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RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Steam Generator Repair)
(Three Mile Island Nuclear Station, Unit No. 1)	)	

TMIA'S RESPONSE IN OPPOSITION TO LICENSEE'S MOTION FOR LEAVE TO FILE REPLY TO TMIA'S RESPONSE TO LICENSEE'S MOTION FOR SUMMARY DISPOSITION

By Motion dated April 13, 1984, Licensee requests leave to file a reply to TMIA's April 3, 1984 Response to Licensee's Motion for Summary Disposition. Licensee contends that it "should be permitted to file such a reply" to "inform the Board", that "TMIA has wrongfully and unfairly predicated its opposition on new allegations" and "unsworn statements which do not even purport to satisfy" documentary requirements; that new issues have been raised; and that TMIA has mischaraterized the license amendment, and Licensee's motion and affidavits.

TMIA strongly opposes this motion. Not only has Licensee cited insufficient and often flatly erroneous grounds to support filing this reply, which are only fully explained ih the proposed reply document itself, but Licensee's tactic seems clearly aimed at thwarting the purpose of summary disposition procedures as an efficient means of avoiding unncessary hearings -- the precise thing it idlely accuses TMIA of attempting.

Licensee also claims in the reply document, as futher grounds for filing this motion, that TMIA has been either so "negligent" as a participant in these proceedings, or has actually engaged in

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"purposeful surprise tactics of questionable propriety," that TMIA's response to Licensee summary disposition motion deserves to be summarily rejected. TMIA can not let such extraordinarily vicious, unsupported attacks on TMIA's integrity go unanswered.

First, since becoming participants in this proceedings, and all through the expedited discovery period, TMIA has made ceaseless, round-the-clock efforts trying to understand and evaluate what can only honestly be described as extremely complex, conflicting, and considerable information regarding the TMI-1 steam generator repairs. We challenge Licensee to prove otherwise.

We have read and re-read this material, and gradually parts have begun to make sense. To the extent that TMIA was able to understand the technical aspects of this process by simple research and study, without technical assistance, TMIA was able to prepare a response certainly of sufficient quality to withstand dismissal of its contentions as a matter of law. The fact is that TMIA understood new information and gained new insights on a continuous basis up until the time of filing TMIA's summary disposition response. Licensee and the Board should understand that TMIA is still learning. But in no respect has TMIA ever deliberately evaded responses to discovery requests, and despite Licensee's implications to the contrary, TMIA only discovered certain relevant information while scrambling to respond to the summary disposition motions.

Ironically, included among this so-called "new" information is a transcript of an ACRS subcommittee meeting called to hear directly from Licensee on the steam generator repairs, which Licensee not only attended, but participated in extensively. Had TMIA known the significance of the contents of this transcript previously, TMIA could

have presented this information in the context of discovery responses. However, neither Licensee nor the Staff revealed to TMIA the existence of this transcript, or even acknowledged that the meeting had taken place. TMIA stumbled upon the document purely independently of Licensee or the Staff. TMIA suggests that if Licensee has problems with the "authentication" of this document, (see page 16 of Licensee's reply), it might do well to look through its own files where a copy can probably be found.

As to Dr. Sih's written statement presented in Senate hearings, TMIA learned of the existence of this document and obtained a copy only after summary disposition motions were served. As to Dr. Sih's more extensive statement (Attachment 2 to TMIA's response), Licensee suggests that TMIA's inability to obtain an affidavit from Dr. Sih in time to accompany this document is a "lame excuse" and impermissible. First, as was made clear to the Board and the parties in the context of TMIA's earlier motion for extention of time to respond to summary disposition motions, to which no party objected, Dr. Sih, who is at Lehigh University in Bethlemhem, PA (i.e. not in close physical proximity to TMIA) was out of town until the week of March 19, 1984. By the time Dr. Sih had time to conduct a reasonable examination of this material, furnishing TMIA with actual comments on March 28, 1984, TMIA had an extraordinarily short period of time to incorporate Dr. Sih's views into the document. But obtaining an actual affidavit was out of the question. By March 30, Dr. Sih's professional duties had called him away to Europe. Further, as the Board and the parties are also aware, the undersigned TMIA intervenor became very ill late that week, but even so, rushed to finish TMIA's response so that no party would receive it more than one day after previously promised.

