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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

## UNION OF CONCERNED SCIENTISTS' SUPPORT OF MOTIONS FOR RECONSIDERATION

By motions dated March 13, 1985 the Commonwealth of Pennsylvania[1] and TMIA have moved the Commission to reconsider its decision of February 25, 1985, CLI-85-2, ruling that no further hearings would be held in the TMI-1 restart proceeding. UCS supports these motions.

### The Commission Has No Legal Authority to Reverse ALAB-738

The decision of the Appeal Board in ALAB-738 which, inter alia, ordered further hearings on GPU management integrity in view of TMI-2 leak rate falsification, was issued in 1983. No party appealed this decision to the Commission. Nor

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[1] The Commonwealth's motion was sent to an outdated address and not received by UCS until March 20.



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did the Commission take review on its own motion pursuant to the procedure and standards established in 10 CFR § 2.786(a), which must be done within 40 days after the date of the decision if no petition for review is filed.

The Commission states in its February 25 order that it "reverses the Appeal Board's decision to reopen the record on this matter." CLI-85-2 at 34. The Commission cannot reverse a decision as to which it has not properly taken review. Moreover, the Commission has no further jurisdiction to review or reverse ALAB-738. The decision is final.

The Decision To Allow Restart Without Hearings on Leak Rate Falsification Is Based on Errors of Fact and Law.

In the remarkable procedural disarray wrought by the Commission's rulings in this proceeding, it has become increasingly difficult to know exactly what is being decided at any time. The salient facts about the Commission's February 25 decision on this issue are that 1) it constitutes a decision on the merits that GPU management has the requisite integrity and competence to operate TMI-1 and 2) it relies in reaching that decision on factual findings which are not based on record evidence but rooted in surmise, speculation and enduring optimism. UCS has argued previously that the Commission may not rely on extra-record material in this manner, particularly when

it is "reversing" a decision of The Appeal Board flowing from the record. See "UCS Comments on TMI-1 Restart Immediate Effectiveness," July 26, 1984, pp. 1-20.

Beyond legalities, The Commission's February 25 decision is an object lesson on the value of the basic principles of rational decision-making (or due process) and the errors which result from disregarding these principles.

We begin by endorsing Commissioner Asselstine's description:

> There has never been a complete, public investigation of this matter. OI did not complete its investigation of this issue, and the grand jury information is not available to us for evaluation. We have some information which clearly indicates that at least at TMI-2 the leak rate falsification was widespread and condoned, it not encouraged by, first level management. However, we do not know precisely who was involved. We also do not know whether anyone above the first level management should be held responsible. Therefore, we do not know whether all necessary remedial actions have been taken.
> CLI-85-2, Dissenting Views of Commissioner Asselstine, pp. 9-10.

Despite the fact that no evidence has ever been taken on Mr. Ross's role in leak rate falsification, the Commission makes the factual finding that it is "highly unlikely" that he knew of or was involved in leak rate falsification. CLI-85-2, Slop at 25. This, in turn, is based on the finding that "the only evidence even possibly linking Ross with TMI-2 leak rate falsification is that he was cross-licensed on TMI-2, and therefore he could be presumed to have had some knowledge of TMI-2 activities." Id.

On the contrary, one need not stretch to "presumption" of Ross's knowledge of TMI-2 activities. Ross operated TMI-2 to keep his license and stood in when the TMI-2 Supervisor of Operations was away. See "TMIA Motion for Reconsideration of

Commissions Order of February 25, 1985," March 13, 1985, p. 19 (hereinafter "TMIA Motion"). Moreover, as TMIA points out, there were monthly shift supervisor meetings, attended by Floyd and Ross, where these matters were very likely to have been discussed. Id. Considering the October 28, 1978, NRC inspection when the discarding of "bad" tests at TMI-2 was discovered by the inspector,[2] and the high-level meetings and LER which ensued, it is hard to believe that Ross could have remained ignorant of the prevailing daily practices at TMI-2. Ross's knowledge of the plant was such that he was called to the control room to advise during the TMI-2 accident. Given that the leak rate falsification occurred on a daily basis and that Ross is universally acknowledged and praised for his attentiveness to the details of operations, it is not plausible to believe that he did not know what was happening. Moreover, as UCS pointed out in detail, many of the same practices involved in daily falsification at Unit 2 were also followed at Unit 1, Ross's own plant. There is no dispute that Unit 1 operators routinely discarded "bad" leak rate tests, in violation of at least four different technical specifications and administrative procedures, and accepted negative tests as "valid". "Union of Concerned Scientists Response to CLI-84-18, Need for Evidentiary Hearings in TMI-1 Proceeding," October 9, 1984, pp. 34-35, 39-40 (hereinafter "UCS October Response".)

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[2]The Commission curiously makes no mention of this event although it is extremely significant evidence that upper level management must have known of the situation at TMI-2. See UCS October Response, pp. 45-6.

