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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)
)
Philadelphia Electric Company)
)
(Limerick Generating Station,)
Units 1 and 2))

Docket Nos. 50-352
50-353

*85 JUN 20 P4:35

APPLICANT'S REQUEST FOR EXPEDITED REVIEW
OF ALAB-809 AND OTHER EMERGENCY RELIEF

OFFICE OF SECRETARY
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Introduction

Applicant Philadelphia Electric Company ("Applicant") petitions the Commission to exercise its authority under 10 C.F.R. §2.786 to review important issues of law and Commission policy arising from ALAB-809,^{1/} where the Appeal Board has created the unprecedented requirement that, to obtain a temporary exemption from emergency planning requirements under 10 C.F.R. §50.47, an applicant must not only meet the specific provisions for emergency planning exemptions under Section 50.47(c)(1), but must also meet the separate criteria under Section 50.12(a), which applies to Part 50 exemptions in general.

^{1/} ALAB-809 results from the Commission's order directing the Appeal Board to consider expeditiously an appeal by the Graterford Prisoners ("intervenor") of the Licensing Board's grant of an exemption to Applicant regarding contentions on emergency planning and preparedness at the State Correctional Institution at Graterford ("Graterford") during the pendency of the litigation. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), "Memorandum and Order," CLI-85-11, 21 NRC _____ (June 11, 1985). The Licensing Board tentatively granted the exemption in an order dated May 9, 1985 and, following an opportunity for comment by interested parties, implemented its grant of the exemption in an order dated May 24, 1985, which authorized the Director of Nuclear Reactor Regulation to issue a full-power license. ALAB-809 reversed those decisions.

Despite its best efforts to obtain the necessary exemption by initially filing its request on February 7, 1985, numerous procedural delays in the case have brought the matter to its present posture. Given the further proceedings and findings required by ALAB-809, and any further disposition by the Commission or Appeal Board, it is now very doubtful that the Applicant can obtain a full-power operating license prior to July 25, 1985. Inasmuch as Commission regulations require that a full-scale exercise be conducted within one year of the issuance of a full-power license,^{2/} the practical impact of ALAB-809 will be to require the completion of another full-scale exercise at Limerick prior to license issuance.

Accordingly, Applicant seeks the following alternative relief from the Commission:

- (1) Reverse ALAB-809, reinstate the Licensing Board's grant of the exemption and authorization for issuance of a full-power operating license, and approve the immediate effectiveness thereof;
- (2) Utilize its authority under 10 C.F.R. §50.12(a) to "upon its own initiative grant" the exemption requestion by Applicant, given the fact that all aspects discussed by the Appeal Board in ALAB-809 already exist in the record;
- (3) In the event that procedural considerations prevent the Commissioners from granting either (1) or (2) above, such that the operating license cannot be issued on or before July 25, 1985 permitting full-power operations, grant the application that Applicant will promptly file pursuant to 10 C.F.R. §§50.12(a)

^{2/} See 10 C.F.R. Part 50, Appendix E, Section IV.F.1. The full-scale exercise for Limerick occurred on July 25, 1984.

and/or 50.47(c)(1) for an exemption from the one-year exercise requirement.^{3/}

Summary of the Decision Below

In ALAB-809, the Appeal Board, as noted, held that both sets of exemption requirements under 10 C.F.R. §§50.12(a) and 50.47(c)(1) must be met in granting the exemption requested by Applicant. Nonetheless, the Appeal Board found no substantive error in the Licensing Board's analysis of the grant of the exemption under Section 50.47(c)(1), i.e., no significant deficiency in the Graterford plan. It simply held that the Board should have also considered the separate exemption criteria under Section 50.12(a). It further held that the Licensing Board erred in granting the exemption prior to admitting intervenor's two contentions,^{4/} even though the Licensing Board had before it all proposed contentions prior to granting the exemption. These legal holdings constitute fundamental error contrary to the Commission's rules and policies.

