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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

June 19, 1984
(ALAB-774)

SERVED JUN 20 1984

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

Joanne Doroshow and Louise Bradford, Harrisburg, Pennsylvania, for intervenor Three Mile Island Alert, Inc.

Ernest L. Blake, Jr., and Deborah B. Bauser, Washington, D.C., for licensee Metropolitan Edison Company.

Mary E. Wagner for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

On May 24, 1984, we issued ALAB-772, 19 NRC ___, in which we reopened the management phase of this proceeding and remanded to the Licensing Board for further hearing on several specified issues, including the adequacy of licensee's training program. Subsequent to the issuance of that decision, we received another motion to reopen from

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intervenor Three Mile Island Alert, Inc. (TMIA).[1] TMIA seeks reopening on two grounds as a result of recently released reports by the NRC's Office of Investigations (OI): (1) alleged training irregularities by licensee dating back to 1976, and (2) licensee's alleged failure to provide to the NRC staff, the Commission, and this Board, in a timely fashion, two reports on its management by outside consulting firms. TMIA contends that both OI reports raise serious questions about the integrity of licensee's management. Licensee and the NRC staff oppose the motion.

For the reasons explained below, we deny the motion to reopen.

I. Background

The OI investigation of the alleged training irregularities was an outgrowth of the staff's review of the record in the post-TMI-2 accident litigation between licensee's parent corporation and the manufacturer of the TMI reactors, Babcock & Wilcox (B&W). See General Public Utilities Corp. v. Babcock & Wilcox Co., No. 80-CIV-1683 (S.D.N.Y. filed March 25, 1980) ["B&W trial"]. One of the

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[1] TMIA's motion was actually served (and thus filed) on May 23, before the issuance of ALAB-772. See 10 C.F.R. § 2.701(c). Thus, we have jurisdiction over the motion to reopen.

documents in that record was a 1976 memorandum written by the former Supervisor of Training at TMI, Alexis Tsaggaris, to other licensee officials. The memorandum discussed a number of problems with licensee's requalification training program for licensed operators and suggested that the company was in violation of NRC training regulations. After discovery last year of this memorandum in the B&W trial record, OI was requested to investigate the matter further. That investigation was recently terminated and resulted in Report No. Q-1-84-004, which is the basis for TMIA's motion to reopen on the training issue. After interviewing the principal licensee managers involved in training at the time of the memorandum and shortly afterward (many of whom are no longer employed by licensee GPU Nuclear), OI reported:

> This investigation has not produced any information to indicate that the TSAGGARIS memorandum was in reference to actual conditions of noncompliance with any requirements of the requalification program, nor was there any testimony to indicate that the licensee willfully concealed information concerning noncompliances from the NRC. Additionally, an NRC Region I inspection performed within several months of the TSAGGARIS memorandum did not identify any instances of noncompliance which should have been reported.

OI Report No. Q-1-84-004 at 6. OI therefore terminated its investigation. The report and underlying documents were served on the parties and us last month.

With respect to the two consultants' reports, in 1982 licensee requested Basic Energy Technology Associates, Inc.

(BETA), to examine manpower utilization and expenditures at its TMI and Oyster Creek nuclear facilities. Licensee also requested Rohrer, Hibler & Replogle, Inc. (RHR), to assess operator attitudes at these same facilities. BETA issued its report, "A Review of Current and Projected Expenditures and Manpower Utilization for GPU Nuclear Corporation," on February 28, 1983, and RHR issued "Priority Concerns of Licensed Nuclear Operators at TMI and Oyster Creek and Suggested Action Steps" on March 15, 1983. At an April 1983 meeting with NRC regional personnel, Henry Hukill, Director of TMI-1, mentioned both reports as examples of positive steps licensee had taken to improve the management of TMI-1. In response to the request of regional staff, Hukill provided copies of the two reports. Per Hukill's request, the reports were returned. A subsequent regional staff request for the reports was honored as well, under the same condition -- that they be returned when review was completed.

In May 1983 during conference calls among regional and headquarters NRC staff (including legal counsel) and licensee officials and counsel, the NRC staff for the first time raised questions concerning the relevancy and materiality of the reports and licensee's corresponding obligation to make them public through the Board Notification process. Staff counsel urged that the documents be submitted to the parties in this proceeding and

to us. But both licensee's management and counsel expressed reluctance in making the documents public. They asserted that the reports were not material to the matters under litigation and that they feared misinterpretation of them. Within a few days, however, licensee served the reports, along with letters from BETA and RHR clarifying the intended purpose of each.

