



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

FYI

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MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Ahearne  
Commissioner Roberts  
Commissioner Asselstine

JMG - 7/6/83

FROM: William J. Dircks, Executive Director  
for Operations

SUBJECT: REPORTABILITY OF GPU INVESTIGATION REPORT AND DEPOSITIONS  
RE HARTMAN ALLEGATIONS

This is in response to the Commission's request of April 8, 1983, to determine whether the 1980 Faegre and Benson Report (Report) concerning the Hartman allegations and the 1982 depositions of Mr. Hartman should have been submitted in a more timely fashion to the Commission.

Background

Harold W. Hartman, Jr. was a control room operator at TMI Unit 2 until the March 28, 1979 accident. In an interview conducted on May 22, 1979 by the Office of Inspection and Enforcement (IE), Mr. Hartman made allegations including that leak rate tests used to show compliance with TMI-2 Technical Specifications were manipulated in late 1978 and up until the accident with the knowledge of at least some supervisory personnel to avoid plant shutdown. These allegations were further discussed in the Rogovin Special Inquiry deposition of Hartman dated October 29, 1979 and in a WOR-TV (Channel 9) interview of Hartman on March 24, 1980. The NRC initiated an investigation into this matter in March of 1980, discussed the limited results of that investigation with the Department of Justice (DOJ) and in April of 1980 halted its investigation at DOJ's request. Since that time, DOJ has been investigating the matter via a Federal grand jury proceeding in Harrisburg, Pennsylvania.

At a March 21, 1983 meeting between Mr. R. Arnold of GPU and members of the NRC team reviewing the B&W-GPU trial court record, Mr. Arnold referred to a GPU investigation into the Hartman allegations and noted that GPU was considering giving that investigation report to DOJ. <sup>1/</sup> The Report was subsequently forwarded by GPU to DOJ and through DOJ to the NRC with the request from DOJ that NRC maintain the Report in confidence. In early April of 1983, the NRC received a copy of the Report directly from GPU with no

1/ The report is entitled "Results of Faegre & Benson Investigation of Allegations by Harold W. Hartman, Jr., Concerning Three Mile Island Unit 2," dated September 17, 1980, hereinafter "the Report."

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limits placed upon its use. The Report was discussed at the Commission meeting of March 30, 1983 and the Staff was requested to examine whether or not any reporting requirements were violated by the submittal by GPU of its Report in 1983, nearly three years after the Report had been finalized. The Staff was also requested to determine whether the depositions of Hartman taken in the B&W-GPU lawsuit on July 16 and August 18, 1982 should have been submitted to the NRC. The depositions were received by the Staff on March 21, 1983 following a specific request to GPU.

#### The Nature of the Report and Depositions

The Report sets forth the results of an investigation into the allegations made by Hartman based primarily upon plant records and technical data. The Report limits its inquiry as follows:

The reader should understand clearly the limitations of this Report. We have not had access to those Metropolitan Edison employees with first-hand knowledge of the substance of Hartman's allegations. Virtually all TMI Unit 2 control room operators, foremen and supervisory personnel accepted the company's offer of legal counsel. In light of the pending federal grand jury proceeding, their counsel understandably declined to allow us to interview those employees during this investigation. They may be able to answer questions which this Report necessarily leaves unresolved.

Because of our inability to interview key employees, this investigation has been based primarily upon our review and analysis of plant records and other technical data. We also have relied upon limited interviewing of other plant employees. We have not been able to pursue every possible line of inquiry or lead. We have tried to indicate throughout the Report those areas which we have not pursued and those questions which remain open. (Report, Vol. 1, pp. 12-13.)

The Report is primarily an investigation and analysis of plant records and other technical data related to ways the leak rate data could have been manipulated. While the Hartman allegations are analyzed technically, and a further extensive voluntary statement from Hartman was taken to aid the investigation, 2/ the Report does not evaluate the role or knowledge of any other individuals in the acts alleged.

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2/ Voluntary Statements of Harold W. Hartman dated April 27 and 29, 1980. These statements were in addition to the May 22, 1979 interview of Hartman conducted by I&E, the October 29, 1979 deposition of Hartman taken by the Regovin Special Inquiry, and the transcript of the March 24, 1980 WOR-TV interview, all of which were available to the authors of the Report.

Indeed, the Report concludes:

Apart from Hartman's own statements, we have no basis for evaluating his allegation that control room operators, foremen and supervisors were subject to undue pressure to obtain "good" leak rate test results. The answer to that charge rests with control room personnel whom we did not interview for various reasons stated earlier. (Report, Vol. 1, p. 36.)

