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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

TMIA'S ANSWER TO LICENSEE'S
PETITION FOR REVIEW OF ALAB-772

Pursuant to 10 CFR §2.786, TMIA files this answer to Licensee's Petition for Review of ALAB-772 opposing Commission review of this decision. Licensee's petition for review should be immediately rejected as deficient on its face. Nowhere in this petition does Licensee assert that the Appeal Board decision raises an important matter of law or policy, an important procedural issue, or otherwise important question of public policy. §2.786(4)(i). Nor does the petition allege that the Appeal Board decided the issues below in a clearly erroneous manner. §2.786(4)(ii). While Licensee attempts to show why the Licensing Board's conclusions are more consistent with its own, this should come as no surprise to anyone, and certainly does not constitute grounds for Commission review of the case.

D503

Assuming for argument's sake there is even a presumption of legality to the petition, it falls substantively as well. Licensee first opines that only the Commission is uniquely qualified to decide the issues remanded by the Appeal Board, when of course, in its order issued one week before the August 27, 1981 Partial Initial Decision (PID), the Commission declared just the opposite and established the Appeal Board for the purpose of resolving the hearing issues. Having made this determination at a time when it appeared the Licensing Board decision would be favorable to Licensee, the Commission can not under these circumstances decide to circumvent its own procedures without appearing uncontrovertably biased.

Clearly, this record is not only vast and cumbersome but currently in a state of major conflict which can only be resolved with more hearings. The Commission is simply not in a realistic position to step in and resolve the conflicting decisions and record below, when for the last four years the Commission has deliberately kept itself in blissful ignorance of the detailed hearing issues, the last Commissioner who was part of the TMI history has now departed, and a brand new Commissioner with no background in the case has entered the process.

Secondly, Licensee's attempts to characterize the Appeal Board decision as a request to "enhance" the record is quite misleading, the implication being that the Appeal Board was somehow acting frivilously by ordering new hearings. This inaccurate representation is addressed on each point, below. Third, Licensee attempts to speak for <u>all</u> parties by implying that all

would agree, except those who do not wish to see a decision made in this case, that the costs involved in new hearings outweigh any benefit. This is an insult to the Commonwealth of Pennsylvania which is participating in the reopened proceedings, the intervenors, and the public they represent. What is demanded is a well-reasoned decision. As a matter of fact, the public will not stand for less than full hearings to produce such a result.

Training

Licensee appears to argue that the Appeal Board was wrong in determining that the Licensing Board did not sufficiently appreciate the infirmities in Licensee's training program "which contributed to cheating as disclosed by the reopened hearing." Petition for Review at 3. It asserts that because the Licensing Board both recognized Licensee's improvements over exam administration, and imposed its own condition -- a two-year probationary period during which a training audit will be conducted during plant operation, (which Licensee assures has been "fully implemented," note 3), the Appeal Board erred in determining the record insufficient to provide assurance that the problems raised by record of the reopened proceeding have been corrected. In sum, Licensee finds the Appeal Board remand of the training issue erroneous as a "substituted judgment which would apply a perfection to the record that is unnecessary," Petition for Review, p. 4, complaining that "the Appeal Board displaces the Licensing Board's determination as its own." Id. at 4.

Even assuming that all the Appeal Board has done is "displaced" the already "valid" Licensing Board decision with its

own judgment, the Appeal Board is certainly not in legal error for doing so. §2.786 (1) plainly does not contemplate such Appeal Board actions as reviewable. But it is certainly a gross perversion of the Appeal Board decision to characterize it as a mere "judgment substitution," and that the remand was ordered simply to obtain unnecessary "perfection" of an already complete record. The Appeal Board expressly determined that while changes in exam administration, i.e. to prevent the reccurence of word for word copying and additional audits may be necessary and desireable, these additional conditions, given the current state of the record, can not provide reasonable assurance that the training department will insure safe plant operation.

Specifically, the Appeal Board's concern is stated simply enough in its decision:

> The cheating and related incidents called into question the adequacy and integrity of licensee's entire training program. Although we have found that the reopened record on the cheating itself was as fully developed as possible, the impact of those findings on the Licensing Board's earlier conclusions on licensee's training program was not given the full consideration it warrants.

ALAB-772 at p. 155.

The Appeal Board's "substituted judgment" is not only resonable and entirely logical, but is plainly mandated by the state of the record. The real puzzle is the Licensing Board's decision. The Licensing Board had earlier determined, on the assurances of Licensee's experts, that Licensee's training program was producing capable licensed operators. PID ¶272.

