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June 22, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

LICENSEE'S PETITION FOR REVIEW OF ALAB-772

In accordance with 10 C.F.R § 2.786, Licensee petitions the Commission to review the Appeal Board's May 24, 1984 decision, ALAB-772, insofar as it reopens and remands the management phase of this proceeding on three matters. The issue the Commission is asked to address here is whether the existing record meets the intent of the Commission's 1979 Orders which initiated this five-year long suspension proceeding, a question the Commission itself is uniquely qualified to decide. Granted further hearings could enhance the record here (which should be true in every case), such enhancement is unnecessary. The existing record is adequate. Moreover, further hearings will involve the Commission, its tribunals and Staff, and the parties in months of additional litigation without an offsetting benefit to anyone other than those who do not want a decision reached in this proceeding.

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The "most significant" record deficiency, in the Appeal Board's view, is in the area of licensed operator training.1/ In its August 1981 partial initial decision, based on an extensive record, the Licensing Board found that training was adequate and that Licensee complied with the Commission's Orders on training. LBP-81-32, 14 N.R.C. 381, 478-79 (1981). This partial decision, which the Appeal Board did not fault, was made subject to the outcome of the Licensing Board's inquiry into cheating. The Appeal Board does not quarrel with the record subsequently developed by the Licensing Board on the cheating incidents, finding that "the overall inquiry (especially the hearing) was as thorough as possible." ALAB-772, slip op. at 61. The Appeal Board's principal difficulty with the record overall, however, that the Licensing Board, subsequent to development of the cheating record, did not seek from the independent experts who testified on behalf of Licensee, and who were relied on by the Board in reaching its initial findings on the substantive adequacy of Licensee's training program, further testimony as to their conclusions in the light of the cheating record. Id. at 65, 67.

1/ This subject was raised in briefs filed by TMIA, the Aamodts and UCS in support of their exceptions to the Licensing Board's final partial decision. See "TMIA's Brief in Support of Exceptions to Partial Initial Decisions of August 27, 1981 and July 27, 1982 - Management Issues and Reopened Proceedings," (September 30, 1982)("TMIA Brief"), at 59-64; "Aamodt Brief of Exceptions Taken to August 27, 1981, July 27, 1982 Partial Initial Decisions (Management Issues/Training/Integrity)," (September 30, 1982) ("Aamodt Brief"), at 8-9, 11; "Union of Concerned Scientists' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding)," (September 30, 1982)("UCS Brief"), at 5, 17, 19-20.

The Appeal Board's concern suggests that the Licensing Board insufficiently appreciated the infirmities in Licensee's training program which contributed to cheating as disclosed by the reopened hearing.2/ This is not the case. Indeed, the Licensing Board took careful stock of Licensee's substantial improvements in test administration designed to cure the identified problems. LBP-82-56, 16 N.R.C. 281, 296-297, 359-360. In contrast, the Appeal Board, in a footnote, simply notes it did not overlook Licensee's improvements. ALAB-772, slip op. at 63 n. 47. The Appeal Board opines that the improvements even when supplemented by additional steps required by the Licensing Board 3/ are largely ministerial and not sufficiently convincing fixes of "what may be more serious infirmities in the training program." Id. (emphasis added).

To ensure Licensee's examination administration improvements coupled with other improvements added by Licensing Board conditions were sufficient, the Board required that Licensee be subject to a two-year probationary period during which Licensee's qualification and requalification testing and training program shall be subjected to an in-depth audit by independent auditors, approved by the

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2/ This view is somewhat surprising, given the Appeal Board's concurrent recognition that "the adequacy of licensee's training program consumed an enormous amount of hearing time below." ALAB-774 (June 19, 1984), at 8, citing ALAB-772, slip op. at 14-15.

3/ Licensee took no issue with the Licensing Board's conditions requiring additional improvements. Notwithstanding the Appeal Board's willingness to take note of "newly supplied, essentially 'objective' information," see ALAB-772, slip op. at 157, it ignored the "objective" fact that Licensee has fully implemented the Licensing Board's conditions for licensed operator training and the Staff has approved the implementation. See Licensee's Comments on the List of Integrity Issues (February 21, 1984), attached Status Report at 36, 45-46.

Director of NRR, such auditors to have had no role in the TMI-1 restart proceedings.4/ This added assurance the Appeal Board treats in two sentences finding it "necessary and desirable"; however, it is unable to determine whether this assurance is sufficient. ALAB-772, slip op. at 65-66.

Thus, in the area of licensed operator training, the Appeal Board displaces the Licensing Board's determination with its own. The Appeal Board has ordered reopening to explore what even it only postulates "may be" more serious infirmities in the training program. Licensee submits that the Licensing Board's decision, based on its extraordinarily thorough review of Licensee's training programs, procedures and managers, was adequate. The Appeal Board's substituted judgment, which would apply a perfection to the record that is unnecessary, is erroneous. The Commission should reinstate the Licensing Board's decision on licensed operator training.

