LIC 11/04/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Linda W. Little

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

LICENSEE'S BRIEF IN SUPPORT OF ITS APPEAL FROM SPECIAL MASTER'S DECISION ON CONFIDENTIALITY

Pursuant to the Special Master's October 22, 1981 Memorandum and Order on Confidentiality, and the Licensing Board's October 26 and 30, 1981 Orders regarding the schedule for appealing the Special Master's decision on confidentiality, Licensee herein files its brief in support of its appeal from the Special Master's confidentiality decision. Licensee requests that the Board reverse the Special Master's decision denying confidentiality. Licensee does not now seek to impose a protective order on the parties to the proceeding; rather, Licensee requests that the Board permit the continuation in any outstanding discovery and in the forthcoming public hearings of

the letter designation system successfully used to date, and the use of in camera sessions at the time unnamed individuals are called to testify in this proceeding.

As a preliminary matter, Licensee would like to clarify its position with respect to the matter of confidentiality. Licensee has not strenuously argued what it perceives to be the NRC's legal entitlement to maintain the confidentiality of information it obtained, disclosure of which would constitute an unwarranted invasion of privacy. However, Licensee has previously argued,[1] and reiterates its position here, that it would be an unwarranted invasion of privacy to disclose the names of individuals who cheated on NRC exams and subsequently left Licensee's employ, and the identities of Licensee's employees about whom cheating rumors or unsubstantiated allegations have been raised. Thus, Licensee is not now "ready to disclose" this information. See Special Master's Memorandum and Order on Confidentiality, October 22, 1981 (Special Master's Order), at 5. In addition, Licensee believes that it would be a violation of the Privacy Act, 5 U.S.C. § 552a (1976), if the NRC disclosed this information or if Licensee were ordered to disclose it by a Licensing Board order.

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1 See Licensee's Response to Board Order Dated September 14, 1981 in the Matter of Confidentiality, September 25, 1981, at 2-5; Prehearing Conference of October 2, 1981 at Tr. 23,205-13 (Trowbridge).

ARGUMENT

I. The Undisputed Injury Which Would Result From Disclosure Outweighs any Speculative Benefit Which Would Be Derived Therefrom

None of the parties to the reopened proceeding on cheating have taken issue with the fact that disclosure of the names of individuals who may have cheated on exams, told the NRC information related to cheating, or are the subject of rumors about cheating, would cause these persons great embarrassment, anguish and even potential physical injury in the communities in which they live. Recognizing that all parties to this proceeding, as well as the public, are entitled to access to all information pertaining to Licensee's competence and integrity, including the competence and integrity of Licensee's employees, extremely careful consideration must be given by the Board whether the information sought to be withheld from public disclosure will in any manner facilitate awareness or understanding of the issues subject to litigation in this proceeding. Licensee submits that disclosure of the names of persons who have engaged in, know of, or are the subject of rumors about cheating will not facilitate the parties' and the public's right to know the facts which are really at issue here.[2] Consequently, the only certain result

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2 It is Licensee's view that the "public interest" in this reopened hearing--indeed, the issues as identified in this hearing--concern whether and to what extent, cheating took place at TMI-1, not whether it was Joe Doe or Harry Doe who cheated.

of public disclosure of individuals' names will be, at a minimum, to expose these people to public humiliation and ridicule. Surely, under such circumstances, disclosure would not be in the public interest.

Over the past month, the parties have actively engaged in extensive discovery, including numerous interrogatories, document requests and depositions of Licensee's employees. Despite the nondisclosure of the identities of numerous individuals subject to or who otherwise participated in the NRC's investigations, initial and follow-on discovery requests have been successfully made and responded to by the parties using the letter designation system in lieu of individuals' identities. Even in the deposition process, this system of identification has proceeded smoothly, as exemplified by the attached excerpts (uncorrected) of the October 24, 1981 deposition of "Mr. T."

Thus, the experience of the parties to date makes clear that the use of the letter designation system in no way prevents necessary information from being communicated, discovered, or understood by the parties to this proceeding. In light of the success of the letter-designation system to date, there is no reason to doubt that when witnesses (other than unnamed individuals) testify in the forthcoming proceeding, they will be able to utilize the letter designation system when responding to questions from the parties, and the parties will be able to fully utilize the information relayed

to them in developing their case. Experience therefore has proven that the system of identification in current use is effective, does not burden the litigants, does not introduce confusion into the process, and generally, is very workable. As the Special Master put it, the "system is working; discovery is proceeding rapidly." Special Master's Order, at 3.

