

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 1)	
)	
)	

THREE MILE ISLAND ALERT'S REPLY TO LICENSEE'S
RESPONSE TO TMIA'S MOTION FOR LEAVE TO PRESENT
TESTIMONY OF VICTOR GILINSKY ON DIECKAMP MAILGRAM
ISSUE WITHOUT PREFILING WRITTEN TESTIMONY AND TO
RESPONSE TO TMIA'S MOTION TO ADMIT DEPOSITION
OF PETER A. BRADFORD AS TESTIMONY

Three Mile Island Alert ("TMIA") files this reply to respond to the specific arguments raised by licensee to TMIA's motion to admit the deposition testimony of Peter A. Bradford and TMIA's motion to call former NRC Commissioner Victor Gilinsky as a witness without prefiling written testimony.¹

- I. TESTIMONY OF FORMER NRC COMMISSIONERS VICTOR GILINSKY AND PETER BRADFORD IS RELEVANT AND PROBATIVE ON THE DIECKAMP MAILGRAM ISSUE BEFORE THIS BOARD.

The issues before this Atomic Safety and Licensing Board ("Licensing Board") are:

¹ TMIA construed the conference call on Tuesday, November 7, 1984, as granting TMIA leave to file a reply brief at least to the arguments raised by licensee based on the Ethics in Government Act. In this brief TMIA raises other factual and legal arguments. Insofar as leave has not been granted TMIA to raise these arguments it seeks such leave through this motion.

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(1) whether Mr. Dieckamp knew or should have known that his mailgram contained false or inaccurate statements at the time he wrote it; and

(2) whether he should have corrected false and inaccurate statements in the mailgram at any time after he sent it.

A. Mr. Dieckamp's obligation in sending the mailgram.

This Board can determine the issue of whether Mr. Dieckamp "should have known" of the false statements in the mailgram only by first defining Mr. Dieckamp's obligation to ensure the accuracy of the statements he made in his mailgram. Mr. Dieckamp's obligation can only be defined in terms of his responsibility as GPU President to ensure all statements he made to the Nuclear Regulatory Commission ("NRC" or "Commission") were complete, accurate and truthful and in terms of licensee's reporting responsibilities. See, e.g., Section 206 of the Energy Reorganization Act of 1974, 10 CFR 50.10, 55.31, 20.403, and 6.8.1 of TMI-2 Tech. Specs.

Two statements in Mr. Dieckamp's mailgram are under scrutiny. One is "^there is no evidence that anyone interpreted the 'pressure spike' or the spray initiation in terms of reactor core damage at the time of the spike...". The second is "^there is no evidence...that anyone withheld any information." "Withhold" is defined as "to desist or refrain from granting, giving or allowing: keep in

one's possession or control: keep back." Webster's Third International Dictionary (1961 ed.). In the context of the mailgram Mr. Dieckamp clearly means that licensee did not withhold information within its possession which it was obligated to provide to the NRC.

In order for this Board to determine whether or not this second statement in Mr. Dieckamp's mailgram is factually accurate it must define licensee's obligation to provide information to the NRC during the accident. It cannot find that Mr. Dieckamp's statement in the mailgram about licensee's compliance with its obligation to provide the NRC with information is accurate without first defining that obligation. Similarly, it cannot determine whether Mr. Dieckamp fully complied with his obligation in sending the mailgram, that is whether he "should have known" statements in the mailgram were inaccurate without defining what steps Mr. Dieckamp should have taken to ensure its accuracy.

Former Commissioner Bradford testified that he believed Mr. Dieckamp and licensee should have done an adequate investigation to ensure the accuracy of the mailgram. Further, he testified that Mr. Dieckamp (and licensee) should have had available the exhibits which he reviewed in the course of his testimony, which indicated statements in the mailgram were incorrect and that licensee personnel did interpret the pressure spike in terms of core damage at the time of the spike.

A review of the portion of NUREG-0760 which addresses the Dieckamp Mailgram indicates the importance of this Board defining Mr. Dieckamp's reporting obligation to the NRC prior to a decision on whether Mr. Dieckamp violated that duty. The NRC Staff stated that it believed Mr. Dieckamp had not made a material false statement because the mailgram was not a statement required to be made as part of a license application. NUREG-0760 at 45. Clearly the NRC Staff found that Mr. Dieckamp had no obligation in writing the mailgram to ensure its accuracy since the mailgram did not constitute part of a license application and was not otherwise required by the Atomic Energy Act. TMIA disagrees with this definition of Mr. Dieckamp's obligation in writing the mailgram and will argue that Mr. Dieckamp's responsibility was:

(1) to do an adequate investigation of the facts concerning licensee's understanding of the pressure spike and containment sprays in terms of core damage prior to sending the mailgram; and

(2) to correct the misstatement that there was "no evidence" upon learning of the various interviews and documents constituting "some evidence" of licensee personnel's understanding of the pressure spike on March 28.

