UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart Remand on Management)
(Three Mile Island, Nuclear Station, Unit No. 1)	)	
	)	
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THREE MILE ISLAND ALERT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CERTIFICATION OF ORDER BARRING GILINSKY AND BRADFORD TESTIMONY

Three Mile Island Alert ("TMIA"), pursuant to 10 CFR 2.771, petitions this Atomic Safety and Licensing Appeal Board ("Appeal Board") to consider and reverse a November 9, 1984 order of the Atomic Safety and Licensing Board ("Licensing Board") which bars TMIA's introduction into evidence of testimony of former Nuclear Regulatory Commission ("NRC" or "Commission") Commissioners Peter Bradford and Victor Gilinsky on the Dieckamp Mailgram issue.

At the same time, the Board has permitted licensee General Public Utilities Nuclear ("GPU") to present opinion and factual testimony on the same matters, including the testimony of Herman Dieckamp, William Lowe and Edwin Zebroski.

This ruling of the Licensing Board affects the structure of the proceeding in a pervasive and unusual manner and presents novel questions of policy and law whose resolution will protect the public interest and avoid undue prejudice to TMIA's interest in this proceeding.

As set forth below, TMIA requests that the Appeal Board consider and reverse the Board's rulings which bar the introduction of former Commissioners Bradford and Gilinsky's testimony on relevant issues before the Board.

I. BACKGROUND.

On May 24, 1984, the Appeal Board remanded for consideration by the Board the circumstances under which on May 9, 1984 GPU President Herman Dieckamp sent a mailgram to Congressman Morris Udall in which he stated that "(t)here is no evidence that anyone interpreted the pressure spike and initiation of containment sprays in terms of core damage"at the time of their occurrence, and that there is no evidence that anyone withheld information.

The Appeal Board's concern was whether the statements in the mailgram were accurate, and if not, who or what was the source of the information which Mr. Dieckamp conveyed in the mailgram. The Appeal Board criticized the Licensing Board for its reliance on the NRC Staff's report on GPU reporting failure, NUREG-0760, which the Appeal Board characterized as "wholly conclusory." ALAB-772 at 131-133.

The Appeal Board also stated explicitly that it remanded the mailgram issue to the Board for further hearing on the "significance of Dieckamp's mailgram vis-a-vis licensee's competence to manage TMI-1 safely." Id. at 133.

The Licensing Board, after a prehearing conference on the scope of the remanded and reopened issues, stated that the issues before it were whether Mr. Dieckamp knew or should have have known that the statements in the mailgram were false or

inaccurate; and whether he should have corrected the statements once he knew that the statements were false or inaccurate. In addition, the Board accepted the issue of whether Mr. Dieckamp "made any effort to discover the facts . . . " Memorandum and Order Following Prehearing Conference at 8 (July 9, 1984).

TMIA proposed to present the testimony of former Commissioner Peter Bradford, currently Chairman of the Maine Public Utilities Commission, on the following;

(1) The operating structure of the Commission and the NRC Staff Emergency Response Center at the time of the TMI-2 accident;

(2) Mr. Dieckamp and GPU's obligation at the time of the accident to report information about the pressure spike, the containment sprays, generation or combustion of hydrogen, core damage and in-core thermocouple temperatures in excess of 2500 degrees which would indicate core damage and hydrogen generation/ burn and their obligation to do an investigation or inquiry to ensure the accuracy and completeness of all information communicated to the Commission and NRC Staff about these matters;

(3) Whether the information available to Mr. Dieckamp and GPU at the time of sending the mailgram was sufficient evidence that licensee personnel understood the significance of the pressure spike at the time it occurred so that it should have been acknowledged as "some evidence" in Mr. Dieckamp's mailgram;

(4) Whether Mr. Dieckamp should have obtained the information now available on the public record by May 9, 1979 so that he would have known on that date that the statements made in his

mailgram were false at the time he made them;

(5) the adequacy of NUREG-0760, the NRC Staff's report on GPU reporting failures, insofar as the report addresses licensee's understanding and appreciation of the pressure spike at the time it occurred and the withholding of information about the pressure spike and evidence of core damage.

(6) Mr. Bradford's opinion of Mr. Dieckamp's integrity and licensee's corporate integrity and competence in light of licensee and Mr. Dieckamp's consistent position over the last five and one-half years that there is no evidence that anyone interpreted the pressure spike in terms of core damage or that anyone withheld any information.

On October 23, 1984, upon adequate notice to all parties, TMIA took the deposition of Peter Bradford. Attorneys for both the licensee and NRC Staff cross-examined former Commissioner Bradford at the deposition. On November 1, 1984, TMIA moved to introduce the deposition testimony of Peter Bradford as the testimony of an unavailable witness insofar as his business responsibilities as Chariman of the Main Public Utilities Commission prevents his attendance during the scheduled time for hearing of the Dieckamp Mailgram issue.[1]

During the deposition TMIA established the following foundation for the opinion testimony it requested from Mr. Bradford:

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[1] See Schedule for hearings before the Maine Public Utilities Commission on "Investigation of Seabrook Involvements by Maine Utilities," Docket No. 84-113, attached and incorporated herein as Exhibit 1. (continued)

