LIC 6/1/82

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LICENSEE'S REPLY TO COMMENTS OF OTHER PARTIES ON THE SPECIAL MASTER'S REPORT AND THE ATOMIC SAFETY AND LICENSING BOARD'S TENTATIVE FINAL DRAFT

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I. INTRODUCTION

1. Licensee herein submits its reply to the comments of other parties on the Report of the Special Master ("Report"), dated April 28, 1982, and on the Licensing Board's Tentative Final Draft which accompanied its May 5, 1982 Memorandum and Order Regarding Licensee's Motion to Reopen the Record ("Board Tentative Final Draft"). Licensee has replied only to TMIA's Comments On Special Master's Report And Atomic Safety And Licensing Board's Tentative Final Draft Decision ("TMIA Comments"), Aamodt Comments On The Report Of The Special Master ("Aamodt Comments"), and Union Of Concerned Scientists Comments On Report Of The Special Master ("UCS Comments"),[1/] relying on

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1/ Neither TMIA, the Aamodts, nor UCS numbered the paragraphs in their comments as required by the Board, see Memorandum and Order, dated March 24, 1982, at 2, so Licensee has cited these comments by page numbers.

its proposed and reply findings submitted to the Special Master, Judge Milhollin, in January, 1982 ("Lic. PF [paragraph number]" or "Lic. REPLY [paragraph number]"), and its Comments On The Report Of The Special Master ("Lic. Comments [paragraph number]") with respect to the additional comments filed.[2/] Licensee has not attempted, even as to these three, to respond to comments which merely restate or paraphrase findings in the Report, comments which are unsupported by any citation to the record, or comments on subjects already dealt with extensively in Licensee's own comments, proposed findings and reply findings. Comments which rely for support on the Report itself can provide no insight into the Report's representation of the record; comments which have no cited support at all require no reply; and comments which represent another party's views of evidence already addressed in some detail by Licensee in findings or comments need not be reargued here. Finally, with respect to the effect of the Report on the Licensing Board's "Management PID," see Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-32, 14 N.R.C. 381

2/ Additional comments include Commonwealth Of Pennsylvania's Comments On The Report Of The Special Master On Operator Cheating ("Commonwealth Comments"); NRC Staff's Comments On The Report Of The Special Master ("Staff Comments"); Comments Of One Of The Three Individuals To Report Of The Special Master ("W Comments"); Comments of O ("O Comments"); Letter from MM to Judge Smith and Drs. Jordan and Little ("MM Comments"); and Gary P. Miller's Comments On The Special Master's Report ("Miller Comments").

(1981), Licensee relies on its proposed findings. See Lic. PF 419.

II. REPLY TO UCS COMMENTS

2. The UCS Comments begin with a disavowal of any involvement in the reopened proceeding. UCS Comments at 1. In fact, there is not in the whole of the UCS Comments a single citation to the record of the reopened proceeding. Rather, the UCS Comments merely paraphrase some of the Special Master's recommended findings and go on to seek relief from earlier UCS disappointments in the Board's December 14, 1981 PID, assuming the correctness of the Special Master's Report.

3. Comments to the Board on the Special Master's Report should assist the Board in carrying out its responsibility to issue a decision which accurately reflects the record in this proceeding. It is necessary, therefore, that the Board learn through comments the extent to which the parties agree or disagree that the recommended findings of the Special Master's Report correctly depict the evidence of record. Comments like those of UCS, which only rehearse the Special Master's Report and provide no insights into the accuracy of the Report, are of no value and should be ignored. Particularly is this the case where, as here, not only did UCS play no role in the reopened phase of the management portion of this proceeding, it also did not participate at all in the earlier hearing of the management

issues which included extended testimony on Licensee's training programs.

4. In particular, Licensee takes issue with UCS' proposal that the Board should reopen and reconsider certain of its earlier findings on plant design issues where reliance on operator action may have entered into the Board's decision. UCS Comments at 11-19. Licensee recognizes, of course, the interplay in some cases between proper operator action (and therefore adequate operator training and procedures) and the Board's design findings. Licensee further recognizes that in reaching its design findings the Board no doubt relied on its determinations in its first Management PID as to the adequacy of operator training and procedures. We do not expect the Board to recommend restart of TMI-1 if, contrary to Licensee's view, it were to find as a result of the cheating hearings that its previous findings on management competence, including the adequacy of operator training, were no longer valid. We certainly do not expect, if the Board were unable to make positive findings on the adequacy of operator training, that the Board would recall its findings on design issues in order to compensate by design changes for deficiencies which might be found by the Board in operator training.3/

3/ Additionally, such a course of action would be procedurally inappropriate. Unlike its findings on management issues, the Board did not condition its design findings on the results of the cheating hearing and did not retain jurisdiction

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III. REPLY TO TMIA COMMENTS

A. Objection to Board Recognition of Certain Individuals' Standing To Comment

5. In its introductory comments, TMIA objects to the Board's "solicitation" of comments from "any individual" mentioned in the Report, claiming "a clear violation of procedural due process for the Board to consider any evidence outside the record of the reopened proceedings, particularly statements submitted by actual witnesses." TMIA Comments at 2. TMIA has two complaints--that the Board will inappropriately consider extra-record material, and that witnesses who appeared at the reopened hearing will now revise or supplement their testimony. Both complaints are unwarranted.

