

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-289-SP

(Restart Remand)

METROPOLITAN EDISON COMPANY

(Three Mile Island Nuclear Station,
Unit No. 1)

LOCATION: BETHESDA, MARYLAND

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Nuclear Regulatory Commission
East-West Towers
Fifth Floor Hearing Room
4350 East West Highway
Bethesda, Maryland

Friday, November 9, 1984

The prehearing conference in the above-entitled
matter convened, pursuant to notice, at 1:00 o'clock p.m.

BEFORE:

JUDGE IVAN W. SMITH
Chairman, Atomic Safety and Licensing Board

JUDGE SHELDON J. WOLFE
Member, Atomic Safety and Licensing Board

JUDGE GUSTAVE A. LINENBERGER, JR.
Member, Atomic Safety and Licensing Board

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1 APPEARANCES:

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22 On behalf of the NRC Staff:

23 JACK R. GOLDBERG, Esquire
24 Office of the Executive Legal Director
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C O N T E N T S

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INSERTS

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Modified Stipulation on Parties on Mailgram Evidence

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P R O C E E D I N G S

1
2 JUDGE SMITH: On the record. Does anyone know if
3 Mr. Voight or Mr. McBride intend to be here? Does anybody
4 know if, in fact, we informed them? I am not sure.

5 MR. GOLDBERG: Judge Smith, I did inform Mr. McBride
6 of this prehearing conference.

7 JUDGE SMITH: Had we informed them, do you know?

8 MR. GOLDBERG: Not that I know of. He had not been
9 informed when I spoke to him a few days ago about this and
10 he indicated that neither he nor Mr. Voigt would in all
11 likelihood attend this prehearing conference.

12 JUDGE SMITH: All right. Thank you. The purpose
13 of the conference is to deal with several evidentiary matters
14 with respect to the mailgram issue and TMIA's proposals to
15 present evidence. Is there any preliminary business within
16 the scope of the announced business?

17 MR. GOLDBERG: Judge Smith, not within the scope of
18 the announced business but just to note that I have
19 distributed to the Board and the parties a copy of the
20 executed modified stipulation of parties on mailgram evidence.
21 The original was also put in your position there. I also
22 distributed to the parties today just for convenience purposes
23 a copy of a letter providing to TMIA certain documents which
24 were responsive to oral requests from Ms. Bernabei and which
25 in the course of searching for documents responsive to those

1 oral requests were identified as possibly responsive to the
2 original TMIA document request. So again, just as a matter
3 of convenience, I have hand-delivered that letter today to
4 the parties and the Board and provided Ms. Bernabei with the
5 documents that are identified on the attachment to the letter.

6 One final matter which I believe is to some extent
7 related to the subject matter of today's prehearing conference,
8 yesterday I attempted to contact Ms. Bernabei to notify her
9 of my intention to raise an additional matter today and I
10 wasn't successful in reaching her yesterday but I did speak
11 earlier today with Joanne Doroshov to notify her of my
12 intention to raise today the subject of Mr. Gamble's testimony
13 in this proceeding and it is a matter which, I think, is
14 somewhat related to the two motions that are on the agenda
15 today and which I think is appropriate to discuss prior to the
16 hearing. So at the appropriate time, I will give further
17 explanation of what I think needs to be considered in connection
18 with Mr. Gamble's testimony.

19 MS. BERNABEI: May I address Mr. Goldberg's point?
20 As I understand it, Mr. Goldberg intends to make a motion to
21 strike Mr. Gamble's testimony apparently on the grounds that
22 it is irrelevant. I don't think that should be handled in
23 an oral fashion or an argument about which we were not
24 notified until this morning. I would suggest that that not be
25 included within the scope but it be done in a written motion

1 form and probably at the beginning of the hearing or at such
2 time as Mr. Gamble testifies. That is the procedure that has
3 been employed in other proceedings I have been involved in.
4 I think that is the appropriate way to handle the testimony of
5 any witness who has prefiled written testimony.

6 JUDGE SMITH: We have not provided for those
7 type of motions in our orders. They are not provided for in
8 the Commission's rules. My experience has been somewhat
9 different than yours. Although I think it is quite appropriate
10 for parties to file advance objections to prefiled testimony,
11 it is helpful to all if you have time to do it, it is also
12 appropriate, I believe, to make the objections at the time
13 that the witness is offered.

14 I would recommend to you that you take full
15 advantage of Mr. Goldberg's advance notice to you as to the
16 basis for his objections. If you feel that you are going to
17 need more time to respond to them, that would be another
18 matter. But I think he is doing something he would not really
19 be required to do.

20 MR. GOLDBERG: Judge Smith, I normally would not
21 oppose the admission of testimony or make a motion to strike
22 until such time as the testimony is offered at the hearing.
23 However, my purpose in raising it today is because it may
24 raise an Ethics in Government Act question similar to the
25 one raised by the possible appearance of former Commissioners

1 Gilinsky and Bradford. It is for that reason that I think
2 advanced notice to all including Mr. Gamble is certainly
3 appropriate and prudent.

4 JUDGE SMITH: All right. With that, let's move to
5 the matter of former Commissioner Bradford.

6 JUDGE WOLFE: Judge Smith, could I interrupt just
7 a moment?

8 JUDGE SMITH: Surely.

9 JUDGE WOLFE: Could someone advise me with regard
10 now to this modified stipulation that we received, I take it
11 that for example in Ms. Bernabei's letter of November 6th, you
12 listed various documents that you intended to offer. What I
13 wanted to know was and anyone can advise me on this, whether
14 the modified stipulation as signed I take it now by the
15 parties incorporates some or all of these documents that you
16 referred to in your letter, Ms. Bernabei?

17 MS. BERNABEI: No, it does not. Those are exhibits
18 additional to those to which the parties have stipulated into
19 evidence.

20 JUDGE WOLFE: Thank you.

21 JUDGE SMITH: I had assumed that your letter of
22 November 6th would be attendant to the discussion of Dr.
23 Gilinsky's appearance because you did indicate that you
24 attached relevance to it. I just assumed that we would go
25 from Dr. Gilinsky's testimony to your letter of November 6th.

1 MS. BERNABEI: I am sorry, Judge Smith.

2 JUDGE SMITH: As I read your letter of November 6th,
3 you had hoped to use the documents listed there and offer
4 them through Dr. Gilinsky.

5 MS. BERNABEI: That is correct.

6 JUDGE SMITH: So I assumed that it would be
7 appropriate to discuss your letter of November 6th in connection
8 with the discussion of Dr. Gilinsky.

9 MS. BERNABEI: That's fine.

10 JUDGE SMITH: Let's move to the matter of Chairman
11 Bradford's proposed testimony through deposition. I might
12 announce with respect to using a deposition in lieu of his
13 appearance that without hearing any additional arguments
14 you have not made your case there because there are questions
15 that the Board if no one else would have of Chairman Bradford
16 before we could accept his testimony.

17 In general, we observed in reading the deposition
18 that he did not know the issue to which he was speaking.
19 He did not understand it at all and he pointed that out on
20 his own initiative, that he doesn't know the purpose to which
21 that the deposition is being put. He also had difficulty
22 understanding what we have deemed the language of the mailgram
23 to mean with respect to this litigation.

24 Therefore, when he looks to the three documents
25 attached to his testimony and offers the opinion from those

1 documents that Mr. Dieckamp should have possessed certain
2 information, we simply have no context to which he is
3 expressing that opinion. We don't know if he knows the
4 context and we have no context and no inkling as to why he
5 comes to that conclusion and great doubts about it because
6 he does not understand the context in which his testimony
7 is being offered.

8 So for that reason alone before the Board could make
9 any findings upon Chairman Bradford's deposition a great deal
10 more inquiry of him as to what he means by his questions and
11 answers would be necessary. So you have lost on that point.

12 With respect to the next issue which is Ethics in
13 Government and the general relevancy of his testimony and
14 one thing that I have not seen discussed in the argument
15 between you and counsel for the licensee is why don't you
16 simply make the arguments that Chairman Bradford would make as
17 to the meaning to be inferred from those documents, make him
18 as counsel for your party. He is looking at documents and
19 he says, "From those documents, you should infer certain
20 conclusions, that is, that Mr. Dieckamp was not forthcoming
21 or he was inaccurate." Why don't you make those arguments
22 and then leave Bradford out of it?

23 You have access to him. You can consult with him
24 and you can say, "Tell us what arguments can we advance if he
25 so believes that these documents and the basis for his

1 opinions command the inference of careless want of knowledge
2 or decept." Why don't you just do that?

3 MS. BERNABEI: That would not be evidence. That is
4 a legal argument.

5 JUDGE SMITH: It is argument, right.

6 MS. BERNABEI: That is a legal argument. What I
7 think is required in this case and what obviously licensee
8 has done to great length in his testimony is provide, one,
9 witnesses that talk about whether or not there was evidence,
10 that is, information that rises to the level of evidence such
11 that Mr. Dieckamp should have acknowledged it in his mailgram.

12 I perceive and I could be corrected, but I perceive
13 that Dr. Zebroski's testimony and Mr. Van Witbeck's testimony
14 is primarily oriented to indicate that there was no substantial
15 information, there was no evidence until weeks or months after
16 the accident that anyone interpreted the pressure spike in
17 terms of core damage. That is the way I interpret those two
18 pieces of testimony.

19 Similarly, I think we are entitled to call people
20 that say, "No, the way the NRC looks at what is evidence, there
21 was evidence." The information available to Mr. Dieckamp and
22 the corporation, whether or not he knew about it, was evidence
23 that rose to that level. If licensee is entitled to call
24 witnesses to talk about what constitutes evidence as it is
25 used in the mailgram, similarly the other parties including

1 TMIA have that right. That is essentially what we are talking
2 about. We are not talking about a legal conclusion.

3 JUDGE SMITH: You you ask in the deposition, you
4 ask Chairman Bradford to look at some documents and I haven't
5 read the deposition since the very moment I got it. I read it
6 once. But when you ask him to look at the attachments to his
7 deposition, the exhibits to his deposition, and give us an
8 opinion, just exactly what expertise were you calling upon
9 him to use, to employ? He looked at factual documents and
10 he is going from those documents and he came up with an
11 expert opinion apparently that these documents constitute
12 a conclusion or mandate a conclusion that Mr. Dieckamp knew
13 or should have known that the statements in the mailgram were
14 false.

15 Now what expertise did he apply there?

16 MS. BERNABEI: With all due respect to the Board,
17 Commissioner Bradford as former Commissioner Gilinsky were
18 Commissioners at the time of the accident. They were the
19 ones along with the three other commissioners at that time
20 who determined whether or not to recommend an evacuation
21 because of the seriousness of the accident to the State of
22 Pennsylvania.

23 As such, they know exactly how events unrolled from
24 their perspective as the regulatory agency, the primary

1 decision makers. In the ensuing years after the accident
2 they had a great deal of information in terms of what might
3 licensee knew about the accident on March 28th. They reviewed
4 in great detail not only the Dieckamp mailgram but the staff
5 report on reporting failures, NUREG-0760.

6 With all due respect, they probably had greater
7 depth of knowledge than the current Commission as to what
8 licensee knew about the pressure spike generation of hydrogen
9 and core damage on the first day of the accident. They also,
10 I think, had a great deal of knowledge about the Dieckamp
11 mailgram, specifically whether or not the statements in that
12 mailgram were accurate.

13 Our point in terms of relevance which is, I think,
14 what you are addressing Judge Smith, are essentially two.
15 One, a determination of whether Mr. Dieckamp should have known
16 that the statements were accurate in the mailgram or were not
17 accurate at the time he sent it. That relies primarily on
18 a determination of what Mr. Dieckamp's responsibilities
19 were on May 9th when he sent that mailgram. Was he supposed
20 to do an investigation? Was this significant information
21 to the NRC? Was this information they needed to know? These
22 Commissioners who had to depend on Mr. Dieckamp and the licensee
23 to provide them the information say yes, it was. We assume
24 that Commissioner Gilinsky will say yes, it is.

25 Secondly, it is relevant in terms of whether this

1 type of information, that is the three exhibits to the
2 memorandum, rise to the level of evidence that should have
3 been acknowledged by Mr. Dieckamp in his mailgram. If it
4 does rise to the level of evidence, then the statement in the
5 mailgram is incorrect as is Mr. Dieckamp's second statement
6 that there was no withholding of information.

7 If that is information of the type that should have
8 been disclosed to the NRC, then there was withholding of
9 relevant information. That is the substance of former
10 Commissioner Bradford's testimony and is likely to be the
11 testimony of former Commissioner Gilinsky in light of what he
12 said in other public settings.

13 We think it certainly is not binding in any way
14 on this Board just as Mr. Dieckamp's opinion of his own
15 integrity or Mr. Lowe's opinion of Mr. Dieckamp's integrity
16 are not binding. They are merely probative evidence.

17 JUDGE SMITH: Would you offer the testimony of
18 Dr. Gilinsky and Chairman Bradford for their opinion as to
19 Mr. Dieckamp's integrity?

20 MS. BERNABEI: Yes, we are.

21 JUDGE SMITH: Would you point out in his deposition
22 where he addresses Mr. Dieckamp's integrity?

23 MS. BERNABEI: Yes. It is at the end of the
24 deposition.

25 JUDGE SMITH: His view on integrity is derived from

1 the review of some documents attached to his testimony.