(1) Mr. Bradford was an NRC Commissioner at the time of the TMI-2 accident, is a graduate of law school, has knowledge of NRC regulations on reporting of information to the NRC at the time of the accident, and has specific knowledge of the NRC requirements for reporting of information during and after the accident;

(2) Mr. Bradford's explanation of how the Commission and the NRC Staff operated to respond to the TMI-2 accident and the information which they needed and required to perform their duties;

(3) Mr. Bradford's specific knowledge of the facts of the TMI-2 accident and reporting of information on the accident, a portion of which is evident from his questioning of Mr. Dieckamp at an October 14, 1981, Commission meeting which addressed specifically Mr. Dieckamp's mailgram; and

(4) Mr. Bradford's specific knowledge and analysis of NUREG-0760, including his analysis at the time he was Commissioner and his current analysis given newly-discovered evidence, on licensee's understanding and appreciation of the pressure spike at the time it occurred.

Mr. Bradford in his deposition testified to the following:

(1) Licensee officials, including Mr. Dieckamp, were required to provide the NRC with detailed information about specific plant conditions in order to permit the Commission and the NRC Staff to make informed decisions concerning the accident,

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(continued)

TMIA requests that the Appeal Board take official notice of the hearing schedule of the Maine Public Utilities Commission of which Mr. Bradford is currently Chairman.

including any decision to recommend evacuation to the Commonwealth of Pennsylvania;

(2) His opinion was that if the licensee had provided to the NRC information about site and GPU Service Corporation personnel's knowledge about the pressure spike, the generation and combustion of hydrogen, and in-core temperature readings in excess of 2200 degrees F, the Commission and NRC Staff would have ordered a precautionary evacuation given that they took steps to do so on much less dramatic information on Friday, March 30, 1979;

(3) Mr. Dieckamp, as GPU President, should have had available to him evidence, including additional evidence uncovered during the discovery portion of this proceeding, which indicated that site personnel did interpret the pressure spike in terms of core damage and that there was withholding of information about the pressure spike and associated conclusions;

(4) Mr. Dieckamp, if he did not have available to him this information, should have done an inquiry to discover this evidence prior to sending the mailgram;

(5) The fact that Mr. Dieckamp would write a mailgram which contained false statements, apparently without doing an adequate investigation to ensure its accuracy, does not reflect well on Mr. Dieckamp's integrity.

This last opinion was based, in addition, on the fact that Mr. Dieckamp maintained this position at an October 14, 1981 meeting under questioning about the mailgram from then-Commissioner Bradford. During an exchange with Mr. Dieckamp at this meeting on the "mailgram," Mr. Bradford was able to make a

first-hand evaluation of Mr. Dieckamp's credibility.

Moreover, Mr. Bradford testified as to the inadquacy of the IE investigation and report on GPU reporting failures. The NRC Staff is again presenting the testimony of the director of that investigation, Norman Moseley, to testify about the investigation and a portion of the report. Mr. Bradford's testimony is relevant to rebut the testimony of Mr. Moseley as to the soundness of the report and its conclusions.[2]

On November 1, 1984, TMIA filed a motion for leave to present both factual and opinion testimony of former NRC Commissioner Victor Gilinsky on the Dieckamp Mailgram issue. TMIA represented to the Board and the parties the general outline of its intended questioning of Dr. Gilinsky, and that although it believed he had relevant testimony TMIA did not have the authority to represent Dr. Gilinsky or present pre-filed testimony on his behalf. TMIA further stated that it wished to present the testimony of Dr. Gilinsky on the following matters relevant to the Dieckamp Mailgram issue before the Board:

(1) On May 7, 1971, Dr. Gilinsky attended a site tour by the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, whose chairman is Representative Morris Udall. During that tour, Dr. Gilinsky spoke to Mr. Dieckamp about the

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[2] TMIA also proposed to introduce two memoranda Mr. Bradford wrote during the time he was Commissioner in which he analyzed the evidence presented in NUREG-0760 concerning licensee's knowledge and understanding of the pressure spike at the time it occurred. These two memoranda, as Mr. Bradford's testimony about the inadequacy of NUREG-0760, were presented to rebut the NRC Staff and licensee's argument that the conclusions of NUREG-0760 support a finding for licensee on this issue. See Moseley Prefiled Written Testimony.

pressure spike, reporting of the pressure spike to the Commission and reporting of information generally to the Commission. The site visit and representation made on the site tour that site and NRC personnel observed the pressure spike at the time it occurred, became the subject of the New York Times article of May 8, 1979, to which Mr. Dieckamp responded by means of his May 9, 1979 mailgram. Dr. Gilinsky's testimony as to a conversation with Mr. Dieckamp about the subject of the mailgram, only two days before the mailgram was sent, is relevant to Mr. Dieckamp's state of mind at the time he sent the mailgram. It is also relevant to Mr. Dieckamp's motive for sending the mailgram to Dr. Gilinsky, the sole NRC Commissioner to whom the mailgram was sent.

(2) Dr. Gilinsky's interpretation and understanding of the relevant "no evidence . . . " portion of the mailgram is probative of Mr. Dieckamp's intent in sending the mailgram. An individual who sends an official document in the nature of the mailgram does so with an expectation as to how the document will be understood by the recipient. Therefore, Dr. Gilinsky's understanding of the meaning and purpose of the mailgram is relevant to the issue of Mr. Dieckamp's state of mind at the time he sent the mailgram.