After the reopened hearings, the Licensing Board was forced to conclude that "we did not see what we thought we were seeing," PID ¶2325, and that :

> -- we agree with the Special Master that evidence presented in the reopened proceeding raises doubts about the quality of instruction...PID ¶2334;
>
> -- the cheating incident and the reopened proceeding flowing from it appear to have been the first stimulus sufficient to cause Licensee to pull back the "paper curtain" and actually view its training and testing proram at its point of delivery; PID ¶2323.
>
> -- the record of the reopened proceeding has provided several indications of weakness in the qualtity of the instruction at TMI-1, such that we no longer have the assurance that there was sufficient quality control over the training and testing process. PID ¶2337.

Thus, based on the Board's own analysis there is not currently reasonable assurance that adequate training is given at TMI-1, or that the record developed in the main proceeding, on which it based its original supportive conclusion, is at all reliable. Based on his analysis of the same evidence, the Special Master concluded that Licensee's training program did not constitute an adequate response to the Commission's August 9, 1979 Order. Report of the Special Master at ¶¶336, 251. Yet the ASLB asserts that the evidence in the reopened proceeding has not brought the adequacy of Licensee's training program into question, deems the whole problem one of "quality assurance", and supports its former conclusion derived from undeniably unreliable evidence. PID ¶¶2061, 2390. It is this reckless decision making which the Appeal Board correctly finds erroneous. slip. op. at 63, note 47, 71, 155. The Appeal Board did not err is concluding that additional hearings are needed to insure that a

determination is to be made of the adequacy of training, it at least be done so on the basis of relevant and reliable evidence.

Dieckamp Mailgram

Licensee alleges that the Appeal Board "erred" on two points. First, Licensee alleges that it applied a "lower threshold for reopening this issue because it was remanding in any event another matter;" and that it erred "in not pursuing whether Mr. Dieckamp was questioned on this subject." On both points, Licensee is flatly wrong.

To support these arguments, Licensee asserts that the Appeal Board did not seek to meet the "test" for reopening on this issue "let alone support it." This is absurd. The Appeal Board clearly determined that the record on this issue, undeniably material to evaluting Licensee's management integrity, slip. op. 133, is seriously deficient. By the Board's own admission, the I&E report, NUREG 0760, on which the Board solely relies, "really leave[s] it dangling," Tr. 13,060 (Smith). I&E's conclusion was devoid of any factual analysis whatsoever. See, id. at 131 ("More importantly, though, is that the staff's investigative report, upon which the Board was so willing to rely, is wholly conclusory.") Licensee insists that the Appeal Board erred since it should have known that Dieckamp was interviewed by I&E. So what? The issue is not whether Dieckamp was ever interviewed but whether there is any actual testimony or questioning produced on the record of this proceeding from which one can evalute his position. If I&E did interview Dieckamp, they certainly gave no hint as to what Dieckamp said. Certainly the Appeal Board did not err

because it correctly refused to wildly guess as to what Dieckamp may have told I&E or would have told the Board if questioned. NUREG 0760 can not provide a well-reasoned basis for decision on the resolution of the mailgram's factual issues, let alone the broader implications for management integrity.

Moreoever, as the Appeal Board correctly noted at slip op. p. 131, note 101,

> the transcript shows [I&E investigator and Staff witness] Moseley thought there might be different ways to interpret Dieckamp's statement; but because Moseley did not believe they were worth pursuing he suggested that the Board question Dieckamp about it. see Tr. 13,062. This hardly shows breadth in the scope of the staff's approach to this matter.

The Board accepted Moselely's recommendation, described above, stating on the record that "it seems...that there should be a further inquiry or further explanation." Not only is NUREG 0760 devoid of any testimony, or even a reported interview of Dieckamp on this matter, but also the scope of I&E's inquiry was extremely limited and certainly was not approached with the broader issue of management integrity in mind. PID ¶501.

But not only did the Licensing Board fail to conduct a further inquiry as it admittedly should have done, it never even questioned Dieckamp on the incident when he appeared as a witness later that month. See Tr. 13,438 et seq. Perhaps the Board simply forgot. In any event, the Board itself clearly recognized its own error and expressly contemplated reopening the record. ID ¶503. It decided against doing so at that time solely because of the "substantial delay in our decision" and the "serious distraction from many issues directly involving the public health and safety." Id. Thus, the Appeal Board gratui-

tously addressed these concerns at the tail end of its decision on this issue, after having already clearly explained that reopening was mandated because of a deficient record. slip. op. 133. These concerns did not provide the basis for reopening, and a "lower threshold" was not applied by the Appeal Board.

