UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Walter H. Jordan
Dr. Linda W. Little

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

September 29, 1982

MEMORANDUM AND ORDER

The intervening Aamodt Family has filed with this Board a pleading dated September 3, 1982 which we deem to be a motion to reopen the evidentiary record of this proceeding.[1/] The matter pertains to the discovery of unsecured radiation worker examination papers at TMI by Licensee's Radiological Assessor. It was the subject of a Board Notification (BN-82-84) to the Appeal Board on August 17, 1982. The incident related to the subject matter of the reopened proceeding on cheating which was concluded by our Partial Initial Decision of July 27, 1982, LBP-82-56. The Aamodt Family was active in the issue of possible cheating on radiological work permit examinations. Id. at ¶ 2226, slip op. at 89.

1/ Aamodt Motion For The NRC Staff And The Licensee To Show Good Cause And/Or Reopening of Record, September 3, 1982.

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This Board lacks jurisdiction over the subject matter of the motion. We grant Licensee's request to forward the matter directly to the Appeal Board without delay.[2/]

One may perceive an inconsistency between two NRC regulations pertaining to the termination of jurisdiction of presiding officers in a particular proceeding. Section 2.717(a) of the Rules of Practice provides, as pertinent, that the jurisdiction of a presiding officer designated to conduct a hearing terminates when the Commission renders a final decision. But Section 2.718(j) authorizes a presiding officer to reopen a proceeding for the reception of further evidence at any time prior to initial decision.[3/]

In Northern States Power Company, et al. (Tyrone Unit 1), ALAB-464, 7 NRC 372, 374, n.4 (1978), the Appeal Board declined to endorse a Licensing Board ruling that it lacked jurisdiction to consider a motion to reopen received after the Licensing Board's final decision.

2/ Licensee's September 20 Answer at 2, n.1.

3/ An exception to the apparent termination of jurisdiction under Section 2.718(j) may be found in Section 2.771(a) which authorizes a petition for reconsideration of a decision within ten days after the date of the decision. Appeal boards have imputed the reconsideration jurisdiction under Section 2.771(a) to licensing boards. Consumers Power Company (Midland Units 1 and 2), ALAB-235, 8 AEC 645 (1974); Commonwealth Edison Company (Byron Units 1 and 2), ALAB-659, 14 NRC 983, 985, n.2.

There the Appeal Board suggested that the Licensing Board may have been in error on the jurisdiction question because the motion to reopen was mailed, thus served, before the Licensing Board's decision. See 10 CFR 2.712(d)(3). There was no suggestion in Tyrone that there might have been any other basis for continued licensing board jurisdiction, e.g., Section 2.717(a). The Appeal Board assumed jurisdiction and disposed of the motion to reopen on its merits.

Again in Duke Power Company (Perkins Units 1, 2, and 3), ALAB-597, 11 NRC 870 (1980), the Appeal Board let pass an opportunity to rule on a similar jurisdictional question. There the Licensing Board had determined that it had jurisdiction over an intervention petition raising, inter alia, issues already finally decided by that Board, but the Board delayed ruling on the merits of the petition until the Appeal Board could act on the jurisdictional question. Noting that the Licensing Board, having assumed jurisdiction, should not have delayed its consideration of the petition's merits, the Appeal Board nevertheless questioned the Licensing Board's analysis of the jurisdictional issue. The Appeal Board indicated that the correct analysis should be whether the Licensing Board retained jurisdiction over the subject matter of the intervention petition, considering that the Licensing Board had made its final decision on that very subject, as compared to a determination as to

whether the Licensing Board had lost jurisdiction over the entire proceeding. Id.[4/] Rather than resolving the matter on a jurisdictional basis, the Appeal Board in the Perkins matter simply assigned the matter, as if on remand, to the Licensing Board for a merits determination on the practical grounds that the Licensing Board was more familiar with the record.

The issue of divided jurisdiction, or, better stated, the issue of concurrent compared to exclusive jurisdiction, has arisen twice in this proceeding. In its unpublished order of March 4, 1982, at 2, the Appeal Board indicated that requests addressed to this Board for changes in our decision, should now be addressed to that Board, but that, in any event, our views might be useful on review. In an unpublished order of September 10, 1982, the Appeal Board recognized that the instant Aamodt motion was pending before this Board but specifically expressed ". . . no opinion on either the merits of the request to reopen or the Licensing Board's jurisdiction to rule on it." Id. at 4, 5, n.1. Moreover, in commenting on the Aamodt motion the Appeal Board made no reference to any

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4/ However in an earlier aspect of that same Perkins issue, ALAB-591, 11 NRC 741, 742 n.3 (1980), the Appeal Board noted that the fact that there was divided jurisdiction over a licensing proceeding between the two boards might render the issue of jurisdiction more difficult than if jurisdiction had passed entirely from the Licensing Board. Again the Appeal Board expressly declined to rule on jurisdiction over the merits of the petition to intervene.

possible convenience or utility in having this Board dispose of the matter on the merits.