(3) After the accident, Dr. Gilinsky had dicussions with Mr. Dieckamp and discussions with other licensee officials of which Mr. Dieckamp was aware, at Commission meetings, concerning licensee's appreciation of the pressure spike; reporting of the pressure spike, hydrogen burn and core damage to the NRC, and the Dieckamp mailgram. Dr. Gilinsky's observa-

tion of Mr. Dieckamp at these meetings and his analysis of the facts before Mr. Dieckamp and the accuracy of his mailgram is probative of whether the statements in the mailgram are false and whether Mr. Dieckamp knew or should have known they were false at the time he sent the mailgram.

(4) Dr. Gilinsky, as senior Commissioner at the time of the TMI accident, can testify as to the licensee and Mr. Dieckamp's obligation to report to the Commission the specific conditions of the reactor during the accident; the materiality of this information to the Commission's decisions about the accident; and his and other Commissioner's probable response to information about the pressure spike, hydrogen burn, in-core thermocouple temperatures in excess of 2500 degrees F and core damage if this information had been reported to the NRC in a timely fashion.

This testimony defines Mr. Dieckamp's obligation to ensure that any information he reported to the Commission about the accident or licensee's reporting failures was fully accurate and complete. It also will demonstrate that the evidence Mr. Dieckamp now contends was not material or of sufficient reliability to acknowledge in his mailgram was in fact "some evidence" which demonstrated that licensee personnel understood the significance of the pressure spike, which should have been reported to the Commission.

At the November 9 Prehearing Conference the Licensing Board denied TMIA's motion to admit the deposition testimony of Mr. Bradford or his testimony at the hearing on matters to which he testified in his deposition. The grounds stated by

the Board for denial of his deposition and hearing testimony were:

(1) Mr. Bradford is in fact available and can be subpoenaed to appear in this proceeding. Tr. at 27852.

(2) Mr. Bradford's testimony, both factual and opinion, is unreliable because Mr. Bradford in his deposition indicated that he did not know the issue to which he was speaking and the use to which his testimony would be put. Tr. at 27850. In addition, TMIA did not establish an adequate foundation for this opinion testimony. Ibid.

(3) Mr. Bradford has no expertise to offer the Board in its determination of this issue so his testimony is irrelevant. Id. at 27851.

(4) The Ethics in Government Act of 1978 has a fairness and reliability aspect within the Board's jurisdiction. The Act therefore provides that admission of Commissioner Bradford's testimony would be unfair to other parties and would be unreliable testimony. The Board based this determination on its judgment that the "only purpose we can see for offering former Commissioner Bradford's testimony is to "lend his status to your /TMIA's/ views" and that using his "status" was not fair to the other parties. Ibid.

The Licensing Board ruled that it would not permit the oral testimony of Dr. Gilinsky on the grounds:

(1) His opinion testimony was not relevant to any matter before the Board. Id. at 27855.

(2) Presentation and introduction of Dr. Gilinsky's opinion testimony is "against the intent of the Ethics in

Government Act" and implementing regulations. Id. at 27855, 27866.

(3) Presentation and introduction of Dr. Gilinsky's factual testimony without prefiling testimony would violate licensee's right to notice of this testimony. Further, presentation of Dr. Gilinsky's testimony for the first time at the time of the hearing "flies in the face of any regulated organized hearing." Id. at 27856.

(4) TMIA has failed to establish with specificity the substance of Dr. Gilinsky's proposed testimony or to establish that he has relevant and material evidence to offer on the issue before the Board. Id. at 27856, 27863-64.

(5) TMIA has refused to disclose to the Licensing Board all information it possesses about Dr. Gilinsky's proposed testimony. Id. at 27864.

The Board denied an oral request for directed certification to the Appeal Board of the Licensing Board's rulings barring the introduction of the Gilinsky and Bradford testimony. Id. at 27874-75.

Over TMIA's objections, the Licensing Board admitted into evidence at the hearing the following testimony of licensee witnesses;

(1) Mr. Lowe's opinion testimony that site personnel would not have deliberately concealed information about the pressure spike from their management and his opinion of Mr. Dieckamp's integrity. Tr. at 28146-28151.

(2) Mr. Dieckamp's testimony about the meaning of the mailgram. Tr. at 28303-28305;

(3) Mr. Dieckamp's testimony about his statements before

the Commission on October 14, 1981. Tr. at 28306-28307;

(4) Mr. Dieckamp's opinion testimony about his own integrity. Tr. at 28308-28310;

(5) Mr. Dieckamp's analysis of the various investigative reports and of the interviews conducted in the course of those investigations. Tr. at 28308-28310.

The Board based its ruling to accept admission of Mr. Dieckamp's analysis of the various investigative reports and interviews on the fact that "latitude should be given to Mr. Dieckamp to state in his own words why he believes what he does. We see no evidentiary prejudice to you /TMIA/. We see it as a sense of fairness." Tr. at 28313.

In all cases TMIA objected to introduction of the testimony cited above on the ground that if it were foreclosed from presenting testimony from the NRC perspective on what Mr. Dieckamp knew or should have known about the accuracy of statements in his mailgram, similarly, the licensee should be foreclosed from offering opinion testimony on the ultimate issue before the Board.