2 MS. BERNABEI: Not entirely. It is derived
3 from his experience in terms of examining licensee's conduct
4 and Mr. Dieckamp's conduct during and after the accident as
5 well as documents that he was shown as well as his somewhat
6 careful examination of the staff's investigation which he finds
7 defective.

8 In addition, Mr. Bradford was one of the primary
9 Commissioners to examine Mr. Dieckamp at length in the
10 October 24, 1981 Commission meeting in which the whole
11 Dieckamp mailgram issue was examined in depth. My memory is
12 that he examined Mr. Dieckamp in that meeting about the
13 mailgram specifically.

14 JUDGE SMITH: What is your response to the argument
15 that the transcript of that meeting is the better evidence of
16 what happened in that meeting?

17 MS. BERNABEI: I think the Board should take notice
18 of what happened at that meeting, but I think, in addition,
19 other evidence has surfaced after that meeting since 1981
20 and is relevant for the Board to consider in light of the fact
21 that it corroborates.

22 JUDGE SMITH: I think you just slipped off there.
23 I think you just slipped off the hook that I was extending.
24 You say in addition to the documents and things he examined
25 Mr. Dieckamp thoroughly at the Commission meeting and I say,

1 what is your response to the argument that the transcript is
2 the better evidence of what happened at that meeting and then
3 you purport to answer that question but you slip off and I
4 don't want you to do that. I want you to be careful to answer
5 the question.

6 MS. BERNABEI: I guess what I am saying is that
7 I don't think this Board has to listen to either former
8 Commissioners Gilinsky and Bradford in terms of their legal
9 conclusions about what you should do. That is not what we are
10 asking that their testimony be entered for. What we are asking
11 is that you listen to them in terms of what information the
12 licensee in their opinion should have been turning over, what
13 information was important to them.

14 JUDGE SMITH: I am going to give you another chance.
15 What do you think the question is?

16 MS. BERNABEI: Whether Mr. Dieckamp either knew or
17 should have known --

18 JUDGE SMITH: No. The question, the narrow question
19 to you right now, is you said that former Commissioner Bradford
20 when he was a Commissioner examined Mr. Dieckamp thoroughly
21 at the October 14th Commission meeting to which the argument
22 is proposed that the transcript of that meeting is the better
23 evidence of what happened at that meeting and my question to
24 you is what is your response. That is the question. Would you
25 like to answer that question?

1 MS. BERNABEI: Yes. I think there was certain
2 evidence available to Mr. Bradford at the time he examined
3 Mr. Dieckamp. He expressed an opinion as well as at least one
4 other Commissioner that the statements in the mailgram were
5 incorrect and that Mr. Dieckamp should have acknowledged that.

6 I think there has been additional evidence uncovered
7 since then that would make it productive for Mr. Bradford to
8 once again address the same questions he addressed at that
9 meeting.

10 JUDGE SMITH: What is your answer for the fourth time
11 to the specific question that whatever happened at that
12 October 14th meeting, whatever it was, the best evidence of
13 it is the transcript of that meeting.

14 MS. BERNABEI: That is true.

15 JUDGE SMITH: That is true.

16 (The Board conferred off the record.)

17 MS. BERNABEI: May I address your question? I think
18 when I answered your question the meeting transcript is
19 obviously best evidence of what went on at the meeting, I don't
20 think that that is the relevance of the former Commissioner's
21 testimony as we have proposed it. That is partially the
22 evidence but the relevance is their interpretation of whether
23 what we have turned up in discovery and what was available to
24 Mr. Dieckamp by October 14, 1981 made his mailgram incorrect.

25 Obviously the Commissioners at a public meeting could

1 ask Mr. Dieckamp certain questions. They couldn't express
2 opinions in terms of their final opinion on the subject of
3 integrity or even on their final opinion on whether statements
4 in the mailgram were incorrect. It was a collegial body and
5 they were deciding things collegially as Commissioners.

6 I am sure you have all read the transcript or
7 were present at those meetings, but none of those Commissioners
8 expressed in great detail and in a reasoned way the basis for
9 their questions. They were merely questioning, probing
10 questions to be sure, but they were merely questioning Mr.
11 Dieckamp. They are not expressing their opinions. They
12 were not supporting their conclusions and in a detailed manner
13 as one would do in offering testimony in this proceeding.

14 JUDGE SMITH: I just don't understand the relevance
15 of that point. That is what escapes me.

16 MS. BERNABEI: I will repeat again that the licensee
17 is presenting testimony --

18 JUDGE SMITH: All right. When they undertake to do
19 that, I think you can make arguments as to whether it is
20 competent testimony or not but right now it is our view in
21 looking at the entire package which you presented with
22 respect to former Commissioner Bradford that the principal
23 purpose and perhaps the only purpose that we can infer from
24 your package is that you are offering him because of his
25 status. That reason flies right in the face of the Ethics in

1 Government Act.

2 If you were offering him for his analytical abilities
3 which I, for one, have a high regard for, you can capture those
4 analyses and present them to the Board by way of argument
5 but you are not satisfied with that. You want to have those
6 analyses presented by a former Commissioner because of the
7 status and not the expertise of that Commissioner.

8 The proposal would fail even if there were no
9 Ethics in Government Act however because his expertise as a
10 Commissioner as to the reporting requirements in effect at
11 that time is not appropriate. The regulations themselves
12 are the best evidence of that and which are charged with
13 interpreting. I guess that is the basis for our ruling.

14 MS. BERNABEL: May I address and we did address in
15 our written motion, first of all the Ethics in Government Act
16 as we made the argument does not apply in that it is testimony
17 under oath. Mr. Bradford is not testifying as an expert
18 witness.

19 JUDGE SMITH: Let's address this a little bit
20 further. The Ethics in Government Act accomplishes two
21 things. It threatens penalties upon persons who violate it.
22 This Board is aware of the licensee's argument that these
23 former Commissioners might be in difficulty with the law
24 if they come here. We haven't made any judgment based on
25 that. We are not policemen and we don't feel it is our

1 responsibility to protect them but the Ethics in Government
2 Act accomplishes something else. It is consistent, what it
3 accomplishes is consistent with our whole system of juris
4 prudence and the general rules of evidence and that is, when
5 you are offering a former employee solely because he is a
6 former employee, you are not doing it because of the value
7 that that former employee and what the former Commissioners
8 would make to the evidentiary record. You are doing it in
9 an effort to persuade us from their status.

10 It is our responsibility to exclude evidence of
11 that nature and exclude efforts of that nature. They have
12 no expertise which you have offered which assists us in
13 resolving these issues. They have analytical abilities
14 and familiarity with the facts. You can borrow that from them
15 if you wish but as far as expertise, they don't have it.

16 The only reason that you are offering Commissioner
17 Bradford that we can see, the only thing worthwhile for you to
18 do it, is try to impress us with the status. That is an
19 important thing because we regard those gentlemen in high
20 regard. We hold them in high regard. We have seen their
21 writings and they do have good analytical ability. This is
22 exactly what the Ethics in Government Act is intended to
23 foreclose, exactly what you are trying to do, as a fairness
24 principle and as a reliability of evidence principle.

25 It is our responsibility to enforce the spirit of

1 the Ethics in Government Act from that perspective.

2 MS. BERNABEI: May I address your points? First
3 of all, I think that this statute is essentially a criminal
4 statute and criminal statutes under the law are to be
5 strictly construed. I think any interpretation that relies
6 on the motive of any party as to offering testimony is
7 impermissible under a criminal statute. Therefore, I don't
8 think it can be interpreted in the spirit of the law. It is
9 a criminal statute and it is to be strictly construed.

10 Secondly, both the legislative history and
11 as I read the clear words of the statute indicate that
12 its intent was to present a revolving door. It was not to
13 prevent individuals or witnesses with important information
14 who have formerly been in the government to offer that
15 information in an adjudicatory setting.

16 JUDGE SMITH: We will come to that. We will come to
17 that with regard to Commissioner Gilinsky.

18 MS. BERNABEI: I believe that is specifically why
19 Section 207(h) was enacted in order that significant informa-
20 tion of former government officials would not be excluded
21 when relevant.

22 The third point that the former Commissioners have
23 no expertise, essentially what we are hearing and what
24 licensee is going to be permitted to present in this hearing
25 is their expertise, the viewpoint of the licensee as to, one,

1 what information it had to provide, that is, on the pressure
2 spike, whether the pressure spike indicated core damage and
3 whether or not the spray initiation indicated core damage
4 and whether anyone realized that at the time. They are going
5 to be able to present expertise that no one understood the
6 significance of the pressure spike in terms of core damage.

7 They are also going to be allowed from their
8 perspective, licensee/GPU perspective, to present evidence
9 that there was no withholding of information about these
10 matters to the NRC. That is a legal conclusion. It is from
11 their perspective.

12 We are entitled to present our perspective from the
13 people who were receiving the information about what their
14 obligation was and whether there was withholding of information
15 on those matters. Those are to some degree expert opinions.

16 JUDGE SMITH: You have not pointed to any testimony
17 by Commissioner Bradford that there was information that
18 existed that was withheld that had been in the possession of
19 Mr. Dieckamp. I think you have mischaracterized the
20 licensee's position. The Board has ruled. The only thing
21 we have not done is since this is important, we have not
22 given the other parties an opportunity to present any answer
23 to Ms. Bernabei's argument if you choose to make any. This
24 would probably be the place in the transcript of the
25 proceeding where any error that we are making is going to be

1 evaluated.

2 MR. TROWBRIDGE: Mr. Chairman, I don't see much
3 purpose in pursuing further the question. I would like to say
4 and I think we are going to have another opportunity to say
5 it in connection with Dr. Gilinsky that Ms. Bernabei now and
6 more so even in her filing this morning mischaracterizes
7 the nature and purpose of licensee's testimony and as the
8 Board has pointed out if she thinks that is its purpose
9 and it is improper, she may object at the time.

10 I do think that we need to know now whether
11 Ms. Bernabei is now going to call Mr. Bradford live because
12 I think we had better get on with other aspects of the
13 argument if that is the case.

14 MS. BERNABEI: I don't understand the question.

15 JUDGE SMITH: Are you going to call Mr. Bradford
16 live?

17 MS. BERNABEI: We will have to see if he would
18 appear pursuant to subpoena. I am not at all sure that that
19 is the case.

20 JUDGE SMITH: If you do, would his deposition be
21 the nature of his prepared written testimony? We are ruling
22 not only that a deposition would not serve, but the
23 deposition were he here if that is the entirety without
24 cross-examination of his testimony, we are ruling that that
25 would not be competent, too.

1 MS. BERNABEI: I understand that. In fact, what we
2 intend to do and we would request certification from the Board
3 is for your to lay out the legal basis, one, for excluding
4 Mr. Bradford's deposition testimony as testimony and
5 two, for excluding him as a witness. As we stated in our
6 pleading, neither Dr. Gilinaky nor Mr. Bradford are our expert
7 witnesses. We have not retained them. We do not pay them and
8 neither would accept payment.

9 Therefore, if either were to testify live it
10 would be pursuant to a subpoena in which case we could not
11 prefile written testimony. We wanted to give the Board the
12 opportunity to address that question which is why we filed
13 our motion with regard to Dr. Gilinsky.

14 In any case, we will discuss with Mr. Bradford
15 whether or not he would appear pursuant to a subpoena to
16 testify at some time. My understanding now is that he may not
17 be available during the three and a half-day weeks that the
18 Board has set out for this hearing. I don't know if he will
19 be able to make it.

20 In any case, what I think would be appropriate
21 is for the Board to make all of the bases of its opinion
22 in terms of exclusion of his deposition testimony as well as
23 exclusion of his hearing testimony on the record so that we
24 can seek certification from the Appeal Board.

25 MR. GOLDBERG: Judge Smith, before you rule any

1 further on it, I would like to state the staff's position on
2 this issue. We believe that the testimony given by former
3 Commissioner Bradford at his deposition of October 23rd is not
4 relevant and material to the issues before the Board.

5 They consist to a large extent of former Commissioner
6 Bradford's personal opinions. I don't believe that that is
7 relevant and material and that the testimony should be excluded
8 on that basis. We do not have a position on whether or not
9 there is a violation of the Ethics in Government Act. We don't
10 think that issue needs to be reached in connection with
11 former Commissioner Bradford's testimony as stated in the
12 deposition because we believe that it should be ruled as
13 irrelevant and immaterial to the issues and not needed by the
14 Board to resolve the mailgram issue.

15 JUDGE SMITH: We have so ruled. We said that that
16 would be an independent basis.

17 MR. GOLDBERG: One other point that I would like to
18 make in connection with the argument that as a matter of law
19 or as a matter of fact, Commissioner Bradford is not available.
20 We do not agree with TMIA's argument about the reach of the
21 Commission's subpoena power. We believe that as a matter of
22 law, he can be reached by NRC subpoena and furthermore, as a
23 matter of fact as I asked Commissioner Bradford at the
24 deposition, he would be available.

25 JUDGE SMITH: With respect to the subpoena, not with

1 respect to the substance of any testimony but with respect to
2 the issuing of a subpoena, we agree with Mr. Goldberg and
3 counsel for the licensee that we do have authority to subpoena
4 him and we did note his deposition testimony that if he could
5 possibly do it, he would come. So with respect to his
6 appearance and nothing else but, we would accommodate that
7 but that does not refer to the substance of his testimony,
8 of course.

