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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Nuclear Regulatory Commission

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

TMIA'S MOTION FOR RECONSIDERATION
OF COMMISSION'S ORDER OF FEBRUARY 25, 1985

Three Mile Island Alert ("TMIA"), pursuant to 10 CFR 2.771, respectfully requests that the Nuclear Regulatory Commission ("NRC" or "Commission") reconsider its Memorandum and Order of February 25, 1985, and modify and/or clarify it in accordance with the arguments presented below.

Specifically, TMIA requests that the Commission reconsider and grant hearings on falsification of leak rate tests at Unit 1 and Unit 2 (July 1984); on the Parks, King, and Gischel allegations concerning harassment of whistleblowers and widespread safety violations; on the NRC Staff's change of position in NUREG-0680, Supp. No. 5; on the Keaten Report; on Licensee General Public Utilities Nuclear's ("GPUN") false response to the Notice of Violation; and Changes to the Lucien Report.

TMIA also requests that the Commission clarify its Memorandum and Order to permit the continuation of informal discovery already undertaken in order to prepare for the ordered hearings on leak rate falsification at TMI-2 at which the Commission

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ordered to proceed outside the restart proceedings.

I. THE COMMISSION APPLIED AN INCORRECT LEGAL STANDARD IN REQUIRING THE PARTIES TO ENUMERATE DISPUTED ISSUES OF FACT AND ALL SUPPORTING EVIDENCE TO SATISFY THE STANDARD FOR REOPENING THE RECORD AND/OR FOR A HEARING.

The Commission directed that all parties who argued that hearings were needed on issues based on "new information" to provide the following:

1) a description of the scope of the hearings;

2) specified disputed issues of fact material to a restart decision by the Commission on which further evidence must be produced; and

3) the most substantial factual and technical bases for their position on each such issue. CLI-84-18, 20 NRC 808, 809 (1984).

This is an incorrect legal standard since it requires the parties to provide the factual basis for their contentions, prior to any permitted discovery. The only facts about particular issues to which the parties other than the NRC Staff and GPUN have access are those records or reports compiled by the Staff and Licensee. Clearly the intervenors and the Commonwealth of Pennsylvania cannot effectively advocate hearings when restricted to the facts which the Staff and Licensee have provided them.

Moreover, the Commission has placed the intervenors and Commonwealth of Pennsylvania essentially in the position of arguing against GPUN and Staff's motions for summary judgment in the absence of any access to factual information. In a similar situation in civil litigation, when unprepared to file an opposition to a motion for summary judgment, a party is free to file a

Rule 56(f) affidavit stating the reasons and supporting facts for his inability to oppose the motion without additional discovery. Rule 56(f), Fed.R.Civ.P.

In imposing this unfair burden on parties with no access to factual information the Commission effectively prejudges the issues. In its Memorandum and Order the Commission largely bases its determination that additicnal hearings are not required on a judgment that the intervenors and Commonwealth have failed to demonstrate a material factual issue in dispute, or to disprove the NRC Staff or Licensee statement of facts. Without discovery or other coercive legal process, the intervenors and Commonwealth had no means by which to make this offer of proof.

The following portions of the Memorandum and Order show the practical bar to intervenors meeting this standard for reopening which the Commission imposed on the parties:

1) The Commission denies hearings on falsification of leak rates at TMI-1 on the basis there are no "significant factual disputes" concerning leak rate practices. The Commission states that TMIA, UCS, the Commonwealth and the Aamodts do not argue with the underlying facts provided by the Office of Investigations ("OI") in its investigation into TMI-1 leak rates, but rather dispute "how the material should be interpreted and what inferences should be drawn from the facts." It also states that none of the parties urging hearings on this issue "have produced evidence to show ...more numerous acts of possible falsification than OI found." Memorandum and Order, at 45 and 45 n.32.

Obviously no party other than the Staff and Licensee had access to facts about falsification of Unit 1 leak rates and so none could

provide facts in opposition to those provided by OI.

2) The Commission denied motions to reopen the record on GPUN's false response to the NOV on the ground that there was no factual dispute regarding Dieckamp's decision to refrain from correcting the response. Id. at 64 n.46. It also used this rationale to deny reopening on the basis of the Staff's change in position insofar as it rested on Dieckamp's involvement in the NOV response. Id. at 82.

Again, it is obvious that the intervenors and the Commonwealth had no factual basis to dispute the company and NRC Staff position other than the factual information provided to them.[1/] Therefore, the Commission predetermined that intervenors would not meet the burden of creating a disputed factual issue concerning Dieckamp's role in the false response to the NOV.

3) The Commission denied hearings on the Keaten Report in the absence of what it called "a showing that false information was used negligently or intentionally" in the Keaten Report.[2/]

Obviously without discovery TMIA had no opportunity to explore and present factual evidence disputing the company's position that its officials had no improper motive in altering the report. Id.