Secondly, licensee's argument that Mr. Dieckamp's reporting obligations to the Commission are clear from NRC regulations and licensee conditions is contrary to General Public Utilities' ("GPU") stated position at prior times in

these proceedings. GPU has stated repeatedly that whatever reporting failures occurred resulted partially from a misunderstanding on the part of officials and site personnel of these requirements.

- B. The evidence of appreciation of the pressure spike is of the type which should have been reported to the NRC and is of a quality to constitute "some evidence" which Mr. Dieckamp should have acknowledged in his mailgram.

The testimony of licensee witnesses is offered to demonstrate that the information possessed by licensee at the time of the accident, and shortly thereafter, was not of sufficient precision and certainty so as to be required to be reported to the NRC or acknowledged by Mr. Dieckamp in the mailgram.

Dr. Edwin Zebroski's testimony is offered to explain

1. The extent to which there was a rapid learning curve evident in the days immediately after the accident, in respect to organizing and integrating the large volume of plant data and in sorting out different views and speculation as to the extent and nature of the damage of the reactor...and
2. The extent to which...uncertainties remained for months after the accident, reflecting the limited general state of knowledge of severe core accidents at that time.

Zebroski testimony at 2.

Thomas Van Witbeck's testimony states that it is offered to indicate that he and other technical personnel's "appreciation for the significance of the pressure spike

as a measure of core damage...was not gained until [he] was exposed to calculations of the volume of H2 involved which was...in the period April 2nd through April 4th." Van Witbeck Testimony at 3.

The purpose of this testimony, therefore, is to demonstrate that no licensee personnel interpreted the pressure spike with certainty and precision to indicate core damage until hydrogen calculations were made in the period from April 2 to April 4 and more extensive research had been completed "months after the accident." Only this type of detailed and documented research and analysis constitutes to licensee "evidence" of someone interpreting the pressure spike in terms of core damage.

Mr. Dieckamp's testimony addresses the same issue. He states that the Mehler, Chwastyk and Illjes' testimony does not rise to the level of "some evidence" required to be acknowledged in his mailgram:

I continue to believe that the evidence and independent analysis thereof support the thrust of the mailgram statement. In making this statement I recognize that the mailgram phrase "no evidence" can if taken literally indicate a measure of absolute knowledge that goes beyond the reasonable basis that I possessed for my judgment and my belief.

Dieckamp Testimony at 19.

Licensee's position appears to be that the information available to Mr. Dieckamp, including the Mehler, Chwastyk and Illjes' interviews and the information which has become

available to TMIA in the course of discovery in these proceedings² is not "evidence" of sufficient reliability that Mr. Dieckamp was required to acknowledge it in his mailgram. Thus, Mr. Dieckamp contends that his mailgram today, as of May 9, 1979, is accurate and correct.

Further, licensee proposes to demonstrate through the Zebroski and Van Witbeck testimony that the second statement in the mailgram -- that there was no withholding of information -- is true because the low level of understanding of core damage of site personnel on March 28, extending for a period of months after the accident, was not information required to be reported to the NRC.

²Included among these documents are the first three exhibits to the Bradford deposition.

Exhibit 1 is a September 17, 1980 Memorandum to R. Arnold, to which is attached a copy of James Moore's notes, which indicate that Mr. Moore was briefed at 5:00 p.m. on March 28 that incore thermocouple temperatures in excess of 2500 degrees F had been measured at TMI-2.

Exhibit 2 is a confidential memorandum from B. Cherry, a GPU Vice President and officer, to Mr. Dieckamp, dated March 29, 1979, which indicates that GPU and Metropolitan Edison knew on March 28, 1979 that Met Ed's press releases were underplaying the seriousness of the accident and that Mr. Arnold and Mr. Dieckamp had hard information about the accident on the first day.

Exhibit 3 is a set of Robert Keaten's notes which include the period of the accident. The relevant entry is for March 29, 1979, which indicates Mr. Keaten was informed of an "explosion in the containment" on that date, apparently by Mr. Broughton.

