

160
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Board

In the Matter of)
GPU NUCLEAR CORPORATION, et al.) Docket Nos. 50-289-OLA and 50-289-OLA-2
(Three Mile Island Nuclear) (Steam Generator
Station, Unit No. 1)) Plugging Criteria)

LICENSEE'S BRIEF ON THE PROPRIETY OF
POST-HEARING CONFIRMATORY TESTING

I. INTRODUCTION

On April 11, 1986, Three Mile Island Alert, Inc. ("TMIA") filed its "Motion for Extension of Time or, in the Alternative, Notice of Withdraw" (hereinafter "Motion"), requesting a six-month extension of the hearing schedule. Both Licensee and the Staff opposed this six-month extension for OLA-1, noting that a six-month delay would preclude a decision on Change Request 148 by the time it was needed for the next scheduled refueling (currently scheduled to begin November 3, 1986).^{1/} The Staff expresses no opposition to a three-month deferral of

^{1/} Licensee's Response to TMIA's Motion for Extension of Time, April 17, 1986; NRC Staff Response to TMIA's Motion for Extension of Time or, in the Alternative, Notice of Withdrawal, April 30, 1986 ("Staff Response").

the licensing schedule. Staff Response at 5-6. In the NRC Staff's responsive pleading filed on April 30, 1986, the Staff noted that Licensee had agreed to pull three tubes during the next refueling outage for examination to confirm Licensee's analysis of the adequacy of its ECT analysis and to confirm that corrosion has been arrested in the steam generator tubes. The Staff stated that it plans to issue an SER concerning Change Request 148 by July 31, 1986, which would indicate the Staff's position on the proposed amendment, subject to certain confirmatory analysis of the pulled tube test data. Staff Response at 4. The Staff indicated that it was interested in reviewing the test results from the pulled tubes in order to confirm Licensee's eddy current measurements regarding intergranular attack ("IGA") and intergranular stress assisted corrosion ("IGSAC"), Licensee's analysis regarding grain drop-out, and to confirm that initial corrosion has been arrested. Staff Response at 3-4.

The Licensing Board convened a conference on May 7, 1986, to hear TMIA's motion for extension. At that hearing the Licensing Board engendered discussion regarding its ability to render a decision on Change Request 148 prior to the Staff's confirmatory analysis of the pulled tube tests. Counsel for Licensee and the Staff argued that the Licensing Board could issue its decision on Change Request 148 prior to the pulled tube tests because these tests will be merely confirmatory of

the evidence presented in support of the proposed amendment, and that the Licensing Board could properly make its reasonable assurance finding based solely on the evidence put forth during the hearing. Tr. at 178-83 (Churchill); see also Tr. at 154 (Wagner). The Staff maintained that the Licensing Board could properly delegate the confirmatory analysis of the pulled tube tests to the Staff for post-hearing resolution. In support of its position the Staff cited Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-226, 8 A.E.C. 381 (1974). Tr. at 213-14 (Wagner).

The Board directed the parties to file briefs on the question of whether delegation of the confirmatory analysis of the pulled tube tests to the Staff was consistent with Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), and Commission case law. Tr. at 214-216. Licensee herein provides the following discussion concerning the propriety of delegating review of the pulled tube confirmatory tests to the Staff for post-hearing resolution in light of the UCS decision.

II. DISCUSSION

A. Commission Decisions Allow Delegation of the Disposition of the Pulled Tube Confirmatory Tests to the Staff for Post-hearing Resolution

Licensing Boards, under certain circumstances, are authorized to delegate unresolved matters to the Staff for post-hearing resolution. The seminal decision concerning the authority of a Licensing Board to delegate such matters to the Staff is Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 A.E.C. 947 (1974). While the Commission's general position is that contested issues should be resolved in an adversary framework prior to issuance of licenses, id. at 951-2, it recognizes that "[i]n some instances. . . the unresolved matter is such that the Boards are nevertheless able to make the findings requisite to issuance of the license." Id. at 951. As an example, the Commission noted that "a Board might, after hearing, find an applicant's security plan adequate, except for minor procedural deficiencies. In such a case, the Board could choose to authorize issuance of a license -- with the deficiencies to be subsequently cured under the scrutiny of the Director of Regulation." Id. at 951 n.8. The essence of the Commission's policy is that where Licensing Boards can make findings requisite to the issuance of a license (e.g. when adequate evidence is put forth upon which to make a reasonable assurance finding on an issue) certain minor matters may be left to the staff for

post-hearing resolution. See Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1103-1105 (1983); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 N.R.C. 681, 707-710 (1985).

