July 31, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S COMMENTS ON JULY 13, 1984 MEMORANDUM AND ORDER ON LEAD INTERVENORS AND MOTION TO PARTIALLY EXCLUDE UCS FROM PARTICIPATION IN THE MANAGEMENT REMAND

During the June 28, 1984 prehearing conference, UCS, TMIA and the Aamodts agreed to report to the Licensing Board by July 11 on a proposed assignment of lead intervenor status on the issues remanded by the Appeal Board in ALAB-772. The Board anticipated an ex parte report that simply designated a proposed lead intervenor on each of the three remanded management issues. See Tr. 27,294, 27,309 (Chairman Smith). Because the report made on behalf of the intervenors by counsel for UCS was more than a simple listing of lead intervenors' responsibilities, the Board has provided an opportunity for the parties to comment on the report. Licensee's comments follow.

Additionally, after having evaluated the role UCS has heretofore played in the TMI-1 restart proceeding, Licensee has concluded that UCS is neither entitled nor should it be permitted to actively participate in two of the three subjects of the remanded management proceeding. Accordingly, Licensee takes this opportunity to request that the Board exclude UCS from participating in the remanded proceeding on the issues of the Dieckamp mailgram and leak rate testing practices at TMI-1. Licensee recognizes that TMIA and not UCS has sought designation as lead intervenor on these issues. UCS, however, reserves the right to pursue its separate interest where TMIA does not fully represent UCS. Further, at the June 28 prehearing conference, UCS counsel stated UCS' intention to participate in the issue of leak rate testing practices at TMI-1. Tr. 27,281 (Jordan).

A. Licensee's Comments on the Board's Memorandum and Order on Lead Intervenors

Licensee's general understanding of the lead intervenor arrangement, which is described by the Board in its July 13 Memorandum and Order, is that in order for a non-lead intervenor to proceed separately on an issue it must persuade the Board that it has made a good-faith attempt to consolidate its efforts with those of the designated lead intervenor but that, notwithstanding this serious attempt, it cannot consolidate

without compromising a specific legitimate interest, identified to the Board. Thus, the operative rule of the lead intervenor arrangement is that the intervenors' efforts will be consolidated unless an intervenor demonstrates to the Board that it is infeasible in some particular instance. The benefit of such consolidation is that the lead intervenor bears the brunt of the discovery burden and other responsibilities of participation. See Tr. 27,302 (Chairman Smith).

As to the specific designations, Licensee has no objection to the designation of TMIA as lead intervenor on the issues of leak rate testing at TMI-1, and the Dieckamp mailgram. Nor does Licensee object to parties dividing lead responsibilities among discrete areas within the training area. With respect to the training issue, however, Licensee has several concerns about the subissues identified in conjunction with the proposed assumption of lead intervenor responsibilities.

The scope of the remanded proceeding was discussed by the parties during the June 28 prehearing conference, and established by the Board in its Memorandum and Order Following Prehearing Conference of July 9, 1984. As indicated in that Order, the scope of the training issue on remand is broad. Notwithstanding its recently established breadth, intervenors already seek to expand the issue even further, designating subissues that go beyond the limit set by the Board of "the implications of cheating and other program deficiencies

specifically discussed in Section III.C of ALAB-772." Memorandum and Order Following Prehearing Conference, July 9, 1984 at 2-3. It is necessary that this expansion be stopped now to avoid potentially unnecessary discovery and time devoted to evidentiary preparations.

With respect to TMIA's four subissues, Licensee does not disagree with the subject matter or scope of subissues (1) through (3), recognizing that the general scope of the proceeding is limited to the implications of cheating and other program deficiencies specifically discussed in Section III.C of ALAB-772, and keeping in mind the Board's statement that "the undisturbed findings on the training program and the Appeal Board's findings not included in the remand are res judicata in the remanded proceeding. For example, there will not be a new cheating litigation on remand." Id. at 3. However, with respect to subissue (4), Licensee has two objections.

