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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, <u>ET AL.</u>	)	Docket No. 50-289-OLA
	)	(Steam Generator Repair)
(Three Mile Island Nuclear Station,	)	
Unit No. 1)	)	

LICENSEE'S BRIEF IN OPPOSITION TO  
APPEAL OF TMIA FROM INITIAL DECISION

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LICENSEE'S BRIEF IN OPPOSITION TO  
APPEAL OF TMIA FROM INITIAL DECISION

I. INTRODUCTION

The Licensing Board below issued its Initial Decision in this proceeding on October 31, 1984 authorizing Licensee to operate Three Mile Island Nuclear Station, Unit 1, with steam generator tubes repaired by a kinetic expansion repair process. On November 10, 1984, Intervenor Three Mile Alert, Inc. ("TMIA") filed a Notice of Appeal. On December 10, 1984 TMIA filed a Motion to Reopen the Record on the Basis of New Information ("Motion") and a single brief in support of both its Motion and the Notice of Appeal ("Brief").<sup>1/</sup> Licensee herein

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<sup>1/</sup> None of the documents was accompanied by a properly executed certificate of service as required by 10 C.F.R. §§ 2.762(f) and 2.701(b). The Notice of Appeal was not served on Licensee.

sets forth its opposition to the TMIA's appeal. Accompanying this opposing brief, as a separate document, is Licensee's answer to TMIA's motion.

## II. PROCEDURAL BACKGROUND

On May 9, 1983, Licensee submitted a request for amendment of the Technical Specifications of the TMI-1 operating license to approve the kinetic repair process for steam generator tubes. Without such a license amendment, TMI-1 would not have been allowed to operate with tubes repaired in such a manner because the Technical Specifications required defective tubes to be plugged, and thus removed from service.

In the August 12, 1983 Notice of Hearing, 48 Fed. Reg. 36707, the Commission specified that the subject matter of the hearing would be limited to Licensee's request for authorization of the kinetic repair process:

The amendment requested would revise the Technical Specifications to recognize steam generator tube repair techniques, other than plugging, provided such techniques are approved by the Commission.

The licensee's application, dated May 9, 1983, further requested that the Commission approve, within the provisions of the proposed Technical Specification revision, the kinetic expansion steam generator tube repair technique used at the facility, thus permitting subsequent operation of the facility, with the as-repaired steam generators.

Parties to the proceeding below were Licensee, the NRC Staff, TMIA, and two individuals referred to collectively as Joint Intervenors. The Licensing Board admitted eight TMIA contentions and three contentions advanced by Joint Intervenors. Memorandum and Order (Ruling on Contentions), LBP-83-76, 18 N.R.C. 1266 (1983).

On February 24, 1984, both Licensee and the NRC Staff filed motions for summary disposition of the contentions of both intervenors pursuant to 10 C.F.R. § 2.749 ("Licensee Motion for Summary Disposition;" "Staff Motion for Summary Disposition"). The motions were granted in major part. Memorandum and Order (Rulings on Motions for Summary Disposition), June 1, 1984 ("Order"). All of Joint Intervenors' contentions were dismissed, and Joint Intervenors were dismissed as a party to this proceeding. Order at 91. Summary disposition was denied in part with respect to two of TMIA's contentions, with the other contentions being dismissed in their entirety. Order at 37, 50, 67, 71, 84, 91-92. For the two TMIA contentions which were not totally dismissed, the Licensing Board identified specific sub-issues for which evidence was to be presented at the hearing. Order at 23, 32, 91-92.

The evidentiary hearings on these matters were held on July 16-18, 1984, in Middletown, Pennsylvania with all parties represented. Also participating in the hearings was the

Commonwealth of Pennsylvania, which had requested leave to participate as an interested State pursuant to 10 C.F.R.

§ 2.715(c).

It is from the ensuing October 31, 1984 Initial Decision that TMIA now appeals. For the reasons stated below, Licensee respectfully submits that the TMIA appeal should be denied and the Initial Decision affirmed.