However, TMIA's position is that the Chwastyk, Mehler and Illjes' interviews, as well as other exhibits uncovered in the course of discovery in these proceedings are 1) information of sufficient reliability and substance that it should have been acknowledged by Mr. Dieckamp in his mailgram to constitute "some evidence"; and 2) the information is of sufficient significance and quality that it should have been reported to the NRC. Therefore, an evaluation of the significance of the information to the NRC during the accident, whether it was required by the Commission, and whether it would have influenced the Commissioner's actions, are relevant factors for this Board to consider in determining if the two statements in the mailgram are accurate.

The former Commissioners' testimony demonstrates information within licensee's possession which should have been reported to the Commission and how the Commission and the NRC Staff would have responded to such information. Therefore this information does rise to the level of "some evidence."³

³GPU has argued that Mr. Bradford and Dr. Gilinsky's testimony as to how they and the other Commissioners would have responded to such information is "speculative." A review of Mr. Bradford's testimony indicates that he states clearly that his opinion is not speculation but based on the NRC Staff's actual response to "much less alarming information" received on March 30, and the Commission's actions in learning this "much less alarming" information. Bradford Deposition at 30.

- C. Former Commissioners Bradford and Gilinsky's opinions on the issues before this Board are probative but not binding.

GPU has further argued that former Commissioners Bradford and Gilinsky cannot offer opinions on the ultimate issue before this Board of whether Mr. Dieckamp knew or should have known that his mailgram was inaccurate and whether this reflects on his and licensee's integrity. Yet licensee offers Mr. Dieckamp's conclusion on this very issue. GPU also offers the opinion testimony of William Lowe on Mr. Dieckamp's integrity.

Therefore, TMIA has the right to present testimony of two former NRC Commissioners to whom Mr. Dieckamp's reporting obligations ran. Dr. Gilinsky in fact was an addressee of the mailgram, and has additionally specific information about a conversation with Mr. Dieckamp a short time prior to the mailgram; Mr. Dieckamp's state of mind at the time of sending the mailgram; the meaning of the mailgram, as he, the addressee, interpreted it; and potentially the reason Mr. Dieckamp sent him the mailgram. Any communication involves two parties, in this case Mr. Dieckamp who sent the mailgram, and the NRC officials who received it. GPU is presenting evidence as to the motivation and intention of Mr. Dieckamp in sending the mailgram. Similarly, TMIA must be permitted to present testimony of the agency officials who received Mr. Dieckamp's

mailgram, relied on it, examined both the mailgram, and ultimately whether the mailgram itself reflected on Mr. Dieckamp's integrity.

Certainly no witness' testimony is binding on this Board which is charged with making an independent inquiry and well-reasoned decision on this issue. Nevertheless both GPU and TMIA must be permitted the opportunity to present witnesses with relevant and probative evidence, including opinions on the ultimate question before the Board.

II. THE ETHICS IN GOVERNMENT ACT DOES NOT BAR THE TESTIMONY OF FORMER COMMISSIONERS BRADFORD AND GILINSKY.

The Ethics in Government Act on its face does not apply to the testimony under oath of witnesses in an NRC proceeding. First, neither former Commissioner Bradford nor former Commissioner Gilinsky fall within the prohibition of 18 U.S.C. § 207(a). Neither through his testimony "intends to influence [the NRC] by oral or written communication" on behalf of TMIA.

This provision of the Act applies to attorneys or agents for parties in adjudicatory proceedings, but not mere witnesses. See In re Asbestos Cases, 514 F. Supp. 914, 917 n.2 (D.Va. 1981).

The purpose of the statute has been clearly stated in the Act's legislative history. The Act's objective

is that "former officers shall not be permitted to exercise undue influence over former colleagues, still in office in matters pending before the agencies..." S.Rep. No. 95-170, 95th Cong., 2nd Sess., reprinted in 1978 U.S.Code Cong.&Ad.News 4248. Former government officials are not permitted to "utilize information on specific cases gained during government service for their own benefit or that of private clients." Id. at 4247.

The Act strengthened the provisions of the pre-existing ethics legislation in order to resolve the "revolving door" problem, that is, officials, "who become advocates for and advisors to the outside interests they previously supervised as government employees." Id. at 4248.