Even assuming, arguendo, the correctness of its decision that both sets of criteria must be met, the Appeal Board should have simply decided itself, as it has in the past on other issues, the remaining issue as to compliance with Section 50.12(a).^{5/} Instead, the Appeal Board created serious and

^{3/} Applicant will also seek expeditious action on this alternative request for relief, including a shortening of the time for any responses permitted. Because Applicant has incorporated its request for other relief within its request for review of ALAB-809, this petition is slightly longer than the ten pages permitted for review requests alone under 10 C.F.R. §2.786(b)(2).

^{4/} See Limerick, supra, "Order Admitting Certain Revised Contentions of the Graterford Inmates and Denying Others" (June 12, 1985).

^{5/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 231 (1980) (acting "in the
(Footnote Continued)

unnecessary delay by remanding the matter to the Licensing Board. As a practical matter, the positions of the parties regarding Applicant's satisfaction of the standards under Section 50.12(a), as well as Section 50.47(c)(1), had already been extensively briefed, with supporting affidavits, and therefore fully developed on the record.

The Commission's review of this matter and an immediate redress of the error by the Appeal Board is necessary to avoid further delay in the licensing of the Limerick Generating Station, Unit 1. Long ago, the Commission pledged that it "will seek to avoid or reduce [costly] delays" by acting "to expedite the hearing process" consistent with a fair and thorough hearing process.^{6/} The instant appeal provides the Commission with a direct opportunity to meet that commitment.

For reasons absolutely and totally beyond its control and through no fault of its own, Applicant has been unable to obtain final NRC approval of emergency planning for the Graterford facility.^{7/} As stated in the

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interests of reasonable expedition"); Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 461 (1978) (avoiding "expense and delay of a remand for such a limited matter").

^{6/} Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

^{7/} Seventeen Graterford inmates filed affidavits in 1981 attesting to their interest in the proceeding and were admitted as a consolidated party collectively as the Graterford Prisoners. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447 (1982). The Commonwealth's Graterford plan was completed at the end of 1984. An expurgated version of the Graterford emergency plan, sanitized for security reasons, was initially made available to intervenor's counsel on December 13, 1984. After three months, the Commonwealth's concerns were resolved and a virtually unsanitized version of the plan was released to the intervenor's representatives under a protective order on March 18, 1985. See Limerick, supra, ALAB-806, 21 NRC _____ (May 1, 1985) (slip
(Footnote Continued)

affidavit of V.S. Boyer, Applicant's Senior Vice President, Nuclear Power (March 14, 1985), further delay at this point results in an enormous financial burden of approximately \$1.5 million per day to be borne by Applicant and its customers.

Given the time required for further hearings or, alternatively, for the Licensing Board to decide and the Commission (and presumably the Appeal Board) to approve the exemption grant, even assuming favorable results, immediate Commission action is necessary to prevent the loss of several weeks and perhaps months in licensing and resultant financial losses in the millions of dollars due to a delay in commercial operations.^{8/}

Legal Error Assigned

The Appeal Board committed fundamental legal error which necessitates immediate review and correction by the Commission:

(1) The Appeal Board ruled that Applicant must satisfy the more broadly applicable exemption requirements under 10 C.F.R. §50.12(a) in addition to the specific requirements for exemptions from emergency planning requirements under 10 C.F.R. §50.47(c)(1). The Appeal Board's ruling violates Section 50.47(c)(1) by imposing additional requirements and is

(Footnote Continued)

op. at 2-6). This resulted in a delay in determining the admitted contentions because the intervenor took the position, which the Appeal Board accepted in ALAB-806, that it was entitled to refile its contentions based upon the unsanitized version of the Graterford plan. Id. at 18.

^{8/} In this connection, it is noted that the Applicant has received temporary relief from the Delaware River Basin Commission from the 59°F temperature limitation on water withdrawals from the Schuylkill River (substituting requirements on dissolved oxygen concentrations), which provides additional water for operation. DRBC has also scheduled a legislative hearing for July 3, 1985 on the application to allow Limerick to use, during 1985, the consumptive use water allocations of the Cromby and Titus electric generating stations.

directly contrary to Commission policy and precedent in affording temporary relief from emergency planning requirements under that specific provision.