9 MS. BERNABEI: Right. Essentially, we don't want
10 to bring him down here to learn at the time he is scheduled
11 if he can come, at the time he is scheduled to testify that
12 he won't be able to so we would like a ruling from the Board
13 as to the admissibility of his testimony.

14 JUDGE SMITH: You have received it.

15 MS. BERNABEI: May I ask you for a clarification on
16 the record for the bases for your decision, both legal and
17 factual.

18 JUDGE SMITH: I thought we had covered that. Let me
19 review it for you. One is that --

20 MS. BERNABEI: Just for clarification.

21 JUDGE SMITH: You are not talking about accepting
22 his deposition?

23 MS. BERNABEI: I am asking for clarification of the
24 ruling on both issues, that is whether his deposition testimony
25 can be introduced in lieu of his live testimony and whether or

1 not his testimony would be excluded from the hearing.

2 JUDGE SMITH: His deposition testimony cannot be
3 received in lieu of his live testimony because it is
4 unreliable and within itself demonstrates that he does not
5 know the issue to which he is speaking. Therefore, his
6 opinions as to the believability of the Dieckamp mailgram
7 are without foundation. I could infer from what he said that
8 he would say that as the president of the corporation in a
9 well-run corporation if things were proceeding according to the
10 way a well-run business should run, that is information he
11 should have had as compared to, did he in fact have the
12 information or did he have a careless disregard for whether
13 he had the information. That is a distinction we made early
14 in this case, that this is not a case of corporate scienter
15 and that is, this is not a case of imputed knowledge. This is
16 a case of actual, personal knowledge and whether there was
17 actual, personal, careless disregard as to what the facts were.

18 So former Commissioner Bradford's opinion that Mr.
19 Dieckamp should have known this information is without
20 context of how we described the issue and as he said, he
21 doesn't know what the issue is any way. His bases were not
22 explored by you who had the biggest duty to do it and without
23 his physical presence here for us to explore, we cannot regard
24 his deposition as being reliable.

25 Second, he has no expertise to offer. Therefore, his

1 testimony is irrelevant.

2 MS. BERNABEI: This would go for his deposition
3 testimony as well as the testimony at trial?

4 JUDGE SMITH: I don't know what his testimony at
5 trial is. Assuming his testimony in trial tracks his
6 deposition, he has no expertise as the issues before us to
7 offer as independent.

8 MS. BERNABEI: Are you making also a finding under
9 the Ethics in Government Act? I would just like it on the
10 record.

11 JUDGE SMITH: We are not finding that if he comes
12 here to testify that he has violated a criminal statute.
13 It is not necessary for us to find that and I Don't even know
14 if it is within our jurisdiction. We are finding however
15 that the Ethics in Government Act has a fairness and a
16 reliability aspect to it which is within our jurisdiction and
17 responsibility.

18 The only purpose that we can see for offering former
19 Commissioner Bradford as for the purpose to which you allude
20 in your motion is to lend his status to your views because
21 you could employ the same analysis that he would employ and
22 make them as arguments but no, you wish to employ his status.
23 Number one, using his status is unfair and number two, using
24 his status is unreliable as far as developing a record.

25 That is our ruling. It is our application of the

1 Ethics in Government Act.

2 MS. BERNABEI: Thank you. Could I also ask just
3 for a complete record if Mr. Trowbridge would state in what
4 way he believes TMIA had mischaracterized the purpose of the
5 Zebroski and Van Witbeck testimony and what the purpose of
6 that testimony is?

7 MR. TROWBRIDGE: I will do that in a moment. Let
8 me add, Mr. Chairman, that if TMIA were to call Mr. Bradford,
9 the objections we have stated under part (b), I believe it
10 was, and part (c), namely the lack of expertise, qualifications
11 to give Mr. Bradford's testimony and the Government in Ethics
12 Act would still stand. We would have an additional objection
13 which would replace the objections to the deposition in part
14 (a), namely we would not unless something is done about it,
15 had received Mr. Bradford's testimony in advance unless it
16 is going to be that position exactly as you offered it
17 which the Chairman has indicated would not be acceptable, we
18 are entitled under the Commission's regulations and the Board's
19 order to receive in advance written testimony and any witness
20 you propose to put on.

21 (The Board conferred off the record.)

22 JUDGE SMITH: Judge Wolfe pointed out that when you
23 asked me to restate our reasons, I neglected the second time
24 around to observe that he would be available and we would have
25 authority to require his attendance.

1 MS. BERNABEI: That has to do with the introduction
2 of the deposition in lieu of his live testimony.

3 JUDGE SMITH: Yes.

4 MS. BERNABEI: Just the first ruling and not the
5 second.

6 JUDGE SMITH: There are two reasons why we don't
7 accept his deposition. One is that it is not reliable and
8 it is not sufficient for us to receive it and the other is
9 that he is available and he is within the reach of our
10 subpoena power and as counsel for licensee has pointed out
11 in their brief, the law favors live testimony particularly
12 on factual issues of this nature and would be more appropriate.

13 MS. BERNABEI: May I also request that Mr. Trowbridge
14 explain what the purpose of the Zebroski and Van Witbeck
15 testimony is?

16 JUDGE SMITH: Before we spend much time on that
17 at one point you stated the purpose of the Zebroski and Van
18 Witbeck testimony and if I were to take that, it would be
19 perfectly appropriate. It was strictly factual. Then you
20 went on in what I regard as a non sequitur in an entirely
21 different direction. I will let Mr. Trowbridge answer if he
22 is so inclined.

23 MR. TROWBRIDGE: I am glad to respond. As I
24 understood your remarks a little while ago, you were saying
25 essentially what you said in your filing this morning with the

1 Board. Reading from that filing and I am going to read two
2 paragraphs, "The purpose of this testimony" and that is
3 Zebroski and Van Witbeck, "therefore is to demonstrate that
4 no licensee personnel interpreted the pressure spike with
5 certainty and precision to indicate core damage until
6 hydrogen calculations were made in the period from April 2
7 to April 4 and more extensive research had been completed
8 months after the accident. Only this type of detailed and
9 documented research and analysis constitutes to licensee
10 evidence of someone interpreting the pressure spike in terms
11 of core damage." Their testimony does not say that and is
12 not put on for that purpose.

13 The purpose of putting Zebroski and Van Witbeck on
14 in part is to help explain Mr. Dieckamp's deep involvement
15 in the accident in the days following the accident. Another
16 purpose is to demonstrate that even experts had difficulty
17 in understanding the accident.

18 MS. BERNABEI: I guess our response to that would be
19 that it appears that second purpose is, in fact, what is
20 stated by TMIA, that there was not a level of understanding --
21 Mr. Trowbridge if you would please let me finish -- there was
22 not a level of understanding an interpretation of the pressure
23 spike that rose to evidence until sometime after the occurrence.
24 That is I how perceive it.

25 MR. TROWBRIDGE: That may be your perception. It is

1 not what they have said. It is not what counsel for licensee
2 has said at any point.

3 MS. BERNABEI: Just to make the record complete,
4 I would like to quote from Mr. Van Witbeck's testimony whose
5 quote appears on the bottom of page five of our reply in
6 which he said that his appreciation for the significance of the
7 pressure spike as a measure of core damage was not gained
8 until he was exposed to calculations of the volume of hydrogen
9 involved which was in the period April 2 through April 4. That
10 is page three of Van Witbeck's testimony.

11 MR. TROWBRIDGE: I simply say, "precisely."

12 JUDGE SMITH: Shall we move on to Dr. Gilinsky. I
13 believe that we have had sufficient discussion as to why
14 former Commissioner Bradford's testimony would not be
15 relevant and would be against the intent of the Ethics in
16 Government Act and its implementing regulations. They would
17 apply with equal force to Dr. Gilinsky.

18 However, there is another area and that is you
19 allude to facts possessed by Dr. Gilinsky with respect to
20 information possessed by Mr. Dieckamp and the issue is as I
21 see it, should we receive that testimony orally, what about the
22 licensee's complaint that they are entitled to notice of that
23 testimony in written form within the schedule that we approved
24 and I guess they made it, I am sure they did, and would occur to
25 us independently, that we don't know what type of information

1 he possesses. We only know a very, very broad category that
2 somehow he discussed these issues but we don't know what you
3 propose to prove by them and we certainly do not want to find
4 out on the witness stand for the first time.

5 Your proposal simply files in the face of any
6 regulated organized hearing, that you don't learn for the
7 first time the testimony of a witness of such importance
8 on such an important matter the day he or she appears to
9 testify. That is bound to lead to unfairness and an unreliable
10 record.

11 I think that there is some merit to your point that
12 Dr. Gilinsky is not under your employ or under your control
13 and perhaps you could not have produced written testimony if
14 he didn't choose to provide it to you but we haven't heard from
15 you as to why you have not presented the specifics of his
16 factual testimony. We haven't heard from you and it is long
17 overdue, it is late.

18 So without anything more, our only choice would be
19 to deny it. We don't know what he is going to testify to in
20 areas that we would consider.

21 MS. BERNABEI: First of all, Dr. Gilinsky has stated
22 that he will not prefile written testimony or prepare
23 testimony for submission in any NRC proceeding. He will,
24 however, pursuant to subpoena, present evidence within
25 areas that the Board considers relevant.

1 It seems to me that what we are talking about in
2 subpoenaing a witness and I think we have laid an adequate
3 predicate that he has relevant and material evidence and I
4 don't think -- first of all, we are not authorized to
5 and cannot file prefiled written testimony nor can we represent
6 what he would say on the stand.

7 JUDGE SMITH: Why?

8 MS. BERNABEI: We are not authorized to. We are not
9 his attorney.

10 JUDGE SMITH: We know what he would say. Whose
11 witness are you offering him as?

12 MS. BERNABEI: What I can represent is I have talked
13 to him about areas in which he has relevant information. I
14 have essentially represented in the pleading what we know.
15 Let me just say a couple of things.

16 JUDGE SMITH: You mean you know nothing more than you
17 have said here?

18 MS. BERNABEI: I am not authorized to state anything
19 more.

20 JUDGE SMITH: What do you mean? Do you know and we
21 will come to authorization, but do you know more than you said
22 in your pleading?

23 MS. BERNABEI: Not too much.

24 JUDGE SMITH: What?

25 MS. BERNABEI: I know somewhat more. I don't believe

1 and I am not authorized and I am not going to state to you
2 at this time what Dr. Gilinsky will say on the stand. I don't
3 know what he will say on the stand. That is precisely why
4 we are seeking a subpoena to have him testify.

5 JUDGE SMITH: Thank you.

6 MS. BERNABEI: What I do know and I think it is
7 absolutely clear from the pleading is that he has relevant and
8 material information. One, he had a conversation with Mr.
9 Dieckamp about reporting of information and the pressure spike
10 and reporting of information about the pressure spike on May 7
11 during the Congressional site visit. That obviously indicates
12 something about Mr. Dieckamp's state of mind just prior to
13 sending the Dieckamp mailgram.

14 Two, he was a recipient of the mailgram. How he
15 interpreted the words of the mailgram in light of his conversa-
16 tion with Mr. Dieckamp on May 7th and his contact with Mr.
17 Dieckamp the preceding period.

18 JUDGE SMITH: What is the antecedent to "he?"

19 MS. BERNABEI: Dr. Gilinsky.

20 JUDGE SMITH: How Dr. Gilinsky interpreted the
21 mailgram?

22 MS. BERNABEI: He was the recipient.

23 JUDGE SMITH: Right.

24 MS. BERNABEI: There is a person who sends the letter
25 and a person who receives it. He had had conversations with

1 Dr. Dieckamp on May 7th specifically about the subject of the
2 mailgram, whether anyone interpreted the pressure spike in terms
3 of core damage and withholding of information.

4 MR. TROWBRIDGE: That is not what the statements says
5 in your pleading.

6 MS. BERNABEI: Let me read the sentence in my
7 pleading.

8 MR. TROWBRIDGE: Very carefully.

9 JUDGE SMITH: Let's everybody find it so we know what
10 we are doing here.

11 MS. BERNABEI: Page four.

12 JUDGE SMITH: This is motion for leave to present
13 testimony.

14 MS. BERNABEI: That's correct. Page four, under
15 item II, "Dr. Gilinsky's understanding and interpretation of
16 the relevant portion of the mailgram is probative of Mr.
17 Dieckamp's intent in sending the mailgram and state of mind
18 at the time of sending the mailgram."

19 MR. TROWBRIDGE: You characterized a minute ago his
20 conversation.

21 MS. BERNABEI: That is item one.

22 MR. TROWBRIDGE: Yes, and you mischaracterized it.

23 MS. BERNABEI: Excuse me. I wrote the pleading.

24 I think I know what we say. Item one, "On May 7, 1979, Dr.
25 Gilinsky attended a site tour by the Subcommittee on Energy

1 and the Environment of the Committee on Interior and Insular
2 Affairs of the House of Representatives. During that tour,
3 Dr. Gilinsky spoke to Mr. Dieckamp about the pressure spike,
4 reporting of the pressure spike to the Commission and reporting
5 of information to the Commission. The site visit became the
6 subject of the New York Times article of May 8, 1979 to which
7 Mr. Dieckamp responded by means of his May 9, 1979 mailgram."

8 It was in this context that Dr. Gilinsky two days
9 later received a copy of the mailgram directly from Mr.
10 Dieckamp. I think his understanding of what the mailgram
11 meant and why he was sent a copy is probative of Mr.
12 Dieckamp's state of mind and his purpose in sending the
13 mailgram.