The similarity in behavior at both plants is evidence of a pattern of disregard for basic safety requirements. Id. In concluding that Ross was oblivious to what was occurring while he was on duty at TMI-2, the Commission has made a factual finding with no record basis and of inherent implausibility. It has substituted its hopes for facts.

The Commission then exonerates Kuhns and Dieckamp on the basis of the U.S. Attorney's statement that he had no evidence indicating their participation in or knowledge of "the acts or omissions that are the subject of the indictment"[3] and by translating into fact its "belief" that they were "so far removed form actual operations" as to lack responsibility, CLI-85-2 at 28, 29. Of course, this leaves a big question which the Commission makes no attempt to answer: how far up the chain of command and how widely within the organization did knowledge and responsibility go? And what does this show about corporate integrity and character?

In reducing the issue to one of individual responsibility, the Commission has condoned GPU's cynical policy followed throughout this proceeding: first, deny wrongdoing, then, when the involvement of a specific individual in acts of dishonesty or incompetence can no longer be overlooked, that individual is gently nudged into the vast GPU universe beyond "nuclear

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[3] Even if one accepts that Kuhns and Dieckamp were unaware of the specific criminal acts spelled out in the indictment, that does not absolve them of accountability for the overall corporate attitude which permitted these acts to take place.

activities." Meanwhile, The GPU management left behind continues to vouch for his integrity. In some metaphysical fashion apparently acceptable to the NRC, the shuffling of these individuals (Herbein, Arnold, Wallace, the TMI-2 operators) to either "non-nuclear activities" or to non-operational activities cleanses the corporation. The result is that responsibility never devolves either on the individuals or the corporation. In fact the Commission has reduced the Atomic Energy Act's requirement of corporate character to a nullity.

Finally, it is remarkable that, in concluding that GPUN now has sufficient systems in place to assure that activities are conducted correctly, the Commission relies on the 1980 Licensing Board decision that came out before the revelations on leak rate falsification, cheating, material false statements, false NOV response to NRC and virtually everything else summarized in NUREG-0860, Supplement 5. CLI-85-2 at 32. The circular nature of this reasoning recalls the edict of the Red Queen: "Sentence first, verdict after."

The Commission's Refusal to Permit Hearings on TMI-1 Leak Rate Falsification is Based on Errors of Fact

As in the case of TMI-2 leak rate falsification, the Commission here accepts all exculpatory evidence or speculation, rejects all inculpatory evidence and, without hearings, makes a merits ruling that leak rate falsification did not take place at Unit 1. It states:

> There is no evidence of falsification beyond speculative inferences that could be drawn solely from the circumstance of a few irregulations in the data and some superficial similarity between leak rate practices at TMI-2 and TMI-1. CL-85-2 at 46.

This is incorrect. First, the "irregularities" were not few. Some 6% of the Unit 1 leak rate tests reviewed involved the addition of hydrogen or water or feed-and-bleed. Moreover, the "irregularities" include discarding bad tests. This happened routinely. NUREG-0680, Supp. 5, p. 4-1. Second, the similarities between the practices at TMI-2 and those at TMI-1 were not "superficial,". On the contrary, except for the number of tests "manipulated," the similarities were clear. "Bad" tests were routinely discarded at both plants, in violation of numerous procedures. Negative tests were accepted as valid in both plants although they do not reflect actual plant conditions. The MUT loop seal - a convenient mechanism for manipulating leak rate tests - existed at both plants. In both plants, tests were simply repeated until a "good" one was obtained. In both plants leak rate tests were run on every shift. UCS October Response, pp. 35-40. The Commission is not simply free to disregard this evidence in the absence of hearings.

Moreover, the Commission absolves Ross of knowledge of the practices at his own plant, "given their infrequency and the mundane nature of the leak rate testing process." CLI-85-2. As noted above, the pertinent "irregularities" include routinely discarding bad results. This did not occur infrequently. Moreover, it was at Ross's direction that the tests were done on every shift and he exhorted operators to get a "good" test during their shift. See TMIA Petition for Revokation of License of General Public Utilities Nuclear Corporation on the Grounds

of Deficient Character, August 13, 1984, p. 316 ff. Contrary to the Commission's assertion, such "mundane" matters were quite obviously not beneath Ross's notice.

In fact, there are only two major differences between practices at the two plants. The first is that manipulations were fewer at Unit 1. This, by itself, is irrelevant, since the need to falsify was also less at Unit 1, concededly a "tighter" plant. The second is that no Unit 1 operator has come forward, as Hartman did for Unit 2, to disclose the practices. Given that such an admission would expose the operators to criminal liability, the Commission cannot draw favorable inferences from their failure to do so. Thus, the fact that the evidence is circumstantial does not derogate its impact, contrary to the Commission's belief. CLI-85-2, n. 37 at 48. This is particularly so considering that, other than the operators' denials, the evidence suggesting innocence is equally circumstantial and inferential. The difference is that the Commission simply chooses to believe the latter.

