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DRAFT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
METROPOLITAN EDISON COMPANY, ET AL.)
(Three Mile Island Nuclear Station,)
Unit No. 1))

Docket No. 50-289
(Restart)

NRC STAFF'S COMMENTS IN RESPONSE TO
THE COMMISSION'S ORDER OF JUNE 1, 1984

I. INTRODUCTION

By Order dated June 1, 1984, the Commission requested the parties to comment on the following question:

[W]hether, in view of ALAB-772 and all other relevant information, including investigative reports by the Office of Investigations, the management concerns which led to making the 1979 shutdown orders immediately effective have been sufficiently resolved so that the Commission should lift the immediate effectiveness of those orders prior to completion of review of any appeals from ALAB-772. (Footnote omitted.)

The Staff provides the following comments.

II. BACKGROUND

In a memorandum from the Staff to the Commission dated May 19, 1983, the Staff identified five open issues: (1) the veracity of the Hartman allegations; (2) the GPU v. B&W lawsuit review; (3) the Parks and King allegations; (4) possible concerns raised by the RHR and BETA reports; and (5) whether GPU failed to promptly notify the Commission or

the Appeal Board of material information in the RHR, BETA, and other reports. Based on these open issues, the Staff stated that it could draw no-conclusion regarding management integrity at that time. In a June 7, 1983 memorandum to the Commission, the Staff outlined the basic steps that would have to be taken before the Staff, for its part, could reach a decision on whether restart should be permitted. These steps included a complete resolution of any outstanding safety issues, and a satisfactory approach to assuring that any individual whose integrity was questioned as a result of the various allegations, reviews and investigations was removed from safety-related activity at TMI-1 pending completion of any required investigations, unless the licensee could satisfactorily demonstrate that one or more of those individuals could be retained while they were under investigation. On July 15, 1983, the Staff provided the Commission with its plan to complete the restart review. The Staff indicated that it would await the outcome of the various reviews and investigations of open issues and integrate the results of those reviews and investigations into an overall staff position on management integrity.

Finally, in a memorandum to the Commission dated January 3, 1984, the Staff provided its written response to GPU's June 10, 1983 management organization proposal as modified by GPU on November 28, 1983. The Staff stated:

At the December 5 meeting, the NRC staff informed the Commission that if the Commission desired to decouple operation of TMI-1 from the ongoing OI investigations in the management integrity area, we did not believe restart would pose any undue risk to public health and safety provided that in addition to GPU's June 10 proposal as supplemented on November 28:

1. The NRC Office of Investigations (OI) completes its review of leak rate irregularities at TMI-1 and provides to the Commission its conclusions on that issue, as well as a status report on the remainder of its investigations and there are no significant adverse implications for key TMI-1 management or personnel.
2. Power level is limited to approximately 25%. This level would limit fission product build-up and would assure limited consequences in the event of an accident, and still provide a stable plant operating level, at which all important plant systems would be operational. Our basis for recommending 25% includes:
 - ° Reactor Coolant Average Temperature is constant above 15% while the pressurizer level is constant within the level control dead-band.
 - ° Main feedwater regulating valve control is stable above the 15-20% full power range and is not subject to feed flow perturbations.

This would permit a thorough check-out of the facility itself and permit operator familiarization or refamiliarization with actual plant operation.

3. The staff provides 24-hour inspection coverage at least until the licensee's operational QA coverage and the Nuclear Safety and Compliance Committee of the licensee's Board of Directors are solidly in place and functioning.

Subsequently, the Commission could base its decision on further operation beyond 25% of full power on:

1. Satisfactory completion of the OI investigations on management issues.
2. The functioning of the Nuclear Safety and Compliance Committee of the GPUN Board of Directors as proposed by GPU on November 28, 1983.
3. A staff report on the plant operations to that point, with no major safety problems having been identified.
4. An evaluation of the effectiveness of the GPU operational QA coverage.

Memorandum from William J. Dircks to the Commission, January 3, 1984,
at 3-4 (footnote omitted).