6. Licensee notes, first, that the Board did not actively "solicit" comments from "any individual" named in the Report, but recognized the "standing to comment" of "O, W, VV and any Licensee employee referred to in the Special Master's Report." Memorandum and Order Regarding Licensee's Motion to Reopen The Record, dated May 5, 1982 ("Board Order of May 5, 1982"), at 4.[4/] The Board allowed these comments on the Report not as a

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(Continued)

over its decision on design issues. These issues are now before the Appeal Board and could come before the Licensing Board only on remand.

4/ There is support for this action in current NRC case law. In Consumers Power Company (Palisades Nuclear Power Facility), ALAB-670, _____ NRC _____ (March 31, 1982), slip. op. at 2-3, a

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means of eliciting new, extra-record evidence, but as a means of elucidating evidence already established on the record. Moreover, the Board required that additional comments be filed at the same time as those of the parties, see Board Order of May 5, 1982 at 3, thereby avoiding any delay in the proceedings and allowing time for parties to reply to the additional comments.

7. In fact, brief comments were submitted by counsel for Messrs. O, W and Gary Miller, and by one individual, Mr. MM, who was not a witness in these reopened proceedings but is named in the Report. These comments include appropriate factual and legal arguments based on record evidence. Notably,

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(Continued)

union for licensed operators was allowed to challenge an order by the Director of the NRC's Office of Inspection and Enforcement which confirmed Consumers Power's actions to upgrade its facility's performance and required, in part, that overtime for licensed operators be restricted to a greater degree than usual. The Appeal Board permitted discretionary intervention of the union under 10 C.F.R. § 2.714(a) and (d), finding, among other things, that the union's interest in the order, the order's effect on that interest and the union's ability to help develop a sound record were sufficiently great to overcome countervailing factors and justify intervention. Consumers Power Company, supra, slip. op. at 17-22. In the present case, the Board's acceptance of Judge Milhollin's conclusions with respect to the four individuals who filed comments; viz., Messrs. O, W, MM and Miller, would have an immediate and substantial effect on these individuals. Their interest in the Report, and the effect of the Report on that interest, are therefore very great indeed. Moreover, they are uniquely suited to analyze and to clarify factual evidence with respect to their own activities and motivations.

Mr. MM's comments include, in addition to references to record evidence, some extra-record statements. See MM Comments at ¶¶ 1, 3.[5/] There is no reason at this juncture to conclude that such extra-record material will be considered by the Board.

8. In sum, TMIA's complaint about the propriety of the Board's consideration of extra-record evidence is simply not founded in fact. Their complaint that the Board will consider or rely on such evidence as the basis for its initial decision in these reopened proceedings is premature.

B. Mr. Ross' Conduct

9. TMIA's initial substantive discussion of the Special Master's Report addresses the issues raised during the reopened proceeding concerning Mr. Michael Ross' conduct. TMIA endorses Judge Milhollin's findings on Mr. Ross, and rejects the Board's draft findings. Id. at 2-5. But this endorsement is based on a misinterpretation of Judge Milhollin's findings on Mr. Ross.

5/ As we view Mr. MM's comments, two principal points are made. First, Mr. MM states he did not cheat. That is directly supported by the record. See Lic. PF 90 and record citations therein. Second, Mr. MM states that he had no motive to cheat because the quiz on which he is alleged to have cheated, see Report at ¶¶ 82-93, 312, was not taken for credit. That, too, is supported by the record. Mr. MM is not a licensed operator or a candidate for a license, but is a Shift Technical Advisor, see Lic. PF, App. C, at C-2, and as such is not required to be licensed. See generally Lic. Management PF (May 15, 1981) 165-67. Mr. MM received no grade at all on the Category-T makeup quizzes administered in November and December, 1980, including the quiz on December 19, 1980 on which he is alleged to have cheated. Lic. Ex. 64, at 3.

Based on this misinterpretation, TMIA describes its understanding of the weight due the Special Master's Report. Specifically, TMIA makes the following assertion:

> By directly contradicting Judge Milhollin's determinations, the Board runs afoul of the basic administrative law principle that the findings of a hearing examiner who heard the testimony of the witness and who has a "feel of the case" which no printed transcript and [sic] impart, Cone v. West Virginia Pulp and Paper Co., 330 US 216 (1947), are entitled to great weight. Universal Camera Corp. v. NLRB, 340 US 474 (1950), Dolan V. Celebrezze, 381 F.2d 231 (2d Cir. 1967), Zinkle v. Weinberger, 401 F. Supp. 945 (N.D. W.V. 1975), Nichols v. Cohen, 290 F. Supp. 207 (S.D. Ill. 1968).

Id. at 3-4. Licensee disagrees with both TMIA's characterization of the Report's findings on Mr. Ross, and TMIA's legal analysis.

10. TMIA begins its argument with a summary of the Report. TMIA states, "Judge Milhollin's findings and conclusions with regard to Mr. Ross . . . are based substantially upon an evaluation of the credibility of the witnesses who testified, particularly Ross and YY." Id. at 3. A review of the Special Master's Report establishes, however, that while Judge Milhollin did evaluate the credibility of these witnesses, most of the Special Master's conclusions are based on an analysis of documentary evidence (particularly the NRC "A" exams), perceived inconsistencies in the record, unexplained circumstantial evidence and inferences drawn by Judge Milhollin

from all of this evidence. See, e.g., Report at ¶¶ 153-178; see also Board Tentative Final Draft at 3, 11, and 13. Similarly, the Board's draft findings consist primarily of a detailed analysis of the record evidence and the reasonable inferences which can be drawn therefrom.