The Report does not resolve the question of management integrity. <sup>3/</sup> And while the Report does contain extensive technical analyses, the Staff had available to it the underlying data from which those analyses were made. The Staff did some analysis in developing the civil penalty assessed against Metropolitan Edison Company for violations of TMI-2 Technical Specifications associated with leak rates. See NUREG-0600. Further extensive analysis had been performed by the NRC Hartman investigation team in March-April 1980. The Hartman depositions explored a number of areas in addition to the Hartman allegations set out above. The Report and depositions do not add substantially to the information of which the NRC was aware at the time those documents were prepared.

#### Analysis of Reportability

The substance of the Hartman allegations were known to the NRC shortly after the TMI-2 accident, nearly 1-1/2 years prior to the completion of the Report. No new allegations are raised in either the Report or the Hartman depositions. The Report focuses primarily upon a technical analysis of the allegations. The substance of the Hartman allegations remain virtually unchanged as a consequence of the Report. The Report does not resolve the Hartman allegations.

With respect to reportability, three separate approaches which could call for reportability have been identified.

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<sup>3/</sup> As part of the Staff's revalidation effort in this area, the Staff concluded:

Based on the inspection team review and resulting Report, the staff concludes that the issues raised by the Hartman allegations should not by themselves be a bar to restart. However, because of all the open issues identified above which were not considered in the revalidation program and Report, the staff can draw no conclusion regarding management integrity at this time.

See Memorandum for the Commissioners from the EDO dated May 19, 1983.

1. Specific License Conditions or Commission Regulations

The TMI-2 facility license and its associated Technical Specifications and the Commission's regulations impose specific notification requirements upon the licensee for certain categories of events. It may well be that the licensee did violate such reporting requirements if the incidents alleged by Hartman did in fact occur. However, the reporting violation would have been the failure to report the incidents which were the subject of the Report and the depositions at issue within the time allowed for reporting the incidents and not the failure to provide the Report and the depositions. The creation of the documents themselves do not appear to give rise to any new reporting obligation under the plant technical specifications or a specific Commission regulation.

2. Reporting Obligations Under Section 186

Section 186 of the Atomic Energy Act of 1954, as amended, imposes a reporting requirement in a sense as it authorizes revocation of a license for any material false statement in the application or any statement of fact required under Section 182. In its VEPCO decision, the Commission held that an omission (i.e., a failure to submit information) could constitute a material false statement. 4/

Materiality of an omission or statement depends on "the context in which information appears and the stage of the licensing process involved" and "whether information has a natural tendency or capability to influence a reasonable agency expert." VEPCO, 4 NRC at 491. Put another way, "materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job." Id. at 486. If the Staff had

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4/ Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978). In VEPCO, the Commission held that some omissions were reachable under section 186. It reserved judgment as to whether all omissions could be reached:

Whether or not enforcement consequences for less obvious or central omissions should await clarifying regulations, silence regarding issues of major importance to licensing decisions is readily reached under the statutory phrase "material false statement"....By reading material false statements to encompass omissions of material data, we do not suggest that unless all information, however trivial, is forwarded to the agency, the applicant will be subject to civil penalties. An omission must be material to the licensing process to bring section 186 into play.

Id. at 489, 491.



not been aware of the Hartman allegations and had not possessed the information it had concerning the allegations, the information contained in the Report and depositions would clearly have been of interest to the Staff and have had a natural tendency and capability to influence the Staff in formulating its positions in the restart matter. However, as indicated above, the Staff had substantial information concerning the Hartman allegations. The Report and depositions do not expand the scope of the allegations, resolve any of the allegations, or add substantially to the information of which the NRC was aware. The Staff was also aware in 1980 that GPU initiated an investigation of the Hartman allegations, but did not seek a copy of the investigation report.

We conclude that the material omitted here does not meet the threshold standard of having the ability to influence the "reasonable agency expert." Therefore, there is insufficient materiality to support a material false statement. 5/

### 3. Duty to Report to Licensing Boards

Although the Staff possessed substantial information concerning the Hartman matter, the Licensing Board's knowledge was limited to the SER's. 6/ The issue remains whether the licensee violated its board notification obligations. 7/

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5/ The present case where the Staff has the substance of the information at issue is unlike VEPCO where neither the Staff nor the Licensing Board possessed the material. Nevertheless, an argument might be made that materiality should be judged on the basis of the material omitted in isolation of any other material the Staff might possess. This would prevent a licensee from benefiting when it failed to provide information it would otherwise be obligated to provide, on the basis that by chance the Staff already had the information. However, this latter circumstance does not appear to be the case here. The investigators preparing the Report had copies of the IE Hartman interview and the Rogovin deposition (Report at 1) and had notes of IE interviews prepared by licensee representatives (Report at 8-12). In addition Supplements 1 and 2 of NUREG-0680, the Staff's SER, briefly addressed the Hartman allegations. The licensee clearly had indications of the material the Staff possessed. However, the reasons for the licensee's actions are not clear.