There is no basis in either the Board's Memorandum and Order Following Prehearing Conference, or in Section III.C of ALAB-772 to relitigate broadly "the competence and integrity of GPU management." Clearly, the qualifications -- technical, ethical, and attitudinal -- of the training management at TMI-1 is subject to reevaluation in the remanded proceeding. See ALAB-772, 19 N.R.C. ___ (May 24, 1984), slip op. at 71 and n.56. However, this is obviously not the thrust of subissue (4), as this subject is specifically identified in TMIA

subissue (2). To the extent TMIA seeks to reopen the proceeding on the management competence and integrity of senior GPU officials, Licensee objects as this was plainly not the intent of the Appeal Board's remand in ALAB-772.

The inappropriateness of TMIA subissue (4)'s unsupported relitigation of senior management capability is compounded by TMIA's interest in litigating, without any threshold showing of current significance, "the history of GPU's problems with training." ALAB-772 clearly remanded the issue of training in order for the Board to assess the implications of the 1980 and 1981 cheating incidents on the adequacy of the operator training program in existence "now". ALAB-772, supra, slip op. at 68; see generally id. at 63-72. During the prehearing conference, TMIA's representative suggested that in ALAB-774 the Appeal Board invited an inquiry into past training deficiencies. See Tr. 27,252 (Doroshow); see generally Tr. 27,250-63 (discussion among the parties). However, it was in ALAB-774 that the Appeal Board unequivocally reiterated the view that, "This proceeding was not instituted to provide a forum in which to litigate directly all possible errors of the past." ALAB-774, 19 N.R.C. ___ (June 19, 1984) slip op. at 8, citing ALAB-772, supra, slip op. at 11 n.7 and 22 n.15. The Appeal Board recognized that insofar as evidence revealed by the recent investigations into past training deficiencies shed "new light on the adequacy of licensee's existing training

program," it had already reopened the record on the adequacy of the existing program. ALAB-774, supra, slip op. at 9. However, information suggesting possible pre-accident problems "is beyond the scope of this particular proceeding." Id.

TMIA is free to assess whether past licensed operator training deficiencies at TMI identified in Section III.C of ALAB-772 have any present significance and, insofar as they do, to file direct testimony or cross-examine on the present significance of these problems to the existing training program. However, the reopened evidentiary proceeding is not a forum available to TMIA to use as an open-ended inquiry into possible deficiencies in a licensed operator training program that no longer exists. Cf. Tr. 27,254-56 (discussion among Chairman Smith, Judge Linenberger and Ms. Doroshaw of TMIA's responsibility to demonstrate the relevance of the evidence it seeks to place in issue). It is also simply incorrect for TMIA to suggest that the scope of the remanded proceeding encompasses the sweeping subissue of "the history of GPU's problems with training," presumably because, based on this history, TMIA considers it appropriate to make judgments about the competence and integrity of GPU's current senior management.

In sum, the Board should omit TMIA subissue(4) from the remanded proceeding. As the Board has previously stated, "subissues are limited to the implications of cheating and other program deficiencies specifically discussed in Section III.C of ALAB-772." Subissue (4) falls outside this scope.

UCS has identified two subissues in connection with the training remand on which it proposes to assume the responsibility of lead intervenor. UCS subissue (2), on the NRC and Company examinations, unquestionably should be limited to Licensee's exams. An inquiry into the NRC exam is permitted only to the extent justified by the degree of reliance placed on it by Licensee's consultants in their evaluation of the adequacy of Licensee's licensed operator training program. See Memorandum and Order Following Prehearing Conference, July 9, 1984 at 4-6. Licensee requests that the Board modify subissue (2), accordingly.

UCS also proposes to serve as lead intervenor on UCS subissue (1): "Are the operators equipped to safely operate the plant particularly in emergency situations?" UCS subissue (1) is unacceptably ambiguous and thus subject to different and not necessarily appropriate interpretations. Licensee would not oppose UCS subissue (1) if it were modified so as to make clear that the issue here is training and not the adequacy of the hardware or the procedures used by the operators. Licensee proposes that the Board substitute the word "trained" for the word "equipped," and insert "in accordance with approved procedures" after the word "plant." If UCS opposes these modifications, Licensee would object to the admission of the subissue as stated, as it invokes litigation of issues that not only are res judicata, but were litigated in a wholly separate part of

this proceeding (by, among others, UCS). In this regard, Licensee does not believe that the remanded proceeding on training in any way encompasses another look at the substantive adequacy of emergency operating procedures or the legitimacy of operator practices in the control room. Rather, ALAB-772 makes plain the fact that the Board should consider the quality of the current program to train licensed operators at TMI, given the operational procedures and practices in place today. See, e.g., ALAB-722, supra, slip op. at 53 (emphasis added) ("[I]s the instruction adequate to prepare the operators to operate the plant safely?").