The Joint Explanatory Statement of the Committee on Conference states that this provision includes "appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise." H.Con.R. No. 95-1756, 95th Cong., 2nd Sess., reprinted in 1978 U.S.Code Cong. & Ad.News 4390. The Act addresses those former employees and officials who appear as agents, attorneys or professional representatives of private entities they formerly regulated. Neither Mr. Bradford nor Dr. Gilinsky is testifying in any such capacity. Mr. Bradford made clear in his deposition that he was testifying pursuant to a request by TMIA counsel but that he had little idea how his testimony fit in TMIA's

case and that he would honor a similar request by any other party. Similarly, Dr. Gilinsky is expected to testify as to matters within his personal knowledge as a former NRC Commissioner. Obviously TMIA has not retained or otherwise hired either so as to trigger the application of the Act. In fact TMIA has not prefiled written testimony on behalf of either former Commissioner because of the nature of its relationship with both. TMIA has simply requested their testimony in areas relevant to the issues before this Board.

Further, even if section 207(a) were found to apply to former Commissioners' Gilinsky and Bradford's testimony, section 207(h) excepts testimony under oath from the prohibition of section 207(a).⁴

The legislative history states that this section was intended to list "exceptions" to sections 207(a), (b) and (c). Id. at 4392.

GPU cites regulations promulgated by the Government Ethics Office to argue that opinions offered by Commissioner Bradford in his testimony may not be introduced. First, insofar as this regulation contravenes the clear meaning of section 207(h) it must fail since it cannot contradict

⁴Section 207(h) provides in relevant part:

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or making statements required to be made under penalty or perjury.

its authorizing statute, which specifically excepts "testimony under oath" from section 207(a) prohibitions.

Second, the regulation on its face does not apply to former Commissioner Bradford's testimony in that he did not testify on TMIA's behalf as an expert witness. He testified only insofar as he was qualified to offer opinions from his experience as an NRC Commissioner and a law school graduate. He stated his willingness to testify if requested by any party to an NRC proceeding.

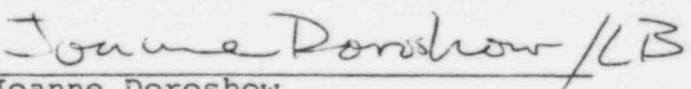
Third, the opinions which Mr. Bradford stated in his deposition are based on his personal knowledge, as that term is normally construed, Licensee's novel interpretation of "personal knowledge" to exclude all knowledge gained from speaking to individuals with relevant information or from reading reports and documents has no basis in law. Mr. Bradford has personal knowledge of all facts on which he based his opinions, in particular, the manner of operation of the agency during the accident; the condition of the TMI-2 reactor and events occurring on March 28, 1979; licensee's obligations to the Commission; and the actions the Commission and NRC Staff took in response to the information they received from licensee about the TMI-2 accident. Therefore, all opinions he offered in the deposition were based on his personal knowledge and are admissible even if the Board finds that this regulation applies.

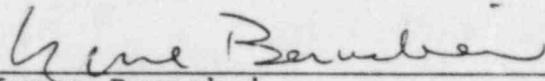
Finally, the regulations promulgated by the Government Ethics Office are merely guidance to the agencies, 5 CFR 737.1(a) Only the NRC's specific regulations implementing the Act are binding. These regulations do not restrict the application of section 207(h) as does 5 CFR 737.19, and therefore supersedes the Government Ethics Office regulations. See 10 CFR § 0.735-26, 27. Given the specific NRC regulations which are silent as to any restrictions on the broad § 207(h) exception of "testimony under oath" from coverage of the Act, and that this interpretation conforms to the plain meaning of § 207(h) and the Act's legislative history, TMIA urges this Board to find that 5 CFR 737.19 does not apply to testimony of former NRC officials in adjudicatory proceedings.

III. CONCLUSION

In accordance with the above arguments, TMIA requests that this Board grant its motion to admit the deposition testimony of Peter A. Bradford, and permit the presentation of the testimony of Dr. Gilinsky on the subject matters outlined by TMIA in its motion.

Respectfully submitted,


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DATED: November 9, 1984

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

I hereby certify that a copy of the foregoing TMIA'S Reply Reply to Licensee's Response to TMIA's Motion for Leave to Present Testimony of Victor Gilinsky Without Prefiling Written Testimony and to Response to TMIA's Motion to Admit Deposition of Peter A. Bradford as Testimony has been served this 9th day of November, 1984, by mailing a copy first-class postage prepaid to the following:

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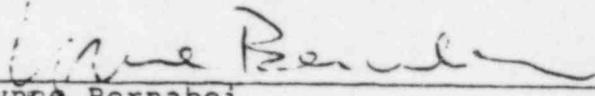
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* Served by hand.