### III. BOARD RULINGS DURING DISCOVERY

#### A. The Protective Order

TMIA asserts that the Licensing Board below should not have issued a protective order to protect from public disclosure Licensee's proprietary information which was requested by TMIA during discovery. Brief at 7. TMIA does not explain why issuance of the protective order constituted Board error. Rather, TMIA claims that the information protected was "relevant to issues in contention," and that the protective order limited TMIA's discovery.<sup>2/</sup>

On December 30, 1983, TMIA filed its First Set of Interrogatories and Request For Production of Documents to Licensee, which included Document Request 22:

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<sup>2/</sup> Contrary to the requirements of 10 C.F.R. § 2.762(d), it is difficult to determine in this exception, as well as in TMIA's other exceptions, precisely what error of fact or law is being asserted.

Provide all documents or portions thereof which have been withheld from all parties, or from the intervenors, on the basis of the "proprietary" or "trade or commercial secret" information claimed to have been within the documents. Include all Topical Reports and Technical Data Reports.

Licensee responded that the document requests, including Document Request 22, were so broadly framed as to seek virtually every document which had been generated with respect to the steam generator tube repair program, including documents beyond the scope of the proceeding. Licensee did not object initially to the request on the grounds that it was overly broad, unduly burdensome and sought irrelevant information. Rather, Licensee stated that it would make available to TMIA essentially all of its files relating to tube repair, and that any proprietary information in its files would be made available subject to a proprietary agreement and protective order. See Licensee's Answer to TMIA's First Set of Interrogatories and Request for Production of Documents, January 13, 1984, at 89-90.

Prior to its January 13 response, Licensee's counsel had offered the documents to TMIA on a protected basis. Licensee had provided TMIA's counsel with a copy of a proposed form of protective agreement and order prior to discussion of the matter with the parties and the Board during a conference call on January 12. TMIA informed Licensee that it would refuse to

receive any documents under protective arrangements. See Board Memorandum (Memorializing Conference Call), January 13, 1984, at 4-5.

On January 25, 1984, TMIA filed a motion to compel discovery with respect to Document Request 22, asserting that it had the right to the documents unprotected by proprietary agreement or protective order. On January 27, 1984, Licensee filed an objection to Document Request 22, and on February 6, 1984, Licensee filed a response to TMIA's motion to compel, along with a motion for a protective order. Licensee filed affidavits in support of its motion demonstrating that proprietary information in 35 documents, or portions of documents, identified in response to TMIA's interrogatories met the Commission's criteria in 10 C.F.R. § 2.790 for protection from public disclosure. Licensee sent the Board a copy of each of these documents for in camera inspection. On February 14 and 27, 1984, respectively, the Staff filed submissions which opposed TMIA's motion and supported Licensee's motion for a protective order. TMIA did not file a response to Licensee's motion for a protective order.

On March 5, 1984, the Board denied TMIA's motion to compel and issued the protective order sought by Licensee. On April 3, TMIA moved the Board to reconsider its protective order; the Board denied this motion for reconsideration on May 2, 1984.

The Board's March 5, 1984 ruling granting TMIA access to the proprietary documents under the provisions of a protective order was clearly proper and in accordance with the provisions of the Commission's regulations. Section 2.740(c)(6) of 10 C.F.R. Part 2 expressly provides that the presiding officer may issue a protective order which, subject to the provisions of 10 C.F.R. § 2.790, directs that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Further, 10 C.F.R. § 2.790(b)(6)(iii) provides that such proprietary information may be inspected

under protective order, by parties to a proceeding, pending a decision by the Commission on the matter of whether the information should be made publicly available... In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence.

The Board adhered precisely to the regulations, and TMIA offers no suggestion that the Board in any way acted inconsistently with them. TMIA was never deprived of the information. It decided of its own volition to refuse to accept the information under the provisions of a duly authorized protective arrangement. Tr. 675-76. See generally, Licensee's Motion For Protective Order and Answer to TMIA's Motion for Order Compelling Discovery, February 6, 1984, at 4-17; NRC Staff Response to Licensee's Motion For Protective Order, February 27, 1984, at 2-5.

TMIA states that preparation of its case was hampered because accepting documents under the authorized protective arrangements would have intimidated TMIA members and hindered TMIA's ability to do adequate research. Brief at 7. These arguments were expressly considered and rejected by the Licensing Board below (March 5, 1984 Memorandum and Order at 4-5), and TMIA is not now presenting any explanation or argument why that determination was in error. Moreover, TMIA did not then and does not now provide any explanation of any special or unique circumstances which would render its members incapable of adhering to the arrangements specifically set out in the Commission's regulations.

