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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

## ATOMIC SAFETY AND LICENSING APPEAL BOARD

## Administrative Judges:

Gary J. Edles, Chairman  
Dr. W. Reed Johnson  
Christine N. KohlAugust 29, 1985  
(ALAB-815)DOCKETED  
USNRC

In the Matter of )

METROPOLITAN EDISON COMPANY, )  
ET AL. )(Three Mile Island Nuclear )  
Station, Unit No. 1) )

'85 AUG 29 P3:21

Docket No. 50-289 SP  
(Management Phase)Louise Bradford, Harrisburg, Pennsylvania, for  
intervenor Three Mile Island Alert, Inc.Deborah B. Bauser, Washington, D.C., for licensee  
Metropolitan Edison Company.Lois R. Finkelstein and Mary E. Wagner for the Nuclear  
Regulatory Commission staff.MEMORANDUM AND ORDER

We have before us a motion filed by intervenor Three Mile Island Alert, Inc. (TMIA), to reopen the record for further hearing in the management phase of this restart proceeding.<sup>1</sup> The motion relies on several pieces of

<sup>1</sup> This motion was initially filed with the Commission, which has referred it to us for disposition. CLI-85-9, 21 NRC 1118, 1145 n.59 (1985), aff'd sub nom. Three Mile Island Alert, Inc. v. NRC, Nos. 85-3301, etc. (3d Cir. Aug. 27, 1985). See note 5, infra.

TMIA's submittal includes two principal documents, plus appendices. The first is entitled "TMIA's Motion to  
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assertedly new information said to bear on the central issue of management competence and integrity.<sup>2</sup>

First, TMIA cites to both a draft and the final version of an August 1979 letter to the NRC from former Three Mile Island (TMI) Station Manager Gary Miller, certifying that a licensee employee, James R. Floyd (designated "VV"), had successfully completed the requalification program; the draft letter is accompanied by a memorandum from Miller asking the licensee's counsel to review the draft. TMIA also presents a copy of a November 1979 application filed by VV for renewal of his senior reactor operator's license, with an accompanying certificate of competence signed by Miller. VV's completion of the requalification program and subsequent certification to the NRC were the subject of considerable attention before the Licensing Board.<sup>3</sup> TMIA asserts that VV's November 1979 application for license

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Reopen the Record for the Purpose of Receiving Additional Information"; the second is entitled "TMIA's Brief in Support of its Motion to Reopen the Record for the Purpose of Receiving Additional Information." Both are dated and were served May 22, 1985, and neither is paginated. For convenience, we refer to the documents as "TMIA's Motion" and "TMIA's Brief" and supply the missing page numbers.

<sup>2</sup> For the background of the management phase of this special proceeding, see generally CLI-85-9, 21 NRC 1118; ALAB-772, 19 NRC 1193 (1984), reversed in part, CLI-85-2, 21 NRC 282 (1985); LBP-82-56, 16 NRC 281 (1982); LBP-81-32, 14 NRC 381 (1981).

<sup>3</sup> See ALAB-772, 19 NRC at 1230.

renewal and the letter and memorandum relating to the requalification were released to the parties for the first time in March of this year as attachments to an Office of Investigations (OI) report. It argues that this information shows that the licensee failed to take appropriate action insofar as VV was concerned.

Second, TMIA provides copies of an emergency procedures review examination taken by VV and another employee designated "O" in May 1979. These purportedly reveal an additional instance of cheating, not made public until June 1984, when the licensee released the tests to a grand jury. TMIA contends that the licensee's earlier "withholding" of this information is evidence of the licensee's lack of integrity.

