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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
	)	
(Three Mile Island Nuclear Station, Unit 1)	)	(Restart-Management Phase)
	)	

THREE MILE ISLAND ALERT'S MOTION TO ADMIT DEPOSITION OF PETER A. BRADFORD AS TESTIMONY OF UNAVAILABLE WITNESS

Three Mile Island Alert ("TMIA"), pursuant to 10 CFR 2.730, 2.740a, and 2.743, and Rule 32, Fed.R.Civ.P., hereby moves this Atomic Safety and Licensing Board ("Licensing Board") to admit as evidence the deposition testimony of former Nuclear Regulatory Commissioner Peter A. Bradford taken on October 23, 1984.

Former Commissioner Bradford is currently Chairman of the Maine Public Utilities Commission and will be involved either in hearings in Maine or be in California on business from November 14 through mid-December, 1984, during which time the hearings on the Dieckamp Mailgram issue are currently scheduled to be held. Given his unavailability to testify in these hearings, TMIA requests this Board to admit as evidence his deposition testimony.

I. THE NRC AND FEDERAL RULES PROVIDE THAT THE DEPOSITION TESTIMONY OF A WITNESS UNAVAILABLE TO TESTIFY AT THE TIME OF A HEARING OR TRIAL MAY BE INTRODUCED AS EVIDENCE WITH LEAVE OF THE PRESIDING OFFICIAL.

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Both the NRC rules governing adjudicatory hearings before this Licensing Board and the Federal Rules of Civil Procedure, which provide guidance to NRC adjudicatory boards, provide that the Licensing Board may admit deposition testimony as evidence in an adjudicatory hearing. 10 CFR 2.740a(g); Rule 32(a), Fed.R. Civ.P.

Section 2.740b(g) provides in relevant part:

> (g) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts.

Rule 32(a),Fed.R.Civ.P., provides in relevant part:

> Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
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> ...
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> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:...(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing...or (D) that the party offering the deposition has been unable to procure the attendance of a witness by subpoena...

While there is no specific NRC rule on the use of depositions at hearings, it is well settled that the application of a federal rule of civil procedure in an NRC licensing proceeding is appropriate in the absence of an analogous NRC rule of practice. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971,978 (1983). See also, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490,497 (1983).

The Licensing Board has held that "In considering whether to follow the federal guidance, a Board should determine whether the situation before it is analogous to the situation the federal rule governs and whether the policy rationale underlying the federal rule is persuasive." Carolina Power and Light Co., supra. Under this test, it is clear that the federal guidance of Rule 32(a) Fed.R.Civ.P. should appply to this situation.

First, from a factual standpoint, Mr. Bradford's situation fits squarely within the federal rule. As noted above, Mr. Bradford will be much further than 100 miles from Harrisburg during the entire length of hearings on the "Dieckamp Mailgram" issue.

Second, the policy rationale which underlies Rule 32(a) is persuasive and should apply to this situation. It has been held that "The purpose of using prior depositions and testimony is to save the time, effort and money of the litigants and to expedite trials, with a view to achieving substantial justice." Hertz v. Graham, 23 F.R.D. 17 (S.D.N.Y. 1958). As discussed earlier, Mr. Bradford, who chairs the Maine Public Service Commission, is required to preside over hearings throughout the period in question, except for a short time during which he must be in California for business matters. Requiring him to testify in Harrisburg during this time would be a tremendous burden on him in terms of his own time and effort, as well as on TMIA, in addition to a significant financial hardship on TMIA, in providing arrangements for his hearing attendance. Moreover, allowing use of his deposition would serve to expedite the

hearing process. It should also be noted that no party could be prejudiced by the use of Mr. Bradford's deposition.

Licensee and the NRC staff were each represented by two attorneys at Mr. Bradford's deposition, and had more than adequate opportunity to thoroughly question him.

Moreover, it is not significant that the statute which authorizes the Commission's subpoena power does not expressly limit the effectiveness of this power to 100 miles as the federal rules provide. The policy considerations behind Rule 32(a) for the use of depositions at trial are not derived from the 100 mile federal subpoena limit. As discussed above, general policy considerations such as time, effort, money and expediting the process arise independently of this limit. Further, the Atomic Energy Act's subpoena power should not extend to Mr. Bradford in any event.

The Atomic Energy Act states, in pertinent part,

> In the performance of its functions the Commission is authorized to . . . (c) . . . by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place.

42 U.S.C. §2201(c). This vague provision is unlike similar administrative subpoena statutes pertaining to other agencies, where a subpoena's effectiveness is expressly designated as within the boundaries of the United States. For example, the Securities and Exchange Commission can compel a witness' attendance "from any place in the United States or any Territory at any designated place of hearing." 15 U.S.C. §775(b). The Atomic Energy Act, however, is not similarly explicit in providing that witnesses may be called from any part of the

United States.

