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Staff
October 9, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO PETITION OF MARVIN I. LEWIS, INTERVENOR, FOR A NEW OR EXPANDED CONTENTION CONCERNING THE HARTMAN LEAK RATE ALLEGATIONS

I. INTRODUCTION

On September 19, 1985, Mr. Marvin I. Lewis filed a petition 1/ with the Atomic Safety and Licensing Board seeking to reopen the record in the restart proceeding for the purpose of admitting the following contention:

> Leak rates have been and are being measured erroneously. Erroneous leak rates allow the TMI #1 reactor to be operated outside technical specification limits, increasing danger of a major nuclear accident and reducing the public's safety.

1/ Petition of Marvin I. Lewis, Intervenor, for a New or Expanded Contention Concerning the Hartman Leak Rate Allegations, September 19, 1985 (Petition). (Although the cover page of the Petition is dated September 18, 1985, Mr. Lewis' signature and certification of service are hand-dated September 19, 1985.)

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Petition at 4. In addition, Mr. Lewis seeks to reopen the record in the TMI-1 restart proceeding to consider leak rate falsifications at TMI-2 (the "Hartman allegations"). 2/ Id.

Mr. Lewis argues that "[t]he NRC, the nuclear steam system supplier and the Licensee have demonstrated a continuing pattern of incompetence" in leak rate measurement. Id. at 3. In particular, Mr. Lewis asserts that allegations of leak rate falsification at TMI-2 and the application of an evaporative loss term in reactor coolant system leak rate determinations at TMI-1 reflect continuing, "systematic, procedural and purposeful errors" in leak rate measurement. Id. at 2-4.

2/ In CLI-85-2, the Commission concluded that preaccident leak rate falsifications at TMI-2 do not currently raise a significant issue for the safe operation of TMI-1 and ruled that no further hearings are warranted in the restart proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 304-05 (1985). Additionally, the Commission decided to institute a new proceeding, separate from the restart proceeding, on TMI-2 leak rate falsifications. Id. at 305-06. Insofar as Mr. Lewis seeks to reopen the TMI-1 restart proceeding for the purpose of considering TMI-2 leak rate falsifications, his petition is properly characterized as one for reconsideration of Commission Order CLI-85-2. This Licensing Board is bound by CLI-85-2 and does not have the authority to "reconsider" that Commission decision. Cf. United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-8, 15 NRC 1095 (1982).

Moreover, in separate motions filed on March 13, 1985, Intervenor Three Mile Island Alert, Inc. and the Commonwealth of Pennsylvania moved for reconsideration of CLI-85-2. TMIA's Motion for Reconsideration of CLI-85-2, March 13, 1985; Commonwealth of Pennsylvania's Motion for Reconsideration of Commission Order CLI-85-2. The Commission denied both motions. CLI-85-7, 21 NRC 1104 (1985). Mr. Lewis presents no new information or arguments as to why there should be further hearings on TMI-2 leak rate falsification in the restart proceeding. Therefore, even if the Licensing Board could "reconsider" CLI-85-2, Mr. Lewis's petition to reopen the record to consider the Hartman allegations should be denied for the same reasons set forth by the Commission in CLI-85-2 and CLI-85-7. Of course, Mr. Lewis is free to file a petition for leave to intervene in the separate TMI-2 leak rate proceeding if the notice of hearing instituting that new proceeding invites intervention.

As discussed below, the Licensing Board no longer has jurisdiction to reopen the restart proceeding, and, consequently, lacks jurisdiction to entertain Mr. Lewis's Petition. Likewise, the Appeal Board does not have jurisdiction to rule on Mr. Lewis's Petition. Accordingly, the Staff suggests that the Licensing Board refer Mr. Lewis's Petition to the Commission for consideration on the merits.

Apart from considerations of the Licensing Board's jurisdiction to entertain Mr. Lewis's petition, Mr. Lewis's petition completely fails to even address the requisite standards to justify reopening the record and to admit his late-filed contention. In addition, the arguments presented by Mr. Lewis are non-specific and unpersuasive and fall far short of meeting the applicable standards. Accordingly, the Staff opposes Mr. Lewis's petition.