(2) The Appeal Board erroneously held that the exemption grant was premature because the Licensing Board had not yet determined whether the intervenor had proffered an admissible contention.^{9/} Contrary to its past practice, the Appeal Board's ruling truly "exalt[s] form over substance."^{10/} The Licensing Board had the proposed contentions before it, which were basically the same contentions previously proposed by intervenor in writing and at a prehearing conference on March 22, 1985. In granting the exemption, the Licensing Board was therefore fully cognizant of the scope and substance of the alleged deficiencies in planning for Graterford and properly found them to be insignificant.

(3) Even assuming that both sets of criteria are applicable, the Appeal Board erred in not deciding compliance with Section 50.12(a). Notwithstanding its disclaimer, it was in at least as good a position as the Licensing Board to decide this legal issue because there was no hearing record to review and the matter had been fully briefed. Notably, the Appeal Board found no deficiency in planning raised by either admitted contention relating to Graterford. Since the Appeal Board failed to do so, the Commission should now take up and expeditiously decide the issue itself rather than await the conclusion of findings and appeals below.

(4) In ruling that both sets of exemption criteria must be satisfied, the Appeal Board raised and decided an argument never raised by any party

^{9/} ALAB-809 at 13.

^{10/} Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979).

nor raised by the Commission in directing the Appeal Board to review the grant of the exemption.^{11/} The Appeal Board's sua sponte action, giving the Applicant no notice whatsoever of the issue it deemed dispositive, denied it due process of law. This appeal constitutes Applicant's first opportunity to address the question raised by the Appeal Board sua sponte.

1. The Appeal Board plainly erred in construing the plain language of 10 C.F.R. §50.12(a). That provision does not, as the Appeal Board stated, specify that its provisions "must be addressed before any exemption from Part 50 requirements can be authorized."^{12/} Rather, Section 50.12(a) simply states that the Commission "may . . . grant such exemptions from the requirements of the regulations in this part as it determines" The regulation does not state, conversely, that any exemption under Part 50 must meet Section 50.12(a) criteria, notwithstanding the existence of a separate and distinct authorization for the exemption.^{13/}

^{11/} Specifically, the Commission directed the Appeal Board "to consider expeditiously the issue of the propriety of granting an exemption during the pendency of contentions filed by the Graterford inmates," particularly with regard to "important questions regarding the hearing rights of the inmates." Limerick, supra, "Memorandum and Order," CLI-85-11, 21 NRC _____ (June 11, 1985) (slip op. at 2). With regard to hearing rights, the Appeal Board agreed with Applicant that "a grant of an exemption does not deprive the inmates of their right to be heard (at a formal hearing, if necessary, or through written filings) on their admissible contentions." ALAB-809 at 13 n.12.

^{12/} ALAB-809 at 7. The Commission discussed neither emergency planning requirements nor Section 50.47(c)(1) in Mississippi Power & Light Company (Grand Gulf Nuclear Station, Unit 1), CLI-84-19, 20 NRC 1055, 1059 n.7 (1984), cited in ALAB-809 at 7.

^{13/} The Appeal Board seemed to find estoppel in Applicant's initial request for the exemption under Section 50.12(a). See ALAB-809 at 7. Rather, Applicant initially applied under Section 50.12(a) because it viewed both approaches under Section 50.12(a) and Section 50.47(c)(1) as equally valid. Applicant later argued that its exemption could be granted, alternatively, under Section 50.47(c)(1). See Applicant's Reply in Support of Its Request for Exemption (April 1, 1985).