Subsequently, the NRC's Director of Nuclear Reactor Regulation (NRR) requested the Executive Legal Director (ELD) to provide a legal opinion on licensee's obligation to disclose the reports. The ELD concluded that licensee could "be considered to have failed to meet its duty to make Board notifications and its obligations under section 186 [of the Atomic Energy Act, 42 U.S.C. § 2236, prohibiting material false statements to the agency] by failing to provide the BETA and RHR reports in a more timely fashion." Memorandum from Guy H. Cunningham, III, to Harold R. Denton (June 14, 1983), attached to Memorandum from William J. Dircks to the Commission (June 22, 1983).[2] Consequently, OI was asked to

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[2] In opposing TMIA's motion here, the staff acknowledges its prior legal opinion in this regard, but argues that licensee's actions were not willful and thus do not reflect negatively on its integrity. The staff's earlier legal opinion is all the more curious in light of its own continuing problem in submitting Board Notifications on a timely basis. For example, we recently received Board Notification BN-84-109 (June 5, 1984), concerning the

(Footnote Continued)

investigate this matter further. In the report for Case No. 1-83-013, OI found no deliberate attempt or conscious decision by licensee to withhold the BETA and RHR reports from the NRC. OI noted, however, that licensee officials remain confused concerning their obligations in this regard and that the responsibility for making such a decision within licensee's management structure is not clear. OI Report No. 1-83-013 at 4.

We have previously touched on both of the matters on which TMIA seeks reopening. TMIA earlier sought to reopen this record on, among other things, unspecified disclosures in the B&W trial record and the timeliness of licensee's disclosure of the BETA and RHR reports. In ALAB-738, supra note 2, 18 NRC at 197, we denied those requests, noting that it was premature to reopen the record on those items before the investigation of each was completed. We also noted that, when they were completed, TMIA could seek again to satisfy the requirements for reopening the record. TMIA has accepted that invitation through the filing now before us.

(Footnote Continued)
findings of a July 1983 inspection of TMI.

We are also curious as to the status of the inquiry into the timeliness of licensee's disclosure of the Faegre & Benson Report. See Memorandum from William J. Dircks to the Commission (June 29, 1983), attached to Letter from Jack R. Goldberg to Appeal Board (July 12, 1983); ALAB-738, 18 NRC 177, 197 n.38 (1983).

II. Discussion

As we have had so much occasion to do lately, we set forth the three-part test for reopening a closed record:

> (1) Is the motion timely? (2) Does it address significant safety (or environmental) issues? (3) Might a different result have been reached had the newly proffered material been considered initially?

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980). Our focus here is on the last two criteria, the significance and outcome-determinative effect of the new information.[3]

A. Training Irregularities

The OI report and supporting documents show what, by this time, should not be news to anyone -- that there were significant shortcomings, to say the least, in licensee's training program before the 1979 TMI-2 accident. Indeed, a fundamental assumption underlying the Commission's TMI-1 shutdown order and this entire proceeding was that training, among other things, required special attention and

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[3] Licensee contests the timeliness of TMIA's motion insofar as it seeks reopening on training, pointing out that some of the documents to which TMIA (and OI Report No. Q-1-84-004) refers have been publicly available for some time. The motion, however, is clearly tied to the recently released OI report, as we suggested was appropriate in ALAB-738, supra, 18 NRC at 197. In that circumstance, we cannot dismiss TMIA's motion as untimely. Neither licensee nor the staff challenges the timeliness of the motion with respect to the BETA and RHR reports.

improvement. See CLI-79-8, 10 NRC 141, 144-45 (1979); CLI-80-5, 11 NRC 408 (1980). Thus, the adequacy of licensee's training program consumed an enormous amount of hearing time below. See ALAB-772, supra, 19 NRC at __ (slip opinion at 14-15). That inquiry, however, was directed primarily to post-accident improvements in that program, with a view toward determining licensee's ability to operate TMI-1 safely in the future, should restart be authorized. This proceeding was not instituted to provide a forum in which to litigate directly all possible errors of the past. Id. at __ n.7, __ n.15 (slip opinion at 11 n.7, 22 n.15).

The "new" information discussed in TMIA's motion and the OI report simply provides additional support for one of the underlying assumptions of this proceeding. It is redundant and, as such, its significance is questionable.[4] It follows that it would not have likely affected the Licensing Board's decision on training -- or, for that matter, ours in ALAB-772 -- in any significant respect.

