UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

February 13, 1985

MEMORANDUM TO: Andy Bates, Secy

FROM: Pat Davis, OCM PD

SUBJECT: DISSENTING VIEWS ON TMI HEARINGS ORDER

Attached are Commissioner Asselstine's dissenting views on the order ruling on what further hearings will be held in the TMI-1 Restart proceeding. Please see that they are attached to the Commission order when it goes out.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Bernthal
Commissioner Zech
OGC
OPE

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DISSENTING VIEWS OF COMMISSIONER ASSELSTINE

In its August 9, 1979 order establishing this proceeding, the Commission concluded that it lacked the requisite reasonable assurance that Three Mile Island Unit 1 can be operated without endangering the health and safety of the public. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 142 (1979). The Commission's order enumerated a series of specific concerns supporting that conclusion, including: the special safety vulnerabilities in the Babcock and Wilcox design and the consequent greater burden that these reactors impose on the plant operators; the potential interaction between Unit 1 and the damaged Unit 2; the potential effect of cleanup activities at Unit 2 on the safe operation of Unit 1; the deficiencies in emergency planning and station operating procedures which were so apparent during the Three Mile Island accident; and last, but not least, the serious questions about the management capabilities and technical resources of the licensee which came to light as a result of the accident. Although the NRC staff had developed a detailed set of required corrective actions to address many of these concerns, which the Commission expressly endorsed, the Commission found that these actions alone were not enough to restore the Commission's confidence in the licensee's ability to operate this plant in a safe manner. Therefore, the Commission determined that a hearing was required on the issues specified in its order. The Commission further determined that this hearing must be completed, and the resulting decision of the licensing board must be reviewed by the Commission, prior to restart of the facility. Id.

In the ensuing years, a number of hearings have been held on the issues identified in the Commission's August 9, 1979 order. In addition, subsequent events have broadened the scope of the issues which are relevant to a decision on whether the licensee can operate TMI-1 without endangering the health and safety of the public. Perhaps more than anything else, these events have served to focus attention in this proceeding on whether the licensee has demonstrated the requisite competence and integrity to operate the plant in a safe manner. These events, and the concerns they raise, are not insignificant. Indeed, several events were so significant that they caused the NRC staff to conclude that it could not support its previous testimony in favor of the licensee's competence and integrity. These events include among others: the deliberate falsification of leak rate tests at TMI Unit 2 prior to the accident and the resulting criminal conviction of the licensee for failure to even have a valid leak rate test; the widespread cheating by TMI-1 operators on company-administered tests and NRC licensing examinations as part of the requalification process for licensed operators; the false certification and management involvement in the coverup of cheating by a licensed operator during the requalification process; failures in the licensee's pre-accident and post-accident training programs; evidence of contractor discrimination against an employee for seeking to raise safety concerns; evidence of widespread failures to follow safety procedures in the TMI-2 cleanup, and inaccuracies in the licensee's response to the October 25, 1979 Notice of Violation which resulted from the TMI accident. Some of these events -- most notably, the training and cheating incidents -- are or have been the subject of hearings, but most

have not. Some have also been covered, in varying degrees, by investigations by our Office of Investigations.

The question now before the Commission is whether additional hearings are needed in order to fulfill the requirements in the Commission's 1979 order prior to deciding to allow the restart of TMI-1. I conclude that further hearings are required in four areas to fulfill the Commission's commitments in the 1979 order. These areas are: (1) the Parks allegations regarding discrimination and widespread violations of safety procedures in the TMI-2 cleanup; (2) the staff's change in position on the question of the licensee's managerial competence and integrity; and, (3) TMI-2 leak rate falsification and TMI-1 leak rate falsification.

Parks Allegations

As OI's May 18, 1984 report on the Parks allegations notes, the Department of Labor has substantiated Mr. Parks' allegation that he was discriminated against by the licensee's contractor for raising safety concerns regarding the TMI-2 cleanup. In addition, OI's September 1, 1983 report on allegations regarding TMI-2 safety procedures found widespread violations by the licensee's contractor. The report went on to identify the failure of senior licensee management to monitor responsibly the contractor's work and to hold the contractor accountable as the underlying cause of the violations of TMI-2 safety procedures.

The Parks allegations, and the ensuing OI reports, raise several issues which may be relevant to the licensee's managerial competence and integrity to operate TMI-1. These issues include: the extent of discrimination against employees for raising safety concerns; any involvement of licensee personnel; the implications of the discriminatory actions for the competence and safety attitudes of the licensee's management, and the significance of the procedural violations and their relationship to a determination on the competence and integrity of the licensee's operation of TMI-1. An opportunity for a hearing should be afforded on these issues.