TMIA suggests that the protective order should not have been issued because the documents were "relevant to issues in contention" and "Licensee had not denied this fact." Id. The whole purpose of the protective order was to make documents available which presumably were relevant. Were they not, a protective order would not have been necessary because TMIA would not have been otherwise entitled to inspect the information.

TMIA argues that Licensee had not shown cause why the documents should be protected. Id. To the contrary, Licensee submitted with its motion for a protective order affidavits demonstrating that the designated information was entitled to

protection under the provisions of section 2.790. TMIA did not answer that motion.

Finally, TMIA's assertion that the Board did not review the documents which Licensee claimed were proprietary, Id., is clearly contrary to the record. The Board's review of Licensee's affidavits and its determination that Licensee had shown good cause under section 2.740(c) for issuance of the protective order would suggest that the Board did review the documents. March 5, 1984 Memorandum and Order at 5-6. In fact, the Licensing Board expressly stated that it has reviewed the documents:

Judge Wolfe: ...Moreover, I would add that we have reviewed the 35 unexpurgated documents and concluded that none of the asserted privileged portions of these documents evoke any concern on our part with respect to the health and safety of TMI-1.

Tr. 676.

What the Board did not do was to make a determination under section 2.790(b) that the information was ultimately entitled to proprietary status. The purpose of the provisions of section 2.790(b)(6)(iii) is to allow the Board to proceed with a hearing, in camera to the extent necessary, prior to resolution of such proprietary issues, in order to avoid a delay in the hearings. In the matter of Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16

N.R.C. 1245, 1261, (1982). The Board indicated that it was taking just that course of action because it did "not want to delay the progress of the proceedings during the rather lengthy time it would take to review the documents and determine whether they should be publicly disclosed." March 5, 1984 Memorandum and Order, at 6-7.

At the close of the hearing the Licensing Board correctly ruled that, because TMIA had refused to accept delivery of the proprietary documents, refused to proceed in an in camera session, and refused to abide by the protective order, there was no need to make a determination of whether the documents were entitled to protection against public disclosure. Tr. 675-77. If TMIA had accepted the information under the protective order, and the information had been used in an in camera session as provided by the regulations, TMIA would have been ultimately entitled to such a determination. But the information was not used, and the reason it was not used was one of TMIA's own election. Certainly TMIA does not have a right to refuse to look at the information under protective status, then to demand that a section 2.790 determination be made by the Board, and finally to demand that the hearing be delayed so that it can use the information after the determination had been made. This would abrogate the clear purpose of the rule in section 2.790(b)(6) to avoid delay.

The Licensing Board clearly committed no error, and the exception should be denied.

B. Request for Expert Panel

TMIA alleges that the Board improperly denied its January 25, 1984 motion for the appointment of a special panel to preside over the hearing. TMIA, however, does not assert any error on the part of the Board in denying the motion, nor does TMIA explain why it believes the denial was improper. TMIA merely summarizes the motion and states that it was denied on February 24, 1984.

TMIA has clearly failed to brief this allegation of Board error. It is by now well established that a failure to brief an exception on appeal will result in a denial of that exception. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1083 (1983); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 2), ALAB-650, 14 N.R.C. 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982).

In any event, the issue was thoroughly briefed in the answers of Licensee and the Staff, filed on February 9 and February 14, 1984, respectively. The Licensing Board correctly denied the motion, primarily on the grounds that it had no

authority to invoke such a radical departure from its obligation to conduct the hearing. Memorandum and Order, February 24, 1984, at 2-3.

Section 2.722 of the Commission's Rules of Practice, 10 C.F.R. section 2.722, specifically designates those instances where special assistants to the presiding officer may be employed. That section, however, does not provide for the type of panel and procedures requested by TMIA. Section 2.722(a)(2) provides that a Special Master may be appointed to hear evidence, but that provision is far more limited than the situation proposed by TMIA. Most significantly, and dispositively, a Special Master cannot be utilized without the consent of all parties. Such consent was not obtained.

Because TMIA has not briefed the points cited by the Licensing Board as the basis for its denial of the motion, and because the Licensing Board obviously committed no error in denying the motion, this exception must be denied.

