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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
)
METROPOLITAN EDISON COMPANY)
)
(Three Mile Island Nuclear)
Station, Unit 1))

Docket No. 50-289
(Restart -- Management
Phase)

OFFICE OF SECRETARY
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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

Pursuant to 10 C.F.R. § 2.730 Three Mile Island Alert ("TMIA") moves that the Board strike certain portions of "Licensee's Proposed Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision on the Dieckamp Mailgram" ("Licencee's Findings") on the ground that they are not supported by evidence on the record of this proceeding. TMIA requests that the following portions be stricken:

- (I) Licensee's Findings, Par. 37, at 25, from "In fact..." through the end of par. 37, at 26, related to TMIA's Deposition of H. McGovern (September 26, 1984) at 32 ("McGovern Deposition").
- (II) Licensee's Findings, par. 131, at 92, n. 21.

I. The McGovern Deposition

Licensee refers to portions of the McGovern Deposition taken by TMIA on September 26, 1984, in the course of discovery in this proceeding. Licensee listed the McGovern Deposition in a so-called "Notification by Licensee of Intended Joint Mailgram Exhi-

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bit References and Deposition Stipulations"(November 27, 1984).
ff Tr. 30, 105, at 2-3. None of the depositions taken during
the course of discovery, including the portions of the McGovern
Deposition to which Licensee has cited, were included in the Joint
Mailgram Exhibits stipulated into evidence by the parties. Al-
though Licensee listed a portion of the McGovern Deposition in its
Board Notification, it never moved the Deposition into evidence.
Under the rules established by the Atomic Safety and Licensing
Board ("Licensing Board"), Board Notices or Notifications were
authorized in order to permit parties to draw the Board's atten-
tion to specific items in Joint Mailgram Exhibit 1 (c) upon which
the parties intended to rely in their findings.

The Board established the procedures which the parties were
to follow with respect to relying on Joint Mailgram 1 (c) on the
first days of the hearing, November 14, 1983. Tr. 28, 134-28,
136.

The Board stated, in relevant part, the following:

(A)ny party that wishes to rely on any document
or any document in the bound exhibits to bring
it to the attention of the Board and the parties
that you intend to rely upon these documents in
your proposed findings to the Board. Otherwise,
in your proposed findings if you allude to a
document and it has never been discussed during
the hearing, never been referred to by a witness,
never been identified, you may find that we will
disregard the document. Tr. 28, 134.

Joint Mailgram Exhibit 1 was received into evidence with this
caveat on November 14, 1984. Tr. 28, 137.

The McGovern Deposition, however, was not included in Joint
Mailgram Exhibit 1 (c) , and never moved into evidence by Licen-
see. Therefore, the McGovern Deposition is not in evidence be-

fore this Board and Licensee may not rely on it. Moreover, the Licensing Board made it clear that Licensee's Notification was merely "notice and not a motion...", apparently to indicate that it was not admitting into evidence any exhibits since Licensee had not sought their admission. Tr. 29, 556. The Board "accepted" the Licensee's Notification, but clearly did not expressly admit into evidence any of the documents listed in the Notification which were not already in evidence. Tr. 29, 550-29, 557. Therefore, Licensee cannot rely on the McGovern Deposition in its findings since the Deposition is not in evidence before the Board. TMIA requests that the Board strike Licensee's Findings, par. 37 at 25 from "In fact..." through the end of par. 37, at 26.

II. Dr. Henry Myers' Stipulated Testimony and Attendance at the Hearings

In Licensee's Findings, par. 131, at 92, n. 21, Licensee states as follows:

The lack of finding on the Dieckamp mailgram is curious in that the very issue of the Dieckamp mailgram has been perpetuated at the considerable urging of Congressman Udall and Dr. Henry Myers (the Committee's Science Advisor). Congressional interest in this matter has been evident both to the Special Inquiry Group and to the NRC's I&E. Tr. 30, 661-30, 662, 30, 703 (Gamble); JME 1(c)(107) at 81. In fact, even in this proceeding TMIA at one point proposed Dr. Myers as a TMIA witness. TMIA subsequently withdrew the proposal in return, inter alia for Licensee's agreement to drop interrogatories inquiring into information and support provided TMIA by Dr. Myers. See JME 1(a) at 9. Nevertheless, the Board observed that Dr. Myers did attend the hearings during the appearances of key witnesses in this proceeding.

