UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge Gary L. Milhollin
as Special Master

In the Matter of

METROPOLITAN EDISON COMPANY

(Three Mile Island Nuclear Station,
Unit 1)

Docket No. 50-289-SP

(Restart)
(Reopened Proceeding)

October 22, 1981

MEMORANDUM AND ORDER ON CONFIDENTIALITY

I. Background

On July 31, 1981, the Office of Inspector and Auditor of the United States Nuclear Regulatory Commission reported that candidates for the positions of reactor operator and senior reactor operator at the nuclear power reactor at Three Mile Island, Unit 1, cheated on their NRC licensing examinations. It also reported that the NRC had failed to proctor the examination properly and had failed to detect the cheating when grading the examination papers. On August 1, 1981, the NRC's Office of Inspection and Enforcement filed a similar report, in which two candidates admitted in signed statements facts which constitute an admission of cheating. As a result of these investigations, the Atomic Safety and Licensing Board on September 14, 1981, ordered that the above-entitled proceeding be reopened to evaluate the effect this cheating might have on the conclusions the Board reached

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in its Partial Initial Decision of August 27, 1981. The Board also appointed me Special Master under 10 CFR § 2.722 (1981) for the purpose of conducting the reopened proceeding.

The purpose of this Memorandum and Order is to decide to what extent individuals who may have cheated on examinations, or who have been or may in the future be accused of cheating, are entitled to have their identities held confidential. The parties to the reopened proceeding have taken the following positions on this question: the NRC Staff urges that confidentiality is required by the NRC's Rules of Practice and by the regulations which implement the Freedom of Information Act; the Intervenors, Mr. and Mrs. Aamodt and Three Mile Island Alert (TMIA), urge that confidentiality is inconsistent with the need to examine and to refer to those who cheated in order to discover whether management condoned or encouraged cheating and to discover how much cheating there was; attorneys for the individuals who were involved in cheating oppose public disclosure on the ground that intense feeling in the community may result in threats or other harm to the individuals and their families; the Licensee, GPU Nuclear Corporation, takes the position that it has no legal right to refuse to identify these individuals by name through the normal process of discovery, but suggests a lettering system which, if adopted by the Special Master through exercise of his discretion, could preserve anonymity at least until individuals are called to testify; the Commonwealth of

Pennsylvania takes no position on the legality of disclosure, but recommends discretionary use of the Licensee's lettering system. The parties were given an opportunity to make these arguments orally and in writing at a conference among the parties held in Harrisburg, Pennsylvania on October 2, 1981. At that time the Special Master ruled from the bench that the Licensee's lettering system should be used to facilitate discovery until such time as a final ruling on confidentiality could be made. (Tr. 23,228.)

IV. The timing of this decision

As stated above, the parties are now using the lettering system proposed by the Licensee. That system consists of replacing, by letters, the names of individual candidates in investigatory reports, examination papers, and seating diagrams. The system is working; discovery is proceeding rapidly. However, when the evidentiary hearing begins on November 10 it will then be necessary to decide whether confidentiality will be maintained. Individual operator candidates will be called to testify; they will be asked about their own conduct, their knowledge of the conduct of other operators, and the conduct of management. That decision will be appealable, first to the Atomic Safety and Licensing Board (Tr. 23,119-120) and then, perhaps, to the Atomic Safety and Licensing Appeal Board, and to the Commission. The time required to decide such an appeal would probably amount to three

or four weeks, at a minimum. Unfortunately, the schedule for this reopened proceeding cannot accommodate such a delay.

The balance of the Licensing Board's initial decision will be issued in late November (unpublished Licensing Board Order of September 3, 1981). If that decision is favorable to restart, the Commission will decide by early January whether to make the decision immediately effective. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-81-19, 14 NRC ____, slip op. at 3 (August 20, 1981). At that point, however, the Commission will not have a complete record before it because the Licensing Board rendered its first Partial Initial Decision (P.I.D.) subject to the outcome of this special proceeding. P.I.D., August 27, 1981 at 27. Therefore, in order to provide the Commission with a timely opportunity to rule on a complete record, this proceeding must go forward (and will go forward) on an extraordinarily rapid schedule. As things now stand the evidentiary hearing in this proceeding should be completed in November of 1981. Under this schedule the Special Master could, if necessary, make a preliminary report in December or early January regarding the content of the record. A delay to decide appeals on confidentiality would preclude such a report. Under the present schedule the Special Master's final report is due in early January, and the Licensing Board's decision on the final report on the first of February, 1982.

For the reasons stated above, a ruling on confidentiality will now be made so that an appeal can be decided before the evidentiary hearing begins.

