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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF : DOCKET NO. 50-289
METROPOLITAN EDISON COMPANY : (RESTART)
(Three Mile Island Nuclear :
Station, Unit No. 1) : (Reopened Proceeding)

COMMENTS OF ONE OF THREE INDIVIDUALS
TO REPORT OF THE SPECIAL MASTER

May 17, 1982

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I. Background

As a result of the accident which occurred at Three Mile Island on March 28, 1979, to Unit 2, questions have arisen as to whether the Licensee (General Public Utilities Corporation) should be permitted to operate the undamaged Unit 1, which had voluntarily been shut down by the Licensee. In this regard, public hearings were held before the Atomic Safety & Licensing Board on the issue of restart. The results of these hearings were contained in a Partial Initial Decision of August 27, 1981.

At about the same time the Partial Initial Decision was published, the Licensing Board became aware of cheating incidents on licensing examinations conducted April 23 and 24, 1981, at Three Mile Island. In response to these incidents, the Licensing Board determined that the proceedings to determine whether the Licensee should be permitted to restart Unit 1 should be reopened to ascertain what effect the incidents might have on the Partial Initial Decision of the Licensing Board. In addition to ordering the reopening of the proceedings, the Licensing Board appointed Gary L. Milhollin Special Master to conduct the reopened proceedings pursuant to 10 C.F.R., Section 2.722.

Discovery and testimony in the reopened proceedings occurred between October 2, 1981, and December 10, 1981.

A report on the reopened proceedings was filed by the Special Master on April 28, 1982. Parties to the proceedings were requested to make comments on the report. By Memorandum and Order of the Licensing Board, dated May 5, 1982, Individuals O, W and VV were given standing to comment on the Special Master's Report.

The comments that follow concern only those portions of the Special Master's Report dealing with Findings of Fact or Conclusions and Recommendations as they relate to Individual W.

II. Purpose of Reopened Proceedings and Duty of Special Master

Before making comment on the Report of the Special Master, it is important to remember the purpose of the reopened proceedings, the issues to have been covered in the proceedings, and the duty of the Special Master in the proceedings. Against such a backdrop, one can more effectively evaluate the Report of the Special Master and make comments thereon.

A. Purpose of Reopened Proceedings and Issues to be Covered in the Proceedings

Because of the cheating incidents which came to light in August of 1981, it was determined by the Licensing Board, by Order of September 14, 1981, that the TMI-1 restart proceedings should be reopened. The initial basis upon which the proceedings were to be reopened was to evaluate the impact the cheating might have on the conclusions contained in the Partial Initial Decision. In addition, the reopened proceedings were to consider the adequacy of operator testing and licensing. A narrowing of the issues to be focused on in the reopened proceedings occurred as a result of a prehearing conference held on October 2-3, 1981. In a Licensing Board Memorandum and Order dated October 14, 1981, it was ruled that the reopened proceeding would consider the following issues:

The Broad Issue

The broad issue to be heard in the reopened proceeding is the effect of the information on cheating in the NRC April examination on the management issues considered or left open in the Partial Initial Decision, recognizing that, depending on the facts, the possible nexus of the cheating incident in the NRC examination goes beyond the cheating by two particular individuals, and may involve the issues of Licensee's management integrity, the quality of its operating personnel, its ability to staff the facility adequately, its training and testing program, and the NRC process by which the operators would be tested and licensed.

Particular Issues

1. The extent of cheating by TMI-1 operator license candidates on the NRC license examinations in April 1981, and on any other Licensee- or NRC-administered examinations, including, but not limited to, the following: the Kelly examinations (including Category T) in April 1980; Category T make-up examinations subsequently administered by the company; the ATTS mock examinations in early April 1981; and such other examinations as the Special Master shall deem relevant. These latter

shall include any other Licensee-administered qualification or mock exam or NRC-administered exam since the accident at TMI-2.

2. The adequacy of the Staff's investigation of, and NRC response to, the cheating incident and rumors of cheating in the April 1981 NRC examinations.