TMIA moves that the Board strike footnote 21 on the basis that

it is unsupported by evidence in the record.

First, Licensee suggests that the Dieckamp Mailgram issue is before this Board "at the considerable urging of Congressman Udall and Dr. Henry Myers." This statement is patently untrue. Rather, the Atomic Safety and Licensing Appeal Board remanded the Dieckamp Mailgram issue to this Licensing Board to ensure that the Licensing Board would resolve Board Issue 10 adequately.

Second, Licensee's statement that Dr. Myers "did attend the hearings during the appearances of key witnesses" is an improper subject for Board comment. The record of these proceedings does not include an attendance list of observers. Therefore, the attendance of certain individuals at these hearings cannot form the basis for Board comment.

Third, Licensee states in Footnote 21:

(T)MIA at one point proposed Dr. Myers as a TMIA witness. TMIA subsequently withdrew the proposal in return, inter alia for Licensee's agreement to drop interrogatories inquiring into information and support provided to TMIA by Dr. Myers. See JME 1(a) at 9.

This statement misrepresents the stipulation. The stipulation does not state that TMIA "withdrew" Dr. Myers "in return for" Licensee's agreement not to inquire into "information and support provided to TMIA by Dr. Myers." In contrast, TMIA agreed to stipulate to Dr. Myers' proposed testimony in lieu of calling him as a witness because Licensee agreed to stipulate into evidence the report of the Majority Staff of the House Committee on Interior and Insular Affairs, "Reporting of Information Concerning the Accident at Three Mile Island" (March 1981) ("Udall Report") Joint Mailgram Exhibit 1(c)(144). TMIA proposed Dr.

Myers' testimony to provide a sponsor for admission of the Udall Report and to place into the record evidence about the temperature at which a zircalloy-steam reaction would occur. JME 1(a).

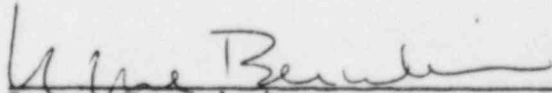
Only the stipulation is in evidence before the Board and not the undocumented negotiations between the parties leading up to the stipulation. Thus, the Board cannot rely on any party's characterization of these negotiations in its decision.

Therefore, TMIA moves that the Board delete footnote 21 from Licensee's findings.

III. Conclusion

For the foregoing reasons, TMIA requests that the Board strike the portions of Licensee's Findings cited above on the ground they are not supported by evidence in the record.

Respectfully submitted,



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DATED: February 19, 1985

GOVERNMENT ACCOUNTABILITY PROJECT

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February 4, 1985

Ivan W. Smith, Chairman
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Atomic Safety and Licensing Board
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Sheldon J. Wolfe
Administrative Judge
Atomic Safety and Licensing Board
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Gustave A. Linenberger, Jr.
Administrative Judge
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Washington, D.C. 20555

Dear Administrative Judges:

I am writing to inform the Licensing Board of what I perceive as a serious misrepresentation by Licensee in proposed findings on the Dieckamp Mailgram issue, filed on January 28, 1985, pertaining to, in part, negotiations between licensee attorney Mr. Blake and myself. Since these proposed findings are part of the public record I think it is important to bring the matter to the Board's and the public's attention at this time.