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1. While it is true that the false NOV response first came to TMIA's attention during its review of the GPU v. B&W trial record, TMIA's review of the material indicates that issues such as Dieckamp's particular involvement, and that of other top GPU management, was not specifically explored during the course of that litigation. Thus, there is little information on that record concerning that issue. In any event, TMIA has been denied its own discovery opportunities in the context of this NRC proceeding.

2. TMIA contends that there is sufficient evidence to demonstrate, although not conclusively, that Licensee altered the Keaten Report with an improper motive. See, also note 1, supra.

at 80-81.

4) The Commission denied reopening of the record for litigation of improper changes to the Lucien Report. The basis for the Commission's decision was that TMIA had failed to present any factual disputes and had merely drawn inferences different than OI from the facts in OI's investigative report. Id. at 84-86.

Again, TMIA was forced to rely on the facts provided by OI in its argument since it did not have any independent access to factual information.[3/]

5) Finally, the Commission denies reopening of the record on the change in operator testimony at the GPU v. Babcock & Wilcox trial on the ground that TMIA had failed to demonstrate a factual dispute of any significance, other than with regard to Frederick's earlier position. Id. at 88. The Commission states further that TMIA's argument that the change in testimony was improperly motivated and caused by management pressure is unsupported by the factual evidence and effectively countered by the company's argument that the change in testimony results from newly-available technical analyses. Ibid.

Again, without access to any independent source of factual information TMIA cannot effectively counter GPUN's argument on the merits or prevail on a motion to reopen.

As is clear from the five examples cited above, the burden the Commission placed on the intervenors and the Commonwealth is one it knew could not be met. The Commission's Memorandum and Order rests

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3. Management issues related to the Lucien report were not fully developed during the GPU v. B&W trial. See note 1, supra.

largely on the intervenors' and Commonwealth's alleged failure to meet this impossible burden. Imposing on the parties this extraordinary condition to reopen the record, prior to any opportunity to discover relevant facts, is a violation of the parties due process.[4]/

II. THE STANDARD APPLIED BY THE COMMISSION FOR REOPENING ON THE BASIS OF THE STAFF'S CHANGE OF POSITION IS IN LEGAL ERROR.

The Commission refused to reopen the record on the basis of the NRC Staff's change in position. The basis for the Commission's decision was that even if the Staff had testified that Licensee "had not met the standard of reasonable assurance of no undue risk to public health and safety" in the main hearings, this testimony would not have been likely to change the Licensing Board's validation of the company's management. Memorandum and Order, at 66.

The Commission based this conclusion on the fact that the Licensing Board relied on other testimony on "Licensee's acceptability"; it examined individual issues bearing on the company's acceptability; and, even if the NRC Staff had not validated the company's management, the Licensing Board would have been forced to inquire into the "seriousness of the events" underlying the Staff's change in position, and the company's corrective action. Ibid. The Commission finds that if the Licensing Board had undertaken

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4. The usual or traditional standard to reopen the record to consider new information is stated in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980). It includes no requirement of demonstrating a material factual issue in dispute or the best factual and technical case possible.

this latter endeavor, presumably in the context of adjudicatory hearings on the issues which led to the Staff's change in position, it would still decide in GPUN's favor. In adopting this analysis, the Commission required of the parties not only that they demonstrate that the new information "might" lead to a different decision on the part of the Licensing Board, but they show conclusively that it "would have" led to a different decision. This is an illegal standard to force the intervenors and the Commonwealth to meet, especially since, as pointed out in section I, supra, they have had no opportunity for discovery.

III. THE COMMISSION HAS APPLIED A STANDARD TO DETERMINE WHEN COMPANY EMPLOYEES' ACTIONS ARE TO BE IMPUTED TO MANAGEMENT WHICH IS IN LEGAL ERROR.

The Commission has scattered throughout its Memorandum and Order different standards by which it has judged the circumstances under which the acts of a corporation's employees may be imputed to management. For example, the Commission states at one point:

> The Commission has nonetheless given considerable thought to the arguments that (1) Kuhns and Dieckamp should be held responsible for the acts of those under them, whether or not they knew what was occurring, and (2) if they did not know what was occurring, they should be faulted for not knowing because of the apparent widespread nature of the falsifications. If the Commission subscribed to either theory, it could find that there should be a hearing on the Hartman allegations in the restart proceeding.
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> The Commission cannot find from the available evidence that Kuhns and Dieckamp were responsible for the attitude that allowed the falsifications to occur. The Commission is concerned with the apparent extent of falsification and the attitude that allowed such acts to occur. However, the Commission places primary responsibility for that attitude on those managers in charge of day-to-day operation, not on Kuhns and Dieckamp.

