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RELATED CORRESPONDENCE

UCS - September 14, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

AND THE NUCLEAR REGULATORY COMMISSION

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

UNION OF CONCERNED SCIENTISTS' MOTION FOR EXTENSION OF THE DISCOVERY PERIOD AND THE HEARING SCHEDULE AND SUPPORT FOR TMIA'S MOTION TO SET SCHEDULE AND LITIGATE LEAK RATE FALSIFICATION ISSUE

The Union of Concerned Scientists moves that the Atomic Safety and Licensing Board extend the deadline for completion of discovery on the training and Dieckamp mailgram issues, and that it extend the remainder of the hearing schedule. UCS also supports TMIA's Motion of September 11, 1984, seeking litigation of leak rate falsification issues and appropriate extension of discovery and the hearing schedule on the training and Dieckamp mailgram issues.

These extensions are required in order to permit the parties enough time to prepare for the hearings. The original schedule does not allow adequate preparation for hearing on the training and Dieckamp mailgram issues. Since the Licensing Board

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established that schedule, the Commission has imposed an extraordinarily onerous schedule on the parties for the briefing of ALAB-772, ALAB-738, and related issues. As demonstrated by TMIA's Motion, the Commission has also effectively directed that the leak rate falsification issues now be litigated. Due process requires the Licensing Board to extend and revise the original hearing schedule in order to assure the parties a full and fair opportunity to prepare for the litigation.

This motion is filed simultaneously with the Licensing Board and the Commission in the event that the Licensing Board considers itself constrained by CLI-84-18 from altering the hearing schedule.[1] We request an expedited ruling from the ASLB by September 18, 1984. If the ASLB rules against this motion, we request that it immediately certify the question to the Commission.

I. The Parties Require More Time To Litigate The Training And Dieckamp Mailgram Issues.

In CLI-84-18, the Commission directed UCS and the other parties to prepare papers addressing the following issues by October 1, 1984, the day after discovery is currently scheduled to close:

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[1] CLI-84-18 states, "Nor does the Commission intend this order to affect the ongoing hearing before the Licensing Board." Sl. op. at 4. UCS does not view this language as precluding the ASLB from altering the current schedule, but rather as a statement that the hearing shall not be changed in scope and shall not be stayed.

1. Whether the Appeal Board was correct in remanding to the ASLB the question of whether GPU's training and testing program ensures operator competence.[2]

2. Whether the Appeal Board was correct in ordering the record reopened in the issue of whether Mr. Dieckamp knew or should have known that his mailgram was inaccurate.

3. Whether the Appeal Board was correct in ordering the record reopened on the issue of possible falsification of TMI-1 leak rate calculations.

4. Whether the Appeal Board was correct in ordering the record reopened in the issue of falsification of TMI-2 leak rate calculations

5. Whether any of the material considered or referred to in NUREG-0680, Supplement 5 - which involves nine OI investigations and much other material with underlying documentation literally thousands of pages in length, none of which is currently in the evidentiary record - requires reopening the record.

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[2] It should be noted that the Commission appears not to recognize the distinction between this issue and those covered by the remainder of ALAB-772 and ALAB-738. with regard to the leak rate falsification and Dieckamp mailgram issues, the resolution requires reopening the records. This is not the case with the training/operator competence issues. As to those issues, GPU has lost an appeal based on the evidence in the record. The case has been remanded, not reopened, to give GPU an opportunity to present evidence which might change the result, i.e. establish on the basis of new testimony that training is adequate. Thus, the standards for reopening are inapposite. Unless further evidence is taken, GPU has lost on this issue insofar as the merits are concerned.

6. Whether Mr. Husted is legally entitled to notice and a hearing before the Appeal Board can condition TMI-1 operation on his removal as Director of Nonlicensed Training.

In addition, between October 1 and October 15, UCS is required not only to respond to the submissions of GPU and the Staff on all of the above issues, but also to address the following issues which cannot be addressed by Intervenors until the Staff and/or GPU submissions are received:

7. Are further evidentiary hearings required and, if so, prior to restart, to determine the "final deposition" of the status of an as-yet unknown number of unspecified persons previously employed at TMI-2 who now fill unspecified positions at TMI-1? (GPU is directed to provide a list of these persons in its direct submission, CLI-84-18, Sl. op. n.3 at 8.)

8. Provide response to the Staff's designation of specific disputed issues of fact and "supplemental testimony" by affidavit concerning each issue concerning NUREG-0680, Supplement 5 that the staff believes requires reopening the record. Id. at 10.

9. Provide response to the Staff's statement of "exactly what new information" led it to conclude that had it known early what it now knows, it "would likely" have concluded that GPU did not meet the standard of reasonable assurance of no undue risk to public health and safety. Id.

10. Provide response to the Staff's explanation of the basis for its belief that current GPU management is acceptable in light of assention that it may not have been acceptable in 1982. Id., n. 5 at 10-11.