14 JUDGE SMITH: What kind of metaphysical principle
15 is intended to apply here?

16 MS. BERNABEI: No metaphysical principle. What I
17 am saying is that someone who receives a letter has an idea
18 what the letter means. That is what I am saying. Mr.
19 Dieckamp has gone on in great length in his testimony to say
20 what he meant by "no evidence" and what he meant by
21 "withholding of information."

22 JUDGE SMITH: Is that the purpose for which you
23 would offer his testimony, that and some other unknown area
24 as to which you are not at liberty to disclose?

25 MS. BERNABEI: He had a conversation with Mr.

1 Dieckamp on May 7, 1979 in which he discussed reporting of the
2 pressure spike to the Commission and reporting of information
3 generally to the Commission. That indicates Mr. Dieckamp's
4 state of mind at that time.

5 JUDGE SMITH: All right. What would he testify
6 about that?

7 MS. BERNABEI: The substance of the conversation.

8 JUDGE SMITH: What is the substance of the
9 conversation?

10 MS. BERNABEI: I don't know what Dr. Gilinsky is
11 going to state on the stand. I am not authorized to state that.

12 JUDGE SMITH: Wait a minute. You are racing ahead
13 faster than I can think. One, you don't know everything.

14 MS. BERNABEI: That's true.

15 JUDGE SMITH: Is there another subset of information
16 that you are not authorized to reveal?

17 MS. BERNABEI: Yes. I am saying that Mr. Dieckamp
18 was a participant in this conversation. He knows what they
19 talked about and if there was some concern and I broached this
20 very early on as soon as we knew we intended to call Dr.
21 Gilinsky with Mr. Blake about if the licensee wanted discovery
22 about Dr. Gilinsky. We laid out these areas in our original
23 announcement of him as a witness. If they want to know what
24 he is going to testify to, they could have taken discovery.

25 We stated we did not have authority and could not

1 file prefiled written testimony. If they had some question
2 about what he is going to testify to, what happened during
3 this conversation, they can depose him. We said given the
4 time at which we announced him as a witness, we would not
5 oppose discovery as beyond the discovery period.

6 MR. TROWBRIDGE: Mr. Chairman, first let me correct
7 a misrepresentation by Ms. Bernabei. She took Mr. Dieckamp's
8 deposition and she was told in several times over that he did
9 not remember, he may well have had a conversation with Dr.
10 Gilinsky, but he did not remember it.

11 The suggestion that all we have to do is to ask
12 Mr. Dieckamp what happened is just not in keeping.

13 MS. BERNABEI: Let me state that that is a misrepre-
14 sentation of the deposition and I allow that it was not
15 deliberate on Mr. Trowbridge's part because he was not at the
16 deposition. It is not true that Mr. Dieckamp said he did not
17 remember anything about the conversation. He said that he may
18 have been present and he did seem to remember some parts of
19 it.

20 JUDGE SMITH: Who is this? Are we talking about
21 Mr. Dieckamp?

22 MS. BERNABEI: Yes, Mr. Dieckamp. And whether or
23 not we take his memory as expressed in deposition as credible
24 is our judgment.

25 JUDGE SMITH: I think that each of you have digressed

1 somewhat there because even assuming Mr. Dieckamp does remember
2 the conversation, that is not a substitute for advanced disclo-
3 sure of what Dr. Gilinsky remembers from the conversation.
4 It relates to it but it certainly is no substitute because
5 I assume there would be a difference in memory. Anything
6 further?

7 MS. BERNABEI: Discovery was available to the
8 licensee. We expressed that we had no objection to discovery
9 beyond the discovery cut-off. Mr. Trowbridge in his pleading
10 makes much of the fact that we didn't answer a letter by Mr.
11 Blake. There were as I remember it, at least one conversation
12 and perhaps more after Mr. Blake sent his letter in which I
13 indicated there was no change in position of TMIA.

14 JUDGE SMITH: All right. Anything further?

15 (No response.)

16 (The Board conferred off the record.)

17 JUDGE SMITH: Your motion to produce the oral
18 testimony of Dr. Gilinsky is denied. The Board is concerned
19 that you have represented to us that Dr. Gilinsky may have
20 information which may be important to this issue and important
21 to Mr. Dieckamp's state of mind which you have felt restrained
22 to reveal.

23 However, I am sure that that could be a measure of
24 how important you think it is. You have not made a representa-
25 tion to us that convinces us we should inquire independently

1 of Dr. Gilinsky. You have minimized the area of information
2 that you possess and are unwilling to disclose. Apparently
3 we infer from your comments that the major area of his
4 proposed testimony would be unknown to you. Therefore, it
5 seems to me that you are using this hearing process as a
6 substitute for discovery and we have had discovery opportunities
7 and we just simply cannot give you carte blanche to present
8 a witness whose testimony you don't know what it is going to
9 be and in any event where you know what it is going to be, you
10 refuse to reveal.

11 So your motion is denied.

12 MS. BERNABEI: May I just clarify our position
13 because I don't believe you have stated it accurately. It is
14 not true that the major area of Dr. Gilinsky's proposed
15 testimony is unknown. We are not authorized to go into greater
16 detail than we did in our motion.

17 JUDGE SMITH: I must say that that reinforces my
18 confidence in the correctness of our ruling.

19 MS. BERNABEI: May I ask also for the basis of
20 your ruling on the Ethics and Government Act, that is whether
21 you would independently even with prefiled testimony bar
22 his testimony on that ground?

23 JUDGE SMITH: No. If you were to represent to us
24 this is opinion testimony as to your discussion which parallels
25 the discussion of Peter Bradford's proposed testimony, we felt

1 it was not necessary to review all of our reasons. Referring
2 now to Dr. Gilinsky's conversation with Mr. Dieckamp which
3 I believe would be permitted under the Ethics in Government
4 Act, I don't hear any argument that it would not be. It
5 is certainly an expressed exemption of the OPM implementation
6 regulation. So we are not excluding his factual testimony,
7 the testimony as to what he knows about the information
8 possessed by Mr. Dieckamp and his conversation with him
9 on the basis of the Ethics in Government Act.

10 We are excluding it on the basis that one, the
11 major portion of it which you know about you have declined
12 to reveal and other aspects of it which you represent to be
13 relevant, you don't know what it is. So we have no basis
14 to grant your motion. We deny your motion because we have
15 no basis upon which to grant it.

16 I want to state again if you had pointed out
17 information to us which we believe brings into important
18 question this issue, then the Board would go into the next
19 area and talk about timeliness and talk about what it would
20 mean to the hearing process and the need to be fully
21 informed and all those other things.

22 But we don't have to go that far because you have
23 not given us any information upon which we can form a belief
24 that he possesses anything that we have to have to make a
25 complete and reliable evidentiary record.

1 MS. BERNABEI: Judge Smith, just to clarify for the
2 record, you then are specifically citing the paragraph one, two
3 and three.

4 JUDGE SMITH: Would you want to point out something
5 to me that we may have overlooked? I am looking now at page
6 four, "Outline of TMIA's questioning of former Commissioner
7 Gilinsky" and we got the site tour in paragraph one. In
8 paragraph two your sentence, "Dr. Gilinsky's understanding and
9 interpretation of the relevant portion of the mailgram is
10 probative of Mr. Dieckamp's intent in sending the mailgram
11 and state of mind at the time of sending the mailgram." That
12 was my reference to metaphysical principles with which we are
13 not charged with expertise.

14 In paragraph three you demonstrate a broad relevance
15 but you simply say -- it is just not specific enough at this
16 stage of the hearing.

17 MS. BERNABEI: So your latter ruling applies to
18 paragraphs one, two and three.

19 JUDGE SMITH: Paragraph four, that is covered in
20 the Bradford ruling, I believe. It is just the factual,
21 one, two and three that we believe are not covered by the
22 Ethics in Government Act but you have not demonstrated
23 within the Rules of Practice and in the procedural orders
24 issued by this Board that you can bring him in.

25 MS. BERNABEI: I would just like to state one other

1 thing, that since primarily the basis lies on a determination
2 of the relevance and probativeness of his testimony prior to
3 hearing it, that it is the practice that a subpoenaed
4 witness is allowed to testify and there is a provision to
5 strike testimony in the event that it is not relevant and
6 material.

7 JUDGE SMITH: But there is no provision at all for
8 you to sit on information and refuse to reveal it. That
9 killed you right there if nothing else. If you were to
10 represent to us that Commissioner Gilinsky told you that he
11 had conversations with Mr. Dieckamp about the subject matter
12 of his mailgram but had refused to reveal the significance
13 of it or the substance of it, then you have a different
14 argument. That is not what you are telling us.

15 You are telling us, one, you don't know and two,
16 what he did tell you, you are not going to tell us about.

17 MS. BERNABEI: No. Just to make it absolutely
18 clear, what we stated here on page four in specifically the
19 factual items, one, two and three, is what we know Dr.
20 Gilinsky has information about. I would say the second
21 sentence under item one states exactly what you said, Judge
22 Smith. "During that tour, Dr. Gilinsky spoke to Mr. Dieckamp
23 about the pressure spike, reporting of the pressure spike to
24 the Commission and reporting of information to the Commission."

25 That is my understanding of the subject of the

1 mailgram. He does have information that he spoke to Mr.
2 Dieckamp about the subject of the mailgram on the site tour.

3 JUDGE SMITH: Right. What did he speak to him
4 about? You can't tell us?

5 MS. BERNABEI: I think it is clear that he spoke
6 to him about the pressure spike, reporting of the pressure
7 spike to the Commission and reporting generally of information
8 to the Commission. That is the subject of the mailgram. I
9 think that indicates a probative and material area for this
10 Board's examination. If your determination is otherwise, fine.

11 JUDGE SMITH: Is this number one, is that the area
12 where you have no information other than this or is that in
13 the area where you have information which you are not authorized
14 to reveal?

15 MS. BERNABEI: I have additional information about
16 the details. I am not authorized to state for Dr. Gilinsky
17 what his testimony would be.

18 JUDGE SMITH: Is it that he told you that you were
19 not able to do that, not allowed to do that?

20 MS. BERNABEI: I am not his attorney. I am not
21 authorized to speak for him.

22 JUDGE SMITH: No. You are his sponsor as a witness.

23 MS. BERNABEI: Right.

24 JUDGE SMITH: If you know what he is going to say,
25 tell us what he is going to say.

1 MS. BERNABEI: There are appropriate means to
2 determine what he is going to say and they are not available
3 and it is not to question me at a hearing. I don't think
4 that is appropriate.

5 JUDGE SMITH: The Board thinks it is appropriate.
6 We think it is appropriate. You have lost on that.

7 MS. BERNABEI: I understand that. I have certain
8 ethical responsibilities with regard to witnesses and the group
9 I represent and I am not going to transgress those.

10 JUDGE SMITH: All right. I think we have discussed
11 it enough.

12 MR. GOLDBERG: Before we leave this subject I just
13 want to put on the record the staff's position on Dr. Gilinsky.
14 They identified four areas as to which they wanted Dr.
15 Gilinsky to testify. As to the first three as generally
16 outlined by TMIA, they concern factual matters and if they
17 were to convince the Board that he has testimony on relevant
18 and material facts which the Board needs to resolve this
19 issue, the staff would have no objection to Dr. Gilinsky
20 testifying as to those matters.

21 With respect to the fourth area outlined by TMIA,
22 our position on that is that it is not relevant or material
23 and that inquiry into these subjects would not be proper by
24 TMIA and that Dr. Gilinsky would not be competent to testify
25 as to how the full Commission would have reacted to certain

1 information. Dr. Gilinsky could speak for himself but could
2 not speak about the state of mind of the other Commissioners.
3 So we would oppose any inquiry into the fourth area identified
4 by TMIA.

5 JUDGE SMITH: I would like to add to the Board's
6 consideration with respect to Dr. Gilinsky and the factual area,
7 we are not comfortable that Dr. Gilinsky has been fully
8 informed concerning the use that is being made with your
9 views of his views.

10 We were taken with the total lack of information
11 that former Commissioner Bradford had about the issues as to
12 which he was being deposed and we are not confident that
13 given the accuracy of your statements one through three, that
14 Dr. Gilinsky is thoroughly informed as to what the narrowness
15 of our issues are and what we are allowed to do. That is part
16 of the problem.

17 We cannot read with any sense of certainty or even
18 of being reasonably assured that Dr. Gilinsky is sitting out
19 there with information which would be important to our
20 determination. If we had that feeling, it would be a different
21 matter but we don't have that feeling. We don't have
22 confidence, any confidence, I do not have any confidence in
23 your presentation.

24 MS. BERNABEI: If I may state first of all both
25 Chairman Bradford and Dr. Gilinsky have been fully informed

1 of all pleadings we filed.

2 JUDGE SMITH: They have been informed of all the
3 pleadings you have filed?

4 MS. BERNABEI: With regard to their testimony. We
5 have provided them with copies and it is my understanding that
6 in terms of the accuracy of what information they have, they
7 do not have a problem with that.

8 JUDGE SMITH: I can tell from the very language of
9 Commissioner Bradford's deposition that he was asked to express
10 opinions and he did express opinions not understanding the
11 significance of the opinions in this case.

