

RELATED CORRESPONDENCE

DOCKETED
November 8, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
COMPLAINTS & ENFORCEMENT
STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

SP

LICENSEE'S RESPONSE TO TMIA'S MOTION
FOR LEAVE TO PRESENT TESTIMONY OF
VICTOR GILINSKY ON DIECKAMP MAILGRAM ISSUE
WITHOUT PREFILING WRITTEN TESTIMONY

On November 1, 1984, TMIA moved the Licensing Board for leave to present the testimony of former Nuclear Regulatory Commissioner Victor Gilinsky without prefiling written testimony. Licensee opposes the motion for the reasons stated below. We address first the question of TMIA's failure to provide prefiled written testimony. We next argue that TMIA has failed to establish that Dr. Gilinsky's testimony would be both admissible and of probative value to the mailgram issue. Finally, we argue that TMIA has failed to establish that Dr. Gilinsky's testimony would not be in violation of the Ethics in Government Act of 1978.

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A. Failure to prefile written direct testimony.

In accordance with Section 2.743(b) of the Commission's Rules of Practice, the Licensing Board by its Memorandum and Order Following Prehearing Conference, dated September 19, 1984, directed all parties to prefile written direct testimony on the mailgram issue by November 1, 1984. TMIA has not only failed to prefile Dr. Gilinsky's testimony but has waited until November 1 to request an exception to the Board's requirement. TMIA's failure to request an exception prior to the November 1 deadline is in itself grounds for denial of TMIA's request, particularly in view of the facts in this case. Licensee's counsel first learned of the prospect that TMIA would seek to call Dr. Gilinsky without prefiled testimony on October 16, 1984. On October 18, 1984, Licensee's counsel, Mr. Blake, wrote to TMIA's counsel, Ms. Bernabei, questioning the propriety of this approach and requesting confirmation of TMIA's final position on the matter. (See Attachment.) Mr. Blake's letter specifically advised TMIA's counsel that if TMIA's position remained as outlined on October 16, it was his intention to raise promptly with the Board the propriety of this approach. TMIA's counsel simply ignored Mr. Blake's letter.

TMIA's excuse for not prefiling Dr. Gilinsky's testimony makes no sense. As Licensee understands TMIA's motion, TMIA would have the Board understand that Dr. Gilinsky is prepared to have TMIA call him as a TMIA witness under a subpoena to be

sought by TMIA,^{1/} but that because of his sensitivities as a recently departed Commissioner who participated in decisions in the TMI-1 restart proceeding it is somehow inappropriate for him to prefile his testimony on TMIA's behalf. The distinction is absurd.

TMIA argues that no party will be prejudiced by the presentation of Dr. Gilinsky's testimony since TMIA has put all parties on notice of the "areas" in which it intends to question Dr. Gilinsky. Identification of the "areas" of TMIA questioning gives the other parties no indication of the substance of Dr. Gilinsky's testimony and provides no basis for the preparation of cross-examination or rebuttal testimony in advance of the hearing. The function of prefiled testimony is precisely to avoid surprises at the hearing.

B. Admissibility and probative value.

Section II of TMIA's motion outlines the "areas" in which it intends to question Dr. Gilinsky but totally fails to state the expected substance of the testimony. We comment below with respect to each of the "areas" of testimony as to the

^{1/} There can be no question that Dr. Gilinsky is being called as a witness on TMIA's behalf. TMIA's motion specifically requests that TMIA "be granted leave to call Dr. Gilinsky to testify on the Dieckamp Mailgram issue." (TMIA Motion, p. 2) TMIA in fact predicates its entire motion on "the right [of every party] to present such oral or documentary evidence . . . as may be required for full and true disclosure of the facts." (Id., p. 1) TMIA also indicates that it intends to elicit Dr. Gilinsky's testimony through questioning of Dr. Gilinsky by TMIA. (Id., p. 4)

likelihood that Dr. Gilinsky's testimony would prove admissible and of probative value on the mailgram issue.

1. The May 7, 1979, site tour. TMIA states that Dr. Gilinsky was present at a site tour by the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs on May 7, 1979, and that Dr. Gilinsky "spoke to Mr. Dieckamp about the pressure spike, reporting of the pressure spike to the Commission and reporting of information to the Commission." TMIA fails to indicate in what way, if any, the conversation is relevant to Mr. Dieckamp's mailgram or to the question whether Mr. Dieckamp or anyone else interpreted the pressure spike in terms of core damage at the time of the spike. TMIA has failed to establish the admissibility and probative value of Dr. Gilinsky's testimony in this area.

2. Copy of mailgram to Dr. Gilinsky. TMIA suggests that the receipt by Dr. Gilinsky (who was present at the May 7, 1979, tour and briefing of the Udall Committee) of a copy of the mailgram gives Dr. Gilinsky a special understanding and insight into the interpretation of the mailgram. The suggestion is simply a non sequitur.