In addition, as to each issue the parties have been given the unprecedented (and we believe legally impermissible) burden of not only addressing the standards for reopening but also complying with the following:

1. Designate each specific disputed issue of fact material to a restart decision in which further evidence must be produced, and

2. Provide their "most substantial factual and technical basis for their position on each such issue." Id. at 2.

In other words, the parties have been directed to present a full evidentiary case in twenty days - in essence, to prepare proposed findings of fact and conclusions of law on specific factual issues not yet heard before an adjudicatory board. This schedule is all but impossible to meet on its own. When one considers that, at the same time, the Intervenors are supposed to be doing all of the work described below for the final two weeks of discovery for the remanded ASLB hearings (discovery ends September 30), preparing direct written testimony (due October 15), and preparing for cross-examination (hearings to start November 1), it is obvious that the combined tasks are beyond the human capabilities of the Intervenors. Certainly, UCS could not

conceivably accomplish all that is required, even if UCS counsel did nothing else but the TMI-1 case for the next 35 days.

Moreover, the schedule was unrealistic when the Licensing Board originally established it on July 9, 1984. At that time, UCS was fully engaged in preparing its comments to the Commission on the effect of ALAB-772 and volumes of extra-record material on restart of TMI-1. UCS filed those comments, 60 pages of detailed legal and factual analysis, on July 26, 1984. The Commission then directed the parties to appear for oral argument on these restart issues on August 15, 1984. UCS participated fully in that argument.

Meanwhile, during this same period, UCS was actively involved in other ongoing aspects of this litigation. This included opposition to the Licensee's petition for review of ALAB-772, response to Licensee's comments on the lead intervenor arrangement and opposition to Licensee's motion to exclude UCS from certain aspects of the case, objection to aspects of Commissioner Zech's proposed site visit and attendance at the site visit, and objection to the waiver of subcooling criteria.

As a result of the demands placed upon it by the need to prepare the comments and oral argument to the Commission and otherwise to participate in this litigation, UCS was unable to devote significant time or resources to litigating these issues until late August. Since that time, it has become apparent that the time required to complete discovery, to engage expert witnesses, and to permit those witnesses to become sufficiently

familiar with this case to prepare testimony is greater than originally allowed by the Licensing Board.

UCS filed its first sets of interrogatories and document requests to the Licensee on August 28, 1984 (hand delivered on August 29, 1984). UCS also responded to the Licensee's first set of interrogatories and request for production of documents on September 4, 1984. Since then, it has filed two more sets of interrogatories and document requests to Licensee, and one set to the NRC Staff. UCS has also now received a second set of interrogatories from the Licensee, which it must answer in the next two weeks.

In the process, UCS has sought to avoid duplicating TMIA's discovery on the training issues, which was first filed on August 13, 1984. UCS has done so by reviewing TMIA's filings prior to preparing its own. Although TMIA was able to file initial discovery on the training issue earlier than UCS, that appears to have had no practical effect since the Licensee took until September 12 to answer those interrogatories, and the relevant documents are only now becoming available. Thus, an earlier filing by UCS would not have changed the situation in which the parties now find themselves.

UCS has also noticed the depositions of all members of the Reconstituted OARP Committee, all Licensee witnesses, and all Staff witnesses. These depositions are scheduled to take at least the entire week of September 24-28. Since September 27 and 28 are Jewish holidays, NRC Counsel has requested UCS to change these dates. The new dates will have to be in the week of

October 1 at the earliest. As this is written, the available time is so short that the depositions that UCS will take will have to overlap with those that TMIA has noticed. UCS and TMIA together will need at least 10 days to depose twenty or more people.

UCS received the Licensee's first response to interrogatories yesterday. We have also just been informed by GPU Counsel that a miscommunication between Counsel and GPU personnel has resulted in the failure to produce any documents requested by UCS except those that overlap with TMIA requests. At this time of writing, it is not known when the documents will be provided. Because they must be reviewed prior to taking the scheduled depositions, it is expected that this will require some delay in the deposition schedule. The documents involved are extremely voluminous; we will have to review thousands of pages of written material, much of which is not yet available, before we can begin to take depositions.

UCS will obviously need substantial time to review this material to determine what it needs for this litigation. UCS and its expert witnesses will then need substantially more time to analyze the material and prepare testimony. UCS will do as much of this as possible before depositions begin, but the depositions themselves will prevent UCS from continuing its review at least during the entire last week in September.

UCS therefore supports TMIA's motion to set discovery and hearing schedule and to lift stay on TMI-1 leak rate falsification issue, filed before the ASLB on September 11,

1984. We believe that the schedule requested therein is nothing more than what is necessary to provide a reasonable time for the intervenors to digest an enormous amount of new material and prepare for these hearings. At absolute minimum, all current ASLB deadlines, September 30, October 15, and November 1, should be extended by 35 days to remove the conflict between the Commission and ASLB schedules. Anything less would deprive UCS of an opportunity to meaningfully prepare its case and thus would constitute a denial of the minimum requirements of due process of law.

