

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 REPLY TO PARTIES' COMMENTS ON IMMEDIATE
EFFECTIVENESS WITH RESPECT TO LICENSING BOARD DECISION
ON CHEATING INCIDENTS

Jack R. Goldberg
Counsel for NRC Staff

Mary E. Wagner
Counsel for NRC Staff

September 1, 1982

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 and Safety Licensing Board's (Licensing Board) decision on the cheating incidents (Partial Initial Decision (Reopened Proceeding), LBP-82-___, 16 NRC ___ (July 27, 1982) (Cheating PID)). Comments were filed by the Staff, the Licensee, the Commonwealth of Pennsylvania, and intervenors Three Mile Island Alert (TMIA), Mr. & Mrs. Aamodt (Aamodts), and the Union of Concerned Scientists (UCS). The Commission's March 10th Order also granted the parties the opportunity to reply to the other parties' comments. The Staff hereby responds to certain of the parties' comments.

II. DISCUSSION

A. The Standard for Lifting the Immediately Effective Shutdown Order^{1/}

The Commission's immediate suspension of the TMI-1 operating 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 action exist. When such circumstances no longer exist, the Commission should lift the suspension and restore the original rights under the license.^{2/}

In the instant proceeding, then, the Commission must determine:

...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). The Licensing Board's three partial initial decisions rendered in this proceeding have fully considered all of the concerns expressed by the Commission in its Order of August 9, 1979, and have resolved these matters in a manner favorable to the restart of the TMI-1 facility. Therefore, a party now advocating that the Commission should not lift the immediately effective shutdown order has the heavy burden of establishing that notwithstanding the Licensing

^{1/} For a complete discussion of the legal standard for lifting an immediately effective license suspension in light of the Administrative Procedure Act and Commission case law, see NRC Staff Reply to Comments on Immediate Effectiveness with Respect to Licensing Board Decision on Management Competence/Operator Training, September 28, 1981, at 3-10.

^{2/} 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).

Board decisions to the contrary, the concerns which formed the basis of the shutdown order have not been fully resolved and thus warrant the continued suspension of the TMI-1 operating license. As discussed below, the Staff submits that none of the parties who argue in their comments that the Commission should not lift the shutdown order has advanced a sufficient basis to support their position.

B. The Licensing Board's Use of a Special Master

In several of the comments filed by intervenors, they criticize the Licensing Board for arriving at findings or conclusions which differ from those of the Special Master. Intervenors argue or imply that, since the Special Master presided over the evidentiary hearing and heard the witnesses, it was improper for the Licensing Board to reject any of the Special Master's findings or conclusions. See e.g., TMIA Comments at 3-10; Aamodt Comments at 3-8; UCS Comments at 1-3. To the extent that such criticism is considered a general objection to a licensing board's reaching findings of fact or conclusions of law which differ from those recommended by a special master, it should be rejected at the outset.

Section 2.722(a) of the Commission's regulations permit a licensing board to use a special master to take evidence, rule on evidentiary issues, and prepare a report that would become part of the record. 10 CFR § 2.722(a).^{3/} Section 2.722(a) further provides, in pertinent part, that:

^{3/} In accordance with these provisions and without objection by any party, the Licensing Board appointed Judge Gary L. Milhollin as Special Master. See Memorandum and Order Reopening Record on Matters Related to Cheating, Appointing a Special Assistant, and Scheduling a Conference of the Parties, September 14, 1981, at 3.

Special Masters' reports are advisory only. The presiding officer shall retain final authority with respect to the issues heard by the Special Master.

Thus, under the express language of the regulation, there is nothing improper in the Licensing Board's rejection of certain of the Special Master's recommended findings or conclusions, and the intervenors' arguments to the contrary are simply without legal support.

C. Reply to Comments on Immediate Effectiveness

1. Aamodts' Comments^{4/}

The Aamodts state that both the Licensing Board and the Special Master noted problems with the substantive content of the NRC operator licensing examinations. Aamodt Comments at ¶ 28. The Aamodts conclude that the NRC licensing examination is not a valid measure of the

^{4/} The comments by the Aamodts on the Licensing Board's Cheating PID touch on a number of matters that simply do not bear on the question of immediate effectiveness. Specifically, the Aamodts urge that the Commission request a Department of Justice Investigation of "false statements" identified by Judge Milhollin, and that the Commission order an internal investigation of OIE's handling of the cheating investigation. Aamodt Comments at ¶ 36. In this regard, they find OIE's decisions "deliberately contrary to a full investigation of the cheating incident" (*Id.*), a position that goes well beyond Judge Milhollin's findings, and is directly contradicted by the Board's finding that the Staff's investigating response was in general "thorough and adequate". PID ¶ 2078. The Aamodts also state they would have no confidence in an investigation of the August 3, 1979 certification of VV if it were conducted by OIE. Aamodt Comments at ¶ 56.