Under the oft stated test for reopening a record, a motion

must be timely and address a significant safety or environmental issue. It must also show that a different result might have been reached had the newly proffered material been considered initially.<sup>4</sup>

We conclude that the motion is not timely and, in addition, does not demonstrate that a different result might have been reached had the proffered material been considered

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<sup>4</sup> Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089 (1984).

initially. That being so, we deny the request to reopen the record.<sup>5</sup>

A. TMIA's motion is substantially out of time. As the licensee points out, the documents (or, in one case, a handwritten version) included in the OI Report and relied upon here by TMIA were part of the so-called Speaker Report, which the licensee released to the parties over two years ago in March 1983.<sup>6</sup> Indeed, drafts of the August 1979

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<sup>5</sup> As noted above, the motion rests in part on information surrounding Miller's August 1979 letter to the Commission regarding VV's completion of the requalification program. In examining this matter initially, the Licensing Board concluded that Miller -- and, hence, the licensee -- had made a material false statement to the Commission. It conditioned any restart on a requirement that Miller's participation in the licensee's operations be under the direct supervision of an "appropriately qualified" licensee official. It also recommended that the Commission institute a broader investigation into the matter. See LBP-82-56, 16 NRC at 292-93, 344-55. The Commission fairly promptly agreed with the Board's recommendation and turned the matter over to OI. At the same time it directed us not to consider this matter as part of our then-forthcoming appellate review of the Board's decisions. CLI-83-31, 16 NRC 1236, 1237, 1239-40 (1982). In compliance with the Commission's directive, we thus did not scrutinize the certification incident. In response to TMIA's general arguments about the licensee's management capability, however, we acknowledged that the episode was additional evidence that serious management problems had existed throughout the licensee's training organization. ALAB-772, 19 NRC at 1230-31.

<sup>6</sup> Licensee's Answer to TMIA's Motion to Reopen the Record for the Purpose of Receiving Additional Information (May 29, 1985) (hereafter, "Licensee's Answer") at 7 n.7. See letter to Appeal Board from Ernest L. Blake, Jr. (March 14, 1983) and Enclosure (hereafter, "Speaker Report"). The Speaker Report was prepared by Fred Speaker, an attorney

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letter to the NRC from Gary Miller and the memorandum from Miller to licensee's counsel, far from being newly revealed information, were actually introduced into evidence in November 1981 by TMIA as its Exhibit 73 and were the subject of TMIA's cross-examination during the course of the earlier proceeding.<sup>7</sup> Thus, the material contained in the OI Report could easily have been submitted -- and, in one instance, was actually submitted -- during the course of the hearing.

With respect to the 1979 emergency procedures tests, TMIA concedes that they were made available to the parties by the licensee in June 1984, almost a year before this motion was filed.<sup>8</sup> Such delay in tendering new information ordinarily renders a motion to reopen untimely.<sup>9</sup> TMIA

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with the Harrisburg, Pennsylvania office of the law firm of Pepper, Hamilton & Scheetz. He conducted a review of the August 1979 certification of VV at the request of the licensee. See also Board Notification No. BN-83-28 (March 4, 1983).

<sup>7</sup> See Tr. 24,412-15.

<sup>8</sup> TMIA's Motion at 2. See Notice to the Commission, Appeal Board, Licensing Board and Parties (June 1, 1984) and Supplement to June 1, 1984 Notice to the Commission, Appeal Board, Licensing Board and Parties (June 5, 1984).

<sup>9</sup> See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1369, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 n.3 (1983).

attempts to justify its tardiness in submitting this information by noting simply that the Licensing Board was no longer receiving evidence on cheating at the time TMIA obtained the information.<sup>10</sup> But TMIA misconceives the timeliness requirement. The question is not whether a board is still receiving evidence on an issue to which the new information relates at the time the information comes to the movant's attention. (Indeed, motions to reopen the record will invariably involve the proffer of information that would have been considered at an earlier stage of a proceeding.) The critical question is whether the information could have been submitted earlier.<sup>11</sup> In this case the answer is yes. TMIA's justification for having failed to tender the O and VV emergency procedures tests for almost a year is thus insufficient.<sup>12</sup>

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<sup>10</sup> TMIA's Motion at 2. TMIA also states that OI was investigating a later cheating incident involving O and VV. The relevance of that fact to TMIA's delay in submitting the instant information is not apparent.

<sup>11</sup> Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-8, 21 NRC 1111, 1114 & n.3 (1985); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973).