The Appeal Board turns this issue on its head in stating that "if the Commission intended section 50.47(c)(1) to provide the sole standard by which to consider exemptions in the emergency planning area, it would have said so" ^{14/} Just the opposite is true. The Commission clearly stated in Section 50.47(c)(1), which governs only emergency planning, that an applicant "will have an opportunity to demonstrate to the satisfaction of the Commission" that an exemption should be granted for any of the three reasons stated in that provision. Had the Commission intended that such "demonstration" requires satisfaction of the additional requirements of Section 50.12(a), it would have said so explicitly. ^{15/}

By engrafting more broadly applicable standards onto the specific standards for the grant of an exemption from emergency planning requirements, the Appeal Board has effectively rewritten the rule and usurped the Commission's rulemaking function. ^{16/} As the Appeal Board acknowledged, the Commission's most recent discussion of emergency planning requirements refers solely to the standards under Section 50.47(c)(1). ^{17/} Further, the

^{14/} ALAB-809 at 9 n.7.

^{15/} For example, Section 50.60(b) expressly incorporates Section 50.12 criteria, whereas Section 50.55a(a)(3) does not. The Appeal Board should accept that the Commission understands the difference between general and specific authorizations for exemptions. Compare, e.g., 10 C.F.R. §73.5 with §73.6. See also 10 C.F.R. §30.11(a), (c) and (d).

^{16/} Nothing in the Commission's statements of consideration in adopting Section 50.47(c)(1) even vaguely suggests that adjudicatory boards and the NRC Staff must consider the broader standards under Section 50.12(a) in addition to the specific criteria for an exemption from emergency planning requirements. See 47 Fed. Reg. 30232 (July 13, 1982); 46 Fed. Reg. 61132 (December 15, 1981).

^{17/} In that instance, the Commission stated that its regulations "specifically contemplated certain equitable exceptions, of a limited duration, from the requirements of 50.47(b)" and that "the Commission
(Footnote Continued)

Appeal Board states no logical reason why its approval of the use of Section 50.47(c)(1) in other cases has never required the application of Section 50.12(a) standards as well.^{18/} In both San Onofre and Shoreham, the Commission has at least implicitly stated that Section 50.47(c)(1) alone is adequate.^{19/}

2. The Appeal Board further erred in ruling that the exemption grant was premature. It stated that until contentions have been admitted, "the specific, potential emergency plan deficiencies that warrant further adjudication are not known."^{20/} Elevating form over substance, the Appeal Board simply ignored the facts. The Licensing Board had considered any possible deficiencies in admissible contentions because the intervenor had filed its contentions on May 13, 1985, well before the final grant of the exemption on

(Footnote Continued)

believes that Licensing Boards . . . may find that applicants . . . meet the requirements of section 50.47(c)(1)" and are therefore entitled to a full-power operating license. Statement of Policy on Emergency Planning Standard 10 CFR 50.47(b)(12), 50 Fed. Reg. 20892, 20893 (May 21, 1985). See also Union of Concerned Scientists, DPRM-83-1, 17 NRC 719, 726 (1983).

^{18/} E.g. Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 131, 142 (1982); San Onofre, supra, ALAB-717, 17 NRC 346, 369 (1983). See also Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983). The Appeal Board's statement that Section 50.12(a) did not arise in San Onofre because the applicant did not seek relief under that section (ALAB-809 at 11 n.9) is a non sequitur. Either the requirement applies or it does not, regardless of the applicant's belief. Moreover, whether or not outstanding contentions remain to be considered (id.) is equally irrelevant. Section 50.47(c)(1) makes no such distinction and in Fermi, supra, the emergency plan in question had not even been completed, in contrast to the Graterford plan which was fully available for review.

^{19/} San Onofre, supra, CLI-83-10, 17 NRC 528, 531 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983).

^{20/} ALAB-809 at 14.