III. DISCUSSION

A. OI Investigations

Until all the OI investigations related to TMI-1 management integrity are completed and the results have been integrated by the Staff into an overall position on management integrity, the Staff's position on restart remains as stated in the Staff's January 3, 1984 memorandum, quoted above. Because the OI investigation of leak rate irregularities at TMI-1 is now complete, and in the Staff's opinion, the OI report does not identify any significant adverse implications for key TMI-1 management or personnel, the Staff believes that the Commission can authorize restart without any undue risk to the public health and safety provided that operation is limited to approximately 25% of full power and the other conditions stated in Staff's January 3rd memorandum are satisfied, i.e., the Commission is satisfied that there are no significant adverse implications for key TMI-1 management or personnel resulting from any of the completed OI investigations, or from a status report on the incomplete OI investigations, and the inspection/QA coverage condition (3) is satisfied. Operation beyond 25% of full power would depend on satisfactory completion of all OI investigations and the other conditions noted above.

Consistent with the approach described in the Staff's July 15, 1983 memorandum and reiterated in the April 29, 1984 memorandum to Chairman Palladino from William J. Dircks, the Staff is continuing its thorough review of all the OI reports relating to management integrity, and will integrate the results of that review into an overall Staff position on management integrity, which will be documented in an SER supplement as soon as possible after completion of the last OI investigation.

To date, the Staff has reviewed seven (?) completed OI investigations. While the Staff cannot determine its overall position on management integrity until all OI investigations are completed and are considered in the aggregate, the Staff provides the following preliminary comments on the individual OI reports which are complete at this time. ✓

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- 6.
- 7.

Bill Russell
will provide
summary conclusions
here.

B. ALAB-772

1. Background

On May 24, 1984, the Appeal Board issued its decision on the management and cheating issues (ALAB-772). The Appeal Board concluded that in certain respects, the evidentiary record was not sufficiently developed to support the Licensing Board's favorable findings concerning

Licensee's management of TMI-1. The Appeal Board remanded the proceeding to the Licensing Board for further development of the record in two areas: Licensee's training and testing program and the circumstances surrounding the 1979 mailgram from Herman Dieckamp to Congressman Udall. The Appeal Board also reopened the record on the issue of leak rate data falsification at TMI-1.

With respect to Licensee's training and testing program, the Appeal Board stated that the principal difficulty with the Licensing Board's decision was its failure to reconsider, in a meaningful way, its earlier favorable findings in light of the cheating findings. The Appeal Board said that since the Licensing Board relied so heavily on the expert testimony of Licensee's outside consultants for its original favorable findings on training and testing, it was incumbent on the Licensing Board to seek further testimony from those independent experts on whether the cheating incidents alter their earlier favorable testimony.

With respect to the Dieckamp mailgram, the Appeal Board emphasized the importance of exploring this issue further because of its importance to management integrity and because Mr. Dieckamp still holds key, high-level, management positions in both GPU Nuclear and GPU.

The Appeal Board affirmed the Licensing Board PID's on management and cheating issues in other respects. Specifically, the Appeal Board affirmed the Licensing Board on the issues of maintenance, corporate organization, and control room staffing. The Appeal Board generally agreed with the Licensing Board on the cheating issues, stating that the overall cheating inquiry, especially the hearing, was as thorough as possible. Significantly, the Appeal Board agreed with the Staff and

Licensing Board that the Special Master erroneously resolved the allegations against Michael Ross, the TMI-1 Manager of Plant Operations.

2. Discussion

The Appeal Board's decision in ALAB-772 does not bar a Commission decision on whether the concerns which led to the 1979 immediately effective suspension of the TMI-1 operating license have been sufficiently resolved to permit restart prior to completion of review of any appeals from ALAB-772. For the reasons discussed below, the Staff believes that the Commission has an adequate record on which to base its immediate effectiveness decision.