Through this motion, TMIA requests this Appeal Board to consider and reverse the Licensing Board's ruling which bars introduction of the two former Commissioners' factual and opinion testimony.

II. TMIA HAS MET THE STANDARD FOR DIRECTED CERTIFICATION TO THIS APPEAL BOARD.

The standard to determine whether the Appeal Board should undertake discretionary interlocutory review is whether the Licensing Board ruling: either (1) threatens

the party adversely affected by it with immediate and serious irreparable harm, which, as a practical matter, could not be alleviated by later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 N.R.C. 1190, 1192 (1977).[3]

Section V(f)(4) of Appendix A to 10 C.F.R. Part 2 provides the following standard for directed certification:

> A question may be certified to the Commission of the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when a prompt and final decision is important for the protection of the public interest, or to avoid undue delay or serious prejudice to the interests of a party.

The questions which TMIA requests the Appeal Board to determine are the following:

(1) Whether the proposed testimony of former Commissioners Bradford and Gilinsky is relevant to the Dieckamp Mailgram issue before the Licensing Board and should be permitted:

(2) Whether the opinion testimony of former Commissioners Bradford and Gilinsky is barred by the Ethics in Government Act;

(3) Whether the testimony of former Commissioner Gilinsky may be presented without prefiling written testimony; and

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[3] See also Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693,694 (1979); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533,534 (1980); Houston Lighting and Power Co. (Allens Creek Generating Station, Unit No. 1), ALAB-635, 13 NRC 309,310 (1981).

(4) Whether former Commissioner Bradford is an unavailable witness such that his deposition testimony may be introduced in lieu of his live testimony at the hearing.

The Board's foreclosure of the testimony of the two former Commissioners' testimony effectively serves to permit only the licensee to present evidence, from the company's perspective, on Mr. Dieckamp's obligation to report information to the Commission and the accuracy of his mailgram. Similarly, it effectively permits only the licensee's testimony as to the ultimate issue before the Board, that is Mr. Dieckamp's integrity and the significance of the mailgram in terms of corporate integrity.

The Board's rulings thereby affect the basic structure of the proceeding in a pervasive manner. The Board acknowledged this in stating that its rulings seriously affected TMIA's presentation of its case. Tr. at 27874.

Moreover the Board's application of the Ethics in Government Act to bar the testimony of two former NRC officials is a legal question of first impression for the agency. As such this issue involves a novel and important issue whose resolution is required to protect the public interest and to avoid undue and serious prejudice to TMIA's interest. Certainly the Appeal Board should rule on whether or not the Act, which TMIA contends on its face does not apply to testimony under oath of former NRC Commissioners, should be applied in this case.

Therefore, the second basis for the Board's rulings should be decided on appeal as a novel question of law which requires interpretation by the Appeal Board.

III. THE PROPOSED TESTIMONY OF FORMER NRC COMMISSIONERS GILINSKY AND BRADFORD IS RELEVANT AND PROBATIVE EVIDENCE.

The issues before this Atomic Safety and Licensing Board ("Licensing Board") are:

(1) whether Mr. Dieckamp knew or should have known that his mailgram contained false or inaccurate statements at the time he wrote it; and

(2) whether he should have corrected false and inaccurate statements in the mailgram at any time after he sent it.

A. Mr. Dieckamp's obligation in sending the mailgram.

One can determine the issue of whether Mr. Dieckamp "should have known" of the false statements in the mailgram only by first defining Mr. Dieckamp's obligation to ensure the accuracy of the statementshe made in his mailgram. Mr. Dieckamp's obligation can only be defined in terms of his responsibility as GPU President to ensure all statements he made to the NRC were complete, accuract and truthfu; and in accordance with licensee's reporting responsibilities. See, e.g., Section 206 of the Energy Reorganization Act of 1974, 10 CFR 50.10, 55.31, 20.403, and 6.8.1 of TMI-2 Tech. Specs.

Two statements in Mr. Dieckamp's mailgram are under scrutiny, One is " /t/here is no evidence that anyone

interpreted the 'pressure spike' or the spray initiation in terms of reactor core damage at the time of the spike . . .". The second is "/t/here is no evidence . . . that anyone withheld any information. "Withhold" is defined as "to desist or refrain from granting, giving or allowing: keep in one's possession or control: keep back." Webster's Third International Dictionary (1961 ed.). In the context of the mailgram the second statement means licensee did not withhold information within its possession which it was obligated to provide to the NRC.

In order to determine whether or not this second statement in Mr. Dieckamp's mailgram is factually accurate licensee's obligation to provide information to the NRC during and after the accident must be defined. Mr. Dieckamp's statement in the mailgram about licensee's compliance with its obligation to provide the NRC with information is accurate only if it has complied with all reporting obligations. Similarly, one cannot determine whether Mr. Dieckamp fully complied with his obligation in sending the mailgram, that is whether he "should have known" statements in the mailgram were inaccurate without defining what investigation or inquiry Mr. Dieckamp should have done to ensure its accuracy.

Former Commissioner Bradford testified that he believed Mr. Dieckamp and licensee should have done an adequate investigation to ensure the accuracy of the mailgram. Further, he

testified that Mr. Dieckamp (and licensee) should have had available the exhibits which he reviewed in the course of his testimony, which indicated statements in the mailgram were incorrect and that licensee personnel did interpret the pressure spike in terms of core damage at the time of the spike.

