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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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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)

NRC STAFF'S RESPONSE TO THREE MILE ISLAND
ALERT'S MOTION FOR DIRECTED CERTIFICATION
OF LICENSING BOARD'S RULINGS EXCLUDING TESTIMONY
OF FORMER NRC COMMISSIONERS BRADFORD AND GILINSKY

Mary E. Wagner
Counsel for NRC Staff

November 28, 1984

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I. INTRODUCTION

On November 19, 1984, Three Mile Island Alert (TMIA) filed a motion ^{1/} and supporting memorandum ^{2/} requesting that the Appeal Board direct certification of Licensing Board rulings on TMIA's proffered testimony of former NRC Commissioners Peter Bradford and Victor Gilinsky in the captioned proceeding. Specifically, TMIA asks that the Appeal Board consider and reverse the Licensing Board's order excluding the testimony of former Commissioners Bradford and Gilinsky in the portion of the captioned proceeding on the remanded Dieckamp mailgram issue and that

^{1/} Three Mile Island Alert's Motion for Directed Certification on Exclusion of Testimony of Former NRC Commissioners Peter Bradford and Victor Gilinsky, November 19, 1984.

^{2/} Three Mile Island Alert's Memorandum of Points and Authorities in Support of Motion for Certification of Order Barring Gilinsky and Bradford Testimony, November 19, 1984 (TMIA Memorandum).

the Appeal Board determine whether the Ethics in Government Act ^{3/} precludes the admission into evidence of proposed opinion testimony of these former Commissioners. For the reasons set forth below, the NRC Staff opposes TMIA's motion.

II. BACKGROUND

On November 1, 1984, TMIA filed a motion requesting that the Licensing Board in the remanded proceeding on the Dieckamp mailgram issue admit into evidence the deposition of former Commissioner Peter Bradford taken by TMIA on October 23, 1984. Arguing that Mr. Bradford would be "unavailable" to testify at hearing and that his deposition is "probative of the main issues" before the Licensing Board on the Dieckamp mailgram matter, TMIA requested that the Bradford deposition be admitted into evidence in lieu of Mr. Bradford's actual appearance and live testimony at hearing. ^{4/}

On that same date, TMIA filed a separate motion requesting leave to present the testimony of former Commissioner Victor Gilinsky without the need to prefile written testimony as otherwise required by 10 CFR § 2.743. In its motion, TMIA outlined in general terms the areas of

^{3/} 18 U.S.C. 207.

^{4/} Three Mile Island Alert's Motion to Admit Deposition of Peter A. Bradford as Testimony of Unavailable Witness, November 1, 1984.

Dr. Gilinsky's proposed testimony, ^{5/} argued that such testimony would be relevant and material to the Dieckamp mailgram issue, indicated that Dr. Gilinsky was unwilling to provide prefiled written testimony, and asserted that, because TMIA had generally outlined the areas in which Dr. Gilinsky would testify, no party would be prejudiced by the lack of prefiled written direct testimony.

Both of these motions were considered by the Licensing Board at a prehearing conference held on November 9, 1984. After apprising TMIA of the problems it had with each proposal and affording TMIA the opportunity to address its concerns, the Licensing Board denied both motions. As to the request to admit the Bradford deposition in lieu of actual testimony from Mr. Bradford at hearing, the Licensing Board found that the testimony in the deposition itself is not sufficiently reliable to be

5/ That testimony generally was to encompass:

- (1) Dr. Gilinsky's discussions with Mr. Dieckamp during a May 7, 1979 TMI site tour of the pressure spike and of reporting the pressure spike and other information to the Commission;
- (2) Dr. Gilinsky's understanding and interpretation of the Dieckamp mailgram;
- (3) Dr. Gilinsky's post-accident discussions with Mr. Dieckamp and other licensee officials concerning reporting of the pressure spike, the hydrogen burn and core damage to the NRC; and
- (4) Dr. Gilinsky's views as to licensee's reporting obligations and how he and the full Commission would have reacted to information about key parameters reflecting the TMI-2 reactor's condition.