Moreover, it has been held that even when a statute explicitly provides for nationwide service of process, there are implicit limits on the agency's power to compel compliance, dependent upon the particular burdens placed on the witness. See, Bank of America v. National Trust and Savings Association, 105 F2d 100, 70 App. D.C. 221 (D.C. Cir. 1939). See also, Hale v. Henkel, 201 U.S. 43 (1905).

Without an explicit reference in either the statute or the Commission regulations, the federal rules should be used as guidance. See, supra. The federal rules restrict the effectiveness of a subpoena requiring attendance at a hearing to 100 miles. Fed.R.Civ.P. 45(e). Mr. Bradford can not be made to travel more than 100 miles from the place he is served with a subpoena to appear at these hearings. Thus, as he is unavailable, his deposition should clearly be permitted into evidence at hearing.

II. COMMISSIONER BRADFORD'S DEPOSITION TESTIMONY PROVIDES PROBATIVE EVIDENCE ON THE ISSUES BEFORE THIS LICENSING BOARD.

Former Commissioner Bradford was questioned during his deposition on October 23, 1984 on the following points which TMIA contends are probative of the main issues before this Licensing Board:

(1) Mr. Dieckamp should have known at the time he sent the mailgram on May 9 that it contained a false statement; and

(2) Mr. Dieckamp should have corrected the mailgram at

such time as he learned that it contained misstatements. [1]

Mr. Bradford's testimony was predicated on the following:

(1) his general knowledge as an NRC Commissioner and graduate of law school of NRC regulations and procedures at the time of the accident and his specific knowledge of NRC requirements about licensee reporting of information at the time of the accident;

(2) his knowledge of the manner in which the full Commission and the NRC staff operated to make decisions in the emergency situation of the TMI-2 accident;

(3) his specific knowledge of the facts of the TMI-2 accident;

(4) his specific knowledge and analysis of NUREG-0760; and

(5) the specific documents provided to Mr. Bradford for his review prior to his deposition, attached as Exhibits 1, 2, and 3 to his deposition.

Mr. Bradford testified to the following points which are probative of TMIA's case that Mr. Dieckamp should have known that his mailgram contained false statements at the time he

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[1] TMIA has provided a copy of Mr. Bradford's deposition and the referenced exhibits to Chairman Ivan Smith of the Licensing Board. Both licensee and NRC staff counsel have ordered, and presumably have received, copies of Mr. Bradford's deposition with exhibits.

TMIA has not provided copies of the Bradford Deposition for the other Licensing Board judges but will do so if necessary for consideration of this motion.

If this Licensing Board grants TMIA's motion to admit Mr. Bradford's testimony in his hearing, TMIA will ensure that the required number of copies of his testimony are provided.

sent it and should have corrected the mailgram when he learned it contained misstatements:

(1) The licensee was required to provide the NRC with significant information about plant conditions in order for the Commission and the NRC staff to make informed decisions concerning the accident. This included the fact that in-core temperature read over 2500 degrees F; a complete set of in-core temperatures indicated six readings greater than 2200 degrees F; a pressure spike to 28 psi occurred which some site personnel believed indicated a real increase in pressure and believed was caused by the production or combustion of hydrogen and caused a change in strategy to bring the reactor to a stable condition; and the fact that an explosion had occurred in the containment which was reported from GPU Service Corporation engineers at TMI to their management in Parsippany.

(2) If the licensee had provided the Commission with a portion of the above information or information that hydrogen exceeding the containment design limit of four percent was detected, Mr. Bradford believed that the Commission and the NRC staff would have recommended to the Commonwealth of Pennsylvania instituting a precautionary evacuation, as was in fact done upon receipt of information about hydrogen on Friday, March 30. Tr. at 7-8; 12-21; 29-34; and 36-41.

(3) Mr. Bradford believed that the information available to him during the time he was a Commissioner and additional documents he reviewed prior to his deposition, i.e., Exhibits

1, 2, and 3,[2] was information Mr. Dieckamp had available to him at the time he sent the mailgram. This information demonstrates statements in the mailgram are false. Tr. at 43-49; 75.

(4) Mr. Bradford testified that he believed the statement that there was "no evidence" that anyone interpreted the pressure spike and spray initiation in terms of core damage was not accurate in that there was such evidence, even if Mr. Dieckamp did not believe or discounted the quality of this evidence. Tr. at 46. Further, Mr. Bradford testified that Mr. Dieckamp "should have known of the matters that have come to light in the exhibits that you have since shown to me before making a statement like that." Tr. at 47.

In reviewing Mr. Keaten's notes for March 29, Mr. Bradford testified, "certainly if an employee of the company at Mr. Keaten's level had concluded that an explosion had taken

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[2] Exhibit 1 is a September 17, 1980 Memorandum to R. Arnold to which it attached a copy of James Moore's notes. Mr. Moore's notes indicate that he, a GPUSC engineer sent to the site early on March 28, 1979, to analyze the accident and provide technical support if required, learned at 5:00 p.m. that in-core thermocouple temperatures in excess of 2500 degrees F had been measured at TMI-2.