#### IV. SUMMARY DISPOSITION

At pages 8-11 of its Brief, TMIA takes exception to the Licensing Board's summary disposition of TMIA Contention 1.c relating to the plugging of defective tubes, and TMIA Contentions 2.a, 2.b.1, and 2.b.2 concerning the potential for reinitiation of the conditions that had caused the steam

generator tube damage. For much of its argument, TMIA relies on new information from documents obtained by TMIA subsequent to the closing of the record. Obviously, the Appeal Board cannot look to the presentation of new information outside of the record below as basis for finding Licensing Board error. To the extent TMIA's arguments are based on such new information, Licensee has addressed them in its accompanying answer to TMIA's motion to reopen the record. This brief will address only those allegations of error properly brought on appeal, i.e., those not based on the new information presented.

A. TMIA Contention 1.c

TMIA Contention 1.c, as admitted by the Licensing Board, read as follows:

- c. The kinetic expansion repair weakened the tubes. As a result, the plugs will not be able to hold and give a good seal, and thus the plant's ability to respond to transients and accidents will be adversely affected.<sup>3/</sup>

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<sup>3/</sup> Contention 1.c, as presented by TMIA at pages 3-4 of its Brief, was not admitted by the Licensing Board in that form. That contention, as written, bore no relationship to the kinetic expansion repair process which was the subject of the hearing below. On the basis of TMIA's oral statement at the October 17, 1983 prehearing conference that its concern was the effect of the repair process on the integrity of the plugs, Tr. 58, the Licensing Board, rather than rejecting the contention as urged by Licensee and the staff, Licensee's Motion for Reconsideration of November 29, 1983 Memorandum and Order, December 12, 1983, at 6-9; NRC Staff Response in Support of

(Continued Next Page)

In arguing that the Licensing Board erred in dismissing the contention on summary disposition, TMIA provides no citation to the record. Brief at 8-9. TMIA instead relies primarily on new information about plugs which have allegedly "failed." Without consideration of the new information, which will be addressed in Licensee's answer to the motion to reopen, 4/ all that remains are TMIA's statements (without supporting citations) that TMIA had supported its Contention l.c. by noting (a) the concerns of Licensee's Third Party Review Group that "the tubes had been weakened," and (b) that there were "23 plugs which leaked after testing." Brief at 8. Beyond disagreeing with the Licensing Board's position, TMIA has presented no argument or basis for the Appeal Board to find that the Licensing Board committed error.

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(Continued)

Licensee's Motion for Reconsideration of November 29, 1983 Memorandum and Order, January 3, 1984, at 3-4, amended the contention and admitted it in the form as stated above. Memorandum and Order, January 9, 1984, at 5. TMIA has not taken exception to the reformation of Contention l.c.

4/ As evidenced by the affidavit in support of Licensee's answer to the motion to reopen, the plug failures were caused by irregularities in their installation, and had nothing to do with the kinetic expansion repair process. Affidavit of Branch D. Elam, January 11, 1985, ¶ 7.

In their motions for summary disposition of Contention 1.c, both Licensee and the NRC Staff provided detailed and extensive evidence by affidavit showing that the kinetic expansion repair process had no effect on the integrity of steam generator tube plugging.<sup>5/</sup> Licensee and the Staff demonstrated that the portion of the tube which engages the plug would not be weakened or otherwise changed by the kinetic expansion process in a way that would affect the integrity of the plugging seal.<sup>6/</sup> TMIA provided no relevant evidence to contradict the evidence of Licensee and the Staff. Order at 33-37. The Licensing Board dismissed the contention in its entirety. Id. at 37.

Contrary to TMIA's statement, Brief at 8, the Licensee's Third Party Review Group (TPR) felt that the tubes had not been weakened by kinetic expansion, and expressed no concerns whatsoever about the capacity of the tubes to accept plugs.<sup>7/</sup> Although TMIA does not cite to the record or to the TPR report, presumably TMIA is referring to its Statement of Material

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<sup>5/</sup> Licensee's Motion for Summary Disposition at 14-16, 83-87, and Affidavit of Branch D. Elam, February 23, 1984; Staff Motion for Summary Disposition at 8-10 and Affidavit of Conrad E. McCracken and Louis Frank, Contention 1.c, February 24, 1984.

<sup>6/</sup> Id.