12 MS. BERNABEI: I would like to address the second
13 point. Neither one is being called as a Judge in this
14 hearing. They are both witnesses. Witnesses do not as a rule
15 and certainly have no authority to provide the Board with an
16 overall legal analysis of this case. I think it is clear from
17 former Commissioner Bradford's testimony that he had no
18 intent to do that. He had particular information, particular
19 facts, particular opinions, which could be useful to the Board.

20 It is within the Board's province to define the scope
21 of the hearing and what information is material based on
22 argument of both sides. It seems to me that it would be
23 improper for either Dr. Gilinsky or Mr. Bradford to make
24 recommendations to you in that respect. That is the parties'
25 responsibility and you may accept or reject their position.

1 JUDGE SMITH: Normally I would agree with you that
2 a witness should not really have to know the issues which
3 they are addressing to offer testimony. I was concerned about
4 that observation, too, except with respect to your purported
5 use of their opinions.

6 All right. Anything further? That brings the
7 problem of what are we going to do about all those documents
8 you were going to offer through Dr. Gilinsky?

9 MS. BERNABEI: Let me just address one point first.
10 We would move to certify the two decisions to the Appeal Board.
11 We can file a written motion but I would prefer to do it
12 orally so if it is denied we can seek certification directly
13 from the Appeal Board.

14 JUDGE SMITH: You want a referral by ruling is
15 really what you want.

16 MS. BERNABEI: That's correct.

17 JUDGE SMITH: What are the standards for such a
18 referral?

19 MS. BERNABEI: The significant issue of fact or law,
20 of law primarily, such that it pervasively affects the hearing.
21 We think that both Commissioners' testimony in terms of the
22 rulings you have made about the probativeness of the
23 information is pervasive in the sense that it forecloses TMIA
24 from presenting evidence on which licensee will present
25 evidence and as such will pervade the hearing generally.

1 Secondly, I think in terms of the Ethics in Government
2 Act, that there is a legal mistake of such significance that
3 it deserves attention and again will pervasively influence
4 the hearing.

5 I think we meet the standard.

6 JUDGE SMITH: All right.

7 (Counsel for licensee conferring off the record.)

8 JUDGE SMITH: Would you like to break?

9 MR. TROWBRIDGE: I would like a break, Judge Smith.

10 JUDGE SMITH: All right. Let's break for ten
11 minutes.

12 (Whereupon, a short recess was taken.)
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2A 1 JUDGE SMITH: On the record. Mr. Trowbridge, do you
2 wish to answer the oral motion to refer the ruling?

3 MR. TROWBRIDGE: Yes, Mr. Chairman. I tried to take
4 a look at the regulation and I am not sure I got all the right
5 places, but I think the case law on this is probably where you
6 have to look for the groundrules and rulings on this. If the
7 Board is going to entertain this motion, I think it should be
8 put in writing and we have a chance to respond in writing.

9 JUDGE SMITH: I know we are all very busy and I
10 might point out with respect to your motion it may be the first
11 time ever that the Ethics in Government Act has come up in our
12 proceedings. I am inclined to think that it is and that
13 if our rulings were to depend on the Ethics in Government
14 statute and implementing regulations your argument would have
15 more merit than we are giving it but in essence our rulings
16 are really relatively routine evidentiary rulings that a
17 person proposed as an expert does not have the expertise.
18 They may be unusual experts but nevertheless it is a relatively
19 routine evidentiary hearing.

20 It does affect your case in an important way but it
21 is not the type of thing that should be referred.

22 MS. BERNABEI: Essentially we are doing this because
23 we have to seek certification first from the Board.

24 JUDGE SMITH: Yes, I understand.

25 MS. BERNABEI: And then from the Appeal Board. I

1 you want to deny it and consider that --

2 JUDGE SMITH: Yes. We deny it.

3 MS. BERNABEI: That's fine. We would then feel free
4 to seek certification from the Appeal Board. Let me just
5 state I did understand the basis of your rulings with regard
6 to both motions were stated on the record. Is that correct?

7 JUDGE SMITH: Yes.

8 MS. BERNABEI: Thank you.

9 MR. GOLDBERG: I would like to state the staff's
10 position on the oral motion to refer the ruling to the Appeal
11 Board. The Licensing Board stated several reasons for denying
12 both of TMIA's motions.

13 With respect to both of those motions, there are
14 independent rulings in the nature of evidentiary rulings of
15 the Board as to whether the testimony would be reliable,
16 relevant, material and probative and whether there was the
17 appropriate expertise on the part of the individuals to
18 support the proffered testimony. Those reasons in and of
19 themselves support the Board's denial of both of TMIA's
20 motions.

21 They are the typical routine rulings on evidentiary
22 matters for which appeals are interlocutory in nature and
23 clearly prohibited under the Commission's case law. The
24 Board also stated reasons as part of its denial of the motions
25 in connection with the Ethics in Government Act. The basis

1 in connection with the Ethics in Government Act is not needed
2 to support the Board's ruling and therefore, that issue need
3 not be reached regardless of how the Appeal Board may view
4 that matter. We believe that the Board's rulings in
5 connection with the reliability, the relevancy, the
6 materiality and the expertise of the individuals provides an
7 adequate support for the denials of the motions such that a
8 referral is not appropriate.

9 MS. BERNABEI: May I address MR. Goldberg's point?
10 First of all, the motion or petition for certification is the
11 appropriate way to take an interlocutory appeal of an
12 evidentiary ruling that affects a proceeding in a pervasive
13 manner. That is what we are attempting to do.

14 So Mr. Goldberg's point about interlocutory appeals
15 being impermissible does not apply.

16 Secondly, we think in the sense that the Ethics in
17 Government Act forms one basis for the ruling that it is
18 appropriate to appeal or move for certification on that ground
19 as well as the others.

20 MR. GOLDBERG: The point I was trying to make is
21 that there is no pervasive effect on the proceeding. It is a
22 typical evidentiary ruling by the Board and those have been
23 repeatedly held to not constitute a pervasive effect on the
24 proceeding which would support referral or directed certifica-
25 tion.

1 JUDGE SMITH: Shall we move on? Having lost your
2 efforts to produce the oral testimony of Dr. Gilinsky, then
3 you have a problem with your November 6, 1984 letter. Is that
4 ripe for consideration or should it simply wait until the
5 evidentiary hearing?

6 I think either is an appropriate course. It would
7 be the pleasure of the parties.

8 MS. BERNABEI: I did not come today prepared to
9 address that.

10 JUDGE SMITH: All right. Shall we move on Mr.
11 Gamble's testimony?

12 MR. GOLDBERG: Yes. I would like with the Board's
13 permission to distribute to the Board and to the parties an
14 October 29th letter from Ms. Bbrnabei to Mr. Blake which
15 previously was provided to the Board and all the parties
16 which makes a point about TMIA's position on which I would like
17 to agree and indicate that TMIA's position seems to be
18 consistent with ours in connection with the relevancy of
19 Mr. Gamble's testimony.

20 (Counsel for NRC staff distributed above-referenced
21 document.)

22 MR. GOLDBERG: If I could direct your attention to
23 the last paragraph which begins on the first page beginning
24 with the second sentence of that paragraph, Ms. Bernabei has
25 stated TMIA's position in this proceeding to be that the

1 "adequacy of various investigations or inquiries into the TMI
2 accident and information flow during the accident is not the
3 issue before the Licensing Board. The issue is whether Mr.
4 Dieckamp knew or should have known of misstatements which TMIA
5 believed exist in his mailgram at the time he sent it and
6 whether he should have corrected these misstatements after
7 he send the mailgram. The various reports and interviews
8 which provide support for them are relevant only insofar as
9 they provide factual support for the argument as to whether
10 specific Met-Ed personnel knew about and understood the
11 pressure spike on March 28. Therefore, I do not believe
12 litigation into the adequacy of the House Report is permitted
13 under the scope of the hearing."

14 This was Ms. Bernabei's position with respect to the
15 licensee's attempt to inquire into certain of the background
16 of the House Report which is one of the documents, the so-called
17 Udall Report, which is one of the documents on the modified
18 stipulation of the parties.

19 I agree TMIA that this Board does not need to
20 litigate the adequacy of the various reports in connection
21 with information flow and the adequacy of investigations
22 which led to those various reports. As TMIA has stated and as
23 the Board has made clear in its order accepting the original
24 stipulation of the parties on the mailgram evidence, these
25 documents are being admitted into evidence without a challenge

1 of the parties on authenticity grounds but the Board will
2 determine the probative value of each one of these and whether
3 or not they are reliable.

4 We don't need to litigate the adequacy of the various
5 investigations. I don't think that is within the intent of
6 the Appeal Board's remand of this issue as to Mr. Dieckamp's
7 state of knowledge. I think it would be a significant
8 expansion of the scope of the proceeding.

9 Mr. Gamble's testimony is in its entirety directed
10 to the adequacy of the investigation which led to NUREG-0760.
11 It is precisely the matter which TMIA has stated they don't
12 believe should be litigated in this proceeding and I agree with
13 them.

14 Therefore, I will move to exclude the testimony of
15 Mr. Gamble in its entirety. I don't think there is anything
16 in there that is relevant and material to the issue which the
17 Board has to decide. I take this position not because of a
18 reluctance at all to address any of the concerns which Mr.
19 Gamble has about the adequacy of the investigation into
20 information flow and the resulting report, NUREG-0760.

21 If the Board shares any of the concerns that Mr.
22 Gamble has expressed and does believe that it is relevant to
23 litigate those matters, the staff would be glad to present
24 evidence on the adequacy of the investigation and the
25 adequacy of NUREG-0760. It will require, however, as I

1 indicated what we view as an expansion of the proceeding and
2 will require additional witnesses on behalf of the staff in
3 order to properly address that matter.

4 The reason why I want to raise now at this time
5 before the hearing my position that the testimony of Mr.
6 Gamble should be excluded in its entirety as irrelevant and
7 immaterial is that I am sensitive, staff is sensitive to
8 the Ethics in Government Act and part zero of the Commission's
9 regulations. This issue was squarely raised by TMIA and the
10 licensee in connection with TMIA's motions concerning former
11 Commissioners Bradford and Gilinsky.

12 The staff does not have a position on whether
13 there is a violation of the Ethics in Government Act by any
14 of these matters but we do have a position as we indicated
15 previously with respect to testimony from former Commissioners
16 Gilinsky and Bradford and as we are doing now, we do have a
17 position on the relevancy of that testimony, the materiality
18 of that testimony, whether it is competent for those witnesses
19 to testify as to the matters outlined and we believe that the
20 Board should rule on those matters as we have stated our
21 position.

22 If the Board is inclined to allow the testimony of
23 Mr. Gamble and wishes to have the parties address the
24 adequacy of the investigation into information flow whether it
25 is staff's or the Udall or Kemeny or Rogovin or whatever, that

1 can be done. But because of the fact that there is an issue
2 involving the Ethics in Government Act we think that before
3 Mr. Gamble is called to testify that there is some indication
4 from Mr. Gamble himself that he is familiar with part zero
5 and the Ethics in Government Act and that he has made his
6 own decision to appear and testify as to the matters that
7 are contained in his testimony.

8 I would point out that in response to an interroga-
9 tory that I asked of TMIA about whether Mr. Gamble was
10 appearing as a fact witness or an expert witness, the answer
11 that was given to me was that he was appearing as both and I
12 just want to alert the Board to the sensitivity that we have
13 that everyone is aware of the Ethics in Government Act and they
14 make their own individual decisions, an informed decision,
15 as to whether they wish to participate in the hearing as
16 has been indicated by TMIA.

17 MS. BERNABEI: May I respond to some of Mr. Goldberg's
18 point? Again I am not sure this is appropriate at this time.
19 I think it is more appropriate at the time Mr. Gamble appears.
20 At the time Mr. Gamble appears to testify, I think it is
21 more appropriate that this be raised. In any case, I would
22 like to address some of the points he made.

23 First, with regard to Dr. Myers' testimony, we
24 entered into a stipulation in large part because of the
25 problems in calling, deposing or otherwise dealing with a staff

1 member of the House of Representatives and as expressed in my
2 letter the problem largely had to do with the House's
3 assertion of the speech and debate clause privilege with
4 regard to testimony or other kinds of presentations by either
5 House members or House staff.

6 In any case, in a pleading that we filed, that is
7 TMIA's response to licensee's fifth set of interrogatories,
8 we specifically dealt with what Mr. Goldberg is bringing up
9 now, that is the fact that we do intend to present a witness
10 as to the adequacy of the staff's investigation.

11 The staff has chosen to present Mr. Moseley on that
12 investigation. If it had chosen not to present itself a
13 witness, I think it might be a more appropriate position to
14 say that we can't criticize or in some way address the
15 adequacy of the investigation. The staff, itself, has chosen
16 to present a witness on this matter.

17 Secondly, I think the Appeal Board --

18 JUDGE WOLFE: With respect to the adequacy of the
19 staff's inspection and enforcement investigation?

20 MS. BERNABEI: I think that the basis of Mr. Moseley's
21 testimony is his participation as director of that investiga-
22 tion and as such is based I assume on his evaluation that it
23 was an adequate and thorough investigation.

24 Secondly, I would like to say that the Appeal Board
25 specifically in its remand of this matter stated that it was

1 not satisfied with the Licensing Board's exceptions or apparent
2 decision to base an opinion on NUREG-0760 and Mr. Moseley's
3 testimony. It said that this Licensing Board should have
4 inquired further and Ms. Doroshov has pointed out that in
5 addition, there is a statement that the Appeal Board could not
6 find evidence in the report itself as to why certain witnesses
7 were believed over other witnesses.

