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RELATED CORRESPONDENCE

UCS-September 21, 1984

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 SEP 24 A10:24

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

METROPOLITAN EDISON COMPANY)

(Three Mile Island Nuclear
Station, Unit No. 1))

Docket No. 50-289
(Restart Remand on
Management)

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UCS' MOTION TO COMPEL NRC STAFF RESPONSE TO
UCS' FIRST SET OF INTERROGATORIES TO NRC STAFF
AND MOTION FOR SANCTIONS

The NRC Staff has objected to and refused to answer several of the interrogatories in UCS' First Set of Interrogatories to NRC Staff. UCS has previously moved to require a Staff response under 10 C.F.R. § 2.720(h)(2)(ii). UCS now moves to compel a Staff response and addresses the Staff's objections. UCS also moves for sanctions on the ground that the Staff's positions are taken in bad faith.

In view of the Board's decision to handle discovery matters orally so that the parties can minimize written filings, UCS will not present detailed arguments here. Rather, we will state our positions on the major points at issue so that the Board will be familiar with the arguments.

I. General Arguments

1. Scope

The Staff argues that the scope of this proceeding is limited to obtaining "the views of licensee's consultants," and

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that whatever is litigated in this proceeding must arise in some way from those views. The Staff is incorrect.

As the Appeal Board held, the question is whether the licensee's training program is adequate in light of the deficiencies revealed by and acknowledged as a result of the cheating incidents. ALAB-772, Slip op. at 63, 67. Those deficiencies are discussed, for example, in the Licensing Board's ruling following the Special Master's report. 16 N.R.C. at 355, ¶¶ 2321, et seq. The particular deficiencies cited by the Appeal Board included, inter alia, whether the licensee's examinations were an effective way to measure the operators' ability to run the plant. ALAB-772, Slip op. at 63. This example encompasses the question of whether the examination accurately reflects the plant, and the question of whether the examination adequately tests ability to operate the plant. Other examples appear in the cited decisions and in the Special Master's Report, particularly ¶¶ 242-251.

This Board recognized the correct scope of this proceeding when it stated that,

Our view of the scope of the training issue on remand is that the adequacy of the training program to prepare the TMI-1 licensed operators to operate the plant safely is the broad issue, but that the respective subissues are limited to the implications of cheating and other program deficiencies discussed in Section III.C of ALAB-772.

Memorandum and Order Following Prehearing Conference at 2-3. In the same discussion, the Board recognized that the proceeding

cannot be limited to the views of licensee's consultants, but must be defined by the "broader aspects of cheating and the other deficiencies noted in ALAB-772." Id. at 3. The Board also stated, and UCS agrees, that undisturbed findings are res judicata.

Thus, UCS is entitled to litigate not only whether the OARP Review Committee is right in its views as to the effect and significance of these deficiencies, but also the underlying question of the adequacy of the training program in light of the deficiencies. It follows that UCS is entitled to have the NRC Staff answer all discovery requests that are reasonably designed to lead to the discovery of evidence relevant to this issue.

On a closely related point, the Staff argues, in essence, that only those issues within the scope of the OARP Review Committee's testimony are not res judicata. Indeed, the Staff argues that even the issue of the validity of memorization is res judicata, although the Appeal Board specifically identified that as a serious question in ALAB-772. It seems the Staff would have the licensee determine the scope of the proceeding. As previously noted, this Board has already rejected that position. The issues that are res judicata must be determined by the scope of the issues remanded by the Appeal Board, as discussed earlier. They cannot be decided by the scope of the testimony of one of the parties to this hearing.

2. NRC Examinations

The Staff refuses to answer any discovery requests related to NRC examinations. It's reasoning is that since such

information is not relevant unless licensee's consultants continue to rely upon the NRC examination as a measure of operator competence, the Staff cannot be required to respond to these interrogatories until a "particular evidentiary situation" arises in which licensee's consultants rely upon the NRC examinations. By this reasoning, the Staff need not respond to discovery on this issue until licensee's consultants' testimony, or perhaps their responses to discovery, reveal that they continue to rely upon NRC examinations. Since the discovery period will have expired by then, the result is that UCS will have no discovery.

The Staff has ignored the only existing evidence of the views of the Reconstituted OARP Review Committee, which establishes that the Committee continues to rely upon the NRC examinations. It has also confused the scope of discovery with the separate question of admissibility of evidence at trial.

The substantive limitation cited by the Staff is correct, but it does not support the Staff's position. The Special Report of the Reconstituted OARP Review Committee states that, "This conclusion [concerning the adequacy of training] is further amplified and documented in the presentation of the ... results of the most recent NRC examinations." Id. at 46. This is the only evidence to date on the question of whether licensee's consultants continue to rely upon the NRC examinations. It establishes that they relied upon the NRC exams at least June 12, 1984, when the Special Report was issued.

Accordingly, UCS is entitled to pursue appropriate discovery concerning the NRC examinations. This discovery cannot be limited by a requirement that UCS await either licensee testimony or discovery responses from the OARP Review Committee. To do so would effectively eliminate UCS' discovery rights.