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[4] Among the matters revealed by the OI investigation were that classroom attendance was often poor, there was inordinate delay in returning makeup material, and too little time was actually spent in the control room. OI Report No. Q-1-84-004 at 1. The hearing before the Special Master showed that similar problems continued after the accident. See generally LBP-82-34B, 15 NRC 918, 1014-20 (¶¶ 238-251) (1982); LBP-82-56, 16 NRC 281, 355-66 (¶¶ 2321-2351) (1982).

To the extent that anything revealed by the OI investigation might be construed as shedding new light on the adequacy of licensee's _existing_ training program, we have already reopened the record on that score. Such matters can be pursued in accordance with the hearing we have outlined in ALAB-772, _supra_, 19 NRC at __ (slip opinion at 63-77). Insofar as the information contained in the OI investigation report may indicate possible violations of NRC training regulations _before_ the TMI-2 accident, that would be an enforcement matter, which, as noted above, is beyond the scope of this particular proceeding.

B. _The BETA and RHR Reports_

It is important at the outset to stress what the precise issue is in this regard. TMIA does _not_ argue that this proceeding be reopened on the basis of the substantive content of the BETA and RHR reports. Indeed, in ALAB-738, _supra_, 18 NRC at 198-99, we addressed that very issue.

> Given the limitations in both reports [as discussed above in ALAB-738] and -- more important -- the fact that the ground covered therein (including the criticisms) was well traversed at the hearing below, we are unable to conclude that any of the matter called to our attention might have made a difference in the Licensing Board's decision. Further, we would not want to discourage any licensee from undertaking such reviews of its management and operations (and disclosing their results) for fear of reopening a closed record. Our perusal of the BETA Report, in particular, shows it to be an extremely useful document, upon which licensee can rely to improve its operation overall.

There is no basis provided here for us to alter that view.

Instead, TMIA contends that licensee's failure to submit the BETA and RHR reports earlier and without reluctance shows a lack of integrity on the part of licensee's management. The necessary predicate of such a conclusion, however, is that licensee was legally obligated to release the materials more promptly and "voluntarily" than it, in fact, did. We are unable to reach such a conclusion on the facts of this case.

This legal obligation, as pertinent here, could arise from two sources. First, section 186a of the Atomic Energy Act provides:

> Any license may be revoked for any material false statement in the application or any statement of fact required under section 182, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application. . . .

42 U.S.C. § 2236a. In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), aff'd sub nom. Virginia Electric Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978), the Commission held that this provision of the statute could be violated by omission as well as by an affirmative statement.[5] Second,

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[5] The Commission recently released a policy statement, however, in which it announced that it is reconsidering its earlier views on what constitutes a material false statement. 49 Fed. Reg. 8583, 8584 (1984).

we have long required parties to our proceedings to inform the adjudicatory boards and other parties of any new information that is "relevant and material to the matters being adjudicated." Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973). See also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982).[6]

There can be little doubt that both the BETA and RHR reports are of some relevance to the broad issue of licensee's management competence, as explored in this

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[6] We recognize that, with respect to issues in adjudication, there exists some overlap in these obligations, inasmuch as both focus on the materiality of the new information. A review of our case precedents, however, shows that the "Board Notification obligation" of an applicant or a licensee seems to pertain more to matters that could affect the course of the litigation, such as a change in the license application or an event that would moot or resolve some issue. Section 186a, on the other hand, is more often invoked with regard to previously undisclosed information that appears to raise a serious safety or environmental question, contrary to an applicant's or a licensee's interest. Compare McGuire, supra (modification of applicant's quality assurance organization), and Browns Ferry, supra (modification of application to store low level radioactive waste), with North Anna, supra (discovery of new seismic information), and Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant Units 1 & 2), CLI-82-1, 15 NRC 225 (1982) (statements concerning independence of consultant performing seismic reverification program). See generally Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 912-13 (1982), review declined, CLI-83-2, 17 NRC 69 (1983); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26.

proceeding. See ALAB-772, supra, 19 NRC at __ (slip opinion at 3-11). The BETA report considered licensee's management in many of the same areas as did the hearing below (e.g., maintenance), although from an efficiency, rather than a safety, perspective. The RHR report took up the matter of operator attitudes, an issue that arose particularly in the reopened hearing on cheating.