8 In any case I think there is reason given the
9 staff's presentation of a witness to talk about that report
10 or at least one conclusion reached in the course of that
11 report, that the other parties be given adequate opportunity
12 to present witnesses about the adequacy of the investigation
13 in the report.

14 Specifically Mr. Gamble's testimony addresses those
15 portions of the investigation relevant to this Board, one,
16 whether or not anyone interpreted the pressure spike in terms
17 of core damage on the first day of the accident and two,
18 whether the conclusions including the Dieckamp mailgram
19 conclusion was supported by the facts uncovered by the
20 investigation.

21 I think some of the criticism is generic and go to
22 all the conclusions including the one specifically Mr.
23 Moseley is choosing to testify, other ones are focused on
24 whether anyone interpreted the pressure spike in terms of
25 core damage. I think the staff has raised the issue and now

1 to attempt to foreclose the other party from offering evidence
2 on it is similar to what the licensee has attempted to do
3 with Dr. Gilinsky and Mr. Bradford's testimony, that is
4 present their own expert testimony as to what information
5 and what opinions they held and not allow the other parties
6 to present similar information.

7 On the last point, Mr. Gamble is an attorney and
8 he has been advised of the fact that at least with regard to
9 the Bradford and Gilinsky testimony there would be a claim
10 that the Ethics in Government applied. He didn't seem
11 particularly worried about it and he is quite familiar from
12 his own investigations in the Act and the implementing
13 regulations.

14 So I think Mr. Goldberg's concern is misplaced.

15 JUDGE WOLFE: Ms. Bernabei, I have before me and
16 I am certain you do also a copy of Mr. Moseley's proposed
17 testimony. Would you point out to me wherein he testifies
18 or will testify as to the adequacy of the staff investigation?
19 You so stated that he does. I don't know where he does.

20 MS. BERNABEI: Yes. On page two where he talks about
21 his role in the investigation, he says that he led the team
22 that performed the inspection and enforcement investigation
23 and that it led to NUREG-0760 and included in that investiga-
24 tion was an assessment of the Dieckamp mailgram. It seems to
25 me that his testimony as to the Dieckamp mailgram issue, that

1 portion of the report is based in part on the investigation
2 and the report of the investigation.

3 JUDGE WOLFE: I don't see specifically where he
4 addresses in any fashion explicitly that it is his conclusion
5 that the staff's investigation was adequate and you have
6 represented to us that he did do in his proposed testimony
7 and I don't see it.

8 MS. BERNABEI: That is the premise of his testimony.
9 He does not state in those words. That is the premise of his
10 testimony.

11 MR. GOLDBERG: I would like to respond to Ms.
12 Bernabei's statements about Mr. Moseley's testimony. Judge
13 Wolfe, you are correct. He does not testify about the
14 adequacy of the staff's investigation.

15 Mr. Moseley, as the Board is aware, testified in the
16 original management proceeding. The Board specifically asked
17 him about his view of the mailgram and the statements that
18 were in NUREG-0760 about there not being a material false
19 statement in connection with the mailgram. Mr. Moseley in
20 oral testimony answered some questions of the Board about
21 Mr. Dieckamp's mailgram and Mr. Moseley offered his opinion
22 that he believed that the information Mr. Dieckamp was trying
23 to convey was true.

24 In one question by Chairman Smith at that time,
25 Chairman Smith said to Mr. Moseley, "You people have

1 interviewed Mr. Dieckamp and what I want to know is what
2 your conclusions are." Mr. Moseley responded by saying,
3 "I believed Mr. Dieckamp was telling the truth with the
4 information he was trying to convey in the mailgram."

5 Mr. Moseley's interview of Mr. Dieckamp was not
6 entered into evidence. The Appeal Board made it clear when
7 they remanded this proceeding that it wasn't clear to the
8 Appeal Board that the staff had ever interviewed Mr. Dieckamp
9 and therefore, the Appeal Board questioned whether there was
10 a basis for Mr. Moseley's testimony that he believed that
11 the information Mr. Dieckamp was trying to convey was true.

12 The purpose of Mr. Moseley's testimony in this
13 reopened proceeding is to make it clear that in fact he did
14 interrogate Mr. Dieckamp about Mr. Dieckamp's state of
15 knowledge. Mr. Dieckamp's sworn statement that was taken
16 as a part of that interview is a part of the stipulation which
17 the parties have agreed in connection with the mailgram
18 evidence.

19 This testimony merely establishes that there was a
20 basis for Mr. Moseley's testimony on his belief as to whether
21 Mr. Dieckamp was telling the truth. There are two statements
22 in here which Mr. Moseley gives as indicating that there was
23 a basis for his earlier testimony. One, he interviewed
24 Dieckamp personally and he believed the answers he got from
25 Mr. Dieckamp. Two, the answers that he got from Mr. Dieckamp

1 were consistent with the conclusions which were reached in
2 NUREG-0760. One does not have to accept the investigation
3 or 0760 as adequate or sound. You might think it is a lousy
4 investigation. You might think that lots of things should
5 have been done. The only point that Mr. Moseley is making with
6 this testimony is that there was a basis for the opinion
7 which he previously gave to the Board as to why he believed
8 Mr. Dieckamp was telling the truth. One, Mr. Dieckamp said so
9 and Mr. Moseley believed him and two, the answers that he got
10 were consistent with the facts that were developed and as
11 stated in NUREG-0760.

12 As I said, I don't think that for that purpose it is
13 necessary to litigate the adequacy of the investigation, any
14 investigation into information flow. I don't think that
15 any of the testimony of Mr. Gamble is relevant and material
16 to the Dieckamp mailgram issue.

17 The Board will reach a determination and rule.
18 I would certainly be prepared if the Board wishes to address
19 the adequacy of the investigation at the hearing. I don't
20 think it is necessary. I think it is irrelevant and immaterial
21 but if the Board disagrees, then the staff will be glad to
22 address that.

23 MS. BERNABEI: Could I just address a couple of points
24 Mr. Goldberg raised? I think Mr. Goldberg really has proved
25 our point. Mr. Moseley as is apparent I think from the entire

1 bit of his testimony relies on his judgment about Mr.
2 Dieckamp's credibility in part with and I quote Mr. Goldberg
3 that his answers were consistent with the conclusions reached
4 in NUREG-0760. Those are the very conclusions, the basis of
5 Mr. Moseley's testimony, that Mr. Gamble says are not supported
6 by the facts. The investigation wasn't good enough to reach
7 those conclusions.

8 The conclusions themselves are not supported by the
9 facts. The very conclusions that Mr. Gamble criticizes in his
10 testimony are the conclusions Mr. Moseley is relying on to say
11 Mr. Dieckamp is sincere and credible.

12 Secondly, regardless of whether Mr. Goldberg thinks
13 that the adequacy of the conclusions in NUREG-0760 are before
14 this Board the Appeal Board thinks they are. The Appeal Board
15 did not say they didn't think the Board adequately looked at
16 the basis for Mr. Moseley's testimony. They wanted the Board
17 to look more closely at the adequacy or the basis of the report.

18 Although I may not be citing it precisely, there is
19 a portion in which they say that the conclusions are not
20 supported insofar as there is no indication of why certain
21 witnesses were given credibility and others were not.

22 The Appeal Board directly addressed the report,
23 not just Mr. Moseley's testimony. Therefore, I think the
24 direction to this Board is to itself take another look at it.

25 JUDGE SMITH: Didn't the Appeal Board tell us that

1 we erred in relying upon reports of investigation and that
2 we relied upon the investigators and we should have inquired
3 ourselves? As I recall the criticism of us was that we just
4 sat back and we accepted Mr. Moseley's representation that
5 NUREG-0760 did an adequate job in inquiring into this issue
6 and that he, himself, did too and we should not have done that.
7 We should have made our own inquiry.

8 So even if we were to accept Mr. Gamble's testimony
9 and believe him, I don't know what we are going to do with it.
10 We are doing exactly what the Appeal Board said. We are talking
11 to the actors, the participants.

12 MS. BERNABEI: It seems to me that if Mr. Moseley's
13 testimony is permitted and I quote now from page four, "Mr.
14 Moseley said the conclusion of his about Mr. Dieckamp's
15 sincerity is supported by the fact that in NUREG-0760 we
16 concluded no one present in the control room in TMI-2 believed."

17 JUDGE SMITH: Correct.

18 MS. BERNABEI: What I am saying is that Mr. Moseley
19 can say I believed Mr. Dieckamp because we reached this
20 conclusion after our investigation after we wrote this report.
21 We can present evidence that that report and those conclusions
22 were not supported and that is what we are trying to do.
23 If the staff can present evidence as to how the report sustains
24 Mr. Dieckamp's credibility, we can say, "No, that report
25 doesn't" and that is what we are doing. I think we would be in

1 a much weaker position if the staff was not presenting testimony
2 on NUREG-0760. It is and I think we have the right to present
3 testimony as to why NUREG-0760 does not support their
4 conclusion.

5 JUDGE SMITH: All right.

6 MR. GOLDBERG: Judge Smith, the testimony supports
7 Mr. Moseley's credibility, not Mr. Dieckamps. Mr. Moseley
8 had a basis for the opinion he gave.

9 The point is that Mr. Moseley believed the
10 conclusions. You don't have to agree with the conclusions in
11 NUREG-0760. TMIA doesn't have to believe. Mr. Moseley
12 believes those conclusions and the answers that Mr. Dieckamp
13 gave Mr. Moseley are consistent with the conclusions that
14 Mr. Moseley believes are supported by 0760 and that is why he
15 chose to believe Mr. Dieckamp and that is supporting the
16 credibility of Mr. Moseley's earlier testimony in this
17 proceeding. There indeed was a basis for the opinion he
18 offered.

19 JUDGE SMITH: But there is a thread of logic there.
20 Mr. Moseley is going to tell us as I recall his testimony
21 that one, he believes his testimony to us was accurate based in
22 part upon what, his own personal investigation and interview.

23 MR. GOLDBERG: Yes. That is correct.

24 JUDGE SMITH: Two, because the results of his own
25 investigation and interview were consistent with the work of

1 others.

2 MR. GOLDBERG: That is correct.

3 JUDGE SMITH: And consistent with NUREG-0760 and she
4 is saying now to the extent that Mr. Moseley depends upon the
5 work of others in 0760, to that extent she is allowed to
6 attack the value of that dependency and she does it through
7 Mr. Gamble.

8 Although I had problems with the logic of Mr.
9 Gamble's testimony, I don't have any problems with the logic
10 of Ms. Bernabei's argument that to the extent that Mr. Moseley
11 depends upon the work of others, she can attack that work of
12 others to the extent that the Board is going to rely upon it.
13 I think her logic is good enough. I am not ruling and the
14 Board hasn't discussed it and we are not discussing whether
15 Mr. Gamble's testimony actually does what she is offering it
16 for. That is an entirely different matter.

17 MR. GOLDBERG: If we assume that TMIA establishes
18 that each one of the conclusions in NUREG-0760 is not supported
19 by the facts, it doesn't remove the basis for Mr. Moseley's
20 earlier testimony.

21 JUDGE SMITH: One of the bases.

22 MR. GOLDBERG: It doesn't remove any basis. There are
23 two of them.

24 JUDGE SMITH: It diminishes the extent to which we
25 may rely today upon Mr. Moseley's assurance that his

1 investigation under his direction is -- I just lost track of
2 my thoughts here. To the extent that Mr. Moseley tells us
3 that he depends in part upon the validity of NUREG-0760 for
4 his opinion that Mr. Dieckamp was telling the truth accurately
5 and to the extent that that is not a reliable basis, it seems
6 to me that that obviously is a relevant subject to attack.

7 MS. BERNABEI: If I could also state, I don't think
8 Mr. Moseley outside of his official role as leader of this
9 investigation or director has any relevant evidence. His
10 personal feelings of Mr. Dieckamp are no more important than
11 Mr. Bradford or any one else. I would say that licensee's
12 objections would apply in terms of the Ethics in Government Act
13 to Mr. Moseley who now works for INPO and does not work for
14 the NRC as well as former Commissioners Bradford and Gilinsky.

15 I don't think outside of his role as director of the
16 investigation, he has any relevant information for the Board.

17 JUDGE SMITH: He interviewed Dieckamp, that is not
18 relevant?

19 MS. BERNABEI: If Dr. Gilinsky's conversation on the
20 site tour which generated the mailgram, if his conversation
21 with Mr. Dieckamp is not relevant, I don't think Mr. Moseley's
22 is either.

23 JUDGE SMITH: We never ruled it wasn't relevant.
24 We ruled that you are sitting on the relevancy and you won't
25 tell us about it. I don't think there is anything before us

1 right now. You haven't offered it. Mr. Goldberg was good
2 enough to warn you what he is going to do and we are not
3 really being requested to make a ruling, are we?

4 MS. BERNABEI: It is his motion.

5 JUDGE SMITH: All right. How about the modified
6 stipulation? You reattracted the Board's attention, Mr.
7 Goldberg, when you said that the stipulation goes to the
8 genuineness of the documents and it is for the Board to
9 determine the relevancy of all these documents. That got our
10 attention.