On August 9, 1979, the Commission issued an Order and Notice of Hearing^{1/} in which it specified the basis for its concerns regarding the

^{1/} CLI-79-8, 10 NRC 141 (1979).

operation of TMI-1 and set out the procedures to govern further proceedings. The Commission established a Licensing Board to preside over the restart proceeding and render an initial decision in accordance with 10 CFR § 2.760, and directed that, upon the issuance of an initial decision, the record be certified to the Commission itself for final decision. In addition, the Commission instructed that, if the Board issued a decision recommending restart of TMI-1 and if the Staff certified that the Licensee had completed all the necessary actions, it would issue an order deciding whether the provision of the August 9, 1979 Order requiring the Licensee to shut down would remain immediately effective. In its August 9, 1979 Order, the Commission stated it would

"issue an order lifting immediate effectiveness if it determines that the public-health, safety or interest no longer require immediate effectiveness." 10 NRC 141, 149 (1979).

Subsequently, the Commission modified its August 9, 1979 Order to provide that an Appeal Board be established to entertain appeals arising out of the TMI-1 restart proceeding.^{2/} The Commission has made

^{2/} CLI-81-19, 14 NRC 304 (1981).

it clear, however, that the Commission is the

...exclusive administrative body with the power to determine whether Unit One may restart during the pendency of any possible appeals of a Board decision before the Atomic Safety and Licensing Appeal Board. Parties may not file papers with the Appeal Board either supporting or opposing a stay of any such decision during the pendency of any such appeals. Therefore, any party which has a position on whether, in light of the Licensing Board's decision, Unit One should be allowed to restart during the pendency of any such appeals should so argue in its comments submitted to the Commission.

CLI-81-34, 14 NRC 1097, 1098 (1981).

The Commission's immediate suspension of the TMI-1 license without affording the Licensee an opportunity for a prior hearing is an extraordinary agency action which is justified only so long as the facts supporting that specific action exist. When such circumstances no longer exist, the Commission should lift the suspension and restore the original rights under the license.^{3/} Consistent with this principle,

^{3/} Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082 (1973); See also Northwest Airlines v. CAB, 539 F.2d 748 (D.C. Cir. 1976); ICC v. Oregon Pacific Industries, Inc. 420 U.S. 184 (1975) (concurring opinion of Justice Powell).

the Commission has carefully distinguished its immediate effectiveness review in this restart proceeding from that undertaken in an ordinary licensing proceedings:

this case differs significantly from normal initial operating license cases. Here, a decision by the Commission rather than granting effectiveness to a Licensing Board decision, would be determining, based on that decision and other factors, whether the concerns which prompted its original immediate suspension order of August, 1979, justify a continuation of that suspension. If they do not, and the Commission therefore can no longer find that the 'public health, safety and interest' mandates the suspension, then the Commission is required by law -- whatever the nature of the Licensing Board's decision -- to lift that suspension immediately.

CLI-81-34, 14 NRC 1097-1098 (1981). Consequently, the critical question for the Commission's consideration is whether the resolution of the issues in the partial initial decisions removes the "public health, safety or interest" concerns which form the basis for the immediate effectiveness of the TMI-1 license suspension. CLI-79-8, 10 NRC at 149. For the reasons which follow, the specific concerns with the evidentiary record identified by the Appeal Board in ALAB-772 do not bar an immediate effectiveness decision.

The Appeal Board did not conclude that the evidentiary record supported conclusions on any issue which contradict those of the Licensing Board in favor of restart. Rather, the Appeal Board noted certain limited areas where further development of the evidentiary record is required in order to resolve certain issues on the merits. Three such areas were identified by the Appeal Board: (1) Licensee's training and testing program; (2) the circumstances surrounding a 1979 Dieckamp mailgram; and (3) leak rate testing at TMI-1.