Licensee's comments on UCS' proposed subissues (1) and (2) assume particular importance in the light of UCS' prior participation in this proceeding. UCS was an active participant in the TMI-1 restart proceeding on plant design and procedures. LBP-81-59, 14 N.R.C. 1211 (1981); ALAB-729, 17 N.R.C. 814 (1983); CLI-84-11 (July 26, 1984). However, UCS did not participate at all in the TMI-1 restart proceeding, including the reopened proceeding, on management issues. Not surprisingly, then, UCS did not file proposed findings of fact or conclusions of law on any of the management issues before either the Licensing Board or the Special Master. UCS did file comments with the Licensing Board on the Special Master's Report, and filed a brief with the Appeal Board after the Licensing Board's decision in the reopened proceeding. See LBP-82-56, 16 N.R.C.

281 (1982). UCS' main concern, however, was that the findings of the Special Master and the Licensing Board on management issues justified reconsideration of the Licensing Board's prior findings on design.

At the June 28 prehearing conference, counsel for UCS indicated that UCS was planning to take a very active role in the reopened management proceeding on training and leak rate test practices at TMI-1.1/ Tr. 27,280-81 (Jordan). This keen interest in the management proceeding was surprising, in view of UCS' complete disinterest in the initial litigation of the management issues.2/ UCS explains its belated interest in the training issue as, in effect, a necessary outgrowth of its participation in the so-called hardware design proceedings. Tr. 27,280-81, 27,286-87 (Jordan). In UCS' view, its pursuit of issues such as feed and bleed, and preventing premature operator termination of safety systems, supports its active role in training now. UCS offers no explanation whatsoever for its

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1/ UCS does not "foresee" any participation in the remand proceeding on the Dieckamp mailgram issue. Tr. 27,281 (Jordan).

2/ A more recent illustration of UCS' disinterest in management issues was its failure to respond to three motions to reopen the management proceeding filed by the Aamodts and TMIA. Notwithstanding this default, UCS subsequently sought and obtained permission to address the Appeal Board on these motions during the scheduled oral argument. UCS then proceeded not to attend the oral argument. See Appeal Board Oral Argument, Tr. 3 (July 28, 1983); UCS Comments on Appeal Board Order of June 16, 1983 (July 1, 1983).

sudden interest in the management issue of leak rate test practices at TMI-1. Although UCS does not propose itself as a lead intervenor on this subject, it does plan to participate in the remanded proceeding on this management capability issue. Tr. 27,281 (Jordan).

UCS' argument has a superficial appeal because of the obvious interdependence between hardware and its proper use, i.e., operators must be trained to use the hardware properly.3/ In fact, however, UCS has now turned its previous interest in operator-related hardware issues completely on its head. The lynchpin of UCS' position during the design proceeding was that operators ought not be relied on; hardware should, in effect, be operator-proof. See, e.g., Tr. 6,241-336 (UCS' cross-examination of P. Clark, M. Ross and E. Patterson on premature operator termination of safety systems); see also Pollard, ff. Tr. 6,410 (UCS testimony on UCS Contention No. 10, which does not even mention training (i.e., inadequacies) as a basis for

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3/ During the reopened design proceeding before the Appeal Board, Judge Buck observed, "[W]hat this hearing is really about, as I understand it, is whether the plant is adequately built, designed, and th[illegible] sort of thing, to operate . . . . The final question comes down to whether the operators have, one, the proper guidance; two, the proper training; and finally, that they do what they have been told to do. But that is an entirely different subject." App. Tr. 663-64 (March 17, 1983); see also ALAB-729, 17 N.R.C. 814 at 854 n.177 ("We appreciate that operators must be properly trained to employ the feed and bleed method. The adequacy of such training will be examined in the management phase of the case and has not been considered here.").