TMIA's theory of Mr. Dieckamp's obligation in writing the mailgram considering the mailgram would be received and considered by the Commission, is that :

(1) He had a responsibility to do an adequate investigation of the facts concerning licensee's understanding of the pressure spike and containment sprays in terms of core damage prior to sending the mailgram; and

(2) He had a responsibility to correct the misstatement that there was "no evidence" upon learning of the various interviews and documents constituting "some evidence" of licensee personnel's understanding of the pressure spike on March 28.

Therefore, both Mr. Bradford's testimony and Dr. Gilinsky's proposed testimony is relevant to defining licensee's reporting obligation to the Commission.

The Board has stated that neither Commissioner has any special expertise regarding the reporting obligations of the licensee during the accident since the NRC regulations are clear as to these obligations. The entire thrust of the Dieckamp Mailgram issue before the Board is the

is alleging clear reporting responsibility of licensee. Further licensee's compliance or failure to comply with this clear reporting duty has been investigated in at least two different NRC investigations and one Congressional investigation.

Further, the NRC regulations are not clear as to the precise information which must be reported or the quality of information which must be reported. Insofar as the Dieckamp Mailgram itself has itself been studied as a possible reporting failure there have been conflicting interpretations of whether or not the information contained in the mailgram can constitute a reporting violation insofar as it was not required in the license application. NUREG-0760 at 45.

The NRC Commissioners who needed and required information to respond to the accident are clearly the best interpreters of the NRC regulations and best judges of what information was material information to the Commission which should have been reported.

B. The evidence of appreciation of the pressure spike is of the type which should have been reported to the NRC and is of a quality to constitute "some evidence" which Mr. Dieckamp should have acknowledged in his mailgram.

The testimony of licensee witnesses is offered to demonstrate that the information possessed by licensee at the time of the accident, and shortly thereafter, was not evidence of sufficient quality or accuracy that it needed to be reported to the NRC or acknowledged by Mr. Dieckamp in the mailgram.

Dr. Edwin Zebroski's testimony admitted into evidence explained

1. The extent to which there was a rapid learning curve evident in the days immediately after the accident, in respect to organizing and integrating the large volume of plant data and in sorting out different views and speculation as to the extent and nature of the damage of the reactor . . . and

2. The extent to which . . . uncertainties remained for months after the accident, reflecting the limited general state of knowledge of severe core accidents at that time.

Zebroski, ff. Tr. ___ (November 16, 1984) at 2.

Thomas Van Witbeck's testimony admitted into evidence was offered to indicate that his "appreciation for the significance of the pressure spike as a measure of core damage . . . was not gained until /_he_/ was exposed to calculations of the volume of H2 involved which was . . . in the period April 2nd through April 4th."

Van Witbeck, ff. Tr. 28261 at 3.

The purpose of their testimony is to demonstrate even experts did not understand the extent of core damage at TMI-2 until extensive research had been completed on the accident. The implication is that site personnel, who were not accident experts, could not have understood the significance of the pressure spike. The purpose of this testimony is also to demonstrate that whatever understanding site personnel had of the pressure spike in terms of core damage were vague, unsupported and undocumented understandings which do not rise to the level of "some understanding."

Mr. Dieckamp's testimony, admitted into evidence, is that Mehler, Chwastyk and Illjes' testimony does not rise to the level of "some evidence" required to be acknowledged in his mailgram:

> I continue to believe that the evidence and independent analysis therefore support the thrust of the mailgram statement. In making this statement I realize that the mailgram phrase "no evidence" can if taken literally indicate a measure of absolute knowledge that goes beyond the reasonable basis that I possess for my judgment and my belief. By the same token, they do not rise to the level of substance necessary to justify a responsible questioning of my integrity.

Dieckamp, ff. Tr. 28316, at 19-20.

Licensee has permitted to introduce testimony from licensee and consultant witnesses as to whether the information concerning site personnel's understanding of the pressure spike is sufficient to rise to the level of "some evidence" of understanding of the pressure spike required to be acknowledged in Mr. Dieckamp's mailgram and required to be reported to the NRC.

TMIA proposes, through the testimony of former Commissioners Bradford and Gilinsky to demonstrate that the Mehler, Chwastyk and Illjes' interviews, as well as other evidence uncovered during the discovery portion of this proceeding, rises to the level of "some evidence" which was material to the Commission in responding to the accident. As such material information, Mr. Dieckamp was required to acknowledge

it in his mailgram and the licensee was required to report it to the Commission.

C. The Bradford and Gilinsky opinions on Mr. Dieckamp's integrity and the Licensee's integrity in light of the evidence on the public record is probative evidence which the Board must consider.

The Board has barred Mr. Bradford and Dr. Gilinsky's opinions on the ultimate issue before it -- how the inaccuracies contained in the Dieckamp mailgram reflect on his and licensee's integrity. Yet it has permitted licensee witnesses to testify on this issue, including Mr. Dieckamp himself.

Certainly Mr. Bradford and Dr. Gilinsky's opinions do not in any way bind the Board but they do provide probative evidence that the Board should consider.

D. Former Commissioners Bradford and Gilinsky have relevant analyses to offer the Board of the evidence before it, including the adequacy of the NRC's investigation into licensee's knowledge of the pressure spike and analyses of whether the interviews and documentary evidence uncovered during discovery indicate the inaccuracy of the statements in Mr. Dieckamp's mailgram.