Nor does the Commission subscribe to the view that individual executive managers and Board members such as Kuhns and Dieckamp should be held personally responsible for all acts of subordinate employees. The Commission believes that only a few high-level employees are in such positions of responsibility that their acts may be considered synonymous with those of the company, and herefore that the executive managers as part of the corporate entity should be held responsible for their acts. However, even in those cases the company or executive managers should not necessarily be censored for the improper acts, if adequate corrective actions, such as discipline or removal, are implemented. As for other employees, the Commission expects executive managers and Board members to encourage a policy of discovering any problems or improper acts and of taking appropriate corrective action. However, the Commission will not hold, purely as an abstract matter, that executives such as Kuhns and Dieckamp are completely responsible for the acts of individual employees. For such responsibility to attach, there must be some knowledge or involvement in those acts at the executive level. The Commission has found none in the present case.

. . .

Again, there is no reason to expect or require senior executives to be involved in or directly supervise day-to-day plant operations, but they should have procedures in place so that significant problems come to their attention. The Commission finds that, if falsifications were as widespread as it appears, plant management should have been aware of it and stopped it, and senior management should have been aware of plant management's failure. However, this failure must be viewed in context with remedial steps subsequently taken.[5]

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5. The Commission states that it does not believe that Dieckamp was involved in daily plant operations to the extent that he would be familiar with widespread leak rate falsification at TMI-2. It cites to Dieckamp's testimony in the recent hearing on the Dieckamp Mailgram issue. Id. at 28, citing Tr. 28,615.

However, Dieckamp's full testimony on this point paints a different picture. Dieckamp admitted that he was the direct line

(Footnote Continued on Next Page)

Id. at 29-30.

The Commission states both that acts of corporate employees can under some circumstances be charged to management and the corporation, but that even in those cases such fault or liability does not attach if managers take appropriate corrective action.

The Commission states that it faults managers such as Dieckamp and Kuhns for not having procedures which would bring to their attention problems such as leak rate falsification. Alternatively, the Commission seems to believe that it was really the fault of plant management that such falsifications were not stopped and were not brought to the attention of upper management.

Without any explanation the Commission finds that undefined changes in "organizational structure and procedures" will ensure such failures are identified to senior management in the future.

At another point in its Memorandum and Order the Commission cites with seeming approval the standard set out in a portion of the Appeal Board's decision in ALAB-772, 19 NRC 1193, 1264-65, 1265 n.98 (1984):

(Footnote Continued From Previous Page)
supervisor for the GPU Service Corporation design and construction group responsible for TMI-2, from March, 1973 through the accident. He also maintained an awareness of the problems which occurred during this design and construction phase, and sat in on meetings where specific programs or contracts with major contractors were discussed. Dieckamp stated too that he communicated directly with Herbein even though he did not have direct supervisory authority over Herbein. Tr. 28,613-615.

Dieckamp's testimony reveals an understanding and involvement in the specifics of the design and operation of TMI-2 beyond that which would be expected of an executive of his level in the parent company to GPU. Moreover, he became Chairman and CEO of GPUN at the time of its formation. He remains today a member of GPUN's Board of Directors.

> We would agree that, if further hearing established significant improper action by...any employee--the corporate entity itself must bear some of the responsibility. The degree would depend on the circumstances and conduct involved. In that sense, then, the corporate entity can never be held blameless for past acts. But the question here is whether the corporate entity can reasonably assure more responsible conduct by its managers in the future...[I]t cannot be gainsaid that [the absence of the implicated individuals] from the ranks of Licensee's managers removes a large hurdle in Licensee's path to proving it is competent to manage TMI-1 in a safe manner.

Memorandum and Order, at 82.

The Commission here appears to adopt the view that the top managers determine the character of the corporation, and removal of those responsible for prior misconduct will assure proper corporate behavior in the future. This is patently inconsistent with the view expressed earlier in its opinion that top management is not responsible for the misconduct of operational personnel.

It is obvious that neither of the standards enunciated by the Commission can serve as a proper measure of the capabilities of Licensee management. TMIA has consistently urged the Commission to look at the Licensee's pattern of misconduct to determine whether management is capable of safely operating TMI-1. Reviewing the corporation's conduct both before and after the accident will show that despite some structural changes, some personnel changes, and some changes in procedures, the corporation continues to engage in a pattern of deceptive misconduct. Removing key personnel is not sufficient evidence of change. What is important is that the concrete actions of the corporation change after these managers' removal. Licensee's pattern of misconduct has continued despite

the removal of key individuals, including Gary Miller, John Herbein, and Robert Arnold. Thus it is clear that the Commission's standard of removing managers to solve the problem is not the proper standard to apply.

Further, the Commission cannot judge the capabilities of current GPUN management by the corrective action they promise to take to correct past problems. Consistently the past corrective action Licensee management has taken has proven inadequate to resolve the pattern of management failures.