<sup>7/</sup> The TPR Report, February 18, 1983, is included in Attachment 6 to the Staff's Safety Evaluation Report, NUREG-1019, November 1983. (Staff Exhibit 1).

Facts, Contention 1.c., ¶¶ 2-3, page 32, which TMIA filed on April 3, 1984 in response to the motions for summary disposition. Citations there lead to pages 14-16 of the February 18, 1983 TPR Report. The only material on those pages dealing with the effects of the kinetic expansion repair process on the strength of the tubes is Finding 1 at page 14, and Comment 2 at page 15. Those sections indicate that the TPR did not feel that the repair process had weakened the tubes. More to the point, however, neither those sections nor any other sections of the TPR Report, as supplemented, indicate any concern by the TPR that plugging would be adversely affected by the kinetic expansion.

TMIA's suggestion that the existence of 23 leaking plugs is evidence of inadequate plugging because of the kinetic expansion process, Brief at 8, is equally without merit. This is apparently a reference to the Staff's statement that 23 plugs were found to leak and were repaired. Affidavit of McCracken and Frank, Contention 1.c, ¶ 6. The Staff also noted, however, that in light of the large number of plugs, that percentage of leaking plugs "was not unusual for typical plugging operations which do not include kinetic expansion." Id. TMIA also failed to mention Licensee's point that of the 23 plugs, only six were in the kinetically expanded portions of the tubes. Licensee's Reply to TMIA's Response to Licensee's Motion For Summary

Disposition, Attachment I, p. 15, ¶ 12 (April 13, 1984). Thus, the twenty-three leaking plugs provide no basis for suggesting that the repair process impaired plugging integrity.

Accordingly, in view of the substantial evidence supporting the Licensing Board's dismissal of Contention 1.c and the lack of evidence or valid argument in contradiction, the Board did not err in dismissing Contention 1.c.

B. TMIA Contentions 2.a., 2.b.1 and 2.b.2

These three contentions all related to TMIA's issue of whether Licensee had accurately identified the cause of the tube damage and was thus able to take measures to provide adequate assurance that the damage would not recur. The affidavit evidence of both Licensee and the Staff showed conclusively that the source of the cracking had been positively identified, that the conditions leading to the cracking were known and controllable, and that measures would be taken to assure that such conditions would not recur.<sup>8/</sup> On the basis of this evidence, the Licensing Board dismissed the three contentions on summary disposition, as well as similar contentions which had been raised by Joint Intervenors. Order at 56-91.

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<sup>8/</sup> See Licensee Motion for Summary Disposition at 33-46, 90-120, and Affidavit of F. Scott Jacobbe (February 23, 1984); Staff Motion for Summary Disposition at 13-19 and Affidavits of Conrad E. McCracken and Stanley Kirslis on Contentions 2.a, 2.b.1, and 2.b.1, February 24, 1984.

The failure mechanism in the TMI-1 steam generator tubes was unusual in that the indications were circumferential in nature and were initiated from the primary side of the cooling system, on the inner surface of the tubes. Both Licensee and the Staff provided evidence of an extensive series of tests and studies which demonstrated that the cracking was caused by an unusual combination of circumstances which occurred while the plant was in its period of extended shutdown. The cause of the tube condition was determined to be intergranular stress assisted cracking (IGSAG) induced by intermediate metastable sulfur compounds. Unplanned introductions of sulfur into the primary system were followed by a combination of axial load stresses, low temperatures, and oxidizing conditions which occurred during the cooldown and shutdown following hot functional testing in August and September of 1981. See Licensee Motion for Summary Disposition, Affidavit of F. Scott Giacobbe, February 23, 1984 ("Giacobbe Affidavit"), ¶¶ 37-43. Because of the extensive detail in which the source and cause of the IGSAC is known, recurrence can be effectively prevented by controlling the total amount of sulfur in the primary system and by preventing the combinations of temperature and oxidizing conditions which could result in the formation of the harmful sulfur forms. Id., ¶¶ 108-116.