11. For example, TMIA is wrong in suggesting that the Board improperly found Mr. YY's testimony incredible, thereby disregarding Judge Milhollin's observations of Mr. YY's demeanor. TMIA Comments at 4. The Board's conclusions about Mr. YY's testimony have nothing to do with Mr. YY's demeanor on the witness stand. Rather, the Board carefully reviewed Mr. YY's testimony, determined precisely what Mr. YY had said and recollected, and considered what inferences could reasonably be drawn from Mr. YY's testimony.[6/] Licensee also did not challenge Mr. YY's veracity in our proposed findings; rather, we questioned the accuracy of Mr. YY's recollections and the inferences he drew from them. See, e.g., Lic. PF 221, 223 and 228, regarding the so-called midnight requisition incident, and Mr. YY's misunderstanding of the facts.

6/ In its discussion of Mr. YY, TMIA asserts that Mr. YY has been in "personal jeopardy" since he informed the NRC Staff of his views on Mr. Ross' conduct during the April, 1981 NRC exams. TMIA Comments at 4. This very serious statement is unsupported by citation to the record. This is not surprising, however, since there is absolutely no record support for such a proposition.

12. TMIA also states, "No evidentiary fact was omitted from the [Special Master's Report] which could provide the basis for the Board's rejection of the report. Thus, the Board is obligated to accept his findings and conclusions on the Ross issues." TMIA Comments at 4-5 (citation omitted). In Licensee's view, a review of the record unequivocally establishes that a great deal of material evidence was not considered by the Special Master in his discussion of Mr. Ross' conduct. See Lic. Comments 58-85.

13. Thus, as a preliminary matter, even if Licensee were to accept TMIA's legal interpretation and accord "great weight" to Judge Milhollin's views on matters related to the Ross incident, a fair reading of all of the record evidence, including Mr. Ross' and Mr. YY's testimony and the NRC "A" exams of the TMI-1 operators, belie the Special Master's findings. In addition, however, Licensee takes issue with TMIA's understanding of the weight to be accorded the Special Master's Report.

14. Judge Milhollin was appointed by the Board as a Special Master, technical advisor and informal assistant under the provisions of 10 C.F.R. § 2.722. Board Memorandum and Order of September 14, 1981; see Report at ¶ 2. Section 2.722 makes clear that the function of Judge Milhollin as a Special Master, technical advisor and informal assistant is "to assist the presiding officer in taking evidence and preparing a

suitable record for review." 10 C.F.R. § 2.722(a) (emphasis added). A Special Master can provide invaluable assistance to the presiding officer by hearing evidentiary presentations on specific matters and, upon completion of the presentation of evidence, preparing a report that becomes part of the record. Id. at § 2.722(a)(2). However, a Special Master's report is "advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master." Id. (emphasis added). Thus, the role of the Special Master is not the same as, or even analogous to, that of the hearing examiner whose findings are reviewed by an appellate tribunal; rather, the Special Master serves as an adjunct to the Board. It is only the Board that has authority--indeed, is legally obligated--to resolve the issues in dispute.

15. TMIA relies on five federal court cases to support its position that the Board has run afoul of a basic administrative law principle. None of these cases is relevant. In Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 67 S. Ct. 752 (1947), the Supreme Court analyzed the application of Rule 50(b) of the Federal Rules of Civil Procedure, concerning judgments notwithstanding the verdict, to an action for damages for trespassing brought in federal district court. At issue was whether a party's failure to make a motion in district court for judgment notwithstanding the verdict, as permitted in Rule 50(b), precluded an appellate court from directing entry

of such a judgment. 330 U.S. at 215, 67 S. Ct. at 754. The Court held that the Court of Appeals was so precluded. The Court identified the trial court as the appraiser of "the bona fides" of the litigants' claims; however, this well-established trier-of-fact function was based on the rule that "primary discretionary responsibility for its decision [on the question whether to grant a judgment NOV] rests on the District Court." 330 U.S. at 218, 67 S. Ct. at 756. This principle does not apply here, where the Special Master is simply an advisor to the trier-of-fact, the Licensing Board.7/

16. TMIA next cites Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S. Ct. 456 (1951). In Universal Camera, a labor relations case, the Supreme Court made clear that under the Administrative Procedure Act and the Taft-Hartley Act, 5 U.S.C.A. § 1001 et seq.; 29 U.S.C.A. § 141 et seq.,

> [t]he [National Labor Relations] Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

7/ In Cone, the Supreme Court held that the Court of Appeals was without power to direct the District Court to enter a judgment NOV. Such a course of action would have eliminated the district court's discretionary authority, based on the facts, to decide between a judgment NOV and a new trial. Moreover, it would not only foreclose a litigant's right to a new trial, but would prevent him from exercising his unqualified right to take a nonsuit. 330 U.S. at 215-17, 67 S. Ct. at 754-56.

340 U.S. at 490, 71 S. Ct. at 466. The Supreme Court in Universal Camera set forth the now well-established substantial evidence standard of appellate review, whereby "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." 340 U.S. at 488, 71 S. Ct. at 465. This standard is inapplicable here, where the first decision-maker is the Board, not the Special Master.[8/]

17. TMIA's reliance on three other federal court cases is similarly misplaced. Dolan v. Celebrezze, 381 F.2d 231 (2d Cir. 1967), is a social security benefits case which refers to and applies Universal Camera's substantial evidence test. Zinkle v. Weinberger, 401 F. Supp. 945 (N.D. W.Va. 1975), a "black lung" benefits case, cites the Dolan case. (In contrast to TMIA's assertion that the Board is "obligated" to accept the Special Master's findings and conclusions, TMIA Comments at 5,

