

STAFF
3/6/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
15110

*85 MAR -8 AM 11:06

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

Docket No. 50-289 *SP*
(Restart Remand
on Management)

NRC STAFF'S RESPONSE TO THREE MILE ISLAND
ALERT'S MOTION TO STRIKE PORTIONS OF
LICENSEE'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON THE DIECKAMP MAILGRAM ISSUE

I. INTRODUCTION

On February 19, 1985, Intervenor Three Mile Island Alert (TMIA) moved, 1/ pursuant to 10 C.F.R. § 2.730, to strike 2/ portions of Licensee's Proposed Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision on the Dieckamp Mailgram, January 28, 1985.

-
- 1/ Three Mile Island Alert's Motion to Strike Portions of Licensee's Proposed Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue, February 19, 1985 (TMIA Motion).
 - 2/ Licensee argues that whether or not the excerpted portions of its findings are supported by the evidence of record, no portion of its proposed findings should be stricken. Licensee's Response to Three Mile Island Alert's Motion to Strike Portions of Licensee's Proposed Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue, March 1, 1985, at 7 (Licensee Response). Rather, Licensee argues that in the event the Licensing Board concludes that the challenged portions of its findings are not in evidence, the Board should simply ignore those proposed findings. Id. The Staff does not believe that the question of the appropriateness of a motion to strike is particularly important or necessary to resolve. Rather, the important consideration is whether the challenged citations in Licensee's proposed findings are correctly relied upon by Licensee and may be properly relied upon by the Licensing Board.

DS07

Specifically, TMIA requests that the Board strike that portion of Licensees' proposed finding ¶ 37 which excerpts, in part, a portion of TMIA's September 26, 1984 deposition of Hugh McGovern in this proceeding.^{3/} For the following reasons, the Staff believes that the Licensing Board should not rely on the McGovern deposition excerpt in making its findings on the mailgram issue.

II. DISCUSSION

TMIA argues that because the McGovern deposition was not included in the Joint Mailgram Exhibit 1(c) and never admitted into evidence, Licensee cannot properly rely on the deposition in its proposed findings. TMIA Motion at 2-3. While it is not entirely clear from the evidentiary record whether the McGovern deposition was received into evidence, certain on-the-record discussions suggest to the Staff that, in fact, the Licensing Board may have intended to admit the McGovern deposition into evidence. For example, when notified by Licensee of its intention to refer in proposed findings to the McGovern deposition, the Board heard arguments from Licensee and TMIA regarding the relevance of the McGovern deposition and the timeliness of Licensee's notification. Tr. 29,450-51; 29,456-59; 29,535-42. Moreover, with respect to the September 26, 1984

^{3/} In addition, TMIA requests that footnote 21 of Licensee's proposed finding ¶ 131 also be stricken as unsupported by the evidence of record in this proceeding. The Staff did not adopt this footnote in its proposed findings because the Staff concluded it was unnecessary to the Board's resolution of the remanded mailgram issue. Consequently, while the Staff does not believe the Board should adopt Licensee's proposed footnote 21, the Staff takes no position on TMIA's motion in this regard.

McGovern deposition in particular, and the issue of Joint Mailgram Exhibit references in general, the Board stated:

And it will be our tendency to allow in the information that you [Licensee] are notifying. But we recognize Ms. Bernabei's argument that perhaps it should have been done while Mr. Dieckamp was there.

Well, with this particular narrow thing, no problem. If she feels that she was hurt by your [Licensee's] failure to do it on redirect, or when Mr. Dieckamp was here, no problem. He can come back, you know, for that purpose.

*

*

*

So, in general, your Notification is accepted. Now we have particular questions about it.

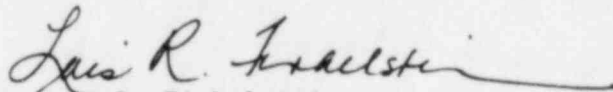
Tr. 29,541-42 (Judge Smith). These discussions suggest that the Licensing Board may have intended to admit the McGovern deposition into evidence. However, as licensee points out, it is not at all clear whether the McGovern deposition excerpt was admitted in fact. Licensee Response at 7. Therefore, in view of the lack of clarity in the record regarding the Licensing Board's intention to admit into evidence the McGovern deposition, the Staff believes that the better course of action would be that the Board not rely on this deposition excerpt.