With respect to the limited portion of the forthcoming proceeding in which unnamed individuals are called to testify, Licensee recognizes that the risk inherent in continuing public evidentiary sessions is public disclosure of these persons' identities, e.g., by photographs. In order to avoid this risk, Licensee requests that unnamed individuals testify in camera. Although the Special Master denied confidentiality, he acknowledged that "it still appears that a reasonable accommodation may be possible through in camera proceedings and protective orders." Special Master's Order, at 13.[3]

Because a protective order would be unnecessary to accommodate the proposed in camera procedure, the concerns raised by TMIA with respect to the assistance of volunteers in reviewing documents, etc., would not apply. See TMIA's

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3 By using the letter designation system and in camera sessions, as necessary, the Board would avoid the concern raised in Houston Lighting & Power Company et al. (South Texas Project, Units 1 and 2), ALAB-639, 13 N.R.C. 469, 475 (1981), that maintaining confidential the informants' identities would prevent the parties from questioning these individuals.

Comments to Board Order dated September 14, 1981 Concerning Confidentiality. The only interest potentially constrained by in camera sessions would be that of the public at large. But it is highly unlikely that any information will be relayed in the proposed in camera sessions which have not already been fully disclosed to the public, in previous testimony or the public record, including NRC's investigative reports. Moreover, unlike the traditional application of in camera proceedings, so long as the letter designation system is used during in camera sessions Licensee sees no reason why unexpurgated versions of these in camera session transcripts could not be made immediately available without restriction. Licensee sees no value in the public's learning who specifically is implicated in unsubstantiated rumors about cheating on past tests given at TMI. Thus, the only benefit of disclosure is in the utilization of the favored public process -- a benefit Licensee believes will be reduced minimally by the very limited use of in camera sessions[4], while the privacy interests which this proposal protects are vital.

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4 Licensee's entire slate of proposed witnesses is identified by name and these individuals have not sought confidentiality. As additional Licensee employees are produced voluntarily or following subpoenae, Licensee will endeavor to encourage them to participate without requiring confidentiality for themselves. Nevertheless, Licensee believes it is encumbent on it to support and argue on behalf of its employees, their individual rights, particularly where to support their positions infringes minimally, if at all, on any other party's interests or the "public interest."

The Aamodt Family has argued that there is no more reason to avoid embarrassment of the unnamed individuals in this case than there is in a criminal trial. See Aamodt Memorandum Opposing the Withholding of the Names of Operators Known to have Cheated on Examinations, October 2, 1981. Licensee strongly disagrees. Most of the unnamed individuals have not been accused, much less indicted with the associated safeguards that the criminal justice system affords, for wrongdoing of any kind. Most of the information which is the subject of these investigations involves unnamed persons' awareness of wrongdoing by others, and familiarity with numerous unsubstantiated rumors. There is no threshold of substantiality (much less evidentiary reliability) required before these unnamed individuals can be (and have been) questioned on these matters. To publicize such inherently unreliable information is not in any way comparable to the publicity which may accompany a criminal trial. Moreover, we are engaged here in an administrative hearing in which the issue in controversy is whether TMI Unit 1 should be permitted to restart. It is not a proceeding against individuals. It is difficult to understand how the identities of individuals named in investigations and in rumors will substantively add to the multi-issue administrative record which will form the basis for the Commission's decision. In sum, we are orders of magnitude away from the highly structured criminal trial context to which the Aamodt Family refers in advocating disclosure.

In conclusion, there is no reason to believe that the evidentiary process will profit in any way by the Board requiring disclosure of individuals whose names have remained private to date. To the contrary, the facility with which the parties and deponents have utilized the letter designation system in the past month proves that disclosure is unnecessary. With respect to potential testimony by unnamed individuals, the use of in camera sessions will avoid the severe embarrassment and potential danger to which these people will be subject, while only very minimally infringing on the NRC policy favoring public hearings. In light of the undisputed privacy interests at stake here, Licensee requests that the Board reverse the Special Master's Order refusing to grant confidentiality.

II. The Special Master's Decision Is Inconsistent With The Privacy Act

The Special Master's decision on confidentiality was based in part upon his conclusion that neither the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), nor the Privacy Act, 5 U.S.C. § 552a, gives "a private individual the right to prevent disclosure" of information about that individual. Special Master's Order, at 6. Although this statement is correct in part with respect to the FOIA,[5] it clearly reflects

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5 The Special Master based his conclusion principally upon Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979), in which the Supreme Court held that the FOIA, in and of itself, cannot be used to require an agency to withhold information. However, the Court also held that the Administrative Procedure Act could

a misreading of the Privacy Act. As shown below, the Privacy Act prohibits disclosure of the NRC investigative reports, examination results and other records at issue here. Any disclosure by the NRC of those documents--or of the names of individuals mentioned in those documents--would constitute a violation of the Privacy Act and could give rise to a civil damage action by any adversely affected individual as well as a possible criminal prosecution of the NRC employees responsible for the disclosure. On behalf of its employees, Licensee strenuously objects to any disclosure concerning them that is inconsistent with the Privacy Act.