1. Contention 2.a

TMIA appears to be arguing that the motions for summary disposition did not adequately demonstrate that the source of the IGSAC had been properly identified. Other than arguments based on new information, 9/ TMIA's only argument centers around the statement of Staff consultant Digby Macdonald that, as stated by TMIA, "a volatile polysulfur must be present in the system." Brief at 10. TMIA alleges that Macdonald's statement (a) is inconsistent with Licensee's failure scenario as advanced by two independent laboratories, Id. at 9-10, and (b) was dismissed as irrelevant by the Staff, Id. at 10. Neither allegation is correct.

Licensee's failure analysis, consistent with the analyses of the two independent laboratories, identifies sulfur contaminants as the cause of the IGSAC. Giacobbe Affidavit, ¶¶ 9, 37-39. The failure scenario identified by Licensee includes chemical reduction under hot conditions of the sulfur contaminants (primarily thiosulfate) to more reduced metastable species. Subsequent system oxygenation created an environment

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9/ On the basis of information submitted with its motion to reopen the record, TMIA is arguing that observed increases in the levels of sulfates and chlorides in the primary coolant, and recent eddy current indications, suggest that IGSAC may be recurring. This is addressed in Licensee's accompanying answer to that motion which demonstrates that no such recurrence is taking place.

conducive to chemical attack by these species. Giacobbe Affidavit, ¶¶ 33, 38-43. Dr. Macdonald's statement, taken in context, refers to the presence of a volatile species present at the time of chemical attack, not to the introduction of a separate contaminant. NUREG-1019 (Staff Exhibit 1), Attachment 4, pp. 22-23. Inasmuch as polysulfur species are nothing more than reduced species of sulfur, Giacobbe Affidavit, ¶ 33, this is totally consistent with Licensee's failure scenario. Thus, an alleged inconsistency between these statements cannot be used to support TMIA's assertion that "[t]he corrosive contaminant and the failure mechanism had not been adequately identified." Brief at 9.

TMIA's implication that the Staff dismissed Macdonald's statement as irrelevant is clearly incorrect. The Staff noted that the statement was technically irrelevant to the subject matter of TMIA's Contention 2.a. This was because the statement had been made in support of a recommendation that the system be desulfurized. Staff Motion for Summary Disposition, Affidavit of McCracken and Kirslis, Contention 2.a, ¶¶ 8, 10. The Staff nevertheless addressed both the specific comment, Id., ¶ 10, and the substance of the comment, in which the Staff concurred that the cause of the IGSAC was reduced forms of sulfur. Id., ¶ 4. This is totally consistent with Macdonald's statement, as well as with Licensee's failure scenario.

Accordingly, TMIA has provided no basis for a finding of error by the Licensing Board in its dismissal of Contention 2.a.

2. Contention 2.b.1

In its argument for Contention 2.b.1, TMIA alleges that new information "indicates that cracking has reinitiated and [Staff Consultant] Dillon's theory concerning the cleaning process cannot be ruled out as the cause." Brief at 10-11. As is demonstrated by affidavit in the Licensee's accompanying answer to TMIA's motion to reopen, cracking has not in fact reinitiated. Since TMIA has advanced no reason why the Licensing Board erred in dismissing Contention 2.b.1 beyond reliance on information that was not on the record before the Licensing Board, there can be no finding of error on appeal.

3. Contention 2.b.2

TMIA presents no reasons whatsoever for alleging that the Licensing Board erred in dismissing Contention 2.b.2. TMIA simply states what it alleged in the contention, and recites some of Licensee's assertions. TMIA does not even state which of Licensee's assertions it alleges are incorrect, and presents no reasons why the Licensing Board should not have relied on the positions advanced by Licensee or the Staff. Consequently, there can be no finding of error.

## V. BOARD RULINGS DURING THE HEARING

### A. Questions Relating to Plugging

TMIA asserts that the Licensing Board improperly disallowed questioning on the subject of plugging. Brief at 11-12. There was no error here, because the contention relating to plugging had been eliminated on summary disposition, and plugging was no longer within the scope of the subject matter of the hearing.<sup>10/</sup>

To be allowed to question witnesses on the subject of plugging, TMIA would have had to have been successful in moving the Licensing Board to admit a new contention (or to readmit the original contention). No such motion was made.