Three Mile Island Alert's Motion for Leave to Present Testimony of Victor Gilinsky on Dieckamp Mailgram Issue Without Prefiling Written Testimony, November 1, 1984, at pp. 4-5.

admitted without probing through cross examination (Tr. 27850), ^{6/} that Mr. Bradford has no particular expertise to offer expert opinions on which the Board might rely (Tr. 27842, 27843, 27850-51), and that, in any event, the testimony in the deposition proffered by TMIA is not clearly relevant and material to the issues which the Board must decide and is not needed by the Board to resolve those issues. (Tr. 27848). Separate and apart from this basic evidentiary ruling, the Board also found that the proffered opinion testimony of a former Commissioner would run counter to the Ethics in Government Act ^{7/} and that the deposition should be rejected on that additional basis. As to the request to permit the oral testimony, without prefiled written testimony, of former Commissioner Gilinsky, the Licensing Board found that TMIA had failed to sufficiently particularize and show the relevance of and the need for the proposed factual testimony (Tr. 27865-66, 27892). ^{8/} The Board rejected the proffered Gilinsky opinion testimony (on licensee's reporting obligations and on how the Commission would have reacted to information on TMI-2 plant parameters) on the same grounds as it rejected the proffered opinion testimony of former Commissioner Bradford (Tr. 27866)

^{6/} The Board found that much of the deposition testimony demonstrated that Mr. Bradford was unaware of the issues he was addressing or the context in which he was being questioned. Tr. 27850.

^{7/} Specifically, the Board found that the apparent principal purpose in presenting Mr. Bradford's non-expert opinion testimony is to lend credibility to such opinions through Mr. Bradford's status as a former Commissioner, and that the Ethics in Government Act would not permit that sort of testimony. Tr. 27841, 27843, 27851-52.

^{8/} The Board did not rely on Ethics in Government Act provisions to deny the TMIA motion insofar as the proffered Gilinsky testimony on factual matters is concerned. Tr. 27865.

-- i.e., the witness has no particular expertise that would allow him to offer expert opinions on which the board might justifiably rely (Tr. 27842, 27843). ^{9/}

It is these rulings as to which TMIA seeks directed certification and Appeal Board reversal. Because TMIA seeks expedited consideration of its motion for directed certification, responses to TMIA's motion are due to the Appeal Board by November 28, 1984.

III. ARGUMENT

A. TMIA Has Not Satisfied The Requirements For Directed Certification

1. The Requirements For Directed Certification

Under the provisions of 10 C.F.R. § 2.718(i) and § 2.785(b), Atomic Safety and Licensing Appeal boards have the power to direct the certification of legal issues raised in proceedings still pending before licensing boards. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). Because Commission policy does not favor appellate examination of interlocutory rulings, exceptional circumstances must first be demonstrated before an Appeal Board will exercise its discretionary powers to direct certification of an issue under 10 C.F.R. § 2.718(i). Id. at 483. Discretionary interlocutory review is reserved for important licensing rulings that, absent immediate appellate review, would either (1) threaten the party

^{9/} Although it is not entirely clear (see Tr. 27866), the Board presumably rejected the proffered Gilinsky opinion testimony on Ethics in Government Act grounds also.

adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal; or (2) affect the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). "In sum, a licensing board may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a 'final' licensing board decision." Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).

The only other method of justifying this extraordinary appellate review is by a showing that there exists a "crucial issue" involving "a significant legal or policy question . . . on which Commission guidance is needed." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981). The Staff is aware of only one instance where this method of seeking interlocutory review has been allowed by an Appeal Board. That referral was allowed based on the Appeal Board's findings that: (1) the issue was a generic issue which involved the interpretation of 10 C.F.R. § 2.714(b) (the circumstances in which a Licensing Board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by 10 C.F.R. § 2.714(b)); (2) the issue had not been squarely addressed on an appellate level; (3) the issue had "immediate recurring importance" but would escape appellate scrutiny once the initial decision was issued; and (4) the issue was legal in character. Duke Power Company (Catawba

Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465 (1982), vacated in part, CLI-83-19, 17 NRC 1041 (1983).