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8/ Even if the substantial evidence standard did apply, the Board's rejection of Judge Milhollin's findings on Mr. Ross would stand, since the Board's draft findings make clear that there is not substantial evidence supporting the Special Master's decision, when the record is viewed in its entirety. Stated another way, the Board found there were evidentiary facts the Special Master ignored which provide a substantial basis for rejecting Judge Milhollin's findings. See Dolan v. Celebrezze, 381 F.2d 231, 233 (2d Cir. 1967) and Nichols v. Cohen, 290 F. Supp. 207, 210 (S.D. Ill. 1968), cited by TMIA in its Comments at 5.

the Zinkle court states the "well established rule that although a trial examiner's findings may not be ignored, his findings are not binding upon the agency he serves. Peterson v. Gardner, 391 F.2d 208, 209 (2d Cir. 1968)." 401 F. Supp. at 951-52.) Finally, Nichols v. Cohen, supra, cited in Zinkle, is another social security benefits case in which the Universal Camera test is applied, and in which the nonbinding nature of the examiner's findings is noted by the district court.

18. Certainly, none of the cases on which TMIA relies stands for the proposition that it is improper for a tribunal, such as the Board, to rely on its familiarity with a witness, such as Mr. Ross, from repeated appearances by that witness during earlier portions of the same administrative proceeding. This would seem to be especially true here, where findings based on the earlier record, including the quality of the testimony, are the very subject of the reopened proceeding.

19. In summary, TMIA's factual arguments in support of its attack on the Board's draft findings concerning Mr. Ross inaccurately describe the findings of the Special Master and the draft findings of the Board. In addition, TMIA's legal position is incorrect.

C. Mr. U In Mr. Husted's Office

20. TMIA agrees with Judge Milhollin's findings, Report at ¶¶ 122, 318, that there was insufficient evidence to

establish that Licensee's management stationed Mr. U in Mr. Husted's office. However, TMIA now, for the first time in its comments, hypothesizes that Mr. U might have stationed himself in Mr. Husted's office, and that "management" (no particular name is ever suggested) might have learned of Mr. U's acts at some point during the NRC exams. TMIA Comments at 5; compare TMIA PF 134 (TMIA suggests that "it would be speculative to assume they [Licensee management] therefore knew about Mr. U's activities [in Mr. Husted's office]"). Licensee disagrees with this transparent speculation.

21. In support of its position, TMIA finds it "possible" that Mr. OO heard the rumor about someone being stationed outside the exam rooms when Mr. U was chatting with some examinees in the nonsmokers' exam room twenty minutes before the commencement of the NRC Reactor Operator ("RO") "B" exam administered on April 23, 1981. TMIA Comments at 5; see Lic. PF 196. However, TMIA cites no evidence, nor can Licensee find any evidence, indicating that Mr. OO was indeed in the non-smokers' exam room or participated in the discussion with Mr. U just prior to the exam, or that Mr. OO learned about the rumor at that time. On the contrary, the record shows that Mr. U only remembered talking to Messrs. O, A, Z and possibly S prior to the RO "B" exam. Lic. PF 196. In addition, when Mr. OO learned of the rumor, he did not hear Mr. U's name associated with it. Tr. 25,986-87 (Mr. OO). Surely, if Mr. OO had

learned of the rumor at the time Mr. U was chatting with examinees, it follows that Mr. OO would have gleaned that Mr. U was the one to be stationed near the exam rooms.

22. TMIA also finds it "quite possible" that a management person learned of Mr. U's activities during a search for materials related to answer key changes. TMIA Comments at 6. In support, TMIA cites Mr. Ross' testimony that Licensee reviewers had to obtain materials with respect to answer key changes "someplace within the training area." Tr. 24,161 (Ross). Again, TMIA cites no record evidence, nor is Licensee aware of any such evidence, to show that any Licensee reviewer (1) went into Mr. Husted's office to find materials during the NRC "B" exams; (2) saw or spoke to Mr. U during these exams; or (3) heard a rumor about anyone being stationed outside the NRC exam rooms, much less had any reason to suspect that Mr. U might have been that person.

23. Despite the complete lack of evidence, TMIA leaps from an initially hesitant statement: "The evidence does not appear to preclude this possibility [that Mr. U stationed himself in Mr. Husted's office and management learned of his activities during the NRC exams]," TMIA Comments at 5, to the following bold announcement: "The preponderance of the evidence supports a conclusion that U was indeed stationed in the vicinity of the exam to help answer questions and that management likely knew about it at least during the course of the

exam." TMIA Comments at 6. "In light of this," id., TMIA concludes that Mr. U should be permanently removed from licensed duties. This conclusion is totally devoid of factual support or legal justification.

D. The 1979 VV/O Incident

24. TMIA suggests that the Board recommend to the Nuclear Regulatory Commission not only that Messrs. Miller, Herbein, Zechman, Beers and Lawyer (TMIA incorrectly refers to Mr. Lawyer as "Lawyers")[9/] should all be prosecuted under 18 U.S.C. §§ 371 and 1001 for their roles in the 1979 VV/O incident, but that they should all be found "incompetent to remain in any management or operational capacity with GPU or any of its subsidiary companies." TMIA Comments at 7. Licensee stands by its proposed findings and comments with respect to the facts leading to this incident and Licensee management's response to it. See Lic. PF 298-320; Lic. REPLY 14-15; Lic. Comments 121-23. Nevertheless, several additional points must be made.

