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March 1, 1985

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

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LICENSEE'S RESPONSE TO THREE MILE ISLAND ALERT'S MOTION TO STRIKE PORTIONS OF LICENSEE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DIECKAMP MAILGRAM ISSUE

I. Introduction

On February 19, 1985, TMIA filed a Motion to Strike Portions of Licensee's Proposed Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue. TMIA asks the Board to strike a portion of Licensee's Proposed Finding 37 and footnote 21 of Licensee's Proposed Findings. As explained below, Licensee believes the challenged portions of its findings were appropriate and could be relied on by the Board. In any event, however, even if the Board were to decide not to rely on these particular findings, the Board should not strike them.

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TMIA first moves the Board to strike the portion of paragraph 37 in Licensee's January 28, 1985 findings that discusses the deposition of Hugh McGovern conducted by TMIA during discovery in this proceeding.1/ As its basis, TMIA argues that the portion of the McGovern deposition clearly was not received into evidence. TMIA Motion, at 2-3. It, however, is not as clear as TMIA suggests. Licensee believed when it submitted its findings that the excerpt from the McGovern deposition was admitted into evidence and thus relied on it in its findings. See LIC PF 37. Given TMIA's motion, Licensee has reviewed the relevant portions of the record.2/ Although we certainly cannot subscribe to TMIA's view that the Board clearly did not admit the fifteen-line excerpt from McGovern's deposition, it is by no means clear in retrospect that the Board did admit it. Briefly, the circumstances are as follows.

During its cross examination of Mr. Dieckamp, TMIA referred him to a statement in a chronology dictated by TMI-2 operator Hugh McGovern on March 29, 1979. TMIA suggested that the statement indicated that at the time of the pressure spike on March 28th, McGovern did not question that it indicated a

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1/ TMIA correctly identified the portion of Licensee's findings which quote and rely on TMIA's September 26, 1984 deposition of H. McGovern. See TMIA Motion, at 1.

2/ Licensee has reviewed in this regard: Tr. 28,672-82; Tr. 28,953-957; Tr. 29,075-79; Tr. 29,256-69; Tr. 29,435; Tr. 29,439-64; Tr. 29,535-59; Tr. 30,103-05.

real increase in pressure. See Tr. 28,682. Licensee challenged TMIA's characterization of the McGovern chronology, since McGovern had himself explained to TMIA during its questioning of him in a deposition that TMIA was incorrectly reading his statement and that he did not at the time of the spike believe it was real.3/ Licensee was also concerned that in its questioning of Mr. Dieckamp TMIA also made no mention of a May 4, 1979 (pre-mailgram) MetEd interview of McGovern, in which McGovern explained his belief that the spike was an electrical malfunction somehow connected with the loss of electrical buses.4/ Accordingly, in order to ensure a complete record, Licensee indicated that it intended to refer in proposed findings to the May 4, 1979 McGovern interview and proposed that the relevant portion of TMIA's McGovern deposition be stipulated into evidence. Tr. 28,953-54. TMIA indicated an initial unwillingness to accept Licensee's proposal, based on what it characterized as "licensee's outright refusal to stipulate any portion of any deposition." Tr. 28,957. The Board, however, intimated that it hoped the matter would be resolved not on the basis of a "quid pro quo," but rather on the basis of "what is necessary for a reliable and complete evidentiary record." Tr. 28,757.

3/ See TMIA deposition of H. McGovern (Sept. 26, 1984) at 32, quoted in LIC PF 37.

4/ JME 1(c)(21) at 7-8, quoted in LIC PF 38.

Licensee subsequently reduced to writing and provided to the Board and Parties its notification and proposed stipulation. Notification by Licensee of Intended Joint Mailgram Exhibit References and Deposition Stipulations (Nov. 27, 1984). See Tr. 29,435. At this juncture, TMIA argued that its deposition of McGovern was of little relevance (Tr. 29,450-451), but it did not reiterate a demand for a quid pro quo.5/ TMIA also questioned the timeliness of Licensee's notice. Tr. 29,456-57. There followed intermingled arguments on the McGovern deposition with more general observations regarding timely notification to the Board and other parties of an intention by one party to rely in its findings on portions of the fourteen-volume Joint Mailgram Exhibit 1(c).

