

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
METROPOLITAN EDISON COMPANY, ET AL.)
(Three Mile Island, Unit 1))

Docket No. 50-289
(Restart)

NRC STAFF COMMENTS ON IMMEDIATE EFFECTIVENESS
WITH RESPECT TO LICENSING BOARD DECISION ON CHEATING INCIDENTS

August 20, 1982

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DESIGNATED ORIGINAL

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I. INTRODUCTION

By Order dated March 10, 1982, the Commission invited the parties to this proceeding to file comments with regard to the continued effectiveness of the Commission's TMI-1 shutdown order in light of the Atomic Safety and Licensing Board's (Licensing Board) decision on the cheating incidents.^{1/} Specifically, the Commission requested comments on whether that Licensing Board's decision on cheating should be made immediately effective if that decision is favorable to restart. Commission Order, March 10, 1982, p. 2.

On July 27, 1982, the Licensing Board issued a Partial Initial Decision (Reopened Proceeding) on the cheating issues (Cheating

^{1/} In that same order the Commission decided that it will not make any decision regarding the immediate effectiveness of the Licensing Board's Partial Initial Decisions of August 27, 1981 (Management PID) and December 14, 1981 (Plant Design and Procedures, Separation and Emergency Planning PID) until the Licensing Board has rendered its decision on the cheating incidents. Commission's Order, March 10, 1982, p. 1.

PID).^{2/} In that decision, the Licensing Board resolved the cheating issues in favor of restarting TMI-1 and stated that its conclusions in the Partial Initial Decisions of August 27, 1981 (14 NRC 381) and December 14, 1981 (14 NRC 1211) remain in effect.^{3/}

Pursuant to the Commission's March 10th Order, the NRC Staff's position on immediate effectiveness with respect to the Licensing Board's July 27, 1982 Partial Initial Decision on cheating is set forth below.^{4/}

2/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-82-___ (July 27, 1982).

3/ On August 27, 1981, the Licensing Board issued its first Partial Initial Decision on management issues in which it resolved those issues in a manner favorable to the eventual operation of TMI-1 with the exception of the subissue on operator testing and licensing as to which it retained jurisdiction. Metropolitan Edison Co. (Three Mile Island, Unit 1), LBP-81-32, 14 NRC 381 (1981) (Management PID). Subsequently, the Licensing Board reopened the record on management issues to consider allegations of cheating on operator licensing examinations and any impact such cheating may have on the Board's previously expressed management findings and to develop a record for findings on the still unresolved management-related issue of operator testing and licensing. In accordance with the Commission's Orders of November 30 and December 23, 1981 and January 11, 1982, the NRC Staff (Staff) and other interested parties filed, on January 13 and January 20, 1982, comments and reply comments respectively on the question as to whether the Commission should defer a decision on restart until the Board issued its additional decision on those operator cheating matters. By Order dated March 10, 1982, the Commission decided that it would not make any decision regarding the immediate effectiveness of the Partial Initial Decisions until after the Licensing Board resolved the cheating issues.

4/ These comments filed by the Staff are limited to the question posed by the Commission on immediate effectiveness with regard to the Licensing Board's PID on the issue of cheating. The Staff is not addressing in these comments the separate matters of the psychological health effects of operating TMI-1 or the steam generator repairs. Since these two matters were not among the bases for the Commission's immediately effective shutdown order (see CLI-79-8, 10 NRC 141 (1979)), they are not relevant to the issue of whether that immediately effective shutdown order should be lifted, although they are relevant to whether and when TMI-1 will actually operate.

II. BACKGROUND

In response to the accident at Three Mile Island, Unit 2 in March, 1979, the Commission issued an Order on July 2, 1979 stating that it lacked the requisite reasonable assurance that the Three Mile Island, Unit 1 facility, a reactor of design similar to that of TMI-2, could be operated without endangering the public health and safety. Accordingly, the Commission directed that the TMI-1 facility remain in a shutdown condition until further order of the Commission and that a hearing be conducted prior to any restart of the facility. The July 2, 1979 Order was made immediately effective.