The second area where the Appeal Board found the record is not as complete as it should be concerns the circumstances surrounding a mailgram sent by GPU President Herman Dieckamp to Congressman Morris Udall in May, 1979. The Appeal Board believes the Licensing Board should have inquired more deeply into this matter on its own,5/ and should not have relied on an I&E report on the subject

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4/ Again, Licensee took no issue with this requirement. And again, although the Appeal Board took no notice under its "objective" evidence standard, Licensee nominated an independent auditor on May 7, 1983, and the Staff on April 9, 1984 approved Licensee's nominee.

5/ This is the same Licensing Board about which the Appeal Board states: "Our canvas of the record reveals a board well aware of its responsibility to the public and the Commission to ensure that it receives all information necessary to a thorough investigation and resolution of the questions before it." ALAB-772, slip op. at 94 (citations omitted).

and the testimony of the head of the I&E team that investigated the subject and issued the report. This issue was raised on appeal by TMIA.6/

As with the training issue, the Appeal Board unjustifiably rejects the Licensing Board's belief that it had enough information and more information was not necessary on this matter. While admitting that the additional hearing it orders "may not be particularly fruitful," ALAB-772, slip op. at 133, the Appeal Board believes it's "worth some additional effort," particularly since it is remanding in any event on the training issue. Id. at 134.

The Appeal Board erred in applying a lower threshold for reopening this issue because it was remanding in any event another matter. The test for reopening on each issue should be independently applied.7/ Although on the training issue, the Appeal Board finds that the test for reopening is met,8/ see id. at 66 n. 50, it does not even make such a determination as to the Dieckamp mailgram, let alone support it.

The Appeal Board regarded it as particularly important that Mr. Dieckamp be questioned on the subject of the mailgram. It

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6/ See TMIA Brief at 29; LBP-81-32, 14 N.R.C. 381, 556-556 (1981); see also Licensee's Brief in Opposition to Appellants' Brief on Exceptions Relating to Management Capability, November 15, 1984 ("Licensee's Brief"), at 57-58; "NRC Staff's Brief in Response to the Exceptions of Others to the Atomic Safety and Licensing Board's Partial Initial Decisions on Management and Cheating Issues," (November 19, 1982) at 30-32.

7/ See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 N.R.C. 1340, 1344-46 (1983).

8/ Licensee disputes this determination. See discussion of training record, supra.

faults the Licensing Board for not doing so on its own, despite the fact that no party sought to question Mr. Dieckamp on the subject when he appeared as a witness. With their interest in this subject so keen as to require a reopening, we believe the Appeal Board erred in not pursuing whether Mr. Dieckamp was questioned on this subject. It is a matter of fact that he was questioned, and by the very I&E team that the Licensing Board relied on for its determination in the Dieckamp matter.9/ No party challenges that fact, nor could it.

Under its "objective" standard, see n.3, supra, the Appeal Board certainly could have determined conclusively that Mr. Dieckamp was questioned. Its finding that the transcript "suggests" he was questioned is unfathomable under the circumstances.10/ Undoubtedly, however, the Commission knows Mr. Dieckamp was questioned. To ignore this fact, to therefore fault the adequacy of the I&E investigation effort upon which the Licensing Board relied, and to consequently fault the Licensing Board and the adequacy of the record on this count is erroneous. The Commission should reverse the Appeal Board's reopening on this matter, and

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9/ Licensee explicitly pointed in its brief to the Appeal Board to the fact that Mr. Dieckamp specifically was questioned on this subject. Licensee's Brief at 58 n. 60. Moreover, Licensee's Comments on Immediate Effectiveness in which this subject was further addressed were provided to the Appeal Board Panel Chairman in September 1981. Finally, the Commission itself has questioned Mr. Dieckamp. See Public Meeting, Presentation on TMI-1 Restart, October 14, 1981, at 10, 91-95 (morning session) and at 3-6 (afternoon session).

10/ The remand on this basis is particularly disturbing given the fact that the Appeal Board never asked a question on this subject during some 30 months when the appeal lay before them or during a full day's oral argument on this appeal.

avoid a costly additional proceeding which the Appeal Board itself admits "may not be particularly fruitful."

The third area where the Appeal Board would reopen and remand the proceeding for further hearing concerns leak rate testing practices at TMI-1. This subject was not specifically addressed in the restart hearings nor was it the subject of exceptions or related appellate briefs before the Appeal Board. Rather, it was the raised in a motion to reopen in January, 1984, which is granted in ALAB-772. The Appeal Board has erred in determining that this matter is so significant that a different result would have been reached by the Licensing Board if this subject had been considered in the hearing.