III. Confidentiality as a matter of right

A. With respect to the Licensee.

The Licensee now stands ready to disclose to any party in this case the identity of any present or former employee whose name may be linked to cheating on operator examinations. The Licensee points out that neither the Privacy Act nor the Freedom of Information Act (both of which are discussed below) applies to the Licensee's records. Thus, the Licensee does not assert any legal basis for refusing a properly-drawn discovery request which seeks these identities. The Licensee also states that, in its opinion, there are no solid grounds upon which individual employees would be legally entitled to prevent disclosure by the Licensee. From this it follows that the only way in which the Licensee could refuse to supply the identities would be if the Licensee were ordered not to supply them by the Special Master. As stated above, the Licensee recommends that the Special Master make such an order through the use of his discretion. The Special Master's decision on discretion is set out below.

With respect to the law applicable to the Licensee, there is little doubt about the soundness of the Licensee's position. Both the Privacy Act, 5 U.S.C. § 552a (1974) and the Freedom of Information Act, 5 U.S.C. § 552 (1977), apply to government agencies only, not to the Licensee. Nor does either of these Acts give a private individual the right to prevent disclosure. Chrysler Corporation v. Brown, 441 U.S. 281, 60 L.Ed. 2d 208, 99 S.Ct. 1705 (1979) (no private right of action where a government agency elects to disclose). The result is that the litigants to this case are fully entitled under the law to obtain the information they seek. In the absence of the Special Master's discretion, mentioned above, there is no barrier to discovery from the Licensee.

B. With respect to the NRC Staff.

The Staff urges that the identities of the individuals accused of cheating are not discoverable from the Staff because they fall within two exceptions to 10 CFR § 2.790, the rule which makes final NRC documents generally available to the public. These exceptions are contained in §§ 2.790(a)(6) and 2.790(a)(7). The first, in § 2.790(a)(6), exempts "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This language is the same as that in 10 CFR § 9.5(a)(b), which implements the Freedom of Information Act

(5 U.S.C. § 552 (1977)). The second, in § 2.790(a)(7), exempts "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would... constitute an unwarranted invasion of personal privacy...". There is, again, a parallel provision in 10 CFR § 9.5(a)(7), implementing the Freedom of Information Act. With respect to § 2.790(a)(6), there is considerable doubt whether that exemption is intended to shield the type of information sought here. The concern of the exemption, as the Staff points out, is with the "personal quality of the information in the file," Wine Hobby U.S.A. v. I.R.S., 502 F.2d 133, 135 (3d Cir. 1974), and with "intimate details of a highly personal nature," Getman v. N.L.R.B., 450 F.2d 670, 675 (D.C. Cir. 1971). The qualifications of an individual reactor operator for his job are rather different from that. They are not "intimate details of a personal nature," they are objective facts necessary to resolve an issue of central relevance to the restart proceeding. Those qualifications include, of course, the fact of whether the operator cheated on a licensing examination.

With respect to § 2.790(a)(7), however, which deals with investigatory reports, it is clear that the exemption applies. The names of the operators involved in cheating first appear in NRC investigative reports, so the policy of protecting the privacy interests of individuals named in these reports is brought squarely into play. In order to decide whether to implement that policy in a particular case,

a balancing test is required. 10 CFR § 2.744 provides that the presiding officer may order production of an NRC record exempt under § 2.790 if its "disclosure is necessary to a proper decision in the proceeding and the document, or the information therein is not reasonably obtainable from another source...". This balancing test in § 2.744, which weighs the need for a proper decision against the interest in privacy, is similar to that used by the courts in cases under the Freedom of Information Act where this same language is at issue. See Columbia Packing Co., Inc. v. Department of Agriculture, 563 F.2d 495, 498 (1st Cir. 1977); Wine Hobby, supra, at 136; Getman v. N.L.R.B., supra, at 674. However, this balancing test is apparently not required under § 2.744 if the "information... is... reasonably obtainable from another source...". Here, of course, it is "reasonably obtainable" from the Licensee. This would appear to make the above inquiry moot unless the Special Master exercises his discretion so as to block the Licensee's disclosure. As indicated below, this discretion will not be so exercised, at least at this time. The result with respect to the Staff, therefore, is that it is unnecessary to decide which way the balance under § 2.744 should tip with respect to information which is also obtainable from the Licensee.

Such a result might not be reached if it were decided that the protection enjoyed by the Staff's reports should be extended, as a matter of policy, to the Licensee. It could be argued that the policy

underlying the exemption for investigatory reports is principally one of preserving the government's power to investigate effectively. If identities of persons mentioned in raw investigatory data are released, persons could be inhibited from speaking candidly to investigators. This power might well be undermined if the same information contained in the government's reports could be obtained directly from the Licensee through routine discovery. However, the fact that Congress did not choose to make the Freedom of Information Act or its exemptions applicable to private entities weakens such an argument considerably. Further, the NRC Staff in this case has not requested that the exemption be extended to the Licensee. Finally, the language of § 2.744, quoted above, appears to view disclosure of information by the Licensee as a clear alternative to disclosure by the NRC Staff. The result is that no basis appears in law for extending any of the concepts peculiar to the Freedom of Information Act to the Licensee. The only basis could lie in the Special Master's discretion as discussed below.