3. The adequacy of Licensee's investigation of, and Licensee's response to, cheating or possible cheating in the examinations listed in Issue 1 above.

4. [Proposed Issue 4 was combined with Issue 3.]

5. The extent of Licensee management knowledge of, encouragement of, negligent failure to prevent, and/or involvement in, cheating in the above-mentioned NRC and Licensee examinations.

6. The existence and extent of Licensee management involvement in cheating as alleged by the Aamodts in Paragraph 7 in response to the Board's Order of August 20, 1981.

7. The existence and extent of Licensee management constraints on the NRC investigation of cheating and rumors of cheating in the NRC April 1981 examinations.

8. The adequacy of Licensee management response to the incident in July 1979, referred to in the OIE investigation report and involving one of the two operators terminated as a result of cheating on the NRC April 1981 examinations.

9. The adequacy of Licensee's plans for improving the administration of future Licensee qualification examinations for licensed operators and candidates for operator licenses, including the need for independent administration and grading of such examinations.

10. The adequacy of the administration of NRC licensing examinations for TMI-1 personnel, including proctoring, grading, and safeguarding the integrity of examination materials; the adequacy of the Staff's review of the administration of Licensee's Category T examinations; and the adequacy of the Staff's plan for retesting operators and monitoring its NRC examinations to assure proper adherence to NRC testing requirements in order to assure that the purposes of the NRC examinations, because of the nature of the questions, cannot be defeated by cheating, the use of crib sheets, undue coaching or other evasive devices.

11. The potential impact of NRC examinations, including retests, the operator terminations on the adequacy of staffing of TMI-1 operations.

12. The sufficiency of management criteria and procedures for certification of operator license candidates to the NRC with respect to the integrity of such candidates and the sufficiency of the procedures with respect to the competence of such candidates.

In summary, then, the reopened proceedings were to cover not only the effect the cheating incidents might have on the Partial Initial Decision, but also the adequacy of operator testing and licensing, with the overriding issue being whether, as a result of the inquiry in the reopened proceedings, the Licensee should be permitted to restart TMI-1.

B. Duty of the Special Master

The power of the Licensing Board to appoint a Special Master is found in 10 C.F.R., Section 2.722. Section 2.722(a)

(2) provides in pertinent part:

- (a) ... Such special assistants may function as:
- (2) Upon consent of all parties, Special Masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become

part of the record. Special Masters may rule on evidentiary issues brought before them, ... Special Masters' reports are advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master ...

From Section 2.722, it is clear that Special Masters' duties are threefold: (1) to hear evidentiary presentations; (2) to rule on evidentiary issues brought before them; and (3) to prepare a report as part of the record. Though not set forth in Section 2.722, the Special Master clearly also has two important other duties. The first is to conduct any evidentiary hearings, and to consider any evidence presented, being ever mindful of the purpose and reason for his appointment as Special Master as ordered by the Licensing Board. The second, but equally important unwritten, duty of the Special Master is to make Findings of Fact, Conclusions of Law and Recommendations in his Report, based solely on the evidence presented and in view of the issues to be covered in any hearings. He is clearly not expected to interject in his Report personal feelings or observations either unsupported by the evidence presented or concerning matters beyond the scope of the issue to be heard by him.

III. Report of the Special Master and his Recommendations Concerning Individual W

Special Master Milhollin in his report of April 28, 1982, makes the following Findings of Fact and Recommendations concerning Individual W:

1. W showed a lack of respect for the NRC examination (SMR Paragraph 19);

2. W engaged in a pattern of cheating over a period of time (SMR Paragraph 305);

3. W lied to NRC investigators during their first two interviews (SMR Paragraph 305);

4. When testifying under oath in this proceeding, W was not forthright (SMR Paragraph 305);

5. W was fired from his position when his guilt was established (SMR Paragraph 306);

6. W appears to have violated two sections of United States Criminal Code, 18 U.S.C. Section 1001 and 18 U.S.C. Section 371 (SMR Paragraph 307); and

7. Because of the unrepentant posture of W, his disrespectful attitude toward the NRC examination, the other acts of cheating or attempted cheating which occurred during the examination, and the threat to the public health and safety posed by

unqualified operators and supervisors, the NRC should recommend criminal prosecution of W (SMR Paragraph 310).