Having heard considerable argument regarding both the McGovern deposition excerpt in particular and the general question of need for timely notifications of an intention to rely on the Joint Mailgram exhibits, the Board ruled. See Tr. 29,535-42. With respect to the Notification of November 27th by Licensee and TMIA's arguments on timeliness, the Board stated:

5/ Indeed, in the interim, Licensee and TMIA had agreed to stipulate into evidence portions of TMIA's depositions of Walter Creitz and Richard Lentz. Tr. 29,066-69, 29,257. Licensee had also provided TMIA with other proposed deposition stipulations responsive to the discussions of TMIA's requests during the November 13 Prehearing Conference. Tr. 29,256.

> "Well, with this particular narrow thing, no problem. If [counsel to TMIA] feels that she was hurt by [Licensee's] failure to do it on direct, or when Mr. Dieckamp was here, no problem. He can come back, you know, for that purpose."

Tr. 29,542. TMIA apparently accepted the Board's decision on timeliness, not seeking subsequently to have Mr. Dieckamp return for additional questions. With respect to Licensee's November 27th Notice and the approach to be utilized generally in the proceeding regarding notice to other parties, the Board stated:

> So, that would be the bottom line, that when you have the other side of the story and it's relevant, even though it's relevant on another sub-issue, you should be allowed to follow through and have a complete record. And it should be done at the earliest time.
>
> So, in general, [Licensee's November 27, 1984] notification is accepted. Now we have particular questions about it.
>
> Do you have any questions? Any questions where we are now?

Tr. 29, 5426/

In this context, it was Licensee's understanding when it submitted the findings that the Board had accepted not only the

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6/ TMIA points to the Board's use of the term "accepted" and distinguishes it from admitting evidence. Use of the term "accepted" is not dispositive. The Board used "accepted" elsewhere in receiving evidence. See, for example, Tr. 29,708 where the Board "accepted" portions of Lentz and Creitz depositions as their stipulated testimony.

notification of Joint Mailgram Exhibit references, but also the pertinent portion of TMIA's deposition of McGovern. We saw the Board's ruling as furtherance of its repeated concern for a complete and reliable record.7/ In retrospect, that understanding could have been wrong. Licensee did not at the time take up the Board's invitation to ask questions; Licensee did not seek clarification. As TMIA correctly points out, the McGovern deposition is not a part of the Joint Mailgram Exh. 1(c) and reliance on it by the Board would require both that it be admitted into evidence and that it be noticed by a party. Notice is definitely not a problem here -- these fifteen lines of text were very specifically discussed with Licensee stating it intended to rely on them and the purpose of that reliance.

7/ The Board considered the fairness to the parties as well (Tr. 29,260):

> The intent is that no item of evidence be received unless the significance of it is known at the time it is received, and the purpose for which it is being received is known. And it doesn't matter how that comes about. If the witness testifies about it, and gets his perspective through that channel, fine. If he gets the perspective through arguments of counsel, timely made, fine.
>
> But again, it is the objective that we are trying to achieve, and that is no item of information be received in the record and then be later used for purposes that no one had any forewarning about. It is simply a matter of due notice and opportunity to confront all items of evidence.

The issue as TMIA properly points out, is whether this deposition excerpt was admitted. Licensee believed that it was and relied on it. In retrospect, it is not at all clear.

However, regardless of whether or not the Board intended to accept the McGovern deposition excerpt into evidence, Licensee submits that no portion of its proposed findings should be stricken. In the event the Board determines that the quoted portion of the McGovern deposition is not in evidence, the Board should simply ignore it. The Commission's Rules of Practice do not provide for a motion to strike proposed findings. See 10 C.F.R. § 2.754. Compare 10 C.F.R. § 2.762(g) (which explicitly provides for a motion to strike an appellate brief that is not in compliance with the provisions of that section); 10 C.F.R. § 2.757 (authorizing the presiding officer to strike argumentative, repetitious, cumulative or irrelevant evidence). While the Board has authority to grant such a motion under the general power of the presiding officer to regulate the course of the hearing (10 C.F.R. § 2.718), it is discretionary and need not be exercised here. Cf.Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-55, 18 N.R.C. 415, 419 (1983) (ruling that extra-record material need not be struck since such material may be ignored by the Board in reaching its decision). See also FRA S.P.A. v. Surg-O-Flex of America, Inc., 415 F.Supp. 421, 427 (S.D.N.Y. 1976).