Staff's Change in Position

The staff's change in position presents perhaps the most compelling case for further hearings to fulfill the Commission's commitments in the August 9, 1979 order. In its July 1984 re-evaluation of the licensee's management integrity, the staff found a pattern of activity by the licensee which, had it been known by the staff at the time the staff formulated its position on management in the restart proceeding, "would likely have resulted in a conclusion by the staff that [the licensee] had not met the standard of reasonable assurance of no undue risk to the public health and safety." NUREG-0680, Supp. No. 5, p. 2-2. The staff went on to conclude, however, that the licensee's present organization was acceptable. Id. That judgment was based upon a variety of factors: the staff's finding on the significance and extent of licensee participation in the pattern of events which the staff identified as the basis for its change in position; the staff's finding that the pattern of events which it identified as

significant was all-inclusive; the staff's finding that the present licensee organization was a new organization in all significant respects, and the staff's findings regarding subsequent performance of the licensee's new organization.

It is clear that the staff's change in position would have substantially affected the licensing board's earlier positive conclusion on the licensee's competence and integrity. I cannot believe that the board or the Commission would have found acceptable a licensee organization which the NRC staff found to lack the requisite competence and integrity. This fact, together with the staff's refusal to identify the specific portions of its previous testimony which are no longer valid, provides a compelling reason for further hearings on the broad question of the licensee's managerial competence and integrity. That reason is further bolstered by the fact that there has been no opportunity for hearing on the many judgments made by the staff, and the extensive new information relied upon by the staff, in support of its current conclusion that the present licensee organization possesses the requisite managerial competence and integrity to operate the plant in a safe manner. Further, the Licensing Board has never been given an opportunity to address the issue of whether all necessary remedial actions have been taken in response to these problems. Given these factors, it is beyond question that the present hearing record on the licensee's management competence and integrity is stale and hardly serves as an adequate record upon which to make a decision.

Under these circumstances, the need to provide an opportunity for further hearings on the competence and integrity of the licensee's current organization is clear. Such hearings should include: a review of the present TMI-1 organization; consideration of the staff's reasons for its change in position and other factors affecting the validity of the licensing board's previous conclusions on the question; the significance and implications of a pattern of misconduct by the licensee; the information and analysis which the staff points to in support of its new conclusion regarding the competence and integrity of the licensee's current organization; and the need for additional corrective actions.

TMI-2 and TMI-1 leak rate falsifications

I also disagree with the Commission's treatment of the TMI-1 and TMI-2 leak rate issues (Hartman allegations). I believe that hearings are required on these issues and that those hearings must be a part of the TMI-1 restart proceeding. The reasons given by the Commission order for not reopening the record on the TMI-2 leak rate issues are very interesting and may have some relevance to whether the Commission can allow restart while the hearings proceed; however, on the issue of whether the TMI-1 record should be reopened, they are largely irrelevant.

We need not make predictions as to whether our hearing boards would find these issues relevant to restart because the Appeal Board has already decided that the restart record should be reopened to hear these issues.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177 (1983) and ALAB-772, 19 NRC 1193 (1984).

The Board found that the Hartman allegations raised significant safety issues, stating:

> Whether the Hartman allegations raise significant safety issues need not detain us long. Alleged violation of technical specifications, noncompliance with proper operating procedures, and destruction and falsification of records at Unit 2 before the accident -- all assertedly under the auspices of at least first level management -- obviously have serious implications for the proposed restart of Unit 1. The facts that the NRC staff referred this matter to the Justice Department for criminal investigation and that the Department has presented it to two Grand Juries underscore its significance. 18 NRC at 188.

The Board said that this was clearly within an issue the Commission directed the Licensing Board to examine:

> whether the actions of Metropolitan Edison's corporate or plant management (or any part or individual member thereof) in connection with the accident at Unit 2 reveal deficiencies in the corporate or plant management that must be corrected before Unit 1 can be operated safely[.] Id.

The Board also concluded that the Hartman allegations might have affected the outcome of the Licensing Board proceeding. In fact, the Licensing Board noted its lack of information about the Department of Justice matter and made its conclusion that there were no deficiencies in corporate or plant management subject to the Hartman matter. The Appeal Board said that, in effect, the record never closed on this matter. Without an on-the- record examination of the Hartman matter, the Appeal Board said

that the record contained a material gap and that it could not make a final judgment as to the licensee's management competence and integrity without an adequate record. The Appeal Board concluded that: "'The Commission's primary commitment...to a fair and thorough hearing and decision' in this case requires no less than an exploration of Hartman's charges at [a] hearing. CLI-79-8, 10 NRC 141, 147 (1979)." Id. at 190.

In choosing to take review of the Appeal Board's decision, the Commission did not apply its usual standards for review. Normally the Commission only reverses an Appeal Board decision for a clear abuse of discretion or a clearly erroneous application of the law. 10 CFR 2.786. The Commission has not applied that standard here. Instead the Commission chose to reconsider the issue virtually without reference to the fact that the Appeal Board had already decided the issue. See, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-84-18, 20 NRC 808(1984).