Thus, a petitioner seeking directed certification of a Licensing Board's decision must satisfy one of the two tests established in Marble Hill, supra, or demonstrate the existence of a "crucial issue" on which Commission guidance is needed in accordance with the guidance established by the Appeal Board in Catawba, supra.

2. TMIA Has Failed To Demonstrate That Certification Is Justified Based On The Marble Hill Decision

TMIA only addresses the second prong of the Marble Hill test -- that Appeal Boards will undertake discretionary interlocutory review "only where the ruling below . . . affected the basic structure of the proceeding in a pervasive or unusual manner." Marble Hill, supra, at 1192. TMIA argues that the Board's foreclosure of testimony by former Commissioners Bradford and Gilinsky effectively permits only the Licensee to present evidence on Mr. Dieckamp's obligation to report information to the Commission and the accuracy of his mailgram, and effectively permits only the Licensee's testimony as to Mr. Dieckamp's integrity and the significance of the mailgram in terms of corporate integrity. See TMIA Memorandum at 14. Accordingly, TMIA claims the rulings "affect the basic structure of the proceeding in a pervasive manner." Id. In short, TMIA's claim amounts to no more than an assertion that it is prevented by the Board's rulings from presenting certain evidence it feels is relevant to the issue being litigated. As such, TMIA's claim is in no way distinguishable from other evidentiary rulings and does not merit interlocutory review.

The Board's rulings at issue here are routine evidentiary rulings of the sort made regularly in the course of an evidentiary proceeding -- the Board found against TMIA on simple grounds of relevance and the lack of demonstrated expertise of the proffered witnesses to testify on certain of the matters for which their testimony is offered. See Tr. 27,874. While the rulings may have the effect of shortening the proceeding, its effect is hardly "pervasive", and "unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a 'final' licensing board decision." Perry, supra.

Appeal Boards have been particularly reluctant to grant discretionary review where the question for which certification has been sought involves the admissibility of evidence. Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474 (1982). As the Appeal Board in Clinch River noted, the reason for this is apparent:

During the course of a lengthy and involved . . . proceeding, a licensing board almost inevitably will be called upon to make numerous determinations respecting what evidence is permissible and in what procedural framework it may be adduced. Were we to allow ourselves to be cast in the role of a day-to-day monitor of those determinations, we would have little time for anything else. Although the applicants urge that there are exceptional circumstances present here which warrant interlocutory involvement on our part, we do not perceive them. The most that can be said is that, if on review of the eventual initial decision we should conclude that the Board below was wrong, a new hearing might have to be ordered. But it is also possible that the ultimate result will moot the questions which the applicants would have us resolve immediately.

Clinch River, supra, quoting Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976).

Thus, the Appeal Board's disinclination to review interlocutory orders extends even to cases where a new hearing might eventually be ordered because the interlocutory ruling was in error. Indeed, as the Clinch River Appeal Board observed, the potential for appellate reversal is always present whenever a licensing board decides significant procedural questions adversely to the claims of one of the parties, and the Commission is presumed to have been aware of that fact when it chose to proscribe interlocutory appeals. Id. at 475.

The Licensing Board's basis for excluding the testimony of former Commissioners Bradford and Gilinsky is, essentially, that these former Commissioners have no expertise in the areas for which their opinion testimony is being offered, and that their testimony was not relevant to the proceeding. See, e.g., Tr. 27,841-844, Tr. 27,848-851. Such garden-variety evidentiary rulings by a licensing board simply do not rise to the level necessary for the Appeal Board to grant directed certification, and accordingly, TMIA's request for the extraordinary relief of directed certification should not be granted.

3. TMIA Has Failed To Demonstrate That Certification Is Justified Based On The Commission's Policy Statement

TMIA also argues in support of its Motion that the Board's application of the Ethics in Government Act, 18 U.S.C. § 207 (the Act), is a legal question of first impression for the Commission and "as such this issue involves a novel and important issue whose resolution is

required to protect the public interest and to avoid undue and serious prejudice to TMIA's interest." TMIA Memorandum at 14. ^{10/}

The Staff disagrees. The Licensing Board's ruling on the effect of the Ethics in Government Act does not meet the criteria contemplated by the Commission in its Policy Statement and does not merit the extraordinary review sought here by TMIA. A look at the factors considered by the Appeal Board in Catawba, supra, in its application of the Commission's Statement of Policy with regard to referrals and certification makes clear that the circumstances justifying certification are not extant here. While the question of the applicability of the Act appears to meet two of the Catawba standards (i.e. it is a legal issue and has not been squarely addressed at the appellate level), it does not satisfy the two other standards found necessary by the Appeal Board to justify interlocutory review. Catawba, supra.