The Privacy Act expressly prohibits any agency from disclosing any "record" in a "system of records" to any person or another agency without the prior written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b). It is beyond dispute that the NRC is an "agency" within the meaning of the Privacy Act. In addition, the investigative reports, examination results and other documents at issue here constitute "records," which are broadly defined in the Act to include "any item, collection, or grouping of information about

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(continued)
be used to enjoin disclosure of information within one of the FOIA's exemptions if the disclosure would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1976). The Supreme Court pointed out that the Privacy Act, by contrast, "explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission." 99 S. Ct. at 1713 n.14.

an individual." 5 U.S.C. § 552a(a)(4). Moreover, even if the NRC has already disclosed expurgated versions of the documents with the names of individuals deleted, those names in and of themselves would constitute records under the Act.[6]

The record also must be contained in a "system of records," which is defined in the Privacy Act as follows:

> (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. . .

5 U.S.C. § 552a(a)(5). Since the pertinent documents relate to NRC-licensed reactor operators, it appears that the records would be retrievable by the name of the individual or by some other identifying particular, such as his license number or the facility for which he is licensed. In this connection, the NRC has published in the Federal Register a description of its systems of records, as required by the Privacy Act. 46 Fed. Reg. 46,707 (Sept. 21, 1981). This listing contains at least two records systems in which the documents at issue are likely to be found--NRC-16 (Facility Operator Licensees Record Files) and NRC-18 (Office of Inspector and Auditor Index File).

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6 A "record" can be part of another "record," and it can be "as little as one descriptive item about an individual" so long as the item contains a name or other "individual identifier." OMB Circular No. A-108, 40 Fed. Reg. 28,948, 28,952 (July 9, 1975).

A record in a system of records may not be disclosed without the consent of the affected individual unless the disclosure falls within one of the eleven exceptions listed in 5 U.S.C. § 552a(b). None of those exceptions appears applicable here, and no one has suggested that they apply.

If an agency improperly discloses records in violation of section 552a(b), the individual involved, if he is adversely affected, may bring a civil damage action against the agency and is entitled to a minimum recovery of $1,000 plus costs and attorneys' fees. 5 U.S.C. § 552a(g)(4). In addition, 5 U.S.C. § 552a(i) provides criminal penalties for any agency employee who knowingly discloses records in violation of the Privacy Act.[7]

In view of this statutory framework, Licensee submits that the investigative reports, examination results and related records cannot be disclosed by the NRC under the Act without the consent of the individuals involved, which has never been given. Insofar as the NRC has already disclosed redacted versions of the documents, it may well have violated the Privacy Act already. It would clearly be violation of the Act

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7 The Privacy Act does not expressly provide for injunctive relief against disclosures prohibited by the Act. However, under the rationale of Chrysler Corp. v. Brown, an individual could use the Administrative Procedure Act to enjoin such a disclosure on the ground that it would be "not in accordance with law." See note 3, supra. In addition, at least one case has held that a court has inherent equitable power to enforce the Privacy Act by injunction. Wolman v. United States, 501 F. Supp. 310 (D.D.C. 1980).

if the NRC now revealed the names of individuals that were deleted from the documents previously disclosed. The Special Master's ruling should not be affirmed to the extent it would require the NRC to violate the Privacy Act in this fashion.

Moreover, Licensee believes that the requirements and purposes of the Privacy Act should not be circumvented by requiring Licensee to turn over the "key" to the operator lettering system so that the intervenors--and the public at large--can "decode" the documents previously released by the NRC and fill in the blanks with individuals' names. It must be kept in mind that the adjudicatory arm of the NRC is part of the agency and is fully subject to the constraints of the Privacy Act. Since the NRC cannot disclose this information directly, it would be anomalous at best if the NRC could indirectly achieve the same result by issuing an administrative order requiring an unwilling third party to make the same information publicly available. Licensee submits that any such administrative order would amount to a forced "disclosure" falling within the prohibition of 5 U.S.C. § 552a(b). Accordingly, the Special Master's October 22nd Order is contrary to the Privacy Act and therefore should be reversed.

III. Conclusion

For the reasons stated above, Licensee respectfully requests that the Licensing Board reverse the confidentiality decision of the Special Master and allow the reopened hearing

to proceed using the letter designation system and in camera sessions when unnamed individuals testify.

Respectfully submitted,

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