the need for uninterferable automatically-initiated safety system hardware).4/

Consistent with this approach, UCS did not participate at all in the original litigation of the substantive adequacy of Licensee's management and personnel, including the TMI operator training program and the NRC exam, or in the litigation of the cheating issues. In fact, UCS has disclaimed familiarity with the management record. UCS Brief on Exceptions to Partial Initial Decision (Reopened Proceeding) at 9-10 (Sept. 30, 1982).5/ In short, although training "related" to UCS' interests, it was not the subject of inquiry during the design proceeding nor has UCS exhibited a genuine interest in the subject.6/

4/ It should be noted that Licensee never concurred in UCS' desire to "operator-proof" TMI-1. See, e.g., Testimony of P. Clark, M. Ross and E. Peterson ff. Tr. 6,225 (Nov. 20, 1980) at 4 (In response to UCS Contention 10, Clark states, "Licensee completely disagrees with the basic philosophy underlying this contention . . . . [T]he real need is to prepare the operators to correctly diagnose the plant condition and carry out the appropriate actions.") As the Appeal Board has stated and Licensee has repeatedly acknowledged, "proper training is essential to the safe operation of the plant and requires the closest scrutiny." ALAB-772, supra, slip op. at 76. Thus, Licensee has always disputed the underlying premise of UCS' position on various hardware issues, viz., that operators would not need to be well trained. This fact is no more true today than it was five years ago.

5/ Evidence of this unfamiliarity can be found in numerous UCS pleadings on the import of the Special Master's Report, in which UCS invariably cites from the various decisions and not from the record. See, e.g., UCS Comments on Report of the Special Master, May 18, 1982; UCS' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding), Sept. 30, 1982.

6/ There are a number of examples of the relationship but difference between training and the issues litigated during the

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When UCS filed contentions in the restart proceeding, UCS could have asserted that hardware ought to be operator-proof but, to the extent it is not, training and other managment issues are important as well. It chose not to make these latter arguments, putting all of its eggs in the hardware basket. UCS' contentions speak for themselves. They were all hardware contentions.

The design proceeding has not been reopened. Neither is the assumption underlying aspects of the Licensing Board, Appeal Board and Commission decision on design now subject to

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design proceeding. The closest link was in response to Board Question No. 11 on operator performance during transients and accidents, when Licensee presented testimony on the Abnormal Transient Operator Guidelines (ATOG) program. Broughton, ff. Tr. 10,941 (Jan. 27, 1981); see also LBP-81-32, 14 N.R.C. 381, 449 (1981). (¶ 188). However, UCS did not appear at the hearing when this testimony was presented, nor does Licensee believe any of UCS' findings addressed this issue. In response to UCS Contention 7 on water level instrumentation, Michael Ross testified about training given to operators on obtaining and interpreting the status of core cooling. See Keaton, Ross and Jones, ff. Tr. 10,619 at 14-19. Although other parties asked questions of the witnesses on this testimony, UCS did not as it was not even in attendance while its Contention 7 was being litigated. See also Tr. 7,420-24 (Keaton); Joyce, ff. Tr. 7,467 (Dec. 4, 1980) at 4-5 (discussion of operators' need for computers in connection with computer hardware issue (Sholly Contention 13 and ECNP Contention 1a); UCS again not present for this part of design hearings); Tr. 4,777-804 (UCS cross-examination of B&W's Robert Jones on the complexity of operator actions needed in feed and bleed mode. Notwithstanding the issue's "relationship" to training, there is no specific reference to the adequacy of training; rather, UCS' focus is on not allowing this operator action); Tr. 4,928-29 (UCS cross-examination of W. Jensen).

challenge. Stated another way, if Licensee cannot establish that its operator training program is adequate, it will not be able to operate TMI-1. It cannot compensate for this inadequacy and operate the plant anyway by making the hardware modifications favored by UCS.