There is not here the "significant" or "crucial" type of issue that existed in the Catawba case. The referred rulings on contentions in Catawba posed generic questions as to the circumstances in which a licensing board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by

^{10/} TMIA seems to be arguing that because the question is one of first impression for the Commission it therefore is a "novel and important" issue whose resolution is required. See TMIA Memorandum at 14. Needless to say, the fact that an issue is of first impression does not of itself mean it is important or that its resolution is required. Indeed, in the instant case there is no need to resolve the issue at all, since the Licensing Board's independent ruling excluding the testimony on common evidentiary grounds serves as a basis for affirming the decision below even if the Appeal Board should decide to direct certification on that ground.

10 C.F.R. § 2.714(b). That referral was therefore based on an issue which is faced routinely in almost every proceeding. No such issue exists in the instant proceeding. Furthermore, it is not the kind of issue which will escape appellate scrutiny once the initial decision has issued -- it then will be ripe for review, and a remedy exists to correct any error that has been committed. Thus, two of the four elements leading the Appeal Board to accept referral in the Catawba case are clearly lacking here.

Since the Board's ruling on the applicability of the Act was only one of two independent bases for ruling, Tr. 27,848, the ruling on the applicability of the Act was not necessary to the ultimate result reached, i.e., the exclusion of the proffered testimony of former Commissioners Bradford and Gilinsky. Since a ruling under the Act was not necessary to the Board's resolution of TMIA's Motions, it can hardly be said to be a "crucial issue" in this case involving a "significant legal or policy question" on which Commission guidance is needed. Thus, the test set forth in the Commission's Policy Statement (CLI-81-8) is clearly not met.

In sum, giving consideration to the above factors considered by the Appeal Board in Catawba regarding interlocutory review, TMIA has failed to demonstrate that the issue of whether the Board correctly applied the Ethics in Government Act to this proceeding is so "crucial" as to require immediate guidance through interlocutory appellate review.

B. On The Merits, The Licensing Board Rulings Do Not Require Reversal

1. The Board's Evidentiary Rulings Are Correct

a. The Board Properly Excluded Commissioner Bradford's Testimony On Evidentiary Grounds

The Licensing Board correctly found that Commissioner Bradford was within the reach of its subpoena power and further that he was available so that it would not be appropriate to receive his deposition testimony without his appearance.

The NRC's subpoena power extends nationwide and not, as TMIA argues, to only within 100 miles of the place of hearing. 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 produce documents, or both, at any designated place.

The statute in no way limits the NRC subpoena power to 100 miles nor would it be reasonable to read into it such a limitation.

Moreover, TMIA has made no showing that Mr. Bradford would be unavailable; indeed, during his deposition Mr. Bradford, in responding to a question posed by Staff counsel as to whether he would appear if subpoenaed, indicated that he would do his best to appear. Deposition of Peter Bradford, October 23, 1984, at 82-83.

The Board also found that Commissioner Bradford had no expertise with regard to the matter being litigated -- whether Mr. Dieckamp knew or should have known that the statements in his mailgram were false. Tr. 27,843. As for factual testimony, TMIA could point to no information that Mr. Bradford knew existed that was in the possession of Mr. Dieckamp and that was withheld. As for Mr. Bradford's asserted expertise as to

the reporting requirements at the time, the regulations themselves are the best evidence of a licensee's reporting obligations, not Mr. Bradford's opinion. Tr. 27,842. If Mr. Bradford's testimony at the hearing were to track his deposition, the Board correctly found that it would also be irrelevant for the same reasons. Tr. 27,850-51.