IV. Comments on the Report of the Special Master as it Relates to Individual W

Individual W takes issue with several of the Conclusions and Recommendations reached by the Special Master in his Report. The first Conclusion of the Special Master at issue is contained in Paragraph 305 of the Report. The Special Master concludes in this paragraph that W was not forthright under oath. This is simply not the case. Prior to his testimony before the Special Master, W had told everything he knew about the cheating incidents to NRC investigators. As a result of his involvement in the incidents, W had already lost his position with the Licensee. And W had agreed to testify voluntarily before the Special Master in return for confidentiality. W simply had no reason not to testify truthfully. He had nothing to gain by not being forthright. The Conclusion by the Special Master that W was not forthright is neither logical nor true; rather, it must be viewed as speculation on the part of the Special Master.

The second Conclusion with which W would take issue is found in Paragraph 306 of the Special Master's Report. It is stated

in this paragraph that W was fired from his position with the Licensee. This is simply not true. W was not fired from his position. Rather, he voluntarily resigned his position with the Licensee.

The third Conclusion at issue here is contained in Paragraphs 307-309 of the Report. In these paragraphs, the Special Master initially concludes that W seems to have violated two Sections of the United States Criminal Code. He then proceeds at length in succeeding paragraphs to prove that, in fact, these Sections of the Criminal Code are applicable to W; and that, in fact, W has violated these Sections. This Conclusion clearly goes beyond the scope of the reopened proceedings as set forth in Section II of these Comments. This Conclusion can be seen at best as an attempt to make an example of W to other operators, or at worst the scapegoat for the Licensee's problems. The purpose of the reopened proceedings was to determine what effect the cheating incidents might have on the decision to restart TMI-1. The proceedings were not reopened to consider the criminal guilt or innocence of anyone. W testified voluntarily and forthrightly to the Special Master in an attempt to help create a complete record on which to base a decision to restart. W did not have to testify. W's guilt or innocence was never an issue in these proceedings and was not the

purpose for reopening the proceedings. It can only be hoped that the Licensing Board will keep in mind the stated purpose of the reopened proceedings; and, therefore, will ignore a Conclusion of the Special Master which is not at issue in the proceedings.

The final Conclusion reached by the Special Master with which W would take issue is found in Paragraph 310. In that paragraph, the Special Master recommends criminal prosecution of W. The question that arises immediately from such a Recommendation is from what authority does the Special Master draw to make such a Recommendation? Under the provisions of 10 C.F.R., Section 2.722, the Special Master is authorized to hear evidentiary presentations, to rule on evidentiary issues brought before him, and to prepare a Report as part of the record. A Special Master is not invested with the authority to recommend criminal sanctions against anyone. The NRC in August 1981 had the same information about W's involvement in the cheating as the Special Master. Yet the NRC has not recommended prosecution. Nor should a Special Master, since he is not vested with the authority to determine if there has been criminal conduct on the part of anyone; nor does he have the power to recommend criminal sanctions against anyone.

The effect of the Special Master's action in recommending criminal sanctions, despite a lack of stated authority to do

so, cannot be underestimated. Out of his Report of 196 pages, containing 343 paragraphs, the Press has seized upon the Recommendations concerning W. See attached as EXHIBIT "A" a copy of Harrisburg Patriot News article. Whether the Special Master knew that his Recommendations concerning W could have such an impact is irrelevant. The fact is that, despite all his other Recommendations, the focus has been placed on the Recommendations relating to W.

W has already paid dearly for his involvement in the cheating incidents. Had W known that the Special Master was even contemplating the Recommendations found in his Report, he might not have testified before the Special Master. What did his testimony gain him, when now he might have to defend against criminal charges? It can only be hoped that the Licensing Board will view the Recommendations as beyond the scope of the authority granted to a Special Master.