11 MR. GOLDBERG: What I intended to point out was
12 that after the original stipulation was entered into by the
13 parties, the Board issued an order and the Board gave its
14 understanding of what it meant to accept that stipulation.

15 JUDGE SMITH: With which you essentially agree?

16 MR. GOLDBERG: Yes. That is correct.

17 JUDGE SMITH: So whatever we may have said in that
18 order is what you are--

19 MR. GOLDBERG: That is correct. You said it would be
20 up to the parties. You didn't say it was up to the Board.

21 JUDGE SMITH: All right.

22 MR. GOLDBERG: It would be up to the parties to argue
23 and demonstrate the reliability of those documents. That merely
24 by accepting them into evidence, it doesn't give any indication
25 at all that the Board deems them reliable and probative and so

1 forth.

2 JUDGE SMITH: So this modified stipulation doesn't
3 do anything with respect to that, the original one. It
4 simply has a different list of documents.

5 MR. GOLDBERG: That is correct and an additional
6 paragraph on another matter that the parties stipulate to
7 and it certainly is my intention is signing that that it is
8 done subject to and in accordance with the Board's prior order
9 when they accepted the original stipulation.

10 JUDGE SMITH: What is the paragraph to which you
11 refer?

12 MR. GOLDBERG: Paragraph two there is a new paragraph.
13 The previous paragraph two is now paragraph three.

14 JUDGE SMITH: So it is the Wandling notes.

15 MR. GOLDBERG: Wandling notes, yes. That is an
16 addition.

17 JUDGE SMITH: We don't understand the significance of
18 this paragraph, of course, or at least I don't.

19 MS. BERNABEI: The Wandling notes there are stipulated
20 into evidence between the parties for a limited purpose, that
21 is not for the truth of the matters asserted but just to
22 indicate that Mr. Wandling was at B&W receiving information
23 during the period of the accident. We requested that it be
24 included in part because other evidence hopefully will depend
25 on that, other evidence that we intend to either negotiate into

1 evidence or otherwise seek to introduce.

2 JUDGE SMITH: So you are going to put 13 pages in,
3 why don't you just stipulate that he was indeed receiving and
4 recording. That way you don't have the risk of citing the
5 notes for the truth of them.

6 MS. BERNABEI: Because I think the detail provided
7 in the notes is significant as well in terms of the stated
8 purpose, namely that he was receiving and recording information
9 at B&W's offices in Lynchburg.

10 JUDGE SMITH: For the sole purpose of showing that
11 Mr. Wandling was receiving and recording at B&W's offices in
12 Lynchburg and now you say they are going to be received to
13 demonstrate the details of it?

14 MS. BERNABEI: No. For the purpose stated.

15 JUDGE SMITH: If that is what the parties want, I
16 don't see any problem with it. I would have preferred however
17 to have seen a stipulation that Wandling was receiving and
18 recording at B&W's offices in Lynchburg. When I look at this
19 whole list of exhibits and the possible problems that they
20 might bring up, I guess it is sort of nit-picking to worry
21 about the significance of Wandling's notes but I intuitively
22 wonder why you don't go directly to the stipulation and you
23 want to show it indirectly through 13 pages of notes.

24 Were I a trial advocate in this hearing, my warning
25 bells would be ringing. It is very indirect. But if no one

1 is objecting, all right. I don't see any problem.

2 So it is on the same basis that we accepted the
3 previous stipulation with the same caveat that we would
4 accept this one. Is that agreed by everybody?

5 (No response.)

6 (Board conferring off the record.)

7 JUDGE SMITH: Then the Board will accept the
8 stipulation and we will bind it into the transcript at this
9 point.

10 (The Modified Stipulation of Parties on Mailgram
11 Evidence follows:)

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

MODIFIED STIPULATION OF PARTIES
ON MAILGRAM EVIDENCE

On September 21, 1984 Licensee and TMIA entered into a Stipulation of Parties on Mailgram Evidence. They agreed that documents listed in the stipulation would be admitted into evidence without objection. The NRC Staff joined in the stipulation on September 26, 1984. The parties also agreed that the stipulation would not foreclose further stipulation with respect to the admissibility of additional documents.

The parties have now agreed to modify the list of stipulated documents that may pertain in whole or part to the Dieckamp Mailgram issue. Accordingly, the undersigned parties, Licensee, NRC Staff, and TMIA (lead intervenor on this issue), hereby enter into the following modified stipulation, which supersedes the previous stipulation. The parties stipulate as follows:

1. At the evidentiary hearing presently scheduled to convene on November 14, 1984, the below listed documents or portions of documents shall be admitted into evidence without objection. All listed documents are admitted only in so far as they contain information within the scope of the Dieckamp mailgram issue, such scope as determined by the presiding Licensing Board in this proceeding. Some listed documents (notably NUREG-0600, NUREG-0760 and the Report of the Majority Staff of the Committee on Interior and Insular Affairs as well as a number of individuals' statements or depositions) are recognized to include information beyond the scope of the Dieckamp mailgram issue, but are to be admitted in their entirety because relevant and material information therein is intertwined with irrelevant or immaterial information.

Met Ed Chronology dictated by H. McGovern
(March 29, 1979)

Met Ed Interview of C. Faust (March 30, 1979).

Met Ed Interview of E. Frederick (March 30, 1979).

NRC Meeting (March 30, 1979).

TMI Nuclear Power Plant Accident: Hearings Before the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, 96th Cong., 1st Sess., Parts 1 and 2 (1979).

Met-Ed Interview of E. Frederick (April 6, 1979)

Met-Ed Interview of C. Faust (April 6, 1979)

NRC Interview of G. Miller (April 11, 1979)

Statement by G. Miller et al. (April, 1979)

Met-Ed Interview of J. Flint (April 20, 1979)

NRC Interview of C. Faust (April 21, 1979)

NRC Interview of D. Berry (April 21, 1979)

NRC Interview of J. Flint (April 23, 1979)

NRC Interview of J. Flint (April 23, 1979)

NRC Interview of W. Zewe (April 23, 1979)

NRC Interview of M. Ross (April 25, 1979)

Met Ed Interview of B. Mehler (April 25, 1979)

NRC Interview of G. Kunder (April 25, 1979)

NRC Interview of J. Higgins (May 1, 1979)

NRC Interview of L. Rogers (May 4, 1979)

Met Ed Interview of H. McGovern (May 4, 1979)

NRC Interview of R. Bense1 (May 7, 1979)

NRC Interview of G. Miller (May 7, 1979)

NRC Interview of L. Wright (May 9, 1979)

NRC Interview of J. Logan (May 9, 1979)

NRC Interview of R. Arnold (May 9, 1979)

NRC Interview of J. Herbein (May 10, 1979)

Accident at Three Mile Island: Oversight Hearings
before a Task Force of the Subcommittee on Energy and
the Environment of the House Committee on Interior and
Insular Affairs, 96 Cong., 1st Sess., Parts 1 and 2 (1979)

NRC Interview of G. Kunder (May 17, 1979)

NRC Interview of W. Marshall (May 17, 1979)

NRC Interview of B. Mehler (May 17, 1979)

NRC Interview of M. Ross (May 19, 1979)

NRC Interview of I. Porter (May 21, 1979)

NRC Interview of J. Chwastyk (May 21, 1979)

NRC Interview of T. Illjes (May 23, 1979)
NRC Interview of G. Kunder (May 23, 1979)
NRC Interview of D. Weaver (May 24, 1979)
Third Meeting of the President's Commission on the
Accident at Three Mile Island: Testimony of G.
Miller (May 31, 1979)
NRC Interview of J. Hilbish (May 31, 1979)
NRC Interview of D. Croneberger (June 1, 1979)
NRC Interview of G. Capodanno (June 1, 1979)
NRC Interview of R. Wilson (June 1, 1979)
NRC Interview of G. Lehmann (June 1, 1979)
NRC Interview of R. Keaten (June 1, 1979)
NRC Interview of J. Thorpe (June 1, 1979)
NRC Interview of R. Lentz (June 1, 1979)
NRC Interview of T. Broughton (June 11, 1979)
NRC Interview of J. Moore (June 11, 1979)
NRC Interview of J. Abramovici (June 11, 1979)
Statement of L. Rogers (June 12, 1979)
NRC Interview of T. Wright (June 15, 1979)
NRC Interview of N. Bennett (June 19, 1979)
NRC Interview of W. Yeager (June 20, 1979)
Kemeny Comm. Interview of J. Flint (June 30, 1979)
NRC Interview of J. Flint (July 2, 1979)
NRC Interview of I. Porter (July 2, 1979)
NRC Interview of R. Bensel (July 5, 1979)
NRC Interview of G. Kunder (July 11, 1979)
NRC Interview of C. Mell (July 14, 1979)

NUREG-0600 (July, 1979)

NSAC, "Analysis of Three Mile Island-Unit 2 Accident"
(July 1979 and Oct. 1979 Supp.)

Tape of Kemeny Comm. Interview of J. Herbein (July 19, 1979)

Kemeny Comm. Interview of W. Creitz (August 14, 1979)

Kemeny Comm. Interview of H. Dieckamp (August 15, 1979)

Hart Comm. Interview of J. Herbein (August 21, 1979)

Hart Comm. Interview of B. Mehler (Aug. 22, 1979)

Hart Comm. Interview of C. Mell (Aug. 22, 1979)

Hart Comm. Interview of I. Porter (Aug. 22, 1979)

Hart Comm. Interview of E. Frederick (Aug. 22, 1979)

Hart Comm. Interview of G. Kunder (Aug. 22, 1979)

Hart Comm. Interview of R. Arnold (August 23, 1979)

NRC Interview of J. Hilbish (September 5, 1979)

NRC Interview of Faust, Frederick, Scheimann, and
Zewe (Sep. 11, 1979)

NRC Deposition of G. Hitz (Sep. 12, 1979)

NRC Interview of J. Logan (Sep. 12, 1979)

NRC Interview of J. Floyd (Sep. 13, 1979)

NRC Deposition of J. Higgins (Sep. 13, 1979)

NRC Deposition of G. Kunder (Sep. 18, 1979)

NRC Deposition of M. Ross (Sep. 18, 1979)

NRC Deposition of J. Herbein (Sep. 19, 1979)

NRC Interview of G. Miller (Sep. 20, 1979)

NRC Interview of R. Arnold (Sep. 24, 1979)

Hart Comm. Interview of G. Miller (Sep. 28, 1979)

NRC Interview of H. Dieckamp (Oct. 3, 1979)

NRC Deposition of L. Rogers (Oct. 11, 1979)
NRC Deposition of J. Chwastyk (Oct. 11, 1979)
NRC Deposition of B. Mehler (Oct. 11, 1979)
NRC Deposition of D. Neely (Oct. 12, 1979)
Hart Comm. Interview of J. Gilbert (Oct. 16, 1979)
Hart Comm. Interview of W. Marshall (Oct. 17, 1979)
Hart Comm. Interview of G. Miller (Oct. 18, 1979)
NRC Interview of W. Creitz (Oct. 23, 1979)
NRC Deposition of G. Miller (Oct. 29, 1979)
NRC Deposition of M. Ross (Oct 30, 1979)
NRC Deposition of I. Porter (Oct. 30, 1979)
NRC Deposition of B. Mehler (Oct. 30, 1979)
NRC Deposition of J. Chwastyk (Oct. 30, 1979)
Hart Comm. Interview of L. Rogers (Nov. 5, 1979)
Hart Comm. Interview of E. Frederick (Nov. 14, 1979)
Hart Comm. Interview of W. Zewe (Nov. 15, 1979)
Hart Comm. Interview of J. Herbein (Nov. 15, 1979)
SIG Interview Memo of W. Lowe (Dec. 4, 1979)
Hart Comm. Interview of G. Miller (Dec. 19, 1979)
NUREG/CR-1250: Report of the Special Inquiry Group
(Jan. 1980)
 SIG Interview Memo of W. Lowe (Dec. 4, 1979)
 Vol. I, pages i-x (Intro)
 Vol. I, pages 42-43 (The Thud)
 Vol II, Part 3, pages 894-916 (Reporting
 of Critical Information/Management Organization)
Memorandum from Rogovin/Frampton to Chairman Ahearne
(March 4, 1980)
Subcommittee on Nuclear Regulation of the Senate
Committee on Environment and Public Works, "Report
to the U.S. Senate: Nuclear Accident and Recovery at
Three Mile Island" (June 1980)

pages 1-5 (Introduction)
pages 13-18 (Responses to the Accident)
pages 33-160 (The First Day)

Interview of J. Flint (Sep. 2, 1980)
NRC Interview of L. Rogers (Sep. 2, 1980)
NRC Interview of H. McGovern (Sep. 3, 1980)
NRC Interview of J. Gilbert (Sep. 3, 1980)
NRC Interview of D. Berry (Sep. 3, 1980) with
notes attached.
NRC Interview of B. Mehler (Sep. 3, 1980)
NRC Interview of L. Wright (Sep. 3, 1980)
NRC Interview of J. Chwastyk (Sep. 4, 1980)
NRC Interview of G. Kunder (Sep. 4, 1980)
NRC Interview of W. Zewe (Sep. 4, 1980)
NRC Interview of J. Herbein (Sep. 5, 1980)
NRC Interview of R. Arnold (Sep. 5, 1980)
NRC Interview of G. Miller (Sep. 5, 1980)
NRC Interview of H. Dieckamp (Sep. 12, 1980)
NRC Interview of M. Ross (Sep. 24, 1980)
NRC Interview of I. Porter (Sep. 24, 1980)
NRC Interview of M. Benson (Sep. 24, 1980)
NRC Interview of T. Illjes (Sep. 24, 1980)
NRC Interview of N. Bennett (Sep. 29, 1980)
NRC Interview of J. Higgins (Oct. 7, 1980)
NRC Interview of D. Neely (Oct. 7, 1980)
NRC Interview of W. Raymond (Oct. 7, 1980)
NRC Deposition of E. Frederick (Oct. 9, 1980)
NRC Deposition of C. Faust (Oct. 9, 1980)

NRC Deposition of J. Scheimann (Oct. 9, 1980)
NRC Deposition of W. Conaway (Oct. 9, 1980)
NRC Deposition of J. Logan (Oct 16, 1980)
NRC Deposition of A. Miller (Oct. 28, 1980)
NRC Interview of G. Miller (Nov. 10, 1980)
OIA Interview Memo of G. Gallina (Dec. 2, 1980)
OIA Interview Memo of K. Plumlee (Dec. 2, 1980)
OIA Interview Memo of K. Plumlee (Dec. 3, 1980)
OIA Interview Memo of A. Fasano (Dec. 4, 1980)
OIA Interview Memo of D. Neely (Dec. 3, 1980)
OIA Interview Memo of G. Gallina (Dec. 8, 1980)
OIA Interview Memo of R. Nimitz (Dec. 8, 1980)
OIA Interview Memo of G. Smith (Dec. 8, 1980)
OIA Interview Memo of J. Seelinger (Dec. 23, 1980)
NRC Deposition of K. Plumlee (Jan. 9, 1981)
NRC Interview of D. Neely (Jan. 13, 1981)
NUREG-0760 (Jan. 1981)

Majority Staff of the House Committee on Interior
and Insular Affairs, "Reporting of Information
Concerning the Accident at Three Mile Island"
(March, 1981).