Although the evidentiary record on those matters may need to be supplemented for the purpose of resolving the merits of those issues, it does not mean that the Commission does not have an adequate record, developed in the course of its immediate effectiveness review, on which to base a restart decision prior to a review of the merits of any appeals from ALAB-772.^{4/} Licensee is correct when it pointed out in Licensee's

4/ It is important to distinguish the Commission's immediate effectiveness decision in this restart proceeding from its ultimate decision on the merits of the issues which were litigated. Unlike the Commission's resolution of the adjudicatory issues which, of course, supported by the evidentiary record, the Commission's immediate effectiveness decision may be based on the entire record, including non-evidentiary information, developed for that purpose, provided that the parties have been given, as they have on numerous occasions in this proceeding, the opportunity to comment on the information relied upon by the Commission. Although not applicable to this enforcement proceeding, the Commission's immediate effectiveness rule for operating license proceedings provides for the Commission's consideration of matters which the parties believe pertain to the immediate effectiveness issue. See 10 C.F.R., § 2.764(f)(2)(ii). In a case analogous in certain respects to this restart proceeding, the Commission approved the lifting of an immediately effective order (continuing the suspension of certain construction activities) on the basis of extra-evidentiary record information on the ground that the issuance of an immediately effective order without affording an opportunity for a prior hearing is a "drastic procedure" which can be modified on the basis of available information. Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-73-35, 6 AEC 1082 (1973). The Commission made it clear that modification of the suspension order was without prejudice to the resolution of any adjudicatory issues considered at a hearing on the matter. Id. See also Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-79-7, 9 NRC 680 (1979), affirmed Friends of the Earth, Inc., v. United States, 600 F.2d 753 (9th Cir. 1979).

In summary, if the Commission believes that the concerns which prompted the immediately effective shutdown order have been resolved on the basis of information now available to the Commission, it can lift the suspension order without prejudice to the ultimate resolution of the issues on their merits.

Comments on ALAB-772 (Management Phase), dated May 29, 1984, that the Commission has an adequate record on each of the three matters of concern to the Appeal Board.

With respect to Licensee's training and testing program, there are a number of post-evidentiary record evaluations and inspections of Licensee's current training and testing program which have been provided to the Commission by the Staff and Licensee, including SALP reports, INPO evaluations, NRC Inspection Reports, and an Operational Readiness Evaluation. See Licensee's Comments on ALAB-772 at 4-5 for citations.

With respect to the Dieckamp mailgram, the NRC's deposition of Mr. Dieckamp in September, 1980, as well as Staff's testimony in this proceeding on Mr. Dieckamp's knowledge at the time he sent the mailgram (Tr. 13060-64 (Mosley)), are available to the Commission as a basis for resolving the impact, if any, of this incident on the integrity of Mr. Dieckamp^{5/} in particular and Licensee in general.

^{5/} In addition, as noted in Licensee's comments on ALAB-772 at 8, n.3, the Commission questioned Mr. Dieckamp on this matter at the Public Meeting, Presentation on TMI-1 Restart, October 14, 1981.

As far as the issue of leak rate testing at TMI-1^{6/} is concerned,

^{6/} After noting that the Commission indefinitely stayed the reopened proceeding on the Hartman allegations of leak rate falsification at TMI-1 in Order of October 7, 1983 (ALAB-772, slip op. at 150 n.114), the Appeal Board stated that "it is logical that the Licensing Board consider it [leak rate testing practices at Unit 1] in conjunction with the hearing ... on the Hartman Allegations." ALAB-772, slip op. at 154.

the Commission has the completed OI Reports (#1-83-028 and supplement) on this matter. As noted above, the Staff does not believe the OI

investigation into leak rate testing practices at TMI-1 identified any significant adverse implications for key TMI-1 management or personnel so as to be a bar to restart.

In summary, the Appeal Board's concerns with the evidentiary record which were identified as ALAB-772 do not bar an immediate effectiveness decision by the Commission in favor of restart.

IV. CONCLUSION

In conclusion, the Staff believes that there is an adequate record to support a Commission decision on whether the concerns which were the basis for the immediately effective suspension of the TMI-1 operating license have been sufficiently resolved to permit restart, in accordance with the limitations and conditions stated in Staff's January 3, 1984 memorandum, prior to a completion of review of any appeals from ALAB-772. Nothing in ALAB-772 or the completed OI investigations to date prevent the Commission from concluding, on the basis of the immediate effectiveness record, that TMI-1 can be restarted as discussed above.

Respectfully submitted,

Jack R. Goldberg
Counsel for NRC Staff

Date at Bethesda, Maryland
this day of June, 1984.