In sum, the UCS design issues, no longer pending before the Commission, are not at issue here. Counsel for UCS suggests this is not the case when he says the training issue is central to UCS' concerns which "had really not been resolved by the proceeding in which UCS had participated." Tr. 27,288 (Jordan). This is incorrect. The design issues have been resolved; however, not necessarily as UCS would have liked them to be. But this remanded proceeding is not a back door into reconsideration of the issues raised by UCS during the design proceeding. But see Tr. 27,286-87 (counsel for UCS suggests cheating findings raise questions about the remedies to the operator action issues litigated during the design proceeding). The Board should not allow UCS' participation in the remanded training issues to devolve into a relitigation of the issues of plant design and procedures that have already been decided.

B. Motion to Partially Exclude UCS From Participation in the Management Remand

UCS ought not be permitted to participate in issues to be heard in this remanded proceeding that have absolutely no relationship to UCS' prior interests. Those issues are the Dieckamp mailgram and leak rate test practices at TMI-1. Whatever claim of prior interest UCS may now assert as to training, there is no basis for claiming such an interest in other management issues.

1. UCS Is Not Entitled To Participate In These Management Issues As A Matter Of Right

In NRC practice, an intervenor that wholly fails to participate in the consideration of a particular issue at the initial hearing stage, and that fails to file proposed findings of fact or conclusions of law on the issue, cannot claim a right to later litigate the issue on appeal or on remand. See United States Department of Energy Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-761, 19 N.R.C. 487 (1984); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253 (1978); Northern States Power Company (Prairie Island Nculear Generating Plant, Units 1 and 2), ALAB-244, 8 A.E.C. 857 (1974); see also 10 C.F.R. §§ 2.707, 2.754(b). After all, "intervention in an NRC adjudicatory

proceeding does not carry with it a license to step into and out of the consideration of a particular issue at will." Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 N.R.C. 390, 393 (1978). This default principle serves the purposes of NRC procedure by requiring p rties to meet their responsibilities and by giving the Licensing Board the benefit of a party's contribution in the first instance, preventing needless further litigation. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 906, 907 (1982).

Thus in Marble Hill, the intervenor Save The Valley (STV) indicated at the initial hearing that it did not wish to be involved in the environmental issue of the location of the site boundary for purposes of state jurisdiction under the Federal Water Pollution Control Act (FWPCA). ALAB-493, supra, 8 N.R.C. 253, 268. STV did participate in the question of the propriety of state FWPCA certification proceedings, however, to which the site boundary issue was relevant. Id. Subsequently, the boundary issue was appealed and remanded for further evidence before the Licensing Board. STV claimed that the procedures adopted by the Licensing Board on remand infringed STV's right to participate in the boundary issue. However, the Appeal Board held that STV was not entitled to participate in the remanded hearing as a matter of right since "[a]t the initial hearing, Save the Valley submitted no contentions, proffered no

evidence, proposed no findings, and suggested no conclusions of law to the Board below respecting the boundary's location."7/ Id. at 268-69. The Appeal Board noted that the question of state FWPCA certification, which STV did litigate, was relevant to the boundary issue, but it determined that this made no difference because STV had previously indicated that its interest was only in the former, and not in the latter issue. Id. at 268.

A very recent case also is illustrative. In Clinch River, the application to build a breeder reactor was opposed by intervenors, NRDC and the Sierra Club. ALAB-761, supra, 19 N.R.C. at 489. The Licensing Board issued applicants a limited work authorization (LWA); NRDC and the Sierra Club appealed this decision. Id. The Licensing Board meanwhile went forward with the litigation of other issues. However, because of limited resources, NRDC and the Sierra Club obtained permission from the Board to withdraw their contentions relating to these non-LWA issues and, accordingly, were dismissed as parties to the proceeding. Id. When Congress cut off funds for the

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7/ The Appeal Board also noted that STV failed to except from the Licensing Board's ruling. However, this could not be a critical factor because once STV failed to participate in the consideration of the boundary issue and failed to file findings of fact or conclusions of law on the issue, it lost any right to appeal the Licensing Board's decision. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 A.E.C. 857, 864 (1974).