In addition, the Aamodts criticize the conduct of the Staff's investigation in several respects. Specifically, they accuse OIE of destroying evidence of a system of cheating by encouraging KK to "launder" information through Licensee management and counsel before presenting it to the investigators. Aamodt Comments at ¶ 79.

(CONTINUED ON NEXT PAGE)

performance of control room operators and does not test the ability of operators to respond to a variety of emergency situations. Aamodt Comments at ¶99. These Aamodt "conclusions" are not supported by the record and their comments in general on the NRC licensing examination must be considered in context. Although it is true that the Special Master and the Licensing Board noted problems with the content of the NRC operator licensing examinations, both the Special Master and the Licensing Board recognized that the content per se of NRC examinations was not an issue in the reopened proceeding on cheating. Special

This charge is simply not supported by the evidence or the findings of either the Special Master (Special Master's Report ¶ 298) or the Board (PID ¶ 2382), both of whom found OIE's investigation of this incident to be adequate.

The Aamodts also find that OIE "withheld information concerning an instance of reported cheating" involving an instructor, Mr. Husted. Aamodt Comments at ¶ 80. There was no "withholding" of information by the Staff. See Staff's Proposed Finding ¶ 97. While the Board found OIE's response to this information inadequate, (PID ¶ 2391), it did not find in this response any "withholding" on the part of OIE.

Finally, the Aamodts state that "the opinions of an OIE investigator were deliberately withheld from the hearing." Aamodt Comments at ¶ 81. They refer to their late-filed proposed finding, rejected by the Special Master (see Memorandum and Order, February 11, 1982; Memorandum and Order, April 14, 1982), in which they assert that a section of Mr. Ward's draft testimony, where he discussed the effects of management presence during OIE's interviews, was omitted from the final version of his prefiled testimony. As Mr. Ward testified at the hearing, the subject of management presence was addressed in OIE's reports and he did not think it needed to be reinserted into his testimony. (Tr. 25,398-9 (Ward)).

Master's Report ¶ 269; PID ¶ 2363. For as the Licensing Board expressly ruled:

The Board will not permit a relitigation as to whether the substance of the NRC operators' license examinations are technically adequate to assure that operators are qualified to operate the plant without endangering the health and safety of the public.

Memorandum and Order on October 2, 1981 Conference of the Parties Relative to Reopened Proceeding, October 14, 1981, at 5; see PID ¶ 2363. As the Licensing Board held, the Staff, therefore, justifiably did not present evidence, as it could have done, on the adequacy of the substantive content of NRC examinations.^{5/} PID ¶ 2364.

With particular reference to the Special Master's criticism of the content of the NRC examination, the Licensing Board stated the following:

In line with the Board's ruling, the Staff did not present evidence on the adequacy of the substantive content of the NRC examinations. Staff Comment ¶ 18. The Staff was justified in not presenting such evidence and incidentally, further justified in its observation that the Special Master had not taken into account in his criticism of the content of the examination the fact that the examination includes not only the written portion but an oral portion more oriented to evaluating problem-solving and analytical ability of the examinee. Staff Comments ¶¶ 19-20.

PID ¶ 2364. The Licensing Board did not arrive at any factual conclusion as to the substantive adequacy of the operator licensing examinations. PID ¶ 2074.

^{5/} As set forth above, the Staff did not provide any testimony on this matter and does not now seek to rely on any extra-record material. However, to assure that the Commission is kept apprised of the Staff's continuing activity in this area, the Staff notes that in its comments to the Licensing Board on the Special Master's Report, the Staff stated that additional analysis is being done by the Staff to further ensure that the content of the NRC written and oral examinations is valid. See PID ¶ 2371.