6/ On May 4, 1983, GPU provided the Report to the Appeal Board.

7/ Board notifications are required even if the Staff has received the material. The Appeal Board has said that "[t]he obligation to provide information to adjudicatory bodies requires that information be submitted to them directly." Tennessee Valley Authority (Brown Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982).

Parties to Commission proceedings have an "absolute obligation to alert adjudicatory bodies directly regarding...new information that is relevant and material to the matters being adjudicated...." 8/ Consequently, if the subject matter of the Report or the Hartman depositions were considered to be new information that is relevant and material to matters being adjudicated in the TMI-1 Restart Proceeding, the licensee may have violated its notification obligations to the Licensing Board presiding over that proceeding.

Supplement 1 to the Staff SER 9/ discussed the leak rate allegations in regard to issue 10. 10/ Without mentioning Hartman by name, the SER stated:

During interviews with the NRC, the SIG, and the media, allegations were made by a former TMI operator concerning the implementation of the RCS leakage procedure and improper data collection. The allegations raised concerns regarding the principles of compliance with operating procedures and management philosophy and actions.

Supplement 2 to the SER stated that the leak rate information was included in the first supplement because the investigation of the matter could turn up information which is relevant to past management practices. 11/ The Supplement further stated that the leak rate matter was only of historical significance in light of the licensee's clear management policies and based upon the Staff's current knowledge. 12/ The Board made a brief reference

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8/ Id.

9/ NUREG-0680, TMI-1 Restart, 37 (Nov. 1980).

10/ Issue 10 involved:

Whether the actions of Metropolitan Edison's corporate or plant management (or any part or individual member thereof) in connection with the accident at Unit 2 reveal deficiencies in the corporate or plant management that must be corrected before Unit 1 can be operated safely.

CLI-80-5, 11 NRC 408, 409 (1980).

11/ NUREG-0680, Supplement 2, at 9 (March 1981).

12/ Id. at 10. The Staff has stated to the Commission in the "NRC Staff's Comments on the Analysis of GPU v. B&W Transcript" (April 18, 1983), that the wording of this conclusion in Supplement 2 "should have been more precisely stated to be that the actions taken by the Licensee in light of the Hartman allegations were adequate to address the concerns identified."

to this subject in its August 1981 decision. <sup>13/</sup> Given the reference to the leak rate matter in the Staff's SERs and the caveat in the Licensing Board's August 1981 decision, the Hartman allegations are relevant to the management issue.

A number of factors might militate against making a board notification. As indicated above, the Staff discussed the leak rate allegations in Supplements 1 and 2 of the SER (NUREG-0680). In Supplement 2, at 9-10, the Staff concluded that there appeared to be no direct connection between the leak rate matter and the Unit 2 accident. None of the parties challenged the Staff's conclusion. The essential thrust of the Hartman allegations, i.e., the possible falsification of leak rate data, was known by the Board and the parties.

They were also aware that the allegations had been referred to DOJ and DOJ had requested the NRC to suspend its investigative effort of the allegations pending conclusion of the DOJ investigation. Another consideration is the evolving nature of the management integrity issue with the attendant uncertainty as to when the issue encompassed the Hartman allegations.

Nonetheless, any uncertainty regarding board notification should have been resolved in favor of notification. <sup>14/</sup> Thus, we conclude that the licensee should have made a board notification. The Staff recognizes that in reaching

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<sup>13/</sup> Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-32, 14 NRC 381, 557-58 (1981). Specifically, the Board quoted from NUREG-0680, Supplement 2, and concluded:

Due to our limited information and given the posture of an ongoing DOJ investigation, we have no basis to conclude that restart should not be permitted until the DOJ investigation is complete.

Id. at 557. The Licensing Board further concluded that "[s]ubject to this [leak rate] matter," and except as identified in the detailed findings, there were not deficiencies in GPU management arising from the Board's inquiry into GPU's response to the Unit 2 accident which have not been corrected and which must be corrected before there is reasonable assurance that Unit 1 can be operated safely.

<sup>14/</sup> The Appeal Board has stated that "[a]ny uncertainty regarding the relevancy and materiality of new information should be decided by the presiding board." Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 n.15 (1975).

this conclusion it might also be subject to criticism for not providing additional information on the Hartman matter. The Staff did not do so in order to avoid any possible interference with the DOJ investigation. In this connection it should be recognized that there is an inherent conflict between the board notification obligation and the protection of information developed during an ongoing investigation. 15/

(Signed) William J. Dircks

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OPE

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15/ Another example of this inherent conflict follows. The Commission has before it the results of an investigation of the VV and Miller cheating incident together with the views of the Staff on the appropriateness of any enforcement action. Given these circumstances, these documents have not been provided to the Appeal Board which is reviewing the cheating issue.

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