Clinch River reactor, the Appeal Board terminated its appellate proceedings; however, it remanded the LWA issues to the Licensing Board to determine the necessity for imposing measures to ameliorate the environmental impact of site preparations. NRDC then filed a motion for permission to reenter the proceeding to raise the question of the effect of Congress' action on the non-LWA issues. The Licensing Board ruled that: (1) NRDC and the Sierra Club were entitled to make only limited appearance statements with respect to the site redress issue; and (2) NRDC would not be allowed to participate at all in the non-LWA issues. Id. at 490. Intervenors appealed these rulings. The Appeal Board reversed the first ruling, holding that both intervenors were entitled to participate fully in the site redress issue; however, it affirmed the second ruling.

First, the Appeal Board denied that its remand of the LWA segment of the case was intended in any way to restrict the participation of NRDC and the Sierra Club in LWA issues. Id. at 491. Second, the Appeal Board noted that the intervenors had previously indicated an interest in the site redress issue. Id. at 492. Third, the Appeal Board stressed that intervenors had been active participants in the LWA segment of the case. Merely because they had concentrated their efforts on other LWA issues was no reason to prevent them from participating in the site redress issue because that issue was part of the LWA segment and it had just come up. Id.

However, with respect to NRDC's motion to reenter on non-LWA issues, the Appeal Board upheld the Licensing Board. By withdrawing their contentions on the non-LWA issues, NRDC (and the Sierra Club) had accepted the risk that these issues would be decided adversely to their interests. Id. at 493. Nor could NRDC base its motion to reenter on the grounds that Congress' action was a new development. Such an action was "not one that should have been wholly unanticipated when the intervenors withdrew." Id.

The default principle invoked in Marble Hill and Clinch River is applicable here. UCS declined to participate at all in the TMI-1 management proceeding. Similarly, it failed to file findings of fact or conclusions of law on management issues, either before the Licensing Board or the Special Master. The only remanded management issue at all relevant to the design issues that UCS did litigate is the training issue. The Dieckamp mailgram and leak rate practices at TMI-1 have absolutely no nexus to UCS' design contentions. Like the intervenor in Marble Hill, UCS is not entitled to participate in the remanded management proceeding on these issues because it is indisputable that UCS chose to stay out of the management proceeding and to participate only in the litigation of design issues.

Furthermore, the relevance of management issues to design concerns is not any more apparent now than it was when the

initial hearings took place. Unlike the intervenors in Clinch River (with respect to site redress), UCS did not vigorously participate in one aspect of the case and then later seek to participate in a new issue that arose in that aspect; rather, UCS refrained from any direct participation at all in the initial TMI-1 restart proceeding on management issues litigated before the Licensing Board. UCS also did not file exceptions to this decision before the Appeal Board.8/ UCS has characterized its interest in the design proceeding as encompassing an interest in training and operator qualifications. See Tr. 27,286-87 (Jordan). However, it has not even attempted to justify its participation in either of the other two remanded issues.

In sum, UCS improperly seeks to enter an aspect of the case in which to date it deliberately chose not to participate, just as did NRDC in the Clinch River case (with respect to non-LWA issues).9/ Under these circumstances, UCS has clearly

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8/ As previously stated, UCS did file comments before the Licensing Board on the Report of the Special Master. However, it did not take part at all in the adjudication of the reopened proceeding on cheating issues. See, e.g., Union of Concerned Scientists' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding) at 9-10 (Sept. 30, 1982) (admitting non-participation in the reopened proceeding and disclaiming ability to engage in a detailed discussion of the evidence). Nor did UCS file proposed findings of fact or conclusions of law in the reopened proceeding.

9/ Indeed, the instant case is a stronger one for default than was Clinch River. In that case NRDC was not allowed to

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defaulted and is not entitled to participate in the remanded TMI-1 management issues.

2. UCS Should Not Be Allowed To Participate In Portions Of The Remanded Management Proceeding As A Matter Of Discretion

Even though UCS' default has deprived it of the right to participation in the remand of management issues, the Licensing Board may nonetheless allow it to participate in the litigation of these issues as a matter of discretion. In deciding whether to exercise its discretion, the Licensing Board is guided by the five factors for evaluation of late intervention which are set forth in 10 C.F.R. § 2.714(a)(1).10/ See Clinch River, ALAB-761, supra, 19 N.R.C. at 493-94. Consideration of these factors demonstrates that UCS should not be allowed to participate in that portion of the remanded management proceeding devoted to the Dieckamp mailgram and TMI-1 leak rate issues.