Licensee is incorrect to suggest that submission of TMIA's response without an affidavit is flatly "impermissible." In fact, insituations where affidavits are not obtainable, it is within the Board's discretion to determine whether such affidavits are needed or not. 10 CFR § 2.749. The Board may then require them. If the Board so determines in this case, TMIA will certainly attempt of obtain one from Dr. Sih, provided of course he can be located, and is able once again to provide volutary assistance.

Moreover, while TMIA finds respect for its aggregate intelligence somewhat flattering, particularly coming from Licensee surely Licensee can not seriously believe that TMIA had such a sophisticated grasp of this material that it actually plotted and schemed to "surprise" Licensee with "new information" in a calculated move to discredit Licensee's case at this stage. Despite what warped visions of reality Licensee may have of TMIA, we are afraid to say that TMIA at the moment is struggling to credibly participate in this case, overwhelmed by the sheer complexity of this material.

But more importantly, this allegation amounts to a thoughtless, reckless attack on TMIA's integrity, without even a pretense of support. These wanton accusations can only serve to generate bad feelings among the parties in a process where a premium should be placed on open communication and informal resolution of issues. Further, such accusations lower the level of discussion before the Board to a sheer pettiness. (On a similar note, TMIA apologizes to this Board for Licensee's decision to make as an issue before this Board TMIA's letter regarding harassing conduct by Licensee's counsel. See, TMIA's letter of February 20, 1984, served by Licensee. TMIA was hoping to save the Board from bothering with such matters. TMIA's

letter was only meant to serve notice on Licensee that its counsel was behaving improperly hoping to prevent such conduct in the future. While Licensee's response to TMIA's letter contains numerous self-serving observations and factual errors, TMIA will not waste the Board's and the parties' valuable time quibbling over who did what when.)

But as if that were not enough, Licensee suggests that TMIA be "sanctioned" for "noncomplicance with Licensee's valid discovery requests." Page 10 of Licensee's proposed reply. Licensee intimates that TMIA must have responded disingenously to discovery requests, the inference being that TMIA perhaps outright lied to Licensee, claiming, "TMIA, after all, was certainly 'able' to obtain the assistance necessary to detail specific allegations when it came time to seek to defeat Licensee's Motion. If it can do so now, it could do so then." Such offensive insinuations really deserve little comment and only serve to debase the hearing process. Save very limited contact with Dr. Sih, TMIA obtained no assistance from any outside individual to prepare its response, gaining knowledge soley through its own gradual study and research process. See, discussion supra.

Further, the legal argument propounded by Licensee that TMIA is "estopped" from using "new statements" to defeat summary disposition because of an alleged failure to respond to discovery, is unfounded. First, it must be made clear that TMIA did not fail to respond to discovery requests. Based on informal discussions with various individuals, TMIA learned that with expert assistance, a very broad attack could be launched against Licensee's repair and clean up program. TMIA has been in rigorous search of such an individual since the inception of this hearing process. But each expert located has either been

industry connected thus fearful of lending support to an "intervenor," or has been prohibitively expensive.

But when faced with possible dismissal of its contentions, TMIA could obviously no longer afford to continue its search for experts. Thus, it learned as much as possible itself to respond competently. In the process, TMIA had to narrow its allegations considerably, to its own prejudice.

Second, Licensee took account of the broad nature of the contentions in its summary disposition motion. Claiming at that time an inability to determine what was being alleged, Licensee covered itself at that time by attaching "an extensive and comprehensive affidavit executed by David G. Slear, Licensee's manager of engineering Projects, to explain how the kinetic expansion repair was qualified to the original licensing basis for steam generator tubes, and to explain why this provides the requisite reasonable assurance that the tube ruptures will not occur during the operating conditions and transients specified in Contention 1.a. Licensee Motion for Summary Disposition at p. 8. Thus, Licensee clearly had its "shot" at killing TMIA's Contentions and avoiding public hearings once before. That it failed to meet its burden then does not constitute good cause for allowing them a second chance.

Further, TMIA responded to Licensee's motion point by point with factual assertions. By no stretch of the imagination can it be claimed that TMIA's allegations are beyond the scope of the contentions when TMIA limited its response solely to the facts relied upon by Licensee in its attempts to refute the vallidity of the contentions.