Finally, it should be noted that the adequacy of NRC examinations was specifically litigated in the management aspect of the TMI-1 restart proceeding. See Management PID ¶¶ 242-275, 14 NRC 381, 465-79 (August 27, 1981). The Licensing Board considered the scope of NRC examinations and the grading criteria. Management PID ¶ 268. The Licensing Board concluded:

We reject the Aamodt attack on the adequacy of NRC's license examinations. In so doing, we take into account not only Mr. Boger's testimony but also the opinions of experts such as Dr. Gardner (who reviewed with favor Mr. Kelly's examinations which were fashioned after NRC examinations), who unanimously agreed that successful completion of such examinations coupled with training sufficient to allow success on those examinations was indicative of a capable licensed operator.

Management PID ¶ 272 (citations omitted). Thus, when the adequacy of the NRC examination was an issue, and when all parties had a fair opportunity to address that issue, it was found by the Licensing Board to be adequate. This finding was explicitly reaffirmed by the Licensing Board, after consideration of the entire record on cheating, in its Cheating PID: "[O]ur conclusion expressed in the August 27, 1981 PID that the NRC examinations are the basic assurance of operator competency remains undisturbed." PID ¶ 2073. It is clear that the Licensing Board's findings on the NRC examination provide no basis for not lifting the TMI-1 shutdown order.

The Aamodts also urge the Commission to suspend the licenses of TMI operators until the NRC examination and licensing process "can be demonstrated to assure that licensed operators have the requisite knowledge to operate a nuclear power plant under emergency conditions," and request

retesting of all presently licensed TMI operators to determine their emergency response capabilities. Aamodt Comments at ¶ 4. As mentioned above, the adequacy of the NRC examinations was specifically litigated in the management aspect of the TMI-1 restart proceeding, where the Licensing Board concluded that "successful completion of such examinations coupled with training sufficient to allow success on those examinations was indicative of a capable licensed operator". Management PID ¶ 272. The Aamodts have made no demonstration as to why their view of the evidence should be accepted in lieu of the Licensing Board's findings, and certainly have fallen far short of showing a basis for the continued suspension of the TMI-1 operating license.

2. Union of Concerned Scientists' Comments

UCS asserts as the most important consideration against lifting the shutdown order the fact that "TMI-2 is in no condition to start operation." UCS Comments at 1. Since the readiness of TMI-2 has no direct relevance to the issue of restarting Unit 1, we assume that UCS means to assert that TMI-1 is currently in no condition to start operation, presumably because of the current repair of steam generator tubing and the question of psychological stress. The lifting of the Commission's shutdown order -- which is mandated when the grounds underlying the shutdown order no longer exist -- will not affect the due consideration and disposition of other non-related restart issues in the normal course of events. There may well be reasons, other than the reasons set forth in its shutdown order, why the Commission would not permit restart of TMI-1 at present. Those other reasons, if any, have no bearing on the legal

question of whether the reasons forming the basis for the Commission's shutdown order continue to exist.

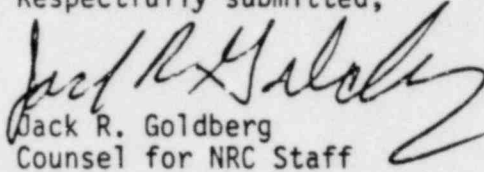
UCS also argues that the Licensing Board's resolution of the design and operational safety issues is dependent at several points on the premise that the TMI-1 operators can be fully relied upon to diagnose plant failures and to take the correct action. UCS Comments at 2-3. The Staff does not dispute the fact that the Licensing Board relied on operator competency in its PID on plant design and procedures. The Staff points out, however, that the Licensing Board has explicitly reaffirmed all its conclusions in its prior PID's, including the plant design and procedures PID. PID ¶ 2423. In addition, the Licensing Board has reaffirmed that completion of the training program and successful completion of the NRC licensing examination assures the capability of the TMI-1 operators. PID ¶ 2073. Thus, UCS has established no basis for the continued shutdown of TMI-1.^{6/}

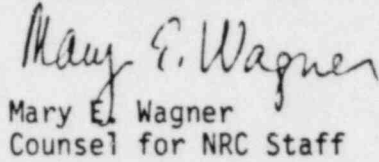
^{6/} While unrelated to the issue of immediate effectiveness, Licensee stated in its comments in connection with Licensee condition (1) in PID ¶ 2421 that it has contracted with Data-Design Laboratories (DDL), an independent engineering service corporation, to assess the effectiveness of training at TMI, and proposed that the NRC's Office of Nuclear Reactor Regulation (NRR) review the qualifications and work product of DDL with respect to their appropriateness to conduct the further Board-ordered independent training audit. Licensee Comments at 10. NRR has agreed to Licensee's proposal. Licensee has informed the Staff that it will submit appropriate information concerning DDL to NRR shortly.