We do not read too much into this silence in that the motion was addressed to us, not the Appeal Board. But on the other hand, we see no reason to volunteer our views on the merits of the motion since the subject matter is simple and discrete. In ALAB-685 the Appeal Board has indicated its intention to review the entire record of this proceeding sua sponte. We see no benefit to the parties or the Appeal Board in adding an unneeded determination for appellate review.

Following a Licensing Board's initial decision, the Appeal Board in Pacific Gas and Electric Company (Diablo Canyon, Units 1 and 2), ALAB-598, 11 NRC 876 (1980), accepted jurisdiction over a motion to reopen the record on seismic issues, granted the motion and proceeded toward a decision on the factual merits. Therefore, following the Diablo Canyon precedent, if any jurisdiction whatever remains with this Board -- which it does not -- it would, at most, be a jurisdiction shared concurrently with the Appeal Board over the issue in question.

The sole procedural difference between this motion and the motion accepted by the Appeal Board in Diablo Canyon, is that here the movant selected the Licensing Board, but in Diablo Canyon the movants selected the Appeal Board. This is an unsatisfactory method to determine jurisdiction. The better NRC practice is for jurisdiction over the subject matter of a particular issue to reside exclusively with one presiding

officer. To allow the parties to bestow jurisdiction by selecting the tribunal would be a very questionable practice. To maintain a system of shared jurisdiction over a post-decisional issue would be pointless, and worse. It could lead to confusing simultaneous exercise of jurisdiction by boards, or if the boards tended to be reticent, as unlikely as that might seem, concurrent jurisdiction could result in delay while each board hesitated in deference to the other.

However, aside from the impracticality of shared jurisdiction, the better interpretation of the NRC regulations is that jurisdiction over a particular subject is not simultaneously shared. We noted that Section 2.717(a) might be perceived to be inconsistent with Section 2.718(j). The two sections are logically reconcilable, however. As Section 2.717(a) provides, jurisdiction of the presiding officer continues until the Commission's final decision. But the identity of the presiding officer changes as the proceeding moves up the appellate ladder either as to an entire initial decision or as to particular issues. Section 2.718(j), limiting the power of the presiding officer to reopen a record to any time prior to the initial decision, adequately describes when the jurisdiction, thus the identity of the cognizant presiding officer, changes from licensing board to appeal board.

This is especially the case where an appeal board, wearing the hat of an NRC presiding officer, as in Diablo Canyon, takes evidence. It is also the case where, as is the NRC practice, appeal boards conduct a sua sponte review of the entire record.

The established practice of remanding a post-decisional matter to a licensing board where that approach is practicable seems to work well, and is consistent with the NRC's overall procedural scheme.

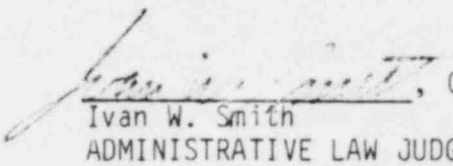
Another jurisdictional aspect of the Aamodt motion must also be addressed. The Commission, not the Appeal Board, has jurisdiction over whether the TMI-1 shutdown order should be lifted in accordance with the Board's three partial initial decisions in favor of restarting the unit. 14 NRC 304. There is, of course, no question about where jurisdiction lies over the short-term pre-restart issues with respect to this Board vis-a-vis the Commission. All jurisdiction has passed from us. We do not know how thoroughly the Commission can evaluate the record of this proceeding in its "immediate effectiveness" review, but given the short time period it has established for its review (id. at 305) and because of the obvious press of other matters demanding its attention, the Commission's review necessarily must be something less than the sua sponte review of the entire record promised to be undertaken by the Appeal Board in ALAB-685. Therefore we believe that it might be helpful to the Commission and the parties for us to comment on the short-term significance of the Aamodt motion.

Board Notification (BN-82-84) reporting the unsecured radiation worker examinations to the Appeal Board was also served on this Board. Because of the special nature of this proceeding, this Board, without regard to the niceties of jurisdiction, would have notified the Commission sua sponte if we had believed that the incident raised safety or

management issues so important that our conclusions regarding short-term items and favoring restart were brought into question. After considering the Aamodt motion and the Licensee's factual response, we remain of the opinion that the incident raises no significant short-term issues. Although the Aamodt motion (at 1) refers in general terms to "conditions to restart" and the Commission's immediate effectiveness review, the motion was addressed solely to this Board and requests only that the record be reopened if the Licensee and Staff cannot show good cause why it should not be reopened. If the motion has merit, it relates only to the long-term issues now within the jurisdiction of the Appeal Board.

Accordingly, without expressing an opinion on the merits of the motion, we refer it and the attendant pleadings to the Appeal Board.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD



Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

September 29, 1982