The Appeal Board has suggested that a motion to strike may be an appropriate vehicle to challenge a submission as insufficient, improper, untimely, or unauthorized. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 N.R.C. 1391, 1396-97 (1977). In Hartsville, the Appeal Board indicated parenthetically that a scandalous submission was an example of an "improper" submission that might be struck.8/ Hartsville, supra, ALAB-409, 5 N.R.C. at 1397. See, also, Texas Utilities Generating Co, (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 N.R.C. 241-45 (1981) (striking motions and responses that contained ad hominem attacks and amounted to no more than bickering); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 N.R.C. 637, 678 (1981) (striking an affidavit as scurrilous). Beyond this, NRC precedent provides little elucidation, and these cases have no application to the instant question.

Some guidance may be derived from the Federal Rules of Civil Procedure but this, too, suggests no need to strike. Fed. R. Civ. P. 12(f) provides for the striking from pleadings of "redundant, immaterial, impertinent, or scandalous matter."

8/ An example of an "unauthorized" submission which was stricken is Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-79-22, 10 N.R.C. 213, 218 n.5 (1979) where a licensing board struck a reply to a response to a motion as unauthorized by 10 C.F.R. § 2.730(c).

However, in Federal practice, the application of this provision is limited:

> Motions to strike alleged redundant, immaterial, impertinent or scandalous matter are not favored. Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied. Even if the allegations are redundant or immaterial, they need not be stricken if their presence in the pleading cannot prejudice the adverse party.

2A J. Moore, MOORE'S FEDERAL PRACTICE ¶ 12.21, AT 2429-31 (2D ED. 1984). TMIA's motion is devoid of any argument that TMIA would be prejudiced by denial of its motion.

TMIA's second request is that footnote 21 of Licensee's Proposed Finding be stricken as unsupported by evidence. TMIA Motion at 4. This echos an earlier request by TMIA in its letter of February 4, 1985, which letter is attached without reference to the instant TMIA Motion. TMIA first states "Licensee suggests that the Dieckamp Mailgram issue is before this Board 'at the considerable urging of Congressman Udall and Dr. Henry Myers.'" Id. at 4. This characterization is inaccurate as Licensee explained in response to TMIA's earlier letter on the same subject. See Letter from E. Blake to Licensing Board, dated February 24, 1985. Licensee made no suggestion that Congressman Udall or Dr. Myers influenced either the Licensing or Appeal Board. Rather, Licensee referred to the consideration

of the mailgram issue by the Special Inquiry Group and the NUREG-0760 investigations -- consideration that predates the remanded proceeding. Licensee cited evidence in the record showing that the Dieckamp mailgram issue was examined by the Special Inquiry Group and then by the NUREG-0760 interviewers in response to requests by Congressman Udall and Dr. Myers. In addition to the Rogovin/Frampton Memorandum responding to questions by Congressman Udall (Joint Mailgram Exhibit 1(c)(107)), Licensee referred to the following testimony of David Gamble during examination by TMIA:

> Q. In Mr. Stello's memorandum to Mr. Moseley, which I believe is attached as Exhibit 2 to your testimony, it states that the date due for the completion of the investigation was June 6th, 1980. Do you know why that date was extended?
>
> A. I wasn't party to the exact decision to extend that date, but I know that there were, in addition to the initial meetings of the task group, which is reflected in Mr. Moseley's April 18, 1980 memorandum, there were other discussions concerning the scope of this investigation which appeared to add to what the task group felt they should cover in this investigation and my opinion at the time was that those meetings and additional tasks were the reason that this date was extended.
>
> I am speaking here of meetings such as the one I attended with a representative of the staff of the Committee on Interior and Insular Affairs of the House of Representatives in which Mr. Stello personally accompanied the task group to this meeting and discussed with this staff member what items should be covered in this investigation.