The Commission Cannot Presume that the Staff's Change in Position Would Not Have Affected the Outcome

The Commission notes that, contrary to its explicit direction, the Staff never indicated what testimony it would have changed before the ASLB. Nevertheless, the Commission apparently concludes that no matter what the Staff might have said in support of the changed conclusion that GPUN did not have the requisite character and integrity to operate TMI-1, this would not have changed the outcome. What the Commission means

is that this would not have changed the Commission's mind; the Commission has no way of knowing whether or how it would have affected the licensing Board. There has never been a case where any licensing Board has issued a commercial license over a Staff conclusion that the requirements of the Atomic Energy Act are not met[3] and it is disingenuous to suggest that it would have happened here. We believe that there can be no serious dispute that this evidence, coupled with the Staff's conclusion that GPUN did not meet the character requirements of the Atomic Energy Act, had the potential to change the ASLB's original decision. That is the long established standard governing reopening. It is presumably no accident that the Commission does not apply that standard here, but instead finds that it would not have "invalidated" the decision. CLI-85-2 at 66. It reached this conclusion by reasoning that the Board would have had to "fully inquir[e]" into the underlying events - i.e. held hearings - and could have concluded, as the Commission has, that shuffling guilty individuals to non-operational activities cures all ills. Id. The Commission here highlights the fact that its reasoning has made a nullity of the corporate character requirements of the Atomic Energy Act as interpreted by numerous previous NRC cases:

> Therefore it likely would at most have led to further consideration of the specific issues cited by staff, in light of staffs altered views rather than to further hearings on some abstract notion of corporate adequacy.
> CLI-85-2 at 66.

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[3] This would have been the Staff's conclusion had it known the pertinent facts. See CLI-80-2, p. 65

However, corporate character is not an "abstract" issue, but flows precisely from consideration of the acts of the corporation through its agents and employees. In this case, those acts include false statements, cheating, coverups; in the staff's own words:

> a pattern of poor attitude toward training responsibilities and leak rate testing requirements, a failure to provide accurate and complete statements to the NRC, an unwillingness to admit violations of NRC requirements and a failure to promptly report cheating and its subsequent coverup. CLI-85-2 at 65.

The Commission's conclusion that the evidence would not change the outcome is necessarily based on the underlying premise that there are no acts or pattern of actions of the corporation's agents which might disqualify the corporation from holding a license. No one -- neither the Commission nor any Board -- has considered whether this corporation should be disqualified in light of all of the evidence bearing on its character. This makes a mockery of the law and is contrary to NRC precedent.[4]

Perhaps the clearest illustration of this is the Commission's consideration of the impact of the company's false response to the Notice of Violation. The allegation here is

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[4] See ALAB-772, 19 NRC 1193, 1202-1208 and cases cited therein.

> Either abdication of responsibility or abdication of knowledge . . . could form an independent and sufficient basis for revoking a license . . . on grounds of lack of competence (i.e. technical) or character qualification . . .
>
> Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980).

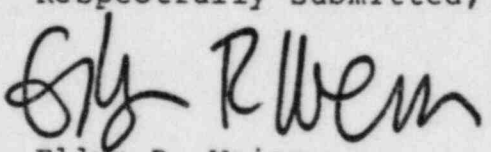
that the then-President of the company and his chief assistant lied to the NRC. None of this evidence has ever been brought before the Board. The Commission concedes that "if true, it reflects some lack of integrity in licensee's management." CLI-85-2 at 64. However, since the two individuals "primarily responsible" have been moved to other GPU positions, the issue is resolved. The Commission does not note that the Company has made no admission, has undertaken no investigation, has never changed its response, and has apparently moved Mr. Wallace to Oyster Creek - another nuclear plant. Nor have there ever been hearings to determine who else bears responsibility. Nothing could more starkly illustrate the cynical nature of this shuffling and, most sadly, the Commission's unbounded willingness to accept it.

Conclusion

The facts known today do not support a conclusion that GPU manifests integrity: "an uncompromising adherence to a code of moral . . . values: utter sincerity, honesty and candor: avoidance of deception, expediency, artificiality, or shallowness of any kind." ALAB-772, 19 NRC 1193, n. 9 at 1207 (1984). Yet, CLI-85-2 constitutes a decision which, as a matter of law, determines that GPU meets the standards of character, and integrity required of an NRC licensee. In thus turning its back on the principle that the operation of nuclear power plants should only be entrusted to those exhibiting the highest standards of honesty and integrity, the Commission has taken an action of fleeting expedience that will have enduring

consequences. At a time when more and more of the responsibility for oversight is being given by the Commission to the industry itself, it is more than ever necessary that the Commission be able to trust implicitly in the honesty and forthrightness of its licensees. This decision is a great stride backward. UCS urges reconsideration.

Respectfully submitted,



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March 28, 1985

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNION OF CONCERNED SCIENTISTS' SUPPORT OF MOTIONS FOR RECONSIDERATION was served on those indicated on the accompanying Service List. Service was made by deposit in The United States mail, first class, postage prepaid, on March 28, 1985, except those indicated by an asterisk were delivered by hand.

Ellyn R. Weiss

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Before the Nuclear Regulatory Commission

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