There remains the question of information which may be available only from the Staff's investigatory records. In this case, those records contain the identities of persons who have provided information relative to cheating. These persons will be called as witnesses. They may give testimony which describes acts or words which amount to cheating by others, or which reflects upon management's possible

implication in the cheating. Such testimony is very likely to be contradicted by other testimony. It is obvious that whatever facts emerge from this conflicting testimony will be important to the question of operator competence at TMI-1, and of great interest to the community surrounding the reactor. The policy in favor of public hearings is designed to avoid having testimony such as this received in camera. Absent a far stronger showing in favor of confidentiality than the Staff has made so far, the community's right to have these matters aired publicly means that the balance under 10 CFR § 2.744 must be struck in favor of public disclosure. It follows that there is no legal right on the part of the Staff to hold these identities confidential.

C. With respect to rights asserted by private individuals.

Counsel for three persons who have been involved in cheating incidents entered appearances. They argued that their clients' names should be held confidential. However, they cited no persuasive authority for the proposition that their clients had any individual rights against either the Staff or the Licensee. Instead, they cited evidence that the intense feeling in the community, where all the individuals still reside, may result in harm to the individuals and their families if identities are disclosed. They indicated that

this fact should be taken into account by the Special Master in the exercise of his discretion.

In the recent decision of Chrysler Corporation v. Brown, supra, the Supreme Court of the United States decided that individuals have no private right of action under the Freedom of Information Act to enjoin disclosure of documents by a governmental agency. This decision would be relevant to a decision to disclose by the NRC Staff. However, in this case the Licensee stands ready to disclose, and no authority whatever has been cited for the proposition that private individuals have a right against the Licensee.

IV. Confidentiality as a matter of discretion

Under 10 CFR § 2.718, a presiding officer has all powers necessary to conduct a fair and impartial hearing. Under 10 CFR § 2.722, a Special Master must be assumed to have these same powers with respect to those matters wich the Master has been appointed to hear. From this it follows that a Special Master has the power to hold information confidential if to do so would increase the likelihood of a fair and impartial hearing. In this case, it appears that confidentiality would have that effect to the extent that it increases the likelihood of compiling a full and accurate evidentiary record. If such a record were made more likely, for example, because witnesses

accused of wrongdoing would be more cooperative under confidentiality, then it might be proper to exercise discretion to facilitate such cooperation. Also, granting confidentiality might advance the policy underlying the exemption for investigatory reports, as explained above. However, these benefits of confidentiality may be possible only at the cost of placing practical burdens on other parties, and at the cost of subordinating the general policy, contained in 10 CFR § 2.751, of having NRC hearings be public. A weighing of these considerations determines whether discretion should be exercised, and to what extent.

The information sought from the Staff's investigatory reports can be divided into two types. First is the identity of those who cheated. Second is the manner in which they cheated, the extent to which they cheated, their knowledge of cheating by others, their knowledge of management's attitude toward cheating, and their knowledge of the extent to which the integrity of the examination process could have been or was in fact compromised by other devices, such as coaching, or knowledge of questions in advance, which would permit an unqualified candidate to become licensed. It is possible that the second type of information could be explored without going into the first. It is also possible that it could not be. The persons involved in cheating will be called as witnesses. Other persons called as witnesses will be asked about the persons involved in

cheating. Both TMIA and Mr. and Mrs. Aamodt assert that disclosure is necessary. TMIA contends that it would be confusing, and perhaps impossible, to develop a factual record on the cheating without referring to specific individuals by name during questioning of the witnesses. There is also the public interest in open hearings. At this time it is difficult to predict what, if any, arrangements for confidentiality will be feasible. It is, however, clear now that testimony by those involved in cheating, and about those involved in cheating, will be of vital importance to issues in the reopened proceeding, and it is clear that all litigants have the right to participate effectively in exploring this testimony. Any claim of confidentiality which conflicts with this right must give way. Since it is not possible now to say with confidence whether it will eventually be feasible to reconcile confidentiality with litigants' rights and the public interest in open hearings, it is imprudent to exercise discretion to prevent disclosure. This is true even though it still appears that a reasonable accommodation may be possible through in camera proceedings and protective orders.

V. Ruling

It is the ruling of the Special Master that there is no right, on behalf of the individuals involved in cheating incidents, the

Licensee, or the NRC Staff, to prevent the disclosure of the identities of these individuals during the hearng process.

VI. Effectiveness of this ruling

This Order refusing to grant confidentiality is immediately appealable to the Atomic Safety and Licensing Board (Tr. 23,120). A party may appeal this Order within seven (7) days after its service by filing a notice of appeal and a supporting brief. Any other party may file a brief in support of or in opposition to the appeal within seven (7) days after the appeal. During pendency of any appeal, and until further notice, confidentiality shall be maintained by use of the lettering system, referred to above, or by such other order of the Special Master as shall become necessary.

IT IS SO ORDERED.

Gary L. Milhollin by &
Gary L. Milhollin
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 22nd day of October, 1981.