25. There is absolutely no evidence cited by TMIA, nor by Judge Milhollin in those portions of the Report on which TMIA

9/ At the time of the VV/O incident in 1979, Mr. Miller was Station Manager of TMI, see Lic. PF 298; Mr. Herbein was Vice President for Generation, see Management PID, supra, 14 N.R.C. 543, at ¶ 475; Mr. Zechman was Supervisor of Training, see TMIA Ex. 66, at 3; Mr. Lawyer was Manager of Training, see TMIA Ex. 73, at 3; and Mr. Beers' position was unidentified in the record. (On information and belief, Mr. Beers was a training instructor at that time.)

relies, Report at ¶¶ 227, 233, 236-37, which suggests that any of the five noted individuals--Messrs. Zechman, Beers and Lawyer were not even mentioned in the Report--had the requisite specific intent to violate 18 U.S.C. § 1001, or made the requisite agreement for an unlawful purpose in violation of 18 U.S.C. § 371. See Report at ¶ 307.

IV. REPLY TO AAMODT COMMENTS

A. Objection to Board Recognition of Certain Individuals' Standing to Comment

26. The Aamodts, like TMIA, object to the Board's recognition of the standing of certain individuals to comment on the Report. Aamodt Comments at 4. In response, Licensee refers to its reply to TMIA Comments at ¶¶ 5-8, supra.

B. Mr. Ross' Conduct

27. The Aamodts' discussion of Mr. Ross' conduct during the April, 1981 NRC exam review sessions extends from page 5 through page 14 of the Aamodts' Comments. Here, the Aamodts challenge the Board's independent assessment of the evidence on Mr. Ross, stating that the Board "appears to have already made up its mind before the receipt of the Special Master's Report or the comments of the parties." Aamodt Comments at 5. In response to TMIA's Comments, Licensee has already addressed and will not now repeat our understanding of the strictly advisory function of the Special Master. Since Judge Milhollin serves

only in an adjunctive capacity, it is perfectly appropriate for the Board to review and analyze the record and reach its own tentative conclusions as to what the record establishes. See ¶¶ 14-18, supra. We will take this opportunity, however, to address several other Aamodt Comments related to Mr. Ross.

28. According to the Aamodts, the Board conceded "that the operators' testimonies supported YY's description of the conversation Ross allegedly had about his participation in the answer key review." Aamodt Comments at 7 (emphasis added), citing Board Tentative Final Draft at 8. Based in part on this fact, the Aamodts reject the Board's analysis of Mr. YY's allegations and endorse Judge Milhollin's views. Licensee believes the Aamodts are misquoting the Board, and thereby obfuscating the real issue here.

29. What the Board clearly indicated in its analysis of the Ross allegations was that while three individuals (Messrs. GG, KK and RR) recalled statements by Mr. Ross which could have been the basis of Mr. YY's inferences, contrary to Mr. YY, these individuals understood Mr. Ross to be stating that "he had fairly broadened the answer keys, and that, apparently by joking, he was seeking to cheer his crew." Board Tentative Final Draft at 8. The point of the Board's analysis, and the point that the Aamodts appear to be missing entirely, is that in understanding the Ross incident there are several factual questions which must be answered. First, did Mr. Ross talk to

the operators about his work on the review session? Answer: Almost certainly. Second, what exactly did Mr. Ross say? Answer: It is impossible to determine exactly, but Mr. Ross probably stated that the candidates did not have to worry, they would do okay, Ross thought, since he felt the exams were fair. Id. at 8; Lic. Comments 83. Mr. Ross probably also said something like, "I took care of that job," a slang expression reflecting his show of confidence in the fairness of the exams and therefore, the ability of his operators to do well on the exams. Board Tentative Final Draft at 8. Third, what did Mr. Ross mean by his statements? Answer: Mr. Ross categorically denied trying to improperly broaden the answer key, keep the proctor out of the exam room, or engage in any other improper conduct. Staff Ex. 27 at 12-13; Ross, ff. Tr. 24,127 at 3; see Lic. PF 225. Fifth, how were Mr. Ross' remarks interpreted? Answer: Mr. YY was equivocal about what Mr. Ross meant. Board Tentative Final Draft at 4-8. Everyone else who testified on this subject was convinced that Mr. Ross did not mean that he had improperly broadened the answer key. Id.; see also Lic. PF 223-29.

30. In summary, setting aside Mr. Ross' staunch denial of misconduct, it is the inferences drawn by those who recalled Mr. Ross' statements that are at issue here. In that regard, the other operators' testimonies clearly do not support Mr. YY's allegations.

31. The Aamodts assert that Mr. Ross "testified falsely" in stating that he first learned of the cheating by Messrs. O and W on July 27. Aamodt Comments at 14. Citing to the OIA investigation report, Staff Ex. 24, the Aamodts contend that Mr. Ross was informed of this information a week earlier, on July 20. Id. The Aamodts also contend that Mr. Ross told Mr. I about O's and W's misconduct on July 23. Id.

32. Mr. Ross' prefiled testimony and the OIA investigation report are fully consistent with each other and completely at odds with the Aamodts' interpretation. Mr. Ross stated:

> The first awareness that I had that there was a potential problem, of some unknown kind, with regard to the NRC examinations was when Mr. Donald Haverkamp, one of the onsite regional I&E inspectors, called me and asked me who, among the operations staff, smoked. I cannot recall when this conversation took place, although it was before the information regarding operators O and W was discussed with GPU Nuclear personnel on July 27. Because Mr. Haverkamp's questions was unusual, and of seemingly no importance, I asked him why he was asking me this question. Mr. Haverkamp informed me that there could be a potential problem with the April NRC exams, although he did not know the details. He asked me not to discuss his call with anyone. I did not discuss it.

