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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Gary J. Edles, Chairman
Christine N. Kohl

December 3, 1984
(ALAB-791)

In the Matter of	
METROPOLITAN EDISON COMPANY, et al.	Docket No. 50-289-SP (Restart Proceeding-Management Remand)
(Three Mile Island Nuclear Station, Unit 1)	

Joanne Doroshow and Lynne Bernabei, Washington, D.C., for intervenor Three Mile Island Alert.

Ellyn R. Weiss, Washington, D.C., for intervenor Union of Concerned Scientists.

George F. Trowbridge, Washington, D.C., for licensee Metropolitan Edison Company.

Mary E. Wagner for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

This proceeding is pending before the Licensing Board pursuant to our remand of certain issues, including the so-called Dieckamp mailgram.[1] On November 9, 1984, during the course of a prehearing conference, the Licensing Board ruled that it would not permit intervenor Three Mile Island Alert (TMIA) to introduce into evidence the testimony of

[1] See ALAB-772, 19 NRC 1193, 1265-68 (1984), stay denied, CLI-84-17, 20 NRC __ (Sept. 11, 1984), review granted, CLI-84-18, 20 NRC __ (Sept. 11, 1984).

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former NRC Commissioners Peter Bradford and Victor Gilinsky in connection with the Dieckamp mailgram issue. The Board's determination rested on several grounds, including unreliability, irrelevance, and inconsistency with the intent of the Ethics in Government Act.[2] That statute prohibits former federal officials from attempting to influence their former agencies with respect to particular matters in which they were personally and substantially involved while government employees.[3] The Licensing Board also denied TMIA's request to refer its ruling to us.[4]

TMIA has filed a motion seeking directed certification and reversal of the Board's determination.[5] We ordered the expeditious filing of responses to TMIA's motion.[6] The licensee and the NRC staff oppose the motion.[7] Intervenor

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[2] Tr. 27,832-76.

[3] 18 U.S.C. § 207(a).

[4] Tr. 27,874-75.

[5] TMIA invokes 10 C.F.R. § 2.771 as authority for its motion. That regulation, however, pertains to petitions for reconsideration of final decisions. Directed certification of interlocutory board rulings is pursuant to 10 C.F.R. §§ 2.718(i), 2.785(b)(1).

[6] Order of November 20, 1984 (unpublished).

[7] Curiously, the licensee confines its argument to the merits of the Licensing Board's evidentiary ruling. It does not address the standards for directed certification. Such omission could be construed as a waiver of any argument

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Union of Concerned Scientists (UCS) supports it. Upon consideration of the pleadings and the relevant record, we conclude that interlocutory appellate review of the Board's ruling is not warranted.

In deciding whether to exercise our directed certification authority, we consider whether a licensing board ruling either (1) threatens the party 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) affects the basic structure of the proceeding in a pervasive or unusual manner.[8] TMIA claims that the Board's ruling affects the basic structure of the proceeding in a pervasive manner because it effectively permits only the licensee to present evidence on some elements of the case.[9] TMIA also argues that the Board's reliance on the Ethics in Government Act to bar the testimony presents a legal issue of first impression. In

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regarding the propriety of directed certification. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

[8] Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 171 (1983), quoting Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

[9] TMIA Motion for Directed Certification (Nov. 19, 1984) at 14.

this connection, it contends that the Commission's Rules of Practice (specifically, 10 C.F.R. Part 2, Appendix A) provide for directed certification of novel and important issues when necessary to protect the public interest and to avoid serious prejudice to a party's interest.[10]

Virtually every adverse evidentiary ruling tends to skew the overall evidentiary presentation in favor of one or another party. Such rulings, however, may turn out to have little, if any, effect on a licensing board's ultimate substantive decision. Perhaps more important, even an erroneous, prejudicial ruling of this type can be corrected on appeal at the end of the proceeding. Thus, determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant our interlocutory intercession.[11] The Licensing Board's ruling in this case is no exception.

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[10] Id. at 13-15. Section V(f)(4) of Appendix A provides, in part: "A question may be certified to the Commission or the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party."

[11] See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-353, 4 NRC 381 (1976);

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The fact that the ruling involves a matter that may be novel or important does not alter the strict standards for directed certification. We addressed this issue in our North Anna opinion.[12] In seeking directed certification of a ruling adverse to it, the applicant in that case relied on a Commission Policy Statement providing: "If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission."[13] Concluding that that reliance was misplaced, we explained that the Policy Statement neither explicitly nor implicitly relaxes the standards for directed certification. Rather, "it simply exhorts the licensing boards to put before us legal or policy questions that, in their judgment, are 'significant' and require prompt appellate resolution."[14] The same is true of the

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Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976). See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982) (error must fundamentally alter the very shape of the proceeding to warrant interlocutory review).

[12] Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374-75 (1983).

[13] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981).

[14] North Anna, supra, 18 NRC at 375. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit
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comparable language in Appendix A to the Rules of Practice.[15] We agree here with the Licensing Board that its ruling does not merit interlocutory review.[16]

TMIA's motion for directed certification is denied.[17]

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1), ALAB-780, 20 NRC __, __ (Aug. 15, 1984) (slip opinion at 6-7); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 384 n.10 (1983).

[15] Our decision to accept a referral of an interlocutory Licensing Board ruling in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983), does not dictate a grant of directed certification here. In accepting the Board's referral in Catawba, we relied on the Commission's Policy Statement discussed above. We stressed, however, the generic implications and recurring importance of the legal question there involved (the standards for admitting late contentions). See also North Anna, supra, 18 NRC at 375-78. By contrast, neither the Licensing Board nor we see such important, generic considerations inherent in the Ethics in Government Act issue raised by TMIA's motion in this case.

[16] TMIA states that the Licensing Board "acknowledged" that its ruling affected the proceeding in a pervasive manner. TMIA Motion at 14. In fact, the Board only agreed that its evidentiary ruling affected TMIA's case "in an important way," but stated that this was nevertheless not the type of ruling that should be referred to us for interlocutory review. Tr. 27,874.

[17] In denying TMIA's motion, we offer no view on the merits of its claim.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board