On page 92, footnote 21, of licensee's findings the following is stated:

The lack of finding on the Dieckamp mailgram is curious in that the very issue of the Dieckamp mailgram has been perpetuated at the considerable urging of Congressman Udall and Dr. Henry Myers (the Committee's Science Advisor). Congressional interest in this matter has been evident both to the Special Inquiry Group and to the NRC's I&E. Tr. 30,661-30,662, 30,703 (Gamble); JME 1(c)(107) at 81. In fact, even in this proceeding TMIA at one point proposed Dr. Myers as a TMIA witness. TMIA subsequently withdrew the proposal in return, inter alia for Licensee's agreement to drop interrogatories inquiring into information and support provided to TMIA by Dr. Myers. See JME 1(a) at 9. Nevertheless, the Board observed that Dr.

Myers did attend the hearings during the appearances of key witnesses in this proceeding.

First, I would note that the Dieckamp Mailgram issue is currently before this Board as a result of an Appeal Board order remanding the issue. Licensee has not, and cannot, make any showing of how Congressman Morris Udall or Dr. Henry Myers influenced, or is in anyway responsible for, that Appeal Board decision. And, as this Board well knows, the Board itself found the Dieckamp Mailgram important to its resolution of Board Issue 10. The Commission itself has viewed the mailgram as important to a determination of management integrity and competence. See Transcript of October 14, 1981 Nuclear Regulatory Commission meeting. Licensee's representation that Congressman Udall, the NRC oversight committee which he chairs, or the committee staff in some manner improperly promoted the issue as a matter of concern to this Board should not be tolerated by this Board.¹

Secondly, Licensee suggests that Three Mile Island Alert ("TMIA") made some kind of agreement to drop Dr. Myers as a witness and withdraw his testimony in this proceeding in order to avoid answering interrogatories about information or support Dr. Myers provided to TMIA. As can be seen from the face of the Joint Mailgram Stipulation (or the Modified Joint Mailgram Stipulation) TMIA did not withdraw Dr. Myers' testimony but in fact stipulated to this testimony. At the time Dr. Myers' testimony was stipulated, discovery concerning that testimony became moot and irrelevant to this proceeding.

The Joint Mailgram Stipulation reads, in relevant part, as follows:

The signatory parties agree that acceptance of this stipulation by the Licensing Board will bind the parties at the evidentiary hearing and further obviate TMIA's calling Dr. Henry Myers as a witness in the captioned proceedings. Licensee agrees in the captioned proceedings not to depose Dr. Myers, and not to seek documents from Dr. Myers, TMIA or NRC related to Dr. Myers on the Dieckamp mailgram issue. Licensee further has withdrawn a number of outstanding interrogatories to TMIA . . .

¹Licensee cites David Gamble's testimony as supportive of its characterization. In fact, Mr. Gamble testified merely that Dr. Myers' concern about this issue, and Victor Stello's direction to resolve this concern, were the reasons I&E reviewed the issue in the course of its NUREG-0760 investigation.

TMIA agreed to stipulate to Dr. Myers' proposed testimony because Licensee agreed to stipulate into evidence the report of the Majority Staff of the House Committee on Interior and Insular Affairs, "Reporting of Information Concerning the Accident at Three Mile Island (March 1981) ("Udall Report") of which Dr. Myers was the primary author. Further, licensee agreed to stipulate a technical point on the temperatures at which a zircalloy-steam reaction would occur. See Stipulation at 9.

TMIA did not draft and did not pursue this stipulation. To the contrary, TMIA entered into this stipulation largely at the urging of Mr. Blake, who envisioned that he would have problems obtaining discovery of a House Committee staff member whose testimony was been offered in this hearing for the limited purpose of sponsoring the Udall Report.

The background to the stipulation is instructive of how licensee has misled the Board in its description of the stipulation. In a prehearing conference held on September 17, 1984, I informed the Board that TMIA would propose calling Dr. Myers as a witness if arrangements could be made through attorneys for the House of Representatives for him to appear to sponsor the Udall Report. The Board urged the parties to see if they could arrive at some accommodation as to his testimony because of the sensitivity of agency attempts to compel the testimony of a staff member of an NRC Congressional oversight committee.