Third, Licensee cites no cases to support the broad proposition that TMIA is simply estopped from using so-called "new statements" to defeat summary disposition. In fact, such a proposition would totally defeat the purpose of summary disposition. Dismissal of contentions through judgement by summary disposition is only justified where it is clear what the truth is and where no genuine issue remains for trial. Public Service of New Hampshire (Seabrook Units 1 & 2), 7 AEC 877, 878 (1974). The only question under consideration here is whether there is but one open question of material fact on each contention. Alabama Power Company (Joseph M. Farley Nuclear Plant, Unit 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). In determining this, the Board is entitled to consider answers to interrogatories and other discovery, and any other statement of the parties'. 10 CFR § 2.749(d).

Licensee presents no justification to limit the Board's consideration of relevant evidence to, of all things, TMIA's response to interrogatories. The burden is clearly that of Licensee's to demonstrate the absence of any issue of fact. The U.S. Supreme Court has clearly held that in the context of summary judgement motions. See, Adickes v. Kress & Co., 398 US 144, 157 (1970). See also, 10 CFR § 2.732.

At this time is would be fundamentally unfair to expect TMIA to engage in virtual hairsplitting over technical details in opposing this motion. In addition, it is not TMIA's legal responsibility to show that it will prevail on each factual issue, as Licensee's motion seems to assume, but only that there are such issues to be tried. Public Service of New Hampshire, supra, at 879. TMIA has already done that in its response to Licensee and Staff motions.

A few points demand brief responses, however. Licensee implies that TMIA's discussion of the qualification program is inappropriate since that program is not part of the post repair and plant performance testing and analysis mentioned literally in TMIA Contention 1.a. This is astonishing. In the precise context of TMIA Contention 1.a, Licensee presents the qualification program as the justification for determining the safety of these repairs, thus downplaying the significance of Licensee's post repair and plant performance testing and analysis, devoting pages to the qualification program in support of its summary disposition motion. See, Licensee's Motion for Summary Disposition, pp. 64-73. Licensee then intimates that TMIA has no business challenging the qualification program since it is not part of the post repair and plant performance testing and analysis. This is absurd.

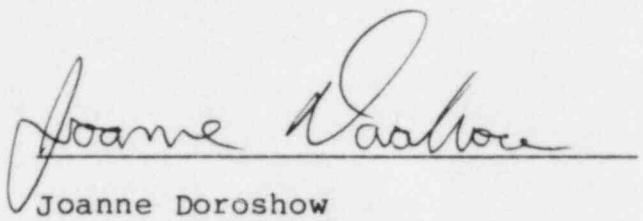
Second, regarding Paul Shewmon's memorandum and statements before the ACRS, it is remarkable that Licensee continues to twist the meaning of Shewmon's very clear statement of concern, raised both publicly and privately, regarding the risk of simultaneous ruptures. As Chair of the ACRS Subcommittee looking into the TMI-1 steam generator problem, Paul Shewmon is certainly an expert in his own right, and his opinion which raises a significant issue of material fact deserves that recognition.

In conclusion, TMIA hopes the Board keeps in mind that this hearing process has required TMIA to confront the knowledge and expertise of teams of technical experts hired to promote Licensee's position, with very little assistance. Yet if TMIA did not have the personal endurance to withstand such a grueling process, none of Licensee's many complex technical, controversial, and otherwise unchal-

lenged claims would even be under examination. Clearly, the documents in this case evidence significant issues of fact demanding full examination in hearings. Licensee has presented nothing in its reply which would provide any assistance to the Board in ruling on Licensee's summary disposition motion.

Licensee motion for leave to file this reply should be denied.

Respectfully submitted,



Joanne Doroshow
Louise Bradford
TMIA

April 20, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	)	
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METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached TMIA'S RESPONSE IN OPPOSITION TO LICENSEE'S MOTION FOR LEAVE TO FILE REPLY TO TMIA'S RESPONSE TO LICENESEE'S MOTION FOR SUMMARY DISPOSITION dated April 20, 1984, were served this 21st day of April 1984, by deposit in the U.S. Mail, first class, postage prepaid, or, hand delivered where possible on April 23rd to those on the attached service list.

Joanne Doroshow

JOANNE DOROSHOW

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-289-OLA
	)	ASLBP 83-491-04-OLA
(Three Mile Island Nuclear Station, Unit No. 1)	)	(Steam Generator Repair)

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