April 5, 1985

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

UCS' REPLY TO LICENSEE'S COMMENTS ON
COMMISSION POLICY STATEMENT ON TRAINING AND
QUALIFICATION OF NUCLEAR POWER PLANT PERSONNEL

At the urging of the Licensing Board, UCS filed its initial comments on the Commission's policy statement on training by hand on Thursday, March 28, 1985, before the comments were due. Pursuant to oral discussions with the Board and to the Board's Memorandum and Order of March 28, 1985, (received by UCS on April 2, 1985) UCS now files its reply to Licensee's comments of March 28, 1985.

Licensee presents two major arguments in its comments. First, Licensee asserts that the policy statement represents the position within the Commission on the training issue, suggesting that this Board is bound by the policy statement. Second, Licensee argues that the policy statement's endorsement of INPO accreditation, coupled with a substantial amount of extra-record

material, compels the Board to conclude that the TMI-1 licensed operator training program is effective in training reactor operators.

Licensee's arguments fail on several counts. First, as a matter of law neither the Board nor the Commission may rely upon a policy statement to determine or affect the outcome of this proceeding. Second, even assuming that a policy statement could be binding on a Licensing Board, this policy statement does not apply to this proceeding. Third, even if the policy statement applied here, it would not significantly affect the outcome of this case.

Background

This issue does not arise in a vacuum, but in the context of extensive litigation, including prior decisions that have determined the issues now before the Board. The Board must take this context into account in considering Licensee's arguments.

As a result of the accident at TMI-2, the Commission ordered that all reactor operators be retrained and subjected to 100 percent reexamination in various areas. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 N.R.C. 141, 144 (1979). Thus, the adequacy of training and the important relationship between training and operator competence became significant issues in this proceeding.

After extensive hearings, the Licensing Board issued a Partial Initial Decision in which it generally found that Licensee's training program to be "adequate." Metropolitan

Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-32, 14 N.R.C. 381, 479 (¶ 276). The Board retained jurisdiction over training issues, however, in order to consider the effect on its decision of newly-discovered cheating by TMI-1 personnel on reactor operator examinations. LBP-81-32, 14 N.R.C. at 402-03 (¶¶ 43-44). It also promised to reconsider its findings after further investigation of the cheating incidents. LBP-81-32, 14 N.R.C. at 454 n. 18, 479 n. 24, 582 n. 63 (¶¶204, 276, 584).

The Special Master then held extensive hearings on the cheating incidents. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34B, 15 N.R.C. 918 (1982). After reviewing the findings of the Special Master, the Board resolved all issues in favor of restarting TMI-1 and affirmed the conclusions in its previous decision on training. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-56, 16 N.R.C. 281 (1982).

The Appeal Board reversed the Licensing Board's decision on the ground that the Licensing Board had inadequately reconsidered its earlier decision. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-772, 19 N.R.C. 1193 (1984). The Appeal Board identified a number of issues for which the record was inadequate for decision, including whether deficiencies manifested by the cheating episodes and related

failings had been cured by Licensee. ALAB-772, 19 N.R.C. at 1232-1237.[1] These are the issues that the Board must now address in this remanded proceeding. They have been the subject of extensive testimony and of proposed findings based upon the hearing record.

I. Neither The Board Nor The Commission May Rely Upon The Policy Statement In Reaching A Decision In This Proceeding.

Licensee' argument concerning the impact of a policy statement is confusing at best. Since Licensee acknowledges that policy statements are not "finally determinative" of the issues, it presents a twofold theory in an effort to convince the Board to consider itself bound by the policy statement. First, Licensee asserts that a policy statement represents the position within the NRC on the issues addressed by the statement, and presumably, therefore, that this policy statement is binding upon the Board as part of the NRC. Second, Licensee addresses the policy statement's lack of formal legal status by suggesting that a reviewing court can independently inquire into the merits of the issue, thereby presumably remedying the fact that the agency based its decision on a document that had not been subjected to the public participation requirements of the Administrative Procedure Act.