The above cited cases allow delegation to the staff of "deficiencies" to be corrected or actions to be completed in order to fulfill regulatory requirements. The facts of this case present an even stronger argument for delegation. No "deficiencies" have been identified which require post-hearing correction, and Licensee and the Staff will be prepared to present evidence which will permit the Board to make its reasonable assurance finding prior to commencement of the confirmatory tests. The tests are expected to confirm the determination already made; they are not an integral part of the basis for that determination.

Squarely on point with the instant case is the Appeal Board's decision in Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 N.R.C. 814 (1983). The intervenor in that case argued on appeal that the Licensing Board had improperly delegated responsibility to resolve disputed substantive technical issues to the Staff. Id. at 885. The intervenor had objected to the Licensing Board's decision to have the Staff monitor a test involving the

connection of the pressurizer heaters to the emergency diesels. Id. The Licensing Board had ruled that the licensee had satisfactorily demonstrated that the pressurizer heater loads could be connected adequately; nonetheless it also required the Staff to monitor a test of the connection and energization of the heaters from the diesel generators and to evaluate the results thereof. Id. at 886. In affirming the Licensing Board's delegation, the Appeal Board determined that:

If, as the Licensing Board apparently expected, the test confirms the Board's substantive conclusion regarding the proper operation of the heaters, nothing further need be done.... If...the test fails to confirm the Licensing Board's conclusions, we believe the staff must advise the Commission of that fact and indicate what corrective actions are contemplated. The Commission can then consider at that time whether it is necessary to accord the parties an opportunity to address the issue of necessary corrections or changes.

ALAB-729, 17 N.R.C. at 886-87. Similarly, the Licensing Board in the present case may make its findings based on the record while delegating to the Staff responsibility for reviewing the pulled tube test results to confirm those findings.

It is not necessary for a Licensing Board to await the results of every test or study pertaining to the issues before it where the Licensing Board can adequately address the issues raised based on the evidence before it. Thus, it was proper for the Licensing Board in the TMI-1 Steam Generator Repair

hearings, Docket No. 50-289-OLA, to issue its decision on the corrosion issue prior to the conclusion of the confirmatory long term corrosion tests the analysis of which was underway at the conclusion of those proceedings.^{2/} Similarly it is not necessary here for the Licensing Board to await the results of the confirmatory pulled tube tests prior to rendering its decision.^{3/}

^{2/} The Licensing Board granted Licensee's motion for summary disposition, thereby dismissing TMIA's contention which had alleged that the cause of the corrosion in the steam generator tubes had not been identified and that reasonable assurance had not been provided that corrosion would not reinitiate. Memorandum and Order (Rulings on Motions for Summary Disposition) (June 1, 1984) (unpublished) at 56-68, 71-80. The Licensing Board subsequently issued its initial decision granting Licensee's license amendment subject to a license condition that required Licensee to provide quarterly reports to the Staff of the long-term corrosion test results -- which the Licensing Board noted were designed to verify that corrosion will not reinitiate in the steam generator tubes. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-84-47, 20 N.R.C. 1405, 1425 (1984). The Appeal Board affirmed the Licensing Board's conclusions, notwithstanding its delegation to the Staff of responsibility for reviewing Licensee's confirmatory long-term corrosion tests for post-hearing resolution. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 N.R.C. 1195, 1203 (1985).

^{3/} It is noteworthy that 29 tubes were pulled and examined by Licensee between December, 1981 and May, 1982 as part of Licensee's metallurgical test program. TR-008, Rev. 3 at 8. Moreover, Licensee has already used pulled tube samples to verify the accuracy of its EOT analysis with respect to IGSAC. TDR-642 (cover page).

B. The Impact of the UCS Decision

The U.S. Court of Appeals decision, Union of Concerned Scientists v. NRC; 735 F.2d 1437 (D.C. Cir. 1984), does not alter a Licensing Board's authority to delegate unresolved matters to the Staff for post-hearing resolution pursuant to the Commission's policy stated in Indian Point, supra, and its progeny. A careful evaluation of the UCS case indicates that the Court's decision neither affects the Licensing Board's present authority to delegate disposition of the confirmatory pulled tube tests to the Staff for post-hearing resolution nor undermines the commission's policy regarding such delegations of authority.

