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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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In the Matter of)
)
PHILADELPHIA ELECTRIC COMPANY)
)
(Limerick Generating Station,)
Units 1 and 2)

Docket Nos. 50-352 OL
50-353

OFFICE OF SECRETARY
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RESPONSE OF THE COMMONWEALTH OF PENNSYLVANIA
TO THE APRIL 18, 1985 APPEAL BY THE GRATERFORD INMATES
AND APRIL 16, 1985 SUPPLEMENTAL PETITION OF GRATERFORD INMATES

I. INTRODUCTION

In accordance with the Appeal Board's Order of April 23, 1985, the Commonwealth of Pennsylvania (Commonwealth) hereby responds to the April 18, 1985 Appeal of the Graterford Inmates from the Licensing Board's April 12, 1985 Memorandum and Order denying inmates proposed contentions and dismissing them from this proceeding. The Commonwealth responds as well to the April 16, 1985 Supplemental Petition by Inmates for review of the Appeal Board Order of February 12, 1985 dismissing without prejudice the inmates' Petition for Directed Certification. For the reasons stated below, the inmates' Appeal of April 18, 1985 and Supplemental Petition of April 16, 1985 should be denied.

II. BACKGROUND

On December 13, 1985, counsel for the Graterford inmates received an unclassified, sanitized version of the evacuation plan for the State Correctional Institution at Graterford (Plan 1). Plan 1 provided counsel for the inmates, as well as his expert, substantial information as to the concept of operation of the plan. For example, Plan 1

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disclosed that the inmates would be transported away from the institution in buses, vans and other vehicles; that support personnel would be dispatched to the institution; that restraints would be used and other security-type information. It also indicated that different actions would take place as the plant incident became more serious. Other information that would be useful in developing contentions regarding the adequacy of the plan can be discerned from reading Plan 1.

On December 19, 1984, counsel for the inmates filed a Motion for Full Disclosure with the Licensing Board and also requested additional time to file contentions. Oral argument was scheduled on January 29, 1985 on the above motion. During the oral argument on the motion, the Commonwealth of Pennsylvania (hereinafter Commonwealth) presented the testimony of the second ranking officer in the Department of Corrections, Deputy Commissioner Erskind DeRamus. Deputy Commissioner DeRamus's testimony focused on the need for limiting disclosure of the plan for security reasons. Counsel for the inmates had no expert present at this oral argument to describe the types of information that the expert would need to help frame the proposed contentions. Furthermore, despite repeated requests by the Licensing Board for a list of information Mr. Love would need to form his proposed contentions, the list was still not forthcoming on January 29, 1985. For these reasons, the Board denied the inmates' Motion for Full Disclosure and gave inmates twenty days to file contentions. A Memorandum and Order was issued on February 5, 1985 which memorialized the oral decision.

On February 8, 1985, the Graterford inmates filed a Notice of Appeal of the Licensing Board's ruling on disclosure with this Appeal Board. The Appeal Board characterized the appeal as a request for directed certification. The Appeal Board dismissed the petition without prejudice by Order dated February 12, 1985. The Appeal Board commented that parties should attempt to reach a middle ground in this case with regard to additional disclosure of portions of the Graterford plan.

On February 15, 1985, the inmates filed proposed contentions based on Plan 1. Although counsel for the inmates consistently claims that Plan 1 provided his expert and himself with very little information, a review of the contentions reveals they are quite comprehensive in subject matter.

On February 27, 1985, the Licensing Board convened the first of two conferences among the parties to accommodate the competing interests regarding the Graterford plan. The Commonwealth of Pennsylvania had present at the February 27, 1985 meeting, the Commissioner of the Department of Corrections, as well as the Director and Deputy Director of the Pennsylvania Emergency Management Agency (hereinafter PEMA). Using the proposed contentions of the counsel for inmates as a guide for the discussion, counsel for the inmates and his expert were asked as to each proposed contention what information they would need to satisfy them that there were reasonable assurances that the safety of the inmates was protected. Counsel for the inmates and his expert were given substantial information by Commissioner Jeffes, as well as by PEMA Director Patten. On each of the proposed contentions, Mr. Love was requested to indicate what information he needed to be satisfied.

Specific information requested by Mr. Love and his expert was provided by the Commonwealth in the "Response of the Commonwealth of Pennsylvania, Department of Corrections to Requests for Information Raised at the February 27, 1985 Atomic Safety and Licensing Board Conference" filed on March 15, 1985. In an attempt to be cooperative, the Commonwealth provided to counsel for the inmates and his expert, under protective order, a version of the Graterford Plan which contained only minimal deletions (Plan 2). This plan was made available to counsel for the inmates and his expert on March 18, 1985.