Licensee's argument ignores the nature of the policy statement at issue here and is not supported by the cases on

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[1] The Appeal Board identified a number of other specific issues that the Licensing Board was required to resolve in this remanded proceeding. The issues identified by the Appeal Board are set out in UCS' Proposed Findings at 3-5, ¶¶ 3-5

which Licensee relies. Moreover, Licensee ignores authority directly on point involving Appeal Board and Commission reliance upon a policy statement.

This policy statement constitutes a factual determination by the Commission that INPO accreditation can generally be relied upon to ensure that operating personnel are adequately trained.[2] None of the Commission decisions cited by Licensee involves this type of policy statement. Rather, they involve a policy decision as to the scope of Commission action under a particular statute,[3] and a determination that intervenors may not litigate issues that go beyond requirements established by the Commission.[4] Thus, they are essentially interpretations of applicable authority. As such, they can be appropriately and independently reviewed by a court under the authorities cited by Licensee. See, e.g., Guardian Federal Savings and Loan Association v. FSLIC, 589 F.2d 658, 664 (D.C. Cir. 1978).

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[2] This interpretation of the policy statement is actually quite generous to Licensee. In fact, the policy statement appears to be little more than the Commission's justification for refraining from rulemaking in the training area for two years. It is clear that the Commission will take INPO accreditation into account in considering possible enforcement actions, but it is by no means clear that the Commission considers INPO accreditation to be of significance in the issuance of reactor licenses or the resolution of contested hearing issues. See discussion at 7-11, infra.

[3] Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702 (1978).

[4] Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-19, 12 N.R.C. 67 (1980); Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, CLI-81-16, 14 N.R.C. 14 (1980).

By contrast, a court could not and would not conduct an independent review of a factual determination reached in a policy statement. Rather, as occurred in State of Minnesota v. U.S. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979), a court would remand such a determination to the agency for completion of required public participation procedures. That case is strikingly similar to the one at hand. There, the Appeal Board relied upon a Commission "policy declaration" to resolve contested issues in a spent fuel licensing proceeding. The Court remanded the decision for consideration of the issues in an appropriate public proceeding, generic or otherwise. Just as the Appeal Board could not rely upon a policy statement to resolve factual issues in that case, so the Licensing Board may not do so here.

The applicable principles are set out in Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974), which Licensee itself cites but seems to ignore:

> An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.
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> * * *
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> It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law . . . . When the agency applies the policy in a particular

> situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

(Emphasis added.)

Thus, the Commission may not rely upon the policy statement for any purpose in reaching a decision as to the issues addressed in the restart proceeding. Licensee's tortured attempt to suggest that the Licensing Board may be able to rely upon the policy statement "within the agency" even if the Commission itself could not do so invites the Licensing Board to reach a decision that the Commission could not defend on judicial review. In addition to violating the rights of the parties to this case, such a decision would do a disservice to the Commission.

II. The Policy Statement Does Not Apply To This Case.

UCS demonstrated in its initial comments that the Commission's recent review of ALAB-772 and the issuance of the policy statement shortly after that review establish that the Commission did not intend the policy statement to affect this proceeding. Had the Commission intended such an effect, it would undoubtedly have said so.

Having recently reviewed ALAB-772, the Commission was aware of the number and complexity of issues involved in the training proceeding as a whole and in the remanded hearings. Yet the policy statement speaks in only the most general terms about the significance of the Commission's endorsement of the INPO

accreditation program.

The Commission states, for example, that the accreditation program "will provide the basis to ensure that personnel have qualifications commensurate with the performance requirements of their jobs." Policy Statement at 1. In the next sentence, however, the Commission states that, "It remains the continuing responsibility of the NRC to independently evaluate applicants' and licensees' implementation of improvement programs to ensure that desired results are achieved." Id. Similarly, the Commission states that, "For operating reactors, accreditation of the above training programs constitutes a method acceptable to the NRC for implementing performance-based training." Id. at 4. But in the next sentence the Commission states that, "The NRC will continue to review and approve all applicant training programs in accordance with applicable regulations, regulatory guidance, and the Standard Review Plan and to conduct inspections necessary to determine that current regulations and license training commitments are being met."