The Commission should therefore reject both inconsistent standards of judging the responsibility of top GPUN management employed in its Memorandum and Order. It should instead adopt a standard which examines the current conduct of Licensee to determine whether or not past patterns of misconduct have been eradicated. Only from using such a standard can the Commission make the predictive determination that Licensee is capable of operating TMI-1 safely.

IV. THE COMMISSION SHOULD CLARIFY ITS ORDER TO ASSURE THAT ONGOING VOLUNTARY DISCOVERY ON TMI-2 LEAK RATE FALSIFICATION CONTINUES.

The Commission has decided to institute a separate proceeding on the Hartman allegations for the stated reason of developing "the facts surrounding the falsifications in sufficient detail to determine the involvement of any individual who may now work, or in the future desire to work, at a nuclear facility; specifically, whether any such individual participated in, or knew of and condoned, or by their dereliction or culpable neglect allowed the leak rate falsifications at TMI-2, and, if so, what action is appropriate." Id. at 35. The Commission intends these hearings to allow a "full

airing of the issues." Memorandum and Order at 2, 34.

Pursuant to the Licensing Board's Memorandum and Order of September 19, 1984, the parties have undertaken voluntary discovery on the Unit 2 leak-rate falsification issue. Licensee has provided to TMIA a large number of documents relevant to this issue. TMIA and Licensee have spent a considerable amount of time arranging for a room for examination of these documents. About 12 TMIA volunteers have examined these documents over a period of approximately eight weeks.

When the Commission issued its Memorandum and Order Licensee denied TMIA any further access to these documents until the Commission provided clarification of its Memorandum and Order that hearings be held on the Unit 2 leak rate falsification outside the restart proceedings. Because the documents which TMIA has examined are relevant to the issue as defined in the Commission's Memorandum and Order, and because of the extensive time and efforts expended in examining and indexing these documents, TMIA requests that the Commission state explicitly that TMIA and the other parties shall continue to have access to these documents.6/

TMIA will participate in any hearings the Commission establishes to examine individuals' culpability for leak rate falsification. Undoubtedly any such hearing will require granting the

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6. The documents produced by Licensee are contained in over 50 boxes. They include, inter alia, Unit 2 technical specifications; documents released to the grand jury which drew up the indictment of Metropolitan Edison; surveillance reports; meeting minutes; and personnel files. TMIA has already expended great time and effort in indexing these documents.

parties continued access to the documents which Licensee has already produced. Permitting the parties an opportunity now to continue their review will expedite the process.

The Commission stated that it needed to institute a separate proceeding to provide a full public airing of the issue and to determine whether any specific individuals should be removed from licensed nuclear operator duties. Id. at 34-35. Directing TMIA and the other parties to continue informal discovery on this issue will be a step in this direction.

V. THE COMMISSION MADE CLEAR ERRORS OF FACT IN ITS ANALYSIS OF UNIT 2 LEAK RATE FALSIFICATION

The Commission's articulation of the views of U.S. Attorney David Queen regarding the culpability of upper mangement, particularly Kuhns and Dieckamp, in the Unit 2 leak rate falsification, is factually incorrect. Id. at 28-31. There is no dispute that the U.S. Attorney did not develop sufficient evidence to indict those Directors and Officers of GPUN named in the February 28, 1984 "Change of Plea and Sentencing of Metropolitan Edison Company." However, as explicitly stated to the court, the government indicted the corporation Met Ed because a judgment was made that based on the evidence which was developed, the corporation itself should be held responsible for the criminal misconduct.

The Commission has distorted the views of the U.S. Attorney in its claim that his statements to the court exonerated Kuhns, Dieckamp, and other senior managers at GPUN. Id. at 28. Queen in fact told the court as follows:

> The company was indicted for a reason. It was to serve notice on this and all other licensees that

> you can't sluff off the responsibility for corporate activity on a handful of scapegoat employees . . . I think at the risk of debating back and forth, the proposition that this company be held responsible for its conduct is unavoidable.

Transcript of Proceedings, (February 28, 1984), cited at Petition for Revocation of License of General Public Utilities Nuclear Corporation on the Basis of Deficient Character (August 13, 1984 as supplemented) ("Petition") at A-262.[7]

The Commission states that the available evidence does not indicate that Kuhns and Dieckamp were responsible for the attitude that allowed the falsification to occur. Id. at 29. This is also factually incorrect as there is a great deal of evidence suggesting that financial pressure of the type for which only senior management is responsible, was the precise reason operators falsified leak rates.

