November 8, 1984

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
	)	(Restart Remand
	)	on Management)
(Three Mile Island Nuclear Station, Unit No. 1)	)	

LICENSEE'S RESPONSE TO
TMIA'S MOTION TO ADMIT DEPOSITION
OF PETER A. BRADFORD AS TESTIMONY

On November 1, 1984, TMIA moved the Licensing Board to admit as evidence the deposition of former Nuclear Regulatory Commissioner Peter A. Bradford taken by TMIA on October 23, 1984. Licensee opposes the motion for the reasons stated below. We address first the question of admitting Mr. Bradford's deposition without producing Mr. Bradford as a witness. Second we challenge the admissibility and probative value of Mr. Bradford's testimony. Lastly, we argue that the submission of Mr. Bradford's deposition to the Licensing Board would be a violation of the Ethics in Government Act of 1978.

A. Admission of Mr. Bradford's Deposition Without Producing Mr. Bradford as a Witness

The admission of Mr. Bradford's deposition in evidence in lieu of producing Mr. Bradford as a witness is not supported by NRC regulations or federal rules of civil procedure. It would also be prejudicial to licensee and inconsistent with the Board's independent responsibility for the adequacy of the record on the mailgram issue.

The NRC rules of practice do not define the circumstances under which depositions may be admitted in evidence. The applicable NRC rule, 10 C.F.R. 2.740 a (g), merely states that

> A deposition will not become part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

In a situation in which there is no applicable NRC rule, it is appropriate under established NRC case law for the Board to turn to the federal rules of civil procedure for guidance, but only after determining "whether the situation before it is analogous to the situation the federal rule governs and whether the policy rationale underlying the federal rule is persuasive." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), 17 NRC 971, 978 (1983). TMIA argues that the admissibility of Mr. Bradford's testimony should be governed by Fed.R.Civ.P. 32(a)(3) which provides in part:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (b) that the witness is at a distance greater than 100 miles from the place of trial or hearing . . . or (d) that the party offering the deposition has been unable to procure the attendance of a witness by a subpoena.

TMIA maintains that the policy underlying this rule is "to save the time, effort and money of the litigants and to expedite trials." Licensee strongly disagrees with TMIA's characterization of the rationale underlying this rule.

Contrary to TMIA's assertion, the policy underlying Rule 32(a)(3) is to allow the use of deposition testimony as a substitute for the appearance of a witness when the witness is "unavailable" either because he is beyond the reach of the subpoena power of the court, or because requiring him to appear would cause the witness undue inconvenience. United States v. I.B.M. Corp., 90 F.R.D. 377 (S.D.N.Y. 1981). 1/ It has long been recognized that "the deposition always has been, and still is, treated as a substitute, a second-best, not to be used when

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1/ The I.B.M. court noted that the drafters of Rule 32(a)(3) "apparently had two related objectives in designing the 100 mile rule as it now stands. One was to permit deposition use when a witness was beyond the subpoena power of the court. The other was to permit deposition use when the deponent would be unduly inconvenienced by requiring his presence at trial . . ." TMIA claims that it will be put to undue expense if Mr. Bradford is required to appear. The policies underlying Rule 32(a)(3) identified by the I.B.M. court make it clear that expense or inconvenience to a party is irrelevant to the question of whether a witness' deposition is admissible.

the original is at hand." Napier v. Bossard, 102 F.2d 467 (2d Cir. 1939). This principle has been often recognized and reaffirmed. See, e.g., Salsman v. Witt, 466 F.2d 76 79 (10th Cir. 1972) ("testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is unavailable to testify in person"); see also Newburger, Loeb and Co. v. Gross, 365 F.Supp. 1364, 1370 (D.C.N.Y. 1973); Hotel Constructors, Inc. v. Seagrave Corporation, 543 F.Supp. 1048, 1051 (N.D.Ill. 1982). Thus, policy considerations strongly suggest that Mr. Bradford's deposition testimony should not be admissible if his personal appearance at this hearing can be obtained. Nevertheless, TMIA maintains that Mr. Bradford's testimony should be admissible because (1) he is not reachable by NRC subpoena, and (2) he will be much further than 100 miles from Harrisburg during the entire length of the hearings.