II. DISCUSSION

A. The Licensing Board's Jurisdiction To Consider Mr. Lewis's Petition To Reopen and Admit a New Contention

Because the Licensing Board in the restart proceeding has issued initial decisions on all the issues it considered and either the time for Appeal Board or Commission review of those decisions has expired or notices of appeals of decisions have been filed, the Licensing Board no longer has jurisdiction to reopen the record. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1326-27 (1982). Consequently, the Licensing Board lacks jurisdiction to entertain Mr. Lewis's Petition to reopen and admit a new contention. Moreover, insofar as the Atomic Safety and Licensing Appeal Board has

retained jurisdiction in this proceeding solely with respect to the issues of licensed operator training at TMI-1 and the Dieckamp mailgram, neither of which are the subject of Mr. Lewis's Petition, the Appeal Board, likewise, does not have jurisdiction to rule on the merits of Mr. Lewis's petition. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 226 (1980). Accordingly, the Staff suggests that the Licensing Board refer Mr. Lewis's petition to the Commission for its consideration on the merits.

With respect to the substance of Mr. Lewis's Petition, for the reasons discussed below, Mr. Lewis lacks standing to seek to reopen the record and his Petition fails to meet the necessary standards for reopening and admission of a late contention.

B. Mr. Lewis's Standing to Seek to Reopen and Litigate a New Contention in the TMI-1 Restart Proceeding

It is beyond peradventure that only a person who has demonstrated the requisite interest in a proceeding, as outlined in 10 C.F.R. § 2.714, has a right to participate as a full party in the proceeding. Mr. Lewis, however, is not a full party to the restart proceeding, and therefore is not clothed with those rights accorded to parties, such as the right to file motions and answers and generally participate in the proceeding.

Mr. Lewis timely filed a petition for leave to intervene in the restart proceeding on August 21, 1979. The Licensing Board ruled that although Mr Lewis had demonstrated a familiarity with some of the events at TMI-2, he had not demonstrated an interest sufficient to justify his

active participation as a litigative party in the restart proceeding. Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference, September 21, 1979. Accordingly, the Licensing Board rejected most of Mr. Lewis's contentions. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-32, 14 NRC 381, 392 n.4 (1981). Thus, Mr. Lewis has already been found by the Licensing Board in this proceeding to lack standing. As a matter of discretion, however, the Licensing Board did allow Mr. Lewis to participate in the proceeding solely with respect, and strictly limited, to his contention on the adequacy of the TMI-1 filter system. Id.

In his Petition, Mr. Lewis presents no new information which would warrant a different result now concerning his standing and right to intervene in the restart proceeding. 3/ He has failed to demonstrate that he is entitled to be made a full party to the restart proceeding. In turn, because Mr. Lewis is not a party to the restart proceeding, he does not have a right to move to reopen the record or to proffer and litigate a new contention. Cf. Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978) (non-party may not appeal a board decision). Mr. Lewis's petition may be denied on that basis alone.

3/ The simple fact that Mr. Lewis "visits, drives thru and does business in the TMI Exclusion area", Petition at 4, falls far short of any recognized basis for finding standing. See, e.g., Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979).

C. Merits of the Petition

Apart from considerations of Mr. Lewis's right to seek to reopen and litigate a new contention, Mr. Lewis's petition fails to meet the necessary standards for reopening and admission of a late contention.

1. Motion to Reopen the Record

It is well established that a motion to reopen may not be granted unless it meets the standards for reopening a record set forth in Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 339 (1978). Specifically, the motion

> (i) must be timely; (ii) must raise significant safety (or environmental) issues; and (iii) must show that a different result might have been reached had the newly proffered material been considered initially.

Wolf Creek, 7 NRC 320, 339 (1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 9 NRC 1350, 1355 (1984), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).

A motion to reopen is timely presented when the movant shows that the issue sought to be raised could not have been raised earlier. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Irrespective of the timeliness of a motion, a record need not be reopened when the issues sought to be presented are not of "major significance" and absent a showing that the "outcome of the proceeding might be affected." Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10

NRC 775, 804 (1979). 4/ A proponent of the motion must present "'significant new evidence . . . that materially affects the decision.'" Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362-63 (1981). In other words, the proponent must establish the existence of newly discovered evidence having a material bearing on the proper result in the case. Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-699, 15 NRC 453, 465 (1982).

