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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

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

ORDER

CLI-84-18

On May 24, 1984 the Appeal Board issued its decision on the management issues in the Three Mile Island, Unit 1 (TMI-1) restart proceeding, ALAB-772, 19 NRC ___. The Appeal Board found in three areas "that the record does not support the Licensing Board's favorable findings concerning licensee's management of TMI-1." Slip Op. at 155. Those areas involve the adequacy of licensee's training program, the May 9, 1979 mailgram from Herman Dieckamp to Congressman Udall regarding the "pressure spike," and leak rate practices at TMI-1.

As explained below, the Commission has decided to review the Appeal Board's decision on these three issues to determine whether further hearings are warranted. The Commission has also decided to review whether the Appeal Board in this proceeding had the legal authority to remove Mr. Charles Husted from supervisory duties, insofar as the training of

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non-licensed personnel is concerned, without providing Mr. Husted with notice and an opportunity to request a hearing.

In addition, as explained below, the Commission has decided to take review of whether in view of changed circumstances further hearings are required on the Hartman allegations, as directed by the Appeal Board in ALAB-738, 18 NRC 177 (1983).[1] Finally, the Commission has decided to review whether any of the information discussed in staff's latest evaluation of management integrity, NUREG-0680, Supplement No. 5, requires further hearings.

The Commission in this manner will decide whether any further hearings are required in this proceeding, and, if so, what their scope should be. The Commission in making its determination whether new information requires reopening of the record will use the traditional standards for reopening, and, accordingly, the parties should apply those standards in their comments. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 879 (1980). The parties in addressing the scope of further hearings, if any, as requested throughout this order, shall designate the specific disputed issues of fact material to a restart decision by the Commission on which further evidence must be produced and shall provide their most substantial factual and technical bases for their position on each such issue.

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[1] Licensee's request that the remanded hearings directed by the Appeal Board in ALAB-772 be stayed and TMIA's request that the stay of ALAB-738 be immediately lifted are being addressed in a separate order that is being issued today.

The Commission has decided not to rule on whether to lift the immediate effectiveness of the 1979 shutdown orders until after it has decided on what further evidentiary hearings, if any, are required in the restart proceeding. If the Commission decides that further hearings are required, it will decide whether the public health, safety and interest require completion of those hearings prior to a decision on lifting effectiveness.

I. Review of ALAB-772

Licensee, General Public Utilities Nuclear (GPU Nuclear), on June 22, 1984 requested the Commission to review ALAB-772 insofar as it reopens the record on the management phase of this proceeding. Licensee argued that the Licensing Board's decision, which found in favor of restart, was adequate, and that the perfection in the record sought by the Appeal Board was unnecessary. The NRC staff had no objection to Commission review of ALAB-772.

Licensee's petition was opposed by Three Mile Island Alert (TMIA) and the Union of Concerned Scientists (UCS). Both argued that the Appeal Board was correct on the three remanded issues, and that licensee had failed to demonstrate that these issues met the standards for Commission review set forth in 10 CFR 2.786.

The proceeding to determine whether TMI-1 should be restarted was initiated by Commission order in August, 1979. CLI-79-8, 10 NRC 141. The Commission at that time had no conception that this proceeding would last

for five or more years. The proceeding has become one of the most complex in Commission history, requiring a high degree of Commission involvement.

The Commission has decided that, due to the unique nature of this enforcement proceeding, it will make the decision on whether further hearings are required, and if so, what the specific issues in those hearings should be. See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977); United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (August 27, 1976). Accordingly, the Commission has decided to take review of ALAB-772 insofar as it remands three issues to the Licensing Board for further hearings. The parties in their comments should address both the need for further hearings and what the scope of such further hearings, if any, should be. The Commission in this regard is particularly interested in the parties' analysis and conclusions regarding the significance of information developed since the close of the hearing record relating to the adequacy of licensee's training program. The Commission by taking review is expressing no view on the merits of the Appeal Board's decision. Nor does the Commission intend this order to affect the ongoing hearings before the Licensing Board.

In addition, the Commission has decided to take review of the Appeal Board's requirement as a condition of restart that Mr. Charles Husted "have no supervisory responsibilities insofar as the training of non-licensed personnel is concerned." Slip Op. at 46. The Commission is not concerned with the underlying justification for the Appeal Board's act, but rather with whether an adjudicatory board in an ongoing hearing has the legal authority to impose a condition on a licensee which in effect operates as a

sanction against an individual, where that individual is not a party to the proceeding and has had no notice of a possible sanction or opportunity to request a hearing. The parties should accordingly limit their comments to the legal issue involved. The Commission if it determines that the Appeal Board erred will then decide whether to take enforcement action against Mr. Husted separate from the restart proceeding.