First, it is not a matter of dispute that by the time of the Unit 2 accident, the plant had been experiencing serious identified leakage problems, and that a management decision was made to keep the plant operating until cold shutdown since identified leakage was within technical specifications limits. Petition at A-54 n. 29. OI concedes that information it developed indicates that there was serious concern over the leakage problem, and that "contact or inquiries with other off-site personnel concerned with plant

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7. Moreover, the Commission itself correctly recognized that some high-level employees "are in such positions of responsibility that their acts may be considered synonymous with those of the company, and therefore that the executive managers as part of the corporate entity should be held responsible for their acts." Order at 29-30. See, Petition at 14-22. This is the appropriate standard by which to judge the culpability of Licensee's most senior managers, including Kuhns and Dieckamp.

conditions appears reasonable." NUREG-0680, Supp. No. 5 at 5-15; Petition at A-260.

It has been suggested that management decided to tolerate the leaks until Unit 1 could come back on line in order to save the company approximately $500,000 per day in replacement power. Ibid.. The testimony of shift supervisor Brian Mehler supports this view. Three Mile Island Nuclear Generating Station (NGS) Unit 1 - Possible Falsification of Reactor Coolant System Inventory Leak Rate Tests, No. 1-83-028, Supplement, (O.I. April 16, 1984)("OI Report") Supp. Ex. 4 at 35-36.

The Staff has said that financial considerations may have been involved in decisions to violate procedures specifying block valve closure to diagnose the leaks. NUREG-0680, Supp. no. 5 at 8-33. OI has never refuted this theory because it never expressly examined the issue. Ibid.

Similarly, Hartman indicated that management pressure on operators to "fudge" leak rates was related to the company's determination to begin commercial operation by the end of 1978. Petition at A-259. See also Petition at A-258-261. Hartman's veracity was specifically endorsed by OI investigators. Petition at A-249.

If financial considerations were indeed the motive for deliberate toleration of these leaks, senior corporate management must have been aware of and pressed these considerations since only they held financial responsibility within the corporation. Day-to-day operations and supervisory personnel were paid whether the plant was operating or not. OI Report, Exh. 1 at 28 (Ken Bryan).

Even assuming this was not true, an operational problem of this magnitude must have come to upper mangement's attention, particularly Arnold and Dieckamp. Dieckamp in particular was in close contact with Kuhns. Petition at 19-20. OI seems to confirm this. NUREG-0680, Supp. No. 5 at 5-15; Petition at A-260 ("contacts or inquiries with other off-site personnel concerned with plant conditions appears reasonable.") Anyone familiar with the operation of the plant, as these two clearly were, also knew that there was a direct correlation between the amount of identified leakage, and the accuracy of unidentified leak rate calculation. Thus, knowledge of the enormity of the leak rate problem would have led them, as any reasonable person familiar with Unit 2, to understand the potential problems with unidentified leak rate calculations.

The Commission also made clear errors of fact in addressing the arguments of TMIA and UCS that Licensee conducted a sweeping cover-up of leak rate falsification. Memorandum and Order at 17. The Commission's major error is its faulty identification of the actions which constitute Licensee's cover-up. It defines this as Licensee's inability to conduct what it defines as a full-scale internal investigation of the matter. Id. at 31 n. 26.

The Commission fails to consider significant aspects of this cover-up, particularly as they relate to senior management. The cover-up began with the violations themselves, which involved at a minimum on-site management and Met Ed's Vice-President for Generation. Id. at 23 n. 20. The next stage began after the accident. Between May 22 and October 29, 1979, Harold Hartman disclosed his allegations to the NRC in three separate interviews.

Licensee representatives not only scheduled these interviews, but closely tracked them as they were released. Moreover, NUREG- 0600, released in August, 1979, specifically discussed excessive RCS leakage during March, 1979. NUREG-0600 at I-1,2-4. In light of the attention devoted by the Keaten Task Force to PORV and leakage issues, the company's position that senior management first heard about the falsification allegations from news reports following Hartman's television appearance is not plausible. See, e.g., Statement of Bob Arnold at June 20, 1983 GPUN/Staff Meeting, Tr. at 25; Petition at A-209-210.

Further, Arnold and Dieckamp, and to some extent Kuhns, were closely overseeing the progress of the Keaten Task Force. Petition at A-38-39. Yet the company took no action to determine whether Hartman's charges were accurate; which individuals knew or were involved in leak rate falsification; and who should have been disciplined. Moreover, it was only when Hartman appeared on television that Licensee became "shamed" into looking into the matter.

Licensee hired consultants Faegre & Benson to investigate. The firm interviewed Hartman, and conducted a technical review, on the basis of which it concluded Hartman's allegations were substantially correct. Licensee did not disclose this conclusion during the restart hearings in violation of Board Notification requirements. NUREG-0680, Supp. 5 at 5-17. In fact, the report was not revealed until March, 1983 -- two and a half years after completion. See Petition at 207-212.

Licensee violated its Board Notification requirements again my

not turning over to the NRC Hartman's 1982 deposition taken in the GPU v. B&W litigation.