In addition, the new material in support of a motion to reopen (1) "[a]t minimum, . . . must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.714(b) for admissible contentions" and (2) if the evidence is to materially affect the previous decision, "it must possess the attributes set forth in 10 C.F.R. 2.743(c) defining admissible evidence," that is, it must be "'relevant, material and reliable.'" Diablo Canyon, ALAB-775, 19 NRC 1361, 1366-67 (1984) (footnote omitted). Accordingly, the proponent of a motion bears a "heavy burden." Wolf Creek, 7 NRC at 338. The moving papers concerning a motion to reopen must be strong enough, in light of opposing filings, to avoid summary disposition. Vermont Yankee, 6 AEC at 523. If the undisputed facts establish that an allegedly significant safety issue does not exist, has been resolved, or, for some

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4/ See also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 887 (1980); Georgia Power Co. (Alvin W. Vogtle Nuclear Power Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

other reason, will have no effect on the outcome of the licensing proceeding, the motion to reopen should not be granted. Id.

a. Timeliness

With respect to the timeliness of Mr. Lewis's request, the Staff notes that the evaporative loss term has been used continuously in leak rate determinations at TMI-1 since March 14, 1974. See the attached affidavit of Lee H. Bettenhausen (Bettenhausen Affidavit) at ¶6. However, Mr. Lewis is silent as to why he waited until now to raise his contention and seek to reopen the record on leak rate determination practices. Moreover, to the extent that Mr. Lewis is basing his petition on Staff concerns regarding the application of the evaporative loss term in detecting reactor coolant pressure boundary leakage at TMI-1, the Staff also notes that this issue was discussed in IE Inspection Reports 50-289/83-20 and 50-289/84-18, which reports were made publicly available in the NRC Public Document Room in August 1984 and in September 1984, respectively. Mr. Lewis fails to show that the issue he now seeks to raise could not have been raised earlier. As such, Mr. Lewis's petition cannot be considered timely presented.

b. Safety Significance

Secondly, Mr. Lewis fails to establish the safety significance of the application of the evaporative loss term to reactor coolant system leak measurements. Contrary to Mr. Lewis's arguments that leak rates at TMI-1 are being measured incorrectly, the inclusion or exclusion of the

evaporative loss term has no impact on the safe operation of TMI-1. 5/ See Bettenhausen Affidavit at ¶6. As the Bettenhausen Affidavit demonstrates, the application of an evaporative loss term has no effect upon the capability of detecting reactor coolant pressure boundary leakage from the various leakage detection methods at TMI-1. Id. at ¶7. Accordingly, there is no safety significance to the evaporative loss term issue raised by Mr. Lewis which would warrant reopening the record in the restart proceeding.

c. Likelihood of a Different Result

Finally, Mr. Lewis has offered no "significant new evidence" as defined by Commission case law. See Diablo Canyon, CLI-81-5, 13 NRC at 362-63. Mr. Lewis has submitted neither affidavits nor anything which might be characterized as "relevant, material and reliable" evidence. Moreover, Mr. Lewis has failed to establish a nexus between the application of the evaporative loss term in leak rate determinations at TMI-1 and any issues addressed in the restart proceeding. Mr. Lewis does not even suggest how the inclusion of the evaporative loss term in the

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5/ Mr. Lewis attached to his Petition the first page of a recently published notice of proposed modification to the Commission's General Design Criterion requirements for protection against dynamic effects of postulated pipe ruptures. Proposed Rule, Modification of General Design Criterion 4 Requirements for Protection Against Dynamic Effects of Postulated Pipe Ruptures, 50 Fed. Reg. 27006 (July 1, 1985). Although the apparent purpose of such attachment is to indicate the general importance of leak rate determinations, the attached document does not establish that the methods of leak rate determination at TMI-1 are erroneous, or that the inclusion or exclusion of the evaporative loss term in TMI-1 leak rate calculations is of any safety significance.

NRC-approved Technical Specifications for TMI-1 raises a management integrity or competence issue. Nor does he indicate any manner in which the use of the evaporative loss term relates to or affects hardware/design issues, unit separation issues, or emergency planning issues, which formed the basis for the Commission's immediately effective shutdown order and were the subjects of the restart proceeding. Thus, Mr. Lewis has failed to show that the newly proffered information would have affected any specific decisions or the overall result in the restart proceeding.

In sum, Mr. Lewis's petition to reopen is not timely, does not show that the application of the evaporative loss term in leak rate determinations at TMI-1 raises a matter of safety significance, and does not demonstrate that were the matter considered, a different result might have obtained. Thus, Mr. Lewis has not met any of the standards for reopening and his motion to reopen should be denied.