On August 9, 1979, the Commission issued an Order and Notice of Hearing^{5/} in which it specified the basis for its concerns regarding the operation of TMI-1 and set out the procedures to govern further proceedings. The Commission established a Licensing Board to preside over the restart proceeding and render an initial decision in accordance with 10 CFR § 2.760, and directed that, upon the issuance of an initial decision, the record be certified to the Commission itself for final decision. In addition, the Commission instructed that, if the Board issued a decision recommending restart of TMI-1 and if the Staff certified that the Licensee had completed all the necessary actions, it would issue an order deciding whether the provision of the August 9, 1979 Order requiring the Licensee to shut down would remain immediately effective. In its August 9, 1979 Order, the Commission stated it would "issue an order lifting immediate effectiveness if it determines that the public

^{5/} CLI-79-8, 10 NRC 141 (1979).

health, safety or interest no longer require immediate effectiveness." 10 NRC 141, 149 (1979).

Subsequently, the Commission modified its August 9, 1979 Order so as to provide that an Appeal Board be established to entertain appeals arising out of the TMI-1 restart proceeding.^{6/} The Commission has made it clear, however, that the Commission is the

...exclusive administrative body with the power to determine whether Unit One may restart during the pendency of any possible appeals of a Board decision before the Atomic Safety and Licensing Appeal Board. Parties may not file papers with the Appeal Board either supporting or opposing a stay of any such decision during the pendency of any such appeals. Therefore, any party which has a position on whether, in light of the Licensing Board's decision, Unit One should be allowed to restart during the pendency of any such appeals should so argue in its comments submitted to the Commission.

CLI-81-34, 14 NRC 1097, 1098 (1981).

III. DISCUSSION

A. Legal Standard Regarding Immediate Effectiveness

As discussed at length in the Staff's comments on the question of the Commission's deferral of decision on immediate effectiveness,^{7/} the Commission's immediate suspension of the TMI-1 license without affording the Licensee an opportunity for a prior hearing is an extraordinary agency action which is justified only so long as the facts supporting that specific

^{6/} CLI-81-19, 14 NRC 304 (1981).

^{7/} "NRC Staff Comments on Whether Commission Should Defer Restart Decision Until Issuance of Licensing Board's Opinion on Operator Cheating Incidents," January 13, 1982, pp. 4-6.

action exist. When such circumstances no longer exist, the Commission should lift the suspension and restore the original rights under the license.^{8/}

In the instant proceeding, then, the Commission must determine, based on the Licensing Board's partial initial decisions,

whether the concerns which prompted its original immediate suspension order of August, 1979, justify a continuation of that suspension. If they do not, and the Commission therefore can no longer find that the 'public health, safety and interest' mandates the suspension, then the Commission is required by law--whatever the nature of the Licensing Board's decision--to lift that suspension immediately.

CLI-81-34, 14 NRC 1097-1098 (1981). Consequently, the critical question for the Commission's consideration is whether the resolution of the issues in the partial initial decisions removes the "public health, safety or interest" concerns which form the basis for the immediate effectiveness of the TMI-1 license suspension. CLI-79-8, 10 NRC at 149. We turn now to a review of the bases for the Commission's decision to make the shutdown immediately effective and an examination of the Licensing Board's PIDs in this regard.

B. Consideration of the Bases for Immediate Effectiveness of the TMI-1 License Suspension

The bases for the Commission's imposition of its immediately effective shutdown order for TMI-1 were certain concerns identified in the August 9, 1979 Order as further specified in the Commission's

^{8/} See Northwest Airlines v. CAB, 539 F.2d 748 (D.C. Cir. 1976). See also ICC v. Oregon Pacific Industries, Inc., 420 U.S. 184 (1975) (concurring opinion of Justice Powell).

March 6, 1980 and March 23, 1981 Orders. These concerns involved plant design and procedures,^{9/} unit separation,^{10/} emergency planning,^{11/} and the management capability and technical resources of the Licensee.^{12/} For each of these areas of concern, the Commission identified short-term and long-term actions recommended by the Director of NRR as necessary and sufficient to resolve those concerns which prompted the Commission's immediately effective shutdown order. The Commission directed that the Licensing Board consider, based on the evidence presented at hearing, whether the short-term actions are necessary and sufficient to provide reasonable assurance that TMI-1 can be operated without endangering the public health and safety and should be required before resumption of operation and whether the long-term actions are necessary and sufficient to provide reasonable assurance that the facility can be operated for

^{9/} More specifically, concerns involving (1) the unusual sensitivity of B&W reactors to off-normal transient conditions, (2) human errors during the TMI-2 accident which contributed to its severity, and (3) certain other short-term design and procedural concerns specified in an NRR report to the Commission dated April 25, 1979, were identified as bases for making the effectiveness of the shutdown order immediate. Commission Order of August 9, 1979, CLI-79-8, 10 NRC at 142-43.