CONCLUSION

It is unfortunate that the cheating incidents occurred on NRC examinations given at TMI. Restart proceedings had to be reopened

to determine the effect of the cheating on the potential restart. It is even more unfortunate, however, that the Special Master, assigned very specific duties in conducting the reopened proceedings, has seen fit to make Recommendations concerning individuals, Recommendations that are clearly beyond the scope of the proceedings or his authority, and yet Recommendations that have a tremendous impact, not only on the Press, but also on the lives of W and his family. There is nothing to be gained by criminal prosecution of W, and it can only be hoped that the Licensing Board in its wisdom will recognize this error and not recommend any prosecution of W.

Respectfully Submitted,
SMITH AND SMITH, P.C.

Date:

May 13, 1988

By

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The Patriot

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Harrisburg, Pa., THURSDAY, April 29, 1982 25¢ \$1.20 per week suggested
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Prosecution of 2 Urged In TMI Exam Cheating

WASHINGTON (UPI) — Two former shift supervisors at Three Mile Island Nuclear Generating Station should face criminal prosecution on charges they cheated on examinations, a special report to the Nuclear Regulatory Commission recommended Wednesday.

The report was highly critical of Three Mile Island's operator,

General Public Utilities Corp., concluding, "In light of the number of persons who were compromised, and their positions on the operations staff . . . the overall level of integrity of the operations staff has been shown to be inadequate."

The independent investigation by Administrative Judge Gary Milhollin was authorized by the NRC

after allegations of cheating on reactor operator examinations at Three Mile Island. The cheating allegedly occurred in April of last year.

Milhollin's conclusions in a complex, 196-page report present another major obstacle to General Public Utilities' effort to restart the undamaged Unit 1 reactor at Three Mile Island.

The examinations were given as part of a training program for personnel who would operate the reactor after the NRC approves a restart.

Milhollin found that while the company's management did not encourage or participate in the cheating, it "must have known of the widespread, negative attitude toward the NRC examination," and as a result "failed in its responsibility to instill in the operations staff a proper attitude toward the NRC examination."

Acting as a "special master" for

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the NRC, Milhollin said the cheating "did not occur in the lower ranks of the operations staff. It occurred in the middle and upper ranks. The senior operations engineer, the two shift supervisors, and the shift foreman came from those ranks."

Milhollin called General Public Utilities' entire training and testing program at TMI Unit 1 "poorly administered, weak in content, ineffective in its method of instruction and not an adequate response to the commission's order."

And he told the commission the company's response to the cheating "was inadequate and its testimony at the hearing on that subject was not credible."

The special master, however, did not make a recommendation on whether, in light of his damaging conclusions, the company has "demonstrated the necessary level of competence and integrity to op-

erate safely Three Mile Island Unit 1."

That key determination is up to the Atomic Safety and Licensing Board, he said.

The entire, two-reactor facility near Middletown, Pa., was shut down three years ago after the worst accident in the history of commercial nuclear power occurred at the TMI Unit 2 reactor.

On March 28, 1979, a loss of coolant water severely damaged the reactor's uranium fuel core.

On the issue of criminal charges, Milhollin said "the threat to the public health and safety posed by unqualified operators and supervisors" at the reactor prompted him to "recommend criminal prosecution."

He said there was a "generally disrespectful attitude at TMI-1 toward the NRC examination." He also found that one of the shift supervisors has taken an "unrepentant posture" about the cheating.

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NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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(Three Mile Island Nuclear :
Station, Unit No. 1) : (Reopened Proceeding)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of COMMENTS OF ONE OF THREE INDIVIDUALS TO REPORT OF THE SPECIAL MASTER, dated May 17, 1982, was served to all persons on the attached Service List by deposit in the United States Mail, postage prepaid, on this 19th day of May, 1982.

David E. Cole

DAVID E. COLE, ESQ.

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