A second conference among the parties took place on March 22, 1985. Counsel requested additional information and attempted to raise new issues, based on his claims that his review of Plan 2 prompted new concerns.

The Licensing Board rejected these claims by counsel for the inmates and provided the parties an opportunity to respond to the remaining proposed contentions raised by counsel for the inmates. The applicant, Commonwealth and the NRC staff filed responses.

III. THE APRIL 16, 1985 SUPPLEMENTAL PETITION SHOULD BE DENIED

The sole issue raised by the inmates in their pleading of April 16, 1985, is whether the Licensing Board erred in denying inmates' counsel the opportunity to use the information obtained from additional disclosure of the Graterford Evacuation Plan to update the inmates' contentions. (see Commission Order of April 23, 1985 and attached letter from Samuel J. Chilk, Secretary).

The Commonwealth has provided this Appeal Board with Plan 2, which is a plan that was provided to inmates' counsel and his expert as a result of the encouragement of this Appeal Board in its Memorandum and Order dated February 12, 1985. Plan 2 was covered by a protective order and affidavits of non-disclosure signed by all parties who viewed the plan other than NRC staff. Throughout the March 22, 1985 conference, counsel for the inmates indicated that Plan 2 satisfied his concerns regarding the disclosure issue. Furthermore, on Page 3 of the counsel for the inmates "Intervenor Graterford Inmates Supplemental Petition for Review of Appeal Board Order Dismissing Petition for Directed Certification" filed with the Commission on April 16, 1985, counsel for the inmates specifically states that "they were satisfied with the further disclosure brought forth by the review of Plan 2".

Counsel for the inmates has not indicated what further information, if any, he would need to be able to further evaluate the plan. He has also not provided any expert testimony as to the necessity for any further disclosure. The relief he seeks is an opportunity to respecify the proposed contentions based on the information contained in Plan 2, yet he does not specify how the information in Plan 2 is different than the information in Plan 1 to support his delay in filing the proposed contentions.

IV. THE APRIL 18, 1985 APPEAL OF THE LICENSING BOARD'S
APRIL 12, 1985 MEMORANDUM AND ORDER SHOULD BE DENIED

There are really two primary issues to be discussed under this heading. The first issue is whether the contentions should be admitted even though they were late-filed, and the second issue is whether these proposed contentions are lacking in specificity and bases.

A. The Contentions Should Not Be Admitted Since They Are Late-Filed

Late-filed contentions may only be admitted if the Licensing Board finds that on balance the five factors enumerated in 10 CFR § 2.714(a)(1) balance in favor of the intervenor. The factors under this regulation are:

1. Good cause, if any, for the failure to file on time.
2. The availability of other means to protect petitioner's interest.
3. The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.
4. The extent to which existing parties will represent the petitioner's interest.
5. The extent to which petitioner's participation will broaden the issues or delay the proceeding.

A review of these factors indicates that the balance is in favor of not admitting counsel for the inmates late-filed contentions.

The Commonwealth acknowledges that counsel for the inmates could not submit proposed contentions without viewing a version of the evacuation plan for SCIG. A version of the evacuation plan was submitted to counsel for the inmates on December 13, 1984. The counsel for the inmates formulated and filed, in a timely fashion with the Board, contentions based on the evacuation plan filed December 13, 1984.

With regard to counsel for the inmates' claims that he should be able to respecify or revise his contentions based on the disclosure of Plan 2, the Commonwealth maintains that he has not shown good cause for the delay in filing contentions. We

are specifically referring to the alleged new concerns or modifications of his contentions that are referred to in the March 22, 1985 conference. The information provided in Plan 2, although of much greater specificity, did not give counsel for the inmates a reason for filing or modifying his existing contentions.

There are other means to protect petitioners' interests in this matter. One means has already taken place and that is the review by counsel for the inmates and his expert of the plan and the two conferences that have taken place, during which they supplied input as to the sufficiency of the plan. There has already been formal litigation on the medical care issue. At this stage in the proceedings, counsel for the inmates' remaining reservations are apparently not whether the Department of Corrections has arrangements with medical care facilities or whether these health care facilities meet certain standards imposed by the Joint Commission on Accreditation of Hospitals, but rather whether the Joint Commission on Accreditation of Hospitals (hereinafter JCAH) standard is sufficient to provide reasonable assurances of sufficient medical facilities. This issue has already been litigated and is covered by a partial initial decision by the Licensing Board in this case. In that decision, the Licensing Board found that the JCAH Accreditation was sufficient to provide reasonable assurances that sufficient medical care would be available.