These hardly amount to a clear statement that Licensing Boards may rely upon the policy statement. To the contrary, they indicate that the Commission will generally rely upon INPO accreditation as a basis for confidence in the adequacy of training, but that in reviewing license applications or resolving problems that arise at particular facilities, the Commission will rely upon independent development and review of the relevant facts. Thus,

the language of the policy statement does not support application of the policy statement to this or any other Commission adjudicatory proceeding.

The purpose of the policy statement is clearer when the statement is considered as a whole. The Commission's point is that it is prepared to experiment with the INPO accreditation program as a guide to the exercise of Commission discretion in the area of training, and thus the Commission will forego further rulemaking in the training area for two years. See, e.g., Policy Statement at 1. Clearly the policy statement will guide staff actions with respect to training for the next two years.

The Commission has not said, however, that attainment of INPO accreditation will constitute a presumption, or even sufficient evidence that a training program is adequate for the purpose of issuing an operating license. Nor has the Commission said that INPO accreditation resolves any training issues that were outstanding at particular plants as of the date the policy statement was issued.

There is nothing in the policy statement to support its application to a proceeding such as this one, which involves specific concerns identified by the Appeal Board and known to the Commission when it issued the policy statement. Certainly there is no indication in the policy statement that the Commission considers INPO accreditation to address the cheating-related questions that are the subject of this remand. Moreover, the Commission's emphasis on its independent responsibility to

evaluate and resolve licensee implementation of training programs indicates that the Commission will not rely upon INPO accreditation to address concerns that may arise about the adequacy of particular training programs. The purpose of INPO accreditation under this scheme is to give the Commission some assurance that accredited programs are generally adequate so that it can turn its attention to programs, such as this one, that are found to have particular problems in need of resolution.

This interpretation of the policy statement is supported by the testimony of the NRC Staff in this proceeding. The policy statement was issued "in lieu of a rule that had been proposed by the Staff in response to the Nuclear Waste Policy Act." Persensky, Tr. 33,257. In issuing the policy statement, the Staff was "suggesting that the number of inspections and reviews be limited for those programs that are accredited by IMPO (sic)." Id. Under the policy statement, "the staff would not do that thorough a review on a routine basis. We would follow up on special issues. . . . So, I have a hard time linking it to this particular utility, or this particular plant, because what we do say in the policy statement is that if there is any special issue that comes up, that we would in fact do our own thorough review." Id. at 33,258.

Thus, the Commission did not intend the policy statement to be relied upon by this or any other Licensing Board. This case involves special issues that arise directly from

cheating by Licensee personnel. The resolution of these issues would not be governed by this policy statement. Indeed, the resolution of these issues would not be affected at all by the policy statement because it is not the purpose of the policy statement to address situations such as this.

III. Assuming The Policy Statement Applied To This Proceeding, It Would Not Determine Or Significantly Affect The Board's Decision.

On the premise that the policy statement can be applied to this proceeding, Licensee argues that the Board should take official notice of the accreditation of the TMI-1 licensed operator training program, and that the Board should consider a substantial amount of extra-record material in interpreting the application of the policy statement to this case.[6] Licensee also asserts that accreditation should constitute prima facie evidence of an adequate training program, thereby shifting the

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[6] Licensee also suggests that the parties had every opportunity to challenge the value or significance of the INPO accreditation during the reopened hearing. Licensee Comments at 4. This is a remarkable argument. During the hearing, the parties learned that Licensee was seeking accreditation, that INPO had made the required visits, and that Licensee expected to receive its accreditation in the near future. All they had, however, was Licensee's self-serving predictions on the subject. They also did not know when, if at all, the Commission would issue this policy statement. It would have been an inexcusable waste of judicial resources and the resources of the parties to litigate INPO accreditation during this hearing.

Had UCS known the accreditation would become dispositive, it would certainly have challenged the significance of this industry-controlled procedure in general and its application to the issues of this remand in particular. It did not have reasonable notice that it should pursue that course. Licensee cannot change the rules after the game has been played.

burden to opposing parties to establish that the training program is inadequate.[7] In addition, Licensee takes this opportunity to reargue a number of its findings in the guise of supporting the significance of INPO accreditation.