<sup>12</sup> We note, in addition, that in June 1984 and again in September 1984, as part of its deliberations looking toward a final restart decision, the Commission explicitly invited the parties to bring to its attention any unresolved matters that needed to be explored before a final decision could be

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B. The Licensing Board and the Special Master reviewed scores of allegations as part of a wide-ranging examination of management competence and integrity. Among the matters expressly considered during the course of the proceeding were Miller's August 1979 certification of VV's successful completion of the requalification program;<sup>13</sup> cheating on licensee-administered examinations, including the collaboration of O and VV (although not their collaboration on the particular examination attached to TMIA's motion);<sup>14</sup> and management's response to the cheating incidents, including its response to VV's cheating.<sup>15</sup> We are fully satisfied that the information tendered by TMIA, even if timely presented, would not have produced a different result in the Board's resolution of these matters.

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made. See CLI-84-18, 20 NRC 808 (1984); Order of June 1, 1984 (unpublished) at 2. TMIA submitted comments in response to both of the Commission's orders but did not refer to the matters now included in its motion. TMIA Response to June 1 Order (July 26, 1984); TMIA Response to Commission Order of September 11, 1984 (October 9, 1984). Given the Commission's express solicitation of views as to what matters remained for resolution, TMIA had a heightened obligation to canvass its files and present any new matters that might bear on the restart question.

<sup>13</sup> LBP-82-56, 16 NRC at 292-93, 348-55.

<sup>14</sup> Id. at 325; LBP-82-34B, 15 NRC 918, 969, 1006-13 (1982).

<sup>15</sup> LBP-82-56, 16 NRC at 293-95, 344-48.

1. TMIA asserts that, despite its earlier request for all documents related to cheating, the licensee withheld the 1979 emergency procedures review examinations until forced to release them to a grand jury.<sup>16</sup> It argues that the tests were graded in 1979, so the training department must have known about this additional incident of cheating.<sup>17</sup> The licensee indicates, however, that the tests were not reviewed earlier because of an agreement with TMIA not to provide exams prior to 1980 unless they involved a known incident of misconduct. It maintains that the tests here at issue were discovered only when it began a document review in connection with the later grand jury investigation of VV.<sup>18</sup>

This added illustration of cheating by O and VV on a licensee-administered test would not have affected any pertinent Licensing Board conclusion on the cheating itself. In reaching its determination regarding management integrity, the Board explicitly declined to conclude that all possible cheating had been revealed.<sup>19</sup> It was fully aware, moreover, that the licensee's training department was

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<sup>16</sup> TMIA's Motion at 1-2.

<sup>17</sup> TMIA's Brief at 4.

<sup>18</sup> Licensee's Answer at 3 n.3.

<sup>19</sup> LBP-82-56, 16 NRC at 290.



not entirely an innocent bystander; that department, after all, had assigned VV a passing score on a portion of his requalification exam although Supervisor of Training Richard Zechman was aware that O had contributed to VV's exam and had discussed the matter with Miller.<sup>20</sup> What was clear -- and what was decisionally significant -- was that the administration of the licensee's testing program was quite lax.<sup>21</sup> Any further evidence of cheating, including the training department's possible knowledge and concealment of such cheating, would not have materially altered that conclusion.<sup>22</sup>

Insofar as TMIA contends that the licensee improperly withheld this information and did not fully respond to its discovery request, we cannot definitively determine why the additional incident of cheating by O and VV was not brought to public attention earlier. The discovery papers and licensee's argument here are ambiguous.<sup>23</sup> Other factors,

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<sup>20</sup> Id. at 349-50.

<sup>21</sup> Id. at 357. See also ALAB-772, 19 NRC at 1212 n.15, 1231-32.

<sup>22</sup> See ALAB-774, 19 NRC 1350, 1356 (1984).

<sup>23</sup> See TMIA's First Set of Discovery Requests of Licensee in Reopened Hearing of Cheating Incident (As Modified by Agreement) (October 2, 1981); TMIA's First Set of Interrogatories Addressed to Licensee (October 8, 1981) at 8; Licensee's Answer at 3 n.3.

however, lead us to conclude that the licensee's failure to produce the tests earlier was likely inadvertent and, in any event, would not have altered any previous Board findings.