Exhibit 2 is a confidential memorandum from B. Cherry, a GPU Vice President and Officer, to Mr. Dieckamp dated March 29, 1979. It indicates that GPU and Metropolitan Edison knew on the first day of the accident that Met Ed's press release on the accident was underplaying its seriousness. It also indicates that Mr. Arnold and Mr. Dieckamp apparently had hard information about the accident on the first day of the accident.

Exhibit 3 is a set of Robert Keaten's notes for the period of the accident. The relevant entry is for March 29, 1979, which indicates that Gary Broughton, a GPUSC manager sent to the site with Mr. Moore, informed Mr. Keaten of an "explosion in the containment" on that date.

place in the containment, that is the type of information that I would have thought would have been available to Mr. Dieckamp in advance of sending a mailgram, and would have thought that he would have taken some pains to search out before saying that there was no evidence anyone had associated the pressure spike with reactor core damage." Tr. at 49; Exhibit 3.

(5) Mr. Bradford also testified, "before writing a no evidence type of statement, certainly Mr. Dieckamp was in a position to cause an investigation to be done and cause a review to be done. The company was doing its own review." Tr. at 76.

This testimony is probative of Mr. Dieckamp's lack of understanding of his reporting responsibilities to the NRC which included his duty to report information accurately, fully, and in a timely fashion to the Commission. It is also probative of the fact that the NRC imposed on Mr. Dieckamp the requirement to conduct an inquiry to ensure statements such as he included in his mailgram of May 9, 1979, were accurate.

Moreover, Mr. Bradford's testimony demonstrates Mr. Dieckamp's duty to correct the inaccurate statements in the mailgram at the time the information available to him indicated he had made misstatements. Tr. at 52.

Mr. Bradford's testimony is also probative of the point that Mr. Dieckamp and the licensee's insistence at this time that the mailgram contains no false statements reflects poorly on licensee management's integrity:

(1) Mr. Bradford stated that Mr. Dieckamp in a Commission meeting of October 14, 1981, adhered to his position that there were no false statements in the mailgram, even though that was no longer a tenable position. Tr. at 41-43; 46-47; 50-53.

(2) Mr. Bradford testified that in his personal opinion, "I don't think that the adherence to those statements in the mailgram, in the face of what seems to me to be definite evidence to the contrary, reflects well on Mr. Dieckamp as the chief executive of a company operating under NRC regulation." Tr. at 56-58.

Finally, Mr. Bradford's testimony is relevant on the issue of the adquacy of the IE investigation into information flow which led to NUREG-0760:

(1) Mr. Bradford stated that Exhibits 1, 2, and 3, attached to his deposition, which were produced to TMIA in the course of discovery in these restart proceedings, cast serious doubt on the adequacy of the NRC's investigation. Tr. at 53-54.

(2) Two other memoranda which Mr. Bradford wrote at the time the Commission was reviewing NUREG-0760 were critical of the conclusion of that report. Tr. at 54-56. These memoranda address the issue as to whether site personnel on March 28, 1979, interpreted the pressure spike to indicate core damage. Id.

TMIA thereby offers Mr. Bradford's deposition testimony as probative on Mr. Dieckamp's state of mind on May 9, 1979,

when he sent the mailgram; on whether Mr. Dieckamp, in light of his known reporting obligations to the NRC, should have conducted an inquiry to ensure the accuracy of the mailgram; on whether Mr. Dieckamp should have corrected statements in the mailgram once information indicated misstatements in the mailgram; and on the adequacy of the NRC staff's investigation into and report on information flow.[3]

III. CONCLUSION.

In consideration of the above arguments, the deposition testimony with attached exhibits of former Commissioner Peter Bradford, and Mr. Bradford's unavailability during the scheduled hearing on the Dieckamp Mailgram issue, TMIA requests that this Licensing Board admit Mr. Bradford's deposition testimony with attached exhibits into evidence as though presented as evidence at the hearing itself.[4]

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[3] Licensee has stated, in response to Interrogatory No. 48 in TMIA's First Set of Interrogatories, that it first received copies of the tapes of the Mehler and Chwastyk NRC interviews on May 21, 1979. See, E. Blake to L. Bernabei letter of October 24, 1984.

Clearly, at this point Mr. Dieckamp was on notice that there was "some evidence" that site personnel on the first day of the accident understood the pressure spike to indicate core damage.

[4] As is apparent from Mr. Bradford's deposition, licensee intends to challenge the introduction of Mr. Bradford's testimony on the ground that he violated the Ethics in Government Act, 18 U.S.C. 207(a), (h). Tr. at 22, 28. TMIA requests leave of the Licensing Board to respond to licensee's legal argument that the Act prohibits introduction of Mr. Bradford's deposition into evidence at such time as the objection is raised and briefed.

It is TMIA's position that the Act on its face does not apply to testimony given under oath of an ex-official such as Mr. Bradford.

Respectfully submitted,

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Dated: November 1, 1984

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