If the Board, however, wishes to make the finding proposed by Licensee's ¶ 37, namely McGovern's explanation of a statement made in his March 29, 1979 chronology, the Staff notes that there is in evidence a different deposition of McGovern which does support that proposed finding. In that event, the Licensing Board can and should rely on that portion of the May 4, 1979 Metropolitan Edison interview of McGovern contained in Joint Mailgram Exhibit 1(c)(21) at 7-8 admitted into evidence for the proposition stated in Licensee's proposed finding ¶ 37.

III. CONCLUSION

For the reasons set forth above, the Staff believes that the Licensing Board should not rely on TMIA's September 26, 1984 deposition of Hugh McGovern in making its findings. If, however, the Board wishes to make the finding proposed by Licensee's ¶ 37, the Board may properly rely upon the May 4, 1979 Metropolitan Edison interview of Mr. McGovern.

Respectfully submitted,



Lois R. Finkelstein
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of March, 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
(Restart Remand
on Management)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THREE MILE ISLAND ALERT'S MOTION TO STRIKE PORTIONS OF LICENSEE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DIECKAMP MAILGRAM ISSUE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 6th day of March, 1985:

*Ivan W. Smith
Administrative Law Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Thomas Gerusky
Bureau of Radiation Protection
Dept. of Environmental Resources
P. O. Box 2063
Harrisburg, PA 17120

*Sheldon J. Wolfe
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George F. Trowbridge, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, NW
Washington, DC 20036

*Mr. Gustave A. Linenberger, Jr.
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas Y. Au, Esq.
Office of Chief Counsel
Department of Environmental Resources
505 Executive House, P.O. Box 2357
Harrisburg, PA 17120

Ms. Marjorie Aamodt
R.D. #5
Coatesville, PA 19320

Michael W. Maupin, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Mr. Marvin I. Lewis
6504 Bradford Terrace
Philadelphia, PA 19149

Mr. C. W. Smyth, Manager
Licensing TMI-1
Three Mile Island Nuclear Station
P. O. Box 480
Middletown, PA 17057

Ms. Jane Lee
183 Valley Road
Etters, PA 17319

Allen R. Carter, Chairman
Joint Legislative Committee on Energy
Post Office Box 142
Suite 513
Senate Gressette Building
Columbia, South Carolina 29202

Chauncey Kepford
Judith Johnsrud
Environmental Coalition on Nuclear Power
433 Orlando Avenue
State College, PA 16801

Ms. Frieda Berryhill, Chairman
Coalition for Nuclear Power Plant
Postponement
2610 Grendon Drive
Wilmington, Delaware 19808

Mr. Henry D. Hukill
Vice President
GPU Nuclear Corporation
Post Office Box 480
Middletown, PA 17057

Michael McBride, Esq.
LeBoeuf, Lamb, Leiby & McRae
Suite 1100
1333 New Hampshire Avenue, NW
Washington, DC 20036

William S. Jordan, III, Esq.
Harmon, Weiss & Jordan
2001 S Street, NW
Suite 430
Washington, DC 20009

Lynne Bernabei, Esq.
Government Accountability Project
1555 Connecticut Ave., NW
Washington, DC 20009

Jordan D. Cunningham, Esq.
Fox, Farr and Cunningham
2320 North 2nd Street
Harrisburg, PA 17110

Louise Bradford
Three Mile Island Alert
1011 Green Street
Harrisburg, PA 17102

Ms. Ellyn R. Weiss
Harmon, Weiss & Jordan
2001 S Street, NW
Suite 430
Washington, DC 20009

*Gary J. Edles
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20036

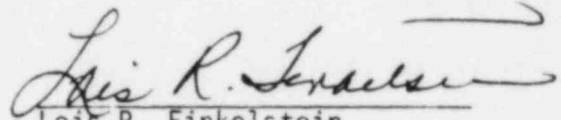
*Christine N. Kohl
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Reginald L. Gotchy
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety & Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Lois R. Finkelstein
Counsel for NRC Staff