II. Particular Interrogatories

Interrogatories 3,4, and 6

These interrogatories request information related to the development and administration of NRC examinations. Since the OARP Review Committee relied upon NRC examinations as support Reconstituted for its favorable conclusions concerning whether operators are prepared to operate the plant safely, the information sought by these interrogatories is within the scope of discovery. The information is directly relevant to the basis for the Committee's conclusions. If, for example, the NRC examination does not accurately reflect the facility, or if it is a poor test of ability to operate the facility, those facts would undermine favorable Committee conclusions. They would also be necessary to the Licensing Board's decision.

These interrogatories are calculated to lead to the discovery of that type of information and other information relevant to the Committee's reliance upon NRC examinations. Since the Staff prepared the examinations and has the information concerning how the examinations were developed, how well applicants performed, how grades were determined, and the like, it is the only source for the information sought by these interrogatories.

Interrogatories 5, 12-18, 20, 21, and 23

These interrogatories seek information concerning Staff reviews of the GPU training program. The Staff objects on the ground that such information is not relevant to the issues at hand.

This position is astonishing. The information is relevant for two reasons. First, it bears upon the credibility and reliability of any Staff testimony that may be filed in this proceeding on the issue of training. Second, it seeks information that is calculated to lead to the discovery of relevant evidence.

The Staff responds to the first point by arguing that to the extent that the discovery relates to challenging Staff testimony, UCS must await the testimony and is limited to cross-examination of Staff witnesses. Invoking this Catch-22, the Staff would effectively eliminate discovery for the purpose of possible impeachment of its testimony. The rules prevent the Staff from achieving this goal.

Even if the Staff chose not to participate at all in the litigation of the training issue, UCS would be entitled to pursue these interrogatories. The interrogatories seek information concerning the status of licensee's training program. Staff evaluations of that program are relevant, particularly if they reveal deficiencies identified that have not yet been corrected. Even if the Staff were not participating, this information would be essential to a full record for a Board decision.

Interrogatories 8 and 9

These interrogatories seek information concerning Staff interviews of TMI-1 operators on the adequacy of the training program. We are advised by the consultants whom we have contacted in the search for expert witnesses that trainee attitudes, and particularly respect for the training program, are crucial to its success. Thus, these interrogatories are well within the scope of the proceeding. The information is also necessary to a full record.

Interrogatories 10 and 11

These interrogatories ask whether the NRC believes that the OARP relied too heavily on memorization. The Staff responds that the adequacy of the OARP program is res judicata. The Staff is incorrect. Although the adequacy of the OARP has previously been litigated, it is not res judicata because the Appeal Board reversed the Licensing Board's favorable decision and reopened the issue. Among the open questions considered paramount by the Appeal Board is precisely whether the OARP program-the subject of the prior testimony of Licensee's panel-was overly reliant on memorization:

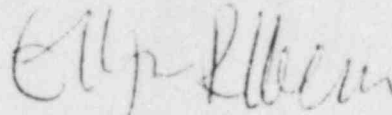
Indeed, the record in the reopened proceeding perhaps has raised more questions than it has answered satisfactorily. For example, does the training program actually enhance the operators' knowledge or simply encourage memorization for test-taking purposes? ALAB-772, Sl. op. at 63.

III. Motion for Sanctions

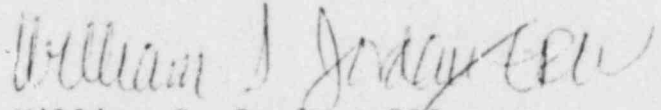
The Staff's positions on UCS' discovery are wholly without basis. They bear no relationship either to the principles governing discovery in administrative proceedings or to the scope of this proceeding as it has previously been established by the Appeal Board and the Licensing Board. In particular, the Staff's position that its views on the GPU training program are irrelevant is patently frivolous. (See Staff objections to Interrogatories 5, 12-18, 20, 21 and 23.) When read together with its position that the adequacy of the OARP program is res judicata (Staff objections to Interrogatories 10 and 11), one must conclude that there are no Staff views on GPU training, either the current program or the OARP program which are relevant or discoverable. Such a proposition is absurd and thus, these positions must have been taken in bad faith for some purpose such as harassment or delay that would hinder UCS' participation in this litigation.

Accordingly, UCS moves that the Licensing Board impose strict sanctions upon the NRC Staff. Since monetary sanctions are unavailable, UCS urges the Board to rule that discovery against the Staff shall be extended by the amount of time between September 19, 1984, the deadline for Staff responses to these interrogatories, and the date that the Staff eventually complies with the Board's order to respond.

Respectfully submitted,



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Dated: September 21, 1984

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the "UCS' MOTION TO COMPEL NRC STAFF RESPONSE TO UCS' FIRST SET OF INTERROGATORIES TO NRC STAFF AND MORION FOR SANSTIONS" were served on the following by deposit in the U.S. mail, first class, postage prepaid, on September 21, 1984.

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