2. The parties stipulate that the "Wandling Notes", consisting of thirteen pages whose first page is a memorandum, dated March 29, 1979, to "Distribution" from "G. K. Wandling, Plant Startup Services" on the subject "Information from Transient of March 28, 1979" shall be admitted into evidence without objection for the sole purpose of showing that Mr. Wandling was receiving and recording at

B&W's offices in Lynchburg, Virginia on March 28, 1979, information on the TMI-2 transient on March 28, 1979.

3. For purposes of the evidentiary hearing presently scheduled to commence on November 14, 1984, the parties stipulate that in retrospect, if all the in-core thermocouple readings had been available and had been examined, it might have been recognized that the $>2000^{\circ}\text{F}$ temperature indicated that the core was within the range in which an autocatalytic exothermic zircalloy-steam reaction could occur.

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

(namely, Interrogatory Nos. 13 and 19 of Licensee's Second Set of Interrogatories to TMIA and Interrogatory Nos. 1 through 18, 21, and 22 of Licensee's Third Set of Interrogatories to TMIA.)

Respectfully submitted,
SHAW, PITTMAN, POTTS & TROWBRIDGE

Ernest L. Blake, Jr. 11/7/84
Ernest L. Blake, Jr.
Counsel for Licensee

Lynne Bernabei 11/7/84
Lynne Bernabei
Counsel for TMIA

Jack Goldberg 11/8/84
Jack Goldberg
Counsel for NRC Staff

1 JUDGE WOLFE: I have a mechanical problem and I don't
2 want to belabor it but I take it at some time the Board will
3 be furnished with these documents and if so, by whom -- first
4 question. Secondly, how are these documents to be identified,
5 as parties exhibits?

6 Who will speak to that?

7 MR. BLAKE: I will speak to that, Judge Wolfe, because
8 it has fallen on me the responsibility to put these together
9 and have them indexed and bound and copied, indexed and bound.
10 It is our intention to enumerate them as joint exhibits in a
11 numbered fashion just as they appear in the modified stipulation,
12 the same sequence.

13 We are currently copying, indexing and binding. I
14 would hope that by Monday we would be able to distribute three
15 copies to the Licensing Board, at least one to the staff and
16 to Ms. Bernabei. We would also have three copies available
17 for the Court Reporter at the hearing.

18 So that process is underway and I recognize the
19 Board from its earlier order had indicated a desire to have
20 these organized in a way that they could be presented.

21 JUDGE SMITH: As far as I can see that is all the
22 business we had scheduled for this afternoon. Is there
23 anything further which does not affect the other parties that
24 we should address?

25 MR. BLAKE: Judge Smith, Ms. Bernabei and I have not

1 progressed in our discussions related to TMIA's letter of
2 November 5 identifying the witnesses, depositions in lieu
3 of witnesses, and other related documents or depositions on
4 the 3(a) people. I am prepared at this point to provide based
5 on discussions I have had as late as literally when I went out
6 the door to come to this hearing with the client my position on
7 these but it will require discussions with Ms. Bernabei but I
8 am prepared to at least for purposes of the Board's knowing
9 either how close or how far apart we may be and as close to
10 the hearing as we are now to provide that position if the Board
11 wants to hear it and if Ms. Bernabei does at this point.

12 MS. BERNABEI: I am a little surprised since we are in
13 the midst of negotiation and obviously Mr. Blake hasn't stated
14 his position to me prior to bringing it up to the Board.

15 I would suggest that in order not to waste the
16 Board's time that perhaps we talk about it and see if we can
17 come to agreement on a number of matters prior to bringing it
18 to the Board for some kind of disposition.

19 MR. BLAKE: I am in agreement with that.

20 JUDGE SMITH: That is fine that you are working it
21 out but I might say that it is very timely to bring the Board
22 into your confidence as to how you plan to handle some 40 to
23 50 witnesses which as you know we are not going to hear.

24 MS. BERNABEI: I agree. That is why I think we
25 should work it out. I agree. I think we should discuss it

1 and then those people we can not decide on bring it for your
2 decision.

3 MP. BLAKE: Judge Smith, I raise that at this
4 juncture really having in mind that we are headed for a hearing
5 next Wednesday. As Ms. Bernabei is aware, we have a fairly
6 tight schedule for witnesses at least during that first week
7 and to the extent that we are unable to work out between us
8 the cast of TMIA witnesses, I would not want to take hearing
9 time during those first three days at least of the hearing to
10 do it. It might be as Ms. Bernabei and I talk today
11 and early next week, there might be a need to come back to the
12 Board before that hearing even next Wednesday and I don't know
13 the Board's availability to do that or I would suggest that
14 it be off until the week of the 19th which is before
15 Thanksgiving where presumably we will have finished with our
16 witnesses and TMIA being the next we might have to have our
17 arguments then to the Board.

18 But I sure don't want to have to walk away from here
19 today with the Board thinking that this is all worked out
20 and when it isn't have to take up hearing time next week.

21 JUDGE SMITH: We anticipate an evidentiary hearing
22 on the 19th.

23 MR. BLAKE: Yes, sir. I would anticipate if we are
24 unable to work it out and if that becomes apparent or if we
25 don't have the Board's availability next week that when we argue

1 this is after we complete our case during the week of the 19th,
2 that is, before the Thanksgiving break. So depending on the
3 resolution the parties can go away and be prepared to come back
4 the following week to hear TMIA's case depending upon that
5 resolution.

6 MS. BERNABEI: We have no problem with that. My
7 suggestion is that we try to resolve as many things as
8 possible to take up as little of the Board's time as necessary.
9 I think we can resolve some of the issues. I would certainly
10 have no problem with Mr. Blake's proposal.

11 (Board conferring off the record.)

12 JUDGE SMITH: Perhaps we had better reserve some
13 time Tuesday, November 13th to resolve this because we are all
14 here and it is time to do it.

15 JUDGE WOLFE: I must say that I haven't been following
16 the discovery that has been going on. Occasionally I will
17 look at an interrogatory or a response or whatever but I just
18 don't understand why there are the numerous witnesses listed
19 in this letter of November 1, 1984 which is I guess before us
20 at this point. All these people, Ms. Bernabei, have been
21 deposed in the past three or four months, is that correct?

22 MS. BERNABEI: Yes.

23 MR. BLAKE: The answer is no but many of them have.

24 MS. BERNABEI: I think that almost all of them in
25 the November 1st letter.

1 MR. BLAKE: We are talking about the November 5 letter
2 I take it.

3 MS. BERNABEI: Judge Wolfe mentioned November 1st. I
4 believe almost all of them have with the exception perhaps of
5 Mr. Keaten.

6 JUDGE WOLFE: I am not telling anyone how to run
7 their case but I can't conceive that all of these listed in
8 your letter of November 1 are vital to your case. I would
9 think that even before you get together with Mr. Blake that you
10 could winnow down this list and talk about witnesses that
11 really have concrete and probative testimony.

12 MS. BERNABEI: Judge Wolfe, there has been a
13 subsequent letter which perhaps you are not familiar with.
14 There is a November 6th letter in which we do what you suggest
15 and in addition what we propose is that those portions of
16 depositions taken of those individuals be introduced in lieu of
17 their testimony.

18 A number of the witnesses have testimony that is
19 relevant on a very small bit of our case. What we propose if
20 there is no problem is to use their deposition testimony in
21 lieu of their live testimony for that small portion which
22 would obviate the need to call a large number of witnesses.

23 That is, in fact, what I state in the last paragraph
24 of that letter and that is explained more fully in the
25 November 6th letter.

1 JUDGE WOLFE: I have that letter now.

2 MR. BLAKE: I believe it is November 5. Only to
3 advise the Board, there are 12 individuals I believe which
4 Ms. Bernabei has identified in that letter where portions of
5 the deposition might take the place but at this juncture, she
6 has identified for two out of the 12 even what portions she
7 is talking about. So when I say we haven't progressed very
8 far, I am not even in a position to react to that proposal
9 nor know whether or not it is going to succeed.

10 MS. BERNABEI: Mr. Blake is not really being quite
11 open with the Board. I did commit to him that I would give
12 him those portions of the depositions that we would propose
13 to introduce in lieu of testimony given that this hearing was
14 scheduled and that we asked to provide a reply brief to the
15 Board, we have not had time to do that. I fully intend to
16 do what I committed to do and Mr. Blake should have disclosed
17 that to the Board.

18 JUDGE WOLFE: The Board is assured that you are
19 making every effort to winnow down the extent of your witness
20 list. All right. With that assurance, I have nothing more to
21 add.

22 JUDGE SMITH: The Board will be available for a
23 conference of the parties on Tuesday afternoon for this. The
24 difficulty is we cannot call the reporting service within a
25 matter of minutes. Would you recommend that we adjourn this

1 session until Tuesday afternoon?

2 MR. BLAKE: I make the following recommendation,
3 that either Ms. Bernabei or I or Mr. Goldberg inform the Board
4 by 5:00 on Monday whether or not there is a need for a
5 prehearing conference Tuesday afternoon. Is that sufficient
6 time for you, Judge Smith?

7 JUDGE SMITH: It is the reporter.

8 MR. BLAKE: That is what I am asking.

9 MR. GOLDBERG: Why isn't a conference call all that
10 is needed for that one remaining matter?

11 MS. BERNABEI: Mr. Blake's proposal that it be
12 handled at the end of the licensee's case, we are amenable to
13 that. We don't know. Maybe there won't be anything to handle
14 but I don't have any problem with that.

15 JUDGE SMITH: Except that you are talking about
16 carving it straight out of hearing time.

17 MS. BERNABEI: We could do it in the evening. It
18 doesn't seem to me that it is going to take that much time.
19 We could do it one evening.

20 MR. BLAKE: With the Board?

21 MS. BERNABEI: Sure. We are all going to be in
22 Harrisburg. I think that makes more sense and that allows
23 the greatest possibility we will work as much as possible out
24 between us.

25 JUDGE SMITH: It is up to the parties, whatever they

1 want. We would be available. We won't be available for a
2 prehearing conference Tuesday afternoon unless that
3 determination is made either today or Monday and it is going
4 to be hard to make it Monday but we would be available for a
5 telephone conference call Tuesday afternoon which I really
6 recommend that if you can possibly resolve it before. We
7 tend to get tired at the hearings and night sessions are
8 a large strain. I think you will share that experience. So
9 I recommend that if we can resolve it in a telephone conference
10 Tuesday afternoon, that you inform us Monday morning.

11 If your differences are so great that you believe
12 that a reported prehearing conference is necessary, I will
13 leave my home phone numbers with you and you will be able to
14 reach me. I will do that after we go off the record.

15 Anything further this afternoon?

16 (No response.)

17 JUDGE SMITH: All right. Then we are adjourned until
18 the 14th at 1:30 unless we interpose another prehearing
19 conference. Thank you.

20 (Whereupon, the prehearing conference was adjourned
21 at 3:30 o'clock p.m., to reconvene on November 14th at 1:30
22 o'clock p.m., in Harrisburg, Pennsylvania.)
23

24 - - -
25

CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING:

Metropolitan Edison Company
(Three Mile Island Nuclear Station, Unit
No. 1)

DOCKET NO.: 50-289SP
(Restart Remand on Management)

PLACE: Fifth Floor Hearing Room
4350 East West Highway

DATE: Bethesda, Maryland

Friday, November 9, 1984

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sig) Marilynn M. Nations
(TYPED)

Marilynn M. Nations
Official Reporter

Reporter's Affiliation
Ace-Federal Reporters, Inc.