May 24, 1985.^{21/} The Appeal Board should not have presumed that the Licensing Board failed to analyze the proposed contentions.^{22/}

3. Even if the Commission should agree with the Appeal Board that both sets of criteria under Sections 50.12(a) and 50.47(c) (1) apply, the Appeal Board should have avoided altogether unnecessary delay in its remand to the Licensing Board by reviewing the briefs of the parties as to the satisfaction of Section 50.12(a) standards in the context of the two admitted contentions.^{23/} It should have followed its own example in ALAB-806, where it reversed a dismissal of intervenor's proposed contentions and determined on

^{21/} The contentions refiled by intervenor on May 13, 1985 were no more than the contentions previously filed in writing (minus contentions voluntarily withdrawn) and contentions orally pleaded at the prehearing conference on March 22, 1985. Accordingly, in granting the exemption, the Licensing Board had a sound understanding of the scope and substance of the deficiencies in planning alleged by intervenor. It did not have to formally admit a contention in order to comprehend the planning deficiencies asserted by intervenor.

In sharp contrast to its criticism of the Licensing Board for not waiting until contentions had been admitted, the Appeal Board in ALAB-806 reversed the dismissal of intervenor's contentions and found, on its own initiative, that intervenor had satisfied the requirements for late-filed contentions even before the revised, late-filed contentions had been resubmitted.

^{22/} The Appeal Board's holding that the exemption could not be determined without examination of specific deficiencies, i.e., admitted contentions, is a self-defeating proposition. Deficiencies as such cannot be "specifically" determined without litigation. Yet, the Appeal Board explicitly rejected intervenor's argument that an exemption cannot be granted before litigation of the contentions is complete. ALAB-809 at 13 n.12. Moreover, admitted contentions are frequently revised throughout the hearing process. Formal admission of the contentions was therefore neither a legal nor practical consideration.

^{23/} Notably, the Appeal Board lauded the Licensing Board's "desire to handle this matter -- arising so late in the proceeding -- as efficiently and expeditiously as possible," further stating that "procedural shortcuts and innovations can serve a useful purpose without working a hardship on any party." ALAB-809 at 15.

the record before it, presumably to save time, the legal issue of whether intervenor had satisfied the Commission's requirements for late-filed contentions.^{24/}

4. Finally, the Appeal Board erred in raising sua sponte and deciding, without giving Applicant and other parties fair notice, the issue it actually considered dispositive, i.e., whether both sets of exemption criteria must be satisfied.^{25/} This violated Applicant's hearing rights under Section 189 of the Atomic Energy Act of 1954, as amended, and its due process rights under the Administrative Procedure Act because it was not afforded notice of the basis for adverse agency action.^{26/} Thus, this appeal constitutes Applicant's first opportunity to address the issue raised sua sponte and decided by the Appeal Board.

Conclusion

As discussed above, the Commission should act immediately to review and reverse ALAB-809, to reinstate authorization for issuance of a full-power

^{24/} ALAB-806 at 11-17.

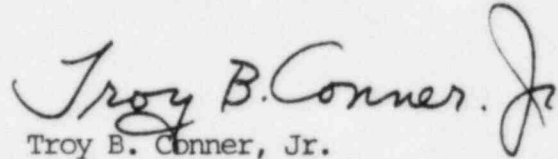
^{25/} In ALAB-809 at 8, the Appeal Board observes that its Order of May 21, 1985, dismissing intervenor's interlocutory appeal, referred to this issue. Applicant disagrees. The Appeal Board merely stated: "Moreover, we do not understand how the Board could properly weigh the exemption criteria of both 10 C.F.R. §§50.12(a) and 50.47(c)(1) (as well as pertinent case law) before it has determined whether any exemption will even be necessary. . . ." Limerick, supra, ALAB "Memorandum and Order" at 2 (May 21, 1985). Because Applicant had sought the exemption alternatively under both provisions, there was no discernable import to this statement. It did not, therefore, alert Applicant to the Appeal Board's apparent conclusion at that point that both sets of criteria must be met. It certainly did not forewarn Applicant that an appellate issue had been raised sua sponte. Nor did the Commission raise the issue in its Memorandum and Order of June 11, 1985 (CLI-85-11).