The Board foreclosed admission into evidence of Mr. Bradford's and Dr. Gilinsky's analyses of the relevant evidence on the ground that they offered no evidence but only analysis which TMIA counsel could make themselves. However, the Board did admit into evidence Mr. Dieckamp's analysis of the record evidence because he stood as the corporate official accused of misconduct.

Clearly it is a violation of TMIA's due process rights to permit licensee testimony on an issue but bar TMIA's presentation of relevant evidence. More importantly, however, the analyses of two former Commissioners as to whether or not there was evidence which indicated site personnel understood the significance of the pressure spike at the time it occurred is relevant opinion testimony, given their depth of understanding of NRC requirements and the facts of the TMI-2 accident. Further, their evaluation of NUREG-0760 is probative of what weight this Board should give Mr. Moseley's proferred testimony.

IV. THE ETHICS IN GOVERNMENT ACT DOES NOT BAR THE TESTIMONY OF FORMER COMMISSIONERS BRADFORD AND GILINSKY.

Section 207(a) provides in relevant part:

> Disqualification of former officers and employees; disqualification of partners of current officers and employees.
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> (a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States . . . after his employment has ceased, knowingly . . . with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to
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> (1) any department, agency, . . . and
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> (2) in connection with any judicial or other proceeding . . . in which the United States is a party, and
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> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the

> rendering of advice, investigation or otherwise, while so employed . . . shall be fined not more than $10,000 or imprisoned for not more than two years or both.

18 U.S.C. § 207(a).

The implementing regulations to which the Board refers in its rulings are those of the Government Ethics Office which provide as follows:

> Testimony and statements under oath or subject to penalty of perjury.
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> (a) Statutory basis. Section 207(h) provides:
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> "Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.
>
> (b) Applicability. A former Government employee may testify before any court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. 207(a), (b) or (c) to testify on behalf of another as an expert witness except: (1) to the extent that the former employee may testify from personal knowledge as to the occurrences which are relevant to the issues in the proceeding . . .

5 CFR 737.19.

The Ethics in Government Act on its face does not apply to the testimony under oath of these witnesses in this NRC proceeding. First, neither former Commissioner falls within the prohibition of 18 U.S.C. § 207(a). Neither through his testimony "intends to influence /the NRC/ by oral or written communication on behalf of TMIA. This provision of the Act applies

to attorneys or agents for parties in adjudicatory proceedings, but not mere witnesses." See In re Asbestos Cases, 514 F. Supp. 914, 917 n.2 (D.Va. 1981).

The purpose of the statute has been clearly stated in the Act's legislative history. The Act's objective is that "former officers shall not be permitted to exercise undue influence over former colleagues, still in office in matters pending before the agencies . . ." S.Rep. No. 95-170, 95th Cong., 2nd Sess., reprinted in 1978 U.S.Code Cong.&Ad.News 4248. Former government officials are not permitted to "utilize information on specific cases gained during government service for their own benefit or that of private clients." Id. at 4247.

The Act strengthened the provisions of the pre-existing ethics legislation in order to resolve the "revolving door" problem, that is, officials, "who become advocates for and advisors to the outside interests they previously supervised as government employees." Id. at 4248.

The Joint Explanatory Statement of the Committee on Conference states that this provision includes "appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise." H.Con.R. No. 95-1756, 95th Cong., 2nd Sess., reprinted in 1978 U.S.Code Cong.&Ad.News 4390. The Act addresses those former employees and officials

who appear as agents, attorneys or professional representatives of private entities they formerly regulated.

Neither Mr. Bradford nor Dr. Gilinsky is testifying in any such capacity. Mr. Bradford made clear in his deposition that he was testifying pursuant to a request by TMIA counsel but that he had little idea how his testimony fit in TMIA's case and that he would honor a similar request by any other party. Similarly, Dr. Gilinsky is expected to testify as to matters within his personal knowledge as a former NRC Commissioner. Obviously, TMIA has not retained or otherwise hired either so as to trigger the application of the Act. In fact, TMIA has not prefiled written testimony on behalf of either former Commissioner because of the nature of its relationship with both. TMIA has simply requested their testimony in areas relevant to the issues before the Licensing Board.

Further, even if section 207(a) were found to apply to former Commissioners' Gilinsky and Bradford's testimony, section 207(h) excepts testimony under oath from the prohibition of section 207(a).[4]

The legislative history states that this section was intended to list "exceptions" to sections 207(a), (b) and (c). Id. at 4392.

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[4] Section 207(h) provides in relevant part:

> (h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or making statements required to be made under penalty of perjury.

GPU cites regulations promulgated by the Government Ethics Office to argue that opinions offered by Commissioner Bradford in his testimony may not be introduced. First, insofar as this regulation contravenes the clear meaning of section 207(h) it must fail since it cannot contradict its authorizing statute, which specifically excepts "testimony under oath" from section 207(a) prohibitions.

Second, the regulation on its face does not apply to the former Commissioners' testimony in that they are not testifying on TMIA's behalf as expert witnesses. They are testifying only insofar as they are qualified to offer opinions from their experience and knowledge as NRC Commissioners.