For one thing, as the Licensing Board emphasized, the involvement of O and VV in cheating was first brought to the Commission's attention by Robert Arnold, licensee's former president.<sup>24</sup> In due course, O's employment was terminated due to other cheating, and VV resigned.<sup>25</sup> There appears to be no incentive, therefore, for licensee to have concealed an additional incident of cheating by these individuals. Further, TMIA has provided no basis on which we could conclude that licensee routinely and intentionally withheld discoverable material pertinent to the hearing. Nor has TMIA given us cause to reconsider our own earlier conclusion that licensee's investigation of various cheating incidents was adequate.<sup>26</sup> Finally, the principal managers that might have been involved in any deliberate effort to conceal are no longer licensee officials. The significance of the additional incident of cheating by O and VV to the outcome of this proceeding is thus de minimis.

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<sup>24</sup> LBP-82-56, 16 NRC at 293, 355.

<sup>25</sup> ALAB-772, 19 NRC at 1231 n.45.

<sup>26</sup> See id. at 1229-30.

2. TMIA continues to challenge the propriety of the sanctions imposed against VV by the licensee's top management. The Special Master did not believe that VV's reassignment to the Accident Investigation Documentation Group following discovery of his cheating was a demotion or sufficiently punitive to serve as a deterrent. As a consequence, he believed that the licensee had failed to declare a clear policy against what VV did.<sup>27</sup> The Licensing Board took a somewhat different view. It was less critical of the licensee's motives, believing that VV's peers most likely viewed the reassignment as a demotion. The Board concluded that Arnold's reassignment of VV was a proper reallocation of the company's personnel resources.<sup>28</sup>

TMIA now submits a copy of VV's senior operator license renewal application, which was filed after he had been reassigned but nevertheless lists him as Supervisor of Station Operations. TMIA also points to the certificate of competence, which was signed by Miller in connection with the application but does not indicate VV's reassignment.<sup>29</sup>

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<sup>27</sup> LBP-82-34B, 15 NRC at 1009-13.

<sup>28</sup> LBP-82-56, 16 NRC at 347-48.

<sup>29</sup> TMIA's Motion at 4. The certificate of competence stated that VV had "discharged his license responsibilities in a competent and safe manner during his current license period." Id., Exh. C (OI Report), Attachment 27.

TMIA concludes that this represents further evidence that the Special Master was right and the Licensing Board was wrong.<sup>30</sup>

We cannot conclude that this information would have affected the Board's determination regarding the adequacy of management's response to VV's cheating. The Board fully evaluated the circumstances surrounding VV's reassignment.<sup>31</sup> It was aware that neither Miller nor VV appeared to view the cheating incident as particularly troubling.<sup>32</sup> TMIA's "new" information would, at most, supply additional confirmation of this. For the purpose of evaluating management integrity, however, the Board focused its attention on Arnold's response.<sup>33</sup> It found that response appropriate, noting as well that VV's Unit 1 license had been voided and that the licensee did not plan to recertify VV for Unit 2

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<sup>30</sup> TMIA's Brief at 2.

<sup>31</sup> LBP-82-56, 16 NRC at 345-48.

<sup>32</sup> Id. at 345-46. It is not clear why the license renewal application referred to VV as Supervisor of Station Operations. In answer to questions from Speaker during his investigation of the incident, Miller suggested that the application and accompanying certificate were probably prepared by the training department, which simply relied on an outdated computer printout of names and titles. The language of the certificate of competence was said to be a standard format used by the training department. Speaker Report, Investigation of VV's Qualifications 1979-1982, Deposition of Gary Miller (December 17, 1982) at 18-21.

<sup>33</sup> LBP-82-56, 16 NRC at 346-48.

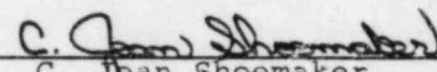
licensing.<sup>34</sup> Nothing in TMIA's presentation here undermines that ultimate Board assessment so as to warrant reopening.

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TMIA's motion to reopen the record for further hearing is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board

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<sup>34</sup> Id. at 348, 355.