II. Review of ALAB-738

On October 7, 1983 the Commission issued an Order taking review of whether the hearing on the Hartman allegations ordered by the Appeal Board in ALAB-738 should be stayed until the Commission's Office of Investigations (OI) had completed an investigation it had started on the Hartman allegations. To preserve the status quo, the Commission stayed the Appeal Board decision pending receipt and consideration of the parties' comments.

At the time that it issued its Order the Commission was concerned that concurrent efforts by OI and the Licensing Board on the Hartman allegations would involve a duplication of effort and constitute a possible source of complaint of harassment of witnesses. Another concern was that the NRC had already issued subpoenas to 47 witnesses requesting them to appear to answer questions posed by OI. A motion to quash the subpoenas had been denied by the Commission and the government was preparing a motion asking the federal district court to enforce the subpoenas. There was no reason to believe that the Licensing Board would have had an easier time than OI in securing witness cooperation. Accordingly, the Commission perceived

that there was little chance that Licensing Board hearings could meaningfully proceed.

After the Commission stayed the hearing, the Department of Justice on December 14, 1983, asked the Commission to stay further agency activity related to the Hartman allegations until the then pending criminal trial, United States v. Metropolitan Edison Company, Criminal No. 83-00188 (M.D. Pa.), had been completed. The Commission agreed to cooperate with the Department of Justice and suspended the OI investigation of the Hartman allegations.

Metropolitan Edison entered into a plea agreement on February 29, 1984 with the United States which ended the criminal prosecution. Metropolitan Edison pleaded guilty to one count of the indictment charging it with failure to establish, implement and maintain an accurate and meaningful reactor coolant system water inventory balance procedure to demonstrate that unidentified leakage was within allowable limits. It also pleaded no-contest to six other counts of the indictment, including those which charged the company with improper manipulation of TMI-2 leak rate tests to generate results that would fulfill the company's license requirements.

The Commission has been considering how best to proceed in this matter since completion of the criminal trial. The Commission felt that decision would depend in part on whether the Commission could obtain access to the record of the grand jury proceeding which led to the indictment of Metropolitan Edison. On June 25, 1984 the District Court for the Middle District of Pennsylvania denied the Commission's request for the grand jury record.

The Commission has also been considering the future extent of OI's investigation into this matter, and the effect of changes in personnel at TMI on the relevance of that investigation to operation of TMI-1. For instance, Herman Dieckamp has been relieved of his duties as Chairman and Chief Executive Officer of GPU Nuclear, although he continues to serve on the Board of Directors of GPU Nuclear, and Robert Arnold, who had been President of GPU Nuclear, has been reassigned to non-nuclear work with the GPU organization. Philip Clark, formerly executive vice president of GPU Nuclear, has replaced Arnold as president of GPU Nuclear, while E.E. Kintner, formerly vice president, has become executive vice president. GPU Nuclear has also added to its Board of Directors three outside directors who will comprise a Nuclear Safety and Compliance Committee of the GPU Nuclear Board. That Committee has hired a staff to monitor the operation and maintenance of the GPU Nuclear units. The Committee's findings will be detailed in periodic public reports. These new individuals in charge -- Messrs. Clark, Kintner, and the new members of the Board -- had no connection to or responsibility for the actions taken in 1978 and 1979 that led to the criminal convictions.[2] Nor are any of the individuals who may have

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[2]The Commission notes in this regard the statement by the United States Attorney at the sentencing hearing that the evidence does not indicate that any of the Directors and Officers of GPU Nuclear from its organization in 1982 to the date of the indictment, or the Directors of Metropolitan Edison Company during the period covered by the indictment, "participated in, directed, condoned or was aware of the acts or omissions that are the subject of the indictment."

been directly responsible for the falsifications currently employed in operational positions at TMI-1.[3]

In light of these developments, the Commission has determined that it should now decide whether the restart hearing should be reopened, and, if not, whether there should be a hearing on the Hartman allegations separate from the restart proceeding in order to allow the matter to be fully aired. Accordingly, the Commission is inviting the parties to submit their views on whether a hearing on the Hartman allegations is warranted and, if so, what the scope of the hearing should be.

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[3]The Commission believes that, in the absence of any contrary information, OI's report on leak rate practices at TMI-1 leaves no significant doubt that Michael Ross had no involvement in falsifications at Unit 2. Mr. Ross is the only person currently in an operational position at TMI-2 who was licensed to operate TMI-2 prior to the accident. OI's investigation shows that Mr. Ross primarily worked at TMI-1, and that he had no involvement with leak rate falsifications at TMI-2.