Third, the opinions which TMIA proposes to elicit are based on the Commissioners' personal knowledge, as that term is generally construed. The Board's novel interpretation of "personal knowledge" to exclude all knowledge gained from speaking to individuals with relevant information or from reading reports and documents has no basis in law. Both Mr. Bradford and Dr. Gilinsky have personal knowledge of the accident; licensee's reporting of information during the accident; the manner of operation of the agency during the accident; licensee's obligations to the Commission; and the actions the Commission and NRC Staff took in response to the information they received from licensee about the TMI-2 accident. They have also spoken to and personally observed Mr. Dieckamp in connection with these hearing issues. Therefore, all opinions

they would offer are based on their personal knowledge and admissible even if this regulation is found to apply.

Fourth, the regulations promulgated by the Government Ethics Office are merely guidance to the agencies. 5 CFR 737.1(a) Only the NRC's specific regulations implementing the Act are binding. These regulations do not restrict the application of section 207(h) as does 5 CFR 737.19, and therefore supersedes the Government Ethics Office regulations. See 10 CFR § 0.735-26-27. Given the specific NRC regulations which are silent as to any restrictions on the broad § 207(h) exception of "testimony under oath" from coverage of the Act, and this interpretation conforms to the plain meaning of §207(h) and the Act's legislative hisotry, the better interpretation is that 5 CFR §737.19 does not apply to testimony of former NRC officials in adjudicatory proceedings.

Finally, the Licensing Board does not have the authority to bar the former Commissioners' testimony on the ground that they, through their testimony, violate the "spirit" or "intent" of a criminal statute. The Act and implementing regulations provide that either criminal prosecution or administrative sanctions may be taken against individuals who violate the Act. However, outside of the administrative sanctions which the OPM regulations outline, there is no authority for the Licensing Board to bar such testimony. See generally 5 CFR 737.27. Further, insofar as the Licensing Board has

authority to bar such testimony it can do so only after providing an opportunity for the witness or party to protest the action. Ibid.[5]

V. FORMER COMMISSIONER BRADFORD IS UNAVAILABLE TO TESTIFY AND THEREFORE HIS DEPOSITION TESTIMONY SHOULD BE ADMITTED IN LIEU OF HIS LIVE TESTIMONY AT THE HEARING.

TMIA refers the Appeal Board to its argument in its Motion to Admit the Deposition of Peter Bradford as an Unavailable Witness. TMIA Motion at 1-5. TMIA also refers the Appeal Board to Exhibit 1 which confirms Mr. Bradford's representations at his deposition.

VI. TMIA HAS DEMONSTRATED THE RELEVANCE OF FORMER COMMISSIONER GILINSKY'S FACTUAL TESTIMONY SUCH THAT IT MAY BE HEARD WITHOUT REQUIREMENT THAT TMIA FILE PREFILED WRITTEN TESTIMONY.

Dr. Gilinsky's testimony is sought on three factual issues:

(1) His conversation with Mr. Dieckamp about the subject of the mailgram during the site tour on May 7, 1979;

(2) His interpretation of the mailgram;

(3) His observation of Mr. Dieckamp at Commission meetings.

The Board ruled that TMIA had not demonstrated the relevancy of Dr. Gilinsky's testimony on the Dieckamp Mailgram Issue and that TMIA had defaulted by failing to present prefiled, written testimony with the Board.

First, the relevance and materiality of the factual matters listed above dictate that the Board should permit the

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[5] The criminal provisions of the Ethics in Government Act must be strictly construed. Therefore the Licensing Board's interpretation of the "spirit" of the Act is impermissible and warrants reversal on that basis.

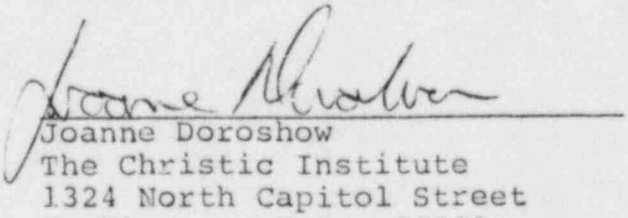
testimony of Dr. Gilinsky without prefiled written testimony. Licensee has had adequate opportunity to depose Dr. Gilinsky to determine the basis for his factual testimony. Further, licensee has other means to determine the substance of Dr. Gilinsky's testimony, including questioning of its officials and employees.

Finally, TMIA does not represent Dr. Gilinsky and is not authorized to state more than the specific areas in which he has relevant testimony. Dr. Gilinsky has stated his unwillingness to prefile written testimony on behalf of any party but did state that he would honor a subpoena to testify about those matters on which he held relevant information. TMIA's proffer of the relevant areas of his testimony is a sufficient showing of relevance to dictate that the Board permit his testimony at this hearing.

VII. CONCLUSION

In consideration of the above arguments TMIA requests that the Appeal Board reverse the rulings of the Licensing Board barring the introduction into evidence of the testimony of former Commissioners Bradford and Gilinsky on the grounds stated in the Board's November 9, 1984 Prehearing Order.