II. Due Process Requires The Requested Extensions.

It is fundamental that the Commission must provide the parties an opportunity for a "fair trial." Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1960); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). The Commission must assure the parties "the right to present [their] evidence and summon the witnesses of [their] choice." Union Bag-Camp Paper Corporation v. FTC, 233 F. Supp. 660, 665 (S.D.N.Y. 1964). It cannot effectively deny that right by imposing a litigation schedule that prevents effective preparation. Central and Southern Motor Carriers Ass'n v. ICC, 1979 Fed. Carriers Cases Para. 82,836 (.D.C. 1979) (Penn. J.). The issue here is the same as that which prompted the Court to stay the licensing proceedings at Shoreham earlier this year. Mario M. Cuomo, et al. v. United States Nuclear Regulatory Commission, et al., C.A. No. 84-1264, (D.D.C., April 25, 1984) (Memorandum Opinion and Order granting temporary restraining order).

The current schedule violates due process in several respects. First, since the Licensing Board established this schedule, the Commission has directed the parties to prepare the major filing described above, in which UCS must present extensive legal argument and virtually all of the evidence that it would present in this case. That effort will demand all of UCS' time and resources until the reply comments are due on October 16.

In requiring the parties to brief those Appeal Board decisions, the Commission also took the extraordinary step of directing the parties to proffer the evidence on which they intend to rely in these hearings and to meet the standard for reopening a hearing. UCS considers this procedure to be patently illegal and unjustified, and it will challenge the Commission's action in the appropriate forum. The point here is that the Commission has imposed extraordinary and unjustified burdens on the parties that prevent them from preparing for this litigation

Second, because of the need to prepare comments and present oral argument to the Commission by July 26, and August 15, respectively, UCS was not able to devote significant time to this litigation until late August. From that point, the schedule provided only some sixty days for both massive discovery and the preparation of direct testimony. In light of the complexity of the issues, the volume of material involved, and the need to have experts become sufficiently familiar with the material to make an informed judgment, closing discovery on September 30, with testimony to be filed on October 15, is arbitrary and

unreasonable. It prevents effective preparation by UCS.

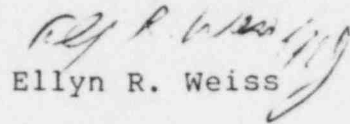
Third, in addition to imposing extraordinary and unnecessary burdens upon the parties in the form of these filings, the Commission has now required the parties to proceed with the leak rate falsification issues. These have not yet been litigated. They involve extensive factual development, and they go to the heart of the issue of the integrity of this Licensee and many of those responsible for the nuclear program. Litigation of those issues will necessarily take a substantial amount of time, and effort put into that litigation will detract from the time available to address the training and Dieckamp mailgram issues. For the reasons stated in TMIA's Motion, the Commission's action on the leak rate falsification issue requires an extension of this discovery and hearing schedule.

CONCLUSION

This schedule was unrealistic when it was established. Since then, the Commission has effectively cut thirty-five days out of the time available for this litigation by imposing the filing requirements discussed above at the time when pre-hearing preparation is at its most demanding and crucial point. In order to remedy the unfairness of the schedule as originally established substantially, more time will be needed. At an absolute minimum, the Board must extend discovery and the remainder of this hearing schedule by 35 days in order to account for the burdens recently imposed by the Commission. UCS urges

the Board to adopt the schedule proposed in TMIA's Motion.

Respectfully submitted,



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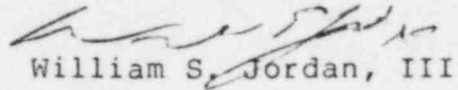

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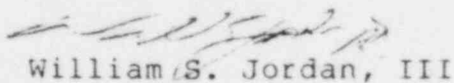
	)	(Restart Remand on Management)
(Three Mile Island Nuclear Station, Unit No. 1)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of UNION OF CONCERNED SCIENTISTS' FOURTH SET OF INTERROGATORIES AND DOCUMENT REQUESTS TO GENERAL PUBLIC UTILITIES and UNION OF CONCERNED SCIENTISTS' MOTION FOR EXTENSION OF THE DISCOVERY PERIOD AND THE HEARING SCHEDULE AND SUPPORT FOR TMIA'S MOTION TO SET SCHEDULE AND LITIGATE LEAK RATE FALSIFICATION ISSUE were served this 14th day of September 1984, as follows: (1) by hand on all parties marked by a single asterisk on the attached service list, and (2) by U.S. mail, first class postage prepaid, to the other parties on the attached service list. Those marked with two asterisks were served only the second of these documents.



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METROPOLITAN EDISON COMPANY

(Three Mile Island Nuclear Station, Unit No. 1)

Docket No. 50-289 (Restart Remand on Management)

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