Q. And did Mr. Stello give additional directions concerning expanding the scope of the investigation?

A. Although I couldn't recall the exact directions, I recall conversations from Mr. Stello in which he admonished the task group to ensure that this investigation was comprehensive and that this be an investigation to cover all aspects and not leave open areas of question. Mr. Stello clearly wanted this investigation to be comprehensive and to include all these areas of concern.

Q. All these areas of concern meaning the items that were idertified in his memorandum which is Exhibit 2 to your testimony, or were there other areas?

A. I believe I interpreted his statements to include the areas of concern of the Congressional staff member as well.

Q. We.., what additional areas of concern did this Congressional staff member express?

A. I couldn't recall them all, but the one that specifically stands out in my mind and obviously is a concern to this Board is the Dieckamp mailgram issue which was a particular concern to that staff member and that was discussed at some length.

Tr. 30,660-62.

Q. Now if I understand your testimony, Mr. Gamble, this memorandum did not include a delineation of the Dieckamp mailgram issue as one area of inquiry; is that correct?

A. I don't believe it did.

Q. And it is your understanding that somehow through subsequent discussions between the House Committee staffer and NRC personnel, including Mr. Stello, that the issue became delineated as one the IE task group was to address?

A. Right. My sense of that is it kind of evolved as an issue through the discussions. There were numerous discussions with this House staff member and this issue kind of grew out of those discussions.

Q. Okay. And who is the House staff member to whom you refer?

A. Dr. Henry Myers.

Tr. 30,703(emphasis supplied). Accordingly, Licensee submits that its finding is supported by evidence.

TMIA also takes issue with Licensee's observation that Dr. Myers attended the proceeding. TMIA in effect argues that the Board can neither comment on its own observations nor indicate who attended the hearings. TMIA cites no support for such a position; Licensee has found no cases on point. It bears noting however that observing Dr. Myers' attendance does not require taking attendance of every member of the general public as TMIA suggests. Dr. Myers is not just any member of the general public by virtue both of his position and his interest in the subject matter.

Finally, TMIA claims that footnote 21 is based in part on what it characterizes as a misrepresentation of the Modified Stipulation of the Parties on Mailgram Evidence. TMIA refers to Licensee's statement that "TMIA subsequently withdrew the proposal in return, inter alia, for Licensee's agreement to drop interrogatories inquiring into information and support provided to TMIA by Dr. Myers." TMIA Motion at 4. TMIA

ignores Licensee's use of the term "inter alia" and attacks this statement on the grounds that there were other elements of the stipulation. The stipulation, however, speaks for itself and indicates that Licensee's withdrawal of the interrogatories was indeed part of the agreement. Modified Stipulation of Parties on Mailgram Evidence, ff Tr. 27,896, at 9. See also letter from E. Blake to the Board (February 14, 1985).

Accordingly, Licensee submits that its footnote 21 was appropriate and could be relied upon by the Board. Surely it should not be stricken. Matter should be stricken from a pleading when it has no possible relation to the controversy. Augustus v. Board of Public Instruction, 306 F.2d 862, 868 (5th Cir. 1962). That is not the case here. If the Board disagrees with Licensee's position, it may simply choose not to adopt Licensee's proposed finding. It need not and should not strike footnote 21 from Licensee's proposed findings.

For the reasons stated above, Licensee submits that TMIA's Motion to Strike Portions of Licensee's Proposed Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue should be denied in toto.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

Ernest L. Blake, Jr., P.C.
David R. Lewis

Counsel for Licensee

Dated: March 1, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Response to Three Mile Island Alert's Motion to Strike Portions of Licensee's Proposed Findings of Fact and Conclusions of Law on the Dieckamp Mailgram Issue", dated March 1, 1985, were served on those persons on the attached Service List by deposit in the United States mail, postage prepaid this 1st day of March, 1985.

Ernest L. Blake, Jr., P.C.
Counsel for Licensee

DATED: March 1, 1985

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NUCLEAR REGULATORY COMMISSION

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