



ADJUDICATORY ISSUE
(Affirmation)

October 27, 1983

SECY-83-406A

COMMISSION LEVEL
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For: The Commission

From: Martin G. Malsch
Deputy General Counsel

Subject: REVIEW OF ALAB-744 (DENYING REQUEST TO
RECONSIDER WHETHER ISSUE OF ENVIRONMENTAL
QUALIFICATION OF ELECTRICAL EQUIPMENT IS
WITHIN RESTART PROCEEDING)

Facility: Three Mile Island Nuclear Station, Unit No. 1

Purpose: To advise the Commission of an Appeal Board
decision [which, in our view.

Review Time Expires: November 15, 1983

Petitions for Review: None

Discussion: The Appeal Board issued ALAB-729, its decision on the hardware and designs issues in the Three Mile Island, Unit 1 (TMI-1) restart proceeding, on May 26, 1983. In that decision the Appeal Board held that the issue of environmental qualification of electrical equipment had been removed from the restart proceeding by the Commission's generic rulemaking on the subject. OGC and OPE analyzed that decision in SECY-83-406.

CONTACT:
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4-1465

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GILINSK92-436 PDR

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

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On June 30, 1983 the Court of Appeals for the District of Columbia Circuit vacated and remanded the Commission's environmental qualification rulemaking. Union of Concerned Scientists v. NRC, 711 F.2d 370 (D.C. Cir. 1983). The court found that the Commission erred in relying on a finding that continued operation without qualification would not pose an undue risk to public health and safety where that finding had never been subjected to public comment. The court therefore required the Commission to provide an opportunity for public comment "on the sufficiency of current documentation purporting to justify continued operation pending completion of environmental qualification of safety-related equipment." 711 F.2d at 383 (footnote omitted). The court left it to the NRC to decide whether to proceed by adjudication or rulemaking.

On August 18, 1983 the Union of Concerned Scientists (UCS) informed the Appeal Board of the D.C. Circuit's opinion. UCS urged the Appeal Board to reconsider its decision on environmental qualification in light of UCS v. NRC. UCS argued that there is now no finding that TMI-1 can be safely operated while equipment important to safety remains unqualified, and that the Appeal Board must therefore resolve the issue.

The Appeal Board in ALAB-744 declined to reconsider its holding that the issue of environmental qualification of electrical equipment had been removed from the restart proceeding. The Appeal Board initially noted that it was unclear whether it had jurisdiction to entertain the request for reconsideration. Without resolving that question, the Appeal Board found that the matter should not be reconsidered. The Appeal Board repeated its conclusion in the hardware decision that the Commission had decided to address the issue of environmental qualification generally. The Appeal Board, noting that the court in UCS v. NRC declined to address whether any evaluation

must be undertaken generically or in separate adjudications, found that the issue remained one for the Commission to consider on remand, and, in the absence of a change in the Commission's earlier position, that the environmental qualification issue remained outside the proceeding.

Analysis

EX. 5
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x 5

Martin G. Malsch
Martin G. Malsch
Deputy General Counsel

Attachments:

- 1. Draft order
- 2. ALAB-744
- 3. UCS letter

¹In our view,

EX. 5
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Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, November 9, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Thursday, November 3, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of November 7, 1983. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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Attachment 1

Attachment 2

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Gary J. Edles, Chairman
Dr. John H. Buck
Dr. Reginald L. Gotchy

October 6, 1983
(ALAB-744)

In the Matter of)	
METROPOLITAN EDISON COMPANY,)	
<u>ET AL.</u>)	Docket No. 50-289 SP
(Three Mile Island Nuclear)	(Design Issues)
Station, Unit No. 1))	

MEMORANDUM AND ORDER

On May 26, 1983, we issued an opinion disposing of appeals regarding plant design and procedures and the separation of Units 1 and 2 at the Three Mile Island Nuclear Station. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC ___ (May 26, 1983). Among other things, we affirmed a Licensing Board determination that the issue of environmental qualification of safety-related equipment must be resolved outside this adjudication. Id. at ___ (slip opinion at 170-75). Our opinion explained that all issues of environmental qualification as litigated in this case were fully embraced within the determinations announced by the Commission in pending rulemaking proceedings, including a determination made on June 30, 1982, to extend the deadline for completion of environmental qualification and permit all plants to

operate pending such qualification. See 47 Fed. Reg. 28,363 (1982).