^{10/} More specifically, concerns involving (1) potential interaction between the two TMI units, and (2) the potential effect on Unit 1 of operations necessary to decontaminate Unit 2, were identified as bases for making the effectiveness of the shutdown order immediate. Id. at 143.

^{11/} Id. at 143-44.

^{12/} Id. at 143.

the long term without endangering public health and safety and should be required as soon as practicable.^{13/}

All of the specific issues delineated by the Commission in its Orders as well as other issues raised by the parties and the Licensing Board were addressed during the hearing and were the subject of findings and conclusions in the Licensing Board's partial initial decisions. The Staff believes that the Licensing Board's findings on all the issues remove the bases for the immediately effective shutdown order. The Staff already has submitted its comments on immediate effectiveness with respect to the Licensing Board's August 27, 1981, Management PID^{14/} and its December 14, 1981, Plant Design and Procedures, Separation and Emergency Planning PID.^{15/} In summary, the Staff stated in these pleadings that the findings reflected in those PIDs, if accepted by the Commission, remove the corresponding bases for the immediately effective shutdown order. For the reasons set forth below, the Staff believes that the Licensing Board's findings on the cheating incidents remove the remaining bases for the immediately effective shutdown order.

^{13/} Id. at 148.

^{14/} NRC Staff Comments on Immediate Effectiveness with Respect to Licensing Board Decision on Management Competence/Operator Training, September 11, 1981. See also NRC Staff Reply to Comments on Immediate Effectiveness with Respect to Licensing Board Decision on Management Competence/Operator Training, September 28, 1981.

^{15/} NRC Comments on Immediate Effectiveness with Respect to Licensing Board Decision on Hardware/Design Issues, Unit Separation and Emergency Planning, January 28, 1982. See also NRC Staff Reply to Parties' Comments on Immediate Effectiveness, February 4, 1982.

C. Licensee Management Capability and Technical Resource Concerns

1. The Licensing Board's August 27, 1981 Management PID

With regard to the management capability and technical resource concerns identified by the Commission in its August 9, 1979 Order (and further specified in the Commission's Order of March 6, 1980, CLI-80-5, 11 NRC 408), the Licensing Board found, based on the reliable, probative and substantial evidence of record, that, with the satisfaction of specified prerequisites to restart:

- (1) the short-term actions recommended by the Director of NRR as set out in the Commission's August 9, 1979 Order are necessary and sufficient to provide reasonable assurance that Licensee has the management competence to operate TMI-1 without endangering the health and safety of the public and should be required before restart (August 27th Management PID, ¶ 534.a);
- (2) the long-term actions recommended by the Director of NRR as set out in the Commission's August 9, 1979 Order are necessary and sufficient to provide reasonable assurance that the Licensee has the management competence to operate TMI-1 for the long term without endangering the health and safety of the public and should be required as soon as practicable (August 27th Management PID, ¶ 584.b);
- (3) Licensee has augmented its operator training and will conduct a 100 percent reexamination of operators (August 27th Management PID, ¶ 584.c);
- (4) Licensee has demonstrated its managerial capability and technical resources to operate Unit 1 while maintaining Unit 2 in a safe configuration and carrying out planned decontamination and/or restoration activities (August 27th Management PID, ¶ 584.d); and
- (5) Licensee complies with short-term recommendations related to management competence, and has made reasonable progress toward completion of the long-term recommendation related to management competence, in NUREG-0578. (August 27th Management PID, ¶ 584.e).