First, contrary to TMIA's suggestion, Mr. Bradford is within the subpoena power of the NRC. 42 U.S.C. § 2201(c) provides in part:

> In the performance of its functions the Commission is authorized . . . (c) . . . by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place.

TMIA makes the dubious assertion that this provision is "vague" and that the 100 mile limit on federal subpoenas should therefore apply. In fact, the statute is not vague; no reasonable

reading of its language permits the conclusion that the NRC subpoena power is limited to 100 miles from the place at which the hearing is being held. Moreover, this language is also the source of the authority to compel witnesses to appear for depositions, -- authority which TMIA has already invoked to compel the appearance of deponents from distances greater than 100 miles. Having done so, TMIA has little credibility when it claims that the NRC subpoena power is limited to 100 miles in order to demonstrate that Mr. Bradford is not reachable by subpoena.

Second, the fact that Mr. Bradford will be more than 100 miles from Harrisburg at all times during this hearing does not demonstrate that he will be so inconvenienced as to justify allowing his deposition in evidence in lieu of his personal appearance. Rule 32(a)(3)'s 100 mile limit as a measure of inconvenience to potential witnesses was established in 1938 when travelling over 100 miles would be substantially more inconvenient than it is today. In addition, Mr. Bradford said himself that he would make every effort to appear at this hearing if subpoenaed. During his deposition taken on October 23, 1984, Mr. Bradford stated, in response to a question by NRC staff counsel as to whether he would appear if subpoenaed:

> I would do my best. We are under what we are told are billion dollar deadlines to decide whether or not our utilities can stay in Seabrook by roughly the first of December, and I am trying to protect my ability to participate in those decisions.

Beyond that, I would certainly make every effort to.

Any inconvenience which Mr. Bradford may experience by appearing should be balanced against the strong policy reasons which favor the appearance of witnesses at hearings whenever possible. Thus, the facts of this case and the policy reasons underlying Rule 32(a)(3) suggest that Mr. Bradford's deposition testimony should not be admissible.

Finally, TMIA argues that Licensee and the NRC staff would not be prejudiced by the use of Mr. Bradford's deposition because they were represented by counsel at the deposition and had an opportunity to question him. As stated by another Licensing Board, "[c]ross-examination during a deposition, which might suffice under truly exceptional circumstances, is not otherwise a ready substitute for cross-examination before a presiding officer." Consolidated Edison Company of New York (Indian Point, Unit No. 2), 17 NRC 1117, 1120 (1983). The circumstances present in this proceeding reinforce the need for cross-examination before the Licensing Board if Mr. Bradford's testimony is to be received. Licensee's and staff counsel objected to a large portion of the questions put to Mr. Bradford. It is unreasonable to expect Licensee's and staff counsel to have pursued extensive cross-examination in the absence of a ruling by the Board on the objections. Further, Licensee would be deprived of the opportunity contemplated by the NRC's Rules

of Practice and by the Board's Memorandum and Order of September 19, 1984, to review written direct testimony in advance of the hearing and to prepare carefully for cross-examination. TMIA's proposed use of Mr. Bradford's deposition testimony also ignores the Board's special responsibility to this proceeding to satisfy itself as to the adequacy of the record and the fact that the Board would have no opportunity to put its own questions to Mr. Bradford. Consequently, Mr. Bradford's deposition testimony should not be admitted.

B. Admissibility and probative value of Mr. Bradford's testimony.

Leaving aside the question of the relevance of much of Mr. Bradford's deposition to the issues in this proceeding, Mr. Bradford's testimony consists in large part of his personal opinions on the very issues which this Licensing Board is to decide and falls outside the bounds of allowable opinion evidence.