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reenter the non-LWA issues because its claimed interest, i.e., the effect of Congress cutting off funds, was foreseeable at the time it chose not to pursue those issues. Here UCS' claimed interest was not merely foreseeable, but actually present, at the time of the initial management issue hearings.

10/ These factors are: (i) good cause, if any, for failure to file on time; (ii) the availability of other means whereby the petitioner's interest will be protected; (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record; (iv) the extent to which the petitioner s interest will be represented by other parties; and (v) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

UCS has shown no good cause for its failure to participate in the management proceedings at an earlier stage. 10 C.F.R. § 2.714(a)(1)(i). UCS argues that it has always been interested in management issues by virtue of their relationship to design issues. See Tr. 27,286-87 (Jordan). Even here, however, UCS' arguments are limited to the training remand. UCS offers no rationale for its interest in the other two remanded issues. UCS freely admits it has not participated previously in the extensive litigation of Licensee's management capability. See Union of Concerned Scientists' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding) at 9-10 (Sept. 30, 1982). Assuming arguendo that UCS has always been "interested" in management issues, Licensee fails to see how this helps UCS' position in the least. If UCS had not been interested in management issues when the initial hearings took place but is now interested because of the occurrence of some unforeseeable event, UCS might have a persuasive argument for being allowed to participate in the remanded management proceeding. Cf. Clinch River, supra, slip op. at 9. But this is not the case. UCS could have participated at the initial hearings, see Tr. 27,289 (J. Doroshow, counsel for TMIA); it chose not to. This choice reflected a deliberate decision on UCS' part that, notwithstanding its interest in design issues, it did not wish to participate in management issues. As in Clinch River, by making this choice, UCS accepted the risk that the

management issues would be decided adversely to its perceived interest. ALAB-761, supra, slip op. at 10.11/

UCS' position is not aided by the fact that it filed comments on the Special Master's Report and a brief on the Licensing Board's decision of July 27, 1982. These filings show only that UCS belatedly became interested in the results of the cheating proceedings, not that it participated or even intended to participate in the litigation of Licensee's management capability. Indeed, UCS disclaimed the ability even to argue the management evidentiary record. See Union of Concerned Scientists' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding) at 9-10 (Sept. 30, 1982).12/ In short, UCS'

11/ The legal basis for Licensee's motion to exclude UCS from participating in the litigation of TMI-1 leak rate testing practices and the Dieckamp mailgram issue applies equally to the remand on training; that is, to date, UCS has played no role in the development of the management record on this issue. However, in view of the potential delay in the schedule established by the Board which Licensee believes might result from an effort to exclude UCS from participating in the training issue, Licensee has opted not to pursue this course.

12/ Furthermore, UCS was not entitled to file these briefs -- it had not filed proposed findings of fact or conclusions of law before either the Licensing Board or the Special Master. Prairie Island, ALAB-244, supra, 8 A.E.C. at 864. Licensee largely ignored these filings, because they represented nothing more than a rehashing of the arguments and conclusions of others. See Licensee's Reply to Comments of Other Parties on the Special Master's Report and the Atomic Safety and Licensing Board's Tentative Final Draft at 3 (June 1, 1982) ("Comments like those of UCS, which only rehearse the Special Master's Report and provide no insights into the accuracy of the Report, are of no value and should be ignored"); Licensee's Brief in

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gratuitous participation in the "significance" of the Special Master's Report does not cure its voluntary nonparticipation in the development of an adequate management record.

UCS must have been well aware that its failure to participate in the initial management hearings constituted a default on its right to participate in the issues at a future date. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-32, 14 N.R.C. 381, 389 (1981) (Partial Initial Decision on Management Issues) ("[t]he parties to this proceeding were cautioned on several occasions that the Board requires the parties to file proposed findings of fact and conclusions of law pursuant to 10 C.F.R. 2.754(a) and that failure to file would be deemed a default by that participant as to the respective issues in accordance with section 2.754(b)"); see also Special Master's Memorandum and Order Following a Conference Among the Parties at 6 (Oct. 8, 1981) ("all parties are required to submit proposed findings . . . [and] [i]f a party does not submit proposed findings on a particular issue, that party will be in default, and will thereby forfeit the right to have its position considered on that issue"). Given these

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Opposition to Appellants' Briefs on Exceptions Related to Management Capability at n.133 (Nov. 15, 1982) (UCS' arguments on training encompassed by those of other parties and therefore not separately discussed by Licensee).

repeated warnings, even a pro se intervenor, much less an experienced intervenor represented by counsel, cannot claim ignorance of its responsibilities.