2. Late-Filed Contention

In petitioning to reopen the record for litigation of a new contention, Mr. Lewis must not only demonstrate that the standards for reopening are met, but he must also show that the criteria for admission of late-filed contentions balance in his favor. Diablo Canyon, CLI-82-39, 16 NRC 1712, 1714-15 (1982). These criteria are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). Mr. Lewis's showing on each of the late-filing factors is addressed below.

a. Factor (i)

As noted in the previous section, Mr. Lewis had sufficient information available to him at the inception of the restart proceeding and certainly no later than September 1984 with which to file the subject contention. Mr. Lewis, however, tenders no excuse to justify his late filing.

The burden of persuasion regarding the late-filing factors is on the petitioner. "[I]n order to discharge that burden, the petitioner must come to grips with those factors in the petition itself." Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, ___ NRC ___, slip op. at 9 (September 5, 1985), citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980). Mr. Lewis has failed not only to discharge this obligation, but also to familiarize himself with the Commission's Rule of Practice. See id. at 11 n. 24. As the Appeal Board noted in Pilgrim, a petitioner who ignores the terms of 10 C.F.R. 2.714(a)(1) does so at his own peril. Id. at 13. Therefore, because Mr. Lewis has not shown good cause for the delay in filing, the good cause factor, 10 C.F.R. § 2.714(a)(1)(i) weighs heavily against admission, and Mr. Lewis must now make a particularly strong showing on the remaining four factors. See Duke Power Co.

(Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 91977) and cases cited therein.

b. Factors (ii) and (iv)

To the extent that the evidentiary record has already closed in the restart proceeding, it does not appear that there is another party or another adjudicatory forum through which Mr. Lewis can have his interest in TMI-1 leak rate practices represented, and therefore the second and fourth lateness factors, 10 C.F.R. § 2.714(a)(1)(ii), (iv) appear to favor admission. Cf. Washington Public Power Supply System (WPPSS Nuclear Project 3), ALAB-747, 18 NRC 1167, 1173-77 (1983). However, these factors ordinarily are accorded "relatively minor importance" in the balancing of the five factors. The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).

c. Factor (iii)

With respect to whether Mr. Lewis can reasonably be expected to assist in developing a sound record, 10 C.F.R. § 2.714(a)(1)(iii), he has given no indication that he possesses any special expertise concerning leak rate measurement or has access to qualified experts who would aid in the development of a sound record. See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 892-93 (1981); Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980). Additionally, Mr. Lewis fails to set out with any degree of particularity the issue he plans to cover and the witnesses he plans to call. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704,

16 NRC 1725, 1730 (1982). In short, Mr. Lewis has shown nothing in the way of his ability to contribute to the development of a sound record. This factor weighs against admission of his proffered contention.

d. Factor (v)

Finally, the fifth lateness factor, the extent to which the admission of the proffered contention will broaden the issues or delay the proceeding, weighs heavily against Mr. Lewis's participation. The application of the evaporative loss term in Reactor Coolant System Leak Rate determinations was a subject of neither a previous contention nor any issue in the restart proceeding. Admission of this contention thus will add a new issue. In addition, since the record is closed and all litigation (apart from appellate consideration of limited training and Dieckamp Mailgram decisions) in the restart proceeding has been completed, admission of this late contention for new litigation would "[occasion] a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." WPPSS, 18 NRC at 1180, citing Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650 n. 25 (1975) (emphasis in original). Admission of the proffered contention will both broaden the issues and delay completion of the proceeding, and thus factor five weighs against admission.

In sum, the three heavily weighted late-filing factors, 10 C.F.R. § 2.714(a)(1)(i), (iii), (v), all weigh against admission of the contention, while only the two lightly weighted factors, § 2.714(a)(1)(ii),

(iv), weigh in favor. On balance, the late-filing factors weigh heavily against admission of the proffered contention.

III. CONCLUSION

For the reasons set forth above, the Atomic Safety and Licensing Board lacks jurisdiction to consider Mr. Lewis's Petition and therefore should refer the Petition to the Commission. On the substance of the Petition, Mr. Lewis lacks standing to seek to reopen the record and, in any event, has failed to demonstrate that the standards for reopening the record and admitting a late-filed contention are met. Thus, the petition, if it is considered on the merits, should be denied in its entirety.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 9th day of October, 1985.