As discussed in Section IV.A, supra, Contention 1.c was dismissed on the basis of affidavits of both Licensee and the Staff which demonstrated conclusively that the kinetic expansion repair process did not affect plugging integrity. TMIA's attempt to question the witnesses was based on the recent discovery of a missing plug and a loose plug. Tr. 208. Nothing was presented below to suggest that they were in any way caused

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<sup>10/</sup> The Board correctly stated: "The matter of plugging is not in issue. [TMIA's representative] may cross-examine to the full extent within the scope of the remaining matters that are in issue this case. There is nothing now before us with regard to plugging."

by the kinetic repair process; no such argument has been presented on appeal, and the affidavit evidence presented on summary disposition had precluded the likelihood of any such relationship.11/

Given the extensive and unequivocal affidavit evidence on summary disposition which had previously demonstrated that the kinetic expansion process would not affect the integrity of plugging, and given that TMIA attempted to question witnesses on matters beyond the scope of the contentions at issue in the hearing without providing any showing that plug failures could be in any way related to the kinetic expansion repair process, the Licensing Board was clearly correct in excluding a line of questioning on plugging.

B. Material Expunged From The Record

TMIA alleges that the Licensing Board committed error by improperly expunging material from the record. Brief at 12-13.

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11/ TMIA also requested to question witnesses on the basis of Board Notification 84-131, July 13, 1981 ("BN-84-131"). Tr. 204-5. The only reference to plugs in that notification was the following: "A total of approximately 15 tubes and/or plugs showed indications of minor leakage. Minor leakage of this magnitude is typical from plugs and anticipated from the repaired tubes." BN-84-131 contained no suggestion that the plug leakage was in any way related to the kinetic expansion. In any event, since TMIA's brief refers only to "loose and missing plugs," Brief at 11, TMIA is apparently not relying on BN-84-131.

The facts are that, during cross-examination by TMIA, one of Licensee's witnesses inadvertently disclosed information which Licensee considered to be proprietary. Following a bench conference during which Licensee's counsel explained the situation to the Licensing Board, the material was expunged from the record. Tr. 442-44; see generally Tr. 442-55, 677-79. TMIA was offered the opportunity to continue the line of questioning in camera, and thus reinstate the information into the record, but refused to do so. Tr. 443-44, 445-46, 449, 455.

As discussed in section III.A, supra, the Commission's regulations specifically provide for in camera sessions of hearings when proprietary information is produced or offered in evidence. 10 C.F.R. § 2.790(b)(6)(iii). In providing the opportunity for the in camera session, the Licensing Board acted strictly in accordance with both the spirit and the letter of the regulations. Hence, it cannot be said to have committed error in providing precisely the measure of protection contemplated by the Commission's Rules of Practice.

Because TMIA was offered, and refused, the opportunity to proceed with its line of questioning in camera, it cannot be said to have been prejudiced by the Licensing Board's action. TMIA at no time asserted that it would in fact have suffered prejudice. See Tr. 443, 445-46, 677-78.

TMIA relies on the argument that Licensee had provided the proprietary information to TMIA on discovery, and then "belatedly decided that the information was proprietary" during the hearing. Brief at 12-13. The information in question was "whether or not there were one or more expansions in the kinetic expansion process, and if so, how many ..." Tr. 447. This information has always been considered proprietary by the contractor who performed the repairs. Licensee was not aware until that day at the hearing that TMIA possessed the information, if in fact it did, 12/ or that TMIA would attempt to use or elicit it at the hearing. If Licensee had provided the information to TMIA, it was certainly inadvertent. Under the circumstances, it cannot be said that Licensee was untimely in asserting its right to have the proprietary information protected in an in camera session of the hearing.

## VI. CONCLUSION

For all of the foregoing reasons, none of TMIA's exceptions supports a determination of error by the Licensing Board

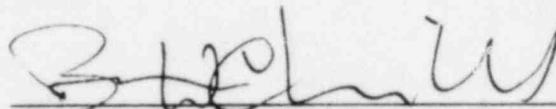
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12/ At the close of the hearing, TMIA stated that, "[t]he information that I refer to is so prevalent throughout the documents that I really have not even bothered to cite it, so I have no cites to give you." Tr. 677. To this day, Licensee is unaware of just what information TMIA possesses on the subject, or, if it has such information, how it obtained it. Licensee is unaware of its having turned over on discovery any documents which contain the proprietary information.

below. Accordingly, Licensee respectfully submits that TMIA's appeal should be denied, and the Initial Decision of October 31, 1984 affirmed.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



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