To date, it appears that the late-filing party in this case is going to be of little, if any, assistance in the development of a sound record. The only expert that has been identified by counsel for the inmates is Major John Case. Although the Commonwealth does not concede Major Case to be an expert in evaluating a statewide correctional system, the Licensing Board has deemed him sufficiently expert to participate in this case. Mr. Case has provided insight into the security aspects of the evacuation plan and has expressed little, if any, concern regarding the sufficiency of the plan (Tr. pp. 20,530-20,548; 20,559-20,568; 20,580-20,581; and 20,664-20,665). In reviewing the Vita of Major Case provided by counsel for the inmates, there is clearly no expertise

with regard to either medical care issues or radiological issues. Counsel for the inmates has not fulfilled its responsibility to identify its prospective witnesses and summarize their proposed testimony. Mississippi Power and Light Company, et al., (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-704, 16 NRC 1725, 1730 (1982).

Although there is no other party who directly represents the interests of the intervenor, this is obviously a rather unique situation in that the Department of Corrections is charged with the responsibility of the care, custody and control of the inmates. Only the Department of Corrections has the requisite expertise to plan for the inmate care, custody and control in the course of an evacuation. Counsel for the inmates' statement in his Notice of Appeal that PEMA has little or no experience in the correctional field is certainly true; however, it misses the mark in that the only part PEMA played in developing the evacuation plan was with regard to the radiological equipment and standards. PEMA is unquestionably experts in this area and is charged with the responsibility of providing assistance to institutions developing radiological emergency evacuation plans.

Without a doubt, admission of inmates' contentions on behalf of the inmates would delay the proceedings. But for these proceedings, the hearings on all off-site emergency planning contentions were completed on January 29, 1985. It is also clear that to admit any contentions would also broaden the issues. Although it appeared as of the February 27, 1985 conference that the issues were of limited number and limited scope, the record of the March 22, 1985 hearing clearly shows that at every turn in this proceeding, the number of proposed contentions increases and that the scope of those proposed contentions widens.

For the above reasons, we request that the Appeal Board uphold the finding of the Licensing Board that a balancing of the above factors does not support admission of the late-filed contentions.

B. The Proposed Contentions Lack the Requisite Specificity and Basis and Were Properly Rejected by the Licensing Board

As the Licensing Board outlined in its April 12, 1985 Memorandum and Order, pursuant to 10 C.F.R. 2.714(b) proposed intervenors are required to file "a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity". The Licensing Board Memorandum and Order of April 12, 1985, at Page 6 and cases cited.

Counsel for the inmates readily admits that the contentions he filed were general (see Notice of Appeal, Page 10). He attempts to provide for specificity and basis by referring to three less general issues. These are: the medical services in the plan are not sufficient, that civilian bus drivers should be afforded the same opportunity for training as civilian bus drivers evacuating school children and other such persons in the EPZ and that there is no reasonable assurance that the general concept of evacuation, as outlined in Attachment A, Page E-1-A-1, will provide for the safety and security of the inmates and SCIG personnel during the evacuation. Addressing these issues seriatim, it is clear that they lack the specificity and basis to form the foundation of an admissible contention.

Contrary to the representation of the counsel for the inmates in his Notice of Appeal, there is no debate on the standard with which the hospitals should meet to provide reasonable assurances of adequate medical services.¹ The standard a hospital must meet with regard to the care of radiologically contaminated and injured persons was the subject of litigation in an earlier phase of this proceeding. In the Licensing Board's second partial initial decision, the Board found that JCAH accreditation was sufficient to provide a reasonable assurance of the sufficiency of medical services Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 531-34 (1984). In response to counsel for the inmates request for

1. On Page 10 of the Notice of Appeal to this Board, he states "A debate has arisen regarding the standards with which hospitals are charged...".

further information at the hearing on February 27, 1985, the Commonwealth provided counsel for the inmates with examples of addenda to statements of understandings that are currently in effect with hospitals at each of our support institutions to be utilized in the possible evacuation. The addenda states that "this is to certify that _____ Hospital complies with the provisions of the Joint Commission on the Accreditation of Hospitals, Standard No. 5, Emergency Services dealing with the treatment of radioactively contaminated wounded." Furthermore, the Commonwealth provided a copy of the JCAH, Standard No. 5, for review by counsel for the inmates. Counsel for the inmates indicated that JCAH accreditation would be sufficient to satisfy him at the February 27, 1985 conference (see Tr. pp. 20,555-20,562). It is apparent that counsel for the inmates is attempting to go against the representations he made at the February 27, 1985 hearing with regard to this issue. Additionally, counsel for the inmates has not indicated, in any way, how the JCAH standard fails to provide for reasonable assurance of medical care for the inmates. Therefore, there is no basis for this proposed contention.