The Commission also erroneously finds that only members of "responsible" GPUN management, or those "directly associated with the operation of TMI-1" could pose safety risks if formerly involved in leak rate falsification. The Commission theorizes that the "present system of checks and balances and procedural safeguards ensures that no individual in other positions can adversely affact the plants operation." Id. at 20 n. 17. This latter theory has not been advanced by any party.

TMI-1, as any nuclear plant, employs many maintenance, I&C, radiation control, and technical support personnel who work in safety-related activities, and could pose safety risks. Brian Mehler, former TMI-2 shift supervisor who recently became TMI-1 Radwaste Manager, is in this category. The Commission proposes to allow Mehler to remain in this senior position even though he performs safety functions and clearly was involved in or had knowledge of TMI-2 leak rate falsification.

The Commission's analysis of Michael Ross also rests on clearly erroneous facts. The Commission states,

> 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. In view of OI's conclusions, the Commission finds that the mere fact that Ross was cross-licensed does not indicate that he was aware of the falsifications. The Commission concludes that it is highly unlikely that Ross knew of or was involved in leak rate falsifications at TMI-2, and that his continued presence at TMI-1 does not raise a safety concern.

Id at 25.

There is no dispute that Ross holds a post of great safety significance at Unit 1. Ibid. It is also correct that OI examined Ross' involvement in Unit 2 during its supplemental Unit 1 leak rate investigation.

Contrary to the Commission's statement of facts, however, is that the OI interviews confirmed Ross was aware of the leak rate test "problems" at Unit 2. Not only was there testimony that Ross spent time at Unit 2 both during normal operations and when his Unit 2 counterpart James Floyd was away, OI Report, Supp. Exh. 3 at 35; Supp. Exh. 4 at 42-43, but there was also considerable testimony that these problems were discussed at monthly shift supervisor meetings attended by shift supervisors from both Units, Floyd and Ross. See, OI Report, Supp. Exh. 1 at 22-23; Supp. Exh. 2 at 19-20, 22-23, 44, 49-50, 67-68; Supp. Exh. 3 at 88-89; Supp. Exh. 4 at 39-42; Supp. Exh. 5 at 23-24, 39, 41-44.

VI. THE COMMISSION MADE CLEAR ERRORS OF FACT IN ITS ANALYSIS OF UNIT 1 LEAK RATE FALSIFICATION

The Commission's analysis of the Unit 1 leak rate falsification issue contains several clear errors of fact leading to the erroneous conclusion that "...that there are no significant factual disputes concerning leak rate practices at TMI-1." Id. at 45.

First, there is a significant factual dispute as to the season spurts of hydrogen were added during the leak rate tests. OI has found no technical justification for these additions other than to affect leak rates. Petition at A-100-102. OI found enough questions raised by the "aberration with hydrogen bumps" that it referred the matter to the Department of Justice for potential

criminal prosecution.

Most operators and shift supervisors knew that hydrogen additions could affect leak rate test results. OI Report, Exh. 36 at 43; Exh. 40 at 27; Exh. 41 at 25; Exh. 44 at 20; Exh. 51 at 33-34; Exh. 65 at 9; Exh. 71 at 28-29; Exh. 76 at 57; Exh. 78 at 51; Supp. Exh. 1 at 42-43; Supp. Exh. 2 at 43-45, 50, 67-68. Former shift supervisor Chwastyk testified further that he believed it was "common knowledge" at the site that hydrogen addidtions would affect the leak rates and was discussed at shift supervisors meetings. Supp. Exh. 2 at at 45, 67-68.

Former shift supervisor Bryan states that he knows of no other operational reason to add hydrogen in amounts under a pound per square inch. OI Report, Supp. Exh. 1 at 42-43. This testimony clearly contradicts Licensee's technical position that there were legitimate operational reasons to add hydrogen in these amounts. Memorandum and Order at 42.

Secondly, the Commission makes a factual error in asserting that the loop seal becomes significant only after it is determined that hydrogen was used to manipulate leak rates. Id. at 48-49. In fact, the existence of and knowledge of the existence of the loop seal in Unit 1 is important because operators may have learned to manipulate leak rates in Unit 2 from similar falsifications in Unit 1. See e.g., OI Report, Supp. Exh. 2 at 46-47 (Chwastyk).

Moreover, Faegre & Benson found in 1980 that the loop seal was the usual method by which to make hydrogen additions at Unit 2. NUREG-0680, Supp. No. 5 at 4-15. Given that Ross is imputed to have known of leak rate testing problems at Unit 2 during this

period of time and his depth of knowledge about Unit 1, a factual dispute arises as to whether Ross knew that the loop seal in Unit 1 was similarly used to make improper additions of hydrogen. See, generally, OI Report, Supp. Exh. 2 at 22-23, 29-30, 49-50, 67-68, Supp. Exh. 3 at 29, 33, 39; Supp. Exh. 4 at 41-43; Supp. Exh. 5 at 24, 39, 41-42, 44; Petition at A-31-33.