The Commission has decided that the Appeal Board was wrong and that it need not reopen the TMI-1 hearing to take evidence on the Hartman issues. The basis for the Commission's conclusion is the mass of information available to the Commission about changes to TMI management, personnel and organization which has never been made a part of the hearing record and which has never been tested in an adjudicatory setting. In 1979, the Commission said that its decision on the management competence and integrity issues was going to be made on the record developed at a hearing before a licensing board. Metropolitan Edison Co. (Three Mile Island

Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141 (1979). In its haste to restart TMI-1, the Commission has decided to ignore that fact.

The information upon which the Commission relies to conclude that the record need not be reopened has never been the subject of a hearing. The parties have never had an opportunity to subject this information to cross-examination. The opportunity to file written comments on written reports is hardly an adequate substitute. Further, the Licensing Board has never had an opportunity to consider that information. The Board could very well decide that further management, personnel or organizational changes are necessary after reviewing a complete hearing record on the Hartman issues. In fact, the Licensing Board made it conclusion's subject to the Hartman issues, and in effect, left the record open on these issues.

The Commission concludes, however, that it knows enough about what happened to find that there is no longer any safety significance to this issue. This conclusion is based on the changes to licensee's organization, quarantine of some personnel from operational positions, and the statement of the U.S. Attorney relating to the plea agreement between the government and licensee on the criminal indictment. I cannot agree that the record is sufficiently complete that I can conclude with certainty that there is no remaining safety significance to these issues.

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, if 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.

The Commission relies on the statement of the U.S. Attorney for its conclusion that upper level management should not be held responsible, and that there is, therefore, no further remedial action which must be taken. Unfortunately, the U.S. Attorney's statement while helpful as a starting place to begin an investigation of the issue can hardly be termed dispositive. We have no idea upon what information the U.S. Attorney's statement was based because we do not have access to grand jury materials. Also, the interests of the U.S. Attorney's office are not coextensive with those of the NRC. The U.S. Attorney is interested only in prosecution for violations of criminal statues. The standards for proving criminal violations are much higher than those we apply to determine violations of our regulations. Further, our interests go beyond mere personal involvement in a particular act. We must also determine whether corporate management should be held responsible for such actions, regardless of direct involvement, because they allowed an attitude to develop such that falsifications occurred and because they had not developed procedures to assure that upper management was aware that the facility was not operating in conformity with its technical specifications. The Licensing Board has never been given an opportunity to consider these issues, or whether

sufficient remedial actions have been taken to prevent the recurrance of such episodes and to ensure that the plant will be operated safely.

In fact, the issue of corporate responsibility will never be the subject of a hearing. The Commission has decided to throw a bone to the intervenors in the TMI-1 restart case by offering a limited hearing, outside the TMI-1 proceeding, which the Commission calls a "full airing" of the issue. That "full airing" will not address the involvement of anyone named by the U.S. Attorney in his statement. Thus, most of the GPU Nuclear management, and specifically Messrs. Kuhns and Dieckamp, are to be outside the scope of the proceeding. It will not address the issue of corporate responsibility. This hardly amounts to a "full airing" of the issue. Obviously, the U.S. Attorney was right when he said that the Commission does not really care to know the true extent of what occurred and who were responsible. All the Commission seems to care about is what control room operators were involved. Once again the Commission demonstrates its talent for going for the capillary in resolving an issue.

While our information on TMI-1 leak rates is substantially more complete than that of the TMI-2 leak rate issues, that information is not a part of the TMI-1 restart record and has never been tested in an adjudicatory proceeding. I would also reopen the record on this issue so that there can be a full airing of the issue and so that the Licensing Board has a complete record before it when making a final judgment on the management competence and integrity of the utility. This would ensure that all needed

remedial measures are required to further ensure that TMI-1 will be operated safely.

Conclusion

For the foregoing reasons, I conclude that further hearings are required on the subjects of TMI-2 and TMI-1 leak rate falsifications, the Parks allegations, and the staff's change in position on the question of the licensee's management competence and integrity. Absent a commitment to hold such hearings, I cannot find a basis for concluding that this licensee possesses the requisite competence and integrity to operate TMI-1 in a manner that will not endanger the health and safety of the public. In deciding to deny further hearings on all but the question of TMI-2 leak rate falsifications, and to narrow the scope of that issue to the point where the hearing will be little more than a sham, the Commission has both abandoned the requirements it set forth in its August 9, 1979 order and broken its commitments to the public regarding the acceptable basis for a decision to restart TMI Unit 1. By its decision today, the Commission has violated the trust of the people of central Pennsylvania.