The second issue which counsel for the inmates raises in his Notice of Appeal is the training for civilian bus drivers. At the March 22, 1985 conference, the Licensing Board made a substantial effort to try and determine exactly what type of training counsel for the inmates felt would provide a reasonable assurance that the civilian bus drivers would participate in the evacuation.² Counsel for the inmates acknowledged that these individuals could not be forced to take training and also recognized that if a bus driver volunteered to drive and had not had any special emergency response training with regard to the use of radiological equipment for his own protection that the Department of Corrections should not refuse to allow the bus driver to drive the bus (Tr. pp. 20,689-20690). Further, the record demonstrates on every bus with a civilian bus driver, there will be Department of Corrections personnel who have had

2. This is so even though it is clearly a matter of record that the Department of Corrections will maintain sufficient numbers of Department of Corrections staff to drive every bus necessary to accomplish the evacuation (Transcript p. 20,517-20,518; 20,688).

training in the radiological response field. Counsel for the inmates indicated that he thought emergency response training would be sufficient. In response to a question by counsel for the Commonwealth, if a letter from PEMA was sent to the civilian bus companies which have been recruited by the Department of Corrections to provide services in the event of an evacuation at Graterford offering the same level of training was sufficient to satisfy his concerns, counsel for the inmates responded in the affirmative (see Tr. pp. 20,690-20,691).

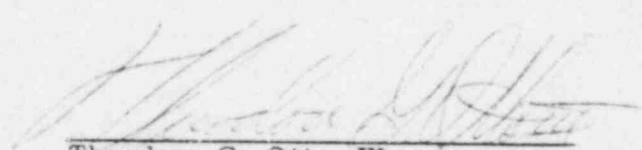
A copy of this letter was attached to the "Answer of the Commonwealth of Pennsylvania to Proposed Contentions of the Graterford Inmates With Regard to the Evacuation Plan" as Exhibit B, a copy of which was served upon Mr. Love, counsel for the inmates. Thus, Mr. Love's raising this issue at this time, is not only contrary to his representations to the Board, but also indicates that there is no basis or specificity for his contention.

The third issue raised by the inmates is the general concept of evacuation. The Commonwealth readily acknowledges that the general concept of evacuation in Plan 1 is heavily censored. This section as provided in Plan 2 is, in contrast, essentially uncensored. The general concept of evacuation discussed on E-1-A-1 is basically a preamble to the specifics of the plan, all of which Mr. Love has been able to review. Yet, the inmates failed to describe specific information that they find troubling with reference to this section of the Graterford Plan. This contention is thus lacking in requisite basis and specificity and was, therefore, properly denied.

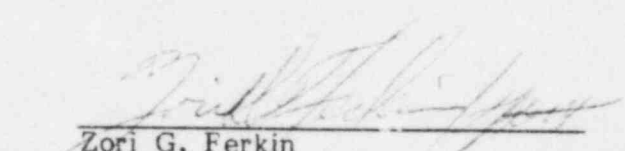
CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that the April 18, 1985 Appeal from the Licensing Board's Memorandum and Order and the April 16, 1985 Petition for Directed Certification be denied and the Licensing Board's Memorandum and Order of April 12, 1985 be affirmed.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Units 1 and 2))

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DOCKETING & SERVICE
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CERTIFICATE OF SERVICE

I, David B. Farney, Attorney for the Commonwealth of Pennsylvania, hereby certify that a true and accurate copy of the response of the Commonwealth of Pennsylvania to the April 18, 1985 Appeal by the Graterford Inmates and April 16, 1985 Supplemental Petition of the Graterford Inmates, in reference to the above captioned matter, was mailed First Class, Postage Pre-paid, on April 29, 1985, to the following list, except as indicated:

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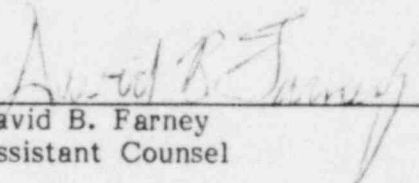
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