

November 26, 1982



SECY-82-467

ADJUDICATORY ISSUE

(Notation Vote)

To: The Commissioners

From: Trip Rothschild
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-699 -- IN THE MATTER OF
METROPOLITAN EDISON COMPANY

Facility: Three Mile Island Nuclear Station, Unit 1

Purpose: To inform the Commission of an Appeal Board
decision [which, in the opinion of the General
Counsel, _____] EY-5

Petitions for
Review: None

Review Time
Expires: December 13, 1982, as extended.

Discussion: In ALAB-699, the Appeal Board held that a
licensing board does not have jurisdiction to
reopen a record on a motion by an intervenor
after that licensing board has issued its
complete initial decision and exceptions have
been filed. This question of when
jurisdiction passes from a licensing board to
an appeal board was raised by Intervenor
Marjorie M. Aamodt's motion to reopen the

CONTACT:
Beverly S. Segal, OGC
4-3224

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

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management phase of the restart record. ^{1/} Intervenor's motion was prompted by an NRC investigation which revealed that several radiation worker examinations and their answer keys had twice been left unsecured and unattended in the TMI training department. The report of that investigation was served on the parties after the Licensing Board had rendered its final partial initial decision in the restart proceeding. On the basis of this report, intervenor concluded that these events raised additional questions about the licensee's integrity and asked that the record be reopened.

The Licensing Board, noting the lack of clear jurisdictional guidelines in the Commission's regulations and the lack of clear appeal board precedent on the jurisdictional issue posed by the Aamodt motion, issued an Order on September 29, 1982 which referred the motion to reopen to the Appeal Board. The Board stated that its jurisdiction had passed when it issued its initial decision and exceptions had been filed. LBP-82-86, 16 NRC ____ (1982).

The Appeal Board affirmed the Licensing Board's decision, finding it implied by several provisions in the regulations: (1) licensing board may "[r]eopen a proceeding if the reception of further evidence at any time prior to initial decision." 10 CFR 2.718(j); (2) an initial decision becomes final agency action within 45 days of its issuance, unless exceptions have been filed . . . 10 CFR 2.760(a); and (3) a licensing board's

^{1/} The Appeal Board has previously declined to decide this issue. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-597, 11 NRC 870 (1980); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741 (1980); Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372 (1978).

"jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision . . . whichever is earliest." 10 CFR 2.717(a).

The Appeal Board read these provisions to imply that a licensing board may ". . . reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or appeal board can exercise its right to review the record." ALAB-699, pp. 4-5.

The Appeal Board also found that although there were no Appeal Board decisions directly on point, its ruling was consistent with related jurisdiction decisions. The Appeal Board has previously held that a licensing board is empowered to reopen a proceeding until it has rendered its complete initial decision; ^{2/} but that where a motion to reopen was filed after issuance of the initial decision and after exceptions had been filed and appeal issues briefed, jurisdiction vested in the appeal board. ^{3/}

The Appeal Board concluded its opinion by stating that it was not ruling on the merits of the Aamodt motion because it did not yet

^{2/} Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741 (1980); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972).

^{3/} Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-598, 11 NRC 876 (1980).

have sufficient familiarity with the underlying record.

OGC believes

Trip Rothschild
Trip Rothschild
Acting Assistant General Counsel

Attachment:
ALAB-699

Commissioners' comments should be provided directly to SECY by c.o.b. Monday, December 13, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT December 6, 1982, with an information copy to SECY. 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.

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'82 OCT 27 P2:20

ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
LICENSING & SERVICE
BRANCH

Administrative Judges:

- Gary J. Edles, Chairman
- Dr. John H. Buck
- Christine N. Kohl

SERVED OCT 27 1982

_____)
 In the Matter of)
)
 METROPOLITAN EDISON COMPANY,)
ET AL.)
)
 (Three Mile Island Nuclear)
 Station, Unit No. 1))
 _____)

Docket No. 50-289 - SP
(Management Phase)

MEMORANDUM AND ORDER

October 27, 1982

(ALAB-699)

In a series of partial initial decisions and orders issued between August 1981 and July 1982, the Licensing Board announced its findings of fact and conclusions of law in this special proceeding instituted to determine whether Unit 1 of the Three Mile Island nuclear facility should be restarted. ^{1/} Exceptions have been filed to each

1/ See LBP-81-32, 14 NRC 381, 386-99 (1981), for a discussion of the history and procedural background of this case. See also LBP-81-59, 14 NRC 1211 (1981); LBP-81-60, 14 NRC 1724 (1981); LBP-82-56, 16 NRC _____ (July 27, 1982).

decision and appellate review of emergency planning issues is now completed. ^{2/} Review of other issues by two appeal boards, including this one, is under way.

On September 3, 1982, after the filing of all exceptions, intervenor Marjorie M. Aamodt filed a motion with the Licensing Board requesting a reopening of the management phase of the record. The asserted ground for reopening is an NRC staff Board Notification, BN-82-84 (August 17, 1982). In Inspection Report 50-289/82-07, attached to the Board Notification, the staff states that, while conducting a review of radiation worker training records on May 5, 1982, the licensee's Radiological Assessor observed that certain examinations and their answer keys had been left unattended. The Radiological Assessor immediately reported this to senior licensee management and, several days later, to the NRC staff. According to the report, this appeared to be an isolated incident and various corrective actions have been taken. Ms. Aamodt argues, however, that this matter raises various questions about the licensee's integrity -- an issue that is within the scope of this proceeding and should now be explored more fully. She also contends, among other things, that the NRC staff should be required to explain why it "withheld this information for

^{2/} See ALAB-697, 16 NRC (Oct. 22, 1982); ALAB-698, 16 NRC (Oct. 22, 1982).

over three months." Aamodt Motion for Reopening of Record (September 3, 1982) at 1-2. Both the staff and licensee filed oppositions to the motion to reopen.