Respectfully submitted,



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Dated: November 19, 1984

Attorneys for Three Mile Island Alert

Exhibit 1

STATE OF MAINE
PUBLIC UTILITIES COMMISSION
242 State Street
State House Station 18
Augusta, Maine 04333
(207) 289-3831

October 31, 1984

Re: PUBLIC UTILITIES COMMISSION, Investigation of Seabrook Involvements by Maine Utilities, Docket No. 84-113

TO ALL PARTIES AND INTERESTED PERSONS:

Attached is the most recent schedule governing this proceeding. The schedule was attached to the Procedural Order issued on October 1, 1984 in the Central Maine Power rate case, Docket No. 84-120 and, I believe, was distributed to the participants present at the hearings in 84-113 at that time.

The parties should submit a suggested order of witnesses for the first two weeks of hearings on the Seabrook 2 issues no later than Friday, November 9, 1984.

Sincerely,

Joseph G. Donahue

Joseph G. Donahue
General Counsel

JGD/sn
Enclosure

10/31/84

JSC
10/1/84

Date	Seabrook Unit 1 Investigation* 84-113	Seabrook Unit 2 Investigation 84-113	MPS 84-80	CMP 84-120	CONTINENTAL 84-105
July 16-20			7/20 Company files		
July 23-27					
July 30-Aug. 3					
Aug. 6-10			8/7 Intervention; 8/10 Prehearing Conference		
Aug. 13-17					
Aug. 20-24					
Aug. 27-31	8/31 Companies file Direct			8/31 Company files	
Sept. 4-7	9/7 Staff files Direct				
Sept. 10-14	9/11 Intervenors file Direct		9/14 Data Requests due **		9/14 Data Requests Due **
Sept. 17-21	HEARINGS (9/17-21)			9/21 Intervention	
Sept. 24-28	HEARINGS (9/24-28)	9/28 Utilities file		9/25 Prehearing (8:30 a.m.)	
Oct. 1-5	HEARINGS (10/1-5)		10/5 Data Responses Due	10/5 Data Requests Due **	10/5 Data Responses Due
Oct. 9-12	HEARINGS (10/9-12)		HEARINGS (10/15-18)		
Oct. 15-19					
Oct. 22-26	10/26 Briefs	10/22 Data Requests Due***	HEARINGS (10/22-26)	10/26 Data Responses Due	
Oct. 29-Nov. 2	11/2 Reply Briefs				HEARINGS (10/29-11/2)
Nov. 5-9		11/7 Data Responses Due		HEARINGS (11/7-9)	
Nov. 13-16			11/13 S&I File Direct	HEARINGS (11/13-16)	11/16 S&I file Direct
Nov. 19-21		HEARINGS (11/19-21)	11/21 Data Requests Due		
Nov. 26-30			11/30 Data Responses Due		11/28 Data Requests Due **
Dec. 3-7		HEARINGS (12/3-7)			
Dec. 10-14		12/14 S&I File Direct	HEARINGS (12/10-14)	12/11 S&I File Direct	12/14 Data Responses Due
Dec. 17-21		12/19 Data Requests Due		12/21 Data Requests Due	
Dec. 24-28		12/28 Data Responses Due			
Dec. 31-Jan. 4				1/2 Data Responses Due	
Jan. 7-11****		HEARINGS (1/7-11)			HEARINGS (1/7-11)
Jan. 14-18		HEARINGS (1/14-18)	1/14 Company files Rebuttal		1/14 Rebuttal filed
Jan. 21-25			1/25 S&I file Surrebuttal	HEARINGS (1/21-25)	1/25 Surrebuttal filed
Jan. 28-Feb. 1		1/28 Rebuttal filed			HEARINGS (1/28-2/1)
Feb. 4-8		2/4 Surrebuttal filed	HEARINGS (2/4-8)	2/4 Co. files Rebuttal	
Feb. 11-15		HEARINGS (2/11-15)		2/15 S&I file Surrebuttal	
Feb. 18-22					2/22 Briefs
Feb. 25-Mar. 1				HEARINGS (2/25-3/1)	
Mar. 4-8		3/8 Briefs	3/8 Briefs		3/8 Reply Briefs
Mar. 11-15					
Mar. 18-22		3/22 Reply Briefs	3/22 Reply Briefs	3/22 Briefs	
Mar. 25-29					
Apr. 1-5				4/5 Reply Briefs	4/5 Examiners Report
Apr. 8-12			4/12 Examiners Report		4/12 Exceptions
Apr. 15-19			4/19 Exceptions		
Apr. 23-26				5/3 Examiners Report	
Apr. 29-May 3			5/10 Decision	5/10 Exceptions	4/30 Decision
May 6-10					
May 13-17					
May 20-24					
May 28-31				5/31 Decision	
June 3-June 7					
June 10-14					

* This Section of the schedule is particularly tight. All parties should be aware that it may not be met if the issues involved require extensive hearings or deliberation.

** Any data request submitted before the due date must be answered within three weeks. Objections to any data request must be made within seven days.

*** Any data request submitted before the date must be answered within two weeks. Objections to any data request must be made within seven days.

**** Note conflict in hearings this week.

"S&I" = Staff & Intervenors

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Three Mile Island Alert's Motion for Directed Certification and Memorandum of Points and Authorities in Support of Motion for Directed Certification has been served on the parties to this proceeding, by mailing a copy, first class, postage prepaid this 19th day of November 1984, to the following. Service by hand-delivery on this date has been made on all persons beside whose name an asterisk appears.

Lynne Bernabei

Lynne Bernabei

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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