

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

COMMENTS OF O

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Introduction

On April 28, 1982, Special Master Milhollin issued a "Report of the Special Master" ("Report") in this reopened proceeding. The subject of these comments is the following recommendation of the Special Master:

"Because of the generally disrespectful attitude at TMI-1 toward the NRC examination, the other acts of cheating or attempted cheating which occurred during the examination, the unrepentant posture of O, W, and some of the other operators, and the threat to the public health and safety posed by unqualified operators and supervisors, I believe the Commission should recommend criminal prosecution of O and W." Report at 176, ¶310.

These comments do not address the merits of the Special Master's findings with respect to O,<sup>1/</sup> but rather the

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<sup>1/</sup> We also do not address the merits of the Special Master's findings with respect to VV, the other client of the undersigned in these proceedings, because no recommendations about VV were made by the Special Master.

propriety of the recommendation itself. As we demonstrate herein, the Special Master's recommendation about O is completely inappropriate, in excess of the Special Master's authority, contrary to the conclusion previously reached by NRC and the Department of Justice, and contrary to the most elementary notions of due process and fair play.

#### Argument

THE LICENSING BOARD SHOULD DISAVOW  
THE SPECIAL MASTER'S RECOMMENDATION  
THAT O SHOULD BE CRIMINALLY PROSECUTED.

The Special Master properly concluded that the NRC Staff "did a thorough and effective job of investigating O and W." Report at 165, ¶289. Nevertheless, the Special Master recommends criminal prosecution of O and W, despite the fact that the NRC's Office of Inspector and Auditor ("OIA") and the Department of Justice ("DOJ") have concluded otherwise on the basis of that same "thorough and effective" investigation. Tr. 25,345-48. It is the function of OIA and DOJ to make that determination. 10 C.F.R. §1.30. It is not the function of the Licensing Board (or, a fortiori, the Special Master) to recommend prosecution.

It is important to note that O is no longer employed at TMI. Report at 174, ¶306. Thus, further punishment is utterly irrelevant to the question whether

TMI-1 should be restarted. Nevertheless, we take strong issue with the Special Master's conclusions about O and his conduct. He testified voluntarily; he attempted to be as candid and honest as possible in his testimony (e.g., Tr. 26,247-48); he did so without immunity; and he admitted that it was wrong for him to have done what he did during the NRC examination in April, 1981 (Tr. 26,231). We do not, however, contest the Special Master's findings about O; we seek only to expunge the Special Master's recommendation that criminal prosecution of O be commenced.

The Special Master's recommendation (in ¶310) that O should be criminally prosecuted is remarkable in that most of it has nothing to do with O!

The Special Master's recommendation is based on the following factors (Report at 176, ¶310):

1. "[T]he generally disrespectful attitude at TMI-1 toward the NRC examination. . . ." Of course, any "generally disrespectful attitude" (even if true) is not O's attitude. Moreover, O seems to have been the person at TMI least disrespectful toward the NRC examinations--he was known as a "head pounder" and "he had the reputation of studying more than anyone else at the plant." Report at 9, ¶10.

2. "[T]he other acts of cheating or attempted cheating which occurred during the examination. . . ."

Obviously, the acts of others are no reason to prosecute O.

3. "[T]he unrepentant posture of O, W, and some of the other operators. . . ." The attitudes of W and some of the other operators provide no basis to prosecute O. With respect to O, the Special Master's characterization ignores O's testimony. O stated: "I did not pass any papers. So in my mind I did not willfully help. But talking to people since then, I know that what I did was wrong. I should not have let it happen. I should not have done it." Tr. 26,231. How much more repentant must O have been to satisfy the Special Master?

4. "[T]he threat to the public health and safety posed by unqualified operators and supervisors. . . ."

Obviously, there is no "threat to the public health and safety" posed by persons no longer employed at TMI, such as O. Report at 174, §306. The Special Master ignored the fact that termination of employment removes any theoretical "threat to the public health and safety" posed by such persons.

No other basis is cited for the recommendation. As demonstrated above, none of the cited bases supports the recommendation.

The Special Master's recommendation is fundamentally inappropriate. It did not need to be part of the Report; it has nothing to do with his assignment or the Licensing Board's responsibilities. If the Special Master felt it necessary to make the recommendation, he could have done so on a confidential basis to OIA. OIA and DOJ could then have reconsidered their earlier decision not to prosecute. See Tr. 25,345-48. If OIA and DOJ decided not to prosecute, the decision not to do so would remain (as it should) out of the public eye. If a decision were made to prosecute, the matter would be referred to a Federal grand jury which could decide (in secrecy) whether probable cause existed to prosecute. Then, and only then, would an accusation of criminal misconduct be made public against O. The Special Master has gravely prejudiced O by superseding the criminal justice system and depriving O of the safeguards built into that system.

It is no consolation that the Special Master's Report does not identify O. In several recent depositions in the civil litigation concerning the accident at TMI-2, attorneys for Babcock & Wilcox have sought O's identity. His identity is also being sought by the media. One has to assume that his identity may be disclosed at some point, whether inadvertently or otherwise. If so, the damage to

his reputation by the Special Master's report drawing conclusions about the alleged criminality of his conduct will be incalculable.

The Special Master's recommendation that O should be criminally prosecuted violates O's rights to due process and violates the most elementary notions of fair play. The recommendation was reached without giving O the opportunity to present evidence on his own behalf, cross-examine the witnesses against him, or even have the benefit of counsel who could participate meaningfully in the proceedings while he was testifying. See, e.g., Tr. 26,183-89. The Licensing Board should disavow that recommendation and associated findings (¶¶306-10).

#### Conclusion

For the foregoing reasons, the Licensing Board should expunge the Special Master's recommendation that O should be criminally prosecuted.

Respectfully submitted,

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