In North Anna, supra, 4 NRC at 487, the Commission defined "material" in the traditional evidentiary sense -- i.e., whether it is "capable of influencing a decisionmaker, not whether the statement would, in fact, have been relied on." Whether either the BETA or RHR report can be properly characterized as material evidence is a question not readily answered.[7] In such cases of reasonable doubt, however, we have held -- with regard to both the Board Notification obligation and section 186 -- that the information should be disclosed for the board to decide its true worth. McGuire, supra, 6 AEC at 625 n.15; Midland, ALAB-691, supra note 6, 16 NRC at 914.

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[7] Both reports perhaps might have been "capable" of influencing the Licensing Board to some degree at an early stage of this proceeding. But by the time the reports came into existence, much of the significant information contained in them, as we noted above in ALAB-738, was similar to or duplicative of that already generated in the hearing record. The reports were also limited in scope. See ALAB-738, supra, 18 NRC at 198.

Thus, even though licensee disputed staff counsel's claim that the material should be submitted via a Board Notification, the proper course was to disclose the reports. That is exactly what licensee did, within a matter of days from being confronted squarely with the issue by the staff. The question then is whether licensee's expressed reluctance to do so and failure to provide the reports even earlier constitute culpable conduct. We think not.

As to the latter point, an applicant or a licensee is entitled to a reasonable period of time for internal corporate review of documents like reports prepared by outside consultants.[8] Indeed, it is during such time that an applicant or a licensee should also review the document in the context of its reporting responsibilities. The time during which licensee reviewed the RHR and rather comprehensive BETA reports, before any mention or disclosure of them to the NRC, is in our view such a reasonable time.[9]

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[8] The obvious exceptions are for reports and the like that could have an immediate effect on matters currently being pursued at hearing, or that disclose possible serious safety or environmental problems requiring immediate attention. An applicant or a licensee is obliged to report the latter to the NRC staff without delay, pursuant to myriad regulatory requirements. See, e.g., 10 C.F.R. § 50.72.

[9] We note OI's finding that licensee remains confused as to its responsibilities in this regard. See OI Report No. 1-83-013 at 4. To avoid such problems in the future, we urge licensee to establish some means for inhouse review of similar reports and studies for reportability, perhaps within its law department.

We also believe that an applicant or a licensee -- indeed, any party -- has a right to assert a reasonable position as to any claimed obligation -- including the disclosure of ostensibly material information. Nothing in the OI report or its underlying documents gives us a reasonable basis upon which to doubt licensee's motives in openly resisting for a limited time the full public disclosure of the BETA and RHR reports. See Midland, CLI-83-2, supra note 6, 17 NRC at 70 (deliberate planning to make material false statement, even where not carried to fruition, would be evidence of bad character). Licensee explained its reluctance to the staff but eventually and promptly (by any standard) disclosed the material. The fact that licensee may still disagree in principle as to the scope of its obligation to disclose cannot reasonably outweigh licensee's actions here. Nor should it be overlooked that it was the current Director of TMI-1 who initially and voluntarily revealed the documents' existence to NRC regional personnel.

This situation bears a strong resemblance to that confronting the Commission in United States Dep't of Energy (Clinch River Breeder Reactor Plant), CLI-82-22, 16 NRC 405 (1982). There the Commission stated:

> the Applicants on May 9, 1977 informed the staff of their objections with regard to providing the information and the format of the response; that the staff in a May 27, 1977 letter to the Applicants adhered to its position on the need for

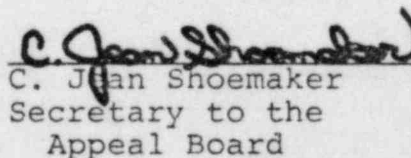
> information and for it to be in the format requested; and that eventually the Applicants provided the answers to the staff's questions.
>
> These documents demonstrate that there is no foundation for Petitioners' allegation that the Applicants intended to conceal information. Rather, the documents show that the Applicants objected to, but finally acceded to, the NRC's request for information and the requested format. We find nothing here that warrants further inquiry or other action.

Id. at 408 (footnotes omitted). We believe that the same reasoning pertains here. We therefore find no improper action by licensee with regard to the reporting of the BETA and RHR studies and, accordingly, no basis for reopening the record on that count.

TMIA's motion to reopen the record on (1) licensee's past training irregularities, and (2) the timeliness of licensee's submission of the BETA and RHR reports, is denied.[10]

It is so ORDERED.

FOR THE APPEAL BOARD



C. Jean Shoemaker
Secretary to the
Appeal Board

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[10] TMIA complains about the adequacy of the OI investigations. Given the bases for our denial of the motion, however, the adequacy *vel non* of those investigations is not a controlling factor.