to know not who they are, but for example, what they were, what did they do, why did they do it, how did they do it, do they think that others did it, what did others know about their conduct, and related inquiries. If this information could be produced without sacrificing their personal privacy, we would so direct that it be protected, and we believe that Judge Milhollin would do the same. The need for and the public interest in this information is far greater than any of the "personal privacy" cases cited by the NRC Staff or known to us. It is intertwined with their identities and the personal privacy must be sacrificed if needed for a full inquiry.[8/]

We anticipate that for practical reasons, Judge Milhollin will find it necessary to cause some private information to be revealed and he is authorized to do so. After an extensive search, the Board's personnel were unable to find a hearing place which could be under the tight control of the Special Master. Therefore an in camera hearing, awkward under normal circumstances,[9/] may not assure confidentiality. Without effective control, a clumsy effort at in camera testimony might accomplish nothing

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8/ We reject the argument of TMIA before the Special Master that we should require public disclosure because its members may be unwilling to risk penalties by signing non-disclosure agreements.

9/ Licensee originally recognized that in camera hearings were awkward in its September 25 memorandum, at p. 4.

more than to whet the appetites of the idly curious. We do not see depositions, as suggested by the Licensee, as a practical substitute. The lettering systems now in use for discovery may or may not be effective in testimony. We cannot anticipate all of the problems Judge Milhollin and the parties might face, but we recognize enough difficulties to be convinced that he might need to disclose otherwise confidential information to complete the record.

Moreover, as we stated at the outset, the public right to know about this reopened proceeding is great. Care should be taken not to proceed in camera or otherwise secretly unless, as the statutes and case law state, there is an "unwarranted invasion of personal privacy" -- or unless the assurance of confidentiality is necessary under the informer privilege of 10 CFR 21.2.

Our rulings above should not be construed to restrict Judge Milhollin to affording confidentiality only when there is an unwarranted invasion of personal privacy. Recently in Houston Power and Lighting Company (South Texas, Units 1 and 2); ALAB-639, 13 NRC 439 (May 1981), both the majority and dissenting member of the Appeal Board have provided thorough and reasoned discussions of the need to preserve future NRC enforcement effectiveness by withholding the identities of informants who, on a precise FOIA balancing, may not be entitled to confidentiality.

Judge Milhollin is already faced with this consideration in that he has been informed by two of the involved persons in the affidavits accompanying their appeal brief that they will not voluntarily appear, and

if they are required to appear publicly they will refuse to answer based upon the privilege against self-incrimination. He is, of course, free and required to comply with the directions of South Texas, supra, and to provide for confidentiality wherever it is needed to develop a full and accurate record on questions of public health and safety. Our recognition of the South Texas decision we believe should satisfy the Staff's concern, expressed at pp. 21-22 of their appeal brief, that some confidentiality may be required to preserve future effective NRC regulation in the industry. Judge Milhollin has correctly analyzed this problem in his discussion of confidentiality as a matter of discretion at pp. 11-12 of his order of October 22.

Judge Milhollin is authorized to disclose or not to disclose information concerning the involved persons and Licensee employees depending upon his judgment as to the needs of the hearing and the considerations set forth above.

So that the jurisdiction of the Appeal Board is preserved, the effectiveness of this order is stayed until the close of business, November 10, 1981.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Louis W. Pratt, Chairman
Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

November 6, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF RAPID SERVICE

I hereby certify that I have today mailed copies of the Board's MEMORANDUM AND ORDER AFFIRMING SPECIAL MASTER'S ORDER ON CONFIDENTIALITY, dated this date, to the persons designated on the attached Mailing List. (* Express mail; ** Hand delivered.)

Doris M. Moran
Clerk to the Atomic Safety
and Licensing Board

Bethesda, Maryland

November 6, 1981

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing "LICENSEE'S NOTICE OF APPEAL," "LICENSEE'S MOTION FOR A STAY OF LICENSING BOARD'S ORDER ON CONFIDENTIALITY," and "LICENSEE'S MEMORANDUM IN SUPPORT OF ITS APPEAL FROM LICENSING BOARD ORDER ON CONFIDENTIALITY AND IN SUPPORT OF ITS MOTION FOR STAY" were hand delivered this 10th day of November, 1981, to those persons on the attached Service List with a single asterisk (*) appearing before their names; were hand delivered on either November 10, 1981 or November 11, 1981, to those persons on the attached Service List with two asterisks (**) appearing before their names; and were served by deposit in the United States mail, postage prepaid, addressed to all other persons on the attached Service List this 10th day of November, 1981.

James B. Hamlin

LIC 11/10/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

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