On September 18, I spoke to Steve Ross, attorney for the House of Representatives, who indicated to me that Dr. Myers would be permitted to testify but that his testimony would be limited by restrictions imposed by the Speech and Debate Clause. Mr. Blake informed me that he visited Mr. Ross in his office the following day, September 19, and was informed as to the restrictions on any testimony by Dr. Myers and restrictions on any discovery of Dr. Myers by Licensee. Mr. Blake, according to my notes of a conversation I held with him later that day, stated that he had asked the company if he could propose entering into a stipulation to solve the potential problems with Dr. Myers' testimony. I indicated to him that I had no problem with that since TMIA intended to call Dr. Myers for the limited purpose of sponsoring the Udall Report and to testify as to the temperature range at which the zirconium-steam reaction occurs.²

²Dr. Myers is science advisor to the House Committee on the Interior and Insular Affairs. He is a physicist and familiar with basic reactor physics.

Within the next two days, Mr. Blake completed drafting the "Joint Mailgram Stipulation." In both drafts of the stipulation which I reviewed, Mr. Blake, not I for TMIA, included sections withdrawing interrogatories concerning Dr. Myers and his testimony. I had previously told Mr. Blake that these interrogatories and document requests appeared to me intended not to elicit useful or discoverable information but merely to harass TMIA and Dr. Myers. However, I at no time recommended that they be included in the stipulation or suggested that I would withdraw our proposal that Dr. Myers appear as a witness because TMIA feared responding to licensee's discovery requests. In fact, my legal opinion was then, as now, that the discovery requests simply because moot at such time as the parties stipulated to Dr. Myers' testimony.

Mr. Blake proceeded to expend what I perceived as extensive time and energy to ensure that we entered into a stipulation regarding Dr. Myers' testimony. I played little role, and expended little time or effort, in drafting or reviewing the Joint Mailgram Stipulation. TMIA's position was that it perceived no problem in presenting limited testimony from Dr. Myers on the Udall Report or in answering relevant discovery requests from GPU concerning that limited testimony.

Licensee's suggestion that TMIA somehow withdrew Dr. Myers' testimony in exchange for not having to answer certain interrogatories is simply knowing misrepresentation.

Finally, it is clear to me that this Licensing Board has no jurisdiction to base findings on observations of individuals who attended these hearings. Moreover, it appeared that on those occasion when Dr. Myers attended the hearings he was in the company of NRC personnel. This Board does not have any idea what the purpose of Dr. Myers' attendance was, and certainly could not substantiate the inference urged by the licensee.

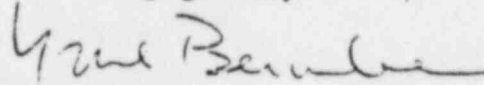
TMIA would consider it just as improper, for example, to rely in its findings on the fact that it observed five company attorneys in the hearing room during the testimony of Curtis Conrad, in addition to Mr. Conrad's personal counsel Mr. McBride.

TMIA, therefore, requests that this Board order licensee to amend its Findings to delete footnote 21 on page 92 since it

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currently appears in the public record of this case. Further, TMI requests that licensee counsel be admonished that this conduct not be repeated in the future.

Sincerely yours,



Lynne Bernabei

Attorney for
Three Mile Island Alert

cc: TMI Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
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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 Three Mile Island Alert's Proposed Findings of Fact and Conclusions of Law on Dieckamp Mailgram Issue has been served this 19th day of February, 1985, by mailing a copy first-class, postage prepaid to the following:

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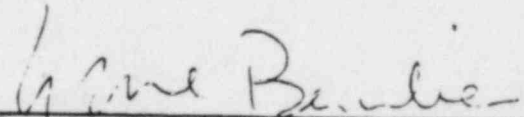
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