On August 18, 1983, intervenor Union of Concerned Scientists (UCS) sent us a letter enclosing a copy of a decision by the United States Court of Appeals for the District of Columbia Circuit that vacated the Commission's June 30, 1982 determination. Union of Concerned Scientists v. NRC, 711 F.2d 370 (D.C. Cir. 1983). UCS contends that the court's vacation of the Commission's decision now obliges us to examine independently whether the lack of environmental qualification of safety equipment poses an undue risk to the public health and safety if TMI-1 is permitted to resume operation. Although the letter is not in the form of a motion for reconsideration, UCS nevertheless urges us to reconsider and amend our earlier opinion.

We issued our decision disposing of all design issues on May 26 and a petition for discretionary review of that decision is now pending before the Commission. Thus, it is not at all clear that we have jurisdiction to entertain the request for reconsideration. See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381 (1978). We need not decide that issue,


however, because other considerations lead us to conclude that the matter should not be reconsidered.

We do not believe that the court's decision either requires or encourages reconsideration of our earlier conclusion. The Commission originally decided to address the issue of environmental qualification generically. In the face of that decision, we rejected UCS' earlier claim that the Licensing Board was obligated to decide independently of Commission determinations whether TMI-1 can be operated safely while environmental qualification is undertaken. (We nonetheless approved a Licensing Board conclusion that there is no basis for treating TMI differently than other operating reactors, a conclusion UCS does not challenge in its letter). Although the court overturned the Commission's June 30 decision, it expressly declined to address the question of whether any evaluation must be undertaken in separate adjudications or may be conducted generically. See Union of Concerned Scientists, supra, 711 F.2d at 380 n.24. This is a matter that the court left for the Commission to consider as part of the proceedings on remand. In the absence of a change in the Commission's earlier position, the issue of environmental qualification remains outside the scope of this case.

UCS' request for reconsideration is denied.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

Attachment 3

Release

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USNRC

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**UNION OF
CONCERNED
SCIENTISTS**

1346 Connecticut Avenue, N.W. • S. 1101 • Washington, DC 20036 • (202) 296-5600

OFFICE OF SECRETARY

August 18, 1983

Gary J. Edles, Chairman
Dr. John H. Buck
Dr. Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

RE: TMI-1 Restart, Docket 50-289

Gentlemen:

Enclosed for your attention is the decision of the U.S. Court of Appeals for the District of Columbia Circuit in UCS v. NRC, No. 82-2000.


You will note that the Court struck down the Commission's determination of June 30, 1982 that all plants are sufficiently safe despite failure to comply with environmental qualifications requirements. The Court held that this determination, made without any opportunity for public participation, violated the Atomic Energy Act, the Administrative Procedure Act and the NRC's own rules. UCS v. NRC, Sl.op. at 19.

ALAB-729, Sl.op. at 173-175, relies on the vacated Commission determination as justification for leaving unresolved UCS's environmental qualification contention in the Restart proceeding. There is nowhere in the Restart record evidence to justify a finding that TMI-1 can be safely operated despite failure to qualify equipment important to safety. Nor is there any such lawful "finding" at the Commission level, as the Court's decision plainly states. The most that can be said of the June 30, 1982 determination is that it presumably constitutes the Commission's current belief. However, a belief which has been reached without the benefit of public participation cannot lawfully be used to determine an issue which has been fairly put before a licensing board, (Cf. Minnesota v. NRC, 602 f.2d 412 (D.C. Cir. 1979)).

The Appeal Board has the obligation to determine whether TMI-1 can be operated without undue risk to the public health and safety. Under these circumstances, you cannot avoid deciding whether the lack of qualification of safety equipment poses such risk.

UCS urges the Appeal Board to reconsider and amend ALAB-729 in view of the Court's decision.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ellyn R. Weiss".

Ellyn R. Weiss

Enclosure

cc: TMI-1 Service List