Unit[1] Leak Rates

Licensee cites "errors" by the Appeal Board in reopening the record on this issue. First, Licensee alleges that the "Appeal Board has erred in determining that this matter is so significant that a different result would have been reached by the Licensing Board if this subject had been considered in the hearing, " because while facts surrounding Unit 2 falsification were significant as evidenced by the criminal investigation, the facts surrounding Unit 1 falsification are not so significant. Petition for Review at 8. In fact, Licensee falsely asserts that "there has never been, is not now, and is not in the offing, any basis for a Justice Department investigation of TMI-1 leak rate practices."

On January 10, 1984, OI investigators Christopher and Hayes told the Commission:

> Christopher: The bottom line so far is no one particular individual has acknowledged, admitted to any falsification of records at Unit 1. The individuals have....exhibited a much better awareness of how the falsification could be done via this effect of hydrogen additions or water additions....The individuals have also acknowledged that it was a routine practice to discard unacceptable leak rate test results versus keep them..... The only records that were destroyed were those test results that they termed as unacceptable....
>
> Hayes: I'm unaware of some ulterior motive that would cause the operators to falsify leak rates, other than maybe it was getting close to the shift or the timeframe for the surveillance tests -- I think it was 24 hours and they needed a good test....I'm unaware of any allegations that said we had leaky valves. And I can't explain the aberration here of

> the hydrogen bumps, as an example....We can find no technical reasoning or reason for the addition of hydrogen other than to affect the leak rate test.
>
> Christopher: ...the average hydrogen addition to the RCS during plant operations takes approximately four to six minutes, thereabouts, to make an addition that you would normally make. The additions...during these leak rate tests have been....in the area of only three to four, to as much as ten seconds. We cannot logically explain why only a 10-second hydrogen addition was made.

Commission Meeting Transcript of January 10, 1984, pp. 24-28. (emphasis added). Contrary to Licensee's conjecture, the case was referred to the Justice Department, -- but at the last minute. As explained by NRC General Counsel Plaine, "[w]hen the Justice Department received this report for the first time in December, they threw up their hands and they said how can we expect to run a criminal investigation on this with the statute just about to run." Id., p. 54.

Moreover, OI's review of the leak rate data from April 1978 to Marcn 1979 indicates that out of 645 test records reviewed, some tests noted in the logs were missing, negative leak rates were frequently recorded, (almost 40% in a two month period), and unaccounted for hygrogen, water, and feed and bleed operations were discovered. Unit 1 leak rate investigation record review at 11-13. These violations are more extensive than those to which Met Ed pled guilty in February, and certainly compare to those for which it was indicted and to which it pled " no contest." See, Plea Agreeement, United States of America v. Metropolitan Edision Company, (M.D. PA), Criminal Docket No. 83-00188. Thus,

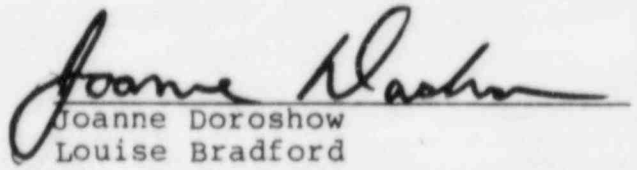
Licensee's assertion that there were no facts significant enough to justify reopening the record is wrong.

Licensee also alleges that it was inappropriate for the Appeal Board to rely on the OI investigation without imput from the parties. Even if all the Appeal Board relied upon was the OI investigation, which it did not, and even if it were "inappropriate" for the Appeal Board to acknowledge facts which are relevant and material, which it is not, this certainly does not constitute clear error and Licensee cites no legal justification for such a proposition.

For all of the above stated reasons, Licensee's petition for review of ALAB-772 should be denied.

Respectfully submitted,

Three Mile Island Alert, Inc.



Joanne Doroshow
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July 11, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached TMIA ANSWER TO LICENSEE'S PETITION FOR REVIEW OF ALAB-772 dated July 11, 1984, were served this 11st day of July 1984, by deposit in the U.S. Mail, first class, postage prepaid, or, hand delivered where possible on July 11 to those on the attached service list.

Joanne Doroshow

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