Ross, ff. Tr. 24,127 at 4. Similarly, the OIA investigation report states that, in an effort to determine whether O and W were in the smoking or non-smoking group, "Don Haverkamp, IE [was asked] to make the discreet inquiry. Haverkamp felt in order to obtain this information it was necessary to inform

[Mr. Ross] that there was a problem with the taking of the exam and we (NRC) needed to know who were smokers and non-smokers out of the group of SRO examinees." Staff Ex. 24, summary of Collins interview at 3.

33. The Aamodts find that Mr. I's statement about being informed by Mr. Ross on a Thursday impeaches Mr. Ross. Licensee disagrees. Mr. Ross testified that he learned about the O and W allegations on Monday, July 27. On the following day, Mr. Ross was interviewed by the NRC, and reviewed the suspect exams. At that time he became aware of the genuineness and dimension of the problem. Ross, ff. Tr. 24,127 at 4. Mr. I stated that he was away in New York, and that Mr. Ross called him on Thursday because "he did not want me to read it in the paper and find out that way." Tr. 26,542 (Mr. I). Clearly, Mr. I could not have read about it in the paper before Tuesday, July 28, "when the news broke." Aamodt Comments at 14. Thus, either Mr. I is mixing up Tuesday and Thursday, or Mr. Ross called Mr. I on Thursday, July 30. There is absolutely no reason to believe that Mr. Ross called Mr. I the week before, on Thursday, July 23. Not only is such a theory contrary to the testimony of a Staff witnesses about the limited information relayed to Mr. Ross on July 20 and contrary to Mr. Ross' testimony, but it makes no sense given Mr. Ross' stated purpose in calling Mr. I in New York.

34. Finally, in connection with the Ross allegations, the Aamodts, through innuendo, suggest that Mr. Ross' "reluctance" to identify the location of Mr. Husted's office, where Mr. U studied on the two days of the "B" exams, is due to the fact that Mr. Ross was the "someone higher up in the company" who "knew of a person stationed in the vicinity of the examination rooms to provide answers to the examinees." Aamodt Comments at 14. This allegation, which seriously maligns Mr. Ross, is without record support. First, Mr. Ross' so-called reluctance to identify the location of Mr. Husted's office stemmed from an error on TMIA Ex. 61, a diagram of the training complex in which the April, 1981 exams were taken. After looking at the diagram, Mr. Ross realized that TMIA Ex. 61 showed one office located where two offices were in fact located. See Tr. 24,203-06 (Ross). Insofar as Mr. Ross was initially uncertain about the location of Mr. Husted's office, as soon as Mr. Ross realized that the diagram was wrong he was able to recall this information quite clearly in addition to specifying the location of Mr. Brown's office, immediately adjacent to Mr. Husted's office. Id. Furthermore, there is absolutely no evidence to even suggest that Mr. Ross knew or suspected that someone was stationed in the vicinity of the exams to help examinees (not to mention the absence of evidence supporting the rumor). In fact, even the limited circumstantial evidence--Mr. Ross' location in Mr. Boltz's office during the

review sessions--contradicts the Aamodts' hollow theory: Mr. Boltz's office is on another part of the training complex corridor from Mr. Husted's office. See TMIA Ex. 61.

C. Observation And Reporting of O and W Cheating Incident

35. The Aamodts claim to have found evidence that Ronald Maines, the proctor in the NRC licensing exam room where Messrs. O and W cheated, see Lic. Ex. 83, saw the two operators cooperating, but did not consider their behavior to be cheating so did not report it. Aamodt Comments at 21-22. Licensee finds this conclusion to be nothing more than pure speculation, unsupported by any evidence of record.10/

36. The Aamodts rely on certain testimony of Mr. Ward as an indication that NRC proctors did not consider some cooperation among examinees to be cheating. Aamodt Comments at 21-22. Mr. Ward is not an NRC proctor, however, but Chief of the Investigations Branch, Enforcement and Investigations Staff,

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10/ In support of this claim, the Aamodts cite to certain of their proposed findings which were filed late and were not admitted into the record. See Motion for Reconsideration of Aamodt Motion for Admissibility of Findings of January 20, 1982 and Admissibility of Additional Findings, attaching Supplement to Aamodt Proposed Findings of Fact and Conclusions of Law on Issues Raised in the Reopened TMI-1 Restart Proceeding Filed January 18, 1982, at ¶¶ 159-66; Memorandum and Order of Special Master, dated April 14, 1982 (above-cited Aamodt motion denied). Our reply here is not to those late-filed findings, but to the evidence of record relied upon by the Aamodts, either cited in their comments or in their findings (timely or late-filed).

Office of Inspection and Enforcement. Ward, ff. Tr. 25,274 at 1. Therefore, his perception of cheating sheds no light on what proctors might have thought. Moreover, the Aamodts' criticism of Mr. Ward for lacking a definition of cheating and relying on an "informal concensus" among the investigators, Tr. 25,425 (Ward), is misplaced. This "informal consensus" concerned "examination situations where perhaps there was [sic] people exclaiming out loud about how difficult the exam was." Tr. 25,427 (Ward: referring to the alleged solicitation of Mr. P by Mr. Husted during an NRC exam). Such situations are not comparable to the cases of Messrs. O and W, whose cheating was extensive, methodical and long-term, and was recognized by Mr. Ward as such. Tr. 25,340 (Ward).