VII. THE COMMISSION MADE CLEAR ERRORS OF FACT IN ITS ANALYSIS OF ALLEGED DISCRIMINATION AGAINST PARKS, KING AND GISCHEL.

The Commission's summary discussion of the factual background of these incidents is in error. Memorandum and Order at 67-69.

It must be first noted that the Commission is wrong in stating "no party has moved to reopen because of the procedural violations themselves." Id. at 71 n. 51.[8/] In both TMIA's Motion to Reopen the Record on Clean Up Allegations (Sept. 17, 1984), and TMIA's Response to Commission Order of September 11, 1984 (Oct. 9, 1984), TMIA recited in full detail OI's findings regarding the accuracy and significance of safety violations alleged by the "whistleblowers." See Motion to Reopen, supra, at 3-5; Petition at A-44-46 and references cited in A-281-315.

The Commission also erred in ignoring the fact that at the time management took action against King and Gischel, they were engaged in protected activity involving the reporting of safety violations, the significance of which both OI and the NRC Staff have substantiated. Both have also confirmed the reports of King

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8. It is unclear how the Commission can make this finding since the Commission did not direct the parties in its September 11, 1984 Order to address this issue, and it was not addressed by the Staff in NUREG-0680, Supp. No. 5.

and Gischel that Licensee management willfully violated the clean up safety procedures which King and Gischel identified and reported.

Among the erroneous statements made by the Commission in this regard are the following:

> 1. The Commission states that the only reasonable criticisms of licensee are that a Bechtel employee had a private procurement investigation of King conducted, that licensee acted peremptorily in suspending King without pay based on the limited information it then possessed, and that the timing of King's suspension and ultimate removal was unfortunate. Memorandum and Order at 72. See Petition, at 281-287 and 291-299 for other criticisms.
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> 2. The investigation by the Bechtel employee appears to have been at least partly based on a personality conflict, and GPUN did not approve of that investigation. Memorandum and Order at 72. For discussion of the factual errors in this statement, see Petition at A-293-294.
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> 3. Licensee had sufficient information to act against King when it did. Memorandum and Order at 72. For discussion of the factual errors in this statement, see Petition at A-298.
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> 4. Licensee revised the suspension to one with pay to obtain further information from King regarding his safety concerns. Memorandum and Order at 72. For discussion of the factual errors in this statement, see Petition at A-297.
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> 5. While the timing of the suspension may have given the appearance that it was retaliatory, the evidence does not support such a conclusion. Memorandum and Order at 72-73. For discussion of the factual errors in this statement, see generally, Petition at A-291-297.
>
> 6. The evidence developed by OI indicates that licensee was motivated by concern for Gischel's physical problems, and, indeed, if licensee had not acted as it did it could have been criticized for failing to act regarding a potential safety concern. Memorandum and Order at 73. For discussion of the factual errors in this statement, see generally, at A-299-308.

7. As in the case of King, this controversy happened to occur at the same time that Gischel was raising safety concerns. While this may have given the appearance of retaliation, the evidence does not support such an inference. Memorandum and Order at 74. For discussion of the factual errors in this statement, See, gnenerally, Petition at A-299-308.

8. There has been no showing of a widespread pattern of discrimination against more than one individual. Memcrandum and Order at 74-75. For discussion of the factual errors in this statement, see generally, Petition at A-281-317.

9. Robert Arnold was the major GPUN official involved. Memorandum and Order at 75. For discussion of the factual errors in this statement, see Petition at A-294-297 (Clark); A-299 (corporation as a whole); A-306-307 (Gifford, Wilson); A-307-308 (Kuhns). Further, the Staff concluded that the corporation was responsible for acts of harassment against Parks. NUREG-0680, Supp.No. 5 at 10-19. For discussion of the factual errors in this statement, see Petition at A-291.

10. The Commission finds that the removal of Arnold eliminates any such overlap [between individuals and policies at Units 1 and 2]. Memorandum and Order at 75. This is incorrect, since not only is there an overlap of corporate individuals, but an overlap of corporate policies which Arnold's removal obviously does not eliminate. See, generally, Petition at A-281-317.

VIII. THE COMMISSION FUNDAMENTALLY MISSTATES THE FACTS CONCERNING THE KEATEN REPORT

The Commission's limited recitation of the facts regarding the Keaten Report fundamentally misconstrues the broad issue before the Commission. The Commission lists only two changes made to the Keaten Report, Memorandum and Order at 80, and one inaccurate item in Licensee's response to the NRC's Notice of Violation. Id. at 75-76.