Because of the operator cheating incidents, however, the Licensing Board made no findings on operator testing and licensing matters. The Board reopened the record to consider the operator cheating incidents, and stated that it would consider the potential impacts of the reopened proceeding on operator cheating on its previous findings on Licensee management competence and technical resource concerns. Nevertheless, as discussed at some length in the Staff's initial and reply comments on whether the Commission should defer its restart decision until the issuance of the Licensing Board's decision on the operator cheating incidents,^{16/} despite the fact that operator training and testing issues were not yet fully resolved and that the Board's findings on management competence were potentially subject to reexamination based on the outcome of the cheating proceeding, the Licensing Board determined, in its December 14th PID, that the Commission's management-related concerns had been sufficiently resolved to allow TMI-1 restart and operation at up to five percent of design power.

Accordingly, prior to the Licensing Board's decision on operator cheating, the determination had been made by the Board that, with the satisfaction of identified conditions, those management-related concerns which prompted the Commission's immediately effective shutdown order, other than operator testing and licensing concerns, had been satisfactorily

^{16/} NRC Staff Comments on Whether Commission Should Defer Restart Decision Until Issuance of Licensing Board's Opinion on Operator Cheating Incidents, January 13, 1982; NRC Staff's Reply to Parties' Comments on Whether Commission Should Defer Restart Decision until Issuance of Licensing Board's Opinion on Operator Cheating Incidents, January 20, 1982.

resolved and that the operator testing and licensing concerns had been resolved to a degree sufficient to allow restart and operation up to five percent of design power prior to resolution of the operator cheating issues. Those findings removed the bases for the immediately effective shutdown order, at least to the extent of allowing limited operation of TMI-1, insofar as Licensee management competence and technical resources are concerned. As discussed immediately below, the Licensing Board's findings on operator cheating remove the remaining bases for the immediately effective shutdown order and eliminate the five percent of design power limitation on operation.

2. The Licensing Board's July 27, 1982 Cheating PID

In its July 27, 1982 Partial Initial Decision (Reopened Proceeding) addressing the cheating question, the Licensing Board resolved the cheating issues in favor of restarting TMI-1 and reaffirmed its conclusions favoring restart which were set forth in its earlier Management PID and Plant Design and Procedures, Separation and Emergency Planning PID. July 27, 1982 Cheating PID, ¶¶ 2089, 2423. More specifically, the Licensing Board concluded that, based on its findings, recommendations and conditions, the cheating issues in the reopened proceeding "have been resolved in favor of restarting Three Mile Island Unit 1 and that the conclusions of the Partial Initial Decisions of August 27, 1981, 14 NRC 381, and December 14, 1981, 14 NRC 1211, remain in effect." July 27, 1982 Cheating PID ¶ 2423. Those PIDs, in turn, removed all the bases for the Commission's immediately effective shutdown order except for operator

testing and licensing, which was held open pending the resolution of the cheating issues. The PIDs, therefore, were favorable to the restart of TMI-1, subject to the conditions therein imposed, but only "up to, but not exceeding five percent of design power." December 14, 1981 PID ¶ 2023. The five percent of design power limitation on operation, however, was imposed solely because of the then unresolved issues concerning cheating which were to be examined in the reopened proceeding.^{17/} December 14, 1981 PID ¶ 2021.^{18/}

The cheating issues now have been resolved in favor of restart, with conditions,^{19/} and the Licensing Board has reaffirmed its earlier

^{17/} The unresolved cheating issues related mostly to "management" issues regarding operator testing and licensing. See August 27, 1981 PID ¶ 584, n.63; December 14, 1981 PID ¶ 2016.

^{18/} In fact, only one Licensing Board member, Dr. Little, believed the five percent limitation was necessary. December 14, 1981 PID ¶¶ 2020-2021. Dr. Jordan would have permitted restart at full power. *Id.* at ¶ 2020. Chairman Smith had no view on the relative merits of full power versus five percent power but deferred to the technical members' expertise where they agreed. *Id.* ¶ 2023. The result was that the Licensing Board unanimously determined that the reopened proceeding was not a bar to the restart of TMI-1 and operation up to, but not exceeding, five percent of design power. *Id.*

^{19/} In addition to the conditions imposed for restart, the Licensing Board also sought to impose a monetary penalty on Licensee (Cheating PID, ¶ 2420), as "a remedial, symbolic penalty intended to attract the attention of all interested parties" . (Cheating PID, ¶ 2412). This penalty was found by the Board to be "desirable, thus necessary, in the long term to provide reasonable assurance that the unit can be operated without endangering the public health and safety...." (Cheating PID, ¶ 2411). Recognizing that it may not have the authority to impose such a penalty, the Board alternatively recommended that the Commission itself impose the penalty (Cheating PID, ¶¶ 2413, 2419(3)).