The Licensing Board ruled that it lacked jurisdiction over the subject matter of the motion. LBP-82-86, 16 NRC , (Sept. 29, 1982) (slip opinion at 2). It noted some arguable inconsistencies in the Commission's Rules of Practice and lack of clear appeal board precedent, but nonetheless reasoned that jurisdiction passes from a licensing board to an appeal board when the former issues its initial decision. Id. at (slip opinion at 6). It therefore referred the motion and related pleadings to us, declining to express an opinion on the merits.

We agree with the Licensing Board's ruling that it no longer has jurisdiction over the Aamodt motion to reopen. ^{3/} As the Board noted, the Commission's Rules do not directly answer the question of when jurisdiction passes, for purposes of a motion to reopen, from a licensing to an appeal board. Several provisions, however, are

^{3/} The Licensing Board correctly observed that we have declined to decide similar jurisdictional issues on past occasions. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873-74 (1980); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 n.3 (1980); Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978). We see no cause, however, to resist reaching the issue any longer.

pertinent.

10 CFR § 2.717(a) states that a licensing board's "jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision . . . whichever is earliest." ^{4/} Pursuant to 10 CFR § 2.760(a), a licensing board's initial decision in a licensing proceeding becomes final agency action within 45 days of its issuance, unless exceptions have been timely filed, or the Commission or the appeal board as its delegate (see 10 CFR § 2.785) certifies the record to it for subsequent review and final decision. ^{5/} Finally, 10 CFR § 2.718(j) authorizes a licensing board to "[r]eopen a proceeding for the reception of further evidence at any time prior to initial decision." Taken together, these provisions imply that a licensing board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which

^{4/} See generally Houston Lighting and Power Co. (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582, 590-91 (1977).

^{5/} See Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC __, __ & n.4 (Sept. 1, 1982) (slip opinion at 4 & n.4).

the Commission or an appeal board can exercise its right to review the record. Applied here, the Rules thus suggest that the Licensing Board's jurisdiction to reopen this proceeding lapsed, at the latest, when exceptions to its last partial initial decision were filed.

Although there is no direct appeal board precedent on the issue (see note 3, supra), our decisions are consistent with this application of the Rules of Practice. Both Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 n.3 (1980), and Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376, 377 (1972), suggest that a licensing board has authority to reopen a proceeding until it has issued a complete initial decision on all issues before it. On the other hand, in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 878-79 (1980), we entertained (and, in fact, granted) a motion to reopen filed after not only issuance of the initial decision but also briefing of the appeals. We therefore hold that jurisdiction to rule on a motion to reopen filed after exceptions have been taken -- like that in the instant case -- rests with the appeal board rather

than the licensing board. 6/

We regard this as the most workable solution for the jurisdictional question posed by the Aamodt motion. Once exceptions are filed, appeal board review of the merits commences. Encompassed within such review is a general concern about the adequacy of the record developed before the licensing board. Thus, in most cases, we can incorporate in our review any matters pertinent to a request to reopen the record. Moreover, unlike other appellate tribunals, we have the option of reopening the record and receiving the new evidence ourselves, if necessary, obviating remand to a licensing board. See, e.g., Diablo Canyon, supra. Compare the federal court procedure outlined in 6A J. Moore, Moore's Federal Practice ¶ 59.09[5] (2d ed. 1979).

We therefore acknowledge jurisdiction over the Aamodt motion to reopen and accept the Licensing Board's referral. At the same time, however, we defer ruling on its merits. The disposition of such a motion turns on whether (1) it is timely, (2) it addresses a significant issue, and (3) a different result might have been reached if the new material had been previously considered. Diablo Canyon, supra, 11

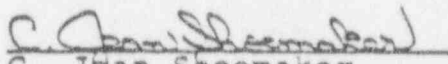
6/ We leave for another day the question of where jurisdiction lies to rule on a motion to reopen filed after the issuance of the initial decision but before the filing of exceptions.

NRC at 879. Our appraisal of particularly the last factor is one we cannot and, in any event, do not wish to make in this case until we have achieved a greater familiarity with the total record. 7/ Further, in urging a prompt disposition of the Aamodt motion, licensee fails to demonstrate any compelling reason for our acting on the request to reopen without being fully conversant with the record. See Licensee's Answer to Aamodt Motion (September 20, 1982) at 2 n.1. 8/

For the reasons stated, we assert jurisdiction over the Aamodt motion to reopen but defer ruling on it, pending further order.

It is so ORDERED.

FOR THE APPEAL BOARD


 C. Jean Shoemaker
 Secretary to the
 Appeal Board

7/ Thus far, briefing of only appellants' case is completed.

8/ The Commission itself has assumed the responsibility for the "immediate effectiveness" review of the Licensing Board's decision and thus will determine if and when TMI-1 will restart. CLI-81-34, 14 NRC 1097 (1981).