The Appeal Board in its discussion of leak rate practice first clarifies ALAB-738 by stating that all that it reopened in that decision was preaccident leak rate practices at TMI-2 and that there was no basis at the time to explore leak rate practices at both units.11/ ALAB-772, slip op. at 151-152. It then goes on to cite the Board notifications by the staff of indications of practices at TMI-1 similar to those at Unit 2. The Appeal Board reasons that if the allegations at Unit 2 which were the subject of a Justice

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11/ The Appeal Board expresses curiosity that Licensee in a hearing on the Hartman allegations would be prepared to present evidence regarding leak rate practices at Unit 1. ALAB-772, slip op. at 151. This proceeding's purpose is to determine the restart of Unit 1. Licensee could not conceive that where practices at Unit 2 which led to a federal criminal proceeding were to be explored, Licensee should not be prepared, indeed might not be required, to discuss the nature of the current practices which would be employed upon restart of the very unit in question, Unit 1. This view was supported by the Staff. See NRC Staff's Answer to Aamodt Motion for Reopening to Examine Leak Rate Falsification at Unit 1 (February 9, 1984), at 3.

Department investigation (and ultimately a criminal proceeding) were so significant that the Licensing Board made its decision subject to the outcome of that investigation, then "[t]he same necessarily follows for the new allegations concerning leak rate practices at TMI-1." Id. at 152. This is error. What new allegations? The Staff's? The Intervenors'? There are no facts which warrant this faulty logic. In fact, there has never been, is not now, and is not in the offing, any basis for a Justice Department investigation of TMI-1 leak rate practices. Other than the Aamodts' outrageous, unsupported and irresponsible accusations, see Licensee's Response to Aamodt Motion For Reopening To Examine Leak Rate Falsification at Unit 1 dated February 8, 1984, there is no basis for the Appeal Board's equating TMI-1 practices to those at TMI-2.

Moreover, the Appeal Board has rejected, without basis, Licensee's view that it should await the outcome of a pending OI investigative report before deciding whether to reopen the record on TMI-1 leak rate practices.12/ We now have the OI investigative report. We now have for the first time an account 13/ of the facts

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12/ As Licensee stated to the Appeal Board in its response to the motion to reopen, none of the parties nor the Appeal Board were privy to facts sufficient to evaluate the TMI-1 leak rate practices and reopen the record, and: "At a minimum, the Appeal Board should await the results of N.R.C.'s present investigation, its disclosure (along with the inspection report) to the parties, and a meaningful opportunity for argument on the possible need to reopen." Licensee's Response to Aamodt Motion For Reopening to Examine Leak Rate Falsification at Unit 1, February 9, 1984, at 4.

13/ Licensee expects shortly to make available a second investigative report it commissioned on TMI-1 leak rate practices. See ALAB-772, slip op. at 154 n. 120.

upon which to argue the possible significance of this matter to the Licensing Board's decision. The Appeal Board provided no opportunity to the parties to argue the need to reopen once the facts were available. Instead, it took account of the OI report, without any input from the parties, and decided to reopen apparently coincident with the timing of ALAB-772. In particular, it did not ask the Staff in light of the OI report to clarify the Board notifications on which the Appeal Board based its decision to reopen. This is error. Moreover, that it finds support in the OI report for reopening the record on management issues is illogical. The significance of the Hartman allegations regarding leak rate practices at Unit 2 is not present at Unit 1 and the OI report bears this out in spades.14/

In sum, the Appeal Board erred in granting the motion to reopen to consider TMI-1 leak rate practices because there were not facts extant concerning TMI-1 which provided a basis for applying the serious implications of Unit 2 practices to Unit 1. Further, to the extent the Appeal Board relied on the OI report, it was inappropriate to do so without input from the parties. This is particularly true in view of the Appeal Board's effective rejection of the OI report findings absolving Unit 1 of the implications of

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14/ The Appeal Board goes on to interpret and place reliance on its perception of the OI report's discussion of record-keeping requirements, knowledge of "a loop seal," and pre-accident work request response. ALAB-772, slip op. at 153. There is in this proceeding extensive evidence on record-keeping, pre-accident work requests and the talent and technical know-how of the present Licensee organization. The Appeal Board does not find, nor could it reasonably find, that the subjects it points to in the OI report rise to the level of significant new information which would have affected the outcome in this proceeding and now justify reopening.

serious concern at Unit 2. The Commission should reverse the Appeal Board's decision to reopen on the subject of TMI-1 leak rate testing.

The Commission should exercise its discretion in favor of granting this petition. The TMI-1 proceeding is unique. The Commission itself has demonstrated an interest in this proceeding which dwarfs its involvement in any other licensing proceeding. There have been numerous Commission meetings on this proceeding. It has monitored directly the proceeding from its start.

The Appeal Board's action in ALAB-772 to reopen and remand will involve Commission and party resources in months and months of additional litigation of this case. The record is adequate now. The degree of record perfection sought by the Appeal Board in ALAB-772 is unnecessary and unwarranted. The Commission's judgment should be brought to bear to grant Licensee's Petition.

Respectfully submitted,

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Dated: June 22, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Petition for Review of ALAB-772," dated June 22, 1984, were served on those persons listed on the attached service list by deposit in the United States mail, postage prepaid, this 22nd day of June, 1984.

Ernest L. Blake, Jr.,
Counsel for Licensee

Dated: June 22, 1984

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(Three Mile Island Nuclear Station, Unit No. 1)	)	(Restart - Management Phase)

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