While the monetary penalty sought to be imposed, or at least recommended, by the Licensing Board is a long-term action, is not a condition for restart (Cheating PID, ¶ 2413), and, therefore, need not necessarily

(Continued)

conclusions favoring restart in its two previous partial initial decisions. Thus, the one remaining basis for the Commission's immediately effective shutdown order, namely operator testing and licensing, has now been removed. In addition, the sole basis assigned by the Board for the five percent of power limitation no longer exists. Hence the Licensing Board's July 27, 1982 Cheating PID, along with the Board's earlier findings in the August 27 and December 14, 1981 PIDs, provide the basis for the Commission's lifting its immediately effective shutdown order.

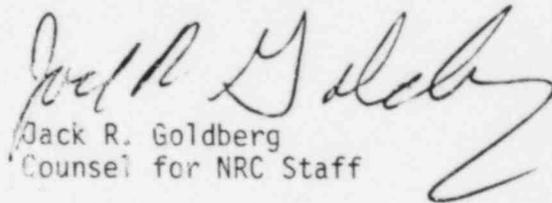
19/ (Continued)

be considered by the Commission in its immediate effectiveness determination, the Staff feels constrained to register its concerns regarding the propriety of the Licensing Board itself imposing a monetary penalty. Specifically, the Commission's Order and Notice of Hearing of August 9, 1979 (CLI-79-8, 10 NRC 141) does not appear to confer upon the Licensing Board, either explicitly or implicitly, the authority to consider or impose upon Licensee monetary penalties. Since a licensing board may act only within the confines of the authority conferred upon it by the Commission, the Licensing Board here appears to have exceeded its authority. In addition, as the Licensing Board recognized (Cheating PID, ¶ 2413), certain procedural prerequisites necessary for imposition of a monetary penalty, such as written identification of specific statutory, regulatory or license violations, written notice of the date, facts and nature of the act or omission with which licensee is charged, written advice of the proposed penalty, and opportunity for the licensee to show in writing why the penalty should not be imposed (42 U.S.C. 2282(b); 10 CFR § 2.205), were not afforded to Licensee in this instance. Nor did the Licensing Board's action reflect the Commission's general policy and procedure for NRC enforcement actions. See 10 CFR Part 2, App. C. Because of these jurisdictional and procedural infirmities in the Licensing Board itself imposing a monetary penalty, the Staff is of the view that the Board's action regarding a monetary penalty should more appropriately be treated as a recommendation to the Commission (Cheating PID, ¶ 2419(2)). Of course, since such recommendation involves a long-term action (Cheating PID, ¶ 2413), the Commission need not consider that recommendation in its immediate effectiveness review.

IV. CONCLUSION

In the Staff's previously submitted comments on immediate effectiveness with respect to the Licensing Board's August 27, 1981 and December 14, 1981 partial initial decisions, the Staff stated its position that the findings reflected in those PIDs remove all the bases for the Commission's immediately effective shutdown order except for the operator testing and licensing concerns, which remained open pending conclusion of the reopened proceeding on cheating. The Staff believes that the Licensing Board's July 27, 1982 findings on the cheating issues remove that remaining basis for the immediately effective shutdown order and also remove the basis for the Licensing Board's five percent of power limitation. It follows that the Licensing Board's three partial initial decisions together remove all the bases for the immediately effective shutdown order and provide the basis for the Commission's lifting that shutdown order.

Respectfully submitted,


Jack R. Goldberg
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Dated at Bethesda, Maryland
this 20th day of August, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF COMMENTS ON IMMEDIATE EFFECTIVENESS WITH RESPECT TO LICENSING BOARD DECISION ON CHEATING INCIDENTS" dated August 20, 1982 in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 20th day of August, 1982:

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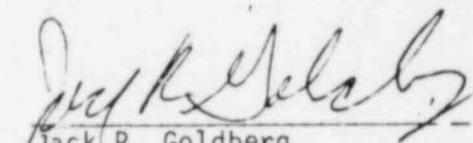
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