In any event, Mr. Bradford's qualifications as an expert have not been established. TMIA's listing at page 6 of its motion of Mr. Bradford's credentials neither qualify him as an expert nor provide a basis for opinion testimony. Neither his "general knowledge" of NRC regulations and procedures at the time of the accident or his "specific knowledge" of NRC

requirements about licensee reporting add anything to the proceeding. NRC's regulations and license conditions speak for themselves. 2/ His knowledge of the manner in which the Commission and NRC Staff operated to make decisions about the accident have nothing to do with the mailgram issue. His "specific knowledge of the facts of the TMI-2 accident" consist by his own admission only of what he has been told or read about the accident. (Bradford deposition, Tr. 68-70). His "specific knowledge and analysis of NUREG-0760" does not mean that Mr. Bradford has any special expertise in analyzing that report. Finally, the fact that Mr. Bradford reviewed three documents made available to him by TMIA and which are attached to his deposition adds nothing to his credentials.

C. The Ethics in Government Act.

Section 207(a) of the Ethics in Government Act of 1978 (18 U.S.C 207) contains the following prohibition:

> (a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance

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2/ The issue in this proceeding in any event is the Dieckamp mailgram, not general reporting requirements or the adequacy of Licensee's reporting of the accident.

before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to---

> (1) any department, agency, court, court-martial or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
>
> (2) in connection with any judicial or other proceeding, application, request for a ruling or or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
>
> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed. . .

shall be fined not more than $10,000 or imprisoned for not more than two years, or both. (Emphasis supplied)

There can be no question that Mr. Bradford falls within the category of persons to whom the prohibition applies. He is a former Nuclear Regulatory Commissioner; 3/ his deposition is being offered in an NRC adjudicatory hearing in which the NRC Staff is a party and in which the Commission has an interest;

3/ Part 0 of the Commission's regulations make it clear that for purposes of the statutory prohibitions of the Ethics in Government Act a former Commissioner is a former officer and employee within the meaning of that Act. 10 C.F.R. 0. 735-4(c) and 0.735-26.

and he participated as a former Commissioner in a number of decisions with respect to the TMI-1 restart proceeding.

Licensee submits that it is equally clear that his deposition is being offered on behalf of a person other than the United States with intent to influence the decision of the Licensing Board. TMIA is the party who took Mr. Bradford's deposition and who has moved to put his deposition in evidence, and Mr. Bradford was informed prior to the taking of his deposition by TMIA of TMIA's intent to do so. (Bradford deposition, Tr. 66). It is ridiculous to suggest, particularly given the nature of the opinions he has expressed, that Mr. Bradford did not intend that his deposition influence the Licensing Board's decision. Mr. Bradford's protestations to the contrary, stating that he "will not be making a recommendation to the Commission," would deprive Section 207(a) of the Ethics in Government Act of any meaning. (Bradford deposition, Tr. 26). For what other purpose does Mr. Bradford offer his personal opinion that Mr. Dieckamp's mailgram was inaccurate, that he should have known so, and that he should have corrected the mailgram (Bradford deposition, Tr. 46-50)?

Subsection 207(h) of the Ethics in Government Act contains the following exception to the Act's prohibitions:

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

Regulations published by the Government Ethics Office explain, however, the narrow scope of this exemption:

> § 737.19 Testimony and statements under oath or subject to penalty of perjury.
>
> (a) Statutory basis. Section 207(h) provides:
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> "Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury."
>
> (b) Applicability. A former Government employee may testify before any court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. 207(a), (b), or (c) to testify on behalf of another as an expert witness except: (1) To the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise, or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same subject to be obtained by other means, and that the former Government employee's testimony is required in the interest of justice.(5 C.F.R. 737.19) (Emphasis supplied)

Thus the exemption covers only factual testimony as to occurrences within the personal knowledge of Mr. Bradford. Most of Mr. Bradford's deposition consists of personal opinions, not occurrences within his personal knowledge, and the small portion which relates to the activities of the Commissioners and Staff at the time of the TMI-2 accident is irrelevant to the mailgram issue.

D. Conclusion.

For all of the reasons stated above, TMIA's motion to admit the deposition of Mr. Bradford in evidence should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

George F. Trowbridge, P.C.
Counsel for Licensee

Dated: November 8, 1984

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NUCLEAR REGULATORY COMMISSION

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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to TMIA's Motion to Admit Deposition of Peter A. Bradford as Testimony," dated November 8, 1984, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, or where indicated by an asterisk (*), by hand delivery, this 8th day of November, 1984.

George F. Trowbridge, P.C.

Dated: November 8, 1984

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