The Commission recognizes that a limited number of individuals who were in operational positions at TMI-2 prior to the accident are now in non-operational positions at TMI-1 and it is possible that the Commission may order the temporary separation of some or all of these individuals as a condition of restart. The Commission also recognizes that licensee, until the open issues (including the Hartman allegations) are resolved, has temporarily reassigned personnel in such a manner that those functions which provide an overview assessment, analysis, or audit of plant activities, contain only personnel who, prior to the accident, had not been in a management, supervisory, or professional position at TMI-1 or -2. The parties in their comments should address whether or not further evidentiary hearings are required to determine the final disposition of the status of these individuals and whether any such hearings can be separated from the restart proceeding. Licensee in this connection should provide a list of the individuals who have been temporarily reassigned and who licensee may wish to return to TMI-1 at any time in the future.

III. Review of NUREG-0680, Supplement No. 5

The NRC staff in NUREG-0680, Supp. No. 5, reviewed nine investigations by OI and other materials that appeared to be relevant and material to evaluating licensee's management integrity. Staff in its evaluation indicated that significant facts unknown to the staff during the hearings demonstrated a "pattern of activity on the part of the Met-Ed [that], had it been known at the time, would likely have resulted in a conclusion by the staff that the licensee had not met the standard of reasonable assurance of no undue risk to public health and safety." Id. at 13-5. However, with regard to the current licensee, GPU Nuclear, staff concluded after balancing the past improper activities against the subsequent record of remedial actions and performance, as well as the record of current senior management, that present GPU Nuclear management was acceptable. Staff in making this determination relied in part on information outside the formal adjudicatory record.

Considering the amount of extra-record material relied on by staff in Supp. No. 5 and staff's conclusions regarding Metropolitan Edison, the Commission wishes the parties to address whether any of the information addressed in Supp. No. 5 requires further reopening of the record. The parties should not address matters where motions to reopen have already been granted or denied on the same information cited by staff, but rather

should specify what, if any, new information which has not yet been passed on by a Board warrants reopening of the record.[4]

If the staff's position is that the evidentiary record in the restart proceeding needs to be reopened on Supp. No. 5 issues, the staff shall designate the specific disputed issues of fact on which further evidence must be produced and shall provide in its response its supplemental testimony on each such issue in the form of affidavits. Staff shall also explain how this supplemental testimony alters the testimony it provided to the Licensing Board.

If the staff's position is that the evidentiary record in the restart proceeding does not need to be reopened on Supp. No. 5 issues, the staff shall explain how it reached this conclusion in view of its statement in Supp. No. 5 that "[t]his pattern of activity on the part of Met-Ed, had it been known at the time, would likely have resulted in a conclusion by the staff that the licensee had not met the standard of reasonable assurance of no undue risk to public health and safety. However, these matters, or the significant facts concerning these matters, were not known to the NRC staff during the ASLB's proceeding on TMI-1 restart." Supp. No. 5 at 13-5.[5]

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[4]Because the Commission will decide whether or not the information contained in Supp. No. 5 requires reopening of the record, the parties should not file separate motions to reopen the record on matters addressed in Supp. No. 5 with the Licensing Board or Appeal Board.

[5]Regardless of its position on reopening, staff shall set forth exactly what new information led it to the above-quoted conclusion on Metropolitan Edison Co. The Commission notes in this regard that the certification of Floyd and post-accident cheating were litigated before the Licensing Board, the Appeal Board in ALAB-774, 20 NRC ___ (1984), denied a motion to reopen on pre-accident training irregularities, and the staff was

[Footnote Continued]

Staff in this regard should specify what testimony it gave before the Licensing Board that it would now change, and why that change in testimony does not require reopening.

The parties have twenty days from service of this order to submit their views on the above issues, and fifteen days thereafter to submit any reply comments. The Commission will then decide the overall question of whether further hearings are required, and, if so, what their scope should be.

Commissioner Asselstine disapproved this Order. His separate views are attached. The separate views of Commissioner Roberts and the additional views of Chairman Palladino are also attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 11th day of September, 1984.

[Footnote Continued]

aware of the Hartman allegations in 1979.

Staff in addressing whether further hearings are required should also explain why it believes current GPUN management is acceptable in light of its assertions that management may not have been adequate until 1982. We note that from 1980-1982 key GPUN personnel such as Messrs. Philip Clark and Henry Hukill held senior management positions, and some of the organizational elements that were in place prior to 1982 closely paralleled current GPUN structures.