3. Subsequent discussions with Mr. Dieckamp. TMIA alleges that "after the accident, Dr. Gilinsky had discussions with Mr. Dieckamp, and discussions with other licensee officials of which Mr. Dieckamp was aware, concerning the reporting of the pressure spike, the hydrogen burn, and core damage to

the NRC." The discussions are not identified or described. Again, TMIA fails to indicate in what way, if any, the discussions are relevant to Mr. Dieckamp's mailgram or to the question whether anyone interpreted the pressure spike in terms of core damage at the time of the spike. To the extent the discussions referenced by TMIA refer to colloquys between Dr. Gilinsky and Mr. Dieckamp or other Licensee officials at the Commission's public meeting on immediate effectiveness on October 14, 1982, the transcript of the meeting speaks for itself and Dr. Gilinsky's testimony is not needed.

4. Reporting obligations and Commission reaction. TMIA states that Dr. Gilinsky can testify as to Licensee's reporting obligations and the information the Commission relied on in making decisions about the accident. Licensee's reporting obligations are not in issue and, if they were, NRC's regulations and license conditions are the best evidence of them.

TMIA states that Dr. Gilinsky can testify as to how the Commission would have reacted to information about key parameters of the accident if they had been promptly reported to the Commission. Any such speculative testimony is irrelevant to Mr. Dieckamp's state of mind or the accuracy of his mailgram.

C. The Ethics in Government Act.

In its response, filed today, to TMIA's motion to admit the deposition of former Commissioner Peter A. Bradford as

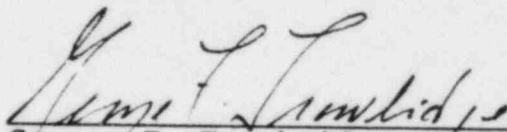
testimony, Licensee has explained the prohibitions and limitations on testimony of former Nuclear Regulatory Commissioners. Commissioner Gilinsky may testify only as to matters of fact and to occurrences within his personal knowledge. The only areas identified by TMIA where such personal knowledge might be involved relate to alleged communications between Dr. Gilinsky and Mr. Dieckamp. It is incumbent on TMIA to establish, which TMIA has not done, that there were communications within Dr. Gilinsky's personal knowledge which are relevant to the mailgram issue.

D. Conclusion.

For the reasons stated above the Licensing Board should deny TMIA's motion for leave to permit testimony of Dr. Gilinsky on the mailgram issue.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE


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

Dated: November 8, 1984

SHAW, PITTMAN, POTTS & TROWBRIDGE

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October 18, 1984

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In the Matter of
Metropolitan Edison Company
(Three Mile Island Nuclear Station, Unit 1)
Docket No. 50-289

Dear Lynne:

This will confirm my message to you yesterday that Mr. Lowe is available for deposition at 11:00 a.m. in Shaw, Pittman's offices on Friday, October 19, on the subjects discussed in yesterday's conference call with the Board Chairman. Please advise me as to the name of the officer before whom the deposition will be taken.

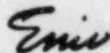
When we met the evening of October 16 to attempt to resolve discovery differences, you advised me that you do not now expect to file prepared written testimony of Dr. Gilinsky prior to the hearing. Rather, you expect to apply for a subpoena for Dr. Gilinsky to appear as a witness and that his testimony would first be available to the other parties when he appeared at the hearing. As I indicated to you, I am surprised by this approach and regard it as unusual for NRC proceedings in other than adverse witness situations. While Licensee had expected to forgo discovery related to Dr. Gilinsky in view of his late identification as a witness, that decision was based largely on our expectation that his testimony would be prefiled to allow some preparation time.

SHAW, PITTMAN, POTTS & TROWBRIDGE
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Lynne Bernabei, Esq.
October 18, 1984
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Please advise me of TMIA's final position in this regard. If that position is as you outlined, I intend to raise promptly with the Board the propriety of this approach.

Sincerely,



Ernest L. Blake, Jr.
Counsel for Licensee

cc: Service List

November 8, 1984

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UNITED STATES OF AMERICA,
NUCLEAR REGULATORY COMMISSION NOV -9 A10:25

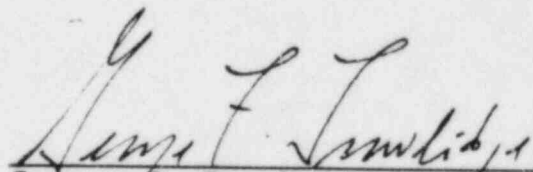
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to TMIA's Motion for Leave to Present Testimony of Victor Gilinsky on Dieckamp Mailgram Issue Without Prefiling Written 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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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