^{26/} See 5 U.S.C. §554(b)(3); e.g., Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968).

operating license and to make any findings necessary for the grant of an exemption and such authorization.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in cursive script that reads "Troy B. Conner, Jr." with a large, stylized flourish at the end.

Troy B. Conner, Jr.
Mark J. Wetterhahn
Robert M. Rader

Counsel for the Applicant

June 20, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-352 DOCKETED
) 50-353 USNRC
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Units 1 and 2))

'85 JUN 20 P4:36

CERTIFICATE OF SERVICE

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

I hereby certify that copies of "Applicant's Request for Expedited Review of ALAB-809 and Other Emergency Relief" dated June 20, 1985 in the captioned matter have been served upon the following by deposit in the United States mail this 20th day of June, 1985:

- | | |
|--|---|
| * Samuel J. Chilk, Secretary
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | * Lando W. Zech, Jr.,
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 |
| * Nunzio J. Palladino,
Chairman
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | Christine N. Kohl, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 |
| * Thomas M. Roberts,
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | Dr. Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 |
| * James K. Asselstine,
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | Gary J. Edles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 |
| * Frederick M. Bernthal,
Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555 | |
| * Hand Delivery | |

Helen F. Hoyt, Esq.
Chairperson
Atomic Safety and
Licensing Board U.S.
Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Jerry Harbour
Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Philadelphia Electric Company
ATTN: Edward G. Bauer, Jr.
Vice President &
General Counsel
2301 Market Street
Philadelphia, PA 19101

** Mr. Frank R. Romano
61 Forest Avenue
Ambler, Pennsylvania 19002

** Mr. Robert L. Anthony
Friends of the Earth of
the Delaware Valley
106 Vernon Lane, Box 186
Moylan, Pennsylvania 19065

Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

** Ann P. Hodgdon, Esq.
Counsel for NRC Staff
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

** Angus Love, Esq. 107 East Main
Street Norristown, PA 19401

Robert J. Sugarman, Esq.
Sugarman, Denworth &
Hellegers
16th Floor, Center Plaza
101 North Broad Street
Philadelphia, PA 19107

Director, Pennsylvania
Emergency Management Agency
Basement, Transportation
and Safety Building
Harrisburg, PA 17120

Kathryn S. Lewis, Esq. City of
Philadelphia Municipal
Services Bldg. 15th and JFK
Blvd. Philadelphia, PA 19107

* Hand Delivery
** Federal Express

Charles W. Elliott, Esq.
325 N. 10th Street
Easton, PA 18042

Phyllis Zitzer, Esq.
Limerick Ecology Action
P.O. Box 761
762 Queen Street
Pottstown, PA 19464

** Zori G. Ferkin, Esq.
Assistant Counsel
Commonwealth of Pennsylvania
Governor's Energy Council
1625 N. Front Street
Harrisburg, PA 17102

Jay M. Gutierrez, Esq. U.S.
Nuclear Regulatory
Commission
631 Park Avenue
King of Prussia, PA 19406

Timothy R.S. Campbell
Director
Department of Emergency
Services
14 East Biddle Street
West Chester, PA 19380

** Theodore G. Otto, Esq.
Department of Corrections
Office of Chief Counsel
P.O. Box 598
Lisburn Road
Camp Hill, PA 17011

Spence W. Perry, Esq.
Associate General Counsel
Federal Emergency
Management Agency
500 C Street, S.W., Rm. 840
Washington, DC 20472

Thomas Gerusky, Director
Bureau of Radiation
Protection
Department of Environmental
Resources
5th Floor, Fulton Bank Bldg.
Third and Locust Streets
Harrisburg, PA 17120

James Wiggins
Senior Resident Inspector
U.S. Nuclear Regulatory
Commission
P. O. Box 47
Sanatoga, PA 19464

Mr. Ralph Hippert
Pennsylvania Emergency
Management Agency
B151 - Transportation
Safety Building
Harrisburg, PA 17120


Robert M. Rader

** Federal Express