The broad issue which is not examined is management's influence over the numerous changes which occurred in the eight

different versions of the task force report during its year of preparation. After each draft was produced, the task force rescinded significant findings of culpability which had been previously reached, unanimously by members of the task force. See generally, Petition at A-172-197. The drafts were modified to conform to Licensee's NOV response, its litigative posture for purposes of its suit against B&W, and Licensee's position during the restart hearings. Petition at A-173-175. By failing to address the pattern of modifications and false statements and limiting discussion to three items, the Commission escapes analysis of the broad issue before it.

Moreover, the Commission is fundamentally confused as to the reasons for the modifications, as evidenced by its discussion of the facts. Memorandum and Order at 76. The Commission discusses the report in the context of the company's response to charges in the NRC's Notice of Violation ("NOV") regarding operation with excessively high PORV discharge line temperatures. However, within this discussion, the Commission cites a Staff conclusion which has nothing whatever to do with that particular NOV response. See, NUREG 0689, Supp. 5 at 8-21.

The Commission's discussion of the company's misstatements in its NOV response, particularly Dieckamp's involvement, is similarly confused. The opinion recites Dieckamp's testimony, stating "He reviewed the matter, found the argument kind of thin, and chose not to intervene." Memoradum and Order at 82. However, Dieckamp's testimony dealt only with his involvement in Lincensee's response to one violation for which it was cited, surveillance

procedures in violation of the technical specifications. Petition at A-181-183. These errors demonstrate the Commission's failure to understand and analyze properly the relevant facts.

Regarding Licensee's potential misstatements to the Commission and NRC investigators about the report's purpose, the Commission misstates the record. Memorandum and Order at 77. There is strong evidence, ignored by the Commission, which supports the view that Kuhns and Dieckamp misrepresented the company's understanding of the report's purpose in testimony to the Commission and NRC investigators. See Petition at A-194-197.

The Commission makes a factual error in finding Kuhns and Deickamp told the Commission that "the study might well be made public and hence have a public impact." Memorandum and Order at 84. They both clearly implied the opposite. Kuhns testified, "This was not a report that was designed for advocay on our part and therefore not really for public information." See, Petition at A-194. Similarly, Dieckamp told the Commission, "At no time in my mind was it designed as a document for external distribution." Ibid.

IX. THE COMMISSION MAKES CLEAR ERRORS IN FACTS IN ADDRESSING THE ISSUE OF CHANGES TO THE LUCIEN REPORT

The Commission is factually incorrect in its interpretation of Lucien's reasons for removing from his report a conclusion that start-up and test documents may have been falsified. The Commission states,

> Lucien changes his conclusion when it was explained to him that only the date the overall testing process was finished was placed on the records. Lucien, based on this understanding, found that the discrepancy in the records "was the result of 'poor' administrative practices and recordkeeping."

Memorandum and Order at 86.

However, the evidence indicates that Lucien reached no such "understanding." According to OI, Met Ed employees argued for the change before they had determined that such a falsification had occurred, and Lucien changed this conclusion without investigating the matter further. See Petition at 183-184. In fact, neither Licensee nor Lucien can now say that the testing had in fact taken place, or that the documents support such a position. Ibid.

X. THE COMMISSION'S ANALYSIS OF THE STAFF CHANGE IN POSITION RESTS ON THE CLEAR ERROR OF FACT THAT SIGNIFICANT ORGANIZATIONAL AND PERSONNEL CHANGES OCCURRED IN JANUARY, 1982

The Commission accepts the NRC Staff's explanation for its change in position on validation of licensee management in its analysis of whether reopening of the record is required on the issue. Memorandum and Order at 58-67. However, the Commission never explained in its opinion what occurred after January 1982 to lead the Staff to this change in position. As TMIA pointed out in its comments to the Commission, the only change which occurred after this date was the resignation of Arnold. The Commission's conclusion that the NRC Staff's current validation rests on licensee's corrective action is not supported factually on the record.[9/]

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9. The Commission's criticisms of the NRC Staff's response to its September 11, 1984 Order are well-founded since the Staff made no effort to explain why it chose the date of January 1, 1982, as the turning point for its renewed faith in GPUN management. See generally Memorandum and Order at 4; W. Dircks to NRC Commissioners Memo Re: TMI-1 Restart Order -- the Commission's Criticisms of Staff's Response to CLI-84-183 (March 6, 1985).

XI. CONCLUSION

For the above stated reason, the Commission should reconsider it Order of February 25, 1985, and modify and/or clarify it in accordance with the arguments presented above.

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DATED: March 13, 1985 Attorneys for Three Mile Island Alert

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

I hereby certify that a copy of the foregoing Three Mile Island Alert's Motion for Reconsideration of Commission Order of February 25, 1985, has been served on the following, by mailing a copy, first class, postage prepaid, on March 13, 1985:

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