37. More importantly, the Aamodts twist a statement by Mr. Maines to support their claim about NRC proctors. Mr. Maines' simple declaration to Mr. Ward that "he had seen them [Messrs. O and W]" during the NRC exams, Tr. 25,412-13 (Ward), is transformed by the Aamodts into a statement that Mr. Maines saw Messrs. O and W "copying," Aamodt Comments at 22, despite the fact that there is absolutely no record support for this added inference. Having nevertheless made this unfounded assumption that Mr. Maines saw Messrs. O and W cheating, the Aamodts then rely on it as a basis for questioning the meaning of Mr. Maines' statement to the OIA investigators that "he did not see anything out of the ordinary on Friday [the day on

which Messrs. O and W took the NRC SRO "B" exam] which indicated there was cheating." Staff Ex. 24, Interview of Ronald M. Maines (unnumbered tenth page of report). To imply that Mr. Maines may have meant that he saw Messrs. O and W cheating but believed that it was not "out of the ordinary," is to ignore the benign and obvious explanation that Mr. Maines saw no talking, passing of papers or other activities among the examinees that would have led him to conclude that cheating was occurring.

D. Operator Training and Testing

38. Most of the allegations raised by the Aamodts from page 23 to the end of their Comments concern the quality of operator training at TMI-1. Licensee has already provided its views on Judge Milhollin's inappropriate critique of the substantive content of Licensee's operator training program. See Lic. Comments 124-45. Nevertheless, we recognize the Report's enticement to the parties to address the substantive training issues again, and the Aamodts took advantage of the opportunity in their Comments. Licensee considers it appropriate to respond to the major Aamodt arguments directed at the substance of operator training.

39. On page 23 of their Comments, the Aamodts resurrect an argument they advanced in their late-filed findings on the reopened proceeding, filed approximately three weeks after the

Board issued an Order denying the Aamodts' earlier motion to admit late-filed findings. See Supplement to Aamodt Proposed Findings, March 4, 1982, at ¶¶ 282-286; Board Memorandum and Order Denying Aamodts Motion for Admissibility of Findings, February 11, 1982. The Aamodts state that Mr. Brown and Mr. Newton "misrepresented the administration of tests at TMI. Tr. 24,739-40." Aamodt Comments at 23. On the transcript page to which the Aamodts refer, Messrs. Newton and Brown were questioned by Aamodts' counsel, Mr. Clewett, about the use of open and closed book exams at TMI. Neither individual's testimony constitutes a misrepresentation, nor do the Aamodts point to any evidence supporting their indictment of these individuals' integrity.

40. Licensee is not blind to the confusion in the record on how weekly quizzes were administered. See, e.g., Lic. PF 329-330; Lic. Comments 131. But it is important to distinguish between witnesses' differing recollections of (possibly different) facts and differing inferences drawn from the facts, on the one hand, and lies, on the other--a critical distinction absent from the Aamodts' analysis. Specifically, the Aamodts juxtapose the testimony of Mr. Newton concerning the date of the revision to AP-1006, April 15, 1981, at which time the requalification training program procedure was formally changed to require closed book exams, Tr. 24,739 (Newton), with Dr. Long's statement earlier in the proceeding that a letter was

sent to the Staff in mid-February, 1981, committing that the training procedure would not authorize open-book tests. Tr. 12,740 (Long). That it took six weeks to implement this commitment does not establish, as the Aamodts charge, an effort by Licensee to mislead the Board, the Special Master or the parties. Similarly, Mr. Brown's testimony that in his recollection exams have never been given open book, including the one take-home test (the makeup Category T) which he could recall, is not a "misrepresent[ation]". Aamodt Comments at 23; see Tr. 24,739-41 (Brown); see also Lic. Ex. 63 (summary of primary TMI-1 operator exams given since March 28, 1979). The testimony of Licensee's training managers simply reinforces the Training Department's perspective on past exam taking at TMI--a perspective borne out by their testimony, generally, about doing one's own work during exams.

41. The Aamodts also state that Dr. Long misled the Board earlier in the restart proceeding by "concealing" the loose administration of tests. Aamodt Comments at 23. But Dr. Long could not have "misled" the Board in February of 1981, since he was unaware of the problem at that time. See, e.g., Long, ff. Tr. 24,921 at 2-4.

42. In sum, the testimony of the witnesses in the initial management and reopened proceeding to which the Aamodts refer clearly establishes that the managers of the training organization believed exams were being given, and should have been

given in a closed book format. No misrepresentation or concealment of facts occurred; rather, management did not appreciate the problem they had, as they forthrightly testified in the reopened proceeding.

43. The Aamodts also state that Mr. Newton "gave misleading testimony in the main hearing concerning plans to improve and individualize training given to operators who had repeatedly failed the Lessons Learned test. Tr. 20,639." Aamodt Comments at 23. The Aamodts are correct that Mr. Newton did state his plans to improve Category T training. They are wrong, however, in describing this statement as misleading. What the Aamodts ignore is that the record supports the improvement in both the substance and the procedures used for the Category T makeup tests given after Mr. Newton testified in April, 1981. Specifically, both Mr. H and Mr. OO testified concerning the improved quality of the review process for the July and November, 1981 Category T makeup tests. See Tr. 25,907 (Mr. H); Tr. 26,003 (Mr. OO); Lic. PF 344.

44. The Aamodts state that "[t]he Manager of Operator Training knew of cheating on the Lessons Learned test and did nothing about it. Tr. 24,743 (Newton)." Aamodt Comments at 25. This is not an accurate rendition of what Mr. Newton in fact stated. Mr. Newton was suspicious that cheating might have occurred on the take-home makeup Category T test taken by Messrs. G and H, due to the similarities in the answers to

these tests. However, since he felt he would not be able to prove cheating, and since the two individuals in question had failed the test and had to be re-examined, Mr. Newton decided that what he should do was "ensure on a retest that the individuals were closely monitored, and in fact they were when they retested." Tr. 24,743 (Newton); see also Tr. 24,698-99 (Brown).