The UCS case addressed the Commission's authority to amend 10 C.F.R. § 50.47 such that the emergency preparedness exercise would be eliminated as a prerequisite to authorization of a license by a Licensing Board. UCS, supra, 735 F.2d at 1440-42. On July 13, 1982, the Commission had issued an amendment on emergency preparedness exercises designating such exercises as part of the operational inspection program, thereby removing the consideration thereof from any initial licensing decision. Id. at 1440, citing 10 C.F.R. § 50.47(a)(2) (1983). The Court ruled that the amendment was invalid because the Commission was not authorized to remove consideration of the emergency preparedness exercises from the realm of litigable issues to be

decided in a public hearing pursuant to the mandate of section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1) (1976).^{4/}

There are two distinct differences between the issues addressed by the Court of Appeals and those currently under consideration by the Licensing Board. First, the Court addressed the propriety of amending a regulation to remove from consideration during public hearings a major prerequisite to licensing that is required to be performed by regulation (emergency preparedness exercises). USC, supra, 735 F.2d at 1439-41. Pulled tube tests, the matter presently before the Licensing Board, are neither required by regulations to be performed by regulation, nor are they required to be reviewed prior to licensing. Thus, at a minimum, it is clear that the significance of an individual's right to litigate this issue pales by comparison to the public's interest in reviewing emergency preparedness exercises. An analogy between the considerations of the UCS case and the matter presented before the Licensing Board cannot readily be made.

^{4/} "In any proceeding under this chapter, for the granting ... of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1) (1976); 42 U.S.C.A. § 2239(a)(1) (West Supp. 1985).

Second, the Court expressly recognized that there are certain preoperational tests which are traditionally delegated to the Staff for assessment following the hearing. UCS, supra, 735 F.2d at 1439-41. The Court's invalidation of the Commission's attempt to remove consideration of emergency planning exercises from the public hearing phase of licensing rested on its analysis of issues which are and are not suitable for post-hearing consideration as preoperational testing. Id. The Commission in UCS had argued that emergency planning exercises were exempt from the strictness of section 189(a) because Congress had acquiesced in the Commission's traditional practice of conducting preoperational testing of reactor systems to ensure that they meet the acceptance criteria without the results thereof being subject to litigation in public hearings. The Court noted that "Congress exempted from formal hearing procedures adjudicatory 'decisions [that] rest solely on inspections, tests, or elections,' 5 U.S.C. § 554(a)(3) (1982), 'because those methods of determination do not lend themselves to the hearing process.'" Id. at 1450-51. The Court rejected the Commission's classification of emergency planning exercises as "preoperational testing" because it noted that traditional post-hearing preoperational testing typically involves the conducting of tests by licensee, the results of which are reported to the NRC. The assessment of those tests "falls squarely within the NRC Staff's technical expertise." Id. at 1451. The

Court reasoned that emergency preparedness exercises involve several independent entities (e.g., licensee, state, and local plans and participants), the evaluation of which "will be as much within outside participants' expertise, or that of other federal agencies like FEMA, as within the expertise of the NRC staff." Id. The Court therefore found emergency exercise evaluations to be sufficiently different from traditional preoperational testing matters to reject the Commission's argument that they should be coincided as falling within the preoperational testing process. Concurrently, the Staff's confirmatory review of Licensee's pulled tube test results is clearly in the nature of its review of other test results traditionally considered proper for post-hearing resolution and is well within its realm of expertise.^{5/}

For the aforementioned reasons, it is clear that the UCS decision involved distinctly different issues and considerations than those now before the Licensing Board. The Court did not intend its decision to affect the Commission's policy concerning the appropriate delegation of minor matters to the Staff for post-hearing resolution. Instead, it merely proscribes the delegation of issues that are fundamental to

^{5/} See, e.g., Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 N.R.C. 1132, 1151-52 (1983) (staff delegated to verify that licensee's diesel vibration was at the desired normal level post-hearing).

licensing and required to be reviewed by regulation to the Staff without an opportunity for public hearing. The UCS decision does not therefore affect nor undermine the Commission's policy with respect to delegation of minor matters to the staff for post-hearing resolution; nor does it undermine or invalidate the rulings of Indian Point, supra, and its progeny.^{6/}