Assuming that the Board takes official notice of the accreditation of the TMI-1 licensed operator training program and accepts the notion that this constitutes prima facie evidence of an adequate program, this avails Licensee nothing. First, there is no indication in the policy statement or in this record that INPO accreditation addresses the cheating-related issues that are the subject of this remanded proceeding. Second, the standard for countering prima facie evidence was refuted long ago by the very cheating that resulted in this remand. Third, this argument has been mooted by the fact that the evidence is now in the record. Whoever would have had the burden of going forward if this policy statement had applied at the beginning of this proceeding, Licensee maintains the ultimate burden of proof. The question now is whether, in light of the evidence in this record, Licensee has met that burden.

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[7] Licensee even goes so far as to argue that the TMI-1 licensed operator training program is not subject to challenge now that it has been accredited by INPO. This argument ignores the very authorities cited by Licensee in its discussion of the general impact of policy statements. See, e.g., Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974). Since the policy statement has not been subjected to rulemaking or adjudication, it cannot determine the rights of the parties or any of the facts on which the Board may base its decision. Licensee relies in this argument on Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 N.R.C. 751 (1982). The citation is inapposite because it relates to a legal interpretation by the Commission rather than to the sort of factual determination at issue here.

Finally, Licensee seeks to rely on various extra-record material to demonstrate that INPO accreditation establishes that Licensee should not be required to perform periodic formal evaluations of operator performance. Licensee Comments at 6-7. This argument highlights the dangers of attempting to rely upon or apply the policy statement to this case without litigating its meaning or significance.

Licensee asserts that INPO must not require any periodic formal evaluations of operator performance since INPO has accredited Licensee's program, which does not include such evaluations. But the Board and the parties do not know how INPO interprets what the policy statement describes as a requirement for "evaluation and revision of the training based on the performance of trained personnel in the job setting." Policy Statement at 4. Nor do they know how INPO addressed this issue in reviewing the TMI-1 training program. Significantly, they do not know what Licensee told INPO about Licensee's program in order to receive this accreditation. All of these are issues whose resolution could significantly affect any attempt to apply the policy statement to this case.

Licensee's attempt to foist still more extra-record material upon the Board must also fail. Licensee relies upon Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1366-67 (1984), for the proposition that the Board may consider such material. Licensee's citation of this decision is mysterious at best. It relates to

consideration of new, necessarily extra-record material filed in support of a motion to reopen. If the Board in that case had decided that the extra-record material should have been considered in that case, it would have reopened the hearing so that the parties could litigate the issues further. That is the whole point of a motion to reopen. If the hearing is not reopened, the new material has no affect on the Board's decision.

The case applies here, but not as Licensee would have it. Had there been a motion to reopen, the Board could decide whether the information proffered by Licensee was adequate to require further litigation by the parties. There has been no such motion, nor is this information any basis for such a motion.[8] Thus, there is no basis for the Board to consider this extra-record material in reaching a decision in this proceeding.

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[8] Other than the fact of the accreditation itself, none of the extra-record information cited by Licensee appears to be new information that could not have been litigated during the hearing. Moreover, this information appears at most to be cumulative in that it merely repeats assertions made by Licensee during the hearing. Thus, the information now cited by Licensee would not justify reopening of the hearing.

CONCLUSION

For these reasons, the Board may not consider either the policy statement or the extra-record materials proffered by Licensee in reaching a decision in this proceeding.

Respectfully submitted,

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April 5, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNION OF CONCERNED SCIENTISTS' REPLY TO LICENSEE'S COMMENTS ON COMMISSION POLICY STATEMENT ON TRAINING AND QUALIFICATION OF NUCLEAR POWER PLANT PERSONNEL was served on those indicated on the accompanying Service List. Service was made by deposit in The United States mail, first class, postage prepaid, on April 5, 1985, except those indicated by an asterisk were delivered by hand.

William S. Jordan, III

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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