Thus, it is clear that UCS cannot show good cause for its failure to participate in the management proceedings earlier. Since it is without a good excuse, UCS should only be allowed to participate if it can make a very strong showing with respect to the other late intervention factors specified in § 2.714(a)(1). See Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273 (1975). These factors provide no such support for UCS.

There is a great deal of reason to believe that UCS' newfound interest in Licensee's management capability will be adequately protected without allowing it to participate in the remanded management proceeding. See 10 C.F.R. § 2.714(a)(1)(ii) and (iv). TMIA and the Aamodts have aggressively pursued the issues involved in this remanded proceeding for the many years of its litigation.13/ There is no reason to believe that they will not continue to litigate the management issues vigorously and resourcefully. UCS has previously been

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13/ During the prehearing conference, the Aamodts discussed the possibility of their dropping out or, at least, taking a lower profile in this remand. See Tr. 27,280, 27,282-83, 27,292A-93 (Mrs. Aamodt). To date, however, the Aamodts have not given any indication of waiving any of their rights as a party to this proceeding, although they have not assumed the role of lead intervenor on any of the remanded issues.

quite content to allow these intervenors the responsibility of developing and arguing the management record. See Union of Concerned Scientists' Brief on Exceptions to Partial Initial Decision (Reopened Proceeding) at 9 (Sept. 30, 1982). Furthermore, in this remand, the Licensing Board has an independent responsibility to ensure that the record is properly complete, as specified in ALAB-772. Given these facts, it is impossible to say that UCS' "interests" could not be protected without its participation in the remanded proceeding. The same arguments suggest that UCS' participation would not significantly contribute to the develoment of a sound record. See 10 C.F.R. § 2.714(a)(1)(iii).

Finally, the fifth late intervention factor also cuts against UCS' participation. See 10 C.F.R. § 2.714(a)(1)(v). The addition of another party to a multi-party proceeding virtually by definition broadens the issues and uses up a considerable amount of time. This is true notwithstanding UCS' non-lead intervenor status on the two issues in question. Already, there is every indication that UCS' participation will broaden the issues and cause delays. For example, during the prehearing conference, UCS unabashedly proposed that the remanded proceeding encompass nonlicensed operator training, notwithstanding its admitted total lack of basis in ALAB-772 for so broadening the issues. See Tr. 27,230, 27,333 (Jordan). UCS also proposed an extraordinarily lengthy discovery period

for the remanded proceeding. Tr. 27,296-97 (Jordan). In addition, UCS maintained that it intended to call witnesses; however, "[t]hey are going to need time that of course the Licensee's witnesses do not need, having been involved in it for a considerable period." Tr. 27,304 (Jordan). In short, it is reasonable to conclude that UCS' participation, if at all successful, will broaden the issues and delay the proceeding.

In summary, UCS has vigorously pursued the interests it defined for itself very early in this lengthy proceeding. Those interests were hardware interests. Licensee believes that the record reflects UCS' consistent pursuit of those but not other issues. UCS has never demonstrated a genuine interest in Licensee's management capability, nor did they participate in the litigation of management issues in the restart proceeding. Under these circumstances, and in view of UCS' admitted ignorance of the underlying record that is at issue

here, the Licensing Board should exclude UCS from participation in the issues of the Dieckamp mailgram and the TMI-1 leak rate testing practices.

Respectfully submitted,

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Dated: July 31, 1984

July 31, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Comments on July 13, 1984 Memorandum and Order on Lead Intervenors and Motion to Partially Exclude UCS From Participation in the Management Remand" were served this 31st day of July, 1984, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

Deborah B. Bauser

Deborah B. Bauser

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

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