III. CONCLUSION

Commission policy precedent allows Licensing Boards to delegate minor matters such as the confirmatory results of the pulled tubes tests to the Staff for post-hearing resolution. Nothing in the UCS case has any bearing on the Board's authority to leave such matters to the Staff. Furthermore, leaving confirmatory items to the Staff is not tantamount to a delegation of the Board's decision-making function. In licensing proceedings, a Licensing Board's deliberation is distinct from the NRC Staff's review and approval. A Licensing Board's determination always precedes the NRC Staff's issuance of the license or license amendment. While a Licensing Board generally does require an NRC Staff safety evaluation report addressing a contested issue before it will decide the issue, the

^{6/} The Appeal Board's decision in Limerick, supra, was issued subsequent to and in recognition of the Court of Appeals' holding in Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 735 F.2d 1437 (1984). Limerick, supra, ALAB-819, 22 N.R.C. at 695 n.9.

existence of a confirmatory item in the SER is not an impediment to the decision. The fact that some item is designated by the NRC Staff as a confirmatory item indicates that the NRC Staff has found the information submitted by the applicant sufficient to support the granting of the license or license amendment. In other words, the available information permits the requisite reasonable assurance findings. A confirmatory item is thus an item that need not be closed out prior to issuance of a license or license amendment.

In the case at hand, the NRC Staff proposes to issue a Safety Evaluation Report in July. The NRC indicates that it views the pulled tube tests analysis as "confirmatory data." It therefore appears that the NRC Staff intends to issue an SER resolving all issues, subject only to a "confirmatory item." Licensee firmly believes that the information and data it has already provided will permit the NRC Staff to issue a favorable SER in July. Licensee also firmly believes that this information is sufficient for the Board's resolution of the contested matters. The Board should not at this juncture predict that the NRC Staff's SER will be inadequate or that Licensee will be unable to present a prima facie case. There is no basis for such negative inference or prejudgment. Rather, Licensee should be permitted -- indeed is entitled to the opportunity -- to present its case. In the event the Board should subsequently determine that more information is required


for its decision, the Board may reopen the record. A delay at present, however, would be premature and would delay timely resolution of the issues.

The Licensing Board should not delay this proceeding to await the results of confirmatory analysis of the pulled tubes to be conducted during the next refueling outage. There is at present no justification for such delay, nor would the delay be consistent with NRC practice.

Staff.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



Bruce W. Churchill, P.C.
Wilbert Washington II
Alan D. Wasserman

Counsel for Licensee

1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Dated: May 14, 1986

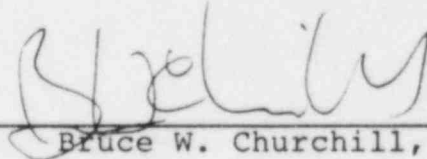
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board Panel

In the Matter of)	
)	
GPU NUCLEAR CORPORATION, <u>et al.</u>)	Docket Nos. 50-289-OLA-1
)	50-289-OLA-2
)	(Steam Generator
(Three Mile Island Nuclear)	Plugging Criteria)
Station, Unit No. 1))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Brief on the Propriety of Post-Hearing Confirmatory Testing" dated May 14, 1986, were served on the following by deposit in the U.S. mail, first class, postage prepaid, or, as indicated by one asterisk, by hand delivery, this 14th day of April, 1986.



Bruce W. Churchill, P.C.

Dated: May 14, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board Panel

In the Matter of)
)
GPU NUCLEAR CORPORATION, et al.) Docket Nos. 50-289-OLA-1
) 50-289-OLA-2
) (Steam Generator
(Three Mile Island Nuclear) Plugging Criteria)
Station, Unit No. 1))

SERVICE LIST

- * Sheldon J. Wolfe, Chairman
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Docketing and Service Section (3)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Three Mile Island Alert, Inc.
315 Peffer Street
Harrisburg, PA 17102
- * Oscar H. Paris
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Thomas Y. Au
Assistant Counsel Commonwealth
of Pennsylvania
Dept. of Environmental Resources
Bureau of Environmental Resources
Room 505 Executive House
P. O. Box 2357
Harrisburg, PA 17120
- * Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Louise Bradford
Three Mile Island Alert, Inc.
1011 Green Street
Harrisburg, PA 17102
- * Mary E. Wagner, Esq. (2)
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
- Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555