45. The Aamodts state that Mr. Toole, the Director of Plant Operations and Maintenance, knew about the attitude problem among the operators; viz., bitterness towards the April, 1981 NRC exam, and a feeling that the exam was an unfair requirement imposed on them. Aamodt Comments at 26. The Aamodts go on to state that management "did nothing to correct the situation," referring to Mr. Toole's interview with the NRC Staff during the second OIE investigation. Id., citing Staff Ex. 27 at 33. The Aamodts' summary inaccurately describes what Mr. Toole said. Mr. Toole was very concerned about the cheating that had taken place and, like Mr. Hukill, see Lic PF 237, personally felt a sense of responsibility for the incident.

> [Mr. Toole] commented that he was troubled by the instances of cheating that had been documented to date and stated that he felt in part personally responsible for it. [Mr. Toole] went on to explain that as a manager, he felt that he could and should have spent more effort on motivating his subordinates to do well on the examinations rather than to look at the exams as merely one more obstacle set up by the NRC. [Mr. Toole] felt that his self-proclaimed

> failure to highlight the significance of the examinations may have led some of his employees to conclude that they should just get them (the exams) out of the way anyway they could and not spend an inordinate amount of time studying.

Staff Ex. 27, at 33.

46. Mr. Toole's sense of responsibility for the cheating which took place is not tantamount to management doing nothing about the situation. To the contrary, Mr. Hukill testified that during the summer of 1981--albeit after the exams were given, but before the discovery of cheating--he spent an enormous amount of time talking to the operators.

> I talked with the entire plant staff of more than 300 individuals in groups of five to ten individuals, for one to two hours, in order to emphasize to them the issues of importance to me which we faced as TMI-1 personnel, to get to know them as individuals and vice versa, and to discuss with them the problems which were on their minds. My focus, as a relative newcomer to the island, was to instill in them a pride in the organization and an understanding that TMI-1 is a place where people should like to work and should excel in their work. I also wanted to ensure they understood my philosophy regarding the absolute need for professionalism in carrying out their duties.

Hukill, ff. Tr. 23,913 at 9-10. Mr. Hukill also testified about management's initiative in June of 1981, to issue a bonus to operators in an effort to boost morale. Tr. 23,961-62 (Hukill). While neither of these efforts antedates the cheating which occurred in April, 1981, both occurred before

management knew or had any suspicion whatsoever that cheating had taken place. Clearly, then, management not only was concerned about operator attitude, but they did something about it.

47. The Aamodts' discussion of their Contention 2, concerning operator training, includes only one citation to the reopened proceeding. Other than that, the Aamodts refer only to the Special Master's Report and the Aamodts' findings in either the initial management phase of the proceeding or, in one instance, their late-filed findings in the reopened proceeding. In Licensee's view, these references shed no additional light on the efficacy, or lack thereof, of the Special Master's findings.

48. Furthermore, the one record citation to the reopened proceeding which the Aamodts make is wrong. In describing the Staff's review of the November Category T makeup exams, the Aamodts state:

> Even if you assume that the NRC reviewer was competent, his attitude did not assure any serious review. He testified, "Well, I looked at the two makeup examinations that were given in November." Tr. 25,635 (Boger). Actually, there was only one test (given twice). AAM F # 302-303.

Aamodt Comments at 39. The Aamodts are mixed up. As Mr. Brown clearly stated in prefiled testimony, one Category T exam was administered twice, on November 2 and 6, 1981. In addition, a different exam was given as a re-exam to one individual who did

not pass the November 6 exam at the 90% level and therefore had to take another exam. Brown, ff. Tr. 24,695 at 1; see also Report at ¶ 249.

49. Finally, apparently as an afterthought, the Aamodts state, "The evidence suggests that the [Kelly] test was administered in an 'open-book' fashion, contrary to the Commission's directives." Aamodt Comments at 40. Although the only reference cited by the Aamodts is to one of their own late-filed proposed findings, AAM F # 305, and Licensee does not believe this comment is legitimately provoked by anything in the Special Master's Report, this troubling theory should not go unaddressed.

50. There is absolutely no reason to question the credibility of Mr. Kelly, the independent consultant from PQS Corporation who wrote, administered and graded the mock "Kelly" exams conducted in April of 1980. Kelly, ff Tr. 24,894 at 1-5. Mr. Kelly testified that the Kelly exams were closed book. Tr. 12,609-10 (Kelly). In their late-filed finding, to establish the contrary theory, the Aamodts quote a misstatement, subsequently corrected, by Mr. Kelly during the initial phase of the restart hearing. A fair reading of Mr. Kelly's testimony,

however, unequivocally establishes that "no books," but "calculators and steam tables" were allowed to be available to examinees during the Kelly exams. Id.

Respectfully submitted,

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LIC 6/1/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that true and correct copies of the foregoing LICENSEE'S REPLY TO COMMENTS OF OTHER PARTIES ON THE SPECIAL MASTER'S REPORT AND THE ATOMIC SAFETY AND LICENSING BOARD'S TENTATIVE FINAL DRAFT were served this 1st day of June, 1982, as follows: four copies hand delivered to Judge Ivan Smith; one copy each addressed to Judges Walter H. Jordan and Linda W. Little, deposited with Federal Express for delivery on June 2, 1982; and one copy deposited in the United States mail, postage prepaid, addressed to each other person on the attached Service List.

Ernest L. Blake, Jr.

DATED: June 1, 1982.

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