III. CONCLUSION

For the reasons set forth above, the Staff believes that the views of the parties discussed herein do not support the conclusion that the decision of the Licensing Board should not be given immediate effectiveness.

Respectfully submitted,


Jack R. Goldberg
Counsel for NRC Staff


Mary E. Wagner
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of September, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO PARTIES' COMMENTS ON IMMEDIATE EFFECTIVENESS WITH RESPECT TO LICENSING BOARD DECISION ON CHEATING INCIDENTS" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 1st day of September, 1982:

*Samuel J. Chilk (12)
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Linda W. Little
Administrative Judge
5000 Hermitage Drive
Raleigh, North Carolina 27612

*Leonard Bickwit, General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George F. Trowbridge, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, NW
Washington, DC 20036

*Ivan W. Smith
Administrative Judge
Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert Adler, Esq.
505 Executive House
P. O. Box 2357
Harrisburg, PA 17120

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, Tennessee 37830

Honorable Mark Cohen
512 D-3 Main Capital Building
Harrisburg, PA 17120

Gary L. Milhollin, Esq.
1815 Jefferson Street
Madison, WI 53711

Ms. Marjorie Aamodt
R.D. #5
Coatesville, PA 19320

*Dr. John H. Buck
Atomic Safety & Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Thomas Gerusky
Bureau of Radiation Protection
Dept. of Environmental Resources
P. O. Box 2063
Harrisburg, PA 17120

Mr. Marvin I. Lewis
6504 Bradford Terrace
Philadelphia, PA 19149

Mr. C. W. Smyth, Supervisor
Licensing TMI-1
Three Mile Island Nuclear Station
P. O. Box 480
Middletown, PA 17057

Ms. Jane Lee
R.D. 3; Box 3521
Etters, PA 17319

Gail Phelps
ANGRY/TMI PIIC
1037 Macclay Street
Harrisburg, Pa. 17103

Allen R. Carter, Chairman
Joint Legislative Committee on Energy
Post Office Box 142
Suite 513
Senate Gressette Building
Columbia, South Carolina 29202

Chauncey Kepford
Judith Johnsrud
Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, PA 16801

Ms. Frieda Berryhill, Chairman
Coalition for Nuclear Power Plant
Postponement
2610 Grendon Drive
Wilmington, Delaware 19808

Mr. Henry D. Hukill
Vice President
GPU Nuclear Corporation
Post Office Box 480
Middletown, PA 17057

Michael McBride, Esq.
LeBoeuf, Lamb, Leiby & McRae
Suite 1100
1333 New Hampshire Avenue, NW
Washington, DC 20036

David E. Cole
Smith & Smith, P.L.
Riverside Law Center
2931 N. Front Street
Harrisburg, PA 17110

William S. Jordan, III, Esq.
Harmon & Weiss
1725 I Street, NW
Suite 506
Washington, DC 20006

John Levin, Esq.
Pennsylvania Public Utilities Comm.
Box 3265
Harrisburg, PA 17120

Jordan D. Cunningham, Esq.
Fox, Farr and Cunningham
2320 North 2nd Street
Harrisburg, PA 17110

Louise Bradford
Three Mile Island Alert
1011 Green Street
Harrisburg, PA 17102

Ms. Ellyn R. Weiss
Harmon & Weiss
1725 I Street, NW
Suite 506
Washington, DC 20006

Mr. Steven C. Sholly
Union of Concerned Scientists
1346 Connecticut Avenue, NW
Dupont Circle Building, Suite 1101
Washington, DC 20036

*Judge Gary J. Edles
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Judge Reginald L. Gotchy
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

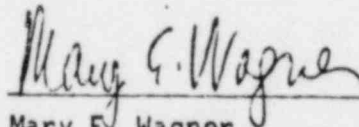
*Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Secretary
U.S. Nuclear Regulatory Commission
ATTN: Chief, Docketing & Service Branch
Washington, DC 20555

*Christine N. Kohl
Atomic Safety & Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Dr. Lawrence R. Quarles
Atomic Safety & Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Michael W. Maupin, Esquire
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, VA 23212



Mary E. Wagner
Counsel for NRC Staff