Dissenting Views of Commissioner Asselstine

I cannot agree with the Commission's order taking review of ALAB-772 and other miscellaneous TMI Restart issues. The Appeal Board decision should be allowed to stand, and the Commission should merely remand the other issues it has decided to review to the Licensing Board. The Licensing Board can then determine whether new information warrants holding a hearing.

The Appeal Board decision on management issues (ALAB-772) is a particularly thoughtful and well-done review of the Licensing Board's decision. The Commission has not and indeed cannot point to anything in the Appeal Board decision which is either clearly erroneous or an abuse of discretion, neither is there any important question of law or policy involved. These are the proper triggers for Commission review. 10 CFR 2.786. Instead, the Commission, without finding that the Appeal Board erred, is requiring parties who have already prevailed before the Appeal Board to again meet the heavy burden of showing why the record should be reopened.

Further, the Commission has required the parties, in effect, to set out contentions they want to put forth at a hearing and the evidentiary bases for those contentions. The Commission intends not only to rule on whether the record should be reopened and remanded to the Licensing Board, but it also intends to rule on what specific contentions the Licensing Board may hear, if any. As I have said in the past, this is

the kind of ruling best left in the hands of licensing boards which are perfectly capable of, and in fact were specifically set up for, handling such fact-specific adjudicatory rulings.

The Commission has also decided to solicit comments on whether the record should be reopened on the Hartman issues (ALAB-738) and based upon the staff's latest evaluation of licensee management--NUREG-0680, Supp. No. 5. There has been so much new information on the management issue since the close of the Licensing Board record that the Licensing Board record clearly is stale. The following statement of the staff, standing alone, demonstrates the staleness of the Licensing Board record:

> "The pattern of activity by Met-Ed, had it been known by the staff at the time the staff formulated its positions on management in the restart proceeding would likely have resulted in a conclusion by the staff that Met Ed had not met the standard of reasonable assurance of no undue risk to the public health and safety."
> NUREG-0680, Supp. No. 5, p. 2-2.

The Commission ought simply to acknowledge the obvious, reopen the record, and remand the case to the Licensing Board for a determination on whether further hearings on these issues would be useful. The parties to this proceeding have been asked repeatedly to comment on all this new information, and have repeatedly expressed opinions about the need to, or lack of a need to, reopen the record for a hearing. Obtaining further comments on this issue is nothing more than procedural window dressing and is a waste of time and energy for all concerned.

The Commission ought to decide finally whether the TMI-1 Restart decision is to be based on a formal adjudicatory record or on an informal record. If the Commission really thinks a formal record is necessary, as it said it did five years ago, it ought to stop playing procedural games, reopen the record and get these hearings moving. If the Commission instead intends to make its decision based partially on the informal record developed since the close of the Licensing Board record and not wait for the results of any hearings, the Commission ought to just make that decision and move on. Today's order accomplishes nothing but delay in either case.

September 10, 1984

SEPARATE VIEWS OF COMMISSIONER ROBERTS
ON ALAB-772 AND OTHER MATTERS

My dissenting colleague asserts that the majority has improperly taken review of ALAB-772 and other matters decided by the Appeal Board. I must disagree with that characterization of our decision.

I view our taking of review as exercising our supervisory authority and responsibility to chart the course of the remainder of this proceeding. At this stage of the proceeding, the procedures used by a Licensing Board to screen contentions at the initial stages of a proceeding do not apply. We are not "playing procedural games." We are trying to assure that any further hearings that may be necessary to produce factual information material to our decision on restart are focused on issues which are genuinely in dispute. Until we receive from the parties their responses to this order, we cannot decide whether further hearings are necessary, or, if they are, what their scope should be.

In light of the course of this proceeding over the past five years, I believe that, had we not taken review, we would have been shirking our duty.

ADDITIONAL VIEWS OF CHAIRMAN PALLADINO

I agree with the Commission's decision and with Commissioner Roberts' comments in response to the dissenting opinion of Commissioner Asselstine. I would add that I cannot agree with Commissioner Asselstine that our decision "accomplishes nothing but delay." I believe that the restart proceeding can benefit from Commission guidance at this time on what specific disputed issues warrant further hearings as they may affect the Commission's pending restart decision. I would not conclude that the Commission's decision can only engender delay, particularly in light of the decision to permit hearings to proceed in the interim. The course that fosters delay, it seems to me, is for the Commission to do nothing as Commissioner Asselstine appears to prefer, thus leaving the entire matter in the Licensing Board's lap.