In short, the Board's exclusion of the proffered testimony of former Commissioner Bradford on the grounds that (a) he had no particular expertise to support the opinions in his proffered testimony and such opinions are not necessary for the Board to resolve the issues, and (b) the proffered testimony is not demonstrably relevant and material to the issues before the Board in any event is correct and should be affirmed.

b. The Board Properly Excluded Commissioner Gilinsky's Testimony On Evidentiary Grounds

The Licensing Board correctly held that, for the same reasons Mr. Bradford's opinion testimony is not relevant, Dr. Gilinsky's opinion testimony is not relevant as well. Tr. 27,855. If Dr. Gilinsky is being offered, by virtue of his status as a former Commissioner, to testify on the Commission's reporting requirements and the state of mind of his fellow Commissioners and how those Commissioners would have reacted, ^{11/} his testimony would not be admissible because it is neither relevant nor supported by any particular expertise or competence on Dr. Gilinsky's part to offer such opinions.

^{11/} This subject is the fourth subject area identified by TMIA as to which Dr. Gilinsky would present testimony. See fn. 5 supra.

Before excluding Dr. Gilinsky's testimony as a fact witness, the Board attempted, without avail, to ascertain some specifics of Dr. Gilinsky's testimony. Without such knowledge, the Board correctly reasoned, Licensee would not receive the notice to which it was entitled with regard to that testimony.

TMIA cites three subjects of testimony as evidence of "material and relevant" information in Dr. Gilinsky's possession. The first is a conversation between Dr. Gilinsky and Mr. Dieckamp during the Congressional site visit on May 7 about the subject of the mailgram. The second is Dr. Gilinsky's interpretation of the mailgram in the light of that conversation and in light of the fact that Dr. Gilinsky was himself a recipient of the mailgram. The third area is Dr. Gilinsky's post-accident discussions with Mr. Dieckamp and others concerning reporting of the pressure spike and other information to the Commission. Upon inquiry, however, TMIA was either unwilling or unable to reveal any of the substance of Dr. Gilinsky's testimony. Tr. 27,855-65. On the basis of the information presented to it, the Board could reasonably do nothing other than deny TMIA's motion for failure to demonstrate that Dr. Gilinsky possessed information that was relevant and material. ^{12/}

^{12/} The Staff took the position at oral argument on TMIA's motion that if TMIA could present specific information to the Board that demonstrated Dr. Gilinsky's knowledge of relevant and material facts necessary to a resolution of the issue, the Staff would not oppose Dr. Gilinsky's testimony, as a fact witness, on those factual matters. Tr. 27,869. Nothing in TMIA's Memorandum filed in support of the instant motion causes the Staff to believe that TMIA has now made such a showing.

In sum, the Board below correctly denied TMIA's Motion for Leave to Present the Testimony of Victor Gilinsky, on the grounds that no showing has been made that the testimony would be relevant, material or probative.

2. The Applicability of The Ethics In Government Act To This Case Need Not Be Reached

The Licensing Board ruled that opinion testimony by former Commissioners Bradford and Gilinsky would run contrary to the spirit of the Act. At oral argument before the Board, the Staff did not take a position on whether the Act precludes the opinion testimony of Mr. Bradford and Dr. Gilinsky, because that issue need not be reached. The Board has now held, as an independent basis for its rulings, that such testimony is irrelevant and the witnesses lack the expertise to allow them to offer expert opinions on which the Board might justifiably rely. For the reasons set forth above, the Staff supports the correctness of the Board's evidentiary rulings and accordingly continues to believe that a ruling on the effect of the Ethics in Government Act need not be made.

CONCLUSION

For the reasons set forth above, TMIA's Motion For Directed Certification is without foundation and should be denied.

Respectfully submitted,

Mary E. Wagner

Mary E. Wagner
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of November, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THREE MILE ISLAND ALERT'S MOTION FOR DIRECTED CERTIFICATION OF LICENSING BOARD'S RULINGS EXCLUDING TESTIMONY OF FORMER NRC COMMISSIONERS BRADFORD AND GILINSKY" 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, or, as indicated by double asterisks, by hand delivery, this 28th day of November, 1984:

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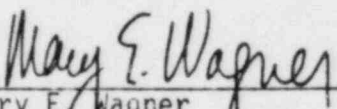
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